

**DEPARTMENT OF VETERANS
AFFAIRS****38 CFR Parts 17 and 59**

RIN 2900-AJ43

**Grants to States for Construction and
Acquisition of State Home Facilities****AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

SUMMARY: This document affirms as final, with changes, an interim final rule that amended regulations regarding grants to States for the construction or acquisition of State homes for furnishing domiciliary and nursing home care to veterans, or for the expansion, remodeling, or alteration of existing State homes for furnishing domiciliary, nursing home, or adult day health care to veterans. This rule is necessary to update the regulations and to implement statutory provisions, including provisions of the Veterans Millennium Health Care and Benefits Act. This document also incorporates some non-substantive changes to the regulations in the interim final rule and recognizes a change made to 38 CFR 59.50(b) on February 14, 2007.

DATES: *Effective Date:* The effective date is October 8, 2008.

FOR FURTHER INFORMATION CONTACT: Stephanie A. Robinson, Chief, State Home Construction Grant Program (114), Veterans Health Administration, 810 Vermont Ave., NW., Washington, DC 20420, 202-461-6767. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on June 26, 2001 (66 FR 33845), we established a new part 59 setting forth a mechanism for providing grants to States for the construction or acquisition of State homes for furnishing domiciliary and nursing home care to eligible veterans, or for the expansion, remodeling, or alteration of existing State homes for furnishing domiciliary, nursing home, or adult day health care to eligible veterans. The new part 59 consists of a comprehensive rewrite of the regulations set forth in former 38 CFR 17.210 through 17.222. We provided a 60-day comment period which ended August 27, 2001. We received responses from 10 commenters. The issues raised in the comments are discussed below. Based on the rationale set forth in the interim final rule and in this document, we are adopting the provisions of the interim final rule as a final rule with changes explained below and with the final regulatory change made to § 59.50 that was effective on February 14, 2007 (72 FR 6959).

A number of commenters asserted that the overall change in methodology for determining the number of authorized beds per State was arbitrary and lowers the overall bed levels nationally. No changes have been made based on this comment.

The provisions of 38 U.S.C. 8134 require VA to prescribe for each State the number of nursing home and domiciliary beds for which grants may be furnished. Statutorily this is required to be based on the projected demand for nursing home and domiciliary care on November 30, 2009 (10 years after the date of enactment of the Veterans Millennium Health Care and Benefits Act (Pub. L. 106-117)) by veterans who at such time are 65 years of age or older and who reside in that State. In determining the projected demand, VA must take into account travel distances for veterans and their families. In determining the maximum number of nursing home and domiciliary beds authorized for each State, VA used the most recent data available to project, among other things, the population of veterans 65 years of age or older in each State and veteran domiciliary and nursing needs in each State in 2009. Since the publication of the interim final rule, only three States have requested exceptions to the published bed levels, which VA has granted. We also recognized that all States would have a decrease in bed needs or the maximum number of State home and domiciliary beds authorized. For some States, such decreases were due in part to migration of veterans out of the State. Moreover, the change in methodology itself also resulted in lower maximum bed numbers for individual States, but this was due to the fact that the previous methodology was no longer relevant. VA calculated the previous maximum numbers of beds per State at 4 beds per 1,000 veterans for nursing home care facilities and 2 beds per 1,000 veterans for domiciliary care facilities. These formulas were established in the 1980's when the use of inpatient facilities was increasing and the aim was to increase the number of beds. However, these formulas became significantly outdated in the 1990's, when the trend went toward trying to keep patients in their homes rather than moving them to nursing homes. We also note that, although VA's new methodology for determining each State's unmet bed needs resulted in less total authorized beds than under the previous methodology, the reduced numbers were very similar across the board for all States, regardless of State size. VA does not consider the new methodology

to be arbitrary because it more accurately reflects the projected bed needs of each State.

One commenter asserted that this new methodology is an attempt by VA to limit its financial liability for long-term care for veterans. We disagree with that assertion. VA also has committed to mandatory long-term care requirements under provisions in the Veterans Millennium Health Care and Benefits Act, which require VA to provide, to certain veterans, nursing home care either through VA's own nursing homes or contract nursing care. Furthermore, nothing in this rule prohibits the States from constructing their own State fully funded facility. The awards for construction grants that VA provides under this regulation should not be considered in isolation; rather they should be recognized as part of the entire spectrum of care VA provides. Provisions of the rule also allow for a State to request from the Secretary of Veterans Affairs exceptions to the bed levels when exception is needed due to travel distances. Our experience has been that this provision, when used, ensures that States with rural veteran populations are not adversely affected by the provisions of this rule.

There were a number of comments on the interim final rule's inclusion of domiciliary care beds with nursing bed totals in the methodology in establishing the State bed limits. No changes have been made based on these comments.

The Veterans Millennium Health Care and Benefits Act requires that the Secretary shall take into account the availability of beds already operated by the State, which will serve the needs of veterans that the State proposes to meet with its application for a grant. We do not believe that this requires any distinction between nursing and domiciliary beds. States that have participated in the State Home Construction Grant Program for the construction of domiciliary and nursing facilities have done so to provide care to an identified veteran population located within their respective States. A determination is made by the State to provide such care and to serve these veterans who have very similar care needs. Often, States have determined to build a nursing facility, a domiciliary, or both. In some cases, such veteran populations are often managed in co-located facilities, and as the care needs of domiciliary residing veterans increase, these veterans are usually moved into the higher level care of nursing home beds. VA, therefore, believes that such beds can and should be counted together when assessing the

total bed needs of the State. Once the facilities are fully constructed and operating, the State may take actions to request conversion of those beds to a higher or lower level of care, since both nursing home and domiciliary beds are constructed to the same VA construction standards.

One commenter remarked that such bed limits do not address the great unmet nursing home needs of veterans. No changes were made based on this comment. This rule provides grants for those States interested in building and providing nursing home, domiciliary, and adult day health care to veterans. The State Home Program is an integral part of VA's health care for veterans, which includes VA's own nursing homes as well as contracted care through community nursing home providers. It is not intended to be the only program to address the nursing care of veterans.

One commenter remarked that preference should be given to Vietnam veterans. No changes were made based on this comment. Pursuant to 38 U.S.C. 1742(b), the States have the sole responsibility in managing these homes and thus the flexibility to determine certain service era preferences, if any, within Federal laws barring discrimination. The law specifically prohibits VA from managing the homes.

A couple of commenters remarked that VA should consider funding assisted and supportive living care rather than institutional models. No changes were made based on this comment. Congress has authorized VA to award funds for nursing home care, domiciliary care or adult day health care.

One commenter cited concerns about the square footage allotment requirement and remarked that VA should consider expanding it for motorized scooters and patient wheel chairs. No changes were made based on this comment. VA has long been in the forefront in the approval and design of model nursing home facilities. This rule and VA building requirements as well as other Federal laws require open access by wheelchair and individuals with such need. The current rule also allows for flexibility in the requirements in order for the State to expand its building plans to accommodate any State specific requirement, by up to 10 percent. Even with the advent of motorized scooters, we believe the space requirements remain adequate to meet any additional demands placed upon the design for their use.

A number of comments were received regarding the rule's incorporation by reference of the 2000 edition of the

National Fire Protection Association Life Safety Code (NFPA 101, Life Safety Code) and the 1999 edition of the NFPA 99, Standard for Health Care Facilities. Although we received comments in support of the utilization of such reference and standards, we also received a comment objecting to the exclusiveness of the reference. No changes were made based on this comment.

VA's own standards are based on the adopted standards (2000 edition of the NFPA 101, Life Safety Code and the 1999 edition of the NFPA 99, Standard for Health Care Facilities). VA life safety engineers throughout the country have been trained to use such standards for over 40 years. Other codes including the International Building Code (IBC) do not address existing buildings except under renovations. Since VA also adopted the NFPA fire codes for the State Home Per Diem program, it would be confusing to attempt to use two standards to determine a State's compliance.

One commenter cited concerns with the rule's method for establishing or projecting nursing home bed needs for veterans in each State. The commenter suggested that the regulation fails to mandate the consideration of the availability of community nursing home beds in each State when determining the State's projected bed needs and such failure has an adverse impact on the scarce health care resources and funds. No changes were made based on this comment.

VA believes that the rule adequately requires the States to assess, through a comprehensive report, the feasibility and viability of constructing a State veterans home in the State. The rule also anticipates that the State, through the legislative appropriations process, will properly review and assess the viability and impact of the home in the community.

A number of commenters applauded the rule's flexibility in allowing a State to request a waiver from the bed limits whenever veteran populations lived beyond a 2-hour radius from the existing State veterans home. One commenter suggested, however, that the distance was far too great, and a number of commenters suggested that the exception apply to all States, including those with "limited" needs. No changes were made based on these comments.

The 2-hour radius is a reasonable distance for both veterans and their families, beyond which we believe a hardship on their health might prevail and visits by their families would become prohibitively difficult. VA believes that the waiver supports the concerns of large rural States when

although population levels might limit bed levels for the State, a waiver allows the State to request building grant funds to ensure care to veterans in all parts of the State. This exception applies to all States regardless of their unmet bed needs, in light of the direction given by the Veterans Millennium Health Care and Benefits Act to take into account travel distances for veterans and their families, and to fairly respond to all State requests.

A couple of commenters objected to VA's categorization of States as in "great need," "significant need," and "limited need" for purposes of its prioritizing proposed projects and asserted that VA's new prioritization process is unfair. The commenters suggested that VA use a process that prioritizes proposed projects based on the percentage of each State's unmet bed need, instead of based on the actual number of beds needed by each State. VA's previous prioritization process was based, at least in part, on a State's percentage need of unmet beds. No changes have been made based on these comments.

The Veterans Millennium Health Care and Benefits Act required VA to identify the need for beds in each State and provided VA with the three categories to be used. Although the percentage-based approach is an alternative way to prioritize proposed projects, VA believes that its new prioritization process, which focuses on the actual number of beds needed by each State, is a reasonable approach in satisfying the statutory requirement of prioritizing proposed projects between the States. The actual number of beds needed by each State clearly reflect each State's "need" for unmet beds, as referenced by statute. VA believes that its new prioritization process may more effectively allocate resources and potentially serve more veterans nationally by giving priority to proposed projects that will serve the most veterans.

During the time of the original analysis in 2000, "small States" such as the District of Columbia, Alaska, Delaware, Hawaii, and Wyoming, were at the top of the list because they had no State Nursing Homes. Since then, Alaska, Delaware and Hawaii have received VA State Home Construction grants, and their homes are under construction. The District of Columbia and Wyoming remain, by definition, in the "great need" category. VA believes that, with its new prioritization process, VA will be able to continue to serve both small and large States, but more importantly may potentially serve more

veterans nationally than with an alternative process.

The number of unmet beds for each State provided clear break points for separating the States into the "great need," "significant need," and "limited need" categories. We have decided to retain the break points as follows:

Great = 100 percent Unmet Need or an Unmet Bed Need of at least 2000 beds.
Significant = 1000–1999 Unmet Bed Need.
Limited = less than 1000 Unmet Bed Need.

Paperwork Reduction Act

This final rule contains provisions constituting a collection of information, including certain new, updated, and revised forms, which have been approved by OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). VA has obtained new OMB control number 2900–0661 for all the VA Forms identified in § 59.170 of the interim-final rule and has renumbered these VA grant forms to comply with OMB requirements. At the time the interim-final rule was published, VA awarded less than 10 grants per year and did not require OMB control numbers for each form. Since the June 26, 2001, publication, VA has awarded more than 10 grants per year and was, therefore, required to obtain OMB approval for all VA grant forms. Accordingly, the VA grant forms have new VA Form numbers and references to the previous VA Form numbers in §§ 59.20, 59.60, and 59.100 of the interim-final rule have been changed to reflect the new VA Form numbers. VA has removed copies of the grant forms from § 59.170 and changed the reference to the Internet Website address at which the forms may be found to the following Web site addresses: "<http://www.va.gov/forms/>" for VA Forms and "<http://www.gsa.gov>" for Standard Forms. VA believes that the forms are easily accessible at these Web sites.

In addition, two new forms have been added to the grant requirements. VA Form 10–0388–2, Certification of Compliance with Provisions of the Davis-Bacon Act, was added to ensure that applicants comply with Federal wage rates. The certification on this form was part of the Standard Form 424D certification, which was provided in the interim-final rule in § 59.170(p). VA Form 10–0388–14, Checklist of Major Requirements for State Home Construction/Acquisition Grants, was added to ensure that all grant requirements are met throughout the application process. This form is used by the applicants and VA to merely summarize the requirements in three

other greater-detailed VA Forms (10–0388–1, Documents and Information Required for State Home Construction and Acquisition Grants—Initial Application; 10–0388–5, Additional Documents and Information Required for State Home Construction and Acquisition Grants Application; and 10–0388–13, Documents and Information Required for State Home Construction and Acquisition Grants—Post-Grant Requirements), which were provided in the interim-final rule in § 59.170(g), (h), and (i).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory action 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. All of the entities that would be subject to this final rule are State government entities under the control of State governments or entities under contract with State governments. Of the 117 State homes, all are operated by State governments except for 17 that are operated by entities under contract with State governments. These contractors are not small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirement 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 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 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 will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number and title for this rule is as follows: 64.005, Grants to States for Construction of State Home Facilities.

List of Subjects

38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Government programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and record keeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

38 CFR Part 59

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Government programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and record keeping requirements, Travel and transportation expenses, Veterans.

Approved: July 10, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ Accordingly, the interim final rule amending 38 CFR parts 17 and 59, which was published in the **Federal Register** at 66 FR 33845 on June 26, 2001, is adopted as a final rule with the following changes and with the final regulatory change made to § 59.50 that was effective on February 14, 2007 (72 FR 6959):

PART 59—GRANTS TO STATES FOR CONSTRUCTION OR ACQUISITION OF STATE HOMES

■ 1. The authority citation for part 59 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137.

■ 2. Amend § 59.20 by revising paragraph (a) to read as follows:

§ 59.20 Initial application requirements.

(a) For a project to be considered for inclusion on the priority list in § 59.50 of this part for the next fiscal year, a State must submit to VA an original and one copy of a completed VA Form 10–0388–1 and all information, documentation, and other forms specified by VA Form 10–0388–1 (these forms are available on the internet Web site provided in § 59.170 of this part).

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■ 3. Amend § 59.60 by revising paragraphs (a) and (b) to read as follows:

§ 59.60 Additional application requirements.

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(a) Complete, updated Standard Forms 424 (mark the box labeled application and submit the information requested for an application), 424C, and 424D (these forms are available on the internet Web site provided in § 59.170 of this part), and

(b) A completed VA Form 10–0388–5 and all information and documentation specified by VA Form 10–0388–5 (this form is available on the internet Web site provided in § 59.170).

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■ 4. Revise § 59.100 to read as follows:

§ 59.100 Payment of grant award.

The amount of the grant award will be paid to the State or, if designated by the State representative, the State home for which such project is being carried out or any other State agency or instrumentality. Such amount shall be paid by way of reimbursement, and in such installments consistent with the progress of the project as the Chief Consultant, Geriatrics and Extended

Care, may determine and certify for payment to the appropriate Federal institution. Funds paid under this section for an approved project shall be used solely for carrying out such project as so approved. As a condition for the final payment, the State must comply with the requirements of this part based on an architectural and engineering inspection approved by VA, must obtain VA approval of the final equipment list submitted by the State representative, and must submit to VA a completed VA Form 10–0388–13 (this form is available on the internet Web site provided in § 59.170). The equipment list and the completed VA Form 10–0388–13 must be submitted to the Chief Consultant, Geriatrics and Extended Care (114), VHA Headquarters; 810 Vermont Avenue, NW.; Washington, DC 20420.

Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137

■ 5. Revise § 59.170 to read as follows:

§ 59.170. Forms.

All forms required by this part are available on the internet at “<http://www.va.gov/forms/>” for VA Forms and at “<http://www.gsa.gov>” for Standard Forms, or at the Veterans Health Administration, Room 789, 810 Vermont Ave., NW., Washington, DC 20420.

Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131–8137, Section 2, 3, 4, and 4a of the Architectural Barriers Act of 1968, as amended, Pub. L. 90–480, 42 U.S.C. 4151–4157

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–1191; FRL–8382–9]

Cymoxanil; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of cymoxanil in or on bulb onion subgroup 3–07A; green onion subgroup 3–07B; leafy greens subgroup 4A; leaf petioles subgroup 4B; cilantro leaves; and caneberry subgroup 13–07A. The Interregional Research Project (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA). This regulation also deletes the tolerances for caneberry and head lettuce.

DATES: This regulation is effective October 8, 2008. Objections and requests for hearings must be received on or before December 8, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–1191. All documents in the docket are listed in the docket index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Barbara Madden, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6463; e-mail address: madden.barbara@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American