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

IN THE MATTER OF

**CRESCENT POINT U.S.
CORPORATION'S APPLICATION
FOR CERTIFICATION OF THE
SURFACE CASING OF THE DEEP
CREEK 7-27-4-2E WELL AS A
POLLUTION CONTROL FACILITY**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND RECOMMENDED ORDER ON
THE MERITS**

August 31, 2018

**Lucy B. Jenkins
Administrative Law Judge**

This matter is before me pursuant to appointment by the Executive Director of the Utah Department of Environmental Quality dated March 29, 2018. The appointment charges the Administrative Law Judge to conduct the adjudicative proceeding and to submit to the Executive Director a proposed dispositive action pursuant to Utah Code Ann. § 19-1-301.5 and Utah Admin. Code R305-7-101 through 113, R305-7-200 through 217, and the applicable sections of R305-7-601 through 623. Following are my Findings of Fact, Conclusion of Law and Recommended Order on the Merits.

INTRODUCTION

This matter came before me for oral argument on July 17, 2018 at 9:00 am. Present at the argument was Amanda Smith and Steve Young on behalf of Crescent Point U.S. Corporation ("Crescent Point" or "Petitioner" and Kimberly McEwan on behalf of the Director of the Utah Division of Water Quality ("Director"). Having reviewed the briefing in this matter and heard oral arguments on the merits, I recommend that the Executive Director grant and approve Crescent Point's application for certification of the Surface Casing for the Deep Creek Well.

REGULATORY BACKGROUND

1. This administrative proceeding arises under the Pollution Control Act, Utah Code Ann. §§ 19-12-101 to 305, and implementing regulations found in Utah Admin. Code R317-12-1 to 5.

2. In order to claim a sales and use tax exemption under the Pollution Control Act, a person must file an application for certification to the Utah Division of Water Quality (DWQ) if the application relates to water pollution. Utah Code Ann. § 19-12-202(3).

3. The property that is the subject of the application for certification must meet the applicable requirements set forth in Pollution Control Act. If the property is “freestanding pollution control property”, one of the certification requirements that it must meet is the definition of “freestanding pollution control property.” Utah Code Ann. § 19-12-102(5).

4. “Freestanding pollution control property” is defined as:

. . . tangible personal property located in the state, regardless of whether a purchaser purchases the tangible personal property voluntarily or to comply with a requirement of a governmental entity, if: (i) the primary purpose of the tangible personal property is the prevention, control, or reduction of air or water pollution by: (A) the disposal or elimination of, or redesign to eliminate, waste, and the use of treatment works for industrial waste. . . .”

Utah Code Ann. § 19-12-102(5)(a).

PROCEDURAL BACKGROUND

1. On November 24, 2015, Crescent Point submitted an application for certification of the “casing system,” which included the surface casing, conductor casing and production casing, for its Deep Creek 7-27-4-2E Well (“Deep Creek Well”) as a pollution control facility. AR000076, AR000083-85.

2. On January 20, 2016, Crescent Point submitted an application to DWQ for sales and /or tax exemption certification for the surface casing at the Deep Creek Well. AR000095.

3. On February 11, 2016, the DWQ sent Crescent Point a letter denying its application and stating that “the primary purpose” of the surface casing is “not water pollution prevention.” AR000107.

4. On March 11, 2016, Crescent Point appealed the DWQ decision, and submitted several facts and authorities outlining why the primary purpose of the Deep Creek Well surface casing, as designed and installed in accordance with Utah law, was to prevent pollution. AR000108-197.

5. On April 1, 2016, DWQ prepared a memo to the file, stating that the basis for its denial of certification was as follows: “Primary purpose of surface casing is not be a Pollution Control facility only, but also: protect BOP; isolate other zones; prevent fluid loss into or contamination of production zones; provide a stronger upper base to use high-density drilling fluid to continue drilling deeper; prevent unstable upper foundation from caving in and string of forming large caverns; seal off high pressure zones from the surface, avoiding potential for a blowout; maintain well stability and integrity.” The memo also stated that “No production wells were installed without surface casing so far,” and “Surface casings are deep enough because of potential loss of mud.” AR000198.

6. On June 20, 2016, Crescent Point prepared a draft discussion memorandum analyzing why the primary purpose of surface casing is prevention of water pollution with multiple supporting attachments. AR000202-000414, 000429-000432.

7. On July 19, 2016, Crescent Point updated and revised its application for certification, and submitted several additional authorities outlining why the primary purpose of the Deep Creek Well surface casing, as designed and installed in accordance with Utah law, was to prevent pollution. AR000317-357.

8. On August 22, 2016, Shelley Robinson of the Utah State Tax Commission sent an e-mail to DWQ, stating as follows: “Last week I spoke with Dustin Doucet, Petroleum Engineer, with DOGM . . . It is his determination that the primary purpose of surface casing is blowout prevention. A benefit of surface casing is to protect fresh water aquifers, but it is not the primary purpose. Surface casing is required on all wells regardless if they have water related issues or not.” AR000358.

9. The Director denied certification for the surface casing of the Deep Creek Well in a letter dated September 15, 2016 with the following statement:

From our review of the application materials, additional research, and discussions with oil and gas experts with Utah Division of Oil, Gas, and Mining (UDOGM), we conclude that the primary purpose of surface casing is not pollution prevention, as required for tax exemption certification under UCA Subsection 19-12-102(6) of the Utah Pollution Control Act. Although oil production surface casing does isolate internal casings from the formation and groundwater, the primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction and of the well during production. In particular, the surface casing is necessary to: maintain hole integrity by preventing caving; minimize lost circulation into shallow, permeable zones; cover weak incompetent zones to control kick-imposed pressures; provide a means for attaching the blowout preventers; cover freshwater sands; and to support the weight of all casing strings run below the surface casing.

Further, we find that an oil well surface casing does not meet the definition of a pollution control facility because there is no “treatment works” as defined by UCA Subsection 19-6-102(19) for industrial waste associated with the surface casing.”

AR000359-360.

10. Crescent Point filed a Request for Agency Action dated October 14, 2016, challenging the denial by the Director of Crescent Point's application for certification of the surface casing of the Deep Creek 7-27-4-2E Well as a Pollution Control Facility under Utah Code Ann. § 19-12-101, *et seq.*

11. Under authority of Utah Code Ann. §§ 19-1-301(5) and (6), the Executive Director appointed, by letter dated October 26, 2017, the undersigned as Administrative Law Judge to conduct the adjudicative proceeding and to submit to the Executive Director a proposed dispositive action pursuant to Utah Code Ann. § 19-1-301 and Utah Admin. Code R305-7-301, *et seq.*

12. On December 5, 2017, the Director filed the administrative record pursuant to Utah Code Ann. § 19-1-301.5(8)(a)(i) and (9)(b) and Utah Admin. Code R305-7-209. On August 8, 2018, the Director filed a supplement to the administrative record.¹

13. On March 22, 2018, Counsel for the Director of the Utah Division of Water Quality and Counsel for Crescent Point U.S. Corporation ("Crescent Point") filed a Joint Proposed Scheduling Order which included an agreement that this administrative proceeding shall be conducted under Utah Code § 19-1-301.5 and its corresponding rules.

14. The Executive Director issued a Revised Notice of Appointment of Administrative Law Judge, by letter dated March 29, 2018, which requests the undersigned as Administrative Law Judge to conduct the adjudicative proceeding and to submit to the Executive Director a proposed dispositive action pursuant to Utah Code Ann. § 19-1-301.5 and Utah

¹ The administrative record filed by the Director is referred to as the "Administrative Record" and is referenced by the administrative record bates label "AR".

Admin. Code R305-7-101 through 113, R305-7-200 through 217, and the applicable section of R305-7-601 through 623.

15. On July 17, 2018, after receiving briefs on the merits from the parties, I heard oral arguments on the merits of Petitioner's Request for Agency Action ("Hearing on the Merits")², as required by the Utah Code. After reviewing and considering all of the facts and arguments presented in the briefing and at the Hearing on the Merits and pursuant to Utah Code § 19-1-301.5(12)(c), I hereby submit to the Executive Director the following Findings of Fact, Conclusions of Law, and Recommended Order on the Merits.

FINDINGS OF FACT

1. In 2014, Crescent Point drilled the Deep Creek Well (API No. 43-047-54258). This is an oil producing well located in Section 27, Township 4 South, Range 2 East, USM, Uintah County, Utah. AR000331 (Crescent Point drilling application).

2. An oil or gas well is a hole drilled in the earth so underground oil and gas can be pumped to the surface. AR000227, 000305 (US Dep't of Energy ("DOE") and Utah Division of Oil, Gas & Mining ("DOG M") Reports. In order to drill a well, operators must install various types of casing. *See e.g.* Utah Admin. Code R649-3-8 (DOG M Rule with Utah casing requirements). The American Petroleum Institute ("API") also publishes recommended standards for casing. AR000228-229 (DOE Report discussing API standards).

3. Section 7.3 of the API guidelines discusses surface casing, and states the following:

² The recording of the Hearing on the Merits is available from the Utah Department of Environmental Quality ("DEQ").

After the conductor pipe is installed and cemented, the surface hole is drilled and the surface casing is run into the hole and cemented in place using proper cementing practices. One of the main purposes of the surface casing is the protection (through isolation) of groundwater aquifers. The surface casing is designed to achieve all regulatory requirements for isolating groundwater and also to contain pressures that might occur in the subsequent drilling process.

. . . State regulations dictate the minimal setting depth of surface casing, and the vast majority of states require the casing to be set below the deepest groundwater aquifer. At a minimum, it is recommended that surface casing be set at least 100 ft below the deepest USDW encountered while drilling the well.

Hydraulic Fracturing Operations – Well Construction and Integrity guidelines,
API Guidance Document HFI (1st ed. 2009).
https://www.hollandhart.com/pdf/API_Guidance_Document_HF1_1st_Edition_October_2009.pdf

4. Casing consists of pipes, and often cement. AR000018, 228-232, 305 (Petroleum Services Association of Canada (“PSAC”), DOE & DOGM Reports).
5. In general, the casing is accomplished in multiple phases, from the largest diameter casing to the smallest. AR000229 (DOE Report).
6. The first phase often involves the setting of “conductor casing” at the surface. AR000229-230 (DOE Report). The purpose of this casing is to prevent the sides of the hole from caving into the wellbore where it is drilled. AR000229 (DOE Report).
7. Pictures of conductor casing are found at AR000230 (Society of Petroleum Engineers), -118 (PSAC Report), and -230 (DOE Report).
8. After the conductor casing is set, drilling continues inside the conductor casing to below the lowest ground water zone depending upon regulatory requirements. AR000229 (DOE Report).

9. “Surface casing” is then run from the surface to just below the bottom of the hole and cement is pumped down inside of the surface casing, forcing the cement up into the space between the outside of the casing and the dirt. AR000229 (DOE Report).

10. This cementing of surface casing from bottom to top insures that the entire space fills with cement from below the deepest ground water zone to the surface. “This cementing is designed to ensure that ground water zones are isolated from production zones.” AR000229 (DOE Report).

11. “Although the surface casing has many purposes, its primary function is to allow a kick to be circulated safely out of a well.” “If the complete shut-in of a well would require unreasonably deep (and therefore uneconomic) surface casing, and if aquifers can be protected for the long-term by alternative methods generally accepted by regulators, and if by providing hole stability surface casing also ensures only reasonably competent zones are open below it for the purpose of well control, then, by elimination, the primary function of surface casing is to allow the successful circulation of a kick.” (“New Method Determines Optimum Surface Casing Depth,” Oil & Gas Journal, February 7, 1994). AR000001, AR000003.

12. “Surface casing has several important functions:

The pressure integrity at the surface casing shoe determines the ability to shut-in the well during a kick.

Surface casing protects freshwater sands from contamination.

Surface casing isolates the shallow unconsolidated sections to combat drilling difficulties.

Surface casing helps contain surface pressures resulting from a kick.”

AR000002 (“New Method Determines Optimum Surface Casing Depth,” Oil & Gas Journal, February 7, 1994).

13. “The surface casing is a very important part of a well and serves many functions. The surface casing protects fresh water aquifers from contamination during drilling, throughout the production phase, and even after the well is plugged. It acts as an anchor to which blow out prevention equipment is attached, it holds back unconsolidated or unstable shallow formations while the lower portion of the hole is being drilled, and it prevents loss of drilling fluid to permeable shallow formations.” (Utah Division of Oil, Gas & Mining, Department of Natural Resources, January 1996). AR000040.

14. “*Surface Casing*. Surface casing is set to provide blowout protection, isolate water sands, and prevent lost circulation. It also often provides adequate shoe strength to drill into high-pressure transition zones.” (Petroleum Engineering Handbook, Vol. II, Chapter 7, Casing Design). AR000052.

15. “Many purposes exist for running surface casing, including:

- Cover freshwater sands.
- Maintain hole integrity by preventing caving.
- Minimize lost circulation into shallow, permeable zones.
- Cover weak incompetent zones to control kick-imposed pressures.
- Provide a means for attaching the blowout preventers.
- Support the weight of all casing strings (except liners) run below the surface pipe.”

(Petroleum Engineering Handbook, Vol. II, Chapter 7, Casing Design).

AR000054-55.

16. “The combination of surface casing and cement completely isolate the well from groundwater aquifers and provide support for the final type of casing to be set—production casing.” (Discussion & Summary of Casing as a Pollution Control Facility, Crescent Point, November 24, 2015) AR000080.

17. “Once the conductor pipe has been put in place the surface hole is drilled to the base of groundwater protection, as defined by the regulatory body. Surface casing is lowered into the hole and cemented in place. At this stage, a barrier of steel and cement is created to prevent the contamination of potential shallow groundwater aquifers as well provide wellbore stability for the remaining drill hole.” (CSUR, “Understanding well Construction and Surface Footprint”). AR000155.

18. “Surface Casing. This casing is designed to provide a competent anchor for blowout prevention equipment, which provides well control until the next string of casing is set; and to protect fresh water zones.” (“BLM Manual, H-3161-1—Technical and Environmental Considerations, February 2, 1984). AR000310.

19. Schlumberger Limited, a leading supplier of technology and services to the oil and gas industry, states in its online oilfield glossary that “surface casing” is put in place for several reasons: “First, the surface casing protects fresh-water aquifers onshore. Second, the surface casing provides minimal pressure integrity and thus enables a diverter or even a blowout preventer (BOP) to be attached to the top of the surface casing string after it is successfully cemented in place. Third, the surface casing provides structural strength so that the remaining casing strings may be suspended at the top and inside of the surface casing.” AR000147.

20. Once the surface piping and cementing is set, drilling continues to the next zone where casing will be set. In some states, “intermediate casing” is set for “additional control of fluid flow and pressure effects.” AR000229

21. The well is then drilled further until the oil or gas are reached. The final casing is “production casing,” which consists of the piping or tubing through which the oil or gas will flow to the surface. AR000229

22. Pictures of a well with these four types of casing are shown at AR000230 (Society of Petroleum Engineers), -118 (PSAC Report), and -230 (DOE Report).

23. The Petroleum Services Association of Canada defines surface casing as “isolate[ing] freshwater zones, so that they are not contaminated during drilling and completion.” AR000118.

24. American Petroleum Institute Guidelines quoted in the record state that “maintaining the integrity of the well is . . . critical in protecting the environment, including the groundwater.” (Crescent Point’s supplementary documentation submitted with its November 24, 2015 application.) AR000081.

25. The Deep Creek Well was drilled with conductor casing, then surface casing, then production casing. AR000333 (Drilling application).

26. The instant case involves only the surface casing. AR000318 (Crescent Point pollution control application submitted July 19, 2016).

27. Crescent Point’s pollution control application submitted July 19, 2016 states that the surface casing prevented oil, gas, wastewater, brine water and drilling mud from entering into and contaminating the ground water. AR000322.

28. The Utah Division of Oil, Gas and Mining (“DOG M”) regulates the design and construction of surface casing in Utah. Utah Admin. Code R649-3-8.

29. Utah Admin. Code R649-3-8 has four sub-sections. The first, second and fourth sub-sections deal with all well casing, and the third deals solely with surface casing. The rule states in its entirety:

(a) The method of cementing casing in the hole shall be by pump and plug method, displacement method, or other method approved by the division.

(b) When drilling in wildcat territory or in any field where high pressures are probable, the conductor and surface strings of casing must be cemented throughout their lengths, unless another procedure is authorized or prescribed by the division, and all subsequent strings of casing must be securely anchored.

(c) In areas where the pressures and formations to be encountered during drilling are known, sufficient surface casing shall be run to: 3.1 Reach a depth below all known or reasonably estimated, utilizable, domestic, fresh water levels. 3.2 prevent blowouts or uncontrolled flows.

(d) The casing program adopted must be planned to protect any potential oil or gas horizons penetrated during drilling from infiltration of waters from other sources and to prevent the migration of oil, gas or water from one horizon to another.

30. Utah Admin. Code R649-3-9, regarding the entire well casing system, states:

2. In any well that appears to have defective, poorly cemented, or corroded casing that will permit or may create underground waste or may contaminate underground or surface fresh water, the operator shall proceed with diligence to use the appropriate method and means to eliminate such hazard of underground waste or contamination of fresh water. If such hazard cannot be eliminated, the well shall be properly plugged and abandoned.

31. The surface casing at the Deep Creek Well was designed and constructed using a large-diameter, 8.625 inch steel pipe that was completely encased in cement from the surface to a depth of just over 1,000 feet. This encasement extended several hundred feet below the ground water aquifer. AR000385.

32. In drilling the Deep Creek Well, ground water was encountered at various intervals from the surface to a maximum depth of approximately 700 feet. AR000337, -339 (“BMSW” on AR000337 means “base of the moderately saline water”).

33. Crescent Point previously filed two applications with DWQ for certification of Class II Injection Wells for the disposal of produced water from oil and gas production wells which were approved by DWQ on October 15, 2015. AR000058-75.

34. On March 29, 2017, counsel for Crescent Point sent an email to counsel for the Director regarding supplementary information on the pollution control sales tax exemption and attached a Memorandum dated February 13, 2017 regarding “Application of the Utah Pollution Control Sales Tax Exemption Statute” and the Affidavit of Floyd Hernandez dated March 21, 2017 which states that “[t]he primary purpose of the surface casing constructed in accordance with Utah Admin. Code R649-3-8 is to prevent contamination of utilizable, domestic, fresh water sources” and the secondary function of the surface casing is “to prevent blowouts or uncontrolled flow by installing sufficient amounts of casing.” AR000416-424.

35. Counsel for the Director sent a letter dated July 6, 2017 to counsel for Crescent Point responding to Crescent Point’s Memorandum dated February dated February 13, 2017 and addressing the Director’s position on the requirement to use treatment works for pollution control certification. AR 000425-000428.

STANDARD OF REVIEW

This permit review adjudicative proceeding is governed by Utah Code Ann. § 19-1-301.5, which requires the administrative law judge to “conduct a permit review adjudicative proceeding based only on the administrative record and not as a trial de novo.” Utah Code Ann. § 19-1-301.5(9)(a). The administrative law judge must “conduct a review of the director’s order or determination, based on the record” and submit a proposed dispositive action to the Executive Director. Utah Code Ann. § 19-1-301.5(13)(b) and (c).

In a permit review adjudicative proceeding, it is clear that the Utah Legislature intended to limit the administrative law judge’s authority to a review of the Director’s decision, thereby placing the administrative law judge in an appellate-like review role. There is to be no trial. There will be no witnesses, no examination or cross examination, and no findings of fact where disputed testimony is weighed and where witness credibility is at issue, as often occurs in other administrative adjudicative proceedings. Rather, all of the weighing of the evidence has already occurred at the Director level.

The Director’s determination can include factual findings, interpretations of law, and mixed determinations of law and facts.

Crescent Point has the burden of proof to demonstrate that the Director’s determination to deny Crescent Point’s certification application was in error. To carry their burden of proof with respect to their challenge of factual, technical and scientific findings, Crescent Point must demonstrate that DWQ’s findings are clearly erroneous; otherwise, the ALJ must “uphold all factual, technical, and scientific agency determinations that are not clearly erroneous based on

the petitioner's marshaling of the evidence." Utah Code § 19-1-301.5(14)(b).³ Utah

Administrative Code Rule R305-7-214 explains this standard of review as follows:

- (a) The petitioner has the burden of proof;
- (b) Marshaling the evidence is a natural extension of the petitioner's burden of proof;
- (c) For each factual, technical, and scientific determination challenged by petitioner, the petitioner is required to marshal and acknowledge the evidence in the record that supports the Director's determination. Such determination shall be overturned as clearly erroneous only if the petitioner has proven, after marshaling, that the Director's determination is not supported. See Subsections 19-1-301.5(6)(d)(v)(G) and (H) and 19-1-301.5(14); and
- (d) If the petitioner fails to marshal, there is a presumption that the Director's factual, technical, and scientific determination is not clearly erroneous."

A finding of fact is clearly erroneous if it is "not adequately supported by the record, resolving all disputes in the evidence in a light more favorable to the trial court's determination." *Save Our Sch. v. Bd. of Educ. of Salt Lake City*, 2005 UT 55, ¶ 9. A finding is clearly erroneous if that "finding is without adequate evidentiary support or was induced by an erroneous view of the law." *R.B. v. L.B.*, 2014 UT App 270, ¶ 26, 339 P.3d 137 (citing *Halve v. Big H. Constr., Inc.*, 2012 UT App 283, ¶ 9, 288 P.3d 1046).

³ While subsection (13)(b) expressly applies directly to the Executive Director's review, the standard of review that the ALJ is to apply to the record is not expressly stated in the Utah Code. Under a fair reading of the statute, it is clear that the ALJ is to apply the same standard as the Executive Director is required to apply. This conclusion is based on a reading of the permit review adjudicative proceeding statute as a whole. In the first instance, the ALJ's express duty and authority is to undertake a permit review adjudicatory proceeding and not a trial *de novo* on the merits, resulting in a recommended ruling for the Executive Director. In other words, the role of the ALJ is to "stand in the shoes" of the Executive Director and provide her with a recommended ruling on the merits. Thus, the ALJ is to apply the same standard of review to the administrative record as the Executive Director is required to apply. Utah Code Ann. § 19-1-301.5.

With respect to questions of law, the administrative law judge should grant “substantial discretion” to the agency in its interpretation of its governing statutes and rules. *See* Utah Code Ann. § 19-1-301.5(16)(c)(i); Utah Administrative Code Rule R305-7-214((3)). In this case, the governing statutes and rules include the Utah Water Quality Act and the implementing regulations. DWQ’s legal interpretation of these statutes and rules may be overturned only if Petitioner shows that such interpretation is a “clearly erroneous interpretation or application of the law.” *See, e.g., Sierra Club v. BOGM*, 2012 UT 73, ¶ 10 (citing *Assoc. Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291 (an agency’s “interpretation of the operative provisions of the statutory law it is empowered to administer” must be given deference)). *See Utah Physicians for a Healthy Env’t v. Utah Dept. of Env’tl. Quality*, 391 P. 3d 148, paragraph 12 (recognizing this standard of review).

By contrast, DWQ’s general interpretations of the law, including constitutional questions, jurisdiction, and statutes unrelated to the agency, are granted little or no deference and are simply reviewed for correctness. *Sierra Club*, 2012 UT 73, ¶ 9; *see also, Sevier Citizens v. Dept. of Env’tl. Quality*, 2014 UT App 257, ¶ 6 (where the statute under review was procedural, and where the issue was interpretation of the statute itself that granted agency interpretive discretion, the court imposed a correctness standard to the question of whether the failure to file a petition to intervene strips the agency of jurisdiction under Utah Code Ann. § 19-1-301.5(7)).

When the agency has been granted discretion to interpret the statute or regulation at issue, mixed questions of law and fact are reviewed under an abuse of discretion standard. *See Murray v. Utah Labor Comm’n*, 2013 UT 38, ¶ 39, 308 P.3d 461. Here, § 19-1-301.5(16)(c)(i) expressly grants DWQ “substantial discretion to interpret its governing statutes and rules.”

Agency decisions on mixed questions of law and fact must be upheld under this discretion standard if they are “rationally based” and set aside only “if they are imposed arbitrarily and capriciously or are beyond the tolerable limits of reason.” *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18 (internal quotation marks omitted).

CONCLUSIONS OF LAW

The Director denied the Petitioner’s application for certification of the surfacing casing as a pollution control facility for two reasons: because the primary purpose of the surface casing was not the prevention of water pollution, and because there was no “treatment works” associated with the surface casing. The Petitioner appeals the Director’s denial, contending that the primary purpose of the surface casing is the prevention of water pollution and that treatment works is not required, and requests an order for certification of the surface casing of the Deep Creek Well as a freestanding pollution control facility.

The Pollution Control Act gives DWQ the authority to certify real or personal property as a pollution control facility (real property) or a freestanding pollution control facility (personal property) in order to obtain exemptions from sales and use tax. The parties have agreed that the freestanding pollution control facility requirements are pertinent to the Petitioner’s application to certify the surface casing at the Deep Creek Well, which are found at Utah Code Ann. § 9-12-102(5):

(5)(a) “Freestanding pollution control property” means tangible personal property located in the state, regardless of whether a purchaser purchases the tangible personal property voluntarily or to comply with a requirement of a governmental entity, if

(i) the primary purpose of the tangible personal property is the prevention, control, or reduction of air or water pollution by:

(A) the disposal or elimination of, or redesign to eliminate, waste, and the use of treatment works for industrial waste; ...

Utah Code Ann. § 19-12-102(5).

The following terms used in the definition of “freestanding pollution control property” are defined in the Utah Water Quality Act and the Utah Administrative Code as follows:

“Pollution” means any man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of any waters of the state, unless the alteration is necessary for the public health and safety.” Utah Code Ann. § 19-5-102(13).

“Treatment works” means any plant, disposal field, lagoon, dam pumping station, incinerator, or other works used for the purpose of treating, stabilizing, or holding wastes. Utah Code Ann. § 19-5-102(19).

“Waste” or “Pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. Utah Code Ann. § 19-5-102(22).

“Industrial wastes” means the liquid wastes from industrial processes as distinct from wastes derived principally from dwellings, business buildings, institutions and the like. It is synonymous with the term “industrial wastewater”. Utah Administrative Code Rule R317-1-1.

For the reasons stated below, DWQ erred in its denial of Petitioner’s application for certification of the surface casing.

I. The Primary Purpose, or One Primary Purpose, of the Surface Casing is the Prevention of Water Pollution

The Director’s first reason for denying the Crescent Point’s certification application was:

From our review of the application materials, additional research, and discussions with oil and gas experts with Utah Division of Oil, Gas, and Mining (UDOGM), we conclude that the primary purpose of surface casing is not pollution prevention, as required for tax exemption certification under UCA Subsection 19-12-102(6) of the Utah Pollution Control Act. Although oil production surface casing does isolate internal casings from the formation and groundwater, the primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction

and of the well during production. In particular, the surface casing is necessary to: maintain hole integrity by preventing caving; minimize lost circulation into shallow, permeable zones; cover weak incompetent zones to control kick-imposed pressures; provide a means for attaching the blowout preventers; cover freshwater sands; and to support the weight of all casing strings run below the surface casing. AR000359-360.

Crescent Point contends that the primary purpose of the surface casing is the prevention of water pollution. For the reasons stated below, DWQ erred in concluding that the primary purpose of the surface casing was not water pollution prevention.

A. DWQ Takes Inconsistent Positions on the Primary Purpose of the Surface Casing.

DWQ asserts different and inconsistent positions on the primary purpose of the surface casing:

1. On April 1, 2016, the DWQ prepared a memo to the file, stating that the basis for its denial of certification⁴ was as follows: “Primary purpose of surface casing is not be a Pollution Control facility only, but also: protect BOP; isolate other zones; prevent fluid loss into or contamination of production zones; provide a stronger upper base to use high-density drilling fluid to continue drilling deeper; prevent unstable upper foundation from caving in and string of forming large caverns; seal off high pressure zones from the surface, avoiding potential for a blowout; maintain well stability and integrity.” AR000198.

2. On August 22, 2016, Shelley Robinson of the Utah State Tax Commission sent an e-mail to DWQ, stating as follows: “Last week I spoke with Dustin Doucet, Petroleum Engineer, with DOGM . . . It is his determination that the primary purpose of surface casing is blowout

⁴ This memo was prepared after DWQ’s February 11, 2016 denial of the Crescent Point’s January 20, 2016 application for certification of the surface casing.

prevention. A benefit of surface casing is to protect fresh water aquifers, but it is not the primary purpose. Surface casing is required on all wells regardless if they have water related issues or not.” AR000358.

3. The Director denied certification for the surface casing of the Deep Creek Well in a letter dated September 15, 2016. In his denial, the Director provided the following statement: “...the primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction and of the well during production. In particular, the surface casing is necessary to: maintain hole integrity by preventing caving; minimize lost circulation into shallow, permeable zones; cover weak incompetent zones to control kick-imposed pressures; provide a means for attaching the blowout preventers; cover freshwater sands; and to support the weight of all casing strings run below the surface casing.” AR000359-360.

4. The Director asserts in its Response Brief that “The primary purpose of the casing and the entire production well is to bring oil and gas to the surface.” Director’s Response, page 26.

5. In the Hearing on the Merits, the Director asserted that the surface casing has no primary purpose, because the surface casing has many equally important purposes.

In summary, the Director asserts different and inconsistent positions on the primary purpose of the surface casing:

- The surface casing has many primary purposes including water pollution control.
- The primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction and of the well during production.

- The primary purpose of the casing and the entire production well is to bring oil and gas to the surface.
- The surface casing has no primary purpose, because the surface casing has many equally important purposes.

In addition, the Director's September 15, 2016 denial is inconsistent with the email from the Utah State Tax Commission informing DWQ that a DOGM engineer stated that the primary purpose of the surface casing is blowout prevention⁵. AR000358.

The Director does not explain or rationalize DWQ's inconsistent positions on the primary purpose of the surface casing.

B. DWQ's Interpretation of "Primary Purpose" is Inconsistent with its Positions on the Primary Purpose of the Surface Casing.

DWQ asserts that a purpose can only be primary if the other purposes are only incidental, citing to a Utah Supreme Court case on the meaning of "properties purchased for resale". *Nucor Corp., Nucor Steel—Utah Div. v. Utah State Tax Comm'n*, 832 P.2d 1294 (Utah 1992). The court affirmed the Tax Commission's reasoning that the items at issue were not purchased for resale because they were purchased "primarily for their use as equipment and only incidentally for their use as ingredients in the manufacturing process." *Id.* at 1297. This case is not interpreting the meaning of "primary purpose". Furthermore, the Director's interpretation that a purpose can be primary only if the other purposes are incidental is inconsistent with DWQ's various positions on the primary purpose of the surface casing while at the same time admitting

⁵ Counsel for the Director asserted in the Hearing on the Merits that the Director considered the entire Administrative Record as supporting her denial of Crescent Point's certification application.

that the surface casing has many important purposes including water pollution prevention.⁶

Other purposes are not incidental if they are important.

C. The Administrative Record Does Not Support DWQ's Denial.

The Administrative Record does not include any analysis by DWQ of its own guidance on primary purpose or any analysis or response to Crescent Point's application or any other analysis of the primary purpose of the surface casing.

DWQ's guidance document "Sales Tax Exemption, Water Pollution Control Facilities" includes the following guidance on primary purpose:

Guidance for "Primary Purpose"
Test Used by DWQ

- There must be a water pollutant contained in the stream entering this water PCF⁷ to be reduced or eliminated.
- There must be a quantifiable demonstrated (test data, modeling results, calculations, etc.) reduction or prevention of water pollution as a result of the operation of the water PCF. The demonstration documentation should be furnished by the applicant.
- The "before construction/installation etc. of the PCF" scenario should be compared to the "after construction/installation etc. of the PCF" scenario, i.e., is there a net reduction of pollution in the before and after scenarios? This determination can be modified if there is a *net decrease* of more critical pollutants.

⁶ As an example, the Director asserts:

DEQ recognizes that one of the many purposes of surface casing in an oil and production well is to secondarily protect groundwater, should something catastrophic happen in the production casing. It provides another layer of casing and cement between the product being pulled from the ground and the groundwater. However, surface casing has many other equally important structural functions that cannot be considered incidental. Therefore, the primary purpose of surface casing is not to prevent water pollution. Director's Response, page 25.

⁷ Pollution Control Facility.

- The material, equipment, services, structures, land, etc. directly associated with the proper functioning of the water PCF can be considered for certification.

AR000326-327. Crescent Point addressed each of DWQ's above primary purpose tests in its application dated July 19, 2016. AR000317-357. The Administrative Record does not contain any documentation or any analysis by DWQ of this test to determine the primary purpose of the surface casing.

Crescent Point also submitted several other documents which analyze the primary purpose of the surface casing and support Crescent Point's position that the primary purpose of the surface casing is the prevention of water pollution. See Section I.D. below.

The Administrative Record includes an email from Shelly Robinson, with the Utah Tax Commission, to DWQ relating her communication with DOGM that the primary purpose of the surface casing was blowout prevention, but there are no documents prepared by DOGM on the analysis of the primary purpose and no documentation of any direct communications between DOGM and DWQ on the primary purpose in the Administrative Record.

The only DWQ documents in the Administrative Record that mention the primary purpose of the surface casing are:

1. DWQ's February 11, 2016 denial (AR000107);
2. DWQ's April 1, 2016 Memo to File (AR000198); and
3. DWQ's September 15, 2016 denial (AR000359).

These documents indicate DWQ's conclusions, but do not include any analysis by DWQ of its primary purpose guidance or any other analysis of primary purpose. Furthermore, although there are multiple documents in the Administrative Record supporting the Director's position that the

surface casing has many important purposes, I see no documents in the Administrative Record, other than the above DWQ documents, that conclude that the primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction and of the well during production, as stated in DWQ's September 15, 2016 denial letter (AR000359).

D. The Primary Purpose, or One Primary Purpose, of the Surface Casing is Prevention of Water Pollution.

As stated in DWQ documents in the Administrative Record and the Director's briefs, the Director's position is that the surface casing has many important purposes, including water pollution prevention:

1. DWQ's April 1, 2016 memo to the file states that the basis for its February 11, 2016 denial of certification was as follows: "Primary purpose of surface casing is not be a Pollution Control facility only, but also: protect BOP; isolate other zones; prevent fluid loss into or contamination of production zones; provide a stronger upper base to use high-density drilling fluid to continue drilling deeper; prevent unstable upper foundation from caving in and string of forming large caverns; seal off high pressure zones from the surface, avoiding potential for a blowout; maintain well stability and integrity." AR000198. This memo indicates that all of the listed purposes, including water pollution prevention, are primary purposes.

2. "DEQ recognizes that one of the many purposes of surface casing in an oil and production well is to secondarily protect groundwater, should something catastrophic happen in the production casing. It provides another layer of casing and cement between the product being pulled from the ground and the groundwater. However, surface casing has many other equally important structural functions that cannot be considered incidental. Therefore, the

primary purpose of surface casing is not to prevent water pollution.” Director’s Response, page 25.

3. The Director denied Crescent Point’s application for its Deep Creek Well in part because: “. . . 2) although one purpose of surface casing is to protect groundwater, it is not the primary purpose, as surface casing has many purposes.” Director’s Response, p. 15.

Crescent Point contends that the DOGM regulation requiring surface casings indicates that the primary purpose is to protect groundwater because it is the first purpose listed in the regulation, which provides:

3. In areas where the pressures and formations to be encountered during drilling are known, sufficient surface casing shall be run to: 3.1 Reach a depth below all known or reasonably estimated, utilizable, domestic, fresh water levels. 3.2 prevent blowouts or uncontrolled flows.

Utah Admin. Code R649-3-8. Even assuming the first listed is not the most important purpose, the regulation supports the conclusion that both purposes are important and neither is incidental. In addition, “DEQ recognizes that one of the many purposes of surface casing in an oil and production well is to secondarily protect groundwater....” Director’s Response, page 25. Other documents in the Administrative Record also support that the conclusion that groundwater protection and prevention of blowouts or uncontrolled flows are important purposes:

1. Section 7.3 of the API guidelines: “One of the main purposes of the surface casing is the protection (through isolation) of groundwater aquifers. The surface casing is designed to achieve all regulatory requirements for isolating groundwater and also to contain pressures that might occur in the subsequent drilling process.” Finding of Fact number 3.
2. “The surface casing is a very important part of a well and serves many functions. The surface casing protects fresh water aquifers from contamination during drilling,

throughout the production phase, and even after the well is plugged. It acts as an anchor to which blow out prevention equipment is attached, it holds back unconsolidated or unstable shallow formations while the lower portion of the hole is being drilled, and it prevents loss of drilling fluid to permeable shallow formations.” (Utah Division of Oil, Gas & Mining, Department of Natural Resources, January 1996). AR000040.

3. “Once the conductor pipe has been put in place the surface hole is drilled to the base of groundwater protection, as defined by the regulatory body. Surface casing is lowered into the hole and cemented in place. At this stage, a barrier of steel and cement is created to prevent the contamination of potential shallow groundwater aquifers as well provide wellbore stability for the remaining drill hole.” (CSUR, “Understanding well Construction and Surface Footprint”). AR000155.
4. “Surface Casing. This casing is designed to provide a competent anchor for blowout prevention equipment, which provides well control until the next string of casing is set; and to protect fresh water zones.” (“BLM Manual, H-3161-1—Technical and Environmental Considerations, February 2, 1984). AR000310.
5. “Once the conductor pipe has been put in place the surface hole is drilled to the base of groundwater protection, as defined by the regulatory body. Surface casing is lowered into the hole and cemented in place. At this stage, a barrier of steel and cement is created to prevent the contamination of potential shallow groundwater aquifers as well provide wellbore stability for the remaining drill hole.” (CSUR, “Understanding well Construction and Surface Footprint”). AR000155.

The Utah courts in other contexts have concluded that there can be more than one primary purpose.⁸ This view is consistent with DWQ's April 1, 2016 memo which indicates that the primary purpose of the surface casing is not only a pollution control facility but also all of the other purposes listed in the memo. AR000198.

The Utah Legislature amended the pollution control sales and use tax exemption statute in 1994 to change the wording from "a substantial purpose" to "the primary purpose".⁹ The legislative history¹⁰ indicates that the rationale for the amendment was to make the standard harder, in order prevent prior abuses where applications were submitted for purposes only related to pollution control. The legislative history also indicates that determining primary purpose may be difficult if the equipment is not clearly for pollution control only and that the agency will have to address how primary purpose is defined; for example whether primary purpose means fifty one percent of all purposes or some other measurement or criteria. Based on the legislative history, the Legislature did not intend to refuse certification if an important purpose is water pollution prevention, even though there are other important purposes. Also, the Legislature left it to DEQ to address how primary purpose is determined. DWQ addressed how primary purpose

⁸ In Jensen v. Jensen, 2008 UT App 392, ¶ 9, 197 P.3d 117, 120, the Utah Court of Appeals lists three primary purposes of alimony (citing to Fish v. Fish, 2010 UT App 292, ¶ 25, 242 P.3d 787, 794). The Utah Supreme Court has listed several primary purposes of statutes: Machock v. Fink, 2006 UT 30, ¶ 26, 137 P.3d 779, 786 (Sup.Ct.) (Listing the primary purposes of Utah Code Ann. Section 57-1-32, the pleading requirements for a deficiency action.); Craftsman Builder's Supply v. Butler Mfg. Co., 1999 UT 18, ¶ 114, 974 P.2d 1194, 1226 (Sup.Ct.) (Listing the primary purposes of statutes of repose.)

⁹ H.B. No. 346, which amended Utah Code Ann. Sections 19-2-102, -124, -125, and -126 (where the pollution control sales and use tax exemption was codified at that time).

¹⁰ House Floor Debates:

<https://le.utah.gov/asp/audio/index.asp?Sess=1994GS&Day=0&Bill=HB0346&House=H#>;

Senate Floor Debates:

<https://le.utah.gov/asp/audio/index.asp?Sess=1994GS&Bill=HB0346&Day=0&House=S#>

is determined by preparing guidance on primary purpose which includes a four part test.¹¹ The DWQ guidance does not say there can only be one primary purpose.

The Administrative Record supports Crescent Point's position that the primary purpose, or one primary purpose, of the surface casing is prevention of water pollution:

1. Crescent Point's July 19, 2016 application addresses DWQ's tests for demonstrating that water pollution prevention is the primary purpose and attaches industry and government references that support water pollution as the primary purpose. AR000317-000357.

2. The email dated March 29, 2017 from counsel for Crescent Point to counsel for the Director states that the Affidavit of Floyd Hernandez was provided in response to DWQ's request that Crescent Point have an engineer certify that the primary purpose of the surface casing was water pollution prevention. AR000416-424.¹² The Affidavit of Floyd Hernandez dated March 21, 2017 states that "[t]he primary purpose of the surface casing constructed in accordance with Utah Admin. Code R649-3-8 is to prevent contamination of utilizable, domestic, fresh water sources" and the secondary function of the surface casing is "to prevent blowouts or uncontrolled flow by installing sufficient amounts of casing." AR000416-424.

3. Crescent Point's March 15, 2016 petition for review and attached references. AR000108-000197.

4. Draft Discussion Memo dated June 20, 2016 and attached references prepared by Crescent Point's counsel and submitted to DWQ. AR000200-316.

¹¹ See discussion at Section I.C.

¹² The Director submitted this document as part of the Administrative Record, even though it is dated after her September 15, 2016 denial.

E. Standard of Review.

The Director's denial is based on her legal interpretation of "primary purpose" and her factual and technical findings on the primary purpose of the surface casing and that water pollution prevention was not the primary purpose of the surface casing. Therefore, the issue of the primary purpose of the surface casing is a mixed question of law and fact. When the agency has been granted discretion to interpret the statute or regulation at issue, mixed questions of law and fact are reviewed under an abuse of discretion standard. *See Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 39, 308 P.3d 461. Here, § 19-1-301.5(16)(c)(i) expressly grants DWQ "substantial discretion to interpret its governing statutes and rules." Agency decisions on mixed questions of law and fact must be upheld under this discretion standard if they are "rationally based" and set aside only "if they are imposed arbitrarily and capriciously or are beyond the tolerable limits of reason." *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18 (internal quotation marks omitted).

For the reasons stated above and based on Crescent Point's marshaling of the evidence¹³, Crescent Point has satisfied its burden of proof that (i) DWQ's denial on the basis of primary purpose was clearly erroneous, by demonstrating that the DWQ's interpretation was arbitrary and capricious and not supported by the record and (ii) the primary purpose, or one primary purpose, of the surface casing is prevention of ground water pollution.

¹³ The Director asserts that "Crescent Point failed to include as evidence the many parts of the record that demonstrate surface casing has several purposes, thereby supporting the Director's determination." Director's Surreply, page 4. I find that Crescent Point cited to the relevant facts in its Opening Brief that support the Director's denial.

II. Treatment Works Are Not Required for Certification of the Surface Casing

The Director denied the Petitioner's certification application in part because there was no "treatment works":

Further, we find that an oil well surface casing does not meet the definition of a pollution control facility because there is no "treatment works" as defined by UCA Subsection 19-5-102(19) for industrial waste associated with the surface casing. AR 000359.

Petitioner contends that the Director's requirement to use treatment works is a new interpretation of the Pollution Control Act that is inconsistent with the statute, the rules and guidance. For the reasons stated below, DWQ erred in requiring use of treatment works as a basis for denial of Petitioner's certification application.

A. The Pollution Control Act Should be Construed to Mean "Or" the Use of Treatment Works.

The Pollution Control Act authorizes DWQ to certify "free standing pollution control property" if the primary purpose of the property is:

the prevention, control, or reduction of air or water pollution by: (A) the disposal or elimination of, or redesign to eliminate, waste, and the use of treatment works for industrial waste; (part of definition of "free standing pollution control property") at Utah Code Ann. Section 19-12-102(5).

As concluded in Section I above, the primary purpose, or one primary purpose, of the surface casing is the prevention of water pollution by the elimination of waste or pollutants. Petitioner asserts that the treatment works requirement (underlined above) is inconsistent with the concept of pollution prevention because treatment works are for "treating, stabilizing, or holding wastes"¹⁴ (or pollutants), with no mention of preventing pollution and that in order to harmonize

¹⁴ Utah Code Ann. § 19-5-102(19) (definition of "treatment works").

this provision, the underlined portion should read “or the use of treatment works for industrial waste”. AR000416-424; Crescent Point’s Opening Brief, pages 14-17; Crescent Point’s Reply Brief, Section I.

The Director responds that the use of treatment works is not inconsistent because treatment works prevent pollution. Director’s Response, page 17. However, DWQ’s letters approving Crescent Point’s two applications for certification of injection wells state that these wells “are permitted by the Division of Oil, Gas, and Mines and are the preferred method for disposal of produced water”. AR000058-75. The disposal of produced water is inconsistent with the concept of preventing pollution. AR000058-75.

When interpreting a statute, Utah courts look to the “plain language of the statute as a whole, and interprets its provisions in harmony with other statutes in the same chapter and related chapters”. *Miller v. Weaver*, 66 P.3d 592 paragraph 17 (Utah 2003). In order to harmonize the provisions of the definition of “free standing pollution control facility and all provisions of the Pollution Control Act, DWQ should construct the word “and” to mean “or”, so that the above quoted portion of the definition of “free standing pollution control facility reads (“or” is underlined for emphasis):

the prevention, control, or reduction of air or water pollution by: (A) the disposal or elimination of, or redesign to eliminate, waste, or the use of treatment works for industrial waste;

B. DWQ’s Interpretation of the Pollution Control Act to Require Treatment Works is Inconsistent with its Guidance and Application Form

DWQ’s September 25, 2016 denial letter which requires the use of treatment works is inconsistent with DWQ’s guidance and application form, which do not mention a treatment works requirement.

DWQ's form for Pollution Control Facility Application for Sales and/or Use Tax

Exemption Certification (AR000318-320) states:

1. To be certifiable, the PCF(s) must be designed, constructed, installed, or be use primarily (its primary function is) to control, remove, reduce or prevent water pollution. Basic to any consideration for exemption is that (1) there needs to be water pollution in the stream entering PCF(s) and (2) there needs to be a demonstrated reduction, control, or prevention of pollution.

The application form does not mention "treatment works" or require any information about "treatment works".

DEQ's guidance document entitled "Sales Tax Exemption, Water Pollution Control Facilities" (AR000325 - 000329) states:

Certain pollution control facilities are exempt from sales tax. [citations to rules and statute omitted.] These facilities are defined as any land, structure, building, installation, excavation, machinery, equipment, device, etc., if the primary purpose of the construction or installation is to prevent, control, or reduce air or water pollution.

The DEQ guidance document includes a section entitled "Guidance for "Primary Purpose"" which lists four points used by DWQ to determine the primary purpose of the pollution control facility.¹⁵ The DEQ Guidance does not mention "treatment works" as a requirement for certification.

C. The Administrative Record does not include any documents indicating that DWQ considered "treatment works" as a requirement for certification of the surface casing until September 15, 2016, when DWQ denied the Petitioner's application for certification.

On November 24, 2015, Crescent Point submitted an application for certification of the "casing system," which included the surface casing, conductor casing and production casing, for

¹⁵ See discussion above at Section I.C.

its Deep Creek 7-27-4-2E Well (“Deep Creek Well”) as a pollution control facility. AR000076, AR000083-85.

On January 20, 2016, Crescent Point submitted an application for certification of the surface casing of the Deep Creek Well as freestanding pollution control property pursuant to Utah Code Ann. § 19-12-102(5)(a). AR000092-97. In a letter dated February 11, 2016, DWQ denied the application for certification stating, “Surface casing for this production well does not qualify to be a Pollution Control Facility and the primary purpose of it (**sic**) not water pollution prevention.” AR000107. There is no mention of “treatment works” as a basis for denial of certification.

On April 1, 2016, the DWQ prepared a memo to the file, stating that the basis for its denial of certification was as follows: “Primary purpose of surface casing is not be a Pollution Control facility only, but also: protect BOP; isolate other zones; prevent fluid loss into or contamination of production zones; provide a stronger upper base to use high-density drilling fluid to continue drilling deeper; prevent unstable upper foundation from caving in and string of forming large caverns; seal off high pressure zones from the surface, avoiding potential for a blowout; maintain well stability and integrity.” AR000198. There is no mention of “treatment works” as a basis for denial of certification.

In a letter dated July 19, 2016, Crescent Point filed a revised application for certification of the surface casing of the Deep Creek Well as pollution control property under Utah Code Ann. § 19-12-102(6)(a), plus various attachments. AR000317-357.

There is nothing in the Administrative Record indicating that DWQ found any of Petitioner’s certification applications to be incomplete because treatment works was not

addressed or that DWQ requested the Petitioner to supplement any of its applications to address whether the surface casing used treatment works.

The Director denied certification for the surface casing of the Deep Creek Well in a letter dated September 15, 2016, stating that “the primary purpose of a surface casing is not pollution prevention” and

Further, we find that an oil well surface casing does not meet the definition of a pollution control facility because there is no “treatment works” as defined by UCA Subsection 19-6-102(19) for industrial waste associated with the surface casing.

AR000359-000360. This is the first mention Administrative Record that DWQ required the use of treatment works for certification of the surface casing.

D. The Administrative Record does not support the Director’s assertion that DWQ has required the use of treatment works in considering past certification applications.

The letter dated July 6, 2017 from Kimberlee McEwan, Assistant Attorney General, to Holland and Hart, attorneys for Petitioner, includes the following statements:

The DWQ looked at the sales tax exemption approvals and denials going back to 2008 to understand how this statute has been interpreted in the past. The attached table shows the sales tax exemption applications that were submitted, the type of facility, and the final action taken. This list may not be comprehensive, as the table has been kept by previous and current employees of DWQ simply as a tracking tool for application, and not as a comprehensive record of applications, but it is certainly helpful and instructive.

In general, of the applications that were approved, approximately half of them are wastewater treatment facilities, and the other half are waste disposal facilities (such as injection wells and landfills). Wastewater treatment facilities meet both requirements—that of eliminating or disposing waste, and the use of treatment works.

Landfills, by definition, also meet both requirements of disposing or eliminating waste, and also using treatment works. In many of the injection well applications, the use of a phase separator, such as a heater treater, is mentioned as the means by which the water quality is improved prior to disposal in an injection well. The

DWQ has accepted this as the treatment works even though the water quality improvements are a byproduct of the heater treater, which is primarily used to maximize the recovered hydrocarbons prior to disposal of the water product. Although it may not have been specifically mentioned in all applications, there is a general assumption that the wastewater that goes into injection wells—which eliminate or dispose of waste by definition—first goes through a similar type of treatment.

AR 000425-428 (emphasis added).¹⁶ As emphasized above, the letter itself indicates that DWQ may not have determined whether the pollution control facilities at issue in each application used treatment works.

The DWQ documents related to the approval of Crescent Point’s applications for two Class II injection wells (AR000058-75) do not mention the term “treatment works”, indicating that DWQ did not consider the treatment works requirement in approving the two applications.¹⁷ The Administrative Record does not include any other records for the applications summarized in the DWQ table (AR 000428) which could address whether or not:

1. DWQ required the use of treatment works for each application;
2. Whether the pollution control equipment involved industrial waste (wastewater) that would trigger the treatment works requirement; or
3. Whether the applicant had obtained a construction permit and an operating permit for treatment works as required under DWQ laws and regulations¹⁸.

¹⁶ The Director submitted this document as part of the Administrative Record, even though it is dated after her September 15, 2016 denial.

¹⁷ The Director asserts that these two applications show that DWQ did require use of treatment works. AR000425-428. However, the term “treatment works” is not used in the applications.

¹⁸ DWQ requires a construction permit and operating permit for treatment works. Utah Code Ann. § 19-5-107(3)(b).

E. DWQ’s interpretation of the Pollution Control Act that “the primary purpose of the facility must be both to dispose/eliminate waste *and* must involve the use of treatment works to treat the waste” is not supported by the Administrative Record.

The Director asserts that the Petitioner must show that “the primary purpose of the facility must be both to dispose/eliminate waste *and* must involve the use of treatment works to treat the waste.”¹⁹ Director’s Response to Crescent Point’s Opening Brief, page 21. The Director’s September 15, 2016 denial letter does not include this interpretation and there is nothing in the Administrative Record prior to the denial letter to support this interpretation.

Furthermore, the Director asserts that DWQ has certified injection wells because they satisfy the primary purpose of both disposal of waste and use of treatment works. However, the Director admits that DWQ certified injection wells even though the primary purpose of the phase separator (treatment works) is hydrocarbon recovery and water quality improvements are a byproduct:

In many of the injection well applications, the use of a phase separator, such as a heater treater, is mentioned as the means by which the water quality is improved prior to disposal in an injection well. The DWQ has accepted this as the treatment works even though the water quality improvements are a byproduct of the heater treater, which is primarily used to maximize the recovered hydrocarbons prior to disposal of the water product. AR000425-428 (emphasis added).

¹⁹ “DWQ has certified class II injection wells as pollution control facilities, as they meet both primary purpose requirements by disposing of waste produced at production wells like Crescent Point’s Deep Creek Well, and involve the use of treatment works, like the use of a phase separator, such as a heater treater. DWQ has accepted phase separators as treatment works, even though water quality improvements are a byproduct of the heater treater or other phase separator, which is also used to maximize the recovered hydrocarbons prior to the disposal of the waste product.” Director’s Response to Crescent Point’s Opening Brief, p. 21 (emphasis added).

F. Standard of Review.

The interpretation of the Pollution Control Act and whether treatment works is a requirement for certification is a question of law. The administrative law judge should grant “substantial discretion” to the agency in its interpretation of its governing statutes and rules. *See* Utah Code Ann. § 19-1-301.5(16)(c)(i); Utah Administrative Code Rule R305-7-214((3). DWQ’s legal interpretation of the Pollution Control Act and the implementing regulations may be overturned only if Petitioner shows that such interpretation is a “clearly erroneous interpretation or application of the law.” *See, e.g., Sierra Club v. BOGM*, 2012 UT 73, ¶ 10; *see also Assoc. Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291 (an agency’s “interpretation of the operative provisions of the statutory law it is empowered to administer” must be given deference). *See Utah Physicians for a Healthy Env’t v. Utah Dept. of Env’tl. Quality*, 391 P. 3d 148, paragraph 12 (recognizing this standard of review).

For the reasons stated above, Crescent Point has satisfied its burden of proof that DWQ’s interpretation of the Pollution Control Act to require the use of treatment works was clearly erroneous, by demonstrating that the DWQ’s interpretation was arbitrary and capricious, not supported by the record and inconsistent with the meaning of the provision as a whole.

CONCLUSION AND RECOMMENDED ORDER ON THE MERITS

1. Based on the foregoing, Crescent Point has met its burden to demonstrate that DWQ erred in denying Crescent Point’s certification application for the surface casing of the Deep Creek Well.

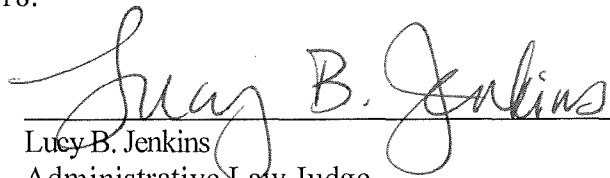
2. Further based on the foregoing and having satisfied my charge to undertake a permit review adjudicative proceeding in connection with this matter in accordance with Utah

law, I recommend that the Executive Director grant Crescent Point's Request for Agency Action and approve Crescent Point's application for certification of the surface casing for the Deep Creek Well.

NOTICE OF OPPORTUNITY TO COMMENT

Parties may file comments to the Recommended Order with the Executive Director of the Utah Department of Environmental Quality within ten business days of service of this Recommended Decision in accordance with the requirements of Utah Admin. Code R305-7-213(6). Comments shall not exceed 15 pages. A party may file a response to the other party's comments, not to exceed five pages, within five business days of the date of the service of the comments.

DATED this 31st day of August, 2018.



Lucy B. Jenkins
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2018, a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Recommended Order on the Merits was sent by electronic mail to the following:

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