

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Marcia S. Krieger**

**Civil Action No. 09-cv-00019-MSK-MEH**

**UNITED STATES OF AMERICA**

**Plaintiff,**

**v.**

**CEMEX, INC.,**

**Defendant.**

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**CONSENT DECREE**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. JURISDICTION AND VENUE ..... 3

III. APPLICABILITY ..... 3

IV. DEFINITIONS..... 5

V. CIVIL PENALTIES..... 11

VI. COMPLIANCE REQUIREMENTS..... 12

VII. PROHIBITION ON NETTING CREDITS OR OFFSETS FROM  
REQUIRED CONTROLS ..... 19

VIII. PERMITS..... 20

IX. REVIEW AND APPROVAL OF SUBMITTALS ..... 23

X. REPORTING REQUIREMENTS ..... 24

XI. STIPULATED PENALTIES ..... 27

XII. FORCE MAJEURE ..... 31

XIII. DISPUTE RESOLUTION ..... 33

XIV. INFORMATION COLLECTION AND RETENTION ..... 36

XV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS..... 38

XVI. COSTS ..... 39

XVII. NOTICES..... 40

XVIII. EFFECTIVE DATE..... 41

XIX. RETENTION OF JURISDICTION..... 41

XX. MODIFICATION ..... 42

XXI. GENERAL PROVISIONS ..... 42

XXII. TERMINATION..... 43

XXIII. PUBLIC PARTICIPATION ..... 44

XXIV. SIGNATORIES/SERVICE..... 45

XXV. INTEGRATION ..... 45

XXVI. FINAL JUDGMENT .....46

## **I. INTRODUCTION**

**WHEREAS**, Plaintiff, the United States of America (the “United States”), on behalf of the United States Environmental Protection Agency (“EPA”), filed an Amended Complaint against the Defendant CEMEX, Inc., pursuant to Sections 113(b) and 167 of the of the Clean Air Act (“Clean Air Act” or “the Act”), 42 U.S.C. §§ 7413(b) and 7477, for injunctive relief and the assessment of civil penalties for alleged violations of the following statutory and regulatory requirements at CEMEX Inc.’s portland cement manufacturing operations located at 5134 Ute Highway, Lyons, Colorado (hereinafter, the “Facility”): the Prevention of Significant Deterioration (“PSD”) provisions, 42 U.S.C. §§ 7470-7492; Title V, 42 U.S.C. § 7661-7661f, the Non-attainment New Source Review (“NNSR”) provisions, 42 U.S.C. §§ 7501-7515; and the State Implementation Plan (“SIP”) adopted by the State of Colorado and approved by EPA pursuant to Section 110 of the Act, 42 U.S.C. § 7410;

**WHEREAS**, in its Amended Complaint, the United States alleges, *inter alia*, that CEMEX failed to obtain the necessary PSD and NNSR permits; install the controls necessary under the Act to reduce nitrogen oxides (“NO<sub>x</sub>”) and particulate matter (“PM”); and incorporate those PSD and NNSR requirements into CEMEX’s Title V operating permit;

**WHEREAS**, on March 28, 2007, EPA issued a Notice of Violation (“NOV”) to CEMEX pursuant to Section 113(a)(1) and (a)(3) of the Act, 42 U.S.C. § 7413(a)(1) and (a)(3), for, among other things, the violations alleged in the Amended Complaint, and EPA provided a copy of the NOV to the State of Colorado;

**WHEREAS**, the United States provided notice of the commencement of this action to the State of Colorado, pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b);

**WHEREAS**, in December 2009, CEMEX, Inc. transferred the Facility to its wholly-owned, indirect subsidiary, CEMEX Construction Materials South, LLC (hereinafter jointly referred to as “CEMEX”);

**WHEREAS**, on July 8, 2010, the Parties entered a Stipulation Regarding Withdrawal of the United States’ Third and Fourth Claims for Relief, Doc. No. 108, which withdrew from the Amended Complaint fugitive dust and opacity violations at the Facility alleged by Plaintiff.

**WHEREAS**, on March 30, 2012, the Court granted in part CEMEX’s Motion to Dismiss Claims One and Two to the extent they were based on Title V of the Clean Air Act and otherwise denied CEMEX’s motion;

**WHEREAS**, the United States and CEMEX (“the Parties”) agree that settlement of this action is in the best interest of the Parties and in the public interest, agree on the appropriateness of various measures intended to resolve the alleged violations, and further agree that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter; and

**WHEREAS**, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, will avoid further litigation between the Parties, and is fair, reasonable, and in the public interest;

**WHEREAS**, CEMEX denies the violations alleged in the Amended Complaint and does not admit to any liability arising out of the transactions or occurrences alleged in the Amended Complaint.

**NOW, THEREFORE**, before trial and without the admission of any issue of fact or law except as provided in Section II (Jurisdiction and Venue), below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

**II. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 113(b) and 167 of the Act, 42 U.S.C. §§ 7413(b) and 7477, and over the Parties. Venue lies in this judicial district pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and 28 U.S.C. § 1391(b) and (c) and 1395(a), because the violations alleged in the Complaint are alleged to have occurred in, and CEMEX conducts business in, this judicial district.

2. For purposes of this Consent Decree, or any action to enforce this Consent Decree, the Parties consent to the Court's jurisdiction and further consent to venue in this judicial district.

**III. APPLICABILITY**

3. The obligations of this Consent Decree apply to and are binding upon the United States and upon CEMEX and CEMEX's successors, assigns, or other entities or persons otherwise bound by law.

4. At least fifteen (15) Days prior to any transfer of ownership or operation of the Facility, CEMEX shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to the United States, in accordance with Section XVII of this Consent Decree (Notices). No transfer of Facility ownership or operation, whether in

compliance with the procedures of this Paragraph or otherwise, shall relieve CEMEX of its obligation to ensure that the terms of the Decree are implemented, unless: (a) the transferee agrees to undertake the obligations required by Sections VI (Compliance Requirements), VII (Prohibition on Netting Credits or Offsets), VIII (Permits), IX (Review and Approval of Submittals), X (Reporting Requirements), XI (Stipulated Penalties), XII (Force Majeure), XIII (Dispute Resolution), and XIV (Information Collection and Retention) of this Consent Decree and to be substituted for CEMEX as a Party under the Decree and thus be bound by the terms thereof; (b) the United States consents to the substitution and agrees to relieve CEMEX of its obligations; and (c) the transferee becomes a Party to this Consent Decree with respect to the transferred Facility, pursuant to Section XX (Modification). Any attempt to transfer ownership or operation of the Facility, or any portion thereof, without complying with this Paragraph constitutes a violation of this Consent Decree. CEMEX may assert that written notice provided under this Paragraph is protected as Confidential Business Information under 40 C.F.R. Part 2.

5. CEMEX shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any Contractor retained to perform work required under this Consent Decree.

6. In any action to enforce this Consent Decree, CEMEX shall not raise as a defense the failure by any of its officers, directors, employees, agents, or Contractors to take any actions necessary to comply with the provisions of this Consent Decree.

#### IV. DEFINITIONS

7. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. **“30-Day Rolling Average NO<sub>x</sub> Emission Rate”** shall mean the rate of NO<sub>x</sub> emissions expressed as pounds (lb) per Ton of clinker produced (“lb NO<sub>x</sub>/Ton of clinker”) at the Lyons Kiln for an Operating Day and the previous 29 Operating Days calculated in accordance with the following procedure: first, sum the total pounds of NO<sub>x</sub> emitted from the Lyons Kiln Main Stack during an Operating Day and the previous 29 Operating Days, as measured by the NO<sub>x</sub> CEMS; second, sum the total Tons of clinker produced by the Lyons Kiln during the same Operating Day and the previous 29 Operating Days; and third, divide the total number of pounds of the specified pollutant emitted from the Lyons Kiln Main Stack during the 30 Operating Days referred to above by the total Tons of clinker produced at the Lyons Kiln during the same 30 Operating Days. A new 30-day rolling average NO<sub>x</sub> emission rate shall be calculated for each new Operating Day. Each 30-day rolling average NO<sub>x</sub> emission rate shall include all NO<sub>x</sub> emissions from the Lyons Kiln Main Stack during all periods of Kiln Operation on any Kiln Operating Day, including emissions during each Startup, Shut Down, or Malfunction. If CEMEX asserts that a Malfunction and any resulting Kiln Shut Down and Startup is a Force Majeure event within the meaning of Section XII (Force Majeure), CEMEX shall include all such emissions in the calculation of the 30-day rolling average

NOx emission rate, but may not be subject to stipulated penalties for a violation of an applicable emission limitation pursuant to Section XI (Stipulated Penalties) to the extent that emissions associated with the particular Malfunction and any resulting Kiln Shut Down and Startup cause an emission violation and the Malfunction and any resulting Kiln Shut Down and Startup is determined to be a Force Majeure event under Section XII (Force Majeure) and CEMEX has complied with the requirements of that Section;

b. **“Ammonia Injection Meter”** shall mean the total equipment required to meter the flow of ammonia injected into the SNCR System.

c. **“Ammonia Slip”** shall mean the amount of unreacted ammonia contained in emissions from the Lyons Kiln Main Stack when the SNCR System is operating as measured by the Ammonia Stack Monitor in parts per million. Ammonia Slip shall be calculated by subtracting Baseline Ammonia from Stack Ammonia;

d. **“Ammonia Stack Monitor”** shall mean the total equipment and software required to sample, analyze, and provide a record of ammonia contained in emissions from the Lyons Kiln Main Stack;

e. **“Baseline Ammonia”** shall mean the average (arithmetic mean) of the ammonia in emissions from the Lyons Kiln Main Stack, as measured by the Ammonia Stack Monitor in parts per million during the period that commences 60 days after CEMEX receives notice of EPA’s approval of the initial performance specification testing required under Paragraph 10 and continues for the following, 180 consecutive Operating Days. Baseline Ammonia must be determined prior to the installation of the SNCR System



when ammonia is not being injected into the Lyons Kiln, but may, with EPA approval, be reconfirmed or reestablished after installation of the SNCR System periodically;

f. **“Business Day”** means any day, except for Saturday, Sunday, and federal holidays;

g. **“CDPHE”** means the Colorado Department of Public Health and Environment;

h. **“CEMEX”** shall mean both CEMEX, Inc. and CEMEX Construction Materials South, LLC;

i. **“CEMS”** or **“Continuous Emission Monitoring System”** shall mean, for obligations involving NO<sub>x</sub> under this Consent Decree, the total equipment and software required to sample, condition (if applicable), analyze, and provide a record of NO<sub>x</sub> emissions rates;

j. **“Commence Operation”** or **“Commencement of Operation”** of a pollution control technology that is required to be installed and operated pursuant to this Consent Decree shall mean to begin the introduction of the reagent employed by the pollution control technology;

k. **“Complaint”** or **“Amended Complaint”** shall mean the complaint or amended complaint the United States filed in United States v. CEMEX, Inc., Civil Action 09-cv-00019-MSK;

l. **“Consent Decree”** or **“Decree”** shall mean this Consent Decree;

m. **“Continuously Operate”** or **“Continuous Operation”** shall mean that the SNCR System (or alternative pollution control technology approved by EPA pursuant to Paragraph 13 of this Consent Decree), Ammonia Injection Meter, Ammonia Stack

Monitor, and NO<sub>x</sub> CEMs that are used to comply with provisions of this Consent Decree shall be operated at all times of Lyons Kiln Operation, except during (a) Malfunctions of the pollution control, emissions monitoring, or ammonia metering technology, (b) metering or monitoring equipment repairs, calibration checks, and zero and span adjustments, or (c) when Baseline Ammonia is being established or reestablished per Paragraph 12, consistent with the technological limitations (including but not limited to the gas temperature at the point of ammonia injection), manufacturers' specifications, and good engineering and maintenance practices for such pollution control technology and the Lyons Kiln, and good air pollution control practices for minimizing emissions;

n. **“Contractor”** shall mean any person or entity CEMEX hires to perform services on its behalf necessary to comply with the provisions of this Consent Decree;

o. **“Date of Lodging”** shall mean the date the United States files a Notice of Lodging, together with this Consent Decree, with the Clerk of the Court for the United States District Court for the District of Colorado;

p. **“Day”** shall mean a calendar day unless expressly stated to be a Business Day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next Business Day;

q. **“Effective Date”** shall have the meaning given in Section XVIII (Effective Date);

r. **“Final 30-Day Rolling Average Emission Limit”** or **“Final NO<sub>x</sub> Emission Limit”** shall mean the 30-day rolling average NO<sub>x</sub> emission limit that is identified as a result of the completion of the process outlined in Paragraphs 19, 23, or 24;

- s. **“EPA”** shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;
- t. **“Facility”** or **“Lyons Facility”** shall mean CEMEX’s portland cement manufacturing plant located at 5134 Ute Highway, Lyons, CO 80540;
- u. **“Kiln”** or **“Lyons Kiln”** shall mean the kiln, preheater, precalciner, and clinker cooler at the Lyons Facility;
- v. **“Kiln Operation”** shall mean, with respect to the Lyons Kiln, any period when any raw materials are fed into the Lyons Kiln or any period when any combustion is occurring or fuel is being fired in the Lyons Kiln;
- w. **“Main Stack of the Lyons Kiln”** or **“Lyons Kiln Main Stack”** or **“Main Stack”** means the exhaust stack of the Lyons Kiln that vents gases from the Kiln to the atmosphere (AIRS Stack No. 007);
- x. **“Malfunction”** as used in this Consent Decree shall have the same meaning as defined at 40 C.F.R. § 60.2;
- y. **“NOx”** shall mean oxides of nitrogen, measured in accordance with the provisions of this Consent Decree and expressed as nitrogen dioxide (“NO<sub>2</sub>”);
- z. **“Non-attainment NSR”** or **“NNSR”** shall mean the non-attainment area New Source Review program within the meaning of Part D of Subchapter I of the Clean Air Act, 42 U.S.C. §§ 7501-7515, 40 C.F.R. Part 51, and the Colorado State Implementation Plan;

- aa. **“NOx Demonstration Period”** shall mean the period that commences on the 60<sup>th</sup> Day after CEMEX receives EPA’s approval of the Optimization Report and ends 365 consecutive Operating Days thereafter;
- bb. **“Operating Day”** shall mean any Day on which Kiln Operation occurs;
- cc. **“Optimized SNCR”** shall mean the SNCR System after it is optimized pursuant to an EPA-approved SNCR Optimization Report submitted pursuant to Paragraph 16;
- dd. **“Paragraph”** shall mean a portion of this Decree identified by an Arabic numeral;
- ee. **“Parties”** shall mean the United States of America and CEMEX;
- ff. **“Proposed 30-Day Rolling Average Emission Limit”** or **“Proposed NOx Emission Limit”** shall mean the NOx emission limit CEMEX shall propose in its NOx Demonstration Period Final Report, calculated as prescribed in Paragraph 20;
- gg. **“PSD”** shall mean the Prevention of Significant Deterioration program within the meaning of Part C of Subchapter I of the Clean Air Act, 42 U.S.C. §§ 7470 -7492, 40 C.F.R. Part 52, and the Colorado State Implementation Plan;
- hh. **“Section”** shall mean a portion of this Decree identified by a Roman numeral;
- ii. **“Selective Non-Catalytic Reduction System”** or **“SNCR System”** shall mean a pollution control system that injects an ammonia-based reagent into the gas stream without the use of a catalyst for the purpose of reducing NOx emissions;
- jj. **“SIP”** shall mean the Colorado State Implementation Plan as submitted to and approved by EPA pursuant to Section 110 of the Act, 42 U.S.C. § 7410;

- kk. **“Shut Down”** shall mean the period commencing with the cessation of raw material feed to the Lyons Kiln and ending when kiln rotation ceases;
- ll. **“Stack Ammonia”** shall mean the concentration of ammonia in emissions from the Lyons Kiln Main Stack (AIRS Stack Number 007) as measured by the Ammonia Stack Monitor;
- mm. **“Startup”** shall mean the period beginning when fuel is first fired in the Kiln and ending when feed is being continuously introduced into the Kiln for at least 120 minutes or when the feed rate exceeds 60 percent of the Kiln design limitation rate, whichever occurs first;
- nn. **“State”** shall mean the State of Colorado, acting on behalf of the Colorado Department of Health and Environment;
- oo. **“Title V permit”** shall mean a permit required by or issued pursuant to the requirements of Title V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f;
- pp. **“Ton”** or **“Tons”** shall mean short ton or short tons; and
- qq. **“United States”** shall mean the United States of America, acting on behalf of EPA.

#### V. CIVIL PENALTIES

8. Not later than 30 Days after the Effective Date of this Consent Decree, CEMEX shall pay one million dollars (\$1,000,000) to the United States as a civil penalty, together with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961 as of the Effective Date. Such civil penalty shall be paid by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with written instructions to be provided to

CEMEX, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney's Office for the District of Colorado. At the time of payment, CEMEX shall send a copy of the EFT authorization form and the EFT transaction record together with a transmittal letter, which shall state that the payment is for the civil penalties owed pursuant to the Consent Decree in *United States. v. CEMEX, Inc.*, and shall reference the civil action number and DOJ case number 90-5-2-1-09151, to the United States in accordance with Section XVII (Notices) of this Decree; by email to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov); and by mail to:

U.S. EPA Cincinnati Finance Office  
26 Martin Luther King Drive  
Cincinnati, Ohio 45268

9. CEMEX shall not deduct any penalties paid under this Decree pursuant to this Section or Section XI (Stipulated Penalties) in calculating its federal, state, or local income taxes.

#### **VI. COMPLIANCE REQUIREMENTS**

10. Not later than 90 Days after the Effective Date, CEMEX shall install an Ammonia Stack Monitor in the Lyons Kiln Main Stack to measure Stack Ammonia. The Ammonia Stack Monitor shall be installed and operated in a manner that meets the requirements of 40 C.F.R. Part 60, Appendices B and F, including Performance Specification 6. Not later than 180 Days after the Effective Date, CEMEX shall submit to EPA for review and approval the initial performance specification testing for the Ammonia Stack Monitor pursuant to 40 C.F.R. Part 60, Appendix A, Test Methods 1-4 and Conditional Test Method (CTM-027). CEMEX shall Continuously Operate the Ammonia Stack Monitor beginning not later than 30 Days after CEMEX receives notice pursuant to Section XVII (Notice) of EPA's approval of the initial performance specification testing and thereafter at all times during Kiln Operation.

11. Within 60 Days of the Effective Date of the Decree, CEMEX shall certify to EPA that its NOx CEMS meets the requirements of 40 C.F.R. Part 60, Appendix B Performance Specifications 2 and 6 requirements. The NOx CEMS shall be calibrated, maintained, and operated in accordance with 40 C.F.R. § 60.13 and Part 60, Appendices B and F and shall be Continuously Operated during Kiln Operation. The NOx CEMS shall be used to gather NOx data in connection with this Consent Decree.

12. Baseline Data Collection. During the time period that commences 60 Days after CEMEX receives notice of EPA's approval of the initial performance specification testing required under Paragraph 10 and ending 180 consecutive Operating Days later, CEMEX shall collect baseline data on the operating and production characteristics specified in Subparagraphs a. – n. of this Paragraph. During the baseline data collection period, CEMEX shall operate the Lyons Kiln in conformity with good engineering practices, and all baseline data shall be derived from available direct monitoring of the process or as estimated from monitored or measured data during normal operation of the Kiln. During the baseline data collection period, the type, quality, and composition of fuel burned in the Kiln, proportions of fuel burned at any location, and the location at which fuel is burned shall reflect fuel burning practices in the 12 month period preceding the Effective Date to the greatest extent possible. CEMEX shall collect the following data during the baseline data collection period:

- a. Baseline Ammonia concentration (ppm);
- b. Kiln flue gas temperature at the inlet to the PM control device(s) for the Main Stack at the Lyons Kiln (daily average);
- c. Kiln production rate in Tons of clinker (daily total);

- d. Raw material feed rate in Tons (daily total);
- e. Type and percentage of each raw material used and the total feed rate (daily);
- f. O<sup>2</sup>, NO<sub>x</sub>, and ammonia concentrations and mass rates for the Lyons Kiln Main Stack (daily average for concentrations and daily totals for mass rates) as measured by the CEMs;
- g. Flue gas volumetric flow rate (daily average in dscfm or acfm, as appropriate);
- h. Feed burnability (at least once at the beginning and once at the end of the baseline data collection period) using tricalcium silicate as the relative index;
- i. Temperatures that are representative of the burning zone;
- j. Kiln fuel feed rate and type of fuel by weight or heat input rate (calculated to a daily average);
- k. Fuel distribution, if fuel is injected at more than one location, how much is injected at each location (daily average);
- l. Primary and secondary air rates or blower/fan settings (daily average);
- m. Documentation of any Startup, Shut down, or Malfunction events; and
- n. An explanation of any gaps in the data, estimated data, or missing data.

13. Design of SNCR System. Not later than 90 Days after the Effective Date, CEMEX shall submit a SNCR Design Report to EPA for review and approval pursuant to Section IX (Review and Approval of Submittals) that contains the design for a SNCR System for the Lyons Kiln to achieve the greatest emission reduction of NO<sub>x</sub> from the Lyons Kiln Main Stack, consistent with a NO<sub>x</sub> emission target of 1.85 lb/Tons of clinker, during Kiln Operation. The SNCR System shall be designed to inject 19% aqueous ammonia into the Kiln at the



optimum temperature window and at the optimum location to obtain maximum NO<sub>x</sub> reductions. The SNCR System design shall consider different operating scenarios, and utilize multiple sets of nozzles if necessary to accommodate the different operating scenarios. The SNCR Design Report shall justify the location(s) selected for reagent injection and other design parameters based on maximum emission reduction effectiveness, good engineering judgment, vendor standards, and available data.

14. Not later than 120 Days after EPA's approval of the SNCR Design Report or 450 Days after the Effective Date, whichever is later, CEMEX shall install and Commence Operation of a SNCR System meeting the design criteria established in the approved SNCR Design Report.

15. Not later than 30 Days after the installation of the SNCR System on the Lyons Kiln, CEMEX shall install and operate during Kiln Operation an Ammonia Injection Meter to continuously measure the ammonia injection rate of the SNCR System. The Ammonia Injection Meter must be installed, calibrated, operated, and maintained in accordance with good engineering practices and the manufacturer's recommendations. Except during breakdowns, repairs, calibration checks, and zero and span adjustments, CEMEX shall capture, record, and report data from the Ammonia Injection Meter, Ammonia Stack Monitor, and NO<sub>x</sub> CEMS in a form and manner that allows EPA to determine CEMEX's compliance with the requirements of this Consent Decree.

16. SNCR Optimization. After the installation of the SNCR System, CEMEX shall optimize for maximum NO<sub>x</sub> reduction: (a) the amount of ammonia injected into the Lyons Kiln, (b) the location or locations at which the ammonia is injected, and (c) the number of nozzles used to inject the ammonia. CEMEX also shall develop a protocol for operating the SNCR System at

an Ammonia Slip setpoint of 15 ppm and to maintain Ammonia Slip below a maximum concentration of 25 ppm while following good engineering practices to minimize NOx emissions from the Lyons Kiln Main Stack. Not later than 90 Operating Days after the installation of the SNCR System, CEMEX shall submit a SNCR Optimization Report to EPA for review and approval pursuant to Section IX (Review and Approval of Submittals). The SNCR Optimization Report shall identify the final location or locations selected for ammonia injection, the protocol that will be used during the demonstration to maintain an Ammonia Slip setpoint of 15 ppm and Ammonia Slip below a maximum concentration of 25 ppm, and all other steps taken to comply with this Paragraph, including a discussion of any problems encountered with the operation of the SNCR System, and operational solutions to problems. The SNCR Optimization Report shall include the baseline data collected pursuant to Paragraph 12 and shall identify the Baseline Ammonia.

17. Beginning no later than 10 Days after EPA's approval of the SNCR Optimization Report, and continuing each Day thereafter until a Final NOx Emission Limit is established pursuant to Paragraphs 19, 23 or 24, CEMEX shall Continuously Operate the SNCR System consistent with the protocol established in the approved SNCR Optimization Report.

18. The time period beginning 30 Days after EPA's approval of the SNCR Optimization Report and ending 365 Operating Days thereafter (but in no event later than two years after EPA approval of the SNCR Optimization Report), shall constitute the NOx Demonstration Period. The length of the NOx Demonstration Period may be altered by written agreement of the Parties pursuant to Section XX (Modification) of this Decree. The purpose of the NOx Demonstration Period is to establish the Final 30-Day Rolling Average Emission Limit.

During the NOx Demonstration Period (and any period thereafter before a Final NOx Emission Limit is determined pursuant to Paragraphs 19, 23 or 24), CEMEX shall: (a) comply with the protocol for minimizing NOx emissions set forth in the EPA approved SNCR Optimization Report; (b) not exceed a 30-Day Rolling Average Emission Rate of 3.11 lb NOx/Ton of clinker; (c) operate the Kiln in a manner consistent with normal operation; and (d) not adjust any operating parameters solely for the purpose of increasing NOx emissions. CEMEX shall not be considered in violation of this Consent Decree if the Ammonia Slip is below 15 ppm. during the NOx demonstration period, however, EPA reserves the right to exclude any NOx data from the calculation of the Final Emission Limit during time periods in which CEMEX has not complied with the protocol for minimizing NOx emissions set forth in the SNCR Optimization Report.

19. Notwithstanding the provisions of this Consent Decree pertaining to the NOx Demonstration Period and/or the SNCR Optimization Report, CEMEX may at any time upon Notice to EPA, pursuant to Section XVII of this Consent Decree, elect a 30-Day Rolling Average Emission Limit of 1.85 lb NOx/Ton of clinker. If CEMEX makes this election, the Final 30-Day Rolling Average Emission Limit shall be 1.85 lb NOx/Ton of clinker. CEMEX need not continue any remaining portion of the NOx Demonstration Period if it makes this election. CEMEX shall comply with this Final NOx Limit within 30 Operating Days of providing EPA with Notice of this election pursuant to Section XVII (Notice) of this Consent Decree.

20. Not later than 90 Days after completion of the NOx Demonstration Period, CEMEX shall submit a NOx Demonstration Period Final Report to EPA for review and approval pursuant to Section IX (Review and Approval of Submittals). The NOx Demonstration Period

Final Report shall include the information set forth in Paragraph 12 a. – n. collected during the NOx Demonstration Period. CEMEX shall also include a Proposed 30-Day Rolling Average Emission Limit in the NOx Demonstration Period Final Report together with an explanation of how the proposed limit was determined. The Proposed NOx Emission Limit shall be calculated in accordance with the following formula:

$X = \mu + 1.65\sigma$  where:

$X$  = Proposed 30-Day Rolling Average Emission Limit (lb. NOx/Ton of clinker)

$\mu$  = arithmetic mean of the 30-Day rolling averages for each Operating Day

$\sigma$  = standard deviation of all of the 30-Day rolling averages, as calculated in the following manner:

$$\sigma = \sqrt{\frac{1}{N} \sum_{i=1}^N (x_i - \bar{x})^2}$$

In calculating the Proposed NOx Emission Limit, CEMEX shall not use data from any time period that does not comply with the requirements of the approved SNCR Optimization Report. Notwithstanding the procedures for calculating the Proposed NOx Emission Limit set forth above, the Proposed NOx Emission Limit need not be less than 1.85 lb NOx/Ton clinker and shall not be greater than 3.11 lb NOx/Ton clinker.

21. Immediately upon submission of the NOx Demonstration Report, CEMEX shall not exceed the Proposed NOx Emission Limit. Thereafter, CEMEX shall not exceed the Proposed 30-Day Rolling Average Emission Limit until the Final 30-Day Rolling Average Emission Limit is established pursuant to Paragraphs 19, 23, or 24.

22. NOx CEMS data collected pursuant to and deemed valid by 40 C.F.R. part 60 shall be used in calculating the Proposed 30-Day Rolling Average Emission Limit for NOx pursuant to Paragraph 20.

23. Notwithstanding Section IX of this Consent Decree (Review and Approval of Submittals), EPA shall either approve CEMEX's Proposed NOx Emission Limit or establish an alternative NOx Emissions Limit. If EPA approves CEMEX's Proposed NOx Emissions Limit, it shall become the Final NOx Emission Limit. If EPA establishes an alternative NOx Emissions Limit, EPA's alternative NOx Emission Limit shall become the Final NOx Emission Limit unless CEMEX invokes Dispute Resolution within 30 Days of receiving notice of EPA's alternative NOx Emission Limit pursuant to Section XVII (Notice) of this Consent Decree.

24. If CEMEX invokes Dispute Resolution regarding EPA's alternative NOx Emissions Limit, the Final NOx Limit shall be the 30-Day Rolling Average agreed to by the Parties at the conclusion of Informal Dispute Resolution pursuant to Paragraph 63 of this Consent Decree. If Informal Dispute Resolution does not resolve the dispute, CEMEX shall comply with its Proposed Final NOx Emissions Limit until a Final NOx Emissions Limit is determined by the Court.

25. Not later than 45 Days after a Final NOx Emissions Limit is established pursuant to Paragraph 19, 23, or 24 of this Consent Decree, CEMEX shall demonstrate and maintain continuous compliance with the Final NOx Emissions Limit .

**VII. PROHIBITION ON NETTING CREDITS OR OFFSETS FROM  
REQUIRED CONTROLS**

26. Emission reductions resulting from compliance with the requirements of this Consent Decree shall not be considered as a creditable contemporaneous emission decrease for

the purpose of obtaining a netting credit or offset under the Clean Air Act's Non-attainment NSR and PSD programs.

27. The limitations on the generation and use of netting credits or offsets set forth in Paragraph 26 do not apply to emission reductions achieved by CEMEX at the Lyons Kiln Main Stack that are greater than those required under this Consent Decree. For purposes of this Paragraph, emission reductions are greater than those required under this Consent Decree if they result from CEMEX's compliance with enforceable emission limitations that are more stringent than the limits imposed under this Consent Decree, applicable provisions of the Clean Air Act, and the Colorado SIP, and the emission reductions resulting from the more stringent emission limits are made "creditable" within the meaning of, and as required by, the Colorado SIP.

28. Nothing in this Consent Decree is intended to preclude the emission reductions generated under this Decree from being considered by EPA as creditable contemporaneous emission decreases for the purpose of attainment demonstrations submitted pursuant to Section 110 of the Act, 42 U.S.C. § 7410, or in determining impacts on National Ambient Air Quality Standards, PSD increments, or air quality-related values, including visibility in a Class I area.

#### **VIII. PERMITS**

29. Where any compliance obligation under this Consent Decree requires CEMEX to obtain a federal, State, or local permit or approval, CEMEX shall submit a timely and complete application for such permit or approval and take all other actions necessary to obtain all such permits or approvals, including requests for additional information by the permitting or approval authority. The inability of CEMEX to obtain a permit in adequate time to allow for compliance with the deadlines stated in this Consent Decree shall be considered a Force Majeure

event if CEMEX demonstrates that it exercised best efforts to timely fulfill its permitting obligations and has otherwise complied with the requirements of Section XII of this Consent Decree (Force Majeure). If, after demonstrating compliance with the requirements of this Paragraph, CEMEX determines that it is unable to timely obtain a permit or approval necessary to install and Commence Operation of the SNCR System as required by this Consent Decree, then CEMEX shall immediately notify EPA pursuant to Section XVII of this Consent Decree (Notice) and shall request an extension of time necessary to obtain such permit or approval and/or to install and Commence Operation of the SNCR System. If EPA determines that CEMEX's inability to timely obtain any such required permit or approval is a Force Majeure event, then the provisions of Paragraph 59 shall apply to extend the deadline for installation and commencement of Continuous Operation of SNCR and for achieving and maintaining compliance with any applicable Proposed or Final NO<sub>x</sub> Emission Limit.

30. Within 180 Days of the date a Final NO<sub>x</sub> Emission Limit is established pursuant to Paragraph 19, 23, or 24, CEMEX shall apply to the CDPHE to include the following requirements of this Consent Decree into a federally enforceable permit (other than a Title V permit) issued under the Colorado SIP (and independent of the authority to issue Title V permits): (a) the Final Emission Limit established pursuant to Paragraph 19, 23, or 24; (b) the operational requirements for the SNCR System; (c) the monitoring requirements of this Decree; and (d) the requirements in Section VII (Prohibition on Netting Credits or Offsets). In lieu of incorporating these terms of the Consent Decree directly into a federally enforceable permit, CEMEX may request the CDPHE to submit the requirements of the Consent Decree to EPA for approval under the Colorado SIP in accordance with 42 U.S.C. § 7410(k). Following submission

of the application for the permit or request for SIP revision, CEMEX shall cooperate with CDPHE by timely submitting any additional information requested following its receipt of the application for the permit or request for SIP revision.

31. Within 60 Days of issuance of a permit by the appropriate permitting authority, or in conjunction with the issuance of such permit, or upon issuance of a SIP revision, CEMEX shall file any applications necessary to incorporate the requirements of the permit or SIP revision into the Title V operating permit for the Facility.

32. The Parties agree that incorporation of the requirements of this Consent Decree into the Title V permit for the Facility shall be in accordance with the applicable federal, State or local rules or laws.

33. Contemporaneously with its submission to CDPHE, CEMEX shall provide EPA with a copy of each application for a permit or request for SIP revision required by Paragraph 30, as well as a copy of any permit or SIP revision proposed as a result of such application or request, to allow for timely participation in any public comment opportunity.

34. Notwithstanding the reference to Title V permits in this Consent Decree, the enforcement of such permits shall be in accordance with their own terms and the Act. The Title V permits shall not be enforceable under this Consent Decree, although any term or limit established by or under this Consent Decree shall be enforceable under this Consent Decree regardless of whether such term has or will become part of a Title V permit, subject to the terms of Section XXI (Termination) of this Consent Decree.



**IX. REVIEW AND APPROVAL OF SUBMITTALS**

35. After review of any plan, report, or other document that is required to be submitted pursuant to this Consent Decree, EPA shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove (with explanation) the remainder; or (d) disapprove (with explanation) the submission.

36. If the submission is approved pursuant to Paragraph 35(a), CEMEX shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part, pursuant to Paragraph 35(b) or (c), CEMEX shall, upon written direction of EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to CEMEX's right to dispute only the specified conditions or the disapproved portions, under Section XIII (Dispute Resolution) of this Decree.

37. If the submission is disapproved in whole or in part pursuant to Paragraph 35(c) or (d), CEMEX shall, subject to its right to dispute the disapproved portions pursuant to Section XIII (Dispute Resolution) of this Decree, within 45 Days of receipt of the disapproval or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, CEMEX shall proceed in accordance with the preceding Paragraph.

38. Any stipulated penalties applicable to an original submission that is disapproved in whole or in part pursuant to Paragraph 35(c) or (d), as provided in Section XI (Stipulated Penalties) of this Decree, shall continue to accrue during the 45 Day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of CEMEX's obligations under this Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

39. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require CEMEX to correct any deficiencies in accordance with the preceding Paragraphs, or may correct any deficiencies itself and seek stipulated penalties, subject to CEMEX's right to invoke Dispute Resolution under Section XIII of this Consent Decree and the right of EPA to seek stipulated penalties provided in the preceding Paragraphs.

#### **X. REPORTING REQUIREMENTS**

40. CEMEX shall submit the following reports: Within 30 Days after the end of each half calendar year (*i.e.*, by January 30th and July 30th) after the Effective Date, until termination of this Decree pursuant to Section XXII (Termination), CEMEX shall submit a semi-annual report to EPA as specified in this Paragraph for the immediately preceding half calendar year period that shall:

- a. Identify any and all dates on which CEMEX installed, or describe the progress of installation of, the SNCR System required to be installed and operated at the Lyons Kiln under Section VI (Compliance Requirements) and describe any

- problems encountered or anticipated during such installation, together with implemented or proposed solutions;
- b. Identify any and all dates on which CEMEX has completed installation of, or describe the progress of installation of, the Ammonia Stack Monitor, Ammonia Injection Monitor, and NOx CEMS required under Section VI., and describe any problems encountered or anticipated during such installation, together with implemented or proposed solutions;
  - c. Provide all NOx CEMS data collected for the Lyons Kiln Main Stack under Section VI not previously submitted;
  - d. Provide all data necessary to determine compliance with Section VI not previously submitted;
  - e. Describe the status of permit applications required under this Consent Decree; and
  - f. Describe the status of any operation and maintenance work relating to activities required under this Consent Decree.

The semi-annual report shall also include a description of any non-compliance with the requirements of this Consent Decree and an explanation of the violation's likely cause and of the remedial steps taken (including the length of time to comply or date when compliance will be achieved), or to be taken, to prevent or minimize such violation.

41. If CEMEX violates any requirement of this Consent Decree, it shall notify the United States (pursuant to Section XVII (Notice)) of such violation and its likely duration, in writing, within 10 Days of the Day CEMEX first became aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to

prevent or minimize such violation. CEMEX shall investigate the cause of the violation and shall then submit an amendment to the report required under this Paragraph, including a full explanation of the cause of the violation, within 30 Days of the Day CEMEX became aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves CEMEX of its obligation to provide the notice required by Section XII (Force Majeure) of this Consent Decree if CEMEX contends a Force Majeure event occurred.

42. Whenever any violation of this Consent Decree, or of any applicable permits required under this Consent Decree, or any other event affecting CEMEX's performance under this Decree, or the performance of the Facility, may pose an immediate threat to the public health or welfare or the environment, CEMEX shall notify EPA and CDPHE orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after CEMEX first knew, or should have known, of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

43. All reports shall be submitted to the persons designated in Section XVII (Notices) of this Consent Decree.

44. Each report submitted by CEMEX under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

45. The reporting requirements of this Consent Decree do not relieve CEMEX of any reporting obligations required by the Clean Air Act or implementing regulations, or by any other federal, State, or local law, regulation, permit, or other requirement.

46. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

**XI. STIPULATED PENALTIES**

47. CEMEX shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified in Table 1 below, unless excused under Section XII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

**TABLE 1**

<b>CONSENT DECREE VIOLATIONS</b>	<b>STIPULATED PENALTY</b>
Failure to pay the civil penalty as specified in Section V (Civil Penalty) of this Consent Decree	\$5,000 for each Day
Failure to comply with any 30-Day Rolling Average Emission Rate limitation for NO <sub>x</sub> , where the emissions are less than 5% in excess of the limits set forth in this Consent Decree	\$1,000 for each Operating Day during any 30-Day Rolling Period where the violation is less than 5% in excess of the limitation

<b>CONSENT DECREE VIOLATIONS</b>	<b>STIPULATED PENALTY</b>
Failure to comply with any 30-Day Rolling Average Emission Rate limitation for NOx, where the emissions are equal to or greater than 5% but less than 10% in excess of the limits set forth in this Consent Decree	\$ 2000 for each Operating Day during any 30-Day Rolling Period where the violation is equal to or greater than 5% but less than 10% in excess of the limitation
Failure to comply with a 30-Day Rolling Average Emission Rate limitation for NOx, where the emissions are equal to or greater than 10% in excess of the limits set forth in this Consent Decree	\$ 3,000 for each Operating Day during any 30-Day Rolling Period where the violation is equal to or greater than 10% in excess of the limitation
Failure to timely install or Commence Continuous Operation of the SNCR System as required in Paragraphs 14 at the Lyon’s Kiln	\$5,000 for each Day during the first 30 Days, \$10,000 for each Day for the next 60 Days, and \$37,500 for each consecutive Day thereafter
Post Installation Failure to Continuously Operate the SNCR System as required in Paragraphs 17 at the Lyon’s Kiln	\$1,000 for each Day during the first 20 Days, \$2,500 for each Day for the next 40 Days, and \$5,000 for each Day thereafter
Failure to timely apply for any permit or permit amendment required by Section VIII (Permits)	\$1,000 for each Day for each such failure
Failure to certify or operate a CEMS in conformance with the requirements of Paragraph 11	\$1,000 for each Day for each such failure
Failure to install or operate a Ammonia Injection Meter in conformance with the requirements of Paragraph 15	\$1,000 for each Day for each such failure
Failure to install or operate a Kiln Ammonia Stack Monitor in conformance with the requirements of Paragraph 10	\$1,000 for each Day for each such failure
Failure to timely complete the NOx Demonstration Period required by Paragraphs 18-19	\$1,000 for each Day during the first 20 Days, \$2,500 for each Day for the next 40 Days, and \$5,000 for each Day thereafter
Failure to timely submit, modify, or implement, as approved, any of the following: (1) SNCR Design Report, Paragraph 13; (2) SNCR Optimization Report, Paragraph 16; (3) NOx Demonstration Period Final Report, required by Paragraph 20; or the Semi-Annual Report, required by Paragraph 40	\$1,000 for each Day during the first 20 Days, \$2,500 for each Day for the next 40 Days, and \$5,000 for each Day thereafter

<b>CONSENT DECREE VIOLATIONS</b>	<b>STIPULATED PENALTY</b>
Failure to timely submit, modify, or implement, as approved, any report, plan, study, analysis, protocol, or other submittal required by this Consent Decree other than those specifically identified in this table	\$750 for each Day during the first 10 Days, \$1,000 for each Day thereafter
Any other violation of this Consent Decree	\$1,000 for each Day for each violation

48. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

49. Violations of the Final 30-Day Rolling Average Emissions Limit constitutes 30 Days of violation, but where such a violation recurs within periods less than 30 Days, CEMEX shall not be obligated to pay a daily stipulated penalty for any Day of the recurrence for which a stipulated penalty has already been paid.

50. CEMEX shall pay any stipulated penalty within 30 Days of receiving the United States' demand.

51. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due the United States under this Consent Decree.

52. Stipulated penalties shall continue to accrue as provided in this Section, during any Dispute Resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, CEMEX shall pay accrued penalties determined to be owed, if any, together with interest in accordance with Paragraph 55 within 30

Days of the effective date of the agreement or the receipt of EPA's decision or order.

- b. If the dispute is appealed to the Court and the United States prevails in whole or in part, CEMEX shall pay all accrued penalties determined by the Court to be owing, if any, together with interest in accordance with Paragraph 55, within 60 Days of receiving the Court's decision or order, except as provided in Subparagraph (c), below;
- c. If any Party appeals the District Court's decision, CEMEX shall pay all accrued penalties determined to be owing, if any, together with interest in accordance with Paragraph 55, within 15 Days of receiving the final appellate court decision.

53. CEMEX shall pay stipulated penalties owing to the United States in the manner set forth in, and with the confirmation notices required by, Paragraph 8, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

54. CEMEX shall not deduct stipulated penalties paid under this Section in calculating their federal or state or local income tax.

55. If CEMEX fails to pay stipulated penalties according to the terms of this Consent Decree, CEMEX shall be liable for interest on such penalties, as provided for in 28 U.S.C. §1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from securing any remedy otherwise provided by law for CEMEX's failure to pay any stipulated penalties.



56. Subject to the provisions of Section XV. (Effect of Settlement/Reservation of Rights) of this Consent Decree, the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for CEMEX's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of any applicable statute or regulation, CEMEX shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

## **XII. FORCE MAJEURE**

57. "Force Majeure," for purposes of this Consent Decree, is defined as any event, including events qualifying as Force Majeure under Paragraph 29, arising from causes beyond the control of CEMEX, of any entity controlled by CEMEX, or of CEMEX's Contractors that delays or prevents the performance of any obligation under this Decree despite CEMEX's best efforts to fulfill the obligation. The requirement that CEMEX exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay and any adverse environmental effects of the delay, to the greatest extent possible. Force Majeure shall include CEMEX's inability, after demonstrating compliance with the requirements of Paragraph 29, to obtain a permit or approval with adequate time to install and Commence Operation of the SNCR System in compliance with CEMEX's obligations under this Consent Decree. Force Majeure does not include CEMEX's financial inability to perform any obligation under this Consent Decree.

58. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, CEMEX shall provide notice orally or by electronic or facsimile transmission to the persons required to receive notice pursuant to Section XVII (Notices) for EPA, within 5 Business Days of when CEMEX first knew that the event may cause a delay. Within 10 Business Days thereafter, CEMEX shall provide in writing to EPA an explanation and description of: the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay and any adverse environmental effects of the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effects of the delay including measures to address any adverse environmental effects; CEMEX's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of CEMEX, such event may cause or contribute to an endangerment to public health, welfare, or the environment. CEMEX shall include with any written notice all available documentation supporting the claim that the delay was attributable to a Force Majeure. Failure to comply with the above requirements shall preclude CEMEX from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. CEMEX shall be deemed to know of any circumstance in which CEMEX, any entity controlled by CEMEX, or a CEMEX Contractor(s) knew of the circumstance.

59. If EPA agrees that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by EPA for such time as is necessary to complete those

obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify CEMEX in writing pursuant to Section XVII (Notices) of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

60. If EPA does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, EPA will notify CEMEX pursuant to Section XVII (Notices) in writing of its decision.

61. If CEMEX elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), they shall do so no later than 45 Days after receipt of EPA's written notice. In any such proceeding, CEMEX shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that CEMEX complied with the requirements of Paragraphs 57 and 58, above. If CEMEX carries this burden, the delay at issue shall be deemed not to be a violation by CEMEX of the affected obligation of this Consent Decree identified to EPA and the Court.

### **XIII. DISPUTE RESOLUTION**

62. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. CEMEX's failure to seek resolution of a dispute under this Section shall preclude CEMEX from raising any such issue as a defense to an action by the United States to enforce any obligation of CEMEX arising under this Decree.

63. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when CEMEX sends the United States a written Notice of Dispute in accordance with Section XVII (Notice). Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 45 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 45 Days after the conclusion of the informal negotiation period, CEMEX invokes formal dispute resolution procedures as set forth below.

64. Formal Dispute Resolution. CEMEX shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States pursuant to Section XVII (Notices) a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not necessarily be limited to, any factual data, analysis, or opinion supporting CEMEX's position and any supporting documentation relied upon by CEMEX.

65. The United States shall serve its Statement of Position upon CEMEX pursuant to Section XVII (Notices) within 45 Days of receipt of CEMEX's Statement of Position. The United States' Statement of Position shall include, but may not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The Statement of Position of the United States shall be binding on CEMEX, unless CEMEX files a motion for judicial review of the dispute in accordance with the Paragraph 66.

66. CEMEX may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XVII (Notices) of this Consent Decree, a motion requesting judicial resolution of the dispute. The motion must be filed within 60 Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of CEMEX's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

67. The United States shall respond to CEMEX's motion within the time period allowed by the Local Rules of this Court. CEMEX may file a reply memorandum, to the extent permitted by the Local Rules.

68. Standard of Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 64 (Formal Dispute Resolution), CEMEX shall bear the burden of demonstrating that its position complies with this Consent Decree and that it is entitled to relief under applicable principles of law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law, and CEMEX reserves the right to oppose this position.

69. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of CEMEX under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but

payment shall be stayed pending resolution of the dispute as provided in Paragraphs 63 and 64.

If CEMEX does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (Stipulated Penalties).

#### **XIV. INFORMATION COLLECTION AND RETENTION**

70. Any authorized representative of the United States, including their attorneys, contractors, and consultants, shall have the right of entry into the Facility, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by CEMEX or its representatives, Contractors, or consultants;
- d. obtain copies of any documents, including photographs and similar data; and
- e. assess CEMEX's compliance with this Consent Decree.

71. Until five years after the termination of this Consent Decree, CEMEX shall retain, and shall instruct their Contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in their or their Contractors' or agents' possession or control, or that come into their or their Contractors' or agents' possession or control, and that relate to CEMEX's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United

States, CEMEX shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

72. CEMEX shall also retain all existing information described in Paragraph 12 for the 5-year period prior to the Effective Date of this Consent Decree. Such information will be used by EPA to determine the validity of a proposed NOx Emission Limit.

73. At the time the consent Decree terminates, Section XII (Termination), the Parties will agree on a protocol for the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraphs 71 and 72 and, upon request by the United States, CEMEX shall deliver any such documents, records, or other information to EPA. CEMEX may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If CEMEX asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by CEMEX. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

74. CEMEX may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2. As to any information that CEMEX seeks to protect as CBI, CEMEX shall follow the procedures set forth in 40 C.F.R. Part 2.

75. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable laws, regulations, or permits, nor does it limit or affect any duty or obligation of CEMEX to maintain documents, records, or other information imposed by applicable federal or State laws, regulations, or permits.

**XV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

76. This Consent Decree resolves the civil claims of the United States against CEMEX for the violations alleged in the Amended Complaint filed in this action through the Date of Lodging.

77. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 76. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 76. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the Facility, whether related to the violations addressed in this Consent Decree or otherwise.

78. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Facility or CEMEX, CEMEX shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States



in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 76 of this Section.

79. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. CEMEX is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and CEMEX's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that CEMEX's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Clean Air Act, 42 U.S.C. § 7401 et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

80. This Consent Decree does not limit or affect the rights of CEMEX or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against CEMEX, except as otherwise provided by law.

81. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

#### **XVI. COSTS**

82. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalties or stipulated penalties due but not paid by CEMEX.

**XVII. NOTICES**

83. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and sent by mail delivery to the following addresses. Communications by electronic mail shall not constitute notice for any requirement under this Decree.

As to EPA:

Director, Air & Toxics Technical Enforcement Program  
Office of Enforcement, Compliance and Environmental Justice  
U.S. Environmental Protection Agency  
Region 8  
Mail Code 8ENF-AT  
1595 Wynkoop Street  
Denver, CO 80202

Director, Air Enforcement Division  
U.S. Environmental Protection Agency  
MC 2242A  
1200 Pennsylvania Ave. NW  
Washington DC 20460  
Attn: Shaun Burke  
Senior Environmental Engineer  
Air Enforcement Division, OCE, EPA  
202-564-1039

As to the United States – to the EPA addressees above and to:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-2-1-09151

and

As to CEMEX:

General Counsel  
CEMEX, Inc.

929 Gessner, Suite 1900  
Houston, TX 77024

With copies to:

CEMEX  
Attention: Legal Department  
1501 Belvedere Road  
West Palm Beach, Florida 33406

CEMEX  
Attention: Plant Manager  
5314 Ute Highway, Box 529  
Lyons, Colorado 80540

84. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

85. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

#### **XVIII. EFFECTIVE DATE**

86. The Effective Date of this Consent Decree shall be the date upon which this Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first.

#### **XIX. RETENTION OF JURISDICTION**

87. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XIII (Dispute Resolution) and XX (Modification), or effectuating or enforcing compliance with the terms of this Decree.

## **XX. MODIFICATION**

88. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Consent Decree, it shall be effective only upon approval by the Court.

89. Any disputes concerning modification of this Consent Decree shall be resolved pursuant to Section XIII (Dispute Resolution) of this Decree, provided, however, that, instead of the burden of proof provided by Paragraph 68, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

## **XXI. GENERAL PROVISIONS**

90. At any time prior to termination of this Consent Decree, CEMEX may request approval from EPA to implement an alternative NO<sub>x</sub> pollution control technology that is different than the technology required by this Consent Decree. In seeking such approval, CEMEX must demonstrate to EPA that such alternative pollution control technology will not exceed a 30-Day Rolling Average NO<sub>x</sub> Emission Rate of at least 1.85 lb NO<sub>x</sub>/Ton of clinker or an emission rate that is more stringent than the Final NO<sub>x</sub> Emission Limit determined in accordance with Paragraph 19, 23, or 24. Approval of such a request is solely at EPA's discretion. If EPA approves such a request, nothing in this Paragraph shall relieve CEMEX from complying with any other requirement of this Consent Decree applicable to the Lyons Kiln, including any requirements regarding the Continuous Operation of pollution control technology at the Lyons Kiln.

91. Nothing in this Consent Decree is intended to, or shall, alter or waive any applicable law (including but not limited to any defenses, entitlements, challenges, or clarifications related to the Credible Evidence Rule, 62 Fed. Reg. 8314 (Feb. 24, 1997)) concerning the use of data for any purpose under the Act.

92. Each limit and/or other requirement established by or under this Consent Decree is a separate, independent requirement.

93. Performance standards, emissions limits, and other quantitative standards set by or under this Consent Decree must be met to the number of significant digits in which the standard or limit is expressed. For example, an emission rate limit of 1.85 is not met if the actual emission rate is 1.86. CEMEX shall round the third significant digit to the nearest second significant digit. For example, if an actual emission rate is 1.854, that shall be reported as 1.85, and shall be in compliance with an emission rate limit of 1.85; and if an actual emission rate is 1.855, that shall be reported as 1.86, and shall not be in compliance with an emission rate limit of 1.85. CEMEX shall report data to the number of significant digits in which the standard or limit is expressed.

## **XXII. TERMINATION**

94. After CEMEX has satisfied the requirements of Sections VI (Compliance Requirements), has obtained all permits (or, where applicable, SIP revisions) referenced in Section VIII (Permits) of this Decree, and has maintained operation of the SNCR System as required by this Consent Decree for a period of 2 years after the establishment of the Final NOx Emission Limit in accordance with Paragraph 19, 23, or 24 of this Consent Decree (including any period required for Dispute Resolution), has fulfilled all other requirements of this Consent

Decree, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, CEMEX may serve upon the United States pursuant to Section XVII (Notices) a Request for Termination, stating that CEMEX has satisfied those requirements, together with all necessary supporting documentation.

95. Following the United States' receipt of CEMEX's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether CEMEX has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

96. If the United States does not agree that the Decree may be terminated, CEMEX may invoke Dispute Resolution under Section XIII (Dispute Resolution) of this Decree. However, CEMEX shall not seek Dispute Resolution of any dispute regarding termination under Paragraph 64 (Formal Dispute Resolution) of Section XIII (Dispute Resolution) of this Consent Decree until 60 Days after service of its Request for Termination.

### **XXIII. PUBLIC PARTICIPATION**

97. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Decree is inappropriate, improper, or inadequate. CEMEX consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any

provision of the Decree, unless the United States has notified CEMEX in writing that it no longer supports entry of the Decree.

**XXIV. SIGNATORIES/SERVICE**

98. Each undersigned representative of CEMEX and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind the Party he or she represents to this document.

99. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. CEMEX agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree. CEMEX shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of CEMEX with respect to all matters arising under or relating to this Consent Decree.

**XXV. INTEGRATION**

100. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding or promise constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

**XXVI. FINAL JUDGMENT**

101. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and CEMEX. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

Dated and entered this \_\_\_\_ day of \_\_\_\_\_, 2013.


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MARCIA S. KRIEGER  
United States District Court Judge




Signature Page for *United States of America v. CEMEX, Inc.* Consent Decree

FOR THE UNITED STATES OF AMERICA

  
IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

Date: 4/18/13

  
JOHN N. MOSCATO  
JAMES D. FREEMAN  
LEIGH P. RENDE  
U.S. Department of Justice  
Environmental Enforcement Section  
999 18th Street, South Terrace - Suite 370  
Denver, CO 80202  
Telephone: (303) 844-1380  
Email: john.moscato@usdoj.gov

Date: 4/18/2013

**DISCUSSION DRAFT: DOJ 4/3 RESPONSE TO CEMEX 3/29 REDLINE  
PRIVILEGED SETTLEMENT COMMUNICATION: SUBJECT TO FRE 408**

Signature Page for *United States of America v. CEMEX, Inc.* Consent Decree

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

[Redacted Signature]

Date: 4/17/13

CYNTHIA GILES  
Assistant Administrator  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

[Redacted Signature]

Date: 4/9/2013

PHILLIP A. BROOKS  
Director, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

[Redacted Signature]

Date: 4/9/2013

ROBERT G. KLEPP  
Attorney, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

Signature Page for *United States of America v. CEMEX, Inc.* Consent Decree

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

[Redacted Signature]

APR 16 2013

Date: \_\_\_\_\_

ANDREW M. GAYDOSH  
Assistant Regional Administrator  
Office of Enforcement, Compliance and  
Environmental Justice  
U.S. Environmental Protection Agency  
1595 Wynkoop Street  
Denver, CO 80202

[Redacted Signature]

APR 16 2013

Date: \_\_\_\_\_

LINDA KATO  
Legal Enforcement Program  
Office of Enforcement, Compliance and  
Environmental Justice  
U.S. Environmental Protection Agency  
1595 Wynkoop Street  
Denver, CO 80202

Signature Page for *United States of America v. CEMEX, Inc.* Consent Decree

FOR CEMEX CONSTRUCTION MATERIALS SOUTH, LLC:

 \_\_\_\_\_

Date: 4/16/13 \_\_\_\_\_

Name: 

Title: *General Counsel*

The following is the name and address of Defendant CEMEX, Inc.'s agent for service pursuant to Paragraph 97.

Corporate Creations Network Inc.  
11380 Prosperity Farms Rd, #221E  
Palm Beach Gardens, FL 33410