

NEW JERSEY RACING COMMISSION

Horse Racing

Post-Race Blood Gas Testing Program; Pre-Race Guarded Quarantine; Punishment for Failure to Cooperate

Adopted Amendment: N.J.A.C. 13:70-14A.14, 14, 14A.15 and 14A.6

Proposed: July 16, 2007 at 39 N.J.R. 2596 (a)

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

Filed: September 20, 2007 as R. 2007 d.330, 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: Barbara Sachau of New Jersey opposes the proposed new rule questioning the integrity of the instrument used for testing, and the process for identifying the horse that is being tested, she further stated that a trainer with two offenses should be suspended and fined and that the rules should have been implemented ten years ago.

Response: The Racing Commission disagrees with Ms. Sachua's comments concerning the proposed new rules. Testing is conducted at the State Police Office of Forensic- Sciences Equine Testing Laboratory, a secure, state of the art facility. Horses selected for testing are identified by lip tattoo and other

identifying procedures before samples are collected and documented for testing. Strict chain of custody procedures are implemented in all aspects of sample collection for drug testing. The penalties are defined on the proposed new rules for second time offenses. Milkshakes were not a regulatory problem 10 years ago.

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 opposes the Blood Gas Testing rule for the following reasons:

- 1) There is no need for testing;
- 2) There is no indication that the use of the bicarbonate milkshaking techniques has a positive effect on the performance of thoroughbred race horses;
- 3) As a condition precedent to the expansion of this type of additional burden on the process, the Commission must be persuaded by competent professional opinions that milkshaking through the overuse of bicarbonate mixtures does actually have an effect on racehorses;
- 4) The fact that some ignorant trainers have attempted to obtain an advantage and may even have injured and/or destroyed valuable racehorses in the process, is no justification for the proposed instigation of the rule;
- 5) The administration of this rule in the standardbred industry has proved to be very difficult and, at best, produced minimal results at a very high cost, meaning that the NJTHA is aware of the difficulties with the quarantine program and they also state that there is no proper baseline established under the testing

procedure; 6) The NJTHA states that the Commission should require proof that it has proper statistical data regarding thoroughbred race horses for a spread sheet which shows what average tco2 levels are after various distance races so as to provide a valid threshold for imposition of sanctions. Mr. Schottland states that the legislature should be required to specifically authorize the expenditures associated with this rule as no such authorization currently exists. Mr. Schottland also stated that there should be a full 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 NJ THA 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 NJ THA 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 NJ THA the results obtained from the testing conducted pursuant to this rule.

As concerns the NJ THA'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 the law.

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 NJ THA 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 Commission disagrees with the NJTHA'S comments concerning the proposed rule. The commission has noted that the promulgation of blood gas testing in thoroughbreds has already been implemented in many racing jurisdictions in North America. This fact supports the contention that milkshakes are used with the intention of delaying the onset of fatigue during racing. Also, as stated in the Summary of the proposal, the Commission is interested in protecting the health and well being of the horse from the dangers of such practices as tubing on race day and the negative interaction these substances have when co-administered with Lasix. The NJTHA's statement that the standardbred industry program has also proved costly with minimal results is factually incorrect. First, the Commission's harness program has produced meaningful results for the regulation of milkshaking in harness racing. Its proficient strategy has deterred the abuse of milkshakes and returned the

harness population back to the blood gas levels expected from normal horses. Secondly, the thoroughbred proposal is not requesting any additional funding for laboratory equipment or personnel to implement the program. The NJTHA's statement that there are problems with the quarantine program and that no proper baseline (normal level) is established under the harness rule is also factually incorrect. There is an abundance of published research that supports the scientific methodology and population statistics used to establish the threshold levels in the rule. Lastly, the Commission's program has been totally upheld in New Jersey courts. Population data used to establish blood gas levels for thoroughbreds has already been accepted world-wide. Other racing regulators (Australia, Hong-Kong, Canada, U.S.) have determined that population data on thoroughbred horses are not any different than standardbred horses.

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 proposed rule. The letters indicate the signors believe there are many questions regarding the need for the program, and the methodology being employed and whether there are less onerous alternatives available so as to establish a baseline for each thoroughbred at a meet which will be used as a standard. The letters question whether the Commission has the authority to impose the cost

associated with this program on the horsemen. In each letter a “formal public hearing” is requested for the purpose of answering the questions raised and possibly to offer and consider alternatives to the proposed rule.

Response: The Commission disagrees with the signors not in favor of the proposed rule. The testing of thoroughbreds for the purpose of regulating alkalizing agents (milkshakes) is fully endorsed by the Racing Medication and Testing Consortium (RMTC), a major racing organization whose members are representative of thoroughbred industry stakeholders. The Commission’s proposed rule encompasses RMTC recommendations for milkshake testing of thoroughbreds. The scientific methodology has already been deployed in New Jersey for 10 years and is fully endorsed by that organization. Normal population statistics associated with blood gas levels in thoroughbred race horses have been accurately determined and well documented.

Despite presenting any factual support for the questions and concerns they reference; the commentors 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 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 commentators an additional opportunity to comment on the rule, when all commentators 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. 2596(a) 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 Jersey and the safety of the participants. Finally, it is important to note, once again, that the letter 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 been anticipated by the Commission.

Comment: On September 13, 2007, Tom Luchento SBOA President filed comments on behalf of the SBOA. Mr. Luchento stated that testing standardbred and not thoroughbreds is unfair and that the playing field be leveled with either testing for both breeds or no testing at all. Mr. Luchento further stated that the penalty for an excessive high reading seems out of balance for the infraction.

Response: The Commission agrees that testing should be conducted for both standardbred and thoroughbred race horses. The standardbred program has been in existence in New Jersey for ten years, and the program has been upheld in the New Jersey Courts. The SBOA had an opportunity when the standardbred rule proposal was introduced to file any objections concerning the language or penalty phase of the regulation.

It should be understood that all Commissions in North American racing were

receiving information from the Racing Industry that milkshaking was abused in harness racing only. This was evident considering the fact that there is a significant difference between the exercise duration among both breeds.

Milkshakes benefitted horses racing closer to 2 minutes. Most thoroughbred races don't last more than a minute and half (1.30s). This preempted milkshakes from buffering blood in thoroughbreds

Federal Standards 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 proposed 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. 2596 (a).