ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Hardway Solutions, LLC d/b/a Hardway Performance and Hardway Performance Solutions and Ryan Milliken Respondents	)	Docket No. CAA-HQ-2020-8388

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement, effective immediately.

So ordered.[1]

ENVIRONMENTAL APPEALS BOARD

Dated: ***Jan 10 2020***

Aaron Avila
Environmental Appeals Judge

[1] The three-member panel ratifying this matter is composed of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of: Hardway Solutions, LLC, d/b/a Hardway Performance and Hardway Performance Solutions and Ryan Milliken Respondents.	Docket No. CAA-HQ-2020-8388

CONSENT AGREEMENT

Preliminary Statement

1. This is a civil administrative penalty assessment proceeding instituted under section 205(c)(1) of the Clean Air Act ("CAA"), 42 U.S.C. § 7524(c)(1). The issuance of this Consent Agreement and attached Final Order simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).

2. Complainant in this matter is the United States Environmental Protection Agency ("EPA"). On the EPA's behalf, Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized by lawful delegation to institute and settle civil administrative penalty assessment proceedings under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1). EPA Delegation 7.6.A.

3. Respondents in this matter are Hardway Solutions, LLC, d/b/a Hardway Performance and Hardway Performance Solutions, and Ryan Milliken. Respondent Hardway Solutions, LLC is a limited liability company organized under the laws of the State of Florida with a facility at 1490 Highway 98 W, Mary Esther, Florida 32569. Respondent Ryan Milliken is a member of and

manages Respondent Hardway Solutions, LLC, and his address is 1975 Tampa Boulevard, Navarre, Florida 32566. Respondents operate a diesel truck performance upgrade sales and installation facility, as well as a commercial website for sales of aftermarket diesel truck performance upgrade products at www.hardwayperformance.com. Respondents have specialized in the manufacture of custom engine tuning software for diesel pickup trucks. Respondents have manufactured, sold, offered for sale, and/or installed aftermarket parts and components intended for use with, or as part of, motor vehicles or motor vehicle engines that have a principal effect of bypassing, defeating, or rendering inoperative emission control devices and elements of design installed in or on a motor vehicle or motor vehicle engine in compliance with the CAA.

4. The EPA and Respondents, having agreed to settle this action, consent to the entry of this Consent Agreement and the attached Final Order before taking testimony and without adjudication of any issues of law or fact herein, and agree to comply with the terms of this Consent Agreement and the attached Final Order.

Jurisdiction

5. This Consent Agreement is entered into under section 205(c)(1) of the CAA, 42 U.S.C. § 7524(c)(1), and the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R. Part 22 ("Consolidated Rules").

6. The EPA may administratively assess a civil penalty if the penalty sought is less than $378,852. CAA §§ 205(c)(1), 42 U.S.C. §§ 7524(c)(1), 7545(d)(1); 40 C.F.R. § 19.4.

7. The Consolidated Rules provide that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and

concluded by the issuance of a Consent Agreement and Final Order (CAFO). 40 C.F.R. §§ 22.13(b), 22.18(b).

8. The Environmental Appeals Board is authorized to approve settlements of proceedings under the Consolidated Rules commenced at EPA Headquarters and to issue final orders ratifying such settlements and assessing penalties under the CAA. 40 C.F.R. §§ 22.4(a)(1), 22.19(b)(3).

Governing Law

9. This proceeding arises under Part A of Title II of the CAA, CAA §§ 202-219, 42 U.S.C. §§ 7521–7554, and the regulations promulgated thereunder. These laws aim to reduce emissions from mobile sources of air pollution, including non-methane hydrocarbons ("NMHC"), particulate matter ("PM") oxides of nitrogen ("NO_x"), and carbon monoxide ("CO"). The Alleged Violations of Law, stated below, concern motor vehicles and motor vehicle engines, specifically light heavy-duty diesel engine ("LHDDE") trucks, and violations of the tampering and Defeat Device prohibitions of sections 203(a)(3)(A) and 203(a)(3)(B) of the CAA, 42 U.S.C. §§ 7522(a)(3)(A) and 7522(a)(3)(B).

10. "Motor vehicle" is defined in section 216(2) of the CAA, 42 U.S.C. § 7550(2), as "any self-propelled vehicle designed for transporting persons or property on a street or highway." *See also* 40 C.F.R. § 85.1703 (further defining "motor vehicle").

11. Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1), prohibits a vehicle manufacturer from selling a new motor vehicle in the United States unless the vehicle is covered by a certificate of conformity ("COC").

12. The EPA issues COCs to vehicle manufacturers (also known as "original equipment manufacturers" or "OEMs") under section 206(a) of the CAA, 42 U.S.C. § 7525(a), to certify

that a particular group of motor vehicles conforms to applicable EPA requirements governing motor vehicle emissions.

13. Under section 202 of the CAA, 42 U.S.C. § 7521, the EPA promulgated emission standards for NMHC, PM, NOx, and CO. *See generally* 40 C.F.R. Part 86.

14. To obtain a COC for a given motor vehicle test group or engine family, the OEM must demonstrate that each motor vehicle or motor vehicle engine will not exceed established emission standards for NMHC, PM, NOx, CO, and other pollutants. 40 C.F.R. §§ 86.004-21, 86.1811-04, 86.1844.01.

15. The COC application must describe, among other things, the emissions-related elements of design of the motor vehicle or motor vehicle engine. This includes all auxiliary emission control devices ("AECDs"), which are defined as "any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purposes of activating, modulating, delaying, or deactivating the operation of any part of the emission control system" of the motor vehicle. 40 C.F.R. §§ 86.094-21, 86.1844-01.

16. "Element of Design" means "any control system (*i.e.*, computer software, electronic control system, computer logic), and/or control system calibrations, and/or the results of systems interaction, and/or hardware items on a motor vehicle or motor vehicle engine." 40 C.F.R. § 86.094-2. For example, OEMs employ various ignition timing and fueling strategies to control emissions, *e.g.*, retarded fuel injection timing as a primary emission control system for NOx. OEMs also employ certain hardware devices as emission control systems to manage and treat exhaust to reduce levels of regulated pollutants from being created or emitted into the ambient air. Such devices include exhaust gas recirculation ("EGR"), diesel oxidation catalyst ("DOC"), diesel particulate filter ("DPF"), NOx adsorption catalyst ("NAC"), and selective catalytic reduction ("SCR") systems.

17. "On-Board Diagnostic System" or "OBD" is a monitoring system, including components and sensors designed to detect, record, and report malfunctions of all monitored emission-related powertrain systems or components. 40 C.F.R. § 86.1806-05(b).

18. Under section 202(m) of the CAA, 42 U.S.C. § 7521(m), the EPA promulgated regulations requiring manufacturers of LHDDEs to install OBD systems on vehicles beginning with the 2007 model year. The regulations require the OBD system to monitor emission control components for any malfunction or deterioration causing exceedance of certain emission thresholds. When the OBD system detects a problem, a check-engine light on the dashboard of the vehicle alerts the driver that a certain repair or repairs are needed. 40 C.F.R. §§ 86.1806-05, 86.1807-17. Thus, OBD is a critical element of design of the motor vehicle.

19. Under the CAA, the term "Person" includes individuals, corporations, partnerships, associations, states, municipalities, and political subdivisions of a state. 42 U.S.C. § 7602(e).

20. Section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), prohibits any person from removing or rendering inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations promulgated under Title II of the CAA prior to its sale or delivery to the ultimate purchaser, or for any person from knowingly removing or rendering inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

21. Section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), prohibits any person from manufacturing, selling, offering to sell, or installing any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under Title II of

the CAA, where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use.

22. It is also a violation for any person to cause any of the acts set forth in CAA section 203(a), 42 U.S.C. § 7522(a).

23. Persons violating sections 203(a)(3)(A) or (B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), are subject to a civil penalty of up to $3,750 for each for each violation that occurred prior to November 2, 2015, and up to $4,735 for each violation that occurred on or after November 2, 2015, where penalties are assessed on or after January 15, 2019. CAA § 205(a), 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2056, 2059 (Feb. 6, 2019).

24. Pursuant to section 205(a) of the CAA, 42 U.S.C. § 7524(a), each act of tampering a motor vehicle or motor vehicle engine shall constitute a separate violation of section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A), with respect to each motor vehicle or motor vehicle engine.

25. Any violation of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), shall constitute a separate offense with respect to each part or component. CAA § 205(a), 42 U.S.C. § 7524(a).

Definitions

26. Definitions, as the terms are used in this Consent Agreement:

    (a) "Defeat Device" means a part or component, including Defeat Tuning Products, EGR Delete Parts, and Exhaust Aftertreatment Delete Pipes, intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative a motor vehicle emission control device or element of design, including such emission control devices or

elements of design required by regulation under Title II of the CAA. *See* CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B).

(b) "Electronic Control Module" or "ECM" is a computer and primary emission control component installed in a motor vehicle that determines how the motor vehicle functions. An ECM receives input signals from multiple sensors in the motor vehicle. Based upon the input signals, and according to the map(s)/tune(s) installed on the ECM, an ECM sends output signals that direct vehicle functions including ignition timing and fueling strategy. The ECM continuously monitors engine and other operating parameters and controls the emission control elements of design such as fueling strategy and emission control device operation.

(c) "Exhaust Gas Recirculation" or "EGR" is an element of design in motor vehicles that reduces NOx emissions, which are formed at high temperatures during fuel combustion. By recirculating exhaust gas through the engine, EGR reduces engine temperature and NOx emissions. The EGR (including the EGR valve, EGR cooler, and associated throttle valve) consists of all hardware, parts, sensors, subassemblies, software, AECDs, calibrations, and other components that collectively constitute the system for implementing the strategy for adjusting the volume of exhaust gas in the engine cylinders. The EGR is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

(d) "Diesel Particulate Filter" or "DPF" is a filter that captures soot from engine exhaust, thereby decreasing PM emissions. By design, soot that collects in the DPF is periodically burned off by elevated exhaust temperatures in a process referred to as active or passive regeneration. The DPF includes all hardware, parts, sensors,

subassemblies, AECDs, ECM software (calibrations), and other components that collectively constitute the system for implementing this emission control strategy. The DPF is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

(e) "Diesel Oxidation Catalyst" or "DOC" is a precious-metal coated, flow-through honeycomb structure. As exhaust gas passes through the DOC, the coating precious metal causes a catalytic reaction that breaks down CO and NMHCs in the exhaust into their less harmful components. The DOC includes all hardware, parts, sensors, subassemblies, AECDs, ECM software (calibration), and other components that collectively constitute the system for implementing the emissions control strategy. The DOC is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

(f) "Selective Catalytic Reduction" or "SCR" system reduces NOx emissions by chemically converting exhaust gas that contains NOx into nitrogen and water through the injection of diesel exhaust fluid, typically composed of urea. The SCR includes all hardware, parts, sensors, subassemblies, AECDs, ECM software (calibration) and other components, that collectively constitute the system for implementing this emissions control strategy. The SCR is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

(g) "NOx Adsorption Catalyst" or "NAC" reduces NOx emissions by chemically adsorbing NOx from exhaust gas. The NAC includes all hardware, parts, sensors,

subassemblies, AECDs, ECM software (calibrations) and other components that collectively constitute the system for implementing this emission control strategy. The NAC is a "device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with [CAA] regulations" within the meaning of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B).

(h) "Defeat Tuning Products" means aftermarket ECM programmers (including hardware commonly referred to as "tuners" and software commonly referred to as "tunes") that modify ECM programming or calibrations and/or OBD operation, where a principal effect of the product is to bypass, defeat, or render inoperative devices or elements of design, including EGR, DOC, DPF, SCR, or OBD systems, or fuel injection timing calibrations, installed on or in motor vehicles or motor vehicles engines in compliance with Title II of the CAA.

(i) "Exhaust Gas Recirculation Delete Part" or "EGR Delete Part" means a part or component that is designed to physically remove, disable, or bypass a component or component of the EGR system installed on or in a motor vehicle or motor vehicle engine in compliance with Title II of the CAA.

(j) "Exhaust Aftertreatment Delete Pipe" means a component that is designed to physically remove, disable, or bypass an aftertreatment emission control device or element of design, such as a DPF, DOC, NAC, or SCR, from the exhaust system installed on or in a motor vehicle or motor vehicle engine in compliance with Title II of the CAA.

Stipulated Facts

27. Respondent Hardway Solutions, LLC and Respondent Ryan Milliken are each a "person," as that term is defined in section 302(e) of the CAA, 42 U.S.C. § 7602(e).

28. Sales records obtained from Respondents indicate that they have manufactured, sold, offered for sale, or installed Defeat Tuning Products, EGR Delete Parts, and Exhaust Aftertreatment Delete Pipes as described in Paragraphs 29-40 below.

29. Respondents have manufactured and sold custom software programs, or "tunes," using EFILive tuning software, which are designed to modify the programming of ECMs on Dodge Ram Cummins Diesel pickup trucks and Chevrolet/GMC Duramax diesel pickup trucks ("EFILive Custom Tunes"). Respondents have sold these EFILive Custom Tunes under, among other names, the brand name "EFIBYRYAN."

30. Respondents have sold EFILive Custom Tunes either by installing the tunes preloaded onto an EFILive AutoCal or V2 FlashScan Tuner and shipping the tuner to the customer, or via email.

31. Among the EFILive Custom Tunes manufactured and sold by Respondents are tunes that alter fuel timing maps within the ECM's electronic calibrations and/or modify the ECM's programming governing emission control devices to disable and/or allow for removal of a EGR, DOC, DPF, NAC, or SCR system without illuminating a malfunction indicator lamp ("MIL") in the OBD system, prompting any diagnostic trouble code ("DTC") in the OBD system, or causing any engine derating or malfunctioning due to deactivation or removal of an emission control device.

32. Between December 4, 2014, and October 31, 2016, Respondents manufactured and sold at least 2,618 EFILive Custom Tunes as described in Paragraph 31 via a loaded EFILive AutoCal or V2 FlashScan Tuner and at least 1,988 EFILive Custom Tunes as described in Paragraph 31 via email, which equates to a total of at least 4,606 Defeat Tuning Products.

33. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 76 Exhaust Aftertreatment Delete Pipes, including, but not limited to, the following:

(a) Flo Pro 1670 13+ 5" Exhaust with Muffler;

(b) Flo Pro 1870 13+ 4" Exhaust with Muffler;

(c) Flo Pro 07-09 5" Turbo Back Exhaust with Muffler;

(d) Flo Pro SS652NB 5" Stainless Downpipe Back Single Exit with Muffler;

(e) Flo Pro SS664 5" Downpipe Back Single Exit Stainless Exhaust with Muffler;

(f) Flo Pro 619 5" Turbo Back Single Exhaust Aluminized;

(g) Flo Pro 1648 Aluminized 5" Exhaust with Muffler;

(h) Flo Pro 1849 DSL Dodge 6.7L 2010-2012 Turbo Back CAT DPF Delete Kit;

(i) Flo Pro 1848 4" Exhaust with Muffler;

(j) Flo Pro 1639 Exhaust Kit- 5" Turbo Back Single Exhaust with No Muffler;

(k) Flo Pro 1669 5" Single Exhaust No Muffler;

(l) Flo Pro 1836 4" Turbo Back Single with Muffler;

(m) Flo Pro 864 4" with Muffler;

(n) Flo Pro 1670 5" Turbo Back Exhaust with Muffler;

(o) Flo Pro 1636 07-09 5" Turbo Back Exhaust with Muffler;

(p) Flo Pro 868NB Delete Pipes;

(q) Flo Pro SS1670 13+ 6.7 Cummins 5" Exhaust with Muffler;

(r) Flo Pro 1649 5" Exhaust No Muffler Aluminized;

(s) Flo Pro 868NB Exhaust Race Pipe 13-16;

(t) Flo Pro 835FNB Delete Pipe;

(u) Flo Pro 1669 Turbo Back Single 13-15 Cummins 5" Exhaust;

(v) Flo Pro 21124;

(w) Flo Pro SS1669 2013-2016 Cummins 6.7L 5" Exhaust System No Muffler No Bungs.

34. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 42 EGR Delete Parts, including, but not limited to, the following:

(a) GDP '09-'12 Cummins 6.7L EGR Valve & Cooler Conversion Kit;

(b) GDP Mega-Flo S-3 6.7L Cummins Intake Manifold;

(c) Glacier Diesel EGR Delete Kit;

(d) XDP XD 175 Ford 6.4L EGR Delete Kit with Intake Elbow;

(e) Glacier Diesel '07.5-'08 Cummins 6.7L EGR Valve & Cooler Conversion Kit;

(f) XDP XD158 09-12 EGR Valve and Cooler Kit;

(g) Bad Ass Solutions EGR Delete Kit.

35. Respondents have sold a class of Defeat Tuning Products, which include SCT 7015 X4 Powerflash Tuners, SCT 3015 SF3 Tuners, and SCT 5015 Livewire Tuners ("SCT Tuners") that are designed to disable EGR systems and OBD oxygen sensors. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 6 such SCT Tuners.

36. Respondents have sold a class of Defeat Tuning Products, which include the H&S Mini Maxx Tuner and XRT Pro Race Tuner ("H&S Tuners") that alter fuel timing maps within an ECM's electronic calibrations and modify an ECM's programming governing emission control devices to disable and/or allow for removal of a EGR, DOC, DPF, or SCR system without illuminating a MIL in the OBD system, prompting any DTC in the OBD system, or causing any engine derating or malfunctioning due to deactivation or removal of an emission control device.

37. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 3 such H&S Tuners as described in Paragraph 36.

38. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 87 H&S Tuner Unlock software codes, each of which unlocks the tunes contained in the H&S Tuners that disable emission control devices. These software codes constitute Defeat Tuning Products.

39. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 312 H&S Max Calibration Control ("MCC") software code, each of which allows the full functionality of H&S Tuner software designed to modify ECM calibrations, including disabling the calibrations governing the operation of emission control devices. These software codes constitute Defeat Tuning Products.

40. Between December 4, 2014, and October 31, 2016, Respondents have sold at least 254 Bully Dog GT Tuners (P/M 40420) and Bully Dog Unlock Cables. These products constitute Defeat Tuning Products and were specifically advertised by Respondent as necessary for using Respondent's custom tunes or tuners on model year 2013 and newer Dodge Ram 6.7L Cummins diesel trucks, as the 6.7L Cummins diesel engine has technology designed to prevent ECM reprogramming and therefore such technology must be disabled or "unlocked" to allow for ECM reprogramming.

41. The Defeat Devices identified in Paragraphs 29-40 above were designed and marketed for use on makes and models of motor vehicles and motor vehicle engines manufactured by FCA US LLC and its predecessors, General Motors Company, and Ford Motor Company. These OEMs sought and obtained certificates of conformity from the EPA. In doing so, the manufacturers have certified that the motor vehicles have demonstrated compliance with applicable federal emission standards, including certified design configurations using elements of design such as fuel timing maps, EGRs, DOCs, DPFs, NACs, SCRs, and OBD systems.

42. On October 31, 2016, the EPA inspected Respondents' facility in Mary Esther, Florida. During this inspection, the EPA found that Respondents were in the process of removing or rendering

inoperative emission control devices or elements of design on at least three motor vehicles and motor vehicle engines as follows:

(a) A model year 2012 Chrysler RAM 2500 6.7L Cummins diesel truck with a missing EGR system and DOC and DPF replaced by an Exhaust Aftertreatment Delete Pipe. The truck had a Texas license plate. As part of an interview with Respondent Ryan Milliken, Mr. Milliken told the inspectors that, with respect to this truck, he was redesigning the ECM's calibration and to do so the EGR, DOC, DPF, and SCR all must be disabled.

(b) A model year 2014 General Motors Sierra 6.6L Duramax diesel truck for which there was a written estimate for installation of a Hardway custom tune and an Exhaust Aftertreatment Delete Pipe to remove the DPF and DOC. The truck had a Florida license plate.

(c) A model year 2012 Chrysler RAM 6.7L Cummins diesel truck in the process of being modified. The truck had no EGR cooler, had its intake manifold replaced with one that does not contain an EGR port, and the DPF and DOC missing and replaced with an Exhaust Aftertreatment Delete Pipe.

43. In addition to actions described in Paragraph 42 above, sales records obtained from Respondents indicate that Respondents knowingly removed or rendered inoperative emission control devices or elements of design on motor vehicles or motor vehicle engines on at least 7 occasions between December 4, 2014 and October 31, 2016.

Alleged Violations of Law

44. The EPA alleges that, between December 4, 2014, and October 31, 2016, Respondents manufactured, sold, offered to sell, or installed, at least 5,132 Defeat Devices, including 5,014

Defeat Tuning Products, 76 Exhaust Aftertreatment Delete Pipes, and 42 EGR Delete Parts, which are parts and components intended for use with, or as part of, motor vehicles or motor vehicle engines, where a principal effect of the parts or components is to bypass, defeat, or render inoperative emissions-related elements of design that are installed on a motor vehicle to meet the CAA's emission standards, and Respondents knew or should have known such parts and components were being offered for sale or installed for such use or put to such use.

45. The EPA alleges that, between December 4, 2014, and October 31, 2016, Respondents committed at least 5,132 violations of section 203(a)(3)(B) of the CAA, 42 U.S.C. § 7522(a)(3)(B), by manufacturing, selling, offering for sale, or installing Defeat Devices, including Defeat Tuning Products, Exhaust Aftertreatment Replacement Pipes, and EGR Delete Parts.

46. The EPA alleges that, between December 4, 2014, and October 31, 2016, Respondents knowingly removed or rendered inoperative devices or elements of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under Title II of the CAA on at least 10 occasions.

47. The EPA alleges that, between December 4, 2014, and October 31, 2016, Respondents committed approximately 10 violations of section 203(a)(3)(A) of the CAA, 42 U.S.C. § 7522(a)(3)(A).

Terms of Agreement

48. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondents: admit that the EPA has jurisdiction over this matter as stated above; admit to the stipulated facts stated above; neither admit nor deny the alleged violations of law stated above; consent to the assessment of a civil penalty as stated below; consent to any conditions specified in this Consent

Agreement; waive any right to contest the alleged violations of law; and waive its right to appeal the Final Order accompanying this Consent Agreement.

49. For the purpose of this proceeding, Respondents:

(a) agree that this Agreement states a claim upon which relief may be granted against Respondent;

(b) waive any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Agreement, including any right of judicial review under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1);

(c) waive any rights it may possess at law or in equity to challenge the authority of the EPA to bring a civil action in a United States District Court to enforce this Agreement or Order, or both, and to seek an additional penalty for noncompliance with this Agreement or Order, or both, and agrees that federal law shall govern in any such civil action;

(d) consent to personal jurisdiction in any action to enforce this Agreement or Order, or both, in the United States District Court for the District of Columbia;

(e) agree that Respondents may not delegate duties under this Consent Agreement to any other party without the written consent of the EPA, which may be granted or withheld at EPA's unfettered discretion. If the EPA so consents, the Consent Agreement is binding on the party or parties to whom the duties are delegated;

(f) acknowledge that this Consent Agreement constitutes an enforcement action for purposes of considering Respondents' compliance history in any subsequent enforcement actions;

(g) acknowledge that this Consent Agreement and attached Final Order will be available to the public and agree that it does not contain any confidential business information or personally identifiable information;

(h) acknowledge that its tax identification number may be used for collecting or reporting any delinquent monetary obligation arising from this Agreement (see 31 U.S.C. § 7701);

(i) certify that the information it has supplied concerning this matter was at the time of submission true, accurate, and complete; and

(j) acknowledge that there are significant penalties for knowingly submitting false, fictitious, or fraudulent information, including the possibility of fines and imprisonment (see 18 U.S.C. § 1001).

50. For purposes of this proceeding, the parties each agree that:

(a) this Consent Agreement constitutes the entire agreement and understanding of the parties and supersedes any prior agreements or understandings, whether written or oral, among the parties with respect to the subject matter hereof;

(b) this Consent Agreement may be signed in any number of counterparts, each of which will be deemed an original and, when taken together, constitute one agreement; the counterparts are binding on each of the parties individually as fully and completely as if the parties had signed one single instrument, so that the rights and liabilities of the parties will be unaffected by the failure of any of the undersigned to execute any or all of the counterparts; any signature page and any copy of a signed signature page may be detached from any counterpart and attached to any other counterpart of this Consent Agreement.

(c) its undersigned representative is fully authorized by the Party whom he or she represents to bind that Party to this Consent Agreement and to execute it on behalf of that Party;

(d) each party's obligations under this Consent Agreement and attached Final Order constitute sufficient consideration for the other party's obligations under this Consent Agreement and attached Final Order; and

(e) each party will bear their own costs and attorney fees in the action resolved by this Consent Agreement and attached Final Order.

51. Respondents agree to pay to the United States a civil penalty of $45,000 (the Civil Penalty). The EPA has reduced the civil penalty on the basis of information produced by Respondents to demonstrate their inability to pay a higher civil penalty.

52. Respondents agree to pay the Civil Penalty to the United States within 30 calendar days following the issuance of the attached Final Order (i.e., the effective date of this Consent Agreement and attached Final Order).

53. Respondents agree to pay the Civil Penalty in the manner specified below:

(a) Pay the Civil Penalty using any method provided on the following website: http://www2.epa.gov/financial/additional-instructions-making-payments-epa;

(b) Identify each and every payment with "Docket No. CAA-HQ-2020-8388"; and

(c) Within 24 hours of payment, email proof of payment to Mark J. Palermo, Attorney-Advisor, at palermo.mark@epa.gov ("proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with "Docket No. CAA-HQ-2020-8388").

54. As a condition of settlement, Respondents agrees to the following: By their signature to this Consent Agreement, Respondents certify that from the date of its signature, they will not manufacture, sell, offer for sale, or install any Defeat Device that defeats, bypasses, or otherwise renders inoperative any emissions-related device or element of design on a motor vehicle or motor vehicle engine subject to regulation under Title II of the CAA, as prohibited under section 203(a)(3) of the CAA, and they will not remove or render inoperative any emissions-related

device or element of design installed on or in a motor vehicle or motor vehicle engine subject to regulation under Title II of the CAA, as prohibited under section 203(a)(3) of the CAA, unless any such action is no longer prohibited through any future revision to the CAA or applicable regulations. Toward this end, Respondents agree to comply with the Compliance Plan attached as Appendix A of this CAFO provided that, if any provision of the CAA or regulations conflict with the Compliance Plan, Respondents shall comply with the CAA and regulations as revised.

Effect of Consent Agreement and Attached Final Order

55. In accordance with 40 C.F.R. § 22.18(c), Respondents' full compliance with this Consent Agreement shall only resolve Respondents' liability for federal civil penalties for the violations and facts alleged above.

56. Failure to pay the full amount of the penalty assessed under this Consent Agreement may subject Respondents to a civil action to collect any unpaid portion of the proposed civil penalty and interest. In order to avoid the assessment of interest, administrative costs, and late payment penalty in connection with such civil penalty, as described in the following Paragraph of this Consent Agreement, Respondents must timely pay the penalty.

57. If Respondents fail to timely pay any portion of the penalty assessed by the attached Final Order, the EPA may:

(a) request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses; and a 10 percent quarterly nonpayment penalty, 42 U.S.C. § 7524(c)(6);

(b) refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13, 13.14, and 13.33;

(c) collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds (see 40 C.F.R. Part 13, Subparts C and H); and

(d) suspend or revoke Respondents' licenses or other privileges, or (ii) suspend or disqualify Respondents from doing business with the EPA or engaging in programs the EPA sponsors or funds, 26 C.F.R. § 13.17.

58. Penalties paid pursuant to this Consent Agreement are not deductible for federal tax purposes. 28 U.S.C. § 162(f).

59. This Consent Agreement and attached Final Order apply to and are binding upon the Complainant and the Respondents. Successors and assigns of Respondents are also bound if they are owned, in whole or in part, directly or indirectly, or otherwise controlled by Respondents. Nothing in the previous sentence adversely affects any right of the EPA under applicable law to assert successor or assignee liability against Respondents' successors or assignees.

60. Nothing in this Consent Agreement shall relieve Respondents of the duty to comply with all applicable provisions of the CAA or other federal, state, or local laws or statutes, nor shall it restrict the EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

61. Except as provided in Paragraph 55, above, nothing in this Consent Agreement shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

62. The EPA reserves the right to revoke this Consent Agreement and accompanying settlement penalty if and to the extent the EPA finds, after signing this Consent Agreement, that any information provided by Respondents was or is materially false or inaccurate. The EPA shall give Respondents written notice of such termination, as provided herein, which will be effective upon mailing.

63. The Parties agree to submit this Consent Agreement to the Environmental Appeals Board with a request that it be incorporated into a Final Order.

64. Respondents and Complainant agree to issuance of the attached Final Order. Upon filing, the EPA will transmit a copy of the filed Consent Agreement to the Respondents. This Consent Agreement and attached Final Order shall become effective after execution of the Final Order by the Environmental Appeals Board and filing with the Hearing Clerk.

Appendix A:

In the Matter of Hardway Solutions, LLC, dba Hardway Performance and Hardway Performance Solutions, and Ryan Milliken, Docket No. CAA-HQ-2020-8388

Compliance Plan to Avoid Illegal Tampering and Aftermarket Defeat Devices

This document explains how to help ensure compliance with the Clean Air Act's prohibitions on tampering and aftermarket defeat devices. The document specifies what the law prohibits and sets forth two principles to follow in order to prevent violations.

The Clean Air Act Prohibitions on Tampering and Aftermarket Defeat Devices

The Act's prohibitions against tampering and aftermarket defeat devices are set forth in section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), (hereafter "§ 203(a)(3)"). The prohibitions apply to all vehicles, engines, and equipment subject to the certification requirements under sections 206 and 213 of the Act. This includes all motor vehicles (e.g., light-duty vehicles, highway motorcycles, heavy-duty trucks), motor vehicle engines (e.g., heavy-duty truck engines), nonroad vehicles (e.g., all-terrain vehicles, off road motorcycles), and nonroad engines (e.g., marine engines, engines used in generators, lawn and garden equipment, agricultural equipment, construction equipment). Certification requirements include those for exhaust or "tailpipe" emissions (e.g., oxides of nitrogen, carbon monoxide, hydrocarbons, particulate matter, greenhouse gases), evaporative emissions (e.g., emissions from the fuel system), and onboard diagnostic systems.

The prohibitions are as follows:

> "The following acts and the causing thereof are prohibited–"
>
> > **Tampering:** CAA § 203(a)(3)(A), 42 U.S.C. § 7522(a)(3)(A), 40 C.F.R. § 1068.101(b)(1): "for any person to remove or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser;"
> >
> > **Defeat Devices:** CAA § 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), 40 C.F.R. § 1068.101(b)(2): "for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any [vehicle, engine, or piece of equipment], where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a [vehicle, engine, or piece of equipment] in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use."

Section 203(a)(3)(A) prohibits tampering with emission controls. This includes those controls that are in the engine (e.g., fuel injection, exhaust gas recirculation), and those that are in the exhaust (e.g., filters,

catalytic convertors, and oxygen sensors). Section 203(a)(3)(B) prohibits (among other things) aftermarket defeat devices, including hardware (e.g., certain modified exhaust pipes) and software (e.g., certain engine tuners and other software changes).

The EPA's longstanding view is that conduct that may be prohibited by § 203(a)(3) does not warrant enforcement if the person performing that conduct has a documented, reasonable basis for knowing that the conduct does not adversely affect emissions. *See* Mobile Source Enforcement Memorandum 1A (June 25, 1974).

The EPA evaluates each case independently, and the absence of such reasonable basis does not in and of itself constitute a violation. When determining whether tampering occurred, the EPA typically compares the vehicle after the service to the vehicle's original, or "stock" configuration (rather than to the vehicle prior to the service). Where a person is asked to perform service on an element of an emission control system that has already been tampered, the EPA typically does not consider the service to be illegal tampering if the person either declines to perform the service on the tampered system or restores the element to its certified configuration.

Below are two guiding principles to help ensure Respondent commits no violations of the Act's prohibitions on tampering and aftermarket defeat devices.

Principle 1: Respondent Will Not Modify any OBD System

Respondent will neither remove nor render inoperative any element of design of an OBD system.[i] Also, Respondent will not manufacture, sell, offer for sale, or install any part or component that bypasses, defeats, or renders inoperative any element of design of an OBD system.

Principle 2: Respondent Will Ensure There is a *Reasonable Basis* for Conduct Subject to the Prohibitions

For conduct unrelated to OBD systems, Respondent will have a *reasonable basis* demonstrating that its conduct[ii] does not adversely affect emissions. Where the conduct in question is the manufacturing or sale of a part or component, Respondent must have a *reasonable basis* that the installation and use of that part or component does not adversely affect emissions. Respondent will fully document its *reasonable basis*, as specified in the following section, at or before the time the conduct occurs.

Reasonable Bases

This section specifies several ways that Respondent may document that it has a "reasonable basis" as the term is used in the prior section. In any given case, Respondent must consider all the facts including any unique circumstances and ensure that its conduct does not have any adverse effect on emissions.[iii]

A. **Identical to Certified Configuration:** Respondent generally has a reasonable basis if its conduct: is solely for the maintenance, repair, rebuild, or replacement of an emissions-related element of design; and restores that element of design to be identical to the certified configuration (or, if not certified, the original configuration) of the vehicle, engine, or piece of equipment.[iv]

B. **Replacement After-Treatment Systems:** Respondent generally has a reasonable basis if the conduct:

(1) involves a new after-treatment system used to replace the same kind of system on a vehicle, engine or piece of equipment and that system is beyond its emissions warranty; and

(2) the manufacturer of that system represents in writing that it is appropriate to install the system on the specific vehicle, engine or piece of equipment at issue.

C. **Emissions Testing:**[v] Respondent generally has a reasonable basis if the conduct:

(1) alters a vehicle, engine, or piece of equipment;

(2) emissions testing shows that the altered vehicle, engine, or piece of equipment will meet all applicable emissions standards for its full useful life; and

(3) where the conduct includes the manufacture, sale, or offering for sale of a part or component, that part or component is marketed only for those vehicles, engines, or pieces of equipment that are appropriately represented by the emissions testing.

D. **EPA Certification:** Respondent generally has a reasonable basis if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by the EPA under 40 C.F.R. Part 85 Subpart V (or any other applicable EPA certification program).[vi]

E. **CARB Certification:** Respondent generally has a reasonable basis if the emissions-related element of design that is the object of the conduct (or the conduct itself) has been certified by the California Air Resources Board ("CARB").[vii]

ENDNOTES

[i] *OBD system* includes any system which monitors emission-related elements of design, or that assists repair technicians in diagnosing and fixing problems with emission-related elements of design. If a problem is detected, an OBD system should record a diagnostic trouble code, illuminate a malfunction indicator light or other warning lamp on the vehicle instrument panel, and provide information to the engine control unit such as information that induces engine derate (as provided by the OEM) due to malfunctioning or missing emission-related systems. Regardless of whether an element of design is commonly considered part of an OBD system, the term "OBD system" as used in this Appendix includes any element of design that monitors, measures, receives, reads, stores, reports, processes or transmits any information about the condition of or the performance of an emission control system or any component thereof.

[ii] Here, the term *conduct* means: all service performed on, and any change whatsoever to, any emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3); the manufacturing, sale, offering for sale, and installation of any part or component that may alter in any way an emissions-related element of design of a vehicle, engine, or piece of equipment within the scope of § 203(a)(3), and any other act that may be prohibited by § 203(a)(3).

[iii] General notes concerning the Reasonable Bases: Documentation of the above-described reasonable bases must be provided to EPA upon request, based on the EPA's authority to require information to determine compliance. CAA § 208, 42 U.S.C. § 7542. The EPA issues no case-by-case pre-approvals of reasonable bases, nor exemptions to the Act's prohibitions on tampering and aftermarket defeat devices (except where such an exemption is available by regulation). A reasonable basis consistent with this Appendix does not constitute a certification, accreditation, approval, or any other type of endorsement by EPA (except in cases where an EPA Certification itself constitutes the reasonable basis). No claims of any kind, such as "Approved [or certified] by the Environmental Protection Agency," may be made on the basis of the reasonable bases described in this Policy. This includes written and oral advertisements and other communication. However, if true on the basis of this Appendix, statements such as the following may be made: "Meets the emissions control criteria in the United States Environmental Protection Agency's Tampering Policy in order to avoid liability for violations of the Clean Air Act." There is no reasonable basis where documentation is fraudulent or materially incorrect, or where emissions testing was performed incorrectly.

[iv] Notes on Reasonable Basis A: The conduct should be performed according to instructions from the original manufacturer (OEM) of the vehicle, engine, or equipment. The "certified configuration" of a vehicle, engine, or piece of equipment is the design for which the EPA has issued a certificate of conformity (regardless of whether that design is publicly available). Generally, the OEM submits an application for certification that details the designs of each product it proposes to manufacture prior to production. The EPA then "certifies" each acceptable design for use, in the upcoming model year. The "original configuration" means the design of the emissions-related elements of design to which the OEM manufactured the product. The appropriate source for technical information regarding the certified or original configuration of a product is the product's OEM. In the case of a replacement part, the part manufacturer should represent in writing that the replacement part will perform identically with respect to emissions control as the replaced part, and should be able to support the representation with either: (a) documentation that the replacement part is identical to the replaced part (including engineering drawings or similar showing identical dimensions, materials, and design), or (b) test results from emissions testing of the replacement part. In the case of engine switching, installation of an engine into a different vehicle or piece of equipment by any person would be considered tampering unless the resulting vehicle or piece of equipment is (a) in the same product category (e.g., light-duty vehicle) as the engine originally powered and (b) identical (with regard to all emissions-related elements of design) to a certified configuration of the same or newer model year as the vehicle chassis or equipment. Alternatively, Respondent may show through emissions testing that there is a reasonable basis for an engine switch under Reasonable Basis C. Note that there are some substantial practical limitations to switching engines. Vehicle chassis and engine designs of one vehicle manufacturer are very distinct from those of another, such that it is generally not possible to put an engine into a chassis of a different manufacturer and have it match up to a certified configuration.

[v] Notes on emissions testing: Where the above-described reasonable bases involve emissions testing, unless otherwise noted, that testing must be consistent with the following. The emissions testing may be performed by someone other than the person performing the conduct (such as an aftermarket parts manufacturer), but to be consistent with this Appendix, the person performing the conduct must have all documentation of the reasonable basis at or before the conduct. The emissions testing and documentation required for this reasonable basis is the same as the testing and documentation required by regulation (e.g., 40 C.F.R. Part 1065) for the purposes of original EPA certification of the vehicle, engine, or equipment at issue. Accelerated aging techniques and in-use testing are acceptable only insofar as they are acceptable for purposes of original EPA certification. The applicable emissions standards are either the emissions standards on the Emission Control Information Label on the product (such as any stated family emission limit, or FEL), or if there is no such label, the fleet standards for the

product category and model year. To select test vehicles or test engines where EPA regulations do not otherwise prescribe how to do so for purposes of original EPA certification of the vehicle, engine, or equipment at issue, one must choose the "worst case" product from among all the products for which the part or component is intended. EPA generally considers "worst case" to be that product with the largest engine displacement within the highest test weight class. The vehicle, engine, or equipment, as altered by the conduct, must perform identically both on and off the test(s), and can have no element of design that is not substantially included in the test(s).

[vi] Notes on Reasonable Basis D: This reasonable basis is subject to the same terms and limitations as EPA issues with any such certification. In the case of an aftermarket part or component, there can be a reasonable basis only if: the part or component is manufactured, sold, offered for sale, or installed on the vehicle, engine, or equipment for which it is certified; according to manufacturer instructions; and is not altered or customized, and remains identical to the certified part or component.

[vii] Notes on Reasonable Basis E: This reasonable basis is subject to the same terms and limitations as CARB imposes with any such certification. The conduct must be legal in California under California law. However, in the case of an aftermarket part or component, the EPA will consider certification from CARB to be relevant even where the certification for that part or component is no longer in effect due solely to passage of time.

The foregoing Consent Agreement *In the Matter of Hardway Solutions, LLC, d/b/a Hardway Performance and Hardway Performance Solutions, and Ryan Milliken*, Docket No. CAA-HQ-2020-8388, is Hereby Stipulated, Agreed, and Approved for Entry.

For Hardway Solutions, LLC:

Signature _____ Date 15 December 2019

Printed Name: Ryan Hugh Milliken

Title: President, Hardway Solutions, LLC

Address: 1490 W Hwy 98 Mary Esther, FL 32569

Respondent's Federal Tax Identification Number: 47-2436985

For Ryan Milliken

Signature _____ Date 15 December 2019

Printed Name: Ryan Milliken

Address: 1975 Tampa Boulevard, Navarre, Florida 32566

The foregoing Consent Agreement In the Matter of *Hardway Solutions, LLC, d/b/a Hardway Performance and Hardway Performance Solutions, and Ryan Milliken*, Docket No. CAA-HQ-2020-8388, is Hereby Stipulated, Agreed, and Approved for Entry.

For Complainant:

12/12/2019

Phillip A. Brooks, Director
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

Date

11/19/19

Mark J. Palermo, Attorney Advisor
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

Date

CERTIFICATE OF SERVICE

I certify that copies of the foregoing "Consent Agreement" and "Final Order," in the matter of *Hardway Solutions, LLC d/b/a Hardway Performance and Hardway Performance Solutions and Ryan Milliken,* Docket No.CAA-HQ-2020-8388, were sent to the following persons in the manner indicated:

By First Class Certified Mail/
Return Receipt Requested

Hardway Solutions, LLC
1490 Highway 98 W,
Mary Esther, Florida 32569

Ryan Milliken
1975 Tampa Boulevard,
Navarre, Florida 32566

Stewart D. Cables, Esq., Partner
Hassan + Cables, LLC
1035 Pearl Street, Suite 2000
Boulder, CO 80302

By Interoffice Mail:

Mark Palermo
Air Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mail Code 2242A
Washington, DC 20460

Dated: ***Jan 10 2020***

Annette Duncan
Administrative Specialist