

LAW AND PUBLIC SAFETY

NEW JERSEY RACING COMMISSION

Horse Racing

Out-of Competition Testing (on Non-Race days and on Race days Pre-Race) of Racehorses for Erythropoietin (Epogen, EPO), DarbEPO, or Other Blood Doping Agents; Penalties, Procedures and Testing Costs for Positive Test Results for Erythropoietin (Epogen, EPO), DarbEPO, or Other Blood Doping Agents, as a Result of Out-of-Competition Testing; Penalties, Procedures and Testing Costs for Positive Test Results for Erythropoietin (Epogen, EPO), DarbEPO, or Other Blood Doping Agents, as a Result of Post-Race Blood Sample Testing (on Race days) Conducted Pursuant to Other Provisions of this Chapter

Adopted Amendment: N.J.A.C. 13:70-14A.13

Proposed: 39 N.J.R. 2593

Adopted: September 17, 2007 by the New Jersey Racing Commission, Frank Zanzuccki, Executive Director

Filed: September 20, 2007 as R. 2007 d.329 without change.

Authority: N.J.S.A. 5:5-30

Effective Date: October 15, 2007

Expiration Date: June 17, 2010

Summary of Public Comments and Agency Responses:

COMMENT: On September 7, 2007, Michael D. Schottland, Esq., counsel to the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), filed comments (dated September 5, 2007) on behalf of the NJTHA. The NJTHA, although noting that it is against the use of Epogen or any of its

derivatives seeking to enhance the performance of thoroughbred race horses during the course of pari-mutuel races, opposes the proposed rule. The NJTHA opposes the rule on the following grounds: 1) it claims there is probably no lawful justification for the drawing of blood from a horse without probable cause or reasonable basis, and this gives rise to a search and seizure issue under current law; 2) the NJTHA claims that the imposition of a 120-day quarantine, following a positive test on a horse and the expense of having to demonstrate that the horse is free of Epogen before it can compete, is a major disability; and 3) the rule will act as a deterrent to the claiming of race horses; 4) the inability of the Racing Commission to develop a test to track Epogen the day of the race should not be the basis for an unwarranted expansion of foreign substance testing to non-race days. Mr. Schottland states that there should be a full public hearing held before the Commission regarding this rule proposal. Following the submission of these comments, on September 12, 2007, Mr. Schottland (on behalf of the NJTHA) submitted a letter indicating that the NJTHA withdraws its opposition to the rule proposal for purposes of two race dates (October 26 and 27, 2007) only, at Monmouth Park. In another letter, dated September 14, 2007, Mr. Schottland states that the NJTHA withdraws its opposition to the adoption of this rule and request for a

hearing for the remainder of this year's thoroughbred racing year. In this letter, Mr. Schottland also states that the NJTHA reserves its right to challenge the enforcement and administration of the rule as being in violation of the Administrative Procedure Act, the Open Public Meetings Act, and the substantive needs of the New Jersey thoroughbred racing industry. Mr. Schottland, in this September 14, 2007 letter, requests that the Racing Commission share with the NJTHA the results obtained from the testing conducted pursuant to this rule.

RESPONSE: Because the rule as proposed by the Racing Commission does not limit its applicability to October 26 and 27, or to the remainder of the 2007 thoroughbred racing season, and because the NJTHA appears to condition the withdrawal of its opposition to the proposed rule as advertised for public comment in the New Jersey Register on July 16, 2007, the Racing Commission has determined to respond to the comments as filed by the NJTHA.

The Racing Commission commends the NJTHA for opposing the use of Epogen and DarbEPO (hereinafter "Epogen") in New Jersey race horses.

The Commission, however, disagrees with the NJTHA's comments in opposition to the proposed rule. The Racing Commission believes that this rule is necessary to address the serious and present threat to the integrity

of racing presented by Epogen administrations. While the NJTHA comments that there is no lawful justification for the rule, the Racing Commission is a regulatory agency, empowered to issue licenses to participants in the industry and to farms where race horses are situated. Because the business of racing and the legalized gambling attendant thereupon are strongly affected by a public interest, the Legislature has granted the Commission broad regulatory authority to ensure that persons who may be in a position to interfere with the fair and proper conduct of racing are effectively policed and regulated. The administration of foreign substances to a horse to enhance its racing performance strikes at the heart of the public's confidence in horse racing. To protect the integrity of racing, the Racing Commission must strictly adhere to its regulatory duty to prohibit horses from being entered to race with a drug or foreign substance enhancing its race performance. To carry out this duty, the Racing Commission is statutorily authorized to promulgate regulations.

The Commission's regulatory authority to test race horses in order to detect the unauthorized administration of drugs or foreign substances is well-established, as is the Commission's authority to penalize licensees who fail to protect horses entrusted to their care from the administration of foreign substances. This authority to test, as well as the necessity of such

testing to protect the integrity of racing, the safety of the participants and the public's confidence in the sport, has been routinely recognized and upheld by this State's courts. This proposed rule, which authorizes the Racing Commission to additionally take blood samples for testing from race horses on non-race days and on race days pre-race, is entirely consistent with the Commission's regulatory purpose. It is a new rule directed toward addressing a new threat, which threat goes to the primary purpose of the legislature in creating the Racing Commission, to insure the continued integrity of racing and the safety of the race participants. The NJTHA cites no legal support for its claim that probable cause or reasonable suspicion is necessary to draw a blood sample from a race horse, and the Commission is aware of none. The Racing Commission's long established post-race testing program subjects every horse to potential testing without any such requirement, and neither the legislature nor the courts have required otherwise. The horse racing industry, with the wagering attendant thereto, is a highly regulated industry and the privilege of licensure carries with it the need to comply with regulatory criteria directed toward the industry's and public's well-being.

The NJTHA's comment, that the Racing Commission's inability to test for Epogen post-race pursuant to its traditional post-race testing protocol

should not serve as a basis for an unwarranted expansion of testing to non-race days, is factually incorrect. The Summary to the rule proposal clearly indicates that the Racing Commission has developed a direct testing strategy for Epogen. However, the Racing Commission believes Epogen administrations (dosing) are initiated during training, many weeks in advance of race day, in an attempt to improve the red cell condition of the horse for race day. Considering the fact that the half life of this drug in blood is extremely short, this administration approach renders any race day test for Epogen ineffective. This is why the international scientific community endorses the concept of out-of-competition testing for blood doping products. Also, the problem presented by this scenario is two-fold. First the performance enhancing effects of Epogen continue through race day, in that the drug impacts red blood cell production in the animal, which increases its ability to intake oxygen. Secondly, in that the Epogen administration alters the horse's physiological state, the negative impact to the animal continues. Accordingly, the Racing Commission believes that the proposed rule, through its absolute prohibition of such administrations to race horses at any time and at any location, coupled with the ability of the Racing Commission to sample racehorses for the presence of such substances close to the administration and when most likely detectable, is

necessary to capture and deter such administrations.

The NJTHA also comments in opposition to the 120-day ineligibility for a horse that tests positive under the rule, and to the requirement that the horse thereafter test negative for Epogen (or other blood doping agents) at cost to the owner or trainer. The Commission believes these provisions of the rule serve as a deterrent to unlawful administrations, insure that horses that test positive compete only when Epogen free, and appropriately allocate testing costs.

The NJTHA further comments that the rule will deter horse claims. However, individuals who consider whether to claim a horse presently evaluate many things in making a claim decision, including whether or not the horse has been administered foreign substances, some of which cannot yet be detected by the Commission. The Commission believes that its ability to now directly test for Epogen, coupled with the ability to sample racehorses at a meaningful point in time in advance of race day, will encourage race day claims. This is because potential claimant's will have more confidence that the horse has not been administered Epogen, which administration may not be detectable on the date of the claim (that is, race day).

In reply to Mr. Schottland's request for a hearing, as explained in the

reply to the comment immediately below, the Racing Commission sees no legal or reasonable factual basis that would warrant granting this request. As concerns the NJTHA's request that the Racing Commission provide it with any testing results obtained as a result of any testing conducted pursuant to the proposed rule, the Racing Commission will provide such information to the extent consistent with law.

COMMENT: Mr. Schottland, with the above-discussed comments filed on behalf of the NJTHA, included 50 letters in comment to the proposed rule. These letters, received by and filed with the Commission on September 7, 2007, are identical in their content. They express that the individual signors are not in favor of the use of Epogen and related substances. However, they oppose the proposed rule on various grounds. The letters indicate that the signatories "believe there are serious questions regarding expenses associated with the program, practice problems and concerns regarding the administration of the program and the threat to innocent trainers and others caused by such random use of the testing procedures." The letters further provide that issues are presented "regarding the costs associated with the program and the authority of the Commission to impose these costs on trainers or others." The letters further state "[w]e also have serious concerns about the chemistry which is at the bottom of the testing

program...”, and that “[u]nder the proposed program, an innocent trainer could very easily be subjected to severe penalties where circumstances beyond the trainers control may result in positive tests which are not involved on the race track or in racing.” In each letter, a “formal public hearing” is requested in order for the Commission to answer the questions raised and possibly to offer and consider alternatives to the proposed rule.

RESPONSE: Although the comments set forth in the described letters indicate concerns and questions may exist about the proposed rule, they offer no sufficient factual basis or specifics that support these questions or concerns. The Commission believes that the proposed rule addresses each of these areas sufficiently, and that these unidentified concerns set forth in the comments are unjustified.

While the occurrence of a positive test will result in testing-related costs to licensees as explained in the rule, the Commission’s inclusion of such in the rule is reasonable, and testing related costs have been imposed in the past. While the proposed rule includes provisions which will authorize the Racing Commission to take blood samples from racehorses at in-state farms subject to the Racing Commission’s jurisdiction, these provisions are entirely consistent with the Commission’s long-standing authority to appear upon and inspect any farm subject to its jurisdiction.

The Commission does not believe that the additional ability to obtain blood samples from a horse at premises subject to its jurisdiction, or requiring the production of a horse at a racetrack subject to its jurisdiction for sampling, is inconsistent with its broad regulatory authority or that it presents any threat to “innocent trainers”. Rather, the Commission believes that the proposed rule advances interests of “innocent trainers” as the implementation of the rule will insure Epogen-free race competitions, the rule will likely deter improper Epogen administrations, and because the rule will result in the imposition of serious, necessary and warranted sanctions on those determined to have violated it.

Despite presenting any factual support for the questions and concerns they reference, the commenters seek an extension of the opportunity to comment by specifically requesting a formal public hearing where their questions “could be answered and, perhaps, alternatives could be offered and considered by the Commission.” The Commission believes that the necessity for a public hearing is not evidenced through its review and assessment of the comments received. The public was afforded ample opportunity to present comments on the proposed rule, or to offer alternatives to the proposed rule, for appropriate consideration and response by the Racing Commission. While the described comments

indicate that concerns may exist, that questions may exist, and that alternatives to the proposed rule may exist, the choice to later disclose these matters at a public hearing for response by the Racing Commission, instead of sufficiently doing so within the written comment period applicable to this rule proposal, does not provide an adequate basis for the Commission's scheduling of a public hearing. Indeed, to grant such hearing based upon the mere suggestion of unsupported concerns or the unidentified alternatives in these comments, or in order to afford the commentors an additional opportunity to comment on the rule, when all commentors have already been given adequate opportunity to do so, would unnecessarily delay the implementation of a rule important to the integrity of racing and to the safety of the participants.

Any delay in the decision whether or not to adopt this rule is also unwarranted given the fact that the request for a public hearing was filed with the Commission outside of the time period established by statute. Pursuant to N.J.S.A. 52:14B-4(a)(3), the Commission must consider conducting a public hearing only if the request is made within 30 days following the publication of the proposed rule and the request shows sufficient public interest. Here, the commentators' request was filed with the Commission on September 7, 2007, which is 53 days after the

publication of this proposed rule in 39 N.J.R. 2593 on July 16, 2007. As set forth above, the comment period provided for this rule has given the public an adequate opportunity to comment. Moreover, a decision to grant this out-of-time request, which would unnecessarily delay the adoption of this much-needed rule, would negatively impact the integrity of racing in New Jersey and the safety of the participants. Finally, it is important to note, once again, that the letters submitted to the Commission in support of these hearing requests have not set forth an adequate showing of sufficient public interest in that they do not raise important issues that have not been anticipated by the Commission.

COMMENT: Comments were received from Ms. Barbara Sachau. Ms. Sachau appears to be in favor of the proposed rule and appears to believe that the rule should be more expansive. For example, she questions what is being tested for and whether the rule covers sponges in horses noses. Ms. Sachau comments that the Commission should test every race horse every day on a mandatory basis. She states that the penalties in the rule proposal should be higher, and that suspensions should be immediate. She questions why separate rules were proposed for thoroughbred and harness race horses (PRN2007-242).

RESPONSE: As noted in the proposed rule, it is aimed toward detecting

blood doping agents such as Erythropoietin (Epogen, EPO) and DarbEPO. The Commission believes that its present post-race testing protocol is sufficient to detect other prohibited foreign substances in the horse. The proposed rule does not encompass sponges in noses, unless such devices are used to administer the described agents to a horse. The proposed rule is directed to these specific prohibited substances because of the unique situation and challenge they present to the integrity of racing. The direct test for Epogen, administered on race day post-race, cannot normally capture the illicit use of blood doping agents due to the calculated method of administration being utilized by persons with knowledge of the drug. These individuals administer the drug well in advance of race day, so that the drug is not detectable post-race. Since Epogen has the impact of increasing the red blood cell production of the horse, thereby increasing the oxygen intake ability of the animal, the performance enhancing effect of the drug continues through race day notwithstanding the discontinuance of the drugs administration. The Racing Commission believes that the penalties set forth in the proposed rule are adequate to deter violations, and to sanction those determined to have violated the rule. In fact, the Commission believes that the implementation of the proposed rule, with its stringent penalties, will have a significant deterrent effect on the described

method of administration. The Commission therefore believes that the positive impact to racing, to the animal involved, and to the well-being of the race participants, will be immediate. It would not be practical, administratively or from a cost perspective, to sample horses every day on a mandatory basis as Ms. Sachau suggests. A substantially similar rule was proposed for harness racing because the Racing Commission has separate regulations for harness racing, which appear at Chapter 71 to the New Jersey Administrative Code.

Federal Standard Statement

A Federal standards analysis is not required because the rules of racing are dictated by State statute, N.J.S.A. 5:5-22, et seq., and the adopted amendment is not subject to any Federal requirements or standards.

The rule text of the adopted rule can be found in the New Jersey Register at 39 N.J.R. 2593.