

# Park Districts Coping With Environmental Liability and Environmental Responsibility in the Nineties

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## INTRODUCTION

### A. BACKGROUND

Since the passage of sweeping environmental legislation over a decade ago, the federal government has spent billions of dollars cleaning up the nation's hazardous waste sites. Over the next several years, the federal, state, and local governments will spend billions more in an effort to carry out federal mandates under CERCLA<sup>1</sup> and its progeny.<sup>2</sup> These various government agencies will also be seeking to recover their cleanup costs from responsible parties who created the problems. In the past, environmental cost recovery actions at the state and federal levels have aggressively pursued private industry. There is some indication, however, that authorities will broaden the enforcement loop to include more local governmental bodies as defendants. The push to include municipalities appears to be driven by private industry in search of additional "deep pockets," as well as Congressional efforts at more stringent enforcement against noncompliant municipalities.

### B. LOCAL GOVERNMENTS LIABLE FOR ENVIRONMENTAL VIOLATIONS

Although local governments are potentially liable for violations of most state and federal environmental laws, these political bodies

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1. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675 (1988)).

2. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986); Hazardous and Solid Waste Amendments Act of 1984, Pub. L. No. 98-616, 98 Stat. 3277 (1984).

have been criticized for having only a vague understanding of what these laws require of them until they actually receive notice of their potential liability.<sup>3</sup> Other municipalities, though cognizant of the requirements imposed on municipal corporations by such federal legislation as the Clean Water Act ("CWA"),<sup>4</sup> are actually opposed to compliance with the provisions of these Acts for reasons that include lack of financial wherewithal, public support, and public perception of necessity.<sup>5</sup> Whatever the reasons for this apparent non-compliance, in 1989, reportedly over two-thirds of the nation's 15,600 wastewater treatment plants failed to comply with CWA standards.<sup>6</sup> Additionally, statistics from the same year show nearly 20 percent of the 1,226 sites on the Superfund National Priorities List ("NPL") are municipal landfills.<sup>7</sup>

As an example, four villages in Ford County, Illinois formed a corporation to operate a landfill.<sup>8</sup> The corporation was issued a permit in 1974 and accepted waste until 1986 at which time it ceased operations because of problems in securing proper insurance. The corporation violated numerous environmental laws by failing to meet closure, post-closure and financial assurance standards required by law for the operation of landfills. Because the landfill property is owned by only one of the villages, that village faces tremendous liability as the property's owner. The state, however, has the discretion to go after one or all of the villages.<sup>9</sup> Under joint and several liability, courts have consistently upheld the ability of the Environmental Protection Agency ("EPA") to prosecute any or all potentially responsible parties.<sup>10</sup> This situation illustrates the problems that can arise from the failure of a local government to determine the legal and financial consequences of its actions.

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3. See Rena Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 URB. LAW. 79, 79-81 (1990) (regarding CERCLA).

4. 33 U.S.C. §§ 1251-1387 (1988).

5. See Glenn E. Deegan, Comment, *Judicial Enforcement of State and Municipal Compliance with the Clean Water Act: Can the Courts Succeed?*, 19 B.C. ENVTL. AFF. L. REV. 765, 767-68 (1992) (regarding CWA).

6. Douglas Jehl, *Clean Water Cost Put at \$83.5 Billion*, L.A. TIMES, Feb. 15, 1989, at A4.

7. U.S. GEN. ACCT. OFF., PUB. NO. GAO/RCED-89-165, NONHAZARDOUS WASTE: STATE MANAGEMENT OF MUNICIPAL LANDFILLS AND LANDFILL EXPANSION 2 (1989).

8. Telephone Interviews with Attorneys from the Illinois Attorney General's Office.

9. 415 ILCS 5/22.18(B)(b)(1) (1992).

10. See, e.g., *United States v. Kramer*, 757 F. Supp. 397, 433-35 (D. N.J. 1991) (discussing the EPA's discretionary enforcement powers under CERCLA).

## II. ENVIRONMENTAL RESPONSIBILITY OF PARK DISTRICTS

Like all other local governmental units in Illinois, park districts have environmental responsibilities that cover the whole range of environmental concerns: air, water, and land. Park districts typically manage large areas of land and frequently control other recreational facilities such as beaches, lagoons, and harbors. Park districts are expected to comply with an ever increasing number of detailed and complex environmental regulations promulgated by the state and federal governments. In addition, park districts are viewed as important and integral partners in protecting the state's natural resources and environment. As such, the public has come to expect and demand that park districts play a major role in implementing a variety of highly visible, innovative, non-mandated environmental initiatives.

In this regard, the Chicago Park District stands as a model. Over the years, often in cooperation with community groups and other governmental entities, the Chicago Park District has undertaken a remarkable number of initiatives aimed at promoting and educating the public about sound environmental and ecological practices. In fulfilling its responsibility to the environment, the District is involved in a number of ongoing projects.<sup>11</sup> These projects help to establish the Chicago Park District in the community as an environmental

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11. A partial listing of the Chicago Park District's voluntary environmental initiatives includes:

- (a) a cooperative intergovernmental effort to create bike paths and related facilities with the goal of increasing bicycle usage for general transportation and commuting purposes;
- (b) an agreement with the Metropolitan Water Reclamation District to develop a gateway park to the North Branch River Walk;
- (c) the creation of an underground engineering system to hydrate parched trees and landscapes from rainwater; (d) co-sponsoring an Earth Day for Chicago in which over 10,000 volunteers participated in the cleanup of more than 300 parks and beaches;
- (e) planting in excess of 10,000 trees and shrubs in 1992;
- (f) recycling such natural items as tree branches, leaves, grass clippings, and Christmas trees;
- (g) recycling plastic and processing it into plastic timbers which are used in the Park District's soft surface playlot program;
- (h) launching a comprehensive tree care program called "Save the Shade" to educate the public on the vulnerability of Chicago's trees;
- (i) cooperating with the Army Corps of Engineers to secure approval to reconstruct 8 miles of Lake Michigan shoreline; and
- (j) purchasing a small parcel of wetland for the purpose of preserving the wetland and using it as an opportunity to educate the public on the importance of urban wetlands.

activist. Although park districts may be tempted to devote significant financial resources to voluntary initiatives, the penalties for non-compliance with mandated environmental activities may be so severe that environmental compliance should receive priority. Additionally, park districts which find themselves in trouble with environmental regulatory agencies may receive extremely negative publicity and, hence, community sympathy will be hard to find.

### III. THE IMPACT OF ENVIRONMENTAL REGULATIONS ON PARK DISTRICTS

In their day to day operations, park districts are confronted with numerous environmental issues such as the use of underground storage tanks for fueling vehicles and heavy equipment, the use of pesticides and herbicides in planting operations, lead in play areas, and activities of others who operate on park district property that may violate environmental laws. The potential liability that local governments are exposed to under CERCLA,<sup>12</sup> the Resource Conservation and Recovery Act ("RCRA"),<sup>13</sup> the Underground Storage Tank program,<sup>14</sup> and other related environmental laws have had a major impact on local government operations.

Environmental statutes greatly impact the potential liability of local governments. Thus, at this point, an examination of the relevant statutes, their impact on local governments, and methods available to the local governments to reduce this potential liability is necessary.

#### A. POTENTIAL ENVIRONMENTAL LIABILITY IN REAL ESTATE TRANSACTIONS

To be sure, park districts should understand that they face potentially unlimited liability under Superfund if they own property where hazardous substances have been disposed.

CERCLA, commonly known as Superfund, was enacted by Congress in 1980 in an attempt to alleviate the health hazards created by abandoned disposal sites. The statute was amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")<sup>15</sup> which, in summary, provides for: (1) express private rights of action;<sup>16</sup> (2)

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12. 42 U.S.C. §§ 9601-9675 (1988).

13. 42 U.S.C. §§ 6901-6991 (1988).

14. 415 ILCS 5/4(v)(1) (1992).

15. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

16. 42 U.S.C. § 9659 (1988).

additional rights of contribution;<sup>17</sup> and (3) additional defenses.<sup>18</sup> The main purpose of CERCLA is to remedy past disposals of hazardous substances by: (1) providing for the establishment of a federal fund (Superfund) to finance cleanup of closed or abandoned hazardous waste sites;<sup>19</sup> and (2) forcing responsible parties to undertake cleanup action or allowing the federal government to recover the cost of cleanup from responsible parties.<sup>20</sup> The law does not exempt local, state or federal government from liability.<sup>21</sup>

CERCLA imposes broad liability against generators, transporters, owners and operators of hazardous waste sites.<sup>22</sup> In a series of landmark cases, federal courts have interpreted CERCLA to contain strict, joint and several liability with only a few limited defenses.<sup>23</sup> Under the original statute, the only defenses were an act of God, an act of war, or an act or omission of a completely unrelated third party which occurred without the defendant's cooperation or assent.<sup>24</sup> These limited defenses, obviously, provide little or no relief to the typical CERCLA defendant. For one thing, acts of God or war almost never occur. In cases where a third party is involved, there is usually some type of contractual relationship with the defendant so that the defense is not available.

The 1986 amendments sought to correct the unfairness of the original statute to innocent purchasers by providing the "innocent landowner" defense.<sup>25</sup> Under the provision, the landowner who takes title without knowledge of any environmental problems is exempt from liability in some instances.<sup>26</sup> The provision, however, is extremely limited. It requires the purchaser to undertake a fairly extensive inquiry into the condition of the property in order to demonstrate that at the time of acquisition, the purchaser did not know, and had no reason to know, that any hazardous substance was disposed of on, in, or at the facility.<sup>27</sup> A second provision of the amendments exempts local government site owners from liability in the case of involuntary takings such as that which occurs through the previous

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17. 42 U.S.C. § 9613(f) (1988).

18. 42 U.S.C. § 9607(b) (1988).

19. CERCLA, *supra* note 1.

20. 42 U.S.C. § 9607(a) (1988).

21. 42 U.S.C. § 9607(d)(2) (1988).

22. 42 U.S.C. § 9607(a) (1988).

23. Steinzor, *supra* note 3, at 88-89.

24. Pub. L. No. 96-510, § 107, 94 Stat. 2767, 2781 (1980).

25. 42 U.S.C. § 9607(b)(3) (1988).

26. *See id.*

27. *See id.*

owner's bankruptcy, tax delinquency or abandonment.<sup>28</sup> As a practical matter, it is difficult to imagine this provision ever providing any protection against environmental liability to park districts. Title transfer to a park district under eminent domain, for example, is a voluntary taking, and, therefore, would probably not fall within the local government exemption.

The issue of a property owner's potential environmental liability arises in many other real estate transactions and should be of major concern to park districts. Recently, in Cook County, it has become popular for park districts and other local governments to acquire property through the county's scavenger sale program. This method of acquiring property should be used with extreme caution, giving due consideration to potential environmental exposure by looking into past history of the property and how it was used. If a preliminary search of records raises suspicions, and there is no practical way to determine the environmental risks involved with the property, it would not be prudent to pursue such property. If, on the other hand, the environmental risks are determined, the governmental unit is in a position to make a more informed business decision regarding the propriety of acquiring the property. Occasionally, local governments may receive property through a private donation. Park districts, especially, may be approached by developers to acquire a portion of the development site to create a park as an enhancement to the development. In all real estate transactions, local governments should proceed on the assumption that they generally will not be exempt from environmental liability. Accordingly, park districts should make every effort to avoid acquiring properties with environmental problems. Regardless of the manner in which park districts acquire property, they would be well advised to exercise due diligence. At a minimum, park districts should conduct on-site observations of the property for any physical signs of environmental problems and an examination of the property's chain of title to determine prior owners and uses of the land in order to protect themselves against environmental liability. Park districts may also find it useful to make environmental audits an integral part of their real estate transactions.

#### B. LOCAL GOVERNMENT LIABILITY FOR UNDERGROUND STORAGE TANKS

Another major source of potential liability for local governments, including park districts, is compliance with underground storage tank

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28. *See id.*

regulations. Most local governments own and operate a large number of underground storage tanks ("USTs"), many of which may be subject to regulation. In addition to state regulations,<sup>29</sup> USTs are regulated by federal legislation known as a subchapter of the Resource Conservation and Recovery Act ("RCRA"), also known as the Solid Waste Disposal Act.<sup>30</sup> The final regulations, enacted in 1988, consist of substantive performance standards, record-keeping and recording obligations, release response requirements, closure requirements, and financial responsibility requirements. Owners and operators of USTs will likely devote considerable attention to trying to understand and comply with these regulations. The federal statute defines an underground storage tank as "any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances,"<sup>31</sup> the volume of which is 10 per centum or more below the surface. The definition expressly excludes any farm or residential tank containing less than 1100 gallons used for the storage of heating oil for consumption on the storage premises; septic tanks; pipeline facilities, surface impoundments, pits, ponds, lagoons; storm or waste water collection systems; and storage tanks that are situated above the floor in such areas as a basement or cellar.<sup>32</sup> Regulated substance means hazardous materials as defined in 42 U.S.C. 9601(14) and petroleum.<sup>33</sup>

In Illinois, USTs are concurrently regulated by the Illinois Environmental Protection Agency ("IEPA")<sup>34</sup> and the Office of the State Fire Marshal.<sup>35</sup> The IEPA's regulations are identical to those of the U.S. Environmental Protection Agency. The Underground Storage Tank Program is administered by the Illinois Office of the State Fire Marshal which has also promulgated regulations that correlate with the regulations adopted by the IEPA.<sup>36</sup> In 1990, the UST regulations extended to heating oil tanks with a capacity of 1100 gallons or greater.<sup>37</sup> These USTs must have been registered with the State Fire Marshal along with the payment of registration fees by certain dead-

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29. 415 ILCS 5/22.18 (1993).

30. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. §§ 6901-6991 (1988)).

31. 42 U.S.C. § 6991(1) (1988).

32. *Id.*

33. 42 U.S.C. § 6991(2) (1988).

34. 415 ILCS 5/4 (1992).

35. 430 ILCS 15/4 (1992).

36. 415 ILCS 5/22.4 (1992).

37. 430 ILCS 15/4 (1992).

lines. The registration varies depending on whether the UST contained heating oil or some other substance. There is a penalty for late registration. Again, local governments are not exempt from these requirements.

The potential liability for leaking tanks can be substantial. Both the UST's owner and operator are responsible for compliance with UST statutes and regulations.<sup>38</sup> The IEPA, however, is authorized to take whatever preventive or corrective measures, including removal or remedial action, that is necessary in the event of a release or substantial threat of release of hazardous substances, pesticides, or petroleum from USTs.<sup>39</sup> UST owners and operators are liable for the costs of all preventive, corrective, and enforcement action incurred by the State of Illinois that result from the release or threatened release of petroleum from an UST.<sup>40</sup>

Failure to comply with UST registration requirements can have disastrous financial consequences for any UST owner, especially local governments which operate on very limited public funds. In the usual case, the owner or operator who has complied with the State Fire Marshal's registration requirements will be eligible to receive money for clean-up costs from the Illinois Underground Storage Tank Fund, after application of a \$10,000 deductible.<sup>41</sup> If none of the tanks at the site of the leak were properly registered, the IEPA will apply a \$100,000 deductible before reimbursement for clean-up costs.<sup>42</sup> Each owner or operator must maintain responsibility for \$10,000 per occurrence for corrective action and the same amount per occurrence for third-party bodily injury and property damage.<sup>43</sup> Evidence of financial responsibility must be maintained by commercial or private insurance, qualification as a self-insurer, guarantee, surety bond, letter of credit, certificate of deposit or designated savings account.<sup>44</sup>

Disputes may arise over who is responsible for UST compliance where the owner is not the same party as the operator of the UST. For example, in the absence of explicit contractual provisions, a concessionaire who operates an UST on park district property may argue that the park district, as owner, is responsible for complying

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38. 42 U.S.C. § 6991b(h)(6)(A) (1988); 415 ILCS 5/22.18 (1992); 40 C.F.R. § 280.72 (1992); 35 ILL. ADMIN. CODE § 731.172, *repealed by* 16 ILL. REG. 7407 (1992).

39. 415 ILCS 5/4(d)(2) (1992).

40. 415 ILCS 5/22.18 (1992).

41. 415 ILCS 5/22.18(b) (1992).

42. *Id.*

43. 430 ILCS 5/6.1(b) (1992).

44. 430 ILCS 15/6.1(c) (1992).



with UST requirements. Without express contractual language, questions of liability may well depend on an interpretation of the contract by the court.

Therefore, where USTs are operated by a contractor, concessionaire or licensee on local government property, the contractual relationship should be structured so that (1) the UST operator is wholly responsible for compliance and (2) the local government is fully indemnified against liability. Furthermore, the local government should monitor the licensee's actions in order to protect itself against liability as owner. Efforts to limit local government liability for underground storage tanks will depend on understanding the ever-expanding UST regulations and establishing a comprehensive management system that is adaptable to changing requirements.

#### IV. RELATED ENVIRONMENTAL LAWS AND POTENTIAL LIABILITY FOR ACTIVITIES OF GUN CLUB TENANTS

In recent years, the operation of gun clubs on publicly-owned property has emerged as one of the most controversial and politically sensitive environmental issues facing a number of local government property owners. Chicago-area gun clubs have included among others, the former Northbrook Gun Club in Deerfield, Illinois which operated on a site jointly owned by the Village of Deerfield and the State of Illinois; the Milwaukee Gun Club which operated on property owned by Milwaukee County along Lake Michigan; and the former Lincoln Park Gun Club which operated from about 1918 until termination of its lease in 1991 on lakefront property owned by the Chicago Park District. In each of these cases, the local government owner sought to curtail the gun club's activities or terminate the lease agreement because of environmental concerns. From the beginning, opponents of these gun clubs have argued that the clubs' trapshooting activities were not compatible with the recreational use of lakefront property and, further, that the discharging of lead shot, clay targets, and shotgun shell waddings into lake waters and the surrounding land violates numerous state and federal environmental laws. The gun clubs, on the other hand, deem themselves to have been singled out unfairly by local government under pressure from environmental activists. Some have also argued that their shooting activities do not constitute an environmental hazard and that the clay targets that fall into the lake are no more hazardous than material routinely put into the lake as fill.

In 1991, a federal district court ruled that the deposition of lead shot into the Long Island Sound as a result of the operation of a trap

and skeet shooting club violated the RCRA.<sup>45</sup> The district court, however, was reversed on appeal.<sup>46</sup> The defendant had operated a trap and skeet shooting club in Stratford, Connecticut for over sixty years.<sup>47</sup> Lead shot and clay targets used in the sport fell onto the land leased or owned by the defendant and into the adjacent waters of Long Island Sound.<sup>48</sup>

In *Remington*, approximately four million pounds of lead shot and eleven million pounds of clay target were deposited in the area as a result of the club's shooting operations.<sup>49</sup> The defendant had neither a Clean Water Act permit to discharge pollutants at the club nor a RCRA permit to dispose of hazardous wastes.<sup>50</sup> In 1985, the Connecticut Department of Environmental Protection ordered Remington to undertake a study of the effects of lead shot on the aquatic life and water fowl of the Long Island Sound.<sup>51</sup> In 1986, the order was modified to requiring the club to completely cease from discharging lead shot into the Sound by the end of the year.<sup>52</sup> In 1987, the citizens group known as the Connecticut Coastal Fishermen's Association filed suit alleging that Remington violated the terms and provisions of the Clean Water Act by their unpermitted and unlawful discharges of lead from point sources into the Long Island Sound.<sup>53</sup> The Association also alleged that the RCRA had been violated by the club's unpermitted storage and disposal of hazardous waste, illegal open dumping of solid hazardous waste, and creating an imminent endangerment to the Sound and its biota.<sup>54</sup> The court left for the state court to decide whether the club's activities also violated the Clean Water Act.<sup>55</sup>

The factual circumstances of the Lincoln Park Gun Club (LPGC) are similar to those involved in *Remington*. LPGC began operating on lakefront property in 1912 and initially signed a lease with the Park District in 1921. It is estimated that approximately 40 to 3000

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45. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173 (D. Conn. 1991).

46. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1306 (2d Cir. 1993).

47. *Connecticut Coastal Fishermen's Ass'n*, 777 F. Supp. at 175.

48. *Id.* at 176.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 177.

54. *Id.* at 175.

55. *Id.*

tons of lead have been deposited into Lake Michigan from the lead shot used by the LPGC members. As in *Remington*, the LPGC neither had a Clean Water Act permit nor a RCRA permit.

In 1991, the Illinois Attorney General filed suit against the LPGC. Subsequently, the lease was terminated by the Park District. The lawsuit enjoined the club from further shooting activities and alleged in a five-count complaint virtually the same violations as involved in *Remington*. Specifically, it was alleged that LPGC violated the Clean Water Act and its Illinois equivalents; Illinois' Water Pollution Regulations, Illinois Environmental Protection Act, and it was also alleged that the LPGC had created a common-law public nuisance.

The action also called for substantial civil penalties against the LPGC and required the club to remove contaminants from the lake and its surrounding soil. A default judgment entered against the LPGC in 1992 ordered the removal of "all lead shot and clay target material . . . on the bottom of Lake Michigan, and any lead contamination of the soil."<sup>56</sup>

The Chicago Park District, as property owner of the former LPGC site, now finds itself in the position of having to respond to the environmental violations outlined in the lawsuit. Funding for an environmental investigation and feasibility study of the lake and soil around the former LPGC site was provided by the Park District and a USEPA grant made available through the IEPA. Final results are still pending.

Based on preliminary results, the environmental liability which the Park District now faces for remediation of the site is expected to be substantial. The Park District, the IEPA, and the Illinois Attorney General Office are currently cooperating to try to resolve the environmental problems at the former site of the LPGC.

The prospect of enormous liability for environmental cleanup at the site and the likely financial impact on the Park District, however, raise several important questions. Is it fair that the Park District and, therefore, the taxpayers of the City of Chicago should have to pay the cost of cleaning up the LPGC site, when the LPGC was the sole generator of the hazardous materials? If the LPGC's corporate status is dissolved, what recourse does the Park District have for recovery of cleanup costs? Alternatively, what is the likelihood of success in a cost recovery or contribution action against the LPGC's general

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56. *People v. Lincoln Park Traps, Inc.*, No. 91CH1181, slip op. at 3 (Cook County Cir. Ct. July 13, 1992) (on file with the *Northern Illinois University Law Review*).

liability insurer? If the Park District is required to bear the full cost of cleaning up the club site, what will be the financial impact on competing spending priorities, especially other environmental initiatives of the Park District? What, if any equitable considerations might the Park District raise with the IEPA in order to persuade the state or federal government to assume part or all of the gun club's cleanup costs?

Legal counsel will likely play an important role in helping the Park District sort through these and other issues with the ultimate goals of cleaning up the site, reducing the financial consequences to the Park District, and returning the gun club's former site to public use.

### CONCLUSION

In light of the steep damages threatened by most environmental legislation and efforts by enforcement authorities to more frequently implicate local governments in violations of various federal legislation, future misapprehension of environmental law is no longer tolerable at the municipal level. In short, environmental mishaps and non-compliance are much too costly. Local governments, including park districts, cannot afford to be uninformed about their environmental responsibilities or liabilities. The Chicago Park District's efforts toward community and intergovernmental initiatives could very well provide a model of environmental regulation and compliance.

The challenge in the years ahead is for park districts and, in particular, the Chicago Park District to be as proactive in the highly regulated environmental area as these organizations have been in the past in promoting non-mandated innovative environmental initiatives. In addition, it will be extremely important for all local governments to obtain good current information as to the legal requirements for environmental compliance, focus on minimizing environmental mishaps through a strictly enforced risk management program, and whenever possible or appropriate, seek affirmative opportunities to shift environmental response costs on others, either through contractual agreements, negotiated settlements, or litigation.