

## SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into by and between the California Air Resources Board (ARB), with its principal office at 1001 I Street, Sacramento, California, and Home Depot U.S.A., Inc. (Home Depot) with its principal place of business at 2455 Paces Ferry Road, Atlanta, Georgia.

### RECITALS

1. California Code of Regulations (CCR), title 17, section 94509(a) (17 CCR § 94509(a)) specifies that no person shall sell, supply, offer for sale, or manufacture for sale in California, any consumer product containing volatile organic compound (VOC) content that exceed the specified limits.
2. 17 CCR § 94509(a) sets forth in the Table of Standards the percentage by weight VOC limit for Automotive Windshield Washer Fluid: Nontype "A" areas products sold after December 31, 2002. Products in this category must meet the 1 percent by weight VOC standard.
3. Failure to comply with the Consumer Products Regulation is a violation of State Law resulting in penalties. Among other penalties, Health and Safety Code (H&SC) sections 42400-42403 (H&SC §§ 42400-42403) authorize strict liability penalties up to \$10,000 for each day that the violation occurs.
4. ARB alleges that between June 1, 2016 and September 8, 2016, Home Depot sold, supplied, and offered for sale in California, Rain-X All Season 2-in-1 Windshield Washer Fluid 0 °F that is subject to the 1 percent by weight VOC limit for Automotive Windshield Washer Fluid: Nontype "A" areas in 17 CCR § 94509(a).
5. ARB alleges that the Rain-X All Season 2-in-1 Windshield Washer Fluid 0 °F referenced in Recitals paragraph 4 contained concentrations of VOCs exceeding the 1 percent by weight VOC limit for the Automotive Windshield Washer Fluid: Nontype "A" areas category specified in 17 CCR § 94509(a).
6. ARB alleges that if the allegations described in Recitals paragraphs 4 and 5 were proven, civil penalties could be imposed against Home Depot as provided in H&SC § 42402, et seq. for each and every unit involved in the violations.
7. Home Depot admits the allegations described in recital paragraphs 4 and 5, but denies any liability resulting from said allegations.
8. Home Depot took measures to prevent non-compliant products from being offered for sale in Nontype "A" areas.

9. The supplier of this product misidentified the product composition, leading Home Depot to believe it was compliant for Nontype "A" areas of California.
10. Home Depot has enhanced its processes regarding Automotive Windshield Washer Fluid from this supplier to further reduce the risk of offering for sale non-compliant Automotive Windshield Washer Fluid in Nontype "A" areas of California.
11. Home Depot enters into this Agreement to settle this matter without the delay and unnecessary expense of litigation.
12. 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 violation and voluntarily agree to resolve this matter by means of this Agreement, without the need for formal litigation. Home Depot has taken or agrees to take, the actions enumerated below within the Terms and Conditions. ARB accepts this Agreement in termination and settlement of this matter.

#### **TERMS AND CONDITIONS**

In consideration of ARB not filing a legal action against Home Depot for the violations referred to above, ARB and Home Depot agree as follows:

13. Home Depot shall not manufacture, sell, supply, or offer for sale for use in California, any consumer products in violation of ARB consumer products regulations set forth in 17 CCR § 94500, et seq.; the terms and conditions set forth in this Agreement will remain valid and enforceable notwithstanding any future violations that may occur.
14. Home Depot in settlement of the above-described violation of 17 CCR § 94509(a) agrees to pay a penalty to ARB in the amount of eighty three thousand five hundred dollars (\$83,500) payable to the California Air Pollution Control Fund, concurrent with the execution of this Agreement. Payment and the signed Agreement shall be mailed to the address specified on the Payment Transmittal Form enclosed with this Agreement.
15. This Agreement shall apply to and be binding upon Home Depot and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this settlement.
16. The parties stipulate that this Agreement shall be the final resolution of ARB claims regarding the above-described violations and shall have the same res judicata effect as a judgment in terms of acting as a bar to any civil action by ARB against Home Depot, its officers, directors, receivers, trustees, employees,

successors and assignees, subsidiary and parent corporations. This Agreement shall be deemed the recovery of civil penalties for purposes of precluding subsequent criminal action as provided in H&SC § 42400.7(a).

17. This 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.
18. This Agreement constitutes the entire agreement and understanding between ARB and Home Depot concerning the claims and settlement in this Agreement. This Agreement fully supersedes and replaces any and all prior negotiations and agreements of any kind or nature, whether written or oral, between ARB and Home Depot concerning these claims.
19. The effective date of this Agreement shall be the date upon which this Agreement is fully executed.
20. This Agreement is deemed to have been drafted equally by ARB and Home Depot; it will not be interpreted for or against either Party on the ground that said Party drafted it.
21. No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all parties to this Agreement.
22. This Agreement shall further serve to toll any statute of limitation until all terms and conditions of this Agreement have been fulfilled.
23. It is further agreed that the stipulated penalties described in this Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7).
24. **Penalty Determination**

H&SC § 39619.7 requires ARB to provide information on the basis for the penalties it seeks. This Agreement includes this information, which is also summarized here.

**The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.**

The penalty provision being applied in this case is H&SC § 42402, et seq. because Home Depot sold, supplied, offered for sale, or manufactured for sale consumer products for commerce in California, in violation of the Consumer Products Regulations (17 CCR § 94507, et seq.). The penalty provisions of H&SC § 42402, et seq. apply to violations of the Consumer Products Regulations because the regulations were adopted under authority of H&SC § 41712 which is in Part 4 of Division 26.

**The manner in which the penalty amount was determined, including aggravating and mitigating factors and the per unit penalty.**

H&SC § 42402, et seq. provides strict liability penalties of \$1,000 per day for violations of the Consumer Product Regulations with each day being a separate violation. In this case, ARB considered the number of past Home Depot violations, including previous violations involving Windshield Washer Fluid products being sold to California consumers, as well as efforts Home Depot has undertaken to prevent future violations.

In this case, the total penalty of \$83,500 reflects a penalty of approximately \$843 per day for 99 days the noncompliant product was sold, supplied, or offered for sale. Penalties in future cases might be higher or lower on a per ton or per day basis.

**Is the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.**

The Consumer Product Regulations do not prohibit emissions above a specified level, but they do limit the concentration of VOCs in regulated products. In this case a quantification of the excess emissions attributable to the violations was practicable because Home Depot made the product formulation and sales data necessary to make this quantification available to ARB. Based upon this information (which the Home Depot has designated as confidential), the violations were calculated to have emitted 0.66 tons of excess VOC emissions in California.

Final penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar negotiated cases, and the potential cost and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days resulting in quantifiable harm to the environment considered together with the complete circumstances of this case. Penalties in future cases might be smaller or larger on a per ton basis.

The final penalty in this case was based in part on confidential financial information or confidential business information provided by Home Depot that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and Home Depot that ARB does not retain in the ordinary course of business. The penalty also reflects ARB's assessment of the relative strength of its case against Home Depot, the desire to avoid the uncertainty, burden and expense of

litigation, obtain swift compliance with the law and remove any unfair advantage that Home Depot may have secured from its actions.

25. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be illegal, invalid, or unenforceable in any jurisdiction, the remainder of this Agreement remains in full force and effect.
26. The undersigned represent that they have full power and authority to enter into this Agreement.

ACKNOWLEDGED AND ACCEPTED BY:

**California Air Resources Board**

By: Ellen M. Peter  
Ellen M. Peter  
Chief Counsel  
Date: 12/6/2017

**Home Depot U.S.A., Inc.**

By: Candace N. Rodriguez  
Name:  
Title:  
Date: