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 Commandant Instruction M16475.lD which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph 34(g) of the Instruction from further environmental documentation. This rule establishes a security zone and as such is covered by this paragraph. A final ''Environmental Analysis Check List'' and a final ''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 record keeping requirements, 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; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A new temporary § 165.T09–004 is added as follows:

§ 165.T09–004 Security Zone; Cleveland Harbor, Dock 32.

(a) *Location.* The following area is a temporary security zone: all waters of Cleveland Harbor, Cleveland, OH, within a 200 yard radius originating from the north east corner of dock 32.

(b) *Effective period.* This section is effective from 12 noon until 5 p.m. on May 22, 2008.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.33 of this part, entry into, transiting, or anchoring within this security zone is prohibited unless authorized by the Captain of the Port Buffalo, or his on-scene representative.

(2) The security zone described in paragraph (a) of this section is closed to all vessel traffic, except as may be permitted by the Captain of the Port Buffalo or his on-scene representative.

(3) The *on-scene representative of the Captain of the Port* is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be onboard either a Coast Guard or Coast Guard Auxiliary vessel.

(4) Vessel operators desiring to enter or operate within the security zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the security zone shall comply with all directions given to them by the Captain of the Port Buffalo or his on-scene representative.

Dated: April 14, 2008.

S.J. Ferguson,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. E8–9479 Filed 4–29–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AM17

Notice and Assistance Requirements and Technical Correction

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulation governing VA's duty to provide a claimant with notice of the information and evidence necessary to substantiate a claim and VA's duty to assist a claimant in obtaining the evidence necessary to substantiate the claim. The purpose of these changes is to clarify when VA has no duty to notify a claimant of how to substantiate a claim for benefits, to make the regulation comply with statutory changes, and to streamline the development of claims. Additionally, we are making a non-substantive, technical correction to the statutory references in a separate part 3 regulation.

DATES: *Effective Date:* This amendment is effective May 30, 2008.

Applicability Date: The amendments to 38 CFR 3.159 apply to applications for benefits pending before VA on or filed after the effective date of this rule.

FOR FURTHER INFORMATION CONTACT: Maya Ferrandino, Consultant, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (727) 319–5847.

SUPPLEMENTARY INFORMATION: On October 31, 2006, VA published in the **Federal Register** (71 FR 63732) a proposal to revise VA's regulation regarding VA assistance in developing claims, 38 CFR 3.159. Interested persons were invited to submit written comments on or before January 2, 2007. We received two comments from members of the public.

Proposed Rule

38 CFR 3.159(b)(3)

Under 38 U.S.C. 5103(a), upon receipt of a substantially complete application for benefits, VA must ''notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim'' (section 5103(a) notice). VA implemented section 5103(a) in 38 CFR 3.159, which reflects section 5103(a)'s requirement that VA give the notice upon receipt of a substantially complete application. *See* 38 CFR 3.159(b)(1). In addition, VA defined ''substantially complete application'' for purposes of section 5103(a) notice. *See* 38 CFR 3.159(a)(3).

Experience implementing section 5103(a) disclosed a potential ambiguity in the regulations, which this rulemaking removes. That ambiguity is whether VA's receipt of a notice of disagreement (NOD) also triggers VA's duty to give section 5103(a) notice because the NOD can be viewed as satisfying the definition of ''application'' in 38 CFR 3.1(p). We proposed to clarify that it does not.

An NOD is the means by which a claimant initiates an appeal of a decision on a claim to the Board of Veterans' Appeals (Board). 38 U.S.C. 7105(a); 38 CFR 20.200. ''A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute [an NOD].'' 38 CFR 20.201.

We stated that, because the definition of ''application'' in § 3.1(p) is a holdover from before the Veterans Claims Assistance Act of 2000 (VCAA), Public Law 106–475, 114 Stat. 2096, and was not intended to govern when VA must give section 5103(a) notice, VA does not view it as dispositive of the question. Furthermore, section 5103(a) does not

specify whether VA must issue section 5103(a) notice upon receipt of an NOD. VA believes that Congress did not intend to require section 5103(a) notice upon VA's receipt of an NOD, for the following reasons: Congress intended VA to give section 5103(a) notice at the beginning of the claim process, but an NOD is filed after VA has decided a claim; Congress requires VA to issue a statement of the case in response to an NOD, so additional section 5103(a) notice would be redundant; giving section 5103(a) notice at the appeal stage of the claim process results in logical inconsistencies in the claim process; and not requiring section 5103(a) notice upon VA's receipt of an NOD would be consistent with case law governing such notice. Therefore, we proposed to state in § 3.159(b)(3)(i) that VA does not have a duty to provide section 5103(a) notice upon receipt of an NOD.

To avoid any confusion, however, we note that VA may continue to have an obligation to provide adequate section 5103(a) notice despite receipt of an NOD, if compliant notice was not previously provided and if the claim was denied. In such instances, VA's duty to provide adequate section 5103(a) notice is still triggered upon receipt of a substantially complete application for benefits, not upon receipt of an NOD. Courts have specifically held that, although VA is required to provide section 5103(a) notice prior to the initial adjudication of a claim, if VA does not provide timely notice and a claim remains unsubstantiated, this defect can be cured by the subsequent provision of section 5103(a) notice followed by readjudication of the claim. *See Mayfield* v. *Nicholson*, 444 F.3d 1328, 1333–34 (Fed. Cir. 2006); *Paralyzed Veterans of Am.* v. *Sec'y of Veterans Affairs*, 345 F.3d 1334, 1345–46 (Fed. Cir. 2003); *Overton* v. *Nicholson*, 20 Vet. App. 427, 437 (2006); *Dingess* v. *Nicholson*, 19 Vet. App. 473, 491 (2006). After further consideration, we have revised § 3.159(b)(3)(i) to clarify that no duty to provide section 5103(a) notice arises upon VA's receipt of an NOD.

Additionally, we proposed to state at § 3.159(b)(3)(ii) that the section 5103(a) notice duty does not arise when the claimant is not entitled to the claimed benefit as a matter of law. In such circumstances, there is no additional information or evidence the claimant could provide or VA could obtain that could substantiate the claim. This regulation would be consistent with the intent of Congress expressed in 38 U.S.C. 5103A(a)(2), which provides that ''[t]he Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.'' The legislative history of sections 5103(a) and 5103A(a) supports the conclusion that, if the claim is barred as a matter of law, VA's duty to notify does not apply because there is no relevant information or evidence to obtain.

Proposed § 3.159(b)(3)(ii) provided some examples of when a claimant would not be entitled to the claimed benefit as a matter of law, such as when the claimant lacks qualifying service or veteran status. However, because a determination that a claimant is not entitled to a benefit as a matter of law often requires fact-specific analysis, VA may be required to furnish section 5103(a) notice in the specific examples provided in the proposed rule. *See*, e.g., *Palor* v. *Nicholson*, 21 Vet. App. 202, 209 (2007) (concluding that VA's section 5103(a) notice should have informed the veteran in that case of the types of evidence he could have submitted to establish veteran status and qualifying service); *Dingess* v. *Nicholson*, 19 Vet. App. 473, 485 (2006) (concluding that section 5103(a) notice should address evidence required to establish veteran status when appropriate). After further consideration, we have decided not to include specific examples in § 3.159(b)(3)(ii) because they may not always determine whether section 5103(a) notice is required in a given case.

38 CFR 3.159(b)(1)

We additionally proposed to amend 38 CFR 3.159(b)(1). First, we proposed to remove the third sentence of current § 3.159(b)(1), which states that VA will request the claimant to provide any evidence in the claimant's possession that pertains to the claim. Section 3.159(b)(1) generally implements the notice requirements of section 5103(a). The three notice requirements in section 5103(a) are currently prescribed in § 3.159(b)(1) as follows: VA will notify the claimant (1) of the information and medical or lay evidence required to substantiate the claim, (2) of which information and evidence, if any, that the claimant is to provide to VA, and (3) of which information and evidence, if any, VA will attempt to obtain on behalf of the claimant. However, the third sentence of current § 3.159(b)(1) is not required by statute and is redundant of the three statutory requirements from the perspective of what the claimant needs to submit to support the claim. As such, it is unnecessary as part of the regulation. A claimant who receives a section 5103(a) notice containing the three statutory elements will have received the same information regarding what the claimant needs to submit to support the claim as the claimant would have received had the claimant received a letter containing the three statutory elements and an additional request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

To avoid the possibility of misunderstandings regarding the nature of this provision and to ensure consistency between the manual and regulatory provisions, we further proposed to rescind the provision of paragraph I.1.B.3.b of the Veterans Benefits Administration Adjudication Procedures Manual M21–1MR (VBA Manual M21–1MR) that currently requires regional offices (ROs) to send to the claimant in response to a substantially complete application a letter that ''asks the claimant to submit any evidence in his/her possession that pertains to the claim.''

Second, for ease of use, we proposed to add at the end of the first sentence of current § 3.159(b)(1) the term ''notice'' in parentheses, to use as a term of art within § 3.159(b)(1).

Third, we proposed to remove the fourth sentence of current § 3.159(b)(1). This sentence states: ''If VA does not receive the necessary information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application.'' This provision implemented language from section 5103 that was repealed by the Veterans Benefits Act of 2003, Public Law 108–183, section 701(b), 117 Stat. 2670. To ensure consistency with current law and the intent of Congress, we proposed to replace this sentence with the following: ''The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice.''

38 CFR 3.159(g)

We proposed to add to § 3.159 a new paragraph (g), which states that the authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations, in accordance with VA's intention to issue regulations when the Secretary deems it appropriate to provide any additional assistance in substantiating a claim, as contemplated in section 5103A(g). In accordance with section 5103A(g), VA promulgated the second sentence of

§ 3.159(c), obligating itself to give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) of § 3.159, relating to assistance with obtaining records, to an individual attempting to reopen a finally decided claim. *See* Duty to Assist, 66 FR 45,620, 45,628 (Aug. 29, 2001). The main purpose of this new provision is to avoid the potential disparate treatment of similarly situated claimants that could arise from inconsistent use in various parts of the agency of open-ended authority to provide ''extra'' development assistance. Also, this provision is consistent with the Secretary's determination, in the prior rulemaking for § 3.159, of the appropriate level of assistance to be provided individuals based on VA's finite resources and the need to process claims in an efficient manner for the benefit of all veterans.

38 CFR 3.159(c)(4)(i)

We proposed to add the following sentence after the first sentence in § 3.159(c)(4)(i): ''A medical examination or medical opinion is not necessary to show a link between a veteran's current disability or death and some disease or symptoms during service when the evidence of record already satisfies the chronicity or continuity requirements in § 3.303(b).'' After further consideration, we have decided not to effectuate this proposed revision for policy reasons. We will reconsider this proposed revision at a later date if necessary.

Response to Comments

One commenter stated that VA information was withheld from him and that he had not been offered assistance by VA. He felt that VA was interested in denying veterans benefits. He additionally stated that he felt that any claim for benefits should be considered a claim for any benefits for any reason. This commenter's comments concern the development of the commenter's specific claim and are irrelevant to the amendments contained in the proposed rule. Therefore, we make no changes to this final rule based on these comments.

The other commenter stated that he did not like the proposed amendment to § 3.159(b)(1) to add the following sentence: ''The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice.'' The commenter stated that it could take more than one year to obtain some information and evidence.

To ensure consistency with 38 U.S.C. 5103(b)(1) and the intent of Congress, we proposed to remove the fourth sentence of current § 3.159(b)(1) and replace it with the following sentence: ''The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice.'' The statute requires that, ''[i]n the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, such information or evidence must be received by the Secretary within one year from the date such notice is sent.'' 38 U.S.C. 5103(b)(1). Because we are implementing a statutory requirement with this amendment, we make no changes based on this comment.

Further, VA will make reasonable efforts to assist claimants. It is VA's intent that adequate information regarding evidence to support the claim should be received from the claimant within the one-year time period, not that all evidence, including examination reports, must be obtained by VA within the one-year period. Therefore, we make no changes based on this comment.

Additional Change

In the proposed rulemaking, we proposed to amend the fifth sentence of current § 3.159(b)(1), which states that VA may decide the claim if the claimant has not responded to the section 5103(a) notice within 30 days. We proposed to provide 45 days as a more reasonable period after which VA may decide a claim if no response to the section 5103(a) notice has been received. Based on administrative concerns and matters of consistency, we have reconsidered this proposal and decided to maintain the current 30-day period after which VA may decide a claim if a claimant has not responded to the section 5103(a) notice. By statute, VA may make a decision on a claim before the expiration of the one-year period, 38 U.S.C. 5103(b), and this 30-day period merely sets forth a time frame for VA to wait for a response from the claimant before deciding the claim. The claimant will continue to have one year from the date of the section 5103(a) notice to provide the information and evidence requested. Furthermore, if VA decides the claim after 30 days and subsequently receives the information or evidence requested from the claimant within one year of VA giving the notice, VA must readjudicate the claim.

We additionally proposed to rescind the provision of paragraph I.1.B.3.c of the VBA Manual M21–1MR that currently advises ROs to ''inform the claimant that if he/she does not respond to the request for information within 60 days, VA may decide the claim based on all the information and evidence in the file.'' We did not receive any comments on this manual rescission. To ensure consistency between the manual and current regulatory provisions, we will rescind that manual provision and replace it with a new provision that will provide for a 30-day period, as set forth in the regulation.

VA appreciates the comments submitted in response to the proposed rule. Based on the rationale stated in the proposed rule and in this document, the proposed rule is adopted with the changes noted.

Technical Correction

Section 5(a) of Public Law 102–83, the Department of Veterans Affairs Codification Act, redesignated 38 U.S.C. 410, 416, and 417 as 38 U.S.C. 1310, 1316, and 1317, respectively. We are updating the parenthetical following the last sentence in 38 CFR 3.5(b)(3) to reflect current statutory designations. We are making no substantive changes to the regulation.

Paperwork Reduction Act

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment 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. Only VA beneficiaries could be directly affected. 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

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 the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in 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 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 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 Part 3

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

Approved: January 17, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR part 3 is amended 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.

§ 3.5 [Amended]

■ 2. Amend § 3.5(b)(3) by removing ''(38 U.S.C. 410, 416, 417, Public Law 92–197, 85 Stat. 660)'' and adding, in its place, ''(38 U.S.C. 1310, 1316, 1317, Public Law 92–197, 85 Stat. 660)''.

■ 3. Amend § 3.159 as follows:

■ a. In paragraph (b)(1), at the end of the first sentence after the word ''claim'', add the following parenthetical ''(hereafter in this paragraph referred to as the ''notice'')''.

■ b. In paragraph (b)(1), at the beginning of the second sentence, add ''In the notice,''.

■ c. In paragraph (b)(1), remove the third sentence.

■ d. In paragraph (b)(1), remove the fourth sentence and add a new sentence in its place as set forth below.

■ e. In paragraph (b)(1), remove ''request'' each place it appears and add, in its place, ''notice''.

■ f. Add paragraphs (b)(3), and (g).

The revisions read as follows:

§ 3.159 Department of Veterans Affairs assistance in developing claims.

* * * * *

(b) * * *

(1) * * * The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice.* * *

* * * * *

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a Notice of Disagreement; or

(ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

* * * * *

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

[FR Doc. E8–9454 Filed 4–29–08; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2007–1177; FRL–8559–7]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Revisions to Particulate Matter Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On March 14, 2008, EPA proposed to approve Indiana's February 21, 2008, request to revise its particulate matter State Implementation Plan (SIP) for sources in Clark, Dearborn, Dubois, Howard, Lake, Marion, St. Joseph, Vanderburgh, Vigo, and Wayne Counties. This SIP revision updated facility names, revised formatting, removed sources no longer in operation, and revised some emission limits. The State submitted air quality modeling analyses that demonstrated that air quality will continue to be protected in the five counties where some emission limits increased. EPA received one letter containing several comments on the proposal. After review of these comments and for the reasons discussed below, EPA is approving this SIP revision request.

DATES: This final rule is effective on May 30, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2007–1177. All documents in the docket are listed on the *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