
**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

**FINAL ORDER ADOPTING
RECOMMENDED DECISION
DISMISSING ADJUDICATIVE
PROCEEDINGS**

July 27, 2021

Lucy B. Jenkins,
Administrative Law Judge

PROCEDURAL BACKGROUND

Based on my review of Administrative Law Judge (“ALJ”) Jenkins’ Findings of Fact, Conclusions of Law, and Recommended Order dated December 29, 2020, Crescent Point U.S. Corporation (“Crescent Point”) submitted an application to the Division of Water Quality (“DWQ”) to certify the surface casing of an existing production well¹ under the Pollution Control Act.² Certification is necessary to claim a sales and use tax exemption under the Act. On July 22, 2016, Crescent Point submitted a revised application for certification of the well as a “pollution control facility.”³ The application did not describe any “treatment works” associated with the well.

On September 15, 2016, the Director of DWQ denied the revised application for certification of the surface casing as a “pollution control facility.” On October 14, 2016, Crescent Point filed a Request for Agency Action to contest the Director’s denial of the revised

¹ Deep Creek 7-27-4-2E Well.

² Utah Code §§ 19-12-101 *et seq.*

³ Utah Code § 19-12-102(6)(a) “Pollution Control Facility.”

application for certification. An ALJ was appointed to hear the matter. The Director’s denial was treated as a “permit order” for purposes of review in a special adjudicative proceeding conducted under Utah Code §19-1-301.5.

The ALJ’s Conclusions of Law notes that the parties characterized the surface casing as a “freestanding pollution control property”⁴ rather than as a “pollution control facility” during the motion and hearing phase of the special adjudicative proceeding. On August 31, 2018, the ALJ issued a Recommended Order in favor of certification. Following a review of the Recommended Order, a prior Executive Director⁵ remanded the case back to the ALJ on January 25, 2019, with instructions to conduct supplemental briefing consistent with Crescent Point’s Revised Application which sought certification as a “pollution control facility” and not as a “freestanding pollution control property.”

Later, on June 16, 2020, another Executive Director⁶ issued a Limited Remand Order with instructions for the ALJ to remand the original certification determination back to the Director for reconsideration and re-issuance of an amended permit order.⁷ Pursuant to the Limited Remand Order, on September 3, 2020, the DWQ Director issued a revised permit order denying Crescent Point’s revised application for certification as a “pollution control facility” (“Amended Denial”).⁸

The ALJ subsequently reviewed the Director’s Amended Denial together with the briefs and arguments presented by the parties during the special adjudicative proceeding and supplemental briefing. Pursuant to Utah Code § 19-1-301.5 and Utah Admin. Code Rules R305-

⁴ Utah Code § 19-12-102(5)(a) “Freestanding Pollution Control Property.”

⁵ Alan Matheson, prior DEQ Executive Director.

⁶ L. Scott Baird, prior DEQ Executive Director.

⁷ Utah Code § 19-1-301.5(14)(a)(ii).

⁸ The amended denial superseded and replaced the Director’s September 15, 2016, denial.

7-101 to 113, R305-7-200 to 217, and the applicable sections of R305-7-601 to 623, on December 29, 2020, the ALJ issued Findings of Fact, Conclusions of Law, and Recommended Order on the Merits After Revised Permit Order. The ALJ now recommends that I (Kimberly D. Shelley, Executive Director) affirm the Director's amended denial of certification of the well as a "pollution control facility."

When the ALJ submits a proposed dispositive action to the Executive Director, the Executive Director may, pursuant to Utah Code § 19-1-301.5(14)(a): (i) approve, approve with modifications, or disapprove a proposed dispositive action; or (ii) return the proposed dispositive action to the ALJ for further action as directed.

I have reviewed the ALJ's Recommended Order. I have also reviewed Crescent Points' Comments on the ALJ's Recommended Order submitted on January 13, 2021, and the Director's Response to Crescent Points' Comments on the ALJ's Recommended Order submitted on January 21, 2021.

CONSIDERATION OF CRESCENT POINT'S COMMENTS

Crescent Point's comments contend that I (the Executive Director) should not adopt the ALJ's December 29, 2020, Recommended Order ("Pollution Control Facility") addressing the primary purpose of the surface casing and the interpretation of the treatment works provision in the statute. Rather, Crescent Point avers that I should adopt the ALJ's August 31, 2018, Recommended Order in favor of certification ("Freestanding Pollution Control Property"). Crescent Point suggests that the only reason for the change in the ALJ's August 31, 2018, decision in favor of certification appears to be that the factual and legal details were contained in the Director's September 3, 2020, Amended Denial rather than in the prior hearing and briefing in the Special Adjudicative Proceeding.

In response, the Director argues that: based on the information provided in the Director's initial September 15, 2016, denial, the subsequent briefing by the parties, the hearing in the special adjudicatory proceeding, the ALJ's remand and the Director's September 3, 2020, *revised permit order* (Amended Denial) denying the revised application, Crescent Point failed to meet its burden of proof showing that the Director's factual, technical, and scientific determinations are clearly erroneous. Furthermore, the Director avers that the plain language of the Pollution Control Act requiring that a pollution control facility⁹ have an associated treatment works¹⁰ cannot be ignored.

Based on my review, the ALJ's findings specifically address the circumstances following the prior remand and the Director's Amended Denial. Furthermore, the ALJ's findings explain that the Director has substantial discretion to interpret the statute as requiring both the disposal or elimination of waste *and* the use of treatment works. For these reasons, I find that the points raised in the parties' comments were fully litigated in the special adjudicative proceeding and the supplemental briefings, and were considered by the ALJ. For these reasons, I agree with ALJ Jenkins' findings, analysis, and conclusions.

ORDER

Based on my review of the adjudicatory record and pursuant to Utah Code § 19-1-301.5, I hereby adopt ALJ Jenkins' Findings of Fact, Conclusions of Law, and Recommended Order on the Merits After Revised Permit Order in full. The Request for Agency Action filed by Crescent Point on October 14, 2016, is hereby denied and the Director's Amended Denial is affirmed.

⁹ 19-2-102(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.

¹⁰ 19-5-102(19) "Treatment Works" means a plant, disposal field, lagoon, dam, pumping station, incinerator, or other works used for the purpose of treating, stabilizing, or holding wastes.

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Utah Code § 19-1-301.5(16)(a), judicial review of this final order may be sought in the Utah Court of Appeals in accordance with 63G-4-401, 63G-4-403, and 63G-4-405 by filing a petition within thirty (30) days after the date of this order.

DATED this 27th day of July, 2021.

Signature: 

Email: kshelley@utah.gov

Kimberly D. Shelley, Executive Director
Utah Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify on this 27th day of July, 2021, a true and correct copy of the foregoing **FINAL ORDER ADOPTING RECOMMENDED DECISION DISMISSING ADJUDICATIVE PROCEEDINGS** was served via e-mail with the following recipients:

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