

**STATEMENT OF CONSIDERATION RELATING TO
810 KAR 1:110E, 810 KAR 1:110, 811 KAR 1:240E,
811 KAR 1:240, 811 KAR 2:150E, 811 KAR 2:150
PUBLIC PROTECTION CABINET
KENTUCKY HORSE RACING COMMISSION**

**810 KAR 1:110E and 810 KAR 1:110 Amended After Comments.
811 KAR 1:240E and 811 KAR 1:240 Amended After Comments.
811 KAR 2:150E and 811 KAR 2:150 Amended After Comments.**

I. A public hearing on new administrative regulations: 810 KAR 1:110E, 810 KAR 1:110, 811 KAR 1:240E, 811 KAR 1:240, 811 KAR 2:150E, 811 KAR 2:150 (the "Proposed Regulations") was held on October 28, 2010 at 10:00 a.m. at the offices of the Kentucky Horse Racing Commission, 4063 Ironworks Parkway, Building B, Lexington, Kentucky 40511

II. The following individual submitted written comments:

Name	Association
Douglas L. McSwain	Sturgill, Turner, Barker & Maloney, PLLC

III. The following individuals from the Kentucky Horse Racing Commission ("KHRC") attended the hearing:

Name	Title
Timothy A. West	Assistant General Counsel

IV. Summary of Comments and Responses

(1) Subject Matter: The Proposed Regulations exceed the scope of the authority granted to the KHRC.

Commenter: Douglas L. McSwain

(a) Comment: The Proposed Regulations exceed the authority of the enabling legislation in that they purport to regulate activity beyond racing and outside the state's

borders. It authorizes testing of any horse, even one that might not ever race, so long as the horse is deemed "eligible to race." The problem, however, is that there is no mechanism to know which horses may be "eligible to race."

(b) Response: KRS 230.215(2) vests the KHRC with "forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth ... to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices..." KRS 230.225(1) states that, "[T]he Kentucky Horse Racing Commission is created as an independent agency of state government to regulate the conduct of horse racing and pari-mutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky." In order to fulfill the statutory mandate established by these statutes, the KHRC must regulate and prevent the administration of any prohibited, performance-enhancing substances to horses competing in horse races in the Commonwealth. As both the KHRC and numerous other racing jurisdictions have realized, because of the nature of many of the prohibited, performance-enhancing substances, effective regulation necessarily involves both pre- and post-race drug testing.

Toward that end, the KHRC has included consent language in the application completed by each person who receives a license from the KHRC. It states:

I acknowledge that the KHRC has the right to search any location described in KRS 230.260(7) and may seize any medication, drug, substance, paraphernalia, object, or device in violation or suspected violation of KRS Chapter 230 or KAR Title 810 or 811. I agree to cooperate with the KHRC during any such investigation and respond correctly to the best of my knowledge if questioned by the KHRC about a racing matter. ... I agree to "out of competition" drug testing on all race horses which I own or train in conformity with KAR Title 810 or 811.

The Proposed Regulations create a regulatory framework to conduct the out of competition drug testing referenced in the license application.

Section 3(1) allows the KHRC to sample and test any horse that is eligible to race in Kentucky and states a horse is "eligible to race in Kentucky" if:

- (a) It is under the care, custody or control of a trainer licensed by the commission; or
- (b) It is owned by an owner licensed by the commission; or
- (c) It is nominated to a race at an association licensed pursuant to KRS 230.300; or
- (d) It has raced at an association licensed pursuant to KRS 230.300 within the previous twelve (12) calendar months; or
- (e) It is stabled on the grounds of an association licensed pursuant to KRS 230.300 or a training facility subject to the jurisdiction of the commission; or
- (f) It is nominated to participate in the Kentucky Thoroughbred Development Fund.

Section 3(1) clearly identifies the criteria that define what it means to be eligible to race in Kentucky for the purpose of out of competition testing. Because each of the criteria demonstrates an intent to participate in horse racing in Kentucky, Section 3(1) seeks to regulate "the conduct of horse racing and pari-mutuel wagering on horse racing, and related activities," and does not exceed the scope of the enabling statutes.

The Proposed Regulations allow the KHRC to test out of competition for blood doping agents, natural and synthetic venoms and their derivatives, and growth hormones. Each of these substances presents a practical difficulty when it comes to drug testing. Although they have the ability to impact a horse's performance for weeks, if not months, after administration, they can only be detected in the horse's system for a very short time, sometimes as little as 24-48 hours. Therefore, in order for the Proposed Regulations to be effective, the KHRC must have the ability to collect samples very close to the time when the prohibited substances are likely to have been administered. Often times, this will be weeks or months in advance of a horse being nominated to or entered in a particular race. Because nominations usually close just a couple of weeks out from the date of the race, and entries usually close just a couple of days out from the date of the race, the KHRC cannot be limited to only collecting samples after horses are nominated to or entered in a race. Any such limitation would create a loophole that would render the Proposed Regulations almost completely meaningless.

Furthermore, it is very common for horses to ship in from out of state to compete in races in the Commonwealth. Often times, the horses will ship in immediately before the race. If the KHRC is limited to collecting samples from horses located in Kentucky, an owner or trainer can administer a prohibited substance to a horse and evade detection simply by keeping the horse out of state until it is certain to test "clean." Again, any such limitation would create a loophole that would render the Proposed Regulations almost completely meaningless.

Section 3(1) of the Proposed Regulations conforms with the scope of the KHRC's authority, as stated by the Kentucky Attorney General in OAG 10-009. In response to the question of "whether the KHRC is authorized to conduct reasonable warrantless administrative searches and seizures of the properties of its licensees on association grounds for any items that are relevant to its investigations," the Attorney General stated that:

- (1) The KHRC may make a reasonable warrantless administrative search of any property of its licensees that is on association grounds, including vehicles, with the exception of private dwelling areas.
- (2) The KHRC may make a reasonable warrantless administrative search of the property of its licensees for any items deemed relevant to a potential violation of a KHRC regulation, including but not limited to drugs, syringes, and related items.

- (3) The clause in the KHRC license application consenting to reasonable warrantless administrative search for items relevant to a KHRC investigation is valid, except as it is interpreted to apply to private dwelling areas.

Because the Proposed Regulations do not allow the KHRC access to “private dwelling areas,” they do not exceed the scope of the KHRC’s statutory authority.

Section 3(2) of the Proposed Regulations allows the KHRC to test any horse that “may become eligible to race in Kentucky.” Although Section 3(1) does not exceed the scope of the KHRC’s authority, Section 3(2) could be implemented in such a way that it would. Because this subsection does not include any criteria which define what “may become eligible to race in Kentucky” means, it could be applied in such a way as to include any horse, anywhere, even if there is no objective evidence which suggests an intent to participate in horse racing in Kentucky. Because Section 3(2) could be applied in a manner that exceeds to scope of the KHRC’s statutory authority, it has been removed from the Proposed Regulations.

(2) Subject Matter: The Proposed Regulations allow for unconstitutional searches and seizures.

Commenter: Douglas L. McSwain

(a) Comment: The Fourth Amendment to the U.S. Constitution protects individuals’ residential, personal and commercial property from “unreasonable” searches and seizures by government agencies, including warrantless searches or seizures of personal property. The Proposed Regulations allow for warrantless searches of residential, personal and commercial property and thus violates these constitutional protections.

(b) Response: The Proposed Regulations do not violate the “reasonableness” requirements of the state and federal constitutions.

As stated above, licensees consent to out of competition testing when they apply for and receive a license to participate in horse racing in the Commonwealth. This consent eliminates the need for a warrant and renders the search reasonable.

Furthermore, in *New York v. Burger*, 482 U.S. 691 (1987), the Supreme Court articulated an exception to the warrant requirement for administrative searches of commercial property in closely regulation industries. The Supreme Court stated that a warrantless administrative search of commercial property may be reasonable within the meaning of the Fourth Amendment if:

1. There is a substantial government interest informing the regulatory scheme pursuant to which the search is made;
2. A warrantless search is necessary to further the regulatory scheme; and

3. The inspection program must provide a "constitutionally adequate substitute for a warrant.

Id., at 702. The Court interpreted the third prong of the test to mean that the regulatory scheme must, (1) inform the owner of the property that the search is being made pursuant to law and (2) properly limit the discretion of the searching officials. *Id.*, at 703.

Horse racing is certainly a closely regulated industry and there is a substantial government interest in preventing the use of prohibited, performance-enhancing substances in horse racing. The Proposed Regulations further that interest. Furthermore, there can be no dispute that the Proposed Regulations themselves inform the property owner (licensee) that the out of competition drug testing is being done pursuant to law. Finally, the Proposed Regulations properly limit the discretion of the KHRC in that:

- When the horse is located anywhere other than a licensed race track or training facility under the jurisdiction of the KHRC, the KHRC can only collect a sample between 7:00 and 6:00 p.m. (Restriction on time);
- The KHRC can only sample a horse at an agreed-upon stall or other safe location. (Restriction on place);
- The KHRC can only test horses eligible to race in Kentucky and can only look for the substances prohibited by the proposed regulation. (Restriction on scope)

These limitations provide ample protection to licensees that will prevent the KHRC from conducting unreasonable searches.

With respect searches of personal property (i.e., horses), in the ordinary case, such searches are unreasonable within the meaning of the 4th Amendment without more, unless . . . accomplished pursuant to a judicial warrant." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). However, the United States Supreme Court went on to state in that same opinion that, "[W]e nonetheless have made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Id.*

In *Schmerber v. California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court held that a warrantless blood test for alcohol was reasonable where a delay would have led to loss of evidence. The *Schmerber* case presents a similar problem to the one facing the KHRC with respect to out of competition testing. In *Schmerber*, the Supreme Court recognized that a delay in collecting a blood sample would result in the loss of evidence as alcohol was metabolized by the body. As such, blood had to be drawn immediately to preserve

evidence of intoxication. For out of competition testing, samples must be collected from horses very soon after a prohibited substance is likely to have been administered or else that evidence will be lost as the horse metabolizes the substance. In *McArthur, supra*, the Supreme Court stated that, "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *McArthur*, 531 U.S. at 326. See also, *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (determining lawfulness by balancing privacy and law enforcement interests); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (same).

In considering the Proposed Regulations, a balancing of the factors mitigates in favor of a finding that the intrusion – testing for illegal substances in a race horse – is reasonable. The prohibited substances identified in the Proposed Regulations have the potential to impact a horse's performance for weeks, if not months, after administration. However, those substances can only be detected in the horses system for a very short time after administration. If required to obtain a warrant, the KHRC would have virtually no chance of detecting any of the prohibited substances and the Proposed Regulations would be rendered virtually meaningless.

(3) Subject Matter: The Proposed regulation includes an excessive sanction.

Commenter: Douglas L. McSwain

(a) Comment: The sanctions (penalties) levied by the Proposed Regulations are excessive. Their severity could amount to a "death sentence" from racing.

(b) Response: Because of the difficulties in conducting out of competition testing, as articulated above, the penalty contained in the Proposed Regulations is meant to both punish violations and, just as importantly, deter the prohibited conduct. In order to be an effective deterrent, the penalty must be severe. That being said, the Proposed Regulations are in line with other jurisdictions that have out of competition testing rules and, if anything, are less severe. Indiana, New Jersey, Delaware and Ontario all impose flat 10-year license suspensions for first-time offenses. New York has proposed a rule in which a first-time violation simply results in an unlimited license revocation.

The Proposed Regulations, on the other hand, call for a license revocation of 5-10 years for a first offense and allow for the consideration of mitigating circumstances in imposing the appropriate penalty. While it is certainly a severe sanction, it is justified by the difficulties in detecting violations and the impact of the prohibited conduct on the integrity of horse racing.

(4) Subject Matter: The KHRC only way that the KHRC can constitutionally implement an out of competition testing rule is to implement a "consent" regime.

Commenter: Douglas L. McSwain

(a) **Comment:** The only way an OCT rule can be implemented constitutionally so as to reach as many horses as possible within the Commonwealth is to employ a “consent” regime whereby the KHRC designates the horse (assuming it has never raced), and the horseman has the opportunity to agree to such OCT testing, or by saying no to such testing, renders his/her horse automatically ineligible to race (by taking the horseman/woman at his/her word that it is not intended to race) for a period of time sufficient to clear any potentially administered doping substances from the horse’s body. In the case of blood doping, that period is satisfied by a 180-day waiting period before becoming eligible to enter a race. If the horseman/woman doesn’t know whether a horse designated at his/her private farm by the KHRC for OCT testing is ever going to be raced, then s/he may simply “consent” to the testing, and forgo any ineligibility of the horse.

(b) **Response:** The KHRC considered and rejected the “consent” regime because it undermines the deterrent purpose of the regulation and allows an owner or trainer an “out” if they are at risk of getting caught. If an owner or trainer is administering any of the prohibited substances to one of his or her horses, and that horse is designated for testing, the owner or trainer will *always* sacrifice the horse’s eligibility, rather than face a possible lengthy revocation of his or her license. In this scenario, while the horse would be prevented from competing for a specified time period, the owner and/or trainer who administered the prohibited substance would suffer no penalty at all. Therefore, the “consent” regime does little to deter a trainer from administering a prohibited substance because there is an opportunity to refuse testing without penalty.

In addition, Mr. McSwain’s “consent” regime is unnecessary because, as set forth above, the KHRC has already obtained consent from its licensees through the completion of the license application.

V. **Action taken by Promulgating Administrative Body**

In response to the comments received during the public comment period, the KHRC has: deleted Section 3(2) from each of the Proposed Regulations. This subsection is located on page 4, lines 4-6 from 810 KAR 1:110, 811 KAR 1:240 and 811 KAR 2:150.

Re-number subsections (3) – (7) as (2) – (6).