
State Water Resources Control Board

**CLOSING BRIEF OF DIVISION OF WATER RIGHTS PROSECUTION TEAM
IN THE MATTER OF THE HEARING ON THE PROPOSED REVOCATION OF MILLVIEW
COUNTY WATER DISTRICT: LICENSE 5763**

I. INTRODUCTION

Water use under License 5763 has been forfeited due to non-use. The testimony and exhibits presented in this matter show that the water right previously assigned to Masonite and later transferred to Millview County Water District (Millview) was forfeited after at least five years of non-use. The Prosecution's evidence shows that water use gradually declined up to the closing of the Masonite Plant, and water use under the license ceased shortly thereafter. Millview presented no credible evidence at the hearing to show that beneficial use of water under the license has occurred over the last ten years.

Forfeiture is supported by law, and as a matter of public policy the State Water Resources Control Board (Board) should revoke License 5763 due to non-use. Doing so furthers the long-standing policy that the State's waters be put to beneficial use. Unexercised rights do not allow for the full beneficial use of the State's waters, provide the necessary certainty for other water users to exercise their rights, and do not allow for short or long-term planning of the State's water resources.

II. FACTS

Masonite held a water right (License 5763) to divert 5.9 cubic feet per second, or approximately 4,900 acre-feet per year, year-round for its industrial operations in Ukiah. According to its licensee reports, until it ceased filing them in 1999, it diverted far less than the face value of its license. (P.T. Ex. 14.) Masonite diverted approximately 500 acre-feet per year for its operations during the final years of reporting. (Reporter's Transcript (R.T.) p.103; 16-17.) In 2001, Masonite shut down its manufacturing operations. No licensee report was filed for 2001, the final water use report was received by the Division for use in 1999.

On July 25, 2006, Millview filed a petition with the Division to transfer Masonite's water right to Millview. Although the intent of the petition was unclear as it was filed on a "Long Term Transfer Form", Millview later clarified that it sought to change the Place of Use, Point of Diversion and Purpose of Use authorized under the license. This request triggered a need for California Environmental Quality Act (CEQA) compliance. For purposes of complying with CEQA, Millview was the lead agency responsible for document preparation and the State Water Board was a responsible agency. The State Water Board received no CEQA documentation with the filing, and to date has received no CEQA documentation.

In April 2007, the Division noticed the change in ownership from Masonite to Millview. Masonite had now ceased all operations for over five years and approximately seven years had passed since a report of water usage under the license had been filed. In August 2007, Millview submitted a letter to the Division stating that its July 25, 2006 petition was inadvertently submitted as a long-term transfer petition instead of a permanent change petition. No further information or CEQA documentation was included with this request.

In April 2008, the Division inspected the Masonite site and found all licensed water diversion facilities inoperable and in a condition that suggested that they had been inoperable for some time. Wires were missing to supply electricity to the water pumps and large vegetation

was growing through the pump areas. (P.T. Ex. 20.) In 2008, most of the buildings on the site had been demolished and there was no evidence of any water use at the site. (R.T. p.17;1.) In May 2008, the Division issued a notice of proposed revocation based on Water Code section 1241 and 1675 because there was no evidence water had been used in accordance with License 5763 for the statutory forfeiture period of five years. Subsequently, Millview filed licensee reports for License 5763 that covered years 2009-2011. The reports state no water had been used under the license during those years. (P.T. Ex. 15.)

III. SUMMARY OF ARGUMENTS

A. Water Has Not Been Used under the License for Five or More Years

The evidence presented at the hearing and in the Prosecution Team's exhibits show water has not been used under the license for five or more years. Masonite had three authorized points of diversion under the license: Wells No. 3, 4, and 5. Millview does not contest that Well No. 4 was abandoned sometime in the 1980's. Evidence has also been presented showing that water was diverted from Well No. 6, a well not covered by the license. Water diverted from this well will be further discussed below.

Regarding Wells No. 3 and 5, both were inoperable, appeared to have been inoperable for an extended time period, and there was no indication or suggestion that they would become operable when the Division conducted a field investigation in 2008. (Reporter's Transcript (R.T.) p.25; 1-10.) Well No. 3 had no power source and vegetation and trees growing through the pumping facility. Millview presented no credible evidence to support use of water from these wells after Masonite closed its plant in 2001. No records were kept, no water use logged. The claim from Millview's witness, Lauren Beauving, who testified that water was used for fire

suppression, asbestos removal and irrigation after Masonite closed will be further discussed below in response to the questions posed by the hearing officers.

Masonite ceased filing any reports of water diversion and use in 1999. When Millview submitted a transfer petition to the Division in 2006, it included "Attachment 1" and listed use of 651.57 acre-feet of water during its final full year of operation. (P.T. Ex. 19.) What year this references, is not stated in the attachment. Even if it were referencing 2001, the final year of any production at the Masonite plant, neither Masonite nor Millview submitted any records of water use with the Division subsequent to the filing of a licensee report for 1999 until 2006. If Millview or Masonite, intended to maintain the water right, it is completely unclear why either party failed to record usage during this period. Millview first claimed use occurred in 2006 when it filed Attachment 1 to its petition. It submitted no additional documentation, even in the form of a letter to the Division, to demonstrate that water use continued at the site after 2001. Licensee reports for 2009-2011 confirm zero water use under the license. It is apparent from the evidence presented that the parties did not file reports, or claim water use under License 5763 because the plant operations had ceased, the licensed pumps were in disrepair, and Masonite no longer required the water authorized under the license for industrial uses.

B. A Water Right is Measured by Actual Use

The evidence shows that Millview attempted to purchase Masonite's water right and executed an agreement to buy the right in 2006. As stated above, the Division had no reports on file documenting water use under the license since 1999 when the petition was received. In the 2006 "Petition for Long Term Transfer" filing, "Attachment 1" to the filing lists 651.57 acre-feet of water use during Masonite's last full year of operation. When Millview filed this petition in 2006, it was not capable of legally utilizing the right. First, it did not submit any CEQA documentation with the petition; second, it did not clarify what type of petition it was actually submitting and

change it was seeking until August 2007. At that point, it still had not begun CEQA work, indicated CEQA work would begin by any certain date, and had not shown any actual legal beneficial use of water was occurring, or could occur under the license.

The Masonite water right, License 5763, covered only industrial uses. Whether owned by Masonite or Millview, the water right allowed industrial use on the specified place of use. Once the water ceased to be used for that purpose for five or more years, the right was forfeited. Millview made no claim until the hearing, that water was used for *any* purpose after the Masonite Plant closed in 2001. The only action Millview took in relation to License 5763 was to file a petition to transfer the water right in July 2006, which it later amended to a change petition in 2007. When questioned about actions Millview took to legally use water under the license, Millview's witness, Mr. Timothy Bradley confirmed it had done nothing to preserve the right outside of filing the improper petition in 2006, later amended in 2007. (R.T. p.121-122.) Moreover, by the time the amended petition was filed in 2007, at least five years of non-use had occurred. (R.T. p.66; 5-7.)

The Division had no evidence of water use in 2006, and could not act on the petition without further documentation from Millview. Subsequent to the filing of the petition, Millview submitted no evidence of actual beneficial water use to the Division. The filing of a petition, and nothing more, does not preserve a water right. If that were the case, unused water could be tied up and made unavailable for beneficial uses indefinitely merely through a party filing a petition and doing nothing more until it was capable of using the water.

C. Questions Posed by Hearing Officers

The Hearing Officers posed three questions for the parties to address in closing briefs. The questions will be addressed in order below.

1. *As it relates to the proposed revocation, what is the significance, if any, of the recycled water component to the Masonite water right?*

Masonite claimed a credit for recycled water use under License 5763 beginning in 1996. (R.T. p.63; 18-19.) The Water Code provides that a user through conservation measures or other conjunctive uses can maintain a certain level of use based on water conserved. Masonite last claimed a recycled water credit on a licensee report filed for 1999. Based on its licensee report, however, it is impossible to determine how much recycled water was actually used for industrial purposes and how much was used for other purposes not authorized by the license. For example, the 1999 report lists irrigation as a use, but irrigation is not authorized by the license so Masonite could not claim any credit for water used for irrigation purposes. (P.T. Ex.14, R.T. p.30; 8-14.) After 1999 and up to the end of 2001 when Masonite ceased industrial production, there is no recycled water component claim.¹ After 2001, the field investigation confirmed no water use at all was apparent at the site.

Millview's witnesses presented no credible evidence showing how much water was recycled at the site. Mr. Bradley confirmed that when Millview was investigating whether to purchase the water right, approximately 549 acre-feet of water was used at the Masonite Plant. (R.T. p.103; 16-17.) When questioned about water use after 2001, Mr. Bradley stated he did not know how much water Masonite would have used for its water system- let alone how much could be considered recycled water. (R.T. p.110; 9-11.)

Finally, based on the report titled "FINAL Aquifer Characterization of the Masonite Plant Property, Ukiah, California" (Masonite Report) dated November 2002, all water use at the site

¹ The only claim referencing recycled water appears on "Attachment 1" filed in 2006, that recycled water was used during the last full year of operation.

came from Well No. 6. The Masonite Report confirms the licensed wells were unused or inoperable. Therefore, any recycled water use, to the extent that it occurred at all from 1999 on, would almost certainly have been from Well No. 6, not from the authorized points of diversion.

Ultimately, however, the recycled water right component that may have existed under the water right in 1996 when the recycling facilities came online, has little relevance to the forfeiture of the water right because the evidence shows all legal use under License 5763 was forfeited due to five or more years of non-use.

2. As it relates to proposed revocation, what is the significance, if any, of the characterization of water from Well 6?

Masonite made notation of water use from Well No. 6 in the "Remarks" section of its 1999 report when it stated, "groundwater well #6 replaced some surface water use from well #3 and #5". (P.T. Ex. 14.) This well is not covered by License 5763, and it was previously claimed to be a "groundwater" well. (R.T. p.31.) The Division made no determination on the characterization of the well, other than noting it was not covered by License 5763. It is unknown exactly how much water was diverted from Well No.6 because although the well had a reported pump capacity, it was unmetered. (See Masonite Report, p. 1.)

Millview's witness, Mr. Bradley, testified that he believed Well No. 6 had been determined to be pumping water from the underflow of the Russian River. (R.T. p.116;18-19, p.117; 11-24). The Masonite Report, referenced by Mr. Bradley in his testimony, confirms that water from Well No. 6 is underflow from the Russian River. As such, Well No. 6 would require an appropriative water right. The Masonite Report also states, as Masonite confirmed in its licensee report for 1999, that it diverted water for its operations from Well No. 6.

Because Well No. 6 is not listed as an authorized point of diversion under License 5763, or covered by any other appropriative water right granted by the Division, Masonite has no legal

right to divert from this point of diversion. This hearing only pertains to revocation of License 5763, which covers Wells No. 3, 4 and 5. Thus, although Well No. 6 is not directly at issue in this hearing, any water diverted from Well No. 6 could not be considered legal use under License 5763.

3. *As it relates to the proposed revocation, what is the significance, if any, of testimony regarding some unquantified use of water by Masonite from 2001-2011 for demolition purposes, domestic use, and fire suppression (e.g. incidental rotational use of Wells No. 3, 5, and 6?)*

Water use under License 5763 was not accurately measured or reported in any manner after 1999. The only possible exception is an attachment that was received with the petition Millview filed in 2006. "Attachment 1" to the petition states 651.57 acre-feet was used during the last full year of operation. (As stated earlier, it is unclear whether the "last full year of operation" is 2001 or some earlier year as operations were ramping down in 2001.) After plant closure, witnesses for Millview testified that as the plant was demolished, water was used for other purposes at the site, including those referenced in the hearing officers' questions. According to Millview's witness, Mr. Lauren Beuving, a long-time Masonite employee who was familiar with the practices of Masonite and was present during "some of the dismantling process" (R.T. p. 78-79), water continued to be used at the site following closure. (R.T. p.82;8-10.)

When questioned about usage amounts, however, or any other reports documenting this water use, no information was provided by Millview or Mr. Beuving. (R.T. p.85; 15-23) In fact, Millview's witness affirmatively stated he had never seen any record or report of water use and did not know who would have been responsible for reporting such use. (R.T. p.82; 1-17.)

If water continued to be used under the license for these incidental purposes, it is completely unclear why Masonite did not continue to file licensee reports. Further, not only did Masonite fail to file reports of use, Millview failed to file any reports documenting usage from 2002 through 2011. Millview's reports for 2009-2011 list zero water use.

Even if the Board were to accept the testimony of Millview's witnesses that some amount of water was used for fire suppression, demolition etc. the evidence suggests the water would have come from Well No. 6, which is not covered by the license. The Masonite Report, referenced by Mr. Bradley, and submitted in response to the hearing officers' questions, makes it clear that in late 2002 when the Masonite Report was prepared, all water use at the site came from Well No. 6. There is no evidence, other than that of Mr. Beuving's testimony, where he stated they "tended to rotate" wells (R.T. p.83; 4-5), to suggest that water was diverted rotationally from the licensed wells and Well No. 6. When questioned on whether all water diverted at the site could have come from unlicensed Well No. 6, Mr. Beuving stated he had no knowledge of how much water came from each well. (R.T. p.85; 11-12.)

The licensed wells were completely inoperable in 2008 as documented during the field investigation. Contradicting Mr. Beuving's testimony, the Masonite Report confirms the licensed wells were compromised in late 2002 and all water was supplied from Well No. 6. It is incredible to suggest that as the Masonite Plant was being shuttered, and uses of water were already decreasing, two unnecessary wells would be rehabilitated for minor uses for a period of a few years, then following that effort, be allowed to fall into disuse—all while an existing unlicensed well was capable of supplying any limited needs at the site.

Additionally, even if by some chance a small amount of water were diverted from licensed Well No. 3 or No. 5, and these "incidental" uses are considered covered under Masonite's industrial purpose of use, Millview presented no method for determining how much water may have been used at sporadic times for these other activities. Millview's witnesses

provided no estimates of how much water may have been used for activities such as asbestos removal and fire suppression. It is reasonable to conclude that very little water would have been necessary for asbestos removal. Millview presented no evidence regarding the amount of water that was required for asbestos removal, but it would seem prudent to limit the amount of water used to wet any asbestos present at the site to help contain the asbestos fibers and limit the amount of runoff that would contain asbestos. As far as fire suppression activities, it is difficult to imagine why an ongoing diversion would be needed for this purpose. Even if a tank was filled for fire suppression needs as Millview's witness testified, Millview documented no such use, and it is hard to imagine how such use could be anything but inconsequential, as a single filling would presumably cover suppression needs for an extended period. And if the tank had to be refilled from time to time to keep it functioning and operable, the amount of water needed for this purpose is likely so small as to be insignificant. Millview's evidence and witnesses did not suggest otherwise. Likewise, incidental domestic uses such as toilets, showers and drinking water for a non-operational plant with a few individuals intermittently present on site would be so small as to be inconsequential. Even Masonite's witness, and last employee, Mr. Beving, was only sporadically on the site as he "worked next door." (R.T.p.82 ;1.) Finally, any other uses that may have required more extensive, but still relatively small amounts of water, such as irrigation, are not covered by the license, which only authorizes industrial uses.

It is telling that Millview has no records or documentation to suggest how much water may have been used for these activities. The use was likely so minor that Masonite did not keep records. Accordingly, Millview had no data to present to the Division when it acquired the license, and after acquiring the license kept no data or records of use because there simply was no water to report from licensed points of diversion. The evidence suggests that whatever small quantity of water that was used came from an unmetered, unlicensed well--Well No. 6.

IV. CONCLUSION

No reports documenting water use under License 5763 have been filed with the Division since 1999. Millview claims that even after the Masonite Plant shut down some water was used for other purposes, but provided no documentation or credible explanation of that use. A field investigation by the Division confirmed that pumps were in disrepair, non-operational and no water use was occurring at the site in 2008, and based on the conclusions of the report no water use occurred for five years prior to 2008. The Masonite Report, prepared for Masonite to examine the characteristics of the aquifer and water diversions on the site, confirmed that the licensed pumps were inoperable or compromised. The Masonite Report states all water use came from unlicensed Well No. 6. It strains reason to suggest that a plant in the process of closing down would rehabilitate pumps when it currently had an operating pump to supply any of the site's minimal needs.

In summary, the Prosecution's evidence shows water use under License 5763 has ceased, and water has not been used under the license for at least five years. Accordingly, the right should be forfeited.

Respectfully Submitted,



Nathan Jacobsen

Attorney for the Prosecution Team