

of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

#### Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023-01, and Commandant Instruction M16475.ID which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

#### List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

#### PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05-1; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 117.821(a)(4) to read as follows:

#### § 117.821 Atlantic Intracoastal Waterway, Albermarle Sound to Sunset Beach.

(a) \* \* \*

(4) S.R. 74 Bridge, mile 283.1, at Wrightsville Beach, NC, between 7 a.m. and 7 p.m., the draw need only open on the hour; except that from 7 a.m. to 11 a.m. on the third and fourth Saturday in September of every year, the draw need not open for vessels and between 7 a.m. and 10:30 a.m. on the last Saturday of October each year or the first or second Saturday of November of every year the draw need not open for vessels due to annual triathlon events.

3. Revise § 117.823 to read as follows:

#### § 117.823 Cape Fear River.

The draw of the Cape Fear Memorial Bridge, mile 26.8, at Wilmington need not open for the passage of vessels from 8 a.m. to 10 a.m. on the second Saturday of July of every year, and from 7 a.m. to 11 a.m. on the first or second Sunday of November of every year to accommodate annual marathon races.

4. Revise § 117.829(a)(4) to read as follows:

#### § 117.829 Northeast Cape Fear River.

(a) \* \* \*

(4) From 8 a.m. to 10 a.m. on the second Saturday of July of every year, from 12 p.m. to 11:59 p.m. on the last Saturday of October or the first or second Saturday of November of every year, and from 7 a.m. to 11 a.m. on the first or second Sunday of November of every year, the draw need not open for vessels to accommodate annual marathon and triathlon races.

\* \* \* \* \*

Dated: February 1, 2011.

**William D. Lee,**

*Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.*

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#### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Parts 3, 14, 20

#### RIN 2900-AN91

#### Substitution in Case of Death of Claimant

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its regulations concerning adjudication of claims, representation of claimants, and Board of Veterans' Appeals rules of practice. These amendments would

implement section 212 of the Veterans' Benefits Improvement Act of 2008, which allows an eligible survivor to substitute for a deceased claimant in order to complete the processing of the deceased claimant's claim. The intended effect of these amendments is to clarify the rules and procedures for those situations in which substitution is authorized. Under section 212, if a claimant dies while his or her claim or appeal is pending before VA, a survivor who would be eligible for accrued benefits under existing statutory authority may, not later than one year after the death of the claimant, request to be substituted for the claimant for the purposes of processing the claim or appeal to completion. Accordingly, after substitution, VA will continue to process the claim or appeal as if the claimant had not died. These amendments clarify the following matters: Eligibility for substitution, how an eligible survivor makes a request to substitute, how VA responds to requests to substitute, a substitute's rights in adjudication, limitations related to substitution, order of preference among eligible survivors, representation of substitutes, and procedures for substitution when a claim is before the Board of Veterans' Appeals.

**DATES:** Comments must be received by VA on or before April 18, 2011.

**ADDRESSES:** Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll free number.)

Comments should indicate that they are submitted in response to "RIN 2900-AN91—Substitution in Case of Death of Claimant." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Robert Watkins, Department of Veterans Affairs, Veterans Benefits Administration, Compensation and Pension Service, Regulation Staff (211D), 810 Vermont Avenue, NW., Washington, DC 20420, 202-461-9214. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Section 212 of the Veterans' Benefits Improvement Act of 2008, Public Law 110-389 (the Act), added to title 38, United States Code, a provision codified at 38 U.S.C. 5121A. It authorizes a living person eligible to receive accrued benefits under 38 U.S.C. 5121(a) to substitute for a deceased claimant in order to process a claim or appeal pending before VA to completion. Section 5121A permits, upon timely request, a person who would be eligible for accrued benefits under 38 U.S.C. 5121(a) to continue a claim that was pending when the claimant died. The legislative intent in enacting section 212 was to change the then-state of the law, which permitted eligible survivors to file an accrued benefits claim after the death of a claimant, but made no provision for substitution. See 154 Cong. Rec. S10447 (daily ed. Oct. 2, 2008) (Joint Explanatory Statement on Amendment to Senate Bill, S. 3023, as Amended) ("Currently \* \* \* the surviving spouse or other beneficiary is unable to take up the claim where it is in the process and must refile the claim separately as if submitting a new claim."); 38 U.S.C. 5121. A successful accrued benefits claim can only result in payment of those benefits "to which [the claimant] was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death \* \* \* and due and unpaid." 38 U.S.C. 5121. By permitting substitution, Congress created a new procedural right and expanded the nature of benefits that eligible survivors can secure following a claimant's death. The availability of substitution means that survivors are no longer limited to those benefits to which the claimant was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death. However, the types of benefits payable to a survivor—periodic monetary benefits (other than insurance and servicemembers' indemnity)—remain the same.

To implement the Act, VA proposes to add to 38 CFR part 3, subpart A, a new § 3.1010 to clarify adjudication procedures affected by section 5121A. Because the Act inserted section 5121A immediately after section 5121 in title 38, U.S. Code, and otherwise closely links the two statutes, VA proposes to insert 5121A's implementing regulation, § 3.1010, immediately after section 5121's existing implementing regulations at §§ 3.1000–3.1009 (referred to as the "accrued benefits regulations"). Further, VA proposes to generally model §§ 3.1010 after the accrued benefits regulations to the extent

appropriate. In addition, VA proposes to add to and amend portions of part 14 to address the representation of substitutes before VA. Finally, VA proposes to add to and amend portions of 38 CFR part 20 to clarify procedures before the Board of Veterans' Appeals (Board) affected by section 5121A.

Section 5121A(a)(3) provides: "Substitution under this subsection shall be in accordance with such regulations as the Secretary may prescribe." In addition, section 5121A(a)(2) states, "Any person seeking to be substituted for the claimant shall present evidence of the right to claim such status within such time as prescribed by the Secretary in regulations." Finally, pursuant to 38 U.S.C. 501(a), the Secretary possess the authority to prescribe all the rules and regulations that are necessary or appropriate to carry out the laws administered by VA and that are consistent with those laws. Pursuant to the authority granted to the Secretary under sections 501(a) and 5121A, VA proposes the addition of § 3.1010 and the amendment of §§ 14.630, 14.631, 20.900, 20.1106, 20.1302, and 20.1304. With respect to each of these amendments, VA proposes to add a citation to 38 U.S.C. 5121A in the existing authority citation. The following sections of this **SUPPLEMENTARY INFORMATION** discuss in more detail the proposed changes to parts 3, 14, and 20.

### Amendments to Part 3

#### *Eligibility for and Scope of Substitution*

Proposed § 3.1010(a) would set forth the eligibility criteria for substitution. In accordance with the Act (38 U.S.C. 5121A(a)(1)), the proposed rule states that, if a claimant dies on or after the effective date of the Act—October 10, 2008—then a person who would be eligible to receive accrued benefits under § 3.1000(a) of the accrued benefits regulations may request to become a substitute for the deceased claimant in a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim that was pending, when the claimant died. The "claimant" is in most circumstances a veteran claiming benefits based upon his or her own service. However, the "claimant" could also be a veteran's surviving spouse, the veteran's child, or a person receiving an apportioned share of a veteran's benefits, if such person were claiming benefits based on their original entitlement, rather than the entitlement of another person.

Proposed § 3.1010(a) would also describe the scope of substitution. Consistent with the Act (38 U.S.C. 5121A(a)(1)), § 3.1010(a) would state, "Upon VA's grant of a request to substitute, the substitute may continue the claim or appeal on behalf of the deceased claimant for purposes of processing the claim or appeal to completion."

#### *Requests To Substitute and Determinations*

Proposed § 3.1010(b) would describe the time and place for filing a request to substitute. Consistent with the Act (38 U.S.C. 5121A(a)(1)), § 3.1010(b) would require that a person desiring to substitute for a deceased claimant file a request to substitute "no later than one year after the claimant's death." Proposed § 3.1010(b) would also require that all requests to substitute be filed with the agency of original jurisdiction (AOJ) for a decision on the request to substitute in the first instance. Similarly, proposed § 3.1010(e), "Decisions on substitution requests," would specify that the AOJ "will decide in the first instance all requests to substitute, including any request to substitute in an appeal pending before the Board." These provisions would clarify that, if a claimant dies while his or her appeal is pending before the Board, a person seeking to substitute must file a request to substitute with the AOJ in order to receive an initial decision on a request to substitute. Pursuant to proposed § 3.1010(g)(1)(ii), an appeal would be considered to be pending "if a claimant filed a notice of disagreement in response to a notification from an agency of original jurisdiction of its decision on a claim, but dies before the Board of Veterans' Appeals issues a final decision on the appeal. Once the Board issues its final decision on an appeal, the appeal is not pending for purposes of this section, even if the 120-day period for appealing the Board's decision to the Court of Appeals for Veterans Claims has not yet expired." As explained in more detail below, this procedure is consistent with the Board's jurisdictional authority, 38 U.S.C. 7104(a), which provides that "[a]ll questions in a matter which \* \* \* is subject to decision by the Secretary shall be subject to *one review on appeal* to the Secretary. Final decisions on such appeals shall be made by the Board." See 38 CFR 20.101(a) (emphasis added). Because neither the Act nor any other legislation amended the Board's jurisdictional statute at 38 U.S.C. 7104(a), the Board lacks original jurisdiction to decide a request to substitute in the first instance, but, as

discussed below in this preamble, may hear an appeal of a denial of a request to substitute.

The Board's role in VA's adjudication system is generally limited to providing appellate review of adverse decisions made by an AOJ. With very limited exceptions, such as motions to revise a final Board decision based upon clear and unmistakable error, the Board does not have original jurisdiction over matters subject to a decision by the Secretary. Because the Board is jurisdictionally limited to deciding appeals, the Board cannot entertain requests to substitute in the first instance, as this would be outside the Board's jurisdiction and deprive putative substitutes of their statutory right to "one review on appeal to the Secretary" in the event of a Board denial of a request to substitute. Under the current statutory scheme, an AOJ decision on a request to substitute is itself appealable to the Board. Accordingly, under proposed § 3.1010(e)(2), "Appeals," the denial of a request to substitute may be appealed to the Board. For these reasons, the AOJ, not the Board, must decide these requests in the first instance.

Notably, the Act (38 U.S.C. 5121A(a)(2)) contemplates the submission of evidence to establish eligibility for substitution, specifically providing that "[a]ny person seeking to be substituted for the claimant shall present evidence of the right to claim such status." (emphasis added). (Proposed § 3.1010(d), discussed below in this preamble, would address the submission of evidence in support of a request to substitute.) The United States Court of Appeals for the Federal Circuit has made clear that, except as otherwise specifically provided by law, the Board generally cannot develop and consider evidence in the first instance. Initial consideration of evidence, including that relating to eligibility for substitution, must be undertaken by the AOJ. See *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1347 (Fed. Cir. 2003) (*DAV*) ("[w]hen the Board obtains evidence that was not considered by the AOJ \* \* \* an appellant has no means to obtain 'one review on appeal to the Secretary,' because the Board is the only appellate tribunal under the Secretary"). This is another reason to have all requests to substitute be decided by an AOJ in the first instance.

Proposed § 3.1010 would contain no provision allowing a person requesting to substitute the option of waiving his or her right to one review on appeal. In *DAV*, the Federal Circuit implicitly approved of waiver by a claimant of the

consideration of evidence by the AOJ in the first instance. 327 F.3d at 1341. However, it would be contrary to VA's statutory adjudication authority to employ the use of waivers in the context of a decision on a request to substitute. An AOJ decision on a request to substitute is an appealable decision under to 38 U.S.C. 7104(a). See, e.g., 20 CFR 19.28 (establishing as an appealable issue the question of whether a notice of disagreement is adequate). A significant difference exists between waiving the AOJ's consideration of certain evidence regarding a claim and waiving the AOJ's consideration of an appealable issue in the first instance, particularly because waiver would require original jurisdiction that the Board lacks. Nothing in *DAV* suggests that the Board has the authority to adjudicate an appealable issue in the first instance. Rather, *DAV* stands for the proposition that the Board may consider newly obtained evidence that was not first considered by the AOJ as part of its adjudication of an issue if a valid waiver is obtained from the appellant. In the context of a request to substitute, the Board would not be soliciting a waiver for purposes of considering evidence regarding eligibility to substitute, which would be a situation analogous to the discussion of waiver in *DAV*. For these reasons, proposed § 3.1010 would make no provision for waiver of AOJ consideration of a request to substitute in the first instance.

Proposed § 3.1010(e)(3) would define the term "joint class" and provide the joint class order of preference rules for substitution. Specifically, under § 3.1010(e)(3), "joint class representative," a "joint class" would mean "a group of two or more persons eligible to substitute under the same priority group under 38 CFR 3.1000(a)(1) through (a)(5), e.g., two or more surviving children." As explained above, Congress closely linked section 5121A and section 5121. Also, the Act (38 U.S.C. 5121A(b)) specifically provides the limitation that "[t]hose who are eligible to make a claim under this section shall be determined in accordance with section 5121." Thus, it is consistent with the Act to apply the eligibility standards in the accrued benefits regulations to the substitution regulations. The proposed definition of "joint class" would simply describe the eligibility categories enumerated in the accrued benefits statute at 38 U.S.C. 5121(a) that could contain multiple persons, such as "[t]he veteran's children" and "[t]he veteran's dependent parents." Although the phrase "joint

class" is used in the accrued benefits regulations at 38 CFR 3.1000(c)(2), it is not described in further detail. For the sake of clarity, the proposed rule would include a definition of "joint class." We propose in § 3.1010(e)(3)(ii) that "only one person of the joint class may be a substitute at any one time," and "[t]he first person in the joint class to file a request to substitute that is granted will be the substitute representing the joint class." This is consistent with the Act (38 U.S.C. 5121A(a)), which authorizes only "a person" to substitute.

#### *Format of Request To Substitute*

Proposed § 3.1010(c), "Request format," would specify the required format for a request to substitute. Under proposed § 3.1010(c), a request to substitute would be required to be submitted in writing. Further, a request to substitute would be required to contain, at a minimum, the word "substitute" or "substitution," the applicable claim number or appeal number, and the names of the deceased claimant and the person requesting to substitute. Alternatively, under proposed § 3.1010(c)(2), a claim for accrued benefits, death pension, or dependency and indemnity compensation by an eligible person listed in 38 CFR 3.1000(a)(1) through (5) would be deemed to include a request to substitute if a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, was pending before the AOJ or the Board when the claimant died. This provision would be consistent with VA's current treatment of claims for death benefits as interchangeable. Specifically, 38 CFR 3.152(b)(1) requires that "[a] claim by a surviving spouse or child for [death] compensation or dependency and indemnity compensation \* \* \* be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension \* \* \* be considered to be a claim for death compensation or dependency and indemnity compensation and accrued benefits."

Although under the proposed rule VA would treat qualifying death benefits claims as requests to substitute, VA anticipates that not all persons filing a claim for death benefits will wish to substitute for a deceased claimant. Therefore, VA would provide an opportunity for a person to waive the right to substitute when he or she has filed a claim for accrued benefits, death pension, or dependency and indemnity

compensation, which VA would otherwise deem a request to substitute.

#### *Evidence of Eligibility To Substitute*

Proposed § 3.1010(d), “Evidence of eligibility,” would address the submission of evidence in support of a request to substitute. Consistent with the Act (38 U.S.C. 5121A(a)(2)), proposed § 3.1010(d) would establish the time period in which a person seeking to be substituted for a deceased claimant must present evidence of the right to claim such status. As an initial matter, a person desiring to substitute would have to file a request to substitute no later than one year after the claimant’s death, pursuant to the Act (38 U.S.C. 5121A(a)(1)) and as would be required under proposed § 3.1010(b). Under proposed § 3.1010(d), if the request to substitute does not include sufficient evidence of the person’s eligibility to substitute, then VA would send notification to the person who filed the request. VA would not provide notification if the person filing the request could not be an eligible person. For example, VA would not send notification if the person who filed the request claimed to be an individual outside the categories of eligible persons under 38 CFR 3.1000(a)(1) through (5).

Pursuant to proposed § 3.1010(d)(1) through (3), a person who filed a request to substitute without necessary evidence of eligibility would be notified: “(1) Of the evidence of eligibility required to complete the request to substitute; (2) That VA will take no further action on the request to substitute unless VA receives the evidence of eligibility; and (3) That VA must receive the evidence of eligibility no later than 60 days after the date of notification or one year after the claimant’s death, whichever is later, or VA will deny the request to substitute.” Thus, under proposed § 3.1010(d)(1), a person who does not provide required evidence of eligibility to substitute with their request to substitute would be given 60 days from the date of VA’s notification or until the expiration of one year after the claimant’s death, whichever is later, to provide necessary evidence of eligibility. The later of 60 days from the date of notification or one year from the date of the claimant’s death is a reasonable time in which to submit evidence of eligibility to substitute, especially because VA would have notified the person who filed the request of the evidence required to demonstrate eligibility.

The accrued benefits regulation at § 3.1000(c)(1)(iii) gives an accrued benefits claimant 1 year from the date of VA’s notification of an incomplete

application for accrued benefits in which to provide the necessary eligibility evidence. However, this 1-year time period from the date of notification is mandated by the accrued benefits statute at 38 U.S.C. 5121(c). In contrast, under the Act (38 U.S.C. 5121A(a)(2)), Congress granted the Secretary the authority to establish the time period for the submission of evidence of eligibility to substitute with the intent of ensuring the timely submission of evidence. The sooner the AOJ receives evidence of eligibility to substitute, the sooner an eligible person may become a substitute and begin to process to completion the claim or appeal that was pending. Such timeliness is less significant under the accrued benefits statute (38 U.S.C. 5121), which does not provide for the completion of any pending claim or appeal. Further, proposed § 3.1010 would be consistent with the Act (38 U.S.C. 5121A) because in no event would a person requesting to substitute be given less than 1 year from the date of the claimant’s death in which to complete the request to substitute.

#### *Adjudications Before the AOJ*

Proposed § 3.1010(f) would clarify the rules governing an adjudication before the AOJ of a claim involving a substitute. As noted in proposed § 3.1010(f)(5), the rules governing an appeal before the Board involving a substitute are specifically addressed in parts 19 and 20, the proposed amendments to which are discussed below in this preamble.

As a general matter, all part 3 regulations that would have been applicable to the claimant had the claimant not died would be applicable to the substitute under the proposed regulations, with some exceptions predicated on the fact that the claimant has died. Under proposed § 3.1010(f)(1), VA would send to a substitute notice under 38 CFR 3.159(b) only if the required notice was not sent to the deceased claimant or if the notice sent to the deceased claimant was inadequate. Section 3.159(b) governs VA’s duty to notify claimants of information or evidence that is necessary to substantiate a claim and is the implementing regulation for the notification duty imposed on VA by the Veterans Claims Assistance Act (VCAA) of 2000 (Pub. L. 106–475), codified at 38 U.S.C. 5103. VA recognizes that in some circumstances a claimant would have been provided this VCAA notice under § 3.159(b) prior to death. In such cases, VA will send notice to a substitute only if notice was not previously sent or was inadequate because a substitute is

generally considered to “stand in the shoes” of the deceased claimant.

Under proposed § 3.1010(f)(2), a substitute would be expressly prohibited from adding new issues to or expanding the existing claim. However, a substitute would be permitted to raise new theories of entitlement as to the claim. This limitation would be consistent with the Act (38 U.S.C. 5121A(a)(1)) because the Act contemplates that a substitute will replace a deceased claimant for the purpose of processing a claim or appeal that was pending to completion. However, the Act does not authorize a person to add new issues to a claim, which would be tantamount to filing a new claim on behalf of a deceased claimant. For example, if a veteran had a claim pending regarding the single issue of service connection for a knee injury, a substitute could raise a previously unraised theory of entitlement, such as secondary service connection. However, the substitute could not add the issue of or file a claim for service connection for post-traumatic stress disorder.

Although a substitute could not add new issues to or expand a claim, under proposed § 3.1010(f)(3), a substitute could submit evidence and generally would have the same rights regarding hearings, representation, and appeals as would have applied to the claimant had the claimant not died.

#### *Limitations on Substitution*

Proposed § 3.1010(g), “Limitations on substitution,” would address the limitations that apply to substitution. These limitations would help to further clarify the scope of substitution and would be consistent with the language of the Act. Section 3.1010(g)(1) would clarify when a person may substitute for a deceased claimant by specifying that a claim or appeal must be undecided to be pending for purposes of substitution. Specifically, a person could substitute if a claim has been filed with but has not been decided by the AOJ before the claimant’s death, or if a notice of disagreement has been filed to initiate an appeal to the Board, but the Board has not decided the appeal before the claimant’s death. In other words, a person could not substitute for a “claimant” who dies without first filing a claim or initiating an appeal, even if the substitute were to file a request to substitute during the appeal period.

VA recognizes that the limitation in proposed § 3.1010(g)(1) may appear to conflict with VA’s definitions of “pending claim” and “finally adjudicated claim” in 38 CFR 3.160, “Status of claims.” Pursuant to

paragraphs (c) and (d) of § 3.160, a “pending claim” is one that has not been “finally adjudicated,” and a “finally adjudicated claim” means “[a]n application, formal or informal, which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier.” This means that a decided claim for which the 1-year appeal period has not yet expired is considered a “pending claim” unless the Board has already decided the appeal. However, the Act does not use the term “pending claim” or “finally adjudicated claim,” and VA does not use these terms in the proposed rule. VA interprets the phrase in the Act “a claim \* \* \* or an appeal \* \* \* is pending” to mean that a claim or appeal must have been initiated by the claimant before death in order for an eligible person to substitute for the claimant upon the claimant’s death. In the context of a living claimant, a claim must be a “pending claim” until the expiration of the appeal period because that claimant could initiate an appeal at any time during that period. Also, a claim must be a “pending claim” even if appealed to the Board and not yet decided by the Board because of the possibility of the Board remanding the claim for additional development. However, when a claimant dies before initiating a claim or appeal, substitution is not available because a person may not substitute for the purpose of initiating a claim or an appeal.

As explained above, the Act authorizes VA to pay benefits of a different nature than allowed by the accrued benefits statute, i.e., benefits not limited to those to which the claimant was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death and due and unpaid. Proposed § 3.1010(g)(2) would further clarify the nature of benefits payable under section 5121A. First, paragraph (g)(2) would clarify that VA is authorized to award only past-due benefits to the substitute and other members of a joint class, if any. Second, paragraph (g)(2) would specify that past-due benefits are those benefits for the time period between the effective date of the award and what would have been the effective date of discontinuance of the award as a result of the claimant’s death. See 38 CFR 3.500(g). In other words, a substitute would be eligible to receive past-due benefits for the period between the effective date of the award and the last

day of the month preceding the claimant’s death.

Proposed paragraphs (g)(3) and (g)(4) would parallel provisions in the accrued benefits statute and implementing regulations. As discussed previously, parallelism between the proposed substitution regulations and the accrued benefits regulations is generally appropriate given that Congress closely linked the two statutes together. Proposed § 3.1010(g)(3) would describe when the amount of benefits awarded to a substitute and members of a joint class, if any, is limited to the amount of the expense of last sickness and burial. This provision would simply repeat the limitation under the accrued benefits statute at 38 U.S.C. 5121(a)(6), implemented at 38 CFR 3.1000(a)(5), which limits the amount of accrued benefits payable when entitlement cannot be established under categories (a)(1) through (a)(5) of that section. Because the Act (38 U.S.C. 5121A(a)(1)) defines eligibility to substitute in terms of the eligibility criteria under section 5121(a), the benefit amount limitation inherent in the eligibility provisions of section 5121(a)(6) applies to a person substituted on the basis of having borne the expense of last sickness and burial.

Proposed paragraph (g)(4) would mirror the accrued benefits regulation at § 3.1000(c)(2) and clarify that, if an eligible person in a priority category fails or waives the right to file a request to substitute, persons of a lower category are not permitted to substitute. Similarly, under proposed paragraph (g)(4), failure or waiver of the right to file a request to substitute by a member of a joint class would not serve to increase the amount payable to other persons in the class.

Finally, proposed paragraph (g)(5) would explain when subsequent substitutions are permitted upon the death of a substitute. Proposed paragraph (g)(5) would permit substitution for a deceased substitute only under the same circumstances in which substitution would have been permitted for a deceased claimant. In other words, substitution for a substitute would be permitted only if the substitute died while a claim was pending before the AOJ or the Board or an appeal of a decision on a claim was pending before the AOJ or the Board. Further, proposed paragraph (g)(5) would allow substitution upon the death of a substitute only if the request to substitute for the deceased substitute is filed within the one-year period from the date of the claimant’s death, not the date of the substitute’s death. This provision comes directly from the Act (38 U.S.C. 5121A(a)(1)), which

authorizes a request to substitute to be filed not later than 1 year after the date of the death of the claimant, but does not authorize substitution outside of this 1-year period.

#### **Amendments to Part 14**

##### *Representation of Substitutes*

The Act does not address the representation of substitutes by attorneys, claims agents, veterans service organization representatives, or other individuals. However, we propose to revise VA’s regulations governing representation of VA claimants to clarify that the same rules that would apply to a claimant apply to a substitute. Specifically, we propose to amend 38 CFR 14.630, “Authorization for a particular claim,” by adding a new paragraph (e), to explain that a person authorized to represent a claimant on a one-time basis pursuant to § 14.630 may also represent the substitute with respect to that claim upon the claimant’s death as long as a new VA Form 21–22a, “Appointment of Individual as Claimant’s Representative,” is filed. Proposed § 14.630(e) would permit such representation notwithstanding § 14.630(b), which authorizes representation on a “one time only” basis, because the substitute will be processing the same claim to completion.

Similarly, we propose to amend § 14.631 by adding a new paragraph (g), to clarify that an attorney, claims agent, or veterans service organization representative may represent a substitute only if a new VA Form 21–22, “Appointment of Veterans Service Organization as Claimant’s Representative,” or VA Form 21–22a, “Appointment of Individual as Claimant’s Representative,” signed by the substitute is filed. In other words, in no case will the representative of the deceased claimant be permitted to represent the substitute without the filing of a new VA Form 21–22 or VA Form 21–22a signed by the substitute to authorize such representation. In addition, if the substitute wants the representation of a person under § 14.630(a), a statement signed by the person and the substitute that no compensation will be charged or paid for the services would be required.

#### **Amendments to Part 20**

##### *Adjudications Before the Board*

We propose to amend 38 CFR 20.900 by adding new paragraph (a)(2) stating, “Cases returned to the Board following the grant of a substitution request or pursuant to an appeal of a denial of a

substitution request assume the place on the docket that was originally held by the deceased appellant.” This provision ensures that substitutes in appeals that were pending before the Board when the appellant died will get the benefit of the claim’s original docket number. This proposed rule also makes a related organizational amendment to § 20.900 by designating as paragraph (a)(1) the existing provision stating that cases returned to the Board following action pursuant to remand assume their original place on the docket. This provision is currently part of paragraph (a).

We also propose to amend 38 CFR 20.1106, “Rule 1106. Claim for death benefits by survivor—prior unfavorable decisions during veteran’s lifetime,” by adding that “[c]ases in which a person substitutes for a deceased veteran under 38 U.S.C. 5121A are not claims for death benefits and are not subject to this section. Cases in which a person substitutes for a deceased death benefits claimant under 38 U.S.C. 5121A are claims for death benefits subject to this section.” The inclusion of these statements is appropriate because a substitute on behalf of a veteran will be continuing a claim that was pending when the veteran died, and therefore the claim is not one for “death benefits,” and any issues decided must be decided with regard to the prior disposition of those issues during the veteran’s lifetime as they would have been were the veteran still alive. A person who substitutes for a death benefits claimant will be prosecuting a claim for “death benefits” so the rule regarding decisions without regard to any prior disposition of the issues during the veteran’s lifetime will apply as in other death benefit claims.

In addition, we propose to amend § 20.1302, “Rule 1302. Death of appellant during pendency of appeal,” to account for section 5121A. Specifically, we propose to specify that an appeal pending before the Board when the appellant dies will be dismissed “without prejudice.” This amendment is intended to allow the appeal to continue following a grant of a request to substitute and to ensure that a substitute is not prejudiced by the dismissal of the appeal upon the death of the claimant. We also propose to refer to § 3.1010 to clarify that requests to substitute must be filed with the AOJ for a decision on the request to substitute in the first instance. Moreover, the proposed amendment contains a reference to § 20.900(a)(2) to clarify that, “[i]f the agency of original jurisdiction grants the request to substitute, the case will assume its original place on the

docket pursuant to Rule 900 (§ 20.900(a)(2) of this part).”

We also propose to add to 38 CFR 20.1302 a paragraph (b) to specify a narrow exception to the general rule described in what would be designated as paragraph (a). Specifically, paragraph (b)(1) would permit the grant of a request to substitute by the AOJ prior to the dismissal of an appeal by the Board when the appellant had requested a hearing before the AOJ prior to death and a written request to substitute has been received at or before that hearing. In this limited context, the AOJ may make a decision on the request to substitute before the Board dismisses the appeal on account of the appellant’s death. Paragraph (b)(2) explains what happens if the AOJ grants the request to substitute:

If the [AOJ] grants the request to substitute, the [Board] can then take the testimony of the substitute at a hearing held pursuant to Rule 700 *et seq.* (§ 20.700 *et seq.* of this part). If the substitute desires representation at the hearing, he or she must appoint a representative prior to the hearing pursuant to § 14.631(g) of this chapter.

This proposed amendment is intended to promote efficiency in those circumstances where a hearing is scheduled to be held before the AOJ following the appellant’s death.

Finally, we propose to amend 38 CFR 20.1304(b)(1), which provides the general rule applicable to a request for a change in representation, a request for a personal hearing, or the submission of additional evidence, received more than 90 days following notification of certification of an appeal and transfer of the appellate record to the Board. We propose to add to the list of items required in a motion for acceptance of such requests or evidence based on good cause “the name of any substitute claimant or appellant.”

#### **Paperwork Reduction Act**

Although this document contains provisions constituting collections of information, at 38 CFR 3.1010(b) and (c) and 14.631(g), under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), no new or proposed revised collections of information are associated with this proposed rule. The information collection requirements for §§ 3.1010(b) and (c) and 14.631(g), are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0740 (VA Form 21–0847, Request for Substitution of Claimant Upon Death of Claimant); 2900–0321 (VA Form 21–22, Appointment of Veterans Service Organization as Claimant’s Representative); and 2900–

0321 (VA Form 21–22a, Appointment of Individual as Claimant’s Representative).

#### **Regulatory Flexibility Act**

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This proposed rule would directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Order 12866**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined that it is not a significant regulatory action under the Executive Order.

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the

private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

### Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for the programs affected by this document are 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance.

### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on January 31, 2011, for publication.

### List of Subjects

#### 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

#### 38 CFR Part 14

Administrative practice and procedure, Claims, Courts, Foreign relations, General Counsel, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

#### 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Dated: February 8, 2011.

**Robert C. McFetridge,**

*Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.*

For the reasons stated in the preamble, VA proposes to amend 38 CFR parts 3, 14, and 20 as follows:

## PART 3—AJUDICATION

### Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, Subpart A continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

2. Add § 3.1010 to read as follows:

#### **§ 3.1010 Substitution under 38 U.S.C. 5121A following death of a claimant.**

(a) *Eligibility.* If a claimant dies on or after October 10, 2008, a person eligible for accrued benefits under § 3.1000(a) of this part (listed in 38 CFR. 3.1000(a)(1) through (5)) may, in priority order, request to substitute for the deceased claimant in a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, that was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. Upon VA's grant of a request to substitute, the substitute may continue the claim or appeal on behalf of the deceased claimant for purposes of processing the claim or appeal to completion. Any benefits ultimately awarded are payable to the substitute and other members of a joint class, if any, in equal shares.

(b) *Time and place for filing a request.* A person may not substitute for a deceased claimant under this section unless the person files a request to substitute with the agency of original jurisdiction no later than one year after the claimant's death.

(c) *Request format.* (1) A request to substitute must be submitted in writing. At a minimum, a request to substitute must include the word "substitute" or "substitution," the applicable claim number or appeal number, and the names of the deceased claimant and the person requesting to substitute.

(2) In lieu of a specific request to substitute, a claim for accrued benefits, death pension, or dependency and indemnity compensation by an eligible person listed in 38 CFR 3.1000(a)(1) through (5) is deemed to include a request to substitute if a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. A claimant for accrued benefits, death pension, or dependency and indemnity

compensation may waive the right to substitute.

(d) *Evidence of eligibility.* A person filing a request to substitute must provide evidence of eligibility to substitute. If a person's request to substitute does not include evidence of eligibility when it is originally submitted and the person may be an eligible person, the Secretary will notify the person—

(1) Of the evidence of eligibility required to complete the request to substitute;

(2) That VA will take no further action on the request to substitute unless VA receives the evidence of eligibility; and

(3) That VA must receive the evidence of eligibility no later than 60 days after the date of notification or one year after the claimant's death, whichever is later, or VA will deny the request to substitute.

(e) *Decisions on substitution requests.* Subject to the provisions of § 20.1302 of this chapter, the agency of original jurisdiction will decide in the first instance all requests to substitute, including any request to substitute in an appeal pending before the Board of Veterans' Appeals.

(1) *Notification.* The agency of original jurisdiction will provide written notification of the granting or denial of a request to substitute to the person who filed the request, together with notice in accordance with § 3.103(b)(1).

(2) *Appeals.* The denial of a request to substitute may be appealed to the Board of Veterans' Appeals pursuant to 38 U.S.C. 7104(a) and 7105.

(3) *Joint class representative.* (i) A *joint class* means a group of two or more persons eligible to substitute under the same priority group under 38 CFR 3.1000(a)(1) through (a)(5), e.g., two or more surviving children.

(ii) In the case of a joint class of potential substitutes, only one person of the joint class may be a substitute at any one time. The first eligible person in the joint class to file a request to substitute will be the substitute representing the joint class.

(f) *Adjudications involving a substitute.* The following provisions apply with respect to a claim or appeal in which a survivor has been substituted for the deceased claimant:

(1) *Notice under 38 CFR 3.159.* VA will send notice under 38 CFR 3.159(b), "Department of Veterans Affairs assistance in developing claims," to the substitute only if the required notice was not sent to the deceased claimant or if the notice sent to the deceased claimant was inadequate.

(2) *Expansion of the claim not permitted.* A substitute may not add an issue to or expand the claim. However, a substitute may raise new theories of entitlement in support of the claim.

(3) *Submission of evidence and other rights.* A substitute has the same rights regarding hearings, representation, appeals, and the submission of evidence as would have applied to the claimant had the claimant not died. However, rights that may have applied to the claimant prior to death but which cannot practically apply to a substitute, such as the right to a medical examination, are not available to the substitute. The substitute must complete any action required by law or regulation within the time period remaining for the claimant to take such action on the date of his or her death. The time remaining to take such action will start to run on the date of the mailing of the decision granting the substitution request.

(4) *Board of Veterans' Appeals procedures.* The rules and procedures governing appeals involving substitutes before the Board of Veterans' Appeals are found in parts 19 and 20 of this chapter.

(g) *Limitations on substitution.* The following limitations apply with respect to substitution:

(1) *A claim or appeal must be pending.* (i) A claim is considered to be pending if the claimant had filed the claim with an agency of original jurisdiction but dies before the agency of original jurisdiction makes a decision on the claim. If the agency of original jurisdiction has decided a claim before the claimant dies, but the claimant dies before filing a Notice of Disagreement, no claim or appeal is pending for purposes of this section.

(ii) An appeal is considered to be pending if a claimant filed a notice of disagreement in response to a notification from an agency of original jurisdiction of its decision on a claim, but dies before the Board of Veterans' Appeals issues a final decision on the appeal. If the Board issued a final decision on an appeal prior to the claimant's death, the appeal is not pending for purposes of this section, even if the 120-day period for appealing the Board's decision to the Court of Appeals for Veterans Claims has not yet expired.

(2) *Benefits awarded.* Any benefits ultimately awarded are limited to any past-due benefits for the time period between the effective date of the award and what would have been the effective date of discontinuance of the award as a result of the claimant's death.

(3) *Benefits for last sickness and burial only.* When substitution cannot

be established under any of the categories listed in 38 CFR 3.1000(a)(1) through (a)(4), only so much of any benefits ultimately awarded may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial. No part of any benefits ultimately awarded shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any claimant.

(4) *Substitution by subordinate members prohibited.* Failure to timely file a request to substitute, or a waiver of the right to request substitution, by a person of a preferred category of eligible person will not serve to vest the right to request substitution in a person in a lower category or a person who bore the expense of last sickness and burial; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to other persons in the class.

(5) *Death of a substitute.* If a substitute dies while a claim is pending before an agency of original jurisdiction or the Board, or an appeal of a decision on a claim is pending, another member of the same joint class or a member of the next preferred subordinate category listed in 38 CFR 3.1000(a)(1) through (5) may substitute for the deceased substitute but only if the person requesting the second substitution files a request to substitute no later than one year after the date of the claimant's death (not the date of the substitute's death).

#### **PART 14—LEGAL SERVICES, GENERAL COUNSEL, AND MISCELLANEOUS CLAIMS**

3. The authority citation for part 14 continues to read as follows:

**Authority:** 5 U.S.C. 301; 28 U.S.C. 2671–2680; 38 U.S.C. 501(a), 512, 515, 5502, 5901–5905; 28 CFR part 14, appendix to part 14, unless otherwise noted.

4. Amend § 14.630 by adding paragraph (e) and revising the authority citation at the end of the section to read as follows:

#### **§ 14.630. Authorization for a particular claim.**

\* \* \* \* \*

(e) With respect to the limitation in paragraph (b) of this section, a person who had been authorized under paragraph (a) of this section to represent a claimant who later dies and is replaced by a substitute pursuant to 38 CFR 3.1010 for purposes of processing the claim to completion will be permitted to represent the substitute if

the procedures of 38 CFR 14.631(g) are followed.

\* \* \* \* \*

(Authority: 38 U.S.C. 501(a), 5121A, 5903)

5. Amend § 14.631 by adding paragraph (g) and revising the authority citation at the end of the section to read as follows:

#### **§ 14.631 Powers of attorney; disclosure of claimant information.**

\* \* \* \* \*

(g) If a request to substitute is granted pursuant to 38 CFR 3.1010, then a new VA Form 21–22, “Appointment of Veterans Service Organization as Claimant’s Representative,” or VA Form 21–22a, “Appointment of Individual as Claimant’s Representative,” under paragraph (a) of this section is required in order to represent the substitute before VA. If the substitute desires representation on a one-time basis pursuant to § 14.630(a), a statement signed by the person providing representation and the substitute that no compensation will be charged or paid for the services is also required.

\* \* \* \* \*

(Authority: 38 U.S.C. 501(a), 5121A, 5902, 5903, 5904)

#### **PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE**

6. The authority citation for part 20 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

#### **Subpart J—Action by the Board**

7. Amend § 20.900 by revising paragraph (a) and the authority citation at the end of the section to read as follows:

#### **§ 20.900 Rule 900. Order of consideration of appeals.**

(a) *Docketing of appeals.* Applications for review on appeal are docketed in the order in which they are received.

(1) Cases returned to the Board following action pursuant to a remand assume their original places on the docket.

(2) Cases returned to the Board following the grant of a substitution request or pursuant to an appeal of a denial of a substitution request assume the place on the docket that was originally held by the deceased appellant.

\* \* \* \* \*

(Authority: 38 U.S.C. 5121A, 7107, Pub. L. 103–446, § 302)

#### **Subpart L—Finality**

8. Revise § 20.1106 to read as follows:

**§ 20.1106 Rule 1106. Claim for death benefits by survivor—prior unfavorable decisions during veteran’s lifetime.**

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2) and 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor’s claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran’s lifetime. Cases in which a person substitutes for a deceased veteran under 38 U.S.C. 5121A are not claims for death benefits and are not subject to this section. Cases in which a person substitutes for a deceased death benefits claimant under 38 U.S.C. 5121A are claims for death benefits subject to this section.

(Authority: 38 U.S.C. 5121A, 7104(b))

**Subpart N—Miscellaneous**

9. Revise § 20.1302 to read as follows:

**§ 20.1302 Rule 1302. Death of appellant during pendency of appeal before the Board.**

(a) *General.* An appeal pending before the Board of Veterans’ Appeals when the appellant dies will be dismissed without prejudice. A person eligible for substitution under § 3.1010 of this chapter may file with the agency of original jurisdiction a request to substitute for the deceased appellant. If the agency of original jurisdiction grants the request to substitute, the case will assume its original place on the docket pursuant to Rule 900 (§ 20.900(a)(2) of this part). If the agency of original jurisdiction denies the request to substitute and the person requesting to substitute appeals that decision to the Board, the appeal regarding eligibility to substitute will assume the same place on the docket as the original claim pursuant to Rule 900 (§ 20.900(a)(2) of this part).

(b) *Exception.* (1) If a hearing request is pending pursuant to Rule 704 (§ 20.704 of this part) when the appellant dies, the agency of original jurisdiction may take action on a request to substitute without regard to whether the pending appeal has been dismissed by the Board, if the request is submitted in accordance with § 3.1010 of this chapter.

(2) If the agency of original jurisdiction grants the request to substitute, the Board of Veterans’ Appeals can then take the testimony of the substitute at a hearing held pursuant to Rule 700 *et seq.* (§ 20.700 *et seq.* of

this part). If the substitute desires representation at the hearing, he or she must appoint a representative prior to the hearing pursuant to § 14.631(g) of this chapter.

(Authority: 38 U.S.C. 5121A, 7104(a))

10. Revise § 20.1304, paragraph (b)(1) introductory text and the authority citation at the end of the section to read as follows:

**§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans’ Appeals.**

\* \* \* \* \*

(b) \* \* \*

(1) *General rule.* Subject to the exception in paragraph (b)(2) of this section, following the expiration of the period described in paragraph (a) of this section, the Board of Veterans’ Appeals will not accept a request for a change in representation, a request for a personal hearing, or additional evidence except when the appellant demonstrates on motion that there was good cause for the delay. Examples of good cause include, but are not limited to, illness of the appellant or the representative which precluded action during the period; death of an individual representative; illness or incapacity of an individual representative which renders it impractical for an appellant to continue with him or her as representative; withdrawal of an individual representative; the discovery of evidence that was not available prior to the expiration of the period; and delay in transfer of the appellate record to the Board which precluded timely action with respect to these matters. Such motions must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran’s survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual’s behalf) or the name of any substitute claimant or appellant; the applicable Department of Veterans Affairs file number; and an explanation of why the request for a change in representation, the request for a personal hearing, or the submission of additional evidence could not be accomplished in a timely manner. Such motions must be filed at the following address: Director, Management and Administration (01E), Board of Veterans’ Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Depending upon the ruling on the motion, action will be taken as follows:

\* \* \* \* \*

(Authority: 38 U.S.C. 5121A, 5902, 5903, 5904, 7104, 7105, 7105A)

[FR Doc. 2011–3196 Filed 2–14–11; 8:45 am]

BILLING CODE 8320–01–P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 1**

[FRL–9267–2]

**Notice of a Public Meeting: Environmental Justice Considerations for Drinking Water Regulatory Efforts**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of meeting.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is hosting a public meeting to discuss and solicit input on environmental justice considerations related to several upcoming regulatory efforts. These regulatory efforts include the long-term revisions to the Lead and Copper Rule (LCR) and the third Regulatory Determinations from the drinking water Contaminant Candidate List 3. EPA recently announced its intentions to develop drinking water regulatory actions for perchlorate and carcinogenic volatile organic compounds (VOCs). While the Agency is in the very preliminary stages of developing the regulatory efforts for perchlorate and carcinogenic VOCs, EPA plans to discuss these actions at this meeting. Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. EPA is holding this meeting to provide information to communities and an opportunity for communities to provide input on the LCR, Regulatory Determinations 3, perchlorate, and carcinogenic VOCs rulemaking efforts.

*Date and Location:* The public meeting will be held in Washington, DC on Thursday, March 3, 2011, from 10 a.m. to 5 p.m., Eastern Daylight Time (EDT). Participants will be notified of the specific meeting room upon confirmation of registration. Teleconferencing will be available for individuals unable to attend the meeting in person.

**FOR FURTHER INFORMATION CONTACT:** For general information about this meeting, contact Lameka Smith, Standards and Risk Management Division, Office of Ground Water and Drinking Water; by