



CWA Implementation & Enforcement

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June 16, 2020

Agenda

- CWA Implementation
 - Mandating Legislation
 - Regulations
- Federal CWA Enforcement
 - CWA Section 309
 - CWA Section 311
 - Penalty Calculation



How is the CWA Implemented?

- Mandating legislation
 - E.g., “Except as otherwise expressly provided in this chapter, the Administrator of the [EPA] ...shall administer this chapter.”
- Federal and State agencies then “fill in the details” with procedural and substantive regulations
 - Waters of the United States (WOTUS) (EPA)
 - Concentrated Animal Feeding Operations (EPA)
 - Sheen Rule (EPA)
 - Blowout Preventer and Well Control Rules (BSEE/DOI)



CWA Regulations in Action: Concentrated Animal Feeding Operations

Question: Does my 2,000 head cattle feedlot need to obtain a NPDES permit?

- CWA's definition of "point source" includes CAFO
- CAFOs trigger NPDES permitting requirements
- CWA does NOT define CAFO or any other useful related term.

CWA Regulations in Action: *Defining a CAFO*

1. CAFOs are point sources
33 U.S. Code § 1362(14)



2. EPA writes the federal regulations
33 U.S.C. § 1251(d)



3. “Concentrated Animal Feeding
Operations”
40 CFR § 122.23

4. 40 CFR § 122.23(b)(1)
defines AFO



5. 40 CFR § 122.23(b)(2)
defines CAFO



6. 40 CFR § 122.23(c)
CAFO designation

CWA Regulations in Action: *Defining a Large CAFO*

A Large CAFO confines at least the number of animals described in the table below.

	1,000 or more
(weighing over 55 pounds)	2,500 or more
(weighing less than 55 pounds)	10,000 or more
horses	500 or more
sheep or lambs	10,000 or more
	5,000 or more
laying hens or broilers (liquid manure handling systems)	30,000 or more
chickens other than laying hens (other than a liquid manure handling systems)	125,000 or more
laying hens (other than a liquid manure handling systems)	82,000 or more
chickens other than laying hens (other than a liquid manure handling systems)	30,000 or more

CWA Regulations in Action: *Defining a Medium CAFO*

horses

sheep or lambs

turkeys

laying hens or broilers (liquid manure handling systems)

A **Medium CAFO** falls within the size range in the table below and either:

- has a manmade ditch or pipe that carries manure or wastewater to surface water; **or**
- the animals come into contact with surface water that passes through the area where they're confined.

If an operation is found to be a significant contributor of pollutants, the permitting authority may designate a medium-sized facility as a CAFO.

3,000 - 9,999

16,500 - 54,999

9,000 - 29,999

CWA Regulations in Action: *Designating a CAFO*

horses

sheep or lambs

turkeys

laying hens or broilers (liquid manure handling systems)

If an operation is found to be a significant contributor of pollutants, the permitting authority may designate a medium-sized facility as a CAFO.

A **Small CAFO** confines fewer than the number of animals listed in the table **and** has been designated as a CAFO by the permitting authority as a significant contributor of pollutants.

less than 3,000

less than 16,500

less than 9,000

How is the CWA enforced?

- Investigation, Monitoring & Reporting
- Strict Liability
- Enforcement Actions
 - Civil Administrative
 - Civil Judicial
 - Criminal
- Citizen Enforcement (CWA § 505)
- Remedies:
 - Settlements
 - Penalties
 - Injunctive Relief
 - Mitigation
 - Supplemental Environmental Projects
 - Incarceration





3 Steps of a Civil Oil Spill Trial

- Liability & Degree of Fault
- Quantification
- Penalty Calculation

Enforcement Example:

*In re Oil Spill by the Oil Rig
DEEPWATER HORIZON in the Gulf of
Mexico, on April 20, 2010*





Step One: 311 Liability

- Owner, operator, or person in charge
- Of any vessel, onshore facility, or offshore facility from which oil is discharged
- Into or upon navigable waters of the United States
- In a quantity that “may be harmful”

Step One: Degree of Fault



- Per barrel penalty amounts are based on degree of fault:
 - Violators “**shall** be subject to a civil penalty in an amount up to \$25,000 per day of violation or an amount up to \$1,000 per barrel of oil ...”
 - If a violation is “the result of **gross negligence** or **willful misconduct** ... the person **shall** be subject to a civil penalty of not less than \$100,000, and not more than \$3,000 per barrel of oil ...”
- Regulations have increased these numbers



Deepwater Liability Holdings

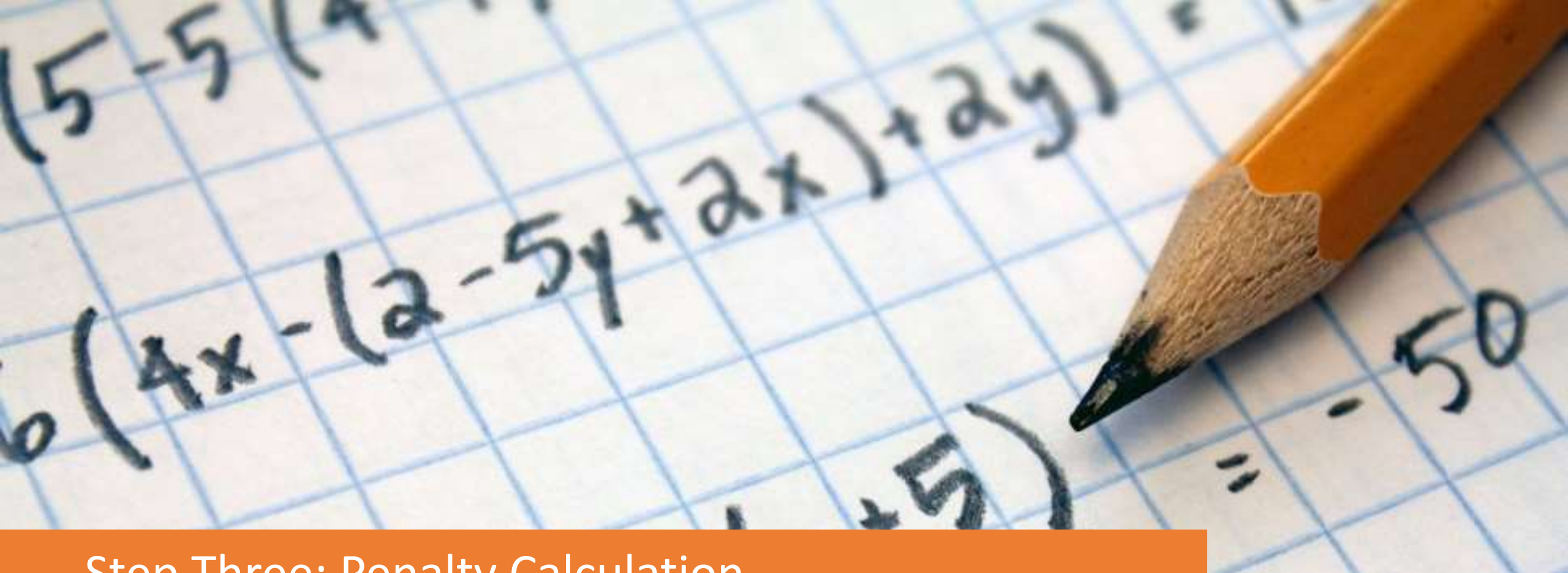
- BPXP was an “operator” and “person in charge” of rig
- Oil discharge resulted from gross negligence or willful misconduct by leaseholder
- BPXP was vicariously liable under Clean Water Act’s enhanced penalty provision for gross negligence or willful misconduct by its employees
- BPXP was liable under Clean Water Act’s enhanced penalty provision

In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010, 21 F. Supp. 3d 657 (E.D. La. 2014)



Step 2: Quantification

- Identify total barrels of oil discharged
 - Oil and barrels defined by the Act
- Battle of the experts
- *Deepwater* Quantification Holding: “[T]he Court finds that 4.0 million barrels of oil released from the reservoir. ... [F]or purposes of calculating the maximum possible civil penalty under the CWA that 3.19 million barrels of oil discharged into the Gulf of Mexico.”



Step Three: Penalty Calculation

Calculate maximum statutory penalty

Total barrels spilled * per barrel penalty

Apply “penalty factors”

Top-down

Bottom-up



Penalty factors courts *shall* consider....

- Seriousness
- Economic benefit to the violator
- Degree of culpability involved
- Any other penalty for the same incident
- History of prior violations
- Efforts to mitigate
- Economic impact of the penalty on the violator
- Any other matters as justice may require

Penalty Calculation for Anadarko

- Top-Down
- Most influential factors:
 - Seriousness
 - Economic Benefit
 - Culpability
- \$50 per barrel penalty assessed
- \$159.5M total

