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Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rules Final Rule (75 FR 31514-01)

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Legislative Summaries

Table of Contents

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Final Rule (75 FR 31514-01) 165
I. Introduction 165
II. PSD & Title V Requirements..... 166
III. Emitters Excluded from the Rule..... 168
The Home Star Energy Retrofit Act of 2010 (H.R. 5019)..... 170
I. Introduction 170
II. Title I – Home Star Retrofit Rebate Program 170
A. Administration 171
B. Rebate Programs 173
III. Title II – Energy Efficient Manufactured Homes..... 174

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Final Rule (75 FR 31514-01)

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I. Introduction

On June 3, 2010, the Environmental Protection Agency (EPA) published a final rule which tailored the application of the Prevention of Significant Deterioration (PSD) and Title V programs of the Clean Air Act (CAA).[1] Effective August 2, 2010, the EPA will relax and delay enforcement of permitting requirements for greenhouse gas (GHG)

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1. *See generally* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 51, 70).

emissions under the CAA.[2] In 2011, the EPA will begin enforcing PSD and Title V requirements on a narrow range of large GHG emitters.[3] The EPA will delay enforcement of these requirements for stationary sources that emit less than 50,000 tons per year (tpy) of carbon dioxide equivalent (CO_2 e) and modification projects that result in a net GHG emission increase of less than 50,000 tpy CO_2 e.[4] These smaller sources will not be subject to the permitting requirements until at least April 30, 2016.[5] While the EPA remains committed to full implementation of the PSD and Title V, the agency says that this Tailoring Rule is necessary to reduce administrative costs and burdens.[6]

II. PSD & Title V Requirements

The PSD and Title V apply to both GHG and non-GHG pollutants regulated under the CAA.[7] To summarize a vast and complex regulatory regime, the EPA requires new "major" sources and modifications to obtain a permit prior to or soon after the commencement of construction or operation.[8] Among other requirements, the emitters must perform a "Best Available Control Technology" (BACT) analysis and submit other studies showing how the emitters are doing their best to reduce their emissions and their impact on the environment.[9] The PSD and Title V permitting requirements were scheduled to fully apply on January 2, 2011.[10] This Tailoring Rule changes that by extending the timeline for enforcing the PSD and Title V permitting requirements.[11] Pursuant to the Tailoring Rule,

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2. *See id.* at 31525–26 (establishing August 2, 2010 as the deadline for states to submit information to the EPA that will influence if, when, and how the EPA will begin full enforcement of its PSD and Title V permitting programs).

3. *See id.* at 31516 (describing the proposed actions the EPA will take in 2011 pursuant to this Tailoring Rule).

4. *See id.* at 31524–05 (stating that "in no event will sources below 50,000 typ CO2 e be subject to PSD or title V permitting" until at least April 30, 2016).

5. *Id.*

6. *See id.* at 31516–07 (discussing, inter alia, the "administrative necessity" and "absurd results" justifications for the Tailoring Rule).

7. *See id.* at 31541 (explaining that both GHG and non-GHG emissions can subject a source or modification to PSD and/or Title V permitting requirements).

8. *See id.* at 31520 (discussing when the pre-construction permitting regime is triggered). A "major stationary source" emits or has the potential to emit 100 tpy or more of any pollutant regulated under the CAA. *Id.* A "major modification" is a physical change in, or change in the method of operation of, a major stationary source that results in a "significant" emission increase or net increase of a regulated pollutant. *Id.*

9. *See id.* at 31516–20 (describing the BACT requirement in the context of the Tailoring Rule).

10. *Id.* at 31516.

11. *See id.* at 31517–18 (explaining how the Tailoring Rule reflects the EPA's desire to "phase-in" the PSD and Title V enforcement regime rather than fully implementing the regime on its previous timeline).

the EPA will "phase-in" enforcement of the permitting requirements in three steps.[12]

The permitting burdens on emitters to implement and authorities to manage Title V and PSD programs led the EPA to tailor the applicability criteria of GHG emission sources.[13] In this final rule, the EPA announced two steps of a planned three step process to phase-in PSD and Title V requirements.

Step One of the Tailoring Rule will begin on January 2, 2011, when PSD or Title V requirements will apply to GHG emitters "only if the sources would be subject to PSD or Title V anyway due to their non-GHG pollutants."[14] No sources or modifications will be subject to permitting "solely on account of their GHG emissions."[15] During Step One, the EPA will focus its enforcements efforts on the BACT requirement.[16] The EPA will require projects that increase net GHG emissions by at least 75,000 tpy carbon dioxide equivalent (CO_2 e) to show that the emitter is using the best available technology to minimize their environmental impact.[17] However, Step One mandates the PSD's BACT requirement "only if" the project also significantly increases emissions of at least one non-GHG pollutant.[18]

The second step becomes effective on July 1, 2011, when the EPA will begin to phase in other large sources of GHG. New and existing sources not covered by Title V that emit or have the potential to emit 100,000 tpy CO_2 e will be governed by the PSD and Title V. The EPA also warned that PSD review will apply to any source that implements an operational or physical change that results in a net GHG increase of 75,000 tpy CO_2 e or more.[19] Sources already covered by Title V will remain covered under the title due to the non-GHG emissions regulations established by Step One. If a source has emissions that equal or exceed 100,000 tpy CO_2 e, then the source must obtain a Title V permit if they are currently permitted. A source that only obtains a Title V permit under these conditions will not trigger more substantive compliance with GHG controls. The EPA, however, will still enforce applicable CAA requirements for the source. Steps One and Two do not cover modifications unless the GHG emissions exceed mass-based triggers.

For Step Three, the EPA intends to propose a rule by July 1, 2012 to become effective on July 1, 2013. It is significant that the proposed rule

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12. *Id.*
13. *Id.* at 31535.
14. *Id.* at 31516.
15. *Id.*
16. *See id.* (explaining how, beginning January 2, 2011, the BACT requirements will be implemented on large emitters as part of "Step 1" of the Tailoring Rule).
17. *Id.*
18. *Id.*
19. *Id.* at 31516.

may permanently exclude certain unnamed emissions from PSD or Title V requirements.[20] The EPA affirmed its commitment to three principles of the *Chevron* Doctrine when formulating this step.[21] These include consideration of the 1) potential "absurd results" of implementing the program too literally, 2) administrative necessity of implementing the requirements in the spirit that Congress intended, and 3) implementing the program one-step-at-a-time to evaluate its effectiveness.[22] The EPA committed itself to evaluating the implementation of Steps One and Two. To do this, the EPA will solicit comment on how to streamline the permitting process. This will enable the agency to gather data from sources regarding how to avoid "absurd results" from applying the rule too literally. The EPA used this method previously, determining that excluding smaller sources for six years from the Title V and PSD rule would be a better use of agency resources. The agency also will consider bringing in these smaller sources in later steps. In regard to major sources, the EPA is using this method to redefine "major stationary source" for PSD and "major source" for Title V permitting.

III. Emitters Excluded from the Rule

The EPA will exclude smaller sources from the promulgated requirements for six years in order to gather data and will exclude these sources from the other earlier phases to assess staff and resource allocation.[23] The agency emphasized that the rule will not cover sources with a significance level below 50,000 tpy CO_2 e until April 30, 2016 at the earliest.[24] This may become Step Four, but without data, the EPA will not commit to any new rules.[25]

The EPA, throughout the Final Rule, emphasized the need to modify the Proposed Rule in order to avoid "absurd results." Comments on the Proposed Rule, reports from state and local environmental agencies, and estimates of the rule's financial and manpower burdens led the agency to modify the original requirements for the Final Rule.[26] The Proposed Rule, according to EPA estimates, would have required permitting authorities to

20. *Id.* at 31524.
21. *Id.* at 31516.
22. *Id.*
23. *Id.* at 31524.
24. *Id.*
25. *See id.* at 31525 (noting that EPA's commitment to the phase in process may require not only a Step 4 that adds sources, but also the potential for a Step 5 to bring in even more sources as the permitting process becomes more efficient).
26. *Id.* at 31535.

process 100-fold as many permits per year.[27] The agency also estimated that the workload to process applications would increase by approximately 130-fold.[28] Finally, the additional cost would increase by similar factors. The current PSD program cost $12 million while the estimated cost of the proposed rule was $1.5 billion.[29] The EPA had to balance these findings with its understanding of Congressional intent under Chevron.[30] The magnitude of the additional costs of permitting both large and small sources led the EPA to focus on larger sources and develop the phase-in program outlined above.

The EPA's Tailoring Rule is a rational response to a weak economy. The EPA was mindful of the poor economic conditions when it enacted this Tailoring Rule.[31] Specifically, the EPA feared that without the Tailoring Rule, "overwhelming permitting burdens" would have fallen on regulating authorities and regulated interests.[32] The EPA's gradual implementation of the PSD and Title V permitting requirements appears to be a pragmatic approach to environmental regulation.

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27. *Id.* at 31557 (noting that under the current PSD program that 800 permits may be processed in a year while estimating the new requirements would require authorities to process 82,000 permits).

28. *Id.* (estimating an increase in 19.5 million work hours compared to the current 150,795 work hours).

29. *Id.*

30. *Id.* at 31548 (interpreting PSD and Title V requirements to pass Step 2 of the Chevron doctrine, while also finding only PSD requirements pass Step 1 of Chevron).

31. *See id.* at 31544–45 (summarizing how the EPA will consider "evolving economic and technological conditions" when it takes action pursuant to this Tailoring Rule).

32. *Id.* at 31516.

The Home Star Energy Retrofit Act of 2010 (H.R. 5019)

Kelli Layton*

I. Introduction

The Home Star Energy Retrofit Act of 2010 (HSERA) was passed by the House of Representatives on May 6, 2010.[1] HSERA would establish a rebate program designed to provide reimbursements for the implementation of energy-efficient mechanisms in homes.[2] The program is intended to promote the use of energy-efficient measures, particularly retrofits designed to decrease home energy consumption.[3] This legislation is intended to supplement existing energy efficiency programs that states may have in place.[4] As such, the Act requires that states avoid the endorsement of duplicate programs to the best of their ability.[5]

II. Title I – Home Star Retrofit Rebate Program

Under HSERA, owners of dwellings with fewer than four residential units that were built prior to the enactment of this legislation will have the

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1. *See* Press Release, House Committee on Energy and Commerce, House Passes Home Star Energy-Efficiency & Jobs Bill (May 6, 2010) ("Today the House of Representatives passed the Home Star Energy Retrofit Act (H.R. 5019) . . . . "), *available at* http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1995:house-passes-home-star-energy-efficiency-a-jobs-bill&catid=122:media-advisories&Itemid=55&layout=default&date=2010-06-.

2. *See H.R. 5019, The "The Home Star Energy Retrofit Act of 2010,"* COMM. ON ENERGY AND COMMERCE DEMOCRATS (May 6, 2010) http://democrats.energycommerce.house.gov/index.php?q=bill/h-r-5019-the-the-home-star-energy-retrofit-act-of-2010 ("Home Star is designed to spur home energy retrofits by providing rebated to homeowners who install energy-saving products[.]").

3. *See id.* ("Home Star is a short-term program to create jobs, save energy, and lower families' energy bills.").

4. *See* The Home Star Energy Retrofit Act of 2010, H.R. 5019, 111th Cong. § 101(m)(1) (2010) (describing coordination with state programs).

5. *See id.* at §101(m)(1) ("A state shall, to the maximum extent practicable, prevent duplication through coordination of a program authorized under this title . . . ").

opportunity to apply for government refunds for the installation of mechanisms that reduce energy use.[6]

A. Administration

The Act would create the Federal Rebate Processing System (FRPS), which would oversee the programs established under this Act.[7] The FRPS would provide information about the program to the public and maintain a database of all rebate applications and transactions.[8] A retrofit website would outline the process by which homeowners could participate in the programs and would specify the particular measures that would qualify homeowners for rebates.[9] The Act also provides for an association of rebate aggregators, who would be available to all homeowners seeking reimbursements under the Act.[10] Rebate aggregators would function as liaisons between the government, contractors, and individuals interested in participating in the program.[11] Rebate aggregators would also reimburse homeowners for contracting services provided by qualified contractors.[12] Entities eligible to act as rebate aggregators include domestic utilities and companies that administer energy-efficient retrofit programs or demonstrate the ability to manage such a program.[13] Homeowners would also have the opportunity to receive limited rebates for self-installed energy-efficient measures.[14] The rebate aggregator would be responsible for reviewing

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6. *See id.* at §2(11) ("The term 'home' means a principal residential dwelling unit in a building with no more than 4 dwelling units that . . . was constructed before the date of enactment of this Act.").

7. *See id.* at §101(b)(1) (describing the way in which the FRPS will oversee the rebate program).

8. *See id.* at §101(b)(1)(A) ("[The FRPS] shall serve as a database and information technology system to allow rebate aggregators to submit claims for reimbursement using standard data protocols[.]").

9. *See id.* at §101(b)(1)(B) ("[A] national retrofit website [would provide] information on the Home Star Retrofit Rebate Program, including how to determine whether particular energy efficiency measures are eligible for rebate and how to participate in the program[.]").

10. *See id.* at §102(b) ("Not later than 90 days after such date of enactment, the Secretary shall ensure that rebate aggregation services are available to all homeowners in the United States at the lowest reasonable cost.").

11. *See generally id.* at §102(c) (outlining the responsibilities of rebate aggregators, which include reviewing applications, providing data for inclusion in the FRPS database, maintaining accounting, vetting potential contractors, and distributing funds).

12. *See id.* at §102(c)(4) ("Rebate aggregators shall—not later than 30 days after the date of receipt, distribute funds received from the Secretary to contractors, vendors, or other persons in accordance with approved claims for reimbursement made to the [FRPS][.]").

13. *See id.* at §102(d) (describing eligibility requirements for rebate aggregators).

14. *See id.* at §103(f) (describing rebate options for individuals who purchase and install energy-efficient mechanisms on their own).

homeowners' applications to ensure that the measures implemented are eligible for reimbursement under the HSERA.[15]

The rebate aggregator would then submit the application to the FRPS database, which would process the application.[16] The FRPS is tasked with dispensing rebates for eligible homeowners to the rebate aggregator, that in turn would issue funds to the applicant.[17] Under the Act, the Secretary of Energy is responsible for enlisting enough rebate aggregators in each state to ensure that all rebate applications are timely processed at a low cost to homeowners.[18]

The Act provides for a quality assurance framework to ensure that work under the retrofit contracts meets desired energy efficiency levels.[19] Under the quality assurance framework, quality assurance providers would conduct field inspections to ensure that retrofits comply with the standards articulated in the Act.[20] Additionally, the quality assurance framework would permit homeowners to submit complaints regarding the quality of retrofit installations.[21] Certified contractors would correct or re-install retrofits, as necessary.[22]

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15. *See id.* at §102(c)(1) ("Rebate aggregators shall—review each proposed rebate application for completeness and accuracy[.]").

16. *See id.* at §102(c)(3) ("Rebate aggregators shall—provide data to the Secretary for inclusion in the database maintained through the Federal Rebate Processing System, consistent with data protocols established by the Secretary[.]").

17. *See id.* at §102(c)(4) ("Rebate aggregators shall— . . . distribute funds received from the Secretary to contractors, vendors, or other persons in accordance with approved claims for reimbursement made to the [FRPS][.]").

18. *See id.* at §102(b) (outlining the Secretary's responsibility to identify rebate aggregators in each state to ensure that rebate services are available to "all homeowners . . . at the lowest reasonable cost.").

19. *See id.* at §2(17) ("The term 'quality assurance framework' means a policy structure adopted by a State to develop high standards for ensuring quality in ongoing energy efficiency retrofit activities in which the State has a role[.]").

20. *See id.* at §2(18) ("The term 'quality assurance program' means a program authorized under this Act to oversee the delivery of home efficiency retrofit programs to ensure that work is performed in accordance with standards and criteria established under this Act.").

21. *See id.* at §104(e)(2)(C) ("A homeowner may make a complaint under the quality assurance program that compliance with the quality assurance requirements of this title has not been achieved.").

22. *See id.* ("The quality assurance program shall provide that, upon receiving such a complaint, an independent quality assurance provider shall conduct field verification on the retrofit work performed by the contractor.").

B. Rebate Programs

As drafted, HSERA offers two separate rebate options. The "Silver Star" program provides homeowners with rebates for specific measures.[23] Homeowners may choose from among a number of safe energy modifications and installations, including total home air sealing measures; attic insulation; duct sealing; wall installation; window replacement; and heating or cooling system replacements.[24] Retrofit installations must meet the proposed specifications listed under Section 103(b) of the Act in order to qualify the homeowner for government rebates.[25] Each modification would result in a rebate of $50 to $1500, depending on the measure.[26] Homeowners may receive rebates up to $3000 or 50 percent of the total cost of safe energy measures, whichever is less.[27] Homeowners may also receive 50 percent of the total cost of insulation or air-sealant products purchased by the homeowner for self-installation, up to $250.[28]

Under the "Silver Star" program, retrofits may be subject to review by quality assurance providers in random field verifications.[29]

Under the "Gold Star" program, homeowners may receive rebates for reductions in total home energy use.[30] In addition to the measures eligible under the "Silver Star" model, any safe energy measure that can clearly be demonstrated to decrease energy consumption may be included in the calculation of whole home energy savings.[31] The reduction in home energy consumption would be determined by a comparison of simulations of the home's energy consumption before and after installation of safe energy

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23. *See id.* at §103(a)(1) (" . . . [A] Silver Star Home Energy Retrofit Program rebate shall be awarded . . . for the installation of energy savings measures—selected from the list of energy savings measures described in subsection (b)[.]").

24. *See id.* at §103(b) (describing energy saving measures for which rebates shall be provided).

25. *See id.* at §104(b)(1) (describing eligibility requirements for energy saving measures).

26. *See id.* at §103(d) (noting the rebate amounts to be provided for various measures).

27. *See id.* at §103(d)(4)(A)–(B) ("The total amount of rebates provided for a home under this section shall not exceed the lower of—$3,000 [or] 50 percent of the total cost of the installed measures[.]").

28. *See id.* at §103(f)(3) ("A rebate under this subsection shall be awarded for 50 percent of the total cost of the products described in paragraph (1), not to exceed $250 per home.").

29. *See id.* at §103(e)(2) (describing field verification of retrofits).

30. *See id.* at §104(a) ("A Gold Star Home Energy Retrofit Program rebate shall be awarded, subject to subsection (b) . . . for retrofits that achieve whole home energy savings. . . .").

31. *See id.* at §104(b) (describing measures for which rebates may be provided under the Gold Star program).

measures.[32] Homeowners may receive $3000 for a 20 percent increase in energy conservation and an additional $1000 for each five percent increase in energy conservation, up to a total rebate amount of $8000 or 50 percent of the total cost of energy-efficient measures, whichever is less.[33] The Act provides for random field verification of work performed.[34] However, homes that are reviewed post-installation by a statutorily-specified rating service may be exempt from field verification.[35] The total amount of rebates received by a homeowner may not exceed the amount designated under the "Gold Star" program.[36] Additionally, homeowners may not receive rebates under both the "Silver Star" and the "Gold Star" programs unless the measures for which rebates are received under the "Silver Star" program are not included in the calculation of total home energy savings under the "Gold Star" program.[37]

III. Title II – Energy Efficient Manufactured Homes

HSERA provides for grants that would permit low-income families that reside in manufactured homes built prior to 1976 to purchase Energy Star homes.[38] States would receive $7500 per home for each manufactured home that was destroyed or replaced.[39] Grants would be allocated to states

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32. *See id.* at §104(c)(2) (describing tests through which improvement in total home energy use is assessed).

33. *See id.* at §104(d) ("[T]he amount of a rebate provided under this section shall be—$3,000 for a 20-percent reduction in whole home energy consumption; and an additional $1,000 for each additional 5-percent reduction up to the lower of—$8,000; or 50 percent of the total retrofit cost.").

34. *See id.* at §104(e)(2)(A) ("[A]ll work conducted in a home as part of a whole-home retrofit by an accredited contractor under this section shall be subject to random field verification . . . .").

35. *See id.* at §104(e)(2)(B) ("A home shall not be subject to field verification . . . if—a post-retrofit home energy rating is conducted by an entity that is an eligible certifier[.]").

36. *See* H.R. REP. NO. 111–469, pt. 1 (2010) ("Prohibits rebates from being provided under the Silver Star Program and the Gold Star Program with respect to the same home unless . . . the total amount of rebates paid for the home does not exceed the maximum rebate available pursuant to the Gold Star Home Energy Retrofit Program.").

37. *See id.* ("Prohibits rebates from being provided under the Silver Star Program and the Gold Star Program with respect to the same home unless the . . . measures installed pursuant to the Silver Star Program are excluded from the calculations performed for . . . the Gold Star Program.").

38. *See* H.R. 5019 at §201(b) ("The purpose of this section is to assist low-income households residing in manufactured homes constructed prior to 1976 to save energy and energy expenditures by providing funding for the purchase of new Energy Star qualified manufactured homes.").

39. *See id.* at §201(c)(4) ("Funding provided by State agencies under this subsection shall not exceed $7.500 per manufactured home from any funds appropriated pursuant to this section.").

based on their respective percentage of all manufactured homes built before 1976.[40]

40. *See id.* at §201(c)(2) ("Grants . . . shall be distributed to State agencies in States on the basis of their proportionate share of all manufactured homes constructed prior to 1976. . . .").