



California Dump Truck Owners Association

334 N. Euclid Avenue, Upland, California 91786

(909) 982-9898 Fax (909) 985-2348

email: leebrown@cdtoa.org

web: cdtoa.org

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VIA REGULAR MAIL and E-MAIL

The Honorable Arnold Schwarzenegger
Governor of California
State Capitol Building
Sacramento, CA 95814

Re: Request for Investigation into Serious Misconduct by the California Air Resources Board and Immediate Suspension of All Impacted Diesel Regulations

Dear Governor Schwarzenegger,

On behalf of the members of the California Dump Truck Owners Association (CDTOA) we are writing to identify our urgent and grave concerns about certain serious misconduct by Board Members and staff of the California Air Resources Board (CARB). As you may already be aware, new facts have recently come to light that certainly evidence potential scientific fraud and a resulting cover-up within CARB that has not only completely compromised a full and fair public rulemaking process, but also jeopardizes the entire integrity of this once valuable state agency.

We request that your office immediately initiate an investigation into CARB's wrongdoing including, but not limited to, any and all legal and ethical violations committed by the CARB Chair, Board Members, and staff relating to CARB employee Hien Tran's misrepresented credentials and subsequent non-disclosure and cover-up of such crucial information. To the extent there are any potential criminal improprieties, it may be fitting to call for the Attorney General to initiate a separate investigation.

We also request the immediate temporary suspension of all impacted diesel engine regulations until all investigations are complete. Should the investigations verify CARB's misconduct, we prospectively request permanent suspension of all impacted regulations, and a renewed, unprejudiced rulemaking process be conducted. Additionally, we are requesting you ensure that CARB initiates all new scientific reports that conclusively establish that diesel emissions directly cause premature deaths in California.

While clean air is certainly an admirable goal, a full and fair public rulemaking process should not be compromised to justify the end result, nor should California companies be unjustly run out of business. Thus, the public apology issued by Chair Nichols at the December 9, 2009 CARB Board Meeting is completely insufficient to remedy the situation.

The California Dump Truck Owners Association (CDTOA) is a trade association incorporated in 1941. Just two years ago, we represented 1,400 construction industry related trucking company members ranging in size from one truck to over 350 trucks. Today that number has diminished to just over 900 due to the recessionary economy, near-depressionary construction industry, CARB's off-road diesel engine rule, and unfortunately now, CARB's on-road regulation. While our members are predominately dump truck operators, we also represent a large segment of the construction industry that hauls other construction commodities as well.

We have identified the following misconduct by members of the Air Resources Board and its staff:

1. **Lead Technical Report Author Committed Credential Fraud** – The scientific basis for CARB's on-road diesel regulations is the October 24, 2008 CARB Staff Report on PM2.5 and Premature Deaths in California by lead author Hien T. Tran. However, lead author Tran admittedly misrepresented his qualifications and education, as he did not in fact have a Ph.D. from UC Davis as he had originally claimed. Rather, Tran purchased a mail-order Ph.D. degree in June 2007 from "Thornhill University," which operates out of a New York City UPS Store. As documented in CARB's April 2009 Notice of Adverse Action, CARB found Tran guilty of "fraud, dishonesty and other failure of good behavior". Further (page 4 of the Notice), CARB states "Since you were the lead author and project coordinator of this report which was used to support the Regulation, your lack of credibility has called into question the credibility of the entire Regulation." However, despite fundamentally misrepresenting his credentials, both upon hiring and when subsequently questioned, and jeopardizing years of rulemaking, Hien Tran still remains employed by the Air Resources Board. We find it

absurd that a 11 year employee who is very familiar with CARB's employment guidelines, was in fact only demoted and his salary was cut by a whopping \$1,066 per month to \$7,899 per month (\$94,788/yr.). He was not fired. We remain curious as to why CARB continues to protect this unethical employee.

2. **Key CARB Personnel Knew About Fraud, Yet Failed to Disclose Crucial Information to the Full CARB Board and Public Prior to Important Vote, and Subsequently Perpetrated a Cover-up** – Prior to approving an extremely costly regulation for the on-road rule affecting a million truck and bus owners on December 12, 2008, key CARB officials including the Board's Chairwoman Mary Nichols, Executive Director James Goldstene, Chief Legal Counsel Ellen Peter and at least one Board Member, Dr. John Balmes, had actual knowledge that the project leader Hien Tran had falsified his Ph.D. credentials. In addition, on December 3, 2008, Board Members Ronald Loveridge and Barbara Riordan were directly informed by four California scientists that Tran had misrepresented his Ph.D. However, the staff and Board Members chose to conceal this crucial information from both the full 11-member Board, as well as the public, until after the Board adopted the controversial on-road rule, which was based largely on the science and findings of this Tran study. Essentially, CARB purposefully withheld fundamental misrepresentations from the public in order to pass this contentious and costly rule.

In a November 10, 2009 email message to Board Member Dr. John Telles, CARB Chairwoman Mary Nichols admitted she knew of the falsified credentials prior to the Board's vote on December 12, 2008. She also acknowledged that Tran's conduct was illegal and unethical, and admitted that it was a "mistake" to have concealed the information from the other Board Members. Ms. Nichols justified her cover-up by claiming to know that Tran's report was true despite his lies, and therefore decided that the vote should go forward without revealing the "distraction" of his misrepresentations. Dr. Telles has since filed a formal November 16, 2009 complaint with CARB legal counsel claiming that key CARB officials had actual knowledge that Tran lied about his qualifications on or before December 10, 2008.

It is imperative to state the severe economic consequences this rule will have on California's already-struggling businesses and taxpayers. By CARB's own admission, the on-road rule alone will result in a \$5.5 billion cost to California's businesses, and tens of million to public school districts. Based on CARB's past documented regulatory underestimates, industry now calculates the costs of this rule alone to be over \$20 billion, at least four times the CARB's original estimate. Given the current economic collapse in this state, this regulation is likely to become the premiere "job-killer" government regulation of all time that will without a doubt cause businesses that are already operating under thin profit margins to either shut down or avoid business in California altogether. Certainly a rule with such huge financial consequences deserves a fair, unprejudiced reevaluation and substantiated scientific justification.

The purposeful withholding of information appears to be a violation of the Administrative Procedure Act (APA) which, governs the rule-making process in California and appears at Government Code section 11340, et seq. The purpose of the APA is to "advance meaningful public participation in the adoption of administrative regulations by state agencies." (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 908.) Moreover, "[t]he APA is expressly designed to establish 'basic minimum procedural requirements' governing the rulemaking process." (*California Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 505, quoting Government Code section 11346.) Regulations promulgated by CARB are subject to the APA. (Government Code section 39601, subd. (a).)

The Attorney General's Office has previously opined that these basic due process requirements of the APA are inconsistent with a state agency receiving ex parte communication on a matter pending before the agency. (44 Ops.Cal.Atty.Gen. 95 (1964).) By analogy, it is also inconsistent with the APA for CARB staff and Board Members to willfully conceal information from the public which may have impacted the nature of the public input, as well as the vote of the Board members in deciding whether to adopt the rule.

Government Code section 11346.2, subdivision (b)(2) requires a state agency to identify any scientific reports relied upon when proposing a new regulation. While CARB identified Mr. Tran's report, they failed to identify a crucial component – the fact that Mr. Tran did not have the credentials he purported to have *in the report*. It is worth noting that on page three of the original report, Mr. Tran is listed as having a Ph.D. However, the report that is currently available on the CARB website simply lists Mr. Tran without any degree. The public was further misled by a November 4, 2008 letter from Linda Adams, the Secretary for the Environmental Protection Agency (EPA). In the second paragraph of that letter, Ms. Adams states that Mr. Tran holds a doctorate from UC Davis. In other words, CARB willingly let the entire rulemaking process proceed upon a document (Tran's report) that was knowingly false in a material respect. Ms. Adams has not written another letter correcting this error.

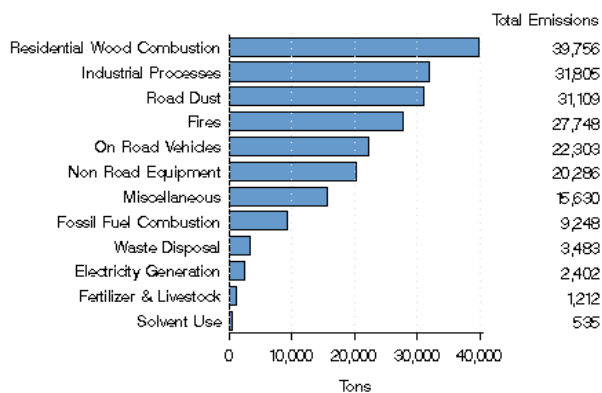
Government Code section 11346.8, subdivision (a) mandates that any state agency which is considering adopting a regulation "shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation." In the instant case, it appears that although CARB staff and some members (including Chairwoman Nichols) were aware of Mr. Tran's misrepresentations, they failed to present it to the full Board for their consideration prior to voting on adoption of the rule.

Finally, having fully reviewed the facts associated with Mr. Tran's fraud, and the ensuing Board cover-up, we believe that Mr. Tran may have been chosen as the lead author because he showed a propensity towards a lack of ethics within his work. We believe that he was easily manipulated and that he may or may not have even written the key report, but was clearly willing to put his name on it. We firmly believe that CARB's management and Chairwoman Nichols, are in fact, protecting Mr. Tran for what he knows about the "fixing" of his report and the Chairwoman and staff will do almost anything to insulate him from discovery, including retaining him as a CARB employee as they are currently doing. This is all confirmed by the fact that "someone or group" purposely minimized and obfuscated all 148 pages of critical comments by many credentialed parties that appeared to provide data, information, guidance or comments that would have exposed the truth that there is no proven causal relationship between diesel emission and premature deaths – at least in California. The draft report also miraculously becomes the "Final" very biased report ready for peer review. Then CARB sends it out to peer viewers that they and EPA use as their chosen consultants. We also have a growing concern that CARB merely hires "rubberstamp" scientific advisors like Jonathan Levy of Harvard University, Professor Arden Pope of BYU and Dr. Bart Ostro Cal/EPA's Office of Environmental Health Hazard Assessment who are all particularly lenient with their approval, such that political agendas are advanced rather than well-vetted policies supported by substantiated science.

3. **CARB Continues to Ignore Contrary Scientific Evidence**– While Tran's lack of adequate credentials should in itself call into question the validity of his report, independent scientists, including epidemiologist Dr. James E. Enstrom, Ph.D., M.P.H., continue to dispute the validity of his original report based on the following reasons:

- a. Substantial epidemiologic evidence from six different sources indicates that there is no current relationship between PM2.5 (specifically diesel PM) and premature deaths in California. The EPA's own (most recent 2005) California source data of PM2.5 indicates that on- and off-road diesel powered vehicles account for just over 10% (this includes on-road diesel trucks and cars) of the total PM2.5 in California and consequently fully regulating the existing fleet of on-road diesel powered vehicles will have virtually no quantifiable impact on reducing total PM2.5 levels in CA, but will cost in excess of \$20-billion to implement or \$896,740/ton. See EPA graph right:
- b. The key epidemiologists relied upon by CARB in the October 24, 2008 CARB Staff Report (Drs. C. Arden Pope, Michael Jerrett, Daniel Krewski, and Michael J. Thun) have clear conflicts of interest (CARB and EPA funding, involvement in review of report, etc.) Furthermore, they have repeatedly refused to allow reanalysis of the key American Cancer Society CPS II database, which is in violation of Federal Data Access Act.
- c. CARB has not considered several factors relevant to the justification of their draconian diesel emission regulations. California has the fourth lowest total age-adjusted death rate of all 50 states; California is currently experiencing 13% unemployment, and 25% underemployment the highest level since the Great Depression; none of the epidemiologic evidence used by CARB satisfies the Federal Judiciary Center standards for establishing a causal relationship between PM2.5 and premature deaths.
- d. On May 22, 2008 a Draft CARB Report on PM2.5 & Premature Deaths by Hien T. Tran, Ph.D., was published. On July 11, 2008 Tran had a detailed teleconference with Professor Enstrom and other key epidemiologists who explained their data which was extremely relevant to the rule. On July 11, 2008, 148 pages of mostly critical scientific comments were submitted to CARB in response to the May 22, 2008 Draft CARB Report. The October 24, 2008 Final CARB Report does not properly include or address the critical comments by Professors Enstrom, Moolgavkar, and North, Drs. Dunn and Lipfert, and others.
- e. Additionally, it is also significantly of note that pursuant to California Health and Safety Code Sections 39670-39671, the CARB Scientific Review Panel (SRP) on Toxic Air Contaminants (TAC) was not legally constituted when it identified diesel exhaust as TAC on April 22, 1998. The Pacific Legal Foundation filed a lawsuit on June 18, 2009 challenging the matter in Sacramento Superior Court (*Brown v. Adams*), in which CDTOA is listed as a petitioner.

PM2.5 Emissions by Source Sector
in California in 2005



At the December 9, 2009 CARB meeting, the Board reluctantly agreed to reconsider opening Tran's disputed scientific report due to the fraudulent nature of his credentials. However, we continue to question CARB's true earnestness in reevaluating this report. As you will note, James Goldstene, CARB's Executive Officer, has stated numerous times that the Tran report previously "went through three levels of formal, independent, external peer review before the report was finalized, and did not rely on the health research or original work of ARB staff." Goldstene said the findings were then reviewed again when the CARB asked its 10 expert advisers to examine the report – nine stood by their earlier findings, and one did not respond. CARB staff provided copies of the comments of CARB Chief Legal Counsel Peter and Goldstene. The Board and staff also noted that the study ultimately was peer-reviewed by a number of experts, "with all reviewers finding out it was methodology scientifically sound and reasonable." But because the report "provides important input into the regulation, which in turn results in increased regulations to the trucking industry (whose effects are far reaching), the credibility of the lead author and project coordinator is paramount," CARB noted this in its own adverse action report against Tran. However, Mr. Goldstene fails to acknowledge that the October 24, 2008 Final CARB Report does not properly include or address the critical comments by Professors Enstrom, Moolgavkar, and North, Drs. Dunn and Lipfert, and others, as stated above.

In his October 27, 2009 memo to the CARB members Goldstene wrote "Second, we received comments throughout the process, including review of the final report, from three advisors: Professor Jonathan Levy of Harvard University, Professor Arden Pope of BYU and Dr. Bart Ostro of Cal/EPA's Office of Environmental Health Hazard Assessment." All three advisors have a clear conflict of interest because they reviewed their own research in the Draft Staff Report and the Final Staff Report. Levy authored two papers that are cited: Levy 2000 (page 23); Ostro 2006JAWMA (Appendix 2, page A-12). Pope authored nine papers that are cited: Pope 1989, 1991, 1995, 1996, 2002, 2004, and 2006; Dockery 1993; and Jerrett 2005. Ostro authored two papers that are cited: Ostro 2006EHP and Ostro 2006JAWMA. Incredibly, Levy and Ostro authored their 2006 paper (Ostro 2006JAWMA) with Hien Tran: "The health benefits of reduced tropospheric ozone in California." J Air Waste Manage Assoc. 2006 Jul; 56(7):1007-21.

Then Goldstene wrote "Third, our draft report was reviewed following the Cal/EPA external scientific peer review guidelines for independent review. In this process, the University of California at Berkeley Institute of the Environment selects the peer reviewers without input from staff. Candidates were accepted as reviewers only if their disclosure information showed they had no conflict of interest related to the report. The six reviewers identified by the University of California at Berkeley and selected by the Cal/EPA Project Director to review the proposed methodology in the PM2.5 Mortality staff report were: Jeff Brook from Environment Canada, Professor Mark Eisner of the University of California at San Francisco, Professor Richard Flagan of the California Institute of Technology, Professor Alan Hubbard of the University of California at Berkeley, Professor Joel Kaufman of the University of Washington, and Professor Joel Schwartz of Harvard University.

Contrary to Goldstene's statement above, three of these peer reviewers have a clear conflict of interest. Based on a PubMed.gov search, Eisner has published 65 papers during 1998-2009 with CARB Scientific Review Panel (SRP) member Paul D. Blanc, who has been a SRP member since the SRP identified diesel exhaust as a Toxic Air Contaminant in 1998. Eisner has published 17 papers during 2003-2009 with CARB member John R. Balmes and 16 of these papers include Blanc as a co-author. Kaufman authored three papers that are cited in the Final Staff Report: Goss 2004, Miller 2004, and Miller 2007. Schwartz authored five papers that are cited: Schwartz 1996, 2002, and 2008; Laden 2006; and Franklin 2007. Additional investigation may reveal further conflicts of interest among these reviewers.

In light of these astonishing conflicts, we are formally requesting you ensure CARB reopens Tran's disputed scientific report with a fresh panel of truly independent peer reviewers.

In conclusion, we have worked closely with CARB to help its staff to better understand how our industry operates. But after helping facilitate these efforts, there was a total unwillingness by CARB management and some Board Members to be fair and balanced with its analysis and our reasonable suggestions similar to DTCC's. We are a strong proponent for clean air and clean diesel trucks and can provide many examples of that commitment. But we also believe that these rules need to strike the right balance between protecting our environment, our economy and the businesses that drive it.

The defenders of CARB's diesel emissions science continue to state that, even if they may have disparaged doubters and excluded contrary points of view from qualified peers, their science and peer-reviewers are still the best. CARB's science is the best we're told, because it's the most-published and most-cited – at least within their same peer-reviewed activist, academic world.

The Clean Air Act charges these (CARB/EPA) environmentally-focused governmental agencies with setting air pollution health standards. But this means that federal regulators and their state counterparts decide when their own jobs are finished. Not surprisingly, no matter how clean the air gets, CARB and EPA continue to find unacceptable risks – risks that appear to be even contrived and artificial. The EPA and CARB's powers and budgets (CARB's is \$630-million alone), as well as those of environmentalists and activist academics, depend on a continued public perception that there are many serious health problems to solve – as we get increasing healthier

and live longer. Yet these same regulators are also major funders of the many frivolous and wasteful health research studies intended to demonstrate the need for more regulation. These agencies now also provide tens, if not hundreds of millions of dollars a year to environmental activist groups, which use the money to manipulate public opinion into believing that pollution is now responsible for virtually every health problem we have. Then they arrogantly seek increases in their powers and budgets with expectations of total immunity from their actions. These conflicts of interest largely explain the ubiquitous exaggeration of air pollution levels and health risks, even as air quality has steadily improved. Power corrupts, but absolute power corrupts absolutely – this is CARB's world!

In light of these facts here, the public and especially the diesel equipment owners most harmed from these regulations need to understand why CARB disregards ethical behavior if their science is as indisputable as they claim.

We, the taxpayers and small businesses most affected by these draconian regulations, believe that a complete investigation into these factual claims touched on here in this letter, is the only reasonable and responsible course that your administration should take in dealing with this serious CARB misconduct. A mere apology is completely inadequate and downright offensive. We also request the immediate temporary suspension of all impacted diesel engine regulations until the investigation is complete.

Respectfully,

Lee Brown
CDTOA Executive Director

Cc: Air Resources Board Members:

Dr. John R. Balmes, M.D.
Ms. Sandra Berg
Ms. Dorene D'Adamo
Mr. Ken Yeager
Ms. Lydia H. Kennard
Mr. Ronald O. Loveridge
Ms. Barbara Riordan
Mr. Ron Roberts
Dr. Daniel Sperling, Ph.D.
Dr. John G. Telles, M.D.

Members, California State Legislature
Members, California Congressional Delegation
Ms. Linda Adams, Secretary, California EPA
Mr. Dale Bonner, Secretary, California BT&H

CDTOA Executive Committee & Board
Jeanne Cain, Executive Vice President, California Chamber of Commerce
Brooks Ellison, Ellison Wilson Advocacy, CDTOA General Counsel & Legislative Advocate
Sean Edgar, Clean Fleets Coalition
Dr. James E. Enstrom, Ph.D., M.P.H.
Members of the DTCC & CIAQC