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26 (See next page for additional counsel)

27 UNITED STATES DISTRICT COURT FOR THE
28 CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

29 UNITED STATES OF AMERICA,

30 Plaintiff

31 v.

32 CEMEX CALIFORNIA CEMENT,
33 LLC,

34 Defendant.

35 Case No. ED CV 07-00223-GW
36 (JCRx)

37 **CONSENT DECREE**

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Attorneys for CEMEX California Cement, LLC

1 WHEREAS, Plaintiff, the United States of America (the “United States”), on
2 behalf of the United States Environmental Protection Agency (“EPA”), filed a
3 Complaint against the Defendant CEMEX California Cement, LLC (“CEMEX”),
4 for civil penalties and injunctive relief for violations of the Prevention of
5 Significant Deterioration) (“PSD”) provisions of the Clean Air Act (the “Act”), 42
6 U.S.C. §§ 7470-7492, and failure to comply the requirements with Title V of the
7 Act, 42 U.S.C. §§ 7661-7661f, at its portland cement manufacturing plant located
8 in and near Victorville, San Bernardino County, California (the “Facility”);
9

10 WHEREAS, on July 10, 2007, the Court denied CEMEX’s Motion to
11 Dismiss or Strike the First and Second Claims to the Extent Civil Penalties are
12 Sought, but granted CEMEX’s Motion to Dismiss the Third Claim in its Entirety;
13

14 WHEREAS, the United States provided notice of the commencement of this
15 action to the appropriate State air pollution control agency, in accordance with
16 Section 113(b) of the Act, 42 U.S.C. § 7413(b);
17

18 WHEREAS, on August 10, 2007, CEMEX filed an answer denying any
19 liability for the violations alleged in the First and Second Claims in the Complaint;
20

21 WHEREAS, the United States and CEMEX have agreed that settlement of
22 this action is in the best interest of the parties and in the public interest, have
23 agreed on the appropriateness of various measures intended to resolve the alleged
24 violations and have further agreed that entry of this Consent Decree without further
25 litigation is the most appropriate means of resolving this matter; and
26

27 WHEREAS, the Parties recognize, and the Court by entering this Consent
28 Decree finds, that this Consent Decree has been negotiated by the Parties in good

1 faith and will avoid litigation between the Parties and that this Consent Decree is
2 fair, reasonable, and in the public interest.

3
4 NOW, THEREFORE, before trial and without the final adjudication, or
5 admission, of any issue of fact or law except as provided in Section I (Jurisdiction
6 and Venue), below, and with the consent of the Parties, IT IS HEREBY
7 ADJUDGED, ORDERED, AND DECREED as follows:

8
9 **I. JURISDICTION AND VENUE**

10 1. This Court has jurisdiction of the subject matter herein and over the
11 parties consenting hereto pursuant to 28 U.S.C. §§ 1331, 1345, and 1355 and
12 pursuant to Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477; and
13 over the parties to this action. Venue is proper under Section 113(b) of the Act, 42
14 U.S.C. § 7413(b), and under 28 U.S.C. § 1391(b) and (c) because the violations
15 alleged in the Complaint are alleged to have occurred in, and Defendant conducts
16 business in, this judicial district.
17

18
19 2. For purposes of this Consent Decree, CEMEX agrees that the First
20 and Second Claims in the Complaint state claims upon which relief may be granted
21 pursuant to the Act, and CEMEX waives all objections and defenses that it may
22 have to the jurisdiction of the Court or to venue.
23

24 **II. APPLICABILITY**

25 3. The obligations of this Consent Decree apply to and are binding
26 upon the United States and upon CEMEX and any successor, assign, or other entity
27 or person otherwise bound by law.
28

1 them in the Act or such regulations, unless otherwise provided in this Decree.

2 Whenever the terms set forth below are used in this Consent Decree, the following
3 definitions shall apply:
4

5 a. "30-Day Rolling Average Emission Limit" shall mean, for
6 each Kiln, the maximum allowable rate of emission of a specified air pollutant
7 from such Kiln and shall be expressed as pounds of such air pollutant emitted per
8 ton of clinker produced (lbs/ton). Compliance with the 30-Day Rolling Average
9 Emission Limit shall be determined for each Kiln in accordance with the following
10 procedure: first, sum the total pounds of the air pollutant in question emitted from
11 the Kiln during an Operating Day and the previous twenty-nine (29) Operating
12 Days; second, sum the total tons of clinker produced by the Kiln during the same
13 Operating Day and previous 29 Operating Days; and third, divide the total number
14 of pounds of the air pollutant emitted from the Kiln during the thirty (30)
15 Operating Days by the total tons of clinker produced by such Kiln during the same
16 30 Operating Days to arrive at the Kiln's lbs/ton average emissions over the rolling
17 30-day period. A new compliance determination of the 30-Day Rolling Average
18 Emission Limit shall be calculated for each Kiln on each new Operating Day in
19 accordance with the provisions of this Consent Decree. In calculating each
20 compliance determination of the 30-Day Rolling Average Emission Limit, for a
21 specified air pollutant at each Kiln, the total pounds of such air pollutant emitted
22 from the Kiln during the 30-day rolling period shall include all emissions of that
23 pollutant, including emissions during each Startup, Shutdown, or Malfunction that
24 occurs during the period, except to the extent a Malfunction qualifies as a Force
25
26
27
28

1 Majeure event under Section X (Force Majeure) and CEMEX has complied with
2 the requirements of that section.

3
4 b. "CEMEX" shall mean CEMEX California Cement, LLC.

5 c. "CEMS" shall mean a continuous emission monitoring system,
6 *i.e.*, equipment that continuously measures and records the concentration or
7 emission rate of a pollutant, in the units specified by the emission limit concerned.

8
9 d. "CO" shall mean carbon monoxide, measured in accordance
10 with the provisions of this Consent Decree.

11 e. "Complaint" shall mean the complaint filed by the United
12 States in this action.

13
14 f. "Consent Decree" or "Decree" shall mean this Decree.

15 g. "Continuously Operate" or "Continuous Operation" shall mean
16 that when a monitoring or control technology is used at a Kiln, except during a
17 Malfunction, it shall be operated at all times of Kiln Operation, consistent with the
18 technological limitations, manufacturers' specifications, and good engineering and
19 maintenance practices for such control technology and the Kiln.
20

21 h. "Date of Lodging" shall mean the date the Consent Decree is
22 lodged with the Clerk of the Court for the United States District Court for the
23 Central District of California.
24

25 i. "Day" shall mean a calendar day unless expressly stated to be a
26 working day. In computing any period of time under this Consent Decree, where
27 the last day would fall on a Saturday, Sunday, or federal holiday, the period shall
28 run until the close of business of the next working day.

1 j. “District” shall mean the Mojave Desert Air Quality
2 Management District.

3
4 k. “Effective Date” shall have the meaning given in Paragraph 70.

5 l. “EPA” shall mean the United States Environmental Protection
6 Agency and any successor department or agency.

7 m. “Facility” shall mean CEMEX’s portland cement
8 manufacturing plant in and near Victorville, California, including the Black
9 Mountain Quarry Plant located near Apple Valley, California, and the River Plant
10 located in Victorville, California.

11
12 n. “Kiln” as used in this Consent Decree shall have the same
13 meaning as defined at 40 C.F.R. § 63.1341.

14
15 o. “Kiln Q2” shall mean the Kiln located at the Black Mountain
16 Quarry Plant identified in District permits as B001083.

17 p. “Kiln Q3” shall mean the Kiln located at the Black Mountain
18 Quarry Plant identified in District permits as B005362.

19 q. “Kiln Operation” shall mean, with respect to each Kiln, any
20 period when any raw materials are fed into the Kiln or any period when any
21 combustion is occurring or any fuel is being fired in the Kiln.

22
23 r. “Malfunction” as used in this Consent Decree shall have the
24 same meaning as defined at 40 C.F.R. § 60.2.

25
26 s. “NNSR” shall mean the Nonattainment New Source Review
27 program within the meaning of Part D of Subchapter I of the Act, 42 U.S.C. §§
28 7501-7515 and 40 C.F.R. Part 51.

1 t. "NOx" shall mean oxides of nitrogen, measured in accordance
2 with the provisions of this Consent Decree.

3
4 u. "NOx Control Technology" shall mean the control technology
5 or emission control strategy to be installed or utilized at Kiln Q2 and Kiln Q3 to
6 meet the NOx emission limits set forth in Paragraph 11 and 14 below.

7 v. "Operating Day" shall mean any Day of Kiln Operation.

8
9 w. "Paragraph" shall mean a portion of this Decree identified by an
10 arabic numeral.

11 x. "Parties" shall mean the United States and CEMEX.

12
13 y. "PSD" shall mean the Prevention of Significant Deterioration
14 program within the meaning of Part C of Subchapter I of the Act, 42 U.S.C. §§
15 7470-7472 and 40 C.F.R. Part 52.

16 z. "Section" shall mean a portion of this Decree identified by a
17 roman numeral.

18
19 aa. "SIP" shall mean the District portion of the California State
20 Implementation Plan as submitted to and approved by EPA pursuant to Section
21 110 of the Act, 42 U.S.C. § 7410.

22 bb. "Shut Down" shall mean to cease Kiln Operation.

23
24 cc. "Startup" shall mean the commencement of Kiln Operation.

25 dd. "SO₂" shall mean sulfur dioxide, measured in accordance with
26 the provisions of this Consent Decree.

27 ee. "Title V permit" shall mean a permit required by or issued
28 pursuant to the requirements of 42 U.S.C. §§ 7661 - 7661f.

1 ff. "Ton" or "tons" shall mean short ton or short tons.
2
3 gg. "United States" shall mean the United States of America, acting
4 on behalf of EPA.

5 a. **IV. CIVIL PENALTIES**

6 8. CEMEX shall pay to the United States as civil penalties pursuant to
7 Section 113 of the Act, 42 U.S.C. § 7413, the sum of \$2,000,000.00, as follows:

8 (i) Within thirty (30) Days after the Effective Date of this Consent Decree,
9 CEMEX shall pay \$1,000,000.00, together with interest accrued on the sum of
10 \$2,000,000.00 from the Date of Lodging through the Effective Date at the rate
11 specified in 28 U.S.C. § 1961 as of the Date of Lodging; and (ii) within 90 Days of
12 the Effective Date of this Consent Decree, CEMEX shall pay the balance of the
13 civil penalties due together with interest on the balance at the rate specified above
14 accruing from the 31st Day following the Effective Date through the date of
15 payment.
16
17
18

19 9. CEMEX shall pay the civil penalties due by FedWire Electronic
20 Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with
21 written instructions to be provided to CEMEX, following lodging of the Consent
22 Decree, by the Financial Litigation Unit of the U.S. Attorney's Office for the
23 Central District of California, 1200 U.S. Courthouse, 312 North Spring Street, Los
24 Angeles, California, 90012, phone: (213)894-2434. At the time of payment,
25 CEMEX shall send a copy of the EFT authorization form and the EFT transaction
26 record, together with a transmittal letter, which shall state that the payment is for
27 the civil penalties owed pursuant to the Consent Decree in United States v.
28

1 CEMEX California Cement, LLC, and shall reference the civil action number and
2 DOJ case number 90-5-2-1-08691, to the United States in accordance with Section
3 XIV (Notices) of this Decree; by email to acctsreceivable.CINWD@epa.gov; and
4 to:
5

6 U.S. Environmental Protection Agency
7 Fines and Penalties
8 Cincinnati Finance Center
9 P.O. Box 979077
10 St. Louis, MO 63197-9000

11 10. CEMEX shall not deduct the civil penalties paid under this Section
12 in calculating its federal income tax.

13 **V. COMPLIANCE REQUIREMENTS**

14 **A. Pollutant Emission Limits and Notification of NOx Control Technology**

15 11. CEMEX shall achieve the following emission limits for the
16 following pollutants on the schedule identified in the table below:
17
18
19

Kiln	Emission Limit Compliance Deadline	30-Day Rolling Average Emission Limit (lbs/ton of clinker)		
		NOx	SO ₂	CO
2	October 1, 2009	1.95	0.35	2.9
3	July 1, 2009	1.95		

1 12. No later than April 1, 2009, CEMEX shall notify EPA of the NOx
2 Control Technology it will implement at Kiln Q3 to achieve and maintain the NOx
3 emission rate specified in Paragraph 11, including a detailed description thereof.
4 Thereafter, CEMEX may implement an equivalent alternative technology upon
5 EPA's review and approval, provided that the use of any equivalent alternative
6 technology shall not affect the compliance dates set forth in this Consent Decree.
7 No later than May 1, 2009, CEMEX shall complete preliminary compliance testing
8 of its selected NO_x Control Technology. No later than June 1, 2009, CEMEX
9 shall submit to EPA all results of its preliminary compliance testing, together with
10 copies of all correspondence with the District relating to the selected NOx Control
11 Technology. No later than July 1, 2009, CEMEX shall notify EPA of the NOx
12 Control Technology it will implement at Kiln Q2 to achieve and maintain the NOx
13 emission rate specified in Paragraph 11, including a detailed description thereof.
14 Thereafter, CEMEX may implement an equivalent alternative technology upon
15 EPA's review and approval, provided that the use of any equivalent alternative
16 technology shall not affect the compliance dates set forth in this Consent Decree.
17 No later than August 1, 2009, CEMEX shall complete preliminary compliance
18 testing of its selected NO_x Control Technology. No later than September 1, 2009,
19 CEMEX shall submit to EPA all results of its preliminary compliance testing,
20 together with copies of all correspondence with the District relating to the selected
21 NOx Control Technology.

22 13. No later than July 1, 2009, CEMEX shall notify EPA of the NOx
23 Control Technology it will implement at Kiln Q2 to achieve and maintain the NOx
24 emission rate specified in Paragraph 11, including a detailed description thereof.
25 Thereafter, CEMEX may implement an equivalent alternative technology upon
26 EPA's review and approval, provided that the use of any equivalent alternative
27 technology shall not affect the compliance dates set forth in this Consent Decree.
28 No later than August 1, 2009, CEMEX shall complete preliminary compliance
testing of its selected NO_x Control Technology. No later than September 1, 2009,
CEMEX shall submit to EPA all results of its preliminary compliance testing,
together with copies of all correspondence with the District relating to the selected
NOx Control Technology.

1 14. In addition to the emission limits set forth in Paragraph 11 above,
 2 CEMEX shall achieve the following mass emission limits for the following
 3 pollutants on the schedule identified in the table below:
 4

Kiln(s)	Emission Limit Compliance Date	Emission Limit Per Operating Day (lbs. per Day of Operation)		
		NOx	SO ₂	CO
3	From July 1, 2009 to September 30, 2009	11,880	Not applicable	Not applicable
2	October 1, 2009		1,540	12,760
2 and 3 Combined	October 1, 2009	19,314		

12 15. As of October 1, 2009, CEMEX shall Continuously Operate the
 13 NOx Control Technology selected pursuant to Paragraph 13 above at Kiln Q2 at all
 14 times of Kiln Operation so as to meet the emission limits in Paragraphs 11 and 14
 15 above.
 16

17 16. As of July 1, 2009, CEMEX shall Continuously Operate the NOx
 18 Control Technology selected pursuant to Paragraph 12 above at Kiln Q3 at all
 19 times of Kiln Operation so as to meet the emission limits in Paragraphs 11 and 14
 20 above.
 21

22 17. As of the Effective Date, CEMEX shall comply with good pollution
 23 control practices at Kiln Q2 and Kiln Q3 in accordance with 40 C.F.R. § 60.11(d)
 24 at all times of Kiln Operation.
 25
 26
 27
 28

1 **B. Continuous Emissions Monitoring System (CEMS).**

2 18. As of the Effective Date, CEMEX shall Continuously Operate NOx,
3 SO₂, and CO CEMS at each of Kiln Q2 and Kiln Q3 in accordance with the
4 requirements of 40 C.F.R. Part 75.

5
6 19. Each CEMS shall monitor and record the applicable emission rate
7 for NOx, SO₂ and CO from each Kiln in units of pounds per ton of clinker
8 produced and pounds per hour at such Kiln and shall be used to demonstrate
9 compliance with the emission limits established in Section V.A. (Pollutant
10 Emission Rates and Notification of NOx Control Technology) of this Consent
11 Decree.
12

13
14 20. During any time when the CEMS is inoperable or otherwise not
15 measuring emissions from any Kiln, CEMEX shall apply the missing data
16 substitution procedures in 40 C.F.R. Part 75, Subpart D.
17

18 **VI. PROHIBITION ON NETTING CREDITS OR**
19 **OFFSETS FROM REQUIRED CONTROLS**

20 21. CEMEX shall not use or rely on emission reductions generated as a
21 result of compliance with the obligations of this Consent Decree in any Federal or
22 State emission averaging, banking, trading or other emission credit or compliance
23 program. Emission reductions resulting from compliance with the requirements of
24 this Consent Decree shall not be considered as a creditable contemporaneous
25 emission decrease for the purpose of obtaining a netting credit under the NNSR or
26 PSD programs.
27
28

1 into federally-enforceable permit(s) or Facility-specific amendments to the SIP.
2 For purposes of this Consent Decree, the federally-enforceable permit must be
3 issued by the permitting authority under its authority to issue permits pursuant to
4 the SIP, and not solely under its authority to issue permits pursuant to its Title V
5 permit program. Following submission of any application for the issuance or
6 modification of such permit or for a Facility-specific amendment to the SIP,
7 CEMEX shall cooperate with the appropriate authorities by promptly submitting
8 all information that such authorities seek following receipt of its application.
9

11 26. Within ninety (90) days after CEMEX is issued a
12 federally-enforceable permit or Facility-specific amendment to the SIP (whichever
13 occurs first) pursuant to Paragraph 25 above, CEMEX shall apply for its revised
14 Title V permit for the Facility to include the emission limits, operational
15 requirements, and monitoring and reporting requirements of this Consent Decree.
16

17 27. CEMEX shall provide EPA, in accordance with Section XV
18 (Notices) of this Consent Decree, with a copy of each application (including any
19 application submitted in compliance with this Consent Decree) for the issuance or
20 modification of any federal, state, or local permit relating to air emissions from
21 Kiln Q2, Kiln Q3, including any PSD or NNSR permit or modification, at the same
22 time it is submitted to the permitting authority. If CEMEX sells or transfers part or
23 all of its ownership interest in Kiln Q2, Kiln Q3, or the Facility, CEMEX shall
24 comply with the requirements of Paragraphs 25 and 26 with regard to that Kiln or
25 the Facility prior to any such sale or transfer, unless CEMEX remains the holder of
26
27
28

1 the Title V or other federally enforceable permit for the Facility or for such Kiln
2 following any such sale or transfer.

3
4 **VIII. REPORTING REQUIREMENTS**

5 28. Within 30 days after the end of each calendar-year half (*i.e.*, by July
6 30, and January 30) after the Date of Lodging, until termination of this Decree
7 pursuant to Section XIX (Termination), CEMEX shall submit semi-annual report to
8 EPA by January 31 and July 31 of each year for the preceding six months that
9 include:
10

11 a. The date on which CEMEX commenced Continuous Operation
12 of the NOx Control Technology at Kiln Q2 and Kiln Q3 required to meet the
13 emission limits in Paragraphs 11 and 14 above, or the status of CEMEX's progress
14 in installing the new NOx Control Technology at Kiln Q2 and Kiln Q3, including
15 the dates on which each milestone was achieved at each Kiln, and problems
16 encountered or anticipated together with implemented or proposed solutions;
17 provided this reporting obligation shall cease with respect to each Kiln once
18 CEMEX has reported the commencement of Continuous Operation of the NOx
19 Control Technology for such Kiln;
20
21
22

23 b. All CEMS data collected for each Kiln, including any missing
24 data for which CEMEX applied missing data substitution procedures under Section
25 V.B of this Consent Decree;
26

27 c. Demonstration of compliance with all 30-Day Rolling Average
28 Emission Limits of this Consent Decree.

1 d. Demonstration of compliance with all Operating Day Mass
2 Limits under Section V.A of this Consent Decree; and

3
4 e. The status of CEMEX's application for the issuance or
5 modification of a permit or for the adoption and approval of a Facility-specific SIP
6 amendment submitted in compliance with this Consent Decree.

7 29. The semi-annual report shall also include a description of any non-
8 compliance with the requirements of this Consent Decree and an explanation of the
9 violation's likely cause and of the remedial steps taken, or to be taken, to prevent
10 or minimize such violation. If CEMEX violates, or has reason to believe that it
11 may violate, any requirement of this Consent Decree, CEMEX shall notify the
12 United States, of such violation and its likely duration, in writing, within ten
13 working days of the day CEMEX first becomes aware of the violation, with an
14 explanation of the violation's likely cause and of the remedial steps taken, or to be
15 taken, to prevent or minimize such violation. If the cause of a violation cannot be
16 fully explained at the time the report is due, CEMEX shall so state in the report.
17 CEMEX shall investigate the cause of the violation and shall then submit an
18 amendment to the report, including a full explanation of the cause of the violation,
19 within 30 days of the day CEMEX becomes aware of the cause of the violation.
20 Nothing in this Paragraph or the following Paragraph relieves CEMEX of its
21 obligation to provide any notice required by Section X (Force Majeure) of this
22 Consent Decree.
23

24 30. Whenever any violation of this Consent Decree, or of any applicable
25 permits, or any other event affecting CEMEX's performance under this Decree, or
26

1 the performance of Kiln Q2, Kiln Q3, or the Facility, may pose an immediate
2 threat to the public health or welfare or the environment, CEMEX shall notify
3 EPA, orally or by electronic or facsimile transmission as soon as possible, but no
4 later than 24 hours after CEMEX first knew of the violation or event. This
5 procedure is in addition to the requirements set forth in the preceding Paragraph.
6

7 31. All reports shall be submitted to the persons designated in Section
8 XV (Notices) of this Consent Decree.
9

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

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

22 This certification requirement does not apply to emergency or similar notifications
23 where compliance would be impractical.
24

25 33. The reporting requirements of this Consent Decree do not relieve
26 CEMEX of any reporting obligations required by the Clean Air Act or
27 implementing regulations, or by any other federal, state, or local law, regulation,
28 permit, or other requirement.

1	Failure to comply with any 30-Day Rolling Average Emission Limit where the violation is equal or greater than 10% in excess of the limits set forth in this Consent Decree.	\$5,000 per day for each pollutant and each 30-day rolling period.
2		
3		
4		
5	Failure to comply with any Operating Day Mass Emission Limit where the violation is less than 5% in excess of the limits set forth in this Consent Decree.	\$1,500 per day for each pollutant and for each Operating Day.
6		
7		
8		
9	Failure to comply with any Operating Day Mass Emission Limit where the violation is equal or greater than 5% but less than 10% in excess of the limits set forth in this Consent Decree.	\$3,000 per day for each pollutant and for each Operating Day.
10		
11		
12		
13	Failure to comply with any Operating Day Mass Emission Limit where the violation is equal or greater than 10% in excess of the limits set forth in this Consent Decree.	\$5,000 per day for each pollutant and for each Operating Day.
14		
15		
16	Failure to timely install, commence Continuous Operation, or to maintain Continuous Operation of new NOx Control Technology at any Kiln.	For each Kiln, \$5,000 per day during the first 30 days, \$10,500 per day and each day thereafter.
17		
18		
19		
20	Failure to apply for the issuance or modification of any permit or the adoption and approval of a Facility-specific SIP amendment in accordance with Section VII (Permits).	\$1,000 per day for each such failure.
21		
22		
23	Failure to timely submit, modify, or implement, as approved, any report, plan, study, analysis, protocol, or other submittal required by this Consent Decree.	\$750 during the first ten days, \$1,000 per day thereafter.
24		
25		
26		

27 36. Subject to the provisions of Paragraph 35 above, stipulated penalties
28 under this Section shall begin to accrue on the day after performance is due or on

1 the day a violation occurs, whichever is applicable, and shall continue to accrue
2 until performance is satisfactorily completed or until the violation ceases.

3 Stipulated penalties shall accrue simultaneously for separate violations of this
4 Consent Decree.
5

6 37. CEMEX shall pay any stipulated penalty within thirty (30) days of
7 receiving the United States' demand.
8

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

12 39. Stipulated penalties shall continue to accrue as provided in this
13 Section, during any Dispute Resolution, but need not be paid until the following:
14

15 a. If the dispute is resolved by agreement or by a decision of
16 United States that is not appealed to the Court, CEMEX shall pay accrued penalties
17 determined to be owing, together with interest within 30 days of the effective date
18 of the agreement or the receipt of EPA's decision or order.
19

20 b. If the dispute is appealed to the Court and the United States
21 prevails in whole or in part, CEMEX shall pay all accrued penalties determined by
22 the Court to be owing, together with interest, within 60 days of receiving the
23 Court's decision or order, except as provided in Subparagraph c., below.
24

25 c. If any Party appeals the District Court's decision, CEMEX shall
26 pay all accrued penalties determined to be owing, together with interest, within 15
27 days of receiving the final appellate court decision.
28

1 40. CEMEX shall pay stipulated penalties owing to the United States in
2 the manner set forth in, and with the confirmation notices required by, Paragraph 9,
3 except that the transmittal letter shall state that the payment is for stipulated
4 penalties and shall state for which violation(s) the penalties are being paid.
5

6 41. CEMEX shall not deduct stipulated penalties paid under this Section
7 in calculating its federal income tax.
8

9 42. If CEMEX fails to pay stipulated penalties according to the terms of
10 this Consent Decree, CEMEX shall be liable for interest on such penalties, as
11 provided for in 28 U.S.C. § 1961, accruing as of the date payment became due.
12 Nothing in this Paragraph shall be construed to limit the United States from
13 securing any remedy otherwise provided by law for CEMEX's failure to pay any
14 stipulated penalties.
15

16 43. Subject to the provisions of Section XIII (Effect of
17 Settlement/Reservation of Rights) of this Consent Decree, the stipulated penalties
18 provided for in this Consent Decree shall be in addition to any other rights,
19 remedies, or sanctions available to the United States for CEMEX's violation of this
20 Consent Decree or applicable law. Where a violation of this Consent Decree is
21 also a violation of any applicable statute or regulation, CEMEX shall be allowed a
22 credit, for any stipulated penalties paid, against any statutory penalties imposed for
23 such violation.
24
25

26 **X. FORCE MAJEURE**

27 44. "Force majeure," for purposes of this Consent Decree, is defined as
28 any event, including those events described in Paragraph 24, arising from causes

1 beyond the control of CEMEX, of any entity controlled by CEMEX, or of
2 CEMEX's contractors, that delays or prevents the performance of any obligation
3 under this Decree despite CEMEX's best efforts to fulfill the obligation. "Best
4 efforts" includes anticipating any potential force majeure event and addressing the
5 effects of any such event (a) as it is occurring and (b) after it has occurred, to
6 prevent or minimize any resulting delay to the greatest extent possible. "Force
7 Majeure" does not include CEMEX's financial inability to perform any obligation
8 under this Consent Decree.
9

11 45. CEMEX shall provide notice to the United States orally or by
12 electronic or facsimile transmission as soon as possible, but not later than 5 days
13 after the time CEMEX first knew of, or by the exercise of due diligence, should
14 have known of, a claimed force majeure event. CEMEX shall also provide written
15 notice to the United States, as provided in Section XV (Notices) of this Consent
16 Decree, within 10 days of the time CEMEX first knew of, or by the exercise of due
17 diligence, should have known of, the event. The notice shall state the anticipated
18 duration of any delay; its cause(s); CEMEX's past and proposed actions to prevent
19 or minimize any delay; a schedule for carrying out those actions; and CEMEX's
20 rationale for attributing any delay to a force majeure event. Failure to provide oral
21 and written notice as required by this Paragraph shall preclude CEMEX from
22 asserting any claim of force majeure.
23
24
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26 46. If the United States agrees that a force majeure event has occurred,
27 the time for performance of the obligations under this Consent Decree that are
28 affected by the force majeure event will be extended by EPA. An extension of

1 time to perform the obligations affected by a force majeure event shall not, by
2 itself, extend the time to perform any other obligation.

3
4 47. If the United States does not agree that a force majeure event has
5 occurred, or does not agree to the extension of time sought by CEMEX, the United
6 States' will notify CEMEX in writing of its position and the United States' position
7 shall be binding, unless CEMEX invokes Dispute Resolution under Section XI
8 (Dispute Resolution) of this Consent Decree. In any such dispute, CEMEX bears
9 the burden of proving, by a preponderance of the evidence, that each claimed force
10 majeure event is a force majeure event, that CEMEX gave the notice required by
11 Paragraph 45, that the force majeure event caused any delay CEMEX claims was
12 attributable to that event, and that CEMEX exercised best efforts to prevent or
13 minimize any delay caused by the event.
14

15 16 **XI. DISPUTE RESOLUTION**

17 48. Unless otherwise expressly provided for in this Consent Decree, the
18 dispute resolution procedures of this Section shall be the exclusive mechanism to
19 resolve disputes arising under or with respect to this Decree. CEMEX's failure to
20 seek resolution of a dispute under this Section shall preclude CEMEX from raising
21 any such issue as a defense to an action by the United States to enforce any
22 obligation of CEMEX arising under this Consent Decree.
23

24
25 49. Informal Dispute Resolution. Any dispute subject to Dispute
26 Resolution under this Consent Decree shall first be the subject of informal
27 negotiations. The dispute shall be considered to have arisen when CEMEX sends
28 the United States a written Notice of Dispute. Such Notice of Dispute shall state

1 clearly the matter in dispute. The period of informal negotiations shall not exceed
2 20 days from the date the dispute arises, unless that period is modified by written
3 agreement. If the Parties cannot resolve a dispute by informal negotiations, then
4 the position advanced by the United States shall be considered binding unless,
5 within 30 days after the conclusion of the informal negotiation period, CEMEX
6 invokes formal dispute resolution procedures as set forth below.
7

8
9 50. Formal Dispute Resolution. CEMEX shall invoke formal dispute
10 resolution procedures, within the time period provided in the preceding Paragraph,
11 by serving on the United States a written Statement of Position regarding the
12 matter in dispute. The Statement of Position shall include, but may not necessarily
13 be limited to, any factual data, analysis, or opinion supporting CEMEX's position
14 and any supporting documentation relied upon by CEMEX.
15

16 51. The United States shall serve its Statement of Position within 21
17 days of receipt of CEMEX's Statement of Position. The United States' Statement
18 of Position shall include, but may not necessarily be limited to, any factual data,
19 analysis, or opinion supporting that position and any supporting documentation
20 relied upon by the United States. The United States' Statement of Position shall be
21 binding on CEMEX, unless CEMEX files a motion for judicial review of the
22 dispute in accordance with the following Paragraph.
23
24

25 52. CEMEX may seek judicial review of the dispute by filing with the
26 Court and serving on the United States, in accordance with Section XV (Notices)
27 of this Consent Decree, a motion requesting judicial resolution of the dispute. The
28 motion must be filed within 15 days of receipt of the United States' Statement of

1 Position pursuant to the preceding Paragraph. The motion shall contain a written
2 statement of CEMEX's position on the matter in dispute, including any supporting
3 factual data, analysis, opinion, or documentation, and shall set forth the relief
4 requested and any schedule within which the dispute must be resolved for orderly
5 implementation of the Consent Decree.
6

7 53. The United States shall respond to CEMEX's motion within the
8 time period allowed by the Local Rules of this Court. CEMEX may file a reply
9 memorandum, to the extent permitted by the Local Rules. Except as otherwise
10 provided in this Consent Decree, in any dispute brought under this Section,
11 CEMEX shall bear the burden of demonstrating that its position clearly
12 complies with this Decree. The United States reserves the right to argue that its
13 position is reviewable only on the administrative record and must be upheld
14 unless arbitrary and capricious or otherwise not in accordance with law and
15 CEMEX reserves the right to argue otherwise.
16
17

18 54. The invocation of dispute resolution procedures under this Section
19 shall not, by itself, extend, postpone, or affect in any way any obligation of
20 CEMEX under this Consent Decree, unless and until final resolution of the dispute
21 so provides. Stipulated penalties with respect to the disputed matter shall continue
22 to accrue from the first day of noncompliance, but payment shall be stayed pending
23 resolution of the dispute as provided in Paragraph 39. If CEMEX does not prevail
24 on the disputed issue, stipulated penalties shall be assessed and paid as provided in
25 Section IX (Stipulated Penalties).
26
27
28

1 55. If CEMEX prevails on a disputed issue, the Parties may agree on, or
2 this Court may order, an extension or modification of the schedule for completion
3 of the activities required under this Consent Decree to account for the delay that
4 occurred as a result of the dispute resolution.
5

6 **XII. INFORMATION COLLECTION AND RETENTION**

7 56. The United States and its representatives, including attorneys,
8 contractors, and consultants, shall have the right of entry into any facility covered
9 by this Consent Decree, at all reasonable times, upon presentation of credentials,
10 to:
11

12 a. monitor the progress of activities required under this Consent
13 Decree;
14

15 b. verify any data or information submitted to the United States in
16 accordance with the terms of this Consent Decree;
17

18 c. obtain samples and, upon request, splits of any samples taken
19 by CEMEX or its representatives, contractors, or consultants;

20 d. obtain documents, including photographs and similar data; and

21 e. assess CEMEX's compliance with this Consent Decree.
22

23 57. Until five years after the termination of this Consent Decree,
24 CEMEX shall retain, and shall instruct its contractors and agents to preserve, all
25 non-identical copies of all documents, records, or other information (including
26 documents, records, or other information in electronic form) in its or its
27 contractors' or agents' possession or control, or that come into its or its
28 contractors' or agents' possession or control, and that relate in any manner to

1 CEMEX's performance of its obligations under this Consent Decree. This
2 information-retention requirement shall apply regardless of any contrary corporate
3 or institutional policies or procedures. At any time during this information-
4 retention period, upon request by the United States, CEMEX shall provide copies
5 of any document, record, or other information required to be maintained under this
6 Paragraph.
7

8
9 58. At the conclusion of the information-retention period provided in the
10 preceding Paragraph, CEMEX shall notify the United States at least 60 days prior
11 to the destruction of any document, record, or other information subject to the
12 requirements of the preceding Paragraph and, upon request by the United States,
13 CEMEX shall deliver any such document, record, or other information to EPA.
14 CEMEX may assert that certain documents, records, or other information is
15 privileged under the attorney-client privilege or any other privilege recognized by
16 federal law. If CEMEX asserts such a privilege, it shall provide the following: (1)
17 the title of the document, record, or information; (2) the date of the document,
18 record, or information; (3) the name and title of each author of the document,
19 record, or information; (4) the name and title of each addressee and recipient; (5) a
20 description of the subject of the document, record, or information; and (6) the
21 privilege asserted by CEMEX. However, no documents, records, or other
22 information created or generated pursuant to the requirements of this Consent
23 Decree shall be withheld on grounds of privilege.
24
25
26

27 59. CEMEX may also assert that information required to be provided
28 under this Section is protected as Confidential Business Information ("CBI") under

1 40 C.F.R. Part 2. As to any information that CEMEX seeks to protect as CBI,
2 CEMEX shall follow the procedures set forth in 40 C.F.R. Part 2.
3

4 60. This Consent Decree in no way limits or affects any right of entry
5 and inspection, or any right to obtain information, held by the United States or the
6 States pursuant to applicable federal or state laws, regulations, or permits, nor does
7 it limit or affect any duty or obligation of CEMEX to maintain documents, records,
8 or other information imposed by applicable federal or state laws, regulations, or
9 permits.
10

11 **XIII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

12 61. This Consent Decree resolves the civil claims of the United States
13 for the violations alleged in the Complaint filed in this action through the Date of
14 Lodging.
15

16 62. The United States reserves all legal and equitable remedies available
17 to enforce the provisions of this Consent Decree, except as expressly stated in
18 Paragraph 61. This Consent Decree shall not be construed to limit the rights of the
19 United States to obtain penalties or injunctive relief under the Act or implementing
20 regulations, or under other federal or state laws, regulations, or permit conditions,
21 except as expressly specified in Paragraph 61. The United States further reserves
22 all legal and equitable remedies to address any imminent and substantial
23 endangerment to the public health or welfare or the environment arising at, or
24 posed by, CEMEX's Facility, whether related to the violations addressed in this
25 Consent Decree or otherwise.
26
27
28

1 **XV. NOTICES**

2 67. Unless otherwise specified herein, whenever notifications,
3 submissions, or communications are required by this Consent Decree, they shall be
4 made in writing and addressed as follows:
5

6 As to EPA:

7 Adam M. Kushner
8 U.S. Environmental Protection Agency
9 MC 2242A
10 1200 Pennsylvania Ave. NW
11 Washington, D.C. 20460

12 Chief, Air Enforcement Office
13 Air Division (AIR-5)
14 U.S. Environmental Protection Agency, Region 9
15 75 Hawthorne Street
16 San Francisco, CA 94105

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

18 Chief, Environmental Enforcement Section
19 Environment and Natural Resources Division
20 U.S. Department of Justice
21 Box 7611 Ben Franklin Station
22 Washington, D.C. 20044-7611
23 Re: DOJ No. 90-5-2-1-08691

24 and

25 As to CEMEX:

26 Leslie S. White
27 Executive Vice President and General Counsel
28 CEMEX, Inc.
840 Gessner, Suite 1400
Houston, Texas 77024

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

1 the Parties may have as to whether CEMEX has satisfactorily complied with the
2 requirements for termination of this Consent Decree. If the United States agrees
3 that the Consent Decree may be terminated, the Parties shall submit, for the
4 Court's approval, a joint stipulation terminating the Decree.
5

6 76. If the United States does not agree that the Consent Decree may be
7 terminated, CEMEX may invoke Dispute Resolution under Section XI (Dispute
8 Resolution) of this Consent Decree. However, CEMEX shall not seek Dispute
9 Resolution of any dispute regarding termination under Paragraph 52 of Section XI
10 (Dispute Resolution) until 60 days after service of its Request for Termination.
11

12 **XX. PUBLIC PARTICIPATION**

13
14 77. This Consent Decree shall be lodged with the Court for a period of
15 not less than 30 days for public notice and comment in accordance with 28 C.F.R.
16 § 50.7. The United States reserves the right to withdraw or withhold its consent if
17 the comments regarding the Consent Decree disclose facts or considerations
18 indicating that the Decree is inappropriate, improper, or inadequate. CEMEX
19 consents to entry of this Consent Decree without further notice and agrees not to
20 withdraw from or oppose entry of this Decree by the Court or to challenge any
21 provision of the Decree, unless the United States has notified CEMEX in writing
22 that it no longer supports entry of the Decree.
23
24

25 **XXI. SIGNATORIES/SERVICE**

26 78. Each undersigned representative of CEMEX and other parties to the
27 Consent Decree and the Assistant Attorney General for the Environment and
28 Natural Resources Division of the Department of Justice certifies that he or she is

1 fully authorized to enter into the terms and conditions of this Decree and to execute
2 and legally bind the Party he or she represents to this document.

3
4 79. This Consent Decree may be signed in counterparts, and its validity
5 shall not be challenged on that basis.

6 80. CEMEX shall identify, on the attached signature page, the name,
7 address and telephone number of an agent who is authorized to accept service or
8 process by mail on behalf of CEMEX with respect to all matters arising under or
9 relating to this Consent Decree.
10

11 **XXII. INTEGRATION**

12 81. This Consent Decree constitutes the final, complete, and exclusive
13 agreement and understanding among the Parties with respect to the settlement
14 embodied in the Decree and supersedes all prior agreements and understandings,
15 whether oral or written, concerning the settlement embodied herein. Other than the
16 notice of new NOx Control Technology referenced in Paragraph 12 and any
17 deliverable that is subsequently submitted and approved pursuant to this Decree,
18 no other document, nor any representation, inducement, agreement, understanding,
19 or promise, constitutes any part of this Decree or the settlement it represents, nor
20 shall it be used in construing the terms of this Decree.
21
22

23 **XXIII. FINAL JUDGMENT**

24 82. Upon approval and entry of this Consent Decree by the Court, this
25 Consent Decree shall constitute a final judgment of the Court as to the United
26 States and CEMEX.
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Dated and entered this ____ day of _____,

UNITED STATES DISTRICT COURT JUDGE
Central District of California

1 Through their undersigned representatives, the Parties agree and consent to entry
2 of the foregoing Consent Decree in United States of America v. CEMEX
3 California Cement, LLC

4 FOR PLAINTIFF UNITED STATES OF AMERICA:

5 Date: 12/31/08

6 RONALD J. TENPAS
7 Assistant Attorney General
8 Environment and Natural Resources Division
9 United States Department of Justice

10 Date: 1/14/08

11 KATE KONSCHNIK
12 Trial Attorney
13 Environmental Enforcement Section
14 Environment and Natural Resources Division
15 Department of Justice
16 P.O. Box 7611
17 Washington, D.C. 20044-7611
18 (202) 305-0312 (Tel.)
19 (202) 514-2583 (Fax)

20 THOMAS P. O'BRIEN
21 United States Attorney

22 LEON W. WEIDMAN
23 Chief, Civil Division
24 United States Attorney's Office
25 MONICA L. MILLER
26 Assistant United States Attorney
27 300 North Los Angeles Street
28 Room 7516
Los Angeles, CA 90012
(213) 894-4061 (Tel.)
(213) 894-7819 (Fax)

1 Through their undersigned representatives, the Parties agree and consent to entry
2 of the foregoing Consent Decree in United States of America v. CEMEX
3 California Cement, LLC

4 FOR THE UNITED STATES ENVIRONMENTAL PROTECTION
5 AGENCY:

6
7 _____ Date: *January 13, 2009*
8 GRANTA Y. NAKAYAMA
9 Assistant Administrator
10 Office of Enforcement and Compliance Assurance
11 United States Environmental Protection Agency

12 _____ Date: *January 6, 2009*
13 ADAM M. KUSHNER
14 Director, Air Enforcement Division
15 Office of Enforcement and Compliance Assurance
16 United States Environmental Protection Agency
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1 Through their undersigned representatives, the Parties agree and consent to entry
2 of the foregoing Consent Decree in United States of America v. CEMEX
3 California Cement, LLC

4 FOR THE UNITED STATES ENVIRONMENTAL PROTECTION
5 AGENCY:

6
7 Date: 12/29/08

8 WAYNE NASTRI
9 Regional Administrator
10 United States Environmental Protection Agency
11 Region IX
12 75 Hawthorne Street
13 San Francisco, CA 94105

14
15 Date: 12/23/08

16 IVAN LIEBEN
17 Assistant Regional Counsel
18 United States Environmental Protection Agency
19 Region IX
20 75 Hawthorne Street
21 San Francisco, CA 94105

1 Through their undersigned representatives, the Parties agree and consent to entry
2 of the foregoing Consent Decree in United States of America v. CEMEX
3 California Cement, LLC

4 FOR CEMEX CALIFORNIA CEMENT, LLC:

6 Date: *December 19, 2008*

7 LESLIE S. WHITE
8 Executive Vice President and General Counsel
9 CEMEX, Inc.

10
11
12
13 The following is the name and address of CEMEX California Cement, LLC's's
14 agent for service pursuant to Paragraph 80: