comments received to the docket and the results of the previous studies, analyses, and agency and stakeholder experience.

Study Recommendations

The PARS recommendations include the following:

1. Establish a Precautionary Area near the approaches to the Cape Fear River. A pilot transfer area will be located inside the precautionary area.

2. Establish a Traffic Separation Scheme (TSS) near the approaches to the Cape Fear River.

3. Establish offshore anchorage areas near the approaches to the Cape Fear River and Beaufort Inlet, NC.

Next Steps

A brief synopsis of how the PARS recommendations will proceed towards implementation follows:

1. Establishing a TSS will require approval by the International Maritime Organization (IMO). The addition of the TSS to the Code of Federal Regulations (CFR) will be accomplished through the rulemaking process.

2. The establishment of offshore anchorage areas will be accomplished through the rulemaking process.

3. Changes to aids to navigation resulting from the above actions will be accomplished through the following established procedures—notification of proposed changes in the Local Notice to Mariners with an opportunity for comment and notification of the final changes in the Local Notice to Mariners.

Conclusion

We appreciate the comments we received concerning the PARS. We will provide ample opportunity for additional comments on any recommended changes to existing routing or operational measures that require codification through notices of proposed rulemakings (NPRMs) published in the **Federal Register**.

Dated: March 31, 2004.

Howard L. Hime,

Acting Director of Standards, Marine Safety, Security & Environmental Protection.

[FR Doc. 04–7956 Filed 4–7–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 147

[FRL–7644–8]

State of Alabama: Underground Injection Control Program Revision; Proposed Response to Court Remand

AGENCY: Environmental Protection Agency.

ACTION: Proposed determination on remand of final rule; request for public comment.

SUMMARY: In this document, the Environmental Protection Agency (EPA) is requesting public comment on its proposed response to the Eleventh Circuit Court of Appeals' remand in *Legal Environmental Assistance Foundation, Inc.*, v. *United States Environmental Protection Agency*, 276 F.3d 1253 (11th Cir. 2001) (hereinafter *LEAF II*), directing EPA to determine whether Alabama's revised underground injection control (UIC) program covering hydraulic fracturing of coal bed seams to recover methane gas complies with the requirements for Class II wells. In *LEAF II*, the Eleventh Circuit Court affirmed EPA's decision to review Alabama's hydraulic fracturing program pursuant to the approval criteria in section 1425 of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300h *et seq.*, instead of the approval criteria in section 1422 of the SDWA, and rejected LEAF's claim that EPA's approval of the program pursuant to section 1425 was arbitrary. However, the Court remanded the matter, in part, for EPA "to determine whether Alabama's revised UIC program complies with the requirements for Class II wells.'' After considering this issue, EPA has preliminarily determined that the hydraulic fracturing portion of the State's UIC program relating to coal bed methane production, which was approved under section 1425 of the SDWA, complies with the requirements for Class II wells within the context of section 1425's approval criteria. EPA is requesting comment on this proposed determination.

DATES: Comments on this proposed response to the Court remand must be in writing and either postmarked or received by the docket for this action by May 10, 2004.

ADDRESSES: Send written comments to: Larry Cole, U.S. Environmental Protection Agency, Region 4, Water Management Division, Ground Water and Drinking Water Branch, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303. When submitting written comments, please submit an original and three copies of your comments and enclosures (including any references). Documents relevant to this action are available for inspection at this same address between 8 a.m. and 5 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: General questions and questions on technical issues concerning today's document should be directed to Larry Cole at (404) 562–9474, or at the address above. Questions on legal issues concerning today's document should be addressed to Zylpha Pryor, Office of Environmental Accountability, U.S. Environmental Protection Agency—Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303, telephone (404) 562–9535.

SUPPLEMENTARY INFORMATION:

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I. Background Information

A. Court Decisions

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 appropriately regulating injection activities associated with coal bed methane gas production wells. Following the Agency'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) (*LEAF I*), the Court held that hydraulic fracturing activities constitute underground injection under Part C of the SDWA and must be regulated by permit or rule. On February 18, 1999, the Eleventh Circuit directed EPA to implement the Court's August 1997 decision. The Court established a schedule for EPA to follow in determining whether, in light of the Court's ruling regarding hydraulic fracturing, EPA should withdraw approval of Alabama's UIC program. In a January 19, 2000, **Federal Register** (FR) final rule, EPA announced its determination that Alabama's UIC program regulating hydraulic fracturing associated with coal bed methane production was consistent with the requirements of the SDWA and the

LEAF I Court mandate. *See* 65 FR 2889 (January 19, 2000).

LEAF filed a petition for review of EPA's determination with the Eleventh Circuit Court, arguing that it should be set aside for three reasons. First, LEAF argued that the underground injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds is not underground injection for the secondary or tertiary recovery of natural gas under section 1425 of the SDWA. Second, LEAF contended that wells used for the injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds are Class II wells as defined in 40 CFR 144.6(b), and EPA's classification of hydraulic fracturing as a "Class II-like underground injection activity'' was not in accordance with law. Third, LEAF argued that, even if Alabama's revised UIC program was covered by the alternative approval procedure of section 1425, EPA's approval of the revised program was arbitrary and capricious. The Eleventh Circuit generally ruled in favor of EPA, holding that: (1) EPA's decision to approve Alabama's hydraulic fracturing program pursuant to section 1425 of the SDWA was a permissible construction of the statute; and (2) EPA was not arbitrary in determining that Alabama's UIC program complies with the section 1425 statutory approval requirements. *LEAF II*, 276 F.3d at 1260–61, 1265. However, the Court remanded, in part, for EPA to determine whether Alabama's revised program covering the hydraulic fracturing of coal beds to produce methane complies with the requirements for Class II wells. Id. at 1264. The purpose of this document is to announce EPA's preliminary determination regarding the remanded issue, and to request public comment on it. EPA is not soliciting comment on any other aspects of its January 2000 approval of Alabama's revised UIC program.

B. Section 1425 of the SDWA

Any State that seeks to acquire primary enforcement responsibility for the regulation of Class II wells may, at its option, apply for primacy for its Class II UIC program under the approval criteria in either section 1422 or section 1425 of the SDWA. Approval under either section is aimed at achieving the same fundamental objective of protecting underground sources of drinking water from endangerment by well injection. However, State program approvals under section 1422(b)(1) of the SDWA are required to meet a different legal standard than State program approvals under section 1425. Section 1425 was added as part of the 1980 amendments to the SDWA to offer States an approval alternative that was not necessarily tied to the detailed regulatory requirements for Class II wells found at 40 CFR Parts 124, 144, 145, and 146.

Approval under section 1422(b)(1)(A) requires that the State UIC program meet the requirements of regulations in effect under section 1421. Those regulations, which are found at 40 CFR Parts 124, 144, 145, and 146, are very detailed and specific. However, under the alternate section 1425 approval criteria, a State may instead demonstrate that the Class II portion of its UIC program meets the requirements of section 1421(b)(1)(A) through (D) and represents an "effective'' program to prevent injection which endangers drinking water sources. A State has more flexibility in developing a section 1425-approvable Class II program than if it were developing the same program for approval under section 1422. Similarly, EPA has more discretion to approve a Class II program under the section 1425 criteria, because that program does not have to "track'' or be "as stringent as'' each of the Class II-related requirements of 40 CFR parts 124, 144, 145, and 146. *See* 40 CFR 145.11(b)(1). If a State makes a satisfactory demonstration pursuant to section 1425 that its Class II program warrants approval, it has done all that is required to demonstrate that its program complies with the requirements for Class II wells.

II. EPA's Response to Court Remand

During the hydraulic fracturing process, fracturing fluids are injected through methane production wells to create fractures in the formation through which methane flows to the well and up to the surface. In its January 19, 2000, **Federal Register** final rule approving Alabama's UIC program revisions, EPA characterized hydraulic fracturing for the production of coal bed methane as a "Class II-like underground injection activity.'' In the final rule, EPA acknowledged that its classification scheme recognizes only five classes of wells. However, EPA stated that, since the injection of fracture fluids is often a one-time exercise of extremely limited duration and was ancillary to the well's principal function of producing methane, it did not seem entirely appropriate to ascribe full Class II status to that activity. EPA also based its Alabama well classification decision on the fact that the general UIC "well classification systems found in 40 CFR 144.6 and 146.5 do not expressly include hydraulic fracturing'' and "the various permitting, construction, and other requirements found in Parts 144 and 146 do not specifically address hydraulic fracturing.'' 65 FR at 2892. It is still the case today that EPA has not promulgated national regulations expressly and specifically designed to establish minimum requirements for State programs that regulate hydraulic fracturing of coal beds to enhance methane production.

The *LEAF II* Court found EPA's classification of Alabama's hydraulically fractured coal bed methane wells as "Class II-like'' to be inconsistent with the plain language of 40 CFR 144.6, which defines Class II injection wells. In its opinion, the Court held that, even though the injection of fracture fluids is often a one-time exercise of extremely limited duration, "wells used for the injection of hydraulic fracturing fluids fit squarely within the definition of Class II wells.'' *LEAF II*, 276 F.3d at 1263; *see also* 40 CFR 144.6(b)(2). In view of its finding that the wells are Class II wells, the Court remanded, in part, for EPA to determine whether Alabama's revised UIC program complies with the requirements for Class II wells.

In applying for approval of that part of its Class II UIC program regulating hydraulic fracturing of coal beds, Alabama could have sought primacy either under section 1422 or section 1425 approval criteria of the SDWA. Since Alabama chose to make its demonstration pursuant to section 1425, EPA appropriately evaluated that part of Alabama's Class II program regulating hydraulic fracturing of coal beds using the section 1425 alternative approval requirements.

To receive approval for its Class II program, or some component thereof, under the optional demonstration, section 1425 requires a State to show that its program meets the following five criteria: (1) Section 1421(b)(1)(A) provides that the State program must prohibit any underground injection which is not authorized by permit or rule; (2) section 1421(b)(1)(B) provides that the State program require that the applicant for a permit satisfy the State that the underground injection will not endanger drinking water sources and prohibits the State from promulgating any rule which authorizes underground injection which endangers drinking water sources; (3) section 1421(b)(1)(C) requires that the State program include inspection, monitoring, record keeping, and reporting requirements; (4) section 1421(b)(1)(D) provides that the State program must apply to underground injections by Federal agencies, as well as underground injections by any other person, whether or not occurring on

property owned or leased by the United States; and (5) the State program must represent "an effective program'' to prevent underground injection which endangers drinking water sources, in accordance with section 1425(a). If a State can successfully demonstrate that its Class II program satisfies all of these requirements, the program has met all the statutory requirements for approval. As previously discussed, under section 1425, that program, or a component thereof, does not have to demonstrate that it contains requirements as stringent as, or identical to, each of the specific Class II requirements found in Parts 144 and 146 of EPA's regulations. Instead, a finding that such a program, or component thereof, meets the Class II approval requirements of section 1425 means that such a program, by virtue of that finding, necessarily complies with all applicable statutory and regulatory requirements for Class II wells.

EPA's determination that Alabama's hydraulic fracturing program related to coal bed methane production complied with the section 1425 requirements for Class II program approval was explained in great detail in the January 19, 2000, **Federal Register** final rule. The *LEAF II* Court held that EPA's determination that Alabama's UIC program complies with the SDWA's statutory requirements was not arbitrary. *LEAF* v. *EPA,* 276 F.3d at 1265. EPA is not reopening that earlier approval decision or soliciting additional comment on it. EPA is only seeking comment on its proposed response to the *LEAF II* Court's question on remand.

In reviewing and approving Alabama's coal bed methane-related hydraulic fracturing program, EPA was cognizant of the various regulatory provisions in Parts 144 and 146 designed to prevent Class II injection wells from causing the movement of fluid containing any contaminant into an underground source of drinking water (USDW). EPA generally expects traditional State Class II programs, *i.e.*, those regulating the injection of fluids brought to the surface either in connection with conventional oil and gas production or for enhanced recovery or storage of oil and gas, to demonstrate their "effectiveness'' to prevent underground injection which endangers USDWs pursuant to Section 1425 by inclusion of statutory or regulatory provisions preventing fluid movement. EPA was concerned that according "full'' Class II status to Alabama's hydraulically-fractured methane production wells could have been misconstrued as requiring a strict application of those "no fluid movement'' provisions and could have unnecessarily impeded methane gas production in Alabama within the meaning of SDWA section 1421(b)(2) because Alabama's revised program allowed injection of fracturing fluids into USDWs, provided they did not cause a violation of any maximum contaminant level (MCL) or otherwise adversely affect the health of persons. *LEAF* v. *EPA,* F.3d at 1264 n.12; EPA brief at 30–31. EPA thus decided to characterize wells used to inject hydraulic fracturing fluids into Alabama's coal bed formations as "Class II-like,'' rather than Class II. However, this characterization of Alabama's hydraulically-fractured methane production wells, while designed to further ensure that regulation of those wells did not unnecessarily interfere with or impede methane gas production, was unnecessary for purposes of EPA's approval due, in part, to the unique attributes of hydraulic fracturing in Alabama, and because EPA did, in fact, make a substantive finding, which was upheld by the *LEAF II* Court, that Alabama's program does not endanger USDWs because, among other requirements, the injection must not cause a violation of any MCL or otherwise adversely affect the health of persons. EPA thus appropriately exercised the discretion and flexibility inherent in SDWA section 1425 to approve Alabama's coal bed methane-related hydraulic fracturing program allowing such movement where: (1) EPA's Class II regulations were not designed to, and do not specifically address the unique technical and temporal attributes of hydraulic fracturing, and (2) EPA determined pursuant to section 1425 that Alabama's program is effective at preventing endangerment of USDWs.

In sum, SDWA gives Alabama more flexibility in developing a section 1425-approvable Class II program for the hydraulic fracturing of coal beds to produce methane than if it were developing the same program for approval under the criteria in section 1422. Similarly, EPA has more discretion to approve Alabama's revised Class II program relating to coal bed methane production under the criteria in section 1425, because that program does not have to "track'' or be "as stringent as'' each of the Class II-related requirements of 40 CFR parts 124, 144, 145, and 146. *See* 40 CFR 145.11(b)(1). Because Alabama made a satisfactory demonstration pursuant to section 1425 that its coal bed methane-related hydraulic fracturing program warranted approval, it did all that was required to demonstrate that its program complies with the requirements for Class II wells.

Dated: April 5, 2004.

Benjamin H. Grumbles,

Acting Assistant Administrator, Office of Water.

[FR Doc. 04–7974 Filed 4–7–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0025; FRL–7353–4]

Lambda-Cyhalothrin and an Isomer Gamma-Cyhalothrin; Tolerances for Residues

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending 40 CFR part 180 by promulgating a new tolerance expression for the isomer form of gamma-cyhalothrin. Gamma-cyhalothrin is the isolated active isomer of lambda-cyhalothrin under 40 CFR 180.438. Pytech Chemicals GmbH, 9330 Zionsville Rd., Indianapolis, IN 46268, requested this change in tolerance expression in support of the registration of a pesticide formulation enriched with the gamma isomer of lambda-cyhalothrin.

DATES: This regulation is effective April 8, 2004. Objections and requests for hearings, identified by docket ID number OPP–2004–0025, must be received on or before June 7, 2004.

ADDRESSES: Written objections and hearing requests may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: William G. Sproat, Jr.,Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 308–8587; e-mail address: *sproat.william@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111), e.g., agricultural workers; greenhouse,