



State of Tennessee
Department of State

Administrative Procedures Division
312 Rosa L. Parks Avenue
William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

September 30, 2025

Emily B Vann, Esq.
Tennessee Dept. of Environment and Conservation
Davy Crockett Tower, 5th Floor
500 James Robertson Parkway
Nashville, TN 37243
Sent via email only to: emily.vann@tn.gov

Brian C. Quist, Esq.
Quist, Fitzpatrick & Jarrard, PLLC
800 South Gay Street, Suite 2121
Knoxville, TN 37929-2121
Sent via email only to:
bcquist@qfjlaw.com

Samantha Buller-Young, Esq.
Tennessee Dept. of Environment and Conservation
Davy Crockett Tower, 5th Floor
500 James Robertson Parkway
Nashville, TN 37243
Sent via email only to: Samantha.Buller-Young@tn.gov

Peter P. Amoruso, Esq.
Quist, Fitzpatrick & Jarrard, PLLC
800 South Gay Street, Suite 2121
Knoxville, TN 37929-2121
Sent via email only to:
pamoruso@QFJLaw.com

**RE: TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION V.
TOWN OF TELLICO PLAINS, TENNESSEE, APD Case No. 04.02-244954J**

Enclosed is an *Initial Order*, including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

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

IN THE MATTER OF:

**TENNESSEE DEPARTMENT OF
ENVIRONMENT AND CONSERVATION,
*Petitioner,***

v.

**TOWN OF TELLICO PLAINS,
TENNESSEE,
*Respondent.***

APD Case No. 04.02-244954J

INITIAL ORDER

This matter was heard on June 16-17, 2025, in Knoxville, Tennessee, before Administrative Judge Mark Garland, assigned by the Tennessee Secretary of State's Administrative Procedures Division (APD) to sit on behalf of the Board of Water Quality, Oil, and Gas ("the Board"), upon the appeal of Director's Order DWS23-0190 by the respondent, the Town of Tellico Plains, Tennessee ("the Town"), pursuant to TENN. CODE ANN. §§ 68-221-712 and -713. The petitioner, the Tennessee Department of Environment and Conservation ("the Department"), was represented by attorneys Samantha Buller-Young and Emily B. Vann. The Town was represented by attorneys Brian C. Quist and Peter Amoruso.

STATEMENT OF THE ISSUES AND DETERMINATIONS

In its Order Determining Certain Questions of Law entered on February 19, 2025, this tribunal held that the Department must prove two things. First, the Department must establish by a preponderance of the evidence that the allegations set forth in its order are "true or ... should be resolved in its favor." Second, the Department must establish by a preponderance of the evidence that the civil penalty assessed in the Director's Order is appropriate under the Tennessee Safe Drinking Water Act of 1983, TENN. CODE ANN. §§ 68-221-701 to -720 ("the SDWA"), and not

otherwise arbitrary and capricious. *See* Order Det. Questions of Law, p. 3. In its May 6, 2025, Order Granting Partial Summary Judgment, this tribunal dispensed with the first item and determined that, as a matter of undisputed fact, the various violations of the SDWA set forth in the Director's Order occurred (excluding the three violations withdrawn by the Department). The Undisputed Material Facts, Analysis, and Conclusions of Law from the May 6, 2025, order are hereby adopted and incorporated into this Initial Order.

Therefore, the remaining issue to be addressed in this Initial Order is whether the Department established by a preponderance of the evidence that the civil penalty assessed in the Director's Order is appropriate under the applicable law and policy and not otherwise arbitrary and capricious. For the reasons set forth below, the civil penalty assessed in the Director's Order is **AFFIRMED IN PART** and **MODIFIED IN PART**.

As an auxiliary issue, the Department has requested an award of costs incurred pursuant to TENN. CODE ANN. §§ 68-221-713(a)(3) and (e) and TENN. COMP. R. & REGS. 1360-04-01-.16(1). Because the Department did not make its request in the form of a motion as required by TENN. COMP. R. & REGS. 1360-04-01-.16(1), the Department's request for costs is **DENIED**.

SUMMARY OF EVIDENCE

During the hearing, the following witnesses testified for the Department: Jeff Bagwell, Brad Antone, Robert Ramsey, Erich Webber, Jenna Williams, Tom Moss (by deposition), and Jessica Murphy. The following witnesses testified for the Town: Mayor Marilyn Parker and Troy Taubert. A total of 43 exhibits were entered into evidence.

FINDINGS OF FACT

1. The SDWA represents a comprehensive program for the monitoring, treatment, and distribution of water for human consumption in Tennessee. Order Granting Partial Summ. J., p. 3.

The Board has promulgated rules governing the operation of public water systems. TENN. COMP. R. & REGS. 0400-45-01 *et seq.* (“the rules”).

2. The Town owns and operates a drinking water system, identification number TN0000693. Order Granting Partial Summ. J., pp. 4-5. The type and frequency of monitoring that a public water system must perform under the rules depend on the category of public water system, population served, and type of water source. The Town’s drinking water system is a community water system as defined in the rules. *Id.* at 5. 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.” *Id.* When compared to surface water, groundwater has the least potential for contamination at its source. However, potential harm is increased for a community water system because it serves more people, thereby increasing the risk of exposure to contaminants.

3. The Town has two water treatment plants: the Main (or “Town”) Plant and the Rural Vale Plant. At the time of the violations that occurred in this case, the Town’s system served approximately 2,443 connections and a population of approximately 6,132 people. *Id.*

4. Under Tennessee law, the Town is required to have certified operators in four areas: water treatment (WT1), distribution (DS1), wastewater treatment (STP-2), and collections (CS-1).

5. On July 14, 2023, Brad Antone, an Environmental Manager with the Department, was informed by the Town’s certified operator, Robert Patty, that Mr. Patty’s last day of employment with the Town would be July 28, 2023. Mr. Patty held all four certifications for the Town. During the Town’s 2019 sanitary survey, the Department advised the Town of the risks associated with having a single operator who holds all four certifications.

6. On July 17, 2023, Mr. Antone mailed Mayor Marilyn Parker a letter reminding her of the Town's obligation to maintain certified operators.¹ The letter included a list of certified operators and advised Mayor Parker that a Certified Operators Agreement form, along with a letter identifying the Town's new wastewater system operator, "must be completed and returned to [the Department] by August 30, 2023." Exhibit 10. Mayor Parker received the letter approximately one week after it was sent.

7. On advice of legal counsel and in consultation with the Municipal Technical Advisory Service (MTAS), Mayor Parker released Mr. Patty effective July 19, 2023, and did not require him to work during the remainder of his two-week notice period. Mayor Parker informed the Department of this change on July 19, 2023.

8. On July 21, 2023, Mr. Antone sent a revised letter to Mayor Parker advising her that a Certified Operators Agreement form and a letter identifying the Town's new wastewater system operator "must be completed and returned to the [Department] by August 19, 2023." Exhibit 11.

9. In mid-August 2023, the Town experienced a significant rainfall event that flooded the Town plant and the wastewater plant. The Town plant shut down due to a loss of water pressure, and the wastewater plant overflowed, causing raw, untreated sewage to run into the Tellico River. The Town was without certified operators at this time. This hindered the Town's ability to take required bacteriological samples and other steps required to get the drinking water and wastewater systems back to normal operating conditions. The flood at the Town plant increased the risk of untreated surface water entering the distribution system.

¹ Mr. Antone also tried to email the letter and attachments to Mayor Parker, but sent the email to an incorrect email address, which delayed the Town's receipt of the information.

10. On August 15, 2023, Department staff visited and assisted the Town by providing, among other things, guidance on issuing a boil water notice and how to take proper bacteriological and chlorine residual samples.

11. On August 22, 2023, Mr. Antone sent Mayor Parker a Notice of Violation (NOV) letter. The letter advised her that the August 19, 2023, deadline had passed and informed her that a Certified Operators Agreement form and a letter identifying the Town's new wastewater system operator "must be completed and returned to the [Department] by September 21, 2023, to avoid further enforcement action." Exhibit 13.

12. On or about August 28, 2023, the Town hired Brett Ward as its wastewater treatment operator.² *See* Exhibits 22 and 24.

13. On September 7, 2023, the Town hired Troy Taubert as its water treatment operator. Mr. Taubert had been advising the Town as early as August 9, 2023, and was doing his due diligence during the month of August to determine whether he wanted to work for the Town on a more permanent basis. *See* Exhibit 5, p. 2, and Exhibit 37.

14. After being hired by the Town, Mr. Taubert asked the Department to conduct a sanitary survey of the Town's water system. On September 26, 2023, the Department sent Mayor Parker a letter via certified mail informing her that the sanitary survey would occur on September 28, 2023. It also advised Mayor Parker that a Certified Operator Agreement form for the drinking water system operator (distribution operator) "must be completed and returned to the [Department] by October 25, 2023, to avoid further enforcement action ... which could result in financial penalty." Exhibit 14.

² Mr. Ward also held the collections certification and may have also filled that role for the Town. It is not clear from the record that he did so, but the Department has not alleged any failure to hire a collections operator.

15. On or about November 28, 2023, the Town hired Jonathan Dixon as its distribution operator. By this time, the Town had been without a distribution operator for just over four months. The Town's small size and rural location made it more challenging for the Town to locate and hire certified operators.

16. Mayor Parker was first elected mayor in November 2020. At that time, she received some training through MTAS that may have included information about contacting the Board to request an extension of the 30-day timeline for hiring certified operators. While the Department did not remind Mayor Parker of this option, it was under no obligation to do so. *See Exhibit 36.*

17. On July 18, 2023, Mr. Robert Ramsey, a Facilities Unit Manager for the Department, spoke with Mayor Parker about the number of bacteriological samples that the Town needed to take each month. At the time of the conversation, Mr. Ramsey was unsure of how many samples were needed, so he looked it up on Drinking Water Watch, which is a Departmental database. Mr. Ramsey then advised Mayor Parker about the number of required samples based on what he saw in the online database.

18. Erich Webber, Environmental Technical Advisor for the Department's drinking water program, spoke with Mr. Taubert shortly after he took over as the Town's water treatment operator. They discussed an issue with the Town's continuous chlorine analyzer (CCA), and Mr. Webber advised Mr. Taubert not to submit numbers on the CCA data submittals if he did not have an actual record with data points. Accordingly, after being hired, Mr. Taubert submitted the July and August 2023 Disinfectant Monitoring Reports in blank, containing no data.

19. At Mr. Taubert's request, Ms. Jenna Williams, an Environmental Specialist II with the Department, along with other Departmental staff, conducted the requested sanitary survey on September 28-29, 2023. *See Exhibit 29.* During the sanitary survey, Ms. Williams determined that

the Town only collected six of seven required bacteriological samples and six of seven required disinfectant residual samples in July of 2023. 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, as no grab sample results were available.

20. The Town did not repair the Rural Vale CCA within 14 days as required by the rules. *See* Exhibits 28 and 29.

21. On December 11, 2023, the Division sent a Sanitary Survey Report and NOV to the Town, which detailed the deficiencies identified during the sanitary survey.

22. The Department uses the Environmental Protection Agency's (EPA's) Enforcement Tracking Tool (ETT) to track water system compliance with environmental regulations. Each water system earns an ETT score based on its compliance history during a five-year period. The ETT score fluctuates as older violations drop off and new violations are added. At all times relevant to this case, the Town's ETT score ranged from 19 to seven.

23. Consistent with EPA policy, the Department prioritizes formal enforcement actions against water systems whose ETT score reaches 11 or higher. *See* Exhibit 3. However, the EPA policy does not preclude the Department from engaging in formal enforcement actions against a water system with an ETT score that falls below 11.

24. In December 2023, Mr. Tom Moss, an Environmental Manager in the Department's Compliance and Enforcement Unit, drafted the Director's Order at issue in this case. As part of the order-writing process, Mr. Moss reviewed the case file, including the most recent sanitary survey, and calculated civil penalties using the Department's Uniform Guide for Calculation of Civil Penalties ("the Uniform Policy").

25. The Department proceeded to formal enforcement through an administrative order for several reasons: 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.

26. On March 21, 2024, the Department issued the Director's Order to the Town. *See* Exhibit 33. By the time the Director's Order was issued, the violations cited in the order had been rectified by the Town. As of the hearing date, the Town had committed no additional violations.

27. The Department is pursuing a violation for only taking six of the seven required bacteriological samples for July 2023. Mr. Antone credibly testified that failure to take all the required bacteriological samples increases the risk of harm because it increases the possibility that the presence of E. coli in the water might not be detected. The civil penalty assessed for this moderate/moderate violation was \$1,000.

28. The Department is pursuing a violation for only taking six of the seven required disinfectant (chlorine) samples in the distribution system for July 2023. Mr. Antone credibly testified that failing to take disinfectant samples creates potential for harm because excess chlorine can have negative effects on the liver, kidneys, and central nervous system. The civil penalty assessed for this moderate/minor violation was \$100.

29. The Department is pursuing a violation for failing to report chlorine residuals for July and August 2023. Mr. Antone credibly testified that failing to take or report chlorine residuals creates a potential for harm because there must be sufficient free chlorine in the system to kill off any bacteria. The civil penalty assessed for this major/moderate violation was \$3,200 (\$1,600 for each month).

30. The Department is pursuing a violation for failing to report that the Rural Vale CCA was inoperable. The evidence shows that when the CCA is inoperable, it may not inject the proper amount of chlorine into the water supply, and the chlorine may have to be manually added. Failing to report the CCA's inoperability increases the potential harm because the Department cannot monitor the situation by ensuring that grab samples are taken and that the proper amount of chlorine is being added to the system. The civil penalty assessed for this major/major violation was \$4,000.

31. The Department is pursuing a violation for failing to take grab samples while the Rural Vale CCA was inoperable in July, August, and September 2023. The evidence shows that, without grab samples, the amount of chlorine in the system could not be determined which increases potential harm. The civil penalty assessed for this major/moderate violation was \$4,800 (\$1,600 for each month).

32. The Department is pursuing a violation for failing to have a certified water treatment operator for August 2023 and a certified distribution operator for August, September, and October 2023. Although Mr. Taubert was advising the Town during the month of August 2023, Mr. Antone credibly testified that during his site visit, the Town's staff did not seem to know what to do. This is further evidenced by Mayor Parker having to ask Mr. Ramsey about how many samples should be taken. Failing to have certified operators increases potential harm to the public because it increases the likelihood that a water system is not being properly operated and may result in misfeeding chemicals into the supply or inadequate testing and maintenance. The civil penalty assessed for the major/moderate violation of not having a certified water treatment operator for one month was \$1,600, and the civil penalty assessed for the major/major violation of not having a certified water distribution operator for three months was \$4,800 (\$1,600 per month).

33. Pursuant to the Uniform Policy, the Department assessed an upward adjustment of \$3,330 for the town's failure to have certified operators. Relevant to this adjustment, the Town was advised in 2019 of the risk of having a single operator holding all four certifications but took no action to mitigate that risk. Additionally, the Town went over 90 days without a certified distribution operator despite several reminders from the Department that the position must be filled.

34. The record demonstrates that the Department properly calculated the civil penalties for the violations at issue in this case. Departmental witnesses and Mr. Taubert testified, providing opposing opinions on an appropriate civil penalty amount. The Department's witnesses have years of training and experience in evaluating violations and calculating civil penalties across the state, while Mr. Taubert does not. Therefore, the testimony of the Department's witnesses regarding the amount and calculation of the civil penalties is more credible and is entitled to more weight than the opinions offered by Mr. Taubert.

35. The Department is not pursuing the \$12.40 damages amount assessed in the Director's Order, nor is it pursuing civil penalties for the following violations:

- a. Failure to take seven bacteriological samples in August of 2023 (one of two violations alleged in paragraph X of the Order).
- b. Failure to take seven disinfectant residual samples in August of 2023 (one of two violations alleged in paragraph XI of the Order).
- c. Failure to report the chlorine residual leaving the plant on September 15, 2023 (one of three violations alleged in paragraph XII of the Order).

36. Consistent with the Uniform Policy, the Director's Order divided the total civil penalty into an upfront portion and a contingent portion. After removing the violations and

damages no longer being pursued, the total calculated civil penalty is \$22,830. Of that amount, the upfront portion is \$4,566 (20%), and the contingent portion is \$18,264.

37. The Director's Order states that the contingent portion comes due "only if [the Town] fails to comply with the following corrective action items." Exhibit 33 at pp. 8-9. It goes on to list certain requirements that the Town is already obligated to comply with and divides the contingent portion of the civil penalty among these requirements as pre-determined civil penalties for future violations. Thus, under the terms of the Director's Order, a future violation would trigger payment of a portion of the contingent penalty as a pre-determined civil penalty.

ANALYSIS

As an initial matter, the Town asserts that the Director's Order is invalid and should be dismissed, and no penalty imposed, because the Town's ETT score fell below 11. While it is true that the Town's ETT score ultimately fell below 11, the Town's argument reads the applicable EPA policy too strictly. The EPA policy on which the Town relies merely prioritizes formal enforcement actions against water systems whose ETT score reaches 11 or higher. *See* Exhibit 3. It does not preclude the Department from fulfilling its statutory enforcement obligations under the SDWA. *See* TENN. CODE ANN. §§ 68-221-702, -705(1), (2), (8) ("*bring suit in the name of the Department for any violation of this part, rules and regulations of the board*"), (9) ("*assess civil penalties for violations of any provision of this part or any rule, regulation, or standard*"), (10) ("*issue orders as may be necessary to secure compliance*"), (11) ("*investigate any alleged or apparent violation of this part and take any action authorized hereunder as the commissioner deems necessary to enforce these sanctions*") (emphasis added). Moreover, the EPA policy does not specifically preclude the use of formal enforcement actions against a water system with an ETT score below 11. Additionally, the evidence shows that the Department was seriously concerned

that the Town lacked a certified distribution operator for over 90 days and that there were violations found in the September 2023 sanitary survey. In short, the EPA policy sets a bar that the Department cannot fall below, but it does not preclude the Department from going above that bar to enforce state law.³ For these reasons, the Town’s ETT argument fails.

Next, we turn to the issue of civil penalties. As noted above, it has already been determined that the remaining violations at issue in this case have occurred. *See* Order Granting Partial Summ. J. ¶ 12, at p. 12. Therefore, the remaining question is whether the Department established by a preponderance of the evidence that the assessment of civil penalties imposed in the Director’s Order is appropriate under the SDWA and not otherwise arbitrary and capricious. *Based on the evidence presented and the analysis below, it is determined that the Department met its burden of proof as to the calculation of the civil penalty imposed for the violations at issue and the assessment of the upfront portion of that penalty. However, the Department improperly assessed the contingent portion of the civil penalty as a pre-determined civil penalty to be imposed for future violations.*

This inquiry begins with the SDWA. The SDWA establishes a range for civil penalties of “not less than fifty dollars (\$50.00) nor more than five thousand dollars (\$5,000) per day for each day of violation.” TENN. CODE ANN. § 68-221-713(a)(1). The civil penalties assessed for each

³ In other words, the EPA policy on which the Town relies does not preempt state law. “[T]he only agency actions that can determine the answer to the pre-emption question, of course, are agency actions taken pursuant to the [federal agency’s] congressionally delegated authority. The Supremacy Clause grants “supreme” status only to the “the Laws of the United States.” And pre-emption takes place “only when and if [the federal agency] is acting within the scope of its congressionally delegated authority, ... for an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 315 (2019) (internal citations omitted). *See also Kemp v. Medtronic, Inc.*, 231 F.3d 216, 222 (6th Cir. 2000) (noting that “the states’ police powers relating to public health and safety are not preempted by federal law unless Congress’ intent to do so is clearly expressed.”)

violation in this case fall within this range. Therefore, they do not violate the SDWA.⁴ However, the inquiry does not end there. The civil penalty must also be assessed in accordance with the Department's Uniform Policy. *See* Exhibit 35.

The Department uses the Uniform Policy across all of its statutory schemes in which civil penalties are calculated. Relevant to this case, the Uniform Policy requires the Department to determine 1) the gravity or percentage of the deviation, 2) whether a multi-day component should be included, 3) whether any adjustments should be made to the initial penalty, and 4) whether the cost of any economic benefit gained through non-compliance should be included.

To determine the gravity of the deviation of a SDWA violation, the Department must first establish which of the statutory factors set forth in TENN. CODE ANN. § 68-221-713(d) apply. *See* Exhibit 35 at pp. 5, 8. The evidence shows that the Department identified the harm or potential harm to the public, the deterrent effect of the civil penalty, and the effort put forth by the Town to remedy the violations as the statutory factors relevant to the civil penalty assessed in this case. After determining which statutory factors apply, the Department must determine whether the harm to public health or the environment is major, moderate, or minor and whether the deviation from the regulatory requirement is major, moderate, or minor. *Id.* at p. 8. The evidence shows that the Department identified harms or potential harms to public health associated with each violation and properly determined whether those harms or potential harms, and the deviation from each regulatory requirement, were major, moderate, or minor. As noted above, the Department's witnesses have years of training and experience in evaluating violations and calculating civil penalties across the state, and the fact that the Town can think of worse potential harm that could

⁴ In fact, many of the penalties are significantly less than they could have been. The maximum penalties for the violations at issue could have exceeded one hundred thousand dollars.

possibly occur does not discredit the determinations made by the Department.⁵ Additionally, 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. 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. Thus, the Department properly determined the gravity or percentage of each deviation and properly applied its determinations to the penalty matrix.

The Department could have applied a multi-day factor to the civil penalties for some violations, such as the failure to have a certified operator. However, the Department chose not to apply the multi-day factor in order to avoid significantly increasing the penalty amount. Nevertheless, the Department did adjust the overall civil penalty upward for failure to have certified operators. Relevant to this adjustment, the Department sent multiple 30-day notice letters to Mayor Parker to remind her that the hiring deadline had passed. After the deadline passed, there was nothing more the Department could do but set a new deadline and remind Mayor Parker of the risk of formal enforcement. Additionally, the Town's small size and rural location made it more challenging for the Town to locate and hire certified operators, and the Department was not obligated to remind Mayor Parker that she could request a 30-day extension from the Board. However, the Town was put on notice in 2019 about the risks associated with having a single operator who holds all four certifications. Those risks played out when that operator left and the floodwaters arrived. The evidence shows that the Town failed to mitigate those risks. The evidence

⁵ At the hearing, the Town suggested that a violation resulting in illness or death would constitute a major harm and a major deviation, and that the Town's violations in this case cannot be major because they do not rise to that level.

further shows that it is highly unusual for a water system to go 90 days without a certified distribution operator. Additionally, the Department could have imposed an economic benefit penalty based on the Town's cost savings of not having a distribution operator on staff but chose not to do so. Considering the foregoing, the penalty adjustment for failure to have certified operators was appropriate.

“Ultimately, the selection of the exact penalty amount ... is based upon the discretion and judgment of the case manager and the Division Director in any given case.” *Id.* at 9. The Department did not abuse its discretion or make an arbitrary or capricious calculation of the civil penalties in this case. *Accordingly, the Department has proven by a preponderance of the evidence that its civil penalty calculation is appropriate and in compliance with applicable law and policy.*

Finally, this tribunal must address 1) whether the upfront portion of the civil penalty was properly assessed under applicable law and policy, and 2) whether the contingent portion of the civil penalty was properly assessed under applicable law and policy. *See Order Granting Partial Summ. J., at pp. 13-14. Based on the evidence and the foregoing analysis, it is determined that the \$4,566 upfront portion of the civil penalty is appropriate and shall be assessed. However, because the Town corrected all cited violations and effectively remediated all violations cited in the Director's Order, the \$18,264 contingent portion of the civil penalty is not triggered and is not due. Moreover, assessing the contingent portion of the civil penalty as a pre-determined penalty for future violations violates due process.*

The Uniform Policy states that “The purpose of a contingent penalty is to provide an incentive for the respondent to correct the violations or take remedial action ... If the respondent misses the compliance dates specified in the order, the contingent penalty becomes due.” Exhibit 35, pp. 1-2. In this case, the Director's Order did not contain any compliance dates by which the

Town must correct the cited violations. Perhaps this is because, as the undisputed evidence shows, the Town had already corrected the cited violations before the Director's Order was issued. Additionally, the Director's Order lists certain requirements that the Town is already obligated to comply with and divides the contingent portion of the civil penalty among these requirements as pre-determined civil penalties for future violations. Thus, under the terms of the Director's Order, a future violation would trigger payment of a portion of the contingent penalty as a pre-determined civil penalty. *See* Exhibit 33, at pp. 9-10.

The Department's desire to deter similar violations in the future is understandable. However, to pre-determine a civil penalty now for a violation that has not and may never occur is to deny the Town due process if the future violation occurs. For example, the Director's Order requires the Town to pay \$1,000 for each future failure to notify the Department of a major equipment breakdown within 48 hours, not to exceed \$5,000. *Id.* at 9. If such a failure occurs six months from now, the Town is left with no avenue to challenge any factual issues or the calculation of the penalty.⁶ If the undersigned were to affirm the Director's Order on this point, the pre-determined penalty would be set and not subject to review despite no evidence of this future violation being presented in this case. Such a result is contrary to due process and to the appeal rights mandated by the SDWA. *See* TENN. CODE ANN. §§ 68-221-712 through -714.

The Director's Order seeks to use future non-compliance as a triggering event for the contingent portion of the civil penalty at issue in this case. This is also inconsistent with the Uniform Policy, which states that "The purpose of a contingent penalty is to provide an incentive for the respondent to correct the violations or take remedial actions... ." Exhibit 35 at 1. As

⁶ A determination that the penalty was reasonably calculated in this case does not necessarily mean that the same penalty would be appropriate under different facts. The potential harm and degree of deviation from the regulatory requirements may change, resulting in a different application of the penalty matrix. Thus, a higher or lower penalty may be necessary.

discussed above, the Town already took remedial action and corrected the violations at issue. In the event of future noncompliance, the Department's remedy is to issue a new Director's Order, based on those future facts, that includes an appropriate civil penalty sufficient to deter that noncompliance. Because the Town already corrected the violations and took remedial action, the purpose of the contingent penalty portion of the Uniform Policy was fulfilled. *To allow the contingent portion of the penalty to be assessed as a pre-determined civil penalty for future violations runs contrary to the Uniform Policy and denies due process. For these reasons, the pre-determined civil penalties for future violations set forth in paragraph XVI, sections (3) through (7), of the Director's Order are void and of no effect.*

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and render a decision in this contested case proceeding under TENN. CODE ANN. §§ 68-221-712(a) and -713(b)(2)(A). Pursuant to TENN. CODE ANN. § 68-221-714(a), the undersigned heard this matter, sitting alone, for the Board.

2. The Department, as the petitioner, bears the burden of proof in this case. *See* Order Determining Certain Questions of Law entered on February 19, 2025. The conclusions of law set forth in the Order Granting Partial Summary Judgment are incorporated herein by reference. Those conclusions found that the Department met its burden of proof on the issue of liability and that the violations at issue occurred.

3. The Department has proven by a preponderance of the evidence that its civil penalty calculation is appropriate, in compliance with applicable law and policy, and not otherwise arbitrary or capricious. *See* TENN. CODE ANN. §§ 68-221-713(a)(1), (d)(1), and the Uniform Policy. Because the Department is no longer pursuing three of the violations and is not seeking to collect the \$12.40 in damages, the total civil penalty calculation is reduced to \$22,830.

4. Consistent with the Uniform Policy and the terms of the Director's Order, \$4,566 (20%) of the calculated penalty is assessed upfront and shall be paid by the Town. The Department could have assessed a larger upfront portion but chose not to do so.

5. As discussed above, the purpose of the contingent portion of the civil penalty is "to provide an incentive for the [the Town] to correct the violations or take remedial action." Exhibit 35, pp. 1-2. The purpose of this portion of the policy has already been fulfilled. Because the Town has already taken remedial action and corrected the violations at issue, the contingent penalty of \$18,264 cannot now be triggered, is not due, and shall not be assessed.

6. Pursuant to TENN. CODE ANN. §§ 68-221-705(9), -712, and -713 as well as the Uniform Policy, and as discussed above, assessing the contingent portion of the civil penalty as a pre-determined civil penalty for a future violation runs contrary to the Uniform Policy and denies due process. *See* TENN. CODE ANN. §§ 68-221-712 through -714. For this reason, the pre-determined civil penalties for future violations set forth in paragraph XVI, sections (3) through (7), of the Director's Order are void and of no effect.

7. In its post-hearing brief, the Department sought recovery of some of its costs. While the Department has statutory authority to recover its costs under TENN. CODE ANN. §§ 68-221-713(a)(3) and (e), TENN. COMP. R. & REGS. 1360-04-01-.16 requires that any request for costs be made in the form of a motion and that the non-moving party be given an opportunity to respond. Because a post-hearing brief is not the proper vehicle for requesting costs, the Department's request for costs is denied. *However, the parties may file any motion for costs within 14 days of the entry of this Initial Order. The opposing party shall have seven days from the filing of said motion to file any response.*

POLICY STATEMENT

Upholding the Director's Order as modified is consistent with the purpose of the SDWA to protect the right of the people of Tennessee to an adequate quantity and quality of drinking water. TENN. CODE ANN. § 68-221-702.

It is so **ORDERED**.

This INITIAL ORDER entered and effective this the **30th day of September 2025**.



MARK GARLAND
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the **30th day of September 2025**.

NOTICE OF APPEAL PROCEDURES

REVIEW OF INITIAL ORDER

The Administrative Judge's decision in your case **BEFORE THE TENNESSEE BOARD OF WATER QUALITY, OIL, AND GAS (the Board)**, called an Initial Order, was entered on **September 30, 2025**. The Initial Order is not a Final Order but shall become a Final Order unless:

1. **A Party Files a Petition for Reconsideration of the Initial Order:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration with the Administrative Procedures Division (APD). A Petition for Reconsideration should include your name and the above APD case number and should state the specific reasons why you think the decision is incorrect. APD must **receive** your written Petition no later than 15 days after entry of the Initial Order, which is no later than **October 15, 2025**. A new 30 day period for the filing of an appeal to the Board (as set forth in paragraph (2), below) starts to run from the entry date of an order ruling of a Petition for Reconsideration, or from the twentieth day after filing of the Petition if no order is issued. Filing instructions are included at the end of the document.¹

The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied you may file an appeal, which must be **received** by APD no later than 30 days after the date of denial of the Petition. See TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **A Party Files an Appeal of the Initial Order and/or Other Earlier Orders:** You may appeal the decision, together with any earlier order issued by the Administrative Judge you specifically choose to appeal, to the Board, by filing an Appeal of the Initial Order with APD. An Appeal of the Initial Order should include your name and the above APD case number and state that you want to appeal the decision to the Board, specifying any earlier order(s) issued by the Administrative Judge that you also want to appeal, along with the specific reasons for your appeal. APD must **receive** your written Appeal no later than 30 days after the entry of the Initial Order, which is no later than **October 30, 2025**.² The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317.
3. **The Board Decides to Review the Initial Order:** In addition, the Board may give written notice of its intent to review the Initial Order within the longer of 30 days or 7 days after the first board meeting to occur after entry of the Initial Order. No later than 7 days after the entry of an Initial Order, TDEC shall file, and serve, a Notice of Filing containing the date of the next Board meeting. No later than 7 days after the next Board Meeting, TDEC shall file, and serve, a Notice of Filing setting forth what action, if any, the Board took with respect to the Initial Order.

¹ See TENN. CODE ANN. §§ 68-201-108 (Air Pollution Control Board); 68-211-113, 68-212-113, 68-212-215, 68-215-115, 68-215-119 (Underground Storage Tanks and Solid Waste Disposal Control Board); TENN. CODE ANN. §§ 60-1-401, 69-3-110, 68-221-714 (Board of Water Quality, Oil & Gas).

² The deadline to file an appeal of the initial order (15 versus 30 days) in cases brought under the Tennessee Water Quality Control Act of 1977, TENN. CODE ANN. § 69-3-101, et seq., is an issue currently under review in a case before the Tennessee Supreme Court. *Jamesway Construction, Inc. v. David Salyers, P.E.*, No. M2023-01704-SC-R11-CV.

NOTICE OF APPEAL PROCEDURES

If either of the actions set forth in paragraphs (2) or (3) above occurs prior to the Initial Order becoming a Final Order, there is no Final Order until the Board renders a Final Order affirming, modifying, remanding, or vacating the administrative judge's Initial Order.

If none of the actions in paragraphs (1), (2), or (3) above are taken, then the Initial Order will become a Final Order. **In that event, YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER.**

STAY

In addition, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Initial Order. A Petition for a stay must be **received** by APD within 7 days of the date of entry of the Initial Order, which is no later than **October 7, 2025**. See TENN. CODE ANN. § 4-5-316. A reviewing court also may order a stay of the Final Order upon appropriate terms. See TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

REVIEW OF A FINAL ORDER

When an Initial Order becomes a Final Order, a person who is aggrieved by a Final Order in a contested case may seek judicial review of the Final Order by filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," within 60 days of the date the Initial Order becomes a Final Order. See TENN. CODE ANN. § 4-5-322. The filing of a Petition for Reconsideration is not required before appealing. See TENN. CODE ANN. § 4-5-317.

FILING

Documents should be filed with the Administrative Procedures Division by email *or* fax:

Email: APD.filings@tnsos.gov

Fax: 615-741-4472

In the event you do not have access to email or fax, you may mail or deliver documents to:

Secretary of State
Administrative Procedures Division
William R. Snodgrass Tower
312 Rosa L. Parks Avenue
Nashville, TN 37243-1102