SUMMARY OF LITIGATION CHALLENGING
THE CALIFORNIA HEAVY-DUTY VEHICLE INSPECTION PROGRAM

The Heavy Duty Vehicle Inspection Program (HDVIP) regulations (§§ 2180-2187, title 13, California Code of Regulations) became effective on November 21, 1991. The regulations authorize inspectors of the Air Resources Board (ARB or Board) to inspect heavy-duty vehicles and issue citations for excessive smoke. The regulations provide that the opacity of smoke emitted by the vehicles is to be measured by a "snap-idle" test. Opacity as measured by the snap-idle test generally may not exceed either 40 or 55 percent, depending on the age and characteristics of the vehicle.

Companion regulations (§§ 60075.1 - 60075.47, title 17, California Code of Regulations) provide for an administrative review of any issued citation. Decisions of the administrative hearing officer may be challenged in state court pursuant to California Code of Civil Procedure (CCP) section 1094.5. CCP section 1085 allows persons to challenge regulations adopted by a state agency on the ground that they are arbitrary, capricious, or lacking in evidentiary support. It also authorizes courts to enjoin future enforcement of invalid regulations.

As of October 1997, four different lawsuits have been brought challenging the HDVIP. In each case, counsel for the California Trucking Association (CTA) have represented the plaintiffs. At each level in each case, the courts have ruled against the plaintiffs bringing the lawsuits.

I. ***Valley Spreader Inc. v California Air Resources Board***, Imperial County Superior Court Case No. 72969 filed December 30, 1991

This first legal challenge to the HDVIP regulations was filed on December 30, 1991 by a operator of heavy-duty vehicles in Imperial County. The plaintiff asked the court to invalidate the HDVIP regulations. A five-day hearing was conducted by the court intermittently during October and November 1992. After considering the evidence presented by the parties, on May 5, 1993 the Imperial County Superior Court ruled as follows:

1. The ARB had authority to adopt smoke emission standards for in use on-road heavy-duty diesel-powered vehicles.

2. The ARB complied with all procedural requirements in adopting the regulations.

3. The regulations were supported by substantial evidence and were not arbitrary and capricious.

4. The 40 and 55 percent cut points were reasonably substantiated before being enacted by the Board.

5. The snap idle test was not chosen in an arbitrary or capricious manner.

6. The data used to determine the smoke opacity cut point was reasonably selected based on data collected from the ARB pilot study.

7. The *Kelly*[1] evidentiary rule was not applicable to the introduction of snap idle-test results in the HDVIP administrative hearings.

The plaintiffs chose not to appeal the *Valley Spreader* decision.

II. ***Harris Transport et al. v. California Air Resources Board***, Sacramento County Superior Court Case No. CV374301 filed April 29, 1993, *appeal denied* January 31, 1995, 32 Cal.App.4th 1472.

The *Harris* case was brought on behalf of ten trucking companies who were issued citations for excessive smoke. They challenged the citations in administrative hearings, asserting that the smoke test results were not admissible under the *Kelly* rule. The hearing officer upheld the citations. In their Petition filed with the Sacramento County Superior Court on April 29, 1993, the plaintiffs raised many of the same issues raised in *Valley Spreader*. They asked the court to order the ARB to set aside the decisions on the individual citations, and to enjoin the ARB from enforcing the HDVIP program in the future.

Sacramento Superior Court Judge James Ford denied the petitions after a July 30, 1993 hearing, and the plaintiffs appealed this ruling to the California Third District Court of Appeal. In a January 31, 1995 published decision, the Court of Appeal affirmed Judge Ford's ruling. The court directly addressed and rejected the plaintiffs' argument that the *Kelly* rule applied to the admissibility of snap-idle test results in citation hearings. Because the regulations identify standards for opacity *as measured by the snap-idle test*, the test results are introduced not to scientifically prove a particular opacity level but rather to establish the results of the snap-idle test. The court explained:

> Whether the snap-idle test is scientifically accepted as an accurate measure of vehicle emissions is not the relevant issue at this juncture. Rather, it is whether the plaintiffs' vehicles failed the test prescribed by the Board, i.e. the snap-idle test. If a vehicle fails the snap-idle test, it is in violation of Board regulations and the owner is subject to citation. In this context, *Kelly* is inapplicable. (32 Cal.App.4th 1472, 1479.)

While the *Harris* plaintiffs had originally claimed that the HDVIP regulations were

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[1] The "*Kelly*" rule (formerly called the "*Kelly/Frye*" rule) sets the evidentiary standard for determining the admissibility of evidence from new scientific techniques in the state courts. In *People v. Kelly* (1976) 17 Cal.3d 241, the California Supreme Court held that in order for scientific evidence to be admissible, the prosecution must show "general acceptance of the new technique in the relevant scientific community." This rule is applied to the use of "lie detector" tests, for instance, which are not admissible as "proof" of a person's truthfulness or guilt.

unlawful, the Court of Appeal found they had abandoned this challenge at the hearing before the trial court and "had conceded the regulations had been properly adopted." (*Id.* at 1480). The plaintiffs had also abandoned any claims the tests had been improperly conducted. (*Id.*) Finally, the court held that the plaintiffs were not entitled to consideration of an order enjoining future enforcement of the HDVIP program, because the plaintiffs have the option of raising their claims at future citation hearings.

Dissatisfied with the Court of Appeal's decision in *Harris*, the plaintiffs filed a Petition for Rehearing on February 14, 1995 which the court denied on February 24, 1995. The CTA attorneys then filed a Petition for Review with the California Supreme Court on March 10, 1995. The Supreme Court denied the petition on April 19, 1995, thereby ending the litigation of this case.

III. ***Aura Hardwood v. Air Resources Board***, Sacramento County Superior Court Case No. CV377421 filed March 11, 1994, *appeal denied* August 31, 1995 (3rd Cir. No. C019826)

Shortly before the California Supreme Court denied the final *Harris* appeal, on March 11, 1994 the CTA attorneys filed this new lawsuit challenging the HDVIP program. The *Aura* plaintiffs were 12 owners of heavy-duty trucks whose citations had been upheld following administrative hearings. The hearing officer denied the plaintiffs' argument that the *Kelly* rule applied to introduction of the smoke test results, and also denied their claim that the HDVIP regulations are invalid. The *Aura* plaintiffs sought a writ of mandate from the Sacramento Superior Court commanding the Board to: (a) stay the enforcement of the HDVIP, (b) stay review by the administrative hearing process, and (c) ban the use of the snap idle test procedure. Once again Sacramento Superior Court Judge Ford denied the petition after a full hearing on October 21, 1994.

The *Aura* plaintiffs then appealed Judge Ford's determination to the Third District Court of Appeal. On August 31, 1995, the appellate court again upheld the validity of the Heavy Duty Vehicle Inspection Program. Citing the *Harris* decision, the *Aura* court held that the *Kelly* rule does not apply to the use of smoke test results to demonstrate a smoke violation in the HDVIP. However, the *Aura* court also held that the *Aura* plaintiffs had preserved their challenge to the legality of the underlying regulations. The Court of Appeals considered the plaintiffs' arguments and then upheld the regulations. First, the court rejected the plaintiffs' "false premise that the Board's rulemaking proceedings are subject to the evidentiary requirements of *Kelly*." Noting the statutory qualifications for appointment to the Board, the court stated, "there is no need to protect the Board members from being misled by scientific evidence." (Slip op. at 12) The court then concluded,

> The record in this case reveals that the Board acted within the scope of its authority and its action adopting the HDVIP regulations was not arbitrary, capricious, or lacking in evidentiary support. We therefore conclude the [trial] court was correct in deferring to the Board's expertise and denying the petition for writ of mandate under Code of Civil Procedure sections 1085 and 1094.5. (Slip

op. at 13)

Finally the court held that the 1993 amendments to Health and Safety Code 44011.6 did not affect the validity of the HDVIP regulations. Unlike *Harris*, the *Aura* decision was not certified by publication. This means that it does not serve as precedent in future lawsuits.

The CTA attorneys petitioned the Court of Appeal for a rehearing, and the petition was denied on September 26, 1995. They next petitioned the California Supreme Court for review, and that petition was denied on November 15, 1995.

IV. ***Viviano Trucking v. California Air Resources Board***, Sacramento Superior Court Case No. CV376933 filed January 14, 1994, *appeal pending* Third Cir. No. C026354

The initial Petition in this case, involving a total of 290 plaintiffs, was filed before the *Aura* petition and raised most of the same issues. In October 1994 the trial court stayed the *Viviano* proceedings until completion of the *Aura* case as it was thought that the *Aura* decision could resolve the *Viviano* issues. However, after *Aura* was decided in favor of the ARB, on June 14, 1996 the CTA counsel filed a First Amended Petition in *Viviano*. The First Amended Petition raised both old and new claims — that the *Kelly* rule applied both to admission of test results at administrative hearings and adoption of the HDVIP regulations, that the authorizing statute (Health and Safety Code §44011.6) and the inspectors' practices violated the constitutional rights of the plaintiffs to be free from illegal searches and seizures, and that the authorizing statute violates the plaintiffs' constitutional right to be free from vague legislation. The "constitutional" issues had generally not been raised by the plaintiffs' CTA counsel at the administrative hearings.

The *Viviano* First Amended Petition came before Judge Ford on March 7, 1997, at which time he denied the petition. The CTA counsel then filed a notice of an appeal to the Third Appellate District of the Court of Appeals — the same court that had rejected the appeals in the *Harris* and *Aura* cases. The Appellants' Opening Brief was filed on August 7, 1997, and the ARB filed its Respondents' Brief on September 10, 1997.