OFFICE OF ADJUDICATIONS

IN THE MATTER OF : *ORDER NO.SRD- 170*

M& R GASSNER FAMILY, LLC : *DECEMBER 24, 2007*

FINAL DECISION

I
SUMMARY

The Respondent M & R Gassner Family LLC has appealed from a pollution abatement order issued by the Department of Environmental Protection (DEP) as a result of a spill on its property located in West Hartford (the site). Following various stipulations reached during the hearing process, the remaining contested allegation in the order is whether the Respondent is maintaining a condition on the site that reasonably can be expected to create a source of pollution to the waters of the state in violation of General Statutes §22a-432.

A hearing was held on June 11 and 12, 2007.[1] Following my review of the record and after consideration of legal arguments presented by both parties in briefs filed after the hearing,[2] I find that DEP staff has presented sufficient evidence that the Respondent is maintaining a condition in violation of §22a-432. I therefore affirm the order that is the subject of this appeal.

[1] The hearing was convened on May 2, 2007, but recessed shortly after it began in order for discussions between the parties regarding certain matters to continue.

[2] In a September 7, 2007 letter, Michael E. Gassner, a principal of the Respondent, wrote to me on its behalf. I recognize Mr. Gassner's desire to resolve this matter, however, to the extent his letter to me is an ex parte communication and references alleged facts that were not presented during the hearing, I cannot consider its contents in this decision.

II
FINDINGS OF FACT

A
Procedural History/Issue on Appeal

1. On March 21, 2007, the parties submitted the following written stipulations:[3]

    a. M&R Gassner Family, LLC is the owner of 935 Farmington Avenue, West Hartford, Connecticut.

    b. The Form III filing[4], received by the DEP on March 1, 2006, satisfies the requirement of appealed Order SRD-170, Paragraph B.2.a. (1) to file under the Transfer Act.

    c. The DEP is not proceeding against Michael E. Gassner individually for maintaining g a condition pursuant to §22a-432.

(Exs. DEP-5, 18, 46, 47; ex. HO-1; ex. RES-3; trans. 5/2/07, G. Frigon, pp. 4-8.)

2. The Respondent's answer to the order raised several legal issues. On June 8, 2007, I issued a Ruling that, as a matter of law, the Respondent could be maintaining a condition pursuant to §22a-432 as a landlord of tenant-operated property and where a Form III filing had been made and a site investigation was proceeding. I also found that an ongoing investigation and remediation pursuant to the Transfer Act, §§22a-134 through 22a-134e, do not constitute the "necessary steps" under §22a-432 as a matter of law. Finally, given my ruling, there was no basis for considering a determinative date other than the date on which the order was issued.[5]

[3] Admitted into the record as Hearing Officer exhibit #1.
[4] French Cleaners, Inc. is the certifying party on the Form III.

3. In a July 16, 2007 Post Hearing Directive, I advised the parties to review my June 8 Ruling, and noted the March stipulations that had been made. I also set out the remaining issue, which was whether the DEP has presented sufficient evidence to show that the respondent is maintaining a condition on its property that could reasonably be expected to create a source of pollution to the waters of the state such that the Commissioner can maintain her claim for relief set forth in the subject order.

B

The Site

4. Since about 1920, The French Cleaners, Inc. has leased the property from the Respondent and has operated a dry cleaning business on the site. Michael E. Gassner, acting individually, conveyed the property to the Respondent on November 28, 1997. The Respondent has no ownership interest in French Cleaners, nor does it have any operational rights. However, Mr. Gassner is a principal of the Respondent and was the president/treasurer/director of French Cleaners until July 31, 1998. (Exs. DEP-5-12; test. M. Gassner, 6/12/07, pp. 27-30, 42-54.)

5. Three underground storage tanks were installed for the use of the dry cleaning business. The actual ages of the tanks are unknown, but are estimated to be a minimum of fifty years old. (Ex. DEP-25.)

[5] This Ruling is in the administrative record and on file with the Office of Adjudications.

C

Conditions at the Site

6. On or about July 23, 1998, work began to excavate the underground tanks at the site so that liquid, identified as stoddard solvent, could be pumped from them and they could be removed. The tops of the tanks were exposed and 2350 gallons of solvent wastewater were pumped from them. The weather turned to torrential rains and activity ceased at the site before pumping could be completed. The excavation area was flooded, forcing solvent out of the tanks and onto the ground. (Ex. DEP-25; test. M. Gassner, 6/12/07, pp. 35-37.)

7. On July 24, 1998, a release was reported to the DEP that involved the failure of underground storage tanks and leaking petroleum products. DEP staff went to the site to corroborate the information that had been reported. Three exposed tanks were observed, with some type of petroleum product leaking from the top of at least one of the tanks; there also was oily standing liquid in areas in the vicinity of the tanks. Soils had been excavated and there were three soil stockpiles at the site. Personnel from ASW Environmental Consultants LLC working on the site collected two samples from the tanks, and, at the request of DEP staff, from each of the three soil stockpiles. (Exs. DEP-25, 31-Attachment C, 52, 72[6]; test. B. Emanuelson, 6/11/07, pp. 19- 29, 31, 33 - 36, 42-43, 88-93, 110-117.)

8. While on site on July 27, 1998, DEP staff reviewed analytical results for the samples collected on July 24. The pre-excavation soil sample result indicated the presence of total petroleum hydrocarbons (TPH); soil samples taken from the pre-excavation tank area, the in-tank soil, and the post-excavation soil revealed tetrachloroethylene (PCE). (Exs. DEP-24, 25; test. B. Emanuelson, 6/11/07, pp.75, 94-99.)

9. Other results of testing detected the presence of unidentified oils. Further testing later identified this liquid as stoddard solvent, which is also called dry cleaning safety solvent and petroleum solvent. (Exs. DEP-25, 68, 69; test. 6/11/07, B. Emanuelson, pp. 98, 99, 101-103, J. Czeczotka, pp. 143, 144.)

10. Five borings in the area of the tanks were performed at the site on July 24, 29 and 30, 1998. Soil samples collected from those borings at varying depths indicated concentrations of PCE and TPH. All the borings had exceedences of the Remediation Standards Regulations (RSRs)[7], specifically for the pollutant mobility criteria (PMC)[8] for PCE, some for the direct exposure criteria (DEC) of the RSRs for PCE and, in the case of boring number three, also for the PMC and DEC of the RSRs for TPH. Sample results of the liquid collected indicated that there was an exceedence of the groundwater protection criteria of the RSRs. (Exs. DEP-25, 68; test. K Neary, 6/11/07, pp. 163-171.)

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[6] Bottom photo, p. 1; both photos, p. 2; both photos, p.8, and photo, p.11. (Trans. 6/11/07, pp. 41, 42, 47.)
[7] The RSRs provide guidance and standards to determine whether or not remediation of a site is necessary to protect human health and safety. The RSRs contain numeric and narrative standards for the remediation of soil and groundwater. Regs., Conn. State Agencies §§22a-133k-1 through 22a-133k-3.
[8] PMC is the concentration above which there is likely to be migration of contamination from the soil to the groundwater. (Test. K. Neary, 6/11/07, p. 166.)

11. On August 10 and 11, 2006, further on-site investigations took place in the form of twenty-one soil borings inside the building and one outside the building. All of the borings were to depths of between four and eight feet. PCE was detected in samples collected and analyzed from these borings, as well as trichloroethylene (TCE) and vinyl chloride, both breakdown products[9] of PCE and TPH. Eleven of the borings inside the building had PCE detections that were above the PMC of the RSRs. (Ex. DEP-35; test. K. Neary, 6/11/07, pp. 174-183; test. R. Rosen, 6/12/07, pp. 92-95.)

12. The concentrations detected in the August 10 and 11, 2006 sampling were in areas of specific dry cleaning processes, either current or historic. The boring with the highest concentration of PCE was located almost entirely within the current area of dry cleaning processes. The boring with the next highest PCE detection was located in an area that formerly contained the PCE dry cleaning machines. The boring with the highest on-site TPH concentration was located southeast of the boiler room but still inside the building. (Exs. DEP-31, 35; test. K. Neary, 6/11/07, pp. 183-185, R. Rosen, 6/12/07, pp. 110-112.)

13. Although the intervals of the sample lengths were questioned, a modification of the sample length would not change the presence of constituents in a boring. Respondent's expert did not question the chemicals and their concentrations that were detected in the samples from the borings advanced on August 10 and 11, 2006. (Ex. DEP-35; test. R. Rosen, 6/12/07, pp. 93, 106-107.)

[9] A breakdown product is a result of the chemical being in the environment. More and different breakdown chemicals will be detected the longer a chemical is in the environment. (Test. 6/11/07, K. Neary, p. 178.)

14. Hazardous materials were shipped from the site, resulting in the production of hazardous waste manifests and land ban forms. Information in the waste manifests includes a description of the type and amount of waste that was generated and removed from the site. Land ban forms accompany manifests and serve as notice that a waste stream includes hazardous waste that cannot be shipped to a landfill. Michael Gassner signed these manifests and forms in his representative capacity as President of French Cleaners. (Exs. DEP-6-12, 24, 25; test. B. Emanuelson, 6/11/07, pp. 48- 50, 54, 55, 68, 72, 80, 81, 89; test. M. Gassner, 6/12/07, pp. 33-42, 56.)

15. The record is replete with evidence of the condition of the site, both prior to and after July 24, 1998, as well as evidence of the type and amount of waste found at the site. Efforts to remove the waste and investigate and remediate the site are also documented. (Exs. DEP-13-17, 19-45, 48, 52, 59, 72, 73, ex. RES-2; test. 6/11/07, B. Emanuelson, pp. 15- 104, 108-117, 124-129, J. Czeczotka, pp. 138- 144; test. 6/12/07, K. Neary, pp. 8, 160-171, R. Rosen, pp. 69, 102-104, 108-110.)

16. The May 26, 2005 order alleged that the Respondent is maintaining a facility or condition that reasonably can be expected to create a source of pollution to the waters of the state. A Form III was filed approximately nine months later on March 1, 2006. (Exs. DEP-46, 47, ex. RES-3; test. 6/12/07, K. Neary, pp. 8-16, R. Rosen, pp. 110-111.)

III

CONCLUSIONS OF LAW

The sole issue on appeal is whether the Respondent is maintaining a condition on the site that reasonably can be expected to create a source of pollution to the waters of the State. Section 22a-432 of the General Statutes states, in relevant part, that "[i]f the Commissioner finds that any person … is maintaining any … condition which reasonably can be expected to create a source of pollution to the waters of the state, [s]he may issue an order to such person to take necessary steps to correct such potential source of pollution." To this end, the burden of proof rests with DEP staff to demonstrate that there was sufficient evidence of this allegation to support the order issued to the Respondent.

The Respondent does not directly address the issue on appeal. Three of its four post-hearing claims are the same issues that were raised and addressed as threshold legal questions, and therefore arguably beyond the scope of my post-hearing direction to the parties. The Respondent claims: 1) it cannot be maintaining a condition as a matter of law due to its status as a landowner of a tenant occupied and operated property; 2) the investigation and remediation under the Transfer Act constitute the "necessary steps" under §22a-432 as a matter of law; and 3) the determinative date to assess the impact of that Form III filing on this order is the date of the hearing, not the date the order was issued. The only new issue addressed by the Respondent in its post-hearing brief, that §22a-432 is unconstitutional if applied as described in the order, is arguably beyond the scope of my authority.

However, to make the record and the basis of my decision clear and provide the Respondent with all possible opportunities to present its claims, I will respond to each of the three arguments seriatim and will then address the constitutional claim.[10]

A

The Order Was Properly Issued Under the Provisions of General Statutes §22a-432

The Respondent argues the order must be dismissed because, as an owner of tenant occupied and operated property, it cannot be "maintaining" a condition pursuant to §22a-432. Relying on *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358 (1993), the Respondent claims that the Commissioner's only remedy (if any) was to issue an order pursuant to §22a-433 in conjunction with an order issued to its tenant French Cleaners under §22a-432.

The appeal in *Starr* turned on the interpretation of §22a-432, more particularly the meaning of "maintaining." Finding that an "innocent landowner" could be maintaining and therefore liable for cleanup under §22a-432, the Court observed that under the common law of nuisance at the time of the enactment of §22a-432[11], a landowner, once apprised of the existence of a contaminated condition on his or her land, could generally be held liable for "maintaining a nuisance"[12] on that property without regard to fault or whether the landowner had created or caused the condition. Id. at 384. The Court noted

[10] The Respondent also seeks dismissal of the order against Mr. Gassner. Such an action is not within my authority as the hearing officer in this matter, however, as the DEP has stipulated that it is not proceeding against Mr. Gassner individually, that stipulation is incorporated into this decision.

[11] It is not necessary for the legislature to expressly state that is incorporating the common law in order to apply common law principles of nuisance to §22a-432. "It is assumed that all legislation is interpreted in light of the common law at the time of its enactment. (Citations omitted.)" Id. at 389. Moreover, the court may refer to applicable common law principles at the time of the statute's enactment for guidance. Id.

that in enacting §22a-432, the legislature incorporated the common law in order to preserve its effectiveness. Id. at 389. It was therefore clear to the Court that the legislature, in defining the scope of §22a-432 to apply to "any person …[who] is maintaining …[a] condition," foresaw that the word "maintaining" would, consistent with the common law of nuisance, encompass situations where, without fault, a contaminated condition could exist on an owner's land. Id. at 385.

The Court acknowledged that §22a-433, which provides for an order to be issued to an owner who is not liable under the principles of common law, would add nothing to the Commissioner's authority and therefore be rendered superfluous if property ownership were the only element necessary to establish that a party is maintaining a condition pursuant to §22a-432. However, the Court explained, it did not read §22a-432 as necessarily making mere ownership of contaminated property a sufficient basis for subjecting a landowner to liability for "maintaining" a condition.

Noting that under the common law, an otherwise unaware landowner who had leased its property to a tenant was not "considered liable for a nuisance 'where that nuisance did not exist when they were leased or was not a result reasonably to be anticipated from their use for the purpose and in the manner intended.' (Citations omitted.)" Id. at 387. Therefore, the Court opined, a "blameless owner" who had leased

[12] The legislature, in §22a-422 of the Water Pollution Control Act, §§22a-416 through 22a-434, declared pollution to the waters of the state to be a "public nuisance". "Maintaining a nuisance" is a legal term of art, having a technical meaning in the common law of nuisance. Id. at 383.

its property to a tenant would not be liable for maintaining a condition under §22a-432, but could be the recipient of an order under that statute's complement, §22a-433.[13] Id.

However, *Starr* does not mean that, as a matter of law, orders to owners are only possible pursuant to the provisions of §22a-433. As the *Starr* Court noted, an owner of a leased property can still be liable for "maintaining" a condition under the provisions of §22a-432 if the acts of its tenant were "reasonably to be anticipated" from the use of the property. Id.[14] This is also be true where a landowner knows of or has reason to know the activity to be carried on at the property. 2 Restatement (Second), Torts §837 (1)(a).

The Respondent argues that there is no "legal relationship" between itself and French Cleaners other than that of landlord/tenant and that nothing in the record supports a finding that the Respondent operated or controlled the site. However, Mr. Gassner is a principal of the Respondent and was the president/treasurer/director of French Cleaners until July 31, 1998. Mr. Gassner also signed the hazardous waste manifests and land ban forms. Although this was officially in his representative capacity for French Cleaners, he was not aware of what was in the manifests or on the land ban forms only in that capacity. It would be beyond reason or common sense to conclude that this Respondent did not know the business of its tenant or that use of underground storage tanks were "reasonably to be anticipated" from the use of the property.

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[13] Consistent with its conclusions as to the purpose of the Water Pollution Control Act, the Court noted that liability could be imposed on all those who, in some way, have responsibility toward the land. Id. at 358. §§22a-416 through 22a-434. See §22a-422.

[14] The Court cited *Swift & Company v. The People's Coal & Oil Company*, 121 Conn. 579 (1936) for the proposition that at common law, a landowner was not considered liable if a nuisance was not a result reasonably to be anticipated from the use of the property.

The Respondent recognizes the common law nuisance concept that imposes liability on a landowner under §22a-432 where the acts of its tenant are reasonably to be anticipated from the use of the property, but argues that the subject order did not make a specific allegation that the Respondent is liable under this principle of common law. As noted in *Starr*, however, the legislature incorporated the common law principles of nuisance when it enacted §22a-432. Therefore, an allegation under that statute incorporates the common law principles codified in that law.

French Cleaners has operated this site as a dry cleaning business for over eighty years. In order to operate the business, three underground storage tanks were installed for the use of that business. The Respondent can be liable for the result of the use of those tanks as this was "reasonably to be anticipated" from the use of the property. Id. at 386. The Respondent was properly a recipient of the order issued pursuant to §22a-432.

B
Ongoing Investigation and Remediation (Including the Filing of a Form III) Does Not Cancel a Finding that a Condition is Being "Maintained"

The Respondent argues that it cannot be "maintaining" a condition at the site as that term is reasonably interpreted, as ongoing site investigation and remediation activities are taking place at the site in furtherance of the development and implementation of a remediation plan. The Respondent claims this is therefore not the active maintenance of a condition that was contemplated by *Starr,* which held that something more than passive ownership is necessary for liability for "maintenance" under §22a-432. However, in *Starr*, the Court was clear: "[T]he legislature, in defining the scope of §22a-432…foresaw that the word "maintaining" would, consistent with the

common law of nuisance, encompass situations where, without fault, a contaminated condition *could exist* on an owner's land. (Emphasis added.) Id. at 385. The Respondent asks that the term "maintaining" not be construed out of all meaning. I agree. A condition still *exists* on the Respondent's property – it is still being maintained.

The Respondent also notes that a Form III filing has been made, arguing that French Cleaners has therefore made a legal commitment to ensure investigation and remediation of the site. However, as DEP staff correctly asserts, the Transfer Act is clear: "The provisions of sections 22a-134 to 22a-134e, inclusive, shall not affect the authority of the commissioner under any other statute or regulation, including, but not limited to, the authority to issue any order to the transferor or transferee of an establishment." §22a-134c.

Section 22a-432 is remedial in nature and must be construed liberally to reach its desired purpose. *Manchester Environmental Coalition v. Stockton,* 184 Conn. 51, 57 (1981). Ongoing investigation and remediation activities do not mean the site is clean. Moreover, these activities could stop and without a final order against a responsible party, the DEP would not be able to assure that this site is cleaned up without starting the enforcement process all over again. The Respondent is liable for maintaining a condition that could reasonably cause pollution to the waters of the state.

C
Investigation and Remediation Under the Transfer Act
Do Not Constitute the "Necessary Steps" Under §22a-432

The Respondent argues that, as a matter of law, the Transfer Act defines the necessary steps for investigation and remediation of the site. The Respondent is correct that the provisions of the Transfer Act direct specific requirements for investigation and remediation to a certain "subset" of properties that fall within the requirements of §22a-432. The Respondent is also correct that this direction may inform the "necessary steps" the Commissioner may authorize under §22a-432 for this site.

However, it does not follow that a Transfer Act investigation and remediation constitutes the "necessary steps" required under §22a-432 as a matter of law. The Commissioner is the final authority as to the appropriate and necessary steps of an investigation and remediation under both the Transfer Act and §22a-432. §22a-5a.

D
The Determinative Date for Assessing the Impact of the Form III Filing

Because the Form III filing has no impact on whether the Respondent is maintaining a condition on the site and because the Transfer Act investigation and remediation do not constitute the "necessary steps" under §22a-432 as a matter of law, there is no reason to find a date for an evaluation of the impact of the Form III filing.

E
The Constitutionality of §22a-432

The Respondent claims §22a-432 is unconstitutional as applied by the DEP through the subject order. Specifically, the Respondent notes that §22a-432 authorizes

the Commissioner to order parties to "take the necessary steps to correct [a] potential source of pollution", and argues that the decision process that will result denies a respondent due process as that respondent will not have a "meaningful opportunity to be heard" (i.e., an administrative hearing) regarding any disputes that may arise during the investigation and remediation of the site.

I may and do take notice of the fact that the Respondent will be granted opportunities to work with staff during the subsequent phases of this order, including disputes as to issues regarding the site investigation and remediation. Staff also correctly notes that a respondent has the ultimate option of choosing not to perform a disputed order and thereby obtain a forum in the Superior Court to present a claim that the DEP has acted arbitrarily, capriciously, or contrary to law.

This is not, however, the forum in which this issue may be raised. As a hearing officer, I have been authorized by the Commissioner to render final decisions in contested cases before the agency regarding enforcement actions. See §22a-2. My decision is rendered following an adjudication of facts and the application of the law (i.e. applicable statutory or regulatory criteria) to those facts. *Laufer v. Conservation Commission of Fairfield*, 24 Conn. App. 708, 713 (1991), citing *Connecticut Natural Gas Corporation v. Public Utilities Control Authority*, 183 Conn. 128, 136-137 (1981).[15]

[15] The administrative decision-making process includes at least five steps: 1) taking evidence; 2) weighing the accuracy and credibility of evidence; 3) determining basic facts from a consideration of the evidence; 4) determining whether to infer the ultimate facts mentioned in the controlling statute or regulation from those facts; and 5) applying the statutory criteria to the findings of ultimate facts. Id. at 286.

I apply facts to the law; I can evaluate whether staff has followed the law in applying the facts of a case to that law. However, I cannot rewrite a law or determine whether its application is constitutional.

Moreover, the commissioner of the DEP has broad powers and duties necessary to carry out her role to achieve the environmental policies of the state. §22a-5. Included in this power is her ability to issue an order to enforce any statute within her jurisdiction, including §22a-432. §22a-6(a)(3) and (e). The order issued to the Respondent directs the investigation and cleanup of a condition that could pollute the waters of the state. The Commissioner is authorized to issue this order to protect those waters from that pollution.

III

CONCLUSION

DEP staff had sufficient evidence to issue this order against the Respondent, who is maintaining a condition on the site that reasonably can be expected to create a source of pollution to the waters of the state in violation of General Statutes §22a-432. Order SRD-170 is hereby *affirmed.*

/s/ Janice B. Deshais
Janice B. Deshais, Hearing Officer

P A R T Y L I S T

In the matter of M&R Gassner Family, LLC
Order No. SRD-170

PARTY	*REPRESENTED BY*
The Respondent	
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