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ENVIR. APPEALS BOARD

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December 15, 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 *Sixteenth 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 415.228.5496. Thank you.

Very truly yours,

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

Marc A. Zeppetello

MAZ/fmc  
Enclosures

1 BEFORE THE ENVIRONMENTAL APPEALS BOARD  
2 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
3 WASHINGTON, D.C.  
4  
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ENV. APPEALS BOARD

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6 In the Matter of,

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

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,

Petitioners.

15  
16 **SIXTEENTH JOINT STATUS REPORT**

17 Nancy J. Marvel  
18 Regional Counsel  
19 Region IX

20 Joshua Wirtschafter  
21 Assistant Regional Counsel  
22 U.S. Environmental Protection Agency  
23 Region IX  
24 75 Hawthorne Street  
25 San Francisco, CA 94107  
26 Telephone: (415) 972-3912

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28 COUNSEL FOR REGION IX

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Marc A. Zeppetello, Esq.  
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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 September 15, 2010, EPA Region IX and Petitioners BNSF Railway  
5 Company and Union Pacific Railroad Company ("the Railroads") submitted their Fifteenth 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 ninety days or by no later than December 15, 2010.

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. Region IX expects to be able to provide a draft proposed administrative settlement  
 3 agreement to the Railroads, for their review and comment, in approximately one month.

4 Region IX and the Railroads jointly request that the Board continue the stay in this matter  
 5 for another ninety days to allow the parties additional time to discuss settlement. The parties will  
 6 advise the Board if they are able to reach a settlement of the Railroads' petition, but in any case will  
 7 submit another joint status report in ninety days or by no later than March 15, 2011.

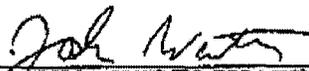
8 Respectfully submitted,

9 DATED: December 15, 2010

NANCY J. MARVEL  
Regional Counsel

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

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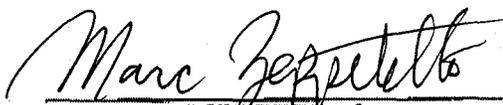
16

17 DATED: December 15, 2010

BARG COFFIN LEWIS & TRAPP, LLP

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By:   
MARC A. ZEPPELLO

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Counsel for BNSF Railway Company and  
Union Pacific Railroad Company

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**CERTIFICATE OF SERVICE**

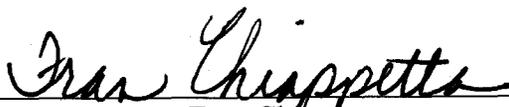
I certify that I served the foregoing **Sixteenth Joint Status Report** by Federal Express to the following on December 15, 2010:

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 December 15, 2010:

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: December 15, 2010

  
\_\_\_\_\_  
Fran Chiappetta