

DISPOSING OF LEAKS AND SPILLS: PASSIVE DISPOSAL OF HAZARDOUS WASTES UNDER CERCLA

Even in a supposedly modern and technologically advanced world, most people have no reason to think about what happens to hazardous waste, or the problems that it poses for society. Most of us will never witness a hazardous waste release, and many of us have never heard of the tragedy of Love Canal.¹ Nevertheless, as Love Canal reminded America decades ago, hazardous waste disposal poses significant health risks and economic costs for our society.

The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) imposes liability for and regulates such hazardous waste cleanup.² CERCLA imposes liability on four categories of potentially responsible parties (“PRPs”).³ Section 9607(a)(2) imposes liability on any party who owned the regulated facility in question at the time of disposal of hazardous wastes.⁴ “Disposal” is the key word, and its definition has sparked debate among federal courts and commentators alike.⁵ CERCLA defines “disposal” as the “discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous

1. Love Canal refers to a canal near Niagara Falls in which 20,000 tons of chemical wastes were buried. DANIEL MAZMANIAN & DAVID MORELL, *BEYOND SUPERFAILURE: AMERICA’S TOXICS POLICY FOR THE 1990S* 3 (1992). In 1977, a river overflowed sending the wastes into the surrounding community. *Id.* President Carter declared the area an emergency disaster area. *Id.*

2. 42 U.S.C. § 9607(a) (2000).

3. *Id.* Under relevant portions, the potentially responsible parties (“PRPs”) are (1) “the owner and operator of a vessel or a facility”; and (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.” *Id.* (emphasis added). CERCLA states that potentially responsible parties might be liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

4. 42 U.S.C. § 9607(a)(2) (2000).

5. Craig May, *Taking Action—Rejecting the Passive Disposal Theory of Prior Owner Liability Under CERCLA*, 17 VA. ENVTL. L.J. 385, 385 (1998). The author asserts, “The meaning of disposal determines which prior owners will be liable for cleanup of a contaminated site, a cleanup that can often cost millions of dollars.” *Id.* at 387.

waste into or on any land or water.”⁶ While the definition seems straightforward, courts and commentators nevertheless disagree over whether any action, passive or active, may constitute a disposal. Courts must decide whether disposal should require affirmative human conduct, or whether a PRP who has not affirmatively or actively contributed to a disposal should be liable for the leaking or migration of wastes. In other words, courts must decide whether a *passive disposal* can trigger liability under CERCLA.⁷ Differing answers to this question suggest strong disagreement over the level of causation courts should read into CERCLA liability provisions.⁸

6. 42 U.S.C. § 6903(3) (2000). CERCLA defines “disposal” by way of the Solid Waste Disposal Act. *See* 42 U.S.C. § 9601(29) (2000). The definition in its entirety reads:

The term “disposal” means 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.

42 U.S.C. § 6903(3).

7. Most commentators have argued against passive disposal theories. *See, e.g.*, Robert L. Bronston, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 MICH. L. REV. 609 (1994) (arguing that Congress intended disposal to have an active meaning, and therefore the theory of passive migration should be rejected); Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 ENVTL. L. REP. 10121, 10121 (1998) (arguing that “CERCLA’s language, structure, and policies compel the conclusion that passive migration of hazardous substances during ownership does not trigger CERCLA liability.”); Lisa A. Lee, *Guilty for Having Done Nothing: Passive Past Owners Face CERCLA Liability*, 1 MO. ENVTL. L. & POL’Y REV. 88 (1993) (contending that *Nurad* was wrongly decided and passive migration should not be a basis for liability); Rita H. McMillen, *Liability for Passive Disposal of Hazardous Wastes Under CERCLA*, 42 DRAKE L. REV. 255, 283 (1993) (stating “‘disposal’ is confined to active human behavior.”); Henry L. Stephens, *When is “Leaching” not “Leaking”?: CERCLA Liability of Owners and Operators at the Time of Disposal*, 24 ENVTL. L. REP. 10177 (1994) (arguing that *Nurad* is flawed and that no passive disposal should trigger liability of prior owners and operators); *Cf.* Joseph Lipinski, *Last Owner Liability for Passive Migration Under CERCLA*, 7 DICK. J. ENVTL. L. & POL’Y 97, 97 (1998) (concluding that ‘disposal’ should be interpreted to include passive migration,” not just passive disposal in general); Catherine S. Stempien, *Sins of Omission, Commission and Emission: Does CERCLA’s Definition of “Disposal” Include Passive Activities?* 9 J. ENVTL. L. & LITIG. 1, 24 (1994) (concluding that neither a completely active nor a passive/active interpretation of disposal “makes any sense given the purpose and framework of the statute as a whole”).

8. Many authors frame the issue in a manner that reveals a larger concern with whether the PRP affirmatively contributed to the contamination. *See* Stephens, *supra* note 7, at 10177 (“Some recent court decisions have interpreted this language expansively to include essentially every grantee in the chain of title to contaminated realty, *irrespective of the grantee’s acts, omissions, or authority to control practices regarding hazardous substances at the site.*”) (emphasis added); Lee, *supra* note 7, at 88 (“Passive past owners (PPOs) who once owned contaminated property and *who did not contribute to or even know of the contamination* may be potentially responsible parties (PRPs) under [CERCLA.]”) (emphasis added); May, *supra* note 5, at 385 (“[O]ne issue that has been sharply contested is whether a prior owner of property on which there was pollution should be liable for cleanup, *even if the owner did nothing* actively to cause the pollution.”) (emphasis added); McMillen, *supra* note 7, at 260 (“A broad definition of ‘disposal’ creates liability for parties that did not actively

Nevertheless, and despite an apparent circuit split between the Second, Third, Fourth, and Sixth Circuits, the ambiguity surrounding the definition of disposal once appeared to have been resolved.⁹ Until recently, most courts held that passive disposal activities were insufficient for establishing liability under § 9607(a)(2), instead requiring affirmative human conduct by the PRP.¹⁰ A recent case before the Ninth Circuit Court of Appeals has not only drawn new attention to the apparent circuit split, but also has suggested that the “split” was never very sharp. Moreover, this case provides a new method for analyzing the meaning of disposal.¹¹

This Note contends that the Ninth Circuit Court of Appeals correctly decided *Carson Harbor Village v. Unocal Corp.*, and that other courts deciding whether a passive activity constitutes a disposal under CERCLA should follow *Carson’s* principles.¹² This Note argues that the definition of disposal under CERCLA contemplates both active and passive activities. Under such an analysis, a passive *leak* should trigger a PRP’s liability under § 9607(a)(2), regardless of whether the PRP affirmatively participated in the disposal. At the same time, this Note argues that passive *migration* of contaminants into soil should not be considered a disposal under CERCLA. Excluding passive migration while permitting other instances of passive disposal would resolve many of the concerns associated with a broader passive disposal theory without implicating the same dangers.

bury waste in the ground and are not current landowners.”).

9. Some commentators considered the issue resolved.

Until now, it has generally been accepted that the owner or operator of real estate not actively involved in the disposal of a hazardous substance had no liability under CERCLA. Now the Ninth Circuit Court of Appeals has ruled that an owner/operator may be subject for liability for clean costs if the property was contaminated from prior use (i.e., passive migration) during the period when the owner or operator had control of the property.

REAL EST. L. REP., Feb. 30, 2001, at 5. This comment somewhat overstates the understanding because CERCLA largely imposes strict liability on current owners and operators, regardless of whether they were actively involved. *See* 42 U.S.C. § 9607(a)(1). However, as to prior owners and operators, which are covered by § 9607(a)(2), this article reflects a strong trend in the federal courts. *See infra* note 10.

10. When addressing this issue, many courts simply adopted the holding of the Third Circuit Court of Appeals as the leading opinion, and held that passive disposal does not trigger liability. *See, e.g.,* *Servco Pacific Inc. v. Dods*, 106 F. Supp.2d 1034, 1048 (D. Haw. 2000) (holding that disposal required affirmative conduct); *In re Tutu Wells Contamination Litig.*, 994 F. Supp. 638, 668 (D.V.I. 1998) (holding that passive migration of hazardous wastes does not constitute disposal); *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 653 (N.D. Ohio 1995) (stating that passive migration of hazardous wastes does not constitute disposal, although leaking or spilling might suffice).

11. *See infra* notes 116-18 and accompanying text.

12. 270 F.3d 863 (9th Cir. 2001) (en banc); 227 F.3d 1196 (9th Cir. 2000), *cert. denied*, 122 S.Ct. 1437 (U.S. Apr. 1, 2002).

Part I of this Note reviews relevant CERCLA provisions and CERCLA's purpose as a remedial statute. Part II reviews the passive disposal controversy and the varied holdings of federal courts on this issue. Part III discusses the Ninth Circuit *Carson* decision. Part IV of this Note introduces the circuit court decisions concerning passive disposal. Finally, Part V of this Note presents the author's proposal.

I. CERCLA HISTORY

Congress passed CERCLA, also known as the Superfund Law, in 1980 to facilitate cleanup of hazardous and solid waste releases.¹³ On the eve of a new administration, Congress passed CERCLA rapidly, leaving little legislative history to aid interpretation of the statute.¹⁴ Without useful legislative history concerning the word "disposal," federal courts construe the definition by considering CERCLA's overall purpose.¹⁵ Courts commonly state that the primary purposes of CERCLA are to assure the "prompt cleanup of hazardous waste sites and [to impose] all cleanup costs on the responsible party."¹⁶ Other courts indicate that the purpose is not to impose costs on the responsible party, but to impose costs on the owners and operators to the largest extent possible instead of placing the burden on the general taxpayers.¹⁷

13. 42 U.S.C. § 9601 (2000). The Supreme Court has explained the Superfund by stating, CERCLA imposes an excise tax on petroleum and other specified chemicals. The Act establishes a trust fund, commonly known as "Superfund," 87.5% of which is financed through the excise tax, and the remainder through general revenues. Superfund money may be used to clean up releases of hazardous substances and for certain other purposes. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986).

14. See Rosemary J. Beless, *Superfund's Innocent Landowner Defense: Guilty Until Proven Innocent*, 17 J. LAND RESOURCES AND ENVTL. L. 247, 248 (1997) ("CERCLA has little legislative history because Congress passed it in the final days of the lame duck session of the outgoing ninety-sixth Congress in response to the enormous public outcry stemming from the Love Canal disaster. Moreover, as a result of this swift passage, courts were forced to struggle with congressional intent when attempting to interpret provisions of the statute."); May, *supra* note 5, at 388 ("CERCLA has very little legislative history in general and almost nothing on the meaning of disposal."). For a brief overview of CERCLA, see John C. Cruden, CERCLA OVERVIEW American Law Institute-American Bar Association, SF97 ALI-ABA 397 (2001).

15. See, e.g., *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996).

16. *Gen. Elec. Co. v. Litton Indus. Automation Sys. Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990).

17. *Horsehead Industries, Inc. v. Paramount Communications, Inc.*, 258 F.3d 132, 135 (3d Cir. 2001) ("[The purpose of CERCLA is] to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities."); *Aviall Serv. Inc. v. Cooper Indus. Inc.*, 263 F.3d 134, 136-37 (5th Cir. 2001) ("[CERCLA's purpose is to] facilitate the cleanup of hazardous waste sites, and to shift the costs of environmental response from the taxpayers to the parties who benefited from the use or disposal of the hazardous substances.").

II. PASSIVE DISPOSAL IN THE FEDERAL COURTS

A. District Court Interpretation of “Disposal”

District courts defined disposal under § 9607(a)(2) in varying ways. Some courts have held that passive migration definitively constitutes a disposal triggering liability.¹⁸ Other courts have held that passive migration specifically is not a disposal triggering liability.¹⁹ Still other courts have held that no passive disposal whatsoever triggers liability under § 9607(a)(2).²⁰ Finally, several cases have conceded that passive disposal might trigger liability under certain circumstances.²¹

One of the first and more influential district court decisions was *United States v. Petersen Sand & Gravel, Inc.*²² In *Petersen*, the federal government sued Petersen Sand & Gravel for remedial costs under § 9607(a)(2).²³ The court held that passive disposal in the form of leaking or leaching does not trigger liability of prior owners and operators under CERCLA.²⁴ In reaching its decision, the court considered the definitions of “disposal” and “release” under CERCLA.²⁵ First, the court suggested

18. See *Reichhold Chem., Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129 (N.D. Fla. 1995) (“While it may seem inequitable, the mere migration of contaminants from adjacent land constitutes disposal for the purposes of CERCLA, and passive downstream landowners are liable for the cleanup costs resulting from their neighbors’ activities.”).

19. See *In re Tutu Wells*, 994 F. Supp. at 638; *Plaskon Elec. Materials*, 904 F. Supp. at 644; *Snediker Developers Ltd. P’ship v. Evans*, 773 F. Supp. 984, 989 (E.D. Mich. 1991); *Ecodyne Corp., v. Shah*, 718 F. Supp. 1454, 1457-58 (N.D. Cal. 1989); *In re Diamond Reo Truckers, Inc.*, 115 B.R. 559, 565 (Bankr. W.D. Mich. 1990).

20. See *Idylwoods Assoc. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1311 (W.D.N.Y. 1996) (“Congress did not intend so expansive a definition of disposal so as to include the concept of passive disposal.”).

21. See *Stanley Works v. Snyder Gen. Corp.*, 781 F. Supp. 659, 660-61 (E.D. Cal. 1990). The *Stanley Works* court phrases the issue as “the extent to which the ongoing leaking, leaching, and migration of hazardous substances constitutes a release or disposal giving rise to liability under CERCLA under section 9607(a)(2).” *Id.* at 662. See also *Reading Co. v. Philadelphia*, 155 B.R. 890, 898 (E.D. Pa. 1993). The *Reading* court drew a distinction between a leak that occurs after the initial disposal, which properly qualifies as a passive leak, and a leak that initiates a disposal, which does not qualify as a passive disposal. *Id.*

22. 806 F. Supp. 1346 (N.D. Ill. 1992).

23. *Id.* at 1349.

24. *Id.* at 1351.

25. *Id.* The court also considered the words of the Seventh Circuit Court of Appeals in *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988):

We are enforcing a statute rather than modifying rules of common law . . . to the point that courts could achieve “more” of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court’s job is to find and enforce stopping points no less than to implement other legislative choices.

that, because “release” must necessarily be broader than “disposal,” Congress intended that “disposal” would contemplate only active conduct.²⁶ Second, the court centered on the requirement in the definition of disposal that the waste “may enter the environment or be emitted into the air or discharged into any waters.”²⁷ The court contrasted this language with the language under the definition of “release,” which includes only “into the environment.”²⁸ The court concluded that Congress intended that an affirmative act would be required to constitute a disposal, but would not be required for a release.²⁹ The court also indicated that the addition of the innocent landowner defense to the statute supported its conclusion that “‘disposal’ refers to a discrete human act with a discrete ending.”³⁰ For the

Id. at 157.

26. *Petersen*, 806 F. Supp. at 1352.

27. *Id.* at 1351.

28. *Id.*

29. *Id.*

30. *Id.* at 1352. The innocent owner defense is an affirmative defense provided by CERCLA, 42 U.S.C. § 9607(b)(3) (2000). The defense provides that there will be no liability for a party who can show “by a preponderance of the evidence” that “the release or threat of release . . . and the damages resulting” were caused solely by:

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Id. When finding that disposal must be active in order to preserve the innocent owner defense, the *Petersen* court explained:

[F]or the defense to apply in all but the rarest of circumstances, “disposal” must be limited to its active meaning. Otherwise, this defense would be available only to innocent owners who are fortunate enough to have purchased a facility where all the hazardous waste is sealed in concrete—any seeping or leaking on a site occurring after the purchase would eliminate the defense. Put simply, the amendment on its face has a plain purpose: to exclude from liability owners who bought after the hazardous waste was placed on the land and knew nothing about the hazardous waste at the time of purchase.

806 F. Supp. at 1352. Commentators also suggest that that permitting passive disposal would destroy the innocent landowner defense. *See* Beless, *supra* note 14; Shane Clanton, *Passive Disposal of the Innocent Landowner Defense*, 9 J. NAT. RESOURCES & ENVTL. L. 255, 255 (1994). On the other hand, CERCLA cases suggest that the defense may apply not apply to prior owners and operators at all. *See* CDMG Realty Co., 96 F.3d at 717:

The innocent owner defense's apparent limitation to current owners also supports the conclusion that “disposal” does not encompass the passive spreading alleged here. The provision establishing the innocent owner defense states: “Nothing in this paragraph or in section 9607(b)(3) of this title [, which provides the causation defenses including the third party defense,] shall diminish the liability of any previous owner or operator who would be otherwise liable under this chapter.” 42 U.S.C. § 9601(35)(C). This language certainly suggests that the innocent owner defense is unavailable to prior owners or operators.

Id. at 716-17. *Cf.* *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distrib. Corp.*, 964 F.2d 85, 91

Petersen court, “[t]he inescapable conclusion [was] that giving ‘disposal’ a passive meaning controverts the plain language of CERCLA.”³¹

B. “Disposal” in the United States Courts of Appeals

Later that year, in *Nurad, Inc. v. Hooper & Sons Co.*, the Fourth Circuit Court of Appeals held that a passive leak constitutes a disposal under CERCLA.³² In *Nurad*, the current owners of contaminated property sought reimbursement from prior owners for removing underground storage tanks and their hazardous contents.³³ One of the prior owner defendants, Hooper & Sons, Co. (“Hooper”), used underground storage tanks on the property and did not properly dispose of the tanks or their contents when the business discontinued use of the tanks.³⁴ The contents leaked into the surrounding soil.³⁵ The district court found Hooper liable because Hooper had been affirmatively involved with the use of the tanks.³⁶ However, the court found that the owners subsequent to Hooper were not liable because they had no affirmative involvement with the tanks or the disposal of hazardous wastes.³⁷ The district court granted summary judgment for those defendants, reasoning that disposal required “some element of affirmative participation of [each] defendant”—in other words, the court ruled that CERCLA precluded liability for passive disposal.³⁸ The Fourth Circuit reversed, holding that prior owners and operators were liable for passive disposal.³⁹ The Fourth Circuit explained, “the statute plainly imposes liability on a party who owns a facility at the time hazardous waste leaks from an underground storage tank on the premises.”⁴⁰ The appellate court found that the lower court’s holding was erroneous because it “ignore[d] the language of the statute, contradict[ed] clear circuit precedent and

(2d Cir. 1992) (suggesting that the defense does apply to prior owners and operators).

31. 806 F. Supp. at 1352.

32. 966 F.2d 837 (4th Cir. 1992). The district court also considered whether tenants were liable under CERCLA for remediation costs. *Id.* at 842. The Fourth Circuit agreed with the district court and found that the tenants at hand did not have the authority prescribed by CERCLA. These tenants were entitled to summary judgment. *Id.* at 844.

33. *Id.* at 840.

34. *Id.* at 840.

35. *Id.* at 840-41.

36. *Id.* at 841.

37. *Id.*

38. *Id.*

39. *Id.* at 840.

40. *Id.* The court reasoned that “[a]ny other result would substantially undermine CERCLA’s goal of encouraging voluntary cleanup on the part of those in a position to do so.” *Id.*

frustrate[d] the fundamental purposes of CERCLA.”⁴¹

The *Nurad* court used several lines of rationale.⁴² First, the Fourth Circuit reasoned that, while some of the words contained in the definition of “disposal” were clearly active, others “readily admit to a passive component: hazardous waste may leak or spill without any active human participation.”⁴³ The *Nurad* court added that the district court’s interpretation “arbitrarily deprived these words of their passive element by imposing a requirement of active participation as a prerequisite to liability.”⁴⁴ Second, the *Nurad* court reasoned that the district court’s interpretation would encourage owners to “avoid liability simply by standing idle while an environmental hazard festers on his property.”⁴⁵ Third, the court said that the district court’s view contradicted CERCLA’s strict liability focus.⁴⁶ The Fourth Circuit refused to add additional fault requirements to the statute.⁴⁷

Around the time of the *Nurad* decision, many of the courts that had decided the issue were in agreement: passive disposal could trigger liability of PRPs.⁴⁸ However, the tide changed with the next federal appellate court to decide the issue.⁴⁹

In *United States v. CDMG Realty Co.*, the Third Circuit Court of Appeals held that passive migration did not trigger PPR liability under § 9607(a)(2).⁵⁰ *CDMG* involved ten acres of land that had once been part of a landfill.⁵¹ After an EPA investigation, the federal government sued the

41. *Id.* at 844.

42. *Id.* at 845-46.

43. *Id.* at 845.

44. *Id.*

45. *Id.* The court asserted that, at the same time, “[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 part of the current owner liability scheme,” an outcome that Congress could not have intended. *Id.* at 845-46.

46. *Id.* at 846.

47. *Id.* The court concluded, “Thus we hold that § 9607(a)(2) imposes liability . . . for ownership of the facility at a time that hazardous waste was ‘spilling’ or ‘leaking.’” *Id.*

48. See Clanton, *supra* note 30, at n.32; Stephens, *supra* note 7, at 10181 (“[*Nurad*] has been followed in lemming-like fashion by district courts . . .”). Cf. May, *supra* note 5, at 386 (“At the time of the *Petersen* decision, cases were fairly evenly split on the issue, with some commentators asserting that the *Nurad* decision, given its appellate status, represented the majority view.”).

49. *CDMG Realty*, 96 F.3d at 711.

50. *Id.* The current owner had two theories of recovery. The first was a passive migration/disposal theory because the contaminants migrated during the ownership of the prior parties. *Id.* at 710. The second theory was based upon active disposal through dispersal of contaminants. *Id.* The Third Circuit rejected the passive theory, affirming the district court. *Id.* at 711. With respect to the second theory, the Third Circuit reversed the district court, finding that the district court should not have granted summary judgment. *Id.*

51. *Id.* The land was located in Morris County, New Jersey. *Id.*

current owner for the costs of cleanup.⁵² The current owner subsequently sued a previous owner for contribution, contending that the prior owner was liable because contaminants buried in the landfill had migrated through the landfill during its period of ownership.⁵³ The *CDMG* court distinguished *Nurad* and chose not to decide whether a passive leak or spill constituted a disposal, explaining that it was unnecessary to decide whether “disposal” was by definition active.⁵⁴ According to the *CDMG* court, whatever definition of disposal in the broad sense, “[the] definition cannot encompass the spreading of waste at issue here.”⁵⁵

The Third Circuit presented essentially the same arguments as the *Petersen* court.⁵⁶ The *CDMG* court also compared the definitions of “release” and “disposal,” finding that “release” encompassed “disposal;” therefore, “release” was necessarily broader.⁵⁷ Furthermore, the court reasoned that if Congress were to sanction a passive migration theory of disposal, it “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.”⁵⁸

The *CDMG* court argued that although CERCLA was not “written with great clarity,” it would not assume that Congress had intended to cast a never-ending net of liability.⁵⁹ The court also found that a passive migration interpretation would weaken the innocent landowner defense.⁶⁰ The court concluded that Congress passed CERCLA with two main purposes: “to facilitate the cleanup of potentially dangerous hazardous

52. *Id.* at 710.

53. *Id.*

54. *Id.* at 711.

55. *Id.* The court conceded, “We think there is a strong argument, however, that in the context of this definition, ‘leaking’ and ‘spilling’ should be read to require affirmative human action.” *Id.* at 714. Ultimately, however, the court would not decide the issue because, “[w]hile ‘leaking’ and ‘spilling’ may not require affirmative human conduct, neither word denotes the gradual spreading of contamination alleged here.” *Id.*

56. *Id.* at 714-17.

57. *Id.* at 714-15. The court noted that “release” included “leaching,” which “is commonly used in the environmental context to describe this migration of contaminants.” *Id.* at 715. The court explained that “Congress’s use of the term ‘leaching’ in the definition of ‘release’ demonstrates that it was aware of the concept of passive migration in landfills and that it knew how to explicitly refer to that concept.” *Id.*

58. *Id.* at 715.

59. *Id.* at 715-16.

60. *Id.* at 716. The court explained that “[b]ecause CERCLA conditions the innocent owner defense on the defendant’s having purchased the property ‘after the disposal’ of hazardous waste at the property, ‘disposal’ cannot constitute the allegedly constant spreading of contaminants. Otherwise the defense would almost never apply, as there would generally be no point ‘after disposal.’” *Id.* See *supra* note 30.

waste sites and to force polluters to pay the costs associated with their pollution.”⁶¹ The court declared that its holding was consistent with the latter purpose⁶² and insisted that the first purpose was not undermined because “ample incentives remain[ed] to promote cleanup.”⁶³

In *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, the Second Circuit Court of Appeals agreed with the Third Circuit’s decision in *CDMG* by holding that passive migration did not constitute disposal under CERCLA.⁶⁴ In *ABB*, the current owners of the property sued prior owners for reimbursement under CERCLA.⁶⁵ The plaintiffs contended that wastes had passively migrated through the soil.⁶⁶ The court rejected the passive migration theory, adopting wholesale the reasoning of the Third Circuit in *CDMG*.⁶⁷ Like the *CDMG* court, the *ABB* court also distinguished *Nurad*, explaining that “because the definition of disposal includes ‘leaking,’ some courts have concluded that prior owners are liable if they acquired a site with leaking barrels even though the prior owners’ actions are purely passive We express no opinion on this issue.”⁶⁸

In *United States v. 150 Acres of Land*,⁶⁹ the Sixth Circuit Court of Appeals held that passive disposal does not constitute disposal under CERCLA.⁷⁰ In *150 Acres*, the EPA removed nearly one thousand drums

61. *Id.* at 717 (citation omitted).

62. *Id.* The court said that those who owned property while hazardous wastes migrated “without their aid cannot reasonably be characterized as ‘polluters’.” *Id.* The court noted that excluding them would not let the actual polluters off the hook. *Id.* In addition, the court added that in many cases, [T]hese [prior] owners will pay for the pollution: if they disclose the fact that the land contains waste, their selling price will reflect the cost of CERCLA liability. If they have knowledge of contamination and do not disclose it to a transferee, they are liable for response costs even after the transfer. The only prior owners who will not pay any cleanup costs are those who bought and sold land with no knowledge that the land is contaminated.

Id. at 717-18 (citations omitted).

63. *Id.* at 718. The court discussed incentives including: (1) the innocent owner defense in §9607(b)(3); (2) the liability provisions of § 9607(a); (3) the provisions imposing criminal liability for failure to report a release above a certain threshold; and (4) section 9601(35)(C) making an owner liable who transfers land with knowledge of contamination. *Id.*

64. 120 F.3d 351, 354 (2d Cir. 1997).

65. *Id.* at 353.

66. *Id.* at 354. Alternatively, the plaintiffs in *ABB* also contended that there had been leaking or spilling. *Id.* The court rejected the theory, finding that the plaintiffs had presented no evidence of any leakage or spilling during the ownership of the defendants. *Id.* at 357.

67. *Id.* at 358. The court explained that “although hazardous chemicals may have gradually spread underground while the dismissed defendants controlled the property (passive migration), we conclude that prior owners are not liable under CERCLA for migration.” *Id.* at 354.

68. *Id.* at 358 n.3.

69. 204 F.3d 698 (6th Cir. 2000).

70. *Id.* at 705. The case concerned 150 acres of real estate in Medina County Ohio. *Id.* at 700-01. The owners operated a farm equipment repair business on one end of the property and the wastes were found on another end of the property. *Id.* at 701.

from a property in Ohio, about 450 of which were empty and 550 of which contained paint waste, red sludge, and laboratory chemicals.⁷¹ The federal government sued the current property owners for reimbursement costs and moved for summary judgment. The district court granted the motion.⁷² The district court determined that whether the owners were entitled to the innocent landowner defense depended on “whether the ‘disposal’ preceded the [current owner’s] acquisition of the property.”⁷³

The Sixth Circuit concluded that “the distinction between ‘disposal’ and ‘release’” was important to the determination and indicated that it would adopt the definition of disposal used by the *CDMG* and *ABB* courts.⁷⁴ At the same time, the *150 Acres* court went one step further: the court held that disposal requires active human conduct, and, unlike the cases it cited for this proposition, the court did not distinguish *Nurad*.⁷⁵ The court concluded that there had been no disposal, explaining that “[i]n the absence of any evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property since the [defendants] have owned it, we hold that the [defendants] have not ‘disposed’ of hazardous substances on the property.”⁷⁶

III. RECONSIDERING PASSIVE DISPOSAL

Carson Harbor Vill., Ltd. v. Unocal Corp. (“*Carson I*”) first appeared in federal district court in 1997, after the *CDMG* appellate opinion, but before the *ABB* and *150 Acres* opinions.⁷⁷ In *Carson*, the current owners of the property sued several former owners and operators for reimbursement

71. *Id.* at 701-02. The case mentions that soil samples revealed high levels of contamination, but it does not specifically refer to a leak or migration of wastes. *Id.* at 701. Because there were barrels of wastes involved, one can infer that there was a leak and possibly migration after the leak. *Id.* at 701-02.

72. *Id.* at 700.

73. *Id.* at 705.

74. *Id.* at 705-06.

75. *Id.* at 706.

76. *Id.* The *150 Acres* court further held that summary judgment was not appropriate on two issues: (1) whether wastes were “released” after the owners acquired the property; and (2) whether they were entitled to the innocent landowner defense. *Id.* at 706, 711.

77. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 990 F. Supp. 1188 (C.D. Cal. 1997) [hereinafter *Carson I*]. The Ninth Circuit previously acknowledged, but declined to address, the passive migration/disposal issue in *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992). In *Kaiser*, the court said, “Congress did not limit the term to the initial introduction of hazardous material onto property. Indeed, such a crabbed interpretation would subvert Congress’ goal that parties who are responsible for contaminating property be held accountable for the cost of cleaning it up.” *Id.* at 1342-43.

of cleanup costs under CERCLA.⁷⁸ Carson operated a mobile home park on the property.⁷⁹ The defendant, a prior owner, was a partnership that had also operated a mobile home park on the property.⁸⁰

In 1994, Carson Harbor Village, Ltd. discovered “tar-like” and “slag” materials that it alleged were dumped on the property by Unocal, a party that had previously leased the property.⁸¹ The materials were removed in 1995.⁸² In the district court, Carson alleged that the partnership defendants were owners of the facility at the time hazardous materials were disposed of, triggering liability under § 9607(a)(2).⁸³ Carson relied on *Nurad* to support a passive migration theory.⁸⁴ Both parties moved for summary judgment.⁸⁵

The district court granted summary judgment for the defendants,⁸⁶ holding that passive migration did not constitute disposal under CERCLA.⁸⁷ The *Carson I* court explained that the plaintiffs’ only evidence showed that the materials had been deposited before the

78. *Carson I*, 990 F. Supp. at 1191. The Carson action also included claims under the Resource Conservation and Recovery Act, Clean Water Act, and state common law claims. *Id.* The owners also sued government parties. *Id.*

79. *Id.* at 1192. The current owners owned a 70-acre parcel of land in Carson, California. *Id.* About 17 acres of the property constituted an undeveloped wetlands and a natural drainage course. *Id.* The upstream drainage area included industrial and residential properties, collectively the “Government Defendants.” *Id.*

80. *Id.* at 1194. The partnership defendants owned the property from 1977 and 1983. *Id.* at 1192, 1194. Defendant Unocal Corporation held a leasehold interest in the property between 1945 and 1983. *Id.* at 1192. Unocal used the property for petroleum production and operated a number of oil wells, pipelines, and above ground storage tanks and production facilities. *Carson Harbor Vill. Ltd. v. Unocal Corp.*, 227 F.3d 1196, 1199 (9th Cir. 2000) [hereinafter *Carson II*].

81. *Carson I*, 990 F. Supp. at 1192. Plaintiffs discovered the contamination as part of an effort to refinance their mortgage. A prospective lender required the investigation. *Id.* The lender’s investigation revealed that (1) the substances had been on the property for several decades prior to development as a mobile home park; (2) that the material was some form of waste or by product from petroleum production, covering a 30 by 160 foot area in the wetlands; (3) that the materials in the soil around the area contained elevated levels of petroleum hydrocarbons (THP) and lead; and (4) up gradient soil sample samples also contained elevated THP and lead levels. *Carson II*, 227 F.3d at 1199-1200.

82. *Carson I*, 990 F. Supp. at 1192. In five days of cleanup, 1,042 tons of materials were removed. *Carson II*, 227 F.3d at 1200.

83. *Carson I*, 990 F. Supp. at 1194.

84. *Id.*

85. *Id.* at 1191-92.

86. *Id.* at 1191.

87. *Id.* at 1194. The district court held that the CERCLA claims failed on two alternative independent grounds. *Id.* First, removal was not necessary under CERCLA. *Id.* at 1193. Second, passive migration did not constitute disposal. *Id.* at 1194. The Ninth Circuit later reversed on both grounds. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001) [hereinafter *Carson III*]. The passive disposal claim only applied to partnership defendants because the migration theory only applied to those defendants. *Carson I*, 990 F. Supp. at 1194. Carson claimed that defendant Unocal originally deposited the substances. *Id.* at 1192. *See supra* note 80.

partnership defendants owned the property.⁸⁸ The court would not accept the argument that the defendants were liable merely because “lead from the tar-like and slag materials leaked into the surrounding soil” during the defendants’ ownership.⁸⁹ The district court relied on the reasoning of the Third Circuit in *CDMG*.⁹⁰

In *Carson II*, the Ninth Circuit reversed and held that passive migration did constitute disposal under CERCLA.⁹¹ First, the *Carson II* panel said that “discharge,” “spill,” and “leak” clearly have passive meanings, that support a passive theory of liability.⁹² Second, the court insisted that disposal represents more than the initial placement of the substances on a property.⁹³ The court stated that in consideration of the CERCLA’s remedial purposes, “‘disposal’ should be read broadly to include the subsequent ‘move[ment], dispers[al], or release [of such substances] during landfill excavations and fillings’.”⁹⁴ Finally, the *Carson II* court argued that a passive interpretation was more appropriate in light of CERCLA’s strict liability emphasis.⁹⁵

[W]hile the statute was surely designed . . . to impose the costs of cleanup on ‘responsible parties’ the imperative was to create a mechanism for prompt cleanup and Congress was well aware that many directly responsible parties were insolvent or no longer in existence. For that reason, traditional causation requirements were abandoned in favor of a strict liability regime. The categories of PRPs incorporated in the liability provisions are correspondingly broad, sweeping in parties who may have done nothing

88. *Id.* at 1194.

89. *Id.* Plaintiff also contended that “lead from the storm water runoff leaked onto the property during the time that they were owners.” *Id.* at 1192.

90. *Id.* at 1195. The *Carson I* court discussed the limits of CERCLA liability, explaining that: While CERCLA was intended to reach broadly, it also clearly expresses limits to the contemplated statutory liability. To find otherwise would subject previous owners who had no knowledge of or control over hazardous substances on their property to liability under the statute. This result is in stark conflict with the intent of CERCLA, which is to affix the ultimate cost of cleaning up disposal sites on the parties responsible for the contamination.

Id. (citing *Kaiser*, 976 F.2d at 1340).

91. *Carson II*, 227 F.3d at 1210. The Ninth Circuit reversed in part and affirmed in part, affirming the district court holdings on the state law claims. *Id.* at 1199.

92. *Id.* at 1206-07.

93. *Id.* at 1207.

94. *Id.* (quoting *Kaiser*, 976 F.2d at 1342 (alteration in original)).

95. *Id.*

affirmatively to contribute to the contamination at a site and forcing them to disprove causation as an affirmative defense.⁹⁶

The *Carson II* panel stated that a passive migration theory of liability was entirely consistent with this scheme.⁹⁷

The *Carson II* court also explained why it was not persuaded by the *CDMG* decision.⁹⁸ First, the Ninth Circuit explained that “even if [the court] were to concede that these concerns do indeed arise from reading ‘disposal’ to include passive migration, it is far from obvious that an ‘active-only’ interpretation must prevail.”⁹⁹ The court noted that the active theory of disposal “creates inconsistencies of its own.”¹⁰⁰ For example, the court argued that an active theory assumes “that Congress intended to create an irrational distinction *between prior owners*” because a prior owner who owned the property while wastes passively migrated would not be liable regardless of whether he knew.¹⁰¹ At the same time, the court argued, prior owners who owned the property while wastes were actively disposed of would be liable “even if they were in no way responsible for, or connected with, the disposal.”¹⁰² Second, the court in *Carson II* pointed to the need for broad construction of a remedial statute such as CERCLA.¹⁰³ Third, the court noted the apparent redundancy between “release” and “disposal.”¹⁰⁴ The court suggested that a reading allowing the terms to overlap would not compromise the purposes of the statute.¹⁰⁵

The *Carson II* court concluded that the district court’s analysis would unfairly immunize the partnership defendants in the present case.¹⁰⁶ The court rejected such an unfair outcome, stating that the partnership defendants were no less guilty than the current owners because both

96. *Id.*

97. *Id.*

98. *Id.* at 1208.

99. *Id.*

100. *Id.* at 1210.

101. *Id.*

102. *Id.*

103. *Id.* at 1208-09.

104. *Id.* at 1209.

105. *Id.* The *Carson II* court explained that “[t]he question is whether Congress intended to avoid the particular redundancy that would result from reading ‘disposal’ in accordance with the passive terms in its definition and whether this particular redundancy is one we should care about.” *Id.* The court also noted that an “active” or “affirmative conduct” interpretation is also not required to preserve the innocent landowner defense. *Id.* at 1209-10. The court considered that the discrepancy in interpretations would be “avoided by assuming that Congress meant what it said – i.e., that a defendant need only show that he or she purchased the property either (1) after disposal or (2) after placement.” *Id.* at 1210 n.20.

106. *Id.* at 1210.

parties were owners while the contaminants migrated into the soil.¹⁰⁷

Rehearing the case en banc,¹⁰⁸ the Ninth Circuit in *Carson III* reversed the three-judge panel.¹⁰⁹ The *Carson III* court held that passive migration could not constitute a disposal under CERCLA.¹¹⁰ The court began with the plain meaning of the statute,¹¹¹ considered the reading of the statute as a whole,¹¹² the purpose of the statute,¹¹³ the effect of inconsistent readings,¹¹⁴ and the legislative history of the statute.¹¹⁵

In *Carson III*, the court began its analysis by using the language of the United States Supreme Court concerning statutory construction.¹¹⁶ The en

107. *Id.* The court noted that the only significant difference between the partnership defendants and the current owners was that during the partnership defendants' ownership, Unocal was producing oil on the property. *Id.* The court reasoned that the partnership defendants had more of a reason to watch against contamination than the current owners. *Id.*

In his partial dissent, Judge Weiner argued that the definition of disposal does not lend itself to any passive interpretation. *Id.* at 1213 (Weiner, J. dissenting). Judge Weiner reasoned that "the statutory scheme requires that even ['leaking' and 'spilling'] be understood to imply some kind of active human conduct." *Id.* He stated that "[t]he statutory distinction between 'disposal' and 'release' supports this limitation." *Id.* at 1213. Weiner's advocacy of an active interpretation stressed the importance of concurrent human conduct and involvement with the source of the disposal.

To me, something "spills" only when it is actively emptied or, because of human action or inaction, is placed in a position where gravity, or the elements taking their natural course, cause the contents to be emptied into the environment. In the dictionary, spill is defined in its verb tense as "to cause or allow to pour, splash, or fall out." Whether a substance pours, splashes or falls, human conduct was necessary *ab initio* to create the situation permitting the spill to occur, and it is *this* conduct with which I believe the statute is concerned.

[Similarly] "leak" is defined as "to permit to enter or escape through a leak." Even an accidental leak requires human activity to cause it. Whether one let a metal drum rust to the point of leakage or fails to ensure the container is leakproof before it is filled, leaks don't occur without someone actively placing the hazardous waste in the container and creating the conditions under which it could, with the passage of time, begin to escape.

Id. (citations omitted).

108. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 240 F.3d 841 (9th Cir. 2001).

109. *Carson III*, 270 F.3d 863 (9th Cir. 2001).

110. *Id.* at 867.

111. *Id.* at 878-80.

112. *Id.* at 880-84.

113. *Id.* at 880-81.

114. *Id.* at 881-84.

115. *Id.* at 884-87.

116. *Id.* at 877. The court began its analysis using quotes from United States Supreme Court cases. The court began by explaining, "When interpreting a statute, '[o]ur task is to construe what Congress has enacted.'" *Id.* (quoting *Duncan v. Walker*, 533 U.S. 167, 150 (2001)). Next, the Ninth Circuit stated, "We begin, as always, with the language of the statute." *Id.* at 878. (quoting *Duncan*, 533 U.S. at 172.) As to explicit definitions in statutes, the court said, "When a statute includes an explicit definition, [however,] we must follow that definition, even if it varies from that term's ordinary meaning." *Id.* at 878 (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)). The court also quoted its own language regarding statutory interpretation: "We will resort to legislative history, even where the plain language is unambiguous, where the legislative history clearly indicates that Congress meant something other than what it said." *Id.* at 877 (quoting *Perlman v. Catapult Entm't, Inc.*, 165 F.3d 747,753 (9th Cir. 1999)).

banc panel concluded that “[t]he plain meaning of the terms used to define ‘disposal’ compels the conclusion that there was no ‘disposal’ during the Partnership Defendants ‘ownership, because the movement of the contamination . . . cannot be characterized as a ‘discharge, deposit, injection, dumping, spilling, leaking, or placing’.”¹¹⁷ The court noted that the dictionary definition of “disposal” includes both passive and active meanings.¹¹⁸ “We therefore reject the absolute binary ‘active/passive’ distinction used by some courts.”¹¹⁹ The court said that the proper inquiry in such cases was to determine whether the movement of contaminants in a particular set of facts constituted a disposal.¹²⁰ The court determined that its approach was “consistent with CERCLA’s purposes, minimiz[ing] internal inconsistency in the statute, and present[ing] no conflict with CERCLA’s legislative history.”¹²¹

The *Carson III* court also found that reading the statute as a whole presented no reason to construe the terms within the meaning of disposal any differently.¹²² First, the court argued that the purposes of the statute were still achieved under its construction.¹²³ Second, the court insisted that the inconsistencies and the problems with the innocent landowner defense and other affirmative defenses were minimized with an interpretation that was not extreme.¹²⁴ For example, the court explained that the innocent owner defense would be unnecessary if all passive migration constituted “disposal,” and the defense would be nearly impossible to request if all disposal were active.¹²⁵ Third, the court found that CERCLA’s sparse

117. *Carson III*, 270 F.3d at 877-78.

118. *Id.* at 878-79.

119. *Id.* at 879.

120. *Id.*

121. *Id.* at 878.

122. *Id.* at 880-84.

123. *Id.* at 881. In the *Carson III* court’s opinion, “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.” *Id.* The Ninth Circuit noted that its conclusion was limited to passive soil migration, not passive migration as a whole. *Id.* According to the court, other types of passive migration might be consistent with “the plain meaning of the terms used to define ‘disposal’” under CERCLA. *Id.*

In adopting this plain meaning construction, we are mindful that the statute will be applied in a myriad of circumstances, many of which we cannot predict today This approach does not rule out the scenario in which “spilling,” “leaking,” or perhaps other terms in some circumstances, encompasses passive migration.

Id. at 883-84.

124. *Id.* at 881.

125. *Id.* at 882-83. The court also noted provisions unrelated to the meaning of disposal that are nevertheless important. *Id.* at 884. For example, CERCLA provisions allowing proportional payment after initial liability has attached help to insure that a party who has minimally contributed is not held jointly and severally liable. *Id.*

legislative history clearly supported a definition that included some passive disposal.¹²⁶ The legislative history revealed that Congress had considered environmental threats that did not involve affirmative human conduct.¹²⁷

The *Carson III* court reviewed and analyzed the decisions of other circuits involving passive disposal and passive migration of hazardous waste, but found no clear answer.¹²⁸ The court concluded, “although all of the cases reference the active/passive distinction in some manner, there is no clear dichotomy among the cases that have interpreted ‘disposal.’ Rather the cases fall in a continuum.”¹²⁹

Considering the passive migration on the Carson Harbor property, the en banc panel reasoned, “[i]f we try to characterize this passive soil migration in plain English, a number of words come to mind, including gradual ‘spreading,’ ‘migration,’ ‘seeping,’ ‘oozing,’ and possibly ‘leaching.’ But certainly none of those words fits within the plain and common meaning [of disposal under CERCLA].”¹³⁰

IV. ANALYSIS

The above cases present several issues. First, both courts and commentators have largely failed to distinguish between passive disposal of wastes *in general* and *passive migration* of wastes as a particular method of disposal.¹³¹ Both courts and commentators have often recognized a “sharp” circuit split among the appellate courts.¹³² However,

126. *Id.* at 885.

127. *Id.*

128. *Id.* at 876.

129. *Id.* at 876-77.

130. *Id.* at 879. The *Carson III* court added that the contamination at issue could not be characterized as a deposit “because there was neither a deposit by someone, nor does the term deposit encompass the gradual spread of contaminants.” *Id.* This addition addressed the dissenting judge’s argument that passive migration was clearly within the term “deposit,” therefore constituting disposal under CERCLA. *Id.* at 889-90.

131. Articles both in favor of and against passive disposal theories discussed passive migration and passive disposal as if they are necessarily synonymous. See Stephens, *supra* note 7, at 10179 (“The phrase ‘passive disposal’ is often used to describe this rationale for imposing liability on one whose only sin was possession of property at the time of migration of hazardous substances that had been actively disposed of by another.”); Lipinski, *supra* note 7, at 108-9 (interpreting the *Nurad* holding as specifically addressing and sustaining passive migration as a form of disposal under CERCLA); May, *supra* note 5, at 404 (“[Some cases] distinguished *Nurad* on the facts and essentially rejected the theory of passive migration set forth in *Nurad*.”).

132. *Carson II*, 227 F.3d at 1206. See also Lee, *supra* note 7, at 91 (“With this ambiguous statutory language, the courts are sharply divided.”); *Disposal for CERCLA Liability Purposes May Include Passive Migration of Waste*, 69 U.S. LAW WEEK 1169 (2000) (“A ‘disposal’ under the Comprehensive Environmental Response, Compensation and Liability Act may include passive

as the *Carson III* court conceded, “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.”¹³³

The holdings suggest a “more nuanced range of views” because the cases suggest several different scenarios implicating passive disposal issues.¹³⁴ In scenario one, John Doe owns land on which he disposed of containers of hazardous wastes. The wastes leak or spill out of the containers, contaminating the surrounding soil. In a second scenario, Jane Doe owns land on which a previous owner disposed of containers of hazardous wastes, and Jane Doe might or might not know that these wastes have been disposed of on her property. In this scenario, the wastes also leak or spill from their containers, contaminating Jane’s property. In the third scenario, Mary Doe owns land on which a former owner or operator buried wastes or discarded wastes on the land and the wastes migrate, continuously contaminating a larger area.

Second, the cases suggest an issue that is more complex than whether the definition of disposal is properly interpreted as requiring active human

migration of hazardous waste, the U.S. Court of Appeals for the Ninth Circuit held Sept. 14, weighing in on a circuit split.”)

133. *Carson III*, 270 F.3d at 875.

134. Several articles spell out their own scenarios. *See* Stephens, *supra* note 7, at 10178-79 (citations omitted).

The factual scenario that creates the greatest difficulty . . . is quite common . . . [S]ome person or entity allowed hazardous substances to enter the environment through an act or omission, such as pouring waste on the land, burying drums which subsequently ruptured, or using underground storage tanks containing hazardous substances and abandoning those tanks in place. Later, after completion of this active disposal, the site was leased or sold to a person or entity who may not have used hazardous substances at all, and may have had no knowledge of prior disposal practices at the site. Having been released into the environment by prior owners or operators, however, hazardous substances continue to migrate through soil and groundwater, coming to rest in locations other than where originally placed.

Imposing liability on those persons who *actively* placed waste into the environment or abandoned waste in such a way that it could escape into the environment could hardly offend traditional notions of justice and fair play. But in *Nurad*, its predecessors, and its progeny, the courts go further, finding that mere movement of substances through soil and groundwater constitutes “disposal,” making the unwitting owner or operator—who took no action with respect to the waste—“the owner or operator at the time of disposal.”

See also Bronston, *supra* note 7, at 610 (citations omitted).

In this scenario, the original owner of the land generates hazardous waste and thereby contaminates the property. A second owner then uses the land for a different purpose, does not create any new waste, and is *not aware* of the previous contamination. During the second owner’s tenure, the previously deposited hazardous material spreads via leaching or migration. Finally, a third owner assumes control of the land and retains ownership at the time of the required remedial activity.

See also Caplan, *supra* note 7, at 10122.

conduct. The cases and articles suggest that what ultimately may be at issue for many is *fairness*.¹³⁵ For some, liability will lie in the first scenario because John Doe is the one who made the deposit. John Doe concurrently and affirmatively contributed to the waste disposal. However, liability will not lie in the second or third scenario, regardless of the fact that one involved a leak, as in *Nurad*, and the other involves mere migration, as in *CDMG*. There would be no liability because in neither scenario did the PRP commit an affirmative, concurrent act in addition to the migration or leakage of wastes.¹³⁶

Preoccupied with concerns of fairness, many commentators and cases compare decisions such as *Nurad* and *CDMG* and conclude that “a sharp split in the federal court decisions has emerged.”¹³⁷ Such statements completely overlook the fact that the *CDMG* court distinguished *Nurad*.¹³⁸ In contrast to the assertions of numerous articles on the issue, *CDMG* did not hold that all disposals must be active,¹³⁹ and *Nurad* did not license

135. See *supra* note 8 and accompanying text.

136. *Nurad* provides an excellent example of this point: In *Nurad*, there was a leak, but there was no concurrent conduct by the PRP. See *supra* notes 33-38 and accompanying text. Several cases and courts suggest that the PRP’s lack of “fault” is especially objectionable. See *supra* notes 107, 135; *infra* notes 138, 141. Likewise, in *CDMG*, there was migration without concurrent conduct. See *supra* note 50 and accompanying text.

137. See May, *supra* note 5, at 385 (comparing *Nurad* and *CDMG* and rejecting *Nurad*). Accord Lee, *supra* note 7, at 91. Lee, *supra* note 7, at 91. See also Lipinski, *supra* note 7, at 97 (contrasting *Nurad* with *CDMG* and asserting, incorrectly, that the *Nurad* holding included passive migration.). Cf. Lipinski, *supra* note 7 (comparing *Nurad* and *CDMG* and rejecting the *CDMG* holding.) All of these articles assume that *Nurad* addressed passive migration, as opposed to a passive leak. See *infra* note 140.

138. *CDMG*, 96 F.3d at 713. The *ABB* court noted the *Nurad* distinction as well. *ABB*, 120 F.3d at 358 n.3. The *Carson II* panel noted that *CDMG* has distinguished *Nurad*, but apparently did not make much of the distinction:

In any event, the *CDMG* court does not appear to have been completely convinced of its *noscitur a sociis* argument. The court said only that “Congress may have intended active meanings of ‘leaking’ and ‘spilling.’” The [*CDMG*] court went on to distinguish *Nurad* not on the theory that the Fourth Circuit wrongly interpreted disposal to include passive migration, but rather on the narrower ground that although disposal must include “leaking” from an underground storage tank, as in *Nurad*, disposal clearly does not include the gradual spread of wastes through a landfill. All very well, except that in conceding that some forms of passive migration are indeed covered by the passive terms in the statute, the entire foundation of the court’s analysis is undermined—all the inconsistencies and redundancies identified as reasons to avoid a passive reading are present under its own reading.

Carson II, 227 F.3d at 1209 n.18 (citations omitted). Apparently the court implicitly read *Nurad* as addressing passive migration and passive leaking as one and the same. *Id.*

139. See, e.g., *150 Acres*, 204 F.3d at 705 (“[T]wo circuits [in *CDMG* and *ABB*] have recently limited ‘disposal’ to spills occurring by human intervention.”); Caplan, *supra* note 7, at 10124 (asserting that the *CDMG* court held that spilling and leaking must be read as requiring active conduct); Lipinski, *supra* note 7, at 98-99 (asserting that the *CDMG* court held that all disposals require active conduct); May, *supra* note 5, at 407-408 (explaining that the *CDMG* court and the *ABB* court rejected the passive disposal theory entirely).

mere passive migration.¹⁴⁰

The *CDMG* court did not address passive disposal generally, but instead addressed the narrow issue of passive migration.¹⁴¹ Ultimately, the *CDMG* court did not decide whether all disposals should be active.¹⁴² In addition, *Nurad* concerned *leaking* and never extended its holding to migration where no leak had occurred.¹⁴³ *ABB*, a second case cited as being in opposition to *Nurad*, not only left the *Nurad* holding intact, but also specifically included “leaking” and “spilling” as proper instances of disposal.¹⁴⁴

Federal courts have compounded the confusion by following *CDMG* blindly. These courts have failed to note that *CDMG* did not address broader instances of passive disposal, and did not consider whether the facts of a case involved passive leaking or passive migration.¹⁴⁵ For

In some senses, the Lipinski comment was unclear. First Lipinski wrote, “[T]he [*CDMG*] court determined that, for purposes of ‘disposal’ under CERCLA, there is a requirement of action.” Lipinski, *supra* note 7, at 98-99. In the following paragraph, however, Lipinski wrote, “The court in *CDMG* refused to decide whether passive migration could ever be included in ‘disposal,’ holding more narrowly that the type of migration involved in *CDMG* cannot be ‘disposal.’” *Id.* at 99.

140. *Id.* at 97 (asserting that the *Nurad* holding explicitly licensed passive migration). *Accord* Caplan, *supra* note 7, at 10122-23; Clanton, *supra* note 30, at 258; Stephens, *supra* note 7, at 10180-81; Bronston, *supra* note 7, at 610-11; Lee, *supra* note 7, at 89; McMillen, *supra* note 7, at 274.

141. *CDMG*, 96 F.3d at 711.

142. *Id.* at 714. In dicta, the *CDMG* court did indicate that perhaps leaking should require active conduct: “We think there is a strong argument, however that in the context of this definition, ‘leaking’ and ‘spilling’ should be read to require active human conduct.” *Id.* at 714. The court discussed the plain meanings of the words “leaking” and “spilling,” and concluded, “In the context of these . . . words . . . Congress *may* have intended active meanings of ‘leaking’ and ‘spilling.’ *But we need not address this question* in the broad terms of whether disposal always requires active human conduct.” *Id.* (emphasis added) (citations omitted).

143. The *Nurad* court did use the word “migration” once: “The [district] court held . . . that [the defendant] was not liable—even though passive migration of hazardous substances may have occurred during his ownership—because he did not take an active role in managing the tanks or their contents.” *Nurad*, 966 F.2d at 844. The *Nurad* opinion seems to refer to a migration of substances after an appropriate instance of passive disposal—in other words, after passive disposal in the form of a leak. *See supra* notes 33-34 and accompanying text. *Nurad* suggests that the PRP need not have been actively involved in the causing the leak, not that there need not have been a leak at all. *Id.* *See also* *Nurad, Inc. v. Wm. E. Hooper & Sons, Co.*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,079 (D. Md. Aug. 15, 1991).

144. *See supra* note 66. *See also* *ABB*, 120 F.3d at 358 (“[W]e interpret the word ‘disposal’ as limited to spilling, discharging, leaking, etc., and not to passive migration.”).

145. *150 Acres*, 204 F.3d at 705-06. The court cited *CDMG* and *ABB* as the sources of its holding, yet holds that all disposal must be active. *Id.* The court reasoned that “[b]ecause ‘disposal’ is defined primarily in terms of active words such as injection, deposit, and placing, the potentially passive words ‘spilling’ and ‘leaking’ should be interpreted actively.” *Id.* at 706. Of course, not all cases have failed to distinguish migration and leaking. In *New York v. Almy Bros., Inc.* the district court held a party liable under CERCLA for the passive leaking of drums, citing the *Nurad* decision. 866 F. Supp. 668, 676 (N.D.N.Y. 1994). The court said that “The [parties] cannot escape liability based upon their argument that they took no affirmative action that ‘caused’ the release of the hazardous substances into the environment.” *Id.* at 676. Where there was clear evidence that a leak had occurred, the court said,

example, the court in *150 Acres* erroneously interpreted both *CDMG* and *ABB* as cases that “limited ‘disposal’ to spills occurring by human intervention.”¹⁴⁶ In addition, the *Carson II* court quickly agreed with *Nurad* and rejected the *CDMG* holding without noting that the cases addressed different, though related, issues.¹⁴⁷

One explanation for the disparity in the case law is that courts and commentators alike have feared that if the *Nurad* principle—permitting liability for *passive leaking*—were extended to permit *passive migration*, the result would be both unfair and incongruous with the statute. The result would be objectionable because—allegedly—if PRPs were liable for migration, all owners or operators in the chain of title would be liable long after a leak or spill had stopped.¹⁴⁸ With such an interpretation, many contend that the innocent owner defense would be useless.¹⁴⁹

However, it is far from obvious that because passive migration is an impermissible theory, other forms of passive disposal, such as passive leaking or spilling, must be impermissible as well.¹⁵⁰ First, the word “migration” does not appear in the definition of “disposal” under CERCLA.¹⁵¹ “Leaking” and “spilling” do appear in the definition.¹⁵² Thus, the plain language of the definition of “disposal” supports both the *Nurad* holding permitting leaking and the *CDMG* holding precluding passive migration. Second, there is nothing in the statute or the legislative history

“The state need not pinpoint at what precise moment leakage may have begun.” *Id.* at 677. Likewise, in *Bob’s Beverage, Inc. v. Acme Inc.*, the Sixth Circuit applied an appropriately narrow rule and held that passive migration did not constitute disposal under CERCLA. 264 F.3d 692, 697-98 (6th Cir. 2001).

146. *150 Acres*, 204 F.3d at 705.

147. *Carson II*, 227 F.3d at 1207.

148. See, e.g., *CDMG*, 96 F.3d at 715; *Snedicker Developers Ltd. P’ship v. Evans*, 773 F. Supp. 984, 989 (E.D. Mich., 1991) (“assuming that [waste] may migrate long after it has been introduced into the environment, [this] interpretation of . . . disposal would effectively impose cleanup liability on any owner in a chain of title . . . if the drafters of CERCLA had intended such a far reaching consequence, they would have said so explicitly.”); *In re Diamond Reo Trucks, Inc.*, 115 B.R. at 565 (“[Section 9607(a)(2) provides] an action against prior owners or operators who owned the site at the time the hazardous substances were introduced into the environment Otherwise, [the provision includes] all owners or operators in the chain of title subsequent to the contamination.” (quoting *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989))). Several articles present a similar argument. See Clanton, *supra* note 30, at 263; May, *supra* note 5, at 410-11.

149. See, e.g., *CDMG*, 96 F.3d at 716; *ABB*, 120 F.3d at 358.

150. *Carson III*, 270 F.3d at 880 (“This approach does not rule out the scenario in which ‘spilling,’ ‘leaking,’ or perhaps other terms in some circumstances, encompasses passive migration.”).

151. 42 U.S.C. § 6903(3).

152. *Id.* In fact, several courts hold that leaks do constitute a “disposal” triggering liability. See *Reading Co. v. Philadelphia*, 155 B.R. at 890. *In re Hemingway Transport, Inc.*, 180 B.R. 375 (D. Mass. 1989). Other cases hold that “spilling” is a disposal triggering liability. See *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784 (D.N.J. 1989); *Emhart Indus. Inc. v. Duracell Intern. Inc.*, 665 F. Supp. 549 (M.D. Tenn. 1987).

indicating that wherever “leaking” and “spilling” appear they must have an active meaning.¹⁵³ Third, the words “leaking” and “spilling” have common meanings with preponderantly passive connotations. For example, a leak by definition refers to an unintended or unknown escape or release.¹⁵⁴ No resort is necessary to the meanings suggested by the remaining words in the definition.

Furthermore, in the environmental context, the word “leaching” is commonly used to refer to migration through soil.¹⁵⁵ “Leaching” does not appear in the definition of “disposal,” but it clearly appears in the definition of “release.”¹⁵⁶ This distinction further supports a conclusion that migration can be excluded in interpreting disposal, without excluding passive instances of leaking.

Courts and commentators have also argued that a disposal triggering liability under CERCLA must be active because “release” must necessarily have a broader definition than “disposal.”¹⁵⁷ This argument is likewise flawed. “Release” is defined under CERCLA as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.”¹⁵⁸ “Disposal” is defined as a “discharge, deposit, injection, dumping, spilling, leaking, or placing.”¹⁵⁹ The definition of “release” explicitly includes the word “disposal” as well as all of the words defining

153. *Carson III*, 270 F.3d at 878 (“We must presume that words used more than once in the same statute have the same meaning.”) (quoting *Boise Cascade Corp. v. United States Envtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991)).

154. The definition of “leak” in Webster’s dictionary is: “1. an unintended hole, crack, or the like, through which liquid, gas, light, etc., enters or escapes: *a leak in the roof*. 2. an act or instance of leaking. 3. any means of unintended entrance or escape.” The Dictionary goes on to define “leak” as “7. to let a liquid, gas, light, etc., enter or escape, as through an unintended hole or crack.” Random House Webster’s Unabridged Dictionary 1094 (2d ed. 1997). “Spill” is defined as: “to run or fall from a container, esp. accidental or wastefully.” *Id.* at 1837.

155. *See supra* notes 54, 106 and accompanying text. *Cf. Carson II*, 227 F.3d at 1207. The *Carson II* court considered migration to be a part of the definition of disposal, even though they were aware of the common interpretation of the word “leaching.” *Id.* at 1208 (considering the *CDMG* court’s reference to the inclusion of the word “leaching” in the definition of “release”). The *Carson II* court stated, “Since the prescribed definition [of disposal] includes passive migration by its own terms, we are bound to give effect to that definition.” *Id.*

156. *See supra* note 6 and accompanying text.

157. *See 150 Acres*, 204 F.3d at 706; *Peterson*, 806 F. Supp. at 1352; May, *supra* note 7, at 393.

158. 42 U.S.C. § 9601(22). The definition reads in its entirety: “The term ‘release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).” *Id.*

159. 42 U.S.C. § 9601(29) (2000). “The terms ‘disposal’, ‘hazardous waste’, and ‘treatment’ shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903].” *Id.*

“disposal.”¹⁶⁰ This overlap suggests that although “release” is defined more broadly than “disposal”, the definition is not significantly broader. In fact, the significant overlap provides a stronger argument that the definitions are not exclusive. As the *Nurad* court recognized, to argue that “leaking” has different meanings in different places in the statute “arbitrarily deprive[s] these words of their passive element by imposing a requirement of active participation as a prerequisite to liability.”¹⁶¹

In other words, no strong support exists for the assertion that absolutely no passive disposal constitutes a “disposal” under CERCLA. The arguments supporting exclusion of passive migration as a basis for liability do not similarly support exclusion of passive “leaking” or “spilling.”¹⁶²

V. PROPOSAL

One problem that the cases suggest is that by failing to distinguish *Nurad* and *CDMG*, many courts have reached decisions that are overbroad. Thus, some cases hold that passive disposal in general may never trigger liability under section 9607(a)(2), though the facts only involve passive migration.¹⁶³ A second problem in cases involving passive migration is that some courts might feel compelled by fairness concerns to extend the holding to passive disposal generally. A few commentators urge that it seems unfair to hold a party liable when he/she did not act affirmatively.¹⁶⁴

Courts should be careful on both counts. First, federal courts should recognize that there is no sharp circuit split; in fact, one might question whether there is a split at all.¹⁶⁵ The only decisions that appear to oppose each other are the holdings of *Nurad* and *150 Acres*.¹⁶⁶ Of all the circuit court cases, only *Nurad* and *150 Acres* decided whether passive leaking constituted disposal under CERCLA.¹⁶⁷ Additionally, the *150 Acres* court evidently misinterpreted the other federal appellate decisions because

160. *Id.*

161. *Nurad*, 966 F.2d at 845.

162. *See supra* note 150 and accompanying text.

163. *See generally 150 Acres*, 204 F.3d 698.

164. *See supra* note 8; Stephens, *supra* note 7, at 10183 (“Courts should not expand CERCLA’s broad liability scheme lightly and without any evidence of culpability of the parties sought to be held liable.”).

165. 270 F.3d at 876.

166. *See supra* notes 39, 69-70 and accompanying text. These holdings were addressed to passive disposal specifically.

167. *Nurad*, 966 F.2d at 844 (“[W]e must ask whether recovery against [prior owners] is nonetheless barred because no ‘disposal of hazardous wastes took place on their watch. The district court took a narrow view of the word ‘disposal,’ limiting it to affirmative human conduct.”).

those decisions do not support its broad holding.¹⁶⁸

Courts should also keep in mind that the word “migration,” whether passive or otherwise, does not appear in the definition of disposal.¹⁶⁹ “Leaking” does.¹⁷⁰ It is therefore unnecessary to address instances of passive leaking or other forms of passive disposal where the facts do not present them. In other words, the holdings and the language of the cases should not address passive disposal generally if the facts allege passive migration. At the same time, courts should not address passive migration where the facts involve passive leaking.¹⁷¹

On the other hand, where a court grasps this distinction, but nevertheless wishes to preclude all passive disposal from triggering liability under § 9607(a)(2), it should resist the temptation. First, while it is important to make the “responsible party” pay, CERCLA recognizes that this is not always possible.¹⁷² If CERCLA were based simply on making the responsible party pay, only the party who made the initial deposit would be liable. Instead, CERCLA makes current owners liable if they do not qualify for one of the restricted defenses.¹⁷³ Second, CERCLA largely imposes strict liability. Requiring another level of causation interferes with Congress’s intent.¹⁷⁴ Third, a party who affirmatively causes a disposal is not necessarily more responsible for the release than one who passively causes a disposal.¹⁷⁵ A party associated with a passive disposal might have full knowledge of the hazardous wastes entering the environment.¹⁷⁶ The fact that such a party does not tip over the wastes might not make the party

168. See *supra* notes 75, 146 and accompanying text.

169. See *supra* note 6 and accompanying text.

170. See *supra* note 6 and accompanying text.

171. See generally *150 Acres*, 204 F.3d at 698.

172. Several courts state that the purpose of CERCLA is to make the responsible party pay. See *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (“[The] two . . . main purposes of CERCLA” are “prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party.”). CERCLA’s strict liability focus clearly realizes, however, that the party responsible for the initial deposit cannot always pay. See *supra* note 96 and accompanying text.

173. 42 U.S.C. § 9607(a)(2) (2000).

174. *Nurad*, 966 F.2d at 846. (“The district court’s view of the CERCLA definition of disposal is also at odds with CERCLA’s strict liability emphasis. The trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.”) CERCLA’s strict liability application is well settled in the case law. See *New Castle County v. Halliburton NUS Corp.* 111 F.3d 1116, 1120-21 (3d Cir. 1997) (“A section 107 cost recovery action imposes strict liability on potentially responsible persons for costs associated with hazardous waste clean-up and site remediation.”); See CERCLA Overview, *supra* note 14, at 402.

175. *Nurad*, 966 F.2d at 845.

176. *Id.*

any less responsible.¹⁷⁷ Fourth, courts should remember that CERCLA liability might later be apportioned to account for fairness. Parties who are “not as guilty” might qualify for defenses, or be apportioned a smaller amount of liability by the judge under 42 U.S.C. § 9613(f)(1).¹⁷⁸

VI. CONCLUSION

The courts in *Carson III*, *Nurad*, and *CDMG* reached correct conclusions. Circuit split or not, between the three decisions, courts should be able to find guidance to reach a result that is consistent with the strict liability scheme of CERCLA.

Although the legal question seems finally settled, a policy question remains. The question in these cases is not simply whether a leak or spill of hazardous wastes is passive or active. Rather, the question is whether the leak or spill must be associated with *concurrent, affirmative conduct* by the person who might be held liable. The inquiry seems to boil down to whether the PRP had anything to do with the wastes before the disposal.¹⁷⁹ This is an issue of guilt or liability, and perhaps it should be resolved by protesting CERCLA’s general strict liability scheme, and not through a strained interpretation of disposal.

The Supreme Court has not heard many cases under CERCLA, and given its caseload, and the absence of a veritable circuit split, it is unlikely that the Court will address this issue in the future.¹⁸⁰ The Court denied certiorari in the *Carson* case in April 2002.¹⁸¹ Under the current

177. *Id.*

178. This provision is entitled “contribution.” It reads:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. *In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.* Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1) (2000) (emphasis added).

179. See Stephens, *supra* note 7, at 10179-80:

The disparity in the district and the appellate courts’ views of the scope of the term “disposal” hinged not on whether active human conduct is required to trigger “disposal,” but rather on whether disposal by “leaking” requires *concurrent* human conduct (the district court’s view) or whether it can simple occur as a result of *prior* human conduct (the Fourth Circuit’s view).

180. A Westlaw search for Unites States Supreme Court cases involving CERCLA resulted in only five cases.

181. See *supra* note 12.

administration and with other problems battling for our nation's attention, it also seems unlikely that CERCLA is a priority for Congress.¹⁸² Therefore, it is currently up to the courts to define "disposal."

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182. A few commentators propose that Congress expressly define "disposal" to exclude passive disposal. *See, e.g.*, Beless, *supra* note 14, at 280-81; Clanton, *supra* note 29, at 267; McMillen, *supra* note 7, at 286.

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