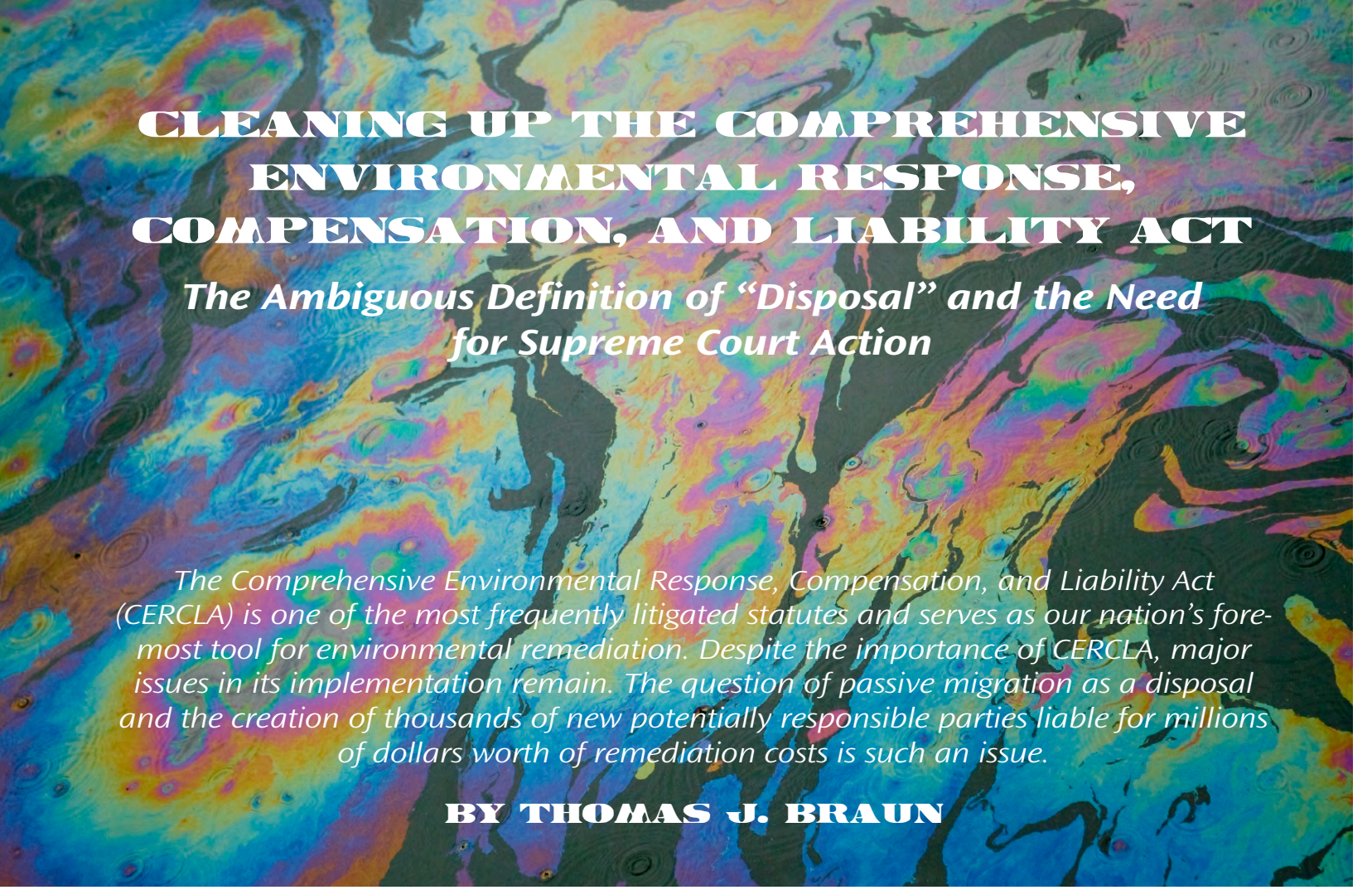

CLEANING UP THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

The Ambiguous Definition of "Disposal" and the Need for Supreme Court Action

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is one of the most frequently litigated statutes and serves as our nation's foremost tool for environmental remediation. Despite the importance of CERCLA, major issues in its implementation remain. The question of passive migration as a disposal and the creation of thousands of new potentially responsible parties liable for millions of dollars worth of remediation costs is such an issue.

BY THOMAS J. BRAUN

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 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."[1] Among other things, CERCLA provides a cause of action against liable parties in order to recover cleanup costs incurred in remediating a contaminated site.[2] In addition, CERCLA allows parties who are found liable for cleanup costs to seek contribution from other liable parties.[3] The difference between a cost recovery action under CERCLA, § 107 and a contribution claim under § 113 is that in a § 107 cost recovery action a party can impose joint and several liability for the entire cost of its cleanup on the defendant.[4] This liability scheme is known as a "polluter pays" scheme, the goal of which is to "place the ultimate responsibility for the clean-up of hazardous waste on those responsible for problems caused by the disposal of chemical poison."[5]

As part of this "polluter pays" scheme, CERCLA imposes liability on those parties who own the land "at the time of disposal."[6] Since its passage, this provision of CERCLA has been the impetus to extensive litigation stemming from the confusion surrounding the definition of "disposal." U.S. appellate courts are split as to whether the word "disposal" encompasses passive migration or whether disposal requires an active human component. This article attempts to explain the development of the law and predict where it might go in the future.

The second part this article examines CERCLA's liability scheme and the origin of the questions surrounding the definition of "disposal." This examination includes an in-depth look at the statutory language that establishes a cost recovery claim, the four categories of potentially responsible parties, and defenses to liability. The third part describes the circuit split that has developed over the last 20 years and reviews the prominent cases setting forth the law in each circuit. The fourth part evaluates whether the controversy has developed sufficiently so as to make it ready for the U.S. Supreme Court to review. The last part argues that the Supreme Court should—and most likely will—define "disposal" as requiring active conduct, thereby finding that passive migration does not constitute disposal.

CERCLA

In order to establish liability under CERCLA, a plaintiff must prove four elements:

- Hazardous substances were disposed of at a "facility."
- There has been a "release" or "threatened release" of hazardous substances from the facility into the environment.
- The release or threatened release of these substances has required or will require the expenditure of "response costs" consistent with the National Contingency Plan.

- The defendant falls within one of four categories of responsible parties.[7]

Despite the numerous requirements to prove a prima facie case, perhaps the most important element—and the one that is litigated most often—is the establishment of the defendant as a potentially responsible party (PRP).

Under its polluter pays scheme, CERCLA imposes both strict and joint and several liability for environmental contamination on four categories of potentially responsible parties:[8]

- the owner and operator of a vessel or a facility;
- any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- any person who, by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such a person or by any other party or entity at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
- any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person, from which there is a release or a threatened release that causes the incurrence of response costs of a hazardous substance.[9]

Once a person or entity is found to be a PRP, he or she may be compelled to clean up a contaminated site or reimburse another party who undertakes the action.[10] PRPs may be liable for these costs even if they are not at fault.[11] In addition, the statutes of limitations on these claims do not begin to run until response actions are under way, thus rendering parties potentially liable for contamination that occurred decades in the past.[12]

The heavy consequences of liability under CERCLA provide a strong incentive for parties to try to avoid liability. CERCLA includes few defenses, however. The original legislation included only one defense: a PRP may escape liability if he or she can prove that the disposal of a hazardous substance was caused by an act of God; by war; by a third party other than an employee or agent of the defendant or a party whose act or omission occurs in connection with a contractual relationship with the defendant; or by some combination thereof.[13] In 1986, however, the Superfund Amendments and Reauthorization Act (SARA) added another defense: the innocent purchaser defense.[14] SARA amended the definition of "contractual relationship" in § 9607(b) "to exclude contracts for the acquisition of real property where the buyer can establish that (a) it acquired the property after the hazardous substance release occurred and (b) before the acquisition, it had no knowledge and no reason to know of the contamination."[15]

Similarly, another defense is available to purchasers who bought property after the adoption of the Brownfields Act in 2002: the bona fide prospective purchaser defense.[16] Congress inserted this defense because, at the time of its adoption, numerous brownfields remained vacant as a result of buyers' fear of acquiring liability under CERCLA along with the property.[17] The innocent purchaser defense did not protect a knowing buyer of a contaminated brownfield site,[18] but the bona fide prospective purchaser defense protects a purchaser who acquired contaminated property after the law was enacted on Jan. 11, 2002, and who can prove the following:

- All disposal of hazardous substances occurred prior to that purchaser's acquisition of the property.
- Prior to acquiring the property, the purchaser made "all appropriate inquiries" about the ownership and uses of the property in accordance with "generally accepted good commercial and customary standards."
- The purchaser provided all legally required notices with respect to the discovery or release of hazardous substances at the facility.
- The purchaser exercised appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (1) stop continuing releases; (2) prevent any threatened future release; and (3) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances.
- The purchaser provided full cooperation, assistance, and access to government agencies or private parties authorized to perform response actions or natural resource restoration at the facility.
- The purchaser complied with any land-use restrictions established or relied on in connection with a response action and do not impede the effectiveness of any institutional controls.
- The purchaser complied with any government request for information or subpoena issued under CERCLA.
- The purchaser has no corporate affiliation or family relationship with another person who would otherwise be liable.[19]

Aside from these defenses, the federal courts are divided over the scope of liability of prior owners who did not actively contribute to the disposal of a hazardous substance on their property. This scenario develops in a common context:

> [T]he original owner of the land engages in activity that results in the release of a hazardous substance on the property. A second owner then purchases the land, does not create any new waste, and is not aware of the previous contamination. During the second owner's tenure, the previously deposited hazardous substance spreads via leaching or migration. Finally, a third owner purchases the land and retains ownership at the time of the required remedial activity.[20]

In this situation, it is clear that, without a defense, the original owner is liable. Similarly, in the absence of a

defense, the third owner would be liable as the current owner. But, is the second owner liable as a potentially responsible party? The prior owner provision imposes liability only on those who owned that land "at the time of disposal."[21] Therefore, one must determine whether "disposal" requires the owner to actively participate in the disposal, or if the passive migration of previously disposed hazardous substances renders the owner liable.

Definition of "Disposal"

In order to resolve this dilemma, one must define the term "disposal." The first step in interpreting statutory language is an examination of the language itself.[22] In the case of the term "disposal," this examination requires an in-depth look at both CERCLA and the Resource Conservation and Recovery Act (RCRA), because CERCLA defines "disposal" by incorporating the definition used by RCRA, which defines "disposal" as 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." [23]

Based on this definition, the term "disposal" describes not only the initial introduction of contaminants into a site but also the spread of those contaminants throughout the site and possibly onto others. This idea is exemplified in *Tanglewood East Homeowners v. Charles-Thomas Inc.*,[24] in which the Fifth Circuit held a residential developer liable under CERCLA for spreading soil contaminated with creosote during site grading.[25] The court stated that disposal is not a "one-time occurrence—there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."[26] What this definition leaves unclear, however, is whether disposal requires an active component—such as the case in *Tanglewood*, in which human activity actually moved contaminated soil around the site—or whether the migration of contaminants without a discrete human action suffices for the process to be considered disposal.

Legislative History

Because the statutory language itself is not clear on the point of passive migration, determining the definition of "disposal" requires an analysis of the legislative history of the language. With a sense of urgency usually not seen in the U.S. Congress, CERCLA was rushed through the legislative process without the development of the normal, extensive legislative record.[27] For instance, there were no committee reports on important provisions as a result of a closed-door meeting attended by more than 25 senators from which the main provisions of the liability section emerged.[28] Because a legislative record is lacking, transcripts of the floor debate contain the best evidence of legislative intent.

When Rep. James Florio introduced the bill that would eventually become CERCLA in the House of Representatives in 1980, he stated, "A strong liability scheme will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response and damages to natural resources."[29] Rep. Al Gore, another supporter of the bill, stated the following: "If one cannot prove the defendant caused the damage which led to the suit, then the strict liability standard is never triggered."[30] Some scholars argue that these statements make it plain that Congress envisioned a requisite causal connection between the original disposal and the passive release.[31] However, this interpretation seems to ignore the fact that current owners of land face strict liability without proof of causation. Or do these statements mean that the requisite causal connection applies only to the liability of prior owners? Based on this conflict, it appears the legislative history of CERCLA does not reveal clear answers to the question of passive migration.

Instead of developing a novel definition in CERCLA, Congress adopted by reference the definition of "disposal" that is used in RCRA.[32] Therefore, if Congress intended to include passive migration as disposal under CERCLA, it would have to be in RCRA as well. Congress enacted RCRA in 1976, four years before CERCLA was enacted, in order to establish a system that tracked hazardous waste from cradle to grave. Section 7003 of RCRA gives the U.S. Environmental Protection Agency the authority to require certain parties to take certain precautions if the "handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."[33] Like the legislative history of CERCLA, RCRA's history provides little insight. Congress passed RCRA in the last days of the congressional session in 1976.[34] The version of the bill that eventually passed was not negotiated in a conference committee; rather, it was formed as a result of an informal House-Senate compromise.[35] Without a single member having read the final version, the House passed the bill just before the end of the session.[36] Because of the absence of any meaningful evidence from committee reports and floor statements, it is impossible to determine whether passive migration fits within the definition of "disposal" based solely on the law's legislative history. Therefore, the courts must decide whether disposal requires a discrete human action or whether passive migration suffices.

The Courts' Interpretation of "Disposal"

Without the benefit of any evidence from the statutory language or legislative history of CERCLA and RCRA, it is up to the courts to define "disposal" and determine whether passive migration satisfies that definition. Currently, the federal courts are split on the issue. The Sixth Circuit occupies one extreme, holding that a former landowner is liable under CERCLA only if the disposal of hazardous substances stems from an active human component during the ownership period.[37] The Second,[38] Third,[39] and Ninth[40] Circuits hold that, even though the passive migration of contaminants through soil does not constitute disposal under CERCLA, disposal does not always require an active human component. At the other extreme, only the Fourth Circuit has held that passive migration alone is sufficient to constitute disposal under CERCLA.[41] The split among the circuits

is best understood as a continuum, with the Sixth Circuit at one extreme, requiring human activity to constitute a disposal; the Second, Third, and Ninth Circuits rejecting passive migration as disposal but not requiring human activity; and the Fourth Circuit at the opposite extreme of the Sixth Circuit, defining "disposal" to include passive migration.

Human Activity Is Required for Disposal

The Sixth Circuit represents the extreme end of the continuum that requires evidence of human activity in "whatever movement of hazardous substances occurred on the property."[42] The Sixth Circuit first came to this conclusion in 2000 in *United States v. 150 Acres of Land*,[43] which involved landowners who had inherited property without the knowledge that hundreds of drums of hazardous materials were hidden on the parcel of land.[44] The Environmental Protection Agency remediated the site and sued the property owners to recover its response costs. The court reasoned that "because '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."[45] Therefore, the court concluded that, without "evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property," the landowners had not "disposed" of hazardous substances and were not PRPs.[46]

The Sixth Circuit reiterated this stance in 2001 in *Bob's Beverage Inc. v. Acme Inc*.[47] In that case, a former warehouse owner sued the former owners of the property under CERCLA after a potential purchaser discovered that the property's water supply was contaminated from a leaking underground septic tank.[48] The court held that a former owner was not liable for response costs, because the former owner did not cause an increase in these costs, even though the hazardous substance continued to leak during the previous owner's ownership period.[49] The court came to this conclusion by reasoning that a disposal is not the same as a release.[50] According to the court, release is broader than disposal. Disposal "requires evidence of 'active human conduct,' and addresses 'activity that precedes the entry of a substance into the environment.'"[51] Therefore, the Sixth Circuit ruled that passive migration does not constitute disposal and that "the failure of the [previous owners] to prevent passive migration of hazardous substances during their ownership does not constitute a disposal."[52]

Passive Migration Does Not Constitute Disposal but Human Activity Is Not Required for Disposal

Decisions made by the Third, Second, and Ninth Circuits agree with the Sixth Circuit's ruling that passive migration alone does not constitute disposal but that human activity is not required for the process to be deemed a disposal.

The Third Circuit provided the bedrock case for the idea that passive migration does not satisfy CERCLA's definition of disposal in *United States v. CDMG Realty Co*.[53] This case involved a property that was formerly used as a landfill for six years before being sold to another party.[54] The defendant who owned the property and sold it used it only for environmental testing.[55] The subsequent owner sued the defendant as a prior owner under CERCLA for response costs, even though the plaintiff conceded that no one dumped hazardous substances during the time that the defendant owned the property.[56] The Third Circuit refused to conclude whether the passive migration of contaminants can ever constitute disposal but did find that "the passive migration of contamination dumped in the land prior to [defendant's] ownership does not constitute disposal." The court reasoned that, because "spilling" and "leaking" have active meanings that require some active human conduct, they could be "read to require affirmative human action."[57] The court refused to go so far as to require active human conduct but emphasized that the canon of *noscitur a sociis*, which allows one to infer the meaning of a term from those that surround it, supports the reading of leaking and spilling in an active context. For these reasons, the court found that passive migration does not constitute disposal.

The Second Circuit has heard multiple cases on the passive migration as disposal issue. The first case was *ABB Indus. Sys. Inc. v. Prime Tech. Inc*.[58] In that case, ABB tested property it currently held and found the presence of multiple hazardous substances.[59] The tests indicated that the property might have been contaminated before ABB acquired it; therefore, ABB sued the prior owners, alleging that they were liable for the costs of remediating the property.[60] Instead of reinventing the wheel, the court adopted the reasoning the Third Circuit used in its *CDMG Realty* decision: the Second Circuit held that "disposal" does not include the "gradual spreading of hazardous chemicals already in the ground" and that "prior owners and operators of a site are not liable under CERCLA for mere passive migration."[61] Therefore, the owners who did not add to the contamination during their ownership period were not liable.

The Second Circuit affirmed this finding in *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*,[62] in which Niagara paid to remediate its property and brought claims for contribution under the New York Navigation Law and CERCLA. A company called Tar Asphalt Services (TAS), which owned the property adjacent to Niagara's land, cleaned its trucks with kerosene and allowed the runoff to flow onto Niagara's property. The court stated that this constituted a disposal on TAS's property, not on Niagara's. In the court's opinion, the passage of the contaminants from TAS's property to Niagara's does not constitute disposal because it could not be said that there was a "discharge, deposit, injection, dumping, spilling, leaking, or placing," on TAS's property as required by the definition of "disposal."[63] As a result, the court found that TAS was not liable under CERCLA.

Like the Second Circuit, the Ninth Circuit followed the Third Circuit's reasoning in the *CDMG Realty* ruling in *Carson Harbor Village Ltd. v. Unocal Corp*.[64] The case first came before a three-judge panel and involved a CERCLA cost recovery action stemming from the cleanup of a contaminated wetlands site that was formerly used for petroleum production and later as a mobile home park. The Ninth Circuit initially held that disposal included passive

migration after concluding that the terms "discharge," "spill," and "leak" used in the definition of "disposal" had "well recognized meanings," and that, "[s]ince the prescribed definition includes passive migration by its own terms, we are bound to give effect to that definition."[65] Furthermore, the court found that "a passive theory fits better with Congress' decision to eschew a causation-based liability framework and to ensure prompt cleanup by drawing in all 'potentially responsible parties.'"[66]

Five months after issuing its initial opinion, the Ninth Circuit granted a motion for rehearing en banc. The court struggled to reconcile the various opinions on passive migration and concluded that the precedent "cannot be shoehorned into the dichotomy of a classic circuit split" but, instead, demonstrates "a more nuanced range of views, depending in large part on the factual circumstances of the case."[67] After concluding "one can find both 'active' *and* 'passive' definitions for nearly all of these terms in any standard dictionary," the Ninth Circuit opted not to attempt to find a spot on the continuum.[68] Instead, the court adopted a factual analysis test that examined whether any of the terms fit the hazardous substance contamination at issue. Applying this test, the court found that the contamination in question moved through the soil by "gradual 'spreading,' 'migration,' 'seeping,' 'oozing' and possibly 'leaching.'"[69] Such movement did not fit within the plain meaning of "'discharge, … injection, dumping, … or placing.'"[70] Nor did the migration of the contaminants constitute a "deposit," "spill," or "leak."[71] Therefore, the court held that the passive migration of contaminants through soil is not a disposal for purposes of CERCLA liability. The fact that the decision by the three-judge panel was reheard and reversed exemplifies the confusion and uncertainty surrounding the definition of the terms "disposal" and "passive migration" and should be considered a microcosm of the general jurisprudence on the subject.

Disposal Includes Passive Migration

In 1992, the Fourth Circuit, which occupies the extreme end of the continuum opposite the Sixth Circuit, provided the bedrock case for including passive migration in the definition of "disposal." In *Nurad Inc. v. Hooper & Sons Co.*, Nurad, the current owner of a site with leaking underground storage tanks brought a suit under CERCLA against previous owners seeking their contribution for remediation costs.[72] The court reasoned that some terms in CERCLA's definition of "disposal" were "primarily of an active voice," but others "readily admit to a passive component."[73] After coming to this conclusion, the court held the previous owners liable because disposal could occur "without any active human participation."[74] Therefore, CERCLA "imposes liability not only for active involvement in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at the time that hazardous waste was 'spilling' or 'leaking.'"[75]

The Fourth Circuit extended this holding to apply to a leak in a buried tank or drum where the landowner was unaware of the drum's very existence. In *Crofton Ventures Ltd. v. G&H Partnership*, the plaintiff purchased property from the defendants after the defendants represented that the property was not contaminated.[76]The plaintiff discovered the drums and hazardous substances when he began to develop the site, remediated it, and sued the defendants as previous owners under CERCLA. The court held that the district court had made a legal error in finding the defendants not liable for remediation costs, because the district court erroneously believed that liability could not attach "unless [the plaintiff] showed that the defendants placed or dumped [contaminants] on the site."[77] Because of this legal error, the Fourth Circuit reversed the district court's ruling and held that an owner is liable for contamination if he or she was the owner "at the time when hazardous waste was either placed on the site or leaked into the environment from a source on the site, whether or not such owner or operator was the cause of the disposal or, indeed, even had knowledge of it."[78] Therefore, according to the Fourth Circuit, even if the owner did not take an action, the passive migration of contaminants is sufficient to constitute disposal.

Based on this survey of cases ranging from the Second Circuit to the Ninth Circuit, one can see the wide disparity in how the courts of appeals treat the issue of passive migration. Because of this disparity, it is time for the U.S. Supreme Court to weigh in on the controversy.

Fitness for Supreme Court Intervention

The U.S. Supreme Court grants petitions for certiorari in very few instances. The Court receives approximately 10,000 petitions each year and grants certiorari in an average of 75–80 cases per year.[79] Supreme Court Rule 10 sets out factors that, although "neither controlling nor fully measuring the Court's discretion, indicate[] the character of the reasons the Court considers."Some of these considerations include the following:

- a decision made by a U.S. court of appeals that conflicts with a decision made by another U.S. court of appeals,
- when a decision made by the U.S. court of appeals that departs from Supreme Court precedent, or
- a U.S. court of appeals decision on an issue of national importance that should be heard by the Supreme Court.

Ideally, a petition for certiorari will demonstrate that the lower courts are in conflict on an issue of national importance.[80]

The Circuit Split

As examined above, there is a deep split among the circuit courts on the issue of passive migration as disposal under CERCLA. In *150 Acres* and *Bob's Beverage*, the Sixth Circuit unequivocally held that disposal requires "evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property."[81] The Fourth Circuit held the opposite in *Nurad Inc.* and *Crofton Ventures*: that "disposal may occur without any active human participation."[82] The other circuit courts fall

somewhere in the middle. Uniformity throughout the circuit courts is critical because this is such a frequently litigated issue, and both corporations and the general public want definitive answers to questions that affect the values of their businesses and homes. The lack of uniformity throughout the circuit courts will create inertia in the real estate market because, without a ruling from the Supreme Court, the governing law in a circuit court's jurisdiction could change at any time. Potential buyers will not know whether they could be stuck with paying for a remediation project. Similarly, potential sellers will fear the discovery of environmental liabilities during inspection procedures prior to a sale. Because of these potentially devastating repercussions on the real estate market and connected industries, the conflict among the circuit courts on the question of passive migration as disposal under CERCLA weighs in favor of the Supreme Court granting certiorari so that the Court can set forth a clear rule.

Departure from Supreme Court Precedent

Perhaps one of the chief reasons for the circuit split on this issue is the absence of a Supreme Court ruling on point. Despite being one of the chief factors in the Supreme Court's determination as to whether or not to grant certiorari, the absence of a circuit court ruling that departs from Supreme Court precedent does not necessarily weigh against the petition. Novel issues are often brought before the Court if there has been sufficient time for the controversy to develop into an important issue that demands attention. In this case, the issue is novel from the standpoint that the Supreme Court has not heard it before, but the controversy itself is not new. The Fourth Circuit defined "disposal" in a passive manner in 1992,[83] while the Third Circuit held that passive migration did not constitute disposal in 1996.[84] Over the course of the last 15 years, the circuit courts have proved that they will not achieve uniformity without the intervention of the Supreme Court. This uncertainty weighs greatly in favor of the Supreme Court granting certiorari.

Issues of National Importance

In addition to a circuit split and a departure from Supreme Court precedent, the Court evaluates whether the case presents an issue of national importance. Issues that the Court finds to be of national importance are characterized as those that affect not only the petitioner but also an entire industry or segment of the population.[85]The issue of CERCLA liability is such an issue. An enormous amount of resources is expended each year stemming from brownfields and CERCLA liability. The United States has an estimated 400,000 to 1,000,000 brownfields representing as much as $2 trillion of contaminated real estate.[86] Uncertainty within such a large and important sector of the U.S. economy has the potential to wreak havoc on the national economy.

In addition, the issue of remediation of hazardous substances represents a confluence of health, economic, and legal issues. A prime example is the Love Canal tragedy. In the 1890s, William Love bought a piece of property and began to develop it into a canal that would bypass Niagara Falls,[87] but he never finished the project. A few years later, however, the Occidental Chemical Corporation (OCC) arranged to use the property for waste disposal, including the disposal of numerous chemicals considered hazardous substances under CERCLA. After five years as a waste disposal site, OCC sold the Love Canal site to the Board of Education of the city of Niagara Falls, N.Y. Hazardous substances were later found "in the surface water, groundwater, soil, basements of homes, sewers, creeks, and other locations in the area surrounding the Love Canal" site.[88] As a result of these hazardous substances, children were born with birth defects, families were evacuated from their homes, and the government was forced to purchase affected homes in the ensuing CERCLA remediation project, which cost nearly $7 million.[89] The Love Canal tragedy illustrates the intersection of health, economic, and legal issues that are at the center of our lives and at the heart of CERCLA. The importance of these issues to everyday life is clear, and therefore the question of the definition of "disposal" is ready for the Supreme Court to address.

Overall, the presence of a circuit split and existence of an issue of national importance weigh in favor of the Supreme Court's granting certiorari in order to settle the dispute among the lower courts and to resolve these questions once and for all.

Supreme Court Review

Should the Supreme Court grant certeriori, it will likely examine the plain language of the statute and find that disposal under CERCLA does not include passive migration of hazardous substances. As in statutory interpretation, it is prudent to begin with the language of the statute itself. Supporters of passive migration as disposal argue that the statutory language ("discharge, deposit, injection, dumping, spilling, leaking, or placing"[90]) contains terms, such as "leaking," that seem to suggest an absence of human activity. Multiple district courts agree with this position. In *CPC International Inc. v. Aerojet-General Corp.*, a district court stated that "[t]he definition of 'disposal' adopted in CERCLA expressly includes 'spilling' and 'leaking.' Therefore, the unchecked spread of contaminated groundwater … qualified as disposal."[91] Similarly, in *United States v. Price*, the court held in a RCRA case that "[b]y its plain language, the statute authorizes relief restraining further disposal, i.e., leaking, of hazardous wastes from the landfill into the groundwaters."[92]

Despite the arguments in favor of passive migration as disposal, the legal maxim of *noscitur a sociis* stands for the idea that "a word is known by the company it keeps" and that "while not an inescapable rule, [it] is often wisely applied where a word is capable of many meanings in order to avoid the giving of unlimited breadth to an act of Congress."[93] Because "leaking" is surrounded by words that suggest active human activity, it should be construed in that way as well, as held by the Third Circuit.

As in the case of "leaking," the word "disposal" can be examined in the same way. The word "disposal" or a close variation thereof appears eight times in CERCLA and the

application of the canon supports a conclusion that disposal requires an active human component.[94] For example, the term "disposal" appears in the definition of the word "removal":

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.[95]

In this definition, "disposal" is explicitly labeled as an action and, logically, an action requires an actor to complete the action. This suggests that passive migration, which does not require an actor, is inconsistent with the use of disposal, which requires an actor, throughout CERCLA.

Similarly, the word "disposal" is used in the innocent landowner defense.[96] As discussed above, the provision provides that landowners are liable for the contaminants found on their property unless the owners can show, inter alia, that "the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility."[97] This provision clearly refers to a distinct period of time: "after disposal." Passive migration is a continuous process that occurs over time and has no discernible time constraints. Thus, disposal cannot contemplate passive migration in this instance, because a disposal has a discernible point at which the landowner could have acquired the land afterward in order to qualify for the innocent landowner defense. Passive migration, on the other hand, has no such point. Therefore, the canon of *noscitur a sociis* stands for the proposition that disposal does not include passive migration.

Conclusion

The definition of "disposal" under the Comprehensive Environmental Response, Compensation, and Liability Act presents an important question that the U.S. Supreme Court needs to answer. As evidenced by the wide range of interpretations in the courts of appeals, uncertainty runs rampant. With enormous amounts of money tied up in contaminated real estate and thousands of parties potentially liable for cleaning up the affected sites, it is important that the Court deal with this issue in the near future. The controversy certainly fulfills the common characteristics of petitions for which the Supreme Court grants certiorari in that there is a circuit split, an issue of national importance, and an issue that affects broad range of people and industries. Furthermore, once the Court agrees to consider the controversy, an examination of the plain language of the statute will push the Court toward defining "disposal" as a process that requires an element of active human participation. The only thing that is certain right now is that the federal courts will remain in disarray until the Supreme Court agrees to weigh in on the issue. **TFL**

Thomas J. Braun is a J.D. candidate at the University of Minnesota Law School. He expects to receive his degree in 2012.

Endnotes

[1]*Burlington Northern and Santa Fe Railway Co. v. United States*, 129 S. Ct 1870, 1874 (2009) (quoting *Consolidated Edison Co. v. UGI Util. Inc.,* 423 F.3d 90, 94 (2d Cir. 2005)). *See* Robert L. Bronston, *Note: The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 Mich. L. Rev. 609 (1994).

[2]42 U.S.C. § 9607 (2008).

[3]*Id.* at § 9613(f).

[4]*Axel Johnson Inc. v. Carroll Carolina Oil Co. Inc.*, 191 F.3d 409, 415 (4th Cir.1999).

[5]*Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990).

[6]42 U.S.C. § 9607(a)(2) (2008).

[7]*Id.* at § 9607(a).

[8]Bronston, *supra* note 1, at 609.

[9]42 U.S.C. § 9607(a)(1)(4).

[10]*Cooper Industries Inc. v. Aviall Services Inc.*, 543 U.S. 157, 161 (2004).

[11]The statute adopts the strict liability standard of 33 U.S.C. § 1321, the Clean Water Act, 42 U.S.C. § 9601(32). *See New York v. Shore Realty Corp.*, 759 F.2d 1042 (2d Cir. 1985).

[12]42 U.S.C. § 9613(g) (2008).

[13]*Id.* at § 9607(b)(1)–(4).

[14]Eva Fromm O'Brien and Carol R. Boman, *The Due Diligence Dilemma: How Much is Enough?*, 3 A.B.A. Sec. Env't, Energy, & Resources L. 155 (2004).

[15]*Id.*

[16]42 U.S.C. § 9601(40) (2008).

[17]David B. Hird, *Federal Brownfields Legislation*, 3 A.B.A. Sec. Env't, Energy, & Resources L. 40, 43 (2010).

[18]*Id.* (citing 42 U.S.C. §§ 9601(40), 9607(r)(1)).

[19]*Id.*

[20]Bronston, *supra* note 1, at 610.

[21]42 U.S.C. § 9607(a)(2) (2008).

[22]*Pa. Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 557–58 (1990) (referring to the "fundamental canon that statutory interpretation begins with the language of the statute itself "); *Mallard v. United States*, 490 U.S. 296, 300 (1989) ("Interpretation of a statute must begin with the statute's language.").

[23]*See* 42 U.S.C. § 9601(29) ("The terms 'disposal,' 'hazardous waste,' and 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act.").

[24]*Tanglewood E. Homeowners v. Charles-Thomas Inc.*, 849 F.2d 1568 (5th Cir. 1988).

[25]*Id.*

[26]*Id.*

[27]*See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (N.Y. 1985).

[28]Valerie M. Fogleman, Hazardous Waste Cleanup, Liability, and Litigation 12 (1992).

[29]126 Cong. Rec. 31,964 (1980) (statement of Rep. Florio).

[30]126 Cong. Rec. 26,787 (1980) (statement of Rep. Gore).

[31]Bronston, *supra* note 1, at 619–20.

[32]*Id.*

[33]42 U.S.C. § 6973(a) (2008).

[34]William L. Kovacs and John F. Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 Colum. J. Envtl. L. 205, 216–20 (1977).

[35]*Id.* at 219.

[36]*Id.* at 220.

[37]*United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000).

[38]*Niagara Mohawk Power Corp. v. Jones Chem. Inc.,* 315 F.3d 171, 178 (2d Cir. 2003).

[39]*United States v. CDMG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996).

[40]*Carson Harbor Vill., Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. 2000), *rev'd en banc*, 270 F.3d 863 (9th Cir. 2001).

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

[42]*United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000).

[43]*Id.*

[44]*Id.* at 701

[45]*Id.* at 706.

[46]*Id.*

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

[48]*Id.* at 694.

[49]*Id.* at 693.

[50]*Id.* at 697.

[51]*Id.* (quoting *United States v. 150 Acres of Land*, 204 F.3d 698, 705–06 (6th Cir. 2000)).

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

[53]*United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996).

[54]*Id.* at 711.

[55]*Id.*

[56]*Id.*

[57]*Id.* at 714.

[58]*ABB Indus. Sys. Inc. v. Prime Tech. Inc*, 120 F.3d 351, 358 (2d Cir. 1997)

[59]*Id.* at 354.

[60]*Id.* at 355.

[61]*Id.* at 359.

[62]*Niagara Mohawk Power Corp. v. Jones Chem. Inc.,* 315 F.3d 171 (2d Cir. 2003).

[63]*Id.*

[64]*Carson Harbor Vill. Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. 2000), *rev'd en banc*, 270 F.3d 863 (9th Cir. 2001).

[65]*Id.* at 1206-07.

[66]*Id.* at 1210.

[67]*Carson Harbor Vill. Ltd.*, 240 F.3d at 875.

[68]*Id.* at 878 (emphasis in original).

[69]*Id.* at 879.

[70]*Id.*

[71]*Id.*

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

[73]*Id.* at 845.

[74]*Id.*

[75]*Id.*

[76]*Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 297 (4th Cir. 2001).

[77]*Id.* at 300.

[78]*Id.* at 297.

[79]Supreme Court of the United States, *Frequently Asked Questions*, www.supremecourt.gov/faq.aspx#faqgi9.

[80]Posting of Timothy S. Bishop and Jeffrey W. Sarles to FindLaw, Petitioning and Opposing Certiorari in the U.S. Supreme Court, library.findlaw.com/1999/Jan/1/241457.html.

[81]*United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000); *Bob's Beverage Inc. v. Acme Inc.,* 264 F.3d 692, 696 (6th Cir. 2001).

[82]*Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir. 1992); *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 302-03 (4th Cir. 2001).

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

[84]*United States v. CDMG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996).

[85]Bishop and Sarles, *supra* note 80.

[86]National Brownfields Association, *What is a Brownfield?*, www.brownfieldassociation.org/AboutUs/BrownfieldDefinition.aspx.

[87]*U.S. v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 549 (W.D.N.Y. 1988).

[88]*Id.*

[89]Eckardt C. Beck, *The Love Canal Tragedy*, EPA Journal (Jan. 1979), www.epa.gov/history/topics/lovecanal/01.htm (accessed Sept. 7, 2011).

[90]42 U.S.C. § 6903(3) (2008).

[91]*CPC International Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1278 (W.D. Mich. 1991).

[92]*United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981) *affd.*, 688 F.2d 204 (3d Cir. 1982).

[93]*Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 306–07 (1961).

[94]42 U.S.C. §§ 9601(9)(B), 9601(22), 9601(23), 9601(35)(A), 9603(c), 9607(a)(3), 9607(a)(4), 9622(g)(1)(B)(ii) (2008).

[95]*Id.* at § 9601(23) .

[96]*Id.* at § 9601(35)(A).

[97]*Id.*