



Environmental Due Diligence Guide

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Final Rule Offers Another ASTM Standard For Due Diligence Option at Rural Properties

The Environmental Protection Agency Dec. 23, 2008, promulgated a direct final rule giving prospective purchasers of larger rural tracts of land the option of using a new ASTM standard when conducting environmental due diligence reviews (73 FR 78651).

The rule allows but does not require prospective purchasers to use *Standard Practice for Environmental Site Assessments: Phase I Environmental Process for Forestland or Rural Property* (ASTM standard E2247-08), according to EPA.

“The standard is a methodology for conducting a Phase I site assessment,” according to Patricia Overmeyer of EPA’s Office of Brownfields and Land Revitalization. She said it closely tracks the existing “all appropriate inquiries” regulation and also provides helpful tips on how to conduct the assessment.

Phase I site assessments include interviewing owners or other parties, such as local regulators; obtaining or creating topographic maps; reviewing a property’s historical use and ownership records; taking aerial photographs; and visiting the site. The need for an emergency response can be determined through a Phase I assessment. No testing or sampling of soil or water is done in a Phase I assessment. Sampling, testing, and analysis of soil or water are conducted in Phase II environmental site assessments.

The new ASTM standard applies to assessments of forest or rural tracts of 120 acres or more. It is intended for use in the due diligence process when interested parties want to establish limits on liability for known or suspected contamination on property.

The 2002 brownfields amendments to the Comprehensive Environmental Response, Compensation, and Liability Act offer liability relief if prospective purchasers conduct “all appropriate inquiries” into present and past uses of the property and the potential presence of environmental contamination, according to EPA.

The final rule “allows for the use of an additional recognized standard” but it “does not require any person to use the newly recognized standard.” EPA also will continue to accept the ASTM standard promulgated in November 2005, ASTM E1527-05, as the standard for conducting all appropriate inquiries.

The direct final rule will take effect March 23, 90 days after its publication date, unless EPA receives adverse comment within the first 30 days. In that event, it would be withdrawn as a final rule and the process for a proposed rulemaking would apply. EPA simultaneously has issued the rule as a proposed rule for which there will be 30-day comment period ending Jan. 24.

For further information on the EPA rule, contact Patricia Overmeyer at overmeyer.patricia@epa.gov. The ASTM E2247-08 standard is available for purchase on the Web at <http://www.astm.org>.

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Enforcement

EU Directive Expected To Lead to Widespread Review

A European Union directive effective Dec. 26, 2008, is expected to lead to a wide-ranging review of how EU environmental legislation is enforced.

The Directive on the Protection of the Environment Through Criminal Law (2008/99/EC) was finalized by EU legislators in May 2008. EU countries have two years from the effective date to transpose the directive into national law.

Under the directive, EU member states are required to ensure certain violations of EU environmental law are punishable by criminal sanctions.

Covered violations include illegal disposal of radioactive substances, illegal trade in ozone-depleting substances, serious damage to conservation sites, and serious instances of waste dumping and negligent or deliberate pollution releases.

The legislation also requires member states to ensure legal persons, such as companies, can be held liable "where such offenses have been committed for their benefit."

Marc Pallemmaerts, senior fellow at the Institute for European Environmental Policy, said the directive would lead to an "across the board review of national legislation on environmental law."

Annex A of the directive as published in the Official Journal lists 69 EU environmental laws, violations of which could lead to criminal penalties under the new regime.

"Member states will effectively be forced to review the entire system of enforcement" for environmental law, Pallemmaerts said.

This will lead to concrete changes in some countries, such as Germany, where environmental law enforcement until now mainly has been based on civil sanctions, Pallemmaerts said. However, he said it will be a "huge exercise to go through the laws and regulations," meaning a number of member states are likely to miss the Dec. 26, 2010, deadline for transposing the Environmental Crime Directive.

Although the directive requires EU countries to criminalize certain environmental violations, it does not set out a scale of penalties.

The EU's executive body, the European Commission, originally proposed harmonized criminal penalties, but the European Court of Justice ruled in October 2007 that defining criminal sanctions was a matter for member states.

Mark Breddy of Greenpeace said this had weakened the final legislation, though it was "better to have it than not."

Pallemmaerts said harmonization of criminal penalties was "not beyond judicial review" because the finalized directive does require EU countries to adopt "effective, proportionate, and dissuasive" criminal sanctions.

Once the directive has been transposed by all EU countries, the commission could compare levels of penalties. If there is wide divergence between member states or penalties are judged insufficient, "a case could be made" for greater harmonization, Pallemmaerts said.

The finalized version of the directive is available on the Web at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF>.

BNA's ENVIRONMENTAL DUE DILIGENCE GUIDE

BNA's Environmental Due Diligence Guide (ISSN 1931-6615) is published monthly, at the annual subscription rate of \$305 for a single print copy, by The Bureau of National Affairs, Inc., 1801 S. Bell St., Arlington, VA 22202-4501. **Periodicals Postage Paid** at Arlington, VA and at additional mailing offices. **POSTMASTER:** Send address changes to BNA's Environmental Due Diligence Guide Report, BNA Customer Service, 9435 Key West Ave, Rockville, MD 20850. For Customer Service, please call 1-800-372-1033, M-F, 8:30 a.m. to 7:00 p.m. ET or visit <http://www.bna.com/contact>.

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On the Cutting Edge: An Insider's Perspective

Green Retrofits to Existing Buildings Key to Greenhouse Gas Reductions

To ensure ambitious greenhouse gas emission-reduction goals can be met, it will be necessary to mandate green retrofits to the existing building stock, a New York City attorney told BNA Jan. 8.

Considering that on average existing buildings account for 40 percent of greenhouse gas emissions nationwide, and up to 80 percent of emissions in some U.S. cities, ambitious reduction targets cannot be met if the focus primarily is on new construction or public buildings, Larry Schnapf, special counsel with Schulte, Roth, & Zabel, said. Retrofitting "existing buildings is the local solution to global climate change."

Citing the Intergovernmental Panel on Climate Change's study on commercial and residential buildings, Schnapf said the potential exists to cost effectively reduce baseline emissions in the commercial and residential building sectors approximately 29 percent by 2020. The technology to improve heating, insulation, lighting, and windows already exists, he said.

Schnapf also noted it is a good time to get these initiatives rolling. "High performance buildings will be a way to distinguish your property from a competing property. A growing concern of property portfolio owners is that nongreen buildings will become obsolete."

Furthermore, he added, considering the amount of anticipated vacancies over the next couple of years, it is an ideal opportunity to retrofit buildings.

Phase In Requirements

Schnapf suggested the most effective model for retrofitting buildings is the same scheme used for underground storage tanks. "There is an existing stock of buildings, and under this strategy you phase in requirements over time, mandating that older, less energy efficient buildings be retrofitted first," he said.

Regarding specific requirements, Schnapf said a building improvement plan, similar to an as-

bestos abatement plan, could specify how particular goals will be met.

Schnapf also noted that the economic downturn and troubled commercial real estate markets, which he called the "Great Recession," also must be considered when developing GHG reduction policies. As such, he noted that "carrots," or financial incentives, including public funding in the form of grants, low-interest bonds, or tax exemptions, must be offered to building owners to assist with funding retrofits.

However, he strongly feels sanctions as well as incentives are needed to force building owners to upgrade, especially in an economy where building owners are just trying to survive.

Schnapf also noted the potential tie-in to brownfield sites. Because several states, such as Iowa and Michigan, define brownfield sites as obsolete properties, there is the possibility of using brownfield money to retrofit buildings. Parties working in those states should be able to use that money for green retrofits, he explained.

Schnapf also suggested policymakers revisit initiatives undertaken during the Carter administration. In 1978, Carter signed into law legislation requiring energy audits for all federal buildings, federal energy efficiency requirements, and grants for weatherizations that were dismantled under the Reagan administration.

"People don't look back far enough and they forget the lessons from the past. Instead of reinventing the wheel, there are some good models from the 1970s that can be brought back. If those programs were implemented, we would have had more energy efficiency by now," Schnapf said.

Legal Considerations

Absent federal energy efficiency requirements for existing buildings, state and local governments are leading the charge, Schnapf said. This is problematic, he explained, because many local gov-

ernments need to get state approval to adopt energy requirements that are more stringent than state or federal requirements. "We need to ensure that locals can go beyond federal requirements if they choose. Right now, they can't," he said, noting the decision in *Air-Conditioning, Heating, and Refrigeration Institute v. City of Albuquerque* (D.N.M., Civ. No. 08-633 MV/RLP, 10/3/08).

The ruling by the U.S. District Court for the District of New Mexico was not a final decision on whether the city's laws violate pre-emption clauses in federal energy efficiency legislation, but it indicates at least some of the elements of the energy efficiency codes could be found to be in violation of federal law (17 EDDG 78, 10/16/08).

Need Technology-Forcing Laws

Schnapf also noted that historically, energy standards have been consensus standards based on economically feasible existing technologies rather than technology-forcing laws, such as the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act. "These laws forced the regulated community to come up with new technology."

"People arguing for more marketplace solutions and allowing businesses to continue business as usual are creating a generational moral problem," he said. Instead, "we have to create national uniform energy standards that states must implement."

While economic incentives are needed, standards with a "hard hammer" also are necessary, and a phase-in approach could work, Schnapf said.

It would be a mistake if the Obama administration only provides financial incentives for energy efficiency, he explained. "Incentives must be coupled with hard deadlines that go beyond consensus standards, much like we did with car emissions standards in the 1970s."

Hazardous Waste

\$1.7 Million Verdict Upheld, Court Says Shell Misled Buyer

A California appeals court Dec. 10, 2008, upheld a 2006 jury finding that Shell Oil Products U.S. should pay \$1.7 million to a California man for intentionally misleading him into thinking no environmental problems existed at a gasoline station the company sold to him in 2004 (*Atallah v. Equilon Enterprises*, Cal. Ct. App., 2d App. Dist., No. B195336, 12/10/08).

In an unpublished opinion, the California Court of Appeal, Second Appellate District, said there was overwhelming and at times undisputed evidence the company failed to disclose to the buyer that the Riverside, Calif., gasoline station's impact on a nearby water well had been the subject of numerous meetings between Shell (also known as Equilon Enterprises LLC) and local water quality officials.

Also deliberately undisclosed, the appeals court found, was one public agency's adamant opposition to the continued operation of the station and Shell's own internal estimates of the huge costs that would have to be incurred to comply with water quality officials' demands aimed at keeping the nearby well contaminant-free.

In addition to upholding the jury's \$1.7 million compensatory damages award in favor of purchaser Elias Atallah, the appeals court also ruled the lower court improperly barred the jury from weighing how much in punitive damages Atallah was entitled to because of the oil company's deceptive course of conduct during the 2004 gasoline station sale.

While the appeals court said the jury's 2006 verdict "recognized that Equilon was answerable to Atallah for punitive damages," the lower court did not allow the jury to actually consider the amount of such damages because it said Atallah did not have adequate financial information about Shell's ability to pay. The appeals court remanded the case for the trial court to reconsider how much Atallah should receive in punitive damages.

In upholding the jury's finding that Shell was liable for intentionally misrepresenting to Atallah the environmental condition of the gasoline station, the court said, "Equilon (Shell) contends that there is no evidence of any intent to conceal and deceive."

"In many ways," the court said, "this case is a paradigm fraudulent concealment case. There is no doubt about what was concealed, no doubt that what was concealed was not merely material but crucial—a literal deal-breaker—and no doubt that Equilon intended to deceive Atallah."

Green Buildings

EPA, Cushman & Wakefield Partner to Reduce CO2 Impact

Cushman & Wakefield, one of the world's largest commercial real estate firms, has entered into a partnership agreement with the Environmental Protection Agency to reduce the carbon dioxide emissions at more than 3,000 office buildings it manages across the United States, the agency's Region II office announced Jan. 6.

Office buildings account for 17 percent of the U.S. output of carbon emissions, EPA said in announcing the agreement.

"Just like cars and smokestacks, office buildings are responsible for significant quantities of carbon dioxide emissions, as their electricity and heat is often derived from the burning of fossil fuels," Regional Administrator Alan J. Steinberg said in a statement.

"By making modest, cost-efficient adjustments like increasing energy efficiency in plans for office buildings, Cushman & Wakefield stands to drastically reduce its carbon footprint at thousands of buildings across the country."

In a memorandum of understanding with EPA, the New York-based company pledged to evaluate opportunities to conserve energy when selecting new corporate office spaces and begin an energy-efficiency pilot program at several offices, the agency said.

Overall, the company pledged to cut energy consumption at its offices and managed properties by 30 percent by 2012, EPA said.

The agreement also calls for Cushman & Wakefield to encourage its clients to participate in the agency's Data Center Data Collection Initiative to help develop an energy-efficiency rating for data centers; help building owners conduct energy analyses using EPA's Energy Star benchmarking tool; promote the use of water-efficient fixtures and water conservation measures; and track water usage.

In EPA's WasteWise partnership program, the company also will conduct an assessment of waste reduction activities, document sustainable purchases, and provide an annual estimate on improvements in waste reduction and recycling at selected properties, EPA said. As part of the agency's Greenscapes program, it added, the company has pledged to encourage its clients to implement sustainable landscaping practices and reuse industrial materials.

More information on EPA's voluntary programs is available on the Web at <http://www.epa.gov/partners>.

General Policy

Obama Announces Nominees For Energy, Environment Posts

President-elect Obama Dec. 15, 2008, announced his nominees to lead the federal agencies and White House offices that will direct climate, energy, and environmental policy.

During a news conference, Obama announced he would nominate Lisa Jackson, former commissioner of the New Jersey Department of Environmental Protection, as administrator of the Environmental Protection Agency and Nobel Prize-winning physicist Steven Chu as his secretary of energy. Chu currently is the director of the Lawrence Berkeley National Laboratory.

Nancy Sutley, deputy mayor of Los Angeles for energy and environment, will head the White House Council on Environmental Quality.

In addition, Obama announced Carol Browner, who headed EPA for eight years during the Clinton administration, would serve as the administration's so-called "climate czar."

Browner's specific title will be assistant to the president for energy and climate change, a new position within the White House. Heather Zichal received the appointment of deputy assistant to the president for energy and climate change. Zichal currently is co-chair of the Obama transition team for energy and environment policy and advised Obama on environmental matters during the campaign.

In announcing Browner's appointment, Obama said "the scope of the effort before us will demand coordination across the government, and my personal engagement as president."

Role of Insurer to Be Reviewed; Payments, Cleanups at Risk

The U.S. Supreme Court Dec. 12, 2008, agreed to review a federal appeals court decision that would allow thousands of asbestos personal injury plaintiffs to directly sue certain insurance companies alleged to have knowledge of the dangers of asbestos as early as the 1950s (*Travelers Indemnity Co. v. Bailey*, U.S., No. 08-295, 12/12/08; *Common Law Settlement Counsel v. Bailey*, U.S., No. 08-307, 12/12/08).

While the Supreme Court decides the jurisdictional role insurance companies play in bankruptcy and mass tort cases, the documents filed with the court suggest millions of dollars of worker settlements currently in the court system might be at risk, and attorneys said the case could have implications for environmental cleanups as well.

Travelers Indemnity Co. and two of its companies filed a petition for writ of certiorari Sept. 4, 2008. A group of attorneys for persons harmed by asbestos filed a petition for writ of certiorari the same day.

The lead named respondent in both cases is Pearlie Bailey, for the estate of James Bailey, one of six asbestos claimants represented by Provost & Umphrey LLP, attorneys for about 10,000 asbestos claimants. When granting certiorari, the Supreme Court consolidated the two cases.

Both cases challenge a Feb. 15, 2008, ruling of the U.S. Court of Appeals for the Second Circuit that vacated a district court's decision that direct action claims against insurance companies were barred under the Johns-Manville corporate bankruptcy (*In re: Johns-Manville Corp.*, 517 F.3d 52 (2nd Cir. 2008)).

The Second Circuit said it used the term "direct action" claims to mean a lawsuit filed against an insurance company directly for its own conduct instead of pursuing compensation through the insured and the terms of the insurance policy.

In case No. 08-307, the common law settlement attorneys made a two-fold argument for Supreme Court re-

view, asserting the Second Circuit obscured the distinction between jurisdiction and statutory authority and that as a result of the Second Circuit decision, the finality of certain Chapter 11 reorganization plans in federal bankruptcy is uncertain.

Mass tort and large business reorganization plans might be in jeopardy, the attorneys argued, if the Second Circuit opinion is allowed to stand. The attorneys asserted non-debtor third-party contracts, such as agreements with insurance companies, might never be finalized.

The settlement attorneys further assert that about \$440 million in individual settlements for asbestos-related diseases may be held in abeyance until the validity of the current procedure is ascertained.

The Second Circuit opinion also may jeopardize some environmental cleanups conducted pursuant to bankruptcy reorganizations. Such cleanups, like personal injury settlements, often depend on insurance money or other third-party funds.

California Can 'Stack' Policies in Stringfellow Litigation

A California trial court erred by limiting the state's insurance coverage for the Stringfellow Superfund Site to policies in effect during a single three-year period instead of allowing the state to obtain greater coverage by combining multiple policies over a period of more than three decades, a state appeals court ruled Jan. 5 (*California v. Continental Insurance Co.*, Cal. Ct. App., 4th App. Dist., No. E041425, 1/5/09).

The Court of Appeal of the State of California, Fourth Appellate District, reversed a 2005 ruling by a Riverside County trial court that barred the state from using multiple policies over a period of many years in a process known as "stacking."

A jury verdict in the trial court found six insurance companies liable to the state for coverage of claims related to the Stringfellow site. The court's refusal to allow the state to stack the insurance policies, however, meant the state could not come close to recovering the estimated \$700 million it will cost to clean up

the site, which has a history of contamination stretching back 50 years.

The appellate opinion will give California a second chance during a retrial at obtaining what it considers appropriate insurance coverage for the Stringfellow site in Riverside County, which the state opened as a hazardous waste dump in 1956 and for which the state started buying insurance policies in 1964.

"We're thrilled and grateful," Darryl Doke, the former deputy attorney general who represented the state at the 2005 trial, told BNA Jan. 9. "It's a very solid opinion and vindicated a position we have been advancing for many years on stacking."

The appellate court ruling came in a case in which the companies were held liable by the trial court for providing coverage to the state for the cleanup of the Stringfellow site. The companies are Continental Casualty Co., Continental Insurance Co., Employers Insurance of Wausau, Horace Mann Insurance Co., Stonebridge Life Insurance Co., and Yosemite Insurance Co.

Located in Glen Avon, Calif., the hazardous waste facility generally known as the Stringfellow Acid Pits operated from 1956 to 1972. Toxic waste was dumped in unlined ponds, then escaped through cracks in the bedrock, resulting in pollution that continues to taint groundwater supplies. According to Doke, remediation at the site has been ongoing for about 30 years and could go on "for centuries."

In 1998, a federal court found the state liable for past and future cleanup costs. The court concluded the state negligently had invested in, designed, and operated the site during the 1950s and 1960s and failed to address the pollution in a timely way during the 1970s.

Although the state won at the trial court level on the issue of the insurers' liability, it appealed to the Fourth Appellate District on the question of stacking the policies and whether the insurers should be entitled to offset any award by amounts the state already has collected in settlements with other insurers.

Sustainability

Refundable Energy Credits Key to Meeting Obama's Goal

Congress must modify existing renewable energy tax credits to make them refundable to meet President-elect Obama's goal of doubling renewable energy production in three years, solar and wind industry officials said Jan. 9.

Executives for the American Wind Energy Association and Solar Energy Industries Association praised Obama's Jan. 8 economic speech in which he listed renewable energy development as one of his top job-creating priorities for an economic stimulus program.

However, the executives said solar energy's investment tax credit and wind energy's production tax credit basically are useless to investors during the current economic downturn when survival, not protecting profits, is the primary concern.

In fact, the number of large institutional investors in renewable energy has fallen sharply and the entire renewable industry is feeling the effects of the recession, according to AWEA President Denise Bode and SEIA President Rhone Resch.

In a teleconference with reporters, Bode and Resch said they are talking to the tax writers on Capitol Hill and Obama's economic advisers about their strong desire to make tax credits refundable, but so far they have no guarantee it will be in the final legislation.

There have been concerns raised by the tax staff about creating a new precedent, but the benefits in economic growth and job creation far outweigh the cost of making the tax credits refundable, Bode and Resch argued.

Noting the explosive growth of renewable energy in recent years, Bode said her advice to Congress is: "Don't let it die on the vine in these tough economic times."

The trade association executives said 2008 was a record-breaking year for renewable energy production, but there will be a dramatic slowdown in 2009 if renewable tax incentives are not made refundable.

"Projects are now being put on hold, factories are closing, and workers face potential layoffs unless Congress refines the tax credits now so they work as originally intended," Resch said.

AWEA estimates the wind industry installed a record 7,500 megawatts of capacity in 2008, bringing total U.S. wind capacity to about 24,000 megawatts.

The solar industry is estimated to nearly have doubled the growth of solar photovoltaic installations in 2008. A California state solar initiative reported doubling the growth of photovoltaic installations in 2008 from the prior year.

In October, Congress passed an extension of the investment tax credit and the production tax credit as part of the \$700 billion financial rescue package for Wall Street (H.R. 1424).

A simple extension of the current tax credits will not help the renewable energy industry because most companies and individual tax filers expect lower tax liabilities in the current recession, the executives said.

Tax credits already are refundable for biodiesel and other alternative transportation fuels, and the same principle should apply to the electric generation sector, they argued.

Resch said the solar energy industry employs more than 80,000 people in the United States and created more than 15,000 jobs in the last two years.

By 2016, the solar energy sector alone will create 440,000 permanent jobs and spur \$325 billion in private investment with the investment tax credit, according to Navigant Consulting.

Resch said the tax equity markets would have to grow fivefold by 2011 to meet Obama's ambitious goal of doubling renewable energy production over the next three years.

Resch said a refundable tax credit is "the single most important action" Congress can take for the solar and wind industries. The refundable concept has been a priority for some time.

The solar and wind energy industries have other legislative goals as well, both in tax and nontax policies.

The renewable energy community is lobbying for carryback provisions and a five-year extension of the production tax credit; a modern, expanded transmission grid; and a national renewable electricity standard, among other measures.

Bode and Resch said the solar and wind industries do not plan to seek any financial bailout money from the federal Treasury and instead will focus on the stimulus bill.

Conference Calendar

Jan. 15-17: "Commercial Real Estate Financing: Strategies for Changing Markets and Uncertain Times," Miami, Fla.; ALI-ABA; 4025 Chestnut St., Philadelphia, Pa. 19104-3099; \$1,249; (215) 243-1630; Fax: (215) 243-1664; Web: <http://www.ali-aba.org>.

Feb. 4-6: "Environmental Law," Washington, D.C.; ALI-ABA; 4025 Chestnut St., Philadelphia, Pa. 19104-3099; \$1,149; (215) 243-1630; Fax: (215) 243-1664; Web: <http://www.ali-aba.org>.

March 5-7: "Commercial Real Estate Defaults, Workouts and Reorganizations," Orlando, Fla.; ALI-ABA; 4025 Chestnut St., Philadelphia, Pa. 19104-3099; \$1,399; (215) 243-1630; Fax: (215) 243-1664; Web: <http://www.ali-aba.org>.

March 12-15: "38th Annual Conference on Environmental Law," Keystone, Colo.; ABA Section on Environment, Energy, and Resources; ABA SEER, 321 N. Clark St., Chicago, Ill. 60654; Registration prices vary, see Web site for pricing; (312) 988-5724; Fax: (312) 988-5572; Web: <http://www.abanet.org/envirom/programs/keystone/2009/>.

April 2-3: "Global Warming: Climate Change and the Law," Washington, D.C.; ALI-ABA; 4025 Chestnut St., Philadelphia, Pa. 19104-3099; \$1,099; (215) 243-1630; Fax: (215) 243-1664; Web: <http://www.ali-aba.org>.

April 6-8: "Sustainable Property Transactions: Doing Contaminated Site Redevelopments in a Downturned Market," Washington, D.C.; RTM Communications Inc.; 510 King Street, Suite 410, Alexandria, Va. 22314; Registration prices vary, see Web site for pricing; 800-966-7475; Fax: (703) 549-0977; Web: <http://www.rtmcomm.com>.

In Brief

Climate Change Audioconferences

BNA's EHS Division will host two related audioconferences addressing the policy challenges of climate change. The Jan. 28 event, titled "Global Perspectives on the Challenges of Climate Change," will feature BNA reporters located in Washington, D.C., and Europe. Steven Cook (Washington), Stephen Gardner (Brussels), Eric J. Lyman (Rome), and Dean Scott (Washington) will discuss policy developments in the United States and abroad as well as the challenges that lie ahead as new climate change programs are implemented. The Feb. 4 event, titled "Legal Perspectives on the Challenges of Climate Change," will include a panel of three legal experts across the nation. Richard Faulk, partner and chair of the Litigation Department at Gardere Wynne Sewell LLP (Houston); Jennifer Hernandez, a partner at Holland+Knight LLP (San Francisco); and Roger Martella, a partner and former EPA general counsel now with Sidley Austin LLP (Washington), will discuss the legal implications of an emerging framework in the United States to address climate change as well as their potential impacts on businesses. CLE credits will be offered and a \$100 discount is available when registering for both events. Additional information is available on the Web at <http://ehsstore.bna.com/Default.aspx>.

Rapanos Agrees to Restoration

John Rapanos, a Michigan landowner whose battle with environmental regulators over wetlands policy has gone on for nearly 15 years and included an argument before the U.S. Supreme Court, has agreed to restore 54 acres of property and pay a \$150,000 fine to settle the civil case, the U.S. Justice Department announced Dec. 29, 2008 (*United States v. Rapanos*, E.D. Mich., No. 94-CV-70788-DT, filed 12/29/08). Rapanos also will spend an estimated \$750,000 to mitigate the 54 acres that the Environmental Protection Agency and Justice Department argued were filled in violation of the Clean Water Act. The landowner also has agreed to preserve an additional 134 acres of wetlands as part of the settlement. The agreement, which affects three

sites in Bay and Midland counties in Michigan, is detailed in a consent decree lodged in the U.S. District Court for the Eastern District of Michigan and is subject to a 30-day comment period and final court approval. The settlement does not affect Rapanos's ongoing criminal case, which still is pending, according to the Justice Department. The settlement will bring to a close nearly 15 years of civil litigation.

PRPs Will Pay \$99 Million

Hundreds of defendants have agreed to pay a total of \$99 million to resolve claims by the state of New Jersey and the federal government in connection with a superfund site under terms of a proposed consent decree lodged in federal court Jan. 6 (*United States v. Coulter*, D.N.J., No. 98-cv-4812 (WHW), 1/6/09; *New Jersey Department of Environmental Protection v. American Thermoplastics Corp.*, D.N.J., No. 98-cv-4781 (WHW), 1/6/09). The multiparty settlement filed in the U.S. District Court for the District of New Jersey is subject to a 30-day federal public comment period, a state comment period, and court approval. It would resolve lawsuits filed in 1998 by the New Jersey Department of Environmental Protection and Environmental Protection Agency against parties suspected of contaminating the Combe Fill South Landfill in Morris County, N.J. From the early 1950s until it closed in 1981, Combe Fill South operated as a sanitary landfill, accepting chemicals, industrial wastes, septic tank wastes, sewage sludge, and waste oils. It was placed on the National Priorities List in the early 1980s after a DEP investigation found significant levels of volatile organic compounds in groundwater and surface water at the site. The consent decree is available on the Web at <http://www.usdoj.gov/enrd/946.htm>.

'Endangerment' Suit Moves Forward

The failure to use the term "imminent and substantial endangerment" in a Resource Conservation and Recovery Act citizen suit notice letter does not bar the plaintiff from bringing suit under that provision if it includes the proper statutory reference, a federal district court held Dec. 8,

2008. (*Clemons Ye Olde Homestead Farms Ltd. v. Briscoe*, E.D. Tex., No. 07-285, 12/8/08). The defendant argued the notice of intent to sue was insufficient notice of a substantial endangerment violation because the letter focused on the violation of a different RCRA provision related to open dumping. The U.S. District Court for the Eastern District of Texas disagreed, however. While the letter never used the term "imminent and substantial endangerment," it did reference the correct RCRA provision—42 USC 6972(a)(1)(B). As a result, the court said, even though the notice letter mostly dealt with open dumping (a violation of 42 USC 6972(a)(1)(A)), sufficient notice of an endangerment claim had been given because the plaintiff "did allege the specific RCRA sections alleged to have been violated."

'Green' Energy Priority for Congress

Senate Democratic leaders unveiled their top 10 legislative priorities Jan. 6, with an economic recovery bill and a measure to promote so-called green energy on the list of must-pass bills. The priority bills, which carry the numbers S. 1 through S. 10, also include other measures to address the economic crisis, including one providing new protections for homeowners. The list also includes a bill (S. 8) that calls for a review of "midnight regulations" issued in the final days of the Bush administration. Previewing Democrats' priorities on the Senate floor, Senate Majority Leader Harry Reid (D-Nev.) struck a bipartisan tone, saying Democratic leaders want to work more closely with Republicans in the coming year to enact proposals that will address U.S. economic and social problems as well as security concerns. He said he already has been holding private meetings with Senate Republicans to set the stage for bipartisan agreements this year. Reid's office said S. 5 the Cleaner, Greener, and Smarter Act, is a measure aimed at "green" investment and updating U.S. infrastructure to be more efficient. It also seeks to reduce dependence on foreign and unsustainable energy sources.

Special Report

Corps, EPA Revise Definition of 'Discharge of Dredged Material'

The Environmental Protection Agency and U.S. Army Corps of Engineers Dec. 30, 2008, promulgated a final rule aimed at helping determine whether a permit is required under the Clean Water Act during excavation by clarifying the definition of "discharge of dredged material" (73 FR 79641).

The rule was in response to a 2007 federal district court ruling that vacated a 2001 regulation on dredging at 33 CFR 323 and 40 CFR 232. It removed the definition of "incidental fallback" and deleted language indicating the agencies assume the use of mechanized earth-moving equipment automatically results in a discharge subject to regulation.

In a case brought by the National Association of Home Builders, the U.S. District Court for the District of Columbia in 2007 held that the rule issued by the Corps and EPA—known as *Tulloch II*—violated the Clean Water Act because of the way it tried to determine what constituted incidental fallback (*National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 64 ERC 2050 (D.D.C. 2007)) (16 EDDG 16, 2/15/07).

The latest rule returns the definition of "discharge of dredged material" to that issued in a 1999 rule on dredging.

The final rule outlines several examples where a discharge results in a "redeposit" subject to regulation but specifically excludes "incidental fallback" without defining the term.

Case-By-Case Evaluation

As with the 1999 rule, deciding when a particular redeposit of dredged material is subject to Clean Water Act jurisdiction will entail a case-by-case evaluation consistent with the act and governing case law, the agencies said in the notice.

The court decision on *Tulloch II* effectively reinstated the text of the 1999 rule, the agencies said. The latest final rule is meant to ensure the language in the Code of Federal Regulations conforms to the court de-

cision, according to the Corps and EPA.

The 1999 rule defined "discharge of dredged material" to mean any addition of dredged material into waters of the United States, including redeposit of dredged material other than incidental fallback (64 FR 25120, 5/10/99) (8 EDDG 38, 5/20/99).

The definition also included the redeposit, other than incidental fallback, of dredged material, including excavated material, into waters of the United States incidental to any activity, including mechanized channelization, ditching, land clearing, or other excavation.

Under Section 404 of the Clean Water Act, the Corps may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into navigable waters at specified disposal sites.

The 2001 rule required developers to obtain permits when clearing trees and digging channels near lakes and rivers to prevent excavated material from falling back into the waters.

Incidental Fallback Issue

The district court held the *Tulloch II* rule violated the Clean Water Act because of the way the rule used volume to determine when incidental fallback occurred. The court also criticized the rule for failing to specify exactly when mechanized land clearing would require a permit.

Previous amendments to the definition aimed to better distinguish between redeposits of dredged material subject to regulation and incidental fallback, which is not regulated under Corps or EPA regulations.

The 2001 *Tulloch II* rule defined incidental fallback as the "redeposit of small volumes of dredged material that is incidental to excavation activity . . . when such material falls back to substantially the same place as the initial removal."

Those potentially affected by the final rule include industries, land developers, local governments, and state or tribal agencies that discharge

dredged materials to waters of the United States.

Jan Goldman-Carter, an attorney with the National Wildlife Federation, told BNA Dec. 29, 2008, "We're supportive of the rule the Corps and EPA are issuing as a step in clarifying the definition of the discharge of dredged material. However, we do not see this rule as solving the underlying problem of destruction of wetlands and streams from excavation activities that still may not require 404 permits."

Representatives of the National Association of Home Builders, a group that has been involved in the debate over wetlands regulation, could not be reached for comment.

Agency Backpedals

The Clean Water Act prohibits the discharge of a pollutant into a water of the United States except in compliance with specified sections, including Section 404. This section authorizes the Corps (or state or tribe with an authorized permitting program) to issue discharge permits.

In 1993, the Corps and EPA issued a regulation, commonly referred to as the *Tulloch* rule, providing that any addition of dredged material, including any redeposit of dredged material, into waters of the United States would be subject to Section 404 of the Clean Water Act (58 FR 45008, 8/25/93; 33 CFR 323.2(d)(1) and 40 CFR 232.2).

The American Mining Congress and several other trade associations challenged the regulation. In January 1997, the U.S. District Court for the District of Columbia held that the regulation exceeded the agencies' authority under the Clean Water Act because it impermissibly regulated incidental fallback of dredged material.

The agencies modified their definition of "discharge of dredged material" in their 1999 final rule in response to a federal appellate court ruling affirming the district court's order invalidating the *Tulloch* rule.