

Environmental Enforcement Actions

Brian B. Bell

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Brian Bell assists clients in obtaining environmental and operating permits for controversial industrial, energy, and natural resources projects. As part of this work, Brian advocates for companies before local, state, and federal regulatory bodies and on judicial review. Brian also represents clients in defending against agency enforcement actions.

Brian has litigated cases in district and appellate courts throughout the country, including in Minnesota, Wisconsin, and Montana. Brian also represents clients conducting environmental due diligence in mergers and acquisitions, and real estate transactions.

A long-exposure photograph of a multi-lane highway at night, showing light trails from cars in various colors (white, red, blue, yellow) against a dark background. The road curves to the right, and the image is partially obscured by a white diagonal shape on the right side.

Topics

1. **Background and Statistics**
2. **Role of Environmental Consultants**
3. **What's Ahead**
4. **The Nuts and Bolts**

Enforcement Statistics and Players

Environmental Enforcement Actions

The State Enforcers

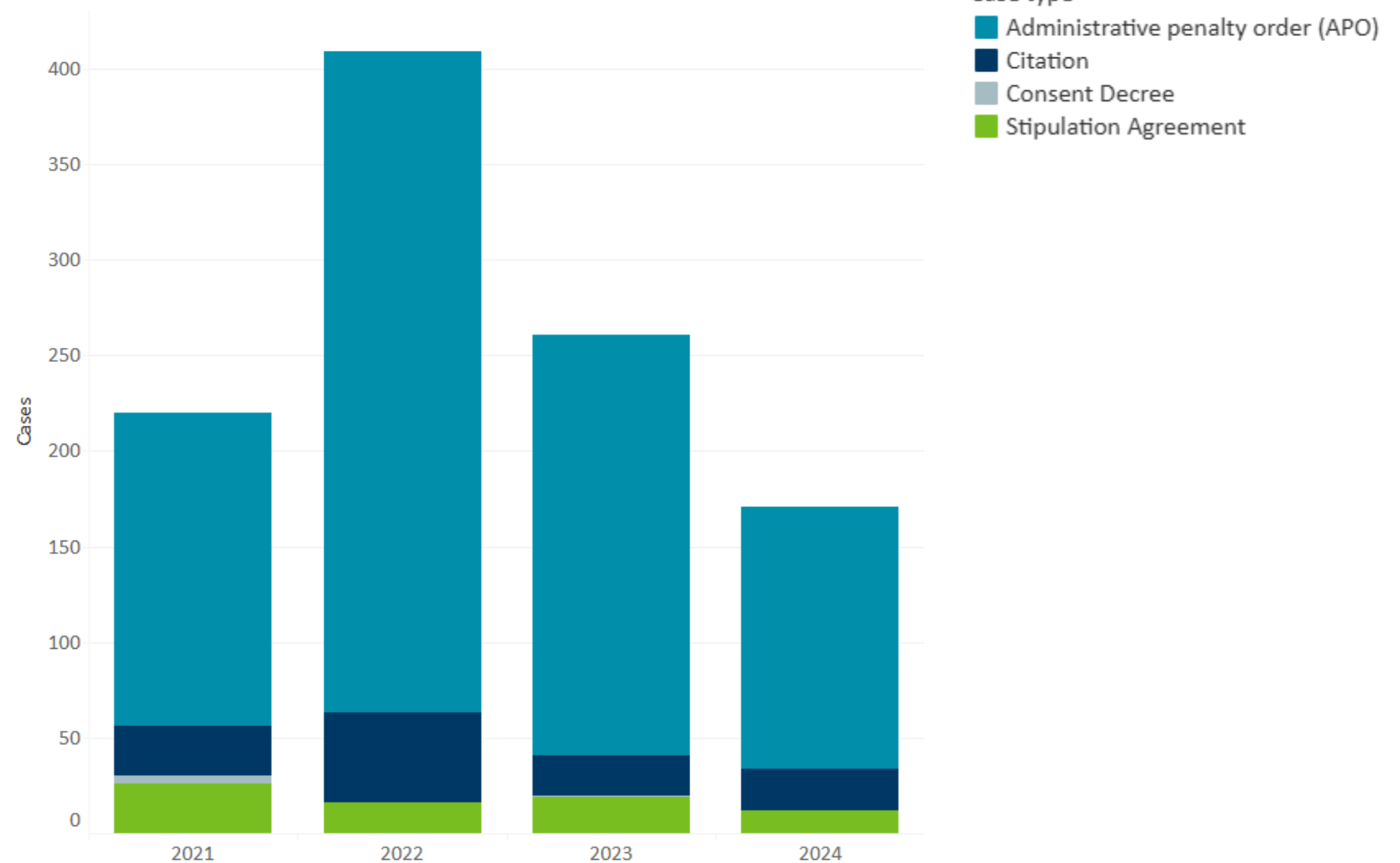
- **Minnesota Pollution Control Agency (Industrial Division, Compliance Unit/Legal Services Unit)**
- **Minnesota Office of the Attorney General (Environmental and Natural Resources Division)**



**Minnesota
Pollution
Control
Agency**

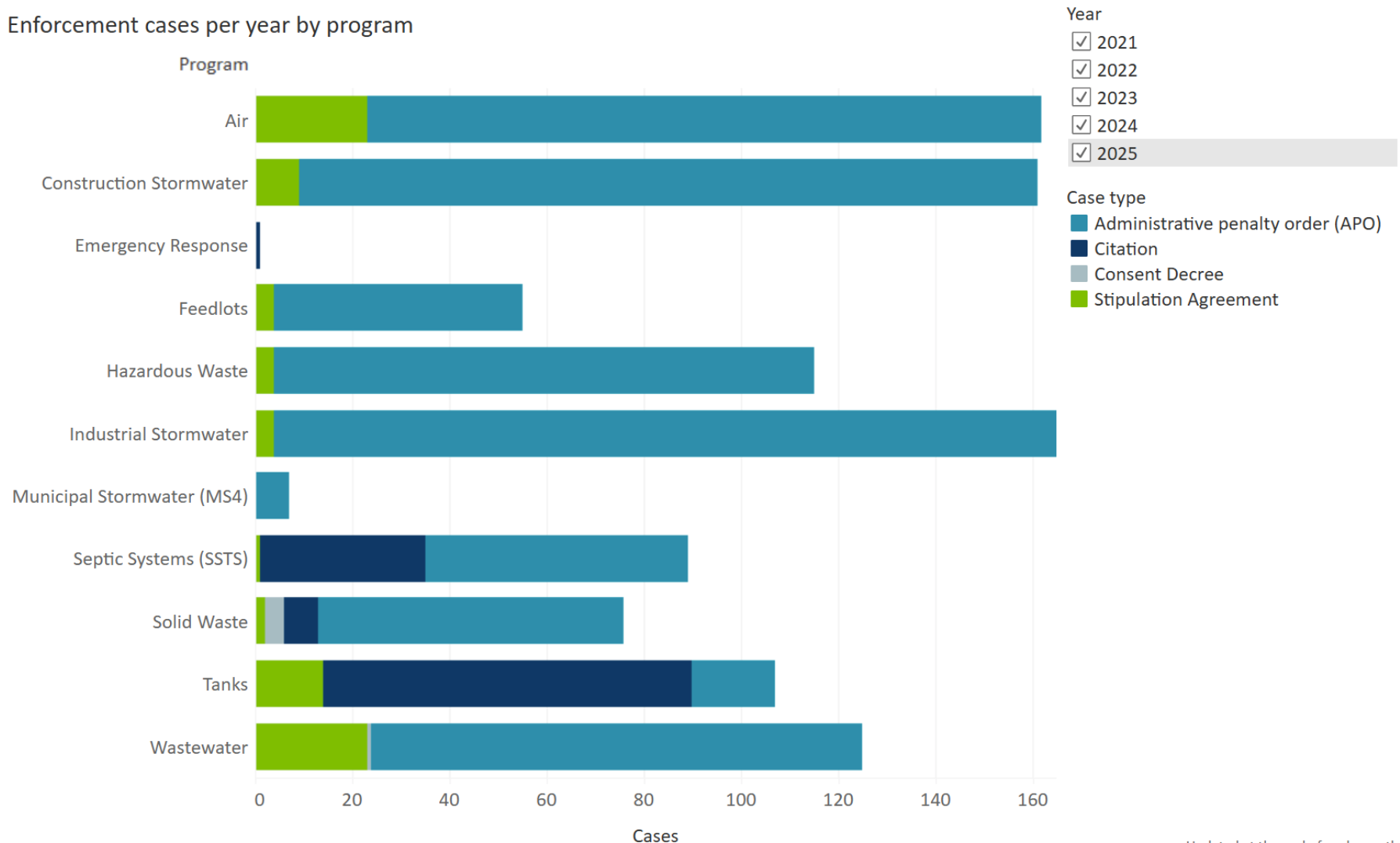
Minnesota Enforcement Actions by Year

Enforcement cases per year



Enforcement Actions by Program Type

Enforcement cases per year by program



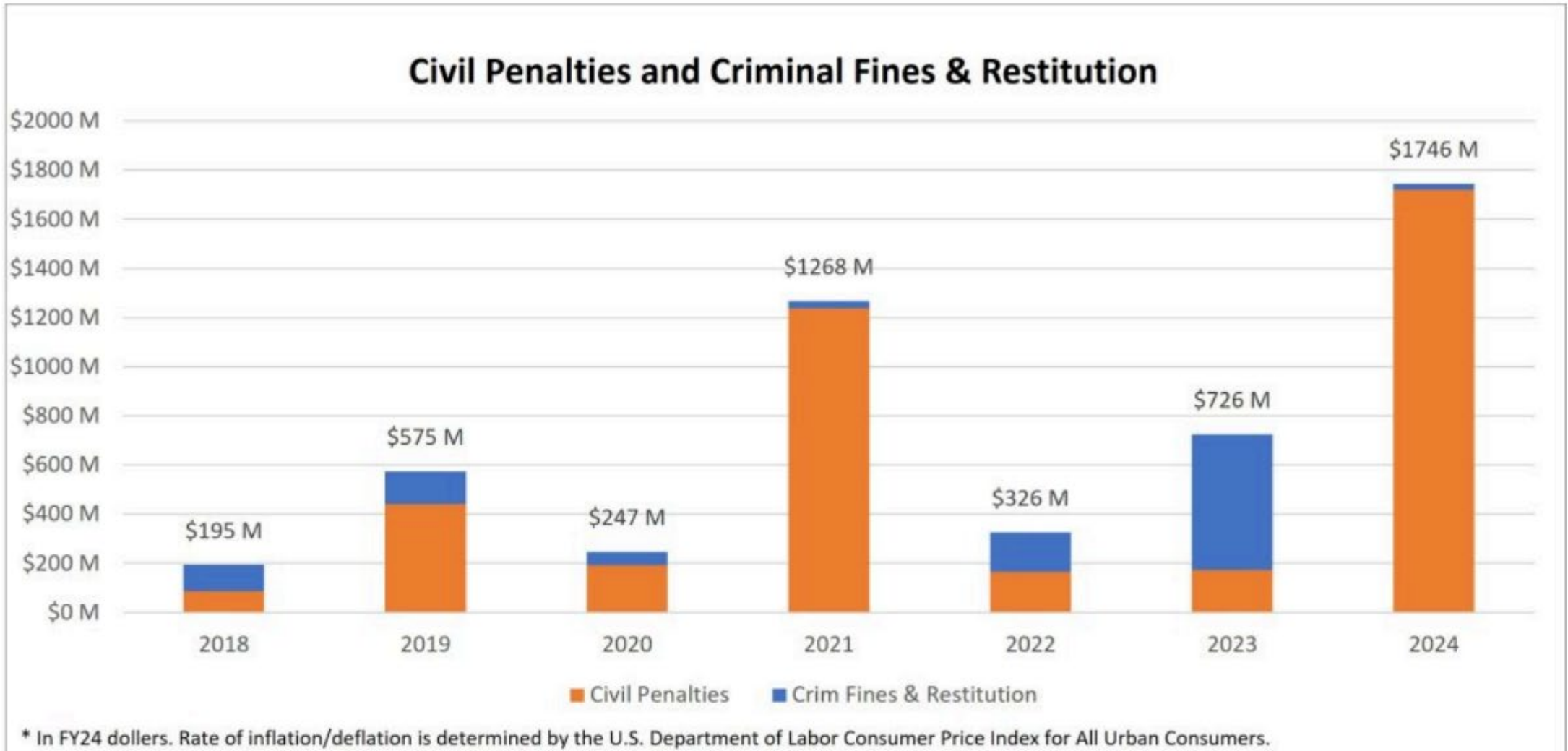
Updated at the end of each month

Federal Players

- **Environmental Protection Agency**
 - Office of Enforcement and Compliance Assurance (OECA)
 - National Enforcement Investigations Center
- **Department of Justice (Environment & Natural Resources Division)**
- **Other federal agencies**
 - U.S. Fish and Wildlife Service
 - Army Corps of Engineers

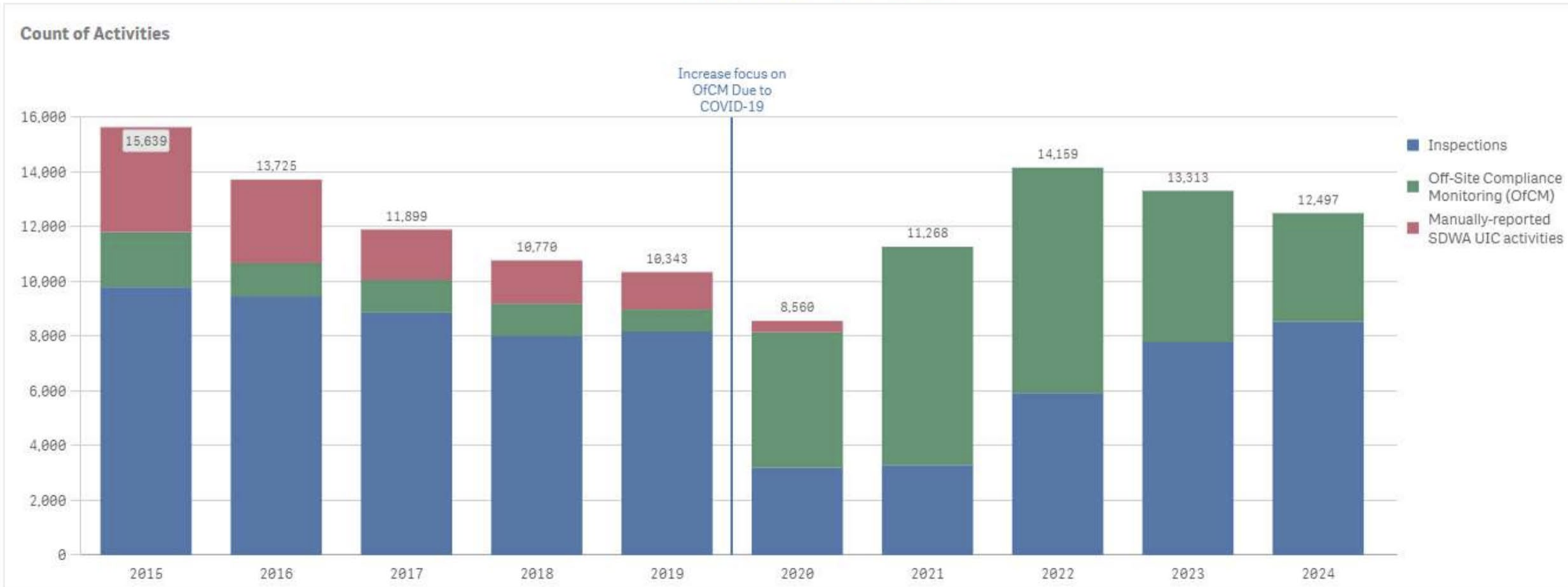


Federal Fiscal Year Statistics



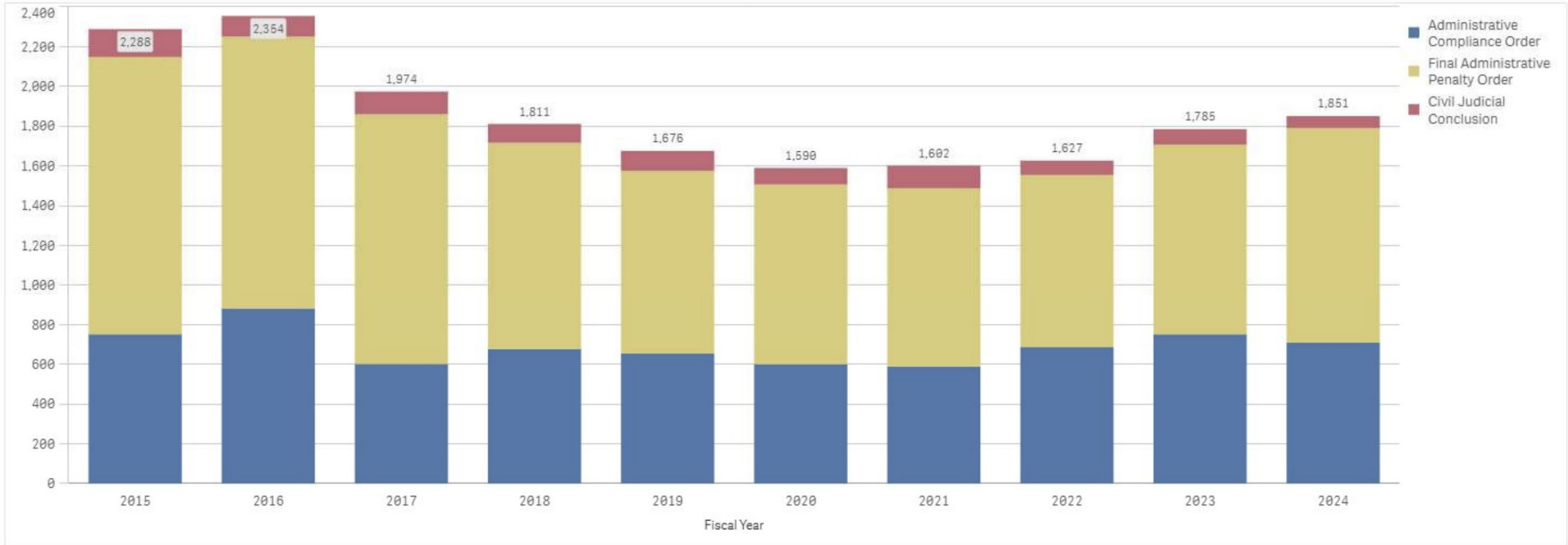
Federal Fiscal Year Statistics

Federal Compliance Monitoring Activities Conducted by EPA FY 2015 – FY 2024



Federal Fiscal Year Statistics

Total Civil Enforcement Case Conclusions FY 2015 – FY 2024



Recent Developments in Enforcement (State)

- **Passed in the wake of Water Gremlin and Smith Foundry**
- **Clarified emergency powers**
- **Clarified actions the district court can take**
 - Cease operations
 - Cease activities
- **Authorized MPCA to deny an extension under a stipulation agreement based solely on “increased costs of compliance”**
- **Increased monetary penalties**
 - \$25,000 total administrative penalty
 - \$15,000 per day of violation judicial penalty
- **Penalty for repeat violations must be 10% higher than previous penalty**
- **Allowed MPCA to recover costs of overseeing enforcement of stipulation agreement**

State Emergency Powers

- **May shut facility down immediately if there is “an imminent or substantial danger” or “other acts of concern”**
- **“Other acts of concern”**
 - **Falsification of records,**
 - **History of noncompliance,**
 - **Chronic or substantial permit violations,**
 - **Where there is evidence of danger to the health or welfare or evidence of environmental harm**
- **May be issued without notice or hearing**
- **Court may issue an injunction to cease operations**



State Emergency Powers Available

- **Suspend or revoke a permit,**
- **Issue an order to cease operations,**
- **Require financial assurances,**
- **Modify a permit,**
- **Require additional agency oversight,**
- **Pursue other actions necessary to abate pollution and protect human health**



Recent Developments in Environmental Enforcement (Federal)

- **Post-Chevron (*Loper Bright*)**
 - Even more focus on administrative enforcement
 - Increased incentive for EPA to settle
 - Less incentive for respondent to settle
- **Environmental Justice**
- **Will not stop energy production unless**
 - Imminent threat
 - Worker safety
 - Disrupt production
- **Less focus on enforcing GHG emissions regulations**
- **Supplemental environmental projects?**



Environmental Engineers & Enforcement Actions

- **Indispensable**
- **May have more knowledge of the substantive regulations than the lawyers**
- **Often needed for factual background**
- **Should know when to call in lawyer (at the latest when alleged violations letter is received—even earlier to ensure privilege)**
- **Need to provide realistic, conservative times frames for completing actions. Consultant may have a role long after the lawyer has left.**
- **Know from who you're taking direction**
 - **Mark things attorney-client privileged/sought at the request of attorney**
 - **If enforcement is likely, discuss whether you should be communicating with the agency**
- **Don't hide mistakes/bad facts**
- **Must meet deadlines**
- **If you're unwilling to testify or submit affidavits make that known early**

Enforcement Methods and Authorities

Environmental Enforcement Actions

State v. Federal Comparison

- **Overall structure similar**
 - Investigations/Requests for Information
 - Administrative enforcement
 - Civil enforcement
 - Criminal enforcement
- **Federal enforcement tools differ more based on statute/media**
- **More likely to bring criminal enforcement?**

Enforcement Methods

Inspections
Requests for Information (RFI)

Alleged Violations Letter (AVL)
Letter of Warning (LOW)
Notice of Violation (NOV)

Field Citation
Administrative Penalty Order (APO)
Schedule of Compliance (SOC)
Stipulation Agreement (STIP)
Emergency Powers
Criminal Proceedings

Information Gathering

- **Passive**
 - Publicly available information (internet)
 - Drive by
 - Periodic reports
 - Informants (e.g., disgruntled employees)
- **Active**
 - Request for Information
 - Inspections
- **Feds have unique inspection powers under each statute**
 - CERCLA § 104(e)
 - CAA § 114
 - CWA § 308
 - RCRA § 3007



Alleged Violations Letter (AVL)

- Hybrid between NOV and RFI
- Typically after an inspection or RFI
- Allege violations
- Provide an opportunity to respond
- Request additional information



Minnesota Pollution Control Agency

520 Lafayette Road North | St. Paul, Minnesota 55155-4194 | 651-296-6300
800-657-3864 | Use your preferred relay service | info.pca@state.mn.us | Equal Opportunity Employer

April 20, 2017

The Honorable Bill Mars
Mayor, City of Shakopee
129 Holmes St. S.
Shakopee, MN 55379

RE: Alleged Violations Letter
City of Shakopee, Scott County

Dear Mayor Mars:

On March 9, 2017, the Minnesota Pollution Control Agency (MPCA) staff conducted an audit of the City of Shakopee's Stormwater Pollution Prevention Program (SWPPP) under the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Small Municipal Separate Storm Sewer System (MS4) General Permit (MS4 Permit) and identified the following alleged violations.

This letter describes actions you should take to correct the violations.

Please respond within ten days with facts or circumstances we should consider in determining whether and what level of enforcement action is appropriate. Page numbers of the MS4 Permit are included so you can easily find information related to the alleged violations.

Alleged Violations

National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Small Municipal Separate Storm Sewer System (MS4) General Permit (MS4 Permit) [MNRO40000]

1. Failure to inspect and document each site inspection using an inspection checklist or other written means as required under Part III.D.4.f.(2) (page 14).
2. Failure to revise the existing Post-Construction Stormwater Management program to include a regulatory mechanism(s) that incorporates the requirements under Part

Letter of Warning (LOW)/Notice of Violation (NOV) (Non-Monetary)

- **LOW**
 - **Alleges violations**
 - **Requires corrective action (7-30 days)**
 - **Less serious violations**
- **NOV**
 - **Alleges violations**
 - **Requires corrective action (>30 days)**
 - **More serious violations**

Schedule of Compliance (SOC)

- **Negotiated agreement**
- **Provides a schedule for final compliance**
- **Permittee should have an understanding of what's needed to get into compliance**
- **No monetary penalty, but . . .**
- **Stipulated penalties for failure to meet compliance schedule**

“Negotiated” Agreement

- **Negotiated under threat of sever sanctions—often boilerplate**
- **May provide a schedule for final compliance**
- **Stipulated penalties for failure to comply with agreement**
- **State v. Federal**
 - **State**
 - **Stipulation Agreement (STIP)**
 - **No formal administrative action**
 - **No sign-off from adjudicator**
 - **Allows fines over \$25,000**
 - **Federal**
 - **Administrative Consent Order (ACO)/Consent Agreement and Final Order (CAFO)**
 - **Part of formal administrative process**
 - **May be before or after a complaint**
 - **Signed by adjudicator**

Penalty Amount Negotiated Agreement

- **Economic benefit**
- **Gravity**
- **Adjustments**
 - **Willfulness**
 - **Cooperation**
 - **Self-reporting**
 - **Compliance history**

State: Administrative Penalty Order (APO)

- Forgivable
- Nonforgivable
- Combined

Minn. Stat. § 116.072



APO/AO

- **May require corrective action within 30 days**
- **Respond showing violation corrected or appropriate steps towards correcting the violation have been taken**



Challenging APO

- 30 days
- Expedited administrative hearing
- District court review



APO: Expedited Administrative Hearing

- Office of Administration Hearings
- Hearing must occur within 30 days of request
- Administrative law judge makes only a *recommendation*
- May only recommend reduced penalty if “unreasonable”
- May comment on recommendation before MPCA issues decision
- Appealable to court of appeals within 30 days



District Court Review

- State district court
- ***MPCA has burden to establish by a preponderance of evidence that***
 - A violation occurred,
 - Regulated party is responsible for the violation, and
 - Penalty amount is justified.



Pros and Cons of Administrative Review & District Court Review

Office of Administrative Hearings Review	District Court Review
Relatively fast (hearing within 30 days)	MPCA has burden of proof
Cheaper	Build the record
MPCA still makes final decision	Less deferential to MPCA
Limited chance to build the record	Longer
	More expensive

Federal Administrative Orders

- **Statute/fact dependent**
 - **Emergency orders (“imminent and substantial endangerment”) are immediately enforceable**
 - **Nonemergency orders typically require agency to file a complaint and provide an opportunity for hearing**
- **Appeals of emergency orders are to court, if at all**
- **Appeals of nonemergency orders are generally to Environmental Appeals Board (EAB) and then court**

Civil Penalty Amounts

- **State**

- **Up to \$25,000 (Administrative)**
 - **How calculated**
 - Willfulness
 - Gravity
 - Compliance history
 - Number of violations
 - Economic benefit
 - Other factors
 - **Repeat violation must be at least 10% higher than previous violation (but can't exceed \$25,000)**
- **Up to \$15,000 per day (judicial)**

- **Federal**

- **Inflation adjustment**
- **Heavily statute dependent. See 40 C.F.R. § 19.4**
- **How calculated**
 - **Benefit component**
 - Delayed costs
 - Avoided costs
 - Competitive advantage
 - **Gravity component**

Civil/Judicial Enforcement

- **MN Attorney General or U.S. Department of Justice will be involved**
- **When used:**
 - **Administrative relief is insufficient or capped**
 - **Want judicial enforcement mechanisms**
 - Injunction
 - Consent decree
 - Contempt of court
 - **To avoid caps on administrative penalties (mostly state)**
 - **Nationally significant, highly visible case (federal)**
 - **Involves facilities in different regions (federal)**



Civil Enforcement

- **Why so rare?**
 - Time
 - Money
 - Right to a jury trial on monetary damages (federal)
 - Judicial officers may be less favorably disposed to agency's position
- **Why more resource intensive?**
 - More formal procedures
 - Discovery
 - Written discovery
 - Depositions
 - More motions
 - Formal trial

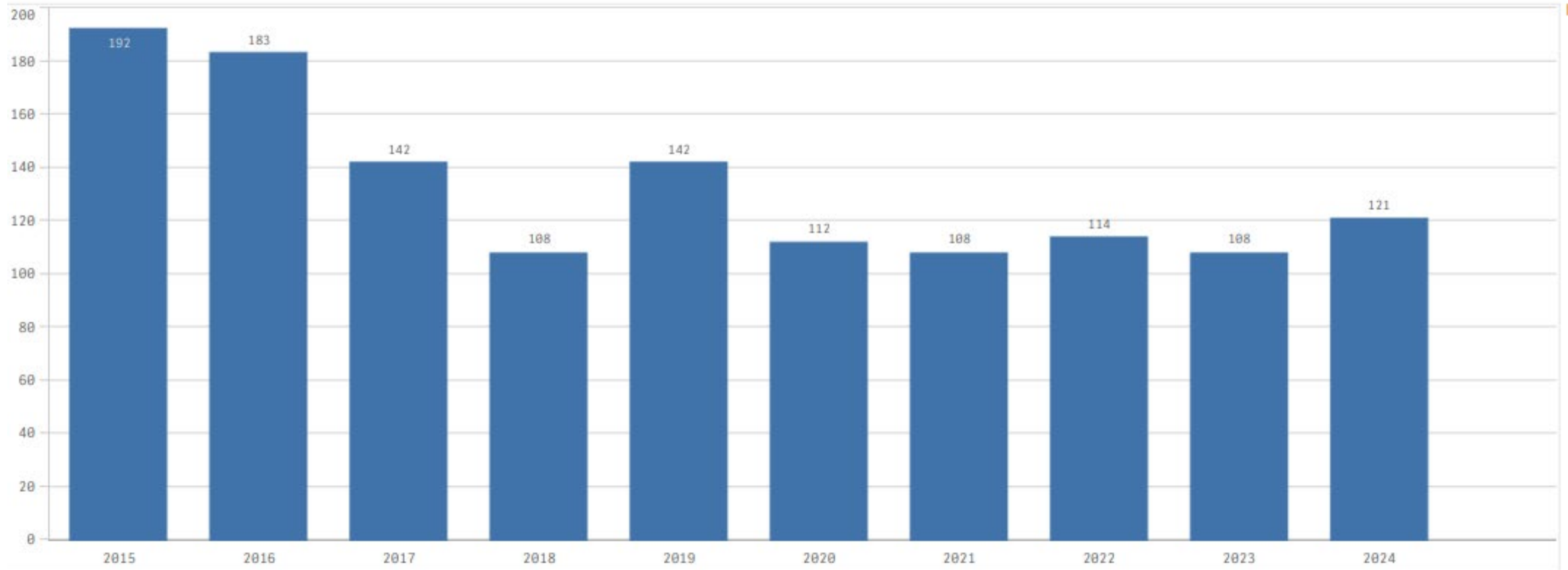
State Criminal Enforcement

- Rarely Used
- Can be either against individuals or the company itself
- Requires cooperation of the county attorney or attorney general
- Misdemeanor
 - “Willfully or negligently” violates environmental laws
 - \leq 90 days imprisonment; \leq \$1,000 fine
- Felony
 - Knowingly violates environmental laws
 - \leq \$1 million fine
 - \leq Ten years in jail

Federal Criminal Enforcement

Criminal Defendants Charged

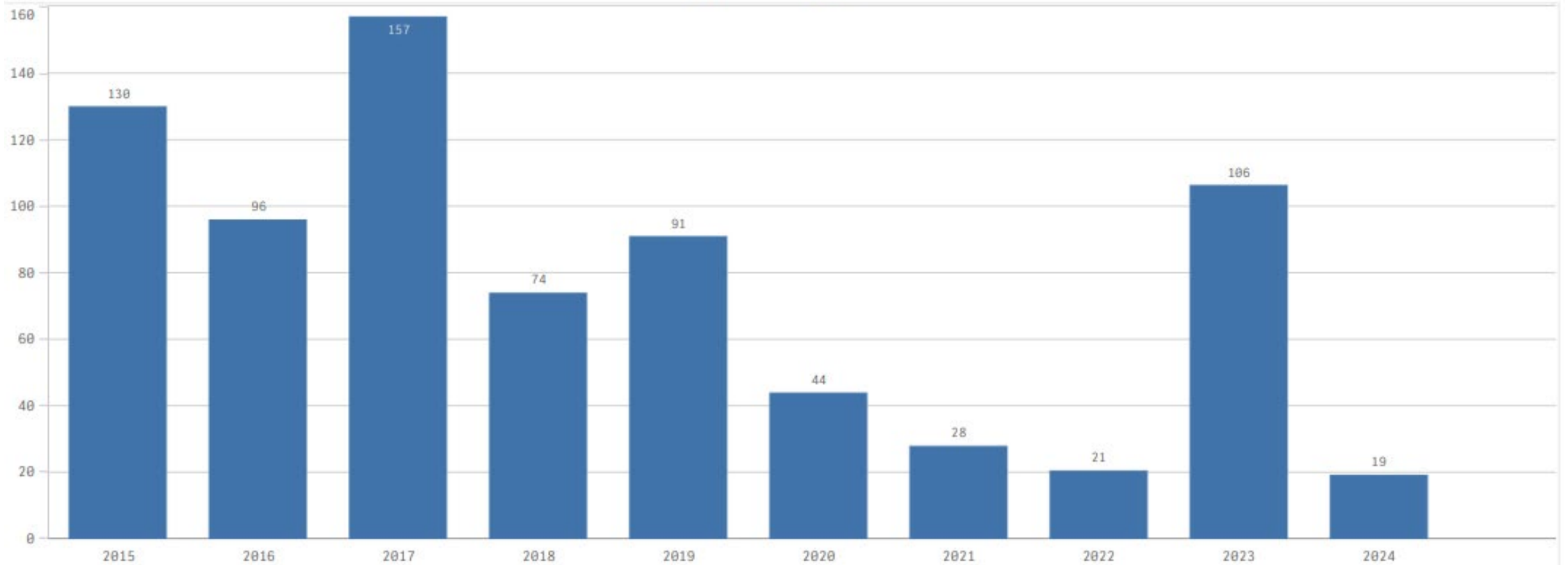
FY 2015 – FY 2024



Federal Criminal Enforcement

Criminal Sentencing Results (Years of Incarceration)

FY 2015 – FY 2024



Federal Criminal Enforcement

- Requires the cooperation of the DOJ Environmental Crimes Division and, in some cases, the local U.S. Attorney
- Statute specific
- Misdemeanor
 - “Strict liability” or negligence
 - No harm
 - ≤ 1 year imprisonment; \leq \$250,000 fine
- Felony
 - Knowing or intentional violation
 - Endangerment to public health
 - > 1 year imprisonment; $>$ \$250,000 fine



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