DORSEY always ahead

FEDERAL ENFORCEMENT FORUM

PANEL I: Environmental Enforcement: Issues in the Age of Trump
(James Rubin Memorial Environmental Law Address)

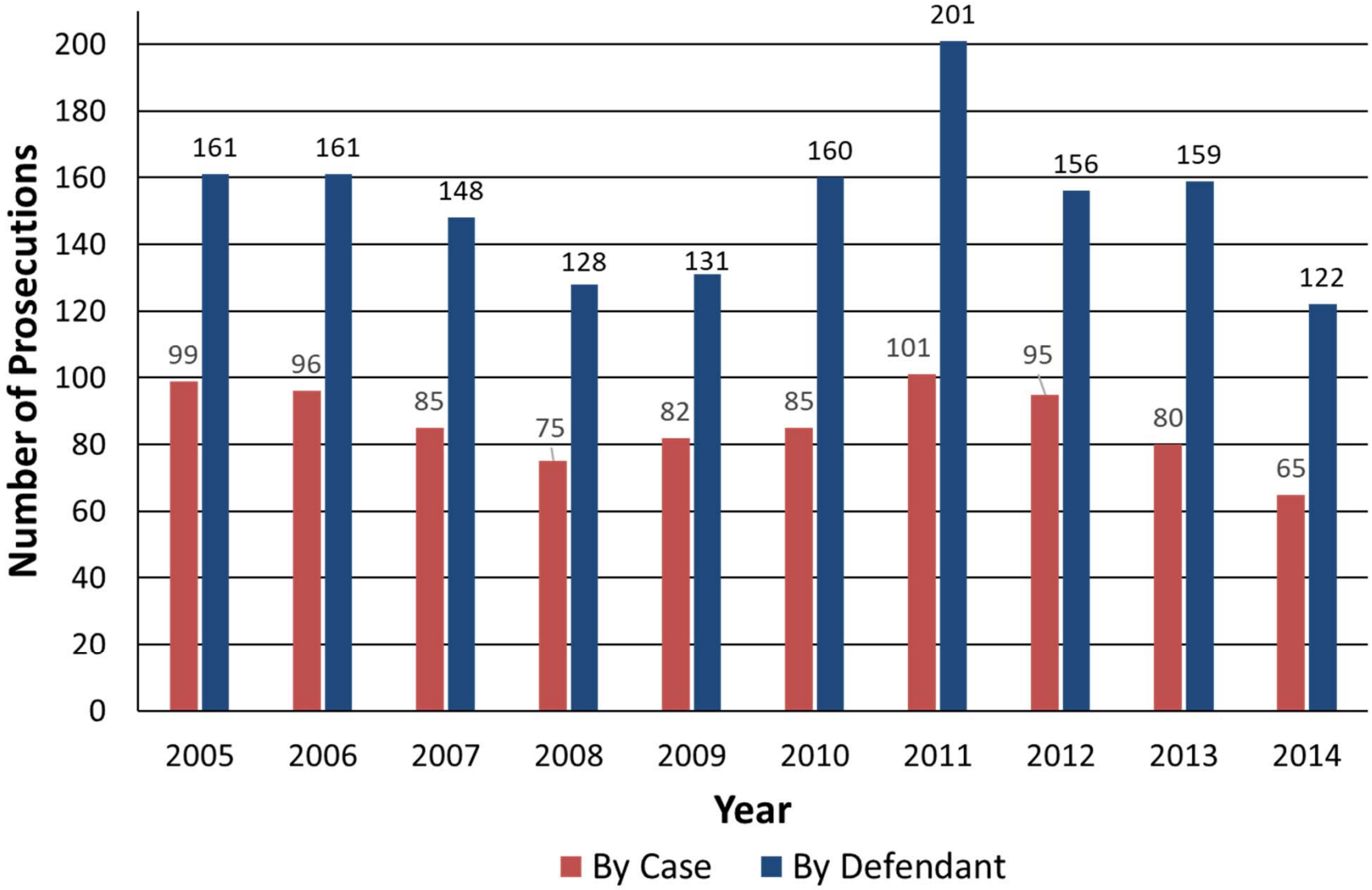
Special guest lecturer:

David M. Uhlmann, Professor and Director of the Environmental Law and Policy Program, University of Michigan Law School; former Chief of the Environmental Crimes Section, DOJ

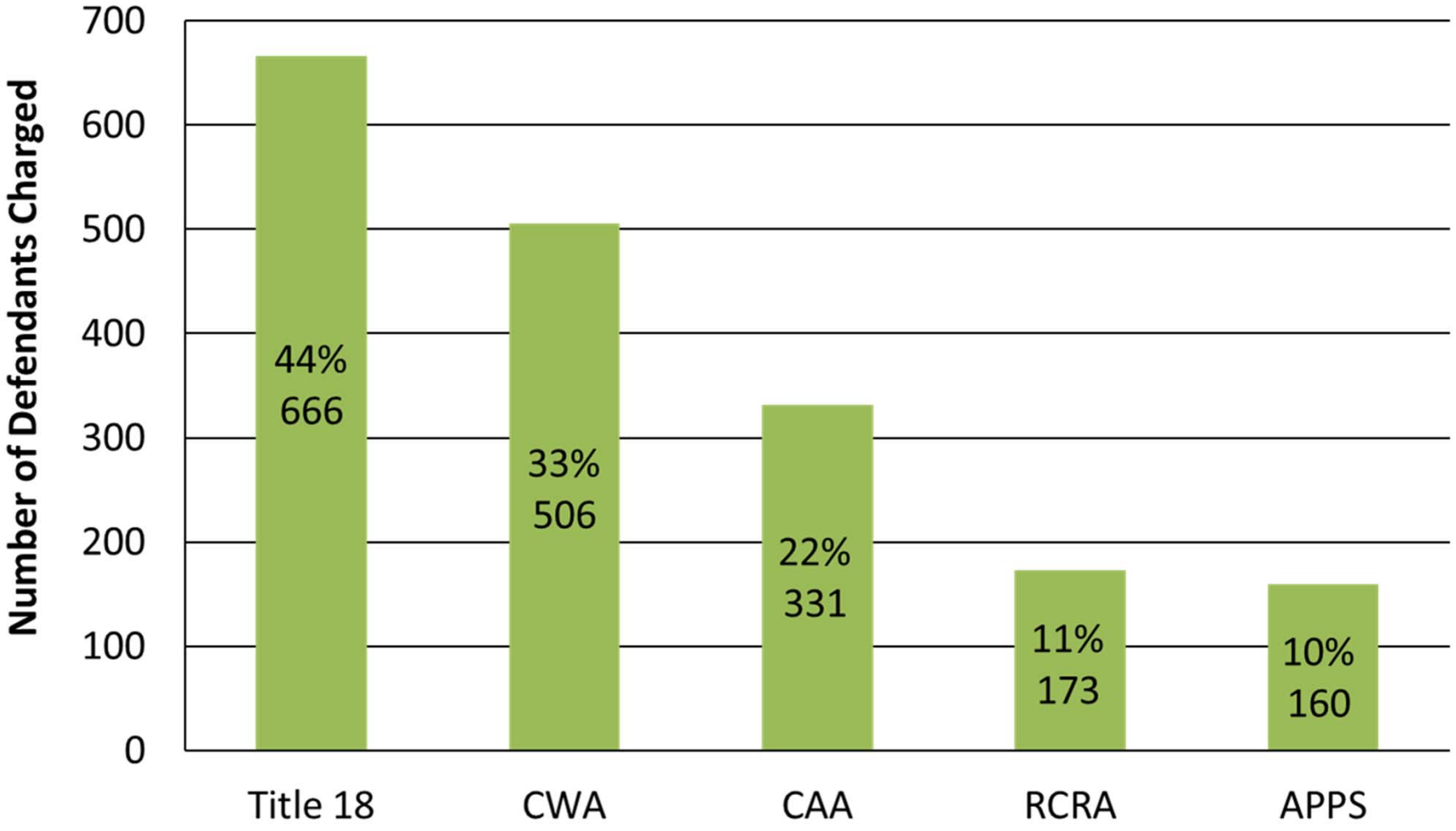
Prosecutorial Discretion and Environmental Crime

David M. Uhlmann
Jeffrey F. Liss Professor from Practice
Director of the Environmental Law and Policy Program
University of Michigan Law School

Trends in Criminal Enforcement Efforts: Prosecutions by Year

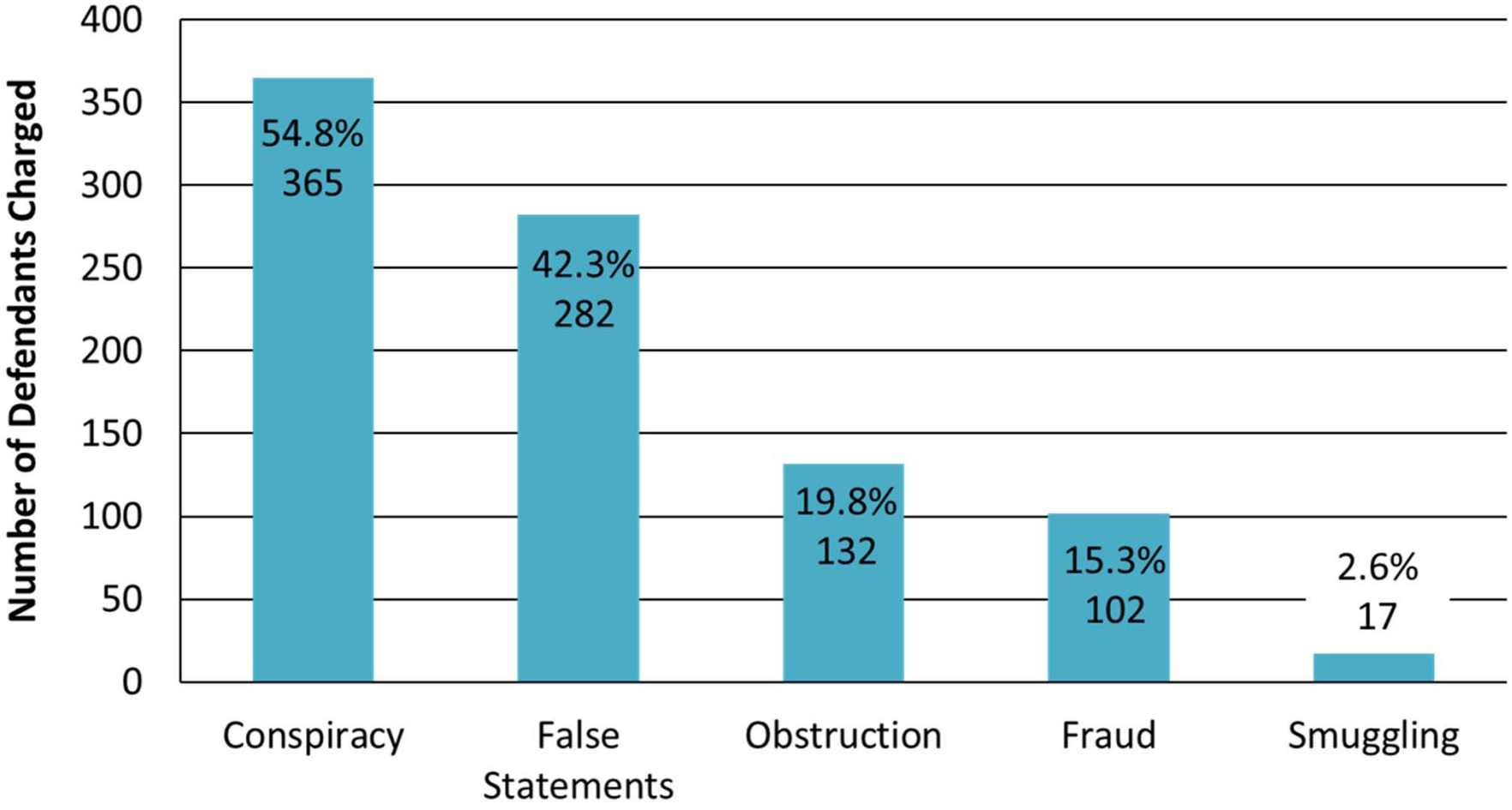


Frequently Charged Environmental Statutes (2005-2014)



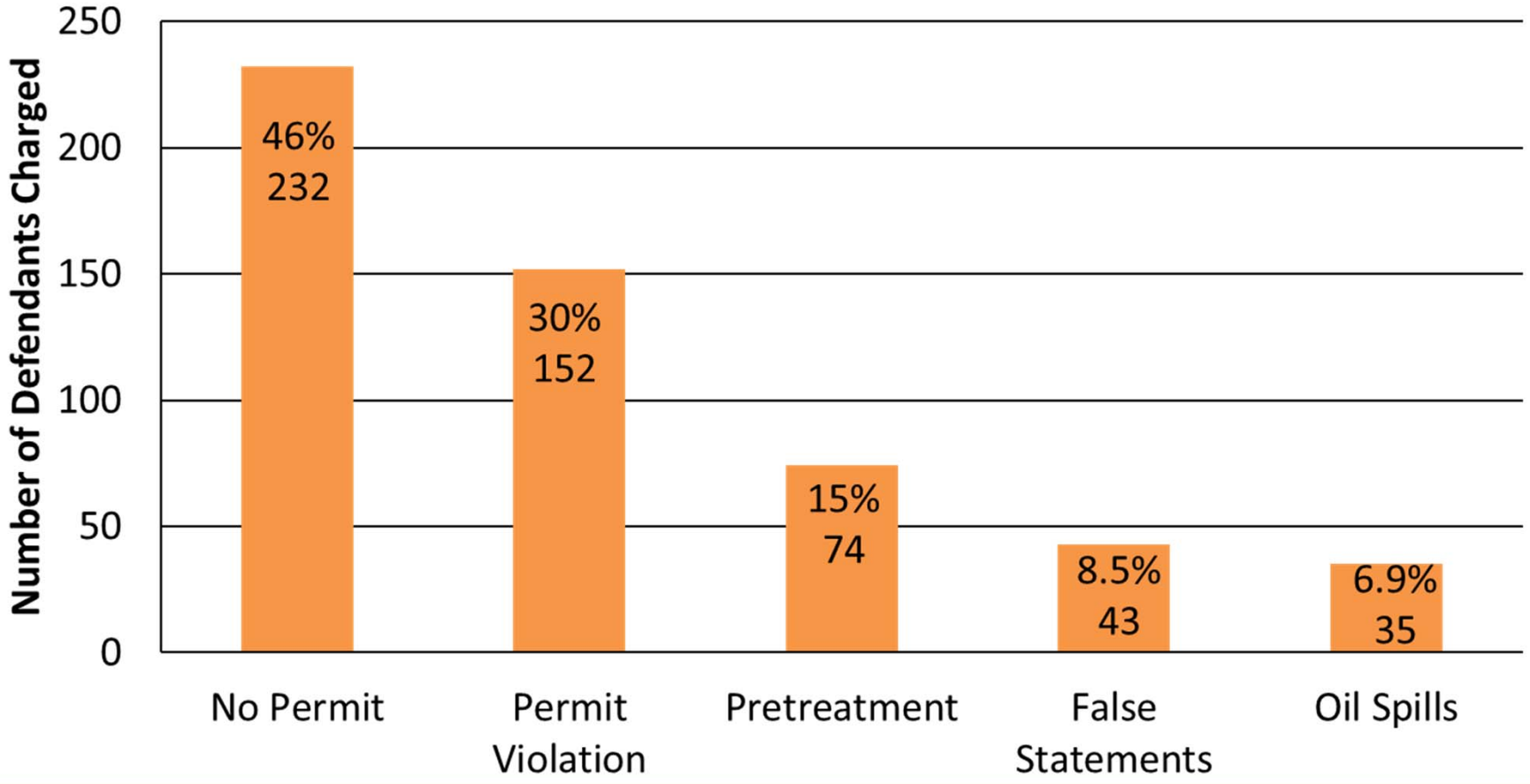
	Title 18	CWA	CAA	RCRA	APPS
% of Defendants 2005-2012	42.9%	35.8%	19.0%	13.4%	12.5%

Defendants Charged Under Title 18 (2005-2014)



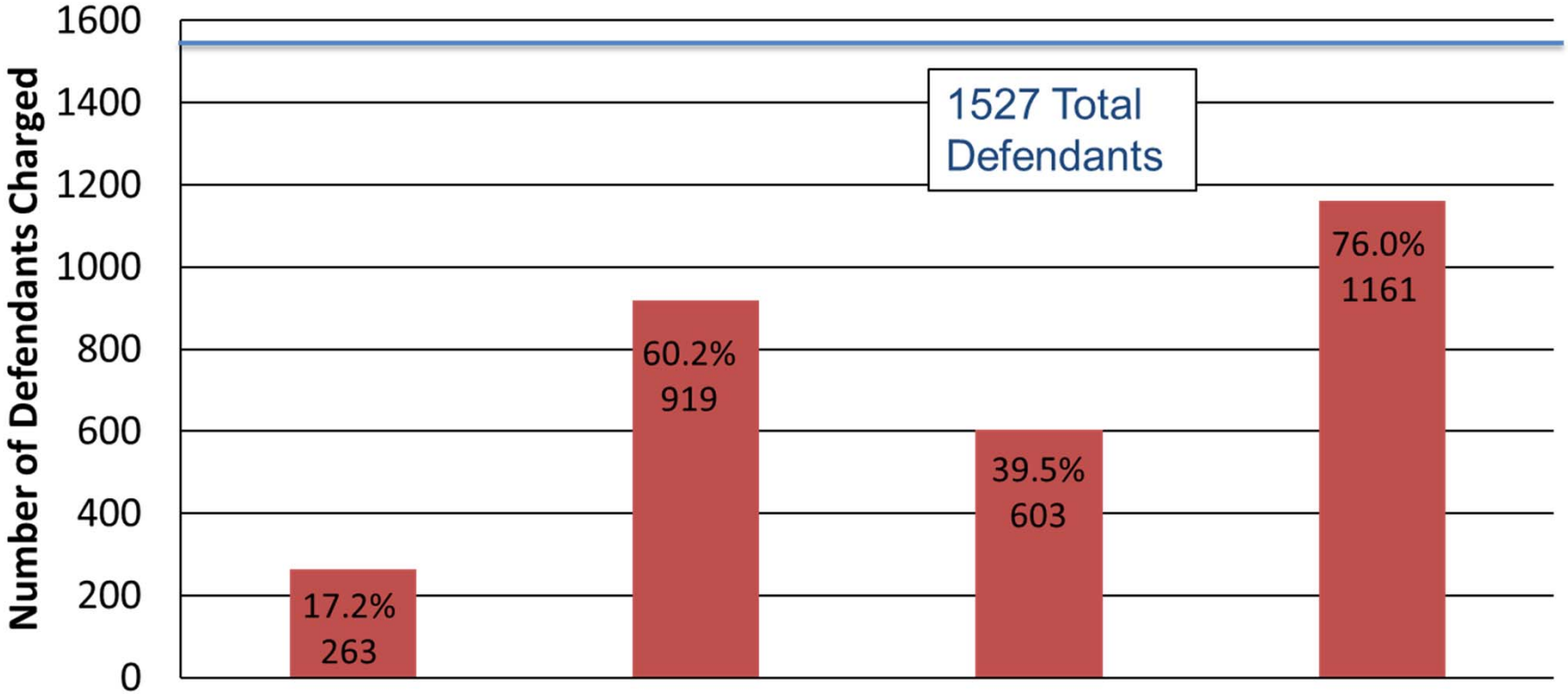
% of Defendants 2005-2010	50.9%	45.9%	17.3%	11.5%	2.9%

Defendants Charged Under the Clean Water Act (2005-2014)



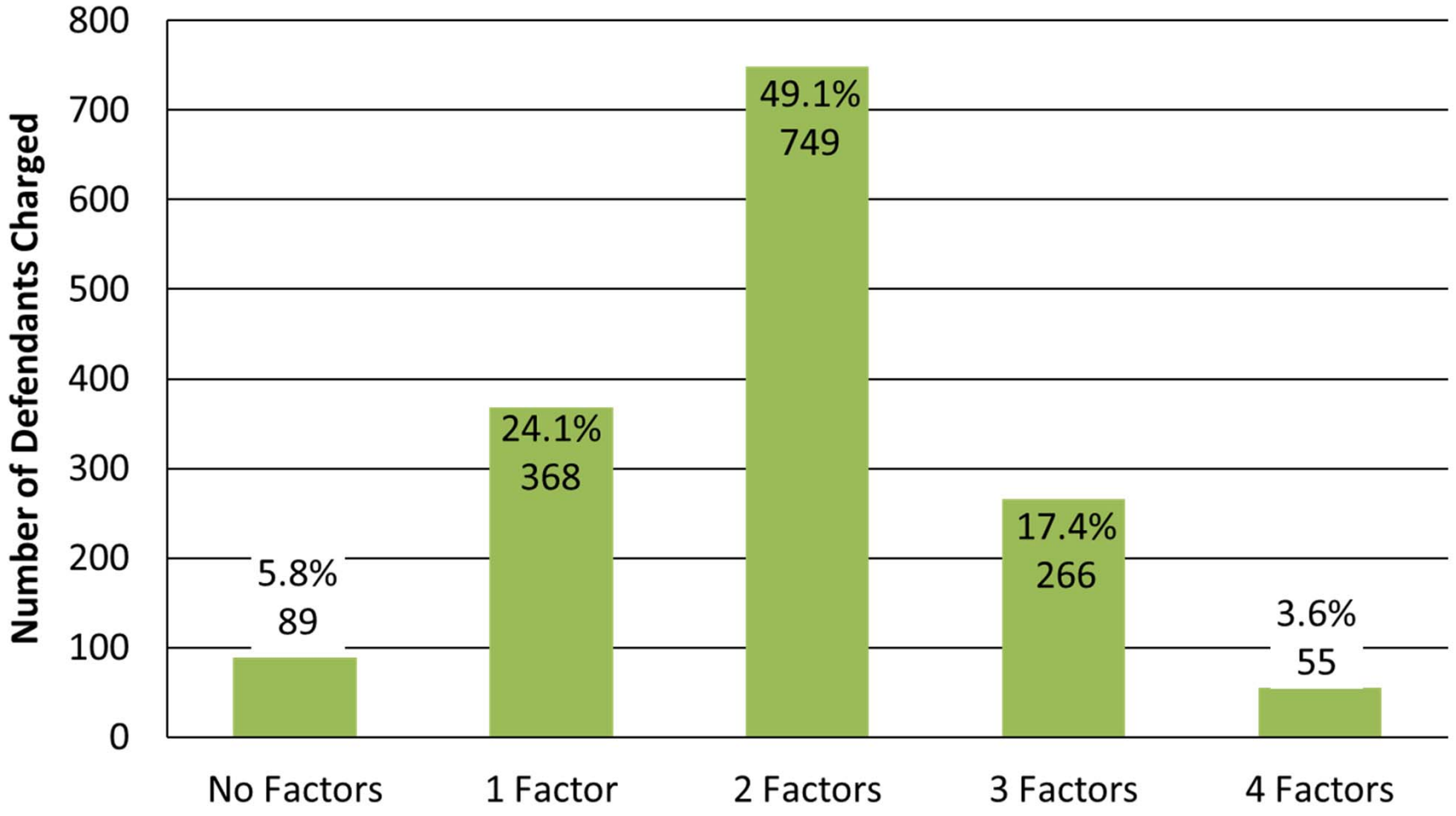
% of Defendants 2005-2010	42.8%	30.5%	18.2%	6.9%	6.6%

Prosecutorial Discretion Factors (2005-2014)



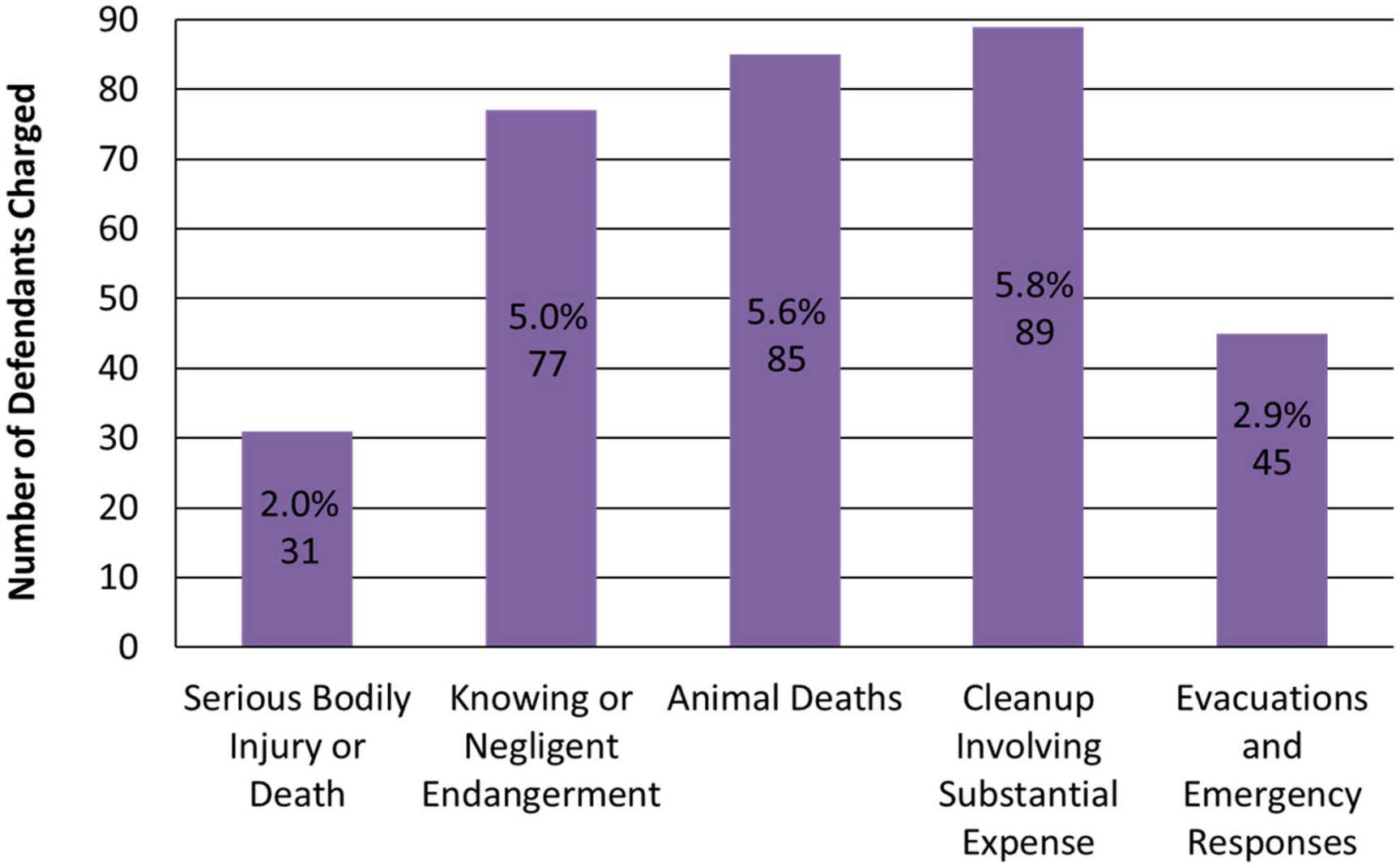
	Significant Environmental Harm or Public Health Effects	Deceptive or Misleading Conduct	Operating Outside the Regulatory System	Repetitive Violations
% of Defendants 2005-2010	16.6%	62.2%	33.2%	78.1%

Defendants Charged by Number of Aggravating Factors: (2005-2014)



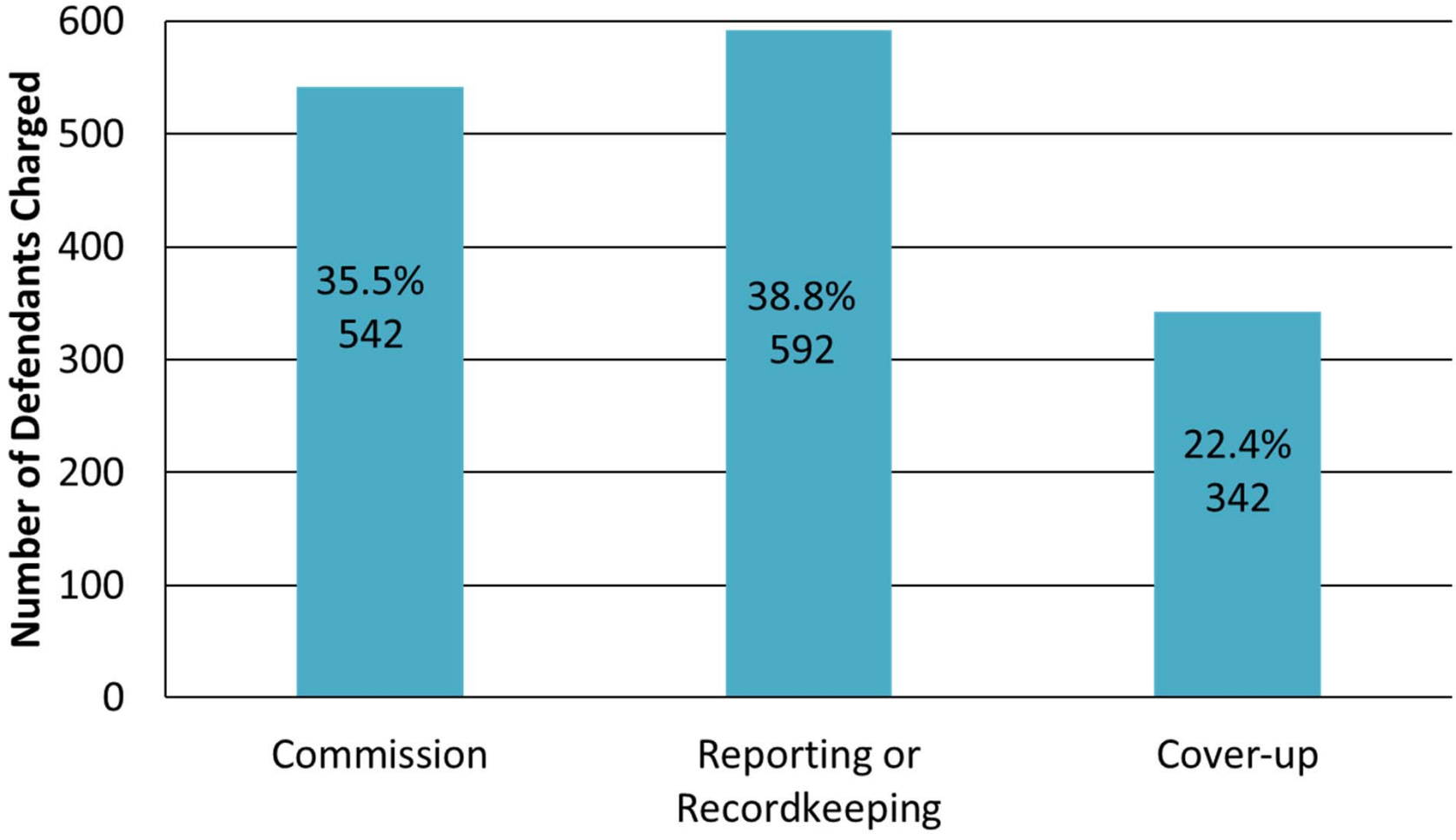
% of Defendants 2005-2010	4.7%	22.3%	53.5%	17.1%	2.4%

Significant Environmental Harm or Significant Public Health Effects: Subcategories (2005-2014)



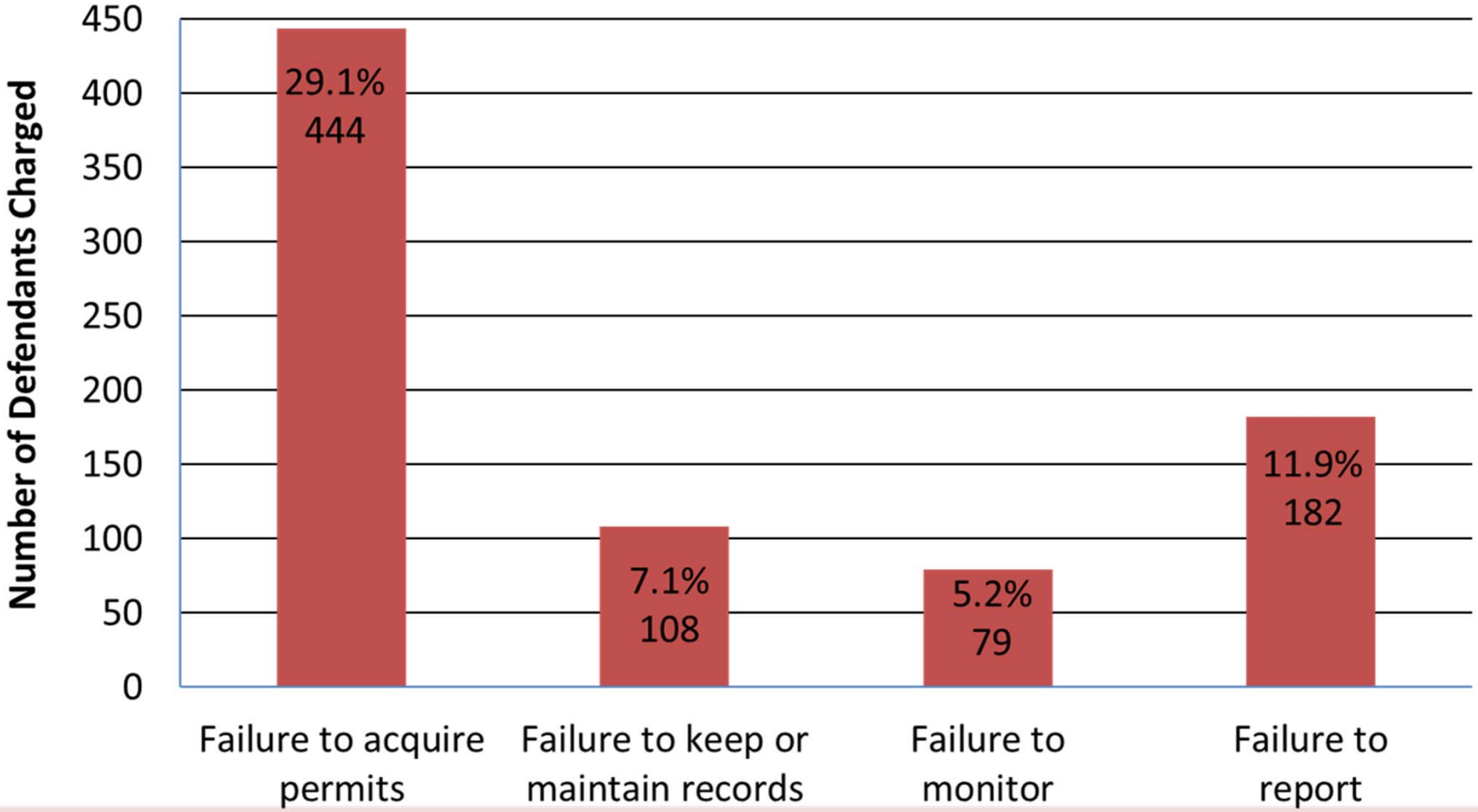
% of Defendants 2005-2010	1.8%	2.7%	4.5%	6.4%	2.7%

Deceptive or Misleading Conduct: Subcategories (2005-2014)



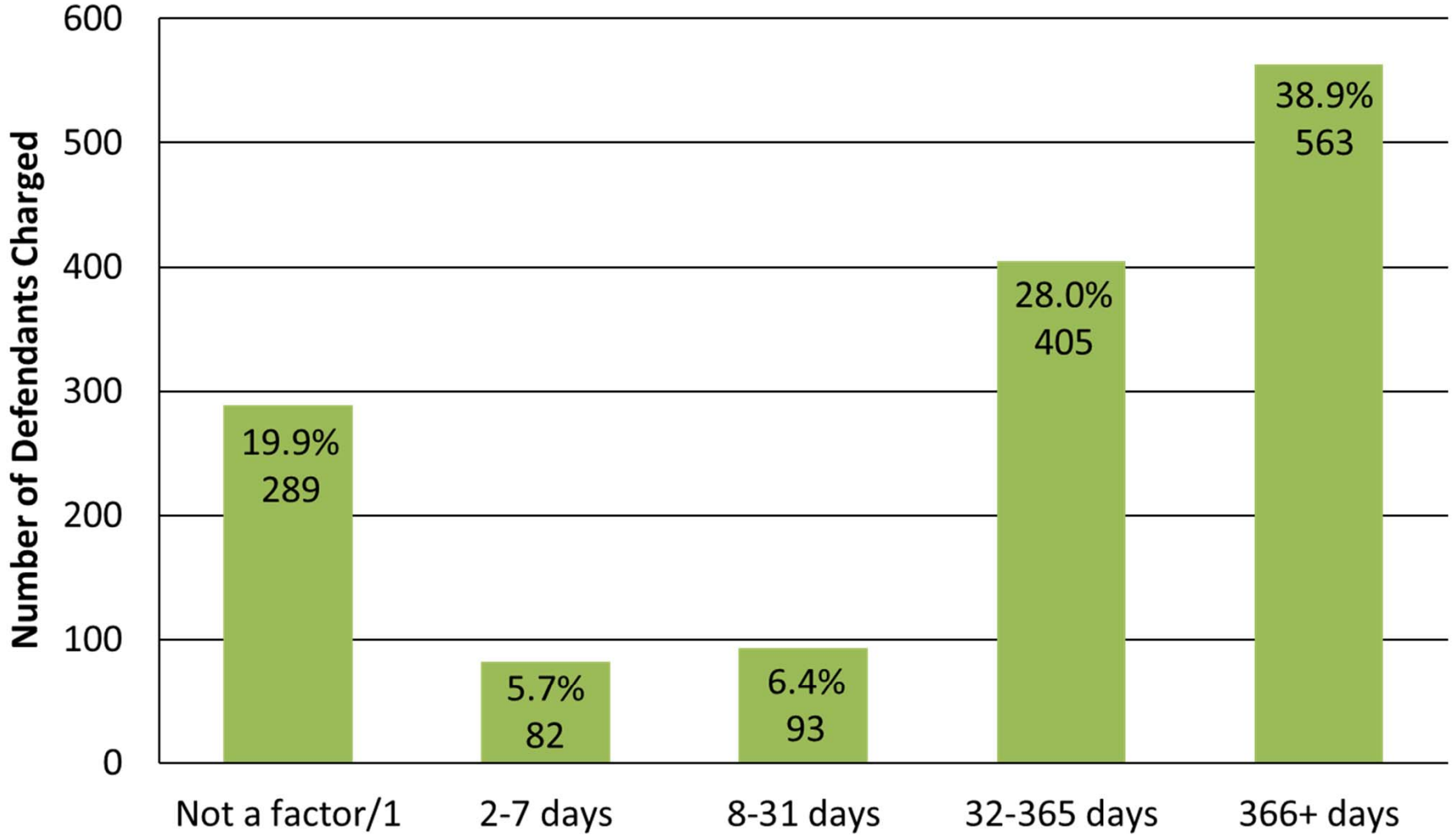
% of Defendants 2005-2010	35.5%	38.5%	24.4%

Operating Outside the Regulatory System Subcategories: (2005-2014)



% of Defendants 2005-2010	28.2%	5.2%	2.0%	10.0 %

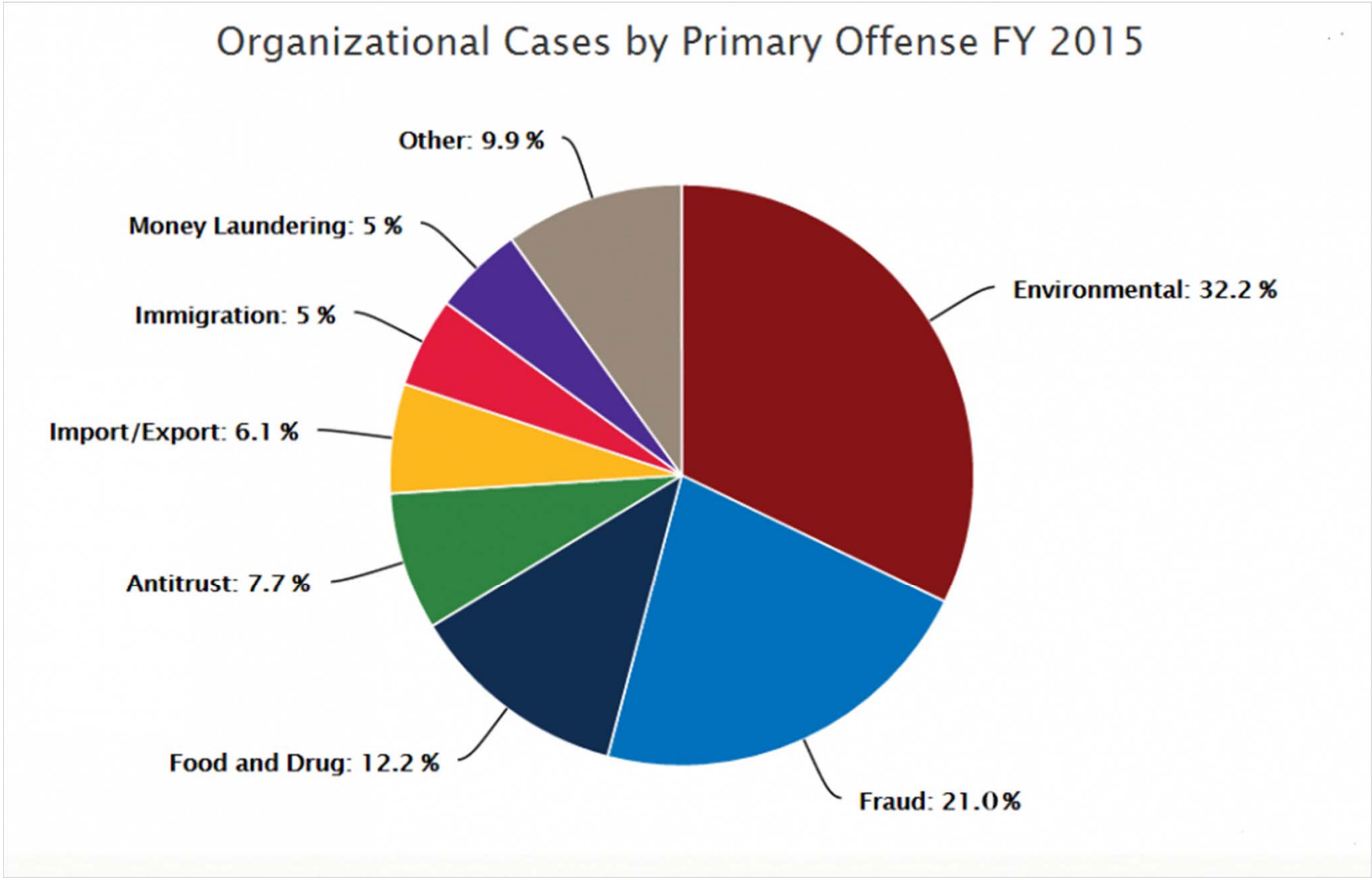
Repetitive Violations Breakdown by Duration (2005-2014)



% of Defendants 2005-2010	21.3%	5.7%	6.2%	26.3%	39.8%

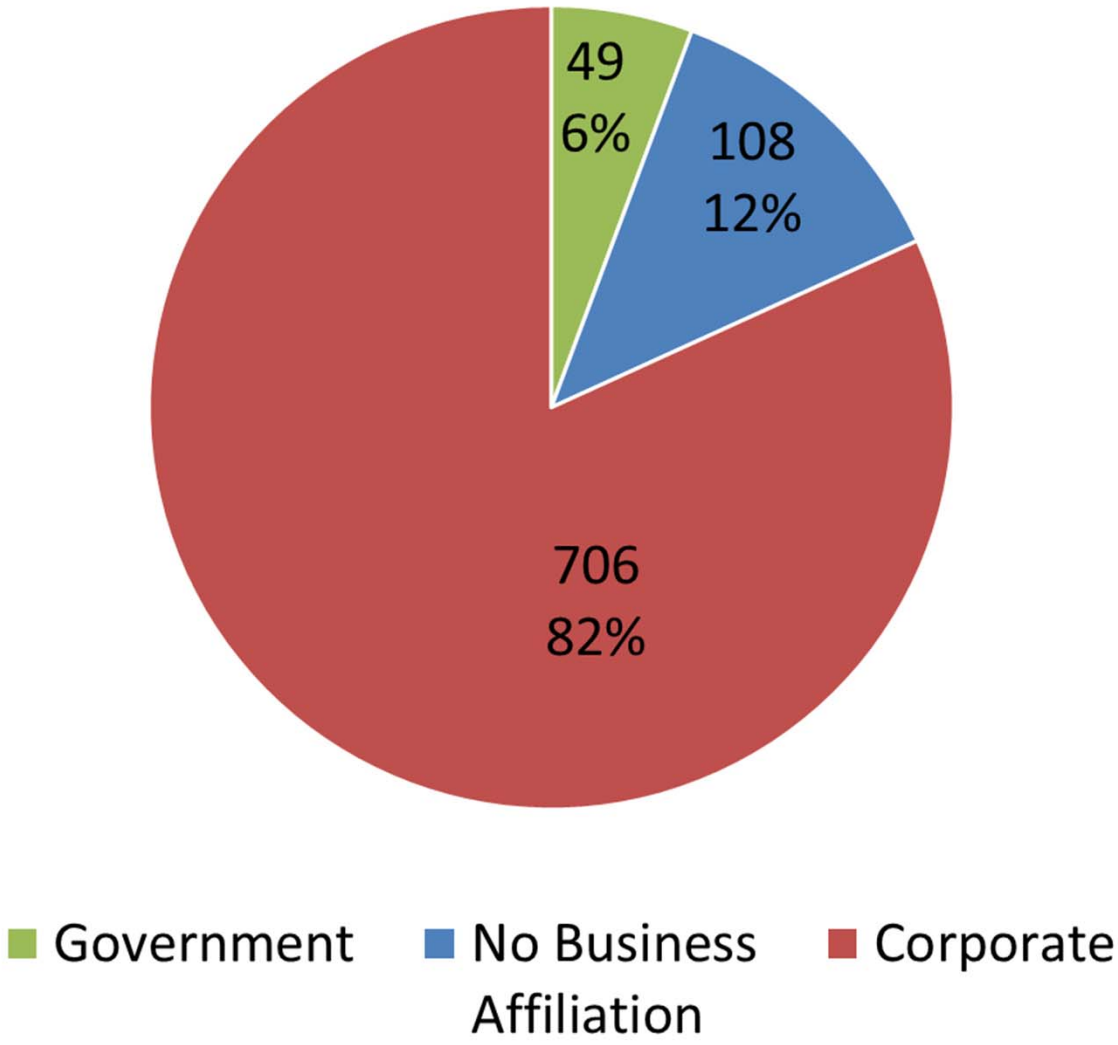
Prosecutorial Discretion and Environmental Crime

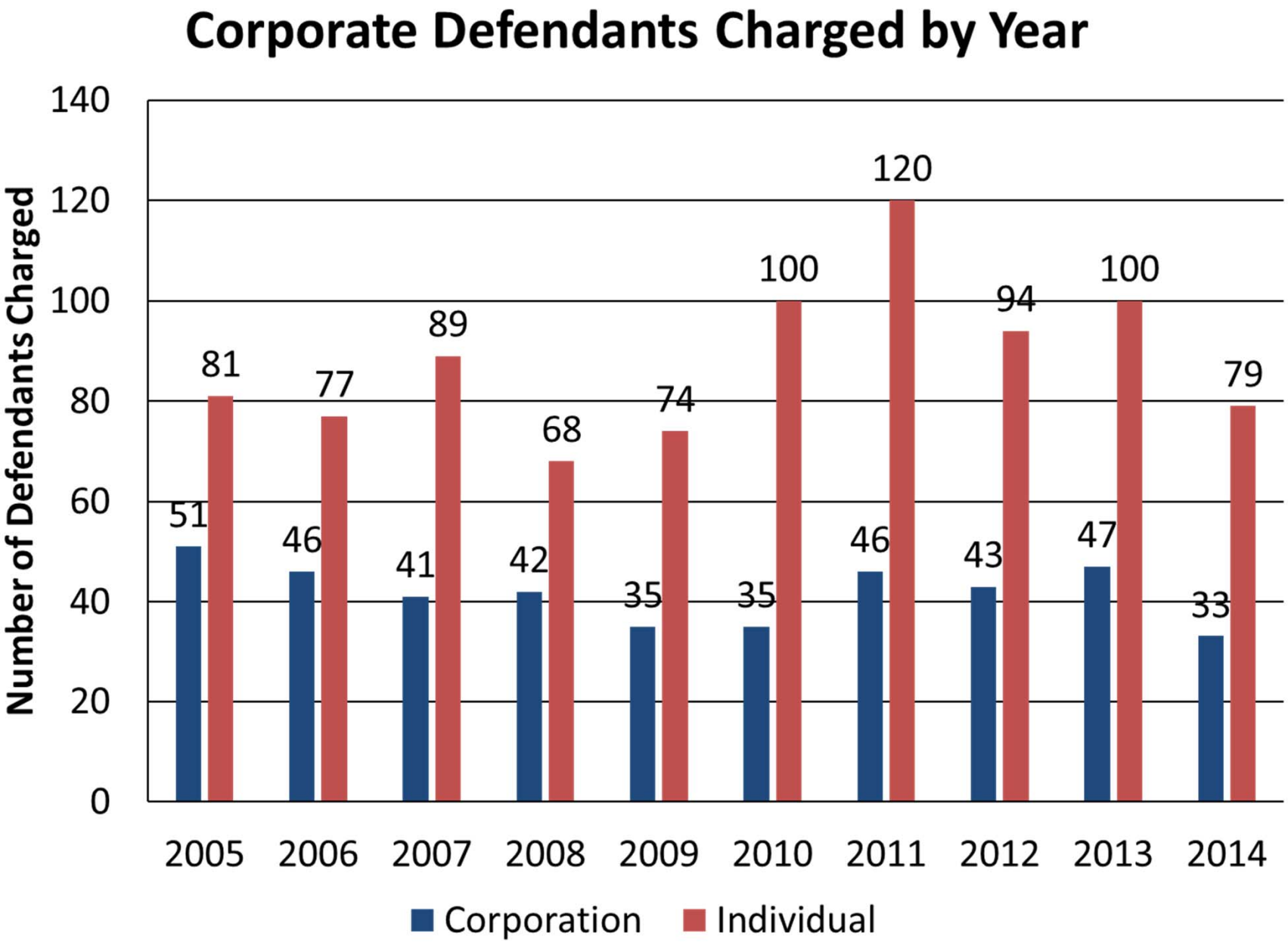
Corporate Data 2005-14

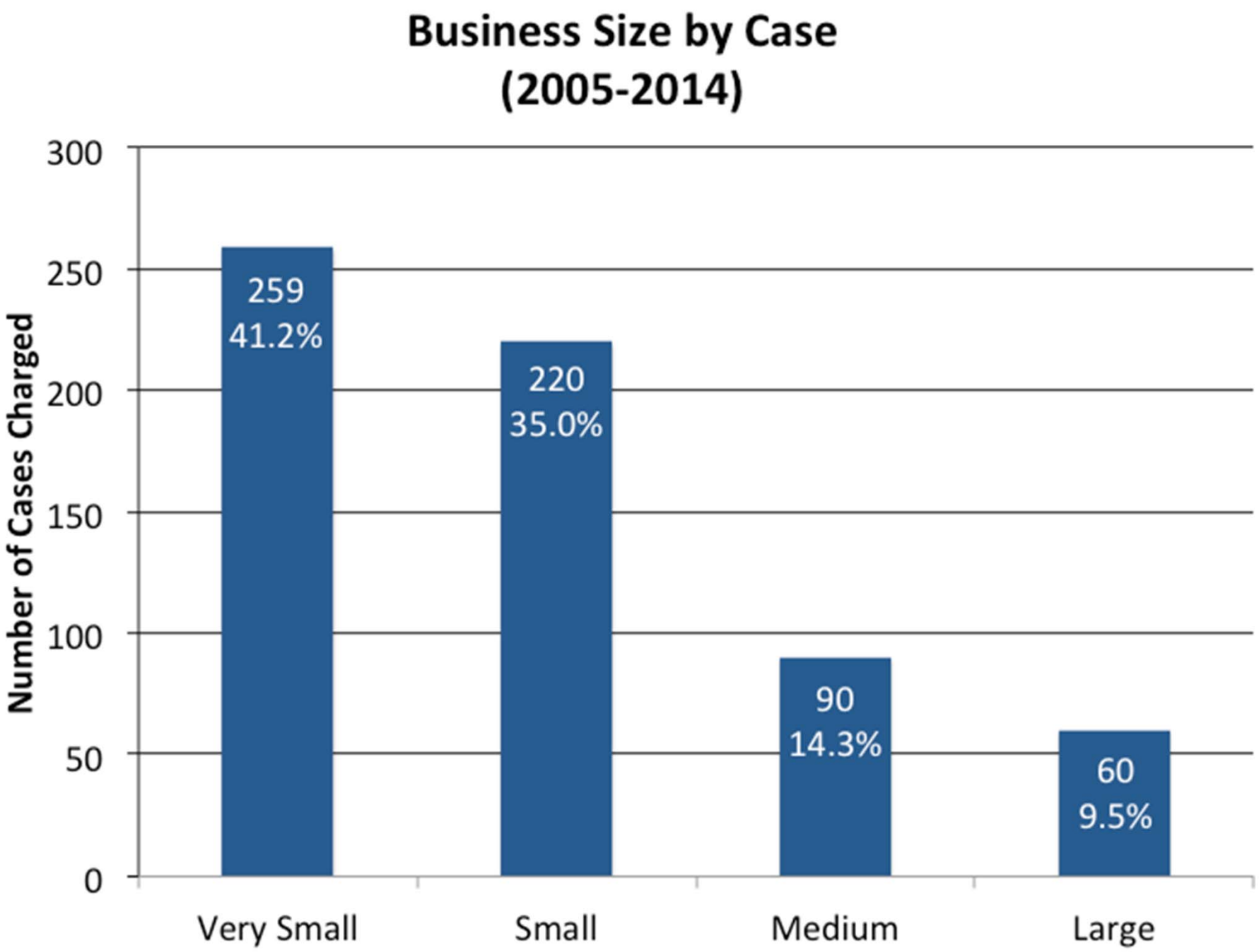


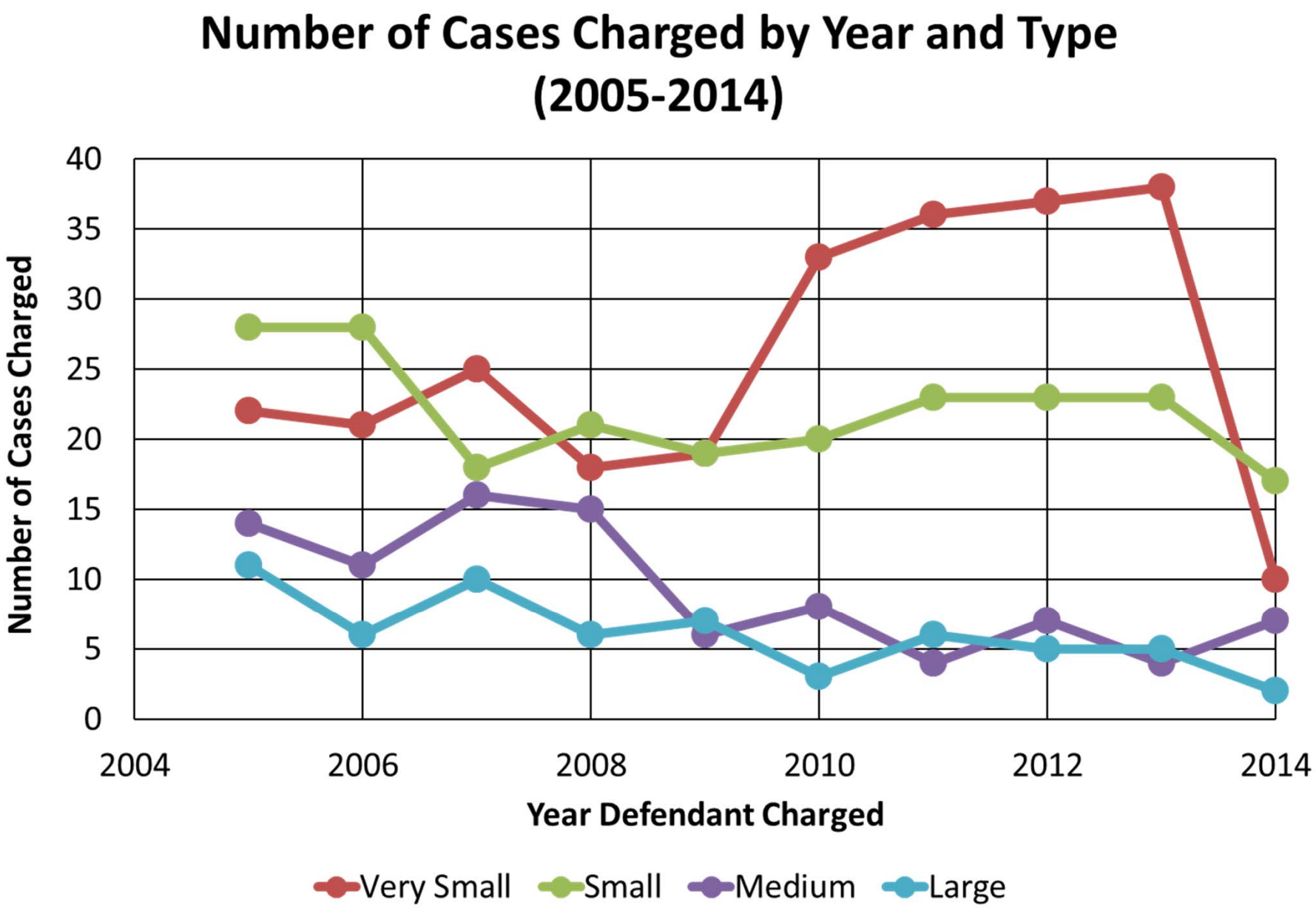
Source: http://www.uscourts.gov/news/2016/12/22/environmental-crime-tops-list-organizations

Case Breakdown: By Organization Type

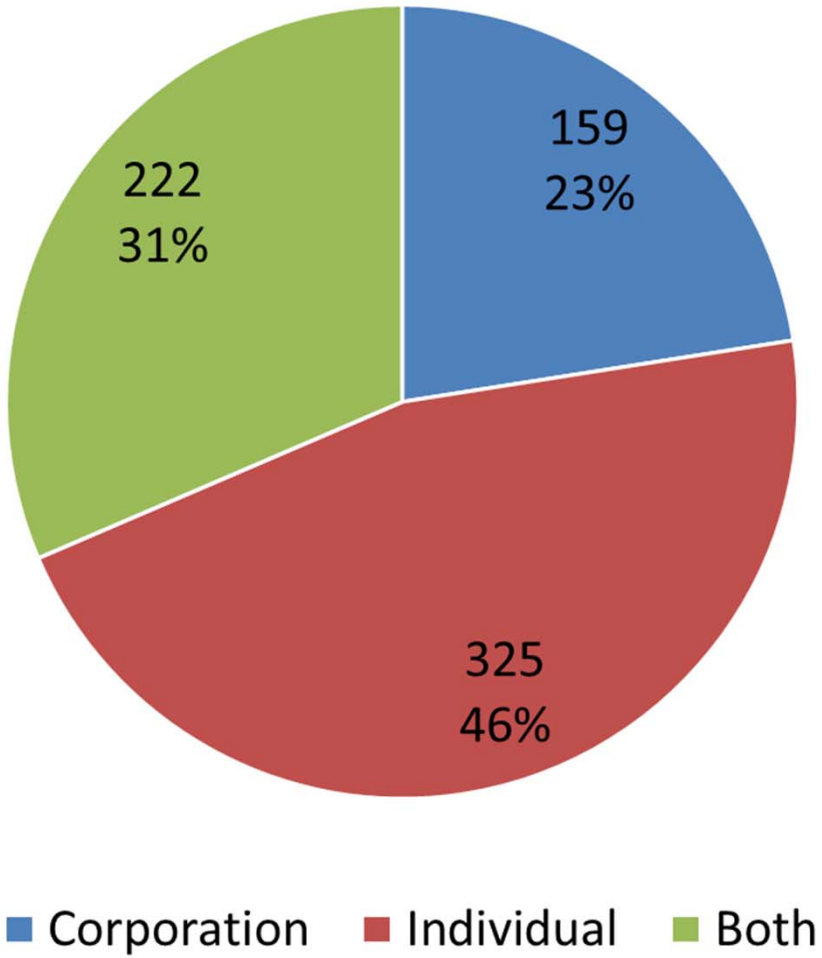



Corporate Defendants Charged by Year
Number of Defendants Charged
140
120
100
80
60
40
20
0
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
51
81
46
77
41
89
42
68
35
74
35
100
46
120
43
94
47
100
33
79
Corporation
Individual


Business Size by Case
(2005-2014)
Number of Cases Charged
300
250
200
150
100
50
0
259
41.2%
220
35.0%
90
14.3%
60
9.5%
Very Small
Small
Medium
Large

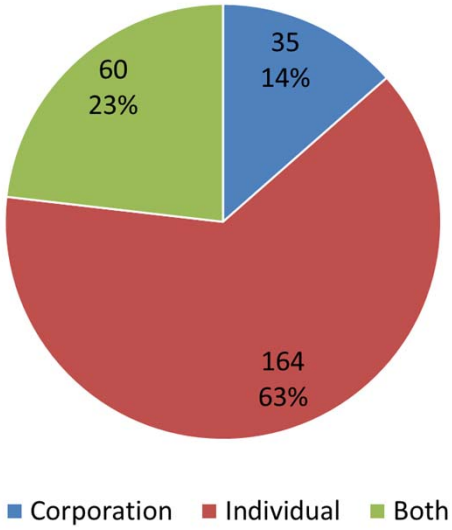

Number of Cases Charged by Year and Type
(2005-2014)
Number of Cases Charged
40
35
30
25
20
15
10
5
0
2004
2006
2008
2010
2012
2014
Year Defendant Charged
Very Small
Small
Medium
Large

Corporate Defendants:
Who was charged in each case?

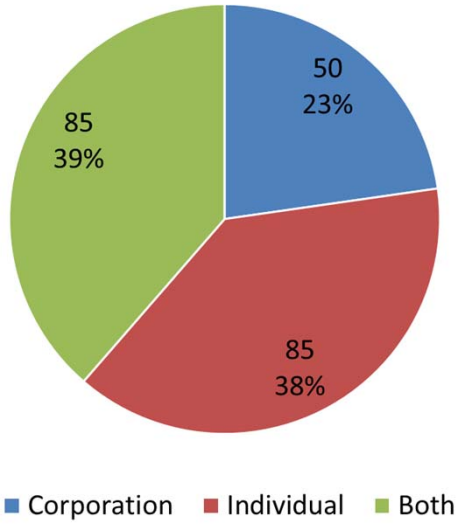


Corporate Defendants: who was charged?

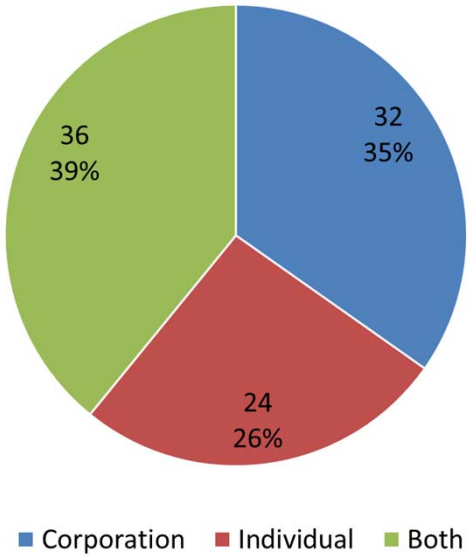
Very Small



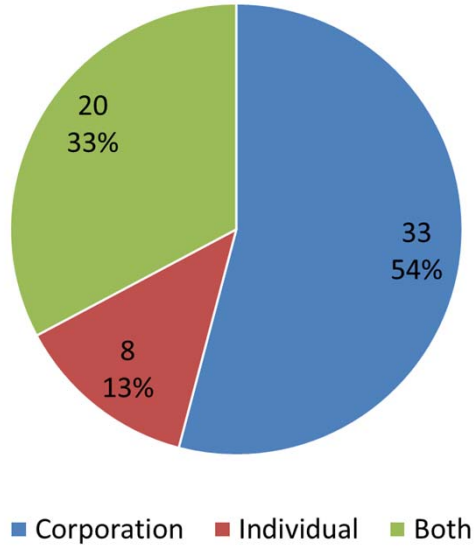
Small

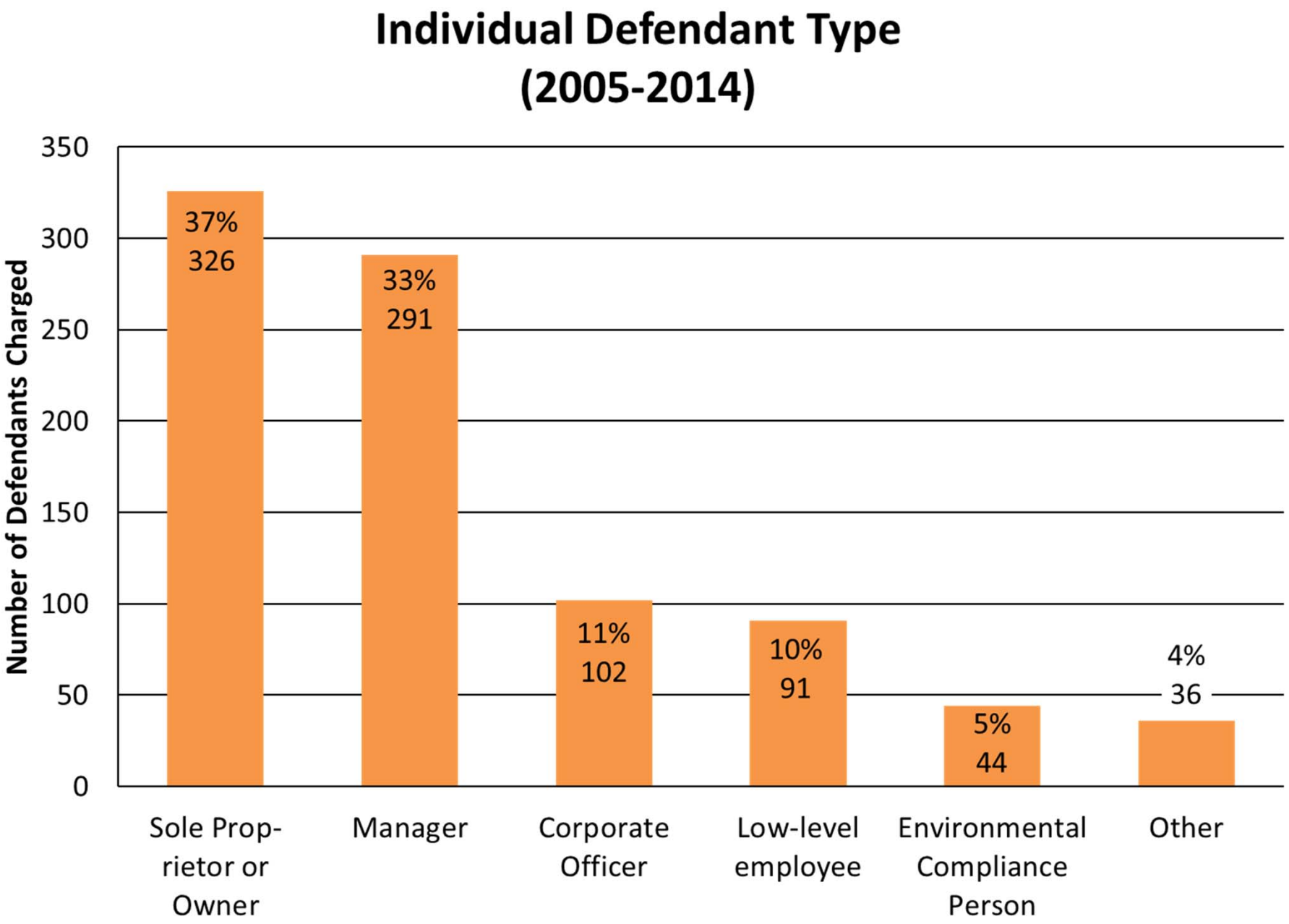


Medium

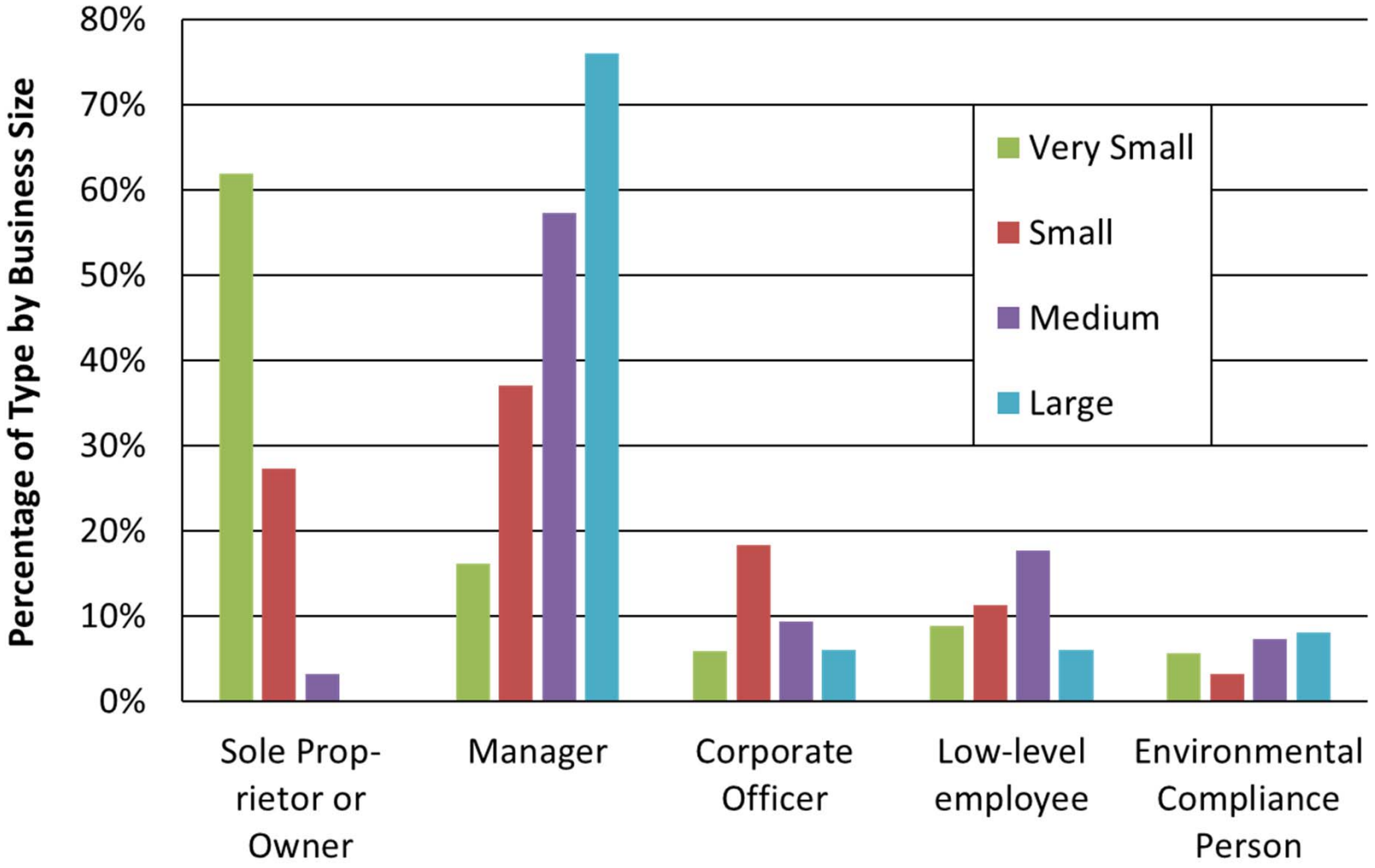


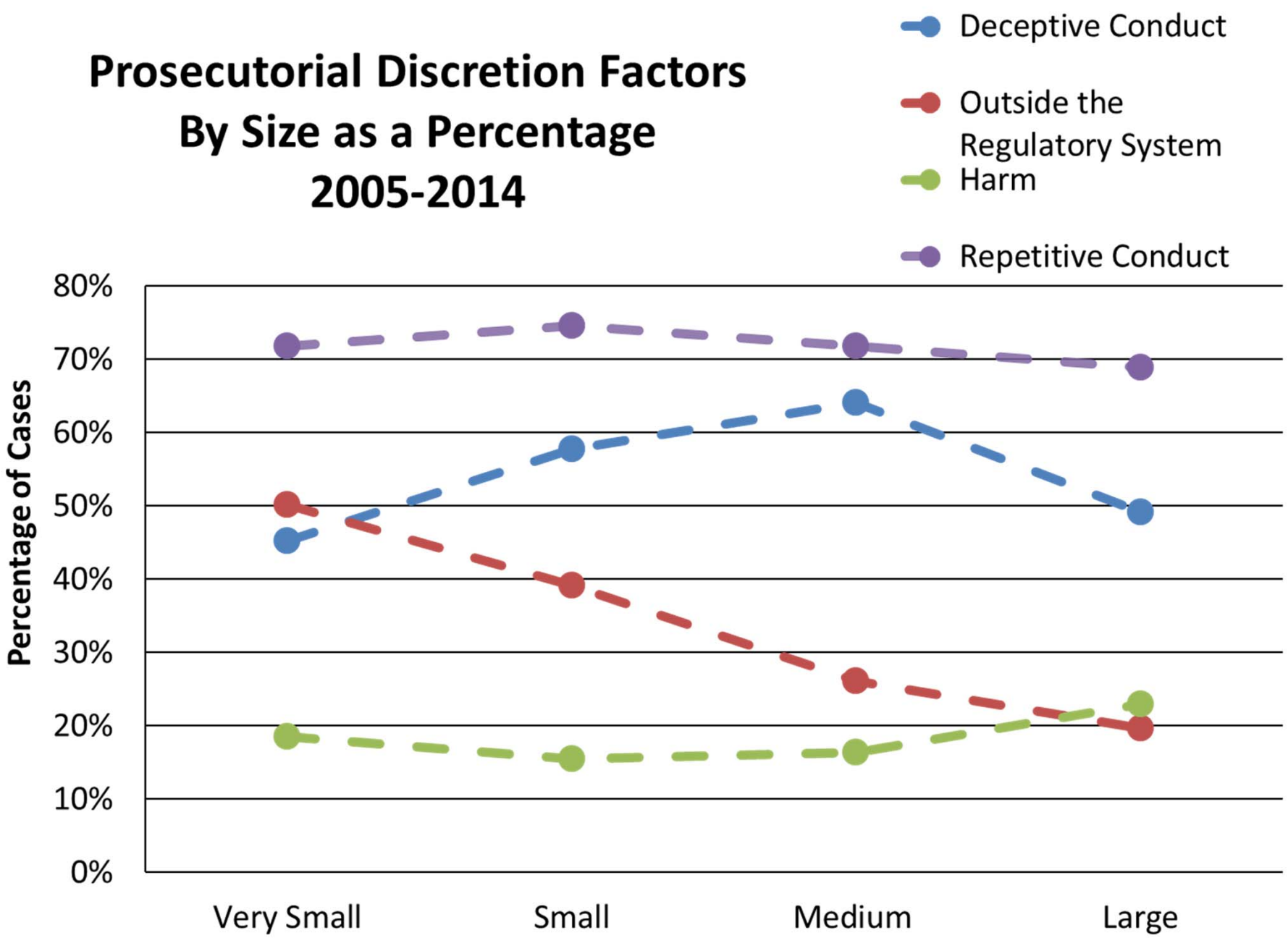
Large




Individual Defendant Type
(2005-2014)
Number of Defendants Charged
350
300
250
200
150
100
50
0
37%
326
33%
291
11%
102
10%
91
5%
44
4%
36
Sole Proprietor or Owner
Manager
Corporate Officer
Low-level employee
Environmental Compliance Person
Other

Individual Defendant Type By Size (2005-2014)




Prosecutorial Discretion Factors
By Size as a Percentage
2005-2014
Deceptive Conduct
Outside the Regulatory System
Harm
Repetitive Conduct
Percentage of Cases
80%
70%
60%
50%
40%
30%
20%
10%
0%
Very Small
Small
Medium
Large

Defendant Industry

Industry Type	Number of Defendants Charged	Percentage of Def.'s Charged
Maritime	174	11.5%
Asbestos remediation	122	8.0%
Construction	114	7.5%
Waste management	114	7.5%
Oil and gas	113	7.4%
Mining and chemicals	102	6.7%
Manufacturing	96	6.3%
Environmental services	90	5.9%
Agriculture and food processing	74	4.9%
Government entity, e.g., wastewater utility	72	4.7%
Real estate development / property management	55	3.6%
Ground, rail, or air transportation	47	3.1%
Electroplating	40	2.6%
Water and wastewater	29	1.9%
Other	276	18.2%

Top Defendant Industries By Business Size (Case)

Very Small (<10)

Industry	Number (%)
Asbestos Remediation / Environmental Services	28 (10.5%)
Construction	25 (9.4%)
Real estate development & property management	22 (8.3%)

Small (10-99)

Industry	Number (%)
Maritime	27 (12.3%)
Manufacturing	22 (10.0%)
Mining and Chemicals/ Construction / Waste Management	19 (8.6%)

Medium (100-999)

Industry	Number (%)
Maritime	20 (21.7%)
Manufacturing	16 (17.4%)
Oil and gas	10 (10.9%)

Large (1000+)

Industry	Number (%)
Maritime	13 (21.3%)
Oil and gas	12 (19.7%)
Agriculture and food processing	7 (11.5%)

PROSECUTORIAL DISCRETION AND ENVIRONMENTAL CRIME: UPDATED ENVIRONMENTAL CRIMES PROJECT DATA

David M. Uhlmann*

In a 2014 article entitled "Prosecutorial Discretion and Environmental Crime,"[1] I presented empirical data developed by student researchers participating in the Environmental Crimes Project at the University of Michigan Law School. My 2014 article reported that 96 percent of defendants investigated by the United States Environmental Protection Agency and charged with federal environmental crimes between 2005 and 2010 engaged in conduct that involved at least one of the aggravating factors identified in my previous scholarship. On that basis, I concluded that defendants who committed environmental violations that did not involve one of those aggravating factors were unlikely to face federal criminal charges for their violations.

In this article, I provide a preliminary update of the data presented in "Prosecutorial Discretion and Environmental Crime" to cover defendants charged between 2005 and 2014. We again find that most defendants charged with federal environmental crimes committed violations that involved significant harm, deceptive or misleading conduct, operating outside the regulatory system, and/or repetitive violations, although the numbers are slightly lower (94 percent of all defendants). Over the last four years of the study (2011-2014), there are more defendants who were operating outside the regulatory system (48 percent vs. 33 percent for the first six years), which requires further examination. Overall, however, prosecutors continue to limit criminal prosecution to conduct that involves one or more of the aggravating factors that I argue may warrant criminal enforcement—and defendants who commit violations that do not involve one of those aggravating factors remain unlikely to face federal criminal charges.

INTRODUCTION

In January 2008, during my first year as a University of Michigan law professor, I agreed to participate in a symposium at the University of Utah Law School entitled "Environmental Criminal Prosecution: Essential Tool or Government Overreaching?" As the title suggests, the conference brought together both critics and supporters of the federal government's environmental crimes program. The organizers of the conference asked me to address the contentious question of when criminal prosecution was appropriate for environmental violations.

You might say I was not an unbiased commentator. Before becoming a law professor, I had served for 17 years as a prosecutor in the United States Department of Justice's Environmental Crimes Section (ECS), the last seven as ECS Chief and the individual responsible for approving all indictments and all plea agreements in cases prosecuted by the Section. But perhaps because of that experience, I knew how much discretion prosecutors enjoyed under the environmental laws and how challenging it was for practitioners to advise their clients prospectively about when environmental violations might result in criminal prosecution.

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* Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. I am indebted to Caitlin Dean, Brett Frazer, Drew Kramer, and Emily Van Dam for their research assistance and data analysis, as well as the more than 200 Michigan Law students who have participated in the Environmental Crimes Project since its inception in 2010.

[1] David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159 (2014).

At the conference in Salt Lake City and in a subsequent article for the *Utah Law Review*, I argued that the exercise of prosecutorial discretion required more than a rote elements analysis of whether the defendant had committed an environmental violation and acted with the requisite mental state (knowingly for most felony violations and negligently for most misdemeanors).[2] I claimed that prosecutors would meet their obligation to do justice—and have a better chance of securing convictions in cases that went to trial—if they limited criminal enforcement to cases where aggravating factors were present that justified treating the violation as criminal. Based on my experience at the Justice Department, I identified significant harm, deceptive or misleading conduct, operating outside the regulatory system, and repetitive violations as aggravating factors.[3]

During the Utah conference, commentators from a wide range of backgrounds, including from the conservative Washington Legal Foundation, agreed with my aggravating factor analysis. Where we disagreed was over the question of whether prosecutors were exercising their discretion in the ways that I argued they should, an empirical question that demanded further study. In part for that reason—and because there was insufficient data available about environmental criminal enforcement—I created the Environmental Crimes Project during 2010.

Since 2010, I have worked with over 200 Michigan Law students to analyze every pollution case investigated by the United States Environmental Protection Agency (EPA) that resulted in criminal charges since January 2005.[4] My students collect what I have referred to as "quantitative" data about the cases (i.e. geographical information, defendant types, statutes charged, size of criminal penalties, and percentage of defendants receiving jail time), as well as "qualitative" data about the presence or absence of the aggravating factors that I identified.[5]

In a 2014 *Harvard Environmental Law Review* article, I presented the results from the first six years (2005-2010) of cases analyzed by the Environmental Crimes Project. From a quantitative standpoint, I reported that Title 18 of the United States Code, which makes it a crime to commit conspiracy, false statements, fraud, and obstruction of justice, was the most frequently charged statute for environmental crimes. Among environmental statutes, the Clean Water Act was most frequently charged, followed by the Clean Air Act, the Resource Conservation and Recovery Act ("RCRA"), and the Act to Prevent Pollution from Ships.[6]

From a qualitative standpoint, I determined that 96 percent of the defendants (828 out of 864 defendants) charged with environmental crimes committed violations with one or more aggravating factor present. The most prevalent aggravating factors were repetitive violations (78 percent) and deceptive or misleading conduct (63 percent). These findings led me to conclude that one or more aggravating factor was present in nearly all environmental prosecutions and that violations that did not involve aggravating factors were unlikely to result in criminal charges.[7]

In this article, I provide a preliminary update on data from the first ten years of the Environmental Crimes Project (2005-2014).[8] Part One provides a preliminary update of the

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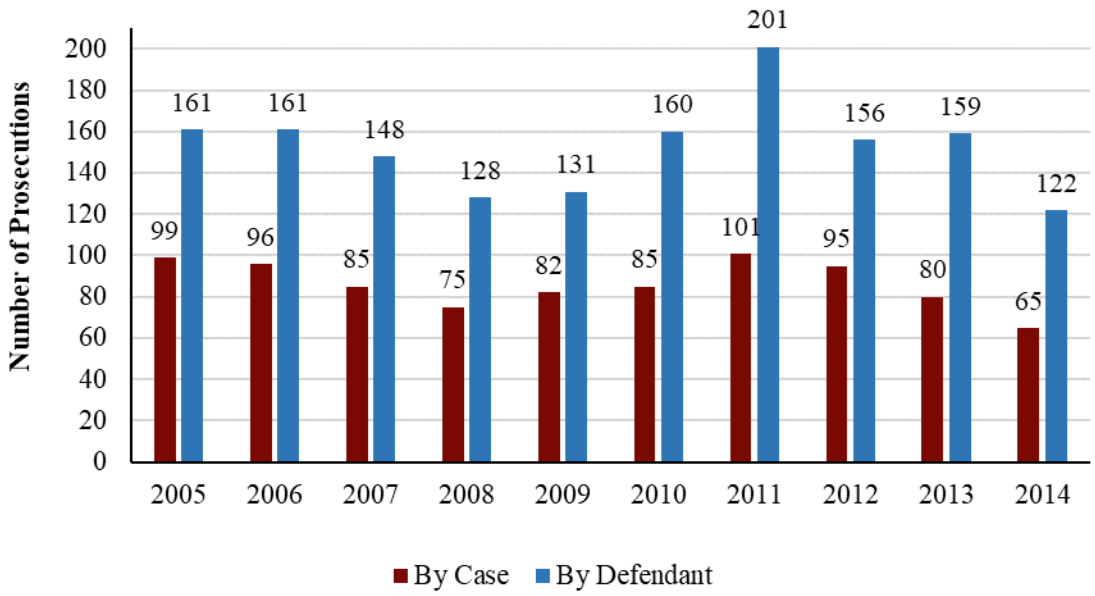
[2] David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1245.
[3] *Id.* at 1245-52.
[4] The Environmental Crimes Project does not analyze wildlife crime, although it is a growing area of prosecution activity, because most of those cases are investigated by the United States Fish and Wildlife Service, not EPA. Likewise, the Environmental Crimes Project does not include data from state cases, since most of those cases are investigated (and prosecuted) by state law enforcement personnel.
[5] Uhlmann, *Prosecutorial Discretion and Environmental Crime*, *supra* note 1, at 177-82.
[6] *Id.* at 183-93
[7] *Id.* at 193-95.
[8] The data presented in this article has been reviewed by at least two students and one supervisor, but we have not completed our final quality control of the data, hence its designation as preliminary data.

quantitative data, where we again found that Title 18 was the most frequently charged statute, followed by the Clean Water Act. Part Two offers a preliminary update of the qualitative data, where we again determined that most violations charged criminally involved one or more aggravating factors, with repetitiveness and deceptive or misleading conduct the most prevalent aggravating factors. Where appropriate, I identify shifts in the recent data that may warrant further examination, as we continue analyzing the preliminary data presented in this article.

PART ONE: PROSECUTIONS TRENDS AND FREQUENTLY CHARGED ENVIRONMENTAL CRIMES

In my 2014 article, I presented data involving 864 defendants in 664 cases (based on federal district court docket numbers). Our updated data involves 1527 defendants in 863 cases. The number of prosecutions per year ranges from a high of 201 defendants in 101 cases during 2011 and a low of 122 defendants in 65 cases during 2014, as shown in Figure 1 below:

Figure 1: Trends in Criminal Enforcement Efforts: Prosecutions by Year



The average number of annual prosecutions across the ten years of our dataset is 153 defendants in 86 cases. Only 2011 significantly exceeds the number of defendants prosecuted, while 2008, 2009, and 2014 fell well below the average number of defendants across the ten-year period.

Yearly variations in case numbers and defendants prosecuted would appear to be normal in a law enforcement program with comparatively few resources. EPA has less than 200 agents nationwide, compared to over 10,000 Federal Bureau of Investigation agents.[9] With limited

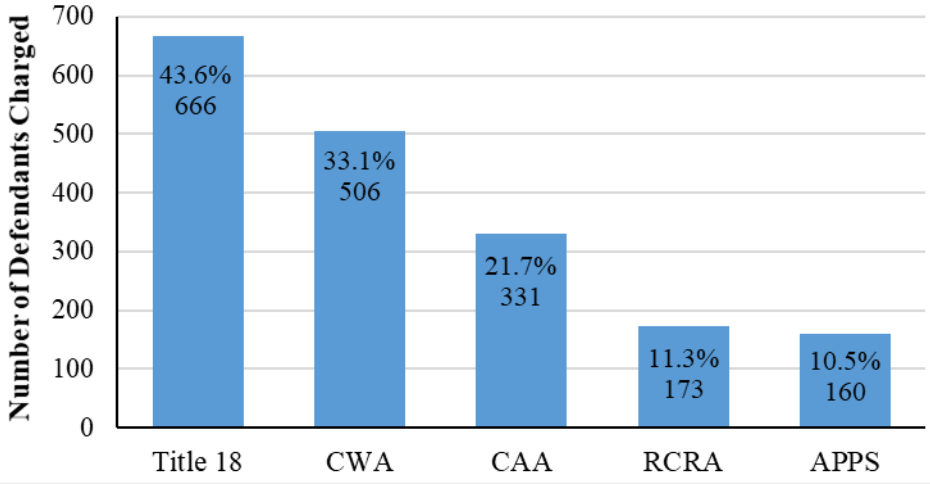
[9] *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA-190-K-17-002, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATION, 630 (2017) (demonstrating that the number of case-carrying agents declined over the past five years, resulting in fewer cases being opened over that time); FEDERAL BUREAU OF INVESTIGATION, FY 2017 BUDGET REQUEST AT A GLANCE (2016) (showing a funding request for nearly 35,000 positions, including nearly 13,000 agents). *See also*

resources and cases that vary widely in complexity, I would expect to see annual variation in this data, which in fact has occurred.

Another observation about the overall case data is that political observers might expect to see disparate numbers when comparing Republican and Democratic administrations. Indeed, the overall prosecution numbers might suggest a drop-off in the final years of the George W. Bush administration and, perhaps as a result, the first year of Barack Obama's administration. But the Bush administration averaged 150 defendants per year in the four years of data available, while the Obama administration averaged 155 defendants per year. Those relatively consistent numbers support the proposition that environmental criminal enforcement is largely non-partisan and receives support across Presidential administrations.[10]

The most frequently charged statute in our updated study remains Title 18, followed by the Clean Water Act, the Clean Air Act, RCRA, and the Act to Prevent Pollution from Ships. There are no dramatic shifts in the statutes charged, although the percentage of Clean Water Act and RCRA cases decreased modestly, while the percentage of Clean Air Act cases increased modestly. Charging data is shown in Figure 2:

Figure 2: Frequently Charged Environmental Statutes 2005-2014



	Title 18	CWA	CAA	RCRA	APPS
% of Defendants 2005-2010	42.9%	35.8%	19.0%	13.4%	12.5%

A closer look at the charging data, however, suggests larger shifts in the type of Title 18 and Clean Water Act charges during the last four years of the updated data.

Under Title 18, the Justice Department filed conspiracy charges against 51 percent of defendants from 2005-2010; those numbers increased to 60 percent from 2011-2014. As a result, 55 percent of defendants faced conspiracy charges across the ten-year-period covered by the entire study. Prosecutors also increased their use of obstruction of justice during the last four years (23 percent vs. 17 percent) and fraud charges (20 percent versus 12 percent).

Under the Clean Water Act, the biggest shift we identified was in charges involving discharges without a permit, which increased from 43 percent of defendants from 2005-2010 to

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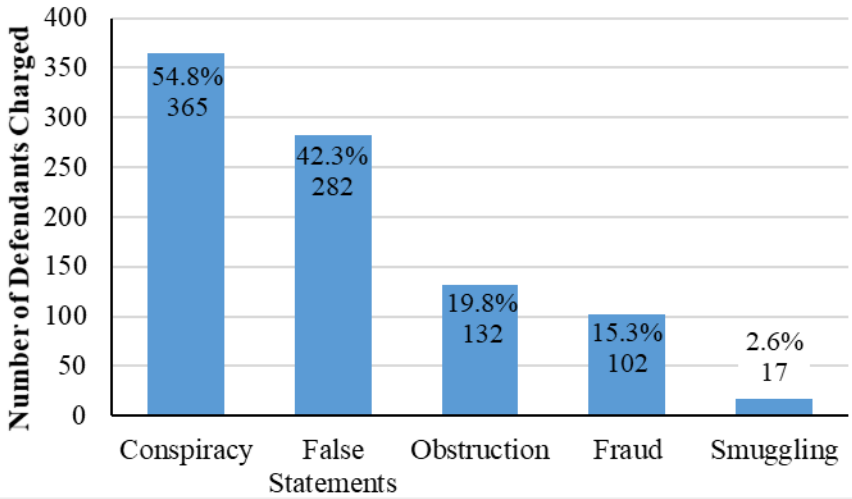
Uhlmann, *Environmental Crime Comes of Age*, *supra* note 2, at 1236 n.59 (regarding Pollution Prevention Act requirement that EPA employ 200 criminal investigators).

[10] *See* David M. Uhlmann, *Strange Bedfellows*, ENVTL. FORUM, May-June 2008, at 40.

51 percent of defendants from 2011-2014. We also saw shifts in the numbers of pretreatment, false statements charged under the Clean Water Act (as opposed to Title 18), and oil spill cases, although the small sample sizes make it harder to know the significance of those changes.

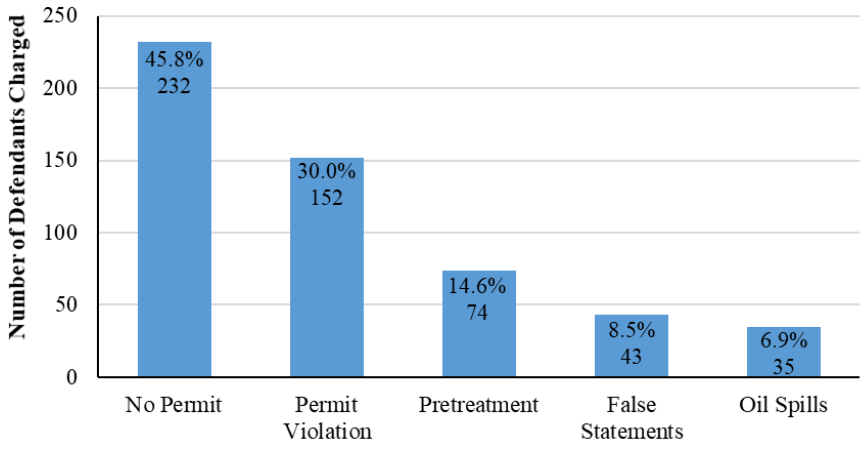
The Title 18 data and the Clean Water Act data, broken down by types of violations charged, are presented in Figures 3 and 4 below:

Figure 3: Defendants Charged Under Title 18 (2005-2014)



	Conspiracy	False Statements	Obstruction	Fraud	Smuggling
% of Defendant 2005-2010	50.9%	45.9%	17.3%	11.5%	2.9%

Figure 4: Defendants Charged Under the Clean Water Act (2005-2014)



	No Permit	Permit Violation	Pretreatment	False Statements	Oil Spills
% of Defendants 2005-2010	42.8%	30.5%	18.2%	6.9%	6.6%

The increased use of conspiracy, false statements, and obstruction of justice charges over the last four years warrants further examination. It may reflect increased reliance on the familiar terrain of Title 18 to highlight the classic criminal features of environmental crimes. Or it may reflect a

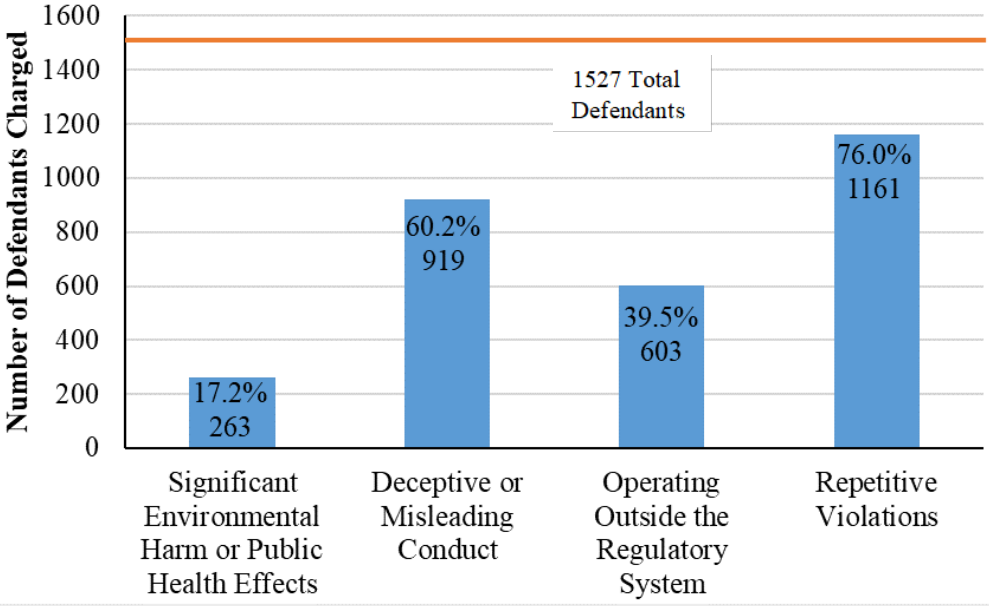
shift in the type of cases selected for criminal enforcement, although if that were the case we would expect to see a corresponding increase in the percentage of cases involving deceptive or misleading conduct, which has not occurred.[11] Likewise, the increased percentage of discharge without a permit cases warrants further inquiry, as it could be attributable to more facilities operating outside the regulatory system, an increase that is reflected in our most recent data.[12]

PART TWO: THE PRESENCE OF AGGRAVATING FACTORS IN ENVIRONMENTAL PROSECUTIONS

The central finding of our original study was that 96 percent of all defendants charged with environmental crime committed violations that involved at least one of the aggravating factor I have identified. On that basis, I determined that prosecutors were exercising their discretion to limit criminal charges to conduct involving those aggravating factors—and that violations that did not involve aggravating factors were unlikely to result in criminal charges.[13]

Our updated data produced similar results on the question of whether aggravating factors were present: 94 percent of all defendants charged between 2005 and 2014 committed violations that involved at least one aggravating factor. Repetitiveness and deceptive or misleading conduct remained the most prevalent aggravating factors, although there are more defendants operating outside the regulatory system. Figure 5 presents updated aggravating factor analysis:

Figure 5: Prosecutorial Discretion Factors (2005-2014)



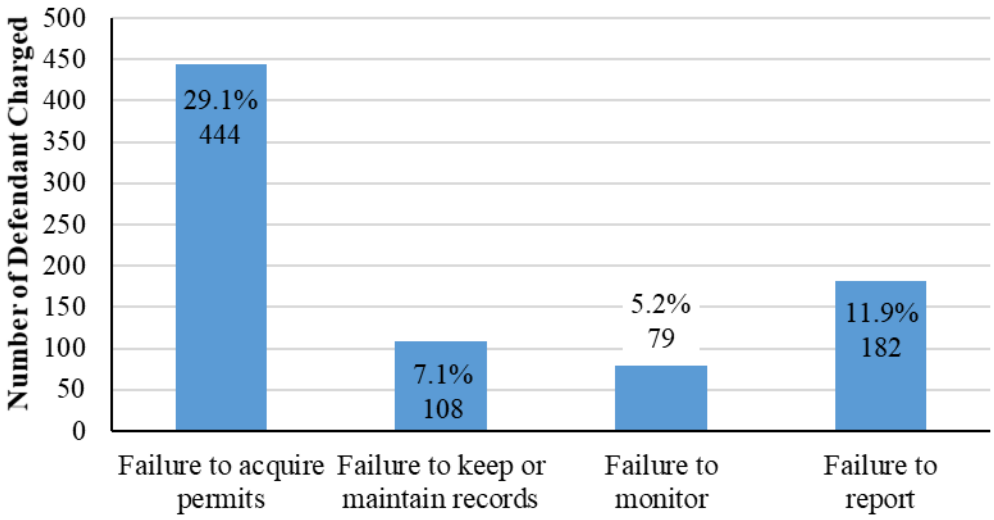
% of Defendants 2005-2010	16.6%	62.2%	33.2%	78.1%

Our updated data continues to support the conclusion that prosecutors reserve criminal prosecution for violations that involve aggravating factors—and that defendants who commit

[11] See *infra* Part II, Figure 5.
[12] *Id.*
[13] Uhlmann, *Prosecutorial Discretion and Environmental Crime*, *supra* note 1, at 194.

violations that do not involve aggravating factors are unlikely to face criminal charges. What is harder to assess is the upward shift in the number of defendants operating outside the regulatory system, which was 33.2 percent of all defendants from 2005-10 but is 48.3 percent of defendants from 2010-14. We see an increase in each of the four subcategories of operating outside the regulatory system (failure to acquire permits, failure to monitor, failure to maintain records, and failure to report). But it is more difficult to analyze this data because it is possible for defendants to commit violations that involve one of these subcategories without operating completely outside the regulatory system, unlike the other aggravating factors.[14] Figure 6 provides the breakdown of our updated operating outside the regulatory system data:

Figure 6: Operating Outside the Regulatory System Subcategories: (2005-2014)



% of Defendants 2005-2010	28.2%	5.2%	2.0%	10.0%

It may be significant that the largest increases are for failure to monitor and failure to maintain records, which I have argued is rarely conduct that by itself should result in criminal charges.[15] But we see increases in each of the subcategories, which suggests that operating outside the regulatory system may have become a greater focus for prosecutors (and investigators). We intend to do further analysis of the underlying data to better understand this aggravating factor.

Another significant aspect of our original study involved the presence of multiple aggravating factors and the relationship between aggravating factors. Two or more aggravating factors were present for 74 percent of all defendants, suggesting a higher level of egregiousness. When we analyzed that data further, we were able to make three additional findings. First, 88 percent of the defendants committed violations involving one of the first three aggravating factors (i.e. significant harm, deceptive or misleading conduct, or operating outside the regulatory system). Second, while repetitiveness was the most prevalent aggravating factor (79 percent of all defendants), it was rarely the sole aggravating factor (10 percent of defendants who engaged in

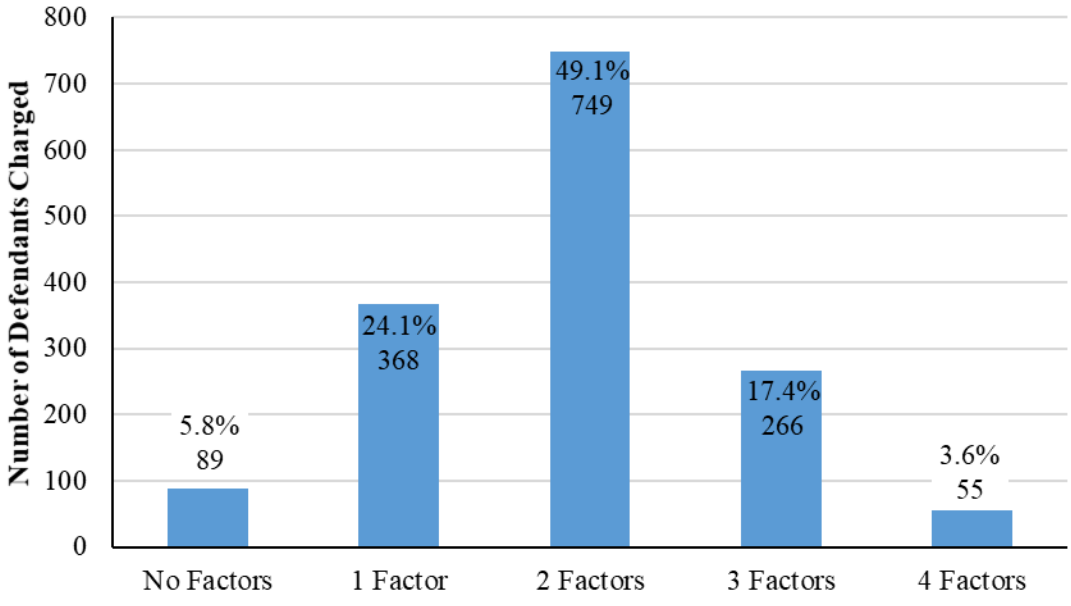
[14] Uhlmann, *Prosecutorial Discretion and Environmental Crime*, *supra* note 1, at 180.
[15] *Id.* at 200-02.

repetitive violations). Third, 71 percent of the defendants committed violations that involved one of the first three aggravating factors *and* repetitiveness.[16]

Based on this data from the original study, I concluded that prosecutors were focusing on conduct involving one of the first three factors. I also concluded that, while prosecutors preferred to charge repetitive violations, repetitiveness alone might not be driving charging decisions. As a result, a high percentage of criminal charges involved both one of the first three aggravating factors and repetitiveness. The converse also was true: prosecutors rarely charged violations that did not involve one of the first three aggravating factors (only 12 percent of all defendants)[17] and avoided criminal charges based on isolated violations (only 21 percent of all defendants).[18]

We replicated most of the core findings from the first six years of data (2005-2010) when we expanded our study to include ten years of data (2005-2014), although at slightly lower percentages. We found that 70 percent committed violations with two or more aggravating factors present (compared to 74 percent). We found that 86 percent of defendants committed violations involving one of the first three aggravating factors (compared to 88 percent for the first six years). We also found that 64 percent of the defendants committed violations involving one of the first three factors and repetitiveness (compared to 71 percent for the first six years). Our findings on the presence of multiple aggravating factors are presented in Figure 7 below:

Figure 7: Defendants Charged by Number of Aggravating Factors (2005-2014)



% of Defendants 2005-2010	4.7%	22.3%	53.5%	17.1%	2.4%

This data again allows us to conclude that most defendants engaged in conduct involving multiple aggravating factors, suggesting a higher level of egregiousness. We again conclude that most cases involve one of the first three factors, and that the majority involve misconduct over an extended time period, although neither of these findings are as robust as during the first six years.

[16] *Id.* at 204-06.
[17] *Id.* at 205.
[18] *Id.* at 203.

We also conclude again that prosecutors are unlikely to charge violations that do not involve one of the first three factors and avoid bringing criminal charges based on isolated conduct.

CONCLUSION

The updated data from the Environmental Crimes Project continues to suggest that prosecutors are exercising their discretion to reserve criminal charges for conduct involving one or more of the aggravating factors I have identified in my scholarship—and that defendants who commit violations that do not involve those factors will not face criminal prosecution. Prosecutors continue to focus on violations that involves harm, deceptive or misleading conduct, or operating outside the regulatory system—and in most cases prosecutors continue to charge violations that involve one of those factors plus repetitiveness. There appears to be an increased focus on defendants operating outside the regulatory system, which warrants further analysis.