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U.S. ENVIRONMENTAL PROTECTION AGENCY
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April 21, 2009

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 *Tenth Joint Status Report* submitted by Petitioners and EPA Region IX in the referenced action. If you "file-stamp" these pleadings, I have enclosed one extra copy of the cover sheet to be returned to Mr. Zeppetello in the self-addressed, stamped envelope.

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

Very truly yours,

A handwritten signature in cursive script that reads "Fran Chiappetta".

Fran Chiappetta
Secretary to Marc A. Zeppetello, Esq.

/fmc
Enclosures

1 BEFORE THE ENVIRONMENTAL APPEALS BOARD
2 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
3 WASHINGTON, D.C.

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U.S. EPA.
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ENVIRONMENTAL APPEALS BOARD

6 In the Matter of,
7 BROWN & BRYANT, INC. SITE
8 600 South Derby Road
9 Arvin, California
10 SOUTHERN PACIFIC
11 TRANSPORTATION COMPANY
12 and
13 THE ATCHISON, TOPEKA & SANTA FE
14 RAILWAY,
15 Petitioners.

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

16 **TENTH JOINT STATUS REPORT**

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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
2 Continuing Stay Of Proceedings (“Order”) for this CERCLA § 106(b) Petition. By that Order, the
3 Board requested semi-annual status reports on the progress of the Brown & Bryant Arvin Site case
4 in federal court. This is the tenth joint status report of Region IX and Petitioners BNSF Railway
5 Company and Union Pacific Railroad Company (“the Railroads”).

6 As previously reported, on March 16, 2007, the United States Court of Appeals for the
7 Ninth Circuit issued its opinion on the appeal of the United States District Court’s judgment in the
8 United States’ CERCLA cost recovery action relating to the Brown & Bryant Arvin Superfund
9 Site. The Court of Appeals reversed the district court’s finding on apportionment and held that the
10 Railroads and Shell Oil Company (“Shell”) (another defendant sued by the United States) are
11 jointly and severally liable for the harm at the Arvin site.

12 On May 7, 2007, the Railroads filed a petition for rehearing en banc, and Shell filed a
13 petition for rehearing and rehearing en banc. On May 31, 2007, the Ninth Circuit panel ordered
14 the appellants, the United States and the California Department of Toxic Substance Control
15 (“DTSC”), to file a response to the petitions for rehearing and rehearing en banc. On July 27,
16 2007, the United States filed its response and DTSC filed its answer to the petitions.

17 On September 4, 2007, the Ninth Circuit panel issued an order amending its opinion and
18 an amended opinion. Addressing an issue raised by Shell in its petition for rehearing, the order
19 added a footnote to the opinion upholding the district court’s finding that Shell is not liable for
20 any part of the costs of cleaning up a discrete area contaminated by Dinoseb, a chemical that
21 Shell did not manufacture or ship to the site. *United States v. Burlington Northern & Santa Fe*
22 *Railway Co.*, 502 F.3d 781 (9th Cir. 2007). The order also stated that “[t]he petition for rehearing
23 and petition for rehearing en banc remain pending.” *Id.* at 789.

24 On March 25, 2008, the Ninth Circuit panel issued an order amending its opinion and a
25 second amended opinion. The March 25th order made numerous revisions to the opinion, but did
26 not modify the panel’s holding that the Railroads and Shell are jointly and severally liable for the
27 harm at the Arvin site, except that Shell is not liable for the so-called “Dinoseb hot spot.” The
28 March 25th order also stated that, after a judge of the Court requested a vote on en banc

1 rehearing, the majority of the active judges voted to deny rehearing the matter en banc. *United*
2 *States v. Burlington Northern & Santa Fe Railway Co.*, 520 F.3d 918, 926 (9th Cir. 2008). Eight
3 Circuit Judges joined in a dissent from the Court’s denial of the Railroads’ and Shell’s petitions
4 for rehearing en banc. *Id.* at 952-64.

5 On March 31, 2008, the Railroads and Shell each filed unopposed motions to stay the
6 Ninth Circuit’s mandate pending the filing of their respective petitions for a writ of certiorari in
7 the United States Supreme Court. By order dated April 3, 2008, the Ninth Circuit panel granted
8 the unopposed motions to stay the mandate, for ninety days, to allow the Railroads and Shell to
9 petition the Supreme Court for a writ of certiorari.

10 On June 23, 2008, the Railroads and Shell each filed their respective petitions for a writ
11 of certiorari in the Supreme Court. The question presented by the Railroads’ petition is:

12 “Whether the Ninth Circuit erred by reversing the district court’s reasonable
13 apportionment of responsibility under CERCLA, and by adopting a standard of
14 review and proof requirements that depart from common law principles and
15 conflict with decisions of other Circuits.”

16 Railroads’ Petition for a Writ of Certiorari, at i.¹

17 On July 25, 2008, the Association of American Railroads filed an amicus curiae brief in
18 support of the Railroads’ petition; the Chamber of Commerce of the United States and a number
19 of other parties jointly filed an amicus brief in support of Shell’s and the Railroads’ petitions;
20 and the Product Liability Advisory Council, Inc., the Civil Justice Association of California, and
21 the International Association of Defense Counsel each filed amicus briefs in support of Shell’s
22 petition.

23 On August 25, 2008, the United States filed its brief in opposition to the Railroads’ and

24 _____
25 ¹ The questions presented by Shell’s petition are: (1) whether liability for “arranging”
26 for disposal of hazardous substances under CERCLA may be imposed upon a
27 manufacturer who merely sells and ships, by common carrier, a commercially useful
28 product, transferring ownership and control to a purchaser who then causes
contamination involving that product; and (2) whether joint and several liability may be
imposed upon several potentially responsible parties under CERCLA even where a
district court finds an objectively reasonable basis for divisibility that would suffice at
common law. Shell’s Petition for a Writ of Certiorari, at i.

1 Shell's petitions. The question presented by the United States' opposition with respect to
2 apportionment is:

3 "Whether the court of appeals properly held petitioners jointly and severally
4 liable under CERCLA for the response costs of the United States and California
5 governments, based on the court's conclusion that petitioners did not satisfy
their evidentiary burden of providing a reasonable basis to apportion liability."

6 Brief for the United States in Opposition at 1.²

7 On September 9, 2008, the Railroads filed their reply brief in support of their petition,
8 and on September 10, 2008, Shell filed its reply brief in support of its petition.

9 On October 1, 2008, the Supreme Court granted the Railroads' and Shell's petitions for a
10 writ of certiorari, and consolidated the cases.

11 On November 17, 2008, the Railroads and Shell filed their respective opening briefs in
12 the Supreme Court.

13 On November 24, 2008, the Association of American Railroads filed an amicus curiae
14 brief in support of the Railroads. A number of other parties also filed amicus briefs in support of
15 the Railroads and/or Shell including: the Chamber of Commerce of the United States; the
16 Product Liability Advisory Council, Inc.; Newmont USA Limited and Canadian Oxy Offshore
17 Production Co.; General Electric Company; Washington Legal Foundation; International
18 Association of Defense Counsel; Teck Cominco Metals, Ltd.; and the Civil Justice Association
19 of California.

20 On December 17, 2008, the United States filed its brief in opposition to the Railroads and
21 Shell.

22 On December 22, 2008, DTSC filed its brief in opposition to the Railroads and Shell.

23 On January 16, 2009, the Railroads and Shell filed their respective reply briefs.

24 On February 24, 2009, the Supreme Court heard oral argument in the consolidated cases,
25 which were submitted at the conclusion of the argument. The Supreme Court has not yet issued
26

27 ² The United States' opposition also presented the question whether the court of appeals
28 correctly affirmed the district court's determination that Shell is liable under CERCLA
an entity that "arranged for disposal" of hazardous substances.


1 a decision, but it is expected to do so in the next approximately 30 to 60 days.

2 The Board's Order granted a stay of this proceeding until the federal court litigation "is
3 resolved by entry of final judgment after appeal." Order at 5. Final judgment after appeal will
4 not be entered until after the Supreme Court rules on the issues pending before it and remands
5 the cases to the Ninth Circuit or the district court for further proceedings or entry of judgment.
6 Region IX and the Railroads agree that the stay granted by the Board remains in effect at this
7 time. The parties will continue to submit semi-annual status reports, as required by the Board's
8 Order.

10 Respectfully submitted,


12 DATED: April 21, 2009

NANCY J. MARVEL
Regional Counsel

14 
15 JOSHUA WIRTSCHAFTER
16 Assistant Regional Counsel
17 U.S. Environmental Protection Agency
18 Region IX

19 DATED: April 21, 2009

BARG COFFIN LEWIS & TRAPP, LLP

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21 By: 
22 MARC A. ZEPPELLO
23 Counsel for BNSF Railway Company and
24 Union Pacific Railroad Company
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CERTIFICATE OF SERVICE

I certify that I served the foregoing **Tenth Joint Status Report** by Federal Express to the following on April 21, 2009:

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

and by first class U.S. mail to the following on April 21, 2009:

Joshua Wirtschafter
Assistant Regional Counsel
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U.S. EPA Region IX
75 Hawthorne Street
San Francisco, CA 94105
Fax No. (415) 947-3570

Dated: April 21, 2009


Fran Chiappetta