BEFORE THE TENNESSEE
BOARD OF WATER QUALITY, OIL, AND GAS

In the Matter of: Tennessee Department of Environment and Conservation.	)	
Petitioner,	)	
	)	APD Case no. 04.02-244954A
vs.	)	
Town of Tellico Plains, Tennessee	)	SDWA no. DWS23-0190
Respondent.	)	

THE TOWN OF TELLICO PLAINS' HEARING BRIEF

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ORAL ARGUMENT REQUESTED

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Preface and Background

The Town of Tellico Plains ("**The Town**") herewith submits its Hearing Brief regarding its appeal to the Board of Water Quality, Oil, and Gas (the "**Board**") for the Board to review the Assessment issued March 19, 2024; the ALJ's Initial Order entered in this matter effective September 30, 2025; certain earlier ALJ orders; the ALJ's Order entered October 15, 2025, denying The Town's Motion for Respondent's Costs; the ALJ's Order entered October 21, 2025, granting to TDEC its costs; and to grant the relief requested by The Town herein.

> "I have discussed Tellico Plains with Jessica. Even though they are off the hook on this one with EPA, she still wants me to do an order since they really haven't fixed anything."
>
> -- Email from Tom Moss dated January 18, 2024, stating TDEC's reason for issuing the Order and Assessment.[1]

Because TDEC was not required to issue the Assessment in this case, it needed a valid discretionary reason to issue the Assessment consistent with law and its own policies. However, TDEC's reason as explained by Mr. Moss in his above email was false. By the date of Mr. Moss's email, The Town had actually fixed everything, and TDEC knew this. This appeal stands for the proposition that penalties issued based on a lie are void.

This case concerns a Director's Order and Assessment issued March 19, 2024 (the "**Assessment**"), by the Tennessee Department of Environment and Conservation ("**TDEC**") that reflects TDEC had pre-determined The Town owed it $25,542.40 because of alleged Safe Drinking Water Act, T. C. A. § 68-221-701, *et. seq*. (the "**SDWA**") violations by The Town as the operator of a water system subject to the SDWA (an "**Operator**"). The Assessment derives from T. C. A. § 68-221-713(b)(1) which allows TDEC, part of the state's executive branch, to

[1] Cont. H. Ex. 9, T. Moss email dated 1/18/2024; Tech. R. p. 1227.

pre-determine in secret, as it did in this case, an Operator's liability, impose a debt on an Operator, and proceed to collect this debt. This in-house assessment procedure afforded The Town no prior notice, opportunity for The Town to be heard, or opportunity to defend.

I. Section One – This Tribunal Lacks Subject Matter Jurisdiction

A. Introduction

This tribunal, part of the executive branch, lacks subject matter jurisdiction over this dispute because the Assessment is a private-rights, common-law cause of action premised upon an alleged debt, and based on Tennessee constitutional principles of separation of powers, The Town is entitled to have its private-rights dispute with TDEC over a debt decided by the state's judicial branch where, if elected, The Town could demand a trial by jury. Tennessee's Constitution at Article II, Section 1, provides that:

> The powers of the Government shall be **divided** into three distinct departments: the Legislative, Executive, and Judicial (emphasis added).

Tenn. Const. Art. II, § 1. Tennessee's Constitution at Article II, Section 2, provides that:

> No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed or permitted.

Tenn. Const. Art. II, § 2. Tennessee's Constitution also bestows the right to have disputes decided by the state's judicial branch. Tennessee's Constitution at Article I, Section 17, provides, in pertinent part:

> That all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due process of law …

Tenn. Const., Article I, § 17. At the federal level, the concept of separation of government's powers into three co-equal branches is accomplished simply by virtue of separately designating

in Articles I, II, and III of the U. S. Constitution the separate legislative, executive, and judicial powers.

The Town's only avenue to dispute the debt claimed to be owed TDEC is through T. C. A. § 68-221-714(b)(2)(A), T. C. A. § 68-221-714(a), T. C. A. § 68-221-714(c), and T. C. A. § 4-5-322. In the end, an enforceable judgment may be entered against The Town pursuant to T. C. A. § 68-221-713(b)(2)(B) and (3). These statutes violate Tennessee's constitution because they vest the state's executive branch with judicial branch powers to adjudicate a dispute on a debt. As private-rights, common-law dispute adjudication is a function reserved to the judicial branch, this tribunal lacks subject matter jurisdiction to adjudicate this dispute.

B. The SDWA and APA Statutes at Issue

1. Imposition of the Assessment

The SDWA is codified at T. C. A. § 68-221-701 *et. seq*. The Town owns and operates a water system regulated by the SDWA. To address putative violations of the SDWA by Operators, the SDWA sets forth several non-emergency options for TDEC including proceedings in Chancery Court.[2] However, in this case TDEC (part of the executive branch) elected to proceed under T. C. A. § 68-221-713(b)(1) and determine, in secret and without The Town's opportunity to be heard or defend, the SDWA violations and the corresponding civil penalties owed by The Town. T. C. A. § 68-221-713(b)(1) provides:

> The commissioner [of TDEC] may issue an assessment against any person responsible for the violation or damages.

[2] T. C. A. § 68-221-712(a) permits TDEC to give advance notice to an Operator and an opportunity to be heard by the Board; T. C. A. § 68-221-713(c) permits TDEC to institute proceedings in Chancery Court; and T. C. A. § 68-221-715 is another statute that permits TDEC to institute proceedings in the Chancery Court.

T. C. A. § 68-221-713(b)(1). As such, the Assessment is a bill for a pre-determined debt. The Town is not told how the penalty is calculated, but it is told it owes the money unless it timely asks the same executive branch to "review" the bill and maybe change its mind.

2. Agency Review – Round One

At the request of the Operator, Assessments issued pursuant to the SDWA are subject to two (2) rounds of review by the Board of Water Quality, Oil, and Gas (also part of the executive branch). The first round of review begins with a petition to the Board. T. C. A. § 68-221-713(b)(2)(A) provides, in pertinent part:

> Any person against whom an assessment has been issued may secure a review of such assessment by filing with the commissioner a written petition setting forth the grounds and reasons for such person's objections and asking for a hearing in the matter involved before the board.

T. C. A. § 68-221-713(b)(2)(A). T. C. A. § 68-221-714(a) requires the Board to appoint an administrative law judge (an "**ALJ**"), who also works for the executive branch, to conduct the review and preside over proceedings. While the ALJ serves the Board in that role, the "tribunal" for the review is still the Board. Said review proceedings are without a jury and are otherwise conducted pursuant to Tennessee's Administrative Procedures Act (the "**APA**") set forth at T. C. A. § 4-5-301 *et. seq*. and the rules for hearing contested cases of the Department of State (also part of the executive branch).

For this first round of review by the Board with proceedings conducted by an ALJ, it is unclear and vague as to just what is meant by "review" as contemplated by T. C. A. § 68-221-713(b)(2)(A). In this context, "review" probably means comparison of the Assessment to some standard or criteria, but we do not know. The results of the ALJ's review of the Assessment are then placed in an Initial Order.

3. Agency Review – Round Two

The second round of Board review takes place on petition to the Board as a whole for "review" of the ALJ's Initial Order. T. C. A. § 68-221-714(c) and (d) provide, in pertinent part:

> The administrative judge's initial order, together with any earlier orders issued by the administrative judge, shall become final unless appealed to the board by the commissioner or other party within thirty (30) days of entry of the initial order … If appealed to the board, the board's review of the administrative judge's initial order shall be limited to the record but shall be de novo with no presumption of correctness. In such appeals, the board shall thereafter render a final order, in accordance with § 4-5-314, affirming, modifying, remanding, or vacating the administrative judge's order.

T. C. A. § 68-221-714(c) and (d). Again, it is unclear and vague as to what is meant for the Board to review the prior review, but probably means comparison of the Assessment to some standard or criteria, but we do not know. Incidentally, there is no statutory binding criteria or constraint on TDEC in making civil penalty assessments other than the $5,000.00 per-occurrence-per-day cap contained at T. C. A. § 68-221-713(a). T. C. A. § 68-221-713(d) contains only non-binding suggestions.

4. Judicial Review

Following the exhaustion of the foregoing administrative proceedings, pursuant to T. C. A. § 68-221-713(b)(2)(A), T. C. A. § 68-221-714(c) and (d), and APA statute T. C. A. § 4-5-322(a)(1), an aggrieved Operator may petition the state's judicial branch for a very, very limited "review" of all the prior reviews. T. C. A. § 4-5-322(a)(1) provides, in pertinent part:

> A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.

T. C. A. § 4-5-322(a)(1). Pursuant to T. C. A. § 4-5-322(g), the review by the judicial branch is to be conducted without a jury and confined to the record created by the executive branch. Further, it seems the Board's Final Order receives a presumption of correctness as it can only be

set aside or modified if the Chancellor determines it is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) arbitrary, capricious, characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence that is both substantial and material in the light of the entire record. See T. C. A. § 4-5-322(h).

5. Confession of Judgment After Final Review

After the exhaustion of all available reviews, TDEC's Final Order becomes "final," pursuant to T. C. A. § 68-221-713(3)(A) and (B), and TDEC can obtain judgment as follows:

> Whenever any order or assessment has become final because of a person's failure to appeal the commissioner's assessment, the commissioner may apply to the appropriate court for a judgment and seek execution of such judgment … The court, in such proceedings, shall treat the failure to appeal such assessment as a confession of judgment in the amount of the assessment.

T. C. A. § 68-221-713(b)(3)(A) and (B). Note that the statutorily forced agreement by confession, which of course is actually no agreement since agreements must be voluntary and not forced, is a most interesting contrivance.

C. Separation of Powers

1. Generally

The separation of government's powers is not a complicated concept. The legislative branch has the authority to make, order, and repeal laws; the executive branch is to administer and enforce laws; and the judicial branch is to interpret and apply the law. Mansell v. Bridgestone Firestone N. Am. Tire, 417 S. W. 3d 393, 402 (Tenn. 2013)(citing, Underwood v. State, 529 S. W. 2d 45, 47 (Tenn. 1975). When it comes to the judiciary's role in deciding disputes, there are limitations on the legislature:

> The legislature can have no constitutional authority to enact [laws] that strike at the very heart of a court's exercise of judicial power … Indeed, a court's constitutional

> function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate.

Mansell, 417 S.W. 3d at 403; Citing, State v. Mallard, 40 S.W. 3d 473, 483 (Tenn. 2001).

2. Private-rights, Common-law Disputes Must be Adjudicated by the Judicial Branch

Separation of powers means the judicial branch should try and decide private-rights, common-law disputes, not any other branch. A private-rights dispute is a dispute involving common-law, equitable, or admiralty claims. Drawing upon federal decisions as guidance:

> The Constitution vests "[t]he judicial Power of the United States … in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. 3, § 1. The judges of those courts enjoy life tenure and salary protection, attributes that preserve an "independent spirit" that is "essential to the faithful performance" of their duty. The Federalist No. 78 (A. Hamilton). Because non-Article III tribunals lack these important qualities, **Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty"** (internal citations omitted, emphasis added).

Sun Valley Orchards, LLC v. United States DOL, 2025 U. S. App. LEXIS 18801 at [*10] - [*11]. A private-rights dispute is also a dispute that is not a public rights dispute. Public rights disputes, which may be decided by the executive branch (referred to as the "public rights exception"), are very narrow and limited to just five (5) categories:

> Despite its misleading name, the [public rights] exception does not refer to *all* matters brought by the government against an individual to remedy public harms, or even all those that spring from a statute. Instead, public rights are a narrow class defined and limited by history. As the Court explains, that class has traditionally included the collection of revenue, customs enforcement, immigration, and the grant of public benefits (internal citations omitted).[3]

[3] Justice Gorsuch mentions just four (4) categories. In the Majority opinion, Chief Justice Roberts mentions the fifth category which is relations with Indian tribes. Further, "public benefits" includes such things as payments to veterans, pensions, and patent rights. SEC v. Jarkesy, 603 U. S. 109, 130 (2024).

SEC v. Jarkesy, 603 U. S. 109, 152 – 153 (2024). (Gorsuch, J., concurring opinion). As Chief Justice Roberts wrote:

> The public rights exception is, after all, an *exception*. It has no textual basis in the Constitution … To avoid misconstruction upon so grave a subject, we think it proper to state that **we do not consider congress can … withdraw from judicial cognizance any matter which from its nature, is the subject of a suit at the common law, or in equity, or admiralty.** We have never embraced the proposition that "practical considerations alone can justify extending the scope of the public rights exception to such matters (internal citations omitted, emphasis added).

Jarkesy, 603 U.S. at 131 – 132.

In summary, separation of powers is important; otherwise, the legislative branch would be free to pass a law that all disputes are to be decided by the executive branch, leaving the judicial branch with nothing to do.

> Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's "judicial power" on entities outside Article III (citation omitted).

Jarkesy, 603 U. S. at 132. Further,

> … [Permitting] Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch … is the very opposite of separation of powers that the Constitution demands.

Jarkesy, 603 U. S. at 140.

3. The Assessment is a Private-rights, Common-law Dispute that May Only be Adjudicated by the Judicial Branch

As mentioned, private-rights disputes are either claims at common law, equity, or admiralty. The imposition of civil penalties by an executive branch agency of the type issued by TDEC in the Assessment is a private-rights dispute because it is a common law cause of action premised on a debt. Support for this conclusion, and guidance for this tribunal, may be found in recent federal court decisions. SEC v. Jarkesy, 603 U.S. 109 (2024) is a case on point. In

Jarkesy, the Securities and Exchange Commission ("**SEC**"), a part of the federal executive branch, had an in-house procedure for secretly determining violations of the Securities and Exchange Act, determining civil penalties, issuing an assessment for those penalties to the alleged violators, limiting the rights of such persons to contest the assessment to administrative, executive branch review, and then further limiting the alleged violator's rights to a limited review by the federal judiciary. This process, struck down in Jarkesy, is identical to TDEC's process to collect its Assessment debt against The Town. As it regards statutory civil penalties being a common-law claim on a debt, Chief Justice Roberts explained:

> By its text, the Seventh Amendment guarantees that in "[s]uits at common law … the right of trial by jury shall be preserved." In construing this language, we have noted that the right is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified. As Justice Story explained, the Framers used the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence." The Amendment therefore "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." The Seventh Amendment extends to a particular statutory claim if the claim is "legal in nature." **As we made clear in Tull, whether that claim is statutory is immaterial to this analysis.** In that case, the Government sued a real estate developer for civil penalties in federal court. The developer responded by invoking his right to a jury trial. Although the cause of action arose under the Clean Water Act, the Court surveyed early cases to show that the statutory nature of the claim was not legally relevant. "Actions by Government to recover civil penalties under statutory provisions," we explained, "historically had been viewed **as [a] type of action in debt** requiring trial by jury" (internal citations omitted, emphasis added).

Jarkesy, 603 U. S. at 122. Chief Justice Roberts further noted:

> As we have previously explained, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to punish culpable individuals." Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law." The same is true here (internal citations omitted).

Jarkesy, 603 U. S. at 123. As it regards separation of powers, Chief Justice Roberts further explained:

> The Constitution prohibits Congress from "withdraw[ing] form judicial cognizance any matter which, from its nature, is the subject of a suit at common law. Once such a suit "is brought within the bounds of federal jurisdiction," an Article III court must decide it, with a jury if the Seventh Amendment applies … "[T]he judicial powers of the United States" cannot be shared with the other branches. Or, as Alexander Hamilton wrote in the Federalist Papers, "there is no liberty if the power of judging be not separated from the legislative and executive powers" (internal citations omitted).

Jarkesy, 603 U. S. at 127.

Another federal decision on point is Sun Valley Orchards, LLC v. United States DOL, 2025 U. S. App. LEXIS 18801*; 148 F. 4th 121 (3rd Cir. 2025), which was decided on separation of powers principles. The case concerned the United States Department of Labor ("**DOL**") bringing an administrative proceeding against Sun Valley, a farm in New Jersey, over alleged statutory H-2A nonimmigrant visa program violations. The DOL (part of the federal executive branch) issued an assessment for civil penalties against Sun Valley, the DOL administrative regime limited Sun Valley to a review by an administrative law judge (also part of the executive branch) which took place, and from that appealed to the Administrative Review Board (also part of the federal executive branch). Sun Valley then challenged the DOL decision in the District Court alleging, among other things, that the DOL's order adjudicated private rights in violation of Article III. The Third Circuit found Sun Valley's Article III argument[4] to have merit. The Court held:

> Because non-Article III tribunals lack [independence], Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.
>
> …

[4] In the federal judiciary, the "separation of powers argument" is called the "Article III" argument.

> With these principles in mind, we turn to Sun Valley's Article III challenge. The Farm contends that DOL violated Article III by adjudicating its private rights through in-house proceedings. To resolve this claim, we must first decide (1) whether DOL's action concerns private rights (that is, whether it is in the nature of a common lawsuit), (2) whether DOL's action fits within the public rights exception, and (3) whether Sun Valley waived its right to Article III adjudication (internal citations omitted).

Sun Valley, 2025 U. S. App. LEXIS 18801 [*11] – [*12]. Applying the separation of powers principles from Jarkesy, the Third Circuit found:

> As the Supreme Court's recent decision in Jarkesy explains, a party challenging enforcement under Article III need not match the agency's action to an exact historical comparator. Jarkesy considered whether the SEC could, consistent with Article III and the Seventh Amendment, enforce federal antifraud statutes through in-house civil penalty proceedings. The Court said no. The SEC sought civil penalties, which traditionally "could only be enforced in courts of law." … Because both the action and the remedies that the SEC pursued could be traced to English common law, Jarkesy's case presumptively "involve[d] a matter of private rather than public right." **Those same considerations require Article III adjudication here** (internal citations omitted, emphasis added).

Sun Valley, 2025 U. S. App. LEXIS 18801 [*12].

In AT & T, Inc. v. FCC, 149 F. 4th 491 (5th Cir. 2025), the Fifth Circuit also treated the Seventh Amendment challenge and separation of powers challenge (i. .e. the Article III challenge) as separate challenges on which Jarkesy provided authority. In that case, similar to Sun Valley, the Federal Claims Commission (part of the executive branch) sought to enforce civil penalties against AT & T that it decided in-house, an executive branch administrative dispute process was required, and from that AT & T appealed to the federal District Court, asserting the Commission's enforcement regime was unconstitutional under Article III and the Seventh Amendment. Id. at 497. The Fifth Circuit stated, "Our analysis is governed by SEC v. Jarkesy." Id.

> The Commissioner's civil penalties "are the prototypical common law remedy." They are money damages designed to "punish or deter" violators of section 222.

> This is evident form the statutory factors, which instruct the Commission to set penalties by reference to "the nature, circumstances, extent, and gravity of the violation" as well as the violator's "degree of culpability" (internal citations omitted).

A T &T, Inc., 149 F. 4th at 498.

Citing Jarkesy, the Court held the FCC's claim was an action at common law, and "Suits at common law presumptively concern private rights and must be adjudicated by Article III courts." Id. at 500.

4. Summary

While premised on a modern Tennessee statute and labeled as penalties, the Assessment is nonetheless a private-rights, common-law cause of action based on an asserted debt. As such, pursuant to principles of separation of powers, The Town, as an operator of a water system, like every other citizen, is entitled to have a private-rights, common-law dispute against it decided by the judicial branch. T. C. A. § 68-221-713(a); T. C. A. § 68-221-713(b)(1); T. C. A. § 68-221-713(b)(2)(A); T. C. A. § 68-221-713(b)(2)(B); T. C. A. § 68-221-714(a); T. C. A. § 68-221-714(b); T. C. A. § 68-221-714(c); T. C. A. § 68-221-714(d); T. C. A. § 4-5-322(a)(1); T. C. A. § 4-5-322(g); T. C. A. § 4-5-322(h); and T. C. A. § 68-221-713(b)(3) (collectively the "**SDWA and APA Statutes at Issue**") wrongfully permit the executive branch of this state to both prosecute and decide The Town's liability to TDEC for money. Because this tribunal is not part of the judicial branch, it has no subject matter jurisdiction to decide private-rights, common-law claims for a debt, and so this action should be dismissed. These SDWA and APA Statures at Issue violate The Town's state constitutional rights, as an operator of a water system, under separation of powers principals at Article II, Section 1; Article II, Section 2; and Article I, Section 17, of Tennessee's Constitution to have its private-rights, common-law dispute adjudicated by the judicial branch.

II. Section Two – The SDWA and APA Statutes at Issue Violate Due Process

The SDWA and APA Statues at Issue violate The Town's constitutional due process rights because they are (1) impermissibly vague, unfair, and oppressive, and (2) deprive The Town of the right to defend itself at a meaningful time and in a meaningful manner that would otherwise be present in the state's separate judiciary. The reasons are now discussed.

A. Adjudication by the Executive Branch Violates Due Process

Similar to the argument in the previous Section, the SDWA and APA Statutes at Issue violate due process because they purport to give subject matter jurisdiction to the executive branch to adjudicate private-rights, common-law disputes.

B. Where Due Process Rights Are Found

Tennessee's Constitution at Article I, Section 8, contains a due process requirement and reads in pertinent part:

> That no man shall be … deprived of his … property but by the judgment of his peers or the law of the land.

Tenn. Const., Article I, § 8. Tennessee's Constitution also contains a right to have disputes decided by the state's judiciary. Tennessee's Constitution at Article I, Section 17, reads in pertinent part:

> That all courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due process of law …

Tenn. Const., Article I, § 17.

At the federal level, the right to due process is contained at the Fifth Amendment to the U. S. Constitution. That Amendment provides, in pertinent part: "No person shall … be deprived of … property without due process of law." This Fifth Amendment right to due process is imposed upon the state of Tennessee by virtue of the Fourteenth Amendment to the U. S.

Constitution which provides, in pertinent part: "No state shall … deprive any person of … property without due process of law." U. S. Const., Am 14. To hammer home the point, states also may not limit federal constitutional due process rights by virtue of the U. S. Constitution's supremacy clause, which at Article VI, Clause 2, provides in pertinent part:

> This Constitution … shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the constitution or laws of any State to the contrary notwithstanding.

U. S. Const., Article VI, Clause 2.

Tennessee has regarded the relationship between the state's constitutional due process requirement and the federal constitutional due process requirement as identical:

> The phrase, 'the law of the land' used in this section of our State Constitution, and the phrase, 'due process of law' used in the [Fifth and Fourteenth Amendments to the United States Constitution], are synonymous phrases meaning one and the same thing. In consequence, while this Court is the final arbiter of the Tennessee Constitution and is always free to expand the minimum level of protection mandated by the federal constitution, article I, section 8 has consistently been interpreted as conferring identical due process protections as its federal counterparts. Under both the state and federal constitutions, due process encompasses procedural and substantive protections (citations omitted).

Mansell, 417 S.W. 3d at 407.

C. What is Meant by Due Process

The core concept of due process is fairness. Constitutional due process means both substantive due process and procedural due process. The distinction between the two is not always clear, yet it may fairly be said that substantive due process concerns whether government has the right to take the action, and procedural due process assumes government has the right to take the action but in doing so must follow the proper process. Substantive due process bars oppressive government action regardless of the fairness of the procedures used to implement the action. Mansell, 417 S.W. 3d at 409. The fundamental requirement of procedural due process is

the opportunity to be heard "at a meaningful time and in a meaningful manner." Mansell, 417 S.W. 3d at 407; Citing, Mathews v. Eldridge, 424 U.S. 319, 333 (1976). In the separation of powers context, the United States Supreme Court indicates that due process means **judicial** due process. Simply put:

> Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles.

Jarkesy, 603 U. S. at 141. (Gorsuch, J., concurring opinion). Incidentally, as originally understood,

> because it was the "peculiar province of the judiciary" to safeguard life, liberty, and property, due process often meant *judicial* process… In other words, "due process of law" generally implie[d] and include[d] … *judex* [a judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. This constitutional baseline was designed to serve as a "restraint on the legislative" branch, preventing Congress from "mak[ing] any process 'due process of law,' by its mere will" (internal citations omitted, emphasis in the original).

Jarkesy, 603 U. S. at 150. (Gorsuch, J., concurring opinion).

As next discussed, the SDWA and APA Statutes at Issue violate The Town's due process rights because they deprive The Town of its rights to have its monetary liability to TDEC for an alleged debt decided **in** the judicial branch by time honored principles **of** the judicial branch.

D. The Assessment Itself Violates Due Process

T. C. A. § 68-221-713(b)(1) permits TDEC, part of the executive branch, to pre-determine The Town's liability for a debt in secret. This Section affords The Town no opportunity to be heard, defend itself, or argue correct application of law and policy to facts. This Section provides no criteria for determining the amount of the Assessment other than to impose the $5,000 per-day-per-occurrence cap at T. C. A. § 68-221-713(a)(1). The provisions at T. C. A. § 68-221-713(d) do not count; they are non-binding suggestions. Further, the face of the

Assessment presents no meaningful way for the Town to determine the factors that went into TDEC's determination of the dollar amounts. There is no reverse engineering possible that would reveal how TDEC came up with its numbers.

Once The Town gets its bill for the debt that is the Assessment, The Town is deemed to owe TDEC money unless The Town has the capacity and resources to request review by the Board pursuant to T. C. A. § 68-221-713(b)(2)(A). Otherwise, the Assessment is confessed as a judgment in Chancery Court subject to execution/collection against The Town as with any other judgment (i. e. seizing The Town's property) pursuant to T. C. A. § 68-221-713(3) quoted in full above. Thus, The Town is guilty until it establishes innocence. It is difficult to imagine a statute creating a more one-sided and oppressive process.

In summary, T. C. A. § 68-221-713(a)(1); T. C. A. § 68-221-713(b)(1); and T. C. A. § 68-221-713(3) violate The Town's due process rights and are unconstitutional because they are oppressive and deny The Town the right to defend at a meaningful time and in a meaningful manner. Specifically, these statutes (1) vest the executive branch with the power to decide, in secret, The Town owes it a debt; (2) provide no binding criteria on the executive branch for determining the amount of the debt; (3) fail to inform the Town how the debt was arrived; and (4) place the burden on The Town to dispute the debt or the debt is confessed.

E. The First Review Hearing Requirement Violates Due Process

T. C. A. § 68-221-713(b)(2)(A) is particularly offensive because, unless The Town elects to confess judgment, this statute forces The Town into executive branch administrative proceedings as its only option. This statute takes away all the rights The Town would otherwise have to resist wrongfully owing money in a real lawsuit in the judicial branch. After getting its bill for the Assessment debt from the executive branch, The Town's only recourse is to seek a

first "review" of the Assessment by the executive branch pursuant to T. C. A. § 68-221-713(b)(2)(A) and T. C. A. 68-221-714(a). However, this Subsection only permits the ALJ (who works for the executive branch) to conduct an unspecified review of what TDEC has already decided, make a record, and enter an Initial Order. That there are no specified criteria for review of the Assessment is doubly offensive. The existence of a criteria for review is all important because said criteria would be what establishes relevance of information submitted, arguments to be made, and an understanding of whether one is being treated fairly. A statute that requires The Town to participate in a review, with no criteria for said review, is no less as absurd as Kafka's *The Trial*. While the ALJ first review is called a contested hearing, and in making a record the ALJ may use as "guidance" state-court rules of procedure,[5] that is not the same as The Town having the full rights it would otherwise have to defend itself in the state's separate judiciary. For example, in the contested hearing there is no Tenn. R. Civ. P. 38 opportunity to demand a jury trial, there are no pleadings, Tennessee's Rules of Evidence do not expressly apply (but perhaps serve as guidance (see, APD Rule 1360-04-01-.15)); and the ALJ's decisions on procedure, evidence, motions, and law are not subject to appellate review by the state's Court of Appeals.

In summary, T. C. A. § 68-221-713(b)(2)(A) and T. C. A. § 68-221-714(a) violate The Town's due process rights and are unconstitutional because they are oppressive and deny The Town the right to defend at a meaningful time and in a meaningful manner before an independent finder of fact and judge. Specifically, these statutes (1) strip away the rights The Town would otherwise have to defend itself in the judicial branch, including trial by jury; (2) vest the executive branch with the power to decide whether The Town owes the executive branch

[5] See, APD Rule 1360-04-01-.01(3).

a debt; (3) provide no criteria for the review, and so they are intolerably vague; and (4) deprive The Town of any right of appeal as to ALJ decisions on procedure, evidence, and law.

F. The Second Review Hearing Requirement Violates Due Process

Following the entry of the Initial Order at the end of the round-one review, unless willing to confess judgment, T. C. A. § 68-221-714(c) next forces The Town to seek a second "review" before the Board, also a part of the executive branch. This second review is even more absurd than the first review. First, once again there are no stated criteria for the review of the earlier review, other than such review is limited to the record of the ALJ's earlier review. Second, one of the appointed Board members tasked with reviewing TDEC's actions so as to give The Town a fair chance, and the one designated as Chairman of the Board to preside over Board matters so as to give The Town fair process, is none other than the Commissioner of TDEC. See, T. C. A. 68-221-703(2) and T. C. A. § 69-3-104(a)(1)(A). From this second review, the Board enters a Final Order which becomes "final" and subject to execution unless appealed pursuant to T. C. A. § 68-221-714(e).

In summary, T. C. A. § 68-221-714(c) violates The Town's due process rights and is unconstitutional because it is oppressive and denies The Town the right to defend at a meaningful time and in a meaningful manner before an independent finder of fact and judge. Specifically, this statute (1) strips away the rights The Town would otherwise have to defend itself in the judicial branch, including trial by jury; (2) vests the executive branch with the power to decide whether The Town owes the executive branch a debt; (3) designates the Commissioner of TDEC Chairman of the Board to preside over the round-two review where TDEC is a party to the dispute; (4) provides no criteria for the round-two review, and so it is intolerably vague; and

(5) deprives The Town of any right of appeal as to ALJ/Board decisions on procedure, evidence, and law.

G. The Limitation on Judicial Review Violates Due Process

Following the Final Order entered by the Board, The Town can appeal this order to the Chancery Court pursuant to T. C. A. § 68-221-714(e) and APA statute T. C. A. § 4-5-322(a)(1) for a very limited review of the two (2) prior reviews upon just the five (5) categories mentioned at T. C. A. § 4-5-322(h) and, pursuant to T. C. A. § 4-5-322(g), without a jury. See Section One I(B)(4). These statutes violate The Town's due process rights and are unconstitutional because they are oppressive and deny The Town the right to defend at a meaningful time and in a meaningful manner. Specifically, these statutes (1) strip away the rights The Town would otherwise have to defend itself in the judicial branch; (2) create a presumption the Final Order is correct because the Chancery Court can only set it aside if The Town can demonstrate one of the five criteria for setting aside the Final Order apply (i. e. The Town is guilty until it proves its innocence); (3) have no provision for appealing prior evidentiary, procedural, and legal rulings made by the ALJ or the Board; (4) deprive The Town of its Tenn. R. Civ. P. 38 right to a jury trial; and (5) deprive the judicial branch from receiving evidence as the Chancery Court is limited to the record created by the ALJ, based on what the ALJ decided should be in the record.

H. Summary – The Assessment is Void

As Justice Gorsuch wrote, separation of powers "entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles." Jarkesy, 603 U. S. at 141. (Gorsuch, J., concurring opinion). The SDWA and APA Statutes at Issue provide neither, the statutes do not provide a meaningful process, and minimum due process requires the state's separate judicial branch to decide whether

The Town owes TDEC a debt. These SDWA and APA Statutes at Issue violate The Town's due process rights and are therefore unconstitutional. Since the Assessment is the result of unconstitutional statutes, violates principles of separation of powers, and violates The Town's due process rights, the Assessment is void.

III. Section Three – The SDWA and APA Statutes at Issue Violate the Town's Right to a Jury Trial

A. Tennessee Constitutional Right to a Jury Trial

The SDWA and APA Statutes at Issue violate The Town's Tennessee Constitutional right to a trial by jury. Article I, § 6, of Tennessee's Constitution provides, in pertinent part: "That the right of trial by jury shall remain inviolate." Despite the broad language, Article I, § 6, does not guarantee a jury trial in every case. Helms v. Tennessee Dep't of Safety, 987 S. W. 2d 545, 547 (Tenn. 1999). According to Tennessee's Supreme Court, the right to trial by jury extends only to those causes of action that were cognizable at common law in North Carolina as of 1796, when Tennessee's Constitution was adopted. Id. Eighteenth century North Carolina common law bifurcated the system of justice into courts of law, where a jury trial could be requested, and courts of equity (chancery court) tried by a judge. Smith Cnty. Educ. Ass'n v. Anderson, 676 S. W. 2d 328, 226 (Tenn. 1984). The right to trial by jury did not apply to actions that were "inherently equitable." Id. As explained in Jarkesy discussed more fully above, statutory civil penalties such those imposed by TDEC in this case is a common-law claim on a debt.

> "Actions by Government to recover civil penalties under statutory provisions," we explained, "historically had been viewed **as [a] type of action in debt** requiring trial by jury" (internal citations omitted, emphasis added).

Jarkesy, 603 U. S. at 122. Thus, common-law claims are those claims that are not claims in equity, admiralty, or maritime. Using federal decisions as guidance:

> This Court has long understood the Seventh Amendment's protections to apply in "all [civil] suits which are not of equity [or] admiralty jurisdiction" (citation omitted).

Jarkesy, 603 U. S. at 149 (Gorsuch, J., concurring opinion). The TDEC Assessment is a claim for money (specifically a debt), and since a claim for money is not a claim in equity, admiralty, or maritime the TDEC Assessment is a common-law claim. Since TDEC's claim for civil penalties is a common-law claim, Tennessee's Constitution entitles The Town to have its dispute with TDEC on this debt adjudicated by the judicial branch with a jury.

B. Seventh Amendment Right to Trial by Jury

For the reasons set forth in Jarkesy discussed above, The Town argues that the SDWA and APA Statutes at Issue violate The Town's U. S. Constitution Seventh Amendment and Fourteenth Amendment rights to a trial by jury. While Jarkesy concerned dispute resolution in the federal system, and presently TDEC and The Town are in the state system, there is no reason why the U. S. Constitution's Fourteenth Amendment should not incorporate the Seventh Amendment upon the states. While that should be the law, presently it is not the law … for the time being. Perhaps it will be this case that changes things.

The leading case on the topic is Minneapolis & St. Louis R. Co. v. Bombolis, 241 U. S. 211 (1916). In Bombolis, the United States Supreme Court held that the Seventh Amendment's civil jury trial right is not enforceable against the states. Bombolis, 241 U. S. at 217. However, this ruling is destined for change. In a recent October 14, 2025, concurring opinion in Thomas v. Humboldt Cnty., 2025 U. S. LEXIS 3843* (2025), Justice Gorsuch had this to say about Bombolis' precedential value from the year 1916:

> I do not doubt that Bombolis warrants a second look.
>
> As petitioners observe, Bombolis is something of a relic. There, the Court dismissed as "strange" the notion that the Seventh Amendment – or, for that matter,

> any of the Bill of Rights – might be enforceable against the states. But what once might have seemed strange almost goes without saying today. In the years since Bombolis, this Court has "shed any reluctance" about the idea that the Fourteenth Amendment "incorporates" against the States many of the liberties enshrined in the Bill of Rights. To be sure, debate exists around the edges. There are, for example, those who hold that the Fourteenth Amendment incorporates provisions of the Bill of Rights through its Due process Clause, while others believe that the Privileges or Immunities Claus supplies the truer source of authority for the job. Similarly, some have argued that the Fourteenth Amendment selectively incorporates only fundamental or deeply rooted aspects of the Bill of Rights, while others have suggested that, under that test or any other, the Fourteenth Amendment renders all of the first eight Amendments enforceable against the States.
>
> But whatever one's position on matters like those, it is hard to imagine how the Seventh Amendment might not be among those rights the Fourteenth Amendment secures against the States. Under this Court's contemporary case law, States must respect the First Amendment's Establishment Clause, the Second Amendment's right to bear arms, the Fifth Amendment's protections against self-incrimination and its Takings Clause, the Eighth Amendment's Excessive Fines Clause; the list goes on. On what account should the Seventh Amendment be treated differently?
>
> …
>
> That Bombolis lingers on the books not only leaves our law misshapen, it subjects ordinary Americans to a two-tiered system of justice.
>
> …
>
> No less than at the founding, civil juries today play a critical role in checking governmental overreach, holding public officials accountable, and ensuring a fair hearing for those who come before our courts.
>
> Bombolis may survive today, but this Court should confront its Seventh Amendment holding soon (internal citations omitted).

Thomas, 2025 LEXIS at [1*] – [5*].

IV. Section Four – Review of Pre-Contested-Hearing Orders

Tin case it is needed, The Town appeals and seeks Board review of certain pre-contested-hearing Orders by the ALJ.

A. The Order Denying The Town's Motion to Dismiss Entered March 13, 2025

The Town seeks appeal and review of the ALJ's Order entered March 13, 2025, denying Respondent's Motion to Dismiss TDEC's Assessment as Void or in the Alternative for Dismissal of the Monetary Portions of the Assessment Due to the Court Lacking Subject Matter Jurisdiction.[6] For the constitutional-argument reasons presented in Sections One through Three above, the ALJ erred in not granting said Motion.

B. The Order Determining Certain Questions of Law Entered February 19, 2025

The Town seeks appeal and review of the AJL's standard for review of the Assessment set forth on page 3 of its Order Determining Certain Questions of Law entered February 19, 2025.[7] One question The Town sought to be addressed was the standard by which the Assessment would be "reviewed" pursuant to T. C. A. § 68-221-713(b)(2)(A). The concept behind the Motion seeking guidance on this topic is that if there is going to be a review, perhaps there should be known criteria for that review. Without waiving its constitutional arguments presented above, under the present statutory framework, it would seem the only meaningful standard for ALJ review of the Assessment would have been the same standard for judicial review of the Assessment set forth at T. C. A. 4-5-322(h). The standard for review set forth by the ALJ on page 3 of its order was incomplete, and as such it was in error.

C. The Order Granting TDEC Partial Summary Judgment Entered May 6, 2025

The Town seeks appeal and review of the ALJ's Order Granting Partial Summary Judgment entered May 6, 2025.[8] While perhaps not inappropriate for the ALJ to have decided

[6] Order entered March 13, 2025; Tech. R. p. 400.
[7] Order entered February 19, 2025; Tech. R. p. 126.
[8] Order entered May 6, 2025; Tech. R. p. 824.

that certain undisputed facts occurred and that those facts technically constituted some SDWA violations, the ALJ was mistaken in going the next step and determining "liability" for those violations. In determining The Town was "liable" to TDEC, the ALJ predetermined the Assessment was properly brought against The Town. That is, The Town would not have "liability" to TDEC if the Assessment was brought for an unauthorized and/or improper purpose and in violation of TDEC's policies. If The Town could show the Assessment was brought for an unauthorized and/or improper purpose contrary to law and TDEC policy, then The Town would not have liability to TDEC. That is, a person should not be liable for something unauthorized and/or improper and contrary to policy.

In response to TDEC's Motion for Summary Judgment, The Town placed into the record significant evidence that the Assessment was brought for an unauthorized and/or improper purpose contrary to TDEC policy sufficient to overcome summary judgment. Specifically, at that time in the case, as Mr. Moss testified under oath in his deposition, it was TDEC's position that it was required by EPA to bring the Assessment because of The Town's ETT score being at 11 or higher.[9] At minimum, that reason was shown to be a mistake as The Town's truthful ETT score at the time was nowhere near 11 as Mr. Moss claimed.[10] Actually, Mr. Moss's testimony under oath was untruthful. It seems that Mr. Moss's own email dated January 18, 2024, established he knew The Town's ETT score was well below 11, enforcement was not required by EPA, but TDEC was going to do an Assessment anyway.[11] Consideration of summary judgment required the ALJ to accept as true The Town's facts (Eaton v. McLain, 891 S. W. 2d 587, 590

[9] The Town's MSJ Resp. Brief, pp. 15 – 16 (T. Moss dep. testimony); Tech. R. pp. 569 – 570.
[10] The Town's MSJ Resp. Brief, pp. 18 – 25 (with record citations); Tech. R. pp. 572 – 579.
[11] The Town's Mo. for Sanctions, Tech. R. p. 739, supporting, Decl. of BCQ, Tech. R. p. 746, Ex. 1 T. Moss email dated 1/18/2024, Tech. R. p. 750; Cont. H. Ex. 9, T. Moss email dated 1/18/2024, Tech. R. p. 1227.

(Tenn. 1994), but that was not done. The ALJ's Order on Partial Summary Judgment should be set aside.

V. Section Five – Review of the Assessment

Because an assessment is not issued for each and every violation of the SDWA by a water system,[12] (1) TDEC must have a valid reason for its decision to issue the Assessment, not just that violations occurred, (2) the reason must be supported by the evidence, (3) the reason must be consistent with an authorized purpose, (4) the reason cannot be arbitrary and capricious, and (5) the content of the assessment itself must be appropriate and likewise not arbitrary and capricious. These topics are now discussed.

A. TDEC Did Not Have a Valid Reason for Issuing the Assessment

1. Determining TDEC's Reason

Preliminarily, the Board must determine TDEC's reason for issuing the Assessment. There are only two categories of reasons for issuing assessments: (1) when the assessment is required, and (2) when the assessment is discretionary.

(a) Required Enforcement

Under the SDWA, TDEC is required to take enforcement actions[13] in just two instances: (1) when a water system's ETT score reaches 11 or higher or (2) upon a low enough, percentagewise, sanitary survey score,[14] and the field office requests it.[15] "ETT" means Enforcement Tracking Tool.[16] Pursuant to this tool, a water system is assigned ETT points based

[12] Cont. H. Transcript, T. Moss testimony, p. 284; Tech. R. p. 970.
[13] The term "enforcement action" is the broader term for available remedies to bring about compliance and includes assessments, which is the particular enforcement action at issue in this case.
[14] Cont. H. Transcript, T. Moss testimony, p. 284 – 285; Tech. R. pp. 970 – 971.
[15] Cont. H. Transcript, J. Murphy testimony, p. 349; Tech. R. p. 1019.
[16] Cont. H. Transcript, T. Moss testimony, p. 319; Tech. R. p. 1011.

on existing, non-abated/non-fixed, SDWA violations.[17] The score is a rolling score over five years.[18] Points are added when violations are logged, and points are removed when violations are abated or remedied.[19] TDEC is a primary enforcement agency for EPA.[20] EPA requires TDEC to take formal enforcement action when a water system's ETT score reaches 11 or greater.[21] Upon achieving such a score, TDEC has no choice but to bring an enforcement action,[22] which must be brought within two (2) calendar quarters.[23]

(b) Enforcement Action by Discretion

TDEC may decide to issue assessments even though not required to do so. Doing something, when not required to do so, means to exercise discretion in deciding to take the action or not. While, TDEC has the discretion to issue assessments, doing so must be for an authorized reason. The reasons for which TDEC may decide to issue discretionary assessments are those contained in TDEC's Uniform Guidance for the Calculation of Civil Penalties dated May 2016 (hereinafter the "**Uniform Guide**.") which is considered TDEC policy.[24] The Uniform Guide, provides the following purposes for assessments:

> The goal of TDEC's compliance assurance and enforcement programs is to attain and maintain a high rate of compliance within the regulated community. This goal is accomplished through comprehensive monitoring and inspection programs and by addressing **the more serious violators** with timely, visible, and effective enforcement actions. A timely and appropriate enforcement action should return the violator to compliance as expeditiously as possible, as well as deterring future or potential non-compliance (emphasis added).

[17] Cont. H. Ex. 3, EPA policies; Tech. R p. 1198.
[18] Cont. H. Transcript, J. Bagwell testimony, p. 20; Tech. R. p. 878.
[19] Cont. H. Ex. 3, EPA policies; Tech. R p. 1198.
[20] Cont. H. Transcript, T. Moss testimony, p. 324; Tech. R. p. 1013.
[21] Cont. H. Transcript, T. Moss testimony, pp. 319 and 341; Tech. R. pp. 1011 and 1017.
[22] Cont. H. Transcript, T. Moss testimony, pp. 319 and 324; Tech. R. pp. 1011 and 1013.
[23] Cont. H. Transcript, J. Murphy testimony, p. 401; Tech. R. p.1032.
[24] Cont. H. Transcript, T. Moss testimony, p. 335; Tech. R. p. 1015.

Uniform Guide, p.1, Cont. H. Ex. 35, Tech. R. p. 1321. Based on the foregoing, there is a five-part test for determining authorized purposes for discretionary assessments. Basically, assessments (1) are for the more serious violators; (2) must be timely; (3) must be appropriate; (4) should return the violator to compliance as expeditiously as possible; and (5) should deter future non-compliance.

As for the upfront and contingent portions of the civil penalties contained in the Assessment, the Uniform Guide states the purposes of theses penalties are to:

> remove any known economic benefit which the facility may have enjoyed during the period of non-compliance and **encourage compliance** by having non-compliance cost more than compliance. The purpose of the contingent penalty is to provide an incentive for the respondent to **correct the violations** or take remedial actions within specified timelines (emphasis added).

Id. Thus, it would seem the authorized purpose of civil penalties are to "encourage compliance" when compliance is needed, because compliance has not already happened, and to "correct violations" because violations are in needed of being corrected because the violations have not already been corrected.

In summary, the key to appropriateness of an order and assessment is the water system's compliance status at the time the assessment is issued. If, at the time the assessment is issued, the water system is already in compliance and has long ago corrected all violations, an assessment and penalties at that time would be contrary to the authorized purposes.

2. TDEC's Reason for Issuing the Assessment

At TDEC, it is Jessica Murphy who ultimately decides when an assessment is to be issued.[25] Jessica Murphy is the head of TDEC's Compliance and Enforcement Unit.[26] At the

[25] Cont. H. Transcript, T. Moss testimony, p. 286; Tech. R. p. 971.
[26] Cont. H. Transcript, J. Murphy testimony, p. 345, Tech. R. p. 1018.

time of the issuance of the Assessment in this case, all SDWA assessments were written and authored by Tom Moss[27] but only when directed to do so by Ms. Murphy.[28] As mentioned, what is under review in this case is TDEC's **reason for issuing** the Assessment. Accordingly, when endeavoring to ascertain an agency's reason for taking action, the reason given by the agency *before* taking the action is the most probative evidence of the reason for that decision. In an email dated January 18, 2024, discussed below, TDEC's Tom Moss informs others in the Knoxville field office of Ms. Murphy's reason.

As background, TDEC's initial plan in this case was to use the Town's ETT score as the reason for the Assessment. Tom Moss testified in his deposition given January 30, 2025, that Ms. Murphy tasked him with writing the Assessment on January 25, 2024, because the Town's ETT score was 17.[29] However, on January 18, 2024, it was learned by Mr. Moss that 10 points were to come off the Town's ETT score retroactive to October 31, 2023,[30] meaning the Town's truthful ETT score was to drop from 17 to no more than 7 at that time.[31] At the contested hearing, when asked about Contested Hearing Exhibit 8, TDEC's Jeff Bagwell testified as follows:

> Q: Mr. Bagwell, Hearing Exhibit 8 appears to be an email from you dated January 18, 2024, at 5:10 a.m. to Mr. Moss and others. Let me have you read into the record – just your email at the top – and then I'll ask you a question.

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[27] Cont. H. Transcript, T. Moss testimony, p. 318; Tech. R. p. 1011.
[28] Cont. H. Transcript, T. Moss testimony, p. 286; Tech. R. p. 971.
[29] Cont. H. Transcript, T. Moss testimony, p. 287; Tech. R. p. 971.
[30] See, Cont. H. Ex. 1 showing a 10-point ETT score for the September 2023 GWR treatment technique violation and Cont. H. Ex 8 where TDEC's Mr. Bagwell affirms this violation returns The Town to compliance retroactive to October 31, 2023, for the Town having issued a public notice. See, also, Cont. H. Ex. 4 and J. Bagwell's testimony, Cont. H. Transcript, pp. 39 – 43, Tech. R. pp. 883 – 884. TDEC conceded this item was actually not a violation (See, Cont. H. Transcript, p. 270, statement of TDEC counsel during J. Williams testimony, Tech. R. p. 967).
[31] Cont. H. Transcript, J. Bagwell testimony, p. 42; Tech. R. p. 884.

A: The contents of the email says, Thanks Brad! I don't think I have seen this but will add it to SDWIS. This will allow the Ground Water Rule Treatment Technique violation of September 2023 to return to compliance as of the last day of the subsequent monitoring period of 10/31/2023.

Q: Mr. Bagwell, what is going on here if I have this right is that this September 2023 treatment violation you told us about earlier where the Town was not putting chlorine into the water for some period of time, the 10 points associated with that come off the Town's ETT score. Is that what's happening?

A: Yes. When the violation is returned to compliance, those points accrued for that violation will be taken out of the overall ETT score.

Q: Retroactive to – looks like you're saying – October 31, 2023?

A: Yes.

Q: And so you're telling Mr. Moss there that morning of January 18 that 10 points are coming off the Town's score; is that right?

A: Correct. As of the next calculation of the ETT points, it will be reflected

…

The next calculation of the ETT score will reflect that.

Q: When would that be?

A: Probably that was done on January 18th. I think the next ETT calculation come out around January 25th to the 31st somewhere in that time frame.

Q: And the January 25th number should reflect the ETT score reduced by 10. Correct?

A: Correct.

Q: And even though it's the 18th, you're letting Mr. Moss now that that is going to be happening. Right?

A: Correct.[32]

[32] Cont. H. Transcript, J. Bagwell testimony, pp. 52 – 54; Tech. R. pp. 886 – 887.

As such, with the Town's truthful ETT score now below 11, being required by EPA to do the Assessment could no longer be the reason. In response to learning that ETT score could not be the reason, Ms. Murphy tells Mr. Moss to issue the Assessment anyway "since they [The Town] really haven't fixed anything," and Mr. Moss reports her reason to the Knoxville field office in an email. That email was Contested Hearing Exhibit 9 and reads:

> I have discussed Tellico Plains with Jessica. Even though they are off the hook on this one with EPA, she still wants me to do an order since they really haven't fixed anything.

Cont. H. Ex. 9; Tech. R. p. 1227. Accordingly, it is inescapable that TDEC's reason for its decision to issue the Assessment is the above statement attributed to Ms. Murphy on January 18, 2024, that the Town really had not fixed anything. Further, the only possible "anything" that had allegedly not been fixed by January 18, 2024, to which Ms. Murphy referred, were the violations that came to appear in the Assessment.[33] Note that Ms. Murphy's reason for the Assessment is not that violations occurred. In short, it must be Ms. Murphy's view that the Town is out of compliance and needs an assessment as motivation to become compliant for violations already fixed, which of course is absurd.

At the contested hearing, Ms. Murphy testified but did not deny, qualify, or explain this reason for TDEC's decision attributable to her.

B. TDEC's Reason for Issuing the Assessment is not Supported by the Evidence

Having identified the reason for the Assessment, the next inquiry is whether TDEC's reason for issuing the Assessment is supported by the evidence. However, TDEC's reason for issuing the Assessment was not supported by the evidence. The undisputed evidence at the contested hearing was that by January 18, 2024, The Town had long ago fixed everything. Troy

[33] Cont. H. Transcript, J. Bagwell testimony, p. 59; Tech. R. p. 888.

Taubert, the Town's Utilities Manager, testified that prior to the Assessment being issued, The Town had long ago fixed everything,[34] and the Assessment provided no motivation to fix that which had already been fixed.[35] Furthermore, in her cross examination, Ms. Murphy conceded, as to each and every alleged violation, The Town had fixed all the violations prior to the issuing of the Assessment. Her questioning about each violation in the Assessment went like this:

Q: The first violation is Roman Numeral X. Do you see that there?

A: I do.

Q: It speaks of not taking some bacteriological samples in July and August. Do you see that there?

A: I see that.

Q: A violation, fair to say, is a problem. It's a problem for the Town. Agree?

A: Agreed.

Q: The way to fix that problem is to in the next month take the correct number of samples. Agreed?

A: I am very glad they took the correct number in [sic] following that.

Q: That is the way you fix the problem is by doing what you are supposed to. Right?

A: Well, you fix the problem in the future. You can't go back and sample when you didn't sample originally. It's still – a violation is still there.

Q: You could never – under that logic, Ms. Murphy, you could never fix anything. Right?

A: I don't know that fix is a good word. It's just correcting the sampling procedure so that they take enough.

Q: Did they correct it or not? And to speed things along they did, of course, didn't they?

[34] Cont. H. Transcript, T. Taubert testimony, p. 551; Tech. R. p. 1110.
[35] Cont. H. Transcript, T. Taubert testimony, pp. 523, 525, 530, 541 – 542, 548, 551, and 555; Tech. R. pp. 1103, 1105, 1107 – 1108, 1109, 1110, and 1111.

A: That's my understanding.

Q: Look at violation Number 2. It's Roman Numeral 11. Same line of questioning. Some chlorine residuals weren't taken in July or August, whatever it says, and then the way you fix that problem is to in the ensuing months take the correct number of samples and don't do it again. Right?

A: Agreed.

Q: All right. Number XII, the next item. Failing to report the chlorine residuals leaving the plant for the time periods, et cetera. Once again, the way you fix the problem is by doing the required reporting thereafter. Agreed?

A: Agreed.

Q: And that's what the Town did. They fixed the problem – right – because they did the required reporting thereafter. Agreed?

A: Agreed.

…

Q: Roman Numeral XIII there, same line of questioning. It's a violation for not performing grab samples when the analyzer was malfunctioning. Do you see that there?

A: Yes.

Q: Again, the way you fix that problem is that thereafter if the machine goes down, you do your grab samples. Right?

A: Yes.

Q: And after this time period, would you agree with me that the Town fixed that problem because they didn't receive a violation for that thereafter, did they?

A: Not as far as I know.

Q: Okay. Roman Numeral XIV. By failing to notify the Division that the analyzer was down, that's a problem that is fixed by reporting that problem should it occur again. Right?

A: That sounds logical.

Q: Okay. And they, in fact, fixed that problem because they've not received a violation for that issue ever again, have they?

A: As far as I know, they have not received another violation for that.

Q: Item Numeral XV, by failing to have certified operators for the water treatment and distribution. Do you see that?

A: Yes, I do.

Q: Well, there's a time period when the Town did not have its certified operators, and we know that and fair to say that's a problem, and you fix the problem by getting your operators. Right?

A: Correct.

Q: And so the Town fixed that problem by getting operators. Would you agree?

A: Yes.[36]

Further to this issue, and by the time of the Assessment, the Town was performing satisfactorily. TDEC employee Brad Antone provided the following:

Q: Prior to [the date of the Assessment], Mr. Antone, of the violations mentioned in the order and assessment, had there any of those violations not been satisfactorily addressed by the Town as of that date?

A: All of the violations had been addressed and they took action to not have those violations occur since then.

Q: Satisfactorily to the Department. Is that fair?

A: They haven't occurred yet so – or since then, so I would say yes.[37]

In summary, Ms. Murphy's reason for issuing the Assessment, that the Town really had not fixed anything, is not supported by the evidence.

[36] Cont. H. Transcript, J. Murphy testimony, pp. 410 – 414; Tech. R. pp. 1034 – 1035.
[37] Cont. H. Transcript, B. Antone testimony, pp. 108 – 109; Tech. R. p. 900 – 901.

C. The Assessment Was Not Issued for an Authorized Purpose

1. Introduction

As discussed in the preceding Subsection, TDEC's reason for its decision to issue the Assessment was not supported by the evidence and was, frankly, untruthful. Since basing an agency decision on an untruthful reason can never be appropriate, perhaps no further discussion is needed. However, for completeness, the following analysis is made.

2. Enforcement Action Was Not Required

As discussed above, at the contested hearing TDEC offered no credible proof that it issued the Assessment because it was required to do so by EPA because of the Town's ETT score. "Credible" is needed as a qualifier because Mr. Moss did testify in his deposition taken January 30, 2025, unequivocally, that the reason for issuing the Assessment was the Town's ETT score being 11 or higher, but this testimony was not true. Likewise, TDEC offered no proof that the Assessment was issued because the Town received an unsatisfactory sanitary survey score and the field office requested enforcement action. To the contrary, the proof was that the Town's truthful, adjusted December 11, 2025, sanitary survey score was a 95.993% which is regarded as an approved score.[38]

3. Discretionary Enforcement Action

As TDEC was not required to issue the Assessment, what remains is that the Assessment was issued in TDEC's discretion. In addition to the requirement that TDEC's reason for its decision be supported by the evidence, as mentioned above, there are five (5) criteria TDEC

[38] Cont. H. Transcript, J. Williams testimony, pp. 273 – 274, Cont. H. Ex. 29 (Sanitary Survey, last page, Tech. R. p. 1290).

must meet to show that it appropriately exercised its discretion. Those five (5) criteria are now discussed.

(a) Serious Violators

According to the Uniform Guide, assessments are reserved for "serious violators." The term "serious violator" is not defined in the Uniform Guide, yet common sense would seem to indicate that the context requires a serious violator to not just be a violator. That is, while violations may have occurred, to justify issuing the Assessment, TDEC needed to prove at the contested hearing that The Town was a serious violator. Accordingly, it would seem that being a serious violator, in the context of the Uniform Guide, means the violator has something of a special disposition necessitating the need for external motivation such as having a habitual and contemptuous disregard of SDWA responsibilities or a habitual and willful indifference to compliance. A non-serious violator, on the other hand, suffers a SDWA violation of a rule, or perhaps several rules; recognizes the importance of compliance; is not indifferent to compliance; and complies as soon as it is able.

To say The Town is a serious violator of the SDWA within the meaning of the Uniform Guide would be an injustice. At the contested hearing, TDEC failed to prove that The Town was contemptuously disregarding SDWA rules, was willfully indifferent to its obligations, and was habitually violating the same rule over and over (through indifference or otherwise). TDEC did not prove there were any violations of these same rules prior to the occurrences in this case. The various violations were one-time occurrence not repeated from the occurrence dates through the date of the Assessment and, also, to the date of the contested hearing.[39]

[39] Cont. H. Transcript, B. Antone testimony, pp. 108 – 109; Tech. R. pp. 900 – 901.

(b) The Assessment Must be Timely.

As it regards the requirement that the Assessment be timely, the various separate SDWA violations occurred between July and October 2023. All but one violation was fixed by September 2023. All violations were fixed by November 2023. The violations were one-time events, and by the time of the Assessment March 19, 2024, no external motivation was required to be imposed on The Town to motivate it to comply. The Assessment five (5) months later served no purpose. Thus, TDEC failed to prove its Assessment was timely.

(c) The Assessment Must be Appropriate

The Uniform Guide requires the content of the Assessment be appropriate. This topic is discussed below in Subsection E of this Brief presented below.

(d) The Assessment Should Return the Violator to Compliance as Expeditiously as Possible

Returning a rogue water system to compliance is the essential justifying purpose for an Assessment, and this is borne out by Tom Moss's testimony. He was asked:

Q: Is it common for public water systems to come into compliance after an order is issued?

A: Absolutely. I don't know of a case where we've ever collected the entire penalty.

Q: So public water systems usually see the order and fix the violations; is that right?

A: Correct.[40]

However, as discussed above, the violations were one-time events. At the contested hearing, TDEC failed to prove that on the date the Assessment was issued, March 19, 2024, the Assessment was needed to return The Town to compliance because the Assessment occurred five (5) months after The Town had fully complied and corrected all violations. As to TDEC's policy

[40] Cont. H. Transcript, T. Moss testimony, p. 342; Tech. R. p. 1017.

on enforcement actions against water systems already in compliance, TDEC employee Brad Antone confirmed there is not one. He had this to say:

> Q: What is TDEC's preferred method to gain [compliance] of the Safe Drinking Water Act violation when the water system has already complied?
>
> A: As far as a formal response or a formal policy, **I don't know of one**. We've already – you already asked about voluntary compliance. I think that's our first preferred method (emphasis added).[41]

Accordingly, at the contested hearing, TDEC failed to prove the Assessment was needed to bring The Town into compliance when it otherwise would not have complied because at the time of the Assessment, The Town was already in compliance.

(e) The Assessment Should Deter Future Non-compliance.

The need for fining The Town as some sort of deterrence for future violations required TDEC to prove at the contested hearing that The Town's compliance with the SDWA rules at issue in the Assessment had been a chronic problem for The Town due to The Town's willful contempt for the rules or willful indifference to its SWDA responsibilities. The need for such deterrence would be manifested by SDWA violations before and after the occurrences at issue in the Assessment or, perhaps, in some communication by The Town manifesting the intent not to comply with its SDWA responsibilities. TDEC proved none of that. In fact, the proof at the contested hearing was the opposite as The Town endeavored to comply with the SDWA rules to the best of its ability. According to TDEC's Robert Ramsey, Mayor Parker acted in good faith and tried to do the right thing;[42] she tried to do her best, and was neither disinterested or uncaring.[43] Another possible justification for deterrence would be where the public was actually

[41] Cont. H. Transcript, B. Antone testimony, pp. 105 – 106; Tech. R. p. 900.
[42] Cont. H. Transcript, R. Ramsey testimony, p. 181; Tech. R. p. 945.
[43] Cont. H. Transcript, R. Ramsey testimony, p. 183; Tech. R. p. 945.

harmed. However, there was no proof at the contested hearing that the SDWA violations at issue harmed the public. TDEC's Erich Webber agreed there were no reported deaths, no serious injuries, and no minor injuries from anything The Town did or failed to do.[44]

D. TDEC's Reason for Issuing the Assessment was Arbitrary and Capricious

TDEC's reason for issuing the Assessment (that The Town really had not fixed anything) was arbitrary and capricious. According to Black's Law Dictionary, arbitrary means:

> of, relating to, or involving a determination without consideration of or regard for facts and circumstances, fixed rules, or procedure. (of a judicial decision) founded on prejudice or preference rather than on reason or fact.

Black's Law Dict., 10th Ed. Capricious means:

> (of a person) characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways. (of a decree) contrary to the evidence or established rules of law.

Black's Law Dict., 10th Ed. In reviewing Tennessee case law, it does seem that when these two words are used in conjunction with each other, they are to relay a single concept, rather like the expression "aiding and abetting" which seems to also relay just one concept. Tennessee's Supreme court has defined "arbitrary and capricious" as follows:

> [a]n arbitrary or capricious decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that could lead a reasonable person to reach the same conclusion.

Issuing an Assessment premised on being required to do so by EPA because of a high ETT score at the time of the Assessment would have been reasonable. When it became apparent that ETT score could not be the reason, TDEC needed an alternative reason. As discussed above, on January 18, 2024, Ms. Murphy provided her subordinate Tom Moss with that reason,

[44] Cont. H. Transcript, E. Webber testimony, pp. 224 – 225; Tech. R. pp. 955 – 956.

which was that The Town really had not fixed anything. As discussed above, that reason was false. TDEC's reason for issuing the Assessment against The Town for a discretionary reason that was false, and that TDEC knew it was false, is the epitome of arbitrary and capricious conduct.

E. The Content of the Assessment was Inappropriate and Otherwise Arbitrary and Capricious

Assuming for the purposes of this topic that TDEC's decision to issue the Assessment against The Town was valid, the content of the Assessment needed to be appropriate and not arbitrary and capricious. As such, for the Board to be able to sustain or modify the civil penalties there must exist reasonably objective criteria for determining the dollar amounts of the penalties. To sustain the Assessment, the Board needs to be able to locate the objective criteria in TDEC's policies and apply the criteria to the facts in the same manner as did Mr. Moss, the author of the Assessment, to arrive at a similar result. Likewise, to modify the Assessment, the Board needs to be able to identify the objective criteria missed and apply the correct objective criteria. Note that in the absence of objective criteria, what remains is subjective criteria or no criteria.

1. <u>The Face of The Assessment</u>

From the face of the Assessment, it is impossible to know whether any reasonably objective criteria exist or were applied for determining the civil penalties. To be sure, there are alleged violations mentioned, and a "here-is-what-you-owe" total dollar amount, but in no way can the Board determine from the face of the Assessment how the alleged violations correlate into an amount owed. As Mr. Moss testified, TDEC does not provide that explanation in its assessments and never has.[45] Mr. Moss has been doing SDWA assessments for 11 years, he is

[45] Cont. H. Transcript, T. Moss testimony, pp. 291 and 333; Tech. R. pp. 972 and 1015.

the only one who writes them, and he has written over 180.[46] Further, Mr. Moss seems to regard water systems undeserving of such an explanation. He testified:

> Well, they [the water systems] know what the violations were and the assessment part is saying don't do it again. This is the violations you had. Basically don't do it again.[47]

2. Explanation for the Civil Penalties Found Elsewhere

The civil penalties are derived from a Penalty Matrix worksheet (Contested Hearing Ex. 34; Tech. R. 1317) which is purportedly based on the Uniform Guide.[48] Tom Moss was the one who filled out the Penalty Matrix in this case.[49] As shown by the Penalty Matrix worksheet, violations are assigned values depending upon whether the violation is a minor, moderate, or major deviation from the SDWA rule and also a minor, moderate, or major potential harm to the public. There is a chart, some math, and (by using math) the appearance of an objective method. However, there is a fatal flaw with the process, which is that there are no objective criteria for anyone to separately figure out how Mr. Moss made the initial determination that an event was the assigned qualitative deviation from the rule and the assigned qualitative potential harm to the public. Frankly, it seems the true purpose of the Uniform Guide is, as Mr. Moss put it, just "to be consistent across the various programs in the Department."[50] Mr. Moss does not say the purpose of the Uniform Guide is to arrive at an appropriate and fair assessment by an objective standard that everyone can understand. That leaves the door open to the potential for all of

[46] Cont. H. Transcript, T. Moss testimony, p. 283; Tech. R. p. 970.
[47] Cont. H. Transcript, T. Moss testimony, p. 291; Tech. R. p. 972.
[48] Cont. H. Transcript, T. Moss testimony, pp. 290, 294, and 304 – 305; Tech. R. pp. 972, 973, and 975 – 976.
[49] Cont. H. Transcript, T. Moss testimony, p. 334; Tech. R. p. 1015.
[50] Cont. H. Transcript, T. Moss testimony, pp. 292 and 305, and 334; Tech. R. pp. 972 and 976.

TDEC's assessments being consistently inappropriate, consistently lacking in objectivity, consistently in violation of TDEC's policies, and consistently unfair.

Had Mr. Moss been at the contested hearing, Mr. Moss could have been called upon to share the objective considerations present in the Uniform Guide that he used in making the first-order determinations that each of The Town's violations were of a specific rule deviation quality and a specific quality in potential harm to the public. Instead, at the contested hearing, TDEC offered no justification on that topic. Mr. Moss's only justification was that he writes the assessments the way he does, he has written over 180 of them, and he has been doing it the same way for 11 years.[51]

The difficulty with these purported justifications for the actions taken against The Town, premised solely on what TDEC always does, is not justification that the civil penalties against The Town were appropriate and not arbitrary and capricious. That is, previously issuing possibly inappropriate fines against 180 water systems over 11 years does not make doing the same thing in this case right. TDEC's logic is not surprising as no one has ever challenged TDEC's enforcement of an SDWA assessment. Mr. Moss testified that since 2014, when he began writing SDWA assessments, there has never been a SDWA contested case gone to hearing.[52]

3. Digression into Potential Harm to the Public Proves the Point

Regarding potential harm to the public, the proof at the contested hearing was that The Town's water source was classified as "true-ground water."[53] According to The Town's Utilities Manager Troy Taubert, The Town's true-ground water source comes from the shady dolomite formation which is a very high quality water source in the State of Tennessee "because it does

[51] Cont. H. Transcript, T. Moss testimony, p. 283; Tech. R. p. 970.
[52] Cont. H. Transcript, T. Moss testimony, p. 340 – 341; Tech. R. p. 1017.
[53] Cont. H. Transcript, T. Taubert testimony, p. 504; Tech. R. p. 1098.

not have any bacteria whatsoever."[54] True-ground water is the least regulated, and there is every reasonable expectation that even untreated, the source of The Town's water is free of harmful contaminants.[55] Whether true-ground water even has to be treated or monitored depends on the population being served.[56] Using Mr. Moss's criteria premised on "potential harm," one must take "potential" to mean reasonable expectation. As such, whether the Town took a sample, missed a sample, missed a treatment, or failed to submit a required piece of paper to TDEC provided no quantifiable change in the reasonable expectation that there would be no harm to the public in receiving true-ground water. Completely absent from the proof at trial was the objective criteria Mr. Moss used to determine potential harm to the public.

The violation that best demonstrates TDEC's proof problem concerns the last violation on the Penalty Matrix. This event concerns the reporting violation for not reporting to TDEC that the chlorine analyzer was inoperable. Reporting means sending TDEC a piece of paper. In no way can TDEC not having a piece of paper be a "major potential harm to the public" as Mr. Moss wrote.

4. The Assessment Cannot be Affirmed or Modified in the Absence of Objective Criteria

The importance of objective criteria cannot be over emphasized. The Board needs to be assured that in selecting these monikers of minor, moderate, and major Mr. Moss is being appropriate under the law and TDEC policy. The Town should also be able to know for itself how these monikers were derived. Since Mr. Moss never explained how he derived the

[54] Cont. H. Transcript, T. Taubert testimony, p. 504; Tech. R. p. 1098.
[55] Cont. H. Transcript, E. Webber testimony, pp. 216 – 219; Tech. R. pp. 953 – 954.
[56] Cont. H. Transcript, E. Webber testimony, p. 228; Tech. R. p. 956.

monikers, The Town's Utilities Manager Troy Taubert examined Mr. Moss's work to see if he could determine how Mr. Moss came up with the monikers. Mr. Taubert testified as follows:

> Q: Mr. Taubert, apparently Mr. Moss has some type of criteria for what constitutes a moderate, major, minor.
>
> A: Yeah. In looking at these documents before trial, Mr. Quist, I can't figure out what the criteria is for moderate, minor, or major.
>
> Q: How Mr. Moss decided between the three?
>
> A: Yes. Correct.
>
> Q: So how then, Mr. Taubert, can you be assured that in selecting those monikers that Mr. Moss is being appropriate under the law and applicable policy?[57]

At this point in the contested hearing, counsel for TDEC made an objection to this question, asserting the witness lacked personal knowledge of what he was being asked, and the ALJ sustained the objection. Accordingly, if after looking at the pertinent documents in this case, in no way can a third person ever determine (or be permitted to determine) how Mr. Moss came up with those monikers then that same conclusion constrains the Board from making a similar inquiry. Thus, because the Board can in no way determine how Mr. Moss came up with those monikers, the Board cannot sustain the Assessment or modify it. Modifying the Assessment means that in some way Mr. Moss did not do it right; but if the ALJ ruled a third party can in no way determine if Mr. Moss did it right, there is no way to say he did it wrong. If the Assessment cannot be sustained or modified, it is void.

Other problems with sustaining or modifying the Assessment are now discussed.

[57] Cont. H. Transcript, T. Taubert testimony, pp. 510 – 511; Tech. R. p. 1100.

(a) Example One – the Reporting Issue

Take for example the last violation on the penalty matrix, failing to send in a report, discussed above. Failing to send in a piece of paper in no way constitutes a major harm to the public. Whether TDEC had that piece of paper was not going increase or decrease the reasonable expectation somebody might die from the true-ground water supplied by The Town. However, the conundrum is then, what potential-harm-to-the-public value is TDEC not getting a piece of paper? The Board is precluded from deciding because there is no objective criteria in the Uniform Guide that would make that clear.

(b) Example Two – the Operator Issues

Another example concerns the certified operator issue. While it is true that it is a violation of the SDWA rules for The Town to provide water to the public without certified operators, penalizing The Town thousands of dollars for doing so under these facts, once again, is not appropriate. To begin with, as The Town's Mayor Parker testified, shutting off The Town's water at Mr. Patty's resignation in July 2023 and not turning it back on until the last operator was hired in November 2023 would have been grossly irresponsible AND not a reasonable choice. Fire departments need water, fire suppression sprinkler systems need water, and water is needed to flush toilets. It is all well and good to make rules and issue fines, but TDEC's penalties policy on this topic unfairly does not anticipate this Hobson's choice that faced the Mayor. Furthermore, there was conflicting evidence at the contested hearing on just what was the true urgency for getting replacement operators under the facts of this case. It seems that when an operator leaves, the water system has 30 days to notify TDEC.[58] Then once

[58] Cont. H. Transcript, R. Ramsey testimony, p. 181; Tech. R. p. 945; T. C. A. § 68-221-912(c).

notified, TDEC policy is to allow a water system a 30-day grace period,[59] followed by another 30-day notice period,[60] followed by a second 30-day notice period "to avoid further enforcement action."[61] These four thirty-day time periods total 120 days. Contested Hearing Exhibit 16 (Tech. R. p. 1249) and Mr. Antone's testimony tell us that if a water system goes for three to four months without notifying TDEC it had no operator, then said water system just gets the routine 30-day notice, likely followed by a second 30-day notice.[62] Specific to this case, by October 2023, the Town had not hired the last of four needed operators, and TDEC's Robert Ramsey addresses the lack of urgency at that time:

> Q: Did you end up having any conversations with the enforcement section pursuing formal enforcement against Tellico plains?
>
> A: I did. I spoke with Tom Moss and at the time we felt like giving them more time was appropriate.
>
> Q: Do you remember when that was?
>
> A: It was – it would have had to have been sometime right around this email communication of October 20th.
>
> Q: Why did you initiate this conversation?
>
> A: Because I wanted to see what direction we needed to go if we were going to pursue enforcement or if we were going to give them an additional time period to get the remaining operator.
>
> Q: To your knowledge, were they given an additional time period?
>
> A: Actually we didn't. To my knowledge, we didn't have to because somewhere right around November there was another email or another communication that said that they were hiring someone. Did I just add something?[63]

[59] Cont. H. Transcript, B. Antone testimony, p. 77; Tech. R. p. 893.
[60] Cont. H. Transcript, B. Antone testimony, p. 93; Tech. R. p. 897.
[61] Cont. H. Ex. 14, B. Antone letter dated 9/26/2023 (Tech. R. p. 1246); Cont. H. Transcript, B. Antone testimony, p. 94; Tech. R. p. 897.
[62] Cont. H. Transcript, B. Antone testimony, pp. 120 – 121; Tech. R. p. 903 – 904.
[63] Cont. H. Transcript, R. Ramsey testimony, p. 176; Tech. R. p. 943.

Furthermore, T. C. A. § 68-221-912(a) and (b) tell us The Town could have applied to Tennessee's Board of Certification of operators for extensions of time in obtaining certified operators for up to a 180-day period of time, and Contested Hearing Ex. 36 (Tech. R. p. 1338) informs us that pending the application for more time to hire certified operators, TDEC will not pursue enforcement. Should the application for more time be denied, another 30-day notification is sent.[64] Further, at the time there was a state-wide shortage of certified operators[65] to which Tom Moss gave no consideration because he did not know about it.[66]

In summary, while having certified operators is important, the above rather lengthy time frames speak to TDEC's real view of operator replacement urgency, which is frankly not all that urgent. The qualitative values selected by Mr. Moss are therefore not supported by the evidence at the contested hearing. However, once again, by what objective criteria can the Board determine lesser values for the operator related fines? That there is no objective criteria proves the point the Uniform Guide lacks the objective criteria due process requires.

(c) Example Three – the Multiplier

The civil penalties imposed on The Town are subject to upward or downward adjustment depending on certain factors. In this case, Mr. Moss decided The Town needed an upward adjustment of $3,330.00 because it had received notices of its violations.[67] However, good faith is a basis for downward adjustment, yet Mr. Moss determined The Town deserved no such downward adjustment for good faith efforts to resolve the violations. This aspect of the Penalty Matrix is perplexing. Mr. Moss's upward adjustment is because the Town received notices.

[64] Cont. H. Ex. 36, p. 2; Tech. R. p. 1339.
[65] Cont. H. Transcript, T. Taubert testimony, p. 492; Tech. R. p. 1095.
[66] Cont. H. Transcript, T. Moss testimony, p. 338; Tech. R. p. 1016.
[67] Cont. H. Ex. 34, the Penalty Matrix, p. 2; Tech. R. p. 1318.

Well, if the Town is not in compliance, it is getting the notices, and is ostensibly already being fined for not being in compliance. The event of notices being issued for a violation is not separate and independent of the violation. The notice does not exist without the violation, and The Town is being fined for the violation. Thus, for Mr. Moss to write that the Town owes $3,330.00 more because it was sent notices is inappropriate.

As mentioned, The Town was eligible to receive a downward adjustment if it was acting in good faith. The proof at the contested hearing was that Mayor Parker acted in the utmost good faith in her efforts to put The Town on the right path after Mr. Patty's departure, undertake the correct sampling, and hire replacement operators. According to TDEC's Robert Ramsey, Mayor Parker acted in good faith and tried to do the right thing;[68] she tried to do her best, and was neither disinterested or uncaring.[69] Mr. Ramsey agreed that it was more challenging for the Town to procure certified operators due to the Town being located in a remote rural area.[70] However, the Board cannot determine what this downward adjustment should be since there is no objective criteria in the Uniform Guide for the Board to make this dollar amount determination. This problem again proves the point that the determination of the civil penalties lacked the objective criteria due process requires.

5. Equitable Relief

As the Assessment was issued in its original form, the contingent penalties are triggered only as a result of The Town failing to do certain things it was ordered to do. While the ALJ deemed the contingent penalties void, did that mean that part of the Assessment whereby The

[68] Cont. H. Transcript, R. Ramsey testimony, p. 181; Tech. R. p. 945.
[69] Cont. H. Transcript, R. Ramsey testimony, p. 183; Tech. R. p. 945.
[70] Cont. H. Transcript, R. Ramsey testimony, pp. 183, 188 and 190; Tech. R. pp. 945, 946, and 947.

Town is ordered to do certain things is also void? The answer to that question is seemingly, "yes." However, if TDEC takes the position that the equitable relief in its order survives, it is The Town's position that in addition to the arguments presented elsewhere, TDEC's entitlement to equitable relief is barred by the doctrine of unclean hands because the reason on which the Assessment was premised was a lie.

VI. Section Six – Review of the Initial Order

In several places, the Initial Order makes incomplete and/or incorrect findings, conclusions, and analyses. To the extent the Board does not grant the relief requested by The Town, The Town requests the Board make the changes and additions to the Initial Order set forth on pages 10 – 23 of The Town's Appeal Notice filed October 13, 2025, Tech. R. P. 1548 - 1561. The Appeal Notice was quite thorough in this regard, and so repeating all thirty (30) items verbatim herein would be unnecessarily repetitive. However, a few noteworthy examples are discussed. The reference to "Item" numbers refers to the item number in that section of the Appeal Notice.

A. Errors in the Findings of Fact Section

In the Findings of Fact Section of the Initial Order, there are no less than twenty-seven (27) errors that should be corrected. These four (4), also mentioned in The Town's Appeal Notice, are particularly glaring:

Item 11. Paragraph 21 of the Initial Order contains an incomplete explanation of the December 11, 2023, Sanitary Survey Letter and should be amended. After correction for TDEC's mistakes, The Town's true score was 95.993%, which constitutes an "Approved Score." The letter did not cite The Town with new violations because TDEC had already cited The Town for the asserted violations well before December 11, 2023.

Item 12. The final sentence of paragraph 22 of the Initial Order is false and should be stricken and replaced with the following findings:

> The record demonstrates that at all times relevant to this case, The Town's ETT score was in fact at or near zero. The Town's truthful ETT score is not what the Department wrongfully says it is. For example, the supposed 10-point treatment violation for the events of September 15, 2023, should never have been recorded by the Department because the events on which it was based NEVER happened, and that the alleged treatment violation never happened was conceded by the Department. The fact that the Department chose not to acknowledge and correct this mistake, and present a hearing exhibit purporting to show that at one time The Town's ETT score was 17 did not make it true, because it was not. In the fall of 2023, the Town's ETT score was at or near zero and did not increase between that time and the date the Director's Order was issued.

Item 13. As for paragraph 24 of the Initial Order, Mr. Moss testified he was assigned the task of writing the Assessment by Jessica Murphy on January 25, 2024, not in December 2023.

Item 14. At paragraph 25 of the Initial Order, the ALJ lists three reasons the Assessment was issued. These were in fact not the reason the Assessment was issued. Paragraph 25 is incorrect, otherwise incomplete, and should be stricken and replaced with the following findings:

> Unless an Assessment is required to be issued by EPA due to an ETT score at or above 11, the Department has discretion to issue an Assessment, and in exercise of that discretion, the Department needed a reason for issuing the Assessment against the Town consistent with law and the Department's own policies. The Department's reason for issuing the Director's Order is best established by the reason given by the Department before, and closest in time to, the issuing of the Director's Order which was the statement attributed to Jessica Murphy, Manager of TDEC's Enforcement and Compliance Unit, by Tom Moss on January 18, 2024, two months before the Director's Order. That reason was, "Even though they are off the hook on this one with EPA, she still wants me to do an order since they really haven't fixed anything." The reference to being "off the hook with EPA" is a reference to The Town's ETT score not being the reason for the Director's Order as it had just been confirmed The Town's ETT score was at that time well under 11, and so ETT score could not serve as the reason. The reference to "they really haven't fixed anything" is a refence to the violations itemized in the Director's

Order, which was false because by January 18, 2024, The Town had actually fixed everything, and the Department knew this.

B. Errors in the Analysis Section

In the Analysis section of the Initial Order, there are three (3) errors that should be corrected. These two (2), also mentioned in The Town's Appeal Notice, are particularly glaring:

Item 1. On page 11 of the Initial Order, the ALJ writes that "The Town asserts that the Director's Order is invalid … because The Town's ETT score fell below 11." That is not correct. The Town's argued the Assessment was invalid because TDEC brought the Assessment for Jessica Murphy's false reason (that The Town really had not fixed anything) and knowing the reason for bringing the Assessment was false, but bringing it anyway, is arbitrary and capricious action that should not be tolerated. See, Section V(B) of this Brief. Further, The Town's truthful ETT score was never above 11. See, Section V(A)(2) of this Brief.

Item 3. At the top of page 14 of the Initial Order, the ALJ states that The Town rectified the violations and committed no further violations because of the "deterrent effect of the civil penalty in this case." That cannot be true because The Town was not notified of the civil penalties until the issuing of the Assessment, long after all violations were fixed. Something cannot deter action if it is not known. The civil penalties in this case, issued many, many months after the fact, served no deterrence.

VII. Section Seven – The Town's Motion for Respondent's Costs

The Town appeals the ALJ's denial of its post-contested-hearing motion for Respondent's Costs, ALJ Order entered October 15, 2025, Tech. R. p. 1613.

A. Introduction

T. C. A. § 4-5-325(a) provides, in pertinent part

(1) When a state agency issues a notice to a person, local governmental entity, board, commission for a violation of a rule or statute and the notice results in a contested hearing, at the conclusion of the contested case hearing, the hearing officer or administrative judge may order the state agency to pay to the respondent the reasonable expenses incurred because of the notice, including a reasonable attorney's fee, if the hearing officer or administrative judge determines that:

(A) (i) The claims contained in the notice are not warranted by existing law nor by a nonfrivolous argument for the extension or modification of existing law; and

(ii) The claims contained in the notice do not have evidentiary support; or

(B) The state agency issued the notice to harass, cause unnecessary delay, or cause needless expense to the party issued the notice.

(2) Subdivision (1)(1) is not satisfied simply by a state agency failing to prevail against the respondent.

B. Discussion

Section 325 allows The Town to be awarded its Respondent's Costs under either Subsection (a)(1)(A) or Subsection (a)(1)B. A discussion of each subsection follows.

1. Subsection (a)(1)(A) – Claims Not Warranted

The Town may be awarded its Respondent's Costs if the Board finds the claims against The Town were not warranted and were without evidentiary support. "Warranted" means "justified" and "being what is called for by accepted standards of right and wrong." "Not warranted" would then mean "unjustified, unfair, undue, unjust, and unreasonable." It remains The Town's position that the power granted to TDEC by the State to issue fines should not be abused and should only be used consistent with the policy reasons stated in the Uniform Guide to bring about compliance by water systems when fines are needed as motivation for compliance when self-compliance would otherwise not take place. The alleged violations at issue in this case were one-time occurrences and there was no evidentiary support that The Town needed fines as motivation for compliance. In fact, the opposite was shown. Further, the reason for

TDEC bring the Assessment was not warranted by "accepted standards of right and wrong." In this case, the clear reason for TDEC bringing the claims was the reason attributed to Jessica Murphy at Contested Hearing Exhibit 9 that "they [The Town] really haven't fixed anything." Tech. R. p. 1227. Since that reason was false, as The Town had long ago fixed everything prior to TDEC bring the Assessment, TDEC's reason is invalid, and its action in bringing the Assessment for a false reason is not warranted as being an acceptable standard of right versus wrong. TDEC nonetheless bringing the claims anyway for a false reason when it knew what it was doing was wrong, served no legitimate purpose and was therefore absolutely not warranted.

In summary, the Assessment was not warranted and there was no evidentiary support that the fines were needed to accomplish the goal of the Uniform Guide, and so the criteria of Subsection (a)(1)(A) are satisfied.

2. Subsection (a)(1)(B) – Claims Brought to Harass, etc.

The Town may be awarded its Respondent's Costs if the claims against The Town were issued to harass or cause needless expense. This Subsection contemplates an award where the driving force behind TDEC bring the claims was to harass The Town and/or cause needless expense. To survive "arbitrary and capricious scrutiny," TDEC needed a reason for bringing the claims, since it was not required to do so, and as such that reason needed to be a valid reason consistent with the Uniform Guide. As mentioned above, in this case, the clear reason for TDEC bringing the claims was the reason attributed to Jessica Murphy at Contested Hearing Exhibit 9 that "they [The Town] really haven't fixed anything." Tech. R. p. 1227. Since that reason was false, as the Town had long ago fixed everything prior to TDEC bring the Assessment, TDEC's reason is invalid. TDEC nonetheless bringing the claims anyway for a false reason when it knew

what it was doing was wrong served no legitimate purpose. Black's Law Dictionary defines harassment, in pertinent part, as:

> Words, conduct, or action that, being directed at a specific person, annoys, alarms … and serves no legitimate purpose; purposeful vexation.

Black's Law Dictionary, 10th Ed.

In summary, that the Assessment (80% of which the ALJ found violated due process) was brought against the Town for harassment and/or to cause it needless expense is the only probable conclusion. Incidentally, Ms. Murphy testified at the contested hearing and had every opportunity to attempt to explain away this obvious conclusion but chose not to. As such the most probable conclusion remains, and The Town is entitled to recover its Respondent's Costs. See Am. Child Care v. State, 83 S. W. 3d 148, 153 (Tenn. Cr. App. 2001).

C. The Town's Respondent's Costs

Section 325 is not specific as to what constitutes Respondent's Costs other than that attorney's fees are expressly allowed. Thus, it would seem that the recoverable costs are those costs reasonably "incurred because of the notice." Because of the Assessment, The Town incurred the following costs:

1. Administrative Time – Troy Taubert

TDEC issuing the Assessment needlessly consumed the time of The Town's Utilities Manager Troy Taubert, which time could have been spent more beneficially for The Town on other activities. Filed in the record in support is the Second Affidavit of Troy Taubert (Tech. R. p. 1530) and the Second Affidavit of Mayor Marilyn Parker (Tech. R. p. 1527). The Town's claim for this category of Respondent's Costs is $4,123.44.

2. Attorney's Fees

TDEC issuing the Assessment required The Town to hire an attorney. Unless The Town was to roll over and accept the Assessment, it needed to have its attorney provide a proper defense. In doing so, The Town incurred $100,376.00 in attorney's fees allocated to the defense against TDEC which The Town has paid. Support for this amount is provided in the Second Declaration of Brian Quist previously filed in the record (Tech. R. p. 1490). To the extent that dollar amount raises an eyebrow (as it is higher than the initial $25,542.40 amount in controversy), bear in mind The Town did not pick this fight. The ALJ even found what TDEC was doing was more than 80% wrong (i. e. vacating the contingent penalties), in violation of due process, and a quantitative value cannot be placed on defending a constitutional right as important as due process.

3. Shipping, Court Reporter, and Transcript Expenses

TDEC issuing the Assessment required The Town to incur $8,237.14 in shipping expenses, court reporter fees, and transcript costs which The Town has paid. Support for this amount is provided as **Attachment 2** to the Second Declaration of Brian Quist. Tech. R. p. 1512. As with the attorney's fees, these costs were the costs required for The Town to defend itself against TDEC.

D. The Town Was the Prevailing Party

The requirement that The Town be a prevailing party may not be a requirement under Section 325 to recover Respondent's Costs, but comparing the face amount of the Assessment of $25,542.40 in penalties and damages to the $4,566.00 end result reveals that 82% of TDEC's claim was wrongful. While not 100%, it must be fairly regarded that an 82% defeat, in strict quantifiable terms, for TDEC is a substantial victory for The Town. At all times The Town

resisted the idea that the contingent penalties could be forced upon it. Again, in non-quantifiable terms, defeating the unjust nature of the contingent penalty method of TDEC enforcement is immeasurable. As such, The Town is the prevailing party.

E. Summary

The Town askes that it be awarded the above Respondent's Costs totaling $112,736.58 as the fair cost to stand up for one's rights. While standing up for due process rights has a high price, vindicating due process rights is priceless.

VIII. Section Eight – TDEC's Motion for Costs

A. Introduction

The Town appeals the ALJ's Order (Tech. R. p. 1626) granting TDEC's Motion for Costs (Tech. R. p. 1589). In its Motion for costs, TDEC cited two (2) reasons The Town owed it $5,340.00 for alleged costs. Incidentally these costs are not TDEC's costs. These are the Administrative Procedure's Division's costs. Anyway, TDEC's two reasons are (1) entitlement pursuant to Tenn. Comp. R. & Regs. 1360-04-01-.16 and (2) entitlement pursuant to Tenn. R. Civ. P. 54.04.

B. Section 1360-04-01-.16

TDEC's first reason for entitlement to be paid $5,340.00 is Tenn. Comp. R. & Regs. 1360-04-01-.16. That provision provides, in essence, that "whenever a statute allows for the recovery of costs," TDEC "shall file a motion for the … costs … incurred." Seeking recovery for what was incurred means getting paid for what was previously paid, and so TDEC's costs are what TDEC paid. Here, TDEC seeks to be paid costs incurred by someone else, the Administrative procedures Division. TDEC Mo. for Costs, Ex. 1; Tech. R. p. 1593. Further, a motion under Section 1360-04-01-.16 requires there be a separate statute entitling TDEC to an

award of its "costs." Section 1360-04-01-.16 does not entitle TDEC to be paid its costs, only that if there is a statute so providing, TDEC must file a motion. TDEC has filed its motion, and so we now need to review the statute cited by TDEC that allows it to recover its "costs." In theory, that statute ought to mention the word costs.

In its Motion, TDEC cited two (2) statutes purporting to entitle it to be paid its costs from The Town: T. C. A. § 68-221-713(a)(3) and T. C. A. § 68-221-713(e). However, neither statute provides for TDEC to recover and be paid something called "costs." Section 713(a) speaks to the two (2) remedies for a Director's Order and Assessment. Section 713(a) is the statute creating liability for civil penalties and damages. Subpart 713(a)(1) provides for subjection to civil penalties, and Subpart 713(a)(3) provides for subjection to something called "damages." In this case, TDEC's Director's Order and Assessment endeavored to do just that when it subjected The Town to the civil penalties of $25,530.00 and damages of $12.40. Section 713(a)(3) does not provide for TDEC to recover and be paid something called costs. That section only provides:

> In addition, such person shall also be liable for any damages to the state resulting therefrom, without regard to whether any civil penalty is assessed.

Because Subpart 713(a)(3) does not mention "costs," Subpart(a)(3) is NOT a statute within the meaning of Section 1360-04091-.16 as a "statute allow[ing] for the recovery of costs."

Section 713(e) is likewise NOT a "statute allow[ing] for the recovery of costs" within the meaning of Section 1360-04091-.16. Section 713(e) is just further information as to what is meant by Section 713(a)(3) damages. Section 713(e) provides:

> Damages to the state may include any reasonable expenses incurred in investigating and enforcing violations of his part, or any other actual damages cause by the violation.

In summary, TDEC's Section 1360-04091-.16 motion fails because TDEC does not seek recovery of money it paid out and has not cited to a statute to which TDEC is entitled to recover its "costs." Simply put, the Administrative Procedure's Division's costs are not TDEC's costs.

C. Tenn. R. Civ. P. 54.04(1) Is Not Applicable

TDEC also relies upon Tenn. R. Civ. P. 54.04(1) as authority to be able to recover and be paid its costs. In pertinent part to the matter at hand, this subsection of the rule allows the non-prevailing party to be assessed with a clerk's bill of costs. Attached to TDEC's Motion is a document labeled as the costs assessed by the Administrative Procedures Division. TDEC Mo. for Costs, Ex. 1; Tech. R. p. 1593.

TDEC's reliance on Rule 54.04(1) is problematic for two reasons. First, TDEC's Motion literally seeks an award of costs, which means for it to be paid. Rule 54.04(1) is not a mechanism for a party to be paid. Second, to the extent the Administrative Procedures Division's costs are routinely assessed against the non-prevailing party, TDEC did not ask the ALJ to do that, and entry of an order to that effect would have required the ALJ to find TDEC was the prevailing party. However, TDEC lost over 80% of its case. Specifically, the ALJ set aside the contingent penalties as violating due process. Contingent penalties are the means by which water systems are coerced into agreeing to succumb to power over them not authorized by law. To have put a stop to TDEC abusing its power in this case against The Town also means TDEC cannot abuse its power, with the use of contingent penalties, against all water systems in the state. That is an incredible David-verses-Goliath victory! Finding that what TDEC has done in this case is wrongful (specifically over 80% wrongful) is hardly grounds for TDEC crowing victory.

D. The ALJ's Reliance on Tenn. R. Civ. P. 54.04(2) Was in Error

In its Order granting TDEC's Motion for Costs (Tech. R. p. 1627), the ALJ relied upon case law citing an inapplicable rule of Tennessee Civil Procedure. On page one of said Order, the ALJ cites to Rhea v. Rhea which is a case, as expressly noted in the ALJ's Order, concerning discretionary costs that may be awarded pursuant to Tenn. R. Civ. P. 54.04(2). Order re TDEC's Costs, Tech. R. p. 1627. However, TDEC is not seeking discretionary costs, and so the ALJ's reliance on Rule 54.04(2) is in error.

IX. Section Nine – Conclusion and Relief Requested

The constitutional arguments above are based on the United States Supreme Court's ruling in SEC v. Jarkesy and the federal circuit court opinions following Jarkesy. Those rulings are founded on basic, common-sense principles of separation of powers, right to a jury trial, and due process. Without question, these constitutional principles of separation of powers, right to a jury trial, and due process are a threat to TDEC's traditional unchecked-practice of coercing water systems. However, TDEC's traditional practice is wrong, and it has always been wrong. The Town asks the Board to follow the law, place constitutional principles over institutional imperatives, and grant the relief The Town seeks. The Town seeks the following relief:

1. A declaration that this Board lacks subject matter jurisdiction to adjudicate TDEC's claim for the debt that is the Assessment. As such, the Assessment is dismissed.

2. A declaration that the SDWA and APA Statutes at Issue violate The Town's constitutional due process rights. As such, the Assessment is void.

3. A declaration that the SDWA and APA Statutes at Issue violate The Town's constitutional right to a jury trial. As such, the Assessment is dismissed.

4. A ruling that the Order denying The Town's Motion to Dismiss entered March 13, 2025, is set aside.

5. A ruling that the Partial Summary Judgment Order entered May 6, 2025, is set aside.

5. A determination that the Assessment was issued without a valid reason, TDEC's reason for issuing the Assessment (that The Town really had not fixed anything) was not supported by the evidence, the Assessment was not issued for an authorized purpose, and the reason for issuing the Assessment was arbitrary and capricious. As such, the Assessment is dismissed.

6. In the alternative, the Initial Order is modified pursuant to The Town's Appeal Notice filed October 13, 2025.

7. The ALJ's Order awarding TDEC its costs (Tech. R. p. 1626) is vacated.

8. The Town is awarded its Respondent's Costs in the amounts requested in its Motion (Tech. R. p. 1483) plus such additional amounts incurred after the filing of its Motion, to be presented by supplemental motion to the Board within ten (10) days of the Board's decision.

Respectfully submitted this ___12th _____ day of January, 2026.

/s/ Brian C. Quist

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served upon the following persons or entities in the manner indicated on this _12th ___ day of January 2026.

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