



Department of Corrections and Rehabilitation
NOTICE OF CHANGE TO REGULATIONS

Sections: 3499, 3499.1, and 3499.2	NCR Number: 22-08	Publication Date: June 10, 2022	Effective Date: TBD
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INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of Sections 3499, 3499.1, and 3499.2 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, Division 3, Chapter 1, regarding Elderly Parole Eligible Date.

PUBLIC COMMENT PERIOD

The public comment period will close on July 29, 2022. Any person may submit written comments about the proposed regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received or postmarked no later than July 29, 2022.

PUBLIC HEARING INFORMATION

A public hearing regarding these proposed regulations will be held on August 1, 2022, from 10:00 a.m. to 11:00 a.m. in suite 128N, located at 1515 S Street, Sacramento, CA 95811. The purpose of the hearing is to receive comments about these proposed regulations. It is not a forum to debate the proposed regulations. No decision regarding the permanent adoption of these regulations will be rendered at this hearing. Written comments submitted during the prescribed comment period are given the same significance and weight as oral comments presented at the hearing. This hearing site is accessible to the mobility impaired.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each department facility and field office not later than five calendar days after receipt. Also, institutions and facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev. 05/19), Certification of Posting, shall be returned to RPMB by mail or email. See Department Operations Manual Section 12010.6.7 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to D. Kostyuk, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2276, or e-mail to RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations should be directed to Marilyn Ouye, Division of Adult Institutions, Case Records Unit, at (916) 445-3716.

Original signed by:

JEFF MACOMBER
Undersecretary, Operations
California Department of Corrections and Rehabilitation

Attachments

NOTICE OF PROPOSED REGULATIONS
California Code of Regulations
Title 15, Crime Prevention and Corrections
Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR or department), proposes to amend Sections 3499, 3499.1, and 3499.2 into Title 15, Division 3, Chapter 1, regarding Elderly Parole Eligible Date.

PUBLIC COMMENT PERIOD

The public comment period begins **June 10, 2022** and closes on **July 29, 2022**. Any person may submit written comments by mail addressed to the primary contact person listed below, or by email to rpmb@cdcr.ca.gov, before the close of the comment period. For questions regarding the subject matter of the regulations, call the program contact person listed below.

CONTACT PERSONS

Primary Contact

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Back-Up

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Program Contact

M. Ouye
Telephone: (916) 445-3716
Division of Adult Institutions
Case Records Unit

PUBLIC HEARING

Date and Time: **August 1, 2022 – 10:00 a.m. to 11:00 a.m.**
Place: Department of Corrections and Rehabilitation
Suite 128N
1515 S Street – North Building
Sacramento, CA 95811

AUTHORITY AND REFERENCE

Government Code Section 12838.5 provides that commencing July 1, 2005, CDCR succeeds to, and is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of abolished predecessor entities, such as Department of Corrections, Department of the Youth Authority, and Board of Corrections.

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. **PC Section 5050** provides that commencing July 1, 2005, any reference to the Director of Corrections in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished.

PC Section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. **PC Section 5055** provides that commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the CDCR. **PC Section 5058** authorizes the Director to prescribe and amend rules and regulations for the administration of prisons and for the administration of the parole of persons. **PC Section 5058.3** authorizes the Director to certify in a written statement filed with Office of Administrative Law that operational needs of the department require adoption, amendment, or repeal of regulation on an emergency basis.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Assembly Bill (AB) 1448 added Penal Code (PC) section 3055, codifying the elderly parole process order by the Three Judge Panel Court Order. AB 3234 amended the elderly criteria from 60 years of age or older to 50 years or older and the amount of time served from at least 25 years to at least 20 years. The proposed regulations will incorporate elderly inmate criteria and determinations as currently defined in PC section 3055 into California Code of Regulations (CCR), Division 3, sections 3499, 3499.1, and 3499.2

This action will:

- Define elderly inmate and the criteria which determines an elderly inmate for elderly parole.
- Define incarceration and continuous incarceration.
- Specify the responsible agency that determines whether an inmate qualifies as an elderly inmate and calculates elderly parole eligible date.
- Specify how an inmate can appeal an elderly parole eligible date that they disagree with.

DOCUMENTS INCORPORATED BY REFERENCE

None

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS

Clarifying the process for calculating an EPED benefits inmates, victims, and other hearing participants because each stakeholder will have a better understanding of when to prepare for an elderly inmate's initial or subsequent parole consideration hearing.

EVALUATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING LAWS AND REGULATIONS

Pursuant to Government Code 11346.5(a)(3)(D), the department has determined the proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the department has concluded that these are regulations consistent with Elderly Parole Eligibility Date.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- Cost or savings to any state agency: *None*
- Cost to any local agency or school district that is required to be reimbursed: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*
- Cost or savings in federal funding to the state: *None*

EFFECT ON HOUSING COSTS

The department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The department has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting business, including the ability of

California businesses to compete with businesses in other states, because the proposed regulations place no obligations or requirements on any business.

EFFECT ON SMALL BUSINESSES

The department has determined that the proposed regulations will not affect small businesses. This action has no significant adverse economic impact on small businesses because they place no obligations or requirements on any business.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The department has determined that the proposed regulation will have no effect on the creation of new, or the elimination of existing, jobs or businesses within California, or effect the expansion of businesses currently doing business in California. The department has determined that the proposed regulation will have no effect on worker safety or the state's environment. These regulations may benefit the welfare of California residents by helping to make CDCR institutions safer for inmates, staff, and visitors. Additionally, safer institutions may provide an environment more conducive to rehabilitation, thereby reducing recidivism.

CONSIDERATION OF ALTERNATIVES

The department must determine that no reasonable alternative considered by the department or that has otherwise been identified and brought to the attention of the department would be more effective in carrying out the purpose for which the action is proposed, 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 provisions of law. Interested persons are invited to present statements or arguments with respect to any alternatives to the changes proposed at the scheduled hearing or during the written comment period.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the department's contact person. The proposed text, ISOR, and Notice of Proposed Regulations will also be made available on the department's website: www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the department may adopt the proposed regulations substantially as described in this Notice. If the department 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 department adopts, amends or repeals the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The department will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

TEXT OF PROPOSED REGULATIONS

In the following text, underline indicates added text.

California Code of Regulations, Title 15, Division 3, Adult Institutions, Programs, and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 5.5. Parole Consideration

Article 4. Elderly Inmate

3499. Elderly Inmate Defined.

[New section is adopted to read:]

(a) An elderly inmate is an inmate who meets all of the following criteria for Elderly Parole:

(1) Fifty years of age or older;

(2) Has served a minimum of 20 years of continuous incarceration on the inmate's current sentence;

(3) Currently serving a determinate or indeterminate sentence with the possibility of parole;

(4) Not sentenced pursuant to Penal Code section 667, subdivisions (b) through (i) or 1170.12;

(5) Not convicted of first-degree murder of a peace officer, as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who was killed while engaged in the performance of their duties, and the individual knew, or reasonably should have known, that the victim was a peace officer, engaged in the performance of their duties; and

(6) Not convicted of first-degree murder of a peace officer or former peace officer under any of the above-enumerated Penal Code sections listed in subsection (a)(5), who was intentionally killed in retaliation for the performance of their duties.

(b) For purposes of this article, "incarceration" means detention in any city or county jail, local juvenile facility, mental health facility, Division of Juvenile Justice facility, or department facility including Community Correctional Facilities, and facilities designated

as the place for reception and service of the California term under Penal Code section 2900.

(c) For purposes of this section, “continuous incarceration” means an uninterrupted period of detention in one or more facilities described in subsection 3499(b) of this article.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1213, 2900, 2900.5, 2901, 3055, and 5054, Penal Code; (*People v. Culp* (2002) 100 Cal.App.4th 1278.)

3499.1 Elderly Inmate Determinations.

[New section is adopted to read:]

(a) The department’s Correctional Case Records Services shall determine whether an inmate qualifies as an elderly inmate as defined in subsection 3499(a), of this article, and calculate the Elderly Parole Eligible Date (EPED) as defined in subsection 3499.1(c) of this article for inmates who qualify as elderly inmates under Elderly Parole.

(b) Correctional Case Records Services shall determine elderly inmate qualification and calculate the EPED, if appropriate, within 60 calendar days of an inmate’s admission to the department.

(1) For purposes of calculating an EPED, a break in custody shall include instances where an inmate:

(A) Escapes from custody; or

(B) Is released on their own recognizance or bail after sentencing for their current term.

(2) For purposes of calculating an EPED, a break in custody shall not include instances where an inmate:

(A) Is released on their own recognizance or bail prior to sentencing for their current term; or

(B) Released from custody in error;

(c) An EPED is the date on which an inmate qualifies as an elderly inmate and is therefore the earliest date on which an elderly inmate is eligible for an elderly inmate parole hearing under subsection 3499(a).

(1) An elderly inmate’s EPED is set according to the following criteria: If the inmate qualifies for Elderly Parole under subsection 3499(a), the EPED is the day the

elderly inmate reaches 50 years of age and has served 20 years of continuous incarceration.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1213, 2900, 2900.5, 2901, 3055, and 5054, Penal Code.

3499.2. Elderly Inmate Determination Review.

[New section is adopted to read:]

If an inmate disagrees with a determination they are not qualified as an elderly inmate under section 3499.1 of this article or disagrees with the calculation of their EPED, the inmate may appeal the department's Correctional Case Records Services decision at their institution by filing a CDCR Form 602-1 (Rev. 01/22), Grievance.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 1213, 2900, 2900.5, 2901, 3055, and 5054, Penal Code.

INITIAL STATEMENT OF REASONS

The California Department of Corrections and Rehabilitation (CDCR or the department) proposes to adopt sections 3499, 3499.1, and 3499.2, of the California Code of Regulations (CCR), Title 15, Division 3 regarding Elderly Parole Eligible Date.

INTRODUCTION AND PROBLEM STATEMENT

Through ongoing litigation in *Coleman v. Newsom*, and *Plata v. Newsom*, prisoners with serious medical and mental health conditions filed suit in federal courts, asserting their constitutional rights were violated due to prison overcrowding, resulting in their receiving inadequate medical and mental health care. The court found that the deficiencies in prison medical and mental health care violated prisoners' Eighth Amendment Rights. Plaintiffs in both cases requested a three-judge court be convened pursuant to the Prison Litigation Reform Act (PLRA). The two district judges in each case independently granted those requests, and the Chief Judge of the Court of Appeals for the Ninth Circuit convened a three-judge court to preside over the consolidated class action.

On August 4, 2009, the three-judge court issued an order that required the State to submit a plan to reach a prison population cap of 137.5% design capacity in two years. According to the three-judge court's order, the population reduction was necessary because, at the time, the State's prisons housed twice as many prisoners as they were designed for, making the prisons unsafe for prisoners and staff. The three-judge court found that prisoners were unable to obtain life-saving medical and psychiatric care in these overcrowded prisons.

As an additional measure to reduce overcrowding, on February 10, 2014, the three-judge court directed the Board of Parole Hearings (Board) to "finalize and implement a new parole process whereby inmates who are 60 years of age and have served a minimum of [25] years of their sentence" to be referred to the Board for parole consideration. This process excluded from eligibility inmates who were either sentenced to life without the possibility of parole or condemned.

On June 16, 2014, the Board issued a memorandum providing guidance on how the Board would implement the court-ordered Elderly Parole Program. This memorandum also outlined that risk assessments performed by the Board's forensic psychologists would incorporate how an inmate's age, long-term confinement, and diminished physical condition, if any, reduce the inmate's risk of future violence. The court-ordered Elderly Parole Program was fully implemented on October 1, 2014.

On January 1, 2018, the California Legislature enacted Assembly Bill 1448 (2017-2018 Reg. Session) (AB 1448), which codified into law the Elderly Parole Program by adding section 3055 to the Penal Code. The statutory version of the Elderly Parole Program was similar to the Court-Ordered Elderly Parole Program in that it required an inmate to be 60 years old and have served 25 years of continuous incarceration. It differed from the Court-Ordered Elderly Parole Program in several respects. First, in addition to excluding condemned inmates or inmates sentenced to life without the possibility of parole, the statutory Elderly Parole Program also excluded inmates sentenced on any current

offense under the strike laws in Penal Code sections 1170.12 or 667, subdivisions (b) through (i). Second, the statutory Elderly Parole Program also excluded any inmate convicted of first-degree murder of a peace officer, where the individual knows or reasonably should have known the victim was a police officer.

In signing AB 1448, Governor Brown commented that the Elderly Parole Program “has been a successful program that saves [California] a significant amount of money that would be otherwise spent for geriatric prisoners who no longer pose a risk to public safety,” and that he believed “the pool of eligible inmates can and should be broadened.”

On January 1, 2021, the California Legislature enacted Assembly Bill 3234 (2019-2020 Reg. Session) (AB 3234), which amended Penal Code section 3055, lowered the required age from 60 to 50 and lowered the required years of continuous incarceration served from 25 to 20. The statutory exclusions were retained.

The statutory language in Penal Code section 3055, as enacted by AB 1448 and amended by AB 3234, broadened the pool of inmates who qualify for elderly parole by lowering the minimum age and decreasing the length of incarceration required. The statute also excluded some inmates who are not excluded under the Court-Ordered Elderly Parole Program from qualification. This creates a two-track system where some inmates will be eligible for statutory Elderly Parole Program, but others (third and second-strike inmates and those convicted of murdering a peace officer) will only be eligible under the Court-Ordered Elderly Parole Program. Thus, the department is clarifying for inmates and the public how to determine when an inmate qualifies for elderly parole under the statutory track (Penal Code section 3055).

Penal Code section 3055 does not define the term “continuous incarceration.” Thus, the department needs to provide clarification for the public, inmates, and victims to determine when “continuous incarceration” begins and what constitutes a break in custody for purposes of qualifying an inmate for elderly parole. Further, the department needs to clarify the definition of “incarceration” for the public and inmates to demonstrate which detention facilities qualify for purposes of calculating an Elderly Parole Eligible Date (EPED).

Penal Code section 3055 does not specify whether the Board or the department is responsible for determining whether an inmate qualifies as an elderly inmate or which agency calculates the inmate’s EPED. Thus, the department needs to specify in the proposed regulations which agency conducts these determinations.

CONSIDERATION OF ALTERNATIVES:

The department must determine that no other reasonable alternatives were considered, or have otherwise been identified and brought to the attention of the department, which would be more effective in carrying out the purpose for this proposed action, or would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Currently, no reasonable alternatives have been brought to the attention of the department that would alter the department’s initial determination.

Interested persons are accordingly invited to present statements or arguments with respect to any alternatives to the proposed changes at the scheduled hearing or during the written comment period.

ECONOMIC IMPACT ASSESSMENT:

In accordance with Government Code section 11346.3(b), the department has made the following assessments regarding the proposed regulations:

Significant Adverse Economic Impact on Business

The department has made an initial determination that the proposed regulations will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the department's initial determination. The proposed regulations affect the internal management of the department, and place no requirements or restrictions on businesses.

Creation of New, or Elimination of Existing Jobs within the State of California

The department believes the proposed regulations will have no significant impact on the creation of new, or elimination of existing jobs within the State of California. The proposed action is designed to bring the department's regulations into compliance with Penal Code section 3055, as enacted and amended by AB 1448 and amended by AB 3234. However, the department has determined the proposed action will require funding to cover the initial workload of reviewing the current population with the new criterion associated with this change and will require the hiring of staff to absorb the ongoing workload after implementation. Therefore, the department has submitted a Budget Change Proposal requesting overtime funds and additional Case Records positions.

Specifically, the main substantive changes in this proposed action require the department to conduct determinations for elderly inmates who either (a) were already in the Board's hearing cycle but may be entitled to an earlier hearing date or (b) were not previously entitled to receive hearings until AB 3234 went into effect.

Creation of New, Expansion, or Elimination of Existing Businesses Currently Doing Business within the State of California

The department believes the proposed regulations will not have an impact on the creation of new, expansion, or the elimination of existing businesses currently doing business within the State of California, including the ability of California businesses to compete with businesses in other states, because private businesses are not significantly affected by the management of correctional facilities.

Benefits to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The department has determined the proposed regulations may have a positive impact on the health and welfare of California residents, worker safety, and the environment, by reducing prison overcrowding and by providing greater clarity on how to determine which inmates qualify as elderly inmates.

BENEFITS OF THE REGULATIONS:

Defining who qualifies as an elderly inmate benefits all stakeholders by resolving several ambiguities and clarifying how to determine whether an inmate will qualify for elderly parole consideration. These processes also benefit public safety by ensuring the greatest possible accuracy in qualifying inmates for elderly inmate status and calculating their parole eligibility dates.

Clarifying the process for calculating an EPED benefits inmates, victims, and other hearing participants because each stakeholder will have a better understanding of when to prepare for an elderly inmate's initial or subsequent parole consideration hearing.

MATERIALS RELIED UPON:

In interpreting and making specific the definition of continuous incarceration in sections 3499 and 3499.1 of the proposed regulations, the department relied on the following court decision:

- [People v. Culp \(2002\) 100 Cal.App.4th 1278](#)

The department has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included in this section.

SPECIFIC PURPOSE AND RATIONALE FOR EACH PROPOSED REGULATORY SECTION, PER GOVERNMENT CODE 11346.2(b)(1):

Section 3499 is adopted to define who qualifies as an elderly inmate because following the enactment of Penal Code section 3055, the department needed to provide clarity to institution staff, inmates, and the public about how to determine if an inmate qualifies for Elderly Parole. The department also found it necessary to define "incarceration" and "continuous incarceration" in this section to clarify for stakeholders how the department will determine when an inmate has served enough time in prison to qualify for parole consideration as an elderly inmate. For consistency with established law, the board interpreted continuous incarceration in accordance with the case law in (*People v. Culp* (2002) 100 Cal.App.4th 1278), which indicates "continuous incarceration" means a period of time uninterrupted by a break in custody.

Moreover, the department deemed it necessary to identify inmates who could qualify for statutory elderly parole. Inmates sentenced to death, sentenced to life without the possibility of parole, sentenced as second-strikers or third-strikers pursuant to Penal Code sections 1170.12, or 667, subdivisions (b) through (i), or convicted of first-degree murder of a peace officer or former peace officer in the performance of their official duties cannot qualify for statutory elderly parole under Penal Code section 3055.

Section 3499.1 is adopted to identify, that the department's Case Records Services is responsible for determining which inmates qualify as an elderly inmate and calculating elderly inmates' EPED. This is necessary so that inmates, the public, and institutional staff are aware of the process through which elderly inmate determinations are made.

Further, in the interest of clarity and simplicity, the department found it necessary to define the earliest date on which an elderly inmate is eligible for an elderly inmate parole hearing (if not eligible earlier under other law), using the acronym "EPED" (Elderly Parole Eligible Date) as defined in subdivision (a) of this section in the proposed regulations for consistency with how the department and the Board are identifying these dates.

Establishing the criteria for calculating an EPED in section 3499.1, subdivision (a), is necessary to provide clarity for institutional staff, inmates, and the public. Specifically, since the Board needs to track the date on which elderly inmates first become eligible for hearings pursuant to either Penal Code 3055 (establishing the EPED as the date on which an inmate will both be at least 50 years of age and have served 20 years of continuous incarceration, with exclusions) is necessary to provide the Board with proper tracking so the Board can establish scheduling requirements in relation to that eligibility date.

The Board and the department further deemed it necessary to interpret "incarceration" in subsection (b) of this section of the proposed regulations, to clarify for institutional staff, the public, and inmates what constitutes "incarceration" for purposes of calculating an inmate's EPED.

Section 3499.2 is adopted to clarify an inmate may file a CDCR Form 602-1 Grievance if they disagree with their elderly inmate determination or EPED calculation.