**STATE OF TENNESSEE**
**BOARD OF WATER QUALITY, OIL, AND GAS**

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| **IN THE MATTER OF:** | ) | **DIVISION OF WATER RESOURCES** |
| | ) | **CASE NUMBER DWS23-0190** |
| | ) | |
| **DEPARTMENT OF ENVIRONMENT** | ) | |
| **AND CONSERVATION,** | ) | |
| ***Petitioner,*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **TOWN OF TELLICO PLAINS** | ) | **DOCKET NUMBER 04.02-244954A** |
| **TENNESSEE,** | ) | |
| ***Respondent.*** | ) | |

**DEPARTMENT'S RESPONSE TO RESPONDENT'S HEARING BRIEF**

Comes now the petitioner, Department of Environment and Conservation ("Department"), by and through counsel and in accordance with the Safe Drinking Water Act, Tenn. Code Ann. §§ 68-221-701 to -721 ("SDWA"), and the Uniform Rules of Procedure for hearing Contested Cases before State Administrative Agencies ("APD Rules"), and respectfully submits this response to Respondent the Town of Tellico Plains ("Town")'s Hearing Brief. In support of this response, the Department would show that the Board of Water Quality, Oil & Gas ("Board") cannot decide facial constitutional challenges to statutes under the law of Tennessee and that the administrative record in this case demonstrates that the Department proved the existence of SDWA violations and its civil penalty calculation by a preponderance of the evidence.

## PROCEDURAL HISTORY AND CONTESTED CASE HEARING

This case concerns the appeal of Director's Order and Assessment No. DWS23-0190 ("Director's Order"), which was issued by the Department's Division of Water Resources

("Division") to the Town due to self-reported violations of the SDWA and its implementing rules that took place at the Town's water treatment plant in the Summer and Fall of 2023.

## I. Pre-Hearing Procedural History

The Town owns and operates a community water system, identification number TN0000693 ("System"), which serves the residents of the Town of Tellico Plains. (R. at 612–13, Admission ¶ 14.)[1] The System obtains its water from eight wells that are classified as not under the direct influence of surface water, commonly referred to as "true groundwater." (R. at 613, Admission ¶ 15; R. at 1461, ¶ 2.) The System has two water treatment plants: the Main (or "Town") Plant and the Rural Vale Plant. (R. at 1098, 503:11-20.) At the time of the violations that occurred in this case, the System served approximately 2,443 connections and a population of approximately 6,132 persons. (R. at 1461, ¶ 3.)

On March 21, 2024, the Division issued the Director's Order to the Town. (Hr'g Ex. 33.) The violations alleged in the Director's Order included failing to collect 7 bacteriological samples in the distribution system, failing to collect 7 chlorine residual samples in the distribution system, failing to report the lowest chlorine residual leaving the plant, failing to continuously monitor the chlorine residual leaving, failing to notify the Division within 24 hours of a breakdown in the continuous chlorine analyzer, and failing to have a certified operator for both water treatment and distribution. (Not. of Hr'g, R. at 4, Ex. A.) The Director's Order required the Town to submit standard operating procedures for the water treatment plant and to not commit further violations of the drinking water rules. (Not. of Hr'g, R. at 4, Ex. A.) The Director's Order also assessed civil penalties for the reported violations. (Not. of Hr'g, R. at 4, Ex. A.)

[1] Citations to the Certified Technical Record are identified by the initial "R" followed by the blue Bates reference number located on the lower left corner of each page. Citations to the contested case hearing transcript will also list the transcript volume (I-IV) and the specific transcript page number and line numbers, for convenience. Citations to Hearing Exhibits will be indicated by "Hr'g Ex." or "Hr'g. Exs." for multiple exhibits.

On May 20, 2024, the Town appealed the Director's Order. On October 21, 2024, the Department filed a Notice of Hearing with the Secretary of State's Administrative Procedures Division (APD) to docket the appeal and have it set for a contested case hearing in front of an Administrative Judge sitting on behalf of the Board. (Not. of Hr'g, R. at 1.) Administrative Judge Mark Garland was assigned to the case. (R. at 42.) On January 17, 2025, the Town filed its motion to dismiss the Director's Order, arguing that the Town was entitled to a jury trial and that the Board did not have subject matter jurisdiction due to a U.S. Supreme Court decision, *SEC v. Jarkesy* ("Motion to Dismiss"). (R. at 48–52.) On February 7, 2025, the Department filed its Response in Opposition to the Town's Motion to Dismiss, arguing that Jarkesy had no application to this case because it was decided on the Seventh Amendment to the U.S. Constitution, which has never been incorporated against the states. (R. at 99–110.) On February 13, 2025, the Town filed its reply, doubling down on its federal constitutional theory. (R. at 111–14, 115–23). On March 13, 2025, Judge Garland denied the Town's Motion to Dismiss, holding that, because this is not a federal administrative matter and the Seventh Amendment does not apply to the states, the Board had jurisdiction and a jury trial was not required. (R. at 400–05).

On January 23, 2025, the Town filed a motion requesting that Judge Garland provide guidance on two questions of law: who bore the burden of proof in the case, and what the standard of review would be at the contested case hearing ("Motion re. Questions of Law"). (R. at 72–77.) On January 29, 2025, the Department filed its Response to the Town's Motion re. Questions of Law, explaining that, as the petitioner, the Department bore the burden, and the standard of review was simply whether the Director's Order was correct, lawful, and appropriate by a preponderance of the evidence. (R. at 82–86.) On February 19, 2025, Judge Garland issued an order answering the Town's questions of law, clarifying that the Department was correct in that it bore the burden

of proof to "establish by a preponderance of the evidence that the allegations set forth in [the Director's Order] are true or ... should be resolved in its favor[]" and that "the assessment of civil penalties and damages imposed in [the Director's Order] is appropriate under the [SDWA] and not otherwise arbitrary and capricious." (R. at 126–30 (internal citations omitted).)

On March 7, 2025, the Department filed a detailed motion for summary judgment, which made the case—based on affidavits from Division staff and the Town's own admissions in written discovery—that there were no material facts in dispute and, therefore, Judge Garland could decide the case without a full hearing. (R. at 152–54.) On March 27, 2025, the Town filed its response in opposition to the motion for summary judgment. (R. at 555–609). On May 6, 2025, Judge Garland granted partial summary judgment to the Department. (R. at 825–38.) Specifically, Judge Garland found that there were no material facts in dispute with respect to the Town having committed SDWA violations in 2023. *Id.*

## II. The Evidence at the Contested Case Hearing

The contested case hearing—which is a trial-like proceeding with opening statements, witnesses, evidence, and closing arguments—was held on June 16-17, 2024. As the Petitioner, the Department put on its proof first, calling six different Division staff members to the stand over the course of the first day and a half of the hearing. (R. at 874–1039.)

Mr. Jeff Bagwell, a veteran Department employee and Environmental Consultant in the Division's Compliance Unit, testified first. (R. at 877, Tr. Vol. I, 16:8-17:15.) He explained how the Division monitors water systems' compliance with the Board's drinking water rules and also explained the Environmental Protection Agency's Enforcement Targeting Tool ("ETT"). (R. at 878, Tr. Vol. I, 17:21-22:21.) Mr. Bagwell was given the Town of Tellico Plains' validated ETT score for November 2018 through October 2023, and explained that the Town would have already

had the opportunity to dispute the existence of the violations on the list. (R. at 878–80, Tr. Vol. I, 22:22-28:16; Hr'g Exs. 1, 2.)

Mr. Brad Antone, an Environmental Manager in the Division's Knoxville Environmental Field Office, testified at the contested case hearing that in July of 2023 he was contacted by the Town's certified operator, Robert Patty, who informed Mr. Antone that his last day as the certified operator for the Town's drinking water system would be July 28, 2023. (R. at 891–92, Tr. Vol. I, 72:24-73:15.) On July 17, 2023, Mr. Antone sent a letter, by email and mail, informing the Town of the need to have a certified treatment and distribution operator. (R. at 892, Tr. Vol. I, 73:16; 1093, Tr. Vol. IV, 485:19-486:12; Hr'g Ex. 10.)

On July 19, 2023, nine days ahead of his anticipated departure date, the Town fired Mr. Patty. (R. at 1090, Tr. Vol. IV, 471:1-472:21.) The Honorable Marilyn Parker, Mayor of the Town, testified she was in control of this decision, and notified the Division of the firing the same day it happened. (R. at 893, Tr. Vol. I, 78:21-25; 938, Tr. Vol. II, 154:22-155:5; 944–45, Tr. Vol. II, 180:14-181:19; 1090, Tr. Vol. IV, 471:1-21; 1090, Tr. Vol. IV, 472:22-473:3; Hr'g Ex. 18.) Mr. Antone testified he sent a follow-up letter to the Town on July 21, 2023, notifying the Town that it is against the law to serve drinking water to the public without a certified operator. (R. at 893, Tr. Vol. I, 77:14-79:10.) Because of Mr. Patty's early termination, the letter also moved up the deadline for the Town to notify the Division it had hired an operator, to August 19, 2023. (R. at 893, Tr. Vol. I, 78:13-18; 893, Tr. Vol. I, 79:1-5; Hr'g Ex. 11.)

Mr. Antone also described what he witnessed at the Town's treatment plant during an emergency flooding event in August of 2023, soon after the Town had fired their only certified operator. (R. at 893–94, Tr. Vol. I, 79:11-84:9.) Mr. Antone described that the Town didn't seem to have a plan, and that he and his colleagues from the Division had to instruct the people at the

plant to do basic response activities, like taking bacteriological samples. (R. 894, Tr. Vol. I, 81:4-84:9.) During the hearing, Mr. Antone was asked to read from an email he sent to his manager, Robert Ramsey, soon after the flooding event:

> Q. Would you read out your email for us?
> **A. Sure. "Rob, the deadline for Tellico Plains to obtain a certified operator was August 19." They have not had – "They have not hired operators yet and I am getting increasingly concerned with the level of knowledge of the individuals operating the drinking water system, especially under the conditions caused by last week's rain events. This week, they are required to take DBP samples and the person 'running' the system asked me what the name of the samples were. What is the next step in pushing them to get a certified operator?"**

(R. at 895, Tr. Vol. I, 85:5-86:11; Hr'g Ex. 12.) Mr. Antone testified he was concerned that the individuals 'running' the plant did not even know what DBP (disinfection byproducts) samples were, which was an indication that they had not learned how to operate the plant, and he thought "it was somewhat luck that nothing worse happened." (R. at 896, Tr. Vol. I, 89:4-23.)

Mr. Robert Ramsey, the Division's Knoxville Environmental Field Office Manager, testified that way back in 2019, the Division had actually warned the Town during a sanitary survey[2] that having a succession plan for their certified operator was important and that the Town was at risk because it had a single operator holding all the necessary certifications for proper operation of the Town's drinking water system. (R. at 940, Tr. Vol. II, 161:11-162:17; 947–48, Tr. Vol. II, 192:15-193:10.) Mr. Ramsey explained that the potential harm of not having a certified operator is greater for a community water system than it is for a transient system, because the exposure is chronic. (R. at 940, Tr. Vol. II, 162:18-25.) Mr. Ramsey also testified that he communicated numerous times with the Town about getting certified operators on board, and that

[2] A sanitary survey is an inspection of a water system, which involves a tour of the treatment facility and review of records. (R. at 959, Tr. Vol. II, 240:16-20.)

his impression was that the Town, while not disinterested, was not aggressive enough in the search for a certified operator. (R. at 948, Tr. Vol. II, 193:11-194:9; Hr'g Ex. 25.)

On September 7, 2023, Mr. Ramsey received a letter from Mayor Parker indicating the Town had hired Mr. Troy Taubert as its certified water treatment operator. (R. at 942–43, Tr. Vol. II, 172:14-173:19; Hr'g Ex. 22.) Erich Webber, Environmental Technical Advisor for the Division's drinking water program, testified that he spoke with Mr. Taubert in September, shortly after he took over as the operator. (R. at 951, Tr. Vol. II, 206:13-207:2.) Mr. Webber and Mr. Taubert discussed an issue with the continuous chlorine analyzer ("CCA") at the Rural Vale plant, which as it turned out had not been recording data since July 2023. (R. at 951, Tr. Vol. II, 206:21-207:2; 952, Tr. Vol. II, 209:2-7; 953, Tr. Vol. II, 215:1-24; 1117, Tr. Vol. IV, 581:15-23; Hr'g Exs. 28, 29.)

Ms. Jenna Williams, a water and wastewater inspector in the Knoxville Environmental Field Office, testified that on September 28-28, 2023, she led a sanitary survey at the Town's water system. (R. at 958, Tr. Vol. II, 234:1-16; 959, Tr. Vol. II, 237:21-239:10; 959, Tr. Vol. II, 240:1-15; Hr'g Ex. 29.) Upon arrival, Ms. Williams testified that the facility was unsecured: the water plant was unlocked, and some of the tanks were missing locks. (R. at 959–60, Tr. Vol. II, 240:21-241:4.) During the sanitary survey, Ms. Williams determined the Town had only collected 6 bacteriological and disinfectant residual samples in July of 2023, instead of the required 7 samples. (R. at 961, Tr. Vol. II, 245:8-246:7; Hr'g Ex. 29.) She also observed that CCA data was not available for certain days in July and August of 2023 and learned that while the Rural Vale CCA was malfunctioning, the Town did not take grab samples every four hours as required in the event of a monitoring or recording equipment breakdown. (R. at 961, Tr. Vol. II, 246:8-247:24; Hr'g Ex. 29.)

The sanitary survey identified critical and redundant deficiencies, which both Ms. Williams and Ms. Jessica Murphy—Manager of the Division's Compliance and Enforcement Unit—

testified make formal enforcement more likely in any given case. (R. at 962, Tr. Vol. II, 250:24-251:8; 962–63, Tr. Vol. II, 251:25-253:2; 963, Tr. Vol. II, 253:23-254:25; 1019, Tr. Vol. III, 351:22-352:15.) The various deficiencies identified during the sanitary survey resulted in a sanitary survey score of 94%, which is a low score. (R. at 960, Tr. Vol. II, 242:4-14; 970, Tr. Vol. II, 284:21-285:3; 971, Tr. Vol. II, 286:3-12; 1019, Tr. Vol. III, 351:10-21; Hr'g Ex. 29.)

After the September 2023 sanitary survey, staff from the field office, including Mr. Antone, Mr. Ramsey, and Ms. Williams, spoke with staff in the Compliance and Enforcement Unit regarding the potential for formal enforcement against the Town. (R. at 943, Tr. Vol. II, 176:1-16; 944, Tr. Vol. II, 179:1-180:4; 963, Tr. Vol. II, 253:3-22; 965–66, Tr. Vol. II, 261:6-265:1; 1020–21, Tr. Vol. III, 355:19-357:1; Hr'g Exs. 9, 32.) In December of 2023, Ms. Murphy assigned Mr. Tom Moss, an Environmental Manager in the Division's Compliance and Enforcement Unit, to draft the Director's Order that was ultimately issued against the Town. (R. at 1019, Tr. Vol. III, 348:20-349:24; 1020, Tr. Vol. III, 353:13-354:9; Hr'g Ex. 33.) Ms. Williams and Ms. Murphy testified that the Division proceeded to formal enforcement against the Town for several reasons: because the Town did not have certified operators for an extended period, because the Town's ETT score had risen above 11, and because the Town had a bad sanitary survey in which several deficiencies were identified. (R. at 970, Tr. Vol. II, 284:21-285:5; 1020–21, Tr. Vol. III, 354:1-357:8.)

## III. Post-Hearing Procedural History

After the contested case hearing had concluded, on August 4, 2025, both the Town and the Department filed their Post Hearing Briefs, the Town filed its proposed Initial Order, and the Department filed its Proposed Findings of Fact & Conclusions of Law. (R. at 1385–1426; 1442–57.) On September 30, 2025, Judge Garland entered an Initial Order ("Initial Order") that affirmed the Director's Order and modified it in part, holding that the Department proved its calculation of

the civil penalty amount was appropriate by a preponderance of the evidence. (Initial Order, Sept. 30, 2025, R. at 1458–79.) The Initial Order made many findings of fact based on the record evidence, and specifically called out the credibility of the Department's witnesses: "The credible testimony of the Department's witnesses and the facts presented support a conclusion that the Department properly determined the harm or potential harm to public health and the deviation from the regulatory requirement for each violation." (Initial Order, R. at 1472.) On October 7, 2025, despite having lost its case, the Town filed a motion for costs, which included a claim for over $100,000 in attorney's fees alone. (R. at 1483–1538.) On October 13, 2025, the Town filed its appeal of the Initial Order. (R. at 1539–62.) The next day, the Department filed its own motion for costs, a response in opposition to the Town's motion for costs and attorney's fees—which argued that, as the losing party, the Town was not entitled to costs or attorney's fees—and its narrow appeal of two conclusions made in the Initial Order. (R. at 1589–1607.)

On October 15, 2025, Judge Garland denied the Town's motion for costs, finding the Department's claims "that gave rise to this action were warranted and were not frivolous because the Town violated certain regulatory requirements, and the claims contained in the notice had evidentiary support." (Order, October 15, 2025, R. at 1613–15). That very same day, the Town filed its first amended appeal to add as one additional basis for appeal Judge Garland's denial of the Town's costs and attorney's fees. (R. at 1616–17). On October 21, 2025, Judge Garland granted the Department's motion for costs, noting specifically that the Department was the prevailing party. (R. at 1626–29). On October 22, 2025, the Town filed its Second Amended Petition for Appeal to appeal Judge Garland's grant of the Department's costs. (R. at 1630–34).

## ARGUMENT

### I. SDWA Generally

In enacting the SWDA, the Tennessee General Assembly recognized that state waters are "held in public trust" for the benefit of Tennesseans and "declared that the people of the state are beneficiaries of this trust and have a right to both an adequate quantity and quality of drinking water." Tenn. Code Ann. § 68-221-702. To achieve its purpose and policy, the General Assembly specifically tasked the Commissioner of the Department with enforcement of the SDWA and its implementing rules.[3] Tenn. Code Ann. § 68-221-705. Under the statutory provision of the SWDA, the Commissioner may issue orders to secure compliance with the SDWA and its implementing rules and assess civil penalties for violations. Tenn. Code Ann. § 68-221-705(9)-(10). The Commissioner also has authority to assess damages incurred by the State resulting from the violation. Tenn. Code Ann. § 68-221-713. The statutes also provide that the Commissioner may delegate any of their powers, duties, and responsibilities under the SDWA to the Director of the Division of Water Resources ("Director"), Tenn. Code Ann. § 68-221-705(12).

### II. The Tennessee Supreme Court's decision in *Richardson* precludes the Board from deciding a facial constitutional challenge

The Town spends close to a third of its hearing brief attempting to convince the Board that certain sections of the SDWA and the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 to -326 ("UAPA"), are unconstitutional on their face. However, this Board, as an administrative tribunal, is not empowered to decide facial constitutional challenges to Tennessee statutes. As such, the Board cannot consider the Town's constitutional challenges at all, and instead must focus on its review only on the orders on appeal.

[3] The drinking water rules can be found online as part of the Secretary of State's official compilation of rules and regulations for the state of Tennessee, under chapter 0400-45-01. The rules are available at the following link: https://publications.tnsosfiles.com/rules/0400/0400-45/0400-45-01.20190217.pdf .

If the Town truly wishes to challenge the constitutionality of the General Assembly's enacted statutes, it may do so, however, the Board is simply not the correct venue for such an attempt, nor is the appeal of an administrative enforcement order the right mechanism. The Board is empowered to hear appeals from administrative enforcement orders and render a decision on whether to affirm, modify, or revoke those administrative enforcement orders. Tenn. Code Ann. § 68-221-704(3). The Board does not have the authority to determine the facial constitutionality of a statute. The Tennessee Supreme Court laid down this rule in 1995, in its decision in *Richardson v. Board of Dentistry*. *Richardson*, 913 SW.2d 446 (Tenn. 1995).The Richardson court held that, while an administrative agency can "determine the constitutionality of the *application* of statutes or rules and of the procedures employed", "administrative agencies have no authority to determine the facial constitutionality of a statute." *Richardson*, 913 S.W.2d at 455 (emphasis added).

The Town is not making an "as-applied" constitutional challenge. The Town does not merely argue that the Department's *application* of statutes or rules to the Town is unconstitutional, but, instead, beginning with its Motion to Dismiss and continuing up through to this appeal, the Town has consistently argued that the SDWA and UAPA are unconstitutional on their face. (R. at 48–51.) Indeed, entire sections of the Town's Hearing Brief are dedicated to "[t]he SDWA and APA (*sic*) [s]tatutes at [i]ssue." (Hearing Brief, pp. i-ii.) Regardless of whether the Town's constitutional arguments are meritorious—and they are not—they certainly are facial constitutional challenges to statutes, which this Board is not empowered to decide under either its grant of authority from the General Assembly or the *Richardson* precedent. A constitutional challenge to the administrative enforcement mechanisms provided by statute in SDWA must be brought in a state trial court. *Id*; *see also* Tenn. Code Ann. §§ 16-10-101 and 16-11-101.

The Department expressly reserves the right to defend the constitutionality of the SDWA and the UAPA should the Board's order be appealed to chancery court, but will not discuss the issue further in this brief as it would be futile due to the clear bar on administrative tribunals deciding facial constitutional challenges. The Board simply may not decide the Town's constitutional claims, and therefore there is no need for argument on this topic.

## III. The record demonstrates that Director's Order No. DWS23-0190 was issued for valid reasons and was justified by both law and policy, and not "based on a lie" as the Town alleges

The Town attempts to claim in its Hearing Brief that the Director's Order and the civil penalties assessed in it were "based on a lie." Hearing Brief, p. 2.[4] This bold theory has no support in the record. The Town's position rests on a single, cherry-picked and misconstrued email, Hearing Exhibit 9, which, importantly, is contradicted by the weight of the evidence presented at the contested case hearing, including hundreds of pages of testimony from multiple witnesses and a total of 43 hearing exhibits. (R. at 874–1376.) To support its theory, the Town relies almost solely on Mr. Moss' discovery deposition, during which Mr. Moss was never asked about this email. By stark contrast, in the Initial Order, Judge Garland weighed all the evidence in the record, including the testimony and documentary evidence presented during the contested case, and found there were several reasons for the Director's Order, including that "the Town was without a certified water distribution operator for almost four months, the Town's sanitary survey identified several deficiencies, and the Town's ETT score had fluctuated above 11." (Initial Order, R. at 1466.) For the reasons further explained below, the Board should not revisit Judge Garland's findings and instead affirm the Initial Order

[4] The Town's brief repeatedly, and inappropriately, accuses the Department of lying, without any evidence to support this claim other than a misinterpretation of a single exhibit. *See* Hearing Brief, pp. 1, 24, 34, 39, 48, 49, 50, 52.

a. A water system's ETT score is not a limitation on the Department's ability to enforce against violations of the SDWA and has no effect on civil penalty assessments.

To comprehend the Town's theory, one must first understand a particular tool: the Enforcement Targeting Tool, or "ETT." The Division uses the U.S. Environmental Protection Agency (EPA)'s ETT as one method for prioritizing water systems with compliance violations for formal enforcement action. As Mr. Bagwell explained during his testimony, the ETT score is calculated on an ongoing basis. (R. at 878, Tr. Vol. I, 20:7-9.) When a water system incurs a violation, the Division's Compliance and Enforcement Unit enters that violation into its database. (R. at 878, Tr. Vol. I, 18:20-19:5; 880, Tr. Vol. I, 25:2-16.) The Division does not 'assign' an ETT score to a water system as the Town alleges, and the Division has no control over whether a given violation gets calculated into a system's ETT score—the process is automatic and routine. (R. at 878–79, Tr. Vol. I, 20:6-21:4.) A water system is also notified when it incurs a violation and receives correspondence from the Division that invites the system to submit any documentation to disprove that violation. (R. at 878, Tr. Vol. I, 19:6-23; 879, Tr. Vol. I, 21:5-22:5; 880, Tr. Vol. I, 27:8-28:9; Hr'g Ex. 2.) Periodically, Division staff in the Department's Environmental Field Offices "validate" violations that are listed for the water systems in their region. (R. at 879–80, Tr. Vol. I, 24:22-25:6.) The ETT is also always a lagging indicator, because takes time for Division staff to validate the preliminary violations. (R. at 879, Tr. Vol. I, 22:8-21.) Once the Division has the validated list, Ms. Murphy, as the Manager of the Division's Compliance and Enforcement Unit, reviews the generated list and assigns any water systems that have ETT scores of 11 or higher to an order writer in the unit to draft a formal enforcement order. (R. at 1019, Tr. Vol. III, 348:17-349:2.) At any time, if a water system wants to know what its ETT score is, the water system can request that information from the Division. (R. at 880, Tr. Vol. I, 28:10-14.)

The evidence in the record shows that, in the Fall of 2023, the Town's ETT score exceeded 11 points. (R. at 878–80, Tr. Vol. I, 20:15-26:8; Hr'g Ex. 1.) As discussed, an ETT score is not static—it goes up and down as violations are added and removed from water system's validated list. (R. at 878–79, Tr. Vol. I, 20:15-22:21.) When the Town's ETT score fell back below 11 at some point in the Spring of 2024, that did not take away the Division's authority to enforce against the violations. The Division's authority to enforce against the violations comes directly from state environmental law, specifically Tennessee Code Annotated sections 68-221-705(9)-(10), -711, -712 and -713, which authorize the Department to issue enforcement orders and assess civil penalties for *any* violation of the SDWA. By contrast, the ETT is not a source of legal authority for the Department. The ETT is a tool, not a limitation—it is a helpful method to prioritize systems for enforcement, but the Department can (and does) enforce in cases where a water system's ETT is below 11. (R. at 962–63, Tr. Vol. II, 250:6-254:25; 1025–27, Tr. Vol. III, 376:7-380:3.) The record shows that after the September 2023 sanitary survey, Division staff from the Department's Knoxville Environmental Field Office, including Mr. Antone, Mr. Ramsey, and Ms. Williams, spoke with staff in the Division's Compliance and Enforcement Unit regarding the potential for formal enforcement against the Town. (R. at 943, Tr. Vol. II, 176:1-16; 944, Tr. Vol. II, 179:1-180:4; 963, Tr. Vol. II, 253:3-22; 965, Tr. Vol. II, 261:6-265:1; 1020–21, Tr. Vol. III, 355:19-357:1; Hr'g Exs. 9, 32.) In this case, the Department had several reasons to enforce. As Ms. Murphy testified, the Director's Order was issued because the Town "did not have a certified operator for an extended period of time, they had violations that caused their ETT score to go up, and they had a bad sanitary survey." (R. at 1020, Tr. Vol. III, 354:10-18; Hr'g Ex. 29.)

The statutes could not be clearer: the Commissioner of the Department—and therefore the Division, Tenn. Code Ann. 68-221-705(12)—has broad authority to enforce against any violation

of the SDWA. There is no bespoke five-part test for enforcement, as the Town suggests. (Hearing Brief, pp 34-38.) The Division may "[a]ssess civil penalties for violation of *any* provision of this part or any rule, regulation, standard adopted[,] or order issued by the board or commissioner pursuant to [the SDWA]." Tenn. Code Ann. § 68-221-705(9) (emphasis added); *see also* Tenn. Code Ann. §§ 68-221-705(10) and -705(12). The SDWA further provides that "[w]henever the [Division] has reason to believe that a violation of this part or regulations pursuant thereto has occurred, is occurring, or is about to occur, the [Division] may cause a written complaint to be delivered to the alleged violator or violators." Tenn. Code Ann. § 68-221-712(a)(1). That complaint "may order that corrective action be taken within a reasonable time to be prescribed in such order. . ." Tenn. Code Ann. § 68-221-712(a)(2). The SDWA does not mention EPA's ETT. The Division's elective practice of using the ETT as one method to prioritize formal enforcement does not supersede the General Assembly's broad grant of authority in the state environmental statutory scheme. In Judge Garland's words: "the EPA policy on which the Town relies does not preempt state law." (Initial Order, R. at 1470, n. 3.)

b. Hearing Exhibit 9 does not overcome the weight of the evidence in the record that the Director's Order was issued for valid reasons

To support its claim that the Director's Order was "based on a lie," the Town repeatedly relies on a single email sent from Mr. Moss to several other members of the Division on January 18, 2024. (Hearing Brief, pp. 1, 24, 28, 30-33, 38, 49, 50, 52.) In the Town's erroneous view of the evidence, the January 18, 2024 email represents the sum total of the Department's reason for issuing the Director's Order. Unfortunately for the Town, its reliance is misplaced and the January 18, 2024 email is not the "significant evidence" it claims. (Hearing Brief, p. 24.)

Mr. Moss' email was introduced into evidence during the contested case hearing while counsel for the Town was examining Jeff Bagwell,[5] and was marked as Hearing Exhibit 9. (R. at 887, Tr. Vol. I, 54:22-56:24; Hr'g Ex. 9, R. at 1227–29.) In full, the email states: "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."[6] (Hr'g Ex. 9, R. at 1227–29.) During redirect examination by counsel for the Department, Mr. Bagwell testified as follows:

> Q. Mr. Bagwell, you aren't involved in enforcement decisions for the Division, are you?
> **A. I'm involved in the preliminary identification of compliance issues.**
> Q. But as far as deciding, yeah, we're going to issue an order against the system or not, you're not involved in those decisions, are you?
> **A. No.**
> Q. Who makes those enforcement decisions for the Division?
> **A. It's in our enforcement group and that decision's probably with Jessica Murphy as the manager of the compliance enforcement.**
> Q. If the Division had issued orders and assessments against water systems with ETT scores below 11, you wouldn't necessarily know about that, would you?
> **A. No.**

(R. at 889, Tr. Vol. I, 62:18-63:10.) Despite the fact that Mr. Bagwell was not the author of the email and does not even work for the enforcement group, counsel for the Town asked Mr. Bagwell about the email. (R. at 887, Tr. Vol. I, 54:22-56:24.) In support of its position on appeal, the Town asserts that Ms. Murphy never "den[ied], qualif[ied], or explain[ed]" her statement that

[5] Notably, Mr. Bagwell does not make enforcement decisions for the Department, and was not the author of the email message the Town stakes its theory upon. (R. at 889, Tr. Vol I, 62:18-63:10.)

[6] Mr. Moss' email never uses the term "ETT score," however, as Ms. Murphy testified, the Division has a primacy agreement with EPA, and one of the requirements for Tennessee to have primacy over its drinking water program is for the Division to take formal enforcement action once a water system's ETT score reaches 11. (R. at 1025–27, Tr. Vol. IV, 376:7-380:3.) The fact that the Town's ETT score had fallen below 11 at some point is likely what Mr. Moss' email referred to. (R. at 887–88, Tr. Vol I 55:9-58:7.) But the ETT score is a red herring because, while the Division's primacy agreement with EPA sets a *minimum* expectation for enforcement, the Division's legal authority to enforce comes from state law, which authorizes enforcement for any violation of the SDWA. Tenn. Code Ann. § 68-221-711. Ms. Murphy testified that the Division does issue enforcement orders even when systems' ETT scores are below 11. (R. at 1025–27, Tr. Vol. IV 376:7-380:3.)

the Town hadn't fixed anything. Hearing Brief, p. 30. However, there are two unavoidable problems with this line of reasoning: first, ***the email is not actually Ms. Murphy's own statement***. (Hr'g Ex. 9, R. at 1227–29.) The author of the email is Mr. Moss, who the Town did not call to testify as a witness at the contested case hearing.[7] (R. at 850–51.) At best, the email is Mr. Moss' apparent recollection of his interpretation of something Ms. Murphy might (or might not have) said. However, we cannot know for sure, because the Town never asked Mr. Moss about the email during his deposition. (R. at 1011–18, Tr. Vol. III 316:23-344:7.) Second, ***Ms. Murphy was never asked about the email during the contested case hearing***. (R. at 1018–38, Tr. Vol. III, 344:10-427:7.) As a result, she never had the opportunity to explain what she thought Mr. Moss meant by his email. The Town's assertion that Ms. Murphy "never 'den[ied], qualif[ied], or explain[ed]'" the email is, in fact, a direct result of the Town's failure to ask for any such denial, qualification, or explanation.

Throughout this matter, the Department has consistently maintained that the Division initiated enforcement against the Town for multiple reasons, and the record is replete with evidence that supports its position that the Director's Order was issued against the Town for a number of reasons, not solely due to its ETT score exceeding 11 in the Fall of 2023. Ms. Murphy testified at the contested case hearing that the Division's decision to issue the Director's Order in this case was multifaceted: in her own words, the enforcement order was issued because the Town "did not

[7] Given the Town's commentary on Mr. Moss' unavailability in its Hearing Brief (pp. 41, 42–43), the Department believes it is incumbent upon it to provide the Board with additional information regarding the factual context missing from the Town's argument. The Town deposed Mr. Moss prior to the contested case hearing and therefore had access to sworn testimony from Mr. Moss. The parties also *agreed and stipulated* that Mr. Moss, having retired immediately prior to the commencement of the contested case hearing, was unavailable to testify at the hearing. (R. at 850–51). This stipulation was signed by counsel for the Town. *Id*. To be clear, if the Town thought Mr. Moss's email was crucial evidence, it was under no obligation to agree that he was unavailable for the hearing and instead could have subpoenaed him to testify. The Town instead entered into this stipulation on its own volition and in exchange for the agreed admissibility of certain documents that the Town's counsel wished to present at the hearing, including Hearing Exhibit 9. *Id*. Therefore, it is inappropriate and disingenuous for the Town at this stage in the proceedings to attempt to use Mr. Moss' unavailability as a basis to cry foul or cast aspersions on the Department's witnesses.

have a certified operator for an extended period of time, they had violations that caused their ETT score to go up, and they had a bad sanitary survey." (R. at 1020, Tr. Vol. III, 354:10-18; Hr'g Ex. 29.) Ms. Murphy also testified that she personally had conversations with the Division's Knoxville Environmental Field Office staff regarding enforcement against the Town, and that Mr. Moss, the enforcement order writer in this case, would have also reviewed the sanitary survey report, which identified critical and redundant deficiencies. (R. at 1020–21, Tr. Vol. III, 355:19-357:8; 1037, Tr. Vol. III, 423:2-11.)

The Division's reasons for pursuing enforcement in this matter, as stated in Ms. Murphy's affidavit and her live testimony during the hearing and as recalled by Mr. Moss in his deposition, are not inconsistent or mutually exclusive. Ms. Murphy's testimony at the hearing was consistent with Mr. Moss' own recollections during his deposition, when he noted that low sanitary survey scores can result in formal enforcement and that he reviewed the Town's sanitary survey. (R. at 970–71, Tr. Vol. II, 284:21-285:5; 974, Tr. Vol. II, 298:10-20.) Mr. Moss also had conversations with Knoxville Environmental Field Office staff regarding the potential for formal enforcement in this case. (R. at 965–66, Tr. Vol. II, 261:6-265:1; Hr'g Ex. 32.) The fact that Mr. Moss emphasized the Town's ETT score during his deposition does not negate the other reasons that existed for formal enforcement in this case.

The proof demonstrates that the Department, after considering the totality of the circumstances, which included the sanitary survey findings, the fact the Town had served drinking water to the public for months without certified operators in place, and the Environmental Field Office staff's impressions of the situation based on their visits to the water treatment plant after the flooding, used sound judgment in exercising its enforcement discretion to issue the Director's Order to the Town. Judge Garland, after considering and weighing all the evidence in the record

and presented during the contested case hearing, appropriately found in the Department's favor on this issue. (Initial Order, R. at 1469–70.) The Town's subjective and self-serving interpretation of what a single exhibit in the record shows is not a sufficient basis for an allegation that the Department witnesses have committed perjury, especially when the only witnesses in a position to speak to the meaning of the exhibit were never asked about it directly, and it certainly does not support the Town's request that the Board overturn the Initial Order.

## IV. The Board should affirm the Initial Order with respect to the civil penalty calculation, because it is based on significant record evidence

Because Judge Garland had previously partially granted the Department's motion for summary judgment, finding there were no material facts in dispute regarding the Town's having committed violations of the SDWA and therefore the Department was entitled to judgment as a matter of law on these issues, the contested case hearing was limited to the question of whether the civil penalties assessed in the Director's Order were appropriate under applicable law and policy. (R. at 838).[8] In both its original petition for appeal and its Hearing Brief, the Town makes many assignments of error with regard to Judge Garland's findings of fact. (R. at 1548–60.) However, because Judge Garland's findings are supported by significant evidence in the record, the Board should not disturb the findings of fact in the Initial Order as the Town suggests.

As an initial matter, the SDWA authorizes the Commissioner to assess civil penalties of not less than $50 and not greater than $5,000 per violation, for each day that such violation occurs. Tenn. Code Ann. §§ 68-221-705 and -713. As the civil penalty calculation in this case did not

[8] In the Order Granting Partial Summary Judgment, Judge Garland also noted an additional issue—whether Town failed to comply with the Order such that the "contingent" civil penalties of $20,424.00 are due and appropriate under applicable law and policy." (R. at 838). This issue was addressed both during the hearing and in the Department's post-hearing brief. (R. at 1423–24.) Because the Director's Order was and remains under appeal, none of the deadlines laid out in the Director's Order are in effect. The deferred portions of the civil penalty cannot be triggered during the pendency of the appeal.

exceed the statutory maximum set by the SDWA, it is consistent with the grant of authority in the statute and therefore lawful. (R. at 1030, 394:7-19; Hr'g Ex. 34.)

The Department carried its burden at the contested case hearing by putting on substantial proof regarding every civil penalty amount assessed for each violation alleged in the Director's Order. Mr. Moss testified during his deposition that he calculated the civil penalty in conformance with the Department's Uniform Guidance for the Calculation of Civil Penalties ("Uniform Guidance"). (R. at 972, 292:4-18; Hr'g Ex. 35.) The criteria from the Uniform Guidance have been imported into a fillable form that the Division uses for calculating civil penalties under the SDWA, which Mr. Moss used to do the math for the civil penalty calculation. (R. at 624, Admission, ¶ 51; 975–76, 304:24-305:11.)

Mr. Moss' civil penalty calculation was reviewed by Ms. Murphy, who testified at the contested case hearing that she had reviewed hundreds of drinking water orders, including the Director's Order in this case. (R. at 1027, 380:4-383:4.) Ms. Murphy further testified that, based on her knowledge of this case and her familiarity and experience reviewing civil penalty calculations, the civil penalty assessment for each of the twelve violations the Department is still pursuing was appropriate. (R. at 1027, 383:5-396:11; Hr'g Exs. 33, 34, 35.) Contrary to the Town's claim that "there are no objective criteria for anyone to . . . figure out" the basis of the penalty calculation, Hearing Brief p. 40, Ms. Murphy was able to articulate why the various violations were categorized as a minor, moderate, or major deviation from the requirements found in the SWDA's implementing rules, as well as why each violation was categorized as a minor, moderate, or major potential harm to public health. (R. at 1028, Tr. Vol. III, 385:22-386:5; 1028, Tr. Vol. III, 387:7-20; 1029, Tr. Vol. III, 391:8-19; 1030, Tr. Vol. III, 392:22-393:3; Hr'g Exs. 33, 34, 35.) For each combination of categories—whether it's moderate/moderate, moderate/minor, major/major,

etc.—both Mr. Moss and Ms. Murphy explained that there is a base, pre-set dollar value (which is arrived at by multiplying a 'factor' and the statutory maximum of $5,000). (R. at 973, Tr. Vol. II, 296:7-20; 1024–25, Tr. Vol. III, 371:11-372:14; 1027, Tr. Vol. III, 382:1-22; Hr'g Ex. 34.) For example, the violations for failure to have certified operators (treatment and distribution) were assessed as 'major' deviation from the requirement and a 'moderate' potential for harm. (Hr'g Ex. 34.) During her testimony, Ms. Murphy explained that this combination of categories was appropriate:

> Q. Okay. Now I will direct you to the order Page Number 7, Paragraph XV. Would you please read the text there that leads into the rule paragraph?
> **A. "By failing to have certified operators for water treatment and distribution, the Respondent violated R-400-45-09-.04 and 0400-45-01-.17(1)(d)."**
> Q. Ms. Murphy, is this violation in the order the same violation that is contained in the penalty worksheet on those two rows?
> **A. Yes, it is.**
> Q. Ms. Murphy, based on your knowledge of this case and your familiarity in reviewing these civil penalty calculations, is the category assessed here of major/moderate appropriate for these violations?
> **A. Yes. Definitely a major deviation. I think the moderate is appropriate due to it being a ground water system. If it were surface water, it would be major/major.**

(R. at 1028, Tr. Vol. III, 385:10-386:5.) Because the violations were categorized as major/moderate, the factor for these four violations[9] was 0.32. (Hr'g Ex. 34.) When one multiplies the statutory maximum of $5,000 by 0.32, the result is $1,600, which was the civil penalty assessed for each of these violations. (Hr'g Ex. 34.) So, the Town is simply incorrect in its assertion that

[9] According to the SDWA, each day a violation occurs is a separate violation. Tenn. Code Ann. § 68-221-712(a)(2). However, the Division used its enforcement discretion in this case to compress these violations. (R. at 1023, Tr. Vol. III, 366:12-367:2.) The Town went one month without a certified treatment operator, so that was assessed as one violation. (Hr'g Ex. 34.) The Town went three months without a certified distribution operator, so that was assessed as three violations. (Hr'g Ex. 34.) Had the Division assessed the violations based on the number of days the Town went without a certified operator, the civil penalty could have been much higher.

there are "no objective criteria" for calculating civil penalties—the objective criteria come straight from the Uniform Guidance. (Hr'g Ex. 35.)

There was also evidence at the contested case hearing regarding the propriety of the adjustment to the base civil penalty, which increased the total by $3,330. When making a penalty adjustment, the Division can take into account the violator's behavior, any good faith displayed, history of non-compliance, and other mitigation factors, which are listed in the penalty matrix. (R. at 1023, Tr. Vol. III, 367:21-368:6; 1025–26, Tr. Vol. III, 375:7-358:6; Hr'g Ex. 34.) Mr. Ramsey testified that in 2019, the Division instructed the Town that having a succession plan for their certified operator was important and that the Town was at risk because it had a single operator holding all the necessary certifications for proper operation of the Town's drinking water system. (R. at 940, Tr. Vol. II, 161:11-162:17; 947, Tr. Vol. II, 192:15-193:10.) The potential harm of not having a certified operator is greater for a community water system than it is for a transient system. (R. at 940, Tr. Vol. II, 162:18-25.) Mr. Ramsey's impression was that the Town, while not disinterested in the Division's instruction, was not aggressive enough in the search for a certified operator. (R. at 948, Tr. Vol. II, 193:11-194:9; Hr'g Ex. 25.)

In sum, the evidence at the contested case hearing established by a preponderance of the evidence that the civil penalties assessed in the Director's Order for the Town's violations of the SDWA were lawful, reasonable given the severity of the violations, calculated in accordance with Department policy, and consistent with the civil penalties assessed for similar violations. (R. at 895–96, Tr. Vol. I, 87:6-89:3; 896, Tr. Vol. I, 89:4-90:4; 896–97, Tr. Vol. I, 91:13-93:18; 897, Tr. Vol. I, 94:13-96:8; 905, Tr. Vol. I, 127:21-128:19; 907, Tr. Vol. I, 133:13-136:3; 907–08, Tr. Vol. I, 136:16-138:14; 950, Tr. Vol. II, 201:15-204:7; 953, Tr. Vol. II, 213:9-214:17; 961, Tr. Vol. II, 247:6-24; Hr'g Exs. 13, 14, 17, 29, 33, 34, 35.)

## V. The Department had authority to issue the Director's Order for past violations

The Town argues that the Division should not have issued the Director's Order because, by the time it was issued, the Town had already "fixed" all the alleged violations. (Hearing Brief, pp. 30–33; R. at 1126, Tr. Vol. IV, 616:22-617:7.) This argument evidences the Town's fundamental lack of understanding regarding the enforcement order and the outlined violations. First, as Mr. Antone and Ms. Murphy explained, many of the assessed violations could not actually be "fixed." (R. at 900, Tr. Vol. I, 106:11-107:9; 1034, Tr. Vol. III, 410:14-411:14.) For example, the Town could not "fix" the fact that it served drinking water to customers for months on end without appropriate operators on staff. Similarly, the Town could not go back in time and take the correct number of samples in the distribution system in July of 2023 or continuously monitor the chlorine leaving the plant in July and August of 2023, when the Town's Rural Vale Plant's continuous chlorine analyzer was malfunctioning.

Second, all the violations assessed in the Director's Order occurred in the past, meaning the Town had already committed the violations prior to its issuance of the order itself, and it is wholly permissible for the Department to issue administrative orders assessing civil penalties and requiring corrective action for violations that occurred in the past. In fact, the plain text of the SDWA contemplates as much, providing the Commissioner with the authority to issue orders for any violation that "*has occurred*, is occurring, or is about to occur." Tenn. Code Ann. § 68-221-712 (emphasis added). As evidenced by the clear statutory language, the SDWA contemplates enforcement for both compliance purposes *and* for deterrence purposes, and there is no requirement that violations be ongoing for the Department to enforce.

It may be helpful to think of enforcement orders as a speeding ticket: upon being pulled over, no one would tell an officer "I was driving 55 mph in a 35 mph zone, but I slowed down as

soon as your blue lights turned on. Therefore, the violation was not that serious, and you have no authority to issue a speeding ticket." Likewise, the Department primarily responds to violations of the state's environmental laws *after* they have occurred. The Department's hands are not tied if the violations are not ongoing—the violations occurred, and therefore, pursuant to state law, the Department is authorized to take enforcement action. Once again, the plain text of SDWA makes this reality eminently clear: the General Assembly empowered the Commissioner to "[i]ssue orders as may be necessary to secure compliance with this part" and to "[a]ssess civil penalties for violation of *any provision* of this part or any rule, regulation, standard adopted or order issued by the board or commissioner pursuant to this part." Tenn. Code Ann. § 68-221-705(9)-(10).

Securing compliance with the SDWA is not limited to scenarios where drinking water violations are ongoing—the Department can 'secure compliance' by issuing enforcement orders where violations have occurred in the past. The obvious benefit in doing this is the desire to deter future noncompliance, both by the subject water system and other water systems in the state. The SWDA's statutory framework is also echoed by the Department's Uniform Guidance. (Hr'g Ex. 35.) On the very first page, under Purpose and Scope, the Uniform Guidance makes clear that one of the purposes of civil penalties is that "persons are deterred from committing violations. . ." (Hr'g Ex. 35.) Further, as Judge Garland noted, the fact that the Town did not go on violating the SDWA after the Division issued the Director's Order only serves to prove the deterrent effect of the civil penalties: "[a]dditionally, to the Town's credit, it did rectify the violations and had not committed any additional violations as of the hearing date. This indicates that the deterrent effect of the civil penalty in this case, combined with the Town's desire to provide quality drinking water to its customers, was adequate to deter further violations." (Initial Order, R. at 1472.)

The deterrence justification for the Director's Order is supported by the record in this case. Ms. Murphy testified that one of the Division's goals in issuing formal administrative orders is to deter future non-compliance, and that purpose undergirded the Order at issue in this case. (R. at 1022, Tr. Vol. III, 363:6-364:1; 1037–38, Tr. Vol. III, 423:12-427:1.) The civil penalties assessed in the Division's administrative orders have a similar deterrent logic as speeding tickets: just because a person slows down after an officer pulls them over for going 90 mph in a 55 mph zone, a reasonable person would not take that to mean they did not exceed the speed limit or that they do not have to pay the speeding ticket. In a similar fashion, when a water system resumes complying with the law after committing violations, that does not relieve it from its responsibility to pay lawfully assessed civil penalties levied as a result of its committed violations.

## VI. The Board should affirm the Order Denying the Town's Motion to Dismiss

For the reasons discussed in section II. above, the Board cannot decide the Town's appeal of the order denying the motion to dismiss, as it would require the Board to decide a facial constitutional challenge to a statute. The Town's motion to dismiss relied on the U.S. Supreme Court's decision in *SEC v. Jarkesy*, which interpreted the Seventh Amendment's application to federal administrative adjudications. Because the Seventh Amendment's right to a jury trial has never been incorporated against the states, Judge Garland found that the "Town seeks to take *Jarkesy* to places the Court likely did not intend for it to go," and "it is settled law that the Seventh Amendment does not apply to the states." (R. at 402.) Although he found that the Town's due process argument was without merit, Judge Garland ultimately held that because the separation of powers and due process arguments are also facial constitutional challenges to statutes, an administrative tribunal cannot decide them, due to the *Richardson* bar. Because it lacks the

authority to decide facial constitutional challenges, the Board should affirm in full Judge Garland's order denying the Town's motion to dismiss.

## VII. The Board should affirm the Order Answering Questions of Law

The Board should affirm Judge Garland's Order Determining Certain Questions of Law. (R. at 126–30.) The Town spends all of one paragraph on this issue in its Hearing Brief. Aside from the conclusory statement that the standard of review articulated by Judge Garland's "was incomplete" and therefore "in error," Hearing Brief p. 23, the Town offers no arguments on appeal as to how Judge Garland erred in his determination. As the petitioner, the Department bore the burden of proof. (R. at 127–29.) As the Department fully explained in its response to the Town's motion, the standard of review as articulated by Judge Garland—that the Department had to show by a preponderance of the evidence that the assessment of civil penalties. . . imposed in [the Director's Order] was appropriate under the [SDWA] and not otherwise arbitrary and capricious—is the correct standard of review for a contested case arising from SDWA enforcement because no "other law or rule has created a different standard." (R. at 82–86; 129–30.) The Board should affirm in full Judge Garland's Order Determining Certain Questions of Law. (R. at 127–30.)

## VIII. The Board should affirm the Order Granting Partial Summary Judgment

The Town has also appealed Judge Garland's order granting the Department's motion for partial summary judgment, arguing that Judge Garland was "mistaken" when he ruled that the Town was liable for the violations of the SDWA outlined in the Director's Order. (Hearing Brief, p. 23.) In its argument, the Town acknowledges that it had the opportunity to offer evidence into the record regarding its theory that the Director's Order was "brought for an unauthorized and/or improper purpose." (Hearing Brief, p. 24.) Still, the Town insists that Judge Garland did not decide the Department's motion on the correct summary judgment

standard. (Hearing Brief, pp. 24–25.) While the Town is correct that the summary judgment standard requires that evidence be viewed in the light most favorable to the nonmoving party (in this case, the Town) and the judge must allow all reasonable inferences in favor of the non-moving party,[10] the record reflects that Judge Garland did precisely that. At the summary judgment stage, Judge Garland reviewed the parties' motions and the record evidence before him, taking it all in the light most favorable to the Town and found specifically that:

> [t]he Town has not presented any facts that would call into question the occurrence of the remaining violations. Indeed, the Town admitted to each of the remaining violations in its Response to TDEC's Statement of Material and Undisputed Facts. Therefore, there is no genuine issue of material fact as to whether these violations occurred . . . Accordingly, TDEC is entitled to summary judgment on the question of liability for the foregoing violations.

(R. at 835–36.) Judge Garland's finding of liability was soundly based on undisputed facts—in other words, facts that were agreed to by both parties. In its brief, the Town offers no evidence that Judge Garland did not abide by the summary judgment standard of review. Thus, the Town's claim that Judge Garland did not accept its facts as true is simply not supported by the record.

The Town also claims that it was premature for Judge Garland to rule on its "liability" for the violations, as "[t]he Town would not have 'liability' to [the Department] if the [Director's Order] was brought for an unauthorized and/or improper purpose and in violation of [the Department's] policies." (Hearing Brief, p. 24.) This argument reflects a misunderstanding of the Judge Garland's ruling. In his order, Judge Garland simply held that the facts underlying the violations were not in dispute. By operation of law, that meant that the Town was responsible, or "liable" under the SDWA for those violations. After the contested case, had the Town made a persuasive case that the Department had issued the Director's Order for some improper purpose

[10] *See Jackson*, 2016 WL 4443535, at *3 (citing *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002)); *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000); *Byrd*, 847 S.W.2d at 215.

(some reason other than for the SDWA violations), Judge Garland still had the option to amend the Director's Order or void it entirely. Instead, in the Initial Order Judge Garland affirmed the Director's Order, modifying only those portions addressed in the Department's Appeal Brief. The Board should therefore affirm in full Judge Garland's Order Granting Partial Summary Judgment.

## IX. The Board should affirm the Order Denying Respondent's Costs and the Order Granting the Department's Costs

As the Department fully explained in its response in opposition to the Town's motion for costs, the Town simply was not the prevailing party at the contested case hearing, and therefore is not entitled to either its costs or attorney's fees. (R. at 1600–04, 1628.) Furthermore, the claims in the Director's Order "were warranted and not frivolous because the Town violated certain regulatory requirements. . . Similarly, there is no evidence in the record that would suggest that the Department issued the notice to 'harass, cause unnecessary delay, or cause needless expense.' . . . Rather, the evidence shows that the Department was fulfilling its statutory obligations." (R. at 1615 (internal citations omitted).)

The Department demonstrated that it was entitled to its costs because Tennessee Code Annotated section 68-221-713 authorizes recovery of reasonable expenses incurred in enforcing the SDWA. (R. at 1589–99.) Judge Garland agreed, and granted the Department its costs request,[11] noting that the Department could have asked for discretionary costs as well. (R. at 1628–29.)

## CONCLUSION

This Board should deny the Town the relief it seeks for two reasons: (1) The Town attempts to raise a facial constitutional challenge to the statutory enforcement scheme provided by SDWA, and the Board does not have the authority to determine the facial constitutionality of a statute, and

[11] The Department requested $5,340 in APD costs, which are in fact billed to the Department, contrary to the Town's baseless claim in its brief that they are not the Department's costs. (Hearing Brief, p. 55; R. at 1597–98, 1628.)

(2) the evidentiary record does not support the Town's assignment of errors on appeal. For these reasons, and for the reasons offered and elaborated on above, the Department respectfully requests that the pre-hearing orders entered by the Administrative Judge be affirmed and that the Initial Order be slightly amended as described in the Department's Appeal Brief.

Respectfully submitted on January 30, 2026.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been sent to the following by electronic mail on January 30, 2026.

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