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CERCLA "PASSIVE" DISPOSAL THROUGH MIGRATION: STILL ALIVE AND KICKING

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Statement of the Problem:

The Ninth Circuit recently issued a decision resuscitating a once hotly contested,[2] but later barely viable issue in CERCLA[3] liability, namely, "passive" disposal of hazardous substances through their migration.[4] In *Carson Harbor Village*, the Ninth Circuit held that CERCLA does indeed impose disposal liability on "interim" landowners for continuing migration of preexisting contamination.

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[2] The authors have found approximately 30 CERCLA cases on this issue, with district court decisions nationwide divided almost evenly. While there are certainly several other CERCLA issues that have generated this many decisions, the rules for resolving those issues have largely been settled in one way or another.

[3] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 *et seq*. ("CERCLA").

[4] *Carson Harbor Village, Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. September, 2000).

"Interim" owners are those who neither owned or operated the facility at the time of initial disposal[5] of hazardous substances nor currently own or operate the facility.[6] Rather, they owned or operated the facility during the period when a secondary form of "disposal" arguably took place without human agency – hence, "passive" – by migration of previously deposited contaminants through soil or groundwater. The Ninth Circuit's decision went against three Circuit Court decisions issued since 1996 – including one earlier in 2000 – rejecting the theory. The Circuit Courts of Appeal are now well divided[7] on the issue. Thus, Supreme Court resolution seems possible and perhaps likely.[8]

The stakes in the struggle between these competing views are important. If the passive migration or movement of contaminants is indeed "disposal," then the class of liable persons includes prior owners of land who did not overtly or actively dispose hazardous substances as well as those who did. Resolution of the issue in favor of liability of such past owners would enlarge the circle of parties caught in CERCLA's strict liability scheme, thus spreading risk among those who benefitted from the ownership or operation of property. Clarity on the issue could eliminate a significant amount of current transaction cost in CERCLA litigation. This would, in turn, potentially speed the rate of cleanups of contaminated sites, a matter of continuing concern for the United States Environmental Protection Agency ("EPA") and the environmental community. The passage of time and the settling of other CERCLA issues has not diminished the number of disputes on this issue, as

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[5] Liable under § 107 (a) (2), 42 U.S.C. § 9607 (a) (2). "Facility" includes any building or any area where a hazardous substance has been deposited.

[6] Liable under § 107 (a) (1), 42 U.S.C. § 9607 (a) (1).

[7] The Ninth Circuit joined the Fourth Circuit, *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), while the Third, Second and Sixth Circuits have rejected the theory in, respectively, *United States v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996), *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2nd Cir. 1997) and *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000). The Fifth Circuit also declined to adopt the *Nurad* view, noting among other reasons that plaintiff was the "primary contaminator" and had failed to introduce convincing evidence that any hazardous wastes leaked or spilled during defendants' ownership. *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750 (5th Cir. 1994).

[8] Rule 10 of the Rules of the Supreme Court ("Considerations Governing Review on Certiorari") states in pertinent part that among the "compelling reasons" indicating the "character of the reasons the court considers" in deciding whether to grant certiorari writs is when "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ."

two opposing circuit court decisions and several district court decisions in the year 2000 attest.

The "no passive disposal" majority view allows interim owners to ignore preexisting contamination they did not cause and to sell property without investigation and full disclosure of pre-existing environmental contamination. And the continued rarity with which courts find that a non-culpable, but statutorily liable, owner can satisfy the "innocent landowner" requirements (CERCLA, 42 U.S.C. §9601(35)(A)) also discourages owners from uncovering the sins of their predecessors. These two factors inadvertently re-create a "*caveat emptor*" principle, contrary to well-established public policy as to other environmental matters.

Summary of Argument:

The authors review the background of *Carson Harbor Village* and its detailed rebuttal of the reasons for which the Third Circuit in *CDMG Realty* rejected the "passive" disposal theory. The authors then categorize those two cases along with most prior cases in which the theory was raised, including *CDMG Realty's* progeny. They conclude that the passive disposal theory is most readily accepted by the courts when the defendant knew or should have known about the contamination. Courts find a defendant should not have known about the contamination if the defendant owned or controlled the facility for a short duration, if the source of contamination was not obviously leaking, or if no government agency had found out about the problem or attempted to involve the owner in an investigation or cleanup.

The criterion of knowledge of contamination is dispositive, however, only where no "culpability" or equity factors *work against the plaintiff* (who is usually the current owner). Thus, courts reject the passive disposal theory, irrespective of defendant's state of knowledge, where plaintiff had a role in causing the contamination, or at least knew about the contamination prior to purchase.

Practitioners should continue to argue for "passive" disposal in all Circuits, under the appropriate facts. The area of potential "passive" disposal explicitly not foreclosed by the Third and Second Circuits – namely, leakage from tanks or drums – is susceptible to enlargement to most factual situations. At the same time, resolution of the issue could occur either by the Supreme Court or by Congressional action. There are no clear signs as to how the high court would rule. Congress could, however, amend CERCLA to clarify that passive disposal liability applies to certain past owners. Relevant factors are the past owners' knowledge and the adequacy of pre-purchase investigation, as well as the relative culpability of claimants, while respecting the "polluter pays" principle. Such a solution would be desirable from a policy viewpoint and consistent with the patterns found in the court decisions.

Discussion:

A. *Carson Harbor Village*

1. Facts

In *Carson Harbor Village,* the current owner of a mobile home park, contaminated by past, on-site oil production activities and by road runoff, sought recovery from past owners and operators, private and governmental, for CERCLA clean up costs. The would-be "passive" disposal defendant was a private partnership that owned and operated the mobile home park in the property prior to plaintiff, from 1977 to 1983. Part of the property in that period was used by Unocal, which held a leasehold interest in the property between 1945 and 1983, and used the property for oil production during most of that time. Unocal operated a number of oil wells, pipelines, above-ground storage tanks and production facilities.

Four-foot thick slag and tar-like materials, waste or by-product from decades of this on-site petroleum production, had migrated to a 30 by 60 foot area of the 17 acres of wetlands on-site. Runoff from three miles of freeway drains also emptied into the wetlands.

Plaintiff was required to do a clean up to obtain refinancing. Plaintiff's claim in relevant part related to the failure of the prior mobile park owner during its years of ownership to do anything to prevent continued migration of Unocal's production wastes into the wetlands.

The Ninth Circuit reversed the District Court's finding that plaintiff failed to meet its burden of proof on summary judgment on the passive disposal theory against the former mobile park owner defendant.

2. *Carson Harbor Village* response to *CDMG Realty*:

The Ninth Circuit undertook a careful analysis of each element of a "passive disposal" theory, and then reviewed each of the major points of the Third Circuit's "thoughtful opinion" in *CDMG Realty*.[9] After noting the existence of a "circuit split" on the issue, the court began "with the language and structure of the statute." 227 F.3d at 1206. The Court reviewed the fact that "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land or water so that such . . . hazardous waste . . . may enter the environment or be emitted into the air or discharged into any waters, including groundwater." *Id.*, citing the source in the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901 et seq., at § 6903(3).

The court found the argument "that this definition encompasses passive migration" to be "straightforward," because three of the listed terms have "well-recognized passive meanings." A "discharge," "spill" or "leak" may all occur without "any active human participation." The court found that in addition to "spill" and "leak," the usual focus of examination, "the passive meaning of 'discharge' is especially broad . . . [including] 'give outlet to: pour forth: emit . . . to release or give vent to'." *Id.*, 227 F.3d at 1206-1207.

[9] In the interests of full disclosure, we note that the first of the co-authors represented the party in this case on the losing side of the passive disposal issue.

Since the definition "includes passive migration by its own terms, we are bound to give effect to that definition [citations omitted]." *Id*. The court noted the many cases supporting the theory under the statute from which the relevant word "disposal" comes – RCRA – including an earlier Third Circuit case. Including the passive meaning of the statutory definition is consistent with the structure and purpose of CERCLA's liability provisions, in order to accomplish its remedial goals. *Id.*

The court cited Fourth and Fifth Circuit decisions on both the statutory analysis and the policies supporting inclusion of a passive migration in the definition of disposal. The Circuit referenced in particular *Nurad* in its initial analysis: "Including as PRPs [potentially responsible parties] owners who held land while waste passively migrated through the property is entirely consistent with this liability scheme." *Id.*, at 227 F.3d at 1207.

The Ninth Circuit restated and then answered each of the Third Circuit's arguments against the theory in *CDMG Realty*. First, the Third Circuit concluded that it could not interpret "leak" and "spill" as passive, when the other statutory words are active, because that would undermine the "coherence" of the statute. *CDMG Realty*, 96 F.3d at 714. Giving "disposal" a passive meaning makes the term synonymous with "release," which Congress explicitly defined to include not only "disposal" but terms typically used to describe passive migration such as "leaching." Congress chose to make persons liable for owning at the time of "disposal," not "release," *Id*., 96 F.3d at 714-15.

In responding, the Ninth Circuit began by noting that the Third Circuit itself had observed that "because of the great haste with which CERCLA was passed, inconsistencies and redundancies pervade the statute." *Id.*, 227 F.3d at 1208. Thus, an inconsistency – such as finding both passive and active words in the list of types of disposal – is "not necessarily fatal to a given construction." The Ninth Circuit concluded that "there is no indication that the operation of either term in the statute would be compromised," by permitting overlapping passive and active meanings to each word. *Id.*, 227 F.3d at 1209.

Second, the Third Circuit said the "time of disposal" in Section 107(a)(2) of CERCLA is "arguably an awkward means" of creating liability for all owners "after the introduction of waste into the facility." *CDMG Realty,* 96 F.3d at 715. The Ninth Circuit disagreed. The "time of disposal" requirement makes "disposal a temporal trigger for prior owner liability," by confirming that owners and operators who precede the "active" disposal of hazardous substances are not covered by the Act. To insist that "time of disposal" was part of an "active" disposal meaning would "import a form of causation analysis into § 9607(a)(2)" that Congress did not otherwise do in CERCLA. *Carson Harbor Village,* 227 F.3d at 1209.

Third, the Third Circuit reasoned that if "disposal" includes passive migration, the innocent landowner defense would be rendered "meaningless" since no one could show that he acquired the property "after disposal." *CDMG Realty,* 96 F.3d at 716. The Ninth Circuit answered by noting that "the innocent landowner defense" applies if the property "was acquired after the disposal *or placement* of the hazardous substances," *Carson Harbor Village,* 227 F.3d at 1210, citing 42 U.S.C. § 9601(35)(a)(emphasis added). Thus, given the common meaning of "placement," as well as Congress' intent, "this defense applies even though wastes were passively migrating during a defendant's ownership so long as he or she acquired the property after the hazardous wastes were first placed on the property." *Id.*

Finally, the Third Circuit reasoned, under a passive reading of "disposal," prior owners with no knowledge that their land was contaminated would fall within the statute's liability provisions, which would be contrary to the "polluter pays" principle. *CDMG Realty,* 96 F.3d at 717. Yet, said the Ninth Circuit, an "active only" theory of disposal creates its own inconsistencies. Under such a theory, "one must assume that Congress intended to create a major distinction between current and former owners/operators," and though current owners are liable without regard to fault, "prior owners would be completely immune from suit if they did not own the property during an act of [active] disposal." This would exempt from liability even "prior owners who knew or should have known that their

property was contaminated and the waste was spreading." This "categorical exemption" would irrationally protect past owners even "if they (1) failed to conduct a reasonably diligent review of the environmental condition of their property (and thereby allowed readily discoverable contamination to worsen), or (2) simply allowed known, pre-existing contamination to remain untreated." *Id.*, 227 F.3d at 1210.

Reviewing the factual history before it, the Ninth Circuit found that, in general, the plaintiffs and partnership defendants in *Carson Harbor Village* were in equally "innocent," *i.e.*, non-culpable, positions as both became owners "long after the tar and slag material was 'actively' disposed on the property." However, the one important factual distinction was that "during the Partnership Defendants' ownership, Unocal was still engaged in oil production on the property." *Id.* Thus, "if anything, the Partnership Defendants had more reason to be vigilant about the possibility of contamination from oil production." Yet "by reading 'at the time of the disposal' to require human agency," those defendants "would be completely exempt from liability for the cleanup costs incurred by" plaintiff. A "passive disposal" framework better comports "with Congress' decision to eschew a causation-based liability framework and to ensure prompt cleanup by drawing in all 'potentially responsible parties.'" *Id*.

B. *Other decisions in which passive disposal has been accepted or rejected:*

A categorization of lower court opinions that were not appealed, as well as other circuit court decisions, reveals certain consistent patterns of judicial decision making. Tables 1 and 2 present all cases the authors found, discussing the relevant factors, in which passive disposal was, respectively, either accepted or rejected.

A review of the cases in the tables confirms the hypothesis that the passive disposal theory is accepted by the courts generally when the defendant knew or should have known about the contamination. Thus, if there is either evidence that defendants actually knew or reason to believe they should have noticed leaking drums or tanks, or other plain evidence in the record or in the transaction (such as Phase I and II environmental site assessments),

but defendants did nothing about it, passive disposal liability is imposed on them. These cases (defendant knew) include *Nurad, Briggs & Stratton Corp., Almy Bros., In Re Hemingway Transport* and *In Re Tutu Wells.* Among those where defendant "should have known" are *State ex rel. Howes v. Peele* and *Southfund Partners III.*

This criterion of knowledge is dispositive, however, only where no "culpability" or equity factors *work against the plaintiff* (who is usually the current owner). In these situations, both plaintiff and defendant are, typically, equally situated vis à vis the initial disposal – neither caused that disposal – and rejection of the theory would make an accident of timing impose liability on one but not the other. These cases include *Carson Harbor Village* and *Stanleyworks.*

On the other hand, the passive disposal theory is mostly rejected, in the first instance, when the same interim (now past) owner defendant did not know, or could not have known about the contamination. Included in the latter group are cases where ownership or control was not of long duration; defendants were not sophisticated owners; the source was not obviously leaking drums or tanks; or no government discovery of the problem (and attempts to get that owner involved in the investigation or cleanup) had yet taken place. Examples of this, see Table 2, include *ABB Industries, 150 Acres of Land,* and *Snediker Developers*.

Where that interim owner did know about the contamination, but some "culpability" or equity factor *also works against the plaintiff*, the passive disposal theory is also usually rejected. These are cases where the record demonstrates, or at least suggests, that plaintiff, usually though not always a later owner who purchased from the defendant, itself knew about the contamination prior to purchase and, in some cases, even caused it. Examples of plaintiff as itself the contaminator include *ABB Industries*, *Joslyn Mfg. Co.* and *Idylwoods Associates v. Mader Capital*.[10] *Idylwoods* is a particularly good example of this

[10] The first of the co-authors was counsel for the proponent of the theory of passive disposal in this case, which the district court rejected.

type of case although the court did not articulate these factors in rejecting the theory. In *Idylwoods*, the proponent of the "passive disposal" theory was actually the prior owner and principal contaminator of the parcel, who paid for the cleanup and then sought contribution from defendant for a portion of the $10 million cleanup costs expended. The defendant was not the "interim" but the current owner which had allowed the known contamination problem to fester for more than a decade without taking action though requested by federal, state, county and city agencies to do so.

Similarly, where plaintiff did not cause but simply knew about the contamination prior to purchase, yet improvidently chose to become an owner, the theory is rejected. *CDMG Realty* is itself a good example of this, as the plaintiff readily acknowledged, in the purchase agreement, the extensive contamination on the site and obtained no protections in that agreement. *See, also*, *Edward Hines Lumber* and *Ecodyne*, where plaintiffs also acknowledged the contamination in the contract; in *Ecodyne*, plaintiff paid a reduced price for the parcel.

C. *Litigants Should Continue to Raise the Theory of Passive Disposal*:

In *CDMG Realty*, the Court carefully excluded from its analysis and holding a case in which a leaking drum or tank (above or underground) was the factual basis for "passive" disposal:

> A common definition of "leak" – and the one most favorable to [plaintiff] – is to enter or escape through a hole, crevice, or other opening." Webster's, supra at 1285. This definition would encompass the escape of waste through a hole in a drum [fn 3: "The question whether continuous seeping of contaminants from a hole in a drum constitutes 'disposal' is not before us and we do not resolve the issue here."] But [plaintiff] has offered no evidence of leaking drums. Compare, e.g., *Nurad* [citation omitted]. And there is no other evidence that waste escaped from any opening during [defendant's] ownership.

Thus, the Third Circuit clearly left the door open for another litigant to make the argument bridging the gap, as it were, between "leaking" from a drum, as in *Nurad,* and the concept of "leaking" or migration in a landfill. The *CDMG Realty* court excluded application of its ruling to leaking tanks and drums, whether above ground and thus obvious, or below ground and thus hidden. It did so consistent with its emphasis on the distinction between "disposal" and "release." The Third Circuit found that Congress knew what it was doing in including "leaching" in the definition of "release," but not in the definition of "disposal." 96 F.3d at 715. The Second Circuit in *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351 (2nd Cir. 1997), following *CDMG Realty*, was "persuaded by the Third Circuit's reasoning" and decided not to "reinvent[ ] the wheel," but rather to "summarize below what we believe to be the Third Circuit's most persuasive arguments." 120 F.3d at 358.

ABB, like *CDMG Realty*, left the door open for leaking tanks and drums, noting that "because the definition of disposal includes 'leaking,' some courts have concluded that prior owners are liable if they acquired a site with leaking barrels even though the prior owner's actions are purely passive. [citation to *Nurad* omitted] *We express no opinion on this issue*." *Id.* at n. 3 (emphasis added).

While not clearly articulated, the Third and Second Circuits thus clearly recognize some form of passive disposal. If leaking drums constitute a (passive) disposal for which otherwise non-disposing owners can be liable, it is unclear why "leaking" underground formations do not result in the same kind of liability. Knowledge or "knowability" of the contamination does not supply the answer. Leaking tanks can be under ground as well as above ground, and thus no less "out of sight" than uncontained wastes moving under ground. Thus, holding defendants liable for "passive" disposal in the first case but not the second seems at least as irrational as the other "irrationalities" to which the Third Circuit and others point in rejecting "passive" disposal liability.

Improvements in the environmental part of business due diligence makes the distinction even less rational. The standard for environmental site assessments (ESA), both Phase Is and Phase IIs, has been set by the American Society for Testing and Materials (ASTM). Since the release of the Phase I ESA Standard, E1527, in 1993, the ASTM standard has been accepted as the gold standard of "good customary and commercial practice." While "innocent landowner" status is rarely granted, compliance with the ASTM standard has on occasion qualified a party for that defense.

The Phase II standard, E1903-97, more recently developed (1997), is meant to define the appropriate level of investigation of those "recognized environmental conditions" identified in Phase I ESAs. In particular, Phase IIs are designed to "determine whether hazardous substances or petroleum products have been disposed or released there [at the facility]." *Id.*, Section 1.1.1. The standard does so while recognizing the continuing definitional distinction between "disposal" and "release." *Id.*, Section 3 ("Terminology").

Properly performed, a Phase II examination reveals the presence and movement of underground contaminants. This inquiry includes examination of rates

of movement of different contaminants based on, among other factors, geological conditions, consolidation of underground material, and the rate of adsorption of particular contaminants to soil particles. Environmental engineers, geologists and scientists are working in a mature, developed area of inquiry, and a large and varied class of professionals are readily available to perform geophysical testing.

In sum, litigants should continue to educate courts that it is no more a mystery that contamination moves in underground formations and how it so moves, and thereby "leaks from such formations, than that tanks and drums rust and otherwise deteriorate over time to cause a classic "leak." In that sense, the presence of "leak" but not other "passive" words like "leach" in the definition of "disposal," although both terms appear in the definition of "release," is of little relevance in measuring whether a property owner or prospective owner has undertaken "good commercial and customary practice."

That courts need education on these issues is evident. *CDMG Realty* and other courts focus on the passive meaning of "leach" as a term included in "release" but not "disposal." These courts erroneously seem to believe that "leaching" defines the general under ground migration and movement of contaminants. That is not the case: "leaching" defines the movement of contaminants, usually in a landfill (not any contaminated property), occasioned by the downward pressure of rain and other precipitation, in a vertical path into ground water usually at the same location. Leaching does not define the more general and more typical lateral movement of contaminants on any property (not just landfills) to off-site locations. Thus, Congress' exclusion of a passive term like "leaching" or similar passive terms from the definition of "disposal" cannot have the meaning court have ascribed to it. If it did, that would exclude any under ground movement of contaminants, and mean that Congress had intentionally left a vast area of on going and spreading

environmental damage completely unaddressed by CERCLA's liability scheme. Such a huge "hole" in the liability scheme cannot have been contemplated by Congress.

D. Congress should amend CERCLA:

Because the goals are so important – eliminating transactions costs, spreading liability and speeding clean ups – resolution of the issue of whether CERCLA imposes liability for "passive" disposal is desirable. Two ways present themselves. The first and classic means of resolving a split in circuit courts is by appeal to the United States Supreme Court. The second is for Congress to amend CERCLA.

As to resolution by the Supreme Court, the outcome is far from certain. On the one hand,

this Supreme Court reads environmental statutes narrowly and conservatively, rarely looks to legislative history and does not have a reputation for zealous protection of the environment. But there is nothing particularly "environmental" or political about this issue, for the "unfairness" of CERCLA, to the extent that appeal would be made to a business-oriented court, cannot be read out of the statute by the high court. It is only a question of whether the unfairness should be spread, in CERCLA's strict liability scheme, from *current* causally-innocent landowners to *past* causally-innocent landowners.

Perhaps a guide to the current Supreme Court's attitude can be found in a significant CERCLA decision on parent-subsidiary liability in the ownership and operation of a facility. *United States v. Bestfoods, et al.*[11] *Bestfoods* is in fact a "passive" disposal case on appeal, though not on that issue.[12] The Court found that a parent's liability as the operator of the particular *facility* – as opposed to control of

[11] 524 U.S. 51, 141 L.Ed.2d 43, 118 S.Ct. 1876 (1998).

[12] *CPC Int. v. Aerojet-General Corp., et al*., 759 F. Supp. 1269 (W.D. Mich. 1991)(see Table 1).

the *subsidiary* generally — could be sufficient to impose operator liability on the parent acting through an agent. Among the factors to be considered are when an agent of the parent "played a conspicuous part in dealing with the toxic risks emanating from the operation of the plant." *Bestfoods*, 141 L.Ed.2d at 62. The Court found that the parent could be liable as operator if it "became directly involved in environmental and regulatory matters through the work of" its governmental and environmental affairs director. *Id.* "Facility" in CERCLA includes any property, not just an operating industrial facility; thus, in this respect *Bestfoods* may not be applicable to property ownership generally.

However, *Bestfoods* demonstrates a Supreme Court willing to impose CERCLA liability on an operator that may not itself necessarily have been responsible for the initial or active disposal of hazardous substances. In sum, because the political, ideological and jurisprudential views on "passive" disposal liability are not clearly "pro" or "anti" environmental, and the statutory language is itself unclear, it is anyone's guess how the Supreme Court would decide on the issue.

On the other hand, Congress could clarify or amend CERCLA to insure that passive disposal liability applies to past owners where the facts warrant it. The division in the courts' decisions, discussed above, provides the appropriate factors. These include (1) the past owner's actual or reasonably knowable awareness of pre-existing contamination; (2) the adequacy of the pre-purchase investigation, as measured by the time it was taken and other factors consistent with "good customary and commercial practice"; (3) the relative culpability of the claimant along with the past owner, including the degree of responsibility taken by the claimant; and (4) at the same time, reflecting respect for the "polluter pays" principle. Application of these factors in any rewrite of CERCLA during the reauthorization process is obviously not uncomplicated and without significant hurdles. However, this effort forms the basis for a significant improvement of

CERCLA and for the public's willingness to continue to believe, despite some discouraging signs, that the Superfund law continues to provide the basis for cleaning up the nation's toxic waste dumps.

Revised

Table 1

PASSIVE DISPOSAL UPHELD (AND IMPOSED ON DEFENDANT)

1. Defendant (usually, interim owner) knew of contamination or should have known because there was some evidence of contamination and ignored it, typically, no other "culpability" or equity factors against plaintiff (usually, current owner):

Carson Harbor Village, 227 F.3d 1196 (9th Cir. 2000).

Briggs & Stratton Corp. v. Concrete Sales and Services, 20 F. Supp. 2d 1356 (M.D.Ga. 1998) (defendant knew about leaking containers).

New York v. Almy Bros., 866 F. Supp. 668 (N.D.N.Y. 1994) (allowed drums to deteriorate, at the least, and may have moved them).

In Re Hemingway Transport, 108 B.R. 378 (Bankrupt. MA. 1989) *aff'd* 126 B.R. 6 (D. Mass. 1991) *aff'd* 954 F.2d 1 (1st Cir. 1992) (leaking drums).

CPC Int. v. Aerojet 759 F. Supp. 1289, 1277-78 (W.D. Mich. 1991) (defendant knew about contamination and agreed to clean up but did not).

Southfund Partners III v. Sears, Roebuck and Co., 57 F. Supp 2d 1369 (N.D.Ga. 1999) (uncapped tanks leaked and spilled).

Nurad, Inc. v. William E. Hooper & Sons Co., 996 F.2d 837 (4th Cir. 1992) *cert. denied sub nom* Mumaw v. Nurad, 506 U.S. 940 (underground tanks containing mineral spirits leaking during defendant's ownership).

U.S. v. Price, 523 F. Supp. 1055 (D.N.J. 1981) *aff'd* 688 F.2d 204 (3d Cir. 1982) (a RCRA case often cited for issue of passive disposal, involving landfill).

State ex rel. Howes v. W.R. Peele, 876 F. Supp. 733, 745 (EDNC 1995) (leaks from deteriorated containers in chemicals openly exposed during defendant's ownership).

Northwestern Mutual Life Ins. Co. v. Atlantic Research Corp., 847 F. Supp. 389, 398 (E.D. Va. 1994) (spilling and leaking of hazardous materials during defendant's tenancy and defendant engaged in activities which contributed to release).

In Re Tutu Wells Contamination Litigation, 846 F. Supp. 1243, 1281-82 (D.Va. 1993) (Hazardous materials openly stored on property and defendant did nothing to remove them; if not actual release, was threat of release).

Stanleyworks v. Snydergeneral Corp., 781 F. Supp. 659, 662-64 (ED Cal. 1990) (particularly unfair that an accident of time would determine whether a non-culpable owner is liable (current owner) or not liable (interim owner)).

Emhart Ind., Inc. v. Duracell Int., Inc., 665 F. Supp. 549, 574 (MD Tenn. 1987).

City of Toledo v. Beazer Materials and Services, Inc., 1995 WL 770396 (N.D. Ohio 1995).

Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992).

2. Defendant (usually, interim owner) did not know, could not have known of contamination:

No cases.

3. Though Defendant might have suspected the problem, Defendant owned for short period of time:

No cases.

4. Defendant knew about contamination, but "culpability" or equity factors work against Plaintiff (usually, current owner):

No cases.

Revised

Table 2

PASSIVE DISPOSAL REJECTED

1. Defendant (usually, interim owner) knew of contamination or should have known because some evidence of contamination but Defendant ignored the problem; and no "culpability" or equity factors working against plaintiff (usually, current owner):

No cases.

2. Defendant (usually, interim owner) did not know, or could not have reasonably known of contamination (or no proof contamination at that stage of litigation);

U.S. v. 150 Acres of Land, 204 F.3d 698 (6th Cir. 2000) (whether defendants knew was unresolved fact issue, but appears they did not).

U.S. v. Petersen Sand & Gravel, 806 F. Supp. 1346, 1349-53 (N.D. Ill. 1992).

In re Diamond Reo Trucks, Inc., 115 B.R. 559 (Bank., W.D. Mich. 1990) (interim owners knew of presence of drums but no evidence drums were leaking during their tenancy).

Servco Pacific v. Dods, 106 F. Supp. 2d 1034 (D. Hawaii July 2000) (defendant did not know or have reason to know of contamination).

3. Whether Defendant might have suspected a problem, defendant owned or operated for only a short period of time:

ABB Industries; Joslyn Mfg. Co.

4. Even though Defendant knew about contamination at the time of its ownership, "culpability" or equity factors working against Plaintiff:

U.S. v. CDMG, 96 F.3d 706 (3rd Cir. 1996) (plaintiff acknowledged existence of contamination in contract of purchase from seller/defendant (no opinion on whether a leaking tank situation would be analyzed differently)).

ABB Industries, 120 F.3d 351 (2nd Cir. 1997) (plaintiff itself contaminated the site after they gave up control).

Ecodyne v. Shah, 718 F. Supp. 1454 (N.D. Cal. 1984) (plaintiff acknowledged problem in contract of purchase from seller/defendant, and paid reduced price).

Edward Hines Lumber .v Vulcan, 861 F. 2d 155 (7th Cir. 1988) (both parties knew of contamination as of time of sale).

Snediker Developers v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991) (power disparity in that interim owners were less educated/sophisticated).

Idylwoods Associates v. Moder Capital, 915 F. Supp. 120 (W.D.N.Y. 1996) (plaintiff sought recovery of the clean up costs it incurred from the current owner who let

previously discovered contamination fester and worsen; but plaintiff had been prior owner who disposed of hazardous wastes at the site).

Joslyn Mfg. Co. v. Koppers Co. Inc., 40 F.3d 750 (5th Cir. 1994) (declined to adopt Nurad (4th Cir) approach because plaintiff is former owner who was the "primary contaminator of the property" through its use of creosote in wood treatment operation, and plaintiff failed to show that any hazardous waste "leaked" or "spilled" during defendant's brief period of ownership).