

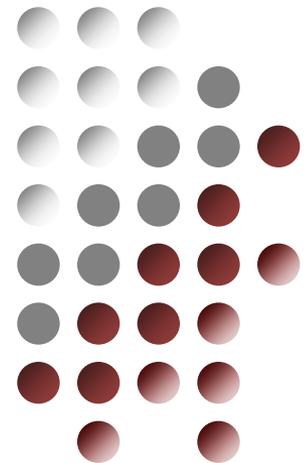
# Environmental Enforcement Trends in the Midwest

James T. Price  
June 20, 2011

Missouri Waste Control Coalition Conference

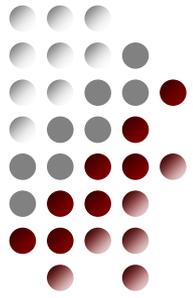
Lake of the Ozarks, Missouri

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**SPENCER FANE**  
BRITT & BROWNE LLP

# Contact Information



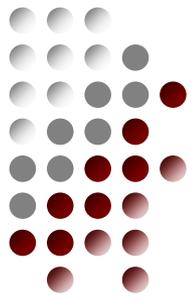
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# Obama Administration Enforcement Themes

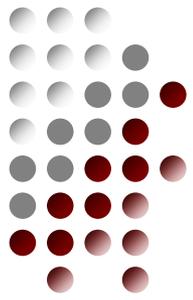


- Tougher
- Penalties are higher
- Get to Penalties Quicker
- Transparency/Publicity
- Criminal Charges



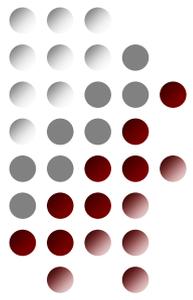
# EPA National Enforcement Priorities, FY 2011 - 13

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- Keeping raw sewage and contaminated stormwater out of our waters
- Cutting animal waste to protect surface and ground waters
- Reducing widespread air pollution from the largest sources, especially the coal-fired utility, cement, glass, and acid sectors

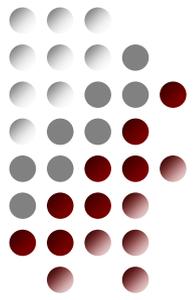
# EPA National Enforcement Priorities, FY 2011 – 13, cont'd



- Cutting toxic air pollution that affects communities' health
- Assuring energy extraction sector compliance with environmental laws
- Reducing pollution from mineral processing operations

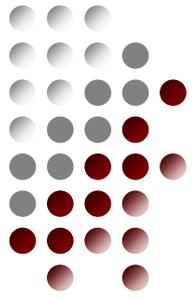


# EPA Enforcement Priorities, Region VII



- Municipal sewage, CSOs, WWTPs
- Large power plant and facility NSR cases
- Carbon emissions; Greenhouse gases
- Chemical management: Prevention Matters!
- Risk Management Plans
- Environmental releases
- RCRA: Hazardous waste management
- Cleanups: Enforcement vs. voluntary programs

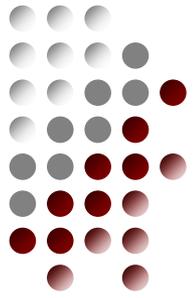
# More Aggressive Environmental Regulation and Enforcement



- Manufacturing
- Distribution/logistics
- Food storage
- “Dirty” service industries
- Construction
- Laboratories
- Energy
- Recycling
- Financial



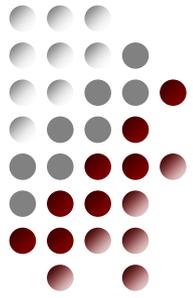
# Hazardous Waste



- Tougher Inspections, Enforcement
- Hazardous Waste Determinations
  - - Waste vs. Product
  - - Laboratories
  - - Older, Off-Spec Materials
  - - Recycled, Reusable Materials
- Environmental Reporting, Disclosure



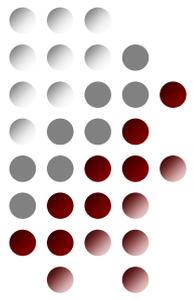
# RCRA Hazardous Waste: Top 10 Violations



10. Failure to update notifications of haz waste activity
9. Failure to report haz waste activity and pay fees
8. Universal waste: Batteries, lamps, etc.
7. Used oil
6. Satellite accumulation
5. Inadequate LQG contingency plans
4. Marking and labeling
3. Open containers
2. Training, records of training
- 1.



# RCRA Hazardous Waste: Top 10 Violations

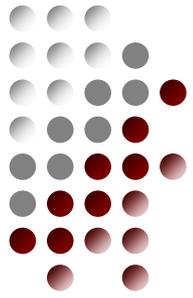


No. 1: Failure to determine whether a material is a hazardous waste

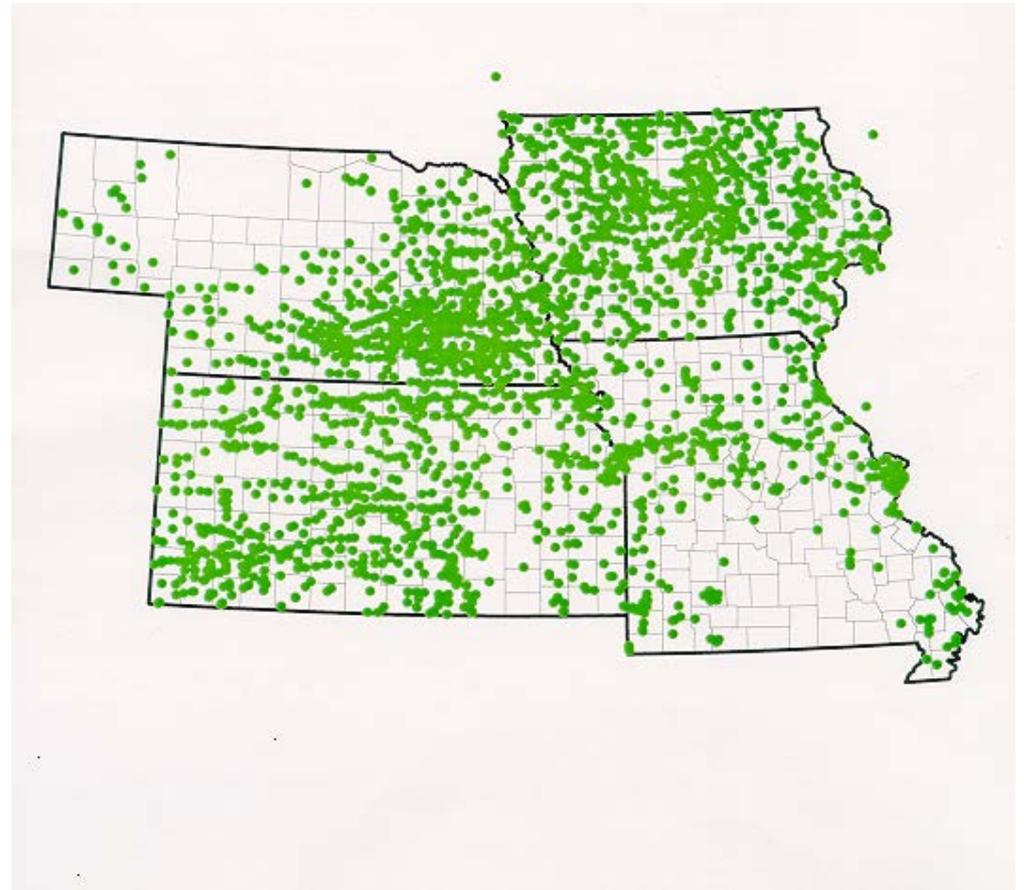
Bonus: Improper disposal of waste materials



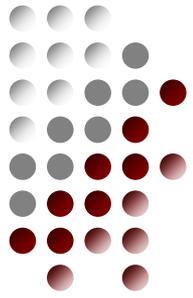
# Risk Management Plans: EPA Region 7 RMP Facilities



- 2,487 RMPs
- Approx 20% of the U.S. total
- High Impacts: Chemical manufacturers, fertilizer distribution, water treatment



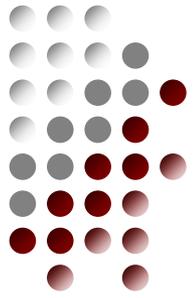
# EPA Enforcement Trends 112(r)



- More onsite inspections
- Higher penalties
- Compliance orders (inspections and mechanical integrity – good engineering practices)
- General Duty Clause 112(r)(1) enforcement



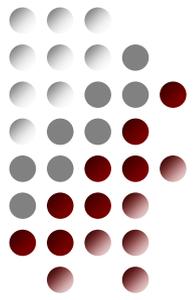
# EPA Enforcement Trends 112(r) – What's Causing the Shift



- Enforcement in past - did the company file?
  - - Shift away from 1999 filing deadline; on-site inspections
- EPA/OIG Report Feb. 2009 Recommendations:
  - Identify facilities that have not yet filed RMPs;
  - Target higher-priority facilities for inspections.
- News of chemical accidents, industrial explosions



# 112(r) Enforcement Misc. Issues

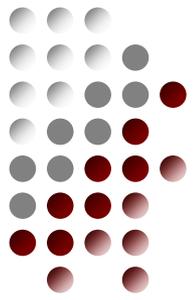


- Changes to SEP Policy
- Intersection with CERCLA/EPCRA
- Increased employee participation in RMP inspections



# Current Issues in Air Emissions

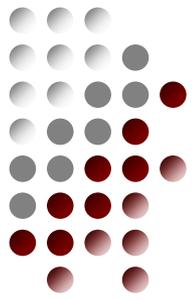
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- More stringent emissions limits
- New emissions requirements being issued, affecting smaller operations
  - Paint stripping and coating
  - Stationary engines
- Compliance certification
- Modification vs. repair
- Greenhouse gas emissions

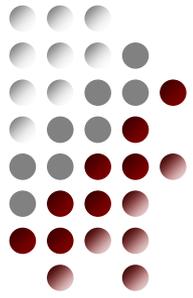
# Current Wastewater Discharge Issues

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- Tightening discharge standards
- Impacts on direct dischargers
- Impacts on discharges to POTWs
- Citizen suits

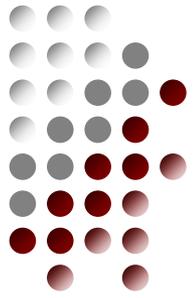
# Stormwater



- Stormwater management
  - - Land disturbance activities
  - - Potential impact to lenders



# Environmental Inspections

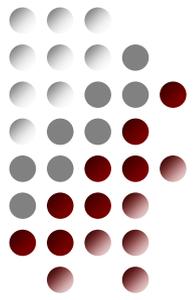


- Multimedia inspections
- Compliance across programs



# How to Respond to Agency Inspections – Pre-Inspection

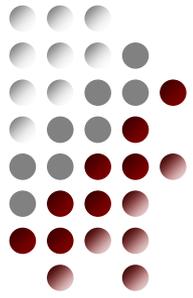
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- Policies and Procedures
  - First Points of Contact
  - Escort Procedures
  - Training
    - - Search warrant? - How to answer Qs
- EHS File Review
  - Privileged Documents
  - Outdated contacts and training files

# How to Respond to Agency Inspections – During Inspection

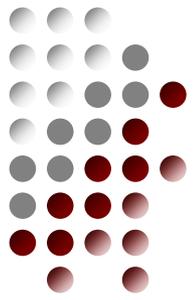
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- Opening Conference
- Considerations for Escorts
- Employee Interviews
- Closing Conference

# How to Respond to Agency Inspection – Post-Inspection

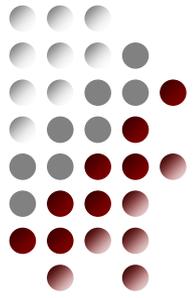
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- Immediate Steps
  - Corrective action
  - NOV issuance
  - Prepare responses; assert legal arguments
- Long-term Steps
  - Seek to avoid enforcement action and/or negotiate settlement
  - Improve procedures and training
  - Avoid repeat violations

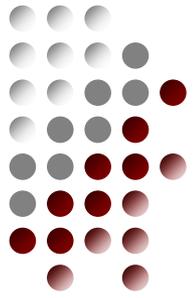
# Environmental Auditing

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- Privileged?
- Opportunities
- EPA's Environmental Audit Guidance and Its Limitations
- Limits of voluntary disclosure
- Strategic considerations

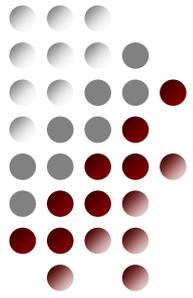
# Creative Settlement Opportunities



- Supplemental Environmental Projects

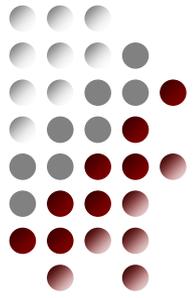


# Liability for Contaminated Properties



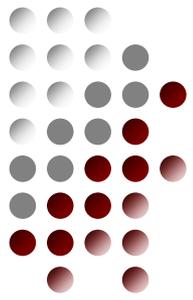
# Landowner Liability Under Federal Superfund Law & State Counterparts

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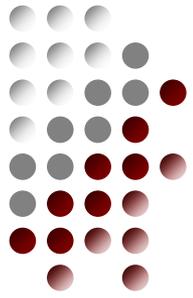
- Plays role in facility expansions
- Trend: State voluntary cleanup programs reduce costs
  - - But, do they move quickly enough?
- Current issues:
  - - Institutional controls
  - - Vapor intrusion

# Preparing Facilities and Clients for a New Enforcement Regime



- Penalties Higher Than Ever Before
- EPA Pressure on States
- Multimedia emphasis
- Prevention emphasis
- New methods: Mining data to develop targets; aerial inspections; subpoenas
- Environmental Audits
- Attorney-Client Privilege Issues and Related Matters
- Preparation, training

# Questions?



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