

November 17, 2016

Via U.S. Mail and Email: [ellendavis@fs.fed.us](mailto:ellendavis@fs.fed.us)

Jim Unsworth, Chair  
Matt Hogan, Co-Chair  
Interagency Grizzly Bear Committee  
U.S. Forest Service, Northern Region  
Building 26 Fort Missoula Road  
Missoula, MT 59804

Re: Bear spray duration and endorsement motions pending before the IGBC

Dear Chairman Unsworth, Co-Chairman Hogan, and Members of the IGBC Executive Committee:

The Executive Committee is scheduled to reconvene in Missoula, Montana on December 13-14 for its winter meeting. This letter is a reminder that committee members will be asked to vote on two motions initiated this summer at the request of UDAP Industries, Inc. ("UDAP"):

- 1. That the IGBC withdraw the six-second spray duration recommendation and reconsider the committee's role in issuing public position statements on bear spray product performance and efficacy; and*
- 2. That the IGBC fulfill its promise not to promote or endorse one commercial bear spray product over any other.*

As you may know, an ad-hoc committee consisting of Scott Jackson, Rick Hotaling, Ellen Davis, and two bear management specialists – John Waller (NPS) and James Jonkel (Montana FWP) – are evaluating UDAP's motions and will present their findings to the Executive Committee for decision. UDAP appreciates the efforts of the ad-hoc committee, as well as the Executive Committee, in evaluating the pending motions and giving thoughtful consideration to the IGBC's future role in advising and influencing consumers regarding the selection and purchase of commercial bear spray products.

### **Six-Second Duration Recommendation**

UDAP is asking the IGBC to withdraw its six-second spray duration recommendation because it is not supported by sound science or empirical data. The six-second duration guideline is arbitrary and lacks any meaningful or rational relationship to bear spray performance or efficacy, and yet it is being represented to the public as a benchmark for product safety and performance. In truth, there is no scientific literature or peer-reviewed research concluding that a bear spray canister with a six-second spray time is any safer or more effective than a can with a four- or five-second spray time. Indeed, the leading contemporary bear spray researcher, Dr. Tom S. Smith, has concluded that “[b]ased on data we collected, there is no indication that any of the commercially available products bests another by durations that vary by a few seconds,” but instead “all fall within an acceptable range of effectiveness in light of the results of the study I conducted on the efficacy of bear spray in Alaska.”<sup>1</sup> We would encourage the ad hoc committee to reach out to Dr. Smith, who has indicated a willingness to speak with you about his research and the IGBC’s recommendations.

While the six-second duration recommendation has persisted for years, that fact, of itself, is no reason to continue it. Indeed, the very origins of the recommendation are questionable. In 1998, a subcommittee of the IGBC outsourced its investigation of bear spray to the Center for Wildlife Information (CWI) an organization lead by an individual without any formal scientific training and who is a well-known supporter of the only bear spray company (at the time) to meet the six-second duration recommendation.<sup>2</sup> CWI urged the IGBC to adopt the recommendation, which it did. The basis for doing so, however, has never been substantiated, despite repeated inquiries and a formal request under the Freedom of Information Act, 5 U.S.C. § 552, for documents, studies, reports, and any other information justifying a six-second recommendation.

In 2008, the IGBC reaffirmed the duration recommendation, but again, it did not rely on any scientific evidence or empirical data. Instead, the 2008 Bear Spray Report included conclusory opinion letters from employees of the IGBC’s member agencies. Yet, the letters failed to subject the six-second duration recommendation to scientific evaluation or analysis of any rigor.

At the upcoming winter meeting, the IGBC has an opportunity to clarify its position on bear spray and provide the public with accurate, defensible, and science-based information. And, as a compilation of federal and state agencies, it has an obligation to do so in a manner that is not arbitrary or capricious. In evaluating the pending motion, we would encourage you to avoid some of the common misconceptions about bear spray and the duration recommendation.

For example, a common misconception is that “the longer the spray duration the better.” As explained at the summer meeting, it is imprudent to base a public recommendation on spray

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<sup>1</sup> Correspondence, Dr. Tom S. Smith to UDAP Industries, dated June 14, 2016 (provided to Ellen Davis on July 1, 2016 for distribution to IGBC committee members).

<sup>2</sup> See, e.g., KTVH, *Bear Spray Could Save Your Life, But Only if You Use It Right*, available at <http://www.ktvh.com/2016/10/bear-spray-save-life-use-right> (last visited Nov. 9, 2016) (“Bartlebaugh’s preferred bear spray is Counter Assault.”).

duration because it fails to account for variability in canister volume and capsaicin delivery rate. Not all durations are created equal. Conceivably, a 7.9 ounce can of bear spray could be designed with a 15-second spray duration by reducing the size of the discharge orifice. The product could still meet the distance recommendation because it would have a high velocity, but the amount of atomized capsaicin placed in front of the user after a short burst is likely to be too small to have any meaningful deterrent effect on a charging bear. Thus, despite meeting IGBC recommendations and having a long duration, this hypothetical bear spray product is unlikely to be considered safe or effective, and debunks the myth that “the longer the spray duration the better.”

Another misperception is that a six-second duration is needed to compensate for various contingencies, such as repeated attacks, multiple bear scenarios, weather, operator error, and the hike out. These scenarios, however, do not lend themselves to a quantifiable duration standard and they fail to establish why six seconds is the “magic” number, as opposed to some other duration. What these scenarios *do* suggest is the need for a bear spray that is capable of multiple bear-stopping bursts, with sufficient reserve for the hike out. As demonstrated this summer, even a 7.9 oz can with a four-second discharge time is more than capable of accommodating these various scenarios, assuming it is deployed consistent with manufacturer instructions.<sup>3</sup> Moreover, these scenarios can be compensated for in other ways, such as by recommending users carry two cans of bear spray or that users read and understand the manufacturer’s instructions for how to deploy their chosen bear spray product, and to practice.

Another erroneous justification for the six-second recommendation is the suggestion that it deters bear spray companies from producing small, fast discharging bear spray canisters that could be confused with personal defense “pepper spray” products, which are not recommended for use on bears. This concern is unfounded. The EPA will not approve a bear spray product smaller than 7.9 oz (approximately 225-230 grams of formulation). Thus, there is no likelihood that a bear spray company would develop a small-volume bear spray product with an exceedingly short discharge time, which might put the user’s safety at risk.

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<sup>3</sup> Bear spray is regulated by the EPA and federal law requires users and consumers of bear spray to deploy the product *in a manner consistent with manufacturer instructions on the label*. 7 U.S.C. § 136j(a)(2)(g) (providing that it is unlawful for any “person” to “use any registered pesticide [*i.e.*, bear spray] in a manner inconsistent with its labeling”). It is likewise unlawful to aid, abet, or counsel another to use a pesticide, like bear spray, in a manner inconsistent with its labeling. *See* 18 U.S.C. § 2(a). UDAP’s EPA-approved label instructs users to deploy the spray using a “1 second burst of spray.” IGBC materials encourage use of 2-3 second bursts of spray. This recommendation may violate federal law in that such statements encourage use of bear spray in a manner inconsistent with UDAP’s EPA-approved labeling. Moreover, the inconsistency between approved manufacturer labeling and the IGBC’s recommendations on how to use bear spray unnecessarily contributes to public confusion about how to properly deploy bear spray and creates an issue of public safety. For this reason, we would suggest that the IGBC, consistent with federal law, encourage the public to follow the manufacturer’s instructions on their chosen bear spray, rather than provide generic bear spray deployment instructions that may not be appropriate for all EPA-approved bear spray products on the market.

Finally, Kerry Gunther (YNP) recognized in 2008 that “I do not know of any scientific data that could be used to determine the most adequate spray duration[.]” Undeniably, there are countless variables at play in any human-bear interaction, and there are differences between and among bear spray delivery systems and performance characteristics. To Gunther’s point, when situational variability is taken together with the differences across bear spray product lines, it may very well be impossible to establish a defensible, non-arbitrary recommendation on duration. In such case, a rational and sensible alternative would be for the IGBC to withdraw its numeric bear spray guideline, recommend the use of any EPA-registered bear spray product, and encourage users to become familiar with the specific performance characteristics of their chosen bear spray and to practice using it.

For these reasons, and those previously submitted to the Executive Committee, we would appreciate your vote to withdraw the six-second duration recommendation.

### **Implied Endorsement**

UDAP is also asking the IGBC to refrain from expressly or impliedly promoting or endorsing one commercial bear spray product over any other. While the IGBC has made improvements to its website and brochures, the appearance of IGBC promotion and endorsement continues to pervade its website and other informational materials made available to the public. For example, the IGBC’s numeric bear spray recommendations continue to promote one particular brand of bear spray to the exclusion of all others, and, as explained above, the IGBC lacks a rational or legitimate scientific basis for doing so. The IGBC’s website prominently displays Counter Assault bear spray canisters and the concluding page of the IGBC Bear Spray Report (June 2008) depicts various bear spray educational products, all of which prominently display a red can. Counter Assault is the only bear spray producer to use a red can. Finally, the IGBC website directs the public to other websites, such as CWI, that promote the red can.

UDAP requests that the IGBC honor its commitment to ensure that its website and other materials do “not convey any message or image that could be construed as an endorsement of any single brand of EPA-approved bear spray.”<sup>4</sup>

### **Montana Congressional Delegation**

We would also like to inform you that UDAP has provided desk-side briefings to the Montana congressional delegation concerning the motions pending before the IGBC. Staffers for Senator Tester, Senator Daines, and Representative Zinke all expressed an interest in the matter and wish to be kept informed of developments. Staffers may be contacting members of the Executive Committee and/or the ad hoc committee in the future to discuss the IGBC’s role in making consumer bear spray recommendations.

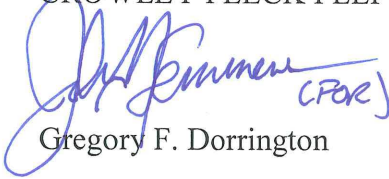
Again, UDAP appreciates your time and thoughtful consideration of the pending motions. If there is anything we can do to assist in the process, please do not hesitate to contact me.

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<sup>4</sup> See IGBC Minutes, Dec. 11, 2007.

Sincerely,

CROWLEY FLECK PLLP



Gregory F. Dorrington

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