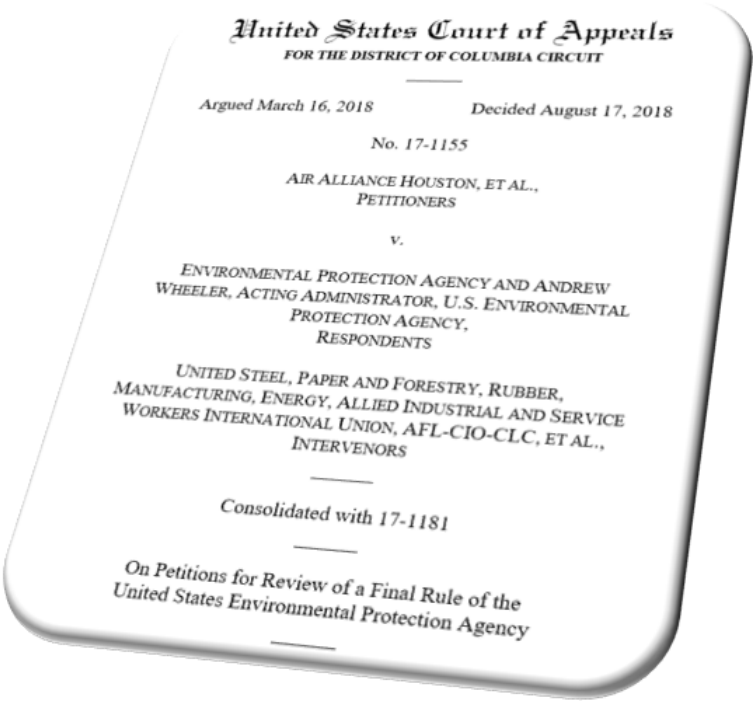
AUGUST 17, 2018 | OSHA RULEMAKINGS & STANDARDS

D.C. Circuit Strikes Down the Trump EPA Delay of Obama EPA's Overhaul of the Risk Management Program Rule

By Micah Smith, Eric J. Conn, and Beeta Lashkari

Today, the U.S. Court of Appeals for the D.C. Circuit handed EPA (and Industry) a significant setback in the long-running battle over the 2017 Amendments to EPA's Risk Management Program (RMP) Rule (EPA's companion regulation to OSHA's Process Safety Management Standard). Specifically, in a *per curiam* order in *Air Alliance Houston v. EPA*, the D.C. Circuit held that EPA under the Trump Administration acted improperly when it issued a final rule delaying the effective date by 20 months (from June 2017 to February 2019), of a significant set of Amendments to the RMP Rule that had been promulgated in the final days of the Obama Administration.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 16, 2018 Decided August 17, 2018

No. 17-1155

AIR ALLIANCE HOUSTON, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, ACTING ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, ET AL.,
INTERVENORS

Consolidated with 17-1181

On Petitions for Review of a Final Rule of the United States Environmental Protection Agency

This ruling creates significant concern for the regulated community. The Amendments require major overhauls

to they way covered employers implement their risk management plans. But EPA is still advancing a rulemaking to rescind and narrow those Amendments. Without this delay, there is tremendous uncertainty about whether or when to implement changes to those programs.

Indeed, EPA's express purpose of the lengthy delay of the RMP Amendments was to provide time for EPA to reconsider and eliminate or curtail the sweeping new provisions. The D.C. Circuit criticized EPA for its attempts to delay a regulation that it had just recently issued, stating in the written opinion that:

"the Delay Rule thus contains no provisions that advance or accomplish these goals [of preventing accidental releases and protecting human health and the environment], but instead delays these objectives contrary to EPA's prior determinations in a rulemaking."

While the Court criticized the agency for its inconsistency, the Court did not explicitly address the relationship between the change in administrations and EPA's change in position. That timeline does, however, provide good context:

Obama Administration

- 7/2014 – Request for Information issued to consider expanding RMP requirements
- 9/2015 – 3/2016 – SBAR Process
- 3/14/16 – Notice of Proposed Rulemaking issued (before SBAR report even issued)



- 3/2016 – A single public hearing was held before comments to NPRM were due
- Rushed to OMB for final approval
- 1/13/17 – Final Rule issued a week before Trump's Inauguration; general effective date 3/14/17

For more information about EPA's rushed RMP Rulemaking during the Obama Administration, check out our

earlier article: EPA Poised To Make Sweeping Changes to the Risk Management Program Rule.

Trump Administration

- 1/26/17 – One week delay of effective date; moved effective date to 3/21/17
- 3/16/17 – 90 day delay ordered; moved effective date to 6/19/17
- 4/3/17 – EPA proposes 20-month delay in effective date, with formal rulemaking
- 6/14/17 – 20-month delay ordered; moved effective date to 2/19/19
- 5/30/18 – A new Notice of Proposed Rulemaking issued to rescind most of the Amendments

By ignoring the obvious change in regulatory strategy after the change in Administrations, the D.C. Circuit Court highlighted the difficulty EPA may face as it seeks to reverse the actions the same agency took during the Obama Administration. While the Court made clear that EPA has the ability make substantive changes to its own rules, that ability is limited by its Congressional authorization (the Clean Air Act in this case), and a change in presidential administrations has no effect on that authorization. In language that may have been intended as a warning, the Court outlined the detailed findings that EPA must make in the future if it seeks to reverse a substantive policy, citing the Supreme Court for the conclusion:

"An 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'"

While there is more to be written on how this decision may shape EPA's ongoing effort to rescind the 2017 RMP Amendments, the immediate effects of this ruling are of greatest concern to Industry.

Short Term Impact on Industry

Appellate procedural rules allow the Parties in this legal challenge time to petition for rehearing, and the Court's mandate (the formal direction to EPA instructing it to follow the judgment) will not issue until after the time period for that petition expires. Accordingly, the earliest the RMP Amendments could realistically go into effect is early October 2018. However, if a petition for rehearing is granted by the DC Circuit, the timeline should extend several months further as we wait for that rehearing and subsequent decision. If a rehearing is not granted, the Court's mandate would issue promptly, causing some provisions of the RMP Amendments to become immediately effective:

Effective dates

- ***Immediately effective*** – Requirement for 3-year Compliance Audits to cover all elements of the Rule in each covered process at the facility [Original effective date: March 14, 2017]
- ***Immediately effective*** – Duty to Coordinate Emergency Response Activities with local emergency responders [Original effective date: March 14, 2018]
- ***March 14, 2020*** – Emergency Response Program Revisions
- ***March 15, 2021*** – Third-party Auditor Requirements; Incident Investigation and Root Cause Analyses; Safer Technology and Alternatives Analyses/IST Provisions; Emergency Response Exercise; and Public Availability of Information
- ***March 14, 2022*** – Revised Elements of the RMP provisions in Subpart G

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Follow the OSHA Defense Report blog for more on these and the next developments with the RMP Rule, and of course, what OSHA does with the PSM Standard if these changes to the RMP Rule stick. Also, register to attend the Inaugural Process Safety Summit in Washington, DC on October 22-23, 2018, presented by Conn Maciel Carey LLP and sponsored by the American Fuel and Petrochemical Manufacturers (AFPM) and the American Petroleum Institute (API). The event will feature panels with senior officials from EPA and OSHA, where these RMP developments will surely be a hot topic.

