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Via email to commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Sacramento, Ca. 95812-0100

RE: DRAFT ORDER REVOKING LICENSE 5763 - IN THE MATTER OF LICENSE 5763
(APPLICATION 15679) TO MILLVIEW COUNTY WATER DISTRICT-RUSSIAN RIVER (UNDERFLOW)
IN MENDOCINO COUNTY

Dear Ms. Townsend:

The undersigned represents Millview County Water District. This letter comments upon the Draft Order revoking License 5763 and renews Millview's request that the State Board exercise its discretion to preserve 1303 afa of the 4271 afa License, representing the last confirmed usage by Masonite Corporation, Millview's predecessor in interest.

Three general issues are presented by the Draft Order revoking License 5763: (1) whether the public interest supports forfeiture; (2) whether forfeiture is appropriate for a water right by a municipal water agency when non-use is attributable to factors beyond the control of the agency; and (3) whether the evidence adduced at the hearing supports the findings of the Draft Order.

Millview County Water District as a public agency is a municipal corporation providing water service to approximately six percent of the population of the County of Mendocino. This Russian River water right originates in Mendocino County. The Draft Order at p. 16 balances the interest of the 600,000 customers of Sonoma County Water Agency against the interest of the less numerous Mendocino County residents. Such balancing is wrong.

The Masonite Corporation started using water at its property in 1948 when it constructed its fiberboard manufacturing plant and commenced operations. License 5763 was issued in 1959 as the Coyote Project was being constructed. Therefore, License 5763 was perfected with natural flows in the Russian River, and not with Project Water. Although it is true that the Sonoma County Water Agency, ("SCWA") must maintain in-stream flow

perfected with natural flows in the Russian River, and not with Project Water. Although it is true that the Sonoma County Water Agency, ("SCWA") must maintain in-stream flow requirements as the bargain for its permit, the SCWA must do so with Project Water. Under the circumstance of the Russian River having been declared to be fully appropriated by Order WR 98-08 the forfeiture of License 5763 effectively assigns the flow perfected by License 5763 to the SCWA because the SCWA may upon forfeiture of License 5763 utilize the Non Project Pre-Coyote-Project flows perfected by License 5763 to maintain the in-stream flows required of it in Decision 1610. If the License is forfeited, and no new permits are to be issued because the Russian River is fully appropriated, the effect is to permanently supplement in-stream flows allowing the SCWA to reduce the flows from the Project to maintain environmental values. It therefore comes as no surprise that the SCWA encouraged the initiation of this proceeding and supports the result proposed in the Draft Order. The Draft Order is also disingenuous in supporting the arguments for forfeiture by stating that Millview should "go through the water right permitting process," when the face of the Draft Order indicates that new permits cannot be accepted for filing due to Order WR 98-08.

The State Board in 1963 recognized that protection of Mendocino County water rights as being in the public interest when considering Sonoma County Permit Application. The State Board in Order 1030 stated:

"The Board finds that the protection of water uses supplied from the Russian River which existed at the time of Applications 12919 and 12920 were filed in 1949 is in the public interest, and that permits issued to Sonoma County and Mendocino Districts should be appropriately conditioned for that purpose."

This public interest has not changed.

The Proposed Order effectively modifies the permit issued to the SCWA to remove the condition this Board had previously declared to be in the public interest. The state filings which enabled the Coyote Project were made subject to the County of Origin protection set forth in Water Code §§10500 et seq. The requirement conditioning the SCWA permit upon protection of Mendocino County uses was in furtherance of statutory county of origin requirements. The forfeiture of the entirety of License 5763 not only releases a Mendocino County priority in contravention of Water Code § 10505, but due to the operation of Order WR 98-08 declaring the Russian River fully appropriated a forfeiture of License 5763 operates to deprive Mendocino County of a water right that originates in Mendocino County, has been used in Mendocino County and which Mendocino County needs.

The Draft Order disregards the public interest of residents in Mendocino County where the Russian River originates; and the Draft Order disregards the Board's prior expression of the

public interest in D-1030. The Draft Order also effectively modifies by reduction the requirement in Decision 1610 that the SCWA maintain stream flows with project water from the Coyote Project. The State Board in taking discretionary action pursuant to Water Code 1241 to declare forfeiture under these circumstances would abuse its discretion by adopting the Draft Order.

These factors justify the preservation of the entire 4200 afa embodied by License 5763 although the owner of the License is merely requesting the State Board to exercise its discretion to maintain 1303 afa, less than a third of the License 5763. This reduced amount reflects the most recent documented usage by Masonite Corporation and the amount that Millview as the municipal owner of the license sought to preserve during the entirety of the purported forfeiture period.

The Draft Order if adopted by the State Board would also offend the "established policy of this State" that the right of Millview as a municipal water purveyor "should be protected to the fullest extent necessary for existing and future uses." This policy was established by the Legislature and codified in Water Code § 106.5. The Administrative Record for this proceeding establishes that a municipal water purveyor entitled to the protection of Water Code § 106.5 acquired License 5763 in June 2006 before five years had expired from the time that the Masonite Plant was closed and the historical use of the License was interrupted.¹

The policy expressed in Water Code § 106.5 recognizes that public agencies are under disabilities in acquiring and using water rights, the most notable disability being the compliance with the California Environmental Quality Act. This disability is on full display in the Administrative Record in this proceeding, the disability having engulfed both the Division of Water Rights and Millview.

Millview at all times since 2001 has been under a connection moratorium due to the lack of water source supply. Therefore Millview was anxious to utilize the License but could not do so until the Division of Water Rights processed the Change Petitions changing the place of diversion, type of use and place of use. (See Exhibit No. PT-19.) The impediment to the Division approving or even handling these Change Petitions was lack of Division staff resources as testified to by Kathy Mrowka, (RT 58:6-14), and the need for Millview to comply with CEQA, (RT: 49: 19-24.) Although Millview requested that the Division Staff meet and confer with it concerning the initiation of the CEQA process, (Exhibit No. Mil-5) the Division having lack of staff resources was unable to meet with Millview, or to cooperate with Millview in any way in addressing the impediments to its processing the necessary CEQA documents which in turn would enable the necessary actions upon the pending Change Petitions. (See RT 58:6-14 as to lack of Division staff resources, and Testimony of Tim Bradley, (Exhibit No. Mil-13, p. 4 and RT

¹. The Masonite Plant closed in December 2001. (Exhibit No. PT-19, p.9.) Millview acquired License 5763 on June 21, 2006. (Exhibit No. Mil-2.)

99:17-25 , 100: 1-7 as to impediments for Millview not only completing the CEQA process, but even even commencing the CEQA process.)

The Draft Order does not take into account that the License was held by a municipal water purveyor during the stated forfeiture period, and that the failure of Millview to utilize the License upon acquisition in 2006 was due to circumstances beyond its control and attributable to the necessity of compliance with procedures unique to public agencies not encountered by private interests.²

The statement in Draft Order at p 13 that disabilities related to CEQA were “under the control of Millview” is belied by the Administrative Record for this proceeding. Not only does the Draft Order disregard the evidence that both the Division and Millview were under a legal disability due to the need to comply with CEQA, the Draft Order fails to account for the unambiguous policy expressed in Water Code §106.5. This failure in the context of the State Board potentially taking a discretionary action would constitute an abuse of such discretion for want of application of policy dictates to which the State Board is bound. The strict application of a five year forfeiture period against a public agency in the context of discretion being vested in the State Board is inconsistent with the discretion entrusted to the State Board. This principle is best illustrated by the fact that the SCWA as the leading proponent for this forfeiture proceeding and its sole beneficiary, did not place the entirety of its permitted use approved in D-1030 to actual use within five years and it would not likewise not be appropriate under the established principles as expressed in Water Code § 106.5 to have declared or to declare a forfeiture of portions of that permit.

Lastly, the Administrative Record as to water usage does not support the findings of the Draft Order.

The Prosecution Team failed to present any evidence as to the availability of flow to justify forfeiture for non- use of available flow. It is well established that for forfeiture to operate the flow must be available. The burden to establish the basis for forfeiture is upon the party promoting forfeiture. The Notice of Proposed Revocation was issued in May 2009 just one month after the State Board on April 6, 2009 approved a Temporary Urgency Change in Permit 12947 allowing the SCWA to reduce its in-stream flow requirements supported by a hydrological analysis showing that in years 2009, 2007, 2004 and 2002 that hydrological conditions in the Russian River Watershed were severely constrained. (See 2009 WR-0027-DWR and Order WR 2007-0022.)

The findings of the Draft Order are unsupported because the Draft Order relies heavily upon speculation by a division inspector in April 2009 that there had been no usage of License

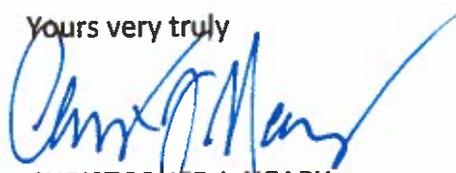
² The forfeiture period was May 9, 2004 to May 9, 2009 when the Notice was issued, (Exhibit No. PT-23), Millview acquired the License before five years elapsed after the closure of the Masonite Plant, and has owned the License since June 21, 2006, almost three years prior to the end of the forfeiture period.

5763 for five years prior to the time of her inspection. The Draft Order adopts speculation by the Division Inspector of matters outside her personal knowledge as trumping the observations of Laurence Beuving with personal knowledge of the usage of the License 5763 from the mid 1980's through the year 2011. The Draft Order that the State Board avoids this dilemma by finding that Mr. Beuving not to be credible, although he possessed direct knowledge of the Masonite usage, its recycling and reclamation practices, and direct observation of the usage of water upon the property through 2011. As to Mr. Beuving's credibility, he is a respected member of the business community in Mendocino County having been entrusted by two separate corporations—Masonite until 2006 and Mendocino Redwoods since 2006- with management positions.

Even if Mr. Beuving's testimony as to continued usage of water under the License after the Masonite Plant closed in 2001 to 2011 is disregarded altogether, the fact remains that the historical usage by Masonite under the License is established by the Administrative Record as having been at least 1303 afa through December 2001, (Exhibit PT-19.) This figure is conservatively established by the last report of usage by Masonite Corporation as being 651.57 afa with a conservatively claimed credit under Water Code §1010 (a) of that amount due to operation of Masonite's water recycling plant at a conservative factor of 2-1. Hence, the calculation of 651.57×2 yields 1303 afa.

Although the factors stated herein would justify the preservation of the entirety of the 4271 afa License for use in Mendocino County, Millview requested at the hearing, and now renews its request, that the State Board exercise its discretion to limit its forfeiture to 2968 afa, leaving Millview with 1303 afa for present and future use in Mendocino County.

Yours very truly



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