

Dated: July 2, 2008.

**M.J. Huebschman,**

*Captain, U.S. Coast Guard, Captain of the Port Sault Ste. Marie.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 19 and 20

RIN 2900-AM49

#### Supplemental Statement of the Case

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its regulations to adjust the time period for filing a response to a Supplemental Statement of the Case in appeals to the Board of Veterans' Appeals (Board) from 60 days to 30 days. The purpose of this adjustment is to improve efficiency in the appeals process and reduce the time that it takes to resolve appeals while still providing appellants with a reasonable period to respond to a Supplemental Statement of the Case.

**DATES:** *Effective Date:* This rule is effective July 16, 2008.

*Applicability Date:* VA will apply this rule to appeals pending before VA after a period of 90 days from the effective date of this rule.

**FOR FURTHER INFORMATION CONTACT:**

Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals (012), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565-5978. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** The Board is an administrative body within VA that decides appeals from denials by Agencies of Original Jurisdiction (AOJ) of claims for veterans' benefits, as well as a limited class of cases of original jurisdiction. The Board is under the administrative control and supervision of a Chairman who is directly responsible to the Secretary of Veterans Affairs. 38 U.S.C. 7101(a).

On March 26, 2007, VA published in the **Federal Register** (72 FR 14056) a Notice of Proposed Rulemaking (NPRM) that proposed to reduce the time limit for filing a response to a Supplemental Statement of the Case from 60 days to 30 days. Interested persons were invited to submit written comments on or before May 25, 2007.

Eight comments were received, all of which disagreed with the proposed rule for reasons summarized below. At least

three commenters argued that 30 days was simply not enough time to respond to a Supplemental Statement of the Case. Those commenters also questioned the purpose of the time reduction, arguing that this action would not serve the stated purpose of expediting appeals adjudication. One commenter indicated that the proposed rule would add further confusion regarding the various time periods within which claimants must respond to VA documents. Another commenter expressed concern that the proposed rule did not consider individuals who have appeals pending and yet reside outside of the United States. Two commenters expressed concern over the process of requesting an extension for filing a response to a Supplemental Statement of the Case. Finally, several commenters provided general suggestions for improving the VA adjudication system.

A recurring theme among the comments received was that 30 days was simply not enough time to prepare a response to a Supplemental Statement of the Case. One commenter noted that many veterans are represented by veterans service organizations that are overworked and understaffed, which results in veterans having to wait 3 to 4 weeks just to get an appointment with their representative. Thus, the commenter concluded, 30 days would be an insufficient amount of time in which to prepare a response. The commenter also suggested that VA was implementing this time reduction in hopes of receiving fewer responses to Supplemental Statements of the Case. A second commenter noted that if additional medical evidence, such as a rebuttal medical opinion, was required to respond to evidence outlined in the Supplemental Statement of the Case, a 30-day response period leaves little time to obtain such evidence. Yet another commenter remarked that Supplemental Statements of the Case often contain only a brief description of the evidence added to the record, thus, requiring claimants to request complete copies of such evidence from the AOJ in order to prepare a response. The commenter argued that this process alone can take more than 30 days.

Although VA recognizes and appreciates the concerns expressed by these commenters, we believe that the 30-day response time offered under the proposed rule does in fact afford appellants a reasonable opportunity to meaningfully respond to a Supplemental Statement of the Case, and we decline to make any changes to the response time outlined in the proposed rule based on these comments.

As explained in the NPRM, Supplemental Statements of the Case are issued at a late stage in the appellate process, often the last formal step prior to certification of an appeal to the Board. By that stage in the appeal period, appellants have already had extensive opportunity to gather evidence, including supportive medical opinions, for submission to the AOJ. Unlike a Statement of the Case, which must contain specific information about the evidence and issues in the case, the applicable laws and regulations, and the reasons for each determination, a Supplemental Statement of the Case is not required to contain the same degree of detail. As its name implies, a Supplemental Statement of the Case is a *supplement* to the Statement of the Case. The purpose of this document is to inform the appellant of any material changes in, or additions to, the information included in the Statement of the Case or any prior Supplemental Statement of the Case. 38 CFR 19.31(a). In *no case* will a Supplemental Statement of the Case be used to announce AOJ decisions on issues that were not previously addressed in a Statement of the Case. 38 CFR 19.31(a). Therefore, due to the limited purpose of a Supplemental Statement of the Case, less time should be needed to respond to a Supplemental Statement of the Case as compared to the Statement of the Case. Significantly, a response to a Supplemental Statement of the Case is *optional* and generally is not required to perfect an appeal. 38 CFR 20.302(c).

To the extent that certain cases involve a degree of medical or legal complexity so as to require additional time to craft an appropriate response to a Supplemental Statement of the Case, appellants can easily request an extension of the 30-day period for responding to a Supplemental Statement of the Case under the provisions of 38 CFR 20.303. Section 20.303 provides that an extension of the period for filing a response to a Supplemental Statement of the Case may be granted for good cause. Although good cause is not specifically defined by that regulation, it seems logical that a request for an extension on the basis that additional medical evidence was being sought would indeed be good cause for such an extension. Moreover, in response to one commenter's concern that the extension request may not be granted, the rule provides that a denial of a request for extension is appealable to the Board. 38 CFR 20.303.

We will, however, make one minor revision to the extension provisions of 38 CFR 20.303 to ensure that they have

broad applicability. Currently, § 20.303 allows for an extension of the period to respond to a Supplemental Statement of the Case based on good cause only when a response to the Supplemental Statement of the Case “is required.” As noted above, however, in the vast majority of cases, a response to a Supplemental Statement of the Case is merely optional and is not mandatory to perfect an appeal. 38 CFR 20.302(c). A response to a Supplemental Statement of the Case is only “required” when a Substantive Appeal has not been submitted and the statutory period to file the same has not expired. *Id.* Because Supplemental Statements of the Case are typically issued after a Substantive Appeal has been filed, a response is rarely needed to perfect the appeal. Thus, as currently written, the extension request provisions of § 20.303 have narrow applicability in that they only apply in the rare case where a Substantive Appeal has not been filed and a response to a Supplemental Statement of the Case is required to perfect an appeal.

To ensure that all appellants are able to request an extension of the period to respond to a Supplemental Statement of the Case based on good cause, regardless of whether such response is required to perfect the appeal, we will delete the phrase “when such a response is required” from the first sentence of 38 CFR 20.303. This minor revision will ensure that all appellants will have a mechanism to request an extension, regardless of the procedural posture of their cases.

Even in the absence of an approved extension request, the appellant still has an additional opportunity to submit evidence and argument in his or her appeal. As noted in the NRPM, in addition to the 30-day period to respond to the Supplemental Statement of the Case, once an appeal has been certified and transferred to the Board, the appellant typically still has 90 days to submit further evidence. 38 CFR 20.1304(a). Although 38 CFR 20.1304(a) states that the appellant has 90 days or until the Board promulgates a decision to submit evidence, as a practical matter, with the exception of a limited class of cases, such as cases advanced on the Board’s docket pursuant to 38 U.S.C. 7107(a)(2), the Board generally does not decide cases until after the 90-day period has passed. This effectively provides the vast majority of appellants with the full 90 days to submit additional evidence. Moreover, under 38 CFR 20.1304(b), even after the 90-day period expires an appellant may still move to submit additional evidence if

he or she can demonstrate good cause for the delayed submission.

One commenter expressed concern that the aforementioned extension procedure imposes an “additional burden” upon appellants to request an extension of time and show good cause, which “suggests hostility toward their claims and is inconsistent with the notion of a veteran-friendly VA system.” VA respectfully disagrees with this comment for several reasons. First, the commenter is presupposing that this rulemaking will have adverse effects for veterans and other claimants seeking veterans’ benefits. On the contrary, we believe that this rulemaking will add efficiency to the appeals process and lessen the time needed at the AOJ level to resolve appeals. Currently, due in part to the fact that a response to a Supplemental Statement of the Case is usually optional, many appellants choose not to file a response. However, VA must wait until the current 60-day time period expires before taking any further action in the appeal. Although a waiver form is sometimes used to ask appellants if they wish to waive this 60-day period, responses are not always received to that request. Therefore, the result is cases that sit without any action, simply waiting for a regulatory time period to expire. By shortening the turn-around time provided for a response to a Supplemental Statement of the Case, appeals can be certified and transferred to the Board sooner, thereby allowing that tribunal to adjudicate the claim sooner than if the claims file was allowed to linger at the AOJ for an additional 30 days.

VA emphasizes that the purpose of this rulemaking is not to saddle appellants with an additional obligation to make extension requests, but rather to streamline the appeals process for the vast majority of appellants who either need little time to formulate a response to a Supplemental Statement of the Case or who wish to submit no response at all.

In response to the criticism that this reduced time period will not serve the stated purpose of expediting appeals or that VA is taking this action in the hopes that few responses will be received, that is simply not true. The VA claims and adjudication process has grown tremendously over the years both regarding the volume of claims and appeals, and the legal and medical complexity of the cases. Along with this high volume has come an increased appeals resolution time. VA is closely examining its systems to determine where time can be reduced. Although this 30-day reduction may be small in the scheme of the average appeal, it is

an initial step in the right direction. Reducing unnecessary wait times encourages efficiency and promotes case movement. There is no adverse effect on the appellant, as a process exists for requesting an extension, if one is desired. That extension request is itself an appealable issue, thus ensuring legal protection of the appellant’s right to respond to a Supplemental Statement of the Case.

While an extension request may be needed in more complex cases or where extenuating circumstances are present, such cases constitute a relatively small percentage of the overall number of appeals in the VA system. We do not believe that requiring appellants to request an extension in these cases represents an overly burdensome task. The extension procedure is already an integral part of 38 CFR 20.303. This rulemaking merely reduces to 30 days, as opposed to 60, the period during which the extension request must be made. It also liberalizes the extension request procedure by allowing all appellants to make an extension request, regardless of whether a response to the Supplemental Statement of the Case is required to perfect the appeal. As outlined above, at the Supplemental Statement of the Case stage, the appellant has already been afforded ample opportunity to submit evidence and argument in support of his or her claim. In the relatively small number of cases where a 30-day response period may be inadequate to respond to the Supplemental Statement of the Case, an extension request provides an uncomplicated means to allow for the submission of additional evidence and argument. Again, should the AOJ deny such request, that denial is itself appealable to the Board. Moreover, as noted above, there is still generally a minimum period of 90 days for evidence submission after the appeal is certified and transferred to the Board. We therefore make no changes based on these comments.

Another commenter also expressed concern that a 30-day response time was inadequate for those individuals who have appeals pending but reside outside the United States. The commenter argued that a Supplemental Statement of the Case mailed to an address overseas presumably takes longer to be delivered than mail being delivered to an address close to the AOJ. While VA acknowledges that mail delivered to destinations at a distance from the AOJ may take longer to reach the intended recipient, we do not believe that such consideration warrants any change to the proposed rule. In fact, no other VA regulations pertaining to claims

adjudication allow different time periods for overseas mailings. We do note, however, that while mailing to a distant destination may delay the appellant's actual receipt of the Supplemental Statement of the Case, it will not affect the timeliness of the response. The regulations currently provide that a response postmarked prior to the expiration of an applicable time limit will be accepted as having been timely filed. 38 CFR 20.305. In the event that the postmark is not of record, the postmark date will be presumed to be 5 days prior to the date of the receipt of the document by VA. *Id.* Thus, if a claimant's response to a Supplemental Statement of the Case is postmarked prior to the expiration of the 30-day period, it will be considered timely, even if the response is not received by VA within the 30-day period (including due to mailing delays). Accordingly, VA makes no change based on this comment.

As outlined above, Supplemental Statements of the Case are limited in scope and are issued for the sole purpose of informing the appellant of material changes in or additions to information found in the Statement of the Case or a prior Supplemental Statement of the Case. We again note that Supplemental Statements of the Case are issued well into the appeals process and after claimants have had adequate opportunity to submit or identify favorable evidence. Due to the limited purpose of a Supplemental Statement of the Case and its occurrence late in the appeals process, little time should be required to respond in most cases. Thus, most appellants should be able to timely respond even in situations where the Supplemental Statement of the Case is not immediately received by a claimant due to mailing delays. As with other cases, should 30 days prove insufficient, an extension may be granted where good cause is shown. In certain circumstances, good cause may include those situations where an appellant's response time is truncated due to mail delays.

Another commenter expressed concern that the change to a 30-day response period would "add further confusion regarding the time periods with which claimants must respond to VA documents." We respectfully disagree. The revised period is not misleading or difficult to calculate. The 30-day response period established in this rulemaking is not inherently more confusing than the current 60-day period. Nor do we find confusing a 30-day period among other periods for responding to other documents.

Response periods and filing deadlines are a necessary part of any regulatory system, including that governing the response to Supplemental Statements of the Case. While claimants and their representatives will need to adjust to a shortened time frame to craft a response to a Supplemental Statement of the Case, we believe that this change is quite straightforward in application. Therefore, we make no change based on this comment.

Finally, we acknowledge the comments containing general suggestions for improving the VA claims adjudication system. While VA welcomes any input regarding improvements in the system, these particular comments do not directly concern the subject of this rulemaking, and therefore, this document is not an appropriate venue to address such comments. Thus, VA makes no changes to the NPRM based on those comments.

Based on the rationale stated above, as well as the rationale outlined in the NPRM, the proposed rule is adopted with the minor change to 38 CFR 20.303 outlined above.

#### **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 Secretary 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. By reducing the period allowed for submitting an optional response to a Supplemental Statement of the Case to 30 days, this final rule will affect claimants for VA benefits who appeal to the Board. It may also affect a few small organizations appealing to the Board, including attorneys appealing the cancellation of their accreditation by the VA General Counsel and accredited attorneys appealing decisions affecting payment of their fees out of past-due benefits awarded to VA claimants. This final rule may also affect a few small governmental jurisdictions appealing to the Board, such as state agencies appealing VA decisions on per diem payments for services provided to veterans in state homes.

However, reducing the period permitted for submitting an optional response to a Supplemental Statement of the Case would not have a significant economic impact on a substantial number of these small entities. Rather, it will expedite the processing of their

appeals to the Board. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirement of 5 U.S.C. 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) 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 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 final rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866.

#### **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 1 year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### **Catalog of Federal Domestic Assistance Numbers**

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal 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, Veterans 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.

#### List of Subjects in 38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

Approved: April 25, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

■ For the reasons set forth in the preamble, 38 CFR parts 19 and 20 are amended as follows:

#### PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

■ 1. The authority citation for part 19 continues to read as follows:

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

#### Subpart B—Appeals Processing by Agency of Original Jurisdiction

##### § 19.38 [Amended]

■ 2. Section 19.38 is amended by removing “60-day” and adding, in its place, “30-day”.

#### 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 D—Filing

##### § 20.302 [Amended]

■ 4. Section 20.302(c) is amended by removing “60” and adding, in its place, “30”.

##### § 20.303 [Amended]

■ 5. Section 20.303 is amended by removing the phrase “or the 60-day period for responding to a Supplemental Statement of the Case when such a response is required” and adding, in its place, “or the 30-day period for responding to a Supplemental Statement of the Case”.

[FR Doc. E8-16238 Filed 7-15-08; 8:45 am]

**BILLING CODE 8320-01-P**

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA-R05-OAR-2006-0003; FRL-8578-5]

#### Approval and Promulgation of Air Quality Implementation Plans; Illinois

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a revision to the Illinois Ozone State Implementation Plan (SIP). On August 17, 2005, Illinois requested that five compounds be added to its list of compounds that are exempt from being considered as volatile organic compounds (VOCs). EPA no longer considers four of the compounds to be VOCs for control and recordkeeping/reporting purposes because the compounds were shown to be negligibly photochemically reactive, and do not lead to ozone formation. EPA, however, determined that tertiary-butyl acetate (t-butyl acetate) has negligible contribution to ozone formation, and, therefore, is not considered a VOC for emission limits and VOC control requirements, it should, nonetheless, continue to be covered by recordkeeping, emission reporting, and inventory requirements. Illinois provided a supplementary submission on January 29, 2008, correcting the August 17, 2007, submittal by clarifying the restrictions pertaining to the compound t-butyl acetate.

**DATES:** This final rule is effective on August 15, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2006-0003. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886-6524 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Matt Rau, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6524, [rau.matthew@epa.gov](mailto:rau.matthew@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we”, “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What Revisions Did the State Request?
- II. What Is EPA's Analysis of the Revisions?
- III. What Are the Environmental Effects of This Action?
- IV. What Action Is EPA Taking Today?
- V. Statutory and Executive Order Reviews

#### I. What Revisions Did the State Request?

Illinois requested revisions to its ozone SIP which would add five compounds to the list of compounds exempt from VOC requirements because they are negligibly photochemically reactive. Illinois uses the term “volatile organic matter” or “VOM” in place of VOC. The State requested the compounds 1,1,1,2,2,3,3-Heptafluoro-3-methoxypropane (“n-C<sub>3</sub>F<sub>7</sub>OCH<sub>3</sub>”), 3-Ethoxy 1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl)hexane (“HFE-7500”), 1,1,1,2,3,3,3-Heptafluoropropane (“HFC-227ea”), Methyl formate, and tertiary-Butyl acetate (“t-butyl acetate”) be added to Title 35 of the Illinois Administrative Code (IAC) Section 211.7150(a), its list