Maine Coast Heritage Trust
A Statewide Land Conservation Organization

ENVIRONMENTAL DUE DILIGENCE PROCEDURES

Background

Before MCHT acquires an interest in land, it performs due diligence to investigate the property's title and condition. Due diligence includes reviewing environmental issues, the subject of this procedure. The purpose of environmental due diligence is to determine the existence of any hazardous or toxic contaminants or other pollutants, or the potential for contamination by such substances. It is clearly preferable to prevent the acquisition of environmentally contaminated property than to discover a problem after acquisition. An investigation into possible contamination may disclose the existence of a problem or potential problem, allowing MCHT to require cleanup before acquiring the fee or a conservation easement, to restructure the transaction to protect the organization, or to walk away from the project. In the event that a contamination problem is discovered after we have acquired a piece of land, having conducted environmental due diligence will put MCHT in the best possible position to take advantage of limited legal defenses.

There are three equally important reasons for conducting environmental due diligence:

1) Mission: As a land protection organization, are we truly protecting the natural area? Or will we be expending resources protecting and stewarding a site with environmental contamination? Could such a site be a public health and safety concern?
2) Liability: If a site does turn out to have environmental contamination, MCHT could be liable for all costs associated with the contamination, including the cost of cleaning up the site, even though we did not create the problem. This can be an extremely expensive process. Even establishing that MCHT is not responsible could entail substantial costs.
3) Public relations: MCHT doesn't want to be viewed as an organization that either protects or spends its money cleaning up other people's messes.

In addition, environmental due diligence is required by the Land Trust Alliance's Practice 9C.

Federal law (the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA), also known, along with updates, as the Superfund law) imposes strict liability upon owners and operators of property to clean up environmental contamination, whether or not the current owner or operator caused the problem. The law contains an "Innocent Property Owner" defense, which may be available if the owner has reasonably investigated the property. To use this defense, a landowner has to prove:

1) That the property was acquired <u>after</u> the hazardous material was deposited; and
2) Either:
   a) The landowner did not know and had no reason to know of hazardous material on the property; and/or
   b) The landowner acquired the property by inheritance or through a will.

For MCHT to have "no reason to know" about hazardous waste, we must have conducted "all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice".

The Environmental Protection Agency (EPA) published a rule in November, 2005, effective November 2006, which establishes the specific requirements for conducting all appropriate inquiries (AAI) into the previous ownership, uses and environmental conditions for the purposes of qualifying for an "Innocent Property Owner" defense under CERCLA. The standards for AAI require that an environmental assessment be conducted by an "environmental professional", and an environmental professional is defined in terms of certification, education and experience. The assessment that this professional would conduct is often referred to as a "Phase I Environmental Site Assessment". MCHT does not have staff who meet these qualifications and can perform a Phase I. Therefore, unless MCHT hires out a hazardous waste assessment, we cannot qualify for the "Innocent Property Owner" defense.

The question becomes, therefore, given the nature of the properties in which we are interested, what steps can we take to gain assurance that contamination is highly unlikely, without incurring the expense of paying for a full "Phase I" for each acquisition? The American Society for Testing and Materials Standards (ASTM), whose Standard Practice for Phase I Environmental Site Assessments is recognized by EPA as satisfying the requirements for AAI, has also published a Standard Practice for Limited Environmental Due Diligence: Transaction Screen Process. This practice defines good commercial and customary practice when the user wishes to conduct less than a Phase I Environmental Site Assessment. It will not suffice to qualify for the "Innocent Property Owner" defense under CERCLA; it will, however, provide us with information that will help to determine if we think there is a possibility of contamination, and if we wish to go to the next step and have a Phase I performed. (ASTM 1528 1.1.)

Scope of the environmental due diligence

MCHT will perform a TRANSACTION SCREEN FOR POTENTIAL ENVIRONMENTAL CONCERNS prior to the acquisition of the following interests in property:

- All **fee acquisitions**, whether purchased or donated, and whether we intend to hold the property or transfer it. (MCHT will be the owner.)
- All **conservation easements in which MCHT will hold affirmative management rights**. (MCHT will be the operator.) The project manager and/or staff counsel will determine whether a CE contains affirmative management rights.

Other examples of when environmental due diligence should be performed:

- Before entering into any management agreement or other arrangement under which MCHT will be actively involved in the operation or management of a piece of land.
- Prior to taking possession of a property in which MCHT has a legal interest (example: prior to accepting a gift of property subject to a life estate, and again at the termination of the life estate);
- If MCHT holds a mortgage on a piece of property, prior to any foreclosure or repossession of the property.

Note that MCHT not only needs to check for past problems with hazardous waste, but also for potential problems, and not only on the property that we are acquiring, but also on adjacent properties, including those separated from the subject property by a road. (ASTM 1528 1.2.1)

The first step in environmental due diligence is a TRANSACTION SCREEN FOR POTENTIAL ENVIRONMENTAL CONCERNS, and this is the minimum that must be completed before closing on any project in the five categories above. If, as a result of this TRANSACTION SCREEN FOR POTENTIAL ENVIRONMENTAL CONCERNS, it is determined that there is a reasonable likelihood that hazardous waste exists on the site, and MCHT wishes to continue to pursue the acquisition of fee title, or management, then MCHT must secure the innocent landowner defense by performing "all appropriate inquiries", as follows:

1) A PHASE ONE investigation must be conducted, under ASTM Rule E1527, as finally promulgated by EPA on November 1, 2005, and effective on November 1, 2006, in order to secure the "innocent landowner defense" under the Brownfield Amendments to CERCLA liability for clean-up costs [[CERLCA Section 101(35)(B); the contiguous property exemption to CERCLA liability under Section 107(q); and the bona fide prospective purchaser exemption to CERCLA liability under Section 107(r)(1) and Section 101(40)]]. The PHASE ONE must be conducted or supervised by a qualified "environmental professional" as defined in the law published at the Federal Register on November 1, 2005 (usually a licensed professional engineer (PE) or geologist (PG)). A qualified environmental professional may well be able to supervise and approve the information provided in our initial Transaction Screen to prepare the Phase One report.

2) If, at the recommendation of the Phase One inspector, a PHASE TWO inspection may be warranted, MCHT must re-evaluate the transaction, and decide whether to have a Phase Two conducted by an environmental professional and hydro-geologist, which will include soil and groundwater tests. If the site is actually a "brownfield" site or Superfund site, there may be grants available for the inspections and clean-up under Section 104(k)(2), as well as indemnities available from state and federal government. This will require the extended assistance of the environmental professional.

3) If hazardous contamination is found in PHASE TWO, MCHT should not generally acquire the property without receiving extensive indemnities from governmental agencies, since a third Phase of excavation and removal of contaminated materials must occur.

For conservation easements in which MCHT will NOT hold affirmative management rights

Unless staff has a reason to suspect possible environmental contamination on the subject property or adjoining properties, we should not do further inquiry. If environmental contaminations **is** suspected, MCHT should evaluate whether a conservation easement on this land is a proper use of its time and effort, or consistent with its mission. During site visits, therefore, staff should keep an eye out for any warning signs of environmental contamination, as detailed in the Transaction Screen. In conversations with the landowner, it is recommended that staff inquire as to past uses of the subject property, as well as current and past uses of the surrounding parcels. If you know a Superfund site is nearby, please bring this to the attention of the staff counsel.