

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CEMEX, INC.,

Defendant.

AMENDED SCHEDULING ORDER

Scheduling Conference: April 6, 2009, at 9:15 a.m., Courtroom 203, Byron G. Rogers
United States Courthouse, 1929 Stout Street, Denver, Colorado before Magistrate Judge Michael
E. Hegarty.

Counsel for Plaintiff United States of America

John N. Moscato, Senior Counsel
United States Department of Justice
Environmental Enforcement Section
1961 Stout Street, 8th Floor
Denver, CO 80294
303-844-1380
John.Moscato@usdoj.gov

Robert R. Homiak, Senior Attorney
United States Department of Justice
Environmental Enforcement Section
1961 Stout Street, 8th Floor
Denver, CO 80294
303-844-1391
Robert.Homiak@usdoj.gov

Counsel for Defendant CEMEX, Inc.

Chet M. Thompson.
Crowell & Moring, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202-624-2655
cthompson@crowell.com

Jeffrey Poston
Crowell & Moring, LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202-624-2775
jposton@crowell.com

Hugh Gottschalk
Wheeler Trigg Kennedy, LLP
1801 California Street, Suite 3600
Denver, Colorado 80202-2617
303-244-1858
Gottschalk@wtklaw.com

Christina J. Valerio
Wheeler Trigg Kennedy, LLP
1801 California Street, Suite 3600
Denver, Colorado 80202-2617
303-244-1908
Valerio@wtklaw.com

2. STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), and pursuant to 28 U.S.C. §§ 1331, 1345 AND 1355.

3. STATEMENT OF CLAIMS AND DEFENSES

a. *Plaintiff*: The United States seeks injunctive relief and the imposition of civil penalties against CEMEX, INC. (“CEMEX”), for violations of the Clean Air Act (“CAA”) and the Colorado State Implementation Plan (“SIP”), which was promulgated pursuant to the CAA. The United States contends that CEMEX implemented physical and operational changes at its Facility which resulted in significant net increases in the emission of pollutants, a “major modification” within the meaning of the CAA, at its cement production Facility located near Lyons, Colorado. These physical and operational changes resulted in a significant increase in oxides of nitrogen (“NO_x”) and fine particulate matter known as PM-10, each of which is a regulated pollutant under the CAA and Colorado SIP. CEMEX implemented the modifications at issue between 1997 and 1999 and without obtaining requisite preconstruction permits, which would have mandated the use of Best Available Control Technology (“BACT”) to minimize excess NO_x emissions and achieving the Lowest Achievable Emissions Rate (“LAER”) for PM-10 emissions. CEMEX’s modification of its Facility without appropriate permitting and its continuing operation of its Facility without appropriate permitting or pollution controls constitute continuing violations of the CAA and the Colorado SIP. These claims are set forth in the First and Second Claims For Relief in the United States’ First Amended Complaint.

In addition, the United States contends that CEMEX violated numerous provisions of an operating permit issued by the State of Colorado pursuant to Title V of the CAA, by operating its

Facility during times when wind speeds exceeded permitted levels, failing to calibrate its wind speed sensing equipment as required, reporting inaccurate data to the Environmental Protection Agency (“EPA”) and the State of Colorado, and failing to follow good air pollution control practices to minimize air pollution emissions. These violations are set forth in the Third Claim For Relief in the United States’ First Amended Complaint. Finally, in the Fourth Claim For Relief in the United States’ First Amended Complaint, the United States contends that, on hundreds of occasions, CEMEX discharged gasses into the atmosphere that exceeded applicable opacity standards and failed to report these excess emissions as required by the CAA and Colorado SIP.

b. *Defendant:* CEMEX requests that this Court dismiss EPA’s first and second claims as they are barred by the applicable statute of limitations. CEMEX contends that the alleged changes at the Facility did not require preconstruction permitting under the CAA or Colorado State Implementation Plan (“SIP”) because they did not result in a significant net emissions increase of NO_x or PM-10. All projects undertaken at the Facility have been properly permitted to the extent that permitting was required.

CEMEX also contends that it complied with the terms and operating standards of its Title V permit by shutting down certain equipment when wind speeds exceeded permitted levels, calibrating its wind speed sensing equipment, accurately reporting data to EPA and the State of Colorado, and following good air pollution control practices to the extent required by law. CEMEX contends that it did not discharge gases into the atmosphere that exceeded applicable opacity standards.

c. *Other Parties:* None

4. UNDISPUTED FACTS

The following facts are undisputed:

- a. CEMEX is a Louisiana corporation which maintains its corporate headquarters at 840 Gessner Road, Suite 1400, Houston, Texas.
- b. CEMEX is a “person” as defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).
- c. CEMEX’s Lyons Facility is located at 5134 Ute Highway in Lyons, Boulder County, Colorado, (“the Lyons Facility” or “Facility”).
- d. Construction of CEMEX’s Facility was originally commissioned in December 1969, by Martin Marietta, Inc., which owned the Facility until selling it in 1984 to Southdown, Inc.
- e. CEMEX acquired the Facility from Southdown, Inc., in November 2000 when it became the owner of Southdown, Inc. At that time, Southdown, Inc., became a wholly owned subsidiary of CEMEX and subsequently changed its name to CEMEX.
- f. The Lyons Facility has two separate components, the Dowe Flats quarry and the Portland cement manufacturing plant. These facilities are connected by a conveyor belt system, approximately two miles long, which transports raw materials from the quarry to the manufacturing plant.
- g. Raw materials transported from the quarry to the manufacturing plant are stockpiled before undergoing processing through a primary crusher, a dryer and a secondary crusher.
- h. After processing as described in Paragraph 4.g., supra, the raw material is

combined with other materials and is further processed through a precalciner and a rotary kiln to form “clinker.” The clinker is then further ground and combined with gypsum to produce cement.

i. During the clinker production and cement production processes, the manufacturing plant emits air pollutants, including carbon monoxide (“CO”), oxides of nitrogen (“NOx”), and particulate matter smaller than 10 microns in size (“PM-10”).

j. The Lyons Facility is and was a “major stationary source” within the meaning of the CAA, the Prevention of Significant Deterioration (“PSD”) and Non-Attainment New Source Review (“NNSR”) regulations and the Colorado SIP. The Lyons Facility is and was a “major source” within the meaning of the National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry.

k. The Lyons Facility is a “major source” within the meaning of the CAA’s and Colorado’s Title V program.

l. During the period relevant to this case, the State of Colorado, including the Boulder County Area was designated as an “attainment area” for NOx.

m. During the period relevant to this case, the Denver Metropolitan PM-10 Area, which included Boulder County (excluding Rocky Mountain National Park), was designated as a non-attainment area for PM-10.

n. The Colorado Department of Public Health and Environment (“CDPHE”) issued to CEMEX a Title V Operating Permit, Permit No. 95OPBO082, on February 1, 2000.

o. CEMEX’s Title V permit was renewed on March 1, 2008.

p. The EPA had authority to review and object to the issuance of the Title V permits

to CEMEX by CDPHE.

q. At all times relevant to this case, CDPHE was authorized by EPA to administer the Prevention of Significant Deterioration and Non-attainment New Source Review programs under the CAA. Notwithstanding this authorization, EPA retained independent authority to enforce CAA and SIP requirements within the State of Colorado.

5. COMPUTATION OF DAMAGES

United States

Section 113(b) of the CAA, 42 U.S.C. § 7413(b), authorizes the imposition of a civil penalty “of not more than \$25,000 per day for each violation” of the CAA. Under the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Rule, 40 C.F.R. Part 19, as amended, penalties of not more than \$27,500 may be assessed per day for each violation that occurs after January 30, 1997, through March 15, 2004, penalties of not more than \$32,500 may be assessed per day for each violation that occurs after March 15, 2004, through January 12, 2009, and penalties of not more than \$37,500 may be assessed per day for each violation that occurs after January 12, 2009. See 73 Fed. Reg. 75, 340 (Dec. 11, 2008). The United States seeks penalties for the violations describe in its Claims for Relief Numbers One through Four commensurate with the foregoing schedules.

The United States further seeks injunctive relief which will: (a) require CEMEX to obtain permits that are in conformity with the requirements of the PSD, NNSR and Title V programs; (b) require CEMEX to install and operate the Best Available Control Technology (“BACT”) and achieve the Lowest Achievable Emission Rate (“LAER”) as required by the CAA and the Colorado SIP; (c) require CEMEX to submit an excess emissions report for any event when the

continuous monitoring system data indicate that the source is not in compliance with the applicable emission limitation or operating parameter limit, as required by the National Emissions Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry; and (d) require Defendant to take other appropriate actions to offset its unlawful emissions of NOx and PM-10.

6. REPORT OF PRECONFERENCE DISCOVERY AND MEETING UNDER FED. R. CIV. P. 26(f)

- a. Dates of Rule 26(f) meeting: **February 23, 24, and March 30, 2009.** b.Names of each participant and Party he/she represented:

For the United States: John Moscato and Robert Homiak of the United States Department of Justice and Linda Kato and David Rochlin of U.S. Environmental Protection Agency, Region 8, Denver, CO; and

For CEMEX, Inc.: Chet Thompson, Jeff Poston, and Hugh Gottschalk.

- c. Proposed changes, if any, in timing or requirement of disclosures under Fed. R. Civ. P 26(a)(1): None.

d. Statement as to when Rule 26(a)(1) disclosures will be made: Disclosures were made on **April 27, 2009.**

- e. Agreements to conduct informal discovery: None.

f. Electronic Discovery: The Parties have addressed electronic discovery in the Fed. R. Civ. P. Rule 29 Stipulation attached to the Scheduling Order (Doc.# 24).

7. CONSENT

All parties have not consented to the exercise of jurisdiction of a magistrate judge.

8. CASE PLAN AND SCHEDULE

a. Deadline for Joinder of Parties and Amendment of Pleadings was: **May 21, 2009.**

b. Discovery Cutoff: All fact discovery, including any affirmative motions practice but excluding expert discovery, must be completed by **February 5, 2010.**

c. Dispositive Motion Deadline, including motions under Fed. R. Evid. 702,,:
December 31, 2010.

d. Expert Witness Disclosure:

(1.) Anticipated fields of expert testimony, if any:

United States. The United States anticipates presenting expert testimony on: the cement manufacturing process; applicability to the Facility of federal New Source Review and state analogue laws and regulations; the effects that the Facility modifications at issue had on production capacity; the effects that the Facility modifications at issue had on emissions increases/decreases; past and present BACT and LAER limits for Portland cement Facilities; MACT and Title V violations; economic benefit related to deferred/avoided BACT, LAER, MACT and Title V compliance; and past and present public health and environmental harm related to CEMEX's alleged noncompliance and appropriate mitigative measures. Additional areas for expert testimony may become necessary as the discovery process proceeds.

CEMEX. CEMEX anticipates presenting expert testimony on the cement manufacturing process, the methodology for determining applicability of federal New Source Review, the emissions implications of projects undertaken during the time period relevant to this case, Best Available Control Technology and Lowest Achievable Emission Rate limits for Portland cement facilities; and the appropriate civil penalty in the event that CAA liability is found for each

of the Plaintiff's four claims. Additional areas for expert testimony may become necessary as the discovery process proceeds.

(2) State any limitations proposed on the use or number of expert witnesses: Each Party anticipates designating up to nine (9) expert witnesses, with additional expert designation for good cause shown.

(3) The United States shall designate all of its experts and provide CEMEX's counsel with all information specified in Fed. R. Civ. P. 26(a)(2) on or before **March 5, 2010**.

(4) CEMEX shall designate all its experts and provide opposing counsel with all information specified in Fed. R. Civ. P. 26(a)(2) on or before **May 24, 2010**. Between May 10, 2010 and August 13, 2010, absent good cause shown, CEMEX shall not depose any United States' expert.

(5) The United States shall designate its rebuttal experts and provide CEMEX's counsel with all rebuttal expert opinion and information specified in Fed. R. Civ. P. 26(a)(2) on or before **August 12, 2010**. CEMEX will not proffer sur-rebuttal expert reports and all expert discovery shall be completed by **September 20, 2010**. Between August 13, 2010 and September 13, 2010, absent good cause shown, CEMEX may only depose United States' experts for whom the United States has produced rebuttal opinions.

(6) Notwithstanding the provisions of Fed. R. Civ. P. 26(a)(2)(B), no exceptions to the requirement of the rule will be allowed by stipulation of the Parties unless the stipulation is approved by the court.

e. Deposition Schedule: At this time, the United States has identified the following fact witnesses that it may seek to depose. In addition, the United States envisions taking at least three Rule 30(b)(6) depositions. The United States may modify this list as discovery progresses.

| Name of Deponent | Date of Deposition | Time of Deposition | Deposition length |
|-------------------------|---------------------------|---------------------------|--------------------------|
| Steve Goodrich | | | 1 day |
| Monica Sanders | | | 1 day |
| John Lohr | | | 1 day |
| Ken Kerr | | | 1 day |
| Andrew Jackura | | | 1 day |
| Amarjit Singh Gill | | | 1 day |
| Gregg St. Clair | | | 1 day |
| Dave Repasz | | | 1 day |
| Eric Hodek | | | 1 day |
| Lilian DePrimo | | | 1 day |
| Alex Gnyse | | | 1 day |
| Randy Wiley | | | 1 day |
| Keith Baugues | | | 1 day |
| Bret Peterson | | | 1 day |
| Ram N. Seetharam | | | 1 day |

At this time, CEMEX has identified the following fact witnesses that it may seek to depose. In addition, CEMEX would envision taking at least three Rule 30(b)(6) depositions. CEMEX may modify this list as discovery progresses.

| Name of Deponent | Date of Deposition | Time of Deposition | Deposition Length |
|-------------------------|---------------------------|---------------------------|--------------------------|
| Paul Carr | | | 1 day |
| Garry Kauffman | | | 1 day |
| Ram N. Seetharam | | | 1 day |
| R.K. Hancock III | | | 1 day |
| Roland C. Hea | | | 1 day |

| | | | |
|------------------|--|--|-------|
| Cathy Rhodes | | | 1 day |
| Jacqueline Joyce | | | 1 day |
| Emilio Llamozas | | | 1 day |
| Andrew Gaydosh | | | 1 day |

f. Interrogatory Schedule: Interrogatories shall be propounded on or before **33 days prior to the close of discovery**.

g. Schedule for Request for Production of Documents: The parties shall submit all requests for the production of documents on or before **33 days prior to the close of discovery**.

h. Discovery Limitations:

(1) Number of Depositions: Each Party shall be limited to 35 depositions, total, including both fact and expert witnesses. The Parties will make good faith efforts prior to scheduling depositions and to adhere to any schedules agreed upon by counsel. The Parties will adhere to the following procedures: (i.) counsel agree to accept notices of deposition on behalf of the represented Parties and shall be responsible for securing the attendance of the deponent at the designated time and place of examination; (ii.) the time between service of deposition notice and the date set for the deposition by that notice shall be at least ten business days unless shortened by agreement of the parties or order of the Court.

(2) Length of Depositions. Each deposition of a fact witness, not including Fed. R. Civ. P. 30 (b)(6) deponents, shall be limited to one day of 7 hours, excluding breaks, unless extended by agreement of the Parties or order of the Court. Each deposition taken pursuant to Fed. R. Civ. P. 30(b)(6) shall be limited to two days of 7 hours each, excluding breaks, unless extended by agreement of the Parties or order of the Court. Expert witness depositions shall be limited to two

days of 7 hours each, excluding breaks, unless extended by agreement of the Parties or order of the Court.

(3) Modification of Presumptive Numbers. Each Party is limited to 60 interrogatories, including, pursuant to Fed. R. Civ. P. 33(a), all discrete subparts.

(4) Limitation for Requests for Production of Documents and Requests for Admission: Requests shall be subject to the requirements of Fed. R. Civ. P. 34 and 36.

(5) Other Planning Or Discovery Orders.

(a) Inadvertent Production of Documents Claimed As Privileged

(i.) The inadvertent production of documents by a Party shall not, in and of itself, waive any privilege that would otherwise attach to the documents produced. The following procedure shall apply to any such claim of inadvertent production:

(A) Upon discovery of the inadvertent production, the producing Party shall promptly give all counsel of record notice of the claimed inadvertent production. The notice shall identify the document, the portions of the document that were inadvertently produced, and the date the document was produced. If the Party that produced the document claims that only a portion of the document was inadvertently produced, the Party shall provide with the notice of inadvertent production a new copy of the document with the allegedly privileged portions redacted;

(B) A Party receiving documents is under a good-faith obligation to promptly notify the producing Party upon identification of a document which appears on its face or in light of facts known to the receiving Party to be potentially privileged. Such

notification shall not waive the receiving Party's ability to subsequently challenge any assertion of privilege with respect to the identified document. If the producing Party believes the document to be privileged and inadvertently produced, the producing Party shall provide notice within five (5) business days of the receiving Party's notification of production of a potentially privileged document;

(C) Upon receiving notice of inadvertent production, the receiving Party must promptly sequester the specified information and any copies it has, and may not use or disclose the information until the claim is resolved. If the receiving Party disclosed the information before being notified, it must take reasonable steps to retrieve the information and prevent further use of such information until the claim is resolved. However, notwithstanding the provisions of this Subparagraph, the receiving Party may promptly present the information to the court under seal for a determination of the claim;

(D) In the absence of an agreement of the Parties on the claim of inadvertent production and privilege, the burden is upon the Party that inadvertently produced a document to promptly move for a ruling concerning the inadvertency of the production and the validity of the privilege claim. Upon resolution of an inadvertent production claim in favor of the producing Party, the receiving Party shall locate and return to the producing Party, or destroy, the originally produced non-redacted documents and all copies;

(E) Inadvertently produced metadata shall be treated as a document pursuant to the provisions of Paragraphs 8.h.(5)(A) through (D).

9. SETTLEMENT

The parties have discussed settlement on several occasions before the government filed its Complaint. The parties were not able to reach agreement. A decision on CEMEX's motion to dismiss certain of the government's claims could influence the possibility of settlement.

10. OTHER SCHEDULING ISSUES

- a. Counsel, after a good-faith effort, are unable to reach agreement on the following issues: None.
- b. The parties anticipate that trial of this matter to the Court would take two weeks.
- c. Request to Conduct Proceedings In Colorado Springs, Colorado: No.

11. DATES FOR FURTHER CONFERENCES

- a. A settlement conference with the magistrate judge will be held on **October 23, 2009** at 10:00 o'clock a.m. It is hereby ordered that all settlement conferences that take place before the magistrate judge shall be confidential.
 - () *Pro se* parties and attorneys only need be present.
 - (X) *Pro se* parties, attorneys, and client representatives with authority to settle must be present.
 - (X) Each Party shall submit a Confidential Settlement Statement to the magistrate judge and opposing counsel on or before **October 9, 2009**, outlining the facts and issues, as well as the strengths and weaknesses of their case.
- b. Status conferences will be held in this case at the following dates and times:

- c. A final pretrial conference will be held in this case by Judge Krieger to be scheduled

by separate order.

12. OTHER MATTERS

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any notice of withdrawal, notice of substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

Counsel will be expected to be familiar and to comply with the Pretrial and Trial Procedures established by the judicial officer presiding over the trial of this case.

In addition to filing an appropriate notice with the clerk's office, a *pro se* Party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1A.

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1D. by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

The Parties have entered into a Stipulation pursuant to Fed. R. Civ. P. 29 regarding discovery of certain electronically stored information and certain obligations with respect to preserving potential evidence, producing documents and asserting claims of privilege which is attached hereto as an appendix to this Scheduling Order.

13. AMENDMENTS TO SCHEDULING ORDER

The scheduling order may be altered or amended only upon a showing of good cause.

Dated in Denver, Colorado, this 13th day of August, 2009.

BY THE COURT:



Michael E. Hegarty
United States Magistrate Judge

APPROVED:

s/John Moscato
Attorney for Plaintiff
John N. Moscato, Senior Counsel
United States Department of Justice
Environmental Enforcement Section
1961 Stout Street, Suite 800
Denver, CO 80294
303-844-1380
John.Moscato@usdoj.gov

S/Chet Thompson
Attorney for Defendant
Chet Thompson
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1001 Pennsylvania Ave., N.W.
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cthompson@crowell.com