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ENVIR. APPEALS BOARD

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April 16, 2010

VIA FEDERAL EXPRESS

Clerk of the Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

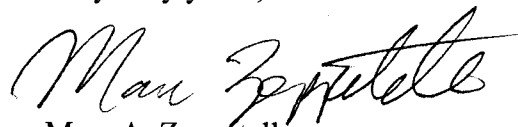
Re: *In the Matter of Brown & Bryant, Inc. Site*
CERCLA Section 106(b)
Petition No. 94-12

Dear Sir or Madam:

Enclosed please find an original and five copies of the *Thirteenth Joint Status Report* submitted by Petitioners and EPA Region IX in the referenced action. If you would please "file-stamp" these pleadings, I have enclosed one extra copy to be returned to me in the self-addressed, stamped envelope.

If you have any questions, please call me at 415.228.5417. Thank you.

Very truly yours,



Marc A. Zeppétello

MAZ/fmc
Enclosures

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BEFORE THE ENVIRONMENTAL APPEALS BOARD

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Paul
APR 27 AM 10:21

WASHINGTON, D.C.

ENVIR. APPEALS BOARD

In the Matter of,
BROWN & BRYANT, INC. SITE
600 South Derby Road
Arvin, California

CERCLA Section 106(b)
Petition No. 94-12

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

and

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY,

Petitioners.

THIRTEENTH JOINT STATUS REPORT

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Regional Counsel
Region IX

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San Francisco, CA 94107
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COUNSEL FOR REGION IX

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Counsel for UNION PACIFIC RAILROAD
COMPANY, as successor to SOUTHERN
PACIFIC TRANSPORTATION COMPANY

and

Counsel for BNSF RAILWAY COMPANY, as
successor to THE ATCHISON, TOPEKA &
SANTA FE RAILWAY COMPANY

1 On April 15, 2004, the Environmental Appeals Board ("Board") issued an Order Continuing
2 Stay Of Proceedings ("Order") for this CERCLA § 106(b) Petition. By that Order, the Board
3 requested semi-annual status reports on the progress of the Brown & Bryant Arvin Superfund Site
4 case in federal court. This is the thirteenth joint status report of EPA Region IX and Petitioners
5 BNSF Railway Company and Union Pacific Railroad Company ("the Railroads").

6 As previously reported, on May 4, 2009, the Supreme Court issued its decision in the United
7 States' CERCLA cost recovery action relating to the Arvin site. In an opinion authored by Justice
8 Stevens, in which seven other justices joined, the Supreme Court determined that the trial record
9 provided a reasonable basis for the district court's conclusion that the Railroads are liable for only
10 9% of the harm caused by the contamination at the Arvin site, and, therefore, reversed the Ninth
11 Circuit's ruling that the Railroads are subject to joint and several liability for all response costs
12 arising out of the contamination at the Arvin site. The Supreme Court also reversed the Ninth
13 Circuit's ruling as to the liability of Shell Oil Company ("Shell"), and held that Shell is not liable as
14 an "arranger" for the contamination at the Arvin site. The Supreme Court reversed the Ninth
15 Circuit's judgment and remanded the case for further proceedings consistent with the Court's
16 opinion. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. 1870 (2009), 2009 WL
17 1174849 (U.S. May 24, 2009).

18 On July 27, 2009, counsel for Region IX, the United States, the Railroads, Shell, and the
19 California Department of Toxic Substances Control ("DTSC") participated in a status conference in
20 the district court. On August 26, 2009, the district court issued its judgment for Shell, ruling that the
21 United States, DTSC, and the Railroads shall recover nothing from or as against Shell. On
22 September 10, 2009, Shell submitted its bill of costs to the district court, and on September 21,
23 2009, the United States, DTSC, and the Railroads jointly submitted objections to Shell's bill of
24 costs. On October 28, 2009, counsel for the United States, the Railroads and Shell participated in
25 another status conference in the district court. The following day, the Court issued its Order After
26 Status Conference which states, in part: "All parties agree that following resolution of the Shell Oil
27 Cost Bill, it is anticipated by the parties that the judgment in this case shall be final and the case will
28 be closed." To date, the district court has not ruled on Shell's bill of costs.


1 The Board's Order granted a stay of this proceeding until the federal court litigation "is
 2 resolved by entry of final judgment after appeal." Order at 5. The Railroads' position is that the
 3 Supreme Court's decision affirmed the Judgment On Decision By The Court, entered by the district
 4 court on September 10, 2003, as to the Railroads, and that judgment is now final after appeal as to
 5 the Railroads, notwithstanding that the district court's decision on Shell's bill of costs remains
 6 pending. In any event, Region IX and the Railroads agree that the Board could proceed to consider
 7 and resolve the Railroads' petition for reimbursement. However, as previously reported, Region IX
 8 and the Railroads are engaged in settlement discussions. Those discussions are continuing, and
 9 encompass both the response costs at issue in this administrative proceeding and the response costs
 10 incurred and to be incurred by Region IX subsequent to those costs proved at trial, which in the
 11 absence of a settlement will be at issue in subsequent federal court action, in accordance with the
 12 declaratory judgment contained in the September 10, 2003, Judgment On Decision By The Court.


13 Region IX and the Railroads jointly request that the Board continue the stay in this matter
 14 for another sixty days to allow the parties additional time to discuss settlement. The parties will
 15 advise the Board if they are able to reach a settlement of the Railroads' petition, but in any case will
 16 submit another joint status report in sixty days or by no later than June 15, 2010.

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 18 DATED: April 15, 2010

Respectfully submitted,
 NANCY J. MARVEL
 Regional Counsel

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 24 DATED: April 15, 2010


 JOSHUA WIRTSCHAFTER
 Assistant Regional Counsel
 U.S. Environmental Protection Agency
 Region IX

BARG COFFIN LEWIS & TRAPP, LLP
 By: 
 MARC A. ZEPPELLO
 Counsel for BNSF Railway Company and
 Union Pacific Railroad Company

1 **CERTIFICATE OF SERVICE**

2 I certify that I served the foregoing **Thirteenth Joint Status Report** by Federal
3 Express to the following on April 16, 2010:

4
5 U.S. Environmental Protection Agency
6 Clerk of the Environmental Appeals Board
7 1341 G Street, N.W., Suite 600
8 Washington, DC 20005
9 Fax No. (202) 233-0121
(Original and five copies)

10 and by first class U.S. mail to the following on April 16, 2010:

11 Joshua Wirtschafter
12 Assistant Regional Counsel
13 Office of Regional Counsel
14 U.S. EPA Region IX
15 75 Hawthorne Street
16 San Francisco, CA 94105
17 Fax No. (415) 947-3570

18 Dated: April 16, 2010

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20 Fran Chiappetta

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