

SETTLEMENT AGREEMENT

This Settlement Agreement and Release (Agreement) is entered into between the State of California Air Resources Board (ARB), with its principal location at 1001 I Street, Sacramento, California 95814; and CEMEX Construction Materials Pacific, LLC (CEMEX), with its principal location at 1155 Terminal Street, San Diego, CA 92101.

I. RECITALS

- (1) Health and Safety Code sections 39650-39675 mandate the reduction of the emission of substances that have been determined to be toxic air contaminants (TAC). In 1998, following an exhaustive 10-year scientific assessment process, the Air Resources Board (ARB) identified particulate matter (PM) from diesel-fueled engines as a TAC. Mobile cargo handling equipment (CHE) is powered by diesel-fueled engines that emit toxic PM. CHE diesel PM emissions are regulated under chapter 9, division 3, California Code of Regulations, title 13, section 2479 (Cal. Code Regs., tit. 13, § 2479; hereinafter CHE Regulation).
- (2) The purpose of the CHE Regulation is to reduce diesel PM and criteria pollutant emissions from compression ignition (CI) mobile CHE that operates at ports and intermodal rail yards in the State of California.
- (3) The CHE Regulation applies to any person who conducts business in California, who sells, offers for sale, leases, rents, purchases, owns, or operates any CI mobile CHE that operates at any California port or intermodal rail yard.
- (4) Any CI mobile CHE that operates at any California port or intermodal rail yard must meet the performance requirements outlined in the CHE Regulation.
- (5) Failure to comply with the requirements of the CHE Regulation is a violation of state law resulting in penalties. Health and Safety Code sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410 authorize civil penalties for the violation of the programs for the regulation of TACs not to exceed one thousand dollars (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00), respectively, per engine or piece of CHE for each day in which the violation occurs.
- (6) ARB Enforcement Division staff, with the cooperation of CEMEX, has alleged certain violations of the CHE Regulation with respect to CEMEX's CHE in California, with 9 non-yard trucks that did not conform to the requirements of the CHE Regulation. In particular, these alleged violations involve the lease, rental, purchase, and ownership of CI mobile CHE that operates at CEMEX's California port facility.

- (7) ARB alleges that if the allegations described in recitals 1 through 6 were proven, civil penalties could be imposed against CEMEX as provided in Health and Safety Code sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410 for each and every piece of equipment involved in the violations and each day.
- (8) CEMEX admits the allegations described in recital paragraphs 1 through 7, but denies any liability resulting from said allegations.
- (9) In consideration of the foregoing, and of the promises and facts set forth herein, the Parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed alleged violations and voluntarily agree to resolve this matter by means of this Agreement. In order to resolve the violations described herein, CEMEX has taken, or agrees to take, the actions enumerated below within the Terms and Conditions. Further, ARB accepts this Agreement in termination and settlement of this matter.

II. TERMS AND CONDITIONS

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

- (1) The Parties shall exchange signed copies of this Agreement by March 24, 2017. This Agreement may be executed in counterparts. Facsimile or photocopied signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this Agreement. CEMEX shall send the original signed Agreement and any future mailings or documents required per the terms of this Agreement to:

Mr. H. Cuauhtémoc Pelayo
Air Pollution Specialist
Enforcement Division
Air Resources Board
9480 Telstar Avenue, Suite 4
El Monte, California 91731

- (2) Upon execution of this Agreement, the sum of one hundred eighteen thousand, one hundred twenty-five dollars (**\$118,125.00**) shall be paid on behalf of CEMEX no later than March 24, 2017, as follows:
 - \$59,063.00 to the California Air Pollution Control Fund
 - \$59,062.00 to the San Joaquin Valley Air Quality Management District

School Bus Diesel Particulate Filter Retrofit Supplemental Environmental Project (SEP)
CEMEX will send the payment by March 24, 2017, along with the attached Settlement Agreement Payment Transmittal Form (Attachment A) to:

California Air Resources Board
Accounting Office
P.O. Box 1436
Sacramento, California 95812-1436

- (3) CEMEX shall not violate any provision of the CHE Regulation.
- (4) CEMEX has corrected, prior to the execution of this Agreement, all equipment known to have been in violation and cited in the Notice of Violation #070215-HCP-01, issued April 29, 2016, by selling, retiring, retrofitting, or replacing the noncompliant equipment in compliance with all requirements of the CHE Regulation.
- (5) CEMEX has provided documentation that proves that the violations have been corrected and ARB reserves the right to inspect and confirm correction of the violations.
- (6) Now therefore, in consideration of the payment on behalf of CEMEX to ARB, for deposit into the California Air Pollution Control Fund and for the SEP, ARB hereby releases CEMEX and their principals, officers, agents, predecessors, and successors from any and all claims for violations of the CHE Regulation alleged in recital paragraph 6.

III. GENERAL PROVISIONS

- (1) This Agreement constitutes the entire agreement and understanding between ARB and CEMEX concerning the subject matter hereof, and supersedes and replaces any and all prior negotiations and agreements of any kind or nature, whether written or oral, between ARB and CEMEX concerning the subject matter hereof.
- (2) This Agreement shall apply to and be binding upon CEMEX and their officers, directors, receivers, trustees, employees, successors and assignees, subsidiaries, and parent corporations, and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (3) The terms and conditions set forth in this Agreement shall remain valid and

enforceable notwithstanding any future violations that may occur.

- (4) The effective date of this Agreement shall be the date upon which CEMEX executes this Agreement.
- (5) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all Parties to this Agreement.
- (6) This Agreement shall further serve to toll any statute of limitation until all terms and conditions of this Agreement have been fulfilled.
- (7) CEMEX agrees not to assert laches as a defense.
- (8) Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be illegal, invalid or unenforceable in any jurisdiction, the remainder of this Agreement remains in full force and effect.
- (9) The headings in this Agreement are not binding and are for reference only and do not limit, expand, or otherwise affect the contents of this Agreement.
- (10) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (11) It is further agreed that the stipulated penalties described in this Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7).
- (12) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either Party on the ground that said party drafted it.
- (13) Each of the undersigned represents and warrants that he or she has full authority to enter into this Agreement.

IV. PENALTY DETERMINATION

- (1) Pursuant to Health and Safety Code section 39619.7, ARB must provide information on the basis for the penalties it seeks. This information is provided throughout this settlement agreement and summarized below.

The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code section 43024.

The per unit or per vehicle penalty in this case is a maximum of \$1,000.00 per unit per day for strict liability violations, and \$10,000.00 per unit per day for negligent or intentional violations. The penalty of \$118,125.00 over an unspecified number of days of violation is for 9 noncompliant units. The per unit penalty in this case is approximately \$13,125.00 per non-yard truck.

This penalty was calculated by considering all factors specified in Health and Safety Code sections 42403 and 43024, including the fact that CEMEX came into compliance quickly, is a first time violator and has cooperated with the investigation.

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

The penalty provision being applied in this case is Health and Safety Code section 39674 because CEMEX failed to comply with section 2479 of the CHE Regulation, which was adopted under the authority of Health and Safety Code section 39674, et seq.

Whether the provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.

The provisions cited above do prohibit emissions above a specified level. However, since the hours of operation of the noncompliant units involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

- (2) CEMEX acknowledges that ARB has complied with Health and Safety Code section 39619.7 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at Health and Safety Code section 43024, has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate), has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level. However, since the hours of operation of the noncompliant units involved and their

individual emission rates are not known, it is not practical for ARB to quantify the excess emissions.

- (3) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar case negotiations, and the potential costs and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days considered together with the complete circumstances of this case. Penalties in future cases might be smaller or larger on a per unit basis.
- (4) The penalty in this case was based in part on confidential business information provided by CEMEX that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and CEMEX that ARB does not retain in the ordinary course of business. The penalty also reflects ARB's assessment of the relative strength of its case against CEMEX, the desire to avoid the uncertainty, burden, and expense of litigation, to obtain swift compliance with the law, and to remove any unfair advantage that CEMEX may have secured from its actions.

V. STIPULATED CONSENT JUDGMENT

- (1) CEMEX stipulates to the entry of a Consent Judgment if CEMEX defaults on any of the terms and conditions of this Agreement and hereby waives the right to challenge the Consent Judgment or its terms.
- (2) The Consent Judgment does not constitute evidence of an admission by CEMEX regarding any issue of law or fact alleged in the Agreement but sets forth the obligations of CEMEX and constitutes the complete, final, and exclusive agreement between ARB and CEMEX.
- (3) ARB expressly reserves the right to bring an enforcement action based on violations of law not covered in this Agreement and to seek whatever fines, penalties, or remedies provided by law, including injunctive relief.
- (4) For purposes of this Consent Judgment, CEMEX agrees to the following:
 - a. Superior Court of California, County of Sacramento (Court) has jurisdiction over the Parties and to the subject matter of this action;
 - b. Venue is proper in this Court;
 - c. The Court has personal jurisdiction over CEMEX for purposes of enforcing the terms of the Consent Judgment; and

- d. The terms and conditions of this Agreement shall be deemed the terms and conditions of the Consent Judgment.

ACKNOWLEDGED AND ACCEPTED BY:

California Air Resources Board

Dated: 4/7/2017

By: 
(Signature)

Printed Name: Richard Corey
Title: Executive Officer

CEMEX Construction Materials Pacific, LLC

Dated: March 21, 2017

By: 
(Signature)

Printed Name: OSCAR FRIAS
Title: VICEPRESIDENT