kits consisting of or containing APCP, black powder, or other similar low explosives, regardless of amount, do not fall within the ''propellant actuated device'' exception and are subject to all applicable Federal explosives controls pursuant to 18 U.S.C. 841 *et seq.*, the regulations in part 555 of title 27 of the CFR, and applicable ATF policy. The Department believes that the rule will not have a significant impact on small businesses. Under the law and its implementing regulations, persons engaging in the business of manufacturing, importing, or dealing in explosive materials are required to be licensed (e.g., an initial fee of $200 for obtaining a dealer's license for a 3-year period; $100 renewal fee for a 3-year period). Other persons who acquire or receive explosive materials are required to obtain a permit. Licensees and permittees must comply with the provisions of part 555, including those relating to storage and other safety requirements, as well as recordkeeping and theft-reporting requirements. This will not change upon the effective date of this rule.

Rocket motors containing 62.5 grams or less of explosive propellants (*e.g.*, APCP) and reload kits that can be used only in the assembly of a rocket motor containing a total of no more than 62.5 grams of propellant are exempt from regulation, including permitting and storage requirements. Typically, rocket motors containing more than 62.5 grams of explosive propellant would be required to be stored in a type-4 magazine that costs approximately $400; however, this rule does not impact ATF's storage requirements, nor does it affect the applicability of ATF's 62.5-gram exemption.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act of 1995

This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

Disclosure

Copies of the notice of proposed rulemaking, all comments received in response to the NPRM, and this rule will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–063, 99 New York Avenue, NE., Washington, DC 20226; telephone: (202) 648–7080.

Drafting Information

The author of this document is James P. Ficaretta; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 555

Administrative practice and procedure, Authority delegations, Customs duties and inspection, Explosives, Hazardous materials, Imports, Penalties, Reporting and recordkeeping requirements, Safety, Security measures, Seizures and forfeitures, Transportation, and Warehouses.

Authority and Issuance

■ Accordingly, for the reasons discussed in the preamble, 27 CFR part 555 is amended as follows:

PART 555—COMMERCE IN EXPLOSIVES

■ 1. The authority citation for 27 CFR part 555 continues to read as follows:

Authority: 18 U.S.C. 847.

■ 2. Section 555.11 is amended by revising the definition for ''Propellant actuated device'' to read as follows:

§ 555.11 Meaning of terms.

* * * * *

Propellant actuated device. (a) Any tool or special mechanized device or gas generator system that is actuated by a propellant or which releases and directs work through a propellant charge.

(b) The term does not include—

(1) Hobby rocket motors consisting of ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount; and

(2) Rocket-motor reload kits that can be used to assemble hobby rocket motors containing ammonium perchlorate composite propellant, black powder, or other similar low explosives, regardless of amount.

* * * * *

Dated: January 7, 2009.

Michael B. Mukasey,

Attorney General.

[FR Doc. E9–578 Filed 1–13–09; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Parts 545 and 550

[Docket Nos. BOP–1093–F; BOP–1109–F; BOP–1139–F]

RIN 1120–AA88; RIN 1120–AB07; RIN 1120–AB41

Drug Abuse Treatment Program: Subpart Revision and Clarification and Eligibility of D.C. Code Felony Offenders for Early Release Consideration

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes three proposed rules on the drug abuse treatment program. Finalizing all three proposed rules together results in a more uniform and comprehensive revision of our drug abuse treatment program (DATP) regulations. Specifically, this amendment will streamline and clarify these regulations, eliminating unnecessary text and obsolete language, and removing internal agency procedures that need not be in rules text.

This rule clarifies the distinction between mandatory and voluntary participation in the drug abuse education course, removes eligibility limitations pertaining to cognitive impairments and learning disabilities, and addresses the effects of non-participation both in the drug abuse education course and in the residential drug abuse treatment program (RDAP). In this rule, we also add escape and attempted escape to the list of reasons an inmate may be expelled from the RDAP. Furthermore, in our regulation on considering inmates for early release, we remove obsolete language, add as ineligible for early release inmates with a prior felony or misdemeanor conviction for arson or kidnapping, and clarify that inmates cannot earn early release twice.

DATES: This rule is effective on March 16, 2009.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105, e-mail *BOPRULES@BOP.GOV.*

SUPPLEMENTARY INFORMATION: In this document, the Bureau of Prisons (Bureau) finalizes three proposed rules. The first was published on September 20, 2000 (65 FR 56840) (the 2000 proposed rule), and the second was published on July 1, 2004 (69 FR 39887) (the 2004 proposed rule). The third, published on November 2, 2006, proposed to revise 28 CFR 550.55(a) of the 2004 proposed rule to extend early release consideration to D.C. Code felony offenders pursuant to D.C. Code § 24–403.01 (71 FR 64507) (the 2006 proposed rule).

In this rule, we merge the three proposed rules, which will result in a more uniform and comprehensive revision of our DATP regulations. We discuss our responses to comments received for the three proposed rules separately.

The 2000 Proposed Rule

The 2000 rule proposed amendments to requirements for the drug abuse education course and participation in the RDAP. In these rules, we finalize the changes we proposed with regard to the regulations on the Drug Abuse Education Course (new § 550.51), the institution RDAP (new § 550.53), eligibility for performance pay (new § 545.25), and incentives for participation (new § 550.54).

This rule clarifies the distinction between mandatory and voluntary participation in the drug abuse education course, removes eligibility limitations pertaining to cognitive impairments and learning disabilities, and addresses the effects of non-participation both in the drug abuse education course and in the institution RDAP.

For consistency, we also revise the consequences pertaining to work assignment pay in the provisions which pertain to the drug abuse education course. We amend our regulations on inmate work and performance pay (28 CFR 545, subpart C) to conform with these requirements.

Comments on the 2000 Proposed Rule

Non-U.S. citizen inmates. One commenter was concerned that we routinely deny access to the Drug Abuse Treatment Program (DATP) to ''non-U.S. citizens.'' The Bureau does not deny drug abuse treatment to inmates based on their citizenship. Instead, we offer several program options, such as a drug abuse education course or non-residential drug abuse treatment to inmates who have drug problems but who do not otherwise meet the admission criteria for the RDAP. These options are currently available for ''non-U.S. citizen'' inmates.

However, in light of the commenter's misunderstanding of our proposed rule, we do make a revision to clarify our intent. Section 550.53(b) stated that, ''[u]pon the expiration of their sentence, inmates are eligible to be transported only to the place of conviction or legal residence within the United States or its territories.'' We do not intend this section to be understood to exclude non-U.S. citizens. We intended only that participants must be capable of completing each of the three components of the RDAP program (the unit-based component, follow-up services, and the transitional drug abuse treatment component) when they begin the program. We have therefore clarified this language in the regulation.

Treatment for inmates who voluntarily participate. A commenter believed that the DATP incentives and program are limited to ''individuals who may not seek therapy otherwise,'' and asks us to ''include those inmates who have taken it up on [sic] themselves to seek therapy.''

This commenter mistakenly believes that we routinely deny participation to certain inmates. However, inmates who volunteer for the drug program and otherwise meet the admission requirements can enter the DATP. The program is not limited to only those inmates whom staff designate for treatment.

Delay in getting inmates into DATP. A commenter complained that inmates who wish to participate remain too long on waiting lists.

Currently, the Bureau has over 7000 inmates waiting for residential treatment that is provided with limited Bureau resources. Also, inmates are selected for admission based on their proximity to release. Unfortunately, these two factors result in some inmates being on the waiting list for a long time.

Drug abuse documentation. One commenter complained that it is unfair for inmates who want to participate in the drug abuse program to be rejected because ''drug abuse was not in their PSI or * * * they did not have documentation from a doctor.''

Because the early release is such a powerful incentive, as evidenced by over 7000 inmates waiting to enter treatment, the Bureau must take appropriate measures to ensure that inmates requesting treatment actually have a substance abuse problem that can be verified with documentation. For those inmates who want treatment but do not have the requisite documentation to enter the RDAP, non-residential counseling services are available and encouraged. However, because we find it necessary to require documentation of drug abuse problems as a criterion for RDAP participation, we are not altering this requirement in the final rule.

Adding other incentives. Finally, with regard to a regulation on incentives for program participation, which was proposed in the 2000 rule, two commenters requested that we add other possible incentives, such as vocational training. However, residential drug program completers are always encouraged to improve their educational and vocational training when possible. Vocational training, as an incentive, and enhancing skills in a trade are covered by other Bureau policies and regulations.

The commenters suggested possible ''incentives'' that are already part of other regulations which have other benefits for participation, such as the Bureau's Good Conduct Time regulations (28 CFR part 523), the Education regulations (28 CFR part 544), and Federal Prison Industries Inmate Work Programs (28 CFR part 345). Because we already provide these benefits in other regulations, we need not reiterate them or use them as incentives for drug abuse treatment.

Also, the commenters recommended that, if we were not going to provide the enhanced incentives they recommended, that the incentives proposed in the regulation should be eliminated. The commenters suggested that the incentives we proposed were essentially meaningless and did not provide real motivation to voluntarily participate in the program.

In anticipation of the incentives program, the Bureau conducted pilot programs to determine the usefulness of the enhanced incentives. As a follow up, we conducted focus groups of inmates at several institutions. The results of the pilot programs and the focus groups showed that the majority of inmates considered the enhanced incentives to be motivational. After internal deliberation, we have determined that the proposed incentives will encourage further inmate participation in the drug abuse treatment programs, contrary to the commenters' suggestions. We therefore retain the proposed new incentives in the final rule.

Further, these incentives work in tandem with new § 550.53(h)(1), which provides disincentives for non-completion. This section states that if

inmates refuse to participate in RDAP, withdraw, or are otherwise removed from RDAP, they are not eligible for furloughs (other than possibly an emergency furlough); performance pay above maintenance pay level, bonus pay, or vacation pay; and/or Federal Prison Industries work program assignments (unless the Warden makes an exception on the basis of work program labor needs).

Each of these three privileges are available for inmates to earn through various forms of good behavior, including participation in RDAP. It would be inconsistent to award an inmate a privilege in one area, such as a furlough, special pay, or special work assignment, if the inmate has demonstrated poor behavior in other areas, such as refusal, withdrawal, or removal from RDAP. The Bureau's furlough regulations state that an inmate is only eligible for a furlough if, among other things, the inmate ''has demonstrated sufficient responsibility to provide reasonable assurance that furlough requirements will be met'' (§ 570.34(d)). If an inmate refuses to participate in drug treatment, withdraws, or is removed from drug treatment, the inmate does not demonstrate the level of responsibility necessary to qualify for a furlough.

Additionally, the Bureau has similar disincentives in the literacy program: § 544.74 provides that inmates who do not participate as required in the literacy program may not earn incentive pay or receive special work assignments. Similarly, the disincentives provided in § 550.53(h)(1), work with the incentives described above to maximize encouragement of inmates to participate in drug abuse treatment as necessary.

The 2004 Proposed Rule

The 2004 proposed rule streamlined and clarified the regulations on the drug abuse treatment program, eliminating unnecessary text and obsolete language and removing internal agency procedures that need not be in rules text.

In this rule, we added escape and attempted escape to the list of reasons an inmate may be expelled from the Residential Drug Abuse Treatment Program (RDAP). We also clarified language describing ''withdrawal/expulsion'' by reorganizing and breaking block paragraphs into smaller subdivisions. Essentially, inmates will be removed from RDAP for the reasons given in § 550.53(g) because allowing the participation of inmates who commit serious prohibited acts involving the use of alcohol or drugs, violence or threats of violence, escape or attempted escape, or any of the highest severity (100-level series) prohibited acts, would undermine the spirit and intent of the Bureau's drug abuse treatment programs, minimize the seriousness of these offenses, and threaten the safety, security, and good order of the institution.

Further, the commission of these types of prohibited acts is a violation of the trust given to inmates who are admitted into RDAP. An inmate who is found to have committed any of these prohibited acts demonstrates a propensity to impede or disrupt not only his/her own progress in overcoming a drug abuse problem, but, potentially, the progress of other inmates who are making a true effort to succeed in the program. Providing such consequences for these types of prohibited acts would be greater disincentive to commit such acts.

Also in the 2004 proposed rule, we (1) deleted obsolete language, (2) added as ineligible for early release inmates with a prior felony or misdemeanor conviction for arson or kidnaping, and (3) clarified that inmates cannot earn an early release twice.

Title 18 U.S.C. 3621(e) provides the Director of the Bureau of Prisons the discretion to grant an early release of up to one year upon the successful completion of a residential drug abuse treatment program. The regulation [550.55(b)(4)(i)–(vii)] provides that an inmate who has a prior misdemeanor or felony conviction for homicide, forcible rape, robbery, aggravated assault, arson, kidnaping, or child sexual abuse will not be eligible for early release.

In exercising the Director's statutory discretion, we considered the crimes of homicide, forcible rape, robbery, aggravated assault, arson, and kidnaping, as identified in the FBI's Uniform Crime Reporting Program (UCR), which is a collective effort of city, county, state, tribal, and federal law enforcement agencies to present a nationwide view on crime. The definitions of these terms were developed for the National Incident-Based Reporting System and are identified in the UCR due to their inherently violent nature and particular dangerousness to the public.

The Director of the Bureau exercises discretion to deny early release eligibility to inmates who have a prior felony or misdemeanor conviction for these offenses because commission of such offenses rationally reflects the view that such inmates displayed readiness to endanger the public.

Likewise, we also deny early release eligibility to inmates who have a prior felony or misdemeanor conviction for an offense that involves sexual abuse committed against minors. Like the offenses identified in the UCR, sexual abuse offenses committed against minors exhibit a particular dangerousness to the public and often entail violent or threatening elements that resonate with victims and the community as a whole. Because of this, the Director has chosen to use his discretion to exclude offenders of these offenses from early release consideration.

The Director's rationale was mirrored by the enactment of the Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act). The Walsh Act specifically expanded the definition of ''sex offense'' to include ''a criminal offense that is a specified offense against a minor'' and to include all offenses by ''child predators.'' Public Law 109–248, section 111, 120 Stat. 587, 591–92 (2006). The Walsh Act also expanded the National Sex Offender Registry by integrating the information in state sex offender registry systems to ensure that law enforcement has access to the same information across the United States. Section 113, 120 Stat. at 593–94; *see also* 2006 U.S.C.C.A.N. S35, S36. This evidences the intent of Congress to encompass any offense relating to minors that involves sexual conduct, and to limit public exposure, including early release opportunities, to inmates found to have these types of offenses in their backgrounds. We therefore deny early release eligibility to such inmates in conformance with Congressional intent and recognition of the seriousness of such offenses.

Also, in the new rule, we added language to exempt from early release consideration inmates who previously earned early release under 18 U.S.C. 3621(e) for the following reasons: As we stated in the preamble to the 2004 rule, Congress created the early release incentive to motivate drug-addicted inmates to enter residential drug abuse treatment who would not do so without this incentive. However, in our discretion, it is not appropriate to provide this incentive for inmates who completed RDAP, gained early release, but failed to remain drug and crime free. To provide this incentive to the same inmate twice would be counter to our drug treatment philosophy that inmates must be held accountable for their actions when released to the community. Allowing inmates the opportunity to receive early release twice would undermine the seriousness of the inmate's offense, and essentially benefit recidivists.

It is arguable that recidivists have additional needs for drug abuse treatment programming. We therefore note that such inmates may still receive drug treatment, even if they have already been through the Bureau's programs and received early release. This provision does not prevent an inmate from receiving further treatment programming. It simply removes early release as an incentive for further treatment.

Comments on the 2004 Proposed Rule

Award time off up to a year. One commenter recommended that the Bureau should, instead of giving a year off, award time off up to a year based on the inmate's level of dedication to their sobriety, as determined by a council consisting of the local DAP Coordinator and specialists.

In fact, we award time off of ''up to'' a year, based on several factors, including the inmate's level of dedication to sobriety. Title 18 U.S.C. 3621(e)(2)(B) gives the Bureau the discretion to reduce the period of incarceration for an inmate who successfully completes the drug abuse treatment program, but ''such reduction may not be more than one year.'' In § 550.55(c), we have chosen to exercise this discretion by awarding early release based on successful completion of the program, the length of sentence imposed by the Court, and fulfillment of the inmate's community-based treatment obligations by the presumptive release date.

In § 550.55(c)(2), we add language explaining that, under the Director's discretion allowed by 18 U.S.C. 3621(e), we may limit early release based upon the length of sentence imposed by the Court. We add this provision to adhere to the Court's intent in determining the length of the sentence. An early release of a substantial period of time (e.g., twelve months) for relatively short sentences would diminish the seriousness of the offense and unduly undercut the sentencing court's punitive intent, as manifested in the length of the sentence imposed.

Also, as part of a general review undertaken to measure successful completion of the treatment program, the Bureau takes into consideration the inmate's ''level of dedication to their sobriety,'' and the determination of successful completion of the treatment program is made by the local DAP coordinator and other specialists, just as the commenter recommends.

Allowing all inmates to participate in drug treatment. The second commenter recommended that all inmates, not just those qualifying under our early release regulation, be allowed to participate in the drug abuse treatment program and be eligible for and receive a year off.

Title 18 U.S.C. 3621(e) only authorizes the Bureau to extend drug abuse treatment participation and eligibility for early release to inmates with ''a substance abuse problem,'' not to all inmates. Although, by statute, inmates without a substance abuse problem may not have the opportunity for early release consideration, § 550.52 allows all inmates to participate in non-residential drug abuse treatment services. In the new rule, we remove several pre-existing eligibility requirements for the program to make it more inclusive.

Early release eligibility of inmates convicted of an offense involving a firearm. The second commenter also recommended that § 550.55(b)(5)(ii) be altered so that inmates convicted of an offense that involved the carrying or possession (but not use) of a firearm or other dangerous weapon or explosives would be eligible for early release consideration. The commenter further recommended that § 550.55(b)(5)(iii) be deleted, granting eligibility for early release consideration to inmates convicted of an offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another.

Under 18 U.S.C. 3621(e), the Bureau has the discretion to determine eligibility for early release consideration (*See Lopez* v. *Davis,* 531 U.S. 230 (2001)). The Director of the Bureau exercises discretion to deny early release eligibility to inmates who have a felony conviction for the offenses listed in § 550.55(b)(5)(i)–(iv) because commission of such offenses illustrates a readiness to endanger the public. Denial of early release to all inmates convicted of these offenses rationally reflects the view that, in committing such offenses, these inmates displayed a readiness to endanger another's life.

The Director of the Bureau, in his discretion, chooses to preclude from early release consideration inmates convicted of offenses involving carrying, possession or use of a firearm and offenses that present a serious risk of physical force against person or property, as described in § 550.55(b)(5)(ii) and (iii). Further, in the correctional experience of the Bureau, the offense conduct of both armed offenders and certain recidivists suggests that they pose a particular risk to the public. There is a significant potential for violence from criminals who carry, possess or use firearms. As the Supreme Court noted in *Lopez* v. *Davis,* ''denial of early release to all inmates who possessed a firearm in connection with their current offense rationally reflects the view that such inmates displayed a readiness to endanger another's life.'' *Id.* at 240. The Bureau adopts this reasoning. The Bureau recognizes that there is a significant potential for violence from criminals who carry, possess or use firearms while engaged in felonious activity. Thus, in the interest of public safety, these inmates should not be released months in advance of completing their sentences.

It is important to note that these inmates are not precluded from participating in the drug abuse treatment program. However, these inmates are not eligible for early release consideration because the specified elements of these offenses pose a significant threat of dangerousness or violent behavior to the public. This threat presents a potential safety risk to the public if inmates who have demonstrated such behavior are released to the community prematurely. Also, early release would undermine the seriousness of these offenses as reflected by the length of the sentence which the court deemed appropriate to impose.

The 2006 proposed rule. The proposed rule published in 2006 modified § 550.55(a) from the 2004 proposed rule to state that inmates may be eligible for early release by a period not to exceed twelve months if they were sentenced to a term of imprisonment under either 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense, or D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those in D.C. Code § 23–1331(4). There was no further change to the provisions in the 2004 rule.

The National Capital Revitalization and Self-Government Improvement Act of 1997, approved August 5, 1997, (Pub. L. 105–33; 111 Stat. 740) (''Revitalization Act'') dictates that D.C. Code felony offenders ''shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.'' D.C. Code § 24–101(b). Therefore, as with federal offenders, it is also within the Director's discretion, as provided by 18 U.S.C. 3621(e), to determine D.C. Code felony offenders' eligibility for early release according to the same criteria used for federal offenders.

Comments on the 2006 Proposed Rule

We received three comments to the 2006 proposed rule. One was in support of the regulation. We address issues raised by the other two commenters below.

One commenter was concerned that there existed ''literal disparity between the regulation as proposed and the plain language'' of the D.C. Code, suggesting that § 550.55(a)(1)(ii) ''track the statutory language of D.C. Code section 24–403.01(d)(2) so as to prevent any current and more likely future conflict and confusion.''

Section 550.55(a)(1)(ii) states that inmates may be eligible for early release by a period not to exceed twelve months if they were sentenced to a term of imprisonment ''under D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those in D.C. Code § 23–1331(4).'' D.C. Code § 23–1331(4) begins with the phrase ''(4) The term 'crime of violence' means'' and then lists crimes that would constitute crimes of violence.

The Bureau's regulation language at § 550.55(a)(1)(ii) is ''offense other than those in D.C. Code § 23–1331(4).'' The commenter wishes us to change this to ''offense other than those included within the definition of 'crime of violence' in D.C. Code § 23–1331(4),'' to more closely track the language of D.C. Code § 24–403.01. We have changed this language accordingly.

The second commenter was concerned that ''[a]llowing the DC [sic] Superior Court inmates to get time off will only increase the number of serious attitude inmates in the program. These will be additional inmates who will not be expelled from the program for misconduct or lack of programming because it will mess up the statistics.''

While the Revitalization Act authorizes the Bureau to expand the early release option to include D.C. Code felony offenders in Bureau custody, eligibility for participation in the Bureau's drug abuse treatment programs remains the same. In other words, any inmate with a verified substance use disorder (§ 550.53(b)(1)) can be placed on the waiting list to receive drug treatment, but they will not receive early release unless they are eligible for that incentive. D.C. Code felony offenders are now eligible under the statute to receive early release for participation in drug treatment. Therefore, this regulation will result in D.C. Code felony offenders having a greater incentive for participation because of the new applicability of the early release option. For that reason, the number of D.C. Code felony offenders eligible for participation in the program may increase, but despite that, the Bureau does not anticipate significant change to any misconduct in the program or increase in other issues related to the program.

The Revitalization Act dictates that D.C. Code felony offenders ''shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed, and the Bureau of Prisons shall be responsible for the custody, care, subsistence, education, treatment and training of such persons.'' D.C. Code section 24–101(b).

D.C. Code § 24–403.01(d-1), amended on May 24, 2005, states that D.C. Code felony offenders sentenced under D.C. Code § 24–403.01 for a nonviolent offense are eligible for early release consideration in accordance with 18 U.S.C. 3621(e)(2). Accordingly, the Director now extends early release eligibility pursuant to 18 U.S.C. 3621(e)(2) to D.C. Code felony offenders for successful completion of the RDAP.

Second Chance Act Changes

The Second Chance Act of 2007, approved April 9, 2008, (Pub. L. 110–199; 122 Stat. 657) (''Second Chance Act''), section 231(a)(2)(A), states that, ''incentives for a prisoner who participates in reentry and skills development programs * * * may, at the discretion of the Director, include * * * the maximum allowable period in a community confinement facility.'' Further, section 251 of the Second Chance Act amends 18 U.S.C. 3624(c) to require that the Director must, ''to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed twelve months), under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community.''

The Second Chance Act, section 251, also amends 18 U.S.C. 3624(c)(6) to require the Bureau to issue regulations reflecting these provisions ''not later than 90 days after the date of the enactment of the Second Chance Act of 2007 * * *.'' In compliance with the Second Chance Act requirement regarding the timely issuance of revised regulations, we make the following two changes to the final regulation text. Both of these changes will be beneficial to inmates, as they will allow the Bureau to consider potentially longer periods of community confinement than previously contemplated by these regulations.

First, we remove a reference in § 550.53(h)(1)(ii) which stated that an inmate who is expelled from the RDAP, withdraws from the RDAP, or refuses to participate, is not eligible for ''[m]ore than 90 days community-based program placement.'' Because section 251 of the Second Chance Act contemplates a maximum allowable time of up to twelve months, we add a new provision (subparagraph (2)) which states that refusal, withdrawal, and/or expulsion will be a factor to consider in determining length of community confinement. This conforms with the Second Chance Act, section 231 (a)(2)(A). We also make a conforming change to remove § 550.51(e)(1)(iii), which lists ineligibility for ''community programs'' as a consequence of non-participation in the drug abuse treatment course. The possibility of community confinement is a strong motivation for inmates to participate in drug treatment programs, as emphasized by several inmate comments to the previous proposed rules. Conversely, having a limitation imposed on community confinement as a possible consequence would strongly deter inmates from negative behavior which could jeopardize the effectiveness of their drug treatment.

Second, we remove a parenthetical reference in § 550.54(a)(1)(ii) which states that the ''maximum period of time'' allowable ''in a community-based treatment program'' is 180 days. This reference also conflicted with section 251 of the Second Chance Act, as explained above.

Additionally, section 252 of the Second Chance Act amended 18 U.S.C. 3621(e)(5)(A) to describe residential drug abuse treatment as ''a course of individual and group activities and treatment, lasting at least 6 months * * *.'' Section 252 therefore authorizes the Bureau to offer a residential drug abuse treatment course lasting ''at least six months,'' but leaves it in the discretion of the Director whether to expand it beyond six months. We therefore alter § 550.53 (a)(1) to conform to the specific language of the Second Chance Act. That regulation will reflect that the unit-based component of the residential drug abuse treatment program should last for ''at least six months.''

Technical Change

We make one minor change to § 550.51, regarding drug abuse education course placement. In § 550.51(b)(3)(iii), we previously indicated that inmates may not be considered for course placement if they complete a structured drug abuse

treatment program at one of the Bureau's Intensive Confinement Centers (ICC). However, we published a final rule on July 11, 2008 (73 FR 39863) which removed Bureau rules on the intensive confinement center program (ICC). The ICC was a specialized program for non-violent offenders combining features of a military boot camp with traditional Bureau correctional values. Discontinuing this program was a decision made as part of an overall strategy to eliminate programs that do not reduce recidivism. Because the Bureau is no longer offering the ICC program (also known as Shock Incarceration or Boot Camp) to inmates as a program option, we remove it from the list of reasons that render inmates ineligible for the drug abuse treatment course.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review,'' section 1(b), Principles of Regulation. The Director, Bureau of Prisons has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

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 distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, this rule does not have sufficient federalism implications for which we would prepare a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation. By approving it, the Director certifies that it will not have a significant economic impact upon a substantial number of small entities because: This rule is about the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not cause State, local and 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. We do not need to take action under the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 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 competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects

28 CFR Part 545

Employment, Prisoners.

28 CFR Part 550

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

■ Under the rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we amend 28 CFR parts 545 and 550 as follows:

PART 545—WORK AND COMPENSATION

■ 1. The authority citation for 28 CFR part 545 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3013, 3571, 3572, 3621, 3622, 3624, 3663, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

■ 2. In § 545.25, revise paragraph (d) to read as follows:

§ 545.25 Eligibility for performance pay.

* * * * *

(d) An inmate who refuses participation, withdraws, is expelled, or otherwise fails attendance requirements of the drug abuse education course or the RDAP is subject to the limitations specified in § 550.51(e) or § 550.53(g) of this chapter.

* * * * *

PART 550—DRUG PROGRAMS

■ 3. The authority citation for part 550 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3521–3528, 3621, 3622, 3624, 4001, 4042, 4046, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 21 U.S.C. 848; 28 U.S.C. 509, 510; Title V, Pub. L. 91–452, 84 Stat. 933 (18 U.S.C. Chapter 223).

Subpart F—Drug Abuse Treatment Program

■ 4. Revise Subpart F to read as follows:

Sec.

§ 550.50 Purpose and scope.

The purpose of this subpart is to describe the Bureau's drug abuse treatment programs. All Bureau institutions have a drug abuse treatment specialist who, under the Drug Abuse Program Coordinator's supervision, provides drug abuse education and non-residential drug abuse treatment services to the inmate population. Institutions with residential drug abuse treatment programs (RDAP) should have additional drug abuse treatment specialists to provide treatment services in the RDAP unit.

§ 550.51 Drug abuse education course.

(a) *Purpose of the drug abuse education course.* All institutions provide a drug abuse education course to:

(1) Inform inmates of the consequences of drug/alcohol abuse and addiction; and

(2) Motivate inmates needing drug abuse treatment to apply for further drug abuse treatment, both while incarcerated and after release.

(b) *Course placement.* (1) Inmates will get primary consideration for course placement if they were sentenced or returned to custody as a violator after September 30, 1991, when unit and/or drug abuse treatment staff determine, through interviews and file review that:

(i) There is evidence that alcohol or other drug use contributed to the commission of the offense;

(ii) Alcohol or other drug use was a reason for violation either of supervised release (including parole) or Bureau community status;

(iii) There was a recommendation (or evaluation) for drug programming during incarceration by the sentencing judge; or

(iv) There is evidence of a history of alcohol or other drug use.

(2) Inmates may also be considered for course placement if they request to participate in the drug abuse education program but do not meet the criteria of paragraph (b)(1) of this section.

(3) Inmates may not be considered for course placement if they:

(i) Do not have enough time remaining to serve to complete the course; or

(ii) Volunteer for, enter or otherwise complete a RDAP.

(c) *Consent.* Inmates will only be admitted to the drug abuse education course if they agree to comply with all Bureau requirements for the program.

(d) *Completion.* To complete the drug abuse education course, inmates must attend and participate during course sessions and pass a final course exam. Inmates will ordinarily have at least three chances to pass the final course exam before they lose privileges or the effects of non-participation occur (see paragraph (e) of this section).

(e) *Effects of non-participation.* (1) If inmates considered for placement under paragraph (b)(1) of this section refuse participation, withdraw, are expelled, or otherwise fail to meet attendance and examination requirements, such inmates:

(i) Are not eligible for performance pay above maintenance pay level, or for bonus pay, or vacation pay; and

(ii) Are not eligible for a Federal Prison Industries work program assignment (unless the Warden makes an exception on the basis of work program labor needs).

(2) The Warden may make exceptions to the provisions of this section for good cause.

§ 550.52 Non-residential drug abuse treatment services.

All institutions must have non-residential drug abuse treatment services, provided through the institution's Psychology Services department. These services are available to inmates who voluntarily decide to participate.

§ 550.53 Residential Drug Abuse Treatment Program (RDAP).

(a) *RDAP.* To successfully complete the RDAP, inmates must complete each of the following components:

(1) *Unit-based component.* Inmates must complete a course of activities provided by drug abuse treatment specialists and the Drug Abuse Program Coordinator in a treatment unit set apart from the general prison population. This component must last at least six months.

(2) *Follow-up services.* If time allows between completion of the unit-based component of the RDAP and transfer to a community-based program, inmates must participate in the follow-up services to the unit-based component of the RDAP.

(3) *Transitional drug abuse treatment (TDAT) component.* Inmates who have completed the unit-based program and (when appropriate) the follow-up treatment and are transferred to community confinement must successfully complete community-based drug abuse treatment in a community-based program to have successfully completed RDAP. The Warden, on the basis of his or her discretion, may find an inmate ineligible for participation in a community-based program.

(b) *Admission criteria.* Inmates must meet all of the following criteria to be admitted into RDAP.

(1) Inmates must have a verifiable substance use disorder.

(2) Inmates must sign an agreement acknowledging program responsibility.

(3) When beginning the program, the inmate must be able to complete all three components described in paragraph (a) of this section.

(c) *Application to RDAP.* Inmates may apply for the RDAP by submitting requests to a staff member (ordinarily, a member of the unit team or the Drug Abuse Program Coordinator).

(d) *Referral to RDAP.* Inmates will be identified for referral and evaluation for RDAP by unit or drug treatment staff.

(e) *Placement in RDAP.* The Drug Abuse Program Coordinator decides whether to place inmates in RDAP based on the criteria set forth in paragraph (b) of this section.

(f) *Completing the unit-based component of RDAP.* To complete the unit-based component of RDAP, inmates must:

(1) Have satisfactory attendance and participation in all RDAP activities; and

(2) Pass each RDAP testing procedure. Ordinarily, we will allow inmates who fail any RDAP exam to retest one time.

(g) *Expulsion from RDAP.* (1) Inmates may be removed from the program by the Drug Abuse Program Coordinator because of disruptive behavior related to the program or unsatisfactory progress in treatment.

(2) Ordinarily, inmates must be given at least one formal warning before removal from RDAP. A formal warning is not necessary when the documented lack of compliance with program standards is of such magnitude that an inmate's continued presence would create an immediate and ongoing problem for staff and other inmates.

(3) Inmates will be removed from RDAP immediately if the Discipline Hearing Officer (DHO) finds that they have committed a prohibited act involving:

(i) Alcohol or drugs;

(ii) Violence or threats of violence;

(iii) Escape or attempted escape; or

(iv) Any 100-level series incident.

(4) We may return an inmate who withdraws or is removed from RDAP to his/her prior institution (if we had transferred the inmate specifically to participate in RDAP).

(h) *Effects of non-participation.* (1) If inmates refuse to participate in RDAP, withdraw, or are otherwise removed, they are not eligible for:

(i) A furlough (other than possibly an emergency furlough);

(ii) Performance pay above maintenance pay level, bonus pay, or vacation pay; and/or

(iii) A Federal Prison Industries work program assignment (unless the Warden makes an exception on the basis of work program labor needs).

(2) Refusal, withdrawal, and/or expulsion will be a factor to consider in determining length of community confinement.

(3) Where applicable, staff will notify the United States Parole Commission of inmates' needs for treatment and any failure to participate in the RDAP.

§ 550.54 Incentives for RDAP participation.

(a) An inmate may receive incentives for his or her satisfactory participation in the RDAP. Institutions may offer the basic incentives described in paragraph (a)(1) of this section. Bureau-authorized institutions may also offer enhanced incentives as described in paragraph (a)(2) of this section.

(1) *Basic incentives.* (i) Limited financial awards, based upon the inmate's achievement/completion of program phases.

(ii) Consideration for the maximum period of time in a community-based treatment program, if the inmate is otherwise eligible.

(iii) Local institution incentives such as preferred living quarters or special recognition privileges.

(iv) Early release, if eligible under § 550.55.

(2) *Enhanced incentives.* (i) Tangible achievement awards as permitted by the Warden and allowed by the regulations governing personal property (see 28 CFR part 553).

(ii) Photographs of treatment ceremonies may be sent to the inmate's family.

(iii) Formal consideration for a nearer release transfer for medium and low security inmates.

(b) An inmate must meet his/her financial program responsibility obligations (see 28 CFR part 545) and GED responsibilities (see 28 CFR part 544) before being able to receive an incentive for his/her RDAP participation.

(c) If an inmate withdraws from or is otherwise removed from RDAP, that inmate may lose incentives he/she previously achieved.

§ 550.55 Eligibility for early release.

(a) *Eligibility.* Inmates may be eligible for early release by a period not to exceed twelve months if they:

(1) Were sentenced to a term of imprisonment under either:

(i) 18 U.S.C. Chapter 227, Subchapter D for a nonviolent offense; or

(ii) D.C. Code § 24–403.01 for a nonviolent offense, meaning an offense other than those included within the definition of ''crime of violence'' in D.C. Code § 23–1331(4); and

(2) Successfully complete a RDAP, as described in § 550.53, during their current commitment.

(b) *Inmates not eligible for early release.* As an exercise of the Director's discretion, the following categories of inmates are not eligible for early release:

(1) Immigration and Customs Enforcement detainees;

(2) Pretrial inmates;

(3) Contractual boarders (for example, State or military inmates);

(4) Inmates who have a prior felony or misdemeanor conviction for:

(i) Homicide (including deaths caused by recklessness, but not including deaths caused by negligence or justifiable homicide);

(ii) Forcible rape;

(iii) Robbery;

(iv) Aggravated assault;

(v) Arson;

(vi) Kidnaping; or

(vii) An offense that by its nature or conduct involves sexual abuse offenses committed upon minors;

(5) Inmates who have a current felony conviction for:

(i) An offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another;

(ii) An offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device);

(iii) An offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; or

(iv) An offense that, by its nature or conduct, involves sexual abuse offenses committed upon minors;

(6) Inmates who have been convicted of an attempt, conspiracy, or other offense which involved an underlying offense listed in paragraph (b)(4) and/or (b)(5) of this section; or

(7) Inmates who previously received an early release under 18 U.S.C. 3621(e).

(c) *Early release time-frame.* (1) Inmates so approved may receive early release up to twelve months prior to the expiration of the term of incarceration, except as provided in paragraphs (c)(2) and (3) of this section.

(2) Under the Director's discretion allowed by 18 U.S.C. 3621(e), we may limit the time-frame of early release based upon the length of sentence imposed by the Court.

(3) If inmates cannot fulfill their community-based treatment obligations by the presumptive release date, we may adjust provisional release dates by the least amount of time necessary to allow inmates to fulfill their treatment obligations.

§ 550.56 Community Transitional Drug Abuse Treatment Program (TDAT).

(a) For inmates to successfully complete all components of RDAP, they must participate in TDAT in the community. If inmates refuse or fail to complete TDAT, they fail the RDAP and are disqualified for any additional incentives.

(b) Inmates with a documented drug abuse problem who did not choose to volunteer for RDAP may be required to participate in TDAT as a condition of participation in a community-based program, with the approval of the Transitional Drug Abuse Program Coordinator.

(c) Inmates who successfully complete RDAP and who participate in transitional treatment programming at an institution must participate in such programming for at least one hour per month.

§ 550.57 Inmate appeals.

Inmates may seek formal review of complaints regarding the operation of the drug abuse treatment program by using administrative remedy procedures in 28 CFR part 542.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1031; FRL–8754–7]

Approval and Promulgation of Air Quality Implementation Plans; Utah's Emission Inventory Reporting Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving State Implementation Plan (SIP) revisions submitted by the State of Utah on September 7, 1999, and December 1, 2003. The revisions add the requirements of EPA's Consolidated Emission Reporting Rule (CERR) to the State's SIP.

Utah has submitted four SIPs that relate to today's action on the CERR requirements. The State of Utah submitted a SIP revision on September 20, 1999, which did not make any substantive changes, but adopted a re-organization and renumbering of the air quality regulations. Although EPA is not acting on this particular submittal, EPA is approving and incorporating by reference rules using this new numbering scheme. Approving these rules rather than the earlier version will avoid confusion to the public and will obviate the need for future SIP revisions merely to renumber the SIP. In the remainder of this notice, we will refer to the rules by their current numbers, as reflected in the September 20, 1999 submittal, unless the context dictates otherwise.

EPA is acting on the submittal of September 7, 1999, which addresses inventory requirements for emissions from landfills. EPA is approving only the emission inventory requirement for larger landfills, located at Utah Rule R307–221–1 under the State's new numbering system. As emissions from these larger landfills may exceed the emission reporting thresholds addressed in the CERR, Utah must include this information in its emission inventory report to EPA. The remainder of the September 7, 1999 revisions do not affect the State's ability to comply with the CERR; therefore, EPA is not acting on them.

The Governor submitted additional revisions to their air quality emission inventory rules on October 23, 2000, which addressed inventory requirements for ammonia emissions. These revisions are contrary to the CERR issued on June 10, 2002 and,