

drinking wells, and other sensitive ground water areas. EPA requests comment on this phased-in approach.

#### *B. Identifying the Point of Injection*

Commenters have suggested that EPA identify the point of injection and the location at which samples would be collected to determine compliance with the Class V rule.

EPA is considering clarifying the point of injection/sampling point as the last accessible point prior to injection. In the case of septic tanks, the last accessible point prior to injection would be the distribution box between the septic tank and the leach field. If a sampling point is not installed after the septic tank, the point of injection would be at or before the septic tank. For a drywell, the sampling point would be the end of the pipe before the waste enters the well.

#### *C. Requirements for Industrial Wells*

Some commenters submitted comments and information suggesting that industrial wells should be subject to the same permit requirements as motor vehicle wells. The proposal identified three permit conditions for motor vehicle wells: meeting MCLs and other health-based standards at the point of injection, monitoring for liquid and sludge, and best management practices. EPA request comments on this suggestion.

Dated: May 19, 1999.

**J. Charles Fox,**

*Assistant Administrator, Office of Water.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 147

[FRL-6347-5]

#### **State of Alabama; Underground Injection Control (UIC) Program Revision; Withdrawal of Alabama's Class II UIC Program**

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

**ACTION:** Notice of proposed rulemaking, public hearing and public comment period on withdrawal.

**SUMMARY:** EPA announces a proposed rulemaking, public hearing and public comment period regarding withdrawal of Alabama's Class II Underground Injection Control (UIC) Program from the State Oil and Gas Board of Alabama on the grounds that it does not regulate as "underground injection," hydraulic

fracturing associated with coalbed methane gas production. This program is currently approved by EPA under section 1425 of the Safe Drinking Water Act (SDWA), as amended. This action is being taken in accordance with paragraph 2(a) of the Writ of Mandamus issued on February 18, 1999, by the U. S. Court of Appeals for the Eleventh Circuit and the requirements in 40 CFR 145.34(b)(2).

By court order, the Regional Administrator for EPA's Region 4 Office informed the State Oil and Gas Board of Alabama of specific areas of alleged noncompliance regarding its approved UIC Program. Specifically, EPA informed the State that, consistent with the Eleventh Circuit's ruling in *LEAF v. EPA*, hydraulic fracturing associated with coalbed methane gas production must be regulated as an "underground injection" under Alabama's UIC Program. Withdrawal of the Alabama program would, if completed, divest Alabama of primary enforcement authority under the SDWA to regulate Class II Wells, including hydraulic fracturing associated with coalbed methane gas wells within Alabama.

EPA is proceeding at this time with this proposed rulemaking, notice of public hearing, and notice of public comment period in order to comply with paragraph 2(a) of the Writ of Mandamus because hydraulic fracturing associated with coalbed methane gas production is not currently regulated as underground injection (by permit or rule) pursuant to the EPA-approved underground injection control program for Alabama.

At the public hearing, all interested persons shall be given the opportunity to make written or oral presentations on EPA's proposed action to withdraw approval of Alabama's Section 1425 approved Class II Program on the grounds of its failure to regulate as "underground injection" hydraulic fracturing associated with coalbed methane gas production. In addition, comments may be submitted as provided herein.

**DATES:** The public hearing will be held Wednesday, July 28, 1999, at 5:30 p.m. Central Standard Time (CST).

Written comments on EPA's proposed rule must be received by the close of business Thursday, August 5, 1999.

**ADDRESSES:** The public hearing will be held at the Tuscaloosa Public Library, Rotary Room, 1801 River Road, Tuscaloosa, Alabama 35401. Those interested should contact the Tuscaloosa Public library at (205) 345-5820 for directions.

Persons wishing to comment are invited to submit oral or written comments at the public hearing or submit written comments to the Ground Water/Drinking Water Branch, Ground Water & UIC Section, United States Environmental Protection Agency, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960, Attention: Mr. Larry Cole.

Copies of documents regarding this action are available between 8:30 a.m. and 4:00 p.m. Monday through Friday at the following locations for inspection and copying: Environmental Protection Agency, Region 4, 9th Floor Library, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960, PH: (404) 562-8190; and the State Oil & Gas Board of Alabama, 420 Hackberry Lane, Tuscaloosa, AL 35489-9780, PH: (205) 349-2852.

**FOR FURTHER INFORMATION CONTACT:** Ms. Nancy Marsh, at (404) 562-9450, or Mr. Larry Cole, at (404) 562-9474 or at the following address: Environmental Protection Agency, Water Management Division, Ground Water/Drinking Water Branch, Ground Water & UIC Section, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background Information**

On August 2, 1982, EPA granted primary enforcement responsibility (primacy) for the Class II Underground Injection Control (UIC) Program under section 1425 of the Safe Drinking Water Act (SDWA) to the State of Alabama. The SDWA requires EPA to approve an effective in-place state UIC Program to protect Underground Sources of Drinking Water (USDW) from endangerment that could result from the improper injection of fluids associated with, among other things, oil and gas production. On May 3, 1994, the Legal Environmental Assistance Foundation, Inc. (LEAF) submitted a petition to EPA to withdraw Alabama's UIC Program asserting that the State was not regulating activities associated with coalbed methane gas production wells. Following EPA's May 5, 1995 denial of the petition, LEAF sought review of this decision by the United States Court of Appeals for the Eleventh Circuit. On August 7, 1997, in *LEAF v. EPA*, 118 F. 3d 1467 (11th Cir. 1997), the Court held as follows: hydraulic fracturing activities constitute "underground injection" under Part C of the Safe Drinking Water Act, *id.* at 1478; all underground injection is required to be regulated (by permit or rule), *id.* at 1474;

and hydraulic fracturing associated with coalbed methane gas production is not currently regulated under Alabama's UIC Program, *id.* at 1471. On February 18, 1999, the Eleventh Circuit issued a Writ of Mandamus directed at EPA to enforce its August 1997 decision. The Writ established a schedule for EPA to follow to determine whether, in light of the Court's holding regarding hydraulic fracturing, EPA should withdraw approval of Alabama's UIC Program.

In response to the LEAF decision and the Writ of Mandamus, EPA must review Alabama's UIC Program in accordance with federal regulations at 40 CFR 145.34(b). The timing of EPA's review and decision-making process must adhere to the time frame contained in the Writ of Mandamus. In order to comply with the Writ of Mandamus and 40 CFR 145.34(b)(2), EPA must hold a public hearing no less than 60 days nor more than 75 days, following the publication of this notice of the hearing in the **Federal Register**. In order to comply with this time frame, Region 4 has decided to hold a public hearing on July 28, 1999, at the time and place indicated in the previous section. All interested persons shall be given the opportunity to make written or oral presentation at the public hearing on whether EPA should withdraw Alabama's Class II UIC Program on the ground that it does not regulate as "underground injection" hydraulic fracturing associated with coalbed methane gas production.

#### *Alabama Class II UIC Section 1425 Program Deficiencies*

The State Oil & Gas Board of Alabama is not regulating hydraulic fracturing of coalbed methane gas production wells as "underground injection" (by permit or rule) pursuant to its EPA-approved underground injection control program.

#### *Withdrawal Procedure*

Section 1425 of the SDWA and subsequent published EPA guidance does not contain express procedures for the withdrawal of a Section 1425 Program. EPA has promulgated procedures for withdrawing a Section 1422 Program at 40 CFR 145.34(b). In lieu of different express regulatory provisions for the withdrawal of Section 1425 Programs and in light of the Court's Writ of Mandamus, EPA is following the procedures at 40 CFR 145.34(b) in proposing to withdraw Alabama's Section 1425 Program.

On March 19, 1999, the Regional Administrator of EPA Region 4 notified the Supervisor of the State Oil and Gas Board of Alabama of EPA's decision to initiate the process to withdraw

approval of the Alabama UIC Program. The Regional Administrator's notice to the Supervisor of the State Oil and Gas Board of Alabama constituted the first step in the withdrawal process. According to the procedures established in 40 CFR 145.34(b) and the Writ of Mandamus, the State was given 30 days after the notice to demonstrate that its UIC Program is in compliance with the SDWA and 40 CFR part 145 (i.e., that hydraulic fracturing associated with methane gas production is regulated as "underground injection," by permit or rule, pursuant to the EPA approved Underground Injection Control Program).

The Supervisor of the State Oil and Gas Board responded to the Regional Administrator's letter by a letter dated April 15, 1999. The response indicated that on March 5, 1999, the State Oil & Gas Board of Alabama promulgated rules which regulate hydraulic fracturing of coalbed methane gas wells by rule authorization. These new regulations were added as an Emergency Order and sent to the Alabama Legislative Reference Service under Section 41-22-5 of the Code of Alabama (1975). They became effective on March 11, 1999, for a period of no longer than 120 days. The State Oil & Gas Board expects the rules to be made permanent prior to the expiration of the Emergency Order. To become part of the EPA approved UIC Program, Alabama should submit a revised UIC Program package containing new regulations to EPA for review and approval. These new regulations must protect current and potential USDWs from endangerment.

The State will not have fully corrected the identified program deficiencies consistent with the requirements of the Writ of Mandamus until a revised Alabama Section 1425 Program has been approved by EPA. Therefore, in accordance with 40 CFR 145.34(b)(2), the Regional Administrator of Region 4 is soliciting comments on the appropriateness of withdrawing the Class II UIC Program from the State Oil & Gas Board of Alabama on the grounds that it does not, as currently approved by EPA, regulate as "underground injection" hydraulic fracturing associated with methane gas production. This action constitutes the second step in the withdrawal process set out in 40 CFR 145.32(b) and the Writ of Mandamus. Following the public hearing and close of the public comment period, EPA will fully evaluate the record in this matter. If EPA determines that the State is still not in compliance, the Administrator will notify the State.

Within 90 days of receipt of that notification, the State of Alabama must fully implement any required remedial actions regarding regulating hydraulic fracturing or the State's Class II UIC Program will be withdrawn. Class II program approval will, however, not be withdrawn if Alabama can demonstrate that hydraulic fracturing associated with methane gas production is regulated as "underground injection" (by permit or rule) pursuant to the EPA approved underground injection control program. If EPA withdraws approval of the Alabama Class II Program pursuant to the requirement of 40 CFR 145.32(b) and the Writ of Mandamus, it will propose and promulgate a federal program for Class II wells located in Alabama, including hydraulic fracturing associated with methane gas production.

EPA is providing a public comment period regarding withdrawal of the Alabama Class II UIC Program for failure to adequately regulate hydraulic fracturing associated with methane gas production as "underground injection." Public comments received on or before close of business on August 5, 1999, will be considered in EPA's final evaluation of the State of Alabama Section 1425 Program. Comments may be submitted at the public hearing to be held on July 28, 1999, at 5:30 p.m., CST in the Rotary Room of the Tuscaloosa Public Library located at 1801 River Road, Tuscaloosa, Alabama 35401.

## **II. Regulatory Impact/Administrative Requirements**

### *A. Executive Order 12866: Regulatory Planning and Review*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

#### *B. Executive Order 13045: Children's Health Protection*

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that:

(1) Is determined to be "economically significant" as defined under Executive Order 12866; and,

(2) Concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children.

If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under Section 5-501 of the Order has the potential to influence the regulations. This rule is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866. Further, this rule does not establish an environmental standard intended to mitigate health or safety risks. This rule proposes to withdraw federal approval of Alabama's UIC Class II Program in response to a court order to do so. However, the requirements of the Alabama UIC Class II Program relating to underground injection will remain in effect as a matter of State law. Additionally, if EPA withdraws the State approved Class II UIC Program, EPA will promulgate a replacement federal program. Therefore, this proposed rule does not present any foreseeable effect on children's health and well being.

#### *C. Paperwork Reduction Act*

There are no information collection requirements established by this proposed rule. Therefore, the Paperwork Reduction Act does not apply.

#### *D. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA generally is required to conduct a regulatory flexibility analysis describing the impact of the regulatory action on small entities as part of rulemaking. However, under section 605(b) of the

RFA, if EPA certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, EPA is not required to prepare a regulatory flexibility analysis. Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Regional Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed rule merely proposes to withdraw federal approval of the UIC Program for Class II wells in the State of Alabama, except for those in Indian lands. Withdrawal of such approval does not change the regulatory requirements that currently apply to such wells as a matter of State law, nor does it add additional federal regulatory requirements.

#### *E. Executive Order 12875: Enhancing the Intergovernmental Partnership*

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local or tribal government, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or EPA consults with those governments.

If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local and tribal governments, the nature of their concerns, any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's proposed rule does not create a mandate on a state, local or tribal government. The proposed rule does not impose any enforceable duties on these entities. The rule merely proposes to withdraw federal approval of Alabama's UIC Class II Program. However, the requirements of that Program relating to underground injection will remain in effect as a matter of State law. Accordingly, the requirements of Section 1(a) of Executive Order 12875 do not apply to this proposed rule.

#### *F. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public

Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement including a cost-benefit analysis for proposed and final rules with "federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year.

Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the proposed rule. The provisions of section 205 do not apply when they are inconsistent with applicable law.

Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no federal mandates (under the regulatory provision of Title II of the UMRA), for state, local or tribal governments, or the private sector. The proposed rule imposes no enforceable duty on any state, local or tribal governments or the private sector. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has also determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's proposed rule is not subject to the requirements of section 203 of UMRA.

#### *G. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement

Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., material specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

*H. Executive Order 13084: Consultation and Coordination with Indian Tribal Governments*

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments.

If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the proposed rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's proposed rule does not significantly or uniquely affect the communities of Indian Tribal governments. This proposed rule does not affect the UIC Program on Indian Tribal lands. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this proposed rule.

## List of Subjects in 40 CFR Part 147

Environmental protection, Intergovernmental relations, Water supply.

Dated: May 13, 1999.

**John H. Hankinson, Jr.,**  
*Regional Administrator, Region 4.*

For the reasons set out in the preamble, 40 CFR part 147 is proposed to be amended as follows:

### PART 147—[AMENDED]

1. The authority citation for part 147 continues to read as follows:

**Authority:** 42 U. S. C. 300h; and 42 U. S. C. 6901 *et seq.*

### Subpart B—Alabama

#### § 147.50 [Removed]

2. Section 147.50 is removed.

[FR Doc. 99-12747 Filed 5-18-99; 11:31 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition To List the Baird's Sparrow as Threatened With Critical Habitat

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding.

**SUMMARY:** We, the Fish and Wildlife Service (Service), announce a 90-day finding for a petition to list the Baird's sparrow (*Ammodramus bairdii*) as threatened, and to designate critical habitat, under the Endangered Species Act of 1973, as amended (Act). We find that the petition does not present substantial information indicating that listing of this species as threatened may be warranted.

**DATES:** The finding announced in this document was made on May 13, 1999.

**ADDRESSES:** Data, information, comments, or questions concerning this petition should be submitted to the Field Supervisor, North Dakota Ecological Services Field Office, U.S. Fish and Wildlife Service, 1500 East Capitol Avenue, Bismarck, North Dakota 58501. The petition finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Al Sapa, at the above address, or telephone (701) 250-4481.

### SUPPLEMENTARY INFORMATION:

#### Background

Section 4(b)(3)(A) of the Act, requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. This finding is to be based on all information available to us at the time the finding is made. To the maximum extent practicable, this finding is to be made within 90 days of the date the petition was received, and the finding is to be published promptly in the **Federal Register**. If the finding is that substantial information was presented, we are required to promptly initiate a review of the status of the species.

We initiated a status review for the Baird's sparrow when it was categorized as a Category 2 species in the Animal Notice of Review published in the **Federal Register** on November 21, 1991 (56 FR 58804). At that time, a Category 2 species was one that was being considered for possible addition to the Federal List of Endangered and Threatened Wildlife, but for which conclusive data on biological vulnerability and threat were not available to support a proposed rule. Designation of Category 2 species was discontinued in the February 28, 1996, Notice of Review (61 FR 7596). We completed the Baird's Sparrow Status Assessment and Conservation Plan (Jones and Green 1998) in April 1998. Based on the results of the Assessment, we recommended no change in the status for this species and it remains on our list of Nongame Migratory Bird Species of Management Concern. This designation does not confer legal protection but is intended to stimulate a coordinated effort by Federal, State, and private agencies to develop and implement comprehensive and integrated approaches for management.

On July 1, 1997, we received a petition dated June 26, 1997, from the Biodiversity Legal Foundation, to list the Baird's sparrow (*Ammodramus bairdii*) as threatened, and to designate critical habitat, pursuant to the Act. We acknowledged receipt of the petition on July 23, 1997, and indicated to the petitioner that our Listing Priority Guidance for fiscal year 1997, published in the December 5, 1996, **Federal Register** (61 FR 64475), would preclude working on the 90-day finding at that time. The fiscal year 1997 Guidance designated the processing of listing