Making Good Neighbors:

Liability for Passive Migration of Hazardous Waste Under CERCLA

Jasmine M. Starr *

Congress enacted CERCLA in 1980 to encourage the fair and timely cleanup of hazardous waste. Yet, more than twenty years later, thousands of sites remain contaminated. One barrier to redeveloping these sites is uncertainty over who is responsible for their cleanup, particularly when the waste has spread throughout the property and onto neighboring land, a situation known as passive migration. Since CERCLA does not specifically address passive migration, courts compare it with “disposal” and “release,” both elements of liability in CERCLA. Most of the passive migration cases have dealt with interim owners of land where previous owners disposed waste, and these cases adopted a narrow definition of “disposal.” Yet, two recent cases address owners of neighboring properties contaminated by passive migration. This Note argues that these cases demonstrate the flaw in adopting a narrow definition of “disposal.” While neighbors should not ultimately bear the cost of cleaning up hazardous waste they never controlled, they do have a responsibility to respond to the waste on their property once it is discovered, which is required by the affirmative defenses to liability under CERCLA. Broad definitions of “disposal” and “release,” combined with the many affirmative defenses provided by Congress, would achieve both fairness for neighbors and encourage the prompt cleanup of hazardous waste.

Copyright © 2004 by the Regents of the University of California.

* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2005; B.A., New York University, 1999. Thanks to Deborah Keeth, whose thorough and insightful edits immeasurably improved this piece and taught me how to be an editor. Thanks also to Bob Infelise, Brendan Cody, Beko Reblitz-Richardson, Sachiko Morita, Katie Saral, Ross Astoria, Adrianna Kripke, Reda Dennis, and the members of ELQ for their valuable suggestions and contributions.
Introduction ........................................................................................................... 437
I. CERCLA Liability and Defenses ................................................................. 439
   A. Establishing and Apportioning Liability Under CERCLA .......... 440
   B. Defenses to Liability Under CERCLA ........................................... 441
      1. The Third-Party Defense ......................................................... 441
      2. The Innocent Purchaser Defense ............................................ 442
      3. The Bona Fide Purchaser Defense ........................................... 443
      4. The Contiguous Property Owner Defense ................................. 444
II. The Problem of Passive Migration: How the Existing Doctrine
    Addresses Interim Owners ................................................................. 445
   A. Are Interim Owners Liable for Contamination on Their
      Property? ...................................................................................... 445
   B. The Definition of “Disposal” Excludes Passive Migration ........ 446
      1. The Active/Passive Distinction ................................................. 446
      2. The Enumerated Meanings Approach .................................... 446
III. Liability of Original Neighbors for Passive Migration: Niagara
     Mohawk Power Corporation v. Jones Chemical, Inc .................... 447
   A. Facts and Procedural History ....................................................... 447
   B. Second Circuit Opinion .............................................................. 448
IV. Liability of Current Owners for Passive Migration: Castaic
    Lake Water Agency v. Whittaker Corporation ................................. 449
   A. Facts .......................................................................................... 450
   B. District Court Opinion ................................................................. 451
IV. Analysis ................................................................................................. 452
   A. The Consequences of Excluding Past Owners from
      Liability for Passive Migration .................................................... 453
      1. A Narrow Definition of “Disposal” Relieves
         Neighbors of any Accountability for Pollution Moving
         through Their Property .......................................................... 453
      2. A Narrow Definition of “Disposal” Renders Part of
         the Brownfields Act Redundant ............................................ 454
      3. A Narrow Definition of “Disposal” Moves Closer to
         the Polluter Pays Principle .................................................... 454
   B. The Consequences of Holding Current Owners Liable for
      Passive Migration ....................................................................... 455
      1. Defenses and Apportionment of Liability Create
         Fairness with a Broad Definition of “Release” ....................... 455
      2. A Broad Definition of “Release” Requires
         Neighbors’ Cooperation in Cleanup ....................................... 456
      3. A Broad Definition of Release Can Be Consistent
         with the Brownfields Act ....................................................... 456
Conclusion ....................................................................................................... 457
CERCLA LIABILITY FOR PASSIVE MIGRATION

INTRODUCTION

Around the country, hazardous waste contaminates hundreds of thousands of commercial and industrial sites, turning otherwise valuable land into brownfields. On some sites, the contamination remains stagnant where it was originally disposed. On other sites, however, natural processes cause hazardous substances to move through air, soil, or water after disposal. For example, a chemical may migrate through the soil, conveniently remaining within the lines of a single piece of property. A chemical may also spread outward onto neighboring properties and may even be carried by gravity, groundwater flows, or other forces onto distant properties. Courts and commentators refer to this natural spreading of contamination as "passive migration," because no human action causes the spreading.

Congress passed the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) to encourage prompt remediation of contaminated sites and to place liability for the cost of remediation on those responsible for the pollution. CERCLA attempts to achieve these goals by assigning liability to the owner of contaminated property. It divides owners into two categories, past and present, with two different standards of liability. Past owners must have owned the property at the time of the disposal of hazardous waste to be liable. Also, present owners are liable so long as a release of hazardous waste occurred on the property, even if it occurred before their ownership. CERCLA does not specify whether a neighbor, past or present, is liable when hazardous waste passively migrates onto their property. Uncertainty surrounding the scope of "disposal" and "release" hampers efforts to clean up contaminated sites because businesses that...
could develop the sites are reluctant to acquire a brownfield without knowing what liability may come with ownership.\(^8\)

Two recent cases attempt to clarify the liability of neighbors for hazardous waste that migrates onto their property. In *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, the Second Circuit found that the meaning of “disposal” does not include passive migration, thereby relieving from liability a past owner of property contaminated by passive migration.\(^9\) In a more recent decision, *Castaic Lake Water Agency v. Whittaker Corp.*, the Central District of California found that the meaning of “release” includes passive migration, but the court allowed the current owner of land contaminated by passive migration an affirmative defense.\(^10\) The defense requires that the neighbor take precautions to address the contamination. Both cases hold that neighbors, past and present, are not liable for passive migration. Yet, the approach in *Castaic* forced the neighbor to use an affirmative defense, thus recognizing that neighbors have some responsibility to address the migrating pollution, even if they are not ultimately liable for the cost of cleanup. This approach is more consistent with Congress’s efforts to craft limited defenses to CERCLA with the purpose of encouraging prompt remediation of hazardous waste.

This Note analyzes the responsibility of neighbors for hazardous waste that migrates onto their property and suggests that neighbors should be held to the *Castaic* standard of having to respond to hazardous waste in order to escape financial liability for the cleanup. Part I reviews CERCLA’s liability scheme and its defenses to liability. Part II introduces the difficulty in assigning liability for passive migration and reviews the existing doctrine that assesses the liability of interim owners. This doctrine serves as a backdrop to the question of liability for neighbors. Part III considers how *Niagara* took the interim owner doctrine and applied it to exempt a neighbor from liability for passive migration. Part IV rounds out the discussion by analyzing how *Castaic* holds neighbors liable for pollution that passively migrated onto their property unless they can establish an affirmative defense. Part V examines the overall framework of liability for passive migration and argues that the courts have allowed past owners to escape liability for passive migration without requiring that they take any reasonable steps to address pollution moving across their property. The Note further


\(^9\) 315 F.3d 171 (2003); see infra Part III (discussing liability of past owners).

\(^10\) 272 F. Supp. 2d 1053 (C.D. Cal. 2003); see infra Part IV (discussing liability of current owners).
argues that this is inconsistent with the purpose of CERCLA and Congress’s efforts to craft limited defenses to liability under CERCLA.

I. CERCLA LIABILITY AND DEFENSES

In the wake of the Love Canal controversy\(^{11}\) and similar incidents of abandoned hazardous waste around the country,\(^{12}\) Congress enacted CERCLA in 1980.\(^{13}\) CERCLA seeks to reduce the threat of hazardous waste to human health and the environment by encouraging prompt response to and remediation of polluted sites.\(^{14}\) CERCLA allows the Environmental Protection Agency (EPA), state and local governments, and private parties to engage in remediation of hazardous waste sites and then to sue responsible parties for recovery of the resulting cleanup costs.\(^{15}\) The EPA can also order a private party to assume responsibility for cleaning up hazardous waste.\(^{16}\) That party may then bring suit against other potentially liable parties for contribution to the cleanup costs.\(^{17}\)

Passive migration creates a unique situation under CERCLA, which does not explicitly address liability for hazardous waste that has migrated.\(^{18}\) Passive migration thus presents courts with a challenge to stretch the existing liability structure to address passive migration in a sensible way. In doing so, the courts must balance the fairness concern\(^{19}\)

---

11. The story of toxic pollution in the Love Canal neighborhood of New York is famous. Hooker Chemical Company dumped over 21,000 tons of hazardous waste on the site, covered the waste, and sold it to the local school board for one dollar. In the 1970s, heavy rains caused the toxic sludge to rise into basements and schoolyards, creating a public health emergency. Over two hundred families were evacuated. See RICHARD L. REVESZ & RICHARD B. STEWART, ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 4-5 (1995) [hereinafter ANALYZING SUPERFUND]; SWITZER & BULAN, supra note 4.

12. The “Valley of Drums” in Kentucky, where tens of thousands of leaking barrels of toxic waste were discovered, is an example of a hazardous waste problem that garnered national attention. See ANALYZING SUPERFUND, supra note 11, at 5.


14. FINDLEY, FARBER & FREEMAN, supra note 1, at 736.

15. 42 U.S.C. § 9604 (authorizing EPA cleanups); 42 U.S.C. § 9607(a)(4)(A) (authorizing EPA suits for cost recovery); 42 U.S.C. § 9607(a)(4)(B) (authorizing state and local government and private party cleanups and suits); see also Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890-93 (9th Cir. 1986) (allowing private party to sue for response costs even though the government did not initiate or authorize the cleanup); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1141-43 (E.D. Pa. 1982) (allowing city to sue for response costs even though the federal government did not initiate the cleanup and the city itself may be a responsible party). The EPA only takes remedial action itself on sites on the National Priorities List (NPL), the list of the highest priority sites. 42 U.S.C. § 9605(a)(8)(B).

16. § 9606.

17. § 9613(f)(1); see, e.g., Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930 (8th Cir. 1995); Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503 (7th Cir. 1992).

18. Disposal and release triggers liability under CERCLA. 42 U.S.C. § 9607(a). Thus, courts must decide whether these two terms encompass passive migration.

19. For example, passive migration affects landowners who were in no way connected to the original source of pollution. Likewise, a later owner of the land where the pollution
of making the polluter pay against the practical concern of cleaning up waste rapidly and preventing further harm to the environment and private property.20

A. Establishing and Apportioning Liability Under CERCLA

CERCLA tries to create a liability system that places cleanup costs on those who are responsible for the pollution. To establish a prima facie case under CERCLA, the plaintiff21 must show that: (1) the site of pollution is a facility, (2) the facility has released or threatened to release hazardous substances, (3) such release or threatened release caused the plaintiff to incur necessary response costs, and (4) the defendant is within the four categories of persons subject to CERCLA liability.22

Of the four categories of defendants potentially liable under CERCLA, only two are relevant to this discussion: (1) the current owner or operator of the facility, and (2) the owner or operator at the time of disposal of the hazardous waste.23 The first category only applies to current owners of the property, regardless of whether they had any connection to the creation of the pollution. Thus, a person who buys a property contaminated fifty years ago is still the "current owner" for purposes of CERCLA liability. The second category includes past owners who owned the land at the time of disposal. Typically, this category covers the party who was originally responsible for the pollution, either because they dumped hazardous waste on their own property or allowed others to dump there.

There is potentially a third, unmentioned group of liable landowners, "interim landowners," who owned the land after the time of disposal but sold the property before the CERCLA action began. Landowners in this

20. Cleanup is slow and expensive. From the enactment of CERCLA in 1980 until May 1998, only 511 NPL sites were cleaned up, and over a thousand sites were still on the NPL in 2002. Findley, Farber & Freeman, supra note 1, at 737-38. The General Accounting Office estimated that the EPA took an average of 9.4 years to evaluate a site and place it on the NPL and another 10.4 years to conduct and finish cleanups. Id. The average cleanup cost for a site on the NPL is $30 million. Richard L. Revesz & Richard B. Stewart, The Superfund Debate, in Analyzing Superfund, supra note 11, at 14.

21. The plaintiff could be the EPA, state and local government, or a private party suing potentially responsible parties to recover response costs. 42 U.S.C. § 9607(a)(4)(A), (B); see supra note 14. The plaintiff could also be a responsible party suing other potentially responsible parties for contribution to response costs. 42 U.S.C. § 9613(f)(1); see supra note 16.

22. See, e.g., Carson Harbor Village, Ltd., v. Unocal Corp., 270 F.3d 863, 870 (9th Cir. 2001); 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1358 (9th Cir. 1990).

23. 42 U.S.C. § 9607(a). The other two categories of potentially liable defendants include any person who arranged for the disposal and any person who accepted a hazardous substance for transport. Id.
category do not fit into the first category because they no longer own the land. They also do not fall into the second category because active disposal ceased before they bought the property. If a party does not fit into one of these two categories, the fourth *prima facie* element of liability is unsatisfied and the defendant escapes liability.

Escaping liability is particularly significant because CERCLA has a severe method of distributing liability among responsible parties. Liability under CERCLA is strict, meaning that a showing of causation is unnecessary.\(^4\) Thus, CERCLA may hold an owner liable for hazardous waste on her property when she meets the *prima facie* elements, even if evidence shows neither that she placed the waste there nor that she even knew about the pollution. Liability under CERCLA can also be joint and several; a defendant can be liable for the entire cost of cleanup even if another party contributed more to the contamination.\(^25\) Given the potentially high cost of cleanup, defenses to liability under CERCLA are prized.

### B. Defenses to Liability under CERCLA

A property owner who meets the *prima facie* elements of CERCLA liability may escape liability by asserting a defense. Initially, defenses to CERCLA liability were quite limited. As originally enacted, CERCLA permitted a defense only when a defendant could prove by a preponderance of the evidence that the release of hazardous waste and the resulting damages were caused solely by: (1) an act of God, (2) an act of war, or (3) an act or omission of a third party.\(^6\) With growing concern for the fairness and unintended consequences of the liability system, Congress added several variations of the third-party defense.

1. **The Third-Party Defense**

   The third-party defense is one of the original defenses under CERCLA.\(^27\) It allows current owners to escape liability by showing that a third party was the sole cause of the pollution.\(^28\) Current owners must also

---

\(^4\) See, e.g., United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988) (finding that the plain language of CERCLA “extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste”).


\(^25\) 42 U.S.C. § 9607(b). No defendant has ever asserted the act of God defense, and a defendant has successfully raised the act of war defense only once. *Switzer & Bulan*, supra note 4, at 40-41.

\(^27\) 42 U.S.C. § 9607(b).

\(^28\) *Id.*
prove by a preponderance of the evidence that they exercised due care with respect to the waste and took precautions against foreseeable acts, omissions, and consequences of the third party's behavior.\textsuperscript{29} Congress rejected the defense for current owners who contracted with the third party.\textsuperscript{30} This provision was added to the third-party defense to close a potential loophole in liability.\textsuperscript{31} However, the contractual relationship limitation may prove harsh when applied to the contract between buyers and sellers of land. Purchasers of land would not be eligible to assert the third-party defense, because they had a contractual relationship either with the seller or with an earlier owner who had caused the pollution. Buyers could thus be held responsible for contaminated land, even though they were ignorant of the contamination at the time of purchase and did not cause the contamination.\textsuperscript{32} Concerned about the fairness of this arrangement,\textsuperscript{33} Congress amended CERCLA in 1986 to create the "innocent purchaser defense."\textsuperscript{34}

2. The Innocent Purchaser Defense

Congress amended the existing third-party defense to allow current owners to escape liability if they "did not know and had no reason to know that any hazardous substance... was disposed of on, in, or at the [property]."\textsuperscript{35} Congress crafted this innocent purchaser defense from the third-party defense by creating an exception to the meaning of "contractual relationship" for those parties related only by deed.\textsuperscript{36} To
prevent willful ignorance, purchasers must make all appropriate inquiry into the history of the property to determine if the property is contaminated at the time of purchase.\textsuperscript{37} If the purchasers find contamination, they must take reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.\textsuperscript{38} While the innocent purchaser defense injected some fairness into CERCLA, it did nothing to encourage investment in brownfields. This is because developers who want to invest in brownfields already know about the pollution before purchasing the land. In order to encourage redevelopment of brownfields, Congress extended protection from liability to brownfield redevelopers in the form of the bona fide purchaser defense in the Brownfields Act.\textsuperscript{39}

3. The Bona Fide Purchaser Defense

The bona fide purchaser defense shields brownfield redevelopers from liability by exempting contracts for the purchase of brownfields from the bar on a contractual relationship in the third-party defense.\textsuperscript{40} The defense is available to past and current owners who have acquired land after disposal has ceased.\textsuperscript{41} While the defense does not contain an


\textsuperscript{38} Brownfields Act § 223 (42 U.S.C. § 9601(35)(B)(i)(II)).

\textsuperscript{39} Brownfields Act § 221 (codified at 42 U.S.C. § 9607(q)).

\textsuperscript{40} Brownfields Act § 222 (codified at 42 U.S.C. § 9601(40)). Prior to 2002, the only way for brownfield redevelopers to avoid CERCLA liability was to enter into a Prospective Purchaser Agreement (PPA) with the EPA. Spencer M. Wiegard, \textit{The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability?}, 28 WM. & MARY ENVTL. L. & POL'Y REV. 127, 148 (2003). Under a PPA, the EPA agreed not to bring a CERCLA action against the purchaser in exchange for the purchaser's agreement to cooperate in the cleanup of the site. EPA, \textit{Prospective Purchaser Agreements}, at http://www.epa.gov/region4/ead/legal/ppa.htm (last visited Feb. 15, 2004). Negotiating a PPA could be a lengthy process that, according to the EPA guidelines, should include publication of the PPA in the Federal Register. EPA, \textit{Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement}, 60 Fed. Reg. 34792, 34795 (July 3, 1995). Thus, while protecting developers from liability, the time and cost involved in getting a PPA presented an obstacle to brownfield redevelopment. The bona fide purchaser defense was intended to lessen the need for PPAs. Robert J. Vincze and Christopher J. Neumann, \textit{New Brownfields Guidance on Bona Fide Prospective Purchasers and Agreements with the EPA}, GT ALERT (2002), at http://www.gtlaw.com/pub/alerts/2002/vinczer_07.asp (last visited Feb. 15, 2004).

\textsuperscript{41} Brownfields Act § 222 (codified at 42 U.S.C. § 9601(40)). In signing the bill, President Bush commented that "fear of endless litigation" deters investment in rehabilitating brownfields and that the liability protection in the Act would lessen the "unfair lawsuits" and focus efforts
innocence element, it does require that the purchaser make all appropriate inquiries into past uses of the site, take reasonable steps to stop any continuing release and prevent future releases, and cooperate in the cleanup.

4. The Contiguous Property Owner Defense

At the same time that Congress created the bona fide purchaser defense, it also attempted to address passive migration liability for owners of land contiguous to the land from which the pollution emanated. In the Brownfields Act, Congress created the new contiguous property owner defense to protect "parties that are essentially victims of pollution incidents caused by their neighbor's actions." This provision specifies that current owners are not liable for contamination that moves onto their property from a contiguous property that they do not own (i.e., passive migration). Congress implemented this defense by creating an exception to the definition of liable owners or operators in the first two categories of liable parties under CERCLA (current owners or operators and owners or operators at the time of disposal of the hazardous waste).

The defense requires that the neighbors did not cause the contamination, were not affiliated with those who did, cooperated with any investigation and cleanup, and exercised due diligence at the time of purchase and were not aware of the contamination. Like the innocent purchaser defense, the neighbors must take "reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from" the property. If they establish the defense, they are not considered to be owners or operators under CERCLA.

42. Brownfields Act § 222.
43. Id. (42 U.S.C. § 9601(40)(B), (D), (E)).
44. Id. § 221(42 U.S.C. § 9607(q)).
46. Brownfields Act § 221 (42 U.S.C. § 9607(q)).
47. § 221 (42 U.S.C. § 9607(q)(1)) ("A person [who] owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property not owned by that person shall not be considered to be an owner or operator of [the property.]"); see supra Part I.A. (describing the categories of potentially liable defendants).
48. Brownfields Act at 115 Stat. 2369 (42 U.S.C. § 9607(q)(1)(A)(i)-(vii)). The contiguous property owner defense is an affirmative defense. As such, the current owner has the burden of proving every element of the defense by a preponderance of the evidence. § 221 (42 U.S.C. §9607(q)(1)(B)).
49. Brownfields Act § 221 (42 U.S.C. § 9607(q)(1)(A)(iii)).
II. THE PROBLEM OF PASSIVE MIGRATION: HOW THE EXISTING DOCTRINE ADDRESSES INTERIM OWNERS

Although CERCLA's strict liability scheme for contamination addresses many threats to human and environmental health, it does not clearly assign responsibility for contamination caused by passive migration. Until recently, the courts focused on assessing liability for passive migration of interim owners—those who purchased contaminated land after active disposal of waste on the property ceased and sold the property before the CERCLA action began. This doctrine serves as a backdrop to recent efforts to curb liability of neighbors for passive migration.

A. Are Interim Owners Liable for Contamination on Their Property?

Interim owners do not clearly fit within CERCLA's liability framework. They are not current owners. They are past owners, but they did not actively introduce contaminants into the environment, nor did they own the land when such disposal took place. However, they did own the land after it was contaminated, but neglected to address the existing contamination and prevent it from spreading on their property. The question facing courts in cases involving interim owner is whether CERCLA holds them responsible for the migration of pollution on their former property. While CERCLA's efficacy in cleaning up contaminated sites depends on broad assignments of liability, the text of the statute fails to clearly address the liability of interim owners.

The second category of potentially responsible defendants under CERCLA covers those defendants who owned the property at the time of disposal. The meaning of "disposal" is therefore the key to whether a defendant may be liable for cleanup of the property. CERCLA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing" of any solid or hazardous waste into or on the land or water. Courts must assess whether the spreading of contaminants through soil or groundwater meets this definition. If passive migration is considered a disposal under CERCLA, the "interim" owner would become an original owner subject to liability. Under this theory, the continued spreading of contaminants through the soil and groundwater constitutes new disposals of hazardous waste, for which the interim owner is liable. Most courts that have considered this issue agree that interim owners are not liable for passive migration because the definition of "disposal" does not include passive migration. They have reached this conclusion using two different approaches: (1) the active/passive distinction, and (2) the enumerated meanings approach.

51. 42 U.S.C. § 9607(a)(2); see supra Part I.A. (discussing the liability of past owners).
52. 42 U.S.C. § 9601(29) (incorporating the Solid Waste Disposal Act, 42 U.S.C. § 6903(3)).
B. The Definition of "Disposal" Excludes Passive Migration

1. The Active/Passive Distinction

Some courts make distinctions between active and passive terms to determine if passive migration is a disposal. Most of the terms in the statute used to define "disposal" are active, such as "injection," "deposit," and "placing."53 Looking to this common characteristic, the Third Circuit found that the definition of "disposal" requires human action.54 The court read the definition of "disposal" in the statute as listing the types of actions Congress had in mind when it assigned liability—all of which are active. Since passive migration by definition does not involve any human action, the court found that passive migration does not fall within the meaning of "disposal." Under this reading, interim owners would not be liable for passive migration because no prima facie case can be made against them.

Other courts have eschewed a rigid active/passive distinction in defining "disposal."55 They have found that human action is not necessary to the meaning of "disposal" since "spilling" and "leaking"—two terms Congress also used in the statute to define "disposal"—do not require such action.56 At least one dissent interpreted "deposit," another term in the definition of "disposal," to include the passive movement of contaminants through water and the surrounding soil.57 These courts have allowed for the possibility that some forms of passive migration may be a disposal under CERCLA.

2. The Enumerated Meanings Approach

In contrast to the active/passive approach, some courts read the statutory definition of "disposal" as providing an exhaustive list of the actions Congress considered disposals. Therefore, an action must fall within the enumerated meanings of "disposal" in order to be considered a disposal. The Ninth and Second Circuits followed this approach and found that the gradual spreading of contamination through soil did not fit any of the statutory definitions of "disposal."58 In contrast, the Fourth Circuit used this approach and found that the passive leaking of waste

53. United States v. 150 Acres, 204 F.3d 698, 706 (6th Cir. 2000).
54. E.g., United States v. CDMG Realty Co., 96 F.3d 706, 714 (3d Cir. 1996).
55. See, e.g., Carson Harbor Village, Ltd., v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001); ABB Industrial Systems, Inc., v. Prime Technology, Inc., 120 F.3d 351 (2d Cir. 1997).
57. Carson Harbor, 270 F.3d at 890 (Fletcher, B., concurring in part and dissenting in part).
from an underground storage tank did constitute disposal.\textsuperscript{59} Thus, passive migration may be disposal when it involves leaking or spilling from a specific container, such as an underground storage tank.\textsuperscript{60}

The active/passive and enumerated meanings approaches to fitting passive migration into the CERCLA liability system arose in the context of interim owners. Recently, the Second Circuit was presented for the first time with passive migration in the context of original neighbors—those who owned their land at the time that their neighbors actively disposed of waste.

III. LIABILITY OF ORIGINAL NEIGHBORS FOR PASSIVE MIGRATION: NIAGARA MOHAWK POWER CORPORATION V. JONES CHEMICAL, INC.

Courts have only recently been faced with determining liability of a neighboring owner in space—the original neighbor—for passive migration. These defendants were the neighbors of the original polluter at the time of contamination. They undoubtedly owned their land at the time of disposal. However, the disposal only reached their land by passive migration during their ownership. Importing the reasoning developed in the context of interim owners, the Second Circuit recently held in \textit{Niagara Mohawk Power Corp. v. Jones Chemical, Inc.} that original owners, like interim owners, are not liable for passive migration because no "disposal" occurred.\textsuperscript{61}

\textbf{A. Facts and Procedural History}

In \textit{Niagara}, the Second Circuit considered pollution of contiguous parcels on an industrial peninsula near Utica, New York. In 1961, Plaintiff Niagara Mohawk Power Company ("Niagara") sold a parcel on the peninsula to Defendant Mohawk Valley Oil ("Mohawk").\textsuperscript{62} Mohawk used the parcel to store gasoline and transfer fuel to trucks and barges.\textsuperscript{63} Niagara leased the contiguous parcel to Tar Asphalt Services ("TAS"), which engaged in manufacturing and laying asphalt.\textsuperscript{64} TAS used kerosene to clean the tar and asphalt from its trucks.\textsuperscript{65} When TAS rinsed off the trucks, the kerosene flowed downhill off the TAS parcel, traversed Mohawk's parcel, and ran into the harbor on the downhill side of Mohawk's parcel.\textsuperscript{66} Mohawk was aware of its neighbor's practice when Mohawk bought the property, and it completed a separator that caught

\begin{itemize}
\item \textsuperscript{59} See Nurad, 966 F.2d at 846.
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} 315 F.3d 171 (2003).
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.} at 174.
\item \textsuperscript{66} \textit{Id.} at 177.
\end{itemize}
the kerosene run-off and prevented it from entering the harbor a year after purchase.\textsuperscript{67} Three or four years later, Mohawk built a berm, a narrow ledge to catch run-off, along the property line between its parcel and the TAS parcel to stop the run-off from entering its parcel and the harbor.\textsuperscript{68} Mohawk ceased use of the property in 1977 and sold it in 1987.\textsuperscript{69}

Between 1989 and 1992, Niagara, as the "owner" of the TAS parcel for purposes of CERCLA, entered into four consent decrees with the State of New York that required cleanup of the peninsula and the harbor.\textsuperscript{70} Niagara brought suit for contribution from various owners and operators of manufacturing facilities on the peninsula, including Mohawk.\textsuperscript{71} Under one of Niagara's theories of liability, it alleged that Mohawk was liable for the kerosene from the TAS parcel that entered the harbor after traversing the property Mohawk leased.\textsuperscript{72} Niagara claimed Mohawk was an owner at the time of disposal because the movement of kerosene across Mohawk's property and into the harbor constituted disposal.\textsuperscript{73}

In an unpublished decision, the district court granted summary judgment for Mohawk on the CERCLA run-off claim, finding that Mohawk successfully availed itself of the third-party defense by taking measures to prevent the contamination from reaching the harbor.\textsuperscript{74} Critically, the district court assumed that Niagara established a prima facie case against Mohawk in reaching the third-party defense.\textsuperscript{75} The district court thus accepted Niagara's argument that passive migration of kerosene across Mohawk's parcel constituted a disposal, bringing Mohawk into the category of defendants who owned land at the time of disposal.

\textbf{B. Second Circuit Opinion}

On appeal, the Second Circuit upheld the grant of summary judgment but on different grounds.\textsuperscript{76} Rather than deciding whether

\begin{itemize}
\item \textsuperscript{67} Id. at 174-75.
\item \textsuperscript{68} Id. at 175.
\item \textsuperscript{69} Id. at 174.
\item \textsuperscript{70} Id. at 175.
\item \textsuperscript{71} Id. Niagara settled with the other defendants, leaving only its claims against Mohawk.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. at 177. A Phase I investigation did not uncover any evidence that Mohawk was the original source of any hazardous waste. Id. at 174.
\item \textsuperscript{74} Id. "The district court granted summary judgment for [Mohawk] on the ground that [Mohawk's] construction of a separator and a protective berm satisfied the precautionary and 'due care' requirements of the statutory third-party defense under CERCLA." Id.; see supra Part I.B.1. (describing the third-party defense).
\item \textsuperscript{75} See supra Part I.A. (describing the elements of liability).
\item \textsuperscript{76} Id. at 177-78.
\end{itemize}
Mohawk successfully raised the third-party defense, the court concluded that Niagara failed to establish a prima facie case against Mohawk. The Second Circuit reasoned that Mohawk was not within any of the four classes of defendants liable under CERCLA. As in the interim owner cases, the meaning of "disposal" was crucial to the Second Circuit's conclusion. Drawing on the interim owner doctrine, the Second Circuit concluded that the kerosene run-off was not a "disposal."

Applying the passive/active distinction, the court concluded that most of the meanings of "disposal" in the statute require that human agency set the contamination in motion. The court found that the movement of waste across the surface of Mohawk's property was passive, and consequently the definitions of "disposal" could not encompass this movement. The court also noted that one of the enumerated terms in the definition of "disposal"—"leaking"—seemed to be passive. It found, however, that leaking requires a containment through which the material passes. The court reasoned that property lines do not provide such containment, and therefore the movement of waste across Mohawk's property could not be characterized as "leaking." Applying the reasoning of the interim owner cases, the Second Circuit found that passive migration of hazardous waste across the surface of a property was not a disposal and exempted Mohawk from liability.

IV. LIABILITY OF CURRENT OWNERS FOR PASSIVE MIGRATION: CASTAIC LAKE WATER AGENCY V. WHITTAKER CORPORATION

Passive migration also complicates the liability question for current owners of contaminated land—those who did not create the original disposal but now own the site where the contamination originated. These property owners fall under the first category of liable defendants as "current owners . . . of a facility." In contrast to the liability of past owners of a facility.

77. Id. at 177-79.
78. Id. at 178-79; see supra Part I.A. (describing the classes of liable defendants).
79. Niagara, 315 F.3d at 178.
80. Id.
81. Id.
82. Id. Thus, in order to "leak," the waste must move from a vessel (such as a barrel, drum or bucket), into the soil or groundwater. The waste cannot simply move from one area of soil to another. The court relied on a dictionary definition rather than any precedent for this conclusion. Id. Yet this distinction reconciles Nurad, which found liability for movement of chemicals from an underground storage tank (a definite container) into the soil, with Carson Harbor and similar cases, which withheld liability for movement of chemicals through the soil rather than any definite container. Compare Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992) with Carson Harbor Village, Ltd., v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001); ABB Industrial Systems, Inc., v. Prime Technology, Inc., 120 F.3d 351 (2d Cir. 1997).
83. Id. at 178-79.
84. Id. at 179.
85. 42 U.S.C. § 9607(a)(1); see supra Part I.A. (describing liability of current owners).
owners discussed above, "disposal" is not a factor in establishing liability for current owners. Rather, "release" is the operative term because liability attaches to the current owner of a facility "from which there is a release, or a threatened release." The holdings in the interim and original neighbor cases discussing the meaning of "disposal" are nonetheless relevant because they consider "disposal" in contrast to "release." The court in the Central District of California recently found in *Castaic Lake Water Agency v. Whittaker Corporation* that a current owner may be liable for passive migration under CERCLA, basing its decision on the expansive definition of "release" developed in interim owner cases.

A. Facts

In *Castaic*, the district court considered a case of ground water pollution in the Santa Clarita Valley of Southern California. Defendant Whittaker Corporation ("Whittaker") owned the Whittaker-Bermite site from 1967 to 1999. Whittaker-Bermite used the site to manufacture munitions and explosives until 1987. Whittaker disposed of industrial waste containing the chemical perchlorate in burn-pits at the site, and perchlorate chemicals periodically spilled onto the ground. In 1999, Whittaker sold the property to the defendant Santa Clarita L.L.C., which planned to build a housing development on the site. Plaintiffs Newhall County Water District, Santa Clarita County Water Company, and Valencia Water Company ("the water districts") are the current owners of water wells downstream of the Whittaker-Bermite site. The water districts alleged that perchlorate migrated through groundwater from the Whittaker-Bermite site and contaminated four of their water wells.

The water districts brought suit under CERCLA against Whittaker and Santa Clarita for cost recovery, contribution, and declaratory relief. The water districts argued that Whittaker was liable as the owner of the Whittaker-Bermite site at the time of the perchlorate disposal and that

---

86. 42 U.S.C. § 9607(a)(1), (4) (emphasis added).
88. Id. at 1058.
89. Id. at 1061.
91. Id. at 1057-58. Remediation Financial, Inc. ("RFI") is the sole managing member of Santa Clarita L.L.C. Id.
92. Id. at 1058.
93. Id.
94. Id. at 1057; 42 U.S.C. § 9607(a), 9613(f), (g).
Santa Clarita was liable as the current owner of the original site of contamination. In an interesting twist, the defendants counterclaimed for declaratory judgment and contribution, alleging that the water districts were also liable as the current owners of the contaminated wells. Although the contamination originated on the defendant's property, Whittaker contended that the water districts were liable for the passive migration of the perchlorate through the water district property because the movement constituted a release, thereby triggering current owner liability under CERCLA. Whittaker further claimed that the water districts' pumping of the wells drew the perchlorate through the ground towards the wells, thereby barring the water districts from a third-party defense.

B. District Court Opinion

On summary judgment, the district court found Whittaker and Santa Clarita liable under CERCLA for necessary and consistent response costs incurred by the water districts. Moreover, the court found that the defendants had established a prima facie case against the water districts plaintiffs because "release" included passive migration. The court also found, however, that the water districts presented sufficient evidence to create a triable issue on their innocent purchaser defense.

In order to establish the water districts' liability as a "current owner," the defendants had to establish that: "(1) perchlorate is a hazardous substance; (2) there has been a release of perchlorate at the [water districts'] facilities; (3) the release caused Whittaker to incur necessary response costs consistent with the NCP; and (4) [the water districts] are proper CERCLA defendants." The critical issue was whether passive migration falls under CERCLA's definition of "release."

CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching,
dumping, or disposing into the environment." The district court turned to the interim owner cases that discuss the meaning of "disposal" to determine whether passive migration fit within this definition of "release." The leading interim owner cases compared "release" to "disposal" in defining the latter term and concluded that "release" is considerably broader than "disposal." This reading is based in part on the textual argument that the statutory definition of "release" includes the term "disposal," as well as several other terms. Although the court agreed that "release" is broader than "disposal," it held that further evidence was necessary to establish that "release" is sufficiently broad to encompass passive migration.

Relying in part on the Ninth Circuit's decision in Carson Harbor, the district court focused on the term "leaching," which is part of the definition of "release." In dicta, the Carson Harbor court suggested that "leaching" is an apt description of passive migration because leaching occurs without any human action. The district court agreed that passive migration was indeed leaching and therefore fell within the meaning of "release." Thus, the water districts were liable parties based on the release of perchlorate on their property. Although the district court accepted Whittaker's passive migration theory of liability, it did not grant summary judgment for Whittaker because it found that the water districts presented sufficient evidence to create a genuine issue on their innocent landowner defense.

IV. ANALYSIS

These cases create different liability standards for neighbors depending on when they owned the land. Past owners, whether original or interim, will usually not be liable for passive migration unless the contamination can be characterized as "leaking" or "spilling." On the other hand, current owners usually will be liable for passive migration unless they can establish an affirmative defense. The idea that a landowner who is essentially a victim of his neighbor's disposal of waste

107. Castaic, 272 F. Supp. 2d at 1077; ABB Industrial Systems, 120 F.3d at 358; CDMG Realty, 96 F.3d at 715; Carson Harbor, 270 F.3d at 878.
109. Id.
110. Carson Harbor, 270 F.3d at 878-79. Following similar logic, see ABB Industrial Systems, 120 F.3d at 358; CDMG Realty, 96 F.3d at 715.
112. Id. at 1085.
could be liable at first seems strange and unfair. Yet this system ensures that neighbors will cooperate in cleanups. Furthermore, it will usually not work an injustice due to the availability of affirmative defenses and equitable principles of cost allocation among responsible parties. Unfortunately, the narrow definition of "disposal" in the interim owner cases and *Niagara* rewards past neighbors for ignoring the spreading pollution on their land and allows current owners to escape all responsibility by just selling their land (thereby becoming past owners).

A. *The Consequences of Excluding Past Owners from Liability for Passive Migration*

The result in *Niagara*—excluding original neighbors from liability for passive migration—follows fairly directly from the interim owner cases. It would be incongruous to define "disposal" differently for interim owners and original neighbors. The application of the narrow definition of "disposal" to cases like *Niagara*, however, demonstrates problems with this approach that are not apparent in the interim owner context.

1. *A Narrow Definition of "Disposal" Relieves Neighbors of Any Accountability for Pollution Moving Through Their Property*

The principal problem revealed by *Niagara* is that a narrow meaning of "disposal" allows original neighbors to sit back and do nothing while hazardous waste flows across their property and into the environment. This disincentive does not arise in the context of interim owners because they acquired their interest in the land after active disposal of hazardous waste ceased. Thus, interim owners cannot do anything to prevent the original contamination (although they could take steps to prevent further spreading). Original neighbors are in a different position because they own their land while their neighbors are dumping waste. They could take actions to stop their neighbors from dumping. By exempting them from

113. Attempting to introduce equity into CERCLA, a remedial statute, may itself be a mistake. *See Andrea Ruiz-Esquide, Carson Harbor Village v. Unocal Corporation: Using Background Principles to Solve CERCLA’s Ambiguities?, 30 ECOLOGY L.Q. 473 (2003)* (noting problems when the courts attempt “to solve CERCLA’s interpretive riddles using traditional notions of fairness, causation, and individual responsibility”).

114. Since the owner is not facially liable, she does not need to comply with any of the due care and reasonable steps required of those who can only escape liability through an affirmative defense. *See supra* Part I.A, B.

115. *See supra* Part II.


117. For example, the landowner could build a berm to stop the flow of waste, report the pollution to the appropriate authorities, or bring a trespass or nuisance action in court.
liability, however, the courts remove an incentive for the neighbor to get involved.

If the definition of "disposal" included passive migration, however, Mohawk and other similarly situated landowners would only escape liability by qualifying for a third-party defense. That defense requires due care and precautions against foreseeable acts of third parties. In order to avoid liability, neighbors would therefore have to report the pollution and take immediate action to stop the pollution from spreading through their property. Such an incentive would advance CERCLA's goal of encouraging the timely cleanup of hazardous waste.

2. A Narrow Definition of "Disposal" Renders Part of the Brownfields Act Redundant

The Brownfields Act reveals Congress’s intent to obligate neighbors to act with due care towards pollution moving through their property. The Act's contiguous property owner defense protects owners from liability if their neighbor is the sole source of the contamination of their land. This scheme indicates that, but for the defense, Congress intended for past owners to be subject to liability for passive migration.

Under Niagara's narrow reading of "disposal," which does not include passive migration, original and interim owners can never be liable. A prima facie case cannot be made out against them. Original and interim owners would therefore never raise the contiguous property owner defense provided in the Act, although by the Act’s terms they should. If "disposal" does not include passive migration, the courts at best have rendered a provision of the Act without meaning and at worst have interpreted the Act contrary to Congress's intent.

3. A Narrow Definition of "Disposal" Moves Closer to the Polluter Pays Principle

While the narrow reading of disposal in Niagara may create disincentives for neighbors to act with due care and may render portions of the Act irrelevant, the narrow definition is consistent with the polluter pays principle. Recent cases and the Act move toward a system of liability where the only party liable for cleanup is the party who owned

118. 42 U.S.C. § 9607(b)(3)(a), (b); see supra Part I.B.
120. See supra Part I.B.4. (describing the contiguous property owner defense).
121. Id.
the land when the hazardous waste was first disposed on the property.\textsuperscript{123} While not a strict polluter pays principle,\textsuperscript{124} it comes close by limiting liability to the person who owned the land and may have controlled and benefited from the use of hazardous waste on that land. In most cases, these developments advance the polluter pays principle.

**B. The Consequences of Holding Current Owners Liable for Passive Migration**

Under the broad definition of "release" adopted by the district court in \textit{Castaic}\textsuperscript{125} and suggested by the Second,\textsuperscript{126} Third,\textsuperscript{127} and Ninth Circuits,\textsuperscript{128} current owners of land contaminated by passive migration will usually be unable to defeat a prima facie case of liability by contesting the occurrence of a release on their property.\textsuperscript{129} In some sense, the outcome is unfair by penalizing the victim—a landowner who had nothing to do with the hazardous waste and whose land was damaged by the spreading waste. Yet the availability of affirmative defenses, the ability of courts to apportion damages among responsible parties, and the need for current owners to cooperate in the cleanup all mitigate this outcome. The Brownfields Act also indicates Congress's intent to apply liability in this way.

1. **Defenses and Apportionment of Liability Create Fairness With a Broad Definition of "Release"**

Although a current owner of land contaminated by passive migration will often be facially liable, affirmative defenses and cost allocation among responsible parties ensure fair treatment of innocent victims of spreading pollution. As in \textit{Castaic}, the innocent landowner defense can operate to shield current owners from liability for passive migration.\textsuperscript{130} Innocent owners will escape liability if they use due care when they discover contamination on their land.\textsuperscript{131} This outcome is desirable

\begin{itemize}
\item \textsuperscript{123} Past owners are not liable for passive migration; only the owner who allowed active disposal on her land is liable. \textit{See supra} Parts II, III. Current owners escape liability by way of an affirmative defense. \textit{See supra} Part IV.
\item \textsuperscript{124} It is possible that another person dumped the chemical on the owner's land without her knowledge or approval. Under the existing liability scheme, she would still be liable even though she is not the polluter.
\item \textsuperscript{125} 272 F. Supp. 2d 1053, 1076-77 (C.D. Cal. 2003).
\item \textsuperscript{126} ABB Industrial Systems, Inc., v. Prime Technology, Inc., 120 F.3d 351, 358 (2d Cir. 1997).
\item \textsuperscript{127} United States v. CDMG Realty Co., 96 F.3d 706, 714-15 (3rd Cir. 1996).
\item \textsuperscript{128} Carson Harbor Village, Ltd., v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001).
\item \textsuperscript{129} \textit{See supra} Part IV.
\item \textsuperscript{130} \textit{Castaic} at 1079-84. In addition, the third-party defense and the contiguous owner defense may protect an innocent landowner. \textit{See supra} Part I.B.1, 4.
\item \textsuperscript{131} \textit{See supra} Part I.B.2.
\end{itemize}
because it protects landowners, human health, and the environment. Even if a court denies the defense, these innocent owners have the right to sue other responsible parties and assert legal and equitable theories of cost allocation.¹³²

2. A Broad Definition of “Release” Requires Neighbors’ Cooperation in Cleanup

Requiring cooperation of innocent owners in cleanup is fair and necessary to achieve the aims of CERCLA. In most situations, owners will want to cooperate because cleaning up the contamination may improve their use of the property.¹³³ Yet Congress anticipated that this will not always be true, and it inserted provisions in all of the affirmative defenses to encourage cooperation in cleanup.¹³⁴ Cooperation by current property owners advances the purpose of CERCLA to promptly clean up hazardous waste.

3. A Broad Definition of Release Can Be Consistent with the Brownfields Act

The contiguous property owner defense in the Brownfields Act creates a snag in the system of liability for current owners worked out by the courts. Although this defense applies by its terms to current owners,¹³⁵ it may be out of reach for current owners whose land is contaminated by passive migration. This is because it requires that the “release or threatened release of a hazardous substance” come from “real property that is not owned by [the] person [asserting the defense].” Under the broad definition of “release” adopted in Castaic, current owners of land contaminated by passive migration could not assert the defense because there is a “release” from their property.¹³⁶ Courts can resolve this problem by interpreting the statute to find that although a release on the defendant’s property occurred, the defendant’s land was not contaminated by this release but by a release from the source site. The

¹³² United States v. Monsanto, 858 F.2d 160, 173 (4th Cir. 1988). Indeed, the court need not assign any of the costs to a responsible party. E.g., Kalamazoo River Study Group v. Rockwell Int’l Corp., 274 F.3d 1043 (6th Cir. 2001) (upholding decision not to allocate any response costs to defendant who released only a small volume of PCBs into river when compared to the large amounts released by the plaintiffs); see Douglas McWilliams, District Courts Can Inject Some Fairness Into CERCLA Liability Scheme, 33 ENV’T REP. 663 (2002).

¹³³ The cleanup will remedy any damages to the owner’s property caused by the hazardous waste.

¹³⁴ See supra Part I.B.

¹³⁵ See supra Part I.B.4 (describing the contiguous property owner defense).

terms of the defense would thus make sense and not render the defense void.

CONCLUSION

Overall, the holdings in *Niagara* and *Castaic* are consistent with trends establishing an exemption from CERCLA liability for passive migration. The conflict arises in the manner in which that exemption is given. In the context of original and interim owners, the courts have defined "disposal" in such a way that a prima facie case cannot be made out based on passive migration. Yet Congress indicated in the Brownfields Act that it only intended these owners to escape liability for passive migration through successfully asserting an affirmative defense. This line of cases therefore contradicts congressional intent and removes an incentive for owners to act affirmatively to mitigate pollution that enters their property. In the context of current owners, the broad definition given to "release" is largely consistent with congressional action and the purpose of encouraging owners to respond to contamination on their property. Interpretation of new provisions in the Brownfields Act should be consistent with this strategy.