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ENVIR. APPEALS BOARD

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San Francisco, CA
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September 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 *Fifteenth 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

1 BEFORE THE ENVIRONMENTAL APPEALS BOARD RECEIVED
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2 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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3 WASHINGTON, D.C.

4 ENVIR. 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,

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16 Petitioners.

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FIFTEENTH 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 June 15, 2010, EPA Region IX and Petitioners BNSF Railway Company
5 and Union Pacific Railroad Company ("the Railroads") submitted their Fourteenth Joint Status
6 Report; in that report, the parties noted, among other matters, that they are engaged in settlement
7 discussions, jointly requested that the Board continue to stay in this proceeding to allow them
8 additional time to discuss settlement, and proposed to submit another joint status report in ninety
9 days or by no later than September 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 Region IX and the Railroads jointly request that the Board continue the stay in this matter

1 for another ninety days to allow the parties additional time to discuss settlement. The parties will
 2 advise the Board if they are able to reach a settlement of the Railroads' petition, but in any case will
 3 submit another joint status report in ninety days or by no later than December 15, 2010.

4 Respectfully submitted,

5 DATED: September 15, 2010

NANCY J. MARVEL
Regional Counsel

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

11 DATED: September 15, 2010

BARG COFFIN LEWIS & TRAPP, LLP

13 By: 
 14 _____
 15 MARC A. ZEPPELLO

Counsel for BNSF Railway Company and
Union Pacific Railroad Company

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CERTIFICATE OF SERVICE

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



Fran Chiappetta