

MEMORANDUM FOR: Olga Kebis  
National Weather Service

FROM: Nancy Briscoe  
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SUBJECT: Federal OSHA Liability- Defining Employees

DATE: November 9, 2001

This memorandum delineates the application of OSHA standards for worker safety in the Federal workplace. It does not specifically address Federal government liability for employee injury under the Federal Employee's Compensation Act (FECA) or for civilian and contractor injury under the Federal Tort Claims Act (FTCA). Federal liability under FECA and FTCA are addressed in a companion document to this memorandum entitled "The Federal Tort Claims Act and the Federal Employees Compensation Act" dated November , 2001.

#### I. OSHA Coverage- Federal Employees

The Occupational Safety and Health Act (OSHA) , enacted into law in 1970, is the Federal statute which addresses worker health and safety in the workplace. OSHA by its terms does not apply to Federal agencies because it only applies to "employers" who have "employees" which by statutory definition exclude the Federal Government. Specifically, 29 USC 652(5) and (6) define these terms as follows:

The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States ...

The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

Although excluded from direct regulation by definition, OSHA section 19 does provide that the heads of Federal agencies must provide their employees "healthful and safe places and conditions of employment." In addition, Executive Order 12580 provides that Federal agencies must comply with OSHA standards unless the Secretary of Labor has approved an alternative standard. The net result is that we apply OSHA standards in the Federal workplace, but are not actually subject to the same OSHA administrative procedures and penalties.

## II NWS Volunteers and Liability

Volunteer workers who are performing tasks for the NWS directly, under NWS supervision and direction, shall be considered NWS employees for purposes of determining liability under Federal OSHA standards. They shall be considered NWS employees regardless of where they are working, and whether or not they are performing unrelated activities of their own in connection with their NWS work. The NWS is therefore under an obligation to provide the same level of care and safety with regard to these persons as they would any other NOAA employee.

## III. Contractor OSHA Requirements

Federal government contractors are not NOAA employees. Rather they are employees of the contracting entity. Prior to 1995, regulations promulgated under OSHA specifically excluded federal contractors from the safety responsibilities of federal agencies (See F.R. 60:34851-34852). However, in 1995 the regulations were changed to bring the treatment of federal contractors into line with the treatment of contractors in the private sector. These changes made federal agencies responsible, as “host employers,” to take reasonable steps to correct, or to require the correction of, hazards of which they could reasonably be expected to be aware. This does not mean that the agency needs to be aware of all hazards, even those which it lacks the expertise to recognize. It also does not mean that the agency is required to provide the same safety equipment and training to the employees of federal contractors that it would be required to provide to its own employees engaged in the same activities.<sup>1</sup> It does, however, mean that the agency has a duty to inform would-be contractors of known hazards and to be reasonably aware of what hazards might exist. It might also mean making evidence of OSHA compliance a condition of a contract award. How much knowledge an agency is expected to have about potential hazards would depend on its involvement with the facility and the obviousness of the hazard.<sup>2</sup>

To ensure that NOAA’s contractors provide their employees with all required health and safety training

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<sup>1</sup> For example, it would not be reasonable to expect a federal agency that was hiring a contractor to perform asbestos abatement to either be aware of all potential dangers presented by this highly-specialized activity or to provide safety equipment to the workers employed by the contractor. However, if an agency were hiring an electrician to run wiring in an area that the agency knew to contain asbestos insulation, it would be reasonable to expect the agency to alert the contractor to this hazard.

<sup>2</sup> For example, it might be reasonable to assume that an agency would have more information about potential hazards at a facility that it owns as opposed to one where it is a tenant. In addition, it might be reasonable to assume that an agency would be aware of obvious hazards, such as the danger inherent in climbing a NWS tower, as opposed to hidden hazards, like something buried by a previous owner/tenant.

and equipment, NOAA's contracts and statements of work should contain standard language delineating these requirements. The following language is recommended:

It is the responsibility of the contractor to comply with all applicable state and federal laws governing the health and safety of its employees, including all regulations promulgated under the Occupational Safety and Health Act (OSHA). Such compliance shall include, but not be limited to, ensuring that all employees are properly trained for the work to be performed and have been supplied with all necessary protective and safety equipment.