

CLIENT ALERT



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Authors:

Nadira Clarke

1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6069
nclarke@bdlaw.com

Thomas M. DiBiagio

201 North Charles Street
Suite 2210
Baltimore, MD 21201
(410) 230-1340
tdibiagio@bdlaw.com

Mark N. Duvall

1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6090
mduvall@bdlaw.com

David M. Friedland

1350 I Street, N.W.
Suite 700
Washington, DC 20005
(202) 789-6047
dfriedland@bdlaw.com

Madeleine B. Kadas

98 San Jacinto Boulevard
Suite 1420
Austin, TX 78701
(512) 391-8010
mkadas@bdlaw.com

Laura K. McAfee

201 North Charles Street
Suite 2210
Baltimore, MD 21201
(410) 230-1330
lmcafee@bdlaw.com

Criminal Prosecution for Failure to Develop and Implement Clean Air Act Risk Management Program Results in \$100,000 Fine

In one of the first criminal enforcement cases under the Clean Air Act's Risk Management Program ("RMP"), the Hershey Creamery Company ("Hershey") recently pleaded guilty to a felony for its storage and use of anhydrous ammonia as part of the refrigeration operations at two facilities. Notably, this case did not arise out of an accident or release, but instead involved only "paperwork" violations involving a commonly-used refrigerant. This case may signal two important trends: the use of OSHA inspections as a mechanism for identifying violators of environmental laws; and an increased focus on RMP enforcement. By prosecuting Hershey, the government appears to be sending a message that RMP requirements apply broadly and have teeth.

LEGAL CONTEXT OF HERSHEY CASE

RMP requirements originated in the 1990 Amendments to the Clean Air Act and were designed to minimize risks associated with accidental releases of certain regulated toxic substances. 42 U.S.C. § 7412(r)(7). Facilities that exceed a threshold quantity of certain regulated substances must develop and implement an RMP that addresses a variety of topics, including worker notification, procedures for handling an accidental release and coordination with local emergency agencies, assessments of risks to neighboring communities, and periodic audits. RMP requirements are typically included in a facility's Title V operating permit, which requires an annual certification of compliance with all permit terms.

The RMP program was modeled in large part on the Process Safety Management ("PSM") regulations, which were promulgated by the Occupational Safety and Health Administration ("OSHA") to address workplace safety issues. The PSM standard sets forth requirements for managing the use, storage, manufacturing, handling, and on-site movement of highly hazardous chemicals; compliance is enforced through regular audits. 29 C.F.R. § 1910.119.

FACTUAL BACKGROUND

Hershey, a family-owned Pennsylvania ice cream manufacturer and distributor, had a long and interwoven history of RMP and PSM compliance issues. The chronology of facts set forth in the government's criminal information is somewhat confusing, but it appears that in 2004, OSHA conducted an inspection of Hershey's facilities in connection with workplace safety issues and concluded that the company failed to comply with PSM requirements. This inspection resulted in a \$100,000 civil penalty. Less than one year later, in 2005, EPA conducted an RMP inspection at one of Hershey's facilities, presumably for similar issues. The inspection allegedly revealed that Hershey twice certified compliance with RMP requirements in its annual Title V compliance certification, despite the fact that at least two consultants had advised the company that the RMP program was entirely deficient. In addition, Hershey was allegedly unresponsive to two follow-up written information requests from EPA.

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In 2006, OSHA inspected the facility again, and assessed another citation for PSM violations and a \$2,045 fine. Merely five months later, EPA then issued another order under the CAA, requiring Hershey to develop and implement RMPs for both facilities. Hershey took steps to comply with the CAA compliance order, and in April 2007, EPA advised the company that the program was in compliance. Notwithstanding EPA's finding, however, the following year, the United States Attorney's Office for the Middle District of Pennsylvania filed criminal charges against Hershey for the past violations. On or about October 31, 2008, Hershey pleaded guilty to a knowing violation of Section 112(r)(7) for failure to develop and implement an RMP, and agreed to pay a \$100,000 fine. The company will serve one year's probation.

THE LINK BETWEEN RMP ENFORCEMENT AND OSHA INSPECTIONS

The prosecution of Hershey follows a multi-agency initiative to target and prosecute worker safety related violations. In 2005, the Environmental Crimes Section of the Department of Justice, OSHA, and EPA joined forces to announce the "Worker Safety Initiative" ("WSI"). The WSI forged new alliances between OSHA compliance officers, criminal investigators for the EPA and FBI, and prosecutors from DOJ and the United States Attorney's Offices. As a result of the initiative, OSHA inspectors received training on how to identify certain environmental violations. The initiative also effectively expanded the jurisdiction of OSHA inspectors and increased the likelihood that worker safety violations would be prosecuted criminally. Under the OSH Act, a willful violation—even one causing death to an employee—is only punishable by misdemeanor penalties, whereas violations of certain environmental laws are punishable by felony penalties including jail time. *See e.g.*, 29 U.S.C. § 666(e); 42 U.S.C. § 7413(c)(1).

Although not identified as such, the Hershey case appears to be a direct product of the WSI. The information obtained by OSHA inspectors in the course of the 2004 PSM compliance inspection and the subsequent administrative subpoena likely triggered EPA's RMP investigation one year later. The decision to charge the company with a felony CAA violation was also likely the result of the WSI. It is reasonable to expect that the government will continue to use environmental statutes with their higher penalties and felony provisions, as well as the federal criminal code, to prosecute cases which would probably not be brought under the criminal provisions of the OSH Act.

BROADER APPLICATION OF RMP REQUIREMENTS

The decision to charge Hershey criminally for violation of the RMP requirements may also illustrate a strategy by the government to use environmental laws more aggressively and proactively to address worker safety issues. Since its inception, a number of high-profile prosecutions have developed out of the WSI. Criminal charges, often brought under the endangerment provisions of the environmental protection statutes, have previously been filed against companies such as BP Products North America, McWane, Inc., Motiva Enterprises, LLC, and W.R. Grace & Co. Each of those cases, however, involved industrial accidents in which workers died or suffered serious injuries. For example, following the 2005 catastrophic explosion at BP's Texas City, Texas refinery that killed 15 contract employees and injured more than 170 others, OSHA assessed a fine of \$21 million, but brought no criminal charges. Under the Clean Air Act, however, BP agreed to pay a criminal fine of \$50 million and to serve a three-year probation period for a felony conviction under Section 112(r)(7) of the CAA.

The Hershey prosecution represents a significant change in enforcement focus. It involved no accidental release and no worker injuries. Rather, the only violations alleged were "paperwork" ones: the failure to develop and implement an RMP over a period of years,

while falsely certifying compliance with RMP requirements. This less dramatic case may be an indicator of the government's current preference to take a more proactive stance before a catastrophe occurs.

WORKPLACE SAFETY ISSUES ARE ALSO BEING ADDRESSED BY CONGRESS

In April 2007, The Protecting America's Workers Act, H.R. 2049, a bill which seeks to amend the OSH Act and expand its coverage, including increased civil and criminal penalties for certain violations, was introduced and referred to the House Committee on Education and Labor. In April 2008, the Workforce Protections Subcommittee of the House Education and Labor Committee conducted a hearing on the legislation, including OSHA's lack of adequate enforcement and oversight of workplace safety and health conditions with large, multiple-facility corporations. David H. Uhlmann, the former Chief of the Environmental Crimes Section of the Department of Justice testified before the subcommittee on April 29, 2008, and advocated for strengthening the criminal enforcement provisions of the Act. There has been no further action as of this date.

If you would like further information or to discuss the implications of this decision in more detail, please contact Thomas M. DiBiagio (202-789-6049) or Nadira Clarke (202-789-6069) regarding the criminal issues; David Friedland (202-789-6047) or Laura McAfee (410-230-1330) regarding the Clean Air Act issues; or Maddie Kadas (512-391-8010) or Mark Duvall (202-789-6090) regarding the Occupational, Safety and Health Act issues.

Office Locations:

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