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July 18, 2011

*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 *Nineteenth 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. Zeppetello 

MAZ/fmc  
Enclosures

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APPEALS BOARD

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

In the Matter of,  
BROWN & BRYANT, INC. SITE  
600 South Derby Road  
Arvin, California  
  
SOUTHERN PACIFIC  
TRANSPORTATION COMPANY  
  
and  
  
THE ATCHISON, TOPEKA & SANTA FE  
RAILWAY,  
  
Petitioners.

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

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**NINETEENTH JOINT STATUS REPORT**

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Regional Counsel  
Region IX

Joshua Wirtschafter  
Assistant Regional Counsel  
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Telephone: (415) 972-3912

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. On May 16, 2011, EPA Region IX and Petitioners BNSF Railway Company  
5 and Union Pacific Railroad Company ("the Railroads") submitted their Eighteenth Joint Status  
6 Report; in that report, the parties noted that they are engaged in settlement discussions, jointly  
7 requested that the Board continue to stay this proceeding to allow them additional time to discuss  
8 settlement, and proposed to submit another status report in sixty days, or by July 18, 2011.

9 As previously reported, on May 4, 2009, the Supreme Court issued its decision in the United  
10 States' CERCLA cost recovery action relating to the Arvin site. In summary, the Supreme Court  
11 determined that the trial record provided a reasonable basis for the district court's conclusion that  
12 the Railroads are liable for only 9% of the harm caused by the contamination at the Arvin site, and,  
13 therefore, reversed the Ninth Circuit's ruling that the Railroads are subject to joint and several  
14 liability for all response costs arising out of the contamination at the Arvin site. The Supreme Court  
15 reversed the Ninth Circuit's judgment and remanded the case for further proceedings consistent with  
16 the Court's opinion. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. 1870 (2009),  
17 2009 WL 1174849 (U.S. May 24, 2009).

18 The Board's Order granted a stay of this proceeding until the federal court litigation "is  
19 resolved by entry of final judgment after appeal." Order at 5. Region IX and the Railroads agree  
20 that the Board could proceed to consider the remaining factual issues and resolve the Railroads'  
21 petition for reimbursement. However, Region IX and the Railroads are continuing to engage in  
22 settlement discussions. Those discussions raise complicated issues, and encompass both the  
23 response costs at issue in this administrative proceeding and the response costs incurred and to be  
24 incurred by Region IX subsequent to those costs proved at trial, which in the absence of a settlement  
25 would be at issue in a subsequent federal court action, in accordance with the declaratory judgment  
26 contained in the district court's judgment entered on September 10, 2003.

27 On December 14, 2010, Region IX provided updated information to the Railroads regarding  
28 the response costs Region IX claims to have incurred subsequent to those costs proved at trial, plus

1 interest. On January 6, 2011, after reviewing the updated cost information, the Railroads provided  
2 comments and questions to Region IX concerning the updated costs. Subsequently, counsel for the  
3 parties have participated in phone conversations and exchanged emails regarding the issues raised  
4 by the Railroads concerning Region IX's updated costs.

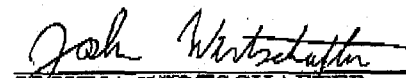
5 On May 13, 2011, Region IX provided a draft proposed administrative settlement agreement  
6 to the Railroads, for their review and comment. On June 6, 2011, the Railroads provided  
7 comments on and suggested revisions to the draft proposed agreement, and, on June 30, 2011, EPA  
8 provided a revised draft of the proposed agreement to the Railroads for further review.

9 The parties intend to have further discussions in the coming weeks regarding both the terms  
10 of the proposed administrative settlement agreement and amount of the claimed EPA response costs  
11 that would be resolved by the proposed settlement. Therefore, Region IX and the Railroads jointly  
12 request that the Board continue the stay in this matter for another sixty days to allow the parties  
13 additional time to discuss settlement. The parties will advise the Board if they are able to reach a  
14 settlement of the Railroads' petition, but in any case will submit another joint status report in sixty  
15 days or by no later than September 19, 2011.

16 Respectfully submitted,

17 DATED: July 18, 2011

NANCY J. MARVEL  
Regional Counsel

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

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23 DATED: July 18, 2011

BARG COFFIN LEWIS & TRAPP, LLP

24  
25 By: \_\_\_\_\_  
26 MARC A. ZEPPELLO

27 Counsel for BNSF Railway Company and  
28 Union Pacific Railroad Company

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NANCY J. MARVEL  
Regional Counsel

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

23 DATED: July 18, 2011

BARG COFFIN LEWIS & TRAPP, LLP

24  
25 By:   
MARC A. ZEPPELLO

26  
27 Counsel for BNSF Railway Company and  
Union Pacific Railroad Company

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**CERTIFICATE OF SERVICE**

I certify that I served the foregoing **Nineteenth Joint Status Report** by Federal Express to the following on July 18, 2011:

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 July 18, 2011:

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

Dated: July 18, 2011

  
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Fran Chippetta