

## COMMENTS FILED IN RESPONSE TO THE NOPR ON CREDITWORTHINESS STANDARDS FOR INTERSTATE NATURAL GAS PIPELINES IN DOCKET NO. RM04-4-000—Continued

| Commenter                                         | Abbreviation     |
|---------------------------------------------------|------------------|
| Williston Basin Interstate Pipeline Company ..... | Williston Basin. |

Nora Mead Brownell, Commissioner  
*dissenting:*

I have previously expressed my conviction that establishing mandatory creditworthiness principles will promote consistent practices across markets and service providers and provide customers with an objective and transparent creditworthiness evaluation. Such an approach would lessen the opportunity for applying these provisions in an unduly discriminatory manner. Therefore, I cannot support the majority's decision to issue mere guidance, as opposed to a binding final rule.

The majority concludes that standardizing the creditworthiness process beyond the business practices adopted by NAESB is not necessary. Unfortunately, the NAESB business practices provide only the scantest of customer protections, for example, requiring a pipeline to state the reason it is requesting credit evaluation information from existing shippers and to acknowledge receipt of that requested information.<sup>1</sup> Further, comments from all segments of the transportation market that use interstate pipeline services generally support the issuance of a final rule. The Electric Power Supply Association asserts that electric generators need consistent credit terms to facilitate infrastructure investment.<sup>2</sup> The associations for local utilities argue that the proposed regulations reflect a balanced approach in providing the pipelines with protection against the risks of non-creditworthy shippers while at the same time assuring that pipelines can not impose unreasonable burdens on the shippers.<sup>3</sup> Peoples Gas Light and Coke Company and EnCana Marketing (USA) Inc. point out that the proposed regulations reflect Commission's credit policy as it has evolved in several individual proceedings and declare that at this point it is appropriate to codify that policy and apply it to all pipelines.<sup>4</sup> The Northwest Industrial Gas Users argue that, without consistent credit requirements, their ability to purchase unbundled service through interstate pipelines could be restricted.<sup>5</sup> The Process Gas Consumers Group, the American Forest & Paper Association, the American Iron and Steel Institute, the Georgia Industrial Group, the Industrial Gas Users of Florida and the Florida Industrial Gas Users (Industrials) support the overwhelming majority of the proposed regulations as a fair balance

between the needs of the pipelines and their shippers.<sup>6</sup> Finally, even the New York Independent System Operator acknowledges that standardization is generally beneficial and suggests that a comprehensive credit program can serve as a rational, workable model for the electric industry.<sup>7</sup>

The majority concludes that creditworthiness issues should be addressed on a case-by-case basis. This conclusion seems premised on the fear that mandatory principles will lead to institutionalizing a "one-size-fits-all" approach. Let me be clear, I agree that such an approach is hazardous and I would not support it. What I am saying is that creditworthy provisions need to be more systematic, transparent, and non-discriminatory with sufficient flexibility to adapt to specific situations but with customer safeguards such as written explanations. Promulgation of a final rule would have accomplished the goal of providing objective credit principles in every pipeline tariff while retaining the necessary flexibility to adapt to particular situations.

Commenters from all segments of the interstate transportation market supported the rulemaking approach and, I believe, the market would have been better served had we promulgated a final rule. As I stated in my dissent to the policy statement on electric creditworthiness,<sup>8</sup> the non-binding effect of this policy statement seems to result in a known problem still wanting a remedy, and therefore, I dissent.

Nora Mead Brownell.

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 19

#### RIN 2900-AL97

#### Board of Veterans' Appeals: Clarification of a Notice of Disagreement

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

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its regulations governing appeals to the Board of Veterans' Appeals (Board) to clarify the actions an agency of original

jurisdiction must take to determine whether a written communication from a claimant that is ambiguous in its purpose is intended to be a Notice of Disagreement with an adverse claims decision.

**DATES:** Comments must be received on or before August 29, 2005.

**ADDRESSES:** Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273-9026; e-mail to [VAregulations@mail.va.gov](mailto:VAregulations@mail.va.gov); or, through <http://www.regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AL97." All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

**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).

**SUPPLEMENTARY INFORMATION:** The Board is the component of VA that decides appeals from denials of claims for veterans' benefits rendered by VA agencies of original jurisdiction. The Board is under the administrative control and supervision of a Chairman directly responsible to the Secretary of Veterans Affairs. 38 U.S.C. 7101.

An agency of original jurisdiction (AOJ) makes the initial decision on a claim for VA benefits. An AOJ is typically one of VA's 57 regional offices in the case of benefits administered by the Veterans Benefits Administration (VBA), or a VA Medical Center in the case of benefits administered by the Veterans Health Administration (VHA). A claimant who wishes to appeal the AOJ's decision to the Board must file a timely Notice of Disagreement (NOD) with the AOJ that decided the claim. We propose an amendment to the rules governing NODs to clarify the actions an AOJ must take to determine whether a written communication received from a claimant, which is ambiguous in its purpose, is intended to be an NOD.

<sup>1</sup> See Order No. 587-S, 111 FERC ¶61,203 (2005).

<sup>2</sup> See Comments of Electric Power Supply Association at 2-3.

<sup>3</sup> See Comments of American Gas Association at 1-2 and American Public Gas Association at 1.

<sup>4</sup> See Comments of Peoples Gas Light and Coke Company at 3 and EnCana Marketing (USA) Inc. at 3.

<sup>5</sup> See Comments of The Northwest Industrial Gas Users at 2.

<sup>6</sup> See Comments of Industrials at 1 and 4-6.

<sup>7</sup> See Comments New York Independent System Operator at 4.

<sup>8</sup> *Policy Statement on Electric Creditworthiness*, 109 FERC ¶61,186 (2004).

When a claimant files a written communication that meets the requirements of 38 CFR 20.201, that communication is an NOD. The AOJ must respond to the NOD by reviewing the claim and determining whether additional development of the evidence to substantiate the claim is warranted. If the AOJ cannot grant the claim after this review and development process, it issues a Statement of the Case (SOC) to the claimant, identifying and summarizing the evidence pertinent to the decision on the issue(s) with which the claimant has expressed disagreement. The SOC also provides the claimant with a citation to the laws and regulations that govern the decision made on the claim, and explains how those laws were applied to the facts of the claim. See 38 U.S.C. 7105(d)(1). The SOC is issued to assist the claimant in preparing his or her substantive appeal. See 38 CFR 19.29.

On occasion, an AOJ receives from a claimant a written statement that is unclear as to whether the claimant seeks to initiate an appeal from an adverse AOJ decision, or only a portion of an adverse AOJ decision, or one of several AOJ decisions. Difficulty in interpreting a document is particularly likely to occur when the AOJ has denied multiple claims in one decision document. Currently, 38 CFR 19.26 requires the AOJ to contact a claimant to request clarification if an NOD "is received following a multiple-issue determination and it is not clear which issue, or issues, the claimant desires to appeal." We propose to amend 38 CFR 19.26 to require the AOJ to contact the claimant if the AOJ is uncertain as to whether the claimant intends to initiate the appellate process by the submission of a document which is not clear as to this intent on its face.

We propose to designate the first sentence of current § 19.26 as § 19.26(a), and to reorganize and rewrite the remaining sentences as separate paragraphs in order to distinguish the different elements of the regulation.

We propose to restate the second sentence of current § 19.26 with additional explanation, and designate it as § 19.26(b). In this paragraph (b), we propose to state that if the AOJ receives a written communication from a claimant that leaves the AOJ uncertain as to whether the claimant intends to initiate the appellate process, or as to which of multiple adverse determinations the claimant wishes to appeal, the AOJ must contact the claimant, and the claimant's representative, if any, to request clarification. The AOJ would also inform the claimant that VA will not

consider the unclear communication to be an NOD unless the claimant timely responds as described in § 19.26(c). Proposed § 19.26(b) would apply in cases where the AOJ has denied one claim, and where the AOJ has made "multiple-issue determination[s]," whereas the current rule applies only in the latter case.

With regard to the "multiple-issue determination[s]" current rule, § 19.26 states that "clarification sufficient to identify the issue, or issues, being appealed should be requested." We propose to change "should" to "will," in order to emphasize the mandatory nature of the duty. We propose to state in paragraph (b) that VA will inform the claimant that if the claimant does not respond to the request for clarification within the time period described in § 19.26(c), the communication from the claimant will not be considered to be an NOD as to any adverse decision for which clarification was requested but not obtained.

We propose to establish a limit to the period of time in which the claimant may respond to a request for clarification. Paragraph (c) would require the claimant to respond, either orally or in writing, to the AOJ's request for clarification within the later of the following two dates: (1) 60 days after the date of mailing of the AOJ's request for clarification, or (2) one year after the date of mailing of notice of the adverse decision being appealed (60 days for simultaneously contested claims). Under 38 U.S.C. 7105(b)(1) claimants have one year to initiate an appeal (in all but simultaneously contested claims) after the AOJ issues an initial adverse decision. Thus, the time limit that we propose would not abridge the statutory period for initiating an appeal. Moreover, by allowing a response to be alternatively filed within 60 days after the date the AOJ requests clarification, or within one year after the date of mailing of notice of the adverse decision being appealed, we have provided the claimant with a reasonable period in which to respond in the event VA requests clarification either within the last 60 days of the one-year appeal period, or later. We believe that 60 days is a reasonable time frame in which to expect the claimant to respond.

Because there can only be one valid NOD, the written communication from the claimant that prompts the AOJ to request clarification will be considered to be a valid NOD if the claimant subsequently provides the requested clarification. See *Hamilton v. Brown*, 39 F3d 1574 (1994) (holding that there may only be one valid NOD in each appeal). For purposes of calculating all

subsequent filing deadlines, the date of the single NOD must be the date the first communication indicating disagreement, albeit ambiguous, is received at the AOJ.

We propose a new paragraph (d), derived from the last sentence of current § 19.26, which provides that upon receipt of clarification of the claimant's intent to file an NOD, the AOJ will undertake any necessary review and development action and prepare a Statement of the Case pursuant to § 19.29, unless the NOD has been resolved by granting the benefit(s) sought on appeal or the NOD is withdrawn by the claimant or his or her representative.

We propose in paragraph (e) to state that references to the "claimant" in § 19.26 include reference to the claimant and his or her representative, if any, as well as to his or her fiduciary, if any. This paragraph simply provides a short-hand reference for purposes of readability. We envision that the AOJ will contact any of these parties when clarification of an NOD is required. Similarly, any may respond to the request. Once a clarifying response is received from one of these parties, further contact will not be necessary. Thus multiple contacts and responses are not required and would likely prove impractical. Contact for the purpose of seeking clarification would cease as soon as clarification is received from one of the authorized parties or when the potential sources for clarification have been exhausted. Proposed paragraph (e) would not require VA to contact both the claimant and the representative if, after contacting one of the two parties, VA is no longer unsure as to whether the claimant had intended to file an NOD. If, after receiving a response from one of the parties, VA is still not able to determine whether the document filed was intended as an NOD, VA will contact another party.

We propose to amend 38 CFR 19.27 only to clarify that the procedures for an administrative appeal are intended as a remedy in the event any intra-agency dispute remains after the procedures set forth in § 19.26 have been followed, as to whether a written communication expresses an intent to appeal or as to which denied claims the claimant wants to appeal. We anticipate that administrative appeals of this nature will occur only rarely.

#### Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure

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

#### Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would 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 proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Paperwork Reduction Act

Proposed 38 CFR 19.26, which is set forth in full in the proposed regulatory text portion of this document, and current 38 CFR 20.201 contain collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). These provisions set forth procedures for initiating an appeal to the Board of Veterans' Appeals, including the type of information that must be contained in an NOD. As required under section 3507(d) of the Act, VA has submitted a copy of this proposed rulemaking action to the Office of Management and Budget (OMB) for its review of the collection of information.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*Title:* Notice of Disagreement and Clarification of Notice of Disagreement.

*Summary of collection of information:* Under 38 CFR 20.302, a claimant who wishes to appeal the AOJ's decision to the Board must file a NOD with the AOJ that decided the claim within one year from the date that the AOJ mails notice of the determination to him or her. The provisions of 38 CFR 20.201 require that an NOD must be a written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the AOJ and a desire to contest the result. Proposed 38 CFR 19.26 provides that

AOJs must seek clarification from a claimant if an unclear communication that may or may not constitute an NOD is received.

*Description of the need for information and proposed use of information:* The first element of a complete appeal to the Board is an NOD. The NOD is the mechanism that a claimant uses to inform the VA of his or her dissatisfaction with a decision denying a VA benefit. After receiving an NOD, VA is required to reexamine the denied claim, performing additional evidentiary development is warranted. If the claim cannot be granted at that stage, VA initiates the appellate processing by issuing a Statement of the Case to the claimant, informing the claimant of the laws and regulations governing his or her claim, and the basis for the denial of that claim.

*Description of likely respondents:* VA benefits claimants who have received a denial decision from an Agency of Original Jurisdiction.

*Estimated number of respondents:* 108,931 NODs were filed in fiscal year 2004. The number of NODs filed in future years will depend upon the number of dissatisfied claimants who wish to pursue the appellate process.

*Estimated frequency of responses:* This information is collected on a "one-time" basis.

*Estimated average burden per collection:* Respondents have wide discretion in the amount of time spent in preparing the notice of disagreement. They may simply identify, in writing, the issues with which they are in disagreement. Some may add a few sentences explaining why they are in disagreement. Most respondents use this approach. On the other hand, a respondent may write several pages explaining why he or she is in disagreement with the decision. With this in mind, the Board's best estimate would be that an average of one hour is spent in preparation of the notice of disagreement.

*Estimated total annual reporting and recordkeeping burden:* The estimated total annual reporting burden is approximately 108,931 hours. This information collection imposes no recordkeeping requirement. There should be no costs to respondents. No ongoing accumulation of information, or special purchase of services, supplies or equipment, is required.

The Department considers comments by the public on proposed collections of information in:

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including

whether the information will have practical utility;

- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Written comments on the collections of information should be submitted to Sue Hamlin, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or e-mail to [sue.hamlin@va.gov](mailto:sue.hamlin@va.gov). Comments should indicate that they are in response to "RIN 2900–AL97," and must be received on or before August 29, 2005.

#### Catalog of Federal Domestic Assistance Numbers

There is no Catalog of Federal Domestic Assistance number for this proposed rule.

#### List of Subjects in 38 CFR Part 19

Administrative practice and procedure, Claims, Veterans.

Approved: March 22, 2005.

**R. James Nicholson,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, we propose to amend 38 CFR part 19 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.

2. Section 19.26 is revised to read as follows:

##### § 19.26 Action by agency of original jurisdiction on Notice of Disagreement.

(a) *Initial action.* When a claimant files a timely Notice of Disagreement (NOD), the agency of original jurisdiction (AOJ) must reexamine the claim and determine whether additional review or development is warranted.

(b) *Unclear communication or disagreement.* If within one year after issuing an adverse decision (or 60 days for simultaneously contested claims), the AOJ receives a written

communication from the claimant expressing dissatisfaction or disagreement with the adverse decision, but the AOJ cannot clearly identify that communication as expressing an intent to appeal, or the AOJ cannot identify which denied claim(s) the claimant wants to appeal, then the AOJ will contact the claimant to request clarification of the claimant's intent. In this request for clarification, the AOJ will explain that if the claimant does not respond to the request within the time period described in paragraph (c) of this section, the earlier, unclear communication will not be considered an NOD as to any adverse decision for which clarification was requested.

(c) *Response required from claimant*—(1) *Time to respond*. The claimant must respond to the AOJ's request for clarification within the later of the following dates:

(i) 60 days after the date of mailing of the AOJ's request for clarification; or  
(ii) One year after the date of mailing of notice of the adverse decision being appealed (60 days for simultaneously contested claims).

(2) *Failure to respond*. If the claimant fails to provide a timely response, the previous communication from the claimant will not be considered an NOD as to any claim for which clarification was requested. The AOJ will not consider the claimant to have appealed the decision(s) on any claim(s) as to which clarification was requested and not received.

(d) *Action following clarification*. When clarification of the claimant's intent to file an NOD is obtained, the AOJ will reexamine the claim and determine whether additional review or development is warranted. If no further review or development is required, or after necessary review or development is completed, the AOJ will prepare a Statement of the Case pursuant to § 19.29 unless the disagreement is resolved by a grant of the benefit(s) sought on appeal or the NOD is withdrawn by the claimant.

(e) *Definition*. For the purpose of the requirements in paragraphs (a) through (d) of this section, references to the "claimant" include reference to the claimant and his or her representative, if any, as well as to his or her fiduciary, if any.

(Authority: 38 U.S.C. 501, 7105, 7105A)

3. Section 19.27 is revised to read as follows:

**§ 19.27 Adequacy of Notice of Disagreement questioned within the agency of original jurisdiction.**

If, after following the procedures set forth in 38 CFR 19.26, there remains

within the agency of original jurisdiction a question as to whether a written communication expresses an intent to appeal or as to which denied claims a claimant wants to appeal, the procedures for an administrative appeal, as set forth in 38 CFR 19.50–19.53, must be followed.

(Authority: 38 U.S.C. 501, 7105, 7106)

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 271**

[FRL–7930–6]

**Indiana: Final Authorization of State Hazardous Waste Management Program Revision**

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

**ACTION:** Proposed rule.

**SUMMARY:** Indiana has applied to EPA for Final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for Final authorization, and is proposing to authorize the State's changes through this proposed final action.

**DATES:** Written comments must be received on or before August 1, 2005.

**ADDRESSES:** Send written comments to Gary Westefer, Indiana Regulatory Specialist, DM–7J, 77 West Jackson Boulevard, Chicago, Illinois 60604. Please refer to Docket Number IN ARA20. We must receive your comments by August 1, 2005. You can view and copy Indiana's application from 9 a.m. to 4 p.m. at the following addresses: Indiana Department of Environmental Management, 100 North Senate, Indianapolis, Indiana, (mailing address P.O. Box 6015, Indianapolis, Indiana 46206) contact Steve Mojonner (317) 233–1655, or Lynn West (317) 232–3593; and EPA Region 5, contact Gary Westefer at the following address.

**FOR FURTHER INFORMATION CONTACT:** Gary Westefer, Indiana Regulatory Specialist, U.S. EPA Region 5, DM–7J, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–7450.

**SUPPLEMENTARY INFORMATION:**

**A. Why Are Revisions to State Programs Necessary?**

States which have received final authorization from EPA under RCRA

section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

**B. What Decisions Have We Made in This Rule?**

We conclude that Indiana's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we propose to grant Indiana Final authorization to operate its hazardous waste program with the changes described in the authorization application. Indiana has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders (except in Indian Country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Indiana, including issuing permits, until the State is granted authorization to do so.

**C. What Is the Effect of Today's Authorization Decision?**

This decision means that a facility in Indiana subject to RCRA will now have to comply with the authorized State requirements (listed in section F of this notice) instead of the equivalent Federal requirements in order to comply with RCRA. Indiana has enforcement responsibilities under its State hazardous waste program for violations of such program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to:

- Do inspections, and require monitoring, tests, analyses or reports.
- Enforce RCRA requirements and suspend or revoke permits.
- Take enforcement actions regardless of whether the State has taken its own actions.