Carson Harbor Village v. Unocal Corporation: Using Background Principles to Solve CERCLA's Ambiguities?

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In Carson Harbor Village v. Unocal Corporation the Ninth Circuit held that "disposal" under CERCLA does not encompass passive migration of contaminants. This Note suggests that the decision can be understood in the context of widespread criticism of CERCLA's liability provisions. It proposes that the court attempted to infuse a concept of fairness into the statute that is antithetical to its broad remedial purpose. It claims, finally, that it would have been preferable for the court to hold, as the dissent did, that "disposal" does encompass passive migration.

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| INTRODUCTION |

In Carson Harbor Village v. Unocal Corporation, the Ninth Circuit Court of Appeals, en banc, faced a question that had split courts around the nation for a decade: whether “disposal” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) encompasses passive migration of contaminants. The court, engaging in a textual analysis of the words used in the statutory definition of “disposal,” and considering the statute’s purpose and legislative history, concluded that it does not. However, three judges signed an impassioned dissent, following the same approach as the majority, in which they reached the opposite conclusion.

This Note suggests that traditional tools of statutory interpretation are inadequate to understand the bases of the court’s decision. Under the premise that interpretation is a dynamic enterprise where judges necessarily resort to background principles to elicit the meaning of vague provisions in statutes, this Note argues that the court’s holding may be explained in light of the widespread criticism of CERCLA’s liability provisions. It proposes that the court attempted to infuse a concept of fairness into CERCLA that is antithetical to its broad remedial purpose, and suggests that, if courts must use such background principles to interpret vague provisions in the statute, it would be better to resort to

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1. 270 F.3d 863 (9th Cir. 2001).
the canon of interpretation that calls for liberal construction of remedial legislation.

I. BACKGROUND

A. Legal Landscape

CERCLA, commonly known as Superfund, was enacted in 1980, during the final days of the Carter administration. The political pressure for such a bill had grown throughout the 1970s, as a result of the dramatic discovery of a series of abandoned hazardous waste sites around the country – including Love Canal and the Valley of the Drums. Congress intended CERCLA to force the clean-up of abandoned hazardous wastes sites that posed a risk to public health or the environment. To achieve this end, it authorized the Environmental Protection Agency (EPA) to clean-up waste sites and then recover costs from parties responsible for the waste creation. Additionally, EPA can order these “potentially responsible parties” (PRPs) to undertake the clean-up themselves. Congress also authorized cost recovery actions by private parties who have spent money cleaning up hazardous waste sites.

In order to recover costs, a plaintiff seeking contribution from a liable party must prove “(1) that hazardous substances were disposed of at a ‘facility’; (2) that there has been a ‘release’ or ‘threatened release’ of hazardous substances from the facility into the environment; (3) that the release or threatened release has required or will require the expenditure of ‘response costs’; and (4) that the defendant falls within one of four categories of responsible parties.” If these requirements are met,


3. See JAMES O'REILLY ET. AL., RCRA AND SUPERFUND: A PRACTICE GUIDE WITH FORMS, 9-2 (2001); Frank P. Grad, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability (“Superfund”) Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982). Love Canal was an area near Niagara Falls where chemical companies dumped more than 21,000 tons of hazardous waste during the 1940s and 1950s. The area was later developed for residential use. Upon discovery of the extent of the contamination, the government relocated over 700 families and destroyed or boarded up their homes. See U.S. v. Hooker Chemicals & Plastics Corp., 680 F.Supp. 546, 549 (W.D.N.Y. 1988). The Valley of the Drums was a seven-acre site near Louisville, Kentucky where the EPA discovered 17,000 abandoned drums, six thousand of which were leaking toxic substances. See Nova Chem., Inc. v. GAF Corp., 945 F.Supp. 1098, 1101 n.4 (E.D. Tenn. 1996).


5. Id.

6. Id. § 9613(f)(1).

responsible parties are held strictly liable, regardless of their fault. In addition, courts have construed CERCLA to impose joint, several and retroactive liability on all parties deemed responsible. Congress provided few affirmative defenses in the statute. As described in Section 9607(b) of CERCLA, liability does not attach if the release or threatened release was caused by

(1) an act of God; (2) an act of war; (3) 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, existing directly or indirectly, with the defendant.

Six years after CERCLA’s original enactment, in the Superfund Amendment and Reauthorization Act (SARA) of 1986, Congress expanded and clarified the third-party defense available under Section 9607(b)(3). Among other things, SARA added a new “innocent landowner defense.” To qualify and thereby escape CERCLA liability, a defendant must show that he acquired the property after the “disposal or placement” of hazardous substance in or on it, and that he had no reason to know of any hazardous substances on the property.

Much CERCLA litigation has centered on whether the defendant fits one of the classes of persons subject to liability under Section 9607(a). Under Section 9607(a)(1), any current owner or operator is potentially liable, regardless of whether the substances were disposed of at the site during its tenure. Section 9607(a)(2), in contrast, does not

8. 42 U.S.C. § 9601(32) states that “liability” under CERCLA “shall be construed to be the standard of liability under section 1321 of Title 33.” Courts have interpreted this section to impose strict liability. See CDMG Realty, 96 F.3d at 712; 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990). See generally New York v. Shore Realty Corp., 759 F.2d at 1032, 1042 (2d Cir. 1985) (discussing CERCLA’s legislative history).

9. See United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988) (“While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm”); Environmental Protection Agency v. Olin, 107 F.3d 1506, 1511-1515 (11th Cir. 1997) (holding that CERCLA applies to preenactment releases of hazardous wastes).


13. Id.

14. That section lists four types of potentially responsible parties:

(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged... for transport for disposal or treatment, of hazardous substances... and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person.

apply to all previous owners or operators, but only to those that owned or operated the facility "at the time of disposal." Thus only current landowners and those who owned the land during disposal are potentially liable. "Disposal" is defined in CERCLA by reference to the Resource Conservation and Recovery Act (RCRA), which provides that

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air and discharged into any waters, including ground waters.

The exact meaning of disposal's definition, as applied to previous owners of contaminated sites, has been the focus of considerable debate and litigation. A key question is whether this definition encompasses passive migration of contaminants – for example, where a landowner does not actively participate in the disposal of contaminants, but in whose lands pollutants are nevertheless seeping through the ground. In 1992, the Fourth Circuit was the first appellate court to decide whether this kind of passive migration constitutes "disposal" under CERCLA. In Nurad, Inc. v. William Hooper & Sons Co., the district court found that "disposal" necessarily contemplated some element of active participation and granted defendant summary judgment on the grounds that it was not an owner "at the time of disposal." The Court of Appeals disagreed. It noted that the statute defines "disposal" using both active and passive verbs, and that the district court had "arbitrarily deprived these words of their passive element." It stressed that basing liability only on active conduct would frustrate the broad remedial purposes of the statute.

While some commentators interpreted Nurad as a major victory for the passive interpretation of "disposal," that same year another decision explicitly rejected Nurad, and opened the door to an interpretation of "disposal" that requires action on the part of the disposer. In United States v. Petersen Sand and Gravel, Inc., the district court for the Northern District of Illinois acknowledged that while the words used in the statutory definition of "disposal" can be interpreted both actively and

15. Id. § 9607(a)(2).
16. Id. § 9601(29).
19. Id. at 845.
20. Id. at 845-846 (noting that under the active interpretation an owner could avoid liability simply by standing idle while an environmental hazard festers on his property).
passively, "neither [of these positions] is dispositive." The court noted that "the rest of the definition requires that in order for an event to be a 'disposal,' the event must be one such that waste 'may enter the environment or be emitted into the air or discharged into any waters.' The court concluded that "the inescapable conclusion is that giving 'disposal' a passive meaning controverts the plain language of CERCLA." Petersen Sand was very influential. Its reasoning was followed by the Third Circuit in its 1996 opinion, United States v. CDMG Realty Co. In that case, the court found that the kind of passive migration at issue – the slow spreading of wastes in a landfill due to rain, groundwater movement, and wind – did not constitute disposal under CERCLA. The court based its conclusion on the language of the statute and on CERCLA's liability scheme and purposes. It declined to address, however, "whether the movement of contaminants unaided by human conduct can ever constitute 'disposal." Soon after, the Second Circuit joined the Third Circuit in rejecting Nurad's passive interpretation of "disposal." The Sixth Circuit followed. Until recently, although district courts within the Ninth Circuit had reached opposite conclusions on whether passive migration of contaminants constitutes "disposal" under CERCLA, the Ninth Circuit had addressed the question only indirectly. In Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., it held that the dispersal of contaminated soil during the excavation and grading of a development site constituted disposal. In 3550 Stevens Creek Associates v. Barclays

23. Id.
24. Id. at 1352.
26. Id. at 711.
27. ABB Industrial Systems, Inc. v. Prime Technology, Inc., 120 F.3d 351, 359 (2d Cir. 1997) (holding that "prior owners and operators of a site are not liable under CERCLA for mere passive migration").
28. See United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (holding that in the absence of any evidence that there was human activity involved in the movement of hazardous substances on the property, defendants had not "disposed" of hazardous substances).
29. Compare Ecodyne Corp. v. Shah, 718 F.Supp. 1454, 1456-57 (N.D. Cal. 1989) (interpreting "disposal" in CERCLA as "only providing an action against prior owners or operators who owned the site at the time the hazardous substances were introduced into the environment") with Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 663 (E.D. Cal. 1990) (holding that "disposal" includes passive migration).
30. Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342-43 (9th Cir. 1992), following Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir.1988) (reasoning that "Congress did not limit the term to the initial introduction of hazardous material onto property. Indeed, such a crabbled interpretation would subvert Congress's goal that parties who are responsible for contaminating property be held accountable for the cost of cleaning it up").
Bank, on the other hand, it held that “disposal” for purposes of Section 9607(a)(3) refers only to “an affirmative act of discarding a substance as waste not to the productive use of the substance.”

Carson Harbor Village, Ltd. v. Unocal Corporation presented the court directly with the issue that had been so vehemently litigated in other circuits.

B. Carson Harbor Village v. Unocal: Facts and Procedure

Carson Harbor Village, Ltd. (Carson Village) is the owner and operator of a mobile home park on seventy acres in the city of Carson, California. From 1977 to 1983, Carson Harbor Village Mobile Home Park, a partnership controlled by Richard G. Braley and Walker Smith (the Partnership defendants) owned the property. From 1945 to 1983, the Unocal Corporation (Unocal) owned a leasehold interest in the property and used it for petroleum production. Unocal operated a number of wells, pipelines, above-ground storage tanks, and production facilities. A wetlands area traverses the property with a downward slope from the northeast to the southwest. Storm water and urban water runoff drain into the wetlands from properties located in the adjacent cities of Carson and Compton and from unincorporated areas within the City of Los Angeles (the Government defendants). California Highway 91, which is operated by the California Department of Transportation (Caltrans) is also located immediately upstream from the property. Runoff from approximately three miles of the highway drains into the wetlands.

In 1993, Carson Village discovered tar-like and slag materials on the property. Investigations revealed that these hazardous substances, which contained elevated levels of petroleum hydrocarbons and lead, were by-products of petroleum production and had been on-site for decades prior to its development as a mobile park. Carson Village reported these findings to the appropriate agencies and undertook clean-up efforts under the leadership of the Regional Water Quality Control Board (RWQCB). The RWQCB approved Carson Village’s remedial action program (RAP), but required it to bring down the contamination to

31. 3550 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d 1355, 1362 (9th Cir. 1990) (holding that there was no “disposal” of asbestos in a building when it was installed as insulation and as a fire retardant).
33. id.
34. Id.
35. id.
36. id.
37. id.
38. id.
levels lower than what Carson Village had initially proposed.\textsuperscript{39} The tar-like and slag materials were removed in 1995.\textsuperscript{40} The RWQCB then sent Carson Village a closure letter, stating that it considered the clean-up complete, and that no further action was required.\textsuperscript{41}

In 1997, Carson Village brought suit under CERCLA, RCRA, the Clean Water Act (CWA) and state common law against the Partnership defendants, the Government defendants and Unocal, to recover its clean-up costs, which totaled approximately $285,000.\textsuperscript{42} According to Carson Village, Unocal was responsible for dumping the tar-like and slag materials on the property; the Partnership defendants were liable as past owners of the property, and the Government and Caltrans were liable for lead on the property that resulted from lead-contaminated storm water runoff.\textsuperscript{43} The district court granted the defendants' summary judgment motions on all claims except state common law claims asserted against Unocal.\textsuperscript{44} It held that the Partnership defendants were not PRPs within the meaning of Section 9607(a)(2) because "disposal warranting CERCLA liability requires a showing that hazardous substances were affirmatively introduced into the environment."\textsuperscript{45} With respect to the storm water runoff, it held that "there was no direct evidence that any lead-contaminated storm water entered the property at any time before 1983, when Carson Harbor purchased the property."\textsuperscript{46} Carson Village appealed.

The Ninth Circuit Court of Appeals, in an opinion written by Judge Betty Fletcher, reversed, holding that the term "disposal" in the definition of PRPs includes passive migration of hazardous substances.\textsuperscript{47} Defendants petitioned for and were granted en banc review.

\begin{itemize}
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 869.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Carson Harbor Village, Ltd. v. Unocal Corp., 990 F. Supp. 1188 (C.D. Cal. 1997)
\item \textsuperscript{45} Carson Harbor Village, Ltd., v. Unocal Corp., 270 F.3d 863, 869 (9th Cir. 2001) (citing Carson Harbor Village, Ltd. v. Unocal Corp., 990 F. Supp. 1188, 1195 (C.D. Cal. 1997)). The district court also held that Carson Village's CERCLA claims failed because it had not proven that its remedial action was "necessary" under 42 U.S.C. § 9607(a)(4)(B). The district court granted summary judgment on the RCRA claim because it found that "the evidence shows that there was no imminent danger" to human health and the environment - a required element for a RCRA claim. \textit{Id.} at 1196. On the CWA claim, the court found that there was no evidence that defendants had violated a National Pollutant Discharge Elimination System permit, as required by a CWA violation. \textit{Id.} at 1197. With respect to the common law claims of nuisance, trespass and injury to easement against the Government defendants, the court held that CAL. CIV. CODE § 3482, which states that nothing done pursuant to express statutory authority constitutes nuisance, provided a complete defense. \textit{Id.}
\item \textsuperscript{46} Carson Harbor Village, 990 F. Supp. at 1197.
\item \textsuperscript{47} Carson Harbor Village v. Unocal Corp., 227 F.3d 1196, 1197 (9th Cir. 2000).
\end{itemize}
II. CARSON HARBOR VILLAGE: THE EN BANC APPELLATE DECISION

The Ninth Circuit Court of Appeals, en banc, in an opinion written by Circuit Judge McKeown, reversed the panel opinion.\(^\text{48}\) To decide whether the kind of contamination that occurred in Carson Village’s property during the ownership of the Partnership defendants constituted a “disposal” under CERCLA, the court first engaged in a textual analysis of the statutory definition of that term. The court acknowledged that there was ample disagreement among the circuits on the issue,\(^\text{49}\) and noted that it was an issue of first impression in the Ninth Circuit.\(^\text{50}\)

Analyzing the plain meaning of the terms in the statutory definition of “disposal,” the court noted that many of the terms in the definition have both passive and active meanings. It proposed that “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 to determine whether the movement of contaminants is, under the plain meaning of the terms, a ‘disposal’.”\(^\text{51}\) The court described the contamination on Carson Village’s property as moving slowly through the soil—a movement that according to the court can be characterized as “spreading,” “migration,” “seeping,” “oozing,” but not as “discharge... injection, dumping... or placing.”\(^\text{52}\) Similarly, it found that the gradual spread of the pollutants here could not be “characterized as ‘deposit,’ because... the term ‘deposit’ does not encompass the gradual spread of contaminants.”\(^\text{53}\) It discarded as well the term “leaking,” because “under the plain and common meaning of the word, we conclude that there was no ‘leaking’.”\(^\text{54}\) The court concluded from this plain meaning analysis that the terms in the statutory definition of “disposal” “simply do not describe the passive migration that occurred here.”\(^\text{55}\) Importantly, though, it acknowledged the possibility that, under other circumstances, “spilling,” “leaking,” or other terms within the statutory definition of “disposal” might encompass passive migration.\(^\text{56}\)

The court then analyzed CERCLA’s purpose to determine whether its interpretation of the plain meaning of “disposal” was in accordance with the statute as a whole. It stated that CERCLA’s “dual purposes”

\(^{48}\) Carson Harbor Village, 270 F.3d at 888.

\(^{49}\) Id. at 875 (noting that “these opinions cannot be shoehorned into the dichotomy of a classic circuit split. Rather, a careful reading of the holdings suggests a more nuanced range of views, depending in large part on the factual circumstances of the case”).

\(^{50}\) Id. at 875.

\(^{51}\) Id. at 879.

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id. at 880.
are "(1) to ensure the prompt and effective clean up of waste disposal sites, and (2) to assure that parties responsible for hazardous substances [bear] the cost of remediing the conditions they created." The Court found that its plain meaning interpretation of disposal was consistent with CERCLA as a whole because (1) it "made sense" within the liability provisions of CERCLA, (2) it preserved the scope and the role of the defenses established by Congress, and (3) it was consistent with CERCLA provisions that administer the allocation of liability among PRPs.

Having reached its conclusion by analyzing the "plain meaning" and the "dual purpose" of the statute, the court next engaged in a limited analysis of its legislative history, with the narrow purpose of ensuring "that there is no contrary legislative intent." The court acknowledged that "any inquiry into CERCLA's legislative history is somewhat of a snark hunt," since "CERCLA was an eleventh-hour compromise hastily assembled." It nevertheless cited testimonies from members of Congress showing that a strong concern behind the enactment of the bill was the passive spillage or leakage of hazardous wastes from abandoned sites. It reviewed the legislative history of SARA, particularly that of the innocent landowner defense, and concluded that "the legislative history... does not contradict the plain meaning interpretation of 'disposal.'"

III. DISCUSSION

A. Analyzing the Decision in Legal and Historical Contexts.

An analysis of Carson Harbor Village can take several approaches. It can proceed as an internal, purely legal critique of the decision, which was the approach taken by the dissent. One could also attempt a deeper examination and look at the fundamental assumptions underlying the court's opinion. The following section will attempt the former, while the remainder of this note will undertake the latter.

57. Id. (citing Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997)).
58. See id. at 880-884.
59. Id. at 884.
60. Id. at 885.
61. Id. at 885-886.
62. Id. at 887.
1. Internal Critique: The Equivocal Search for Certainty

It could be argued that the majority's "plain meaning" analysis of the words in the definition of "disposal" is conclusory. The court tells us that words used in the definition "simply do not describe the passive migration that occurred here."\(^6\) As the dissent shows, however, even from a purely textual perspective words often have multiple, nuanced meanings, making efforts to ascertain their "plain meaning" far from evident.\(^6\) The court's cursory rejection of the terms "deposit" and "discharge," without engaging in a more detailed textual analysis, seems to ignore these dangers and appears to be overly results-driven.

The dissent, written by Judge B. Fletcher and joined by Judges Pregerson and Paez, responded to each of the arguments advanced by the majority in its own terms. Judge Fletcher rejected the court's "plain meaning" interpretation by engaging in some "plain meaning" interpretation of her own. She found that the common meaning of the term "deposit," one of the terms used in the statutory definition of "disposal," "exactly describes the spread of hazardous waste throughout the wetlands: the wastes were carried by the water flowing through the wetlands and deposited in the surrounding soil."\(^6\)

The dissent also focused on the dual purposes of the statute—to ensure prompt and effective clean-up and to assure that parties responsible for hazardous substances bear the cost of clean-up—and explained how the majority's interpretation of "disposal" frustrates both. It warned that the majority's holding would produce little incentive for a landowner to examine her property and to clean up any contamination discovered, frustrating CERCLA's first central purpose.\(^6\) It rejected, as well, the court's notion that recognition of the dispersal of hazardous waste through soil by water as "disposal" would eliminate the innocent landowner defense.\(^7\)

The dissent rejected the court's use of legislative history as well. It noted some irony in the majority's use of "isolated statements" to support its interpretation, while acknowledging that "its reliance on legislative

63. Id. at 879 (emphasis added).
65. Carson Harbor Village, 270 F.3d at 890.
66. Id. at 891.
67. Id. at 893.
history is a weak reed," and concluded that Congress’ concern with leakage of hazardous wastes from abandoned properties “is hardly evidence that [it] meant to limit CERCLA’s reach to only those forms of passive contamination that could be described as ‘spills’ or ‘leaks’.”

Finally, it can be argued that the court’s holding is flawed as a matter of policy, because it creates disincentives to use of due care. The majority recognized 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.” This statement, as the dissent pointed out, contradicts the court’s holding: “[o]f course, counting the passive migration at issue in this case as ‘disposal’ also would encourage prompt clean-up, and excluding it produces the decreased incentives about which the majority frets.”

2. External Critique: Criticism and Reform of CERCLA

The challenge presented by the case, however, seems larger than what such confined analysis may offer. The majority purported to answer the question of whether passive migration of the type experienced in Carson Village’s property during the Partnership Defendant’s ownership constituted “disposal” under CERCLA with certainty and confidence. It assured us that its reasoning is consistent with the language of the statute, statutory policy, and legislative history. Yet as the dissent made clear, textual, policy and historical analyses can lead, with equal certainty, to the opposite conclusion. One is left with the discomforting feeling that maybe none of them “got it right” – that traditional tools of statutory interpretation may not suffice to determine what the law is in this case.

Therefore, to understand the outcome of this case one ought to look beyond the text of the statute, its purpose and its history, to the ways in which courts and commentators have criticized—and ultimately reshaped—CERCLA in recent years.

From the beginning, CERCLA has been very controversial. Much of the criticism has centered on EPA’s slow progress under the statute, the high costs of clean-up, and the perceived inefficiency of the system.

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68. Id.
69. Id. at 881.
70. Id. at 891.
71. See John Copeland Nagle, CERCLA’s Mistakes, 38 WM. & MARY L. REV. 1405, 1410 (noting that “CERCLA confounds every theory of statutory interpretation.”).
72. By the end of 1988, EPA had identified 30,000 sites for potential inclusion in the National Priorities List, and actually placed 1,200 on the proposed or final list. In 1997, EPA Administrator Reilly testified that clean-up had been completed at a total of 63 NPL sites. EPA had spent about $2.6 billion and recovered $230 million from responsible parties. See Jan Paul
Critics have also focused on the statute's perceived unfairness; it has been deemed "a black hole" that swallows all that come near it. Particularly, the imposition of strict, joint, several, retroactive and successor liability has been the target of countless complaints. As one court put it, CERCLA is now viewed nearly universally as a failure... The imposition of strict liability solely on the basis of property ownership...transfers the costs of the national problem of remediating abandoned contaminated sites onto the shoulders of individuals involved in real estate transactions, many of whom had never violated any environmental regulation, thereby negating Congress' intention of making those responsible for causing contamination pay for its remediation.

As a result of these criticisms, in 1993 the EPA introduced major reforms. An important element of these reforms was a series of administrative changes aimed at making the administration of CERCLA fairer, including the expansion of the agency's coverage of orphan shares at multiparty sites and of its previously-existing exemption from liability for so-called "de micromis" parties, and more favorable enforcement policies for certain PRPs who are lenders and government entities who acquire property involuntarily.

These changes, however, have failed to appease those who criticize the statute. A recent General Accounting Office report found that "for a majority of the reforms, it is difficult for the agency to demonstrate the extent to which they are working and have met the goals set for them – to make the program faster, fairer and more efficient." Some dispute the very notion that the reforms can make CERCLA fairer: "there is a
difference between a system of liability that is fair on its face and one that relies upon the exercise of the EPA's discretion to make it fair. 79

For Congress, few legislative problems have proven as persistent, contentious, and intractable as whether, and how, to amend CERCLA's liability scheme. 80 Yet the "chances that [the statute's] most controversial provisions will be discarded are slim... [E]fforts to amend CERCLA have failed because the proponents of sweeping changes and the proponents of more modest changes have been unwilling to compromise." 81

In light of these developments, it becomes apparent that Carson Harbor Village's holding may be grounded not solely on statutory language, purpose and history. Ultimately, the decision, together with the decisions of the other circuits that have gradually decided to follow Petersen Sand instead of Nurad, may be understood as a sign of a growing judicial willingness to rely on equitable considerations to limit the statute's broad liability scheme. 82 For example, the opinion recognized that the innocent landowner defense was designed by Congress to be very narrowly applicable, only to then warn that "we need not narrow the defense any more than Congress did in creating it." 83 Most tellingly, it invoked CERCLA's provisions on how to administer liability in support of its interpretation of "disposal:"

These provisions, for example, allow a court to allocate liability on the basis of culpability; create a system by which de minimis contributors can escape joint and several liability; and authorize administrative policies encouraging early settlement with the EPA, shielding the settler from suit by other parties... [E]ach of them, in different ways, attempts to ensure that a PRP with minimal responsibility—such as an owner without culpability but outside the technical parameters of the innocent owner defense—does not get stuck with more than his fair share of the financial responsibility for clean-up. In the real-world administration of the statute as a whole, these are the provisions that allow a court or the EPA to ensure that

79. Spence, supra note 77 439.
82. A similar tendency is evident in the cases analyzed by Nagle, supra note 71 at 1461.
83. Carson Harbor Village, 270 F.3d at 883.
the parade of horribles—the liability of the five-minute landowner, the one-drop contributor, or the unknowing homebuyer—does not come to pass.84

As the dissent pointed out, the majority seemed to be “motivated by a sense that the structure of the statute is unfair by including essentially innocent persons in the process.”85

B. Using Extrinsic Values to Fill Gaps in Statutory Language

1. Interpretation Inevitably Takes Place in a Normative Context

Federal judges, unlike members of Congress, are not accountable to the electorate. Thus, the idea that courts may use extrinsic values to resolve ambiguities in statutes that cannot be settled with traditional tools of interpretation gives rise to “counter-majoritarian anxieties.”86 In other words, “why should judges be able to substitute their own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute?”87

These fears, although grounded in the rule-of-law values of legislative supremacy and judicial restraint, are somewhat overstated. The use of background norms is inherent to the enterprise of interpretation. While our common view of the role of courts assumes that the judge’s task is limited to discerning and applying the rules enacted by the legislature, legal scholars have argued convincingly that, as a practical matter, the task of interpretation necessarily “depends on the precepts with which interpreters approach [the] text.”88

An important lesson that hermeneutics suggests for lawyers is that statutory interpretation is not simply a matter of retrieving the original meaning from a historical text. Rather, the interpreter inevitably understands the text from her own historical perspective, and must take account of the relation between legal text and social circumstances... The historical text speaks to the present-day interpreter, who learns from the text and responds to it. The

84. Id. at 884.
85. Id. at 894.
86. William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 378 (1990) (These “‘counter-majoritarian anxiet[ies]’ arise from the view that statutory law derives its legitimacy from its enactment by Congress, which is elected by and accountable to the people.”)
interpretation is the common ground reached in this interaction—a common ground that did not preexist the interaction.\textsuperscript{89}

The process of interpretation, thus, necessarily requires courts to draw on background principles. These principles are not found in any authoritative enactment but instead are drawn from the social and historical contexts in which judges are situated.\textsuperscript{90} The law, from this perspective, is better understood as the equilibrium point struck between competing interpretive actors.\textsuperscript{91}

Moreover, when the legislature itself has granted courts the authority to resolve ambiguous provisions in statutes, these “counter-majoritarian anxieties” should not arise—or at least not with the same intensity. Even textualists acknowledge that Congress may empower the courts to develop a sort of common law to resolve questions left unanswered in statutes.\textsuperscript{92} Legal scholars have claimed that Congress intended CERCLA to be one of such statutes. “In passing CERCLA, Congress avoided volatile issue[s]... leaving the gap for courts to fill based on ‘evolving principles of common law.’”\textsuperscript{93}

The court’s use of values extrinsic to CERCLA’s liability scheme to interpret the vagueness of the statutory definition of “disposal” is thus not new, nor extraordinary. Rather, it can be seen as an example of judicial recourse to background norms that is inherent in the very enterprise of interpretation.

2. Use of Equitable Principles to Interpret CERCLA’s Ambiguous Provisions Can Lead to Undesirable Results

While drawing on background principles may be inevitable, it is by no means clear what norms and principles would be most appropriate in

\textsuperscript{89} Eskridge & Frickey, supra note 86 at 380-81 (referring to similar developments in philosophy and the sciences that have “demonstrated the situatedness and historical particularity of much accepted foundational theory”).

\textsuperscript{90} Sunstein, supra note 88 at 411.


any particular situation. Arguably, attempting to solve CERCLA's interpretive riddles using traditional notions of fairness, causation and individual responsibility is problematic.

First, by importing a fairness standard based on causation and individual responsibility into CERCLA's strict liability scheme, courts may be transforming the statute into an increasingly incoherent edifice, where pockets of fairness co-exist with other liability provisions that do not take equity into consideration. Under the holding in Carson Harbor Village, for example, past owners or operators, such as the Partnership defendants, are not liable for passive migration of contaminants in their lands, even if they knew or should have known that their property was contaminated, whereas current owners or operators in the same situation are strictly liable.\(^9\)\(^4\) Moreover, this theory also draws unfair distinctions between different types of prior owners. Prior owners who failed to conduct a reasonable inquiry into the presence of contamination on their lands, and those who allowed previous contamination to remain untreated, would be categorically exempt, while prior owners at the time of active disposal would be PRPs, even if they were not connected with the disposal in any way.\(^9\)\(^5\)

Second, allowing the courts to import traditional notions of fairness into CERCLA may lead to inconsistent results across jurisdictions. As the law stands now, whether a PRP in the position of the Partnership defendants would be liable for passive migration would largely depend on whether the facility happens to be located in a jurisdiction that has held passive migration is "disposal" (such as the Fourth Circuit did in Nurad) or in one that has declined to do so (such as the Third Circuit in CDMG or the Ninth Circuit after Carson Harbor Village). Such a state of uncertainty is even greater in the Ninth Circuit after Carson Harbor Village. The court's vague holding—that passive migration of the type present in this case is not a disposal under CERCLA, but that under other, unspecified circumstances, it might be—fails to offer lower courts an intelligible standard to guide their decisions.\(^9\)\(^6\)

Accordingly, allowing the courts to import traditional notions of fairness and causation into CERCLA's strict liability scheme, unguided by clear criteria, risks the development of an incoherent legal edifice, where similarly situated PRPs (both geographically and vis a vis their relative behavior) are treated differently.

\(^9\)\(^4\) Carson Harbor Village, 227 F.3d at 1210.

\(^9\)\(^5\) Id.

\(^9\)\(^6\) See Servco Pacific Inc. v. Dods, 193 F. Supp. 2d 1183, 1197 (D. Haw. 2002) (stating that "[t]he Ninth Circuit sitting en banc... addressed whether 'passive migration' could constitute a 'disposal' for purposes of section 9607(a). The gist of Carson Harbor is that it depends.") (emphasis added).
3. Use of the Canon that Remedial Statutes are to be Construed Liberally Would Have Been Preferable

Arguably, if courts were aided in their mission to interpret CERCLA by some uniform guiding principle, they could avoid the risks that presently result from their ad hoc use of traditional notions of fairness and individual responsibility. Some have argued that such principle can be provided by the substantive canon of statutory interpretation that remedial statutes are to be construed broadly to further their purposes.\(^7\) This canon has been part of Anglo-American jurisprudence for centuries.\(^8\) Its origins can be traced to the "mischief rule" of Heydon's Case, where Sir Edward Coke instructed that legislation ought to be construed in a manner as "shall suppress the mischief, and advance the remedy" that the legislature intended to address by enacting the law.\(^9\) Although the remedial purpose canon has been sharply criticized for its vagueness,\(^0\) it is still broadly applied.\(^1\) A recent study shows that it is most often invoked when the statute at issue is protective in nature; when legislation is designed to protect and promote public health and public safety; or when interpreting statutes enacted to further the social well-being of the general public by protecting individuals against race, age, gender, and disability discrimination.\(^2\)

The remedial purpose canon has been employed by the federal appellate and district courts in CERCLA cases with remarkable frequency.\(^3\) The statute has been described as approximating "the best case scenario" for the application of the canon.\(^4\) Indeed, there are good reasons to think that, if judges are to import extrinsic values into CERCLA in order to give meaning to the statute's ambiguous provisions, the remedial purpose canon is far preferable to the notions of causation

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\(^7\) Watson, supra note 93 at 230.
\(^8\) See NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 60.01 (5th ed. 1992).
\(^0\) Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV. 581, 581-84 (1989-1990) (the remedial purpose canon "is surely among the prime examples of lego-babble").
\(^1\) See WILLIAM N. ESKRIDGE, PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY, 848, n. a (3\textsuperscript{rd} Ed. 2001) (citing Supreme Court cases that have invoked the liberal construction of the remedial purpose canon).
\(^2\) Watson, supra note 93 at 236-238.
\(^3\) Id. at 271.
\(^4\) Id. (arguing that "CERCLA is a "public-regarding" statute that is inherently "more remedial" than other non-penal statutes"). See also Sunstein, supra note 88 at 485-86 (arguing that statutes designed to protect non-market values (such as the environment) should be broadly construed to protect the embodied aspirations and non commodity values that are often jeopardized in the post-enactment political marketplace).
and individual fairness used by courts, including the Ninth Circuit in *Carson Harbor Village*. First, widespread use of the remedial purpose canon would help avoid inconsistent and unpredictable results, such as those described above. Second, and perhaps most important, the remedial purpose canon is arguably closer to Congress' intent when it enacted CERCLA than are the notions of fairness and individual responsibility judges have imported into the statute. The next section explores this rationale further.

4. *The Remedial Purpose Canon Insures Consistency with the Intent of Congress*

a. *Congress Intended CERCLA to be a Strict Liability Statute*

Although CERCLA's sparse legislative history provides little guidance in discerning the legislature's original intent, the little we do know confirms the idea that Congress explicitly considered, and rejected, using fairness and individual causation as substantive criteria in allocating liability under CERCLA. When Congress enacted the statute, it considered two alternative liability schemes, both of which required that "polluters pay" for the cleanup of hazardous wastes.\textsuperscript{105} The House proposed imposing liability on those who "caused or contributed" to hazardous waste problems,\textsuperscript{106} while the Senate looked to specifically designated "responsible parties."\textsuperscript{107} The Senate prevailed.\textsuperscript{108} The Report of the Committee on Environment and Public Works that accompanied


\textsuperscript{106} 2 CERCLA LEGISLATIVE HISTORY, supra note 105 at 391, 438 (adding Safe Drinking Water Act § 3071(a)(1)), cited by Nagle, supra note 105 at 1554.

\textsuperscript{107} S.1480, reprinted in 1 CERCLA LEGISLATIVE HISTORY, supra note 105 at 462, 485-88.

the Senate Bill explained that its liability provisions were based on the concept of strict liability. The report explained that the purpose of strict liability is to assure that the costs of dangerous or harmful activities are borne by the persons that create the risks rather than by innocent victims, and that strict liability provides incentives to eliminate such risks. In other words,

> [t]he text, structure, and history of the statute indicate that CERCLA does not require proof of causation. Most importantly, the statute itself specifies who is liable, and the statutory language says nothing about showing cause in fact. The absence of a causation requirement suggests that Congress intended none... The silence of the statute acquires added meaning when compared with the House version, which made proof of causation the sole determining consideration in establishing liability.

Numerous courts have agreed, holding that individual fault or causation need not be shown to hold a defendant liable as a PRP. Thus commentators have concluded that "[w]hen [Congress] established the Superfund liability system, [it] made a policy choice to... finance hazardous waste site cleanups primarily by imposing liability on individual PRPs rather than through tax revenues."

Moreover, subsequent amendments that have modified CERCLA’s broad liability scheme while leaving the basic structure intact can be interpreted as congressional reenactment of this original policy choice. Congress amended CERCLA in 1986 in an effort to respond to the perceived unfairness of the statute. It introduced new amendments in

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109. 1 CERCLA LEGISLATIVE HISTORY, supra note 105 at 340, cited by MacAyeal, supra note 108 at n. 295.

110. Id., cited by MacAyeal, supra note 108 at n.300.

111. Nagle, supra note 105 at 1507.

112. See MacAyeal, supra note 108 at 286 (citing numerous cases where courts have recognized there is no need to prove individual causation to hold a defendant liable as a PRP).

113. Spence, supra note 77 at 436.

114. According to the congressional reenactment rule of statutory interpretation, Congress can be said to have endorsed an interpretation of a statute when it takes subsequent legislative action on the statute without changing the prevailing interpretation. See ESKRIDGE, FRICKEY & GARRETT, supra note 101, 1020-1037. Although courts are often reluctant to attribute significance to the failure of Congress to act on a particular legislation, this case closely resembles the situation in Bob-Jones University v. United States, 461 U.S. 574, 600-01 (1983). There the Supreme Court interpreted Congressional inaction as a sign of acquiescence towards the challenged IRS rulings. The Court reasoned that, in light of the multiple legislative proposals that had been discussed in Congress and the highly debated nature of the question at issue, “it is hardly conceivable that Congress— and in this setting, any member of Congress— was not abundantly aware of what was going on.”

115. See 42 U.S.C. § 9601(35) (establishing an innocent landowner defense); id. § 9613(f) (authorizing contribution actions); id. § 9622(g) (directing prompt settlement with parties whose liability “involves only a minor portion of the response costs at the facility”).

1996, to limit creditors’ liability.\textsuperscript{116} It visited the topic again in 2002, enacting the \textit{Small Business Liability Relief and Brownfields Revitalization Act}, to exempt contiguous property owners and prospective purchasers from CERCLA liability, and to clarify what constitutes appropriate inquiry for innocent landowners.\textsuperscript{117}

\textbf{b. Congress Intended CERCLA to be Broadly Remedial}

Although CERCLA is one of the few statutes that lacks a statement of congressional goals and policies,\textsuperscript{118} the statute’s legislative history indicates that Congress intended it to be broad and remedial. The leading bills in both houses refer to the remedial nature of the proposed legislation.\textsuperscript{119} The major House bill, as originally introduced, prohibited releases of hazardous waste unless the disposal site was properly permitted and authorized civil penalties for unlawful releases.\textsuperscript{120} The final version of the bill, however, deleted the prohibition against releases and only allowed penalties for violation of an order to perform response actions issued by the EPA.\textsuperscript{121} Thus “the legislation started out as a public welfare offense, but became more remedial and compensatory in character.”\textsuperscript{122} The Senate bill, on the other hand, was expressly characterized as “remedial legislation” in its legislative report.\textsuperscript{123} An influential supporter of the bill explained that its remedial nature was not at issue in the negotiations between both houses: “[t]he basic concept of creating response authority and a response fund to prevent and remedy health and environmental threats from releases or threatened releases of hazardous substances is the same in both the House and Senate version of [the bill].”\textsuperscript{124}

Courts have accordingly interpreted the statute as “overwhelmingly remedial.”\textsuperscript{125} In determining that CERCLA is “more” remedial than other statutes – and thus a better candidate for the remedial purpose

\begin{itemize}
\item \textsuperscript{116} See 42 U.S.C. § 9601(20)(E).
\item \textsuperscript{118} See Watson, supra note 93 at 289.
\item \textsuperscript{119} Id. at 290.
\item \textsuperscript{120} 2 CERCLA LEGISLATIVE HISTORY, supra note 105 at 35-36, cited by MacAyeal, supra note 108 at n. 248.
\item \textsuperscript{121} Id. at 38-39, cited by MacAyeal, supra note 108 at n. 249.
\item \textsuperscript{122} MacAyeal, supra note 108 at 263.
\item \textsuperscript{123} 1 CERCLA LEGISLATIVE HISTORY, supra note 105 at 343-344, cited by Watson, supra note 93 at n. 373.
\item \textsuperscript{124} 1 CERCLA LEGISLATIVE HISTORY, supra note 105 at 779 (statement of Rep. Florio), cited by Watson, supra note 93 at n. 377.
\item \textsuperscript{125} See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), cited by Watson, supra note 93 at 286.
\end{itemize}
canon – courts have contrasted it with other environmental laws that possess a regulatory focus.126 In New York v. Shore Realty Corp., for example, the Second Circuit noted that “CERCLA is not a regulatory standard-setting statute such as the Clean Air Act.”127 CERCLA is likewise often contrasted with RCRA, which, although also concerned with hazardous substances, is described as regulatory, not remedial in nature.128

In sum, courts facing the need to import background values into CERCLA to solve the statute’s textual ambiguities – such as whether “disposal” encompasses passive migration of the kind that took place in Carson Village’s property during the ownership of the Partnership defendants – would do better to resort to the remedial purpose canon of statutory interpretation than to notions of fairness based on causation and individual responsibility. Consistent use of the remedial purpose canon would promote uniformity and predictability in CERCLA law – values that are presently impaired by the courts’ willingness to resort to equitable considerations. Moreover, there are strong indications that the canon is closer to congressional intent than are notions of fairness and individual responsibility. Congress explicitly considered, and rejected, a liability scheme based on fairness, causation and individual responsibility. It chose, instead, a strict liability scheme, where parties’ liability depends solely on their relationship with the hazardous nature of a vessel or facility.129 In the absence of congressional action to the contrary, that is the scheme that still governs hazardous waste clean-up.

CONCLUSION

Carson Harbor Village shows the limits of traditional approaches to statutory interpretation. Both the majority and the dissent base their conclusion on whether “disposal” under CERCLA encompasses passive migration on the text of the statute, its purposes, and its legislative history, only to reach opposite conclusions. This demonstrates that interpretive differences are often not grounded in unassailable logic, but on the values used to approach the questions at issue. Statutory interpretation is a dynamic exercise, where interpreters inevitably resort to background values and principles. The court’s holding in this case can thus be understood in the context of growing criticism of CERCLA’s liability scheme, which is often perceived as inefficient and unfair.

126. Watson, supra note 93 at 287.
129. MacAyeal, supra note 108 at 332-333.
The fact that courts necessarily use background principles to approach their interpretive tasks does not mean, however, that they have unbounded discretion to come-up with whatever interpretation they wish. Nor does it mean that judges are free to impose their own personal policy views through statutory interpretation. "Although interpretation is neither objective nor predictable, it is bounded... The historical text itself constrains, for the interpreter is charged with learning from the text and working from it to the current problem. Moreover, the interpreter's perspective itself is conditioned by tradition – the evolution of the historical text as it has been interpreted, the values of society, and current circumstances."

From this perspective, the court in Carson Harbor Village can be criticized, not because it reached the "wrong" conclusion in its textual, policy or historical analyses, but because it chose to resort to background values and principles that are foreign to CERCLA's tradition – and to congressional intent at the time of enacting the statute. Congress chose to enact a strict liability scheme. The court's holding disregards that scheme.

Faced with the inevitable need to resort to background principles, the court should have chosen the canon of statutory interpretation that posits that remedial statutes are to be construed liberally. Use of the remedial canon would produce more coherent results and would be more consistent with congressional intent.

130. Eskridge & Frickey, supra note 86 at 382.