

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

Consolidated Permit Regulations

**AGENCY:** Environmental Protection Agency (EPA)

**ACTION:** Suspension of portion of final rule

**SUMMARY:** This action suspends a portion of the definition of the term, "waters of the United States" in the Consolidated Permit Regulations pending further rulemaking.

**EFFECTIVE DATE:** [Date of publication in the Federal Register.]

**FOR FURTHER INFORMATION CONTACT:**

Peter Holmes  
Office of General Counsel (A-131)  
Washington, D.C. 20460  
(202) 755-0753

**SUPPLEMENTARY INFORMATION:** On May 19, 1980, EPA issued final consolidated permit regulations under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Clean Water Act, and the Clean Air Act. Included in those regulations was a definition of the term "waters of the United States." 40 CFR §122.3. This term governs the applicability of the "National Pollutant Discharge Elimination System" (NPDES) permit system under the Clean Water Act.

The definition amended the previous definition, formerly appearing at 40 CFR §122.3(t) (1979) of the term "navigable waters."

This prior definition had specified that:

. . . waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

The May 19 regulations provided:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR §423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [40 CFR §122.3, definition of "waters of the United States," FR 33424, May 19, 1980]

The Agency's purpose in the new last sentence was to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands.

Petitions for review were filed in several courts of appeals by industries and an environmental group seeking review of the May 19 consolidated regulations. Certain industry petitioners wrote to EPA expressing objections to the language of the definition of "waters of the United States." They objected that the language of the regulation would require them to obtain permits for discharges

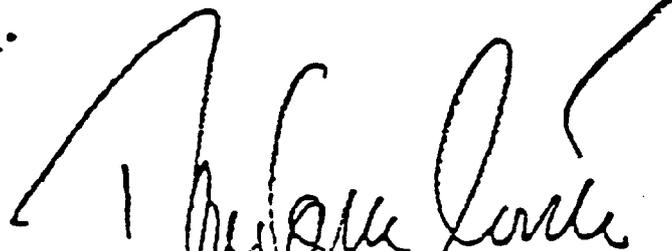
into existing waste treatment systems, such as power plant ash ponds, which had been in existence for many years. In many cases, they argued, EPA has issued permits for discharges from, not into, these systems. They requested EPA to revoke or suspend the last sentence of the definition.

EPA agrees that the regulation should be carefully re-examined and that it may be overly broad. Accordingly, the Agency is today suspending its effectiveness. EPA intends promptly to develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the rule, or terminate the suspension.

AUTHORITY: This suspension is issued under authority of the Clean Water Act, 33 U.S.C. §1251 et seq.

Dated:

July 16, 1980

  
Administrator

1. In 40 CFR §122.3, in the definition of "Waters of the United States," the last sentence, beginning "This exclusion applies . . .," is suspended until further notice.

July 17, 1980

Ms. Martha Girard  
Director, Executive Agencies  
Office of Federal Register  
1100 L Street, N.W.  
Washington, D.C.

Dear Ms. Girard:

This is to request expedited publication of the attached suspension of a portion of the final consolidated permit regulations published May 19, 1980. EPA believes a provision of one of the definitions may be overly broad and wishes to promptly suspend that provision pending a reexamination. Inasmuch as that provision was only recently reviewed in the light of new litigation and because it will go into effect on July 18, 1980, it is necessary to request the earliest possible publication of the suspension.

Sincerely yours,



Frank E. Hall  
Director, Permits Division

Attachment

EN-336:FEHall:cnm:X52545:7/17/80

bcc: Alan Eckert, OGC

AMERICAN ENVIRONMENTAL INSSTITUTE,

Plaintiffs

v.

DOUGLAS M. COSTLE, Administrator,  
U.S. Environmental Protection Agency

Defendants

Civil Action  
No. 79-0958

AFFIDAVIT OF JEFFREY G. MILLER

1. My name is Jeffrey G. Miller. I am Acting Assistant Administrator for Enforcement of the U.S. Environmental Protection Agency.

2. It is my responsibility to supervise and direct implementation of the National Pollutant Discharge Elimination System (NPDES) permit program under Section 402 of the Clean Water Act.

3. The Administrator signed on July 16, 1980 a notice suspending the effectiveness of the last sentence in the definition of "waters of the United States." EPA will promptly publish this notice in the Federal Register. A copy of this notice is attached as Exhibit A.

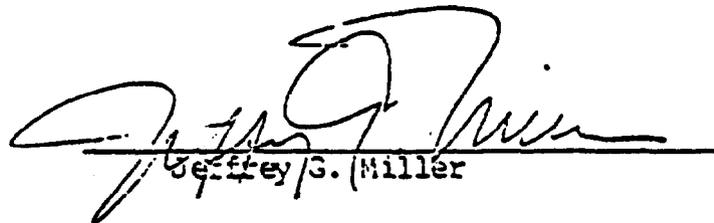
4. For several months my staff and staff of EPA's Regional office in Dallas, Texas, have been engaged in developing a series of general permits for offshore drilling in the Gulf of Mexico. Drafts of these permits will be published for comment in the Federal Register in the immediate future. These general permits will authorize operators

to engage in exploratory and production operations in most areas of the Gulf without submitting individual permit applications. Only areas of potential mineral and oil reserves will be excluded from coverage of these permits.

5. These general permits have been prepared in consultation with representatives of the American Petroleum Institute (API), various oil companies, and environmental organizations. Several meetings have been held with representatives of the oil industry including meetings in Washington, D.C., on February 6, 1980 and April 2, 1980. Correspondence on this matter has been with the firm of Liskow and Lewis, who represent plaintiffs in this proceeding. On July 15, 1980, William Jordan, Chief of the Industrial Permits Branch of my office and representatives of the Regional office met in Dallas to advise API and the oil companies of the contents of the draft permits.

6. The Administrator has directed that offices and regions of EPA take steps to expedite issuance of permits to offshore facilities. The Administrator has specifically directed that a general permit be developed for the Gulf of Mexico. This directive is attached as Exhibit B.

I hereby declare that the foregoing statement is made under penalty of perjury.

  
Jeffrey S. Miller

Dated: July 16, 1980.