

1753. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The Department is delaying the effective date of the final rule published December 29, 2008 (73 FR 79367), which regulates the sustainable free use, commercial harvest, and sale of special forest products and forest botanical products from National Forest System lands. The Department previously delayed the effective date on March 30, 2009 (74 FR 14049). Further delay is necessary, because more time is needed for the Forest Service to properly respond to the comments and to consider any potential changes to the rule.

Dated: May 27, 2009.

**Ann Bartuska,**

*Acting Deputy Under Secretary, Natural Resources and Environment.*

[FR Doc. E9-12685 Filed 5-29-09; 8:45 am]

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 38

RIN 2900-AM53

#### Headstone and Marker Application Process

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Department of Veterans Affairs (VA) regulations concerning headstones and markers furnished by the Government through the VA headstone and marker program. It updates ordering procedures for headstones and markers and provides instructions for requesting the addition of a new emblem of belief to VA's list of emblems available for inscription on Government-furnished headstones and markers. Additionally, this final rule establishes criteria to guide VA's decisions on requests to add new emblems of belief to the list.

**DATES:** *Effective Date:* July 1, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Lindee Lenox, Director, Memorial Programs Service, Office of Field Programs, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 501-3100 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** On January 19, 2007, VA published a notice of proposed rulemaking in the **Federal Register** (72 FR 2480). We proposed to amend VA's regulations concerning procedures for ordering Government-furnished headstones and markers and to establish requirements for requesting the addition of a new emblem of belief to VA's list of emblems available for inscription on headstones and markers. We provided a 60-day comment period, which ended on March 20, 2007, and received 538 comments from 522 individuals and 16 organizations. Of the 538 comments, 256 expressed support for VA's approval of a specific emblem of belief. Several other commenters suggested that VA conduct a review of all existing emblem inscriptions to ensure compliance with the proposed rule. Since the proposed rule concerned the procedures for adding a new emblem to the list of emblems available for inscription, not whether a specific emblem should be added pursuant to the proposed procedures or whether each of the 2,774,634 graves currently maintained by VA are marked in accordance with the proposed procedures, these comments are beyond the scope of this rulemaking and will not be addressed in this document.

Several commenters generally questioned the rulemaking process and our standard statements of compliance with regulatory law. A few commenters also requested that we send them separate, written responses to each of their comments. VA is required to follow the rulemaking procedures established by the Administrative Procedure Act, other Federal statutes, and various Executive Orders. Comments concerning those procedures are also beyond the scope of this rulemaking and will not be addressed in this document.

Based on the rationale set forth in the proposed rule and in this document, we adopt the provisions of the proposed rule as a final rule with the changes indicated below.

#### Application Process

Many commenters recommended that VA establish a period within which it must act on a request to add a new emblem of belief to its list of emblems available for inscription on Government-furnished headstones and markers. We disagree and will not make any changes based on these comments.

To ensure that individuals are afforded every opportunity to substantiate their claims and receive the full benefit of VA's duty to assist, VA has not established arbitrary or unnecessary deadlines for deciding

applications for veterans benefits. For the same reasons, we decline to establish such a deadline for emblem requests. Under 38 CFR 38.632(f), VA will provide individuals who submit an incomplete emblem request notice concerning the status of their request and an opportunity to submit additional information. Also, in § 38.632(g), we clarify that VA will decide applications for new emblems only if they are complete. Although we decline to establish an arbitrary deadline for deciding an emblem request, § 38.632(g)(1) limits such requests to cases of immediate need. The request must relate to an application for a Government-furnished headstone or marker for an eligible deceased individual. Previously organizations could request that VA add their emblem to the list of emblems available for inscription when there was no immediate need. Many of the submissions we received from organizations were not actual applications, but merely letters of interest that required research, review, and written responses. Under the new "immediate need" requirement in § 38.632(g)(1), VA will be able to process applications for new emblems within a reasonable time after an interment or other memorial ceremony.

Several commenters suggested that VA could provide greater transparency in the emblem request process by providing notice of receipt of requests and information concerning the status of requests.

We agree that it is important to keep applicants apprised of the status of their requests. As described above regarding § 38.632(g), VA will decide complete requests as soon as possible. Upon receipt of an incomplete request to add a new emblem of belief, § 38.632(f) provides that VA will notify the applicant in writing of any missing information and that he or she has 60 days to submit the information. Further, if the Under Secretary for Memorial Affairs determines that an emblem represents a belief but would adversely affect the dignity and solemnity of the cemetery environment, § 38.632(h)(2) provides for additional notice to the individual concerning remedial options. These measures provide sufficient transparency, and we decline to impose additional administrative requirements at this time.

Some commenters suggested that VA allow living veterans and servicemembers, particularly servicemembers deployed to or serving in combat zones, to request a new emblem of belief in advance of need. We

will not make any changes based on these comments.

VA has a substantial interest in timely providing inscribed headstones and markers for interments or other memorial ceremonies. By this we mean that it is VA's obligation to respond to veterans' next-of-kins' or personal representatives' requests for inscribed, Government-furnished headstones and markers without undue delay. There are currently over 23 million veterans and 1.4 million active duty servicemembers. In addition, VA currently receives approximately 350,000 applications for Government-furnished headstones and markers annually. VA has imposed the immediate need requirement to ensure that it meets its obligation to provide headstones and markers for interments and memorial ceremonies as expeditiously as possible with available resources. We decline to further burden those resources by reviewing requests for new emblems prior to time of need. However, we note that veterans and servicemembers may at any time make their burial wishes known to their next-of-kin or personal representatives and may provide them a completed VA Form 40-1330, Application for Standard Government Headstone or Marker, for their use if the need arises.

Servicemembers may also prepare this form in advance and have it added to their service department records.

Several commenters inquired about VA's application of the good cause exception in § 38.632(g)(1) for replacement headstones and markers. Good cause will generally exist for purposes of providing a replacement headstone or marker if VA denies an emblem request but subsequently adds the emblem to the list of emblems available for inscription. Whether there is good cause in other situations will depend upon the facts as determined by VA's case-by-case review.

A few commenters questioned whether VA's action on an individual request for a new emblem of belief based upon immediate need would also apply to all future requests for the same emblem. The final rule prescribes procedures for adding new emblems of belief to VA's list of emblems available generally for inscription on Government-furnished headstones and markers. Upon approval of an applicant's request for addition of a new emblem of belief, the emblem will be added to the list and available for inscription on all Government-furnished headstones or markers.

#### Evaluation Criteria

Several commenters asserted that VA should either approve all emblems of

belief or discontinue the program. The Federal Government has a long history of furnishing headstones and markers inscribed with emblems of belief to the family members or personal representatives of deceased veterans for interments or memorial ceremonies. The headstone and marker program was administered by the Department of the Army until 1973 when Congress created the National Cemetery System and transferred authority for the program to VA. Our experience has shown that emblem of belief inscriptions are requested for the majority of Government-furnished headstone and markers. Discontinuing this program might cause veterans' survivors to suffer unnecessary grief and anguish during a very difficult time. Further, as we describe below, we believe that we can address the commenters' concerns by imposing only very narrow, viewpoint-neutral restrictions on the design of emblems of belief and expressly prohibiting VA evaluation of the beliefs that they represent. Accordingly, we decline the commenters' suggestion that we either approve all emblems of belief or discontinue the optional inscription of emblems.

Many commenters criticized proposed § 38.632(b)(3), which defined "belief system" as meaning "genuine and non-frivolous" religious opinions, doctrines and/or principles. They also objected to the provision in proposed § 38.632(h) that allowed the Under Secretary for Memorial Affairs to consider "information from any source" in evaluating a belief system and asserted that any claim of authority by VA to ascertain a belief system's genuineness and non-frivolousness is unconstitutional. Other commenters objected on constitutional grounds to proposed § 38.632(e), which would require applicants to establish that an emblem is "widely used and recognized as the symbol of a distinct belief system" and produce supplemental information concerning recognition of the decedent's belief system by a group, organization, or another Federal agency. Some commenters suggested that VA limit its discretion to ascertaining whether an eligible decedent's declared belief system was sincerely held or was a belief system that played a role equivalent to a religious belief system in the life of that individual.

After carefully considering the comments and the applicable law, we agree with the commenters that it is difficult to establish objective criteria in VA's regulations for evaluating the religious beliefs of eligible deceased veterans and family members consistent with the First Amendment. In *United*

*States v. Seeger*, 380 U.S. 163, 184-185 (1965), the Supreme Court held that courts "are not free to reject beliefs because they consider them 'incomprehensible.' Their task is whether the beliefs professed by [an individual] are sincerely held and whether they are, in his own scheme of things, religious." See also *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (The issue of whether a belief qualifies as a religion "is not to turn upon a judicial perception of the particular belief or practice in question."). In *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985), the Court held that an "individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." It rejected the notion that this right "merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Id.*

In other contexts, courts have applied various tests and indicia in an effort to determine whether a belief or practice has a religious character for First Amendment purposes. See *Seeger*, 380 U.S. at 163; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir. 2000); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996); *Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986); *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3rd Cir. 1981). However, we have determined that these tests are not readily adaptable to promulgation of binding, objective criteria in the Department's regulations. For example, the *Seeger* test, under which one would evaluate whether the claimed belief occupies the same place in the life of the adherent as an orthodox belief in God holds in the life of another individual, would require some degree of subjective judgment on the part of a Department official. Given the difficulty in establishing objective criteria that can withstand constitutional challenge, we will not evaluate any belief for which an individual requests inscription of an emblem of belief on a Government-furnished headstone or marker. We have determined that it is necessary to clarify instead that VA's discretion is limited to ascertaining whether an emblem that assertedly represents the decedent's religion or religious belief system should be precluded because it is, for reasons unrelated to religious beliefs, inappropriate for inscription in VA cemeteries or on Government-furnished headstones and markers. In the absence

of evidence to the contrary, VA will accept an applicant's statement regarding the religious or functionally equivalent belief of a deceased eligible individual. VA will attempt to resolve factual disputes concerning the emblem that represents the decedent's belief in accordance with the decedent's expressed preference. In cases where the decedent did not state a preference, VA would look to the individual(s) most likely to have the best knowledge of the decedent's religious or functionally equivalent belief, which would be the first individual(s) listed in § 38.632(g)(2)(ii) as follows: the decedent's surviving spouse; the decedent's children 18 years of age or older; the decedent's parents; or the decedent's siblings.

We also agree that emblems representing individuals' sincerely held beliefs are appropriate for inscription on Government-furnished headstones and markers even if such beliefs are not promulgated or endorsed by any specific church, organized denomination, or religious organization. The Supreme Court has rejected the notion that "to claim the protection of the Free Exercise Clause one must be responding to the commands of a particular religious organization." See *Frazer v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989) (appellant asserted he was a Christian but did not claim to be a member of a particular Christian sect). Further, we have determined that it would not be too burdensome for VA to provide for the inscription of an emblem that represents an individual's, as opposed to a group's, asserted religious belief system. As indicated on VA Form 40-1330, VA already accommodates individual requests for inscription of other optional (birth date, date of death, military rank, military awards, and war service) and additional (terms of endearment, nicknames, military or civilian credentials or accomplishments, and special military unit designations) items, and digital imaging technology has allowed VA's contractors to achieve considerable flexibility in processing inscription requests. Accordingly, we have modified the rule to accommodate the religious beliefs of decedents who during their lives were not affiliated with a religious group.

We wish to emphasize that we will not require an individual requesting inscription of a new emblem of belief to provide supplemental information to support his or her assertion that a particular belief was sincerely held by the decedent and played a role functionally equivalent to that of religion in the life of the decedent. Also,

we will not establish criteria for "affiliated organizations" or require endorsement from such organizations. VA recognizes that several denominations or sects may adhere to a religious or functionally equivalent belief, each with its own emblem design. As described in this final rule, we have determined that it is appropriate to impose only minor, reasonable limits on religious emblems, to ensure that they do not undermine the purpose of Government-furnished headstones and markers or have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the nation. In doing so, VA's discretion will be limited to evaluating emblems only for that narrow purpose. VA will not evaluate an individual's sincerely-held religious or functionally equivalent belief. VA's acceptance of an applicant's statement regarding the religious or functionally equivalent belief of a deceased eligible individual does not constitute an endorsement or approval of that belief.

Several commenters objected to proposed § 38.632(b)(4), under which we proposed to prohibit inscription of emblems that are obscene or have an adverse impact on the dignity and solemnity of cemeteries. The commenters suggested that we remove the provision because the terms "obscene" and "adverse impact" are too ambiguous or ill-defined, and leave room for arbitrary or subjective decision-making. We agree that the constitutional obscenity standard, which includes a determination of whether the average person applying contemporary community standards would find that the expression appeals to the prurient interest, would be difficult to apply in the context of VA's emblems of belief determinations. To ensure clarity and consistency, the availability of markers furnished by the Federal Government should not turn on local community standards. Moreover, emblems depicting certain kinds of sexual content may be inappropriate for display on Government-furnished markers even if those emblems might not be deemed obscene. Accordingly, we have removed that standard and will prohibit instead emblems that explicitly or graphically depict or describe sexual content that is shocking, titillating, or pandering in nature. However, we disagree with and decline the commenters' suggestion that we avoid establishing a standard for determining whether an emblem is appropriate for inscription on Government-furnished headstones and markers.

National cemeteries and Government-furnished headstones and markers serve

a particular, congressionally mandated purpose, namely, to commemorate the gallant dead in a manner commensurate with the dignity of their sacrifice. See 38 U.S.C. 2403(c) (cemeteries under VA control shall be considered "shrines as a tribute to our gallant dead"); see also 38 U.S.C. 2306(a) (eligibility for Government-furnished headstones and markers). Under 38 U.S.C. 2404(a), VA has authority to promulgate all rules and regulations necessary and appropriate for administration of national cemeteries. Section 2404(c)(1) further authorizes VA to provide "appropriate" grave markers and to prescribe rules concerning inscription of information on those markers. We interpret these clear statutory provisions as authorizing VA to prohibit inscription of emblems that would have an adverse impact on the dignity and solemnity of cemeteries.

The commenters object to the proposed "adverse impact" standard because it is susceptible to multiple interpretations. However, we note that regulatory language is not unconstitutionally vague simply because it is susceptible to multiple interpretations. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998) ("decency and respect for the diverse beliefs and values of the American public" was not an unconstitutionally vague evaluation criteria). "[W]hen the Government is acting as a patron rather than a sovereign, the consequences of imprecision are not constitutionally severe." *Id.* at 589. Nonetheless, we have determined that it would be helpful to expand the definition of "emblem of belief" in § 38.632(b)(2) to identify certain kinds of emblems that would have an adverse impact on the dignity and solemnity of cemeteries. In this regard, we have proscribed emblems that are graphic depictions or descriptions of sexual content that is shocking, titillating, or pandering in nature; or that include coarse or abusive language or images. In our view, these restrictions are reasonable in light of the express purpose of National Cemeteries and Government-furnished headstones and markers. Moreover, such exclusions do not impermissibly discriminate on the basis of viewpoint. Cf. *Bethel School Dist. 403 v. Fraser*, 478 U.S. 675 (1986) (school district did not engage in impermissible viewpoint discrimination, or otherwise violate the First Amendment, by disciplining a student for giving a lewd speech at a school assembly).

We have carefully avoided judging an individual's religious or functionally equivalent belief and intend only to

proscribe the inscription of emblems that are not appropriate for cemeteries and Government-furnished headstones and markers that honor deceased veterans. We acknowledge that proscribing explicit or graphic sexual content and coarse or abusive language inserts a minor but unavoidable element of subjectivity in VA's decisions. However, the Court of Appeals for the Federal Circuit has emphasized that restrictions on speech in nonpublic fora "may be reasonable if they are aimed at preserving the property for its intended use." *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50–51 (1983)). In *Griffin*, the Federal Circuit held that "the government has established national cemeteries to serve particular commemorative and expressive roles" in a nonpublic forum. *Griffin*, 288 F.3d at 1324. The court also held that the nature and function of the national cemeteries make the preservation of dignity and decorum a paramount concern, and that the Government "must have greater discretion to decide what speech is permissible in national cemeteries than in those fora which serve no patriotic purpose." *Id.* Because the judgments necessary to ensure that cemeteries remain sacred to the honor and memory of those interred or memorialized there may defy objective description and may vary with individual circumstances, the court concluded that "the discretion vested in VA administrators by [the challenged regulation] is reasonable in light of the characteristic nature and function of national cemeteries." *Griffin*, at 1325.

The Federal Circuit's analysis in *Griffin* may be extended to the provision of Government-furnished headstones and markers, even if they are not placed in a national cemetery. In *Perry v. McDonald*, 280 F.3d 159, 171 (2d Cir. 2001), the Court of Appeals for the Second Circuit held that viewpoint-neutral restrictions on the speech depicted on vanity license plates need only be reasonable in light of the purpose of the forum. *See also Griffin*, 288 F.3d at 1321 ("restraints on speech in a nonpublic forum will be upheld unless they are unreasonable or they embody impermissible viewpoint discrimination"). The court stated that "automobile license plates are governmental property intended primarily to serve a governmental purpose" and must be approved prior to issuance. *Perry*, 280 F.3d at 169. Similarly, in a 1948 opinion, the Army Judge Advocate General (JAG) held that

title to Government-furnished headstones and markers, which are installed for the express Government purpose of commemorating deceased veterans in a respectful manner, remains with the Government. The VA Office of the General Counsel has interpreted the law regarding ownership of headstones and markers consistent with the JAG opinion since the transfer of the national cemetery system to VA in 1973. The fact that VA makes available to the applicant the option of inscribing an emblem does not detract from the proprietary interest the Government maintains in the headstone or marker or from the solemn purpose of the headstone or marker.

As a check on discretion, § 38.632(g)(4) states that an adverse impact determination "may not be made based on the content of the religious or functionally equivalent belief that the emblem represents." Section 38.632(h)(2) provides for notice concerning any VA determination that an emblem design is inappropriate and an opportunity to modify the design before any final decision. Finally, should any applicant disagree with the Under Secretary's decision concerning the design of an emblem, the decision is a final agency action for purposes of judicial review under the Administrative Procedure Act. *See* 5 U.S.C. 701–706. Accordingly, this final rule is narrowly-tailored to ensure that VA meets its obligation to provide headstones and markers that appropriately honor the service of deceased veterans.

#### Other Administrative Matters

Some commenters expressed concern about the requirement in proposed § 38.632(e)(7) concerning trademark and copyright restrictions. The commenters found it contradictory for VA to limit inscription of emblems to those that are free from copyright and trademark restrictions because VA currently allows for inscription of two emblems that are not free from such restrictions. Other commenters suggested that VA should not restrict an emblem that has copyright or trademark protections if the copyright or trademark owner has authorized inscription of the emblem on Government-furnished headstones and markers.

VA administers the headstone and marker program with the assistance of over 165 contractors and 40 vendors. The list of emblems available for inscription on Government-furnished headstones and markers is distributed to these contractors and vendors and to the general public for purposes of expediting the application for and

delivery of headstones and markers. Emblems are added to the list for the future general use of all applicants for Government-furnished headstones and markers. Further, VA does not have the resources or legal duty to monitor and protect the intellectual property rights of others. That duty belongs to the owner of the intellectual property. For these reasons, VA has determined that it is not feasible to add restricted-use emblems to the list of emblems available for inscription. Nonetheless, we agree with the commenters that there is a less restrictive alternative to proscribing inscription of intellectual property.

Accordingly, we will modify § 38.632(e)(2) to clarify that the requested emblem must be free of copyright or trademark restrictions or authorized by the owner for inscription on Government-furnished headstones and markers. A few commenters also inquired about inscription technology and the costs to individuals for inscribing an emblem of belief on a headstone or marker. Regarding inscription technology, VA contracts with private vendors for the procurement and inscription of headstones and markers. As technologies improve, VA amends contracts to incorporate improved and diverse manufacturing techniques to take advantage of new inscription technologies. There are no costs imposed on families to inscribe emblems on Government-furnished headstone or markers.

#### Paperwork Reduction Act

Although this final rule will impose a new information collection for requests to add a new emblem of belief to VA's list of emblems available for inscription on Government-furnished headstones and markers, VA has concluded that this new requirement will affect fewer than 10 individuals within any 12-month period. Under 5 CFR 1320.3(c), requests that do not impose a collection of information on 10 or more entities within any 12-month period do not constitute a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Therefore, this final rule contains no provisions constituting a new collection of information. Furthermore, the Office of Management and Budget (OMB) previously approved all collections of information referenced in this final rule under control number 2900–0222. This rule does not change those collections.

#### 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 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 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.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this final 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. This final rule primarily affects only individuals who request Government-furnished headstones and markers for deceased eligible veterans. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

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

#### Catalog of Federal Domestic Assistance Program Number

The Catalog of Federal Domestic Assistance program numbers and titles for this proposed rule are 64.201, National Cemeteries; and 64.202, Procurement of Headstones and Markers and/or Presidential Memorial Certificates.

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

Administrative practice and procedure, Cemeteries, Veterans.

Approved: February 20, 2009.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

■ For the reasons set out in the preamble, the Department of Veterans Affairs amends 38 CFR part 38 as follows:

#### PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 continues to read as follows:

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

■ 2. Revise § 38.632 to read as follows:

##### § 38.632 Headstone or marker application process.

(a) *General.* This section contains procedures for ordering a Government-furnished headstone or marker through the National Cemetery Administration (NCA) headstone and marker application process for burial or memorialization of deceased eligible veterans and eligible family members. It also contains procedures for requesting the inscription of new emblems of belief on Government-furnished headstones and markers.

(b) *Definitions.* For purposes of this section:

(1) *Applicant* means the decedent's next-of-kin (NOK), a person authorized in writing by the NOK, or a personal representative authorized in writing by the decedent to apply for a Government-furnished headstone or marker and, in appropriate instances, a new emblem of belief for inscription on a Government-furnished headstone or marker.

(2) *Emblem of Belief* means an emblem that represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent. In the absence of evidence to the contrary, VA will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible

individual. The religion or belief system represented by an emblem need not be associated with or endorsed by a church, group or organized denomination. Emblems of belief do not include social, cultural, ethnic, civic, fraternal, trade, commercial, political, professional or military emblems. VA will not accept any emblem that would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation, including (but not limited to) emblems that contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature; and emblems that display coarse or abusive language or images.

(3) *Federally-administered cemetery* means a VA National Cemetery, Arlington National Cemetery, the Soldiers' and Airmen's Home National Cemetery, a military post or base cemetery of the Armed Forces, a service department academy cemetery, and a Department of the Interior National Cemetery.

(4) *Headstones or markers* means headstones or markers that are furnished by the Government to mark the grave or memorialize a deceased eligible veteran or eligible family member.

(5) *State veterans cemetery* means a cemetery operated and maintained by a State or territory for the benefit of deceased eligible veterans or eligible family members.

(c) *Headstone or Marker Application Process.* (1) Headstones or markers will be ordered automatically during the process of arranging burial or memorialization for a deceased eligible veteran or eligible family member in a national cemetery or a State veterans cemetery that uses the NCA electronic ordering system. Cemetery staff will order a Government-furnished headstone or marker by entering information received from the applicant directly into the NCA electronic ordering system. Unless a new emblem of belief is requested (see paragraph (d)(1) of this section), no further application is required to order a Government-furnished headstone or marker when the national or state cemetery uses the NCA electronic ordering system.

(2) Submission of a completed VA Form 40–1330 (Application for Standard Government Headstone or Marker) is required when a request for a Government-furnished headstone or marker is not made using the NCA electronic ordering system. VA Form 40–1330 requires the applicant to provide information about the decedent,

inscription preferences, and placement of headstone or marker. There is a space in the Remarks section of VA Form 40-1330 for applicants to clarify information or make special requests, to include an emblem of belief that is not

currently available. To access VA Form 40-1330 use the following link: <http://www.va.gov/vaforms/va/pdf/40-1330.pdf>.

(d) *Application Process for New Emblems of Belief*. When there is an

immediate need, and the applicant requests a new emblem of belief for inscription on a new, first Government-furnished headstone or marker for a deceased eligible individual, the following procedures will apply:

If the burial or memorialization of an eligible individual is in a:	The applicant must:
(1) Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system.	(i) Submit a written request to the director of the cemetery where burial is requested indicating that a new emblem of belief is desired for inscription on a Government-furnished headstone or marker; and (ii) Provide the information specified in paragraph (e) of § 38.632 to the NCA Director of Memorial Programs Service.
(2) Private cemetery (deceased eligible veterans only), Federally-administered cemetery or a State veterans cemetery that does not use the NCA electronic ordering system.	(i) Submit a completed VA Form 40-1330 to the NCA Director of Memorial Programs Service, indicating in the REMARKS section of the form that a new emblem of belief is desired; and (ii) Provide the information specified in paragraph (e) of § 38.632 to the NCA Director of Memorial Programs Service.

(e) *Application*. The applicant must identify the deceased eligible individual for whom a request has been made to add a new emblem of belief to those emblems of belief available for inscription on Government-furnished headstones and markers. The application must include the following:

(1) Certification by the applicant that the proposed new emblem of belief represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent.

(2) A three-inch diameter digitized black and white representation of the requested emblem that is free of copyright or trademark restrictions or authorized by the owner for inscription on Government-furnished headstones and markers and can be reproduced in a production-line environment in stone or bronze without loss of graphic quality.

(f) *Incomplete application*. If VA determines that an application for a new emblem of belief is incomplete, VA will notify the applicant in writing of any missing information and that he or she has 60 days to submit such information or no further action will be taken. If the applicant does not submit all required information or demonstrate that he or she has good cause for failing to provide the information within 60 days of the notice, then the applicant will be notified in writing that no further action will be taken on the request for a new emblem.

(g) *Evaluation criteria*. The Director of NCA's Office of Field Programs shall forward to the Under Secretary for Memorial Affairs all complete applications, any pertinent records or information, and the Director's

recommendation after evaluating whether:

(1) The applicant has demonstrated that there is an immediate need to inscribe the emblem on a new, first, Government-furnished headstone or marker for a deceased eligible individual, unless good cause is shown for an exception;

(2) The applicant has submitted a certification concerning the emblem that meets the requirements of paragraph (e)(1) of this section.

(i) In the absence of evidence to the contrary, VA will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual. If a factual dispute arises concerning whether the requested emblem represents the sincerely held religious or functionally equivalent belief of the decedent, the Director will evaluate whether the decedent gave specific instructions regarding the appropriate emblem during his or her life and the Under Secretary will resolve the dispute on that basis.

(ii) In the absence of such instructions, the Under Secretary will resolve the dispute in accordance with the instructions of the decedent's surviving spouse. If the decedent is not survived by a spouse, the Under Secretary will resolve the dispute in accordance with the agreement and written consent of the decedent's living next-of-kin. For purposes of resolving such disputes, next-of-kin means the living person(s) first listed as follows:

(A) The decedent's children 18 years of age or older, or if the decedent does not have children, then

(B) The decedent's parents, or if the decedent has no surviving parents, then

(C) The decedent's siblings.

(3) The emblem meets the definition of an emblem of belief in paragraph (b)(2);

(4) The emblem would not have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation—for example, the emblem cannot contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature, or display coarse or abusive language or images. A determination that an emblem would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation may not be made based on the content of the religious or functionally equivalent belief that the emblem represents.

(5) The emblem meets the technical requirements for inscription specified in paragraph (e)(2) of this section.

(h) *Decision by the Under Secretary for Memorial Affairs*. (1) A decision will be made on all complete applications. A request to inscribe a new emblem on a Government-furnished headstone or marker shall be granted if the Under Secretary for Memorial Affairs finds that the request meets each of the applicable criteria in paragraph (g) of this section. In making that determination, if there is an approximate balance between the positive and negative evidence concerning any fact material to making that determination, the Under Secretary shall give the benefit of the doubt to the applicant. The Under Secretary shall consider the Director of NCA's Office of Field Programs' recommendation and may consider information from any source.

(2) If the Under Secretary for Memorial Affairs determines that allowing the inscription of a particular proposed emblem would adversely

affect the dignity and solemnity of the cemetery environment or that the emblem does not meet the technical requirements for inscription, the Under Secretary shall notify the applicant in writing and offer to the applicant the option of either:

(i) Omitting the part of the emblem that is problematic while retaining the remainder of the emblem, if this is feasible, or

(ii) Choosing a different emblem to represent the religious or functionally equivalent belief that does not have such an adverse impact.

Applicants will have 60 days from the date of the notice to cure any adverse impact or technical defect identified by the Under Secretary. Only if neither option is acceptable to the applicant, the applicant's requested alternative is also unacceptable, or the applicant does not respond within the 60-day period, will the Under Secretary ultimately deny the application.

(3) If the Under Secretary determines that the request should be denied and that decision is based wholly or partly on information received from a source other than the applicant, then the following procedure will be followed:

(i) A tentative decision denying the request will be prepared;

(ii) Written notice of the tentative decision accompanied by a copy of any information on which the Under Secretary intends to rely will be provided to the applicant;

(iii) The applicant will have 60 days from the date of the written notice specified in subparagraph (ii) to present evidence and/or argument challenging the evidence and/or tentative decision; and

(iv) The Under Secretary will consider the applicant's submission under subparagraph (iii) and will issue a final decision on the request.

(4) The Director, Office of Field Programs, will provide the individual who made the request written notice of the Under Secretary's decision.

**Authority:** (38 U.S.C. 501, 2404).

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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 51 and 52**

[EPA-HQ-OAR-2003-0062; FRL-8910-6]

RIN 2060-AN86

**Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)**

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

**ACTION:** Final rule; notice of grant of reconsideration and administrative stay of regulation.

**SUMMARY:** The Environmental Protection Agency (EPA or Agency) is providing notice that through a letter signed on April 24, 2009, EPA has granted a petition for reconsideration dated February 10, 2009, submitted by Earthjustice on behalf of the National Resources Defense Council (NRDC) and the Sierra Club, with respect to the final rule titled, "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)," published on May 16, 2008. In addition, EPA has administratively stayed one of the provisions to which the petitioners objected—a "grandfathering" provision for PM<sub>2.5</sub> contained in the federal prevention of significant deterioration (PSD) program. The EPA will publish notification in the **Federal Register**

establishing a comment period and opportunity for a public hearing for the reconsideration proceeding.

The petition for reconsideration and request for administrative stay can be found in the docket for the May 16, 2008 rule. The EPA considered the petition for reconsideration and request for stay, along with information contained in the rulemaking docket, in reaching a decision on both the reconsideration and the stay.

**DATES:** Effective June 1, 2009, 40 CFR 52.21(i)(1)(xi) is stayed for a period of three months, until September 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dan deRoeck, Air Quality Policy Division, (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541-5593; or e-mail address: [deroeck.dan@epa.gov](mailto:deroeck.dan@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. How Can I Get Copies of This Document and Other Related Information?**

This **Federal Register** notice, the petition for reconsideration and the letter granting reconsideration and an administrative stay of the grandfathering provision under the federal PSD program at 40 CFR 52.21(i)(1)(xi) are available in the docket that EPA has established for the final rule titled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>)," published on May 16, 2008 at 73 FR 28321, under Docket ID No. EPA-HQ-OAR-2003-0062. The table below identifies the petitioner, the date EPA received the petition, the document identification number for the petition, the date of EPA's response, and the document identification number for EPA's response.

Petitioner	Date of petition to EPA	Petition: Document No. in docket	Date of EPA response	EPA response: Document No. in docket
National Resources Defense Council/Sierra Club .....	2/10/2009	0281	4/24/2009	0282

Note that all document numbers listed in the table are in the form of "EPA-HQ-OAR-2003-0062-xxxx."

All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information may not be publicly available, i.e., confidential business information 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 <http://www.regulations.gov> or in hard copy at the EPA Docket Center, Docket ID No. EPA-HQ-OAR-2003-0062, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and

the telephone number for the EPA Docket Center is (202) 566-1742.

In addition to being available in the docket, an electronic copy of this **Federal Register** notice and EPA's response letter to the petitioners are also available on the World Wide Web at <http://www.epa.gov/nsr>.

**II. Judicial Review**

Under Clean Air Act section 307(b), judicial review of the Agency's decision concerning the stay is available only by