

FILED

MAY 03 2002

Terri A. Lorenzon, Director
Environmental Quality Council

BEFORE THE ENVIRONMENTAL
QUALITY COUNCIL

IN THE MATTER OF REEVES/ CUNDY / EVANS/)
OLD CASTLE: *MOTION TO DISMISS*)

WOODROW & CHRISTINE BARSTAD: *RESPONSE*

COMES NOW COMES NOW **THE BARSTADS**, The Legal Property Owners, the DEQ Bonded Operators, and the Legal DEQ permit holders of Land Quality Permit No. (ET 1 100) and Air Quality Permit No.(CT I491). Woodrow and Christine Barstad hereby respond to amend the Barstad application dated March 28,2002 and submitted requesting a hearing before The Environmental Quality Council.

The Barstads now respond to Reeves/ Cundy/ Evans/ Old Castle Motion to Dismiss the Barstads right to a hearing before The Environmental Quality Council. Specifically, the Barstads respond to objections 1 through 5 in the Reeves/ Cundy/ Evans/ Old Castle Motion to Dismiss dated April 17 , 2002.

1.

In the Barstad application for a hearing, Woodrow and Christine Barstad object to the issuance of Permit No. CT -2699, dated January 30, 2002, to Reeves (the Contractor) to extend operations at the Barstad Pit.

2.

Reeves as a Contractor at the Barstad pit, does not have a legal right to hold a permit on the Barstad Pit property.

Reeves as a Contractor did not / has not met DEQ Land Quality requirements of Non Coal Rules and Regulations criteria under Section 6 (a)(b).

* a) Reeves self imposed and required *Amendment* to the Lease dated 21 Oct. 1998: The *Lease Amendment* reads: "Woodrow Barstad agrees to hold the DEQ Land Quality and Air Quality permit in his name. This is done so all legal expenses required to defend the permits are Barstads responsibility".

* b) Reeves letter dated 3/23/98 and an attached *First Lease Agreement* (This first Lease agreement had an unlimited time frame and contained no mining conditions other than the requirement to obtain a DEQ permit).

* c) Reeves letter dated 4/30/98. Reeves response to the Barstads request for *an estimate of the amount of gravel potential* (100,000 ton) on the property and a conformation on the 2 year time frame.

* d) Bob Giurgevich DEQ Land Quality Letter dated 7/22/98: Woodrow Barstad, Dave

Nyenhuis and Bob Giurgevich meet on site, to discuss permit options (Small Mining permit or 10 acre exemption) and 2 year time frame.

The (*Amended*) **Second Lease** dated 9/11/89 was for two years of mining/crushing. Dave Nyenhuis requested an additional two years to remove any stockpiled material that may not sell during the original two years. His logic was as he explained, to avoid haul costs to have any additional unsold stockpiled material removed from the pit after the two years of mining was complete. The Barstads agreed to his request, with his assurance that the amount of material would be minimal, this discussion was based on the based on the 100,000 ton estimate. When Dave Nyenhuis gave us the **Second Lease** to sign he had added yet an additional year for a total of three years for the removal of unsold stockpiled material. The word Crushing had always been used and discussed in the context of (Crushing/ Mining), the two words were synonymous in nature and used interchangeably. In fact, all Crushing/Mining, the act of processing to produce product was represented and actually conducted in the winter months (October-May) as requested and permitted by the DEQ. More specifically **for a two year (24 month) period**, which provided for **16 months (Oct.- May) of Mining/Crushing** in the **2 year period**, The 16 months for mining/crushing actually bridges 3 calendar years, not 2. Reeves only actually Crushed/Mined for 7 of the 16 months in the two year period. This is how the operation was conducted by Reeves up to and until the expiration of Air Quality Permit No.(CT 1491) on 3/9/01.

No Lease Agreement was ever submitted to the DEQ during the permit process, although in writing Reeves attempted to claim to the DEQ that the Lease agreement had been submitted as part of the Official record.

***a) Amendment** to the Lease dated 21 Oct.1998: This *Amendment* was not, and to date, has not been submitted by Reeves to the DEQ. This *Amendment* clearly precludes anyone other than the Barstads from holding a permit. It is my contention that this non disclosure, by non submission of the said Lease Agreement and the *Amendments* to the Lease Agreement was/is deliberate and deceitful. Only now, after the expiration of DEQ Air Quality Permit No.(CT 1491) has Reeves contested the terms of the DEQ permit. Only now after the fact has Reeves submitted to the DEQ the Lease Agreement and contested DEQ Air Quality Permit No.(CT 1491). In fact even this present submission of the *Second Lease* is wilfully inaccurate without the submission of the complete *Amendments* being attached. This pattern of omission, misrepresentation, concealment, and non disclosure of the facts by Dave Nyenhuis/Reeves/Cundy is a consistent pattern, slowly, and quietly oozing throughout the documents from day one. The now present intent of Dave Nyenhuis / Reeves/Cundy is to manipulate the material effect (that he originally, promoted, supported and submitted) of DEQ Air Quality Permit No.(CT 1491). The admitted objective is to obtain more operational mining time in the Barstad Pit so as to preclude the Barstads from bringing in another contractor that will be in competition with Reeves/Cundy.

3.

The Barstads feel that we have already fulfilled these requirements. If not, please clarify your request and we shall respond.

4.

The Barstad's apologize for their technical oversight in not submitting to Reeves a copy of said petition. The Barstad's shall immediately remedy this oversight.

* e.)(1-4) The Barstads are the Legal DEQ Bonded Operators.

According to the *Reeves Amendment*, Reeves imposed the requirement that the Barstads hold the permits. Reeves/ Cundy has breached the lease *Amendment*, agreement.

Reeves as a Contractor did not / has not met DEQ Land Quality requirements of Non Coal Rules and Regulations criteria under Section 6 (a)(b). The DEQ should not have issued Cundy Permit No. CT -2699.

Dave Nyenhuis Affidavit (pg.7)(16), represented to the Court. Woodrow Barstad painted over a sign required by DEQ stating the permit number and the operator. Reeves INC. was listed as the operator. The sign had been cleaned on February 7,2002". The DEQ Permit NO CT 1491 is on file with the DEQ as issued to Woodrow and Christine Barstad, Owners and Bonded Operators of the Barstad Pit. A correct sign meeting all DEQ requirements has been posted.

(4.1) Cundy applied for and received, a one month permit extension in December of 2001, and then additionally Reeves applied for and received Cundy Air Quality Permit No. CT -2699, both without any preliminary pre-application communication between the Barstads and Reeves, without the Barstads consent to apply, and without the Barstads participation or notification even though Dan Olson always referred to any extension applications as Barstad/ Cundy invitations to apply.

In Court Reeves speaks about their DEQ December permit extension in the present.

* f) Note: **Dave Nyenhuis Affidavit (pg6)(11) Quote:** "Some of the aggregate material was not sold or removed (*) after the Crushing ended and was stockpiled on site. Some of the stockpiled material is still stored on the property at various locations on the ten acre trac which was described in the mine permit issued by the DEQ. A dispute then arose between Reeves and the Wyoming Dept. of Environmental Quality regarding whether or not Reeves had the right under Barstads Air Quality permit to remove stockpiled, processed material. (**) Reeves continues to assert that it had the right to remove the stockpiled material under this air quality permit. After some negotiations with DEQ, DEQ issued an extension to Reeves for the removal of stockpiled material until December 31, 2001. In the mean time, the DEQ requested, and Reeves applied for, an additional air quality permit to remove stockpiled material and screen previously processed material on site. This permit was issued by the DEQ on January 30,2002".

Notice above: (*)after the Crushing ended : this was the the last year of the 2 year the Barstad DEQ permit CT 1491. On March 9,2001 Barstad DEQ permit CT 1491 expired. This was the Mining/Crushing season, both have all along been done in conjunction with each other, hand in hand, not separately as Dave Nyenhuis is so desperately trying to convince us. This is a real manipulation of the facts. The DEQ interpretation is simple and clear mining for two years. Dave Nyenhuis is misrepresenting the facts, when put into context with the known events and all the

other facts, Crushing for two years lacks validity. Mining for two years, with the mining/crushing activity limited to the months of Oct-May rings true.

Notice above: (**) Reeves continues to assert that it had the right to remove the stockpiled material under this air quality permit. After some negotiations with DEQ, DEQ issued an extension to Reeves for the removal of stockpiled material until December 31, 2001. Reeves insinuates to the Court that permit CT 1491 is still in effect and that the DEQ December permit extension picks up when permit CT 1491 expires. Reeves selectively omits the fact that they processed material illegally for 9 months in direct violation of permit CT 1491, and prior to receiving this DEQ December extension. In fact Reeves was operating this whole time without any Air Quality permit in place on the Barstad property.

Note: *Dave Nyenhuis Affidavit (pg.10)(24) Quote:* "Reeves vigorously disputes the notice of violations which have been issued by the DEQ. To date, the attorney generals office, on behalf of the State of Wyoming, has not taken any action on its notice of violation. Those notices did not contain any cease and desist requirement".

The implication made to the Court is that the NOV situation is minor in nature.

- (4.2) * **g) (1-5)** At the present time, and at the time of application for Cundy Air Quality Permit No. CT -2699 Reeves/ Cundy was/is in violation of the DEQ Land Quality Permit No. (ET 1 IOO) and Air Quality Permit No.(CT 1491). Reeves has gone 4.5-6.6 acres, beyond the limited 10 acre permitted ET. In addition Reeves continued to mine for an additional 6 months past the expiration of Air Quality Permit No.(CT 1491) after being told to stop by the Barstads on numerous occasions. Reeves/ Cundy and are presently under 2 DEQ NOV for this violation.

* *See attached:* Exhibit:

- (4.3) * **h)** Reeves/ Cundy the present holder of Air Quality Permit No. CT -2699 is not the DEQ Bonded Operator and did not/does not meet the DEQ Land Quality **Non Coal Rules and Regulations criteria under Section 6 (a)(b).**

Dave Nyenhuis required the Barstads to be the Legal Operators, and Dave Nyenhuis authored the original DEQ permit documents to reflect his intention that the Barstads be the Operator.

* *See attached:* Exhibit:

- (4.4) The Reeves/ Cundy Air Quality Permit No. CT -2699 was obtained by a slanted material fashion due to lack of synchronicity in the separate Rules and Regulations that are administered by the DEQ Land Quality and DEQ Air Quality Divisions in their individual permitting processes.

More specifically and factually, the DEQ Land Quality requires written conformation of Land owner consent upon permit application and for the transfer of operator status, where as the DEQ Air Quality permitting does not.

DEQ Land Quality and DEQ Air Quality permits are essential interlocking components. In fact one can not function without the other in situations such as the Barstads sand and gravel operation. Yet against the Barstads protest to the DEQ Land Quality and DEQ Air Quality Divisions the DEQ issued Air Quality

Permit No. CT -2699 to Reeves/Cundy.

Reeves/ Cundy has opportunistically slipped past the intent of the DEQ Rules and Regulations due to this lack of synchronicity between the Land Quality and Air Quality permitting. This technicality must be addressed so as to avoid future legal entanglements such as the present one.

5.

The Barstad' s are not appealing Land Quality Permit No. ET 1100 and Air Quality Permit No. CT-1491, rather the Barstad's are requesting that they be administered according to their required commitment.

The Material Lease Agreement is an incomplete document with Amendments, misunderstandings and ambiguity and open terms. The lease was/is conditional and dependent upon obtaining DEQ permits to operate. Without DEQ Air Quality and/or Land Quality Permits the Lease between the Barstads and Reeves is a moot issue and has no practical effect, there is absolutely no denying that fact.

The October *Amendment* requiring the Barstads to hold all permits was a substantial change to the Lease Agreement. In exchange for the role reversal between Reeves and the Barstads concerning Operator status and permit holder, the Barstads agreed but the 2 year time frame as represented to the neighbors was an agreed upon condition that was to be placed in the DEQ permits and amended to the lease. The content of the DEQ permit applications are **authored and submitted by Dave Nyenhuis on 11/6/98 (Air Quality) and 2/18/99 (Land Quality)**. These DEQ permits are either factual representations of his intent to perform under the **2 year time frame** and the winter **mining/crushing conditions relegated from October -May** in these DEQ permits, or Dave Nyenhuis knowingly and fraudulently misrepresented the content he authored in these documents and knowingly misrepresented this information to the Barstads, the DEQ , and the Public. The non disclosure (document submission) of the conflicting Material Lease Agreement to the DEQ at the time of the DEQ permitting process was intentional. The Lease conflicted with the information in the Air Quality permit and conveyed by Dave Nyenhuis and the Barstads to the DEQ, the neighbors, and at the DEQ required public hearing. The material difference between the Lease and the DEQ permit would have been noticed and addressed if the Material Lease Agreement and *the Amendments* had been submitted to the DEQ. The DEQ Permits 2 year mining time frame conflicted with the 5 year lease in a big way. The Barstad's believed as represented by Dave Nyenhuis that the DEQ permit is the predominate factor in our ability to pursue the mining operation, it gave us the ability to mine , it defines what can and can not be done and the DEQ can shut us down for non compliance, is how the DEQ was explained to the Barstads by Dave Neynhuis and as is stated in the DEQ Air Quality permit.

Once again the Barstads are not appealing the permits. The Barstads request compliance with the terms and conditions set forth in Land Quality Permit No. ET 1100 and Air Quality Permit No. CT-1491 as agreed upon by the Barstads and Reeves.

Reeves could have but never appealed the issuance of Land Quality Permit No. ET 1100 and Air Quality Permit No. CT-1491 and for obvious reasons , the Barstads would have

terminated the lease at that time.

Conclusion:

The Lease Agreement played absolutely no prior role in front of the DEQ. The Lease neither obtained or maintained DEQ permit No. ET 1100 or permit No. CT-1491. The Lease only now has surfaced in incomplete form as an issue in front of the DEQ and has been used to obtain and maintain Cundy Air Quality Permit No. CT -2699. The Lease which the DEQ has no administrative authority over has now circumvented the conditions and the authority of the original DEQ permits.

The Barstads are not trying to avoid or change the lease as Reeves claims . The Barstads entered into this agreement in good faith and are simply requiring the same of Reeves. The Lease contains no entire agreement clause, it is ambagious, it is not complete, it has been in a constant state of amendment. Its life breath was/is dependant upon the DEQ Permitting. Dave Nyenhuis authored, all the documents presented, the Lease Agreement and then he authored the DEQ permit documents. It is Dave Nyenhuis that is playing one document off agianst the other to suit his present needs. The DEQ permits were the last documents in the chain of events authored by Dave Nyenhuis, is this fact or fraud?

Knowing their contract was up and that another contractor was coming in Reeves filed suit against the Barstads and resurrected the Lease as a legal issue in front of the DEQ. At this juncture in time Reeves has successfully impeded the Barstads ability to do business. The Barstads have been forced to cancel their contract with Fisher Industries and have had to turn down contracts for material.

With 15 years experience in the gravel business Dave Nyenhuis of REEVES/CUNDY knows the procedure, the boundaries of the bubble, and what conditions the DEQ will accept. Dave Nyenhuis sees the DEQ Rules and Regulations as guide lines on the economy HWY. If caught, the fine for breaking the rules is a more economically feasible way of doing business then the performance of the rules and regulations.

Reeves has violated numerous administrative regulations while mining on the Barstad Pit:

Dave Nyenhuis Affidavit (pg9)(23): "That at all times , Reeves has operated under the terms of the material lease Agreement dated September 11,1998".

- Reeves has knowingly violated DEQ rules and regulations and is presently cited with 2 Air Quality NOV.
- Reeves has knowingly exceeded the DEQ 10 acre Limited ET by 4.5 acres plus.
- Reeves has knowingly buried trash ,garbage, and mechanical waste on the Barstad Pit without a DEQ permit or permission from the Barstads.
- Reeves has knowingly since opening the pit operated an illegal, uncertified, and unlicensed scale in its day to day operations on the Barstad Pit. The scale has been shut down by the Wyoming Department of Agriculture.

It is the Barstads contention that Reeves/ Cundy has intentionally and knowingly avoided the intent of the DEQ Rules and Regulations and has obtained Air Quality Permit (No. CT -2699) due to the lack of codified synchronicity between the DEQ Land and Air Quality Rules and Regulations. This has been done at the Barstads expense, with no consequence to Reeves/Cundy. The Lease is beyond DEQ administrative parameters, but the DEQ permits are clear in their intent and conditions. The precedent that has been set here will be repeated if not put in check now. The

DEQ Authority should administer the permits as originally submitted and let Reeves pursue the Material Lease in court if they so desire.

DATED this 01, day of May, 2002.


Woodrow Barstad
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Buffalo, Wyoming 82834
(307) 684-0228

CERTIFICATE OF SERVICE

I, Woodrow Barstad, certify that I served a true and correct copy of the foregoing "Response to Reeves/ Cundy/ Evans/ Old Castle Motion to Dismiss" upon Cundy, by depositing a copy thereof in the United States mail, all postage prepaid to:

CUNDY
Ernest Skretteberg
PO Box 2469
Gillette, Wyoming 82717

Terri A. Lorenzon, Director
Environmental Quality Council
Herschler Building, Room 1714
122 West 25th Street
Cheyenne, Wyoming 82002

on  01- day of May, 2002.


WOODROW BARSTAD