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Note

BONA FIDE PROTECTION: FULFILLING CERCLA'S LEGISLATIVE PURPOSE BY APPLYING DIFFERING DEFINITIONS OF "DISPOSAL"

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In the late 1970s, the Love Canal disaster brought toxic contamination into the American consciousness as never before. In response, Congress passed the Comprehensive Environmental Response and Liability Act of 1980 ("CERCLA"), with the aim of cleaning up contaminated sites and making the polluters pay. Unfortunately, the draconian liability scheme imposed by CERCLA has made investors wary of redeveloping possibly contaminated industrial property. To combat this problem, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act. The Brownfields Act amends CERCLA to provide liability protection for landowners who would otherwise be liable, but who did not own the land in question at the time of disposal of hazardous substances.

*Liability protection hinges on whether disposal occurred during the landowner's ownership period, but the federal courts of appeal disagree on the precise meaning of disposal. The prevailing view gives disposal an expansive meaning, consistent with CERCLA's legislative purpose but inconsistent with the amendment meant to encourage redevelopment. In the 2007 case *Environmental Defense v. Duke Energy Corp.*, the U.S. Supreme Court reiterated the principle that the same word may be interpreted differently in different parts of the same statutory scheme. This Note argues that the word "disposal" should be given two different meanings under CERCLA, to respect the two different sets of Congressional concerns which shaped its passage.*

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BONA FIDE PROTECTION: FULFILLING CERCLA'S LEGISLATIVE PURPOSE BY APPLYING DIFFERING DEFINITIONS OF "DISPOSAL"

EMILEE MOONEY SCOTT*

I. INTRODUCTION

"Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."¹ This presumption, however, is "not rigid and readily yields" when context so warrants.² In 2007, the United States Supreme Court reiterated this point, holding that there is "no effectively irrebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically. Context counts."³ The context of the Comprehensive Environmental Response and Liability Act of 1980 ("CERCLA"),⁴ the statutory scheme that apportions liability for contaminated land, allows for different definitions of the term "disposal." Indeed, CERCLA's context demands different definitions in order to respect the legislative intent behind CERCLA and its amendments.

CERCLA was enacted in 1980 with the intention of cleaning up the nation's hazardous waste sites, while making polluters pay for the cleanup.⁵ Spurred to act by the Love Canal disaster,⁶ Congress recognized

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¹ *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

² *Id.*

³ *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007) (citation and internal quotations omitted).

⁴ Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

⁵ *See, e.g., Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007) ("[CERCLA] was intended, for one, to 'establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.' Second, CERCLA was meant to shift the costs of cleanup to the parties responsible for the contamination." (citation omitted) (quoting H.R. REP. NO. 96-1016, at 22 (1980))); *Pritikin v. DOE*, 254 F.3d 791, 794–95 (9th Cir. 2001) (noting that "CERCLA was enacted to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites" (citations and internal quotations omitted)); Richard C. Hula, *Changing Priorities and Programs in Toxic Waste Policy: The Emergence of Economic Development as a Policy Goal*, 15 *ECON. DEV. Q.* 181, 187 (2001) (asserting that CERCLA was enacted in order to quickly remediate contaminated land and protect public health); *see also infra* notes 40–59 and accompanying text.

⁶ Love Canal was an old canal that was filled with a chemical waste landfill and then covered with soil and grass, but the name came to refer to the whole neighborhood. *See* ADELIN GORDON

that “hazardous waste ha[d] been disposed of throughout the United States in a manner which has resulted in, and which may in the future result in, dangerous releases.”⁷ As a result, CERCLA imposes broad (some would say “draconian”⁸) liability for environmental remediation on a wide range of parties associated with hazardous waste sites, including present owners, owners at the time of disposal, and those involved in transporting hazardous waste.⁹

Meanwhile, through the latter half of the twentieth century, urban areas lost much of their population and manufacturing base, leaving behind abandoned factories, warehouses, and the like.¹⁰ An estimated 450,000¹¹ of these sites, known as brownfields,¹² can be found all over the country.¹³ Unfortunately, since these sites have the potential to be contaminated with toxic waste, CERCLA’s broad imposition of liability drives away investors and discourages redevelopment.¹⁴

LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE 11 (1982); *see also infra* notes 44–50 and accompanying text.

⁷ H.R. REP. NO. 96-1016, at 2 (1980); *see also id.* at 18 (citing a 1979 study by the Environmental Protection Agency (“EPA”) that “estimated that as many as 30,000 to 50,000 [hazardous waste] sites existed, of which between 1,200–2,000 present a serious risk to public health”).

⁸ *See, e.g.*, William Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Preemption*, 16 ENVTL. L. 1, 2 (1985) (“Congress included in CERCLA a draconian, retroactive liability provision applicable to generators, transporters, or land owners with some nexus to the abandoned hazardous wastes needing cleanup.”); Theodore Waugh, *Where Do We Go from Here: Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes Across International Borders*, 11 FORDHAM ENVTL. L. J. 477, 496 (2000) (“CERCLA’s liability scheme is so draconian that a generator may seek to export hazardous wastes, in part, as a means of reducing litigation concerns.”); Peter Niemiec, *The Brownfield Blues: Recent Legislation Intended To Promote the Cleanup and Reuse of Brownfields May Actually Have the Opposite Effect*, L.A. LAW., Jan. 2003, at 32 (“[CERCLA’s] draconian liability scheme has brought much financial pain to those who have bought industrial and commercial properties either before CERCLA’s passage or, afterwards, without due consideration for the problems they were purchasing.”).

⁹ *See infra* notes 65–73 and accompanying text.

¹⁰ *See infra* notes 97–102 and accompanying text.

¹¹ ENVTL. PROT. AGENCY, ROAD MAP TO UNDERSTANDING INNOVATIVE TECHNOLOGY OPTIONS FOR BROWNFIELDS INVESTIGATION AND CLEANUP 36 (4th ed. 2005), *available at* <http://www.brownfieldstsc.org/pdfs/Roadmap.pdf>; EPA, About Brownfields, <http://www.epa.gov/swerosps/bf/about.htm> (last visited Jan. 13, 2010).

¹² A “brownfield” is “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” 42 U.S.C. § 9601(39)(A) (2006).

¹³ *See generally* U.S. CONF. OF MAYORS, RECYCLING AMERICA’S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT (2006), *available at* www.usmayors.org/74thAnnualMeeting/brownfieldsreport_060506.pdf (presenting the results of a survey of mayors nationwide on brownfields in their communities).

¹⁴ *See, e.g.*, S. REP. NO. 107-2, at 2 (2001) (“The fear of prolonged entanglements in Superfund’s liability scheme has been reported by some to be an impediment to the cleanup of even lightly contaminated sites, today known as brownfields.”); Todd S. Davis, *Defining the Brownfields Problem*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 13 (Todd S. Davis ed., 2d ed. 2002) (“The environmental and liability issues surrounding brownfields have had the same chilling effect on real estate developers and lenders that the movie *Jaws* has had on swimmers. We know the sharks are out there. And as is the case with certain sharks, some environmental liabilities will eat you alive.”); Kris Wernstedt et al., *The Brownfields Phenomenon: Much Ado About Something or the Timing of the Shrewd?* 2 (Resources for the Future, Discussion

In an attempt to encourage the redevelopment of brownfields,¹⁵ Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Act").¹⁶ The Brownfields Act amended CERCLA to give brownfield redevelopers protection from liability as long as "[a]ll disposal of hazardous substances at the facility occurred before [they] acquired the facility"¹⁷ and other conditions are satisfied.¹⁸ While many commentators have expressed hope that the Brownfields Act will fulfill its goal of encouraging brownfield redevelopment,¹⁹ others have noted that the Act leaves many unanswered questions and potential liability traps that may impair its usefulness.²⁰ The complexity and ambiguity of CERCLA's liability scheme, even after the passage of the Brownfields Act, continues to hinder brownfield redevelopment.²¹

This Note addresses one such ambiguity: the proper definition of the word "disposal."²² The definition of "disposal" is critical because protection as a bona fide prospective purchaser or innocent landowner depends upon whether disposal has occurred in the party's ownership period. The federal circuit courts disagree as to what, precisely, "disposal" means, with the disagreement centering on the issue of how much human

Paper 04-46), available at www.rff.org/RFF/Documents/RFF-DP-04-46.pdf ("As a result of [CERCLA], owners and prospective buyers of properties thought to be contaminated are leery of attracting regulatory attention and becoming responsible for cleanup."); Flannery P. Collins, Note, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303, 309 (2003) (asserting that CERCLA "caused potential developers to shy away from redeveloping brownfield sites due to ambiguous liability and uncertain litigation and cleanup costs"); Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 286 (1995) (arguing that "it has become clear that Superfund has also had a number of unintended effects, the most serious being to dissuade industry from redeveloping on former industrial land" (citations omitted)).

¹⁵ See *infra* notes 113-66 and accompanying text (discussing the legislative history of the Brownfields Act).

¹⁶ Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

¹⁷ 42 U.S.C. § 9601(40)(A).

¹⁸ See *infra* notes 135-66 and accompanying text.

¹⁹ See Collins, *supra* note 14, at 328; Amy Pilat McMorrow, Note, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1089 (2004).

²⁰ See Niemiec, *supra* note 8, at 36.

²¹ See C. GREGORY ROGERS, FINANCIAL REPORTING OF ENVIRONMENTAL LIABILITIES AND RISKS AFTER SARBANES-OXLEY 38 (2005) ("With [CERCLA's] potentially costly and ambiguous liability, businesses often choose the safety of suburban locations over inner-city brownfields.").

²² This ambiguity has been identified by others. See, e.g., Dale A. Guariglia et al., *The Small Business Liability Relief and Brownfields Revitalization Act: Real Relief or Prolonged Pain?*, 32 ENVTL. L. REP. 10,505, 10,507 (2002) ("The meaning of 'disposal' may vary from jurisdiction to jurisdiction, and a broad construction could result in a violation of the condition if, for example, the purchased property contains leaching contaminants, or contaminants leaking from buried drums or tanks.").

agency is required.²³ This disagreement becomes especially important in situations involving, for example, a leaking drum hidden somewhere on the property. According to the United States Court of Appeals for the Fourth Circuit, a leak in a buried tank or drum constitutes “disposal” under CERCLA even if the landowner is unaware of the drum’s very existence.²⁴ The Sixth Circuit, by contrast, has held that disposal requires “evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property.”²⁵ The Second,²⁶ Third,²⁷ and Ninth²⁸ Circuits have not directly commented on the issue, but have suggested that they would agree with the Fourth Circuit. Hundreds of thousands of brownfields have not yet been identified and remediated²⁹ and a substantial number of these sites likely contain leaky underground storage tanks or drums.³⁰

To a prospective brownfield developer, a leaky drum could thus become a landmine of liability. While there are a number of state and federal programs that encourage brownfield redevelopment through grants and technical assistance,³¹ relief from CERCLA liability could provide

²³ For previous commentators’ discussion of the circuit split over the precise meaning of the word “disposal” under CERCLA, see generally Khara Coleman, Note, *Disposing of Leaks and Spills: Passive Disposal of Hazardous Wastes Under CERCLA*, 80 WASH. U. L.Q. 945 (2002); see also generally Ranen Schechner, Note, *Putting the Remedial Cart Before the Statutory Horse: The Ninth Circuit Reopens Debate on CERCLA’s Definition of Disposal*, 29 B.C. ENVTL. AFF. L. REV. 69 (2001) (discussing how the Ninth Circuit has reopened the debate); Jasmine M. Starr, Note, *Making Good Neighbors: Liability for Passive Migration of Hazardous Waste Under CERCLA*, 31 ECOLOGY L.Q. 435 (2004) (arguing that a narrow definition of disposal is inappropriate).

²⁴ See *Crofton Ventures Ltd. P’ship v. G & H P’ship*, 258 F.3d 292, 297 (4th Cir. 2001); see also *infra* notes 193–207 and accompanying text.

²⁵ See *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000); see also *infra* notes 208–13 and accompanying text.

²⁶ See *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178 (2d Cir. 2003); see also *infra* notes 219–20 and accompanying text.

²⁷ See *United States v. CDMG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996); see also *infra* notes 214–18 and accompanying text.

²⁸ See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001); see also *infra* notes 221–24 and accompanying text.

²⁹ In 2004, the EPA estimated that approximately 217,000 hazardous waste sites would be discovered in the coming decades. ENVTL. PROT. AGENCY, CLEANING UP THE NATION’S WASTE SITES: MARKETS AND TECHNOLOGY TRENDS 1-4 (2004), available at <http://www.clu-in.org/download/market/2004market.pdf>. This estimate was based on the rate of new site discoveries in the 1990s and beginning of this decade and “assumes that EPA will add new sites to the [National Priorities List] for another [ten] years, [underground storage tank] site discoveries will continue for [ten] years, and new state and private party site discoveries will continue for [thirty] years.” *Id.* at viii, 1-4.

³⁰ While the number of undiscovered leaky drums or tanks is necessarily uncertain, the EPA estimates that 100,000 to 200,000 of the approximately 450,000 brownfield sites nationwide may contain abandoned underground storage tanks. ENVTL. PROT. AGENCY, ROAD MAP, *supra* note 11, at 36. The EPA estimates that 90,000 new sites with leaking underground storage tanks will arise or be discovered between 2004 and 2013. ENVTL. PROT. AGENCY, CLEANING UP, *supra* note 29, at 1-5.

³¹ See generally TODD S. DAVIS, BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (2d ed. 2002) (detailing brownfields programs in numerous states); John Stainback, *The Public/Private Finance of Redevelopment*, in REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 155 (Brian W. Blaesser & Thomas P. Cody eds., 2008) (discussing opportunities for public/private partnerships in redevelopment projects); Julianne Kurdila & Elise

even more encouragement.³² In a 2004 study, Resources for the Future showed that brownfield redevelopers found "the value of liability relief for future cleanups [to be] strongly positive" even if it came with additional community and agency involvement.³³ Nine years after the passage of the Brownfields Act, it is still unclear what type of disposal would render a party ineligible for protection as a bona fide prospective purchaser, making the defense less useful in encouraging cleanups.

The concept of "disposal" has two distinct functions in CERCLA, so there is room for the Fourth Circuit's expansive interpretation of "disposal" to coexist with the Sixth Circuit's more limited interpretation. The first function of the word "disposal" is in determining which past owners of a site can be held liable for current contamination, as owners at the time of disposal. The more expansive interpretation of disposal favored by the Fourth Circuit³⁴ should be used for this function, because it is consistent with CERCLA's original legislative purpose. In 1980, "Congress cast the liability net wide to capture all potentially responsible parties."³⁵ Courts have been mindful of this congressional goal, holding that due to CERCLA's comprehensive remedial intent, courts are bound to "construe its provisions liberally to avoid frustrating the legislature's purpose."³⁶

The second function of the word "disposal" is to protect those who

Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. ENVTL. AFF. L. REV. 479 (2007) (describing governmental and non-governmental sources of funding); James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857 (2006) (describing programs that encourage brownfield redevelopment and urban revitalization); Scott Sherman, *Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma*, 11 N.Y.U. ENVTL. L.J. 317 (2003) (describing tax-based brownfields incentives); ENVTL. PROT. AGENCY, BROWNFIELDS FEDERAL PROGRAM GUIDE (2005), available at www.epa.gov/brownfields/partners/2005_fpg.pdf (describing federal brownfields programs); EPA, *Brownfields and Land Revitalization: Grants & Funding*, http://epa.gov/brownfields/grant_info/index.htm (last visited Jan. 13, 2010) (providing information on funding sources).

³² See Wernstedt et al., *supra* note 14, at 13 ("[T]he relative effectiveness of nonfinancial interventions—a change in regulatory requirements such as reducing cleanup standards or liability relief that releases 'innocent' parties at contaminated sites from long-term damage claims—may be even more critical.").

³³ *Id.* at 17.

³⁴ *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 297 (4th Cir. 2001); see also *infra* notes 193–207 and accompanying text.

³⁵ *Horsehead Indus. Inc. v. Paramount Commc'ns, Inc.*, 258 F.3d 132, 135 (3d Cir. 2001).

³⁶ *Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 677 (4th Cir. 1995); see also, e.g., *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004) ("We agree with Sierra Club's assertion that CERCLA . . . must be interpreted liberally so as to accomplish its remedial goals."); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996) ("We note that because CERCLA is remedial legislation, it should be construed liberally to carry out its purpose."); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) ("[C]ourts have concluded that a liberal judicial interpretation is consistent with CERCLA's overwhelmingly remedial statutory scheme." (citations omitted)); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 743 (8th Cir. 1986) ("We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA.").

intend to redevelop brownfields, shielding current owners from liability as long as “disposal” stopped before the property was acquired. While the expansive definition of disposal is consistent with CERCLA as a whole, it is completely inconsistent with the legislative goal of the Brownfields Act. The goal of the Brownfields Act was to encourage brownfield redevelopment by providing a safe harbor from liability.³⁷ Senator Barbara Boxer articulated the Brownfield Act’s purpose to protect “people who are interested in cleaning up [a] brownfield site” but “afraid to get involved because they may become liable for somebody else’s mess.”³⁸ It does not make any sense to condition liability protection on a definition of disposal designed to spread liability as far as possible. Thus, the limited interpretation of disposal favored by the Sixth Circuit³⁹ is more appropriate in the context of the bona fide prospective purchaser and innocent landowner defenses. This Note discusses the meaning of disposal under CERCLA with reference to the political circumstances and legislative intentions behind CERCLA and the Brownfields Act. Part II of this Note describes the emergence of hazardous waste as a public policy issue, and outlines CERCLA’s liability scheme. Part III describes the brownfields issue and the CERCLA amendment that intended to encourage brownfield redevelopment. Part IV examines the case law on the definition of “disposal” and contrasts the Fourth Circuit’s expansive interpretation with the Sixth Circuit’s more limited interpretation. Finally, Part V reconciles the two definitions of disposal and concludes that while the passive definition favored by a majority of the circuits is more consistent with CERCLA’s general remedial purpose, the active definition favored by the Sixth Circuit is more appropriate for protected landowners.

II. CONTAMINATED LAND AND THE LIABILITY SCHEME UNDER CERCLA

A. *Contaminated Land in the United States*

During the twentieth century, the United States grew and industrialized rapidly. As society industrialized, waste products became “ever more toxic and persistent” and required more secure means of disposal.⁴⁰ While technological solutions were developed, they lagged somewhat behind the demands of industry and society.⁴¹ By mid-century, engineers recognized that “growth, urbanization, and industrial expansion in the United States

³⁷ For a discussion of the historical and political circumstances that led to the Brownfields Act’s passage, see *infra* notes 97–122 and accompanying text.

³⁸ 147 Cong. Rec. 6241 (2001) (statement of Sen. Boxer).

³⁹ *United States v. 150 Acres of Land*, 204 F.3d 698, 705–06 (6th Cir. 2000). For a more detailed discussion of the case, see *infra* notes 208–13 and accompanying text.

⁴⁰ CRAIG E. COLTEN & PETER N. SKINNER, *THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE EPA* 3 (1996).

⁴¹ *Id.*

[had] created major waste disposal problems."⁴² Concern for water supplies led to water pollution controls, which in turn encouraged land-based disposal of toxic substances.⁴³ Land-based disposal, of course, creates its own set of problems.

Love Canal gained infamy as a result of its use as a toxic substances landfill. As was common at the time, the Hooker Electrochemical Company disposed of its chemical waste by burying drums in a landfill that it had constructed in an old canal.⁴⁴ In the mid-1950s, Hooker covered the site with dirt and grass and sold it to the local school board.⁴⁵ A school was completed in 1955, and a modest residential neighborhood grew around the school.⁴⁶ Every so often the residents would smell noxious odors or suffer skin irritation after coming in contact with the soil, but they complained very little for about twenty years.⁴⁷ Then the Niagara Falls area experienced a period of heavier than usual rainfall, and the toxic brew of Love Canal began seeping into nearby basements.⁴⁸ In the summer of 1978, the New York State Commissioner of Health declared that, in his opinion, the waste at Love Canal presented a "great and imminent peril to the health of the general public residing at or near the site."⁴⁹ By the summer of 1981, hundreds of families had left the area, their unsellable homes having been purchased by the State.⁵⁰

The Love Canal disaster brought toxic waste disposal into the public consciousness as never before.⁵¹ After six years of fruitless attempts to enact legislation addressing liability for the release of hazardous substances,⁵² public attention on Love Canal provided the catalyst for congressional action.⁵³ CERCLA⁵⁴ was signed into law by President

⁴² Gerald Meyer, *Geological and Hydrologic Aspects of Stabilization Ponds*, 32 J. WATER POLLUTION CONTROL FED'N 820, 820 (1960).

⁴³ COLTEN & SKINNER, *supra* note 40, at 68.

⁴⁴ LEVINE, *supra* note 6, at 10–11.

⁴⁵ *Id.* at 11–12.

⁴⁶ *Id.* at 12–13.

⁴⁷ *Id.* at 14–15.

⁴⁸ *Id.* at 15.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 213.

⁵¹ See, e.g., COLTEN & SKINNER, *supra* note 40, at 1 (noting that while the Love Canal disaster means different things to different groups of people, it "has been seared into the collective memory of the country").

⁵² CAROLE STERN SWITZER & PETER GRAY, CERCLA: COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (SUPERFUND) 5 (2d ed. 2008).

⁵³ *Id.* at 3; see also COLTEN & SKINNER, *supra* note 40, at 160 (calling Love Canal "the virtual birthplace of the Superfund legislation"). The fact that the 1980 election had resulted in the Democrats losing control of the White House and the Senate also moved them to act while they were still in power. SWITZER & GRAY, *supra* note 52, at 8.

⁵⁴ Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)). For a detailed contemporary account of the circumstances surrounding CERCLA's passage, see generally Frank P. Grad, *A Legislative History of the Comprehensive Environmental Responses, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

Carter on December 11, 1980, as the relocation of Love Canal residents was still in progress.⁵⁵ CERCLA complemented the Resources Conservation and Recovery Act of 1976 (“RCRA”),⁵⁶ providing the “second part” of the federal law addressing hazardous substances.⁵⁷ On the day CERCLA was signed into law, Representative Florio remarked that RCRA would prevent any new Love Canals, and CERCLA would provide for the remediation of toxic contamination that had already occurred.⁵⁸ Calling it “landmark in its scope and in its impact on preserving the environmental quality of our country,” President Carter said that CERCLA would begin a “massive and a needed cleanup of hazardous wastes[,] . . . a problem that had been neglected for decades or even generations.”⁵⁹

B. CERCLA Liability

CERCLA, as originally written, is fundamentally a public health statute, with the goal of preventing human exposure to toxic substances through remediation of contaminated sites.⁶⁰ The “polluter pays” principle⁶¹ forms the philosophical core of CERCLA’s approach.⁶² Under the polluter pays principle, the goal is to “place the ultimate responsibility for the clean-up of hazardous waste on those responsible for problems

⁵⁵ See Ralph Blumenthal, *Many from Love Canal Still Unsettled*, N.Y. TIMES, Feb. 14, 1981, at 26.

⁵⁶ 42 U.S.C. §§ 6901–6992k (2006); see also *City of Chi. v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994) (“RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures . . .”).

⁵⁷ President Jimmy Carter, Remarks on Signing H.R. 7020 into Law (Dec. 11, 1980), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=44392> (statement by Rep. James Florio).

⁵⁸ *Id.* Two commentators described the difference between CERCLA and RCRA as follows: “If RCRA can be thought of as managing a hazardous substance from its cradle to its grave, Superfund is the fail-safe device should the substance rise from the dead.” James F. Vernon & Patrick W. Dennis, *Hazardous-Substance Generator, Transporter and Disposer Liability Under the Federal and California Superfunds*, 2 UCLA J. ENVTL. L. & POL’Y 67, 73 (1981).

⁵⁹ Carter, *supra* note 57.

⁶⁰ Hula, *supra* note 5, at 187; see also *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (stating that Congress enacted CERCLA in order to remedy “serious environmental and health risks posed by industrial pollution”); *Westfarm Assocs. Ltd. P’ship v. Wash. Suburban Sanitary Comm’n*, 66 F.3d 669, 677 (4th Cir. 1995) (“Congress enacted CERCLA to protect public health and the environment from inactive hazardous waste sites.”).

⁶¹ See generally Michael J. Gergen, *The Failed Promise of the “Polluter Pays” Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624 (1994); Eric Thomas Larson, *Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle*, 38 VAND. J. TRANSNAT’L L. 541 (2005).

⁶² “Most important[ly], [CERCLA] enables the Government to recover from responsible parties the costs of their actions in the disposal of toxic wastes.” Carter, *supra* note 57. Some commentators have criticized CERCLA for failing to apply the polluter pays principle in an appropriate and effective way. See, e.g., Hongkyun Kim, *Is the Korean Soil Environment Conservation Act’s Liability Too Severe?: Learning from CERCLA*, 11 ALB. L. ENVTL. OUTLOOK 1, 29–30 (asserting that CERCLA “distorts the polluter pays principle” in that it “can be interpreted to impose liability on parties with virtually no nexus to the contamination”).

caused by the disposal of chemical poison.”⁶³ As such, CERCLA imposes broad liability on a wide range of parties associated with contaminated sites. This liability arises without regard to relative culpability, and the available defenses at the time of CERCLA’s passage were extremely limited.⁶⁴

Section 107(a) of CERCLA⁶⁵ imposes strict liability⁶⁶ upon classes known as potentially responsible parties for costs associated with the release or threatened release⁶⁷ of hazardous substances.⁶⁸ To establish a prima facie case for cost recovery under CERCLA section 107(a), a plaintiff must prove four elements: “(1) the site is a ‘facility’;^[69] (2) a release or threatened release of hazardous substance has occurred; (3) the release has caused the plaintiff to incur ‘necessary costs of response’ consistent with the [National Contingency Plan (“NCP”)],^[70] and (4) the defendant falls within one of the four categories of potentially responsible parties.”⁷¹ The four groups of potentially responsible parties (“PRPs”) include: (1) the current owner or operator of the facility; (2) the owner or operator of the facility at the time that any hazardous substances were disposed of; (3) any person who arranged for disposal, treatment, or transportation of hazardous substances; and (4) any person who transported hazardous substances to the facility.⁷² As CERCLA is a comprehensive

⁶³ Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) (citation omitted).

⁶⁴ See *infra* notes 86–87 and accompanying text.

⁶⁵ 42 U.S.C. § 9607(a) (2006).

⁶⁶ While the statute does not explicitly say that CERCLA imposes strict liability, it has been consistently interpreted as such by the courts. See *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007) (“[T]he EPA may recover its costs in full from any responsible party, regardless of that party’s relative fault.”); *City of Wichita v. Aero Holdings, Inc.*, 177 F. Supp. 2d 1153, 1164 (D. Kan. 2000) (“Fault or culpability is irrelevant under CERCLA’s statutory scheme.”).

⁶⁷ “Release” is defined by 42 U.S.C. § 9601(22) (2006) to include “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant),” but excluding occupational exposure, motor vehicle emissions, and nuclear accidents. This Note does not examine what constitutes a “release” under CERCLA, as the term is so broad as to encompass virtually any movement of contaminants within a site. As the definition of “release” includes the word “disposing,” courts have taken the term “release” to describe a wider range of situations than “disposal.”

⁶⁸ “Hazardous substance” is defined by 42 U.S.C. § 9601(14) (2006) to include substances designated as hazardous by the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(2)(A) (1994), the Solid Waste Disposal Act, 42 U.S.C. § 6921 (2006), the Clean Air Act, 42 U.S.C. § 7412 (2006), the Toxic Substances Control Act, 15 U.S.C. § 2606 (2006), and any other toxic substances the EPA may deem hazardous under 42 U.S.C. § 9602 (2006). For purposes of this Note, “hazardous substance” is any substance deemed to be hazardous under CERCLA.

⁶⁹ 42 U.S.C. § 9601(9) (2006).

⁷⁰ 42 U.S.C. § 9605 (2006).

⁷¹ *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 541 (6th Cir. 2001).

⁷² 42 U.S.C. § 9607(a) (2006).

remedial statutory scheme, courts typically construe its provisions liberally to avoid frustrating the legislature's purpose.⁷³

Courts consistently impose joint and several liability under CERCLA,⁷⁴ but Congress did not specify joint and several liability in the statute.⁷⁵ Rather, Congress intended for the "scope of liability [to be] determined under common law principles, where a court performing a case-by-case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis."⁷⁶ In *United States v. Alcan Aluminum Corp.*, the Third Circuit examined the *Restatement (Second) of Torts* to determine which rules of liability should be applied.⁷⁷ "[W]here joint tortfeasors cause a single and indivisible harm for which there is no reasonable basis for division according to the contribution of each, each tortfeasor is subject to liability for the entire harm."⁷⁸

When multiple entities have owned or operated a site for a number of years, it is often difficult to determine who is responsible for the harm and precisely how much harm each entity caused, so joint and several liability is applied.⁷⁹ When it is possible to discern which harms were caused by which defendant, it is appropriate to apportion the cleanup costs between defendants.⁸⁰ In such cases, the defendant bears the burden of showing that the costs are capable of apportionment.⁸¹ CERCLA's joint and several liability provision allows a plaintiff⁸² to hold one party with deep pockets

⁷³ See *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996); *Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 677 (4th Cir. 1995); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); see also *infra* notes 226–37 and accompanying text.

⁷⁴ See, e.g., *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 n.7 (2007) ("We assume without deciding that §107(a) provides for joint and several liability.").

⁷⁵ See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) ("[B]oth the House and Senate deleted provisions imposing joint and several liability from their respective versions of the statute before its enactment.").

⁷⁶ *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).

⁷⁷ *Alcan Aluminium Corp.*, 964 F.2d at 268.

⁷⁸ *Id.* at 268–69.

⁷⁹ See *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 n.3 (7th Cir. 2007) (noting that it is possible to establish divisibility, but that it is "a rare scenario").

⁸⁰ See *Alcan Aluminum Corp.*, 964 F.2d at 268 (citing RESTATEMENT (SECOND) OF TORTS § 433A (1977)).

⁸¹ See *id.* at 269 n.28 ("Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor." (quoting RESTATEMENT (SECOND) OF TORTS § 433B(2) (1977))).

⁸² The plaintiff is often the EPA. See, e.g., *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1513 (11th Cir. 1996). Private parties may also be CERCLA plaintiffs. See Joanna M. Fuller, Note, *The Sanctity of Settlement: Stopping CERCLA's Volunteer Remediators from Sidestepping the Settlement Bar*, 34 COLUM. J. ENVTL. L. 219, 233–38 (2009) (detailing the two causes of action—cost

responsible for the entire cost of cleanup,⁸³ even if there are other viable parties who were responsible.⁸⁴ In that case, the defendant can bring cost recovery actions against other PRPs to recover some of its costs.⁸⁵

Before 1986, the available defenses under CERCLA were quite limited. Section 107(b) provided that a potentially responsible party would not be held liable if it could prove by a preponderance of the evidence that the release or threatened release was caused solely by an act of God, an act of war, or “an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . with the defendant.”⁸⁶ In the early 1980s, landowners who had purchased land from the original polluter were ineligible for the third party defense, because a “contractual relationship” had been created by the instrument conveying the property.⁸⁷

The Superfund Amendments and Reauthorization Act of 1986 (“SARA”)⁸⁸ relaxed liability slightly for the first time, offering protection to so-called “innocent landowners.”⁸⁹ Concerned with the fairness of the system, Congress intended for the amendment to make clear that “under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination . . . may have a defense to liability.”⁹⁰ Representative Barney Frank, the sponsor of the amendment, said that “nothing can be more damaging to our efforts” to make CERCLA work properly than a scheme “that could inadvertently sweep out within its coils innocent individuals.”⁹¹

SARA made the innocent landowner defense available to those who had purchased already-contaminated land by clarifying the meaning of “contractual relationship” in 42 U.S.C. § 9601(35)(A). The statute now

recovery and contribution—available under CERCLA for volunteer remediators who wish to recover their costs).

⁸³ See Gergen, *supra* note 61, at 673–76 (1994) (discussing the inefficiencies caused by the common practice of going after “deep pockets” for remediation costs).

⁸⁴ See *N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d at 827 (“[B]y invoking § 107(a), the EPA may recover its costs in full from any responsible party, regardless of that party’s relative fault.”).

⁸⁵ 42 U.S.C. § 9613(f)(1) (2006). Such actions allow PRPs “who are liable for some of the cleanup costs, but have paid more than their fair share of those costs, to recover the amount of their excess payments from other parties who are also responsible for the pollution.” *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1302 (11th Cir. 2002).

⁸⁶ 42 U.S.C. § 9607(b) (1982). Only the third party defense will be analyzed in this Note, as the act of God and act of war defenses have very seldom been used.

⁸⁷ MICHAEL B. GERRARD & JOEL M. GROSS, *AMENDING CERCLA: THE POST-SARA AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 44* (2006).

⁸⁸ Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

⁸⁹ See 42 U.S.C. § 9607(b)(3) (providing a defense to landowners who can show they had no reason to know a property was contaminated prior to holding title).

⁹⁰ H.R. REP. NO. 99-962, at 186 (1986) (Conf. Rep.).

⁹¹ 131 CONG. REC. 34715 (1985) (statement of Rep. Frank).

provides that a “contractual relationship” does not include instruments transferring title or possession if the defendant acquired the facility after the disposal of the hazardous materials and purchased the land without knowing or having any reason to know of the contamination.⁹² In order to gain protection as an innocent landowner, the landowner must prove by a preponderance of the evidence that he did not cause the pollution himself⁹³ and he must show that he was not aware of the pollution at the time of purchase.⁹⁴ Additionally, he must show that he took due care with respect to the pollution and that he took “precautions against foreseeable acts or omissions of . . . third part[ies].”⁹⁵ In order to establish that he had no reason to know of the contamination, the landowner must have conducted “all appropriate inquiries”⁹⁶ into the history of the site prior to purchase.

III. BROWNFIELDS AND THE 2002 AMENDMENTS

A. *Deindustrialization and Brownfields*

Even as the Love Canal crisis and Superfund debates were occurring, the face of America’s industrial cities was changing. Manufacturers moved overseas,⁹⁷ to different regions of the United States,⁹⁸ or to suburban industrial parks that offered more room for expansion.⁹⁹ Between the early 1960s and the early 1980s, the United States’ share of global manufactured exports dropped from twenty-five percent to less than seventeen percent.¹⁰⁰ Many factories shut down,¹⁰¹ and abandoned industrial properties dotted the landscape of American cities.¹⁰²

⁹² 42 U.S.C. § 9601(35)(A) (2006). A purchaser who acquires land after disposal is also protected if it is a government entity that acquired the land through escheat, tax default or eminent domain, or acquired the facility by inheritance or bequest. *Id.*

⁹³ *Id.* § 9607(b).

⁹⁴ *Id.* § 9601(35)(A).

⁹⁵ *Id.* § 9607(b).

⁹⁶ All appropriate inquiries are discussed in more detail *infra* notes 140–49 and accompanying text. For a discussion of what “all appropriate inquiries” means in practice, see generally Michelle Weiler, *The Environmental Protection Agency’s New Standard for CERCLA All Appropriate Inquiry*, 14 U. BALT. J. ENVTL. L. 159 (2007); Nancy A. Mangone, *Brownfields Redevelopment: A Practitioners Guide to EPA’s “All Appropriate Inquiries” Rule*, 43 ARIZ. ATT’Y 32 (2006), available at http://www.myazbar.org/AZAttorney/PDF_Articles/1206Brown1.pdf.

⁹⁷ See BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 6 (1982) (citing the example of General Electric, which in the 1970s added 30,000 foreign jobs and cut 25,000 domestic jobs).

⁹⁸ See *id.* at 164–70 (discussing the movement of manufacturing out of the Northeast and Midwest and into the South and Plains states, where unionization is less common and labor costs are lower).

⁹⁹ See Mark D. Bjelland, *Brownfield Sites in Minneapolis–St. Paul: The Interwoven Geographies of Industrial Disinvestment and Environmental Contamination*, 25 URB. GEOGRAPHY 631, 639–40 (2004).

¹⁰⁰ BLUESTONE & HARRISON, *supra* note 97, at 5.

¹⁰¹ See *id.* at 9.

¹⁰² See JENNIFER S. VEY, *RESTORING PROSPERITY: THE STATE ROLE IN REVITALIZING AMERICA’S OLDER INDUSTRIAL CITIES* 23 (2007), available at <http://www.brookings.edu/~media/>

These abandoned industrial properties have come to symbolize urban neglect and decay,¹⁰³ and have caused a number of problems for the communities in which they are located. Brownfields may lower property values, both by being aesthetically unattractive and by stigmatizing the nearby area as environmentally contaminated.¹⁰⁴ When an industrial site is abandoned, waste control strategies that may have succeeded with maintenance fall into disrepair, making the release of hazardous substances more likely.¹⁰⁵ Brownfields also raise a host of environmental justice concerns, as they are more likely to be located in depressed, urban, and disproportionately minority areas.¹⁰⁶ Brownfield redevelopment provides a two-fold benefit: "an opportunity to both reverse the decay of already developed areas and slow unsustainable development trends throughout the country."¹⁰⁷

While some contaminated land was addressed through CERCLA during its first decade, there were more sites than legislators had

Files/rc/reports/2007/05metropolitanpolicy_vey/20070520_oic.pdf ("[D]eindustrialization has left a tremendous environmental legacy, manifested in the large numbers of contaminated parcels that scar older industrial cities' waterfronts and urban cores.").

¹⁰³ See KARL LINN, URBAN HABITAT PROGRAM, FROM RUBBLE TO RESTORATION 2 (1991) ("The loss of an economic base has left many cities with extensive areas of unused land. Acre upon acre of vacant litter strewn land symbolizes many cities as places of desolation and decay in the minds of residents and visitors alike."); Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 598 (1998) ("The vision of the vacant urban lot embodies most of the elements commonly associated with the decline of our cities: pollution and garbage, unemployment, poverty, racial isolation, crime, drugs, declining public services, and architectural eyesores."); Heidi Gorovitz Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Businesses to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1078 (1999).

¹⁰⁴ See Dennis A. Kaufman & Norman R. Cloutier, *The Impact of Small Brownfields and Greenspaces on Residential Property Values*, 33 J. REAL ESTATE FINAN. ECON. 19, 25–29 (2006) (using empirical results to examine the impact of brownfields on property values in Kenosha, Wisconsin and finding that brownfield remediation would raise the total property value in a single neighborhood by between \$1.19 and \$4.31 million).

¹⁰⁵ See COLTEN & SKINNER, *supra* note 40, at 147; Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 ECOLOGY L.Q. 705, 717 (1994).

¹⁰⁶ See Nancy Perkins, *A Tale of Two Brownfield Sites: Making the Best of Times from the Worst of Times in Western Pennsylvania's Steel Valley*, 34 B.C. ENVTL. AFF. L. REV. 503, 520–32. For further discussion of brownfields and environmental justice, see Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice?*, 37 SANTA CLARA L. REV. 85, 95 (1996); Lincoln L. Davies, Note, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. ENVTL. L.J. 285, 288 (1999); William T. D. Freeland, Note, *Environmental Justice and the Brownfields Revitalization Act of 2001: Brownfields of Dreams or a Nightmare in the Making*, 8 J. GENDER RACE & JUST. 183, 187 (2004).

¹⁰⁷ Wernstedt et al., *supra* note 14, at 4; see also JONATHAN P. DEASON ET AL., PUBLIC POLICIES AND PRIVATE DECISIONS AFFECTING THE REDEVELOPMENT OF BROWNFIELDS: AN ANALYSIS OF CRITICAL FACTORS, RELATIVE WEIGHTS AND AREAL DIFFERENTIALS, at ch. 5 (2001), available at http://www.gwu.edu/~eem/Brownfields/project_report/report.htm (finding that the redevelopment of one acre of brownfield land may prevent the development of an average of 4.5 acres of as-yet undeveloped "greenfield" land).

anticipated, and they were taking longer than expected to clean up.¹⁰⁸ Additionally, CERCLA's role as a public health statute made it ill-suited to address sites with low or uncertain levels of contamination. In the 1980s and 1990s, policy makers began to turn their attention toward brownfields, the industrial sites that were not heavily contaminated enough to be remediation priorities under CERCLA.¹⁰⁹ States began to institute voluntary cleanup programs, which allow landowners to remediate their property voluntarily, in exchange for liability protection and less stringent cleanup standards.¹¹⁰ In 1993, the Environmental Protection Agency ("EPA") began its "Brownfield Initiative" with a pilot grant to Cuyahoga County, Ohio.¹¹¹ Congress began funding the EPA Brownfields program through earmarks in the annual Superfund appropriation in 1997.¹¹²

Proponents of brownfield revitalization criticized CERCLA, arguing that its expansive net of liability discouraged developers from dealing with environmentally compromised land.¹¹³ The EPA is not involved in the typical brownfield cleanup, but the specter of CERCLA liability looms and drives away investors.¹¹⁴ Under CERCLA (as originally written) if contamination was discovered after an investor purchased a site, he could be held liable for the whole cost of a CERCLA clean up, even if he had absolutely nothing to do with the placement of the contamination on the site.¹¹⁵ This makes investment in brownfield land that much more risky than investment in other land, and thus less attractive to investors.

In 2001, a bipartisan group of senators endorsed CERCLA amendments that limited liability and encouraged brownfield redevelopment.¹¹⁶ Senator Bob Smith, a Republican from New Hampshire,

¹⁰⁸ See S. REP. NO. 105-192, at 2 (1998).

When the law was first enacted, it was expected that only a few hundred sites would require Federal attention and that cleanups could be accomplished with relatively limited Federal funding. Almost 41,000 sites, however, have been included on EPA's national inventory of hazardous waste sites, the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS).

Id.

¹⁰⁹ See Ira Whitman, *Overcoming Environmental Constraints to Redevelopment*, in REDEVELOPMENT: PLANNING, LAW, AND PROJECT IMPLEMENTATION 175, 202 (Brian W. Blaesser & Thomas P. Cody eds., 2008); Hula, *supra* note 5, at 192.

¹¹⁰ Hula, *supra* note 5, at 192.

¹¹¹ Jonathan D. Weiss, *Federal Brownfields Initiatives*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 43, 50 (Todd S. Davis ed., 2d ed. 2002).

¹¹² H.R. REP. NO. 109-616, at 3 (2006).

¹¹³ See *supra* note 14 and accompanying text.

¹¹⁴ See ENVTL. PROT. AGENCY, BROWNFIELDS HANDBOOK: HOW TO MANAGE FEDERAL ENVIRONMENTAL LIABILITY RISKS 10 (2002).

¹¹⁵ See *supra* notes 65–85 and accompanying text.

¹¹⁶ See 147 CONG. REC. 6232, 6232–33 (2001) (statement of Sen. Inhofe) (expressing a desire that businesses "feel adequately protected" and invest in brownfield redevelopment); 147 CONG. REC. 6242 (2001) (statement of Sen. Carnahan) ("By providing liability protection and economic incentives to clean up contaminated and abandoned industrial sites, this legislation will make our communities healthier and reduce environmental threats."); *Id.* at 6242 (statement of Sen. Lieberman) (noting that

touted Senate Bill 350, which would later become the part of the Brownfields Act,¹¹⁷ saying:

What this does is it limits the liability and brings us closer to finality in cleanup so we can now get contractors to go on these sites. They can get the insurance, they can take the risk, and *they are not going to be held accountable if a hot spot or some other problem that was not their fault occurs several years down the road.* That has been the problem to date. They cannot do it because they will be held liable so they say, fine, we are not going to go on the site and clean it up and take the risk.

If a contractor comes onto a site, he is responsible. If he does what he is supposed to do, follows the plans as he is supposed to, *cleans it up and does it in good faith and we find something later, he is not accountable.* That is why this bill will go so far toward moving us in the right direction, getting these sites cleaned up.¹¹⁸

Senator Barbara Boxer, a Democrat from California, also endorsed the bill:

This bill includes liability relief for innocent parties. These innocent parties are people who are interested in cleaning up the brownfield site, but they are afraid to get involved because they may become liable for somebody else's mess. *Our bill makes it clear that innocent parties will not be held liable under Superfund for the work they do on a brownfield site.* This provision alone should help reduce the fear of developers and real estate interests, and it should lead to more cleanups. This provision is certainly a strong reason that a variety of business and real estate interests are strong supporters of the bill. They want to come in; they want to clean up the sites; but they don't want to now become held liable for past problems and then be hauled into court on a Superfund case.¹¹⁹

In April 2001, the bill passed in the Senate with a vote of 99-0.¹²⁰ In December 2001, the Senate bill on brownfields was combined with a House initiative to protect small businesses from CERCLA liability, and

the Bill would provide "important legal protections that will give developers, private and public, the confidence to cleanup these toxic sites").

¹¹⁷ GERRARD & GROSS, *supra* note 87, at 33-34.

¹¹⁸ 147 CONG. REC. 6235 (2001) (statement of Sen. Smith) (emphasis added).

¹¹⁹ 147 CONG. REC. 6241 (2001) (statement of Sen. Boxer) (emphasis added).

¹²⁰ 147 CONG. REC. 6257 (2001).

passed in both houses of Congress.¹²¹ President George W. Bush enthusiastically signed the bill, citing the reluctance of developers to build on brownfields as a cause of urban decline and suburban sprawl.¹²²

B. *Liability Protections Under the Brownfields Act*

The Brownfields Act clarified the innocent landowner defense¹²³ and added two additional affirmative third party defenses: the bona fide prospective purchaser defense¹²⁴ and the contiguous landowner defense.¹²⁵ The contiguous landowner defense is similar to the innocent landowner defense in that it applies to landowners who “did not cause, contribute, or consent to the release or threatened release” and who acquired their land without knowing of the contamination.¹²⁶ In contrast to the innocent landowner defense, the hazardous material in question did not originate on that parcel, it migrated in from offsite. In other words, the defense protects “parties that are essentially victims of pollution incidents caused by their neighbor’s actions.”¹²⁷ In order to qualify under this defense, the landowner must have conducted all appropriate inquiries¹²⁸ into the history of the site and not discovered the contamination before purchase.¹²⁹

The bona fide prospective purchaser defense was provided specifically to encourage brownfield redevelopment by shielding developers from liability.¹³⁰ This defense is available with respect to property acquired after the Brownfields Act’s adoption on January 11, 2002.¹³¹ It may be used by parties who, upon conducting all appropriate inquiries before purchasing property, discover it to be contaminated.¹³² Under this defense, a “bona fide prospective purchaser whose potential liability . . . is based solely on the purchaser’s being considered to be an owner or operator of a facility

¹²¹ GERRARD & GROSS, *supra* note 87, at 33–34.

¹²² See George W. Bush, Remarks on Signing the Small Business Liability Relief and Brownfields Revitalization Act in Conshohocken, Penn. (Jan. 11, 2002), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=62694&st=brownfield&st1=>.

¹²³ See *supra* notes 86–96 and accompanying text.

¹²⁴ 42 U.S.C. § 9601(40) (2006).

¹²⁵ 42 U.S.C. § 9607(q) (2006). This codifies previously existing EPA policy not to take enforcement action against landowners when the property was contaminated through passive migration. See Policy Toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34,790 (July 3, 1995).

¹²⁶ 42 U.S.C. § 9607(q)(1)(A)(i) (2006).

¹²⁷ S. REP. NO. 107-2, at 10 (2001).

¹²⁸ See *infra* notes 140–52 and accompanying text.

¹²⁹ 42 U.S.C. § 9607(q)(A)(1)(viii) (2006).

¹³⁰ See *supra* notes 116–22 and accompanying text.

¹³¹ 42 U.S.C. § 9601(40) (2006).

¹³² See Memorandum from Susan E. Bromm, Dir., Office of Site Remediation Enforcement, on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (“Common Elements”) to the Dirs., Adm’rs, and Regional Counsel of the EPA, 3 (Mar. 6, 2003), available at www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elements-guide.pdf [hereinafter Common Elements Memo].

shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.”¹³³ Significantly, in order to qualify for protection as a bona fide prospective purchaser, the purchaser must show that “[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility.”¹³⁴

C. Conditions to Liability Protection

By design, it is not easy to achieve liability protection under the Brownfields Act. As Senator Boxer made clear, the Brownfields Act was intended to “maintain ‘the polluter pays’ principle that underpins many of our hazardous waste statutes.”¹³⁵ Accordingly, liability protection is conditioned upon a series of strict eligibility requirements. First, all three classes of protected landowners must have conducted “all appropriate inquiries” to assess the level of contamination of the site before purchasing it.¹³⁶ Secondly, they must take reasonable steps to (1) stop continuing releases; (2) prevent threatened future releases; and (3) prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.¹³⁷ Finally, all three types of protected landowners must comply with continuing obligations in order to retain the defense against CERCLA liability.¹³⁸ The continuing obligations are meant to limit human exposure to toxins and may include zoning changes or deed restrictions.¹³⁹

The current standards defining “all appropriate inquiries” are quite rigorous, and they must be followed by all parties seeking liability protection on land purchased after January 11, 2002.¹⁴⁰ All appropriate

¹³³ 42 U.S.C. § 9607(r)(1) (2006).

¹³⁴ 42 U.S.C. § 9601(40)(A) (2006).

¹³⁵ 147 CONG. REC. 6215, 6241 (2001) (statement of Sen. Boxer).

¹³⁶ Common Elements Memo, *supra* note 132, at 10. The EPA stresses that all appropriate inquiries must have been performed before purchase rather than after. *Id.*; see also 42 U.S.C. §§ 9601(40)(B), 9607(q)(1)(A)(viii), 9601(35)(A)(i), 9601(35)(B)(i) (2006).

¹³⁷ 42 U.S.C. §§ 9601(40)(D), 9607(q)(1)(A)(iii), 9601(35)(B)(i)(II); Common Elements Memo, *supra* note 132, at 9.

¹³⁸ 42 U.S.C. §§ 9601(40)(F), 9607(q)(1)(A)(v), 9601(35)(A); Common Elements Memo, *supra* note 132, at 6.

¹³⁹ Common Elements Memo, *supra* note 132, at 7.

¹⁴⁰ The Brownfields Act directed the EPA to promulgate standards for all appropriate inquiries and land transactions that occur after the date of the Brownfields Act’s passage (January 11, 2002) are subject to this standard. 42 U.S.C. § 9601(35)(B)(ii) (2006). The final standard went into effect on November 1, 2006. Before the final rule went into effect, parties were required to follow standards set forth by the American Society for Testing and Materials (“ASTM”) which were substantially similar. ENVTL. PROT. AGENCY, ALL APPROPRIATE INQUIRIES FINAL RULE FACT SHEET 1 (2005), available at http://www.epa.gov/brownfields/aai/aai_final_factsheet.pdf. As the bona fide prospective purchaser defense is only available with respect to land purchased after January 11, 2002, all bona fide prospective purchasers are subject to the same standard for all appropriate inquiries. Parties asserting an innocent landowner defense are subject to varying standards, depending on when the land in question was purchased. See *infra* notes 147–49 and accompanying text.

inquiries must be conducted by an “environmental professional”¹⁴¹ no more than 180 days before the closing date of the sale.¹⁴² The environmental professional must consider the past and present uses of the property (including any use of hazardous materials), past and present waste management practices on the site, and whether the area appears to be contaminated upon inspection.¹⁴³ Information may be collected by interviewing past and present owners and neighbors, and consulting old phone books, fire insurance maps, property records, and other sources.¹⁴⁴ The environmental professional will identify “data gaps” in his report, and while a more thorough investigation may be advisable, it is not mandated by the “all appropriate inquiries” standard.¹⁴⁵ It is important, however, to conduct a thorough inquiry, because an incomplete inquiry into the history of the parcel will not protect the owner from liability.¹⁴⁶

For landowners seeking to establish an innocent landowner defense with respect to property purchased before the enactment of the Brownfields Act, the standards for all appropriate inquiries are somewhat looser.¹⁴⁷ For property purchased before May 31, 1997, a court would consider commonly known information about the property, the defendant’s specialized knowledge or experience, the “obviousness of the presence or likely presence of contamination at the property,” and other factors.¹⁴⁸ With respect to property purchased on or after May 31, 1997, but before the promulgation of the final rule discussed above, procedures outlined by the American Society for Testing and Materials fulfill the requirements.¹⁴⁹ These procedures are similar to the final rule for all appropriate inquiries.

Regardless of when the land was purchased, landowners must also take

¹⁴¹ An “environmental professional” is “a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases . . . on, at, in, or to a property, sufficient to meet the objectives and performance factors in § 312.20(e) and (f).” 40 C.F.R. § 312.10 (2005); Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66,070, 66,108 (Nov. 1, 2005).

¹⁴² Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. at 66,083.

¹⁴³ *Id.* at 66,087.

¹⁴⁴ *Id.* at 66,088–89.

¹⁴⁵ Mangone, *supra* note 96, at 36.

¹⁴⁶ Unfortunately, this standard, like so many in CERCLA, is frustratingly vague. See Weiler, *supra* note 96, at 182 (noting that “it is still unclear whether acknowledgment of data gaps can impact the validity of an AAP”).

¹⁴⁷ 42 U.S.C. § 9601 (35)(B)(iv)(I) (2006); see also R.E. Goodson Constr. Co. v. Int’l Paper Co., No. 4:02-4184-RBH, 2005 U.S. Dist. LEXIS 42909, at *43–44 (D.S.C. Oct. 13, 2005) (finding that the sufficiency of a party’s inquiries into the site must be judged with reference to the time period in which they occurred, because “[a]ny other finding would hold landowners to the impossibly high standard of complying with current perceptions of appropriateness in an area where perceptions change quickly”).

¹⁴⁸ 42 U.S.C. § 9601 (35)(B)(iv)(I).

¹⁴⁹ *Id.* § 9601 (35)(B)(iv)(II); see also ASTM STANDARD E1527-97, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENT: PHASE 1 ENVIRONMENTAL SITE ASSESSMENT PROCESS (1997), available at <http://www.astm.org/DATABASE.CART/HISTORICAL/E1527-97.htm>.

reasonable steps with respect to contaminants on their property.¹⁵⁰ The EPA has interpreted this language as a congressional attempt to ensure environmental protection while declining to impose the same standards on protected landowners as on potentially responsible parties.¹⁵¹ The EPA guidance also emphasizes that "[t]he required reasonable steps relate only to responding to contamination for which the [party] . . . is not responsible. Activities on the property subsequent to purchase that result in new contamination can give rise to full CERCLA liability."¹⁵²

While the "reasonable steps" requirement uses the same language for all classes of protected landowners, the EPA notes that the three classes of landowners may be held to different standards as a reflection of their different circumstances.¹⁵³ Since bona fide prospective purchasers acquired the land with knowledge of the contamination, and therefore with a more complete understanding of the hazardous substances that must be controlled, they may be held to a higher standard. As yet there has been very little judicial interpretation of the "reasonable steps" standard. The EPA notes, however, that "the existing case law on due care provides a reference point for evaluating the reasonable steps requirement."¹⁵⁴

The "due care" standard ensures that parties who do not take action, allowing the environmental situation on their property to get worse, will not be afforded protected landowner status. The Sixth Circuit, in *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, provides an instructive example of how the innocent landowner defense can be lost through conduct that does not constitute "due care."¹⁵⁵ The plaintiff, Franklin County Convention Facilities Authority ("CFA"), leased property near railroads in Columbus, Ohio for the purpose of constructing a convention center.¹⁵⁶ Buried on the property was a large wooden box which had been constructed some time prior to 1901 to treat wood for use as railroad ties.¹⁵⁷ No records of the box existed, and it had not been discovered in the course of three environmental assessments of the property.¹⁵⁸ In October 1990, a contractor accidentally split the box open with a backhoe, releasing the

¹⁵⁰ 42 U.S.C. §§ 9601(40)(D), 9607(q)(1)(A)(iii), 9601(35)(B)(i)(II) (2006).

¹⁵¹ Common Elements Memo, *supra* note 132, at 9. The EPA guidance points out that because bona fide prospective purchasers knew of the contamination before purchasing the land, but innocent landowners and contiguous landowners did not, bona fide prospective purchasers might need to take more action to satisfy the "reasonable steps" requirement. *Id.* at 10.

¹⁵² *Id.* at 11.

¹⁵³ *Id.* at 10.

¹⁵⁴ *Id.* at 11.

¹⁵⁵ *Franklin County Convention Facilities Auth. v. Amer. Premier Underwriters, Inc.*, 240 F.3d 534 (6th Cir. 2001).

¹⁵⁶ *Id.* at 539.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

benzene and creosote that the box contained.¹⁵⁹

The U.S. District Court for the Southern District of Ohio found that CFA was an innocent landowner, and the defendant appealed.¹⁶⁰ The Sixth Circuit rejected the district court's determination that CFA was an innocent landowner on the grounds that it had not exercised due care with respect to the contamination.¹⁶¹ While CFA stopped work and alerted authorities when the box was discovered, it did not take adequate steps to prevent the contamination from spreading.¹⁶² Contaminants were allowed to migrate a distance of forty-five feet along an open sewer, and an adequate barrier was not erected until more than a year after the spill.¹⁶³ CFA's failure to take due care to prevent the spread of contamination proved fatal to its attempt to use the innocent landowner defense.

While some commentators have argued that the Brownfields Act does not go far enough to protect human health,¹⁶⁴ it hardly gives polluters a free pass. Due to the strict eligibility requirements and the ambiguity in many of those requirements, it may even be too difficult to establish a protected landowner defense.¹⁶⁵ In addition to all of the conditions described above, a party is ineligible for the protected landowner defenses if disposal occurred during his ownership period.¹⁶⁶ The remainder of this Note discusses the problematic definition of "disposal" in CERCLA case law.

IV. THE JUDICIAL INTERPRETATION OF THE WORD "DISPOSAL"

As a party seeking to establish liability protection as an innocent landowner or bona fide prospective purchaser, the landowner must show by a preponderance of the evidence that all disposal occurred before he acquired the property.¹⁶⁷ Thus, the exact meaning of "disposal" is critical.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 548. The court did not reverse CFA's designation as an innocent landowner simply because its construction activities had led to the breaking of the box. "First, we note that CFA played no role in placing the hazardous substance at the site, nor could have reasonably been aware of the box's presence. Moreover, even though CFA's contractor split open the box, this was accidental and unavoidable, and cannot fairly be attributed to CFA." *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See, e.g., Seth Schofield, Note, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 and the Need for Federal Legislation*, 12 N.Y.U. ENVTL. L.J. 946, 1020 (2005).

¹⁶⁵ See Stanley A. Millan, *Contemporary CERCLA: Reversals of Fortune and Black Holes*, 16 FORDHAM ENVTL. L. REV. 183, 204 (2005); Timothy Harmon & Karen Williams, *Brownfields Revitalization Act: Big Promises Not Delivered in New Brownfields Law*, ENVIRONS (Lane Powell Spears Lubersky LLP, Seattle, Wash.), Summer 2002, at 2.

¹⁶⁶ 42 U.S.C. § 9601(35)(A), 9601(40)(A) (2006).

¹⁶⁷ 42 U.S.C. § 9601(35)(A), 9601(40)(A). By definition, contiguous property owners own land that was contaminated by waste migrating in from off-site, rather than being disposed of on-site. 42 U.S.C. § 9607(q) (2006). Therefore, the definition of disposal is not significant with respect to contiguous landowners, so that defense will not be analyzed in this section.

“Disposal” is defined by CERCLA as the “discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water.”¹⁶⁸ The federal courts disagree as to which factual scenarios would constitute “disposal” and which would not, so the same course of events may lead to CERCLA liability in some jurisdictions but not others.

The term “disposal” does not just describe the initial introduction of contaminants to a site, but also any spreading of the contaminants that may have been caused by human activity.¹⁶⁹ 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.”¹⁷⁰ For example, in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, the Fifth Circuit held a residential developer liable under CERCLA for spreading creosote-contaminated soil during site grading.¹⁷¹ The question, therefore, is what degree of human activity is required in order for the spread of contaminants to constitute disposal?

As the Ninth Circuit explained, the various “opinions cannot be shoehorned into the dichotomy of a classic circuit split. Rather, a careful reading of their holdings suggests a more nuanced range of views, depending in large part on the factual circumstances of the case.”¹⁷² The holdings of the various federal courts can, however, be broadly categorized. Commentators point to the distinction between active and passive disposal,¹⁷³ but it is most helpful to discuss the issue in terms of three categories of situations. In the first category, which this Note shall refer to as “active disposal,” contaminants are introduced to or moved around the site through active human conduct. Such a situation clearly constitutes disposal under CERCLA.¹⁷⁴ On the other end of the spectrum

¹⁶⁸ 42 U.S.C. § 9601(29), which refers to the definition of “disposal” in the Solid Waste Disposal Act, 42 U.S.C. § 6903(3) (2006).

¹⁶⁹ Liability may attach even if contaminants are spread through a benign activity such as soil testing. See generally Jennifer L. Scheller, Note, *No Good Deed Goes Unpunished: The CERCLA Liability Exposure Unfortunately Created by Pre-acquisition Soil Testing*, 103 MICH. L. REV. 1930 (2005) (discussing how soil testing can lead to liability exposure).

¹⁷⁰ *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); see also *United States v. CDMG Realty Co.*, 96 F.3d 706, 719 (3d Cir. 1996) (“Under 42 U.S.C. § 6903(3), ‘disposal’ is defined in part as the ‘discharge’ or ‘placing’ of waste ‘into or on any land or water.’ ‘Disposal’ thus includes not only the initial introduction of contaminants onto a property but also the spreading of contaminants due to subsequent activity.”); *Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489, 1510 (11th Cir. 1996) (“[W]e do not read CERCLA’s definition of ‘disposal’ as being limited to instances where a hazardous substance is initially introduced into the environment at a facility.”); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992) (“Congress did not limit the term [disposal] to the initial introduction of hazardous material onto property.”).

¹⁷¹ *Tanglewood E. Homeowners*, 849 F.2d at 1571.

¹⁷² *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 875 (9th Cir. 2001).

¹⁷³ See, e.g., Starr, *supra* note 23, at 446.

¹⁷⁴ As courts typically interpret CERCLA’s provisions broadly, any active human conduct that could fairly be considered the “discharge, deposit, injection, dumping, spilling, leaking, or placing of

is a situation which this Note shall refer to as “migration,” in which contaminants move within the environment through natural means (as when liquid percolates through the soil, or contaminants migrate within a landfill). The courts of appeals that have commented on the issue have held that migration does not constitute disposal.¹⁷⁵

It is an intermediate scenario, which this Note shall refer to as “passive leaking,” that presents the greatest analytical difficulties. In this scenario, contaminants move through passive means from some sort of man-made containment into the environment (as when contaminants leak from a drum). The courts disagree as to whether passive leaking constitutes disposal. The Fourth Circuit has held that it does¹⁷⁶ and the Sixth Circuit has held that it does not.¹⁷⁷ The Second,¹⁷⁸ Third,¹⁷⁹ and Ninth¹⁸⁰ Circuits have not directly commented on the issue, but have suggested that they would agree with the Fourth Circuit.

When contaminants migrate through completely natural means, this movement does not constitute disposal. For example, the natural movement of waste within a landfill was held by the Third Circuit not to constitute disposal in *United States v. CDMG Realty Co.*¹⁸¹ Dowell owned the property for six years and did not use it (except to perform environmental testing) then sold it to another party.¹⁸² The later owner sued Dowell for remediation costs, claiming that as waste tends to migrate within landfills, Dowell had owned the site at the time of disposal.¹⁸³ The court examined the words used to define disposal under CERCLA and found that while the words “leaking” and “spilling” have passive meanings, they “should be read to require affirmative human action” in this context.¹⁸⁴ To reinforce its conclusion, the court asserted that the innocent landowner defense would be a nullity if passive migration constituted

any solid waste or hazardous waste into or on any land or water” would be held to constitute disposal. See *infra* Part V.A.

¹⁷⁵ See *infra* notes 181–92 and accompanying text.

¹⁷⁶ *Crofton Ventures Ltd. P’ship v. G & H P’ship*, 258 F.3d 292, 297 (4th Cir. 2001); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992); see also *infra* notes 193–206 and accompanying text.

¹⁷⁷ *United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000); see also *infra* notes 208–12 and accompanying text.

¹⁷⁸ *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178 (2d Cir. 2003); see also *infra* notes 219–20 and accompanying text.

¹⁷⁹ *United States v. CDMG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996); see also *infra* notes 214–18 and accompanying text.

¹⁸⁰ *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001); see also *infra* notes 221–24 and accompanying text.

¹⁸¹ *CDMG Realty Co.*, 96 F.3d at 711.

¹⁸² *Id.* at 711–12.

¹⁸³ *Id.* at 712.

¹⁸⁴ See *id.* at 714 (“The words surrounding ‘leaking’ and ‘spilling’—‘discharge,’ ‘deposit,’ ‘injection,’ ‘dumping,’ and ‘placing’—all envision a human actor.”).

disposal.¹⁸⁵ As the innocent landowner defense only applies if the owner acquired the property after disposal occurred, the defense would be nearly impossible to use if gradual spreading of contamination constituted disposal.¹⁸⁶

The Second Circuit explicitly adopted the Third Circuit’s reasoning the following year.¹⁸⁷ In 2003, the Second Circuit again addressed passive migration and discussed disposal by “leaking” in more detail.¹⁸⁸ A business called Tar Asphalt Services cleaned its trucks with kerosene and allowed the tar and kerosene runoff to flow onto a neighboring property called Niagara Flats.¹⁸⁹ The court held that the then-owner of Niagara Flats, Mohawk Valley Oil, was not liable under CERCLA as an owner at the time of “disposal.”¹⁹⁰ As the Second Circuit does not recognize purely passive migration as disposal, there was no disposal on the Niagara Flats property.¹⁹¹ The court noted, however, that the passive migration of contaminants from a container into the environment could constitute disposal under CERCLA.¹⁹²

In *Nurad, Inc. v. William E. Hooper & Sons Co.*, the Fourth Circuit specifically confronted the issue of leaky underground storage tanks, and decided that a leak from a drum does constitute disposal.¹⁹³ *Nurad* is cited as the bedrock case defining “disposal” in a passive way.¹⁹⁴ *Nurad* was the current owner of a site which had incurred remediation costs in removing leaky underground tanks of mineral oil.¹⁹⁵ It brought suit against several previous owners for contribution, including Mumaw, from whom it had bought the property.¹⁹⁶ The district court found that Mumaw was not liable since he had not owned the site “at the time of disposal”—at the time the tanks were buried.¹⁹⁷ The court of appeals rejected the district court’s

¹⁸⁵ *Id.* at 716.

¹⁸⁶ *Id.*

¹⁸⁷ *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997).

¹⁸⁸ *Niagara Mohawk Power Corp. v. Jones Chem., Inc.*, 315 F.3d 171, 178–79 (2d Cir. 2003).

¹⁸⁹ *Id.* at 174.

¹⁹⁰ *Id.* at 179.

¹⁹¹ *Id.* at 178.

¹⁹² *Id.*

¹⁹³ *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 840–41, 845 (4th Cir. 1992).

¹⁹⁴ While not all of these cases agree with the Fourth Circuit, *Nurad*’s definition of “disposal” is cited in numerous cases, including *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 358 n.3 (2d Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706, 713 (3d Cir. 1996); *Joslyn Manufacturing Co. v. Koppers Co.*, 40 F.3d 750, 761–62 (5th Cir. 1994); *Sycamore Industrial Park Associates v. Ericsson, Inc.*, No. 06-C-0768, 2007 U.S. Dist. LEXIS 23881, at *8 (N.D. Ill. Mar. 30, 2007); *Spectrum International Holdings, Inc. v. Universal Cooperatives, Inc.*, Civil No. 04-99, 2006 U.S. Dist. LEXIS 49716, at *19–20 (D. Minn. July 17, 2006); *City of Bangor v. Citizens Communications Co.*, Civil No. 02-183-B-S, 2004 U.S. Dist. LEXIS 3845, at *40 (D. Me. Mar. 11, 2004); and *Bob’s Beverage, Inc. v. Acme, Inc.*, 169 F. Supp. 2d 695, 730 (N.D. Ohio 1999).

¹⁹⁵ *Nurad*, 966 F.2d at 840–41.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 841 (internal quotation omitted). The decision was appealed by *Nurad* and by another defendant, *Hooper*, whom the court found had been the owner at the time of disposal. *Id.*

active construction of “disposal,” saying that “a requirement conditioning liability upon affirmative human participation in contamination . . . frustrates the statutory purpose.”¹⁹⁸ The court found that Mumaw was liable as a former owner because he had not “overcome the presumption” that the tanks had leaked steadily over time, including the period in which he had owned the land.¹⁹⁹

The Fourth Circuit elaborated upon its position on leaking drums in *Crofton Ventures Ltd. Partnership v. G & H Partnership*.²⁰⁰ Plaintiff Crofton had purchased a parcel of land from the defendants, who had represented in the sale contract that the property had not been contaminated with any hazardous substances.²⁰¹ When Crofton began to develop the site in 1995, he discovered 285 fully or partially buried fifty-five-gallon drums containing asphalt and trichloroethylene in addition to “truck tires, household appliances, and other similar refuse.”²⁰² Crofton remediated the site and sued the previous owners to recover his costs.²⁰³ The district court analyzed the issue of liability in terms of who had placed the drums in question on the site.²⁰⁴ It found that since there was no evidence that the defendants had “placed” the contaminants on the site, they were not liable.²⁰⁵ The court of appeals reversed, holding that under 42 U.S.C. § 9607(a)(2) an owner or operator may be held liable for contamination if he was the owner or operator “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.”²⁰⁶ Several district courts have also concluded or suggested that when contaminants leak from drums on a site, even without human intervention, “disposal” has occurred.²⁰⁷

The Sixth Circuit, occupying the opposite end of the spectrum, adopted an active definition of disposal in *United States v. 150 Acres of Land*.²⁰⁸

¹⁹⁸ *Id.* at 845.

¹⁹⁹ *Id.* at 846.

²⁰⁰ 258 F.3d 292, 297 (4th Cir. 2001).

²⁰¹ *Id.* at 294.

²⁰² *Id.*

²⁰³ *Id.* at 295.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 296.

²⁰⁶ *Id.* at 297.

²⁰⁷ *See, e.g.,* Servco Pac., Inc. v. Dods, 193 F. Supp. 2d 1183, 1197 (D. Haw. 2002) (stating that Ninth Circuit precedent dictates that “‘disposal’ does *not* include general gradual passive migration of contamination through the soil” but does include “passive gradual ‘leaking’ such as that from an underground storage tank with a hole in it or from an abandoned barrel”); Southfund Partners III v. Sears, Roebuck & Co., 57 F. Supp. 2d 1369, 1376 (N.D. Ga. 1999) (holding that “the term ‘disposal’ includes the leaking and spilling of hazardous materials from an uncapped tank caused by rainwater displacing the hazardous materials”); *In re Hemingway Transp., Inc.*, 108 B.R. 378, 382 (Bankr. D. Mass. 1989) (holding that the leaking of drums over time constituted disposal).

²⁰⁸ 204 F.3d 698 (6th Cir. 2000).

The defendant owners had inherited land without knowing that there were hundreds of drums of toxic substances on the parcel, hidden by dense vegetation.²⁰⁹ The EPA began removal actions and sued the landowners for contribution, and the owners asserted the innocent landowner defense. 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."²¹⁰ Therefore, the court concluded that without "evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property," the defendants had not "disposed" of hazardous substances.²¹¹ The following year, the court reiterated its opinion that "disposal" requires active human conduct in *Bob's Beverage, Inc. v. Acme, Inc.*²¹² A few other courts have adopted a similarly active construction of disposal.²¹³

In *United States v. CDMG Realty Co.*,²¹⁴ the Third Circuit held that migration does not constitute disposal,²¹⁵ but suggested that passive leaking may. While declining to conclude "whether the movement of contaminants unaided by human conduct can ever constitute 'disposal,'"²¹⁶ the court distinguished between leaking and migration. The court stated that while the word "leaking" implied passive movement of contaminants, it was inapplicable to the case at bar because the waste was not leaking out of any containment.²¹⁷ The court noted, however, that the word "leaking" "would encompass the escape of waste through a hole in a drum."²¹⁸ Similarly, the Second Circuit suggested that a leaking drum would constitute "disposal" in *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*²¹⁹ The court stated that while "leaking" implied passive movement of contaminants, it was inapplicable in that case because "[leaking] denotes the passage of a substance into or out of a containment."²²⁰ Therefore, both the Second and Third Circuits would likely find that the passive leaking of a drum or other containment *does* constitute disposal.

²⁰⁹ *Id.* at 701.

²¹⁰ *Id.* at 706.

²¹¹ *Id.*

²¹² 264 F.3d 692, 697–98 (6th Cir. 2001).

²¹³ *See, e.g.,* City of Bangor v. Citizens Commc'ns Co., No. 02-183-B-S, 2004 U.S. Dist. LEXIS 3845, at *40 (D. Me. Mar. 11, 2004) (noting that all the terms used to define "disposal" "suggest some new introduction of hazardous substances to the environment"); Bethlehem Iron Works, Inc. v. Lewis Indus., Inc., No. 94-0752, 1996 U.S. Dist. LEXIS 14446, at *132 (E.D. Pa. Sept. 19, 1996) (holding that "the term 'disposal' must be interpreted to require taking an affirmative act to get rid of waste").

²¹⁴ 96 F.3d 706 (3d Cir. 1996).

²¹⁵ *See supra* notes 181–86 and accompanying text.

²¹⁶ *CDMG Realty Co.*, 96 F.3d at 711.

²¹⁷ *Id.* at 714.

²¹⁸ *Id.*

²¹⁹ 315 F.3d 171 (2d Cir. 2003).

²²⁰ *Id.* at 178. "[A] property line itself is not a containment, certainly not for liquids." *Id.*

The Ninth Circuit, in *Carson Harbor Village, Ltd. v. Unocal Corp.*, rejected rigid rules, instead opting to determine whether disposal had occurred on a case-by-case basis.²²¹ “Instead of focusing solely on whether the terms are ‘active’ or ‘passive,’ we must examine each of the terms in relation to the facts of the case and determine whether the movement of contaminants is, under the plain meaning of the terms, a ‘disposal.’”²²² The court examined the situation, which had involved passive migration of tar and slag, and found that it could not fairly be characterized as a “discharge, deposit, injection, dumping, spilling, leaking, or placing.”²²³ The court noted that Congress had intended the word “leaking” to refer to a “leaking barrel or underground storage tank,” strongly suggesting that the court would disagree with the Sixth Circuit and find passively leaking drums to constitute “disposal.”²²⁴

V. RECONCILING THE DEFINITIONS OF “DISPOSAL”

A. “Disposal” and Legislative Intent Under CERCLA

As Part IV shows, several of the courts of appeals would likely agree that when contaminants passively move from a man-made container into the environment a disposal may have occurred under CERCLA, whether or not the landowner knew that there had been any leaking or spilling. This definition of “disposal” is consistent with CERCLA’s legislative purpose. CERCLA was enacted to clean up the nation’s hazardous waste sites, and to make the polluters pay for the cleanup.²²⁵ In order to effectuate this goal, “Congress cast the liability net wide to capture all potentially responsible parties.”²²⁶ Courts have been mindful of this congressional goal, holding that due to CERCLA’s comprehensive remedial intent, courts are bound to “construe its provisions liberally to avoid frustrating the legislature’s purpose.”²²⁷

²²¹ *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001).

²²² *Id.* Like the Ninth Circuit, the Eleventh Circuit declined to make strict rules on what constitutes disposal. In a case involving the alleged spread of contamination during excavation, the Eleventh Circuit stated, “Instead of parsing the language of this definition to arrive at a rigid rule for when conduct results in a ‘disposal,’ courts should look at the definition of ‘disposal’ in its entirety in ascertaining whether a particular event qualifies as such.” *Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489, 1510 (11th Cir. 1996).

²²³ *Carson Harbor*, 270 F.3d at 879.

²²⁴ *Id.*; see also *supra* notes 208–13 and accompanying text.

²²⁵ See, e.g., *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007).

²²⁶ *Horsehead Indus., Inc. v. Paramount Commc’ns, Inc.*, 258 F.3d 132, 135 (3d Cir. 2001).

²²⁷ *Westfarm Assocs. Ltd. P’ship v. Wash. Suburban Sanitary Comm’n*, 66 F.3d 669, 677 (4th Cir. 1995); see also *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986).

The case law concerning the definition of “facility” provides an instructive example of a broad definition under CERCLA. The Fourth Circuit held that a publicly owned sewer system was a “facility” under CERCLA because such an interpretation is more consistent with the legislative purpose.²²⁸ The defendant, Washington Suburban Sanitary Commission (“WSSC”), had allowed its sewer pipes to deteriorate, which let chemical waste from a dry cleaner seep into the environment.²²⁹ WSSC’s defense was based on the idea that its sewer was not a “facility” under CERCLA. WSSC argued that since RCRA and the Clean Water Act each permit the discharge of certain chemicals into sewers, Congress could not have intended for sewer operators to be liable for contaminants leaking from the sewers.²³⁰ The court noted that Congress probably did not envision sewer systems as badly deteriorated as the one in question, and then turned to the legislative purposes of the various statutory schemes.²³¹ The court concluded that “CERCLA is a comprehensive remedial statutory scheme, and as such, the courts must construe its provisions liberally to avoid frustrating the legislature’s purpose.”²³² Accordingly, the court interpreted CERCLA’s liability provisions broadly and found the sewer to be a facility under CERCLA.²³³

In *Sierra Club v. Seaboard Farms, Inc.*, the Tenth Circuit relied even more explicitly on CERCLA’s legislative intent in broadly construing the definition of “facility.”²³⁴ The site in question was a hog farm in Oklahoma, owned by Seaboard, which was divided into two contiguous parcels, Dorman North and Dorman South.²³⁵ The Sierra Club argued that, taken together as one facility, the farm discharged enough ammonia that it was subject to CERCLA’s reporting provisions.²³⁶ Seaboard argued that each of the barns, waste lagoons, and other components of the farm was a separate facility, and as such that it was only required to report a discharge if emissions from one particular component of the farm exceeded the specified level.²³⁷ The court first examined the definition of “facility” under CERCLA,²³⁸ finding that it was unambiguous and thus not subject to

²²⁸ *Westfarm Assocs.*, 66 F.3d at 679.

²²⁹ *Id.* at 674.

²³⁰ *Id.* at 679.

²³¹ *Id.*

²³² *Id.* at 677 (citations omitted).

²³³ *Id.* at 679.

²³⁴ *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172–73 (10th Cir. 2004).

²³⁵ *Id.* at 1168.

²³⁶ *Id.* at 1168–69.

²³⁷ *Id.* at 1169.

²³⁸ *Id.* at 1170 (“(A) any building, structure . . . pit, pond, lagoon, impoundment, ditch . . . or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located” (quoting 42 U.S.C. § 9601(9) (2000))).

Chevron deference.²³⁹ Citing CERCLA's broad remedial purpose, the court held that its legislative aims were "best served through treating the Dorman Farm as a single facility."²⁴⁰ Thus, when there is a question as to whether a party is potentially liable under CERCLA, courts are quite likely to conclude that the party is indeed liable.

Furthermore, a definition of disposal that requires affirmative human conduct would encourage "indifference to environmental hazards."²⁴¹ In *Nurad*, the Fourth Circuit argued that under an active definition of "disposal," an "owner could avoid liability simply by standing idle while an environmental hazard festers on his property."²⁴² The court reasoned that if *Nurad* was liable as a current owner of contaminated property under *Shore Realty*, it would be unfair to allow *Mumaw* to escape liability, given that neither party was actually at fault for the contamination.²⁴³ If such a situation were allowed, the court reasoned, it would discourage voluntary cleanups.²⁴⁴

The Ninth Circuit shared similar reasoning in *Carson Harbor*, noting that "if 'disposal' is interpreted to exclude all passive migration, there would be little incentive for a landowner to examine his property for decaying disposal tanks, prevent them from spilling or leaking, or to clean up contamination once it was found."²⁴⁵ Given that CERCLA's purpose is to remediate contaminated sites and prevent human exposure to toxins, Congress must not have meant to reward owners who remain willfully ignorant of the environmental conditions on their land. Therefore, the prevalent view that "disposal" includes passive leaking from a drum or underground storage tank (though not migration through the soil) is more appropriate in light of CERCLA's legislative purpose.

B. "Disposal" and Legislative Intent Under the Brownfields Act

While the active definition of "disposal" embraced by the Sixth Circuit is inconsistent with the larger CERCLA scheme, it is more consistent with the legislative intent of the Brownfields Act than the passive definition used by other circuits. The purpose of the Brownfields Act was to combat the problem of vacant industrial land, the redevelopment of which had been discouraged by CERCLA's expansive liability scheme.²⁴⁶ The Brownfields Act creates a liability shield, so it makes little sense to apply a

²³⁹ *Id.* at 1170–71. For a discussion of the *Chevron* case, see *infra* notes 262–65 and accompanying text.

²⁴⁰ *Id.* at 1174.

²⁴¹ *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845–46 (4th Cir. 1992).

²⁴² *Id.* at 845.

²⁴³ *Id.* at 845–46.

²⁴⁴ *Id.*

²⁴⁵ *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001).

²⁴⁶ See *supra* notes 116–22 and accompanying text.

definition of disposal that was designed to be a liability hook. While the Fourth and Ninth Circuits point out that an active definition of disposal encourages willful ignorance,²⁴⁷ the eligibility requirements²⁴⁸ for the protected landowners prevent that from becoming an issue.

The eligibility requirements for gaining liability protection would be nonsensical if the passive definition of disposal was applied. With regard to the “due care” requirement of the innocent landowner defense,²⁴⁹ the U.S. District Court for the District of Kansas noted that innocent landowners cannot, by definition, exercise due care with respect to contamination that they do not know is there.²⁵⁰ To qualify as an innocent landowner, an entity must “make all appropriate inquiries prior to purchasing a piece of property *and* lack actual knowledge of the pollution at the time of purchase; *then*, whenever the landowner subsequently discovers the contamination, he must take reasonable steps to control the problem as prescribed in [section] (35)(B)(i)(II).”²⁵¹ A landowner cannot earn protection for taking due care with respect to a leaky drum if he becomes strictly liable merely on the basis of the drum’s existence. The “reasonable steps” standard to which bona fide prospective purchasers are to be held presents the same problem. If Congress had intended for undiscovered, ongoing leaks to automatically defeat a protected landowner defense, the “due care” and “reasonable steps” standards would be meaningless.

The language of an EPA guidance document commonly known as the “Common Elements” memo suggests that the EPA does not consider a hidden ongoing leak to be an automatic bar to protected status.²⁵² One of the questions in the “Question and Answer” section asks whether a property owner who has discovered that “the containment system for an on-site waste pile has been breached” would be required by the “reasonable steps” standard to repair the breach.²⁵³ The EPA replied that, ordinarily, a protected landowner would be required to stop continuing releases, and does not hint at the notion that contaminants leaking from a man-made containment could defeat a protected landowner defense in

²⁴⁷ See *supra* notes 241–45 and accompanying text.

²⁴⁸ See *supra* notes 135–66 and accompanying text.

²⁴⁹ See *supra* notes 155–63 and accompanying text.

²⁵⁰ *City of Wichita v. Trs. of the Apco Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1051 (D. Kan. 2003); see also 1325 “G” *St. Assocs. v. Rockwood Pigments NA, Inc.*, No. DKC 2002-1622, 2004 U.S. Dist. LEXIS 19178, at *28–29 (D. Md. Sept. 7, 2004) (holding that the due care requirement arises only upon discovery of the hazardous substances).

²⁵¹ *City of Wichita*, 306 F. Supp. 2d at 1051.

²⁵² See Common Elements Memo, *supra* note 132, Attachment B, Reasonable Steps Questions and Answers, at 2 (discussing scenarios that could lead to strict liability in several circuits without acknowledging that liability could attach).

²⁵³ *Id.*

several federal circuits.²⁵⁴ Surely Congress could not have intended for bona fide prospective purchasers to be strictly liable for a breach in a containment system created by another party. Yet depending on how a court applied the requirement that all disposal occurred before the bona fide purchaser acquired the property, a hidden continuous leak could defeat the bona fide prospective purchaser protections.

Even if the protected landowner defenses are not conditioned on disposal having occurred before the party acquired the property, the existing requirements provide more than sufficient protection to the environment. Given the due care/reasonable steps conditions imposed on protected landowners, a landowner cannot “avoid liability simply by standing idle while an environmental hazard festers on his property.”²⁵⁵ The “all appropriate inquiries”²⁵⁶ standard provides ample incentive for site investigation, contradicting the Ninth Circuit’s assertion that “if ‘disposal’ is interpreted to exclude all passive migration, there would be little incentive for a landowner to examine his property for decaying disposal tanks, prevent them from spilling or leaking, or to clean up contamination once it was found.”²⁵⁷ These standards, and the others imposed on protected landowners,²⁵⁸ ensure that the environment is protected and that only truly non-culpable parties reap the benefits of the protected landowner defenses.

C. *Reconciling the Two Definitions of “Disposal”*

Ideally, Congress would clarify the meaning of disposal, and specify that the protected landowner defenses are held to the less stringent standard. Failing that, this Note urges the EPA to promulgate a rule clarifying its interpretation of the word “disposal,” adopting a passive definition when determining who is a PRP, and an active definition when examining whether a landowner may take advantage of one of the defenses. The EPA has the discretion to interpret ambiguous statutory directives, and such a complex circuit split over the meaning of disposal shows a high degree of ambiguity.

The EPA has the authority to give the word “disposal” one meaning when applied to protected landowners and a different one when applied to

²⁵⁴ *Id.*; see also *Crofton Ventures Ltd. P’ship v. G & H P’ship*, 258 F.3d 292, 297 (4th Cir. 2001) (noting that a landowner may be held liable for contamination if he 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”); *supra* notes 176–224 and accompanying text.

²⁵⁵ *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845–46 (4th Cir. 1992).

²⁵⁶ See *supra* notes 140–49 and accompanying text.

²⁵⁷ *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001).

²⁵⁸ There are other conditions imposed on protected landowners that this Note will not address. See Common Elements Memo, *supra* note 132.

PRPs generally. While the same term is generally interpreted as having the same meaning throughout a statutory scheme, the Supreme Court recently reaffirmed the EPA’s right to give the same term, in the same statutory scheme, different meanings. In the 2007 case *Environmental Defense v. Duke Energy Corp.*, the Supreme Court examined the EPA’s differing interpretations of the word “modification” in two different parts of the Clean Air Act.²⁵⁹ Two of the Clean Air Act’s programs, Prevention of Significant Deterioration (“PSD”) and New Source Performance Standards (“NSPS”), looked to changes in emissions to determine whether a change to a facility constituted a “modification” that would require new permits. The EPA used annual emissions to determine whether a modification of the source had occurred under PSD, while it used hourly emissions under NSPS.²⁶⁰ The Supreme Court upheld the EPA’s varying definitions of the term modification because of the differencing regulatory goals of the statutory sections in question.²⁶¹ As this Note has shown, the legislative goals behind the Brownfields Act were quite different from the legislative goals that inspired CERCLA’s original passage.

The EPA’s varying interpretations of the word “disposal” would be entitled to judicial deference, provided they were reasonable. The landmark administrative law case *Chevron v. Natural Resources Defense Council* laid out the two-step process for determining the level of judicial deference that is appropriate.²⁶² First, the court must determine whether Congress has “directly spoken to the precise question at issue.”²⁶³ If it has, courts and agencies must give effect to Congress’s intent.²⁶⁴ Here, the circuit split over the meaning of the word “disposal” demonstrates that there is ambiguity. When a statute is ambiguous, the court will defer to the reasonable interpretation of the administrative agency tasked with implementing the statute.²⁶⁵ Given the level of ambiguity, and the differing statutory goals, it would be highly reasonable for the EPA to give the word “disposal” different meanings in the two different contexts.

VI. CONCLUSION

CERCLA was enacted in 1980 to address a problem that was visible at that time: toxic waste sites leaching their contaminants into the

²⁵⁹ *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007).

²⁶⁰ *Id.* at 569.

²⁶¹ *Id.* at 566. For a detailed discussion of *Environmental Defense v. Duke Energy Corp.*, see generally Benjamin E. Edwards, Comment, *Environmental Defense v. Duke Energy Corporation*, 33 COLUM. J. ENVTL. L. 197 (2008); Shawn Eisele, Comment, *Environmental Defense v. Duke Energy Corp.: Paving the Way for Cap and Trade?*, 35 ECOLOGY L.Q. 363 (2008).

²⁶² *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

²⁶³ *Id.* at 842.

²⁶⁴ *Id.* at 842–43.

²⁶⁵ *Id.* at 843.

environment and harming people and ecosystems. While CERCLA has led to the remediation of a great number of sites, it has had unintended consequences and arguably exacerbated the problem of brownfields. By the time the Brownfields Act was passed, contaminated land was the subject of completely different political and policy concerns. The crisis was no longer waste seeping into basements; it was acres of urban land sitting vacant. Congress, in making the bona fide prospective purchaser defense available, intended to provide a liability shield to parties willing to redevelop brownfields. This liability shield is only available where disposal of contaminants ceased before the party purchased the property, and given the courts of appeals' very different interpretations of the term "disposal," the usefulness of the liability shield is unclear.

Given the ambiguity surrounding the term "disposal," the definition of the term should be clarified. If there is no "iron rule" requiring that the EPA give the same word exactly the same meaning in different statutory contexts,²⁶⁶ the EPA should adopt differing definitions for potentially responsible parties and protected landowners, reflecting the different statutory goals. The legislative goals behind CERCLA and the Brownfields Act were quite different, reflecting the different conditions of the times. While the expansive definition of disposal fits CERCLA's original intent, the intent of the Brownfields Act should be respected as well.

²⁶⁶ *Envtl. Def.*, 549 U.S. at 576.