State of California
Office of Administrative Law

In re:
California Horse Racing Board

Regulatory Action:

Title 04, California Code of Regulations

Adopt sections:
Amend sections: 1433, 1845
Repeal sections:

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL Matter Number: 2016-1213-04

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

The California Horse Racing Board (Board) proposed this action to amend sections 1433 and 1845 of title 4 of the California Code of Regulations (CCR) to implement third-party administration of race-day furosemide to horses entered to race. The amendments to section 1845 were proposed to bring the section into alignment with recommendations by the Racing Medication and Testing Consortium and the Racing Commissioners International Model Rule for third-party administration of race-day furosemide. The amendments to section 1845 establish furosemide as the only medication that may be used for controlling exercise-induced pulmonary hemorrhage on race day and the dosage and pre-racing time limits in which furosemide may be administered, as well as establish that furosemide may only be administered by a furosemide veterinarian or by a California registered veterinary technician under the direct supervision of the furosemide veterinarian, and only if the veterinarian has not done business with the racing team or established a veterinary-client-patient relationship with the race horse within 30 days of the race. The regulations also proposed other procedures that must be followed and criteria that must be met in order to administer furosemide to a horse on race day.

On December 13, 2016, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On January 27, 2017, OAL notified the Board of the disapproval of this regulatory action.

DECISION

The reasons for the disapproval were that the regulations failed to comply with the "clarity" standard of Government Code section 11349.1. Additionally, the Board failed to follow all required procedures under the California Administrative Procedure Act, Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (secs. 11340-11361) (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the APA. Pursuant to section 11346 of the Government Code, any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA. No exemption or exclusion applies to the present regulatory action under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

I. CLARITY.

OAL must review regulations for compliance with the "clarity" standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "clarity" as meaning "...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

Subdivisions (a)(1), (2) and (4) of section 16 of title 1 of the CCR further define the "clarity" standard with the following:

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
> (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
> ...
> (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation;
> ... .

As discussed below, the proposed regulations violate the clarity standard. All clarity concerns must be addressed by the Board prior to resubmission of this rulemaking action to OAL.

A. NEW SUBDIVISION (d)(1) OF SECTION 1845.

New subdivision (d)(1) of section 1845 provides:[1]

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[1] Throughout this disapproval decision, proposed deletions to existing text are shown in ~~strikethrough~~ and proposed additions are shown in underline.

> (1) The **owner**, trainer **or** a licensed employee of the trainer shall be present and observe the furosemide administration. [Bold emphasis added.]

Section 1845(d)(1) is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation (CCR, tit. 1, sec. 16(2)).

The regulation states that the owner, trainer, ***or*** a licensed employee of the trainer shall be present to observe furosemide administration.

The Board's initial statement of reasons (ISR) states that section 1845(d)(1) is intended to be "in keeping with subsection 1845(b)(2)(B) which states that the horse shall be under the constant care, custody and view of the trainer or a licensed person assigned by a trainer." (ISR, p. 6)

Section 1845(b)(2)(B), provides:

> (B) While in the pre-race security stall, the horse shall be in the care, custody, control and **constant view of the trainer, or a licensed person assigned by the trainer**. ... [Bold emphasis added.]

In that the trainer or a licensed person assigned by the trainer must be present at all times ("constant view") while the horse is in the pre-race security stall as reflected in section 1845(b)(2)(B), new 1845(d)(1) is not "in keeping" with section 1845(b)(2)(B) because an "owner" cannot be the only person who is present and observes the furosemide administration. The "or" in the sentence of subdivision (d)(1) of section 1845 means that only one of the three listed needs to be present. Thus, the regulation is unclear because section 1845(d)(1) is in conflict with the described effect of the section.

We also note that it is unclear if the term "a licensed employee of the trainer" in section 1845(d)(1) and the term "a licensed person assigned by the trainer" in section 1845(b)(2)(B) are intended to be the same person. Since the ISR states that section 1845(d)(1) is intended to be in keeping with subsection 1845(b)(2)(B), one might assume "a licensed employee of the trainer" in section 1845(d)(1) is the same person as "a licensed person assigned by the trainer" in section 1845(b)(2)(B). However, this is not clear. A licensed person "assigned by" the trainer could be a different person than a licensed "employee" of the trainer. The Board should resolve this ambiguity in the text.

Any change to the text that the Board determines is necessary to resolve these clarity issues will require a 15-day notice of modified text pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the CCR.

B. RACE-DAY FUROSEMIDE AGREEMENT.

New subdivision (e) of section 1845 provides:

> (e) The horsemen's organization, trainers' organization and racing association shall enter into an agreement to provide for race-day furosemide administration.

> The agreement to provide for race-day furosemide administration procedures **shall be submitted to the Board for approval in accordance with Rule 1433** of this Division. [Bold emphasis added.]

Neither section 1433 nor section 1845 provide what the furosemide agreement required by section 1845(e) must include. Nor are there any criteria or standards in the proposed or existing regulations that establish how the Board will determine whether to approve or disapprove the required furosemide agreement. Persons directly affected by the proposed regulation would not know how to comply with the furosemide agreement requirement in section 1845(e), making the regulation unclear under Government Code section 11349(c).

Additionally, as discussed below, the amendments to forms CHRB-17 and CHRB-18 appear to refer to this agreement as a "Race Day Furosemide Agreement." Referring to the agreement in this manner, where the words start with uppercase letters, usually denotes some type of formal document; however, it is unclear whether the Board intends a specific agreement or not.

C. FORMS CHRB-17 AND CHRB-18 AND SECTION 1845(e).

The amendment to section 1433 updates two existing incorporated by reference documents: 1) Application for License to Conduct a Horse Racing Meeting (CHRB-17), and 2) the Application for License to Conduct a Horse Racing Meeting of a California Fair (CHRB-18). Both forms are applications for a license to conduct a race meeting that must be approved by the Board. The only change being made to section 23.C. of form CHRB-17 and section 22.C. of form CHRB-18 is an added requirement to "[a]ttach a Race Day Furosemide Agreement to include the name of the furosemide veterinarian." This added language is unclear because it uses language incorrectly. The language makes it uncertain as to whether the agreement contains a requirement to include the name of the furosemide veterinarian or whether the name of the furosemide veterinarian is required to be submitted in addition to the agreement. For example, does the language mean "attach a Race Day Furosemide Agreement ***that includes*** the name of the furosemide veterinarian," or does it mean "attach a Race Day Furosemide Agreement ***and*** the name of the furosemide veterinarian"? Because the added sentence uses language incorrectly, it is unclear under section 16(a)(4) of title 1 of the CCR, and an affected person would not know how to comply with the requirement. (Gov. Code, sec. 11349(c).)

We also note that in the ISR, the Board does not conclusively state whether the name of the furosemide veterinarian is to be included as part of the furosemide agreement, or whether the name of the furosemide veterinarian is to be provided in addition to the agreement:

> The Board proposes to amend Rule 1433 to change section 23 of the form CHRB-17, and section 22 of the form CHRB-18 to require that the applicant racing association/racing fair attach a furosemide agreement, including the name of the furosemide veterinarian. In implementing its program for third party administration of race-day furosemide, the Board determined that it is necessary to require that the horsemen's organization, trainers' organization and racing association/racing fair enter into an agreement regarding the conduct of the racing association's/racing fair's program for the administration of race-day furosemide.

> The agreement shall be submitted to the Board for approval at the time of application for license to conduct the race meeting. Sections 23 of the form CHRB-17, and 22 of the form CHRB-18 are both titled "Declarations," and are the items where the Board states its requirements regarding documents to be attached to the application, such as labor and horsemen agreements, and service contracts. The requirement to attach a furosemide agreement was placed under sections 23 of the form CHRB-17, and 22 of the form CHRB-18 for purposes of consistency. [Emphasis added.]

Any changes to the text or forms that the Board determines are necessary to resolve these clarity issues will require a 15-day notice of modified text pursuant to Government Code section 11346.8(c), and section 44 of title 1 of the CCR.

D. CONFLICT BETWEEN RESPONSES TO COMMENTS AND LANGUAGE OF SECTION 1845(h).

There is a conflict between section 1845(h) and the Board's stated effect of that subdivision, resulting in a clarity issue under section 16(a)(2) of title 1 of the CCR.

New subdivision (h) of section 1845 provides:

> (h) The syringe used to administer furosemide **shall be provided to and retained by** the Board until all testing of the horse is completed. In the event of a positive test finding as defined in this article, the Board may order, or the owner or trainer may request, the retained syringe be analyzed for prohibited substances. The results of the analysis may be used in any action before the Board. [Bold emphasis added.]

In response to a commenter's objection that section 1845(h) does not provide for an evidentiary chain of custody related to the Board being provided the syringe used in administering furosemide for possible post-race testing for prohibited substances, the Board states in its response to comments in the final statement of reasons:

> All parties present will certify in writing that they have witnessed the administration of furosemide by signing the form CHRB-36, Bleeder Treatment Report, **and by initialing the evidence bag in which the syringe is placed.** [Bold emphasis added.]

In responding to this same issue later in the response to comments, the Board further states:

> **The furosemide veterinarian or RVT will place the syringe in an evidence bag which will be sealed in front of the witness. The witness will sign the sealed evidence bag** as well as the form CHRB-36 (New 08/04) Bleeder Treatment Report. **Once sealed, the evidence bags cannot be opened without destroying the bag. The evidence bag will be securely stored by the**

> **furosemide veterinarian until destruction is approved by the CHRB.** [Bold emphasis added.]

There is nothing in section 1845 that provides the procedures for signed or initialed, sealed evidence bags for syringes as described in these two responses to comments. Thus, the language of section 1845(h) conflicts with the Board's description of the effect of section 1845(h). Therefore, section 1845(h) is unclear, pursuant to title 1, CCR, section 16(a)(2). The Board should add the foregoing procedures for a sealed evidence bag for syringes used to administer race-day furosemide to section 1845. Adding these procedures to section 1845 would require a 15-day notice of modified text pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the CCR. We note the definition of "regulation" in Government Code section 11342.600 provides:

> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. [Emphasis added.]

II. FAILURE TO FOLLOW APA PROCEDURES.

A. THE RULEMAKING FILE DID NOT INCLUDE DOCUMENTATION OF ALL PUBLIC HEARINGS.

Government Code section 11347.3(b)(8) requires an agency's rulemaking file to include "[a] transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation." In the Board's rulemaking file for this regulatory action, the Board included a transcript of the public hearing held on June 16, 2016, where the Board received public comment and voted to adopt the final proposed regulation text. However, Government Code section 11347.3(b)(8) requires the rulemaking file to include documentation in the form of a transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of a regulation. The Board will need to include in the rulemaking file all transcripts, recordings, or minutes for all public hearings connected to this regulatory action when resubmitting the action to OAL.

B. SOME AMENDMENTS TO INCORPORATED BY REFERENCE FORMS WERE NOT PROPERLY ILLUSTRATED.

The proposed regulation text, which includes any forms incorporated by reference in the regulation text, is required to show the adoption, amendment, or repeal of any text with annotations that illustrate the changes being made to the text. Government Code section 11346.2(a)(3) requires agencies to "use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations" in the proposed regulation text. Additionally, title 1, CCR, section 8(b) requires the final text of a proposed regulation submitted to OAL to be annotated, as follows:

> (b) The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. Underline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations.

Furthermore, title 1, CCR, section 20(b) provides:

> (b) Material proposed for "incorporation by reference" shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations. ...

Several of the incorporated by reference forms in this action did not use illustrations to show additions to and deletions from the forms, as required by Government Code section 11346.2(a)(3) and title 1, CCR, section 8(b).

All changes to the forms must be accurately illustrated before resubmitting this regulatory action to OAL.

C. THE ORIGINAL INITIAL STATEMENT OF REASONS WAS NOT INCLUDED IN THE RULEMAKING FILE.

Government Code section 11347.3(b)(2) requires the ISR, prepared pursuant to Government Code section 11346.2(b), to be included in the rulemaking file. During a 15-day period, the Board added a revised 45-day notice and a revised ISR to the rulemaking file pursuant to Government Code section 11347.1 to correct an error found in the original 45-day notice and original ISR. The rulemaking file includes the original and revised 45-day notice, but only the revised ISR. The Board needs to also include the original ISR in the rulemaking file to comply with the APA. This will also require the Board to revise the rulemaking file index to indicate that the rulemaking file includes both the original ISR and the revised ISR. These issues need to be resolved before the Board resubmits this regulatory action to OAL.

D. THE RULEMAKING FILE IS MISSING A MAILING STATEMENT.

Government Code section 11347.3(b)(11) requires the rulemaking file to include "[a]ny other information, statement, report, or data that the agency is required by law to consider or prepare in connection with the adoption, amendment, or repeal of a regulation." In connection to a 15-day notice of modified text, title 1, CCR, section 44(b) requires a state agency to include in the rulemaking file "a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period." Similarly, in connection to a 15-day notice that adds a document to the rulemaking file, Government Code section 11347.1(e), requires a state agency to include in the rulemaking file "a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed."

This regulatory action included a 15-day notice for modifying the proposed text. In connection to this, the Board included a mailing statement that satisfied title 1, CCR, section 44(b). But, this regulatory action also included a 15-day notice for adding two documents to the rulemaking file. The mailing statement indicates "[m]odified notices, modified ISRs and modified texts were mailed to all persons specified in sections 44 subsection (a)(1) through (4) of Title 1 of the CCR." While this satisfies the mailing statement required by title 1, CCR, section 44(b), it does not satisfy the mailing statement required by Government Code section 11347.1(e). This mailing statement will need to be revised to include compliance with Government Code section 11347.1(b)(1) through (4) in addition to the reference to section 44, subsection (a)(1) through (4) of title 1 of the CCR; or, alternatively, a separate mailing statement that complies with Government Code section 11347.1(e) needs to be added to the rulemaking file, before the Board resubmits this regulatory action to OAL.

We also note that there are two copies of the mailing statement in the rulemaking file, one under tab 8 and one under tab 10 of the rulemaking file. The mailing statement under tab 8 appears to have been placed there erroneously, as the mailing statement is not indicated in the rulemaking file index as being under tab 8. The rulemaking file index indicates this statement is under tab 10. The mailing statement that is under tab 8 should be removed from the rulemaking file.

E. THE FINAL STATEMENT OF REASONS NEEDS TO BE REVISED.

1. The two statements required by title 1, CCR, section 20(c)(1) and (2), governing documents incorporated by reference, need to be added to the final statement of reasons. This is necessary because there is one new form that is being incorporated by reference in this action (form CHRB-234).

2. Under the heading "SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD OF MAY 31, 2016 TO JUNE 15, 2016" in the final statement of reasons, the Board states: "Don Shields, DVM, submitted a letter dated June 12, 2016; however, the letter was not responsive to the changes described in the notice. (See tab 14.)" While the Board is correct in stating that this comment is not responsive to the changes described in the notice, the rulemaking file shows that Dr. Shields actually submitted two separate comment letters dated June 12, 2016. The statement made by the Board needs to be revised to indicate that Dr. Shields submitted two comment letters, not one.

III. MISCELLANEOUS.

A. NUMEROUS CORRECTIONS NEED TO BE MADE TO THE REGULATION TEXT AND INCORPORATED BY REFERENCE FORMS.

There are numerous errors in the regulation text and incorporated by reference forms related to punctuation, spelling, and grammar that need to be corrected. Additionally, language in the existing CCR text for section 1845 was omitted in one place, which needs to be added to the final text. OAL will go over the corrections that need to be made with Board staff at their convenience prior to resubmitting this regulatory action to OAL. While this disapproval decision

does not itemize all of the text corrections that need to be made, a few examples are provided below. All errors must be corrected in order for OAL to approve this action upon resubmittal.

Example 1. Section 1845(b)(2)(A) provides:

> (A) The pre-race security stall shall be identified by the posting of a form CHRB-234 (New 01/16), Detention Stall sign, which is hereby incorporated by reference.
> ...

The date at the bottom of the form CHRB-234 is "New 09/15." The corresponding date of form CHRB-234 in the text of Section 1845(b)(2)(A) should also state "New 09/15," not "New 01/16." Additionally, the s in the word "sign" should be changed to an uppercase S in section 1845(b)(2)(A).

Example 2. Section 1845(d) provides:

> (d) The person who administers furosemide pursuant to subsection (~~d~~*e*)(1) of this regulation shall notify the official veterinarian of the treatment of the horse. Such Notification shall be made ~~using~~ on form CHRB ~~form~~-36 (New 08/04), Bleeder Treatment Report, which is hereby incorporated by reference, not later than two hours prior to post time of the race for which the horse is entered. ... [Bold emphasis added.]

The d in the cross-reference has double strikethrough and the e in the cross-reference has double underlining and italics. The d with the double strikethrough should be removed and the e with the double underlining and italics should be revised to be a regular e with single underlining. This is required to illustrate the amendment to section 1845(d) is in compliance with title 1, CCR, section 8. We also note that the uppercase N in the word "Notification" should be changed to a lowercase n in section 1845(d).

Example 3. Existing section 1845(e) is being repealed in the proposed text. The repeal of this subdivision is shown in the proposed text as follows:

> ~~(e) A horse qualified for administration of authorized bleeder medication must be treated on the grounds of the racetrack where the horse will race no later than four hours prior to post time of the race for which the horse is entered. The authorized bleeder medication, furosemide, by a single intravenous injection only, in a dosage of not less than 150 mg.~~

The repealed text omits existing text in the CCR. In the second sentence of this subdivision, after it says "by a single intravenous injection only," the following language should be added and shown as stricken out: "shall be administered." The repeal of this text needs to be shown so that the repealed text tracks the existing text in the CCR for section 1845(e).

B. REVISION TO THE STD. 400.

The subject title of this action on the STD. 400 is "Application for License to Conduct a Horse Racing Meeting." This title is the same as the heading title for section 1433 and the title of form CHRB-17, and describes only a very minor aspect of this action. A more inclusive subject title for this action would be something like "Third Party Race-day Administration of Furosemide." OAL recommends that the Board change the subject on the STD. 400 to this or similar description that more accurately describes this regulatory action.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption by the Board. The Board must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this disapproval decision, before resubmitting this regulatory action to OAL.

If you have any questions, please contact me at (916) 323-6809.

Date: February 3, 2017

Richard L. Smith
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