
**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**

**RECOMMENDED ORDER IN RESPONSE TO
DIRECTOR'S REMAND ORDER QUESTION
NUMBER ONE**

April 30, 2019

**Lucy B. Jenkins
Administrative Law Judge**

1. On August 31, 2018, the Administrative Law Judge (ALJ) issued the *Findings of Fact, Conclusions of Law, and Recommended Order on the Merits*.

2. On January 25, 2019, the Executive Director issued the *Executive Director's Remand Order* which requests supplemental briefing with analysis consistent with the Remand Order, including the following questions:

Remand Question 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?

Remand Question 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?

3. The Parties each filed Supplemental Briefs on Remand Question Number 1 and Responsive Briefs.

INTRODUCTION

Crescent Point submitted a Pollution Control Facility Application for Sales and/or Use Tax Exemption Certification for the surface casing at the Deep Creek Well to the Utah Division of Water Quality (“DWQ”) on July 22, 2016 (“Certification Application”). The Director issued a determination letter dated September 15, 2016, which denied Crescent Point’s Certification Application (“Determination”).

Crescent Point’s Certification Application was for a Pollution Control Facility, but Crescent Point presented its case as a request for certification of “Freestanding Pollution Control Property” in its Opening Brief. (Crescent Point’s Opening Brief, page 13, footnote 1). In its Response Brief, the Director agreed to Crescent Point’s characterization of the surface casing as “Freestanding Pollution Control Property”. (Director’s Response Brief, page 15, footnote 1). As the Parties agreed to shift Crescent Point’s Certification Application to a Freestanding Pollution Control Property application, the ALJ’s Recommended Order also characterized the surface casing as Freestanding Pollution Control Property.

The Executive Director declined to allow the Parties to change the characterization of the surface casing from a Pollution Control Facility to Freestanding Pollution Control Property. (Remand Order, pages 10-11, footnote 1.) As directed in the Executive Director’s Remand

Order, the ALJ will evaluate Crescent Point's Certification Application for the surface casing of the Deep Creek Well under Utah Code section 19-12-301 as a Pollution Control Facility.

ANALYSIS

The ALJ requested that the Parties submit supplemental briefs on Remand Question Number One. Having considered the Parties' supplemental briefs and response briefs, the ALJ recommends that a remand to the Director is not appropriate, based on the following analysis.

The Director asserts that the Director's Decision should be remanded to the Director, based on the following reasons:

1. The Director asserts that "the Director based his decision on the primary purpose of the surface casing itself, instead of basing his decision on the primary purpose of the entire facility, the Deep Creek Well". (Director's Supplemental Brief, page 2).
2. The Director asserts that the Remand Order indicates that "the focus of the primary purpose of a Pollution Control Facility is the 'primary purpose of the real property (e.g. the *facility*),' and not the primary purpose of the part of the property for which certification sought". (Director's Supplemental Brief, page 3).
3. The Director asserts that "based on the confusion surrounding the primary purpose analysis, the Executive Director cannot make an informed decision until a property primary purpose analysis is performed, which should be undertaken initially by the Director". (Director's Supplemental Brief, page 3).

The Remand Order states: "[f]or 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. (Remand Order, page 12). The Director misconstrues the Remand Order, as it does not say that the entire Deep Creek Well must meet the Pollution Control Facility criteria.

The Remand Order also states: “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).” (emphasis added; Remand Order, page 12). The Director misconstrues the Remand Order, as it is pointing out the distinction between the real property criteria for Pollution Control Facility and the personal property criteria for Freestanding Pollution Control Property. The Director’s Decision focuses on the primary purpose of the surface casing, which the Director appears to consider as real property.

The Administrative Record shows that the Director analyzed the Certification Application as an application for certification as a Pollution Control Facility and that the Decision was a denial of the application for certification as a Pollution Control Facility. (Remand Order, section I.D., page 6). Since Crescent Point’s application was for certification as a Pollution Control Facility, which is defined as real property, and neither the Administrative Record nor the Decision indicates that the surface casing is not real property, the Director appears to have considered the surface casing to be real property.¹ In addition, there is no reason that the Director should have focused on the distinction between Pollution Control Facility and Freestanding Pollution Control Property since Crescent Point’s Certification Application was for

¹ In addition, as noted in the Executive Director’s Remand Order, “the Director also relied on the ‘treatment works’ element of the Pollution Control Facility analysis [in addition to the primary purpose element], suggesting that the Director was, in fact, considering the “the primary purpose of the real property”.

a Pollution Control Facility. The Decision quotes the definition of Pollution Control Facility at Utah Code Section 19-12-102(6):

...the primary purpose of the real property is the prevention, control or reduction of...water pollution by (i) the disposal or elimination of, or redesign to eliminate: (A) waste; and (B) the use of treatment works for industrial waste; ... (emphasis added).

Crescent Point applied for certification of the surface casing cement and pipe, not the entire Deep Creek Well, as a Pollution Control Facility. As noted in the Remand Order, Crescent Point' Opening Brief re-characterized its application as an application for certification as Freestanding Pollution Control Property and asserted that the surface casing was personal property. Remand Order, page 13. However, Crescent Point now asserts that the surface casing is real property. Brief of Crescent Point on Remand Issue #1, pages 3-5. The Director appears to agree that the surface casing is real property:

The Director appreciates Crescent Point's clarification of the B-J Titan v. Tax Comm' ...case regarding cement used at oil production wells. It is clear that Crescent Point's application for certification of the surface casing at the Deep Creek Well should be treated as one for a pollution control facility, and not one for freestanding pollution control property. (Director's Response to Brief of Crescent Point on Remand Issue #1, page 1)

The Director may assert that he did not analyze whether the surface casing qualified as real property. However, the DWQ posts only one form of certification application on its website,

entitled Pollution Control Facility² and the form does not request information on the characterization of the property as real or personal property.

It does not seem appropriate at this point in this administrative proceeding to remand the Determination to the Director for re-evaluation of the primary purpose of the real property instead of the primary purpose of the surface casing. This question seems best addressed by the Executive Director at this point in the proceedings, since Crescent Point's Request for Agency Action was based on Director's September 15, 2006 Determination and the Administrative Record appears to indicate that the Director did consider the surface casing to be real property.

Crescent Point asserts that the analysis of whether the surface casing is a Pollution Control Facility or Freestanding Pollution Control Property is the same and that the ALJ should reissue the recommended order by changing the analysis from Freestanding Pollution Control Property to Pollution Control Facility. As the Parties' briefs were based on characterizing the surface casing as Freestanding Pollution Control Property and there are distinctions in the requirements for a Pollution Control Facility versus Freestanding Pollution Control Property, the ALJ recommends that the Parties resubmit briefs on whether the surface casing is a Pollution Control Facility.

RECOMMENDED ORDER ON REMAND ISSUE NUMBER 1

Based on the foregoing analysis, I recommend that the Executive Director order that a remand to the Director is not appropriate. The Decision was based on the Pollution Control

² https://deq.utah.gov/legacy/assistance-funds-grants/water-quality/water-pollution-control-tax-exemption/docs/2009/04Apr/tax_form1.pdf

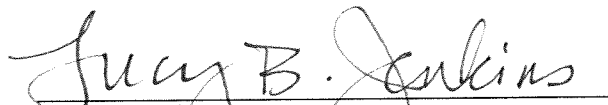
Facility theory and the focus was the primary purpose and treatment works criteria. As the parties now agree that this matter should be based on the original characterization of the surface casing as a Pollution Control Facility, I recommend that parties submit briefs on whether the surface casing qualifies as a Pollution Control Facility, including whether the surface casing of the Deep Creek Well is real property, and address whether the Director's September 15, 2016 determination is clearly erroneous, including analysis of the following questions:

- a) What is the "primary purpose" of the Pollution Control Facility (real property) at issue in this application?
- b) Whether the Pollution Control Act requires the existence of treatment works under the Pollution Control Facility theory?

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 30th day of April, 2019.



Lucy B. Jenkins
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2019, a true and correct copy of the foregoing **RECOMMENDED ORDER IN RESPONSE TO DIRECTOR'S REMAND**

ORDER QUESTION NUMBER ONE was sent by electronic mail to the following:

Administrative Proceedings Records Officer
DEQAPRO@utah.gov

Erica Gaddis
egaddis@utah.gov
Director, Division of Water Quality

Kimberlee McEwan
Assistant Attorney General
kmcewan@agutah.gov
Attorney for the Director, Division of Water Quality

Amanda Smith
asmithdillon@yahoo.com

Steven P. Young
spyoung@hollandhart.com
Holland & Hart LLP
Attorneys for Crescent Point U.S. Corporation

/s/ Karen Richardson