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LIABILITY UNDER CERCLA § 9601(35)(C) FOR INTERMEDIATE LANDOWNERS WHO DISCOVER CONTAMINATION, DO NOT DISCLOSE, AND SELL TO INNOCENT BUYERS

Christine A. Yost*

Abstract: Section 9601(35)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) may amend the traditional classes of liable parties, holding responsible intermediate landowners who convey properties without disclosing their knowledge of contamination. To date, however, courts have failed to settle on whether § 9601(35)(C) constitutes a new and independent basis for liability. This Note provides a discussion of the current status of the law on intermediate landowner liability, presents four scenarios in which the lack of consistency in judicial interpretation of § 9601(35)(C) results in mischievous land transfers, and finally, suggests that courts should use the section as an independent basis for intermediate owner liability to achieve the policy goals of CERCLA.

Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal hazardous waste site cleanup statute, traditionally imposes liability as potentially responsible parties (PRPs) on both the current owner of a contaminated “facility” and the former owner who disposed of hazardous materials. The intermediate

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1 The Superfund created by CERCLA for hazardous waste site cleanup has run dry. See Anthony R. Chase & John Mixon, CERCLA: Convey to a Pauper and Avoid Cost Recovery Under Section 107(a)(1)?, 33 Envtl. L. 293, 339 (2003). Imposing liability on the intermediate owner who deceitfully transfers title will decrease the costs currently born by taxpayers. Id. This Note considers whether courts can force intermediate owners to pay a portion of cleanup costs and, in turn, increase the money available for remediation of waste sites as a potential solution to the lack of funds problem.

landowner, who did not himself dispose of contaminants and later sells the facility, may escape liability under the statute because he does not fall within the traditional classes of PRPs.\(^3\) Section 9601(35)(C) potentially amends CERCLA’s list of liable parties.\(^4\) It states that a defendant possessing actual knowledge of a release or threatened release of hazardous materials, who conveys the property without disclosing his knowledge, is liable.\(^5\) Both CERCLA and case law, however, fail to confirm whether the section serves as an independent basis of liability for intermediate landowners who would not be responsible under the statute otherwise.\(^6\)

This Note discusses whether § 9601(35)(C) should impose liability on an intermediate landowner in order to close the potential loophole in responsibility. Part I summarizes the CERCLA liability scheme—including the theory of intermediate owner responsibility for passive disposal of contaminants—and introduces § 9601(35)(C).\(^7\) Part II discusses whether the provision constitutes an independent basis for liability or merely denies the statute’s innocent owner defense to

\(\text{arranged for disposal and on the transporters of hazardous materials. Id. § 9607(a)(3), (4). For the purposes of the statute, a “facility” is:}\)

\[\text{(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer . . .), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . .}\]

\(\text{Id. § 9601(9).}\)


\(^4\) See 42 U.S.C. § 9601(35)(C). Compare United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996) (stating § 9601(35)(C) is an independent basis for liability), with Westwood, 964 F.2d at 91 (deciding § 9601(35)(C) is not a basis for liability).


\(^6\) Compare CDMG Realty, 96 F.3d at 717 n.9 (“By its plain language, [§ 9601(35)(C)] appears to create a substantive basis of liability.”), with Westwood, 964 F.2d at 91 (holding that the provision applied only to persons who were already PRPs and denied them CERCLA’s innocent owner defense), and Fallowfield, 1993 WL 157723, at *7 (determining that a plaintiff must show an intermediate landowner was a disposer of hazardous materials in order for § 9601(35)(C) to apply). See generally Catherine S. Stempien, Sins of Omission, Commission, and Emission: Does CERCLA’s Definition of “Disposal” Include Passive Activities?, 9 J. ENVTL. L. & LITIG. 1 (1994) (discussing arguments and cases on both sides of the issue of intermediate landowner liability for passive disposal; concluding that passive intermediate landowners should be liable).

\(^7\) See infra Part I.
termediate landowners with knowledge of releases.\textsuperscript{8} Part III examines several scenarios in which mischievous land transfers call into question the applicability of § 9601(35)(C).\textsuperscript{9} Lastly, Part IV proposes that the section should be used as an independent basis for intermediate owner liability in order to promote the purposes of CERCLA and achieve fair results.\textsuperscript{10}

I. CERCLA’s Liability Scheme

The scope of intermediate landowner liability is unclear, and courts have not settled on a single interpretation of § 9601(35)(C).\textsuperscript{11} This Part outlines CERCLA liability in order to provide a foundation for scrutinizing the applicability of the section.

A. Traditionally Liable Parties Under CERCLA

Both the current owner of a facility and the party who owned the facility at the time of disposal are responsible for the costs of site cleanup under CERCLA’s traditional classes of PRPs.\textsuperscript{12} These parties are strictly liable for the cleanup costs—called response costs—if there is a release or threatened release of hazardous materials at the facility.\textsuperscript{13} The U.S. Environmental Protection Agency (EPA) may undertake cleanup and recover its expenditures from PRPs.\textsuperscript{14} Also, a PRP may receive an EPA order to remediate the site or may voluntarily remove the

\textsuperscript{8} See infra Part II.
\textsuperscript{9} See infra Part III.
\textsuperscript{10} See infra Part IV.
\textsuperscript{11} See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846–47 (4th Cir. 1992) (holding an intermediate landowner liable for passive migration of contaminants during ownership); Stempien, supra note 6, at 21–24.
\textsuperscript{12} CERCLA, 42 U.S.C. § 9607(a)(1), (2) (2000).
\textsuperscript{13} E.g., 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990) (CERCLA “generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed”); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989) (“Most courts have held CERCLA imposes strict liability . . . .”). In reference to response costs, the term “response” means “remove, removal, remedy, and remedial action,” including “enforcement activities related thereto.” 42 U.S.C. § 9601(25).
\textsuperscript{14} See, e.g., United States v. 150 Acres of Land, 204 F.3d 698, 702 (6th Cir. 2000) (discussing EPA’s removal operation and subsequent suit to recover costs); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988) (“CERCLA authorizes the government to seek reimbursement of response costs from any of the responsible parties, leaving them to share the expense equitably.”).
A PRP who incurs response costs may sue other PRPs for recovery if he is innocent, or for contribution if he is liable. Courts will consider relative degrees of fault in determining the amount of contribution owed by each party.

Liability is subject to several narrow affirmative defenses. CERCLA includes an innocent owner defense, which absolves PRPs who can prove that at the time they acquired the property they “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.”

The statute also grants freedom from liability for contamination caused by acts of God or war, or acts or omissions of third parties.

Intermediate landowners—those who did not dispose of hazardous materials and transferred title to subsequent purchasers—do not fall within the statute’s traditional classes of PRPs because they are neither current owners nor disposers.

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15 E.g., Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993) (“EPA is invested with broad administrative discretion to compel PRPs to undertake immediate cleanup measures . . . .”); Nurad, 966 F.2d at 845–46 (noting that CERCLA’s liability scheme encourages voluntary cleanup).

16 42 U.S.C. §§ 9607(a)(4)(B), 9613(f)(1). Section 9607(a)(4)(B) explains that a PRP is liable for costs incurred by any other person in cleaning the facility. Id. § 9607(a)(4)(B). Section 9613(f)(1) states, “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title . . . .” Id. § 9613(f)(1); see also Hemingway, 933 F.2d at 922 (explaining that CERCLA authorizes PRPs “to initiate private actions for full or partial contribution from [other] PRPs’); Smith Land, 851 F.2d at 90 (discussing the right of any PRP who incurs response costs to bring a contribution action); McDonald v. Sun Oil Co., 423 F. Supp. 2d 1114, 1125 (D. Or. 2006) (summarizing plaintiff’s claim for cost recovery of cleanup expenditures and defendant’s counterclaim for contribution for response costs incurred).

17 See 42 U.S.C. § 9613(f)(1); Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001); Hemingway, 933 F.2d at 921–22.


19 42 U.S.C. § 9601(35)(A), (A)(i); see Carson Harbor, 270 F.3d at 882–83 (discussing the innocent owner defense as applied to intermediate owners).

20 42 U.S.C. § 9607(b). The provision states:

There shall be no [traditional] liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . (1) an act of God; (2) an act of war; (3) an act or omission of a third party . . . .

*Id.* (emphasis added).

ingly escape liability when they convey facilities, despite the fact that they may gain knowledge of a release or threatened release of hazardous materials during ownership.\textsuperscript{22} The two primary goals of CERCLA are “the expeditious cleanup of sites contaminated or threatened by hazardous substance releases which jeopardize public health and safety, and the equitable allocation of cleanup costs among all potentially responsible persons.”\textsuperscript{23} Some scholars advocate a scheme that imposes liability on intermediate landowners who gain knowledge of contamination and fail to disclose it because relieving them of responsibility and leaving contamination to fester frustrates the purposes of the statute.\textsuperscript{24}

B. The Passive Disposal Theory

As a result of the failure of CERCLA’s traditional classes of PRPs to encompass intermediate landowners, courts developed various methods to determine intermediate owner liability.\textsuperscript{25} For instance, if an intermediate landowner disturbed a prior owner’s hazardous materials during ownership, such an action could represent new disposal activity, giving rise to traditional liability.\textsuperscript{26} In \textit{United States v. CDMG Realty Co.}, the U.S. Court of Appeals for the Third Circuit concluded that the intermediate owner was liable as a disposer because the corporation’s drilling of soil samples caused the dispersal of hazardous materials bur-

\textsuperscript{22} See, e.g., Stempien, \textit{supra} note 6, at 24 (discussing United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992): “The court held that the corporation could avoid liability because no actual disposal occurred during its operation, even though it had full knowledge of the contamination on the site”). \textit{But see} Bronston, \textit{supra} note 18, at 609–10 (arguing that an intermediate owner aware of contamination is liable under § 9601(35)(C)).

\textsuperscript{23} Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); accord \textit{Carson Harbor}, 270 F.3d at 880; Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).


\textsuperscript{25} See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 718–19 (3d Cir. 1996) (disturbing previous owner’s hazardous wastes); \textit{Nurad}, 966 F.2d at 844–46 (failing to remedy passive migration of contaminants during ownership).

\textsuperscript{26} See \textit{CDMG Realty}, 96 F.3d at 718–19.
ied by a previous owner. The court did not resolve whether an intermediate landowner who did not physically disturb contaminates onsite could be considered a disposer.

In a number of cases, CERCLA plaintiffs have attempted to hold intermediate landowners liable under a theory of “passive disposal.” Under this theory, plaintiffs claimed that hazardous substances that were disposed of by a former owner leaked or migrated during the time an intermediate owner held the land, and that this passive migration should suffice as evidence an intermediate owner was a disposer. Their arguments centered on CERCLA’s incorporation of the Resource Conservation and Recovery Act (RCRA) definition of disposal, which states, “The term ‘disposal’ means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . .” Since the statutory definition of disposal included “spilling” and “leaking,” plaintiffs argued that if contaminates moved during intermediate ownership, those owners should be considered disposers, and thus, traditional PRPs. Courts did not unanimously adopt this argument.

The U.S. Court of Appeals for the Fourth Circuit accepted the passive disposal theory in a case in which hazardous waste leaked from un-

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27 Id.
28 See id. (imposing liability on intermediate owner for disturbing hazardous waste while drilling test wells); see also Carson Harbor, 270 F.3d at 877 (concluding that movement of hazardous materials resulting from affirmative conduct was disposal, but that CERCLA was unclear whether passive movement of contaminates constituted disposal).
29 E.g., Carson Harbor, 270 F.3d at 868, 881 (considering intermediate owner liability for migration of prior owner’s lead contamination in stormwater runoff); Nurad, 966 F.2d at 844–46 (arguing that intermediate owner liability should attach when prior owner’s underground storage tanks leaked); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1350–53 (N.D. Ill. 1992) (discussing plaintiff’s argument that leaking and leaching of contaminates from barrels constituted disposal).
30 See, e.g., Carson Harbor, 270 F.3d at 879–80; Nurad, 966 F.2d at 844–46; Petersen, 806 F. Supp. at 1350–53.
33 See, e.g., Carson Harbor, 270 F.3d at 881 (rejecting liability for passive soil migration of contaminates); Nurad, 966 F.2d at 846–47 (accepting theory of passive disposal); Petersen, 806 F. Supp. at 1350–53 (rejecting passive disposal as basis for imposing liability); Bronston, supra note 18, at 610–11.
derground storage containers during intermediate ownership. The court held that CERCLA “imposes liability not only for active involvement in the ‘dumping’ or ‘placing’ of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was ‘spilling’ or ‘leaking.'” On the other hand, several courts have refused to impose liability on an intermediate landowner unless he undertook positive action that led to a release or threatened release. For instance, in United States v. Petersen Sand & Gravel, Inc., the U.S. District Court for the Northern District of Illinois rejected the theory that the leaking and leaching of barrels of hazardous materials constituted disposal, concluding that disposal was a separate action from the spreading of toxics, which is better categorized as a release.

The U.S. Court of Appeals for the Ninth Circuit advocated an approach in the middle of the spectrum of court responses to the passive disposal theory. In a case in which stormwater runoff caused the spread of lead contamination, the Ninth Circuit stated that while the passive soil migration at issue did not fit the plain meaning of the word “disposal,” other forms of passive migration would, and liability should attach in those situations. In sum, the lack of consensus among courts on the applicability of the passive disposal theory suggests that a subsequent purchaser may not have a remedy against an intermediate landowner who fails to disclose the presence of hazardous materials at the time of sale.


35 Nurad, 966 F.2d at 846; Bronston, supra note 18, at 610–11, 613–15.


37 806 F. Supp. at 1350–51; accord United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (“[I]t makes sense . . . to have ‘disposal’ stand for activity that precedes the entry of a substance into the environment and ‘release’ stand for the actual entry of substances into the environment.”).

38 See Carson Harbor, 270 F.3d at 881.

39 Id. at 869–70, 881 (“[I]f ‘disposal’ is interpreted to exclude all passive migration, there would be little incentive for a landowner to examine his property for decaying disposal tanks, prevent them from spilling or leaking, or to clean up contamination once it was found.”).

40 See Chase & Mixon, supra note 1, at 293 (“A title owner who discovers waste and falls short of innocent purchaser immunity, but is not otherwise at fault, may seek to eliminate ownership status (and owner liability) by conveying . . . .”).
C. Section 9601(35)(C) Amends CERCLA

The Superfund Amendments and Reauthorization Act of 1986 (SARA) may close the intermediate landowner liability loophole.41 The SARA amendments arguably impose liability on intermediate landowners who knowingly transfer contaminated property without disclosing the presence of hazardous materials.42 Section 9601(35)(C) states:

Nothing in this paragraph . . . shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable . . . and no defense under [the innocent owner defense] shall be available to such defendant.43

A release is “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).”44 An intermediate landowner who “obtained actual knowledge of the release or threatened release” of hazardous materials and failed to disclose that knowledge to the subsequent purchaser may be liable if § 9601(35)(C) is a basis for liability.45

II. Section 9601(35)(C) as an Independent Basis for Liability

Courts disagree whether § 9601(35)(C) provides an independent basis for liability under CERCLA or instead denies an intermediate

43 Id. (emphasis added).
44 Id. § 9601(22) (emphasis added). A number of cases indicate that because the statute defines both disposal and release, they are separate events. E.g., United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992).
45 See 42 U.S.C. § 9601(35)(C); Stempień, supra note 6, at 21–24; Tracy, supra note 24, at 193.
landowner who is already a PRP the innocent owner defense. Some courts have advocated that because the section begins, “Nothing in this paragraph . . . shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter,” it only applies to those parties who are already PRPs. Supporters of this position maintain that § 9601(35)(C) only functions to deny the innocent owner defense to traditional PRPs when they fail to disclose discovered contamination. These supporters point to the use of the word “defendant” in the section and urge that it was meant to limit the applicability of § 9601(35)(C). As such, some courts conclude that only a person who is already a party to the suit, and thus, clearly fits into the classes of PRPs, must comply with the disclosure requirement.

For example, in Fallowfield Development Corp. v. Strunk, the court concluded that in order for § 9601(35)(C) to apply, the plaintiff must prove the intermediate landowners were within one of the traditional classes of PRPs. Likewise, the U.S. Court of Appeals for the Second Circuit decided that the section only applies to current owners and disposers of hazardous materials. The court emphasized that if Congress wanted to include intermediate landowners in CERCLA’s responsibility scheme, it would have amended the traditional classes of PRPs, rather than burying a sweeping change in liability in § 9601(35)(C).

In response to the argument that § 9601(35)(C) only applies to traditional classes of PRPs, at least one court concluded the provision’s reference to the innocent owner defense shows that it has a broader

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46 Compare United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996) (“By its plain language [§ 9601(35)(C)] appears to create a substantive basis of liability.”), with Westwood Pharm., Inc. v. Nat’l Fuel Gas Distribution Corp., 964 F.2d 85, 91 (2d Cir. 1992) (holding the section applied only to intermediate owners who were already PRPs and denied them the innocent owner defense), and Fallowfield Dev. Corp. v. Strunk, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, at *8 (E.D. Pa. May 11, 1993) (discussing the application of § 9601(35)(C) to intermediate landowners who neatly fit within the traditional classes of PRPs), aff’d, 43 Env’t Rep. Cas. (BNA) 1428 (3d Cir. Aug. 20, 1996).

47 42 U.S.C. § 9601(35)(C) (emphasis added); e.g., Ne. Doran, Inc. v. Key Bank of Me., 15 F.3d 1, 3 (1st Cir. 1994); Westwood, 964 F.2d at 90–91; Stempien, supra note 6, at 21–22.

48 E.g., Ne. Doran, 15 F.3d at 3; Westwood, 964 F.2d at 90–91; Stempien, supra note 6, at 21–22.

49 Stempien, supra note 6, at 22.

50 Id. at 21–22.

51 1993 WL 157723, at *7–8.

52 Westwood, 964 F.2d at 91.

53 Id. at 90.
Section 9601(35)(C) states that a person with actual knowledge of a release or threatened release who transfers title without disclosing what he knows “shall be treated as liable . . . and no defense under [the innocent owner defense] shall be available.” The court in *United States v. Petersen Sand & Gravel, Inc.* noted, “The innocent owner defense is never available to a person who obtained actual knowledge of a release while [he] owned the property and subsequently transferred the property without disclosing the release.” Owners with actual knowledge of contamination, regardless of § 9601(35)(C), likely will be denied the innocent owner defense when they deceitfully transfer land because foisting responsibility for contaminated land onto an unknowing purchaser is unfair, and the defense is an equitable one. Thus, the *Petersen* court argues that interpreting § 9601(35)(C) such that it applies only to those parties who are traditionally liable renders the provision’s reference to the innocent owner defense meaningless.

Some courts have decided that the proper interpretation of § 9601(35)(C) is as an independent basis for liability. These courts read the first sentence of the provision, “Nothing in this paragraph . . . shall diminish the liability of any previous owner . . . who would otherwise be liable,” as separate from the second sentence describing the consequences of nondisclosure. The provision’s second sentence states that “if the defendant obtained actual knowledge of the release or threatened release” then he must disclose that information.

For instance, the U.S. Court of Appeals for the Third Circuit stated in as to § 9601(35)(C), “By its plain language, this provision appears to create a substantive basis of liability,” and concluded that an intermediate landowner with knowledge of contamination who did not disclose

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56 806 F. Supp. at 1353.

57 See id.; Stempien, *supra* note 6, at 21–24.

58 See *Petersen*, 806 F. Supp. at 1353; Stempien, *supra* note 6, at 21–24.


60 42 U.S.C. § 9601(35)(C); see *CDMG Realty*, 96 F.3d at 717 n.9; *Ford Motor*, 1997 WL 594498, at *2–3.

that knowledge remained liable even after transferring the facility.\textsuperscript{62} Similarly, in \textit{Anheuser-Busch, Inc. v. Ford Motor Co.}, the court adopted the plaintiff’s argument that the section provided a basis to hold the intermediate landowner liable under CERCLA.\textsuperscript{63} The court noted that a former owner who failed to disclose the presence of contamination “may be liable even if no disposal of hazardous substances took place during its period of ownership.”\textsuperscript{64} Courts advancing this interpretation emphasize that imposing intermediate landowner liability comports with the twin policy goals of the statute.\textsuperscript{65} Holding responsible the intermediate landowner with knowledge of contamination both forces the information to become public and obligates the intermediate landowner to pay his share of response costs.\textsuperscript{66}

### III. The Intermediate Landowner Who Attempts to Escape Liability by Conveying the Facility

Whether intermediate landowners are liable for contaminated site cleanup is unclear; courts have settled neither on the validity of the passive disposal theory nor the use of § 9601(35)(C) to hold an intermediate landowner responsible.\textsuperscript{67} The lack of clarity in the case law may result in mischievous land transfers.\textsuperscript{68} A clever landowner could take advantage of the ambiguities in the statute and the inconsistencies in judicial interpretation and avoid responsibility by transferring title upon discovery, or near discovery, of hazardous materials.\textsuperscript{69} This Part

\textsuperscript{62} See \textit{CDMG Realty}, 96 F.3d at 717 & n.9.

\textsuperscript{63} 1997 WL 594498, at *2–3.

\textsuperscript{64} Id.

\textsuperscript{65} See, e.g., \textit{CDMG Realty}, 96 F.3d at 717–18; \textit{Nurad, Inc. v. William E. Hooper & Sons Co.}, 966 F.2d 837, 845–46 (4th Cir. 1992) (requiring an intermediate landowner to qualify as disposer was at odds with CERCLA’s strict liability scheme and policy of encouraging expeditious, voluntary cleanup).

\textsuperscript{66} See, e.g., \textit{CDMG Realty}, 96 F.3d at 717–18; \textit{Nurad}, 966 F.2d at 845–46.


\textsuperscript{68} See generally \textit{Chase & Mixon, supra note 1} (selling to a pauper to escape liability).

\textsuperscript{69} See \textit{id.} at 293 (suggesting that the sale of property upon discovery of contamination to a fully informed pauper relieves intermediate owner of liability); Glass, \textit{supra} note 24, at 440 (noting that intermediate landowners who attempted to escape liability by selling property could be liable for fraud); \textit{Tracy, supra} note 24, at 195–96 (discussing the inadequacy of penalties for nondisclosure).
details four such scenarios: (1) the intermediate landowner with actual knowledge of a release who transfers title without disclosing the discovery; (2) the intermediate landowner who fully discloses the release but transfers title to a penniless person in a sham transaction; (3) the intermediate landowner who detects a putrid smell, then quickly sells the property; and (4) the intermediate landowner who would have been on notice of contamination had he conducted a careful title search. Whether liability for response costs will attach in any of these scenarios is unclear.\(^{70}\)

A. The Intermediate Landowner Who Gains Actual Knowledge of a Release, Then Transfers Title Without Disclosing the Knowledge

Prior to the enactment of the SARA amendments, CERCLA’s liability scheme created a disincentive to disclose because an intermediate landowner with knowledge of the presence of hazardous contamination could avoid responsibility by selling and keeping quiet.\(^{71}\) Such a result was in opposition to the goals of swift cleanup of hazardous waste sites to protect public health and of fair allocation of cleanup costs—the hazardous condition would fester on the property and an unsuspecting purchaser would be responsible for expensive cleanup once the contamination is discovered.\(^{72}\) Section 9601(35) (C) altered the statute, potentially creating the harsh penalty of liability for expensive response costs for the intermediate landowner who failed to disclose actual knowledge of a discovered release.\(^{73}\)

1. Defining and Proving Actual Knowledge

Under § 9601(35) (C), the intermediate landowner who gains actual knowledge of a release and transfers title to an unknowing purchaser is potentially liable for response costs.\(^{74}\) Establishing the point at which

\(^{70}\) Compare CDMG Realty, 96 F.3d at 717 n.9 (noting that § 9601(35)(C) may create an independent basis for holding intermediate owners liable for response costs), with Westwood, 964 F.2d at 90–91 (rejecting the claim that intermediate owner who was not otherwise a PRP could be sued for contribution).

\(^{71}\) See Tracy, supra note 24, at 193 (“[T]his potential liability loophole is a definite disincentive to thorough environmental assessment and might encourage landowners to adopt a ‘see no evil’ approach to site evaluation.”).

\(^{72}\) See, e.g., CDMG Realty, 96 F.3d at 717–18; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Nurad, 966 F.2d at 845; Tracy, supra note 24, at 193.

\(^{73}\) See, e.g., CDMG Realty, 96 F.3d at 717 n.9; Tracy, supra note 24, at 193.

the intermediate landowner obtains actual knowledge of a release is
difficult to determine and harder to prove. 75 Actual knowledge can be
distinguished from constructive knowledge because with actual knowl-
edge the owner witnesses a release event himself. 76 For example, in Fal-
lowfield Development Corp. v. Strunk, employees of the defendant testified
that he ordered them to bury bottles of medical waste on the prop-
erty. 77 When the substance in the bottles produced a foul smell, the
employees brought the defendant to the trench, at which point he or-
dered them to cover the broken bottles with dirt. 78 The court in Fallow-
field accepted the testimony of the employees and concluded that the
defendant landowner had actual knowledge of a release because he
watched as his employees buried the hazardous materials. 79

In Hemingway Transport, Inc. v. Kahn, the court did not have evi-
dence that the intermediate landowner witnessed a release, but the
state environmental protection agency notified the owner of leaking
barrels in a letter and requested removal of the hazardous waste. 80 On
this basis, the court concluded that the intermediate landowner had
actual knowledge of the presence of leaking barrels. 81 Because the
intermediate landowner knew of the spreading contamination and
failed to remediate the site, the corporation was a “‘covered person,’
strictly liable to the EPA for future response costs.” 82 Absent evidence
such as a letter from a government agency or testimony that the in-
termediate owner saw a release taking place, a subsequent purchaser
may not be able to prove that the intermediate owner had actual
knowledge of a release and should therefore be liable. 83

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75 See Tracy, supra note 24, at 196 (noting that a seller may “choose nondisclosure, hop-
ing that the buyer never finds out or that the buyer at least will not be able to prove that
the seller had knowledge before the property was transferred”).
76 See BLACK’S LAW DICTIONARY 888 (8th ed. 2004).
78 Id.
79 See id. at *8.
80 993 F.2d 915, 919, 925 (1st Cir. 1993).
81 Id.
82 Id. at 925.
83 See id. at 919, 925; Fallowfield, 1993 WL 157723, at *8; Chase & Mixon, supra note 1,
at 303–06 (discussing the moment at which owner’s awareness of contamination constit-
tutes actual knowledge such that liability should attach); Tracy, supra note 24, at 195–96.
2. Imposing Liability for Nondisclosure Under CERCLA

Should a CERCLA plaintiff successfully show that an intermediate landowner had actual knowledge in witnessing a release and failed to disclose it, the statute would not necessarily provide a remedy if the intermediate landowner would not neatly fit within the statutorily defined classes of PRPs.\(^{84}\) For instance, in *Northeast Doran, Inc. v. Key Bank of Maine*, the defendant bank, holder of a security interest, conducted an environmental assessment, discovered possible environmental contamination, and then promptly sold the property at a foreclosure sale without disclosing the results of the assessment.\(^{85}\) The court in *Northeast Doran* held that the defendant was not liable because it merely held a security interest in the property; it was neither a disposer nor the current owner, and thus, not a PRP.\(^{86}\)

In *Fallowfield Development Corp. v. Strunk*, the court concluded that the intermediate landowner was a *disposer*.\(^{87}\) The intermediate landowner watched his employees bury and break bottles of medical waste on his property, then transferred the property after representing that the land did not contain hazardous material.\(^{88}\) In this case, the court concluded that the owner was a disposer of hazardous materials because he ordered the bottles be buried and watched his employees cover the waste with dirt.\(^{89}\) The *Fallowfield* court went on to apply § 9601(35)(C) and concluded that the provision simply precluded use of the innocent owner defense because the intermediate landowner was obviously a PRP.\(^{90}\)

When sellers actually discover contamination, they must choose between disclosing the knowledge of the release of hazardous materials or remaining silent, hoping the purchaser will fail to either discover the contamination or prove that the intermediate owners had actual knowledge.\(^{91}\) The U.S. Court of Appeals for the Third Circuit noted that in-

\(^{84}\) See *Ne. Doran, Inc. v. Key Bank of Me.*, 15 F.3d 1, 2 (1st Cir. 1994); *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distribution Corp.*, 964 F.2d 85, 91 (2d Cir. 1992); *Fallowfield*, 1993 WL 157723, at *7–8; *Tracy*, supra note 24, at 195.

\(^{85}\) 15 F.3d at 2.

\(^{86}\) Id. at 3.

\(^{87}\) 1993 WL 157723, at *6–7.

\(^{88}\) Id. at *2.

\(^{89}\) Id. at *2, *6–7.

\(^{90}\) See id. at *7–8.

\(^{91}\) *Tracy*, supra note 24, at 195–96 (“[C]urrent owners who know their land is contaminated . . . choose between nondisclosure, taking a chance that the buyer will not be able to prove that the seller knew about the contamination, and disclosure, with its serious consequences of lowered property value . . . .”).
termediate owners “pay” when they transfer land and disclose the presence of hazardous materials because their low selling prices reflect the cost of CERCLA liability.\textsuperscript{92} Either Congress or the courts will have to decide whether § 9601(35)(C) imposes liability on parties who withhold knowledge of contamination but do not fit neatly within the classes of PRPs, otherwise those with actual knowledge may choose to conceal the presence of hazardous materials to keep their selling prices high.\textsuperscript{93}

3. Court-Imposed and State Law Disclosure Requirements

Outside the CERCLA context, courts increasingly are imposing a duty to disclose negative conditions on the property, such as contamination.\textsuperscript{94} Specifically, courts’ refusal to enforce the caveat emptor defense and the proliferation of state statutes requiring disclosure demonstrate a demand for transparency in land sales.\textsuperscript{95}

Some courts reject the caveat emptor—or buyer beware—defense to seller liability, shifting responsibility to the seller to disclose the presence of hazardous materials onsite.\textsuperscript{96} The seller is usually in a position to know more about possible contamination, and utilizing caveat emptor as a defense only increases the disparity in bargaining power in land sales.\textsuperscript{97} The U.S. Court of Appeals for the Third Circuit recognized the inherent unfairness caveat emptor imparted on the modern land transaction, concluding that caveat emptor is not a permissible defense under CERCLA.\textsuperscript{98} The Third Circuit emphasized that the use of the defense frustrates the policy of expeditious site cleanup, as parties will not undertake cleanup promptly if they are unsure whether they can

\textsuperscript{92} United States v. CDMG Realty, Co., 96 F.3d 706, 717 (3d Cir. 1996); see Chase & Mixon, supra note 1, at 303; Tracy, supra note 24, at 195–96.

\textsuperscript{93} See Tracy, supra note 24, at 220 (“To accomplish [CERCLA’s] goals, cleanup statutes should be designed to provide incentives for thorough site evaluation [and] encourage disclosure of relevant information . . . .”).

\textsuperscript{94}Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988); Tracy, supra note 24, at 173, 174, 196–200.

\textsuperscript{95} Smith Land, 851 F.2d at 90; Tracy, supra note 24, at 173, 174, 196–200.

\textsuperscript{96} Smith Land, 851 F.2d at 90 (concluding that caveat emptor defeated purposes of CERCLA and was not a defense); Tracy, supra note 24, at 173, 174 (arguing that courts should reject caveat emptor and impose affirmative duty to disclose presence of hazardous materials).

\textsuperscript{97} See Tracy, supra note 24, at 172 (“In contaminated land transactions, the seller often has access to more definitive information about the site and, in many transactions, the seller may be much more sophisticated than the buyer. An information and bargaining strength disparity might arise . . . .”).

\textsuperscript{98} Smith Land, 851 F.2d at 87, 90.
seek contribution from other PRPs. The person who learned of contamination would refuse to act until a court decided which parties were liable. In addition to court-imposed duties to disclose, many states have enacted mandatory disclosure laws as possible solutions to the disincentive to make revelations created by caveat emptor.

To summarize, there is a trend in the law of land transactions toward imposing a duty upon the seller to make full disclosure. Some scholars argue that because the CERCLA statutory scheme motivates recovery of cleanup costs suits, the best solution to provide consistency and predictability lies in a conclusive and effective interpretation of the disclosure requirements of the statute.

B. The Intermediate Landowner with Actual Knowledge of a Release Who Transfers Title to a Penniless Person in a Sham Transaction

An intermediate landowner who discovers the release or threatened release of hazardous materials may seek to avoid liability by conveying the facility to a penniless person for nominal consideration and making full disclosure of the presence of contamination. By fully informing the penniless person, the intermediate landowner seemingly escapes not only traditional liability, but also any possible liability under § 9601(35)(C). The statute does not appear to prohibit mischievous transfers to a penniless person who could not pay for site remediation, so long as EPA has not already brought suit against the intermediate landowner as a PRP. Scholars suggest that considerations of fairness and the policies underlying CERCLA, however, demand that such a sham transaction should not eliminate one’s liability.

99 Id. at 90.
100 Id.
102 See Glass, supra note 24, at 441, 442; Tracy, supra note 24, at 173, 220, 215–19.
103 See Tracy, supra note 25, at 215–19, 220 (“[W]e should not lose sight of the fact that it is CERCLA’s liability provisions that are the driving force behind site evaluation, site cleanup, and in the long term, prevention of site contamination through improvement of environmental management practices.”).
104 See generally Chase & Mixon, supra note 1 (providing detailed discussion of strategic conveyance to pauper by potential CERCLA defendant).
105 See id. at 293.
106 See id. at 306.
107 See id. at 335–36 (“One could argue that Congress ‘intended’ its program to operate in a world of ordinary transactions. However, people do not ordinarily seek out indigents and give them land.”); Tracy, supra note 24, at 220 (“The goals of the nation’s site cleanup programs, both federal and state, are to promote effective and efficient cleanup
A possible solution lies in Sanford Street Local Development Corp. v. Textron, Inc., in which the court held that the sale of a manufacturing facility containing hazardous waste at a drastically reduced price constituted disposal of the hazardous materials. The court wrote that a “party is a responsible person when a transaction—even though characterized as a ‘sale’—is a sham for disposal.” Therefore, an intermediate landowner with actual knowledge of a release who transfers title to a penniless person could be a disposer within the traditional classes of PRPs, and so, the sham land transfer would not relieve him of liability.

C. The Intermediate Landowner on Notice of a Release Who Transfers Title

In United States v. Buckley, the court delivered jury instructions reading, “[A]n individual cannot avoid knowledge by deliberately closing his eyes to what would otherwise be obvious or by failing to investigate if he is in possession of facts which cry out for investigation.” Though § 9601(35)(C) requires “actual knowledge,” the phrase “release or threatened release” may be read to mean that something approaching actual knowledge, such as being on notice that a release occurred or may occur, could implicate the provision. In Fertilizer Institute v. EPA, the court defined a threatened release as exposure of a hazardous substance to the environment. The court accepted EPA’s conclusion that placing hazardous materials in an unenclosed container, exposed to the air, was a threatened release. It is unclear, however, whether notice of a release of toxic materials constitutes the knowledge required by § 9601(35)(C).
Other sections of CERCLA incorporate knowledge requirements, namely the notification to EPA of a release provision and the innocent owner defense. Examination of what constitutes knowledge in those situations helps to shed light on the proper meaning of the knowledge requirement of § 9601(35)(C).

1. The Intermediate Landowner Who Detects a Putrid Smell, Then Transfers Title

Section 9601(35)(C) is ambiguous as to whether strong evidence that a release occurred, such as detection of a putrid smell, constitutes the requisite knowledge. Another portion of CERCLA requires an owner to notify EPA of contamination if he has knowledge of or is on notice of a release exceeding a certain quantity. Comparing the circumstances in which notice of a release suffices in the reporting context helps illuminate whether an intermediate landowner with similar knowledge should be liable under § 9601(35)(C). In the context of reportable releases, in Thoro Products Co., the Office of the Administrator of EPA determined that the owner of a facility suspected a significant release. The owner responded to a call from one of his employees describing a huge cloud of foul-smelling fog emanating from his factory. He “clearly possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts.” The Office of the Administrator concluded that the owner violated CERCLA by waiting too long to report his knowledge. To summarize, the site owner was on notice of a release, and he violated the statute in failing to immediately investigate and report to EPA.

116 Id. §§ 9601(35)(B) (requiring all appropriate inquiries into contamination to assert innocent owner defense), 9603 (reporting requirements).


119 See id. § 9603.

120 See id.; Thoro Prods., 1992 WL 143993 (discussing the precise moment at which site owner had actual knowledge of release requiring reporting).

121 1992 WL 143993.

122 Id.

123 Id.

124 Id.

125 See id.
Thus, other CERCLA sections require owners to investigate possible contamination when they are on notice of a release, such as when an owner detects a putrid smell.\textsuperscript{126} It is unclear, however, whether the knowledge requirement of § 9601(35)(C) similarly includes an intermediate landowner who is on notice of the need to investigate further the presence of contamination.\textsuperscript{127}

2. The Careful Title Search Revealing the Disposal of Hazardous Materials by a Previous Owner

When an intermediate landowner conducts a careful title search that reveals disposal of hazardous waste by a previous owner, he cannot be sure whether a release has occurred on site or is threatened.\textsuperscript{128} Thus, it is unclear whether he has actual knowledge of a release or threatened release as required by § 9601(35)(C).\textsuperscript{129} In another context, for a PRP to successfully assert the innocent owner defense, he must show that a careful title search would not have exposed the presence of hazardous materials on the site.\textsuperscript{130} An owner must show, \textit{inter alia}, that he conducted “all appropriate inquiries” into the presence of hazardous materials onsite.\textsuperscript{131} To determine whether an owner conducted all appropriate inquiries, courts consider:

\begin{quote}
[A]ny searches conducted of historical sources and public records; relevant specialized knowledge; the relationship of the purchase price to the value of the property if the property was not contaminated; commonly known . . . information about the property; the degree of obviousness of the presence or likely presence of contamination; and the ability to detect the contamination by appropriate investigation.\textsuperscript{132}
\end{quote}

Section 9601(35)(C) does not clarify whether, similarly, an intermediate landowner, who would have been on notice of the potential release of contaminants had he conducted a thorough title search, has actual...
knowledge of the release or threatened release of hazardous substances and may be liable.\textsuperscript{133}

In the context of the innocent owner defense, in \textit{McDonald v. Sun Oil Co.}, the current owners of the property knew the land was formerly a mercury mine, that mercury was dangerous, and that contaminated bricks were onsite.\textsuperscript{134} In addition, the owners indicated that they thought the land had more value than the price they paid.\textsuperscript{135} The court concluded that the owners—because of their knowledge of mercury contamination and the dubious purchase price—should have been suspicious and conducted appropriate inquiries into other possible contamination.\textsuperscript{136} Similarly, in \textit{Acme Printing Ink Co. v. Menard, Inc.}, the court concluded that the purchaser was not an innocent owner because the mere fact that the land was formerly a dump should have put him on notice that hazardous materials were present onsite.\textsuperscript{137} Likewise, the court in \textit{Advanced Technology Corp. v. Eliskim, Inc.} indicated that the owner had knowledge of environmental contamination because a portion of the parcel that the corporation planned to purchase was “held back.”\textsuperscript{138} EPA would not approve the conveyance of that parcel because it suspected the presence of hazardous materials.\textsuperscript{139} The landowner, thus, was on inquiry notice that lead contamination also existed on its site, but failed to conduct an environmental assessment.\textsuperscript{140} As such, the court denied the corporation the innocent owner defense.\textsuperscript{141}

In these three cases, each owner knew of facts that should have prompted him to investigate his chain of title further.\textsuperscript{142} Because all failed to do so, they remained PRPs.\textsuperscript{143} CERCLA does not clarify whether an intermediate landowner who would have obtained actual knowledge

\textsuperscript{134} 423 F. Supp. at 1130.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{See id.}
\textsuperscript{138} 87 F. Supp. 2d 780, 782–83 (N.D. Ohio 2000).
\textsuperscript{139} \textit{Id. at} 782–83, 785.
\textsuperscript{140} \textit{Id. at} 785.
\textsuperscript{141} \textit{Id. at} 785–86.
\textsuperscript{142} \textit{McDonald v. Sun Oil Co.}, 423 F. Supp. 2d 1114, 1130 (D. Or. 2006); \textit{Eliskim}, 87 F. Supp. 2d at 785; \textit{Acme Printing}, 870 F. Supp. at 1480–81.
\textsuperscript{143} \textit{See McDonald}, 423 F. Supp. 2d at 1130; \textit{Eliskim}, 87 F. Supp. 2d at 785–86; \textit{Acme Printing}, 870 F. Supp. at 1480–81.
of a release or threatened release had he conducted a careful title search is similarly liable under § 9601(35)(C).144

IV. ATTACHING LIABILITY TO INTERMEDIATE LANDOWNERS WITH KNOWLEDGE OF CONTAMINATION TO ENCOURAGE CLEANUP AND ACHIEVE EQUITABLE RESULTS

Section 9601(35)(C) should constitute an independent basis for imposing liability on intermediate landowners.145 Even though intermediate landowners did not dispose of hazardous materials, those who gain actual knowledge of releases or threatened releases and keep that knowledge secret should not escape responsibility.146 Permitting intermediate landowners to extinguish their liability by transferring title unfairly shifts the entire cost of waste site cleanup onto the unknowing purchasers.147

This Note suggests that utilizing § 9601(35)(C) to impose liability on intermediate landowners is necessary both because courts have failed to adopt a single interpretation of the passive disposal theory and in order to achieve the two primary goals of the statute.148 As previously discussed, the principal purposes of CERCLA are to encourage voluntary, expeditious waste site cleanup and to equitably allocate response costs.149 Utilizing § 9601(35)(C) as an independent basis for liability achieves both goals by forcing discovered contamination to become

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145 See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996) (“By its plain language [§ 9601(35)(C)] appears to create a substantive basis of liability.”); Anheuser-Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498, at *2–3 (W.D. Ky. Feb. 10, 1997) (concluding that a former owner who failed to disclose the presence of hazardous materials “may be liable even if no disposal of hazardous substances took place during its period of ownership”); Glass, supra note 24, at 441 (“SARA added [§ 9601(35)(C)] which imposes liability upon sellers who knew of the existence of a site and failed to disclose it to the purchaser.”).

146 See CDMG Realty, 96 F.3d at 717–18; Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845–46 (4th Cir. 1992) (requiring that intermediate landowner qualify as disposer was at odds with CERCLA’s strict liability scheme and policy of encouraging expeditious, voluntary cleanup); Ford Motor, 1997 WL 594498, at *2–3; Glass, supra note 24, at 440–41.

147 See Nurad, 966 F.2d at 845–46; Tracy, supra note 24, at 181 (“The cost of cleaning up a site may be overwhelming to an individual or small business and may even exceed the value of the property.”).

148 See infra Part IV.A–B.

149 See, e.g., Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001); Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
public information and by eliminating the gaps in liability left by inconsistent judicial application of the passive disposal theory.\textsuperscript{150} Lastly, interpreting the provision to impose liability on intermediate landowners who deceitfully transfer title helps to resolve the four mischievous land transfers introduced in Part III.\textsuperscript{151}

A. The Necessity of a Broad Interpretation of Liability Under § 9601(35)(C): Failure of the Passive Disposal Theory to Provide Recourse to an Innocent Purchaser

A broad interpretation of the scope of § 9601(35)(C) applicability is necessary to hold the mischievous intermediate owner liable.\textsuperscript{152} Courts failed to settle on a single interpretation when asked to stretch the definition of disposers under the traditional classes of PRPs to include intermediate landowners and, to date, have not unanimously adopted the passive disposal theory.\textsuperscript{153} The U.S. Court of Appeals for the Fourth Circuit, for example, accepted the passive disposal theory as a basis for imposing liability when a prior owner’s hazardous waste barrels leaked while the intermediate landowner possessed the facility.\textsuperscript{154} The court emphasized that absent a definition of disposal that includes passive migration of hazardous materials, “[A]n owner could avoid liability simply by standing idle while an environmental hazard festers on his property.”\textsuperscript{155} In the Fourth Circuit’s view, such a result defeated the goal of voluntary, expeditious site cleanup.\textsuperscript{156}

Equally, several U.S. district courts require that an intermediate landowner take positive action leading to the spread of hazardous materials before attaching liability.\textsuperscript{157} The court in United States v. Petersen Sand & Gravel Inc. reasoned that “‘disposal’ does not contemplate pas-

\textsuperscript{150} See infra Part IV.B.
\textsuperscript{151} See infra Part IV.C.
\textsuperscript{152} See Bronston, supra note 18, at 610–11; Stempień, supra note 6, at 24–25.
\textsuperscript{154} Nurad, 966 F.2d at 844–46.
\textsuperscript{155} Id. at 845.
\textsuperscript{156} Id. (“[A] requirement conditioning liability upon affirmative human participation in contamination . . . frustrates the statutory purpose.”).
\textsuperscript{157} E.g., Petersen, 806 F. Supp. at 1350–53 (spreading of toxics should be categorized as a release, not disposal); Snediker Developers Ltd. P’ship v. Evans, 773 F. Supp. 984, 989 (E.D. Mich. 1991) (“[T]he mere migration of hazardous waste, without more, does not constitute disposal . . . .”); Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989).
sive migration” because passive migration of contaminants is better categorized as a release.\textsuperscript{158} Leaking and spreading of hazardous materials during ownership did not constitute disposal as required for liability, especially because an intermediate landowner might never learn of the leaking.\textsuperscript{159}

In the middle of the spectrum of court responses, the U.S. Court of Appeals for the Ninth Circuit rejected passive migration as a basis for liability when stormwater runoff caused the spread of lead contamination during the intermediate landowner’s possession.\textsuperscript{160} The Ninth Circuit noted, however, that its ruling did not preclude the application of the passive disposal theory in cases involving the spread of contaminants by means other than passive soil migration.\textsuperscript{161}

These scattered rulings on the applicability of the passive disposal theory show that a subsequent purchaser of a waste site may not find recourse against the intermediate landowner who sold the property and did not disclose the presence of contamination.\textsuperscript{162} As a result of the inconsistent application of the passive disposal theory, the goals of CERCLA remain unserved in a jurisdiction that does not accept passive migration as grounds for liability because the intermediate landowner will both keep the information to himself and escape responsibility.\textsuperscript{163}

\textbf{B. Achieving the Goals of CERCLA}

Imposing liability on intermediate landowners serves the two principal goals of CERCLA—swift facility remediation and equitable allocation of costs.\textsuperscript{164} The threat of responsibility for response costs is a strong incentive to investigate and reveal a discovered release or threatened

\textsuperscript{158} 806 F. Supp. at 1351.
\textsuperscript{159} Id. But see Stempien, \textit{supra} note 6, at 20 (discussing Petersen, 806 F. Supp. 1346: “The Petersen court was sorely mistaken in its belief that interpreting ‘disposal’ to include acts of commission but not omission would not frustrate the purposes of CERCLA”).
\textsuperscript{160} Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 868, 881 (9th Cir. 2001).
\textsuperscript{161} Id. at 881.
\textsuperscript{163} See \textit{Nurad}, 966 F.2d at 845–46 (“A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.”); Tracy, \textit{supra} note 24, at 172.
\textsuperscript{164} See, e.g., \textit{Carson Harbor}, 270 F.3d at 880–81; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
Once the information becomes public, cleanup can begin. Thus, the purpose of expeditious site cleanup to protect public health and safety is served by an interpretation of § 9601(35)(C) that imposes liability on intermediate landowners and forces them to disclose knowledge of contamination. In addition, imposing liability on intermediate landowners who choose to conceal knowledge of releases serves the purpose of fair allocation of costs among all responsible parties. Holding intermediate landowners responsible is no more unfair than imposing liability on current innocent owners as traditional PRPs.

1. The Importance of Prompt Disclosure to Ensure Remediation

One of CERCLA’s principal objectives is the voluntary and expeditious cleanup of hazardous waste sites that threaten human health and the environment. Interpreting § 9601(35)(C) as an independent basis for liability promotes this goal because it encourages disclosure, which will lead to facility remediation. An intermediate landowner who learns of the release of hazardous materials will be more likely to reveal the information at the time of sale rather than face expensive response costs with no hope of successfully arguing the innocent owner defense.
Some cases require sellers to disclose negative information about the sale property, though it may decrease purchase prices.\footnote{See, e.g., Carson Harbor, 270 F.3d at 869 (negligent nondisclosure claim); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 87, 90 (3d Cir. 1988) (rejecting caveat emptor defense); McDonald v. Sun Oil Co., 423 F. Supp. 2d 1114, 1125 (D. Or. 2006) (fraudulent misrepresentation).} For instance, many courts have rejected caveat emptor in modern land transactions, noting that it creates a disincentive to disclosure and a disparity in bargaining position.\footnote{See Smith Land, 851 F.2d at 87, 90; Tracy, supra note 24, at 172–73.} The court in Smith Land & Improvement Corp. v. Celotex Corp. reasoned that caveat emptor frustrated the policies of CERCLA because the party who discovered contamination would refuse to act until a court decided who was liable.\footnote{851 F.2d at 90.} Also, many states now have mandatory disclosure laws, requiring sellers to reveal the presence of contamination at a site to the purchaser.\footnote{Tracy, supra note 24, at 196–200 (citing examples from California, New Jersey, Connecticut, Missouri, and Illinois laws).} Thus, sellers increasingly are required to reveal discovered contamination or face liability in court.\footnote{See, e.g., Smith Land, 851 F.2d at 87, 90; Tracy, supra note 24, at 196–200.}

While court-imposed duties to reveal contamination and state mandatory disclosure laws create a strong incentive to disclose, the goal of expeditious hazardous facility identification and cleanup is best accomplished by a comprehensive, uniform interpretation of CERCLA.\footnote{See Tracy, supra note 24, at 215–19, 220.} CERCLA’s statutory scheme provides the motivation for most suits.\footnote{Id. at 220.} Courts should use § 9601(35)(C) as an independent basis of intermediate landowner liability in order to provide consistency and predictability in land sales transactions.\footnote{See id.} Doing so will also motivate expeditious site cleanup because intermediate landowners will reveal the information to avoid liability under CERCLA, and once the presence of hazardous materials becomes public information, cleanup operations can commence.\footnote{See id. at 192–93, 220.}
2. The Goal of Equitable Allocation of Costs

Another primary goal of CERCLA is the equitable allocation of costs among all responsible parties. The statute holds the current owners of facilities strictly liable, regardless of their status as disposers of hazardous materials. The imposition of liability on an intermediate landowner who deceitfully transferred title to contaminated land is no less fair than holding the innocent purchaser responsible for cleanup. The U.S. Court of Appeals for the Fourth Circuit wrote that rejecting intermediate landowner liability “introduces the anomalous situation where a current owner . . . who never [disposed of hazardous waste] could bear a substantial share of the cleanup costs, while a former owner who was similarly situated would face no liability at all,” and noted that “[a] CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.” As such, imposing liability on an intermediate landowner who knowingly concealed information about hazardous contamination promotes fairness.

In addition, as previously discussed, state statutes and judicial decisions increasingly impose a positive duty to disclose on sellers of properties with defects. Thus, a seller forced to pay for failing to disclose actual knowledge of a release or threatened release should not be surprised. Imposing liability on him is both fair and serves the goal of equitable allocation of costs.

When parties bring a CERCLA claim, courts have authority to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” In resolving contri-

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182 E.g., Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001); Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Mardan Corp. v. C.G. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
184 See Chase & Mixon, supra note 1, at 337 (“All entrepreneurs enter transactions knowing they may lose all the money they invested.”); Glass, supra note 24, at 441 (“[T]he law will protect neither purchasers of land who were not prudent in making their purchase, nor sellers who unfairly foisted their hazard on another.”).
186 Id.
187 See supra Part IV.B.1.
188 See Glass, supra note 24, at 441; Tracy, supra note 24, at 196–200.
189 See Glass, supra note 24, at 441; Tracy, supra note 24, at 196–200.
bution claims, courts will consider relative degrees of fault. The amount paid in response costs will be dependent on the intermediate landowner’s role in contaminating the facility. As such, an intermediate landowner may only pay a small portion of any response costs if he is relatively innocent as compared to the disposer.

Intermediate landowners who choose disclosure in compliance with the statute would likely have to accept low purchase prices. A seller’s forced acceptance of a decreased purchase price should not discourage a court from adopting § 9601(35)(C) as a basis for liability. Innocent purchasers who discover contamination lose significant value in their investments, yet the statute imposes liability on them despite their lack of fault.

In sum, holding intermediate landowners responsible for response costs when they fail to disclose the presence of contamination at the time of sale promotes the goal of equitable allocation of costs. Imposing liability on the intermediate landowner is as fair, if not more so, than imposing liability on the current owner. In addition, other areas of the law require disclosure of defects, and the portion of response costs the intermediate landowner pays will be proportionate to his fault. Utilizing § 9601(35)(C) as a basis for liability does not create injustice and further encourages the equitable allocation of costs

191 See id.; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 n.4 (1st Cir. 1993).
192 Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001) (“A PRP’s contribution liability will correspond to that party’s equitable share of the total liability” . . . . The contribution provision aims to avoid a variety of scenarios by which a comparatively innocent PRP might be on the hook for the entirety of a large cleanup bill.” (quoting Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997))).
194 See United States v. CDMG Realty, Co., 96 F.3d 706, 717 (3d Cir. 1996) (noting intermediate owners “pay” when they transfer land and disclose the presence of hazardous materials because their low “selling price[s] will reflect the cost of CERCLA liability”); Tracy, supra note 24, at 184 (“[C]ontaminated property is almost certain to be devalued as a result of the presence of hazardous substances.”).
195 See CDMG Realty, 96 F.3d at 717; Nurad, 966 F.2d at 845; Chase & Mixon, supra note 1, at 337.
196 See CERCLA, 42 U.S.C. § 9607(a)(1) (2000); Tracy, supra note 24, at 181–83 (“Ownership of contaminated land brings with it a host of costly responsibilities and constraints, including management of site cleanup, possible land use restrictions, and vulnerability to legal claims.”).
197 See, e.g., Carson Harbor, 270 F.3d at 880–81; CDMG Realty, 96 F.3d at 717–18; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993).
198 See CDMG Realty, 96 F.3d at 717–18; Nurad, 966 F.2d at 845.
199 See, e.g., 42 U.S.C. § 9613(f)(1); Glass, supra note 24, at 441.
among all parties that contributed to the growing threat of contamination.200

C. Resolving the Four Mischievous Land Transfer Scenarios

Part III of this Note introduced four scenarios in which the lack of clarity as to the applicability of § 9601(35)(C) resulted in mischievous land transfers: (1) the intermediate landowner with actual knowledge of a release who transferred title without disclosing the discovery; (2) the intermediate landowner who fully disclosed the release, transferring title to a penniless person in a sham transaction; (3) the intermediate landowner who detected a putrid smell, then quickly sold the property; and (4) the intermediate landowner who would have been on notice of contamination if he had conducted a careful title search.201 Utilizing § 9601(35)(C) as an independent basis for liability helps to resolve the unfairness in the four deceitful conveyance scenarios.202

1. The Intermediate Landowner Who Transfers Title Without Disclosing Actual Knowledge of a Release Should Be Liable for Response Costs

The intermediate owner who transfers title without disclosing actual knowledge of a release or threatened release is responsible if § 9601(35)(C) is read to impose liability regardless of the intermediate landowner’s status as a disposer.203 If intermediate landowners conceal their knowledge, contamination remains untreated and continues to pose a threat to human health and the environment.204 Also, when intermediate landowners with knowledge of a release escape liability, the unwitting purchaser is left to pay the response costs for site cleanup.205 Imposing liability, however, serves the two primary goals of CERCLA because the information about contamination will become public so

200 See, e.g., Carson Harbor, 270 F.3d at 880–81; CDMG Realty, 96 F.3d at 717–18; Nurad, 966 F.2d at 845; Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
201 See supra Part III.
202 See infra Part IV.C.1–4.
203 See CDMG Realty, 96 F.3d at 717 & n.9 (reasoning that CERCLA may impose liability on intermediate landowners who fail to disclose upon discovering a release of hazardous materials, regardless of their status as disposers); Anheuer-Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498, at #2–3 (W.D. Ky. Feb. 10, 1997).
204 See, e.g., Carson Harbor, 270 F.3d at 880–81; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Nurad, 966 F.2d at 845; Mardan, 804 F.2d at 1455.
205 See Nurad, 966 F.2d at 845; Tracy, supra note 24, at 181–83.
that facility remediation can begin and the entire burden of response costs will not shift unjustly to the unknowing purchaser.206

2. Transferring Title to a Penniless Person in a Sham Transaction Should Amount to Disposal

Transferring the title to a contaminated facility to a penniless person in a sham transaction should not satisfy the demands of § 9601(35) (C).207 An intermediate landowner who conveys the facility and makes full disclosure seemingly meets the requirements of the provision and is free from responsibility.208 Considerations of the policies of CERCLA and of fairness, however, indicate transferring title in a sham transaction should not defeat liability.209 The penniless person who receives title to the facility will not be able to pay for cleanup, frustrating the goal of equitable allocation of response costs.210 Instead, the government will have to pay for cleanup and will not have PRPs from whom to seek recovery of expenses.211

The case of Sanford Street Local Development Corp. v. Textron, Inc. proposes a possible solution.212 The Sanford court treated a sale for nominal consideration to a penniless person as “disposal” and imposed liability on the mischievous seller as a disposer of hazardous materials.213 Courts should not have difficulty seeing beyond an intermediate landowner’s characterization of the transfer as a valid sale to see that it is indeed a sham transaction designed to relieve him of liability.214 Thus, a court should scrutinize conveyances of contaminated facilities to penni-

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206 See supra Part IV.B.
207 See Chase & Mixon, supra note 1, at 293, 339.
208 See id. at 293.
209 See id. at 340 (“Whatever the extent of the practice, a plethora of strategic conveyances would not be good for the public. Conveying contaminated land to an indigent grantee is the functional equivalent of abandonment. The land will sit vacant, perhaps leaking or leaching contaminants . . . .”).
210 See id.
211 See id. (“[I]f at-fault parties cannot be located and sued, some level of government will bear the cost of cleanup.”).
213 Sanford, 768 F. Supp. at 1222–23.
less people and hold sellers liable if the evidence reveals the sales were merely attempts to escape responsibility.\textsuperscript{215}


The use of § 9601(35)(C) as a basis for intermediate landowner liability does not solve the difficult problem of proving actual knowledge of a release or threatened release.\textsuperscript{216} Courts have relied on letters from government environmental protection agencies and testimony of witnesses regarding an owner’s disposal activities to establish actual knowledge in prior cases.\textsuperscript{217} Whether information short of a notification letter or eyewitness testimony would satisfy the knowledge requirement of § 9601(35)(C) is unclear.\textsuperscript{218} Thus, a subsequent purchaser may be unable to show that an intermediate owner deceitfully transferred title without disclosing knowledge of a release, and the mischievous seller would escape liability.\textsuperscript{219}

This Note argues that courts should accept facts indicating that an intermediate landowner was on notice of a release as satisfying the knowledge requirement of § 9601(35)(C).\textsuperscript{220} The provision states that an intermediate owner must have knowledge of “release or threatened release.”\textsuperscript{221} The phrase “threatened release” suggests that circumstances other than eyewitness knowledge may satisfy the knowledge requirement, such as events putting an intermediate landowner on notice of a

\textsuperscript{215} See, e.g., Aceto Agric., 872 F.2d at 1381; Petersen, 806 F. Supp. at 1354; Chase & Mixon, supra note 1, at 333.

\textsuperscript{216} See Tracy, supra note 24, at 196.


\textsuperscript{218} See Hemingway, 993 F.2d at 925; Fallowfield, 1993 WL 157723, at *2, *6, *8; Chase & Mixon, supra note 1, at 303–06 (discussing moment at which owner’s awareness of contamination constitutes actual knowledge such that liability should attach); Tracy, supra note 24, at 195–96.

\textsuperscript{219} See Glass, supra note 24, at 441; Stempień, supra note 6, at 23–24; Tracy, supra note 24, at 196.


release.\textsuperscript{222} The court in Fertilizer Institute \textit{v.} EPA found that a container of hazardous waste without a lid was a threatened release because volatile contaminants could escape into the air.\textsuperscript{223} When an intermediate owner detects a putrid smell, he is on notice that a release occurred and that contaminants are escaping into the environment, and CERCLA should impose some consequence.\textsuperscript{224}

Notice meets the knowledge requirements of other provisions in the statute.\textsuperscript{225} For instance, CERCLA requires owners to notify EPA of the release of hazardous materials in excess of certain amounts within hours of the owner gaining constructive knowledge of the release.\textsuperscript{226} In \textit{Thoro Products, Co.}, the Office of the Administrator of EPA determined that the owner, upon receiving reports of a foul-smelling odor emanating from his factory, “clearly possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts” that required reporting.\textsuperscript{227}

To summarize, other sections of CERCLA require investigation upon notice of a release, such as the detection of a putrid smell.\textsuperscript{228} In the context of the statute’s reporting requirement, demanding that those on notice investigate evidence of hazardous conditions ensures the discovery of contamination.\textsuperscript{229} Likewise, requiring intermediate landowners who detect putrid smells to investigate further and to reveal the information gained advances the goal of expeditious site cleanup; they will discover releases and make their knowledge public at the time of sale so that cleanup can begin.\textsuperscript{230} In order to both avoid the difficulty of proving actual knowledge and to advance the goals of CERCLA, courts should accept notice indicating a release or threat-

\textsuperscript{222} See Tracy, \textit{supra} note 24, at 216 (“Sellers may claim that they had no way of knowing about any contamination . . . . [I]t is quite possible that a seller would consider himself free of any obligation to inform potential buyers about the land’s condition.”).
\textsuperscript{223} 935 F.2d 1303, 1306–07 (D.C. Cir. 1991).
\textsuperscript{224} See 42 U.S.C. § 9601(22). The statute defines a release as, “[A]ny spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, emitting, leaching, dumping, or disposing \textit{into the environment}.” \textit{Id.} (emphasis added); \textit{Thoro Prods.}, 1992 WL 143993.
\textsuperscript{225} 42 U.S.C. §§ 9601(35)(B) (innocent owner defense), 9603 (reporting requirements).
\textsuperscript{226} \textit{Id} § 9603; \textit{Thoro Prods.}, 1992 WL 143993.
\textsuperscript{227} 1992 WL 143993.
\textsuperscript{229} See \textit{Hemingway Transp., Inc. v. Kahn}, 993 F.2d 915, 921 (1st Cir. 1993); Glass, \textit{supra} note 24, at 441; Tracy, \textit{supra} note 24, at 220.
ened release occurred, such as the detection of a putrid smell, as evidence fulfilling the knowledge requirement of § 9601(35) (C).

4. Section 9601(35) (C) Should Apply to the Intermediate Landowner Whose Careful Title Search Would Reveal Disposal by a Prior Owner

When a careful title search would reveal the disposal of hazardous materials by a prior owner, the intermediate owner is on notice that a release may or may not occur. Whether courts should treat this situation differently than detecting a putrid smell, where a release clearly occurred, is uncertain. Additionally, courts must consider whether failure to investigate suspected contamination exposed by a title search should trigger liability for response costs under § 9601(35) (C) or merely deny an intermediate owner the innocent owner defense.

A careful title search is required to successfully assert the innocent owner defense. For example, in Acme Printing Ink Co. v. Menard, Inc., the court held that the mere fact the property formerly was a dump put the purchaser on notice that hazardous materials were present on site. Because the corporate purchaser failed to conduct a careful investigation before buying the facility, it could not assert the innocent owner defense. Similarly, in McDonald v. Sun Oil Co., the purchasers knew that the site was formerly a mercury mine and thought they paid an unusually low price for the property.

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233 Compare Thoro Prods., 1992 WL 143993 (cloud of foul-smelling fog), with McDonald, 423 F. Supp. 2d at 1130 (land formerly a mercury mine), and Acme Printing, 870 F. Supp. at 1480–81 (careful records search revealed land was a dump).


236 870 F. Supp. at 1480–81.

237 Id.

238 423 F. Supp. 2d at 1130.
court denied the purchasers the innocent owner defense because they knew or should have known that the site was contaminated.\(^{239}\)

Because failure to conduct a thorough title search defeats the innocent owner defense and possibly imposes responsibility, an intermediate purchaser whose title search would reveal hazardous materials onsite should also receive a penalty—liability for failing to disclose his knowledge of the possibility of a release when he later conveys the property.\(^{240}\) The threat of denial of the innocent owner defense alone is insufficient to encourage disclosure if an intermediate owner knows he can conceal the information and gamble that the purchaser will not be able to prove he is a PRP.\(^{241}\) Utilizing § 9601(35)(C) as an independent basis of liability, and accepting notice of a release or a threatened release as the requisite knowledge, will ensure both that intermediate landowners conduct thorough title searches and that they do not mischievously transfer title.\(^{242}\)

**Conclusion**

Section 9601(35)(C) of CERCLA arguably imposes liability on an intermediate landowner who sells a facility without disclosing actual knowledge of a release or threatened release. Considerations of fairness and the policies underlying the statute’s liability scheme dictate that an intermediate landowner should not be able to remain silent and escape liability by conveying the facility to an unknowing purchaser.

Failure of the passive disposal theory to provide a remedy for a subsequent purchaser against an intermediate landowner who deceitfully conveyed the facility demonstrates that § 9601(35)(C) should be used as an independent basis for imposing liability in order to provide consistency. Otherwise, the goals of CERCLA will not be met in some jurisdictions where a mischievous intermediate landowner can slip through the liability cracks while the threat of contamination grows.

In order to hold responsible an intermediate landowner with knowledge of a release, courts should utilize § 9601(35)(C) as an independent basis for liability. Courts should consider both the relative fault of an intermediate landowner and decreased proceeds from the sale of the facility in resolving contribution claims. As such, an inter-

\(^{239}\) *Id.*  
\(^{240}\) See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996); McDonald, 423 F. Supp. 2d at 1130; Glass, *supra* note 24, at 441; Tracy, *supra* note 24, at 220.  
\(^{242}\) See, e.g., Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001); Glass, *supra* note 24, at 441; Tracy, *supra* note 24, at 192, 220.
mediate landowner would pay a fair sum of response costs. Courts should also look past an intermediate landowner’s characterization of a land transfer as a sale and treat a sham transaction to a penniless person as disposal activity triggering liability.

Lastly, courts should permit notice of contamination to satisfy the knowledge requirements of § 9601(35)(C). Doing so will further encourage disclosure and avoid the situation in which an intermediate landowner on notice of a release transfers contaminated land, without investigating, to an unwitting purchaser. Courts should not hesitate to use § 9601(35)(C) as an independent basis of intermediate landowner liability because doing so both ensures the remediation of hazardous waste sites and prevents an intermediate landowner from mischievously transferring title to an unknowing, innocent purchaser.