

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

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APR 01 2009

U.S. Chemical Safety
and Hazard Investigation Board
Attn: Mr. Christopher Warner
2175 K Street NW, Suite 400
Washington, DC 20037-1809

Dear Mr. Warner:

In your letter dated March 19, 2009, you requested Coast Guard assistance in identifying any potential sensitive security information (SSI) within a power point presentation prepared by the United States Chemical Safety and Hazard Investigation Board (CSB). CSB is conducting an independent investigation of an incident that occurred at Bayer CropScience (Bayer) Institute, West Virginia on August 28, 2008. Recently, Bayer asserted that most of the documents obtained by CSB during the investigation are, or may be, SSI. None of the documents were originally marked as SSI. As a federal employee with a need to have access to this material under 49 CFR § 1520.11 (b), all CSB employees would be covered persons under 49 CFR § 1520.7 and authorized access to any SSI material related to CSB's investigation. In accordance with 49 CFR § 1520.9 (a), SSI may not be disclosed to non-covered persons unless authorized in writing by the Coast Guard or the Transportation Security Administration (TSA). Following Bayer's assertion, CSB contacted the Coast Guard and requested assistance in explaining SSI determinations and potential impacts upon CSB's investigation. Coast Guard representatives met with CSB staff on February 26, 2009, at CSB's headquarters. Both agencies agreed to work together to protect SSI while at the same time preserve CSB's ability to fully conduct an independent investigation.

One of CSB's stated desires was to conduct a public meeting to discuss its preliminary findings without delay. During our phone conversation on March 5, 2009, we agreed on a course of action to allow the Coast Guard to review a draft presentation for the public meeting to be prepared by CSB. This would allow the Coast Guard to quickly review the material and bring to CSB's attention any potential SSI material. The Coast Guard and CSB would then work together to appropriately address any issues identified by verifying the status of the information and then either protect it from disclosure, specifically authorize disclosure or a determine that the material had lost its designation as SSI and did not require further protective measures.

On March 18, 2009, the Coast Guard received the draft presentation and began our review. The review revealed only two small areas of potential concern, a description of the time of day a chemical was transferred and the potential extent of planned discussion concerning the construction standards of the blast shield. After conferring with you during our phone conversation of March 20, 2009, CSB offered to remove the timing of the transfer from the slide as this did not materially impact any of the points CSB intended to make. The conversation also revealed that the planned discussion of the blast shield during the presentation did not reveal anything the Coast Guard would consider as SSI. The Coast Guard identified no material within the remainder of the proposed power point as SSI as it does not appear to fall within the categories listed in 49 CFR §1520.5 (b) nor constitute information detrimental to the security of transportation.

In an e-mail from you on March 12, 2009, you requested a determination as to the Coast Guard's jurisdiction over Bayer under the Marine Transportation Security Act (MTSA). Bayer's entire facility within the perimeter fence line is currently an MTSA regulated facility in accordance with 33 CFR Part 105. This facility is subject to 33 CFR Part 154 as it transfers cargo to vessels in accordance with Part 154. The requirements of 33 CFR Part 105 apply not only to the traditional marine transportation related portion of the facility regulated under Part 154, but extend to areas which are contiguous, adjacent and under common owner or operators and continue to the furthest security perimeter surrounding the facility. Enclosure (8) to Navigation and Vessel Inspection Circular No. 03-03 explains this in greater detail and has been included as an enclosure. Bayer maintains the outer most facility security perimeter for all of its tenants on the property. Bayer participates in the American Chemistry Council's Alternative Security Program (ASP) which was approved by the Commandant (CG-5). In accordance with this program Bayer also maintains a facility specific security plan annex to the ASP which is reviewed and approved by the local Coast Guard Captain of the Port.

In addition to MTSA regulations, the Coast Guard enforces pollution prevention and safety requirements related to cargo transfer between the docks and the first valve located within secondary containment. Safety and pollution prevention for the remainder of the facility would be covered by other agencies including the Environmental Protection Agency and the Occupational Safety and Health Administration.

Thank you for your continued cooperation and the opportunity to review your draft presentation. The Coast Guard looks forward to continuing to work with you to protect SSI and the independence of CSB's investigatory process. I propose that as we continue to work together that we establish an MOU between our agencies that formalizes this process. Please do not hesitate to contact me if we may be of further assistance.

Sincerely,



S. N. Gilreath

Commander, U. S. Coast Guard
Acting, Office of Maritime and International Law
By direction of the Commandant

Enclosure

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