



IDAHO FISH AND GAME COMMISSION

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Re: Denial of Petition for Rulemaking (Bear Spray)

Introduction

On April 4, 2019, the Idaho Department of Fish and Game (Department) and Idaho Fish and Game Commission (Commission) received a petition for adoption of a rule related to bear spray. The Humane Society of the United States; Sierra Club; Center for Biological Diversity; Natural Resources Defense Council; Western Watersheds Project; Wyoming Wildlife Advocates; and WildEarth Guardians submitted the petition, citing Idaho Code section 67-5230. The petition asks for the adoption of a rule requiring hunters to carry and have immediately accessible bear spray in the field within game management units inside or adjacent to the Greater Yellowstone Ecosystem (GYE) grizzly bear Demographic Monitoring Area.

For some general background, bear spray is a product with chemical formulations (generally with an active ingredient of Oleoresin capsicum in varying concentrations) stored in canisters, as manufactured commercially by several different companies. Bear spray is an effective deterrent for bear encounters, as recognized by the Interagency Grizzly Bear Committee of which Idaho is a member. The product is comparable to mace and pepper spray, which are commonly carried for self-defense.

Most formulations of bear spray are considered a pesticide under federal law, and subject to registration and other regulation by the U.S. Environmental Protection Agency (EPA) under the jurisdiction of the Federal Insecticide, Fungicide, and Rodenticide Act. The EPA regulates pesticide labels, which allows the agency to control how products are used. It is unlawful for any person to use a registered pesticide product, such as bear spray, in a manner inconsistent with its labeling.

Various formulations of bear spray canisters and contents are flammable and explosive, because of their pressurized contents designed for discharging in air at a distance (common formulations up to 30 feet). Bear spray has a shelf life and degrades (or leaks from canisters) at temperature extremes (over 100 or below freezing). For safety reasons, bear spray cannot be transported on commercial aircraft, either in

carry-on or checked luggage. It should also be stored out of the reach of children and pets. In its policy for carrying and use by law enforcement and other field staff, the Department considers bear spray as a chemical weapon, with safety requirements for training, storage, etc.¹

Applicable Law

Idaho Code section 67-5230 allows any person to petition an agency to adopt a rule and requires agencies to either “deny the petition in writing, stating its reasons for the denial” or initiate rulemaking. The Commission must take action on the petition no later its first regularly scheduled meeting that takes place seven (7) or more days after submission of the petition. I.C. § 67-5230(1)(b). The Commission has authority to promulgate rules under Idaho Code, Title 36.

Analysis

The Commission considered the petition at its first regularly scheduled meeting seven or more days after receipt. This meeting was a regular quarterly meeting in Grangeville, Idaho (Idaho County) on May 16-17, 2019. The Commission received handouts and heard testimony providing background information and a recommended decision from Department staff. The Commission makes the following findings:

First, the Commission finds that the proposed requirement is not warranted for every hunter and would create a burdensome regulation. Instead of a one-size-fits-all requirement to carry bear spray, the Commission finds that the decision to carry bear spray is best left up to individual members of the public. Some hunters may travel extensively in grizzly country, warranting extra precaution, while other hunts may rarely travel in areas frequented by grizzly bears. For example, quickly traveling by one’s self through grizzly country at dawn and dusk likely merits more precaution than hunting with others in an open field during broad daylight. As with all weapons, safety around bear spray should be taken seriously and individuals need to gauge their ability to properly store and handle the product. As a matter of policy, the Commission feels it is best to rely on the judgment of individual hunters to decide what safety measures fit unique individual circumstances.

Additionally, a requirement to carry bear spray is both burdensome from a financial and regulatory perspective. Purchasing bear spray would have a financial impact on hunters as bear spray generally costs about thirty to forty dollars and expires after a few years. Moreover, unless specifically listed as an infraction or felony in Idaho Code section 36-1401, violations of Commission administrative rules are criminal misdemeanors. The Commission does not find that failure to carry bear spray within the GYE grizzly bear Demographic Monitoring Area merits being charged with a criminal misdemeanor.

¹ The Commission also finds that the petition mischaracterizes the causes of the increase in lethal human-bear conflict by omitting facts related to the growth and expansion of the GYE grizzly bear population. For clarity of the record, the Commission notes that the growth and expansion of the grizzly bear population in the GYE, well beyond the vision of recovery in federal recovery plans, is a primary cause of increased encounters between humans and bears.

Second, the Commission finds that education is a better-fitted and more meaningful way to approach this issue. The Commission does not generally regulate or mandate personal safety and survival gear for its license-holders or the general public. The Commission has instead chosen to rely on education for most safety issues, whether safety applies to gear, the number of individuals together in the field, or conduct for approaching downed game or leaving baby animals alone. The Department, as well as the Interagency Grizzly Bear Committee, recommends carrying bear spray in areas where grizzly bears are active, in combination with other bear avoidance techniques, such as food storage and carcass management.

Idaho law and Commission rules have focused on education in these sorts of situations. These laws and rules mandate hunter, archery, and trapping education rather than making it illegal to travel without certain safety gear. There are many safety gear/survival items that the Commission and Department recommends license-holders take in the field but does not require them to do so. For example, the Commission encourages and educates hunters to carry a compass, waterproof matches, non-cotton clothing, and emergency blankets. These items can save lives in many circumstances. However, the Commission and the Department have not mandated by rule that these items be carried by every license-holder. Instead of relying on rule, the Commission has approached these items through education, relying on hunters and anglers to make personal safety decisions. The Commission finds that this educational approach is appropriate in this instance.

The Commission believes that educating the hunting public on general safety in bear country, the use of bear spray, and proper food storage and carcass management is a better way to approach the issue than mandating it through a rule. To that end, the Department already has a bear education programs within grizzly bear range in Idaho. Those programs help inform hunters and the general recreating public through interaction and educational materials on the differences between black and grizzly bears, basics of food storage, bear spray use and benefits, and what to do if a bear is encountered. The Department has been conducting these robust educational efforts for many years and will continue to do so.

Third, the Commission finds that the proposed requirement of this petitioned is not an enforcement priority due to the Department's limited enforcement staff. Each individual conservation officer has about 2000 square miles in their patrol areas, which is a large land area to cover. Creating the rule that this petition requests would reduce these officer's ability to address issues that the Commission finds to be higher priority. The petition proposes creating a violation that is a criminal misdemeanor. Conservation officers would need to prove the elements of a violation related to carrying and "accessibility" of bear spray beyond a reasonable doubt, following constitutional privacy and search requirements. This is a significant endeavor. The Commission finds that the Department's conservation officers have higher priorities than enforcing the mandate of this petition.

Conclusion

The Commission denies this petition to mandate hunters carry bear spray in areas identified as grizzly bear range in Idaho. Education of hunters, as well as the non-hunting public, on the proper etiquette in bear country and the use and benefits of bear spray is a more successful strategy than rulemaking to protect the public and reduce negative interactions with bears.

The Commission has denied your petition to initiate rulemaking. This denial of the petition is a final agency action within the meaning of Section 67-5230, Idaho Code. Pursuant to Idaho Code section 67-5230 and 67-5270, any person aggrieved by this denial may seek review of the denial by filing a petition for judicial review in the district court of the county in which the hearing was held; the final agency action was taken; the party seeking review resides or operates its principle place of business in Idaho; or the real or personal property that was the subject of the denial of the petition is located. This appeal must be filed within twenty-eight (28) days of the service date of this denial of the petition to initiate rulemaking. *See* I.C. § 67-5273.

Dated this 20 day of May, 2019.



Ed Schriever

Secretary of the Idaho Fish and Game Commission

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