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Case Number  
34-2009-80000266

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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SACRAMENTO

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13 NORMAN R. BROWN; ROBINSON ENTERPRISES, )  
LTD.; NORTH BAY CORPORATION; CALIFORNIA )  
14 DUMP TRUCK OWNERS ASSOCIATION; )  
SOUTHERN CALIFORNIA CONTRACTORS )  
15 ASSOCIATION; CONSTRUCTION INDUSTRY AIR )  
QUALITY COALITION; CRANE OF UKIAH, INC.; )  
16 DIAMOND D GENERAL ENGINEERING, INC.; and )  
MHS CORPORATION COMPACTION RENTALS, )

No. \_\_\_\_\_

**VERIFIED PETITION  
FOR WRIT OF MANDATE  
(Code Civ. Proc. §1085)**

17 Petitioners,

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v.

19 LINDA ADAMS, in her official capacity as Secretary, )  
California Environmental Protection Agency; )  
20 KAREN BASS, in her official capacity as Speaker )  
of the California Assembly; THE CALIFORNIA )  
21 SENATE COMMITTEE ON RULES; and )  
22 MARK G. YUDOF, in his official capacity as )  
President of the University of California, )

23 Respondents.  
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1           3.       Petitioner North Bay Corporation is an "S" corporation organized under the laws  
2 of the State of California. North Bay has a continuing interest and commitment in seeing  
3 Respondents fulfill their duties under the Health and Safety Code in the nomination and  
4 appointment of members to the Scientific Review Panel. North Bay has at least one shareholder  
5 who is a citizen of the State of California. North Bay's shareholders include individuals who are  
6 beneficially interested in seeing Respondents fulfill their duties under the Health and Safety Code  
7 in the nomination and appointment of members to the Scientific Review Panel. Were it not for  
8 their representation by North Bay, these shareholders would find it difficult or impossible to act  
9 on their own to vindicate their beneficial interest in this matter. By this Petition, North Bay seeks  
10 to procure the enforcement of a public duty, namely, the nomination and appointment of new  
11 members to the Scientific Review Panel to replace those persons whose statutory terms have  
12 expired.

13           4.       Petitioner California Dump Truck Owners Association is a not-for-profit mutual  
14 benefit corporation organized under the laws of the State of California. The Association has a  
15 continuing interest and commitment in seeing Respondents fulfill their duties under the Health and  
16 Safety Code in the nomination and appointment of members to the Scientific Review Panel. The  
17 Association has at least one member who is a citizen of the State of California. The Association's  
18 members include individuals who are beneficially interested in seeing Respondents fulfill their  
19 duties under the Health and Safety Code in the nomination and appointment of members to the  
20 Scientific Review Panel. Were it not for their representation by the Association, these members  
21 would find it difficult or impossible to act on their own to vindicate their beneficial interest in this  
22 matter. By this Petition, the Association seeks to procure the enforcement of a public duty, namely,  
23 the nomination and appointment of new members to the Scientific Review Panel to replace those  
24 persons whose statutory terms have expired.

25           5.       Petitioner Southern California Contractors Association is a not-for-profit mutual  
26 benefit trade association organized under the laws of the State of California. The Association has  
27 a continuing interest and commitment in seeing Respondents fulfill their duties under the Health  
28 and Safety Code in the nomination and appointment of members to the Scientific Review Panel.

1 The Association has at least one member who is a citizen of the State of California. The  
2 Association's members include individuals who are beneficially interested in seeing Respondents  
3 fulfill their duties under the Health and Safety Code in the nomination and appointment of  
4 members to the Scientific Review Panel. Were it not for their representation by the Association,  
5 these members would find it difficult or impossible to act on their own to vindicate their beneficial  
6 interest in this matter. By this Petition, the Association seeks to procure the enforcement of a  
7 public duty, namely, the nomination and appointment of new members to the Scientific Review  
8 Panel to replace those persons whose statutory terms have expired.

9 6. Petitioner Construction Industry Air Quality Coalition is a not-for-profit mutual  
10 benefit corporation organized under the laws of the State of California. The Coalition has a  
11 continuing interest and commitment in seeing Respondents fulfill their duties under the Health and  
12 Safety Code in the nomination and appointment of members to the Scientific Review Panel. The  
13 Coalition has at least one member who is a citizen of the State of California. The Coalition's  
14 members include individuals who are beneficially interested in seeing Respondents fulfill their  
15 duties under the Health and Safety Code in the nomination and appointment of members to the  
16 Scientific Review Panel. Were it not for their representation by the Coalition, these members  
17 would find it difficult or impossible to act on their own to vindicate their beneficial interest in this  
18 matter. By this Petition, the Coalition seeks to procure the enforcement of a public duty, namely,  
19 the nomination and appointment of new members to the Scientific Review Panel to replace those  
20 persons whose statutory terms have expired.

21 7. Petitioner Crane of Ukiah, Inc., is a California "C" corporation. Crane of Ukiah has  
22 a continuing interest and commitment in seeing Respondents fulfill their duties under the Health  
23 and Safety Code in the nomination and appointment of members to the Scientific Review Panel.  
24 Crane of Ukiah has at least one shareholder who is a citizen of the State of California. Crane of  
25 Ukiah's shareholders include individuals who are beneficially interested in seeing Respondents  
26 fulfill their duties under the Health and Safety Code in the nomination and appointment of  
27 members to the Scientific Review Panel. Were it not for their representation by Crane of Ukiah,  
28 these shareholders would find it difficult or impossible to act on their own to vindicate their

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1 | beneficial interest in this matter. By this Petition, Crane of Ukiah seeks to procure the enforcement  
2 | of a public duty, namely, the nomination and appointment of new members to the Scientific  
3 | Review Panel to replace those persons whose statutory terms have expired.

4 |         8.         Petitioner Diamond D General Engineering, Inc., is a California "C" corporation.  
5 | Diamond D has a continuing interest and commitment in seeing Respondents fulfill their duties  
6 | under the Health and Safety Code in the nomination and appointment of members to the Scientific  
7 | Review Panel. Diamond D has at least one shareholder who is a citizen of the State of California.  
8 | Diamond D's shareholders include individuals who are beneficially interested in seeing  
9 | Respondents fulfill their duties under the Health and Safety Code in the nomination and  
10 | appointment of members to the Scientific Review Panel. Were it not for their representation by  
11 | Diamond D, these shareholders would find it difficult or impossible to act on their own to vindicate  
12 | their beneficial interest in this matter. By this Petition, Diamond D seeks to procure the  
13 | enforcement of a public duty, namely, the nomination and appointment of new members to the  
14 | Scientific Review Panel to replace those persons whose statutory terms have expired.

15 |         9.         Petitioner MHS Corporation Compaction Rentals is a California "C" corporation.  
16 | Compaction Rentals has a continuing interest and commitment in seeing Respondents fulfill their  
17 | duties under the Health and Safety Code in the nomination and appointment of members to the  
18 | Scientific Review Panel. Compaction Rentals has at least one shareholder who is a citizen of the  
19 | State of California. Compaction Rentals' shareholders include individuals who are beneficially  
20 | interested in seeing Respondents fulfill their duties under the Health and Safety Code in the  
21 | nomination and appointment of members to the Scientific Review Panel. Were it not for their  
22 | representation by Compaction Rentals, these shareholders would find it difficult or impossible to  
23 | act on their own to vindicate their beneficial interest in this matter. By this Petition, Compaction  
24 | Rentals seeks to procure the enforcement of a public duty, namely, the nomination and appointment  
25 | of new members to the Scientific Review Panel to replace those persons whose statutory terms  
26 | have expired.

27 |         10.        Respondent Linda Adams is Secretary of the California Environmental Protection  
28 | Agency, and she is sued in her official capacity. Pursuant to Section 39670(b)(1) of the Health and

1 Safety Code, Secretary Adams is entrusted with the authority, and therefore has the public duty,  
2 to appoint five members of the Scientific Review Panel.

3 11. Respondent Karen Bass is Speaker of the California Assembly, and she is sued in  
4 her official capacity. Pursuant to Section 39670(b)(2), Speaker Bass is entrusted with the authority,  
5 and therefore has the public duty, to appoint two members of the Scientific Review Panel.

6 12. Respondent California Senate Committee on Rules is one of several standing  
7 committees within the state senate. Pursuant to Section 39670(b)(3), the Committee on Rules is  
8 entrusted with the authority, and therefore has the public duty, to appoint two members of the  
9 Scientific Review Panel.

10 13. Respondent Mark G. Yudof is President of the University of California (U.C.), and  
11 he is sued in his official capacity. Pursuant to Section 39670(b)(4), President Yudof is entrusted  
12 with the sole authority, and therefore has the public duty, to nominate individuals to serve on the  
13 Scientific Review Panel.

#### 14 VENUE

15 14. Venue is proper in this Court pursuant to Code of Civil Procedure section 395(a)  
16 because the Respondents reside and execute their public duties in the County of Sacramento.

#### 17 LEGAL BACKGROUND

18 15. The California Air Resources Board (CARB), established in 1967 by the Mulford-  
19 Carrell Act, *see* Stats. 1967, ch. 1545, at 3680, is the state's leading clean air agency. It is  
20 composed of 11 members appointed by the governor with the consent of the senate. Health &  
21 Safety Code § 39510. Among its statutory missions is to regulate toxic air contaminants within the  
22 state to protect human health. *See id.* § 39650.

23 16. In identifying and regulating toxic air contaminants, CARB uses a number of  
24 statutory factors. *See id.* §§ 39660(c)(1)(A)-(D); 39660(c)(2)(A)-(B); §§ 39665-39666. In this  
25 process, CARB relies in part upon the input and advice of the Scientific Review Panel on Toxic  
26 Air Contaminants (Scientific Review Panel). *See id.* § 39660(c)(3); *see also id.* § 39650(d).

27 17. Prior to identifying a toxic air contaminant, CARB must prepare a report to support  
28 its action. *Id.* § 39661(a)(1). The Scientific Review Panel reviews the report's use of scientific

1 procedures and methods, as well as the data supporting the report's conclusions. *Id.* § 39661(b).  
2 The Scientific Review Panel's findings are then submitted to CARB. *Id.*

3 18. If the Scientific Review Panel determines that the CARB report "is not based upon  
4 sound scientific knowledge, methods, or practices," then CARB must amend the report consistent  
5 with the Scientific Review Panel's comments and resubmit the amended report to the Scientific  
6 Review Panel prior to initiating rulemaking. *Id.* § 39661(c). If the Scientific Review Panel  
7 approves of the report, then CARB must within ten days prepare a hearing notice and a proposed  
8 regulation designating the toxic air contaminant. *Id.* § 39661(b).

9 19. The Scientific Review Panel and CARB have determined that particulate emissions  
10 from diesel-fueled engines are toxic air contaminants. *See* Cal. Code Regs. tit. 17, § 93000.  
11 Among the regulations enacted by CARB that have had a strongly negative effect on Petitioners  
12 and their members are the airborne toxic control measure for stationary compression ignition  
13 engines, *id.* §§ 93115-93115.15, and the regulations governing in-use off-road diesel vehicles, Cal.  
14 Code Regs. tit. 13, §§ 2449-2449.3. Moreover, CARB is currently considering new and  
15 burdensome regulations governing in-use on-road diesel vehicles. *See* Cal. Env'tl. Prot. Agency,  
16 *Proposed Regulation for In-Use On-Road Diesel Vehicles* (2008), available at  
17 <http://www.arb.ca.gov/regact/2008/truckbus08/tbisor.pdf> (last visited May 22, 2009). All of these  
18 regulations are dependant upon CARB's August 27, 1998, declaration that particulate matter  
19 emissions from diesel-fueled engines are a toxic air contaminant. This declaration was based on  
20 the Scientific Review Panel's April 22, 1998, identification of diesel exhaust as a toxic air  
21 contaminant.

22 20. The Health and Safety Code requires the Scientific Review Panel to be composed  
23 of nine members who are "highly qualified and professionally active or engaged in the conduct of  
24 scientific research." Scientific Review Panel members serve for a term of three years. *See id.*  
25 § 39670(b). Five members are appointed by the Secretary of Environmental Protection, two by the  
26 Senate Committee on Rules, and two by the Speaker of the Assembly. *See id.* § 39670(b)(1)-(3).

27 21. The nomination of potential Scientific Review Panel members is provided for as  
28 follows:

1 Members of the panel shall be appointed from a pool of nominees submitted to each  
2 appointing body by the President of the University of California. The pool shall  
3 include, at a minimum, three nominees for each discipline represented on the panel,  
and shall include only individuals who hold, or have held, academic or equivalent  
appointments at universities and their affiliates in California.

4 *Id.* § 39670(b)(4). Hence, to serve as a Scientific Review Panel member in the first instance, or  
5 to be validly reappointed to serve, a person must (1) be selected by the U.C. President as a member  
6 of the nomination pool, and (2) be appointed by one of the aforementioned appointing authorities.

7 *See id.* § 39670(b).

### 8 ALLEGATIONS

9 22. On March 20, 2009, Petitioners' counsel sent a request to CARB under the Public  
10 Records Act (PRA), Gov't Code § 6251, *et seq.*, requesting documents setting forth the date upon  
11 which each currently serving member of the Scientific Review Panel was appointed to his or her  
12 current three-year term. *See* Exhibit A, a true and correct copy of which is attached to this Petition,  
13 and is incorporated herein by reference.

14 23. On April 10, 2009, Petitioners' counsel received CARB's final response to the PRA  
15 request. *See* Exhibit B, a true and correct copy of which is attached to this Petition, and is  
16 incorporated herein by reference. According to CARB's documents, the following are the dates  
17 upon which the Scientific Review Panel's current members were last appointed to their  
18 positions: Dr. Gary D. Friedman, January 17, 1991; Dr. S. Katherine Hammond, April 28, 2008;  
19 Dr. Joseph R. Landolph, Jr., February 27, 2003; Dr. Charles G. Plopper, July 29, 2004;  
20 Dr. Stanton A. Glantz, January 9, 2008; Dr. Paul Blanc, February 4, 2009; Dr. Craig V. Byus,  
21 July 19, 2006; and Dr. John R. Froines, July 19, 2006. (The Scientific Review Panel slot for  
22 atmospheric science is currently vacant.)

23 24. On July 16, 2008, Petitioners' counsel sent a letter to the Scientific Review Panel's  
24 nominating and appointing authorities. *See* Exhibit C, a true and correct copy of which is attached  
25 to this Petition, and is incorporated herein by reference. The letter sets forth Petitioners' concerns  
26 as to whether the Health and Safety Code's prescriptions regarding the nomination and  
27 appointment of Scientific Review Panel members have been observed. In particular, the letter  
28 explains that the Health and Safety Code requires for each Scientific Review Panel appointment

1 that the U.C. President first select a slate of nominees for the open Scientific Review Panel  
2 position. *See id.* at 2.

3 25. By letter dated July 24, 2008, Respondent Yudof replied to Petitioners' counsel's  
4 July 16, 2008, letter. *See Exhibit D*, a true and correct copy of which is attached to this Petition,  
5 and is incorporated herein by reference. In his letter, President Yudof states that his office's  
6 practice is not to prepare Scientific Review Panel nominations until requested to do so by CARB  
7 staff. The letter also states that President Yudof's office was last requested to provide Scientific  
8 Review Panel nominations in 2004.

9 26. Petitioners are informed and believe that sometime after Respondent Yudof sent his  
10 July, 2008, letter, Respondent Yudof was requested to provide a list of nominees for the Scientific  
11 Review Panel member slot occupied by Dr. Paul Blanc, and that Dr. Blanc was one of the  
12 nominees. Respondent Senate Committee on Rules reappointed Dr. Blanc to his position in  
13 February, 2009. With the exception of Dr. Blanc, no currently serving Scientific Review Panel  
14 member has been nominated by the U.C. President within the last five years.

15 27. By letter dated January 22, 2009, Respondent Adams replied to Petitioners'  
16 counsel's July 16, 2008, letter. *See Exhibit E*, a true and correct copy of which is attached to this  
17 Petition, and is incorporated herein by reference. In her letter, Secretary Adams states that,  
18 although initiating the nomination and appointment process for Scientific Review Panel members  
19 "has merit, and we will look into implementing it," in her view new appointments are not legally  
20 required, notwithstanding that "in some cases members have not been reappointed when their three  
21 year terms ended."

22 28. To date, Petitioners' counsel has received no other responses to the July 16, 2008,  
23 letter.

24 **CAUSE OF ACTION AGAINST ALL RESPONDENTS FOR**  
25 **ORDINARY MANDAMUS (Cal. Code of Civ. Proc. § 1085)**

26 29. Petitioners hereby incorporate by reference the allegations of the paragraphs set  
27 forth above as though fully set forth herein.

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3. For such other and further relief as the Court may deem just and proper.

DATED: June 12, 2009.

Respectfully submitted,

PAUL J. BEARD II  
DAMIEN M. SCHIFF  
JOSHUA P. THOMPSON

By   
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