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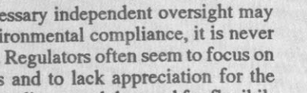
Dear Reader

However necessary independent oversight may be to ensure environmental compliance, it is never easy to live with. Regulators often seem to focus on the wrong issues and to lack appreciation for the difficulties of compliance and the need for flexibility. Given a choice, who among the regulated community could resist opting for a system of *self*-regulation?

For years, federal facilities have been largely self-regulated. Now, many are *way* out of compliance, and the 1992 Federal Facilities Compliance Act and *United States v. Colorado*, 23 ELR 20800 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994), have exposed them to the full range of state enforcement tools. Unlike many of their counterparts in the private sector (who have weathered environmental enforcement for almost 25 years), government officials and contractors have few clues about how to develop systems and attitudes that lead to, and maintain, compliance. And because unrealistic compliance schedules can result in fat fees for contractors, those who negotiate on behalf of federal clients have a built-in incentive to accept state regulators' opening positions as gospel.

Faced with these difficulties, the Administration's instinct with respect to independent oversight is the same as that of its predecessors: "Make it go away!" Thus, the Administration's proposed Superfund Reform Act would preempt state regulation at those NPL sites for which EPA decides not to delegate enforcement authority to states. With a simple NPL listing, EPA could then return any federal facility to a system of self-regulation—i.e., regulation by the so-called unitary executive—deferring indefinitely the need for federal PRPs to face their compliance problems or build credibility with state regulators.



Adam Babich
Editor-in-Chief

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NEWS & ANALYSIS

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the conditions for effective use of this approach are met. However, market mechanisms will not set our goals for us and may even disguise their absence. They are also not universally adapted to even achieving the goals that we have set. They will certainly be a useful tool, but only one among many—including product clearance, land use planning, labeling, "command and control," and removing direct subsidies and tax preferences for environmentally damaging activities—that should *all* have their place in a rational system of environmental control.

ELR
NEWS & ANALYSIS

When Is "Leaching" Not "Leaking"?: CERCLA Liability of Owners and Operators at the Time of Disposal

by Henry L. Stephens Jr.

> [T]he legislative history of CERCLA gives more insight into the "Alice-in-Wonderland"-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature.

The statement quoted above, from a recent federal court decision,[1] captures some of the frustration experienced by those who attempt to divine congressional intent regarding the scope of property owners' liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,[2] as amended by the Superfund Amendments and Reauthorization Act of 1986[3] (CERCLA).[4] CERCLA imposes liability on, inter alia, past owners or operators of property whose relationship to the property coincided with "the time of disposal of any hazardous substance" on the property.[5] Some recent court decisions have interpreted this language expansively to include essentially every grantee in the chain of title to contaminated realty, irrespective of the grantee's acts, omissions, or authority to control practices regarding hazardous substances at the site.[6] Under these decisions, a former owner of tainted property—who held title for only a few minutes to serve as a middleman in a real estate transaction—may be subject to joint and several liability for all costs associated with cleanup of a site if previously disposed of substances migrated underground during the grantee's ownership.[7] Proponents of such an all encompassing liability scheme find support in the Fourth Circuit's recent pronouncements in *Nurad, Inc. v. William E. Hooper & Sons Co.*[8] The rationale of the Fourth Circuit's reasoning in *Nurad*, however, was sharply criticized in a well-reasoned opinion of the U.S. District Court for the Northern District of Illinois in *United States v. Petersen Sand & Gravel, Inc.*[9]

This Dialogue argues that the policies underlying CERCLA and the Resource Conservation and Recovery Act (RCRA),[10] as well as the actions of Congress in fashioning CERCLA's liability scheme, require the conclusion that courts faced with the "active versus passive disposal" issue should adopt the rationale of *Petersen Sand* and eschew the strained logic underlying *Nurad*. Following a brief discussion of pertinent points of CERCLA's liability scheme, the Dialogue discusses the factual scenario present in both *Nurad* and *Petersen Sand*. The Dialogue next discusses the history behind RCRA's definition of "disposal," comparing Congress' objectives in RCRA with the congressional desires manifested in CERCLA. Following an examination of the court's reasoning in *Nurad*, the Dialogue argues that Congress had every opportunity when drafting CERCLA to use precise language to achieve the expansive result obtained in *Nurad* and declined to go so far. The Dialogue concludes that courts should respect Congress' choice of one path over the other and adopt the well-reasoned analysis of *Petersen Sand*.

CERCLA Liability

During the waning days of the Carter Administration, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 in response to perceived failures of existing environmental legislation. Congress saw RCRA—the seminal congressional effort in the regulation of hazardous wastes—as primarily regulatory, rather than remedial, in nature. Indeed, RCRA was designed to address problems created by present and future generation and management of hazardous wastes, and was intended to apply to inactive sites *only* in the event such inactive sites posed imminent hazards.[11] RCRA's inability to comprehensively deal with abandoned dump sites such as the famous Love Canal ostensibly produced the need for CERCLA.[12]

Henry L. Stephens Jr. is Professor of Law at Salmon P. Chase College of Law, Northern Kentucky University and Executive Director of the Ohio Valley Environmental and Natural Resources Law Institute, Inc. He is of Counsel to Robinson & McElwee, Charleston, West Virginia, and Lexington, Kentucky.

1. HRW Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 327, 23 ELR 21586, 21588 (D. Md. 1993).
2. Pub. L. No. 96-510, 94 Stat. 2767 (1980).
3. Pub. L. No. 99-499, 100 Stat. 1613 (1986).
4. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.
5. 42 U.S.C. §9607(a)(2), ELR STAT. CERCLA §107(a)(2).
6. *See, e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 22 ELR 20936 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992); Graybill Terminal Co. v. Union Oil Co. of Cal., No. 92-0238-K(LSP) (S.D. Cal. Jan. 4, 1993); *HRW*, 823 F. Supp. at 318, 23 ELR at 21586.
7. *Graybill Terminal Co.*, No. 92-0238-K(LSP) (S.D. Cal. Jan. 4, 1993), *discussed in* 7 Toxics L. Rep. (BNA) 1182, 1182-83 (Mar. 10, 1993). *See also* O'Neil v. Picillo, 833 F.2d 176, 178-79, 20 ELR 20115, 20116-17 (1st Cir. 1989); United States v. Bliss, 667 F. Supp. 1298, 1313, 18 ELR 20055, 20061 (E.D. Mo. 1987) (applying joint and several liability in the absence of divisible harm).
8. 966 F.2d 837, 22 ELR 20936 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).
9. 806 F. Supp. 1346, 23 ELR 20480 (N.D. Ill. 1992).
10. 42 U.S.C. §§6901-6987, ELR STAT. RCRA §§1001-6992k.
11. *See* Lynda J. Oswald & Cindy K. Schipani, *Legal Theory: CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. REV. 259, 264 (1992) [hereinafter Oswald & Schipani] (citing H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 22, *reprinted in* 1980 U.S.C.C.A.N. 6125 (RCRA "is prospective and applies to past sites only to the extent that they are posing an imminent hazard")).
12. Oswald & Schipani, *supra* note 11. *See also* H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17-18, *reprinted in* 1980 U.S.C.C.A.N. 6120 (noting that RCRA is "clearly inadequate" in dealing with the "massive problem" of existing hazardous waste sites).

RCRA went through Congress with "little or no debate, as it was rushed through during a session's final hours."[13] Likewise, CERCLA "was passed hastily by Congress as compromise legislation after very limited debate under a suspension of the rules."[14] Despite these shortcomings, however:

> Congress [in CERCLA] expressed its major policy goals quite clearly. Thus, the statute's objectives are the following: to encourage maximum care and responsibility in the handling of hazardous waste; to provide for rapid response to environmental emergencies; to encourage voluntary clean-up of hazardous waste spills; to encourage early reporting of violations of the statute; *and to ensure that parties responsible for release of hazardous substances bear the costs of response and cost of damage to natural resources.*[15]

CERCLA assigns the burden of responsibility for cleanup costs incurred by governmental and private parties to four classes of persons, known as "potentially responsible parties": (1) the current owner and operator of a hazardous waste vessel or facility;[16] (2) any person, who at the time of disposal of any hazardous substance, owned or operated any facility at which such hazardous substances were disposed of;[17] (3) any person who arranged for disposal or treatment of a hazardous substance at any facility owned or operated by another person;[18] and (4) any transporter of hazardous substances to a facility.[19]

This Dialogue concerns §107(a)(2), which, read in conjunction with §107(a)(4)(A)-(D), imposes liability for the cost of remedying *releases* of hazardous substances on persons who owned or operated facilities at the time of *disposal* of hazardous substances.[20] While Congress, in drafting CERCLA, borrowed the term "disposal" from RCRA,[21] it created the new term "release" and precisely defined it to include, inter alia, "disposal."[22] Although "release" *includes* "disposal," every release does not necessarily constitute disposal, since RCRA does not define "disposal" to include "release."[23] The fact that courts may be confused as to the application of these two terms is not surprising.

Judicial Constructions of "Release" and "Disposal"

The factual scenario that creates the greatest difficulty for courts considering whether to hold former owners or operators of contaminated property liable under CERCLA §107(a)(2) is quite common. In the past, some person or entity allowed hazardous substances to enter the environment through an act or omission, such as pouring waste on the land, burying drums which subsequently ruptured, or using underground storage tanks containing hazardous substances and abandoning those tanks in place.[24] Later, after completion of this active disposal, the site was leased or sold to a person or entity who may not have used hazardous substances at all, and may have had no knowledge of prior

13. *See* United States v. Waste Indus., Inc., 556 F. Supp. 1301, 1311, 13 ELR 20286, 20291 (E.D.N.C. 1982), *rev'd on other grounds*, 734 F.2d 159, 14 ELR 20461 (4th Cir. 1984) [the district court's decision is hereinafter cited as *Waste Indus. Trial*].

14. *See* United States v. Mottolo, 605 F. Supp. 898, 902, 15 ELR 20444, 20445 (D.N.H. 1985); Oswald & Schipani, *supra* note 11, at 267 & n.38.

15. Chemical Waste Management, Inc. v. Armstrong World Indus., Inc., 669 F. Supp. 1285, 1290 n.6, 18 ELR 20191, 20193 n.6 (E.D. Pa. 1987) (emphasis added).

16. 42 U.S.C. §9607(a)(1), ELR STAT. CERCLA §107(a)(1).

17. *Id.* §9607(a)(2), ELR STAT. CERCLA §107(a)(2).

18. *Id.* §9607(a)(3), ELR STAT. CERCLA §107(a)(3).

19. *Id.* §9607(a)(4), ELR STAT. CERCLA §107(a)(4). CERCLA states in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) 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; and
>
> (D) the costs of any health assessment or safety effects study carried out under section 9604(i) of this title.
>
> 42 U.S.C. §9607(a), ELR STAT. CERCLA §107(a).

20. It is significant that Congress imposed liability retrospectively in §107(a)(2) only upon "owners" and "operators" who had that status *at the time of disposal*. As will be explained in more detail *infra*, Congress could have retrospectively imposed liability upon owners and operators of facilities *at the time of the release*. Its failure to reach so broadly into the past is significant and must be presumed to have been the product of conscious choice. *See* United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351, 23 ELR 20480, 20482 (N.D. Ill. 1988).

21. CERCLA §101(29) provides that "the terms 'disposal,' 'hazardous waste,' and 'treatment' shall have the meaning provided in §1004 of the Solid Waste Disposal Act [42 U.S.C. §6903]" (brackets in original). 42 U.S.C. §9601(29), ELR STAT. CERCLA §101(29). This RCRA section provides:

> 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.
>
> 42 U.S.C. §6903(3), ELR STAT. RCRA §1004(3).

22. "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) . . . ." 42 U.S.C. §9601(22), ELR STAT. CERCLA §101(22) (emphasis added).

23. *Petersen Sand*, 806 F. Supp. at 1351, 23 ELR at 20482.

24. *See, e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 840, 22 ELR 20936, 20937 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).

disposal practices at the site. Having been released into the environment by prior owners or operators, however, hazardous substances continue to migrate through soil and groundwater, coming to rest in locations other than where originally placed.

Imposing liability on those persons who *actively* placed waste into the environment or abandoned waste in such a way that it could escape into the environment could hardly offend traditional notions of justice and fair play. But in *Nurad*,[25] its predecessors,[26] and its progeny,[27] the courts go further, finding that mere movement of substances through soil and groundwater constitutes "disposal," making the unwitting owner or operator—who took no action with respect to the waste—"the owner or operator at the time of disposal." The phrase "passive disposal" is often used to describe this rationale for imposing liability on one whose only sin was possession of property at the time of migration of hazardous substances that had been actively disposed of by another.

The History of the Term "Disposal"

The Ninth Circuit explained in *Wilshire Westwood Associates v. Atlantic Richfield Corp.*[28] that: "The plain language of a statute is the starting point for its interpretation. . . . [But courts] must look beyond the express language of a statute where a literal interpretation 'would thwart the purpose of the over-all statutory scheme or lead to an absurd result.'"[29]

Because "disposal" is a term defined in RCRA, and incorporated by reference into CERCLA,[30] Congress' intention regarding the term's scope for purposes of RCRA should determine use of the term with respect to CERCLA liability. Although a CERCLA "release" may encompass more activities and thus be broader than a RCRA "disposal,"[31] a CERCLA "disposal" is identical to a RCRA "disposal."

The most cogent analysis of Congress' purpose in formulating RCRA's definition of "disposal" appears in a district court opinion which was reversed by the Fourth Circuit. In *United States v. Waste Industries, Inc.*,[32] the U.S. District Court for the Eastern District of North Carolina ruled that RCRA's imminent hazard provision (as it existed before amendment in 1984)[33] did not apply to a dump site that had become inactive prior to the effective date of RCRA.[34] The district court rejected the U.S. Environmental Protection Agency's (EPA's) claim that prior "disposal" activity triggered the imminent hazard provisions of RCRA, holding: "'Disposal' involves . . . some active [concurrent] human conduct, *i.e.*, someone disposing of the waste. Aside from any legislative definition of disposal, the term entails some active, affirmative action which may be prospectively regulated by standards and permit requirements."[35]

The *Waste Industries*' district court, although reaching the wrong result, correctly examined the statutory definition of "disposal" in light of the prospective regulatory approach of RCRA. Noting RCRA's predominant purpose of imposing regulatory and permit requirements on those engaged in treatment, storage, or disposal of hazardous wastes,[36] the court reasoned that Congress' use of the terms "discharge, deposit, injection, dumping, spilling, leaking, or placing" to define the term "disposal" "suggest[s] a legislative intent of covering all ways in which a person might dispose of hazardous waste."[37] The district court stated that the principle of *ejusdem generis*[38] requires that general terms, such as "leak" and "spill," be read as containing the elements common to the specific terms, i.e., deposit, inject, dump, and place.[39] The court cogently noted that the common element among all the terms included within the definition of "disposal" is an *act carried out by a person* and thus concluded that Congress intended "leak" and "spill" to include unintentional acts of disposal.[40] The district court failed to recognize, however, that the "active human conduct" necessary for "leaking" can, and usually does, precede the leaking itself.

Holding that RCRA's imminent hazard provision applies to inactive waste sites, the Fourth Circuit reversed, concluding that use of the term "leaking" demonstrates a congressional intent to reach environmental degradation occurring after the point in time when the active human conduct set in motion the chain of events leading to such degradation.[41] But the disparity in the district and appellate courts'

25. *Id.* at 846, 22 ELR at 20940.

26. *See, e.g.*, United States v. Waste Indus., Inc., 734 F.2d 159, 164-65, 14 ELR 20461, 20462-63 (4th Cir. 1984); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659 (E.D. Cal. 1990).

27. Graybill Terminal Co. v. Union Oil Co. of Cal., No. 92-0238-K(LSP) (S.D. Cal. Jan. 4, 1993).

28. 881 F.2d 801, 19 ELR 21313 (9th Cir. 1989).

29. *Id.* at 803-04, 19 ELR at 21314 (citations omitted), *quoted in Stanley Works*, 781 F. Supp at 663.

30. *See supra* note 21.

31. *See supra* notes 21-22 and accompanying text.

32. 556 F. Supp. 1301, 13 ELR 20286 (E.D.N.C. 1982), *rev'd on other grounds*, 734 F.2d 159, 14 ELR 20461 (4th Cir. 1984). The Fourth Circuit's *Waste Indus.* opinion formed the basis for its reversal of the district court's analysis in *Nurad* in 1992. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 22 ELR 20936 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).

33. RCRA §7003, circa 1982, allowed EPA to bring an action to restrain against any person contributing to handling, storage, treatment, transportation, or disposal of solid or hazardous wastes that may present an imminent and substantial endangerment to health or to the environment. *Waste Indus. Trial*, 556 F. Supp. at 1304, 13 ELR at 20287. Congress amended §7003 in 1984, to explicitly apply to past or present conduct. *See* 42 U.S.C. §6973, ELR STAT. RCRA §7003.

34. RCRA's primary implementing regulations became effective on Nov. 19, 1980. 45 Fed. Reg. 33066-259 (1980) (six different rules). The Flemington site at issue in *Waste Indus.* ceased operating on June 30, 1979. *Waste Indus. Trial*, 556 F. Supp. at 1303, 13 ELR at 20287.

35. 556 F. Supp. at 1305, 13 ELR 20288 (footnote omitted).

36. *Id.* at 1306, 13 ELR at 20288.

37. *Id.*

38. Under the *ejusdem generis* canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

39. Standing alone, "leaking" and "spilling" do not seem to require any antecedent affirmative human conduct.

40. *Waste Indus. Trial*, 556 F. Supp. at 1306, 13 ELR at 20288.

41. *Waste Indus.*, 734 F.2d 159, 164, 14 ELR 20461, 20463 (4th Cir. 1992). The court stated:

> 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

views of the scope of the term "disposal" hinged not on whether active human conduct is required to trigger "disposal," but rather on whether disposal by "leaking" requires *concurrent* human conduct (the district court's view) or whether it can simply occur as a result of *prior* human conduct (the Fourth Circuit's view).[42]

In *Waste Industries*, neither the district court nor the Fourth Circuit were faced with determining whether the term "disposal" applies to a party who engaged in no affirmative conduct respecting the placement of waste on land and who is merely a former owner or operator of a parcel on which *prior* dumping, leaking, or spilling of wastes occurred. It is one thing to hold a party liable for his or her affirmative conduct which does not manifest itself until years later when the drums placed in the ground subsequently leak; it is another to extend that liability to a second party, who merely happened to possess the parcel when those drums ultimately rot and leak. Unfortunately, when faced with determining the liability of this wholly passive property owner in *Nurad*, some eight years after *Waste Industries*, the Fourth Circuit failed to recognize this critical distinction.

The Strained Reasoning of Nurad

In *Nurad*, both the district court[43] and the Fourth Circuit were faced with facts decidedly different from those presented in *Waste Industries*. Plaintiff Nurad, Inc. filed a private cost recovery action as a result of its discovery of a long-abandoned underground storage tank which was found to have leaked hazardous substances under a portion of the site known as Hooperwood Mills Industrial Park in Baltimore, Maryland. Defendant William E. Hooper & Sons Co. (Hooper), during its ownership of the site, used these underground storage tanks to store mineral spirits and subsequently abandoned the tanks and their contents. At that time, Hooper sold the site along with the underground storage tanks and their contents to defendant Nicoll. Thirteen years later, in 1976, defendant Kenneth Mumaw entered into a contract to purchase the park and, later that year, closed the contract by taking title, subdividing the site into parcels, and transferring title to the appropriate parcels to Nurad, Inc. and others.[44] It was undisputed that defendant Mumaw's only actions with respect to the site related only to taking legal title, which he retained only as long as necessary to convey title to Nurad, Inc. and others.[45] "So far as the records show, no one filled, emptied, or otherwise used or managed the [tanks] in 1976, and no evidence indicates that the [tanks] were even leaking at that time."[46] Nevertheless, Nurad, Inc. sought to hold Mumaw liable for cleanup costs incurred at the site, arguing that the passive migration and reposing of hazardous substances at the site during the brief tenure of Mumaw's ownership constituted "disposal" under CERCLA §107(a)(2).[47] Nurad, Inc. argued that this result was mandated by the Fourth Circuit's *Waste Industries* opinion.

The district court disagreed with the plaintiff's assertion that *Waste Industries* controlled the case, stating:

> That case, which was not a CERCLA action, addressed a different factual and legal context than the one presented here. In *Waste Industries*, the court considered whether in 1979 the EPA had authority under RCRA to require remediation by former owners or operators of an inactive landfill. The Fourth Circuit ruled that RCRA §7003 is "designed to deal with situations in which the regulatory schemes break down or have been circumvented. . . . Congress expressly intended that this other language (RCRA §7003) close loopholes in environmental protection." Applying the law as it was before the enactment of CERCLA, it appears that the only way for the *Waste Industries* court to preserve EPA's ability to demand cleanup by the actual former owners and operators was to define "disposal" in RCRA to cover completely passive repose or movement through the environment.[48]

The district court distinguished *Waste Industries* on several grounds. First, unlike defendant Mumaw, the former tenants in *Waste Industries* had *actively* disposed of hazardous waste on the property. Further, *Waste Industries* raised no question regarding the fairness of imposing CERCLA liability on a party who never undertook any waste-related activity whatsoever. The district court noted that although CERCLA adopts the definition of "disposal" found in RCRA, it also adds the term "release" to cover both active and passive conditions. The court reasoned that in enacting CERCLA, Congress expressly limited CERCLA liability to former owners "at the time of disposal," "a phrase which must refer to an action or have no meaning at all."[49] In so holding, the district court relied heavily on *Ecodyne Corp. v. Shah*,[50] in which a district court employed an *ejusdem generis* analysis (similar to that employed by the *Waste Industries* district court) and concluded that to read "disposal" to include passive migration without any preceding or concurrent affirmative human conduct with respect to the wastes by the defendant in question would "make all property owners from the time a site became polluted (up to and including the current owner) potentially liable under section 9607(a)(2) even if these owners did not introduce chemicals onto the site."[51] Therefore, the court reasoned, because Congress intended that courts impose CERCLA liability on those responsible for the contamination, the expansive interpretation of the term "disposal" urged by plaintiff Nurad, Inc. would sweep too broadly.[52]

The Fourth Circuit reversed the well-reasoned opinion of the district court and held that *Waste Industries* controlled the case.[53] The Fourth Circuit chided the district court for its restrictive interpretation of RCRA's definition of "disposal," stating: "[H]azardous waste may leak or spill without any active human participation. The district court arbitrarily deprived these words of their passive element by imposing a requirement of active participation as a prerequisite to liability."[54]

The Fourth Circuit was apparently distressed by the fact that under the district court's view a facility's current owner would be liable under CERCLA §107(a)(1),[55] even if only passive disposal took place during his or her ownership, but a former owner could escape liability if active "disposal" did not take place during his or her watch.[56] As a consequence, the Fourth Circuit reached the strained conclusion that §107(a)(2) imposes liability not only for active involvement in the "dumping" or "placing" of hazardous waste at the facility, but also for mere ownership of the facility at the time hazardous waste was "spilling" or "leaking."[57]

Despite its strained logic and draconian result, *Nurad*, as the only appellate court opinion deciding CERCLA liability of former owners for "passive" disposal, has been followed in lemming-like fashion by district courts not bent upon undertaking scrutiny of RCRA's definition of "disposal."[58] The U.S. District Court for the Northern District of Illinois, however, reached a contrary result in its well-reasoned opinion in *United States v. Petersen Sand & Gravel, Inc.*[59]

Petersen Sand

The *Petersen Sand* court analyzed the propriety of the government's claim that Petersen, Inc. was liable as an "owner at the time of disposal" under CERCLA §107(a)(2), notwithstanding the absence of proof that Petersen, Inc. engaged in any waste disposal activity at the site during its tenure of ownership.[60] Noting that no court in the Seventh Circuit had yet ruled on the issue of whether passive disposal may form the basis of liability under §107(a)(2), the district court relied on the Seventh Circuit's instructions regarding interpretation of CERCLA contained in *Edward Hines Lumber Co. v. Vulcan Material Co.*[61] In *Edward Hines*, the Seventh Circuit adopted a moderate approach to judicial expansions of CERCLA liability, stating that a "court's job is to find and enforce stopping points no less than to implement other legislative choices."[62] Using this approach, the *Petersen Sand* court concluded that "passive disposal" does not trigger §107(a)(2) liability.[63] Noting the split of authority on the issue of the liability of former owners for "passive disposal,"[64] the court focused on the definition of "disposal" in RCRA and reasoned that for an event to be such that waste "may enter the environment or be emitted into the air or discharged into any waters."[65] In contrast, "passive disposal" consists of migration of substances that have *already* entered the environment and are simply moving from place to place.[66] In other words, passive migration of waste cannot be "disposal" because "disposal" occurs *before* substances enter the environment. The court further reasoned that Congress saw and appreciated this distinction when it defined "release" in CERCLA as a series of events (such as spilling or leaking) followed simply by the words "into the environment."[67]

Not content to rely on language distinctions alone, the *Petersen Sand* court analyzed the contextual relationship in CERCLA between the terms "release" and "disposal."[68] The court noted that there was no dispute about whether passive migration constitutes a "release." The only question was whether such migration is "disposal." The court noted that "release" includes "disposal," but "disposal" does not include "release." "In some way, therefore, 'release' must be more inclusive than 'disposal.'"[69] The court opined that Congress must have appreciated the passive migration issue and, in the course of drafting CERCLA, declined to make the liability of past owners or operators depend on a "release" rather than "disposal." Instead, "Congress designed the entire CERCLA response scheme to activate whenever a 'release' occurred, but limited the liability for [past] operators to those who were operators during a 'disposal.'"[70]

(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 constructed 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."

Id. Similarly, the U.S. District Court for the District of New Jersey noted: "[L]eaking . . . ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions." United States v. Price, 523 F. Supp. 1055, 1071, 11 ELR 21047, 21054 (D.N.J. 1981), *aff'd*, 688 F.2d 204, 12 ELR 21020 (3d Cir. 1982).

42. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846, 22 ELR 20936, 20940 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).
43. Nurad, Inc. v. William E. Hooper & Sons Co., No. WN 90-661, 22 ELR 20079 (D. Md. Aug. 15, 1991) [hereinafter *Nurad Trial*].
44. *Id.* at 20080. See also the cogent criticism of the Fourth Circuit's *Nurad* opinion in Samuel A. Bleicher, *Redefining the CERCLA Liability of Former Owners, Tenants, and Operators*, 7 Toxics L. Rep. (BNA) 224, 225 (July 15, 1992) [hereinafter Bleicher].
45. Bleicher, *supra* note 44.
46. *Id.* at 226.
47. *Nurad Trial*, 22 ELR at 20086.
48. *Id.* at 20087. However, even under the facts presented in *Waste Indus.*, affirmative waste disposal conduct preceded the passive migration of the wastes that was occurring at the time of the action instituted by the government.
49. *Id.*
50. 718 F. Supp. 1454, 1457, 20 ELR 20172, 20174 (N.D. Cal. 1989).
51. *Id. See also In re* Diamond Rio Trucks, Inc., 115 B.R. 559, 565 (Bankr. W.D. Mich. 1990) (concluding that "the mere ownership of the site during the period of time in which migration or leaching may have taken place without any active disposal activities does not bring [the defendant] within the liability provision of section 9607(a)(2)"); Stevens Creek Ass'n v. Barclays Bank, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991) (construing "disposal" for purposes of §107(a)(2) as requiring some affirmative act of discarding a substance as a waste).
52. *Nurad Trial*, 22 ELR at 20087.
53. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845, 22 ELR 20936, 20939 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).
54. *Id.*
55. This section simply imposes liability on "the owner and operator of a vessel or facility." 42 U.S.C. §9607(a)(1), ELR STAT. CERCLA §107(a)(1).
56. "The district court's view thus introduces the anomalous situation where a current owner, such as Nurad, who never used the storage tanks could bear a substantial share of the cleanup costs, while a former owner who was similarly situated would face no liability at all." *Nurad*, 966 F.2d at 845, 22 ELR at 20939. As noted in Bleicher's well-reasoned article, "neither the district court nor the court of [a]ppeals gave any consideration to the benefit of cleanup that flows to the current owner by increasing the value of its property. EPA regularly asserts unjust enrichment as a rationale for current owner liability." Bleicher, *supra* note 44, at 228 n.16.
57. *Nurad*, 966 F.2d at 846, 22 ELR at 20940.
58. *See, e.g.*, Graybill Terminal Co. v. Union Oil Co. of Cal., No. 92-0238-K(LSP) (S.D. Cal. Jan. 4, 1993); HRW Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 23 ELR 21586 (D. Md. 1993).
59. 806 F. Supp. 1346, 23 ELR 20480 (N.D. Ill. 1992).
60. *Id.* at 1348, 23 ELR at 20480.
61. 861 F.2d 155, 19 ELR 20187 (7th Cir. 1988).
62. *Id.* at 157, 19 ELR at 20188 (citations omitted).
63. *Petersen Sand*, 806 F. Supp at 1350, 23 ELR at 20482.
64. *Compare* Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 20 ELR 20172 (N.D. Cal. 1989) *with* cases cited *supra* notes 25 & 27.
65. *See* 42 U.S.C. §6903(3), ELR STAT. RCRA §1004(3).
66. *Petersen Sand*, 806 F. Supp. at 1351, 23 ELR at 20482.
67. *Id.* (citing 42 U.S.C. §9601(22), ELR STAT. CERCLA §101(22)).
68. *Id.*
69. *Id.*
70. *Id.*

The distinction Congress intended to create between "release" and "disposal" is reflected in the so-called innocent owner defense, added to CERCLA in 1986. The court noted that one can claim the benefit of the defense when

> [T]he 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, and . . . at the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.[71]

The court noted that unless the term "disposal" was limited to its active meaning, the "innocent owner defense" would apply in only the rarest of circumstances and only to those innocent owners "who are fortunate enough to have purchased a facility where all the hazardous waste is sealed in concrete—any seeping or leaking on a site occurring after the purchase would eliminate the defense."[72] The court reasoned that the innocent owner amendment had an undeniably plain purpose: excluding from liability those owners or operators who bought or operated the site after the hazardous waste was placed on the land and knew nothing about the hazardous waste at the time the site was acquired.[73]

The court took pains to distinguish *Nurad* and its progeny,[74] which had held prior owners in the chain of title liable as "owners at the time of disposal" for passive migration. In a footnote, the court explained that although *Nurad* did not consider the "innocent owner" argument, the court in *Stanley Works v. Snydergeneral Corp.*[75] had rejected the argument outright.[76] The *Peterson Sand* court dismissed the treatment of the issue provided in *Stanley Works*, noting: "If 'disposal' is an ongoing passive process that includes any movement through the environment, it would be the rare owner indeed who acquired the land [utilizing the language of the 'innocent owner defense'] 'after disposal.'"[77] The court reached "[t]he inescapable conclusion . . . that giving 'disposal' a passive meaning controverts the plain language of CERCLA."[78]

The *Petersen Sand* court took issue with a concern expressed in *Nurad* that limiting "disposal" to active conduct would be at odds with CERCLA's liability structure.[79] Merely requiring "disposal" to be active before imposing liability is not tantamount to grafting a "fault" requirement onto CERCLA's liability scheme.[80] Reasoning that the imposition of liability under CERCLA is based upon public policy rather than any conception of fairness or culpability, the court held that courts within the Seventh Circuit must decipher where Congress intended to place the limit on such liability.[81]

The court also dismissed the *Nurad* court's concern that not including passive events as "disposal" would discourage private action to clean up environmental hazards.[82] Any concern that property owners with knowledge would simply pass title along to unwitting grantees is at odds with the express language of the "innocent owner defense," which provides that the defense is never available to a person who (1) obtained actual knowledge of a release while such person owned the property and (2) subsequently transferred it without disclosing facts concerning the release.[83] Finally, citing CERCLA's criminal provisions applicable to failures to report releases, as well as the existence of state common law protecting land purchasers from intentionally hidden defects, the court in *Petersen Sand* found these constraints sufficient to close any loophole "that Congress may have left open by only imposing liability on those who are owners or operators at the time of an *active event* constituting disposal of a hazardous substance."[84] Accordingly, the court denied the motion of the United States for summary judgment against Petersen, Inc., since genuine issues of material of fact existed concerning whether Petersen, Inc. was an owner or operator of the facility at the time of a disposal of hazardous substances.[85]

Leaking Versus Leaching

Passive migration of hazardous constituents is commonly called "leaching."[86] Although "leaching" is specifically included as an event constituting a "release," as that term is defined in CERCLA,[87] it is *not* included within the definition of "disposal" in RCRA.[88] Curiously, no court has yet discussed Congress' having specifically recognized the passive migration issue by including "leaching" in its definition of "release" in CERCLA. Since Congress specifically declined to levy CERCLA liability upon "owners and operators at the time of the release," it specifically declined to impose liability on owners who have no nexus to waste disposal activities other than simply having been owners or operators while leaching took place.

Conclusion

Petersen Sand provides a useful guide for courts faced with the so-called passive disposal issue in the future. Quite simply, under RCRA's definition of "disposal," unless a former owner or operator at some point undertook an act or omission with respect to hazardous substances which could cause such substances to enter the environment, CERCLA liability under §107(a)(2) should not be imposed. Viewed in an historical context, Congress—through RCRA's term "disposal"—did not seek to impose liability on parties who never engaged in waste disposal activities. Rather, RCRA and CERCLA have consonant goals of requiring those responsible for acts or omissions which ultimately may result in leaking or spilling ("disposal" under RCRA) or leaching ("release" under CERCLA) to bear responsibility for the consequences. Although current owners and operators of contaminated sites can certainly argue that CERCLA *does* impose liability for mere possession of property,[89] courts should not expand CERCLA's broad liability scheme lightly and without any evidence of culpability of the parties sought to be held liable.[90] "[W]here the imposition of [CERCLA] liability is based on public policy rather than any conception of fairness or culpability, the ultimate question for the court must be not the end but the intended limit [of liability]."[91]

71. *Id.* at 1352, 23 ELR at 20482 (citing 42 U.S.C. §9601(35)(A), ELR STAT. CERCLA §101(35)(A)).
72. *Id.*
73. *Id.*
74. *See* cases cited *supra* notes 25 & 27.
75. 781 F. Supp. 659 (E.D. Cal. 1990).
76. The *Peterson Sand* court noted the following as the only discussion in *Stanley Works*: "[W]hile it is no doubt more likely that the innocent purchaser defense will prevail in circumstances involving passive disposal, this will not always be the case." *Petersen Sand*, 806 F. Supp. at 1352 n.3, 23 ELR at 20482 n.3 (citing *Stanley Works*, 781 F. Supp. at 664).
77. *Id.*
78. *Id.* at 1352, 23 ELR at 20482. *See, e.g.*, 42 U.S.C. §9601(9)(B), ELR STAT. CERCLA §101(9)(B) (defining "facility" as, inter alia, an area where a hazardous substance has been "disposed of"); 42 U.S.C. §9601(23), ELR STAT. CERCLA §101(23) (including "the *disposal* of removed material" in the term "removal") (emphasis added); 42 U.S.C. §9603(c), ELR STAT. CERCLA §103(c) (referring to a "facility" where hazardous waste has been "stored, treated or *disposed* of") (emphasis added).
79. *Petersen Sand*, 806 F. Supp. at 1352, 23 ELR at 20483 (citing Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845-46, 22 ELR 20936, 20939 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992)).
80. *Id.* For example, one who "safely and carefully" buries drums which subsequently leak is liable under §107(a)(2) as an "owner at the time of disposal" notwithstanding that he may have exercised all due care at the time of disposal.
81. *Petersen Sand*, 806 F. Supp. at 1352, 23 ELR at 20483 (citing *Edward Hines*, 861 F.2d 155, 157, 19 ELR 20187, 20188 (7th Cir. 1988)).
82. *Id.* The *Nurad* court stated that by limiting "disposal" to active conduct, "an owner could avoid liability simply by standing idle while an environmental hazard festers on his property . . . [and transferring] the property before any response costs are incurred." Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845, 22 ELR 20936, 20939 (4th Cir.), *cert. denied*, 113 S. Ct. 377 (1992).
83. *Petersen Sand*, 806 F. Supp. at 1353, 23 ELR at 20483 (citing 42 U.S.C. §9601(35)(C), ELR STAT. CERCLA §101(35)(C)).
84. *Id.* (emphasis added).
85. *Id.*
86. The term "leach" is defined as "causing a liquid to filter down through some material." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 801 (2d college ed. 1978).
87. *See supra* note 22.
88. *See supra* note 21.
89. CERCLA §107(a)(1) imposes liability for response costs upon "the owner and operator of a vessel or facility." 42 U.S.C. §9607(a)(1), ELR STAT. CERCLA §107(a)(1).
90. *See* Edward Hines Lumber Co. v. Vulcan Material Co., 861 F.2d 155, 157, 19 ELR 20187, 20188 (7th Cir. 1988).
91. United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1353, 23 ELR 20480, 20483 (N.D. Ill. 1992).