

### Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

### Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

### Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

### Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office 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 rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

### Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a RNA. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01-0727 to read as follows:

#### § 165.T01-0727 Regulated Navigation Area; Arthur Kill, NY and NJ.

(a) *Regulated Area.* The following area is a regulated navigation area: all waters of the North of Shooters Island Reach, Elizabethport Reach, and Gulfport Reach in the Arthur Kill; bounded in the northeast by a line drawn from position 40° 38'48.637" N, 074° 09'18.204" W; to a point in position 40°38'37.815" N, 074° 09'20.245" W; and bounded in the southwest by a line drawn from position 40° 37'15.643" N, 074° 12'15.927" W; to a point in position 40° 37'15.779" N, 074° 12'08.0622" W. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) *Regulations.*

(1) The general regulations contained in 33 CFR 165.13 apply.

(2) All vessels must remain at least 150 feet from all drilling and blasting equipment; if a vessel must pass within 150 feet of drilling and blasting equipment for reasons of safety, they shall contact the dredge and/or blasting barge on Channel 13.

(3) No vessel shall enter or transit any work area where drill barges and/or dredges are located without the permission of Vessel Traffic Service New York (VTSNY) Director.

(4) No vessel may be underway within 1,500 feet of the blasting area during blasting operations.

(5) No vessel shall enter an area of drilling or blasting when they are advised by the drilling barge or VTSNY that a misfire or hang fire has occurred.

(6) Vessel Movement Reporting System (VMRS) users are prohibited from meeting or overtaking other vessels when transiting alongside an active work area where dredging and drilling equipment are being operated.

(7) Each vessel transiting in the vicinity of a work area where dredges are located is required to do so at reduced speed to maintain maneuverability while minimizing the effects of wake and surge.

(8) The VTSNY Director may impose additional requirements through VTS measures, as per 33 CFR 161.11.

(c) *Effective Period.* This rule is effective from 8 a.m. on August 12, 2011 until 5 p.m. on April 1, 2014.

Dated: 12 Aug 2011.

**J.B. McPherson,**

*Captain, U.S. Coast Guard, Commander, First Coast Guard District, Acting.*

[FR Doc. 2011-21460 Filed 8-22-11; 8:45 am]

**BILLING CODE 9110-04-P**

### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Parts 3 and 20

RIN 2900-AO06

#### Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its hearing regulations to clarify that the provisions regarding hearings before the Agency of Original Jurisdiction (AOJ) do not apply to hearings before the Board of Veterans' Appeals (Board).

**DATES:** *Effective Date:* This rule is effective August 23, 2011.

**FOR FURTHER INFORMATION CONTACT:** Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (012), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-8078. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This document amends 38 CFR parts 3 and 20 to clarify existing hearing practices and procedures before the AOJ and the Board. Specifically, VA is amending § 3.103(a) and (c) to clarify that the hearing procedures outlined in § 3.103 apply to hearings held before the AOJ and not to hearings held before the Board. VA is also amending § 20.706 to further clarify that Board Members presiding over a hearing on appeal are not bound by the hearing procedures in § 3.103(c) and must conduct hearings in accordance with part 20, subpart H, which contains provisions governing Board hearing practice and procedure. In Appendix A to part 20, VA is removing the cross references to § 3.103.

VA has determined these clarifying changes are necessary because of a recent decision by the United States Court of Appeals for Veterans Claims (Court) in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), that applied the provisions of § 3.103(c)(2) to a Board hearing. The *Bryant* Court held that the provisions of § 3.103(c)(2) require a "Board hearing officer" to "fully explain the issues still outstanding that are relevant and material to substantiating the claim" and to "suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Id.* at 496-97. The Court concluded with respect to one of the service connection claims on appeal that the Veteran had been prejudiced because the presiding "Board hearing officer" had not explained matters material to the outcome of the claim and had not suggested that the Veteran could secure evidence regarding a nexus between his current disability and service. *Id.* at 499. The Court found prejudice existed because evidence of a nexus was not of record at the time of the hearing and remained lacking at the time of the decision. *Id.*

In reaching its conclusions, the Court relied in part on its previous holding in *Douglas v. Derwinski*, 2 Vet. App. 435 (1992), which held that the provisions of § 3.103(c) applied to hearings before the Board. *Bryant*, 23 Vet. App. at 494 (citing *Douglas*, 2 Vet. App. at 442). At the time the Court decided *Douglas*, the

Board's Rules of Practice provided that hearings on appeal could be held: "(a) [b]efore a section of the Board of Veterans' Appeals in Washington, DC[;] (b) \* \* \* before a traveling section of the Board of Veterans' Appeals during regularly scheduled visits to [VA] facilities[;] [or] (c) [b]efore appropriate personnel in the [VA] regional or other office nearest the appellant's residence, acting as a hearing agency for the Board of Veterans' Appeals." 38 CFR 19.160 (1991). Under the former rules, if an appellant chose to have a hearing before employees of the AOJ acting as a hearing agency for the Board, then he or she was not entitled to a subsequent hearing before a Board Member. *See id.*; *see also* Veterans Benefits Administration, M21-1 Adjudication Procedures Manual, § 18.17g (1991) ("A formal hearing on appeal at a regional office will be in lieu of such a hearing before the [Board], except in the unusual case in which a special appearance by the claimant before the [Board], or the special attention of an accredited organization's headquarters in Washington, DC, is requested by the appellant.").

Not long after the Court decided *Douglas*, the Board amended its hearing regulations to terminate the practice of AOJ personnel holding appellate hearings on the Board's behalf. The final rulemaking noted that the Board was implementing these changes because it had decided "a clear demarcation should exist between the conduct of hearings by the Board and hearings conducted by [Veterans Benefits Administration] employees at regional offices." 58 FR 27934, 27934 (May 12, 1993). As a result of this procedural modification, an appellant now has the opportunity to appear for a hearing with the AOJ at any time prior to when his or her appeal is certified to the Board. 38 CFR 3.103(a); *Your Rights to Appeal Our Decision*, VA Form 4107 (Sept. 2009). The appellant also has a right to appear at a separate hearing on appeal before a Board Member. 38 CFR 20.700(a); *see* VA Form 4107 (stating that a hearing before the AOJ is separate from any hearing an appellant may later request before the Board); *see also* *Gambill v. Shinseki*, 576 F.3d 1307, 1315, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (explaining that an appellant has a right to appear at hearings before the AOJ and the Board).

The 1993 regulatory changes reflected VA's intent to clearly distinguish hearings before AOJs from hearings before the Board, including the duties of the respective VA personnel conducting the hearing. As a result of these changes, it has become standard VA practice and

procedure that hearings before AOJs are governed by § 3.103 and hearings before the Board are governed by relevant provisions in part 20. The Court's holding in *Bryant* brought to light that the pertinent regulations do not clearly reflect VA's intent. Therefore, VA has decided to make clarifying changes to §§ 3.103 and 20.706 to ensure that the distinction between the duties of AOJ hearing officers and Board Members (also known as Veterans Law Judges (VLJs), *see* § 19.2(b)) is clear on the face of the pertinent regulations and will not result in further confusion.

In part 3, VA is revising § 3.103(a) to clarify that the provisions governing hearings in § 3.103 only apply to hearings conducted before the AOJ and that the provisions in part 20 govern hearings before the Board. VA is also removing the following language from § 3.103(c)(1): "subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review." This language is not necessary since the revision to paragraph (a) clarifies that § 3.103 does not apply to Board hearings. VA is also revising paragraph (c)(1) to change references to "original determinative authority" to "VA office having original jurisdiction". This language is consistent with other portions of § 3.103(c)(1).

In part 20, VA is amending § 20.706 to state that the conduct of hearings by presiding Board Members or VLJs is governed by subpart H of part 20 and that Board Members are not bound by the hearing provisions of § 3.103(c). In Appendix A, VA is removing two cross references to § 3.103 listed for §§ 20.1 and 20.1304 to ensure they do not cause any confusion regarding the correct applicability of § 3.103.

#### Administrative Procedure Act

This document merely clarifies current procedures for obtaining and conducting a hearing on a claim for VA benefits before the VA agency of original jurisdiction or the Board. It does not create new procedure, and no substantive change is intended. Accordingly, this document is being published as a final rule pursuant to 5 U.S.C. 553(b)(A), which exempts procedural rules from the APA's notice-and-comment and delayed effective date requirements.

#### Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

### Regulatory Flexibility Act

The initial and final regulatory flexibility analysis requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601–612, are not applicable to this rule because a notice of proposed rulemaking is not required for this rule. Even so, the Secretary of Veterans Affairs hereby certifies that this final 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. 601–612. This rule will affect only individual VA beneficiaries and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

### Executive Order 12866—Regulatory Planning and Review

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) unless OMB waives such review, 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 planned or taken 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.

VA has examined the economic, interagency, legal, and policy implications of this rulemaking and has concluded 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 an 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 given year. This 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 this rule are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans’ Dependents; 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; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Housing Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing—Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing—Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing—Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans’ Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans’ Children with Spina Bifida or Other Covered Birth Defects.

### 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 August 16, 2011, for publication.

### List of Subjects

#### 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

#### 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Dated: August 18, 2011.

**Robert C. McFetridge,**

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

For the reasons set forth in the preamble, VA amends 38 CFR parts 3 and 20 as follows:

### PART 3—ADJUDICATION

#### 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. Amend § 3.103 by:

- a. Revising the last sentence of paragraph (a) and adding a new sentence after the last sentence.

- b. Revising paragraph (c)(1).

The revisions read as follows:

#### § 3.103 Procedural due process and appellate rights.

(a) \* \* \* The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3, except that the provisions of this section governing hearings apply only to hearings conducted before the VA office having original jurisdiction over the claim. Hearings before the Board of Veterans’ Appeals are governed by part 20 of this chapter.

\* \* \* \* \*

(c) \* \* \* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant’s home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees of the VA office having original jurisdiction over the claim to conduct the hearing and to be responsible for establishment

and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more employees of the VA office having original jurisdiction over the claim who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

\* \* \* \* \*

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

■ 3. 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 H—Hearings on Appeal**

■ 4. Revise § 20.706 to read as follows:

**§ 20.706 Rule 706. Functions of the presiding Member.**

The presiding Member is responsible for the conduct of the hearing, in accordance with the provisions of subpart H of this part, administering the oath or affirmation, and ruling on questions of procedure. The presiding Member will assure that the course of the hearing remains relevant to the issue, or issues, on appeal and that there is no cross-examination of the parties or witnesses. The presiding Member will take such steps as may be necessary to maintain good order at hearings and may terminate a hearing or direct that

the offending party leave the hearing if an appellant, representative, or witness persists in disruptive behavior. The presiding Member is not bound by the procedures described in § 3.103(c) of this chapter, as those procedures only apply to hearings before the agency of original jurisdiction.

■ 5. Amend APPENDIX A TO PART 20—CROSS-REFERENCES table by:

■ a. Removing entries “20.1”; “38 CFR 3.103(a)”; and “Statement of policy.”.

■ b. Revising entry 20.1304 to read as follows:

**APPENDIX A TO PART 20—CROSS-REFERENCES**

Sec.	Cross-reference	Title of cross-referenced material or comment
20.1304	38 CFR 20.700–20.717	See also rehearings.

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 BILLING CODE 8320–01–P

**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 63**

**RIN 2900–AN73**

**Health Care for Homeless Veterans Program**

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Final rule.

**SUMMARY:** This final rule establishes regulations for contracting with community-based treatment facilities in the Health Care for Homeless Veterans (HCHV) program of the Department of Veterans Affairs (VA). The HCHV program assists certain homeless veterans in obtaining treatment from non-VA community-based providers. The final rule formalizes VA’s policies and procedures in connection with this program and clarifies that veterans with substance use disorders may qualify for the program.

**DATES:** *Effective Date:* September 22, 2011.

**FOR FURTHER INFORMATION CONTACT:** Robert Hallett, Healthcare for Homeless Veterans Manager, c/o Bedford VA Medical Center, 200 Springs Road, Bldg.

12, Bedford, MA 01730; (781) 687–3187 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** The HCHV program is authorized by 38 U.S.C. 2031, under which VA may provide outreach as well as “care, treatment, and rehabilitative services (directly or by contract in community-based treatment facilities, including halfway houses)” to “veterans suffering from serious mental illness, including veterans who are homeless.” One of VA’s National priorities is a renewed effort to end homelessness for veterans. For this reason, we are establishing regulations that are consistent with the current administration of this program.

The primary mission of the HCHV program is to use outreach efforts to contact and engage veterans who are homeless and suffering from serious mental illness or a substance use disorder. Many of the veterans for whom the HCHV program is designed have not previously used VA medical services or been enrolled in the VA health care system.

Through the HCHV program, VA identifies homeless veterans with serious mental illness and/or substance use disorder, usually through medical intervention, and offers community-based care to those whose conditions are determined, clinically, to be managed sufficiently that the individuals can participate in such care. We have assisted homeless veterans

with substance use disorders through this program because, based on our practical understanding and experience, the vast majority of homeless veterans have substance use disorders. Treating substance use as a mental disorder is consistent with the generally accepted “disease model” of alcoholism and drug addiction treatment, as well as the modern use of medical intervention to treat the condition. We believe that if a substance use disorder is a contributing cause of homelessness, then that disorder is serious; therefore, it is consistent to include such veterans in a program designed for “veterans suffering from serious mental illness, including veterans who are homeless.” 38 U.S.C. 2031(a).

Veterans who are identified and who choose to participate in this form of care as part of their treatment plan are then referred by VA to an appropriate non-VA community-based provider. In some cases, VA will continue to actively medically manage the veteran’s condition, while in other cases a VA clinician may determine that a veteran can be sufficiently managed through utilization of non-medical resources, such as 12-step programs.

To provide the community-based care, the HCHV program contracts with non-VA community-based providers, such as halfway houses, to provide to these veterans housing and mental health and/or substance use disorder