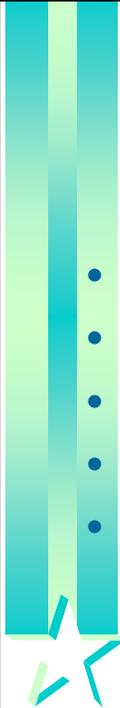


## Recent Developments in CERCLA

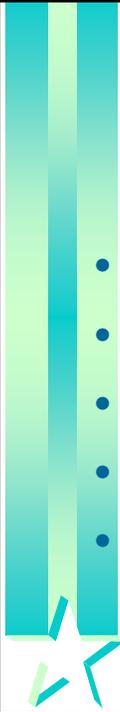
*Joanna Jerison and Audrey Zucker  
Legal Enforcement Office, Region 1  
U.S. Environmental Protection Agency*

*February 2012*



## Updates on . . .

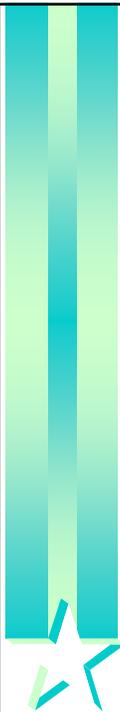
- Who's Who in EPA Superfund
- Enforcement in Region 1
- Remedy Decisions in Region 1
- New Enforcement Guidances
- Important Cases



## Who's Who in EPA Superfund

- Region 1: RA and DRA
- Region 1: OES
- Region 1: OSRR
- HQ: OSWER
- HQ: OECA and OSRE

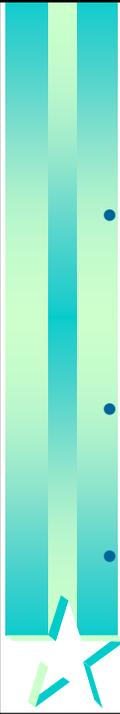
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## *FY11 Superfund Numbers*

- 11 judicial entries and 12 final administrative actions
- About \$270 million in injunctive relief (work, incl. Corrective Action) and \$34 million in cost recovery (past and future)
- 7 judicial referrals
- Obligations to clean up about 8.6 million cu.yds of contaminated soil and groundwater (incl. Corrective Action)

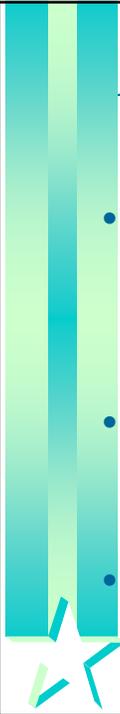
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## *RD/RA Settlements and Negotiations*

- Davis Liquid (RI) - Lodged RD/RA Consent Decree. PRPs will perform \$13.7 million groundwater remedy and pay 100% of future/oversight costs.
- Ironhorse Park (MA) – Special notice issued to 2 PRPs for OU-4 remedy with cost of \$5.4 million.
- Burgess Bros. (VT) – Negotiations for Amended Consent Decree for \$4 million Amended ROD.

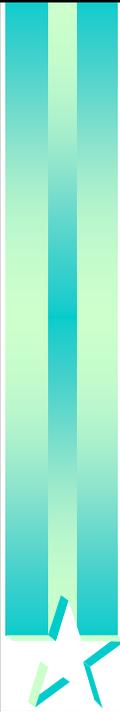
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## *Recent Cost-Recovery Settlements in Region 1*

- Solvents Recovery Service (CT): Entered settlements with 7 ATP PRPs requiring payments to parties performing the cleanup.
- Ely Mine (VT): ATP settlement ensures site maintenance and institutional controls.
- Agawam (MA): Sale of site property.

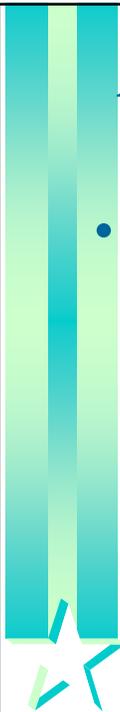
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## *Recent Major Administrative Actions in Region 1*

- Nuclear Metals (MA): Settlement for performance of \$63 million building demolition, payment of \$4.1 million in past costs; 100% of future/oversight.
- Pharmacia/Pfizer (RI): RCRA Corrective Action Order for \$153 million in cleanup work.

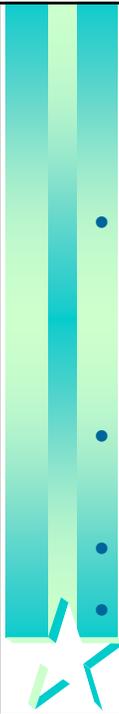
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## *Recent Administrative Actions, cont'd*

- Removal AOCs for cleanup:
  - Tombarello (MA): \$ 70,000
  - Industrial Park (NH): \$ 880,000
  - Parker Street (MA): \$ 160,000
  - Peterson/Puritan (RI): sampling

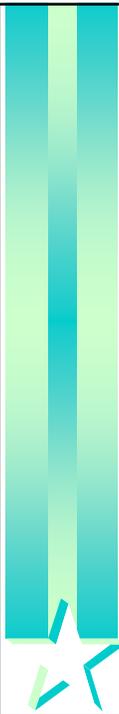
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## *Centredale Litigation*

- Emhart files cost recovery/contribution claim against federal agency PRPs. U.S. motion to dismiss section 107 cost recovery claim denied.
- EPA and federal agency PRPs file counterclaim against Emhart for past costs.
- Approx. 25 other PRPs also named by EPA.
- EPA's Proposed Plan: \$100 million.

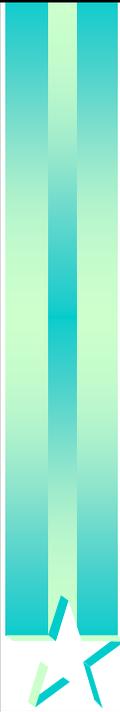
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## *Other Recent R. 1 Litigation*

- **Fletcher's Paint:** (NH) Granted SJ to US on SOL issue ("subsequent action"). Over \$13 million in past costs awarded to US. GE has appealed "SOL" and "arranger" issues. Awaiting decision from 1<sup>st</sup> Circuit.
- **AC Lawrence:** (ME) US seeking over \$5.5 million from successor to owner/operator.

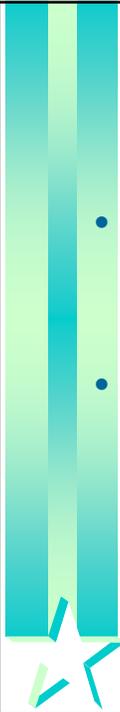
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## *(con't) Other R.1 Recent Litigation*

- **Facemate:** *In rem* action (MA); settlement provides for division of proceeds with Chicopee from future sale of site property
- **Danversport:** Two CDs entered, includes approx. \$1.2 M in cost recovery and over \$100,000 in penalties under general duty clause of CAA.

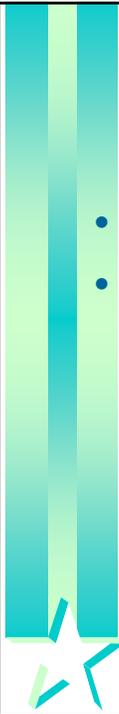
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## *Update on GE-Housatonic*

- GE submitted revised Corrective Measures Study for “rest of river” in 2010; public comment period on CMS ended 1/31/11.
- After reviewing CMS and comments, EPA will propose a remedy for public comment. GE and public have appeal rights (RCRA permit).

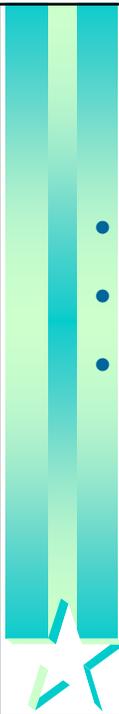
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## *NPL Listings and Remedy Decisions in FY11*

- No new NPL listings in past year in R.1.
- RODs:
  - Ironhorse Park (MA) OU-4
  - Raymark (CT) OU-6
  - Burgess Bros. Amended ROD (VT)
  - Ely Mine (VT) OU-1

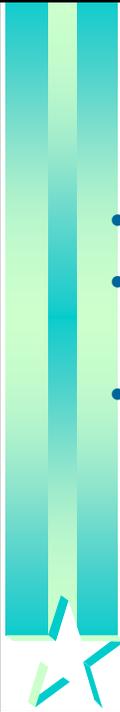
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## *RODs in FY12*

- Fletcher's Paint (NH) OU-2
- Raymark (CT) OU-2
- Centredale Manor (RI)

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## *Enforcement Guidances*

- OSRE guidances at
- <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/> (by year)
- <http://www.epa.gov/compliance/cleanup/superfund/index.html> (general topics)

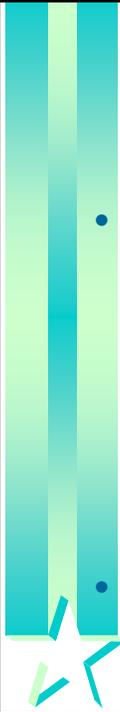
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## *Recent Superfund Guidances and Initiatives*

- Affiliation guidance (9/21/11)
- Model RD/RA Consent Decree (2011)  
Incorporating model language changes since 2009 model.
- Interim Policy on Duration of RD/RA Negotiations
- Integrated Cleanup Initiative (Davis Pilot)
- 2011 update to Revitalization Handbook

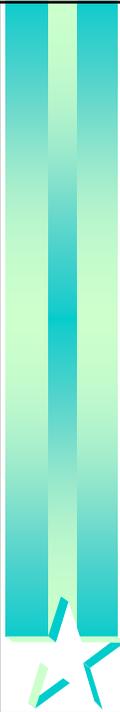
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## *Major Judicial Rulings*

- *GE v. EPA* (D.C.Cir. 2010): On facial challenge, rejected argument that stock price, brand value, etc, were property interests. On “pattern & practice” claim, held because GE did not establish a constitutionally protected property interest, need not decide what process is due
- Cert. denied.

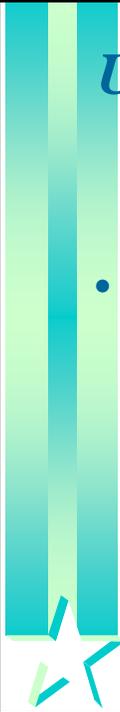
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## *Update on Burlington Northern: Divisibility*

- *Ashley II of Charleston v. PCS Nitrogen* (D.S.C. 2010 and 2011); and *Whittaker Corp v. 3000 E. Imperial* (C.D. CA 2010; on appeal)  
Both held Def. prior owner did not prove divisibility on factually complex records

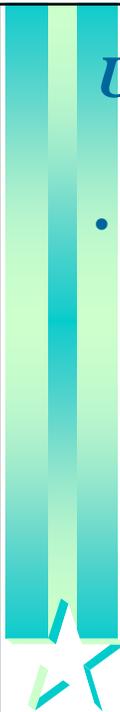
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## *Update on Burlington Northern: Arranger Liability*

- *U.S. v. Washington State DOT* (W.D.Wash. 2010): Held WSDOT is arranger based on highway drainage system that collected coal tar contamination and discharged to waterway; control over run-off

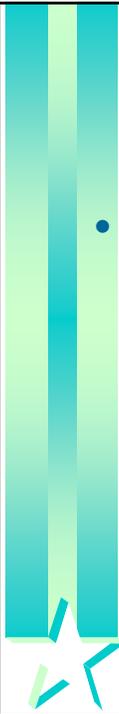
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## *Update on Burlington Northern: Arranger Liability*

- *Schiavone v. Northeast Utilities Service Co.* (D. Conn. 2011): Utilities' intent to sell transformers as scrap metal to scrap yard held not to confer arranger liability; court found intent to sell for recycling of metal only, no intent to dispose of oil

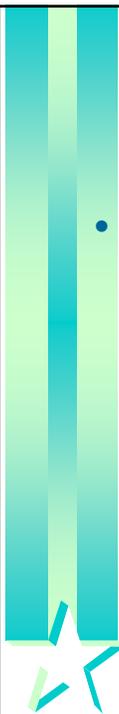
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## *Update on Atlantic Research (107 vs. 113)*

- *Morrison Enterprises v. Dravo Corp.*, 628 F.3d 594 (8<sup>th</sup> Cir. 2011): Held Plaintiff, which had entered into numerous administrative work settlements, cannot bring cost recovery under 107(a); limited to contribution claim under 113(f); costs incurred not “voluntary”

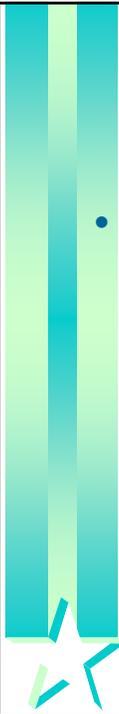
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## *Update on “Reasonable Steps” under BFPP Provision*

- CERCLA 101 (40) BFPP definition:
  - All disposal prior to acquisition
  - Makes “all appropriate inquiry” before buying
  - Takes “reasonable steps” to stop continuing releases, prevent future releases, and prevent exposure to HSs
  - Is not affiliated with a liable person

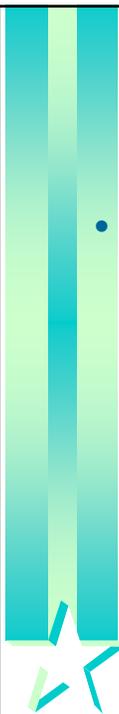
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## ***Update on “Reasonable Steps” under BFPP Provision***

- *Ashley II v. PCS Nitrogen* (S.D.C. 2010; on appeal): Redevelopment company liable:
  - “disposals” likely occurred after it tore down structures, did not test for contamination, and allowed sumps to fill with rainwater;
  - did not exercise “appropriate care” where did not clean the sumps and allowed contaminated debris to accumulate.

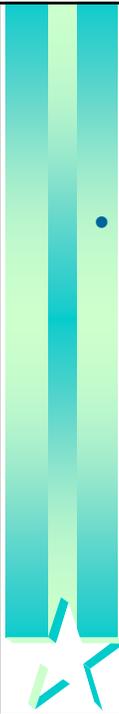
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## ***More on “Reasonable Steps” under BFPP Provision***

- *3000 E. Imperial v. Robertshaw Controls* (C.D. CA 2010): Developer owner took “reasonable steps” where had contents of USTs sampled, emptied USTs soon after learning they contained a haz. substance, even though did not remove USTs for 2 years.

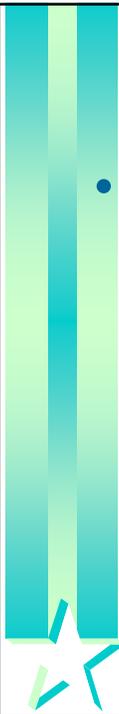
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## *More on “Reasonable Steps” under BFPP Provision*

- *Saline River Props v. Johnson Controls*, (E.D. Mich. 2011): Denies Mo. to Dismiss c-claim; Owner Plaintiff cannot establish was BFPP where broke up a concrete slab, which caused haz. substances beneath to migrate into additional soils and gw.

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## *Superfund is alive and well but...*

- FY12 Enacted Budget for EPA:
  - 3 percent decrease (\$219m) from the FY 2011 budget
  - Overall 5% reduction to Superfund, with 7% (\$39m) to remedial programs
- FY13 Pres Bud: Another \$33m cut to remedial budget

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