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July 6, 2017

Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In Re: CEMEX Construction Materials
Florida, LLC,

DEP Case No. 2017-_____
Title V Permit No. 0530010-045-AV

**PETITION FOR WAIVER OF AIR OPERATION
PERMIT MAXIMUM RENEWAL PERIOD IN RULE 62-210.300**

Petitioner, CEMEX Construction Materials Florida, LLC, a Florida limited liability company (“Petitioner”), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, petitions the Florida Department of Environmental Protection (“the Department”) for a waiver of the maximum renewal period for Air Operation Permits under Rule 62-210.300, Florida Administrative Code.

In support of this petition, the Petitioner states:

Identification of the Petitioner

1. The Petitioner is CEMEX Construction Materials Florida, LLC.
2. For purposes of this Petition, the name, address, telephone number, facsimile number, and e-mail address of Petitioner’s counsel is:

Lawrence E. Sellers, Jr.
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The CEMEX Brooksville North Cement Plant

3. Petitioner owns the CEMEX Brooksville North Cement Plant (“Cement Plant”) located in Hernando County at 16301 Ponce De Leon Boulevard, Brooksville, Florida 34614-0849. Latitude coordinates are 28° 38’ 36.7” North, and Longitude coordinates are 82° 28’ 19.3” West.

4. The Cement Plant produces portland cement and masonry cement and maintains two Polysius GEPOL preheater kilns, two clinker coolers, and numerous other equipment related to the production of cement.

5. Petitioner’s Cement Plant received a Title V Air Operation Permit from the Department, issued on November 25, 2008 (Permit No. 0530010-015-AV). On December 12, 2008, Petitioner’s Cement Plant was forced to shut down due to the economic downturn. Although the State of Florida had consumed more than 12 million short tons (MMST) of portland cement in 2005 and 2006, due to the recession, the state’s consumption fell to 6.5 MMST in 2008, and 4.3 MMST in 2009. This economic recession led to the shutting down of Petitioner’s two kiln units, which have not been operational since the end of 2008.

6. On April 12, 2013, Petitioner applied to the Department for a renewal of Permit No. 0530010-015-AV. The Department renewed Petitioner’s Title V Air Operation Permit on November 20, 2013 (Permit No. 0530010-045-AV). Permit No. 0530010-045-AV is scheduled to expire on November 19, 2018.

7. The consumption of portland cement in the State of Florida has been steadily increasing but still remains lower than pre-recession levels. In 2016, the state consumed 7.2 MMST of portland cement.

8. The Cement Plant is a viable facility that Petitioner will rely upon to produce additional portland cement as the economy improves. Petitioner seeks renewal of Permit No.

0530010-045-AV to enable Petitioner to satisfy the expected future growth in the demand of portland cement in Florida.

The Rule From Which A Waiver Is Sought

9. The Petitioner requests a single waiver of the maximum renewal period for Air Operation Permits under Rule 62-210.300, Florida Administrative Code. Such a waiver would allow Petitioner to submit a separate application, with a separate decision from the Department, for an additional renewal of its current Air Operation Permit; the waiver, if granted, does not obligate the Department to issue the requested renewal.

10. Rule 62-210.300(2)(a)3.c., Florida Administrative Code, states that, except in situations involving electric utility generating units, which are not applicable here,

the operation permit for an emissions unit which has been shut down for five years or more prior to the expiration date of the current operation permit shall be renewed for a maximum period not to exceed ten years from the date of shutdown, even if the emissions unit is not maintained in operational condition, provided the conditions given in sub-subparagraph 62-210.300(2)(a)3.b., F.A.C., are met and the owner or operator demonstrates to the Department that failure to renew the permit would constitute a hardship, which may include economic hardship.

Statutes Implemented By The Rule

11. Rule 62-210.300, Florida Administrative Code, implements Section 403.061, Florida Statutes, which, *inter alia*, authorizes the Department to establish through rulemaking “a permit system whereby a permit may be required for the operation, construction, or expansion of any installation that may be a source of air or water pollution and provide for the issuance and revocation of such permits and for the posting of an appropriate bond to operate.” § 403.061(14), Fla. Stat. The Department is also authorized to act to control air pollution in a number of other ways. *See, e.g.*, § 403.061(6), Fla. Stat. (“Exercis[ing] general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air . . . pollution); § 403.061(7),

Fla. Stat. (“Adopt[ing] rules . . . to implement the provisions of this act.”); § 403.061(8), Fla. Stat. (“Issu[ing] such orders as are necessary to effectuate the control of air . . . pollution and enforce the same by all appropriate administrative and judicial proceedings.”); § 403.061(9), Fla. Stat. (“Adopt[ing] a comprehensive program for the prevention, abatement, and control of the air . . . of the state”); § 403.061(11), Fla. Stat. (“Establish[ing] ambient air quality . . . standards for the state as a whole or any part thereof”); 403.061(28), Fla. Stat. (“Perform[ing] any other act necessary to control and prohibit air and water pollution”).

12. Rule 62-210.300, Florida Administrative Code, also implements Section 403.087, Florida Statutes, which, *inter alia*, provides certain requirement involving the issuance of air pollution permits. *See, e.g.*, § 403.087(1), Fla. Stat. (requiring stationary installations that are sources of air pollution to have a valid permit issued by the Department, unless exempted by the Department’s rules; stating that permits are to have fixed terms of 5 years); § 403.087(2), Fla. Stat. (providing the Department with flexibility to adopt, amend, and repeal rules for the issuance of permits); § 403.087(5), Fla. Stat. (allowing the Department to issue permits to construct, operate, maintain, or modify installations that are reasonably expected to be pollution sources only when the Department determines that pollution control facilities will prevent or reduce the pollution to the degree necessary to comply with Department rules).

The Specific Action Requested

13. Petitioner requests a waiver of the maximum renewal period for Air Operation Permits under Rule 62-210.300, Florida Administrative Code. Specifically, Petitioner requests that the Department waive the ten-year limitation on Title V Air Operation Permit renewals found in Rule 62-210.300(2)(a)3.c., to allow Petitioner to apply for a renewal of its Title V Air Operation Permit, which is currently set to expire on November 19, 2018.

The Specific Facts that Demonstrate A Substantial Hardship
and Show a Violation of the Principles of Fairness

14. Petitioner requests a waiver of Rule 62-210.300(2)(a)3.c., Florida Administrative Code, to allow it to seek an additional renewal of its existing Title V Air Operation Permit No. 0530010-045-AV. The Department is required to grant a waiver “when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.” § 120.542(2), Fla. Stat. (emphasis added)

Substantial Hardship

15. A “substantial hardship” is defined as “a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.” *Id.*

16. As previously stated, the economic downturn led to a dramatic reduction in the amount of portland cement consumed in the Florida market. The decreased consumption forced Petitioner to shut down both its kiln units at its Cement Plant on December 12, 2008. Current economic conditions do not yet justify the re-starting of Petitioner’s kiln units.

17. As background, prior to the Great Recession (which began in December 2007), both Florida and the United States overall had insufficient capacity to meet demand, and were importing cement to supplement domestic production. In 2006, Florida possessed 7.4 million short tons (MMST) of annual cement capacity, just over half of its 13.2 MMST of cement demand, and imported 6.7 MMST, slightly more than the difference, to supplement domestic production. The United States imported 39 MMST that same year, and Petitioner was also importing into Florida and other states to supplement its domestic production.

18. By 2009, just two years after the recession began, United States demand had dropped to just over half of its peak in 2005/2006. The Great Recession far exceeded the

magnitude of any post WWII recession in terms of impact to cement demand. The United States has recovered less than half of the volume lost so far. Although the cement industry is still recovering from this recession, the period since it began already significantly exceeds the full recovery period of any decrease in cement demand since the Great Depression in the early 1900s.

19. By 2010, Florida had 10.5 MMST of annual cement capacity, and demand had fallen to less than 4 MMST. Although demand has since increased, it is not expected to reach capacity within the Portland Cement Association's forecast period that ends in 2021.

20. Petitioner's current Title V Air Operation Permit will expire on November 19, 2018. Petitioner seeks renewal of its Title V Air Operation Permit to allow Petitioner to maintain its existing source status without needing to unnecessarily reactivate any equipment.

21. Rule 62-210.300(2)(a)3.c., Florida Administrative Code, states that an Air Operation Permit for an emissions unit that has been shut down for more than five years may not be renewed for a period that exceeds ten years from the date of the emission unit's shutdown.

22. December 12, 2018 will be ten years from the date that Petitioner shut down its Cement Plant. Thus, Petitioner is not permitted to obtain an additional renewal under Rule 62-210.300(2)(a)3.c., unless it obtains a waiver of the Rule, which caps the length of time that Petitioner may reapply for a Title V Air Operation Permit from the Department while its equipment is not operational.

23. If Petitioner were required to make its kilns operational prior to December 12, 2018, solely for the purpose of enabling it to renew the permit, it would cause Petitioner substantial economic hardship. Petitioner projects that it would need to spend an estimated \$35 million to operate one kiln and as much as \$55 million to operate both kilns to produce a product for which there currently is insufficient demand. Because it is not yet financially feasible for Petitioner to

reopen its Cement Plant, it would be a substantial economic hardship to require Petitioner to restart its kilns prior to an increase in the demand for portland cement in the Florida market that would justify their operation.

24. Conversely, if Petitioner were to lose its ability to apply for an additional renewal permit, and lost that permit, the subsequent inability to operate the kilns would impose a substantial hardship upon Petitioner. Constructing a similar plant, assuming an investment of \$400 per annual ton of capacity, would require an investment of approximately \$600 million. The hardship to Petitioner of the inability to restart its Cement Plant would certainly be measured in the hundreds of millions of dollars.

25. Moreover, the Department has issued guidance memorandum recognizing that the current economic downturn has resulted in the need for increased flexibility in compliance with the Department's rules and regulations. *See, e.g.,* Dep't of Env'tl. Prot., DARM-OGG-19, Guidance Regarding the Temporary Facility/Emissions Unit Shutdown and Start-up (Apr. 22, 2010) (stating that "[d]ue to the current economic climate, there seem to be many permitted facilities that have temporarily shut down one or all of their emissions units," and recommending that Department employees "not require a shutdown emissions unit to start-up in order to perform a compliance test by its due date, even if other parts of the facility are in operation"). Presumably, the purpose of this was to minimize the use of resources and eliminate the corresponding environmental consequences of restarting a unit simply to comply with regulatory timelines.

26. Petitioner expects that, given the improving economic climate, there will be sufficient demand to utilize production from one of its kiln units within the next five years. Being required to restart one or both kiln units within the next year, however, would cause Petitioner a substantial—and unnecessary—hardship.

Principles of Fairness

27. A violation of the “principles of fairness” occurs “when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.” § 120.542(2), Fla. Stat.

28. The Rule expressly states that electric utility generating units are not subject to the same maximum renewal period as Petitioner’s Cement Plant. *See* R. 62-210.300(2)(a)3.d., Fla. Admin. Code. Petitioner’s Cement Plant is similarly situated as an electric utility generating unit, and yet the literal application of Rule 62-210.300 would affect Petitioner in a manner that is significantly different than an electric utility generating unit because, unlike the electric utility generating unit, Petitioner’s Cement Plant is artificially limited by a maximum renewal period. *See id.*

29. Petitioner is willing to abide by the three conditions required of electric utility generating units under Rule 62-210.300, which can receive unlimited permit renewal periods, even if the electric kilns are not maintained in operational condition. *See* R. 62-210.300(2)(a)3.d., Fla. Admin. Code. The three conditions in Rule 62-210.300 are:

- (I) The owner or operator of the emissions unit demonstrates to the Department that the emissions unit may need to be reactivated and used, or that it is the owner’s or operator’s intent to apply to the Department for a permit to construct a new emissions unit at the facility before the end of the extension period; and
- (II) The owner or operator of the emissions unit agrees to and is legally prohibited from providing the allowable emission permitted by the renewed permit as an emissions offset to any other person under Rule 62-212.500, F.A.C.; and
- (III) The emissions unit was operating in compliance with all applicable rules as of the time the source was shut down.

R. 62-210.300(2)(a)3.b., Fla. Admin. Code.

No Adverse Environmental Consequences

30. Granting this Petition will not result in any adverse environmental consequences because the out-of-operation kiln units are not emitting pollution. On the other hand, the denial of this Petition would require Petitioner to either restart the kiln units before it is economically feasible in order to maintain its permits—thereby resulting in unnecessary environmental emissions—or to risk losing its ability to operate the plant in the future.

31. Accordingly, Petitioner seeks a waiver of Rule 62-210.300(2)(a)3.c., Florida Administrative Code, to waive the maximum renewal period for Air Operation Permits under the Rule, and to allow Petitioner to apply for one additional five-year renewal on its existing Title V Air Operation Permit.

The Requested Waiver Will Serve the Underlying Purpose of the Statute

32. The Department must grant a waiver “when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.” § 120.542(2), Fla. Stat.

33. Here, a waiver of Rule 62-210.300, which implements Sections 403.061 and 403.087, would allow the Department to maintain its rules and regulations to control and prohibit air pollution while providing permit holders with renewable Air Operation Permits during economic and other hardships where emissions units may not be operational. *See also, e.g.*, Fla. Dep’t Env’tl. Prot., No. DARM-OGG-19 (discussed in paragraph 25 above).

34. Notably, neither Section 403.061 nor Section 403.087 requires a maximum limitation of 10 years in the number of consecutive five-year Air Operation Permits a facility can receive during the time that the facility’s kiln units are not in operation. Section 403.087(1) simply

requires that permits for major sources of air pollution have fixed terms not exceeding five years. In fact, Section 403.087(1) explicitly states that “upon expiration, a new permit may be issued by the department in accordance with this chapter and the rules of the department.” Thus, the Legislature expressly contemplated and approved of the Department granting additional permits to permit holders as necessary.

35. The granting of Petitioner’s requested waiver will serve the purpose of Sections 403.061 and 403.087 by continuing the Department’s control over air pollution at Petitioner’s Cement Plant, while enabling Petitioner to maintain its existing source status and avoid substantial economic hardship. The underlying purposes of the statutes are not served by requiring Petitioner to expend tens of millions of dollars to reactivate its kilns or risk losing its ability to operate the plant in the future when the portland cement market in Florida has not yet recovered from the economic downturn that necessitated the shutdown of Petitioner’s Cement Plant in 2008.

36. Moreover, the granting of the requested waiver is not inconsistent with the underlying purpose of the Rule, which is, in part, to prevent older “legacy” sources from avoiding compliance with newer and more protective environmental requirements that apply to new sources. Here, the renewal of Petitioner’s permit is subject to the principal new environmental requirements, including the applicable National Emission Standards for Hazardous Air Pollutants (NESHAPs) found in 40 C.F.R. Part 63, Subpart LLL. Accordingly, the purpose of the underlying statute and rule will be achieved by other means, and the granting of the requested waiver simply will avoid a strict application of rule requirements that would “lead to unreasonable, unfair and unintended results in particular instances.” § 120.542(1), Fla. Stat.

Petitioner Requests a Permanent Wavier

37. Petitioner requests a permanent waiver.

Action Requested

WHEREFORE, Petitioner respectfully requests that the Department:

- A. Grant Petitioner a waiver of the maximum renewal period for air operation permits under Rule 62-210.300; and
- B. Grant such further relief as may be deemed appropriate.

Respectfully submitted this 6th day of July, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Petition for Waiver of Air Operation Permit Maximum Renewal Period in Rule 62-210.300 was filed by electronic mail with Lea Crandall, Agency Clerk, e-mail: lea.crandall@dep.state.fl.us; that a true and correct copy was provided by electronic mail to Robert A. Williams, Interim General Counsel, robert.a.williams@dep.state.fl.us; and Justin Wolfe, Office of General Counsel, justin.wolfe@dep.state.fl.us; and Preston McLane, Deputy Director, preston.mclane@dep.state.fl.us; all at the Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000; and that a true and correct copy was provided to the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111

West Madison Street, Tallahassee, Florida 32399-1400, and via email at joint.admin.procedures@leg.state.fl.us, all on this 6th day of July, 2017.

Lawrence E. Sellers, Jr. _____
Lawrence E. Sellers, Jr.