

not to do so, is best placed in the discretion of the Executive Director, who has the most objective perspective. In making this decision, the Executive Director has the ability to consult with Commission staff, including its veterinarians, members of the industry, regulatory bodies from neighboring jurisdictions, and any other relevant experts.

COMMENT: Mr. Drazin suggests "adding additional criteria to assist the Executive Director in arriving at a decision" and that the Commission should "publish exactly what the criteria is to be utilized and considered" when making the final determination to postpone or cancel races.

RESPONSE: The Commission believes that a decision to postpone or cancel racing is fact-specific and must be conformed to the circumstances presented. To the extent the Commission considers, or follows, weather-related protocols, the protocols will be made available to the permit holders upon the Commission's determination to utilize them.

COMMENT: Mr. Drazin suggests that "there should be specific guidelines as to when the decision will be made and how often the decision will be made." He suggests that "if we are expecting extreme temperatures . . . a meeting [should] be held the day before the race date."

RESPONSE: Any decision to cancel or postpone races will be made with as much notice as possible. Due to the unpredictable nature of weather and the unreliability of advanced weather forecasting, each determination must be made on a case-by-case basis. However, in the event of an expected extreme weather condition, the Commission may, depending upon the circumstances, consult with the permit holder several days prior to the scheduled races, to learn the permit holder's decision regarding whether it plans to move forward with live racing, postpone, or cancel. Should circumstances warrant it, this consultation may continue as the Commission monitors the weather forecast while obtaining input from the permit holder, Commission staff, members of the industry, and the regulatory bodies of neighboring racing jurisdictions if similar weather forecasts impact them.

COMMENT: Mr. Drazin states that there should be a "guideline for what time the heat index will be measured" because "the heat may not be extreme at 9:00 or 10:00 in the morning, but may spike upwards at noon."

RESPONSE: The Commission may, depending on the circumstances, consider the predicted heat indices for race day with a focus on the actual or predicted heat indices for the hours during which live racing is scheduled.

COMMENT: Mr. Drazin asks whether "there will be additional decisions made as the day goes on to measure the heat or will racing just be cancelled for the day?"

RESPONSE: The decision whether to postpone or cancel racing is fact-specific according to the circumstances presented. Depending upon the circumstances, if extreme weather conditions are forecast to be present for an extended number of days, racing may be cancelled in advance of race day should the permit holder decide not to cancel or postpone racing. If extreme weather conditions are forecast to change throughout a scheduled race day, the Commission may decide to postpone certain races to see if the racing conditions improve later in the day. Should it be warranted by circumstance, the Commission may determine that races can safely be resumed if they were postponed due to the presence of dangerous weather conditions. If the Commission permits the resumption of racing, the permit holder may seek Commission approval to run only select races from the race program.

COMMENT: Mr. Drazin asks if racing can "be moved to 6:00 PM if it is too hot at noon?"

RESPONSE: The permit holder may seek Commission approval to postpone scheduled races until later in the day to see if the weather conditions improve to the extent that it no longer poses a serious risk to the health, safety, and welfare of the equine and human race participants.

COMMENT: Mr. Drazin inquires as to whether the "Executive Director [will be] required to be on-site during these potentially cancellable events" and notes that the "heat temperature at Monmouth Park may be different than it is in Trenton or elsewhere."

RESPONSE: Any determination to cancel or postpone races will be made based upon the weather conditions forecast for, and present at, the racetrack. The rule does not require the presence of the Executive Director at the racetrack. However, the Executive Director may choose to be present and/or may consult with the permit holder and with persons and staff present at the track.

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## NEW JERSEY RACING COMMISSION

### Horse Racing

### Cancellation of Racing to Protect the Health, Safety, and Welfare of Racing Participants

#### Adopted New Rule: N.J.A.C. 13:70-1.43

Proposed: December 2, 2019, at 51 N.J.R. 1745(a).

Adopted: September 16, 2020, by the New Jersey Racing Commission, Judith A. Nason, Executive Director.

Filed: September 28, 2020, as R.2020 d.111, without change.

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

Effective Date: October 19, 2020.

Expiration Date: August 28, 2024.

#### Summary of Public Comment and Agency Response:

The official comment period ended on January 31, 2020. The following is a summary of the comments received and the response of the New Jersey Racing Commission (Commission). The Commission received comments from two persons in response to the notice of proposal:

Dennis A. Drazin, Chairman and CEO of Darby Development, LLC, and

Karen De Russo, a member of the public.

COMMENT: Mr. Drazin stated that for the thoroughbred permit holder and race operators, the "foremost concern is for safety." He asks the Commission to "place the decision making for the safety of the equine industry in the hands of the Chief State Veterinarian" because the "Chief State Veterinarian has far more extensive experience and a professional license as well as significant background in assessing these conditions . . . , [more] than anyone else who could ultimately make the call to cancel." Mr. Drazin states that in the past, "the Chief State Veterinarian has always been the main individual who has guided the industry in determining whether to cancel racing because of the inclement heat or other conditions." Mr. Drazin further states that "it is unknown what experience subsequent Executive Directors may possess" and that he believes that the "Chief State Veterinarian should guide these decisions if the Commission wishes to eliminate the permit holder's final decision-making authority."

RESPONSE: The new rule, which allows the permit holder to make the initial decision whether to conduct races, will not disrupt the permit holder's current procedures when determining whether to cancel racing for weather-related reasons. The Commission believes that the decision to cancel or postpone racing, in the event that the permit holder has chosen

COMMENT: Mr. Drazin inquires whether the Executive Director will be on site when determining whether to cancel or postpone racing for other weather conditions such as ice or heavy rain. He states that "cancellation of turf racing usually occurs when there are heavy rains and the jockeys complain about the condition of the turf." He writes that he "understands that the Commission agrees that the permit holder makes the initial decision [regarding whether to cancel or postpone]," and then describes the Executive Director as having "veto power or a final say." Mr. Drazin explains that in order to make a determination on whether to cancel or postpone races on the turf due to rain, "the Executive Director would have to walk the turf course to make an assessment." Mr. Drazin suggests that "the Chief State Veterinarian or the head veterinarian on-site during these extreme conditions be designated as the decision maker, as in fact, these decisions will be taken out of the hands of the permit holder with respect to the final say."

RESPONSE: The rule grants the authority to postpone or cancel racing due to weather conditions to the Executive Director. The rule does not require the Executive Director to be present at the racetrack. However, the Executive Director may be present and/or consult with persons or staff who are present.

COMMENT: Mr. Drazin states that "there should be precise criteria in place so that a permit holder can anticipate the actions of the Commission."

RESPONSE: As discussed in the responses to prior comments, the decision whether to postpone or cancel racing is fact-specific according to the circumstances presented.

COMMENT: Mr. Drazin suggests that the Commission "consider whether this ... rule will result in potential liability and exposure to damages being claimed against the [Commission], its Executive Director, or the State of New Jersey for either making or failing to make a decision." He informs the Commission that "the track is usually sued as well as the trainer or any other party that may be involved" when a horse breaks down on the turf course and the decision maker "failed to take the races off the turf." Mr. Drazin states that this rule "will create potential liability claims."

RESPONSE: The Commission believes that the rule is necessary to ensure the health, safety, and welfare of the race participants by postponing or cancelling racing in the event that weather conditions pose an imminent risk.

COMMENT: Mr. Drazin suggests that "we are living in a time of reaction or over-reacting to other track safety concerns" because "horses race in extreme hot weather conditions in other parts of the country on a regular basis." Mr. Drazin agrees that "it is important for the Commission to protect the safety of racing participants, the integrity of the sport, and the trust of the wagering public," but he does not believe "there should be an overreaction to these outside influences."

RESPONSE: The Commission believes the welfare of human and equine race participants is a paramount concern and has adopted this rule to ensure their safety. The Commission believes that the authority to cancel or postpone races should be placed with the Executive Director, in the event that a permit holder determines to proceed with live racing under conditions when safety is in question.

COMMENT: Mr. Drazin suggests that "the Commission ... provide criteria which would be utilized to cancel races in cold conditions" because thoroughbreds "race at night at the Meadowlands." Mr. Drazin points out that "NYRA has recently published its policy regarding cold weather."

RESPONSE: As discussed in the responses to other comments, the decision whether to postpone or cancel racing is fact-specific according to the circumstances presented.

COMMENT: Ms. De Russo states that she is in support of the notice of proposal and applauds the rule changes and believes such changes are overdue. Ms. De Russo states that "if NJ is to grow its racing industry it must appeal to the general public. Most people do not want to watch these beautiful creatures treated inhumanely." She also states that the next rule change "is to ensure the owners have a responsibility to the horses that are no longer racing."

RESPONSE: The Commission thanks the commenter for her support and agrees the new rule promotes equine health and welfare. The

Commission notes that the commenter's statement regarding retired racehorses is outside the scope of the notice of proposal.

#### Federal Standards Statement

A Federal standards analysis is not required as there are no Federal standards or requirements applicable to the adopted new rule.

Full text of the adopted new rules follows:

#### SUBCHAPTER 1. GENERAL RULES

##### 13:70-1.43 Cancellation of racing to protect the health, safety, and welfare of racing participants

In the event a permit holder decides to proceed with the conduct of races, the Executive Director shall have the authority to order the postponement or cancellation of racing for any reason determined to pose a serious risk to the health, safety, and welfare of the equine and human race participants, including, but not limited to, extreme weather conditions, such as high heat and humidity.