

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALNUT CREEK MANOR, LLC,
Plaintiff,
v.
MAYHEW CENTER, LLC; and DEAN DUNIVAN,
Defendants.

MAYHEW CENTER, LLC; and DEAN DUNIVAN
Cross-Claimants,
v.
WALNUT CREEK MANOR, LLC,
Cross-Defendant.

No. C 07-5664 CW

ORDER FOR FURTHER
BRIEFING ON
DEFENDANTS' MOTION
FOR A NEW TRIAL;
DENYING DEFENDANTS'
MOTION TO AMEND OR
ALTER ORDER ON
REMAINING CAUSES OF
ACTION; AND DENYING
DEFENDANTS'
MOTION TO STAY
EXECUTION OF
JUDGMENT WITHOUT
BOND

Defendants Mayhew Center, LLC (MC) and Dean Dunivan¹ have
filed motions for a new trial, to amend or alter the Court's
October 2, 2009 Order on the non-jury causes of action and to stay
the judgment without bond pending disposition of post-trial motions
and appeal. Plaintiff Walnut Creek Manor (WCM) opposes the
motions. The motions were heard on December 3, 2009. Having

¹Hereinafter, the Court refers to Mayhew Center, LLC and Dean
Dunivan collectively as MC.

1 considered all of the parties' papers and oral argument, the Court
2 defers ruling on MC's motion for a new trial and orders further
3 briefing. The Court denies MC's motion to amend or alter the
4 Court's October 2, 2009 Order on the non-jury causes of action, and
5 denies MC's motion to stay the execution of judgment without bond.

6 BACKGROUND

7 On June 1, 2009, a jury returned a verdict in favor of WCM
8 against MC on claims on negligence, ultrahazardous activity,
9 trespass and nuisance. The verdict included awards of \$350,000 for
10 past damages and \$1.597 million for future damages.

11 On October 2, 2009, the Court ruled in favor of WCM and
12 against MC on the remaining non-jury claims under the federal
13 Comprehensive Environmental Response, Compensation, and Liability
14 Act (CERCLA) and the California Hazardous Substance Account Act
15 (HSAA). The Court concluded that the MC property is the source, and
16 that the WCM property is not the source, of all PCE contamination on
17 WCM and MC property. The Court also concluded that MC is 100
18 percent liable for any future response costs that will be necessary
19 and consistent with the national contingency plan. On October 2,
20 2009, the Court entered judgment for WCM and against MC on all
21 claims.

22 WCM now challenges the jury's verdict and the Court's October 2
23 Order.

24 DISCUSSION

25 I. Motion for a New Trial

26 "The trial court may grant a new trial only if the verdict is
27 contrary to the clear weight of the evidence, is based upon false or
28 perjurious evidence, or to prevent a miscarriage of justice."

1 Shimko v. Guenther, 505 F. 3d 987, 993 (9th Cir. 2007).

2 A. Jury Verdict on Negligence, Ultrahazardous Activity and
3 Trespass Causes of Action

4 1. Negligence

5 MC argues that it was not negligent because it could not have
6 abated the soil contamination any earlier without the Water Board's
7 approval. MC does not provide any legal authority for the
8 proposition that a Water Board investigation suspends a property
9 owner's duty of care to its neighbors. Although the Board had not
10 approved an abatement or remediation plan for the MC property by
11 the time of trial, MC did not present any evidence that it was
12 unable to investigate and take reasonable steps to protect against
13 harm to the WCM property upon learning of the PCE contamination.

14 Further, WCM presented extensive evidence to support the
15 jury's finding that MC's conduct fell below the standard of care.
16 "MC has a duty not to act in a way that would potentially release
17 PCE onto WCM's property." Walnut Creek Manor, LLC v. Mayhew
18 Center, LLC, 622 F. Supp. 2d 918, 934 (N.D. Cal. 2009). MC
19 breached this duty in several ways. For instance, MC (1) did not
20 conduct any approved, licensed soil or groundwater sampling of the
21 property; (2) was aware almost a year before the Board's first
22 regulatory investigation request that a Phase 1 environmental
23 report indicated that the PCE source could be at MC, but did not
24 take any corrective action; and (3) drilled a slant boring that
25 created a preferential pathway for contaminants to travel from MC
26 property onto WCM property.

27 MC's failure to take reasonable actions in response to the PCE
28 problem resulted in the migration of PCE from the MC property onto

1 the WCM property. MC failed to rebut this evidence at trial and
2 has not proved that the jury verdict is contrary to the clear
3 weight of the evidence.

4 2. Ultrahazardous Activity and Trespass Claims

5 MC argues that the verdicts on these causes of action should
6 be set aside because (1) no evidence supports the conclusion that
7 the slant boring actually encroached onto WCM property and (2) the
8 slant boring did not increase remediation costs. The evidence at
9 trial does not support these arguments.

10 MC makes much of Mr. Dunivan's trial testimony that he did not
11 "know for a fact" that his slant boring went onto the WCM property;
12 he only "assume[d]" it did. Trial Test. at 1079-1080. However, at
13 trial, WCM also introduced Mr. Dunivan's prior deposition testimony
14 in which he admitted that he "drilled from [MC] property and then
15 onto Walnut Creek Manor's property." Trial Test. at 1121-23.
16 Further, in a letter to the Water Board, Mr. Dunivan's lawyer
17 stated that the slant boring went onto WCM property; and during
18 trial, Mr. Dunivan testified that this letter was "accurate in
19 every sense." Trial Test. at 1121.

20 Evidence at trial also supported the jury's finding that the
21 slant boring was a substantial factor in causing harm to WCM.
22 WCM's expert testified that the slant boring created a pathway for
23 contamination to travel from the MC property onto the WCM property.
24 Trial Test. at 569-571; 638. And, after the boring, other soil
25 testing revealed PCE on WCM property near the area where the slant
26 boring had been drilled. The jury could reasonably have inferred
27 that this PCE was present as a result of the slant boring.

28 //

1 B. Joint and Several Liability

2 MC argues that the jury instruction concerning MC's liability
3 deprived Mr. Dunivan of a fair trial because the instructions did
4 not inform the jury that Mr. Dunivan would be held jointly and
5 severally liable with the MC entity. The relevant instruction
6 states:

7 Under the law, a limited liability company (LLC) such as
8 Walnut Creek Manor and Mayhew Center is considered to be
9 a person. It can only act through its employees, agents
10 and members. Therefore, Walnut Creek Manor and Mayhew
Center are responsible for the acts of their employees,
agents and members.

11 During trial, the parties engaged in the following colloquy.

12 Mr. Blum:² Your honor, the jury -- the verdict form could
just say "Mayhew Center."

13 The Court: Right. But I need to know what you just
14 agreed to in case there is a dispute.

15 Mr. Blum: We agree as to the claim for continuing
16 nuisance, that should the jury find in
17 favor of the plaintiffs on that, that the
18 verdict will only be against Mayhew Center.
And as to the other claims, it will be
jointly and severally against Mayhew Center
and Mr. Dunivan.

19 The Court: The jury doesn't need to know that. That
is just your side agreement.

20 Mr. Blum: Yes, Ma'am.

21 Mr. Kelly:³ I agree with that, your honor.

22 Trial Test. at 1102. Thus, the parties stipulated that the jury
23 did not need to decide the allocation of liability as between MC
24 and Mr. Dunivan.

25 A party may assign error to "a failure to give an instruction,
26

27 ²Mr. Blum was MC's attorney.

28 ³Mr. Kelly is WCM's attorney.

1 if that party properly requested it and -- unless the court
2 rejected the request in a definite ruling on the record -- also
3 properly objected." Fed. R. Civ. P. 51(d)(1)(B). MC failed to
4 follow this procedure. MC's argument now seems to be that if the
5 jury had known that Mr. Dunivan personally would be jointly and
6 severally liable for the damages to WCM, sympathy for him might
7 have reduced its verdict. This is not a legitimate consideration.
8 When viewed along with the stipulation, the jury instructions and
9 verdict form were proper and did not mislead the jury.

10 C. Jury Instructions and Verdict Form Consistency

11 MC argues that the jury instructions conflicted with the
12 verdict form because the verdict form did not allow the jury to
13 list damages specific for each cause of action. The Court
14 instructed the jury that "damages for Walnut Creek Manor's
15 negligence claim can only include damages for the harm that was
16 caused specifically by Mayhew Center's negligence in failing to act
17 more quickly to abate PCE contamination after it was discovered."
18 The Court also instructed, "Damages for Walnut Creek Manor's
19 ultrahazardous activity and trespass claims can only include
20 damages for the harm caused specifically by the slant boring. You
21 may award damages for ultrahazardous activity or trespass, but you
22 may not award the same damages twice." The Court instructed that
23 damages for the "nuisance [claim] may only include the amount of
24 money Walnut Creek Manor has spent up to the time of trial in
25 investigating the contamination."

26 The verdict form asked the jury to address WCM's causes of
27 action in the following order: negligence, ultrahazardous activity,
28 trespass and nuisance. The jury found MC liable for negligence and

1 awarded \$350,000 in past damages and \$1,597,000 in future damages.
2 After the jury then found MC liable for the ultrahazardous activity
3 of slant boring, it was asked, "What are Walnut Creek Manor's
4 damages resulting from Mayhew Center's ultrahazardous activity, if
5 any?" However, the form noted, "If you have already awarded these
6 damages in answer to [the negligence damages question], do not
7 award them again." The jury did not enter a damages amount for the
8 ultrahazardous activity claim.

9 After the jury found MC liable for trespass for the slant
10 boring, it was asked, "What are Walnut Creek Manor's damages
11 resulting from Mayhew Center's trespass, if any?" The form again
12 noted, "If you have already awarded these damages in answer to [the
13 negligence or ultrahazardous activity damages questions], do not
14 award them again." The jury did not enter a damages amount for the
15 trespass claim either. Finally, after the jury found MC liable for
16 nuisance, it was asked, "What are Walnut Creek Manor's damages
17 resulting from Mayhew Center's nuisance, if any?" Just as with the
18 previous causes of action, the form stated, "If you have already
19 awarded some (or all) of these damages in answer to [the
20 negligence, ultrahazardous activity or nuisance damages questions],
21 do not award them again." The jury left this damages award blank
22 as well.

23 There was no conflict between the instructions and the verdict
24 form. The jury determined that no additional or new damages should
25 be awarded for the slant boring, trespass or nuisance that were not
26 already awarded under the negligence claim. Thus, there was no
27 need for the jury to record separately the damages resulting from
28 the slant boring, trespass or nuisance.

1 D. WCM's Opening and Closing Statements

2 MC argues that it was deprived of a fair trial because WCM's
3 counsel misrepresented evidence during his opening and closing
4 statements. The jury was instructed that these statements were not
5 evidence and the Court concludes that no representations made by
6 WCM's counsel during his opening and closing statements prejudiced
7 MC. MC was afforded a fair trial and the evidence presented at
8 trial supports the jury's verdict.

9 E. Damages Award

10 MC argues that the Court should order a new trial because the
11 damages award in this case was erroneous. MC argues that the
12 future damages award of \$1.597 million is excessive. However, this
13 figure is supported by the evidence presented at trial. WCM's
14 expert Scott Warner testified that the remediation of the
15 contaminated soil on WCM property, and the limited removal of the
16 immediately adjacent soil source on MC property, would cost this
17 amount. Removal of the contamination on MC property is necessary
18 to prevent the problem from recreating itself on the WCM property.
19 MC did not present any evidence to contradict this point.

20 MC asserts that the damages award is unlawful because Warner's
21 remediation estimate was based on residential standards, as opposed
22 to commercial standards, for waste abatement. MC did not raise
23 this argument during trial and MC offers no evidence to rebut
24 Warner's explanation that "because a portion of the affected
25 property is residential, we likely will have to go to residential
26 standards." Warner Trial Test. at 580:24-25.

27 MC also contends that WCM's future damages award is
28 speculative because it depends on the action of a third party --

1 the San Francisco Bay Area Regional Water Quality Control Board
2 (Water Board). Yet the resulting property damage from MC's
3 contamination exists independently from any Board action. The
4 evidence presented at trial regarding diminution of property value
5 depended on the real estate market, not on any action taken by the
6 Water Board. In fact, MC's own expert testified that a reasonable
7 estimate of the diminished value of the property due to PCE
8 contamination was sixty percent. MC's expert testimony could also
9 provide evidence of WCM's diminished value.

10 MC asserts that the jury award, combined with the Court's
11 ruling on the CERCLA issues, constitutes a double recovery for WCM.
12 However, the Court has not awarded any CERCLA response costs and
13 cannot award any such costs that would duplicate the jury's future
14 damage award. Title 42 U.S.C. § 9614(b) provides: "Any person who
15 receives compensation for removal costs or damages or claims
16 pursuant to any other Federal or State law shall be precluded from
17 receiving compensation for the same removal costs or damages or
18 claims as provided in this chapter." Therefore, the damages WCM
19 received in tort may not also be recovered as CERCLA response
20 costs.

21 However, the future damages award may constitute a double
22 recovery depending on the Water Board's future actions. The Water
23 Board is currently investigating the PCE contamination on the WCM
24 and MC properties to determine what type of remediation plan to
25 order, if any. The jury awarded WCM \$1.597 million for future
26 damages, which included "the reasonable cost [WCM] will have to
27 spend to repair the harm in the future and the reduction in the
28 value of [WCM's] property even after the repair." Final Jury

1 Instruction at 11. If the Water Board orders MC to remediate the
2 WCM property, and it does so, as well as pays the full future
3 damages award, this could constitute an impermissible double
4 recovery. See Tavaglione v. Billings, 4 Cal. 4th 1150, 1159 (1993)
5 ("Double or duplicative recovery for the same items of damage
6 amounts to overcompensation and is therefore prohibited."). The
7 Court will order further briefing on this point.

8 MC also argues that the damages award to WCM is inconsistent
9 with public policy for three reasons. First, MC argues that the
10 award contravenes the goals of CERCLA. However, a jury may award
11 future damages for tortious injury to property even though future
12 response costs are not allowable under CERCLA. For instance, in
13 Stanton Road Assoc. v. Lohrey Enterprises, 984 F.2d 1015, 1021 (9th
14 Cir. 1993), the Ninth Circuit rebuffed the defendant polluter's
15 argument that CERCLA's proscription against future response costs
16 also precluded relief from simultaneously brought state claims for
17 negligence, nuisance and trespass. The court stated, "Lohrey
18 contends that an award of monetary damages under state law is
19 invalid because it would permit the plaintiff to circumvent the
20 requirement under CERCLA that response costs be necessary and
21 consistent with the national contingency plan. This argument is
22 meritless." Id. CERCLA itself provides, "Nothing in this chapter
23 shall affect or modify in any way the obligations or liabilities of
24 any person under other Federal or State law, including common law,
25 with respect to releases of hazardous substances or other
26 pollutants or contaminants." 42 U.S.C. § 9652(d). As noted above,
27 CERCLA precludes a plaintiff from recovering cost of repair damages
28 under both CERCLA and state law. 42 U.S.C. § 9614(b). Thus, the

1 express language of the statute defeats MC's contention that CERCLA
2 preempts a state law recovery.

3 Second, MC argues that the damages award violates public
4 policy because it interferes with the Water Board's investigation
5 in this matter. Yet, California Water Code § 13002(e) provides:
6 "No provision of this division or any ruling of the state board or
7 a regional board is a limitation . . . [o]n the right of any person
8 to maintain at any time any appropriate action for relief against
9 any private nuisance as defined in the Civil Code or for relief
10 against any contamination or pollution." Moreover, "Courts have
11 long held that the Water Boards' administrative authority, while
12 extensive, does not displace the court's own substantial
13 jurisdiction to declare nuisances and grant damages to injured
14 property owners." People v. Kinder Morgan Energy Partners, 569 F.
15 Supp. 2d 1073, 1079 (S.D. Cal. 2008) (citing People v. City of Los
16 Angeles, 160 Cal. App. 2d 494, 325 (1958)). Even "when a
17 plaintiff's claims and a Regional Board's order involve the same
18 common events or facts, the Regional Board's right to govern
19 remediation is not inconsistent with a plaintiff's right to
20 prosecute their damage claims." Id. See City of Los Angeles, 160
21 Cal. App. 2d at 502 (holding that, despite the Regional Board's
22 action, plaintiffs were able to maintain a nuisance cause of
23 action). Thus, the fact that the Water Board has the power to
24 order MC to remediate does not deprive the Court of the power to
25 address the same acts.⁴

26
27 ⁴To the extent that the Court relied upon evidence to which
28 the parties objected, the objections are overruled. The Court did
(continued...)

1 Third, MC argues that the damages award contravenes public
2 policy because it includes no assurance that, to the extent it was
3 based on the cost of remediation, it will be used for that purpose.
4 The Court is troubled by this. "[A]llowing recovery for future
5 costs absent any binding commitment to incur these costs would
6 leave no incentive to complete the cleanup." In re Dant & Russell,
7 951 F.2d 246, 250 (9th Cir. 1991). WCM proceeded on a continuing
8 nuisance theory. It did not attempt to prove a permanent nuisance
9 nor did MC argue that the nuisance was not abatable. Thus, the
10 Court instructed the jury, "If you find Mayhew Center liable for
11 nuisance, the Court will issue an order requiring Mayhew Center to
12 abate the contamination on Walnut Creek Manor's property." Final
13 Jury Instructions at 12. Neither party objected to this
14 instruction, and both parties agreed that the Court would enter
15 such an order if the jury found a nuisance, as it did. However,
16 neither party has moved for such an order. The Court will order
17 further briefing on this point.

18 II. Federal Rule of Civil Procedure 52

19 MC has separately moved, under Rule 52, to alter or amend the
20 Court's findings in its October 2, 2009 Order on the remaining non-
21 jury causes of action. This rule provides, "Findings of fact,
22 whether based on oral or other evidence, must not be set aside
23

24 ⁴(...continued)
25 not rely on any inadmissible evidence in reaching its decision. To
26 the extent the Court did not rely on evidence to which the parties
27 objected, the objections are overruled as moot. The Court grants
28 MC's motion to take judicial notice that the October 8, 2009
article "Industrial Park Source of Contamination at Pleasant Hill
Retirement Community," was published online at
contracostatimes.com, but not for the truth of the matters stated
therein.

1 unless clearly erroneous, and the reviewing court must give due
2 regard to the trial court's opportunity to judge the witnesses'
3 credibility." Fed. R. Civ. P. 52(a)(5). The rule also notes that
4 "the court may amend its findings -- or make additional findings --
5 and may amend the judgment accordingly." Id. Rule 52(b). Rule 52
6 does not allow the parties to relitigate the issues.

7 As noted above, the October 2 Order resolved the remaining
8 non-jury claims under CERCLA and HSAA in favor of WCM and against
9 MC. The Court concluded that the MC property is the source, and
10 that the WCM property is not the source, of all PCE contamination
11 on WCM and MC property. The Court also concluded that MC would be
12 100 percent liable for any future response costs that would be
13 necessary and consistent with the national contingency plan.

14 MC argues that the Court clearly erred by concluding that MC
15 is responsible for response costs for all PCE contamination
16 discovered on the WCM property. However, during trial, (and in
17 support of this motion), MC did not present any evidence that the
18 PCE detected on the WCM property came from anywhere but the MC
19 property. MC does not support with any facts its allegation that
20 there remains a yet-undiscovered PCE source.

21 As noted in the October 2 Order, extensive evidence presented
22 at trial supports the finding that PCE was used at and came from
23 the MC property. Further, the evidence at trial supported the
24 finding that MC's failure to address the PCE problem resulted in
25 the migration of PCE through the soil, which damaged and will
26 continue to damage the WCM property. MC failed adequately to rebut
27 this evidence at trial. Lastly, sufficient evidence at trial
28 supported the findings that Mr. Dunivan drilled onto the WCM

1 property in the course of conducting his slant boring, and that the
2 boring created a pathway for contaminants to travel from the MC
3 property to the WCM property.

4 In sum, the Court's October 2 Order does not contain incorrect
5 findings of fact and conclusions of law. Accordingly, the Court
6 denies MC's motion to amend or alter the judgment under Rule 52.

7 III. Motion to Stay Execution of Judgment

8 MC also separately moved under Federal Rule of Civil Procedure
9 62 for an order staying execution of, or any proceeding to enforce,
10 the judgment entered in this case on October 2, 2009, and
11 extinguishing any liens or levies purportedly established under
12 California Code of Civil Procedure sections 448.480, 448.674 or
13 700.190, pending the disposition of all post-trial motions and
14 appeals that have been or may be made in this case.

15 Under Rule 62(a), the execution or enforcement of a judgment
16 is automatically stayed for fourteen days after entry of the
17 judgment. After this automatic stay, the Court may continue the
18 stay during the pendency of various post-judgment motions and
19 appeals. Fed. R. Civ. P. 62(b), (d).

20 To stay execution of judgment, a supersedeas bond is normally
21 required. See Poplar Grove Planting and Refining Co., Inc. v.
22 Bache Halsey Stuart, Inc. 600 F.2d 1189, 1191 (5th Cir. 1979);
23 Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1505 n.1 (9th Cir.
24 1987) ("The purpose of a supersedeas bond is to secure the
25 appellees from a loss resulting from the stay of execution and a
26 full supersedeas bond should therefore be required."). "The
27 posting of a bond protects the prevailing plaintiff from the risk
28 of a later uncollectible judgment and compensates him for delay in

1 the entry of the final judgment." National Labor Relations Board
2 v. Westphal, 859 F.2d 818, 819 (9th Cir. 1988).

3 The Court has discretion to stay execution of judgment without
4 requiring a bond. See Federal Prescription Serv. v. American
5 Pharmaceutical Ass'n, 636 F.2d 755, 759-61 (D.C. Cir. 1980) (Rule
6 62 "in no way necessarily implies that filing a bond is the only
7 way to obtain a stay"); Northern Indiana Public Service Co. v.
8 Carbon County Coal Co., 799 F.2d 265, 281 (7th Cir. 1986) (district
9 court has discretion to waive \$2 million appeal bond).

10 MC argues that posting a full bond would impose an undue
11 financial burden. MC must "objectively demonstrate" the reasons
12 the Court should "depart from the usual requirement of a full
13 security supersedeas bond to suspend the operation of an
14 unconditional money judgment." Poplar Grove, 600 F.2d at 1191.
15 Because MC has not offered any evidence of the financial status of
16 Mayhew Center, LLC or of Mr. Dunivan, it has failed to carry this
17 burden. Therefore, MC will be required to post a bond to stay the
18 execution of judgment.

19 MC argues that, in lieu of a supersedeas bond, the Court
20 should allow MC to post an alternate form of security -- the MC
21 property. A lien on the MC property, the source of the PCE, is not
22 adequate security for the judgment awarded to WCM. MC claims that,
23 in December, 2008, the MC property was appraised at \$7 million, but
24 it is not clear that this appraisal is reliable, given the
25 subsequent economic downturn in the real estate market. Further,
26 the MC property is already encumbered with a \$3 million lien.
27 Thus, any lien provided to WCM would be in second position at best.
28 If MC is unable to pay the judgment against it and is forced to

1 give up the MC property, the primary lien-holder, the bank, will
2 likely be motivated to sell the property for the amount necessary
3 to recover its outstanding loan principal and accrued interest and
4 costs. There is no guarantee that, even if the bank were able to
5 accomplish this, WCM would be able to collect on its lien.
6 Therefore, the Court rejects MC's request to allow it to post the
7 MC property as an alternative form of security. The Court will
8 exercise its discretion to stay the execution of judgment pending
9 post-judgment motions and appeal only if MC posts adequate
10 security.

11 CONCLUSION

12 As noted above, it was the intention of the Court and the
13 parties that, if the jury found a nuisance, the Court would order
14 abatement. Abatement would be in the public interest. Any
15 abatement would have to be consistent with the requirements of the
16 Water Board's findings and orders. Neither party has proposed an
17 abatement order, or addressed how one could be entered before the
18 Water Board issues its order. Entry of judgment may have been
19 premature in that no order of abatement has entered. The Court may
20 need to vacate the judgment for this purpose.

21 However, the need for an order of abatement implicates MC's
22 complaint of double damages, and raises practical problems. The
23 jury's award of future damages included both future remediation and
24 the diminution in value of the property even after remediation.
25 Thus, it may be that the cost of remediation, at least in part if
26 not in full, should be paid from the \$1.597 million damage award,
27 and the remainder should compensate WCM for the diminution in value
28 of its property. It is not clear how this can be accomplished.

1 The Court is unaware of the status and likely timing of the Water
2 Board's investigation. An order of abatement would presumably be
3 addressed to MC, but it may be preferable for WCM to contract for
4 the work. Neither party has addressed whether any response costs
5 would be incurred under CERCLA, consistent with the National
6 Contingency Plan, and, if so, how they would be paid.

7 The Court defers decision on MC's motion for a new trial
8 (Docket No. 183), and orders further briefing addressing these
9 issues and proposing solutions. For example, judgment could be
10 vacated and MC could post a bond, or pay \$1.597 million into an
11 escrow account, pending the Water Board's decision as to how the MC
12 and WCM properties are to be remediated. Guided by the Water
13 Board's decision and the parties' briefing on any CERCLA and
14 National Contingency Plan requirements, the Court could issue an
15 abatement order. Judgment could then be re-entered. The
16 remediation could proceed and any appeal could be filed. The
17 remediation could proceed pending appeal. Any portion of the
18 \$1.597 million remaining after the remediation would be distributed
19 to WCM to compensate for the reduction in the value of its property
20 even after the repair, unless the case was reversed on appeal.

21 By March 1, 2010, the parties shall meet and confer to discuss
22 these issues. By March 5, 2010, the parties shall submit a joint
23 statement as to any issues upon which they may be able to agree.
24 As to the issues upon which the parties disagree, they shall submit
25 briefs according to the following schedule: by March 12, WCM shall
26 file a brief addressing the disputed issues. It may propose a
27 different course of action that addresses the Court's concerns. By
28 March 26, MC shall file an opposition and its proposed course of

1 action. By April 2, WCM shall file a reply and by April 9, MC
2 shall file a surreply. The matter will be heard on April 22, 2010
3 at 2:00 p.m.

4 The Court denies MC's motion to amend or alter the Court's
5 October 2, 2009 Order on the non-jury causes of action (Docket No.
6 185), denies MC's motion to stay the execution of judgment without
7 bond (Docket No. 189), and grants MC's motion for judicial notice
8 (Docket No. 220).

9 IT IS SO ORDERED.

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11 Dated: 02/22/2010



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CLAUDIA WILKEN
United States District Judge