

**WANGER JONES HELSLEY PC**  
ATTORNEYS

OLIVER W. WANGER  
TIMOTHY JONES\*  
MICHAEL S. HELSLEY  
RILEY C. WALTER  
PATRICK D. TOOLE  
SCOTT D. LAIRD  
JOHN P. KINSEY  
KURT F. VOTE  
TROY T. EWELL  
JAY A. CHRISTOFFERSON  
MARISA L. BALCH  
AMANDA G. HEBESHA\*\*  
PETER M. JONES†  
MICHAEL L. WILHELM†  
STEVEN M. CRASS†  
JEFFREY B. PAPE†  
DEBORAH K. BOYETT  
STEVEN K. VOTE  
NICOLAS R. CARDELLA  
GIULIO A. SANCHEZ  
CHRISTOPHER A. LISIESKI\*\*\*  
BENJAMIN C. WEST  
HUNTER C. CASTRO  
STEPHANIE M. HOSMAN  
GARRETT R. LEATHAM††  
RACHEL L. POMBO  
NATHAN J. MARTIN

265 E. RIVER PARK CIRCLE, SUITE 310  
FRESNO, CALIFORNIA 93720

MAILING ADDRESS  
POST OFFICE BOX 28340  
FRESNO, CALIFORNIA 93729

TELEPHONE  
(559) 233-4800  
FAX  
(559) 233-9330



CLOVIS OFFICE:  
642 Pollasky Avenue  
Suite 100  
Clovis, California 93612

OFFICE ADMINISTRATOR  
LYNN M. HOFFMAN

Writer's E-Mail Address:  
jkinsey@wjhattorneys.com

Website:  
www.wjhattorneys.com

\* Also admitted in Washington  
\*\* Also admitted in Idaho  
\*\*\* Also admitted in Virginia  
†† Also admitted in Utah  
† Of Counsel

January 6, 2022

**VIA ELECTRONIC SUBMISSION**

Clerk's Office  
CALIFORNIA AIR RESOURCES BOARD  
1001 "I" Street  
Sacramento, CA 95814

**Re: Proposed Amendments to Airborne Toxic Control Measure for  
In-Use Diesel-Fueled Transport Refrigeration Units (TRU)**

Dear Madam Clerk:

I am submitting the following comments on behalf of the California Trucking Association ("CTA") to the Proposed Amendments to Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets, and Facilities Where TRUs Operate (the "Proposed Amendments").

CTA has significant concerns regarding the Proposed Amendments, and in particular the provisions seeking to establish a schedule of fees (the "Proposed Fees") intended "to recover the costs" incurred by the California Air Resources Board's ("CARB") Executive Officer in "administering the TRU ACTM." (See Proposed Regulation, § 2477.21, subds. (a)(1), (b)(1).) In support of the Proposed Fees, the Initial Statement of Reasons cites Section 43019.1 of the Health & Safety Code, which authorizes the adoption of fees "to cover all or a portion of [CARB's] reasonable costs associated with the certification, audit, and compliance of off-road or nonvehicular engines and equipment, aftermarket parts, and emissions control components sold in" California. (Health & Saf. Code, § 43019.1, subd. (a)(1).)

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Under the APA, any proposed rulemaking must “be within the scope of authority conferred [upon the agency by the Legislature] and in accordance with standards prescribed by other provisions of law.” (Govt. Code, § 11342.1.) In addition, “whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” (Govt. Code, § 11342.2.) If a regulation is “not authorized by or is inconsistent with acts of the Legislature,” it is void. (*Terhune v. Superior Court* (1998) 65 Cal.App.4th 864, 873 [citations omitted].) These limitations on CARB’s rulemaking authority are enforceable through judicial review. (See, e.g., Govt. Code, § 11350, subd. (a) [a “regulation . . . may be declared to be invalid for a substantial failure to comply with” the APA].)

The Proposed Fees are unlawful and impermissibly exceed CARB’s statutory authority. The only statutory authority CARB cites to support the adoption of the Proposed Fees is Section 43019.1 of the Health & Safety Code. Section 43019.1, however, is limited on its face to fees “to cover all or a portion of the state board’s reasonable costs associated with the certification, audit, and compliance of off-road or non-vehicular engines and equipment, aftermarket parts, and emissions control components sold in” California. (Health & Saf. Code, § 43019.1, subd. (a)(1).) And those fees may only be imposed on persons seeking certification. (*Id.*, subd. (a)(2).) There is no language in Section 43019.1 authorizing CARB to adopt fees for general administration of a regulation, or for a purpose other than costs incurred by CARB as part of the certification process. (See generally *id.*, subds. (a)(1), (a)(2).)

The language of Section 43019.1 is unambiguous, leaving CARB no discretion to interpret the statute as authorizing a fee for generally administrative costs. (See, e.g., *Bonnell v. Medical Bd. of Calif.* (2003) 31 Cal.4th 1255, 1264-65.) Section 43019.1 states:

- (a)(1) The state board may adopt a schedule of fees to cover all or a portion of the state board’s ***reasonable costs associated with the certification, audit, and compliance of off-road or nonvehicular engines and equipment, aftermarket parts, and emissions control components sold in the state***, as authorized pursuant to Sections 38560, 43013, and 43018 of this code and subdivision (h) of Section 27156 of the Vehicle Code. For purposes of this paragraph, “reasonable costs” does not include the state board’s costs recovered in a fee assessed pursuant to Section 43019.
- (2) For a certification not subject to a fee assessed by the state board pursuant to Section 43019, the state board may adopt a fee to cover all, or a portion of, the state board’s reasonable costs associated with each type of certification described in paragraph (1), ***to be paid by the entity seeking the certification***. The state board may assess a fee at the time of

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application and upon certification to spread the financial burden to entities remitting the fee.

(Health & Saf. Code, § 43019.1, subd. (a) [emphasis added].)

Here, Section 43019.1 plainly provides that the Proposed Fees may only be used to recover costs “associated with the certification, audit, and compliance of” regulated engines and equipment. (Health & Saf. Code, § 43019.1, subd. (a)(1).) There are no other circumstances under which CARB may charge a fee adopted pursuant to Section 43019.1. Moreover, Section 43019.1 only authorizes CARB to charge fees to “an entity seeking . . . certification.” (*Id.*, subd. (a)(2).) The statute includes no language authorizing CARB to impose a fee on any other person.<sup>1</sup>

As a result of the foregoing, CARB may not adopt the Proposed Regulations as currently drafted, as the Proposed Fees exceed CARB’s statutory authority. CARB must instead revise Section 2477.21 to limit the provision to the recovery of CARB’s costs associated with the certification, audit, and compliance of motor vehicles, engines, off-road, or non-vehicular engines and equipment, aftermarket parts, and emissions control components sold in California. And those costs may only be recovered from persons seeking certification. (See Health & Saf. Code, § 43019.1, subds. (a)(1), (a)(2).)

Thank you for your consideration of these comments.

Respectfully submitted,



John P. Kinsey

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<sup>1</sup> The ISOR only relies upon Section 43019.1 of the Health & Safety Code as authority for the Proposed Fees. To the extent, however, that CARB seeks to also rely upon Section 43019, that Section is likewise inapplicable. Specifically, Section 43019 limits the purpose of fees adopted thereunder to those associated with “the certification, audit, and compliance of motor vehicles and engines sold in the state to cover [CARB’s] reasonable costs of implementing the certification, audit, and compliance programs as authorized or required under the California Global Warming Solutions Act of 2006.” (Health & Safety Code, § 43019.)