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# RMP: Managing Compliance in a Shifting Landscape

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Process Safety Summit, Washington, DC

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# RMP Amendments in Effect on 9/28/2018

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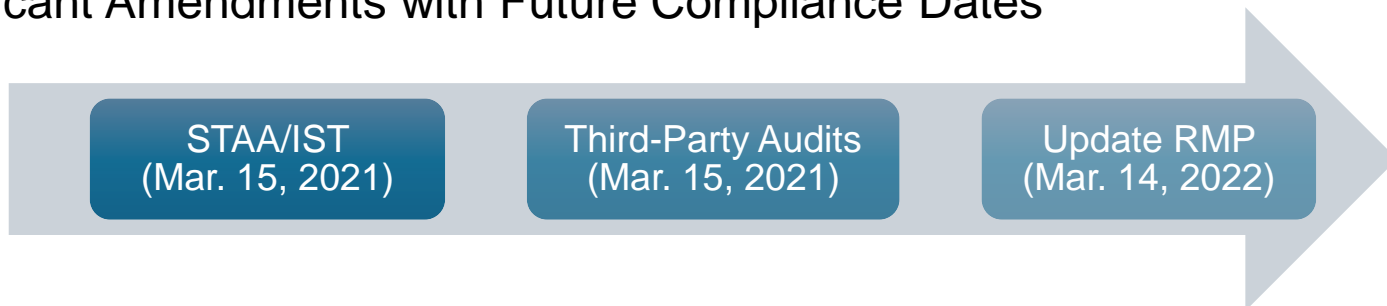
- “Big 3” Amendments in Effect



- Other Amendments in Effect

- See EPA, RMP Amendments Compliance Information (Sept. 24, 2018) (copy provided in the Appendix)

- Significant Amendments with Future Compliance Dates



# RMP Amendments in Effect: Compliance Audits for Each Covered Process Unit, 40 CFR §§ 68.58(a), 68.79(a)

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What does it mean to conduct a compliance audit on each process unit?

Look at every single piece of paper?

Prior actions on the unit count toward an audit?

Do you have to re-do the compliance audit to touch each covered process?

What if a compliance audit was conducted while the Delay Rule was in effect?

Does the source have discretion to define the “covered process”?

# RMP Amendments in Effect: Incident Investigations, 40 CFR §§ 68.60, 68.81

What if the incident occurred during the period when the Delay Rule was in effect?

12-month deadline for completing the investigation

Can EPA grant extensions?

Near misses

What does this mean?

Examples of what near misses are not

Additional elements in incident investigation reports

Amending PHAs to include investigation findings, 40 CFR § 68.67

Same for hazard reviews for Program 2 facilities (40 CFR § 68.50)

# RMP Amendments in Effect: Emergency Response Coordination, 40 CFR § 68.93

Annual coordination  
with LEPCs, 40 CFR  
§ 68.93(a)

What is  
required for  
annual  
coordination?

What's the deadline  
for annual  
coordination?

“Due Process”  
interpretation:  
Sept. 28, 2019

“Literal”  
interpretation:  
Mar. 14, 2019

Consult with  
LEPCs on  
exercise  
schedule, 40  
CFR § 68.93(a)-  
(b)

Deadline:  
Mar. 15, 2021  
(compliance  
date for exercise  
provisions)

Includes  
field and  
tabletop  
exercises

What if  
there's no  
functioning  
LEPC?

# Proposed “Rescission” Rule to address the Amendments

STAA

Third-party audit

Information availability elements

**Compliance audits for every covered process?**

Amendments’ incident investigation additions

Emergency response organization authority to receive sensitive information

Minimum frequency for emergency response field exercises

Process safety information to be kept “up-to-date”

Training requirements for supervisors

What goes

Emergency response exercise evaluation report required elements

Emergency response coordination

CBI and Classified Information provisions

What’s modified

Pre-Amendments RMP provisions

Emergency response exercise provisions

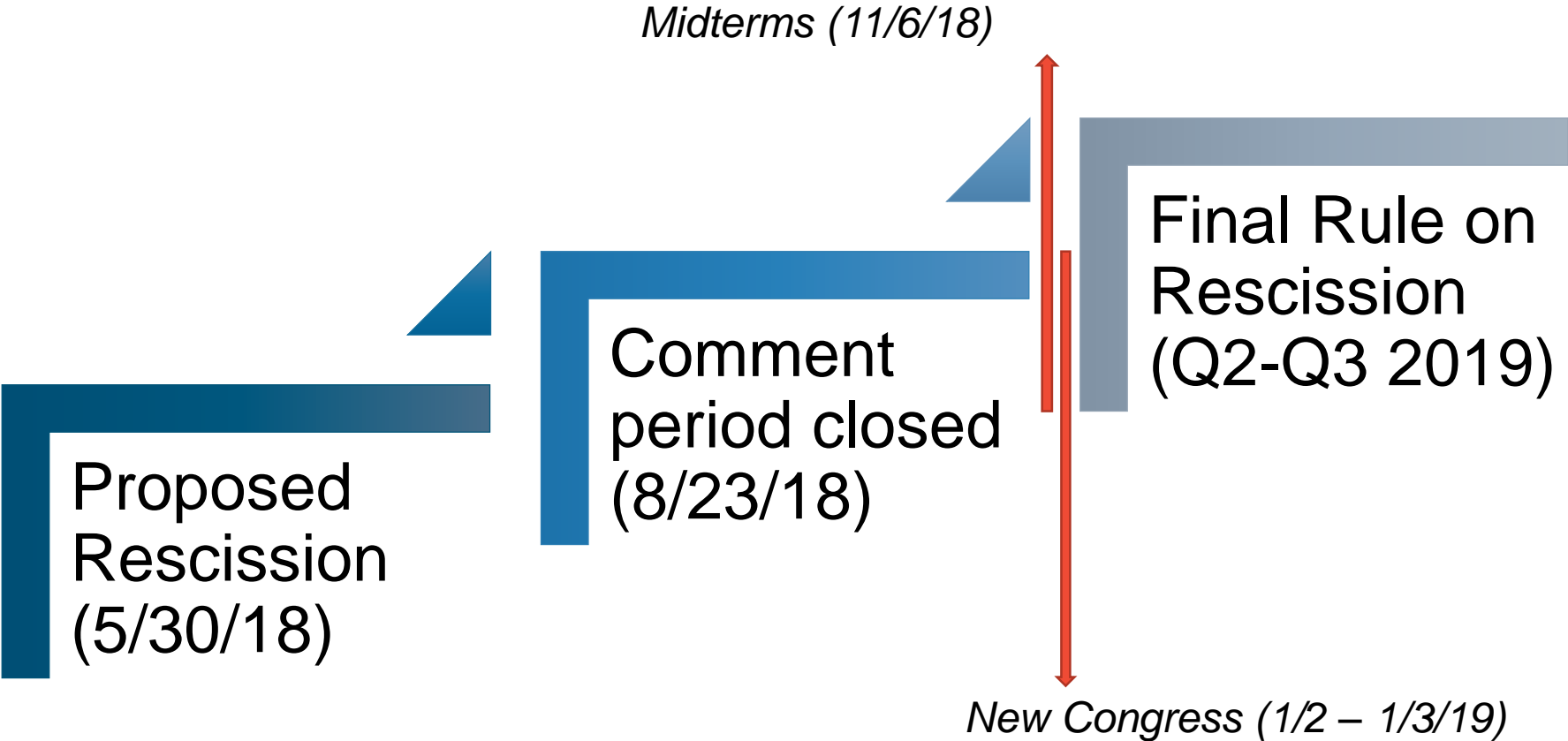
- Frequency for tabletop exercises
- Other exercises may qualify

Information availability

- RMP, exercise schedule publicly available
- Public meetings within 90 days of an incident

What stays

# Rescission Rule Timeline



# Litigation over the Rescission Rule

- Vacatur of Delay Rule in *Air Alliance Houston v. EPA* increases litigation risk on the rescission rule
- “Blue” AGs & NGOs likely to move for an emergency stay of rescission in the DC Cir upon FR publication
  - Motions panel selection
  - Relevant factors in ruling on a stay
- Merits litigation
  - Will it be the same panel as *Air Alliance Houston*?
  - How long will it take the court to rule?
  - Will the rescission rule be upheld?





***What does all this mean for facility owners and operators?***

# RMP Enforcement: The Outlook

- Enforcement of the Amendments unlikely during the rescission rulemaking
- Enforcement of the pre-existing RMP regulations continues to be aggressive, despite overall decline in federal enforcement
  - National compliance initiative
  - Few authorized states – no significant federalism issues
  - EPA administrative enforcement typical for “penalties-only” cases below DOJ referral threshold
  - DOJ judicial enforcement typical where injunctive relief required and/or a significant penalty at issue

## National Compliance Initiative: Reducing Risks of Accidental Releases at Industrial and Chemical Facilities

### Problem

Thousands of facilities nationwide, many of which are in low income or minority communities, make, use and store extremely hazardous substances. Catastrophic accidents at these facilities—historically about 350 each year—result in fatalities and serious injuries, evacuations, and harm to human health and the environment. EPA regulates these facilities under section 112(j) of the Clean Air Act and through the Chemical Accident Prevention regulations, also known as the Risk Management Program (RMP). The regulations apply to stationary sources that have a listed chemical in a process at or above an established threshold quantity. A broader statutory obligation under CAA section 112(j)(1), the General Duty Clause (GDC), applies to all stationary sources with regulated substances or other extremely hazardous substances, regardless of the quantity of chemical involved. EPA has found that many regulated facilities are not adequately managing the risks they pose or ensuring the safety of their facilities in a way that is sufficient to protect surrounding communities.



Air byproduct release from  
Erie at a food processing  
plant.

<https://www.epa.gov/enforcement/national-compliance-initiative-reducing-risks-accidental-releases-industrial-and>

## RMP Enforcement: Issues & Practice Tips

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- EPA continues to base enforcement on both 40 CFR. Part 68 and the General Duty Clause (GDC) in Section 112(r)(7) of the Clean Air Act (CAA)
  - EPA interprets the GDC to require RAGAGEP at facilities that do not meet the threshold for a covered process
- 3<sup>rd</sup> Party Audits have become a common feature of RMP settlements
  - Will this change when EPA rescinds the 3<sup>rd</sup> party audit provisions of the Amendments?
- EPA takes RAGAGEP seriously but EPA employees are not expert in it
  - EPA sometimes hires outside experts to help with RMP enforcement in specific industries
- Expect a fairly deep dive with RMP enforcement in most cases
- Downside of administrative enforcement: compliance certification

# RMP Citizen Suits: Issue of First Impression

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- No reported cases
- *Cf. United States v. Bayer Cropscience LP*, No. 2:15-CV-13331, 2018 WL 3553413, at \*1 (S.D. W. Va. July 24, 2018) (denying NRDC's motion to intervene in RMP consent decree based on lack of standing)



# RMP Citizen Suits

The screenshot shows the EPA website's navigation and content. At the top left is the EPA logo with the text "United States Environmental Protection Agency". To the right are language links: "Español", "中文: 繁體版", "中文: 简体版", "Tiếng Việt", and "한국어". Below the logo is a dark blue navigation bar with "Learn the Issues", "Science & Technology", "Laws & Regulations", and "About EPA". A search bar is on the left, and "FAQ Home", "Frequent Questions", and "My Stuff" are in the center. "Contact Us" and "Share" are on the right. The main content area has a breadcrumb trail: "Emergency Management > Risk Management Program > Other RMP". The question is "Is there a citizen suit provision applicable to RMP?". The answer states that section 304 of the CAA includes a citizen suit provision for violations of emission standards or limitations promulgated under the Act.

**EPA** United States Environmental Protection Agency

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**Frequent Questions**

- Discharge of Oil Regulation (Part 110)
- Emergency Planning and Community Right-to-Know
- Facility Response Plan (Part 112)
- Risk Management Program**
  - Final Amendments to RMP Rule
  - Applicability/General Duty Clause
  - Emergency Response
  - Five - Year Accident History
  - Offsite Consequence Analysis

Emergency Management > Risk Management Program > Other RMP

## Is there a citizen suit provision applicable to RMP?

Is there a citizen suit provision applicable to CAA §112 and the risk management program rule?

Yes, section 304 of the CAA includes a citizen suit provision for violations of emission standards or limitations promulgated under the Act.

<https://emergencymanagement.zendesk.com/hc/en-us/articles/212086667-Is-there-a-citizen-suit-provision-applicable-to-RMP->

# Title V Permits and Deviation Reports

- EPA: all requirements of Section 112, including the GDC and the RMP regulations, are “applicable requirements”
  - Violations are subject to deviation report
- States inconsistent in including 112(r) in Title V permits
- Facilities take different approaches in what they consider to be 112(r) deviations

**TITLE V OPERATING PERMIT**

Second permit in Title V of the Connecticut General Statutes (CGS) and Section 22a-174 of the Regulations of Connecticut State Agencies (RCSA) and permit in the Code of Federal Regulations (CFR), Title 40, Part 70.

Title V Permit Number	000-0026-01
Class, Sequence, Extra Sequence, Transfer	110-5-10-01
Original Permit Issue Date	April 11, 2008
Expiration Date	April 11, 2014

Facility Name:  
The University of Connecticut, Storrs Campus

Facility Location:  
31 LaDell Road, Storrs, CT 06269-3003

Name of Responsible Official and Title:  
Michael J. Hogan, President

All the following attached pages, 1 through 45, are hereby incorporated by reference into this Title V Operating Permit.

By: Janet Griffin, Esq. \_\_\_\_\_ Date: April 11, 2008  
State of Connecticut \_\_\_\_\_  
Commissioner

The University of Connecticut - Storrs Campus Page 1 of 45 Permit No. 000-0026-01

## Impact on Title V Permits: The Problem Now

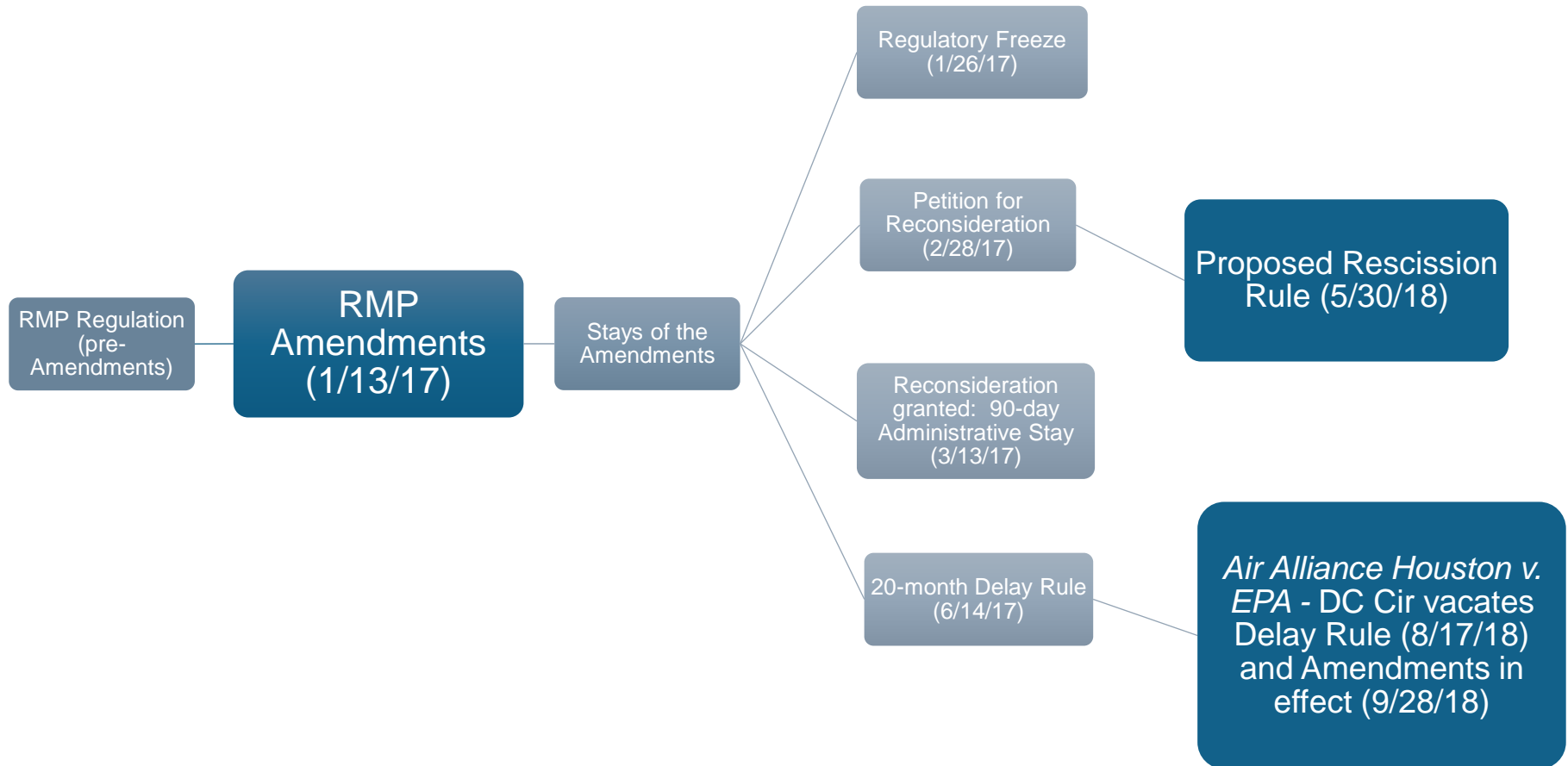
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- Vacatur of the Delay Rule means the 2017 RMP Amendments are now effective
- Where Title V permits are drafted to broadly incorporate applicable requirements by citation (e.g., “40 CFR Part 68”), the RMP Amendments might already be “applicable requirements”
- Need to review individual permits and state approach to updating applicable requirements and deviation reporting

# Appendix



# Timeline of RMP Amendments



# RMP Amendments Guidance (9/24/18), Page 1

## 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 for 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

Revisions to the Emergency Response Program requirements in § 68.95:

- Inform Federal and state emergency response agencies about accidental releases.
- Review and update the source's emergency response plan, as appropriate. Base updates on changes at the stationary source or new information obtained from:
  - coordination activities,
  - emergency response exercises,
  - incident investigations, or
  - other available information.
- Ensure that employees are informed of the changes to the source's emergency response plan.

# RMP Amendments Guidance (9/24/18), Page 2

## RMP Amendments Compliance Information

A facility owner or operator must develop and implement an Emergency Response Program within three years of when the facility becomes subject to the requirements (i.e., a need for a facility Emergency Response Program is determined) (see § 68.10(c)).

### Prevention Program Provisions

Changes to the Program 2 and Program 3 Prevention Program requirements (Subparts C and D) for which the effective date is the compliance date (§ 68.10(a)(4)):

#### Safety information (§ 68.48)

- Maintain Safety Data Sheets (SDS) instead of Material Safety Data Sheets (MSDS).

#### Hazard review (§ 68.50)

- Include findings from incident investigations in the hazard review.

#### Training (§§ 68.54 & 68.71)

- Employee training requirements also apply to supervisors responsible for directing process operations and supervisors with process operational responsibilities.

#### Compliance audits (§§ 68.58 & 68.79)

- The owner or operator must evaluate compliance with the provisions of the RMP rule "for each covered process" at least every three years.

#### Incident investigation (§§ 68.60 & 68.81)

- Added the phrase "[i.e., a near miss]" to describe incidents that "could reasonably have resulted in a catastrophic release."
- An investigation is required when an incident resulting in a catastrophic release also results in the affected process being decommissioned or destroyed.
- Require incident investigation teams to be established for incident investigations on Program 2 processes (§ 68.60(c)).
- Incident investigation reports shall be completed within 12 months of the incident, unless the implementing agency approves, in writing, an extension of time.
- Replaced the word "summary" with "report" to describe the documentation required for an incident investigation (§ 68.60).
- Specified content of the investigation report – new provisions are underlined:
  - Date, time, and location of the incident;
  - description of incident, in chronological order, providing all relevant facts;
  - the name and amount of the regulated substance involved in the release (e.g. fire, explosion, toxic gas loss of containment) or near miss and the duration of the event;
  - the consequences, if any, of the incident including, but not limited to:
    - injuries;
    - fatalities;
    - the number of people evacuated;

# RMP Amendments Guidance (9/24/18), Page 3

## RMP Amendments Compliance Information

- the number of people sheltered in place; and
- the impact on the environment;
- emergency response actions taken;
- the factors that contributed to the incident including the:
  - initiating event;
  - direct and indirect contributing factors; and
  - root causes. Root causes shall be determined by conducting an analysis for each incident using a recognized method (for incidents that occur after March 15, 2021).
- recommendations resulting from the investigation and a schedule for addressing them.

### Process safety information (§ 68.65)

- Owner or operator required to keep process safety information up-to-date.
- Material Safety Data Sheets revised to Safety Data Sheets (SDS) in note to paragraph (b).

### Process hazard analysis (§ 68.67)

- PHA must include the findings from all incident investigations required under § 68.81, as well as any other potential failure scenarios.

### Information Availability Provisions

The RMP availability provision was revised to include a reference to regulations that limit disclosure of the RMP offsite consequence analysis (§ 68.210(a)).

### RMP Amendments with future compliance obligations :

The compliance date for the following RMP Amendments provisions is March 15, 2021:

- Third-party audit provisions in §§ 68.58(f), 68.58(g), 68.58(h), 68.59, 68.79(f), 68.79(g), 68.79(h), and 68.80;
- Incident investigation root cause analysis provisions in §§ 68.60(d)(7) and 68.81(d)(7);
- Safer technology and alternatives analysis in § 68.67(c)(8); and
- Emergency response exercise provisions in § 68.96.
- Providing chemical hazard information or community preparedness information to the public and conducting a public meeting 90 days after an RMP accident in § 68.210 (b) –(e).

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

# Examples of Recent RMP Judicial Civil Settlements

Matter/District/Year	Allegations / Facilities	Civil Penalty/SEP	RMP Injunctive Relief
<u>U.S. v. E.I. du Pont de Nemours &amp; Co.</u> (S.D. Tex. 2018)	2014 release of methyl mercaptan at La Porte, Texas chemical manufacturing facility	<ul style="list-style-type: none"> <li>\$3,100,000 penalty</li> </ul>	<ul style="list-style-type: none"> <li>No injunctive relief because company no longer owns facility</li> </ul>
<u>U.S. v. MFA Inc., et al.</u> (W.D. Mo. 2018)	Alleged RMP violations at agricultural cooperative that manages anhydrous ammonia at various facilities in Missouri	<ul style="list-style-type: none"> <li>\$850,000 penalty</li> <li>\$400,000 SEP</li> </ul>	<ul style="list-style-type: none"> <li>3rd party RMP audit at 20 facilities selected by EPA</li> <li>Establish/implement corporate RMP policies for all facilities to keep up-to-date with RAGAGEP</li> <li>Certify that all identified past violations have been corrected</li> </ul>
<u>U.S. v. Gibson Wine Co.</u> (E.D. Cal. 2018)	RMP/GDC allegations stemming from release of anhydrous ammonia from winemaking facility, resulting in the death of a contract employee	<ul style="list-style-type: none"> <li>\$330,000 penalty (for CAA, CERCLA, and EPCRA violations)</li> </ul>	<ul style="list-style-type: none"> <li>Install and commence continuous operation of computer control system for anhydrous ammonia refrigeration system</li> <li>Many specific requirements</li> </ul>
<u>U.S. v. Kinder Morgan Altamont LLC, et al.</u> (D. Utah 2018)	Alleged RMP violations at two gas plants in Utah and Wyoming	<ul style="list-style-type: none"> <li>\$179,099 penalty</li> <li>\$387,300 SEP</li> </ul>	<ul style="list-style-type: none"> <li>3rd party mechanic integrity audit at four facilities</li> <li>Permanent shutdown of one facility.</li> </ul>
<u>U.S. v. Harcros Chems. Inc.</u> (D. Kan. 2017)	Alleged RMP/GDC violations at chemical manufacturing, blending, repackaging, and distribution facility after EPA pilot audits	<ul style="list-style-type: none"> <li>\$950,000 penalty</li> <li>\$2,500,000 SEP</li> </ul>	<ul style="list-style-type: none"> <li>3rd party audit for compliance audits and potentially additional penalties</li> </ul>
<u>U.S. v. Bayer Cropscience LP</u> (S.D. W.Va. 2016)	Alleged RMP and GDC violations stemming from a runaway chemical reaction at a pesticide manufacturing facility in Institute, WV that caused an explosion and killed two people	<ul style="list-style-type: none"> <li>\$ 975,000 penalty</li> <li>\$\$\$3,050,770 SEP</li> </ul>	<ul style="list-style-type: none"> <li>Many specific items related to SOPs, PHAs, emergency response, etc.</li> <li>Maintain registrations under RC 14001 (Responsible Care) or equivalent</li> </ul>

## RMP Enforcement: Existing Consent Decrees

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- Several existing RMP consent decrees have broad “comply with RMP” obligations, with stipulated penalties attached to violations
- Did the vacatur of the Delay Rule in *Air Alliance Houston v. EPA* immediately create violations of these decrees?
- Example:

16. At each Facility listed in Paragraph 8.m and at Defendant’s facilities located at 17031 Canal Street in Thornton, Illinois, 942 Industrial Access Road in West Point, Mississippi, and 555 Rivergate Road in Memphis, Tennessee, Defendant shall comply with all applicable Risk Management Program requirements and regulations promulgated under 42 U.S.C. § 7412(r)(7) and codified at 40 C.F.R. Part 68 Subparts A-H.

# RMP Citizen Suits: Preview of the Legal Issues

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- May file citizen suits for alleged violations of Section 112 of the CAA\* “without regard to whether such requirement is expressed as an emission standard or otherwise” 42 U.S.C. § 7604(f)(3).
  - \*Section 112 includes RMP and GDC
- But there’s a citizen suit exemption in Section 112(r)(1): “For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph.” 42 US.C. § 7412(r)(1).
  - Does this only exempt GDC claims from citizen suits?
  - Or does it also exempt RMP claims?
- Would standing pose a significant problem?
  - *Cf. Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998) (no standing to bring EPCRA claims for failure to file reports where defendant filed reports by the time the complaint was filed)

# Sidley Environmental Team

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**Timothy K. Webster** is a partner in **Sidley Austin LLP's environmental group**. He has practiced environmental law his entire professional career, including 7 years in the **Environmental Enforcement Section of the Justice Department**. His practice focuses on civil and criminal environmental enforcement defense, internal investigations, rulemaking challenges, and regulatory advocacy. He has handled a wide variety of matters under the Clean Air Act, including the Risk Management Program provisions, as well as other environmental statutes. Mr. Webster served as the 44<sup>th</sup> President of the DC Bar, and served as outside General Counsel of the DC Bar. He is listed in *Who's Who Legal*, *Chambers USA*, and *The Best Lawyers in America*. He is a Fellow of the American Bar Foundation.



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**Justin Savage** is a partner in **Sidley Austin LLP's environmental group** and counsel of record to the RMP Coalition in litigation arising out of the RMP Amendments. Justin specializes in high-stakes EHS litigation and strategic counseling, including enforcement, internal investigations, and rulemaking challenges. Justin represents companies and trade associations in environmental enforcement defense, internal investigations and strategic counseling, particularly under the Clean Air Act Title I, RMP, and Title II. *Chambers USA*, *Legal 500*, and *Law360* have recognized Justin for his success in solving clients' complex EHS issues. Justin served for a decade in the **Environmental Enforcement Section of the Justice Department** where he led teams in several multi-billion dollar cases.



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**Samina M. Bharmal** is an associate in **Sidley Austin LLP's environmental group**, where her practice focuses on guiding clients through agency investigations, regulatory advocacy, including on the RMP Amendments, and representing clients in judicial challenges to agency rulemakings. With her regulatory experience, she advises clients on a wide range of transactions, with an emphasis on energy transactions. Samina's experience also includes two years in the **Environment and Natural Resources Division of the Justice Department**.



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