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ENVIR. APPEALS BOARD

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October 15, 2009

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 *Twelfth 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 A. Zeppetello".

Marc A. Zeppetello

MAZ/cgw
Enclosures

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BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

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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

TWELFTH JOINT STATUS REPORT

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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
2 Continuing Stay Of Proceedings ("Order") for this CERCLA § 106(b) Petition. By that Order, the
3 Board requested semi-annual status reports on the progress of the Brown & Bryant Arvin
4 Superfund Site case in federal court. On June 2, 2009, Region IX and Petitioners BNSF Railway
5 Company and Union Pacific Railroad Company ("the Railroads") submitted their Eleventh Joint
6 Status Report, as a supplemental report, to advise the Board of the decision of the United States
7 Supreme Court in the federal court action. Region IX and the Railroads hereby submit their next
8 scheduled semi-annual report.

9 As previously reported, on May 4, 2009, the Supreme Court issued its decision in the
10 United States' CERCLA cost recovery action relating to the Arvin site. In an opinion authored
11 by Justice Stevens, in which seven other justices joined, the Supreme Court determined, among
12 other issues, that the trial record provided a reasonable basis for the district court's conclusion
13 that the Railroads are liable for only 9% of the harm caused by the contamination at the Arvin
14 site, and, therefore, reversed the Ninth Circuit's ruling that the Railroads are subject to joint and
15 several liability for all response costs arising out of the contamination at the Arvin site. The
16 Supreme Court reversed the Ninth Circuit's judgment and remanded the case for further
17 proceedings consistent with the Court's opinion. *Burlington Northern and Santa Fe Ry. Co. v.*
18 *U.S.*, 129 S.Ct. 1870 (2009), 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. Final judgment after appeal will
21 not be entered until after further proceedings in the district court. Counsel for Region IX and the
22 Railroads participated in a status conference in the district court on July 27, 2009, and another
23 status conference is scheduled for October 28, 2009. In addition, Region IX and the Railroads
24 are engaged in settlement discussions with respect to the response costs at issue in both the
25 federal court action and this administrative proceeding.

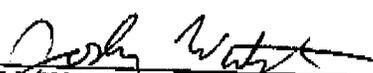
26 Region IX and the Railroads agree that the stay granted by the Board remains in effect at
27 this time. The parties will advise the Board when the district court enters final judgment after
28 appeal or if they are able to reach a settlement of the Railroads' petition for reimbursement, but

1 otherwise will submit their next semi-annual status report in April 2010, as required by the
2 Board's Order.

3 Respectfully submitted,

5 DATED: October 14, 2009

NANCY J. MARVEL
Regional Counsel

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

12 DATED: October ¹⁵ 14, 2009

BARG COFFIN LEWIS & TRAPP, LLP

15 By: 
MARC A. ZEPETELLO

Counsel for BNSF Railway Company and
Union Pacific Railroad Company

