

(1) The alleged violation would be graded no higher than Category Two under the guidelines at § 2.20;

(2) The alleged violation is in any category under the guidelines at § 2.20 and the decision imposes the maximum sanction authorized by law; or

(3) The Commission determines that the releasee has already served sufficient time in custody as a sanction for the violation but that forfeiture of time on parole is necessary to provide an adequate period of supervision.

(b) A releasee who agrees to such a disposition shall indicate such agreement by—

(1) Accepting the decision proposed by the Commission in the Notice of Eligibility for Expedited Revocation Procedure that the Commission sent to the releasee, thereby agreeing that the releasee does not contest the validity of the charge and waives a revocation hearing; or

(2) Offering in writing, before the finding of probable cause or at a probable cause hearing, not to contest the validity of the charge, to waive a revocation hearing, and to accept a decision that is at the bottom of the applicable guideline range as determined by the Commission if the violation would be graded no higher than Category Two under the guidelines at § 2.20, or is the maximum sanction authorized by law.

(c) An alleged violator's agreement under this provision shall not preclude the Commission from taking any action authorized by law or limit the statutory consequences of a revocation decision.

■ 3. Amend § 2.89 by adding an entry for § 2.66 to read as follows:

**§ 2.89 Miscellaneous provisions.**

\* \* \* \* \*

2.66 (Revocation Decision Without Hearing)

\* \* \* \* \*

Dated: August 22, 2007.

**Edward F. Reilly, Jr.,**

*Chairman, U.S. Parole Commission.*

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**DEPARTMENT OF JUSTICE**

**Parole Commission**

**28 CFR Part 2**

**Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes**

**AGENCY:** United States Parole Commission, Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Parole Commission is studying the feasibility of conducting probable cause hearings through videoconferences between an examiner at the Commission's office and alleged parole and supervised release violators in custody at the District of Columbia Central Detention Facility. Therefore, Commission is amending the interim rule allowing hearings by videoconference to include probable cause hearings and to authorize the use of videoconferencing for a sufficient number of such hearings to determine the utility of the procedure.

**DATES:** Effective date: October 18, 2007. Comments must be received by November 19, 2007.

**ADDRESSES:** Send comments to Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815.

**FOR FURTHER INFORMATION CONTACT:** Office of General Counsel, U.S. Parole Commission, 5550 Friendship Blvd., Chevy Chase, Maryland 20815, telephone (301) 492-5959. Questions about this publication are welcome, but inquiries concerning individual cases cannot be answered over the telephone.

**SUPPLEMENTARY INFORMATION:** Since early 2004, the Parole Commission has been conducting some parole proceedings by videoconference to reduce travel costs and to conserve the time and effort of its hearing examiners. The Commission initiated a pilot project in which examiners conducted some parole release hearings by videoconference between the Commission's office in Maryland and the prisoner's federal institution. The Commission published an interim rule that provided notice that the Commission would be using the videoconference procedure. 69 FR 5273 (Feb. 4, 2004).

Based on the success of that project, the Commission extended the use of videoconferencing to institutional revocation hearings by an interim rule promulgated in April 2005. 70 FR 19262

(Apr. 13, 2005). The Commission holds the revocation hearing at a federal institution when the releasee has admitted the charged violation, waives a local hearing, or has been convicted of a crime that establishes a release violation. The great majority of institutional revocation hearings are still held with the hearing examiner and the releasee together at the federal institution. The Commission's experience with the videoconference procedure in institutional revocation hearings is consistent with the satisfactory experience it has had with videoconferencing in parole release hearings. Releasees, their attorneys, and witnesses have been able to effectively participate in the videoconference hearings with the hearing examiner.

Now the Commission has decided to explore the utility of the videoconference procedure for probable cause hearings held at the District of Columbia Central Detention Facility for parolees and supervised releasees arrested for violations of the conditions of release. Following arrest on a violator warrant and subsequent detention at the DC jail, a releasee is given a hearing with an examiner of the Parole Commission within five days of arrest for the purpose of determining whether probable cause exists for the alleged violation of release. At this hearing, the hearing examiner's primary task is to determine whether any submissions from the releasee and counsel require a different decision as to the evidentiary support for the issuance of a warrant and the continued custody of the releasee. The releasee is usually represented by an attorney from the DC Public Defender Service. Given the limited purpose of the proceeding and the five-day time frame in which the hearing must be held, witnesses are normally not present at a probable cause hearing. The hearing examiner has the delegated authority to make a determination as to the existence of probable cause. At the end of the hearing, if the hearing examiner makes a finding of probable cause, the releasee is normally held in custody for a local revocation hearing. If probable cause is not found, the releasee is discharged from custody and revocation proceedings are terminated. At the local revocation hearing a Commission hearing examiner accepts written and oral submissions from the releasee and counsel, takes testimony from witnesses, and recommends credibility determinations that lead to a final examination of the evidence regarding the alleged violation. All local revocation hearings are held with the

hearing examiner in the same room with the releasee, counsel, and any witnesses. With the written report of the hearing by the hearing examiner and the examiner's recommended disposition, the Commission decides if the releasee committed the charged violation, and, if so, whether the Commission should revoke the release.

The Commission held approximately 1700 probable cause hearings in 2006 and sees several benefits in using videoconferencing for these preliminary proceedings. Videoconferencing may allow the hearing examiner to make the best use of the examiner's time and effort during the hearing docket. The progress of a probable cause hearing docket is frequently delayed as releasees are brought in for the hearings by corrections personnel, attorneys and clients meet to discuss some issue regarding the proceedings, or some procedural problem is corrected. If the examiner's attention is not needed during the delay, the examiner may use that time to read the releasee's file that is before the examiner at the Commission's office. (Given the number of probable cause hearings on each docket, it is impractical for an examiner to bring releasee files to the jail for review and use during the hearing docket. The examiner has only a packet of documents concerning the alleged violation.) With the full file readily available, the examiner is in a position to quickly resolve problems such as replacement of a document missing from the releasee's disclosure packet. Moreover, the hearing examiner could promptly respond to questions from the releasee and counsel that may assist them in making a decision whether to initiate a request to the Commission for a disposition of the case without a hearing. These questions may pertain to the calculation of the releasee's salient factor score, the estimate of the releasee's guideline range, or the maximum time remaining on the sentence. Consequently, probable cause hearings by videoconference may offer the possibility of more expeditious decisions regarding the disposition of the charged violation.

The DC Public Defender Service, the Criminal Justice Clinic of the Georgetown University Law Center, and other advocacy programs have already raised concerns that using videoconferencing for probable cause hearings will inhibit the hearing examiner's ability to gauge the credibility of the releasee and witnesses, and will unjustifiably deny the releasee the opportunity to have a face-to-face meeting with a representative of the Commission before release is revoked.

Underlying these concerns is the belief that a revocation proceeding should be guided by procedures appropriate to a criminal prosecution. The Commission does not agree with this proposition. Due process does apply to revocation proceedings, but not to the extent that the proceedings are the equivalent of criminal trials. Moreover, the probable cause hearing is only a preliminary proceeding in the revocation process. The full examination of the credibility of the releasee's statements and witnesses' testimony as to the alleged violation takes place at the local revocation hearing, which is held with the hearing examiner face-to-face with the releasee and counsel, and the witnesses.

Videoconferencing has been found to be legally sufficient for a variety of judicial and administrative proceedings. *Pappas v. Kentucky Parole Board*, 156 S.W.3d 303 (Ky.Ct.App. 2005) (parole release hearing); *Wilkins v. Wilkinson*, 809 N.E.2d 1206 (Ohio Ct. App. 2004) (parole revocation hearing); *United States v. Baker*, 45 F.3d 837 (4th Cir. 1995) (involuntary commitment hearing for a mentally ill prisoner). Furthermore, research studies regarding the use of videoconferencing in forensic interviews show that psychiatric evaluations done with videoconferencing are just as reliable as those done with the evaluator and the subject in a face-to-face meeting. See Lexcen, *et al.*, Use of Video Conferencing for Psychiatric and Forensic Evaluations, *Psychiatric Services*, vol. 57, 713-15 (May 2006). Another study concludes that persons observing witnesses' statements face-to-face with the witnesses, though these "live" observers were likely to perceive the witnesses' appearance more favorably than persons observing the statements through video, were no better at determining the truth of the witnesses' statements than the video observers. Landstrom, *et al.*, "Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory," *Applied Cognitive Psychology*, vol. 19, 913-33 (2005).

The Commission is sensitive to the concern that use of the videoconference procedure may depersonalize the revocation process and might result in the imprisonment of a revoked releasee for a number of months without ever meeting a Commission examiner face-to-face. However, this latter situation would ordinarily occur at the election of a releasee who agrees to waive a revocation hearing, either accepting a sanction offered by the Commission, or offering to accept a designated sanction.

If a releasee decides that he wants a face-to-face meeting with a Commission hearing examiner, the releasee can have such a meeting by declining the sanction offered by the Commission or by not offering to accept a designated sanction. The choice rests with the releasee and counsel, who must weigh the benefits of an early disposition of the alleged violation against the loss of a face-to-face meeting with a hearing examiner. The Commission's experience over the last three years has been that the quality of interpersonal exchange among the hearing participants does not appreciably decline with the use of videoconferencing.

Finally, even before the Commission began its pilot project with videoconference hearings in 2004, 22 state parole boards reported using this procedure for parole release hearings and 17 state boards reported using this procedure for parole revocation hearings. See <http://www.apaintl.org/Pub-ParoleBoardSurvey2003.html>. Since 1996, Congress has authorized federal courts to conduct supervised release revocation hearings by videoconference when the releasee is incarcerated and in default on a payment of a fine or restitution. See 18 U.S.C. 3613A. The Commission is hardly breaking new ground in exploring the benefits of videoconferencing for its proceedings.

The Commission is promulgating this rule as an interim rule in order to determine the utility of the videoconference procedure for probable cause hearings and is providing a 60-day period for the public to comment on the use of the procedure for such hearings.

### Implementation

The amended rule will take effect October 18, 2007, and will apply to probable cause hearings for District of Columbia parolees and supervised releasees held on or after the effective date.

### Executive Order 12866

The U.S. Parole Commission has determined that this interim rule does not constitute a significant rule within the meaning of Executive Order 12866.

### Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have

sufficient federalism implications requiring a Federalism Assessment.

### Regulatory Flexibility Act

The interim rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 605(b), and is deemed by the Commission to be a rule of agency practice that does not substantially affect the rights or obligations of non-agency parties pursuant to Section 804(3)(c) of the Congressional Review Act.

### Unfunded Mandates Reform Act of 1995

This rule will not cause State, local, or tribal governments, or the private sector, to spend \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. No action under the Unfunded Mandates Reform Act of 1995 is necessary.

### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on the ability of United States-based companies to compete with foreign-based companies.

### List of Subjects in 28 CFR Part 2

Administrative practice and procedure, Prisoners, Probation and Parole.

### The Interim Rule

■ Accordingly, the U.S. Parole Commission is adopting the following amendment to 28 CFR part 2.

### PART 2—[AMENDED]

■ 1. The authority citation for 28 CFR part 2 continues to read as follows:

**Authority:** 18 U.S.C. 4203(a)(1) and 4204(a)(6).

■ 2. Revise § 2.25 to read as follows:

#### § 2.25 Hearings by videoconference.

The Commission may conduct a parole determination hearing (including a rescission hearing), a probable cause hearing, and an institutional revocation hearing, by a videoconference between the hearing examiner and the prisoner or releasee.

Dated: August 7, 2007.

**Edward F. Reilly, Jr.,**

*Chairman, U.S. Parole Commission.*

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket No. CGD05-07-084]

#### Special Local Regulations for Marine Events; Sunset Lake, Wildwood Crest, NJ

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce special local regulations for the Sunset Lake Hydrofest on Sunset Lake from 8:30 a.m. September 29, 2007 through 5:30 p.m. September 30, 2007. This action is necessary to provide for the safety of life on navigable waters during the event. During the enforcement period, vessel traffic will be restricted in portions of Sunset Lake during the event.

**DATES:** The regulations in 33 CFR 100.536 will be enforced from 8:30 a.m. September 29, 2007 through 5:30 p.m. September 30, 2007.

**FOR FURTHER INFORMATION CONTACT:** Dennis Sens, Regulatory project manager, Inspections and Investigations Branch, at (757) 398-6204.

**SUPPLEMENTARY INFORMATION:** Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for giving notice of the enforcement date less than 30 days before the enforcement period goes into effect. Delaying notice of the enforcement date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, support vessels, spectator craft and other vessels transiting the event area. However advance notification of this recurring event is being given to users of Sunset Lake via marine information broadcasts, local notice to mariners, commercial radio stations and area newspapers.

The Coast Guard will enforce the special local regulations for the annual Sunset Lake Hydrofest on Sunset Lake, New Jersey in 33 CFR 100.536 from 8:30 a.m. on September 29, 2007, through 5:30 p.m. September 30, 2007. Annually, the Sunset Lake Hydrofest Association sponsors this event on the waters of Sunset Lake near Wildwood

Crest, New Jersey. The event consists of approximately 100 inboard hydroplanes, Jersey speed skiffs and flat-bottom ski boats racing in heats counter-clockwise around an oval racecourse.

Under the provisions of 33 CFR 100.536, except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area. Additionally, when authorized by the Patrol Commander to transit the regulated area, all vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course.

This notice is issued under authority of 33 CFR 100.536 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with extensive advance notification of this enforcement via the Local Notice to Mariners, marine information broadcasts, local radio stations and area newspapers.

Dated: September 11, 2007.

**Neil O. Buschman,**

*Captain, U.S. Coast Guard, Commander, Fifth Coast Guard District, Acting.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 9, 89, and 1039

[EPA-HQ-OAR-2007-0652; FRL-8467-2]

RIN 2060-AO37

#### Nonroad Diesel Technical Amendments and Tier 3 Technical Relief Provision

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

**ACTION:** Direct final rule.

**SUMMARY:** In this rulemaking, EPA is making certain technical corrections to the rules establishing emission standards for nonroad diesel engines. In addition, we are amending those rules to provide nonroad diesel equipment manufacturers with a production technical relief provision for Tier 3 equipment which is similar to the technical relief provision already available for Tier 4 equipment. Like the Tier 4 provisions, the new Tier 3 technical relief provision deals with a situation where an equipment manufacturer which is not vertically integrated with its engine supplier is unable to complete redesign of the equipment within the time required by rule (here, the Tier 3 rule). To be