



ILLINOIS STATE  
BAR ASSOCIATION

# ENVIRONMENTAL LAW

The newsletter of the ISBA's Section on Environmental Law

(Notice to librarians: The following issues were published in Volume 35 of this newsletter during the fiscal year ending June 30, 2005: November, No. 1; March, No. 2; May, No. 3).

## Recent cases of note for Illinois environmental law practitioners

By Joseph R. Podlewski, Jr., Schwartz, Cooper, Greenberger & Krauss, Chtd.

Several cases have been decided in Illinois and federal courts over the past six months that are significant to environmental law practitioners.

### 1. Implied Right of Contribution Under Section 107(a) of CERCLA Recognized

Since the United States Supreme Court severely restricted the circumstances under which a party could pursue a claim for contribution under Section 113(f) of CERCLA (42 U.S.C. § 9613(f)) in *Cooper Industries v. Aviall Services, Inc.*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004), the existence of an implied right of contribution under Section 107(a) of CERCLA (42 U.S.C. § 9607(a)) has been the subject of much commentary. Recently, the federal district court for the Northern District of Illinois recognized the existence of such a right in a case brought by the Metropolitan Water Reclamation District against a polluting tenant. *Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corp.*, 365 F. Supp. 2d 913 (N.D. Ill. 2005).

In denying the defendant's motion to dismiss the MWRD's claim for contribution under CERCLA Section 107(a), Judge James B. Zagel reasoned that if

an implied right of contribution existed under Section 107(a) of CERCLA prior to the enactment of CERCLA Section 113(f) under the 1986 Superfund Amendments and Reauthorization Act (SARA), it still must exist because SARA expressly preserved all preexisting state and federal contribution rights. (42 U.S.C. § 9613(f)(1)). In so doing, Judge Zagel agreed with the *Aviall* dissenters to the extent that they predicted how the Supreme Court would have ruled had it decided whether an implied right of contribution exists under Section 107(a).

Judge Zagel's decision is also notable for its handling of the Seventh Circuit's "innocent landowner" exception to the general rule prohibiting Section 107(a) cost recovery claims by parties potentially liable under CERCLA. Because an owner of property from which there is a release, or threatened release, of hazardous substances is liable under CERCLA for response costs, owners of contaminated properties are generally barred from maintaining cost recovery actions under Section 107(a) against other potentially responsible parties. However, the Seventh Circuit has carved out an exception to this general rule for "innocent landowners" that did not cause or contribute to the release. (*Rumpke v. Cummins Engine Co.*, 107 F. 3d 1235 (7th Cir. 1997); *Akzo*

*Coatings, Inc. v. Aigner Corp.*, 30 F. 3d 761 (7th Cir. 1994)). The MWRD, as property owner, attempted to avail itself of this "innocent landowner" exception to maintain a Section 107(a) cost recovery action against its polluting tenant. Although there appears to have been no evidence that the MWRD caused or contributed to the release, Judge Zagel nonetheless found the innocent landowner exception to be inapplicable because the MWRD "entered into a long term lease with a party it knew intended to keep and process chemical materials" and, by so doing, "did drastically increase the risk of contamination . . .". MWRD, 365 F. Supp. 2d at 917. Accordingly, the MWRD's claim for cost recovery was dismissed.

### 2. Wetlands Connected to Navigable Waters are "Adjacent"

In *U.S. v. Gerke Excavating, Inc.*, No. 04-3941, 2005 U.S. App. LEXIS 11830 (7th Cir. June 21, 2005), the defendant was found to have violated the Clean Water Act by filling a wetland area without a Section 404 permit issued by the Army Corps of Engineers (33 U.S.C. § 134). Appealing a summary judgment for the government and the imposition of a \$55,000 civil penalty, the defendant contended that the wetlands that were