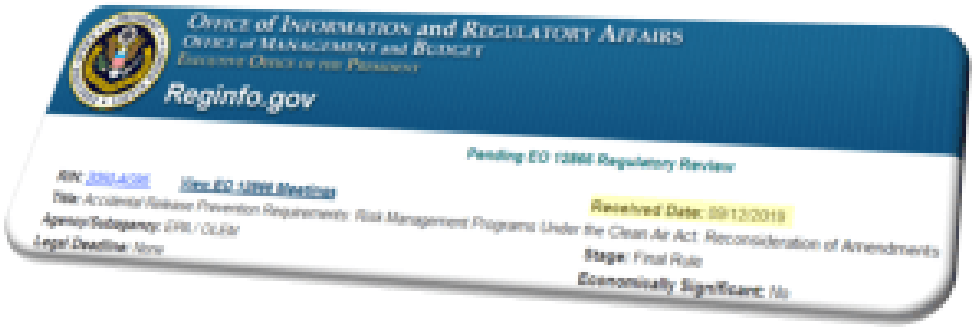
SEPTEMBER 17, 2019 | OSHA RULEMAKINGS & STANDARDS

EPA Sends Final RMP Rollback Rule to OMB for Review

By Micah Smith, Eric J. Conn and Beeta Lashkari

Last week, on September 12, 2019, EPA sent its Final RMP Rollback Rule to the White House Office of Management & Budget (OMB) for pre-publication review. The rule is expected to roll back many of the Obama-era RMP Amendment Rule that added to and enhanced numerous RMP requirements, which was finalized and published in the Federal Register three days before President Trump's Inauguration.



This new near-final RMP Rollback Rule comes after a long and tortured rulemaking and litigation history in which President Obama's EPA rushed out the RMP Amendments Rule, President Trump's EPA attempted to delay the RMP Amendments Rule, those attempts were defeated in federal court, and then EPA quickly finalized the current rulemaking with anticipated roll-backs. Here is a quick summary of that history:

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

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

After several delays of the RMP Amendments Rule at the start of the Trump Administration, the D.C. Circuit, in August 2018, issued a mandate to strike down any further delay of the RMP Amendments Rule, causing certain provisions of the RMP Amendments Rule to immediately go into effect. Rather than seeking to challenge the D.C. Circuit's opinion, EPA decided (as it had planned to do all along) to finalize rewrites to its RMP Rule to effectively undo many of the amendments just finalized by President Obama's EPA. And it appears that EPA has finished that process now that the RMP Rollback Rule is at OMB.

So, what does the road ahead look like? And what should RMP-covered facilities do to remain in compliance with this shifting regulatory landscape?

In short, the road ahead looks long – very long. Although mandatory OMB review typically only takes around 90 days, there is little doubt that any final rule will face swift and serious legal challenges from environmental groups, organized labor, and other critics. Environmental and community groups have pointed to recent industrial fires to support their contention that additional, enhanced RMP requirements – such as those included in the RMP Amendments Rule – are necessary. Though EPA Office of Land and Emergency Management Deputy Assistant Administrator, Steven Cook assured during a Texas environmental conference earlier this summer that the RMP Rollback Rule stays within the bounds of the law, it is very likely that environmentalists, labor, and other critics will disagree; emboldened by the DC Circuit's *per curiam* order in *Air Alliance Houston v. EPA*, rejecting EPA's effort to delay the RMP Amendments Rule. There, the Court made clear that while EPA may 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. Specifically, the DC Circuit criticized EPA for attempting to delay a regulation that it had just recently issued, stating in the written opinion that:


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

"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

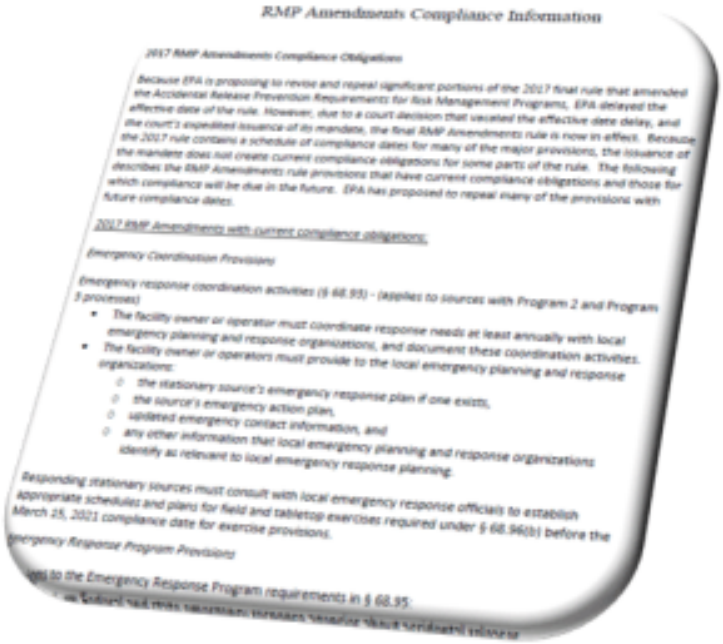
instead delays these objectives contrary to EPA's prior determinations in a rulemaking."

Likewise, in language that may have been intended as a warning about the anticipated, more substantive Rollback Rule, the Court laid out the standard that EPA must meet 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.'"

Accordingly, because the agency failed to effectively delay implementation deadlines of the RMP Amendments Rule, and we can expect a serious challenge to the RMP Rollback Rule, operators of RMP-covered facilities should continue to comply with current obligations as reflected in the RMP Amendments Rule.

So what are current RMP obligations, and what is coming up? As included in EPA's **compliance information sheet**, which the agency posted a few days after the D.C. Circuit's mandate, and as we **previously reported**, two major provisions that went into effect immediately are:


RMP Amendments Compliance Information

2017 RMP Amendments Compliance Obligations

Because EPA is proposing to revise and repeal significant portions of the 2017 final rule that amended the Accidental Release Prevention Requirements: Risk Management Programs, EPA delayed the effective date of the rule. However, due to a court decision that vacated the effective date delay, and the court's expedited issuance of its mandate, the final RMP Amendments rule is now in effect. Because the 2017 rule contains a schedule of compliance dates for many of the major provisions, the issuance of the mandate does not create current compliance obligations for some parts of the rule. The following describes the RMP Amendments rule provisions that have current compliance obligations and those for which compliance will be due in the future. EPA has proposed to repeal many of the provisions with future compliance dates.

2017 RMP Amendments with current compliance obligations:

Emergency Coordination Provisions

Emergency response coordination activities (§ 68.93) - (applies to sources with Program 2 and Program 3 processes)

- The facility owner or operator must coordinate response needs at least annually with local emergency planning and response organizations, and document these coordination activities.
- The facility owner or operators must provide to the local emergency planning and response organizations:
  - the stationary source's emergency response plan if one exists,
  - the source's emergency action plan,
  - updated emergency contact information, and
  - any other information that local emergency planning and response organizations identify as relevant to local emergency response planning.

Responding stationary sources must consult with local emergency response officials to establish appropriate schedules and plans for field and tabletop exercises required under § 68.96(b) before the March 15, 2021 compliance date for exercise provisions.

Emergency Response Program Provisions

to the Emergency Response Program requirements in § 68.95:

1. the requirement for three-year compliance audits to cover all elements of the RMP Amendments Rule in each covered process at the facility; and
2. the duty to coordinate emergency response activities with local emergency responders.

Here is a list of other current compliance obligations:

1. Coordinate emergency response needs at least annually with local emergency planning and response organizations, and make sure to document those coordination efforts.
2. Provide the information set forth in Section 68.93 to local emergency planning and response organizations.
3. If you are a responding facility, start consulting with local emergency response officials to establish schedules

and plans for field and tabletop exercises (before the March 15, 2021 compliance date for those exercises).
4. Include findings from incident investigations in your hazard reviews.
5. Ensure that supervisors responsible for directing process operations and supervisors with process operational responsibilities are meeting employee training requirements.
6. Evaluate compliance with each provision of the RMP Amendments Rule for each covered process at least every three years.
7. Conduct investigations for incidents resulting in catastrophic releases that also result in the process being decommissioned or destroyed.
8. Complete incident investigation reports within 12 months of the incident.
9. Include the specified content set forth in Section 68.60(d) in incident investigation reports.
10. Keep process safety information up-to-date.
11. Include findings from all incident investigations, as well as any other potential failure scenarios, in process hazard analyses.

Other obligations might be in effect now or in the very near future, depending on your facility. For example, within three years of determining a need for a facility emergency response program, you must develop and implement such a program. You must ensure your emergency response plan includes procedures to inform federal and state emergency response agencies about accidental releases. Also, in reviewing and updating your emergency response plan, you must base updates on certain criteria set forth in the rule, and make sure employees are informed of any changes in the emergency response plan.

Additionally, the following RMP Amendments Rule provisions have a compliance date of March 15, 2021:

1. third party audit provisions;
2. incident investigation root cause analysis provisions;
3. safer technology and alternatives analysis provisions;
4. emergency response exercise provisions; and
5. providing chemical hazard information or community preparedness information to the public and conducting a public meeting 90 days after an RMP accident.

Facilities are required to update their RMPs to comply with the new/revised provisions by March 14, 2022.

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Again, we do not expect the road ahead to be a short one, and will be sure to keep you informed of any updates. 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 after all of the RMP dust settles.

Another great way to "keep in the know" would be to register to attend the 2nd Annual Process Safety Summit in Washington, DC on October 15-16, 2019, where these RMP developments will surely be a hot topic. The event will feature panels with senior officials from EPA, OSHA, CSB, and the OSH Review Commission, as well as four former senior OSHA leaders. The program is presented by Conn Maciel Carey LLP and Sidley Austin LLP, and sponsored by the American Fuel and Petrochemical Manufacturers (AFPM) and the American Petroleum Institute


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