

**Editor's Note: Erattum issued June 1, 1998, See 143 IBLA 40g below.**

HEATHERLY MINING, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-277

Decided February 13, 1998

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer affirming Cessation Order No. 93-030-246-001. Docket No. DV 93-15-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally

A Decision affirming a cessation order is properly affirmed when the record shows a surface mining permittee allowed coal mine waste to be deposited on unpermitted lands, contrary to provisions of state law.

APPEARANCES: Stephen W. Smith, Esq., Henryetta, Oklahoma, for Appellant; John S. Retrum, Esq., Office of the Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Heatherly Mining, Inc. (Heatherly), has appealed from a February 14, 1995, Decision by Administrative Law Judge Harvey C. Sweitzer upholding Cessation Order (CO) No. 93-030-246-001, issued by the Office of Surface Mining Reclamation and Enforcement (OSM). The CO cites Heatherly for failure to obtain a permit before disposing of coal mine waste on unpermitted lands, in violation of the Oklahoma surface mining regulatory program approved by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977.

The record reveals that Heatherly either sold or gave mine waste from an underground coal mine near Shulter, Oklahoma, to Okmulgee County and private persons for use on county roads and parking areas. The practice was called to OSM's attention by a citizen's complaint, which OSM initially referred to the Oklahoma Department of Mines (ODM). After ODM refused to inspect, OSM investigators performed an inspection and issued a CO to Heatherly for disposing of coal mine waste on unpermitted lands,

and for failure to obtain a permit for lands on which waste was deposited, in violation of Oklahoma regulations Oklahoma Department of Mines Reclamation Regulations (DOM/RR) §§ 773.11, 817.81(a) and 817.87(b), and 45 Okla. Stat. § 724. After the CO was issued, Heatherly proposed a permit revision to ODM which, if approved, would have allowed the practice complained of to continue; ODM rejected this proposal.

On appeal to this Board, Heatherly does not dispute that material from the underground mine was deposited in areas other than those specifically permitted for that purpose, but argues before us, as was done before Judge Sweitzer, that the action was allowed by Heatherly's mining permit and that ODM, as the primary regulatory authority, properly authorized disposal of the material in this way. Heatherly also repeats an argument made before Judge Sweitzer that, since there was a safe and valid market for the material, it was not subject to regulation as waste material. (See Brief filed Feb. 28, 1994, at 4; Brief filed Apr. 11, 1995, at 5).

Judge Sweitzer rejected these arguments, finding that "a prima facie case was established as to the violation of three of the four provisions of the Oklahoma program cited in the CO, and \* \* \* Heatherly failed to overcome this prima facie case." (Decision at 4.) We find that the judge's Decision, which is adopted as the opinion of the Board and attached hereto as Appendix A, deals fully with the arguments raised by Heatherly on appeal and establishes that the CO issued to Heatherly was properly affirmed.

[1] Judge Sweitzer found that OSM had admitted at the hearing that no violation of DOM/RR § 817.87(b) had occurred; he therefore ordered reference to that regulation stricken from the CO. *Id.* at 6. As to whether Heatherly had violated the other three regulatory provisions, Judge Sweitzer found that Heatherly had allowed coal wastes to be deposited on unpermitted land, contrary to DOM/RR § 773.11 and 45 Okla. Stat. § 724, as alleged in the CO. (Appendix A at 4-6.) As Judge Sweitzer found, the regulations are clear. The material in question falls within the definition of "coal mine waste" and must be placed in disposal areas within a permit area approved by ODM for this purpose. The failure to do so was properly cited by OSM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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Franklin D. Amess  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge

Exhibit A

United States Department of the Interior  
Office of Hearings and Appeals  
Hearings Division  
6432 Federal Building  
Salt Lake City, Utah 84138  
(Phone 801-524-5344)

February 14, 1995

HEATHERLY MINING, INC.	:	Docket No. DV 93-15-R
	:	
Applicant	:	Application for Review
	:	
v.	:	Cessation Order
	:	No. 93-30-246-001
OFFICE OF SURFACE MINING	:	
RECLAMATION AND	:	
ENFORCEMENT, :	:	
	:	
Respondent	:	

**DECISION**

Appearances: Stephen W. Smith, Esq., Henryetta, Oklahoma, for applicant;

John S. Retrum, Esq., Denver, Colorado, for respondent.

Before: Administrative Law Judges Rampton and Sweitzer

On August 16, 1993, Heatherly Mining, Inc. (Heatherly) filed an Application for Review regarding Cessation Order No. 93-030-246-001 (CO) issued to Heatherly by the Office of Surface Mining Reclamation and Enforcement (OSM) on August 4, 1993. Heatherly also filed an Application for Temporary Relief from the CO on December 6, 1993. The CO charges Heatherly, the permittee of an underground coal mine located near Shulter, Oklahoma, with "[f]ailure to obtain a valid permit from the Oklahoma Department of Mines (ODM) before engaging in or carrying out coal mining and reclamation operations."

More specifically, the CO alleges that Heatherly "is allowing coal mine waste to be disposed of outside of the permitted area" in violation of applicable law, and initially ordered Heatherly to cease the removal of coal mine waste from the permitted area. Heatherly contends that it has not violated applicable law because the removal of the waste from the permitted area was approved by ODM.

A hearing regarding both applications was held before now retired District Chief Administrative Law Judge John R. Rampton, Jr., on December 10, 1993, in Tulsa, Oklahoma. At the conclusion of the hearing, and pending a decision on the Application for Review, Heatherly's Application for Temporary Relief was granted. Consequently, only the Application for Review remains at issue.

Upon the retirement of Judge Rampton, the case was assigned to the undersigned for decision consistent with 43 U.S.C. § 554(d). Having reviewed and considered all evidence, as well as the parties' briefs, and for the reasons set out below, I must find that the CO is valid with respect to each of the alleged violations, with the exception of the alleged violation of DOM/RR § 817.87(b).

#### Statement of Facts

The State of Oklahoma, pursuant to sections 503(a) and 523(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1253(a) and 1273(c), has assumed primary responsibility for the regulation and control of surface coal mining and reclamation operations on State and Federal lands within its borders. *See* 30 CFR Part 936. The State's regulatory program for these operations (Oklahoma program) is administered by ODM (Tr. 23).

In 1988, ODM issued to Heatherly permit no. 88/93-4170 (Tr. 22-23). The permit, as subsequently modified, allows Heatherly to conduct surface coal mining and reclamation operations within 70 acres of land near the town of Shulter, Oklahoma (Tr. 23-24; Exs. R-2, R-11). Within this area, Heatherly produces and processes coal from an underground coal mine known as the Pollyanna #4 mine, Shulter mine, or Heatherly mine (Mine), and deposits the coal mine waste in a pile (Tr. 22-25, 37, 41-47).

In 1990, the permit was revised to provide that waste material from coal processing will be used as backfill in an excavation resulting from extension of the Mine's portal area (Ex. R-2). The revision also contemplates that the waste material will then be covered by at least 4 feet of non-acid forming material (Ex. R-2). If the excavation begins to fill up before completion of mining activities, Heatherly will be required to obtain approval for a new waste disposal site before the excavation becomes filled (Ex. R-2). The revision concludes with the following statement: "It should be noted that Heatherly plans to sell or give some of the waste rock to the county for county roads during the life of the mine." (Ex. R-2).

In March 1993, the permit was further revised to provide that if any more "underground development waste is carried to the surface, it will be placed within the designated area. At the completion of the mining operation, the development waste will (1) be carried into the underground mine works, and/or (2) be placed within the portal area and covered with four feet of non-toxic, non-acidic material." (Ex. R-3) This revision co-exists with the 1990 revision, which was not deleted (Tr. 117-119).

On August 3, 1993, OSM Inspector Jeffrey Zingo and his supervisor, Michael Lett, inspected the Mine in response to a citizen's complaint that Heatherly was allowing people to remove coal mine waste from the permitted area (Tr. 35-36, 38, 41; Ex. R-1). They observed a front-end loader scooping up coal mine waste and placing it in the trailer of an orange-colored truck marked "State of Oklahoma." (Tr. 41-44; Ex. R-7) The OSM inspectors followed the truck as it left the permit area and deposited the coal mine waste on a county road a few miles from the Mine (Tr. 43-44; Ex. R-7). The operator of a grader working the surface of the road then told the inspectors that he was an employee of the County of Okmulgee, Oklahoma, and that he was spreading material "from the Shulter mine" for use as road base on the county road (Tr. 43). That same day, the OSM inspectors also discovered that some coal mine waste from the Mine had been used for the base of the parking lot of a nearby Wal-Mart store (Tr. 44, 47-48, 101-102; R-11).

On August 4, 1993, George Richardson, the President of Heatherly, told Inspector Zingo that Heatherly had been allowing the coal mine waste to be removed from the permit area for many years (Tr. 48-49). Indeed, the facts show that, in approximately 1990, Heatherly began selling or giving away the coal mine waste for use off-permit as construction material (Tr. 49-51, 148). Most of it was used by the County of Okmulgee as roadbed material (Tr. 51, 158).

From his August 4th conversation with Mr. Richardson, as well as discussions with ODM, Inspector Zingo also determined that no action was underway to permit an area other than the mine site for disposal of the coal mine waste (Tr. 49-53). Inspector Zingo concluded that a cessation order should be immediately issued to Heatherly prohibiting any further removals of coal mine waste from the mine site, because there was no other approved coal mine waste disposal site (Tr. 52-55).

On August 4, 1993, Inspector Zingo issued the cessation order in question only after ODM refused his request to issue a cessation order (Tr. 55, 58; Ex. R-12). ODM refused because the practice of using coal mine waste off-permit is wide spread in Oklahoma and ODM would have to issue cessation orders to many other permittees if it issued one to Heatherly (Tr. 55).

As previously mentioned, the CO alleged that Heatherly "is allowing coal mine waste to be disposed of outside of the permitted area" in violation of the following portions of the Oklahoma program: DOM/RR §§ 773.11, 817.81(a), and 817.87(b) and 45 Okla. Stat. § 724. The CO ordered Heatherly to cease the removal of coal mine waste from the

permitted area and, as corrective action, required Heatherly to submit permitting and bonding data to ODM for the purpose of permitting a coal mine waste disposal site by September 20, 1993 (Ex. R-12).

Shortly after the CO was issued, Heatherly submitted a proposed permit revision to ODM that, if approved, would have allowed Heatherly to continue to sell or give the coal mine waste to the County for disposal on unpermitted lands (Tr. 164-166). ODM did not approve this proposed permit revision (Tr. 165).

Heatherly then submitted a proposed permit revision for a coal mine waste disposal site within the permit area (Tr. 165-167, 175; Ex. A-2). Based upon Heatherly's requests and its good faith attempts to complete the corrective action required by the CO, Inspector Zingo extended the abatement deadline several times (Tr. 61-71; Exs. R-15, R-18, R-20, R-22). In the final extension, OSM modified the CO to require cessation of all mining activities if abatement was not achieved by December 17, 1993. However, Inspector Zingo has indicated that further extensions will be granted so long as Heatherly pursues abatement in good faith (Tr. 70-71).

### Discussion

Pursuant to 43 CFR 4.1171(a), OSM has the burden of establishing a prima facie case as to the validity of the CO. The ultimate burden of persuasion rests with Heatherly. *See* 43 CFR 4.1171(b).

The argument and evidence in this case has focused upon whether a violation of the Oklahoma program actually occurred; Heatherly arguing that the CO is invalid because none of the charged violations occurred. As more fully discussed below, the evidence shows that a prima facie case was established as to the violation of three of the four provisions of the Oklahoma program cited in the CO and that Heatherly failed to overcome this prima facie case.

The premise for Heatherly's argument that no violations of the law occurred is that ODM approved of the removal of the coal mine waste from the permitted area in the 1990 permit revision. The purported approval is the sentence: "It should be noted that Heatherly plans to sell or give some of the waste rock to the county for county roads during the life of the mine." In light of the other permit provisions requiring burial of the coal mine waste within the permit area and placement of the waste in the designated area, this purported approval is ambiguous. Assuming, *arguendo*, that ODM did approve removal of the coal waste from the permitted area, this approval is no defense to the alleged violations in the CO.

Under the Oklahoma program, "[a]ll coal mine waste shall be placed in new or existing disposal areas within a permit area, which are approved by [ODM] for this purpose."

DOM/RR § 817.81(a). "Coal mine waste means coal processing waste and underground development waste." DOM/RR § 701.5. "Coal processing waste means earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal." *Id.* "Underground development waste means waste-rock mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved, and disposed of from underground workings in connection with underground mining activities." *Id.*

The material in question clearly falls within the definition of "coal mine waste" and, therefore, must be placed in disposal areas within a permit area approved by ODM for this purpose. <sup>1/</sup> See DOM/RR § 817(a). Because ODM had not approved a site other than the permitted area for disposal of the coal mine waste, Heatherly violated section 817.81(a) by allowing the coal mine waste to be taken to unpermitted areas.

Heatherly also violated DOM/RR § 773.11 and 45 Okla. Stat. § 724, as alleged in the CO. Section 724 provides:

It shall be unlawful for any operator to engage in any mining operations in this state without first obtaining from [ODM] a permit to do so for each separate mining operation. [ODM] shall determine what constitutes a separate mining operation by rules and regulations promulgated under the Mining Lands Reclamation Act.

The rules and regulations at section 773.11 provide in pertinent part that:

no person shall engage in or carry out on non-Federal or non-Indian lands within the State any surface coal mining and reclamation operations unless that person has first obtained a valid permit issued by [ODM] under an approved regulatory program.

Heatherly has not disputed that its practice of allowing coal mine waste to be deposited on unpermitted lands constitutes "surface coal mining and reclamation operations." Therefore, Heatherly violated 45 Okla. Stat. § 724 and DOM/RR § 773.11 if it did not have a valid permit for this practice.

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<sup>1/</sup> At the hearing, but not in its post-hearing brief, Heatherly raised the issue of whether the coal mine waste was toxic, and if not, whether the waste could be placed outside of a permit area as excess spoil (Tr. 107-108). Assuming, *arguendo*, that the waste is nontoxic and may be treated as excess spoil, such spoil must be placed within a permitted area (Tr. 15-137). DOM/RR § 817.71(a).

This practice was not validly permitted because the purported ODM approval for removal of the coal mine waste from the permit area is not authorized under the Oklahoma program. The purported approval is not authorized because, contrary to section 817.81(a), it does not provide for placement of the waste within another permit area approved by ODM for this purpose.

Finally, regarding the alleged violation of DOM/RR § 817.87(b), OSM conceded at the hearing that no such violation had occurred (Tr. 7-8). Therefore, the CO is valid, with the exception that the alleged violation of DOM/RR § 817.87(b) should be stricken.

#### Conclusion

Based upon the foregoing, the CO is hereby declared valid, with the exception that the alleged violation of DOM/RR § 817.87(b) shall be stricken.

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Harvey C. Sweitzer  
Administrative Law Judge

United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
4015 Wilson Boulevard  
Arlington, Virginia 22203

June 1, 1998

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ERRATUM

When this case issued on February 13, 1998, an appendix thereto was omitted from the published decision appearing at 143 IBLA 39. The omitted document, Appendix A, numbered 143 IBLA 40a through 40f, is attached hereto for insertion into the IBLA reports immediately following page 40.

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Franklin D. Amess  
Administrative Judge

I concur.

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C. Randall Grant, Jr.  
Administrative Judge

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