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January 28, 2010

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Racing Commission

RULE: Amendment, 178CSR1, Thoroughbred Racing

DATE FILED AS AN EMERGENCY RULE: January 12, 2010

DECISION NO. 1-10

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in black ink, appearing to read "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 1-10)

AGENCY: West Virginia Racing Commission
RULE: Amendment, 178CSR1, Thoroughbred Racing
FILED AS AN EMERGENCY RULE: January 12, 2010

- par. 1 The West Virginia Racing Commission (Commission) has filed the above amendment to an existing rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Commission filed this emergency rule with supporting documents with the Secretary of State January 12, 2010 and with the LRMRC January 12, 2010..
- par. 7 It is the determination of the Secretary of State that the Commission has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. §19-23-6(3) reads:
- (3) To promulgate reasonable rules and regulations implementing and making effective the provisions of this article and the powers and authority conferred and the duties imposed upon the racing commission under the provisions of this article, including, but not limited to, reasonable rules and regulations under which all horse races, dog races, horse race meetings and dog race meetings shall be held and conducted, all of which reasonable rules and regulations shall be promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code: Provided, That in accordance with*

article three, chapter twenty-nine-a, the racing commission shall promulgate separate rules pertaining to the kinds of legal combination wagers which may be placed in connection with the pari-mutuel system of wagering authorized by this article;

par. 9 It is the determination of the Secretary of State that the Commission has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Commission:

The current rule states that thoroughbred race horses "shall take their position at the starting gate in the order in which their names have been drawn, beginning from the inside rail." This is known throughout the thoroughbred racing industry as "single loading." Thoroughbred race horses are known to kick and thrust when confined in the starting gate. In fact, numerous injuries to track personnel, as well as jockeys and horses, can be attributed to the practice of single loading due to the extended amount of time that the horses are confined in the gate prior to the start of the race.

This emergency rule is meant to reduce the number of injuries attributed to single loading by mandating that the horses be loaded "in alternating sequence, with the thoroughbred assigned to the post closest to the inside rail and the thoroughbred assigned to the post position nearest to the middle of the field being loaded first, and so on, until the field is properly loaded. When there are less than seven thoroughbreds running a race, they may be loaded in the starting gate in the order of their positions beginning from the inside rail. Vicious and unruly horses may be loaded out of sequence in the discretion of the starter." This method of loading is commonly referred to as "double loading." This change will reduce by approximately one-half the time required to bring all entrants to their proper position in the starting gate and will accordingly reduce the potential for injury to horses, jockeys and starting gate personnel. This change will also bring West Virginia's regulations regarding starting gate loading into accord with the vast majority of other jurisdictions.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . :to prevent substantial harm to the public interest" and "immediate preservation of public peace, health, safety or welfare."

par. 14

This decision shall be cited as Emergency Rule Decision 1-10 or ERD 1-10 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Racing Commission, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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