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ENVIR. APPEALS BOARD

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March 15, 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

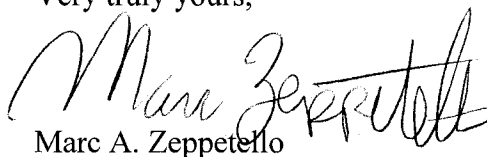
Re: *In the Matter of Brown & Bryant, Inc. Site*
CERCLA Section 106(b)
Petition No. 94-12

Dear Sir or Madam:

Enclosed please find an original and five copies of the *Seventeenth 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,



Marc A. Zeppetello

MAZ/fmc
Enclosures

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

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

SEVENTEENTH JOINT STATUS REPORT

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Regional Counsel
Region IX

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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. On December 15, 2010, EPA Region IX and Petitioners BNSF Railway
5 Company and Union Pacific Railroad Company ("the Railroads") submitted their Sixteenth 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 March 15, 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. Region IX has not yet
4 responded to the Railroads' comments and question, but the parties have agreed to schedule a
5 conference call or meeting to be held prior to the end of March to discuss the issues raised by the
6 Railroads concerning Region IX's updated costs.

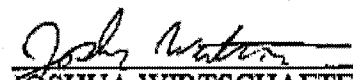
7 In the Sixteenth Joint Status Report, submitted on December 15, 2010, Region IX indicated
8 that it expected to be able to provide a draft proposed administrative settlement agreement to the
9 Railroads, for their review and comment, in approximately one month. Region IX has not yet
10 provided a draft settlement agreement to the Railroads, but hereby reaffirms that it expects to be
11 able to do so in approximately one month, on or before April 15, 2011.

12 Region IX and the Railroads jointly request that the Board continue the stay in this matter
13 for another sixty days to allow the parties additional time to discuss settlement. The parties will
14 advise the Board if they are able to reach a settlement of the Railroads' petition, but in any case will
15 submit another joint status report in sixty days or by no later than May 16, 2011.

16 Respectfully submitted,

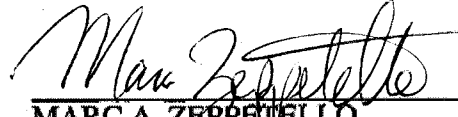
17 DATED: March 15, 2011

NANCY J. MARVEL
Regional Counsel

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

23 DATED: March 15, 2011

BARG COFFIN LEWIS & TRAPP, LLP

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25 By: 
26 MARC A. ZEPPELLO
27 Counsel for BNSF Railway Company and
28 Union Pacific Railroad Company

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