

## Stay or Go: D.C. Circuit Halts EPA's Stay of Obama-era Risk Management Plan Amendments

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### Overview

On August 17, 2018, the United States Court of Appeals for the District of Columbia Circuit vacated a rule that delayed the effective date of the 2017 Risk Management Program (RMP) Rule amendments issued by the U.S. Environmental Protection Agency (EPA) at the end of the Obama administration.<sup>1</sup> One week later, on August 23, 2018, the comment period concluded on a proposed EPA rule that would effectively rescind or substantially revise many provisions of the 2017 amendments. The ruling, coupled with EPA's proposed rule, generates uncertainty for facilities that handle hazardous chemicals.

### Background

In 2013, President Obama issued Executive Order 13650, "Improving Chemical Facility Safety and Security," in response to dangerous chemical-facility incidents in the United States, including the explosion at a fertilizer plant in West, Texas. Following this order, EPA promulgated amendments to the RMP Rule to improve chemical process safety; assist local emergency authorities in planning for, and responding to, accidents; and improve public awareness of chemical hazards. EPA published these rules in the *Federal Register* on January 13, 2017. While some of the rule's provisions were to take effect on March 14, 2017,<sup>2</sup> the rule's primary provisions were to take effect over the course of the following five years. In March 2018, provisions requiring local emergency-response coordination were to become effective. In March 2021, the bulk of the rule's provisions were to become effective, including those requiring emergency-response exercises, public information-sharing and post-accident public meetings, third-party audits, more rigorous post-incident analyses and safer technologies. The final date for regulated facilities to submit an updated RMP was March 14, 2022.<sup>3</sup>

The 2017 RMP Rule classifies three program levels of regulated facilities that are subject to the rule amendments.<sup>4</sup> Program Level 1 applies to the facilities with the lowest risk to the public in the event of an accident. This level imposes minimal hazard

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assessment, accident prevention and emergency response requirements. Program Level 2 applies to facilities with an intermediate risk to the public, requiring a more streamlined accident-prevention program and greater hazard assessment, management and emergency response requirements. Lastly, Program Level 3 applies to facilities with a higher frequency of serious accidents and imposes the Occupational Safety and Health Administration's Process Safety Management standard, as well as greater hazard assessment, management, and emergency-response requirements.

However, one week after President Donald Trump took office in January 2017, EPA delayed the first effective date of the RMP Rule amendments by one week. One month later, the agency received a petition from the RMP Coalition on behalf of several trade associations.<sup>5</sup> In this petition, the Coalition argued that the RMP Rule amendments undermine safety, create significant security risks and do nothing to further prevent criminal acts that threaten facilities. Following the petition, EPA convened a proceeding for reconsideration of the RMP Rule amendments and subsequently instituted a 90-day administrative stay of its original effective date.<sup>6</sup> After this stay, EPA received two additional petitions and subsequently published a notice in the Federal Register that it would further delay the effective date of the amendments by another 20 months.<sup>7</sup> EPA finalized this rule on June 14, 2017, delaying the effective date of the RMP Rule amendments to February 19, 2019.<sup>8</sup> Finally, in May 2018, EPA proposed to rescind or revise almost all of the amendments' new requirements.<sup>9</sup>

## The Court Vacates EPA's Stay

In the case decided in mid-August 2018, the D.C. Circuit determined that EPA lacked authority under the Clean Air Act to delay the RMP Rule amendments. Specifically, the court held that EPA's rule to delay the new chemical and safety requirements was "arbitrary and capricious" because the agency did not provide adequate reasons to justify its 20-month stay of the 2017 amendments, given the Clean Air Act's strict limitation that EPA may issue a stay for only a maximum of 90-days after considering a regulated party's objection.<sup>10</sup> To permit EPA to do otherwise, according to the court, would be to allow the agency to "render illusory" the Clean Air Act's restriction on EPA's authority to stay its own rules. Moreover, the court found that the 20-month stay contained no provisions to accomplish the goals of preventing or reducing disasters and protecting human and environmental health. Ultimately, the court vacated EPA's stay, accusing the agency of making "a mockery" of the law and restoring the original amendments for the time being.

## What This Means for Regulated Facilities

The D.C. Circuit's ruling produces uncertainty for those who are subject to the 2017 RMP Rule amendments. The amendments apply to a wide range of facilities, referred to as "stationary sources," which are subject to the chemical-accident prevention requirements of the Clean Air Act. In total, 12,542 facilities are affected by the rule across all sectors, according to RMP reporting in February 2015.<sup>11</sup> EPA has already stated that it plans to rescind a number of the RMP Rule amendments' key provisions, including the requirements related to safer technology and alternatives analyses, third-party audits, incident investigations and information availability.<sup>12</sup> In addition, the agency has expressed a desire to revise the amendments' compliance dates, as well

as requirements related to local emergency coordination, emergency exercises and public meetings.

With respect to EPA's proposed rule to rescind or revise many of the RMP Rule amendments' provisions, the D.C. Circuit made clear that its holding is narrow and that the court cannot prevent the agency from making substantive changes to the 2017 amendments.<sup>13</sup> The court's decision to vacate EPA's 20-month stay restores only the status quo, which means that the 2017 amendments' requirements with past-due compliance dates are now legally enforceable.<sup>14</sup> The provisions with past-due compliance dates, however, include only minor definitional changes to the RMP Rule and requirements for local emergency-response coordination. Although the current EPA is unlikely to vigorously enforce such provisions, given its demonstrated hostility to the Obama-era amendments, the RMP Rule is subject to citizen suit enforcement under the Clean Air Act.<sup>15</sup> Owners of impacted facilities will undoubtedly be watching and hoping that the agency will work quickly to finalize its regulatory pullback of the 2017 amendments well before the most burdensome provisions become effective and enforceable.

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<sup>1</sup> *Air Alliance Houston, et al. v. EPA*, No. 17-1155 (D.C. Cir. 2018).

<sup>2</sup> Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. (January 13, 2017).

<sup>3</sup> *Id.* at 4678.

<sup>4</sup> Clean Air Act Section 112(r): Accidental Release Prevention /Risk Management Plan Rule Fact Sheet (March 2009).

<sup>5</sup> "Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of Final Rule titled Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act." RMP Coalition. (February 28, 2017).

<sup>6</sup> Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 13968 (March 16, 2017).

<sup>7</sup> Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 16146 (April 3, 2017).

<sup>8</sup> Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133 (June 14, 2017).

<sup>9</sup> Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 83 Fed. Reg. 24850 (May 30, 2018).

<sup>10</sup> *Supra* note 1.

<sup>11</sup> *Supra* note 2 at 4596.

<sup>12</sup> *Supra* note 7.

<sup>13</sup> *Supra* note 1.

<sup>14</sup> Compliance dates become enforceable following a mandate on the ruling. On August 24, 2018, environmentalists sought an expedited mandate of the decision, arguing that further postponing the implementation rewarded EPA's illegal conduct. On August 31, 2018, the D.C. Circuit "inadvertently" issued that mandate and quickly withdrew it following a flurry of emergency requests from states and industry. Replies to the environmentalists'

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request were permitted to be filed by September 5, 2018, and a new ruling on the mandate is anticipated shortly.

<sup>15</sup> See 42 U.S.C. § 7412 (r)(7)(E) (2018).