



Compton Petroleum Corporation

Appeal of ERCB High Risk
Enforcement Action 1

November 3, 2009

ENERGY RESOURCES CONSERVATION BOARD

Decision 2009-064: Compton Petroleum Corporation, Appeal of ERCB High Risk Enforcement
Action 1

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

COMPTON PETROLEUM CORPORATION APPEAL OF ERCB HIGH RISK ENFORCEMENT ACTION 1

Decision 2009-064
Proceeding No. 1624721

1 DECISION

Having considered the evidence and submissions from all parties, the Energy Resources Conservation Board (ERCB/Board) grants the appeal and rescinds the ERCB High Risk Enforcement Action 1.

2 INTRODUCTION

On October 4, 2008, Compton applied routinely for licences for two B140 sweet gas wells at surface locations at Legal Subdivision (LSD) 16, Section 13, Township 16, Range 24, West of the 4th Meridian (16-13 well) and LSD 9-12-16-24W4M (9-12 well). The same day, the ERCB issued Licence No. 0401797 for the 16-13 well and Licence No. 0401806 for the 9-12 well.

On April 30, 2009, the ERCB Facilities Applications Audit Section issued a High Risk Enforcement Action to Compton Petroleum Corporation (Compton), in accordance with *Directive 019: ERCB Compliance Assurance—Enforcement* for incomplete personal consultation and notification prior to filing the applications, as required by *Directive 056: Energy Development Applications and Schedules*. Specifically, Compton had failed to meet requirements in Section 2.2.1(4) of *Directive 056* and failed to include people that it was aware of who had special needs or concerns and resided beyond the consultation and notification radius indicated in Tables 5.1, 6.1, and 7.1 of *Directive 056*. The Audit Section believed that Compton was aware of the concerns raised by Darrell Graff, Barbara Graff, and Larry Graff (the Graffs) regarding numerous related nonroutine applications Compton had filed and of the number of related review and variance files that the ERCB was currently in the process of reviewing and that Compton should have notified the Graffs. As a consequence of the noncompliance, the Audit Section cancelled the two well licences.

On May 12, 2009, Compton requested a review of the Audit Section's finding of noncompliance and issuance of the enforcement action on the following grounds:

- The *Directive 056* edition in effect at the time of Compton's consultation in June 2008 stated, "...people with special needs who **reside** in the area," (emphasis added by Compton) not "...people that it is aware of who have special needs or concerns and reside beyond the consultation and notification radius...."
- *Directive 056* required notification to landowners within 100 metres (m) of the proposed well.

- Although Compton was aware of the Graffs, the Graffs' residence was 17 kilometres (km) from the subject wells and the Graffs' land was outside the 100 m radius; therefore, no notification was provided to them.
- Section 2.2.1(4) of *Directive 056* speaks specifically to residents, not landowners, and tables that define radii specifically distinguish between residents and landowners.

On June 12, 2009, the Audit Section denied Compton's request on the following grounds:

- The 16-13 well was to be located just 180 m south of the Graffs' land, which is the east half of Section 24-16-24W4M.
- The Graffs had a history of concerns and objections to oil and gas development in the Vulcan area. This history involved the ERCB and Compton, as well as others.
- Although the requirements of Table 7.1 were met, that was not material.
- ERCB *Bulletin 2008-25* (released June 16, 2008) stated that the June 2008 edition of *Directive 056* came into effect June 30, 2008. Compton applied for licences for the two wells on October 4, 2008. The Audit Section maintained that applications submitted on or after June 30, 2008, were required to meet the requirements of the June 2008 edition of *Directive 056*.
- Section 2.2 of *Directive 056* states:

Directive 056 sets out the consultation and notification requirements for the various energy developments in Tables 5.1, 5.4, 6.1, 6.2, and 7.1. These tables provide industry with a starting point for developing a participant involvement program and, as such, should not be viewed as the maximum. It is industry's responsibility to assess the area beyond the specified distance to determine if the radius of investigation recommended by *Directive 056* should be expanded. It may be necessary to increase the radius to include public interest groups or others who have expressed an interest in development in the area.
- Section 2.2.1(4) states:

The applicant must also include those people that it is aware of who have special needs or concerns and reside beyond the consultation and notification radius indicated in Tables 5.1, 6.1, and 7.1.
- Previous applications from Compton included the Graffs, so Compton either knew or should have known that the Graffs had concerns in this area. In failing to notify the Graffs, Compton was not following the spirit of Section 2.2.1(4).
- This failure was determined to be "incomplete public and/or industry personal consultation and notification prior to filing an application," which is viewed as a High Risk noncompliance event in the Participant Involvement compliance category of the ERCB's Risk Assessed Noncompliances (available on the ERCB Web site www.ercb.ca).

By letter dated June 23, 2009, Compton appealed the review decision of the Audit Section and the enforcement action to the ERCB Enforcement Advisor. Further submissions were made by both parties.

3 APPEAL TO THE BOARD

On August 21, 2009, after consideration of the submissions, the Enforcement Advisor referred the matter to the Board for determination, given the policy nature of the issue on appeal.

A three-member panel, consisting of Board Members M. J. Bruni, Q.C., T. L. Watson, P.Eng., and J. D. Ebbels, LL.B., was assigned to consider this appeal based on the written materials filed by the parties.

4 SUBMISSIONS OF THE PARTIES

4.1 Views of the Applicant

In support of its June 23, 2009, appeal, Compton stated as follows:

- Section 2.2.1(4) of *Directive 056* referred specifically to residents. Tables 5.1, 6.1, and 7.1 defined radii and specifically distinguished between residents and landowners.
- In many places, *Directive 056* differentiated between residents and landowners. If the requirement was meant to be inclusive of landowners, amendments were required.
- Each project should be considered on its own facts and whether there was truly a requirement to consult given the nature of development and distance from project.
- The Graffs resided 17 km away. Compton's title search did not identify the Graffs' farm land, as it was outside the 100 m radius.
- A test of reasonableness ought to be applied to distances of residences from the proposed well to be included in the consultation process.

An e-mail message from Compton dated July 13, 2009, stated that *Directive 056*'s requirements were purely subjective and that a test of reasonableness should apply. Compton argued that the directive's requirements were opinion based, not based on factual, substantive requirements. Compton felt justified in not conducting notification based on the nature of development, citing a similar type of development regarding which the ERCB agreed that the Graffs were not directly and adversely affected, that the development was a significant distance away from their residence, and that there was no impact from setback on their land.

In a July 23, 2009, e-mail, Compton provided a copy of a recent ERCB decision (April 29, 2009), wherein the ERCB found that the Graffs were not directly affected or impacted by Darian's proposed oil well, which was 6 km away from the Graffs' property. Compton pointed out that Darian had not initially notified the Graffs (but subsequently did provide notification). Compton stated that its applications were for sweet gas wells with less environmental emission sources and that the Graffs' residence was 17 km away from its proposed wells. Compton maintained that the fact that the Graffs were denied standing by the ERCB on the Darian application was consistent with Compton's decision to not consider the Graffs as a special needs case given the distance of their residence from the subject wells.

The ERCB's April 29, 2009, letter to the Graffs on the Darian application stated:

Given the nature of the well, its distance from your home, and the ERCB's combustion efficiency requirements, the Board finds that you will not be exposed to emissions from this well. The Board has concluded you have not established that you may be directly or adversely affected by its decision on Application No. 1598300. The Board has therefore dismissed your objection and has directed that the licence be issued in due course.

At the Enforcement Advisor's request, Compton submitted a copy of its company manual on public and community relations.

In its submission of August 7, 2009, Compton stated:

The requirement in Directive 056 is unequivocal and states that there must be BOTH recognition of special needs people and these people must reside beyond the consultation and notification radius.

Compton was of the opinion that prior decisions on standing were relevant because the onus was placed on industry to determine if extended consultation was required. Compton went on to say this would be based on three factors:

- Are there people with special needs and concerns in a given area?
- If so, do these people reside (not just own land) in a given area?
- If not, do they reside (not just own land) within a reasonable distance from the project?

In special circumstances where there is clear evidence of chronic objectors to any and all industry activity and the ERCB has established through prior decisions that these objectors are not directly and adversely affected and impacted, Compton argued that there was a legitimate question of whether these objectors did indeed fall into a special needs category. Since industry must make a judgement call on extending the consultation radius, it must use some factors to help guide it.

Compton contended that the Graffs did not reside within a reasonable distance from the wells and that their position of special needs was open to debate, given that prior ERCB decisions had found that they were not directly affected or impacted from wells much closer to their residence.

4.2 Views of ERCB Staff

The Audit Section responded to Compton on July 10, 2009, reiterating the basis for its enforcement action. It stated that Section 2.2 of *Directive 056* taken as a whole and specifically Section 2.2.1 did not permit an applicant to follow the requirements of the tables without examining what it knew or could reasonably find out about area concerns beyond these radii. The Audit Section stated that the applicant must take such knowledge into account when designing a participant involvement program for a specific project.

The Audit Section accepted that the Graffs lived outside of the Table 7.1 radius, but maintained that fact did not exclude the Graffs as a party to be considered under Section 2.2.1(4).

The Audit Section stated that it would expect Compton to develop a specific consultation and notification policy regarding the Graffs, given their history of expressed concerns. The Audit Section offered to provide comments on such a proposed plan. The Audit Section maintained

that regardless of what enhanced radii Compton applied to the Graffs, a reasonable person reviewing the history between Compton and the Graffs would conclude that the radii needed to be more than sufficient to include a well 180 m from their property.

The Audit Section confirmed that Table 7.1 was not directly linked to this failure by Compton, but rather that Section 2.2.1(4) stated that Compton must include parties that had concerns and resided **beyond** the radius indicated in Table 7.1. The Audit Section maintained that the Graffs were such a party.

The Audit Section's reliance on Compton's previous applications was limited to the fact that Compton knew that the Graffs owned the east half of Section 24 and that they had concerns about oil and gas development in the area of Vulcan generally and in the vicinity of the east half of Section 24 specifically. The Audit Section noted that Compton admitted in its appeal letter of June 23, 2009, that it "was aware at the time of the Graffs and their situation."

The Audit Section stated that the decision to issue enforcement was based on the following:

- The 16-13 well would have been located 180 m south of the Graffs' property, which was evident from the well site survey.
- The Graffs' property was only 80 m beyond the radius in Table 7.1.
- Section 2.2 of *Directive 056* expected applicants to look beyond the radius to include other interested parties.
- The Graffs were a party such as contemplated by Section 2.2.1(4) in that they had concerns and were beyond the radius identified in Table 7.1.
- Compton knew that the Graffs owned the east half of Section 24-16-24W4M and had concerns in the Vulcan area and in this area specifically, as was evident from the Compton cover letter for Application No. 1493757 dated December 13, 2006.

In a further response to Compton dated August 6, 2009, the Audit Section provided more information regarding previous Compton applications (cover letters, the applications, the surveys, and licences) but declined to provide the associated objection letters from the Graffs and ERCB dismissal letters, as they were not relevant to this matter and the Graffs had not specifically given their permission to use those letters for this purpose.

The Audit Section stated that information related to standing was not relevant to this matter. It conceded that the Graffs had failed to demonstrate that they had standing on numerous occasions; however, Section 2.2.1(4) of *Directive 056* ensured that the Graffs should receive notification of future applications in the area, allowing them to submit new evidence and arguments that would support their claim.

The Audit Section reiterated that any applicant was invited to discuss matters with Facilities Applications for guidance on how *Directive 056* would be applied in a special situation. It also made suggestions as to how Compton might approach public involvement in future applications.

The Audit Section submitted that the relevant questions to be considered in this matter were as follows:

- Did Compton know that the Graffs had ongoing concerns in the area of applications?

- If so, did Compton have a plan to consistently address the Graffs' "special needs or concerns," in accordance with Section 2.2.1(4) of *Directive 056*?
- If so, then a question of reasonableness may be applied. Did Compton know the legal interests that the Graffs had in the area, specifically that they owned the east half of Section 24-16-24W4M located 180 m north of the well proposed to be at LSD 16-13-16-24W4M?

5 ISSUES

The Board must determine whether the enforcement action should be upheld or set aside. Specifically, the Board identifies the following issues:

- Was the June 2008 edition of *Directive 056* applicable?
- Did the cited requirement oblige Compton to notify the Graffs of these applications such that failure to do so constituted an enforceable noncompliance?

In making this determination, the Board has considered all relevant materials constituting the record of this proceeding, including the evidence, argument, and submissions provided by Compton and ERCB staff. References in this report to specific parts of the record are intended to assist the reader in understanding the Board's reasoning relating to a particular matter and should not be taken as an indication that the Board did not consider all relevant portions of the record with respect to that matter.

6 REASONS FOR DECISION

6.1 Was the June 2008 edition of *Directive 056* applicable?

Compton argues that since it had carried out its public consultation on the project prior to June 2008, when *Directive 056* was revised, the May 2007 edition of *Directive 056* applied. The requirement in the May 2007 edition of *Directive 056* referred to "people who have special needs and reside in the area."

The Audit Section argues that since the application was filed after June 30, 2008, the June 2008 version of *Directive 056* applied, as ERCB *Bulletin 2008-25* (released June 16, 2008) stated that the June 2008 edition of *Directive 056* came into effect June 30, 2008. Compton applied for licences for the two wells on October 4, 2008.

Bulletin 2008-25 states that the June 2008 edition of *Directive 056* is effective June 30, 2008. In Section 2: Participant Involvement, the June 2008 edition of *Directive 056* states:

These requirements and expectations apply to the licensing of all new energy developments and all modifications to existing energy developments, as covered in *Directive 056*. [Section 2, paragraph 7, p. 2-1]

No exception is expressly made for the public involvement requirements.

The Board finds that the most reasonable conclusion to draw based on the above is that applications filed with the ERCB after June 2008 must meet the requirements of the June 2008 edition of *Directive 056*, including the revised public involvement requirements.

Accordingly, the Board finds that that June 2008 edition of *Directive 056* was applicable at the material time.

6.2 Did the cited requirement oblige Compton to notify the Graffs of these applications?

The Audit Section cited noncompliance with Section 2.2.1(4) of *Directive 056* as the basis for the enforcement action.

To properly interpret the requirement, the Board finds it necessary to place it in context and trace the requirement from the point of authority in the regulations. The origin of this public consultation and notification requirement is in the *Oil and Gas Conservation Regulations*, which states:

Section 2.020(1) This section applies to an application for a licence for a well other than:

- (a) repealed AR 103/73 s2,
- (b) repealed AR 144/96 s3,
- (c) a well which is one of a group of experimental wells, oil sands evaluation wells or test holes referred to in section 2.030, and
- (d) any other water supply well of a depth of more than 150 metres.

An applicant under this section shall

- (a) notify any landowners or residents as necessary of the applicant's plans to drill a well, in accordance with *Directive 56*, "Energy Development Application Guide and Schedules", published by the Board.

Section 2 of *Directive 056*, entitled "Participant Involvement," states:

***Directive 056* provides** the energy industry with **requirements and expectations** to assist industry in its participant involvement efforts. [Section 2, 2nd paragraph, page 2-1, emphasis added]

Further on, it states:

Industry is required to develop an effective participant involvement program that **includes parties whose rights may be directly and adversely affected** by the nature and extent of a proposed application. [Section 2, 4th paragraph, page 2-1, emphasis added]

Section 2.2 of *Directive 056*, entitled "Planning a Participant Involvement Program," states:

Directive 056 sets out the **consultation and notification requirements** for the various energy developments in Tables 5.1, 5.4, 6.1, 6.2, and 7.1. **These tables** provide industry with a starting point for developing a participant involvement program and, as such, **should not be viewed as the maximum**. It is **industry's responsibility to assess** the area beyond the specified distance **to determine if the radius** of investigation recommended by *Directive 056* **should be expanded**. It **may be necessary** to increase the radius to include public interest groups or others who have expressed an interest in development in the area. [emphasis added]

Section 2.2.1, entitled "Who to Include," states:

Numbered statements represent requirements and expectations (see Section 1.4).

- 2) The applicant **must ensure** that its participant involvement program **includes those parties within the radius** identified by Tables 5.1, 5.4, 6.1, 6.2, and 7.1.

- 3) The applicant **must include all parties whose rights may be directly and adversely affected**. This includes parties with a direct interest in land, such as landowners, residents, occupants, other affected industry players, local authorities, municipalities, and other parties who have a right to conduct an activity on the land, such as Crown disposition holders.
- 4) The applicant **must also include** those people that it is aware of who have special needs or concerns and reside beyond the consultation and notification radius indicated in Tables 5.1, 6.1, and 7.1. [emphasis added]

The Board finds that the regulation is clear that applicants for a well licence must meet the requirements of *Directive 056*.

It is necessary to read Section 2.2.1(4) along with Sections 2.2.1(2) and (3) to properly interpret it. Section 2.2.1(2) provides the baseline requirement to include all parties within the specified radii. Section 2.2.1(3) requires an applicant to “include all parties whose rights may be directly and adversely affected,” including parties with a direct interest in land, such as landowners, residents, occupants. Section 2.2.1(4) then requires an applicant to “also include” those people that it is aware of who have special needs or concerns and reside beyond the radius indicated in the tables. The use of the word “also” indicates that that requirement, stated as mandatory and enforceable, is over and above the obligations in Section 2.2.1(2) and (3).

Section 2.2.1(4) refers specifically to residents, not landowners. The Board agrees with Compton that the requirement relates to the Graffs as residents, not as landowners.

The enforcement action cited noncompliance with Section 2.2.1(4) of *Directive 056* for failure to include people that Compton was aware of who had special needs or concerns and resided beyond the consultation and notification radius indicated in Tables 5.1, 6.1, and 7.1 of *Directive 056*. The Audit Section stated that it believed that Compton was aware of the concerns raised by the Graffs about numerous related nonroutine applications Compton had filed and of the number of related review and variance files the ERCB was currently in the process of reviewing and that Compton should have notified the Graffs.

Nothing further was specified in the enforcement action itself or in subsequent submissions as to the nature of the Graffs’ concerns. Compton argues at some length that there is a question as to whether the Graffs fall into a special needs category, given previous ERCB decisions dismissing their objections and finding that they are not directly and adversely affected by proposed wells with lesser environmental impacts. However, the enforcement action is based upon Compton’s knowledge as to special concerns raised by the Graffs, not the Graffs’ special needs *per se*. As noted above, the applicable edition of the directive is the June 2008 edition, which refers to “people with special needs or concerns who reside beyond...the radius,” not the May 2007 edition, which refers to “people with special needs who reside in the area.”

Compton states in its appeal letter of June 23, 2009, that “While Compton was aware at the time of the Graffs and their situation, we knew that their residence was approximately 17 km from the subject wells.” The Board finds that it is not disputed that Compton was aware of Graffs, the nature of their concerns, and the location of their residence in relation to the proposed wells.

It is the view of the Board that application of Section 2.2.1(4) does not depend upon a finding of special needs, but rather a finding of knowledge by the applicant of people with special needs or concerns. It is the Board’s view that assertion of special needs by a party constitutes evidence of

special concerns. Even if Compton does not agree that the Graffs have special needs, the fact that it was aware that the Graffs had raised concerns asserting special needs was sufficient for the Audit Section to find that Compton was aware of a party with special concerns that resided outside of the specified radius.

Compton argues that given the lengthy distance of the proposed wells from the Graffs' residence and the fact that Section 2.2.1(4) refers to residence only, not landownership, it was reasonable for it to not include the Graffs in its notification. In reply to Compton's submissions, the Audit Section summarizes the basis of the enforcement action as including the fact that the Graffs' land was 180 m away from a proposed well, not that the residence was a certain distance away.

Regarding Compton's argument about the unreasonableness of the enforcement action in these circumstances, the Board recognizes the difficulty posed by the fact that there is no limit imposed on the notification requirement under Section 2.2.1(4). It is entirely open-ended.

The Board agrees with the Audit Section that the purpose of the public involvement requirements is to provide notification of applications so that interested and concerned parties can then make submissions to the Board. The requirements are intended to be broad enough to ensure that interested, concerned, and potentially affected parties are aware of an application before it is submitted. It is for the Board, not the applicant, to then determine if an objector has established that it may be directly and adversely affected by an application. That is within the specific statutory mandate of the Board. Likewise, it is not for the applicant to determine whether or not a party has special needs. If an applicant is aware of a party asserting special needs, that is sufficient evidence of special concerns to trigger the requirement in Section 2.2.1(4). Whether or not the Graffs would ultimately be found to have special needs and may be directly and adversely affected by Compton's application would have been a subsequent issue for Board determination, should the Graffs have filed an objection following notification.

However, the Board agrees with Compton that some sort of measure of reasonableness must be applied, given the open-endedness of the language in Section 2.2.1(4). The Board finds that Compton's approach to public involvement in this matter was reasonable, given the stated requirement and the specific facts of this case. The distance of the proposed wells from the Graffs' residence and the fact that they were sweet gas wells factor into this conclusion. Although no specific evidence is before the Board on this appeal as to the nature of the Graffs' concerns, a *prima facie* assessment of possible risk based on the nature of the well and distance from the residence leads the Board to conclude, even in light of assertion of special needs or concerns, that Compton should not reasonably be required to notify the Graffs of these applications.

The Board also agrees that it is not unreasonable for an applicant to refer to previous decisions of the Board in analogous situations when determining an appropriate public involvement program. Recognizing that every case has its own factual nuances, industry should be permitted to draw some general inferences from the ERCB's position in similar situations.

Given that the Board finds that Compton's actions were reasonable in the circumstances and given the language of Section 2.2.1(4), the Board finds that issuance of a High Risk Enforcement Action was not appropriate here. Enforcement should not be taken if the application of a requirement is unclear or if the result would be unreasonable.

Regarding the Audit Section's arguments about the proximity of the proposed well to the Graffs' lands, as opposed to residence, the Board finds them largely irrelevant. There is no reference to landownership in Section 2.2.1(4). The Audit Section cannot base an enforcement action upon Section 2.2.1(4) on the grounds of proximity to the Graffs' lands. The Audit Section would have had to find noncompliance with another stated requirement to base enforcement action on those grounds.

Accordingly, the Board hereby grants Compton's appeal and rescinds the enforcement action.

Dated in Calgary, Alberta, on November 3, 2009.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

M. J. Bruni, Q.C.
Presiding Member

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T. L. Watson, P.Eng.
Board Member

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J. D. Ebbels, LL.B.
Board Member