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Eliminating Passive Disposal: Equalizing Liability Among Current and Prior Owners and Operators in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

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ELIMINATING PASSIVE DISPOSAL: EQUALIZING LIABILITY AMONG CURRENT AND PRIOR OWNERS AND OPERATORS IN THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

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I. INTRODUCTION

Although Congress did not pass the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[1] until 1980, the seeds were sown in 1942 when the Hooker Chemical Company began using a canal branching off of the Niagara River as a chemical waste dump.[2] In 1953, after dumping about 21,000 tons of toxic chemicals and backfilling the land, Hooker Chemical sold the property to the Niagara School Board, "attempting to absolve itself of any future liability by including a warning in the property deed."[3] Over twenty years later, after more than a hundred homes and a school were built, when unusually heavy rains raised the groundwater levels, "[p]ortions of the Hooker landfill subsided, 55-gallon drums surfaced, ponds and other surface water [in the] area became contaminated, basements began to ooze an oily residue, and noxious chemical odors permeated the area."[4] An initial study on ninety-seven families living around the site revealed a remarkable increase in the rate of miscarriages among pregnant women and birth defects.[5] In 1978, President Carter approved emergency funds to

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[1] 42 U.S.C. §§ 9601–75 (2012).

[2] *Love Canal—A Brief History*, GENESEO, https://www.geneseo.edu/history/love_canal_history [https://perma.cc/K7VW-L898].

[3] *Id.*

[4] Fred Stoss & Carole Ann Fabian, *Background Information—Love Canal Collections*, U. BUFF. LIBR. (Aug. 1998), http://library.buffalo.edu/libraries/special collections/lovecanal/about/background.php [https://perma.cc/X78S-WNBF].

[5] On the northern side of the canal, miscarriages per 100 pregnancies rose from 8.5 to a rate of 18.6, while the southern side of the canal miscarriages rose from 9.3 to 23.7. ROBERT P. WHALEN, N.Y. DEP'T OF HEALTH, LOVE CANAL: PUBLIC HEALTH TIME BOMB, at 13 (Aug. 2, 1978), https://www.health.ny.gov/environmental/investigations/love_canal/lctimbmb.htm [https://perma.cc/LU77-Q4AE]. Birth defects per 100 live births rose from 1.8 to 2.9 on the north side and from 2.2 to 13.3 on the south side. *Id.*

assist with the evacuations of families and cleanup of the site—the first time emergency funds were ever issued for something other than a "natural" disaster.[6]

Unfortunately, the Love Canal disaster was far from an isolated event. In Utah alone there have been twenty-five sites that have been contaminated by hazardous substances,[7] and "identified by the EPA as . . . candidate[s] for cleanup because [they] pose[] a risk to human health and/or the environment."[8] Across the country, the Environmental Protection Agency ("EPA") has identified 1,782 sites where a hazardous substance release has occurred.[9]

Largely motivated by the Love Canal disaster and the threat of other such environmental hazards across the country,[10] Congress enacted CERCLA "with the goal of preventing human exposure to toxic substances through remediation of contaminated sites."[11] In order to achieve this goal, Congress included a "polluter pays" principle,[12] with the aim of "assuring that those who caused chemical harm bear the costs of that harm."[13] Nevertheless, while Congress was trying to assure that those who *caused* chemical harm bear the costs, CERCLA imposes strict liability on four categories of Potentially Responsible Parties ("PRPs").[14] In defining one of these categories of PRPs, CERCLA provides that "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" can be held liable for response costs incurred to clean up the environmental hazard.[15]

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[6] Eckardt C. Beck, *The Love Canal Tragedy*, 5 EPA J. 17, 18 (1979), http://www2.epa.gov/aboutepa/love-canal-tragedy [https://perma.cc/7HK8-SAAG].

[7] *Search for Superfund Sites Where You Live*, EPA, http://www2.epa.gov/superfund/search-superfund-sites-where-you-live#basic (last updated Aug. 12, 2016) (select Utah from the "Select a State" dropdown and click "Go") [https://perma.cc/S7JE-BF9E].

[8] *TOXMAP FAQ*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://toxmap.nlm.nih.gov/toxmap/faq/2009/08/what-are-the-superfund-site-npl-statuses.html (last updated Oct. 2016) [https://perma.cc/8Y4B-RT5S].

[9] Fifty-three of the sites have been proposed for cleanup, 1,337 have been approved and listed on the National Priority List for cleanup, and 392 have gone through the cleanup process and been deleted from the National Priority List. *NPL Site Totals by Status and Milestone*, EPA, http://www2.epa.gov/superfund/npl-site-totals-status-and-milestone (last updated Oct. 3, 2016) [https://perma.cc/E3NJ-7WX9].

[10] *See* ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT 123 (2d ed. 2008).

[11] Emilee Mooney Scott, Note, *Bona Fide Protection: Fulfilling CERCLA's Legislative Purpose by Applying Differing Definitions of "Disposal,"* 42 CONN. L. REV. 957, 966 (Feb. 2010).

[12] *Id.*

[13] United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (quoting SENATE COMM. OF ENV'T & PUB. WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, S. DOC. NO. 97-14, at 320 (2d Sess. 1983)).

[14] *See id.* at 259.

[15] 42 U.S.C. § 9607(a)(2) (2012).

The problem this classification of PRP presents is that "disposal" has been interpreted differently by courts in regard to the natural spreading of contamination known as "passive migration," creating a circuit split. In the Fourth Circuit, passive migration of a pollutant constitutes disposal and creates liability.[16] In the Second and Third Circuits, passive migration isn't necessarily disposal,[17] but neither has it gone as far as the Sixth Circuit which requires active, human conduct in order for liability to attach.[18] The Ninth Circuit ignores the passive/active distinction and instead uses a more case-by-case analysis to see if the activity fits any of the terms used to define disposal.[19] Under the Ninth Circuit's approach, passive migration from an uncontained deposit of a pollutant would be outside the definition of disposal as "leeching" is not a listed term, while the passive escape of a pollutant from a barrel would be considered disposal because "leaking" is included in the definition of disposal.[20] Yet, despite this circuit split, the Supreme Court of the United States has refused to address the inconsistent application of liability for owners and operators at the time of disposal.

This Note addresses whether the passive migration of a hazardous substance meets CERCLA's definition of disposal,[21] making a prior owner or operator at the time of such passive migration liable for response costs as a PRP. Section II identifies the purposes of CERCLA and the major, relevant provisions addressing: (A) who is a PRP; (B) the liability that PRPs face; and (C) the defenses available to PRPs. Section III explains the importance of the definition of disposal in determining whether or not an entity is a PRP and explores how courts have interpreted disposal in CERCLA cases. Section IV examines how different interpretations of disposal in the U.S. Courts of Appeals potentially impact the behavior of entities and how these differing incentives comport with the congressionally defined purposes of CERCLA.

II. CONGRESS'S CREATION OF CERCLA

Congress created CERCLA to serve the following two purposes: (1) to protect the public by effectuating the cleanup of hazardous waste sites; and (2) to force those responsible for the pollution to pay the costs of cleanup.[22] CERCLA is a remedial statute, which not only creates strict liability but also applies retroactively

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[16] Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992).

[17] ABB Indus. Sys. v. Prime Tech., Inc., 120 F.3d 351, 358–59 (2d Cir. 1997); United States v. CDMG Realty Co., 96 F.3d 706, 711 (3d Cir. 1996).

[18] Bob's Beverage, Inc. v. Acme, Inc., 264 F.3d 692, 697 (6th Cir. 2001).

[19] Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 879–80 (9th Cir. 2001).

[20] *Id.* at 879.

[21] 42 U.S.C. § 9601(29) (2012).

[22] CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2180 (2014); JOHN S. APPLEGATE & JAN G. LAITOS, ENVIRONMENTAL LAW: RCRA, CERCLA, AND THE MANAGEMENT OF HAZARDOUS WASTE 128 (2006).

to past conduct occurring before enactment of the statute.[23] In order to achieve its dual purposes, CERCLA: (i) identifies PRPs; (ii) generally holds them jointly and severally liable for response costs; and (iii) provides only three limited defenses to liability.[24]

Under CERCLA, either a governmental or non-governmental party can bring a suit to "be reimbursed for response costs incurred by it regardless of its liability."[25] In order to "establish[] a prima facie case of liability in a cost-recovery lawsuit," the plaintiff must show: "(1) the site is a 'facility' from which (2) a 'release' or 'threatened release' into the environment of (3) a 'hazardous substance' occurred (4) that caused the plaintiff to incur 'response costs,' and (5) the defendant falls within one or more classes of responsible persons defined by CERCLA."[26] PRPs are generally jointly and severally liable to the government for costs.[27] This structure ensures to the maximum extent possible that at least some responsible party will bear the costs of cleanup, and not the government, without completely sacrificing the ability of multiple PRPs to work out a more equitable split. Specifically, CERCLA incorporates principles of contribution and equitable apportionment, allowing for the opportunity for a more equitable split of costs among the liable PRPs.[28]

A. Who Is a Responsible Party Under CERCLA?

CERCLA identifies four categories of persons who are PRPs liable for response costs:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration

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[23] APPLEGATE & LAITOS, *supra* note 22, at 129–30.

[24] *See* 42 U.S.C. § 9607 (2012).

[25] VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION: A COMPREHENSIVE GUIDE TO SUPERFUND LAW 138 (1992).

[26] *Id.* at 138 (citing United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1378–79 (8th Cir. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152 (1st Cir. 1989); CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 786 (W.D. Mich. 1989)).

[27] *See id.* at 137–38.

[28] *See* CHRISTOPHER P. DAVIS, THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION § 14.01(6)(c)(iv) (last updated by Susan M. Cooke May 2009).

> vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .[29]

"Once an entity is identified as a PRP, it may be compelled to clean up a contaminated area or reimburse the Government for its past and future response costs."[30]

B. Liability as a PRP

CERCLA is a strict liability statute, and case law also presumes that PRPs are jointly and severally liable for the costs of cleanup regardless of fault or degree of contribution to the need for cleanup.[31] Such a structure works to achieve one of the primary purposes of CERCLA, forcing polluters to pay for the cleanup of their pollution.

However, the strict liability nature of CERCLA can capture owners and operators who were not actually responsible for the pollution. For example, let's assume that A owns a parcel of land and buries a barrel of hazardous waste in the ground. A sells to B, who knows nothing of the barrel of hazardous waste buried in the land, but while B owns the land, the barrel corrodes and the hazardous substance leaks out of the barrel into the soil. B cannot be said to be a cause of the pollution but nevertheless becomes a PRP under CERCLA because he was the owner at the time of disposal of the hazardous substance.

Fortunately, there are provisions that seek to address this by (1) allowing a PRP forced to pay response costs to seek contribution from other PRPs,[32] (2) providing three narrow defenses that may absolve the liability of a PRP in some situations,[33] and (3) allowing settlement between a party and the government.[34] For example, a PRP can seek contribution for response costs under § 9613(f) by establishing a prima facie case similar to what is necessary in a fee-recovery situation.[35] In such an action, the court may, if sufficient evidence is provided, proportion costs on an equitable basis so that a PRP who contributed almost none

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[29] 42 U.S.C. § 9607(a) (2012).

[30] Anderson Bros v. St. Paul Fire & Marine Ins., 729 F.3d 923, 929 (9th Cir. 2013) (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 609 (2009)).

[31] APPLEGATE & LAITOS, *supra* note 22, at 129–30.

[32] 42 U.S.C. § 9613(f)(1) (2012).

[33] 42 U.S.C. § 9607(b).

[34] 42 U.S.C. § 9622.

[35] AlliedSignal, Inc. v. Amcast Int'l Corp., 177 F. Supp. 2d 713, 734–35 (S.D. Ohio 2001).

of the hazardous substances can be awarded reimbursement for most of the response costs from the party or parties deemed responsible.[36] These provisions serve to reduce the likelihood that the government will have to bear the costs of cleanup in situations where the original polluter has become insolvent but still allow mechanisms that a PRP can utilize to equalize their loss if others share in responsibility.

C. CERCLA's Express Defenses to PRP Liability

Despite CERCLA's strict liability nature, the statute expressly provides PRPs with three defenses.[37] PRPs are not liable when the release and damages "were caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant . . . ."[38]

Once a party is found to be a PRP, only the defenses expressed in the statute can absolve liability.[39] Equitable defenses are not available to defeat liability under CERCLA.[40] However,

> In addition to the third-party defense under § 9706(b)(3), the defendant may assert an 'innocent landowner' defense. In order to plead this defense, the owners of the property must show, 'by a preponderance of the evidence, that the disposal of the hazardous substances occurred before they purchased the property, and that at the time of acquisition they "did not know and had no reason to know" that the substances had been disposed at the facility.'[41]

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[36] *See id.*

[37] 42 U.S.C. § 9607(b) (2012).

[38] *Id.*

[39] Cal. *ex rel.* Cal. Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 672 (9th Cir. 2004) ("Every court of appeals that has considered the precise question whether § 9607 permits equitable defenses has concluded that it does not, as the statutory defenses are exclusive.") (citing Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990) (questioned on other grounds in Key Tronic Corp. v. United States, 511 U.S. 809 (1994)); Blasland, Bouck & Lee, Inc. v. City of North Miami, 283 F.3d 1286, 1304 (11th Cir. 2002) (finding CERCLA "explicitly limits defenses to those three enumerated in section 9607(b)."); Corp. v. Enenco, Inc., 9 F.3d 524, 530 (6th Cir. 1993) ("By its terms, then, section 107 liability is only barred by a limited number of enumerated causation-based affirmative defenses. The clear language of section 107(a) and (b), 42 U.S.C. § 9607(a)(b), manifests the congressional intent to foreclose any non-enumerated defenses to liability."); Town of Munster v. Sherwin–Williams Co., 27 F.3d 1268, 1270 (7th Cir.").

[40] See cases cited *supra* note 39.

[41] United States v. Timmons Corp., No. CIV103CV00951RFT, 2006 WL 314457, at *11 (N.D.N.Y. Feb. 8, 2006) (quoting United States v. A & N Cleaners & Launderers, Inc., 842 F. Supp. 1543, 1547 (S.D.N.Y.1994)).

The Innocent Landowner Defense was created as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[42] SARA defines "contractual relationship" to allow a PRP to escape liability if it can show that it

> acquired the land after the disposal of the hazardous substance thereon, and either (i) the defendant did not know, or had no reason to know, of the hazard when he acquired the land, or (ii) the defendant is a government body which legally acquired the property, or (iii) the property was inherited.[43]

Some circuits, such as the Third Circuit in *U.S. v. CDMG Realty*, have limited the use of the Innocent Landowner Defense to PRPs who are current owners and operators. Conversely, the Second Circuit allows the defense to be used both by current owners or operators and by PRPs found in the second category for owners and operators "at the time of disposal" believing this result is clearly written into the statute.[44]

The defenses provided in § 9607(b) are narrowly applied.[45] Once a party has been labeled as a PRP, escaping liability becomes difficult. Therefore, much CERCLA litigation centers on whether or not an entity is a PRP.

III. INTERPRETATION OF "DISPOSAL" IN CERCLA CASES

The second category of PRPs attaches liability to owners and operators of a facility "at the time of disposal of any hazardous substance."[46] CERCLA's definition of disposal adopts the definition provided in the Solid Waste Disposal Act,[47] which defines disposal as

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[42] Pub. L. No. 99-499, § 1, 100 Stat. 1613 (1986).

[43] Rosemary J. Beless, *Superfund's "Innocent Landowner" Defense: Guilty Until Proven Innocent*, 17 J. LAND RESOURCES & ENVTL. L. 247, 253 (1997) (citing 42 U.S.C. § 9601(35)(A) (1994)); *CDMG Realty Co.*, 96 F.3d at 716 n.6.

[44] *Carson Harbor Vill., Ltd.*, 270 F.3d at 883 n.10 ("It is an open question whether the innocent owner defense is available to only current owners, or both current and past owners."). *Compare CDMG Realty Co.*, 96 F.3d at 716 (explaining that the Innocent Landowner Defense is limited in use to current owners) *with Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 91 (2d Cir. 1992) ("The second sentence of § 101(35)(C) makes it clear that Congress intended the innocent landowner exception to allow innocent purchasers of property—i.e. purchasers who are unaware, despite appropriate inquiry, that hazardous substances have been placed or disposed of on the property—subsequently to sell the property without losing their exemption from liability caused solely by a third party 'in connection with' such a sale.").

[45] FOGLEMAN, *supra* note 25, at 226.

[46] 42 U.S.C. § 9607(a)(2) (2012).

[47] 42 U.S.C. § 9601(29) (2012).

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.[48]

While the initial disposal may be somewhat straightforward, federal courts are split on whether the passive migration of a hazardous substance that occurs after the initial disposal continues to constitute disposal that creates liability for subsequent owners.[49] These courts have identified two distinct circumstances that can differentiate whether or not passive migration can constitute disposal under CERCLA: (1) the continued leakage of a hazardous substance from a container that the owner or operator does not know exists; and (2) the spread of an uncontained hazardous substance through the soil. Both situations involve the same level of culpability on the party of the owner or operator but can lead to different determinations of liability in most circuits.[50]

A. Fourth Circuit Holds Passive Migration Can Create CERCLA Liability

The Fourth Circuit was one of the first federal circuits to squarely address the issue of passive migration as disposal and did so in *Nurad, Inc. v. William E. Hooper & Sons Co.*[51] In *Nurad*, the trial court found that a prior owner or operator of the facility where underground storage tanks leaked a hazardous substance into the environment could not be liable under CERCLA "even though passive migration of hazardous substances may have occurred during his ownership—since he did not take an active role in managing the tanks or their contents."[52] On appeal, the Fourth Circuit reversed, reasoning that the district court's "construction

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[48] 42 U.S.C. § 6903(3) (2014).

[49] *Carson Harbor Vill., Ltd.*, 270 F.3d at 875 ("Other circuit courts have taken a variety of approaches. Those opinions cannot be shoehorned into the dichotomy of a classic circuit split. Rather, a careful reading of their holdings suggests a more nuanced range of views, depending in large part on the factual circumstances of the case."). *Compare 150 Acres of Land*, 204 F.3d at 706 (concluding that absent "any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property," there is no "disposal"), *ABB Indus. Sys., Inc.*, 120 F.3d at 359 (holding that prior owners are not liable for the gradual spread of contamination underground), *and CDMG Realty Co.*, 96 F.3d at 722 (holding that "the passive spreading of contamination in a landfill does not constitute 'disposal' under CERCLA"), *with Nurad, Inc.*, 966 F.2d at 846 (holding past owners liable for the "disposal" of hazardous wastes that leaked from an underground storage tank).

[50] FOGLEMAN, *supra* note 25, at 193.

[51] 966 F.2d 837 (4th Cir. 1992).

[52] *Id.* at 844.

of 'disposal' ignores the language of the statute, contradicts clear circuit precedent, and frustrates the fundamental purposes of CERCLA."[53]

The Fourth Circuit examined the language of the statutory definition of disposal by conceding that some of the terms used require "active human participation," others, such as "leak" or "spill" could be passive without any such active human participation.[54] It referred to its prior ruling in *United States v. Waste Ind., Inc.*,[55] which established that the definition of disposal under 42 U.S.C. § 6903 includes "not only active conduct, but also the reposing of hazardous waste and its subsequent movement through the environment."[56] The court also supported its inclusion of passive conduct in the definition of disposal by claiming that "the district court's requirement of active participation would frustrate the statutory policy of encouraging 'voluntary private action to remedy environmental hazards.'"[57] It explained that under an interpretation of disposal that doesn't hold passive owners and operators liable, a perverse incentive would be created in which "an owner could avoid liability simply by standing idle while an environmental hazard festers on his property . . . [S]o long as he transfers the property before any response costs are incurred."[58] In contrast, "[a] more conscientious owner who undertakes the task of cleaning up the environmental hazard would, on the other hand, be liable as the current owner of the facility, since 'disposal' is not a part of the current owner liability scheme under 42 U.S.C. § 9607(a)(1)."[59] The Fourth Circuit pointed out that such an application would not only create such a perverse incentive but also impose liability on a current owner who is just as passive and innocent as a prior owner who escapes liability, which seems to be incongruent with the strict liability that CERCLA enforces.[60] For these reasons, the Fourth Circuit held that "§ 9607(a)(2) imposes liability not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was 'spilling' or 'leaking.'"[61]

B. Third Circuit Finds Passive Migration Isn't Necessarily "Disposal"

The next major decision regarding passive migration's implications under CERCLA came two years later in *United States v. CDMG Realty Co.*,[62] where the Third Circuit held that passive migration of contaminants dumped in the land does

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[53] *Id.*
[54] *Id.* at 845.
[55] 734 F.2d 159 (4th Cir. 1984).
[56] *Nurad, Inc.*, 966 F.2d at 845 (citing *Waste Inc.,* 734 F.2d at 164).
[57] *Id.* (quoting *In re* Dant & Russell, Inc., 951 F.2d 246, 248 (9th Cir. 1991)).
[58] *Id.*
[59] *Id.* (citing New York v. Shore Realty, 759 F.2d 1032, 1044 (2d Cir. 1985)).
[60] *Id.* at 845–46.
[61] *Id.* at 846.
[62] 96 F.3d 706 (3d Cir. 1996).

not necessarily constitute disposal that would make a prior owner or operator liable for response costs.[63] In *CDMG*, the prior owner, Dowel, purchased a landfill that contained hazardous substances, but no waste was deposited during Dowel's ownership of the property.[64] Dowel's only activity at the site was "soil investigation . . . to determine the land's ability to support construction."[65] In finding that Dowel was not a PRP as an owner "at the time of disposal," the court examined: (1) the language of the definition of disposal itself;[66] (2) a comparison of the definitions and usage of disposal and "release" in CERCLA;[67] (3) the context in which disposal is used in the second category of PRPs;[68] (4) how the Innocent Land Owner defense contained within CERCLA suggests meaning;[69] and (5) how different interpretations serve the purposes of CERCLA.[70]

First, *CDMG* examined the plain meaning of the terms used to define disposal by focusing on the two words that could be considered passive, "leaking" and "spilling."[71] However, the court pointed out that while "leaking" and "spilling" have definitions that do not require "affirmative human action," other definitions of "leaking" and "spilling" do require "affirmative human action."[72] It continued its examination of "leaking" and "spilling" by examining the context in which those words are used, because "one may infer meaning by examining the surrounding words."[73] Without providing a definitive determination as to the meaning of these terms, the Third Circuit pointed out that "[t]he words surrounding 'leaking' and 'spilling'—'discharge,' 'deposit,' 'injection,' 'dumping,' and 'placing'—all envision a human actor."[74]

Therefore, "Congress may have intended active meanings of 'leaking' and 'spilling.'"[75] Nevertheless, the court stated that it did not need to come to a determination on whether or not "leaking" and "spilling" as used in the definition of disposal requires active human conduct, because "neither word denotes the gradual spreading of contamination alleged here," explaining that the spread of contamination simply cannot be said to be either "leaking" or "spilling" regardless of whether either term includes passive conduct.[76]

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[63] *Id.* at 710–11.
[64] *Id.* at 711.
[65] *Id.*
[66] *Id.* at 714.
[67] *Id.* at 714–15.
[68] *Id.* at 715–16.
[69] *Id.* at 716–17.
[70] *Id.* at 717–18.
[71] *Id.* at 714.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

Second, the Third Circuit compared the definition of disposal with the definition of "release" used in CERCLA, pointing to two factors influencing the court's interpretation of disposal.[77] Congress included "disposing" in the definition of "release," which indicates that "release" is broader in meaning than disposal.[78] Congress also used the term "leaching" in its definition of "release," which demonstrates that Congress knew how to refer to the "spreading of waste" and chose to not include such activity in the definition of disposal.[79]

Third, the Third Circuit further supported its position that the passive migration in this case was not intended to be included in the definition of disposal by examining the language of CERCLA's liability provision, § 9607(a).[80] One of the categories of PRPs is "any person who at the time of disposal . . . owned or operated any facility."[81] Interpreting disposal to include the passive spread of a pollutant "would be a rather complicated way of making liable all people who owned or operated a facility after the introduction of waste into the facility," and there would be no need for § 9607(a)(1), which assigns liability to the current owner or operator.[82]

Fourth, *CDMG* stated that considering passive migration to constitute disposal would also invalidate the Innocent Landowner Defense, which provides a defense when the defendant shows, in addition to other elements, that he or she acquired the real property "after the disposal."[83] If the spread of the contaminant constitutes disposal, there will almost never be a time "after the disposal" to which the defense could apply, because disposal would be ongoing until the cleanup of the hazardous substance had been undertaken.[84]

Fifth, the Third Circuit explained that its interpretation of disposal as not including passive migration in this case "is consistent with CERCLA's purposes" of "facilitat[ing] the cleanup of potentially dangerous hazardous waste sites and to force polluters to pay the costs associated with their pollution."[85] Specifically, despite an owner's ability to evade liability for transferring the land that was previously contaminated, the Innocent Landowner Defense could provide similar protection, and there are other disincentives to an owner who knowingly transfers contaminated land.[86] Moreover, even if such an owner can escape liability, there

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[77] *Id.* at 714–15.
[78] *Id.* at 715.
[79] *Id.* at 714.
[80] *Id.* at 715–16.
[81] *Id.* at 715 (quoting 42 U.S.C. § 9607(a)(2) (2012)).
[82] *Id.*
[83] *Id.* at 716 (quoting 42 U.S.C. § 9601(35)(A) (2012)).
[84] *Id.* at 716.
[85] *Id.* at 717 (citations omitted).
[86] *Id.* at 717–18 (stating that a prior owner can become liable under CERCLA simply for knowing of the release or threatened release of a hazardous substance and not disclosing such knowledge to a person to whom she is transferring the property) (citing 42 U.S.C. § 9601(35)(C) (2012)).

are other parties, such as the actual polluter, who can still be found liable for the response costs.[87]

For those reasons, the Third Circuit held that the spread of contamination dumped in the land prior to a person's ownership or operation does not of itself constitute a disposal that makes that person liable under CERCLA.[88]

C. The Second Circuit Adopts the Analysis of CDMG to Hold that Passive Migration Does Not Constitute "Disposal" Under CERCLA

In 1997, in *ABB Industrial Systems v. Prime Technology, Inc.*,[89] the Second Circuit followed the *CDMG* ruling and held "prior owners and operators of a site are not liable under CERCLA for mere passive migration."[90] In *ABB*, ABB Industrial Systems, Inc. was the current owner when it discovered that the property was contaminated with several hazardous substances requiring cleanup.[91] It sued Pacific Scientific Co. ("Pacific"), General Resistance, Inc., and Zero-Max, Inc. as PRPs.[92] There was strong evidence that Pacific had contaminated the property, but no evidence that either General Resistance or Zero-Max had caused any new contamination.[93] However, ABB claimed that General Resistance and Zero-Max were liable under § 9607(a)(2) as prior owners or operators at the time of disposal, arguing that "the chemicals gradually spread[ing] underground (passive migration)" constituted disposal.[94]

In rejecting ABB's argument that passive migration constitutes disposal under CERCLA, the Second Circuit stated that it was "persuaded by the Third Circuit's reasoning" from *CDMG*.[95] Instead of "reinventing the wheel" used to analyze disposal under CERCLA, the court "simply summarize[d] . . . what [it] believe[d] to be the Third Circuit's most persuasive arguments."[96] First, none of the terms used to define disposal are "commonly used to refer to the gradual spreading of hazardous chemicals already in the ground."[97] Second, the court pointed to the differences between the use of "release" and disposal, relying on a presumption that Congress intended there to be the differences there are in its word choices and that Congress chose to include "leaching" in defining "release" but exclude it from the definition of disposal.[98] Third, the Second Circuit pointed to the Third Circuit's

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[87] *Id.* at 718.
[88] *Id.* at 710, 718.
[89] 120 F.3d 351 (2d Cir. 1997).
[90] *Id.* at 359.
[91] *Id.*
[92] *Id.* at 354.
[93] *Id.* at 354–55.
[94] *Id.* at 356.
[95] *Id.* at 358.
[96] *Id.*
[97] *Id.*
[98] *Id.*

understanding of the Innocent Landowner Defense as supporting the exclusion of passive migration from disposal.[99] However, it ultimately did not adopt this argument because the Second Circuit allows prior owners to use the Innocent Landowner Defense, while the Third Circuit and other circuits allow only the current owner to use the defense, which changes the argument significantly.[100] Fourth, "[o]ne of CERCLA's goals is 'to force polluters to pay the cost associated with their pollution.'"[101]

Therefore, a person who "is not a polluter and is not one upon whom CERCLA aims to impose liability" should not be held liable as a PRP.[102] "For these reasons, [the Second Circuit held] that prior owners and operators of a site are not liable under CERCLA for mere passive migration."[103]

D. Sixth Circuit Holds that Active Human Conduct Is a Requirement of "Disposal"

The Sixth Circuit was next to address the issue of what is required of disposal under CERCLA in the cases of *United States v. 150 Acres of Land*[104] and *Bob's Beverage, Inc. v. Acme, Inc.*[105] In *150 Acres*, the court looked at the definition of disposal as it plays into the Innocent Landowner Defense in a context where the current owners of a large property containing several drums filled with hazardous substances did not engage in any active conduct with the hazardous substances or even know of its presence on the property.[106]

The Sixth Circuit examined the definition of disposal in this situation because the Innocent Landowner Defense allows a person to escape liability when that person acquired the land "after the 'disposal' or 'placement' of the substances" and either "acquired their interests by inheritance or bequest" or, after an appropriate inquiry, had no reason to know of the substances.[107] In defining disposal to not include passive migration, the court referred to *CDMG* and *ABB* and supported its decision by stating: (1) "'disposal' is defined primarily in terms of active words"; (2) "'release' must be broader than 'disposal,' because disposal is included within release"; and (3) in considering the statutory scheme, it makes sense that "'disposal' stand for activity that precedes the entry of a substance into the environment and 'release' stand for the actual entry of substances into the environment."[108]

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[99] *Id.*
[100] *Id.*
[101] *Id.* (quoting *CDMG Realty Co.*, 96 F.3d at 717).
[102] *Id.* at 358–59.
[103] *Id.* at 359.
[104] 204 F.3d 698 (6th Cir. 2000).
[105] 264 F.3d 692 (6th Cir. 2001).
[106] *150 Acres of Land*, 204 F.3d at 702–06.
[107] *Id.* at 704 (quoting 42 U.S.C. § 9601(35) (2002)).
[108] *Id.* at 706.

One year later, the Sixth Circuit affirmed this definition of disposal in *Bob's Beverage*, holding that "[d]isposal requires evidence of 'active human conduct,' and addresses 'activity that precedes the entry of a substance into the environment.'"[109] The holdings from *150 Acres* and *Bob's Beverage* place the Sixth Circuit at the end of the disposal definition spectrum with the narrowest definition of disposal.

E. Ninth Circuit Holds Rejects Passive Versus Active Distinction in Interpreting "Disposal" Under CERCLA

In *Carson Harbor Village v Unocal Corp.*,[110] the Ninth Circuit addressed the issue of whether the spread of contaminants in the land constitutes disposal, holding that such migration through the soil does not constitute disposal under CERCLA[111] but suggesting that other forms of passive migration may constitute disposal.[112] Notably, the Ninth Circuit also eschewed the "active/passive" distinction that the other circuits had found key.

The Ninth Circuit began its interpretation of disposal by first looking to the plain meaning of the language and "conclude[d] that 'release' is broader than 'disposal,' because the definition of 'release' includes 'disposing.'"[113] The court also considered but "reject[ed] the absolute binary 'active/passive' distinction used by some courts," because the terms used in both definitions included both passive and active terms.[114] Instead, the Ninth Circuit examined each of the terms used to define disposal in relation to the facts of the case to determine if disposal occurred during the "gradual passive migration of contamination through the soil."[115] It noted that the passive soil migration could be said to be "spreading," "migration," "seeping," "oozing," and "possibly 'leaching'" but none of these can fit within the plain and common meaning of the terms defining disposal.[116]

However, while the Ninth Circuit concluded that the spread of contaminants through the soil did not constitute disposal, it also rejected the "active/passive" distinction. As a result, it did not create a definition of disposal that requires active human conduct as the Sixth Circuit used in *150 Acres* and *Bob's Beverage*. In fact, the court in *Carson Harbor* stated that "[t]he circumstances here are not like that of the leaking barrel or underground storage tank . . . or a vessel or some other container that would connote 'leaking,'" and therefore constitute disposal under CERCLA.[117]

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[109] 264 F.3d at 697 (quoting *150 Acres of Land*, 204 F.3d at 706).
[110] 270 F.3d 863 (9th Cir. 2001).
[111] *Id.* at 867.
[112] *Id.* at 880.
[113] *Id.* at 878.
[114] *Id.* at 878–79.
[115] *Id.* at 879.
[116] *Id.*
[117] *Id.* at 879–80.

Carson Harbor then looked to the statute as a whole in order to "assess whether [its] interpretation of 'disposal' is in accord with the statute's purpose, and creates or minimizes any internal inconsistency in CERCLA."[118] First, the court identified that the primary purpose of CERCLA is "to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites" and the secondary purpose is "assuring that 'responsible' persons pay for the cleanup."[119] The court concluded that its interpretation, which holds a passive owner liable for leaking containers but not soil migration, serves these dual purposes by encouraging landowners to inspect their property for such containers and prevent contamination or clean it up to prevent an increase in costs.[120] Next, the court concluded that its interpretation of disposal fits the liability provisions of CERCLA best because "the extreme positions on either side [of the active/passive debate] render the structure awkward."[121] "[H]ad Congress intended *all* passive migration to constitute a 'disposal,' then disposal is nearly always a perpetual process," and there would be no need for separate categories for current owners and operators and another category for prior owners and operators, because both would be equally owners and operators at the time of disposal.[122] "On the other extreme, had Congress intended 'disposal' to include only releases directly caused by affirmative human conduct, then it would make no sense to establish a strict liability scheme assigning responsibility to 'any person who at the time of disposal . . . owned or operated any facility.'"[123]

In continuing to examine the statute for internal inconsistencies based on the interpretation of disposal, the Ninth Circuit also recognized that "an interpretation of 'disposal' that encompasse[s] all subsoil passive migration" essentially eliminates the "innocent landowner defense."[124] It supported this conclusion by noting that considering all passive migration disposal would lead to almost no one being able to use the defense because the disposal would be never ending and thus no owner could acquire the property *after* the disposal, as the defense requires.[125] Moreover, under an interpretation that finds that no passive migration can constitute disposal, the defense is useless because "there would exist no landowner capable of presenting an innocent landowner defense who would not already be excluded from liability in the first place."[126] For these reasons, the Ninth Circuit held that "passive migration of contaminants through soil . . . [is] not a 'disposal' under § 9607(a)(2)."[127]

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[118] *Id.* at 880.
[119] *Id.* (citations omitted).
[120] *Id.* at 881.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 882.
[125] *Id.* at 881.
[126] *Id.* at 883 (citation omitted).
[127] *Id.* at 887.

IV. EXAMINING THE EFFECTS OF THE DIFFERENT INTERPRETATIONS OF "DISPOSAL"

"As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals."[128] However, does a liberal definition of disposal, resulting in liability for entities that did nothing more than own or operate the property during the passive migration of a hazardous substance that they were unaware of, actually effectuate the goals of CERCLA: (1) to protect the public by effectuating the cleanup of hazardous waste sites; and (2) to force those responsible for the pollution to pay the costs of cleanup?[129]

A. Punishing Passive Migration to Achieve the Purposes of CERCLA

In *Nurad*, the Fourth Circuit supported its holding that "§ 9607(a)(2) imposes liability not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was 'spilling' or 'leaking,'"[130] by stating that a "requirement of active participation would frustrate the statutory policy of encouraging 'voluntary private action to remedy environmental hazards.'"[131] It explained that, under an interpretation of disposal that requires active conduct, "an owner could avoid liability by simply standing idle while an environmental hazard festers on his property . . . so long as he transfers the property before any response costs are incurred."[132] In contrast, a current owner who likewise does nothing about an environmental hazard but is unable to transfer the property before response costs are incurred, will be found liable as a current owner or operator because § 9607(a)(1) does not require disposal.[133] The court concluded that such a scheme "which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind" when it enacted CERCLA.[134]

However, there are two problems with the Fourth Circuit's argument. First, it ignores the existence of the Innocent Landowner Defense. Second, while its solution does remove some of the "rewards [for] indifference," it still does nothing to encourage voluntary cleanups.

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[128] United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (citing B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989)).

[129] CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2180 (2014); APPLEGATE & LAITOS, *supra* note 22, at 128–29.

[130] *Nurad, Inc.*, 966 F.2d at 846.

[131] *Id.* at 845.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 845–46.

The Fourth Circuit conducted its analysis describing the supposed outcomes of a particular definition of disposal without incorporating the Innocent Landowner Defense included in the 1986 SARA amendments.[135] Its argument included the premise that a current landowner cannot escape liability if he or she owns or operates the property when response costs are incurred.[136] However, the Innocent Landowner Defense provides protection to a defendant who can "show, by a preponderance of the evidence, that the disposal of the hazardous substances occurred before they purchased the property, and that at the time of acquisition they did not know and had no reason to know that the substances had been disposed at the facility."[137] Thus, in the scenario the Fourth Circuit presented, the current owner could escape liability so long as he or she did not know or have reason to know of the contamination at the time he or she acquired the property.

However, because some circuits allow only current owners and operators to use the Innocent Landowner Defense, working through the Fourth Circuit's argument while considering the Innocent Landowner Defense is difficult.[138] In circuits that limit the Innocent Landowner Defense to current owners and operators, the Fourth Circuit's argument fails, because prior owners and operators who are just as innocent as the current owner would be liable, while the current owner would be excused from liability.

As a result, the Fourth Circuit's interpretation of disposal does not seem to serve the purposes of CERCLA. In circuits that allow both current and prior landowners to use the Innocent Landowner Defense, the Fourth Circuit's argument holds up better because current owners are still encouraged to address environmental hazards they identify and because they can escape liability without transferring the property before response costs are incurred. Additionally, prior owners and operators can escape liability, though the burden is on the defendant to establish the elements of the defense. However, this burden shifting serves the purposes of CERCLA by requiring inspection in order to assert the defense and not requiring the plaintiff to prove that the defendant did not inspect the property.

B. Excusing Passive Migrations to Achieve the Purposes of CERCLA

The Second, Third, and Sixth Circuits have all to some extent excused passive conduct from being considered disposal.[139] The Third Circuit concluded its interpretation of disposal "is clearly consistent with the latter purpose" of CERCLA, of "forc[ing] polluters to pay the costs associated with their

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[135] *See id.*

[136] *Id.* at 845.

[137] United States v. Timmons Corp., No. CIV103CV00951RFT, 2006 WL 314457, at *11 (N.D.N.Y. Feb. 8, 2006) (citations omitted).

[138] *Bob's Beverage, Inc.*, 264 F.3d at 697; *ABB Indus. Sys., Inc.*, 120 F.3d at 358–59; *CDMG Realty Co.*, 96 F.3d at 711.

[139] *Bob's Beverage, Inc.*, 264 F.3d at 697–98; *150 Acres of Land*, 204 F.3d at 706; *ABB Indus. Sys.*, 120 F.3d at 359; *CDMG Realty Co*., 96 F.3d at 711.

pollution."[140] This argument is strongly supported by its premise that "[t]hose who owned previously contaminated property where waste spread without their aid cannot reasonably be characterized as 'polluters.'"[141] Therefore, "excluding them from liability will not let those who cause the pollution off the hook."[142] The Third Circuit concluded, therefore, that its holding "will not undermine the goal of facilitating the cleanup of potentially dangerous hazardous waste sites."[143]

Such a statement undersells the impact of the court's holding, however, because its application of CERCLA discourages the cleanup of potentially dangerous hazardous waste sites.[144] "The only prior owners who will not pay any cleanup costs are those who bought and sold the land with no knowledge that the land is contaminated."[145] "In addition, the innocent owner defense encourages potential buyers to investigate the possibility of contamination before a purchase." [146] Therefore, the Third Circuit's interpretation of disposal in conjunction with the Innocent Landowner Defense promotes investigation of potential environmental hazards prior to purchase in order to avoid liability and promotes the reporting of any discovered environmental hazards after taking ownership, because liability can be avoided only by either: (1) reporting the hazard while still owning the property and asserting the Innocent Landowner Defense; or (2) by disclosing the release or threatened release to the person to whom ownership is being transferred, which will almost certainly affect any purchase price because the transferee will be accepting liability for the response costs with no applicable defense under CERCLA.

C. Ignoring the Passive Versus Active Interpretations of "Disposal"

The Ninth Circuit in *Carson Harbor* did not accept the argument that interpreting the definition of disposal to determine if passive migration qualified as disposal required an analysis of the active versus passive nature of the terms used to define disposal.[147] Instead, the Ninth Circuit took a more natural approach to apply the statute by looking at the meaning of each of the words used to define disposal and evaluating whether or not the factual scenario presented in the case could be described by those terms.[148] The court ruled that the factual scenario—contaminants spreading through the soil—could be described as "'spreading,' 'migration,' 'seeping,' 'oozing,' and possibly 'leaching,'" but none of these can fit

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[140] *CDMG Realty Co.*, 96 F.3d at 717.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 718.
[144] *See id.*
[145] *Id.* at 717–18.
[146] *Id.* at 718.
[147] *See Carson Harbor Vill., Ltd.*, 270 F.3d at 878–79.
[148] *Id.*

within the terms defining disposal,[149] "discharge, deposit, injection, dumping, spilling, leaking, or placing."[150] The court emphasized that "[n]othing spilled out of or over anything" and "[t]he circumstances here are not like that of the leaking barrel or underground storage tank envisioned by Congress . . . that would connote 'leaking.'"[151] Therefore, the Ninth Circuit's holding means that whether or not a prior owner who does nothing to spread the contamination, or even know of the existence of contamination, he or she can be liable as a PRP under § 9607 (a)(2) if the actual, responsible polluter put the hazardous substance into some sort of container from which the hazardous substance continues to leak or spill.[152]

The Ninth Circuit claimed that its "conclusion that 'disposal' does not include passive soil migration but that it may include other passive migration that fits within the plain meaning of the terms used to define 'disposal' is consistent with CERCLA's dual purposes."[153] It supported its argument by stating that "if 'disposal' is interpreted to exclude all passive migration, there would be little incentive for a landowner to examine his property for decaying disposal tanks, prevent them from spilling or leaking, or to clean up contamination once it was found."[154] This argument fails on each assertion.

First, there is no need to incentivize repeated inspection of land for hazardous substances by imposing liability for passive leaking and spilling. CERCLA incentivizes the inspection of the property before taking ownership of the property in order to effectively assert the Innocent Landowner Defense.[155] Further, the third-party defense requires that "the defendant establishes by a preponderance of the evidence that . . . he took precautions against foreseeable acts or omissions of any such third party . . . ."[156] Thus, a landowner is incentivized by CERCLA to inspect the property before taking ownership and then to take reasonable action to prevent third parties from contaminating the property. Therefore, because there is little likelihood that anything will be discovered by subsequent inspections of the land that wasn't discovered by the initial inspection of the land, there is no need to incentivize such inspections during ownership.

Second, there is a clear incentive to prevent decaying disposal tanks from spilling or leaking. Even if an owner ignores its potential tort liability stemming from the knowledge of hazardous substances in containers that are decaying, CERCLA provides an incentive to prevent such spills and leaks. If response costs are incurred while in ownership, that owner would be liable.[157] Additionally,

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[149] *Id.* at 879.
[150] 42 U.S.C. § 6903 (2012).
[151] *Carson Harbor Vill., Ltd.*, 270 F.3d at 879.
[152] *See id.* at 879–80.
[153] *Id.* at 881.
[154] *Id.*
[155] *150 Acres of Land*, 204 F.3d at 703.
[156] 42 U.S.C. § 9607(b)(3) (2012).
[157] 42 U.S.C. § 9607(a)(1) (2012).

preventing or reporting the release or threatened release would significantly reduce the response costs of the cleanup needed were a release to actually occur.

Furthermore, the scenario where an owner did not know about a hazardous substance that continued to leak from a container that she did not know existed on her land is a very different situation from that of an owner who knows of decaying containers of hazardous waste on her property and does nothing. While both can be said to be passive in common terms, the latter owner who makes a clear choice to do nothing in the face of a significant risk is more culpable. Such an act of omission is not "passive" in the legal sense,[158] and, therefore the owner will have a difficult argument that she was not liable under § 9607(a)(2).

Further, as discussed above, liability attaches to an owner who knows of a hazardous substance's release or threatened release and transfers the property without disclosing such knowledge. Similarly, this line of logic shows how cleaning up found contamination is already incentivized because the earlier the cleanup is initiated the lower the response costs will be, and there is an increased likelihood of escaping liability through the Innocent Landowner Defense.

The Ninth Circuit pointed out that "[n]o statutory provision is written in a vacuum . . . . [and] [t]hus, we examine the statute as a whole, including its purpose and various provisions."[159] So, while the Ninth Circuit's process of determining the plain language meaning of disposal—looking at the common meaning of the terms used in the definition and comparing them to the factual conduct before them—may have been a more logical approach than that of other circuits that looked at the passive/active dichotomy, the Ninth Circuit's holding leads to an illogical result.

Under the Ninth Circuit's approach, a defendant's liability is dependent on whether or not a third party, which the defendant has no knowledge of, placed the hazardous substance in a container or not before contaminating the land—that is, on whether the waste can actually spill or leak from a container or on whether it can only migrate through the soil.[160] The Ninth Circuit defended its holding by arguing that "had Congress intended 'disposal' to include only releases directly caused by affirmative human conduct, then it would make no sense to establish a strict liability scheme . . . . Rather, the statute would have a straightforward causation requirement."[161] However, while courts have interpreted CERCLA to be a strict liability statute, "the text of CERCLA is ambiguous about the liability it imposes."[162] Further, if Congress did intend to create a strict liability statute, as courts have determined, there are other reasons to structure the statute as they did, such as shifting the burden to the defendant in order to ease prosecution.

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[158] *See* WILLIAM L. PROSSER, LAW OF TORTS 339 (4th ed. 1971).

[159] *Carson Harbor Vill., Ltd.*, 270 F.3d at 880 (citing McCarthy v. Bronson, 500 U.S. 136, 139 (1991)).

[160] *See id.* at 879–80.

[161] *Id.* at 881.

[162] APPLEGATE & LAITOS, *supra* note 22, at 130.

The Ninth Circuit pointed to the Innocent Landowner Defense to support its interpretation of disposal on the basis that excluding all passive migration from disposal "would eliminate the need for an innocent landowner defense altogether." [163] However, this argument ignores the fact that the Innocent Landowner Defense would still be used by current owners and operators found liable under § 9607(a)(1) because disposal is not a requirement under that category of PRP.[164] Notably, a representative defending the 1986 amendments argued "that wholly innocent landowners will not be held liable" and it seems likely the amendment was trying to equalize the excuse of liability among "innocent" current owners with that of "innocent" prior owners.[165]

V. CONCLUSION

It seems clear, through the 1986 SARA, that Congress did not want innocent parties who conducted due diligence in inspecting the land to be liable under CERCLA. Thus, expanding CERCLA's definition of disposal to attach liability to passive conduct is inconsistent with Congress's intent. Therefore, in order to align enforcement of CERCLA with its dual purposes and Congress's intent in enacting the Act, disposal should be interpreted to exclude passive migration of hazardous substances when the owner or operator knows nothing of the presence of the hazardous substance that is spreading.

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[163] *Carson Harbor Vill., Ltd.*, 270 F.3d at 883.

[164] 42 U.S.C. § 9607(a)(1) (2012).

[165] *See Carson Harbor Vill., Ltd.*, 270 F.3d at 887 (quoting 131 CONG. REC. 34715 (1985) (statement of Rep. Frank)).