

Emerging Compliance Risks

A Look at the Top EHS Lawsuits & Penalties in the Past Year

Speaker



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Roadmap

- Clean Water Act
- Clean Air Act
- Hazardous Waste – RCRA & Cal. HWCL
- Closing

Emerging Compliance Risks

Clean Water Act

Clean Water Act

- Enacted in 1972 “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
- Comprehensive permitting regime to regulate the “discharge of pollutants into navigable waters” of the United States
- No discharge of pollutants from a point source into navigable waters without an NPDES permit – 33 U.S.C. §§ 1311, 1342
- **Government** and **citizen-suit** enforcement



Idaho Power (ID)

- Electric company with 15 hydroelectric facilities on the Snake River
- Voluntary reporting of unpermitted discharges in Southern and Central Idaho
- No notable factors indicating increased culpability, harm, etc.
- **Civil penalty:** **\$1,093,050**



Marmion Utility LLC (CI)

- Kerite Power Cable factory in Seymour
- Company “cutting back on its environmental compliance program for years”
- Did not have “an employee with an environmental background running its [IWTP] since 2004”
- **Criminal penalty: \$800,000**
(plus \$1,600,000 SEP)



Baldwin & Sons (CA)

- Residential and commercial construction company
- 2016 stormwater discharge (~6 million gallons)
- Contaminant: Sediment



Baldwin and Sons

- Regulatory prosecution team sought over \$9 million in civil penalties
- Five years of litigation, ongoing

Final Civil Penalty:

\$6,660,503

Lesson: Try to build a constructive dialogue with regulators

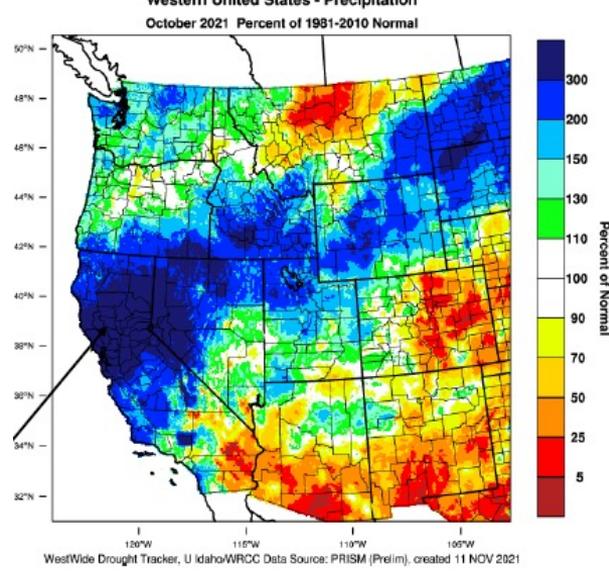
East Bay MUD (CA)

- Municipal wastewater service provider
- 2021 stormwater discharge (~16.5 million gallons)
- Contaminant: Chlorine



East Bay MUD

- 2021 “Atmospheric River” / “Bomb Cyclone”
- Resolved quickly and cooperatively
- **Final Civil Penalty: \$816,000**
- Lesson: historic weather will not prevent significant civil liability



ArtNaturals (CA)

- Warehouse storing beauty products
- 2021 fire
- Contaminant: multiple hazardous wastes/contaminants from burning products



ArtNaturals

- Firefighting water mixed with HW and discharged (~6.8 million gallons)
- Administrative enforcement proceeding pending

Proposed Civil Penalty:
\$17,108.426

Lesson: Civil penalties
are increasing—
dramatically

Clean Water Act – Lessons Learned

- Invest in environmental compliance
 - Even historically low-risk jurisdictions do not look kindly on environmental cost-cutting
- A positive, constructive dialogue with regulators can pay dividends—or at least help avoid their wrath
- Historic weather *may* mitigate, but will not prevent, large civil penalties for CWA violations
- Civil penalties for CWA violations are increasing

Emerging Compliance Risks

Clean Air Act

Clean Air Act

- First enacted in 1955, with major amendments in 1970, 1977, and 1990
- “[T]o protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare...”
- Generally regulates air pollutants from stationary and mobile sources
- Government and citizen-suit enforcement



Clean Air Act

- Federal enforcement tends to focus on certain industries for maximum environmental effect
 - 1999-2015: Coal-fired power plants – 31 EPA enforcement actions
 - 2008-2016: Cement manufacturing plants – 11 EPA enforcement actions
 - 2005-2015: Acid manufacturing plants – 7 EPA enforcement actions
 - 2000 - ??: Petroleum refineries – 36 EPA enforcement actions
 - **2005-2022: Vehicles & engine defeat devices – 27 EPA actions in FY22**
 - *Next... Glass manufacturing plants?*

ExxonMobil (TX)

- Oil refinery and chemical plant complex in Baytown, Texas
- 3,561 instances of illegal flaring and other unauthorized releases
- One of the largest CAA **citizen suits**
 - 13 years of litigation
 - 2022 Fifth Circuit decision rejected Exxon's standing defense

- **Civil penalty:** **\$14,250,000**



Navistar (Nationwide)

- Manufacturer of heavy-duty diesel engines
- Over 7,700 uncertified engines that did not meet emissions standards
- **Civil penalty:** **\$52,000,000**
- Compliance: \$30,000,000
- Also retired all NOx credits



Emerging Compliance Risks

Hazardous Waste – RCRA and Cal. HWCL

RCRA

- Resource Conservation and Recovery Act (“RCRA”)
- Enacted in 1976 to provide “cradle to grave” regulation of solid and hazardous waste
 - Generation
 - Transportation
 - Treatment
 - Storage
 - Disposal
- Government and citizen-suit enforcement



North Slope Borough



- Municipal government
- North Slope Borough, AK
- ~70 hazardous waste storage facilities



North Slope Borough

- RCRA and CWA violations (oil, HW)
- At least two oil spills to sensitive wetlands
- Two prior RCRA administrative enforcement actions against borough

1998 Civil Penalty: \$24,232

2015 Civil Penalty: \$445,336

2022 Civil Penalty: **\$6,500,000**

Lesson: Learn from past mistakes....

California River Watch v. City of Vacaville, 2022

WL 2381056 (9th Cir. July 1, 2022)

- RCRA citizen suit
- Claimed City violated RCRA by “transporting” a “solid waste” in drinking water system
 - “Solid waste” was hexavalent chromium
 - Migrated through groundwater to City extraction well
 - Drinking water complied with all drinking water standards
- District Court dismissed; appeal ensued

California River Watch v. City of Vacaville

- 9th Circuit ultimately affirmed, absolving the City of liability
- BUT, decision was based on “transportation,” not “solid waste”
- 9th Circuit held that hexavalent chromium that migrated into drinking water could be a “solid waste” for RCRA liability purposes

“Solid waste” = “discarded material”

Lesson: RCRA liability can be very broad

HWCL

- California's Hazardous Waste Control Law ("HWCL")
- Similar to RCRA, but expanded in important ways (e.g., California-only HW, "empty" containers, regulation of universal/e-waste)
- **No citizen-suit provision**
 - But state enforcement is aggressive...
 - And RCRA still applies....



CalEPA
California Environmental
Protection Agency



DTSC
Department of Toxic
Substances Control



target



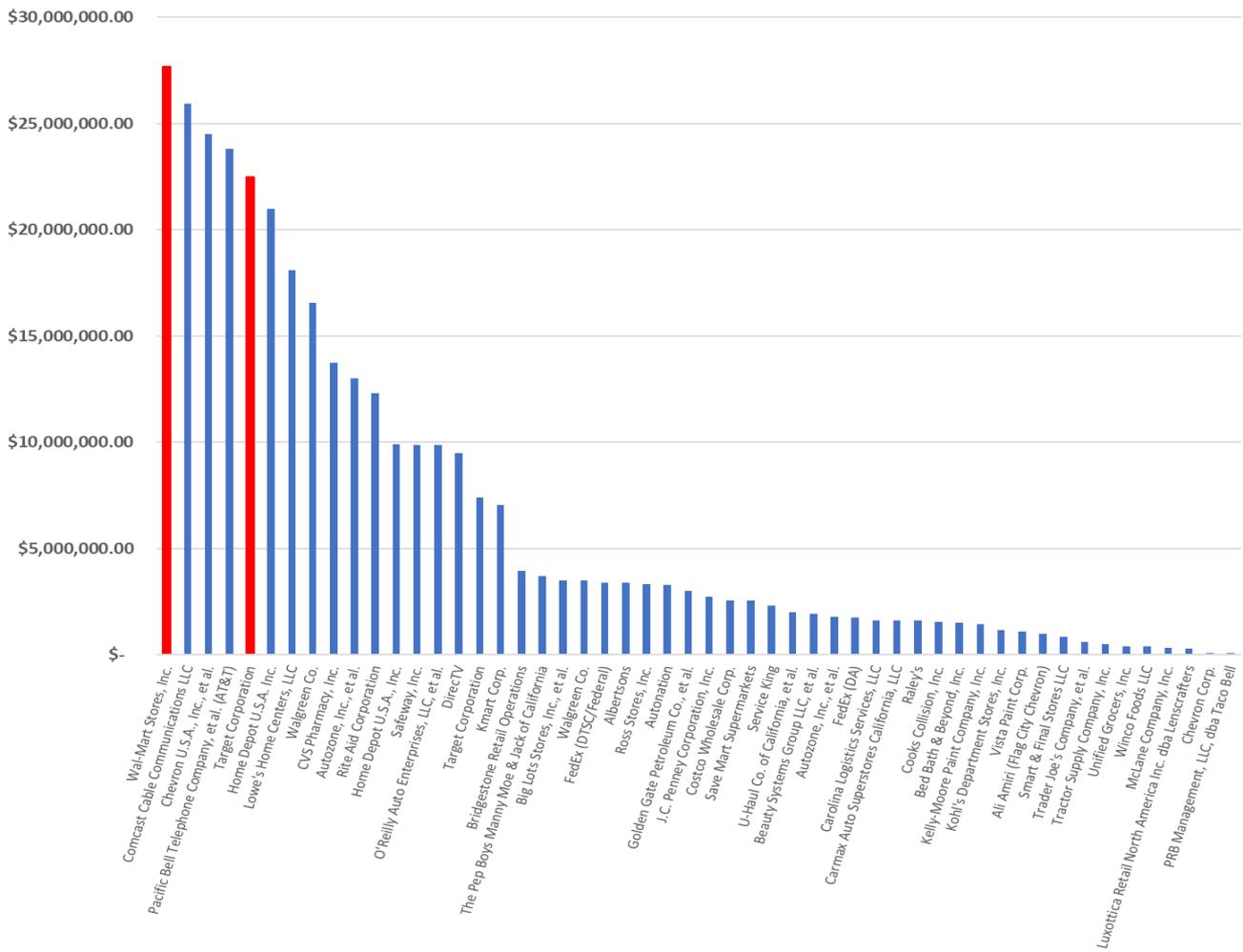
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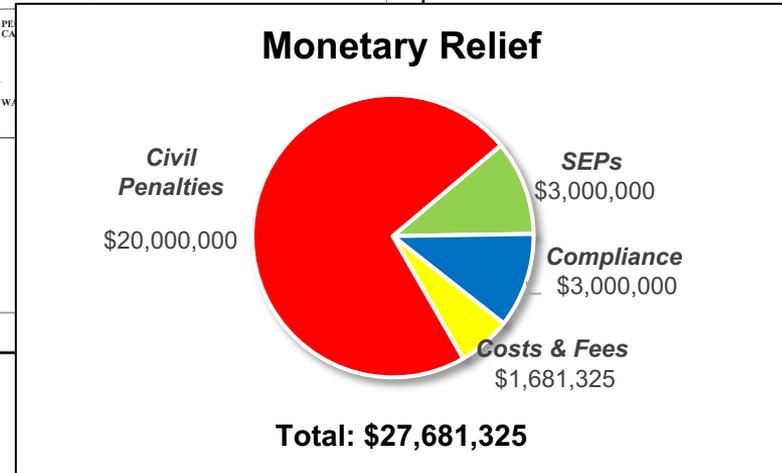
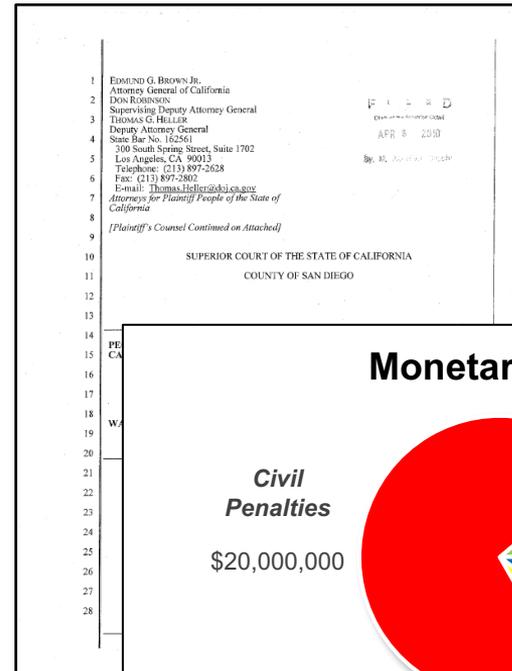


Total Civil Penalties, SEPs, and Costs - CA, Multiple Sites



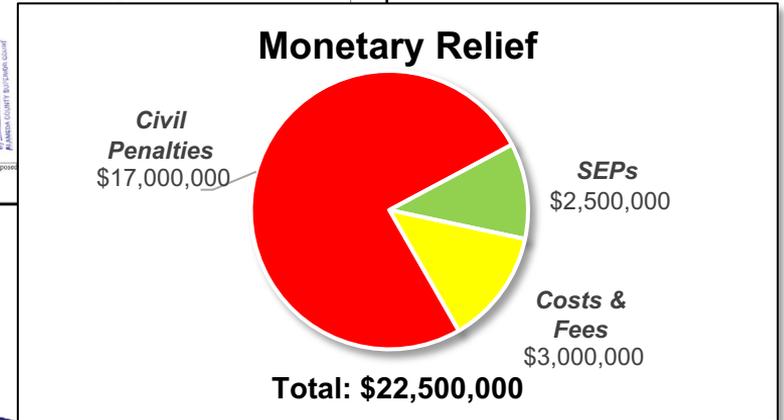
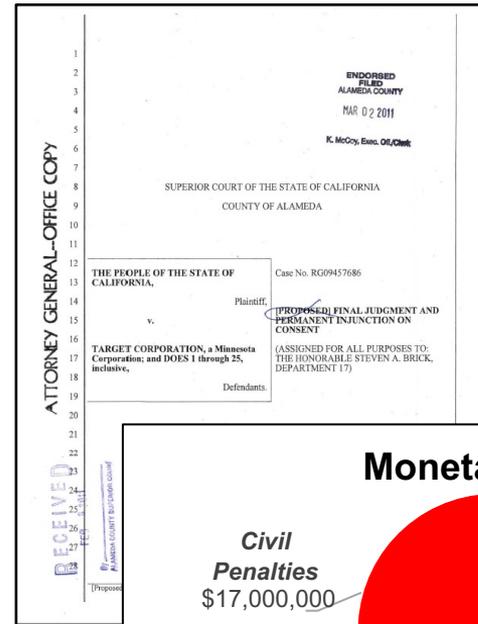
Walmart (2010)

- HWCL action settled in 2010
- California OAG involvement, plus many District Attorneys' Offices
- "Retail" hazardous waste
- **Civil penalty: \$20,000,000**
- Other: **\$7,681,325**
- 5-year injunction



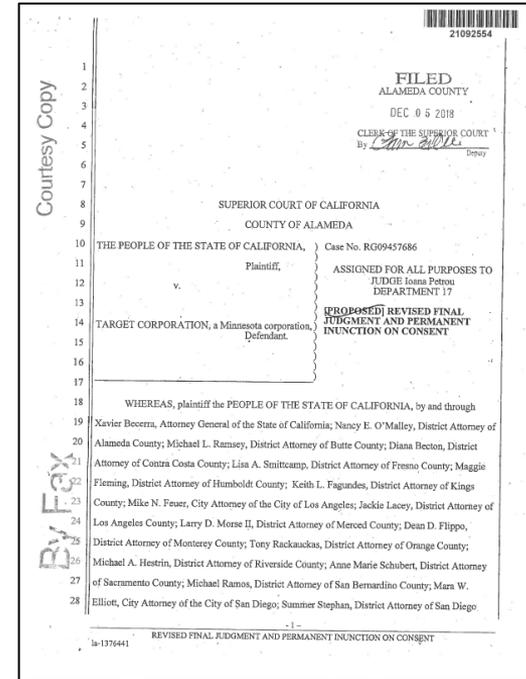
Target (2011)

- HWCL action settled in 2011
- California OAG involvement, plus many District Attorneys' Offices
- "Retail" hazardous waste
- **Civil penalty: \$17,000,000**
- Other: \$5,500,000
- 5-year injunction



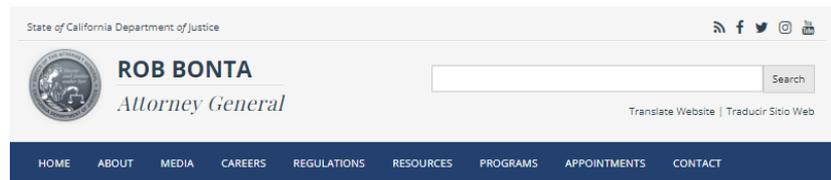
Target (2018)

- Follow-on HWCL action
 - Alleged violations start **the day after** the 2011 Final Judgment was entered
- Same players, same allegations
- **Civil penalty:** **\$3,200,000**
- **Other:** **\$4,200,000**
- 3-year injunction



Walmart (Dec. 2021)

- Follow-on HWCL action
- Same players, same allegations, plus...
 - Alleges violation of injunctive provisions
- No resolution to date....



Attorney General Bonta Announces Statewide Lawsuit Against Walmart for Illegal Disposal of Hazardous Waste

Press Release / Attorney General Bonta Announces Statewide Lawsuit Against W...



Monday, December 20, 2021

Contact: (916) 210-6000, agpressoffice@doj.ca.gov

OAKLAND – California Attorney General Rob Bonta today, joined by the California Department of Toxic Substances Control (DTSC) and twelve district attorneys, filed a statewide lawsuit against Walmart for the illegal disposal of hazardous waste. Over the past six years, Walmart is alleged to have violated California's environmental laws and regulations by disposing of hazardous waste products at local landfills that are not equipped or authorized to receive this type of waste. The waste includes alkaline and lithium batteries, insect killer sprays and other pesticides, aerosol cans, toxic cleaning supplies, electronic waste, latex paints, and LED lightbulbs, as well as confidential customer information. According to results from Walmart's own inspections, the California Department of Justice estimates the company unlawfully disposes of approximately 159,600 pounds – or more than one million items – of hazardous waste in California each year.

"Walmart's own audits found that the company is dumping hazardous waste at local landfills at a rate of more than one million items each year. From there, these products may seep into the state's drinking water as toxic pollutants or into the air as dangerous gases," said **Attorney General Rob Bonta**. "When one person throws out a battery or half-empty hairspray bottle, we may think that it's no big deal. But when we're talking about tens of thousands of batteries, cleaning supplies, and other hazardous waste, the impact to our environment and our communities can be huge. This lawsuit should serve as a warning to the state's worst offenders. We will hold you accountable. As the People's Attorney, taking on corporate polluters and protecting public health will always be among my top priorities."

RCRA/HWCL– Lessons Learned

- RCRA liability is broader than you think—and expanding
 - And penalties can run into the millions
 - But, used relatively less often by citizen-plaintiffs
- HWCL liability for major enforcement initiatives is often much higher than RCRA liability
 - “Settlements” with OAG/DAs must be handled **very** carefully
 - A strong compliance program is critical, both to avoid enforcement and to mitigate penalties

Emerging Compliance Risks

Closing

Airosol Co., Inc. (KS)

- Chemical manufacturer in Neodesha
- Two workers improperly mixed chemicals
- Resulting fire and explosions
- Domino effect...



Airosol Co., Inc.

- Surrounding communities evacuated
- Schools closed
- Contaminated freshwater
- State ordered downstream drinking water plants closed
- FEMA mobilized to provide water



Airosol Co., Inc.

- No OSHA Process Safety Management program
- No EPA Risk Management Plan
- EHS responsibilities are serious
- Failures can have far-reaching consequences

Criminal prosecution

*Environmental
Coordinator sentenced to
12 months probation*

Thank you!