



John R. Kasich, Governor
Mary Taylor, Lt. Governor
Craig W. Butler, Director

Certified Mail: 7013 2630 0000 3714 8753

March 8, 2017

David Longfellow
834 Cookson Avenue. SE
New Philadelphia, OH 44663

**Re: Johnson Run Mining Area
Permit - Intermediate
Correspondence
401 Wetlands
Athens County
DSW401165100**

Subject: Section 401 Water Quality Certification (WQC) application comments
Johnson Run Mining Area
Corps Public Notice No. LRH 2016-114-HOC
Ohio EPA ID No. 165100

Dear Mr. Longfellow:

On September 28, 2016, the Ohio Environmental Protection Agency (Ohio EPA) received an application for your project to recover the #6 coal seam by surface and auger mining operations. The proposed project is located northwest of the intersections of Johnson Run Road and Oakdale Road in Athens County (39°32'56.95"/-82°06'40.59"). In accordance with Section 6111.30 of the Ohio Revised Code (ORC), this application was determined to be administratively complete on January 10, 2017.

Ohio EPA has conducted a technical review of this application and has the below listed comments. In accordance with ORC section 6111.30(F), "the applicant shall respond in writing to written comments or to deficiencies identified by the director during the course of reviewing the application not later than fifteen days after receiving or being notified of them." Please be aware that failure to respond to the comments and/or deficiencies identified in this notice within the allotted time frame may lead to a determination of a deficient application and a proposal to deny water quality certification for this project.

Due to the significant nature of the below listed comments, Ohio EPA strongly urges you to schedule a mid-project review meeting (MPRM) to discuss how these comments will be satisfactorily addressed.

For any responses to these comments that require modifications to the application, please submit revised, dated pages that can be used to replace existing pages where changes were made. As such, each revised page should include in a header or footer the following information:

- ✓ **Project name;**
- ✓ **Ohio EPA ID number;**
- ✓ **Revision date; and**
- ✓ **Revision number.**

Also, the body of the page should clearly identify where changes from the original document were made.

A. COMMENTS RECEIVED DURING PUBLIC NOTICE PERIOD

B. APPLICATION FOR OHIO EPA SECTION 401 WQC

1. **Aquatic Life Use:** Johnson Run is a designated warmwater habitat (WWH) stream but has the potential to support coldwater habitat (CWH). The WWH designation is based on data that is 15 years old. Ohio EPA requests that a presence/absence survey of both coldwater macroinvertebrates and fish be performed outside of the index period detailed in the **Biological Criteria for the Protection of Aquatic Life to determine the existing aquatic life** use of Johnson Run. Please perform the sampling as soon as possible and submit results of the presence/absence survey to Ohio EPA for review. After review of the presence/absence sampling results, it may be determined that additional biological sampling is necessary to verify the existing use during the index period and/or to assign biological goals.



Response: Oxford agrees that Johnson Run is designated WWH. However, they do not agree to the opinion that the stream is Coldwater habitat. Oxford does not agree to biological sampling. If Ohio EPA would like to perform the sampling themselves, they may do so.

Ohio EPA Response: Ohio EPA will perform biological sampling to determine existing use. Ohio EPA will coordinate available dates for sampling with Oxford so that they may be present during sampling.

8. **Application and Hydrology Map:** What is the distance between Johnson Run's streambank and the proposed low wall? By the scale provided the approximate distance appears to be 40 feet. Please provide an explanation of measures that will be taken to ensure that construction of the low wall within approximately 40 feet proximity will not impair the mainstem of Johnson Run via subsurface flow.



Response: We believe that this has been explained under the Stream Impact and Reconstruction Plans (Located within the Proposed Mitigation Plans)

Ohio EPA Response: The Stream Impact and Reconstruction plans do not discuss specific BMP's or construction techniques that detail how elevated flows from Johnson Run will be prevented from entering the pit area, nor does it discuss the structural integrity of the soil types located between the stream

and the low wall. In addition, Ohio EPA consulted with ODNR related to this concern and verified the requested information is not currently available. Please provide a detailed description of construction techniques that will be utilized to prevent flow from Johnson Run from entering the pit area, as a portion of the pit area is within the FEMA flood zone A.



C. MITIGATION PLAN

1. **Adaptive Management:** The following Contingency Plan will be included in the certification: If mitigated streams and/or wetlands are not meeting the performance goals established in the compensatory mitigation plan at the end of the five-year monitoring period, the Certification Holder may:
 - a. Request an extension of up to two years to the monitoring period by the end of the fifth year of monitoring. Ohio EPA shall respond to the request for an extension within fifteen days after receiving it. A corrective action plan to correct material defects in mitigation shall be developed and submitted to Ohio EPA for approval within two months after the approval of the request for an extension. Ohio EPA will approve or deny the corrective action plan within two months after receipt.
 - b. In the corrective action plan, the Certification Holder may make a demonstration of the function and values of the mitigated resources that are meeting set performance goals for the Director's consideration for partial on-site mitigation credit.
 - c. The remaining balance of mitigation credit can be fulfilled through additional on-site mitigation or off-site mitigation. Additional mitigation options may include, but are not limited to, the purchase of credits from either an IRT approved mitigation bank or in lieu sponsor or individual projects as approved by the director.



Response: Oxford does not agree to these conditions.


Ohio EPA Response: Ohio EPA Response: During meetings between Oxford and Ohio EPA to discuss the certification process in general as well agreements on terms to be included in the Shugert South Adjacent certification the applicant was amenable to include this condition within their mitigation plan. Please provide clarification on what has changed since that time that has made the condition disagreeable to Oxford?

3. **Mitigation Work Plan/Drainage Controls:** Sediment basins appear to be proposed for construction within 30 feet of the mainstem of Johnson Run. Please provide an explanation of measures that will be taken to ensure that construction of the basins within approximately 30 feet proximity will not impair the mainstem of Johnson Run via subsurface flow.




Response: We believe that this has been explained under the Stream Impact and Reconstruction Plans (Located within the Proposed Mitigation Plans). Also, please clarify what the significance is of having sediment control structures encroaching within 300' of streambeds. We are not aware of any variance from Ohio EPA that would be required to construct/design structures within 300' of a waterbody. We have submitted a Stream Buffer Variance Request to ODNR-DMRM to propose activities within 100' of a stream, as required by SMCRA, and is currently in technical review by ODNR-DMRM staff.

Ohio EPA Response: The Stream Impact and Reconstruction Plans provide a general construction plan for sediment ponds. The plan does not discuss specific measures or construction techniques that will be utilized for sediment ponds on this project where ponds are proposed for construction within 30 feet of a perennial stream, and within the FEMA flood zone A. Please provide details on how the applicant proposes to prevent elevated flows from Johnson Run from entering and overflowing the sediment ponds. Ohio EPA discussed this issue directly with ODNR who indicated there was not sufficient information submitted to date to evaluate this concern.

6. **Performance Standards/Wetland Mitigation:** Please amend to include that the applicant will perform a **VIBI in year 3 of mitigation** to track the development of the wetland towards its performance goal. 


Response: Although, Oxford does not agree to this the plan has been revised.

Ohio EPA Response: Please include clarification that the applicant will perform a VIBI in year 5 of mitigation as well.

7. **Performance Standards/Stream Mitigation:** Biological performance standards may be required based on results from sampling within the index period. Should impacts to Johnson Run occur, these biological performance standards will be applied to the **reconstructed segment of Johnson Run.** 

Response: Oxford does not agree to this.

Ohio EPA Response: The requirement of biological performance standards will be determined after biological sampling is performed onsite.

8. **Performance Standards:** The proposed survival rate is 200 trees and a total of 400 woody stems per acre planted..." Please revise this to state that the applicant will ensure a survival rate in all riparian areas of a **minimum of 400 native, live, and healthy (disease and pest free) woody plants per acre (of which at least 200 are tree species).** 

Response: Oxford does not agree to this.

Ohio EPA Response: Ohio EPA believes the success and integrity of streams mitigated onsite is dependent on the establishment of an intact forested riparian

buffer. Demonstrations of the importance of forested riparians have been provided to Oxford during past discussions regarding certification conditions; specifically, the Shugert South Adjacent certification. Since that time this condition has been included in certifications issued by Ohio EPA to Oxford for several mining projects. Please provide rationale as to what has changed that has led to Oxford not agree to this condition?

9. **Stream Monitoring:** Please provide performance standards that are quantifiable in order to provide a measurement of recovery as the monitoring period progresses. The following performance standards have been used in recent coal mining permits:
- d. Develop a minimum of 508 lf of perennial stream, 319 lf of intermittent stream and 436 lf of ephemeral stream.
 - e. Develop a minimum of 50 feet of native upland/floodplain buffer as measured from the top of each bank with no more than five percent relative coverage of invasive species as listed in Appendix 7 of the Guidelines for Mitigation Banking in Ohio available at: <http://www.lrb.usace.army.mil/Portals/45/docs/regulatory/MitandMon/guidelineswetlandmitigation-Ohio.pdf>.
 - f. Demonstrate that a minimum of 400 native, live and healthy (disease and pest free) woody plants per acre (of which at least 300 are tree species) are present at the end of the monitoring period in the upland buffer.
 - g. Demonstrate that the stream mitigation channel and banks including up and downstream of the mitigation are stable and show no signs of excessive bank erosion, sedimentation, head-cutting, aggradation, entrenchment, or degradation.

Response: Oxford does not agree to this. Oxford will reconstruct streams per their engineering design.

Ohio EPA Response: During meetings between Oxford and Ohio EPA to discuss the certification process for mining as well as agreement on terms to be included in the Shugert South Adjacent certification the applicant was amenable to include this condition within their mitigation plan. Please provide clarification on what has changed since that time that has made the condition disagreeable to Oxford?

11. **Stream and Wetland Reporting:** Ohio EPA recommends the inclusion of the following language describing mitigation report formatting:

- h. Annual mitigation monitoring reports shall be prepared in the format prescribed in the Ohio EPA Monitoring Report Guidelines document available at: <http://epa.ohio.gov/portals/35/401/402MonitoringReportGuidelines.pdf> and include the Monitoring Report Checklist provided at <http://epa.ohio.gov/portals/35/401/401MonitoringReportChecklistTable.pdf>.

- i. Each annual report shall contain the current contact information for the Certification Holder, agent, environmental covenant owner including phone number, e-mail, and mailing addresses.
- j. Each annual report shall clearly identify the specific monitoring period the report is intended to represent, as well as the calendar year the monitoring occurred. The report shall also provide a summary of current mitigation status, which compares the previous years' monitoring information with the current report including graphs and tables showing trends, etc.
- k. The first monitoring report shall contain a full copy of the final U.S. Army Corps of Engineers 404 permit for the project.
- l. Each annual monitoring report shall contain a list of species planted in all mitigation areas.
- m. The first year report shall contain plan view and of the as-built mitigation area including the location and types of plantings.

Response: Oxford does not agree to these conditions.

Ohio EPA Response: During meetings between Oxford and Ohio EPA to discuss the certification process for mining as well as agreement on terms to be included in the Shugert South Adjacent certification the applicant was amenable to include this condition within their mitigation plan. Please provide clarification on what has changed since that time that has made the condition disagreeable to Oxford?

12. **Revegetation Plan:** Please provide detail on how a 50-foot forested buffer around the perimeter of the Wetland Mitigation area will be achieved when the proposed wetland mitigation area WM-1 abuts the Right of Way for County Road 68?



Response: Oxford does not agree to this.

Ohio EPA Response: Please provide clarification on what Oxford does not agree to. A forested wetland buffer with a tree survival performance standard was proposed by Oxford in the application and has been an agreed to condition in previous issued certifications. Please provide clarification on what has changed since that time that has made the condition disagreeable to Oxford?

13. **Riparian Enhancement/Revegetation:** The applicant states that trees and shrubs will be planted in areas where they existed prior to mining, including along created rock lined channels. Please revise to include tree and shrub plantings in all stream mitigation buffers.

Response: Oxford does not agree to this.

Ohio EPA Response: Ohio believes the success and integrity of streams mitigated onsite is dependent on the establishment of an intact forested riparian buffer. Demonstrations of the importance of forested riparian have been provided to Oxford during past discussions regarding certification conditions;

specifically, the Shugert South Adjacent certification. Please provide rationale as to what has changed that has led to Oxford not agreeing to this condition?

14. **Stream Monitoring:** Please provide performance standards for reconstructed streams to ensure that they will possess pre-mining water quality and substrates.

Response: Oxford will reconstruct streams per their engineering designs.

Ohio EPA Response: To effectively determine if a stream has been restored to a quality equal to or greater than the pre-mining conditions, a measurable goal is required. Engineering designs are not a performance goal.

15. **Long-Term Management Plan:** Please provide an acceptable real estate instrument or other available mechanism for long term protection of reconstructed streams, wetlands and their associated riparian corridors and buffers.

Response: Oxford does not agree to this.

Ohio EPA Response: Ohio EPA believes that the request of information within this technical comment is necessary in accordance with ORC 6111.30(A)(4), which states that applications for coverage under 401 should contain the following: "A specific and detailed mitigation proposal, including the location and proposed real estate instrument or other available mechanism for protecting the property long term." This condition, or conditions very similar, has been included in certifications issued to Oxford in recent years. Please provide clarification on what changes have occurred that have resulted in Oxford's disagreement with this condition.

16. **Long-Term Management Plan:** Ohio EPA does not have the authority to enforce SMCRA regulations. In the case that a riparian area or wetland buffer does not meet its performance goal this deficiency will be the responsibility of Oxford.

Response: This statement is unclear.

Ohio EPA Response: Within the long-term management plan section of the 401 Water Quality Certification the applicant has stated "In the specific case that the mitigation planting is mowed, the party responsible for mowing mitigation plantings would be in violation of the SMCRA permit for interrupting activities on a mine site. Upon identifying the party responsible for this type of vandalism, the Ohio EPA would have the authority to levy enforcement actions at that time." As stated above, Ohio EPA does not have the authority to enforce SMCRA regulations for interrupting activities on a mine site. Additionally, in regard to the survivability of tree plantings, the applicant (Oxford) is responsible for the success of the plantings and the overall success of all set performance goals, not Ohio EPA. If mowing is occurring that interferes with Oxford's ability

to meet set performance goals, Oxford is expected to coordinate with appropriate landowners and contractors in order to ensure conditions conducive to successful mitigation.

This concludes Ohio EPA's comments based on a technical review of this section 401 WQC application. Please be aware that Ohio EPA reserves the right to provide additional comments following these should there be a reason to do so. Also, the responses to these comments could result in additional concerns; therefore, if there are any questions or uncertainty regarding a response, please contact me for clarification at 740-380-5226 or via e-mail at maggie.selbe@epa.ohio.gov.

You may find a copy of Ohio EPA's rules and laws online at <http://www.epa.ohio.gov/dsw/rules/index.aspx>. Information regarding Ohio's Section 401 and Isolated Wetlands Permitting programs is also available online at <http://www.epa.ohio.gov/dsw/401/index.aspx>.

Sincerely,



Maggie Selbe
Application Coordinator
401/Wetlands Section
Division of Surface Water

MS/dh

- c: Adam Fannin, Department of the Army, Huntington District, Corps of Engineers
- c: Steve Cassidy, Oxford Mining Company, LLC
- c: Ginger Bennet, ODNR, Division of Mineral Resources Management