
**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
AFTER REVISED PERMIT ORDER**

December 28, 2020

**Lucy B. Jenkins
Administrative Law Judge**

This matter is before me pursuant to an 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 Rules R305-7-101 to 113, R305-7-200 to 217, and the applicable sections of R305-7-601 to 623. Following are the Director's Findings of Fact and my Conclusions of Law and Recommended Order on the Merits.

REGULATORY BACKGROUND

1. This administrative proceeding arises under the Pollution Control Act (the "Act"), Utah Code Ann. §§ 19-12-101 to 305, and its implementing regulations found in Utah Admin. Code r. 317-12-1 to 5.
2. In order to claim a sales and use tax exemption under the 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 Act allows an exemption from sales and tax exemption for:

- (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;...

Utah Code Ann. § 19-12-201.

4. The Act defines a “pollution control facility”as:

... 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;...

Utah Code Ann. § 19-12-102(6)(a).

5. The Act defines “freestanding pollution control property” 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

6. On July 22, 2016, Crescent Point U.S. Corp. (“Crescent Point”) submitted a revised application for pollution control facility tax exemption certification to the Utah Division of Water Quality (“Division”) (“Revised Application”) which requested a sales and use tax

exemption for the surface casing of the Deep Creek 7-27-4-2E oil production well (“Deep Creek Well”) as a pollution control facility.¹ AR000317-357.

7. On September 15, 2016, the Director of the Division (“Director”) denied the Revised Application on the grounds that the primary purpose of the surface casing was not pollution prevention and that it did not meet the Act’s definition of a pollution control facility:

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.

8. On October 14, 2016, Crescent Point filed a Request for Agency Action challenging the Director’s denial of the Revised Application.

9. On August 31, 2018, the Administrative Law Judge (“ALJ”) issued a Recommended Order in favor of the Deep Creek Well receiving certification as a freestanding pollution control facility (“Recommended Order”).

10. On January 25, 2019, the Executive Director of the Utah Department of Environmental Quality (“Executive Director”) remanded the case back to the ALJ to conduct

¹ Crescent Point states that this application supersedes and replaces its previous applications filed on November 24, 2015 and January 20, 2016. AR000320.

supplemental briefing, stating that a decision must be made consistent with the Revised Application which sought certification of the surface casing as a “pollution control facility” and not as “freestanding pollution control property,” as those terms are defined in the Act.. (“Remand Order”).

11. On June 16, 2020, the Executive Director issued a Limited Remand Order to the Director, asking for issuance of “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” (“Limited Remand Order”). Limited Remand Order, at p. 11.

12. On September 4, 2020, the Director issued an Amended Denial of Crescent Point’s Water Pollution Control Facility Certification (“Amended Denial”).

13. On November 10, 2020, after receiving briefs on the merits from the parties, the ALJ heard oral arguments on the merits of Crescent Point’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), the ALJ hereby submits to the Executive Director the following Findings of Fact, Conclusions of Law, and Recommended Order on the Merits.

DIRECTOR’S FINDINGS OF FACT

1. On July 22, 2016, Crescent Point filed a Revised Application for Sales and/or Use Tax Exemption (“Revised Application”) for Deep Creek 70270402E Well at SWNE 27 4.0 S 2.0 U in Uintah County, Utah.

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

2. Crescent Point requested certification of the surface casing of the Deep Creek Well as a standalone real property pollution control facility. The surface casing consists of concrete and piping. Revised Application, ¶ 8.

3. In its Revised Application, Crescent Point maintained that the surface casing of the Deep Creek Well satisfies the criteria for certification as a water pollution control facility. *See Id.*, p. 1.

4. The surface casing of the Deep Creek Well is comprised of an 8.625- inch steel pipe permanently cemented into the wellbore that runs from the surface to a depth of just over 1,000 feet. *See Id.*, p. 2.

5. Throughout its length, the steel pipe is encased in and affixed to the surrounding strata by industrial-grade 15.8 ppg Class V 2% chlorides cement. *Id.*

6. The Revised Application states that the surface casing was “designed” in compliance with Utah Admin. Code R649-3-8. *Id.*

7. Utah Admin. Code R649-3-8 requires that “in areas where the pressures and formation to be encountered during drilling are known, sufficient surface casing shall be run to reach depths below . . . domestic, fresh water levels [and] prevent blowout or uncontrolled flows. The casing program . . . must be planned to protect any potential oil or gas horizon 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.”

8. The primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction and of the well during oil production. *See, e.g.*, Administrative Record for the administrative adjudicative proceeding at AR000001, AR000003, AR000002, AR000040, AR000052, AR000054-55, AR000080, AR000111, AR000155, AR000310.

9. The primary purpose of the Deep Creek Well is to bring to the surface “large amounts of oil, gas, and waste water (sic). . . .” *See* Revised Application, p.3.

10. Crescent Point does not describe any treatment works associated with the Deep Creek Well in its application for certification, nor can the Director find any treatment works associated with the Deep Creek Well. *See Id.*

11. Pursuant to Utah Code § 19-12-301, on September 14, 2016, the Director denied Crescent Point’s application to be certified as a pollution control facility. Director’s Amended Denial, pp. 2-3.

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. *Id.* § 19-1-301.5(13)(b) and (c).

In reviewing the proposed dispositive action, “[t]he 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.” *Id.* § 19-1-301.5(14)(b)³ Utah Administrative Code Rule R305-7-214 explains this standard of review as follows:

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

- (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.”

The standard of review for non-factual determinations recognizes that the Director has been granted substantial discretion to interpret its governing statutes and rules. Utah Code Ann. § 19-1-301.5(16)(c)(i); Utah Admin.Code r. 305-7-214((3). The Executive Director may use “the executive director’s technical expertise in making a determination.” Utah Code Ann. § 19-1-301.5(14)(d).

The Utah Sales and Use Tax Act includes a tax exemption for purchases or leases that are exempt under the Pollution Control Act (the “Act’). Utah Code Ann. § 59-12-104(11). The Act exempts a purchase or lease of “tangible personal property if the tangible personal property is: ... (ii) used at, used in the construction of, or incorporated into a pollution control facility”. A person must obtain certification from the Utah Division of Water Quality (or the Division of Air Quality) before claiming a sales and tax exemption under the Act. Utah Code Ann. § 19-12-202(1).

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.

While courts generally construe taxing statutes in favor of taxpayers and against the taxing authority, statutes providing tax exemptions are strictly construed against the taxpayers. *See Hales Sand & Gravel, Inc. v. Utah State Tax Comm 'n*, 842 P.2d 887, 890-91 (Utah 1992); *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"). Therefore, Crescent Point has the burden of showing that its certification application meets the requirements for a tax exemption, and the Act must be strictly construed against Crescent Point.

CONCLUSIONS OF LAW

Crescent Point's Revised Application applied for certification of the surface casing as a pollution control facility. However, Crescent Point treated the surface casing as freestanding pollution property - instead of a pollution control facility - in its briefs during the motions phase of this administrative proceeding. The Director did too. Thus, the Recommended Order was based on Crescent Point's and the Director's characterization of the surface casing as a freestanding pollution property, rather than as a pollution control facility (as stated in Crescent Point's application).

The Remand Order directed the ALJ and the parties to refocus on the Revised Application as an application for certification of the surface casing as a pollution control facility. In the Remand Order, the Executive Director pointed out the distinctions between exemption applications for a pollution control facility versus a freestanding pollution property, including that the pollution control facility exemption applies to "tangible personal property if the tangible

personal property is: ... (ii) used at, used in the construction of, or incorporated into a pollution control facility;” Utah Code Ann. § 19-12-201(1)(b). Accordingly, the Executive Director remanded the Recommended Order to the ALJ for further proceedings and reconsideration and directed the parties to include in their supplemental briefing: (i) an analysis of whether the Director’s certification denial should be remanded to the Director for re-evaluation of the primary purpose of real property instead of the primary purpose of the surface casing (as personal property) ; and (ii) if remand to the Director is not appropriate, analysis of: the primary purpose of the pollution control facility (real property) and whether the existence of treatment works is required.

It is important to note that as of the time the Executive Director issued the Remand Order, Crescent Point had characterized the surface casing as personal property and characterized its application as certification of freestanding pollution control property (personal property) in its briefs. The Executive Director remanded the matter for consideration of the surface casing as a pollution control facility, consistent with Crescent Point’s application. Following the Remand Order, Crescent Point reverted to its original position, as an application for certification of the surface casing as a pollution control facility, and acknowledged that the surface casing is real property. *See* Brief of Crescent Point on Remand Issue #1, p. 3.

Following briefing of whether the Director’s certification denial should be remanded to the Director, the ALJ issued its Recommended Order in Response to Director’s Remand Order Question Number One dated April 30, 2019, which recommended that a remand to the Director is not appropriate. The Executive Director then issued its Limited Remand Order to the Director dated June 16, 2020, which directed the Director to issue a revised permit order that includes findings of fact, conclusions of law, and legal analysis.

Pursuant to the Limited Remand Order, the Division issued the Director's Amended Denial of Crescent Point's Certification Application which analyzed Crescent Point's application for certification of the surface casing as a pollution control facility. The Director denied Crescent Point's Application based on the following determinations:

- (i) "The Director has determined that Crescent Point's application was complete, that it was submitted on a form prescribed by the Director, and that it contained the following, as required by statute: a description of the pollution control facility, a description of the property, part, product or service for which a sales and use tax exemption was claimed, a description of the existing or proposed operation procedure for the claimed pollution control facility; and a statement of the purpose serviced or to be served by the pollution control facility. At this time, the Division of Water Quality used only one application form for both a real property pollution control facility, and a tangible personal property freestanding pollution control property.
- (ii) The Director hereby makes a determination that, according to the Pollution Control Act, the Director cannot certify the surface casing standing alone as a pollution control facility. The materials used to construct the surface casing can only be exempt from sales and use taxes pursuant to Utah Code § 19-12-201 if they are "used at, used in the construction or, or incorporated into a pollution control facility," which means that the Deep Creek Well as a whole must be certified as a pollution control facility in order for Crescent Point to receive a sales and use tax exemption. The statute does not allow the Director to segregate parts of the pollution control facility to meet the definition of a pollution control facility. Further, the statute requires a treatment works in all cases, and there is not a treatment works associated with the Deep Creek Well. Therefore, the Director hereby makes the determination that the Deep Creek Well in Uintah Utah, does not meet the definition of a pollution control facility because the primary purpose of the facility the Deep Creek 7-27-4-2E oil production well is to produce oil, not to prevent control, or reduce water pollution, and because there are no treatment works associated with the facility, both as described in detail later.
- (iii) The Director hereby makes a determination that the person who filed the application is a person described in Subsection 19-12-301(1). Crescent Point is a person who is "an owner. . . . of a trade or business that includes a pollution control facility." See Utah Code § 19-12-301(1)(a).
- (iv) The Director hereby makes a determination that the purchase for which Crescent Point seeks to claim a sales and use tax exemption, which includes the concrete and piping that make up the surface casing for the well, are not exempt under Utah Code § 19-12-201, because they were not "used at, used

in the construction or, or incorporated into a pollution control facility.” See Utah Code § 19-12-201(1)(b)(ii). This determination was made because the Deep Creek 7027-4-2E well has been determined not to be a pollution control facility, so that any tangible personal property (i.e., the concrete and piping used to construct the surface casing) used at, used in the construction of, or incorporate into the well are not exempt from sales and use taxes.”

Amended Denial, pp.8-9 (emphasis added). The Director stated that its Amended Denial supersedes and replaces the Director’s September 15, 2016 denial of Crescent Point’s certification application. *Id.*, p. 1.

For the reasons stated below, the ALJ recommends that the Executive Director deny Crescent Point’s application for certification of the surface casing of the Deep Creek Well as a pollution control facility.

I. The Primary Purpose of the Surface Casing as a Pollution Control Facility is Not Pollution Prevention

A. Crescent Point’s exemption application was for the surface casing, not the Deep Well Creek.

The Executive Director did not allow Crescent Point to shift its legal position to claim that the surface casing was freestanding pollution control property: “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.” Remand Order, p. 10. For the same reasons that the Executive Director did not allow Crescent Point to change its certification application to freestanding pollution control property, the Director cannot change Crescent Point’s application from the surface casing to the Deep Creek Well. In addition, the Administrative Record was created in response to Crescent Point’s Revised Application. Also, the Director determined that the application was complete and that it contained a description of the pollution control facility, but this was incorrect because the Director considered the Deep

Creek Well to be the pollution control facility, instead of the surface casing covered in the Revised Application.

The Director claims that the Executive Director directed the parties to consider the primary purpose of the Deep Creek Well instead of the surface casing, but this is misleading. *See* Director's Supplemental Brief Regarding Remand Order Question #1, p. 3; Director's Response to Brief of Crescent Point on Remand Issue #1, p.2. Instead, the Executive Director directed the parties to consider the primary purpose "of the real property (e.g. the *facility*)" instead of the surface casing (which at that time Crescent Point considered the surface casing to be freestanding pollution control property (personal property)). The Remand Order distinguishes the pollution control facility (real property) analysis from the freestanding pollution control property (personal property):

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.

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. ... 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.

Remand Order, pp.12-13 (emphasis added). The Remand Order directs the parties to address 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?

Id., p. 20 (emphasis added).

The Limited Remand Order includes the following issue:

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?

Limited Remand Order, p.13 (emphasis added).

In conclusion, the Director cannot change Crescent Point's Revised Application to an application for certification of the Deep Creek Well as a pollution control facility. Furthermore, the Executive Director directed the parties to analyze the primary purpose of the real property, not the Deep Creek Well.

B. The Pollution Control Act Does Not Require Consideration of the Deep Creek Well, Instead of the Surface Casing Alone, as a Pollution Control Facility.

The Director decided to consider the Deep Creek Well as a whole (and not the surface casing alone) when making a pollution control facility determination. Amended Denial, p. 8.

The Director's analysis supporting this decision is:

“The Director can find no allowances in the Pollution Control Act that allows segregation of portions of real property in order to meet the definition of pollution control property.”

Because the concrete and piping that form the surface casing ultimately becomes real property ... which is affixed to the Deep Creek Well real property as a whole, the Deep Creek Well as a whole must be considered when making a determination regarding whether it meets the definition of a pollution control facility.

Id. 4.

The Director's analysis is not sufficient to support the Director's decision. The Director does not include any analysis of the definition of “real property” such as an analysis of definitions of “real property” in other provisions of the Utah Code or case law. For example, “real property” is defined in Utah Code section 57-1-1 governing real estate conveyances:

Real property” or “real estate” means any right, title, estate, or interest in land, including all nonextracted minerals located in, on, or under the land, all buildings, fixtures and improvements on the land, and all water rights, rights-of-way, easements, rents, issues, profits, income, tenements, hereditaments, possessory rights, claims, including mining claims, privileges, and appurtenances belonging to, used, or enjoyed with the land or any part of the land.

Utah Code Ann. §57-1-1 (emphasis added).

The Director also does not consider the plain language of the Act, which uses the term “real property” to contrast to “personal property” and which does not specifically address whether or not real property, as a whole, has to be considered as the pollution control facility.

See Utah Code Ann. § 19-12-102 *et seq.* The Director states that it can find no allowances in the Pollution Control Act that allows segregation of portions of real property, but takes an

inconsistent position in the briefs by interpreting the statute to allow segregation of real property, such as an air scrubber.⁴

In the Director's analysis of the treatment works requirement, the Director states:

The Director interprets the Pollution Control Act as requiring that there must be a treatment works in all cases in order to meet the definition of a pollution control facility. In the case of real property (a pollution control facility), the Director's discretion is limited to the physical boundaries of that real property and the means or permanence of connectivity between the associated treatment works and the pollution control facility.

Amended Denial, p. 7 (emphasis added). The last sentence in the above quote is a bare, ambiguous legal conclusion with no documentation to support the Director's decision.

The Executive Director remanded the permit denial for the Director to provide more detailed findings, conclusions and basis for the Director's determinations and included the following statements on the standard of review:

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(6=16)(c)(i) recognizes that the Director has been granted substantial discretion to interpret the division's governing statutes and rules. [footnote omitted] 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

⁴ "However, as stated in the Director's September 4, 2020, denial letter, "*In this case*, as stated above, the Director cannot separate the surface casing from the rest of the real property to which it is attached." September 4, 2020, Denial Letter at 5 (emphasis added). Regarding the Deep Creek Well, the three casing strings—conductor casing, surface casing and production casing—make up the Deep Creek Well, and all are required to work together and cannot perform without each other. None of them are standalone units. For instance, in the power plant mentioned by Crescent Point, one standalone portion of the real property, such as an air scrubber, might be certified as a pollution control facility. However, that air scrubber, though affixed to the real property, could be removed from the power plant, and the power plant would still operate—albeit with more pollution to the air. In that particular case, the primary purpose of the entire power plant would be to produce power, but the standalone pollution control facility (i.e. an air scrubber) would have a separate primary purpose." Director's Response to Crescent Point's Opening Brief After Revised Permit Order at 20.

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.

Limited Remand Order, pp. 6-7 (emphasis added).

In conclusion, the Director does not adequately document her interpretation that under the Act, the Deep Creek Well, as a whole, is the pollution control facility and that the surface casing cannot be considered as a standalone pollution control facility. The ALJ therefore does not adopt the Director’s interpretation and concludes that the surface casing should be considered as a standalone pollution control facility, as a part of the real property.

C. The Primary Purpose of the Surface Casing is Not Preventing Water Pollution.

The Director’s Amended Denial focuses on her conclusion that the entire Deep Creek Well is the pollution control facility, but alternatively concludes that the primary purpose of the surface casing is not pollution prevention:

Even if the Pollution Control Act authorized the Director to separate the surface casing from the rest of the real property to which it is attached, from the Division of Water Quality’s review of the application materials, additional research, and discussion with oil and gas experts with the Utah Division of Oil, Gas and Mining, the Director concludes that the primary purpose of a surface casing is not pollution prevention, as required for tax exemption certification under Utah Code § 19-12-102(6). Although oil production well 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 preventer; cover freshwater sands; and to support the weight of all casing strings run below the casing surface. Using the Nucor definition of primary purpose, a purpose can only be primary if all other purposes are incidental. However,

the structural purposes of the surface casing are at least as, or arguably more important, than preventing water pollution. Therefore, the surface casing itself, even if it could be separated from the entire well, cannot be certified as a pollution control facility.

Director's Amended Denial, pp. 5-6 (emphasis added).

The underscored portion of the Director's conclusion is essentially identical to the Director's original denial. The Director's Finding of Fact number 8 says "[t]he primary purpose of the surface casing is to maintain the integrity of the well bore hole during construction and of the well during oil production." This Finding of Fact cites to technical journals, a DOGM Environmental Handbook, Crescent Point's pollution control facility application submitted on November 24, 2015, Crescent Point's Petition for Review submitted on March 11, 2016, and a BLM Manual, all of which seem to support a conclusion that the surface casing has several important purposes, including water pollution prevention and maintaining the integrity of the well bore hole.

The Director does not reference documents in the Administrative Record which support the "Division of Water Quality's review of the application materials, additional research, and discussion with oil and gas experts with the Utah Division of Oil, Gas and Mining". However, the Director does include additional analysis in the Amended Denial which supports the Director's position that the primary purpose of the surface casing is not preventing pollution, in the last three sentences of the Director's conclusion. The Director uses the *Nucor*⁵ definition of primary purpose, *i.e.*, that a purpose can only be primary if all other purposes are incidental, and concludes that preventing water pollution is not the primary purpose of the surface casing because the structural purposes are not incidental. *See also* Director's Response to Crescent

⁵ *Nucor Corp., Nucor Steel – Utah Div. v. Utah State Tax Comm'n*, 832 P.2nd 1294 (Utah 1992).

Point's Opening Brief, p.24. The same argument could be used to refute the Director's finding 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 oil production".⁶ However, the Director's analysis supports the Director's discretion to interpret the division's governing statutes and rules by concluding that the primary purpose of the surface casing is not preventing water pollution. The Director also uses the statutory history of changing the term "a substantial purpose" to "the primary purpose" as support for her position. Amended Denial at 5.

The Director has substantial discretion to interpret the Act. The Director's conclusion that under the Act, the primary purpose of the surface casing of the Deep Creek Well is not to prevent water pollution is sufficiently detailed to support the Director's interpretation. The director is also entitled to strictly construe the tax exemptions against Crescent Point, as Crescent Point has not satisfied its burden of showing that the primary purpose of the surface casing is to prevent water pollution.

II. Treatment Works Are Required for Certification of a Pollution Control Facility

The Act allows an exemption from sales and use tax for:

- 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;...

Utah Code Ann. § 19-12-201(b) (emphasis added). The Act defines a "pollution control facility" as:

⁶ In fact, the Director says "the structural purposes of the surface casing are at least as, or arguably more important, than preventing water pollution." Amended Denial, p.6.

... 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;...

Id. § 19-12-102(6)(a) (emphasis added). The Act defines “[t]reatment works” as “any plant, disposal field, lagoon, dam, pumping station, incinerator, or other works used for the purpose of treating, stabilizing or holding wastes.” *Id.* § 19-6-102(19).

The Limited Remand Order instructed the Director to issue an amended permit order with more detailed findings, conclusions and basis for the Director’s determinations and to address the certain specific questions, including the following:

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 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.

Limited Remand Order at 12.

The Amended Denial includes the following statements related to the treatment works requirement:

1. Finding of Fact 10: “Crescent Point does not describe any treatment works associated with the Deep Creek Well in its

application for certification, nor can the Director find any treatment works associated with the Deep Creek Well. *See generally* Revised Application at 3.” Amended Denial at 3.

2. Determination (ii):

The Director hereby makes a determination that, according to the Pollution Control Act, the Director cannot certify the surface casing standing alone as a pollution control facility. The materials used to construct the surface casing can only be exempt from sales and use taxes pursuant to Utah Code § 19-12-201 if they are “used at, used in the construction or, or incorporated into a pollution control facility,” which means that the Deep Creek Well as a whole must be certified as a pollution control facility in order for Crescent Point to receive a sales and use tax exemption. The statute does not allow the Director to segregate parts of the pollution control facility to meet the definition of a pollution control facility. Further, the statute requires a treatment works in all cases, and there is not a treatment works associated with the Deep Creek Well. Therefore, the Director hereby makes the determination that the Deep Creek Well in Uintah Utah, does not meet the definition of a pollution control facility because the primary purpose of the facility the Deep Creek 7-27-4-2E oil production well is to produce oil, not to prevent, control, or reduce water pollution, and because there are no treatment works associated with the facility, both as described in detail later.

Amended Denial, p. 8 (emphasis added).

The Director’s Finding of Fact 10 and the Director’s analysis of the treatment works focus on the Deep Creek Well. The Director does not make a finding of fact or analyze the treatment works requirement specific to Crescent Point’s Revised Application for the surface casing. As explained above in Section I on the primary purpose requirement, Crescent Point applied for certification of the surface casing and the Director cannot change the application to certification of the Deep Creek Well.

Although the Director does not specifically address whether treatment works are required for certification of the surface casing of the Deep Creek Well, she concludes that the “statute requires a treatment works in all cases.” Amended Denial, p. 8.

Crescent Point maintains that treatment works are not required for certification of water pollution prevention facilities such as a surface casing, asserting that treatment works are not necessary for pollution control facilities such as a surface casing that prevent pollution, that treatment works are not necessary for certification when the Act is read as a whole, that “and” should be read disjunctively, and the Director’s interpretation conflicts with its guidance.

The Director’s 2016 permit order denial was based in part on the Director’s bare legal conclusion that treatment works are required, without any analysis to support the conclusion.⁷ The Amended Denial adds two points regarding the analysis of the treatment works requirement. First, the Director references statutory construction principles and concludes “the Director must interpret the statute as requiring both the disposal or elimination of waste *and* the use of treatment works to treat the waste, and is not given the discretion to change the plain meaning of the statute by reading the word “and” as optional. Amended Denial, pp. 6-7. Second, the Director adds details about prior applications for certification under the Act and approvals, stating that “DWQ has only approved as pollution control facilities/properties those facilities that can meet both primary purpose requirements of ‘the disposal or elimination of, or redesign to eliminate, waste,’ and ‘the use of treatment works for industrial waste.’ *Id.*, p. 7.

The Director has substantial discretion to interpret the Act. The Amended Denial adds analysis sufficient to support the Director’s interpretation that the Act requires treatment works in all cases in order to meet the definition of a pollution control facility. The Director is also entitled to strictly construe the tax exemptions against Crescent Point, as discussed in the Standard of Review section above.

⁷ “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.” AR000360.

CONCLUSION AND RECOMMENDED ORDER ON THE MERITS

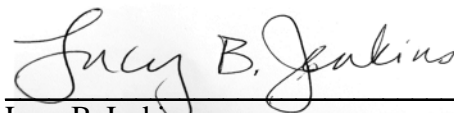
1. Based on the foregoing, Crescent Point has not met its burden to demonstrate that the Division erred in denying Crescent Point's certification application for the surface casing of the Deep Creek Well as a pollution control facility.

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 deny Crescent Point's Request for Agency Action and affirm the Amended Denial.

NOTICE OF OPPORTUNITY TO COMMENT

The 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 28th of December, 2020.



Lucy B. Jenkins
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 28TH day of December, 2020, a true and correct copy of the foregoing ALJ'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER ON THE MERITS AFTER REVISED PERMIT ORDER 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 _____