DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 14

RIN 2900–AR93

Fee Reasonableness Reviews; Effect of Loss of Accreditation on Direct Payment

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this proposed rule to address its process for reviewing, determining, and allocating reasonable fees for claim representation, and to address the effect on direct payment of the termination of an agent's or attorney's VA accreditation.

DATES: Comments must be received on or before February 20, 2024.

ADDRESSES: Comments must be submitted through *www.regulations.gov.* Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: *https://www.regulations.gov.* VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Jonathan Taylor, Office of General Counsel (022D), 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–7699. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: Congress has authorized VA to prescribe reasonable restrictions on the amount of fees that agents or attorneys may charge claimants for services on VA benefits claims. 38 U.S.C. 5904(a)(5). In addition, VA has the authority to review a fee agreement between an agent or attorney and a claimant and order a reduction in the fee if VA finds that fee is excessive or unreasonable. 38 U.S.C. 5904(c)(3)(A). VA also has the discretion to directly pay the fee of an agent or attorney from a claimant's past-due benefits if the claimant and the agent or attorney have entered into a fee agreement that requests direct payment and meets statutory and regulatory criteria, including the requirement that the fee not exceed 20 percent of the past-due benefits awarded to the claimant. 38 U.S.C. 5904(d). VA may issue all necessary or appropriate rules and regulations to carry out these authorities. 38 U.S.C. 501(a).

Based on these authorities, VA's Office of the General Counsel (OGC), which acts as the agency of original jurisdiction for reviewing fee agreements, currently performs a ''fee reasonableness'' review in two circumstances: (1) when the claimant or VA has questioned the reasonableness of the fee set forth in the agreement, and (2) when multiple agents or attorneys provided representation. OGC provides review in the latter circumstance in order to decide the amount to be directed to each agent or attorney for purposes of direct payment, since the ''total fee payable'' in direct payment cases is limited to 20 percent of the past-due benefits awarded. *Lippman* v. *Shinseki,* 23 Vet. App. 243, 250 (2009) (citing *Scates* v. *Principi,* 282 F.3d 1362, 1365–66 (Fed. Cir. 2002)). This review ensures that claimants are not forced to part with, for example, 60 percent of their past-due benefits just because they were represented by three different attorneys with 20-percent fee agreements over the course of a case. Congress intended to protect a claimant's benefits from improper diminution by excessive legal fees, and Congress authorized VA to implement fair processes and reasonable restrictions in these circumstances. 38 U.S.C. 5904(a)(5), (c)(3)(A); *Scates,* 282 F.3d at 1366.

Over the past decade, however, there has been a steady increase in cases involving multiple agents or attorneys, as well as requests for OGC review. For example, in fiscal year 2020, OGC received approximately 150 fee reasonableness requests or referrals; in fiscal year 2023, OGC received almost 700. OGC has limited resources to issue determinations on reasonable fees in all those cases. This has led to increased inventory for all fee matters, which has delayed attorneys, agents, and claimants from promptly receiving their earned fees or benefits. To best ensure timely resolution of fee matters for all parties, VA believes it is appropriate to establish reasonable default allocation rules for fee matters and to focus OGC's resources on those cases where a party has expressed an affirmative desire for an OGC determination based on the unique circumstances of the particular case. Moreover, there are many fee matters that can be worked out between the parties, without OGC involvement, and VA wishes to encourage such resolutions. Overall, these default rules will allow attorneys, agents, and claimants (as further explained below) to receive their fees and benefits faster.

Under current practice, after issuing a decision awarding past-due benefits, if a direct-pay fee agreement has been filed, the agency of original jurisdiction (typically the Veterans Benefits Administration) issues a fee notice containing a determination on agent or attorney fee eligibility. 38 CFR 14.636(c)(4). Under this proposed rule, the fee notice would provide one of two default fee allocations depending on the posture of the case. In cases where there is a ''continuous agent or attorney''—an agent or attorney who provided representation that continued through the date of the decision awarding benefits—who meets the requirements for fee eligibility and direct payment enumerated in other paragraphs of § 14.636, the default would be allocation of the fee to that continuous agent or attorney. Otherwise, the default would be an equal split of the fee based on the number of agents or attorneys who meet the requirements for fee eligibility and direct payment plus the claimant.

The fee notice would note that any party (*i.e.,* the claimant or an agent or attorney who represented the claimant in the case) has the opportunity to request, within 60 days of the notice, OGC review of a reasonable fee allocation for the case. In other words, if any party is dissatisfied with the default fee allocation in a case, they would be free to request OGC review of reasonable fees in the case. Upon receipt of a timely request, OGC would initiate a review, provide an opportunity to respond, and issue a decision on the matter. Absent a timely request for OGC review (or a timely appeal to the Board of Veterans' Appeals regarding an agent's or attorney's fee eligibility), however, the fee would be released in accord with the default allocation in the fee notice.

As to the reason for proposing these specific default fee allocations, where a continuous agent or attorney meets the requirements for fee eligibility and direct payment, the default of allocating the fee to that agent or attorney is logical because that agent or attorney's fee is presumed reasonable under 38 CFR 14.636(f)(1). That agent or attorney—who was the representative of record

when the benefits were actually secured—is in a different position than any agents or attorneys who were discharged or withdrew prior to the award of benefits (hereinafter referred to as ''discharged agents or attorneys''), whose entitlement to a fee is not governed by a presumption but instead premised on their contribution to and responsibility for the benefits awarded. 38 CFR 14.636(f)(2); *see Scates,* 282 F.3d at 1366. Of course, if any discharged agent or attorney believes that he or she contributed meaningfully to the case, he or she can work out the matter with the continuous agent or attorney or (if that effort proves unsuccessful) request that OGC initiate a review of reasonable fees. *See generally* ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 487 (2019) (addressing fee division with client's prior counsel). Similarly, if the claimant believes the total fee to be unreasonable, he or she can work out the matter with the other parties or (if that effort proves unsuccessful) request an OGC determination on reasonable fees.

Furthermore, where all agents or attorneys were discharged prior to the date of the decision awarding benefits, the default of a split of the fee is logical because the presumption of 38 CFR 14.636(f)(1) does not apply to such agents and attorneys, and all agents or attorneys are generally in the same position vis-à-vis the fee: they are only entitled to a fee based on quantum meruit, 38 CFR 14.636(f)(2); *see Scates,* 282 F.3d at 1366. That default split should include the claimant because, historically, when OGC has reviewed fee reasonableness in cases where all agents or attorneys have been discharged, OGC has—more often than not—found it reasonable to bestow the agent(s) and/or attorney(s) less than the full potential fee (and to return the remainder to the claimant). For example, in fiscal year 2022, of the 126 fee reasonableness decisions issued addressing the situation where all agents and attorneys had been discharged, OGC returned some of the potential fee to the claimant in 107 of those decisions (84%). Overall, $2.19 million was at stake in these 126 cases, and OGC returned $1.31 million to claimants (60% of the amount at stake). Similar data has emerged through the first three quarters of fiscal year 2023. Of the 82 fee reasonableness decisions issued addressing the situation where all agents and attorneys had been discharged, OGC returned some of the potential fee to the claimant in 72 of those decisions (88%). Overall, $1.77 million was at stake in these 82 cases, and OGC returned $1.22 million to claimants (68% of the amount at stake).

This data reflects the practical reality that, when a claimant secures a favorable decision (sometimes months, often years) after agent or attorney discharge, it may be the claimant (or a Veterans Service Organization) that bears more responsibility for the benefits awarded, and the former agents or attorneys that bear less. It is reasonable for a default—which is merely a baseline that has no effect once a party requests OGC review—to reflect that reality, particularly given the general law on quantum meruit, which suggests that a default should be structured in a way that places the burden on discharged agents or attorneys to file with OGC if they believe their contributions warrant the full potential fee, not on the claimant to file with OGC if they believe otherwise. *Young* v. *Alden Gardens of Waterford, LLC,* 30 NE3d 631, 656 (Ill. App. Ct. 1st Dist. 2015); *Gold, Weems, Buser, Sues & Rundell* v. *Granger,* 947 So.2d 835, 842 (La. App. 1 Cir. 2006); *Bass* v. *Rose,* 609 SE2d 848, 853 (W. Va. 2004) (attorney bears burden of showing that fees sought are reasonable). Including the claimant in this default split also accounts for the possibility that the claimant may have entered into a non-direct pay agreement with other agents or attorneys and may be personally responsible for paying those other agents or attorneys. In any event, this type of split is just a default, aimed to provide a generally reasonable baseline in these cases; if any party believes the default split is not reasonable in a given case, they can work out another arrangement with the other parties on their own or (if that effort proves unsuccessful) request an OGC determination on reasonable fees.

These changes would be incorporated into § 14.636(i), the current paragraph addressing OGC's review of fee agreements. Proposed paragraph (i)(1) would address fee allocation notices and the default fee allocations therein. Proposed paragraph (i)(2) would address the release of allocated fees and finality at the expiration of the 60-day period for requesting OGC review. Proposed paragraph (i)(3) would address the process for requesting that OGC initiate a reasonableness review. Proposed paragraph (i)(4) would address the opportunity to submit argument and evidence during OGC's review. Proposed paragraph (i)(5) would provide the standards for OGC's decision. Proposed paragraph (i)(6) would note the right to appeal OGC's decision to the Board of Veterans' Appeals.

To be clear, the default fee allocations of this proposed rule do not relieve attorneys or agents of their ethical obligation not to accept an unreasonable fee. *See* 84 FR 138, 151 (2019) (''[P]ursuant to VA's standards of conduct in 38 CFR 14.632, attorneys and agents are prohibited from charging, soliciting, or receiving fees that are clearly unreasonable, and, if an attorney or agent [ ] is found to have violated this standard of conduct, the attorney or agent would risk losing his or her accreditation to represent claimants before VA.''); Model Rules of Prof'l Conduct r. 1.5(a) (Am. Bar Ass'n 2022). In other words, notwithstanding the default fee allocations of this proposed rule, it is a violation of VA's standards of conduct for an attorney or agent to blindly pocket fees that were unearned. 38 CFR 14.632(c)(5); *cf. Scates,* 282 F.3d at 1366 (reasonable fee for discharged agent or attorney is limited to a ''fee that fairly and accurately reflects [the attorney or agent's] contribution to and responsibility for the benefits awarded''); 38 CFR 14.636(f)(2). Thus, upon receipt of a fee allocation notice, the agent or attorney has a professional responsibility to review the default fee and ensure that it is not clearly unreasonable; if it is, that agent or attorney has an ethical obligation to return that fee to the claimant. The failure to return the fee to the claimant in such circumstances could constitute a violation of VA's standards of conduct warranting suspension or cancellation of the agent's or attorney's accreditation to represent claimants before VA. *See* 38 CFR 14.633(c)(6).

Related to that ethical issue, VA is proposing to update § 14.636(h) to address the effect on direct payment of the termination of an agent or attorney's VA accreditation. Post-termination, VA has no internal enforcement mechanism against these individuals for violating VA's standards of conduct, including the aforementioned standard that prohibits receipt of a fee that is clearly unreasonable; it would therefore complicate the ethical safeguards underpinning this proposed rule if agents or attorneys who have lost accreditation are included. Moreover, as a practical matter, it has been difficult to contact and directly pay agents or attorneys who have had their VA accreditation terminated, because they are no longer responsible for maintaining updated contact information with VA.

VA has the discretion to decline direct payment in certain circumstances notwithstanding the submission of a direct-pay fee agreement. *Ravin* v. *Wilkie,* 956 F.3d 1346, 1350 (Fed. Cir.

2020); *see* 38 U.S.C. 5904(d)(3) (Secretary ''may'' directly pay a fee to an agent or attorney upon submission of a direct-pay fee agreement). For the above reasons, VA proposes to exercise its discretion and not directly pay agents and attorneys whose accreditation has been terminated. Instead, any potential fee for these former agents or attorneys would be released to the claimant, and the agent or attorney would be responsible for collecting that fee without assistance from VA. *See* 38 CFR 14.636(g)(2). This limitation on direct payment would be placed in paragraph (h)(1)(iii). The language of current paragraph (h)(1)(iii) would be relocated to paragraph (h)(1)(iv).

Lastly, VA is proposing additional, minor revisions to § 14.636. First, VA would remove § 14.636(c)(4), since the agency of original jurisdiction's fee eligibility notice under that paragraph would now be termed a fee allocation notice under proposed § 14.636(i)(1). Second, VA would revise § 14.636(e) to use the term ''agent or attorney'' in lieu of ''representative,'' because only agents and attorneys (not all representatives) can charge a fee. Also in that paragraph, VA would reiterate that fees set forth in a fee agreement, charged, or received for services must be reasonable, consistent with VA's standards of conduct discussed above, and note that fee reasonableness for one agent or attorney can be affected by the fee entitlement of another agent or attorney. Third, while filing fee agreements within 30 days of their execution would remain a regulatory requirement, § 14.636(g)(3) would explicitly note VA's discretion to accept fee agreements filed thereafter upon a showing of sufficient cause. Fourth, VA would simplify § 14.636(k), since the ''modernized review system'' of the Veterans' Appeals Improvement and Modernization Act, Public Law 115–55 (2017), governs all decisions on new fee matters. Fifth, VA is proposing new or revised captions for paragraphs (e), (j), and (k) that more accurately convey the subject-matter of each paragraph.

Executive Orders 12866, 13563, and 14094

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Orders 12866 and 13563. The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant regulatory action under E.O. 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

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). The basis for this certification is the fact that the proposed rule would merely institute reasonable default rules for fee allocation and provide that agents and attorneys who have lost their VA accreditation collect any earned fees without VA assistance. These changes would not result in any loss of fees to which an agent or attorney is reasonably entitled, because, as noted above, any party dissatisfied with the default allocation in a given case can request OGC's determination on reasonable fees in the case. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This proposed rule includes provisions associated with a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). The collection of information was previously approved by OMB and assigned the control number of 2900–0605 but expired in March 2022. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and reinstatement with change.

OMB assigns control numbers to collection 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. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing the collection of information or take such other action as is directed by OMB.

Comments on the collection of information associated with this rulemaking should be submitted through *www.regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AR93, Fee Reasonableness Reviews; Effect of Loss of Accreditation on Direct Payment'' and should be sent within 60 days of publication of this rulemaking. The collection of information associated with this rulemaking can be viewed at: *www.reginfo.gov/public/do/PRAMain.*

OMB is required to make a decision concerning the collection of information contained in this rulemaking between 30 and 60 days after publication of this rulemaking in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the provisions of this rulemaking.

The Department considers comments by the public on a collection of information in—

- Evaluating whether the collection of information is 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 collection 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 collection 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.

The collection of information associated with this rulemaking is

described immediately following this paragraph, under its respective title.

Title: Application for Accreditation as a Claims Agent or Attorney, Filing of Representatives' Fee Agreements and Motions for Review of Such Fee Agreements.

OMB Control No: 2900–0605.

CFR Provisions: 38 CFR 14.629, 14.636.

• *Summary of collection of information:*

(1) Applicants seeking accreditation as claims agents or attorneys to represent benefits claimants before VA must file VA Form 21a with OGC. The information requested in VA Form 21a includes basic identifying information, as well as certain information concerning training and experience, military service, and employment. *See* 38 U.S.C. 5901; 38 CFR 14.629(b).

(2) If accredited agents and attorneys wish to maintain accreditation, they must file recertifications with OGC that they have completed Continuing Legal Education (CLE) requirements and are in good standing with other courts, bars, and Federal and State agencies. *See* 38 U.S.C. 5904(a)(2)–(3); 38 CFR 14.629(b).

(3) Accredited agents and attorneys must file with VA any agreement for the payment of fees charged for representing claimants before VA. 38 U.S.C. 5904(c)(2); 38 CFR 14.636(g).

(4) Claimants, accredited agents, or accredited attorneys may request an OGC determination on a reasonable fee allocation in a given case. If they do, OGC will solicit (optional) responses from the other parties in the case. 38 U.S.C. 5904(c)(3); 38 CFR 14.636(i).

• *Description of need for information and proposed use of information:*

(1) The information in the VA Form 21a is used by OGC to determine the applicant's eligibility for accreditation as a claims agent or attorney. More specifically, it is used to evaluate qualifications, ensure against conflicts of interest, and to establish that statutory and regulatory eligibility requirements, *e.g.,* good character and reputation, are met.

(2) The information in recertifications is used by OGC to monitor whether accredited attorneys and agents continue to have appropriate character and reputation and whether they remain fit to prepare, present, and prosecute VA benefit claims.

(3) The information in a fee agreement is used by the Veterans Benefits Administration (VBA) to associate the fee agreement with the claimant's claims file, to potentially determine the attorney or agent's fee eligibility, and to potentially process direct payment of a fee from the claimant's past-due benefits. It is used by OGC to monitor whether the agreement is in compliance with laws governing paid representation, and to potentially review fee reasonableness.

(4) The information in a request for OGC fee review, or a response to such request, is used by OGC to determine the agents' or attorneys' contribution to and responsibility for the ultimate outcome of the claimant's claim, so that a determination on reasonable fees can be rendered.

• *Description of likely respondents:* Claimants, Attorneys, Agents.

• *Estimated number of respondents:*

(1) For VA Form 21a applications, 2,280.

(2) For recertifications, 4,860.

(3) For fee agreements, 27,250 (750 first time filers and 26,500 repeat filers).

(4) For requests for OGC fee review, 305 (203 initial requests and 102 party responses).

• *Estimated frequency of responses:* One time.

• *Estimated average burden per response:*

(1) For VA Form 21a applications, 45 minutes.

(2) For recertifications, 10 minutes.

(3) For fee agreements, 11 minutes (1 hour for first time filers and 10 minutes for repeat filers).

(4) For requests for OGC fee review, 2 hours (for both initial requests and party responses).

• *Estimated total annual reporting and recordkeeping burden:*

(1) For VA Form 21a applications, 1,710 hours.

(2) For recertifications, 810 hours.

(3) For fee agreements, 5,167 hours (750 hours for first time filers and 4,417 hours for repeat filers).

(4) For requests for OGC fee review, 610 hours (406 hours for initial requests and 204 hours for responses).

• *Estimated cost to respondents per year:*

(1) For VA Form 21a applications, $74,767.

(2) For recertifications, $63,779.

(3) For fee agreements, $406,850.

(4) For requests for OGC fee review, $43,133.

* To estimate the total information collection burden cost, VA used the Bureau of Labor Statistics (BLS) average hourly wage information available at *https://www.bls.gov/oes/current/oes_nat.htm.*

List of Subjects in 38 CFR Part 14

Administrative practice and procedure, Claims, Courts, Foreign relations, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on December 12, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 14 as set forth below:

PART 14—LEGAL SERVICES, GENERAL COUNSEL, AND MISCELLANEOUS CLAIMS

■ 1. The authority citation for part 14 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 2671–2680; 38 U.S.C. 501(a), 512, 515, 5502, 5901–5905; 28 CFR part 14, appendix to part 14, unless otherwise noted.

■ 2. Amend § 14.636 by:

■ a. Removing paragraph (c)(4);

■ b. Revising paragraphs (e), (g)(3), and (h)(1)(ii);

■ c. Redesignating paragraph (h)(1)(iii) as paragraph (h)(1)(iv);

■ d. Adding new paragraph (h)(1)(iii); and

■ d. Revising paragraphs (i) through (k).

The revisions read as follows:

§ 14.636 Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.

* * * * *

(e) *Fee reasonableness factors.* Fees set forth in a fee agreement, charged, or received for the services of an agent or attorney admitted to practice before VA must be reasonable. They may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases. Factors considered in determining whether fees are reasonable include:

(1) The extent and type of services the agent or attorney performed;

(2) The complexity of the case;

(3) The level of skill and competence required of the agent or attorney in giving the services;

(4) The amount of time the agent or attorney spent on the case;

(5) The results the agent or attorney achieved, including the amount of any benefits recovered;

(6) The level of review to which the claim was taken and the level of the review at which the agent or attorney was retained;

(7) Rates charged by other agents or attorneys for similar services;

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved;

(9) If applicable, the reasons why an agent or attorney was discharged or withdrew from representation before the date of the decision awarding benefits; and

(10) If applicable, the fee entitlement of another agent or attorney in the case.

* * * * *

(g) * * *

(3) A copy of a direct-pay fee agreement, as defined in paragraph (g)(2) of this section, must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. Only fee agreements that do not provide for the direct payment of fees, documents related to review of fees under paragraph (i) of this section, and documents related to review of expenses under § 14.637, may be filed with the Office of the General Counsel. All documents relating to the adjudication of a claim for VA benefits, including any correspondence, evidence, or argument, must be filed with the agency of original jurisdiction, Board of Veterans' Appeals, or other VA office as appropriate. VA may accept fee agreements that were not filed within 30 days of execution upon a showing of sufficient cause.

(h) * * *

(1) * * *

(ii) The amount of the fee is contingent on whether or not the claim is resolved in a manner favorable to the claimant or appellant,

(iii) The agent or attorney is accredited (*see* §§ 14.627(a) and 14.629(b)) on the date of VA's fee allocation notice (*see* paragraph (i) of this section), and

(iv) The award of past-due benefits results in a cash payment to a claimant or an appellant from which the fee may be deducted. (An award of past-due benefits will not always result in a cash payment to a claimant or an appellant. For example, no cash payment will be made to military retirees unless there is a corresponding waiver of retirement pay. (See 38 U.S.C. 5304(a) and 38 CFR 3.750))

* * * * *

(i) *Fee review.* For purposes of this paragraph (i), ''party'' means the claimant or appellant or any agent or attorney who represented the claimant or appellant in the case; ''eligible for direct payment'' means eligible for direct payment of a fee under the requirements of paragraphs (c), (g), and (h) of this section; ''continuous agent or attorney'' means the agent or attorney who provided representation that continued through the date of the decision awarding benefits; and ''timely filed'' means within 60 days of the fee allocation notice.

(1) When one or more direct-pay fee agreements has been filed in accordance with paragraph (g) of this section and a decision awards past-due benefits in a case, the agency of original jurisdiction that issued the decision shall issue to the parties a fee allocation notice. The fee allocation notice shall decide whether the agents or attorneys who filed direct-pay fee agreements in the case are eligible for direct payment, and shall provide one of two default fee allocations:

(i) In cases where a continuous agent or attorney is eligible for direct payment, the default shall be allocation of the fee to the continuous agent or attorney.

(ii) In cases where paragraph (i)(1)(i) of this section does not apply, the default shall be an equal split of the fee based on the number of agents or attorneys who are eligible for direct payment plus the claimant or appellant.

(2) A party that disagrees with the default fee allocation in a given case may file a request for Office of the General Counsel fee review, as provided in paragraph (i)(3) of this section. A party that disagrees with a direct payment eligibility determination may only appeal to the Board of Veterans' Appeals. Absent a timely filed request for Office of the General Counsel fee review or a timely filed appeal to the Board of Veterans' Appeals, the default fee allocation described in paragraphs (i)(1)(i) and (ii) of this section is final and VA may release the fee.

(3) A request for Office of the General Counsel fee review under this paragraph (i) must be filed electronically in accordance with the instructions on the Office of the General Counsel's website, or at the following address: Office of the General Counsel (022D), 810 Vermont Avenue NW, Washington, DC 20420. The request must include the names of the veteran and all parties, the applicable VA file number, and the date of the decision awarding benefits. The request must set forth the requestor's proposal as to reasonable fee allocation, and the reasons therefor, and must be accompanied by all argument and evidence the requestor desires to submit.

(4) Upon the receipt of a timely filed request under paragraph (i)(3) of this section, or upon his or her own initiative, the Deputy Chief Counsel with subject-matter jurisdiction will initiate the Office of the General Counsel's motion for a fee review by sending notice to the parties. Not later than 30 days from the date of the motion, any party may file a response, with all argument and evidence the party desires to submit, electronically in accordance with the instructions on the Office of the General Counsel's website, or at the following address: Office of the General Counsel (022D), 810 Vermont Avenue NW, Washington, DC 20420. Such responses must be served on all other parties. The Deputy Chief Counsel with subject-matter jurisdiction may, for a reasonable period upon a showing of sufficient cause, extend the time for any party's response.

(5) The General Counsel or his or her designee shall render the Office of the General Counsel's decision on the matter. The decision will be premised on the reasonableness factors of paragraph (e) of this section, the standards of paragraph (f) of this section, the limitation on direct payment of paragraph (h)(1)(i) of this section, the claims file, the parties' submissions, and all relevant factors. The decision may address the issue of fee eligibility if no other agency of original jurisdiction has made a determination on that issue.

(6) The Office of the General Counsel's decision is a final adjudicative action that may only be appealed to the Board of Veterans' Appeals. Unless a party files a Notice of Disagreement with the Office of the General Counsel's decision, the parties must allocate any excess payment in accordance with the decision not later than the expiration of the time within which the Office of the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

(j) *Failure to comply.* In addition to whatever other penalties may be prescribed by law or regulation, failure to comply with the requirements of this section may result in proceedings under § 14.633 to terminate the agent's or attorney's accreditation to practice before VA.

(k) *Appeals.* Except as otherwise provided in this section, appeals shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

[FR Doc. 2023–28100 Filed 12–20–23; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0955; FRL–10549–01–R9]

Approval of Implementation Plans for Air Quality Planning Purposes; State of Nevada; Clark County Second 10-Year Maintenance Plan for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve, as a revision of the Nevada state implementation plan (SIP), the State's second 10-year plan for maintaining the 1997 8-hour ozone standard in Clark County (''Clark County Second Maintenance Plan'' or ''Plan''). The Clark County Second Maintenance Plan includes, among other elements, a base year emissions inventory, a maintenance demonstration, contingency provisions, and motor vehicle emissions budgets for use in transportation conformity determinations to ensure the continued maintenance of the 1997 National Ambient Air Quality Standards for ozone (''1997 ozone NAAQS'' or ''1997 8-hour ozone standard''). With this proposed rulemaking, the EPA is initiating the adequacy process for the 2017, 2023, and 2033 motor vehicle emissions budgets. The EPA is proposing these actions because the SIP revision meets the applicable statutory and regulatory requirements for such plans and motor vehicle emissions budgets.

DATES: Comments must be received on or before January 22, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0955, at *https://www.regulations.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Andrew Ledezma, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3985 or by email at *Ledezma.Andrew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

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I. Summary of Proposed Action

Under Clean Air Act (CAA or ''the Act'') section 110(k)(3), the EPA is proposing to approve two submittals from the Nevada Division of Environmental Protection (NDEP) as a revision to the Nevada SIP: the Clark County Second Maintenance Plan dated December 21, 2021, and a supplement to the Clark County Second Maintenance Plan (''Contingency Measure Revision'') dated August 16, 2023. In this action, we refer to the Clark County Second Maintenance Plan and the Contingency Measure Revision collectively as the ''Clark County Second Maintenance Plan submittal.''

The EPA is proposing to find that the maintenance demonstration, showing how the area will continue to attain the 1997 8-hour ozone NAAQS for 10 additional years beyond the approval the State's first 10-year plan for maintaining the 1997 8-hour ozone standard in Clark County (''Clark County First Maintenance Plan'' or ''first maintenance plan'') (*i.e.,* through 2033), and the contingency provisions, describing the actions that Clark County will take in the event of a future monitored violation, meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. The EPA is also proposing to approve the motor vehicle emissions budgets (MVEBs or ''budgets'') in the Clark County Second Maintenance Plan because we find they meet the applicable transportation conformity requirements under 40 CFR 93.118(e).

II. Background

Sections 108 and 109 of the CAA govern the establishment, review, and revision, as appropriate, of the NAAQS to protect public health and welfare. The CAA requires the EPA to periodically review the air quality criteria, the science upon which the standards are based, and the standards themselves. Ground-level ozone is one of the criteria pollutants regulated under the NAAQS.

Ground-level ozone is generally not emitted directly by sources. Rather, directly emitted oxides of nitrogen (NO_X) and volatile organic compounds (VOC) react in the presence of sunlight to form ground-level ozone, as a secondary pollutant, along with other secondary compounds. NO_X and VOC are ''ozone precursors.'' Reduction of peak ground-level ozone concentrations is typically achieved through controlling VOC and NO_X emissions.

Scientific evidence indicates that adverse public health effects occur following exposure to ozone, particularly in children and adults with lung disease. Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases.[1]

[1] ''Fact Sheet—2008 Final Revisions to the National Ambient Air Quality Standards for Ozone,'' dated March 2008.