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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

May 28, 2021

In the Matter of **Environmental Testing and Research Laboratories, Inc.**	**Docket No. 2018-006** MassDEP LAB CIN MA923

RECOMMENDED FINAL DECISION

INTRODUCTION

I. BACKGROUND

Safe drinking water is vital to human health and living. As a result, it is imperative that drinking water samples be properly tested for contaminants that can be harmful to humans, including contaminants such as Total Coliforms and Escherichia coli ("E. coli") bacteria.[1] To that end, the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") has promulgated regulations at 310 CMR 42.00 governing the Certification and

[1] "Total coliforms are a group of bacteria that are widespread in nature[,] [which can exist] . . . in human feces, . . . animal manure, soil, and submerged wood and in other places outside the human body." https://archive.epa.gov/water/archive/web/html/vms511.html#:~:text=the%20indicator%20bacteria.-,E.,standards%20and%20are%20monitoring%20accordingly. Total Coliforms in "drinking water . . . indicates contamination of a water supply by an outside source" and the possible presence of E. coli bacteria in the water supply. Id. "E. coli is a species of fecal coliform bacteria that is specific to fecal material from humans and other warm-blooded animals." Id. E. coli bacteria "[can] cause diarrhea, dysentery, and hepatitis." https://www.cdc.gov/healthywater/drinking/private/wells/testing.html.

Operation of Environmental Analysis Laboratories ("the ELC Regulations").

The ELC Regulations establish certification requirements for laboratories to conduct analytical measurements ("testing") of chemical, radiochemical, and microbiological parameters in environmental samples, including drinking water samples. 310 CMR 42.01(1). A laboratory that has been certified by the Department pursuant to the ELC Regulations has been deemed by the Department to "mee[t] the Department's minimum requirements for certification and . . . capable of producing Valid Data" from the laboratory's testing of particular environmental samples, including drinking water samples. 310 CMR 42.06(1). "Valid Data" is defined by the ELC Regulations as "analytical data that are":

(a) technically sound (i.e., generated in accordance with good laboratory practices and meeting the quality control criteria of approved analytical methods); and

(b) legally defensible (i.e., the laboratory's compliance with quality control criteria designed to assure the accuracy of the analysis is completely and accurately documented).

310 CMR 42.03 (definition of "Valid Data").

Under the ELC Regulations at 310 CMR 42.12(3)(a), "[t]he Department may revoke a laboratory's certification . . . if the Department determines that there are grounds for revocation." The grounds for revocation are specified in 310 CMR 42.12(3)(a)1 through (a)17 and include a certified laboratory's:

(1) "[c]areless, inaccurate, or falsified reporting of analytical measurements and supporting documentation," 310 CMR 42.12(3)(a)6;

(2) "[f]raudulent or deceptive practices," 310 CMR 42.12(3)(a)9;

(3) "[p]erforming, reporting, or failing to report drinking water analyses in a manner so as to threaten public health or welfare," 310 CMR 42.12(3)(a)13; and

(4) "[making] false, inaccurate, incomplete, or misleading statement[s] in [a] record, report[,] plan . . . or other document," in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).[2]

Based on all the grounds set forth above, the Department in this case seeks to revoke the certification of Environmental Testing and Research Laboratories, Inc. ("ETR"), a private laboratory in Leominster, Massachusetts. The Department seeks revocation of ETR's certification because of ETR's purported repeated failure to test private drinking water samples and report the test results for its clients in accordance with the requirements of its certification and the ELC Regulations.[3] The Department also seeks revocation of ETR's certification because of ETR's purported failure to properly test and report the test results for five sets of simulated private well water samples in a double-blind proficiency testing study that the Department conducted of ETR's laboratory testing and test results reporting practices.

ETR denies the Department's claims and has filed this appeal seeking to prevent the Department from revoking its certification on several grounds.[4]

First, ETR asserts that the Department lacks the authority to revoke ETR's certification

[2] 310 CMR 42.12(3)(a)17 authorizes the revocation of a laboratory's certification for "[f]ailure to comply with any other requirement of [the ELC Regulations]." 310 CMR 42.17(2)(d) provides that "it shall be a violation of [the ELC Regulations] for any [certified laboratory] to . . . "[m]ake any false, inaccurate, incomplete, or misleading statement in any record, report[,] plan, file, data package, log, register, or other document issued by or on behalf of a laboratory . . . ."

[3] The source of private drinking water samples is from a private well. In contrast, the source of public drinking water samples is from a public water system that "[provides] . . . water for human consumption, through pipes or other constructed conveyances [and] . . . has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days of the year." 310 CMR 22.02 (definition of "public water system").

[4] Although the Department issued a Revocation Order to ETR on January 31, 2018 revoking ETR's certification, ERT continues to hold its certification during the pendency of this appeal in accordance with the provisions of G.L. c. 30A §13, which provides in relevant part that "no agency [of the Commonwealth] shall revoke . . . any license unless it has first afforded the licensee an opportunity for [a] hearing" to challenge the agency's revocation order. ETR's certification under the ELC Regulations falls within G.L. c. 30A §13's definition of "license" because the statute defines the word as "any license, permit, ***certificate***, registration, charter, ***authority***[,] or ***similar form of permission required by law***." (emphasis supplied).

for failing to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations, because in ETR's view, the ELC Regulations only govern a certified laboratory's testing of public drinking water samples and reporting of the test results. ETR's Notice of Claim for Adjudicatory Hearing ("Appeal Notice"), ¶ 16, at pp. 6-7. In the alternative, ETR asserts that if a certified laboratory's certification and the ELC Regulations govern its testing of private drinking water samples and reporting of the test results, the Department is nevertheless precluded from revoking ETR's certification because the Department's Revocation Order revoking ETR's certification is invalid for failure to set forth in detail the Department's grounds for revoking ETR's certification. Id., ¶ 10, at p. 3. ETR also denies that it violated the requirements of its certification and the ELC Regulations in testing private drinking water samples and reporting the test results. Id., ¶¶ 12-15, at pp. 3-6. In response, the Department rejects ETR's claims, holds firm to its position that ETR's certification should be revoked for repeatedly failing to test private drinking water samples and report the test results in accordance with the requirements of its certification and ELC Regulations, and requests that MassDEP's Commissioner issue a Final Decision in this appeal affirming the Department's Revocation Order and revoking ETR's certification.

II. THE EVIDENTIARY ADJUDICATORY HEARING

I conducted an evidentiary Adjudicatory Hearing ("Hearing") to resolve ETR's appeal of the Department's Revocation Order. The Issues for Resolution at the Hearing ("the Issues") were the following:

(1) Whether the ELC Regulations govern a certified laboratory's testing of private drinking water samples?

(2) If so, did the Department's Revocation Order to ETR provide ETR

with the information required by the ELC Regulations setting forth the Department's grounds for seeking revocation of ETR's certification?

(3) If so, did ETR violate the ELC Regulations as alleged by the Department in its Revocation Order to ETR? Specifically, did ETR:

(a) perform "careless, inaccurate, or falsified reporting of analytical measurements and supporting documentation" in violation of 310 CMR 42.12(3)(a)6;

(b) engage in "fraudulent or deceptive practices" in violation of 310 CMR 42.12(3)(a)9;

(c) "perform, report, or fail to report drinking water analyses in a manner so as to threaten public health or welfare" in violation of 310 CMR 42.12(3)(a)13; and/or

(d) "make . . . false, inaccurate, incomplete[,] or misleading statement[s] in [its] record[s], report[,] plan[s] . . . or other document[s]" in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d)?

At the Hearing, both ETR and the Department were represented by legal counsel and presented witnesses in support of their respective positions in the case. The witnesses were cross-examined by opposing counsel on the sworn Pre-filed Testimony ("PFT") that the witnesses had filed prior to the Hearing in support of the parties' respective positions in the case. The Department, the party with the burden of proof at the Hearing on all the Issues,[5] presented testimonial, documentary, and photographic evidence from five witnesses:

(1) Dr. Oscar C. Pancorbo ("Dr. Pancorbo").[6] Dr. Pancorbo is an expert in the fields of environmental microbiology and chemistry. For nearly 30 years, he has served as the Director of the Department's Division of Environmental Laboratory Sciences and the Senator William X. Wall Experiment Station (collectively "DELS/WES" or "the Massachusetts State Environmental Laboratory") in Lawrence, Massachusetts. As Director, Dr. Pancorbo's duties include being responsible for

[5] See below, at pp. 10-11.

[6] Pre-filed Direct Testimony of Oscar Pancorbo, Ph.D. ("Dr. Pancorbo's Direct PFT").

administration of the Massachusetts State Environmental Laboratory which performs a broad array of laboratory testing and environmental monitoring activities to support the Department's environmental compliance, enforcement, and emergency response programs. Dr. Pancorbo is also responsible for administration of the Department's ELC Program pursuant to 310 CMR 42.00. He holds a Bachelor of Science ("B.S.") degree in Zoology, and a Master of Science ("M.S.") degree and Doctor of Philosophy ("Ph.D") degree in Environmental Engineering Sciences (with a focus in Environmental Microbiology and Chemistry), all from the University of Florida in Gainesville, Florida. Prior to joining the Department, he served as an Associate Professor of Environmental Health Science at the University of Georgia in Athens, Georgia. At the University of Georgia, he also was a member of the University Graduate Faculty, the Faculty of Ecology (Institute of Ecology), the Faculty of the Interdepartmental Program in Toxicology, and the Faculty of the Environmental Soil Science Program.

(2) Lisa Touet ("Ms. Touet").[7] Ms. Touet is the Acting Director of the Department's ELC Program pursuant to 310 CMR 42.00. She has served in the Program for more than 20 years certifying laboratories pursuant to the Program. Prior to joining the Department, Ms. Touet worked for more than 10 years for Department certified laboratories performing and supervising analytical testing of environmental samples. She holds a B.S. degree in Biochemistry from the University of New Hampshire.

(3) Stephen Spencer ("Mr. Spencer").[8] Mr. Spencer is a senior environmental analyst at the Department who has significant environmental investigative experience. For nearly 30 years (since 1991), he has been an investigator for the Environmental Strike Force ("ESF"), an interagency unit comprised of Department scientists and engineers; environmental police officers from the Massachusetts Department of Fish & Game; State Police investigators; and staff members of Massachusetts Attorney General's Office, who collectively investigate environmental violations.[9]
He holds a B.S. degree in Chemistry from the State University of New York at Syracuse and an M.S. degree in Environmental Science and Engineering from the University of Massachusetts at Lowell.

(4) Jennifer Macionus ("Ms. Macionus").[10] Ms. Macionus is a senior

[7] Pre-filed Direct Testimony of Lisa Touet ("Ms. Touet's Direct PFT").

[8] Pre-filed Direct Testimony of Stephen M. Spencer ("Mr. Spencer's Direct PFT").

[9] The ESF is https://www.mass.gov/how-to/report-environmental-violations.

[10] Pre-filed Direct Testimony of Jennifer H. Macionus ("Ms. Macionus's Direct PFT").

environmental analyst at the Department who has significant environmental investigative experience. She has been with the Department for nearly 30 years (since 1992) serving as an environmental investigator principally for the Department's Bureau of Air and Waste in the Department's Central Regional Office in Worcester, Massachusetts. Since 2002, she has also served as an investigator for the ESF. She holds a Bachelor of Arts degree in Environment, Technology, and Society and a Master of Arts degree in Environmental Science and Policy, both from Clark University in Worcester, Massachusetts.

(5) Timothy Dame ("Mr. Dame").[11] Mr. Dame is a senior environmental analyst at the Department who has significant environmental investigative experience. He has been with the Department and served as an ESF investigator for 20 years (since 2001). Prior to joining the Department, he worked in the private sector for 13 years as an environmental chemist and laboratory auditor or supervisor. He holds a B.S. degree in Biology from the University of Massachusetts at Boston and a Master of Science degree from the University of Massachusetts at Lowell.

Only one witness testified at the Hearing for ETR: Eric Koslowski (Mr. Koslowski"),[12] who has been ETR's Laboratory Director and Technical Advisor for more than 20 years. He also serves as ETR's President.[13] He holds a B.S. degree in Chemistry with a Minor in Biology from Fitchburg State University.

III. SUMMARY OF FINDINGS

As discussed in detail below, I recommend that the Department's Commissioner issue a Final Decision affirming the Department's Revocation Order and revoking ETR's certification for the following reasons.

First, based on my legal analysis of the statutory and regulatory scheme governing the ELC Regulations, I find that the ELC Regulations established a standardized laboratory certification system for proper laboratory testing of environmental samples, including private and

[11] Pre-filed Direct Testimony of Timothy Dame ("Mr. Dame's Direct PFT").

[12] Pre-filed Rebuttal Testimony of Eric Koslowski ("Mr. Koslowski's Rebuttal PFT").

[13] See corporate documents on file at the Massachusetts Secretary of State's Office for ERT.

public drinking water samples to ensure safe drinking water for the Commonwealth's inhabitants. As a result, contrary to ETR's claims, a certified laboratory is required to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations and its failure to do so constitutes a violation of its certification and the ELC Regulations, 310 CMR 42.17(2)(c), and may result in revocation of its certification by the Department for:

(1) performing careless and inaccurate reporting of analytical measurements and supporting documentation in violation of 310 CMR 42.12(3)(a)6;

(2) engaging in fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing, reporting, or failing to report drinking water analyses in a manner so as to threaten public health in violation of 310 CMR 42.12(3)(a)13; and/or

(4) making false, inaccurate, incomplete, or misleading statements in laboratory reports setting forth the test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

Second, I also find that the Department's Revocation Order to ETR complied with the requirements of the ELC Regulations by providing ETR in a specific, clear, and concise manner, the facts and grounds supporting the Department's revocation of ETR's certification. Moreover, any lack of specificity in the Department's Revocation Order regarding the facts and grounds supporting the Department's revocation of ETR's certification, was cured in this appeal by the Department's filing of detailed sworn pre-filed testimony of its witnesses setting forth the facts and grounds for the Department's revocation of ETR's certification, which they supported with voluminous documentary evidence, including copies of ETR's laboratory reports for its clients

setting forth ETR's test results from its testing of private drinking water samples.[14] The detailed sworn pre-filed testimony of the Department's witnesses together with the voluminous documentary evidence they presented in support of the Department's position in the appeal provided ETR with more than adequate notice of the facts and grounds supporting the Department's revocation of ETR's certification. Additionally, ETR had more than a reasonable opportunity to challenge these facts and grounds in this appeal because the Department's witnesses appeared at the Hearing for cross-examination under oath and were cross-examined under oath by ETR's counsel on their sworn pre-filed testimony and documentary evidence.

Lastly, based on a preponderance of the evidence presented by the Department and ETR at the Hearing and the governing regulatory requirements of the ELC Regulations, I also find that ETR's certification under the ELC Regulations should be revoked because of: (1) ETR's repeated failure to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations; and (2) ETR's failure to properly test and report the test results for five sets of simulated private well water samples in a double-blind proficiency testing study that the Department conducted of ETR's laboratory testing and test results reporting practices. ETR's actions were quite egregious, including failing to properly test private drinking water samples for Total Coliforms and E. coli bacteria and report the test results on multiple occasions to its clients. ETR's egregious actions warrant revocation of its certification for:

(1) performing careless and inaccurate reporting of analytical measurements and supporting documentation in violation of 310 CMR 42.12(3)(a)6;

(2) engaging in fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9;

[14] As discussed below, at pp. 36-93, ETR's laboratory reports were quite damning to its position in this appeal.

(3) performing, reporting, or failing to report drinking water analyses in a manner so as to threaten public health in violation of 310 CMR 42.12(3)(a)13; and

(4) making false, inaccurate, incomplete, or misleading statements in laboratory reports setting forth the test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

DISCUSSION

I. THE DEPARTMENT'S BURDEN OF PROOF AT THE HEARING

At the Hearing, the Department had the burden of proof on all the Issues notwithstanding the provisions of 310 CMR 42.18 which state that "[i]n every [administrative appeal]" challenging the Department's revocation of a laboratory's certification, "the burden shall be on . . . the holder of [] a certification to demonstrate compliance with 310 CMR 42.00."

Prior to the Hearing, the Department acknowledged that although 310 CMR 42.18 suggested otherwise, it had the burden of proof on all the Issues because: (1) the Department's Revocation Order is akin to a Department enforcement Order; and (2) in administrative appeals of such orders, the Adjudicatory Hearing Proceeding Rules at 310 CMR 1.01(13)(c)1 governing resolution of the appeal mandate that "it shall be the usual practice for [MassDEP] to present its evidence first." Also, undisputedly, the Department has the burden of proof in other appeals of Department enforcement orders such as appeals of Department Unilateral Administrative Orders ("UAOs") directing a party to cease its environmental violations and perform remedial actions to correct the violations.[15] The Department also has the burden of proof in appeals of Department

[15] See e.g. In the Matter of West Meadow Homes, Inc., Docket Nos. 2009-023 & 024, Recommended Final Decision (June 20, 2011), 2011 MA ENV LEXIS 85, at 11-14, 27-37, adopted as Final Decision (August 18, 2011), 2011 MA ENV LEXIS 84 (Department's UAO for appellant's wetlands violations affirmed but $6,000.00 penalty assessment against appellant for same violations vacated where Department proved appellant committed violations and remedial measures ordered by UAO to correct violations were reasonable but failed to prove penalty complied with Civil Administrative Penalties Act, G.L. c. 21A, § 16); In the Matter of Edwin Mroz, OADR Docket No. 2017-021,

civil administrative penalty assessments ("PANs")[16] issued pursuant to the Civil Administrative Penalties Act, G.L. c. 21A, § 16, directing a party to pay a civil administrative penalty to the Commonwealth for having "[violated] "[a] regulation, order, license[,] or approval issued or adopted by the [D]epartment, or of any law which the [D]epartment has the authority or responsibility to enforce."[17] Indeed, the ELC Regulations at 310 CMR 42.17(3) expressly reference the Civil Administrative Penalties Act, G.L. c. 21A, § 16, by authorizing the Department to issue a PAN against "[a]ny person" violating [the ELC Regulations]." Such a "person" would include a private corporation or company that is a certified laboratory and violates the ELC Regulations in testing environmental samples. 310 CMR 42.03 (definition of "person" includes "an individual, corporation, [or] company . . . .).

II. STANDARD OF REVIEW IN THE APPEAL

At the Hearing, my review of the Department's determinations underlying its grounds for seeking revocation of ETR's certification was de novo, meaning that my review was anew based on a preponderance of the evidence presented at the Hearing and the governing statutory and regulatory requirements, irrespective of what the Department determined previously. See e.g.

Recommended Final Decision (June 7, 2019), 2019 MA ENV LEXIS 57, at 36-62, adopted as Final Decision (June 18, 2019), 2019 MA ENV LEXIS 63 (Department's UAO to appellant for wetlands violations affirmed where Department proved appellant committed wetlands violations and remedial measures ordered by UAO to correct violations were reasonable).

[16] The term "PAN" is the acronym for "Penalty Assessment Notice" and a synonymous term for a Department issued civil administrative penalty.

[17] See e.g. In the Matter of Kane Built, Inc., OADR Docket No. 2017-037, Recommended Final Decision (December 18, 2018), 2017 MA ENV LEXIS 77, at 16-93 (Department's $67,250.00 penalty assessment against appellant for violations of asbestos removal regulations affirmed where Department proved appellant committed violations and penalty complied with Civil Administrative Penalties Act, G.L. c. 21A, § 16); In the Matter of Michael J. Cove, OADR Docket No. 2017-031, Recommended Final Decision (May 1, 2020), 2020 MA ENV LEXIS 49, at 15, 19-67, adopted as Final Decision (May 11, 2020) (Department's $55,600.00 penalty against appellant for wetlands violations affirmed where Department proved appellant committed violations and penalty complied with Civil Administrative Penalties Act, G.L. c. 21A, § 16).

Kane Built, Inc., 2017 MA ENV LEXIS 77, at 18-26; Mroz, 2019 MA ENV LEXIS 57, at 36-46; Cove, 2020 MA ENV LEXIS 49, at 16-19. The de novo standard of review has long been the standard of review in administrative appeals challenging Department enforcement orders. Id.

Under the de novo standard review, the Presiding Officer in an appeal of an enforcement order:

> (1) reviews anew the Department's determinations underlying the enforcement order at issue based on a preponderance of the evidence presented by the parties at the evidentiary Adjudicatory Hearing and the governing statutory and regulatory requirements;
>
> (2) makes: (a) findings of fact based on a preponderance of the evidence with no deference to any prior factual determinations of the Department; and (b) legal determinations based on the governing statutory and regulatory requirements with deference to the Department's reasonable interpretations or construction of the requirements; and
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> (3) issues a Recommended Final Decision ("RFD") to the Department's Commissioner, the final decision-maker in the appeal, recommending the Commissioner's affirmance of the enforcement order if based on a preponderance of the evidence presented at the evidentiary Adjudicatory Hearing and the governing statutory and regulatory requirements the Department's determinations underlying the enforcement order have a rational basis, i.e. a sufficient factual and legal foundation, and recommending otherwise if they do not.

West Meadow Homes, Inc., 2011 MA ENV LEXIS 85, at 11-14, 27-37; Kane Built, Inc., 2017 MA ENV LEXIS 77, at 16-93; Mroz, 2019 MA ENV LEXIS 57, at 36-62; Cove, 2020 MA ENV LEXIS 49, at 15, 19-67.

However, notwithstanding the Presiding Officer's independent factual and legal findings and recommendation on the challenged enforcement order in the appeal, it is the Department's Commissioner, as the final agency decision-maker in the appeal, who has the ultimate authority over the enforcement order's fate, and as a result, the Commissioner may affirm the enforcement order in whole or in part or vacate the enforcement order in its entirety based on the evidentiary

record and the governing statutory and regulatory requirements. 310 CMR 1.01(14)(b);[18] In the Matter of Associated Building Wreckers, Inc., OADR Docket No. 2003-132, Final Decision (July 6, 2004), 11 DEPR 176 (2004) (Commissioner's Final Decision affirmed Department's $2,500.00 penalty assessment against appellant for air pollution violations after rejecting, as erroneous, DALA[19] Administrative Magistrate's finding that penalty was excessive and be reduced to $1,875.00); In the Matter of Roofblok Limited, OADR Docket Nos. 2006-047 & 048, Final Decision (May 7, 2010), 17 DEPR 377 (2010) (Commissioner's Final Decision vacated Department's $86,498.50 penalty assessment against appellant for solid waste, hazardous waste, and water pollution violations after accepting DALA Administrative Magistrate's finding that penalty was improper, "but for different reasons than those articulated by the DALA Magistrate"); West Meadow Homes, 2011 MA ENV LEXIS 85, at 11-14, 28-37 (Commissioner's Final Decision affirmed Department's UAO and vacated Department's $6,000.00 penalty against appellant for wetlands violations after adopting Chief Presiding Officer's findings that Department properly issued UAO but failed to comply with Civil Administrative Penalties Act, G.L. c. 21A, § 16, in assessing penalty); Kane Built, Inc., 2017 MA ENV LEXIS 77, at 18-93 (Commissioner's Final Decision affirmed Department's $67,250.00 penalty against appellant for violations of Department's asbestos removal regulations after adopting Chief Presiding Officer's finding that Department properly assessed penalty

[18] It is a well settled principle that "the [Department's] commissioner determines 'every issue of fact or law necessary to the [final] decision [in an appeal,] [and] . . . may adopt, modify, or reject a [Presiding Officer's] recommended decision, with a statement of reasons.'" Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 231 (2010). "[T]he commissioner's interpretation of [the governing] regulations [and statutes]," and not that of the Presiding Officer, "is conclusive at the agency level, and is the only interpretation that is entitled to deference by a reviewing court" on judicial review pursuant to G.L. c. 30A, § 14. Id., at 457 Mass. at 228.

[19] "DALA" is the acronym for the Massachusetts Division of Administrative Law Appeals, an agency within the Massachusetts Executive Office of Administration and Finance ("A&F"), that at one time adjudicated administrative appeals of Department permit decisions and enforcement orders.

pursuant to Civil Administrative Penalties Act, G.L. c. 21A, § 16); Mroz, 2019 MA ENV LEXIS 57, at 36-62 (Commissioner's Final Decision affirmed Department's UAO against appellant for wetlands violations after adopting Chief Presiding Officer's finding that Department properly issued UAO); Cove, 2020 MA ENV LEXIS 49, at 19-67 (Commissioner's Final Decision affirmed Department's $55,600.00 penalty against appellant for wetlands violations after adopting Chief Presiding Officer's finding that Department properly assessed penalty pursuant to Civil Administrative Penalties Act, G.L. c. 21A, § 16).

As for the relevancy, admissibility, and the weight of evidence that the Department and ETR presented at the Hearing, this was governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

> [u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ." Speculative evidence was accorded no weight given its lack of probative value in resolving the issues in the case. In the Matter of Sawmill Development Corporation, OADR Docket No. 2014-016, Recommended Final Decision (June 26, 2015), 2015 MA ENV LEXIS 63, at 84, adopted as Final Decision (July 7, 2015), 2015 MA ENV LEXIS 62 (petitioners' expert testimony "that pharmaceuticals, toxins, and other potentially hazardous material would be discharged from effluent generated by . . . proposed

[privately owned wastewater treatment facility] . . . was speculative in nature and not reliable").

III. THE ELC REGULATIONS GOVERN A CERTIFIED LABORATORY'S TESTING OF PRIVATE DRINKING WATER SAMPLES AND REPORTING OF THE TEST RESULTS, AND ITS CERTIFICATION MAY BE REVOKED BY THE DEPARTMENT FOR FAILURE TO TEST THESE SAMPLES AND REPORT THE TEST RESULTS IN ACCORDANCE WITH THE REQUIREMENTS OF ITS CERTIFICATION AND THE ELC REGULATIONS

As noted above, ETR's principal claim on appeal is that the Department lacks the authority to revoke ETR's certification for failing to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations because in ETR's view, the ELC Regulations only govern a certified laboratory's testing of public drinking water samples and reporting of the test results. ETR's Notice of Claim for Adjudicatory Hearing ("Appeal Notice"), ¶ 16, at pp. 6-7; ETR's Principal Post-Hearing Closing Brief, at p. 9. The basis for ETR's claim is its contention that the Department promulgated the ELC Regulations pursuant to the federal Safe Drinking Water Act of 1974 ("SDWA"), 42 USC § 300f, which was enacted by the United States Congress to promote safe public drinking water supplies.[20] ETR's Principal Closing Brief, at pp. 3-5, 9. ETR's claim is without merit. As discussed in detail below, the ELC Regulations govern a certified laboratory's testing of private and public drinking water samples and reporting of the test results because the ELC Regulations: (1) do not expressly provide that they only govern a certified laboratory's testing of public drinking water samples and reporting of the test results; and (2) were promulgated by the Department pursuant to Massachusetts environmental protection statutes

[20] https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf.

authorizing the Department to adopt regulations protecting private and public drinking water supplies.

A. The ELC Regulations Govern a Certified Laboratory's Testing of Private and Drinking Water Samples and Reporting of the Test Results Because the ELC Regulations Do Not Expressly Provide They Only Govern Testing of Public Drinking Water Samples

ETR's claim that the ELC Regulations only govern a certified laboratory's testing of public drinking water samples and reporting of the test results is not supported by a plain reading of the ELC Regulations. Undisputedly, the ELC Regulations "establis[h] a program for Department certification of laboratories to conduct analytical measurements for purposes of determining chemical, radiochemical, and microbiological parameters in environmental samples," including drinking water samples. 310 CMR 42.01(1), 42.05(1). Nowhere in the ELC Regulations is there a provision that the ELC Regulations only govern a certified laboratory's testing of public drinking water samples and reporting of the test results. Indeed, the ELC Regulations more than suggest that they govern a certified laboratory's testing of private and public drinking water samples and the reporting of the test results for these samples. Specifically, the ELC Regulations expressly provide that a laboratory's certification "applies to analyses of drinking water supplies ***for purposes of, but not limited to,*** determining compliance with [the Public Drinking Water Regulations at] 310 CMR 22.00 . . . ." 310 CMR 42.05(1) (emphasis supplied). Moreover, the term "source water" used by the ELC Regulations to identify the source of drinking water samples is defined by the ELC Regulations as the "untreated ***water*** from streams, rivers, lakes, or underground aquifers that is ***used to supply***

private wells [and/or] public drinking water." 310 CMR 42.03 (definition of "Source Water" emphasis supplied).

In sum, I find that the ELC Regulations established a standardized laboratory certification system for proper laboratory testing of environmental samples, including private and public drinking water samples to ensure safe drinking water for the Commonwealth's inhabitants. A laboratory that has been certified by the Department pursuant to the ELC Regulations has been deemed by the Department to "mee[t] the Department's minimum requirements for certification and . . . capable of producing Valid Data" from the laboratory's testing of a particular environmental samples, including private and public drinking water samples. 310 CMR 42.06(1). "Valid Data" is defined by the ELC Regulations as "analytical data that are":

> (a) technically sound (i.e., generated in accordance with good laboratory practices and meeting the quality control criteria of approved analytical methods); and
>
> (b) legally defensible (i.e., the laboratory's compliance with quality control criteria designed to assure the accuracy of the analysis is completely and accurately documented).

310 CMR 42.03 (definition of "Valid Data"). In contrast, "[a] non-certified laboratory does not have to use any particular method in testing, is not regulated by any governmental agency, and, as a result, the test results might not meet standards for accuracy required of MassDEP-certified

laboratories."[21]

B. The ELC Regulations Govern a Certified Laboratory's Testing of Private and Drinking Water Samples Because the Department Promulgated the ELC Regulations Pursuant to Massachusetts Environmental Protection Statutes Authorizing the Department to Adopt Regulations to Protect Private and Public Drinking Water Supplies

My finding that the ELC Regulations govern a certified laboratory's testing of private and public drinking water samples is further supported by the fact that the ELC Regulations at 310 CMR 42.02 state that they "[were] promulgated by . . . the Department . . . pursuant to authority conferred" by the following Massachusetts environmental protection statutes, which among other things as discussed in detail below, authorize the Department to adopt regulations intended to protect private and public drinking water supplies in various contexts:

(1) the Massachusetts Clean Waters Act, G.L. c. 21, §§ 26-53;

(2) G.L. c. 111, § 160, a statute governing "[the] [e]xamination of water supply" from inland waters for domestic use;

(3) the Massachusetts Solid Waste Management Act, G.L. c. 111, §§ 150A, 150A1/2;

(4) the Massachusetts Hazardous Waste Management Act, G.L. c. 21C; and

(5) Massachusetts Oil and Hazardous Material Release Prevention and Response Act, G.L. c. 21E.

The ELC Regulations at 310 CMR 42.17(1) make clear that the ELC Regulations are a vehicle "to aid in the implementation and enforcement of [these statutes]" by authorizing the Department to "[w]ithout limitation, ... issue orders or downgrade or revoke a [laboratory's] certification as necessary to aid in the implementation and enforcement of [these statutes]." Hence, since these statutes authorize the Department to adopt regulatory measures to protect private and

[21] https://www.mass.gov/service-details/private-drinking-water-testing-and-the-use-of-massdep-certified-laboratories.

public drinking water supplies, it is logical to conclude that the ELC Regulations further the statutes' mission through a standardized laboratory certification system designed for proper testing of private and public drinking water samples to ensure safe drinking water for the Commonwealth's inhabitants. Below, I discuss how each of these statutes authorize the Department to adopt regulatory measures to protect private and public drinking water supplies.

1. The Massachusetts Clean Waters Act ("MCWA"), G.L. c. 21, §§ 26-53

MCWA "confers on the [D]epartment 'the duty and responsibility . . . to enhance the quality and value of water resources and to establish a program for prevention, control, and abatement of water pollution.'" Entergy Nuclear Generation Company v. Department of Environmental Protection, 459 Mass. 319, 323 (2011), citing, G.L. c. 21, § 27. To that end, the statute authorizes the Department to, among other things, "adopt standards of minimum water quality . . . applicable to the various waters or portions of waters of the commonwealth," which the statute broadly defines as "all waters within the jurisdiction of the commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, coastal waters and groundwaters." G.L. c. 21, §§ 26A, 27(5). Undisputedly, these water sources can be a source of water supply for private wells or public drinking water systems.

The MCWA authorizes the Department to "adopt rules and regulations which it deems necessary for . . . the protection of the quality and value of [the Commonwealth's] water resources." G.L. c. 21, § 27(12). This statutory grant of authority includes authorizing the Department to adopt regulations designed to promote safe drinking water in the Commonwealth because the MCWA protects "all waters within the jurisdiction of the commonwealth, including without limitation," the waters listed above that can serve as a source of water supply for private

wells or public drinking water systems. For example, pursuant to the MCWA, the Department has adopted the Public Drinking Water Regulations at 310 CMR 22.00 governing the establishment and maintenance of public drinking water systems. ETR does not dispute that a certified laboratory's testing of public drinking water samples and reporting of the test results are governed by certified laboratory's certification and the ELC Regulations.

The Department has also adopted pursuant to the MCWA, the Groundwater Discharge Permit Regulations at 314 CMR 5.00. Groundwaters "provid[e] water for public drinking water supplies and private water wells." https://www.mass.gov/source-water-protection. These waters are:

> water[s] below the ground surface in the cracks and spaces in soil, sand, and rock. Groundwater[s] [are] contained in formations known as aquifers, which consist of materials such as sand and gravel that are permeable (having large connected spaces between the materials that allow water to flow through). The area where water fills the aquifer is known as the saturated zone, and the top of this zone is known as the water table.

https://www.mass.gov/guides/groundwater-frequently-asked-questions#-what-is-groundwater?-

The Department's Groundwater Discharge Permit Regulations at 314 CMR 5.00 are intended "[to] contro[l] [through permits issued by the Department] the discharge of pollutants to the ground waters of the Commonwealth to assure that ground waters are protected for their actual and potential use as a source of potable water . . . ." 310 CMR 5.01. The permitting requirements of the Groundwater Discharge Regulations require consideration of the proposed discharge's proximity to both public and private drinking wells and a demonstration by the permit applicant that the proposed discharge "will not cause the water quality of any public or private water supply to violate the maximum contaminant limits set forth in 310 CMR 22.00 . . . ." 314 CMR 5.10(9)(c)3 and (9)(d).

2. G.L. c. 111, § 160

The provisions of G.L. c. 111, § 160 authorize the Department to protect private and public drinking water supplies by authorizing the Department to "cause examinations of [inland] waters [of the Commonwealth] to ascertain their purity and fitness for domestic use" and "may make rules and regulations and issue such orders as in its opinion may be necessary to prevent the pollution and to secure the sanitary protection of all such waters used as sources of water supply and to ensure the delivery of a fit and pure water supply to all consumers." "Inland waters" are defined by G.L. c. 111, § 159 as "all inland waters and of all streams, ponds and underground waters used by" various entities or parties, including "any person in the commonwealth as sources of . . . water supply and of all springs, streams and watercourses tributary thereto. . . ." (emphasis supplied).

3. The Massachusetts Solid Waste Management Act ("MSWMA"), G.L. c. 111, §§ 150A, 150A1/2

The MSWMA governs the disposal of solid waste[22] and the establishment, expansion, and operation of solid waste facilities in the Commonwealth.[23] G.L. c. 111, § 150A. The statute provides that solid waste facilities cannot be operated "[on any site] in any city or town [of the Commonwealth] . . . unless, after a public hearing, [the site has been approved] . . . by the [local municipal] board of health . . . in accordance with the provisions of [the statute], or, in the case

[22] The MSWMA defines solid waste as:

> all solid or liquid waste materials [in the Commonwealth], including garbage and rubbish, and sludge, but not including sewage, and those materials defined as hazardous wastes in [G.L. c. 21C, § 2] and those materials defined as source, special nuclear or by-product material under the provisions of the Atomic Energy Act of 1954.

G.L. c. 111, § 150A.

[23] Under G.L. c. 111, § 150A, solid waste facilities include landfills. Accordingly, unless otherwise noted in the text above, the term "solid waste facilities" means all solid waste facilities, including landfills.

of a facility owned or operated by an agency of the commonwealth, [the site] has been [approved] by the [D]epartment . . . ." Id.

The MSWMA authorizes the Department to adopt rules and regulations governing solid waste facilities and to issue orders to enforce the statute. G.L c. 111, § 150A. This authorization also appears in G.L c. 111, § 150A1/2, which directs the Department, "in cooperation with the [Commonwealth's] department of public health, [to] promulgate rules and regulations [which] . . . establish site suitability standards and criteria [for solid waste facilities, which] shall include, but not be limited to, . . . considerations [of]: (1) the location, nature[,] and extent of any existing or potential sources of public or private drinking water supplies in relation to the site, including the recharge area of a sole source aquifer;[24] (2) the relationship of the site to groundwater elevations; (3) the proximity of wetlands, . . . [and] (4) the proximity of surface water bodies . . . ."

In accordance with its statutory authority under G.L c. 111, §§ 150A and 150A1/2, the Department has promulgated: (1) the Site Assignment Regulations for Solid Waste Facilities at 310 CMR 16.000 ("the Site Assignment Regulations"); and (2) the Solid Waste Management Regulations at 310 CMR 19.000. As discussed below, both sets of regulations have numerous

[24] A "Sole Source Aquifer" is:

> an aquifer [that has been] designated [as such] by the U.S. Environmental Protection Agency, or by the Department under the authority of a state program as may be established, that supplies 50% or more of the drinking water for the aquifer service area, and the volume of water which could be supplied by alternative sources is insufficient to replace the petitioned aquifer should it become contaminated.

310 CMR 16.02 (definition of "Sole Source Aquifer").

provisions intended to protect existing or potential private and public drinking water supplies.

a. The Site Assignment Regulations, 310 CMR 16.000

The site assignment regulations at 310 CMR 16.00 create "Restricted Areas" for landfills, solid waste combustion facilities, and solid waste handling facilities. These are areas that are not suitable for siting a new or expanded solid waste facility because these areas contain or are in the vicinity of private and/or public drinking water supplies. 310 CMR 16.40(3)(a) (Restricted Areas may include, for example, a Zone II area of an existing public water supply well[25], Interim Wellhead Protection Areas ["IWPA"] [26], recharge area of a sole source aquifer,[27] and the Zone A or Zone B of a surface water supply[28]). See also 310 CMR 16.40(3)(a)5 (Restricted Areas

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[25] 310 CMR 16.40(3)(a)1. A Zone II area is a Department approved Wellhead Protection Area for a public drinking water supply system, which:

> [is the] area of an aquifer that contributes water to a well under the most severe pumping and recharge conditions that can be realistically anticipated (180 days of pumping at approved yield, with no recharge from precipitation). It is bounded by the groundwater divides that result from pumping the well and by the contact of the aquifer with less permeable materials such as till or bedrock. In some cases, streams or lakes may act as recharge boundaries. In all cases, Zone II shall extend upgradient to its point of intersection with prevailing hydrogeologic boundaries (a groundwater flow divide, a contact with till or bedrock, or a recharge boundary). The Zone II must include the entire Zone I area. For Springs, the Zone II is that area of an aquifer, which contributes water to the Spring under naturally flowing conditions.

310 CMR 22.02 (definition of "Zone II").

[26] 310 CMR 16.40(3)(a)2. The Department applies an IWPA "[f]or public water systems using wells . . . that lack a [Department] approved Zone II . . . ." 310 CMR 22.02 (definition of "Interim Wellhead Protection Area"). An IWPA is the area within a one-half mile radius for sources whose approved pumping rate is 100,000 gallons per day (gpd) or greater. Id. For smaller sources, the IWPA radius is proportional to the well's approved daily volume. Id.

[27] See n. 24, at p. 22 above (definition of "Sole Source Aquifer").

[28] 310 CMR 16.40(3)(a)8. A "Surface Water Source" is "any lake, pond, reservoir, river, stream or impoundment designated as a public water supply in 314 CMR 4.00: Massachusetts Surface Water Quality Standards." 310 CMR 22.02 (definition of "Surface Water Source"). A "Zone A" of a Surface Water Source is either:

> (a) the land area between the Surface Water Source and the upper boundary of the Bank (a portion of the land surface which normally abuts and confines a water body);
>
> (b) the land area within a 400 foot lateral distance from the upper boundary of the Bank of a Class A Surface Water Source, as defined in 314 CMR 4.05(3)(a): Class A; or
>
> (c) the land area within a 200 foot lateral distance from the upper boundary of the Bank of a Tributary

include "any area that the Department has determined a discharge from the facility would pose a danger to an existing or proposed drinking water source area.").

b. The Solid Waste Management Regulations at 310 CMR 19.000

Whereas the Site Assignment Regulations at 310 CMR 16.000 regulate where a proposed new or expanded solid waste facility can be located, the Solid Waste Management Regulations at 310 CMR 19.000 regulate the facility's operations by setting forth detailed permitting and operational requirements for the facility. The Regulations are "intended to protect public health, safety and the environment" and clearly provide for the protection of water sources and supplies and the prevention of water pollution. See General Permitting Requirements at 310 CMR 19.038(a) ("the facility design and operation [must] include[e] components and measures which will assure compliance with other applicable state and federal laws, regulations[,] and policies, ***including without limitation***, 314 CMR 3.00 through 12.00 (water pollution control); 310 CMR 22.00: Drinking Water[;] and [310 CMR] 27.00: Underground Water Source Protection . . . ." 310 CMR 19.038(2)(a)6 (emphasis supplied). The permitting provisions of 310 CMR 19.000 are replete with references to protection of private and public water supplies. See, e.g. 310 CMR 19.038(2)(b) (restricting location of waste handling areas relative to existing or potential public or private water supplies[29] and prohibiting adverse impacts to public or private water supplies

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or associated Surface Water body.

310 CMR 22.02 (definition of "Zone A"). A "Zone B" of a Surface Water Source is:

> the land area within ½ mile of the upper boundary of the Bank of a Class A Surface Water Source, as defined in 314 CMR 4.05(3)(a): Class A, or edge of Watershed, whichever is less. However, Zone B shall always include the land area within a 400-foot lateral distance from the upper boundary of the Bank of the Class A Surface Water Source.

310 CMR 22.02 (definition of "Zone B").

[29] 310 CMR 19.038(2)(b)2.b and 2.e.

from facility located or proposed to be located in a Zone II or IWPA[30]), and 310 CMR 19.038(2)(c) (prohibiting or restricting landfills being located within certain water supply areas[31]).

The operational requirements for landfills in 310 CMR 19.000 mandate protection for groundwater and surface water and contain detailed monitoring requirements. See 310 CMR 19.130(1) (general obligation of landfill operator to employ procedures and practices which will prevent pollution of groundwater and surface water), and 310 CMR 19.118(1) and 310 CMR 19.118(2) (requiring "[a]ny person conducting landfill activities shall install, operate and maintain a ground water monitoring system . . . capable of detecting and quantifying the release of contaminants into the ground [and] ground water . . . ." and specifying requirements for monitoring systems, including capability to yield representative groundwater samples for analysis and location and number of monitoring wells[32]). Similar monitoring systems are required for surface water. See 310 CMR 19.118(1), 310 CMR 19.118(3)(a) and 310 CMR 19.118(3)(b).

4. The Massachusetts Hazardous Waste Management Act ("MHWMA"), G.L. c. 21C

The MHWMA, G.L. c. 21C, governs the storage and disposal of hazardous waste in the Commonwealth. In the Matter of Patriots Environmental Corp., OADR Docket No. 2011-016, Recommended Final Decision (November 27, 2012), MA ENV LEXIS 136, at 55, adopted as

[30] 310 CMR 19.038(2)(b)1.

[31] 310 CMR 19.038(2)(c)1.a through (2)(c)1.d.

[32] 310 CMR 19.118(2)(a)1, (2)(a)2, (2)(b)1, (2)(b)2.

Final Decision (December 7, 2012), 2012 MA ENV LEXIS 134. The statute defines "hazardous waste" as:

> waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness or pose a substantial present or potential hazard to human health, safety or welfare or to the environment when improperly treated, stored, transported, used or disposed of, or otherwise managed . . . .

G.L. c. 21C, § 2; Patriots Environmental Corp., 2012 MA ENV LEXIS 136, at 55-56. The statute provides that only a person licensed by the Department may "collect, transport, store, treat, use or dispose of hazardous waste" and must do so "in a manner which [does not] endanger human health, safety or welfare, or the environment . . . ." G.L. c. 21C, § 5; Patriots Environmental Corp., 2012 MA ENV LEXIS 136, at 56.

With respect to the protection of private and public drinking water supplies, the MHWMA prohibits the siting of a hazardous waste disposal facility "in a location overlying an actual, planned, or potential underground drinking water source," which the statute defines as "an aquifer supplying drinking water for human consumption . . . ." G.L. c. 21C, §§ 2, 7. The statute also prohibits "[the] discharge of hazardous waste into surface waters or groundwaters which the [D]epartment or the [W]ater [R]esources [C]ommission[33] has determined are presently used, or may reasonably be expected to be used in the future, as sources for the supply of drinking water." G.L. c. 21C, § 7.

The MHWMA authorizes the Department to "adopt rules, regulations, procedures and

[33] The Water Resources Commission ("WRC") is a 12 member body comprised of seven appointees from seven Commonwealth agencies, including the Department, and five public members. https://www.mass.gov/orgs/water-resources-commission. The WRC "is responsible for developing, coordinating and overseeing the Commonwealth's water policy and planning activities." https://www.mass.gov/service-details/water-resources-commission-overview.

standards as may be necessary" to enforce the statute, G.L. c. 21C, § 4. This statutory grant of authority includes authorizing the Department to adopt regulations designed to promote safe drinking water in the Commonwealth because the MHWMA protects private and public drinking water supplies from being exposed to hazardous wastes as discussed above. This is reflected by the regulations that the Department has promulgated pursuant to the MHWMA, including the MHWMA Regulations at 310 CMR 30.000, which, among other things, have drinking water protections for "ground or surface water currently in use or which may reasonably be expected to be used in the future as sources of public or private drinking water supply." 310 CMR 30.010 (definition of "Drinking Water Supplies"); 310 CMR 30.703 (public drinking water supply); 310 CMR 30.704 (private drinking water supply). The protections for public drinking water supply and private drinking water supply are set forth in 310 CMR 30.703 and 310 CMR 30.704 respectively and violations of these regulations may result in the Department's imposition of civil administrative penalties against the violator. In the Matter of Harold B. Wassenar, OADR Docket No. 2007-162, Recommended Final Decision (February 24, 2010), 2010 MA ENV LEXIS 214, at 47-48, adopted as Final Decision (March 18, 2010), 2010 MA ENV LEXIS 144; modified in part, Final Decision on Reconsideration (December 22, 2010) (appellant's hazardous waste and solid waste violations included his having "allowed a scrap metal processor to partially crush and dismantle numerous vehicles and fuel oil tanks [still containing fluids] . . . over [an area that contained] medium and high yield aquifer zones of [Town of] Uxbridge['s] public water supply and in an area served by private well water"); See also Wassenar v. Department of Environmental Protection, 85 Mass. App. Ct. 37 (2014) (Superior Court's dismissal of appellant's appeal of Department's Commissioner's Final Decision upholding

Department's $80,586 penalty against appellant for hazardous waste and solid waste violations affirmed).

With respect to the protection of public drinking water supply, 310 CMR 30.703(2) prohibits:

> [any] active portion of a new hazardous waste landfill, land treatment unit, surface impoundment, miscellaneous unit or waste pile [to] be located: (a) on land which is overlying an actual, planned or potential public underground drinking water source (see 310 CMR 30.010); or (b) within a ½ mile (2,640 feet) radius of an existing well used as a source of drinking water for a public water system, or within a Zone 2 [of public drinking water system] if a Zone 2 has been delineated for that area.

Under 310 CMR 30.703(3):

> [n]o active portion of a hazardous waste landfill or land treatment unit shall be located in the flow path of groundwater supplying any well for any public water system. If a well which supplies a public water system is outside the natural flow path of groundwater traversing the facility site, the Department may specify an appropriate buffer zone to ensure that groundwater which has traversed the facility site does not supply such well . . . .

310 CMR 30.703(4) provides that "[n]o active portion of a new hazardous waste landfill or land treatment facility shall be located in the flow path of a planned or potential public underground drinking water source" unless the area in which the facility is located "is already served by a public water system, the drinking water sources of which are all located outside the area described in 310 CMR 30.703(5)(a) and (b)." 310 CMR 30.703(5), in turn, provides that:

> [t]he owner or operator of a hazardous waste landfill or land treatment unit shall not be subject to [the prohibitions in] 310 CMR 30.703(4) if he or she demonstrates to the Department that he [or she] owns the water rights within the area described as follows[:] . . . (a) In the downgradient direction, the area is bounded by the edge of the active portion of the facility and by the points of discharge of groundwater traversing the active portion of the facility; and (b) [t]he other boundaries of the area are the boundaries of the flow path of groundwater

traversing the active portion of the facility plus an adequate buffer zone as specified by the Department.

The protections for a private drinking water supply in 310 CMR 30.704, include the following.

Under 310 CMR 30.704(1)(a), "no active portion of a new hazardous waste landfill shall be located in the flow path of groundwater supplying water to an existing well which is used as a source of drinking water supply by a person other than a public water system and which is located within a distance that corresponds to 20 years of travel of groundwater which has traversed the facility site . . . ." However, this prohibition does not apply if the owner or operator of the new hazardous waste landfill either: (1) "provides to the affected person(s) alternative drinking water which is acceptable to the Department"; or (2) "purchases the affected water rights." 310 CMR 30.704(1)(b).

Under 310 CMR 7.04(2), "[n]o active portion of a hazardous waste landfill shall be located in the flow path of groundwater supplying a potential private underground drinking water source . . . unless the owner or operator [of the landfill] owns the water rights within the area described" under the following conditions:

(1) in the downgradient direction, the area is bounded by the edge of the active portion of the facility and by a boundary downgradient which represents 20 years of travel time of groundwater which has traversed the active portion of the facility; and

(2) the other boundaries of the area are the boundaries of the flow path of groundwater which has traversed the active portion of the facility plus an adequate buffer zone as specified by the Department.

Additionally, 310 CMR 7.04(2)(3) provides that "[no] active portion of a new surface impoundment, land treatment unit or waste pile shall . . . be located within a 1,000-foot radius of

an existing well which is used as a source of drinking water supply by a person other than a public water system."

5. Massachusetts Oil and Hazardous Material Release Prevention and Response Act ("Chapter 21E"), G.L. c. 21E

Chapter 21E is a semi-privatized environmental cleanup program supervised by the Department that "was enacted [by the Massachusetts Legislature] to require owners and operators of real property (among others) with releases of oil or hazardous materials on their properties to assess and remediate those releases to protect health, safety, public welfare and the environment." In the Matter of James M. Knott, OADR Docket No. 2011-011, Recommended Final Decision (January 31, 2012), 2012 MA ENV LEXIS 52, at 7, citing, G.L. c. 21E, §§ 1, 2, 3, 4, and 5, adopted as Final Decision (March 12, 2012), 2012 MA ENV LEXIS 51 (emphasis supplied). Chapter 21E defines "environment" as the "***waters***, land, surface or subsurface strata, or ambient air of the Commonwealth" and the "release" of oil or hazardous materials as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment" of those substances. G.L. c. 21E, § 2 (emphasis supplied).

Under Chapter 21E, a party responsible for cleaning up a real property that has been contaminated by the release of oil or hazardous materials retains a licensed site professional ("LSP") to oversee assessment and cleanup of contamination, and to ensure these actions are performed in compliance with Chapter 21E and the Department's Chapter 21E Regulations at 310 CMR 40.0000 known as the Massachusetts Contingency Plan ("MCP").[34] "An LSP is an

[34] Massachusetts' Approach to Waste Site Cleanup: Chapter 21E and the Massachusetts Contingency Plan (November 2012), at p. 1 (http://www.mass.gov/eea/docs/dep/cleanup/laws/bhfs.pdf). The Department adopted the MCP in accordance with Section 3 of c. 21E which authorizes the Department to "promulgate such regulations as it deems necessary for the implementation, administration and enforcement of [21E] . . . ." G.L. c. 21E, § 3.

environmental scientist or engineer experienced in cleaning up oil and hazardous material contamination [who is] licensed by the [Commonwealth's] Board of Registration of Hazardous Waste Site Cleanup Professionals (usually referred to as the LSP Board), based on education, experience, and passing an examination on applicable regulations and technical issues."[35]

Contaminated properties regulated by Chapter 21E are often referred to "c. 21E Sites" and the MCP has specific provisions relating to the protection of private and public drinking water supplies impacted or potentially impacted by those properties. These provisions include:

(1) 310 CMR 40.0311(6) which requires a party[36] "[to] notify the Department as soon as possible but not more than two hours after obtaining knowledge that . . . a release . . . of oil and/or hazardous material in a private drinking water supply well [reaches certain] . . . concentrations [as specified by the MCP]";

(2) 310 CMR 40.0483(1)(a)8.b which requires the submittal of a Phase I Report to the Department which lists and describes all private and public

[35] Id., at pp. 1-2.

[36] The provisions of 310 CMR 40.0331(1) set forth the parties required to "notify the Department in accordance with 310 CMR 40.0300 of a release or threat of release of oil or hazardous material . . . ." These parties include:

(1) "the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil and/or hazardous material," 310 CMR 40.0331(1)(a);

(2) "any person who at the time of storage or disposal of any hazardous material owned or operated any site at or upon which such hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material," 310 CMR 40.0331(1)(b));

(3) "any person who by contract, agreement, or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from or at which there is or has been a release or threat of release of hazardous material," 310 CMR 40.0331(1)(c); and

(4) "any person who, directly or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels or sites from or at which there is or has been a release or threat of release of such material," 310 CMR 40.0331(1)(d).

See also 310 CMR 40.0331(1)(e) through 40.0331(1)(i) for the other parties required to notify the Department of a release or threat of release of oil or hazardous material to the environment.

drinking water supplies within 500 feet of an oil and/or hazardous material disposal site;[37] and

(3) 310 CMR 40.0520(2)(a) requiring that a disposal site be classified as a Tier 1 site if there is evidence of groundwater contamination with oil and/or hazardous material at concentrations equal to or exceeding the concentrations specified in the MCP and "[the] groundwater is located within an Interim Wellhead Protection Area [or] Zone II [of a public drinking water system], or within 500 feet of a Private Water Supply Well."[38]

IV. THE DEPARTMENT'S REVOCATION ORDER TO ETR PROVIDED ETR WITH SUFFICIENT INFORMATION REGARDING THE DEPARTMENT'S GROUNDS FOR SEEKING REVOCATION OF ETR'S CERTIFICATION

As previously noted above, one of ETR's fallback positions in opposing the Department's revocation of ETR's certification is that if the ELC Regulations govern a certified laboratory's testing of private drinking water samples, the Department is nevertheless precluded from revoking ETR's certification here because the Department's Revocation Order to ETR violated the Regulations by failing to set forth in detail the Department's grounds for seeking revocation of ETR's certification. I reject ETR's claim because, as explained in detail below, the Department's Revocation Order complied with the ELC Regulations by setting forth in a specific, clear, and concise manner, the facts and grounds supporting the Department's

[37] A Phase 1 Report provides the Department with important information about the disposal site to assess its environmental impact at the site and surrounding areas, the effectiveness of any cleanup actions taken at the site, and the appropriateness of any further cleanup actions. 310 CMR 40.0483(1)(a) through 40.0483(1)(h); 310 CMR 40.0483(2).

[38] Under the MCP, 21E contaminated sites are ranked by complexity, the number of sources, and how serious a potential threat the contamination poses. Massachusetts' Approach to Waste Site Cleanup: Chapter 21E and the Massachusetts Contingency Plan (November 2012), at pp. 2-3 (http://www.mass.gov/eea/docs/dep/cleanup/laws/bhfs.pdf). Historically, the more seriously contaminated sites are Tier I (with Tier IA, Tier IB, and Tier IC deemed as the most contaminated sites) or Tier II (less contaminated). Id. The Department maintains a searchable online (internet) database to track the cleanup progress of reported 21E sites. http://www.mass.gov/eea/agencies/massdep/cleanup/sites.

determination to revoke ETR's certification.

The ELC Regulations at 310 CMR 42.12(3)(a) state that "[t]he Department may revoke a laboratory's certification . . . if the Department determines that there are grounds for revocation." The grounds for revocation are specified in 310 CMR 42.12(3)(a)1 through (a)17 and include the following:

(1) "[c]areless, inaccurate, or falsified reporting of analytical measurements and supporting documentation," 310 CMR 42.12(3)(a)6;

(2) "[f]raudulent or deceptive practices," 310 CMR 42.12(3)(a)9;

(3) "[p]erforming, reporting, or failing to report drinking water analyses in a manner so as to threaten public health or welfare," 310 CMR 42.12(3)(a)13; and

(4) "[making] false, inaccurate, incomplete, or misleading statement[s] in [a] record, report[,] plan . . . or other document," in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

310 CMR 42.12(3)(a) also requires the Department to issue a Revocation Order "notify[ing] the laboratory in writing via certified mail in the event of a revocation [of a certification]." However, 310 CMR 42.12(3)(a) does not specifically state what the Department must include in its Revocation Order to the laboratory. Nevertheless, reading 310 CMR 42.12(3)(a) together with the provisions of 310 CMR 42.18, I find that the Department's Revocation Order to a certified laboratory must set forth in a specific, clear, and concise manner, the facts and grounds supporting the Department's revocation of the laboratory's certification. I have made this finding because 310 CMR 42.18 requires a laboratory's administrative appeal notice to OADR challenging the Department's Revocation Order "[to] state specifically, clearly, and concisely the facts which are the grounds for the appeal [and] the relief sought [by the laboratory . . . ." Hence, it is logical that the Department's Revocation Order must set forth in a

specific, clear, and concise manner, the facts and grounds supporting the Department's revocation of the laboratory's certification. This interpretation is also supported by basic notions of fairness and due process principles that all state agencies such as the Department must follow in performing their functions. See e.g. In the Matter of Wilbraham Land and Development LLC, OADR Docket No. 2017-016, Recommended Final Decision (February 13, 2018), 2018 MA ENV LEXIS 27, at 13-15 ("The Requirements of Due Process"), adopted as Final Decision (March 1, 2018), 2018 MA ENV LEXIS 4.

Here, the Department's Revocation Order to ETR set forth in a specific, clear, and concise manner, the facts and grounds supporting the Department's revocation of ETR's certification as required by the ELC Regulations and due process principles. Specifically, the Department's Revocation Order stated that the Department's grounds for revoking ETR's certification were based on ETR's:

(1) "careless, inaccurate, or falsified reporting of analytical measurements and supporting documentation" in violation of 310 CMR 42.12(3)(a)6;

(2) "fraudulent or deceptive practices" in violation of 310 CMR 42.12(3)(a)9;

(3) "performing, reporting, or failing to report drinking water analyses in a manner so as to threaten public health or welfare" in violation of 310 CMR 42.12(3)(a)13;

(4) "[making] false, inaccurate, incomplete, or misleading statement[s] in [a] record, report[,] plan . . . or other document," in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

Department's Revocation Order, at p. 3. Additionally, the Department's Revocation Order provided ETR with a two and one-half page summary of the factual findings supporting the Department's grounds for revoking ETR's certification. Id., at pp. 1-3. These factual findings, which are discussed in detail below, at pp. 36-93, were based on the investigation conducted by

Department personnel of ETR's testing of private drinking water samples and reporting of the test results. Id.

Assuming for the sake of argument that the Department's Revocation Order to ETR was not specific enough regarding the facts and grounds supporting the Department's revocation of ETR's certification, that was cured by the Department's filing in this appeal of detailed sworn pre-filed testimonial and documentary evidence of its witnesses setting forth the facts and grounds supporting the Department's revocation of ETR's certification. See below, at pp. 36-93. As discussed above, this appeal is a de novo review proceeding of the Department's determination to revoke ETR's certification. The detailed pre-filed testimonial and documentary evidence of the Department's witnesses provided ETR with more than adequate notice of the facts and grounds supporting the Department's revocation of ETR's certification. Additionally, ETR had more than a reasonable opportunity to challenge these facts and grounds because the Department's witnesses appeared at the Hearing for cross-examination and were cross-examined by ETR's counsel on their pre-filed testimony and documentary evidence. Simply stated, ETR was well aware prior to the Hearing of the facts and grounds supporting the Department's revocation of ETR's certification and had more than a reasonable opportunity at the Hearing to contest the Department's claims.[39]

[39] ETR's ability to respond to the Department's claims is further evidenced by the detailed Pre-filed Rebuttal PFT that ETR's principal, Mr. Koslowski, filed in response to the PFT of the Department's witnesses. Mr. Koslowski's Rebuttal PFT was 26 type-written pages long, single spaced with paragraph-by-paragraph responses to most of the PFT of the Department's witnesses (as discussed below, at pp. 38-53, he chose to present no testimony responding to the Department's compelling evidence regarding ETR's failure in three instances to comply with local municipal private well regulations requiring ETR's testing of private drinking water samples in accordance with its certification and the ELC Regulations). Although Mr. Koslowski's testimony did not effectively refute the testimony of the Department's witnesses, it nevertheless cuts heavily against ETR's claim that it was unaware of the Department's grounds for seeking revocation of ETR's certification.

V. BASED ON A PREPONDERANCE OF THE EVIDENCE PRESENTED AT THE HEARING ETR'S CERTIFICATION SHOULD BE REVOKED BECAUSE OF ETR'S REPEATED FAILURE TO TEST PRIVATE DRINKING WATER SAMPLES AND REPORT THE TEST RESULTS IN ACCORDANCE WITH THE REQUIREMENTS OF ITS CERTIFICATION AND THE ELC REGULATIONS

As discussed in detail below, at the Hearing, the Department's witnesses presented highly persuasive testimony supported by voluminous documentary evidence demonstrating that ETR repeatedly failed to comply with the requirements of its certification and the ELC Regulations in: (1) testing private drinking water samples and reporting the test results for a number of its clients; and (2) testing five sets of simulated private well water samples and reporting the test results in the Department's double-blind proficiency testing study of ETR's laboratory testing and test results reporting practices. This evidence more than demonstrated that ETR's violations were not minor infractions but rather were serious in nature, including failing to properly test for Total Coliforms and E. coli bacteria on multiple occasions, warranting revocation of its certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in laboratory reports

setting forth test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).[40]

In response, ETR's sole witness, Mr. Koslowski, failed to provide testimonial and documentary evidence effectively refuting the Department's evidence against ETR. Indeed, his testimony that ETR had no legal obligation to test private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations lacked credibility.[41] His lack of credibility was evidenced by among other things, the Department's very compelling evidence that ETR's repeated failure to comply with the requirements of its certification and the ELC Regulations included three incidents where local municipal private well regulations mandated ETR's compliance with the requirements in testing private drinking water samples and reporting the test results for its clients. Below, in Sections A through C (pp. 38-53), I discuss those three incidents involving ETR's violations of the private well regulations of the City of Framingham, the Town of Medway, and the Town of Norton, respectively, in failing to properly test private drinking water samples and report the test results

[40] While much of the testimony of the Department's witnesses was highly persuasive, I accorded little or no weight to certain testimony because of its limited probative value. This testimony included Mr. Dame's testimony that "[i]n an effort to better understand" ETR's purported use of Nuclear Magnetic Resonance ("NMR") Spectroscopy to identify bacteria in private drinking water samples, "[he] contacted [three] professors of biochemistry and microbiology [to obtain their expert opinion regarding whether ETR's] use of NMR [Spectroscopy] for bacterial identification" was proper. Mr. Dame's Direct PFT, ¶¶ 15-18. I accorded little or no weight to this testimony because it attempted to introduce in evidence the expert testimony of three experts who purportedly support the Department's position questioning ETR's purported use of NMR Spectroscopy to identify bacteria in private drinking water samples. Put another away, the Department should have presented those three experts as witnesses to offer direct testimony at the Hearing that would have been subject to cross-examination by ETR.

Although I credited most of her testimony as discussed above in the text, I accorded little or no weight to portions of Ms. Touet's testimony describing complaints that she purportedly received from various individuals regarding ETR's laboratory testing and test results practices that were not substantiated by the Department with probative documentary evidence. Specifically, I accorded little or no weight to Ms. Touet's testimony as set forth in ¶¶ 15(b), 15(c), 15(i), 15(j), 15(k), 15(l), 15(m), 15(o), 15(p), 15(r), 15(s), 15(w), 15(x), 15(y), 15(z), 15(aa), and 15(bb) of her Direct PFT.

[41] In Mr. Koslowski's words: "[the Department] has no jurisdiction over ETR's . . . Test results because they were conducted on . . . private well water [samples]." Mr. Koslowski's Rebuttal PFT, at p. 4.

for one client who had constructed a private well at a residential property in Framingham; one client who had constructed a private well at a residential property in Medway; and one client who was purchasing a home with a private well in Norton. Then in Sections D through K (pp. 54-75), I discuss how ETR failed to comply with the requirements of its certification and the ELC Regulations in testing private drinking samples and reporting the test results for other clients and how those infractions involved a common pattern and practice of violations, including ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information to its clients regarding its testing of the samples for those contaminants. Lastly, in Section L (pp. 75-93), I discuss how ETR failed to comply with the requirements of its certification and the ELC Regulations in failing, by a wide margin, the Department's double-blind proficiency testing study of ETR's laboratory testing and test results reporting practices involving ETR's testing of five sets of simulated private well water samples.

A. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Bay State Pump Co.

On or about January 25, 2017, Bay State Pump Co. of Holden, Massachusetts ("Bay State") retained ETR to test private drinking water samples from a new private well that Bay State had constructed at a residential home at 21 Pleasant Street in Framingham, Massachusetts. Ms. Touet's Direct PFT, ¶ 15.t; Department's Exhibit Appendix N. ETR performed this testing and on January 27, 2017, it provided Bay State with a Comprehensive Scan Report ("ETR's Lab Report for Bay State") setting forth the tests results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Bay State's private drinking water samples

and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Bay State's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations because by ETR's own admission, ETR failed to test the samples in accordance with the requirements of its certification and the ELC Regulations. Ms. Touet's Direct PFT, ¶ 15.t; Department's Exhibit Appendix N. ETR made this admission in a disclaimer in ETR's Lab Report for Bay State which stated that "[a]ll analyses [of Bay State's water samples] were not conducted [by ETR] in accordance with MassDEP certification standards." Id. ETR failed to test Bay State's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations notwithstanding that Sections 9.01-9.05 of the City of Framingham Board of Health's Private Well Regulations ("Framingham's Private Well Regulations") also required ETR to test the samples in accordance with the requirements of its certification and the ELC Regulations. Id.

Framingham's Private Well Regulations specifically mandate that a water quality test must be conducted of a newly constructed private well before it is used as a drinking water supply and the testing be performed by "a Certified Laboratory" using "U.S. EPA-approved methods and MassDEP maximum acceptable limits for drinking water testing . . . ." Framingham's Private Well Regulations, §§ 9.01-9.03. Framingham's Private Well Regulations define "a Certified Laboratory" as "[a]ny laboratory that has full certification by the Department of Environmental Protection [under the ELC Regulations] for the analysis of drinking water and required water quality analytes, as provided in the most recent edition of "Certification Status of

Commercial Environmental Laboratories." Framingham's Private Well Regulations, § 3.00 (definition of "Certified Laboratory").

ETR's principal, Mr. Koslowski, offered no testimony disputing the requirements of Framingham's Private Well Regulations and that the Regulations required ETR to test Bay State's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations. His lack of testimony is evidence of his lack of credibility in disputing the Department's grounds for seeking revocation of ETR's certification.

It is also important to note that ETR's failure to test Bay State's private drinking water samples and reporting the test results in accordance with the requirements of its certification, the ELC Regulations, and Framingham's Private Well Regulations, were not minor infractions, but very serious in nature. This is evidenced by ETR's very problematic actions in testing the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Bay State that it had properly tested the samples for those contaminants, when in fact, it had not. Ms. Touet's Direct PFT, ¶ 15.t; Department's Exhibit Appendix N.

In its Lab Report for Bay State, ETR stated that the USEPA limit for the presence of Total Coliforms and E. coli bacteria in drinking water was 0 (zero) and that ETR's testing of Bay State's private drinking water samples detected 0 (zero) Total Coliforms and E. coli bacteria. Id. The USEPA's 0 (zero) limit of Total Coliforms and E. coli bacteria in drinking water samples is based on the testing of a 100 milliliter ("mL") drinking water sample.[42] Ms.

[42] The National Institute of Standards and Technology ("NIST") is a part of the U.S. Department of Commerce responsible for developing uniform measurement standards. https://www.nist.gov/about-nist. According to NIST, one mL is the equivalent of 0.03 fluid ounces. https://www.nist.gov/pml/weights-and-measures/approximate-conversions-metric-us-customary-measures. Hence, 100 mL drinking water sample contains 3.0 fluid ounces of water (0.03 fluid ounces x 100 mL).

Touet's Direct PFT, ¶¶ 14, 15.t, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This 100 mL drinking water sample standard is also set forth in ETR's Standard Operating Procedure ("SOP"), No. 111 used for the determination of Total Coliforms and E. coli bacteria in drinking water samples, which ETR must adhere to as a condition of maintaining its certification under ELC Regulations. Id.; Department's Exhibit Appendix X (ETR's SOP No. 111, pp. 2-4).[43] ETR's SOP No. 111 also states that ETR uses the Colilert ONPG-MUG Test Kit manufactured by IDEXX to test drinking water samples for the presence of Total Coliform and E. coli bacteria. Ms. Touet's Direct PFT, ¶¶ 14, 15.t, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19); Department's Exhibit Appendix X (ETR's SOP No. 111, p. 2). The Colilert ONPG-MUG Test Kit requires a 100 mL drinking water sample to test for Total Coliforms and E. coli bacteria. Ms. Touet's Direct PFT, ¶¶ 14, 15.t, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19); Department's Exhibit Appendix X (Colilert Test Kit Instruction Sheet, p. 2).

ETR's Lab Report for Bay State stating that the USEPA's limit for the presence of Total Coliforms and E. coli bacteria in drinking water was 0 (zero) and that 0 (zero) Total Coliforms and E. coli bacteria had been detected in the testing of Bay State's private drinking water samples implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the USEPA's 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.t, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18;

[43] All certified laboratories are required by the ELC Regulations to establish, maintain, and follow a written quality assurance plan ("QA Plan") acceptable to the Department. 310 CMR 42.08(5). The QA Plan must include SOPs that accurately reflect all phases of current laboratory activities, including analytical procedures and quality assurance reporting procedures. 310 CMR 42.08(5)(a)1.c.iii; Ms. Touet's Direct PFT, ¶ 14.

Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). However, a subsequent October 3, 2017 inspection that Department staff members Ms. Touet and Ms. Macionus conducted of ETR's laboratory revealed that ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id.

During their inspection, Ms. Touet and Ms. Macionus learned that ETR had a practice of using a 20 mL drinking water sample with one-fifth (1/5) of the reagent in the Colilert ONPG-MUG Test Kit to test for the presence of Total Coliforms and E. coli bacteria. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli bacteria. Id. "Use of less than required [100 mL] volume of sample for analysis significantly reduces the sensitivity of the test and places public health at risk." Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). "There is no valid scientific reason for [ETR's] reducing the water sample [test] volume [from 100 mL to 20 mL] . . . . The only reason for [ETR's] action [was] to lower the cost of the IDEXX Colilert reagent used in each sample." Id.

Based on the evidence discussed above, I find that ETR's improper testing of Bay State's private drinking water samples and reporting the test results warrant revocation of its certification for all the following reasons: careless and inaccurate reporting of the test results in violation of 310 CMR 42.12(3)(a)6; making false, inaccurate, incomplete, or misleading

statements in reporting the test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d); and endangering public health in violation of 310 CMR 42.12(3)(a)13. I also find that ETR's actions also constituted fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9, which alone warrant revocation of ETR's certification.

Although 310 CMR 42.12(3)(a)9 does not define what constitutes a "fraudulent or deceptive practice" by a certified laboratory warranting revocation of its certification, the Massachusetts Consumer Protection Act, G.L. c. 93A ("Chapter 93A") and the Massachusetts Attorney General's ("Mass. AG") Chapter 93A Regulations at 940 CMR 3.16 offer good guidance in determining what a "fraudulent or deceptive practice" is under 310 CMR 42.12(3)(a)9, particularly when evaluating the acts and practices of a certified laboratory such as ETR that is in the business of testing environmental samples and reporting the test results for a fee.

Chapter 93A prohibits "[u]nfair or deceptive acts or practices in the conduct of any trade or commerce" and authorizes civil suits against parties who have committed such acts or practices during the conduct of trade or commerce. G.L. c. 93A, §§ 2(a), 9(3), 9(4), 11. "Chapter 93A does not define what constitutes an 'unfair or deceptive act or practice' . . . [because] unfair or deceptive conduct is best discerned 'from the circumstances of each case.'" UBS Financial Services, Inc., v. Aliberti, 483 Mass. 396, 412 (2019). The factors that are used to determine whether an act or practice is unfair or deceptive include: "(1) whether the [act or] practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other [businesspersons])." Id. Also, in "evaluat[ing] the equities between the parties," what the

parties, respectively, "knew or should have known may be relevant in determining unfairness." Id., at 412-413.

In accordance with its statutory authority under Chapter 93A to "make rules and regulations interpreting [or defining]" what constitutes "unfair or deceptive acts or practices in the conduct of any trade or commerce" that violates Chapter 93A, the Massachusetts Attorney General's Office promulgated the Chapter 93A Regulations at 940 CMR 3.00. G.L. c. 93A, § 2(c); 940 CMR 3.00 (Preamble). Under the Mass. AG's Chapter 93A Regulations at 940 CMR 3.16, "an act or practice [in the conduct of any trade or commerce] is [unfair or deceptive in] violation of [Chapter 93A]," under certain circumstances, including if:

(1) "[the act or practice] is oppressive or otherwise unconscionable in any respect", 940 CMR 3.16(1);

(2) "[a]ny person or other legal entity subject to [Chapter 93A] fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction", 940 CMR 3.16(2); or

(3) "[i]t fails to comply with existing statutes, rules, regulations[,] or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of [the] Commonwealth protection," 940 CMR 3.16(3).

On the last point above, Massachusetts courts have allowed Chapter 93A civil suits to proceed predicated on the provisions of 940 CMR 3.16(3) of the Mass. AG's Chapter 93A Regulations but only if the conduct leading to the violation of the specific public, health, or safety regulations at issue in the case was unfair or deceptive and occurred during trade or commerce because an "overbroad reading of 940 CMR 3.16(3) would 'siphon into the province of c. 93A a bottomless reservoir of ulterior public health, safety, and welfare infractions regulated by separate programs of the police power." Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 169-80 (2013)

(decedent's estate properly asserted Chapter 93A claim based on 940 CMR 3.16(3) against restaurant arising out of decedent's death caused by his fall down restaurant staircase "having been built and rebuilt [by the restaurant] without . . . the [required local municipal] Building Permits and [in violation of the] State Building Code" to avoid the expense of building code compliance).

Accordingly, based on the Chapter 93A criteria set forth above, I find that the ELC Regulations fall well within the ambit of the regulations covered by the Mass. AG's Chapter 93A Regulations at 940 CMR 3.16(3) because the ELC Regulations are "regulations. . . meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth . . . intended to provide the consumers of [the] Commonwealth protection." I also find that an act or practice by a certified laboratory in testing environmental samples and reporting the test results during trade or commerce is a fraudulent or deceptive act or practice within the meaning of the ELC Regulations at 310 CMR 42.12(3)(a)9 warranting revocation of its certification if the act or practice:

(1) violated the requirements of the certified laboratory's certification and the ELC Regulations;

(2) involved the certified laboratory's:

(a) intentional misrepresentation of material information;

(b) failure to disclose to its clients or prospective clients, any fact, the disclosure of which may have influenced the clients or prospective clients not to retain the certified laboratory to test environmental samples and report the test results; or

(c) commission of any other act that was immoral, unethical, oppressive, unscrupulous, or unconscionable; and

(3) the act or practice caused harm or would likely cause harm to any person,

as defined by the ELC Regulations at 310 CMR 42.03 (definition of "person").[44]

In this case, ETR's acts and practices in testing Bay State's private drinking water samples and reporting the test results as discussed above occurred during trade or commerce and more than satisfy the criteria for what constitutes false or deceptive acts or practices warranting revocation of its certification pursuant to 310 CMR 42.12(3)(a)9. Simply stated, ETR's acts and practices at issue, including: (1) denying that it was required to test Bay State's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations notwithstanding Framingham's Private Well Regulations mandating such testing; and (2) the particularly egregious way it tested Bay State's private drinking water samples for Total Coliforms and E. coli bacteria and reported the test results, not only violated the requirements of its certification, the ELC Regulations, and Framingham's Private Well Regulations, they also were immoral, unethical, unscrupulous, unconscionable, and harmful or potentially harmful to the health of its clients and public health in general. Mass. AG's Chapter 93A Regulations at 940 CMR 3.16(3); UBS Financial Services, Inc., 483 Mass. at 412-413; Klairmont, 465 Mass. at 169-80. As discussed in in the next sections below (Sections B through L), ETR's wrongful conduct was not an isolated incident.

B. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Brodeur Pump Co.

On or about April 15, 2017, Brodeur Pump Co. Inc. of Uxbridge, Massachusetts ("Brodeur") retained ETR to test private drinking water samples from a new private well that

[44] 310 CMR 42.03 defines a "person" as any "individual, corporation, company, association, trust, partnership, the Commonwealth, a municipality, district or other subdivision or body politic of the Commonwealth, and any department, agency or instrumentality of the United States."

Brodeur had constructed at residential home at 59R Winthrop Street in Medway, Massachusetts. Ms. Touet's Direct PFT, ¶ 15.q.; Department's Exhibit Appendix K. ETR performed this testing and on April 17, 2017, it provided Brodeur a Comprehensive Scan Report ("ETR's Lab Report for Brodeur") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Brodeur's private drinking water samples and reporting of the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Brodeur's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations because ETR's Lab Report for Brodeur failed to follow good laboratory practices by failing to disclose: (1) the date when ETR tested the samples and (2) the methods utilized by ETR to test the samples. Ms. Touet's Direct PFT, ¶ 15.q.; Department's Exhibit Appendix K. This information was important for quality control purposes and to confirm that ETR had tested the samples in accordance with the requirements of ETR's certification and the ELC Regulations. Id. ETR's Lab Report for Brodeur gave no indication whether the samples had been tested in accordance with those requirements. Id. Instead, ETR's Lab Report for Brodeur contained a disclaimer stating that: (1) "[t]he integrity of the [testing] sample[s] and results [were] dependent on the quality of the sampling"; (2) "[t]he [testing] results appl[ied] to actual sample[s] tested"; and (3) ETR "[would] be held harmless from any liability arising out of the use of such results." Id.

The lack of Valid Data produced by ETR's testing of Brodeur's private drinking samples is also evidenced by ETR's failure to test the samples in accordance with the requirements of its certification and the ELC Regulations notwithstanding that the Town of Medway Board of

Health's Rules and Regulations for Private Water Supply ("Medway's Private Well Regulations") also required ETR to test the samples in accordance with the requirements of its certification and the ELC Regulations. Id.

Medway's Private Well Regulations require that a water quality test must be conducted of a newly constructed private well before it is used as a drinking water supply and the testing be performed by "a MassDEP certified laboratory." Medway's Private Well Regulations, at p. 4 (Water Quality Specifications/Sampling). Medway's Private Well Regulations specifically require that a certified laboratory perform "[a] chemical, physical, and bacteriological analysis of the water samples [and] . . . [w]ater that does not meet the accepted standards for potable water supplies shall be grounds for the [Medway Board of Health's] rejection of the [private well]." Medway's Private Well Regulations, at p. 5 (Laboratory Tests).

ETR's principal, Mr. Koslowski, offered no testimony disputing the requirements of Medway's Private Well Regulations and that the Regulations required ETR to test Brodeur's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations. His lack of testimony is further evidence of his lack of credibility in disputing the Department's grounds for seeking revocation of ETR's certification.

Also very troubling is ETR's failure to properly test Brodeur's private drinking water samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Brodeur that it had properly tested the samples for those contaminants, when in fact, it had not. Ms. Touet's Direct PFT, ¶ 15.q.; Department's Exhibit Appendix K.

In its Lab Report for Brodeur, ETR stated that the USEPA limit for the presence of Total

Coliforms and E. coli bacteria in drinking water was 0 (zero) and that ETR's testing of Brodeur's private drinking water samples detected 0 (zero) Total Coliforms and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the USEPA's 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.q, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli bacteria. Id.

ETR's failure to test Brodeur's private drinking water samples and report the test results in accordance with the requirements of its certification, the ELC Regulations, and Medway's Private Well Regulations was compounded by the untruthful statements that ETR staff members Allison Joyce ("Ms. Joyce") and Elaine Martin ("Ms. Martin") made to Beth Hallal ("Ms. Hallal"), the Health Agent for the Medway Board of Health on April 17, 2017 in response to Ms. Hallel's concerns regarding ETR's testing of Brodeur's private drinking water samples. Ms. Touet's Direct PFT, ¶ 15.q.; Department's Exhibit Appendix K. Ms. Joyce and Ms. Martin made these untrue statements in e-mail communications they had with Ms. Hallal on April 21,

2017 as follows. Id.

At 9:55 a.m. on April 21, 2017, Ms. Hallal forwarded an e-mail message to Ms. Joyce requesting ETR "indicate [its] opinion of the [Brodeur private drinking] water sample[s] in reference to the [samples' potability] under Massachusetts standards." Department's Exhibit Appendix K. Nearly one hour later at 10:42 a.m., Ms. Joyce responded by forwarding an e-mail message to Ms. Hallal stating that "[ETR's Lab] [R]eport [for Brodeur indicated] that [Brodeur's] water [samples were] potable under the Massachusetts standards." Id. Ms. Joyce's statement was not true because, as Ms. Hallal noted in her e-mail message response to Ms. Joyce at 10:58 a.m., ETR's Lab Report for Brodeur did not indicate whether Brodeur's water samples tested potable under Massachusetts standards. Id.

In her 10:58 a.m. e-mail message to Ms. Joyce, Ms. Hallal also expressed concern regarding whether "[ETR was] doing [its] lab testing [pursuant to the testing requirements of ETR's] Massachusetts certification [and the ELC Regulations]" and requested Ms. Joyce confirm ETR's compliance with those testing requirements. Id. In response, Ms. Joyce forwarded an e-mail message to Ms. Hallel at 11:21 a.m. stating that "the information [Ms. Hallel was looking for] on [ETR's] compliance [with the testing requirements of its] MassDEP [certification and the ELC Regulations]" was in the disclaimer appearing in ETR's Lab Report for Brodeur. Id. However, this statement by Ms. Joyce was also not true because, as discussed above, the disclaimer did not contain any information regarding whether ETR had tested Brodeur's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations. Id.

ETR made matters worse, when Ms. Martin, at 12:30 p.m., e-mailed to Ms. Hallel a copy of ETR's Lab Report for Brodeur that had been altered by ETR to contain an additional

sentence in the disclaimer clause noting that "[a]ll analyses [of Brodeur's water samples] were not conducted [by ETR] in accordance with MassDEP certification standards." Id. This disclaimer was made in the altered report notwithstanding that Medway's Private Well Regulations specifically required ETR to test Brodeur's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations. Ms. Touet's Direct PFT, ¶ 15.q.; Department's Exhibit Appendix K. For these reasons, the Medway Board of Health was well within its authority to reject ETR's test results for Brodeur's private drinking water samples after the Board received the altered report from ETR. Id.

In sum, based on the evidence discussed above, I find that ETR's failure to test Brodeur's private drinking water samples and report the test results in accordance with the requirements of its certification, the ELC Regulations, and Medway's Private Well Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Brodeur in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

C. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results for Its Client, Ian Blair

One or about June 6, 2017, Ian Blair ("Mr. Blair") retained ETR to test private drinking water samples from the private well at the home he was purchasing at 134 Lincoln Street in

Norton, Massachusetts. Mr. Spencer's Direct PFT, ¶ 18; Department's Exhibit Appendix DD. ETR performed the testing and on June 8, 2017, it provided Mr. Blair a Comprehensive Scan Report ("ETR's Lab Report for Mr. Blair") setting forth the test results. Id. As demonstrated by Mr. Spencer in his testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. Blair's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. Blair's private drinking water samples failed to produce Valid Data because by ETR's own admission, ETR failed to test the samples in accordance with the requirements of its certification and the ELC Regulations. Mr. Spencer's Direct PFT, ¶ 18; Department's Exhibit Appendix DD. ETR made this admission in a disclaimer in ETR's Report for Mr. Blair which stated that "[n]ot all analyses [of the samples] were conducted [by ETR] in accordance with [MassDEP] certification standards." Id. While this disclaimer suggested that ETR conducted some of the testing in accordance with the requirements of its certification and the ELC Regulations, ETR failed specify what testing was "conducted in accordance with the Department's certification standards" and which were not. Id. Such lack of specificity in my view makes ETR's tests results for Mr. Blair's private drinking water samples neither technically sound nor legally defensible to be considered Valid Data. Id.

ETR failed to test Mr. Blair's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations notwithstanding that the Town of Norton Board of Health's Rules and Regulations for Private Wells ("Norton's Private Well Regulations") also required ETR to test the samples in accordance with the requirements of its certification and the ELC Regulations. Id. Norton's Private Well Regulations require that a

water quality test of a real property's private well water be performed "[a]t the time of [the] real [property's] transfer [to a new owner of the real property] in accordance with th[e] [R]egulations . . . ." Norton's Private Well Regulations, § 5.18 (Private Well Inspection At Time of Transfer), at p. 5-5. Under Norton's Private Well Regulations, "[a] Mass. State Certified Laboratory shall conduct all well testing." Norton's Private Well Regulations, § 5.10 (Well Water Testing), at p. 5-4.

ETR's principal, Mr. Koslowski, offered no testimony refuting the requirements of Norton's Private Well Regulations and that the Regulations required ETR to test Mr. Blair's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations. His lack of testimony is further evidence of his lack of credibility in disputing the Department's grounds for seeking revocation of ETR's certification.

In sum, I find that ETR's failure to test Mr. Blair's private drinking water samples and report the test results in accordance with the requirements of its certification, the ELC Regulations, and Norton's Private Well Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. Blair in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

D. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Naomi Rosenfeld

On or about January 27, 2016, Naomi Rosenfeld ("Ms. Rosenfeld") retained ETR to test private drinking water samples from the private well at her home at 389 Garfield Road in Concord, Massachusetts. Ms. Touet's Direct PFT, ¶ 15.a; Department's Exhibit Appendix B. ETR performed this testing and on January 27, 2016, it provided Ms. Rosenfeld a Health Scan Report ("ETR's Lab Report for Ms. Rosenfeld") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Ms. Rosenfeld's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Ms. Rosenfeld's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations. Specifically, the test results from ETR's testing of the samples were neither technically sound nor legally defensible because ETR failed to follow good laboratory practices by failing to disclose in its Lab Report for Ms. Rosenfeld: (1) the date when ETR tested the samples and (2) the methods utilized by ETR to test the samples. Ms. Touet's Direct PFT, ¶ 15.a; Department's Exhibit Appendix B. This information was important for quality control purposes and to confirm that ETR had tested the samples in accordance with the requirements of ETR's certification and the ELC Regulations. Id. ETR's Lab Report for Ms. Rosenfeld gave no indication whether the samples had been tested in accordance with those requirements. Id. Instead, ETR's Lab Report for Ms. Rosenfeld contained a disclaimer stating that: (1) "[t]he integrity of the [testing] sample[s] and results [were] dependent on the quality of the sampling"; (2) "[t]he [testing] results appl[ied] to

actual sample[s] tested"; and (3) ETR "[would] be held harmless from any liability arising out of the use of such results." Id.

The lack of Valid Data produced by ETR's testing of Ms. Rosenfeld's private drinking water samples is also evidenced by ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Ms. Rosenfeld that it had properly tested the samples for those contaminants, when in fact, it had not. Ms. Touet's Direct PFT, ¶ 15.a; Department's Exhibit Appendix B.

In its Lab Report for Ms. Rosenfeld, ETR stated that the USEPA limit for the presence of Total Coliforms and E. coli in drinking water was 0 (zero) and that ETR's testing of Bay State's private drinking water samples detected 0 (zero) Total Coliform and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.a, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Ms.

Touet's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Ms. Rosenfeld's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, I find that ETR's failure to test Ms. Rosenfeld's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Ms. Rosenfeld in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

E. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, David Mundo Davalos

On or about April 30, 2016, David Mundo Davolos ("Mr. Davolos") retained ETR to test private drinking water samples from the private well at a home at 848 Massachusetts Avenue in Boxborough, Massachusetts that he was considering purchasing from Jesse Camerato. Ms. Touet's Direct PFT, ¶ 15.d; Department's Exhibit Appendix C. ETR performed this testing and on May 2, 2016, it provided Mr. Davolos a Health Scan Report ("ETR's Lab Report for Mr. Davolos") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. Davolos's private drinking water samples

and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. Davolos's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations. Specifically, the test results from ETR's testing of the samples were neither technically sound nor legally defensible because ETR failed to follow good laboratory practices by failing to disclose in its Lab Report for Mr. Davolos: (1) the date when ETR tested the samples and (2) the methods utilized by ETR to test the samples. Ms. Touet's Direct PFT, ¶ 15.d; Department's Exhibit Appendix C. This information was important for quality control purposes and to confirm that ETR had tested the samples in accordance with the requirements of ETR's certification and the ELC Regulations. Id. ETR's Lab Report for Mr. Davolos gave no indication whether the samples had been tested in accordance with those requirements. Id. Instead, ETR's Lab Report for Mr. Davolos contained a disclaimer stating that: (1) "[t]he integrity of the [testing] sample[s] and results [were] dependent on the quality of the sampling"; (2) "[t]he [testing] results appl[ied] to actual sample[s] tested"; and (3) ETR "[would] be held harmless from any liability arising out of the use of such results." Id.

The lack of Valid Data produced by ETR's testing of Mr. Davolos's private drinking water samples is also evidenced by ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Mr. Davolos that it had properly tested the samples for those contaminants, when in fact, it had not. Ms. Touet's Direct PFT, ¶¶ 14, 15.d, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19); Department's Exhibit Appendix C.

In its Lab Report for Mr. Davolos, ETR stated that the USEPA limit for the presence of

Total Coliforms and E. coli bacteria in drinking water was 0 (zero) and that ETR's testing of Mr. Davolos's private drinking water samples detected 0 (zero) Total Coliforms and E. coli bacteria. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the USEPA's 100 mL drinking water testing sample requirement. Id. This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Ms. Touet's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. Davolos's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, based on the evidence discussed above, I find that ETR's failure to test Mr. Davolos's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. Davolos in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

F. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Jason Thomas

On or about May 27, 2016, Jason Thomas ("Mr. Thomas") retained ETR to test private drinking water samples from the private well at his home at 323 Farley Road in Wendell, Massachusetts. Ms. Touet's Direct PFT, ¶ 15.e; Department's Exhibit Appendix D. ETR performed this testing and on May 28, 2016, it provided Mr. Thomas a Health Scan Report ("ETR's Lab Report for Mr. Thomas") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. Thomas's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. Thomas's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations because ETR's Lab Report for Mr. Thomas failed to follow good laboratory practices by failing to disclose: (1) the date when ETR tested the samples and (2) the methods utilized by ETR to test the samples. Ms. Touet's Direct PFT, ¶ 15.e; Department's Exhibit Appendix D. This information was important for quality control purposes and to confirm that ETR had tested the samples in accordance with the requirements of ETR's certification and the ELC Regulations. Id. ETR's Lab Report for

Mr. Thomas gave no indication whether the samples had been tested in accordance with those requirements. Id. Instead, ETR's Lab Report for Mr. Thomas contained a disclaimer stating that: (1) "[t]he integrity of the [testing] sample[s] and results [were] dependent on the quality of the sampling"; (2) "[t]he [testing] results appl[ied] to actual sample[s] tested"; and (3) ETR "[would] be held harmless from any liability arising out of the use of such results." Id.

The lack of Valid Data produced by ETR's testing of Mr. Thomas's private drinking water samples is also evidenced by ETR's failure to properly test Mr. Thomas's private drinking water samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Mr. Thomas that it had properly tested the samples for those contaminants, when in fact, it had not. Id.

In its Lab Report for Mr. Thomas, ETR stated that the USEPA limit for the presence of Total Coliform and E. coli in drinking water was 0 (zero) and that ETR's testing of Mr. Thomas's drinking water samples detected 0 (zero) Total Coliform and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the USEPA's 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.e, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its

certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Ms. Touet's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. Thomas's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, based on the evidence discussed above, I find that ETR's failure to test Mr. Thomas's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. Thomas in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

G. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Scott Thornton

On or about July 9, 2016, Scott Thornton ("Mr. Thornton") retained ETR to test private drinking water samples from the private well at a home at 131 Sugar Road in Bolton, Massachusetts that he was considering purchasing. Ms. Touet's Direct PFT, ¶ 15.g;

Department's Exhibit Appendix F. ETR performed this testing and on July 9, 2016, it provided Mr. Thornton a Health Scan Report ("ETR's Lab Report for Mr. Thornton") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. Thornton's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. Thornton's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations because ETR's Lab Report for Mr. Thornton failed to follow good laboratory practices by failing to disclose: (1) the date when ETR tested the samples and (2) the methods utilized by ETR to test the samples. Ms. Touet's Direct PFT, ¶ 15.g; Department's Exhibit Appendix F. This information was important for quality control purposes and to confirm that ETR had tested the samples in accordance with the requirements of ETR's certification and the ELC Regulations. Id. ETR's Lab Report for Mr. Thornton gave no indication whether the samples had been tested in accordance with those requirements. Id. Instead, ETR's Lab Report for Mr. Thornton contained a disclaimer stating that: (1) "[t]he integrity of the [testing] sample[s] and results [were] dependent on the quality of the sampling"; (2) "[t]he [testing] results appl[ied] to actual sample[s] tested"; and (3) ETR "[would] be held harmless from any liability arising out of the use of such results." Id.

The lack of Valid Data produced by ETR's testing of Mr. Thornton's private drinking water samples is also evidenced by ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report

for Mr. Thornton that it had properly tested the samples for those contaminants, when in fact, it had not. Id.

In its Lab Report for Mr. Thornton, ETR stated that the USEPA limit for the presence of Total Coliforms and E. coli in drinking water was 0 (zero) and that ETR's testing of Mr. Thornton's drinking water samples detected 0 (zero) Total Coliforms and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the USEPA's 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.g, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliform and E. coli. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Ms. Touet's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. Thornton's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, based on the evidence discussed above, I find that ETR's failure to test Mr.

Thornton's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts or practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. Thornton in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

H. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Clients, John and Laura Nikapoulos

On or about July 27, 2016, John and Laura Nikapoulos ("Mr. and Mrs. Nikapoulos") retained ETR to test private drinking water samples from the private well at a home at 55 West Street in Bolton, Massachusetts that they were considering purchasing. Ms. Touet's Direct PFT, ¶ 15.h; Department's Exhibit Appendix G. ETR performed this testing and on July 29, 2016, it provided Mr. and Mrs. Nikapoulos a Health Scan Report ("ETR's Lab Report for Mr. and Mrs. Nikapoulos") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. and Mrs. Nikapoulos's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. and Mrs. Nikapoulos's private drinking water samples failed

to produce Valid Data as required by ETR's certification and the ELC Regulations because ETR's Lab Report for Mr. and Mrs. Nikapoulos failed to follow good laboratory practices by failing to disclose: (1) the date when ETR tested the samples and (2) the methods utilized by ETR to test the samples. Ms. Touet's Direct PFT, ¶ 15.h; Department's Exhibit Appendix G. Instead, ETR's Lab Report for Mr. and Mrs. Nikapoulos contained a disclaimer that: (1) "[t]he integrity of the [testing] sample[s] and results [were] dependent on the quality of the sampling"; (2) "[t]he [testing] results appl[ied] to actual sample[s] tested"; and (3) ETR "[would] be held harmless from any liability arising out of the use of such results." Id.

The lack of Valid Data produced by ETR's testing of Mr. and Mrs. Nikapoulos's private drinking water samples is also evidenced by ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli and providing misleading information in its Lab Report for Mr. and Mrs. Nikapoulos that it had properly tested the samples for those contaminants, when in fact, it had not. Id.

In its Lab Report for Mr. and Mrs. Nikapoulos, ETR stated that the USEPA limit for the presence of Total Coliforms and E. coli in drinking water was 0 (zero) and that ETR's testing of Mr. and Mrs. Nikapoulos's drinking water samples detected 0 (zero) Total Coliforms and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the USEPA's 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.h, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead

used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Ms. Touet's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. and Mrs. Nikapoulos's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, based on the evidence discussed above, I find that ETR's failure to test Mr. and Mrs. Nikapoulos's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts or practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for

Mr. and Mrs. Nikapoulos in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

I. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Brian Forget

On or about March 12, 2017, Brian Forget ("Mr. Forget") retained ETR to test private drinking water samples from the private well that had been constructed one year earlier at his home at 342 Center Street in Groveland, Massachusetts. Ms. Touet's Direct PFT, ¶ 15.u; Department's Exhibit Appendix O. ETR performed this testing and on March 15, 2017, it provided Mr. Forget a Health Scan Report ("ETR's Lab Report for Mr. Forget") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. Forget's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. Forget's private drinking water samples failed to produce Valid Data as required by ETR's certification and the ELC Regulations because by ETR's own admission, ETR failed to test the samples in accordance with the requirements of its certification and the ELC Regulations. Ms. Touet's Direct PFT, ¶ 15.u; Department's Exhibit Appendix O. ETR made this admission in a disclaimer in ETR's Lab Report for Mr. Forget which stated that "[a]ll analyses [of Mr. Forget's water samples] were not conducted [by ETR] in accordance with MassDEP certification standards." Id.

The lack of Valid Data produced by ETR's testing of Mr. Forget's private drinking water samples is also evidenced by ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Mr.

Forget that it had properly tested the samples for those contaminants, when in fact, it had not. Id.

In its Lab Report for Mr. Forget, ETR stated that the USEPA limit for the presence of Total Coliforms and E. coli in drinking water was 0 (zero) and that ETR's testing of Mr. Forget's drinking water samples detected 0 (zero) Total Coliform and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.u, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Ms. Touet's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. Forget's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, based on the evidence discussed above, I find that ETR's failure to test Mr. Forget's private drinking water samples and report the test results in accordance with the

requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. Forget in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

J. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Michael Trotter

On or about July 19, 2017, Michael Trotter ("Mr. Trotter") retained ETR to test private drinking water samples from the private well at his home at 86 Hudson Street in Bolton, Massachusetts. Ms. Touet's Direct PFT, ¶ 15.v; Department's Exhibit Appendix P. ETR performed this testing and on July 19, 2017, it provided Mr. Trotter a Health Scan Report ("ETR's Lab Report for Mr. Trotter") setting forth the test results. Id. As demonstrated by Ms. Touet in her testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. Trotter's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. Trotter's private drinking water samples failed to produce Valid Data because by ETR's own admission, ETR failed to test the samples in accordance with the requirements of its certification and the ELC Regulations. Ms. Touet's Direct PFT, ¶ 15.v;

Department's Exhibit Appendix P. ETR made this admission in a disclaimer in ETR's Lab Report for Mr. Trotter which stated that "[n]ot [a]ll analyses [of Mr. Trotter's private drinking water samples] were conducted [by ETR] in accordance with Massachusetts Department of Environmental Protection certification standards." Id. While this disclaimer suggested that ETR conducted some of the testing in accordance with the requirements of its certification and the ELC Regulations, ETR failed to specify what testing was "conducted in accordance with the Department's certification standards" and which were not. Id. Such lack of specificity in my view makes ETR's tests results for Mr. Trotter's private drinking water samples neither technically sound nor legally defensible to be considered Valid Data. Id.

ETR's test results for Mr. Trotter's private drinking water samples are also neither technically sound nor legally defensible to be considered Valid Data because of ETR's failure to properly test the samples for the presence of Total Coliforms and E. coli bacteria and providing misleading information in its Lab Report for Mr. Trotter that it had properly tested the samples for those contaminants, when in fact, it had not. Id.

In its Lab Report for Mr. Trotter, ETR stated that the USEPA limit for the presence of Total Coliforms and E. coli in drinking water was 0 (zero) and that ETR's testing of Mr. Trotter's drinking water samples detected 0 (zero) Total Coliforms and E. coli. Id. These statements implied that ETR had tested the samples in accordance with the USEPA's testing standards, including the 100 mL drinking water testing sample requirement. Ms. Touet's Direct PFT, ¶¶ 14, 15.v, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19). This was misleading because, as revealed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's facility, ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the

USEPA's 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller 20 mL drinking water sample. Id. Not only did this practice violate the USEPA's 100 mL drinking water testing sample requirement, but also the same requirement in ETR's SOP No. 111, which ETR was required to follow as part of maintaining its certification. Id. It also was a misuse of the Colilert ONPG-MUG Test Kit which requires its reagent to be used with a 100 mL drinking water sample to test for the presence of Total Coliforms and E. coli. Id.

Also troublesome was ETR's statement in its Lab Report for Mr. Trotter that it had detected in Mr. Trotter's private drinking water samples bacteria "similar to" Burkholderia Cepacia and fungi (yeast) "similar to" Rhodotorula Glutnis. Ms. Touet's Direct PFT, ¶ 15.v; Department's Exhibit Appendix P. In making these representations, ETR neither explained how the bacteria were "similar to" Burkholderia Cepacia bacteria nor explained how the fungi (yeast) were "similar to" Rhodotorula Glutnis fungi (yeast). Id. ETR only explained what Burkholderia Cepacia bacteria and Rhodotorula Glutnis fungi (yeast) are and the serious health ailments they could cause. Id.

Regarding Burkholderia Cepacia bacteria, ETR stated that these bacteria typically "[are] widely distributed in water and soil and can live in moist environments for long periods of time" and "rarely pos[e] a risk to healthy individuals, but . . . persons with suppressed immune systems," including individuals with certain lung diseases such as cystic fibrosis, "are more vulnerable to infection caused by these bacteria." Department's Exhibit Appendix P. With respect to Rhodotorula Glutnis fungi (yeast), ETR stated that these fungi typically "[are] widely found in air, soil, lakes, oceans, and dairy products" and "[are] a common contaminant and . . . largely non-pathogenic, though infections caused by this species have been documented in immune comprised individuals." Id. ETR stated that "[i]nfections resulting from [Rhodotorula

Glutnis fungi] include": (1) "fungemia associated with catheters ([the] presence of fungi in the blood)", (2) endocarditis,[45] (3) peritonitis,[46] (4) meningitis,[47] (5) keratomycosis,[48] (6) dacryocystitis,[49] and (7) endophthalmitis.[50] Id.

ETR's description of all the serious health ailments that Burkholderia Cepacia bacteria and Rhodotorula Glutnis fungi (yeast) could cause was "[alarming] information making it appear that a [serious] health threat . . . exist[ed] by exposure to the private drinking water" in the private well of Mr. Trotter's home. Ms. Macionus's Direct PFT, ¶ 19. Given the alarming nature of these serious health ailments, ETR should have informed Mr. Trotter whether the bacteria "similar to" Burkholderia Cepacia bacteria and the fungi (yeast) "similar to" Rhodotorula Glutnis fungi (yeast) that were purportedly present in Mr. Trotter's private drinking

[45] "Endocarditis is a life-threatening inflammation of the inner lining of [the] heart's chambers and valves" known as the endocardium. https://www.mayoclinic.org/diseases-conditions/endocarditis/symptoms-causes/syc-20352576. "Endocarditis is usually caused by an infection. Bacteria, fungi, or other germs from another part of [the] body, such as [the] mouth, spread through [the] bloodstream and attach to damaged areas in [the] heart. If it's not treated quickly, endocarditis can damage or destroy . . . heart valves. Treatments for endocarditis include medications and, sometimes, surgery." Id.

[46] "Peritonitis is inflammation of the peritoneum — a silk-like membrane that lines [the] inner abdominal wall and covers the organs within [the] abdomen — that is usually due to a bacterial or fungal infection." https://www.mayoclinic.org/diseases-conditions/peritonitis/symptoms-causes/syc-20376247. "A common cause of peritonitis is peritoneal dialysis therapy" to treat kidney failure. Id.

[47] "Meningitis is an inflammation of the fluid and membranes (meninges) surrounding [the] brain and spinal cord." https://www.mayoclinic.org/diseases-conditions/meningitis/symptoms-causes/syc-20350508. "The swelling from meningitis typically triggers signs and symptoms such as headache, fever, and a stiff neck." Id. "Most cases of meningitis in the United States are caused by a viral infection, but bacterial, parasitic and fungal infections are other causes. Id.

[48] Keratomycosis is an inflammation of the cornea (the clear dome covering the colored part of the eye) which is caused by a fungal infection of the cornea. https://www.cdc.gov/contactlenses/fungal-keratitis.html.

[49] Dacryocystitis is an infection of the tear (lacrimal) sac of the eye. https://www.merckmanuals.com/home/eye-disorders/eyelid-and-tearing-disorders/dacryocystitis#:~:text=Dacryocystitis%20is%20infection%20of%20the,tear%20sac%20into%20the%20nose.

[50] Endophthalmitis is an inflammation of the interior of the eyeball caused by a fungal infection. https://www.merriam-webster.com/medical/endophthalmitis.

water samples meant that the drinking water in his private well posed a serious health threat requiring immediate attention or a health threat that was remote or minimal. Id. Such information would have enabled Mr. Trotter to have complete information and a better understanding about the test results, not incomplete information that ETR provided him. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Mr. Spencer's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. Trotter's private drinking water samples in accordance with the requirements of its certification and the ELC Regulations.

In sum, based on the evidence discussed above, I find that ETR's failure to test Mr. Trotter's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts and practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. Trotter in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

K. ETR's Failure to Properly Test Private Drinking Water Samples and Report the Test Results For Its Client, Thomas O'Shea

On or about January 10, 2018, Thomas O'Shea ("Mr. Shea") retained ETR to test private drinking water samples from the private well at the home he was purchasing at 117 Chapin Road

in Holden, Massachusetts. Mr. Spencer's Direct PFT, ¶ 21; Department's Exhibit Appendix EE. ETR performed this testing and on January 17, 2018, it provided Mr. O'Shea with a Comprehensive Scan Report ("ETR's Lab Report for Mr. O'Shea") setting forth the tests. Id. As demonstrated by Mr. Spencer in his testimony and supporting documentary evidence, ETR failed to comply with the requirements of its certification and the ELC Regulations in testing Mr. O'Shea's private drinking water samples and reporting the test results, and its failure to do so warrants revocation of its certification for the following reasons.

First, ETR's testing of Mr. O'Shea's private drinking water samples failed to produce Valid Data because by ETR's own admission, ETR failed to test the samples in accordance with the requirements of its certification and the ELC Regulations. Mr. Spencer's Direct PFT, ¶ 21; Department's Exhibit Appendix EE. ETR made this admission in a disclaimer in ETR's Lab Report for Mr. O'Shea which stated that "[n]ot [a]ll analyses [of Mr. O'Shea's private drinking water samples] were conducted [by ETR] in accordance with [MassDEP] certification standards." Id. While this disclaimer suggested that ETR had conducted some of the testing in accordance with the requirements of its certification and the ELC Regulations, ETR failed to specify what testing was "conducted in accordance with the Department's certification standards" and which were not. Id. Such lack of specificity in my view makes ETR's tests results for Mr. O'Shea's private drinking water standards neither technically sound nor legally defensible to be considered Valid Data. Id.

ETR's principal, Mr. Koslowski, offered no probative evidence effectively refuting Mr. Spencer's testimony and supporting documentary evidence as discussed above demonstrating ETR's failure to test Mr. O'Shea's private drinking water samples in accordance with the

requirements of its certification and the ELC Regulations.

In sum, I find that ETR's failure to test Mr. O'Shea's private drinking water samples and report the test results in accordance with the requirements of its certification and the ELC Regulations warrant revocation of ETR's certification for:

(1) careless and inaccurate reporting of analytical measurements in violation of 310 CMR 42.12(3)(a)6;

(2) fraudulent or deceptive acts or practices in violation of 310 CMR 42.12(3)(a)9;

(3) performing and reporting drinking water analyses in a manner so as to threaten public health or welfare in violation of 310 CMR 42.12(3)(a)13; and

(4) inaccurate, incomplete, or misleading statements in its Lab Report for Mr. O'Shea in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

L. ETR's Failure to Pass the Department's Double-Blind Proficiency Testing Study of ETR's Laboratory Testing and Test Results Reporting Practices

Revocation of ETR's certification is also warranted because of its failure to pass the Department's double-blind proficiency testing study as described below involving ETR's testing and reporting the test results for five sets of simulated private well water samples.

1. The Purpose of Department's Double-Blind Proficiency Testing of Certified Laboratories

To obtain and maintain its certification under the ELC Regulations, a certified laboratory is required to perform satisfactorily in proficiency testing ("PT") studies administered by the Department which measure the certified laboratory's ability to properly test and analyze specific types of environmental samples ("analytes"). 310 CMR 42.07(1); Dr. Pancorbo's Direct PFT, ¶ 7 (p. 5). A certified laboratory's "[s]atisfactory performance in [a PT study] is accomplished" when it "correctly identif[ies] and acceptably quantif[ies]" a particular category of analytes based

on "[c]riteria for acceptability . . . set by the Department . . . ." 310 CMR 42.07(1). A certified laboratory's "[c]ontinued unsatisfactory performance in the analysis of . . . a [particular] category [of analytes] may result in revocation of [its] certification" to test those types of analytes. Id.

Analytes used in PT studies are PT samples that "contain known amounts of analytes and are obtained from the Department or from a third party acceptable to the Department. The composition of the sample is unknown to the [certified] laboratory performing the analysis [in the PT study]. The PT sample is used to evaluate the ability of the [certified] laboratory and of the individual analyst to produce accurate and precise results within specified acceptance criteria." 310 CMR 42.03 (definition of "Proficiency Test (PT) Samples"). "PT samples may be single-blind," where "the [certified] laboratory [and/or] analyst knows that the sample is a PT sample," or "double-blind", where "the PT sample appears to be a routine sample so the [certified] laboratory [and/or] analyst is unaware that the sample is a PT sample." Id.

2. The Design of the Department's Double-Blind PT Study of ETR's Laboratory Testing and Test Results Reporting Practices and the Department Staff Who Performed the Study

Here, the Department, as part of its investigation of ETR's laboratory testing and test results reporting practices, subjected ETR to a double-blind PT study involving its testing of five sets of simulated private well water samples. Mr. Spencer's Direct PFT, ¶¶ 22-26; Dr. Pancorbo's Direct PFT, ¶¶ 6-12 (pp. 6-18). Dr. Pancorbo designed and oversaw this study. Id. Dr. Pancorbo was assisted in the study by five Department staff members who posed as private well water clients of ETR using different aliases. Mr. Spencer's Direct PFT, ¶¶ 22-26; Dr. Pancorbo's Direct PFT, ¶¶ 6-12 (pp. 6-18). These Department staff members were:

(1) Mr. Dame, whose alias was "Chet White";

(2) Gregory Levins ("Mr. Levins"), whose alias was "Pete Wilson";

(3) Ms. Macionus, whose alias was "Lynn Bennett";

(4) Mr. Spencer, whose alias was "Rich Kelly"; and

(5) Michael Whiteside ("Mr. Whiteside"), whose alias was "Robert Comparetti."

Id.

3. The Five ETR Health Scan Kits Used in the Department's Double-Blind PT Study of ETR's Laboratory Testing and Test Results Reporting Practices

In March and April 2017, Mr. Dame, Mr. Levins, Ms. Macionus, Mr. Spencer, and Mr. Whiteside, using their respective aliases, each purchased a Health Scan Kit from ETR that was used in the double-blind PT study. Mr. Spencer's Direct PFT, ¶¶ 22-26; Dr. Pancorbo's Direct PFT, ¶¶ 6-12 (pp. 6-18); Department's Exhibits Appendix FF and Appendix II, Part 1. These ETR Health Scan Kits consisted of the following.

Four of the five ETR Health Scan Skits, those that Mr. Dame, Mr. Levins, Ms. Macionus, and Mr. Whiteside purchased using their respective aliases, each came in boxes that contained:

(1) the words "WATER QUALITY TEST" in large print and had information about ETR on the front and sides of the box;

(2) the U.S. EPA agency seal with the language, "EPA Recommended" on the box's front cover;

(3) three sample containers consisting of (a) a 40 mL amber glass vial,[51] (b) an approximately 500 mL plastic bottle,[52] and (c) an approximately 120 mL[53] plastic bottle which were neither pre-marked or labelled nor indicated that they were sterile or pre-cleaned;

[51] 40 mL are 1.2 fluid ounces. https://www.nist.gov/pml/weights-and-measures/approximate-conversions-metric-us-customary-measures (one mL is 0.03 fluid ounces x 40= 1.2 fluid ounces).

[52] 500 mL are 15 fluid ounces. https://www.nist.gov/pml/weights-and-measures/approximate-conversions-metric-us-customary-measures (one mL is 0.03 fluid ounces x 500= 15 fluid ounces).

[53] 120 mL are 3.6 fluid ounces. https://www.nist.gov/pml/weights-and-measures/approximate-conversions-metric-us-customary-measures (one mL is 0.03 fluid ounces x 120= 3.6 fluid ounces).

(4) a sample request form to be completed and included with samples when they were mailed to ETR for testing; and

(5) a postage pre-paid business reply label on the back of the box with ETR's address so that the box could be used as a return shipping container for the three sample containers and the completed sample request form.

Mr. Spencer's Direct PFT, ¶ 25; Department's Exhibit Appendix GG. These ETR Health Scan Kits also contained very limited instructions related to the collection of the water samples and no instructions regarding sample preservation, such as keeping the samples cold until ETR received them for testing. Id. They also contained a sheet entitled "Before You Sample" which erroneously stated that aerators should not be removed by the purchaser of the Health Scan Kit in collecting water samples in order "[t]o prevent outside contamination or other interference." Id. This information was incorrect because it is standard practice to remove aerators in collecting water samples for testing. Id.

The ETR Health Scan Kit that Mr. Spencer purchased using his alias, came in a plain cardboard box containing three sample bottles secured in Styrofoam cutouts, but with no sampling instructions. Id. The three sample bottles were: (1) a 40 mL amber glass vial, (2) an approximately 1,000 mL[54] plastic bottle, and (3) an approximately 120 mL plastic bottle. Id. None of the bottles were pre-marked or labelled, and there was also no indication that they were sterile or pre-cleaned. Id.

4. Phenova, Inc.'s Preparation of the Simulated Private Well Water Samples Contained in the Five ETR Health Scan Kits Used in the Department's Double-Blind PT Study of ETR's Laboratory Testing and Test Results Reporting Practices

Per Dr. Pancorbo's instructions, in April 2017 Mr. Spencer mailed to Phenova, Inc.

[54] 1,000 mL are 30 fluid ounces. https://www.nist.gov/pml/weights-and-measures/approximate-conversions-metric-us-customary-measures (one mL is 0.03 fluid ounces x 1,000).

("Phenova") in Golden, Colorado the five ETR Health Scan Kits that had been purchased by Mr. Dame, Mr. Levins, Ms. Macionus, Mr. Spencer, and Mr. Whiteside under their respective alias, so that Phenova could fill the sample bottles contained in each kit with simulated private well water samples prepared by Phenova. Mr. Spencer's Direct PFT, ¶¶ 22-26; Department's Exhibits Appendix FF and Appendix II, Part 1; Dr. Pancorbo's Direct PFT, ¶¶ 7-9 (pp. 5-9). Dr. Pancorbo chose Phenova to perform this task because "[it] is a leading ISO 17043 accredited provider of PT products and services,[55] quality control standards, and an ISO 17025/ISO Guide 34 accredited manufacturer of certified reference materials." Dr. Pancorbo's Direct PFT, ¶ 7 (pp. 5-6). "Phenova is [also] a national PT provider accredited by the American Association for Laboratory Accreditation ("A2LA")[,] . . . a PT provider accreditor recognized by The NELAC Institute ("TNI")." Id. "Phenova is also the only national accredited PT provider that manufactures whole- volume PT samples required for double-blind studies." Id.

Phenova prepared the simulated private well water samples contained in each of the five ETR Health Scan Kits by using laboratory ASTM Type I reagent water produced by Phenova's large five-year-old custom reagent water system from SUEZ Water Technologies in Trevose, Pennsylvania. Dr. Pancorbo's Direct PFT, ¶ 8 (pp. 6-7). This reagent water system consists of activated carbon media pre-treatment, reverse-osmosis ("RO") membrane treatment, deionization, ultraviolet irradiation for the oxidation of total/dissolved organic carbon and disinfection, and membrane filtration through a 0.3 micrometer ("µm") pore size filter to remove residual bacteria and fungi. Id. Phenova uses reagent water from this system to manufacture all

[55] "ISO" is the acronym for the International Organization for Standardization, "a worldwide federation of national standards bodies (ISO member bodies)" that devises international standards in the science field. https://www.iso.org/obp/ui/#iso:std:iso:guide:34:ed-3:v1:en. "ISO 17043" is "[t]he accreditation standard used by [the ISO] to accredit proficiency test providers." https://www.justice.gov/archives/ncfs/file/795276/download#:~:text=Background,for%20the%20determination%20of%20laboratory (Appendix A: Proficiency Test Definitions).

its microbiological PT products, including whole-volume PT samples, and has historical data spanning the previous five years demonstrating that whole-volume blanks using this water are free of any potential microbial growth. Id.

To simulate a typical private well water matrix, Phenova spiked the reagent water it filled in the sample bottles contained in each of the five ETR Health Scan Kits with the following substances:

(1) calcium (21.8 milligrams per liter ("mg/L");

(2) chloride (80.3 mg/L);

(3) iron (0.499 mg/L);

(4) magnesium (0.932 mg/L);

(5) potassium (1.75 mg/L);

(6) sodium (51.5 mg/L); and

(7) sulfate (10.2 mg/L).

Dr. Pancorbo's Direct PFT, ¶ 8 (pp. 6-7); Department's Exhibit Appendix II, Part 1.[56] Per Dr. Pancorbo's instructions, Phenova also spiked the reagent water it filled in the sample bottles

[56] The documents in the Department's Exhibit Appendix II, Part 1 evidencing Phenova's spiking of the reagent water used to prepare the simulated private well samples contained in all five of the ETR Health Scan Kits are copies of the following Phenova documents:

(1) Ms. Macionus' ETR Health Scan Kit:
"MA DEP Well Study, Lot # 19785-001, Alias: Lynn Bennett, Date: 04/17";

(2) Mr. Dame's ETR Health Scan Kit:
"MA DEP Well Study, Lot # 19785-002, Alias: Chet White, Date: 04/17";

(3) Mr. Levins's ETR Health Scan Kit:
"MA DEP Well Study, Lot # 19785-003, Alias: Pete Wilson, Date: 04/17";

(4) Mr. White's ETR Health Scan Kit:
"MA DEP Well Study, Lot # 19785-004, Alias: Robert Comparetti, Date: 05/17"; and

(5) Mr. Spencer's ETR Health Scan Kit:

contained in the ETR Health Scan Kits purchased by Mr. Dame, Mr. Levins, Mr. Spencer, and Mr. Whiteside under their respective aliases, with the following additional substances:

(1) nitrate (12.0 mg/L as Nitrate-N) in Mr. Dame's ETR Health Scan Kit;

(2) arsenic (0.020 mg/L) in Mr. Levins' ETR Health Scan Kit;

(3) E. coli bacteria (127 CFU/100 mL — lower water supply PT concentration) in Mr. Spencer's ETR Health Scan Kit; and

(4) MTBE (0.030 mg/L)[57] in Mr. Whiteside's ETR Health Scan Kit.

Dr. Pancorbo's Direct PFT, ¶ 8 (pp. 6-7).[58]

Phenova prepared the simulated private well water samples contained in all five of the ETR Health Scan Kits in its controlled manufacturing environment which had been designed to prevent the introduction of airborne microorganisms into the samples. Id. Such a controlled manufacturing environment was of critical importance because the presence of non-target microorganisms could affect the analytical results for target microorganisms as well as for some chemical parameters. Id.

5. ETR's Failure to Pass the Department's Double-Blind PT Study In Testing the Five Sets of Simulated Private Well Water Samples and Reporting the Test Results

By mid-May 2017, Phenova completed its preparation of the five ETR Health Scan Kits with the simulated private well water samples and shipped the Kits back to Dr. Pancorbo at

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"MA DEP Well Study, Lot # 19785-005, Alias: Richard Kelly, Date: 05/17."

[57] "MTBE" is the acronym for methyl tertiary-butyl ether, "a chemical compound that is manufactured by the chemical reaction of methanol and isobutylene." https://archive.epa.gov/mtbe/web/html/faq.html. "MTBE is produced in very large quantities . . . and is almost exclusively used as a fuel additive in motor gasoline. . . . At room temperature, MTBE is a volatile, flammable, and colorless liquid that dissolves rather easily in water." Id.

[58] The documents in the Department's Exhibit Appendix II, Part 1 evidencing Phenova's spiking of the reagent water used to prepare the simulated private well samples contained in the ETR Health Scan Kits purchased by Mr. Dame, Mr. Levins, Mr. Spencer, and Mr. Whiteside under their respective alias are copies of the Phenova documents listed above in n. 56, at p. 80.

DELS/WES. Dr. Pancorbo's Direct PFT, ¶ 9 (pp. 7-9); Department's Exhibit Appendix FF. After receiving the Kits, Dr. Pancorbo removed the Phenova labels from each of the sample bottles and replaced them with appropriate labeling to send them double-blind to ETR for testing. Id. Dr. Pancorbo did this in the DELS/WES Sample Storage Laboratory with no other DELS/WES employees present to protect the double-blind identity of the PT samples.[59] Dr. Pancorbo's Direct PFT, ¶ 9 (pp. 7-9); Department's Exhibit Appendix JJ.

After Dr. Pancorbo replaced the Phenova labels as described above, Mr. Dame, Mr. Levins, Ms. Macionus, Mr. Spencer, and Mr. Whiteside picked up their respective ETR Health Scan Kits from DELS/WES and forwarded them under their respective aliases to ETR for its testing of the simulated private well water samples contained in the Kits. Dr. Pancorbo's Direct PFT, ¶ 10 (pp. 9-10). ETR tested all the simulated private well water samples contained in each Kit and reported the test results in written laboratory reports to Mr. Dame's, Mr. Levins's, Ms. Macionus's, Mr. Spencer's, and Mr. Whiteside's respective aliases. Id.; Department Exhibit Appendix II, Part 1.[60] Dr. Pancorbo then reviewed ETR's test results and the manner in which ETR had reported them. Id. Based on his review, Dr. Pancorbo determined that ETR's

[59] During shipment from Phenova, the 40 mL amber glass vial in the ETR Health Scan Kit that Mr. Whiteside had purchased using his alias and that Phenova had spiked with MTBE, broke. Dr. Pancorbo's Direct PFT, ¶ 9 (pp. 7-9). Under Dr. Pancorbo's supervision, this broken vial was replaced in the ETR Health Scan Kit with another vial containing simulated private well water that Nelson Gomez, a laboratory supervisor at DELS/WES, prepared and spiked with MTBE (0.015 mg/L). Id.

[60] Department Exhibit Appendix II, Part 1:

ETR Health Scan Report for Lynn Bennett (Ms. Macionus), dated April 18, 2017;

ETR Health Scan Report for Robert Comparetti (Mr. Whiteside), dated August 8, 2017;

ETR Health Scan Report for Rich Kelly (Mr. Spencer), dated May 17, 2017;

ETR Health Scan Report for Chet White (Mr. Dame), dated April 15, 2017; and

ETR Health Scan Report for Pete Wilson (Mr. Levins), dated April 18, 2017.

certification should be revoked because in testing all the simulated private well water samples and reporting the test results, ETR failed to provide Valid Data because ETR:

(1) performed careless and inaccurate reporting of analytical measurements and supporting documentation in violation of 310 CMR 42.12(3)(a)6;

(2) engaged in fraudulent or deceptive practices in violation of 310 CMR 42.12(3)(a)9;

(3) reported drinking water analyses in a manner so as to threaten public health in violation of 310 CMR 42.12(3)(a)13; and

(4) made false, inaccurate, incomplete, or misleading statements in laboratory reports setting forth the test results in violation of 310 CMR 42.12(3)(a)17 and 310 CMR 42.17(2)(d).

Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15); ¶ 12 (pp. 15-18); ¶ 13 (pp. 18-19); ¶ 14 (pp. 19-20). Dr. Pancorbo made these determinations for the reasons set forth below, as supported by his testimony at the Hearing, which I accord great weight given his vast experience in the fields of environmental microbiology and chemistry and his near three decades of service as the Director of the Massachusetts State Environmental Laboratory (DELS/WES), which has included direct oversight of the Department's ELC Laboratory Certification Program. However, due to Mr. Koslowski's demonstrated lack of credibility in disputing the Department's grounds for seeking revocation of ETR's certification as discussed above, I accord little or no weight to his testimony criticizing: (1) the Department's double-blind PT study of ETR's laboratory testing and test results reporting practices; and (2) Dr. Pancorbo's analysis of ETR's very poor performance in the study warranting revocation of its certification.

a. The Common Pattern and Practice of Violations Committed by ETR in Testing All the Simulated Private Well Water Samples and Reporting the Test Results

As Dr. Pancorbo demonstrated in his testimony, there was a common pattern and practice

of violations committed by ETR in testing all the simulated private well water samples contained in the five ETR Health Scan Kits and reporting the test results. Those violations were as follows.

(1) ETR's Admission in Its Laboratory Reports that It Did Not Test All the Simulated Private Well Samples in Accordance with the Requirements of Its Certification and the ELC Regulations

First, by ETR's own admission, ETR failed to test all the simulated private well samples contained in the five ETR Health Scan Kits in accordance with the requirements of its certification and the ELC Regulations. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15). ETR made this admission in a disclaimer contained in the laboratory reports it submitted setting forth its test results for the samples. Id.; Department Exhibit Appendix II, Part 1.[61]

In four laboratory reports, those setting forth the test results for the samples contained in Ms. Macionus's, Mr. Spencer's, Mr. Dame's, and Mr. Levins's respective ETR Health Scan Kits, ETR stated that "[a]ll analyses [of the samples] were not conducted [by ETR] in accordance with MassDEP certification standards."[62] In the remaining laboratory report setting forth its test results for the samples contained in Mr. Whiteside's ETR Health Scan Kit, ETR stated that "[n]ot all analyses [of the samples] were conducted [by ETR] in accordance with [MassDEP] certification standards." Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15); Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Robert Comparetti (Mr. Whiteside), dated August 8, 2017). This disclaimer suggested that ETR had tested some of the samples contained

[61] The documents in Department's Exhibit Appendix II, Part I evidencing ETR's laboratory reports are copies of the documents set forth in n. 60, at p. 82 above.

[62] Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Lynn Bennett (Ms. Macionus), dated April 18, 2017; ETR Health Scan Report for Rich Kelly (Mr. Spencer), dated May 17, 2017; ETR Health Scan Report for Chet White (Mr. Dame), dated April 15, 2017; ETR Health Scan Report for Pete Wilson (Mr. Levins), dated April 18, 2017).

in Mr. Whiteside's ETR Health Scan Kit in accordance with the requirements of its certification and the ELC Regulations. Id. However, ETR failed specify what testing was "conducted in accordance with the Department's certification standards" and which were not. Id. Such lack of specificity made ETR's tests results for these samples neither technically sound nor legally defensible to be considered Valid Data. Id. Moreover, as discussed in detail below, at pp. 85-93, this disclaimer was misleading because none of ETR's analyses of the samples contained in Mr. Whiteside's ETR Health Scan Kit and those contained in the other four ETR Health Scan Kits purchased by Ms. Macionus, Mr. Spencer, Mr. Dame, and Mr. Levins, respectively, were performed by ETR in accordance with the requirements of its certification and the ELC Regulations.

(2) ETR's Failure to Submit Proper Laboratory Reports Setting Forth the Test Results for All the Simulated Private Well Water Samples

Second, ETR failed to produce Valid Data from its testing of all the simulated private well water samples contained in the five ETR Health Scan Kits because its laboratory reports setting forth its test results for the samples failed to:

(1) include methods or dates of analysis for individual analytes, and as a result, it was not possible for a reviewer of the report (i.e. clients or data users) to determine whether ETR had utilized approved testing methods, was certified for the testing methods used, and had adhered to the proper sample holding time standards in testing the simulated private well water samples;

(2) state the limits for contaminants contained in the simulated private well water samples, but instead stated "not detected," which was meaningless in the absence of a reporting limit;

(3) include the units of measurement for determining the presence of Total coliform bacteria and E. coli bacteria in the simulated private well water samples, but instead simply indicated "Absent" or "Present" without the volume of sample tested, making it impossible for clients or data users

to determine if the required 100-mL sample volume was used by ETR to test the samples for these bacteria;

(4) properly report the Bacterial Heterotrophic Plate Count ("HPC") units contained in the simulated private well water samples[63] by reporting them as a volume of CFU/100 mL[64] instead of the industry standard volume of CFU per mL which would mislead an individual to believe that his or her private well water supply was more contaminated than it actually was;

(5) include bench records in the laboratory raw data packages for the analysis of pH,[65] turbidity, color, odor, conductivity, Total Dissolved Solids ("TDS"), sediment, alkalinity, chlorine residual, radon, total coliforms, E. coli, and ammonia; and

(6) include calibrations or quality control sample results for the laboratory raw data.

Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15).

(3) ETR's Erroneous Detection or False Reporting of the Detection of Certain Bacteria or Fungi (Yeast) In the Simulated Private Well Water Samples

Third, ETR failed to produce Valid Data from its testing of the simulated private well water samples contained in the five ETR Health Scan Kits because it erroneously detected or

[63] Bacterial HPCs are commonly used to assess the general microbiological quality of drinking water. https://pubmed.ncbi.nlm.nih.gov/15145586/#:~:text=Abstract,500%20cfu%20ml(%2D1).

[64] "CFU" is the acronym for "colony forming unit" that is used to estimate the level of bacteria or fungal cells in an environmental sample. See e.g. https://www.epa.gov/sites/production/files/2015-09/documents/ecoli.pdf.

[65] "pH" is:

> a measure of how acidic/basic water is. The range goes from 0 - 14, with 7 being neutral. pHs of less than 7 indicate acidity, whereas a pH of greater than 7 indicates a base. pH is really a measure of the relative amount of free hydrogen and hydroxyl ions in the water. Water that has more free hydrogen ions is acidic, whereas water that has more free hydroxyl ions is basic. Since pH can be affected by chemicals in the water, pH is an important indicator of water that is changing chemically. . . .

https://www.usgs.gov/media/images/ph-scale-0.

falsely reported detecting the following bacteria and fungi (yeast) in the samples:

(1) "yeast 'similar to' Rhodotorula Glutnis [fungi (yeast)]"[66] in the samples contained in Mr. Levins's and Mr. Whiteside's respective ETR Health Scan Kits;[67]

(2) "filamentous iron bacteria 'similar to' Sphaerotilus Natans" bacteria[68] in the samples contained in Ms. Macionus's, Mr. Dame's, Mr. Levins's, and Mr. Spencer's respective ETR Health Scan Kits;[69]

[66] As ETR previously reported in its laboratory report for its private well client, Mr. Trotter, Rhodotorula Glutnis fungi (yeast) "[are] widely found in air, soil, lakes, oceans, and dairy products" and "[are] a common contaminant and . . . largely non-pathogenic, though infections caused by this species have been documented in immune comprised individuals." Department Exhibit Appendix P. ETR also stated that a person infected with Rhodotorula Glutnis fungi could suffer serious health ailments such as: (1) "fungemia associated with catheters ([the] presence of fungi in the blood)", (2) endocarditis, (3) peritonitis, (4) meningitis, (5) keratomycosis, (6) dacryocystitis, and (7) endophthalmitis. Id.

[67] Dr. Pancorbo's Direct PFT, ¶ 12 (pp. 15-18); Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Pete Wilson (Mr. Levins), dated April 18, 2017 and ETR Health Scan Report for Robert Comparetti (Mr. Whiteside), dated August 8, 2017). ETR purportedly performed NMR Spectroscopy of the simulated private well water samples contained in Mr. Levins's and Mr. Comparetti's respective ETR Health Scan Kits in determining that the samples contained "yeast 'similar to' Rhodotorula Glutnis [fungi (yeast)]" Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15); Mr. Dame's Direct PFT, ¶¶ 5-9, 11-14. NMR Spectroscopy is used to determine the physical, chemical, and biological properties of matter. https://www.acs.org/content/acs/en/education/whatischemistry/landmarks/mri.html. "NMR . . . occurs when the nuclei of some, but not all, atoms in a static magnetic field and are subjected to a second oscillating electromagnetic field in the form of radio frequency radiation, which causes the nucleus to resonate." Id. This procedure determines the molecular identity and structure of matter. Id. Naturally, an NMR Spectroscopy of matter produces data on its molecular identity and structure for evaluation. Id. Such data must include the date on which it was produced to properly inform the reviewer of the data whether it is recent or old data. The age of the data may affect its reliability. Here, ETR provided *undated* NMR Spectroscopy data evidencing its purported: (1) performance of an NMR Spectroscopy of the simulated private well water samples contained in Mr. Levins's and Mr. Comparetti's respective ETR Health Scan Kits; and (2) resulting determination that it detected "yeast 'similar to' Rhodotorula Glutnis [fungi (yeast)]" in the samples. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15); Mr. Dame's Direct PFT, ¶¶ 5-9, 11-14. ETR's failure to supply the date when the NMR Spectroscopy data were produced calls into question the data's reliability. Id.

[68] "Iron . . . [is a] naturally occurring elemen[t] in the earth [that] . . . can be a nuisance in a water supply." https://ag.umass.edu/sites/ag.umass.edu/files/fact-sheets/pdf/ironmanganese.pdf, at p. 3. "A problem that frequently results from iron . . . in water is iron . . . bacteria . . . [which] feed on [the] iron . . . in water. These bacteria form red-brown . . . slime in toilet tanks[,] can clog pipes[,] [and] can give the water a musty or swampy smell." Id., at p. 2. "The most common approach to control iron . . . bacteria [in water] is shock chlorination [treatment of the water]." Id., at p. 3.

[69] Dr. Pancorbo's Direct PFT, ¶ 12 (pp. 15-18); Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Lynn Bennett (Ms. Macionus), dated April 18, 2017; ETR Health Scan Report for Chet White (Mr. Dame), dated April 15, 2017; ETR Health Scan Report for Pete Wilson (Mr. Levins), dated April 18, 2017; and ETR Health Scan Report for Rich Kelly (Mr. Spencer), dated May 17, 2017).

(3) "bacteria 'similar to' Streptomyces species [of bacteria]"[70] in the samples contained in Mr. Dame's and Mr. Spencer's respective ETR Health Scan Kits;[71] and

(4) "bacteria 'similar to' Micrococcus Luteus [Bacteria][72] and Staphylococcus Epidermidis [Bacteria]"[73] in the samples contained in Mr. Whiteside's ETR Health Scan Kit.[74]

Dr. Pancorbo testified that ETR erroneously detected or falsely reported the detection of the bacteria and fungi (yeast) set forth above because they would not have been present in the Phenova reagent water used to prepare the simulated private well water samples. Dr. Pancorbo's Direct PFT, ¶ 12 (pp. 15-18). Dr. Pancorbo testified that the 0.3 µm pore size filter that Phenova uses as part of its reagent water system would have removed any such bacteria and fungi (yeast) from Phenova's reagent water before the water was used to prepare the

[70] "Streptomyces bacteria are filamentous soil bacteria[,] . . . which play an important part in the decomposition of dead plants." https://www.micropia.nl/en/discover/microbiology/streptomycetes/. However, Streptomyces bacteria "can cause local cutaneous fistulized nodules [in human lungs] known as actinomycetoma or mycetoma." https://wwwnc.cdc.gov/eid/article/18/11/12-0797_article. Although, "[s]evere invasive [human lung] infections have seldom been reported, . . . most cases reported have occurred in immunocompromised patients." Id.

[71] Dr. Pancorbo's Direct PFT, ¶ 12 (pp. 15-18); Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Chet White (Mr. Dame), dated April 15, 2017 and ETR Health Scan Report for Rich Kelly (Mr. Spencer), dated May 17, 2017). ETR purportedly performed an NMR Spectroscopy of the simulated private well water samples contained in Mr. Dame's and Mr. Spencer's respective ETR Health Scan Kits in determining that the samples contained "bacteria 'similar to' Streptomyces species [of bacteria]." Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15). However, ETR failed to provide any NMR Spectroscopy data evidencing its performance of an NMR Spectroscopy of the samples. Id. ETR's failure to supply such data calls into question whether ETR performed an NMR Spectroscopy of the samples. Id. At a minimum, the lack of such data calls into question ETR's claim that it detected "bacteria 'similar to' Streptomyces species [of bacteria]" in the samples. Id.

[72] Micrococcus Luteus Bacteria "can be found in water, dust, skin[,] and soil[.] [It] thrives in an oxygen rich environment which is also normally found in the human mouth, respiratory tract[,] and mucosal linings of the upper pharynx [(the area behind the mouth and the nasal cavity)]." https://www.biologyonline.com/dictionary/micrococcus-luteus. Individuals with an immunocompromised immune system including individuals undergoing chemotherapy treatment for cancer or suffering from AIDS might be more vulnerable to these bacteria. Id.

[73] Staphylococcus Epidermidis Bacteria "is a common symbiont bacterium that can become infectious once inside the human host. They are among the most common causes of . . . infection [acquired during a hospital stay] in the United States and can lead to serious complications." https://www.ncbi.nlm.nih.gov/books/NBK563240/.

[74] Dr. Pancorbo's Direct PFT, ¶ 12 (pp. 15-18); Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Robert Comparetti (Mr. Whiteside), dated August 8, 2017).

simulated private well water samples. Id.

(4) ETR's Erroneous Detection or False Reporting of the Detection of A Large Quantity of Mineral and Sand Particles In All the Simulated Private Well Water Samples

Fourth, ETR failed to produce Valid Data from its testing of the simulated private well water samples contained in the five ETR Health Scan Kits because ETR also erroneously detected or falsely reported detecting "[a] large quantity of sand and mineral sediment" in all the samples. Dr. Pancorbo's Direct PFT, ¶ 12 (pp. 15-18); Department's Exhibit Appendix II, Part 1.[75] Dr. Pancorbo testified that the 0.3 µm pore size filter of Phenova's reagent water system would have also removed this material from the reagent water before the water was used to prepare the simulated private well water samples. Id.

(5) ETR's Unauthorized Use of the Capillary Ion Electrophoresis Testing Method to Detect the Presence of Sulfate, Nitrate-N, and Chloride in All the Simulated Private Well Water Samples

Lastly, ETR improperly tested all the simulated private well water samples contained in the five ETR Health Scan Kits for the presence of sulfate, nitrate-N, and chloride by using capillary ion electrophoresis, a testing method that ETR is not certified to utilize.[76] Dr.

[75] See n. 60, at p. 82 above.

[76] Capillary ion electrophoresis involves the separation of ions, which are charged atoms or molecules. https://www.qrg.northwestern.edu/projects/vss/docs/Propulsion/1-what-is-an-ion.html. Atoms are "matter[,] . . . [something] that can be touched physically . . . [and are] . . . made up of three tiny kinds of particles[:] . . . [1] protons, [2] neutrons, and [3] electrons." https://www.qrg.northwestern.edu/projects/vss/docs/Propulsion/1-what-is-an-atom.html. An ion is a charged atom "[when] the number of electrons [in the atom] do not equal the number of protons in the atom . . . ." https://www.qrg.northwestern.edu/projects/vss/docs/Propulsion/1-what-is-an-ion.html. The ions are separated in the capillary ion electrophoresis testing method through use of electrophoresis, which is:

> a laboratory technique used to separate DNA, RNA, or protein molecules [by using] . . . [a]n electric current . . . to move molecules to be separated through a gel. Pores in the gel work like a sieve, allowing smaller molecules to move faster than larger molecules. . . .

https://www.genome.gov/genetics-glossary/Electrophoresis.

Pancorbo's Direct PFT, ¶ 11 (pp. 10-15); ¶ 12 (pp. 15-18).

b. Additional Violations Committed By ETR in Testing Certain Simulated Private Well Water Samples and Reporting the Test Results

In addition to the violations described above that were common to ETR's testing of all the simulated private well water samples contained in the five ETR Health Scan Kits, there were other violations that ETR committed in testing certain samples. As Dr. Pancorbo demonstrated in his testimony, those violations were as follows.

(1) ETR's Failure to Adhere to the Sample Holding Time Limit for Testing the Simulated Private Well Water Samples Contained in Mr. Dame's and Ms. Macionus's Respective ETR Health Scan Kits for the Presence of Nitrate-N

First, ETR failed to adhere to the 48-hour sample holding time limit for testing the simulated private well water samples contained in Mr. Dame's and Ms. Macionus's respective ETR Health Scan Kits for the presence of nitrate-N. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15). ETR exceeded the time limit by testing the samples 72 hours after receiving them. Id.

(2) ETR's Failure to Adhere to the Sample Holding Time Limit for Testing the Simulated Private Well Water Samples Contained in Ms. Macionus's ETR Health Scan Kit for the Presence of Total Coliforms and E. coli Bacteria

Second, ETR also failed to adhere to the 30-hour sample holding time limit for testing the simulated private well water samples contained in Ms. Macionus's ETR Health Scan Kit for the

presence of Total Coliforms and E. coli bacteria. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15). ETR exceeded the time limit by testing the samples 72 hours after receiving them. Id.

(3) ETR's Failure to Report the Presence of Total Coliforms and E. coli Bacteria in the Simulated Private Well Water Samples Contained in Mr. Spencer's ETR Health Scan Kit

Third, ETR also failed to report its detection of Total Coliforms and E. coli bacteria in the simulated private well water samples contained in Mr. Spencer's ETR Health Scan Kit. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15); Department Exhibit Appendix II, Part 1 (ETR Health Scan Report for Rich Kelly (Mr. Spencer), dated May 17, 2017). ETR failed to do so notwithstanding that it initially noted in its laboratory bench sheet in testing the samples that Total Coliforms and E. coli bacteria were "Present" in the samples. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15). This initial determination was correct because, as previously discussed above, Phenova had spiked the reagent water used to prepare the simulated private well water samples contained in Mr. Spencer's ETR Health Scan Kit with E. coli bacteria. Dr. Pancorbo's Direct PFT, ¶ 8 (pp. 6-7); ¶ 11 (pp. 10-15).

However, ETR subsequently changed its determination by crossing out the word "Present" in its laboratory bench sheet and replacing it with the word "Absent" to note that no Total Coliforms and E. coli bacteria had been detected in its testing of the samples. Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15). ETR provided no explanation for changing its determination. Id. Dr. Pancorbo's further examination of ETR's test results for the samples revealed that ETR had changed its determination by failing to adhere to the 100 mL drinking water testing sample requirement for testing for Total Coliforms and E. coli bacteria as mandated by the USEPA, ETR's SOP No. 111, and the Colilert ONPG-MUG Test Kit ETR used to test for

Total Coliforms and E. coli bacteria. Id. This was confirmed by Ms. Touet's and Ms. Macionus's October 3, 2017 inspection of ETR's laboratory, as previously discussed above, at which they discovered that ETR had a practice of not testing private drinking water samples for Total Coliforms and E. coli bacteria for any of its clients based on the 100 mL drinking water testing sample requirement, but instead used an unauthorized, much smaller a 20 mL drinking water sample. Id; Ms. Touet's Direct PFT, ¶¶ 14, 17, 21-23; Ms. Macionus's Direct PFT, ¶¶ 13, 18; Dr. Pancorbo's Direct PFT, ¶ 13 (pp. 18-19).

(4) ETR's Unauthorized Use of the ICP Testing Method to Detect the Presence of Lead and Arsenic in the Simulated Private Well Water Samples Contained in Mr. Spencer's ETR Health Scan Kit

Fourth, ETR improperly tested the simulated private well water samples contained in Mr. Spencer's ETR Health Scan Kit for the presence of lead and arsenic by using inductively coupled plasma ("ICP), a testing method that has not been approved to test for the presence of those substances in potable water.[77] Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15).

(5) ETR's Unauthorized Use of the ICP-MS Testing Method to Detect the Presence of Sodium, Iron, and Calcium in the Simulated Private Well Water Samples Contained in Mr. Dame's, Ms. Macionus's, Mr. Levins's, and Mr. Whiteside's Respective ETR Health Scan Kits

Lastly, ETR also improperly tested the simulated private well water samples contained in in Mr. Dame's, Ms. Macionus's, Mr. Levins's, and Mr. Whiteside's respective ETR Health Scan Kits for the presence of sodium, iron, and calcium by using inductively coupled plasma

[77] ICP is similar to ICP-MS because both techniques use a sample that is heated using a plasma source. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6719745/.

mass spectrometry ("ICP-MS"), a testing method that has not been approved to test for the presence of those substances in potable water.[78] Dr. Pancorbo's Direct PFT, ¶ 11 (pp. 10-15).

CONCLUSION

Based on the foregoing, I recommend that the Department's Commissioner issue a Final Decision Final Decision affirming the Department's Revocation Order and revoking ETR's certification.

Salvatore M. Giorlandino

Date: May 28, 2021

Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain notice to that effect. Once the Final Decision is issued "a party may file a motion for reconsideration setting forth specifically the grounds relied on to sustain the motion" if "a finding of fact or ruling of law on which a final decision is based is clearly erroneous." 310 CMR 1.01(14)(d). "Where the motion repeats matters adequately considered in the final decision, renews claims or arguments that were

[78] ICP-MS "is an analytical technique [using a plasma heat source] . . . to measure elements at trace levels in biological fluids." https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6719745/. Under this technique, the sample is heated using a plasma source to determine its elements, in particular its ions. Id.

previously raised, considered and denied, or where it attempts to raise new claims or arguments, it may be summarily denied. . . . The filing of a motion for reconsideration is not required to exhaust administrative remedies." Id.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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