

# *What's Happening on RMP and PSM in the Courts and in the Trump Administration?*

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# What Is Happening

- The Path to the 2017 RMP Amendments
- Core Elements of the 2017 RMP Amendments
- The Reconsideration
- The Delay
- The Lawsuits
- The Arguments
- What's Next?
- What's a Company to Do?

# Path to the 2017 RMP Amendments

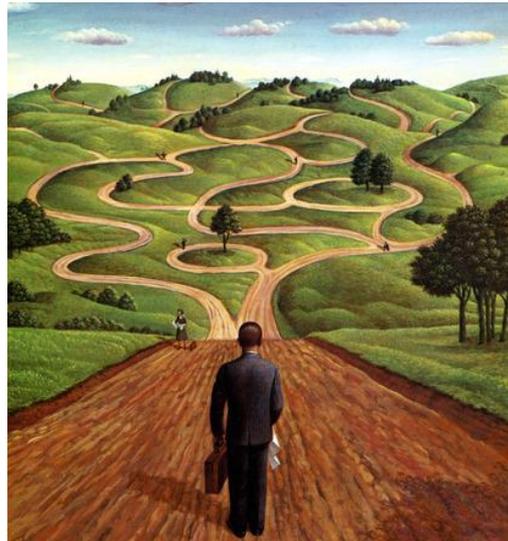
## August 2013 – Executive Order 13650 “Improving Chemical Facility Safety & Security”

- Following West, Texas Fertilizer Plant Incident
- Established working group that includes DHS / FEMA, OSHA, EPA, DOJ, ATF, DOT, USDA to address:
  - Community planning and preparedness
  - Federal interagency coordination
  - Improving data management
  - **Modernizing policies and regulations**
  - Incorporating stakeholder feedback



# Path to the 2017 RMP Amendments

- **March 14, 2016** – Propose Rule Issued
  - Compliance & Third Party Auditing
  - Incident Investigation & Root Cause Analysis
  - LEPC Disclosure
  - Public Disclosure
  - Local Coordination & Emergency Response Preparedness
  - Safer Technologies & Alternatives Analysis (STAA)



## Why Proposal Was Ineffective or Counterproductive to EPA's Objective and/or Had Unintended Consequences

- Changing scope of compliance audits to “each covered process” dramatic expansion of existing requirement.
  - Contrary to fundamental auditing principles.
- Linking Third Party Audits to all reportable accidents significantly increases audit frequency.
  - Provides little, if any, corresponding benefit in safety performance and risk minimization.
- Auditor qualifications mean shortage of available auditors.
  - Undermines effectiveness and substantially increases costs.
  - Company audits more reliable and robust.
  - Regulatory non-compliance trigger overbroad.



## Why Proposal Was Ineffective or Counterproductive to EPA's Objective and/or Had Unintended Consequences

- Fundamental transformation of “catastrophic release.”
  - far broader;
  - sweeps into incident investigations events that could not reasonably lead to catastrophes.
- Prescriptive proposed requirements diverge from the performance-standard program.
  - Must be able to tailor investigations to degree of incident;
  - Focus on continuous improvement.
- Existing requirements already reduce risk and prevent accidents.
- Root cause analysis language tied to “systemic” failure.



## Why Proposal Was Ineffective or Counterproductive to EPA's Objective and/or Had Unintended Consequences

- Proposal would convert LEPCs from statutory role of providing notification of and facilitating response to releases, into RMP information clearinghouse and regulatory body to influence technologies used by facilities.
- Dangerous/irresponsible to mandate disclosure of information EPA suggests should be given on request to LEPCs, who lack capability to protect it.
  - State public records laws require LEPCs to provide it to public if requested.
- EPA taking over communication process between LEPCs and facilities.
  - Usurping expertise of LEPCs and emergency responders;
  - LEPCs already have access to the information that they need through existing coordination functions (in place under EPCRA).
- Substantial burden on facilities to prepare annual summaries of information not needed by LEPCs.



## Why Proposal Was Ineffective or Counterproductive to EPA's Objective and/or Had Unintended Consequences

- Dangerous/irresponsible to mandate disclosure of security-sensitive information.
- Majority of non-security sensitive information proposed to be disclosed to the public would not enhance the public's understanding of response.
- Proposed requirement to hold a public meeting within 30 days of any reportable accident too soon.
  - Divert resources away from incident investigation.
  - Solving a problem that does not exist.



## Why Proposal Was Ineffective or Counterproductive to EPA's Objective and/or Had Unintended Consequences

- Premised on unrealistic notion that facilities are either complete responders or complete non-responders.
- EPCRA already requires coordination.
- Underlying problem is a lack of funding of LEPCs.
- Proposed exercise requirements too rigid, leading to misallocation of resources.
- Inappropriate delegation to LEPCs (or equivalent) to impose regulatory requirements on facilities.



## Why Proposal Was Ineffective or Counterproductive to EPA's Objective and/or Had Unintended Consequences

- For existing processes, would require huge expenditure of resources without corresponding benefit.
- Focus on STAA elevates what might *appear as* inherently safer technology above one that can be managed to a similarly safe or even safer level with passive or active safeguards.
- Proposal likely to result in risk-shifting leading to greater overall risk.



# Core Elements of the 2017 RMP Amendments

## Final Rule – Published January 13, 2017

### Final Rule Provisions/Corresponding Compliance Dates

Rule provision	Compliance date	Initiated after an RMP reportable accident?
Third-party audit	March 15, 2021	Yes.
Root cause analysis	March 15, 2021	Yes (also required after near misses).
STAA	March 15, 2021	No.
Emergency response coordination activities	March 14, 2018	No.
Owner/operator determines that the facility is subject to the emergency response program requirements of § 68.95	Within 3 years of the determination	No.
Emergency response exercises	March 15, 2021	No.
Information sharing	March 15, 2021	Partially-public meeting within 90 days.
Update RMP	March 14, 2022	No (but previously existing correction requirements of § 68.195 still apply).

- **March 13, 2017** – Chemical Safety Advocacy Group (CSAG) files Petition.
  - EPA finalized several provisions of central relevance that were not contained in the Proposed Rule.
  - EPA completely disregarded significant and substantial concerns with its information disclosure, emergency response, and other provisions.
  - Final Rule creates numerous burdensome obligations not justified by any quantifiable benefit, some with tight compliance deadlines requiring facilities to expend resources now in anticipation of compliance.
  - Final Rule issued using a faulty cost/benefit analysis.
  - Final Rule issued in violation of clear Congressional directives to EPA requiring coordination, accurate cost estimates, and public engagement.
- **March 13, 2017** – EPA Administrator Pruitt grants reconsideration.
- **March 16, 2017** – EPA issues 3-month stay of rules effective date.
- **June 14, 2017** – EPA issues Delay Rule delaying rules effective date for 20-months or until **February 19, 2019**.

- **Who challenged the Delay Rule?**
  - **ENGO Petitioners and Union Intervenor:** 13 Environmental NGOs and a group of Unions.
  - **State Petitioners:** 11 states led by New York.
- **Who intervened?**
  - 12 states led by Louisiana.
  - Industry trade groups Chemical Safety Advocacy Group; RMP Coalition.
- **June 22, 2017** – Motion for Stay and Expedited Consideration
  - Filed by Environmental Petitioners and Union Intervenor.
  - August 30, 2017 – Court denied Motion for Stay but granted Expedited Consideration.
- **January 31, 2018** – Briefing Completed



- **March 16, 2018** – Oral Argument Held
  - **Panel** – Judges Rogers, Kavanaugh, Wilkins
- **Arguing Attorneys**
  - Jonathan D. Brightbill – ***Respondent EPA***
  - Emma C. Cheuse – ***ENGO Petitioners***
  - Steve Wu – ***Petitioner-Intervenor States***
  - Susan J. Eckert – ***Petitioner-Intervenor Unions***
  - Shannon S. Broome – ***Respondent-Intervenor CSAG***
  - Elizabeth Murrill – ***Respondent-Intervenor States***



- **Court Decision Expected By June-July 2018**
  - Potential Outcomes
    - Denial of Petitions for Review
    - Grant of Petitions for Review
  - Remedy If Granted
    - Remand?
    - Vacatur?
  - Effect of the remedy
- **Reconsideration Proceedings**
  - Rule at OMB Now
  - What's Likely In It?



# What's a Company to Do?

- Delay Rule only impacts limited dates.
- Planning for compliance.
- Reinterpretation of existing requirements.
- Participate in rulemaking.
- Demonstrate impacts/counterproductive nature of changes.

