1994

The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste

Robert L. Bronston
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Environmental Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Robert L. Bronston, *The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste*, 93 MICH. L. REV. 609 (1994).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss3/5>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

The Case Against Intermediate Owner Liability Under CERCLA for Passive Migration of Hazardous Waste

Robert L. Bronston

INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹ to address the dangers posed by inactive hazardous waste sites.² CERCLA imposes both strict liability and joint and several liability³ for environmental damage on four general categories of potentially responsible parties (PRPs).⁴ The four categories of PRPs include present owners of environmentally contaminated facilities,⁵ prior owners of a facility who owned it at the time it was used for hazardous waste

1. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

2. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119 (stating that CERCLA's purpose is "to provide for a national inventory of inactive hazardous waste sites and . . . to protect public health and the environment from the dangers posed by such sites"); see also *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir.) ("Congress enacted CERCLA to address the increasing environmental and health problems associated with inactive hazardous waste sites."), *cert. denied*, 113 S. Ct. 377 (1992). Hazardous waste sites become "inactive" when they stop accepting discarded material. Congress addressed the problem of *active* hazardous waste sites in the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6987 (1988)).

3. See 42 U.S.C. § 9601(32) (1988) (providing that liability "shall be construed to be the standard of liability which obtains under" § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1988)). Although the statutory language is less than clear, courts have interpreted § 311 of the Clean Water Act to impose strict liability. See, e.g., *United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787, 789 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979). Similarly, courts have interpreted CERCLA's liability provision, 42 U.S.C. § 9601(32) (1988), to impose strict liability under CERCLA. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 182 n.9 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 394 (9th Cir. 1989); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) ("Most courts have held CERCLA imposes strict liability and joint and several liability."). Although CERCLA imposes strict liability upon potentially responsible parties, certain causation-based defenses remain available to such parties. See 42 U.S.C. § 9607(b)(1)-(4) (1988); see also *infra* note 11.

4. See 42 U.S.C. § 9607(a)(1)-(4) (1988). CERCLA often refers to persons who may be liable under these provisions as "potentially responsible parties." See, e.g., 42 U.S.C. § 9613(g)(1)(b) (1988).

5. This category of PRPs includes anyone who is "the owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a)(1) (1988).

disposal,⁶ those owners of hazardous waste who contract for its removal,⁷ and any transporter of hazardous waste.⁸

Federal courts have divided over the scope of liability of *prior owners* who did *not actively contribute* to the contamination of their land. This controversy arises in one common factual context. In this scenario, the original owner of the land generates hazardous waste and thereby contaminates the property. A second owner then uses the land for a different purpose, does not create any new waste, and is *not aware* of the previous contamination.⁹ During the second owner's tenure, the previously deposited hazardous material spreads via leaching or migration. Finally, a third owner assumes control of the land and retains ownership at the time of the required remedial activity.

Liability clearly rests both on the person who dumped the hazardous material¹⁰ and, in all but a narrow range of situations, on the third, or current, property owner.¹¹ The liability of the second owner, however, presents a more difficult problem. CERCLA section 107(a)(2), the prior owner provision, imposes liability on those who owned the land "at the time of disposal."¹² Thus, in order to determine the liability of intermediate owners, courts must determine whether the term *disposal* as used in the prior owner provision requires active conduct on the part of the owner or whether it also includes the passive leaching or migration of previously deposited waste.

Federal courts have split on how to interpret *disposal*. The majority view, adopted by the Fourth Circuit, employs a passive definition, which holds that even passive migration of hazardous waste

6. This category of PRPs includes "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." 42 U.S.C. § 9607(a)(2) (1988).

7. This category of PRPs includes "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person." 42 U.S.C. § 9607(a)(3) (1988).

8. This category of PRPs includes "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities." 42 U.S.C. § 9607(a)(4) (1988).

9. If the intermediate owner becomes aware of the contamination of her land, she faces liability under CERCLA § 101(35)(C). See 42 U.S.C. § 9601(35)(C) (1988); see also *infra* notes 117-20 and accompanying text. This Note addresses only the situation in which the intermediate owner does not know that her land is contaminated.

10. Because the polluter owned or operated the site at the time of disposal, she therefore faces liability under § 107(a)(2). See 42 U.S.C. § 9607(a)(2) (1988); see also *supra* note 6 and accompanying text.

11. The present owner faces liability under § 107(a)(1) unless she can prove that she was covered by one of the causation defenses: that the disposal was caused by an act of God, by war, by a third party, or by some combination thereof. See 42 U.S.C. § 9607(a)(1), (b)(1)-(4) (1988).

12. 42 U.S.C. § 9607(a)(2) (1988).

may trigger section 107(a)(2) liability.¹³ Several district courts and bankruptcy courts, however, have applied an active definition of *disposal*, holding that only prior owners who contribute to the risk of environmental contamination by an intentional act should face liability.¹⁴ Under this view, an intermediate owner who did not actively contribute to the contamination of the site should face no liability because the migration of the hazardous waste did not result from any of her actions. Courts have recently issued opinions on both sides of the issue.¹⁵ Also, as the Environmental Protection Agency (EPA) continues to discover more sites at which passive underground migration has occurred over several years,¹⁶ the fact pattern at issue will tend to recur.

This Note argues that Congress intended *disposal* to have an active meaning and therefore that courts should *not* hold prior intermediate owners liable for the passive migration of hazardous waste under section 107(a)(2). Part I examines CERCLA's definition of *disposal*. This Part concludes that the language of the definition, though somewhat ambiguous, supports the active definition. Part II considers the history of both CERCLA and the Resource

13. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992); *CPC Intl. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1278 (W.D. Mich. 1991); *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659, 660-64 (E.D. Cal. 1990); *In re Hemingway Transp., Inc.*, 108 B.R. 378, 381-82 (Bankr. D. Mass. 1989), *affd.*, 126 B.R. 656 (D. Mass. 1991), *modified*, 993 F.2d 915 (1st Cir.), *cert. denied*, 114 S. Ct. 303 (1993); *cf. United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984) (applying the passive definition in the RCRA context); *United States v. Price*, 523 F. Supp. 1055, 1070-71 (D.N.J. 1981) (holding that disposal as defined in RCRA includes passive migration), *affd.*, 688 F.2d 204 (3d Cir. 1982).

14. See, e.g., *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1350-53 (N.D. Ill. 1992); *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 989 (E.D. Mich. 1991); *In re Diamond Reo Trucks, Inc.*, 115 B.R. 559, 565 (Bankr. W.D. Mich. 1990); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1456-58 (N.D. Cal. 1989); *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 21 Env't. Rep. Cas. (BNA) 1108, 1113 (C.D. Cal. Mar. 5, 1984), *rev'd. on other grounds*, 840 F.2d 691 (9th Cir. 1988).

15. Compare *Nurad*, 966 F.2d at 844-46 (adopting the passive definition) with *Petersen Sand & Gravel*, 806 F. Supp. at 1351 (applying the active definition). Recently, the Ninth Circuit expressly deferred rendering a decision on this issue. See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 n.7 (9th Cir. 1992) ("Because the present case involves the active disposal of hazardous material, we do not consider the passive migration question.").

16. See, e.g., Ralph Odenwald, *Environmental Cleanup*, N.M. Bus. J., July 1994, at 15, 15 (revealing that "New Mexico . . . is uncovering hundreds of hazardous underground storage leaks" and that "[n]ew leak sites are being discovered at a rate of five to 10 a week"); *Underground Storage Tanks: Guide To Evaluate Contaminated Sites and Quantify Risk Debated at Workshop*, Cal. Env'tl. Daily (BNA) (Aug. 16, 1994) ("In California there are approximately 19,000 sites contaminated by underground tank petroleum spills."), available in Westlaw, BNA-CED database. See generally Lois N. Epstein, Prepared Testimony on H.R. 1360, Safe Aboveground Storage Tank Act of 1993, Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce (Sept. 14, 1994), available in LEXIS, News library, Curnws File (discussing what industry and the states are doing to address the problems posed by leaking aboveground storage tank facilities, why those actions are insufficient, and why the EPA lacks the power to deal adequately with this problem).

Conservation and Recovery Act (RCRA),¹⁷ which CERCLA amended, in order to determine whether Congress intended to require affirmative conduct on the part of intermediate owners as a prerequisite to liability. Part II concludes that although the history of CERCLA sheds little direct light on the meaning of *disposal*, the analogous controversy under RCRA indicates that Congress understood *disposal* to have an active meaning in the CERCLA statute. Part III confirms this interpretation, concluding that the structure of CERCLA supports the active reading of the definition. Finally, Part IV demonstrates that the active reading of *disposal* is consistent with CERCLA's purposes. Courts should therefore interpret the word *disposal* to require a showing of affirmative human conduct before imposing liability on intermediate owners under section 107(a)(2).

I. THE LANGUAGE OF THE DEFINITION

In interpreting and applying statutes, a court must first consider the statutory language.¹⁸ If the relevant words have a clear meaning in their context, this meaning should, and arguably must, control.¹⁹ To determine the scope of liability assessed under section 107(a)(2), courts must interpret its use of the term *disposal*. CERCLA defines *disposal* by incorporating the definition used in RCRA:²⁰

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.²¹

This Part examines whether this definition of *disposal* provides a sufficiently clear meaning to end the inquiry. Section I.A considers the argument that this language mandates a passive definition of *disposal*. Section I.B considers the opposing arguments, that the language of the statute suggests an active interpretation. This Part concludes that the statutory language does not have a "plain mean-

17. 42 U.S.C. §§ 6901-6987 (1988).

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

19. *See, e.g., United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

20. 42 U.S.C. §§ 6901-6987 (1988). CERCLA defines disposal in § 101: "The terms 'disposal', 'hazardous waste', and 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act." 42 U.S.C. § 9601(29) (1988). The incorporated definition is the one provided in the text.

21. 42 U.S.C. § 6903(3) (1988).

ing,” although the best reading of the text favors the active definition of *disposal*.

A. Statutory Language Supporting a Passive Reading

Courts applying the passive interpretation of *disposal* have relied on the inclusion of the word *leaking* in the definition of *disposal*. These courts reason that because CERCLA defines *disposal* to include *leaking* — a word which typically does not denote active human conduct — disposal must not require active human conduct.²² One district court²³ that relied on this analysis when construing the word *leaking* in a state statute virtually identical to CERCLA and designed for the same purposes summarized the argument as follows:

“Leaking” does not commonly imply an intentional act. Rusty barrels, radiators, [underground storage tanks] each may “leak” without anyone’s aid or knowledge; moreover, an unseen or unintended gravity-aided release from these containers would most naturally be called a “leak.” Were one purposefully to refer solely to a controlled or intentional release of some substance, one would almost never use the term “leak” to capture that meaning. . . . Therefore, the word “leaking,” by itself, plainly includes and likely connotes an unintentional or inadvertent release.²⁴

This reasoning, however, does not acknowledge that the definition of *leaking* includes both an active component — “to let a substance (as water or gas) or light in or out through a hole, crevice, or other opening”²⁵ — and a passive version — “to enter or escape through a hole, crevice, or other opening.”²⁶ When construed in the active sense, the word *leak* thus implies an affirmative human action that facilitates the escape of the substance. One could say,

22. See, e.g., *CPC Intl., Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1278 (W.D. Mich. 1991) (“The definition of ‘disposal’ adopted in CERCLA expressly includes ‘spilling’ and ‘leaking.’ Therefore, the unchecked spread of contaminated groundwater . . . qualifies as disposal.” (citations omitted)); cf. *United States v. Price*, 523 F. Supp. 1055, 1071 (D.N.J. 1981) (holding in a RCRA case that “[b]y its plain language, the statute authorizes relief restraining further disposal, i.e., *leaking*, of hazardous wastes from the landfill into the groundwaters”), *aff’d*, 688 F.2d 204 (3d Cir. 1982).

23. *Pantry, Inc. v. Stop-n-Go Foods, Inc.*, 796 F. Supp. 1171 (S.D. Ind. 1992) (construing a Kentucky state environmental statute that defined disposal in a manner virtually identical to CERCLA), *vacated*, 844 F. Supp. 1338 (S.D. Ind. 1994). See KY. REV. STAT. ANN. § 224.01-010(10) (Michie/Bobbs-Merrill 1991 & 1994) (“‘Disposal’ means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste into or on any land or water so that such waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”).

24. 796 F. Supp. at 1177.

25. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1285 (Philip Babcock Gove & the Merriam-Webster Editorial Staff eds., 1986).

26. *Id.* Note that the verb *to leak* would be transitive under the active construction and intransitive under the passive construction.

for example, "the owner of the tank leaked the oil by drilling a small hole in the tank" or "the White House aide leaked the information to the press." In ordinary usage the distinction between the two definitions rarely seems relevant. When construing CERCLA, however, the choice between these definitions may determine the result of a case in which a landowner has performed no affirmative act to let the hazardous waste escape.²⁷

Plain-meaning analysis cannot justify the selection of one possible definition and the rejection of other plausible alternatives. The district court quoted above acknowledged later in the same opinion that *leaking* could be subject to an active construction; but the court maintained both that the passive definition was the more common usage and that slight ambiguity should not disturb statutory analysis.²⁸ Once one acknowledges a plausible alternative reading of the statute, however, its meaning becomes less than "plain," and courts should turn to other sources of congressional intent to interpret the statute.²⁹

Under another approach to construing the meaning of *leaking*, and thus the meaning of *disposal*, some courts have arrived at a passive construction by inferring from other words in the definitional list that Congress intended the definition of *disposal* to encompass a wide variety of phenomena.³⁰ This argument emphasizes

27. It is also possible for even unintentional affirmative acts by prior landowners to incur liability. See *infra* note 39.

28. *Pantry, Inc.*, 796 F. Supp. at 1177 ("[O]ne might be quick to argue that it is possible or reasonable to interpret the term 'leaking' to include an affirmative, intentional act *also*. That fact does not create any relevant 'ambiguity'.").

29. If a statute is ambiguous — that is, susceptible to more than one plausible interpretation — courts must seek out other sources of congressional intent, such as legislative history or the structure and purposes of the statute as a whole. See *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."); *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988) ("If we find that the statutory language is unambiguous, then that language is regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. If we find that the statute is ambiguous, we then look to its legislative history." (citations omitted)); *Johnson v. Town of Trail Creek*, 771 F. Supp. 271, 276 (N.D. Ind. 1991) ("When the statutory language is ambiguous on its face . . . the court should look to congressional intent in adopting the provision."); *In re Great N. Forest Prods., Inc.*, 135 B.R. 46, 65 (Bankr. W.D. Mich. 1991) ("First, is the statute plain and unambiguous? . . . If the answer is negative, the court must use all efforts to determine Congress' intent and obtain the best result."). In other words, if the language *does* allow for more than one plausible reading, proper statutory interpretation requires the use of additional analytical tools.

30. See, e.g., *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992). The Fourth Circuit relied on this same argument in an earlier case construing the definition of *disposal* in RCRA:

The inclusion of "leaking" as one of the diverse definitional components of "disposal" demonstrates that Congress intended "disposal" to have a range of meanings, including conduct, a physical state, and an occurrence. Discharging, dumping, and injection (conduct), hazardous waste reposing (a physical state) and movement of the waste after it has been placed in a state of repose (an occurrence) are all encompassed in the broad definition of disposal. "Leaking" ordinarily occurs when landfills are not con-

the diversity rather than the commonality of the words comprising the *disposal* definition. The definitional elements of terms like *spilling* and *leaking* differ — in their passive nature — from other verbs used in the list that require an actor. Thus, the argument runs, one can infer that Congress intended the passive meaning of *leaking* because such an interpretation furthers the breadth of diversity of the words Congress chose to include in the definition.

The order of the words within the definitional list, however, may actually indicate that Congress intended the opposite. The placement of *spilling* and *leaking* between two active verbs — the words *dumping* and *placing*³¹ — may suggest that Congress intended to minimize, rather than to emphasize, the passive aspects.³²

Thus, whether one focuses on the “plain meaning” of *leaking*, or on the context of the term, a critical reading of the statutory text does not obviously require the adoption of a definition of *leaking* that would hold prior intermediate owners liable for passive migration of hazardous waste. The next section examines the arguments made from the opposite perspective — that the language alone supports an active reading of *disposal*.

B. Statutory Language Supporting an Active Reading

Two separate approaches suggest that CERCLA’s statutory language requires a showing of affirmative human conduct before liability can attach to prior owners under section 107(a)(2). Under the first approach, one can construe the statute according to recognized canons of statutory construction to implement the common elements of the words in the definition. Under the second approach, one can focus upon the definition as a whole to determine Congress’s intent. This section argues that these two approaches provide helpful evidence in support of the active interpretation of *disposal*.

structed soundly or when drums and tank trucks filled with waste materials corrode, rust, or rot. Thus “leaking” is an occurrence included in the meaning of “disposal.”

United States v. Waste Indus., Inc., 734 F.2d 159, 164 (4th Cir. 1984). Although less than entirely clear — particularly with respect to the “physical state” element of “hazardous waste reposing” — this argument relies upon the assumption that the words in the definition should be given as broad a construction as possible.

31. See 42 U.S.C. § 6903(3) (1988).

32. By interpreting the word *leaking* as widely divergent from, rather than consistent with, its surrounding language, the *Waste Industries* court also violated the maxim *noscitur a sociis*. See *infra* note 33 and accompanying text. Of course, a contrary canon suggests that statutes should be interpreted in such a way as not to render any words superfluous. See *infra* note 43. But cf. *infra* text accompanying note 39 (demonstrating how *leaking* can be read consistently with surrounding words and yet still have nonsuperfluous meaning).

1. Two Canons That Support an Active Reading

One method of evaluating the meaning of *disposal* involves interpreting the word *leaking* by attempting to render it consistent with the other words in the definition in accordance with the principle of *noscitur a sociis*, which maintains that one may infer the meaning of a word by examining the meanings of the surrounding words.³³ According to this principle, the words *discharge*, *deposit*, *injection*, *dumping*, and *placing* indicate the proper connotation of *spilling* and *leaking*. Examining all of the words together illustrates Congress's intent: all the verbs are transitive and appear to envision a human actor.³⁴ The principle of *noscitur a sociis* indicates that by including *leak* and *spill* among this group of words, Congress likely intended the active version of these verbs to apply. Concluding otherwise would make *leak* and *spill* anomalous in the context of the definition.

Another canon of statutory construction also favors the active reading of *disposal*. The principle of *ejusdem generis*³⁵ states that when general words follow the enumeration of particular classes of things, the general words are most properly construed as applying to the same class of things as those enumerated. The district court in *United States v. Waste Industries*³⁶ applied this principle to the *disposal* definition by interpreting *leaking* to encompass unintentional but active conduct:

33. The Supreme Court has relied upon this principle of statutory construction: "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 306-07 (1961) (construing the word *discovery* in § 456 (a)(2)(B) of the Internal Revenue Code of 1939 to mean only the discovery of mineral resources because of its proximity to the words *exploration* and *prospecting*); see also *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (construing the phrase *reporting and recordkeeping requirements* in the Paperwork Reduction Act not to encompass disclosure rules because of its proximity to the phrases *information collection request* and *collection of information*).

34. In applying *noscitur a sociis* to the *disposal* definition, one district court made the following observations:

[T]he Court looks at its definitional components and finds that these three nouns (*discharge*, *deposit*, and *injection*) and four gerunds (*dumping*, *spilling*, *leaking*, and *placing*), when read together, all have in common the idea that someone do something with hazardous substances. Taking the clearest example, the Court notes that "placing", read in the context of the statute, means a person introducing — putting — formerly controlled or contained hazardous substances into the environment.

Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989).

35. The Supreme Court has relied upon *ejusdem generis* when interpreting statutes: "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. Co. v. American Train Dispatchers' Assn.*, 499 U.S. 117, 129 (1991); see also *Smith v. Davis*, 323 U.S. 111, 117 (1944) ("And, under the rule of *ejusdem generis*, it is reasonable to construe the general words 'other obligations' . . . as referring only to obligations or securities of the same type as those specifically enumerated.").

36. 556 F. Supp. 1301 (E.D.N.C. 1982), *rev'd*, 734 F.2d 159 (4th Cir. 1984). For a discussion of the Fourth Circuit opinion that overruled this district court opinion, see *supra* note 30.

Using . . . the principle of *ejusdem generis*, general terms, i.e. leak and spill, must be read as containing the elements common to the specific terms, i.e. deposit, inject, dump, and place. That common element is an act carried out by a person. Leak and spill evince the legislative purpose not to require that the act have been intentional. Even under the statutory definition, disposal requires someone's *active* conduct, whether intentional or accidental, in the movement of hazardous waste. Thus, the notion that each term contained in the definition of disposal contemplates active conduct does not render terms such as leak or spill superfluous. Those terms serve to provide broad coverage of disposal-related activities, so that one may not avoid liability by pleading that the conduct was unintentional.³⁷

This argument provides a nonredundant reading of *leaking*. For if *leaking* and *spilling* require both active conduct and intent to cause the consequences of the action, they add very little to the other words — *discharge*, *deposit*, *injection*, *dumping* and *placing* — already included in the statutory definition.³⁸ If *leaking* refers to affirmative conduct the results of which were not intended by the actor, then each word in the definition would have independent effect.³⁹

These two principles of statutory construction suggest that CERCLA requires a showing of affirmative human conduct before liability under section 107(a)(2) may properly be imposed. This understanding of the term *disposal* receives additional support from language that appears at the end of the statutory definition, considered in the next section.

2. The Significance of the "Enter the Environment" Language

Focusing analysis on the use of the word *leaking* in the definitional list tends to obscure the importance of additional language at the end of the definition. This language provides a valuable window into congressional intent. The full definition reads as follows:

The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water *so that such solid waste or hazardous waste or any constituent thereof may enter the environment* or be emitted into the air or discharged into any waters, including ground waters.⁴⁰

37. 556 F. Supp. at 1306 (emphasis added).

38. Providing a nonredundant reading of *leaking* is preferable because it gives effect to every word in the statute. See *infra* note 43.

39. Although the concept of an affirmative act that has the unintended consequence of disposing of hazardous waste may at first seem difficult to envision, such cases do arise. See, e.g., *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) (holding that a disposal may occur when a developer accidentally exacerbates contamination of a plot of land by preparing it for commercial development). Note also that the actor would still intend to perform the action that causes the disposal.

40. 42 U.S.C. § 6903(3) (1988) (emphasis added).

The italicized language indicates that Congress envisioned two conceptually distinct phases in the process of environmental contamination. In the first stage, the polluter "disposes" of the waste, such as by burying barrels at a waste site. This disposal renders the toxins capable of entering the environment — that is to say, it creates the risk of eventual contamination. In the second stage, the hazardous pollution actually leaches or migrates into the environment.⁴¹ These two stages may occur simultaneously — the risk may actualize instantly — as would be the case if a landowner poured a barrel of hazardous waste into a pond on the property. Such an action undoubtedly constitutes a disposal. The language quoted above, however, suggests that the second phase *alone* cannot be considered a disposal. The actor must have created the risk of environmental contamination to have disposed of the waste. The definition's structure is essentially equivalent to defining *disposal* as the creation of an environmental risk "so that" such risk may materialize.

Holding that the process of migration itself constitutes a disposal would render the entire second half of the definition meaningless. The passive definition necessarily presupposes that a disposal can consist of a direct emission of toxins from a container into the environment without any action of the intermediate owner in creating the risk. Such a construction of the statute assigns no meaning to the phrase "*so that* such solid waste or hazardous waste or any constituent thereof may enter the environment."⁴² This construction violates the established canon of statutory construction that courts must read statutes in such a way as not to render any words superfluous.⁴³

Thus, a number of arguments militate in favor of interpreting the statutory language to require active conduct on the part of intermediate owners before imposing liability. Although the active construction of *disposal* seems more convincing, the plausibility of the passive reading may prevent textual analysis from being solely determinative.⁴⁴ When the plain language of a statute is less than crystal clear, courts often turn to the history of the statute to deter-

41. CERCLA refers to this second stage in isolation as a "release." 42 U.S.C. § 9601(22) (1988). For a structural analysis of the light which the *release* definition throws upon the meaning of *disposal*, see *infra* notes 101-10 and accompanying text.

42. 42 U.S.C. § 6903(3) (1988) (emphasis added).

43. The Supreme Court has reaffirmed this principle on many occasions. See, e.g., *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (referring to "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (holding that it is a court's "duty 'to give effect if possible to every clause and word of a statute'" (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936) ("[W]e are not at liberty to deny effect to specific provisions . . .").

44. See *supra* note 29.

mine Congress's intent with respect to the ambiguous language.⁴⁵ Part II therefore examines the history of the definition of *disposal* to determine whether it can provide any help in resolving this issue.

II. THE HISTORY OF THE DISPOSAL DEFINITION

Ideally, the history of a statute will provide insight into congressional intentions that can inform a court's interpretation of statutory language. The conditions under which Congress passed RCRA and CERCLA, however, render their legislative histories confusing and contradictory.⁴⁶ Both CERCLA and RCRA have abbreviated and internally inconsistent legislative histories. Although the statutes' histories are tortuous, this Part nevertheless concludes that the history of the *disposal* definition supports the active interpretation. Section II.A traces the compromises reflected in CERCLA's liability scheme but concludes that CERCLA's history does not provide sufficient information to understand what Congress intended with respect to the meaning of section 107(a)(2) — the provision that imposes liability on prior owners who owned the land at the time of disposal. Section II.B examines another legislative source in the development of the *disposal* definition, RCRA, to determine whether the history of that law casts any helpful light upon analogous concerns in CERCLA. This Part concludes that the evidence from RCRA's history supports an active interpretation of *disposal*.

A. Legislative History of CERCLA

CERCLA's whirlwind passage resulted in an absence of satisfactory committee reports discussing its liability provisions.⁴⁷ This section therefore seeks other insights into Congress's conception of

45. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1559 (11th Cir. 1989) ("If the statute is in any way ambiguous, then the court must consider the statute's legislative history.").

46. Congress passed each act in haste at the very end of a congressional session. As a result, neither statute's legislative history provides clear guidance as to the meaning of the text. See VALERIE M. FOGLEMAN, *HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION — A COMPREHENSIVE GUIDE TO SUPERFUND LAW 5* (1992) (describing the harried conditions under which Congress passed CERCLA); William L. Kovacs & John F. Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENVTL. L. 205, 216-20 (1977) (same for RCRA).

47. See *supra* note 46. Over 25 senators hammered out the text in a negotiation held behind closed doors, and Congress passed CERCLA with little discussion. FOGLEMAN, *supra* note 46, at 12. The House of Representatives considered the bill under a suspension of the rules; this device required the House to pass the bill, if at all, without any amendment or alteration. *Id.* at 13. It is unclear why the House imposed a suspension of the rules, although the decision may have been motivated by the concern that Senate support for CERCLA had evaporated and that any House revision could effectively kill the legislation. See *id.* (describing such concerns on the part of Sens. Stafford and Randolph).

the causation standard that applies under section 107(a)(2), the provision that imposes liability on prior landowners, because the standard of causation that Congress chose to apply could indicate whether Congress intended to adopt the active or the passive definition of *disposal*. If Congress intended to apply traditional notions of proximate and but-for causation to past owners, this intention militates in favor of the active definition.⁴⁸ This section offers evidence that several members of Congress did in fact envision such a causation requirement but concludes that the statute ultimately remains unclear on this question.

Some evidence from the floor debate indicates that Congress intended to require a showing of causation before liability could attach to prior owners. Comments of at least two important CERCLA supporters appear to envision a causation requirement. Representative James Florio, who introduced H.R. 7020,⁴⁹ the bill that eventually became CERCLA, stated that "a strong liability scheme will insure that *those responsible for releases* of hazardous substances will be held strictly liable for costs of response and damages to natural resources."⁵⁰ A desire to attach liability to "those responsible for releases" would seem to require finding a causal connection between the original pollution and the release and thus seems fundamentally inconsistent with the passive definition of *disposal*. Representative Al Gore — another key CERCLA supporter — also indicated during floor debate that he anticipated a strict liability scheme with a causation requirement: "If one cannot prove the defendant caused the damage which led to the suit, then the strict liability standard is never triggered."⁵¹ In addition, at least one CERCLA opponent assumed that the statute required a showing of causation: "The Government can sue a defendant under the bill only for those costs and damages that it can prove were caused by the defendant's conduct."⁵²

Although these individual members of Congress appear to have envisioned a traditional causation requirement in CERCLA's liabil-

The resulting debate served only to explain some of the major provisions of CERCLA to members of Congress before the final vote. At no point did Congress explain why it adopted RCRA's definition of *disposal*, nor precisely what it intended by imposing liability upon prior landowners.

48. Under the passive reading of *disposal*, prior landowners face liability for the migration of hazardous waste that they did not create or bury and about which they knew nothing. Because such landowners have no causal relationship to the environmental damage, evidence that Congress intended for traditional principles of causation to apply would indicate that these landowners should not be held liable. Such a result obtains only under the active interpretation of *disposal*.

49. See FOGLEMAN, *supra* note 46, at 8.

50. 126 CONG. REC. 31,964 (1980) (statement of Rep. Florio) (emphasis added).

51. 126 CONG. REC. 26,787 (1980) (statement of Rep. Gore).

52. 126 CONG. REC. 30,972 (1980) (statement of Sen. Helms).

ity scheme, Congress's ultimate intentions regarding causation remain unclear.⁵³ The statements appear on their face to refer to the entire CERCLA statute and would presumably refer to all four categories of PRPs. Yet, as discussed above, current owners of land face strict CERCLA liability without proof of causation.⁵⁴ It is possible that the statements referred only to the liability of prior owners, but such a conclusion is dubious because the statements themselves do not seem limited in their application.

Thus, the ambiguous legislative history of CERCLA does not provide a definitive indication of Congress's intent in adopting the *disposal* definition. Another chapter in the history of the *disposal* definition, however, may prove more illuminating: when Congress passed RCRA in 1976 and created the *disposal* definition later imported into CERCLA, it may have intended one or the other meaning of *disposal* to apply. The next section explores this alternative source of the *disposal* definition's history.

B. Experience Under RCRA

When defining *disposal* in CERCLA, Congress adopted by reference the definition of *disposal* contained in RCRA.⁵⁵ Examining the use of the word *disposal* under RCRA may therefore reveal its proper meaning under CERCLA.⁵⁶ The controversy that divides courts in applying the *disposal* definition under CERCLA — whether Congress intended the *disposal* definition to include passive migration — has also arisen under RCRA, albeit in a slightly different form. This section first provides a general understanding of the role of *disposal* in the RCRA scheme by examining the section of RCRA in which *disposal* figures most prominently — the “imminent hazard” provision. This section then explains the court

53. At least one court has found that Congress explicitly rejected imposing a causation requirement in the liability scheme of CERCLA. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). Although the court in *Shore Realty* expressly held that the causation requirement is absent from all of § 107(a), its reasoning appears to be limited to the category of liability covering present owners: “We agree with the state . . . that section [107(a)(1)] unequivocally imposes strict liability on the current owner . . . without regard to causation.” 759 F.2d at 1044. The *Shore Realty* court discounted Senator Helms’s remarks either as being “a rear guard action” or possibly as referring to the causation defenses provided in § 107(b) of the Act. 759 F.2d at 1045 n.19; see 42 U.S.C. § 9607(b) (1988); see also Anthony J. Fejfar, *Landowner-Lessor Liability Under CERCLA*, 53 MD. L. REV. 157, 194 (1994) (dismissing Sen. Helms’s statement). The *Shore Realty* court rendered its decision in 1985 and thus did not have the benefit of examining the 1986 amendments to CERCLA, the effects of which are considered in Part III. See *infra* notes 80-86 and accompanying text.

54. See *supra* note 11. See also *Shore Realty*, 759 F.2d at 1044 (holding that 42 U.S.C. § 9607(a)(1) does not impose a causation requirement).

55. See *supra* note 20.

56. If, in defining *disposal*, the RCRA Congress intended it to include passive migration, it seems logical to infer that a subsequent Congress that borrowed the identical wording of the definition shared the same intent on this issue.

decisions defining *disposal* under RCRA and surveys RCRA's structure in an attempt to discover whether Congress intended the *disposal* definition in RCRA to cover passive migration. This section concludes that the history of RCRA supports an active interpretation of *disposal*.

1. *The Disposal Controversy Under RCRA*

Congress enacted RCRA in 1976, four years before CERCLA, as a comprehensive solution to the regulation of hazardous waste disposal.⁵⁷ RCRA primarily regulates *ongoing* disposal of hazardous waste. Eventually, however, the EPA decided to use RCRA to seek cleanup of *inactive* hazardous waste sites as well.⁵⁸ The EPA used as its main weapon section 7003 of RCRA,⁵⁹ known as the "imminent hazard provision":

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or *disposal* of any solid waste or hazardous waste is presenting an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States . . . to immediately restrain any person contributing to the alleged *disposal* to stop such handling, storage, treatment, transportation or disposal or to take such other action as may be necessary.⁶⁰

The breadth with which one construes the word *disposal* in this provision determines the breadth of the EPA's power under RCRA to order relief at inactive waste sites. If *disposal* includes passive migration, the EPA could use RCRA's imminent hazard provision to order the cleanup of long-inactive sites. Put differently, if Congress intended for RCRA's imminent hazard provision to apply to inactive waste sites, then Congress must have intended the term *disposal* in RCRA to have a passive meaning.⁶¹ Given the magnitude of

57. See, e.g., H.R. REP. NO. 1491, 94th Cong., 2d Sess., pt. 1, at 2 (1976), reprinted in 1976 U.S.C.A.N. 6238, 6239 ("The Resource Conservation and Recovery Act of 1976 is a multifaceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year . . ."); see also Richard deC. Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 15 (1982).

58. See, e.g., *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980) (allowing the EPA to use the imminent hazard provision to mandate intervention at an inactive site).

59. See J.B. Ruhl, *The Plight of the Passive Past Owner*, 45 Sw. L.J. 1129, 1134-35 (1991) ("Prior to enactment of CERCLA in 1980, the EPA attempted to force cleanup of several of the worst known contaminated sites under RCRA. . . . In the absence of any broad cleanup authority such as CERCLA, the EPA relied on the RCRA [imminent hazard] provision with limited success to achieve basically the same objective.").

60. 42 U.S.C. § 6973 (Supp. II 1978) (emphasis added).

61. Recall that in CERCLA cases, the statute requires cleanup of the hazardous waste site; the only issue hinging on the disposal determination is the joint and several liability of one party. See *supra* note 3. By contrast, in RCRA cases the disposal definition determines whether an inactive hazardous waste site will receive any attention whatsoever.

the problem caused by hazardous waste disposal at abandoned sites,⁶² it should not be surprising that courts attempted to construe the *disposal* definition under RCRA so as to promote liability.⁶³ The next section, however, demonstrates that Congress did *not* intend RCRA's imminent hazard provision to cover inactive waste sites; therefore, *disposal* in this provision has an active meaning.

2. The Meaning of Disposal Under RCRA

Because RCRA's legislative history provides little insight into the intended meaning of *disposal*,⁶⁴ this section considers evidence derived both from RCRA's structure and from the actions of subsequent Congresses that indicates that Congress only intended for RCRA to apply to active waste sites.

Four elements of RCRA's structure suggest that Congress did not intend courts to apply RCRA to inactive waste sites. First, Congress cast the language of the imminent hazard provision in the

62. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120 (referring to "a major new source of environmental concern . . . : the tragic consequences of improper[], negligent[], and reckless[] hazardous waste disposal practices known as the 'inactive hazardous waste site problem'"); H.R. REP. NO. 1491, *supra* note 57, at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6239 (referring to "the problems associated with the 3-4 billion tons of discarded materials generated each year").

63. See, e.g., *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982); *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980). The desire of the courts to expand liability to implicate all possible defendants emerges with particular clarity in *United States v. Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) ("Limiting the government's enforcement prerogatives to cases involving active human conduct would open a gaping hole in the overall protection of the environment envisioned by Congress, a protection designed to be responsive to unpredictable circumstances."). Ultimately, of course, Congress addressed the concerns of these courts when it passed CERCLA in 1980.

Another factor that may explain courts' expansive interpretation of the imminent hazard provision is that in some cases the owner of the land at the time liability attached also had been the entity responsible for contaminating the land. See, e.g., *Solvents Recovery*, 496 F. Supp. at 1130-31. Thus, a RCRA imminent hazard provision defendant may have differed significantly from the typical CERCLA § 107(a)(2) defendant in that the latter was much more likely to be "innocent." *Innocent* here means only that the defendant was not a polluter and did not know about the environmental contamination; this should not be confused with the somewhat more stringent definition incorporated in the "innocent landowner defense" discussed *infra* at notes 80-86 and accompanying text.

64. Like CERCLA, RCRA presents an elusive subject upon which to perform a meaningful legislative history analysis. Congress passed the Act during the final days of a congressional session. See Kovacs & Klucsik, *supra* note 46, at 219-20. The final version of the RCRA bill resulted from an informal House-Senate compromise and did not receive the benefit of a conference committee. See *id.* at 219. The House of Representatives, in a last-minute vote, passed the compromise legislation without a single member having read the final version. See *id.* at 220.

As a result of this hasty and tumultuous passage, RCRA possesses little meaningful legislative history. In fact, the legislative history of the original Act contains no specific discussion of the scope of the imminent hazard provision and no mention of the reasons underlying its insertion. See *Waste Indus.*, 734 F.2d at 165. RCRA's overall structure, however, does provide help in interpreting the definition of *disposal*.

present tense.⁶⁵ The language of the provision — “the Administrator may bring suit on behalf of the United States . . . to immediately restrain any person *contributing to the alleged disposal*”⁶⁶ — applied on its face solely to *currently occurring* activity. No potential defendant could be currently “contributing to” an *inactive* waste site. It therefore seems unlikely that Congress intended the provision to apply to inactive sites.

Second, the location of the imminent hazard provision within the Act also indicates that Congress did not intend for the Act to apply to inactive sites.⁶⁷ The provision appears in a portion of the Act entitled “Miscellaneous Provisions.” The substantive requirements of the Act are located elsewhere. Had Congress intended for the provision to have the broad scope assigned to it by the EPA and some courts, it likely would have placed the provision within the parts of the Act that establish substantive requirements and provide for criminal and civil penalties.⁶⁸

Third, the fact that the imminent hazard provision immediately follows the citizen suit provision has led at least one court to conclude that Congress intended the imminent hazard provision to be predominantly jurisdictional in nature, providing an otherwise unavailable federal forum to cover emergency situations.⁶⁹

Finally, Congress did not draft the language of the imminent hazard provision especially for RCRA; similar provisions appear in other environmental statutes.⁷⁰ It seems highly unlikely that Congress would have used this kind of boilerplate language to enact such an important substantive legal change — that is, allowing the EPA to address inactive waste sites.

In addition to these structural considerations, there exists some additional evidence of Congress’s view of the scope of the imminent hazard provision. In the course of amending RCRA in 1980, the

65. Several courts have commented on the importance of the tense in which the imminent hazard provision was drafted. *See, e.g.,* *United States v. Waste Indus., Inc.*, 556 F. Supp. 1301, 1307 (E.D.N.C. 1982), *revd.*, 734 F.2d 159 (4th Cir. 1984); *United States v. Price*, 523 F. Supp. 1055, 1070 (D.N.J. 1981), *aff’d*, 688 F.2d 204 (3d Cir. 1982).

66. 42 U.S.C. § 6973 (Supp. II 1978) (emphasis added). Congress amended this provision in 1984 to recast it in both present and past tense. *See* Hazardous and Solid Waste Amendments Act of 1984, Pub. L. No. 98-616, § 402, 98 Stat. 3221, 3271. This subsequent change, however, does not reflect either the intent of the RCRA Congress or the intent of the Congress that incorporated RCRA’s understanding of *disposal* into CERCLA in 1980.

67. *See, e.g.,* *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138, 143-44 (N.D. Ind. 1980) (inferring that the imminent hazard provision is jurisdictional in nature because of its location with miscellaneous provisions rather than with standard-creating substantive provisions and because it is located next to a provision conferring standing).

68. For examples of these sections, see 42 U.S.C. §§ 6922-6925 (1988). For a fuller version of this argument, see *Midwest Solvent Recovery*, 484 F. Supp. at 144.

69. *See* 484 F. Supp. at 143-44.

70. *See, e.g.,* Clean Water Act § 504, 33 U.S.C. § 1364 (1988); Safe Drinking Water Act § 1431, 42 U.S.C. § 300i(a) (1988).

Senate Environment and Public Works Committee explained the scope of the imminent hazard provision by announcing that it incorporated common law standards of liability.⁷¹ Although the report in fact indicates that the committee intended the liability standard with respect to persons contributing to disposal to be broader than at common law,⁷² the example the report gives still contemplates that such persons "had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal."⁷³ This language is more consistent with an active definition of *disposal* than with a passive definition, because it envisions landowners who have actual knowledge of the disposal or fail to exercise care with respect to the entity actually conducting the disposal. Those who own the land while toxic waste migrates unbeknownst to them by definition do not have such knowledge and cannot fail to act with care with respect to the conduct of a disposal about which they know nothing.

The final evidence of Congress's intent in fashioning RCRA's imminent hazard provision may be found in the legislative history of CERCLA. A report accompanying the bill that eventually became CERCLA examined the need for new law in the area of inactive waste sites: "Since enactment of [RCRA], a major new source of environmental concern has surfaced: the tragic consequences of improper[], negligent[], and reckless[] hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' . . . Existing law is clearly inadequate to deal with this massive problem."⁷⁴

This report suggests that Congress did not intend RCRA's imminent hazard provision to address the problems posed by inactive waste sites. If the provision could be used to order the cleanup of abandoned or inactive sites, RCRA itself would *not* be "inadequate to deal with this massive problem."⁷⁵ That is, if the definition of

71. S. REP. NO. 172, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023. The Supreme Court has observed that "particularly . . . when the precise intent of the enacting Congress is obscure," the views of subsequent Congresses "are entitled to significant weight." *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *see also* *Bell v. New Jersey*, 461 U.S. 773, 784 (1983) ("Of course, the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.").

72. S. REP. NO. 172, *supra* note 71, at 5, *reprinted in* 1980 U.S.C.C.A.N. at 5023.

73. *Id.* In addition, the fact that Congress envisioned disposal as the type of activity that an "entity" would need to "conduct[]" also indicates that Congress intended the active reading of disposal to apply.

74. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17-18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. In the course of the debate over CERCLA, individual members of Congress made statements along similar lines. *See, e.g.*, 126 CONG. REC. 30,931 (1980) (statement of Sen. Randolph) ("[T]here is no procedure for dealing with dangers posed by . . . past disposal of chemical wastes.").

75. H.R. REP. NO. 1016, *supra* note 74, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 6120.

disposal included passive migration, RCRA's imminent hazard provision would indeed be adequate to cover inactive sites. Thus, the enactment of CERCLA itself provides the strongest argument that Congress did not understand the word *disposal* in RCRA to include passive migration.⁷⁶

The history and structure of the *disposal* definition thus indicate that Congress intended for an active definition of *disposal* to apply. Originally, Congress employed the *disposal* definition in RCRA to allow the EPA to address instances of *ongoing* contamination at *active* waste sites. Congress then placed an identical definition in CERCLA. Although CERCLA's messy history does not provide much new information, it seems logical that Congress would expect identical language to have the same meaning in CERCLA that it did in RCRA.

III. THE STRUCTURE OF CERCLA

This Part argues that the structure of CERCLA supports the active reading of *disposal*.⁷⁷ Section III.A examines uses of the term *disposal* in the statute outside section 107(a)(2) and concludes that these other references support the active interpretation. Section III.B analyzes the role of section 107(a)(2) within CERCLA's general liability scheme and concludes that the contextual relationship between the categories of PRP liability embodied in sections 107(a)(1) and 107(a)(2) confirms Congress's intention to employ the active reading of *disposal*. Finally, section III.C explores the

76. The fact that Congress considered RCRA inadequate and created CERCLA to remedy the problem of inactive waste sites could imply that Congress intended the *disposal* definition in CERCLA to have a broader scope than it did in RCRA. Upon closer analysis, however, this theory must fail. Had Congress intended *disposal* to possess a broader meaning under CERCLA than under RCRA, it would not likely have incorporated the same definition without any clarifying statement. See *supra* note 20 and accompanying text. One might also argue that Congress intended to codify a broad interpretation of *disposal* already reached by courts when Congress selected the same text for CERCLA. Most of the cases adopting the passive interpretation of disposal under RCRA, however, were decided after Congress passed CERCLA. See, e.g., *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981); *United States v. Midwest Solvent Recovery, Inc.*, 484 F. Supp. 138 (N.D. Ind. 1980).

77. Looking to the structure and purpose of statutes as a whole enables courts faced with ambiguous provisions to adopt interpretations with the greatest fidelity to the congressional intent underlying the statute. For the general proposition that courts should analyze statutes by examining the statute as a whole, see *Helferich v. New York Trust Co.*, 292 U.S. 455, 464 (1934). See also *United Sav. Assn. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citations omitted)); Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703, 706 (1988) ("[S]tatutes are to be studied carefully, as a whole, and with due regard for the structure of the statutory edifice and the interpretive lessons to be drawn from that edifice.").

significance of the “guilty prior landowner” provision and infers from it that Congress assumed that the active reading of *disposal* would apply, because only this reading avoids bizarre results.

A. CERCLA's Other Uses of Disposal

The word *disposal*, or a close variation thereof, occurs eight times in CERCLA other than in section 107(a)(2).⁷⁸ In each case, when using the word *disposal*, the statute clearly contemplates an environmental polluter taking active steps to rid itself of contaminated material.⁷⁹

1. Use of the Word Disposal in the Innocent Landowner Defense

In 1986, Congress extended the duration of CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA).⁸⁰ As part of the SARA amendments, Congress modified the CERCLA liability scheme by providing narrow exemptions for certain classes of persons otherwise liable. One such exemption reflects Congress's desire to free from liability those “innocent” current owners of land who did not produce any waste and who, in good faith, had no knowledge that a previous landowner had buried waste on the land.⁸¹ Congress accomplished this exemption by first defining the class of transactions in land that would result in liability and then creating an exception for innocent purchasers. This “innocent landowner exemption,” which appears in a modification to the definitional section of CERCLA, provides that purchasers are liable for the land they acquire unless they can show, *inter alia*, that “the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility.”⁸²

Congress clearly intended the above provision to exempt from liability purchasers who acquired the land after the relevant polluting activity had taken place. Congress expressed this intention,

78. See 42 U.S.C. §§ 9601(9)(B), 9601(22), 9601(23), 9601(35)(A), 9603(c), 9607(a)(3), 9607(a)(4), 9622(g)(1)(B)(ii) (1988).

79. For an example of a court conducting this type of analysis on CERCLA's use of *disposal*, see *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1351 (N.D. Ill. 1992).

80. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1988)). Although the legislative history of SARA does not approach the chaos of the legislative histories of CERCLA and RCRA, it is still far from a model of clarity. See FOGLEMAN, *supra* note 46, at 13-20.

81. See, e.g., 131 CONG. REC. 34,715-17 (1985) (discussing both innocent landowner and innocent purchaser exceptions).

82. 42 U.S.C. § 9601(35)(A) (1988). Section 101(35) of CERCLA defines *contractual relationship* as including, but not being limited to, “land contracts, deeds or other instruments transferring title or possession” with the exception quoted in the text. 42 U.S.C. § 9601(35) (1988).

however, by requiring that the exemption apply only to innocent purchasers who receive the land *after* "disposal" of the hazardous waste. If *disposal* incorporates passive migration, virtually no one could qualify for this defense because the passive migration could well occur or continue to occur during the innocent purchaser's ownership. As one court has noted, only purchasers fortunate enough to purchase land where the buried waste was contained in concrete — and thus incapable of migration — could assert the defense if courts adopted the passive definition of *disposal*.⁸³

By referring in these amendments to a period of time "after the disposal or placement of the hazardous substance,"⁸⁴ Congress clarified two issues. First, Congress envisioned disposal as a discrete act, with distinct beginning and ending points. Construing *disposal* to incorporate passive migration would eliminate any period of time "after the disposal."⁸⁵ Second, Congress appears to have viewed the process of disposal as being akin to the concept of placement,⁸⁶ which requires an affirmative act, further suggesting that Congress envisioned *disposal* as requiring active conduct.

2. Use of the Word Disposal in the De Minimis Settlement Provision

Section 122 of CERCLA, also added as part of the SARA amendments, provides the EPA with authority to enter into an expedited settlement with PRPs who do not figure prominently in the contamination of inactive hazardous waste sites.⁸⁷ A PRP's contribution to the contamination of the site may be considered de minimis in two different cases. Either the PRP has contributed a quantity of waste that, in physical amount and adverse environmental effect, is "minimal in comparison to other hazardous substances

83. See *Petersen Sand & Gravel*, 806 F. Supp. at 1352.

84. 42 U.S.C. § 9601(35)(A) (1988).

85. This argument would fail, of course, if periods of passive migration also had distinct beginning and ending points. Although one could probably identify the beginning point of passive migration with reasonable certainty, the movement of the hazardous waste tends to continue in such a way as to render the identification of an ending point all but impossible. See *Petersen Sand & Gravel*, 806 F. Supp. at 1352 (noting that because passive migration is constant, only prior owners lucky enough to have the waste on their land enclosed in concrete could escape liability under the passive reading of disposal); *Joslyn Mfg. Co. v. T.L. James & Co.*, 836 F. Supp. 1264, 1270 (W.D. La. 1993) (acknowledging that rainfall causes passive migration of hazardous materials on a near-constant basis, but declining to attach § 107(a)(2) liability on that fact alone).

86. Although Congress used the disjunctive in linking the words *placement* and *disposal*, reference to the *disposal* definition reveals that Congress intended for *placement* to be a subsidiary component of *disposal*. Congress defined *disposal* as "the discharge, deposit, injection, dumping, spilling, leaking, or *placing* of any solid waste." 42 U.S.C. § 6903(3) (1988) (emphasis added).

87. 42 U.S.C. § 9622(g)(1) (1988).

at the facility,”⁸⁸ or the PRP is a present owner who “did not conduct or permit the generation, transportation, storage, treatment, or disposal” of the hazardous waste and who “did not contribute to the release . . . through any action or omission.”⁸⁹ The provision thus provides a route to quick settlements for very minor polluters and for certain landowners who are otherwise faultless but cannot satisfy the innocent landowner defense. A later portion of this section confirms that the settlement provision targets innocent present landowners: PRPs are not eligible for expedited settlements under the statute if they “purchased the real property with *actual or constructive knowledge* that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.”⁹⁰

The structure of the de minimis settlement provision supports an active reading of *disposal*.⁹¹ Congress explicitly limits the innocent landowner eligibility for expedited settlement to *present* owners of contaminated land. If *prior* landowners faced liability for passive migration under section 107(a)(2), this limitation would seem bizarre; no principled ground exists for allowing innocent present landowners to settle their liability cheaply and quickly while denying this benefit to innocent prior landowners. Thus, the fact that Congress limited that part of the statute to innocent present owners strongly suggests that Congress did not intend for innocent prior owners to be PRPs at all.⁹²

3. Use of the Word Disposal in the Definition of Facility

The statute’s definition of a “facility” that may require cleanup pursuant to CERCLA includes “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed.”⁹³ The inclusion of *disposed of* in this list of verbs indicates that Congress envisioned disposal as requiring an actor. The words surrounding *disposed of* — *deposited*, *stored*, and *placed* — all require an actor. If courts interpret *disposal* in such a way as to make it harmonize with its surrounding language, as the principle of *nos-citur a sociis* dictates,⁹⁴ then courts should construe *disposal* to re-

88. 42 U.S.C. § 9622(g)(1)(A) (1988).

89. 42 U.S.C. § 9622(g)(1)(B) (1988) (emphasis added).

90. 42 U.S.C. § 9622(g)(1)(B) (1988) (emphasis added).

91. See Ruhl, *supra* note 59, at 1143-44. In addition, the grouping of *disposal* with the words *generation*, *transportation*, *storage*, and *treatment* supports the active definition to the extent that the words obviously all share active characteristics.

92. See *infra* text accompanying notes 116-22 (arguing that Congress never intended to make innocent prior owners PRPs).

93. 42 U.S.C. § 9601(9)(B) (1988).

94. See *supra* notes 33-34 and accompanying text.

quire the same affirmative conduct required by *depositing*, *storing*, and *placing*.

4. *Use of the Word Disposal in the Definition of Removal*

Disposal appears in CERCLA a fourth time when Congress defined *removal* by listing a series of acts, including "the disposal of removed material."⁹⁵ The definition of *removal* explicitly labels a disposal as a type of "action[]."⁹⁶ The *act* or *action* of disposal requires an actor to do the disposing; a definition of *disposal* that encompasses passive migration, which occurs even without an actor, seems inconsistent with such a provision.

5. *Use of the Word Disposal in CERCLA's Generator PRP Category*

The third category of PRPs on whom CERCLA imposes liability includes "any person who by contract, agreement, or otherwise arranged for *disposal* or treatment, or arranged with a transporter for transport for *disposal* or treatment, of hazardous substances owned or possessed by such person."⁹⁷ Conceiving of disposal as the type of activity for which one would need to "arrange[]" clearly implies an active definition of *disposal*.

6. *Use of the Word Disposal in CERCLA's Transporter PRP Category*

The fourth category of PRPs on whom CERCLA imposes liability includes "any person who accepts or accepted any hazardous substances for transport to *disposal* or treatment facilities."⁹⁸ This section, which envisions facilities at which hazardous waste is either recycled — through "treatment" — or eliminated — through "disposal" — presupposes an actor at the facility to perform the desired task. It thus appears to support the active reading of *disposal*.

95. The statute defines *removal*, in part, as:

the cleanup or removal of released hazardous substances from the environment, . . . such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the *disposal* of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23) (1988) (emphasis added).

96. 42 U.S.C. § 9601(23) (1988).

97. 42 U.S.C. § 9607(a)(3) (1988) (emphasis added).

98. 42 U.S.C. § 9607(a)(4) (1988) (emphasis added).

7. Use of the Word Disposal in CERCLA's Notification Requirement

Section 103(c) of CERCLA requires PRPs to notify the EPA of the existence of "a facility at which hazardous substances . . . are or have been stored, treated, or disposed of."⁹⁹ As with the definition of *facility* itself,¹⁰⁰ in order to construe *disposed of* consistently with its surrounding words — *stored* and *treated* — one must interpret the term to require an affirmative act.

8. Use of the Word Disposal in the Definition of Release

The eighth instance of the word *disposal* in CERCLA occurs in the statute's definition of *release*. Release forms a critical part of CERCLA's liability scheme; the statute imposes liability on the four categories of PRPs only for damages resulting from a release or threat of release.¹⁰¹ CERCLA defines *release* as follows:

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or *disposing into the environment* (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).¹⁰²

The above definition contains several significant features. Some words in the above list truly admit of no active component.¹⁰³ For instance, *leaching* and *escaping* require no affirmative conduct; these are intransitive verbs. The fact that the definition of *release* contains words with active meanings *and* words with passive meanings, combined with the fact that one of the words is *disposing*, leads to a second conclusion: Congress intended *release* to have a broader meaning than *disposal*.¹⁰⁴

The contrast between the language used in the two definitions is quite revealing. *Release*, a broader concept than *disposal*, clearly includes both active and passive components. The language of the disposal definition, on the other hand, appears ambiguous on this point. If *release* is broader than *disposal*, and *release* already in-

99. 42 U.S.C. § 9603(c) (1988).

100. See *supra* notes 93-94 and accompanying text.

101. PRPs face liability for, inter alia, "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(C) (1988).

102. 42 U.S.C. § 9601(22) (1988) (emphasis added). The definition continues by excluding certain occurrences, none of which are relevant to the present discussion.

103. Although some courts make a similar claim for the words in the *disposal* definitional list, see, e.g., *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845 (4th Cir.), cert. denied, 113 S. Ct. 377 (1992), the words *leak* and *spill* are ambiguous in that they possess alternative meanings with active components. See *supra* notes 25-28 and accompanying text.

104. See, e.g., *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1351 n.2 (N.D. Ill. 1992) ("What is clear is that 'release' was meant to be more inclusive than 'disposal.'").

cludes explicitly passive components, it makes sense to conclude that *disposal* is limited to its active meaning. Interpreting *disposal* to include passive migration collapses the *disposal* definition into the *release* definition, for if one were to impute passive components into the *disposal* definition, *disposal* and *release* would become operationally interchangeable; no meaningful difference would exist between the two terms. This result, however, makes little sense, for Congress would not have created a separate definition for *disposal* if it intended for that word to mean the same thing as *release*.¹⁰⁵

The use of the words *into the environment* in the *release* definition further reveals its broad scope. Recall that Congress selected different language — “so that such solid waste or hazardous waste or any constituent thereof may *enter the environment*”¹⁰⁶ — in defining *disposal*.¹⁰⁷ Once a landowner has filled tanks with hazardous waste, the material has not entered the environment, but the potential for contamination exists.¹⁰⁸ A *release* — not another *disposal* — occurs when a rupture in the tank causes the hazardous material passively to migrate “into the environment.” In fact, this language refers so clearly to passive migration that Congress added an explanatory phrase — “including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant”¹⁰⁹ — to make clear that *release* also included the smaller and distinct concept of *disposal*.

The contextual difference between *release* and *disposal* thus elucidates Congress’s intent in drafting section 107(a)(2) of CERCLA. Had Congress desired to include passive migration as part of this section of the liability scheme, it would have held previous owners liable if they owned the land at the time of any release. Congress declined this approach, deciding instead to limit prior owner liability to ownership at the time of disposal. At least one court has held the difference in these definitions sufficient reason to adopt the active interpretation of *disposal*.¹¹⁰

105. See *supra* note 43 and accompanying text (discussing the principle that statutes must be construed so as to give every word meaning).

106. 42 U.S.C. § 6903(3) (1988) (emphasis added).

107. See *supra* notes 40-43 and accompanying text.

108. Another way of phrasing this conclusion is to say that the polluter created the risk of eventual environmental contamination, or the threat of release. For an example of a court exploring the importance of the “so that such solid waste . . . may enter the environment” language, see *United States v. Waste Industries, Inc.*, 556 F. Supp. 1301, 1306 (E.D.N.C. 1982), *revd.*, 734 F.2d 159 (4th Cir. 1984).

109. 42 U.S.C. § 9601(22) (1988).

110. See *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1351 (N.D. Ill. 1992). The *Petersen* court also relies heavily on the “innocent landowner” argument. See *supra* notes 80-86 and accompanying text.

B. The Contextual Difference Between Present and Prior Owners

The difference between CERCLA's separate liability categories for present and prior owners¹¹¹ also demonstrates that Congress intended for the active definition of *disposal* to apply. Section 107(a)(1) imposes liability on any current owner of contaminated land.¹¹² Adopting a definition of *disposal* in section 107(a)(2) that includes passive migration would also impose liability upon everyone who owned the land since the original pollution, because passive migration would make disposal a near-continuous process.¹¹³ Although one may question whether Congress intended to treat previous owners differently from present owners,¹¹⁴ it seems reasonable — relying on a structural reading of CERCLA — to infer that if Congress created two separate categories for liability, it must have intended to reach two separate classes of defendants.¹¹⁵ Ownership alone triggers 107(a)(1) liability; something more must be required — for example, the temporal element of owning the land during a disposal — to trigger 107(a)(2) liability. Interpreting 107(a)(2) such that all post-pollution owners face liability tends to collapse the two categories of PRPs. Had Congress intended this result, it probably would have said so directly rather than relying on a tortuous construction of *disposal*.¹¹⁶

111. Recall that § 107(a)(1) renders liable "the owner and operator of a vessel or a facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs." 42 U.S.C. § 9607(a)(1) (1988). Section 107(a)(2) establishes liability for "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." 42 U.S.C. § 9607(a)(2) (1988). In other words, § 107(a)(1) covers present owners and § 107(a)(2) applies to previous owners.

112. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985). The imposition of liability, of course, remains subject to the causation-based defenses, codified at 42 U.S.C. § 9607(b) (1988) and discussed *supra* at note 11.

113. See, e.g., *Joslyn Mfg. Co. v. T.L. James & Co.*, 836 F. Supp. 1264, 1270 (W.D. La. 1993) ("This court does not agree with [plaintiff's] contention that § 9607(a)(2) liability should be extended to all prior owners solely on the basis that rainfall obviously causes hazardous materials to leach through the soil.").

114. See, e.g., *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845-46 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).

115. See, e.g., *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (using a structural reading of CERCLA's liability provisions to differentiate between § 107(a)(1) and § 107(a)(2)); *Shore Realty*, 759 F.2d at 1044 (same).

116. Several courts adopting the active interpretation of *disposal* have commented on this fact. See, e.g., *Snediker Developers v. Evans*, 773 F. Supp. 984, 989 (E.D. Mich. 1991) ("[A]ssuming that any hazardous waste may migrate long after it has been introduced into the environment, [the passive reading's] sweeping interpretation of the term disposal would effectively impose cleanup liability on any owner in a chain of title. The Court is satisfied that if the drafters of CERCLA had intended such a far reaching consequence, they would have said so explicitly."); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989) ("To define disposal as plaintiff wishes would effectively make all property owners from the time a site became polluted (up to and including the current owner) potentially liable under § 9607(a)(2) even if these owners did not introduce the chemicals onto the site. Such a construction conflicts with the limited scope of § 9607(a)(2).").

C. *The Implications of the Guilty Prior Landowner Provision*

Buried amidst the definitions incorporated into CERCLA as part of the 1986 SARA amendments lurks one of the most substantive, liability-generating provisions of the entire statute. Section 101(35) defines the phrase *contractual relationship*¹¹⁷ for purposes of section 107(b)(3), which provides that a third-party defense is not available if the third party's "act or omission occurs in connection with a contractual relationship . . . with the defendant."¹¹⁸ Section 101(35), however, also modifies the meaning of *contractual relationship* so that innocent landowners escape liability.¹¹⁹ Section 101(35)(C) clarifies the scope of the innocent landowner defense. It provides:

Nothing in this paragraph or in section 9607(b)(3) [the causation-based defense section] of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no [causation-based defense] shall be available to such defendant.¹²⁰

This "guilty landowner provision" confirms the active definition of *disposal* because the provision makes no sense if it were to coexist with the passive definition. The passive reading of *disposal* is inconsistent with the provision in two separate ways. First, it would imply that Congress intended innocent present owners to be treated much better than innocent prior owners under CERCLA. Second, it would imply that Congress chose arbitrarily to move PRPs already liable under one category to a different category when such a change would have absolutely no effect.

The initial sentence of the provision clarifies that the innocent landowner defense protects only present owners; prior owners are not eligible. If Congress intended to adopt the passive reading of *disposal*, then almost all owners after the original pollution would become liable as a consequence of passive migration on their

117. 42 U.S.C. § 9601(35)(A) (1988).

118. 42 U.S.C. § 9607(b)(3) (1988).

119. Recall that the innocent landowner defense actually appears in the definitional section, by exempting certain transactions from the phrase *contractual relationship*. See *supra* note 82 and accompanying text. Section 101(35)(A) establishes the elements of this innocent landowner defense. 42 U.S.C. § 9601(35)(A) (1988). Section 101(35)(B) establishes the due diligence standard with which innocent landowners must comply before gaining eligibility for the defense. 42 U.S.C. § 9601(35)(B) (1988).

120. 42 U.S.C. § 9601(35)(C) (1988).

land.¹²¹ Some of these owners undoubtedly would “not know” or would have “no reason to know” about the migration, which would qualify them for the innocent landowner defense if they were present owners. As *prior* owners, however, they would receive no protection from the innocent landowner provision because it specifically restricts its effect to present owners. Thus, innocent present owners would fare much better under CERCLA than seemingly innocent prior owners for no apparent reason. The most likely explanation for the fact that Congress excluded innocent prior owners from the scope of the innocent landowner defense is that Congress never intended to make innocent prior owners PRPs at all.¹²²

Adoption of the passive reading of *disposal* would also imply that Congress wanted to reassign PRPs from one liability category to another. The guilty prior landowner provision assigns liability under section 107(a)(1) to prior landowners who gain actual knowledge of the contamination. The effects such a provision would have if Congress intended the passive definition of *disposal* to apply are anomalous. Recall that under the passive reading most prior owners in the chain of title after the initial contamination would face liability under section 107(a)(2) by virtue of the continuous nature of hazardous waste migration.¹²³ The effect of the provision, then, would be to take guilty prior landowners *already liable* under section 107(a)(2) and to make them liable instead under section 107(a)(1). This explicit reassignment of liability would constitute nothing but meaningless surplusage — PRPs liable under section 107(a)(1) do not face consequences any different from those liable under section 107(a)(2) — and would seem bizarre. Certainly the statute should be interpreted in a way that avoids this result;¹²⁴ only adoption of the active reading of *disposal* accomplishes this end.

IV. THE PURPOSES OF CERCLA

This Part examines Congress's purposes in enacting CERCLA and concludes that use of the active reading of *disposal* is consistent with those purposes.¹²⁵ Congress enacted CERCLA with two goals

121. See *supra* note 85 and accompanying text.

122. Cf. *supra* text accompanying notes 91-92 (reaching a similar conclusion with respect to the de minimis settlement provision).

123. See *supra* note 85 and accompanying text.

124. See *supra* note 43 and accompanying text.

125. In construing a statute to give full effect to the intent of the legislature, courts may look to the purpose of the statutory scheme. See, e.g., *United States v. Bryan*, 339 U.S. 323, 337-38 (1950) (“The history of [the] statute, its original purpose, and its present status are all relevant considerations in its interpretation.”). If at all possible, the reviewing court should give effect to the purpose of the statute. See, e.g., *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 386 (1948) (“Words . . . are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning . . . is to be arrived at not only by a consideration

in mind — to enable the government to clean up inactive hazardous waste sites and to make polluters bear the cost of cleanup.¹²⁶ Section IV.A argues that the cleanup goal does *not* mandate adoption of the passive definition of *disposal*. Section IV.B contends, on the other hand, that the goal of imposing costs on polluters strongly supports the active definition.

A. *Enabling Government Cleanup of Hazardous Waste Sites*

The primary purpose of CERCLA is to enable the government to clean up abandoned or inactive hazardous waste sites.¹²⁷ Although many courts rely on this goal to construe liability under CERCLA broadly and exceptions narrowly — on the apparent theory that the more entities liable under CERCLA, the better equipped the Superfund will be to deal with hazardous waste sites¹²⁸ — this purpose should not be stretched to impose liability beyond the limits in the statutory scheme.¹²⁹ Judge Easterbrook, writing for a Seventh Circuit panel, has forcefully addressed this issue:

When the liability may be large — it is costly to clean up polluted sites — there is a chance that one or more of the firms that have caused the problem will not have the assets necessary to set things

of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.” (quoting *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937))).

126. See, e.g., *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991) (“[CERCLA’s] two essential purposes have been identified. First, Congress intended to provide the federal government with the tools . . . for a swift and effective response to hazardous waste sites. Second, Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created.” (citations omitted)); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *Violet v. Picillo*, 648 F. Supp. 1283, 1288 (D.R.I. 1986). Commentators have underscored these two purposes of CERCLA:

CERCLA has two major purposes: the primary one is to enable the federal government to swiftly clean up abandoned and uncontrolled hazardous waste sites. CERCLA’s secondary purpose is to make persons who were responsible for the improper disposal of hazardous waste bear the cost and responsibility of cleaning it up.

FOGLEMEN, *supra* note 46, at 1 (footnotes omitted); see also, e.g., *Dennis J. Byrne, Jones-Hamilton Co. v. Beazer Materials: Chemical Supplier “Arranges” for CERCLA Liability*, 23 GOLDEN GATE U. L. REV. 213, 220 (1993) (“Courts applying CERCLA have cited two primary legislative purposes underlying the Act: to give governmental agencies the tools for prompt and effective responses to such problems and to force those responsible for *creating the pollution* to bear the costs of remedying the contamination.”) (emphasis added).

127. See, e.g., *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985) (“[CERCLA] was designed primarily to facilitate the prompt cleanup of hazardous waste sites . . .”); see also *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386-87 (5th Cir. 1989) (quoting *Walls*); *Dickerson v. EPA*, 834 F.2d 974, 978 (11th Cir. 1987) (same); *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985) (same).

128. Many courts have taken this approach. For one example, see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

129. See *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989) (“However broad Congress may have intended the definition, Congressional intent does not justify the distortion [of] the statute.”).

right. The prospect of a shortfall in assets means that someone else (the public at large) must incur cleanup costs; victims may be left to bear their own losses The designation of additional firms as responsible ameliorates this problem and so helps to achieve statutory aims. . . .

It is not our function to design rules of liability from the ground up, however. We are enforcing a statute rather than modifying rules of common law. . . . To the point that courts could achieve “more” of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court’s job is to find and enforce stopping points no less than to implement other legislative choices.¹³⁰

The first three Parts of this Note demonstrate that CERCLA contains such a “stopping point” in its definition of *disposal*. These Parts show that Congress intended *disposal* to have an active meaning, thereby limiting the liability of prior landowners to those whose affirmative actions contributed to the spread of hazardous waste. In interpreting CERCLA, then, courts should not use broad, generalized goals, such as achieving maximal funds for cleanup, to ignore the limits inherent in the most plausible reading of the statute.

B. *Imposing Cleanup Costs on Polluters*

CERCLA’s secondary purpose — assuring that polluters bear the costs of cleanup — also bears directly on the controversy over the *disposal* definition. Construing *disposal* to include passive migration would spread the costs of cleanup to prior property owners whose only sin consisted of owning land with leaky storage tanks buried underneath, though they were quite ignorant of that fact. The active reading of *disposal* ensures that liability under section 107(a)(2) rests squarely where it belongs: on the environmental polluters who created the risk that hazardous waste would enter the environment and who received the economic benefits of doing so, and on those who discovered the contamination but refused to take action to remedy the problem.

This equity argument may appear at first blush to overlook the fact that current landowners clearly face liability without any degree of fault under section 107(a)(1).¹³¹ Nevertheless, CERCLA’s statutory scheme explicitly differentiates between present and prior owners: prior owners face liability under section 107(a)(2) only if they owned the land “at the time of disposal.”¹³² The *disposal* lan-

130. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) (citation omitted).

131. 42 U.S.C. § 9607(a)(1) (1988).

132. 42 U.S.C. § 9607(a)(2) (1988).

guage thus serves to qualify the liability imposed on prior owners and to differentiate the legal standards for the two separate classes of liability. As the Second Circuit has explained, "Congress intended to cover different classes of people differently. . . . [S]ection [107(a)(2)]'s scope is more limited than that of section [107(a)(1)]."¹³³ Bound by the plain terms of CERCLA, courts must impose liability upon current owners. Courts should not, however, use the fact that Congress intended to apply very broad liability to present owners in order to impose equally broad liability upon the class of prior owners whose liability Congress expressly qualified by adding the phrase *at the time of disposal*.¹³⁴

One court adopting the passive view of *disposal*, however, has alleged that the active interpretation contravenes the purposes of CERCLA by establishing a perverse set of incentives for the owners of land. This court argued that adoption of the active reading of *disposal* allows owners of land who know that passive migration is occurring on their land to do nothing and to allow the environmental contamination to spread unabated.¹³⁵ So long as the landowner manages to sell the land before response costs are incurred, the argument continues, the landowner could avoid liability for such conduct under the active definition. Interpreting CERCLA's liability scheme so as to discourage voluntary cleanup appears to contravene the purposes of the statute.

This argument, however, makes three false assumptions. First, the argument assumes that without a passive definition of *disposal* CERCLA does not adequately deter sellers attempting to evade liability through fraudulent transfers of land. Such an assumption, however, is patently untrue. CERCLA — as amended by SARA — defines such a landowner as liable under section 101(35)(C).¹³⁶ Because the landowner with knowledge faces mandatory liability as a present owner even if the property is transferred, such a landowner faces no economic incentive to transfer ownership of the land. The statute also provides for criminal penalties of fines and

133. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

134. 42 U.S.C. § 9607(a)(2) (1988).

135. In the course of rejecting a lower court's adoption of the active definition, the Fourth Circuit stated:

Under the [active] view, an owner could avoid liability simply by standing idle while an environmental hazard festers on his property. Such an owner could insulate himself from liability by virtue of his passivity, so long as he transfers the property before any response costs are incurred. . . . A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.

Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845-46 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992). For one court's refutation of this argument, see *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1351 (N.D. Ill. 1992).

136. See *supra* notes 117-24 and accompanying text.

imprisonment for landowners who refuse to report releases on their property.¹³⁷

Second, the argument assumes that the seller can easily rid herself of the contaminated property by way of a bad-faith transfer of the property before incurring any response costs. CERCLA, however, provides many incentives for potential buyers to inspect carefully any potential land purchase in order to guard against liability.¹³⁸ Finding the proverbial sucker on whom to unload land containing hazardous waste may be far more difficult than anticipated by this skeptical court.

Finally, the argument assumes that federal law must provide the solution to the problem of the deceptive seller. State law, however, has historically provided a rescission remedy for buyers who have been victimized by sellers who misrepresent or who fail to disclose dangerous latent defects in their real estate.¹³⁹ In combination, then, these three factors should establish a sufficient counter to any disincentive that the CERCLA liability scheme appears to provide.

V. CONCLUSION

The definition of *disposal* in RCRA as incorporated by reference in CERCLA seems ambiguous as to whether affirmative conduct is required for liability to attach to prior owners. The interpretive question is whether Congress intended *disposal* to have an active or a passive meaning. The plain meaning of the definitional language, although it points tentatively to the active construction, does not answer this question. The histories of RCRA and CERCLA, however, tend to support the active interpretation. Finally, the structure and purposes of CERCLA confirm the active meaning of *disposal*.

Adopting the passive interpretation amounts to taking one word — *leaking* — out of its context in the definition and ignoring alternative definitions. This approach runs contrary to settled principles of statutory construction. It would arbitrarily impose liability along the entire chain of ownership of a parcel of land after any initial contamination. It would eviscerate a defense for innocent purchas-

137. 42 U.S.C. § 9603 (1988).

138. The fact that CERCLA imposes strict liability without fault on present landowners regardless of the time of release is the primary incentive of this type. See 42 U.S.C. § 9607(a)(1) (1988); see also 42 U.S.C. § 9601(35)(A) (1988) (providing that in order to qualify for the innocent purchaser defense, the potential claimant must not have had reason to know of any contamination).

139. See, e.g., *Greenberg v. Glickman*, 50 N.Y.S.2d 489 (Sup. Ct.), modified, 51 N.Y.S.2d 96 (App. Div.), second appeal denied, 51 N.Y.S.2d 861 (1944); *Lawson v. Citizens & S. Natl. Bank of S.C.*, 193 S.E.2d 124 (S.C. 1972); see also RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. d (1979) ("A seller of real or personal property is, for example, ordinarily expected to disclose a known latent defect of quality or title that is of such a character as would probably prevent the buyer from buying at the contract price."); *id.* § 161 cmt. d, illus. 4.

ers specifically adopted by Congress to protect them from the harshness of the CERCLA liability scheme. Finally, it would be inconsistent with the statute as a whole and would render other provisions of the statute beyond understanding.

By adopting the active interpretation, courts better comply with congressional intent. The active reading reflects a superior understanding of the delicate compromise that resulted in CERCLA's scheme of liability. It protects prior landowners who committed no environmental wrong. Most importantly, however, adoption of the active interpretation of *disposal* ensures that section 107(a)(2) liability falls where it was intended: on those entities that received the economic benefits of introducing the hazardous substances into the environment or that refused to halt the spread of such substances when they had the chance.