From: Tom Infusino, CPC

To: MCG

Re: Public Interest Profile Enhancement Project (PIPE)

Date: April 29, 2014

I was discussing with Katie Cole my disappointment that there were no "projects" to implement some of the MCG objectives. These include the demand estimates, demand issues, maximizing benefits, avoiding end use harm, and avoiding unnecessary litigation objectives. She suggested that I try to come up with projects to implement those objectives. I ran some ideas by the project review focus group, and they suggested that I generate a more complete proposal that explains the challenges that the project aims to overcome. Below I propose that the MCG establish a focus group to work on the Public Interest Profile Enhancement Project (PIPE).

I) The PIPE Project addresses many challenges faced by MCG participants who try to negotiate the State Water Board permitting process.

A) Applicants for water permits must demonstrate to the State Water Board that their application complies with a number of Constitutional, statutory, and regulatory provisions.

Many of the efforts at MokeWISE already deal with identifying some of the basic project parameters future applicants will need in their State Water Board application. Efforts at MokeWISE are already aimed toward resolving some basic stakeholder concerns.

For example, at MokeWISE we are learning the names of current and future applicants, the sources of the water supply, the nature and amount of the proposed water uses, and the locations and the descriptions of the diversions and the storage facilities. (Water Code, Section 1260.) Applicants that work out stakeholder concerns regarding the location of diversion and storage facilities will have improved prospects for smooth and successful applications.

In addition, the water availability study in MokeWISE will identify various perspectives on the amount of unappropriated water that is available for appropriation, and how much is needs to stay in-stream to meet recreation, fish, wildlife, and water quality needs. (See Water Code, sections 1242.5, 1243, 1243.5, 1253, and 1257.5.) Applicants that work out these issues with stakeholders will have improved prospects for smooth and successful applications.

However, these are only <u>a few</u> of the issues that the State Water Board will address when it evaluates a permit application.

Agencies seeking water for municipal needs must present data on the "population to be served" and the "future requirements of the city." (Water Code, Section 1264.) Thus, a key issue is the adequacy of the method used for calculating future population growth, and for estimating future water demand. Applicants with weak population growth estimates or poor methods for estimating future water

demand may be stymied at the State Water Board. In contrast, applicants that have worked out their population estimate and demand calculation methodologies (including drought management/storage contingencies) with potential critics have one less thing to worry about.

Similarly, applicants seeking water for agricultural purposes need to identify the land to be irrigated, its acreage, and its irrigation needs. (Water Code, Sections 1260 & 1262.) Again, applicants that have worked out questions about the long-term use of the agricultural lands, and efficient irrigation strategies with potential critics have one less thing to worry about.

In addition, an application for water storage must provide information regarding the height of the dam, the capacity of the reservoir, and the use to be made of the water. (Water Code, Section 1266.) Applicants that have worked out these questions with potential critics have fewer things to worry about.

Furthermore, the California Constitution prohibits the waste, the unreasonable use, the unreasonable method of use, and the unreasonable method of diversion of water. (California Constitution, Article 16, Section 3.) This is a very difficult issue, since the definition of what is an unreasonable use changes as water gets scarcer, and as we develop new ways to avoid waste and to use water more efficiently. Thus, leaking miners' ditches, once suitable for transporting water in rural areas, may become unsuitable. Agricultural irrigation methods that were reasonable in the past may become unreasonable. (See Wilson, Watermaster, State Water Resources Control Board Delta Stewardship Council, *The Reasonable Use Doctrine & Agricultural Water Use Efficiency,* January 2011.) Similarly, using virtually all water in the home only once and flushing it out to sea, without reclaiming a meaningful proportion for a second use, may someday be considered waste. (See for example reclamation goals in SB 1011, Stats. of 1995) A permit applicant that has effectively reduced the waste in its system, and aggressively reclaimed wastewater, will have a better chance of demonstrating that its future use of water will not be wasteful.

Finally, one of the broadest, and perhaps the most confounding, standards that applicants must meet is the public interest standard. The State Water Board must determine that approving the application is in the public interest. (Water Code, Sections 1243, 1243.5, 1253, 1255, 1256, 1257.)

We have already noted that the Water Code specifically calls out some of these public interest issues like unreasonable water use, water waste, water conservation, water demand, water re-use, water for fish and wildlife, water quality, etc.

Furthermore, the State Water Plan, that is updated periodically, is used as a guide on public interest issues. (Water Code, Section 1256.) The 2013 Draft 2013 California Water Plan Update provides guidance on the following public interest issues: Environmental, Economic and Social Prosperity; Innovation & Infrastructure, Transparent Decision-Making, Finance Planning, Agricultural Water Use Efficiency, Urban Water Use Efficiency, Flood Management, System Reoperation, Conjunctive Use, Recycled Water, Matching Quality to Use, Pollution Prevention, Stormwater Management, Ecosystem Restoration, Land Use Planning, Watershed Management, and Water-dependent Recreation.

In addition, the Public Trust Doctrine imposes a duty on the State of California to give proper weight to the public's right to access navigable waterways for fishing, recreation, and commerce when making

decisions about water rights, water storage, and water diversions. An applicant should be prepared to address this aspect of the public interest during the review its water rights application.

Penultimately, a major issue in water rights application is the potential harm to existing water users. All of these aforementioned public interest issues address the concerns of people who may question the impacts of a water application on the water source (e.g. river or lake) and those that use it.

Finally, there is another aspect of the public interest that sincerely drives the concerns of many water application critics. This is the end use harm associated with the water use. These issues are often treated in the environmental review document for the application. In the terminology of the California Environmental Quality Act (CEQA) these are the "secondary impacts" of the water project (not because they are less important, but because they are a step farther down the chain of causation). These are the harms that result when water use (e.g. agriculture, mining, urban development) has significant and unmitigated impacts on the human environment. (For a list of these potential harms, consult a CEQA Initial Study Checklist.) From the perspective of these critics, the public interest is best served when precious water resources are allocated to those entities that do the best job of reducing the adverse impacts of the water use. For example, a local government that has no current plan to meet clean air standards, repeatedly violates clean water standards at its waste water treatment plant, has no program to mitigate the loss of agricultural lands to new development, has no habitat conservation plan for endangered species, and has no plans and/or funding to meet the infrastructure and public service needs of an expanding population, will have a much harder time arguing that additional water provided to it will serve the public interest. On the other hand, a local government that has a clean air plan, complies with its waste discharge requirements, has an active and successful agricultural lands mitigation program, has an effective habitat conservation plan, and has plans to fully fund the infrastructure and services needed for an expanded population will have a much easier time arguing that additional water provided to will serve the public interest.

The bottom line is that an applicant that has developed a broad public interest profile in advance of the application, and in conjunction with likely critics, has a much better chance of a smooth and successful application process.

B) The PIPE Project will help applicants to develop the practices, policies, and programs that will help their application to meet legal standards and to get approved.

Often future applicants choose to ignore the aforementioned permit approval standards until the time comes to file an application. They chose not to deal with the concerns expressed by critics until the time comes to file an application. At that time, applicants try to do their best to try to spin their existing practices, policies, and programs in the best light. However, if there are gaping holes in their waste reduction, conservation, reclamation, or public interest profile, then their critics raise these issues in protests, and propose permit conditions sufficient to warrant dismissal of the protest. If negotiations over those conditions are not successful, the application becomes the focus of a contested hearing before the State Water Board. These expensive and lengthy processes can disrupt timely project completion.

An alternative approach is for future project applicants to anticipate the need to meet these application approval standards. They can spend the years before the permit application developing the practices, policies, and programs that will help their applications to meet legal standards. They can work to alleviate the concerns of critics regarding the impacts of the project on existing water users, the impacts on the water source, and the end use harm. Generally people call this strategy "front-loading." In this instance, the front-loading involves work prior to the water permit application process, so that the actual process runs smoothly and successfully. In addition to the benefits associated with water permit streamlining; practices, policies, and programs that improve an applicant's public interest profile also have the added advantage of actually producing benefits to the applicant's community such as clean water, more secure water supplies, clean air, public infrastructure and services, agricultural land preservation, and wildlife habitat protection, to name a few.

C) The PIPE Project gets applicants the cooperation they need from local land use authorities to meet some State Water Board standards and some DWR funding standards.

Perhaps the biggest barrier that a future water applicant has in improving its public interest profile is the limits of its jurisdiction. If a water purveyor is fortunate, its jurisdiction extends over both providing water and treating wastewater. In that case, it can strongly influence its public interest profile when it comes to reducing water delivery waste, promoting water conservation, meeting waste discharge requirements at the wastewater treatment plant, and investing in water reclamation. Even in these circumstances, it is impossible for the water purveyor alone to address the end use harm associated with water use. The local or regional air districts deal with air pollution. The regional transportation commission, the council of governments, and the individual cities and counties deal with traffic congestion. School districts deal with school capacity. Counties and cities deal with law enforcement and land use issues. This jurisdictional entropy complicates interagency cooperation.

However, the State of California is calling upon water purveyors and local governments to overcome the challenges of jurisdictional entropy and to collaborate across the board. For example, Prop. 84 funding was accessed by regions completing Integrated Regional Water Management Plans (IRWMPs) with multiple local agency stakeholders. These plans needed to demonstrate collaboration among water planners and land use planners. For those future water applicants that will also seek partial (or primarily) state funding for projects, it makes sense to use these IRWMP processes as opportunities to get other jurisdictions to help reduce end use harm that is outside the purview of the water purveyor. Unfortunately, past IRWMP processes have had mixed results in getting active participation from local government representatives, and in securing meaningful land use related improvements in public interest profiles.

Fortunately for us, the MokeWISE MCG includes some county and some city representatives, as well as water purveyor and environmental stakeholders. This provides a new opportunity for the water purveyors and the land use authorities to work together to improve their public interest profile. In addition, since both Amador County and Calaveras County are currently preparing comprehensive updates of their general plans, both counties are in a position to adopt policies and programs to improve

their public interest profiles. The synchronous nature of these planning efforts is a fluke that is unlikely to repeat. This opportunity for coordinated action may not come again.

D) Information exchanged among MCG agencies through the PIPE Project can help the group to better compete against other outside water interests.

We are most fortunate at MokeWISE to have the participation of a variety of agencies that have diverse experiences when it comes to improving their public interest profiles. The Amador Water Agency has been successful in reducing water lost from its leaky ditch system. Calaveras County has been successful in water reclamation. East Bay MUD has been successful in water conservation. San Joaquin County and some of its local governments have developed programs to address the mitigation of agricultural land loss and the protection of endangered species habitat. If these entities are committed to banding together to compete against outside water interests, as opposed to fighting among themselves, it would be in the best interest of these agencies to exchange information to help each other to improve their public interest profiles. By doing so with environmental stakeholders present, it may help to improve the agencies' reputations in the environmental community.

E) Using the PIPE Project to improve the public interest profiles of MCG agencies will reduce local objections to their projects.

As noted above, many critics of water permit applications have sincere concerns about the impacts of water projects on existing users, the impacts on the water source, and the end use harm. By improving their public interest profiles, MCG agencies will be able to resolve many of these concerns.

F) Through the PIPE Project the environmental interests at the MCG will benefit by having their issues addressed at MokeWISE.

Any one who has reviewed the objectives statements and the summary table has seen that different environmental stakeholders at MokeWISE have different interests. Some are concerned about the impacts of future projects on the water source and its many beneficial in-stream uses. Some are concerned about the end use harm. Some are concerned about both. The PIPE Project would address these concerns.

II. The PIPE Project will provide information exchange to resolve the issues likely to otherwise arise during contested hearings at the State Water Board.

A) Demand Reduction and Calculation Exchange

1) Have the focus group review and explain the existing calculation of agency demand estimates. Identify water demand issues for timely and constructive evaluation by the water agencies during the next UWMP update.

2) Have the focus group review and explain the existing drought management efforts. Those entities (e.g. agencies, districts, cities, and counties) doing better on drought management will provide helpful hints to others. At the end of the exercise, each entity can identify the efforts it will take to improve its drought management efforts.

This effort will help each agency to have consistent demand estimates, supported by substantial evidence in the record, and not challenged by other MCG interests, when it comes time for an application to the State Water Board.

B) Waste and Unreasonable Use/Diversion Exchange

Have the focus group review potential future water waste and unreasonable use issues, and the efforts of each entity (e.g. agency, district, cities and counties) to avoid waste and unreasonable use. Those entities (e.g. agencies, districts, cities, and counties) doing better on waste reduction will provide helpful hints to others. At the end of the exercise, each entity can identify the efforts it will take to avoid future waste and unreasonable use. This effort will help each agency to demonstrate, based upon substantial evidence in the record, that their water use does not constitute waste, and is not subject to challenge as such, when it comes time for an application to the State Water Board.

C) Water Conservation and Wastewater Reclamation Exchange

1) The focus group will identify the barriers to wastewater reclamation and craft solutions for overcoming the barriers to wastewater reclamation. Those entities (e.g. agencies, districts, cities, and counties) doing better on wastewater reclamation will provide helpful hints to others. At the end of the exercise, each entity can identify the efforts it will take to improve its wastewater reclamation efforts.

2) Have the focus group review water conservation efforts of each entity (e.g. agency, district, cities and counties). Those entities (e.g. agencies, districts, cities, and counties) doing better on water conservation will provide helpful hints to others. At the end of the exercise, each entity can identify the efforts it will take to improve its water conservation efforts.

This effort will help each agency to demonstrate, based upon substantial evidence in the record, that it is meeting its obligation to implement its water conservation plan, and to help the state meet its water reclamation target.

D) Reduction in End Use Harm/Adverse Secondary Impacts of Water Use

The focus group will identify a list of public interest criteria relating to end use harm. Each of the entities (e.g. agencies, districts, cities, counties) in the focus group that are or will be seeking an approval from the State Water Board related to a water appropriation from the Mokelumne River would evaluate their end use harm against these public interest criteria. Those entities that are doing better on particular criteria can indicate to others how they have managed to achieve those public interest objectives. At the end of the exercise, each agency can identify the efforts it will take to improve its public interest profile to reduce end use harm. This effort will help each agency to demonstrate, based

upon substantial evidence in the record, that its appropriation is in the public interest, and not subject to challenge on those grounds.

E) Design Enhancement

The focus group will identify the objectionable issues associated with the design of the proposed projects and try to improve the design to reduce the objections. This could also be an opportunity to demonstrate how the project design addresses public trust issues (fishing, recreation, commerce, etc.).

III. PIPE Project Work Products

It is up to the MCG, but I can envision many possible work products.

First, I could see each potential applicant producing an agency audit that identifies its strengths and weaknesses regarding each of the application issues noted above: demand calculation and reduction, waste reduction, reclamation and conservation, and reduction in end use harm.

A second work product could be a set of improved project designs to reduce objectionable aspects of projects.

A third work product could be a plan by each potential applicant, and its associated land use authorities, to address those areas where their public interest profile is currently weak. For example, agencies that are good at water conservation but weak in wastewater reclamation can identify ways to improve the latter. By implementing these plans, each applicant could improve its chances for a prompt and successful permit process, and reduce the likelihood of substantive objections arising.

Regardless of the work products chosen, I think that one of the most valuable outputs of the project will be the information exchanged among agencies with unique and varied successes in water management. For example, agencies that are weak in conservation can learn from those that are strong in that area. Also, as agencies share their successes with the environmental community at the table, they are likely to improve their reputation with those MCG participants.

Agencies that complete this process will be effectively preparing for the day when they apply for a permit with the State Water Board. Members of the environmental community who participate in this process will have an opportunity to seek the reforms they strive for in a collaborative setting with all the relevant parties at the table.

IV. Some Possible Reservations & Responses

It is possible that the agencies are not yet inclined to cooperate as fully as required to exchange information. I doubt that, since they generally like to talk about their successes.

It is possible that the agencies do not want to audit their public interest profiles in public at this time. If that is the case, I encourage them to do so privately, so that they can begin improving their public interest profiles as soon as possible.

It is possible that some agencies are not interested in improving some aspects of their public interest profiles. They may not share the values that underlie the state's definition of the public interest. They may not share the political philosophy that state and local government is responsible or well suited for promoting these so called public interests. If that is the case, I would hope that those agencies would not object to the other agencies participating in the PIPE Project.

It is possible that the effort would take more time than the MCG stakeholders are willing to spend at this time. It is possible that this effort, like so many other proposals made during IRWMP processes, will be deferred to some unspecified time, and some uncertain process, that is yet to be funded. That would be unfortunate. It has been stated previously the group may achieve a goal of identifying a set of water development and resource conservation projects that together meet many MCG participants' objectives. It would not be ideal if the applications to the State Water Board for those water development projects proceeded, without employing the PIPE Project to resolve the remaining issues associated with the water permits. If we avoid or postpone the PIPE Project, then we are not likely to meet our stated expectation for MokeWISE: "to yield a scientifically-based and *broadly-supported* water resources program that includes *comprehensive and sustainable approaches* to water resources management in the Mokelumne River watershed." (emphasis added.)

Most of the MCG members have worked too long and too hard at too many half-hearted attempts to resolve water resource management issues in the watershed. Let this effort be different. Let us give this effort our whole hearts.

It is easy to give in to past hurts and ongoing grudges. It is easy to assert one's particular brand of self-righteousness. It is easy to give into the temptation to let somebody else take the risk of failure, and to let somebody else do the heavy lifting of negotiation. It would be easy to half-heartedly glide through MokeWISE, and to make little progress in the end.

It is hard to put aside past hurts and ongoing grudges to come to the table. That is required in collaborative processes. It is hard to try to understand somebody else's reason for self-righteousness. But that is necessary for collaboration. It is hard to take the risks to collaborate. One reason to take the risk is because the rewards of conflict resolution are substantial. Another reason to take the risk to collaborate is to band together against a greater threat. (As the old saying goes, only fools fight in a burning house.) No doubt about it; successful collaboration takes hard work. It is the hard that makes the success great.