

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is entered into between the California Air Resources Board (CARB), with its principal location at 1001 I Street, Sacramento, California 95814; and Five Harvest Co. Inc., with its principal location at 2121 E. 12<sup>th</sup> Street Oakland, California 94606, (collectively, the "Parties," or individually, "Party").

### **LEGAL BACKGROUND**

- (1) Purpose. The California Health and Safety Code mandates the reduction of emission of air pollution from motor vehicles, creates the Motor Vehicle Inspection Program, and requires CARB to adopt regulations that require owners and operators of heavy-duty vehicles to perform regular inspections of their vehicles for excess emissions. (Health & Saf. Code §§ 43013, 43018, 43701, 44011.6.)
- (2) Regulation. CARB adopted the "*Periodic Smoke Inspections of Heavy-Duty Diesel-Powered Vehicles*" Regulation (Cal. Code Regs., tit. 13, §§ 2190 et seq.) (PSIP Regulation) to reduce excess smoke opacity emissions from heavy-duty vehicles.
- (3) Regulatory Provisions. The PSIP Regulation requires owners and operators of heavy-duty diesel vehicles with gross vehicle weight ratings greater than 6,000 pounds that operate within the State of California to conduct annual smoke opacity inspections (or on-board diagnostic review for model year 2013 engines or newer) of their vehicles by a CARB-approved trained smoke tester, using smoke test equipment and procedures that comply with the Society of Automotive Engineers (SAE) procedures J1667, "*Snap Acceleration Smoke Test Procedure for Heavy-Duty Powered Vehicles.*" Owners and Operators must also keep records of this data and provide to CARB upon request. (Cal. Code Regs., tit. 13, §§ 2190-2194.)
- (4) Penalty Provisions. Failure to comply with the regulatory requirements is a violation of state law that may result in penalties up to forty thousand, seven hundred and twenty-five dollars (\$40,725) for each strict liability violation of the PSIP Regulation, respectively, for each day in which the violation occurs. (Health & Saf. Code, § 44011.6; Cal. Code Regs., tit.13, § 2190 et seq.)

### **CASE BACKGROUND**

- (5) Corporate Entity. At all relevant times, Five Harvest Co. Inc. was organized under the laws of State of California as a corporation and conducted business in the State of California
- (6) Allegations. This Settlement Agreement resolves Notice of Violation (NOV) 100413, which was issued on March 19, 2021. CARB alleges Five Harvest Co. Inc. violated the PSIP Regulation by owning or operating heavy-duty vehicles with gross vehicle weight greater than 6,000 pounds in California and failing to conduct

annual smoke opacity inspections, resulting in 4 violations, as outlined in Notice of Violation 100413. CARB alleges that if the allegations described in paragraphs 1 through 6 were proven, civil penalties could be imposed against Five Harvest Co. Inc. for each and every vehicle involved in the violations and each day.

- (7) Acknowledgment. Five Harvest Co. Inc. admits to the facts in paragraphs 1 through 6, but denies any liability resulting from said allegations.
- (8) Consideration. In consideration of the foregoing, and of the promises and facts set forth herein, the Parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed alleged violations and voluntarily agree to resolve this matter by means of this Settlement Agreement. In order to resolve the violations described herein, Five Harvest Co. Inc. has taken, or agrees to take, the actions enumerated below within the Terms and Conditions. Further, CARB accepts this Settlement Agreement in termination and full settlement of this matter.

### **TERMS AND CONDITIONS**

In consideration of CARB not filing a legal action against Five Harvest Co. Inc. for the alleged violations referred to above in the Legal Background and Case Background, and Five Harvest Co. Inc. agreement to complete all terms and conditions set forth below, CARB and Five Harvest Co. Inc. agree as follows:

- (9) Settlement Amount. Five Harvest Co. Inc. shall pay a civil penalty of two thousand dollars (\$2,000.00 USD), Five Harvest Co. Inc. shall make all payments within 30 calendar days from the date CARB notifies Five Harvest Co. Inc. of the full execution of the Settlement Agreement.
- (10) Civil Penalty Payment Method. Five Harvest Co. Inc. shall pay the civil penalty by check, credit card, wire transfer, or portal, payable to CARB, using instructions provided separately by CARB in a Payment Transmittal Form. Five Harvest Co. Inc. is responsible for all payment processing fees. Payments shall be accompanied by the Payment Transmittal Form to ensure proper application. CARB shall deposit the civil penalty amount into the Air Pollution Control Fund for the purpose of carrying out CARB's duties and functions to ensure the integrity of its air pollution control programs. Should payment instructions change, CARB will provide notice to Five Harvest Co. Inc. in accordance with Paragraph 14 (Notices).
- (11) Other Relief. Five Harvest Co. Inc. shall comply with one of the following options: attend the California Council on Diesel Education and Technology (CCDET I) class, (SAE J1667 Snap Acceleration Smoke Test Procedure for Heavy-Duty Diesel Powered Vehicles) as described on the CCDET webpage [www.ccdet.org/class-schedule/](http://www.ccdet.org/class-schedule/), or CARB's Online Training for Fleet Owners/Employees (MS529 Online

Smoke-Test Training) at <https://ww2.arb.ca.gov/our-work/programs/heavy-duty-diesel-inspection-periodic-smoke-inspection-program/hdvip-psip>.

- (a) Five Harvest Co. Inc. shall have the fleet maintenance manager (or equivalent) attend the CCDET I class or the CARB Online Training for Fleet Owners/Employees (MS529 Online Smoke-Test Training). Proof of completion of either course shall be to CARB within six months of the date of this Agreement and be maintained in each applicable employee's file for the term of his or her employment.
  - (b) If Five Harvest Co. Inc. uses a contractor to perform the annual smoke opacity testing required under the PSIP Regulation, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET I or CARB course, Five Harvest Co. Inc. shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I course within the past four years. This proof of CCDET I completion shall be provided to CARB with PSIP Regulation records as required by this Agreement and be maintained with the annual PSIP Regulation records.
- (12) Other Relief. As is typically required, Five Harvest Co. Inc. shall submit copies of all PSIP Regulation compliance records for 2021 and 2022 after the close of the audit to CARB by January 31 of the following year. CARB reserves the right to visit any Five Harvest Co. Inc. fleet location at any time to conduct compliance audits for the HDVIP and PSIP Regulation, or any other applicable CARB program.
- (13) Documents. Five Harvest Co. Inc. shall promptly email or mail the signed and dated Settlement Agreement, with copy of proof of payment of the penalty, mitigation, and/or SEP (if applicable), a copy of the Payment Transmittal Form(s) (if applicable), and the signed and dated Compliance Plan (if applicable) to the address or email in Paragraph 14 (Notices).
- (14) Notices. Unless otherwise specified in this Settlement Agreement, whenever notifications, submissions, or communications are required by this Settlement Agreement, they shall be submitted in writing to the address or email below:

As to CARB:  
California Air Resources Board  
Enforcement Division / Settlement Agreements  
Diesel Programs Enforcement Branch/Specialized Fleet Enforcement  
Section  
P.O. Box 2815  
Sacramento, California 95812-2815  
Settlement\_Agreement@arb.ca.gov

Five Harvest Co. Inc. Settlement Agreement  
Notice of Violation: NOV # 100413

As to Five Harvest Co. Inc:  
Five Harvest Co. Inc.  
2121 E. 12th Street  
Oakland, California 94606  
fiveharvest@yahoo.com

Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above. Notices submitted pursuant to this section shall be deemed submitted upon emailing or mailing.

- (15) Recovery of Costs. If the Attorney General files a civil action to enforce this Settlement Agreement, Five Harvest Co. Inc. shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorneys' fees, and costs.
- (16) Repeat Violations. Five Harvest Co. Inc. agrees to comply with all regulatory requirements and acknowledges that repeat violations could result in increased penalties in the future.
- (17) Entirety. This Settlement Agreement constitutes the entire agreement and understanding between the Parties concerning the Case Background, and supersedes and replaces any and all prior negotiations and agreements of any kind, whether written or oral, between the Parties concerning the Case Background hereof. This Settlement Agreement consists of 7 pages and 35 paragraphs.
- (18) Binding Effect. This Settlement Agreement binds Five Harvest Co. Inc., and any principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations and CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Settlement Agreement.
- (19) Effective Date. The effective date shall be the date upon which this Settlement Agreement is fully executed.
- (20) Modification and Termination. No agreement to modify, amend, extend, supersede, terminate, or discharge this Settlement Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all Parties to this Settlement Agreement.
- (21) Severability. Each provision of this Settlement Agreement is severable, and in the event that any provision of this Settlement Agreement is held to be illegal, invalid

or unenforceable in any jurisdiction, the remainder of this Settlement Agreement remains in full force and effect.

- (22) Choice of Law. This Settlement Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (23) Non-Discharge. It is further agreed that the penalties described in this Settlement Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit.
- (24) Not Tax Deductible. For purposes of this Settlement Agreement, Five Harvest Co. Inc. shall not deduct any monies spent to comply with any provision of this Settlement Agreement in calculating and submitting its federal, state, or local income tax.
- (25) Rules of Construction. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in interpreting this Settlement Agreement.
- (26) Non-Waiver. The failure to enforce any provision of this Settlement Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Settlement Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Settlement Agreement or otherwise provided by law.
- (27) Intent to be Bound. The Parties represent that: They have participated fully in the review and drafting of this Settlement Agreement; understand and accept all terms; enter into this Settlement Agreement freely and voluntarily; have had an opportunity to consult with legal counsel; are fully informed of the terms and effect of this Settlement Agreement; have agreed to this Settlement Agreement after independent investigation and agree it was not arrived at through fraud, duress, or undue influence; and knowingly and voluntarily intend to be legally bound by this Settlement Agreement.
- (28) Venue. The Superior Court of California, located in the County of Sacramento, shall hear any dispute between the Parties arising from this Settlement Agreement.

- (29) Counterparts and Electronic Signatures. This Settlement Agreement may be executed in counterparts. Electronic, facsimile or photocopied signatures shall be considered as valid signatures.
- (30) Release. In consideration of the full completion of civil penalty, and all other undertakings above, CARB hereby releases Five Harvest Co. Inc. and its principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations, from any claims CARB may have based on the circumstances described in all paragraphs contained in the Case Background above.
- (31) Authority. The undersigned represents that he or she has full authority to enter into this Settlement Agreement.

### **PENALTY BASIS**

- (32) Per Unit Penalty. The per unit or per vehicle penalty in this case is a maximum of forty thousand, seven hundred and twenty-five dollars (\$40,725) per vehicle that is in violation of the Health and Saf. Code, § 43016 and PSIP Regulation. (Cal. Code Regs., tit.13, § 2190 et seq.) The penalty of two thousand dollars (\$2,000.00) over an unspecified number of days of violation is for 2 noncompliant heavy-duty vehicles for a period of two years. The per unit penalty in this case is approximately five hundred dollars (\$500.00) per noncompliant vehicle.
- (33) Emissions. The provisions cited above do prohibit emissions above a specified level. Without information on usage and emission rates, it is not practicable to quantify the excess emissions. However, since CARB has alleged that the vehicle did not meet the regulatory requirements, all of the emissions from it were excess and illegal.
- (34) Aggravating and Mitigating Factors. The penalties in this matter were determined in consideration of all relevant circumstances, including statutory factors as described in CARB's Enforcement Policy. CARB considered whether the violator came into compliance quickly and cooperated with the investigation; the extent of harm to public health, safety and welfare; nature and persistence of the violation, including the magnitude of the excess emissions; compliance history; preventative efforts taken; innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods; efforts to attain, or provide for, compliance prior to violation; action taken to mitigate the violation; financial burden to the violator; and voluntary disclosure. The penalties are set at levels sufficient to deter violations, to remove any economic benefit or unfair advantage from noncompliance, to obtain swift compliance, and the potential costs, risks, and uncertainty associated with litigation. Penalties in future cases might be smaller or larger depending on the unique circumstances of the case.

- (35) Confidential Business Information. CARB based this penalty in part on confidential business information provided by Five Harvest Co. Inc. and confidential settlement communications, neither of which are retained by CARB in the ordinary course of business.

ACKNOWLEDGED AND ACCEPTED BY:

**California Air Resources Board**

Signature: /S/

Name: Todd P. Sax, D.Env.

Title: Chief, Enforcement Division

Date: 5/19/2021

**Five Harvest Co. Inc.**

Signature: /S/

Name: Kai L. Yeung

Title: Chief Executive Officer

Date: 5/16/2021