

## CHAPTER 4

### LITIGATION

4-1. Reports. Information regarding the filing of all lawsuits in which the Corps is involved shall be entered on CMIS-II (or its successor) within three days of filing or receipt of the complaint. In addition, a complete litigation report is required for all lawsuits arising from Corps of Engineers activities, unless the U.S. Attorney charged with defending or prosecuting the action does not find a report necessary, or has indicated that an abbreviated report or brief factual statement will suffice. The report should be prepared and assembled in the order indicated below, with each copy signed by the Division or District Counsel or his or her designee.

a. For cases involving nationally significant or precedential legal issues, or relief which exceeds the settlement authority of the U.S. Attorney (usually \$500,000), three copies of the report will be forwarded, through channels, to CECC-K for forwarding to the Department of Justice. If the case is one which does not present nationally significant or precedential issues, and is not monitored by the Main Justice Department, only one copy shall be forwarded to the Division if required by the Division. Nationally significant or precedential cases are those which present unusual or complex issues having the potential to impact Corps programs or policies, or those whose disposition may result in a new procedural or legal precedent or standard. Division, District, Laboratory or FOA Offices should strive to comply with the time deadline included in a request for a report, unless dictated otherwise by the U.S. Attorney's office or an impending court filing date. The report should be prepared in the following format, including the elements listed below:

b. Narrative statement of facts. All known facts and circumstances relating to the controversy should be provided. Copies of relevant correspondence and documents will be attached as exhibits ("core information" as required by Executive Order 12778), and references to them noted in the body of the report. If the litigation involves a government contract, one copy of the provisions relevant to the cause of action or defense will be furnished. To prevent unnecessary

duplication and conserve paper, only the relevant contract portions should be included, and not the entire contract unless required by the issues of the case. If an administrative claim, appeal or other action has previously been filed, the report will summarize the results of the proceeding, and include copies of all available evidence, findings, and decisions rendered in the prior proceedings. However, if the case involves review of an administrative record under the Administrative Procedures Act, 5 U.S.C. 557, that record need not be provided in the litigation report.

c. Suggested form of answer. A suggested answer to each and every allegation of a petition or complaint should be furnished, including admissions, denials, or statements that the government lacks sufficient information on which to admit or deny the allegation.

d. List of witnesses. A list of all witnesses is to be furnished, including present or last known addresses. Each fact to which a particular witness will testify should be listed under his or her name. If there are facts which cannot be proven by witnesses, the omission should be noted and any available documentary evidence relevant to that fact stated. Since there may be considerable delay before a case comes to trial, a statement of facts to which each witness will testify should be obtained from him or her. These statements can subsequently be used to refresh the witnesses' memory at trial, and should therefore be obtained as early as possible after the complaint or petition has been filed. Submission of the litigation report shall not be delayed while the statements are being obtained.

e. Legal analysis. The law applicable to the government's claim or defense should be discussed, unless the Department of Justice attorney or Assistant U.S. Attorney assigned to the case decides otherwise. It is imperative that local laws and regulations of other government agencies be cited in full, since sources of both local statutory and case law may be unavailable for use by Division or Headquarters attorneys.

f. Counterclaims and crossclaims. Information should also be supplied concerning any counterclaim, crossclaim, or other cause of action which may be asserted against the plaintiff or other parties by the government. The counterclaim

or other demand need not always arise out of the matter pleaded in the suit, but may exist because of an entirely separate transaction or incident. In contract litigation, the Department of the Army holdup list should be reviewed for possible set-offs.

4-2. Litigation in the United States Court of Federal Claims and the Court of Appeals for the Federal Circuit.

a. A litigation report prepared for cases in these two courts should take special cognizance of the jurisdictional and procedural rules governing the conduct of such lawsuits. In direct appeals to the Court of Federal Claims or cases appealing decisions by boards of contract appeals to the Federal Circuit, the Trial Attorney who handled the matter administratively should assume responsibility for preparation and/or review of the report. The attorney will be clearly identified so that the Department of Justice can readily contact him or her for assistance. However, a litigation report in the format set out in paragraph 4-1 of this regulation is not required for Contract Disputes Act appeals to the Federal Circuit. Instead, Section 71 of the EFARS provides the report format to be used in these cases.

b. In cases where the Federal Circuit remands a case to the Board of Contract Appeals, care should be taken to ensure that actions taken are coordinated with the procurement office.

4-3. Suits Against Government Officers and Employees in Their Official Capacities. Suits may be brought in state or Federal courts seeking declaratory or injunctive relief against government officers or employees in their official capacities. Such suits will be treated as suits against the United States, and litigation reports shall be prepared in accordance with the directions in this chapter. When the case is filed in state court, a twenty-day time limit for removal to Federal court exists, and the U.S. Attorney should promptly be notified. An abbreviated report outlining the facts of the incident will be forwarded directly to CECC-K within ten days following the first notice of the action. A copy of the report will also be sent to the Division Counsel. If such suits are filed in Federal court, the time limit set forth by the complaint or the letter requesting a litigation report will be observed.

4-4. Tort Litigation. Where a litigation report is requested in response to a tort suit against the government, it should first be determined whether the plaintiff has complied with 28 U.S.C. 2401 by first presenting its claim in writing to the appropriate Federal agency. If the requisite administrative claim has not been filed, the U.S. Attorney's office and CECC-K should be notified immediately. In such event, it shall not be necessary to furnish the requested litigation report unless further instructions requiring a report are received. Liability to the plaintiff shall not be admitted in the proposed answer, unless the U.S. Attorney has obtained prior approval to confess liability.

4-5. Tort Suits Brought Against Government Employees Personally.

a. Common Law Torts. 28 U.S.C. 2679 provides that the Attorney General shall defend all cases arising out of common law torts which are brought against government employees or their estates. All employees should be instructed that any complaint served upon them or their personal representatives in connection with an incident occurring within the scope of their employment should be immediately taken to the District Counsel. Upon receipt of the complaint, the District Counsel should in turn notify the U.S. Attorney's office, so that removal (if necessary) and substitution of the United States as the defendant may be accomplished. In all such cases, a litigation report shall be prepared and sent directly to the U.S. Attorney's office, along with a statement by the employee's supervisor that the employee was acting within the scope of employment at the time the accident or other incident occurred.

b. Constitutional Torts. Occasionally, employees or officers are sued personally for damages in state or Federal courts as a result of actions taken in the performance of their official duties. Government defense counsel will only be furnished where the government has a clear and direct interest in the suit, and the defendant and Attorney General must both consent to the use of government counsel. However, it is Department of Justice policy to furnish such representation if the incident arose out of activities which are within the defendant's scope of employment. The Attorney General has authorized the U.S. Attorneys to immediately enter an appearance as defense counsel upon the informal request of

Division or District Commanders, without the prior approval of the Attorney General. U.S. Attorneys are permitted to decline association with the case where circumstances permit delay or where only a minor charge is involved. Prompt notice by telephone, electronic mail, or fax is to be given to CECC-K concurrently with the informal request for interim representation by the U.S. Attorney. The notice shall contain all information necessary to determine whether or not the defendant was in fact acting within the scope of employment, so that the Chief Counsel may request the Attorney General to formally authorize Department of Justice representation for the employee. The report shall be accompanied by a written request for representation from the employee to the Chief Counsel, and a statement from the employee's supervisor that the actions complained of were within the scope of his or her official duties.

c. Service of Process. Under Rule 4 of the Federal Rules of Civil Procedure, service of process may be effected by first-class mail upon an individual defendant. If such service is not properly acknowledged by return mail within twenty days of the summons' mailing, the defendant may then be personally served. If this occurs, the defendant may be obligated to pay plaintiff the costs of personal service.

d. Acknowledgment. Before first-class mail service is acknowledged, the complaint must be analyzed to determine if the court has personal jurisdiction over the defendant. If personal jurisdiction is lacking, the individual should be instructed not to acknowledge service by mail. In any case where an acknowledgment is returned, it should contain a caveat to the effect that the defendant waives no Rule 12(b) defenses, and that these defenses are specifically preserved. The following format may be followed:

"This acknowledgment is returned solely in order to comply with Rule 4 of the Federal Rules of Civil Procedure. In so doing, the defendant does not admit or concede that the form or substance of service of process in this case is proper or sufficient or that the court has personal jurisdiction over the defendant. The defendant does not waive any defenses, including

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those provided by Rule 12 of the Federal Rules of Civil Procedure. Rather, all defenses are specifically preserved."

4-6. Prosecution for Violation of Laws and Regulations.

a. General. Where criminal violations of laws or regulations have occurred, a litigation report will be prepared in the format specified in paragraph 4-1 of this regulation. The report should contain recommendations regarding the advisability of seeking statutory fines or penalties, where applicable. Actions involving the regulatory program will be handled under 33 C.F.R. Part 326.

b. Section 301, Clean Water Act, and Section 12, Rivers & Harbors Act. District Counsels are authorized to refer civil cases arising out of violations of Section 301 of the Clean Water Act and Section 12 of the Rivers and Harbors (R&H) Act directly to the local U.S. Attorney for appropriate legal action. This authority applies to those violations involving unauthorized discharge of dredge or fill material into navigable waters and violations of R&H Act Sections 9, 10, and 13, and excludes those cases involving a significant question of law or fact. For this purpose, a "significant" issue of law or fact shall include all criminal cases involving discharges of dredged or fill material into waters of the United States. These cases shall be referred through Division to CECC-K with a report as specified in paragraph 4-1 of this regulation.

c. R&H Act and Section 404. In order to facilitate the handling of correspondence and pleadings concerning Rivers and Harbors Act and Section 404 civil cases which are handled under 33 C.F.R. Part 326 and referred directly to the U.S. Attorneys' offices, clearly mark "Direct Referral" on each letter or on the cover sheet of each pleading. In these cases, copies of the referral letter and the narrative statement of facts should be forwarded through Division to CECC-K if nationally significant or precedential issues develop in the case. Proposed settlements involving damages in excess of \$500,000 or which otherwise exceed the U.S. Attorney's authority to settle the case must be forwarded to CECC-K for approval

prior to settling the case. In addition, a short statement as to the disposition of each case will be entered on CMIS-II (or its successor.)

d. Wreck Removal. The United States is entitled under 33 U.S.C. 408 to recover the costs of wreck removals in navigable waters from the responsible parties, notwithstanding the fact that the owners may have attempted to abandon the vessel. The procedures in paragraph 4-1 of this regulation should be followed in removing a wreck and pursuing a claim for recovery of expenses against the owner or other responsible party. All actions should be preceded by the issuance of a mark and remove letter addressed to the sinking party, as specified under 33 U.S.C. 409. Wreck removal claims are not encompassed within the Army Claims Service's jurisdiction, and reports seeking collection of damages will be forwarded directly to CECC-K for referral to the Justice Department.

(1) In cases where emergency removal is determined to be necessary under 33 U.S.C. 415, the District Commander should nonetheless make demand for removal upon the owner before proceeding with Corps actions to remove the vessel. Establishment of abandonment is not a prerequisite to emergency removal. After the vessel has been raised or otherwise disposed of, the party responsible for the sinking should be billed for the costs. If the owner refuses to pay, a litigation report in the format specified under paragraph 4-1 of this regulation shall be prepared, and three copies of the report shall be forwarded to CECC-K for direct referral to the Department of Justice.

(2) In non-emergency removal cases under 33 U.S.C. 414, injunctive relief compelling the owner to remove the vessel should be sought before a determination is made in favor of removal at the Corps' expense. If the responsible party refuses to raise the vessel, or injunctive relief is not feasible, the Corps may remove it after abandonment has been legally established. When the Corps removes a vessel, a monetary claim in the government's favor arises. Upon the owner's failure to make reimbursement, a litigation report will be prepared under paragraph 4-1 of this regulation and three copies forwarded through Division to CECC-K for referral to the Justice Department.

e. Marine Accidents. Claims in favor of the government arising from marine casualties, damage to Corps waterway or harbor facilities, or any other matter falling under admiralty jurisdiction, will normally be handled in accordance with Chapter 3 of this regulation. As a general rule, claims in favor of the Corps for damage to government property may be asserted against the prospective defendant regardless of negligence when such damage or destruction is a violation of 33 U.S.C. 403.

f. Timber Trespass and Encroachments. In cases where timber is removed from federal land administered by the Corps, consideration will be given to whether prosecution under 18 U.S.C. 1852 or under local statutes should be sought in addition to the value of the timber destroyed. Where administrative action is inadequate to protect the interests of the government, a formal litigation report will be prepared in accordance with paragraph 4-1 above, and forwarded directly to the U.S. Attorney. Similarly, routine cases involving encroachments and holdover tenants may be referred directly to the U.S. Attorney after a formal demand has been made on the individual to voluntarily remove the encroachment.

g. Violation of Regulations Governing Corps Reservoirs. In cases where the regulations contained in 36 C.F.R. Part 327 have been violated, citations are handled by the U.S. Attorney's offices. In such cases, no litigation report will ordinarily be prepared. However, where the violation is serious or continuing in nature, as with encroachments on government boundaries, a litigation report should be prepared and forwarded directly to the U.S. Attorney. In cases where injunctive relief is requested, an information copy of the report shall be furnished to CERE-M. If nationally significant or precedential questions of law or fact are involved in the case, a litigation report should be prepared and two copies forwarded to CECC-K, as provided under paragraph 4-1 above.

#### 4-7. Private Litigation.

a. Many private lawsuits are of interest to the government because of potential or existing collateral litigation, because property rights of the United States are involved, or because government policy is implicated. Such cases include water



rights disputes, suits for patent infringement where the defendant has also manufactured the same item under government contract, suits to quiet title or collect taxes where the result may possibly cloud the government's title to land, and suits to enjoin contractor operations on government property.

b. In such matters, the government may seek to intervene, may assist one of the original litigants, or may merely observe the litigation. An abbreviated report setting out the facts and legal issues involved, plus copies of appropriate pleadings, should be made for these cases. Specific notation regarding the government's interest and recommendations concerning participation in the case should be included in the report, which should then be forwarded through Division to CECC-K.

4-8. Bankruptcy Actions. Upon receiving notification that an individual or corporation which may owe the government money or be in possession of government property has filed for bankruptcy, the procedures set out in Chapter 16 of AR 37-103 shall be followed. Litigation reports will be sent directly to DFAS. In cases involving substantial legal issues, as with bankruptcies affecting multiple contracts, two copies of the narrative statement of facts only should be forwarded concurrently to CECC-K for referral to Office of The Judge Advocate General (OTJAG).