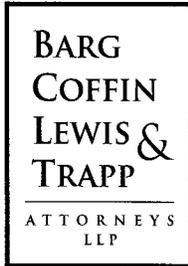


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ENVIR. APPEALS BOARD

350 California Street  
22nd Floor  
San Francisco, CA  
94104-1435  
tel 415 228 5400  
fax 415 228 5450  
www.bcltlaw.com



May 16, 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 *Eighteenth 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,

A handwritten signature in cursive script that reads "Marc Zeppetello".

Marc A. Zeppetello

MAZ/fmc  
Enclosures

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BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

ENVIR. APPEALS BOARD

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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

**EIGHTEENTH JOINT STATUS REPORT**

Nancy J. Marvel  
Regional Counsel  
Region IX

Joshua Wirtschafter  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94107  
Telephone: (415) 972-3912

COUNSEL FOR REGION IX

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John F. Barg, Esq.  
Marc A. Zeppetello, Esq.  
Barg Coffin Lewis & Trapp, LLP  
350 California Street, 22<sup>nd</sup> Floor  
San Francisco, CA 94104-1435  
Telephone: (415) 228-5400  
Facsimile: (415) 228-5450

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 March 15, 2011, EPA Region IX and Petitioners BNSF Railway  
5 Company and Union Pacific Railroad Company (“the Railroads”) submitted their Seventeenth Joint  
6 Status Report; in that report, the parties noted, among other matters, that they are engaged in  
7 settlement discussions, jointly requested that the Board continue to stay this proceeding to allow  
8 them additional time to discuss settlement, and proposed to submit another joint status report in  
9 sixty days or by no later than May 16, 2011.

10 As previously reported, on May 4, 2009, the Supreme Court issued its decision in the United  
11 States’ CERCLA cost recovery action relating to the Arvin site. In summary, the Supreme Court  
12 determined that the trial record provided a reasonable basis for the district court’s conclusion that  
13 the Railroads are liable for only 9% of the harm caused by the contamination at the Arvin site, and,  
14 therefore, reversed the Ninth Circuit’s ruling that the Railroads are subject to joint and several  
15 liability for all response costs arising out of the contamination at the Arvin site. The Supreme Court  
16 reversed the Ninth Circuit’s judgment and remanded the case for further proceedings consistent with  
17 the Court’s opinion. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. 1870 (2009),  
18 2009 WL 1174849 (U.S. May 24, 2009).

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

28 On December 14, 2010, Region IX provided updated information to the Railroads regarding

1 the response costs Region IX claims to have incurred subsequent to those costs proved at trial, plus  
2 interest. On January 6, 2011, after reviewing the updated cost information, the Railroads provided  
3 comments and questions to Region IX concerning the updated costs. On April 22, 2011, counsel for  
4 the parties participated in a conference call to begin discussing the issues raised by the Railroads  
5 concerning Region IX's updated costs.

6 On May 13, 2011, Region IX provided a draft proposed administrative settlement agreement  
7 to the Railroads, for their review and comment.

8 The parties intend to have further discussions in the coming weeks regarding both the terms  
9 of the proposed administrative settlement agreement and amount of the claimed EPA response costs  
10 that would be resolved by the proposed settlement. Therefore, Region IX and the Railroads jointly  
11 request that the Board continue the stay in this matter for another sixty days to allow the parties  
12 additional time to discuss settlement. The parties will advise the Board if they are able to reach a  
13 settlement of the Railroads' petition, but in any case will submit another joint status report in sixty  
14 days or by no later than July 18, 2011.

15 Respectfully submitted,

16 DATED: May 16, 2011

NANCY J. MARVEL  
Regional Counsel

18   
19 JOSHUA WIRTSCHAFTER  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IX

22 DATED: May 16, 2011

BARG COFFIN LEWIS & TRAPP, LLP

24 By:   
MARC A. ZEPPETELLO

26 Counsel for BNSF Railway Company and  
Union Pacific Railroad Company

1 CERTIFICATE OF SERVICE

2 I certify that I served the foregoing **Eighteenth Joint Status Report** by Federal  
3 Express to the following on May 16, 2011:

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  
10 (Original and five copies)

11 and by first class U.S. mail to the following on May 16, 2011:

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

19 Dated: May 16, 2011

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Fran Chiappetta