



**COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
AIR POLLUTION CONTROL DIVISION
STATIONARY SOURCES PROGRAM**

COMPLIANCE ORDER ON CONSENT

Case No. 2005-049

In the Matter of Cemex, Inc.

The Colorado Department of Public Health and Environment (“CDPHE”), through the Air Pollution Control Division (“Division”), issues this Compliance Order on Consent (“Consent Order”), pursuant to the Division’s authority under § 25-7-115(3)(b), C.R.S. of the Colorado Air Pollution and Prevention and Control Act (“the Act”) §§ 25-7-101 to 1309, C.R.S., and its implementing regulations, 5 CCR 1001, *et seq.* (“the Regulations”) with the express consent of entity Cemex, Inc. (“Cemex”). The Division and Cemex may be referred to collectively as “the Parties.”

I. STATEMENT OF PURPOSE

The mutual objectives of the Parties in entering into this Consent Order are:

1. To resolve the violations of the Act and the Regulations identified herein and as determined by the Division and described below.

II. DIVISION’S FINDINGS OF FACT AND DETERMINATION OF VIOLATIONS

Based upon the Division’s investigation into and review of the compliance issues identified herein, and in accordance with § 25-7-115(3), C.R.S., the Division has made the following determinations regarding violations of regulatory, statutory and/or permit requirements associated with the Facility.

2. At all times relevant to the alleged violations cited herein, Cemex was a Corporation in good standing and registered to conduct business in the State of Colorado.

3. Cemex owns and operates the Portland Cement Manufacturing facility located at 5134 Ute Highway, Boulder County, in Lyons, Colorado (“Facility”). Activities at the Facility include raw material handling and processing, kiln operation, clinker storage, finish grinding, cement storage, and cement packaging. The Plant is subject to the following legal requirements:

a. Title V Operating Permit No. 95OPBO082 (“Permit No. 95OPBO082,” issued to Cemex February 1, 2000 and last revised October 8, 2002), and the applicable requirements of several underlying Construction Permits, including

Permit Nos. 93BO1414F, 94BO593, 98BO0259, 98BO0292 and 98BO0315;

- b. Colorado Air Quality Control Commission (“AQCC”) Regulation No. 6, Part A, which incorporates by reference 40 C.F.R. Part 60, Subpart F, Standards of Performance for Portland Cement Plants (“Subpart F”), and, by extension, Subpart A, General Provisions (“Subpart A”);
- c. AQCC Regulation No. 8, Part E, Section III.DD, which incorporates by reference 40 C.F.R. Part 63, Subpart LLL, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry (“Subpart LLL” or “Portland Cement MACT”);
- d. AQCC Regulation No. 1;
- e. AQCC Regulation No. 3; and
- f. The Colorado Air Pollution Prevention and Control Act § 25-7-101 *et. seq.*, C.R.S.

4. On June 14-15, 2005, Mr. Paul Carr, of the Division, conducted a full compliance inspection of the Facility.

5. Based on a review of Mr. Carr’s June 14-15, 2005 inspection and other records related to the Facility, the Division issued a Notice of Violation to Cemex on September 23, 2005 (“2005 NOV”). The Division held a NOV Conference on October 20, 2005, during which Cemex was given the opportunity to provide any information regarding the allegations set forth in the 2005 NOV.

6. Mr. Carr conducted additional inspections on September 28, October 28, and December 19-21, 2005. After extensive discussions with Cemex and based on a review of Mr. Carr’s follow-up inspections and other records related to the Facility, the Division issued a second Notice of Violation to Cemex on June 8, 2006 (“2006 NOV”).

7. On May 1, 2006 the Division sent a letter to Cemex denying an upset condition report concerning an event that occurred on March 6, 2006, and had been reported on March 7, 2006. The May 1, 2006, letter alleged a basis for an enforcement action.

8. On May 20, 2006, Mr. Carr received a complaint about dust coming from the storage silos at the Facility. On May 22, 2006, Mr. Carr conducted an inspection of the facility. Mr. Carr reviewed weekly maintenance logs for the control equipment, which indicated that the unit had plugged periodically since April 26, 2006. On July 31, 2006, the Division sent a letter

to Cemex denying the upset condition report that Cemex had filed for the event triggering the complaint.

9. On September 26, 2006, Mr. Carr conducted an inspection of the facility.

10. On November 16, 2006, the Division sent a letter to Cemex following a citizen complaint of visible dust on or about November 7, 2006. The Division requested that Cemex modify its Start-up, Shutdown, and Malfunction Plan, which it did, and alleged certain violations.

11. The Division and Cemex have engaged in settlement discussions for the violations alleged in the 2005 NOV and 2006 NOV, and any potential violations identified in the June 14-15, 2005, September 28, October 28, December 19-21, 2005, May 22, 2006 and September 26, 2006 inspections and the May 1, 2006, July 31, 2006 and November 16, 2006 letters (collectively "Matters Addressed Herein"). The Parties have reached a settlement agreement regarding the Matters Addressed Herein that is detailed in this Consent Order.

III. ORDER and AGREEMENT

Based on the foregoing factual and legal determinations, pursuant to its authority under § 25-7-115, C.R.S., and in satisfaction of the Matters Addressed Herein, the Division orders, and Cemex agrees to the following:

12. Cemex agrees to the terms and conditions of this Consent Order. Based upon the factors set forth in § 25-7-122, C.R.S., the Division has determined a total penalty in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) against Cemex is appropriate and consistent with the Division's policies for violations of the Act and its implementing regulations cited in Section II of this Consent Order. Cemex agrees to spend at least One Million Five Hundred Thousand Dollars (\$1,500,000.00) in penalties, supplemental environmental projects and compliance requirements as set forth more specifically below. Cemex agrees that this Consent Order constitutes an order issued pursuant to § 25-7-115, C.R.S., and is an enforceable requirement of the Act. Cemex also agrees not to challenge:

- a. The issuance of this Consent Order;
- b. The factual and legal determinations made by the Division herein; and
- c. The Division's authority to bring, or the court's jurisdiction to hear, any action to enforce the terms of this Consent Order under the Act.

13. Notwithstanding the above, Cemex does not admit to any of the factual or legal determinations made by the Division herein and specifically denies parts of these allegations,

and any action undertaken by Cemex pursuant to this Consent Order shall not constitute an admission of liability by Cemex with respect to the conditions of the Facility.

Compliance Requirements

14. Effective immediately, Cemex shall comply with the applicable terms and conditions of the Act, Permit No. 95OPBO082, AQCC Regulation No. 1 and the Portland Cement MACT in the regulation and control of air pollutants from the Facility.

15. On or before April 1, 2007, Cemex shall install and have fully operational PM₁₀/PM_{2.5} monitor or monitors at the fence-line of the Facility to monitor particulate matter at the fence-line. The monitor(s) shall be sited at a location(s) approved by the Division, and shall be operated in accordance with a Division approved plan ("Operation Plan"). Cemex shall operate the monitor(s) for the one-year period after the date that the monitor(s) are installed and fully operational ("Monitoring Period"). Cemex's total expenditure for the installation and operation of the PM₁₀/PM_{2.5} monitor(s) shall not be less than Two Hundred Thousand Dollars (\$200,000.00). Within thirty (30) days after the end of the monitoring period Cemex shall provide itemized costs of the project to the Division, documented by copies of purchase orders and receipts or canceled checks. In the event that Cemex's expenditure for the installation and operation of the PM₁₀/PM_{2.5} monitor(s) at the end of the monitoring period is less than Two Hundred Thousand Dollars (\$200,000.00), Cemex shall pay the difference as an administrative penalty in the manner prescribed in Paragraph 17 below within fifteen days after receiving a written demand for such payment from the Division. Additionally, if Cemex and the Division are unable to agree on either the location for the monitor(s) or on an Operation Plan within ninety (90) calendar days of the effective date of this Consent Order, Cemex shall pay Two Hundred Thousand Dollars (\$200,000.00) to the Division as an administrative penalty in the manner prescribed in Paragraph 17 below.

Tire Derived Fuels ("TDF") Moratorium

16. Cemex is currently permitted to burn tire derived fuels as an alternative fuel for the Kiln pursuant to Permit No. 95OPBO082. Stack tests have shown that TDF can be burned without exceeding applicable emission limits for either criteria pollutants or hazardous air pollutants. Both the Division and Cemex continue to believe that, based upon the aforementioned stack tests, TDF can be used as an alternative fuel under appropriate conditions. Nevertheless, some in the Lyons community have expressed reservations about the tire burning, and requested a moratorium on using TDF. In response to these concerns, and in consideration for the settlement of the Matters Addressed Herein, Cemex agrees not use TDF as an alternative fuel in the kiln for the period from the effective date of this Consent Order until December 31, 2007. At the end of this period, Cemex may commence using TDF as permitted in accordance with the terms and conditions of Permit No. 95OPBO082, unless TDF is prohibited by another legally enforceable requirement.

Administrative Penalty Requirements

17. Cemex agrees to pay the sum of Three Hundred Thousand Dollars (\$300,000.00) in administrative penalties. Payment is due within thirty (30) calendar days of the effective date of this Consent Order by certified, corporate or cashier's check drawn to the order of "Colorado Department of Public Health and Environment" and delivered to the attention of the Legal Administrative Specialist, Air Pollution Control Division, 4300 Cherry Creek Drive South, APCD-SS-B1, Denver, Colorado 80246-1530.

18. The Facility is a stationary source that is subject to the noncompliance penalty provisions of the Act as set forth in § 25-7-115(5)(a)(i), C.R.S., and is required to calculate and pay any economic benefit derived from the noncompliance issues described above. Cemex agrees to pay a non-compliance penalty in the amount of Fifty Thousand Dollars (\$50,000.00) within thirty calendar (30) days of the effective date of this Consent Order in the manner prescribed in Paragraph 17 above.

Supplemental Environmental Project Requirements

19. In order to settle the Matters Addressed Herein, and in addition to the penalties identified above, Cemex agrees to perform a Supplemental Environmental Project, or Projects ("SEP"), which the Parties agree is intended to secure significant environmental or public health protection and improvements in Boulder County, Colorado and/or adjacent communities. Cemex's total expenditure for the SEP shall be at least Nine Hundred and Fifty Thousand Dollars (\$950,000.00).

20. As partial fulfillment of its SEP obligation, Cemex agrees to pay the sum of Four Hundred and Fifty Thousand Dollars (\$450,000.00) to the StEPP Foundation, a non-profit organization devoted to matching renewable energy, energy efficiency, and pollution prevention projects with project funding. Payment is due within thirty (30) calendar days of the effective date of this Consent Order by certified, corporate, or cashier's check drawn to the order of "The StEPP Foundation" and delivered to the attention of Bruce Dines, Executive Director, P.O. Box 468, Golden, Colorado 80402-0468. Cemex shall in writing certify to the Division that the payment to the StEPP Foundation has been timely made. If Cemex fails timely to pay the Four Hundred and Fifty Thousand Dollars (\$450,000.00) to the StEPP Foundation, Cemex shall pay the Four Hundred and Fifty Thousand Dollars (\$450,000.00) as an administrative penalty in the manner prescribed in Paragraph 17 above within fifteen (15) calendar days after receiving a written demand for such payment from the Division.

21. Cemex is currently considering possible SEP projects in Colorado with a total value of Five Hundred Thousand Dollars (\$500,000.00). Cemex will submit one or more

Colorado SEP proposals for the Division's approval within thirty (30) calendar days of the effective date of this Consent Order. If the Division disapproves the SEP proposal or the parties are otherwise unable to agree upon a SEP within one hundred and eighty (180) calendar days of the effective date of this Consent Order, Cemex shall pay the Five Hundred Thousand Dollars (\$500,000.00) as an administrative penalty in the manner prescribed in Paragraph 17 above within fifteen (15) calendar days after receiving a written demand for such payment from the Division.

22. Cemex shall not deduct the cost of such SEPs for any tax purpose or otherwise obtain any favorable tax treatment of such payment or project.

23. The SEPs performed by Cemex may not be any project that Cemex is required to perform or develop by any federal, state or local law or regulation, and it may not be one that Cemex is required to perform or develop by any agreement, grant or an injunctive relief in this or any other case. Cemex further agrees that it has not and will not receive, credit in any other enforcement action for the SEPs.

24. Cemex shall include in any public statement, oral or written making reference to the SEPs the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the Colorado Department of Public Health and Environment, Air Pollution Control Division, for violations of air quality laws and regulations."

25. Cemex shall submit a SEP Completion Report to the Division within thirty (30) calendar days of the completion of the SEP. The SEP Report shall contain the following information:

- a. A detailed description of the SEP as implemented;
- b. A description of any operating problems encountered and the solutions thereto;
- c. Itemized costs, documented by copies of purchase orders and receipts or canceled checks;
- d. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Order; and
- e. A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).

Cemex agrees that failure to submit the Completion Report with the required information, or any periodic report, shall be deemed a violation of this Consent Order and Cemex shall become liable for penalties as a violation of this Consent Order.

IV. SCOPE AND EFFECT OF CONSENT ORDER

26. The Parties agree and acknowledge that this Consent Order constitutes a full and final resolution of the Matters Addressed Herein, and further agree not to challenge the terms and conditions of this Consent Order in any proceeding before any administrative body or in any judicial forum, whether by way of direct judicial review or collateral challenge.

27. This Consent Order constitutes a final agency order upon execution by Cemex and the Division, and shall be enforceable by either party in the same manner as if the Division had entered this Consent Order without agreement by Cemex. The Parties agree that any violation of the provisions of this Consent Order by Cemex concerning the Act, or its implementing regulations, shall be a violation of a final order of the Division for the purposes of §§ 25-7-115, 121, and 122, C.R.S., and may result in the assessment of civil penalties of up to Fifteen Thousand Dollars (\$15,000.00) per day for each day of such violation.

28. The Parties' obligations under this Consent Order are limited to the matters expressly stated herein or in approved submissions required hereunder. All submissions made pursuant to this Consent Order are incorporated into this Consent Order and become enforceable under the terms of this Consent Order as of the date of approval by the Division.

29. The Division's approval of any submission, standard, or action under this Consent Order shall not constitute a defense to, or an excuse for, any prior violation of any requirement under the Act not specifically mentioned and released in this agreement, or any implementing regulations under the Act, or any subsequent violation of any requirement of this Consent Order, the Act, or its regulations.

30. Entering into this settlement shall not constitute an admission of violation of the air quality laws by Cemex, nor shall the Division or any third party infer it to be such an admission by Cemex in any administrative or judicial proceeding. The described violations will constitute part of Cemex's compliance history for any purpose for which such history is relevant, including considering the violations described above in assessing a penalty for any subsequent violations, in accordance with the provisions of § 25-7-122, C.R.S., against Cemex.

31. Cemex shall comply with all applicable Federal, State, and/or local laws and regulations and shall obtain all necessary approvals or permits to conduct the investigation and remedial activities required by this Consent Order and perform its obligations required

hereunder. The Division makes no representation with respect to approval and permits required by Federal, State, or local laws or regulations other than those specifically referred to herein.

32. Nothing herein shall be construed as prohibiting, altering, or in any way limiting the ability of the Division to seek any other remedies or sanctions available by virtue of Cemex's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Cemex's violation of any applicable provision of law.

V. LIMITATION RELEASES AND RESERVATION OF RIGHTS AND LIABILITY

33. Execution of this Consent Order shall resolve all civil claims of the State of Colorado for the Matters Addressed Herein. Upon the effective date of this Consent Order, and during its term, this Consent Order shall stand in lieu of any other enforcement action by the Division with respect to the Matters Addressed Herein. This Consent Order does not grant any release of liability for any violations, regardless of when they occurred, that are not cited in this Consent Order. The Division reserves the right to bring any action it deems necessary to enforce this Consent Order.

34. Nothing in the preceding paragraph shall preclude the Division from imposing additional requirements necessary to protect human health or the environment pursuant to its authority under §§ 25-7-112, 113, C.R.S.

35. Cemex reserves its rights and defenses regarding liability in any proceedings regarding the Facility other than proceedings to enforce this Consent Order.

36. Upon the effective date of this Consent Order, Cemex releases and covenants not to sue the State of Colorado as to all common law or statutory claims or counterclaims arising from, or relating to, the violations of the Act or the Regulations specifically addressed herein.

37. Cemex shall not seek to hold the Division liable for any injuries or damages to persons or property resulting from acts or omissions of Cemex, or those acting for or on behalf of Cemex, including its officers, employees, agents, successors, representatives, contractors or consultants in carrying out activities pursuant to this Consent Order. Cemex shall not hold out the Division as (a) a party to any contract entered into by Cemex in carrying out activities pursuant to this Consent Order; or (b) an owner, operator or generator of hazardous wastes at the Facility. Nothing in this Consent Order shall constitute an express or implied waiver of immunity otherwise applicable to the Division, its employees, agents or representatives.

38. The Division reserves the right to bring any action or to seek civil or administrative penalties or injunctive relief for any past, present, or future violations of the Act and its implementing regulations, not specifically addressed herein and released under this

Consent Order. Further, the Division has the right to bring any action to enforce this Consent Order and to seek authorized penalties for any violation of this Consent Order.

VI. NOTICES

39. Unless otherwise specified, any report, notice or other communication required under the Consent Order shall be sent to:

For the Division: Garry Kaufman
Legal Administrative Specialist
Colorado Department of Public Health and Environment
APCD-SS-B1-1400
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

For Cemex : Leslie White
Executive Vice President and General Counsel
Cemex, Inc.
840 Gessner Road, Suite 1400
Houston, Texas, 77024

VII. OBLIGATIONS UNAFFECTED BY BANKRUPTCY

40. The obligations set forth herein are based on the Division's police and regulatory authority. These obligations require specific performance by Cemex of corrective actions carefully designed to prevent on-going or future harm to public health or the environment, or both. Enforcement of these obligations is not stayed by a petition in bankruptcy. Cemex agrees that the penalties set forth in this Consent Order are not in compensation of actual pecuniary loss. Further, the obligations imposed by this Consent Order are necessary for Cemex and the Facility to achieve and maintain compliance with State law.

VIII. MODIFICATIONS

41. This Consent Order may be modified only upon mutual written agreement of the Parties.

IX. BINDING EFFECT, AUTHORIZATION TO SIGN AND EFFECTIVE DATE

42. This Consent Order is binding upon the Parties to this Consent Order and their corporate subsidiaries or parents, their officers, directors, agents, attorneys, employees, contractors, successors in interest, and assigns. The undersigned warrant that they are authorized to bind legally their respective principals to this Consent Order. This Consent Order shall be effective upon the date signed by the last party. In the event that a party does not sign this Consent Order within thirty (30) calendar days of the other party's signature, this Consent Order becomes null and void. This Consent Order may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Consent Order.

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

By: _____ **Date:** _____
Margie Perkins, Director
Air Pollution Control Division

CEMEX, INC.

By: _____ **Date:** _____
Leslie White
Executive Vice President and General Counsel

cc: Bob Jorgenson, APCD
Paul Carr, APCD
Will Allison, Office of Attorney General
Cindy Beeler, US EPA
Boulder County Health Department
File