Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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OFFICE OF ADJUDICATIONS

IN THE MATTER OF : ***ORDER NO. SRD-222***

VORLON HOLDING, LLC,
JODY R. SMITH AND RICHARD B. SMITH : ***March 21, 2013***

FINAL DECISION

I

SUMMARY

On May 23, 2012, the Commissioner of Energy and Environmental Protection (Commissioner) issued Order No. SRD-222 (Order) to Vorlon Holding, LLC (Vorlon), Jody R. Smith and Richard B. Smith (collectively, the Respondents) requiring them to study, remediate and monitor, with the assistance of a Licensed Environmental Professional, contamination of the soil, groundwater and surface water on property known as 540 New Haven Ave., Milford (Property). The Order alleges that Vorlon, the owner of the Property, Ms. Smith, the sole member and president of Vorlon, and Mr. Smith, through his role in Vorlon and as a manager and member of Vorlon's tenant, The Narn, LLC, are maintaining a condition which reasonably can be expected to create a source of pollution to the waters of the state.

The Order was issued pursuant to the Commissioner's authority under General Statutes § 22a-432. A hearing was held on September 20, 2012.

There is sufficient evidence in the record to show that a condition which can be reasonably expected to pollute the waters of the state exists on the Property and that Vorlon, Jody R. Smith and Richard B. Smith are "persons" maintaining such a condition in violation of General Statutes § 22a-432. I therefore affirm the Order and find the Respondents jointly and severally liable for maintaining that condition.

II

FINDINGS OF FACT

A

Undisputed Facts

1. Following the issuance of the Order, an Answer was filed by counsel for the Respondents on September 7, 2012. In that answer, Respondents admit many of the allegations set forth in the Order. Those admitted facts relevant here are:

    a. Vorlon is the Owner of the Property (¶ 1)[1];

    b. The Property, along with adjacent parcels, was previously owned by the Hyman H. Smith and Eleanor C. Smith Trust (Smith Trust) and was the site of a warehouse and tank farm operated by Connecticut Aerosols, Inc., a company engaged in the filling and packaging of aerosol spray cans with product and propellant (¶ ¶ 2-4);

    c. In February 1988, a 500 gallon spill of a toluene based solvent occurred on an adjacent parcel that caused the Department of Environmental Protection (Department[2]) to perform inspections on February 8 and 9, 1988, which revealed releases of hazardous waste at the Property and resulted in pollution abatement orders being issued to the Smith Trust and to Connecticut Aerosols, Inc. (¶ ¶ 6-8);

    d. Despite the orders issued in 1988 and the consent order between the Smith Trust, of which respondent Richard B. Smith was a trustee, and the Department, contamination still exists on the Property (¶ ¶ 2, 9, 34)[3];

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[1] All citations in this finding refer to Respondents' Answer.

[2] The "Department" shall refer to both the Department of Energy and Environmental Protection and its predecessor, the Department of Environmental Protection.

[3]The 1988 Order and Consent Order were recorded on the land records of the Town of Milford.

e. Vorlon acquired the Property from the Smith Trust on July 28, 1988 (¶ 2);

f. Ms. Smith is the sole member and president of Vorlon (¶ 11);

g. Ms. Smith is the sole member and manager of Deep Space 1, LLC (Deep Space 1) which, for a period of approximately ten years, beginning May 1, 1988 and ending on December 31, 2008, leased the Property from Vorlon (¶ 17);

h. Mr. Smith is the founder and managing member of The Narn, LLC (The Narn) which currently leases the Property from Vorlon, under a lease agreement valid for a period of ten years beginning January 1, 2009 (¶ 18); and,

i. The soil and ground water at the Property is polluted with volatile organic compounds (VOCs), including but not limited to tetrachloroethylene (PCE), trichloroethylene (TEC) and 1,1,1 – trichloroethane (TCA) (¶ 34).

2. In the Respondents' post-hearing brief[4], the following additional facts were admitted:

a. "There is no dispute that a 'condition which reasonably can be expected to create a source of pollution to the waters of the state' exists on [the] Property." (Respondents' Brief at 17)[5].

b. Richard B. Smith admits his personal liability, and claims he has sole liability, under General Statutes § 22a-432, i.e. "[o]f the three Respondents, only Richard B. Smith has liability under C.G.S. Section 22a-432." Respondents also state that Richard has "affirmatively inserted himself into the environmental remediation situation. He managed and manages the two operating entities on the Property, has engaged the

[4] Respondents' Brief is in the administrative record of this proceeding and is in the files of the Office of Adjudications.

[5] This admission is consistent with the Department's characterization of the scope of the hearing in its post-hearing brief, which states, "[t]he operative facts to impose liability for maintaining a condition which reasonably can be expected to create a source of pollution to the waters of the state . . . are essentially admitted . . . and thus, were identified as not being issues for the hearing . . . ." (Department's Brief at 1).

services of environmental professionals, [and] has had dealings with DEEP and EPA personnel . . . . " (Respondents' Brief at 16).

B

Findings of Fact

3. The following additional facts are found, based on the testimony of Jody R. Smith at the hearing on September 20, 2012, and additional evidence noted below.

    a. Vorlon was incorporated by Ms. Smith for the purpose of taking title to the Property, which Ms. Smith was set to acquire from the Smith Trust as compromise compensation after the Smith Trust defaulted on loan payments due to her in her capacity as Trustee of an unrelated trust;

    b. Vorlon uses Ms. Smith's home address as its business address (Ex. DEEP-1);

    c. At the time Vorlon took title to the Property, Ms. Smith had actual knowledge of the contamination on the Property and took possession of the Property through Vorlon instead of in her own name because "the property . . . was known to be contaminated;"

    d. Ms. Smith sought to "make a living" off the Property;

    e. Ms. Smith decided to develop the Property as a self-storage facility and invested $400,000 or $500,000 of her own money renovating the Property for that purpose;

    f. Ms. Smith was aware of and negotiated leases with Deep Space 1, LLC and The Narn, LLC to operate the self storage facility;

    g. When the United States Environmental Protection Agency requested access to inspect the Property, Ms. Smith signed the "Consent for Access to Property" required by that Agency (Ex. DEEP - 25); and,

h. Ms. Smith also signed a "Form III" and an "Environmental Condition Assessment Form" which were completed and filed by Vorlon on May 25, 2005, pursuant to the requirements of the "Transfer Act," General Statutes §§ 22a-134 through 22a-134d (Exs. DEEP - 12, 28).

4. Although Ms. Smith claims that she had no duties as manager of Vorlon, she exercised control or supervision over Vorlon.

5. Richard B. Smith retained Robert J. Carr, P.E., LEP, of Zuvic Carr & Associates to investigate the condition of the site on behalf of Deep Space 1. No remediation has begun and no reasonable measures to address the contamination of the Property have been taken. (Test. 9/20/12, Smith, J. Smith, R., Carr, R.)

III

CONCLUSIONS OF LAW

A

General Statutes § 22a-432

General Statutes § 22a-432 provides that the Commissioner may issue an order if he finds that any person is "maintaining a facility or condition which reasonably can be expected to create a source of pollution to the waters of the state." It is undisputed that there is a "condition" being maintained on the property which can reasonably be expected to pollute the waters of the state. The disputed issue in this appeal is who, if any one, is liable for maintaining that condition. Facts and law concerning each of the three Respondents must be examined individually to determine their liability.

B

Liability of Vorlon Holding, LLC

Vorlon is a "person" within the meaning of General Statutes § 22a-432.[6] It is undisputed that Vorlon is the owner of the Property. Subject to defenses not applicable here, ownership of property constitutes maintenance of a condition for the purposes of liability under § 22a-432. In *Starr v. Commissioner of Environmental Protection*, 226 Conn. 358 (1993) our Supreme Court found legislative intent that the word 'maintaining' would, consistent with the common law of nuisance, encompass situations where, even without fault, a contaminated condition existed on an owners land. In addition,

> 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.

Id. at 382.

Our legislature has defined those specific situations in which an owner may not be liable for contamination on their property by enacting General Statutes § 22a-452d. Section 22a-452d(1)(B) classifies a landowner as an "innocent landowner" as, in relevant part,

> a person who acquires an interest in real estate, other than a security interest, after the date of the spill or discharge if the person is not otherwise liable for the spill or discharge as the result of actions taken before the acquisition and, at the time of the acquisition, the person (i) does not know and has no reason to know of the spill or discharge, and inquires, consistent with good commercial or customary practices, into the previous uses of the property . . . .

[6] General Statures § 22a-423 defines "person" to mean, "any individual, partnership, association, firm, limited liability company, corporation or other entity . . . or any member or manager of a limited liability company. . . ."

The 1988 Order, recorded on the land records of the Town of Milford, put Vorlon on notice of the contamination of the Property.[7] Jody Smith testified that she had actual knowledge of the contamination on the Property before taking it; in fact she testified that this contamination led to the formation of Vorlon to take title to the Property.[8] Vorlon is not an "innocent landowner" under § 22a-452d.

The Respondents imply that the lease agreements between Vorlon and its tenants Deep Space I and The Narn shift liability away from Vorlon. I reject this proposition. [9] There is no support in the General Statutes for such a claim. *Starr* articulates a test for determining under what circumstances liability may be transferred to a leaseholder, holding that

> [u]nder the common law of nuisance, a landowner who was not in fact in possession of his or her property, but who had leased it 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. Because we construe § 22a-432 as having been intended to embrace the common law of nuisance, we do not read it to authorize the commissioner to issue an abatement order pursuant to that section to a blameless owner who was not in possession of his property, but who had leased it to a tenant . . . .

Id. at 387. (Citation omitted; internal quotation marks omitted.)

The leases executed by Vorlon do not satisfy this test. In this case, the nuisance on the Property existed before Vorlon leased the Property to either Deep Space 1 or The Narn. This is also not a case where contamination resulted from the use of the Property by Vorlon's tenants.

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[7] The previous order, issued in 1988 to the Smith Trust, was issued under General Statutes §22a-433, which "enabl[es] the [Commissioner] to impose liability on a landowner even if the owner did not 'establish or create' the condition or was not 'maintaining' the condition."

[8] The recording of the 1988 order on the Milford land records would also provide knowledge if a title search was performed, consistent with good commercial or customary practices when acquiring real property.

[9] Staff presented evidence that the leases were not arms length transactions and called for payments at below market rates. For the purposes of determining Vorlon's liability, the timing of the leases was relevant, but not the terms. Jody R. Smith's liability is examined on a different basis in Section III C below.

Vorlon is not shielded from liability as a "blameless landowner" and liability is not shifted to its tenants.

Vorlon is liable under § 22a-432 because, as the owner of the Property, it is maintaining a condition which reasonably can be expected to create a source of pollution to the waters of the state. Vorlon is neither an "innocent landowner" nor a "blameless" one. Because the condition on the property existed prior to the leases between Vorlon and Deep Space 1 and The Narn, Vorlon is liable for the maintenance of the condition, not its tenants. Vorlon is properly included as a respondent to the Order and I uphold the Order as to Vorlon.

C

Liability of Jody R. Smith

Ms. Smith is the sole member and president of Vorlon, and a member and manager of Deep Space 1. Under certain circumstances, corporate officers may be held personally liable for their acts and omissions which result in conditions that violate General Statutes § 22a-432. In *BEC Corporation v. Department of Environmental Protection*, 256 Conn. 602 (2001), the Connecticut Supreme Court stated that "the language of § 22a-423 strongly suggests that the legislature intended that corporate officers may be held liable under § 22a-432 under appropriate circumstances . . . the mere fact that a 'person' who is polluting is a corporate officer does not automatically shield that officer from liability for his own acts or omissions." Id. at 617. Sections 22a-423 and 22a-432 are also "environmental statutes, considered remedial in nature, and are to be construed liberally to reach the desired result." *Manchester Environmental Coalition v. Stockton*, 184 Conn. 41, 57 (1981).

The *BEC* Court adopted a three-part test for determining personal liability:

> (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there is a nexus between the officer's actions or inactions in that position and the violation of § 22a-432 such that the corporate officer influenced the corporate actions that constituted the violation; and (3) the corporate officer's actions or inactions facilitated the violations.

BEC, supra, 256 Conn. 618. Ms. Smith argues that she took on only a limited role in Vorlon and therefore should not be personally liable. However, Ms. Smith's role as the president, sole manager and member of Vorlon, and her actions or omissions in that capacity, satisfy each element of this test.

It is pivotal that Ms. Smith is the only member and president of Vorlon, meaning she, and only she, has final decision making authority over and responsibility for all corporate decisions.[10] The record in this case reveals that she negotiated leases and determined who may access the Property, by signing, for example, the "Consent for Access To Property" required by the U.S. Environmental Protection Agency. Furthermore, Ms. Smith decided to operate the site as a self-storage facility, and made the investment in renovations to accommodate that use. Ms. Smith has the ability to influence Vorlon's corporate policies or activities.

Of equal importance, there is a nexus between Ms. Smith's actions or inactions, and the maintenance of the condition on the Property. This second part of the *BEC* test was revisited by the Supreme Court in *Celentano v. Rocque,* 282 Conn. 645 (2007). In *Celentano*, the Court applied the *BEC* test to General Statutes § 22a-402, which regulates unsafe dams. In that case, the unsafe dam in question was owned by Cel-Mor, LLC, a limited liability company in which

> [Vincent D.] Celentano is the president, sole officer, and sole director and shareholder of Cel-Mor . . . . Celentano is the primary decision maker for Cel-Mor, including final decisions on environmental matters concerning the dam . . . . Cel-Mor uses Celentano's Florida residence as its business address . . . .

[10] Ms. Smith testified she left decision making in the hands of Mr. Smith.

Id. at 668. The Court found a

> nexus between the actions or omissions of Celentano and the alleged violation of § 22a-402. In the present case, Cel-Mor violated § 22a-402 by virtue of the fact that it owns an unsafe dam. There is a nexus between that violation and Celentano's actions or omissions insofar as Celentano, despite his personal knowledge of the dam and its condition, has failed to influence Cel-Mor's corporate policy, as the person in charge of its operations, to maintain the dam in a safe condition.

Id. at 670-671. Ms. Smith's relationship to Vorlon is nearly identical to Mr. Celentano's relationship to Cel-Mor. Like Mr. Celentano, Ms. Smith is the sole member and president of Vorlon, as well as the primary decision maker for the company. Like Mr. Celentano, Vorlon uses Ms. Smith's personal address as its business address. As in *Celentano*, there is a nexus between Vorlon's violation and Ms. Smith's actions or omissions insofar as Ms. Smith, despite her personal knowledge of the condition on the property, has failed to influence Vorlon's corporate policy, as the person in charge of its operations, to address the condition being maintained on the Property. Although she tried to separate ownership from operations, and claimed she left decision-making regarding the environmental issues on the Property to Mr. Smith, Ms. Smith cannot ignore or abdicate her responsibility as president of Vorlon.

This determination is consistent with the subsequent characterization of *BEC* in *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105 (2005). In *Ventres*, the Court stated,

> the responsible corporate officer doctrine that we adopted in *BEC Corp.* did not require a finding that the officer had committed, directly participated in or directed the conduct that resulted in a violation before he could be held personally liable, but required only that the officer have a position of responsibility and influence from which he could have prevented the corporation from engaging in the conduct.

Id. at 144. Ms. Smith's position in Vorlon gave her sufficient responsibility and influence to direct Vorlon to investigate and remediate the condition.

Under the third part of the test announced in *BEC*, it must be determined whether Ms. Smith's actions or inactions facilitated a violation of General Statutes § 22a-432. Section 22a-432 is a strict liability statute in that maintenance of a condition constitutes a violation. *Ventres*, supra, 275 Conn. 144. To determine if a condition is being maintained, *BEC*, adopting an analysis similar to the analysis used in *Starr*, incorporates the common law of nuisance. *BEC*, supra, 256 Conn 620, quoting *Starr*, supra, 226 Conn. 382. Maintaining a condition under § 22a-432 is therefore akin to maintaining a nuisance. Liability under the common law of nuisance requires "(a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest." (Internal citations omitted). *BEC,* supra, 256 Conn 621.

In order to establish that Ms. Smith is personally liable under the final part of the *BEC* test, the Commissioner must therefore prove: 1) that Vorlon was under an affirmative duty to investigate and remediate pollution on the Property; and, 2) that Ms. Smith's actions or inactions resulted in a failure to satisfy that duty.

Under both General Statutes § 22a-432 and the common law of nuisance, Vorlon had an affirmative duty to abate the nuisance on the Property. See *Starr*, supra, 226 Conn. 382 ("[T]he 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.") A property owner must abate a public nuisance being maintained on his property if,

> (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and (b) he knows or should know that it exists without consent of those affected by it, and (c) he has

> failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.

4 Restatement (Second), Torts, Nuisance § 839 (1979). In this instance Vorlon was created specifically because the condition on the Property was known to Ms. Smith. The 1988 order and consent order, recorded on the Milford land records, provide notice to Ms. Smith that the condition is not maintained with the consent of the Department. See General Statutes § 22a-434. Vorlon has had ample opportunity to investigate and remediate the condition on the Property, and therefore abate the nuisance, in the nearly fifteen years it has owned the Property.

The comment following § 839 of the *Second Restatement of Torts* states "if the condition is not a natural one and if it is abatable, [a property owner] becomes subject to liability unless he takes some action to abate it." *4 Restatement (Second), Torts*, Nuisance § 839 (1979). The law of nuisance creates an affirmative duty to abate a nuisance. As discussed in *Starr* and subsequently adopted by *BEC*, General Statutes §22a-432 tracks the law of nuisance and therefore imposes an affirmative duty to remedy the condition on the Property.

Vorlon has an obligation to take reasonable steps to investigate and remediate the condition on the Property. There is evidence that some limited action has been taken to investigate contamination on the Property, however, that action was taken by Mr. Smith and Deep Space 1, not by Vorlon. The action that has been taken has not included any remediation of the condition, which is unreasonable given that Vorlon has been maintaining the condition for fifteen years. Ms. Smith has failed to direct Vorlon to take any action regarding the condition of the Property during that same time frame.

It is undisputed that a condition which constitutes a violation of General Statutes § 22a-432 currently exists on the Property. As stated above, it is Ms. Smith's actions or inactions that have resulted in the continued maintenance of the condition. Ms. Smith's actions or inactions

have "facilitated a violation" of § 22a-432. As Vorlon's sole decision maker, Ms. Smith's action or inaction to influence its corporate policy has resulted in the continued maintenance of contamination on the Property.

This approach to Ms. Smith's personal liability under General Statutes § 22a-432 is also consistent with the common law exception to personal liability of individuals in a corporate context for tort liability. It is well settled and instructive that,

> [w]here . . . an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal corporation, he is liable to third persons injured thereby . . . . Thus, a director or officer who commits a tort, or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort.

Sturm v. Harb Development, LLC, 298 Conn. 124, 132 (August 31, 2010) (Citations omitted in original; internal quotation marks omitted in original) (quoting *Ventres v. Goodspeed Airport LLC*, 275 Conn. 105, 141-142 (2005), cert denied 547 U.S. 111 (2006)); see also *Scribner v. O'Brien, Inc.*, 169 Conn. 389, 403-404 (1975) ("[A]n officer of a corporation does not incur personal liability for its torts merely because of his official position. Where, however, an . . . officer commits or participates in the commission of a tort, whether or not he acts on behalf of his . . . corporation, he is liable to third persons injured thereby."). Because maintaining a condition on the property is akin to maintaining a public nuisance, Ms. Smith has participated in maintaining, and failing to abate, that public nuisance. Her personal liability under General Statutes § 22a-432 is similar to personal liability for participation in the tort of nuisance under the common law exception discussed in *Sturm* and *Ventres*. This similarity is not mere coincidence, but instead the result of the legislative intent that § 22a-432 incorporate the common law of nuisance, which necessarily includes fundamental principles of tort law such as the common law exception for the personal liability of individuals in a corporate context.

Ms. Smith holds a position of responsibility in Vorlon. There is a nexus between her decision making authority and Vorlon's failure to remediate the pollution being maintained on the Property. General Statutes § 22a-432 and the common law of public nuisance placed an affirmative duty on Vorlon to act to remediate the condition of the Property. Ms. Smith's actions or inactions facilitated a violation of that duty. For these reasons Ms. Smith is personally liable for the maintenance of the condition on the Property. I affirm the Order as issued to her.

D

Liability of Richard B. Smith

Richard B. Smith admits his personal liability under General Statutes § 22a-432. The Respondents describe Mr. Smith as a "responsible corporate officer." In light of these admissions, I will make no further inquiry regarding Mr. Smith's liability. I find that Mr. Smith is properly ordered to study, investigate and remediate the Property.

E

Joint and Several Liability

General Statutes §22a-6a(b) provides for a finding of joint and several liability among multiple respondents when a reasonable apportionment of responsibility is not possible. Cf. *Connecticut Building Wrecking Co. v Carothers,* 218 Conn. 580 (1991) (Where there is a reasonable basis for apportionment of responsibility among multiple respondents, a finding of joint and several liability should not be made.) The Respondents have presented no evidence for me to reasonably apportion and allocate a percentage share of responsibility. Therefore, Vorlon, Jody R. Smith and Richard B. Smith are jointly and severally liable for violations of §22a-432.

IV

Conclusion

The Commissioner has properly exercised jurisdiction over a condition which reasonably can be expected to create a source of pollution to the waters of the state. General Statutes § 22a-432. The facts necessary to conclude that such a condition exists on the Property are undisputed. The Order is properly issued to Vorlon, Jody R. Smith and Richard B. Smith who either own or control the Property or who, through their actions or inactions, are maintaining the condition. The Respondents Vorlon, Jody R. Smith and Richard B. Smith are jointly and severally liable for maintaining a condition on the Property.

I *affirm* the Order issued to Vorlon Holding, LLC, Jody R. Smith and Richard B. Smith. All of the deadlines set out in the Order which run from the date of issuance shall instead run from the date of this decision.

Janice B. Deshais, Hearing Officer

SERVICE LIST

Order SRD – 222
In the Matter of Vorlon Holding, LLC, Jody R. Smith and Richard B. Smith

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