

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

In the Matter of: Tennessee Department of  
Environment and Conservation.

Petitioner,

vs.

Town of Tellico Plains, Tennessee

Respondent.

APD Case No. 04.02-244954J

**MEMORANDUM IN SUPPORT OF THE TOWN OF TELlico PLAINS' 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 TO GRANT SUCH RELIEF**

Comes now into Court Respondent, The Town of Tellico Plains ("**The Town**"), and in support of its 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 to Grant Such Relief submits this Memorandum. As a preface, the ideas presented by this Motion are assuredly not original, new, or even creative. It is just that perhaps they have not heretofore been raised in such a simple and straightforward manner.

**I. Background – SEC v. Jarquesy**

On June 27, 2024, everything we thought we knew about administrative law changed. On that date, the United States Supreme Court published its opinion in SEC v. Jarquesy, 144 S. Ct. 2117 (2024). Jarquesy decided several constitutional issues. Chief among those constitutional issues decided, supported by the majority and concurring opinions, was that, at a basic level, a claim for money upon which a judgment could ultimately be entered and collected, however labeled and from whatever source derived, is nonetheless a common law claim, and a defendant is entitled by the federal constitution to have liability for common law claims for money decided

by a separate judiciary. In Jarkesy, the Securities and Exchange Commission (“SEC”), a part of the federal executive branch, established administrative law procedures to have an administrative law judge, also a member of the executive branch, decide the monetary liability of the defendants for various SEC imposed civil penalties. While Jarkesy centered on the defendants’ asserted federal constitutional right to a jury trial (7<sup>th</sup> Amendment), the broader punchline of the case was that the defendants were indeed entitled to a jury trial ... by a separate judiciary.

As Jarkesy forms the principal basis of the discussion that follows, breaking down the points of Jarkesy applicable to this case at this time is useful.

A. Common Law Claims

As a person has a 7<sup>th</sup> Amendment right to a jury trial as to common law claims, in the first instance the Jarkesy Court had to break down for us what was, and what was not, a common law claim. Chief Justice Roberts made it really simple:

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

SEC v. Jarkesy, 144 S. Ct. at 2117, 2128 – 2129. Thus, common law claims are those claims that are not claims in equity, admiralty, or maritime.

This Court has long understood the Seventh Amendment’s protection to apply in “all [civil] suits which are not of equity [or] admiralty jurisdiction.

Jarkesy, 144 S. Ct. 2144 (Gorsuch concurring opinion). The TDEC Assessment is a claim for money, and since a claim for money is not a claim in equity, admiralty, or maritime the TDEC Assessment is a common law claim.

B. The Right to have Common Law Claims Adjudicated by a Separate Judiciary.

At the federal level, the right to have a separate judiciary decide legal disputes rests simply on the fact that Article III of the U. S. Constitution vests the judicial powers of the federal government in a separate judiciary. In short, the concept of separation of powers is not that complex. Once a dispute is determined to be a legal dispute, like a claim for civil penalties as in this case, the dispute must be tried in a separate judiciary. Again, Chief Justice Roberts makes it simple:

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

Jarkesy, 144 S. Ct. at 2129. Chief Justice Roberts also noted:

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

Jarkesy, 144 S. Ct. at 2131. Thus, the U. S. Constitution requires claims for monetary damages and penalties be decided in courts of law by a separate judiciary.

C. The Fourteenth Amendment

In basic terms, and at the risk of oversimplification, the Fourteenth Amendment to the U. S. Constitution provides that if the federal constitutional prohibits the federal government from depriving a right, the Fourteenth Amendment likewise prohibits a state from depriving those same rights. As such, the legal issues in Jarkesy discussed above are applicable to the state of Tennessee.

D. The Cases that will Follow Jarkesy

Often the United States Supreme Court moves in small steps and only as far as it needs to. For example, Jarkesy was decided on Seventh Amendment and separation of powers principles, and Chief Justice Roberts declined to address the due process issues. Jarkesy, 144 S. Ct. at 2139. However, future cases may be expected to more fully entrench due process rights into case law and more severely limit, if not abolish altogether, the so-called public rights exception. For example, Chief Justice Roberts wrote:

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

Jarkesy, 144 S. Ct. at 2134. Incidentally, the public rights exception is very narrow and limited to just five (5) categories:

Despite its misleading name, the exception does not refer to all matters brought by the government against an individual to remedy public harms, or even all those that spring from a statute. Instead, public rights are a narrow class defined and limited

by history. As the Court explains, that class has traditionally included the collection of revenues, customs enforcement, immigration, and the grant of public benefits.<sup>1</sup>

Jarkesy, 144 S. Ct. at 2147 (concurring opinion by Justice Gorsuch).

## II. Standard for Review

The Motion raises two (2) issues. The first issue is that the assessment issued by TDEC March 19, 2024, at issue in this case (the “**Assessment**”) is void as it resulted from a process that violated our federal and state constitutions, as discussed in detail hereinbelow. Specifically, the Assessment changed the *status quo* and imposed monetary liability on The Town. The Assessment was the result of a secret, unilateral, proceeding internal to TDEC for which The Town had no notice or opportunity to defend in violation of federal and state substantive and procedural due process rights.

The second issue is that this court lacks subject matter jurisdiction to impose monetary liability on The Town. Specifically, a claim for monetary liability is a common law claim which may only be decided by a separate judiciary, a right protected by both our state and federal constitutions (i. e. separation of powers and substantive and procedural due process rights). The Town reserves the right to later assert, and by this Motion does not waive, the right to challenge the subject matter jurisdiction of this tribunal as to any and all claims for relief, equitable or otherwise, which TDEC may assert against it since this tribunal is not part of the Tennessee’s separate judiciary. Without conceding the issue, it is possible that this tribunal may have jurisdiction to decide certain equitable claims under the SDWA.

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<sup>1</sup> Justice Gorsuch mentions just four (4) categories. In the Majority opinion, Chief justice Roberts mentions the fifth category which is relations with Indian tribes. Further, “public benefits” includes such things as payments to veterans, pensions, and patent rights. Jarkesy, 144 S. Ct. at 2133

These constitutional determinations may be made on the face of the existing technical record and as a matter of law pursuant to Tenn. R. Civ. P. 12.02 or otherwise.

### **III. Federal Constitutional Provisions**

#### **A. Federal Separation of Powers**

At the federal level, the concept of separation of government's powers into three co-equal branches is accomplished simply by virtue of separately designating in Articles I, II, and III of the U. S. Constitution the separate legislative, executive, and judicial powers. In the simplest of terms pertinent to this case, separation of powers means the judicial branch should try and decide disputes, not any other branch. Otherwise, the legislative branch would be free to pass a law that all disputes are to be tried and decided by the executive branch, leaving the judicial branch with nothing to do.

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

Jarkesy, 144 S. Ct. at 2134. Further,

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

Jarkesy, 144 S. Ct. at 2139.

#### **B. Federal Due Process – the Fifth and Fourteenth Amendments**

Due process has as its core the concept of fairness. Simply put:

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

Jarkesy, 144 S. Ct. at 2140 (Gorsuch concurring opinion). At the federal level, the right to due process is contained at the Fifth Amendment to the U. S. Constitution. That Amendment provides, in pertinent part:

No person shall ... be deprived of ... property without due process of law.

U. S. Const., Am. 5. Incidentally, as originally understood,

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

Jarkesy, 144 S. Ct. at 2145 (Gorsuch concurring opinion).

Fifth Amendment due process means both substantive due process and procedural due process. While there are no doubt books on the subject, and the distinction between substantive and procedural due process may not always be clear, it may fairly be said that substantive due process concerns whether government has the right to take the action and procedural due process assumes government has the right to take the action but in doing so must follow the proper process. This Fifth Amendment right to due process is imposed upon the state of Tennessee by virtue of the Fourteenth Amendment to the U. S. Constitution which provides in pertinent part:

No state shall ... deprive any person of ... property without due process of law.

U. S. Const., Am 14.

#### C. The Supremacy Clause

The U. S. Constitution Article VI, Clause 2, states in pertinent part:

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



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

#### **IV. Tennessee Constitutional Provisions**

Provisions of Tennessee's Constitution pertinent to this case are now discussed.

##### **A. State Separation of Powers Requirement**

Tennessee's Constitution at Article II, Section 1, contains an express separation of powers provision and reads:

The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.

Tenn. Const., Article II, Section 1.

##### **B. State Due Process Requirements**

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

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

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

That all courts shall be open and every man for an injury done him ... shall have remedy by due process of law ...

Tenn. Const., Article I, Section 17.

#### **V. Procedures Under the Safe Drinking Water Act**

Tennessee's Safe Drinking Water Act (the "SDWA") is codified at T. C. A. § 68-221-701 *et. seq.* The SDWA allows The Tennessee Department of Environment and Conservation



(“TDEC”) to endeavor to enforce the SDWA. The Town operates a water system regulated by the SDWA and in that capacity can be referred to as an “Operator” in the context of the SWDA.

A. Four (4) Methods of SDWA Enforcement

To address violations of the SDWA, TDEC has no less than four (4) formal options. First, pursuant to T. C. A. § 68-221-712 TDEC can notify an Operator of non-compliance and permit the Operator a chance to be heard before the Board. This section provides, in pertinent part:

Whenever the commissioner [of TDEC] has reason to believe that a violation of this part [the SWDA] or regulations pursuant thereto has occurred, is occurring, or is about to occur, the commissioner may cause a written complaint to be delivered to the alleged violator or violators.

The complaint shall specify the provision or provisions of this part or regulation or order alleged to be violated or about to be violated, the facts alleged to constitute a violation thereof, may order that corrective action be taken within a reasonable time to be prescribed in such order, and shall inform the violators of the opportunity for a hearing before the board [of Water Quality, Oil, and Gas].

T. C. A. § 68-221-712(a)(1) – (2) (emphasis added). This method at least avoids a secret determination of violation and affords the Operator an opportunity to be heard, defend, and argue. Note this Section 712 appears to afford TDEC only injunctive/equitable relief and not an award of money against the Operator.

Second, pursuant to T. C. A. § 68-221-715 TDEC can file suit against the Operator in Davidson County chancery court or the chancery court where the Operator is located and seek “injunctive relief and any other relief available in law [i. e. money] or equity.”

The third and fourth methods for SWDA enforcement seem to include both monetary recovery and equitable relief. The third method is the little known and perhaps never used process to have liability for assessments and the amounts thereto (i. e. monetary relief)

determined, in the first instance, by a separate judiciary pursuant to T. C. A. § 68-221-713(c), which provides:

The commissioner [of TDEC], through the attorney general and reporter, may initiate proceedings for assessment in the chancery of Davidson County or in the chancery court of the county in which all or part of the violations occurred, in the name of the department (emphasis added).

T. C. A. § 68-221-713(c). The fourth method, and perhaps the only method actually used by TDEC to obtain money from an Operator, is for TDEC to determine liability for assessments and the amounts thereto in secret and without notice and an opportunity for the Operator to be heard, defend, or argue and then just serve the Operator with the “good news” that TDEC has decided the Operator has violated the SDWA and owes money to TDEC. T. C. A. § 68-221-713(b)(1) provides:

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

T. C. A. § 68-221-713(b)(1). The genius behind this procedural option is that it really sticks it to the Operator. Frankly, the secret process is no different than the hypothetical whereby anyone of us receives a bill in the mail that we owe \$428.14 because some anonymous police officer (or perhaps other person) decided we were speeding somewhere. We are not told how the penalty is calculated, but we are told we owe the money unless we timely ask the police officer’s boss to “review” the bill/ticket.

B. Review of TDEC Orders Issued Pursuant to Sections 712 and 713

Orders issued pursuant to Sections 712 and 713 are subject to two (2) layers of review by the Board of Water Quality, Oil, and Gas (the “**Board**”). The first layer of review is a petition timely filed by the Operator to the Board. T. C. A. § 68-221-714(a) requires the Board to appoint an administrative law judge (an “**ALJ**”) to conduct the review and preside over

proceedings. While the ALJ serves the Board in that role, the “tribunal” for the review is still the Board. As set forth in the style of this case, the matter is “Before the Tennessee Board of Water Quality, Oil, and Gas.” Said review proceedings are expressly without a jury and are otherwise conducted pursuant to Tennessee’s Administrative Procedures Act (the “APA”) set forth at T. C. A. § 4-5-301 et. seq. and the Department of State’s rules for hearing contested cases and not exclusively pursuant to the Tennessee Rules of Civil Procedure and/or Tennessee Rules of Evidence. The Board is not part of the state’s separate judiciary.

For this first layer of review by the Board with proceedings conducted by an ALJ, it is unclear and vague as to just what type of “review of such assessment” is contemplated by T. C. A. § 68-221-713(b)(2)(A). However, “review of such assessment” would seem to be a different analysis than, for instance, “by virtue of the appeal, the Assessment is no longer of any force or effect and there shall be a trial *de novo* wherein TDEC has the burden of proof as to both liability for violation of the SDWA and the amount of any money owed by the operator.” Accordingly, unless this Court decides otherwise, since at the first layer of Board review it is the Assessment that is being reviewed, it must be that the Assessment is the *status quo*, admissible at the ALJ hearing, entitled to a presumption of correctness (after all, it is the thing being reviewed), and set aside in whole or in part only on a successful burden of persuasion by the Operator that the Assessment is the product of some error by TDEC.<sup>2</sup> The results of the ALJ’s review of the Assessment are then placed in an initial order.

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<sup>2</sup> To be sure, in a real trial where the playing field is level, and not a “review,” the Assessment would be inadmissible hearsay. In The Town’s perception of the perceived status quo resulting from the Assessment now discussed, The Town does not waive the right to suggest the Assessment is inadmissible hearsay.

The second layer of Board review takes place on petition to the Board as a whole for “review of the administrative judge’s initial order.” Hence, a review of the review of the Assessment which the Board places in a final order.

Incidentally, as discussed below, there does not seem to be any existing binding criteria or constraint on TDEC in making civil penalty assessments other than the \$50.00 and \$5,000.00 per day range contained at T. C. A. § 68-221-713(a)(1). After all, T. C. A. § 68-221-713(d) contains only suggestions, not binding criteria. Accordingly, if the role of this tribunal is a review of the Assessment, what then is the binding criteria for this tribunal’s review if TDEC is bound by nothing other than the monetary range just mentioned?

C. Judicial Review

Following the exhaustion of the foregoing administrative proceedings, an aggrieved party may petition the state’s separate judiciary for a very, very limited “review” of all the prior reviews. In that instance, it seems the Board’s final order receives a presumption of correctness as it can only be set aside or modified if it is:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) arbitrary, capricious, characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) unsupported by evidence that is both substantial and material in the light of the entire record or unsupported by a preponderance of the evidence is subsection 322(h)(5)(B) applies.

## VI. Discussion

### A. The Assessment is Void

The Assessment is void as being the result of an unconstitutional statute and process. The statutory framework by which the Assessment came into existence and its purported force over The Town violates an Operator's substantive and procedural due process rights, and separation of powers rights, under our state and federal constitutions as presented below.

To begin with, T. C. A. § 68-221-713(c) and 715 allow TDEC to enforce the SDWA in a more constitutional manner if it wanted to.<sup>3</sup> Those Subsections allow TDEC to file suit against an Operator before a separate judiciary. In doing so, TDEC would have the separate judiciary decide if the Operator violated the SDWA and what amount of money the Operator might owe to TDEC. Before filing such a suit, the *status quo* would be that the Operator owed nothing to TDEC and was presumed not liable. TDEC would have the burden of proof, and the separate judiciary's rules of procedure and evidence would apply ... along with the traditional avenues, standards, and rights of review on appeal. Further, it would seem that in the separate judiciary, the Operator, like any other litigant could elect a trial by jury. All would be more constitutional than what TDEC is doing now (see footnote 2).

However, the Assessment in this case was levied against The Town pursuant to T. C. A. § 68-221-713(b)(1) instead, which Subsection permits TDEC to pre-determine The Town's liability in secret. Further to the secrecy, The Town is afforded no opportunity to be heard, defend itself, or argue correct application of law to facts. Moreover, in this secret process, the

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<sup>3</sup> These statutory sections still have constitutional issues. For example, The Town, as an Operator, would take exception to being sued in Davidson County, and there does not seem to be any binding criteria by which a separate judiciary might decide the amount of any assessment, just as there does not seem to be any binding criteria for TDEC to decide an assessment amount.

amount of The Town's monetary liability to TDEC does not seem to have been decided by any known binding criteria or process. There is no such binding criteria or process in the SDWA. As mentioned, T. C. A. § 68-221-713(d) provides only non-binding suggestions, and there do not seem to be any published guidelines binding on TDEC.<sup>4</sup>

As mentioned, once levied, the Assessment then has a force over The Town. The Assessment is the *status quo*. That is, The Town is deemed to owe TDEC money. The force over The Town is that unless The Town has the capacity and resources to request a "review" before the Board, the Assessment can become the subject of a judgment (in the separate judiciary) subject to execution/collection against The Town as with any other judgment. The SDWA provides:

Whenever any assessment has become final because of a person's failure to appeal the commissioner's assessment, the commissioner may apply to the appropriate court for a judgment and seek execution of such judgment.

The court, in such proceedings, shall treat the failure to appeal such assessment as a confession of judgment in the amount of the assessment.

T. C. A. § 68-221-713(b)(3)(A) and (B).

Furthermore, another particularly disturbing aspect of the Assessment is that it does not, on its face, provide explanation for how the amounts comprising the Assessment were determined. T. C. A. § 68-221-713(a)(1) tells us that assessments may be levied for between \$50.00 and \$5,000.00 per day for violations. T. C. A. § 68-221-713(d) tells us that assessments,

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<sup>4</sup> To TDEC's credit, it seems to be at present working on a centralized policy statement for levying civil penalties and damages, albeit not binding on TDEC. See policy draft 043024 on TDEC's website. While perhaps said policy might help in future cases to counter assertions of arbitrary action, even this policy is mostly meaningless to Operators. It states, "this document is policy only and does not create legal rights or obligations."

whether decided by a separate judiciary or unilaterally by TDEC, may be determined utilizing the following non-binding criteria which are reminiscent of sentencing guidelines:

In assessing a civil penalty, the following factors may be considered:

- (1) The harm done to the public health or the environment;
- (2) Whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity;
- (3) The economic benefit gained by the violator;
- (4) The amount of effort put forth by the violator to remedy this violation;
- (5) Any unusual or extraordinary enforcement costs incurred by the commissioner; and
- (6) The amount of penalty set by the board for specific categories of violations.

T. C. A. § 68-221-713(d). Interestingly, by use of the word “may” in the first sentence of this Subsection, TDEC actually is unconstrained to apply any of these criteria. In short, maybe TDEC applied some of these criteria. Maybe it did not. From the face of the Assessment, no one knows. Also, item number (6) “the amount of penalty set by the board for specific categories of violations” could only mean internal, unpublished metrics. Proof that there is no known process binding on TDEC, or otherwise, for determining the amount of The Town’s monetary liability under the Assessment is revealed by the fact that in NO WAY is any explanation for the math, facts, or calculations that went into determining the Assessment apparent from the face of the Assessment. There is no reverse engineering cognizable that would reveal how TDEC came up with its numbers.

If one believes in due process, then it must be that Tennessee has no right to create a statute that permits a secret tribunal within TDEC for TDEC to act as plaintiff, presiding judge, fact finder, and judge imposing unknown and non-binding “sentencing guidelines” with the



resulting change in *status quo* and force on The Town as described above. In a normal civil proceeding, where due process exists and is observed, the defendant owes nothing until a separate judiciary decides it owes money. There are no secret determinations of liability or amount thereof. A complaint is publicly filed. The complaint has no “force” over the defendant because there is no *status quo* of determination of liability that the defendant must take steps to undo. Further, there is an opportunity to defend, the *status quo* is that defendant owes nothing, and plaintiff has the burden of proof. Finally, there is a trial presided over by a separate judiciary and a jury trial when eligible and requested.

That The Town has a right to have TDEC’s award to itself of money (i. e. the Assessment”) subjected to some type of review by another member of the executive branch, the Board, does not mitigate the fact that as a result of the secret process, the *status quo* is presently that The Town now owes TDEC \$25,542.40.

In summary, prior to the Assessment, the *status quo* was that The Town was liable for nothing and owed nothing. As a result of the secret process afforded TDEC pursuant to T. C. A. § 68-221-713(b), TDEC changed the *status quo* to the detriment of The Town as an Operator in violation of its substantive and procedural due process U. S. Constitution 5<sup>th</sup> and 14<sup>th</sup> Amendment rights as well as its substantive and procedural due process rights contained at Tennessee’s Constitution, Article I Sections 8 and 17 discussed above. These are the same due process rights any Operator under the SDWA would have. As such, T. C. A. § 68-221-713(b) is unconstitutional and the Assessment in its entirety should be dismissed.

B. This Court lacks Subject Matter Jurisdiction to Preside Over this Case.

As mentioned above, this Motion presents constitutional issues and argument that are hardly new or creative. However, until Jarkesy, perhaps no one had considered that the current

tribunal that is the Board of Water Quality, Oil, and Gas has no subject matter jurisdiction to decide claims for money which may then be included in a judgment for money against The Town and collected in the usual fashion by which judgments are collected. This conclusion is easily reached by the following steps:

1. As discussed above, Jarkesy affirms for us that if a claim is not seeking relief in equity, admiralty, or maritime and does not pertain to relations with Indian tribes, or public benefits, then it is a common law claim especially if the claim seeks an award of money such as damages and civil penalties as in this case.
2. As discussed above, under the federal and Tennessee separation of powers doctrines, only a separate judiciary has subject matter jurisdiction to preside over a common law claim for money.
3. This tribunal, the Tennessee Board of Water Quality, Oil and Gas, is not a separate judiciary. After the Assessment was levied, The Town was given the right to have the Assessment reviewed by the Board pursuant to T. C. A. § 68-221-714, with the first layer of review being a review presided over by an ALJ pursuant to Subsection 714(a). While a review presided over by an ALJ has the appearances, decorum, and many rules and procedures of a court, the tribunal reviewing the Assessment is still the Board, a member of the state's Executive Branch and not a separate judiciary. Frankly, whether the Board is or is not part of the Executive Branch, or whether the tribunal is really not the Board does not matter. Current proceedings to decide The Town's monetary liability to TDEC are not before the state's separate judiciary.
4. That portion of the SDWA, T. C. A. § 68-221-714, requiring the monetary liability of The Town, as an Operator, be determined by an entity other than a separate judiciary is unconstitutional as violative of the right to a separation of powers under the federal

constitution and our state's constitution at Article II, Section 1 as well as the substantive and procedural due process rights contained at the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the U. S. Constitution and Article I Sections 8 and 17 of Tennessee's Constitution.

5. Therefore, this Court lacks subject matter jurisdiction, as mentioned, to impose monetary liability on The Town, and because of that, this Court must dismiss TDEC's claims for monetary relief.

As mentioned above, The Town reserves the right to later assert, and by this Motion does not waive, the right to challenge the subject matter jurisdiction of this tribunal as to any and all claims for relief, equitable or otherwise, which TDEC may assert against it since this tribunal is not part of the Tennessee's separate judiciary. Without conceding the issue, it is possible that this tribunal may have jurisdiction to decide certain equitable claims under the SDWA.

Respectfully submitted this 17<sup>th</sup> day of January, 2025.



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Attorneys for Respondent  
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### CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served upon the following persons or entities in the manner indicated on this 17<sup>th</sup> day of January, 2025.

via Email Samantha.Buller-Young@tn.gov

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Brian Quist, BPR 012762