



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

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Robbie

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

To: RC - info

cy: OPRA  
(just 13 pages  
only)

IN THE MATTER OF )  
CEMEX, Inc., )  
Lyons Cement Plant )

Permit Number: 95OPBO082 )

Issued by the Colorado Department of )  
Public Health and Environment, Air )  
Pollution Control Division )

PETITION TO OBJECT TO  
ISSUANCE OF A STATE  
TITLE V OPERATING  
PERMIT

Petition Number: VIII-2008-

Pursuant to Section 505(b)(2) of the Clean Air Act and 40 CFR § 70.8(d) and the applicable federal and state regulations, Rocky Mountain Clean Air Action (hereafter "Petitioner") hereby petitions the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the issuance of the March 1, 2008 Title V operating permit (hereafter "Title V Permit") issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division ("Division") for CEMEX, Inc. (hereafter "CEMEX") to operate the Lyons cement plant, Permit Number 95OPBO082, in Boulder County, Colorado. See, Exhibit 1. Petitioner hereby petitions the Administrator to object to the issuance of the Title V permit due to its failure to ensure compliance with Prevention of Significant Deterioration ("PSD") requirements, including best available pollution control technology ("BACT") standards, and to include a plan to bring the Lyons cement plant into compliance with PSD.

INTRODUCTION

The Lyons cement plant is located 15 miles north of Boulder, Colorado near the town of Lyons, Colorado and located less than 20 miles east of Rocky Mountain National Park. See, Figure 1. The Plant manufactures Portland cement. The process of producing cement involves three processes. First, CEMEX mines raw materials, such as limestone and shale, hauls them to the Lyons Cement Plant, then crushes and processes these materials. CEMEX then utilizes a pulverized coal-fired kiln that heats up to turns the processed raw materials into clinker, the raw ingredient of cement. The clinker is then cooled, mixed with gypsum and other minerals, and ground up in the finish mill. See, Exhibit 1 at 1.

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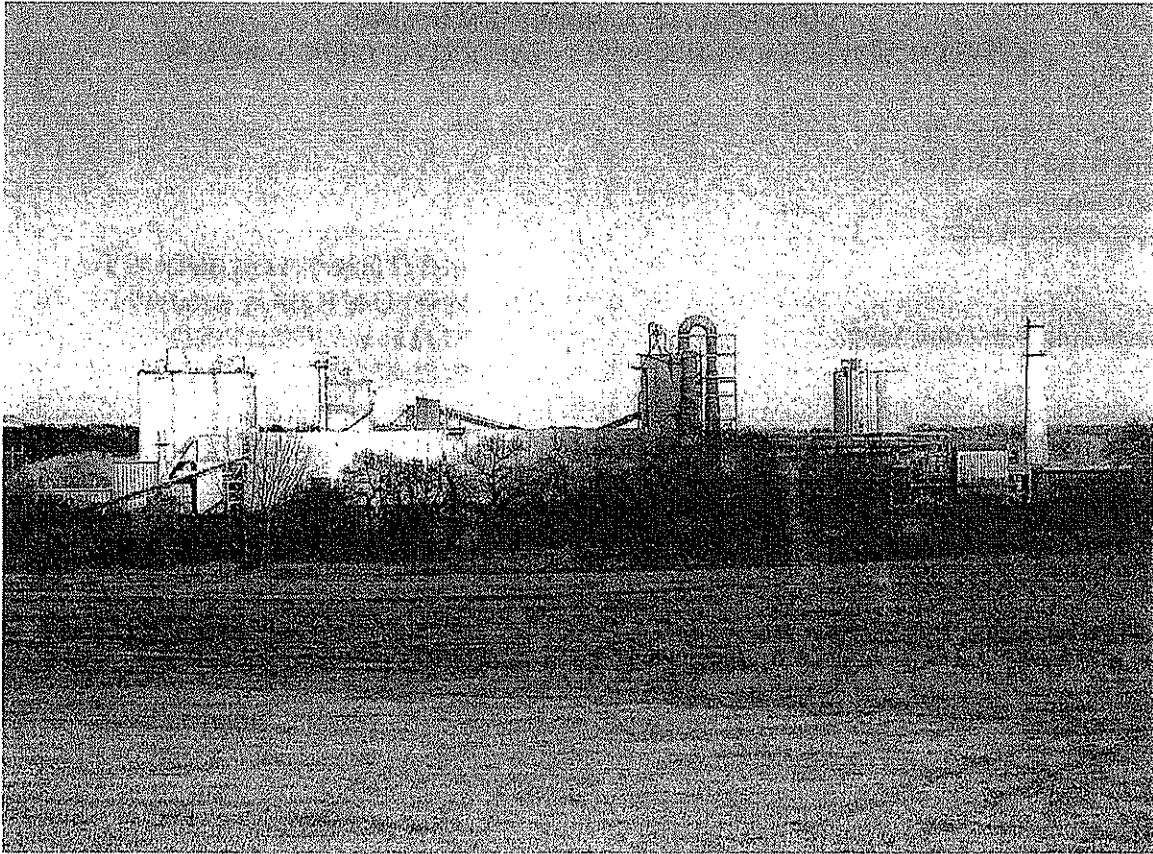


Figure 1. The CEMEX Lyons Cement Plant (photo by EPA).

In the process of manufacturing cement, the Lyons cement plant releases a number of air pollutants known to be harmful to human health. According to the Technical Review Document ("TRD") prepared for the Title V Permit, the plant has the potential to emit 2,662 tons of nitrogen oxides ("NO<sub>x</sub>"), 420 tons of particulate matter less than 10 microns in diameter ("PM<sub>10</sub>"), 1,376 tons of sulfur dioxide ("SO<sub>2</sub>"), 233 tons of volatile organic compounds ("VOCs"), and 453 tons of carbon monoxide ("CO").<sup>1</sup>

NO<sub>x</sub> emissions from the cement plant are of particular concern and are linked to a number of air quality problems in the region.<sup>2</sup> For example:

- NO<sub>x</sub> react with sunlight to form ground-level ozone, the key ingredient of smog. The Denver metropolitan area, including Boulder County, recently violated National Ambient Air Quality Standards ("NAAQS") for ground-level ozone;<sup>3</sup>
- NO<sub>x</sub> form microscopic particles, called PM<sub>2.5</sub>, that when breathed in, reach the very bottoms of our lungs and can even be absorbed into the bloodstream. A number of

<sup>1</sup> The TRD is attached hereto as Exhibit 2.

<sup>2</sup> Nitrogen oxides are a group of gases that include varying amounts of nitrogen and oxygen. For an overview of air quality problems linked to nitrogen oxides, see <http://www.epa.gov/air/urbanair/nox/hlth.html>.

<sup>3</sup> See. <http://ozoneaware.org/documents/OzoneViolation072307.pdf>.

exceedances of the PM<sub>2.5</sub> NAAQS have been reported in the Denver metropolitan area;<sup>4</sup>

- NO<sub>x</sub> creates haze, which impairs visibility. Nearby Rocky Mountain National Park is currently suffering from impaired visibility;<sup>5</sup>
- NO<sub>x</sub> can contribute to nitrogen deposition in waters and soils, essentially overfertilizing the natural environment. Nearby Rocky Mountain National Park is currently suffering from excessive levels of nitrogen deposition;<sup>6</sup> and
- NO<sub>x</sub> includes nitrous oxide, or N<sub>2</sub>O, a greenhouse gas that is 310 times more potent than carbon dioxide.<sup>7</sup>

That amount of NO<sub>x</sub> allowed to be released annually from the CEMEX Lyons cement plant equals the amount released by over 139,000 vehicles.<sup>8</sup>

The CEMEX Lyons cement plant also released a number of exceptionally toxic pollutants into the air every year. According to the company's most recent Toxic Release Inventory report, the Lyons cement plant released 52 pounds of mercury, 9 pounds of lead, and 0.158 grams of dioxins and dioxin-like compounds into the air of Boulder County in 2005.<sup>9</sup> Dioxins and dioxin-like compounds are an exceptionally toxic group of chemicals that are known carcinogens, can cause birth defects, and cause brain damage. The EPA has determined that exposure to one part per million of dioxins over a 70 year lifetime—or 0.000001 grams over 70 years—is “safe” for people, although it has generally been found that dioxin exposure at any level can jeopardize human health.<sup>10</sup>

In addition to release a number of harmful air pollutants, the Lyons cement plant also has a history of regularly violating state and federal clean air laws and regulations. Indeed, the Lyons cement plant has been cited by the State of Colorado, the EPA, and citizens for violating clean air laws and regulations seven out of the last eight years. Most recently, both citizens and the EPA put CEMEX on notice of numerous violations of the Clean Air Act, including violations of New Source Review (“NSR”) permitting requirements. *See*, Table 1.

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<sup>4</sup> *See*,

<http://iaspub.epa.gov/airsdata/adaqs.monvals?geotype=st&geocode=CO&geoinfo=st%7ECO%7EColorado&pol=P M25&year=2007&fld=monid&fld=siteid&fld=address&fld=city&fld=county&fld=stabbr&fld=reg&rpp=25>.

<sup>5</sup> *See*, <http://www.cdphe.state.co.us/ap/RegionalHaze/TSDRockyMountainOct.pdf>.

<sup>6</sup> *See*, <http://www.cdphe.state.co.us/ap/rmnp/NDRPAugust07.pdf>.

<sup>7</sup> *See*, <http://www.epa.gov/nitrousoxide/index.html>.

<sup>8</sup> According to the EPA, an average vehicle emits 38.2 pounds of NO<sub>x</sub> per year. *See*, [www.epa.gov/otaq/consumer/f00013.htm](http://www.epa.gov/otaq/consumer/f00013.htm).

<sup>9</sup> *See*, [http://www.epa.gov/cgi-](http://www.epa.gov/cgi-bin/broker?zipcode=80540&view=ZPFA&trilib=TRIO0&sort=VIEW &sort_fmt=1&state=&city=&spc=&zipcod e=12345&ziprch=yes&chemical=ALL &industry=ALL&year=2005&tab_rpt=1&fld=TRIID&fld=RELLBY&O NDISPD=Y&OTHDISPD=Y&fld=TSFDSP&_service=oiiaa&_program=xp_tri.sasmacr.tristart.macro)

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<sup>10</sup> *See*, <http://www.gascape.org/index%20/Health%20effects%20of%20Dioxins.html>.

Table 1. History of Noncompliance at Lyons Cement Plant.<sup>11</sup>

Date	Type of Notice	Nature of Violations
2000	Compliance Advisory	Particulate violations
2001	Compliance Order on Consent	Opacity violations
2003	Compliance Advisory	Numerous particulate, opacity violations
2004	Compliance Advisory	Consent decree violations, particulate and opacity violations
2005	Notice of Violation	Temperature, dioxin violations
2006	Notice of Violation	Temperature, dioxin violations
2007	Notice of Violation, Notice of Intent	NSR, opacity violations

The Division submitted the proposed Title V Permit for EPA review on December 6, 2006. The EPA's 45 day review period ended on January 20, 2008, although according to a January 28, 2008 e-mail from DJ Law with EPA Region 8, the EPA's 45 day review period formally closed on Tuesday, January 22nd.<sup>12</sup> Based on Petitioner's conversations with Region 8 EPA staff, the EPA did not object to the issuance of the Title V Permit for the Lyons cement plant. Since that time, the Division has issued a final Title V Permit, dated March 1, 2008. This petition is thus timely filed within 60 days following the conclusion of EPA's review period and failure to raise objections.

This petition is based on objections to the permit raised with reasonable specificity during the public comment period. To the extent the EPA may somehow believe this petition is not based on comments raised with reasonable specificity during the public comment period, Petitioner requests the Administrator also consider this a petition to reopen the Title V Permit for the Lyons cement plant in accordance with 40 CFR § 70.7(f).<sup>13</sup> A permit reopening and revision is mandated in this case because of one or both of the following reasons:

1. Material mistakes or inaccurate statements were made in establishing the terms and conditions in the permit. See, 40 CFR § 70.7(f)(1)(iii). As will be discussed in more detail, the Title V Permit for Lyons cement plant suffers from material mistakes that render several terms and conditions meaningless, ambiguous, unenforceable as a practical matter, in violation of applicable requirements, etc.; and
2. The permit fails to assure compliance with the applicable requirements. See, 40 CFR § 70.7(f)(1)(iv). As will be discussed in more detail, the Title V Permit for the Lyons cement plant fails to assure compliance with several applicable requirements.

<sup>11</sup> Copies of all referenced compliance advisories, compliance orders on consent, notices of violations, and notices of intent documenting these violations are attached hereto as Exhibit 3.

<sup>12</sup> This e-mail is attached hereto as Exhibit 4.

<sup>13</sup> To the extent the Administrator may not believe citizens can petition for reopening for cause under 40 CFR § 70.7(f), Petitioner also hereby petitions to reopen for cause in accordance with 40 CFR § 70.7(f) pursuant to 5 USC § 555(b).

## PETITIONER

Petitioner Rocky Mountain Clean Air Action is a Denver, Colorado-based, nonprofit membership group dedicated to protecting clean air in Colorado and the surrounding Rocky Mountain region for the health and sustainability of local communities. On February 2, 2006 and May 12, 2006, Petitioner submitted detailed comments regarding the Division's proposal to renew the Title V Permit for the Lyons cement plant. *See*, Exhibits 5 and 6.<sup>14</sup> The objections raised in this petition were raised with reasonable specificity in comments on the draft Title V Permit.

Petitioner requests the EPA object to the issuance of Permit Number 95OPBO082 for the Lyons cement plant and/or find reopening for cause for the reasons set forth below.

## GROUND FOR OBJECTION

### **I. The Title V Permit Fails to Ensure Compliance With PSD and Nonattainment NSR Requirements and Fails to Include a Compliance Schedule to Bring the Lyons Cement Plant Into Compliance with PSD and Nonattainment NSR Requirements**

A Title V Permit is required to include emission limitations and standards that assure compliance with all applicable requirements at the time of permit issuance. 42 USC § 7661c(a); 40 CFR § 70.6(a)(1). Applicable requirements include, among other things, PSD requirements set forth under Title I of the Clean Air Act, regulations at 40 CFR § 51.166, and the Colorado SIP at Air Quality Control Commission ("AQCC") Regulation Number 3, as well as nonattainment NSR requirements set forth under Title I of the Clean Air Act, regulations at 40 CFR § 51.165, and the Colorado SIP at AQCC Regulation Number 3. 40 CFR § 70.2. If a source will not be in compliance with an applicable requirement, including PSD and nonattainment NSR, at the time of permit issuance, the applicant must disclose the violation and provide a narrative showing how it will come into compliance, and the permit must also include a compliance schedule for bringing the source into compliance. 42 USC § 7661b(b); 40 CFR § 70.6(b)(3).

In the case of the Lyons cement plant Title V permit, not only does it fail to include emission limitations and standards that assure compliance with PSD and nonattainment NSR requirements, but the Title V permit fails to include a compliance schedule that brings the Lyons cement plant into compliance with these requirements. The Administrator must therefore object to the issuance of the Title V permit because it fails to comply with the Clean Air Act. 42 USC § 7661d(b)(2).

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<sup>14</sup> The Division's response to Petitioner's comments is attached hereto as Exhibit 7.

**A. *The Title V Permit Fails to Ensure Compliance with PSD and Nonattainment NSR Requirements***

NSR provisions of Parts C and D of Title I of the Clean Air Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a PSD permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. 40 CFR § 51.165, 40 CFR § 51.166, 40 CFR § 52.21, and 40 CFR § 52.24.

Federal PSD regulations were adopted in 1978 (43 Fed. Reg. 26403) and subsequently amended in 1980 (45 Fed. Reg. 52676) and are now codified at 40 CFR § 52.21. Nonattainment NSR regulations were promulgated in 1979 (44 Fed. Reg. 38473) and are now codified at 40 CFR § 52.24. Both PSD and nonattainment NSR permitting requirements have also been incorporated into the Colorado SIP at Code of Colorado Regulations (“CCR”) 5 CCR 1001-5 and Code of Federal Regulations 40 CFR § 52.320, *et seq.* See also, AQCC Regulation No. 3, Part D. PSD requirements were incorporated into the Colorado SIP in 1986 (51 Fed. Reg. 31125) and nonattainment NSR requirements were incorporated into the Colorado SIP in 1994 (59 Fed. Reg. 42500). The Colorado SIP adheres to PSD and nonattainment NSR regulations at 40 CFR §§ 51.165 and 51.166.

Any facility required under the Clean Air Act to obtain a PSD permit or a nonattainment NSR permit must use modern pollution controls to reduce the pollutant being increased above significant levels. If an area is designated as attainment, BACT must be utilized to reduce air pollution and if an area is designated as nonattainment, lowest achievable emission rates (“LAER”) must be met. 40 CFR § 51.165(f), 40 CFR § 51.166(j)(3) and 40 CFR § 51, Appendix S. PSD permits must ensure protection of human health and protection of air quality in Class I areas, which include National Parks and other pristine areas. 40 CFR § 51.165, 40 CFR § 51.166, and 40 CFR § 52.21.

For a major modification of a major source to occur, there not only has to be a significant emissions increase or potential increase for the criteria pollutant being increased, but there must be a net increase or potential net increase of the pollutant from the facility. Under both PSD and nonattainment NSR requirements, a significant increase occurs when VOCs, NO<sub>x</sub>, and SO<sub>2</sub> increase or have the potential to increase by 40 tons/year or more and when CO increases by 100 tons/year or more. 40 CFR § 51.165(a)(1)(x)(A), 40 CFR § 51.166(b)(23)(i), and 40 CFR § 52.21(b)(23)(i). A net emissions increase is the amount by which the sum of the following exceeds zero: any increase in actual emissions from a particular physical change or change in method of operation at a facility and any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change. 40 CFR § 51.165(a)(1)(vi)(A), 40 CFR § 51.166(b)(3)(i), and 40 CFR § 52.21(b)(3)(i).

The Lyons cement plant is an “existing major source of air pollution.” Exhibit 6 at 3. While the cement plant was grandfathered in under the Clean Air Act as a major source, it has since been modified on numerous occasions. These modifications have led to correspondingly significant increases in emissions, including at times when the facility was located in an area



designated as nonattainment, contemporaneous with net emissions increases. Despite these modifications and significant emission increases, the Lyons cement plant has yet to comply with PSD and nonattainment NSR requirements. Not only that, but the Title V permit for the Lyons cement plant fails to require compliance with applicable PSD and nonattainment NSR permitting requirements, specifically failing to include emission limits and standards that represent BACT and LAER.<sup>15</sup>

In fact, there is no question that the Lyons cement plant is subject to PSD and nonattainment NSR requirements, and that these requirements are “applicable” in the case of the Title V permit at issue. The EPA itself has confirmed this determination. In a notice of violation (“NOV”) issued on March 28, 2007, the agency concluded:

Commencing on or about 1997, and continuing through the date of this NOV, **Cemex modified the Lyons, Colorado cement plant without first obtaining a PSD permit and NNSR permit authorizing the construction and operation of physical modifications of its kiln, clinker cooler, raw mill and finish mill units as required by the Act.** In addition, for each physical modification at this plant, Cemex has operated the modified plant without installing pollution control equipment required by the act. These violations of the Act and the State Implementation Plan (“SIP”) of Colorado have resulted in the release of unpermitted nitrogen oxides (“NO<sub>x</sub>”) and/or other pollutants into the environment.

Exhibit 8 at 1 (emphasis added). In its NOV, the EPA explained:

In 1998, Cemex’s predecessor, Southdown, was in the planning stages of the “Lyons Capacity Increase” project. Southdown documented these plans in an Authorization for Expenditure (“AFE # 98097”), which stated that the project “will increase capacity by 125,000 tons to 575,000 tons per annum at an estimated total cost of \$100 million.” The AFE also stated that “a portion of this capacity increase was already achieved in 1997 through minor modification to the preheater aerodynamics combined with the temporary use of high cost purchased oxygen.”

Attached to AFE # 98097 is a description of the Lyons Plant Expansion project. This description lists several significant changes that were components of the expansion project including:

- A. Raw Mill System – increase production rate from 130 to 140 tons per hour by upgrading the existing raw material driver circuit or adding an additional flash dryer circuit.
- B. Kiln System – upgrade cooler drag chains, upgrade cooler fans, and upgrade cooler grates.

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<sup>15</sup> Indeed, in response to Petitioner’s comments, the Division admitted that “no conditions in the [Title V] permit were established to meet PSD requirements.” Exhibit 6 at 3.

- C. Finish Mill System – install a high efficiency separator to increase production by 10% on the mill system, install a new baghouse for the separator in order to maximize use of the new separator.
- D. Oxygen Plant – purchase two 50 ton per day oxygen plants, one in 1998 and one in 1999.

A Southdown monthly status report, dated April 9, 1999, for the Lyons Plant Expansion showed no major changes in the scope of the project with the clinker cooler project at 100% complete, the finish mill project at 95% complete, the raw feed preparation circuit at 25% complete and the oxygen plant at 10% complete. Completion of the oxygen plant was projected to be completed September 1, 1999 and the materials for the raw mill upgrades were ordered and installation was expected to begin in early May 1999.

The Lyons Plant Expansion was a physical change to the facility subject to 40 C.F.R. § 52.21(b)(2)(i).

As a result of the Lyons Capacity Increase Project, net annual emissions of NO<sub>x</sub> from the Cemex plant increased by 563 tons per year from the baseline period of 1995 through 1996. Annual net emissions of other pollutants, in addition to NO<sub>x</sub> may have increased as a result of the Lyons Capacity Increase Project.

Exhibit 8 at 6-7. The EPA added:

The “Lyons Capacity Increase” project conducted by Cemex caused a significant net emissions increase of NO<sub>x</sub> and/or other pollutants, resulting in a “major modification” as defined in 40 C.F.R. § 52.21(b)(2) and the Colorado SIP. Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Section I.B.2 (Colorado SIP 110(h) Compilation as of 11/15/1995). Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part A, Section I.B.35.B (Colorado SIP 110(h) Compilation as of 11/15/1998). **Cemex failed to obtain a PSD permit or undergo PSD review, including application of BACT, prior to beginning actual construction,** in violation of 40 C.F.R § 52.21(r) and the Colorado SIP. Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Section I.A. and III.A.1 (Colorado SIP 110(h) Compilation as of 11/15/1995). Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part B, Sections I.A and III.A.1 (Colorado SIP 110(h) Compilation as of 11/15/1998).

As stated in Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5 Section IV.D.2.a, for any new major stationary source or major modification, the applicant must provide information outlined in that section for a nonattainment area permit. The Denver Metropolitan area was a nonattainment area for PM-10 during the “Lyons Capacity Increase” project. Pursuant to Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Part A, § I.B.35.B.a, the significant NO<sub>x</sub> emission increase is also a significant emission increase for PM-10. **Cemex failed to obtain a NNSR [nonattainment NSR] permit including applying lowest achievable**

**emission rate (LAER) and offsets prior to commencing construction**, in violation of Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Section IV.D.2.a. Colorado Air Quality Control Commission Regulation No. 3, 5 CCR 1001-5, Section, Section IV.D.2.a (Colorado SIP 110(h) Compilation as of 11/15/1995). Colorado Air Quality Control Commission Regulation No. 3, CCR 1001-5, Part B, Section IV.D.2.a (Colorado SIP 110(h) Compilation as of 11/15/1998).

Exhibit 8 at 10-11 (emphasis added). As set forth in the EPA's NOV, these conclusions indicate that the EPA has made a finding that the CEMEX Lyons cement plant is in violation of PSD and nonattainment NSR requirements. Accordingly, the Title V permit for the Lyons cement plant was required to contain emission limits and standards that ensure compliance with PSD and nonattainment NSR requirements. The permit does not contain such requirements, however, and the Administrator must therefore object to its issuance pursuant to 42 USC § 7661d(b)(2).

In response to Petitioner's comments regarding this issue, the Division asserts that "Although EPA issued an NOV to CEMEX on March 28, 2007, alleging violations of PSD and nonattainment area new source review (NANSR) requirements, the NOV is not final agency action and considered conclusive evidence that a violation has occurred until the process is completed." Exhibit 7 at 3.<sup>16</sup> However, the Division's response is erroneous. Under the Clean Air Act, the EPA can only issue an NOV if the agency "finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan[.]" 42 USC § 7413(a)(1). Thus, under the plain language of the Clean Air Act, the EPA's NOV constitutes a finding that CEMEX is in violation of PSD and nonattainment NSR requirements before issuing its NOV. Accordingly, the NOV constitutes a finding that PSD and nonattainment NSR requirements are applicable to the Lyons cement plant, and therefore applicable requirements in the case of the Title V permit.

Indeed, courts have upheld the fact that NOV's constitute findings of violations, or noncompliance. In *NYPIRG v. Johnson*, the Second Circuit Court of Appeals stated that "to issue a NOV, the Administrator must first find a source in violation of an applicable plan or permit." *NYPIRG v. Johnson*, 427 F.3d 172 (2<sup>nd</sup> Cir. 2005). The court further stated that in issuing an NOV, a permitting authority had determined that PSD requirements "are, indeed, applicable." In that case, the court held that the issuance of an NOV by the State of New York constituted a finding of noncompliance with PSD requirements and that the EPA was required to object to the issuance of a Title V permit that failed to ensure compliance with PSD.

Based on the EPA's finding that the Lyons cement plant is in violation of PSD and nonattainment NSR requirements, it is clear that the Title V permit issued to CEMEX for the Lyons cement plant was required to contain "enforceable emission limitations and standards" to

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<sup>16</sup> Although Petitioner did not specifically raise objections regarding the EPA's March 28, 2007 NOV during the public comment period for the Title V permit, this is due to the fact that the public comment period for the Title V permit ended in May of 2006. Thus, issues related to the EPA's March 28, 2007 NOV arose after the public comment period ended. In accordance with the Clean Air Act, the EPA cannot reject our petition for objection on the grounds that Petitioner did not raise objections regarding the EPA's March 28, 2007 NOV during the public comment period. 42 USC § 7661d(b)(2). Regardless, Petitioner raised objections with reasonable specificity related to the issue of PSD compliance the issue of whether an NOV constitutes a finding of noncompliance during the public comment period. See, Exhibit 5 at 2-3 and 20-21; Exhibit 6 at 3.

ensure compliance with these applicable requirements. 42 USC § 7661c(a). Among other limits and standards, the Title V permit was required to contain limits that represent BACT and LAER, at least for NO<sub>x</sub> emissions, from the Lyons cement plant. The permit does not, and therefore the Administrator must object to its issuance.

***B. The Title V Permit Fails to Include a Compliance Plan to Bring the Lyons Cement Plant into Compliance with PSD and Nonattainment NSR***

Applicable requirements at 42 USC § 7661b(b)(1) and 40 CFR § 70.5(c)(8)(iii)(C) require that if a facility is in violation of an applicable requirement at the time of permit issuance, the facility's permit must include a schedule containing a sequence of actions with milestones, leading to compliance with any applicable requirement. In the case of the CEMEX Lyons cement plant, the Title V permit fails to include a compliance plan to bring the cement plant into compliance with PSD and nonattainment NSR.

As already explained, it is established that the Lyons cement plant is currently in violation of PSD and nonattainment NSR requirements. As the EPA's March 28, 2007 NOV points out, CEMEX has failed to obtain the required PSD and nonattainment NSR permits, and the Lyons cement plant is currently failing to meet emission limits that constitute BACT and LAER. The Division itself has admitted that, "no conditions in the permit were established to meet PSD requirements." Exhibit 7 at 3. Accordingly, the Division was required to include a compliance schedule in the Title V permit in accordance with 42 USC § 7661b(b)(1) and 40 CFR § 70.5(c)(8)(iii)(C). The Division failed to do so.

Although the Division asserted in response to comments on this issue that, "the [EPA] NOV is not final agency action and cannot be considered conclusive evidence that a violation has occurred," this assertion is again erroneous in the context compliance schedule requirements. Once again, the courts have held that the issuance of an NOV does, in fact, demonstrate noncompliance. Ruling that the EPA violated the Clean Air Act by failing to object to the issuance of a Title V permit that lacked a compliance schedule, the Second Circuit Court of Appeals held:

Issuance of a NOV indicates that the DEC [Department of Environmental Conservation] has concluded that a source is non-compliant. Once that has occurred, the EPA is obligated to include a compliance schedule.

*NYPIRG v. Johnson*, 427 F.3d 172 (2<sup>nd</sup> Cir. 2005). The court continued, "[B]ecause issuance of the NOVs manifested a prior finding of non-compliance, the EPA should not have issued an operating permit without a compliance schedule." *Id.* Similar to that case, the EPA's March 28, 2007 NOV in this case constitutes a finding of noncompliance at the Lyons cement plant. Because the Title V permit fails to include a compliance schedule, the Administrator must object to its issuance.

*C. A Number of Other Modifications Have Triggered PSD and Nonattainment NSR Requirements*

In addition to the EPA's finding that the Lyons cement plant is in violation of PSD and nonattainment NSR requirements in relation to modifications and emission increases that occurred between 1997 and the present, additional information strongly indicates the cement plant is in violation of PSD and nonattainment NSR requirements in relation to other modifications and emission increases. The Administrator must also object to the issuance of the Title V permit over its failure to ensure compliance with PSD and nonattainment NSR with regards to these other modifications and emission increases.

Indeed, information on file with the Division shows that the kiln at the Lyons cement plant has been modified at least six times since 1980, and that the dryer has been modified at least three times since 1985. Emissions data on file with the Division further indicates that significant increases of NO<sub>x</sub>, SO<sub>2</sub>, VOCs, and/or CO occurred in conjunction with these modifications. For example, between 1980 and the present, NO<sub>x</sub> emissions increased from 277 tons/year to over 2,000 tons per year. Despite these modifications and emission increases, the cement plant continues to not operate in compliance with PSD and nonattainment NSR requirements with regards to these major modifications.

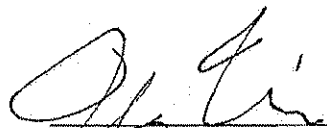
On February 26, 2007, Petitioner notified CEMEX of its intent to file suit pursuant to the Clean Air Act over these violations. *See*, Exhibit 9. In this NOI and the attachments thereto, Petitioner documents the modifications and emission increases that have occurred at the Lyons cement plant. Amazingly, memos from the Division in the late 1980's indicate that staff with the agency had recommended an enforcement action be taken against the cement plant over PSD violations. *See*, Exhibit 10. Despite this, the Division has done nothing to ensure the cement plant was operating in compliance with either PSD or nonattainment NSR requirements, and the Title V permit is no exception.

The Administrator must object to the issuance of the Title V permit over its failure to ensure compliance with PSD and nonattainment NSR with regards to the major modifications identified by Petitioner in their February 26, 2007 NOI, as well as over the failure of the permit to include a compliance schedule due to the cement plant's ongoing noncompliance with PSD and nonattainment NSR requirements.

## CONCLUSION

For the reasons stated above, Petitioner requests the Administrator object to the Title V Permit issued by the Division for the CEMEX Lyons cement plant. As thoroughly explained the Title V permit fails to assure compliance with PSD and nonattainment NSR requirements, and fails to comply with Title V permitting requirements. The Administrator thus has a nondiscretionary duty to issue an objection to the Title V permit within 60 days in accordance with Section 505(b)(2) of the Clean Air Act.

Respectfully submitted this 19<sup>th</sup> day of March 2008



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## EXHIBITS TO PETITION

1. March 1, 2008 CEMEX, Inc. Lyons Cement Plant Title V Permit
2. Most Recent Technical Review Document for CEMEX, Inc. Lyons cement plant
3. Compliance advisories, notices of violation, notices of intent related to noncompliance at the Lyons cement plant
4. January 28, 2008 E-mail from DJ Law, EPA Region 8
5. February 2, 2006 comments on draft Lyons cement plant Title V permit
6. May 12, 2006 comments on draft Lyons cement plant Title V permit
7. December 5, 2007 Colorado Air Pollution Control Division Response to Comments
8. March 28, 2007 Notice of Violation, Environmental Protection Agency, Region 8
9. February 26, 2007 Notice of Intent, Rocky Mountain Clean Air Action
10. November 15, 1989 Air Pollution Control Division Memo