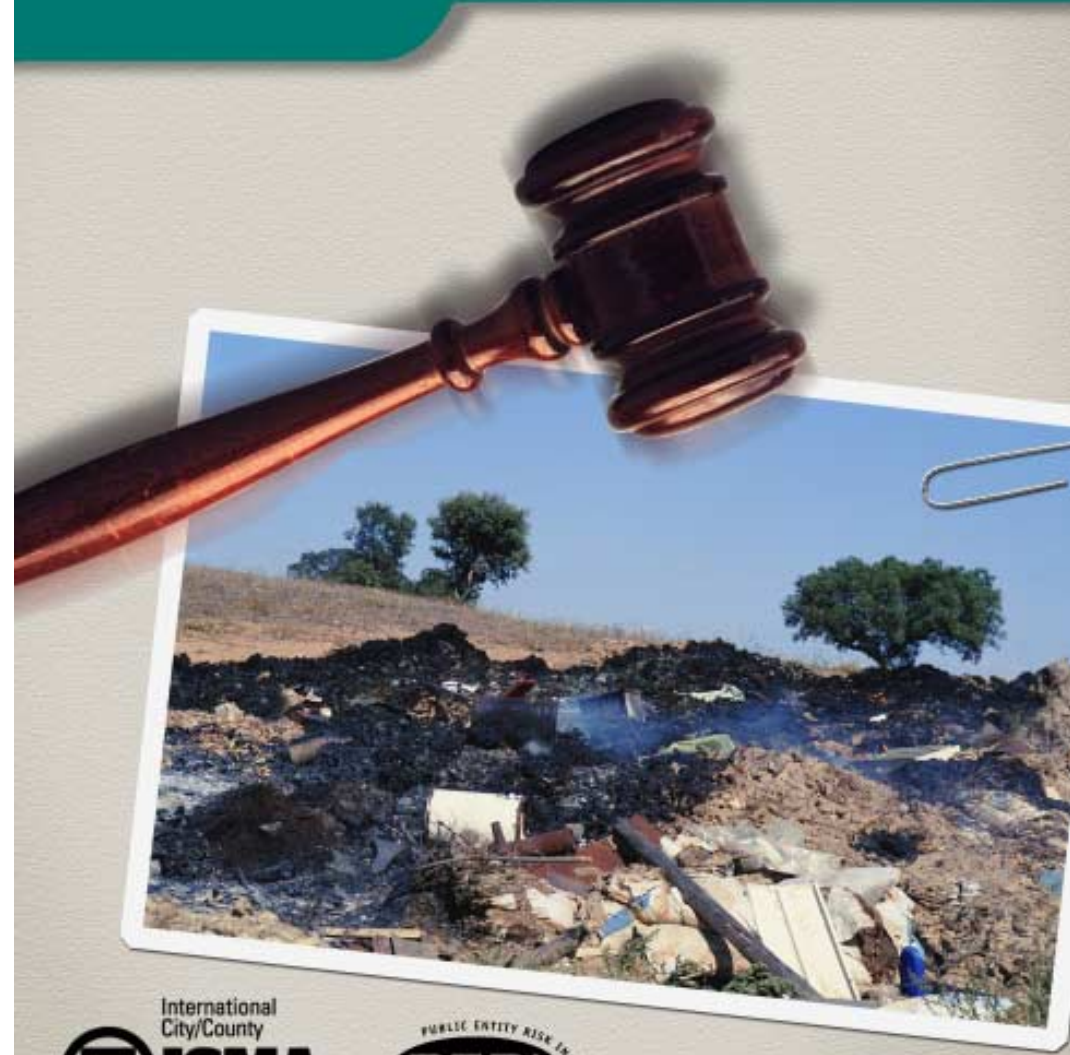


A Primer for Local Governments on Environmental Liability





Acknowledgements

This fact sheet was written to provide local government managers, elected officials, and their staff with a primer on the potential environmental liabilities that local governments face. In writing the *Primer* we sought to ensure that it was readable, but also provided the information and terms that local government officials need to begin to understand the complexities of environmental liability. Though we have tried to keep the “jargon and legalese” to a minimum, we felt it necessary to include some. References have been provided in an effort to ensure understanding. We hope that this primer, in the form of a fact sheet, is used by local officials to begin assessing their environmental risks and developing programs to prevent liabilities.

ICMA would like to thank the Public Entity Risk Institute (PERI) for their continued support of local governments, and particularly their support of ICMA’s Environmental Liability Outreach (ELO) project, under which the *Primer* was developed. The project is managed through ICMA’s Local Government Environmental Assistance Network (LGEAN). Special appreciation goes to Claire Reiss, Director of Grants and Research at PERI, for her support and review of this document.

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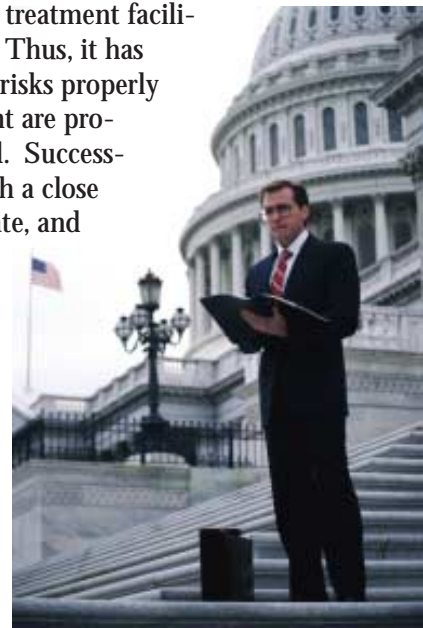
The information provided by Local Government Environmental Assistance Network (LGEAN) is for your review and convenience. It is not intended to provide legal advice or compliance instruction with respect to any specific matter or any other federal, state, or local regulation. The user shall be responsible for consulting with legal counsel and the appropriate federal, state, or local regulatory authorities before interpreting any regulations or undertaking any specific course of action.

Local governments are continually faced with the need to effectively manage all risks so that they may protect their assets, financial health, property, reputation, constituents, and natural resources. “Risk management is the decision-making process whereby a policy or regulation is developed after a risk has been identified and is integrated with other issues, including political, social, historical, and economic factors.”¹ Environmental risks (i.e., risks associated with environmental damage and compliance with federal and state environmental laws and regulations) are common to local government activities but have been poorly managed in the past because they have not been identified as potential sources of major liability. This *Primer* is written to define the issues and provide the terminology that will facilitate local government identification, management, and mitigation of environmental risks and liabilities.

Environmental liability is a legal obligation caused by the past or by the ongoing manufacture, use, release, or threatened release of a particular substance; or by other activities that adversely affect the environment and/or human health. In this day of diminishing natural resources, escalating threats from carcinogenic toxins and an increasing number of complex environmental regulations, local governments can incur environmental liability even when they operate and manage such common and essential municipal services as wastewater treatment facilities, municipal landfills, and pest control. Thus, it has become crucial to manage environmental risks properly so that human health and the environment are protected and natural resources are conserved. Successfully managing these risks must begin with a close consideration of the numerous federal, state, and local laws and regulations that may result in environmental liability.

Federal, state, and local environmental statutes, regulations, and ordinances, whether enforced by public agencies or through private citizens’ suits, give rise

¹ Pia Iolster, *Risk Assessment: The Role of Local Government* (Washington, D.C.: International City/County Management Association, 1997), 7.



to many types of environmental liabilities. Another source of environmental liability is “common law” (i.e., judge-made law or case law), which can vary from state to state. Under federal, state, and local statutes, regulations, and ordinances a local government held liable for environmental violations can be required to pay fines and penalties; it may also incur substantial costs to comply with environmental regulations and cleanup obligations under federal and state Superfund laws.² In a limited number of cases, liability for environmental violations may also result in jail terms for local officials.

The potential imposition of sometimes-massive monetary fines, penalties, and judgments, and the possibility of jail terms for its officials, is something that, even in times of prosperity, no local government can afford. In addition, as stewards of the environment, local governments owe their constituents clean, safe, and livable communities. For these reasons, local governments should be concerned about minimizing their exposure to environmental liabilities.

This *Primer* provides elected and appointed local government officials, as well as staff attorneys and environmental policy specialists, with a general discussion of the terms and issues related to environmental liability to help them better identify and manage environmental risks. Our belief is that the city manager and/or elected official must be able to recognize and identify potential sources of environmental liability before he or she can evaluate and manage them. The *Primer* will also help guide future discussions and actions with staff attorneys and environmental policy specialists.

The following topics are discussed below:

- Local Operations with Potential for Environmental Liability
- Categories of Environmental Liability
- Federal Statutes That Affect Local Governments
- Common Law Forms of Environmental Liability
- Strategies for Minimizing Local Government Environmental Liability Exposure

Local Operations with Potential for Environmental Liability³

The following is a generic list of local government operations and services that are regulated under state and federal laws and regulations as well as under common law theories and could create potential for environmental liabilities. Liability may be incurred when an action committed by the local government or one of its employees violates an environmental law. Generally, a violation of environmental law gives the federal or state governments and their agencies, or affected citizens, a direct cause of action or right of enforcement.

Construction and maintenance

- Roads/bridges/tunnels
- Buildings

Pesticide management

- Purchasing pesticides
- Applying pesticides
- Storing pesticides
- Disposing of pesticides
- Spill response

Public safety

- Emergency planning
- Fire protection
- Police protection

Solid waste management

- Collecting and storing municipal solid waste
- Recycling and composting
- Source reduction
- Disposal
- Household hazardous waste collection and storage
- Siting waste facilities

Wastewater collection and treatment

- Operation and maintenance of sewer systems
- Wastewater treatment

Water resources management

- Surface water protection
- Groundwater (wellhead) protection

Water supply

- Water treatment
- Water distribution system operation and maintenance

Vehicle/equipment maintenance

- Vehicle repair shops
- Fueling stations
- Purchasing

Local government regulatory programs

- Pretreatment program
- Air pollution control
- Land use planning/zoning

Other

- Power generation/utilities
- Transportation
- Land acquisition or foreclosure
- Environmental justice – civil rights or Title VI suit
- Locally unwanted land uses



² For examples of local government violations of various environmental laws, visit the Local Government Environmental Assistance Network (LGEAN) Web site at <<http://lgean.org/html/ela2.cfm>>.

³ More detailed information on the operations identified in this section can be found on the LGEAN Web site under “Regulatory Information” at <<http://lgean.org/html/lgo/toc.cfm>>.

Categories of Environmental Liability⁴

This section identifies the obligations and liabilities that may be triggered if local governments violate federal, state, or local environmental statutes, regulations, and ordinances. Another source of liability can be the common law (i.e., judge-made law or case law), which may provide the basis for a cause of action even if a local government has complied with federal and state laws and regulations. (Common law environmental liability is discussed in more detail in a later section of the *Primer*.) Most federal and state environmental laws sanction violators through administrative, civil, or criminal proceedings. Although being held liable commonly leads to large fines—which are assessed in administrative and civil actions—parties held criminally liable for their actions can be sentenced to jail. The following terms are used to denote categories of environmental liability.

Compliance obligations: Obligations prescribed by laws and regulations that apply to the manufacture, use, disposal, and release of chemical substances and to other activities recognized under environmental laws and regulations as adversely affecting the environment, such as dredging a wetland.

Remediation obligations: Obligations to clean up a site and/or pay for the cleanup of a site contaminated by chemicals and other wastes considered under law, regulations, and by science to pose adverse health risks to humans and the environment. Such sites could include old or previously undiscovered landfills.

Fine and penalty obligations: Obligations to pay fines or penalties under civil or criminal law for noncompliance and/or expenses for supplementary environmental projects⁵ (SEPs) agreed to as part of a settlement for noncompliance.

Compensation obligations: Obligations under some state and federal statutes (as well as under common law), to pay (or “make whole”) individuals and businesses for damages suffered by them or their property from the use or release of toxic substances or other pollutants. Commonly known as “compensatory damages,” these liabilities may occur even if a local government is in compliance with all applicable environmental standards.

Punitive damage obligations: Obligations to pay damages, which are punitive⁶ in nature and are imposed in addition to compensatory damages; to punish and deter conduct viewed as showing callous disregard of others or as being grossly negligent. Punitive damages are typically awarded in addition to compensatory damages, thus dramatically increasing the potential overall costs of environmental liability.

Natural resource damages (NRD) obligations: Obligations (normally in the form of fines) arising from natural resources liability. Natural resource liability arises from injury, destruction, or loss of natural resources that do not constitute private property. Federal, state, local, foreign, or tribal governments must control natural resources, which include plants, wildlife, land, air, and water. NRD can be imposed for accidental releases (e.g., during transport) as well as lawful releases. Penalties can be prescribed under the following federal laws: Comprehensive Environmental Response Compensation and Liability Act; Oil Pollution Act; and Clean Water Act, all of which are discussed in the following section.

⁴ U.S. Environmental Protection Agency (EPA), *Valuing Potential Environmental Liabilities for Managerial Decision-Making: A Review of Available Techniques*, EPA 742-R-96-003 (December 1996), Section 3. Please refer to this EPA document for a more comprehensive discussion of information discussed in this section (available at <<http://www.epa.gov/opptintr/acctg/liabilities/table.htm>>, 11/22/00).

⁵ SEPs are compliance agreements entered into during the settlement process to reduce a predetermined penalty in return for an environmental project. In most cases the estimated cost of the project is greater than the predetermined penalty. SEPs allow local governments the opportunity to put penalty payments toward projects that benefit the environment and the public, while restoring their reputation.

⁶ Punitive damages are awarded in cases of serious or malicious wrongdoing to punish or deter the wrongdoer or deter others from behaving similarly.



Federal Statutes That Affect Local Governments



This section identifies and briefly describes the major federal environmental laws. It does not cover state laws (many of which are modeled after federal law) or the numerous local ordinances that deal with environmental issues. Generally, state law compliance requirements equal or exceed their federal counterparts. Many federal

environmental laws are implemented and administered by the states under delegation from the Environmental Protection Agency (EPA). More comprehensive coverage of the environmental laws identified below is available on the Local Government Environmental Assistance Network (LGEAN) at <http://lgean.org/html/regs.cfm>. Information about federal statutory programs that have been delegated to the states and a list of general state environmental contacts are also available at this site.

Clean Air Act of 1970 (CAA), 42 U.S.C. §§ 7401, et seq.

The CAA regulates air emissions from area, stationary, and mobile sources. It established the National Ambient Air Quality Standards (NAAQS) to protect human health and the environment. To facilitate compliance, the act also directs the states to develop state implementation plans (SIPs) applicable to appropriate industrial sources.

Clean Water Act of 1977 (CWA), 33 U.S.C. §§ 1251, et seq.

The CWA amended the Federal Water Pollution Control Act of 1948 (FWPCA) to give EPA the authority to set technology-based effluent standards on an industry basis. The law also requires EPA to set water quality standards for all contaminants in surface waters. Under the CWA, it is unlawful to discharge any pollutant from a point source into a navigable water without National Pollutant Discharge Elimination System (NPDES) permits.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601, et seq.

CERCLA established a fund, or Superfund (as the program is more commonly referred to), to respond to releases or threatened releases of hazardous substances and to clean up the country's most contaminated sites. CERCLA's primary mission is to clean up sites that may present a substantial danger to public health, welfare, and/or the environment.

Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. §§ 11001, et seq.

EPCRA, or the Superfund Amendments and Reauthorization Act of 1986 (SARA) Title III, was enacted to help local communities protect public health, safety, and the environment from chemical hazards. The law requires the states to develop state emergency planning committees (SERCs), which in turn are required to divide their states into state emergency planning districts and appoint a local emergency planning committee (LEPC) for each district.

Endangered Species Act of 1968 (ESA), 7 U.S.C. § 136; 16 U.S.C. §§ 460, et seq.

The purpose of the ESA is to provide a program to protect threatened and endangered plants and animals and the habitats in which they are found. The Fish and Wildlife Service (FWS) maintain a list of endangered and threatened species.

Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (FIFRA), 7 U.S.C. §§ 136, et seq.

The purpose of FIFRA is to provide federal control of pesticide distribution, sale, and use. It requires both producers and purchasers of pesticides to register with EPA.

National Environmental Policy Act of 1970 (NEPA), 42 U.S.C. §§ 4321, et seq.

The purposes of this act are to declare a national policy that will encourage produc-



tive and enjoyable harmony between people and the environment; to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humankind; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a council on environmental quality

Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2702, et seq.

The Oil Pollution Act strengthened EPA's ability to prevent and respond to catastrophic oil spills. The act also established a trust fund to clean up sites for which responsible parties cannot or will not take responsibility, requires oil storage facilities and vessels to submit plans for responding to discharges, and requires the development of area contingency plans to prepare for potential spills at a regional level.

Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901, et seq.

RCRA gives EPA the authority to control hazardous waste during generation, transportation, treatment, storage, and disposal—or, as many note, from “cradle-to-grave.” The 1986 amendments set standards for underground storage tanks. RCRA covers only active and future facilities.



Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. §§ 300f, et seq.

The purpose of the SDWA is to protect the quality of any waters (above or below ground) designated or potentially designated for drinking use. The Act authorizes the establishment of safe standards for water purity and requires all owners or operators of public water systems to comply with primary (health-related) standards.

Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601, et seq.

TSCA gives EPA the authority to track all current and future chemicals produced or imported into the United States. It also enables EPA to ban the manufacture and importation of chemicals that pose an unreasonable risk.

Common Law Forms of Environmental Liability

Common law was first developed in English courts and subsequently adopted in the United States. It is the body of law based on judicial precedent as reflected in the written decisions of judges in a jurisdiction, rather than on statutory law adopted by the jurisdiction's legislative body.

Like statutory law, common law may differ among jurisdictions, and it plays a definite role in environmental liability.⁷ In fact, the majority of environmental suits filed against local governments will probably arise under common law. Although damages awarded are usually lower under common law than under federal and state statutory law, common law suits can bring certain government activities to a screeching halt. The following briefly identifies the common law theories most typically used in current environmental litigation.

Negligent misrepresentation: Negligent misrepresentation occurs when a party misstates or misrepresents information. Local governments could incur liability in the form of negligent misrepresentation when they provide information to prospective purchasers, their agents, or other persons regarding land to be sold by the local government, or when they provide information to environmental auditors regarding such matters as previously owned land.

Private nuisance law: Local governments may be held liable for nuisance when they interfere with the use or enjoyment, or both, of another's property, or when such use injures the life or health of another party. Most modern statutory environmental liability laws grew out of common law private nuisance principles.

Public nuisance law: Alternatively, public nuisance typically arise when the use of property by one party offends the senses or violates principles of decency of the community or obstructs the free passage or use of highways, navigable streams, public parks and beaches, and other public rights.⁸

⁷ “Although many of today's environmental controversies involve public law statutes and regulations, in functional terms the common law made by judges and private litigants over the course of the last 800 years continues to play a critical role in environmental law.” Citing from J.B. Zygmunt Plater, et al., *Environmental Law and Policy: Nature, Law, and Society*, American Case Book Series (St. Paul Minn.: West Publishing, 1992), 101.

⁸ Plater, et al., *Environmental Law and Policy: Nature, Law, and Society*, 112 and 122.



Riparian rights: Depending on the state common law, the use of local water may be governed by riparian rights concepts. Since property owners whose land abuts a lake or a stream seldom own the water, the common law extends protection to water quality through riparian rights. Riparian rights allow water users to sue those who damage water quality to the point where its use and enjoyment are reduced. Riparian rights doctrines include (1) reasonable use doctrines; (2) first in time, first in use; and (3) a hybrid doctrine (California Doctrine).

Toxic tort: a tort is a wrongful act other than a breach of contract that injures another; a toxic tort entails personal injury or property damage due to exposure to toxic substances. Toxic torts may arise when large classes of victims are exposed to serious harm, such as asbestos exposure or pesticide and herbicide spraying.

Trespass law: Trespass creates rights similar to those of nuisance. If a harmful substance is allowed—intentionally or carelessly—to invade the property of another, whether by land, air, or water, it may be considered a trespass. If so, the local government may be held responsible for damages.

Strategies for Minimizing Local Government Environmental Liability Exposure

The best way for a local government to minimize its environmental liability exposure is to identify areas of potential risk and then develop and implement proactive management practices and guidance to reduce the risk of loss. A local government may begin this process by identifying applicable and relevant laws and regulations that govern its operations and services. To manage environmental impacts in a more efficient and cost-effective manner, several local governments have been experimenting with environmental management systems (EMSs). An EMS is a set of management processes and procedures that allow an organization to evaluate, control, and reduce the environmental impact of its activities, products, and services, resulting in greater operational efficiency and control.

EMSs are being widely adopted in the private sector and some forecast them to become a prerequisite for business transactions on a national and international level. Most private sector EMSs are based on the ISO 14001 standards; a series of international environmental management standards for which an entity can be certified as compliant through a third-party accreditation process; however, it is not necessary to obtain accreditation or precisely follow the ISO 14001 model to benefit from implementing an EMS.⁹

In 1997, EPA selected and funded the Global Environment and Technology Foundation (GETF) to conduct an EMS pilot project designed to study the effectiveness of EMSs in nine local government operations. At the study's conclusion, GETF's "data suggested that EMSs are applicable and beneficial at local government operations."¹⁰ The final GETF report notes that participants reported benefits in environmental compliance and performance, improved environmental awareness, involvement, and competency throughout the organization, better communication about environmental issues inside and outside the organization, improved efficiency, reduced costs, greater consistency, and better relationships with regulators.

Some of the basic steps to be taken when developing an EMS include the following:

- Review the local government's existing environmental goals or create an environmental policy for the local government
- Identify and analyze the local government's current environmental impacts and the legal requirements relating to those impacts
- Set environmental objectives and targets to reduce the local government's environmental impacts and comply with applicable legal requirements
- Establish programs to meet these objectives
- Monitor and measure progress in achieving the objectives
- Provide education and training to ensure public employees' environmental awareness and competence
- Regularly review the progress of the EMS and make necessary improvements.¹¹

⁹ Please refer to the ISO 14001 Web site at <<http://www.iso.org/iso/14001/faq/index.html>> for more information on the ISO model. More resources on EMSs are available on the LGEAN Web site.

¹⁰ GETF, *Final Report: The U.S. EPA Environmental Management System Pilot Program for Local Government Entities* (Annandale, Va.: GETF, 28 January 2000), 7 (<<http://www.getf.org/projects/ems1.pdf>>, 8/22/00).



Other Environmental Management Tools

Several tools can be used in conjunction with, or independently of an EMS to help local governments identify and avoid environmental liabilities:

Environmental audits: Compiling information on a specific media type to determine if an operation or facility is in compliance with federal environmental requirements. EPA has developed specific self-assessment protocols for a number of regulated media. For more information, go to EPA's Web site at <http://es.epa.gov/oeca/main/strategy/crossp.html> or see a related article on LGEAN at <http://lgean.org/html/whatsnew.cfm?id=77>.

Due diligence: In general, due diligence is an investigative process that seeks to identify potential problems with property prior to acquisition. An example of a due diligence activity is the completion of appropriate title searches. In the environmental liability context, a local government performs due diligence when it searches for possible preexisting environmental contamination of a property. If the prospective buyer's investigation satisfies certain basic requirements, the buyer will not be held liable for undiscovered problems, such as environmental contamination, that are found after the sale has become final. The adequacy of the buyer's due diligence is evaluated according to the facts of the situation and governed by any absolute standard. In general, due diligence is demonstrated if the prospective purchaser undertakes the investigation that a "reasonable person" would undertake in the same circumstances.

Environmental insurance: Environmental insurance policies can help finance the costs associated with future unforeseen environmental liabilities, such as the discovery of previously undiscovered toxic contamination.

Familiarity with applicable laws and regulations: Advance familiarity with environmental laws and regulations can help a local government reduce the likelihood of incurring environmental liability, while improving its ability to respond to and mitigate potential liabilities before they occur.

Resources: A local government's ability to record, permit, monitor, and enforce environmental laws and regulations can reduce liability by developing a structure that is risk averse and proactive in its application.

Conclusion

We have attempted to cover the most important and common types of environmental liability. We recognize that the *Primer* may not have all of the answers, however, it provides a good framework from which local governments can begin looking at environmental liability and developing systematic responses. Our primary goal was not for local governments to take away from this a complete understanding of environmental risk, but rather for them to realize the importance of effectively and efficiently managing risk of exposure to environmental liability. A reduced exposure to environmental liability manifests itself by protecting human health and the environment, conserving natural resources, reducing costs, and building friendly and livable communities that are attractive to residents, investors, and businesses.

Local governments that decide to take the next step should begin by assessing their regulatory requirements and environmental risks. In embarking on a track to manage environmental risk, local governments should also be prepared to dedicate sufficient resources and apply current risk management approaches, which may include EMSs. Most important, local government leaders should work closely with their attorneys. In some cases, it may even be necessary to hire outside counsel who specialize in environmental law.



¹¹ Adopted from GETF, *Local Government and Environmental Management Systems: Frequently Asked Questions, 1* (available at <<http://www.getf.org/projects/minifaq.cfm>>, 8/22/00).



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About ICMA

The International City/County Management Association (ICMA) is the professional and educational organization representing appointed managers and administrators in local governments throughout the world. The association sponsors, develops, and implements a number of programs that provide local government managers and administrators with expertise on a variety of topic areas. ICMA is responsible for the construction and day-to-day management of the Local Government Environmental Assistance Network (LGEAN).

About LGEAN

LGEAN is ICMA's "first stop shop" for environmental management, planning, and regulatory information for local government elected and appointed officials and their staff. Visit LGEAN at <http://lgean.org> or call 877/865-4326.

About PERI

The Public Entity Risk Institute (PERI) is a nonprofit organization created to serve public, private, and nonprofit organizations as a dynamic, forward-thinking resource for the practical enhancement of risk management. PERI fulfills its mission by promoting synergy among existing organizations, serving as a catalyst for innovation in the risk management field, and providing resources to address key needs in risk management. Visit PERI's Web site at <http://riskinstitute.org/>, or contact them at 703/352-1846.

About IMLA

Formerly the National Institute of Municipal Law Officers, the International Municipal Lawyers Association (IMLA) is the nonprofit, professional organization that has served as an advocate and valuable legal resource for local government attorneys since 1935. IMLA will play a significant role in the Environmental Liability Outreach (ELO) project by serving as a resource to local officials on environmental liability issues. Visit IMLA's Web site at <http://www.imla.org>, or contact them at 202/466-5424.