COLORADO SUPREME COURT
101 West Colfax, Suite 800
Denver, Colorado 80203
(303) 837-3790

Colorado Court of Appeals Div. IV
Graham, J., Dailey and Gabriel, JJ., concurring
10CA1578

Adams County District Court
Honorable C. Scott Crabtree, District Judge
2007CV287

Petitioners/Plaintiffs: KATHLEEN SULLIVAN; DYANNE CAPRIO; KENNETH HANKS; and THOMAS EICKBUSH, individually and as parent and next friend of WYATT EICKBUSH,

v.

Respondent/Defendant: DANIEL BOWEN.

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▲ COURT USE ONLY ▲

Case No.

PETITION FOR CERTIORARI REVIEW

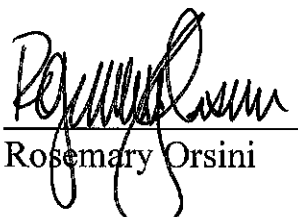
COLORADO SUPREME COURT 101 West Colfax, Suite 800 Denver, Colorado 80203 (303) 837-3790	
Colorado Court of Appeals Div. IV Graham, J., Dailey and Gabriel, JJ., concurring 10CA1578	
Adams County District Court Honorable C. Scott Crabtree, District Judge 2007CV287	
Petitioners/Plaintiffs: KATHLEEN SULLIVAN; DYANNE CAPRIO; KENNETH HANKS; and THOMAS EICKBUSH, individually and as parent and next friend of WYATT EICKBUSH, **v.** **Respondent/Defendant:** DANIEL BOWEN.	▲ COURT USE ONLY ▲ Case No.
Katherine A. Burke, Reg. No. 35716 Insight Law, LLC PO Box 60 Durango, CO 81302 Phone: (970) 385-7409 Fax: (970) 385-7406 Email: kate@insightlawllc.com Rosemary Orsini, Reg. No. 22658 Berenbaum Weinshienk, PC 370 Seventeenth St., Suite 4800 Denver, CO 80202 Phone: (303) 825-0800 Fax: (303) 629-7610 Email: rorsini@bw-legal.com	
CERTIFICATE OF COMPLIANCE	

We hereby certify that this Petition for Certiorari Review complies with all requirements of C.A.R. 32 and 53(a), including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Petition for Certiorari Review complies with C.A.R. 32 and 53(a).

☒ It contains 3,570 words.

BERENBAUM WEINSHIENK PC



Rosemary Orsini

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Attorneys for Appellants/Plaintiffs

I. ISSUES PRESENTED

A. Whether evidence allowing a claim for punitive damages to survive directed verdict is sufficient to also allow a claim for intentional or reckless infliction of emotional distress to survive directed verdict.

B. Whether the Court of Appeals erroneously declared that a "constitutional right to poison coyotes" may be a defense to liability for outrageous conduct for a party who intentionally disregards statutory and regulatory requirements on the use of poison.

C. Whether the Court of Appeals erred by failing to read the evidence in the light most favorable to the Plaintiffs in affirming the directed verdict on the Plaintiffs' claim for intentional or reckless infliction of emotional distress.

II. COURT OF APPEALS OPINION

The Slip Opinion was issued October 27, 2011, in Case No. 10CA1578.

The opinion was not selected for official publication.

III. SUPREME COURT JURISDICTION

A. Date of judgment.

October 27, 2011.

B. Date of order respecting a rehearing and any extensions of time for requesting Certiorari Review.

Plaintiffs' Petition for Rehearing was denied December 15, 2011. No extensions of time for filing this Petition have been requested.

IV. STATEMENT OF THE CASE

A. Factual History.

This case arose out of the poisoning of five pet dogs belonging to Petitioners/Plaintiffs ("Plaintiffs"). Respondent/Defendant Daniel Bowen ("Bowen") soaked meat in Paraquat Plus, an EPA-regulated herbicide, and distributed the meat in rural Adams County both on and off his property. *See* REC. at 208; 2554.[1] Bowen was allegedly trying to kill coyotes that were purportedly harming his cattle. *Id.* at 1969-70. The Trial Court found that Bowen's evidence of coyote damage was only "sketchy." *Id.* at 3022:2-8; 2632:22-25 (Bowen admitting it is very difficult to determine the cause of a calf's death); 2506:3-15 (Plaintiff Hanks, a long-time cattle vet, testifying he has never heard of a healthy calf being killed by a coyote; most coyote damage is from calves that die of disease and are eaten by coyotes after death).

Plaintiffs Hanks and Caprio, husband and wife, are Bowen's neighbors. *Id.* at 2; 5. Plaintiff Eickbush lives at least half a mile to the south and east of Bowen's cattle operations, where Bowen claimed he placed the poison. *Id.* at 1982. Wyatt Eickbush is the son of Tom Eickbush and was nine years old at the time his dog died. *Id.* at 4. Plaintiff Sullivan was visiting Eickbush at the time of

[1] The record is cited with reference to the single .pdf document provided to the parties by the Court of Appeals on a CD. The page and, where relevant, line numbers of particular documents within the electronic record are given here as "REC. at page number:line number."

the poisoning. *Id.* at 2; 5. Hanks and Caprio's dogs, Rooster and Tanner, the Eickbushes' dog, Doc, and Sullivan's dogs, Boomer and Kirby, ate Bowen's poisoned meat and died torturous deaths. *Id.* at 2- 6.

Before spreading the poison, Bowen did not contact the Division of Wildlife ("DOW"), did not provide proof of coyote damage and did not receive the necessary permitting to poison wildlife. *Id.* at 3014; 2556; 2597. Rather than using the poison allowed by the DOW, Bowen knowingly and wrongfully used the Paraquat Plus he had found in an abandoned shed. *Id.* at 2554. Bowen placed the poison less than 200 yards from Plaintiffs' property lines. *Id.* at 1982 (dots showing placement of meat near Hanks and Caprio boundary); 2477:24-25 (Bowen told Hanks he put the meat "right up next to" Hanks's property line); 2489:5-7 (Hanks testifying that his dogs could have eaten poisoned meat on his own property).

Bowen did nothing to secure the poisoned meat from removal or dispersal by wild animals. *Id.* at 3021:11-19. Bowen did not inform his neighbors that he had placed poisonous meat at their property boundaries, despite knowing that his neighbors had pet dogs and children. *Id.* at 3018:11-15. Bowen was aware that his neighbors frequently crossed his property, and that they often had their dogs with them. *Id.* at 2463; 2459. There is no evidence that Bowen gave any warnings even

after he knew that Hanks' and Caprio's dogs, Rooster and Tanner, had eaten the poison and were dying. Bowen lied to Plaintiff Hanks, telling Hanks that Bowen had collected the remainder of the poisoned meat when he had not, giving Hanks false comfort that no further poisonings would occur. *Id.* at 2487-2488. Counter to usual standards, Bowen was calving his herd out in the open in the middle of winter, when calves would be weakest and predators hungriest. *See id.* at 2506-2507.

Hanks found poisoned meat on his property. *Id.* at 2488. Poisoned meat was also found to the east of the Eickbush property, almost a mile from where Bowen said he put the meat. *Id.* at 2772-2773 (DOW official found chicken meat and another, unidentified dead dog to the east of Eickbush property). Plaintiffs Sullivan's dogs, Kirby, Boomer and the Eickbushes' dog, Doc, were on the Eickbush property when they ate the poisoned meat. *Id.* at 2723; 2657. Days before his death, Doc may have been in the area to the east of the Eickbush property, a mile or more in the opposite direction from Bowen's alleged poison. *Id.* at 2683-2684. A suspicious but unidentified substance was found at the edges of the Eickbush property. *Id.* at 2661; 2745-2746.

After the poisoning, Bowen was hostile to his neighbors on several occasions. *See generally, id.* at 2672-2675. Bowen "went on about a 20-minute

rant" about his general hatred of domestic dogs. *Id.* at 2674-2675 (Eickbush testifying that Bowen said "he didn't like the dogs. He didn't want the dogs around. He was tired of seeing dogs crossing his property lines.").

All Plaintiffs suffered significant emotional distress . *Id.* at 2491-2492; 2670; 2704-2706; 2748-2749; 2951. The Eickbushes' dog, Doc, died relatively quickly, but Sullivan's and Hanks' and Caprio's dogs, Boomer, Kirby, Tanner and Rooster, were in agonizing distress for over a week as their owners tried to save them and then had to make the gut-wrenching decision to put them to sleep. *See id.* at 2481-86; 2731-43. As a result of the poisoning, the EPA investigated Bowen. The EPA issued Bowen a Notice of Warning, deeming Bowen's conduct a "negligent, willful and knowing misapplication" of the restricted pesticide. *Id.* at 2005-06. This was the strongest sanction available for the first violation of an EPA pesticide permit. *See, e.g., FIFRA Enforcement Response Policy*, 5-6 (EPA 2009) (Notice of Warning is the penalty for a first violation of FIFRA), available at http://www.epa.gov/compliance/resources/policies/civil/fifra/fifra-erp1209.pdf.

B. Procedural History.

Plaintiffs brought suit in the Adams County District Court, asserting seven claims: negligence per se; premises liability; nuisance; trespass; extreme & outrageous conduct, (a/k/a intentional or reckless infliction of emotional distress)

(hereinafter "IED"); ultrahazardous activity; and negligence. REC. at 8-12. Plaintiffs also requested punitive damages. *Id.* at 120-21.

Plaintiffs' premises liability claims and the Eickbushes' nuisance claims were dismissed on summary judgment. *Id.* at 1029-36. At trial, Plaintiffs voluntarily dismissed their negligence per se claim. *Id.* at 1848. Plaintiffs' trespass, IED and remaining nuisance claims were dismissed on directed verdict, although the ultrahazardous activity and punitive damages claims were allowed to go forward to the jury. Plaintiffs' negligence claim also went the jury. *Id.* at 3007-3013; 3022-3024. The jury found in Bowen's favor on the ultrahazardous activity claim and request for punitive damages and found in Plaintiffs' favor on negligence. *Id.* at 1299-1323.

Plaintiffs appealed, citing four issues including the comparative evidentiary standards for punitive damages and IED and the failure of the Trial Court to read the evidence in the light most favorable to Plaintiffs in entering a directed verdict on the IED claim. The Court of Appeals affirmed. *See* Slip Op., Appendix A. Plaintiffs submitted a Petition for Rehearing which was denied on December 15, 2011.

V. ARGUMENT

Plaintiffs request Certiorari review of three aspects of the Court of Appeals ruling. First, where the Trial Court found sufficient evidence to send the punitive damages claim to the jury, as a matter of law the IED claim also should have survived directed verdict. This is an issue of first impression in Colorado, with only one 1988 footnote from this Court to indicate that Plaintiffs' position is the correct one on this question. By their nature, IED and punitive damages claims are often pled together, making resolution of this question important to litigants and courts.

Second, the Court of Appeals based its affirmation of directed verdict on Plaintiffs' IED claim largely on a statement that Bowen had a "constitutional right to poison coyotes," citing Colorado Const. Art. 18, § 12b(3). In doing so, the Court of Appeals substituted its own findings for the Trial Court's express finding that Bowen was not protected by that provision. The Court of Appeals also misstated the law because it ignored multiple statutes and regulations implementing that provision, all of which Bowen violated. The interplay of these statutes and regulations with the constitutional provision is also an issue of first impression for Colorado courts.

V. ARGUMENT

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Bowen's conduct was reckless—*id.* at 3023:17-3024:8—and Plaintiffs submitted ample evidence of resulting emotional distress—*id.* at 2491-2492; 2670; 2704-2706; 2748-2749; 2951—the other elements of Plaintiffs' claim of IED were met. *See Palmer v. Diaz*, 214 P.3d 546, 550-51 (Colo. Ct. App. 2009) (listing elements of IED). Therefore, it was only the Trial Court's threshold ruling on extreme and outrageous conduct that prevented the jury from considering the IED claim.

While taking the IED claim away from the jury, the Trial Court allowed Plaintiffs' request for punitive damages to go forward on the same evidence it thought insufficient to allow a reasonable juror to find Bowen's conduct extreme and outrageous by a preponderance of the evidence. *See* REC. at 3007-3024. Plaintiffs argued to the Court of Appeals that the evidence allowing the punitive damages claim to go forward was legally sufficient to also allow the IED claim to go forward. The Court of Appeals implicitly rejected this argument by remaining silent and affirming the directed verdict on IED.

"The offensive conduct warranting punitive damages is similar to the conduct that would sustain an [IED] claim." *Mitchell v. Heinrichs*, 27 P.3d 309, 312 (Alaska 2001); *see also Knierim v. Izzo,* 174 N.E.2d 157, 165 (Ill. 1961) (noting that the same elements of "wantonness, malice, oppression or

circumstances of aggravation" characterize both punitive damages and emotional distress claims).

Extreme and outrageous conduct "goes so far beyond the bounds of decency as to be regarded as atrocious and utterly intolerable in a civilized community." *Chryar v. Wolf,* 21 P.3d 428, 430-31 (Colo. Ct. App. 2000). The burden of proof on this issue is a preponderance of the evidence. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1351 n.7 (Colo. 1988). In the punitive damages context, willful and wanton conduct is "dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others" and must be proven beyond a reasonable doubt. § 13-21-102(1)(b), C.R.S. (2011); *Churchey*, 759 P.2d at 1351 n.7.

This Court has compared these two standards only once, in 1988. *See Churchey*, 759 P.2d at 1351 n.7. Seeking a distinction, this Court relied only on the relative burdens of proof. This Court stated that willful and wanton conduct must be proven beyond a reasonable doubt to support punitive damages, but that "outrageous conduct need *only* be proved by a preponderance of the evidence" to support an IED claim. *Id.* (emphasis added). By using the word "only" in comparing the standards, the Court indicated that less evidence is required to support a claim for outrageous conduct than for punitive damages. Of course this

must be so because the preponderance of the evidence standard is significantly lower than the beyond a reasonable doubt standard. To find wrongdoing beyond a reasonable doubt will necessarily require stronger evidence than to find similar wrongdoing by a preponderance of the evidence.

Here, the Trial Court found the evidence sufficient to allow a reasonable juror to find beyond a reasonable doubt that Bowen's conduct was willful and wanton. As a matter of law, the same evidence would have allowed a reasonable juror to find by a preponderance of the evidence that Bowen's conduct was extreme and outrageous. Therefore, the Trial Court erred in granting a directed verdict on the IED claim despite finding the evidence sufficient to support a claim for punitive damages and the Court of Appeals erred in affirming the directed verdict.

C. The Court of Appeals, substituting its own findings of fact for the Trial Court's express finding, made an error of law in announcing a "constitutional right to poison coyotes" without regard to statutory requirements that implement the provision cited.

In affirming the Trial Court's conclusion that Bowen's conduct was not extreme and outrageous as a matter of law, the Court of Appeals erroneously stated that he had a "constitutional right to poison coyotes," citing Colorado Constitution, art. XVIII § 12b(3). Slip Op. at 24.

The Trial Court expressly found the opposite. REC. at 3014 (finding "that constitutional provision is no safe harbor" for Bowen because "there is no question" that Bowen did not follow statutory requirements); 2556; 2597 (Bowen admitting he did not call the DOW before using poison). The Court of Appeals was bound to accept the Trial Court's findings of fact when supported by the record, *see Montemayor v. Jacor Communications, Inc.*, 64 P.3d 916, 922 (Colo. Ct. App. 2002), but instead substituted its own finding. Moreover, the Court of Appeals pronouncement was not supported by the evidence in the record and misstated the applicable law.

The constitutional provision cited provides a limited exception to the prohibition on trapping and poisoning wildlife for a commercial livestock producer if there is evidence of damage from wildlife. However, that provision is implemented by multiple statutes and regulations, which create a permitting system for poisoning wildlife and impose stringent requirements. §33-6-208(c)(I), C.R.S. (2011) (landowners *required* to notify DOW prior to using poison); § 35-40-113, C.R.S. (2011) (defining permit system for poisoning wildlife); 8 C.C.R. 1201-12 (Department of Agriculture regulations for killing predators). The proper interplay between the constitutional provision and the statutory and regulatory requirements is an issue of first impression in Colorado.

The evidence was undisputed that Bowen did not comply with the statutes and regulations. REC. at 3014 (Trial Court finding "no question" that Bowen did not follow statutory requirements); 2556; 2597 (Bowen admitting he did not call the DOW before using poison). The Trial Court also indicated that it would have been futile for Bowen to request permitting from the DOW because the evidence of coyote damage to his calves was only "sketchy." *Id.* at 3022. The Court of Appeals had no basis on which to substitute its own findings on this question for express and unchallenged findings by the Trial Court based on undisputed evidence.

As its second main basis for affirming the directed verdict on IED, and apparently in support of Bowen's alleged constitutional rights, the Court of Appeals stated that Bowen's conduct was also authorized under his EPA pesticide applicator's license. In contrast, the evidence is undisputed that Bowen knew that he was acting outside his licensure by using an herbicide he found in an old shed in a manner completely inconsistent with the label. *Id.* at 2566. Bowen admitted that he "shouldn't have used [Paraquat] to . . . try to kill coyotes," *id.* at 2562, and that the only allowable coyote poison in Colorado is a form of cyanide that causes an instant death. *See id.* at 2597-2598. The EPA issued Bowen a Notice of Warning, the strictest penalty available for a first offense; revoking his license at that stage

was not a possibility. *Id.* at 2005-2006; *see also FIFRA Enforcement Response Policy*, 5-6, *supra*. The Court of Appeals again erroneously substituted its own findings for the Trial Court's by stating without support that Bowen's EPA licensure was unaffected.

The Court of Appeals pronouncement of a "constitutional right to poison coyotes" was an error of law. The Court of Appeals needlessly substituted its own findings for the Trial Court's findings and misstated the law and misapplied the record.

D. The Trial Court failed to read significant evidence in the light most favorable to Plaintiffs in granting directed verdict on Plaintiffs' IED claim, and the Court of Appeals erred in failing to uphold this requirement.

In addition to those errors cited above, neither the Trial Court nor the Court of Appeals read the evidence of Bowen's outrageous conduct in the light most favorable to the Plaintiffs at the directed verdict stage. *See Fair,* 943 P.2d at 436-37. Where evidence was disputed, both courts interpreted it in Bowen's favor rather than in Plaintiffs'. An important example is the question of where Bowen actually placed poisoned meat. Echoing the Trial Court, the Court of Appeals said there was "no evidence" that Bowen placed meat elsewhere than the limited area he testified to; yet this statement was immediately followed by the statement that Plaintiff Hanks found Bowen's chicken meat on his own property. *See* Slip Op. at

26. Additionally, the evidence was clear that poisoned chicken meat was found on or near the Eickbush property and further to the east of the Eickbush boundary, between a half-mile and a mile from where Bowen said he put it. REC. at 2476-89; 2772-2773.

In such instances of disputed evidence, the courts are *required* to resolve such a dispute in the non-moving party's favor. *Fair,* 943 P.2d at 436-37. Here, a proper reading compels a finding—for directed verdict purposes—that Bowen was simply not credible on the issue of where he placed the meat. Moreover, when the evidence is properly read in the light most favorable to Plaintiffs', an inference arises that Bowen placed poisoned meat on his neighbors' property, or on their boundary lines, disregarding the clear risk to them and their animals. *See* Section IV.A., *supra.*

In addition to failing to resolve disputed evidence in Plaintiffs' favor, both courts below overlooked undisputed evidence supporting the outrageousness of Bowen's conduct. For example, although the Court of Appeals made much of Bowen's EPA license, it failed to see the inference in Plaintiffs' favor that Bowen was therefore educated in the applicable law and should be held to a higher standard of care regarding poison than an unlicensed person would be. Additionally, there was no evidence that, after the first dog fell ill from the

poisoned meat, Bowen gave any warning to any person, allowing the now known risk to continue. Worse, Bowen lied to Plaintiffs Hanks about collecting the poisoned meat, giving Hanks false comfort that no further poisonings would occur. REC. at 2487-2488 (Bowen told Hanks he would collect remaining meat but Hanks found poisoned meat several days later). Plaintiff Eickbush gave significant, undisputed evidence about Bowen's hostile attitude toward his neighbors and domestic dogs in general. *See id.* at 2674-2675.

Finally, it is important to note that neither the Trial Court nor the Court of Appeals gave proper weight to the Trial Court's lengthy and detailed findings of fact made while denying a directed verdict on the ultrahazardous activity claim. *Id.* at 3017-3024. A simple review of those factual findings shows that they are more than enough to allow a reasonable juror to find that Bowen's conduct was extreme and outrageous. Even where the facts were laid out and established by the Trial Court, they were not read in Plaintiffs' favor by either court with regard to the IED claim.

When all of the evidence, disputed and undisputed, is properly read and resolved in Plaintiffs' favor, it easily gives rise to the inference that Bowen strewed poisoned meat around his neighbors' properties without any legal or regulatory authorization, taking no actions from start to finish to mitigate possible harm to

dogs or children, without real evidence of coyote damage. The Trial Court and the Court of Appeals both failed to seek or to find these clear inferences in Plaintiffs' favor as they were required to do in ruling on and reviewing Bowen's directed verdict motion. *Fair,* 943 P.2d at 436-37.

For these reasons, Plaintiffs respectfully request that this Court grant their petition and review these errors.

VI. APPENDICES

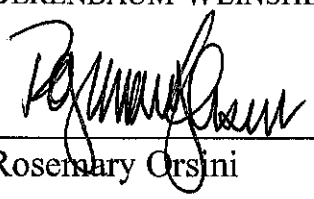
A. December 15, 2011, Slip Opinion.

B. Texts of relevant statutes or ordinances.

1. *FIFRA Enforcement Response Policy*, 5-6 (EPA 2009).
2. C.R.S.A. Const. Art. 18, § 12b.
3. § 33-6-208(c)(I), C.R.S. (2011).
4. § 35-40-113, C.R.S. (2011).
5. 8 C.C.R. 1201-12.

Respectfully submitted this 17th day of January, 2012.

BERENBAUM WEINSHIENK PC



Rosemary Orsini

Katherine A. Burke
INSIGHT LAW, LLC

CERTIFICATE OF DELIVERY

I hereby certify that on this 17th day of January, 2012, a true and accurate copy of the foregoing Petition for Certiorari Review was served via U.S. mail on:

Ellis J. Mayer
Allison R. Ailer
Nathan, Bremer, Dumm & Meyers, P.C.
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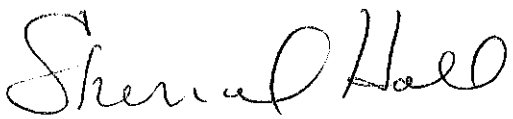

Sherrol Hall

SULLIVAN, et al v. BOWEN
Petition for Certiorari Review

APPENDIX A

December 15, 2011, Slip Opinion

Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202	**COPIES MAILED TO COUNSEL OF RECORD** Tr. Ct. Judge Tr. Ct. Clerk
Adams County 2007CV287	AND _____ ON _____
Plaintiffs-Appellants: Kathleen Sullivan; Dyanne Caprio; Kenneth Hands; and Thomas Eickbush, individually and as parent and next friend of Wyatt Eickbush, a minor; **v.** **Defendant-Appellee:** Daniel Bowen.	BY _____ Court of Appeals Case Number: 2010CA1578
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:
Thomas Eickbush, individually and as parent and next friend of Wyatt Eickbush, a minor, Plaintiff-AppellantDyanne Caprio, Plaintiff-AppellantKenneth Hands, Plaintiff-AppellantKathleen Sullivan, Plaintiff-Appellant

is **DENIED**.

Issuance of the Mandate is stayed until: January 17, 2012.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: DECEMBER 15, 2011

BY THE COURT:

Judge Graham
Judge Gabriel
Judge Dailey

SULLIVAN, et al v. BOWEN
Petition for Certiorari Review

APPENDIX B
FIFRA Enforcement Response Policy
C.R.S.A. Const. Art. 18, § 12b
§ 33-6-208(c)(I), C.R.S. (2011)
§ 35-40-113, C.R.S. (2011)
8 C.C.R. 1201-12

FIFRA ENFORCEMENT RESPONSE POLICY

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

December 2009

III. DETERMINING THE LEVEL OF ACTION

Once the Agency finds that a FIFRA violation has occurred, EPA will need to determine the appropriate level of enforcement response for the violation. FIFRA provides EPA with a range of enforcement options. These options include:

-- Notices of Warning under sections 9(c)(3), 14(a)(2), and 14(a)(4);

-- Notices of Detention under section 17(c);

-- Stop Sale, Use, or Removal Orders under section 13(a);

-- Seizures under section 13(b);

-- Injunctions under section 16(c);

-- Civil administrative penalties under section 14(a);

-- Denials, suspensions, modifications, or revocations of applicator certifications under 40 C.F.R. Part 171;

-- Referral for criminal proceedings under section 14(b); and

-- Recalls.

To ensure national consistency in FIFRA enforcement actions, EPA enforcement professionals should use this ERP as a guide in considering the facts and circumstances of each case and the company's compliance history to ensure an enforcement response appropriate for the particular violations. Each of the potential enforcement responses is discussed below.

A. Notices of Warning

FIFRA §§ 14(a)(2), 14(a)(4), and 9(c)(3) provide EPA with the authority to respond to certain violations of FIFRA with a Notice of Warning (NOW) to the violator. Under FIFRA § 14(a)(2), EPA may not assess a penalty for violations by a private applicator or other person not covered by section 14(a)(1) without having issued a written warning or citation for a prior violation of FIFRA by that person, "except that any applicator not included [in paragraph 14(a)(1)] who holds or applies registered pesticides, or uses dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served . . . may be assessed a civil penalty . . . of not more than $500 for the first offense nor more than $1,000 for each subsequent offense." For all persons not covered by the exception in section 14(a)(2), EPA should issue a Notice of Warning for a first-time violation.

A state citation for a violation that would also be considered a violation under FIFRA, can be used to meet the requirement of a citation for a prior violation under FIFRA § 14(a)(2). For this purpose, the prior citation may be a notice of warning and does not have to include a penalty. The prior citation does not have to be related to the current violation; it may be for any FIFRA violation.

Regions may issue a NOW or assess a penalty of up to $500[2] for the first offense by any applicator within the scope of the exception set forth in section 14(a)(2). Section 9(c)(3) permits EPA to issue a written Notice of Warning for minor violations of FIFRA in lieu of instituting a penalty action if the Administrator believes that the public interest will be adequately served by this course of action. Generally, a violation will be considered minor under this section if the total "gravity adjustment value," as determined from Appendix B of this ERP, is three or less. A Notice of Warning may also be appropriate for certain first-time recordkeeping violations as listed in Appendix A (for example, late Section 7 reports that meet the guidelines of the FIFRA Section 7 ERP). FIFRA § 14(a)(4) provides that EPA may choose to issue a Notice of Warning in lieu of a penalty action if EPA determines that the violation occurred despite the exercise of due care or the violation did not cause significant harm to health or the environment.

B. Notices of Detention

A shipment of a pesticide or device may not be imported into the United States until EPA makes a determination of the admissibility of that shipment. FIFRA § 17 authorizes EPA to refuse admission of a pesticide or device into the United States if EPA determines that the pesticide or device violates any provisions of the Act. EPA may deny entry of a pesticide or device by refusing to accept the Notice of Arrival or by issuing a Notice of Detention and Hearing. Upon receiving a copy of the Notice of Detention, the Department of Homeland Security, through the U.S. Customs and Border Protection (Customs), will refuse delivery to the consignee. If the consignee has neither requested a hearing nor exported the pesticide or device within 90 days from the date of the notice, Customs will oversee destruction of the pesticide or device.

Customs regulations for enforcement of FIFRA § 17(c) (19 C.F.R. Part 12.110 - 12.117) allow Customs to release a shipment to the importer or the importer's agent before EPA inspects the shipment only if (1) the Customs District Director receives a completed Notice of Arrival signed by EPA indicating the shipment may be released and (2) the importer executes a bond in the amount of the value of the pesticide or device, plus duty. When a shipment of pesticides is released under bond, the shipment may not be used or otherwise disposed of until the Administrator has determined the admissibility of that shipment. Should the shipment subsequently be refused entry and the importer or agent fails to return the pesticide or device, the bond is forfeited.

C. Stop Sale, Use, or Removal Orders (SSURO)

FIFRA § 13 provides EPA the authority to issue a Stop Sale, Use, or Removal Order (SSURO) to any person who owns, controls, or has custody of a pesticide or device, whenever EPA has reason to believe on the basis of inspection or tests that:

(1) a pesticide or device is in violation of any provision of the Act;

(2) a pesticide or device has been, or is intended to be, distributed in violation of the Act; or

(3) the registration of a pesticide has been cancelled by a final order or has been suspended.

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[2] Each of the FIFRA penalty amounts referenced in this document has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. The inflation adjustment is based on the date of the violation. See 40 C.F.R. Part 19.

West's Colorado Revised Statutes Annotated

Constitution of the State of Colorado [1876] (Refs & Annos)

Article XVIII. Miscellaneous

C.R.S.A. Const. Art. 18, § 12b

§ 12b. Prohibited methods of taking wildlife

Currentness

(1) It shall be unlawful to take wildlife with any leghold trap, any instant kill body-gripping design trap, or by poison or snare in the state of Colorado.

(2) The provisions of subsection (1) of this section shall not prohibit:

(a) The taking of wildlife by use of the devices or methods described in subsection (1) of this section by federal, state, county, or municipal departments of health for the purpose of protecting human health or safety;

(b) The use of the devices or methods described in subsection (1) of this section for controlling:

(I) wild or domestic rodents, except for beaver or muskrat, as otherwise authorized by law; or

(II) wild or domestic birds as otherwise authorized by law;

(c) The use of non-lethal snares, traps specifically designed not to kill, or nets to take wildlife for scientific research projects, for falconry, for relocation, or for medical treatment pursuant to regulations established by the Colorado wildlife commission; or

(d) The use of traps, poisons or nets by the Colorado division of wildlife to take or manage fish or other non-mammalian aquatic wildlife.

(3) Notwithstanding the provisions of this section 12, the owner or lessee of private property primarily used for commercial livestock or crop production, or the employees of such owner or lessee, shall not be prohibited from using the devices or methods described in subsection (1) of this section on such private property so long as:

(a) such use does not exceed one thirty day period per year; and

(b) the owner or lessee can present on-site evidence to the division of wildlife that ongoing damage to livestock or crops has not been alleviated by the use of non-lethal or lethal control methods which are not prohibited.

(4) The provisions of this section 12 shall not apply to the taking of wildlife with firearms, fishing equipment, archery equipment, or other implements in hand as authorized by law.

(5) The general assembly shall enact, amend, or repeal such laws as are necessary to implement the provisions of this section 12, including penalty provisions, no later than May 1, 1997.

(6) As used in this section, unless the context otherwise requires:

(a) The term "taking" shall be defined as provided in section 33-1-102(43), C.R.S., on the date this section is enacted.

(b) The term "wildlife" shall be defined as provided in section 33-1-102(51), C.R.S., on the date this section is enacted.

Credits

Added by Initiative Nov. 5, 1996, eff. Jan. 15, 1997.

Notes of Decisions (7)

Current with amendments adopted through the Nov. 2, 2010 General Election

End of Document

West's Colorado Revised Statutes Annotated

Title 33. Parks and Wildlife

Parks and Wildlife

Article 6. Law Enforcement and Penalties--Wildlife (Refs & Annos)

Part 2. Traps, Poisons, and Snares

C.R.S.A. § 33-6-208

§ 33-6-208. Thirty-day period--administration--conditions precedent to use of exemption

Currentness

(1) For purposes of the exemption specified in section 33-6-207:

(a) Where an owner or lessee raises livestock or crops on two or more separate parcels of private property, the exemption stated in section 33-6-207 shall apply separately to each parcel.

(b) The division shall verify that the owner or lessee has made reasonable efforts to alleviate ongoing damage to livestock or crops through reasonable efforts using methods other than those prohibited by section 33-6-203. The use of at least two of the following methods shall be presumed to represent reasonable efforts:

(I) Routine gathering of livestock in areas where predators are known to be present;

(II) The use of guard animals;

(III) The use of flashing lights, boom guns, or other scare tactics;

(IV) The presence of human herders or guards;

(V) Any other industry-accepted method that is effective in reducing losses and whose use is approved by the agriculture commission and the wildlife commission for that purpose.

(c)(I) An owner or lessee seeking to use the exemption stated in section 33-6-207 shall notify the division by telephone, telefacsimile, or first-class mail before the beginning of each period during which trapping, snaring, or poisoning activity is to take place. Within ten days after giving such notice, the owner or lessee shall provide the division with a written certification that there exists on-site evidence of ongoing damage to livestock or crops and that the owner or lessee has made reasonable efforts to alleviate such damage by the use of alternative methods.

(II) The owner or lessee need not present on-site evidence of damage or of reasonable efforts using alternative methods before commencing trapping, snaring, or poisoning activity, but the owner or lessee shall be prepared to do so upon request of the division at any time within the thirty-day period. The division may, at its option, send an employee or agent to visit the site and verify compliance with the requirements of this section and of section 33-6-207.

Credits

Added by Laws 1997, S.B.97-52, § 1, eff. May 27, 1997.

Current through the end of the First Regular Session of the 68th General Assembly (2011)

End of Document

West's Colorado Revised Statutes Annotated

Title 35. Agriculture

Protection of Livestock

Article 40. Predatory Animals--Control

Part 1. General Provisions (Refs & Annos)

C.R.S.A. § 35-40-113

§ 35-40-113. Permit system for poisoning of predators

Currentness

The commissioner, after hearing and after consideration of both the needs and concerns involved, shall adopt a permit system incorporating the policies and procedures developed by the commissioner in cooperation with the division of wildlife, pursuant to which annual permits shall be issued for the use of poisons by livestock operators, owners, or their authorized agents, for the control of predatory animals on lands owned or leased by them from private parties, if the point of use is at least two hundred yards from the nearest property line or public right-of-way. Such permit system shall, as practicably and reasonably as possible, provide a balance between the need to control predators and the need for protection for human beings and other forms of life. Such permit system shall specify the type of information to be set forth in the application, including the substance or device to be used, the quantity thereof, and identification of the property where the use is desired. The permit shall similarly set forth such information and shall also set forth such instructions, conditions, and restrictions as may be appropriate in the circumstances, including posting of public notice that poisons are in use.

Credits

Amended by Laws 1989, H.B.1188, § 6.

Current through the end of the First Regular Session of the 68th General Assembly (2011)

End of Document

West's Colorado Administrative Code

Title 1200. Department of Agriculture

1201. Animal Industry Division

8 CCR 1201-12. Depredating Predator Animal Control (Refs & Annos)

8 CCR 1201-12:3.00
8 Colo. Code Regs. 1201-12:3.00Alternatively cited as 8 CO ADC 1201-12

1201-12:3.00. CONTROL OF DEPREDATING ANIMALS EXCEPT BLACK BEARS AND MOUNTAIN LIONS

Currentness

If the methods specified below are utilized to take a depredating animal, the corresponding restrictions apply.

A. Leghold traps - IF leghold traps are used, the following requirements shall apply:

(1) The jaws of Leghold traps must be padded.

(2) An owner or lessee of a parcel of private property, or the employees of such owner or lessee, can use traps so long as all of the following conditions are met as provided by 33-6-207 (1)

(a) The property is primarily used for commercial livestock or crop production;

(b) The use of the methods otherwise prohibited by Section 33-6-203 occurs only on the property;

(c) Such use does not exceed one thirty-day period per year for each parcel of private property; and

(d) The owner or lessee can present on-site evidence to the division that ongoing damage to livestock or crops has not been alleviated by the use of methods other than those prohibited by Section 33-6-203.

(3) Leghold traps are not allowed within 30 feet of either side of a public trail easement across private lands.

(4) Chain length requirements for leghold traps set on land:

(a) When anchored by a stake, a chain of 2 3 feet or less must be utilized.

(b) When used with a drag, a chain of 6 feet or less must be utilized.

(5) Pan tension requirements - For leghold traps size #3 or larger the required minimum pan tension shall be 3.5 pounds.

B. Snares - If snares are used, the following requirements shall apply:

(1) An owner or lessee of a parcel of private property, or the employees of such owner or lessee, can use snares so long as all of the following conditions are met as provided by 33-6-207 (1)

(a) The property is primarily used for commercial livestock or crop production;

(b) The use of the methods otherwise prohibited by Section 33-6-203 occurs only on the property;

(c) Such use does not exceed one thirty-day period per year for each parcel of private property; and

(d) The owner or lessee can present on-site evidence to the division that ongoing damage to livestock or crops has not been alleviated by the use of methods other than those prohibited by Section 33-6-203.

(2) Nonlethal snares with stops shall be set appropriately for the target depredating animal to minimize nontarget catches, with a swivel outside the loop and must break away at a maximum of 350 pounds pull. When used to capture coyotes, stops shall be placed on the snare cable to prevent the loop from closing to a circumference of less than 10.5 inches. On all other depredating animals stops shall be placed on the snare cable to prevent the loop from closing to a circumference of no less than 8 inches.

(3) Lethal snares which will breakaway at a maximum of 350 pounds of pull and are effective in expeditiously killing the animal caught.

(4) Snares are not allowed within 30 feet of either side of a public trail easement across private lands. Lethal snares may be placed on game trails where there is evidence of the target animal(s) and placed where they are not readily accessible to nontarget species.

C. Checking frequencies

(1) Nonlethal traps and nonlethal snares shall be checked a minimum of 3 times per week: twice, 2 days apart and once, 3 days apart in any seven-day period (any combination of 2-2-3).

(2) Lethal snares, lethal traps and drowning sets shall be checked a minimum of once every seven days.

(3) Any animals found in traps or snares upon checking shall either be released or humanely killed and removed, as set forth in Sections 4.00, 5.00 and 6.00 below.

D. Control method restrictions in kit fox and river otter areas

(1) To avoid the taking of river otter, trapping in the following areas is prohibited in water, except with Conibear type traps less than 220 in size and snares that will not close to less than 16 inches in circumference. Trapping on land in the restricted area is prohibited except with a padded jaw trap or snare that will not close to less than 16 inch circumference. Leghold traps and snares shall not be used in a drowning set.

(a) That portion of the Gunnison River and 5 miles upstream along each of its tributaries in Montrose and Delta Counties from the Black Canyon of the Gunnison National Monument downstream to that point where the river meets Highway 92; and all lands within 100 yards of the high water line of this portion of the Gunnison River and all tributaries thereof.

(b) That portion of the Piedra River upstream from Navajo Reservoir to the headwaters including East Fork and Middle Fork of the Piedra River in Hinsdale and Archuleta Counties and 9 miles upstream on the First Fork. This restriction includes the following tributaries: Sand Creek, Weminuche Creek, Little Sand Creek, Williams Creek and all lands within 100 yards of the high water line of the above waters.

(c) The Dolores River from the McPhee Reservoir downstream to Bed Rock within 100 yards of the high water line.

(d) The San Juan River from Pagosa Springs downstream to the New Mexico State line within 100 yards of the high water line.

(2) To avoid the taking of kit fox, lethal traps and lethal snares, except when used as water or tree sets, are prohibited within the following area: that portion of Delta, Mesa and Montrose counties bounded on the north by the Mesa-Garfield county line from the Utah state line east to U.S. Interstate 70; bounded on the east by U.S. Interstate Highway 70 from the Mesa-Garfield county line to Colorado State Highway 65; from Colorado State Highway 65 to its junction with the northern boundary of the Grand Mesa Forest and following the boundary line west, south and then east to its junction with Colorado State

Highway 65; from Colorado State Highway 65 to its junction with the Gunnison River; from the Gunnison River to Colorado State Highway 347; from Colorado State Highway 347 to its junction with U.S. Highway 50; bounded on the south by U.S. Highway 50 from its junction with Colorado State Highway 347 to the Gunnison River; from the Gunnison River to its junction with the Colorado River; from the Colorado River to the Utah state line; and bounded on the west by the Utah state line. All leghold traps and mechanically activated leg snares used within this area shall be set with a tension that requires a minimum of 4 pounds of force to activate the snare or trap.

D. Carcass - if an exposed carcass is used, the following restrictions shall apply:

Leghold or lethal traps, lethal or nonlethal snares, or M-44 device (a specific predicide device) may not be set within 30 feet of an exposed carcass that is plainly visible from above, except as provided in Section 7.00 F.

E. Registered Predicides - if predicides are used, the following restrictions shall apply:

(1) An owner or lessee of a parcel of private property, or the employees of such owner or lessee, can use predicides so long as all of the following conditions are met as provided by 33-6-207 (1)

(a) The property is primarily used for commercial livestock or crop production;

(b) The use of the methods otherwise prohibited by Section 33-6-203 occurs only on the property;

(c) Such use does not exceed one thirty-day period per year for each parcel of private property; and

(d) The owner or lessee can present on-site evidence to the division that ongoing damage to livestock or crops has not been alleviated by the use of methods other than those prohibited by Section 33-6-203.

(2) Predicides may be used by government employees, government certified applicators, or other persons authorized pursuant to the product label.

F. Dogs - if dogs are used, the following provisions shall apply:

(1) Guard dogs and decoy dogs are allowed. Incidental take by these dogs is not unlawful.

(2) Coursing dogs and trailing dogs are allowed, provided the intent of their use is not for the dogs to kill the target animal. Inadvertent take by these dogs is not unlawful.

G. Aircraft - if aircraft is used, the following restrictions shall apply:

(1) Prior to using aircraft, a request must be made in writing to the Commissioner. The Commissioner will approve or disapprove the request. In making this decision, the Commissioner shall consider such factors as, but not limited to, the person's expertise in taking depredating animals by aircraft, as well as the geographical location where use is to occur. The request shall include proof of landowner permission to fly over and discharge firearms on all property in the defined geographical area.

(2) Aircraft shall only be utilized for taking depredating coyotes and red fox in areas where depredation by these species has historically occurred or is occurring.

(3) The authorization to use aircraft shall expire within a specified period of time, as set by the Commissioner. Renewals are at the discretion of the Commissioner.

(4) Take shall be reported pursuant to Section 8.00 below.

H. Artificial light - if artificial light is used, the following restrictions shall apply:

Artificial light may be used on private land. Artificial light may also be used on public lands when taking depredating animals where depredation has occurred or is occurring, except:

(a) During any deer, elk or antelope rifle season or during the 24 hour period prior to the opening weekend, during the opening weekend of any grouse, pheasant, quail, turkey or waterfowl season unless prior authorization is obtained from the Commissioner; or

(b) In any areas where human safety would be jeopardized.

Current through CR, Vol. 34, No. 16, December 25, 2011.

8 CCR 1201-12:3.00, 8 CO ADC 1201-12:3.00

End of Document

West's Colorado Administrative Code

Title 1200. Department of Agriculture

1201. Animal Industry Division

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Highway 65; from Colorado State Highway 65 to its junction with the Gunnison River; from the Gunnison River to Colorado State Highway 347; from Colorado State Highway 347 to its junction with U.S. Highway 50; bounded on the south by U.S. Highway 50 from its junction with Colorado State Highway 347 to the Gunnison River; from the Gunnison River to its junction with the Colorado River; from the Colorado River to the Utah state line; and bounded on the west by the Utah state line. All leghold traps and mechanically activated leg snares used within this area shall be set with a tension that requires a minimum of 4 pounds of force to activate the snare or trap.

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Current through CR, Vol. 34, No. 16, December 25, 2011.

8 CCR 1201-12:3.00, 8 CO ADC 1201-12:3.00

End of Document