

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION -- DIVISION OF WATER RIGHTS
MAY 20, 2014**

ITEM 11

SUBJECT

CONSIDERATION OF A DRAFT ORDER REVOKING LICENSE 5763 (APPLICATION 15679) OF MILLVIEW COUNTY WATER DISTRICT – RUSSIAN RIVER IN MENDOCINO COUNTY

DISCUSSION

On May 9, 2008, the State Water Resources Control Board's (State Water Board) Division of Water Rights issued to Millview County Water District (Millview) a Notice of Proposed Revocation for License 5763 (Application 15679). The Notice alleges that the Licensee: (1) failed to observe the terms and condition of the license; (2) has not, or has ceased, to put the water granted under the license to a useful or beneficial purpose; and (3) has not applied the water to beneficial use for at least five consecutive years. The Notice concludes that the license should be revoked pursuant to Water Code section 1675. On May 23, 2008, Millview requested a hearing. In response to the request, the State Water Board held a hearing on April 2, 2013.

In the draft Order, the State Water Board finds that revocation of water right License 5763 for nonuse of five-years or more is supported by the facts and evidence in the record, and is appropriate.

POLICY ISSUES

Should the State Water Board adopt the proposed order?

FISCAL IMPACT

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT

None

STAFF RECOMMENDATION

Staff recommends that the State Water Board adopt the proposed order revoking License 5763.

<p>State Water Board action on this item will assist the Water Boards in reaching Goal 6 of the Strategic Plan Update: 2008-2012 to Enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies, and procedures.</p>
--

DRAFT – April 22, 2014

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2014-

In the Matter of License 5763 (Application 15679)

to

MILLVIEW COUNTY WATER DISTRICT

SOURCE: Russian River (Underflow) tributary to Pacific Ocean

COUNTY: Mendocino

ORDER REVOKING LICENSE 5763

BY THE BOARD:

1.0 OVERVIEW

This matter comes before the State Water Resources Control Board (State Water Board or Board) pursuant to a 2008 Notice of Proposed Revocation for License 5763 issued to Millview County Water District (hereafter Millview) by the Division of Water Rights (Division). An evidentiary hearing record was developed based on evidence and testimony presented in a public hearing.¹

¹ Citations are indicated as follows:

- (1) Citations to the Reporter's Transcript are indicated by "RT" followed by a Roman numeral for the volume of the transcript, followed by the beginning page and line number and the ending page and line number. Pages and line numbers are separated by a colon. (e.g., RT, 50:1-24.)
- (2) Citations to Exhibits
 - a. All citations to exhibits in the evidentiary hearing record are designated by the name or abbreviation for the party that submitted the exhibit, followed by the exhibit number, followed by the page number or other location of the cited information in the exhibit, if necessary. (e.g., PT 1, p. 1.)
 - b. The party abbreviations used herein are:
 - i. Prosecution Team: "PT"
 - ii. Millview County Water District: "MIL"

(footnote continued on next page)

In this order, the State Water Board finds that revocation of water right License 5763 is supported by the facts and evidence in the record, and is appropriate. The licensed project has been dismantled since 2001 and water has not been put to useful or beneficial purpose for a period of five years or more.

2.0 PROCEDURE

On May 9, 2008, the Division issued a Notice of Proposed Revocation for License 5763. (PT 23.) The Notice alleges the following:

- (1) The Licensee failed to observe the terms and conditions of License 5763;
- (2) The Licensee has not, or has ceased to, put the water granted under License 5763 to a useful or beneficial purpose; and
- (3) The Licensee has not applied the water to beneficial use for at least five consecutive years. Licensee's water right should, therefore, be revoked pursuant to Water Code section 1675. The unused water should revert to the public and be regarded as unappropriated water.

By letter dated May 23, 2008, Millview requested a hearing on the proposed revocation. On December 6, 2012 and February 7, 2013, respectively, the State Water Board issued a Notice of Public Hearing and a Notice of Rescheduling of Public Hearing for this proceeding. The key issue for hearing was:

Has Licensee ceased to use water granted under the license to useful and beneficial purposes, and failed to observe the terms and conditions in the license, such that License 5763 should be revoked?

(footnote continued from previous page)

iii. Sonoma County Water Agency: "SCWA"

On April 2, 2013, the State Water Board held a hearing on the proposed revocation of License 5763, in accordance with the Water Code and State Water Board's regulations. (Wat. Code, §§ 1675, 1675.1; Cal. Code Regs., tit. 23, §§ 850-852.) The parties to the proceeding were Millview, State Water Board staff Prosecution Team and Sonoma County Water Agency (SCWA). Policy statements were submitted by the California Department of Fish and Wildlife (CDFW) in support of the proposed revocation, and by Hop Kiln Industrial Park and DDR DB Mendocino LP against the proposed revocation. The Prosecution Team, Millview and SCWA submitted closing briefs by the May 31, 2013 deadline.

Several hearsay objections were made during the hearing that were taken under submission by the Hearing Officers, including SCWA's objection to MIL 10, 11, 12, and 13, and Millview's objection to SCWA 5, 6, and 7. Government Code section 11513 states that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d).) This order does not rely on any of the exhibits cited above to support a finding or to supplement any findings and therefore we need not issue a ruling on the hearsay objections.

3.0 THE LAW GOVERNING REVOCATION OF A LICENSE

A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose...but no longer. (Wat. Code, § 1627.) If at any time after a license is issued, the Board finds that the licensee has not put the water granted under the license to a useful or beneficial purpose, or that the licensee has ceased to put the water to that useful or beneficial purpose, or that the licensee has failed to observe any of the terms and conditions in the license, the Board may revoke the license and declare the water to be subject to appropriation, after due notice to the licensee and after a hearing, when a hearing is requested by the licensee. (Wat. Code,

§§ 1675, 1675.1; Cal. Code Regs., tit. 23, § 850.) Water Code section 1241 provides the statutory forfeiture period of five years. If the person entitled to the use of water fails to use beneficially all or any part of the water for which the right of use has vested, for the purpose for which it was appropriated, for a period of five years, that unused water may revert to the public. (Wat. Code, § 1241.) That reversion shall occur upon a finding by the State Water Board after notice, and a hearing if requested by a licensee.

4.0 LICENSE 5763 (APPLICATION 15679)

On January 26, 1955, the State Water Board's predecessor, State Water Rights Board, issued Permit 9950 to Masonite Corporation (hereafter Masonite), pursuant to Application 15679, the priority of which dates back to 1954. Permit 9950 authorized Masonite to appropriate 6.0 cubic feet per second (cfs) of water by direct diversion from the Russian River, during the season of diversion of January 1 to December 31, for Industrial Purposes (i.e., mill processes for the manufacture of Masonite products). (See Application 15679, Category 1, Vol. 1 [hereafter referred to as "A15679 File"].²) The facility primarily produced hardboard and softboard products including siding, door facing, and various styles of indoor wall and ceiling panels. (PT 18, p. 2.)

On January 14, 1958, State Water Board staff conducted a licensing inspection of the permitted project. (A15679 File, Inspection Report, January 14, 1959.) The inspecting engineer reported the following description of water application under the following categories:

Major Use of Water: "All of the water diverted under this filing is used in the Masonite Plant for Industrial purposes—the following is an approximate breakdown of the total use as estimated by Chief Engineer Clyde Williams: (1) Mill use about 1,200 gpm (for bearing cooling, washing fiber material, spraying material and in vacuum pumps; (2) Boiler about 500 gpm (3-

² Files associated with License 5763 (A15679) were offered into evidence and accepted into the record at the hearing.

90,000 pound per hour and 1-40,000 pound boiler); (3) Evaporation about 300 gpm; (4) steam condensers – 400 gpm; and (5) processing – 300 gpm.”

Other Uses: “None (all uses covered under Industrial)”³

(*Id.*, pp. 2-3.)

In addition, the inspecting engineer reported that there was a change in the location of the point of diversion, and the permit was amended to allow a change in the point of diversion from a river intake to three points of diversion, Well No. 3, Well No. 4 and Well No. 5. These were three shallow wells located adjacent to the river bank, within one-hundred feet of the originally described point of diversion. (A15679 File, Inspection Report, January 14, 1959, p.3.)

On June 30, 1959, the State Water Rights Board issued License 5763 to Masonite. (PT 1; 8.) The license authorized the direct diversion of water from the Russian River, at a maximum direct diversion rate of 5.9 cfs (4,271 acre feet per annum (afa)⁴), during the diversion season of January 1 through December 31, for industrial purposes at Masonite’s Ukiah Mill Plant. Water could be diverted at three points of diversion, Well No. 3, Well No. 4 and Well No. 5, located along the Russian River. The licensed place of use is described as being within Lots 11, 13, 15, 16 and 18 of the Yokayo Rancho. (PT 8, p. 4.)

During the period 1959 to 1985, use of water under License 5763 was sporadically reported without specific detail with respect to rate of diversion or quantity of use. (PT 1; 10; 11.) The Division conducted a compliance inspection in 1985 to assess the standing of the license. (PT 12.) The inspection confirmed that water was taken only from Well No. 3 and No. 5 (Well No. 4 was noted as abandoned) and that a deep

³ “Other Uses” described in this category include: number of people served; number of housing units; plumbing facilities available; area of garden, lawn, etc. served; area sprinkled to allay dust; number of domestic livestock served; other miscellaneous domestic use; and recreational use.

⁴ Acre feet per annum = 5.9 cfs x 365 days x 1.9834 [conversion rate].

groundwater well was drilled “and supplied water to the plant from ground water....” (PT 12, p. 3.) In addition, a water treatment facility had been installed to allow reuse of water originally pumped from both the river and groundwater. (*Ibid.*) Masonite did not report its water diversion and use for the period 1986 through 1993. (PT 10.)

During the period 1994 through 1999, Masonite reported more specific information regarding diversion and use of water made under License 5763, via submitted Reports of Licensee. (PT 13; 14.) For the period 1994, 1995 and 1996, respectively, Masonite reported that water was being diverted from the Russian River at a maximum rate of 0.72 cfs (521 afa), 0.79 cfs (572 afa), and 0.53 cfs (384 afa). (PT 13, pp. 1-2.) Masonite also reported that in 1996 it started using a groundwater well for the facility’s potable water system. (*Ibid.*) The “groundwater well,” later identified as Well No. 6, was reportedly located 400 yards from the river and 250 feet deep. (PT 17, p. 2.) Additionally, it was later confirmed that Masonite’s reported amounts for groundwater Well No. 6 diversions related only to amounts metered for “domestic use” at the plant. (*Ibid.*)

During the period 1997 through 1999, Masonite’s reported use of water began to reflect a steady reduction of water diversion from the still-active licensed points of diversions Well No. 3 and Well No. 5. (PT 13; 14.) Masonite reported the following diversion rates and quantities of water:

1997 - Well No.3 and Well No.5: 0.79 cfs (572 afa); Groundwater Well No.6: 179 afa;

Recycled: 1,168 afa

1998 - Well No.3 and Well No.5: 0.80 cfs (579 afa); Groundwater Well No.6: 107 afa;

Recycled: 1,126 afa

1999 - Well No.3 and Well No.5: 0.31 cfs (224 afa); Groundwater Well No.6: 107 afa;

Recycled: 1,090 afa.

5.0 CESSATION OF WATER USE UNDER LICENSE 5763 FOR FIVE YEARS OR MORE

5.1 Masonite Plant Dismantled in 2001

Beginning in 2000, Masonite began dismantling its facility and discontinuing its use of water. (PT 1.) In 2000, the Plant's "Molded Door Facing" line was shut down permanently, (PT 18, p. 2.), and Masonite failed to report any diversion and water use.

Masonite also failed to report water diversion and use for 2001. (PT 1.) The "Exterior Siding and Softboard" lines were shut down and all processing ceased. (PT 18, p. 2.) An auction was held and equipment and buildings were sold and removed. (*Ibid.*) Masonite filed with the Division a "Notice of Intention to Close Masonite Ukiah Mill in 60-90 days." (PT 16.) The Division responded and advised Masonite that if the license was to be abandoned, to notify the office so that it could proceed with revocation. (PT 22.) Masonite did not reply to the Division's letter.

In 2002, Masonite did not report any water diversion and use under License 5763. (PT 1.) During this same year, Division staff met with representatives of Masonite, Mendocino County Water Agency (MCWA), and SCWA to discuss issues related to the License 5763.⁵ (PT 17.) A memorandum of this meeting included statements confirming that "Well No.4 covered by License 5763 has been abandoned for more than 10 years", and "in 2001, Masonite shut down its Ukiah plant served by License 5763...." (*Ibid*; see also RT, 80:5 & 81:9-11.)

During the period from 2003 through 2006, Masonite did not report any diversions or use of water under License 5763. (PT 1.) The record shows that most of the land surrounding the licensed place of use east of the railroad tracks was sold in 2003, and the entire Ukiah Mill Plant was scheduled for demolition in 2006. (PT 18, p.2.) In

⁵ MCWA was negotiating to purchase the property served by License 5763, however, prior to purchasing the property, MCWA requested to meet with the Division and SCWA to discuss the water right license. (PT 1.)

June, 2006, Masonite and Millview entered into a Purchase Agreement (MIL 2.), and on April 5, 2007, ownership title of License 5763 was transferred to Millview. (PT 7.)

On April 17, 2008, Division staff met with Millview's General Manager, Tim Bradley, to conduct a site inspection of the Masonite Ukiah Mill plant and well sites. (PT 3.) The purpose of the site inspection was to document the condition of the authorized place of use and points of diversion under License 5763. The Prosecution Team presented witness, Lauren Mulloy⁶ who was employed by the Division during the period 2007 to 2009. (RT, pp. 14:6-9, 15:10.) Ms. Mulloy conducted the site inspection and reported her findings by memorandum dated April 17, 2008. (PT 20.) Ms. Mulloy's site inspection confirmed that the Masonite Ukiah Mill Plant had been shut down and dismantled, and only an empty warehouse remained at the time of the inspection. According to Ms. Mulloy's testimony "[t]here were three wells located on the property, Well No. 3, Well No. 4 and Well No. 5. Well No. 4 was abandoned and filled in with sand. Well Nos. 3 and 5 appeared to not have been in use for some time. There was vegetation growing around the well structures and the electrical boxes were in disrepair. Photographs showing the condition of the wells are included in the Field Inspection Report." (PT 3, p.1 [citing PT 20].) The Field Inspection Report contains photos of the wells overgrown with dense vegetation, and essential infrastructure missing. (PT 20.) Wells No. 3 and No. 5 appeared similar to Well No. 4, which was abandoned as early as 1985. (PT 12.) Based on information obtained during the site investigation and supporting information in the file for License 5763, Ms. Mulloy concluded "that water had not been diverted under License 5763 for at least five years prior to the site inspection." (PT 3, p. 2.) In 2007 and 2008, Millview did not report that water was being diverted and used under the license right. (PT 1.) Following the 2008 inspection, although Millview electronically submitted a Report of Licensee covering the period 2009 through 2011, no diversion or use of water was reported. (PT 15.)

⁶ During her employment with the Division in 2008, Ms. Mulloy's name was Lauren Dailey. (RT, p. 14:6-9.)

The Prosecution Team has met its burden of proof. Use under the license ceased by 2002, and probably as early as 2000. Thus, use under License 5763 had not been exercised for the statutory forfeiture period of five years prescribed by Water Code section 1241.

Millview presented witness, Lauren Beuving, a plant engineer who was employed by Masonite from 1974 to 2006. Mr. Beuving testified that water was used under the license after Masonite closed. (MIL 14; RT, pp. 79:25-80:5.) Mr. Beuving testified that after the last manufacturing was conducted, water continued to be utilized for domestic purposes through at least 2006; and irrigation, fire protection and dust suppression during the removal of plant equipment during the 2001-2006 period. (MIL 14.) When asked where the water came from that was used for the described incidental uses, Mr. Beuving stated “Oh, during that period of time, yeah, it was[sic] came from all three wells.” (RT, 82:22-83:2.) However, when questioned about usage amounts, or any other reports documenting this water use, no information was provided by Millview or Mr. Beuving. (*Id.*, 85:15-23.) In addition, when asked whether he had anything to do with reporting Masonite’s use of water to the Division, Mr. Beuving stated that he did not know who would have been responsible for reporting such use. (*Id.*, 82:11-17.)

Mr. Beuving’s testimony is not sufficiently credible to overcome facts and evidence in the record showing nonuse of water from Wells Nos. 3 and 5. We have no doubt that Mr. Beuving was aware and knowledgeable of Masonite’s water use in his capacity as plant engineer up 2001 when the Plant closed; however, his role during the period between 2001 and 2006 was selling removable assets from the facility and his knowledge of water use and sources is less clear. (RT, 80:5-11.)

Even if some incidental water was used during this time period, it is most likely that such water came from Well No. 6. Mr. Beuving testified that there was a portable tank installed in the field next to the Well No. 6 after the plant shut down. (RT, p.86:4-5.) Well No. 6 was installed in the early 1990s specifically for domestic purposes, and

became the primary source of water for the entire plant. (PT 17, p.2 [groundwater diversion reported for domestic use at the plant].) This would be consistent with the evidence of disuse and disrepair of Wells Nos. 3-5.

The “Masonite Report”⁷ identifies Well No. 6 as being located within 1,000 feet of the river, and Wells No. 3, No. 4, and No. 5 all located on the river bank about 20 feet from the river. (Masonite Report, p. 1.) The report concludes that “[t]he shallow alluvial aquifer located on the Plant property is in direct hydraulic connection with the Russian River....” (*Id.*, p. 4.) “This well is used as a water supply for the water treatment plant at the site. Presently it is the sole source of water supply....” (*Id.*, p. 1; PT 17, p.2.)

Well No. 6 is not a licensed point of diversion under License 5763. While characterized by the Masonite Report as hydrologically connected to the Russian River, it is located considerably further from the Russian River and Wells 3, 4 and 5, and there is no indication that Masonite considered this source the same as the source under the license. The Purchase Agreement confirms that Well No. 6 is not part of the licensed right. “The points of diversion of Russian River water authorized by the License are Seller’s ‘Well 3’ and ‘Well 5’....” (MIL 2, p. 1.) Provision 9(b) provides that if Seller or Seller’s assignee requires water in the future for use on the Masonite Property, “the Seller or its assignee(s) shall first seek to meet such water demand from Well 6 (located on the Masonite Property). If, however, Well 6 or the water drawn from Well 6 is unavailable...the Seller and its assignee(s) shall be entitled to an annual amount of up to 100 acre-feet of water for use on the Masonite Property under the License.” (*Id.*, 5.) This reflects that both Masonite and Millview consider Well No. 6 a separate source unrelated to License 5763.

⁷ On May 1, 2013, State Water Board staff received the Division of Water Rights Prosecution Team's motion to submit rebuttal evidence, and report titled: “Final Aquifer Characterization of Masonite Property, Ukiah California,” hereinafter referred to as the “Masonite Report.” The Report was prepared for Tim O’Laughlin, O’Laughlin & Paris, by Greystone Environmental Consultants, Inc. in November 2002. On May 16, 2013, Millview objected to the Prosecution Team’s Motion, arguing that the report is improperly submitted as rebuttal evidence and is hearsay. The Report provides information related to use of water at the former Masonite Plant, and is responsive to the supplemental questions asked by the State Water Board. Because the Report is responsive to the State Water Board’s follow up questions, it need not be characterized as rebuttal testimony. Therefore, a ruling on the objection to the evidence as rebuttal is not necessary.

Before adding Well No. 6 as a point of diversion under a water right license, the State Water Board would need to determine that the point of diversion is from a subterranean stream in known and definite channels. The burden of proof is on the party alleging a diversion from groundwater is from a subterranean stream. (SWRCB Order WR 2003-0004 at p. 12.) Thus, the burden of proof would be on Millview in a proceeding to add Well No. 6 as an authorized point of diversion under License 5763, and Millview has not submitted any evidence of where the bed and banks of the Russian River are in the vicinity of Well No. 6. The State Water Board has not made any determination as to the extent of the bed and banks of the Russian River for the purpose of evaluating whether diversions from Well No. 6 are from a subterranean stream, however. For purposes of this proceeding, it is only necessary to determine that Well No. 6 is not an authorized point of diversion under License 5763. Neither the State Water Board, or its predecessor, the State Water Rights Board, issued any order after 1959 changing the points of diversion under License 5763. And even if incidental use from Well No. 6 could be shown to be from the same source as the license, the amount of water actually used is negligible, and was not authorized under the license.

Based on the evidence and testimony summarized above, the record supports a finding that water under License 5763 was forfeited by Masonite as a result of Masonite's dismantling of the licensed project. Starting in 2000, there is no documented record of diversions from the points of diversion authorized by License 5763, and the weight of the evidence indicates that water was not diverted or used under the license.

5.2 Assignment of License 5763 to Millview

On June 21, 2006, Millview and Masonite executed a purchase agreement for License 5763. (MIL 2.) The purchase agreement provided, in part, for the transfer of the license to Millview and for the purchase price to be determined based on the amount of water that would need to be authorized by the State Water Board for use by Millview, for potential customers on the Masonite property and throughout the Millview boundaries for residential, commercial, and industrial use. (*Id.*, p. 1.)

On July 25, 2006, Millview submitted a Petition for Long Term Transfer that requested that License 5763 be transferred to Millview.⁸ (MIL 3; PT 19.) The change in ownership of record was confirmed and administratively processed (recorded) by the Division.⁹ (PT 9.) On April 5, 2007, ownership title of License 5763 was transferred from Masonite to Millview.¹⁰ (*Ibid.*)

A change of ownership of a permit or license does not reset the clock on the statutory forfeiture time period. A purchaser acquires a right as it exists and subject to the actions or inaction of the previous owner at the time of purchase. Similarly, the filing of a change petition, filed after the transfer of ownership, cannot operate to negate periods of non-use that occurred before the change in title.

The Long-Term Transfer/Change Petition was filed in 2007, and has not been approved. (PT 1, p. 4.) The requirements of the California Environmental Quality Act (CEQA) have not been met, the petition has not been noticed, and no determination can be made with respects to potential modifications of the license. (RT, 52:4-14.) The Prosecution Team confirms that, absent approval of the requested changes, Millview is unable to make use of the existing water right because Millview “has no need to provide water to the shuttered and abandoned mill....” (PT 1, p.4) All of the Licensee’s proposed new uses of water are located outside of the currently authorized place of use. (*Ibid.*)

Under Water Code section 1675, forfeiture is based on failure to put the water to beneficial use in accordance with terms of the license. Millview correctly asserts that it could not use water for the proposed new uses unless and until the Division approved

⁸ Regulations require the owner of a water right to directly notify the State Water Board with information regarding either a change in the name and/or address of the current water right holder or a change in ownership of the water right (Cal. Code Regs., tit. 23, §§830-831). Notification of ownership change can be provided via (1) Change of Name/Address or Ownership - Online Form, or (2) Notice of Ownership and Agent Assignment Form.

⁹ The Division’s processing of a Notice of Ownership and Agent Assignment is a ministerial procedure and does not suggest that the Division has reviewed and approved, or can confirm the validity of the underlying water right being assigned, or license compliance with its terms or conditions.

¹⁰ Millview later advised the Division that the 2006 petition itself was inadvertently prepared on a Long Term Transfer form instead of a Change form, but the intent was to permanently transfer the water right to Millview. (MIL 8.)

the petition. But this simply reinforces the point that water has not been used in accordance with the terms of the license. And there are substantial obstacles to approval of a change. Compliance with CEQA was required before the Division could act on the change petition; moreover, the record indicates that Division staff had concerns regarding the status of the license, compelling the inspection in 2008. (PT 3.) It is understandable that Millview was hesitant to proceed and pay for CEQA compliance in light of the uncertainty surrounding all or a portion of the license. (PT 22.) But the resulting delays in the processing of the change petition do not constitute use of water in accordance with the license. The length of time for negotiation and decisions on whether to proceed with a CEQA analysis were under the control of Millview. And neither the filing of a change petition nor any delays before it is approved or disapproved prevents a licensee from diverting and using water in accordance with the terms and conditions of the license as they read without the proposed change. Millview's failure to put water to beneficial use in the years since transfer of title and the filing of a change petition reinforce the conclusion that since the closure of the Masonite mill, water could not and has not been put to beneficial use in accordance with the license, for a period exceeding the statutory forfeiture period.

5.3 Early Negotiations

Millview suggests that earlier negotiations could somehow negate the effect of the forfeiture period. According to testimony by Tim Bradley, in late 2002, Millview "opened" negotiations with Masonite to purchase License 5763 to provide a summer time right to divert from the Russian River. (MIL 13.) Mr. Bradley testified that during the period 2000 to 2002, the County of Mendocino attempted, but failed to purchase License 5763 from Masonite because SCWA "was actively concerned that the License 5763 might be utilized in its full amount thereby reducing the background flows in the Russian River affecting the obligation of [SCWA] to maintain specified flows." (*Ibid.*, p. 1.) During the period 2002 to 2006, apparently Millview continued negotiations with Masonite for the purchase of the License 5763. Even if the Division had been aware of Millview's desire to acquire the water right license, this would not constitute a valid defense to forfeiture.

As described in section 5.1, a period of nonuse for five years had likely already occurred prior to Millview's acquisition of License 5763.

5.4 Supplemental Questions

By email dated April 22, 2013, parties were asked to address supplemental questions regarding the significance, if any, of the recycled water component to the Masonite water right and the characterization of water from Well No. 6. These questions were asked, in part, because of specific defenses to the statutory forfeiture period that are codified in the Water Code. (Wat. Code, §§1010-1011.5.) Subject to certain reporting requirements, cessation and reduction of use from recycled water, conservation efforts, or conjunctive use of surface and groundwater supplies constitute reasonable and beneficial use and thus prevent a lapse of the forfeiture period for the amounts specified. As described above, there was no portion of water used under the license after 2001. While the Plant utilized a recycling system to curtail waste discharges while in operation (PT 12, pp. 3-5; 17, p. 2), all use ceased when the Plant was dismantled and therefore, any recycling component of the Plant is irrelevant. No offset can be claimed for incidental use from Well No. 6 because its characterization as groundwater is unclear, any use after 2001 was negligible, it was not reported as a replacement supply, and no requisite reports were filed. (Wat. Code, § 1011.5, subd. (b) ["Failure to file the reports shall deprive the use of water of the benefits of this section."].)

6.0 POLICY CONSIDERATIONS

Millview argues that the State Water Board should not revoke License 5763, even if cause for revocation exists, because the water authorized under the license would provide an important water supply for potential customers on the Masonite property and throughout Millview's water service area boundaries for residential, commercial and industrial uses. Millview's plea was echoed by policy statements made by Hop Kiln

Industrial Park, and DDR DB Mendocino LP. (See Policy Statements by Daniel C. Thomas, and DDR DB Mendocino LP.)¹¹

Millview is one of 20 water districts located within Mendocino County. Millview serves approximately 1,500 water service connections (residential, commercial, industrial, and irrigation users) located within Millview's 8 to 10 square mile service area, with water diverted from the Russian River under claimed, contractual, and state issued water rights.¹² (MIL 13; see also Project Location Map, Order Attachment A.) On May 31, 2001, the Department of Health Services issued a water service connection moratorium order to Millview for "inadequate source water capacity." (MIL 1.)

Because Millview's appropriative water rights are constrained during the summer period of the year, Millview must rely on a contractual agreement entered into with Mendocino County Russian River Flood Control & Water Conservation Improvement District (Improvement District) to supplement its water supply.¹³ According to Millview's witness Mr. Bradley, Millview and other water purveyors cannot count on summertime water supplies provided under contractual agreements with the Improvement District. (MIL 13, p. 1.) Millview's argument implies that if the State Water Board revokes License 5753, then Millview's "inadequate source water capacity" may continue to exist. But, if the State Water Board does not revoke License 5763, then Millview could potentially have available a supplemental appropriative water right, with a priority dating back to 1954, that authorizes the year-round direct diversion of water from the Russian River at a rate of up to 5.9 cfs (4,271 afa). Because License 5763 has a year-round diversion season, such diversions could occur during any month of the year.

¹¹ Hop Kiln Industrial Park purchased 160 acres of industrial zoned ground from the Masonite Corporation in Ukiah, California. "Since we purchased the ground, we have been unsuccessful in being able to sell or develop it...." (Hop Kiln Policy Statement, p. 1.) They ask the State Water Board to allow the direct use of 160 afa under the License.

¹² Millview's State issued appropriative water rights include License 492 (Application 3601) and Permit 13936 (Application 17587). Millview also diverts water under contractual agreement with Mendocino County Russian River Flood Control & Water Conservation Improvement District, which provides for 970 afa from June 30 to November 1.

¹³ The State Water Board has declared the Russian River to be "fully appropriated" during the season July 1 to October 31. ([Order WR 98-08](#))

Millview requests that the State Water Board utilize the last accurate and reliable information to establish the amount that would not be forfeited. (Millview Closing Brief, pp. 5-6, 11.) “[U]nder the unique circumstances of this case, the good faith of Millview in pursuing acquisition of this right, and the public interest in preservation of at least a portion of the License, it is submitted that the Board should use its discretion to preserve the right” in the amount last reported in 1999, which is 1,314 afa. (*Id.*, p. 11.)

SCWA and the CDFW support revocation of License 5763 to protect water supply and prevent environmental impacts on Russian River public trust resources. (SCWA-1; CDFW Policy Statement.) Over 600,000 people in Sonoma and Marin Counties receive and use water that is conveyed by SCWA. SCWA manages the Russian River system with releases of water from Lake Mendocino reservoir storage which often controls river flows, especially throughout most of the summer and fall. When tributary stream flows are low, SCWA releases water previously stored in Lake Mendocino and Lake Sonoma to supplement the natural flows in the Russian River, and to provide flows for water supply, recreation, and aquatic habitat. (SCWA 1, 4.) The CDFW is very concerned that the Russian River fishery¹⁴ has already experienced deleterious effects from water diversions and cannot withstand additional water diversions, especially during low-flow periods. (CDFW Policy Statement.) Because of the low-flow conditions of the Russian River and the status of anadromous fish dependent on adequate instream flows, the CDFW believes that the revocation of License 5763 will be in the public's best interest overall. (*Ibid.*) SCWA and CDFW raise legitimate concerns regarding interference with SCWA's conditioned water rights, which require the maintenance of instream minimum flows in the Russian River for public trust resources protection.

The State Water Board is not persuaded by Millview's argument suggesting that the State Water Board make only a finding of partial forfeiture based on Masonite's reported water use in 1999. The evidence shows all legal use under License 5763 was forfeited due to five or more years of non-use. The State Water Board cannot disregard the fact

¹⁴ Russian River stream flow supports Chinook and Coho salmon, steelhead trout, and other sensitive aquatic species.

that Masonite closed the Ukiah Mill in 2001, and since 2000, it failed to report any use of water diverted from the Russian River under License 5763. To the extent that any use of water occurred from 2000 on, any such use would have been from Well No. 6, not from the licensed points of diversion. In addition, any such use would have been limited to an unquantified amount much less than the 1,314 af reported as being used by Masonite in 1999.

Moreover, while the State Water Board is concerned that ample water supply is available for human consumption, the need to serve additional customers is not a valid policy argument to nullify a forfeiture. If the State Board did not revoke the license, it would essentially allow Millview to initiate a new water right with a much earlier priority than could be obtained by following the proper procedures for obtain a new water right. This would be unfair to junior appropriators who have been relying on availability of water after the Mill closed, and to water users who followed proper procedures for obtaining a water right. Moreover, evidence indicates that were the proper procedures to be followed including the required water availability analysis, water may not be available in the amount or at the time requested by Millview. This reason alone underscores the need for Millview to go through the water right permitting process.

7.0 CONCLUSION

The State Water Board finds that revocation of water right License 5763 for nonuse of five years or more is supported by the facts and evidence in the record, and is appropriate.

ORDER

IT IS HEREBY ORDERED THAT License 5763 (Application 15679) is revoked.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 20, 2014.

AYE:

NO:

ABSENT:

ABSTAIN:

Jeanine Townsend
Clerk to the Board

ATTACHMENT A
PROJECT LOCATION MAP

