

1 ALAN B. LILLY, State Bar No. 107409
2 KATRINA C. GONZALES, State Bar No. 258412
3 BARTKIEWICZ, KRONICK & SHANAHAN
4 A PROFESSIONAL CORPORATION
5 1011 22nd Street, Sacramento, CA 95816-4907
6 Telephone: (916) 446-4254
7 Fax: (916) 446-4018
8 E-Mail: abl@bkslawfirm.com

9 Attorneys for Sonoma County Water Agency

10 STATE OF CALIFORNIA
11 STATE WATER RESOURCES CONTROL BOARD

12 Millview County Water District)
13 Russian River (Subterranean Stream) in Mendocino County))
14 Proposed Revocation of License 5763 (Application 15679))
15 _____)

16 SONOMA COUNTY WATER AGENCY'S CLOSING BRIEF

17 Hearing Date: April 2, 2013
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1 INTRODUCTION

2 The SWRCB’s December 6, 2012 notice of public hearing for this proceeding states the
3 following key issue:

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

7 At the end of the April 2 hearing, the Hearing Officer asked the parties to address the following
8 additional issues in their closing briefs:

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

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

13 c. As it relates to the proposed revocation, what is the significance,
14 if any, of testimony regarding some unquantified use of water by Masonite
15 from 2001-2011 for demolition purposes, domestic use, and fire suppression
16 (e.g. incidental rotational use of Wells # 3, # 5 and # 6)?

17 For the reasons discussed in this brief, the Sonoma County Water Agency (“SCWA”)
18 requests that the SWRCB make the following rulings on these issues:

19 1. Because the licensees did not divert or use any substantial amounts of
20 water under License 5763 during 2002-2006, and because they have not diverted or
21 used any water under this license since 2006, the SWRCB should revoke this license.
22 Because Millview has an alternate water supply, revoking the license will not have
23 any significant water-supply impacts on Millview. On the other hand, because new
24 diversions under License 5763 would cause significant impacts to Russian River
25 fisheries and water users, not revoking the license would have significant impacts.
26 The balance of potential impacts therefore supports revoking the license.

1 a. Because Masonite stopped operating its Ukiah plant near the end
2 of 2001, there has not been any recycled water use under License 5763 since
3 2001. Licensees therefore are not entitled to any credits under Water Code
4 section 1010, subdivision (a), for recycled water use.

5 b. The SWRCB's order in this matter does not need to address or
6 decide the issue of the legal classification of the water that was pumped by
7 Masonite's Well 6. Because this well never was an authorized point of
8 diversion in License 5763, any use by Masonite of water pumped by this well
9 was not water lawfully diverted and used under License 5763, regardless of
10 the legal classification of that water.

11 c. Licensees may claim credits for diversion and use of water pumped
12 by Well 3 or Well 5 during the 2001-2011 period only if Licensees can
13 demonstrate the actual amounts of such diversions and use and that such
14 water was used for industrial purposes (the only authorized purpose of use in
15 License 5763). The evidence in the record indicates that no significant
16 amounts of water have been pumped by these wells since 2001.

17 ARGUMENT

18 Water Code section 1240 provides that "[t]he appropriation must be for some useful or
19 beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such
20 purpose the right ceases." Water Code section 1241 provides:

21 If the person entitled to the use of water fails to use beneficially all or any part
22 of the water claimed by him or her, for which a right of use has vested, for the
23 purpose for which it was appropriated . . . , for a period of five years, that unused
24 water may revert to the public . . . That reversion shall occur upon a finding by the
25 board following notice to the . . . licensee, . . . and a public hearing if requested by
26 the . . . licensee.

1 Water Code section 1627, which is an explicit term in License 5763, provides:

2 A license shall be effective for such time as the water actually appropriated
3 under it is used for a useful and beneficial purpose in conformity with this division
4 [Division 2 of the Water Code, Water Code §§ 1000-5976] but no longer.

5 Water Code section 1675, subdivision (a), provides:

6 (a) If, at any time after a license is issued, the board finds that the licensee has
7 not put the water granted under the license to a useful or beneficial purpose in
8 conformity with this division or that the licensee has ceased to put the water to that
9 useful or beneficial purpose, or that the licensee has failed to observe any of the terms
10 and conditions in the license, the board may revoke the license . . .

11 These statutes raise two questions for the SWRCB in this proceeding: (1) since 2001, have
12 the licensees (Masonite and Millview) failed to divert and beneficially use all or any part of the
13 water that License 5763 authorized them to divert and use? and (2) if the licenses have failed to
14 make such diversions and beneficial uses, then should the SWRCB revoke all or any part of License
15 5763?

16 For the reasons discussed in the following sections of this brief, SCWA requests that the
17 SWRCB rule that: (1) since 2001, the licensees have failed to divert or beneficially use all or almost
18 all of the water that License 5763 authorized them to divert and use; and (2) because of this lack of
19 diversions or beneficial uses, the SWRCB should revoke License 5763.

20 I

21 **LICENSEES DID NOT DIVERT OR USE ANY SUBSTANTIAL AMOUNTS**
22 **OF WATER UNDER LICENSE 5763 DURING 2002-2006, AND LICENSEES**
23 **HAVE NOT DIVERTED OR USED ANY WATER UNDER THIS LICENSE**
24 **SINCE 2006**

25 **A. Masonite Did Not Divert or Use Any Substantial Amounts of Water Under**
26 **License 5763 During 2002-2006**

27 During the April 2 hearing, Lauren Beuving, the former plant engineer for Masonite's Ukiah
28 plant, testified that Masonite ceased its manufacturing operations at this plant sometime near the end

1 of 2001. (RT 81:9-11.)¹ Between 2002 and 2006, Masonite used some water to wash down and
2 clean up the facility. (RT 81:12-18.) While Mr. Beuving said that Masonite pumped water rates
3 during this period at rates of up to 2,000 gallons per minute (“gpm”), he did not testify about how
4 long these pumps were operated on any specific day, and he could not state any annual amounts of
5 pumping during this period. (RT 90:22 to 91:17.) We therefore do not know whether pumping
6 during this period occurred only for a few minutes on a few days or whether it occurred more
7 frequently.

8 Moreover, some of the water that was pumped during this period was used for domestic,
9 irrigation, fire protection and dust suppression purposes, which are not authorized purposes of use
10 in License 5763. (RT 84:14-25; exh. PT-8, p. 4 (only authorized purpose of use is “industrial use”).)

11 Mr. Beuving also did not know how much water was pumped during 2002-2006 by Wells
12 3 and 5, which are authorized points of diversion in License 5763, and Well 6, which is not an
13 authorized point of diversion in this license. (See exh. PT-8, p. 4.) All he could say on this issue
14 was that, during 2002-2006, Masonite rotated its use of these three wells. (RT 83:18 to 84:13.)

15 All of this evidence indicates that, during the 2002-2006 period, Masonite did not divert and
16 use more than minimal amounts of water under License 5763, and it is uncertain how much of this
17 water was diverted at the authorized points of diversion that are specified in License 5763. None
18 of the water pumped by Well 6 can be counted toward historical diversions or use under License
19 5763, because Well 6 was not an authorized point of diversion in License 5763. Also, if any water
20 actually was diverted and used during this period from Wells 3 and 5, then it appears that some of
21 this use was for non-industrial purposes of use, which were not authorized purposes of use under
22 License 5763.²

23
24 ¹“RT” refers to the Reporters Transcript of the SWRCB’s April 2, 2013 hearing in this
25 matter.

26 ²The November 2002 Greystone Environmental Consultants, Inc. report, which the
27 Prosecution Team included in its motion for leave to submit rebuttal evidence, states, on page 1 in
28 the first paragraph, that, although Masonite had used various wells in the past (that is, before 2002),

1 **B. Masonite Has Not Diverted or Used Any Water Under License 5763 Since 2006**

2 Mr. Beuving had even less knowledge regarding Masonite's water use since 2006, when he
3 stopped working for Masonite. (See RT 79:25 to 80:4.) While he testified that he saw that some
4 activities were occurring at Masonite's former plant, he could not specify any number of gallons per
5 year of water use. (RT 91:18 to 92:11.)

6 For the 2007-2011 period, it appears that any water that was used at the Masonite plant was
7 from Well 6, because the electrical panels for Wells 3 and 5 had been vandalized and those wells
8 were not operational. (RT 16:20-22; 21:7-9; 83:9-12.) Accordingly, any water use at this plant
9 during this period must have been pumped by Well 6, which is not an authorized point of diversion
10 in License 5763. (Exh. PT-8, p. 4.)

11 Also, there is no evidence of any diversions or use by either Masonite or Millview under
12 License 5763 since 2011.

13 **C. Licensees May Not Claim Recycled Water Credits Under Water Code Section 1010**
14 **Because Masonite Has Not Used Any Recycled Water Since 2001**

15 When Masonite was operating its Ukiah plant, it recycled substantial amounts of water. (RT
16 87:15 to 88:13.) This use of recycled water might have led to credits under Water Code section
17 1010, if Masonite had properly reported them. However, Masonite did not claim such credits in its
18 licensee reports for 1994-1999, and instead claimed credits for water conservation under Water Code
19 section 1011. (Exhs. PT-13 & PT-14.) Also, there is no evidence that Masonite recycled any water
20 after its closed its Ukiah plant in 2001.

21 For these reasons, Licensees are not entitled to any credits under Water Code section 1010
22 for the use of recycled water since 2001, because Masonite did not recycle any water during this
23 period.

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26 at the time of the report Well 6 was "the sole source of water supply . . ." This suggest that, even
27 during the 2002-2006 period, Masonite did not divert any water through Well 3 or Well 5, and thus
did not divert or use any water under License 5763.

1 **D. Millview's Delays In Complying With CEQA For Its Change Petition Do Not**
2 **Justify Delaying Revocation Of License 5763**

3 Exhibit Millview-2 indicates that Masonite and Millview entered into a purchase and sale
4 agreement for License 5763 on June 21, 2006. On July 28, 2006, Millview filed a petition for long
5 term transfer of water under License 5763 (exh. Millview-3), which Tim Bradley, Millview's general
6 manager, testified was supposed to be a change petition (exh. Millview-13, p. 4.) Mr. Bradley also
7 testified that Millview hired Leonard Charles and Associates to prepare the necessary California
8 Environmental Quality Act ("CEQA") document for this petition. (Exh. Millview-13, p. 4.)

9 However, since 2006, Millview has not taken any CEQA actions for this petition. During
10 the April 2 hearing, Mr. Bradley testified that Millview decided not to pursue preparation of the
11 CEQA document because of uncertainties associated with the Ukiah Valley Area Plan and the
12 SWRCB's notice of revocation of License 5763. (RT, 98:23 to 100:13.)

13 These arguments do not justify Millview's failure to take any CEQA actions on its petition
14 since 2006. Millview is a public agency and planned to carry out the prosecution of its change
15 petition and the implementation of any SWRCB order approving the petition. Under CEQA
16 Guidelines, section 15051(a), Millview therefore is the CEQA lead agency for this petition. As lead
17 agency, Millview was responsible for preparing the CEQA initial study (CEQA Guidelines, §
18 15063), and, if, as a result of this initial study, Millview concluded that an environmental impact
19 report ("EIR") was necessary, then Millview was responsible for preparing and issuing the notice
20 of preparation (CEQA Guidelines, § 15082), and for preparing and circulating the draft and final
21 EIR's (CEQA Guidelines, §§ 15084, 15089). Even if there were some uncertainties regarding how
22 Millview's EIR would have to treat the Ukiah Valley Area Plan (see RT 99:17-22), Millview could
23 have at least started the CEQA process and acknowledged these uncertainties in its documents. The
24 uncertainties associated with the SWRCB's notice of revocation (see RT 99:9-16) also did not justify
25 Millview's decision to take no CEQA actions. To the contrary, the risk of revocation should have
26 motivated Millview to proceed even more expeditiously with its CEQA process.

1 II

2 **THE SWRCB SHOULD REVOKE LICENSE 5763**

3 As discussed above, the evidence demonstrates that Masonite did not divert or use any
4 significant amounts of water under License 5763 during the 2002-2006 period, and neither Masonite
5 nor Millview diverted or used any water under this license after 2006. Because the period of nonuse
6 exceeds five years, and probably exceeds 11 years, Water Code sections 1241 and 1675 authorize
7 the SWRCB to revoke License 5763.

8 Both of these statutes provide that the SWRCB “may” revoke this license, so the SWRCB
9 has discretion to consider all relevant facts when it decides whether to revoke this license. Here,
10 Millview has an alternate water supply, so revoking License 5763 will not have significant water-
11 supply impacts on Millview. On the other hand, SCWA and other users of Russian River water,
12 including instream beneficial uses, would be adversely affected if the SWRCB does not revoke
13 License 5763 and instead allows Millview to start diverting water under this license. The balance
14 of potential impacts therefore supports revoking the license.

15 **A. Millview Has an Alternate Water Supply**

16 During the April 2 hearing, Mr. Bradley testified that Millview has sufficient water available
17 to satisfy its current connections. (RT 112:4-7.) Mr. Bradley also stated that Millview is under a
18 connection moratorium from the Department of Public Health (“DPH”) because of insufficient
19 source capacity. (RT 95:9-12.)

20 Although Mr. Bradley stated that “insufficient source capacity” means lack of water rights
21 (RT 108:14-17), he could not identify any provision of the 2001 DPH order that actually referred to
22 water rights (RT 108:18 to 109:1), and nothing in that order actually refers to water rights (see exh.
23 Millview-1.) Instead, that order refers only to inadequate capacities of Millview’s physical facilities.
24 (Exh. Millview-1.) Mr. Bradley also said that there was a “subsequent letter” from DPH, but
25 admitted that this subsequent letter also referred to lack of “reliable source capacity.” (RT 109:1-8.)
26 Because Millview never submitted this “subsequent letter” into evidence, we cannot review it or

1 determine whether or not it refers to Millview's water rights. Millview therefore has not produced
2 any evidence to support its argument that the DPH moratorium is based on lack of water rights.

3 Although Mr. Bradley claimed that Millview was having problems negotiating a new contract
4 with the Mendocino County Russian River Flood Control and Water Conservation Improvement
5 District (the "Flood Control District"), Millview has not demonstrated that it is infeasible for
6 Millview to renew its existing contract. Moreover, the testimony of Sean White, the Flood Control
7 District's General Manager, during the January 26, 2010 SWRCB hearing on a draft cease and desist
8 order against Millview, demonstrates that it actually is feasible for Millview to renew its contract
9 with the Flood Control District. Specifically, Mr. White testified that Millview can maintain its
10 contractual right to 970 af/yr from the Flood Control District by diverting and using water under that
11 contract. (Exh. SCWA-5, pp. 264-265.) Mr. White explained that, if Millview does this, then its
12 contract will "renew automatically." (Exh. SCWA-5, p. 265:12-13.)³

13 The fact that Millview has the right to renew its contract with the Flood Control District for
14 970 af/yr also is confirmed by exhibits SCWA-6 and SCWA-7, which are declarations that Mr.
15 White signed on March 23, and December 13, 2012.⁴

16
17
18 ³During the April 2 hearing in this matter, SCWA's attorney offered exhibit SCWA-5, which
19 contains copies of the transcript of Mr. White's 2010 hearing testimony and the Millview's contract
20 with the Flood Control District, which was an exhibit to Mr. White's testimony. (RT 148:3 to
21 149:12.) Although Millview's attorney objected to this exhibit as hearsay, this objection is not valid.
22 While this exhibit is hearsay, it is subject to the exception to the hearsay rule for former testimony.
23 (See Evidence Code section 1291, subdivision (a)(2).) This exception applies where the former
24 testimony is offered against a party that was a party to the prior proceeding and had the right and
25 opportunity to cross-examine the declarant. Here, Millview had that opportunity during the 2010,
26 and, as shown by the transcript of Mr. Neary's questions in exhibit SCWA-5, Millview exercised
27 that opportunity. Under this exception to the hearsay rule, this exhibit would be admissible over
28 objection in civil actions, and it therefore is not subject to the limitations on hearsay evidence in
Government Code section 11513, subdivision (d).

⁴These two declarations are hearsay, and thus are subject to the limitations in Government
Code section 11513, subdivision (d). However, this statute authorizes the SWRCB to consider these
declarations "for the purpose of supplementing or explaining" other evidence, including exhibit
SCWA-5.

1 During the April 2 hearing, Mr. Bradley suggested that Millview's contract with the Flood
2 Control District was inadequate because the Flood Control District required a 50-percent cutback
3 in 2009. (RT 112:21 to 113:17.) However, that cutback was a result of implementation of two
4 SWRCB orders, which applied equally to all Russian River water rights in Mendocino County. (See
5 SWRCB Orders WR 2009-0027-DWR, p. 11, term 15, and WR 2009-0034-EXEC, pp. 22-23, term
6 15.) These orders also would have applied to License 5763, if any diversions had been occurring
7 under it in 2009. Millview's 2009 experience under its contract with the Flood Control District
8 therefore does not support Millview's arguments opposing revocation of License 5763.

9 The bottom line is that Millview purchased License 5763 to try to obtain a new water right
10 so that it no longer would have to pay the Flood Control District and not because Millview needs
11 License 5763 to prevent water supply shortages.

12 **B. SCWA, Other Users of Russian River Water, and Russian River Instream**
13 **Beneficial Uses Will Be Adversely Impacted If the SWRCB Allows Millview to**
14 **Start Diverting and Using Water Under License 5763**

15 During the April 2 hearing, Pamela Jeane, SCWA's Assistant General Manager for water and
16 wastewater operations, testified that SCWA holds four water-right permits for the diversion and
17 beneficial use of water in the Russian River system. (Exh. SCWA-1, p. 1, ¶ 2.) Ms. Jeane testified
18 that water that is stored in Lake Mendocino during periods of excess flows is later released into the
19 Russian River to support diversions under SCWA's water rights and other water rights. (*Id.*, p. 1,
20 ¶ 5.) She explained that the Russian River is a managed water system, with releases of water from
21 reservoir storage often controlling river flows, especially through most of the summer and fall. (*Id.*,
22 p. 2, ¶ 7.) SCWA makes these releases as necessary to implement the minimum instream-flow
23 requirements in the SWRCB's water-rights Decision 1610, which added terms to SCWA's water-
24 right permits specifying these minimum flow requirements. (*Id.*, p. 2-3, ¶¶ 8, 10; RT 130:25 to
25 132:9.)

26 Ms. Jeane testified that, if the SWRCB revokes water-right License 5763, then no diversions
27 will occur under this license in the future, and there obviously will be no new impacts associated

1 with diversions under this license. (*Id.*, p. 3, ¶ 12.) On the other hand, if the SWRCB does not
2 revoke License 5763, then diversions of up to 5.9 cubic-feet per second may occur in the future
3 under this license. (*Id.*, p. 3, ¶ 13.) If such new diversions were to begin during any time when
4 SCWA controls the amounts of water being released from Lake Mendocino, then SCWA will have
5 to increase the rates at which water is released from Lake Mendocino by the amount of the new
6 diversion. (*Id.*, pp. 3-4, ¶ 14; RT 132:10 to 133:12.)

7 These additional releases normally will reduce the amounts of water that remain in storage
8 in Lake Mendocino, and such reductions in storage often will have significant impacts later in the
9 season. (*Id.*, p. 4, ¶ 15.) For example, in 2002, 2004, 2007, 2008 and 2009, storage levels in Lake
10 Mendocino declined to seriously low levels, and, as a result, SCWA had to file temporary urgency
11 change petitions with the SWRCB to temporarily reduce the minimum instream-flow requirements.
12 (*Ibid.*) However, even with the reduced minimum instream-flow requirements that were authorized
13 by the SWRCB in these years, and even with significant water-conservation efforts by users of
14 Russian River water, storage in Lake Mendocino declined to very low levels by December of each
15 of these years. (*Id.*, p. 4, ¶ 16.) Such low storage levels are severe threats to the Russian River
16 fisheries that depend on releases from Lake Mendocino for their upstream migrations and to the
17 water supplies of SCWA and other water users that rely on the upper Russian River. (*Id.*; RT 133:13
18 to 135:25.)⁵

19 **C. Because Millview Has an Alternate Water Supply and Because Allowing New**
20 **Diversions Under License 5763 Would Cause Severe Threats to Russian River**
21 **Fisheries and Water Supplies, the SWRCB Should Revoke License 5763**

22 The preceding subsections demonstrate that: (a) if the SWRCB revokes License 5763, then
23 Millview will not suffer adverse water-supply impacts, because it has an alternate water supply; and
24 (b) if the SWRCB does not revoke License 5763 and instead allows Millview to start diverting and

25 ⁵The impacts of such diversions on fish habitat also are discussed in the written testimony
26 of Katherine Mrowka, senior engineer for the Division of Water Rights Prosecution Team (Exh. PT-
27 1, pp. 1-2; see exhs. PT-6 & PT-7) and in the policy statement of Wes Stokes, manager of the
California Department of Fish and Wildlife's Region 1 (RT: 67:6 to 72:7.)

1 using water under this license, then Russian River fisheries and SCWA and other users of Russian
2 River water will be adversely affected. Moreover, Millview acknowledged the risks and
3 uncertainties associated with License 5763 when it purchased this license. (See exh. Millview-2,
4 p. 3.) Under these circumstances, the balancing of potential impacts supports revocation of License
5 5763.

6 **CONCLUSION**

7 For the reasons stated in this brief, the Sonoma County Water Agency requests that the
8 SWRCB issue an order revoking License 5763.

9 Dated: May 31, 2013

BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

11 By  _____

12 Alan B. Lilly

13 Attorneys for Sonoma County Water Agency
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PROOF OF SERVICE BY ELECTRONIC MAIL

I, Terry M. Olson, declare:

I am over the age of eighteen and not a party to this action and work in Sacramento County at 1011 Twenty-Second Street, Sacramento, California 95816. On **May 31, 2013** I e-mailed a pdf file of Sonoma County Water Agency's closing brief for the April 2, 2013 State Water Resources Control Board's Proposed Revocation Hearing regarding License 5763 (Application 15679) for Millview County Water District to the following e-mail addresses:

cjneary@pacific.net

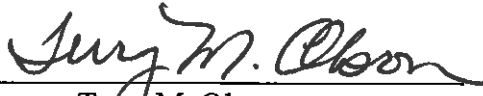
Nathan.Jacobsen@waterboards.ca.gov

Tony.lablanca@wildlife.ca.gov

A copy of my e-mail transmittal memorandum is attached.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 31, 2013



Terry M. Olson