

§ 3.381 Service connection of dental conditions for treatment purposes.

(a) The Veterans Benefits Administration (VBA) will adjudicate a claim for service connection of a dental condition for treatment purposes after the Veterans Health Administration determines a veteran meets the basic eligibility requirements of § 17.161 of this chapter and requests VBA make a determination on questions that include, but are not limited to, any of the following:

- (1) Former Prisoner of War status;
- (2) Whether the veteran has a compensable or noncompensable service-connected dental condition or disability;
- (3) Whether the dental condition or disability is a result of combat wounds;
- (4) Whether the dental condition or disability is a result of service trauma; or
- (5) Whether the veteran is totally disabled due to a service-connected disability.

(b) Treatable carious teeth, replaceable missing teeth, dental or alveolar abscesses, and periodontal disease are not compensable disabilities, but may nevertheless be service connected solely for the purpose of establishing eligibility for outpatient dental treatment as provided for in § 17.161 of this chapter. These conditions and other dental conditions or disabilities that are noncompensably rated under § 4.150 of this chapter may be service connected for purposes of Class II or Class II (a) dental treatment under § 17.161 of this chapter.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 39

RIN 2900-AN90

Tribal Veterans Cemetery Grants

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Veterans Affairs (VA) regulations governing Federal grants for the establishment, expansion, and improvement of veterans cemeteries. This final rule implements through regulation new statutory authority to provide grants for the establishment, expansion, and improvement of Tribal Organization veterans cemeteries, as authorized by Section 403 of the “Veterans Benefits, Health Care, and

Information Technology Act of 2006” (the Act). The Act requires VA to administer grants to Tribal Organizations in the same manner and under the same conditions as grants to States. This final rule makes non-substantive changes to the part heading of Part 39 and the name of the State Cemetery Grants Service to more accurately reflect that VA awards veteran cemetery grants to States and Tribal Organizations. The final rule establishes criteria to guide VA’s decisions on granting Tribal Organization requests to obtain grants for establishing, expanding, and improving veterans cemeteries that are or will be owned and operated by a Tribal Organization. The final rule also expands VA’s preapplication requirement to all veterans cemetery grants as a means to promote consistency and communication in the grant application process. Further, the final rule revises VA regulations to address structural differences between Tribal Organizations and States.

DATES: *Effective Date:* February 29, 2012. The incorporation by reference of certain publications listed in the rule was approved by the Director of the Federal Register as of July 16, 2010.

FOR FURTHER INFORMATION CONTACT:

Contact Frank Salvas, Director of Veterans Cemetery Grants Service, National Cemetery Administration (41E), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420. Telephone: (202) 249-7396 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On May 19, 2011, VA published a notice of proposed rulemaking in the **Federal Register** (76 FR 28925), that proposed to amend regulations in 38 CFR part 39 governing Federal grants for the establishment, expansion, and improvement of veterans cemeteries and to implement through regulation new statutory authority to award grants to Tribal Organizations in the same manner and under the same conditions as awarded to States, as authorized by the Act (Pub. L. 109-461), enacted December 22, 2006. VA provided a 60-day comment period for the proposed rule that ended on July 18, 2011.

We received one comment which supported providing cemetery grants to Tribal Organizations in the same manner VA currently provides grants to States. The comment indicated that the process for Tribal Organizations to qualify for a grant should be no different than the process that States are currently required to follow. No change is required in the final rule to address this comment. As specified in the Act,

grants to Tribal Organizations “shall be made in the same manner, and under the same conditions, as grants to States.” Public Law 109-461, § 403. Accordingly, Tribal Organization grants will be awarded in the same manner as VA currently provides grants to the States. The final rule adheres as closely as possible to the procedures and requirements for States to apply for cemetery grants. The final rule does not change the existing grant prioritization process and retains the same four priority groups as the current Part 39. Thus, in accordance with 38 U.S.C. 2408, Tribal Organizations will compete with States in the prioritization process. We note that since the publication of the proposed rule, the Veterans Cemetery Grants Service (VCGS) has awarded its first Veterans cemetery grant to a Tribal Organization for the establishment of a Tribal veterans cemetery.

Based on the rationale set forth in the proposed rule, and upon consideration of the public comment submission, we adopt the provisions of the proposed rule as a final rule, with minor non-substantive edits to the rule text to accurately reflect the wording and punctuation in the current 38 CFR part 39.

Executive Orders 12866 and 13563

Executive Orders 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). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the

rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Executive Order 13175

Executive Order 13175 provides that Federal agencies may not issue a regulation that has Tribal implications, that imposes substantial direct compliance costs on Tribal governments, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the Tribal Organizations or the Federal agency consults with Tribal officials early in the process of developing the proposed regulation and develops a Tribal summary impact statement. VA's cemetery grant program for Tribal Organizations is required by statute, which specifically provides that the grants shall be "made in the same manner, and under the same conditions, as grants to States are made". In addition, participation is voluntary and 100 percent of the development costs for an approved project are provided by VA. Thus, Executive Order 13175 requirements are not applicable. However, in the spirit of the Executive Order, VA has communicated with the Tribal Organizations regarding the proposed regulatory grant application process. On January 28, 2008, an informational letter was sent to each of the Federally-recognized Indian Tribes informing them that "American Indian Tribal grants will be considered in the same manner as State veterans cemetery grants under the authority of title 38 Code of Federal Regulations (CFR) Part 39." Further, on February 22, 2008, a conference call took place between senior VA officials and representatives designated by Tribal leadership of Federally-recognized Tribes to discuss the grant application process. Senior NCA officials and representatives continue to meet with and communicate with Tribal Organizations that are interested in the grant program.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule has no 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 Secretary

acknowledges that this final rule may affect some Tribal governments that may be considered small entities; however, the economic impact is not significant. This final rule imposes no mandatory requirements or costs on Tribal governments as a whole and only affects those that choose to apply for veterans cemetery grants. To the extent that small entities are affected, the impact of this amendment is both minimal and entirely beneficial. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from final regulatory flexibility analysis requirements of sections 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 year. This final rule would have no such effect on State and local governments, or on the private sector. While the final rule may result in some expenditure by Tribal governments, the aggregate amount of such expenditures is estimated to be significantly less than \$100 million.

Paperwork Reduction Act

This final rule requires Tribal Organizations to submit information to obtain grants under VA's Veterans Cemetery Grants Service. The collections of information referenced in this final rule have been approved by OMB and have been assigned OMB control numbers 0348–0002, 4040–0004, 4040–0008, 4040–0009, and 2900–0559 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Catalog of Federal Domestic Assistance Number and Title

The Catalog of Federal Domestic Assistance program number and title for this final rule is 64.203, State Cemetery Grants.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document 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. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on December 20, 2011, for publication.

List of Subjects in 38 CFR Part 39

Cemeteries, Incorporation by reference, Grants programs—Veterans, Veterans.

Dated: January 24, 2012.

Robert C. McFetridge,

Director of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 38 CFR part 39 as follows:

PART 39—AID FOR THE ESTABLISHMENT, EXPANSION, AND IMPROVEMENT, OR OPERATION AND MAINTENANCE, OF VETERANS CEMETERIES

- 1. The authority citation for part 39 is revised to read as follows:

Authority: 25 U.S.C. 450b(l); 38 U.S.C. 101, 501, 2408, 2411, 3765.

- 2. Revise part 39 heading as shown above.
- 3. Revise § 39.1 to read as follows:

§ 39.1 Purpose.

This part sets forth the mechanism for a State or Tribal Organization to obtain a grant to establish, expand, or improve a veterans cemetery that meets VA's national shrine standards of appearance that is or will be owned by the State, or operated by a Tribal Organization on trust land, or to obtain a grant to operate or maintain a State or Tribal veterans cemetery to meet VA's national shrine standards of appearance.

(Authority: 38 U.S.C. 501, 2408)

- 4. Revise § 39.2 to read as follows:

§ 39.2 Definitions.

For the purpose of this part:

Establishment means the process of site selection, land acquisition, design and planning, earth moving, landscaping, construction, and provision of initial operating equipment necessary to convert a tract of land to an operational veterans cemetery.

Establishment, Expansion, and Improvement Project means an undertaking to establish, expand, or improve a site for use as a State or Tribal veterans cemetery.

Expansion means an increase in the burial capacity or acreage of an existing cemetery through the addition of gravesites and other facilities, such as committal service shelters, crypts (preplaced grave liners), and columbaria, necessary for the functioning of a cemetery.

Improvement means the enhancement of a cemetery through landscaping, construction, or renovation of cemetery

infrastructure, such as building expansion and upgrades to roads and irrigation systems that is not directly related to the development of new gravesites; nonrecurring maintenance; and the addition of other features appropriate to cemeteries.

Indian Tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or Regional or Village Corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Operation and Maintenance Project means a project that assists a State or Tribal Organization to achieve VA's national shrine standards of appearance in the key cemetery operational areas of cleanliness, height and alignment of headstones and markers, leveling of gravesites, and turf conditions.

Secretary means the Secretary of the United States Department of Veterans Affairs.

State means each of the States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

Tribal Organization means:

(1) The recognized governing body of any Indian Tribe;

(2) Any legally established organization of Indians that is controlled, sanctioned, or chartered by such governing body or is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities;

(3) The Department of Hawaiian Homelands; and

(4) Such other organizations as the Secretary may prescribe.

Trust land means any land that:

(1) Is held in trust by the United States for Native Americans;

(2) Is subject to restrictions on alienation imposed by the United States on Indian lands, including native Hawaiian homelands;

(3) Is owned by a Regional Corporation or a Village Corporation as defined in 43 U.S.C. 1602(g) and (j); or

(4) Is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary.

VA means the United States Department of Veterans Affairs or the Veterans Cemetery Grants Service.

Veteran means a person who served in the active military, naval, or air service who died in line of duty while

in service or was discharged or released under conditions other than dishonorable.

Veterans Cemetery Grants Service (VCGS) means the Veterans Cemetery Grants Service within VA's National Cemetery Administration.

(Authority: 25 U.S.C. 450b(l), 38 U.S.C. 101, 501, 2408, 3765)

■ 5. Revise § 39.4 to read as follows:

§ 39.4 Decision makers, notifications, and additional information.

Decisions required under this part will be made by the VA Director, Veterans Cemetery Grants Service (VCGS), National Cemetery Administration, unless otherwise specified in this part. The VA decisionmaker will provide to affected States and Tribal Organizations written notice of approvals, denials, or requests for additional information under this part.

(Authority: 38 U.S.C. 501, 2408)

■ 6. Revise § 39.5 to read as follows:

§ 39.5 Submission of information and documents to VA.

All information and documents required to be submitted to VA must be submitted to the Director of the Veterans Cemetery Grants Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420. All forms cited in this part are available at http://www.cem.va.gov/cem/scg_grants.asp.

(Authority: 38 U.S.C. 501, 2408)

■ 7. Revise § 39.6 to read as follows:

§ 39.6 Amendments to grant application.

A State or Tribal Organization seeking to amend a grant application must submit revised Standard Forms 424 (Application for Federal Assistance) and 424C (Budget Information) with a narrative description of, and justification for, the amendment. Any amendment of an application that changes the scope of the application or increases the amount of the grant requested, whether or not the application has already been approved, shall be subject to approval by VA in the same manner as an original application.

(Authority: 38 U.S.C. 501, 2408)

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 4040-0004 and 4040-0008.)

■ 8. Revise § 39.7 to read as follows:

§ 39.7 Line item adjustment to grants.

After a grant has been awarded, upon request from the State or Tribal Organization representative, VA may

approve a change in one or more line items (line items are identified in Standard Form 424C) of up to 10 percent (increase or decrease) of the cost of each line item if the change would be within the scope or objective of the project and the aggregate adjustments would not increase the total amount of the grant.

(Authority: 38 U.S.C. 501, 2408)

■ 9. Revise § 39.8 to read as follows:

§ 39.8 Withdrawal of grant application.

A State or Tribal Organization representative may withdraw an application by submitting to VA a written document requesting withdrawal.

(Authority: 38 U.S.C. 501, 2408)

■ 10. Amend § 39.10 by:

■ a. Revising paragraph (a).

■ b. Revising paragraph (b) introductory text.

■ c. Revising paragraphs (c) and (d).

The revisions read as follows:

§ 39.10 Cemetery requirements and prohibitions and recapture provisions.

(a) In order to qualify for a grant, a State or Tribal veterans cemetery must be operated solely for the interment of veterans, their spouses, surviving spouses, minor children, unmarried adult children who were physically or mentally disabled and incapable of self-support, and eligible parents of certain deceased service members.

(b) Any grant under this part made on or after November 21, 1997, is made on the condition that, after the date of receipt of the grant, the State or Tribal Organization receiving the grant, subject to requirements for receipt of notice in 38 U.S.C. 2408 and 2411, will prohibit in the cemetery for which the grant is awarded the interment of the remains or the memorialization of any person:

* * * * *

(c) If a State or Tribal Organization which has received a grant under this part ceases to own the cemetery for which the grant was made, ceases to operate such cemetery as a veterans cemetery in accordance with paragraph (a) of this section, violates the prohibition in paragraph (b) of this section, or uses any part of the funds provided through such grant for a purpose other than that for which the grant was made, the United States shall be entitled to recover from the State or Tribal Organization the total of all grants made to the State or Tribal Organization under this part in connection with such cemetery.

(d) If, within 3 years after VA has certified to the Department of the Treasury an approved grant application,

not all funds from the grant have been used by the State or Tribal Organization for the purpose for which the grant was made, the United States shall be entitled to recover any unused grant funds from the State or Tribal Organization.

* * * * *

■ 11. Revise § 39.11 to read as follows:

§ 39.11 State or Tribal Organization to retain control of operations.

Neither the Secretary nor any employee of VA shall exercise any supervision or control over the administration, personnel, maintenance, or operation of any State or Tribal veterans cemetery that receives a grant under this program except as prescribed in this part.

(Authority: 38 U.S.C. 501, 2408)

§§ 39.12 through 39.29 [Reserved]

■ 12. Add and reserve §§ 39.12 through 39.29 in subpart A.

■ 13. In § 39.30, revise paragraphs (a) introductory text and (a)(4) to read as follows:

§ 39.30 General requirements for a grant.

(a) For a State or Tribal Organization to obtain a grant for the establishment, expansion, or improvement of a State or Tribal veterans cemetery:

* * * * *

(4) The State or Tribal Organization must meet the application requirements in § 39.34; and

* * * * *

■ 14. Amend § 39.31 by:

- a. Revising paragraph (a).
- b. Revising paragraphs (b) introductory text, (b)(5), (6), and (8).
- c. Revising paragraphs (c) introductory text and (c)(2) through (7).
- d. Revising paragraphs (d) and (e).
- e. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 39.31 Preapplication requirements.

(a) A State or Tribal Organization seeking a grant for the establishment, expansion, or improvement of a State or Tribal veterans cemetery must submit a preapplication to the Director, Veterans Cemetery Grants Service, through http://www.cem.va.gov/cem/scg_grants.asp.

(b) No detailed drawings, plans, or specifications are required with the preapplication. As a part of the preapplication, the State or Tribal Organization must submit each of the following:

* * * * *

(5) Any comments or recommendations made by the State's or

Tribal Organization's "Single Point of Contact" reviewing agency.

(6) VA Form 40-0895-2 (Certification of Compliance with Provisions of the Davis-Bacon Act) to certify that the State or Tribal Organization has obtained the latest prevailing wage rates for Federally funded projects. Any construction project fully or partially funded with Federal dollars must comply with those rates for specific work by trade employees (e.g., electricians, carpenters).

* * * * *

(8) VA Form 40-0895-6 (Certification of State or Tribal Government Matching Architectural and Engineering Funds to Qualify for Group 1 on the Priority List) to provide documentation that the State or Tribal Organization has authority to support the project and the resources necessary to initially fund the architectural and engineering portion of the project development. Once the grant is awarded, VA will reimburse the applicant for all allowable architectural and engineering costs.

* * * * *

(c) In addition, the State or Tribal Organization must submit written assurance of each of the following conditions:

* * * * *

(2) Title to the site is or will be vested solely in the State or held in trust for the Tribal Organization on trust land.

(3) The State or Tribal Organization possesses legal authority to apply for the grant and to finance and construct the proposed facilities; *i.e.*, legislation or similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the State or Tribal Organization to act in connection with the application and to provide such additional information as may be required.

Note to paragraph (c)(3): In any case where a Tribal Organization is applying for a grant for a cemetery on land held in trust for more than one Indian Tribe, written assurance that the Tribal Organization possesses legal authority to apply for the grant includes certification that the Tribal Organization has obtained the approval of each such Indian Tribe.

(4) The State or Tribal Organization will assist VA in assuring that the grant complies with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), Executive Order 11593 (identification and protection of historic properties),

and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 *et seq.*).

(5) The State or Tribal Organization will obtain approval by VA of the final construction drawings and specifications before the project is advertised or placed on the market for bidding; it will construct the project, or cause the project to be constructed, to completion in accordance with the application and approved plans and specifications; it will submit to the Director of the Veterans Cemetery Grants Service, for prior approval, changes that alter any cost of the project, use of space, or functional layout; and it will not enter into a construction contract for the project or undertake other activities until the requirements of the grant program have been met.

(6) The State or Tribal Organization will comply with the Federal requirements in 2 CFR parts 180 and 801 and 38 CFR part 43 and submit Standard Form 424D (Assurances—Construction Programs).

(7) The State or Tribal Organization will prepare an Environmental Assessment to determine whether an Environmental Impact Statement is necessary, and certify that funds are available to finance any costs related to preparation of the Environmental Assessment.

(d) The State or Tribal Organization must submit a copy of the State or Tribal Organization action authorizing the establishment, maintenance, and operation of the facility as a veterans cemetery in accordance with 38 CFR 39.10(a). If the State or Tribal Organization action is based on legislation, enacted into law, then the legislation must be submitted.

(e) Upon receipt of a complete preapplication for a grant, including all necessary assurances and all required supporting documentation, VA will determine whether the preapplication conforms to all requirements listed in paragraphs (a) through (d) of this section, including whether it contains sufficient information necessary to establish the project's priority. VA will notify the State or Tribal Organization of any nonconformity. If the preapplication does conform, VA shall notify the State or Tribal Organization that the preapplication has been found to meet the preapplication requirements, and the proposed project will be included in the next scheduled ranking of projects, as indicated in § 39.3(d).

(Authority: 25 U.S.C. 450b(l); 38 U.S.C. 501, 2408, 2411)

* * * * *

■ 15. Amend § 39.32 by:

- a. Revising the introductory text.
- b. Revising paragraph (a).
- c. Revising paragraphs (b) introductory text, (b)(1) introductory text, and (b)(2) introductory text.
- d. Revising paragraph (c).
- e. Revising paragraph (d) introductory text.
- f. Revising paragraphs (e) introductory text, (e)(1) through (3), (e)(4) introductory text, (e)(5), (e)(6) introductory text, (e)(7) introductory text, and (e)(9).

The revisions read as follows:

§ 39.32 Plan preparation.

The State or Tribal Organization must prepare Establishment, Expansion, and Improvement Project plans and specifications in accordance with the requirements of this section for review by the VCGS. The plans and specifications must be approved by the VCGS prior to the State's or Tribal Organization's solicitation for construction bids. Once the VCGS approves the plans and specifications, the State or Tribal Organization must obtain construction bids and determine the successful bidder prior to submission of the application. The State or Tribal Organization must establish procedures for determining that costs are reasonable and necessary and can be allocated in accordance with the provisions of Office of Management and Budget (OMB) Circular No. A-87. Once the Establishment, Expansion, and Improvement Project preapplication and the project's plans and specifications have been approved, an application for assistance must be submitted in compliance with the uniform requirements for grants-in-aid to State and local governments prescribed by OMB Circular No. A-102, Revised.

(a) *General.* These requirements have been established for the guidance of the State or Tribal Organization and the design team to provide a standard for preparation of drawings, specifications, and estimates.

(b) *Technical requirements.* The State or Tribal Organization should meet these technical requirements as soon as possible after VA approves the Establishment, Expansion, and Improvement Project preapplication.

(1) *Boundary and site survey.* The State or Tribal Organization shall provide a survey of the site and furnish a legal description of the site. A boundary and site survey need not be submitted if one was submitted for a previously approved project and there

have been no changes. Relevant information may then be shown on the site plan. If required, the site survey shall show each of the following items:

* * * * *

(2) *Soil investigation.* The State or Tribal Organization shall provide a soil investigation of the scope necessary to ascertain site characteristics for construction and burial or to determine foundation requirements and utility service connections. A new soil investigation is not required if one was done for a previously approved project on the same site and information from the previous investigation is adequate and unchanged. Soil investigation, when done, shall be documented in a signed report. The investigation shall be adequate to determine the subsoil conditions. The investigation shall include a sufficient number of test pits or test borings as will determine, in the judgment of the architect, the true conditions. The following information will be covered in the report:

* * * * *

(c) *Master plan.* A master plan showing the proposed layout of all facilities—including buildings, roadways, and burial sections—on the selected site shall be prepared for all new cemetery establishment projects for approval by the VCGS. If the project is to be phased into different year programs, the phasing shall be indicated. The master plan shall analyze all factors affecting the design, including climate, soil conditions, site boundaries, topography, views, hydrology, environmental constraints, transportation access, etc. It should provide a discussion of alternate designs that were considered. In the case of an expansion project or improvement project, the work contemplated should be consistent with the VA-approved master plan or a justification for the deviation should be provided.

(d) *Preliminary or "design development" drawings.* Following VA approval of the master plan, the State or Tribal Organization must submit design development drawings that show all current phase construction elements to be funded by the grant. The drawings must comply with the following requirements:

* * * * *

(e) *Final construction drawings and specifications.* Funds for the construction of any project being assisted under this program will not be released until VA approves the final construction drawings and specifications. If VA approves them, VA shall send the State or Tribal Organization a written letter of approval

indicating that the project's plans and specifications comply with the terms and conditions as prescribed by VA. This does not constitute approval of the contract documents. It is the responsibility of the State or Tribal Organization to ascertain that all State and Federal requirements have been met and that the drawings and specifications are acceptable for bid purposes.

(1) *General.* The State or Tribal Organization shall prepare final working drawings so that clear and distinct prints may be obtained. These drawings must be accurately dimensioned to include all necessary explanatory notes, schedules, and legends. Working drawings shall be complete and adequate for VA review and comment. The State or Tribal Organization shall prepare separate drawings for each of the following types of work:

Architectural, equipment, layout, structural, heating and ventilating, plumbing, and electrical.

(2) *Architectural drawings.* The State or Tribal Organization shall submit drawings which include: All structures and other work to be removed; all floor plans if any new work is involved; all elevations which are affected by the alterations; building sections; demolition drawings; all details to complete the proposed work and finish schedules; and fully dimensioned floor plans at 1/8" or 1/4" scale.

(3) *Equipment drawings.* The State or Tribal Organization shall submit a list of all equipment to be provided under terms of the grant in the case of an Establishment Project. Large-scale drawings of typical special rooms indicating all fixed equipment and major items of furniture and moveable equipment shall be included.

(4) *Layout drawings.* The State or Tribal Organization shall submit a layout plan that shows:

* * * * *

(5) *Structural drawings.* The State or Tribal Organization shall submit complete foundation and framing plans and details, with general notes to include: Governing code, material strengths, live loads, wind loads, foundation design values, and seismic zone.

(6) *Mechanical drawings.* The State or Tribal Organization shall submit:

* * * * *

(7) *Electrical drawings.* The State or Tribal Organization shall submit separate drawings for lighting and power, including drawings of:

* * * * *

(9) *Cost estimates.* The State or Tribal Organization shall show in convenient form and detail the estimated total cost

of the work to be performed under the contract, including provisions of fixed equipment shown by the plans and specifications, if applicable, to reflect the changes of the approved financial plan. Estimates shall be summarized and totaled under each trade or type of work. Estimates shall also be provided for each building structure and other important features such as the assembly area and shall include burial facilities.

* * * * *

■ 16. Revise § 39.33 to read as follows:

§ 39.33 Conferences.

(a) *Predesign conference.* A predesign conference is required for all Establishment, Expansion, and Improvement Projects requiring major construction, primarily to ensure that the State or Tribal Organization becomes oriented to VA procedures, requirements, and any technical comments pertaining to the project. This conference will take place at an appropriate location near the proposed site and should include a site visit to ensure that all parties to the process, including NCA staff, are familiar with the site and its characteristics.

(b) *Additional conferences.* At any time, VA may recommend an additional conference (such as a design development conference) be held in VA Central Office in Washington, DC, to provide an opportunity for the State or Tribal Organization and its architects to discuss with VA officials the requirements for a grant.

(Authority: 38 U.S.C. 501, 2408)

■ 17. In § 39.34, revise paragraphs (a) introductory text, (b) introductory text, and (c) to read as follows:

§ 39.34 Application requirements.

(a) For an Establishment, Expansion, and Improvement Project to be considered for grant funding under this subpart, the State or Tribal Organization must submit an application (as opposed to a preapplication) consisting of the following:

* * * * *

(b) Prior to submission of the application, the State or Tribal Organization must submit a copy of an Environmental Assessment to determine if an Environmental Impact Statement is necessary for compliance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4332). The Environmental Assessment must briefly describe the project's possible beneficial and harmful effects on the following impact categories:

* * * * *

(c) If an adverse environmental impact is anticipated, the State or Tribal Organization must explain what action will be taken to minimize the impact. The assessment shall comply with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*).

* * * * *

§§ 39.36 through 39.49 [Reserved]

■ 18. Add and reserve §§ 39.36 through 39.49 in subpart B.

■ 19. In § 39.50, revise paragraphs (b)(3) and (b)(4) introductory text to read as follows:

§ 39.50 Amount of grant.

* * * * *

(b) * * *

(3) In the case of an establishment grant, the cost of equipment necessary for the operation of the State or Tribal veterans cemetery. This may include the cost of non-fixed equipment such as grounds maintenance equipment, burial equipment, and office equipment.

(4) In the case of an improvement or expansion grant, the cost of equipment necessary for operation of the State or Tribal veterans cemetery, but only if such equipment:

* * * * *

■ 20. In § 39.51, revise the introductory text and paragraph (d) to read as follows:

§ 39.51 Payment of grant award.

The amount of an Establishment, Expansion, and Improvement Project grant award will be paid to the State or Tribal Organization or, if designated by the State or Tribal Organization representative, the State or Tribal veterans cemetery for which such project is being carried out, or to any other State or Tribal Organization agency or instrumentality. Such amount shall be paid by way of reimbursement and in installments that are consistent with the progress of the project, as the Director of the Veterans Cemetery Grants Service may determine and certify for payment to the appropriate Federal institution. Funds paid under this section for an approved Establishment, Expansion, and Improvement Project shall be used solely for carrying out such project as approved. As a condition for the final payment, the representative of the State or Tribal Organization must submit to VA the following:

* * * * *

(d) Evidence that the State or Tribal Organization has met its responsibility for an audit under the Single Audit Act

of 1984 (31 U.S.C. 7501 *et seq.*) and § 39.122, if applicable.

* * * * *

§§ 39.52 through 39.59 [Reserved]

■ 21. Add and reserve §§ 39.52 through 39.59 in subpart B.

■ 22. Revise § 39.60(a) to read as follows:

§ 39.60 General requirements for site selection and construction of veterans cemeteries.

(a) The various codes, requirements, and recommendations of State or Tribal Organization and local authorities or technical and professional organizations, to the extent and manner in which those codes, requirements, and recommendations are referenced in this subpart, are applicable to grants involving construction of veterans cemeteries. Additional information concerning these codes, requirements, and recommendations may be obtained from VA, National Cemetery Administration, 810 Vermont Avenue NW., Washington, DC 20420.

* * * * *

■ 23. Revise § 39.63 introductory text to read as follows:

§ 39.63 Architectural design standards.

The publications listed in this section are incorporated by reference. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 522(a) and 1 CFR part 51. Copies of these publications may be inspected at the office of the Veterans Cemetery Grants Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030 or go to http://www.archives.gov/federal-register/code-of-federal-regulations/ibr_locations.html. Copies of the 2003 edition of the National Fire Protection Association Life Safety Code and Errata (NFPA 101), the 2003 edition of the NFPA 5000, Building Construction and Safety Code, and the 2002 edition of the National Electrical Code, NFPA 70, may be obtained from the National Fire Protection Association, Inc. (NFPA), 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101, (800) 844-6058 (toll free). Copies of the 2003 edition of the Uniform Mechanical Code and the 2003 edition of the Uniform Plumbing Code may be obtained from the International Association of Plumbing and Mechanical Officials,

5001 E. Philadelphia Street, Ontario, CA 91761–2816. (909) 472–4100 (this is not a toll-free number). The 2002 and 2003 NFPA and IAPMO code publications can be inspected at VA by calling (202) 461–4902 for an appointment.

* * * * *

§§ 39.64 through 39.79 [Reserved]

■ 24. Add and reserve §§ 39.64 through 39.79 in subpart B.

■ 25. In § 39.80, revise paragraphs (a) introductory text and (a)(4) to read as follows:

§ 39.80 General requirements for a grant.

(a) For a State or Tribal Organization to obtain a grant for the operation or maintenance of a State or Tribal veterans cemetery:

* * * * *

(4) The State or Tribal Organization must meet the application requirements in § 39.84; and

* * * * *

■ 26. Amend § 39.81 by:

■ a. Revising paragraph (a).

■ b. Revising paragraphs (b)

introductory text, (b)(1) through (3), (b)(9), (b)(10) introductory text, and (b)(11).

■ c. Revising paragraph (c).

■ d. Revising paragraph (d) introductory text.

■ e. Revising paragraph (e).

■ f. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 39.81 Preapplication requirements.

(a) A State or Tribal Organization seeking a grant for the operation or maintenance of a State or Tribal veterans cemetery must submit a preapplication to the Director, Veterans Cemetery Grants Service, through http://www.cem.va.gov/cem/scg_grants.asp.

(b) No detailed drawings, plans, or specifications are required with the preapplication. As a part of the preapplication, the State or Tribal Organization must submit each of the following:

(1) Standard Form 424 (Application for Federal Assistance) and Standard Form 424C (Budget Information) signed by the authorized representative of the State or Tribal Organization. These forms document the amount of the grant requested, which may not exceed 100 percent of the estimated cost of the project to be funded with the grant.

(2) VA Form 40–0895–2 (Certification of Compliance with Provisions of the Davis-Bacon Act) to certify that the State or Tribal Organization has obtained the latest prevailing wage rates for Federally

funded projects. Any construction project fully or partially funded with Federal dollars must comply with those rates for specific work by trade employees (e.g., electricians, carpenters).

(3) VA Form 40–0895–6 (Certification of State or Tribal Government Matching Architectural and Engineering Funds to Qualify for Group 1 on the Priority List) to provide documentation that the State or Tribal Organization has legal authority to support the project and the resources necessary to initially fund the architectural and engineering portion of the project development. Once the grant is awarded, VA will reimburse the applicant for all allowable architectural and engineering costs.

* * * * *

(9) A gravesite assessment survey documenting the State or Tribal cemetery's performance related to the standards outlined in paragraph (b)(10) of this section for the year in which the preapplication is submitted.

(10) A program narrative describing how the project will assist the State or Tribal Organization in meeting VA's national shrine standards with respect to cleanliness, height and alignment of headstones and markers, leveling of gravesites, or turf conditions. Specifically, the preapplication should explain the need for the grant, how the work is to be accomplished, and the expected improvement in the State or Tribal cemetery's performance related to one or more of the following national shrine standards:

* * * * *

(11) A description of the geographic location of the existing State or Tribal veteran cemetery and any other supporting documentation, as requested by the VCGS Director.

* * * * *

(c) In addition, the State or Tribal Organization must submit written assurance of each of the following conditions:

(1) Any cemetery in receipt of a grant under this subpart will be used exclusively for the interment or memorialization of eligible persons, as set forth in § 39.10(a), whose interment or memorialization is not contrary to the conditions of the grant (see § 39.10(b) and 38 U.S.C. 2408(d) and 2411).

(2) Title to the site is or will be vested solely in the State or held in trust for the Tribal Organization on trust land.

(3) The State or Tribal Organization possesses legal authority to apply for the grant.

Note to paragraph (c)(3): In any case where a Tribal Organization is applying for a grant for a cemetery on land held in trust for more

than one Indian Tribe, written assurance that the Tribal Organization possesses legal authority to apply for the grant includes certification that the Tribal Organization has obtained the approval of each such Indian Tribe.

(4) The State or Tribal Organization will obtain approval by VA of the final specifications before the project is advertised or placed on the market for bidding; the project will achieve VA's national shrine standards with respect to cleanliness, height and alignment of headstones and markers, leveling of gravesites, or turf conditions in accordance with the application and approved plans and specifications; the State or Tribal Organization will submit to the Director of the Veterans Cemetery Grants Service, for prior approval, changes that alter any cost of the project; and the State or Tribal Organization will not enter into a contract for the project or undertake other activities until all the requirements of the grant program have been met.

(d) Depending on the scope of the project, the VCGS will work with the State or Tribal Organization to determine which, if any, of the following are required:

* * * * *

(e) Upon receipt of a complete preapplication for a grant, including all necessary assurances and all required supporting documentation, VA will determine whether the preapplication conforms to all requirements listed in paragraphs (a) through (d) of this section, including whether it contains sufficient information necessary to establish the project's priority. VA will notify the State or Tribal Organization of any nonconformity. If the preapplication does conform, VA shall notify the State or Tribal Organization that the preapplication has been found to meet the preapplication requirements, and the proposed project will be included in the next scheduled ranking of projects, as indicated in § 39.3(d).

(Authority: 25 U.S.C. 450b(l); 38 U.S.C. 501, 2408, 2411)

* * * * *

■ 27. Amend § 39.82 by

■ a. Revising paragraphs (a)

introductory text and (a)(3).

■ b. Revising paragraphs (b)

introductory text and (b)(1).

■ c. Revising paragraph (c).

The revisions read as follows:

§ 39.82 Plan preparation.

(a) The State or Tribal Organization must successfully complete its plan preparation under this section before

submitting a grant application for an Operation and Maintenance Project. The State or Tribal Organization may be required to undertake some or all of the following requirements of this section. After submitting all necessary plans and specifications to the VCGS and obtaining approval for the State or Tribal Organization to solicit for the Operation and Maintenance Project contract bids, the State or Tribal Organization shall:

* * * * *

(3) Comply with the uniform requirements for grants-in-aid to State, Tribal and local governments prescribed by OMB Circular No. A-102, Revised.

(b) Depending on the scope of the project, the VCGS will work with the State or Tribal Organization to determine which of the following will be required prior to submission of an application. As determined by VA, these may include:

(1) A boundary and site survey comprising a survey and legal description of the existing State or Tribal cemetery site;

* * * * *

(c) If VA determines that the project's plans and specifications comply with the terms and conditions prescribed by VA, VA will send the State or Tribal Organization a written letter of approval indicating that the project's plans and specifications comply with the terms and conditions as prescribed by VA. This does not constitute approval of the contract documents. It is the responsibility of the State or Tribal Organization to ascertain that all State and Federal requirements have been met and that the drawings and specifications are acceptable for bid purposes.

* * * * *

■ 28. Revise § 39.83 to read as follows:

§ 39.83 Conferences.

(a) *Planning conference.* The VCGS may require planning conferences for Operation and Maintenance Projects, primarily to ensure that the State or Tribal Organization becomes oriented to VA's national shrine standards, procedures, requirements, and any technical comments pertaining to the project. These conferences will normally occur over the telephone.

(b) *Additional conferences.* At any time, VA may recommend an additional telephone conference to provide an opportunity for the State or Tribal Organization to discuss with VA officials the requirements for an Operation and Maintenance Project grant.

(Authority: 38 U.S.C. 501, 2408)

■ 29. Revise § 39.84 introductory text to read as follows:

§ 39.84 Application requirements.

For an Operation and Maintenance Project to be considered for grant funding under this subpart, the State or Tribal Organization must submit an application (as opposed to a preapplication) consisting of the following:

* * * * *

§§ 39.86 through 39.99 [Reserved]

■ 30. Add and reserve §§ 39.86 through 39.99 in subpart C.

■ 31. Revise § 39.101 introductory text and paragraph (d) to read as follows:

§ 39.101 Payment of grant award.

The amount of an Operation and Maintenance Project grant award will be paid to the State or Tribal Organization or, if designated by the State or Tribal Organization representative, the State or Tribal veterans cemetery for which such project is being carried out, or to any other State or Tribal Organization agency or instrumentality. Such amount shall be paid by way of reimbursement and in installments that are consistent with the progress of the project, as the Director of the Veterans Cemetery Grants Service may determine and certify for payment to the appropriate Federal institution. Funds paid under this section for an approved Operation and Maintenance Project shall be used solely for carrying out such project as approved. As a condition for the final payment, the State or Tribal representative must submit to VA each of the following:

* * * * *

(d) Evidence that the State or Tribal Organization has met its responsibility for an audit under the Single Audit Act of 1984 (31 U.S.C. 7501 *et seq.*) and § 39.122.

* * * * *

§§ 39.102 through 39.119 [Reserved]

■ 32. Add and reserve §§ 39.102 through 39.119 in subpart C.

■ 33. Revise § 39.120 to read as follows:

§ 39.120 Documentation of grant accomplishments.

Within 60 days of completion of an Operation and Maintenance Project, the State or Tribal Organization must submit to VCGS a written report regarding the work performed to meet VA's national shrine standards. This report must be based on the original justification for the grant as noted in § 39.81(b)(10) and must include statistical data and detailed pictures of the work accomplished.

(Authority: 38 U.S.C. 501, 2408)

■ 34. Amend § 39.121 by:

■ a. Revising the section heading.

■ b. Revising paragraph (a).

■ c. Revising paragraph (b) introductory text.

■ d. Revising paragraphs (c) and (d).

The revisions read as follows:

§ 39.121 State or Tribal Organization responsibilities following project completion.

(a) A State or Tribal Organization that has received an Establishment, Expansion, and Improvement Project grant or an Operation and Maintenance Project grant shall monitor use of the cemetery by various subgroups and minority groups, including women veterans. If VA determines that underutilization by any of these groups exists, the State or Tribal Organization shall establish a program to inform members of these groups about benefits available to them. If a significant number or portion of the population eligible to be served or likely to be directly affected by the grant program needs benefits information in a language other than English, the State or Tribal Organization shall make such information available in the necessary language.

(b) A State or Tribal veterans cemetery that has received an Establishment, Expansion, and Improvement Project grant or an Operation and Maintenance Project grant shall be operated and maintained as follows:

* * * * *

(c) VA, in coordination with the State or Tribal Organization, shall inspect the project for compliance with the standards set forth in subpart B of this part for Establishment, Expansion, and Improvement Projects and with the standards set forth in subpart C of this part for Operation and Maintenance Projects at the project's completion and at least once in every 3-year period following completion of the project throughout the period the facility is operated as a State or Tribal veterans cemetery. The State or Tribal Organization shall forward to the Director, Veterans Cemetery Grants Service, a copy of the inspection report, giving the date and location the inspection was made and citing any deficiencies and corrective action to be taken or proposed.

(d) Failure of a State or Tribal Organization to comply with any of paragraphs (a) through (c) of this section shall be considered cause for VA to suspend any payments due the State or Tribal Organization on any project until the compliance failure is corrected.

* * * * *

■ 35. Revise § 39.122 to read as follows:

§ 39.122 Inspections, audits, and reports.

(a) A State or Tribal Organization will allow VA inspectors and auditors to conduct inspections as necessary to ensure compliance with the provisions of this part. The State or Tribal Organization will provide to VA evidence that it has met its responsibility under the Single Audit Act of 1984 (see Part 41 of this chapter).

(b) A State or Tribal Organization will make an annual report on VA Form 40–0241 (State Cemetery Data) signed by the authorized representative of the State or Tribal Organization. These forms document current burial activity at the cemetery, use of gravesites, remaining gravesites, and additional operational information intended to answer questions about the status of the grant program.

(c) A State or Tribal Organization will complete and submit to VA a VA Form 40–0895–13 (Certification Regarding Documents and Information Required for State or Tribal Government Cemetery Construction Grants-Post Grant Requirements) to ensure that the grantee is aware of and complies with all grant responsibilities and to properly and timely close out the grant.

(Authority: 38 U.S.C. 501, 2408)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900–0559)

[FR Doc. 2012–1874 Filed 1–27–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****49 CFR Parts 382 and 391**

[Docket No. FMCSA–2011–0073]

RIN 2126–AB35

Harmonizing Schedule I Drug Requirements

AGENCY: Federal Motor Carrier Safety Administration, DOT.

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) amends the physical qualifications for drivers and the instructions for the medical examination report to clarify that drivers may not use Schedule I drugs and be qualified to drive commercial motor vehicles (CMVs) under any circumstances. The rule harmonizes FMCSA's provisions regarding pre-employment and return-to-duty test refusals with corresponding Department

of Transportation (DOT)-wide provisions. Finally, the rule corrects inaccurate uses of the term “actual knowledge.”

DATES: This final rule is effective February 29, 2012.

ADDRESSES: All background documents, comments, and materials related to this rule may be viewed in docket number FMCSA–2011–0073 using either of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.

- Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Angela Ward, Nurse Consultant, Medical Programs Office, Federal Motor Carrier Safety Administration, telephone: (202) 366–3109; email: angela.ward@dot.gov. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:**Table of Contents for Preamble**

- I. Public Participation
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I. Public Participation*A. Viewing Comments and Documents*

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov> and click on the “Read Comments” box in the upper right hand side of the screen. Then, in the “Keyword” box, insert “FMCSA–2011–0073” and click “Search.” Next, click “Open Docket Folder” in the “Actions” column. Finally, in the “Title” column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

B. Privacy Act

All comments received are posted without change to <http://www.regulations.gov>. Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

II. Abbreviations

CAA Clean Air Act
 CFR Code of Federal Regulations
 CMV Commercial Motor Vehicle
 DEA Drug Enforcement Administration
 FMCSA Federal Motor Carrier Safety Administration
 FR Federal Register
 NEPA National Environmental Policy Act
 OTETA Omnibus Transportation Employee Testing Act of 1991
 U.S.C. United States Code

III. Background*A. History*

The Federal laws governing drugs of abuse are set forth in the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act and the Controlled Substances Import and Export Act (21 U.S.C. 801–971), as amended. Controlled substances are drugs and other substances that have a potential for abuse and psychological and physical dependence. The Drug Enforcement Administration (DEA) is the primary agency responsible for enforcing the Federal controlled substance laws. The DEA regulations, which implement these laws, are found in 21 CFR parts 1300 to 1321. As part of these regulations, DEA publishes an updated list of controlled substances in 21 CFR 1308.11 through 1308.15. The controlled substances are divided into five schedules. The controlled substances listed in the schedule that are relevant to this rulemaking, Schedule I controlled substances, have a high potential for abuse and have no currently accepted medical use in the United States (DEA Interim Final Rule on Electronic Prescriptions for Controlled Substances, 75 FR 16236, March 31, 2010).

The Omnibus Transportation Employee Testing Act of 1991 (OTETA) mandated that DOT establish a