Cleaning up the Muck: Clarifying the Scope of CERCLA's Potentially Responsible Parties

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CLEANING UP THE MUCK: CLARIFYING THE SCOPE OF CERCLA’s POTENTIALLY RESPONSIBLE PARTIES

Matthew K. Telford†

“Although we agree that the question whether . . . liability attaches is fact intensive and case specific, such liability may not extend beyond the limits of the statute itself.”

United States Supreme Court Majority Opinion, Burlington Northern & Santa Fe Railway Co. v. U.S., 2009

Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act2 (“CERCLA”) was enacted in 1980 in response to infamous contamination incidents,3 which focused public attention on the need for hazardous waste regulation. One such event was the highly publicized Love Canal disaster.4 In the late 1970s, some twenty-five years after the construction of the Love Canal neighborhood of Niagara Falls, New York, on top of a former hazardous waste dump, residents began to suffer the effects of environmental contamination.5

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2 42 U.S.C. § 9601 et seq. CERCLA is also commonly known as the “Superfund”.
3 See Uniroyal Chemical Co., Inc. v. Deltech Corp., 160 F.3d 238, 246 (5th Cir. 1999) (“In the late 1970s the threat posed by toxic waste sites was brought to the forefront of public awareness by . . . well-publicized disasters . . . .”).
5 See Beck, supra note 3 at 17.
Birth defects, leukemia, and cancers\(^6\) plagued residents of Love Canal, and the incident--and eventual removal of residents\(^7\)--was covered by media outlets nationwide. The situation at Love Canal increased pressure on lawmakers to pass comprehensive legislation regulating hazardous waste; from this maelstrom CERCLA was born.

The statute created a federal fund, through excise taxation,\(^8\) to finance hazardous waste cleanups, while simultaneously establishing a liability mechanism for hazardous waste contamination.\(^9\) This liability protocol establishes four categories of Potentially Responsible Parties ("PRPs") that can be held liable under the statute.\(^10\) Broadly defined, the four categories of PRPs include: (1) “owners/operators” of hazardous waste sites; (2) “transporters” of hazardous waste for disposal; (3) “arrangers” of hazardous waste disposal, and (4) “previous owners/operators” at the time of disposal.\(^11\) These PRPs can be held liable for “all costs of removal or remedial action incurred by the United States Government” and “any other necessary costs of response incurred by any other person consistent with the National Contingency Plan.”\(^12\) Such a liability scheme incentivizes the prevention and cleanup of hazardous waste spills, while also holding accountable parties fiscally liable.\(^13\)

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\(^6\) Id. at 17-18.
\(^7\) Id. at 18.
\(^9\) See \textit{Metro. Water Reclamation Dist.}, 473 F.3d at 826 (discussing CERCLA’s two-fold purpose to “establish a . . . financing mechanism to abate and control the vast problems associated with . . . disposal sites” and to “shift the costs of cleanup to the parties responsible for the contamination”).
\(^11\) Id.
\(^12\) Id. For information on the National Contingency Plan see 42 U.S.C. § 9705 (2006).
\(^13\) See \textit{Burlington N. & Santa Fe Ry. Co. v. U.S.}, 129 S. Ct. 1870, 1874 (2009) (“The Act was designed to promote the ‘timely cleanup of hazardous waste sites’ and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.” (citing Consolidated Edison Co. v. UGI Util. Inc., 423 F.3d 90, 94 (2d Cir. 2005))).
Although the text of CERCLA does not provide as such, the Act has traditionally been interpreted as a strict liability statute.\textsuperscript{14} While liability may be strict, and thus defenses limited, in order for a private party or the federal government to recover cleanup costs, the plaintiff must prove that an entity is covered under the statute.\textsuperscript{15} “Coverage,” or inclusion within the four categories of potentially responsible parties, has become a battleground for determining the breadth of CERCLA’s liability scheme.\textsuperscript{16}

Last term, the Supreme Court held that in order to be considered an arranger--one category of PRP--under CERCLA, a party must take “intentional steps to dispose” of a hazardous waste.\textsuperscript{17} Such an interpretation limits the reach of “arranger liability,” requiring an additional inquiry into intent. In light of Burlington Northern, another dispute surrounding the scope of PRP responsibility under CERCLA takes on new significance: specifically, the extent to which a previous owner--another category of PRP--can be held liable.\textsuperscript{18} With a circuit split--or what might more accurately be termed a circuit continuum--on the issue of whether previous ownership “at the time of disposal”\textsuperscript{19} includes passive disposal of hazardous wastes, courts need resolution on the breadth of previous owner liability.

\textsuperscript{14} Id. at 1878 ("CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs.").
\textsuperscript{15} See U.S. v. Washington State Dept. of Transp., No. C08-5722RJB, 2009 WL 2985474, at *4 (W.D. Wash. 2009) ("To recover its costs... the United States must prove as follows: (1) the site at which the actual or threatened release of hazardous substances occurred constitutes a "facility" under 42 U.S.C. § 9601(9); (2) there was a "release" or "threatened release" of a hazardous substance; (3) the party is within one of the four classes of persons subject to liability under 42 U.S.C. § 9607(a); and (4) the United States incurred response costs in responding to the actual or threatened release.” (citing United States v. Chapman, 146 F.3d 1166, 1169 (9th Cir.1998))). A liable party can also file a contribution claim to relieve its financial burden. See 42 U.S.C. § 9613(f)(1) (2006); United States v. Atlantic Research Corp., 551 U.S. 128, 139 (2007) (Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from a [cost recovery] action...)."
\textsuperscript{16} See e.g., Burlington N. & Santa Fe Ry. Co., 129 S. Ct. at 1879 (determining the scope of arranger liability); Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 874-77 (9th Cir. 2001) (examining various lower court decisions on how to interpret previous owner liability).
\textsuperscript{17} Burlington N. & Santa Fe Ry. Co., 129 S. Ct. at 1879.
\textsuperscript{18} See e.g., Nurad Inc. v. William E. Hooper & Sons Co., 966 F.3d 837, 846 (4th Cir. 1992) (holding previous owners liable for passive migration); Carson Harbor Village, Ltd., 270 F.3d at 874 (excluding passive soil migration but not all passive disposals).
\textsuperscript{19} 42 U.S.C. § 9607 (including “prior owner at the time of disposal” as a PRP category).
Both of the legal issues just mentioned engage what this comment seeks to explore, the fundamental question of how to interpret the scope of CERLCA’s PRP provisions, recognizing that under a strict liability regime the breadth of these categories becomes dispositive of the statute’s reach, and its effectiveness in placing the “cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public.”

Part I of this comment examines the Burlington Northern decision and its circumscription of one category of PRP liability--arranger liability. Part II discusses the current division among the lower courts regarding another area of PRP liability--the extent of previous owner liability. Part III recommends an interpretive solution regarding previous owner liability, imposing a mental state inquiry similar to the Supreme Court’s recent jurisprudence vis-à-vis arranger liability. Finally, Part IV explains that while these mental state requirements, at first blush, may not accord with strict liability, they in fact preserve a strict liability system while also limiting the coverage of CERCLA to those entities truly responsible for contamination.

I. The Settled Limits of Arranger Liability

In May 2009, the Supreme Court confronted a consolidated CERCLA suit, in which the EPA and California Department of Toxic Substances Control (DTSC) sought recovery of costs incurred at a hazardous waste site. One defendant, Shell Chemical Company, manufactured chemicals, which it then sold to a distributor for use in agriculture. These chemicals were stored in large drums and were subject to frequent spills at the hands of the distributor. The

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20 This comment, however, is primarily focused on one specific category of PRP, the previous owner.
22 Id. at 1876 (“By 1988, the Governments had spent more than $8 million. . . .”)
23 Id. at 1875 (noting Shell’s sale of contaminants D-D and Nemagon).
24 Id. (“Shell would arrange for delivery by common carrier, f.o.b. destination. When the product arrived, it was transferred from tanker trucks to a bulk storage tank located on B & B’s primary parcel. . . . During each of these transfers leaks and spills could--and often did--occur.”)
governments argued that Shell, although selling a useable product, was an “arranger” for
hazardous waste disposal.\footnote{Id. at 1876 (“The District Court conducted a 6-week bench trial in 1999 and four years later entered a judgment in favor of the Governments.”).}

Affirming the district court, the Ninth Circuit Court of Appeals held Shell liable as an
“arranger of disposal” (a PRP).\footnote{U.S. v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 952 (2008), rev’d., 129 S. Ct. 1870 (2009) (“We affirm the district court’s findings regarding . . . Shell’s liability.”).} The court recognized a broad “indirect” arranger liability, even though the purpose of the transaction was the sale of a chemical product, not disposal of
hazardous waste.\footnote{See id. at 948-49 (discussing the theory of indirect arranger liability). See also id. at 949-52 (rejecting Shell’s useable product defense and a lack of control defense).} The Court of Appeals interpreted “arrange” which is not defined in
CERCLA, in light of “disposal,” which is a defined term. As disposal included the terms
“spilling” and “leaking,” it did not require purposive conduct; therefore, neither did arranger
liability.\footnote{Id. (“Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient.”).}

The Supreme Court rejected this rationale, declining to interpret the term “arrange” in
light of disposal.\footnote{Id. (“Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient.”).} Instead, the Court took a “plain meaning” interpretive approach, finding that
arrange--according to the dictionary--means to plan for. Thus, arranger liability requires an intent
to dispose of “at least a portion of the product.”\footnote{Burlington N. & Santa Fe Ry. Co., 129 S. Ct. at 1879-80 (detailing the governments’ argument that arrange should be interpreted in light of the fact that the term disposal includes unintentional occurrences such as spilling).} In the case at hand, the Court found that the
evidence did not support an intent to dispose. While the Court recognized that knowledge of
spills can be probative of intent, it instead found Shell had no intent to dispose, as “knowledge
alone is insufficient to prove that an entity ‘planned for’ disposal.”\footnote{Id. at 1880 (“In order to qualify as an arranger, Shell must have entered into the sale . . . with the intention that at least a portion of the product be disposed of during the transfer process.”)} Thus, Shell could not be
held liable as an arranger. The Court indicated that while liability “is fact intensive and case

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25 Id. at 1876 (“The District Court conducted a 6-week bench trial in 1999 and four years later entered a judgment in favor of the Governments.”).
27 See id. at 948-49 (discussing the theory of indirect arranger liability). See also id. at 949-52 (rejecting Shell’s useable product defense and a lack of control defense).
28 Id. (“Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient.”).
29 Burlington N. & Santa Fe Ry. Co., 129 S. Ct. at 1879-80 (detailing the governments’ argument that arrange should be interpreted in light of the fact that the term disposal includes unintentional occurrences such as spilling).
30 Id. at 1880 (“In order to qualify as an arranger, Shell must have entered into the sale . . . with the intention that at least a portion of the product be disposed of during the transfer process.”)
31 Id. (focusing on the fact that Shell, while aware of the product spills, had taken efforts to prevent further spills).
specific,” it requires an intent to dispose, in order for arranger liability to attach, with mere awareness of imminent disposal being insufficient.\textsuperscript{32}

The ultimate effect of \textit{Burlington Northern} remains unclear, as few lower courts have had occasion to interpret its holding.\textsuperscript{33} The Justice Department has emphasized the unusual nature of the facts\textsuperscript{34} and that, while “knowledge alone is insufficient to impose arranger liability, it can be indicative of intent.”\textsuperscript{35} It does appear clear, though, that arranger liability has been virtually eliminated for the manufacturer/seller of a 100 percent useful product,\textsuperscript{36} and may be vastly narrowed in cases where the product is at all useful--as intent will be harder to prove. It remains to be seen how much probative value courts will give “knowledge” in evaluating intent, but with the ultimate inquiry upon intent, CERCLA coverage will not extend to arrangers of a foreseeable, though unintentional, disposal.\textsuperscript{37}

\textsuperscript{32} \textit{Id.} at 1879.

\textsuperscript{33} One district court declined to dismiss a suit that alleged a government agency was an arranger in granting permits to dredge hazardous material. \textit{See U.S. v. Wash. State Dep’t of Transp., No. C08-5722RJB, 2009 WL 2985474, at *8 (W.D. Wash. 2009)} (“[T]he court cannot say as a matter of law that upon further discovery, the facts will fail to show . . . intentional steps to dispose of a hazardous substance.” (citing Burlington N. & Santa Fe Ry. Co. v. U.S., 129 S. Ct. 1870 (2009))).

\textsuperscript{34} John C. Cruden, Acting Assistant Attorney General, Department of Justice, Address at the Environmental Law Institute: The Supreme Court’s Decision in \textit{Burlington Northern} and Santa Fe Railway Company v. United States (May 29, 2009) available at http://www.justice.gov/enrd/1306.htm (“Very few of the United States’ cases involve these types of facts. As you would imagine, it is somewhat unusual for us to litigate a case in which a party disposed of an unused and useful product.”). 

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} This is because no entity can \textit{intend} to dispose of something sold as a 100 percent useful/useable product. Indeed, some courts have already recognized a “useable product” defense to arranger liability. \textit{See, e.g., Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co., 906 F.2d 1059, 1065 (5th Cir. 1990)} (Congress did not intend CERCLA to target legitimate manufacturers or sellers of useful products.”); \textit{Berg v. Popham}, 113 P.3d 604, 611 (Alaska, 2005) (“[Federal courts] have consistently held that ‘a manufacturer who does nothing more than sell a useful, albeit hazardous, product to an end user’ has not arranged for disposal of a hazardous substance.” (citing City of Merced v. Fields, 997 F. Supp. 1326, 1332 (E.D. Cal. 1998))).

\textsuperscript{37} Justice Ginsburg, the sole dissenter in \textit{Burlington Northern}, explained that “Shell did not simply know of the spills and leaks without contributing to them.” \textit{Burlington N. & Santa Fe Ry. Co. v. U.S.}, 129 S. Ct. 1870, 1885 (Ginsburg, J., dissenting) (“Given the control rein held by Shell over the mode of delivery and transfer. . . Shell was properly ranked an arranger.” (internal citations omitted)).
II. The Unclear Limits of Previous Owner Liability

The breadth of previous owner liability also informs the scope of CERCLA’s remedial scheme. Unlike arranger liability, however, the Supreme Court has remained silent on the extent of previous owner liability. A major split has developed among the circuit courts surrounding whether passive waste migration or passive disposal can result in liability for a previous owner. This is sometimes called the active/passive distinction.

At this point, it may be helpful to set out examples of what constitutes passive disposal. Passive disposal in its broadest form would include the movement of pollution through geologic processes, called waste migration, without any owner/human involvement whatsoever. An example of passive waste migration involves B, who purchased property from A. Assume that when B purchased the site there were hazardous wastes present in the soil, and during B’s ownership these wastes migrated within the soil/groundwater before B sold the property. If B is to be held liable as a prior owner, disposal would encompass a very broad range of activity. Passive disposal, in a more limited sense, would include disposal without active human involvement. If, for example, D purchased a site from C, containing an old, abandoned underground storage tank (“UST”), and while D was the owner of the property the tank leaked hazardous material, such a situation would encompass passive disposal, because the incident was unaided by active human intervention. However, it is a narrower form of passive disposal, because a leaking storage tank can potentially be traced to the owner’s failure to prevent such a spill/leak, while waste migration results from purely geologic processes.

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38 See supra note 18; See also 42 U.S.C. § 9607 (clarifying that a previous owner “at the time of disposal” is a PRP). This debate, which hinges on the definition of disposal, also has implications for current owner liability, as it affects the breadth of the innocent landowner defense discussed infra.
As with arranger liability, courts have attempted to determine the scope of coverage under the previous owner provision, recognizing CERCLA’s “strict liability emphasis.” As only a previous owner “at the time of disposal” is a PRP, the circuits have developed varying legal theories about whether “disposal” includes passive circumstances. As will be explained, some courts conflate a strict liability regime with statutory coverage, extending the scope of CERCLA “beyond the limits of the statute itself.” Still, other courts are underinclusive, failing to extend PRP coverage to its statutory limits.

The Fourth Circuit had first occasion to consider the extent of previous owner liability. In Nurad Inc. v. William Hooper & Sons Co., the court held that previous—or what it sometimes called interim—owner liability extends very broadly, to all incidents of passive disposal, including “leaking” from storage tanks. The court argued that a more restrictive view of previous owner liability would run afoul of CERCLA’s language and “frustrate the fundamental purpose.” In explaining its rationale, the court focused on the terms “spilling” and “leaking,” included in the definition of disposal, and the statutory purpose of waste cleanup, to determine that passive disposal—leaking from tanks, and the subsequent spread of waste through the environment—was included in previous owner liability. Such a result allows the former owner of a hazardous waste site, who did not actively contribute to disposal, to be held liable for

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40 See Gwendolyn Johnson, Comment, Passive Migration Theory Swims Against an Aggressive Tide: Majority of Federal Circuits Disfavor Passive Migration Theory, But Theory may be Viable with Narrow Application, 9 U. Balt. J. Envtl. L. 124, 128 (2002) (“[A]ssigning CERCLA liability to interim owners depends upon whether a “disposal” is a discrete act performed by the original polluter or a perpetual act continuing through the ownership of subsequent PRPs.”).
42 Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 876 (9th Cir. 2000) (“The first Circuit to face the question was the Fourth Circuit. . . .”)
43 966 F.3d 837, 846 (4th Cir. 1992) (extending liability to a prior owner without active involvement in disposal).
44 Id. at 845.
45 Id. (discussing the court’s rationale in holding an entity liable for passive migration).
CERCLA cleanup costs. The court has since affirmed its holding that passive disposal at the time of ownership constitutes disposal.\(^{46}\)

While no other court has embraced the Fourth Circuit’s rationale in its entirety,\(^ {47}\) many other courts have stopped short of excluding all passive disposals from previous owner liability.\(^ {48}\) Only the Sixth Circuit has repudiated passive disposal for prior owners, concluding that liability requires affirmative human conduct.\(^ {49}\) The court had occasion to interpret the breadth of “disposal” not for a previous owner but for a current owner/operator in light of a limited CERCLA defense, the innocent landowner defense.\(^ {50}\) Acknowledging that “spilling and leaking” are included in the definition of disposal, the court interpreted these terms actively.\(^ {51}\)

The Court rested its cursory analysis on the fact that most of the words in the CERCLA definition of disposal (injection, deposit, placing) have an active construction, so spilling and leaking should as well. Further, because the term “disposal” is included in CERCLA’s definition of “release,”\(^ {52}\) disposal is--logically--narrower than release. A release, according to the language of the statute, clearly doesn’t require human conduct. To differentiate disposal, the court found it

\(^{46}\) Crofton Ventured Ltd P’Ship v. G & H P’Ship, 258 F.3d 292, 300 (4th Cir. 2001) (explaining that a prior owner could be held liable if previously installed storage tanks leaked hazardous waste).

\(^{47}\) What the court called “the reposing of hazardous waste and its subsequent movement through the environment.” Nurad Inc., 966 F.2d at 845.

\(^{48}\) The Second and Third Circuits have reserved ruling on whether disposal always requires active human conduct, and the Ninth Circuit has declined to exclude all passive situations from disposal. See CDMG, AAB, Carson Harbor.

\(^{49}\) United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (finding that disposal requires active human conduct).

\(^{50}\) See 42 U.S.C. § 9607(b)(3) (2006) (explaining that liability will not attach to a party who can establish by preponderance of the evidence that a release or threatened release was caused by a third party not in contractual relationship with the defendant); 42 U.S.C. § 9601(35) (2006) (excluding deeds, easements, and leases from a contractual relationship if a party can show it acquired land “after disposal” and had no reason to know of the disposal).

\(^{51}\) See 150 Acres of Land, 204 F.3d at 706 (“[B]ecause ‘disposal’ is defined primarily in terms of active words such as injection, deposit, and placing, the potentially passive words “spilling” and “leaking” should be interpreted actively...”).

appropriate to restrict disposal to human conduct. Finally, the court, without much explanation, remarked that it simply “makes sense” for disposal to constitute human conduct.\textsuperscript{53}

The Sixth Circuit, in requiring active human conduct for disposal, remarked that the Second and Third Circuits had limited disposal to “spills” requiring human intervention.\textsuperscript{54} Such a statement is misleading, however, as these courts did not exclude all passive disposal--such as leaking at the time of ownership. They simply excluded the underground migration of pollutants—the broadest form of passive disposal--from the definition of disposal. Thus, the Second and Third Circuits reserved judgment on what the Fourth Circuit included in previous owner liability and what the Sixth Circuit excluded, whether a leaking storage tank--or other, potentially passive circumstances--are included within “disposal.”\textsuperscript{55}

The Ninth Circuit, like the Second and Third, has rejected the idea that waste migration through the soil qualifies as disposal.\textsuperscript{56} However, the court specifically explained that “disposal” should be determined on a case-by-case basis and that leaking and spilling “may not require affirmative human conduct.”\textsuperscript{57} The court, thorough in its rationale, found that the plain meaning, statutory purpose, logic, and legislative history all support this result.\textsuperscript{58}

Interpreting the plain meaning of disposal, the Ninth Circuit found that most terms in the definition of disposal—dumping, depositing, injecting, discharging--have an active construction. The only term that could possibly include waste migration was “leaking,” but the court did not

\textsuperscript{53} \textit{150 Acres of Land}, 204 F.3d at 706.
\textsuperscript{54} See id. at 705 (citing United States v. CDMG Realty Co., 96 F.3d 706 (3d. Cir. 1996); ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 358 (2d. Cir. 1997)).
\textsuperscript{55} If a leaking storage tank is part of disposal, for instance, then a previous owner is within PRP coverage. Additionally, the scope of the innocent landowner defense is curtailed, as the landowner must acquire the property “after disposal.” If disposal is ongoing, a party cannot use this as a defense.
\textsuperscript{56} Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 879 (9th Cir. 2000) (explaining the “gradual passive migration of contamination through the soil . . . was not ‘disposal’”).
\textsuperscript{57} Id. at 880 (citing CDMG Realty Co., 96 F.3d at 714).
\textsuperscript{58} See id. at 877-87 (explaining how its result accords with canons of statutory construction).
believe waste migration was included in “the plain and common meaning” of leaking. Still, the plain meaning, when interpreted in light of statutory logic, clearly envisioned some instances in which passive circumstance are included in disposal. In particular, the court examined the innocent landowner defense, finding that including all passive migration in “disposal” would essentially nullify the defense, as disposal would continue indefinitely. An entity could not use the defense, which requires that land be acquired after disposal, if disposal continues ad infinitum. However, the opposite extreme of excluding all passive situations from disposal would obviate the need for the innocent landowner defense altogether, according to the court. Therefore, certain situations which would fit the definition of disposal, such as a “leak,” even though passive and without human action, are still included in the scope of previous owner liability.

Further, based on the “statutory purpose . . . that ‘responsible’ parties pay for the cleanup,” the Ninth Circuit argued that certain passive situations must be included within disposal. The court also referenced legislative history, finding that a major target of CERCLA was abandoned sites with leaking or spilling contaminates, which support their construction.

59 Id. at 879.
60 Id. at 882-84 (finding that “release” and “disposal” including many of the same terms, which mitigates against the mutually exclusive active/passive distinction adopted by the Sixth Circuit).
61 See supra note 50.
62 Id. at 883. This assumes the innocent landowner defense is not simply for current owners. If the defense is solely for a current landowner, who is liable based on “release” instead of “disposal,” then a narrow definition of disposal excluding all passive migration would still leave the innocent landowner defense viable--and indeed stronger.
63 Id. at 880-81 (“Indeed, if “disposal” is interpreted to exclude all passive migration, there would be little incentive for a landowner to examine his property for decaying disposal tanks, prevent them from spilling or leaking, or to clean up contamination once it was found.”)
64 Id. at 884-86 (discussing the legislative history of CERCLA). The court also examines the hasty passage of CERCLA during a lame-duck session of Congress, finding CERCLA’s legislative history somewhat of a “snark hunt,” alluding to the fictional species of Lewis Carroll.
III. A Solution to Previous Owner Liability Coverage in Light of Burlington Northern

While many courts have attempted to ascertain the limits of previous owner liability, each court’s analysis, to some degree, is flawed. The Fourth Circuit believes that excluding any form of passive disposal, including the natural migration of waste through soil, would abrogate a strict liability regime. But the court, confusing coverage and strict liability, extends liability “beyond the limits of the statute itself.”\textsuperscript{65} Remaining true to the language of the definition of “disposal”\textsuperscript{66} it is hard to conceive of a scheme that would include “completely passive repose or movement through the environment.” While “leak” is included in CERCLA’s definition of “disposal,” the gradual underground migration of contaminants is not properly included within “leak” or any other term. Indeed, the definition of “release” includes the term “leaching,” demonstrating that Congress was aware of a potentially broader definition of disposal, which would clearly include waste migration in soil, and chose not to adopt it.\textsuperscript{67} The court correctly explains that liability is triggered by coverage under the PRP provisions.\textsuperscript{68} Yet, the court seems to discount the fact that the party must still fit within the coverage of CERCLA before strict liability can attach. Limiting liability for previous owners to “disposal” does not abrogate a strict liability regime, it simply comports with coverage under the statute.

If passive waste migration is not included within “disposal,” that still begs the question of how “spilling” and “leaking,” which are included in disposal, should be interpreted. The Sixth

\textsuperscript{66} See 42 U.S.C. § 9601(29) (2006) (explaining that disposal shall have the same meaning provided in RCRA). See also 42 U.S.C. § 6903(3) (2006) (“The term ‘disposal’ means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”)
\textsuperscript{67} See 42 U.S.C § 9601(22) (2006) (defining release).
\textsuperscript{68} See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (1992) (“The trigger to liability . . . is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.”).
Circuit views “spilling” and “leaking,” in light of the active terms “injecting” “placing” and “dumping,” to have an active construction, requiring “human intervention.” However, such a construction would not accord with the plain meaning of the terms “spill” and “leak” and would also circumvent the statutory purpose to incentivize hazardous waste cleanup. For example, Merriam-Webster defines spill as “to cause or allow especially accidentally or unintentionally to fall, flow, or run out so as to be lost or wasted.” “Leak” is defined: “to permit to enter or escape through or as if through a leak.” While both definitions seem to require some level of human agency (to cause, to permit), neither unequivocally requires active engagement in such activity. Further, if disposal required active human involvement, this would create perverse incentives to actually neglect leaking and spilling tanks, something that seems illogical given CERCLA’s purpose to remediate waste contamination. In this analysis, one should not forget that active human involvement, while not required, would still subject a party to liability since they “caused” the leak/spill, something that clearly falls within the plain meaning of “spill” and “leak.”

So, based on a definitional perspective, certain incidences of passive leaking and spilling which were “permitted” by an owner would fall within the definition of disposal. This accords with the Ninth Circuit’s view that some incidents of passive disposal are included in CERCLA’s coverage. But the Ninth Circuit’s precedent leaves the question of how far to extend passive disposal to a case-by-case basis, leaving the resolution of “disposal” too uncertain. While the

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69 See Pamela A. Kayatta, Note, 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, 11 Penn St. Envtl. L. Rev. 295, 304 (2003) (“[T]he Sixth Circuit interpreted ‘disposal’ to extend liability only to past owners actively contributing to property contamination. The Sixth Circuit does not hold past owners liable if they had not been the ones to place hazardous waste on the property.”).


72 See Carson Harbor Village, Ltd. v. Unocal Corp.,
Ninth Circuit explains “we cannot predict” all circumstances under which CERCLA will be applied, courts and parties would benefit from a more definitive resolution of the breadth of previous owner PRP coverage, rather than such an open-ended rationale.73

A. The Resolution Courts Seek: The Human Agency Test

The Supreme Court’s recent jurisprudential approach, resolving the scope of arranger liability, can likewise provide needed resolution to the scope of previous owner liability. In Burlington Northern, the court relied on “plain meaning” to determine that “arrange” requires an intent to dispose.74 Here, when analyzing previous owner liability, although the term disposal is defined in the statute,75 the terms listed within disposal are not defined and have been problematic for the courts.76 Spilling and leaking, while not defined in CERCLA’s statutory regime, have plain meaning’s, just as the Court in Burlington Northern looked to the plain meaning of arrange.77 The plain meaning of spilling and leaking both require some form of human agency,78 which excludes soil migration (waste already in the soil) from the definition of disposal. Yet active human conduct is not required--rather, a party’s choice to neglect a spill or leak would also fall within the plain meaning of the terms, as an actor “permitted” or “allowed” these to occur. Thus, the plain meaning of spill and leak should include a negligence standard, to

75 See 42 U.S.C. § 9607(29) (2006) (importing the RCRA definition of disposal); 42 U.S.C. § 6903(3) (2006) (“The term ‘disposal’ means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”).
76 Compare Nurad Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992) (finding “hazardous waste may leak or spill without any active human participation”) with United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (interpreting spilling and leaking actively based on the other active words in the definition of disposal).
77 See supra notes 70-71 for the dictionary definition of “spilling” and “leaking”.
78 The definition begins with “to allow” or “to permit.”
capture passive incidents attributable to a human actor. Such a standard provides a more workable approach than the case-by-case basis analysis the Ninth Circuit would apply.\textsuperscript{79}

Such a negligence standard would create a human agency test for passive disposals, as it would impose CERCLA liability for “spills” and “leaks” where a party could have prevented such occurrences (by monitoring underground storage tanks, for instance). Indeed, similar approaches have been advocated, but overlooked by most courts.\textsuperscript{80} This negligence standard would, for instance, include those leaks and spills “permitted or allowed” by previous owners, remaining true to the statutory reach of the previous owner PRP provision. In short, this standard would provide a middle way, broader than the active conduct—“interventionist”—approach required by the Sixth Circuit,\textsuperscript{81} narrower than the Fourth Circuit’s broad inclusion of passive soil migration, and similar, but more concrete, than the Ninth Circuit approach.

Given the Supreme Court’s willingness to include a requirement of intent within the definition of arranger liability, a negligence standard for prior-owner PRP status would not disrupt the strict liability regime of CERCLA. A party could still be held liable for a hazardous “spill or leak” on a strict liability basis, but the party would have to first fall within a PRP provision, and a prior owner would need to have negligently “allowed spills or leaks to occur” rather than necessarily actively create them.

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\textsuperscript{79} Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 880 (2001) (approaching the terms spilling and leaking on a case-by-case basis).

\textsuperscript{80} See 150 Acres of Land, 204 F.3d at 711 (Jones, J., concurring) (advocating a broader definition of disposal including human agency, to encompass “willful neglect,” rather than requiring interventionist human conduct). Note how Judge Jones’ standard would be somewhat more difficult to meet, as it only encompasses willful neglect, rather than the negligence standard that I advocate in this piece.

\textsuperscript{81} See Id. (“[The Majority] restricts ‘disposal’ to occasions where property owners release toxic substances themselves, or actively participate in exacerbating existing spills.”).
B. How an Agency Standard conforms with CERCLA’s Statutory Scheme, Purpose and Legislative History

A negligence standard, while not only permissible given a plain language reading of the statute, also conforms to the broader scheme and remedial purposes of CERCLA. Such an agency standard makes sense given that the statutory definition of release, which includes the term “leaching,” is broader than disposal. As mentioned above, the leaching of soil wastes (underground migration) clearly would not meet the agency test of disposal, considering that such an event would not fall within spilling, leaking, or any other term used in disposal. Because lawmakers avoid surplusage, Congress must have intended a different, narrower meaning for the term disposal. If disposal were stretched further to incidences of soil migration, its difference from “release” would be highly questionable.

On the other hand, a human agency standard preserves the innocent landowner defense, further evidence that this is the correct way to resolve previous owner liability. The innocent landowner defense, for instance, requires that a party acquire land “after disposal,” having no reason to know of such disposal. With a human agency standard, disposal can be cut off at a certain point, preserving the innocent landowner defense for current owners/operators of a facility. The innocent landowner defense, then, while applying to current owners, would function in largely the same way as a human agency standard for previous owners. If a current owner had a leaking storage tank, an inquiry into whether the land was acquired after disposal would look to whether the owner was negligent, in order to be included within disposal. If he

82 See 42 U.S.C. § 9607(22) (2006). Indeed, the term release includes disposal, further proof that release encompasses a wider array of circumstances.
84 See supra note 50 (explaining the innocent landowner defense).
85 Id. That is, at least, for parties that want to exclude the deed as a contractual relationship.
was not negligent, and had no reason to know of a prior disposal, then he could use the innocent
landowner defense to avoid liability.

With CERCLA designed “to ensure that the costs of . . . cleanup efforts [are] borne by
those responsible for the contamination,” a human agency scheme advances this goal. Some
form of human agency is required to bind the previous owner to liability, ensuring that parties
responsible for hazardous waste contamination are held liable. With a statutory scheme also
aimed at incentivizing waste cleanup, this system ensures that owners do not neglect leaking or
spilling of contaminates. A narrower version of disposal which required active human
participation would create perverse incentives for owners to actually neglect or remain willfully
blind to potential environmental hazards, such as leaking storage tanks. Moreover, a broader
definition of disposal would ensnare owners who had no connection to responsibility for
contamination but who would be liable for cleanup, nonetheless.

Any good statutory interpretation will include analysis of relevant legislative history.
CERCLA, possessing little legislative history, is somewhat of an oddity. The statute was passed
hastily by a lame duck Congress in 1980, at the end of the Carter presidency. Few statements
or reports surrounding legislative history exist, but the available statements clarify that those
instances of passive disposal which fit within the definitional terms “spill” or “leak” were meant
to be included within disposal, while instances devoid of human influence are not. Thus, the
legislative history confirms that a middle-way approach—the negligence standard—would apply

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87 According to the Fourth Circuit, for example, a prior owner who acquired land with underground contaminates
would be liable simply because these “reposed,” or spread underground. See Nurad Inc. v. William E. Hooper &
88 See Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 885 n.13 (9th Cir. 2001) (“The bill that ultimately
became law was an eleventh-hour compromise hastily assembled by a bipartisan leadership group of senators; it was
introduced and passed by the Senate with only days remaining in a lame-duck session, and went to the House for an
up-or-down vote.”).
the right boundaries to “spill” and “leak” while excluding other passive scenarios which do not fall within these words.

For instance, Representative Goldwater explained, “[t]his bill would establish a sizable ‘superfund’ which would pay for the cleanup costs of inactive . . . dumpsites which leak hazardous wastes . . . ”. Further, available reports confirm that Congress expected passive spills and leaks to be included within CERCLA liability. There is no language, however, about restricting disposal to active human involvement, or extending it beyond “spills and leaks” to “leaching”/percolating. Even though the legislative history is scant, perhaps the best evidence that Congress expected “spills and leaks” not to require active human conduct, are the frequent invocations of Love Canal--where contamination resulted from leaking drums at a long abandoned facility.

IV: The Preservation of a Strict Liability Regime

Courts unanimously agree that CERCLA imposes strict liability on those parties within its purview. A policy of strict liability, though, does not give courts carte blanche to rewrite environmental statutes for the benefit of waste cleanup. A court must also “interpret and apply statutes”, paying prime attention to the text before them. Courts are too often willing to read

90 See e.g., S. Rep. No. 96-848, at 5 (1980) (“Spills have taken place because of . . . non-transportation facilities such as storage tanks, holding lagoons and chemical processing plants.”)
91 See Carson Harbor Village, Ltd., 270 F.3d. at 885-86 (“Love Canal and the Valley of the Drums were both abandoned hazardous waste sites that were described as spilling or leaking with no affirmative human conduct.”); 126 Cong. Rec. 30931 (statement of Sen. Randolph) (1980) (“The dangers posed by buried chemical wastes have only recently begun to make a dent in our national consciousness, largely as a result of the severe health problems discovered at Love Canal.”).
93 Id. at 610.
wider breadth to CERCLA because of its emphasis on liability and cleanup, rather than remaining true to the language of the statute, which tends to rest coverage on responsibility.

The Fourth Circuit, for example, imbued a broad reading of previous owner liability in large part because it believed a more restrictive view was at odds with CERCLA’s “strict liability emphasis.” But such an understanding seems to interpret the breadth of a statute based on policy considerations rather than on the words of the statute itself. However willing courts may be to foster hazardous waste cleanup, the statutory scheme exists to hold only four classes of PRPs liable.95

While CERCLA is not explicitly premised on responsibility, to some extent the statutory scheme reflects as much. The Supreme Court has remarked that parties not responsible for contamination may be liable under the PRP provisions.96 Yet, as stated previously, one of the goals of CERCLA is to place “cost[s] of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public.”97 The breadth of the PRP provisions, then, is dispositive of who can be held liable, and while these categories may not always align with responsibility, they do tend to be limited to those parties involved with hazardous waste.

For instance, only prior owners “at the time of disposal” fall within coverage, or those who “arrange” for disposal.98 Even current owner/operator liability, the broadest category (linguistically) of PRP liability,99 has an innocent landowner defense which limits the scope of

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95 The Supreme Court found that the breadth of arranger liability could not simply be defined by disposal, but that the meaning of arranger must also be considered. Burlington N. & Santa Fe Ry. Co., 129 S. Ct. at 1879-80.
97 Burlington N. & Santa Fe Ry. Co., 190 S. Ct. at 1885 (Ginsburg, J., dissenting).
98 See 42 U.S.C. § 9607 (2006). I have explained above how the Supreme Court interpreted arranger liability and how previous owner liability should be resolved.
99 It has no qualifying language like other PRP provisions.
This comment’s explanation of previous owner liability notwithstanding, the statutory provisions themselves, through their language, make it clear that PRP coverage is not meant to extend to every person/entity who dealt with a piece of land (or hazardous chemical). Rather, each category has linguistically defined borders.

Congress’ intent in primarily holding responsible parties liable is indeed illuminated through a plain meaning reading of the PRP provisions. Arranger liability, we know, only extends to persons who intend to dispose of a substance, not, for instance, to a pesticide supplier for an agribusiness. Current owners (as a PRP category subject to liability) still have statutory defenses, as mentioned, including the new bona fide prospective purchaser defense. And, prior owners are only liable when they owned “at disposal”—which, as explained above, should be based on whether a party spilled, leaked, injected, dumped, or negligently prevented such an occurrence. Thus, the plain meaning along with statutory structure demonstrates that while “responsibility” may not be a requisite to CERCLA liability, the statute tends to cover only those entities involved in hazardous waste contamination.

Placing liability on those parties who contribute to, or are responsible for, hazardous waste is exactly what occurs if prior owner liability requires human agency. An owner cannot neglect underground storage tanks, or neglect an overflowing drum and escape CERCLA liability. But, in the same vein, a party cannot be held liable for the underground movement of waste unconnected to an owner. Thus, a negligence standard for previous owner liability,

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100 See supra note 50.
101 Assuming, arguendo, one avoided interpreting the term disposal.
103 See supra note 10.
104 See 42 U.S.C. § 9607(r) (2006); See also Bonnieview Homeowners Ass’n v. Woodmont Builders, LLC, 655 F. Supp. 2d 473, 499 (D.N.J. 2007) (explaining the defense to liability).
105 See supra Part III.
while being mandated by the plain language of “dispose,” also nests well in a statute that targets contributors to hazardous waste contamination.\textsuperscript{107}

CERCLA then, is not a statutory system meant to impose strict liability on any party who has any relation to hazardous waste. Rather, it is meant to impose strict liability on those entities that are covered under the statute, and thus imposes strict liability on those primarily responsible for the hazardous waste contamination. Such an understanding does not abrogate a strict liability regime. A previous owner, for example, who negligently failed to inspect leaking storage tanks would still be liable, in some sense strictly.\textsuperscript{108} The party may have had no reason to know the tank contained hazardous materials, but once covered under the previous-owner provision, liability automatically attaches (is strict). The same holds true for arranger liability. While adding a requirement of intent\textsuperscript{109} may have seemingly abrogated a strict liability regime, it in fact did not. A party that intended to dispose of a tire, for instance, unaware that it contained toxic components, would still be strictly liable as an arranger. These examples should illustrate the difference between “coverage” and “liability,” illuminating how strict liability is not lost in such cases. Strict liability then, preserves liability for entities covered by the statute. It does not allow a court to extend the statute “beyond its limits” simply because of policy goals advocating waste cleanup.\textsuperscript{110}

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\item[\textsuperscript{107}] See City of Bangor v. Citizens Commc’ns Co., 2004 WL 1572612 *4 (D. Me. 2004)(“CERCLA [has a] broad definition of a PRP, crafted in a way that creates a potential for liability from many \textit{contributors}, including those with only a proportionally small share of the \textit{responsibility},”) (emphasis added).
\item[\textsuperscript{108}] At least under the standard announced herein.
\item[\textsuperscript{110}] Id. at 1879.
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Conclusion

Today is an era not unlike the time of CERCLA’s passage. The call for environmental reform is strong, with President Obama hailing renewable energy,\textsuperscript{111} Congress considering new environmental legislation\textsuperscript{112}, and the EPA moving toward greater regulation.\textsuperscript{113} CERCLA, passed on the heels of an “environmental decade” of reform, was far-reaching and unprecedented in its regulatory scope. The statutory scheme produced a mechanism both to prevent hazardous waste contamination, and encourage hazardous waste cleanup.\textsuperscript{114} This “strict liability scheme,” though, is bound by provisions of statutory coverage\textsuperscript{115} which restrict CERCLA to entities involved, to some degree, with hazardous waste.

The Supreme Court has signaled that PRP provisions, according to their plain language, may impose requirements that seem odd given CERCLA’s strict liability scheme. Arranger liability requires intent to dispose,\textsuperscript{116} which looks like liability framed with a purposive mens rea rather than a strict liability perspective. However, the Court is simply remaining true to the statutory language (or coverage), a requirement irrespective of a strict liability regime. Other PRP provisions also require an inquiry into the plain language before an entity can be found strictly liable. This includes previous owner liability.

Previous owner liability “at the time of disposal” requires a human agency test to ensure disposal actually occurred. If a party caused a spill, leak, dumping, injection, or negligently failed to prevent one, then human agency is implicated, and the party should be included within

\textsuperscript{111} President Barack Obama, State of the Union Address (Jan. 27, 2010) (advocating passage of a “comprehensive energy and climate bill with incentives that will finally make clean energy the profitable kind of energy in America”).
\textsuperscript{112} See H.R. 2454, 111th Congress (2009) (proposing a cap and trade system to curb CO\textsubscript{2} and other greenhouse gas emissions).
\textsuperscript{114} See infra page 1.
CERCLA liability. If, however, a party owned a property where waste migrated through soil from one part of the property to another, such an incident could not properly come within the scope of previous owner liability, as it does not fit within the language of disposal—no spill, leak, or injection has taken place. And, if a previous owner was unaware of a leaking underground storage tank after the requisite due diligence, the human agency test would immunize him from previous owner liability, assuming no negligence. What all of these examples illustrate is that coverage of the previous owner PRP provision is essentially aligned with responsibility for waste contamination, and strict liability does not automatically implicate all previous owners of waste sites.

The human agency test, while it creates another hurdle for liability of previous owners, offers the correct scope of coverage. If an entity were liable for all waste migration, not only would this contradict the language of CERCLA, it would also sieve owners who had no influence over geologic processes. This overinclusive definition of previous owner PRP coverage is untenable, as a party would essential be liable ad infinitum (soil constituents typically percolate and for long periods). Thus, the words “at the time of disposal” would be meaningless. If including all passive disposal is overinclusive, then a requirement of affirmative human conduct is underinclusive. “Spills” and “leaks” counsel accidental situations, not those in which a human actively or intentionally disposes of waste. The Sixth Circuit’s belief that “spilling” and “leaking” require an active construction simply because the words around them are active, is ill-conceived. Instead, a middle of the road approach—the human agency test—correctly defines the scope of previous owner liability, given the plain language of the term “disposal.”

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117 Such a situation, given the extensive environmental consulting industry, should be extraordinarily rare. 118 See United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (interpreting spilling and leaking actively based on the other active words in the definition of disposal).
Plain language aside, it is important to understand that instituting a requirement to show intent to dispose, or a standard to prove human agency when a “spill or leak occurs,” is an attempt to conform to the language of the statute, language that tends to cover parties deemed responsible for hazardous waste contamination. The judiciary should not extend the breadth of PRP provisions simply to effectuate waste cleanup. While a strict liability schema remains, it must coexist with a PRP provision that defines who is subject to legal liability. Congress is charged with creating law, and if it believes that strict liability should exist more broadly, it has the opportunity to revise the statute. At this juncture, however, CERCLA’s PRP provisions circumscribe strict liability, excluding most non-responsible parties from CERCLA’s grasp. Thus, PRP-coverage and strict liability exist in delicate tension, but are mutually dependent, in order to fulfill CERCLA’s mission of environmental remediation.