United States Department of Agriculture
Animal and Plant Health Inspection Service

WS Directive

4.145 10/11/12

APPEARANCE AS A WITNESS OR PRODUCTION OF DOCUMENTS IN JUDICIAL PROCEEDINGS FOR WS EMPLOYEES

1. PURPOSE

To provide guidelines for employees who have been requested or who have been issued a summons, subpoena, or other compulsory process, to appear as witnesses or to produce official APHIS, WS documents or records in judicial or administrative proceedings.

2. REPLACEMENT HIGHLIGHTS

This directive revises WS Directive 4.145 dated 03/10/2004.

3. DENOTATION

These guidelines only apply when the appearance and/or production of official APHIS, WS documents is in the employee's official capacity or arises out of or is related to his/her employment with the USDA. Other reasons for appearing as a witness such as 1) an eyewitness to an accident not arising out of or related to one's employment with USDA, 2) jury duty, and, 3) Congressional requests or subpoenas for testimony or documents are not covered by these guidelines. Consult the Human Resources Desk Guide (HRDG), Subchapter 4630 - Absence and Leave, Section D - Excused Absence, Subsection a - Court, for guidelines covering witness service and the Office of the General Counsel (OGC) for inquiries regarding Congressional requests or subpoenas for testimony or documents.

4. POLICY

A WS employee may provide testimony or produce official documents arising out of or related to their employment with USDA in judicial or administrative proceedings only when they have received specific authorization to do so in accordance with the application regulations (7 CFR 1.210-1.218) and these guidelines. A WS employee who provides testimony or produces official documents arising out of or related to their employment with USDA in violation of the application regulations shall be subject to disciplinary action. (7 CFR 1.218).

With any authorization to appear and/or produce documents pursuant to these guidelines and the applicable regulations, a WS employee will be appearing in his/her official capacity and will be entitled to administrative leave.

5. SPECIFIC APPEARANCES AND/OR PRODUCTION OF DOCUMENTS

a. APPEARANCE as a WITNESS or PRODUCTION of DOCUMENTS in a proceeding in which the UNITED STATES is a party (7 CFR 1.213 and 1.216).

1. Appearance as a witness on behalf of the United States without issuance of a summons, subpoena, or other compulsory process for such appearance is permitted if appropriate notification has been given to the Director of OSS and after OSS has first consulted with OGC concerning such appearance.

2. Appearance on behalf of a party other than the United States in a proceeding in which the United States is a party may be authorized: (1) if a valid subpoena, summons, or other compulsory process has been issued; or (2) upon request without being served with a valid subpoena, summons, or other compulsory process, if, permission for such appearance has been given by the attorney or official representing the United States in the proceeding. An employee served with a subpoena, summons, or other compulsory process, or otherwise requested to appear on behalf of another party shall promptly notify the Director of OSS in order to determine whether or not there are grounds to oppose such appearance or production.

b. APPEARANCE as a WITNESS on behalf of a party other than the UNITED STATES where the UNITED STATES is not a party (7 CFR 1.214).

1. Notification of the Director of OSS and written authorization from the Administrator, with the concurrence of OGC is required when an WS employee is served with a valid summons, subpoena, or other compulsory process, to appear as a witness on behalf of a party other than the United States in a judicial or administrative hearing in which the United States is not a party. Such authorization and concurrence will be based upon a determination that such appearance is in the interest of the USDA.

2. Notification of the Director of OSS, written authorization from the Administrator and approved by the Under Secretary for Marketing and Regulatory Programs, Marketing and Inspection Services and OGC is required when an WS employee is not served with a valid summons, subpoena, or other compulsory process, and is requested to appear as a witness on behalf of a party other than the United States in a judicial or administrative

hearing in which the United States is not a party. Such authorization and approval will be based upon a determination that such appearance is in the interest of USDA.

3. When the summons, subpoena, or other compulsory process was validly issued and served, but the appearance is not authorized or approved as required in 5(b)(1) above, the employee shall appear at the stated time and place, produce a copy of the official regulations (7 CFR 1.210 - 1.218) and respectfully decline to provide any testimony.

c. SUBPOENAS for APHIS-WS DOCUMENTS or RECORDS where the UNITED STATES is not a party (7 CFR 1.215).

1. *Duces tecum* subpoenas for APHIS-WS documents or records in judicial or administrative hearings in which the United States is not a party shall be considered as requests under the Freedom of Information Act (FOIA) and shall be handled pursuant to the rules governing public disclosure (see WS Directive 4.135, Requests for Information).

2. If an employee is served with a *duces tecum* subpoena and compelled to appear, the employee must notify the Director of OSS. After consultation with OGC, the employee shall appear and respectfully decline to produce the records or documents on the grounds that the regulations (7 CFR 1.215) prohibit such production and state that the production will be done in accordance with the FOIA.

6. WITNESS FEES AND TRAVEL EXPENSES (7 CFR 1.217)

a. Any employee who is a witness on behalf of the United States in a judicial or administrative proceeding in an official capacity, or arising out of or related to his/her employment with USDA, is entitled to travel expenses in accordance with the Agriculture Travel Regulations. No witness fees can be received for such appearance or production.

b. Any employee who is a witness on behalf of a party other than the United States in a judicial or administrative proceeding in an official capacity or arising out of or related to his/her employment with USDA is entitled to travel expenses in accordance with the Agriculture Travel Regulations to the extent that expenses are not paid by the court, agency, official, or party compelling or requesting his/her appearance. The employee is required to collect all fees authorized for such appearance or production and remit them to the Director, OSS (made payable to the USDA).

7. PROCEDURE

When an employee receives a court order, subpoena, summons, or request to testify or produce documents in an official capacity or arising out of or related to his/her employment with USDA, it is usually necessary to obtain approval from the Administrator and OGC prior to testifying or producing documents. The following procedure is required:

STEPS	ACTION
1.	Employee immediately notifies supervisor of the request, subpoena, summons, or order to testify and/or to produce documents.
2.	Supervisor obtains from the employee the following information and submits the information to the Director, OSS:

a. Name, title, organizational address, and telephone number of the employee upon whom the request was made or served.

b. Date employee received the request or service and nature of the order compelling WS employee appearance (i.e., court order, subpoena, summons, verbal or other manner).

c. A copy of the subpoena, summons, or court order.

d. Name(s) of court or parties involved and a brief description of the matter being contested.

e. Nature of the requested testimony or records.

f. Why WS appearance is in the best interest of the USDA (refer to MOU's, cooperative agreements, WS legal authority, other).

g. A description or copy of the material the employee has been asked or anticipates being asked to produce or disclose.

h. Any incorrect statements or misspellings in the request.

i. Any fees involved with the request, broken down according to travel expenses, daily fees, and total.

j. The employee's role in and/or familiarity with or knowledge of such request.

3. The Director, OSS submits a formal, written request, from the Deputy Administrator to OGC.

4. OGC notifies the Deputy Administrator of its concurrence or non-concurrence regarding the employee. The Director, OSS then notifies the supervisor and/or the employee, of the approval or non-approval for his/her appearance or production of documents/records.

8. REFERENCES

WS Directive 4.135, Requests for Information (10/07/05).
Hyperlink:
http://www.aphis.usda.gov/wildlife_damage/ws_dir_ch4.shtml

Human Resource Desk Guide, Subchapter 4630 - Absence and Leave, Section D - Excused Absence, Subsection a - Court (Issued 8/97; Updated 2/12).
Hyperlink:
http://www.aphis.usda.gov/mrpbs/publications/hr_desk_guide/4630/4630sdsa.shtml

7 CFR Subtitle A, Part 1, Subpart K 1.212-1.218 Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings 340 U.S. 464, (1950)., Touhy v. Ragen.
Hyperlink:
http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+7&oldPath=Title+7&isCollapsed=true&selectedYearFrom=2012&ycord=0

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