

During the process of adopting the most recent amendments to the Remediation Standards Regulations (“RSRs”), there were questions about whether those standards are the required endpoints for all cleanups – as opposed to just those cleanups undertaken pursuant to a formal cleanup program (e.g., the Transfer Act and Voluntary Programs). This question is often identified by using the shorthand phrase “applicability of the RSRs.” Upon careful consideration, however, the question is not necessarily about applicability, but is instead about when one’s liability to the state for pollution is fully discharged.

To be clear, it has never been the Department’s practice or intent to provide tacit or express approval of a cleanup that does not achieve the standards specified in the RSRs.

Connecticut’s courts have found an affirmative obligation to remediate pollution to the standards in the RSRs. The courts derived this obligation from the Water Pollution Control Act, found at chapter 446k of the General Statutes (the “Act”). The Act declares “that the pollution of the waters of the state is . . . a public nuisance . . .” (Conn. Gen. Stat. § 22a-422) and subjects “any person . . . maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state . . .” to the Commissioner’s enforcement authority<sup>1</sup> (General Statutes §22a-432). The Connecticut Supreme Court has determined that

[i]n light of the remedial purposes of the [water pollution control] act, we conclude that the legislature intended that the word ‘maintaining’ in § 22a–432, be interpreted liberally to include within its purview a landowner who has failed to abate pollution existing on his or her land that reasonably could be expected to create a source of pollution to the state's waters regardless of blame for the creation of the condition.

*Starr v. Comm’r of Env’t Prot.*, 226 Conn. 358, 382, (1993)(Owner liable for “a nuisance in the form of pollution” on her land “of which she has been made aware.”)

In *Vorlon Holding, LLC v. Commissioner of Energy and Environmental Protection*, the Appellate Court affirmed and reiterated the Supreme Court’s holding in *Starr*, stating “[s]ection 22a–432 is a strict liability statute . . . . Under the statute and the common law of nuisance, [there is] an affirmative duty to abate [polluted property].” *Vorlon Holding, LLC v. Comm’r of Energy & Env’t Prot.*, 161 Conn. App. 837, 848 (2015). The Act, then, requires that pollution be abated.

The Connecticut Supreme Court has further determined that the affirmative obligation to abate pollution imposed by the Act is satisfied only when a cleanup has achieved compliance with the RSRs. Indeed, when considering the appropriate cleanup standard for an order issued pursuant to Chapter 446k, the Connecticut Supreme Court held that

[i]f [the person who created or is maintaining pollution is] not required to remediate the effects of their discharges into the waters of the state as required by the applicable remediation standard regulations, the discharges will continue to pollute the waters of the state, thereby undermining not just the technical

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<sup>1</sup> The term “waters of the state” includes groundwater. Remediation of polluted soil is also nearly always required.. See, e.g., *Holbrook v. Cadle Properties of Connecticut, Inc.*, No. CV970567429, 2000 WL 1872041, at \*5 (Conn. Super. Ct. Dec. 4, 2000) (“[O]wnership of contaminated soils . . . constitutes maintenance of a condition that is in fact a source of pollution to the waters of the state.”)

formalities of the statutory permitting scheme, but also the fundamental and overriding purpose of the Water Pollution Control Act—to eliminate water pollution.

*Comm'r of Env't Prot. v. Underpass Auto Parts Co.*, 319 Conn. 80, 98-99 (2015)(Citations omitted, internal quotation marks omitted).

By their own terms, both before and after the most recent amendments, the RSRs apply, “to any action taken to remediate [pollution] required pursuant to . . . Chapter 446k.” Regs., Conn. State Agencies 22a-133k-1(b). Chapter 446k, the Water Pollution Control Act, requires those who are aware of pollution to abate it. Such pollution is considered abated – and any obligation and potential liability to the state is completely discharged – only once the standards in the RSRs are satisfied.

Over time, and with an understanding of the holdings in the cases cited above, the Department has exercised its enforcement discretion to focus its limited resources on those sites that the Department has determined require prompt action to reduce risks to human health or the environment. While the Department retains the authority to issue an order regarding property where pollution is known and full compliance with the RSRs has not been achieved , a new approach to allocating enforcement resources or exercising enforcement discretion is not planned.