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CASENOTE

WHEN LIABILITY CAN ATTACH FOR REMAINING PASSIVE: CONSTRUCTION OF THE TERM “DISPOSAL” UNDER CERCLA

Crofton Ventures Limited Partnership v. G & H Partnership

I. INTRODUCTION

In 1962 Rachel Carson’s Silent Spring, was published. Two years later the first Earth Day, an annual event, was held. These events helped spark congressional interest in environmental issues. Congress acted by passing a series of enactments, in the late 1960s and 1970s, to address the problems that pollution of the environment created. Included in this series were the 1976 Resource Conservation and Recovery Act (“RCRA”) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (“CERCLA”).

II. FACTS AND HOLDING

The instant lawsuit revolves around a fifty-five acre portion of land (the “Tract”) located on Patuxent Road in Anne Arundel County (the “County”), Maryland. The Tract can be divided into two sections, a thirty-two acre portion (the “Site”), and a twenty-three acre portion (the “Adjacent Site”). Facts relevant to the suit have their beginnings in the 1930’s when sand and gravel surface mining and other operations were commenced on the Site, by Alan E. Barton Enterprises. These operations consisted of Alan E. Barton Hot Mix Asphalt, Alan E. Barton Sand and Gravel, and Alan E. Barton Ready Mix Concrete. Bituminous Construction Company (“BCC”) acquired the Tract from the Barton operation in 1976. BCC’s tenure was short lived, as it merged with E. Stewart Mitchell, Inc. (“ESM”) in 1977, with ESM emerging as the surviving entity and retaining ownership of the Tract. ESM opened an asphalt production facility on the Adjacent Site in 1977, the year of the merger. ESM operated the asphalt facility from 1977 until 1981, when it leased both the Adjacent Site and the asphalt facility to Bituminous Construction Inc. (“BCI”), who continued operation of the asphalt facility. BCI was part of a business organization controlled by Harry Ratrie (“Ratrie”). The Ratrie organization in 1985, through G & H Partnership (“G & H”), a partnership in which Ratrie was a general partner,
exercised an option to purchase the Tract.\textsuperscript{20} BCI continued to operate the asphalt production facility, after the purchase by the Ratrie organization in 1985.\textsuperscript{21} In 1987 Joseph Horisk ("Horisk") expressed interest in buying the Site.\textsuperscript{22} In April of that year C & H Properties ("C & H"), of which Horisk was a partner,\textsuperscript{23} entered into an agreement with G & H to purchase the Site.\textsuperscript{24} The agreement contained an addendum making closure "subject to an engineering study to determine that the property contains no hazardous materials of any kind whatsoever."\textsuperscript{25} The addendum further provided that the buyer, C & H, would use its best efforts in obtaining an engineering study to determine the absence of a "hazardous waste or substance."\textsuperscript{26} Finally the addendum provided that "to the best of Seller's knowledge, and while the [Site] was in Seller's possession, the [Site] has not been used for hazardous waste disposal, and no party has transported, caused to be transported, stored or caused to be stored, on the [Site] [any hazardous waste]."\textsuperscript{27} The parties continued to negotiate, amended the agreement, and eventually extended the time for closing until the end of 1991.\textsuperscript{28}

Horisk obtained an engineering study in early in 1991, and in late February of that year C & H assigned its rights under the agreement to Crofton Ventures Limited Partnership ("Crofton"),\textsuperscript{29} which closed the transaction with G & H on or about the 27th of that month.\textsuperscript{30} By that summer the County had made plans to acquire a portion of the Site for road improvements.\textsuperscript{31} The County required Crofton to obtain certification from the Maryland Department of the Environment ("MDE") that the portion to be deeded was "clean."\textsuperscript{32}

The certification process began in February of 1995 with an initial inspection of the Site by Crofton's environmental consultant.\textsuperscript{33} The inspection revealed an area containing partially exposed fifty-five gallon drums.\textsuperscript{34} In April, the environmental consultant took samples from five of the drums, finding trichloroethylene ("TCE")\textsuperscript{35} in four of them.\textsuperscript{36} TCE is known to be carcinogenic and constitutes a hazardous substance under both federal, and Maryland environmental laws.\textsuperscript{37} In July, Crofton unearthed and removed 285 fifty-five gallon drums and other debris\textsuperscript{38} from the Site.

Crofton sought to recover the cost of the clean up from G & H, its general partners Harry and Delila Ratrie, and ESM under the CERCLA,\textsuperscript{40} contending that they were covered persons under Section 107(a)\textsuperscript{41} of CERCLA.\textsuperscript{42} Crofton

\textsuperscript{20} Crofton, 116 F. Supp. 2d at 635.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} C & H Properties was a partnership between Horisk and person named Cox, but Cox was not involved in the lawsuit. Id. at n. 6.
\textsuperscript{24} Id. at 635.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 635-6.
\textsuperscript{27} Id. at 636.
\textsuperscript{28} Id.
\textsuperscript{29} Crofton is a limited partnership whose general partners are Crofton-Horisk, Inc., and Crofton-Cox, Inc. Id. at n. 7.
\textsuperscript{30} Id. at 636.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 636.
\textsuperscript{35} TCE is a chlorinated commercial solvent often used to degrease machinery and to remove paint. Id. at 637. n. 10.
\textsuperscript{36} Id. at 636.
\textsuperscript{37} Crofton, 258 F.3d at 294.
\textsuperscript{38} The debris included: tires, "white goods" described as distressed household appliances like refrigerators, miscellaneous industrial debris, road signs, and three truck mud flaps. Two bearing the name "E.S. Mitchell Asphalt" and one bearing the name "Barton Concrete." Crofton, 116 F. Supp. 2d at 639.
\textsuperscript{39} Id. at 636.
\textsuperscript{40} Id. at 637.
\textsuperscript{41} It is customary to refer to 42 U.S.C. § 9601 as Section 101 of CERCLA, § 9602 as Section 102 of CERCLA etc. Id. at 637. n. 11.
\textsuperscript{42} Section 107(a) of CERCLA provides in pertinent part that "Notwithstanding any other previous 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 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 arranged for disposal...of hazardous substances...shall be liable for...any other necessary costs of response incurred by any other person consistent with the national contingency plan..." Id.
also sought damages for clean up of petroleum products, attorney's fees, and for natural resource damages. Crofton claimed that G & H's liability stemmed from Section 107(a)(2), as it was an owner of a facility at the time of the release or disposal of a hazardous substance on the Site. Crofton claimed that ESM was liable, under Section 107(a)(2), as both an owner and operator, and under Section 107(a)(3) as an arranger. In addition, Crofton sought recovery from G & H for fraudulent misrepresentation in the addendum of the sales agreement, and on breach of warranty and breach of contractual indemnity; however these claims are not germane to this note.

G & H and ESM ("movants") responded with a motion to dismiss for failure to state a claim upon which relief can be granted. The movants argued in part that, because Crofton was a party potentially responsible for the dumping it should be barred from bringing a Section 107 claim against them. Section 107 provides strict liability for a defendant and joint and several liability amongst any defendants unless a showing can be made that the harm was divisible. Unhappy with the harshness of the joint and several liability, courts had implied a right of contribution amongst potentially responsible parties ("PRPs"), until such a right was codified in Section 113(f) of CERCLA in 1986. The Fourth Circuit had not yet addressed the issue of whether a PRP had standing to bring a Section 107(a) cost recovery action, however a majority of courts had held that PRPs are limited to actions for contributions under Section 113 of CERCLA. These courts allowed only "innocent" parties to bring cost recovery actions under Section 107(a)(4)(B).

Judge Marvin J. Garbis, in ruling on the motion to dismiss sided with the minority, found that a PRP, like Crofton, did have standing to bring a cost recovery action under Section 107(a). His reasoning was twofold. First, the Fourth Circuit and the Supreme Court, while not explicitly addressing the issue, have allowed PRPs to bring Section 107 cost recovery actions. Second, he stated that the phrase "any other person" in Section 107(a)(4)(B) suggested that PRPs, not just innocent parties, should be allowed to bring Section 107(a)(4)(B) actions.

Judge Garbis dismissed Crofton's claim against ESM for cost recovery under Section 107(a)(3), but did find that Crofton's allegation that ESM and G & H should be liable as "owners" under Section 107(a)(2) was sufficient to withstand a motion to dismiss. He likewise found that Crofton's allegation that ESM could be liable as an "operator" under Section 107(a)(2), Crofton's claim for fraudulent misrepresentation, and Crofton's contract claims could survive ESM's and G & H's motions.


Crofton was also foreclosed from recovering natural resource damages because Section 107(f)(1) provides that such damages are only recoverable by the federal government, state governments, and Indian Tribes. Id. at *17.

1997 D. Md. LEXIS 8067 at *20.
1997 D. Md. LEXIS 8067 at *2.
Id. at *6.
Section 113(f) provides in pertinent part: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action...under section 9607(a) of this title...In resolving contribution claims, the court may allocate response costs among liable parties using equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under...section 9607(a) of this title."

Crofton, 1997 D. Md. LEXIS 8067 at *7.
Id. at *8.
Id. at *8.
Section 107(a)(4)(A) establishes a cost recovery action for the government and Indian tribes who incurred environmental contamination response costs, while Section 107(a)(4)(B) provides recovery of "any other necessary costs or response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) (1994).

Id. at *10 n. 6.
Id. at *10.
Id. at *24.
Id. at *21.
Id. at *23. *26-28.
Prior to a bench trial in front of Judge Garbis, evidence in Crofton’s control which was potentially of probative value in proving the elements of the Section 107 claims became lost or otherwise unavailable. At trial, Crofton was unable to produce any direct evidence of dumping by G & H or ESM, but sought to show via circumstantial evidence that TCE was disposed of on the Site during the time at issue. The relevant times were 1977 to 1985 for ESM, and 1985 until Crofton’s purchase of the Site for G & H.

Crofton’s case was hampered by their inability at trial to prove the location and size of the dumpsite where the barrels were unearthed. Crofton presented aerial photographs of the Site, and an expert in analyzing aerial photographs testified as to location of the dumpsite. The expert marked on aerial photographs taken in 1968, 1977, and 1984, where the dumpsite was located. The location identified as being the dumpsite on the 1968 and 1977 photos was located in a densely wooded area, whereas the location marked on the 1984 picture was located in a clearing. This, according to Crofton, suggested that sometime after 1977 and before 1984 the area around the dumpsite was cleared, presumably for disposal. Unfortunately for Crofton, it turned out that the location marked on the 1984 photo differed from the location marked on the earlier photos. Judge Garbis found that the expert’s testimony was not sufficiently reliable to accept it as a basis for finding the location of the dumpsite.

Crofton also sought to show the location of the dumpsite via a videotape of the excavation and clean up of the dumpsite. This video also failed to identify the location of the dumpsite. Crofton’s agent narrated the tape, he referred to a “clean area,” as well as specific items of debris as being located a certain number of paces from the office trailer, but never stated where the office trailer was located.

The fifty-five gallon drums themselves were lost in the clean-up process; however pictures of the drums revealed that they were of two different types. Some had all of their sides corrugated whereas others merely had two corrugated sides. There was testimony that fully corrugated drums were used in the 1930s and 1940s, whereas drums with two corrugated sides were used later. Experts, however, did not examine the drums themselves.

A number of truck tires were found on the dumpsite; however they were not preserved. Mud flaps of the type used on ESM asphalt trucks were found at the dumpsite, but Crofton did not preserve evidence of the relationship between the locations of the mud flaps and the drums.

Judge Garbis however, did find that there was cause for suspicion “regarding the propriety of [ESM and G & H’s] actions.” The parties conceded at trial that TCE had been dumped at the Site. ESM and BCI, controlled by G & H,
began using TCE in the testing of hot mix asphalt\(^4\) in 1979\(^5\) but were unable to present any evidence as to the proper disposal of their TCE.\(^6\) Crofton also read into evidence the deposition of a former employee of ESM and BCI.\(^7\) The employee, Mr. Randall, testified in deposition that shortly after the 1985 acquisition of the Tract by G & H, he noticed on the asphalt production facility site approximately thirty fifty-five gallon drums.\(^8\) Mr. Randall also stated that upon inquiring about proper disposal of the drums, he was told not to worry, and that within a week of that statement, the barrels disappeared.\(^9\) Judge Garbis, while not dismissing Mr. Randall’s testimony, stated that it did no more than support a suspicion that BCI was not disposing of waste properly.\(^9\)

During closing arguments Crofton sought to argue that ESM and G & H partnership should be held strictly liable as owners, or in ESM’s case as either owners or operators, at the time hazardous substances “leaked” onto the property.\(^9\) Judge Garbis then directed counsel for Crofton to argue how Crofton had proven that ESM and G & H had actually dumped TCE on the Site, specifically stating that Crofton had to prove “precisely who was the responsible person.”\(^9\) After this, Judge Garbis expressed concern that the issues of ownership were becoming jumbled, and Crofton’s counsel explained that because between 1980 [sic 1981] and 1985 ESM owned the Tract, and BCI, under G & H, operated the asphalt production facility, the issues of ownership were by nature bound to be jumbled.\(^9\) Judge Garbis responded by saying that the first question to be answered was “who put the TCE there” and that then the issue of property ownership could be addressed.\(^9\)

Crofton then attempted to argue that the circumstantial evidence showed actual dumping.\(^9\) Judge Garbis rejected this as inadequate, stating that “[T]he sugar fairy didn’t put [the TCE] there. Somebody put it there and it wasn’t [Crofton].”\(^9\) Later, in an exchange with counsel for ESM, Judge Garbis reiterated his belief that Crofton had to make a showing of actual dumping.\(^7\) Finally, counsel for Crofton argued that Section 107(a)(2) does not require that a plaintiff prove “active disposal” but that a showing of “passive disposal” would suffice.\(^9\) Counsel for Crofton stated that Section 107(a)(2) allows liability not only for active involvement in dumping, but also for ownership or operation at the time hazardous substances were spilling or leaking.\(^9\) Judge Garbis asked why this theory had not been mentioned previously, to which counsel for Crofton stated that Crofton had alleged passive disposal in its complaint.\(^9\)

Judge Garbis held that Crofton had not met the burden of proof in showing actual dumping.\(^10\) He reasoned that even if it were accepted as a fact that ESM and BCI (as a part of G & H) did not properly dispose of their TCE, it would not necessarily follow that such improper disposal took place on the Site as opposed to some other location.\(^10\) He further reasoned that because both ESM and G & H had or anticipated having property interests in the Site, at the time of the TCE disposal, they would have less incentive to dispose of TCE there than at some other location.\(^10\) Thus, Crofton had not

\(^4\) In addition to use in the degreasing of machinery, TCE is also used to test hot mix asphalt. The testing, which usually takes place at the production facility, involves combining a finished sample of asphalt (usually about the size of two hockey pucks) with two to three pints of TCE. The TCE then dissolves hot mix asphalt into its ingredients for inspection. Crofton, 116 F.Supp.2d at 636-637.

\(^5\) In that year the state of Maryland began requiring the use of TCE in the testing of hot-mix asphalt. Crofton, 258 F.3d at 295. In 1985 or 1986 advances in technology allowed BCI to change its testing process such that the liquid residue left behind from the testing, could be distilled, making the recycling of TCE possible. Crofton, 116 F. Supp. 2d at 637.

\(^6\) Crofton, 116 F. Supp. 2d at 642.

\(^7\) The employee expired prior to trial. Id.

\(^8\) Id.

\(^9\) Id.

\(^10\) Crofton, 116 F. Supp. 2d at 643.
made a showing that ESM and G & H were parties liable for response costs under Section 107(a)(2), and deciding whether Crofton’s response costs were consistent with the national contingency plan became a moot point.104

Crofton appealed to the Fourth Circuit Court of Appeals, which affirmed Judge Garbis’s rulings on the fraudulent misrepresentation claims and breach of contract claim, but reversed his ruling on the CERCLA claim.105 The Fourth Circuit held that Judge Garbis had, by requiring a showing of actual dumping, misconstrued the requirements for establishing liability under CERCLA, and that it is irrelevant under CERCLA that Crofton could not prove who actually dumped the TCE or whether any owner or operator had knowledge of the dumping or leaking during the relevant period, as liability under CERCLA is strict.106

III. LEGAL BACKGROUND

A. RCRA and CERCLA Liability

The mission of RCRA,107 which amended the Solid Waste Disposal Act,108 was threefold: (1) to protect the environment, (2) to conserve natural resources, and (3) to provide “cradle to the grave” legislation governing the management of hazardous substances.109 RCRA was designed to fulfill this mission by preventing future “open dumping,” converting existing open dumps into areas that were innocuous to human health and the surrounding environment, and by regulating the treatment, storage, transportation, and disposal of hazardous substances.110 RCRA was limited because, while it dealt comprehensively with the problems of present and future generation and management of hazardous substances, it applied to abandoned hazardous waste sites only if they posed imminent hazards.111

In August of 1978 the New York Times112 made the public aware of the problems of one such abandoned dumpsite at Love Canal.113 In Niagara Falls,114 RCRA’s inability to widely address the problems presented by abandoned and inactive dumpsites led the lame duck 96th Congress to amalgamate three existing environmental bills115 into the bill that would become CERCLA.116 On December 11, 1980 a lame duck President Carter signed the bill.117 CERCLA was designed to address problems like the one at Love Canal by making PRPs strictly liable for cleanup costs incurred by private parties and governmental entities.118

When CERCLA was drafted Congress borrowed the term “disposal” from the RCRA amendment to the Solid Waste Disposal Act.119 The term is used in Section 107(b)(2),120 which Crofton claimed applied to both G & H and ESM, averring that they were owners or operators of a facility at the time of disposal.121 Disposal is defined as:

104 Crofton. 258 F.3d at 297-98.
105 Id. at 300.
106 Id. at 300.
108 Id.
110 Id.
111 “A dump site has been abandoned when its owners and operators no longer maintain a relationship with it.” United States v. Waste Indus., Inc.. 556 F.Supp 1301. 1303 n. 5 (E.D.N.C. 1982).
114 Love Canal was a partially excavated power canal that was used as chemical dumpsite by Occidental Chemical Corporation from 1942 to 1953, during which time over 21,000 tons of waste were disposed at the canal, including numerous substances classified as hazardous under federal statute. Hazardous substances were later detected in surrounding surface water, groundwater, soil, sewers, creeks, and residential basements. United States v. Hooker Chemicals & Plastics Corp.. 680 F.Supp 546. 549 (W.D.N.Y 1988).
117 Stephens. supra n. 111. at 10177.
118 Grad. supra n. 115. at 35.
119 Stephens. supra n. 111. at 10178.
120 Id.
...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.\textsuperscript{123}

Congress also created for CERCLA a new term, “release,” defining it to include disposal.\textsuperscript{124} Release is defined as:

...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)...\textsuperscript{125}

The term “release” appears in Section 107(a)(4) which provides liability for persons accepting hazardous substances for transport.\textsuperscript{126} Including the term “disposal” in the definition of the term “release” means that all “disposals” are “releases” but not all “releases” are “disposals.”\textsuperscript{127}

### B. Early History of the Term “Disposal”

In 1982 the United States District Court for the Eastern District of North Carolina, in ruling on a motion to dismiss in United States v. Waste Industries, Inc.,\textsuperscript{128} engaged in a cogent interpretation of the term “disposal.”\textsuperscript{129} In Waste Industries the Administrator of the EPA brought an action, on behalf of the United States, under RCRA Section 7003,\textsuperscript{130} seeking injunctive relief against the former operator of a landfill from which waste material had “leached”\textsuperscript{131} into nearby groundwater causing wells of local residents to become contaminated.\textsuperscript{132} In ruling on defendant Waste Industries’ 12(b)(6) motion, the Waste Industries court analyzed the language of Section 7003, the Imminent Hazard Provision.\textsuperscript{133} The Waste Industries court stated that the provision highlighted five activities for which the EPA may seek restraint: handling, storage, treatment, transportation, and disposal, and that it was under the “disposal” provision that the EPA contended the landfill presented an imminent danger.\textsuperscript{134}

The Waste Industries court was unclear as to what “disposal” entailed and what its proper application would be in the instant case.\textsuperscript{135} As part of its analysis of the term “disposal,” the Waste Industries District Court employed the *ejusdem generis*\textsuperscript{136} canon of statutory interpretation to ascertain whether any concept of what the term “disposal” entailed

\textsuperscript{123} Section 107(a)(2) provides liability for “any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous wastes were disposed of...”

\textsuperscript{124} Crofton, 1997 U.S. Dist. LEXIS 8067 at *20.

\textsuperscript{125} 42 U.S.C. § 6903(3) (1994).

\textsuperscript{126} Stephens, supra n. 111. at 10178.

\textsuperscript{127} 42 U.S.C. § 6901(22) (1994).

\textsuperscript{128} 42 U.S.C. § 6907(a)(4) (1994) provides liability for “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 threatened release which causes the incurrence of response costs, of hazardous substance...”

\textsuperscript{129} Stephens, supra n. 111. at 10178.

\textsuperscript{130} 556 F.Supp. 1301 (E.D.N.C. 1982).

\textsuperscript{131} Stephens, supra n. 111. at 10179.

\textsuperscript{132} 42 U.S.C. § 6903(3) (1994), the RCRA is commonly referred to by “Sections” like CERCLA: Section 7003, which is titled “Imminent hazard” provides in part that “…upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person... contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.” Id.

\textsuperscript{133} “Leaching is a process whereby pollutants migrate from the service of the land or pond where they are placed though the subsoil and then into groundwater.” Waste Indus., 556 F.Supp. at 1317 n. 32, quoting Webster’s 3d New International Dictionary 1282 (unabridged 1976).

\textsuperscript{134} Waste Indus., 556 F.Supp. at 1302.

\textsuperscript{135} Id. at 1304.

\textsuperscript{136} “Ejusdem generis is a canon of statutory construction which means that when general words follow specific words in a statute, the general words embrace only objects similar to those embraced by the specific words.” Id. at n. 7.
could be gleaned from the context of surrounding words.\textsuperscript{137} The court determined that the terms handling, storage, treatment, and transportation all involve "active human conduct" or a physical handling of the waste, and reasoned based on \textit{ejusdem generis} that the term following those, "disposal," must also entail some handling of the waste, particularly disposing of the waste.\textsuperscript{138}

The \textit{Waste Industries} court buttressed its contention that disposal must entail some handling of the waste with further analysis of RCRA using the \textit{noscitur a sociis}\textsuperscript{139} canon of statutory interpretation.\textsuperscript{140} The court reasoned that the terms handling, storage, treatment and transportation present the notion that each word represents a step in the active movement of hazardous waste, with "disposal" being the active conduct representing the final step.\textsuperscript{141} The court again employed the \textit{ejusdem generis} canon, looking at the definition of "disposal" which includes "discharge, deposit, injection, dumping, spilling, leaking, or placing"\textsuperscript{142} of hazardous waste.\textsuperscript{143} The \textit{Waste Industries} court opined that the terms suggest a legislative intent of covering every way in which a person might dispose of hazardous waste.\textsuperscript{144} It further reasoned that based on \textit{ejusdem generis} the "general terms... leak and spill, must be read as containing the elements common to the specific terms, i.e. deposit, inject, dump, place."\textsuperscript{145} The common element, the court said, was that the act was carried out by a person, meaning that all terms within the definition of "disposal" contain an element of affirmative action on someone or something's part.\textsuperscript{146}

The \textit{Waste Industries} court stated that such an interpretation does not render the terms spill and leak superfluous because they evince a legislative intent to "not to require that the act have been intentional," [emphasis added].\textsuperscript{147} Thus, "leak" and "spill" represent an attempt by Congress to foreclose on the possibility that one might avoid liability by pleading that the conduct was unintentional.\textsuperscript{148} The \textit{Waste Industries} court then granted defendant's motion to dismiss, holding that the EPA had not stated a claim upon which relief could be granted because Section 7003 did not apply to conduct at a dumpsite which had ceased prior to the time the EPA sought injunctive relief under Section 7003.\textsuperscript{149} The court reasoned that since the "disposal" provision of Section 7003, the only provision under which the EPA might possibly have been entitled to relief included only affirmative action, the defendant could not be held liable for leaching of hazardous substances after its involvement with the landfill had ceased.\textsuperscript{150}

The Fourth Circuit Court of Appeals reversed, holding that Section 7003 applied to the inactive landfill formerly operated by \textit{Waste Industries}.\textsuperscript{151} The Fourth Circuit reasoned that the use of the term "leaking" in the definition of "disposal" evinced congressional intent to address environmental dilapidation occurring after the point in time when the affirmative human action triggered the events leading to the environmental dilapidation.\textsuperscript{152} One pundit, Henry L. Stephens Jr.,\textsuperscript{153} summed up the dichotomy between the \textit{Waste Industries} District Court's view and the Fourth Circuit's view by commenting that 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 \textit{concurrent} human conduct (the district court's view) or whether it can simply occur as a result of \textit{prior} human conduct (the Fourth Circuit's view)."\textsuperscript{154} Neither of these courts had to address the issue of whether the term "disposal" was applicable to a party who engaged in no affirmative

\textsuperscript{137} Id. at 1305.
\textsuperscript{138} Id.
\textsuperscript{139} A method of interpreting particular language of a statute teaching "that the meaning of doubtful words in a group should be determined by reference to their association with other words in the same grouping." \textit{Id.}
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} 42 U.S.C. § 6903(3).
\textsuperscript{143} \textit{Waste Indus.} 556 F.Supp. at 1306.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} \textit{United States v. Waste Indus. Inc.}, 734 F.2d 159, 163 (4th Cir. 1984).
\textsuperscript{150} Id.
\textsuperscript{151} \textit{Waste Indus.}, 734 F.2d at 164.
\textsuperscript{152} Stephens, \textit{supra} n. 111. at 10179, citing \textit{Waste Indus.}, 734 F.2d at 164.
\textsuperscript{153} Henry L. Stephens Jr. at the time of his comment, was a 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., and was of Counsel to Robinson & McElwee, Charleston, West Virginia, and Lexington, Kentucky. Stephens, \textit{supra} n. 111. at 10177.
\textsuperscript{154} Id. at 10180.
action with respect to the placement of hazardous waste and who, moreover, “is merely a former owner or operator of a parcel on which prior dumping, leaking, or spilling of wastes occurred.”

C. The Nurad Holding

The United States District Court for the District of Maryland and the Fourth Circuit got the chance to address the issue of whether the term “disposal” was applicable to a party who engaged in no affirmative action with respect to the placement of hazardous waste in Nurad, Inc. v. William E. Hooper & Sons Co., a case differing greatly from Waste Industries.156 Nurad involved a CERCLA, not RCRA claim, brought by a private party seeking compensation under Section 107(a)(2) from prior owners and operators for costs incurred in removing underground storage tanks from a parcel of land it owned in Baltimore.157 William E. Hooper & Sons Co. (“Hooper Co.”) had owned the parcel from 1905 to 1963.158 During Hooper Co.’s tenure, underground storage tanks (“USTs”) were installed on the property to house mineral spirits.159 These USTs and their contents were left in the ground after Hooper Co. ceased operations on the parcel and sold it in 1963 to Property Investors, Inc.160 In 1976 Kenneth Mumaw purchased the parcel, subdivided it, and sold a portion of it to the plaintiff Nurad, Inc.161 Mr. Mumaw’s only actions regarding the parcel related to his taking legal title and retaining it only as long as was necessary to convey title to Nurad, Inc. and others.162 Moreover, there was no record of use of the USTs during Mr. Mumaw’s brief period of ownership and no evidence that the USTs were leaking during that time.163 However, Nurad, Inc. still sought compensation from Mr. Mumaw, for its response costs of removing the USTs, under Section 107(a)(2) of CERCLA.164 Nurad, Inc. relied on the Fourth Circuit’s broad interpretation of disposal in Waste Industries to include both hazardous substances “in a state of repose at a site” and “the gradual leaking of wastes into the environment.”165

The Nurad District Court distinguished Nurad from Waste Industries, stating that “the only way for the Waste Industries court to preserve the EPA’s ability to demand cleanup by the actual former owners and operators was to define ‘disposal’ in CERCLA to cover completely passive repose or movement....” and that “[t]he circumstances that motivated the Fourth Circuit to define ‘disposal’ so broadly in RCRA §7003 do not exist in this situation.”166 The Nurad court said that there was no evidence that Mr. Mumaw actively disposed of hazardous substances during his ownership, whereas Waste Industries Inc. had actively disposed of hazardous substances.167 Furthermore, the courts in Waste Industries never considered the question of whether it would be equitable to impose CERCLA or RCRA liability on a party that was never involved, in any capacity, with hazardous substances.168 Also, the Waste Industries courts examined the term “disposal” in the context of RCRA, where the term “release” was not used.169 The Nurad court then opined that Congress added the term “release” to CERCLA to cover both active and passive conditions, and in enacting CERCLA, Congress expressly limited Section 107(a)(2) “liability to former owners and operators ‘at the time of disposal,’ a phrase which must refer to an action or have no meaning at all.”170 The Nurad court then cited Ecodynce Corp. v. Shah,172 which, after engaging in a

156 id.
157 id.
159 id.
160 The mineral spirits were used to coat fabrics in Hooper Co.’s textile plant. id.
161 id.
162 id.
163 id.
164 Stephens, supra n. 111. at 10180 (citing Samuel A. Bleicher. Redefining the CERCLA Liability for Former Owners, Tenants, and Operators, 7 Toxics L. Rep. (BNA) 224, 225 (July 15, 1992)).
165 id. at 226.
167 Nurad, 22 ELR at 20086.
168 id.
169 id.
170 id.
171 id. at 20087.
172 Stephens, supra n. 111 at 10180.
173 id.
174 Nurad, 22 ELR at 20087.
175 id.
noscitur a sociis analysis\textsuperscript{173} of the definition of “disposal,”\textsuperscript{174} required some affirmative action to constitute a disposal under CERCLA.\textsuperscript{175} After this analysis, the Ecodyne\textsuperscript{c} court granted a prior owner’s 12(b)(6) motion.\textsuperscript{176} Based on this reasoning, the Nurad court granted Mr. Mumaw’s motion for partial summary judgment, holding that he was not liable under CERCLA because there was no evidence that he actually disposed of hazardous substances during his ownership.\textsuperscript{177}

The Fourth Circuit Court of Appeals reversed, holding that the Nurad District Court was obligated to adhere to the Fourth Circuit’s interpretation of the term disposal in Waste Industries.\textsuperscript{178} The Fourth Circuit reinforced the notion that hazardous substances may leak, or spill despite the absence of human participation, and that the Nurad District Court “arbitrarily deprived those words of their passive element” by requiring a showing of active participation as a precursor to liability.\textsuperscript{179} According to Professor Stephens,\textsuperscript{180} the Fourth Circuit was distressed by the fact that under the Nurad District Court’s interpretation, a facility’s current owner would be liable under Section 107(a)(1)\textsuperscript{181} “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.”\textsuperscript{182} Thus, the Fourth Circuit held that Section 107(a)(2) liability would attach not only when there is active involvement in the “dumping” or “placing” of hazardous substances, but also when a party merely owned a facility at a time when hazardous substances were “spilling” or “leaking.”\textsuperscript{183}

Nurad\textsuperscript{c} was the first federal appellate court opinion deciding CERCLA liability of former owners based on a theory of passive disposal.\textsuperscript{184} The U.S. District Court for the District of Maryland followed Nurad in HRW Systems, Inc.\textsuperscript{c} v. Washington Gas Light Co.,\textsuperscript{185} opting not to scrutinize the definition of “disposal.”\textsuperscript{186}

D. The Peterson Sand Approach to “Disposal”

The U.S. District Court for the Northern District of Illinois reached a different conclusion as to the dichotomy between active and passive disposal, and the definition of the term disposal.\textsuperscript{187} In United States v. Peterson Sand & Gravel,\textsuperscript{188} which was decided less than six months after Nurad, the U.S. sought, under CERCLA, to recover funds spent on a remedial investigation to determine the safety of an already cleaned site.\textsuperscript{189} The U.S. sought to establish that defendant, and third party plaintiff, Peterson, Inc. were owners at the time of disposal under Section 107(a)(2).\textsuperscript{190} In denying the U.S. motion for summary judgment against Peterson, Inc., the Peterson Sand court came to the conclusion that giving “disposal” a passive meaning “controverses the plain language” of CERCLA.\textsuperscript{191} The Peterson Sand court noted that while the Seventh Circuit Court of Appeals had not addressed the precise issue of whether a past owner or operator can be liable under Section 107(a)(2) for mere passive disposal, the Seventh Circuit had interpreted Section 107(a)(2) and

\textsuperscript{173} Id. at 1457.

\textsuperscript{174} 42 U.S.C. § 6903(3).

\textsuperscript{175} Nurad, 22 ELR at 20087. The Nurad District Court cited additional cases which limited the scope of Section 107(a)(2) liability to former owners and operators who actually dispose of or introduce hazardous substances into the environment: In re Diamond Reo Trucks, Inc., 115 Bankr. 559, 565 (Bankr. W.D. Mich. 1990) (concluding “the mere ownership of the site during the period of time in which migration of leaching may have taken place, without any active disposal activities, does not bring [the defendant] within the liability provision of [Section] 107(a)(2)”). Emhart Industries, Inc. v. Duracell International, Inc. 665 F.Supp. 549: cf. Stevens Creek Assn. v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990) (construing “disposal” for purposes of Section 107(a)(2) as requiring some affirmative act of discarding a substance as a waste), cert. denied, 111 S.Ct. 2014 (1991). Nurad, 22 ELR at 20087.

\textsuperscript{176} Id.

\textsuperscript{177} Id. at 20087.

\textsuperscript{178} Nurad, 966 F.2d at 845.

\textsuperscript{179} Id.

\textsuperscript{180} Supra n. 152.

\textsuperscript{181} CERCLA Section 107(a)(1) provides liability for “the owner and operator of a vessel or a facility.” 42 U.S.C. § 9607(a)(1).

\textsuperscript{182} Stephens, supra n. 111, at 10181.

\textsuperscript{183} Nurad, 966 F.2d at 846.

\textsuperscript{184} Stephens, supra n. 111, at 10181.


\textsuperscript{187} Stephens, supra n. 111, at 10181.

\textsuperscript{188} 806 F. Supp. 1346 (N.D. Ill. 1992).

\textsuperscript{189} Id. at 1348.

\textsuperscript{190} Id. at 1349.

\textsuperscript{191} Id. at 1352.
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given guidelines for interpreting it. In Edward Hines Lumber Co. v. Vulcan Materials Co., the Seventh Circuit explained the function of a court when interpreting CERCLA was "to find and enforce stopping points no less than to implement other legislative choices." The Peterson Sand Court first examined the definition of "disposal" under RCRA, and reasoned that for an event to be "disposal" under RCRA's definition, it must be such that waste "may enter the environment or be emitted into the air or discharged into any waters, including ground waters." Passive disposal, on the other hand, involves hazardous substances that have already entered the environment and are merely migrating from place to place; thus passive disposal cannot be "disposal" as defined under RCRA and CERCLA because "disposal" for the purposes of those statutes occurs before the substances enter the environment. The Peterson Sand Court then considered the term "disposal" as compared to "release." It stated that it was undisputed that a "release" includes passive migration. The court further found that because the term "release" includes in its definition "disposal," the former must be more inclusive, and Congress must have been cognizant of the issue of passive migration when it created the definition of "release" but chose to make liability of former owners and operators, under Section 107(a)(2), dependent upon "disposal" rather than "release.

As further evidence of the drafter's cognizance of the issue of passive disposal, the Peterson Sand Court cited the 1986 amendments to Section 107(b)(3), the "innocent owner defense." The innocent owner defense can be employed by a party otherwise liable under Section 107(a) in circumstances when the damages were the fault of a third party who is not an agent or employee of the otherwise responsible party and who is not in a contractual relationship with that party. The 1986 amendments expanded the scope of the defense by excluding land sales from the definition of "contractual relationship," under certain circumstances. If, according to the Peterson Sand Court, "disposal" was interpreted to encompass passive disposal the innocent owner defense would be available only to innocent owners who found themselves fortunate enough to have purchased a facility where all the hazardous waste was sealed in concrete. The amendment, the Peterson Sand Court said, had a plain purpose "to exclude from liability owners who bought after the hazardous waste was placed on the land and knew nothing about the hazardous waste at the time of purchase," and interpreting "disposal" to encompass passive migration, would "eviscerate that plain purpose." E. "Disposal," Post- Nurad and Peterson Sand

The U.S. District Court for the Eastern District of Virginia declined to follow Peterson Sand in Pneumo Abex Corp. v. Bessemer and Lake Erie R. R. Co., but the case has not been directly overruled; indeed the Sixth, Second, and Third Circuit Courts of Appeal have agreed that "disposal" requires active human conduct. However the Ninth Circuit Court of Appeals ("Ninth Circuit") agreed with the Fourth Circuit's Nurad reasoning, and ironically abrogated Ecodyne, the case relied on by the Nurad District Court, by holding, in Carson Harbor Village Ltd. v. Unocal Corp., that "disposal" included passive migration.

192 Id. at 1350.
193 861 F.2d 155 (7th Cir. 1988).
195 42 U.S.C. § 6903(3).
196 Peterson Sand, 806 F. Supp. at 1351 (quoting 42 U.S.C. § 6903(3)); see also Stephens supra n. 111. at 10180.
197 Peterson Sand, 806 F. Supp. at 1351. see also Stephens supra n. 111. at 10180.
198 Peterson Sand, 806 F. Supp. at 1351.
199 Id.
200 Id., see also Stephens supra n. 111. at 10181.
201 Peterson Sand, 806 F. Supp. at 1351.
202 Id. at 1351-52.
204 Peterson Sand, 806 F. Supp. at 1352.
205 Id.
206 Id.
208 See United States v. 150 Acres of Land, 204 F.3d 698. 705-06 (6th Cir. 2000); ABB Indus. Sys., Inc. v. Prime Technologies. 120 F.3d 351, 357-59 (2d Cir. 1997); United States v. CDMG Realty Co., 96 F.3d 706. 713-18 (3d Cir. 1996).
209 227 F.3d. 1196 (9th Cir. 2000).
210 Id. at 1210.
At the time *Crofton* was decided, there already existed a split between the circuits over the issue of whether “disposal” under Section 107(a)(2) included passive disposal. Thus, Judge Garbis’ concern with whether *Crofton* was proceeding on a theory of active or passive disposal was not hollow. If the matter were tried in the Sixth, Third or Second Circuits the issue of whether a plaintiff was seeking to show that past owners or operators were liable under Section 107(a)(2) for active versus passive disposal would have been dispositive. Unfortunately for G & H and ESM, the matter was before the First Circuit to hold that “disposal” includes passive migration. The United States Supreme Court denied certiorari to the *Nurad* petitioners in 1992, foregoing the chance to settle the debate over active and passive disposal at that time.  

IV. INSTANT DECISION

A. The Majority Decision

A majority of the Fourth Circuit Court of Appeals believed that there was ample evidence to establish that that dumping of TCE occurred on the Site, and that TCE leaked from the drums at the Site during the time when ESM and or G & H owned the Tract or operated the asphalt production facility. They believed that Judge Garbis failed to grasp this because, according to them, he misconstrued the requirements for liability to attach under CERCLA.

The Fourth Circuit cited the exchanges between counsel for *Crofton* and Judge Garbis as proof of the latter’s mistaken belief regarding *Crofton’s* burden of proof. It noted that *Crofton* was not attempting to introduce a new theory of liability during closing arguments, but rather was advising Judge Garbis that he was reading Section 107(a)(2) “too narrowly, failing to recognize that ‘disposal’ includes ‘leaking.’” The Fourth Circuit pointed to an exchange between counsel for ESM and Judge Garbis, during closing arguments, in which the Judge reaffirmed what the Fourth Circuit called his limited interpretation of Section 107(a)(2):

The court: But it would be reasonable to surmise again at least 50, 60 drums had TCE based on that. What’s the difference if it was one drum. The point is, did you put it there?

Counsel for [ESM]: There is no evidence that we put it there.

The court: That is the whole point. That is why we are here.

The Fourth Circuit cited *Crofton’s* argument that Section 107(a)(2) does not require “active disposal” but allows liability upon a showing of “passive disposal.” Judge Garbis, the Fourth Circuit said, believed this to be an alternate theory of liability, prompting an inquiry as to why it had not been mentioned before. In response to the dissent, who believed that *Crofton* did attempt to introduce a new theory of liability during closing arguments, the majority stated that any unfairness resulting at the District Court level could be attributed to Judge Garbis’ “misperception” of the statute, and not from any change in theory of liability.

The Fourth Circuit believed that the uncontroverted evidence showed that TCE was routinely used on the Adjacent Site beginning in 1979 and that there was no evidence that it was used prior to that time. They pointed out that for the purposes of liability under CERCLA, it was immaterial who used the TCE, and that the evidence also established that a mixture of TCE and asphalt was, from 1979 through the late 1980s, placed in 55-gallon drums on the Tract.

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211. 506 U.S. 940 (1992), supra note 54.
212. *Crofton*, 258 F.3d at 298.
213. *Id.*
214. *Id.* at n. 3.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 299.
221. *Id.*
The Fourth Circuit next addressed the problem of lost evidence, citing the inability of the parties to account for what happened to the drums found on the Site, and the inability to produce the documents relating to the drums. However, the drums found were of late 1970s and 1980s manufacture, and when found in 1995 were in a state of "gross disrepair, evidencing a long period during which their contents were leaking into the environment." Also cited was the fact that TCE was found in the soil and groundwater, surrounding the dumpsite.

The Fourth Circuit concluded that the above facts would "easily" permit the trier of fact to conclude that either: (1) TCE was placed on the Site after 1977; or (2) during the period after 1977, whether the drums were placed on the Site before or after 1977, the drums’ contents, including TCE leaked, and continued to leak into the environment, until cleaned up by Crofton; and that either conclusion support liability of an owner or operator from 1977 until 1995. Because liability under CERCLA is strict, the court found, it is irrelevant that Crofton could not prove who actually dumped the TCE at the Site or whether any owner or operator had knowledge of the dumping or leaking during the relevant period.

The Fourth Circuit again turned its focus on, what it believed to be Judge Garbis’ erroneous construction of the term "disposal" by citing Judge Garbis’ statement that “[t]o establish the CERCLA claims [Crofton] must prove that [ESM and BCI (G & H)] placed TCE on the Site," and his statement that “the case turns on whether the Plaintiff can prove if, and when, operators, of the asphalt plant of the...Site [sic]...dumped TCE on the Site,” as evidence of this construction. The court then pointed out that Judge Garbis did not appear to consider the possibility that the drums were buried on the Site at the “behest of some unknown third party,” despite evidence suggesting such an occurrence. Thus, according to the Fourth Circuit, Judge Garbis made two legal errors. First, he believed that liability could not attach under Section 107(a)(b) unless a showing was made that that ESM and BCI (G & H) placed or dumped TCE on the Site. Second, he believed that ESM and G & H could not be liable for Crofton’s response costs in the absence of evidence linking the TCE used by ESM and BCI and the TCE found in the drums.

The Fourth Circuit closed by citing the definition of disposal, and stated that given the breadth of the definition of “disposal,” Judge Garbis would have to have concluded that the drums did not leak in between 1977 and 1991, regardless of when they were buried, to hold that ESM and G & H were not liable under Section 107(a)(2).

The matter was then remanded for consideration of the other elements of liability, and ESM and G & H’s affirmative defenses.

B. The Dissent

The dissent, authored by Judge M. Blane Michael, believed that Crofton attempted to raise a new theory of liability during closing arguments, after arguing a theory that ESM and BCI (G & H) dumped the TCE-filled drums on the Site during the time they were owners and operators. Thus, to him, Crofton’s claims during closing argument, that ESM and G & H could be held liable based on a showing of leaking constituted a new theory, one of passive disposal. He agreed with Judge Garbis’ refusal to “indulge this belated change in theory because of the prejudice to [ESM and G & H], who had defended a different case,” and believed that it would be “fundamentally unfair” to allow Crofton (on remand) to have a chance to have its case reconsidered under a new and possibly less burdensome theory. He also did
not believe that Judge Garbis misconstrued the standard because Judge Garbis recognized, “If any of the liquid leaks out, any of the TCE leaked out of the drum before [Crofton] moved it, that there would have been passive disposal.”237

Judge Michael then pointed out that not every case involves facts suggesting both active and passive disposal.238 He cited *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*,239 and *Nurad*, in support of this proposition.240 Crofton, he said, chose to frame and argue its case as one involving active disposal, and ESM and G & H responded to this by not pursuing discovery on the issue of leaking, or attempting to rebut a theory of leaking.241 This, he claimed, was not due to oversight, because ESM and G & H legitimately believed they were only facing a charge of active disposal.242

Moreover, according to Judge Michael, Judge Garbis was correct in his observation during closing argument that there was insufficient evidence to establish that TCE leaked from the drums during the relevant time.243 The log that Crofton kept of the clean-up of the drums, and the results of the groundwater testing were insufficient to make the necessary showing of leaking.244 The log, describing drums in various states of deterioration, was not based on any scientific analysis; moreover because it was created during the clean-up, it did not address whether any leakage occurred earlier.245 Although the groundwater test results showed TCE contamination, the testing was not conducted until after the drums were removed.246 Furthermore, he pointed out that the groundwater test results were not relevant to the issue of leaking, rather they were introduced to prove that the drum removal complied with the National Contingency Plan,247 an issue never reached by Judge Garbis.248 Thus, according to Judge Michael even if the issue of leaking were considered, the evidence would not have been sufficient to establish liability for ESM and G & H.249

Judge Michael’s conclusion began with the phrase “this appeal at the core is not about CERCLA.”250 Rather, he believed it was about whether ESM and G & H won according to the rules governing the trial of a lawsuit, and subsequent appeal.251 These rules include (1) a fair notice to defendants of the plaintiff’s theory of liability, and (2) that findings of fact are reviewed on appeal for clear error, and ESM and G & H won according to these rules making the majority’s remand erroneous.252

V. COMMENT

A. Why the Peterson Sand Construction Must Take the Day

Professor Stephens called the result of *Nurad*, that Mr. Mumaw could be liable as an “owner” or “operator” under Section 107(a)(2) for merely owning a facility at a time when hazardous substances were “spilling” or “leaking,” “draconian.”255 The term “draconian” has been defined to include the terms “harsh,” “cruel” and “barbarously severe.”254 The United States Supreme Court has stated that statutory interpretations that would “produce absurd result are to be avoided if alternative interpretations consistent with the legislative purpose are available.”255 So, in examining the Fourth Circuit’s holding the question to be asked should be: is the Fourth Circuit’s, “draconian” or “harsh” holding in *Nurad* one

237 *Id* at 302 n. 1.
238 *Id* at 302.
239 976 F.2d 1338, 1342 & n. 7 (9th Cir.1992) (declining to consider the question of passive migration because plaintiff alleged active disposal, specifically, that defendant excavated contaminated soil and spread it over a clean part of the property).
240 *Crofton*, 258 F.3d at 302-03.
241 *Id* at 303.
242 *Id*.
243 *Id*.
244 *Id*.
245 *Id*.
246 *Id*.
247 Prior to Crofton’s groundwater expert’s testimony, Judge Garbis ruled that evidence from the groundwater testing could only be used to prove compliance with the National Recovery Plan. *Id*.
248 *Id*.
249 *Id*.
250 *Id*.
251 *Id* at 305.
252 *Id*.
253 *Id*.
that should be avoided in lieu of a Peterson Sand type construction of “disposal” which would not result in liability for parties who find themselves in situations like Mr. Mumaw’s? To answer the above question one must divide one’s analysis into two phases: (1) determining if the result of Nurad is truly absurd, and (2) determining if the alternative interpretation, that of the Peterson Sand Court, is consistent with the legislative purposes.

As to the first phase of this analysis, the result of Nurad is absurd. As liability under CERCLA is strict, one need only engage in what is known in the realm of criminal law as the actus reus, to be liable. Retaining the criminal law analogy, the Fourth Circuit’s interpretation of “disposal” for the purposes of Section 107(a)(2) means that liability can rest on the mere ownership of real property. Since, under a construction of “disposal” that includes passive disposal, the owner or operator need not actively participate in the disposal, and thus the only action leading to liability, or actus reus in such cases is legally acquiring title to real property, as Mr. Mumaw did.

The Nurad construction is also both absurd and itself inconsistent with legislative intent when examined in the context of the whole act, particularly in relation to the “innocent owner defense” of CERCLA. As pointed out above, the innocent owner defense can be employed by a party otherwise liable under Section 107(a) in circumstances when the damages were the fault of a third party who is not an agent or employee of the otherwise responsible party and who is not in a contractual relationship with that party.

The scope of the defense was expanded by amendment in 1986 by excluding land sales from the definition of “contractual relationship,” under certain circumstances. One situation in which the amendment excluded land sales was 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 substances 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.

As the Peterson Sand Court pointed out, if “disposal” is construed to include passive disposal, the defense would be limited to innocent owners who were fortunate enough to purchase facilities where all hazardous substances have been “sealed in concrete,” or in some other manner that ensures no migration of the substances. Such a limitation of the innocent owner defense would seem to fly in the face of obvious Congressional intent to expand the reach of the defense by excluding from liability owners who purchased after the hazardous substances were placed on the land and who had no knowledge, actual or constructive, of the substances at the time of purchase.

Also damming to the Fourth Circuit’s construction is an examination of the terms “disposal” and “release” within the context of the amendment. The amendment speaks of a period “after the disposal” but during (or “is the subject of”) a “release,” implying that the Congressional drafters meant for “disposal” to have a “discrete” ending. A construction of “disposal” that would include passive disposal is inconsistent with that implication because with passive disposal there could be no discrete ending; there would always be the possibility of migration of particles. An active disposal construction, on the other hand, is consistent with the implication, as active disposal signifies a “discrete human act with a discrete ending.”

The second phase of this analysis focuses on whether the alternative interpretation, that of the Peterson Sand Court, is consistent with the legislative purpose. The Fourth Circuit, in Nurad opined that defining “disposal” to include active disposal would cut against CERCLA’s strict liability emphasis, and CERCLA’s policy of encouraging “voluntary private action to remedy environmental hazards.”

265 The Nurad District Court found that Mumaw was also an equitable owner of the parcel, prior to the sale to Nurad Inc. Nurad. 22 ELR at 20084.
266 “Innocent owner defense” is common parlance. The pertinent language appears in Section 107(b)(3). Peterson Sand. 806 F.Supp. at 1351.
267 id. at 1351-52.
261 Id. at 1352. quoting 42 U.S.C. § 9601(35)(A).
262 Id.
263 Id.
264 Id.
265 Id.
266 Nurad. 966 F.2d at 846.
267 Id. at 845 (quoting In re Dant & Russell, Inc., 951 F.2d 246. 248 (9th Cir.1991)).
Merely requiring that disposal be active does not take Section 107(a)(2) out of a strict liability regime and place it into a fault-based regime. The Peterson Sand Court recognized this, stating that requiring active disposal as a precursor to liability "has nothing to do with fault." The Peterson Sand Court’s reasoning can be illustrated by again analogizing to criminal law. Requiring that an owner actively dispose of hazardous waste does no more than state the actus reus required for strict liability, albeit a more involved one than under the Fourth Circuit’s construction. No mention is made of a state of mind (or a mens rea element) such as purpose, recklessness, or negligence, that must also exist for liability to attach. Thus, liability for active disposal falls in line with the strict liability regime created by CERCLA.

The Fourth Circuit’s second concern, that requiring active disposal would discourage private action to clean up hazardous substances, hinged on its belief that under the Nurad District Court’s interpretation of “disposal” (i.e. active disposal) an owner could escape liability “simply by standing idle while an environmental hazard festers on his property,” then selling the property prior to incurring response costs. The Peterson Sand Court rejected this concern by asserting that the innocent owner defense was not available for an owner who “obtained actual knowledge of a release” (emphasis added) while he or she owned the property and “subsequently transferred the property without disclosing the release” (emphasis added). While the Peterson Sand Court was correct in employing the innocent owner defense, in its rebuttal it did overlook the fact that the language it cited from Section 101(35)(C) employs the term “release” and makes no mention of “disposal.” In fact, Section 101(35)(C) expressly states that if its conditions are not met, the innocent owner defense will not be available to parties facing liability under Section 107(a)(1) and 107(a)(3) and no mention is made of placing requirements of Section 101(35)(C) on a party seeking to assert the innocent owner defense to Section 107(a)(2) liability. Thus, the Fourth Circuit’s concern is without merit because it appears that the only restriction, relating to knowledge, on employing the innocent owner defense Congress wished to place on Section 107(a)(2) defendants was that in Section 101(35)(A)(i). Section 101(35)(A)(i) requires only that the defendant not have actual or constructive knowledge of the release or disposal at the time of acquiring. There is of course the possibility that Congress intended Section 101(35)(C) to include the term “disposal” but somehow it was left out. However, if that is the case, then the problem lies with Congress and it is not for the courts to add terms to the text of the statute.

It appears that the Fourth Circuit’s construction of the term disposal is absurd, because it both creates liability for the mere ownership of property and denigrates other aspects of CERCLA, and it also appears that the other available construction, that of the Peterson Sand Court is consistent with the purpose of Congress. Thus, applying the Supreme Court’s standard from Griffin, the Peterson Sand Court’s construction should take the day.

B. The Danger of the Crofton Holding

The Fourth Circuit in Crofton sent the message that not only does it recognize that “disposal” for the purposes of Section 107(a)(2) encompasses both active and passive disposal, a plaintiff seeking compensation under Section 107(a)(2) can argue a case based on a theory of active disposal but then prevail on a theory of passive disposal. This is precisely the concern raised by Judge Michael in his dissent. He alluded to Judge Garbis’ concerns that G&H and ESM had had no notice that Crofton would rely on a theory of passive disposal, and that Crofton had not argued a theory of passive disposal during a five-day trial but sought to rely on it during closing argument.

The Fourth Circuit attempted to dismiss Judge Michael’s contention that G&H and ESM had had no notice by arguing that Crofton had given notice, in its complaint, of intent to argue Section 107(a)(2) liability on both active and passive theories of disposal. However, the language in Crofton’s complaint that the Fourth Circuit referred to is ambiguous at best. The Fourth Circuit stated that Crofton had argued, as one basis of Section 107 liability as to all of the defendants, that each was either and owner or operator “of the Property at the time hazardous substances were released.

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268 Peterson Sand. 806 F. Supp. at 1352.
269 Id. at 1353 (quoting Nurad. 966 F.3d at 845).
270 Id. (citing 42 U.S.C. § 9601(35)(C), or § 101(35)(C)).
271 Id.
273 Id.
275 Crofton. 258 F.3d at 301.
276 Id. at 298 n. 3.
and disposed of on the Property.” The ambiguity is that while Crofton was obviously attempting to aver liability under Section 107(a)(2) it used both the term “disposed of,” and the term “released.” This is odd because for the purposes of CERCLA both are terms of art, and yet only the term “disposed of” appears in Section 107(a)(2). The term “release” for the purposes of Section 107(a) liability only appears in Section 107(a)(4), and Crofton did not assert a claim for compensation under Section 107(a)(4). This suggests that Crofton may not have had a clear understanding of liability under Section 107(a)(2). So, at best, the complaint Crofton served compensation under Section 107(a) liability only appears in Section 107(a)(4), and Crofton

CERCLA both are terms of art, and yet only the term “disposed of,” and the term

Peterson Sand requirements for establishing liability under Section 107(a)(2) of

argument? Judge Garbis and Judge Michael did not seem to think so; the former called it 
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hazardous substances, i.e. active disposal. However, should it allow a plaintiff to submit an ambiguous complaint,

argue active disposal during the lion’s share of the trial, and then present a theory of passive disposal during closing argument? Judge Garbis and Judge Michael did not seem to think so; the former called it “unconscionable” and the latter said that it was “unprecedented to allow Crofton to make such a prejudicial change in its theory.”

The Fourth Circuit chastised Judge Garbis by reiterating several times in its opinion that he misconstrued the requirements for establishing liability under Section 107(a)(2) of CERCLA. It believed that Judge Garbis had applied a Peterson Sand Court construction to the term “disposal.” Judge Michael, in defense of Judge Garbis, stated that it was clear that Judge Garbis was aware of the Fourth Circuit’s much broader construction of the term “disposal” but that his main concern, one shared by Judge Michael, was one of notice. These two judges seem to have recognized the consequences of allowing Crofton to proceed in the manner that it did.

Crofton offers CERCLA plaintiffs little incentive to file concise pleadings. In fact it offers plaintiffs little incentive to even read the statute carefully when drafting their complaints. It seems clear that Crofton did not understand the significance that the difference between the terms “disposal” and “release” has played in the last twenty years of cases interpreting those terms for the purposes of CERCLA liability. If it did, it would not have employed both of them with such nonchalance in a section of its complaint averring liability under Section 107(a)(2), because while all disposals are releases, not all releases are disposals, and more importantly because Section 107(a)(2) does not require a showing of “release” but rather “disposal.”

It seems clear that the ambiguous language employed by Crofton in its complaint did not adequately convey to Judge Garbis that it sought to show liability based on a theory of passive disposal. That Crofton failed to adequately convey this point to Judge Garbis is clear from his statements during closing argument that there “was absolutely not the slightest notice that this [passive disposal] was going to be tried,” and that he could not “allow [Crofton] to amend the pleadings and do this at this time.” Crofton’s ambiguous complaint also failed to convey the fact that it would rely on a theory of passive disposal to G & H and ESM. Judge Michael pointed out that the passive disposal theory did not surface in discovery or in pretrial proceedings, and it would seem odd that parties on notice of an opponent’s theory, as the Fourth Circuit contends the defendants were, would not have conducted discovery pursuant to that theory.

Section 107(a)(2) plaintiffs filing in the Fourth Circuit now have a powerful incentive to file complaints with ambiguous language like that used in Crofton’s, leading opposing parties to abstain from conducting discovery as to...
passive disposal, knowing that they can assert a theory of passive disposal during closing arguments. Judge Garbis correctly dubbed such a practice "unconscionable." 2

_Crofton_ should be a warning to Section 107(a)(2) defendants in the Fourth Circuit to conduct discovery pursuant to any practice that is included in the definition of "disposal" regardless of what is averred in the complaint. Defendants and judges, facing ambiguous complaints, and days of trial focusing on an active theory or theories of disposal will receive no quarter from the Fourth Circuit when plaintiffs assert a passive theory of disposal, at a time even as inopportune for such an assertion as closing argument.

VI. CONCLUSION

The Fourth Circuit's construction of the term "disposal" allows a party to file an ambiguous complaint, argue a case based on a theory of active disposal, but then prevail on a theory of passive disposal. Judge Garbis and Judge Michael believed that this was exactly what Crofton did. Such bootstrapping of a theory of passive disposal would not fly in a Circuit or District Court that has interpreted "disposal" to require active disposal on the part of the defendant.

While the above is an important reason for a constructing "disposal" to require active disposal, even more profound reasoning for doing so exists. Construing the term disposal to allow liability for clean-up costs, based on the mere ownership of an interest in real property is absurd. Further, an active disposal construction, which does not lead to an absurd result, is consistent with the legislative purpose of CERCLA.

With the Circuits split, it is now time for the Supreme Court to weigh in on this issue before another Mr. Mumaw is held liable for mere ownership of land.

JASON L. CORDES

289 _Id._ at 302.