**IN THE COURT OF COMMON PLEAS**
**MAHONING COUNTY, OHIO**

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| STATE OF OHIO, ex rel. MICHAEL DEWINE, OHIO ATTORNEY GENERAL | : | CASE NO. 12 CV 2178 |
| Plaintiff, | : | JUDGE D'APOLITO |
| v. | : | |
| ENDC & COMPANY, LLC, et al. | : | |
| Defendants. | : | |

CLERK OF COURTS
MAHONING COUNTY, OHIO
FEB 04 2015
FILED
ANTHONY VIVO, CLERK

**CONSENT ORDER FOR PERMANENT INJUNCTION**

WHEREAS, Plaintiff, the State of Ohio, by and through its counsel, Ohio Attorney General Michael DeWine, filed a Second Amended Complaint against ENDC & Company, LLC, The Acme Company, Acme Resources, Inc., and Daniel Zarlenga (collectively, "Defendants") under Case No. 12 CV 2178 alleging violations of Ohio's Water Pollution Control laws, Ohio Revised Code ("R.C.") Chapter 6111 at 11600 Mahoning Ave., North Jackson, Mahoning County, Ohio ("the Site");

WHEREAS, Plaintiff seeks injunctive relief and civil penalties for Defendants' alleged violations of R.C. 6111 and the rules and permits promulgated thereunder;

WHEREAS, Defendants have agreed to enter into this Consent Order to resolve Defendant's liability for injunctive relief;

WHEREAS, Plaintiff's claims for civil penalties under R.C. 6111.09 remain in dispute between the parties;

NOW THEREFORE, without the trial of any issue of fact or law, and upon the consent of the parties hereto, it is hereby **ORDERED, ADJUDGED** and **DECREED** as follows:

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02178
00042706464
JUDENT



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## I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the parties and the subject matter of this action pursuant to R.C. Chapter 6111. The Second Amended Complaint states a claim upon which relief can be granted against Defendants under R.C. Chapter 6111. Venue is proper in this Court.

## II. PERSONS BOUND

2. All terms and provisions of this Consent Order shall apply to and be binding upon the Defendants' agents, employees, assigns, successors in interest, and others bound by Ohio Civil Rule 65(D), who are acting in concert, privity or participation with Defendants. The undersigned representative of each party to this Consent Order certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of the Consent Order and execute and legally bind that party or parties to it. This Consent Order is in settlement and compromise of disputed claims and nothing in this Consent Order is to be construed as an admission of any facts or liability.

3. Defendants shall provide a copy of this Consent Order to any successor in interest and each key employee, consultant or contractor employed to perform work referenced herein.

4. In the event of the insolvency, bankruptcy, dissolution or other failure of any Defendant, Defendants shall be are required to implement any remaining requirement as set forth by this Consent Order.

## III. SATISFACTION OF LAWSUIT

5. Plaintiff alleges in its Second Amended Complaint that Defendants filled Morrison Run and adjacent wetlands and conducted construction activities on Site in violation of R.C. Chapter 6111 without obtaining a permit authorizing fill activities, a certification issued pursuant to



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Section 401 of the Clean Water Act and a National Pollutant Discharge Elimination System ("NPDES") permit. Additionally, Plaintiff alleges that after obtaining coverage under the General NPDES Permit for Storm Water Discharges Associated with Industrial Activities, Defendants violated NPDES permit terms and conditions.

6. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability for injunctive relief by Defendants for all claims alleged in Mahoning County Court of Common Pleas Case No. 12 CV 2178. However, the issue of civil penalties under R.C. 6111.09 remains outstanding between the parties and shall be addressed separately.

## IV. RESERVATION OF RIGHTS

7. Nothing in this Consent Order, including the imposition of stipulated civil penalties for violations of this Consent Order, shall limit the authority of the State of Ohio to:

(a) Seek any legal or equitable relief from Defendants or any other appropriate person for claims or conditions not alleged in Mahoning County Court of Common Pleas Case No. 12 CV 2178, that occur or exist on the date of or after the entry of this Consent Order;

(b) Seek civil penalties from Defendants under R.C. 6111.09 for claims or conditions alleged in Mahoning County Court of Common Pleas Case No. 12 CV 2178, including violations that occur after the filing of this case;

(c) Enforce this Consent Order through a contempt action or otherwise seek relief for violations of this Consent Order;

(d) Take any action authorized by law against any appropriate person, including Defendants to eliminate or mitigate conditions at the Site and the surrounding areas that may present a threat to the public health or welfare, or the environment; and/or;

(e) Bring any legal or equitable action against any appropriate person other than Defendants for any violation of applicable laws. For the purposes of this Consent Order, and in particular the provisions of this Paragraph, the term "person" includes: an individual, corporation, business trust, estate, trust, partnership, association, municipal corporation, interstate body

created by compact, and other officers, agents, employees, attorneys, and/or those in active concert or participation with any of them.

## V. INJUNCTION

8. Defendants are permanently enjoined and ordered to comply immediately with all applicable provisions of R.C. Chapter 6111 and the rules promulgated under that chapter.

9. Defendants must immediately comply with all requirements of the 2011 General NPDES Permit for Storm Water Discharges Associated with Industrial Activities and must remain in compliance with this permit throughout construction of the stream and wetlands restoration project on Site.

10. By no later than thirty (30) days following entry of this Consent Order, Defendants shall submit a complete and approvable detail plan for stream and wetlands restoration ("Restoration Plan") to Ohio EPA for the Restoration Area consistent with the Conceptual Stream Design Plan 4, attached as **Exhibit A.**

(a) The following stream restoration targets shall be included in the Restoration Plan to apply to the stream located within the Restoration Area:

i. Qualitative Habitat Evaluation Index ("QHEI") score equal to or greater than the current QHEI score of a proposed reference reach from a similar stream segment;

ii. Index of Biotic Integrity ("IBI") score of no less than 40; and

iii. Invertebrate Community Index ("ICI") score of no less than 34.

(b) The following wetlands restoration targets shall be included in the Restoration Plan to apply to the wetlands located within the restoration area:

i. A plan for restoring vegetation, hydrology, and soils to meet wetland criteria outlined in the U.S. Army Corps of Engineers 1987 Wetland Delineation Manual;

ii. A planting plan, consisting of a topographic survey drawing and specification prepared to plant native wetland tree species in a moderate density of 200 trees and 200 shrubs per acre, establish a permanent shrub

and herbaceous understory, and plant an appropriate native seed mix of grass, sedge, forbs, and shrubs applied at a rate of 35 pounds of pure live seed per acre.

iii. A Vegetative Index of Biotic Index ("VIBI") score of 61.

11. By no later than thirty (30) days following entry of this Consent Order, Defendants are enjoined and ordered to submit a complete storm water pollution prevention plan to Ohio EPA that will serve as the storm water pollution prevention plan for industrial activities on Site, consistent with the requirements of the 2011 General National Pollutant Discharge Elimination System Permit for Discharges Associated with Industrial Activities.

12. By no later than thirty (30) days following entry of this Consent Order, Defendants are enjoined and ordered to submit to Ohio EPA for review and approval a proposed environmental covenant for the protection in perpetuity of the Restoration Area as depicted in Exhibit A.

13. By no later than sixty (60) days following receipt of approval of the Defendants' Restoration Plan by Ohio EPA, Defendants are enjoined and ordered to initiate construction of the Restoration Plan on Site.

14. By no later than three hundred sixty-five (365) days following entry of the Consent Order, Defendants are enjoined and ordered to complete construction of the Restoration Plan on Site.

15. Defendants shall monitor the Restoration Area to measure compliance with the stream restoration targets identified above for a period of ten (10) years or until satisfactory performance is attained for three consecutive growing seasons following the entry of this Consent Order as follows:

(a) In years 1 and 2, following completion of the Restoration Plan, submit a qualitative monitoring report evaluating whether the stream restoration area is

stable and not eroding both upstream and downstream and within the constructed area, high quality photographs in representative areas and QHEI scoring sheets.

(b) In years 3, 5, 7 and 10, following completion of the Restoration Plan, in addition to the items outlined above, submit QHEI, ICI, and IBI data and scoring sheets for the stream restoration targets as described above.

16. Defendants shall monitor the Restoration Area to measure compliance with the wetlands restoration targets identified above for a period of ten (10) years or until satisfactory performance is attained for three consecutive growing seasons following the entry of this Consent Order. All monitoring and reporting shall follow requirements outlined in Table 6.b in the Standardized Monotoring Protocols, Data Analysis and Reporting Requirements for Mitigation Wetlands in Ohio v.1.0. Ohio EPA Technical Report WET/2004-6 (2004).

17. Defendants shall submit a signed, filed, and recorded environmental covenant, as described above, to Ohio EPA within sixty (60) days following completion of the Restoration Plan on Site.

## VI. SUBMITTAL OF DOCUMENTS

18. Documents required to be submitted to Ohio EPA pursuant to this Consent Order shall be sent to: Environmental Protection Agency, Northeast District Office, Division of Surface Water (ATTN: DSW Enforcement Group Leader) at 2110 E. Aurora Rd., Twinsburg, OH 44087.

## VII. STIPULATED PENALTIES

19. In the event that Defendants fail to comply with any requirement of this Order, Defendants are liable for, and shall immediately pay, stipulated penalties in accordance with the following schedule for each failure to comply:

(a) For each day of each failure to comply with a requirement or meet a deadline from one (1) day to thirty (30) days –three hundred dollars ($300.00) per day per requirement not met;



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(b) For each day of each failure to comply with a requirement or meet a deadline from thirty-one (31) days to sixty (60) days – five hundred dollars ($500.00) per day per requirement not met;

(c) For each day of each failure to comply with a requirement or meet a deadline over sixty-one (61) days – seven hundred fifty dollars ($750.00) per day per requirement not met.

20. Payments due under the above paragraph shall be made within forty-five (45) days from the date of the failure to meet the applicable deadline. The Ohio EPA is not required to notify Defendants of missed deadlines or the corresponding duty to pay stipulated penalties. Payments shall be accompanied by a written explanation of the deadline missed and/or the effluent violation. Any payment required to be made under this paragraph shall be made by delivering a certified check or checks for the appropriate amount(s), made payable to "Treasurer, State of Ohio," to Scott Hainer, Paralegal, or his successor, at the Ohio Attorney General's Office, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400. The payment of stipulated penalties by Defendants and the acceptance of such stipulated penalties by Plaintiff for specific violations pursuant to this Section shall not be construed to limit Plaintiff's authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Order. Further, payment by Defendants shall not be considered an admission of liability on the part of Defendants.

## VIII. COMPLIANCE NOT DEPENDENT ON GRANTS OR LOANS

21. Performance of the terms of this Consent Order by Defendants are not conditioned on the receipt of any private, Federal or State grants, loans and/or funds. In addition, Defendants' performance is not excused by the failure to obtain or any shortfall of any private, Federal or State grants, loans and/or funds or by the processing of any applications for the same.

## IX. EFFECT OF CONSENT ORDER

22. This Consent Order does not constitute authorization or approval of the construction of any physical structure or facilities not previously approved by Ohio EPA. Approval for any such construction or modification shall be by permit issued by Ohio EPA or other such permits as may be required by applicable federal, state, or local laws, rules or regulations.

## X. MISCELLANEOUS

23. Nothing in this Consent Order shall affect Defendants' obligation to comply with all applicable federal, state or local laws, regulations, rules or ordinances.

24. Any acceptance by the State of Ohio of any payment, document or other work due hereunder subsequent to the time that the obligation is due under this Consent Order shall not relieve Defendants from the obligations created by this Consent Order.

25. Defendant Daniel Zarlenga shall inform the Ohio EPA of any change of his personal address and Defendants The Acme Company, Acme Resources, Inc., and ENDC & Company, LLC shall inform Ohio EPA of any change in Registered Agents' address and business addresses or telephone numbers, or the cessation of the business that is the subject of this action.

## XI. COSTS

26. Defendants shall pay the court costs due and owing in this case as of the date of entry of this Consent Order.

27. Defendants are hereby ordered to pay the costs incurred by the Ohio EPA for the publication of the Consent Order in Ohio EPA's Weekly Review and a newspaper of general circulation. Defendants shall pay the costs associated with publication by delivering a certified

check payable to: "Treasurer, State of Ohio" to the Fiscal Officer, Ohio EPA, P.O. Box 1049, Columbus, Ohio 43216-1049, within thirty (30) days from the date they receive notice of the costs from Ohio EPA.

## XII. CONTINUING JURISDICTION

28. This Court shall retain jurisdiction over this action for the purpose of enforcing and administering Defendants' compliance with this Consent Order.

## XIII. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK

29. The parties agree and acknowledge that final approval by the Plaintiff and the Defendants and entry of this Consent Order is subject to the requirements of 40 C.F.R. 123(d)(1)(iii), which provides for notice of the lodging of the Consent Order, opportunity for public comment, and the consideration of any public comments. Both the State of Ohio and the Defendants reserve the right to withdraw this Consent Order based on comments received during the public comment period.

30. Pursuant to Rule 58 of the Ohio Rules of Civil Procedure, upon the signing of this Consent Order by the Court, the clerk is hereby directed to enter it upon the journal. Within three (3) days of entering the judgment upon the journal, the clerk is hereby directed to serve upon the parties a notice of the judgment and its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

**IT IS SO ORDERED.**

2/4/15

**DATE**

**HON. JUDGE D'APOLITO**
**COURT OF COMMON PLEAS**
**MAHONING COUNTY**

CLERK : COPY TO ALL COUNSEL
OR UNREPRESENTED PARTY.

**APPROVED:**

Respectfully submitted,

**MICHAEL DEWINE**
**OHIO ATTORNEY GENERAL**

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Daniel Zarlenga,
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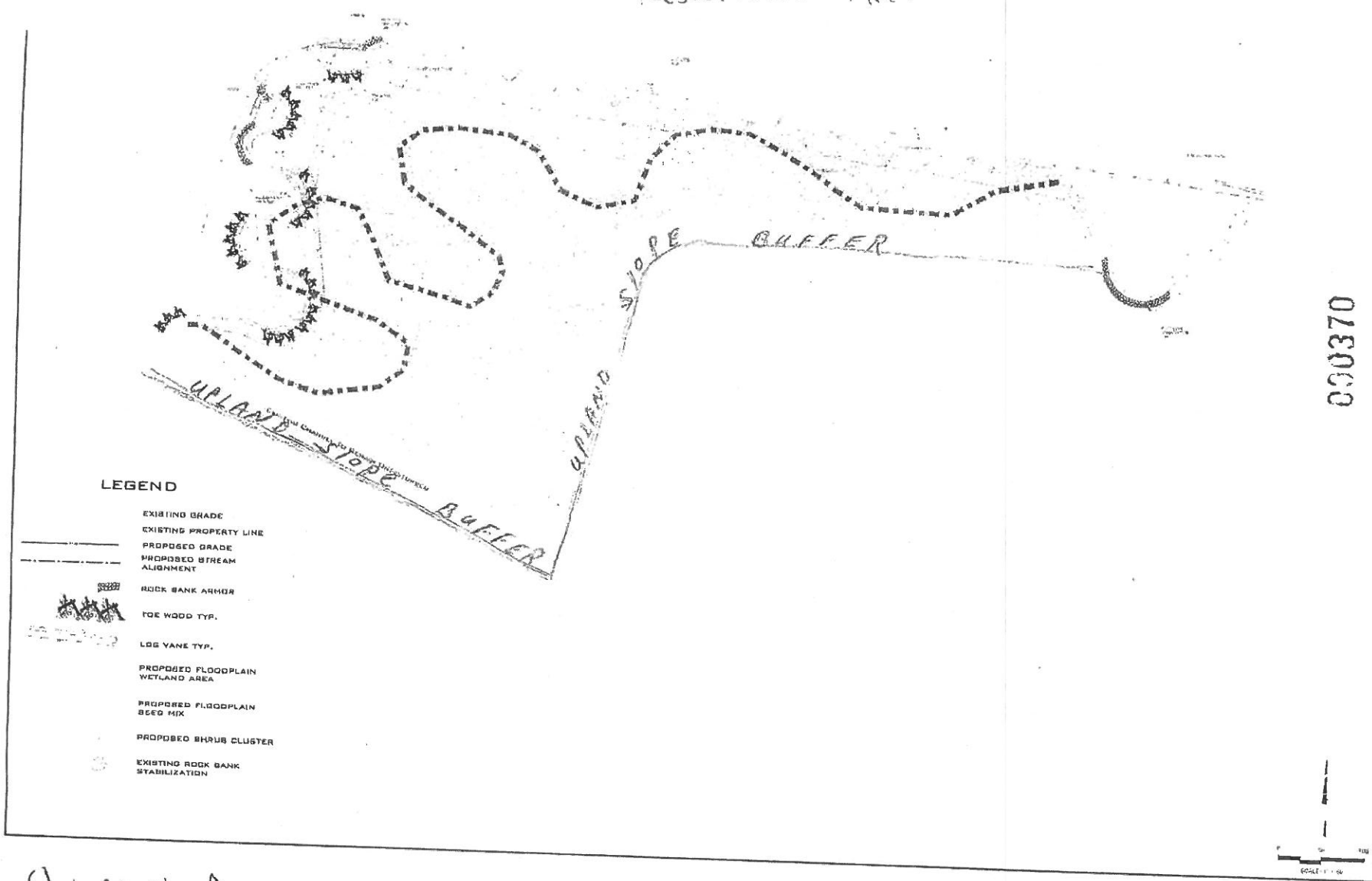
4.0 acres wetlands
2,500 lineal feet of stream

Restoration Area

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WALLACE & PANCHER INC.

WALLACE & PANCHER, INC
1050 S. Hermitage Rd
Hermitage PA 16148

ACME PROPERTY
CONCEPTUAL STREAM DESIGN

ACME COMPANY

CONCEPTUAL STREAM DESIGN
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Exhibit A