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Chapter 14

ENVIRONMENTAL ASSESSMENT

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Anyone who reads a newspaper or listens to the evening news is familiar with the dangers of land contaminated by hazardous materials. Cleanup costs can be very high; the property may be unsafe for public use; and the problem may expose the landowner to liability, regardless of who caused the contamination.

In general, contamination can result from:

- agricultural operations (such as the spraying or storing of pesticides), leaking fuel tanks, sheep dipping procedures, PCB-containing transformers, garbage or waste dumps, or contamination of ground water
- commercial operations, including chemical dumping or leakage or the presence of abandoned tanks or supplies
- mining and timber operations, especially chemicals used in processing
- residential buildings, especially those that contain asbestos

Federal and some state laws now impose "strict liability" (that is, liability regardless of fault) on current owners of polluted property, or on prior owners if the contamination occurred during their ownership. In other words, regardless of fault, anyone in the chain of title can be at severe risk for cleanup costs (and insurance against such liability generally is not available).

The most important goals of a land trust's policy on hazardous materials should be to:

- discover any problem before a decision is made to acquire land
- not acquire contaminated land (unless the resource value outweighs the hazards and the trust is prepared to assume the legal and financial risks of owning and cleaning up the property)
- complete all "due diligence" steps that will position the land trust to take advantage of any legal defenses available in the event a problem is discovered after the trust has taken title

Legal Protection from Liability

The law does provide some protection for the innocent purchaser of contaminated land. For example, under the federal "Superfund" legislation of 1980 (the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA) and 1986 (the Superfund Amendments and Reauthorization Act, or SARA) any landowner who acquires land that already has been contaminated with a hazardous substance can escape liability if she is able to establish by "a preponderance of the evidence" that one of the following situations holds true:

- The land was acquired by inheritance or bequest.
- The landowner is a government entity that acquired the land through escheat or other involuntary transfer or acquisition, or through eminent domain authority.
- The landowner neither knew, nor had reason to know, at the time of the acquisition that hazardous substances had been disposed of on the property.

At first glance, it appears that the last of these is a perfect escape clause. However, it requires that the landowner show "due diligence" in examining a property for hazardous wastes prior to purchase. The landowner needs to be able to prove that she thoroughly examined the property, including having a professional site assessment, if appropriate, and found no problem. Unfortunately, there is not yet a clear delineation of what due diligence requires.

Steps your land trust needs to take. For every property your land trust acquires, you need to:

- assess the condition of the property and determine whether there possibly could be a contamination problem
- determine, if there is a problem, how bad it is and the nature and cost of cleaning it up
- clean up the problem, if required
- craft an acquisition agreement that protects your land trust from liability, whether or not there is a known problem

You must assess the property for environmental contamination before you close. This examination may be as simple as a careful, documented site inspection by a trained staff member or volunteer or it may be as complex as a full-blown professional environmental assessment, involving laboratory tests of soil and groundwater samples. If you are lucky—for example, if the property is remote, its history is known, and a trained person from your land trust has inspected it—you might be able to skip a formal environmental assessment. The level of investigation will vary, depending on the site and the requirements of state and federal laws. It is important that you work closely with your attor-

ney at all stages of assessing the environmental health of a property and drafting your agreements. (See *The Standards and Practices Guidebook: An Operating Manual for Land Trusts*, Land Trust Alliance, 1993.)

First Defense: Looking for Clues

Your first step is to do as much investigation as you can in the early stages of a project, looking for indications of a problem or of a property's particular vulnerability to one. Ask the landowner:

- How and when was the property used in the past? Might this use have created toxic wastes?
- Were any fertilizers, chemicals, hazardous substances, or fuels handled or stored at the site?
- Are there now, or have there ever been, any underground storage tanks on the property?
- Are there any electrical transformers or capacitors on the property that may produce PCBs?
- Are there groundwater wells on the property?
- Is the groundwater in the immediate area used as a source of drinking water?
- Is the property the subject of environmental litigation or regulatory enforcement action?
- Were motor vehicles, machinery, or airplanes used in the operations conducted on the property? Was fuel stored on the property?
- Was any portion of the property used as a landing strip, storage facility, mixing facility, or for any activity related to pesticide application?
- Are there any adverse press reports or complaints on file regarding the property?
- Is the property near any floodplain, wetland, or other sensitive ecological area?
- Are there any improvements on the property? Has asbestos been used in these improvements?
- Is there evidence of waste disposal or landfill on the property?
- If the land was used to harvest timber, are there any sites at which chemicals may have been used to treat the logs?
- Is there any activity on adjacent or near-by land that might affect the property, such as a landfill whose leaching might contaminate the water source of the land in question?

To begin answering these questions, have someone inspect the property. It is essential that this person have appropriate training. While someone from the land trust should always walk any land the trust intends to buy, this usually will not be adequate for an environmental assessment, since some contamination may not be visible to an untrained inspector. The ideal is to have someone on your land trust's team who is trained to inspect land for contamination. In addition to noting problems, this site inspection should determine whether the suspected problem exists so close to a boundary that a survey needs to be ordered and whether there is any evidence (patches of dead vegetation, oil stains on the ground, evidence of illegal dumping, etc.) that a professional environmental assessment may be needed.

Document the site inspection: who has seen the land, how many times, and when. This documentation is crucial to meeting "due diligence" requirements.

There are a variety of additional ways to research the possibility of a problem, including:

- talking to the landowner (which you *always* should do), local residents, environmental organizations, or local citizen groups
- asking landowners of adjacent property whether they have obtained an environmental assessment of their property and whether you could review this (they may be unwilling to share it, particularly if there is a problem)
- consulting with university and other specialists (e.g., park planners, biologists)
- examining public agency studies and government records (such as records from the county recorder's office, county board of health, building departments, county/city planning departments, regional water quality boards)
- calling the state department of environmental protection for any reported incidents of contamination in the area

Negotiating an Acquisition Agreement that Protects You

As stated in Chapter 10, "Final Negotiations," a good acquisition contract should contain conditions that protect your land trust from liability and allocate to the seller the costs of inspection and remediation. These include:

- strong representation by the landowner regarding the existence of environmental contamination
- conditions on the sale under which the land trust can drop the project (and recoup its deposit) if the problems are unacceptable
- clear delineation of who will bear the costs of any environmental assessments and cleanup
- the landowner's agreement to indemnify the land trust if it incurs costs resulting from contamination

Because you often will draft your agreement before you know whether there is any environmental contamination, the clauses of your agreement will be broad. If the problem is known and analyzed at the time of the contract signing, the terms usually will be more specific to the identified problem.

Ordering a Professional Assessment

If you have any reason to be suspicious about a piece of property, consider ordering a professional environmental assessment. An assessment may cost you $1,500 to $10,000, depending on the size and nature of the parcel—which could preclude your taking on the project—but the risks of not doing the assessment could cost you far more; a major contamination problem could put a land trust out of business.

A critical step in the environmental assessment process is selecting, contracting with, instructing, supervising, and evaluating the environmental consultant. Real estate lawyers, title companies, agency staff, or experts on your land trust team should be able to recommend good consultants. Given current laws and regulations, environmental assessments are now as common as title reports or contractors' inspections. You should work closely with your legal counsel in all stages of contracting with environmental consultants.

What level of assessment do you need? The scope of an environmental assessment must be determined on a case-by-case basis. But as a minimum, the person conducting the assessment should take the following steps, which the industry considers a "Phase I" or "Level 1" assessment:

- inspect the entire property (and observe what you can on adjacent land)
- research the land use history of the property (and of adjacent land)
- search public records for evidence of problems
- document the steps taken and the findings

If the assessment turns up evidence of contamination, you will need to determine how bad it is. Work with an attorney to determine whether you should drop the project (either the resource will no longer meet the land trust's criteria or the potential liability could be too great), what further assessments may be needed, and the responsibilities of the seller under the acquisition agreement.

If your initial assessment identifies a problem, pursue additional information until you are satisfied that you and the consultant understand the nature of the contamination. You may decide to drop the project along the way any time you determine that the property is simply too contaminated or the landowner is unwilling (or not contractually obligated) to help with assessment or cleanup costs.

Phase II assessment and beyond. Particularly if there is evidence of a problem, you may need to go on to a Phase II assessment. A Phase II assessment, which can be quite expensive, consists of sampling and analysis:

- initial field sampling and analysis of surface and easily reached sub-surface soils to determine the presence or absence of contaminants generically and make specific recommendations for further sampling and analysis
- more extensive sampling through drilling at different levels and over a wider area (or establishing monitoring wells in groundwater) to determine the extent of the contamination, followed by laboratory chemical analysis to test for specific hazardous substances (some consultants refer to this as "Phase III" testing)

A Phase II assessment provides a much higher degree of certainty regarding the type and extent of contamination. It also provides a basis for estimating the cleanup costs. Phase III (or Phase IV, according to some) consists of remediation.

Handling Problems: Case Studies

There are any number of contamination problems you might encounter in your projects. The severity of the problem for each of these can vary widely and is the key factor in determining how you proceed with your deal.

Household Dump

Your land trust has at last persuaded the cantankerous farmer to sell his 160-acre farm. In touring the property, you notice a smoldering dump behind the barn. The farmer explains that it's a household dump. Recalling something you heard at a recent land trust conclave, you ask whether it might have contaminants. The farmer is insulted. It's just ordinary garbage, he insists, "what you city folks have whisked away by garbage trucks." You back off the issue. Later that day, you and the farmer both sign the preprinted contract provided by the real estate broker. The contract requires the land trust to take the property "as is."

In the course of preparing to close, a neighbor of the farmer lets you know that there is reported "midnight dumping" of refuse in the farmer's dump, which is only thirty feet from the highway. You feel you have to look into this, and hire a local environmental consultant to look at the dump. The news is not good. There indeed has been unauthorized dumping of much refuse, including pesticide containers, paint products, and used motor oil.

The county agency for which you are preacquiring the property tells you that the dump will have to be removed and the soil proved to be clean. This costs the land trust $10,000. Ultimately, the property is deemed to be clean and the sale takes place, but the trust loses $10,000 on the deal and is forced to a position of fiscal crisis.

Household Dump Revisited: A Lesson Learned

Two years later, a ranch on the outskirts of town becomes available. You tour the property with the landowner and, again, this landowner shows you the "household dump," a site that was used to dump debris for 20 years. The owner swears up and down that nothing toxic was ever dumped there and no unauthorized dumping ever went on. Your instinct tells you that the landowner is probably correct on both counts. Nevertheless, having learned a hard lesson, you include fairly strong language in your agreement that calls for an environmental assessment to be paid for by the landowner and, should contamination be found, for the landowner to pay up to $2,000 in cleanup costs (the agreement can specify that if it costs more than this, the land trust can choose to pay the rest or walk from the deal).

The assessment finds no hazardous substances at the site and does not recommend further testing. It does recommend removal of the debris. Once the landowner removes the debris, you close on the deal.

Underground Tanks

The owner of a property believes there is no contamination on the property, and there is no evidence of any. You negotiate the right to conduct an environmental assessment at the owner's expense. To your dismay, the assessment reveals the presence of fuel tanks, abandoned by a prior owner, and the soil tests indicate that the tanks are leaking.

Your agreement specified that the landowner was obligated to clean up any contamination to a ceiling price of $10,000; if the cleanup would cost more, the landowner would have the right to terminate the deal. In fact, the cost of removing the tank and transporting the contaminated soil is $20,000. The landowner decides that it's worth it to pay the extra cost, since any other sophisticated buyer would require the same.

Industrial Waste

Your land trust wants to acquire a parcel for annexation to a county park. The property includes a building that formerly was a laboratory. The landowner discloses that activities on the site contaminated the groundwater, a situation that has been extensively studied by the company and state water quality officials. The owner believes that there is no continuing contamination and that the water will be cleaned up over time through a highly technical process known as "air stripping."

The land trust considers its options. After some study, the county decides it is willing to assume the risk of owning the property, but it wants indemnity from the owner. You negotiate with the landowner to indemnify both the land trust and subsequent owners against liability and fund the cleanup for ten years. You also get the landowner to secure this promise by providing a letter of

credit for $500,000. To keep on the safe side, the land trust structures the deal so that the sale of the land is made directly to the county, keeping the land trust out of the chain of title.

Abandoned Mine

As one of its first projects ten years ago, your land trust bought a large tract of open land at a bargain price from a rancher who was sympathetic to your land trust's goals. The land trust did no environmental assessment. The land has been used for hiking and equestrian trails.

Seven years later, state officials notified the land trust that they had traced contamination of the creek to an abandoned mine site on the land trust's property. The state planned to clean up the site, the cost of which, under state law, would be the owner's responsibility, regardless of the owner's responsibility for the contamination. The land trust is stunned. Its attorney scrambles but finds no loophole. The trust's liability insurance excludes liability from environmental contamination. In addition, the land trust has no recourse to the prior owner, since the purchase contract required the land trust to accept the property "as is."

Two years later, the land trust is still mired in a lawsuit against the prior owner, but the odds are not good. The cost of the cleanup is likely to put the land trust out of business.

Accepting Risks of Environmental Contamination

Dealing with the risk of environmental contamination involves complicated legal and technical considerations and therefore is one of the most challenging facets of conservation land acquisitions. There are no easy formulas. Proceed carefully on each potential acquisition with the support of a team that includes an attorney familiar with the issues and preferably someone who understands the scientific nature of contamination. The most prudent and conservative advice would be to procure a professional site assessment on each property under consideration. Where acquisitions are going to be few and far between, and the cost is manageable, this is probably the right answer.

On the other hand, for land trusts that acquire multiple properties and have seasoned staff capable of conducting an assessment, it may be appropriate on occasion to forego a formal outside professional assessment.