

CALIFORNIA LEGISLATURE



Jared Huffman
ASSEMBLYMEMBER, 6TH DISTRICT

STATE CAPITOL
Room 3120
SACRAMENTO, CA 95814
(916) 319-2006
FAX (916) 319-2106

DISTRICT OFFICE
3501 Civic Center Drive
Suite 412
San Rafael, CA 94903
(415) 479-4920
FAX (415) 479-2123

CHAIR, Water Parks and
Wildlife

COMMITTEES
Natural Resources
Utilities & Commerce
Assembly Budget Committee
Subcommittee No. 3 on
Resources

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February 9, 2011

California Attorney General Kamala Harris
Department of Justice
1300 I Street
Sacramento, CA 95814

RE: Input to Attorney General Working Group on Environmental Enforcement

Dear Attorney General Harris:

Thank you for inviting me to participate in the "Smart on Crime" work group you formed on environmental enforcement. My staff have participated in the working group and provided input to be included in the joint document the group is preparing for your review. To provide you with some more detail on our thoughts regarding environmental enforcement needs of some of the state departments in the natural resources area, I wanted to provide you with this letter for inclusion in the appendices the group is compiling.

First, I want to emphasize that all of the departments we work with have indicated the Attorney General's Office does an excellent job of representing them on cases where the Attorney General is engaged to represent them on prosecutions or to defend the departments in court. That being said, there are several challenges that state natural resource departments are facing, including the following:

- Lack of enforcement staff. Examples include:
 - Insufficient numbers of fish and game wardens
 - Some departments lack sufficient staff to conduct investigations necessary to prepare complex cases for prosecution.
 - Coastal Commission has large backlog of enforcement cases for public access violations; Department of Parks & Recreation (DPR) for encroachments; Department of Fish and Game (DFG) for inland pollution spills and poaching.
- Lack of departmental funding to cover enforcement costs and attorney's fees. Examples include:
 - Some departments indicate problems with defendants who engage in sharp litigation practices (e.g. excessive discovery, refusing typical stipulations) in an effort to drive up fees, knowing the state has limited resources for funding litigation costs.
 - As lead investigator, some departments have had difficulty obtaining cost recovery when cases are settled prior to trial and penalties directed to CDAA or other agencies.
- Lack of priority given to environmental enforcement cases within grand scheme of law enforcement.
 - Wildlife crimes and other environmental crimes are viewed by many D.A.s and judges as lower priority than other violent crimes, especially where county court dockets are full and resources thin.

- Lower priority is partially due to lack of resources at county level, but also due to lack of awareness or appreciation for seriousness of environmental crimes and the threats such crimes pose to public health and safety.
- Some D.A.s have indicated they will not prosecute misdemeanors, which includes most of the Fish and Game Code.
- Considerable resources are spent to prepare egregious poaching cases for prosecution, only to have judges push cases to settlement or impose minimal fines. Poaching rings often find money to be made on the black market exceeds risk of penalties so deterrent effect is lacking.

The following are several specific departmental issues that have been brought to our attention:

- **Department of Parks & Recreation: *Problem:*** DPR has many trespass and encroachment cases which are pursued civilly. Examples include cases where an adjacent land owner builds a fence or road across state park property. In some cases the defendant's litigation strategy is to fight everything, including issues that would normally be stipulated to, in order to drag out the case, drive up litigation costs and pressure the state to settle. Attorney's fees become cost prohibitive for DPR. The problem is not a legal one – the law provides legal tools for prosecution – but rather one of limited financial resources for attorney's fees which escalate due to defendants' sharp practices. ***Proposed Solution:*** Provide more education and training on strategies for recovery of attorney's fees; establish policy that settlement negotiations should include cost recovery for lead investigatory department.

Problem: In addition to environmental enforcement actions, state departments incur litigation costs as defendants when they are sued directly and face liability for a variety of actions. Defending these cases diverts resources that could be used for environmental enforcement cases. ***Proposed Solution:*** The AG's Office could offer training to resource department clients on best practices for minimizing liability, including, for example, standard language to be used for liability waiver clauses. The AG's Office might also advocate for legislation to expand or clarify state agency immunity if needed.

- **Department of Fish and Game: *Problem:*** DFG wardens are involved in investigating a number of illegal marijuana growers on public lands. These crimes often involve significant environmental destruction including, for example, use of DDT, water diversions from salmon streams, pesticide discharge into drinking water supplies, cutting of forests, trapping and killing of wildlife, habitat destruction and other violent crimes. We are told that in the past, the tendency of the US Attorney's Office as lead prosecutor has been to just count the plants and not prosecute the associated environmental crimes. Surveys indicate there is more public support for prosecuting marijuana growing crimes if the environmental violations are prosecuted in addition to plant counts. ***Proposed Solution:*** As a best practice, consideration should be given to making it a policy of the AG's Office to always prosecute the associated environmental crimes as part of any prosecutions of illegal marijuana cultivation on public lands. We understand Santa Clara County has been a leader in prosecuting these kinds of violations and has been successful in obtaining penalty enhancements for the environmental crimes. The AG's Office could play a leadership role in recognizing this approach as a model and encouraging other counties to follow suit.

Problem: Poaching violations have increased dramatically in California in recent years. Between 2003 and 2007 the number of poaching violations more than doubled. AB 708 (Huffman), legislation enacted in 2009 which you supported, increased the penalties for egregious poaching, but many poaching violations still go unprosecuted or receive minor fines and penalties. Poaching rings have learned that money available on the black market for resources like sturgeon roe often outweigh the risk of conviction, and the threat of prosecution therefore serves as little deterrent to these crimes. Poaching crimes are also often viewed by judges as minor "disturbance" cases compared to other violent crimes. Thus, there is pressure to settle these cases out of court if they are prosecuted at all. Not only can poaching pose significant threats to the sustainability of vulnerable wildlife species, but poaching also diminishes the public investment the state and law abiding fishers and hunters have made in restoring habitat for fish and

wildlife, and economically impacts persons and businesses whose livelihoods and local economies depend on the health and vitality of commercial and recreational fisheries. **Proposed Solutions:** 1) The AG's Office could play an important role in training and educating prosecutors and judges on the societal impacts of poaching and other wildlife crimes and publicizing the seriousness of these crimes for public health and safety; 2) The AG's Office could consider taking over prosecution of these cases for the CDAA circuit prosecutors who lack resources; 3) Consideration could be given to creating a "Wildlife Court" with circuit court judges, or designated judges with specific expertise could be appointed to hear wildlife cases, similar to the model that currently exists for CEQA judges (see Public Resources Code §21167.1(b)); 4) The Resources Agency could be encouraged to loan a team of Resource Agency attorneys to the AG's Office or local counties who could be deputized to assist with local prosecutions of wildlife crimes.

Problem: Some of the larger DFG enforcement cases involving multiple defendants have required DFG staff to dedicate significant staff resources and time to develop and prepare the cases for prosecution, including investigation, lab work and evidence documentation, at significant cost to the department, only to have the D.A. handling the case reach a pre-trial settlement that directs all of the penalties and fines to CDAA or other agencies. In that case, not only does DFG not recoup any of their investigatory costs, but none of the funds are directed toward restoration of the habitat or other natural resource damage. The Inland Pollution Spill Account is also being depleted because DFG is not getting reimbursed for their costs. **Proposed Solution:** Establish policy requiring that the lead investigatory agency be included in pre-trial settlements for cost recovery. Consider allocating a portion of penalties to restoration of habitat destruction.

Problem: Lack of sufficient DFG wardens. Today California has roughly the same number of wardens as it had in the 1970's, yet the population of the state has increased exponentially since that time. The number of citations issued by DFG wardens increased from 7,571 citations in 2001 to 14,543 in 2008. During that same time, the number of wardens shrunk by 33%. In 2008 DFG had less than 300 wardens statewide to patrol over 150,000 square miles of land, and over 1,000 miles of coastline, plus out to 200 miles offshore. In 2010, 38 field wardens were added to the force, but DFG still has the lowest warden to population ratio of any state in the nation. **Proposed Solution:** As Attorney General you have emphasized your priority of addressing violent crime and your strong advocacy for public safety funding, particularly when it comes to putting more cops on the street. This advocacy could also extend to fish and game wardens whose jobs are every bit as dangerous as other peace officers. The Legislative Analyst's Office (LAO), noting the decline in the number of DFG wardens and the commensurate increase in DFG's enforcement responsibilities, has also recommended increasing various fees for DFG programs, including for California Endangered Species Act enforcement and for Timber Harvest Plan enforcement.

Finally, we encourage and support all of your efforts to use your position as California's chief law enforcement officer to promote vigorous enforcement of environmental laws, and to protect the Public Trust. We are very pleased to have someone in the Attorney General's Office who understands and values these important goals and will work hard to achieve them. Thank you for valuing our input and inviting us to be part of your "Smart on Crime" team. If I can be of any further assistance to you on these or any other related issues please do not hesitate to contact me.

Sincerely,



JARED HUFFMAN

Assemblymember, 6th District