
**BEFORE THE EXECUTIVE DIRECTOR OF THE
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**

In the Matter of:

Permit Modification for Modification of
Groundwater Monitoring Well System,
Promontory Point Class I Landfill,
Box Elder County

Docket No. 0202R1

**FINAL ORDER ADOPTING
RECOMMENDED DECISION
DISMISSING ADJUDICATIVE
PROCEEDINGS**

July 27, 2021

Lucy B. Jenkins,
Administrative Law Judge

PROCEDURAL BACKGROUND

On October 25, 2017, Promontory Point Landfill (“PPL”) filed a request with the Director of the Division of Waste Management and Radiation Control (“DWMRC”) to modify its landfill permit for the Promontory Point Landfill to relocate and install monitoring wells.¹ On July 10, 2019, the Director issued a statement of basis and permit modification approving the groundwater monitoring wells.

On August 6, 2019, the Friends of the Great Salt Lake (“Friends”) filed a Petition to Intervene and a Petition for Review (“Petition”) of the Director’s permit modification. The Executive Director² subsequently appointed Lucy B. Jenkins as the Administrative Law Judge (“ALJ”) charged to conduct a special adjudicative proceeding as provided for in Utah Code § 19-1-301.5. Friends raised the following issues in its Petition:

1. Whether the Director was clearly wrong not to require PPL to demonstrate the efficacy of its groundwater monitoring system.

¹ Utah Admin. Code R315-308-2 Ground Water Monitoring Requirements Rule.

² L. Scott Baird, former Executive Director, letter of appointment dated November 14, 2019.

2. Whether the Director was clearly wrong to ignore record evidence showing fractured bedrock below the landfill.

3. Whether the Director's decision to require only semi-annual sampling was clearly erroneous.

A hearing on the merits was held on November 10, 2020. At the conclusion of the hearing, the ALJ requested the parties to submit statements of material facts. In response to that request, each party submitted their version of the material facts³ (hearing record) summarizing the site history, hydrogeological studies, public comments, response to public comments, replies, and sur-replies.

Pursuant to Utah Code § 19-1-301.5 and Utah Admin. Code Rules R305-7-101 to 113, R305-7-200 to 217, and the applicable sections of R305-7-601 to 623, on February 12, 2021, the ALJ issued her Findings of Fact, Conclusions of Law, and a Recommended Order. The Recommended Order finds, among other things, that Friends did not meet its burden of proof to demonstrate that the Director erred in issuing the permit modification and that the Director's decision to issue the Permit Modification is supported by the record and is not clearly erroneous.⁴

The parties were given an opportunity to comment on the Recommended Order.

When the ALJ submits a proposed dispositive action to the Executive Director, the Executive Director may, pursuant to Utah Code § 19-1-301.5(14)(a): (i) adopt, adopt with modifications, or reject the proposed dispositive action; or (ii) return the proposed dispositive action to the ALJ for further action as directed.

³ November 30, 2020.

⁴ Utah Code § 19-1-301.5(14)(b) standard of review – the determination of the Director is not clearly erroneous based on the Petitioner's marshaling of the evidence.

I have reviewed the ALJ's Findings of Fact, Conclusions of Laws and Recommended Order. I have also reviewed Friend's comments on the ALJ's Recommended Order submitted on February 26, 2021; Promontory Point's comments dated February 26, 2021; the Director's comments dated March 1, 2021; the Director's Response to Friends and Promontory Point dated March 3, 2021; and Promontory Points Response to comments submitted by Friends and the Director on March 5, 2021.

CONSIDERATION OF FRIEND'S COMMENTS

Friends acknowledges that the Director's discretion in implementing the law is broad and substantial.⁵ Friends comments that "...the ALJ found that Friends failed to meet its burden because, in essence, Friends failed to cite enough evidence in the record to overcome the substantial discretion afforded the Director." In response to the comments made by Friends, the Director responds that the ALJ ruled against Friends because it failed to prove that the Director's decision was clearly erroneous based on a marshaling of the evidence. Furthermore, the ALJ specifically determined that although Friends marshaled and acknowledged some of the evidence, it failed to marshal all of the evidence in the record that supports the Director's determination.

CONSIDERATION OF PROMONTORY POINT'S COMMENTS

PPL makes three comments and requests that the "*ALJ make*" the following changes in the Recommended Order:

1. That page 27 be revised to read: "*Friends, other environmental groups and industry submitted comments* raising concerns about the groundwater monitoring system and its

⁵ The Director notes in response that the Legislature established the administrative hearing process in § 19-1-301.5. Any changes to the statutory process must be initiated by the Legislature.

inadequacy in preventing landfill contamination from reaching the Great Salt Lake through *alleged* fractured subsurface contamination pathways present at the landfill.”

2. Pages 46-47 be revised to read “The Director did *approve* an additional third downgradient well...”

3. Page 52: That the *Executive Director* make a finding that Friend’s claims are without merit and not asserted in good faith. In making these comments, PPL apparently presumes that the Executive Director will remand the matter back to the *ALJ* to make the suggested corrections to the Recommended Order. PPL further requests, however, that the *Executive Director* make a finding of bad faith which was specifically considered and rejected by the ALJ (Conclusions of Law Point V).

PPL concludes its comments with the statement that the “*Executive Director*” should adopt PPLs proposed changes to the ALJ’s Statement of Material Facts, Conclusions of Law, and Recommended Order on the Merits. In response to the comments made by PPL, the Director acknowledges possible typographical errors and technical corrections in the ALJ’s findings and conclusions, but he does not believe that Friends’ challenge was brought in bad faith.

CONSIDERATION OF THE DIRECTOR’S COMMENTS

The Director supports the ALJ’s conclusions and recommended order with two exceptions. The Director requests that the Executive Director *accept* the ALJ’s recommendation that the Geertsen claim be dismissed because Friends did not raise the claim in its opening brief. However, the Director suggests that *in addition*, the Executive Director should dismiss the Geertsen claim because Friends forfeited the opportunity to raise the claim in its sur-reply, and because Utah Code § 19-1-301.5(4) and (6) and Utah Admin. Code Rule 305-7-202 required Friends to raise the issue in its public comments. However, Point I of the ALJ’s Conclusions of

Law specifically addresses the circumstances surrounding the Geertsen claim and recommends that it be dismissed with prejudice because friends failed to raise it in its Petition for Review.

CONSIDERATION OF THE PARITES COMMENTS AND RESPONSES

Based on my review, the ALJ's Statement of Material Facts and Conclusions of Law fully address the points raised in Friends' Petition for Review. Moreover, the ALJ adequately considered and addressed PPL's claim for attorney's fees and the Director's comments on the alternative grounds for dismissing the Geertsen claims. The comments and responses made by the parties do not identify deficiencies sufficient to justify a remand of the matter back to the ALJ for further consideration.

ORDER

Based on the foregoing, I find that the substantive points raised by the parties were fully litigated in the special adjudicative proceeding and I agree with ALJ Jenkin's Findings of Fact, Conclusions of Law, and Recommended Order as written. Based on my review of the ALJ's adjudicatory proceeding and pursuant to Utah Code § 19-1-301.5, I hereby adopt the Findings of Fact, Conclusions of Law, and Recommended Order, as follows:

1. Since Friends failed to preserve its claim that the Fanglomerate is the Geertsen Canyon Formation, this claim is dismissed, with prejudice.
2. The Director did not err in determining that the Monitoring Well System complies with Utah Administrative Code R315-308-2 and that PPL was not required to conduct modeling.
3. The Director did not err in issuing the permit modification.
4. The Director did not err in determining that the bedrock beneath the landfill is cemented and there is no hydraulic connection between the shallow aquifer and bedrock.

5. The Director did not err in determining that the three downgradient monitoring wells are sufficient to detect any releases from Cell 1A.
6. The Director did not err in not requiring PPL to drill into bedrock beneath Cell 1A.
7. The Director did not err in determining that there is no evidence of springs.
8. The Director did not err in approving the sampling schedule.
9. PPL is not entitled to an award of attorney fees.
10. Deny Friends' request for remand of the Director's Groundwater Permit Modification to require the Director to comply with and properly apply the statute and rules to ensure protection of local groundwater and Great Salt Lake from contamination.

The Petition for Review filed by Friends on August 8, 2019, is hereby denied and the Director's statement of basis and permit modification approving the groundwater monitoring wells is hereby affirmed.

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Utah Code § 19-1-301.5(16)(a), judicial review of this final order may be sought in the Utah Court of Appeals in accordance with Utah Code §§ 63G-4-401, 63G-4-403, and 63G-4-405 by filing a petition within thirty (30) days after the date of this order.

DATED this 27th day of July, 2021.

Signature: 

Email: kshelley@utah.gov

Kimberly D. Shelley, Executive Director
Utah Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2021, a true and correct copy of the foregoing **FINAL ORDER ADOPTING RECOMMENDED DECISION DISMISSING ADJUDICATIVE PROCEEDINGS** was served via e-mail with the following recipients:

Administrative Proceedings
Records Officer
DEQAPRO@utah.gov

Lucy B. Jenkins,
Administrative Law Judge
Jones, Waldo, Holbrook
& McDonough, P.C.
170 South Main Street, Suite #1500
Salt Lake City, Utah 84101
ljenkins@joneswaldo.com

Rob Dubuc
Friends of Great Salt Lake
150 South 600 East, Suite #5D
Salt Lake City, Utah 84102
robd@xmission.com

Brad R. Cahoon
Dentons, Durham, Jones
& Pinegar, P.C.
111 South Main Street, Suite #2400
Salt Lake City, Utah 84111
brad.cahoon@dentons.com

Raymond Wixom
Utah Attorney General's Office
195 North 1950 West
P.O. Box 140873
Salt Lake City, Utah 84114-0873
rwixom@agutah.gov

Douglas J. Hansen
Division of Waste Management
and Radiation Control
195 North 1950 West
P.O. Box 144880
Salt Lake City, Utah 84114-4880
djhansen@utah.gov

/s/ Shane R. Bekkemellom
Shane R. Bekkemellom,
Administrative Legal Secretary