



Compton Petroleum Corporation and Darlan Resources Ltd.

Section 39 and 40 Review of Seven Well Licences, Two
Pipeline Licences, and One Facility Licence
Ensign, Parkland Northeast, and Vulcan Fields

Cost Awards

July 11, 2011

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2011-004: Compton Petroleum Corporation and Darian Resources Ltd.,
Section 39 and 40 Review of Seven Well Licences, Two Pipeline Licences, and One Facility Licence, Ensign,
Parkland Northeast, and Vulcan Fields

July 11, 2011

Published by

Energy Resources Conservation Board
Suite 1000, 250 5 – Street SW
Calgary, Alberta
T2P 0R4

Toll free 1-855-297-8311
Telephone: 403-297-8311
Fax: 403-297-7040
E-mail: Hinfoservices@ercb.ca
Web site: www.ercb.ca

CONTENTS

1	Introduction.....	1
1.1	Background.....	1
1.2	Advance Costs Application Prior to Hearing.....	2
1.3	Cost Claim.....	3
2	Views of the Board—Authority to Award Costs.....	3
3	Cost Claim of The Graffs.....	4
4	Views of Compton and Darian.....	4
4.1	Views of the Graffs.....	6
4.1.1	Views of Barbara and Larry Graff.....	6
4.1.2	Views of Darrell Graff.....	7
4.2	Views of the Alston Freeholders.....	8
4.3	Views of the Board.....	9
5	Cost Claim of the Alston Freeholders.....	11
5.1	Views of Compton and Darian.....	11
5.2	Views of the Graffs.....	11
5.3	Views of the Board.....	11
6	Order.....	12
	Appendix A - ERCB’s Advance Cost Decision Dated November 1, 2010.....	13
	Appendix B - Summary of Costs Claimed and Awarded.....	18

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

COMPTON PETROLEUM CORPORATION AND DARIAN RESOURCES LTD.

SECTION 39 AND 40 REVIEW OF SEVEN WELL
LICENCES, TWO PIPELINE LICENCES,
AND ONE FACILITY LICENCE
ENSIGN, PARKLAND NORTHEAST,
AND VULCAN FIELDS

Proceedings No. 1634570, 1634572,
1634573, 1634574, 1634576,
1634580, 1634581, 1634583,
and 1634584 (Proceeding)
Cost Application No. 1674291

1 INTRODUCTION

1.1 Background

[1] The facility licences that were considered in the proceeding that gives rise to the cost applications discussed in this order were originally issued without hearings. After the licences were issued, the Energy Resources Conservation Board (ERCB) received several requests from Barbara Graff, Larry Graff, and Darrell Graff (collectively referred to as the Graffs) for review hearings pursuant to Sections 39 and 40 of the *Energy Resources Conservation Act (ERCA)*. In their review applications, the Graffs submitted that they are special needs individuals, as they have what the ERCB describes as enhanced susceptibility to emissions from oil and gas facilities. Given their enhanced susceptibility, they state that have been and will be directly and adversely affected by Board decisions approving facilities for locations both near their residence and as much as tens of kilometres from lands they own or lease. In granting their requests for review hearings, the Board accepted that the information about the Graffs' special needs due to enhanced sensitivities to emissions was new and was not available to the Board at the time the facility applications were originally approved.

[2] In December 2009, the Board decided that the Graffs had met the test for a review in relation to a number of upstream oil and gas (UOG) facilities for which the Graffs had requested a review hearing, and it decided to consider all of the reviews in one omnibus review hearing.

[3] The Board held a public hearing in High River, Alberta, beginning November 30, 2010 and ending December 7, 2010. At the close of the hearing, Compton Petroleum Corporation and Darian Resources Ltd. (Compton and Darian, respectively) were required to complete a number of undertakings. The undertakings were completed on December 14, 2010, and the review hearing was closed on that date.

[4] Before and immediately upon the commencement of the hearing, the Board received several motions from the Graffs for adjournments, accommodation, and other rulings relating to the hearing. On the second day of the hearing, the Board granted a request from the Graffs to withdraw their participation and evidence from the hearing. Notwithstanding the withdrawal of those individuals, the Board then conducted the review hearing on its own behalf, as provided in Section 39 of the *ERCA*, with the participation of Compton, Darian, Questerre Energy Corporation, and one intervener, the Alston Freeholders.

[5] In accordance with the Board's normal practice in review hearings, Compton and Darian were considered to be the applicants in the review hearing, and all other participants were considered to be interveners. Before the hearing began, Crescent Point Energy Ltd. (Crescent Point) acquired Darian.

During the hearing, witnesses from Crescent Point and Darian explained that Darian exists as a wholly-owned subsidiary of Crescent Point and remains the operator of the Darian facilities that were the subject of the Board's review.

[6] On March 1, 2011, the Board issued its decisions on the review matters in *2011 ABERCB 008: Compton Petroleum Corporation and Darian Resources Ltd., Section 39 and 40 Review of Seven Well Licences, Two Pipeline Licences, and One Facility Licence Ensign, Parkland Northeast, and Vulcan Fields (Decision 2011 ERCB 008)*.

1.2 Advance Costs Application Prior to Hearing

[7] On September 17, 2010, the Graffs applied in the Proceeding for an advance payment of local intervener costs in the amount of \$56 113.00, which was approximately one half of the Graffs' estimated costs for participating in the Proceeding.

[8] On November 1, 2010, following written submissions from the parties, the Board issued its decision on the advance of costs application (Appendix A). The decision states that in order to qualify for advance funding under Subsection 28(6) of the *ERCA*, an interested party must first establish that it meets the test for a local intervener under Subsection 28(1). The Board noted that the concerns raised by the Graffs in the Proceeding were health related. Specifically, the Graffs indicated that Barbara and Darrell Graff have enhanced susceptibility to emissions from oil and gas facilities.

[9] The Board found that there was no evidence before it that lands the Graffs have an interest in, occupy, or are entitled to occupy, are lands that may be directly and adversely affected by the Board's decision in the Proceeding. As such, the Board found that the Graffs were not local interveners under Subsection 28(1) of the *ERCA* and were not entitled to an award of advance costs associated with their participation in the Proceeding.

[10] The Board was, however, mindful that the Proceeding involved issues of interest to the public in the Vulcan area, industry, and the Board, respecting the potential impacts from exploration, processing, and development of energy resources in the area. Given the extraordinary and unique circumstances of the reviews and the significance of the Proceeding to the ERCB, Vulcan residents, and the industry, the Board decided to use its discretion to offer *ex gratia* payments to the Graffs from its own hearing budget. Based in part on its review of the Graffs' estimated hearing costs, the Board stated that it was prepared to provide the Graffs with an immediate *ex gratia* payment of \$20 000.00 in advance costs to be used to assist them with their preparation for and participation in the Proceeding. The Board's offer of payment was subject to the Graffs agreeing to provide a full accounting of how the *ex gratia* payments were applied by way of filing a cost application (after the hearing) that substantially complied with the Board's *Directive 031: Guidelines for Energy Proceeding Cost Claims*, which is the same filing obligation that a party receiving an advance of local intervener costs has under the Board's requirements.

[11] In addition, the Board stated it was prepared to consider making further *ex gratia* payments to the Graffs after the conclusion of the hearing, to a maximum of \$40 000.00, for costs associated with the Graffs' participation in the hearing. The total of all *ex gratia* payments from the Board was not to exceed \$60 000.00.

[12] Provided the Graffs evidenced their written acceptance of the requirements relating to the *ex gratia* payment, the Board was prepared to immediately issue a cheque payable to the Graffs in the

amount of \$20 000.00. The Board did not receive a written acceptance from the Graffs of the offer relating to the *ex gratia* payments.

[13] On November 3, 2010, the Board received an application from the Graffs seeking a review of the Board's decision that the Graffs were not local interveners and not entitled to an award of advance costs. On November 29, 2010, the Board (which did not include the Board members who made the initial decision) dismissed the review application because it found that the Graffs had not alleged new facts, a change of circumstances, or facts not previously placed in evidence that raised a reasonable possibility the Board might materially vary its decision on the Graffs' application for an advance payment of local intervener costs.

1.3 Cost Claim

[14] On December 22, 2010, the Alston Freeholders filed a cost claim in the amount of \$5059.20. On January 1, 2011, the Graffs submitted a cost claim in the amount of \$77 279.57. On January 28, 2011, Compton and Darian submitted comments to the cost claims of the Alston Freeholders and the Graffs. On February 11, 2011, Darrell Graff, Larry Graff, and Barbara Graff submitted their responses to those comments.

[15] The Board considers the cost process to have closed on February 11, 2011.

2 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

[16] In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28 of the *ERCA*, which reads as follows:

28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

[17] It is the Board's position that a person claiming local intervener costs must establish the requisite interest in land, or occupation of land or right to occupy, and provide reasonable grounds for believing that such land may be directly and adversely affected by the Board's decision on the application in question.

[18] When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in *ERCB Directive 031: Guidelines for Energy Proceeding Cost Claims*.

[19] Subsection 57(1) of the *Rules of Practice* states,

57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that

- (a) the costs are reasonable and directly and necessarily related to the proceeding, and

- (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 COST CLAIM OF THE GRAFFS

[20] On January 4, 2011 (dated December 31, 2010), the Graffs filed a cost claim for \$63 130.00 for legal and professional fees, \$7000.00 for preparation and attendance honoraria, expenses in the amount of \$6809.71, and GST in the amount of \$340.49, for a total claim of \$77 280.20.

4 VIEWS OF COMPTON AND DARIAN

[21] Compton and Darian submitted that the Graffs' costs claim should be denied in its entirety and that no portion be attributed to either Compton or Darian in light of the Board's advance determination that the Graffs are not local interveners pursuant to Subsection 28(1) of the *ERCA*.

[22] Compton and Darian noted that on November 1, 2010, the Board issued its reasons and decision to deny the Graffs' September 17, 2010 request for advance payment of local intervener costs. This was done after the Board considered the request, Compton's and Darian's response dated September 26, 2010, and the Graffs' further reply dated September 27, 2010. At Pages 2 and 3 of the Advance Funding Decision, the Board stated

[T]he Board finds that the Graffs are not local interveners pursuant to Subsection 28(1) of the *ERCA* and are not entitled to an award of advance costs associated with their participation in the Proceedings, and

The Board lacks authority to require applicants to pay intervener costs of hearing participants who are not local interveners under Section 28.

[23] Compton and Darian maintained that there is no basis, whether in the record of the proceedings or otherwise, for reconsideration or variation of that decision.

[24] Compton and Darian noted that in ECO 2010-007 with respect to the review of well licences held by Grizzly Resources Ltd., the Board stated the following:

Further, no evidence was presented at the review hearing or in this cost proceeding to demonstrate a potential for the Grizzly wells to directly and adversely affect lands that the Kelly Intervenors have an interest in, occupy, or are entitled to occupy. It therefore follows that the second half of the local intervener test is not satisfied, and the Board finds that the Kelly Intervenors are not local intervenors as defined by Section 28(1) of the *ERCA*.

[25] Compton and Darian stated that during the hearing, the Graffs withdrew their applications for review hearings and all of the evidence that had been pre-filed in support of their applications. They stated that there was no evidence presented by the Graffs for the Board to consider if there was a potential for the wells, pipelines, and facilities that were the subject of the review proceedings to directly and adversely affect the Graffs' lands. They noted that in the hearing, the Board ruled as follows regarding the Graffs' motion to withdraw from the Proceeding, at Transcript Volume 2, p. 263, I. 20 to p. 264, I. 9:

Given Mrs. Graff's representation regarding the possible impacts to her health, the Board has no option but to allow the withdrawal.

However, we will continue with our review and make decisions whether to rescind, change, alter, or vary the subject licences. To facilitate the request of the Graffs, we will need to create a revised list of exhibits to set out the record of this proceeding. To accomplish this, we will need to void the current exhibit number assignments, and we will therefore develop a revised list. The revised list will not include any material filed by the Graffs.

In summary, the hearing will proceed without the participation of the Graffs and without reference to or consideration of any of the material filed by them.

[26] Compton and Darian submitted that, setting aside the Board's ruling that the Graffs were not local interveners for the purposes of Section 28 of the *ERCA* in the context of the Proceeding, it remained that the Graffs unilaterally withdrew their applications and, in so doing, withdrew any standing to claim costs.

[27] Compton and Darian noted that the lion's share of the costs claimed by the Graffs relate to fees and disbursements ostensibly incurred for their erstwhile representatives, namely Scott Stenbeck, then of Stringam Denecky Law Office, and Michael Sawyer, of Hayduke & Associates Ltd. Both of these representatives ultimately withdrew their services prior to the hearing, notwithstanding that the Proceeding had been rescheduled to accommodate, among other things, changes in the Graffs' representatives. The matter of whether the Graffs are obligated to pay such fees and disbursements (in respect of which Compton and Darian were not provided detailed statements of account) is a matter between them and their erstwhile representatives. However, there was no basis upon which the obligation for such costs should, in the circumstances, be passed on to either Compton or Darian, or even the Board to the extent the Board was previously prepared to conditionally make *ex gratia* payments to the Graffs in light of their lack of local intervener status.

[28] With respect to the claimed costs for the services of Dr. Kaye Kilburn and Dr. John Molot, ostensibly for the preparation of medical reports that were initially filed in support of the Graffs' applications, Compton and Darian pointed out that the applications and the subject reports were formally withdrawn by the Graffs. Compton and Darian submitted that the reports provided no assistance whatsoever to the Board's determination of the issues, and the attendant costs for them should be denied.

[29] Compton and Darian submitted that the same reasoning applied to the preparation and attendance honoraria and the disbursements personally claimed by the Graffs. These costs should also be denied.

[30] Compton and Darian submitted that it would be a travesty to effectively reward in any way the conduct of the Graffs and their representatives by awarding any amount of costs. Compton and Darian also submitted that the Graffs' conduct resulted in unnecessary expenditure of immense effort and resources on the parts of Compton and Darian, as well as the Board, to say nothing of the costs and losses to Compton, Darian, working interest partners, surface landowners, and the Crown in Right of Alberta that resulted from the delayed exercise of duly acquired petroleum and natural gas rights in the area.

[31] In conclusion, Compton and Darian stated that the Graffs do not qualify as local interveners, and the Board therefore lacks authority to require Compton or Darian to pay any of their claimed costs. Having formally and unilaterally withdrawn their applications and all of the records in support of them, the Graffs withdrew their entitlement to even claim costs. Lastly, in light of the conduct of the Graffs and their representatives in the Proceeding, Compton and Darian submitted that the Board should not make any *ex gratia* payment to the Graffs to defray any of their insufficiently documented costs claims.

4.1 Views of the Graffs

4.1.1 Views of Barbara and Larry Graff

[32] The Graffs stated that it was apparent at the hearing the Board had made an error deciding their local intervener status because Board counsel had neglected to present the Graffs' evidence to the Board. Specifically, the Graffs submitted that the Board was unaware of the interest Darrell Graff had in the whole of Section 17-16-025 W4M, not just the home quarter, which is located on NW 17-16-025 W4M. In support of the assertion that Darrell Graff rents land in Section 17, the Graffs included in their cost application a cheque to the Wild Rose Hutterian Brethren dated January 19, 2009, for what appears to be the rental of SW $\frac{1}{4}$ and E $\frac{1}{2}$ 17-16-025 W4M. Another cheque dated September 9, 2008, payable to an individual, was included as evidence of the rent paid for the NW $\frac{1}{4}$ 8-18-025 W4.

[33] Likewise, the Graffs submitted that the Board never considered that the Graffs own and operate E $\frac{1}{2}$ 24-16-024W4, which they stated is within 400 m of Compton's well on NW 24-16-24W4.

[34] The Graffs argued that the ERCB's letter of December 16, 2009, which granted the Graffs' review applications, gave the Graffs the legitimate expectation that they would be local interveners. That letter also explained that the sole reason for the hearing was with regard to Darrell and Barbara Graffs' medical condition being impacted by energy development. They stated there was no question that the Graffs should have been given local intervener status with full funding.

[35] The Graffs stated that their participation in the hearing was severely affected by the Board's choice of a venue that was heated with natural gas. They stated that "it was only due to the Board's denial of appropriate and meaningful accommodation that we withdrew from the hearing."

[36] The Graffs also stated that it became apparent to them at the hearing that the entire hearing process was only a game with the Board and its panel, including counsel, and industry, having sport with the Graffs and their lives. It was apparent through no fault of their own that it had been predetermined by the Board and the hearing panel, with or without the companies' encouragement, to play a game of attempting to interrupt and frustrate the Graffs, not allowing them to finish statements, and misconstruing what the Graffs did say, attempting to discourage the Graffs from participating, and causing delay in the process.

[37] The Graffs noted that in the hearing the Chairman stated that what Barbara Graff was saying was "valid and should be on the record," and that Barbara had been extremely articulate in presenting the Graffs' position. Contrary to the companies' assertion, the Graffs submitted that they did contribute to the hearing in a positive and helpful way.

[38] The Graffs also stated that due to the complexity of the Proceeding, the Graffs hired professionals to assist them and that their representatives had apparently been promised by the companies that they would pay for their professional services. The Graffs stated that in both instances that commitment was not kept. As a result entirely because of the frustration of dealing with the ERCB and the companies' lack of commitment, the Graffs' advisors discontinued their services. The Graffs submitted that there was no reason for them to have obtained these services other than for help with the hearing, and, therefore, it was only appropriate that these costs be covered by the cost claims.

[39] The Graffs further submitted that the only reason they travelled to California to see Dr. Kilburn, a neurological expert, was to be assessed for the hearing. The Graffs also travelled to Toronto to be assessed by Dr. John Molot, a Canadian physician whom the Graffs submitted is well recognized for his work in the field of chemical sensitivities. The Graffs explained that he wrote reports for use at the hearing: both an initial report and a second report of retort to industry's opinion. He is cognizant of the effect on an individual's human rights resulting from lack of accommodation for their sensitivities. Therefore, Dr. Molot and Dr. Kilburn had their own areas of individual expertise and there would be very little overlap in their testimony.

[40] The Graffs stated that both Dr. Molot and Dr. Kilburn had not scheduled appointments nor made commitments for a two-week period, waiting to be informed of the exact dates their attendance would be required at the hearing. They were still available and waiting when the hearing started. The Graffs asserted that it is completely unfair that the doctors' work not be recognized and paid for. The Graffs stated that they have submitted actual accounts they have paid to the medical experts.

[41] The Graffs also stated that the cost claim for their attendance at the hearing and particularly for any work in preparation for the hearing was very conservative. They submitted that Barbara Graff has more than 10 years' experience in research and lecturing, particularly in the area of human rights, and her colleagues charge a much higher fee for similar work. Had the Graffs retained one of Ms. Graff's colleagues to do the same work, it would have resulted in a much higher cost claim. All of the Graffs' work was done with the intention of completing the hearing. They reiterate that it was through no fault of their own that they were unable to continue in the hearing.

[42] The Graffs submitted that it was clear there had been a predetermination by the Board and its counsel to force their withdrawal from the hearing, and the reason the venue was chosen was to bully the Graffs out of the hearing. In doing so, the Board denied the Graffs' procedural fairness.

[43] Finally, the Graffs stated that any award of costs would in no way compensate them for all that industry players have imposed on them. They submitted that they are a farm family who have had the energy industry encroach onto their area and, in the process of attempting to protect their health and life, they were put into the position of preparing for a hearing from which they were ultimately evicted.

4.1.2 Views of Darrell Graff

[44] Darrel Graff stated that the purpose of the hearing was to deal with the individual applications, being the review applications the Graffs filed. He also stated that because the ERCB's letter of December 16, 2009 said that the Proceeding was called as a result of the Graffs' review applications, it was clear that he has an interest in land that may be directly and adversely affected by a decision of the ERCB.

[45] Mr. Graff further stated that Compton and Darian's submission that "the Board's decision regarding the Graffs' lack of local intervenor status stands. Moreover, there is no basis, whether in the record of the proceedings or otherwise, for reconsideration or variation of that decision," is false. He argued that the hearing Chairman stated that the question of intervenor status is normally dealt with at the end of a proceeding when people file a cost submission and that the Graffs were still entitled to do that. This statement was never changed or qualified by the Board. Mr. Graff further submitted that Compton and Darian's counsel is propagating false assumptions.

[46] Mr. Graff explained that the reason the Graffs withdrew from the hearing was their exposure to the gas leak at the hearing caused them irreversible health effects, and this was enabled by the ERCB not accommodating the Graffs' disability. He stated that in reviewing the transcripts, it was never said that the Graffs would not be able to claim costs for their participation in the hearing. Mr. Graff submitted that the Graffs came to the hearing prepared to complete the hearing, have their experts testify, and cross examine the opposing side. Because of the release of gas at the venue chosen by the ERCB, the Graffs were forced to quit. He noted that on lines 17-23 of Page 263 of the transcripts the Chairman said, "But we were told this afternoon by Mrs. Graff that she was advised by her doctor last night that if she continued in this process, she would suffer irreversible damage to her health. As a result, the Graffs wish to withdraw from these proceedings. Given Mrs. Graff's representation regarding possible impacts to her health, the Board has no option but to allow the withdrawal."

[47] Mr. Graff argues that by not accommodating his disability, the ERCB has discriminated against him by not allowing him to be heard, and by not allowing the Graffs to recover the costs they incurred in participating and preparing for this hearing on the basis that they withdrew.

[48] With respect to Compton and Darian's submission that the Graffs should not be paid for expenses of their legal counsel, representative, experts, and disbursements, including any preparation or attendance honoraria, Mr. Graff submits that there is no basis for their counsel to make this claim other than spite, as these costs were incurred to prepare for and attend the hearing. He also stated that the companies' counsel's allegation that the Graffs' conduct caused Compton and Darian unnecessary expenditures of immense effort and resources is unfounded.

[49] Mr. Graff argued that it should be obvious even to a city person that if you affect a farmer's ability to work, you affect his ability to care for the land. The wells, pipelines, and facilities being considered in the Proceeding affected his ability to care for his land, including his ability to maintain fences to allow timely rotation of livestock, which affects the quality and production from the land. He submitted that it is clear that he qualifies for standing under Section 28 of the *ERCA*, and is entitled to recover the full amount of the cost claim.

4.2 Views of the Alston Freeholders

[50] The Alston Freeholders stated that they object to the Graffs being given any reimbursement for any part of their cost application. They submit that the Graffs' cost claim should be denied in its entirety and that the Graffs should not receive any *ex gratia* payment from the Board.

[51] The Alston Freeholders submitted that the Board determined the Graffs were not local intervenors when it decided their application for an advance of costs, and therefore the Graffs' only option for cost compensation was to show in the hearing how they were directly and adversely affected pursuant to Subsection 28(1) of the *ERCA*. The Alston Freeholders also submitted that the Graffs were given reasonable alternatives to participate in the hearing; specifically, Larry Graff, who

was in attendance throughout the hearing in the audience, could have presented the Graffs' case for being directly and adversely affected. However, Mr. Larry Graff chose not to participate.

[52] The Alston Freeholders stated that it appeared the Graffs considered that the ERCB could not hold the review hearing without the Graffs' participation if they withdrew all their evidence from the hearing.

[53] The Alston Freeholders submitted that the Chairman and Board members explained very clearly to the Graffs the consequences if they withdrew from the hearing and took all their documents with them. Nevertheless, the Graffs unilaterally withdrew their applications and, in so doing, withdrew any right to be reimbursed for their cost claim.

[54] The Alston Freeholders argued that the Graffs, along with their unsubstantiated health claims, have caused people a lot of monetary expense, as well as time and stress, trying to find solutions for the Graffs.

4.3 Views of the Board

[55] Section 2 of this order outlines the Board's authority to award costs under Section 28 of the *ERCA*. In its November 1, 2010 decision on the Graffs' request for an advance of costs, the Board stated that the Graffs did not meet the local intervener test under Subsection 28(1) of the *ERCA*. Their application for an advance of costs identified that the potential for direct and adverse effect was to the Graffs' personal health and well being, not the land they had an interest in or occupied. Based on the Graffs' submissions, the Board stated as follows in its letter dated November 1, 2011

The Board notes that the concerns raised by the Graffs in the Proceeding are health related. Specifically, the Graffs state that Barbara and Darrell Graff have enhanced susceptibility to emissions from oil and gas facilities. The Board decided to conduct the Proceeding and review the approvals that form the subject of the Proceeding because it determined there was new information with respect to the Graffs' health and medical conditions that was not previously considered by the Board.

The evidence before the Board clearly indicates that the Graffs have an interest in and occupy certain lands. However, there is no evidence before the Board that as a result of the Board's decision in the Proceeding, there is or may be a direct and adverse effect on the lands that the Graffs have an interest in, occupy, or are entitled to occupy. As such, the Board finds that the Graffs are not local interveners pursuant to Subsection 28(1) of the *ERCA* and are not entitled to an award of advance costs associated with their participation in the Proceedings.

[56] Notwithstanding that decision on the advance costs application, the Graffs had an opportunity during the subsequent portion of the Proceeding to bring themselves within the definition of local intervener by providing information indicating that land they have an interest in, occupy, or are entitled to occupy, land that may be directly and adversely affected by the Board's decision in the Proceeding. They also filed written submissions in this cost proceeding that addressed the question of their status as a local intervener.

[57] The Graffs' participation in the oral portion of the hearing was, however, limited to the preliminary matters that were raised by them and considered over the first two days of the hearing. Ultimately, the Graffs withdrew from the oral hearing without providing any testimony, and

concurrently withdrew the written evidence they had previously filed in the Proceeding. As a result, the Board did not receive any new information in the hearing on the question of the Graffs' status as local interveners.

[58] To summarize the Graffs' submissions in this cost-claim process, they stated that the facilities that were the subject of the review hearing may (in fact do) directly and adversely affect their health and well being. They also stated that if they are unable to care for the lands under their control due to impacts on their health and well being, their lands will suffer as a result and are therefore directly and adversely affected.

[59] As stated in Section 2 of this order, a person claiming local intervener status and hearing-related costs must establish the requisite interest in or right to occupy land, and provide reasonable grounds for believing that such land may be directly and adversely affected by the Board's decision on the application in question. If a person does not meet the definition of "local intervener" under Section 28, he or she is not entitled to an award for recovery of costs associated with his or her participation in a hearing.

[60] Based on all the information the Board received in the Proceeding and in this cost-claim proceeding, the Board finds again that there is no potential for lands the Graffs have an interest in, occupy, or have a right to occupy, to be directly and adversely affected by the Board's decision in the Proceeding. None of the facilities whose licences were reviewed are located on the Graffs' lands, nor are the Graffs' lands affected by any setback, access road, right of way, or similar impact on lands arising from such facilities.

[61] Having regard for the all foregoing, the Board finds that the Graffs are not local interveners pursuant to Subsection 28(1) of the *ERCA*, and their cost claim is accordingly denied.

[62] Although not required in order to decide the Graffs' cost claim, the Board wishes to comment on the claim itself so as to provide direction to the parties that may be useful in the event they participate in other Board proceedings. Subsection 57(1) of the *Rules of Practice* states that cost may be awarded to a participant if the Board is of the opinion that the costs were reasonably, directly, and necessarily related to the proceeding, and the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board. Subsection 57(2) lists nine types of conduct the Board may consider when deciding the amount of costs to be awarded to a hearing participant.

[63] The Board is of the opinion that the Graffs' participation, which was solely in relation to procedural matters, failed to contribute to a better understanding of the issues before the Board in the Proceeding. This is the inevitable conclusion resulting from the Graffs withdrawing from the Proceeding and withdrawing all of their written evidence. In so stating, it is not the Board's intention to be critical of the Graffs' decision to withdraw; rather, the Board trusts that the Graffs will understand that their decision to withdraw from a Board hearing severely limits the Board's ability to make an award of costs in their favour.

[64] In addition, the Graffs' participation in the Proceeding did not exhibit any of the conduct listed in Subsection 57(2) that justifies a higher award of costs to a participant. On the other hand, the Graffs' participation over the first two days of the oral hearing was punctuated by repetitive motions for adjournment and a change of venue. In the Board's opinion, this was conduct that unnecessarily lengthened the duration of the Proceeding, as contemplated by Subsection 57(2)(h) of the *Rules of*

Practice, and would have merited a substantial reduction in the amount of any costs awarded to the Graffs.

5 COST CLAIM OF THE ALSTON FREEHOLDERS

[65] On December 22, 2010, the Alston Freeholders filed a cost claim for preparation and attendance honoraria and forming a group in the amount of \$3900.00, expenses in the amount of \$1104.00, and GST in the amount of \$55.20, for a total claim of \$5059.20.

5.1 Views of Compton and Darian

[66] Compton and Darian submitted that the Alston Freeholders' cost claim should be awarded in its entirety regardless of the Board's determination as to whether the Alston Freeholders (in particular Gordon Mueller) are local interveners pursuant to Subsection 28(1) of the *ERCA*. If the Alston Freeholders are determined not to be local interveners, Compton and Darian urged the Board to make an *ex gratia* payment in recognition of their valuable contribution to the Proceeding.

5.2 Views of the Graffs

[67] The Graffs submitted that it would be discriminatory for the Board to award costs to the Alston Freeholders and decline to award costs to the Graffs. The Graffs stated that it appeared to them that the Alston Freeholders were recruited by Compton and Darian to be vexatious to the Graffs and to divide the community.

[68] The Graffs argued that the Alston Freeholders had provided no substantive evidence of any direct effect to them of the applications for the Proceeding. Furthermore, pursuant to Section 28(1) of the *ERCA*, neither Gordon Mueller nor any other freeholder qualifies as a local intervener for cost claim awards as the definition of a local intervener "does not include a person or group or association of persons whose business includes the trading or transportation or recovery of any energy resource."

5.3 Views of the Board

[69] Mr. Mueller, the representative of the Alston Freeholders, owns the mineral rights and surface lands in the SE ¼ of 21-15-25 W4M. He also owns the minerals in the SW ¼ of 13-15-25 W4M and rents the SE ¼ of 29-15-25 W4M where he pastures his cattle. Mr. Mueller stated in his oral evidence that he and other members of his group own freehold minerals that have been unleased or undeveloped, because of delays resulting from the Graffs challenging the operators' initial applications and requesting review hearings. In particular, he stated that the property at SW 27-15-25 W5M owned by the Middleton estate had been approved for a well in 2008. The lease site was prepared and the drilling rig was ready to move on site when the project was shut down by an objection being filed. The soil had to be restored and that was a "fairly major thing" for the landowner.

[70] The Board notes Compton and Darian's submission that the Alston Freeholders' cost claim should be awarded in its entirety. Based upon that and the evidence of the Alston Freeholders, it is the Board's decision that the Alston Freeholders be granted a cost award.

[71] The Board also finds that the evidence of the Alston Freeholders was helpful to the Board in its consideration of and decision on the reviewed licences. The Board notes that Compton and Darian do not take issue with the amount of the costs claimed by the Alston Freeholders.

[72] The Board has reviewed the cost claim and finds the costs and disbursements claimed by the Alston Freeholders to be reasonable and directly and necessarily related to the hearing. Furthermore, the Board finds that the Alston Freeholders acted responsibly in the Proceeding and contributed to a better understanding of the issues before the Board. The Board approves the Alston Freeholders' cost claim in full.

6 ORDER

It is hereby ordered that Compton Petroleum Corporation and Darian Resources Ltd. shall pay intervener costs totaling \$5059.20 to the Alston Freeholders, and payment shall be made to Mr. Gordon Mueller, on behalf of the Alston Freeholders.

Dated in Calgary, Alberta, on July 11, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

B. T. McManus, Q.C.

Presiding Member

<original signed by>

T. L. Watson, P.Eng.

Board Member

APPENDIX A ERCB'S ADVANCE COST DECISION DATED NOVEMBER 1, 2010

November 1, 2010

Hayduke & Associates Ltd.
1109 Maggie Street S.E.
Calgary, AB T2G 4L8

Attention: Michael Sawyer

Dear Sir:

RE: REVIEW HEARING OF VARIOUS COMPTON PETROLEUM CORPORATION (COMPTON) AND DARIAN RESOURCES LTD. (DARIAN) LICENCES PROCEEDING NOS. 1634572, 1634573, 1634574, 1634576, 1634580, 1634581, 1634583 and 1634584 (PROCEEDING)

The Energy Resources Conservation Board (Board) has considered the request by Hayduke & Associates Ltd. (Hayduke) dated September 17, 2010 made on behalf of Larry, Barbara and Darrell Graff (the Graffs) for advance payment of local intervener costs in the amount of \$56,113.00. We understand this amount is approximately one half of the Graffs' estimated costs for participating in the Proceeding.

The Board has also considered the response of Compton and Darian dated September 26, 2010 and your final reply dated September 27, 2010. The Board has asked me to communicate its reasons and decision regarding the request which follows below.

Views of the Board

Section 28 of the Energy Resources Conservation Act (ERCA)

Under section 28(1) of the ERCA, only "local interveners" are entitled to a cost award. *Directive 031: Guidelines for Energy Proceeding Cost Claims* is the Board's directive relating to cost claims. *Directive 031* makes clear that only those persons determined to be "local interveners" by the ERCB will be eligible to recover the costs associated with participating in an ERCB proceeding. In order to qualify for advance funding under section 28(6), an interested party must first establish local intervener status. Section 28 provides as follows:

28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,

- (a) has an interest in, or
- (b) is in actual occupation of or is entitled to occupy

land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

(2) On the claim of a local intervener or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.....

(6) If in the Board's opinion it is reasonable to do so, the Board may make an advance of costs to a local intervener and it may direct any terms and conditions for the payment or repayment of the advance by any party to the proceeding that the Board considers appropriate

The Board notes Hayduke's submission that the Board's decision to conduct the reviews "is an indication that the Graffs may be directly and adversely affected by the Applications..." While the Board stated in its letter of December 16, 2009 that a review hearing should be held as information provided in a number of the review applications concerning the health and medical conditions of the review applicants constitutes new information that was not available to or considered by the Board at the time it made its original decisions...", the Board did not and has not found the Graffs may be directly and adversely affected by the activities. Nor has the Board found the Graffs are local interveners within the meaning of section 28 of the ERCA. The granting of a review hearing under sections 39 or 40 of the ERCA, or for that matter a hearing under section 26 of the ERCA, does not automatically equate to a finding of direct and adverse effect, nor does it qualify an interested party as a local intervener under section 28. The tests under each section are different and they determine different entitlements.

A person claiming local intervener status and hearing related costs must establish the requisite interest in or right to occupy land, and provide reasonable grounds for believing that such land may be directly and adversely affected by the Board's decision on the application in question. If a person does not meet the definition of "local intervener" under section 28, he or she is not entitled to an award for recovery of costs associated with their participation in a hearing.

The Board notes that the concerns raised by the Graffs in the Proceeding are health related. Specifically, the Graffs state that Barbara and Darrell Graff have enhanced susceptibility to emissions from oil and gas facilities. The Board decided to conduct the Proceeding and review the approvals that form the subject of the Proceeding because it determined there was new information with respect to the Graffs' health and medical conditions that was not previously considered by the Board.

The evidence before the Board clearly indicates that the Graffs have an interest in and occupy certain lands. However, there is no evidence before the Board that as a result of the Board's decision in the Proceeding, there is or may be a direct and adverse effect on the lands that the Graffs have an interest in, occupy, or are entitled to occupy. As such, the Board finds that the Graffs are not local interveners pursuant to subsection 28(1) of the ERCA and are not entitled to an award of advance costs associated with their participation in the Proceedings.

The Board is mindful that the Proceeding involves significant policy issues of interest to the public, industry and the Board respecting the potential impact of exploration, processing and development of energy resources in the vicinity of the Graffs' residence and lands. The medical evidence that will be considered by the Board in the Proceeding has not been considered, tested and formally responded to. Given the various issues and concerns involved in the Proceeding and their significance to operators and residents in the Vulcan area, including the new and untested medical information relied upon by the Graffs, it is likely the Board would have initiated its own review into the subject licences under section 39 of the ERCA. This is especially so in light of Compton's and Darian's submissions that the Board has, in effect, imposed a moratorium on development in an area surrounding the Graffs' lands as a result of its decision to conduct the Proceeding. Furthermore, by the time the hearing commences, the majority of the licences under review will have been in the ERCB's review process for more than three years.

The Board lacks authority to require applicants to pay intervener costs of hearing participants who are not local interveners under section 28. However, in exceptional circumstances like those present here, the Board has discretion to make *ex gratia* payments to hearing participants from its own hearing budget. Given the extraordinary and unique circumstances of this case and the significance of the Proceeding to the ERCB, Vulcan area residents, and the industry, the Board is prepared to provide the Graffs with an *ex gratia* payment of advance costs to be used to assist the Graffs in the preparation of their participation in the Proceeding.

Determination of Advance Cost Amounts

The Board has reviewed the estimated budget provided by the Graffs in order to determine an appropriate amount for the *ex gratia* payment and has decided to pay the sum of \$20,000.00 in advance costs. The Board's reasons follow.

Hayduke has estimated representation fees of \$50,908.50. Hayduke claims an hourly wage of \$250.00 for Mr. Sawyer and submits that the hourly professional rate charged is consistent with the *Scale of Costs* established by the Board. The Board noted that Mr. Sawyer has a masters degree in environmental science and during his career has provided environmental consulting services relating to the oil and gas industry. Mr. Sawyer has also participated in previous ERCB hearings as a representative of interveners and hearing participants.

Hayduke has claimed an hourly rate prescribed in the *Scale of Costs* for lawyers, analysts, consultants, and experts. Mr. Sawyer is not planning to file his own expert report or provide expert evidence on behalf of the Graffs in his field of expertise as an environmental consultant. Therefore, it is not reasonable for Hayduke to claim costs in the range of a consultant, analyst or expert for his services. Mr. Sawyer does not have a law degree nor is he a member of The Law Society of Alberta. Therefore, the Board is not prepared to award the hourly prescribed for lawyers in the *Scale of Costs*. Instead, Mr. Sawyer's hourly rate should be assessed as a representative who is assisting the Graffs with their participation in the Proceeding. The Board notes Hayduke's advice that Barbara and Darrell Graff plan to directly participate in the hearing and assist Mr. Sawyer in the cross examination of Compton and Darian witnesses. Based on the foregoing, it is the Board's opinion that for the purposes of this Proceeding, the Board believes

Mr. Sawyer's hourly rate for his work as the Graff's representative should not exceed \$100.00 per hour.

As outlined in Hayduke's letter of September 17, 2010, the Graffs have retained four witnesses to provide testimony on their behalf:

1. Dr. John Molot is a medical doctor who specializes in diagnosing and treating patients who have environmental sensitivities. Dr. Molot's work includes an examination of Barbara and Darrell Graff and the preparation of an expert report summarizing his findings and diagnosis. His professional fees and disbursements are estimated as \$15,819.00.
2. Dr. Kay Kilburn is a medical doctor who specializes in diagnosing and treating neurobehavioral dysfunction in patients who have been exposed to hydrogen sulphide and other petrochemicals. Dr. Kilburn's work includes the examination of Barbara and Darrell Graff and the preparation of an expert report summarizing his findings and diagnosis. His professional fees and disbursements are estimated to be \$14,093.00.
3. Dr. Stephen King is a toxicologist and epidemiologist who specializes in diagnosing and treating patients who have been exposed to hydrogen sulphide and other petrochemicals. Dr. King's work will include a review of the review materials and the third party data on air quality in the subject facilities and the Graff residence and preparation of an expert report on the toxicological and epidemiological implications of the Graffs' exposure to emissions associated with the subject facilities. His professional fees and disbursements are estimated to be \$14,000.00.
4. Dr. Don Gamiles is a meteorologist and air quality specialist who specializes in designing and conducting air quality sampling and monitoring programs. Dr. Gamiles' work will include a review of the proceeding records and conducting air quality sampling at the subject facilities and at the Graff residence. His professional fees and disbursements are estimated to be \$22,000.00.

Although Hayduke submits that Dr. King's and Dr. Gamilies' work includes the preparation of expert reports, the Graffs' submissions state that both Dr. King and Dr. Gamiles will not be submitting "expert reports at this time, but will attend the hearing to assist in cross examination and may provide rebuttal evidence as required".

With respect to the estimated professional fees of the proposed witnesses, the Board noted that Hayduke did not provide any information regarding the hourly rate charged by each witness nor the time each witness estimates working on the Graffs' behalf in relation to the Proceeding. Furthermore, the Board notes the potential for overlap with respect to the work of Dr. Molot and Dr. Kilburn, given that both are medical doctors who diagnose and treat patients with environmental sensitivities and cautions both Hayduke and the Graffs to avoid any duplication of evidence.

Decision

For the reasons above, the Board is prepared to grant an *ex gratia* payment totaling \$20,000.00 to Larry, Barbara and Darrell Graff to assist them in the preparation of their evidence and submissions in connection with the Proceeding. Please note that the Board's payment is subject to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and the Board's *Scale of Costs* in the same way as if the Graffs had been awarded an advance of costs under Section 28 of the ERCA.

Section 57(1) of the *Rules of Practice* states the following:

- 1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that
 - a) the costs are reasonable and directly and necessarily related to the proceeding, and
 - b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

The Board will have reference to the above section, as well as Directive 31, in satisfying itself that all fees and disbursements claimed by the Graffs relate to the Proceedings and conform to the *Scale of Costs* adopted by the Board. Please be advised that the Graffs assume the risk that if the Board is not satisfied that the fees and disbursements claimed by them meet the above requirements the Graffs may be required to re-pay all or a specified portion of the *ex gratis* payment to the Board.

The Board does not wish to prescribe how the Graffs choose to allocate these funds. However, following the hearing the Board will require the Graffs provide a full accounting of how *ex gratia* payments were spent by way of a cost application that substantially complies with Directive 31 (Costs Application). The Cost Application must be supported by receipts and detailed descriptions of services rendered on the Graff's behalf and all information normally required by Directive 31 for costs applications submitted under the Board's cost process. This information is to be submitted thirty (30) days following the closing of the hearing, unless otherwise directed by the Board.

Following the conclusion of the hearing, the Graffs may request a second *ex gratia* payment from the Board for the balance of the costs incurred by them for their participation in the Proceeding as part of the Costs Application. Given the type of proceeding and the circumstances involved, the Board is prepared to consider further *ex gratia* payments to a maximum of \$40,000.00 for the remainder of the Graffs' costs associated with participation in the Proceeding. (The total of all *ex gratia* payments from the Board not to exceed \$60,000.00.) The Board will review and assess the Costs Application having reference to Part 5 of the *Energy Resources Conservation Board Rules of Practice*, the Board's *Scale of Costs* and Directive 31. The Board may determine what costs, if any, will be awarded as a second *ex gratia* payment. In short, payment of \$20,000.00 in advance costs in no way guarantees payment of any further amounts on conclusion of the hearing.

Provided the Graffs evidence their written acceptance of the requirements relating to the *ex gratia* cost payment set out herein, the Board is prepared to issue a cheque in the amount of \$20,000 payable directly to the Graffs. Please inform the undersigned which member of the Graff family should be designated as the recipient of the cheque.

Yours truly,

Barbara Kapel Holden
Board Counsel

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

This appendix is unavailable on the ERCB website. To order a copy of this appendix, contact ERCB Information Services toll-free at 1-855-297-8311.