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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ABARCA, RAUL VALENCIA, *et al.*,  
  
Plaintiffs,  
  
v.  
  
FRANKLIN COUNTY WATER DISTRICT,  
  
Defendants.

1:07-CV-0388-OWW-DLB  
  
MEMORANDUM DECISION RE: BAC  
DEFENDANTS' MOTION FOR  
JUDGMENT AS A MATTER OF  
LAW, OR IN THE ALTERNATIVE  
MOTION FOR NEW TRIAL.  
(PHASE 1)

INTRODUCTION

Defendants Merck & Co., Inc. Amsted Industries Inc., and  
Baltimore Aircoil Company, Inc. (collectively, "BAC Defendants")  
bring this motion for judgment as a matter of law ("JMOL"), or in  
the alternative, motion for new trial following jury verdicts in  
the first phase ("Phase 1") of this multi-party, multi-phase  
toxic tort case.

According to Defendants, Plaintiffs either failed to present  
or presented insufficient evidence of exposure to contaminants  
which allegedly originated from a now-closed cooling tower  
manufacturing facility (the "BAC site") operated by entities that  
were formerly owned by BAC Defendants. Specifically, Defendants  
assert that Plaintiffs' burden of proof (perponderance of the

1 evidence) was not met regarding the surface water and air  
2 pathways, as required under the Phase 1 Court Order Modifying  
3 Scheduling Conference Order ("Phase 1 Pretrial Order"). (Doc.  
4 540.) BAC Defendants further contend that Plaintiffs did not  
5 present sufficient evidence regarding Defendants legal  
6 responsibility for release of contaminates at the BAC Site, i.e.,  
7 to what extent, and when did Defendants, Merk, Amsted and BAC  
8 own, direct actions, remediate, and/or operate the BAC Site to  
9 cause contaminant releases that could be actionable.

10 The first phase of discovery was focused on "whether  
11 contaminants from the former [] BAC Site, Franklin County Water  
12 District or the April 2006 Flood have ever reached any location  
13 where plaintiffs could have been exposed to them, and if so, when  
14 such contaminants arrived, how such contaminants arrived at the  
15 location, how long they were present, and at what levels they  
16 were present." (Doc. 540 at 1:14-1:28.)

17 Plaintiffs oppose the motion. Plaintiffs' rejoin that they  
18 presented "substantial evidence" at trial in the form of expert  
19 opinion and analysis to show that contaminants migrated from the  
20 BAC facility to Plaintiffs' homes and/or properties through the  
21 various pathways. Plaintiffs further argue that BAC Defendants'  
22 criticisms regarding certain expert testimony go to the weight,  
23 not admissibility of the opinion. Finally, Plaintiffs assert that  
24 corporate liability was not an issue for determination in Phase 1  
25 and as such JMOL cannot be granted for Defendants on this issue.<sup>1</sup>

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26  
27 <sup>1</sup> This issue has been resolved by Plaintiffs' motion to amend  
28 decided August 10, 2011 and an order scheduling discovery for the  
corporate liability claims.

1  
2 1. PROCEDURAL HISTORY.

3 On March 8, 2007, Plaintiffs commenced this civil action  
4 against the current public entity defendants, alleging property  
5 damage caused by an April 2006 flood. (Doc. 1.) On September  
6 13, 2007, in the second amended complaint, Plaintiffs named Merck  
7 & Co., Inc., Amsted Industries, Inc., Baltimore Aircoil Company,  
8 and Track Four, Inc. as Defendants in this action. (Doc. 35.)  
9 The eighth amended complaint<sup>2</sup> was filed by Plaintiffs on March  
10 26, 2010. (Doc. 633.) The eighth amended complaint alleges ten  
11 claims against the BAC Defendants: (1) violation of 42 U.S.C.  
12 6972(a)(1) [RCRA]; (2) violation of 42 U.S.C. 6972(a)(1)(b)  
13 [RCRA]; violation of 33 U.S.C. 1311(a) [CWA]; (4) violation of 33  
14 U.S.C. 1342(a) and (b) [CWA]; (5) negligence; (6) trespass; (7)  
15 nuisance; (8) wrongful death; (9) fraud and deceit; and (10)  
16 civil conspiracy.

17 On March 23, 2009, BAC Defendants filed a "Motion for Case  
18 Management Order Re: Exposure" ("*Cottel* motion") to "compel  
19 plaintiffs to make a prima facie showing of exposure." (Doc.  
20 355.) The motion was denied on July 6, 2009; however, on August  
21 12, 2009, the Court established a multi-phase trial plan in which  
22 case-wide contaminant exposure issues were to be tried first  
23 ("Phase 1"), before general medical causation ("Phase 2") and  
24  
25

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26 <sup>2</sup> The eighth amended complaint is the current operative  
27 complaint; however, leave to amend in order to allege Plaintiffs'  
28 corporate liability claims was granted on August 10, 2011. (Doc.  
1442.)

1 plaintiff-specific exposure and causation ("Phase 3").<sup>3</sup> The  
2 August 12, 2009 Phase I Pretrial Order provides, in relevant  
3 part:

4 Discovery and expert disclosures shall be conducted in  
5 phases. Phase 1 shall focus on the issue of general  
6 exposure; that is, whether contaminants from the former []  
7 BAC Site, Franklin County Water District or the April 2006  
8 Flood have ever reached any location where plaintiffs could  
9 have been exposed to them, and if so, when such contaminants  
10 arrived, how such contaminants arrived at the location, how  
11 long they were present, and at what levels they were  
12 present.

13 (Doc. 540 at 1:14-1:28.)

14 On June 1, 2010, BAC Defendants moved for partial summary  
15 judgment on Plaintiffs' state law tort claims for personal injury  
16 and property damages. Defendants' motion was denied in part and  
17 granted in part. (Doc. 982.)

18 The Phase 1 trial began on February 2, 2011. The jury  
19 returned verdicts on March 31, 2011. (Doc. 1226.) Defendants  
20 filed their JMOL on April 28, 2011, asserting that Plaintiffs had  
21 not met their burden of proof regarding: (1) general exposure to  
22 contamination via the surface water pathways, including  
23 contamination via the El Capitan canal (the "canal") and water  
24 from a 2006 flood ("flood water"); (2) general exposure to  
25 contamination via the air pathway; and (3) the Plaintiffs' failed  
26 to present evidence regarding corporate liability of the  
27 Defendants for the relevant time-periods. (Doc. 1259.)

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<sup>3</sup> This phasing schedule is set to change in light of the order granting Plaintiffs leave to allege their corporate liability claims.



1 parts: (1) hexavalent chromium was present in the canal from 1969  
2 to 2006 at a concentration of 87 ppb; (2) hexavalent chromium was  
3 present in the flood water from 2006 to the "present" at a  
4 concentration of 87 ppb; and (3) hexavalent chromium reached the  
5 Beachwood neighborhood via the air in 1969 and was present for  
6 twenty-five years until 1994 at the concentrations described in  
7 trial exhibit 893, a series of maps (isopleths) prepared by  
8 Plaintiffs' expert Camille Sears.

9  
10 3. LEGAL STANDARDS.

11 a. Judgment as a Matter of Law.

12 Fed. R. Civ. Pro. 50(a) provides:

13 If a party has been fully heard on an issue during a jury  
14 trial and the court finds that a reasonable jury would not  
15 have a legally sufficient evidentiary basis to find for the  
16 party on that issue, the court may:

17 (A) resolve the issue against the party; and

18 (B) grant a motion for judgment as a matter of law against  
19 the party on a claim or defense that, under the controlling  
20 law, can be maintained or defeated only with a favorable  
21 finding on that issue.

22 The standards governing a motion for judgment as a matter of  
23 law pursuant to Rule 50 are reiterated in *Gibson v. City of*  
24 *Cranston*, 37 F.3d 731, 735 (9th Cir. 1994):

25 When confronted with a motion for judgment as a matter of  
26 law . . . a trial court must scrutinize the proof and the  
27 inferences reasonably to be drawn therefrom in the light  
28 most amiable to the nonmovant . . . In the process, the court  
may not consider the credibility of witnesses, resolve  
conflicts in testimony, or evaluate the weight of evidence  
. . . A judgment as a matter of law may be granted only if the  
evidence, viewed from the perspective most favorable to the  
nonmovant, is so one-sided that the movant is plainly  
entitled to judgment, for reasonable minds could not differ  
in the outcome . . . .

"[W]hen an expert opinion is not supported by sufficient

1 facts to validate it in the eyes of the law, or when indisputable  
2 record facts contradict or otherwise render the opinion  
3 unreasonable, it cannot support a jury's verdict." *Brooke Group*  
4 *Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209,  
5 242 (1993). "A reasonable jury cannot credit testimony that fails  
6 to reflect reality." *Hynix Semiconductor Inc. v. Rambus Inc.*,  
7 2008 WL 73681, at \*5 (N.D. Cal. Jan. 5, 2008).

8       b. Motion for New Trial

9       A motion for new trial "may be granted to all or any of the  
10 parties and on all or part of the issues ... for any of the  
11 reasons for which new trials have heretofore been granted in  
12 actions at law in the courts of the United States." Fed. R. Civ.  
13 Pro. 59(a). "The grant of a new trial is 'confided almost  
14 entirely to the exercise of discretion on the part of the trial  
15 court.' " *Murphy v. City of Long Beach*, 914 F.2d 183, 186 (9th  
16 Cir. 1990).

17       A new trial is necessary when the court, upon reviewing the  
18 evidence presented at trial and considering the jury's verdict,  
19 "is left with the definite and firm conviction that a mistake has  
20 been committed." *Tortu v. Las Vegas Metro. Police Dept.*, 556 F.3d  
21 1075, 1087-88 (9th Cir. 2009) (quoting *Landes Constr. Co v. Royal*  
22 *Bank of Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987)). A motion  
23 for new trial may also be granted to correct an erroneous  
24 evidentiary ruling that results in substantial prejudice to a  
25 party. *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328  
26 (9th Cir. 1995).

27       The grounds upon which a new trial has been granted are:

28 (1) where the jury's verdict is so contrary to the clear weight

1 of the evidence; (2) if the verdict is based on false evidence;  
2 or (3) if there would otherwise be a miscarriage of justice. *Roy*  
3 *v. Volkswagen of America, Inc.*, 896 F.2d 1174, 1176 (9th Cir.  
4 1990).

5 "While the trial court may weigh the evidence and  
6 credibility of the witnesses, the court is not justified in  
7 granting a new trial 'merely because it might have come to a  
8 different result from that reached by the jury.'" *Id. quoting*  
9 *Wilhelm v. Associated Container Transp. (Australia) Ltd.*, 648  
10 F.2d 1197, 1198 (9th Cir. 1981); *Wallace v. City of San Diego*,  
11 479 F.3d 616, 630 (9th Cir. 2007).

12  
13 4. DISCUSSION

14 A. Exposure Via Surface Water.

15 The jury found that Plaintiffs could have been exposed to  
16 hexavalent chromium at a concentration of 87 ppb in the El  
17 Capitan Canal from 1969 to 2006 and in flood waters in the  
18 Beachwood neighborhood from April 2006 to the present:

<u>Pathway</u>	<u>Chemical</u>	<u>Location</u>	<u>Year of Arrival</u>	<u>How Long Chemical was Present</u>	<u>Concentrations</u>
<u>Flood Water</u>	CR <sup>6</sup>	Beachwood Neighborhood	April 2006	to Present	87 ppb
<u>Canal Water</u>	CR <sup>6</sup>	Canal	1969	1969-2006	87 ppb

24 (Verdicts of Trial Jury at 3) (recreation.)

25  
26 1. El Capitan Canal.

27 Defendants assert that the jury's finding of 87 ppb of  
28



1 hexavalent chromium in the canal throughout the period of 1969 to  
2 2006 is unreasonable, or alternatively, the only reasonable time  
3 span the jury could find that 87 ppb hexavalent chromium existed  
4 in the canal is from 1969 to no later than 1991.

5 Facts on which these findings are based, include: Most of  
6 the data evidence presented were samples which reflected total  
7 chromium values. Evidence presented is uncontradicted that  
8 hexavalent chromium is a percentage of total chromium. It is  
9 undisputed that water from the pond flowed to the canal through a  
10 connecting pipe. It is further undisputed that the pond was the  
11 source of alleged contamination; i.e., no evidence was presented  
12 that, with regard to the canal surface water pathway, any other  
13 contamination source existed.<sup>5</sup> The dispute centers on whether and  
14 when above-standard levels ("MCL") of hexavalent chromium were  
15 present in the pond and/or canal.

16  
17 a. Jury's Verdict Re: Canal Contamination From 1969 -  
18 1991.

19 Over the period of 1969 - 1991, sampling of the pond was  
20 conducted only in January and March of 1989. These samples  
21 tested positive for both hexavalent and total chromium, which was  
22 recorded in a report by Dames & Moore titled, Phase II Soil and  
23 Surface Characterization Report ("Dames & Moore Report"). No  
24

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25 <sup>5</sup> All the data evidence and expert testimony presented from  
26 all parties was related to the pond, canal, and soil sampling and  
27 how this sampling evidence aligned with Plaintiffs' theory that  
28 "storm water comes in contact with the contaminated surface soils,  
[then flows] into the pond and then into the canal. That's the  
claim." (Final Trial Transcript at 1136:21-23, Feb. 9, 2011.)

1 sampling of the canal was done during this time. No other data  
2 or test evidence regarding the pond or canal was presented at  
3 trial for this time period. The absence of testing or sampling  
4 prevents any finding where contamination was present in the  
5 canal. Plaintiffs have strenuously argued that Defendants cannot  
6 benefit from their failure to test by asserting that negative  
7 inferences should be drawn against Defendants. This contention,  
8 however, does not substitute for evidence.

9 Defendants argue that Plaintiffs' have not met their burden  
10 of proof as to whether hexavalent chromium was in the canal  
11 during the period of 1969 to 1991 because no canal water sampling  
12 exists for that time period and Plaintiffs' expert, Dr. Laton,  
13 "admitted that samples collected at the outlet of the pond show  
14 non-detect-to-low detect concentrations of hexavalent chromium,"  
15 citing Dr. Laton's testimony regarding the Dames & Moore Report's  
16 March 1989 sample results. (Doc. 1259 at 10:24-11:1.)

17 Plaintiffs' theory is significantly different and rests on a  
18 series of inferences. Plaintiffs rejoin that Dr. Laton  
19 conditioned his testimony regarding the March 1989 samples by  
20 opining that the January 1989 samples were representative, and  
21 these included a hexavalent chromium measurement of as high as  
22 630 parts per billion ("ppb").

23 Dr. Laton further testified that surface soil measurements  
24 at the BAC Site were above-standard levels for hexavalent  
25 chromium in 2006. (See Declaration of Michael G. Marderosian  
26 ["Decl. Marderosian"], Ex. G, Rough Trial Transcript ["RT"] at  
27 209:22 - 210:3, Feb. 9, 2011) [testifying to an 800 ppb  
28 hexavalent chromium surface soil sample when the remediation goal

1 was 10 ppb.]). Plaintiffs argue that since remediation at the BAC  
2 Site was not started until 1991 and this soil sample was found  
3 even after remediation began, Dr. Laton made a reasonable  
4 scientific assumption that the soil at the BAC Site has been  
5 contaminated for the last forty years. The argument continues  
6 that, combined with Dr. Laton's testimony that the contaminated  
7 soil was being washed into the pond from 1969 on and, construing  
8 the evidence in the light most favorable to Plaintiffs, a jury  
9 could reasonably find that re-contamination of the pond and canal  
10 was constantly occurring during this time period before clean-  
11 closure of the pond. Dr. Laton opined as follows:

12 Q. Returning to the Feinstein report. . . . The document  
13 says, 'Samples collected from the outlet of the pond during  
14 the rain event at that time contained significantly lower  
15 concentrations (total chromium at 180 and hexavalent  
16 chromium not detected above 50 parts per billion). . . .'

17 Do you agree with that?

18 A. I agree they had total chromium of 1490 and 630 parts per  
19 billion for hexavalent chrome [on January 20, 1989].

20 (Declaration of Stephen C. Lewis ["Decl. Lewis"], Ex. 5, RT at  
21 33:1-9, Feb. 10, 2011.)

22 Q. Okay. And am I correct that the sample of water that was  
23 flowing out of the pond into the canal on March 15th, 1989,  
24 had no hexavalent chromium?

25 A. According to this sheet, yes.

26 Q. Do you have a doubt? I mean, when you said 'according to  
27 this sheet.'

28 A. Because the January 20th, 1989 sample did have hexavalent  
chrome leaving.

Q. It had hexavalent chromium in January of 1989 in the pond  
surface waters; correct?

A. Correct.

(Decl. Lewis, Ex. 4, RT at 222:7-22, Feb. 9, 2011; and see Decl.

1 Lewis, Ex. 25) (reporting the concentration value of 630 ppb  
2 hexavalent chromium in January 1989 and low-to-non-detect in  
3 March of 1989).)

4 Q. So prior to 2008, is it your understanding that  
5 contaminated soils still remained on this site?

6 A. Yes.

7 Q. For almost 40 years?

8 A. Correct.

9 [. . .]

10 Q. What is your understanding of the mechanism [] as to how  
11 those soils reached the pond?

12 [. . .]

13 THE WITNESS: [] As the water moves over the surface and  
14 entrains sediments and other chemicals it comes in contact  
15 with, and then it moves toward that drainage ditch, which  
16 ends up at a sump, which is then pumped up into the pond.

17 And by the evidence of the water quality that we've seen in  
18 1988 [sic] and 1989, within the pond, obviously  
19 contamination made it to that point.

20 (RT at 1155:16-1156:16, Feb. 9, 2011.)

21 Plaintiffs further argue that the jury's verdict was  
22 reasonable based on Dr. Laton's testimony that, pursuant to the  
23 Dames & Moore Report's 1989 sampling, an average of 581.8 ppb  
24 total chromium was flowing from the pond to the canal from 1969 -  
25 1991. Dr. Laton opined as follows:

26 Q. And what was your opinion as to that range or average of  
27 chromium in that canal during that period of time between  
28 1969 and 1991?

A. The average that I calculated was 581.8 micrograms per  
liter or parts per billion [of total chrome].

(Id. at 1154:16 - 22.)

Because evidence was presented that hexavalent chromium is  
included in the total chromium value, Plaintiffs argue the jury

1 could reasonably infer that 87 ppb of hexavalent chromium existed  
2 throughout the canal as part of the 581.8 ppb total chromium  
3 value over the entire 1969 - 1991 time period.

4 Dr. Laton further opined that this 581.8 ppb total chromium  
5 concentration was flowing unimpeded into the canal from 1969 to  
6 1991:

7 [A.] There's nothing to impede flow from what's in the canal  
8 to get -- what's in the pond to get into the canal. And then  
to migrate downstream from there.

9 So based upon that, I reviewed the dataset, which is  
10 only one year for the pond water quality, which ranged in  
values from a low of 6 to as high as 1490 micrograms per  
11 liter of total chromium. And took the average of that and  
just said that's a conservative value for what would be  
12 getting into that canal over that whole time frame.

13 (*Id.* at 1154:7 - 15) (emphasis added). From this, Plaintiffs  
14 argue, a reasonable jury could find that 87 ppb hexavalent  
chromium existed in the canal from 1969 - 1991 based on Dr.  
15 Laton's testimony.

16 Defendants rejoin that the jury's canal finding cannot be  
17 justified because Dr. Fendorf's "unrebutted" testimony concerning  
18 chromium valance conversion defeats Plaintiffs' argument and Dr.  
19 Laton had no basis to estimate that from one year of data  
20 observation, twenty-two years of contamination was present.

21 Defendants assert that Dr. Fendorf's analysis proves that no  
22 above-standard levels of hexavalent chromium could have reached  
23 the canal, particularly because Dr. Laton refused to consider the  
24 degree of valance reduction of the chromium leaving the pond.

25 Plaintiffs respond first, that Dr. Fendorf's testimony was  
26 successfully challenged - i.e., Dr. Fendorf's theory was not  
27 presented or established as a matter of law.

28

1 Dr. Fendorf's direct examination established:

2 [T]he bacteria [in the pond] directly take[s] hexavalent  
3 chromium to trivalent chromium. . . . And seeing the pond. .  
4 . in terms of its vegetation and so on [w]e could see that  
5 it was reducing.

6 (RT at 105:15-17, Feb. 10, 2011.)

7 Any chromium that's coming out into, discharging into El  
8 Capitan Canal [] I would expect to have converted to  
9 trivalent chromium dominantly.

10 (Id. at 107:21-23.)

11 Dr. Fendorf's cross-examination, in relevant part, shows:

12 'Question: So in your work in this case, what did you do to  
13 determine the existence of anaerobic conditions in the soil?

14 Answer: I didn't do an extensive analysis. . . I was charged  
15 with looking at whether there might be conditions and to  
16 explain the conditions that could lead to this. What I did  
17 do is I went out to the site, I dug two soil pits.'

18 [. . .]

19 Q. But enable [sic] to determine if there were anaerobic  
20 conditions in areas where hexavalent chromium were used, no  
21 samples were dug in those areas?

22 A. No samples were dug. . .

23 [. . .]

24 Q. So the bottom line is this. You can't really tell this  
25 jury if there were really anaerobic conditions that existed  
26 on this site where the chemicals were used; can you?

27 A. Where they were used, no, I can't. I can't say that.

28 (Decl. Marderosian, Ex. U, RT at 173:25-174:8; 175:18-21; 196:13-  
16, Feb. 10, 2011.) Plaintiffs' question on cross-examination was  
"where" the chemicals were "used" in the retort, not where the  
chemicals were "released," which includes the drop pad, pond  
(sump) and its connection to the canal. This misdirection in the  
question negates any meaningful effect to the Fendorf answer,  
which is not impeaching about the anaerobic effects in the pond

1 and canal. Dr. Fendorf's testimony invokes an indisputable  
2 scientific principle applicable to valance reduction of chromium.

3 Plaintiffs argue the jury was instructed that they may  
4 reject the testimony of an expert like Dr. Fendorf. (See Decl.  
5 Marderosian, Ex. I [jury instruction no. 13].) Jury instruction  
6 number 13 states:

7 Some witness, because of education or experience, are  
8 permitted to state opinions and the reasons for those  
9 opinions.

9 Opinion testimony should be judged just like any other  
10 testimony. You may accept it or reject it, and give it as  
11 much weight as you think it deserves, considering the  
12 witness's education and experience, the reasons given for  
13 the opinion, and all the other evidence in the case.

12 If the expert witnesses disagreed with one another, you  
13 should weigh each opinion against the others. You should  
14 examine the reasons given for each opinion and the facts or  
15 other matters that each witness relied on. You may also  
16 compare the experts' qualifications.

15 *Id.*

16 Nevertheless, Plaintiffs argue that it appears the jury did  
17 weigh each expert opinion. The jury found 87 ppb of hexavalent  
18 chromium, which Plaintiffs argue could have taken Dr. Fendorf's  
19 conversion theory into account since Plaintiffs' expert, Dr.  
20 Laton, testified to a hexavalent chromium level in the pond of  
21 630 ppb and an average total chromium level of 581.8 ppb. In  
22 other words, because Dr. Laton testified to 630 ppb hexavalent  
23 chromium and 581.8 ppb total chromium and the jury's verdict of  
24 87 ppb hexavalent chromium is significantly lower then either of  
25 these values, the jury must have taken Defendants' conversion  
26 theory into account.

27 Plaintiffs finally argue that Defendants' witness Ms.  
28 Kretsinger and Regional Board representative Mr. Austin

1 admitted the pond was contaminated prior to 1991:

2 Q. Is it your opinion that the pond was not contaminated  
3 with hexavalent chromium between 1969 and 1991?

4 A. No. That is incorrect.

5 (RT at 79:8-10, Testimony of Ms. Kretsinger, Mar. 15, 2011.

6 [Q.] Now, here, in this report, it is reported to the  
7 senator that, 'From the early 1960s to mid 1991, wood  
8 treatment operations at the BAC site discharged hexavalent  
9 chromium. This hexavalent chromium polluted soil and  
10 groundwater. In addition, hexavalent chromium was released  
11 off-site through storm water discharges to an adjacent  
12 irrigation canal.'

13 Now, is that a true statement?

14 A. That's correct.

15 Q. So you told the senator that the pollutants from the BAC  
16 site entered the pond and then went off site through the  
17 storm water discharges to this -- to this irrigation canal,  
18 the El Capitan; is that right?

19 A. Yes.

20 Q. And, in fact, isn't it true that you told the residents  
21 at the meeting in 2009, that the contamination got into the  
22 canal. Do you remember that?

23 A. Yes.

24 (RT at 192:13-193:6, Testimony of Mr. Austin, Feb. 18, 2011; see  
25 also Decl. Marderosian, Ex. E, Briefing for Senator Dianne  
26 Feinstein Former Baltimore Aircoil Company Cleanup Site, Jan. 15,  
27 2009 ["Feinstein Report"] ["From the early 1960s to mid 1991,  
28 wood treatment operations at the BAC site discharged hexavalent  
chromium. This hexavalent chromium. . . was released off-site  
through storm water discharges to an adjacent irrigation  
canal."].)

Plaintiffs' evidence includes scientific inferences based on  
an extremely small amount of data, but it is still "tied to the  
facts of the case." *Daubert v. Merrell Dow Pharmaceuticals,*



1 *Inc.*, 509 U.S. 579, 591 (1993). Plaintiffs' mantra throughout  
2 trial was that BAC Defendants' failure to sample and test through  
3 the years "hid" the historical concentrations in the pond and  
4 canal. Based on the only sampling evidence presented, Dr. Laton  
5 opined that re-contamination was occurring via surface soil  
6 washing into the pond which flowed unimpeded into the canal at an  
7 average concentration of 581.8 ppb total chromium. The jury was  
8 told that part of this total chromium value could contain  
9 hexavalent chromium. Plaintiffs correctly argue that Dr.  
10 Fendorf's conversion theory was not proved as a matter of law  
11 and, nonetheless, the jury could have given some weight to Dr.  
12 Fendorf's theory based on the verdict.

13         Construing the evidence in the light most favorable to  
14 Plaintiffs, a reasonable conclusion is one which is consistent  
15 with the jury's verdict. Some evidence supports Dr. Laton's  
16 opinion that hexavalent chromium was being released from the pond  
17 into the canal. This evidence supports the jury's verdict on the  
18 canal water pathway for 1969 - 1991. The extent of aerobic  
19 reduction of hexavalent chromium remains a mystery. The parties  
20 had four years and approximately six days of *Daubert* hearings to  
21 prepare for these issues. Plaintiffs' evidence on canal waters  
22 through 1991 meets the sufficient evidence requirement based on  
23 the totality of the BAC Site operation from 1969 - 1991.  
24 Defendants' motion is DENIED as to the finding that hexavalent  
25 chromium in the canal from 1969 - 1991.

26         Defendants' motion for new trial is also DENIED. Although a  
27 very limited amount of quantitative evidence was presented  
28 "[d]oubts about the correctness of the verdict are not sufficient

1 grounds for a new trial." *Landes Constr. Co.*, 833 F.2d at 1372.  
2 The court must be "left with the definite and firm conviction  
3 that a mistake has been committed". *Id.* (citing *Tennant v. Peoria*  
4 *& Pekin Union Ry.*, 321 U.S. 29, 35 (1944)). To justify a new  
5 trial, the errors must be "so prejudicial as to require a new  
6 trial which would be likely to produce a different result."  
7 *O'Dell v. Hercules Inc.*, 904 F.2d 1194, 1200 (9th Cir. 1990); see  
8 also Fed. R. Civ. P. 61. For the 1969 - 1991 time period, taking  
9 all Plaintiffs' evidence into account, including Defendants' own  
10 expert witness who admitted she believed the pond was or could be  
11 contaminated during that time period, the court would simply be  
12 substituting a different view of the evidence for that of the  
13 jury. The record does not create a "firm conviction" that the  
14 jury was mistaken.

15  
16 b. Jury's Verdict Re: Canal Contamination From 1992 -  
17 2006.

18 Defendants argue that there is no evidentiary basis for the  
19 jury's finding that 87 ppb hexavalent chromium existed in the  
20 canal after 1991 for the following reasons: First, the pond was  
21 "clean closed" and any contaminates it may or may not have  
22 emitted would have ceased. (See RT at 135:18-21, Feb. 18, 2011;  
23 Decl. Lewis, Ex. 7 ["[A]s far as the Water Board was concerned,  
24 the contaminated sediments in the pond had been adequately  
25 excavated and disposed of properly."]; Decl. Lewis, Ex. 21 [1992  
26 Letter from Regional Water Quality Control Board ("RWQCB")  
27 stating "BAC-Prichard has complied with its environmental  
28 remediation obligations with respect to the storm water pond."]).

1 Second, the only pond sampling data presented demonstrates  
 2 only below-standard levels of total chromium from 1992 – 2007,  
 3 aside from one above-standard sample, in January 1994:

Date of Sample	Storm Water Discharge Total Chromium (µg/L)	Storm Water Entering Site Total Chromium (µg/L)
07-Dec-92	20	
24-Jan-94	87	
09-Apr-94	20	
06-Dec-94	24	
20-Mar-95	26.4	
18-Dec-95	28.2	
05-Mar-96	30.7	
02-Jan-97	23.8	
10-Dec-97	13.4	
12-Jan-98	19.8	
23-Feb-98	10.6	
19-Jan-99	35.2	
08-Feb-99	13.8	
09-Mar-99	28.5	
18-Jan-00	24.1	
14-Feb-00	11.85	
11-Jan-01	24.8	
05-Mar-01	3.8	
02-Jan-02	16.2	15
20-Feb-02	37.2	39.3
20-Feb-03	4.5	10.4
14-May-03	4.6	51
11-Oct-07	<10	

27 (Decl. Lewis, Ex. 23 at 3) [Recreation of chart in Feinstein  
 28 Report]) (highlight added.)

1 Third, Dr. Laton admitted that after 1991 the average total  
2 chromium detected in the pond was below MCL standard at 22.3 ppb.  
3 (Decl. Lewis, Ex. 4, RT at 212:20 - 213:4, Feb. 9, 2011.)

4 Fourth, Ms. Kretsinger opined regarding over 50 surface  
5 water samples collected by IT Corporation and the Regional Water  
6 Quality Control Board in 1992, 1995, 1998, and 1999 from various  
7 locations along the canal, none of which detected chromium at  
8 concentrations above MCL standard:

9 A. This map shows locations along the El Capitan Canal, both  
10 upstream from the BAC-Pritchard facility and downstream and  
11 away from it. And these are locations that were included  
12 [in] sampling by our firm and also sampling that had been  
13 historically conducted by others. And also sampling that  
14 occurred by the Regional Water Quality Control Board after  
15 our investigation.

16 And so it includes samples collected by IT in 1995 and it  
17 includes sampling locations that were sampled on multiple  
18 events by IT in 1998 and 1999. And it includes the Regional  
19 Water Quality Control Board's sampling locations in  
20 February 2009.

21 And all of these locations are described in the text of my  
22 report and references to these documents.

23 Q. And approximately how many samples were collected at the  
24 various sites that are indicated on this exhibit, 5653.2?

25 A. There were 50 samples.

26 Q. And not all of those samples were tested for hexavalent  
27 chromium; is that correct?

28 A. That's correct. About a third of them were.

Q. And for those samples that were tested for hexavalent  
chromium, were there any detections of hexavalent chromium  
in that set of samples?

A. There was no hexavalent chromium detected in those  
samples.

Q. Okay. And that's between 1995 and 2009?

A. That's correct.

Q. Okay. Let's look, for a moment, at 5653.1.

1       [. . .]

2       A. All the sampling results that are shown by the bars were  
3       less than 10 or about 10 with one sample at 21 parts per  
4       billion. So they were all well below the California MCL for  
5       chromium.

6       Q. Do you know whether or not IT Corporation did any  
7       sampling in the El Capitan Canal before 1995?

8       A. Yes. I learned of another sample, in reading depositions  
9       just prior to my deposition. So there was a sample collected  
10      by IT in 1992.

11      Q. And do you recall what was found in that sample?

12      A. In that sample, they found [a below-standard value of]  
13      44.4 parts per billion of chromium.

14      (RT at 33:20-36:6, Mar. 15, 2011.)

15             Plaintiffs' counsel briefly cross-examined Ms. Kretsinger  
16      on this subject, but the cross-examination predominantly focused  
17      on the pre-1992 time-period:

18             [Q.] So you're here -- your opinions are as of 2008 and  
19             2009, no contamination in the canal. Correct?

20             A. No. No. We also looked at the historical data. So we  
21             had some 51 samples between the samples that we had  
22             collected and also those that had been collected by others,  
23             that were for the El Capitan Canal that showed that there  
24             was no contamination that exceeded the MCL.

25             Q. Right. All after the time the plant closed; correct?

26             A. It was closed from 1992 forward.

27      (RT at 81:13-21, Mar. 15, 2011.)

28             [Q.] We're talking about the 1992 canal sample. That was  
29             your understanding of the first sample that was taken of  
30             canal water; is that correct?

31             A. That was the earliest sample that we identified.

32             Q. And this was after the pond was drained and the sediment  
33             scraped out of it.

34             A. It was after closure, yes.

35      (RT at 91:15-21, Mar. 15, 2011.)

36             Plaintiffs' counsel attempted to challenge the 1992 canal

1 sample value:

2 Q. All right. But in terms of the canal sampling, the 1992  
3 sample, remember, I'm the one that showed you that in your  
4 deposition. Do you remember that?

5 A. Well, actually I brought deposition exhibits with me that  
6 explained the difficulty with how that sample had been  
7 collected and when it had been analyzed and had very high  
8 concentrations of aluminum and iron and silicon and how it  
9 had been affected by soil and how that sample resembled very  
10 highly the benchmark soils from Merced County in its  
11 composition.

12 Q. Okay. We're going to talk about that. But you're telling  
13 this jury that that sample, in 1992, of canal water is not  
14 valid; correct?

15 A. The sample was the sample. But it showed that it had been  
16 affected by the large amount of sediment. . .

17 (RT at 81:22-82:10, Mar. 15, 2011.)

18 [Q.] Do you remember reading this from the report about that  
19 1992 canal sampling?

20 A. Yes.

21 Q. And it says, 'In addition to the groundwater samples, two  
22 surface quality samples (CS-1, CS-2) were taken from the  
23 canal stream adjacent to the BAC-Pritchard facility (Figure  
24 3).'

25 That's the figure we were just looking at.

26 'These samples were taken when the site was considering  
27 applying for a National Pollutant Discharge Elimination  
28 System (NPDES) permit so that interim groundwater control  
29 system could discharge to the canal. The first sample was  
30 taken upgradient from the facility.'

31 That's the one that I think you just referenced; is that  
32 right, Ms. Kretsinger?

33 A. Correct.

34 Q. Upgradient from the facility, while the second one was  
35 taken downgradient of the storm water retention pond. So  
36 that would be [sic] toward the Beachwood neighborhood;  
37 right? Downgradient?

38 A. It appears from the text that's in the downgradient  
39 direction.

40 Q. So there were two samples, one upgradient and one

1 downgradient from the pond; correct?

2 A. That's what the report says.

3 Q. And it says, 'The results of the analysis detected in the  
4 first canal stream sample are presented in Table 10.' That's  
5 the table we just looked at that showed [below MCL standard]  
6 44 parts per billion; correct?

7 A. Correct.

8 Q. 'The second canal stream sample was not analyzed due to  
9 the decision to apply for a waste discharge permit and not  
10 the NPDES permit.'

11 So here's my question: Did you ever inquire as to why the  
12 second sample, the sample that was downgradient from the  
13 pond toward the Beachwood neighborhood, why that sample  
14 was never analyzed?

15 A. No.

16 Q. Did you look for any lab reports to see if it had been  
17 analyzed?

18 A. We read the report and understood that it was not.

19 (RT at 92:3 - 93:19, Mar. 15, 2011.)

20 Ms. Kretsinger did not admit that the 1992 sample was  
21 invalid and Plaintiffs' cross-examination did not illicit  
22 testimony that any post-1991 canal water samples were above MCL  
23 standard for total or hexavalent chromium.

24 Dr. Daniel B. Stephens testified similarly to Ms. Kretsinger  
25 that samples were taken of the canal water between 1995 - 2009  
26 and there were no detections of hexavalent chromium. Dr.  
27 Stephens testified as follows:

28 Q. Okay. Were the tests that were done in 1995 of canal  
water for total chromium?

A. Yes.

Q. 1998, total chromium?

A. Yes.

1 Q. 1999, total chromium?

2 A. Yes.

3 Q. 2008, total chromium?

4 A. Yes.

5 Q. 2009, total chromium?

6 A. To the best of my knowledge.

7 Q. Was total chromium in any of those years ever found above  
8 drinking water standards?

9 A. Not that I know of.

10 (RT at 97:10-23, Mar. 3, 2011; and see Decl. Lewis, Ex. 27  
11 [showing low-to-non-detect for hexavalent chromium in the El  
12 Capitan canal from 1995 - 2009]; Decl. Lewis, Ex. 28, [Dr.  
13 Stephens & Associates, Inc. Report showing no hexavalent chromium  
14 detected in El Capitan canal between 1998 - 2009].)<sup>6</sup>

15 Plaintiffs ignore this overwhelming and uncontradicted  
16 evidence and an attorney's questions and/or arguments are not  
17 evidence. (See Doc. 1224, Jury Instructions ["Arguments and  
18 statements by lawyers are not evidence. . . Questions and  
19 objections by lawyers are not evidence."].) Plaintiffs' argument  
20 rests solely the totally unsupported and argumentative testimony  
21 of Dr. Laton who opined that re-contamination was occurring in  
22 the canal throughout 1969 - 2006 based on the 1989 Dames & Moore  
23 Report pond water samples and the 2006 surface soil samples. For  
24 the 1992 - 2006 time period, however, this theory is not  
25 supported by a scintilla of evidence and directly conflicts with

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26  
27 <sup>6</sup> Plaintiffs' counsel's cross-examination of Dr. Stephens did  
28 not address this sampling evidence.



1 all the scientific and sampling evidence presented. Dr. Laton  
2 acknowledged and did not dispute the Feinstein Report's findings.  
3 (See Decl. Lewis, Ex. 4, RT at 212:25-213:4, Feb. 9, 2011) ["By  
4 reviewing the storm water reports presented by the defense, I was  
5 able to go through and look at all the chemical concentrations  
6 within the pond in the water. And the average of those, over that  
7 time frame [1992 - 2007], was only 22.3 micrograms per liter [of  
8 total chromium]."].) Dr. Laton never testified regarding the 1992  
9 - 2009 canal sampling evidence, and made no effort to refute this  
10 undisputed evidence.<sup>7</sup> Neither he nor any other witness presented  
11 evidence to explain, e.g., why all the testing samples taken  
12 measured below MCL standard levels of total and hexavalent  
13 chromium, despite the alleged "continual re-contamination" of the  
14 pond. This is because, Defendants' point out, there cannot be re-  
15 contamination when remediation has removed the source.

16 There is a total absence of evidence to provide a foundation  
17 for an opinion that re-contamination was occurring after 1991.  
18 Dr. Laton's unsupported, unscientific opinion is pure  
19 speculation. The testimony suggests a complete lack of scientific  
20

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21 <sup>7</sup> Dr. Laton apparently did not review this sampling evidence  
22 and was never presented this evidence at trial. He was never  
23 questioned about nor did he testify to this evidence. (See e.g., RT  
24 at 12:11-19, Feb. 10, 2011) ("THE WITNESS: I don't recall reading  
25 any documents that stated [the canal] was sampled.") Plaintiffs,  
26 however, acknowledge that the canal was tested after 1991. (See  
27 e.g., Doc. 1288 at 26:2-5 ["If the Merck defendants had routinely  
28 tested the canal, perhaps their arguments on this basis could be  
taken seriously. Of course, no such testing was performed until  
after 1991. . ."]) (emphasis added.) Despite their acknowledgment,  
Plaintiffs choose to turn a blind eye to this evidence.

1 objectivity and the  
2 assumption of an advocate's role. An experts' opinion need not be  
3 accepted uncritically simply because his credentials render him  
4 qualified to testify. "When an expert opinion is not supported  
5 by sufficient facts to validate it in the eyes of the law, or  
6 when indisputable record facts contradict or otherwise render the  
7 opinion unreasonable, it cannot support a jury's verdict."  
8 *Brooke Group Ltd.*, 509 U.S. at 242 (finding that expert testimony  
9 was not sufficient to defeat JMOL because expert's opinion was  
10 not based on sufficient facts to support jury verdict); *see also*  
11 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999)  
12 ("`[N]othing in either *Daubert* or the Federal Rules of Evidence  
13 requires a district court to admit opinion evidence that is  
14 connected to existing data only by the *ipse dixit* of the  
15 expert.'"); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)  
16 ("A court may conclude that there is simply too great an  
17 analytical gap between the data and the opinion proffered.").  
18 Here, Dr. Laton's re-contamination testimony is based on no  
19 evidence. It is simply *ipse dixit*, which creates an unbridgeable  
20 analytical gap between the data and the opinion proffered.

21 Although not specifically argued by Defendants, even taking  
22 the January 24, 1994 sample into account, the jury's verdict is  
23 unreasonable for a further reason.<sup>8</sup> The measurement on January  
24

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25  
26 <sup>8</sup> After 1991 the only evidence to base a finding that  
27 hexavalent chromium existed in the canal is the 87 ppb value of  
28 total chromium found in the pond in January 1994. (See Decl. Lewis,  
Ex. 23, Feinstein Report.)

1 24th is 87 ppb total chromium. The jury was instructed that  
2 hexavalent chromium is a fraction of the total chromium value.  
3 (See e.g., Doc. 1288 at 27:25 - 28:2 ["the jury had been provided  
4 ample testimony during trial as to the fact that total chromium  
5 included hexavalent chromium."]) (emphasis in original)). This  
6 was proved by all the evidence presented and is indisputable.  
7 (See e.g., Decl. Lewis, Ex. 25, [Dames & Moore Report  
8 demonstrating that for each sample in which total chromium was  
9 detected in the pond, hexavalent chromium was detected at a  
10 fraction of the total chromium value; i.e., hexavalent chromium  
11 detections were never higher than 46% of the total chromium  
12 value]). The jury was never told by any expert that hexavalent  
13 chromium could encompass the entirety of or exceed a total  
14 chromium sample value.<sup>9</sup> The jury, nonetheless, found that 87 ppb  
15 hexavalent chromium was continuously present in the canal after  
16 1991. Because the jury had no evidence whatsoever that hexavalent  
17 chromium could encompass and/or exceed the entire total chromium  
18 value in any sample, the jury could not reasonably find that 87  
19 ppb hexavalent chromium was in the canal for approximately  
20 fourteen years after clean closure and remediation, based on the  
21 single 87 ppb total chromium, January 24th sample.

22 An absence of any evidence to support an opinion or finding  
23 of the continuous presence of 87 ppb hexavalent chromium existed  
24

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25  
26 <sup>9</sup> Dr. Laton agreed that "total chromium, as a measurement, is  
27 more commonly found in the earth's crust, naturally occurring, than  
28 hexavalent chromium." (Final Trial Transcript at 1171:6-10, Feb. 9,  
2011.)

1 in the canal is overreaching. And, an expert cannot provide  
2 opinions that are without factual and scientific basis.  
3 Defendants' motion for judgment as a matter of law is GRANTED as  
4 to the canal pathway from the time period 1992 - 2006.<sup>10</sup> There is  
5 no evidence of hexavalent chromium over the MCL for that time  
6 period.

7  
8 (1) Flood water

9 The jury found that 87ppb hexavalent chromium reached the  
10 Beachwood neighborhood during a flood which occurred in April of  
11 2006 and remains in the neighborhood to the "present." The  
12 uncontradicted testimony is that flood waters subsided within two  
13 days. The canal is the sole source of alleged "contaminated flood  
14 waters"; i.e., no evidence was presented that flood water  
15 contamination occurred from any other source.<sup>11</sup>

16  
17 <sup>10</sup> At the July 11, 2011 hearing of argument on the motions,  
18 Defendants pointed out that the jury was presented evidence  
19 regarding a series of "caps" in or around 1994 in which cement was  
20 poured over the most contaminated areas of the BAC Site. (See  
21 Hearing Transcript at 47:24 - 48:5, July 11, 2011.) Defendants,  
22 however, did not cite at the hearing or in their brief where in the  
23 record this evidence was presented. With thousands of pages  
24 transcript and exhibits from this nearly two-month trial, a  
25 citation to the record is necessary in order for the evidence to be  
26 considered. Nevertheless, the need for this evidence is moot as  
27 Defendants' JMOL on the canal surface water pathway from 1992 -  
28 2006 is granted despite the fact that the "capping" evidence was  
not considered.

<sup>11</sup> All expert witness to opine on the subject stated that the  
Beachwood neighborhood was flooded by a mixture of canal water and  
other water sources not-at-issue when a levee approximately a mile  
from the pond breached in April 2006. For example, Plaintiffs

1 Defendants assert that Plaintiffs have not met their burden  
2 to prove hexavalent chromium was in the flood water because the  
3 flood water emanated from the canal and the unchallenged evidence  
4 proves the canal was not contaminated during the relevant time  
5 period. It follows, Defendants assert, that since the flood water  
6 emanated from the canal, none of the flood water could have been  
7 contaminated.<sup>12</sup>

8 Plaintiffs assert their previously described argument, that  
9 the canal water was contaminated from 1969 - 1991 by the  
10 unimpeded flow of hexavalent chromium from the pond through the  
11 connecting pipe, which caused the canal water to remain

12 \_\_\_\_\_  
13 expert Dr. James Shaaf testified:

14 Q. You're not suggesting in any way that the pond at the BAC  
15 site was in any way a cause of the flood; are you?

16 A. It certainly wasn't the cause of the flood.

17 Q. What did you determine was the cause of the flood?

18 A. The excessive amount of water coming from the upper  
19 watersheds, particularly from Bear Creek.

20 Q. So there wasn't anything about the function of the BAC  
21 site, BAC-Pritchard site pond that you believe caused the  
22 levee to fail; is that correct?

23 A. No. It was just another one of the upstream watershed  
24 elements that flowed downstream. And there was just too much  
25 water for the system to handle.

26 (Final Trial Transcript at 1132:7-18, Feb. 9, 2011.)

27 <sup>12</sup> No evidence was admitted that in 2006 or after that any  
28 activity was conducted that released chromium or arsenic from the  
BAC Site, the pond, or the canal.

1 contaminated until it was swept into the Beachwood neighborhood  
2 by the April 2006 flood. Dr. Laton testified:

3 [T]he levee breached in 2006. When that happened, water  
4 spilled into the Beachwood neighborhood. And so did the  
5 sediments that had been sitting there [the canal] from 1969  
6 and earlier, all the way through 1991, being contaminated  
7 from the waters emanating from the BAC facility. They  
8 accrued over that time frame.

9 (RT at 41:25-42:5, Feb. 10, 2011.)

10 Dr. Laton's opinion about canal contamination after 1991 is  
11 not based on evidence. Sampling and test results show no detects  
12 above MCL and it is speculation that any flood water which  
13 emanated from the canal during the relevant time period, 2006 to  
14 present, could have been contaminated in light of the  
15 remediation, clean closure of the BAC Site, and testing evidence.

16 Defendants supplement this contention with three other  
17 undisputed facts to demonstrate that the jury's finding is  
18 unsupported by the evidence. First, the flood water was never  
19 tested. Plaintiffs concede this, but argue that they were not in  
20 a position to test the flood water as they were not notified by  
21 Defendants that the water could be contaminated and Defendants  
22 did "no testing." Plaintiffs' assertions are of little value, as  
23 Plaintiffs had the burden to present evidence of exposure and  
24 Plaintiffs present no case law that supports their assertion that  
25 absence of testing permits projections based on non-existent  
26 samples from facilities which had been remediated in conjunction  
27 with regulatory agency directives and Defendants' compliance with  
28 these regulatory requirements.

Second, any total chromium that existed in the canal had to

1 be diluted by other contributing flood waters. Dr. Laton  
2 admitted:

3 A. There were other sources of water besides the BAC pond,  
4 obviously. The El Capitan Canal continues slightly to the  
5 north as Dr. Schaaf pointed out. And certainly those waters  
6 would have come in contact with that. And there would have  
7 been some dilution that would have been accounted for in  
8 there, yes.

9 (RT at 10:16-21, Feb. 10, 2011.) Defendants expert, Dr.  
10 Haltiner, quantified the extent of dilution: "Our estimate [of  
11 dilution] in our report was about 1500 to 1." (RT at 160:7-8,  
12 Mar. 15, 2011.) Although the existence of dilution was  
13 undisputed, the jury did not take dilution into account. After  
14 1991 the only evidence to base a finding that hexavalent chromium  
15 was present in the canal, is the 87 ppb test sample of total  
16 chromium found in the pond in January 1994. Even assuming,  
17 *arguendo*, the 87 ppb sample of total chromium was comprised  
18 entirely of hexavalent chromium, a reasonable jury should have  
19 reduced such hexavalent value to less than 87 ppb hexavalent  
20 chromium to account for dilution.

21 Third, the 2008 - 2009 soil samples taken in the Beachwood  
22 neighborhood show low-to-non-detect levels of hexavalent  
23 chromium. Plaintiffs argue that there were two areas of the  
24 Beachwood neighborhood that the soils were sampled; one area that  
25 was immersed by the flood water, and another area, the Gospel  
26 Defender Church, that was not. The total chromium levels in the  
27 Gospel Defender Church soils were lower than the areas that were  
28 flooded. Plaintiffs argue this is circumstantial evidence that  
above MCL standard levels of hexavalent chromium reached the

1 Beachwood neighborhood via the flood.

2 Defendants correctly rejoin that no evidence was presented  
3 and no expert testified in support of Plaintiffs' theory.

4 Plaintiffs cite Defendants' expert, Ms. Kretsinger, who opined  
5 that even though the total chromium amount was higher in the  
6 flooded area, neither area tested at above-standard background  
7 levels.

8 A. 26.2 parts per million is 26,200 parts per billion.

9 Q. Certainly well above background; correct?

10 A. No, that's not correct.

11 Q. Okay. And what was the level detected at the Gospel  
12 Defender Church?

13 A. It was 6.8 parts per million.

14 Q. So at the Franklin County Water District yard, next to  
15 the canal, it was 26.2. But at the Gospel Defender Church,  
16 it was 6.8.

17 A. That's correct. But it's a range of concentrations that's  
18 comparable to the range of concentrations that we observed  
19 at locations removed from the BAC-Pritchard facility.

20 (Decl. Marderosian, Ex. C, RT at 101:5-16, Mar. 15, 2011.)

21 Finally, Plaintiffs' expert witness, Dr. James Schaaf, who  
22 modeled the migration of flood waters for Plaintiffs, testified  
23 that a "hydraulic connection" existed between the pond and  
24 Plaintiffs' neighborhood, but that he had no opinion whether  
25 chemicals from the BAC Site ever reached the Beachwood  
26 neighborhood:

27 THE WITNESS: Hydraulic connection means is it possible for  
28 water to flow from one area to another area so that those  
two areas are connected hydraulically.

(RT at 158:2-4, Feb. 9, 2011.)



1 Q. All right. So water from the pond reached the Beachwood  
neighborhood on April 4th, 2006; is that correct?

2 A. Yes.

3 (Final Trial Transcript ("FT") at 1110:12-14, Feb. 9, 2011.)

4 Q. And Dr. Schaaf, you did not ever perform any calculations  
5 to determine whether any compounds or sediments or materials  
6 from the BAC site ever reached the Beachwood neighborhood;  
is that correct?

7 A. That's correct.

8 Q. And you have no opinion as to whether any chemicals or  
9 compounds from the BAC site have ever reached the Beachwood  
neighborhood; is that correct?

10 A. That's correct.

11 (RT at 181:9-17, Feb. 9, 2011.)

12 There is no underlying evidence to base an expert opinion or  
13 finding that above-standard levels of hexavalent chromium existed  
14 in the Beachwood neighborhood from 2006 to present from the 2006  
15 flood waters which receded after two days. (See RT at 80:9-11,  
16 Mar. 22, 2011.) Defendants' motion for judgment as a matter of  
17 law regarding the flood waters pathway after April 2006 is  
18 GRANTED.

19  
20 B. Air Pathway.

21 The jury found that Plaintiffs in the Beachwood neighborhood  
22 could have been exposed to hexavalent chromium in air at the  
23 concentrations depicted in exhibit 893, a series of isopleth maps  
24 prepared by Plaintiffs' expert Camille Sears.

25 Defendants' continue to challenge Ms. Sears' qualifications  
26 and expertise in chemistry and her ability to perform chemical  
27 testing, but the challenge remains unpersuasive. Ms. Sears

1 testified in the *Daubert* hearings that she has taken college  
2 level courses in chemistry; has taught chemistry through an  
3 extension program at the University of California at Santa  
4 Barbara; uses chemistry on a weekly basis in her job; and has  
5 calculated air emissions in a number of environmental  
6 contamination cases, beginning in 1983 when Ms. Sears was hired  
7 by the Santa Barbara county air pollution control district as an  
8 air pollution engineer. (See Doc. 982 at 28:22 - 33:27.) Further,  
9 Dr. Cowherd, the court's Fed. R. Evid. 706 expert, deemed Ms.  
10 Sears a "well-qualified" air modeler:

11 Q. Right. But you recognize Ms. Sears as an experienced air  
12 modeler with -- is that correct or not?

13 A. I do recognize that.

14 (RT at 113:12-14, Mar. 9, 2011.)

15 As the Memorandum Decision on Partial Summary Judgment  
16 ("Summary Judgment Order") analyzed and decided:

17 Camille Sears is qualified to offer the testimony about how  
18 to calculate fugitive air emissions from a former  
19 wood-treatment facility. She has substantial experience in  
20 the air emission field, having calculated air emission rates  
21 for over twenty years in and around Northern and Central  
22 California. Sears has calculated fugitive air emissions for  
23 public and private employers and has experience with  
24 industrial sites and a variety of harmful pollutants,  
25 including hexavalent chromium. By education and experience,  
26 Ms. Sears is qualified to opine on air emissions, analysis  
27 and modeling in this case and her calculations can be  
28 challenged through cross-examination and presentation of  
contrary evidence.

(Doc. 982 at 34:1-12.)

Defendants argue that the following nine "errors and  
baseless assumptions" in Ms. Sears' expert opinions renders her  
testimony an insufficient basis for the jury's verdict:

- 1           1.    Ms. Sears assumed that chromium that dripped off of  
2           wood treated at the Facility would adhere to small  
3           particles of silt that would be subject to wind  
4           transport, when in fact, as Dr. Fendorf testified,  
5           almost no adsorption of chromium onto such particles  
6           would occur, resulting in Sears' model erroneously  
7           overstating emission concentrations by a factor of  
8           1,000.<sup>13</sup>
- 9           2.    Ms. Sears assumed that all of the chromium- and  
10           arsenic-containing particles on the surface of the  
11           treated wood storage area would be smaller than 75  
12           microns. But Dr. Cowherd testified that only  
13           approximately 20 percent would be that size. Dr.  
14           Fendorf also explained that particles formed by  
15           evaporation would be larger than 150 microns in  
16           diameter, and site data showed that Ms. Sears'  
17           assumption was wrong. According to Dr. Cowherd, this  
18           erroneous assumption resulted in the model overstating  
19           emissions by a factor of approximately 5.51.
- 20           3.    Ms. Sears assumed that chromium and arsenic were  
21           deposited uniformly over the entire treated wood  
22           storage area, whereas in fact the storage area  
23           contained marked traffic lanes separated by stacks of  
24           wood, and Dr. Cowherd testified that higher  
25           concentrations would accumulate in lowtraffic areas  
26           under and immediately around the stacks of wood. Dr.  
27           Cowherd testified that this erroneous assumption  
28           resulted in an overstatement of emissions by a factor  
            of approximately 3.53.
4.    Ms. Sears assumed that the concentrations of hexavalent  
            chromium and arsenic in particulate matter at the  
            Facility exceeded 90 percent (i.e., 900,000 parts per  
            million), a concentration that exceeds by orders of  
            magnitude any measured concentrations at the Facility  
            and implies— implausibly—that less than 10 percent of  
            the material on the surface of the wood treating area  
            was anything other than pure chromium or arsenic. When  
            soils immediately beneath the traffic lanes in the  
            treated wood storage area were tested for hexavalent  
            chromium in 1990, while the Facility was still  
            operating, eight out of nine samples detected no

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24           <sup>13</sup> In their Reply, Defendants assert that the court's 706  
25           expert, Dr. Cowherd, and defense expert, Dr. Fendorf, "testified  
26           that Ms. Sears' individual errors caused her to overstate  
27           concentrations of hexavalent chromium in the Beachwood neighborhood  
28           by factors ranging from two to 1,000." (Doc. 1310 at 8:14-15)  
            (emphasis added.)

1 hexavalent chromium; the ninth had a concentration of  
2 less than 1 part per million.

3 5. Ms. Sears assumed, without any foundation or testing,  
4 that 100 percent of the chromium in particles at the  
5 Facility was hexavalent chromium, and not less toxic  
6 trivalent chromium, the only chemists to testify at  
7 trial, Dr. Cowherd and Dr. Fendorf, testified to the  
8 contrary.

9 6. Ms. Sears assumed that one year's worth of drippage  
10 would be present on the surface of the treated wood  
11 storage area at all times, but Dr. Fendorf testified  
12 that, in fact, any drippage would form easily soluble  
13 salts that would be flushed from the surface by rain.

14 7. Ms. Sears used an AP-42 emission factor that was  
15 developed for "freely flowing" traffic at speeds  
16 greater than 10 miles per hour, instead of the new  
17 AP-42 emission factor that applies to "stop-and-go"  
18 traffic traveling at less than 10 miles per hour, when  
19 the forklifts at the facility traveled stop-and go at  
20 an average speed of four to five miles per hour.

21 8. Ms. Sears admitted that her modeled emissions would be  
22 30 percent lower if she used the current and  
23 appropriate EPA emissions factors to predict particle  
24 emissions from the Facility. Dr. Cowherd testified that  
25 the emissions would be 50 percent lower.

26 9. Ms. Sears relied on the erroneous calculations of  
27 plaintiffs' expert Franklin Agardy, who used the wrong  
28 chemical form of chromium in preparing his estimates of  
drippage. This error approximately doubled Ms. Sears'  
modeled chromium emissions from the Facility.

(Doc. 1259 at 20-23.)

Plaintiffs correctly rejoin that these identical criticisms  
were advanced and extensively analyzed and ruled on in  
Defendants' motion for partial summary judgment and the *Daubert*  
challenges to Ms. Sears' testimony and opinions made over six  
days of evidentiary hearings covered by the court. The Summary  
Judgment Order found that "[t]he comparison between the relevant  
expert opinions demonstrates that a reasonable scientific  
disagreement exists among the experts. . . Such a dispute goes

1 [to] the credibility and the weight of the opinions, not  
2 admissibility." (Doc. 982 at 52:6-7.) "Having observed the  
3 experts at the *Daubert* hearing under intensive cross-examination  
4 by counsel, it is clear that the current dispute over Ms. Sears'  
5 calculations should be determined by the trier of fact, not by  
6 the Court on a motion to exclude." (*Id.* at 53:25-54:1.) These  
7 differing opinions were presented at trial. Under vigorous cross-  
8 examination, Ms. Sears responded with scientific explanations to  
9 each of Defendants' criticisms and explained her alleged  
10 volumetric overestimations.

11 Because these criticisms were extensively examined in the  
12 Summary Judgment Order and *Daubert* ruling, it is not necessary to  
13 revisit every detail. However, a prime example of a scientific  
14 factual dispute presented by Defendants' summary judgment motion  
15 and again at trial is Ms. Sears' emission calculations based on a  
16 100 percent hexavalent chromium value. Defendants argue that Ms.  
17 Sears' values are unreasonable because Dr. Cowherd and Dr.  
18 Fendorf testified at trial that "there would be some conversion  
19 of Chromium 6 to Chromium 3 in the drippage." (Decl. Lewis, Ex.  
20 12, RT at 115:5-6, Mar. 10, 2011; and see Decl. Lewis, Ex. 11, RT  
21 at 83:20-21, Mar. 9, 2011) ("Based on my general knowledge of  
22 this area, 100 percent would not be the appropriate number.")).

23 Ms. Sears rejoined that her value conformed to scientific  
24 values:

25 Q. Can you point us to a specific piece of professional  
26 literature that establishes that your 100 percent chromium,  
hexavalent chromium assumption is true?

27 A. Well, I've got several -- I have several different  
28

1 references that we discussed in earlier hearings on why I  
2 believe that that's reasonable. And, again --

3 Q. What would those be?

4 A. I'll tell you what they are in a moment. But again, 100  
5 percent versus 95 percent versus 90 percent, those are all  
6 trivial differences, in my view. That's only 5 percent, 10  
7 percent difference.

8 Q. They're trivial to you.

9 A. They are. Over in the big picture of things, and when  
10 we're talking about the mass of material we're talking  
11 about. So to nit pick whether it was 99, 95, 90 versus 100,  
12 to me that's not an issue.

13 But to answer your question, the State of California, which  
14 has been regulating hexavalent chromium now for about a  
15 quarter of a century, has specific guidelines on how to deal  
16 with chromium compounds. One of the concerns that we talk  
17 about is what is the form of chromium. And because it's  
18 hexavalent chromium, which is the toxic form. There's also a  
19 trivalent form.

20 And the State of California has specific mass weighted  
21 adjustment factors and things like that for compounds such  
22 as chromium trioxide, which is one chromium and three  
23 oxygens. And basically, when you look at the mass of  
24 chromium versus the mass of the chromium and the oxygen  
25 together, it's 100 percent hexavalent.

26 And also, in the risk assessment guidelines that we talked  
27 about before that I helped develop, I was part of the group  
28 that helped develop them. The only time that they assumed  
29 that a chemical is not 100 percent hexavalent chromium is  
30 when the chromium has been underground for a period of time  
31 and has had some time and certain conditions that have to be  
32 measured specifically at the site to determine the rate at  
33 which the hexavalent chromium would convert to the less  
34 toxic form. That doesn't happen on the top of the surface,  
35 it happens in the soil. So I didn't have to worry about  
36 that.

37 And then we also have some data from 1994 that were measured  
38 at the facility in the shallow layer before the treated wood  
39 storage area, which showed that the hexavalent chromium to  
40 total chromium ratio was very high.

(Decl. Marderosian, Ex. B, RT at 104: 17-106:10, Feb. 10, 2011.)

41 In the scientific community, experts reach different

1 conclusions from each other, however, reasonable differences in  
2 scientific evaluation are not a basis for granting JMOL. See  
3 *Tennant*, 321 U.S. at 35 ("Courts are not free to reweigh the  
4 evidence and set aside the jury verdict merely because the jury  
5 could have drawn different inferences or conclusions or because  
6 judges feel that other results are more reasonable.").

7 The following testimony by 706 expert Dr. Cowherd  
8 corroborates that Defendants' objections regarding Ms. Sears'  
9 opinions are factual scientific disputes going to weight rather  
10 than admissibility, which were properly decided by the trier of  
11 fact. First, while Dr. Cowherd did not agree with all of Ms.  
12 Sears' input values, he recognized that she was a "well-  
13 qualified" air-modeler and her methodology was correct:

14 Q. Yes. Now, do you -- your knowledge of Ms. Camille Sears,  
15 the plaintiffs' expert in this case. Do you find that she  
16 has a reputation for being a respected air quality emissions  
17 expert?

18 [...]

19 [THE WITNESS:] As far as whether she can calculate emissions  
20 using an emission factor equation, I think she's very well  
21 qualified to do that. As far as her ability to apply AERMOD,  
22 which is the dispersion model, I recognize that she is very  
23 well qualified to do that.

24 [. . .]

25 [However,] [t]he calculation is not the problem, it's what  
26 value you put into the equation as the basis for the  
27 calculation, as I see it.

28 Q. You found this -- let me ask this. And this is not  
intended as any disrespect at all, so please do not  
interpret it that way at all, Dr. Cowherd. But you are not  
an air modeler; is that correct?

A. I'm very familiar with air models, and I have used air  
models in the past. I'm not primarily an air modeler.  
However, I will say that I understand the function of an air

1 modeler, I understand how input information is put in to the  
2 model. And I understand the model is only as good as the  
input information put into it.

3 Q. Right. But you recognize Ms. Sears as an experienced air  
4 modeler with -- is that correct or not?

5 A. I do recognize that.

6 (Decl. Marderosian, Ex. O, RT at 112:5-113:14, Mar. 9, 2011.)

7 Dr. Cowherd also recognized and agreed that hexavalent  
8 chromium reached the Beachwood neighborhood:

9 [Plaintiffs' counsel]: 'Question: Based on the totality of  
10 your analysis in this case, is there reliable evidence that  
11 hexavalent chromium and arsenic were transmitted by the air  
12 to -- I'm going to call it the target site, you call it the  
receptor site -- given all the information. I'm including in  
that description the qualifications that this be reliable in  
terms of scientific data.'

13 'Answer: My response to that would be yes. There is  
14 certainly indications, evidence that these concentrations --  
15 that some concentrations exist at the target site or the  
16 receptor site. The question obviously is what is the level  
of those concentrations.'

17 Q. Do you remember that testimony?

18 A. Yes.

19 Q. And you still stand behind that testimony today?

20 A. I would make a similar statement, yes.

21 (Id. at 111:12-112:4.)

22 Finally, unlike, e.g., the evidence presented regarding the  
23 canal water pathway from 1992 -2006, there was not a total  
24 absence of conclusive, unchallenged underlying evidence to  
25 demonstrate that Ms. Sears' opinions were wrong as a matter of  
law:

26 Q. [] I'm talking about the basis for the assumptions.  
27 Meaning the fact that you have to make assumptions, it has  
28 to be based on some data. Correct?



1 A. It has to be based on an assessment of what went on at  
2 the site. Yes.

3 Q. Right. And let me ask you this: Do you remember at the  
4 *Daubert* -- excuse me, at the prior hearing, you indicating  
5 that there was very little data available from which to  
6 construct the amount of drippage and that that would be a  
7 critical quality to doing a scientific assessment in this  
8 case?

9 [. . .]

10 Q. And I can show you the testimony as well, whatever you're  
11 comfortable with.

12 A. Could you repeat the question?

13 Q. Yes. Do you recall testifying previously that, in this  
14 case, that 'There was very little data available from which  
15 to construct the amount of drippage and that that would be a  
16 critical quality' -- quantity -- 'critical quantity to have  
17 in doing a scientific assessment. So as a result, this kind  
18 of quantity needed to be estimated by an indirect method.'

19 Do you remember saying that?

20 A. Yes.

21 Q. Okay. Indirect method is modeling is one of the indirect  
22 methods; is it not?

23 A. I -- I don't consider that to be modeling. Modeling, I  
24 consider to be a direct method.

25 Q. All right. But the direct method is, for example, in this  
26 case, it would have been good if, between 1969 and 1994,  
27 when the plant was in operation, when forklifts were moving  
28 about the plant, it would have been good if there was data  
collected at that time regarding these assumption issues. Do  
you agree with that?

A. That would have been helpful in deciding how much  
drippage actually occurred.

[. . .]

Q. Have you seen any data, Dr. Cowherd, that was collected  
when the plant was in operation on those issues?

A. I think I stated earlier that we did not find that kind  
of information in what we looked at.

[. . .]

1 Q. Have you seen any air quality studies that were obtained  
2 when the plant was in operation studying whether or not the  
3 air was contaminated with hexavalent chromium and arsenic  
4 from the activities in the treated wood storage area, in  
5 your work in this case?

6 A. I'm not aware of any such information.

7 (Decl. Marderosian, Ex. O, RT at 114:21-119:1, Mar. 9, 2011.)

8 Some data was available regarding the air pathway. Based on this  
9 data, the experts made scientific assumptions based on recognized  
10 air modeling principles which formed the basis for their  
11 opinions.

12 Defendants' motion for JMOL regarding the air pathway simply  
13 seeks to relitigate the probative value and persuasive effect of  
14 the evidence introduced at trial. The motion is replete with  
15 inferences Defendants asked the jury to draw and theories for  
16 reduction of the weight and value that they wish the jury had  
17 applied to Ms. Sears' opinions. Each party submitted substantial  
18 evidence, bolstered by expert testimony, in support of their  
19 positions on air modeling. The jury found Plaintiffs' showing  
20 more persuasive. The jury reasonably could have concluded, based  
21 upon the record as a whole that Ms. Sears' scientific estimations  
22 were correct, but should have been substantially reduced based on  
23 evidence and expert opinions that supported Defendants' position  
24 that Ms. Sears' input amounts were gross overestimations of  
25 hexavalent chromium reaching and present in the Beachwood  
26 neighborhood. However, such conflicts in the evidence, reasoned  
27 by the jury as trier of fact, do not provide a sufficient basis  
28 for setting aside the verdict. See *Tennant*, 321 U.S. at 35  
29 ("Courts are not free to reweigh the evidence and set aside the

1 jury verdict merely because the jury could have drawn different  
2 inferences or conclusions or because judges feel that other  
3 results are more reasonable." ).

4 Defendants' trial strategy took an all or nothing approach,  
5 arguing that Ms. Sears' testimony had to be entirely rejected.  
6 They ignored that Dr. Cowherd opined that some hexavalent  
7 chromium reached the Beachwood neighborhood. They did not, e.g.,  
8 present competing calculations or offer specific valuations that  
9 reduced any amount of hexavalent chromium level which arrived  
10 through the air to Plaintiffs' neighborhood. Nor did Defendants  
11 ask Dr. Cowherd or any other air modeling defense expert to break  
12 down Ms. Sears' model and reduce all concentrations to the  
13 substantially reduced to non-existent levels they believed  
14 existed. This was a trial strategy and Defendants must abide by  
15 the consequences of this choice made by highly experienced and  
16 competent counsel. Defendants' motion for JMOL regarding the air  
17 pathway is DENIED. Because substantial evidence was presented by  
18 Plaintiffs' regarding this issue, Defendants' motion for new  
19 trial is also DENIED.

20  
21 C. Entity Responsibility.

22 Defendants argue that the Phase 1 jury was asked to identify  
23 the entities that caused the release of contaminants at the  
24 former BAC Site and that Plaintiffs introduced no evidence at  
25 trial suggesting that any of the Defendants engaged in any  
26 activities that released contaminants as part of wood treating  
27 process. Plaintiffs rejoin that corporate liability was not an  
28

1 issue for determination in Phase 1.

2 The relevant facts are as follows: The Phase 1 Final  
3 Pretrial Order pertains only to Phase 1 of this multi-phase  
4 action. The Phase 1 Pretrial Order focused on containment  
5 exposure, i.e., whether contaminants of concern "reached any  
6 location where plaintiffs could have been exposed to them, and if  
7 so, when such contaminants arrived, how such contaminants arrived  
8 at the location, how long they were present, and at what levels  
9 they were present." (Doc. 540 at 1.) Discovery in Phase 1 was  
10 limited to "the issues relevant to exposure" including:

11 (b) BAC Site operations and history relevant to  
12 identification of the presence, amount and concentration of  
contaminants at the BAC Site and in the environment.

13 (Phase 1 Pretrial Order at 2:14-16).

14 Defendants filed a *Cottel* motion on March 23, 2009 which  
15 caused a predominant shift of discovery focus to the complex and  
16 time consuming scientific evidence regarding release of  
17 contaminants. From the time of the first case management  
18 conference, Defendants strenuously argued there was not and  
19 Plaintiffs could not find and/or produce any evidence of  
20 contamination. The *Cottel* motion was followed by a limitation on  
21 and stay of discovery in or around August of 2009 which  
22 discontinued discovery on corporate liability issues.

23 Significant confusion and dispute arose regarding the exact  
24 evidence to be presented at trial. The parties and the Court were  
25 not in agreement about whether evidence of corporate liability -  
26 e.g., theories of vicarious liability, principal/agency, piercing  
27 the corporate veil, and related theories, would be tried and  
28

1 determined in Phase 1, or corporate responsibility for exposure -  
2 e.g., a basic jury decision regarding who owned and/or operated  
3 the BAC Site during the relevant time period.

4 Defendants argue "they understood" that the Phase 1 jury  
5 would be asked to identify the entities that caused the release  
6 of contaminants at the BAC Site and assign legal responsibility.  
7 Defendants filed a trial brief, which they believe was "clearly  
8 framed . . . in accordance with the [Phase One Pretrial Order],"  
9 that "contain[s] a detailed discussion of the relationships among  
10 Merk, Amsted, Baltimore Aircoil, and the various facility owners  
11 and operators [and] discusse[s] controlling California case law."  
12 (Doc. 1259 at 30:19-31:9.)

13 The Court understood, as Defendants themselves point out,  
14 that Phase 1 would not "assign legal responsibility." (Doc. 1259  
15 at 33:9-11.) "[T]here is no suggestion in the [Phase 1 Pretrial  
16 Order] that we are going to determine liability by party in this  
17 phase of the case." (Doc. 1259 at 32:2-3.) What Phase 1 would  
18 include, the Court stated, was a basic jury decision as to: "who  
19 owned, who operated [the BAC Site], what was done through the  
20 period that the lawsuit encompasses." (Doc. 1259 at 33:9-11.)

21 Plaintiffs acknowledge that corporate liability and/or  
22 exposure responsibility was an issue for one of the trial phases  
23 and at certain times Plaintiffs represented that they would be  
24 able to present sufficient evidence on the subject during Phase  
25 1. Yet once Phase 1 began, Plaintiffs had not completed  
26 discovery on corporate liability and did not present evidence on  
27 the subject. (Doc. 1288 at 38:12-14.) Plaintiffs argue that

1 discovery was not complete and a case was not presented because  
2 they understood that corporate liability was not an issue for  
3 Phase 1.

4 During the jury instructions conference after Phase 1 trial  
5 evidence closed, the Court determined that, due to confusion  
6 about the specifics and extent of corporate liability/  
7 responsibility evidence was to be presented, in combination with  
8 the discovery stay sought by Defendants and the *Cottel* motion,  
9 such evidence was not presented for a jury determination on the  
10 subject in that Phase of trial. *U.S. v. Dang*, 488 F.3d 1135, 1143  
11 (9th Cir. 2007) ("the district court is given broad discretion in  
12 supervising the pretrial phase of litigation."); and see Fed. R.  
13 Civ. Pro. 42(b). In light of this totality of circumstances,  
14 judgment as a matter of law cannot be entered regarding corporate  
15 liability. (See also, Doc. 1442, Memorandum Decision Granting  
16 Plaintiffs' Motion for Leave to Amend Complaint, filed August 10,  
17 2011.) Defendants' JMOL is DENIED on this issue.

18  
19 CONCLUSION.

20 For the reasons cited above, Defendants' JMOL is GRANTED in  
21 part and DENIED in part and Defendants' motion for new trial is  
22 DENIED in its entirety. The record unequivocally establishes that  
23 after clean-up and site remediation, there was no chromium of any  
24 valance at above MCL standards in the canal or surface water  
25 which could have reached Plaintiffs' properties.

26  
27 1. Defendants' JMOL regarding general exposure via the El  
28

1 Capitan Canal surface water pathway from 1969 – 1991 is  
2 DENIED.

3  
4 2. Defendants' motion for new trial regarding general  
5 exposure via the El Capitan Canal surface water pathway  
6 from 1969 – 1991 is DENIED.

7  
8 3. Defendants' JMOL regarding general exposure via the El  
9 Capitan Canal surface water pathway from 1992 – 2006 is  
10 GRANTED.

11  
12 3. Defendants' JMOL regarding general exposure via the  
13 flood surface water pathway from 2006 to present is  
14 GRANTED.

15  
16 4. Defendants' JMOL regarding general exposure via the air  
17 pathway is DENIED.

18  
19 5. Defendants' motion for new trial regarding general  
20 exposure via the air pathway is DENIED.

21  
22 6. Defendants' motion regarding corporate liability is  
23 DENIED WITHOUT PREJUDICE. A revised trial schedule  
24 shall be implemented to ensure a full and fair trial on  
25 the merits of all corporate liability claims.

26  
27 Defendants shall submit an order in conformity with this  
28

1 decision within five (5) calendar days following electronic  
2 service of this order.

3

4

5 SO ORDERED.

6

7 DATED: August 31, 2011.

8

/s/ Oliver W. Wanger

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Oliver W. Wanger

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United States District Judge

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