MCDONALD, C. J., with whom SULLIVAN, J., joins, dissenting. I disagree with the majority's conclusion that the trial court properly affirmed the hearing officer's decision that the plaintiff alone must clean up a property that the defendants knew was polluted by a third party with connections to the defendants. I would reverse the judgment of the trial court.

The plaintiff argues that the defendants engaged in selective enforcement because another potentially responsible party, Benjamin Schilberg, had admitted to the defendants in writing that he was responsible for polluting a portion of the site but had not been the subject of any enforcement action under General Statutes § 22a-225.[1] In the majority's view, the plaintiff, to prove selective enforcement, should be compared with ''similarly situated current owners of the property who were not directly responsible for the pollution,'' not with others who were, in fact, responsible for polluting the property. ''[E]qual protection [however] does not just mean treating identically situated persons identically. . . . [Rather], the requirement imposed upon [p]laintiffs claiming an equal protection violation [is that they] identify and relate specific instances where persons situated similarly in all *relevant aspects* were

treated differently . . . .'' (Citation omitted; emphasis altered; internal quotation marks omitted.) *Thomas* v. *West Haven*, 249 Conn. 385, 402, 734 A.2d 535 (1999), cert. denied, U.S. , 120 S. Ct. 1239, 146 L. Ed. 2d 99 (2000). The ''relevant aspects'' include ''whether the plaintiffs are similarly situated to another group for purposes of the challenged government action.'' *Klinger* v. *Dept. of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994). Section 22a-225 (a) provides that abatement orders may be issued to ''any person who violates any provision of this chapter,'' not only to current property owners. Accordingly, I believe that, for purposes of liability under § 22a-225, the appropriate comparison is to all others that are potentially responsible parties under § 22a-225, and not to only other current owners of the property. I would conclude that Schilberg was similarly situated to the plaintiff under § 22a-225 for purposes of the challenged government action, the order requiring the cleanup of the property.

The majority also concludes that the plaintiff failed to prove that the defendants' action against the plaintiff was motivated by a malicious or bad faith intent to injure. The plaintiff's argument, however, is not that the defendants were motivated by malice or bad faith to injure, but rather that the government action was based upon an arbitrary classification. In *Oyler* v. *Boles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the United State Supreme Court expressly stated that a party may establish a federal constitutional violation under a claim of selective enforcement in violation of equal protection if ''the selection was deliberately based upon an unjustifiable standard such as race, religion, *or other arbitrary classification*.'' (Emphasis added.) See also *United States* v. *Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); *LeClair* v. *Saunders*, 627 F.2d 606, 611 (2d Cir. 1980). The plaintiff's claim is that the defendants' decision not to pursue Schilberg was motivated by political bias. In 1994, Schilberg's son was appointed by the commissioner of the department of environmental protection as a member of the underground storage tank petroleum cleanup account review board. As a member of the board, he was well acquainted with many of the high ranking members of that department.

Admittedly, ''the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation''; *Oyler* v. *Boles*, supra, 368 U.S. 456; nor is it contrary to the department's authority under § 22a-225. However, it ''should not extend to the point where [the government] may operate with unbridled discretion . . . by whim or caprice.'' *LeClair* v. *Saunders*, supra, 627 F.2d 608–609. ''[T]he administration of laws 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances' constitutes a denial of equal protection.'' *United States* v. *Berrios*, 501 F.2d 1207,

1209 (2d Cir. 1974).

The importance of preventing impropriety and *the appearance of impropriety* in any government action concerning one's property rights cannot be overstated. "Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.' *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562, 81 S. Ct. 294, 5 L. Ed. 2d 268 (1961)." *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. , 120 S. Ct. 897, 906, 145 L. Ed. 2d 886 (2000). "Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations . . . ." *United States* v. *Berrios*, supra, 501 F.2d 1209.

In *Low* v. *Madison*, 135 Conn. 1, 10, 60 A.2d 774 (1948), this court held that the action of the Madison zoning commission in effect granting a zone change application was invalid because of the relationship that existed between the zoning applicant and a member of the zoning commission.[2] The court reasoned that "[z]oning restrictions limit the individual's free use of his real estate in the interest of the general public good. The administration of power of that nature, whether it be denominated legislative or quasi-judicial, demands the highest public confidence. Anything which tends to weaken such confidence and to undermine the sense of security for individual rights which the citizen is entitled to feel is against public policy." Id., 9. As explained in cases interpreting *Low*, the appearance of impropriety sufficiently weakens the respect and confidence in government that is so vital to our system of democracy. See *Gaynor-Stafford Industries, Inc.* v. *Water Pollution Control Authority*, 192 Conn. 638, 648, 474 A.2d 752, cert. denied, 469 U.S. 932, 105 S. Ct. 328, 83 L. Ed. 2d 265 (1984) (test not whether personal interest does conflict, but whether reasonably might conflict); *Thorne* v. *Zoning Commission*, 178 Conn. 198, 205, 423 A.2d 861 (1979) (same); *Josephson* v. *Planning Board*, 151 Conn. 489, 493–95, 199 A.2d 690 (1964) (same). We also have held that "the principles of law stated [in *Low*] are not restricted solely to [planning or zoning] boards. These criteria and principles of law apply to the exercise of powers of all municipal agencies and boards which affect property rights in the community." *Stocker* v. *Waterbury*, 154 Conn. 446, 453–54, 226 A.2d 514 (1967). I see no reason why state government action in this case should not be held to the same standard.

In this case, the defendants obtained, in 1992, a signed admission from Schilberg, a prior lessee, in which he acknowledged that he had burned insulated copper wire on a one-quarter acre area of the site. The portion of the property that Schilberg acknowledged having polluted

was one of two contaminated areas on the property. Despite having an admission from Schilberg that he actually had polluted the land, which one department analyst testified was very ''rare,'' the defendants never pursued any remediation or initiated an enforcement action against him.[3] The defendants cited a lack of resources as the reason for their inaction in the past. It was not until 1997, after the plaintiff had purchased the property, that the defendants pursued an enforcement action under § 22a-225 against only the plaintiff. The defendants claim that pursuing more than one party would have ''complicate[d] the administrative process,'' and would have frustrated their primary goal, which was to have the entire site cleaned up. They argue that, because Schilberg was responsible for only one of the two contaminated areas, they decided to pursue the plaintiff alone in order to avoid delays in the enforcement process that would have resulted from the parties disputing the allocation of cleanup costs. The defendants concede, however, that allocation of liability is irrelevant because the parties are jointly and severally liable under § 22a-225. Consequently, the defendants patently failed to address why they never took any action against Schilberg after obtaining his admission, but instead pursued the plaintiff alone for the cost of cleanup.

Moreover, the commissioner's appointment of Schilberg's son to an advisory board raises the specter of favorable treatment of a known polluter with a relationship to the department at the expense of a nonpolluter without such a relationship. This is certainly not a situation that inspires public confidence in the even-handed administration of government. As we stated in *Thomas*, ''equal protection does not just mean treating identically situated persons identically. If a bad person is treated better than a good person, this is just as much an example of unequal treatment as when a bad person is treated better than an equally bad person or a good person worse than an equally good person.'' (Internal quotation marks omitted.) *Thomas* v. *West Haven*, supra, 249 Conn. 401, quoting *Esmail* v. *Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). It is, to me, inescapable that a property owner's confidence in the administration of government power over that owner's property would be undermined in these circumstances.

Accordingly, I respectfully dissent.

[1] General Statutes § 22a-225 (a) provides for the issuance of abatement orders to ''any person who violates any provision of this chapter or any regulation adopted or permit issued pursuant to this chapter, or to the owner of any land on which the violation occurs regardless of whether the owner of the land participated in the violation. . . .''

[2] A member of the zoning commission, who was the husband of the applicant, ''assumed the dual role of public officer, as a member of the commission, and agent or advocate of his wife's private interest in the application before the commission. After conducting his role as advocate, he assumed his role as public official and, by his vote, made it possible to secure the relief he had advocated.'' *Low* v. *Madison*, supra, 135 Conn. 9.

[3] In 1993, the defendants also did not pursue any action with respect

to the owner of the land at that time, Ashford Development Corporation (Ashford). Ashford was responsible for the contamination on a second area of the site on which it demolished and disposed of burned debris that remained from a fire on the property.