



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

August 9, 2023

Edward (Ted) Boling
Jeffrey L. Hunter
Counsel for the Port of Portland
Perkins Coie
700 13th Street, NW
Suite 800
Washington, D.C. 20005

Reference No. 23-0025

Dear Messrs. Boling and Hunter:

This letter is in response to your January 19, 2023, letter requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) applicable to the definition of a “hazardous materials (hazmat) employer” as it relates to the Port of Portland. Specifically, your company represents the Port of Portland (i.e., the Port) to ensure the Port complies with any regulatory requirements of the HMR and any applicable requirements of 33 CFR § 126.27.

In your letter, you provide background information related to Terminal 6—a designated waterfront facility located within the Port—which houses ship berths and an intermodal rail and truck yard. Additionally, automobiles, containers, and bulk cargo are managed at Terminal 6, and therefore, the Port holds a general permit as required by 33 CFR Part 126. At the terminal in question, members of the International Longshore and Warehouse Union (ILWU)—who are employed by various stevedores and carriers to unload and load cargo—perform hazmat functions. The Port does not hire, direct, supervise, or otherwise exercise control over the members of the ILWU handling cargo—including hazmat cargo—at Terminal 6. Also, it is the understanding of the Port that members of the ILWU are dispatched or assigned to a port or pier by the Pacific Maritime Association (PMA) and all stevedores in the local area are members of the PMA and are obligated to hire and or use ILWU members under a West Coast Collective Bargaining Agreement for cargo handling procedures that occur at marine facilities. You state that the Port does not have any employees designated as a “hazmat employee” and thus it is your understanding the Port would not be required to train and maintain training records as required in Part 172, Subpart H (Training) of the 49 CFR even though hazmat cargo handling is occurring at Terminal 6. You describe that the Port acts as a landlord for leased portions—which includes Terminal 6—and, other than providing coordination between vessels, the stevedores, and the railroad companies for the public portions of the facility, the Port has no direct involvement in the day-to-day operations, such as hazmat cargo handling, at Terminal 6.

In July 2020, the Port submitted a request for interpretation¹ to the Pipeline and Hazardous Materials Safety Administration (PHMSA) seeking clarification of the term “hazmat employer” as defined in § 171.8 and clarification of who is responsible for training and recordkeeping requirements as required in Part 172, Subpart H (Training). In February 2021, PHMSA issued a response in which we said that it was determined—*based on information provided in the July 2020 request for interpretation*—that the Port was not responsible for training and recordkeeping requirements under the HMR. Moreover, it was determined that the Port has no employee designated as a “hazmat employee” nor does any Port employee engage in the loading or unloading of hazmat cargo, packing hazmat in containers, preparing labels or shipping papers for hazmat, or any other hazmat pre-transportation functions described under the HMR. Therefore, you seek to confirm that based on the previously issued letter of interpretation (Ref. No. 20-0055), the Port is not designated as a hazmat employer and is not required to train and maintain training records for members of the ILWU or any member assigned to the port or pier by the PMA.

To the extent that the Port has no direct employment of persons performing hazmat functions, in this case the ILWU members or others assigned by the PMA, then the Port would not be considered a hazmat employer, for purposes of the HMR. In accordance with the HMR, any person who performs a hazmat function subject to the HMR is considered a hazmat employee and is responsible for complying with the requirements of the HMR applicable to performance of that function. As such, a hazmat employer is required to train and maintain training records of all hazmat employees. Based on the information provided in your letter, the ILWU, and the PMA—which are parties external to the Port who provide hazmat cargo handling services—would be responsible for complying with the training and recordkeeping requirements of § 172.704 as hazmat employers. Please note that our response is limited to the scope of the HMR, and the specific circumstances identified in your letter. Additionally, this response does not relieve the Port from the applicability of the HMR for other hazmat functions it may perform, or functions performed in association with other federal requirements, such as the Port’s obligations under 33 CFR Part 126. These include, but are not limited to, those responsibilities and requirements the Port must observe and fulfill as the holder of a general permit for handling dangerous cargo under 33 CFR § 126.27.

Finally, it may be beneficial for you and your clients to seek out the General Counsel of the United States Coast Guard (USCG) for additional or follow-up meetings regarding any related issues.

I hope this information is helpful. Please contact us if we can be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dirk Der Kinderen", is positioned above the typed name.

Dirk Der Kinderen
Chief, Standards Development Branch
Standards and Rulemaking Division

¹ [20-0055](#)



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January 19, 2023

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VIA EMAIL AND OVERNIGHT DELIVERY

Jonathan Meyer, General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW
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Washington, DC 20528-0485

John E. Putnam, General Counsel
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

**Re: Port of Portland
Application of the Hazardous Materials Regulations (49 C.F.R. Part 172) through
the General Permit Requirements under 33 C.F.R. Part 126**

Messrs: Meyer and Putnam:

We are writing on behalf of the Port of Portland ("Port") in response to an enforcement action that was initiated by the United States Coast Guard ("USCG") based on a misinterpretation of Department of Transportation regulations. Having exhausted our appeal rights, we seek your assistance in finding a resolution so that the Port can comply with its applicable regulatory obligations under the Hazardous Material Regulations ("HMR") contained in 49 C.F.R. Parts 171 - 180 and its obligations under the General Permit issued under 33 C.F.R. §126.27. The Port requests a meeting with General Counsel's Offices of DHS and DOT to discuss this matter and hopefully reach the conclusion that the provisions of 33 C.F.R. Part 126 do not expand the HMR so as to obligate the holder of a General Permit to assume the obligations of a "Hazmat Employer" with respect to every individual handling hazardous material at a designated waterfront facility.

Background

Established in 1891 by the Oregon Legislature, the Port today owns three airports - Portland International (PDX), along with two general aviation airports, Hillsboro and Troutdale - three marine terminals and six business parks. The Port's mission is to build shared prosperity for the region through travel, trade and economic development.

At issue here is Terminal 6. Terminal 6 is a multipurpose, 419-acre facility along the Columbia River in Portland, Oregon. The terminal features 5 ship berths and an intermodal rail and truck yard. Automobiles, containers and breakbulk cargoes are handled at Terminal 6, and it is the only active container terminal in the State of Oregon. Terminal 6 is a designated waterfront facility for purposes of 33 C.F.R. Part 126, and the Port is the holder of the General Permit.

This USCG enforcement action, initiated in May of 2020, concerns the alleged failure to ensure that members of the International Longshore and Warehouse Union ("ILWU"), who are directly employed by the various stevedores and carriers to unload and load cargo, had received the proper training under 49 C.F.R. Part 172 and allegations that the Port was not maintaining the appropriate training records for those members.¹ On July 7, 2020, the US DOT Federal Railroad Administration ("FRA") issued a Notice of Probable Violation ("NOPV") alleging similar violations.

The Port does not hire, direct, supervise or otherwise exercise control over the individual ILWU members handling cargo at Terminal 6. The ILWU members are dispatched by the Pacific Maritime Association ("PMA") and all of the stevedores in the Portland market (and nearly all ocean carriers operating in the container trade) are members of the PMA and are obligated to hire/use ILWU members under the West Coast Collective Bargaining Agreement for cargo handling work that occurs at marine facilities. The Port is not a member of the PMA and does not employ, direct, or control the ILWU longshoreman at Terminal 6 that handle hazardous cargo. The Port itself does not have any "hazmat employees" that it would otherwise be required to train and maintain training records for under the HMR. Other than acting as a landlord for the leased portions and coordinating between vessels, the stevedores and the railroad companies for the public portions of the facility, the Port has no direct involvement in the day-to-day movement of cargo at Terminal 6.

On July 31, 2020, the Port submitted a letter to the US DOT Pipeline Hazardous Material Safety Administration ("PHMSA") requesting clarification as to who is the "Hazmat Employer" responsible for training and recordkeeping of the stevedore company employees and members of the ILWU. On February 19, 2021, PHMSA issued its regulatory determination concluding that the "Hazmat Employers" responsible for complying with the training and recordkeeping requirements under 49 C.F.R. § 172.704 are the **third-party stevedores and contractors** providing cargo handling services at Terminal 6, who are the employers of the ILWU members

¹ Attached is the USCG's CG-385F issued to the Port on May 15, 2020 (Exhibit A). On February 25, 2021, the USCG re-issued the CG-385F referencing 33 C.F.R. §§ 126.3 and 126.27 as the basis for the alleged deficiency (Exhibit B).

that handle containers with hazardous materials, **not the Port**.² Following PHMSA's interpretation, the FRA terminated its Notice of Probable Violation.³

However, the USCG did not terminate its enforcement action following PHMSA's interpretation of DOT rules. The Port appealed the USCG's enforcement action through the various mechanisms authorized under 33 C.F.R. § 160.7 submitting a final appeal to the Assistant Commandant for Prevention. On May 4, 2022, the USCG issued its final decision.⁴ Notwithstanding PHMSA's interpretation and FRA's withdrawal of its enforcement action, the USCG found that through the General Permit under 33 C.F.R. §126.27 "the Port is required to ensure compliance with the Hazardous Material Regulations (HMR) contained in 49 C.F.R. Parts 171 - 180, regardless of who is directly handling the cargo."

During the Port's appeal, the USCG Captain of the Port-Columbia River issued an October 13, 2021 letter informing the Port that the training plan and materials received by Harbor Industrial Services Corporation ("Harbor"), which is the primary stevedore providing cargo handling services at Terminal 6, satisfy the applicable training requirements of the HMR and the deficiencies noted in the CG-835F had been resolved.⁵ On October 28, 2021, the USCG completed an annual inspection of the Port's terminal facilities and reviewed the training records maintained by Harbor. During the inspection, the USCG noted certain incomplete training records and found the training records were not maintained in a usable format. At a meeting on November 16, 2021, Harbor presented the USCG with its plan to address the deficiencies noted during the inspection. At the conclusion of the meeting, the USCG presented the Port with a new CG-835F.⁶ On December 16, 2021, Harbor, through its counsel, provided an update to the USCG regarding its training program and additional training records to address the deficiencies noted in the new CG-835F. On January 4, 2022, the USCG responded directly to Harbor's counsel indicating that the additional training records had been reviewed and the deficiencies cleared.⁷

While the Port appreciates that the CG-835Fs have been resolved, the USCG maintains that it could issue additional enforcement actions against the Port for any infraction of the HMR regulations by any stevedore, cargo carrier or any ILWU member despite the fact that none of the employees of those entities are directly employed by the Port and the Port has no authority to hire, direct, control, supervise or train those employees. With all due respect to the USCG, it remains the Port's position that the USCG's interpretation of the applicability of the HMR to the

² Attached is PHMSA's February 19, 2021 regulatory determination (Exhibit C).

³ Attached is the letter from FRA terminating the NOPV (Exhibit D).

⁴ Attached is the USCG's May 4, 2022 final decision (Exhibit E).

⁵ Attached is USCG's October 13, 2021 letter (Exhibit F).

⁶ Attached is the new CG-835F presented to the Port on November 16, 2021 (Exhibit G).

⁷ Attached is the USCG's January 4, 2022 communication to Harbor's counsel (Exhibit H).

Port is not supported by either the HMR or the text of 33 C.F.R. Part 126. It is not reasonably possible or practical for the Port to ensure that all third-party employees have received the appropriate training under the HMR and maintain training records for those employees and the General Permit under 33 C.F.R. Part 126 does not impose those requirements on the Port or make the Port strictly liable for a third-party's compliance with the HMR.

Following issuance of the USCG's final determination, the Port reached out to the USCG to engage in additional discussions. The USCG declined to participate in further discussions regarding this matter. The Port also submitted a Freedom of Information Request Act ("FOIA") request on **June 17, 2022** asking for similar enforcement actions issued by the USCG against other US ports. In response to an initial email from the USCG asserting the request was "too broad in scope or did not specifically identify the records which you are seeking," the FOIA request was reduced to only request similar enforcement actions against West Coast ports where the same stevedores and ILWU members may unload or load hazardous cargo. Despite repeated request to the USCG FOIA officer regarding the status, the USCG has never provided any documents in response to the FOIA request, not even the CG-835Fs issued to the Port.

Discussion

PHMSA's February 19, 2021 Interpretation

PHMSA is the agency charged by Congress with developing and administering the HMR,⁸ and is the authoritative agency regarding whether the Port, as the governmental entity who owns the port facility, is the "Hazmat Employer" responsible for training all third-party workers, including vessel employees, who load, unload and handle cargo containers. PHMSA's February 19, 2021 regulatory determination concludes that the **third-party stevedores and contractors** providing cargo handling services at Terminal 6 and who are the employers, both in fact and at law, of the ILWU members that handle cargo at Terminal 6, and that from time-to-time handle containers with hazardous materials are the "Hazmat Employers" responsible for complying with the training and recordkeeping requirements under 49 C.F.R. § 172.704, **not the Port**.

The underlying basis for the original CG-835F was the USCG's interpretation of PHMSA's regulations that the Port is the "Hazmat Employer" of the ILWU labor who handle the containers at Terminal 6. Regardless of the citation adjustment in the "revised" CG-835F and the reference to 33 C.F.R. §§ 126.3 and 126.27 in the new CG-835F, the underlying alleged violations of the training and recordkeeping requirements under 49 C.F.R. § 172.704 remain the same because there are no separate or distinct hazardous material training or record retention requirements

⁸ And PHMSA is therefore the agency, with respect to the HMR, entitled to *Auer* deference. See, e.g., *Kisor v. Wilkie*, 139 S.Ct. 2400, 2412-2413 (2019) ("...the agency that promulgate[s] a rule is in the better position to reconstruct its original meaning.") (internal quotation marks and citations omitted).

described, or even referenced, anywhere in 33 C.F.R. Part 126. As PHMSA has determined that the Port is not the “Hazardous Materials Employer” of the ILWU labor, the Port should not be held responsible for their training and related recordkeeping requirements under the HMR. As such, there is no legal basis for the CG-835Fs to have been issued to the Port. The FRA, which issued a NOPV to the Port alleging the same training and related recordkeeping deficiencies, withdrew its NOPV in apparent deference to PHMSA’s interpretation. The USCG should likewise accept PHMSA’s interpretation of PHMSA’s own regulations.

General Permit

Following PHMSA’s interpretation that the Port is **not** the “Hazardous Materials Employer” under the HMR, the USCG then tried to hold the Port responsible under 33 C.F.R. § 126.27.⁹ It appears the USCG relied on PHMSA’s statement in its interpretation that “the Port may be held responsible for non-compliance with HMR as a holder of the general permit under 33 C.F.R. § 126.27.” PHMSA did not take the position that the Port was responsible but rather that the Port “**may** be responsible” as the holder of the General Permit under 33 C.F.R. § 126.27, in apparent deference to USCG. USCG’s reliance on the language to determine the Port is the “responsible party” may have merit if 33 C.F.R. § 126.27 actually included a reference to the HMR training and recordkeeping obligations and imposed them on the holder of the General Permit, but it does neither.

33 C.F.R. Part 126 does not make the Port strictly liable to ensure the third-party contractors comply with the HMR. 33 C.F.R. § 126.27 does not itself independently create training or record retention requirements on the holder of the General Permit, and in fact any reference to “training” or “record retention” are conspicuously absent from both its text and the text of 33 C.F.R. § 126.15 describing the General Permit conditions.¹⁰ 33 C.F.R. Part 126 does **not** even incorporate the HMR by reference or otherwise state or require that owners and operators of waterfront facilities comply with the HMR training requirements with respect to their own employees, much less place responsibility on the holder of a General Permit for the training and record retention requirements under 49 C.F.R. §§ 172.702 and 704 with respect to all individuals who may handle hazardous materials and are **not otherwise** the owner’s “hazardous materials employees” under the HMR. In addition to the employees of stevedores, the broad interpretation adopted by

⁹ The original CG-835F was re-issued on February 25, 2021 (six days after PHMSA’s interpretation) referencing 33 C.F.R. § 126.27 as the regulatory citation supporting the alleged violations.

¹⁰ The conditions under 33 C.F.R. § 126.15 generally address access and safety including lighting, fire-fighting, security, material handling equipment, heating and electrical systems. The regulation references various NFPA chapters, but does not reference or otherwise expressly incorporate the HMR. The only references to the HMR in all of 33 C.F.R. Part 126 is found in 33 C.F.R. § 126.3 wherein the regulation incorporates certain hazardous materials identified under the HMR into the definition of “dangerous cargo” and 33 C.F.R. § 126.27 describing and incorporating the packaging, marking and labelling requirements under the HMR with respect dangerous cargo stored at designated waterfront facilities.

USCG would also require the owners and operators of waterfront facilities to ensure that all vessel and trucking line employees have received the proper training and maintain training records for those employees. Such an interpretation, beyond lacking any textual basis, is directly contrary to the HMR. *See* 49 C.F.R. § 176.13 (imposing the training and recordkeeping obligations on the vessel carrier which the USCG may enforce pursuant to 49 C.F.R. § 176.15).

The General Permit does not, by its terms, purport to impose strict liability upon the governmental entity who owns the designated waterfront facility to ensure that all third-parties who perform work or may perform work at the port facility have received the appropriate training under the HMR or otherwise require the governmental entity to independently maintain training records for all such persons. The Port is not aware that the USCG has ever interpreted the definitions set forth in 33 C.F.R. § 126.3 or conditions enumerated § 126.27 to impose these substantial and onerous requirements on the owner of a designated facility by implication and solely on the basis of their status as the General Permit holder. Moreover, there is little policy justification for doing so where it is undisputed that the actual employers of such individuals—including vessel operators, trucking lines, and stevedores—are already independently obligated to comply with the HMR and within the scope of USCG’s enforcement authority with respect to their activities on waterfront facilities.

Conclusion

The fact that the Port offers terminal services that are provided by third-party independent contractors does not make the Port the “Hazmat Employer” of the stevedore’s employees and all ILWU members who perform cargo handling services. There is no legal basis or policy justification for the USCG to attempt to hold the Port responsible under either the HMR or the General Permit for the training and recordkeeping requirements under the HMR for the ILWU members that handle cargo at Terminal 6.

The Port appreciates your review of this information and an opportunity to discuss a pathway towards resolution. As the only container terminal in Oregon, restricting the shipping of only non-hazardous materials through Terminal 6 will significantly impact operations, the Portland and regional economy as well as potentially resulting in the loss of jobs. The Port remains committed to working with the USCG to see that appropriate steps are taken by the stevedores and the carriers that employ the ILWU members to ensure the ILWU members receive the appropriate training under HMR and the records are properly maintained. However, the Port cannot be in a position that it is strictly liable for all infractions of the HMR by any party that uses Terminal 6.

Jonathan Meyer, General Counsel, US DHS
John E. Putnam, General Counsel, US DOT
January 19, 2023
Page 7

We look forward to discussing this matter with you. Please reach out to me at the number above or Edward (Ted) Boling at (202) 661-5872 to arrange a meeting or if you have any questions.

Sincerely,



Edward (Ted) Boling/Jeffrey L. Hunter
Counsel for the Port of Portland

cc: Geoff Owen, Director of Marine Operation
David Ashton, Assistant General Counsel, Port of Portland\

Enclosures: Exhibit A - CG-385F issued to the Port on May 15, 2020
Exhibit B - CG-385F re-issued to the Port on February 25, 2021
Exhibit C - PHMSA's February 19, 2021 regulatory determination
Exhibit D - Letter from FRA terminating the NOPV
Exhibit E - USCG's May 4, 2022 final decision
Exhibit F - USCG's October 13, 2021 communication to the Port
Exhibit G - CG-835F issued to the Port on November 16, 2021
Exhibit H - USCG's January 4, 2022 communication

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FACILITY INSPECTION REQUIREMENTS

RIGHTS OF APPEAL

33 Code of Federal Regulations Subpart 101.420; 127.015; 154.1075; 160.7

Any person directly affected by a decision, action, order, or direction of a COTP may request reconsideration by the COTP. Any person not satisfied with the COTP's decision following the request for reconsideration may make a formal appeal. Appeal procedures vary by Subpart and general provisions are outlined below. Specific procedures for each Subpart can be found through <https://www.ecfr.gov/>, and should be consulted prior to filing an appeal.

33 CFR 101.420: Any person directly affected by a decision or action taken by a COTP under this subchapter, may appeal that action or decision to the cognizant District Commander. Any person directly affected by a decision or action taken by a District Commander may appeal that decision or action to the Commandant (CG-5P).

33 CFR 127.015: Any person not satisfied with a ruling by the COTP may appeal the ruling to the District Commander of the district in which the action was taken. Any person not satisfied with the ruling of the District Commander may appeal that ruling in writing to the Commandant (CG-5P).

33 CFR 154.1075: Within 10 days of the COTP's decision on a request for reconsideration, the facility owner or operator may appeal the decision of the COTP to the District Commander. Within 30 days of the District Commander's decision, the facility owner or operator may formally appeal the decision of the District Commander to Commandant (CG-MER) via the District Commander.

33 CFR 160.7: Any person directly affected by an order or direction issued by, or on behalf of, a Captain of the Port may appeal to the District Commander through the Captain of the Port. Any person directly affected by an order or direction issued by, or on behalf of, a District Commander, or who receives an unfavorable ruling on an appeal may appeal to the Area Commander through the District Commander. Any person who receives an unfavorable ruling on an appeal taken by the Area Commander may appeal to the Commandant (CG-5P).

In all instances action by Commandant is final agency action. Failure to submit a formal appeal in accordance with procedures and time limits in the applicable regulatory cite results in the decision, action, order or direction becoming final agency action.

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FACILITY INSPECTION REQUIREMENTS

RIGHTS OF APPEAL

33 Code of Federal Regulations Subpart 101.420; 127.015; 154.1075; 160.7

Any person directly affected by a decision, action, order, or direction of a COTP may request reconsideration by the COTP. Any person not satisfied with the COTP's decision following the request for reconsideration may make a formal appeal. Appeal procedures vary by Subpart and general provisions are outlined below. Specific procedures for each Subpart can be found through <https://www.ecfr.gov/>, and should be consulted prior to filing an appeal.

33 CFR 101.420: Any person directly affected by a decision or action taken by a COTP under this subchapter, may appeal that action or decision to the cognizant District Commander. Any person directly affected by a decision or action taken by a District Commander may appeal that decision or action to the Commandant (CG-5P).

33 CFR 127.015: Any person not satisfied with a ruling by the COTP may appeal the ruling to the District Commander of the district in which the action was taken. Any person not satisfied with the ruling of the District Commander may appeal that ruling in writing to the Commandant (CG-5P).

33 CFR 154.1075: Within 10 days of the COTP's decision on a request for reconsideration, the facility owner or operator may appeal the decision of the COTP to the District Commander. Within 30 days of the District Commander's decision, the facility owner or operator may formally appeal the decision of the District Commander to Commandant (CG-MER) via the District Commander.

33 CFR 160.7: Any person directly affected by an order or direction issued by, or on behalf of, a Captain of the Port may appeal to the District Commander through the Captain of the Port. Any person directly affected by an order or direction issued by, or on behalf of, a District Commander, or who receives an unfavorable ruling on an appeal may appeal to the Area Commander through the District Commander. Any person who receives an unfavorable ruling on an appeal taken by the Area Commander may appeal to the Commandant (CG-5P).

In all instances action by Commandant is final agency action. Failure to submit a formal appeal in accordance with procedures and time limits in the applicable regulatory cite results in the decision, action, order or direction becoming final agency action.

EXHIBIT B

**Pipeline and Hazardous
Materials Safety
Administration**

February 19, 2021

Geoff Owen
Director, Marine Operations
Port of Portland
7200 NE Airport Way
Portland, OR 97208

Reference No. 20-0055

Dear Mr. Owen:

This letter is in response to your July 31, 2020 request for clarification regarding the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) applicable to the definition of the “hazmat employer” at the Port of Portland (“the Port”). In your letter, you reference ongoing discussions between the Port, the state of Oregon, and federal agencies regarding the Port’s responsibility for training and recordkeeping of personnel that load and unload hazardous materials (hazmat) cargoes.

In your letter, you seek clarification as to who is the “hazmat employer” responsible for training and recordkeeping for those who load and unload hazmat cargoes at Terminal 6. According to the information you provided, the Port contracts with third parties for maintenance of the cranes, cargo handling equipment, and the provision of loading and unloading services at Terminal 6 of the Port facility. Vessel and rail carriers may also contract with the Port and arrange for these third parties to provide cargo handling services. In such cases, the third parties act on behalf of the carriers to perform functions that are subject to the HMR. You also indicated that vessel and rail carriers can work (contract) directly with the third parties providing cargo handling services, contract with a different third party (e.g., a stevedore) of their choosing, enter a collective bargaining agreement with a labor union representing dock workers, and/or employ labor directly for cargo handling services. You stated that no Port employees are engaged in the loading or unloading of hazmat cargoes, packing hazmat in containers, preparing labels or shipping papers or any other pre-transportation functions described under the HMR. Additionally, you explained that the Port does not engage in the direct selection, hiring, supervising, or directing of personnel handling hazmat.

Please note that our response below is limited to the scope of the HMR and the specific circumstances identified in your letter. Additionally, this response does not relieve the Port from the applicability of the HMR for other hazmat functions it may perform or functions performed in association with other federal requirements, such as the Port’s obligations under 33 CFR Part 126. These include, but are not limited to, those responsibilities and requirements

EXHIBIT C

the Port must observe and fulfill as the holder of a general permit for handling dangerous cargo under 33 CFR § 126.27.

In accordance with the HMR, any person who performs a hazmat function subject to the HMR is responsible for complying with the requirements of the HMR applicable to performance of that function. Based on the information provided in your letter, third parties providing hazmat cargo handling services are responsible for complying with the training and recordkeeping requirements of § 172.704 as "hazmat employers." It is noted, however, that the Port may be held responsible for non-compliance with the HMR at its facilities as a holder of the general permit under 33 CFR § 126.27. The degree of regulatory liability is determined on a case-by-case basis, and is dependent on the facts of the specific situation.

I hope this information is helpful. Please contact us if we can be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dirk Der Kinderen", is positioned above the typed name.

Dirk Der Kinderen
Chief, Standards Development Branch
Standards and Rulemaking Division



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE.
Washington, D.C. 20590

John Akre
Port of Portland
7200 NE Airport Way 97218

Care of Jeffrey Hunter
Perkins Coie LLP
1120 N.W. Couch Street Tenth Floor
Portland, OR 97209-4128

In Response To: Request to Confirm the Status of Case XPOP 2020-1(HMT)

Dear Mr. Akre:

I can confirm that the Federal Railroad Administration (FRA) has declined further enforcement action in the case of XPOP 2020-1(HMT), based on personal knowledge and a review of FRA records. Please direct any questions me at jeffrey.frank@dot.gov, or (202) 493-8957.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey L. Frank".

Jeffrey Frank
Attorney, Federal Railroad Administration

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2703 Martin Luther King Jr., Ave. S.E.
STOP 7501
Washington, DC 20593-7501
Staff Symbol: CG-FAC
Phone: (202) 372-1122
Fax: (202) 372-8353

16600
May 4, 2022

Perkins Coie LLP
Attn: Jeffrey L. Hunter
Counsel for Port of Portland
1120 NW Couch Street, 10th Floor
Portland, OR 97209-4128

Dear Mr. Hunter:

This letter is in response to your correspondence dated November 24, 2021, and additional information supplied, appealing the decision of Commander, U.S. Coast Guard Pacific Area dated September 29, 2021. This decision determined that the Port of Portland ("Port") is responsible for compliance with Title 49 Code of Federal Regulations (CFR), as it relates to maintaining your General Permit for Handling Dangerous Cargo in accordance with 33 CFR Part 126. After careful consideration of the materials you submitted, along with a review of the applicable law, regulations, and policy, I uphold the decision of the Commander, U.S. Coast Guard Pacific Area, and deny your appeal.

The Port is the owner of Terminal 6 and facilitates the movement of goods through the terminal as evidenced by its Marine Tariff System, through which the Port collects fees and contracts with vessel owners and operators in order to import and export dangerous cargoes through its terminal. Terminal 6 is also a "designated waterfront facility" in accordance with 33 C.F.R. § 126.13, and per 33 C.F.R. § 126.3, the Port is the "facility operator." As a "designated waterfront facility," the Port is designated for the "handling, storing, loading, and discharging of any hazardous material(s) subject to the Dangerous Cargoes Regulations" found in 49 CFR Parts 171-180, including the training requirements specified in 49 CFR Part 172.

Dangerous cargo is defined, in relevant part, by 33 CFR § 126.3 as "all hazardous materials listed in 49 CFR parts 170 through 179." In order for a facility operator to move dangerous cargo through a designated waterfront facility, a general permit must be held in accordance with 33 CFR § 126.17. As the sole holder of the general permit issued by the Coast Guard under 33 CFR § 126.27, the Port is authorized to handle hazardous materials through Terminal 6. Without this general permit, the handling of dangerous goods would not be permitted through the terminal, and would have to be re-routed to other facilities that hold a general permit.

In your appeal, you state that the Port is not the HAZMAT employer because Port employees do not directly handle hazardous materials on Terminal 6. However, as the general permit holder of a designated waterfront facility, the Port is required to ensure compliance with the Hazardous Materials Regulations (HMR) contained in 49 CFR Parts 171-180, regardless of who is directly handling the cargo. Accordingly, the Port of Portland is responsible for providing proof of training and meeting the record keeping requirements in 49 CFR Part 172. This decision is in keeping with the Pipeline and Hazardous Materials Safety Administration's (PHMSA) February 19, 2021 letter, which explicitly provides that PHMSA's response "does not relieve the Port from the applicability of the HMR for . . . functions performed in association with other federal

EXHIBIT E

requirements, such as the Port's obligations under 33 CFR Part 126. These include, but are not limited to, those responsibilities and requirements the Port must observe and fulfill as the holder of a general permit for handling dangerous cargo under 33 CFR § 126.27."

Thank you for bringing your concerns to my attention. The Coast Guard remains focused on ensuring the safety and security of the Marine Transportation System while promoting maritime commerce. I encourage you to continue to work with Marine Safety Unit Portland and the Captain of the Port to identify and implement procedures that will best meet your needs while maintaining compliance with safety and security requirements.

This letter serves as final agency action pursuant to 33 CFR § 160.7(d). Future requests involving the review of this specific issue and regulatory applicability will not be considered. If you have any questions regarding this decision, please contact CDR Benjamin Mazyck at 202-372-1130 or by email at Benjamin.D.Mazyck@uscg.mil.

Sincerely,



N. A. VAUGHAN
Captain, Office of Port Facility Compliance
U. S. Coast Guard
By direction

Copy: Commander, Coast Guard Atlantic Area (Api)
Commander, Coast Guard Pacific Area (PAC-54)
Commander, Thirteenth Coast Guard District (dp)
Commander, Coast Guard Sector Columbia River
Commander, Marine Safety Unit Portland, Oregon

U.S. Department of
Homeland Security

United States
Coast Guard



Commander
United States Coast Guard
Sector Columbia River

2185 SE 12th Place
Warrenton, OR 97146-9693
Phone: (503) 861-6206
Fax: (503) 861-6360

16611

OCT 13 2021

Port of Portland
Attn: Mr. Geoff Owen
Director of Marine Operations
7200 NE Airport Way
Portland, Oregon 97218

Dear Mr. Owen:

My office has received the Port of Portland Terminal 6 Hazardous Materials Training Plan (Enclosure 1), provided by Ring Bender LLP on behalf of Harbor Industrial Services Corporation. Based on the information provided, my office is satisfied that the requirements have been met and therefore have cleared the deficiency related to the Terminal 6 Hazardous Materials Regulations (HMR) Training Program.

Based on the determination made in Enclosure 2, the Coast Guard will continue to hold the general permit holder, issued under 33 CFR § 126.27, responsible for compliance with all regulatory requirements. Since it is both common and acceptable for third parties to conduct training on behalf of the general permit holder, I encourage you to work closely with Harbor Industrial Services Corporation to ensure that the HMR Training Program is properly implemented and maintained.

Should you have any further questions concerning this notice, please contact Lieutenant Commander Sean Morrison at Sean.F.Morrison@uscg.mil or (503) 240-9333.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. Scott Jackson".

M. Scott. Jackson
Captain, U.S. Coast Guard
Captain of the Port
Sector Columbia River

Enclosures: (1) Port of Portland Terminal 6 Hazardous Materials Training Plan
(2) Commander, Coast Guard Pacific Area, letter 16611 dated 29 September 2021

EXHIBIT F

1. Date of Inspection 10/28/2021	2. COTP Zone/Unit MSU Portland, OR	3. MISLE Activity Number 7351513	4. FIN PDX20046
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5. Facility Name Port of Portland	6. Inspection Type Safety Exam 33 CFR 126
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[illegible]

Steven L Torres

Carr, Brian, MSTC

503-240-9333

Steven F. Lee

5/15/20

MSUPDXWWM@uscg.mil

~~EXHIBIT G~~

From: Carr, Brian C CPO USCG (USA) <Brian.C.Carr@uscg.mil>
Sent: Tuesday, January 04, 2022 10:51 AM
To: Christine L. Hein <CHEin@ringbenderlaw.com>
Cc: Kent Phillips <kphillips@marinetechserv.com>; Mike Fudurich <mfudurich@harborindustrial.com>; Orf, Nathan <Nathan.Orf@portofportland.com>; Torres, Steve <Steve.Torres@portofportland.com>; McCormack, Bill <Bill.McCormack@portofportland.com>
Subject: RE: Terminal 6 HMR Training - Harbor Industrial's Response to CG-835F

EXTERNAL EMAIL:

Good morning Christine,

Thank you for your follow up. Our office has reviewed the training records and cleared the deficiency from our database. If you have any questions or concerns, please feel free to contact our office. Have a great day.

Very Respectfully,

MSTC Brian Carr
USCG MSU Portland
WWM/ FAC
6767 N. Basin Ave.
Portland, OR 97217
(503) 240-9333

From: Christine L. Hein <CHEin@ringbenderlaw.com>
Sent: Thursday, December 16, 2021 2:43 PM
To: Carr, Brian C CPO USCG (USA) <Brian.C.Carr@uscg.mil>
Cc: Kent Phillips <kphillips@marinetechserv.com>; Mike Fudurich <mfudurich@harborindustrial.com>; Nathan Orf <nathan.orf@portofportland.com>; steve.torres@portofportland.com; bill.mccormack@portofportland.com
Subject: [Non-DoD Source] Terminal 6 HMR Training - Harbor Industrial's Response to CG-835F

Dear MSTC Carr-

Please see attached correspondence. Please keep this information confidential as it includes employee identification information.

Best regards,
Tina

EXHIBIT H

Christine L. Hein, Managing Partner

Ring Bender LLP

920 SW Sixth Avenue, Suite 600, Portland, OR 97204

Direct: (503) 964-6726

Cell: (503) 314-0958

COVID-19 Notice For the protection of our clients and team, our offices have taken measures to limit personal contact. Ring Bender remains available to assist you in your legal needs, as our team is working remotely. We are committed to continuing to provide outstanding service, and are available via phone calls, virtual meetings and emails, while curtailing in-person meetings as much as possible. The best way to reach me is by email or on my cell phone at the number above.