

**BPH RN 21-03: NOTICE OF PROPOSED ACTION**

**BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS  
TITLE 15. CRIME PREVENTION AND CORRECTIONS  
DIVISION 2. BOARD OF PAROLE HEARINGS  
CHAPTER 3. PAROLE RELEASE  
ARTICLE 2. INFORMATION CONSIDERED**

**Amendment of Section 2240  
Comprehensive Risk Assessments**

**NOTICE IS HEREBY GIVEN** that the Executive Officer of the Board of Parole Hearings (board), under the authority granted by Government Code section 12838.4 and Penal Code sections 3052 and 5076.2, authorizes the board to adopt the proposed amendments to section 2240 of division 2 of title 15 of the California Code of Regulations (CCR) concerning Comprehensive Risk Assessments (CRAs).

**AUTHORITY AND REFERENCE**

Government Code section 12838.4 vests the board with all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction of the Board of Prison Terms and Narcotic Addict Evaluation Authority, which no longer exist.

Penal Code section 3052 vests with the board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code section 5076.2 requires the board promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code section 3041 requires the board to meet with each inmate before the inmate's Minimum Eligible Parole Date (MEPD) for the purpose of reviewing and documenting the inmate's activities.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial and guidelines concerning the inmate's right to petition the board concerning the results.

The Federal Eastern District Court of California case *Johnson v. Shaffer* approved a stipulated agreement between the parties requiring the discontinuation of subsequent risk assessments, replacement with CRAs, and a pre-hearing process through which inmates can object to factual errors. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving

stipulated agreement].) In the settlement agreement, there is an acknowledgement that the CRA process could change, including that CRAs may not be provided.

Penal Code section 3051 established a process for hearings for youth offenders. Subparagraph (i)(3)(B) requires the board to conduct an initial youth offender parole hearing by December 31, 2021, for any determinately-sentenced youth offender who qualified as a youth offender under Assembly Bill 1308 (Chapter 675 of the Statutes of 2017) and for whom Case Records Services of the department calculated a YPED as a date occurring prior to the effective date of the bill under which the inmate became qualified

Penal Code section 3051.1, subdivision (b) requires the board must conduct an initial youth offender parole hearing by December 31, 2021, for any determinately-sentenced youth offender who qualified as a youth offender under Senate Bill 261 (Chapter 471 of the Statutes of 2015) and for whom Case Records Services of the California Department of Corrections and Rehabilitation (department) calculated a YPED as a date occurring prior to the effective date of the bill under which the inmate became qualified.

Penal Code section 3053.9 requires the board consider the results of a CRA for sex offenders in considering parole for an inmate with a prior conviction for a sexually violent offense, as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.

The Three-Judge Court in the Eastern and Northern District Courts of California in the cases *Coleman v. Brown* and *Plata v. Brown* issued a February 10, 2014 order requiring the department, in consultation with the Receiver's office, finalize and implement an expanded parole process for medically incapacitated inmates (*Coleman v. Brown* (E.D. Cal. February 10, 2014) No. 2:90-cv-0520, Doc. 2766; *Plata v. Brown* (N.D. Cal. February 10, 2014) No. C01-1351, Doc. 2766.) While Penal Code section 3550 details requirements and conditions under which an inmate can be placed on medical parole supervision, the board is operating under the more expansive provisions in the Expanded Medical Parole Guide, based on the mandates in the court order.

## **SPECIFIC AGENCY STATUTORY REQUIREMENTS**

There are no other statutory requirements specific to the board or to any specific regulation or class of regulations promulgated by the board.

## **PUBLIC COMMENT PERIOD**

Any interested person, or their authorized representative, may submit written comments relevant to the proposed regulations to the board. **THE WRITTEN COMMENT PERIOD ON THIS PROPOSED REGULATORY ACTION WILL COMMENCE ON FRIDAY, JULY 16, 2021, AND WILL CLOSE ON TUESDAY, AUGUST 31, 2021.** For comments to be considered by the board, they must be submitted in writing to the board's Contact Person identified in this Notice no later than the close of the comment period.

## **CONTACT PERSON**

Please direct requests for copies of the Initial Statement of Reasons (ISOR), the Proposed Text of the Regulation, or other information upon which the rulemaking is based to:

### **Christopher J. Hoeft, Staff Attorney**

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If Christopher Hoeft is unavailable, please contact Assistant Chief Counsel, Heather L. McCray at Heather.McCray@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number **BPH RN 21-03**.

## **NO PUBLIC HEARING SCHEDULED**

The board has not scheduled a public hearing on this proposed regulatory action. The board, however, will hold a hearing if it receives a written request for a public hearing from any interested person, or their authorized representative, no later than 15 days before the close of the written comment period. Written or facsimile comments submitted during the prescribed comment period have the same significance and influence as oral comments presented at a public hearing.

If scheduled, the purpose of a public hearing would be to receive oral comments about the proposed regulations. It would not be a forum to debate the proposed regulations, and no decision regarding the permanent adoption of the proposed regulations would be rendered at a public hearing. The members of the board would not be present at a public hearing.

## **PROCEDURAL BACKGROUND**

On February 5, 2021, emergency regulations amending section 2240 of title 15 of the CCR went into effect. The emergency regulations authorized the board to conduct parole consideration and subsequent parole reconsideration hearings scheduled to occur on or between April 1, 2021, and June 30, 2022, for specified inmates without preparing a CRA. Further, the emergency regulations established processes through which specified inmates could challenge the board's determination not to prepare a CRA for their hearing or request the board prepare a CRA for their hearing. As a result of Executive Orders N-40-20 and N-71-20 issued by the Governor of California, the emergency regulations are currently scheduled to expire on December 4, 2021.

This rulemaking seeks to adopt the regulatory language of the emergency regulations in accordance with Government Code sections 11346.2 to 11347.3, inclusive.

In addition, this rulemaking seeks to further amend section 2240 of title 15 of the CCR to clarify the board is not required to prepare a CRA before conducting a parole consideration or subsequent parole reconsideration hearing for specified inmates placed on medical parole supervision on the date the hearing is scheduled to occur.

## **INFORMATIVE DIGEST**

### *Summary of Existing Laws and Regulations and Effect of Proposed Action*

The board is vested with the power to establish and enforce rules and regulations under which inmates committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole. (Pen. Code, § 3052.) An inmate subject to the board's parole-hearing jurisdiction has a protected liberty interest in parole consideration.

Inmates have a right to a parole consideration hearing before the board based on their parole eligibility date, including their MEPD, Youth Parole Eligible Date (YPED), Elderly Parole Eligible Date (EPED), or Nonviolent Parole Eligible Date (NPED), whichever is applicable. (Pen. Code, §§ 3041, subd. (a)(2); 3051, 3055; *In re Edwards* (2018) 26 Cal.App.5th 1181.) Further, inmates identified in Penal Code sections 3000, subdivision (b)(4), and 3000.1, who were remanded to the custody of the department because of a violation of law or condition of parole while on parole, are entitled to annual subsequent parole reconsideration hearings if the board, within one year of the violation, determines the circumstances and gravity of the violation are such that consideration of the public safety requires a more lengthy period of incarceration, unless there is a new prison commitment following a conviction. Additionally, while placed on medical parole supervision under the expanded medical parole program, as described in the board's ISOR, an inmate is still eligible to receive parole consideration hearings under their MEPD, YPED, EPED, or NPED, or subsequent parole reconsideration hearings under Penal Code sections 3000, subdivision (b)(4), or 3000.1, as applicable. Changes to the California Constitution and Penal Code in the last few years have changed requirements and timelines for people who come before the board, resulting in a significant increase in the number of hearings the board is required to hold each year. (Cal. Const., art. I, § 32.; Pen. Code §§ 3051, 3055.)

The board has broad discretion in making parole decisions and, because there is no ideal, error-free way to make decisions, "experimentation involving analysis of psychological factors combined with fact evaluation guided by practical experience" is encouraged in our system of government. (*Greenholtz v. Inmates of Nebraska Penal & Corr. Complex* (1979) 442 U.S. 1, 13.) At a parole hearing, the board is assessing whether the inmate's release presents a current unreasonable risk of danger to public safety. (See *In re Lawrence* (2008) 44 Cal.4th 1181.)

In reaching a parole decision, a hearing panel must consider all relevant and reliable information available. (See Cal. Code Regs., tit. 15, § 2281, subd. (b).) One tool the board uses to generate relevant and reliable information for hearing panels is a CRA. (See Cal. Code Regs., tit. 15, § 2240.) CCR, title 15, section 2240, paragraph (d)(1), requires the board to prepare a CRA for all initial and subsequent parole consideration hearings and subsequent parole reconsideration hearings for inmates housed within California if, on the date of the hearing, more than three years will have passed since the most recent CRA. However, the CRA is intended as a tool to assist the hearing panel to assess the inmate's current risk of danger to the public if released. An inmate

subject to the board's parole-hearing jurisdiction does not have a protected statutory or due process right in the board preparing a CRA prior to a hearing; instead the CRA is intended to benefit the hearing panel by providing information. (*See In re Lazor* (2009) 172 Cal.App.4th 1185, 1202 [CRA is information that bears on suitability for release, but it does not dictate the board's parole decision].) Further, the board may focus its limited resources on inmates most suitable for parole. (*Garner v. Jones* (2000) 529 U.S. 244, 254.)

The board proposes to amend CCR, title 15, section 2240, subdivision (d), by adding language enacted through emergency regulations, as stated above, permitting the board to conduct an initial or subsequent parole consideration hearing or subsequent parole reconsideration hearing for an inmate without preparing a CRA, even if more than three years will have passed since the most recent CRA, unless required under Penal Code section 3053.9. Specifically, the proposed regulations would not require the board to prepare a CRA for a hearing if both of the following circumstances apply: (1) the inmate is designated by the department as Security Level IV as of January 1, 2021, and the inmate has received two or more Serious Rules Violation Reports (RVRs) for which the department found the inmate guilty on or between January 1, 2018, and January 1, 2021, and (2) the board scheduled the inmate's hearing to occur on or between April 1, 2021, and June 30, 2022, or previously scheduled the hearing to occur on or between April 1, 2021, and June 30, 2022, but the hearing was postponed and rescheduled to occur on a date after June 30, 2022. These hearings would still go forward, satisfying the inmate's right to parole consideration. Further, the board proposes to amend CCR, title 15, section 2240, subdivision (d), by adding language to clarify the board will not prepare a CRA for an inmate on medical parole supervision at the time of their hearing, unless required under Penal Code section 3053.9.

Under the proposed amendments, if the board determines an inmate meets the specified criteria to not prepare a CRA for the inmate's hearing, the proposed amendments to subdivision (d) require the board mail notice to the inmate at least 60 days before the inmate's hearing. If the inmate receives such notification and believes they do not meet the criteria for a hearing without a CRA, the inmate or inmate's attorney of record may submit a challenge to the board, as specified. The proposed regulations establish a procedure by which the board's Chief Counsel can evaluate and respond to a challenge received by the board, including when the Chief Counsel may postpone an inmate's hearing to allow the board time to prepare a CRA before the hearing. Additionally, if, since the inmate's most recent RVR, the inmate experienced a change to the inmate's physical or mental health that would be relevant to determining the inmate's suitability for parole, the inmate or inmate's attorney of record may request the board prepare a CRA on that basis, despite meeting criteria for CRA exclusion. The proposed regulations also establish a procedure by which the Chief Counsel can evaluate and respond to a request received by the board, including when the Chief Counsel may postpone an inmate's hearing to allow the board time to prepare a CRA before the hearing.

Finally, under the proposed amendments, if the board did not prepare a CRA for the inmate's hearing, but the hearing panel finds a CRA is necessary to reach a determination on the inmate's suitability for parole, the hearing panel shall continue the hearing and require the board prepare a CRA.

### *Policy Statement Overview*

Because of increased hearing postponements due to COVID-19, as well as statutory and regulatory requirements that the board provide initial parole consideration hearings to certain inmate populations by December 31, 2021, as described in the ISOR, the board was projecting a backlog of about 864 to 1,411 CRAs by the end of 2021. That would have resulted in the postponement of those parole hearings because the board would be unable to comply with the CRA requirements as they existed prior to the enactment of emergency regulations. The proposed amendments to CCR, title 15, section 2240, will enable the board to avoid postponing hearings for inmates and allow the board to move forward with hearings scheduled to occur between April 1, 2021, and June 30, 2022, for specified inmates without preparing a CRA for the hearings.

As noted above, the proposed regulations exempt the board from the requirement to conduct a CRA for inmates designated by the department as Security Level IV as of January 1, 2021, and who were found guilty by the department of two or more Serious RVRs on or between January 1, 2018, and January 1, 2021. By identifying a static date on which the department must have designated the inmate as Security Level IV, as well as a static time over which the department must have found the inmate guilty of two or more Serious RVRs, the board has determined through analysis that the proposed regulations will be sufficient to address the board's CRA backlog. The projected number of hearings the board's proposed regulations will impact is 1,177, meaning the proposed regulations will enable the board to address its projected CRA backlog of about 1,000 CRAs by the end of the 2021-2022 fiscal year.

Further, when analyzing parole hearings conducted in 2019, 99% of hearings that were not postponed and that were held for inmates who were designated Security Level IV and had two or more RVRs in the three years preceding their hearing resulted in a denial of parole, waiver of the hearing, or stipulation by the inmate to unsuitability for parole. Thus, by identifying hearings for inmates who meet similar criteria as those hearings for which the board will not prepare a CRA, the board will be able to address its projected CRA backlog in a manner that allows it to focus available CRA resources on inmates more likely to be found suitable for parole at their hearing.

The proposed regulations include a process by which an inmate or inmate's attorney of record may challenge the board's determination that an inmate meets the specified criteria for the board to not conduct a CRA for the upcoming parole hearing. This process provides a means by which an inmate may seek an administrative remedy if the inmate believes the board incorrectly identified the inmate as meeting the specified criteria.

Further, the proposed regulations allow an inmate or inmate's attorney of record to request the board prepare a CRA even though the inmate meets the specified criteria if there was a change to the inmate's physical or mental health, as specified. This process enables the inmate to request a CRA under circumstances in which a CRA is likely to provide relevant information for a hearing panel when determining the inmate's suitability for parole; namely, an assessment by a licensed psychologist as to how the change to the inmate's physical or mental health impacts the inmate's risk of violence.

Finally, at a hearing for which the board did not prepare a CRA, the proposed regulations allow the hearing panel to continue the hearing and require the board to prepare a CRA before the rescheduled hearing if the hearing panel finds a CRA is necessary to reach a determination on the inmate's suitability for parole. This will ensure a hearing panel will not be forced to determine an

inmate's suitability for parole without any information deemed necessary that the board has authority to provide.

The board determined the current language in CCR, title 15, section 2240, subdivision (d), is vague as to whether the board is required to prepare a CRA for a parole consideration or subsequent parole reconsideration hearing for an inmate placed on medical parole supervision at the time of the hearing. Thus, the board determined it was necessary to clarify within the regulatory language that the board will not prepare a CRA for hearings for this population of inmates, unless required under Penal Code section 3053.9.

#### *Determination of Inconsistency/Incompatibility with Existing State Regulations*

CCR, title 15, section 2240 currently requires the board to prepare a CRA for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent CRA became final. The proposed regulations amend section 2240 by specifying the board is not required to prepare a CRA for specified hearings if the inmates for whom the board will conduct the hearings meet specified criteria. The proposed regulations create an exception to the general rule that the board shall prepare a CRA for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings, as specified above. Thus, by specifying the hearings for which the board will not prepare a CRA, the board has determined the proposed amendments are consistent with existing regulations. The board has also determined the proposed regulations are compatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the board has concluded CCR, title 15, section 2240, is the only regulation that concerns when the board must prepare a CRA for a parole consideration hearing or subsequent parole reconsideration hearing for an inmate subject to the parole authority of the board.

### **DISCLOSURES REGARDING THE PROPOSED ACTION**

**Local Mandates:** The board has determined that the proposed action imposes no mandate upon local agencies or school districts.

**Fiscal Impact Statement:** The board has made the following initial determinations:

- Cost or savings to any state agency: **None.** If enacted, the board does not anticipate any specific cost or savings associated with the proposed regulations. Any speculative savings would be associated with avoiding future litigation.
- Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: **None.**
- Other non-discretionary cost or savings imposed on local agencies: **None.**
- Cost or savings in federal funding to the state: **None.**

**Significant Statewide Adverse Economic Impact on Business:** The board has determined there is no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

**Cost Impacts on Representative Private Persons or Businesses:** The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**Assessment of Effects on Job and/or Business Creation, Elimination, or Expansion:** The board has determined adoption of this regulation will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing business within California; or (3) affect the expansion of businesses currently doing business within California.

**Effect on Housing Costs:** The board has determined the proposed action will have no significant effect on housing costs.

**Small Business Determination:** The board has determined that the proposed regulations do not have a significant adverse economic impact on small business because small businesses are not affected by the board's internal processes governing the board's role and requirements in preparing a CRA prior to a parole consideration hearing or subsequent parole reconsideration hearing for an inmate subject to the parole authority of the board.

## **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT**

**Creation or Elimination of Jobs within California:** The board concludes it is unlikely the proposed regulations will create or eliminate any jobs in California

**Creation of New Businesses or Elimination of Existing Businesses within California:** The board concludes it is unlikely the proposed regulations will create any new business or eliminate any existing businesses in California.

**Expansion of Businesses Currently Doing Business within California:** The board concludes it is unlikely the proposed regulations will result in the expansion of businesses currently doing business in California.

**Anticipated Benefits to the Health and Welfare of California Residents, Worker Safety, and California's Environment:** As explained in the Economic Impact Analysis in the ISOR, these proposed regulations will benefit all stakeholders by providing greater clarity on how to determine whether the board will prepare a CRA in advance of an inmate's parole consideration or subsequent parole reconsideration hearing and how the board will address its CRA backlog in a manner that protects an inmate's liberty interest in receiving a timely parole hearing. We anticipate these benefits will ultimately help to reduce some of the risk and anxiety hearing participants experience when faced with these hearings because they will have a better understanding of what information will be available to a hearing panel at an upcoming hearing and that less hearings will need postponement due to the board needing to prepare a CRA before the hearing. Additionally, the proposed regulations reduce the risk of error through the challenge process, which may reduce inmate anxiety by providing an administrative process to correct any errors by the board. Finally,

under the proposed regulations, inmates and their attorneys will be able to request a CRA under specified circumstances in which a CRA may be especially beneficial to a hearing panel, i.e. change in the inmate's health status, and hearing panels will be able to continue a hearing if they find a CRA is necessary to reach a determination regarding the inmate's risk to public safety. These processes ultimately benefit public safety and welfare by ensuring board hearing panels have the information they need to reach decisions that protect public safety in a manner that also protects an inmate's liberty interest in timely release from incarceration.

### **CONSIDERATION OF ALTERNATIVES**

The board must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Interested parties are accordingly invited to present statements or arguments with respect to any alternatives to the proposed changes during the public comment period.

### **AVAILABILITY OF PROPOSED TEXT**

The board will make the rulemaking file available to the public throughout the rulemaking process at its offices located at 1515 K Street, Suite 600, Sacramento, California. As of the date this Notice is published in the Office of Administrative Law's Notice Register, the rulemaking file consists of this Notice, the Form 400 (Notice of Submission of Regulation), the Proposed Text of the Regulation, the ISOR, and the Form 399 (Fiscal and Economic Impact Statement). Copies of any of these documents may be obtained by contacting the board's Contact Person identified in this Notice at the mailing address, fax number, or email address listed above or by visiting the board's website at: [http://www.cdcr.ca.gov/BOPH/reg\\_revisions.html](http://www.cdcr.ca.gov/BOPH/reg_revisions.html).

### **AVAILABILITY OF CHANGES TO PROPOSED TEXT**

After considering all timely and relevant comments received, the board may adopt the proposed regulations substantially as described in this Notice. If the board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the board adopts the regulations as revised. Please send requests for copies of any modified regulation text to the attention of the Contact Person identified in this Notice or by visiting the board's website at [http://www.cdcr.ca.gov/BOPH/reg\\_revisions.html](http://www.cdcr.ca.gov/BOPH/reg_revisions.html). If the board makes modifications, the board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

### **AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, phone number, fax number, or email address listed above or by visiting the board's website at: [http://www.cdcr.ca.gov/BOPH/reg\\_revisions.html](http://www.cdcr.ca.gov/BOPH/reg_revisions.html).

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