

NATIONAL WEATHER SERVICE INSTRUCTION 10-2006

April 23, 2007

Operations and Services

Forensic Services, NWSPD 10-20

THE ACCIDENT INVESTIGATION/LITIGATION PROCESS

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Certified by: W/OS23 (K. Johnston)

Type of Issuance: Routine

SUMMARY OF REVISIONS: This directive supersedes NWS Instruction 10-2006, dated December 23, 2004. Changes include:

Minor grammatical corrections,

Added to 1.1.1 that the Forensics Services Manager (FSM) will provide NWS contact information to the NTSB.

//SIGNED//

April 9, 2007

Dennis H. McCarthy

Date

Director, Office of Climate, Water, and Weather Services

Table of Contents

Page

1. Accident Investigation Support and Procedures.....2

 1.1 National Transportation Safety Board On-the-Scene Accident Investigation.....2

 1.1.1 National Transportation Safety Board Investigation Liaison.....2

 1.1.2 National Weather Service Participation.....2

 1.2 Weather Documentation Support to the National Transportation Safety Board.....3

 1.3 National Transportation Safety Board Public Hearings.....3

 1.3.1 Designating Parties to the Investigation.....3

 1.3.2 NWS Spokesperson/Representative.....3

 1.3.3 Pre-hearing Conference.....3

 1.3.4 Privileged Status of Board’s Report.....3

 1.3.5 Witnesses.....4

 1.3.6 Counseling of Witnesses.....4

 1.3.7 Conduct of Hearings.....4

 1.4 National Transportation Safety Board Depositions.....4

 1.5 Marine Board of Investigation.....5

 1.5.1 Relationship to the National Transportation Safety Board5

 1.5.2 National Weather Service Spokesperson/Representative.....5

 1.6 Other Hearings.....5

2. Litigation Support and Procedures.....5

 2.1 Litigation Involving the United States Government.....5

 2.1.1 Depositions and Trials.....5

 2.1.2 Selection of Witnesses.....6

 2.1.3 Designation of Witnesses.....6

 2.1.4 Counseling of Witnesses.....6

 2.2 Civil Litigation/Handling of Subpoenas.....7

 2.3 Expenses and Reimbursement.....7

1. Accident Investigation Support and Procedures.

1.1 National Transportation Safety Board On-the-Scene Accident Investigation. The National Transportation Safety Board (NTSB) is responsible for investigation and determination of the probable cause of all civil aircraft accidents, certain highway and railroad accidents, pipeline accidents resulting in a fatality or substantial property damage, and certain major marine accidents.

1.1.1 NTSB Investigation Liaison. In circumstances where the NTSB, during the course of the field investigation, requires meteorological information or assistance from the National Weather Service (NWS), a member of the investigation team will contact the Forensic Services Manager (FSM) at NWS Headquarters (NWSH) or the appropriate NWS regional headquarters (RH). The FSM will ensure appropriate NWS contact information is provided to the NTSB.

1.1.2 National Weather Service Participation. Based on initial evaluation of weather factors and circumstances surrounding an accident/incident, an NWS official may participate in the field investigation at the request of the NTSB Investigator-in-Charge. Such requests will be directed through the local WFO or RH, as appropriate to the FSM, at NWSH. Depending on the

circumstances, the designated NWS representative can be from the Forensic Service Program at NWSH, the appropriate RH program leader, or an official from the nearest NWS office relative to the NTSB field investigation headquarters. The representative serves as a member of the NTSB Weather Group, and is also the NWS Coordinator/Spokesperson at the field investigation. As coordinator, they will act as liaison official for the NWS; help the NTSB Group Chairperson gather appropriate documents and interview NWS personnel and other witnesses; and participate in development of the written factual record of the on-scene investigation phase of the accident.

1.2 Weather Documentation Support to the NTSB. The Forensic Services Program will coordinate documentation support to the NTSB, as needed.

1.3 NTSB Public Hearings. The NTSB, at its discretion, may convene a public hearing in connection with its investigation of a transportation or pipeline accident for the purpose of creating a public record of the facts, conditions, and circumstances relating to the accident. Generally, these hearings are purely fact-revealing proceedings, with no formal pleadings or issues.

1.3.1 Designating Parties to the Investigation. The Hearing Officer may designate as parties to an investigation those persons or Government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident, or have knowledge and information pertinent to the accident. The Hearing Officer may also designate those who participated in the investigation and whose special knowledge and skills contribute to the development of pertinent evidence.

1.3.2 National Weather Service Spokesperson/Representative. The NWSH FSM or designee will be the NWS spokesperson/representative at the NTSB Public Hearing when the NWS is a designated party to the investigation.

1.3.3 Pre-hearing Conference. The Pre-hearing Conference is held prior to a public hearing, at the discretion of the Chairperson of the Board of Inquiry or Hearing Officer. Spokespersons representing the designated parties to the investigation participate in this conference. They are provided with the witness list, given copies of exhibit material to be introduced, if not previously furnished, and advised of the line of questioning to be developed at the Hearing. The Spokespersons, in turn, are given the opportunity to suggest the addition (or deletion) of witnesses and exhibits, and/or additional evidence or examination which, in their opinion, is pertinent to the hearing. However, the final decision on participation and content of the hearing rests with the Board.

1.3.4 Privileged Status of Board's Report. Section 701 (e) of the Federal Aviation Act reveals Congressional intent to exclude liability questions from the Board's accident investigation in providing that no part of the Board's report relating to any accident or the investigation thereof will be used in any suit or action for damages growing out of any matter mentioned in such report. However, because of a long history of court interpretation and decisions, the only portion of NTSB reports not admissible as evidence in litigation is the finding of probable cause. Furthermore, any testimony and factual information developed through the NTSB investigation may be used in subsequent litigation.

1.3.5 Witnesses. Any NWS employee requested or subpoenaed by the NTSB, or any investigative party to appear as a witness in any proceeding, will immediately refer the matter to the National Oceanic and Atmospheric Administration's (NOAA) Office of General Counsel with concurrent notice to the RH and the NWSH FSM. The designation of witnesses for Public Hearings depends on the circumstances of each case and will normally be limited to factual-type witnesses (see section 2.1.3). In some instances, the NTSB requests expert witnesses. The selection of NWS employees to participate as factual witnesses is usually decided by the Board, although advice or recommendations are sometimes sought from the spokesperson/representative. The witness list can be changed during the Pre-hearing Conference. The spokesperson will notify all prospective witnesses through the RH and will be the focal point for arranging for their participation at the hearing.

1.3.6 Counseling of Witnesses. All NWS employees designated as witnesses will receive counseling prior to providing testimony at an NTSB hearing. Pre-counseling sessions normally include a review of weather factors and services surrounding the accident in question, discussions related to procedures and general environment of the hearing, and other issues of concern.

Public Hearings are designed to be fact-finding. However, when a hearing is convened as a result of a major accident involving considerable loss of life or unusual public interest, it frequently receives maximum media exposure and the examination of witnesses may be intensive. It is the responsibility of the spokesperson/representative to ensure prospective NWS witnesses are prepared to testify. An attorney from the General Litigation Division, Department of Commerce (DOC) General Counsel's Office, and other appropriate representatives from NWSH or RH will assist in counseling the witness prior to the hearing.

1.3.7 Conduct of Hearings. A NTSB public hearing normally convenes within six (6) months of an accident and generally remains in session three (3) to four (4) days. Primary participants include: the Chairperson (an appointed member of the NTSB), the Hearing Officer, the Technical Panel, the designated Parties to the Investigation, and the witnesses. Most of the questions addressed to the witness will originate from a member of the NTSB Technical Panel. For NWS witnesses, the Technical Panel member posing the questions is the Chairperson of the Weather Group. The line of questioning initiated by the NTSB examiner is designed to bring out, in logical sequence, certain events and facts to be established in the record. The subject material should be familiar to the witness. Spokespersons or representatives of the designated parties to the investigation may ask the witness questions after the Technical Panel examination is completed.

Any question directed to a witness beyond the scope of the accident investigation, the area of examination agreed to at the pre-hearing conference, or the witness' ability to respond knowledgeably, will be brought to the attention of the Chairperson by the NWS spokesperson for a ruling as to materiality, relevancy, or competency.

1.4 National Transportation Safety Board Depositions. At times, the NTSB finds it more convenient to obtain statements by deposition rather than by personal appearance at an accident investigation hearing. In such cases, an employee's testimony is given under oath in the presence

of an NTSB Examiner and taken down by a court reporter for insertion into the official record of the accident investigation. The FSM is responsible for notification, proper counseling, and appearance arrangements of any NWS employee scheduled to be deposed under NTSB auspices. The witness must be provided a copy of his/her testimony for review and signature. No NWS employee will waive this right, or sign his/her testimony except on the advice of government counsel.

1.5 U.S. Coast Guard Marine Board of Investigation. The United States Coast Guard Marine Board of Investigation is empowered to summon witnesses; require the production of books, papers, documents, and other evidence; and to administer oaths. Parties in Interest to the investigation hearing may be represented by counsel who may call and cross-examine witnesses. A formal record of the proceedings is made. The Board may consist of one or several investigating officers, depending on the complexity of the case. The hearing is convened soon after the marine accident in question. Procedures for depositions, calling and counseling of witnesses, etc., are similar to those detailed in section 1.3.

1.5.1 Relationship to the National Transportation Safety Board. The NTSB may request the Marine Board to examine specific points, may actively participate in the proceedings of the Marine Board of Investigation, or may conduct a separate investigation.

1.5.2 NWS Spokesperson/Representative. The FSM or a NWS marine program manager designee will be the NWS spokesperson or representative at United States Coast Guard and NTSB proceedings when the NWS is a designated Party in Interest. An attorney from the General Litigation Division, DOC General Counsel's Office will provide assistance.

1.6 Other Hearings. Other Federal, state, or local government agencies may hold hearings relative to an accident. Procedures for such hearings cannot be covered in this directive. When requests for NWS participation are received, contact the FSM as soon as possible through the appropriate RH.

2. Litigation Support and Procedures.

2.1 Litigation Involving the United States Government. Any NWS office or RH that is presented with any Notice of Claim for Damage, Injury, or Death (also referred to as an administrative claim) will notify the General Litigation Division, DOC General Counsel's Office and provide it with the original claim. The presentation of an administrative claim is the initial signal of impending litigation against the Government. The Federal Tort Claims Act (FTCA) requires a claim to be presented to the designated government agency within two (2) years of the event triggering the claim.

A complaint (suit) against the Government can be filed six (6) months after an administrative claim is presented, or after the agency denies the claim, whichever comes first. The filing of suit is followed by the discovery phase of litigation. Depending on the scope of the case, discovery can last from one (1) to three (3) years.

2.1.1 Depositions and Trials. A deposition is pretrial testimony, taken under oath. Recorded

transcripts can be used in lieu of actual testimony at trial in circumstances where the witness is unavailable, or when agreeable to both plaintiff and Government attorneys. The law requires a witness be provided a copy of the testimony for review and signature. This offers the opportunity to verify the accuracy of the deposition transcript. No NWS witness will waive the right to examine and sign his/her testimony except on the advice of Government counsel.

The trial will occur well after the event triggering the litigation. The trial date will depend on the scope of discovery, the court's calendar, and a number of other intangibles. All persons previously deposed in connection with the case are potential trial witnesses. An FTCA trial against the Government differs from a corresponding civil proceeding because there is no jury. An exception occurs when there are multiple defendants, including organizations or individuals outside of the Government. In this circumstance, there may be a jury serving in an advisory capacity regarding the case against the Government. However, the ultimate decision regarding the Government's liability rests solely with the judge.

2.1.2 Selection of Witnesses. Participation of NWS personnel as witnesses in litigation involving the Government is determined either by plaintiff's or government's attorneys, by agreement between the above, or on recommendation of NWSH and the appropriate RH. Witness selection depends on the nature of the case. In cases where witness selection is made by parties solely outside the NWS, the involved Department of Justice (DOJ) trial attorney (frequently through the General Litigation Division, DOC General Counsel's Office) will notify the FSM, who will in turn inform the NWS employee and the appropriate RH. The FSM will be informed when such notification is received directly by a RH or NWS employee. In accordance with DOC regulations (15 C.F.R. Part 15, Subpart B), NWS employees are prohibited from testifying for a private litigant against the United States. Any employee who is served with a subpoena will immediately contact a NOAA General Counsel (GC) staff attorney, directly, or through the FSM.

2.1.3 Designation of Witnesses. Prospective NWS witnesses may be designated either as fact or in exceptional cases, as expert witnesses. Fact witnesses are normally those employees whose duties are tangibly involved in the event motivating the litigation (e.g., duty forecasters). Testimony by fact witnesses should be limited to their duties and performance.

On occasion, the DOJ will solicit recommendations from the NWS for prospective expert witnesses. Expert witnesses are acknowledged experts in their fields, and their testimony will include opinion-type responses. The designation of an NWS employee as an expert witness will be coordinated between the FSM, the DOC General Counsel Office and the appropriate RH (including the National Centers for Environmental Prediction) prior to forwarding a recommendation to the DOJ. No NWS employee can be unilaterally designated as an expert witness by a plaintiff's attorney.

2.1.4 Counseling of Witnesses. All NWS employees will receive counseling prior to providing testimony at depositions or trials. The DOJ trial attorney has responsibility for managing the Government's defense. The attorney will prepare prospective witnesses to ensure their testimony is credible and contributes to the success of the Government's defense.

The DOJ trial attorneys require considerable assistance and support due to the complex and time-consuming nature of most Government-related litigation. Although the trial attorneys are proficient in the general field they are defending, i.e., aviation, marine, etc., their knowledge may be limited regarding technical aspects of weather and NWS operations. The FSM, or designee, and an attorney from the DOC General Counsel Office will assist the DOJ trial attorney in preparing for the Government's defense. The assistance will include the preparation of NWS witnesses designated to testify at depositions and trials. Although technically and operationally proficient, most NWS employees are not accustomed to serving as a witness at legal proceedings. Additionally, the witness will be asked about an accident/event that has likely occurred two (2) or more years previous to the date of the trial. As in preparing for NTSB public hearings, a primary objective of pre-counseling is to make the prospective witness as comfortable and relaxed as possible, and enhance his/her capability to provide credible testimony. Pre-counseling sessions will include a review of weather factors and services surrounding the accident in question, NWS operations and procedures as they existed at the time of the accident, discussions related to rules, procedures, and general environment of the deposition/trial, and other issues of concern.

2.2 Civil Litigation/Handling of Subpoenas. NWS personnel are occasionally subpoenaed to appear in their official capacity by private litigants, either to testify or to present official records in evidence. Under DOC regulations, NWS employees cannot produce records or testify in litigation not involving the Government without the consent of NOAA Office of General Counsel. Any NWS employee served with a subpoena, which calls for either an appearance to give testimony or for the production of NOAA documents or records, will immediately notify a NOAA GC staff attorney and the FSM, either directly, or through the appropriate RH or the FSM. If a NOAA GC attorney is not available, employees may seek advice on how to proceed from the General Litigation Division, DOC General Counsel's office or the nearest Office of the United States Attorney, DOJ. However, the subpoena MUST be honored in the event the employee is unable to reach any of the above, i.e., the employee must appear at the time and place set in the subpoena, provide a copy of the regulations to the legal tribunal, and respectfully decline to testify. The employee will notify the NOAA Office of the General Counsel as soon as possible.

2.3 Expenses and Reimbursement. Expenses and reimbursement related to the appearance of NWS employees as court witnesses are listed below.

a. Personnel who appear on behalf of the Government, as part of their official duties as employees of the DOC, are entitled to be paid for their travel expenses and per diem in lieu of subsistence. NWSH or the concerned RH will process the Form CD-29, if applicable.

b. In private litigation cases, where the value of the witnesses' testimony arises from their official capacity, and they are subpoenaed solely because of, and to testify in that capacity, or to produce official records, and they receive necessary NOAA GC clearance, they are considered on duty and pay status during the period of necessary absence in response to such subpoena. Under such circumstances, the employees will receive allowances for expenses of travel and subsistence.

c. Employees subpoenaed to testify as witnesses in private litigation cases, in an unofficial capacity, are not entitled to fees and expenses from the Government. It is the responsibility of the employee to arrange for payment of witness fees and personal expenses related to their appearance in court. Arrangements may be made with the court or litigants. Time absent will be charged to annual leave or leave without pay.