

a permit issued for a demonstration or special event.

(2) Persons permitted to solicit must not:

(i) Give false or misleading information regarding their purposes or affiliations;

(ii) Give false or misleading information as to whether any item is available without donation.

\* \* \* \* \*

Dated: January 25, 2013.

**Rachel Jacobson,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2013-05249 Filed 3-6-13; 8:45 am]

**BILLING CODE 4312-EJ-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R04-OAR-2012-0700; FRL-9788-6]

#### Approval and Promulgation of Implementation Plans; Kentucky; 110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards

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

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve in part, conditionally approve in part, and disapprove in part, the July 17, 2012, State Implementation Plan (SIP) submission provided by the Commonwealth of Kentucky, through the Division of Air Quality (DAQ) of the Kentucky Energy and Environment Cabinet. Kentucky DAQ submitted the July 17, 2012, SIP submission as a replacement to its original September 8, 2009, SIP submission. Specifically, this final rulemaking pertains to the Clean Air Act (CAA or Act) requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS) infrastructure SIP. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure” SIP. Kentucky DAQ made a SIP submission demonstrating that the Kentucky SIP contains provisions that ensure the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in the Commonwealth (hereafter referred to as “infrastructure submission”). EPA is now taking final action on three related actions on Kentucky DAQ’s

infrastructure SIP submission. First, EPA is taking action to approve Kentucky DAQ’s infrastructure submission provided to EPA on July 17, 2012, as meeting certain required infrastructure elements for the 2008 8-hour ozone NAAQS. Second, with respect to the infrastructure elements related to specific prevention of significant deterioration (PSD) requirements, EPA is taking final action to approve, in part and conditionally approve in part, the infrastructure SIP submission based on a December 19, 2012, commitment from Kentucky DAQ to submit specific enforceable measures for approval into the SIP to address specific PSD program deficiencies. Third, EPA is taking final action to disapprove Kentucky DAQ’s infrastructure SIP submission with respect to certain interstate transport requirements for the 2008 8-hour ozone NAAQS because the submission does not address the statutory provisions with respect to the relevant NAAQS and thus does not satisfy the criteria for approval. The CAA requires EPA to act on this portion of the SIP submission even though under a recent court decision, Kentucky DAQ was not yet required to submit a SIP submission to address these interstate transport requirements. Moreover, under that same court decision, this disapproval does not trigger an obligation for EPA to promulgate a Federal Implementation Plan (FIP) to address these interstate transport requirements.

**DATES:** This rule will be effective April 8, 2013.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0700. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional

Office’s official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding federal holidays.

#### **FOR FURTHER INFORMATION CONTACT:**

Nacosta C. Ward, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9140. Ms. Ward can be reached via electronic mail at [ward.nacosta@epa.gov](mailto:ward.nacosta@epa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Table of Contents**

- I. Background
- II. Response to Comments
- III. This Action
- IV. Final Action
- V. Statutory and Executive Order Reviews

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

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic structural SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS.

Section 110(a) of the CAA generally requires states to make a SIP submission to meet applicable requirements in order to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. These SIP submissions are commonly referred to as “infrastructure” SIP submissions. Section 110(a) imposes the obligation upon states to make an infrastructure SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the infrastructure SIP for a new or revised NAAQS affect the content of the submission. The contents of such infrastructure SIP submissions may also vary depending upon what provisions the state’s existing SIP already contains. In the case of the 2008 8-hour ozone NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous ozone NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly

established or revised NAAQS. As mentioned above, these requirements include basic structural SIP requirements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The applicable infrastructure SIP requirements that are the subject of this rulemaking are listed below.<sup>1</sup>

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.<sup>2</sup>
- 110(a)(2)(D)(i): Interstate transport.<sup>3</sup>
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.<sup>4</sup>
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

<sup>1</sup> Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to other provisions of the CAA for submission of SIP revisions specifically applicable for attainment planning purposes. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA; and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's final rulemaking does not address infrastructure elements related to section 110(a)(2)(I) or the nonattainment planning requirements of 110(a)(2)(C).

<sup>2</sup> This rulemaking only addresses requirements for this element as they relate to attainment areas.

<sup>3</sup> Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II). At this time, pursuant to a recent decision of the U.S. Court of Appeals for the DC Circuit, the SIP submission from Kentucky DAQ to meet section 110(a)(2)(D)(i)(I) is not a required SIP submission. The portions of the SIP submission relating to 110(a)(2)(D)(i)(II) and 110(a)(2)(D)(ii), in contrast, are required. Although prongs 1 and 2 are not required, EPA is acting today to disapprove Kentucky's submittal related to these prongs for the reasons described in the proposed rule associated with this rulemaking. See 78 FR 3867. Further information regarding EPA's disapproval of prongs 1 and 2 is also provided below in section II.

<sup>4</sup> This requirement as mentioned above is not relevant to today's final rulemaking.

On January 17, 2013, EPA proposed to approve Kentucky's July 17, 2012, infrastructure SIP submission and proposed to conditionally approve in part sections 110(a)(2)(C), prong 3 of (D)(i), and (J), and disapprove in part section 110(a)(2)(D)(i) for the 2008 8-hour ozone NAAQS. See 78 FR 3867.

EPA proposed conditional approval in part for sections 110(a)(2)(C), prong 3 of (D)(i),<sup>5</sup> and (J) because, while the Commonwealth's SIP does not currently contain provisions to address the structural PSD requirements of the PSD and Nonattainment New Source Review (NNSR) requirements related to the implementation of the NSR PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> Increments), Kentucky DAQ committed in a letter dated December 19, 2012, to submit, within one year, specific enforceable measures to EPA for incorporation into the SIP to address these requirements. See 78 FR 3867. This commitment letter meets the requirements of section 110(k)(4) of the CAA. Kentucky DAQ's December 19, 2012, letter can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2012-0700.

With respect to section 110(a)(2)(D)(i)(I),<sup>6</sup> for the 2008 8-hour ozone NAAQS, EPA published a proposal to disapprove Kentucky DAQ's July 17, 2012, SIP revision. EPA proposed disapproval of these elements because the infrastructure SIP submission asserted that the requirements of 110(a)(2)(D)(i)(I) with respect to the 2008 8-hour ozone NAAQS were satisfied by the Commonwealth's approved regulations to meet the Clean Air Interstate Rule (CAIR) requirements. CAIR, however, was promulgated before the 2008 8-hour ozone NAAQS were promulgated, and CAIR did not, in any way, address interstate transport requirements related to the 2008 8-hour ozone NAAQS. See 78 FR 3867.

Finally, EPA notes that this final action on Kentucky's infrastructure SIP submission for the 2008 8-hour ozone NAAQS is required not only by section

<sup>5</sup> Section 110(a)(2)(D)(i) includes four requirements referred to as prongs 1 through 4. Prongs 1 and 2 are provided at section 110(a)(2)(D)(i)(I); prongs 3 and 4 are provided at section 110(a)(2)(D)(i)(II). Today's conditional approval only relates to the structural PSD requirements of section 110(a)(2)(D)(i)(II), also known as prong 3 as noted above in footnote 3.

<sup>6</sup> Section 110(a)(2)(D)(i)(I) includes two distinct requirements referred to as prongs 1 and 2. Prong 1 requires states to prohibit emissions that significantly contribute to nonattainment of the NAAQS in another state and prong 2 request states to prohibit emissions that interfere with maintenance of the NAAQS in another state.

110(k), but also by order issued by the U.S. District Court for the Northern District of California in *WildEarth Guardians v. Jackson*, Case No. 11–CV–5651 YGR. In an October 17, 2012, order granting partial summary judgment in the case, as modified in a December 7, 2012, order granting in part EPA's motion for an amended order, that court directed EPA to take final action upon the infrastructure SIP at issue in this action by March 4, 2013. With respect to Kentucky, the court specifically ordered EPA to act upon the infrastructure SIP submission made by the Commonwealth on September 8, 2009, as revised on July 17, 2012. As explained in more detail in response to relevant comments, EPA is addressing the requirements of section 110(a)(2)(D)(i)(I) consistent with the opinion of the DC Circuit Court's opinion in *EPA Homer City Generation v. EPA*, 696 F.3d 7 (DC Cir. 2012).

## II. Response to Comments

EPA received five sets of comments on the January 17, 2013, proposed rulemaking to approve in part, conditionally approve in part, and disapprove in part, Kentucky DAQ's infrastructure SIP submission intended to meet the CAA requirements for the 2008 8-hour ozone NAAQS. A summary of the comments and EPA's responses are provided below.

*Comment 1:* One commenter contends that EPA cannot approve the section 110(a)(2)(A) portion of Kentucky DAQ's infrastructure SIP submission because certain counties in the Commonwealth have air quality monitors with data that suggest such areas are not attaining the 2008 8-hour ozone NAAQS. Specifically, the Commenter cites air monitoring reports for Jefferson and Oldham counties indicating violations of the NAAQS based on 2009–2011 design values. The Commenter further contends that, based on available data for 2010–2012, 10 Kentucky counties will violate the 2008 8-hour ozone NAAQS based on 2010–2012 design values. According to the Commenter, if a designated attainment area violates the NAAQS, then this means that the state must necessarily lack adequate emissions limits in its infrastructure SIP submission to attain and maintain that NAAQS.

*Response 1:* EPA disagrees with the Commenter's contention that Kentucky DAQ's 2008 8-hour ozone infrastructure SIP submission is not approvable with respect to section 110(a)(2)(A) because of the monitor design values noted by the Commenter. While EPA shares the Commenter's concern regarding counties monitoring exceedances of the

2008 8-hour ozone NAAQS based upon 2009–2011 design values, such concerns are outside the scope of what is germane to an evaluation of section 110(a)(2)(A) of an infrastructure SIP.<sup>7</sup>

Pursuant to section 110(a)(2)(A), an infrastructure SIP submission must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the Act. The Commenter, however, seems to believe that in the context of an infrastructure SIP submission, section 110(a)(2)(A) requires that a state must monitor attainment of the NAAQS at all monitors throughout the state in order to demonstrate that the SIP contains the requisite emissions limitations and other control measures, means or techniques prescribed by the Act. EPA does not believe that this is a reasonable interpretation of the provision with respect to infrastructure SIP submissions. Rather, EPA believes that the proper inquiry at this juncture is whether the state has met the basic structural SIP requirements appropriate at the point in time EPA is acting upon it. The Act provides states and EPA with other tools to address concerns that arise with respect to violations of the NAAQS in a designated attainment area, such as the authority to redesignate areas pursuant to section 107(d)(3), the authority to issue a “SIP Call” pursuant to section 110(k)(5), or the general authority to approve SIP revisions that can address such violations of the NAAQS through other appropriate measures. As stated in EPA’s proposed approval for this rule, to meet section 110(a)(2)(A), Kentucky submitted a list of existing emission reduction measures in the SIP that control emissions of volatile organic compounds and nitrogen oxides (NO<sub>x</sub>) in order to address ambient ozone levels. EPA believes that this is sufficient for purposes of infrastructure SIP submission.

*Comment 2:* The Commenter contends that EPA must disapprove Kentucky’s infrastructure SIP submission as it

relates to section 110(a)(2)(A) because the submittal fails to contain enforceable ozone precursor limits and schedules/timetables for compliance to ensure attainment and maintenance of the NAAQS. Specifically, the Commenter contends that Kentucky has failed to identify how it will address the violations for those counties monitoring violations of the NAAQS.

*Response 2:* EPA disagrees with the Commenter’s contention that Kentucky should be required to submit the emissions limitations and other control measures associated with a nonattainment plan in order to satisfy section 110(a)(2)(A) requirements. This would be beyond the scope of what is required per section 110(a)(2)(A) in the context of an infrastructure SIP submission. Nonattainment area plans are due on a different schedule from the section 110 infrastructure elements, and such plans, if required, are reviewed and acted upon through a separate process. Here, the most of the counties cited by the Commenter are not designated nonattainment,<sup>8</sup> and as such, the nonattainment plan requirements referenced by the Commenter are not currently due. As noted above, EPA shares the Commenter’s concern regarding areas that are monitoring exceedances of the 2008 8-hour ozone NAAQS and will work appropriately with state and local agencies to address such exceedances. Further, in approving Kentucky’s infrastructure SIP, EPA is affirming that Kentucky has sufficient authority to take the types of actions required by the CAA in order to bring such areas back into attainment.

*Comment 3:* A number of Commenters disagreed with EPA’s position that disapproval of the Kentucky’s infrastructure SIP, as it relates to section 110(a)(2)(D)(i)(I) requirements, would not trigger a mandatory duty for EPA to promulgate a FIP to address these requirements. Specifically, the Commenters contend that the plain language of the CAA requires EPA to issue a FIP within two years of a disapproval action. In addition, the Commenters contend that the decision in *EME Homer City Generation v. EPA*, 696 F.3d 7 (DC Cir. 2012) (*EME Homer City*), was incorrectly decided and is inconsistent with previous decisions by the DC Circuit Court of Appeals. The Commenters suggest that EPA should not voluntarily follow the incorrectly decided *EME Homer City* opinion, particularly in the context of an

infrastructure action that only impacts sources in Kentucky, a state under the jurisdiction of the Sixth Circuit Court of Appeals rather than the DC Circuit Court of Appeals.

*Response 3:* EPA has historically adopted the interpretation suggested by the Commenters that disapproval of section 110(a)(2)(D)(i)(I) would trigger an obligation for the Agency to promulgate a FIP within two years if the state did not correct the SIP deficiency within that time. EPA continues to agree that the plain language of the statute establishes these obligations, and for those reasons, we asked the U.S. Court of Appeals for the DC Circuit to grant rehearing en banc of the decision in *EME Homer City*. That petition, however, was denied on January 24, 2012, and the mandate was issued to EPA on February 4, 2012. The deadline for any party to file a petition for *certiorari* with the Supreme Court has not passed<sup>9</sup> and the United States has not yet decided whether to pursue further appeals. In the meantime, EPA intends to act in accordance with the *EME Homer City* opinion in which the court concluded that states have no obligation to make a SIP submission to address section 110(a)(2)(D)(i)(I) for a new or revised NAAQS until EPA has first defined a state’s obligations pursuant to that section. As described in the proposed rulemaking for today’s action, Kentucky did make such a submittal, and consistent with section 110(k) of the CAA, EPA is required to act upon that submittal. Because CAIR does not, in any way, address transport with respect to the 2008 8-hour ozone NAAQS, it cannot be relied upon to satisfy the requirements of 110(a)(2)(D)(i)(I) for that NAAQS. For this reason, the Agency proposed to disapprove this portion of the infrastructure SIP submission. However, because this portion of the infrastructure SIP submission is not currently required for the 2008 8-hour ozone NAAQS per the *EME Homer City* opinion, EPA’s disapproval action today does not presently trigger a FIP obligation.

EPA also disagrees with the Commenters’ suggestion that the Agency need not follow the DC Circuit’s decision in *EME Homer City* in the context of an infrastructure action for Kentucky. The EPA rule reviewed by the court in *EME Homer City*—“Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and

<sup>7</sup> EPA also notes that the Commenter relies upon preliminary data to suggest that certain areas are violating the 2008 8-hour ozone NAAQS based upon 2010–2012 data. This data has not yet been certified, and as such, is not yet finalized. Regardless, for the reasons discussed in Response 1, EPA does not believe that such data, were it certified and final, would provide an appropriate basis upon which to disapprove Kentucky’s infrastructure SIP as it relates to section 110(a)(2)(A) requirements.

<sup>8</sup> As noted below, a portion of Campbell County, Kentucky is designated nonattainment for the 2008 8-hour ozone NAAQS in association with the Cincinnati-Hamilton nonattainment area.

<sup>9</sup> Pursuant to Rule 13 of the Supreme Court Rules, a petition for *certiorari* must be filed within 90 days of the date of denial of rehearing. The court may extend this deadline for good cause by up to 60 days.

Ozone and Correction of SIP Approvals,” 76 FR 48207 (August 8, 2011) also known as the Cross State Air Pollution Rule (CSAPR)—was designated by EPA as a “nationally applicable” rule within the meaning of section 307(b)(1) of the CAA. *See id.* at 48352. Accordingly, all petitions for review of the CSAPR had to be filed in the U.S. Court Appeals for the DC Circuit and could not be filed in any other federal court. 42 U.S.C. 7607(b)(1). Accordingly, EPA believes the DC Circuit’s decision in *EME Homer City* vacating this rule is also nationally applicable. As such, EPA does not intend to take any actions, even if they are only reviewable in another federal Circuit Court of Appeals, that are inconsistent with the decision of the DC Circuit.

**Comment 4:** A number of states commented that Kentucky contributes significantly to ozone nonattainment in other states. Specifically, the Maryland Department of the Environment commented that it has performed modeling to demonstrate that Maryland will continue to violate the 2008 8-hour ozone NAAQS even if all anthropogenic emissions in Maryland are eliminated. It contends that corrective actions in states like Kentucky that contribute to Maryland’s nonattainment are necessary in order for the state to meet the NAAQS. The Delaware Department of Natural Resources and Environmental Control commented that modeling from the CSAPR demonstrated that Kentucky emissions significantly contribute to Delaware’s ozone pollution by as much as 4.3 percent of the 2008 8-hour ozone NAAQS in 2012 and that Delaware has done its fair share to address ozone, and it expects EPA to ensure that upwind contributing states fully address their contribution to downwind nonattainment. Finally, the Connecticut Department of Energy & Environmental Protection commented that CSAPR modeling demonstrates that Kentucky emissions significantly contribute to Connecticut’s ozone pollution by as much as 3.4 percent of the 2008 8-hour ozone NAAQS in 2012, and that Connecticut has done its fair share to address ozone emissions in the state, and it now expects EPA to ensure that upwind contributing states fully address their contribution to downwind nonattainment.

**Response 4:** EPA acknowledges the Commenters’ concern that interstate transport of ozone and ozone precursors from upwind states to downwind states may have adverse consequences on the ability of downwind areas to attain the NAAQS in a timely fashion. It is for this reason that EPA attempted, through

CSAPR, to address emissions found to significantly contribute to nonattainment of or interfere with maintenance of the 1997 8-hour ozone NAAQS. The modeling done for CSAPR, however, did not address the 2008 8-hour ozone NAAQS and EPA did not draw any conclusions with respect to the 2008 8-hour ozone NAAQS which did not exist when CAIR was promulgated. Moreover, the DC Circuit, in its decision vacating the CSAPR, held that states are not required to submit SIPs addressing the requirements of section 110(a)(2)(D)(i)(I) until EPA has quantified their obligation under that provision. *See EME Homer City*, 696 F.3d at 37. The *EME Homer City* opinion was issued in August of 2012, and on January 24, 2013, the court denied all petitions for rehearing. As noted in the responses above, the deadline for asking the Supreme Court to review the DC Circuit’s decision has not passed and the United States has not yet decided whether to seek further appeal. In the meantime, and unless the *EME Homer City Generation* decision is reversed or otherwise modified, EPA intends to act in accordance with the DC Circuit’s opinion. Under this opinion, EPA has no authority to promulgate a FIP for section 110(a)(2)(D)(i)(I) until such time as the Agency quantifies States’ obligations under this section.

**Comment 5:** One Commenter contended even if EPA chose to follow the *EME Homer City Generation* decision, EPA should acknowledge that the disapproval starts a FIP clock and then move expeditiously to provide Kentucky with the information the *EME Homer City* court said EPA must provide. The Commenter contended that EPA should be able to quantify Kentucky’s obligations under section 110(a)(2)(D)(i)(I) within six months, thereby providing the Commonwealth with 18 months to submit a new SIP to address this requirements.

**Response 5:** EPA disagrees. As discussed above in the response to comment 3, unless the D.C. Circuit’s decision in *EME Homer City* is reversed or otherwise modified, disapproval Kentucky DAQ’s 2008 infrastructure SIP as it relates to section 110(a)(2)(i)(I) does not give EPA authority, much less obligate it, to promulgate a FIP for Kentucky. EPA intends to move forward expeditiously to address the interstate transport requirements of the CAA in accordance with all applicable court decisions.

**Comment 6:** A number of Commenters contend that EPA’s disapproval section 110(a)(2)(D)(i)(I) triggers a section 110(k)(5) obligation to initiate a “SIP Call” to revise Kentucky’s inadequate

infrastructure SIP related to interstate transport requirements.

**Response 6:** EPA disagrees. Section 110(k)(5) of the CAA provides a mechanism (i.e., a “SIP Call”) for correcting SIPs that the Administrator finds to be substantially inadequate to meet CAA requirements. As discussed above, EPA has historically interpreted section 110(a)(1) of the CAA as establishing the required submittal date for SIPs addressing all of the “interstate transport” requirements in section 110(a)(2)(D) including the provisions in section 110(a)(2)(D)(i)(I) regarding significant contribution to nonattainment and interference with maintenance. The D.C. Circuit’s recent opinion in *EME Homer City*, however, concluded that a SIP cannot be deemed to lack a required submission or deemed deficient for failure to meet the 110(a)(2)(D)(i)(I) obligation until EPA first quantifies that obligation. As such, and consistent with the *EME Homer City* opinion, EPA does not at this time believe that disapproval of section 110(a)(2)(D)(i)(I) requirements for Kentucky’s 2008 8-hour ozone infrastructure SIP constitutes a substantial inadequacy in the Kentucky SIP because EPA has yet to quantify the Commonwealth’s obligation under this requirement. EPA intends to move forward expeditiously to implement the interstate transport requirements of the CAA.

**Comment 7:** One Commenter contends that EPA should disapprove Kentucky’s 2008 8-hour ozone infrastructure SIP submission with regard to the visibility component of 110(a)(2)(D)(i)(II) until such time that Kentucky imposes best available retrofit technology (BART) for nitrogen oxides (NOx) and sulfur dioxides for electric generating units. The Commenter asserts that the substitution of the CAIR for BART is not permanent and enforceable and references the previous litigation related to CAIR. The Commenter provides a number of comments in relation to EPA’s “better than BART” approach and reliance on CAIR to support an approval action for the visibility components of Kentucky’s 2008 8-hour ozone infrastructure submission.

**Response 7:** EPA disagrees. As explained in detail in EPA’s proposed rulemaking related to today’s action, EPA believes that in light of the D.C. Circuit court’s decision to vacate CSAPR, also known as the Transport Rule (*see EME Homer City*, 696 F.3d 7), and the court’s order for EPA to “continue administering CAIR pending the promulgation of a valid replacement,” it is appropriate for EPA

to rely at this time on CAIR to support approval of Kentucky's 2008 8-hour ozone infrastructure submission as it relates to visibility. EPA has been ordered by the court to develop a new rule, and to continue implementing CAIR in the meantime. While EPA had filed a petition for rehearing of the court's decision on the Transport Rule, this petition was later denied on January 24, 2013. The deadline for any party to file a petition for *certiorari* with the Supreme Court has not passed, and the United States has not yet decided whether to pursue further appeals. In the meantime, EPA does not intend to act in a manner inconsistent with the decision of the D.C. Circuit. Based on the current direction from the court to continue administering CAIR, EPA believes that it is appropriate to rely on CAIR emission reductions for purposes of assessing the adequacy of Kentucky's infrastructure SIP with respect to prong 4 of section 110(a)(2)(D)(i)(II) while a valid replacement rule is developed and until implementation plans complying with any such new rule are submitted by the states and acted upon by EPA or until the *EME Homer City* case is resolved in a way that provides different direction regarding CAIR and CSAPR.

Furthermore, as neither the Commonwealth nor EPA has taken any action to remove CAIR from the Kentucky SIP, CAIR remains part of the federally-approved SIP and can be considered in determining whether the SIP as a whole meets the requirement of prong 4 of 110(a)(2)(D)(i)(II). EPA is taking final action to approve the infrastructure SIP submission with respect to prong 4 because Kentucky's regional haze SIP, which EPA has given a limited approval in combination with its SIP provisions to implement CAIR adequately, prevents sources in Kentucky from interfering with measures adopted by other states to protect visibility during the first planning period. While EPA is not at this time proposing to change the March 30, 2012, limited approval and limited disapproval of Kentucky's regional haze SIP, EPA expects to propose an appropriate action regarding Kentucky's regional haze SIP if necessary upon final resolution of the *EME Homer City* litigation. More detailed rationale to support EPA's approval of prong 4 for Kentucky's 2008 8-hour ozone infrastructure submission can be found in EPA's proposed rulemaking for today's final action. See 78 FR 3867.

*Comment 8:* One Commenter states that EPA should disapprove the visibility prong of Kentucky's 2008 8-hour ozone infrastructure submission because the Commenter asserts that

Kentucky has failed to conduct its 5-year progress review for its regional haze SIP by the required date.

*Response 8:* EPA does not agree that Kentucky has missed its deadline to submit its 5-year progress review SIP related to regional haze. Kentucky's initial regional haze SIP was submitted on June 25, 2008, so the Commonwealth's 5-year regional haze progress review SIP is not due until June 25, 2013. Even assuming, however, that the deadline for the Commonwealth's submittal of its progress review SIP had passed, this alone would not warrant the disapproval of Kentucky's 2008 8-hour ozone infrastructure SIP submission as it relates to visibility.

*Comment 9:* One Commenter states "[n]ow that *en banc* review of *Homer* has been denied, EPA should promptly propose and promulgate a full approval of KY's regional haze SIP." The Commenter also asserts that, "[t]his prospective action should also apply to the other elements of the KY SIP that address reasonable progress and the long term strategy for visibility."

*Response 9:* This comment is outside of the scope of today's action. As explained in EPA's proposal notice related to today's action, EPA has already taken final action on Kentucky's regional haze SIP. See 77 FR 19098 (March 30, 2012). EPA's proposal notice related to today's action did not involve a reconsideration of the Agency's March 30, 2012, final action on the Commonwealth's regional haze SIP. While EPA's proposal notice did note the litigation related to the Transport Rule and also noted that based on the *EME Homer City* court's decision on the Transport Rule that it would be appropriate to propose to rescind its limited disapproval of Kentucky's regional haze SIP and propose a full approval, EPA did not take such action because the Agency was awaiting a decision related to the possibility that the court would grant EPA's petition for an *en banc* review. EPA mentioned in that proposal notice that an *en banc* review of the court's decision could have a different outcome that could bear on such action on the regional haze SIP. Since the time of EPA's proposal for Kentucky's 2008 8-hour ozone infrastructure SIP, the court has denied EPA's petition for *en banc* review. As noted above, on January 24, 2013, EPA's petition was denied and the mandate was issued to EPA on February 4, 2013. The deadline for any party to file a petition for *certiorari* with the Supreme Court has not passed and the United States has not yet decided whether to pursue further appeals. In the

meantime, EPA does not intend to act in a manner inconsistent with the decision of the D.C. Circuit. However, EPA does not think it is appropriate in today's action to rescind its limited disapproval of Kentucky's regional haze SIP.

Notably, as explained in EPA's proposal notice related to Kentucky's 2008 8-hour ozone infrastructure action, EPA does not believe that rescinding the Agency's previous limited disapproval of Kentucky's regional haze SIP is necessary to support a full approval of the visibility components of 110(a)(2)(D)(i)(I) and 110(a)(2)(I) for Kentucky's 2008 8-hour ozone infrastructure SIP. Moreover, EPA has not proposed to rescind the Agency's previous limited disapproval, which would be an appropriate procedural step prior to rescinding that disapproval.

*Comment 10:* One Commenter contends that "EPA must disapprove the infrastructure SIP because it does not contain the 2008 ozone NAAQS." In support of this contention, the Commenter points to a table codified at 401 KAR 53:010, as evidence that Kentucky's ozone limits "remain at levels set in 1997."

*Response 10:* EPA does not agree with the Commenter's assertion that Kentucky's 2008 8-hour ozone infrastructure SIP should be disapproved because "it does not contain the 2008 8-hour ozone NAAQS." In response to this comment, EPA has investigated the facts concerning the table in question. EPA acknowledges that the table in Appendix A to 401 KAR 53:010 pointed to by the Commenter currently does not list the 2008 8-hour ozone NAAQS. However, EPA does not believe that the out-of-date table indicates that the Kentucky SIP does not adequately address infrastructure requirements for the 2008 8-hour ozone NAAQS.

The Commonwealth's infrastructure SIP submission explicitly stated that it was submitted to address the 2008 8-hour ozone NAAQS. Within that submission, the Commonwealth indicated that its existing provisions are appropriate for purposes of the 2008 8-hour ozone NAAQS. EPA considers this to be accurate, based upon the specific contents of the infrastructure SIP submission for various elements of section 110(a)(2). For example, Kentucky's applicable permitting regulations define a "regulated NSR pollutant" as "[a] pollutant for which a national ambient air quality standard has been promulgated\* \* \*." 401 KAR 51:001(207). In assessing permits issued by the Commonwealth, EPA routinely interprets the "for which a national

ambient air quality standard has been promulgated” language in the Kentucky SIP as referring to the current federally-promulgated NAAQS. EPA notes that in practice the Commonwealth is also addressing the 2008 8-hour ozone NAAQS.<sup>10</sup>

Finally, EPA understands that the Commonwealth has initiated action to update the out-of-date table cited by the Commenter to eliminate any ambiguity or confusion regarding this point. In consultation with the Commonwealth, EPA’s understanding is that the Commonwealth is in the process of updating the table to reflect the current NAAQS. EPA believes that, with correction of the table, there should be no misunderstandings concerning the fact that the Commonwealth’s SIP is designed to address the 2008 8-hour ozone NAAQS in accordance with the requirements of section 110(a)(1) and (2). As such, EPA does not agree that Kentucky’s infrastructure SIP submission must be disapproved as a result of the out-of-date table cited by the Commenter.

*Comment 11:* One Commenter contends that EPA cannot determine that the Kentucky SIP provides the necessary assurances required by section 110(a)(2)(E)(i) that the Commonwealth will have adequate personnel, funding and authority under state law to carry out its implementation plan given (in the Commenter’s opinion) that Kentucky’s infrastructure SIP fails to adequately address the significant and important requirements of element (D)(i).

*Response 11:* EPA does not agree. Section 110(a)(2)(E)(i) requires that the SIP provide “necessary assurances that the State \* \* \* will have adequate personnel, funding, and authority under State \* \* \* law to carry out such implementation plan \* \* \*.” As described in the proposal for today’s action, Kentucky has submitted information to demonstrate that DAQ is responsible for promulgating rules and regulations for the NAAQS, emissions standards, general policies, a system of permits, fee schedules for the review of plans and other planning needs. In addition, EPA noted the March 14, 2012, Agency letter to DAQ outlining the current status of grant commitments for 2011, each of which have since been finalized. Finally, the proposed rule for today’s action described that Kentucky’s personnel, funding, and legal authority

to carry out the Commonwealth’s implementation plan is included with all prehearings and final SIP submittals to EPA. Based upon this information EPA proposed to approve Kentucky’s infrastructure submission for purposes of the 2008 8-hour ozone NAAQS. The Commenter does not refute these facts.

While the Commenter is correct in asserting that Kentucky’s infrastructure SIP presently fails to address section 110(a)(2)(D)(i)(I) for the 2008 8-hour ozone NAAQS, it is incorrect to conclude that such failure must result in a disapproval of section 110(a)(2)(E)(i). EPA does not view the satisfaction of section 110(a)(2)(D)(i)(I) requirements as germane to an evaluation of whether a state has met its obligations under section 110(a)(2)(E)(i). Rather, EPA interprets section 110(a)(2)(E)(i) as requiring that the state have adequate authority under statutes, rules, and regulations to carry out applicable SIP obligations with respect to the relevant NAAQS. See 40 CFR Part 51, Subparts L and O.

As described above, EPA’s disapproval of the Kentucky infrastructure SIP as it relates to the section 110(a)(2)(D)(i)(I) transport requirements is based upon the Commonwealth’s reliance upon CAIR to satisfy the interstate transport obligations of a NAAQS which CAIR did not address. The fact that this portion of the SIP cannot be approved, however, does not in any way demonstrate a deficiency in the underlying authority of the Kentucky DAQ to promulgate rules and regulations to address these requirements. The Commenter provided no information to suggest that Kentucky lacks the personnel, authority to address the interstate transport requirements.

*Comment 12:* One Commenter asserts that EPA must disapprove Kentucky’s infrastructure SIP related to section 110(a)(2)(J) (127 public notice requirements) because in the Commenter’s opinion Kentucky does not provide public notification of 2008 8-hour ozone NAAQS violations in areas beyond Oldham and Jefferson counties. Specifically, the Commenter indicates that the state agency does not notify the public of 2008 8-hour ozone violations in counties that are currently designated attainment for the 1-hour and 1997 8-hour standards (i.e., all counties but Jefferson and Oldham).

*Response 12:* EPA does not agree with the Commenter’s assertion that EPA must disapprove Kentucky’s infrastructure SIP submission as it relates to the section 110(a)(2)(J) requirements for public notification because the SIP does not provide for

public notification of 2008 8-hour ozone NAAQS violations.

First the Commenter fails to note the distinction between exceeding the ozone NAAQS and violating the ozone NAAQS. Under the CAA, there is a clear distinction between a violation and an exceedance of an ambient air quality standard.<sup>11</sup> Pursuant to the public notification requirements of section 110(a)(2)(J), states are not required to notify the public of NAAQS violations as suggested by the Commenter. Instead, states are required “to notify the public during any calendar [year] on a regular basis of instances or areas in which any national primary ambient air quality standard *is exceeded or was exceeded* during any portion of the preceding calendar year \* \* \*” (emphasis added). See 42 U.S.C. 7427.

Second, the Commenter is mistaken because the Commonwealth does notify the public regarding ambient air quality in Kentucky, including exceedances of the standard. As described in the proposal for today’s action, notification to the public regarding exceedances is accomplished through Kentucky DAQ’s Web site at <http://air.ky.gov/Pages/AirQualityIndexMonitoring.aspx>, which provides real time monitoring data for all of the Commonwealth’s ozone monitors and provides access to Air Quality Index (AQI) information.<sup>12</sup> In addition, Kentucky’s Web site also provides information related to health considerations based on the concentration of the pollutants in the air and information related to ways the public can help reduce air pollution. EPA has determined that that this method of notify the public of ambient quality is sufficient to meet Kentucky’s infrastructure SIP obligations described at section 110(a)(2)(J) regarding public notification.

Finally, EPA also notes that this comment presupposes that there have

<sup>11</sup> An exceedance occurs when monitored ozone concentrations exceed the NAAQS. Ozone is collected as an hourly average of continuous data and, in the context of the 2008 8-hour ozone NAAQS is then used to determine the daily 8-hour average value. An ozone exceedance occurs when a monitor records an 8-hour averaged ambient level of ozone above the standard, in this case, above 0.075 parts per million (ppm). A violation of an ozone standard (as opposed to an exceedance) is based on 3-year averages of data. Violations of the 8-hour standard are determined using the annual 4th-highest daily maximum 8-hour ozone value at each monitor. A violation requires a 3-year average of the annual 4th-highest daily maximum 8-hour value that is greater than 0.075 ppm.

<sup>12</sup> EPA notes that Kentucky provides this information for monitors through the Commonwealth, and that the locations of the monitors are included in the Commonwealth’s approved network monitoring plan. Thus this information is available for appropriate locations throughout the state.

<sup>10</sup> For example, EPA is currently reviewing the Suncoke Energy PSD Application (PSD-KY-265), which was submitted to DAQ on December 7, 2012, and received by EPA for review February 7, 2013. The terms of this application reflect the 2008 8-hour ozone standard as the applicable NAAQS.



been violations of the 2008 ozone NAAQS based on 2010 to 2012 design values which have yet to be certified. Although the Kentucky DAQ maintains the above-referenced Web site with real time monitoring data for the Commonwealth's ozone monitors, Kentucky is not required to certify each year's data until April 1, 2013. As such, until the 2012 data referenced by the Commenter is certified, it remains preliminary and EPA does not view a NAAQS violation as having occurred. Consequently, the Commenter's reference to data not-yet-certified is premature.<sup>13</sup>

### III. This Action

In this rulemaking, EPA is taking final action to approve Kentucky DAQ's infrastructure submission as demonstrating that the Commonwealth meets the applicable requirements of sections 110(a)(1) and (2) of the CAA for the 2008 8-hour ozone NAAQS, with the exception of section 110(a)(2)(D)(i)(I) concerning interstate transport, and sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) pertaining to structural PSD requirements.

With respect to section 110(a)(2)(D)(i)(I), which pertains to interstate transport, EPA is taking final action to disapprove this portion of Kentucky DAQ's infrastructure SIP for the 2008 8-hour ozone NAAQS.

With respect to sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J), EPA is finalizing conditional approval for this portion of Kentucky DAQ's infrastructure SIP for the 2008 8-hour ozone NAAQS. Today's final action to conditionally approve of these portions of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) specifically related to the structural PSD requirements is based upon a December 19, 2012, commitment letter submitted by Kentucky DAQ to EPA. The Commonwealth's December 19, 2012, letter can be accessed at [www.regulations.gov](http://www.regulations.gov) using Docket ID No. EPA-R04-OAR-2012-0700. Through this letter, Kentucky DAQ, committed to adopt specific enforceable measures to address current deficiencies

in its SIP related to the structural PSD requirements of the PSD and NNSR requirements related to the implementation of the NSR PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> Increments). This commitment letter meets the requirements of section 110(k)(4) of the CAA, and as such, EPA is relying upon this commitment to conditionally approve sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J). For more information, see EPA's proposal for today's rulemaking. See 78 FR 3867.

Accordingly, for purposes of today's conditional approval sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as it relates to the structural PSD requirements, Kentucky DAQ must submit to EPA by March 10, 2014, a SIP revision adopting the specific enforceable measures as described in the Commonwealth's commitment letter described above. If the Commonwealth fails to actually submit this revision by March 10, 2014, today's conditional approval will automatically become a disapproval for the 2008 8-hour ozone NAAQS.

### IV. Final Action

EPA is taking final action to approve most elements contained in Kentucky DAQ's infrastructure SIP submission made by the Commonwealth on September 8, 2009, as revised on July 17, 2012, because it addresses the required infrastructure elements for the 2008 8-hour ozone NAAQS with exception of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as they relate to structural PSD requirements, and section 110(a)(2)(D)(i)(I) as it relates to interstate transport. With the exceptions noted above Kentucky DAQ has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to section 110 of the CAA to ensure that the 2008 8-hour ozone NAAQS are implemented, enforced, and maintained in Kentucky.

With respect to section 110(a)(2)(D)(i)(I) specifically pertaining interstate transport, EPA is finalizing disapproval for this portion of Kentucky DAQ's infrastructure SIP for the 2008 8-hour ozone NAAQS.

With respect to sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) as they relate to the structural PSD requirements of the PSD and NNSR requirements related to the implementation of the NSR PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> Increments), EPA is taking final action to conditionally approve the Commonwealth's infrastructure SIP in

part, based on an December 19, 2012, commitment that Kentucky DAQ will adopt specific enforceable measures related to the structural PSD requirements detailed above into its SIP and submit these revisions to EPA by March 10, 2014. If the Commonwealth fails to actually submit these revisions by the applicable dates described above, today's conditional approval(s) will automatically be disapproved on that date.

### V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using

<sup>13</sup> EPA also wishes to clarify that Commenter incorrectly indicates that all counties aside from Jefferson and Oldham are designated attainment for the 2008 8-hour ozone NAAQS. There are also three partial counties in Northern Kentucky (i.e., Boone, Campbell and Kenton) are designated nonattainment for the 2008 8-hour ozone NAAQS as part of the Cincinnati-Hamilton Nonattainment Area. The Campbell County monitor referred to by the Commenter is included in the 2008 8-hour ozone nonattainment area and is not in area designated attainment as suggested by one Commenter. See 77 FR 30088.

practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 6, 2013. Filing a petition for reconsideration by the Administrator

of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 1, 2013.

A. Stanley Meiburg

Acting Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

#### PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### Subpart S—Kentucky

■ 2. Section 52.919 is amended by designating the existing undesignated paragraph as paragraph (a) and adding paragraph (b) to read as follows:

#### § 52.919 Identification of plan-conditional approval.

(a) \* \* \*

(b) Conditional Approval—Submittal from the Commonwealth of Kentucky, through the Division of Air Quality (DAQ) of the Kentucky Energy and Environment Cabinet, dated December 19, 2012, to address the Clean Air Act (CAA) sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) for the 2008 8-hour Ozone National Ambient Air Quality Standards. With respect to CAA sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J), the Commonwealth must submit to EPA by March 10, 2014, SIP revisions adopting specific enforceable measures related to the structural PSD requirements of the PSD and NNSR requirements related to the implementation of the NSR PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule (only as it relates to PM<sub>2.5</sub> Increments) as described in the Commonwealth’s commitment letter.

■ 3. In § 52.920, the table in paragraph (e) is amended by adding a new entry “110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards” at the end of the table to read as follows:

#### § 52.920 Identification of plan.

\* \* \* \* \*

(e) \* \* \*

#### EPA-APPROVED KENTUCKY NON-REGULATORY PROVISIONS

Name of non-regulatory SIP provision	Applicable geographic or non-attainment area	State submittal date/effective date	EPA approval date	Explanations
110(a)(1) and (2) Infrastructure Requirements for the 2008 8-Hour Ozone National Ambient Air Quality Standards.	Commonwealth of Kentucky.	7/17/2012	3/7/2013 ..... [Insert citation of publication].	With the exception of section 110(a)(2)(D)(i)(I) concerning interstate transport which is being disapproved and, the portions of sections 110(a)(2)(C), prong 3 of 110(a)(2)(D)(i), and 110(a)(2)(J) related to structural PSD requirements, which are being conditionally approved.

■ 4. Section 52.930 is amended by adding paragraph (l) to read as follows:



**§ 52.930 Control strategy: Ozone.**

\* \* \* \* \*

(l) *Disapproval.* EPA is disapproving in part, the Commonwealth of Kentucky's Infrastructure SIP for the 2008 8-hour Ozone National Ambient Air Quality Standards addressing section 110(a)(2)(D)(i)(I) concerning interstate transport requirements, submitted July 17, 2012.

[FR Doc. 2013-05352 Filed 3-6-13; 8:45 am]

BILLING CODE 6560-50-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Medicare & Medicaid Services****42 CFR Part 412**

[CMS-1588-N]

RIN 0938-AR12

**Medicare Program; Extension of the Payment Adjustment for Low-volume Hospitals and the Medicare-dependent Hospital (MDH) Program Under the Hospital Inpatient Prospective Payment Systems (IPPS) for Acute Care Hospitals for Fiscal Year 2013**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice of extension.

**SUMMARY:** This notice announces changes to the payment adjustment for low-volume hospitals and to the Medicare-dependent hospital (MDH) program under the hospital inpatient prospective payment systems (IPPS) for FY 2013 in accordance with sections 605 and 606, respectively, of the American Taxpayer Relief Act of 2012.

**DATES:** *Effective date:* March 4, 2013. *Applicability dates:* The provisions described in this notice are applicable for discharges on or after October 1, 2012 and on or before September 30, 2013.

**FOR FURTHER INFORMATION CONTACT:**  
Michele Hudson, (410) 786-5490.  
Maria Navarro, (410) 786-4553.  
Shevi Marciano, (410) 786-2874.

**SUPPLEMENTARY INFORMATION:****I. Background**

On January 2, 2013, the American Taxpayer Relief Act of 2012 (ATRA) (Pub. L. 112-240) was enacted. Section 605 of the ATRA extends changes to the payment adjustment for low-volume hospitals for an additional year, through fiscal year (FY) 2013. Section 606 of the

ATRA extends the Medicare-dependent hospital (MDH) program for an additional year, through FY 2013.

**II. Provisions of the Notice****A. Extension of the Payment Adjustment for Low-Volume Hospitals****1. Background**

Section 1886(d)(12) of the Social Security Act (the Act) provides for an additional payment to each qualifying low-volume hospital under the hospital inpatient prospective payment systems (IPPS) beginning in FY 2005. Sections 3125 and 10314 of the Affordable Care Act provided for a temporary change in the low-volume hospital payment policy for FYs 2011 and 2012. Prior to the enactment of the ATRA, beginning with FY 2013, the low-volume hospital qualifying criteria and payment adjustment returned to the statutory requirements under section 1886(d)(12) of the Act that were in effect prior to the amendments made by the Affordable Care Act. (For additional information on the expiration of the provisions of the Affordable Care Act that amended the low-volume hospital adjustment at section 1886(d)(12) of the Act, we refer readers to the FY 2013 IPPS/LTCH PPS final rule (77 FR 53406 through 53408).) The regulations describing the payment adjustment for low-volume hospitals are at 42 CFR 412.101.

**2. Low-Volume Hospital Payment Adjustment for FYs 2011 and 2012**

For FYs 2011 and 2012, sections 3125 and 10314 of the Affordable Care Act expanded the definition of low-volume hospital and modified the methodology for determining the payment adjustment for hospitals meeting that definition. Specifically, the provisions of the Affordable Care Act amended the qualifying criteria for low-volume hospitals under section 1886(d)(12)(C)(i) of the Act to specify that, for FYs 2011 and 2012, a hospital qualifies as a low-volume hospital if it is more than 15 road miles from another subsection (d) hospital and has less than 1,600 discharges of individuals entitled to, or enrolled for, benefits under Part A during the fiscal year. In addition, section 1886(d)(12)(D) of the Act, as added by the Affordable Care Act, provides that the low-volume hospital payment adjustment (that is, the percentage increase) is to be determined "using a continuous linear sliding scale ranging from 25 percent for low-volume hospitals with 200 or fewer discharges of individuals entitled to, or enrolled for, benefits under Part A in the fiscal year to zero percent for low-volume

hospitals with greater than 1,600 discharges of such individuals in the fiscal year."

We revised the regulations at 42 CFR 412.101 to reflect the changes to the qualifying criteria and the payment adjustment for low-volume hospitals according to the provisions of the Affordable Care Act in the FY 2011 IPPS/LTCH PPS final rule (75 FR 50238 through 50275 and 50414). In addition, we also defined, at § 412.101(a), the term "road miles" to mean "miles" as defined at § 412.92(c)(1), and clarified the existing regulations to indicate that a hospital must continue to qualify as a low-volume hospital in order to receive the payment adjustment in that year (that is, it is not based on a one-time qualification). Furthermore, in that same final rule, we discussed the process for requesting and obtaining the low-volume hospital payment adjustment for FY 2011 (75 FR 50240). For the second year of the changes to the low-volume hospital adjustment provided for by the provisions of the Affordable Care Act (that is, FY 2012), consistent with the regulations at § 412.101(b)(2)(ii), we updated the discharge data source used to identify qualifying low-volume hospitals and calculate the payment adjustment (percentage increase) in the FY 2012 IPPS/LTCH PPS final rule (76 FR 51677 through 51680). Under § 412.101(b)(2)(ii), for FYs 2011 and 2012, a hospital's Medicare discharges from the most recently available MedPAR data, as determined by CMS, are used to determine if the hospital meets the discharge criteria to receive the low-volume payment adjustment in the current year. In that same final rule, we established that, for FY 2012, qualifying low-volume hospitals and their payment adjustment are determined using Medicare discharge data from the March 2011 update of the FY 2010 MedPAR file, as these data were the most recent data available at that time. In addition, we noted that eligibility for the low-volume payment adjustment for FY 2012 was also dependent upon meeting (if the hospital was qualifying for the low-volume payment adjustment for the first time in FY 2012), or continuing to meet (if the hospital qualified in FY 2011) the mileage criteria specified at § 412.101(b)(2)(ii). Furthermore, we established a procedure for a hospital to request low-volume hospital status for FY 2012 (which was consistent with the process we employed for the low-volume hospital payment adjustment for FY 2011).