

1 CHRISTOPHER J. NEARY (#69220)

2 JENNIFER M. O'BRIEN (#278821)

3 **NEARY AND O'BRIEN**

4 110 South Main Street, Suite C

5 Willits, CA 95490

6 Telephone: (707) 459-5551

7 Email: [cjneary@pacific.net](mailto:cjneary@pacific.net)

8 Attorneys for Petitioner, MILLVIEW COUNTY WATER DISTRICT

9 STATE OF CALIFORNIA, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

10 STATE WATER RESOURCES CONTROL BOARD

11 DIVISION OF WATER RIGHTS

12 **In the Matter of License 5763**

13 **(Application 15679)**

MILLVIEW CLOSING BRIEF

14 **MILLVIEW COUNTY WATER**  
15 **DISTRICT**

Hearing Date: April 2, 2013

**TABLE OF CONTENTS**

**I. FACTS..... 1**

**II. INTRODUCTION TO ARGUMENT.....3**

**III. ARGUMENT ..... 4**

**A. Standard Of Review..... 4**

**B. The utilization of a water recycling plant should justify preservation of the conserved water..... 5**

**C. The characterization of Well 6 is not significant to this proceeding ..... 6**

        1) **Significance if Well No. 6 is underflow..... 7**

        2) **Significance if Well No. 6 is Groundwater..... 8**

**D. The unquantified usage to Masonite after the closure of the plant justifies The Board to exercise its discretion to utilize the last known quantified usage..... 8**

**E. The Board should exercise its discretion to preserve 1314 afa of the License..... 11**

        1) **Millview acted in good faith..... 11**

        2) **The Board may exercise its discretion to preserve a portion of the License..... 12**

        3) **Preservation of a portion of the License is in the public interest..... 13**

**V. CONCLUSION..... 15**

1  
2  
3 **TABLE OF AUTHORITIES**  
4

5 **Cases**

6 **In the Matter of Licenses 1907 & 4677, Chare Olive Holschaw, et al. Licensees,**  
7 **WRO81-17; 1981 WL 40374 (Nov. 19, 1981)**..... 13  
8 **In the Matter of Permit 16762 (Application 23416) Rancho Murrieta Community**  
9 **Services District. WRO 2006-17 WL 3586980 \*2 (November 15, 2006)**.....  
10 **11**  
11 **In the Matter of the Petition for Reconsideration of Robert V. Sciani re Revocation**  
12 **Of License 11661 (Application 24951) WRO 2008-41; 2008 WL 5032282 \*#**  
13 **(Nov. 14, 2008.)**..... 4  
14 **North Kern Water Storage District v. Kern Delta Water District, (2007 147 Cal.App.4<sup>th</sup>**  
15 **555, 567**..... 10

16 **Statutes**

17  
18 **Water Code §106.5**..... 9  
19 **Water Code § 1011(a)**..... 4  
20 **Water Code § 1011.5**..... 6,8  
21 **Water Code § 1241**..... 4,10  
22 **Water Code § 1675(a)**..... 12  
23  
24  
25  
26  
27  
28

1  
2  
3  
4 **I. Facts**

5 License 5763 was issued to Masonite Corporation (“Masonite”) on June 10, 1959 for  
6 diversion of 5.9 cubic feet per year (PT-8) for its 120 acre site near Ukiah. Masonite ceased  
7 manufacturing activities on the site in September 2001, (MIL-14; RT 81: 2-5.) At the time that  
8 Masonite ceased manufacturing its use of the License was at least 1314 acre feet per year.<sup>1</sup> At  
9 the time that these revocation proceedings were commenced the Russian River had been decreed  
10 to be “fully appropriated” by WRO 98-08 there being no available “unappropriated water.”  
11

12 Masonite recognizing the need to preserve the License for use in Mendocino County  
13 began negotiations with Mendocino County in 2002 to transfer the right to the county. These  
14 negotiations did not result in an agreement, partially because Sonoma County Water Agency,  
15 (“SCWA”), a junior appropriator, intervened to informally raise questions as to whether there  
16 was sufficient water in the Russian River to divert, (“MIL-10.”)  
17

18 Millview County Water District having been placed in a water service moratorium by the  
19 Department of Public Health for lack of sufficient water source supply (MIL-1) commenced  
20 negotiations with Masonite in 2003 to acquire the license so that Millview would have a  
21 summertime water right to supply its 1500 municipal users, (MIL-13.), resulting in an agreement  
22 with Masonite on June 21, 2006, (MIL-2.) The following month, on July 26, 2006, Masonite and  
23 Millview notified the SWRCB that License 5763 had been transferred to Millview and that  
24

25  
26 <sup>1</sup> Although its last filed Statements of Use disclosed diversion of between 500 and 600 afa, Masonite actively  
27 recycled the water diverted by it at least once bringing annual usage to approximately 1314 afa. (Testimony of  
28 Lauren Beuving, MIL-14.) For purposes of this brief it is conceded that the 2886 afa of the 4200 afa license was  
not used by Masonite and is subject to forfeiture. Millview requests that the Board exercise its discretion to preserve  
1314 afa of the subject license.

1 Millview needed to change the type of use from Industrial to Municipal; to change expand the  
2 place of use to the adjacent Millview District, and to change the place of diversion from the  
3 Masonite property to Millview’s water plant and river diversion facilities immediately across the  
4 Russian River from the Masonite property, (MIL-3).

6           Upon being assigned License 5763 in 2006 Millview immediately engaged the firm of  
7 Leonard Charles & Associates to conduct environmental review upon Millview’s acquisition of  
8 the water right as required by the California Environmental Quality Act, (Testimony of Tim  
9 Bradley, MIL-13, RT 99:1-2) Millview on July 26, 2006 contacted the Division of Water  
10 Rights, (“Division”) in writing requesting consultation with SWRCB staff for development of a  
11 memorandum of understanding to enable the environmental review to proceed, (MIL-5.)  
12

13 Furthermore, Millview could not proceed with environmental review for its acquisition while  
14 Mendocino County labored upon its comprehensive planning document by way of Special Plan  
15 for the Ukiah Valley, (called the Ukiah Valley Area Plan, “UVAP,”) (RT 99: 1-25), and by the  
16 time the UVAP was complete in 2010, this revocation proceeding had been commenced by the  
17 Division, effectively placing in question the viability and quantity of the License.  
18

19           To this day Division staff has not responded to Millview’s request for consultation,  
20 (Testimony of Katherine Mrowka, RT 46: 4-21, Testimony of Tim Bradley, MIL-13.) The  
21 failure of the Division to address the Change Petitions, or to consult with Millview as to  
22 environmental review, directly prevented Millview from using License 5763 because, aside from  
23 unquantified use of license water by Masonite’s contractors between 2006 and 2011 to dismantle  
24 the plant, Millview could not divert under the License until the Change Petitions were acted upon  
25 by the Division. It was the Division’s decision to refrain from using its resources to address the  
26  
27  
28

1 Millview Change Petition, not lack of diligence on Millview's part, which effectively precluded  
2 Millview from using the License. (Testimony of Katherine Mrowka, RT 58: 1-22.)

3 In fact, the only thing that the Division staff did in reaction to the Change Petition was to  
4 send a field investigator to the diversion site in April 2008 to document non-use of the License,  
5 (PT-20), and in the following month to issue the Notice of Proposed Revocation, ( PT-23.)

## 7 II. Introduction to Argument

8 It is unclear as to how much water Masonite and its contractors used after 2001 while  
9 plant dismantling operations were conducted. Masonite apparently diverted from three sources:  
10 (1) Well No. 6, (a replacement well for Well No. 4; (2) Well No. 3 and (3) Well No. 5, (RT 83-2-  
11 8.) Millview had no control over the documentation practices of Masonite. Those documentation  
12 practices were compromised, not by inattention but rather by the confusion surrounding by the  
13 closing of the facility and Masonite's administrative staff being laid off. For this reason neither  
14 Masonite nor Millview is presently able to quantify the amount of Masonite's usage from 2001  
15 to the present.

16 This uncertainty as to the amount of water usage after 2001 should not be decisive in this  
17 instance because Millview concedes that water usage was sporadic after 2001, but addresses its  
18 defense as to 1314 afa of the 4200 afa to the discretion of the State Board to preserve the  
19 documented historical use of the water. It is submitted that the State Board should exercise its  
20 discretion due to the fact that from 2003. Millview did everything within its power to diligently  
21 preserve the documented usage of License 5763 for the benefit of its 1500 customers. Although  
22 Millview has been unsuccessful in obtaining approval of its Change Petitions, it acquired License  
23 5763 before five years elapsed from the cessation of Masonite's traditional usage for industrial  
24  
25  
26  
27  
28

1 operations from 1949-2001, and suffered from disability to beneficially use License 5763 while  
2 its Petition for Change was pending.

### 3 **III. Argument**

#### 4 **A. Standard of Review**

5 This proceeding is pursuant to Water Code § 1675 (a) which authorizes, but does not  
6 require, the Board when it makes a finding that a licensee has ceased to put the water to useful or  
7 beneficial purpose. The section emphasizes the Board’s discretion by stating, “. . . [T]he Board  
8 may revoke the license and declare the water to be subject to appropriation . . .”

9  
10 At the hearing on this matter the Division Prosecution Team also proceeded upon the  
11 authority of Water Code § 1241 which authorizes, but does not require, the Board to order  
12 reversion of water to the public when it makes a finding that a person holding a vested right of  
13 use of such water fails to use “. . . beneficially all or any part of the entitlement . . .” for a five-  
14 year period.

15  
16 The Board has authority under Water Code § 1675 (a) to revoke a part of a license and to  
17 reaffirm the validity of a part. [In The Matter of the Petition for Reconsideration of Robert V.  
18 Sciaini re Revocation of License 11661 \(Application 24951\) WRO 2008-41; 2008 WL 5032282  
19 \\*3 \(Nov. 14, 2008.\)](#)<sup>2</sup> This principle is also authorized by Water Code § 1241 in that it  
20 references forfeiture for non-use of “. . . all or any part . . . .

21  
22 Therefore the revocation authority is addressed to the discretion of the Board and that  
23 discretion may be exercised to revoke a portion of a license, leaving a portion intact.

#### 24 **B. The utilization of a water recycling plant should justify preservation of the 25 conserved water.**

26  
27 <sup>2</sup> Citations to authorities are hyperlinked to the WESTLAW database and may be  
28 accessed by right clicking on the authority and clicking “Open Hyperlink.”

1           Although Masonite demonstrated its usage of 4200 acre feet per annum in order obtain  
2 License 5763 (PT-10) Masonite’s diversion from the Russian River dropped off substantially due  
3 to its construction of a water recycling plant.  
4

5           Masonite constructed a water recycling plant (RT 85: 3-8) in 1974 (RT 87: 20-21; RT 88:  
6 3-9) and brought it online in 1975 (RT 88: 12-13.) The recycling plant was first disclosed by  
7 Masonite to the Division in 1978, (PT-11, Report for 1975-1977, line # 25.)  
8

9           The decline in diversion under a license revocation hearing due to conservation is  
10 relevant in that pursuant to Water Code §1011 (a) the amount recycled is to be considered the  
11 equivalent of beneficial use of water to the extent of the reduction thus preserving the portion of  
12 the License reflecting reduced use due to conservation.  
13

14           The most precise data quantifying water usage and the amount of conservation was  
15 reported in the Report of Licensee for 1997-1998-1999 (“the 2000 Licensee Report,”) where  
16 usage was reported in metered gallons.<sup>3</sup>

17           By 2000 Masonite was conserving substantially more water than it was diverting. (See p.  
18 3 of PT-13 for metered usage data.) The reported usage for river diversion 1997 was 186,092,000  
19 gallons (570 acre feet) plus recycled usage 380,500,000 gallons (1168 ac feet) for a total usage of  
20 1738 acre feet. The reported usage for river diversion in 1998 was 187,810,000 gallons (576  
21 acre feet) plus recycled usage of 367,021,000 gallons (1126 acre feet) for a total usage of 1702  
22 acre feet. In 1999 which was probably the last year in which there was full manufacturing  
23 operations the river diversion was 73,178,273 gallons (224 acre feet) plus recycled usage of  
24  
25

---

26 <sup>3</sup> The 2000 Licensee Report is attached as page 3 to Prosecution Exhibit 13 (labeled “Licensee Report 1994-1996,”  
27 although it is properly an attachment to Prosecution Exhibit 14 (labeled Licensee Report 1997-1999 which  
28 references an “attached worksheet”.)



1 355,227,000 gallons (1090 acre feet) for a total usage of 1314 acre feet. <sup>4</sup> This reported 1999 use  
2 is hereinafter referred to as the “Historical and Last Accurately Measured Usage.” It is this  
3 amount which is requested to be preserved.  
4

5 In that Masonite ceased operations in 2001 with its administrative staff being laid off or  
6 transferred, no further reports were filed by Masonite. Although Masonite used water until 2006,  
7 MIL-14 (and perhaps as late as 2011, RT 86:1-16 for its dismantling operations after the plant  
8 closure in 2001, (RT 90: 9-21) there is no quantifiable information as to such usage.  
9

10 In the context of this License Revocation proceeding which is addressed to the Board’s  
11 discretion it would be reasonable for the Board to utilize the last accurate and reliable  
12 information as to the License usage that reported in the 2000 Licensee Report, to establish the  
13 amount that would not be forfeited. If the Board adopts that approach, the last accurate reported  
14 beneficial use was the year 1999 when at least 1314 acre feet is shown by the evidence to have  
15 been used, constituting both actual diversion from the river and the amount conserved.  
16

17 **C. The characterization of Well 6 is not significant in this proceeding.**

18 There is no competent evidence as to the appropriate characterization of Well No. 6.  
19 According to an Inspection Report by the Division in 1985 Masonite’s Well No. 4 had been  
20 abandoned by Masonite, (PT -12.) Well No. 4 was replaced by Well No. 6 in the 1990’s, (MIL-  
21 14.) Apparently Well No. 6 was referred to as being “potable water,” (RT 86:4-10) and it was  
22 also referred to as “groundwater,” (PT- 13, p. 3.)  
23

24 <sup>4</sup> The 2000 Licensee Report also showed usage for what Masonite labeled the “Potable Water Well Flow ground,”  
25 which was undoubtedly a reference to Well 6, discussed *infra*. The record is not clear as to the correct  
26 characterization of Well 6. It might be exclusively underflow in which case diversion was drawn from a different  
27 diversion point on Masonite’s property, or it might be groundwater in which case usage of the water would be  
28 conjunctive as defined in Water Code § 1011.5 which is likewise deemed the equivalent of beneficial use under the  
License; or Well 6 might have been a combination of underflow and groundwater in unknown apportionment. For  
the 1997 year 178 acre fee was used from Well 6; for the 1998 year 107 acre feet was used, and for the 1999 year 98  
acre feet was used.

1           There is no evidence in the record to demonstrate that Masonite had any information as to  
2 the proper characterization of Well No. 6. As with any well close to the river the appropriate  
3 characterization could not be made by Masonite field staff, but would rather have to be made by  
4 hydrologist, and even then the result might be ambiguous. Hence Well No. 6 could be  
5 underflow, groundwater, or a combination of both.  
6

7           The significance of each possible characterization will be discussed as follows:

8                           **1) Significance if Well No. 6 is underflow.**

9           If Well No. 6 was underflow then the use of Well No. 6 could be beneficial use of water  
10 pursuant to the License. The Prosecution Team in its presentation characterized the diversion  
11 point as being “unauthorized,” with the purported significance being that use from that source  
12 must necessarily be disregarded as use under the License. The Prosecution Team did not provide  
13 authority for the proposition that the penalty for diversion from an “unauthorized:” diversion  
14 point is unforgiving disregard of beneficial use. The undersigned is aware of no such authority  
15 for the Division’s proposition. At worst, moving the point of diversion point from the authorized  
16 diversion point of Well No. 4 to Well No. 6, approximately 300 yards away, on the same  
17 property, should be viewed as an infraction, not a misdemeanor, and certainly not a felony.  
18  
19

20           However the Division did not prove that Well No. 6 is outside the described Point of  
21 Diversion as described in the License. (See License, PT-8.) The diversion point for Well No. 4  
22 which was replaced by Well No. 6, was described by an aliquot description as being in the NW  
23 ¼ of the SW ¼ of Section 9, Township 15N, Range 12W, and Mount Diablo Meridian- a quarter  
24

1 section of a quarter section – an area of 40 acres. Indeed, Well No. 6 is located within that 40  
2 acre place of diversion as described in the License.<sup>5</sup>

3  
4 Therefore, the record is not sufficient to disregard altogether the usage of Well No. 6, and  
5 perhaps insufficient to justify inclusion of all usage from Well No. 6. Therefore Millview in  
6 application to the discretion of the Board does not seek to have usage from Well No. 6 included  
7 in the amount of the Historical and Last Accurately Measured Usage reported under the License  
8 because the characterization of Well No. 6 is not capable of being defined by any party to this  
9 proceeding with particularity. (See fn 3 *supra* that the last measured usage of Well No. 6 ranged  
10 from 98 afa to 178 afa.)  
11

## 12 **2) Significance if Well No. 6 is Groundwater**

13 Pursuant to Water Code § 1011.5 use of groundwater conjunctively with licensed  
14 diversion would authorize the Board to count the usage of groundwater as being beneficial use  
15 under the License. Because the characterization of Well No. 6 is not established by the record,  
16 Millview does not request the Board to include the usage from Well No. 6 in determining the last  
17 quantified usage of the subject License.  
18

### 19 **D. The unquantified usage by Masonite after the closure of the plant justifies the** 20 **Board to exercise its discretion to utilize the last known quantified usage.**

21 The evidence discloses that after the Masonite Pant closed in the year 2001 that Masonite  
22 continued using water for a plant demolition process, fire protection, and irrigation associated  
23 with the recycling process and ancillary domestic usage for demolition personnel, (RT 81-82.)  
24

---

25 <sup>5</sup> The Greystone Report admitted as an Exhibit on May 24, 2013 at pdf \*20  
26 (Figure 1) depicts the location of all four wells. Well No. 6 is located at  
27 the northern boundary of the Masonite property and Well No 4 is located  
28 between it and the two river wells (Wells 3 and 5.) All four wells are  
located within the NW ¼ of the SW ¼ of Section 9 which is the designated  
point of diversion, and all are squarely within the designated place of use.

1 The source of the water was from Well No. 6 replacing Well No. 4; Well 3 and Well No. 5,  
2 although there is no accurate record for that time period as to source allocation, (RT 83: 18-25;  
3 84: 1-13.)

4  
5 The problem is that Masonite's administrative staff which had maintained records of  
6 water usage during the 1949-2001 period was laid off in 2001 and the record keeping function  
7 ceased. Although Millview stands in the shoes of Masonite, the failure to maintain water usage  
8 records was not a lapse in responsibility by Millview.

9  
10 It is reasonable to assume that the last accurate recorded water usage for the year 1999  
11 reported in 2000 continued through the last quarter of 2001 when the plant closed.<sup>6</sup> Although it  
12 is also reasonable to assume that between December 2001 and June 2006 the water usage pattern  
13 was reduced, it is clear that the usage had not ceased in 2001 as was incorrectly, but  
14 understandably assumed by the Division Staff when it issued the Notice of Proposed Revocation  
15 in May 2009. (For the Division's assumption of cessation of use see PT-23 ¶ 8.)

16  
17 The license had been transferred by Masonite to Millview effective June 21, 2006, (Mil-  
18 3, ¶2.)<sup>7</sup> The evidence demonstrates that water usage continued until at least 2006, (Testimony of  
19 L. Beuving, MIL-14,). Five years non-usage had not elapsed at the time the License was  
20 transferred to a public agency which is significant in the forfeiture equation because of the  
21 intercession of two statutes, Water Code § 1241 and Water Code § 106.5.

---

22  
23 <sup>6</sup> However, when Masonite transmitted its notice in July 2006 that it had  
24 transferred the License to Millview it reported that in 2001 the plant had  
25 used 651.57 acre feet and that water was recycled at least twice after  
26 initial use documenting 1302 acre feet for that year. However the recycled  
27 use was unquantified and the report is not as accurate as the prior statement  
28 which recorded usage in metered gallons. (MIL-3 Attachment 1 at \*9.)

<sup>7</sup> The Division by letter dated April 5, 2006 (misdated as indicated by context  
to be April 5, 2007) acknowledged that notice had been given of such License  
transfer to Millview in July 2006, (MIL-8.)

Section 1241 provides that the forfeiture period is five years. The five year measurement period is measured for the five years immediately preceding the forfeiture determination in May 2008, (PT-23.) [North Kern Water Storage District. V. H Kern Delta Water District, \(2007\) 147 Cal.App.4<sup>th</sup> 555, 567.](#) Therefore, at the time of the forfeiture notice in 2009 five years non-use had not elapsed, the use having continued until at least 2006.

Water Code § 106.5 requires that rights held by a municipality such as Millview are to be protected for “existing *and future uses*,” (emphasis added.) The legislature’s policy is to protect municipalities, undoubtedly in recognition that municipalities must be able to acquire and hold rights for future uses and that municipalities cannot turn on a dime but must comply with an array of procedural hurdles such as compliance with the California Environmental Quality Act, (RT 60: 5-9). In the context of the legislative policy declared in [H Water Code § 106.5](#) the period between 2006 and 2008 while Millview’s 2006 application was held up pending compliance with CEQA should not be utilized to establish the basis of forfeiture and non-use after the Proposed Notice of Forfeiture pending action by this Board should likewise not be utilized to establish forfeiture. This legislative policy has been interpreted by this Board as it applies to a district such as Millview as affording “some latitude in putting water to beneficial use.” [In the Matter of Permit 16762 \(Application 23416\) Rancho Murrieta Community Services District. WRO 2006-17; 2006 WL 3586980 \\*2, \(Nov. 15, 2006.\)](#)

In summary, there was no cessation of use in 2001. Use continued until at least 2006, well within the five year measurement period of Water Code § 1241. Although the amount of use is unquantified, through no fault of Millview, by the time the forfeiture was asserted by the Division the License was held by a municipality, Millview which could not use the License

1 because it was subject to chicken and egg issues regarding use; compliance with CEQA and  
2 approval by an understaffed Division of Water Rights of the Change Petition filed in 2006.<sup>8</sup>

3           If the Board is to declare forfeiture on the basis of partial use of the historical right after  
4 2006, the question becomes as to how that forfeiture could be quantified. Without conceding the  
5 point, the Board could potentially take the position that it is the License holder's duty to provide  
6 the data to measure use and to forfeit the entire right. However, under the unique circumstances  
7 of this case, the good faith of Millview in pursuing acquisition of this right, and the public  
8 interest in preservation of at least a portion of the License, it is submitted that the Board should  
9 use its discretion to preserve the right in the amount of the Historical and Last Accurately  
10 Measured Usage conservatively defined as being usage of 1314 afa of the 4200 afa License.

11  
12  
13           **E. The Board should exercise its discretion to preserve 1314 afa of the License.**

14           **1) Millview acted in good faith.**

15           Millview acted in good faith at all times. It negotiated to purchase a water right that it  
16 needed because it was under a moratorium and a regulatory order to increase its source supply.  
17 Millview sought to commence environmental review in 2006, but could not effectively do so  
18 until the County's General Plan Amendment by way of Specific Plan was accomplished.  
19 Millview filed a petition to enable it to change the place of diversion off of the Masonite  
20 Property to its water plant almost directly across the Russian River from the Masonite property,  
21 to change the use from Industrial to the highest form of beneficial use, Municipal Use, and to  
22  
23  
24

25           <sup>8</sup> The evidence discloses that Millview could not economically proceed with  
26 compliance with CEQA because the its consultant could not begin until the  
27 Specific Plan addressing growth inducement was resolved by the County of  
28 Mendocino, (RT 99-100.) By the time that the Specific Plan was adopted in  
2011, the Notice of Proposed Revocation had issued requiring the completion  
of this process before environmental review could reasonably commence.

1 expand the place of use to its district boundaries. Millview awaited the Division's consultation  
2 with it and action upon its Change Petitions and did not use the License, even in the drought  
3 year of 2009 when it cut back water usage by 47% (RT 113:1-16), incurring a great deal of  
4 conservation education and enforcement costs, precipitous drop in water sale income, and  
5 leaving the entire district a sea of brown lawns. Millview also accurately reported non-use its  
6 non-use of the License, although its non-use was by reason of legal disability not ability and  
7 need to use the water.  
8

9 **2) The Board may exercise its discretion to preserve a portion of the License.**  
10

11 The Division is proceeding in this revocation proceeding upon Water Code § 1675(a),  
12 and Water Code §1241 both of which statutes are addressed to the sound discretion of the State  
13 Water Resources Control Board. It is not a mechanical process, but one in which the Board  
14 applies the facts to the policy of the law. Water usage, although proven to have occurred from  
15 2001 to well within the 2004-2009 five year forfeiture period, is not capable of quantification for  
16 that period due to a number factors; the cessation of Masonite's traditional manufacturing  
17 activities, its local administration functions ceasing in 2001, and the inability of Millview as  
18 transferee of the License in 2006 to accurately document Masonite's usage.  
19

20 Although mechanical operation of forfeiture is urged by the Division in disregard of these  
21 factors, the matter remains addressed to the discretion of the Board. Millview requests that the  
22 Board quantify the usage under the license at 1314 afa the Historical and Last Accurately  
23 Measured Usage, the amount last accurately recorded taking into account industrial uses and  
24 conservation, and to disregard the confusion as to the amount used after the plant closed in 2001  
25 and the commencement of the forfeiture period. Exercise of discretion in this manner will not  
26  
27  
28

1 offend any fundamental policy. Masonite was able to reduce its consumptive use through  
2 conservation measures to 1314 afa, and Masonite attempted to preserve the License, not abandon  
3 it, by an attempted transfer to the County of Mendocino in 2002 and then by successful transfer  
4 to a municipal body in 2006. Millview would have used the water immediately if it could, but  
5 suffered from a legal disability not of its making.  
6

7 An example of the Board exercising its discretion not to revoke a License is recounted in  
8 [In the Matter of Licenses 1907 & 4677, Clare Olive Holsclaw, et al. Licensees, WRO 81-17;](#)  
9 [1981 WL 40374 \(Nov. 19, 1981.\)](#) Although the disability of use in that matter was different than  
10 here, the principle remains the same; the Board need not mechanically apply a temporal factor in  
11 license revocation proceedings when the licensee is disabled from use of the license. In  
12 [Holsclaw \*Id.\* at \\*2](#) there was uncertainty as to the quantity of water used during the forfeiture  
13 measurement period, there was a shortage of water in the 1976-1977 Drought, and the licensee  
14 was under a legal disability to repair the diversion facilities due to the need of the U.S. Forest  
15 Service to approve a permit. Here, Millview was disabled from using the License as it had to  
16 await the County of Mendocino's completion of its Specific Plan, and await the Division's action  
17 on its Change Petitions. Had these disabilities not been present it is submitted that the record  
18 abundantly demonstrates that Millview would have used the license.  
19  
20  
21

22 **3) Preservation of a portion of the License is in the public interest.**

23 The preservation of an important Mendocino County water right in the hands of a  
24 municipal water purveyor under circumstances where the river has been fully appropriated after  
25 issuance of the License would serve the public interest.  
26  
27  
28



1           The Policy Statement of Daniel Thomas for the Hop Kiln Industrial Park illustrates the  
2 negative economic impact already suffered by reason of this License having been in limbo.  
3 Likewise the Policy Statement of DDR referenced the political disputes which raged over the  
4 Ukiah Valley Area Plan assists in explaining factors leading to the disability of Millview in  
5 proceeding with environmental review and how the revocation of the license would adversely  
6 affect the economy of Mendocino County by preventing Millview from serving redevelopment  
7 projects on the Masonite property and natural growth throughout its district. Ross Liberty, a  
8 purchaser of ten acres of the former Masonite Property, took the time to travel to Sacramento to  
9 address the Board as to the importance of preservation of a portion of the License so that  
10 Millview might be able to provide water service to his proposed factory which will provide jobs  
11 in depressed Mendocino County.  
12  
13

14           The implication urged by Sonoma County Water Agency that Millview misunderstands  
15 its water needs disregards the reality that Millview has been in a connection moratorium since  
16 2001 because its regulator, the Department of Health Services, determined that Millview lacks  
17 water source supply for its existing customers. It is submitted that Millview has the greater  
18 ability to fully understand its own water right needs and the status of its regulation by the  
19 Department of Public Health such as motivated Millview to acquire the subject license.  
20  
21

22           The opposition of Fish and Wildlife merely illustrates the fact that there are competing  
23 uses of available water supply. The opposition of Sonoma County Water Agency, holding rights  
24 junior to the license, merely lays claim to forfeited flow from which it would benefit by  
25 increased background flows decreasing its in-stream requirements. It is submitted that any merit  
26 to their respective positions are furthered by the revocation of 2886 afa, which is conceded for  
27  
28

1 the purposes of this submission as being justified, leaving Millview with 1314 afa, or thirty-one  
2 (31%) per cent of the License.

3  
4 **IV. Conclusion**

5 It is submitted that facts of this matter justify the Board's consideration to exercise its  
6 discretion not to forfeit the historical usage of the Masonite plant as most conservatively defined  
7 by the last accurate measured meter usage for the year 1999 as evidenced by a report filed in  
8 2000. Although Masonite used water for dismantling the plant in unknown but reduced quantities  
9 after September 2001 when its plant closed well into at least 2006 it is suggested that the License  
10 should be retained in the quantity that Masonite used year in and year out from 1975 when it  
11 installed its water recycling plant through to the time of the plant closure. The confusion created  
12 by Masonite's administrative staff being laid off, coupled with a clumsy but nonetheless  
13 successful effort to transfer the License for use in Mendocino County led the Division to  
14 erroneously conclude that the License was not used and should be forfeited.

15  
16  
17 It is submitted that Millview, a municipal water purveyor suffering from all of the  
18 disabilities of a public entity in pursuing water rights, acted in good faith at all times after 2003  
19 when it commenced negotiations to purchase the License from Masonite until the present when it  
20 requests the Board to exercise its discretion to preserve 1314 afa of the License.

21  
22 DATED: May 31, 2013

23  
24 /s/ Christopher J. Neary  
25 CHRISTOPHER J. NEARY  
26 Attorney for Millview  
27  
28

**PROOF OF SERVICE**

I, LESLIE SNYDER, declare that:

I am employed in the County of Mendocino, State of California. I am over the age of eighteen and not a party to the within entitled action; my business address is 110 South Main Street, Suite C, Willits California. On this date I served the attached MILLVIEW CLOSING BRIEF on the parties in said cause via email addressed as follows:

State Water Resources Control Board  
Email: [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

Division of Water Rights Prosecution Team  
Nathan Jacobsen  
Email: [Njacobsen@waterboards.ca.gov](mailto:Njacobsen@waterboards.ca.gov)

Sonoma County Water Agency  
Alan B. Lilly  
Email: [abl@bkslawfirm.com](mailto:abl@bkslawfirm.com)

and, on May 31, 2013, five copies, via Federal Express overnight delivery, postage prepared, deposited in the Willits, California Federal Express drop off box, addressed as follows:

Tracking No.	Attention: Ernest Mona
7998 8612 1172	State Water Resources Control Board
	Division of Water Rights
	1001 1 Street, 2 <sup>nd</sup> Floor
	Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31<sup>st</sup> day of May, 2013 at Willits, California.

/s/ \_\_\_\_\_  
Leslie Snyder