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Determining Past Owner Liability Under CERCLA: The Circuit Split Over the Statutory Interpretation of the CERCLA Term "Disposal" and Why "Disposal" Should Not Include Passive Migration Contamination

Pamela A. Kayatta*

I. Introduction

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a means of holding parties liable for the hazardous waste contamination of property.[1] Congress intended to apply CERCLA retroactively to parties whose past acts contributed to existing contaminated property conditions.[2] Through CERCLA, Congress imposes property cleanup costs on these responsible parties.[3]

Among the circuits, controversy exists as to whether courts should hold past property owners liable even though their conduct did not play an "active"[4] role in the property contamination. Contamination by "active contribution" often arises when a party purchases property that has previously been owned and contaminated with a hazardous material. This party can be seen as the middle purchaser, who does not aid in the

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1. *See* 42 U.S.C. § 9607 (2002); United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996).

2. *See* 42 U.S.C. § 9607; *CDMG*, 96 F.3d at 712 (describing Congress's intent regarding CERCLA).

3. *See* 42 U.S.C. § 9607; *CDMG*, 96 F.3d at 712 (describing CERCLA's purpose).

4. *See infra* notes 5 and 12 (regarding active and passive contamination, respectively). An "active" role in property contamination, within the context of CERCLA, may include the initial disposal of hazardous materials, as well as any active conduct that aids in the spreading of the contaminants after the initial disposal. A "passive" contamination would involve the gradual spreading of hazardous materials through the soil without aid.

property contamination but later chooses to resell the property.[5] Under CERCLA, the middle purchaser is now labeled as a past property owner and may be held liable for property cleanup costs regardless of whether that owner's actions actually contributed to the property contamination.[6]

More specifically, CERCLA provides different categories of liability in order to hold a variety of contaminating parties responsible. A party falls into a certain liability category depending on the time at which that party became responsible for contamination. These liable parties are labeled "Potentially Responsible Parties" (PRPs) and may be subject to liability under the Statute.[7] One such PRP is "a person who '*at the time of disposal*' or treatment of any hazardous substances owned or operated any facility at which such hazardous substances were disposed."[8]

The circuit courts disagree on how to interpret the CERCLA term "disposal." Under CERCLA, Congress defines a "disposal" as a "discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment or be . . . discharged into any waters."[9] Depending on how the courts choose to interpret the term "disposal," the categories of potentially liable parties are either narrowed or broadened. Some courts interpret the CERCLA term "disposal" narrowly, referring only to parties who by human conduct have actually disposed of hazardous materials, thus actively contributing to and creating the event leading to the resulting contamination. Other courts interpret the term "disposal" broadly, to incorporate the passive migration and gradual spreading of a hazardous material through the soil,

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5. *See generally* Carson Harbor Village v. Unocal Corp., 227 F.3d 1196 (9th Cir. 2000) (reasoning that "disposal" includes passive migration); Nurad, Inc. v. William Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992) (same); *CDMG*, 96 F.3d 706 (reasoning that "disposal" requires active human conduct); United States v. 150 Acres of Land, 204 F.3d 698 (6th Cir. 2000) (same); Bob's Beverage, Inc. v. Merkel, 2001 U.S. App. LEXIS 19589 (same); ABB Indus. Sys. Inc. v. Prime Tech., Inc., 120 F.3d 351 (2d Cir. 1997) (same).

6. *See supra* note 4 and accompanying text.

7. 42 U.S.C. § 9607(a)(1)-(4). Under CERCLA, four categories of persons, also known as potentially responsible parties (PRPs) may be held liable if the PRP includes: (1) the current owner/operator of a facility from which there has been a release; (2) a person who at the time of disposal or treatment of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of; (3) generators of hazardous waste; and (4) arrangers for the disposal of hazardous waste.m 42 U.S.C. § 9607(a)(1)-(4).

8. 42 U.S.C. § 9607(a)(2). The plain language of statute provides that a PRP may be held liable if: a person who at the time of disposal or treatment of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of. 42 U.S.C. § 9607(a)(2).

9. *See* 42 U.S.C. § 9601(29) (2002).

thus resulting in property contamination absent human involvement.[10] Consequently, the court's interpretive choice will determine the liability of parties under CERCLA.[11]

If courts interpret the term "disposal" to include the passive migration of hazardous materials, a party may be held responsible for property cleanup costs even though the party's conduct did not actively lead to the contamination.[12] Courts following the Fourth and Ninth Circuits to broadly interpret the term "disposal" to include the passive migration of hazardous waste have relied on the definition of the term "disposal" to support the broader interpretation.[13] The term "disposal" is defined in the Act by terms typically regarded as having a passive meaning such as "discharge," "spill," and "leak." Therefore, advocates of the broader interpretation have reasoned that the courts should interpret the term "disposal" to include passive migration because the term "disposal" is defined by passive terms. Under this interpretation, parties who do not actively contribute to the hazardous contamination will be held liable based solely on the passive migration of contaminants.[14]

Other courts, such as the Third and Sixth Circuits, narrowly interpret the term "disposal" and have determined that CERCLA liability extends only to parties who, by human conduct, have actively contributed to the contamination.[15] These courts have also relied on the terms that define the term "disposal." To support such an interpretation, however, these courts, find that the term "disposal" is typically defined in terms of active words such as "injection," "deposit," and "placing."[16]

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10. A passive contamination generally occurs through the gradual spreading of hazardous materials through the soil due to gravity and without human involvement. *See generally Carson Harbor*, 227 F.3d 1196 (reasoning that "disposal" includes passive migration); *Nurad*, 966 F.2d 837 (same). *But cf. CDMG*, 96 F.3d at 706 (reasoning that "disposal" requires active human conduct); *150 Acres*, 204 F.3d 698 (same); *Bob's Beverage*, 2001 U.S. App. LEXIS at 19589 (same); *ABB Indus.*, 120 F.3d 351 (same).

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

12. *See Carson Harbor*, 227 F.3d at 1206 (reasoning that "disposal" includes passive migration); *Nurad*, 966 F.2d at 844-46 (same). *But cf. 150 Acres*, 204 F.3d at 705-6 (reasoning that "disposal" requires active human conduct); *Bob's Beverage*, 2001 U.S. App. LEXIS at 19589 (same); *ABB Indus.*, 120 F.3d at 357-59 (same); *CDMG*, 96 F.3d at 713-18 (same).

13. *See Carson Harbor*, 227 F.3d at 1206 (reasoning that the term "disposal" is defined by passive terms); *Nurad*, 966 F.2d at 844-46 (same).

14. *See Carson Harbor*, 227 F.3d at 1206; *Nurad*, 966 F.2d at 844-46 ("disposal" includes the passive migration of contaminants).

15. *See generally CDMG*, 96 F.3d 706 (reasoning that "disposal" requires active human conduct); *150 Acres*, 204 F.3d 698 (same); Tanglewood East Homeowners v. Charles-Thomas, 849 F.2d 1568 (5th Cir. 1988); *ABB Indus.*, 120 F.3d 351 (same).

16. *See CDMG*, 96 F.3d at 713-18 (reasoning that "disposal" is defined with active terms); *150 Acres*, 204 F.3d at 706 (same) *Bob's Beverage*, 2001 U.S. App. LEXIS at 19589; *Tanglewood*, 849 F.2d at 1568; *ABB Indus.*, 120 F.3d at 357-59 (same).

Moreover, supporters of a more narrow interpretation reason that Congress further evidenced its intent of having the definition of "disposal" take on an active meaning by expressly writing each defining term in the active tense, with each defining term having an "-ing" ending.[17] Thus, these circuits believe that even defining terms such as "spilling" and "leaking" have an active meaning and support the theory of an active conduct contamination interpretation of "disposal."

To aid in resolving the "disposal" interpretation conflict, it is helpful to analyze a similar active versus passive interpretation conflict present among the Ninth Circuit district courts. Within the Ninth Circuit, the district courts disagree over the interpretation of the term "discharge" used in the Clean Water Act (CWA).[18] Although the CWA statute differs significantly from CERCLA, an analogy may be drawn as to how the courts interpret the key terms and support their reasoning of active conduct or passive migration. The Ninth Circuit district courts differ in determining the liability of parties responsible for pollutants "discharged" into groundwater sources.[19] The controversy turns on whether the CWA term "discharge" includes point or nonpoint sources.[20] Point source pollutants are analogous to active contamination contributions, and nonpoint source pollutants are analogous to the passive migration of contaminants.[21] By looking to the active versus passive interpretation controversy within the Ninth Circuit district courts over the CWA term "discharge," courts can make an analogy may shed some light on the similar controversy present among the circuit courts over the CERCLA term "disposal."

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17. *See CDMG*, 96 F.3d at 713-18 (reasoning that "disposal" has an active meaning); *150 Acres*, 204 F.3d at 706 (same); *Bob's Beverage*, 2001 U.S. App. LEXIS at 19589 (same); *Tanglewood*, 849 F.2d at 1568; *ABB Indus.*, 120 F.3d at 357-59 (same).

18. *See* Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) (The term "discharge" under § 401 of the CWA does not include nonpoint source pollution. The Ninth Circuit in *Dombeck* held that the term "discharge" under the CWA was not intended to include discharge from nonpoint source pollution); Idaho Conservation League v. Caswell, 1996 WL 938215 (D. Idaho 1996) (The United States District Court of Idaho held that the term "discharge" applies only to point sources of pollution. Therefore, the term "discharge" does not include nonpoint sources of pollution); Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (The United States District Court of Oregon held that the term "discharge" is not limited to point sources of pollution. Therefore, the term "discharge" includes nonpoint sources of pollution); National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (The Court of Appeals held that since the Environmental Protection Agency's interpretation of National Pollutant Discharge Elimination System permit program as excluding dam-caused pollution was reasonable, not inconsistent with congressional intent, and entitled to great deference. Thus, the court upheld the permit program).

19. *See supra* note 18 and accompanying text.

20. *See id.*

21. *See supra* notes 18 and 22 and accompanying text.

This Comment will initially provide an overview of CERCLA, including Congress's purpose and primary goals for enacting the statute.[22] In addition, this Comment will explain why the term "disposal" should not include the passive migration of hazardous substances. Past property owners should not be held liable when they have not actively contributed to property contamination. Also, by comparing the Ninth Circuit's interpretation of the CWA term "discharge" and the Circuits' interpretation of the CERCLA term "disposal," this Comment will illustrate that the courts support an active conduct contamination theory and that the CERCLA term "disposal" should not include passive migration.

II. The Comprehensive Environmental Response, Compensation, and Liability Act

A. An Overview of CERCLA

In 1980, Congress enacted CERCLA to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.[23] The two principal goals of CERCLA are: (1) "to facilitate the cleanup of potentially dangerous hazardous waste sites"[24] and (2) "to compel polluters to pay the costs associated with their pollution."[25] CERCLA imposes strict liability on previous landowners and provides present landowners with a cause of action to recover response costs incurred in remedying an environmental property

22. *See generally* the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. § 9607; *CDMG*, 96 F.3d at 712; Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1387 (1994).

23. *See* 42 U.S.C. § 9607; *See generally* GILBERT M. MASTERS, INTRODUCTION TO ENVIRONMENTAL ENGINEERING AND SCIENCE SECOND EDITION 297-307 (Marcia Horton ed., Prentice Hall 1997) (1997). CERCLA was enacted as a response to the impact of events that occurred in the late 1970s such as Love Canal, where hazardous materials oozed from abandoned dumpsites into backyards and basements. *Id.* The public pressured Congress to deal with already contaminated sites. *Id.* CERCLA is focused on identifying hazardous waste sites, preparing clean up plans, and compelling responsible parties to pay for the sites remediation. *Id.* Under CERCLA, the Environmental Protection Agency (EPA) can deal with short-term and long-term situations. *Id.* The short-term problems generally deal with emergency situations caused by actual or potential release of hazardous materials, while the long-term situations generally involve abandoned or uncontrolled hazardous contamination sites. *Id.*

24. *See CDMG*, 96 F.3d at 717; Tippins Inc. v. USX Corp., 37 F.3d 87, 92 (3d Cir. 1994).

25. *See CDMG*, 96 F.3d at 717; United States v. Alcan Aluminum, 964 F.2d 252, 257-58 (3d Cir. 1992).

hazard.[26] In addition, CERCLA also allows parties who are liable for response costs to seek contribution from other liable parties who may have shared in the contamination of the property.[27]

B. *CERCLA: Liability Under 42 U.S.C. § 9607 (a) and Defining the Term "Disposal"*

Under CERCLA, four categories of persons, also known as potentially responsible parties (PRPs), may be held liable if the PRP is: (1) "the current owner/operator of a facility from which there has been a release; (2) a person who '*at the time of disposal*' or treatment of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of; (3) generators of hazardous waste; and (4) arrangers for the disposal of hazardous waste."[28]

Congress has defined the CERCLA term "disposal" by incorporating the definition used in the Resource Conservation Recovery Act (RCRA).[29] Under RCRA, a "disposal" occurs when there is a "discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment or be . . . discharged into any waters."[30]

C. *The Circuit Split in Interpreting the Term "Disposal"*

The circuit courts disagree over the issue of whether the term "disposal" includes the passive migration of hazardous materials or requires active conduct.[31] Passive migration involves the gradual spreading of contaminants through the soil due to gravity, whereas active human conduct creates an event that permits the contamination to

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26. *See* 42 U.S.C. § 9607; *CDMG*, 96 F.3d at 712.

27. *See* 42 U.S.C. § 9607. Under CERCLA, four categories of persons, also known as potentially responsible parties (PRPs) may be held liable if the PRP includes: (1) the current owner/operator of a facility from which there has been a release; (2) a person who at the time of disposal or treatment of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of; (3) generators of hazardous waste; and (4) arrangers for the disposal of hazardous waste; *see also CDMG*, 96 F.3d at 712.

28. 42 U.S.C. § 9607(a)(1)-(4).

29. *See* 42 U.S.C. § 6903(3) (2002).

30. *See* 42 U.S.C. § 9601(29) (2002).

31. *See* Carson Harbor Village v. Unocal Corp., 227 F.3d 1196, 1206 (9th Cir. 2000) (reasoning that "disposal" includes passive migration); Nurad, Inc. v. William Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992). *But cf. CDMG*, 96 F.3d at 713-18 (reasoning that "disposal" requires active human conduct); United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000); *Bob's Beverage*, 2001 U.S. App. LEXIS at 19589; *Tanglewood*, 849 F.2d at 1568; *ABB Indus.*, 120 F.3d at 357-59 (same).

occur.[32] Circuits broadly interpreting the term "disposal" extend liability to past owners when the passive migration of contaminants has occurred during their ownership.[33] Under this interpretation, these courts require only that the passive migration of a hazardous substance exists; they do not require any evidence of active human conduct occurring before the entry of a substance into the environment.[34]

On the other hand, circuits narrowly interpreting the term "disposal" do not extend liability to past owners when the passive migration of contaminants has occurred.[35] These courts require evidence of active human conduct in order for a "disposal" to exist and address the human activity that precedes the entry of a substance into the environment.[36] Such activity may include the affirmative actions of physically putting the hazardous waste into the environment.

1. Broadly Interpreting the Term "Disposal" to Include the Passive Migration of Contaminants

Broadly interpreting the term "disposal," the Fourth Circuit in *Nurad v. Hooper & Sons Co.*[37] held past property owners liable for the passive migration of contaminants.[38] The defendant in *Nurad* was a previous property owner who owned a facility at the time hazardous materials were leaking from underground storage tanks on the property.[39] Although the defendant was a previous property owner, he did not install the underground tanks.[40] In fact, the defendant proved that the hazardous material had begun leaking before he even acquired the property.[41] Nevertheless, the court reasoned that Congress's goal in enacting CERCLA was not to identify when a leak actually began but rather to

32. *See supra* note.

33. *See Carson Harbor*, 227 F.3d at 1206; *Nurad*, 966 F.2d at 844-46 (holding that the term "disposal" includes passive migration).

34. *See Carson Harbor*, 227 F.3d at 1206; *Nurad*, 966 F.2d at 844-46 (holding that the term "disposal" includes passive migration).

35. *See supra* note 14.

36. *See id. See also CDMG*, 96 F.3d at 717-18 (stating that cross contamination, causing the spread of contamination "into or on" previously uncontaminated "soil or water," by a former owner/operator does constitute a disposal).

37. *Nurad*, 966 F.2d 837, 844-46 (4th Cir. 1992) (holding that the term "disposal" includes passive migration).

38. *See Nurad*, 966 F.2d at 837. The Fourth Circuit reasoned that a narrow reading of the term "disposal" frustrates CERCLA's purpose (*see CDMG*, 93 F.3d at 717). The two principle goals of CERCLA's enactment are: (1) to assist with the cleanup of potentially dangerous hazardous waste sites, and (2) to compel polluters to pay the costs associated with their pollution. The court concluded that the CERCLA term "disposal" includes passive migration and held the past owners responsible even though the parties did not actively contribute to the contamination. *Nurad*, 966 F.2d at 846.

39. *Nurad*, 966 F.2d at 840.

40. *Id.* at 846.

41. *Id.* at 844.

extend liability to a responsible party.[42] The court concluded that the term "disposal" includes passive migration and held the defendant liable even though he did not actively contribute to the contamination.[43]

Similarly, the Ninth Circuit in *Carson Harbor Village v. Unocal Corp.*[44] also interpreted the term "disposal" broadly, interpret the term "disposal" to include the passive migration of contaminants. As a result, the Ninth Circuit held the past property owners, who had not actively contributed to the contamination, liable for cleanup costs.[45] In *Carson Harbor*, the property was used for petroleum production between 1945 and 1983.[46] An environmental assessment of the property indicated that the hazardous materials had been present on the property several decades prior to the occupancy of the present owner.[47] Looking to the statutory definition of the term "disposal," the court reasoned that terms defining "disposal," such as "discharge," "spill," and "leak," have passive

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42. *Id.* at 844.

43. *See id.* at 847.

44. Carson Harbor Village v. Unocal Corp., 227 F.3d 1196 (9th Cir. 2000). The Ninth Circuit held property owners liable for contamination cleanup costs under the passive migration disposal theory. *Id.* at 1206. In *Carson Harbor*, the property was used for petroleum production between the years of 1945-1983. *Id.* at 1199. An environmental assessment of the property indicated that the hazardous materials had been on the property several decades prior to the current owner. *Id.* The court reasoned that Congress' intent was to guarantee prompt cleanup by holding potentially responsible parties liable. *Id.* at 1196. The court reasoned that the purpose of CERCLA is to hold parties responsible for costs associated the cleanup of disposal sites. *Carson Harbor*, 227 F.3d at 1205. Thus, the Ninth Circuit interpreted the term "disposal" to include passive migration and extended liability to past property owners who did not actively contribute to the contamination. *Id.* at 1196.

First, in looking at the statutory definition of the term "disposal," the court reasoned that the terms defining "disposal," such as "discharge," "spill," and "leak," have passive meanings because these terms occur without any human activity or conduct. *Id.* at 1206. Second, the Fourth Circuit analyzed its interpretation of the term "disposal" under RCRA, from which CERCLA borrowed the term. *Id.* In previous cases, the Fourth Circuit has refused to limit the term "disposal" to require active conduct on the part of the liable party. *Id.* Instead, the court reasoned that a broad interpretation of "disposal" should include the "movement," "dispersal," or "release" of substances. *Id.* Finally, the court looked to the Congress' goals in enacting CERCLA. *Id.* The court reasoned that because CERCLA is a strict liability act responsible for affixing cleanup costs to a responsible party, causation requirements are not needed in order to hold a party responsible. *Id.*

Moreover, the court distinguished the *CMDG* holding that identified why passive disposal was not an intended liability theory under CERCLA. *Carson Harbor*, 227 F.3d at 1209. The court reasoned that a passive liability theory fit better with Congress' intent in enacting CERCLA, and therefore held potential responsible parties liable for the cost of hazardous cleanup. *Id.* at 1210. Thus, under a passive disposal theory, the court held that the previous property owners were liable under CERCLA. *Id.* at 1196.

45. *See Carson Harbor*, 227 F.3d at 1196 (extending liability to past owners via passive migration).

46. *See id.* at 1199.

47. *See id.*

connotations due to the fact that these actions usually occur without any human activity or conduct.[48] The court reasoned that Congress's intent in enacting CERCLA was to guarantee the prompt remedy of contaminated sites by holding potentially responsible parties.[49] Thus, the Ninth Circuit interprets the term "disposal" to include the passive migration of contaminants and extends liability to past property owners who have not actively contributed to the contamination.[50]

2. Narrowly Interpreting the Term "Disposal" Not to Include the Passive Migration of Contaminants

Narrowly interpreting the term "disposal," the Third Circuit in *United States v. CDMG Realty Co.*[51] held that the passive migration of hazardous materials dumped prior to the person's ownership of the property does not constitute a "disposal."[52] In *CDMG*, the property at issue at one time had been a landfill disposal site.[53] Between 1945 and 1972, the landfill received municipal waste including hazardous chemical waste.[54] The landfill closed, and the property was sold.[55] The new owner then resold the property after fully disclosing to the subsequent buyer that the property had been previously contaminated.[56] After examining the plain meaning of the term, the purpose of CERCLA, and the innocent owner defense[57], the Third Circuit reasoned that the term "disposal" did not include the passive migration of leaking landfill contaminants.[58] Thus, the Third Circuit does not hold the previous property owner liable for the passive migration of contaminants.[59]

Similarly, the Sixth Circuit has held that the passive migration of hazardous substances does not constitute a "disposal."[60] In *United States*

48. *See Carson Harbor*, 227 F.3d at 1206. In referencing Webster's Dictionary, the court found that the term discharge is defined broadly and that the definition itself contains passive terms. *Id.*

49. *See id.* at 1196.

50. *See id.*

51. United States v. CDMG Realty Co., 96 F.3d 706 (3d. Cir. 1996).

52. *See CDMG*, 96 F.3d at 706.

53. *See CDMG*, 96 F.3d at 711.

54. *See id.*

55. *See id.* at 712.

56. *See id.* at 711-12.

57. 42 U.S.C. 9607(b)(3) (2002). The Innocent Owners Defense provides past owners with a defense to CERCLA liability. In order for the defense to apply, the past owner must have purchased the contaminated property after the time of disposal of the hazardous contaminants. The innocent owner must also show that at the time the owner acquired the property, he did not know and had no reason to know that any hazardous substance which is subject to release or threatened release was disposed of on, in, or at the property. United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000).

58. *See generally CDMG*, 96 F.3d 706.

59. *See id.* at 722.

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

v. 150 Acres,[61] the Ohio Environmental Protection Agency (OEPA) discovered approximately 300-400 abandoned drums containing hazardous waste on the owner's property.[62] The OEPA contended that a previous owner had placed the drums on the property during the mid 1950s-1970s and thus had created the event that lead to the passive migration of hazardous waste resulting in the property contamination.[63] The court reasoned that under another section of CERCLA, Congress had used the term "release" to reference the passive migration of contaminants. Therefore, by using the term "disposal" within the CERCLA liability section, Congress illustrated a meaning different and separate from the term "release." Therefore, the Sixth Circuit interpreted "disposal" to extend liability only to past owners actively contributing to property contamination.[64] The Sixth Circuit does not hold past owners liable if they had not been the ones to place hazardous waste on the property.[65]

D. The Plain Meaning of the Term "Disposal" Supports a Theory of Active Conduct Contamination to Hold Only Active Past Contaminators Liable

Congress defines the CERCLA term "disposal" as meaning "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment or be . . . discharged into any waters."[66] Congress extends liability to past owners who have contributed to the contamination of property through active human conduct.[67] Active conduct includes the initial disposal of hazardous materials, as well as any active conduct that aids in the spreading of the contaminants after the initial disposal. Thus, the term "disposal" is defined in part as the "discharge" or "placing" of waste into or on any land or water.[68] The terms "discharge" and "placing" describe contamination that may occur after the initial introduction of contaminants onto property. Thus, the term "disposal" also encompasses the spreading of contaminants due to activity subsequent to the initial

61. *See 150 Acres*, 204 F.3d 705-06.
62. *See id.* at 701.
63. *See id.*
64. *See id.* at 705-06 (illustrating the difference between the terms "disposal" and "release").
65. *See id.* at 711.
66. *See* 42 U.S.C. § 9601(29) (2002).
67. *See generally CDMG*, 96 F.3d 706 (reasoning that the term "disposal" requires evidence of active human conduct); *150 Acres*, 204 F.3d 698 (same).
68. *See* Webster's Third New International Dictionary, Unabridged 2195 (Philip Babcock Gove & the Merriam-WEBSTER Editorial Staff eds., 1986).

placing of the contaminant. Consequently, courts hold parties who contribute to the later spreading of contaminants liable.[69]

In *Carson Harbor*, the Ninth Circuit incorrectly interpreted the term "disposal" to include the passive migration of contaminants within the definition.[70] The court explained that the statutory definition of CERCLA is defined by at least three other terms with "well-recognized passive meanings."[71] These defining, "well-recognized," passive terms include: "discharge," "spill," and "leak."[72] The court reasoned that a "disposal" includes the passive migration of contaminants and does not require active human conduct to precede the contamination in order for a "disposal" to occur.[73]

Conversely, the Third Circuit in *CDMG* correctly interpreted the term "disposal" to require affirmative conduct to precede contamination in order to establish past owner liability.[74] Under the liability section of CERCLA, Congress's description of the term "disposal" leaves little room for passive interpretation.[75] Although the Ninth Circuit majority focuses on the terms "discharge," "spill," and "leak," to define and support a passive interpretation of the term "disposal," these defining terms only constitute a "disposal" if active human conduct creates the "spill," or "leak" which results in the property contamination.[76] The Third Circuit specifically addresses these "passive," defining terms; the Third Circuit, however, actually determines that the terms "spill" and "leak" support a narrow interpretation of "disposal" and that this interpretation requires active human conduct to precede the contamination in order for liability to attach.[77]

Webster's Dictionary defines the terms "spill" and "leak" as: "to cause or allow to pour, splash, or fall out" and "to permit to enter or escape through a leak," respectively.[78] Certainly, human activity is

69. *See CDMG*, 96 F.3d at 706 (reasoning that past owners can be liable if their active conduct causes hazardous substances to contaminate previously uncontaminated property).

70. *See Carson Harbor*, 227 F.3d 1213. The Ninth Circuit in *Carson Harbor* distinguishes the district court's reasoning in *Nurad* to support a passive migration interpretation. This approach is inevitably wrong. The *Carson Harbor* court majority specifically looked to the terms "discharge," "spill," and "leak."

71. *See Carson Harbor*, 227 F.3d at 1206 (recognizing that the term "disposal" is defined by terms with "well-recognized" passive meanings).

72. *Id.*

73. *See Carson Harbor*, 227 F.3d at 1206 (recognizing that the term "disposal" is defined by terms with "well-recognized" passive meanings); *Nurad*, 966 F.2d at 845 (same).

74. *See CDMG*, 96 F.3d at 722.

75. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213.

76. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213.

77. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213.

78. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213; WEBSTER'S THIRD

required in order "to cause or allow" or "permit" hazardous substances to contaminate property. Furthermore, should one argue that the terms "spill" and "leak" do not require active conduct, these terms certainly do not denote the gradual spreading of contaminants, which constitutes passive migration.[79]

In addition, a "disposal" must require active human conduct since the terms "spill" or "leak," which are supposed "well-recognized" passive terms, would actually require human action to create the event permitting the "spill" or "leak" to occur.[80] The Third Circuit reasons that "spills" do not occur unless active conduct permits the container to be emptied.[81] "Leaks" do not occur without someone actively placing the material into a container and creating conditions by which a leak may occur.[82]

Although the Third Circuit does not specifically address any reasoning to support active conduct associated with the term "discharge," the court does refer to Congress's reading of the term "discharge" with the rest of the active terms defining the statute.[83] The Ninth Circuit majority capitalizes on the Third Circuit's failure to expand and define the term "discharge" as it had done with the terms "spill" and "leak," therefore, the Ninth Circuit argued that the term "discharge" denotes a passive connotation.[84]

The Ninth Circuit also reasoned that the plain meaning of the term "discharge" incorporates a passive meaning. A "discharge" may be defined with passive phrases such as "to give outlet; emit."[85] These occurrences do not require human conduct in order to occur and thus the Ninth Circuit explains that the defining term "discharge" supports a passive theory.[86]

While a "discharge" can be a naturally-occurring, passive event, the Ninth Circuit's dissent in *Carson Harbor* supports a passive migration theory and highlights that the term "discharge" merely suggests a lower degree of human interaction than does a "spill" or "leak." For example, a "discharge" may occur when spring water is discharged from the earth due to its own active pressure.[87] Congress, however, ignored any passive

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NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2195 (Philip Babcock Gove & the Merriam-WEBSTER Editorial Staff eds., 1986).

79. *See CDMG*, 96 F.3d at 714.
80. *See id.*; *Carson Harbor*, 227 F.3d 1213.
81. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213.
82. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213.
83. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d 1213.
84. *See Carson Harbor*, 227 F.3d 1206-07.
85. *See id.* at 1213.
86. *See id.*
87. *See id.*

natural occurrences associated with the defining term "discharge." Instead, Congress relied on the occurrences defined by the term "discharge" that require a higher degree of active human conduct such as "to unload, empty; to pour forth."[88] Congress also intended the term "discharge" to be read with the other active verbs defining "disposal," thus requiring active human conduct to establish CERCLA liability.[89]

In addition, Congress evidenced its intention to give active meaning to the term "disposal" through CERCLA's statutory construction.[90] Congress defines the term "disposal" with active words such as "dumping" and "placing," which require human conduct.[91] Also, Congress expressly defines "disposal" with action verbs, each defining term is written with an "-ing" ending. Therefore, Congress intended the terms "spilling" and "leaking" to have active meanings and to be read with the other active terms defining "disposal."[92]

In contrast, the Ninth Circuit concluded that the term "disposal" carries a passive meaning, because it is defined by the term "discharge." The Ninth Circuit argued that the term "discharge" requires an occurrence to result in contamination such that waste "*may* enter the environment or *be* . . . discharged into any waters."[93] The Ninth Circuit's reasoning, however, is incorrect because an action must occur to create the event allowing waste to enter the property. Passive migration occurs when migrating substances enter the environment; a passive migration is not an occurrence or event that allows the contaminants to enter the property as the statute requires. Human activity, however, creates such an event and therefore supports a CERCLA liability theory based on active conduct contamination.[94]

When creating CERCLA, Congress knew and identified the difference between active conduct and passive migration. To describe events associated with active conduct, Congress used the phrasing "may enter into the environment." To describe events associated with passive migration, Congress utilized the phrase "into the environment." Congress recognized and emphasized the difference between the theories of active conduct and passive migration when Congress defined the

88. *See id.*
89. *See id.*
90. *See 150 Acres*, 204 F.3d at 706 (reasoning that the term "disposal" requires active human conduct); *Bob's Beverage*, 2001 U.S. App. LEXIS at 19589; *Tanglewood*, 849 F.2d at 1568; *ABB Indus.*, 120 F.3d at 357-59 (same); *CDMG*, 96 F.3d at 713-18 (same).
91. *See supra* note 90.
92. *Id. But cf. supra* note 71
93. *See* 42 U.S.C. § 9601 (22) (2002).
94. *See CDMG*, 96 F.3d at 714; *Carson Harbor*, 227 F.3d at 1213.

CERCLA term "release" within another section of the Act.[95]

In defining the term "release," Congress used a number of the same terms that it had used in defining the term "disposal."[96] Defining terms that can be found in both "release" and "disposal" include the terms "spilling" and "leaking."[97] The defining terms used to describe the term "release," however, were simply followed by the phrase "into the environment," while the term "disposal" was defined by the same terms but with each term followed by the phrase "may enter into the environment."[98] The phrase "into the environment" suggests the passive migration of materials, while the phrase "may enter into the environment" requires an act to allow the contamination to enter the environment. Thus, Congress used the CERCLA term "release" to include passive migration contamination while the term "disposal" requires active conduct contamination.[99] Furthermore, by using the terms "spilling" and "leaking" to define "disposal" instead of the passive term "release," Congress shows its intent to require active conduct for CERCLA liability.

E. A Comparison of the CERCLA Terms "Disposal" and "Release" Indicates that Congress did not Intend the Term "Disposal" to Include the Passive Migration of Contaminants

Under CERCLA, Congress created and defined two separate terms, "disposal" and "release," and intended them to have two separate meanings.[100] CERCLA defines the term "release" as any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." As discussed earlier, the term "release" is a broader, more encompassing

95. *See Bob's Beverage*, 2001 U.S. App. LEXIS at 19589; *CDMG*, 96 F.3d at 714-15.

96. *See CDMG*, 96 F.3d at 714-15 (reasoning that the term "release" has a more inclusive meaning that the term "disposal," and is used in other sections of 42 U.S.C. § 9607(a)); *150 Acres*, 204 F.3d at 705 (same).

97. 42 U.S.C. § 9607. A "disposal" occurs when there is a "discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment or be . . . discharged into any waters." *Cf.* 42 U.S.C. § 9601 (22). Congress defines the CERCLA term "release" as any "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

98. *See* Bob's Beverage, 2001 U.S. App. LEXIS 19589 (6th Cir. 2001); *CDMG*, 96 F.3d at 714-15; United States v. Petersen Sand & Gravel, 806 F. Supp. 1346, 1351 (N.D. Ill. 1992).

99. *See CDMG*, 96 F.3d at 714; *150 Acres*, 204 F.3d at 705-06; *See Bob's Beverage*, 2001 U.S. App. LEXIS at 19589.

100. *See Bob's Beverage*, 2001 U.S. App. LEXIS at 19589; *CDMG*, 96 F.3d at 714-15.

term that incorporates a theory of passive migration, leaving the term "disposal" to be associated with active conduct contamination.[101] No reason exists for Congress to incorporate passive migration within two separate terms; only confusion would result.[102]

On the other hand, the Fourth and Ninth Circuits view the terms "disposal" and "release" as having overlapping defining terms.[103] These circuits reason that the overlapping terms cannot be separated, and therefore the term "disposal" incorporates passive migration contamination.[104] This reasoning fails, however, since Congress intended the term "release" to be more inclusive that the term "disposal."[105] The term "release" includes the term "disposal" within its definition.[106] Since Congress does not include the term "release" in the definition of "disposal," Congress is suggesting a more limited scope.[107]

In addition, Congress clearly recognizes the difference between the terms "release" and "disposal."[108] Within the PRP liability provision of CERCLA, Congress had the opportunity to expressly ensure that past owner liability would be dependent on a "release" as it had in 42 U.S.C. § 9607(a)(1), another section of CERCLA.[109] Instead, Congress limited liability in 42 U.S.C. § 9607(a)(2) to potentially responsible parties who owned or operated the property "at the time of disposal."[110]

Congress was also aware of passive migration contamination and

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101. *See supra* discussion regarding the terms "disposal" and "release" and their respective defining terms and phrases. *See Bob's Beverage*, 2001 U.S. App. LEXIS at 19589; *150 Acres*, 204 F.3d at 705-06; *Carson Harbor*, 227 F.3d at 1213; *CDMG*, 96 F.3d at 714-15.

102. *See* Bob's Beverage, 2001 U.S. App. LEXIS 19589 (6th Cir. 2001); *CDMG*, 96 F.3d at 714-15.

103. *See Carson Harbor*, 227 F.3d at 1213.

104. *See id.*

105. *See CDMG*, 96 F.3d at 715; United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000); United States v. Petersen Sand & Gravel, 806 F. Supp. 1346 (N.D. Ill. 1992).

106. *See CDMG*, 96 F.3d at 715.

107. *See Petersen Sand and Gravel*, 806 F. Supp. at 1346.

108. *See 150 Acres*, 204 F.3d 705-06; *CDMG*, 96 F.3d at 714-15; *Carson Harbor*, 227 F.3d at 1213; *Compare* 42 U.S.C. § 9607 (a)(1) with 42 U.S.C. § 9607 (a)(2) (illustrating that Congress did not use the same terms within the statute, and, therefore, Congress intended the term "release" and the term "disposal" to have different meanings).

109. *See* 42 U.S.C. § 9607(a)(1) and 42 U.S.C. § 9607(a)(2).

110. *See* 42 U.S.C. § 9607 (a). Under CERCLA, four categories of persons, also known as potentially responsible parties (PRPs) may be held liable if the PRP includes: (1) the current owner/operator of a facility from which there has been a release; (2) a person who at the time of disposal or treatment of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of; (3) generators of hazardous waste; and (4) arrangers for the disposal of hazardous waste; *see also CDMG*, 96 F.3d at 706, 712.

knew how to specifically refer to that concept.[111] Congress uses the term "leaching" to define a "release."[112] "Leaching" is commonly described as the migration of contaminants.[113] Because Congress defined the term "release" based on a migration of contaminants theory, Congress encompassed passive migration within the term "release," and therefore intended the term "disposal" to be based on an active conduct contamination theory.[114] Furthermore, had Congress intended 42 U.S.C. § 9607(a)(2) past owner liability to be based on a theory of passive migration, Congress would have based liability on a "release" as Congress had done in the previously in 42 U.S.C. § 9607(a)(1).

In 1992, the Fourth Circuit in *Nurad* held that the term "disposal" included the passive migration of contaminants by way of leaking underground storage tanks.[115] In a more recent case, *150 Acres*, the Sixth Circuit opinion proves to be more on point with "disposal" interpretation requiring active conduct.[116] Contrary to the *Nurad* court's holding, the Sixth Circuit in *150 Acres* argued that the term "disposal" did not include passive migration contamination via deteriorating hazardous waste drums when the previous owner had not actively participated in the property contamination.[117] In this case, a past owner had placed the leaking drums on the property prior to the defendant past owner.[118] The court reasoned that because the defendant past owner did not actively participate in the placement of the leaking drums or contribute to further the contamination, the past owner was not responsible. Therefore, in future situations similar to that in *Nurad* (where the passive migration contamination occurred via leaking underground storage tanks), courts should follow the Sixth Circuit's reasoning in *150* Acres to hold past owners not liable for passive migration contamination.[119]

F. Congress Extends CERCLA Liability to Parties Who Owned the Property "At the Time of Disposal"

A CERCLA liability theory requiring active human conduct makes sense. Under the CERCLA PRP provision, Congress specifically extends liability to parties who owned the property "at the time of

111. *See CDMG*, 96 F.3d at 715 (reasoning that the terms "leaking" and "spilling" are words that are generally used to describe the passive migration that occurs in landfills.); *150 Acres*, 204 F.3d at 705-06; *Carson Harbor*, 227 F.3d at 1213.
112. *See 150 Acres*, 204 F.3d at 705-06; *see also Carson Harbor*, 227 F.3d at 1213.
113. *See CDMG*, 96 F.3d at 715; *Carson Harbor*, 227 F.3d at 1206.
114. *See 150 Acres*, 204 F.3d at 705-06; *Carson Harbor*, 227 F.3d at 1213.
115. *See Nurad*, 966 F.2d at 837.
116. *See 150 Acres*, 204 F.3d at 698.
117. *See id.* at 713.
118. *See id.*
119. *See id.* at 698; *see also Nurad*, 966 F.2d at 837.

disposal," thus, the Statute regards the party who actively caused the contamination responsible. [120] As the Ninth Circuit suggests, a liability theory including passive migration would be absurd;[121] liability would extend to all parties who had ever owned or operated the property "*after* the time of disposal," not "*at* the time of disposal."[122] Essentially, under a passive migration liability scheme, there would never be liability for the time period occurring "at time of disposal" as written in this section of the Statute. An initial contamination would occur and any person who had ever owned the property after the initial active disposal of the contaminants would be held liable, which could be any number of contributing parties.[123] In addition, this passive migration liability theory would further frustrate the purpose of CERCLA in which Congress expressly seeks to hold responsible parties liable "at the time of disposal."[124]

Moreover, if Congress had intended for CERCLA to hold liable all parties who had ever acquired the property after contamination, it would have worded the Statute to carry out this intent. Without Congress's express direction, the courts should not extend liability to parties via convoluted methodology.[125] In response to public pressure, Congress hastily enacted CERCLA to deal with already contaminated sites.[126] The

120. *See CDMG*, 96 F.3d at 716-17 (reasoning that liability is based on active human conduct because via passive migration it would be rare to find a party liable at a time after the "the time of disposal"); *Carson Harbor*, 227 F.3d at 1213 (same). *Compare Carson Harbor*, 227 F.3d at 1209-10 (reasoning that liability based on passive migration can exist "after the time of disposal").

121. *See CDMG*, 96 F.3d at 716-17 (reasoning that liability via passive migration does not make sense since it would be rare to find a party liable at a time after the "the time of disposal"); *Carson Harbor*, 227 F.3d at 1213 (same). *Compare Carson Harbor*, 227 F.3d at 1209-10 (reasoning that liability based on passive migration can exist "after the time of disposal").

122. *See CDMG*, 96 F.3d at 716-17 (reasoning that the every subsequent property owner after the initial disposal would be held liable via passive migration); *Carson Harbor*, 227 F.3d at 1209-10 (same). *But see* 42 U.S.C. 9607(b)(3) (2002). The Innocent Owners Defense provides past owners with a defense to CERCLA liability. In order for the defense to apply, the past owner must have purchased the contaminated property after the time of disposal of the hazardous contaminants. The innocent owner must also show that at the time the owner acquired the property, he did not know and had no reason to know that any hazardous substance which is subject to release or threatened release was disposed of on, in, or at the property. United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000).

123. *See CDMG*, 96 F.3d at 716-17 (reasoning that the every subsequent property owner after the initial disposal would be held liable via passive migration).

124. *See* 42 U.S.C. 9607(a); *CDMG*, 96 F.3d at 715-16 (describing the goals and purpose of CERCLA).

125. *See id.*

126. *See generally* GILBERT M. MASTERS, INTRODUCTION TO ENVIRONMENTAL ENGINEERING AND SCIENCE SECOND EDITION 297-307 (Marcia Horton ed., Prentice Hall 1997) (1997).

impact of events that occurred in the late 1970s, such as Love Canal, served as an impetus to CERCLA's creation.[127] While inconsistencies and redundancies exist within the Statute, the Third Circuit in *CDMG* excuses them due to the great haste with which CERCLA was passed.[128]

Although the legislative history does not specifically exclude parties from liability via a theory of passive migration contamination, Congress does require evidence of active human conduct in order to hold responsible parties liable for contamination. Such evidence is found in the goals and underlying purpose of CERCLA in addition to other wording within the CERCLA statute.[129]

G. *The Innocent Owner Defense Protects Current Landowners, Because Active Human Conduct Is Required to Establish Liability for Past Landowners*

If the courts interpret the term "disposal" to include passive migration, liability protection would not extend to a past owner of a contaminated site.[130] The innocent owner defense[131] applies to protect past landowners from CERCLA liability where the past land owners acquired contaminated property "*after* the disposal or placement of the hazardous substances," initiated by human contact.[132] Therefore, the term "disposal" would only coincide with the purpose of the innocent owner defense in courts that prescribe to a theory of active conduct contamination.

Courts interpreting the term "disposal" to include passive migration contamination, do not support the purpose of the innocent owner

127. *See generally id.* (Love Canal was deemed an environmental contamination site where hazardous materials oozed from abandoned dumpsites into residential backyards and basements).

128. *See CDMG*, 96 F.3d at 715-16 (reasoning that courts excuse inconsistencies within CERCLA due to the haste with which the Statute was passed); United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (same); *Carson Harbor*, 227 F.3d at 1213 (Weiner, J., dissenting) (reasoning that inconsistencies within CERCLA are excused due to the hast with which the Statute was passed).

129. *See Carson Harbor*, 227 F.3d at 1213 (reasoning that inconsistencies exist in CERCLA's legislative history); *see generally* United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996) (reasoning that the term "disposal" requires active human conduct); United States v. 150 Acres of Land, 204 F.3d 698 (6th Cir. 2000) (same); Bob's Beverage, Inc. v. Merkel, 2001 U.S. App. LEXIS 19589 (same); ABB Indus. Sys. Inc. v. Prime Tech., Inc., 120 F.3d 351 (2d Cir. 1997) (same). The two principle goals of CERCLA are: (1) "to facilitate the cleanup of potentially dangerous hazardous waste sites and (2) to compel polluters to pay the costs associated with their pollution." *See CDMG*, 96 F.3d at 717; United States v. Alcan Aluminum, 964 F.2d 252, 257-58 (3d Cir. 1992).

130. *See Carson Harbor*, 227 F.3d at 1213.

131. 42 U.S.C. § 9607 (b)(3).

132. *See* 42 U.S.C. § 9607; *CDMG*, 96 F.3d at 711.

defense.[133] Under the Ninth Circuit's analysis, a time "*after* disposal" would never exist. Based on a passive migration theory, a "disposal" would be a continuing contamination process in which the substances travel through the soil without any human assistance.[134] Following this reasoning, courts would be forced to hold every subsequent owner of the property liable and the courts would not be able to apply the appropriate and intended meaning of the CERCLA liability provision.[135] There would never be a time *after* a disposal because under a passive migration theory, a disposal is ongoing and continuous. The purpose of the innocent land owner defense would never be served. An innocent land owner who acquired property after contamination would be considered responsible despite the fact that the purpose of the innocent owner defense is to protect past land owners who acquired contaminated property *after* the disposal. The words "after disposal" were written for a purpose.[136] Had Congress intended to make all parties liable, it would have done so expressly, by using the term "release" as was done in other sections of the Statute for the purposes of extending liability more broadly.[137]

In addition, Congress latently suggests the innocent owner defense on an active interpretation of term "disposal."[138] If Congress had intended the term "disposal" to include passive migration contamination, the innocent owner defense would never apply; there would never be a point existing "*after* [the] disposal" because the contamination process would be continuous and ongoing.[139] Congress created the innocent owner defense for the purpose of protecting the property owner who did not contribute to the property contamination from CERCLA liability.

Although the Fourth Circuit in *Nurad* has ruled that CERCLA liability includes a passive migration theory, the court failed to consider

133. *See CDMG*, 96 F.3d at 716-17 (reasoning that the innocent owner defense does not include passive migration); *Cf. Carson Harbor*, 227 F.3d at 1209-10 (reasoning that the innocent owner defense is based on passive migration).

134. *See supra* note 133 and accompanying text.

135. *See id.*

136. *See CDMG*, 96 F.3d at 714-15 (reasoning that Congress had different meanings for the terms "release" and "disposal"); *150 Acres*, 204 F.3d at 704-08 (same); *Carson Harbor*, 227 F.3d at 1213 (Weiner, J., dissenting) (reasoning that Congress had different meanings for the terms "release" and "disposal").

137. *See CDMG*, 96 F.3d at 714-15 (reasoning that Congress had different meanings for the terms "release" and "disposal," and, therefore, by using the term "disposal," Congress extended liability only to parties evidencing active human conduct); *150 Acres*, 204 F.3d at 704-08 (same); *Carson Harbor*, 227 F.3d at 1213 (Weiner, J., dissenting) (reasoning that Congress had different meanings for the terms "release" and "disposal" and therefore by using the term "disposal," Congress extended liability only to parties evidencing active human conduct).

138. *See CDMG*, 96 F.3d at 716-18.

139. *See CDMG*, 96 F.3d at 711.

or even recognize the innocent owner defense.[140] More recently, the Ninth Circuit in *Carson Harbor* suggested that under a passive migration theory, the innocent owner defense is applicable.[141] The court reasoned that the defense would apply in the event that hazardous substances migrate passively through the property, so long as the property owner acquired the property after the hazardous materials were first placed on the land.[142]

The Ninth Circuit's reasoning, however, is flawed. If a "disposal" under a passive migration theory includes the movement of hazardous substances through the soil, then a "disposal" would be a continuous process and no time would exist "after a disposal." The Third Circuit even suggests that basing the innocent owner defense on the passive migration theory is absurd. Only the rare owner would be able to use the innocent owner defense since the owner would not be able to own the property "after the disposal."[143]

H. Interpreting the Term "Disposal" to Require Only Active Human Conduct Does Not Frustrate CERCLA's Purpose

Congress enacted CERCLA to address the increasing environmental and health problems associated with inactive hazardous waste sites.[144] CERCLA's purpose was to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of hazardous waste disposal sites."[145] Congress designed the statute to impose cleanup costs on responsible parties and serve as a mechanism for the prompt cleanup of contaminated sites.[146]

The Fourth and Ninth Circuits seek to avoid an interpretation of the term "disposal" that frustrates the purpose of CERCLA.[147] The Fourth Circuit in *Nurad* suggests that requiring a theory of active participation would frustrate CERCLA's purpose of encouraging "voluntary private cleanup actions."[148] The Fourth Circuit reasons that innocent property owners will not remedy contaminated sites voluntarily if CERCLA

140. *See* Nurad, Inc. v. William Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992); United States v. Petersen Sand & Gravel, 806 F. Supp. 1346, 1353 (N.D. Ill. 1992).
141. *See Carson Harbor*, 227 F.3d at 1213.
142. *See id.*
143. *See Petersen Sand and Gravel*, 806 F. Supp at 1353; *CDMG*, 96 F.3d at 718.
144. *See Nurad*, 966 F.2d at 837.
145. *See Carson Harbor*, 227 F.3d at 1213; Pub. L. No. 96-510, 94 Stat. 2767 (1980).
146. See *CDMG*, 96 F.3d at 717 (illustrating the goals of CERCLA).
147. *See generally Carson Harbor*, 227 F.3d 1196; *Nurad*, 966 F.2d at 844.
148. *See Nurad*, 966 F.2d 845 (reasoning that requiring active human conduct would frustrate CERCLA's purpose).

liability extends only to active conduct.[149] As the Ninth Circuit in *Carson Harbor* correctly points out, responsible parties may generally be insolvent or may no longer be in existence when the cleanup cost is to be obtained.[150]

Inevitably, these courts argue that an owner could avoid liability by doing nothing to remedy the contamination and then transfer the property before incurring cleanup costs.[151] Thus, a past owner would be free of liability, while a current owner would be responsible for the cost of cleanup.[152] This reasoning, however, is incorrect. The current owner is essentially in the same position as was the previous owner, since the current owner, like the previous owner, acquired the contaminated property without actively contributing to the contamination.[153]

Furthermore, interpreting "disposal" to require active human conduct does not frustrate CERCLA's purpose. In fact, CERCLA's imposition of strict liability broadens the range of potentially responsible parties, thus extending liability to all past owners, operators, and generators who in some way aided in the active contamination of the property.[154] In addition, the CERCLA innocent owner defense as specifically enumerated in the Statute is not available to parties who had knowledge of the release of hazardous substances on the property.[155] CERCLA imposes criminal liability, including prison sentences, for failure to report a "release" in a timely manner.[156] Even if a previous owner could pass liability to a current owner via sale of the property, incentives for previous owners to remedy the contaminated site still exist.[157] CERCLA holds previous owners responsible if they did not disclose contamination to the property seller.[158]

Conversely, CERCLA will not extend liability to past property

149. *See Nurad*, 966 F.2d at 845-46; *Carson Harbor*, 227 F.3d at 1207.

150. *See Carson Harbor*, 227 F.3d at 1207 (reasoning that the term "disposal" requires active human conduct).

151. *See id.*

152. *See id.*

153. *See CDMG*, 96 F.3d 706 (reasoning that the innocent owner defense is based on the term "disposal" requiring active human conduct). *But cf. Nurad*, 966 F.2d 845 (reasoning that innocent owner defense is based on the term "disposal" including passive migration).

154. *See* 42 U.S.C. 9607(a); *see generally CDMG*, 96 F.3d 706 (reasoning that the strict liability of CERCLA encompasses a wide range of PRPs); *150 Acres*, 204 F.3d 698 (same).

155. *See* 42 U.S.C. § 9601(35)(C) CERCLA imposes criminal liability (including prison sentences) for failure to report a "release" in a timely manner. *See* 42 U.S.C. § 9603.

156. *See id.*

157. *See CDMG*, 96 F.3d at 718; United States v. Petersen Sand & Gravel, 806 F. Supp. 1346 (N.D. Ill. 1992).

158. *See CDMG*, 96 F.3d at 718; *Petersen Sand and Gravel*, 806 F. Supp. at 1346.

owners when the past owner bought and sold the property having no knowledge of its contamination.[159] CERCLA, however, encourages the potential property buyer to investigate the possibilities of property contamination and make a good faith effort evidencing that the buyer had no knowledge of any possibility of contamination to justify the use of the innocent owner's defense. This additional investigation makes the property transfer more difficult for a contaminating seller to avoid and shift liability to an unknowing buyer.[160]

III. To Resolve the Circuit Dispute over the CERCLA Term "Disposal," the Courts Should Make an Analogy with the Ninth Circuit's Interpretation of the Clean Water Act Term "Discharge"

In order to help resolve the "disposal" interpretation conflict, one may make an analogy to a similar active versus passive interpretation conflict present among the Ninth Circuit district courts. Within the Ninth Circuit, the district courts differ over the interpretation of the term "discharge" used in the Clean Water Act (CWA).[161] Although the CWA statute differs from CERCLA, key similarities exist as to how the courts interpret the key terms and support their reasoning of active conduct or passive migration.

The Ninth Circuit district courts disagree over how to determine the liability of parties responsible for pollutants "discharged" into groundwater sources.[162] This determination turns on whether the CWA term "discharge" includes point or nonpoint sources.[163] A point source pollutant is an identified active point of pollution. Point source pollutants are analogous to active contamination contributions. A nonpoint source pollutant is an unidentified nonactive point of pollution,

159. *See CDMG*, 96 F.3d at 718.

160. *See id.*; Petersen Sand and Gravel, 806 F. Supp. at 1346.

161. *See* Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) (The term "discharge" under § 401 of the CWA does not include nonpoint source pollution. The Ninth Circuit in *Dombeck* held that the term "discharge" under the CWA was not intended to include discharge from nonpoint source pollution); Idaho Conservation League v. Caswell, 1996 WL 938215 (D. Idaho 1996) (The United States District Court of Idaho held that the term "discharge" applies only to point sources of pollution. Therefore, the term "discharge" does not include nonpoint sources of pollution); Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (The United States District Court of Oregon held that the term "discharge" is not limited to point sources of pollution. Therefore, the term "discharge" includes nonpoint sources of pollution); National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (The Court of Appeals held that since the Environmental Protection Agency's interpretation of National Pollutant Discharge Elimination System permit program as excluding dam-caused pollution was reasonable, not inconsistent with congressional intent, and entitled to great deference. Thus, the court upheld the permit program).

162. *See supra* note 18 and accompanying text.

163. *See id.*

analogous to the passive migration of contaminants.[164] By looking to the active versus passive interpretation controversy within the Ninth Circuit district courts concerning the CWA term "discharge" an analogy may be drawn to help resolve the controversy similarly present among the circuit courts over the interpretation of the CERCLA term "disposal."

A. An Overview of the Clean Water Act (CWA)

In order to fully understand the Ninth Circuit interpretation controversy over the CWA term "discharge," one must first consider the Act and its underlying purpose. Congress first enacted the Federal Water Pollution Control Act (FWPCA) in 1948 to control the pollution entering the Nation's waterways.[165] Since then, the Act has been extensively amended and is now more popularly known as the Clean Water Act (CWA).[166] The CWA of 1972 focuses on the discharge of pollutants into navigable waters.[167] The main purpose of the CWA is to create a comprehensive program to eliminate and reduce the pollution of interstate waters and tributaries. Congress also seeks to improve the sanitary condition of surface and underground waters through enforced compliance with set water quality standards.[168] In addition, through the CWA, Congress places restrictions on the discharge of pollutants from "point sources."[169]

Congress clearly identifies CWA's goals and policies in Section

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164. *See generally Dombeck*, 172 F.3d 1092.

165. *See* 33 U.S.C. §§ 1251-1337 (1994).

166. *See* 33 U.S.C. §§ 1251 et seq. The 1972 enactment of the Clean Water Act largely supplanted the 1970 Water and Environmental Quality Improvement Act by replacing water quality standards with point source effluent limitations. FWPCA Amendments include: Restrictions on the discharge of pollutants from "point sources" are commonly called "effluent limitations." 33 U.S.C. § 1362(12) (2002). Effluent Limitations generally: The CWA provides that the effluent limitations pertain to the "discharge of any pollutant." The limits placed on effluent discharges are nationally uniform and are administered through permit programs. The uniform limit place on particular effluent depends on the nature of the pollutant. The Clean Water Act defines the term "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source. The Clean Water Act defines the term "navigable waters" as waters of the United States, including territorial seas. 33 U.S.C. § 1362 (12).

167. *See* Federal Water Pollution Control Act §§ 101 – 607, 33 U.S.C. §§ 1251-1387 (1994); *See generally* GILBERT M. MASTERS, INTRODUCTION TO ENVIRONMENTAL ENGINEERING AND SCIENCE SECOND EDITION 163-64 (Marcia Horton ed., Prentice Hall 1997) (1997).

168. *See id.*

169. *See* 33 U.S.C. §§ 1251 et seq. Restrictions on the discharge of pollutants from "point sources" are commonly called "effluent limitations." As to effluent limitations, generally see §§ 723 et seq. In addition, 33 USCA §§ 1251, CWA § 402, establishes the National Pollutant Discharge Elimination System (NPDES) and § 404 establishes the permit program that regulates dredged or fill material. The EPA is responsible for issuing the NPDES permits. *See* CWA § 402.

1251 of the CWA.[170] These goals include: (1) the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters; and (2) the Congressional recognition, preservation, and protection of primary responsibilities and rights of States.[171]

The CWA makes thousands of water bodies clean and safe for people, fish and wildlife, and the environment.[172] It strengthens the states' ability to clean up polluted waters by identifying pollution reductions needed to meet clean water goals, encouraging cost-effective cleanup, and assuring the implementation of clean water plans that define specific actions and schedules for meeting clean water goals.[173] In order

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170. *See* 33 U.S.C. § 1251.

171. *See* 33 U.S.C. § 1251. The plain language of the Act: Congressional declaration of goals and policy

> a. Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective
> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
> it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
> it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
> it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
> it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
> it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
> it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into navigable waters, waters of the contiguous zone, and the oceans; and
> it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.
> b. Congressional recognition, preservation, and protection of primary responsibilities and rights of States.

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under [§§ 402 and 404]. 33 U.S.C. § 1251.

172. *See generally* FINAL TMDL (TOTAL MAXIMUM DAILY LOAD) RULE: FULFILLING THE GOALS OF THE CLEAN WATER ACT (EPA July 2000).

173. *See id.*

to achieve these goals, states should directly regulate identifiable sources of water pollution point sources.[174] The goals of the CWA are very similar to those of CERCLA; Congress enacted both statutes in order to identify sources of pollution and contamination and to encourage the cleanup of polluted and contaminated sites.[175]

B. The Term "Discharge" as Defined by Congress and the Ninth Circuit Split Over the Interpretation of the Term

Congress defines the CWA term "discharge" on its face and in conjunction with a particular emission.[176] Standing alone, the term "discharge" is defined to include the discharge of a pollutant.[177] The meaning of the phrase "discharge of pollutants," however, is a variation of the meaning of the term "discharge" and is defined as "any addition of any pollutant to navigable waters from any point source."[178]

The term "point source" means any "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants may be discharged."[179] In contrast, the term "nonpoint source" refers to sources of pollutants that are not easily identifiable.[180]

Similar to the statutory confusion over the CERCLA term "disposal," the CWA term "discharge," defined to include the discharge of pollutants, is not explicitly defined to include nonpoint source pollution.[181] The Ninth Circuit Court of Appeals, however, has ruled that

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174. *See generally* 33 U.S.C. § 1251. The CWA Act prohibits the discharge of pollutants into navigable waters from a point source unless specifically approved under the permitting provision. *Id.*

175. *See generally* 33 U.S.C. § 1251.

176. *See* CWA § 502(16), 33 U.S.C § 1362(16) (defining the term "discharge"); CWA § 502(12), 33 U.S.C § 1362(12) (defining the term "discharge of a pollutant").

177. *See* CWA § 502(16), 33 U.S.C § 1362(16) (defining the term "discharge"); CWA § 502(12), 33 U.S.C § 1362(12) (defining the term "discharge of a pollutant").

178. *See* CWA § 502(12), 33 U.S.C. § 1362(12). The Clean Water Act defines the term "navigable waters" as waters of the United States, including territorial seas. *Id.* The term "pollutant" distinguishes conventional and toxic pollutants. *Id.* Conventional pollutants are defined as dredged spoil, solid waste, incinerator residue, sewage garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. *Id.* "Toxic pollutants" are defined as those pollutants or combinations of pollutants including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly through food chains, will, based on available EPA information, cause death, disease, behavioral abnormalities, cancer, genetic mutations, and/or physiological malfunctions. 33 U.S.C. § 1362(13). Under the CWA, toxic pollutants are subject to effluent limitations. *Id.*

179. *See* 33 U.S.C. § 1362 (definitions).

180. *See generally* 33 U.S.C. § 1329 (referring to nonpoint sources).

181. *See* 33 U.S.C. § 1362(12). The "discharge of a pollutant" is defined as any

the term "discharge" does not include nonpoint source pollution.[182]

The Ninth Circuit district courts, however, split in deciding whether the CWA term "discharge" should include nonpoint pollution.[183] Broadly interpreting the CWA term "discharge," some Ninth Circuit district courts have expanded liability to include nonpoint sources of pollution.[184] On the other hand, district courts narrowly interpreting the CWA term "discharge" have held that the term "discharge" does not include nonpoint pollution sources.[185]

C. *The Ninth Circuit Interprets the CWA Term "Discharge" as not Inclusive of Nonpoint Source Pollution; Therefore, Courts May Make an Analogy to Interpret the CERCLA Term "Disposal" as not Inclusive of Passive Migration*

The Ninth Circuit has ruled that the CWA term "discharge" does not include nonpoint source pollution. Thus, an argument may be made that the Ninth Circuit favors liability in connection with point source pollutants, or active conduct contamination. As a result, the Ninth Circuit should use this same non-conservative approach when interpreting the term "disposal" under CERCLA.

Overturning the Ninth Circuit district court decision, the Ninth

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addition of any pollutant to navigable waters from any point source. *Id.* The Clean Water Act address nonpoint sources of water pollution by requiring each state to prepare and submit a report to the Environmental Protection Agency (EPA). 33 U.S.C. § 1329(a)(1). This report should: (1) identify all navigable water within the state; (2) identify nonpoint sources, or particular nonpoint sources that add significant pollution to such navigable waters; and (3) identify the best management practices and measures to control nonpoint sources in order to reduce pollution to the most practical level. *Id.* The EPA will then review and issue guidelines regarding the management programs for nonpoint pollution sources. *Id.*

182. *See Dombeck*, 172 F.3d at 1099 (ruling that the CWA term "discharge" does not include nonpoint sources).

183. *See* Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998). The Ninth Circuit in *Dombeck* held that the term "discharge" under the CWA was not intended to include discharge from nonpoint source pollution; Or. Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (holding that the term "discharge" is not limited to point sources of pollution). Idaho Conservation League v. Caswell, 1996 WL 938215 (D. Idaho 1996) (holding that the term "discharge" applies only to point sources of pollution); Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (holding that since the Environmental Protection Agency's interpretation of National Pollutant Discharge Elimination System permit program as excluding dam-caused pollution was reasonable, not inconsistent with congressional intent, and entitled to great deference, it was required to be upheld).

184. Or. Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534 (D. Or. 1996) (interpreting the CWA term "discharge" to include nonpoint sources of pollution).

185. Or. Natural Desert Ass'n v. Dombeck, 1998 WL 407711 (9th Cir. July 22, 1998) (interpreting the CWA term "discharge" to not include nonpoint source pollution).

Circuit Court of Appeals in *Oregon Natural Desert Ass'n v. Dombeck*[186] ruled that the CWA term "discharge" does not include nonpoint source pollution.[187] In *Dombeck*, an environmental group brought suit against the United States Forest Service for violating the CWA, 33 U.S.C. § 1341.[188] The Forest Service failed to first obtain state approval that state water quality standards would not be violated before issuing a grazing permit to cattle ranchers.[189] The CWA identifies cattle as being nonpoint pollution sources.[190]

The Ninth Circuit court looked to the CWA legislative history in order to ascertain the purpose of the Act.[191] The CWA prohibits the release of point source pollutant discharges except when in compliance with the NPDES[192] permit program.[193] The CWA does not specifically prohibit nonpoint discharges.[194] The court relied on its decision in *Oregon Natural Resources Council v. United States Forest Service*, which recognized the Act's distinct treatment of point and nonpoint source pollution.[195] In *Oregon Natural Resources Council*, the court

186. Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1998) (interpreting the CWA term "discharge" to not include nonpoint pollution source).

187. *See Dombeck*, 172 F.3d at 1092. The term "discharge" falls under 33 U.S.C. § 1341 which provides: Any applicant for a Federal license or permit to conduct any activity... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates ... that any such discharge will comply with the applicable provisions of §§ 1311, 1312, 1313, 1316, and 1317 of this title. 33 U.S.C. § 1341. "... [N]o license or permit shall be granted until the certification required by this section has been obtained or has been waived ...." *Id.*

188. *See Dombeck*, 172 F.3d at 1092.

189. *See id.*

190. *See* 33 U.S.C. § 1362(14) (definitions).

191. *See Dombeck* at 1096. In 1972, Congress passed the Clean Water Act, which made important amendments to the water pollution laws. *Id.* The amendments placed certain limits on what an individual firm could discharge, regardless of whether the stream into which it was dumping was over-polluted at the time ... Thus, the Act banned discharges only from point sources. *Id.* The discharge of pollutants from nonpoint sources- for example, the runoff of pesticides from farmlands-was not directly prohibited. The Act focused on point source polluters presumably because they could be identified and regulated more easily than point source polluters. Natural Res. Defense Council v. Pennsylvania, 915, F.2d 1314, 1316 (9th Cir. 1990) (footnote omitted).

192. 33 U.S.C. § 1329(b)(1). Under the CWA, each state is to prepare and submit a report to the Environmental Protection Agency (EPA). *Id.* This report should: (1) identify all navigable water within the state; (2) identify nonpoint sources, or particular nonpoint sources that add significant pollution to such navigable waters; and (3) identify the best management practices and measures to control nonpoint sources in order to reduce pollution to the most practical level. *Id.* The EPA will then review and issue guidelines regarding the management programs for nonpoint pollution sources. *Id.*

193. *See Dombeck*, 172 F.3d at 1096; *see also* 33 U.S.C. § 1311.

194. *See id.* at 1092.

195. *See* Or. Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842. In this case, an environmental group claimed suit against a logging corporation that caused nonsource

looked to the plain language of the Act and reasoned that the limitations set forth under § 1311 were regarded as effluent[196] limitations, and thus by definition to point sources.[197]

As with any statutory interpretation controversy, the Ninth Circuit in *Dombeck* first looked to the plain meaning and use of the CWA term "discharge."[198] Under § 1341 of CWA, Congress consistently referred to the term "discharge" as meaning "effluent."[199] The term "effluent" commonly describes an active point source of pollution[200] and also suggests that active conduct is required in order to create the point pollution.[201] Looking to the structure of CWA liability, the Ninth Circuit reasoned that although the CWA extends to nonpoint sources, Congress refers to nonpoint sources under a separate and different Act provision.[202]

The CERCLA term "disposal," like the CWA term "discharge," also requires active conduct in order for liability to attach to the parties responsible for the contamination.[203] Similarly, CERCLA extends to passive migration via the term "release"; however, Congress uses the CERCLA statutory structure to refer to the term "release" in a different statutory provision.

Although Congress failed to expressly exclude nonpoint source pollution from the CWA term "discharge," the Ninth Circuit addressed the CWA as a whole in order to determine the Act's overall purpose.[204] An overview of CWA assisted the Ninth Circuit in interpreting the term "discharge." Congress' motivation behind enacting the CWA Amendment was to address the Act's omissions prior to 1972.[205] Congress' goal was to create adequate incentives to encourage parties to

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pollution. The environmental group claimed that 33 U.S.C. § 1311 was violated and that effluent emissions applied to nonpoint source pollutants. Rejecting this contention, the court looked to the plain language of Act. *Id.* The court reasoned that the limitations set forth under the Act pertained to effluent limitations and by definition only pertains to point sources. *Id.*

196. The term "effluent" commonly describes an active point source of pollution 33 U.S.C. §§ 723 and 1251 et seq.

197. *See Dombeck*, 172 F.3d at 1097. A point source pollutant is an identified active point of pollution. *See generally Dombeck*, 172 F.3d at 1092.

198. *See id.* at 1095-96 (reasoning that the plain meaning of the CWA term "discharge" does not include nonpoint source pollution).

199. *See id.* at 1095-96.

200. *See id.* at 1097.

201. *See generally Dombeck*, 172 F.3d at 1096.

202. *See Dombeck*, 172 F.3d at 1096-97.

203. *See supra* note 14.

204. *See id.* at 1096.

205. *See Dombeck*, 172 F.3d at 1096. The CWA statutory wording changed to prohibit unlicensed activity from violating "water quality standards" to "effluent limitation based on the elimination of any discharge pollutants." *Id.* at 1097. Thus, the Act directly pertained to point sources. *Id.*

decrease their use of pollutants.[206] By referring specifically to the "polluting parties," Congress demonstrates that it is referring only to the parties who actively create the event leading to pollution, thus implying that the underlying CWA policy is to address active conduct.

This same reasoning may be utilized to interpret the CERCLA term "disposal." The overall purpose of CERCLA is to extend liability to PRPs and remedy contamination sites. [207] In order for contamination sites to exist in the first place, PRPs must create the event that allows for the contamination to occur; therefore, human conduct is required for the contamination event to occur.[208] Because CERCLA requires human conduct to play a role in the contamination event, the courts should interpret the CERCLA term "disposal" as not including passive migration contamination.

An analogy may be made between the CWA and CERCLA as to how Congress recognized the difference between active and passive contamination within different sections of each statute. Under the CWA, the Ninth Circuit recognized the difference between the CWA terms "discharge" and "runoff."[209] In the CWA, Congress consistently uses the term "discharge" with the term "effluent," suggesting an active meaning, while the term "runoff" is used to describe "pollution flowing from nonpoint sources," suggesting a passive meaning.[210]

Because Congress used the terms "discharge" and "runoff" in different sections of the Act, the Ninth Circuit recognized that Congress intended the terms to have different meanings.[211] Had Congress intended CWA provision 1351 to incorporate nonpoint pollution, Congress could have worded the provision to include the term "runoff."[212] Because Congress demonstrated that it knew how to differentiate between its uses of the two terms, the Ninth Circuit interpreted the CWA term "discharge" not to include nonpoint sources.[213]

Consequently, a comparison may be made between Congress's identification of active and passive contamination in various sections of the CWA statute. Under CERCLA, the Third Circuit recognized Congress' intention to differentiate between the CERCLA terms

206. *See Dombeck*, 172 F.3d at 1096.
207. *See generally CDMG*, 96 F.3d 706.
208. *See supra* note 14.
209. *See Dombeck*, 172 F.3d at 1098 (recognizing the distinction between the CWA terms "discharge" and "runoff").
210. *See id.*
211. *See id.*
212. *See id.; CDMG*, 96 F.3d at 714-15 (reasoning that Congress could have used the term "release" instead of the term "disposal" if it had intended to extend liability to parties via passive migration).
213. *See supra* note 210 and accompanying text.

"disposal" and "release," meaning active conduct and passive contamination, respectively.[214] Thus, the circuit courts should apply this reasoning to interpret the CERCLA term "disposal" to not include passive migration pollution.

IV. The Ninth Circuit Contradicts Itself in Interpreting the Term "Discharge", and, thus, the Ninth Circuit's Passive Migration Interpretation of the CERCLA Term "Disposal" Should Not be Given Weight

The Ninth Circuit has contradicted itself by ruling that the CWA term "discharge" requires active conduct and does not include nonpoint source pollution.[215] Under CERCLA, however, the Ninth Circuit found that the term "disposal" had a passive connotation, and extended liability to apply to passive migration.[216] The Ninth Circuit in *Dombeck*, if following this same reasoning under CERCLA, should have also found the CWA term "discharge" to include nonpoint sources, analogous to passive migration contamination. Instead, the Ninth Circuit's CWA interpretation contradicted its previous CERCLA interpretation. The Ninth Circuit, therefore, cannot infer that the CERCLA term "disposal," which in part is defined by the term "discharge," does not include passive migration since the Ninth Circuit in *Dombeck* has ruled that the term "discharge" includes only active conduct.[217] Only two years prior to its incorrect CERCLA ruling, the Ninth Circuit in *Dombeck* had correctly concluded that the CWA term "discharge" does not include nonpoint source pollution (nonpoint source pollution being analogous to passive migration).[218] Since the CERCLA term "disposal" is defined in part by the term "discharge," courts interpreting the term "discharge" not to include nonpoint source pollution should also interpret the CERCLA term "disposal" not to include passive migration contamination.

V. Conclusion

Under 42 U.S.C. § 9607(a) of CERCLA, Congress did not intend

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214. *See CDMG*, 96 F.3d at 714-15 (reasoning that Congress had different meanings for the terms "release" and "disposal," and, therefore, by using the term "disposal," Congress extended liability only to parties evidencing active human conduct); United States v. 150 Acres of Land, 204 F.3d 698, 704-08 (6th Cir. 2000) (same).

215. *Compare Carson Harbor*, 227 F.3d 1196 (interpreting the CERCLA term "disposal" to include passive migration), *with Dombeck*, 172 F.3d 1092 (interpreting the CWA term "discharge" to not include nonpoint source, similar to not including passive migration).

216. *Carson Harbor*, 227 F.3d at 1212.

217. *See Dombeck*, 172 F.3d 1097.

218. *See id.* at 1099.

for the term "disposal" to include passive migration contamination; therefore, Congress does not extend liability to past property owners who did not actively contribute to property contamination.[219] The statutory construction of CERCLA, as well as an analysis of the plain meaning of the term "disposal," supports this argument. Congress expressly defined the term "disposal" with action verbs, thus illustrating that liability was meant to extend only to parties who exhibit active human conduct that results in contamination.[220] If Congress intended liability to extend to past owners via the passive migration of contaminants, Congress would have used the term "release" as it had done in other sections of CERCLA to differentiate between active and passive migration contamination.[221] By interpreting the term "disposal" not to include passive migration, the courts also further the goals and purposes behind CERCLA.[222] Consequently, the term "disposal" should not be construed to include passive migration.

Furthermore, an analogy may be drawn between the circuit courts' interpretation controversy over the CERCLA term "disposal" and the Ninth Circuit District Courts' active versus passive interpretation controversy over the CWA term "discharge." The Ninth Circuit Court analyzed the CWA term "discharge" and ruled that the term "discharge" does not include nonpoint source pollutants. This Comment has argued that nonpoint source pollutant contamination is analogous to passive migration contamination. Thus, an identical argument may be made to support a finding that the CERCLA term "disposal" refers only to contamination caused by active human conduct and that past owners should not be held liable under a CERCLA "disposal" theory of passive migration contamination.

Moreover, the Ninth Circuit contradicted its CWA ruling, interpreting the CWA term "discharge" to not include nonpoint source pollutants, by wrongly interpreting the CERCLA term "discharge" to include passive migration.[223] Under the CWA, the Ninth Circuit correctly found the term "discharge" not to include nonpoint source

219. *See* 42 U.S.C. 9607(a); *see generally CDMG*, 96 F.3d 706; *150 Acres*, 204 F.3d 698.

220. *See CDMG*, 96 F.3d at 706 (reasoning that the plain meaning of the term "disposal" requires active human conduct); *150 Acres*, 204 F.3d at 705-06 (same)

221. *See CDMG*, 96 F.3d at 714-15 (reasoning that Congress had different meanings for the terms "release" and "disposal," and, therefore, by using the term "disposal," Congress extended liability only to parties evidencing active human conduct); *150 Acres*, 204 F.3d at 704-08 (same); *Carson Harbor*, 227 F.3d at 1213 (Weiner, J., dissenting) (reasoning that Congress had different meanings for the terms "release" and "disposal" and therefore by using the term "disposal," Congress extended liability only to parties evidencing active human conduct).

222. *See generally CDMG*, 96 F.3d 706.

223. *See supra* note 212 and accompanying text.

pollution, which is argued to be analogous to passive migration.[224] Thus, the Ninth Circuit should have interpreted the CERCLA term "disposal" not to include passive migration.

Consequently, if Congress had intended past owners to be held liable under a passive migration contamination theory, then it is the legislators who must amend CERCLA and the CERCLA term "disposal" to refer liability to past property owners exhibiting anything other than active human conduct. As the statutory language now stands, courts should interpret the CERCLA term "disposal" not to include the passive migration of contaminants, and the courts should hold only parties who actively contribute to the property contamination responsible for the costs of cleanup.

224. *See Dombeck*, 172 F.3d at 1097.