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

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**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 LIMITED  
REMAND ORDER TO THE DIRECTOR**

June 16, 2020

Lucy B. Jenkins  
Administrative Law Judge

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In accordance with Utah Admin. Code R305-7-215, the Executive Director hereby orders that this matter be remanded to the Director to issue a revised decision in accordance with this Limited Remand Order.

**INTRODUCTION**

Once again, 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. The Executive Director orders that this matter be remanded to the Director in order to provide a more detailed basis of the Director's underlying order.

**I. The Executive Director Will Treat the Proposed Order as an Interlocutory Appeal under Utah Admin. Code R305-7-215.**

Under Utah Code Section 19-1-301.5(10)(f), the "administrative law judge may take any action in a special adjudicative proceeding that is not a dispositive action." The Proposed Order presents a question of internal Department administrative procedure and is not a proposed dispositive order. Because the Proposed Order is not dispositive, it would ordinarily fall within the authority of the ALJ to enter it without seeking an interim order from the Executive Director. That being said, it is apparent that in this instance, the interests of administrative economy will

best be served by the ALJ's seeking an interim ruling from the Executive Director on this non-dispositive matter. See Recommended Order at 6-7 (providing an economy-based rationale for denying the Director's request to remand the matter). While not expressly stated in the Recommended Order, the most appropriate procedural basis for adopting the Recommended Order as an interlocutory order is under Utah Admin. Code R305-7-215, providing for interlocutory appeals as between the ALJ and the Executive Director in matters governed by Section 301.5.

While R305-7-12 is similar to Rule 5 of the Utah Rules of Appellate Procedure involving interlocutory appeals of non-final orders from state district court judges, the two rules arise in different contexts and should be applied differently. In the civil context, interlocutory appeals are rarely granted, in favor of the policy that only final judgments are subject to judicial review. This "final judgment rule" has several important purposes—to conserve limited judicial resources, avoid "interminable protraction of lawsuits," and minimize review of the trial courts' decisions, giving them an opportunity to "rectify some of their own possible misjudgments at early stages of the proceedings." *Copper Hills Custom Homes, LLC v. Countrywide Bank*, FSB, 2018 UT 56 ¶ 10, 428 P.3d 1133 (internal quotation marks omitted). Because appeals from non-final orders are presumptively improper, inefficient, and disturb the proper relationship between the trial and appellate courts, they are discretionary with the appellate courts. *See Copper Hills*, 2018 UT 56, ¶ 14.

As applied in this matter, however, the Executive Director reads Utah Admin. Code R305-7-215 expansively to promote the efficiency of agency adjudications. Unlike Rule 5, the relationship between the ALJ and the Executive Director is more like that of the relationship between a deciding officer (the Executive Director) and a hearing officer (the ALJ). Notably,

communications between the ALJ and the Executive Director do not fall within the types of communications defined under Section 301.5 as impermissible *ex parte* communications. *See* Utah Code § 19-1-301.5(15) (prohibiting *ex parte* communications between the executive director and any *party* except as may be necessary to address “ongoing operational matters that require the involvement of a division director”).

Based on the foregoing, the Executive Director will accept the Proposed Order as an interlocutory appeal and issue the following ruling on the merits of the Proposed Order. In this instance, it is fully appropriate for the ALJ to seek a ruling from the Executive Director on the remand question prior to completing the adjudication in order to avoid the risk of another remand after re-briefing on the merits.

## **II. Crescent Point Did Not Seek to Supplement the Administrative Record.**

One potential basis for remand to the Director could arise where the administrative record is supplemented with substantive information not previously considered by the Director. In this matter, however, in response to the Remand Order, Crescent Point did not seek to supplement the administrative record to support the theory upon which Crescent Point based its brief on the merits, specifically the Freestanding Pollution Control Property theory (as defined in the Remand Order). *See* Utah Code § 19-1-301.5(9)(c) (providing circumstances for supplementation of the record); Utah Admin Code R305-7-209 (providing for supplementation of the record); and R305-7-210 (providing procedures for responses to supplemental information). Rather, in response to the Remand Order, Crescent Point has reaffirmed that it desires to rely exclusively on the Pollution Control Facility theory, which apparently formed the basis of Crescent Point’s original application and the Director’s permit order. More specifically, Crescent Point offered the following re-evaluation of the evidence in light of the Remand Order:

Upon receiving the Remand Order, Crescent Point reviewed the facts and case law more closely on the subject of whether surface casing is real property or personal property. The surface casing at issue is “8 5/8” 555 24 ppf casing” and “surface cement – 15.8 ppg class V cement.” R. at AR000319. State more specifically, the surface casing is “a large-diameter 8.625 inch steel pipe permanently cemented into the wellbore. . . [and] encased in and affixed to the surrounding strata by industrial grade 15.8 Class V 2% chlorides cement.” R at AR000321. Based on closer review of case law, the cement and pipe compromising the surface casing are legally real property. As a result, the July 19, 2016 application and September 15, 2016 denial correctly presented and analyzed the surface casing as a “pollution control facility.”

*See* Brief of Crescent Point on Remand Issue #1 at 3 (emphasis in original). Based on this assessment, the current administrative record seems to be adequate to complete the adjudication as directed in the Remand Order. No new facts have been presented. And Crescent Point has acknowledged that the cement and pipe constituting the casing are real property, meaning that the Freestanding Pollution Control Equipment theory is not available to Crescent Point in this action as a matter of law.

Section 19-1-301.5 provides procedures for an appellate-like adjudication to review a Director’s permit order based on a clearly erroneous standard of review. *See* Utah Code §§ 19-1-301.5(9)(a) (“An administrative law judge shall conduct a special adjudicative proceeding based only on the administrative record and not as a trial de novo”); (14)(b) (providing that the “executive director shall uphold all factual, technical, and scientific agency determinations that are not clearly erroneous based on the petitioner’s marshaling of the evidence.”).

Supplementation of the record is not at issue in this matter. Whenever the administrative record is supplemented pursuant to Utah Code § 19-1-301.5(9)(c) and Utah Admin Code R305-7-209 to admit new, substantive evidence not previously considered by the Director, a remand to the Director may well be warranted to allow an opportunity for the Director to evaluate and weigh the new evidence in the first instance, for the petitioner to marshal the new evidence as required by statute, and for the ALJ and Executive Director to apply the “clearly erroneous” standard in

review of the Director's decision based on the full record, including the new evidence. But supplementation of the record is not at issue here. The Executive Director concurs with the Proposed Order that a remand to the Director is not warranted based on supplementation of the record.

### **III. Remand Is Appropriate for the Director to Provide More Detailed Findings, Conclusions, and Basis for the Director's Determinations.**

While Crescent Point has agreed to rely on the real property theory and the ALJ recommended against remand to the Director, the Executive Director finds that a limited remand to the Director at this point in the proceedings is appropriate under the circumstances presented. This conclusion is based on several considerations.

First, the Director requested a remand. *See* Director's Response to Brief of Crescent Point of Remand Issue #1. Because Department directors alone are authorized by statute to issue permit orders (which are subject to adjudication under Section 301.5) and to take enforcement actions (which are subject to adjudication under Section 301), a director's request for a remand should not be taken lightly. Department directors are the primary decisionmakers. In this matter, the Executive Director finds that the rationale for the Director's request for a remand is reasonable. The Director who issued the permit order at issue in this matter (Walter Baker) has since retired and the new Director has wishes to reconsider and clarify the basis for the permit order. The Executive Director shares the Director's concerns that the original permit order lacks details, findings, and analysis to support the scope of administrative and judicial review required by Section 19-1-301.5. The Director's request to remand is entirely consistent with the adjudicative review scheme set forth in Section 19-1-301.5, where the Director serves as the primary decisionmaker, is a party to the adjudication, and retains some degree of shared, concurrent jurisdiction over the matter until the Executive Director issues the final agency action.

For example, during the adjudication, a director could seek to amend or withdraw the permit order, notice of violation, or administrative order, or otherwise settle the dispute.

Second, a remand to the Director to create more detailed findings and conclusions is consistent with the review scheme created under Section 301.5 and the Department's rules. Under Section 19-1-301.5, the ALJ and the Executive Director are required, by statute, to make written findings of fact and written conclusions of law. *See* Utah Code §§ 19-1-301.5(12)(a) and (13)(c); Utah Admin. Code R305-7-206(7)(c). The references to "findings of fact" are somewhat anomalous because Section 301.5 provides procedures for an *appellate-like review* of a director's permit order. Neither the ALJ nor the Executive Director will conduct an evidentiary hearing, evaluate and weigh witness testimony, or otherwise weigh the evidence as the initial finder of fact. Rather, the Executive Director, and, by extension, the ALJ, are required to "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) (emphasis added). The statutory reference to "factual, technical, and scientific agency determinations" deserves analysis. The statutory reference to "agency" at this stage of the procedure specifically means determinations made by the director. But this wording also suggests that the director, as the primary decisionmaker, is required to gather, evaluate, and weigh evidence and make formal factual, technical, and scientific determinations in the first instance. Those determinations are then to be reviewed by the Executive Director (through the ALJ acting, in a sense, as the Executive Director's hearing officer), and then by Utah appellate courts based on the same record that the director first evaluated.

Moreover, Utah Admin. Code R305-7-214(3) provides that the "standard of review for non-factual determinations provided in Section 19-1-301.5(16) (c)(i) recognizes that the Director

has been granted substantial discretion to interpret the division’s governing statutes and rules.”<sup>1</sup>

This rule is appropriate because division directors are the primary decisionmakers on permit orders (and financial assurance determinations). Division directors have special expertise and staff to support important programs that often involve federal primacy issues and oversight in highly technical areas, including radiation control, drinking water, hazardous waste, and air quality. But this rule also demonstrates the need for division directors to document how they have exercised their “substantial discretion to interpret the division’s governing statutes and rules” pursuant to findings and conclusions that are adequately detailed to support the review, by the Executive Director and Utah courts, of the director’s determinations.

To be sure, the Executive Director has authority to take judicial notice of matters not in the record and may use the Executive Director’s “technical expertise” in rendering the Department’s final agency action. *See* Utah Code § 19-1-301.5(14)(c)-(d). Moreover, it is the Executive Director’s final order, not the Director’s underlying order, that serves as the Department’s final agency action for judicial review. *See Utah Physicians for a Healthy Environment v. Department of Environmental Quality*, 2016 UT 49, ¶¶ 14-16 (holding, under Section 19-1-301.5, that a public interest group’s failure to directly address the Executive Director’s final agency action in its opening brief to the Supreme Court, instead of the Director’s underlying decision that was reviewed by the Executive Director, was “fatal” to the judicial appeal). Appellate review standards of the Department’s final order are provided in Section 19-1-301.5(16)(c). Finally, in reviewing the ALJ’s proposed findings of fact, conclusions of law, and proposed order, the Executive Director may adopt, *adopt with modifications*, reject, or

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<sup>1</sup> The Utah Administrative Code cites to a previous version of the Utah Code, referencing subsection (15)(c)(i). The citation has been updated to the correct statutory citation, which is quoting the provision relating to judicial review of agency determinations. In the rule, it is recognized that this agency discretion falls primarily to the division directors.

remand the ALJ's proposed dispositive action. *See* Utah Code § 19-1-301.5(14)(a). Based on these authorities, the Executive Director, acting for the Department, enjoys latitude in reaching a final order that may include additional, supplemental, or modified analysis.

However, the Executive Director's latitude to modify a Director's permit order should not be a substitute for matters that would ordinarily fall to the director in the first instance. Expecting the directors to issue complete and detailed findings and conclusions is consistent with the requirement, under the statute and the Department's rules, that the petitioner has the burden to marshal the evidence. *See* Utah Admin. Code R305-7-214(2)(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."). It is not reasonable to expect a petitioner to marshal the evidence if the director has not adequately explained the basis for the director's determinations in the first instance. This could leave it to the petitioner—and the ALJ and Executive Director—to speculate about the basis for the director's permit order.

The Utah Supreme Court faced a similar situation in *Kennon v. Air Quality Board*, 2009 UT 77. To be sure, *Kennon* was decided under a Department review scheme in effect prior to the enactment of Section 301.5 (wherein the Department's boards conducted adjudications). However, this case is instructive insofar as the scope of detail the Supreme Court expects to see in a director's decision to support judicial review. In *Kennon*, the appellants, members of a public interest group, challenged a final permit order issued by the Air Quality Board. In reversing the Air Quality Board's determination, the Supreme Court rejected the Board's argument that the appellants failed to marshal the evidence supporting the Board's decision:

Kennon and Cumiskey marshaled the only evidence available to support the Board's findings—a photocopy of a Post-it note briefly recording the date December 19, 2005 and



the phrase “contacted RE: eighteen month Tech analysis,” and a letter from the Division indicating that a review had been completed. This evidence was identified in and attached to Kennon and Cumiskey’s briefing.”

2009 UT 77, ¶ 27. The Supreme Court found that this degree of evidence did not satisfy the substantial evidence standard and remanded to the Board for a new hearing. To be sure, the Post-it note was not the only evidence of record. However, the Supreme Court found that conclusory testimony that the director and the permit engineer provided to the Board—stating that they conducted a technical review—failed to “adequately bolster the barely existent written record.”

See 2009 UT 77, ¶ 28. The Supreme Court elaborated:

A record limited to a Post-it note indicating that someone was contacted regarding a review is woefully inadequate to convince a reasonable person that a review took place, let alone that the review was sufficiently rigorous to ensure that an approval order implemented the best control technology and would not tie up increment limits unnecessarily.

*Id.* Rather, the Supreme Court expected to see “specifics, such as exactly how many or which permits were compared” to the one at issue to determine the best available control technology in order to meet the substantial evidence standard. *Id.*

Based on *Kennon*, the administrative record must include specific analytical details to demonstrate how and why the director reached a particular conclusion that a person reviewing the director’s decision—be it the Supreme Court or the Executive Director—may determine whether the director’s decision is based on substantial evidence (the standard applicable in *Kennon*) or clearly erroneous (the standard under Section 301.5).

Section 301.5 places important responsibilities on Directors as the primary agency decisionmakers for permit orders and financial assurance determinations. Neither the ALJ nor the Executive Director weighs evidence or finds facts in the first instance. Even at the internal agency review step, the role of the Executive Director and the ALJ is appellate-like in function—

to determine whether the Director's decision is clearly erroneous based on the petitioner's marshaling of the evidence. This statutory scheme presumes that the director will make adequate "factual, technical, and scientific" determinations to enable the petitioner to marshal the evidence and for the ALJ to create written findings of fact, conclusions of law, and a proposed order for the Executive Director to review. The ALJ is required to do this based solely on the record and the director's determinations, without conducting any sort of trial. Thus, the critical responsibility to create detailed written findings of fact, conclusions of law, and a statement of basis for the permit order falls to the director. Just as the record should not leave the petitioner to speculate about the basis for the Director's permit order, the ALJ and the Executive Director should not be placed in the position of having to speculate and evaluate the entire record in an attempt to support and reconcile the director's determinations. The responsibility to explain the basis for those factual, technical, and scientific determinations in the first instance falls to the director.

The same conclusions can be reached with respect to a director's legal determinations of the department's statutes and rules for which the *director* deserves discretion under Utah Admin. Code R305-7-214(3) and Section 19-1-301.5(16)(c)(i). The statutory scheme under Section 301.5 and the Department's rules presume that the director will provide adequate legal analysis, rationale, and support to support review. If a director's proffered legal analysis is nothing more than a bare legal conclusion, a review of the director's determination would be especially challenging. *See* AR000360 ("Further, we find that an oil well surface casing does not meet the definition of the 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.").

A limited remand to the Director is also consistent with the Utah Administrative Procedures Act (UAPA), which is relevant to consider in connection with the nature, purpose, and scope of Section 301.5. *Compare* Utah Code § 63G-4-208(1) (describing the level of detail required for a presiding officer's order) *with* Utah Code § 63G-4-301(6)(c) (describing the level of details required for an internal agency review where a superior agency reviews the inferior agency's initial decision to render a final agency action). These UAPA requirements are analogous to Section 301.5, where the Executive Director, as the superior agency, is called upon to review a director's determinations and, in doing so, issue findings of fact, conclusions of law, and a rationale for a final order. *See* Utah Code §§ 19-1-301.5(12)(a) and (13)(c).

Finally, it is worth noting that Rule 52 of the Utah Rules of Civil Procedure, and related case law, provide analogous procedures in the realm of civil procedure. When conducting bench trials, "the court must find the facts specially and state separately its conclusions of law . . . ." URCP Rule 52(a)(1). This rule appears to be the basis, at least in part, for the statutory requirement that the ALJ make written findings of fact and conclusions of law. As a result, it is appropriate to hold directors to roughly the same kinds of requirements as district court judges under Rule 52. The requirements serve the same core purpose – to facilitate review of a decision.

Based on the foregoing, the Executive Director under 19-1-301.5(14)(a)(ii), returns this matter to the ALJ with the following instructions: To order a limited remand to the Director for the purpose of issuing a revised permit order that includes: (1) written findings of fact; (2) written conclusions of law; and (3) sufficient legal analysis to enable agency and judicial review of the Director's order, consistent with this Order and the Remand Order. The remand to the Director is limited in scope and time. The record is closed. The information in the record, as may be supplemented by the adjudicative record, should be adequate for the Director to issue a

revised form of permit order. This should be done prior to re-briefing on the merits so that the record in this matter is complete and adequate for review by the Executive Director and, if necessary, Utah appellate courts. The Executive Director expects the Director to be able to complete this process quickly, hopefully within 60 days. There is no need to file an amended Petition for Review. As soon as the Director has issued a new permit order decision, this matter may then proceed to briefing on the merits.

The Remand Order included several specific questions. Upon further consideration, on remand to the Director, the Executive Director re-casts these suggested issues on remand to the Director as follows:

1. Does the Director intend that the new Permit Order supersede the Director's rationale presented in the Director's prior order? *See* Remand Order at 9-10.

2. In light of the statutory analysis provided in the Remand Order, what are the Director's findings and conclusions regarding whether the statute requires a treatment works in all situations? How much discretion is the agency afforded in determining that a treatment works be part of the real property?

3. How would the Director address prior Director decisions that may—or may not have—applied the treatment works element stringently in other tax certification matters? *See* Utah Code § 63G-4-403(4)(h)(iii) (providing that a reviewing court may overturn an agency action if it is “contrary to the agency’s prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency . . .”). To create a complete record for review, it is important that the Director’s amended permit order directly address the agency’s prior practice issues with respect to the treatment works element as summarized in the Remand Order at 16-18 and prior briefing.

4. In light of the statutory analysis provided in the Remand Order, what are the Director's findings and conclusions regarding the geographical limits of the real property element in the statute as applied to the facts of this matter? Specifically, is the statutory concept of real property limited to the well casing in question or is it a broader concept that includes the overall treatment facility, including a treatment works? What is the basis for the Director's determination on this issue?

5. Any other issue the Director or the ALJ deem to be relevant to facilitate review of this matter.

### **CONCLUSION**

The Executive Director appreciates that resolution of this matter has taken a long period of time and that remand to the Director may be seen as resulting in yet additional delay. However, after careful consideration of the record, the Executive Director has concluded that requiring that the Director issue a more detailed permit order that addresses the key questions on appeal in the first instance will ultimately result in the most efficient review process possible under the circumstances presented.

### **ORDER**

Based on the foregoing, the Executive Director requests that the ALJ remand this matter to the Director for reconsideration and re-issuance of an amended permit order.

DATED this 16<sup>th</sup> day of June, 2020.

Signature:   
L. Scott Baird (Jun 16, 2020 21:18 MDT)

By \_\_\_\_\_  
L. Scott Baird  
Executive Director

## CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of June, 2020, a true and correct copy of the foregoing **Executive Director's Limited Remand Order to the Director** was served via e-mail upon each of the following:

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