BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: **CRESCENT POINT U.S. CORP.'S APPLICATION FOR CERTIFICATION OF THE SURFACE CASING OF THE DEEP CREEK 7-27-4-2E WELL AS POLLUTION CONTROL FACILITY**	**EXECUTIVE DIRECTOR'S REMAND ORDER** January 25, 2019 Lucy B. Jenkins Administrative Law Judge

In accordance with Utah Code Section 19-1-301.5(14)(a)(ii), the Executive Director hereby remands the Administrative Law Judge's (the "ALJ") Findings of Fact, Conclusions of Law, and Recommended Order on the Merits, dated August 31, 2018 (the "Proposed Order"), for supplemental briefing and analysis of several questions of law discussed below.

INTRODUCTION

The Executive Director thanks the ALJ and the parties, Crescent Point U.S. Corp. ("Crescent Point") and the Director of the Division of Water Quality ("Director") (and their counsel) for their conscientious work in presenting the present matter for final review. This matter involves complex questions of law and fact, and multilayer application of provisions of the Utah Code to the specific facts presented. The Proposed Order is detailed and thoughtful. However, upon careful review of the administrative record and in light of the fact that this matter presents many issues of first impression, the Executive Director has identified several important questions of law that deserve further consideration and development. This Order requests that the parties undertake more detailed legal analysis of several elements of the Utah Code provisions at issue which have not been adequately addressed by the record. The parties'

supplemental briefing should inform a new recommended order from the ALJ, and the ALJ may order additional supplemental briefing from the parties as the ALJ determines is warranted.

I. THE POLLUTION CONTROL ACT TAX EXEMPTIONS

The Executive Director requests that the parties' supplemental briefing account for distinctions in the Sales and Use Tax Act, codified at Utah Code § 59-12-101, *et seq*. (the "SUTA") and the Pollution Control Act, codified at Utah Code § 19-12-101, *et seq*. (the "PCA").

A. Statutory Interpretation

This matter in large part presents issues of statutory interpretation, which are questions of law. *See Hertzske v. Snyder*, 2017 UT 4, ¶ 5, 390 P.3d 307 (quoting *Vorher v. Henriod*, 2013 UT 10, ¶ 5, 297 P.3d 614) (both statutory interpretation and the application of a statute "present[] a question of law") (internal quotation marks and citation omitted). The Utah Supreme Court regularly engages in statutory analysis and has provided guidance as to how this is to be done: "It has been a long-held practice of the courts in this state to 'seek to give effect to the intent of the Legislature' when interpreting statutes," *Hertzske*, 2017 UT 4, ¶ 10 (quoting *State v. Rasabout*, 2015 UT 72, ¶ 10 & n.14, 356 P.3d 1258), and "[t]he best indicator of legislative intent is the plain language of the statutes themselves." *Hertzske*, 2017 UT 4, ¶ 10. To that end, courts read "the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12, ¶ 17; 66 P.3d 592, 597 (Utah 2003). *See also* Utah Code § 68-3-2(3) ("Each provision of, and each proceeding under, the Utah Code shall be construed with a view to effect the objects of the provision and to promote justice.").

B. The Sales and Use Tax Act.

"Since the 1930s, Utah law has imposed a tax on retail sales of tangible personal property." *B-J Titan Servs. v. State Tax Comm'n*, 842 P.2d 822, 824 (Utah 1992). The current statutory program is known as the Sales and Use Tax Act, codified at Utah Code § 59-12-101, *et seq*. (the "SUTA"). The SUTA itself includes several exemptions, such as sales of aviation fuel, motor fuel, special fuel that are already subject to excise tax, and sales of food and alcoholic beverages consumed during flights over the state. These exemptions are codified at Utah Code § 59-12-104. Notably, these exemptions include sales of tangible personal property where such property is "purchased for resale in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product." Utah Code § 59-12-104(25). This exemption was at issue in the *B-J Titan Services* case referenced above. The exemptions codified in the SUTA itself fall to the jurisdiction of the Tax Commission for review, subject to the Utah Administrative Procedures Act. Utah Code § 63G-4-101, *et seq.; See also B-J Titan Services*, 842 P.2d at 824 ("As the proceedings in these petitions commenced after January 1, 1988, the Utah Administrative Procedures Act . . . governs the standards of review.").

C. The Pollution Control Act.

By contrast, the legislature has created additional exemptions from the SUTA as part of the Pollution Control Act ("PCA"). The PCA forms part of the Environmental Quality Code, not part of the SUTA. As a result, there are important differences between the PCA and the SUTA, which are outlined below.

The PCA exemption is stated as follows:

19-12-201. Sales and use tax exemption for certain purchases or leases related to pollution control.

(1) Except as provided in Subsection (2), a purchase or lease of the following is exempt from a tax imposed under Title 59, Chapter 12, Sales and Use Tax Act:
(a) freestanding pollution control property;
(b) tangible personal property if the tangible personal property is:
(i) incorporated into freestanding pollution control property; or
(ii) used at, used in the construction of, or incorporated into a pollution control facility;
(c) a part, if the part is used in the repair or replacement of property described in Subsection (1)(a) or (b);
(d) a product transferred electronically, if the property transferred electronically is:
(i) incorporated into freestanding pollution control property; or
(ii) used at, used in the construction of, or incorporated into a pollution control facility; or
(e) a service, if the service is performed on:
(i) freestanding pollution control property;
(ii) a pollution control facility; or
(iii) property described in Subsection (1)(b), a part described in Subsection (1)(c), or a product described in Subsection (1)(d).
(2) A purchase or lease of the following is not exempt under this section:
(a) a consumable chemical that is not reusable;
(b) a consumable cleaning material that is not reusable; or
(c) a consumable supply that is not reusable.
(3) A purchase or lease of office equipment or an office supply is not exempt under this section if the primary purpose of the office equipment or office supply is not 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; or
(b) the disposal, elimination, or reduction of, or redesign to eliminate or reduce, air pollutants, air pollution, or air pollution sources, and the use of one or more air cleaning devices.

Therefore, subject to certain exclusions, the PCA exemption from the SUTA applies to two different categories of property: (1) ***freestanding pollution control property*** ("Freestanding Pollution Control Property"); and (2) tangible personal property that is (a) incorporated into Freestanding Pollution Control Property; or (b) used at, used in the construction of, or incorporated into a ***pollution control facility*** ("Pollution Control Facility").

Unlike the SUTA, where jurisdiction to grant an exemption falls to the Tax Commission, a person may not claim an exemption under the PCA until one of the directors of the Department

of Environmental Quality makes an express determination that the matter qualifies for the PCA exemption:

19-12-202. Certification required before claiming a sales and use tax exemption.
(1) Before a person may claim a sales and use tax exemption under Section 19-12-201, the person shall obtain certification issued in accordance with Section 19-12-303.
(2) For purposes of Subsection (1), if a certification relates to air pollution:
(a) a person shall submit an application under Section 19-12-301 or 19-12-302 to the director of the Division of Air Quality; and
(b) the director of the Division of Air Quality shall perform the duties described in:
(i) Section 19-12-303 related to certification; and
(ii) Section 19-12-304 related to revocation of certification.
(3) For purposes of Subsection (1), if a certification relates to water pollution:
(a) a person shall submit an application under Section 19-12-301 or 19-12-302 to the director of the Division of Water Quality; and
(b) the director of the Division of Water Quality shall perform the duties described in:
(i) Section 19-12-303 related to certification; and
(ii) Section 19-12-304 related to revocation of certification.

Under Utah Code Section 19-12-303(a) (for a "pollution control facility"), the Director must make four separate determinations in order for an application under Utah Code § 19-12-301 to qualify for the exemption under the SUTA:

(i) the application meets the requirements of Subsection 19-12-301(3);
(ii) the facility that is the subject of the application is a pollution control facility;
(iii) the person who files the application is a person described in Subsection 19-12-301(1); and
(iv) the purchases or leases for which the person seeks to claim a sales and use tax exemption are exempt under Section 19-12-201 . . . .

Utah Code § 19-12-303(a) (emphasis added).

By contrast, under Utah Code Section 19-12-303(b) (for a Freestanding Pollution Control Property), the Director must make four separate determinations in order for an application under Utah Code Section 19-12-302 to qualify for the exemption under the SUTA:

(i) the application meets the requirements of Subsection 19-12-302(2);
(ii) the property that is the subject of the application is freestanding pollution control property;
(iii) the person who files the application is a person described in Subsection 19-12-302(1); and

(iv) the purchases or leases for which the person seeks to claim a sales and use tax exemption are exempt under Section 19-12-201.

Utah Code § 19-12-303(b) (emphasis added).

The two certifications are similar except for the highlighted language in each subsection (ii). In the first instance, the Director must determine that the *facility* that is subject to the application is a Pollution Control Facility, while in the second case, the Director must determine that the *property* that is subject to the application is Freestanding Pollution Control Property. This is an important distinction that is addressed in more detail below.

Because the analysis that the Director must perform is different, depending on the type of exemption the requesting party asserts, the PCA requires a different application form for each type of exemption. Utah Code Section 19-12-301 relates to applications for claimed Pollution Control Facilities, while Utah Code Section 19-12-302 relates to applications for claimed Freestanding Pollution Control Property. It is important to note that under the statutory scheme, an application under one theory is not the same as an application under the other theory. By the express terms of the PCA, neither type of application applies to the other. *Compare* Utah Code § 19-12-301(5) ("This section does not apply to the certification of freestanding pollution control property") *with* Utah Code § 19-12-302(4) ("This section does not apply to the certification of a pollution control facility."). In this respect, the statute is clear and unambiguous.

D. Pollution Control Facility vs. Freestanding Pollution Control Property Theories

The administrative record shows that Crescent Point submitted its final application under the Pollution Control Facility theory and that the Director analyzed the application under this theory. Yet, the Proposed Order is presented using the Freestanding Pollution Control Property theory as the basis for reversing the Director's final decision. This situation arose because

Crescent Point purported to alter its legal position during legal briefing. This shift in legal positions is not allowed by the PCA and constitutes a major reason the Executive Director is remanding this matter to the ALJ for reconsideration.

When a director receives an application under Utah Code Section 19-12-302 requesting certification as a Freestanding Pollution Control Property a director must look to the following definition:

> (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; or
> (B) the disposal, elimination, or reduction of, or redesign to eliminate or reduce, air pollutants, air pollution, or air contamination sources, and the use of one or more air cleaning devices; and
> (ii) ***the tangible personal property is not used at, in the construction of, or incorporated into a pollution control facility***.

Utah Code § 19-12-102(5) (emphasis added).

On the other hand, when a director receives an application under Utah Code Section 19-12-301 requesting certification as a pollution control facility, a director must look to the following definition:

> (6)(a) "Pollution control facility" means real property in the state, regardless of whether a purchaser purchases the real property voluntarily or to comply with a requirement of a governmental entity, ***if the primary purpose of the real property*** is the prevention, control, or reduction of air pollution or water pollution by:
> (i) the disposal or elimination of, or redesign to eliminate, waste and the use of treatment works for industrial waste; or
> (ii)(A) the disposal, elimination, or reduction of, or redesign to eliminate or reduce, air pollutants, air pollution, or air contamination sources; and
> (B) the use of one or more air cleaning devices.

Utah Code § 19-12-102(6) (emphasis added).

As with any other matter that is governed by statute, the agency's analysis must begin with, and be consistent with, the statutory text, in this case focusing on one of the two definitions provided above. The Proposed Order presents a single legal theory, that the surface casing of the Deep Creek Well qualifies as Freestanding Pollution Control Property. *See* Proposed Order at 17-38.

The Proposed Order's adoption of the Freestanding Pollution Control Property theory, rather than the Pollution Control Facility theory, is not supported by the administrative record. Crescent Point submitted its application to the Director exclusively under the Pollution Control Facility theory. Under the PCA, a tax exemption based on the Pollution Control Facility theory is not the same as an exemption based on the Freestanding Pollution Control Property theory, as described above. The legislature created two different application programs for each type of exemption and provided two different definitions to correspond to each exemption. Applications for Pollution Control Facility certifications are submitted and processed under Utah Code § 19-12-301, while applications for certifications for Freestanding Pollution Control Property are submitted and processed under Utah Code § 19-12-302. As discussed above, these applications are separate and distinct.

Review of the administrative record shows that during legal briefing on the merits, Crescent Point impermissibly attempted to change the basis for its application. The Proposed Order states that "[o]n January 20, 2016, Crescent Point submitted an application 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." Proposed Order at 33 (emphasis added). This statement is incomplete and, in any event, misleading and irrelevant because the initial

application was withdrawn. While the cover email to the January 20, 2016 application (AR000092) states that the application was filed under the Freestanding Pollution Control Property theory, the actual application was made using the Division's Pollution Control Facility form. Yet, by Crescent Point's own representation, the January 20, 2016 application was withdrawn and should not form the basis of the ALJ's analysis or the Executive Director's review. On July 19, 2016, Crescent Point filed a "Revised Pollution Control Facility" application ("Revised Application"). *See* AR000317-357. To avoid any doubt, in its Revised Application, Crescent Point represented to the Director as follows: "This revised application is being filed and is meant to ***replace the previously filed applications***." *Id.* AR000320 (emphasis added). The Revised Application cannot be treated as an application for an exemption based on the Freestanding Pollution Control Property theory because Crescent Point never requested such a certification from the Director. *See* Utah Code § 19-12-301(5) ("This section does not apply to the certification of freestanding pollution control property").

Consistent with Crescent Point's Revised Application, the Director's final determination considered the question of whether the Deep Creek surface well casing qualified as a Pollution Control Facility and accordingly did not consider the Freestanding Pollution Control Property definition. *See* AR000359-60. Consistent with its Revised Application and the Director's final decision, Crescent Point's Request for Agency Action is based exclusively on the theory that the Deep Creek Well surface casing qualifies as a Pollution Control Facility. *See* AR000361 (Crescent Point appeals the Division of Water Quality's "denial 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*** . . . .") (emphasis added).

It was not until Crescent Point's Opening Brief, submitted on May 2, 2018, that Crescent Point purported to alter the legal basis for its claimed exemption, this time claiming that the Director's determination was clearly erroneous because the Deep Creek Well surface casing qualifies as Freestanding Pollution Control Property, a theory that was not considered by the Director because Crescent Point did not ask the Director to consider it. The apparent basis for this shift in legal strategy is found in a footnote on page 13 of Crescent Point's opening brief on the merits:

> Under Utah Code Ann. § 19-12-102, "Freestanding pollution control property" is tangible personal property and a "pollution control facility" is real property. In the case of *BJ-Titan v. Tax Comm'n*, 842 P.2d 822, 829 the Utah Supreme Court held that cement poured around well casing "has not lost its identity as tangible personal property." As such, Crescent Point will base its case on the definition of "freestanding pollution control property," as opposed to the definition of a "pollution control facility," though from Crescent Point's perspective, the outcome should be the same under either definition.

Crescent Point Opening Brief at 13, n.1. Crescent Point then proceeded to brief its case as if it had filed an application under, and the Director had based the decision on Utah Code § 19-12-302.

Crescent Point's attempt to shift its legal position should have been rejected out of hand because such an after-the-fact shift is not allowed based on the type of application Crescent Point filed and the Director reviewed. It is not appropriate to hold the Director to a determination that the Director was not asked to make (and expressly did not make). For avoidance of doubt, the Executive Director hereby rules that Crescent Point's application must be evaluated on its merits on the same terms under which it was filed and reviewed by the Director, namely, as a request for certification under Utah Code § 19-12-301 as a Pollution Control Facility.[1]

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[1] The Executive Director can find no basis for the following representation set forth on page 17 of the Proposed Order: "The parties have agreed that the freestanding pollution control facility

Both the Director (in briefing) and the ALJ (in the Proposed Order) failed to account for Crescent Point's shift in legal position. The Proposed Order analyzed the Director's underlying determination on the basis of Freestanding Pollution Control Property under Section 19-12-302. It should be analyzed under the Pollution Control Facility theory under Section 19-12-301.

E. Primary Purpose Analysis.

The "primary purpose" determination is at the heart of the PCA exemptions. The legislature has empowered two DEQ directors to make "primary purpose" determinations under the PCA, in contrast to having given the Tax Commission authority to determine exemptions under SUTA. This reflects the specialized technical and scientific expertise needed to make "primary purpose" determinations under the PCA. As the ALJ noted, based on the legislative history, the legislature "left it to DEQ to address how primary purpose is determined." Proposed Order at 27.

Yet the "primary purpose" analysis is different, depending on the theory presented to the Director. The Executive Director requests supplemental briefing to address the "primary purpose" analysis that applies to the Pollution Control Facility elements of the PCA, not the "primary purpose" analysis that applies to the Freestanding Pollution Control Property elements of the PCA.

In the case of Freestanding Pollution Control Property, the "primary purpose" test is embedded in the definition, as follows:

> (i) the primary purpose of ***the tangible personal property*** is the prevention, control, or reduction of air or water pollution. Utah Code § 19-12-102(5) (emphasis added).

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requirements are pertinent to the Petitioner's application to certify the surface casing at the Deep Creek Well . . . ." Even if such an agreement existed, it would be contrary to the express statutory language cited above. In any event, the Executive Director declines to allow the parties to shift, for the first time on appeal, the basis for an exemption under the PCA.

In the case of a Pollution Control Facility, the "primary purpose" test is likewise embedded in the definition, as follows:

> (6)(a) . . . , if the primary purpose ***of the real property*** is the prevention, control, or reduction of air pollution or water pollution. Utah Code § 19-12-102(6) (emphasis added).

The Proposed Order focuses exclusively on the legal question of whether the "primary purpose" *of the surface casing* of the Deep Creek Well is pollution control. *See* Proposed Order at 2-19. The Executive Director is not persuaded that this analysis is consistent with the plain language of the PCA. For Pollution Control Facility analysis, it must be determined that the primary purpose "of the real property" (*e.g.*, the *facility*) meets the pollution control criteria. By contrast, in the case of Freestanding Pollution Control Property, the focus of the "primary purpose" test is on "the tangible personal property" that is the subject of the application. The confusion of the primary purpose analysis is another reason for the Executive Director's remand to the ALJ for reconsideration.

"Real property" for Pollution Control Facility analysis is not defined by the statute. On this and related points, the legislature apparently intended to rely on the technical expertise of the agency to make the determination by focusing on the primary purpose of the real property (as opposed to the specific equipment or other freestanding personal property at issue). If the legislature had intended the analysis to be the same, it would not have created the distinctions present in the statutory scheme.

It is worth noting that under the PCA text, in the case of Freestanding Pollution Control Property, the tangible personal property at issue in the analysis must not have been "used at, in the construction of, or incorporated into a pollution control facility." Utah Code §

19-12-102(5)(a)(ii). The apparent intent of this limitation is if tangible personal property is used at, in the construction of, or incorporated into a *Pollution Control Facility* it becomes real property and thus is covered instead by the Pollution Control Facility exemption. Again, this portion of the definition makes it clear that the Pollution Control Facility and Freestanding Pollution Control Property theories must be mutually exclusive and must require different analyses: for tangible personal property that is incorporated into (or used in the construction of) real property, only the Pollution Control Facility exemption potentially applies, whereas for tangible personal property that retains its essential character as "freestanding" (*e.g.*, moveable, personal property), only the Freestanding Pollution Control Property theory would potentially apply. Utah Code § 19-12-102(5)(a). This interpretation is bolstered by the fact that the PCA requires separate applications for each type of exemption.

For purposes of the Pollution Control Facility "primary purpose" analysis, it should be noted that Crescent Point has taken the position that the surface casing of the Deep Creek Well qualifies as *tangible personal property*, not as real property. *See* Opening Brief at 13, n.1 (citing *B-J Titan*, 842 P.2d at 829) (noting, for purposes of the manufactured product exemption from the SUTA that cement poured around a well casing "has not lost its identity as tangible personal property."). This position is not necessarily inconsistent with the PCA, which provides a sales and use tax exemption, under the Pollution Control Facility theory, for *tangible personal property* "that is used at, used in the construction of, or incorporated into a pollution control facility." Utah Code § 19-12-201(1)(b)(ii). However, supplemental briefing should address the primary purpose of real, rather than personal property, as required by the fact that Crescent Point applied for certification as a Pollution Control Facility under Utah Code § 19-12-301.

The Proposed Order's focus on the primary purpose of the *surface casing* is not surprising because the Director's underlying analysis appears to be cast, at least in part, in the same terms. *See, e.g.*, AR000359 ("we conclude that the primary purpose of a *surface casing* is not pollution prevention . . . .") (emphasis added); Initial Order at 19-22 (summarizing the Director's evaluation of the primary purpose of the Deep Creek well *surface casing*). However, the Director also relied on the "treatment works" element of the Pollution Control Facility analysis, suggesting that the Director was, in fact, considering the "primary purpose of the real property," as required by the PCA. In this respect, the Director's decision is potentially ambiguous. Based on this potential ambiguity, remand to the Director may ultimately be the best course of action. The Executive Director will leave it to the parties and ALJ to address this question in connection with supplemental proceedings on remand. For the reasons discussed more fully below, it may well be that remand to the Director is not warranted because that decision is merely interim, and it falls to the Executive Director to render the final agency action. This is one of the primary questions that should be addressed on remand, before reaching other questions.

F. Treatment Works.

The Proposed Order suggests that one dispositive legal question presented here is whether "and" in PCA Section 19-12-102(5)(a)(i)(A) should be read in the conjunctive or disjunctive sense, to determine whether pollution control and treatment works are both required, or whether pollution control by itself is enough without treatment works. *See* Proposed Order at 30-31. The Executive Director is not persuaded that this is the correct question and requests that supplemental briefing address the "treatment works" element of the statute anew, within the

proper Pollution Control Facility and real property lens as outlined above. An important element of the Director's final decision is the fact that "there is no treatment works." AR000360. While there is some potential ambiguity in the Director's decision as to the focus of the primary purpose analysis, the reference to treatment works was based on the Director's evaluation of the Pollution Control Facility definition. *Id.* As discussed above, there are more broad legal questions that must be addressed before reaching the conjunctive/disjunctive issue. These broad issues have not been briefed by the parties or evaluated by the ALJ. The new proposed order should evaluate the conjunctive/disjunctive legal question in the broader context of the PCA provisions as discussed herein.

II. STANDARDS OF REVIEW

The Executive Director further requests that the parties account for the following rules of statutory construction, scope, and deference in their supplemental briefing. A director's determination under the PCA is "another administrative authorization made by a director." Utah Code Section 19-1-301.5(1)(e)(5). As a result, if a director's determination under the PCA is appealed, this is to be accomplished as a permit review adjudicative proceeding under Utah Code Section 19-1-301.5. The review procedures for a permit review are distinguishable from the Utah Administrative Procedures Act that governs decisions made by the Tax Commission under the SUTA.

A. Strict Construction of Sales and Use Tax Exemptions.

While review of PCA exemptions falls to the Department of Environmental Quality, not the Tax Commission, the Executive Director is persuaded that in connection with the statutory analysis described above, the Utah Court of Appeals and Supreme Court would nevertheless

apply the general rules of tax code construction. After all, the PCA provides exemptions to the SUTA. To the extent that the Proposed Order engages in statutory analysis, it does not cite or rely on the tax code rules of construction that strictly review statutes providing for tax exemptions against the taxpayer. In connection with the requested statutory analysis, the AJL should evaluate and analyze the applicable provisions of the PCA in light of the guiding construction rules as articulated by the Utah Supreme Court. *See Hales Sand & Gravel, Inc. v. Utah State Tax Comm'n*, 842 P.2d 887, 890–91 (Utah 1992) (courts "generally construe taxing statutes in favor of the taxpayer and against the taxing authority," but "construe statutes providing tax exemptions strictly against the taxpayer.") (citations omitted); *see also Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980) (internal citations omitted) ("Even though taxing statutes should generally be construed favorable to the taxpayer and strictly against the taxing authority, the reverse is true of exemptions. Statutes which provide for exemptions should be strictly construed, and one who so claims has the burden of showing his entitlement to the exemption.").

B. Relevance of Director's Prior Certifications and Determinations.

The Proposed Order relies, in part, on prior certifications made by the Director under the PCA in prior matters that were not appealed, specifically, Crescent Point's prior applications for two Class II injection wells and the use of a phase separator. *See* Proposed Order at 34-36. The Proposed Order contends that the Director, not having required treatment works in those matters, has acted in a manner that is clearly erroneous by doing so now.

The relevance of these previous matters to the present review is not adequately explained in the Proposed Order. The Director's previous certifications, whether relating to Crescent

Point's Class II injection wells, phase separators, or other matters, have not been appealed, nor have they been reviewed by the Executive Director or other board or court. The full administrative records for such matters are not presented here. It may be that the Director made legal errors in the previous certifications, based on the statutory text. But it also may be that the Director made no such errors. That is not the question on appeal in this matter. Even if that were the case, there does not appear to be adequate information in the administrative record for this matter to understand the reasoning behind the Director's past decisions. The sole question before the Executive Director here is whether the Director's denial of the Revised Application is clearly erroneous under Utah Code Section 19-1-301.5.

Similarly, the Proposed Order takes issue with the Director's February 11, 2016 denial, based on the rationale that it did not require treatment works. *See* Proposed Order at 23. The Proposed Order contends that the Director's requirement of treatment works in the Director's final determination (dated September 15, 2016) is therefore clearly erroneous. Yet, the Proposed Order does not account for the fact that Crescent Point expressly withdrew the application(s) that formed the basis for the Director's February 11, 2016 denial. It stands to reason that just as Crescent Point's Revised Application was meant to replace all previous applications, so, too, the Director's final denial was meant to replace the previous denial letter. It would have been helpful had the Director expressly analyzed this issue, but the final denial letter is silent on this point. Yet, the rationale for holding the Director to the analysis of a withdrawn application is not explained in the Proposed Order. This question has not been adequately addressed in the parties' briefing or in the Proposed Order. The Executive Director's provisional view is that the Director's final decision (AR000359-60), issued in response to the Revised Application (which,

by its terms, superseded and replaced Crescent Point's prior applications) must stand on its own merits.

In short, if the ALJ concludes that the Director's previous determinations, in previous matters and based on withdrawn applications in this matter, are relevant to the question of whether the Director's final determination is clearly erroneous, the basis for this conclusion must be explained in detail in the new proposed order and must be supported by the administrative record.

C. Deference.

There seems to be the potential for confusion about the nature and scope of the instant review and the role that deference should play here. Because it is on appeal, the Director's decision here is only an interim agency action. At this stage of the proceedings, there is no final agency action. By definition, the final agency action will be the Executive Director's final order. *See Utah Physicians for a Healthy Env't. v. Utah Dep't of Envt'l Quality*, 2016 UT 49 ¶13. As a result, the Utah case law regarding deference to an agency's interpretations of the law are not applicable to the Executive Director's review of a Director's determinations. Rather, under the statute, the Executive Director is expected to "uphold all factual, technical, and scientific agency determinations that are not clearly erroneous." Utah Code § 19-1-301.5(14)(b). But the Executive Director's statutory deference to Directors is not equivalent to the level of deference a Utah court may apply to the final agency action. To the contrary, the Executive Director "may use the executive director's technical expertise in making a determination." Utah Code § 19-1-301.5(14)(d). Thus, the Executive Director and Division Directors have similar roles in reaching final agency decisions and both may employ their own technical expertise in rendering

a final agency action. Similarly, the ALJs appointed by the Executive Director to preside over adjudicative proceedings must meet minimum levels of technical and legal background and experience. *See* Utah Code § 19-1-301(5).

Thus, under the administrative procedures the legislature created for the Department of Environmental Quality, the roles for internal agency reviews are distinguishable from the role that a reviewing Utah court would apply should the Executive Director's final agency action be appealed judicially. The Utah court cases involving deference to administrative agencies thus do not have direct application at this stage of an adjudicative proceeding. The question of whether a Utah court should defer (if at all) to a final agency action does not apply until after the Executive Director has rendered a final decision. The purpose of the present internal review is to assist the Executive Director in applying the law to facts to render the final agency action. Standing in the shoes of the Executive Director, the ALJ's recommended order should present the case according to the statutory review scheme, rather than as if the Executive Director or ALJ were sitting as reviewing Utah court.

REMAND ORDER

For the reasons stated above, the Executive Director rules that Crescent Point's application must be evaluated on its merits on the same terms under which it was filed and reviewed by the Director, namely, as a request for certification under Utah Code § 19-12-301 as a Pollution Control Facility. As currently drafted, the Proposed Order conflates the analysis, leading to confusion, inconsistency, and an incomplete administrative record.

Based on the foregoing, the Proposed Order is hereby remanded to the ALJ for further proceedings and reconsideration as provided herein. Specifically, the parties shall include in their supplemental briefing an analysis consistent with this Order, including, the following questions:

1. Whether the Director's determination should be remanded to the Director for re-evaluation of the "primary purpose of the real property" instead of the primary purpose of the surface well casing, or whether this question is best addressed by the Executive Director at this point in the proceedings?

2. If the answer to the first question is that remand to the Director is not appropriate, whether the Director's September 15, 2016 determination is clearly erroneous, including analysis of the following two questions (among others):

a) what is the "primary purpose" of the Pollution Control Facility (real property) at issue in this application?

b) whether the PCA requires the existence of treatment works under the Pollution Control Facility theory?

DATED this 25th day of January, 2019.

By______________________________
Alan Matheson
Executive Director

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2019, a true and correct copy of the foregoing **Executive Director's Remand Order** was served via e-mail upon each of the following:

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