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

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

THE TOWN OF TELLICO PLAINS'
PETITION FOR APPEAL OF THE
INITIAL ORDER AND OTHER EARLIER ORDERS AND RULINGS

The Town of Tellico Plains ("**The Town**"), pursuant to T. C. A. § 4-5-315(b), herewith petitions for appeal to the Board of Water Quality, Oil, and Gas (the "**Board**") for the Board to review the Initial Order entered in this matter effective September 30, 2025, and the various earlier orders and rulings referred to hereinbelow and grant the relief requested.

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

1. Introduction

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

2. The Town's Proposed Initial Order

As demonstrated by this appeal notice, there are numerous errors with the ALJ's Initial Order. Most glaring of which was, on page 11, to completely misstate The Town's non-constitutional argument for why the Assessment was invalid. At the beginning of the Analysis section, The ALJ asserts The Town argues that the Assessment is invalid because The Town's ETT score fell below 11. That is not The Town's argument. In addition to the constitutional issues, The Town argues the Assessment was invalid because TDEC brought the Assessment for Jessica Murphy's false reason quoted above (that The Town really had not fixed anything) and TDEC knowing the reason for bringing the Assessment was false, but bringing it anyway, is arbitrary and capricious action that should not be tolerated. Agencies cannot act for arbitrary and capricious reasons, and action premised on arbitrary and capricious reasons are invalid. The Town asks the Board to review whether the Assessment is invalid for that reason.

By the time of the Review Hearing June 16 – 17, 2025, the whole business with The Town's ETT score may have become a distraction. The ETT issue came up in Tom Moss's deposition. Mr. Moss was the TDEC employee tasked with writing the Assessment. In his deposition he was asked why TDEC issued the Assessment. He chose to give the reason, which if true would be unimpeachable. He testified that TDEC had no choice because The Town's ETT score was greater than 11, and EPA required TDEC to issue the Assessment for any score above 11. If true, that would be unimpeachable. However, his reason given under oath was false and he knew it. The ETT score reason was false because (1) Mr. Moss knew The Town's truthful ETT score was not above 11, The Town was therefore "off the hook on this one with EPA," and he says so in his January 18, 2024, email quoted above, and (2) he knew the real

reason TDEC was bringing the Assessment was Ms. Murphy's false reason that The Town really had not fixed anything.

Further, the record in this case demonstrated that The Town's truthful ETT score was no where near 11. The truthful score was at or near zero.

Summary: Except for the ALJ's invalidating the contingent penalties, The Town requests the remainder of the ALJ's Initial Order be replaced with the Proposed Initial Order submitted by The Town in this case and a favorable determination on the constitutional issues discussed in Section 3 below.

3. Order Denying Respondent's Motion to Dismiss Entered March 13, 2025

The Town seeks appeal and review of the ALJ's Order entered March 13, 2025, denying Respondent's Motion to Dismiss TDEC's Assessment as Void or in the Alternative for Dismissal of the Monetary Portions of the Assessment Due to the Court Lacking Subject Matter Jurisdiction. In this case, the unilateral process by which TDEC decided in secret that The Town violated a statute and owed it $25,542.40 violated The Town's substantive and procedural due process rights under the federal and Tennessee constitutions. Said process also violated the doctrines of separation of powers present in both our state and federal constitutions. Specifically, T. C. A. § 68-221-713(b)(1) allows TDEC, a part of the executive branch, to decide to assert The Town violated the SDWA (i. e. act as plaintiff/prosecutor) and then decide, in secret and without the opportunity for The Town to defend itself, that The Town is liable to it for money (i. e. act as jury) and the amount of that money (i. e. act as judge pursuant to undisclosed "sentencing guidelines"). That The Town has a right to have the award of money against it "reviewed" by the Board of Water Quality, Oil, and Gas, also part of the Executive Branch, and

thereafter in a severely limited review by the courts, does not mitigate any of these wrongs. That only limited reviews are available gives the Executive Branch too much unchecked power.

A. The Assessment is Void

As recently affirmed by the United States Supreme Court in SEC v. Jarkesy, 144 S. Ct. (2014), because T. C. A. § 66-221-713(b)(1) permits TDEC to award itself money that could become the basis for a judgment (see T. C. A. § 68-221-713(b)(3)(A)) this statute violates principles of separation of powers under Tennessee's Constitution, Article II Section I, and the U. S. Constitution as well as violating The Town's substantive and procedural due process rights, as an operator of a water system, under the 5th and 14th Amendments to the U. S. Constitution as well as Article I, Sections 8 and 17 of Tennessee's Constitution. Section 713(b) is particularly offensive in that it takes away all the rights a person would have to resist wrongfully owing money in a real lawsuit, and The Town's only recourse is that it can seek "review" of the Assessment pursuant to T. C. A. § 68-221-713(b)(2)(A) by the Board and a limited review thereafter in the Chancery Court. Review is not defined in Subsection 713(b)(2)(A), and because of that violates due process as being unconstitutionally vague. Review certainly does not mean trial *de novo*. Accordingly, T. C. A. § 68-221-713(b) is unconstitutional, and because the statute on which the Assessment was based is unconstitutional, the Assessment as a whole must be dismissed as void.

B. The Tribunal Lacks Subject Matter Jurisdiction

That portion of TDEC's claims against The Town for money is a cause of action to collect money and, while premised on a modern Tennessee statute and labeled as penalties, the Assessment is nonetheless a common law cause of action. As recently affirmed in Jarkesy, a cause of action that is not equity or admiralty is a common law cause of action. As such,

pursuant to principles of separation of powers, substantive due process, and procedural due process as affirmed in Jarkesy, The Town, as an operator of a water system, like every other citizen, is entitled to have common law claims for money damages against it decided by a separate judiciary. However, this tribunal is not a part of the state's separate judiciary. The SDWA at T. C. A. § 68-221-714(a) – (d) wrongfully permits the executive branch of this state to both prosecute and decide The Town's liability to TDEC for money. Further, T. C. A. § 68-221-714(e) and T. C. A. § 4-5-322 wrongfully constrain the rights The Town would otherwise have in a separate judiciary, including trial by jury should that right be elected.[1] Specifically, as it pertains to the application of T. C. A. § 68-221-714(a) – (d) for determining The Town's liability for money (which liability is then made into an enforceable judgment), said statutes are unconstitutional. These statutory provisions violate The Town's rights, as an operator of a water system, to separation of powers under Articles I, II, and III of the U. S. Constitution, generally, and Article II, Section 1, of Tennessee's Constitution. These statutory provisions also violate The Town's rights, as an operator of a water system, to substantive and procedural due process pursuant to the 5th and 14th Amendments of the U. S. Constitution and Article I Sections 8 and 17 of Tennessee's Constitution. T. C. A. § 68-221-714(a) – (e) and T. C. A. § 4-5-322 are unconstitutional, and as such, this tribunal lacks subject matter jurisdiction to decide monetary relief to be awarded against The Town. Accordingly, this tribunal must dismiss all claims for monetary relief contained in the Assessment.

[1] Heretofore, The Town could not meaningfully elect a jury trial in a tribunal not offering trial by jury.

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

The Town seeks appeal and review of the AJL's standard for review of the Assessment set forth on page 3 of its Order Determining Certain Questions of Law entered February 19, 2025. One of those questions The Town sought to be addressed was the standard by which the Assessment would be "reviewed" pursuant to T. C. A. § 68-221-713(b)(2)(A). While in the first instance, it is the Town's position that Subsection 713(b) is unconstitutional as presented above, if the Assessment is to be reviewed, there must exist a criteria for review. Under the present statutory framework, it would seem the only meaningful standard for the ALJ to review the Assessment would be the same standard as for judicial review of the Assessment set forth at T. C. A. 4-5-322(h). The standard for review set forth by the ALJ on page 3 of its order was incomplete. That said, it will be argued later that for the same reasons Subsection 713(b) limiting The Town's rights is unconstitutional, T. C. A. § 4-5-322(h) limiting The Town's rights to just a narrow judicial review is also unconstitutional.

5. Order Granting Partial Summary Judgment Entered May 6, 2025

The Town seeks appeal and review of the ALJ's Order Granting Partial Summary Judgment entered May 6, 2025. While perhaps not inappropriate for the ALJ to have decided that certain undisputed facts occurred and that those facts technically constituted SDWA violations, the ALJ was mistaken in going the next step and determining "liability" for those violations. In determining The Town was "liable" to TDEC, the ALJ predetermined the Assessment was properly brought against The Town. That is, The Town would not have "liability" to TDEC if the Assessment was brought for an unauthorized and/or improper purpose.

If The Town could show the Assessment was brought for an unauthorized and/or improper purpose contrary to law and TDEC policy, then The Town would not have liability to TDEC. That is, a person should not be liable for something unauthorized and/or improper.

In response to TDEC's Motion for Summary Judgment, The Town placed into the record significant evidence that the Assessment was brought for an unauthorized and/or improper purpose sufficient to overcome summary judgment. Specifically, at that time in the case, as Mr. Moss testified under oath in his deposition, it was TDEC's position that it was required by EPA to bring the Assessment because of The Town's ETT score being at 11 or higher. That reason turned out to be false, and Mr. Moss's testimony under oath in his deposition to that effect was revealed as a lie since his own email dated January 18, 2024, established he knew The Town's ETT score was well below 11 and enforcement was not required by EPA. Consideration of summary judgment required the ALJ to accept as true The Town's facts, but that was not done. The ALJ's Order on Summary Judgment should be set aside. Further, all TDEC objections at the Review Hearing sustained premised on liability having been decided on summary judgment should be set aside and The Town permitted to introduce into the record the excluded evidence.

6. The Initial Order entered September 30, 2025

A. <u>The $4,566.00 Monetary Award</u>

The Town seeks appeal and review of the ALJ's Initial Order entered September 30, 2025, that requires The Town to pay to TDEC $4,566.00. In addition to the constitutional issues set forth in Section 3 above, The Town asks that this award of money to TDEC be set aside for no less than the following reasons in this Subsection A, the next Subsection B, and Subsection C:

1. The Assessment Was Not for an Authorized Purpose.

Based on the Uniform Guide, there is a five-part test for determining authorized purposes for discretionary assessments. The assessments (1) are for the more serious violators; (2) must be timely; (3) must be appropriate; (4) should return the violator to compliance as expeditiously as possible; and (5) should deter future or potential non-compliance. In this case, The Town was not a serious violator; the Assessment was not timely, appropriate, and did not return The Town to compliance (because by the time of the Assessment The Town was already in compliance for months); and there was no proof in the record The Town needed a financial penalty as motivation for future compliance.

The reasons the ALJ set aside the contingent penalties in the Initial Order are reasons no less applicable to the upfront penalties. The purpose of the civil penalties, both upfront and contingent, per the Uniform Guide, is to accomplish policy objectives such as to provide incentive for The Town to correct the violations, take remedial action, or provide deterrence. In this case, as the ALJ found, the Assessment was issued long after all violations had been corrected and remediated by The Town. Further, the asserted violations were acute, non-chronic, one-time violations having as a single root cause not having certified operators. With the recognized policy objectives for issuing assessments absent, the Assessment as a whole was issued contrary to TDEC policy, was unauthorized, and as such is void.

2. The Reason for Bringing the Assessment was Wrongful and Arbitrary and Capricious.

Because assessments are not issued for each and every violation of the SDWA by a water system, it remains The Town's position that (1) TDEC must have a reason for its decision to issue discretionary assessments, not just that violations occurred, (2) the reason for the decision must be supported by the record, (3) the reason for the decision must be consistent with an

authorized purpose, (4) the reason for the decision cannot be arbitrary and capricious, and (5) the content of the assessment itself must be appropriate and likewise not arbitrary and capricious. It is The Town's further position that the reason for TDEC bringing the Assessment was not for an authorized purpose, was false, and was also arbitrary and capricious. TDEC's reason for issuing the Assessment is best established by the reason given by TDEC before, and closest in time to, the issuing of the Assessment which was the statement attributed to Jessica Murphy, Manager of TDEC's Enforcement and Compliance Unit, by Tom Moss on January 18, 2024, two months before the Assessment, which was

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

The reference to being "off the hook with EPA" is a reference to The Town's ETT score not being the reason for the Assessment as it had just been confirmed The Town's ETT score was at that time well under 11, and so ETT score could not serve as the reason. The reference to "they really haven't fixed anything" is a refence to the violations itemized in the Assessment, which statement by Ms. Murphy was false because by January 18, 2024, The Town had actually fixed everything. On the topic of The Town having fixed everything before the Assessment, the ALJ agreed. Incidentally, at the Review Hearing, Ms. Murphy declined to address this statement attributed to her.

It remains The Town's position that TDEC should not be allowed to issue assessments for arbitrary and capricious reasons. Arbitrary means "of, relating to, or involving a determination without consideration of or regard for facts and circumstances, fixed rules, or procedure … founded on prejudice or preference rather than on reason or fact." Capricious means "(of a person) guided by unpredictable or impulsive behavior or (of a decree) contrary to the evidence or established rules of law." Being false, and being knowingly false, Ms. Murphy's

reason for directing Mr. Moss issue the Assessment is arbitrary and capricious, and the Assessment is void as a result.

3. The Assessment Dollar Amounts Violate Due Process

It remains The Town's position that to the extent TDEC can issue civil penalties, it's penalty calculation must be appropriate, incompliance with applicable law and policy, and not otherwise arbitrary and capricious. However, the dollar amounts of the Assessment were shown to be incapable of objective review, and if a process is incapable of scrutiny, it can be no better than just arbitrary and capricious.

4. Equitable Relief

As the Assessment was issued in its original form, the contingent penalties are triggered only as a result of The Town failing to do certain things it was ordered to do. While the ALJ has deemed the contingent penalties void, did that mean that part of the Assessment whereby The Town is ordered to do certain things is also void? The answer to that question is seemingly, "yes." However, if TDEC takes the position that the equitable relief in its order survives, it is The Town's position that in addition to the defenses in this appeal document as to why that equitable relief is void, TDEC's entitlement to said equitable relief is barred by the doctrine of unclean hands.

B. Various Findings and Conclusions

In several places, the Initial Order makes incomplete and/or incorrect findings. If the Board is not to adopt the format of The Town's Initial Order, then The Town requests that the Board, in its Final Order, make the following additions and corrections to the findings and amend the Analysis and Conclusions Sections accordingly.

1. Paragraph 2 is incomplete in its description of the characteristics of true ground water, a fundamental issue in the case, and should be amended to include the following additional findings:

> The Town's water system is classified as "true ground water" which is the purest of all possible water sources. Ture ground water is expected to be uncontaminated and is so pure that EPA does not require true groundwater to be treated.

The last sentence of paragraph 2 is a misstatement and should be stricken. Nothing in the record established that contaminants in drinking water increase with the number of customers.

2. The last sentence of paragraph 5 should be stricken. First, if the 2019 Sanitary Survey really had some probative value, it would have been an exhibit. Second, one person having all four licenses is permitted and not a violation. Being advised of "risks associated with" one person having all four certifications is vague and lacks probative value of an issue in the case. What were the "risks?" The record does not establish what those risks were. One can speculate that the risk is that if the operator holding all four certifications manages to get himself fired (as TDEC claims happened to Mr. Patty in this case) it is *perhaps* mathematically more difficult to find a replacement holding all four licenses.

3. Paragraph 6 is incomplete and should be amended to include the following additional findings:

> While Mr. Antone sent to Mayor Parker this list of certified operators, Mr. Antone did not know if any of those operators were in fact available to serve the Town. Any conclusion that all Mayor Parker had to do to find replacements was to make some calls that she failed or refused to make is not valid.

4. Paragraph 7 is incomplete and should be amended to include the following additional findings:

> The Town, released Mr. Patty earlier then the end of his two-week notice. Doing so exposed the Town to more fines than otherwise, and so with his situation requiring the need for legal advice, the fair conclusion is that there was a serious

problem with Mr. Patty's services and no doubt explains the problems the Town faced with the flood in August 2023 as described by Brad Antone.

5. Because paragraph 9 contains no information probative to the SDWA order at issue in this case, it should be stricken. Presumably, paragraph 9 was included to demonstrate generalized short comings, incompetence, or just to embarrass The Town. The record demonstrated that in August 2023, The Town received a large amount of rain in a short period of time, and a flood occurred. The record does not demonstrate the flood was The Town's fault, and TDEC did not issue any SDWA violations to The Town because of the flood. Further, the Assessment in this case is a SDWA order, not a wastewater order. As interesting as the August 2023 flood was, issues with the wastewater plant are not probative as to the SDWA order. Further, the drinking water system has no open connections where flood water could have entered, and Mr. Antone did not testify the flood caused an increased risk of untreated surface water entering the distribution system.

6. Paragraph 10 pertains to the flood events referred to in paragraph 9, for which The Town received no SDWA violations. If paragraph 9 is not to be stricken, paragraph 10 is incomplete and should be amended to include the following additional findings:

> The "boil water" notice was for just one day, and all bacteriological tests of the drinking water conducted following the flood were negative.

7. Paragraph 13 contains a factual error and should be amended. Mr. Taubert was hired by The Town on August 26, 2023, and reported for work on September 7, 2023. Paragraph 13 should be further amended to add the following findings:

> The Department requested that certified operators be hired and that they be notified of the new operators by August 19, 2023. On August 15, 2023, Mr. Taubert sent his contract to The Town to be approved as its certified treatment operator and in a perfect world could have been "hired" on that date, which was prior to the August 19, 2023, TDEC first deadline. However, because of the recent flood and the

> Town's council needing time to approve the contract, Mr. Tauber was not confirmed by the Mayor as hired until August 26, 2023.

8. Paragraph 16 should be stricken and replaced. That Mayor Parker "may" have received information is not probative that she did receive any such information. This paragraph should be replaced with the following findings:

> Tennessee's Operator Certification statute at T. C. A. § 68-221-912 allows water systems an opportunity to seek extensions from the operator certification board for time to find certified operators. During this time in 2023, there was a shortage of operators generally, and there was great difficulty to get operators to come to The Town. During this time, the Department was informally affording The Town many months of extensions to find its operators anyway (see paragraph 14). The Department informing the Town that it could obtain formal extensions from the board to avoid fines is an appropriate mission for a state agency. Remaining silent so as to be able to posture for increased fines is not.

9. Paragraph 17 is meaningless and should be stricken. The record demonstrates that in July 2023, Mayor Parker called Robert Ramsey and asked how many samples The Town was required to take. Mayor Parker testified Mr. Ramsey told her six samples were required, and in reliance on that Mayor Parker caused The Town to take just 6 samples in July 2023. At the Review Hearing, Mr. Ramsey did not contradict this specific number and the statement attributable to him. Paragraph 17 of the Initial Order merely recounts that in response to the Mayor's call, Mr. Ramsey looked at a database and told the Mayor a number. Speculating that the number on the database was 7 and not 6, or that Mr. Ramsey did not say 6 by mistake, is not the same as evidence.

10. Paragraph 19 contains incorrect facts and should be amended. Ms. Williams' site visit September 28 – 29, 2023, did not reveal the missed sampling in July 2023. Mr. Taubert had already informed TDEC of this. Ms. Williams visit did not reveal CCA data was not available for July and August 2023 and that the Rural Vale CCA was not recording data. Mr. Taubert had already informed TDEC of these matters.

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

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

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

13. As for paragraph 24, Mr. Moss testified he was assigned the task of writing the Assessment by Jessica Murphy on January 25, 2024, not in December 2023. Paragraph 24 contains errors and should be stricken and replaced the following findings:

> On January 25, 2025, Mr. Tom Moss, an Environmental Manager in the Department's Compliance and Enforcement Unit was assigned the task of drafting 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 testified he calculated the civil penalties using the Department's Uniform Guide for the Calculation of Civil Penalties ("the Uniform Policy').

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

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

15. The ALJ adopted all of TDEC's dollar values for the asserted violations. It remains The Town's position that the only way to affirm the dollar values is for the ALJ to have scrutinized whether Mr. Moss followed an objective process to determine whether the violations were minor, moderate, or major. In his deposition read at the hearing, Mr. Moss did not share any such objective process, and so TDEC's proof as to the process for determining whether violations were minor, moderate, or major came from Jessica Murphy and was essentially, "the fines to The Town were consistent with what we always do." That process is, of course, meaningless. The Initial Order should be amended to include the following findings:

> Approving or modifying the Assessment requires, as the first order of business, to determine the objective criteria that Mr. Moss was supposed to follow in deciding whether the asserted violations were minor, moderate, or major deviations from the rules and potential harm to the public. Mr. Moss never testified how he came up with the monikers for the asserted violations, and Mr. Taubert could not figure it out either and was not permitted to testify on the topic. Accordingly, if after looking at the pertinent documents in this case, in no way can a third person ever determine how Mr. Moss came up with those monikers, then that same conclusion constrains the Court from making a similar inquiry. Thus, because the Court can in no way determine how Mr. Moss came up with those monikers, the Court cannot sustain the Assessment or modify it. Modifying the Assessment means that in some way Mr. Mos did not do it right, but if the Court has determined a third person can in no

way determine if Mr. Moss did it right, there is no way to say he did it wrong. For this reason the Assessment in its entirety must be set aside.

16. The Initial Order makes no mention of TDEC's responsibility to compress asserted violations stemming from the same event and/or root cause. The Initial Order should be amended to include the following findings:

> The Uniform Guide provides that where violations flow from one basic violation, or where violations are similar, those violations may be grouped (i. e. "compressed") together and treated as one violation. In this case many of the asserted violations were similar and/or flowed from one basic violation, and are to be compressed as discussed hereafter. Specifically, the root cause of all the asserted violations directly and proximately flowed from not having certified operators.

17. Paragraph 26 of the Initial Order is incomplete and should be replaced with the following findings:

> On March 21, 2024, the Department issued the Director's Order to the Town. See Exhibit 33. However, by the time the Director's Order was issued, the violations cited in the order had been rectified by the Town by November 2023 when The Town's water distribution operator came to work. As set forth in paragraph 35, three of the cited violations were not even violations and were withdrawn by the Department. As of the hearing date (June 16 – 17, 2025) the Town had committed no additional SDWA violations.

18. Paragraph 27 exaggerates the severity of the rule violation and potential harm to the public from The Town not having taken the seventh bacteriological test in the distribution system in July 2023 and fails to address compressing this asserted violation with the root cause for this violation, which was not having certified operators as discussed at paragraph 32. Paragraph 27 should be stricken and replaced with the following findings:

> The Department is pursuing a violation for only taking six of the seven required bacteriological samples in the distribution system for July 2023. This is an asserted monitoring violation. Testing for bacteria in the distribution system is important, but the Department exaggerates the severity of the rule violation and potential harm to the public of the asserted violation. The source of the Town's water is true ground water, expected to be so pure EPA does not require it to be treated. There was no proof that the Town had ever had a distribution system positive bacteria test, and so there was no reasonable expected increased risk of harm to the public

for the Town not having taken the seventh test. There certainly was no chronic bacteria problem in July as the August tests were all negative. Missing this seventh test is a minor/minor violation. However, the Town did not know how many tests to take in July. The root cause of not knowing what to do stems from the same violation asserted for not having certified operators. As such, pursuant to the Uniform Guide this violation is compressed into that violation (see discussion at paragraph 32, *infra*).

19. Paragraph 28 misstates the purpose of this type of chlorine sample taken in the distribution system, exaggerates the severity of the rule violation and potential harm to the public from The Town not having taken the seventh chlorine sample, and fails to address compressing this asserted violation with the missed Bac-T sample discussed at paragraph 27 and as further compressed with the asserted violation as discussed at paragraph 32 (certified operators). Paragraph 28 further confuses this type of test with the annual disinfectant byproducts testing ("DPB"). As Mr. Antone testified, **annually** The Town is required to conduct **separate** DPB testing. The record does not support a statement from Mr. Antone that DPBs are caused by excess chlorine. Paragraph 28 should be stricken and replaced with the following findings:

> The Department is pursuing a violation for only taking six of the seven required free chlorine samples in the distribution system for July 2023. This is an asserted monitoring violation. Free chlorine samples are taken monthly and only taken at the same time Bac-Ts are taken to ensure against a false positive Bac-T sample. That is, the presence of adequate chlorine in the sample means that for any positive Bact-T result, said bacteria came from the testing process and not from the distribution system water. Further, this chlorine sample is only taken contemporaneously with a Bac-T, and so if the seventh Bac-T was not taken, necessarily the seventh chlorine sample is not taken. Pursuant to the Uniform Guide, any violation for a missed seventh chlorine sample should be compressed into the violation for not taking the seventh Bac-T, which is further compressed into the certified operator asserted violation (see discussion at paragraph 32, *infra*).

20. Paragraph 29 exaggerates the severity of the rule violation and potential harm to the public from The Town not sending reports to TDEC and fails to address compressing this asserted violation with the asserted violation as discussed at paragraph 32 (certified operators). Paragraph 29 should be stricken and replaced with the following findings:

> The Department is pursuing a violation for failing to report chlorine residuals leaving the plant for July and August 2023. This is an asserted reporting violation and has no bearing on whether The Town's drinking water was, at all times, being adequately dosed with chorine. Whether the Department has a piece of paper or not does not increase or diminish harm to the public. The proof was that The Town's drinking water system was, at all times, receiving adequate chlorine because the automatic shut-off feature on the continuous chlorine analyzer (CCA) at both of The Town's plants were operable, and had chlorine leaving the plant dropped below accepted levels, the CCA would have shut down the plant. The plants did not shut down, and so therefore the chlorine levels were adequate. The Department offered no proof this was not the case. The issue behind this violation had to do with the CCA not recording the readings for the chlorine leaving the plant. As the proof was that at all times in July and August The Town's drinking water was receiving adequate chlorine, there was no reasonable increased risk of harm to the public. Not sending the Department this paperwork is a minor/minor violation. However, the root cause of not resolving the CCA recording issue and sending the Department paperwork stems from the same violation asserted for not having certified operators. As such, pursuant to the Uniform Guide this violation is compressed into that violation (see discussion at paragraph 32, *infra*).

21. Paragraph 30 mischaracterizing the purpose and function of the continuous chlorine analyzer (CCA), exaggerates the severity of the rule violation and potential harm to the public, and fails to address compressing this asserted violation with the asserted violation discussed at paragraph 32 (certified operators). The CCA does not inject chlorine into the water system. The CCA analyzes the chlorine levels leaving the plant, cause the plant to shut-down if adequate chlorine is not leaving the plant, and causes the specific chlorine levels to be recorded. Paragraph 30 should be stricken and replaced with the following findings:

> The Department is pursuing a violation for failing to report that the Rule Vale CCA was inoperable. This is an asserted reporting violation. To begin with, a CCA has three functions. First, the CCA analyzes the amount of chlorine leaving the plant. Second, if the level of chlorine leaving the plant is below the accepted level, the CCA automatically causes the plant to be shut down. Third, the CCA causes the readings collected to be recorded. In this case, it was the third feature that was not working. The proof was that the two most important features of the CCA, chlorine analyzing and automatic shut-off, were working. The plants did not shut down and the record demonstrates that at all times in July and August The Town's drinking water was adequately chlorinated. As such, the Department mischaracterizes the CCA as being wholly inoperable. For clarity, the CCA does not inject chlorine. For this reporting violation, whether the Department did or did not have the

> required paperwork from the Town had no bearing on whether the Town's drinking water was adequately chlorinated. The Department not having the paperwork created no reasonable increased risk of harm to the public. Not sending the Department paperwork is a minor/minor violation. However, the root cause of this asserted violation of not reporting the CCA recording issue to the Department is the same as discussed in paragraph 29 and pursuant to the Uniform Guide should be compressed with that violation and further compressed with the violation for not having certified operators (see discussion at paragraph 32, *infra*).

22. Paragraph 31 exaggerates the severity of the rule violation and potential harm to the public for The Town not taking grab samples in July, August, and September and fails to address compressing this asserted violation with the asserted violation discussed at paragraph 32 (certified operators). While the CCA was not recording at the Rural Vale plant in July, August, and half of September, as mentioned the CCA was indeed monitoring the chlorine levels leaving the plant and determining those levels were at or above accepted levels. Paragraph 31 should be stricken and replaced with the following findings:

> 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. This is an asserted monitoring violation. As mentioned, the third feature of the CCA that causes the readings collected to be recorded was not working. The proof was that the two most important features of the CCA, chlorine analyzing and automatic shut-off, were working. The plants did not shut down and as such ensured that at all times in July, August, and September The Town's drinking water was adequately chlorinated. However, recording data is important, and so since the CCA was not recording data, the Town should have taken grab samples as required, but there was no proof that the Town's water was not adequately chlorinated or at reasonable increased risk of causing harm to the public. In these circumstances, not taking grab samples is a minor/minor violation. However, the root cause of the Town's personnel not being instructed to take grab samples stems from the same violation asserted for not having certified operators. As such, pursuant to the Uniform Guide this violation is compressed into that violation (see discussion at paragraph 32, *infra*).

23. Paragraph 32 concerns The Town not having a certified treatment operator for August 2023 and for not having a certified distribution operator for August, September, and October 2023. While having these operators is an important rule, the record is incomplete and

contradictory as to the degree of resulting reasonable increased risk of harm to the public.

Paragraph 32 should be stricken and replaced with the following findings:

> 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. While not having certified operators permits the conclusion to be made that this is a rule violation and there is an increased risk of harm to the public. While that is the case, the Department needed to prove the objective criteria used by Mr. Moss to determine the relative degree of the asserted violations, and the record is insufficient to support any conclusion as to degree of violation. The Department's proof was essentially "because Tom Moss says so," and "because Jessica Murphy said that is the way it is always done." That process for decision making is in fact no process and otherwise insufficient.
>
> Furthermore, if not having certified operators is a major/major violation as the Department insists, there would be a tremendous urgency in the requirement to obtain replacements. The record demonstrates numerous contradictions on this point. To begin with, a water system has 30 days to notify the Department of the departure of a certified operator; following that, it is the Department's routine is to give water systems 30 days from the date the Department is notified of the departure to find a replacement; in this case, the Department extend the deadline an additional 60 days without enforcement action (see paragraph 14, *supra*); and the Operator Certification statue permits a water system to seek even further extensions. Coupled with the fact that the source of the Town's water is true ground water, the record does not support the conclusion that the Town's not having certified operators for this duration constituted major harm to the public.
>
> Another troublesome example was present with hearing exhibit 16. This exhibit revealed a situation with a water system that failed to notify the Department it was missing an operator. Roughly four months later, that fact was discovered. With that water system not having a certified operator for four months, Mr. Antone testified that situation only warranted the water system receiving the standard 30-day notice, which would be followed by another 30-day notice.
>
> The Department had the burden of proof that Mr. Moss's determination as to the degree of this violation, and the Department has not done so.

24. Paragraph 33 concerns the upward or downward adjustments to the civil penalties referred to as a multiplier. The problems associated with a meaningful review of TDEC's imposition of the civil penalties discussed above are the same for the determination of the adjustments. Paragraph 33 should be stricken and replaced with the following findings:

> The Department is pursuing an upward adjustment in the civil penalties based on a percentage multiplier of 15% resulting in an increase in the civil penalties by $3,330.00. According to Mr. Moss's penalty matrix, Exhibit 34, Mr. Moss tells us this upward adjustment warranted because The Town was
>
> > "reminded multiple times about having certified operators."
>
> There are several problems with the Department's use of upward adjustments under these facts. First, the reason for the upward adjustment is the Town being told it needed operators. The proof was that the Town knew this, was working diligently and in good faith to find operators, and being told by the Department to get operators one, three, or a thousand times would not change the Town's ability to get operators to come to Tellico Plains more quickly. The implication from Mr. Moss is that The Town was ignoring its obligations, which was of course not true. Second, as mentioned above, generally, Mr. Moss provided no objective criteria for how he came up with the 15% multiplier. Without objective criteria, Mr. Moss's upward adjustment decision and multiplier percentage cannot be reviewed. If the multiplier is incapable of meaningful review, it is incapable of being affirmed. Third, clearly the Town is entitled to a downward adjustment multiplier for acting in good faith. The Department agreed the Town acted in good faith. However, the same problem exists for considering a downward adjustment as with the upward adjustment. There is no objective criteria for anyone to apply to select the correct percentage multiplier. As such, the adjustment multiplier feature of the Assessment violates due process and is set aside as void.

25. Paragraph 34 asserts TDEC properly calculated the civil penalties. For the reasons presented above, TDEC did not. The conclusion for this paragraph is that the value for a civil penalty can only be determined by people whose jobs are to assess civil penalties for TDEC. According, it would seem that it no way can other independent evidence, considerations, viewpoints, or argument be brought to bear on determining the values of TDEC civil penalties. The ALJ applied no independent analysis, evaluation, or scrutiny. The ALJ applied no objective criteria because there is none, hence the problem. Since Mr. Moss did not testify in-person at the Review Hearing and explain the objective criteria he used to determine the minor, moderate, and major violation monikers, nor the upward adjustment, TDEC's proof was limited to Jessica Murphy in essence testifying that the penalties were fair because it was consistent with what

TDEC always does, so she said. This, "we just do what we always do" is wrongful, violates the Uniform Guide, and violates due process.

26. At paragraph 36, for the reasons mentioned above, the adjusted total civil penalties of $22,930.00 are not supported by the record and should be stricken.

27. Paragraph 37 is incomplete. A significant problem with the contingent feature of the Assessment not mentioned by the ALJ is that potentially the future violations could expose The Town to more money then the $18,264.00 contingent amount. Paragraph 37 should be amended to include the following finding as a concluding sentence:

> Furthermore, the potential for total penalties is by no means capped by the contingent amount. The Town's financial exposure has the potential to exceed $18,264.00.

C. Analysis Section

In the Analysis section of the Initial Order, there are several errors that should be corrected as follows.

1. On page 11 of the Initial Order, the ALJ asserts The Town argues that the Assessment is invalid because The Town's ETT score fell below 11. That is not correct. In addition to the constitutional issues, The Town argues the Assessment was invalid because TDEC brought the Assessment for Jessica Murphy's false reason (that The Town really had not fixed anything) and knowing the reason for bringing the Assessment was false, but bringing it anyway, is arbitrary and capricious action that should not be tolerated. The Town asks the Board to review whether the Assessment is invalid for that reason. Further, The Town's truthful ETT score was never above 11.

2. At the middle of page 13, the ALJ asserts the Department properly determined whether the harms from the violations, and the rule deviations, were major, moderate, or minor.

As mentioned above, that cannot be known since TDEC demonstrated no objective criteria for these monikers. The record only demonstrated that the monikers were selected by Tom Moss and according to Jessica Murphy, consistent with what TDEC always does. This is insufficient criteria.

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

7. Conclusion

The Town requests the Board review the Initial Order and make the above requested changes.

Respectfully submitted this ___13th_____ day of October, 2025.

/s/ Brian C. Quist

Brian C. Quist BPR #012762
Peter P. Amoruso, BPR # 040982
QUIST, FITZPATRICK & JARRARD, PLLC
800 South Gay Street, Suite 2121
Knoxville, Tennessee 37929-2121
(865) 524-1873 Ext. 207
bcquist@QFJlaw.com
Attorneys for Respondent
Town of Tellico Plains

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served upon the following persons or entities in the manner indicated on this _13th____ day of October 2025.

Via Email Samantha.Buller-Young@tn.gov

Samantha Buller-Young
Assistant Counsel
Department of Environment and Conservation
Knoxville Field Office
3711 Middlebrook Pike
Knoxville, TN 37921

Via email Emily.vann@tn.gov

Emily B. Vann
Senior Associate Counsel
Office of the General Counsel
Davy Crockett Tower, 5th floor
500 James Robertson Parkway
Nashville, TN 37243

/s/ Brian C. Quist

Brian Quist, BPR 012762