



DATE: August 19, 2009

TO: Honorable Mayor and City Councilmembers

FROM: Development Services Department/Planning Division

SUBJECT: **COLLECTION OF ADDITIONAL FEES FOR THE HANSON RECLAMATION PROJECT**

SYNOPSIS

Staff recommends that the City Council approve the staffing and processing agreement with Hanson Aggregates Pacific Southwest, Inc. (Hanson), for the amended Hanson Reclamation Plan including work previously done at the former rock quarry and to support future work on the Reclamation Plan located south of State Route 78 and west of College Boulevard; and authorize the City Manager to execute the agreement.

BACKGROUND

South Coast Materials began mining operations in 1961 in the City of Carlsbad south of SR 78 and expanded eastward into the City of Oceanside in 1977 when Conditional Use Permit (CUP) C-2-77 was approved. The CUP had a 15-year life which expired in late 1992. A new CUP was granted in 1993 providing for two years of mining followed by one year of reclamation. By July 1995, all mining operations on the Oceanside portion of the parcel were complete and three primary reclamation sites were identified for the site. In Oceanside, reclamation was complete on the East Wall area in 1996 and on the Southerly Slopes in 1997; reclamation activities continued on the Carlsbad side due to the need for significant amounts of fill material necessary to bring the area to final reclamation grades.

The entire site mining operation, including the Carlsbad portion, is subject to California's Surface Mining and Reclamation Act of 1975 (SMARA), which assures that sites are left in a safe and stable condition after mining ceases. As Oceanside had several mining operations at the time and Carlsbad had none, it was mutually decided that Oceanside would use its Reclamation Ordinance to administer the plan for this location in both cities. The State Mining and Geology Board approved a Reclamation Plan for the entire site on September 13, 1991, by Resolution No. 91-11, using a four-phase plan. Although the City of Oceanside requested that the State impose a deadline to complete the reclamation of the site, no definite time frame for completion was included in the

resolution. The City of Oceanside was designated by the State as the lead agency for the Reclamation Plan for the entire site.

In 1999, City Council adopted Ordinance 099-07 amending Article XXIII of Oceanside Grading Ordinance 81-20 related to surface mining and reclamation activities with the City. The ordinance incorporates the SMARA provisions, as well as allowing for additional standard performance standards.

Section 9 of the ordinance addresses financial assurances and allows the City to require security which will be released upon satisfactory performance. This security may be in any financial form or method acceptable to the City and the State Mining and Geology Board which the City reasonably determines is adequate to perform reclamation in accordance with the surface mining operation's approved Reclamation Plan. The financial assurance is based on the estimated costs of the reclamation for the years or phases stipulated in the approved Reclamation Plan, and will not be refunded until the reclamation is completed – including any maintenance required. It allows for an annual review of the work to be performed and the cost estimates of that work.

Section 15 allows for the City to collect all fees it deems necessary to cover the reasonable costs incurred in implementing Article XXIII and the State regulations . . . “to ensure that all reasonable costs of implementing this Article are borne by the mining operator.”

Concurrent with approval of the Development Plan (D-28-99) and Tentative Parcel Map (P-12-99) for the Quarry Creek Shopping Center development, the Reclamation Plan (RMA-88) was amended for changes to finish grades and phase boundaries, consistent with the shopping center, in October 2001. Any additional work on the quarry site would come as reclamation proceeded in Carlsbad and as the necessary work with various resource agencies was completed.

Currently, there are 104.2 acres in the Reclamation Plan, of which 4.1 acres are in Oceanside and 101.1 acres are in Carlsbad.

The proposed reclamation plan is under review. The Environmental Impact Report public review period has closed and responses to comments are being prepared for the Final Environmental Impact Report.

ANALYSIS

The City of Carlsbad is now ready to develop the mining property within its boundaries, but must complete the requirements of the Reclamation Plan in order to proceed. The City of Oceanside, as the lead agency, must process a reclamation plan and Environmental Impact Report in order to enable the City Council to find that:

1. The Reclamation Plan complies with SMARA and any other applicable provisions.
2. The Reclamation Plan complies with applicable requirements of State regulations.
3. The Reclamation Plan has been reviewed pursuant to CEQA and all significant adverse impacts from reclamation of the surface mining operations are mitigated to the maximum extent feasible.
4. The land and /or resources to be reclaimed will be restored to a condition that is compatible with, and blends in with, the surrounding natural environment and topography, or that suitable off-site development will compensate for related disturbances.
5. The Reclamation Plan will restore the mined lands to a usable condition which is readily adaptable for alternative land uses.
6. A written response to the State Department of Conservation has been prepared describing the disposition of major issues raised by that department.

The establishment of the Developer Deposit Account with Hanson will allow the City to collect fees in advance of the work to be done, and will ensure that the developer bears the full cost of the reclamation, including all staff time. Developer Deposit accounts are frequently used by cities and counties as a cost-recovery account for services provided to a developer that are not covered by existing fee schedules. Each account is given an individual monitoring number and all expenses incurred by the project are charged directly to the project. Consultant contracts, City staff time and materials can be charged in this manner and the developer can be given an exact accounting of the time and expenses incurred by the City on its project.

FISCAL IMPACT

The Developer is required to pay all costs associated with processing the amended Reclamation Plan and environmental documents, pursuant to Article XXIII Section 15 of the City Ordinance. These funds will be deposited into the revenue account 450404101.4426.100234.

The City requires a Processing and Staffing Agreement with Hanson which will cover all future work on the Reclamation Plan. The deposit will be appropriated to developer deposit revenue account 450408101.2052.100457 and transferred to the Developer Deposit Program 450408101.4426.100457 and 450408101.5305.100457. These funds will ensure that time and material for City staff, as well as a consultant contract for the environmental work, will be charged against Hanson's own funds. More funds will be requested if necessary, and any surplus will be returned at the end of the project.

CITY ATTORNEY'S ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

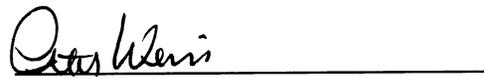
RECOMMENDATIONS

Staff recommends that the City Council approve the staffing and processing agreement with Hanson Aggregates Pacific Southwest, Inc. (Hanson), for the amended Hanson Reclamation Plan for work previously done at the former rock quarry located south of State Route 78 and west of College Boulevard; and authorize the City Manager to execute the agreement.

PREPARED BY:


Jerry Hittleman
City Planner

SUBMITTED BY:


Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager
George Buell, Development Services Director
Teri Ferro, Financial Services Director





ATTACHMENT:

1. Developer Deposit Agreement

CITY OF OCEANSIDE MINE RECLAMATION PROJECT
STAFFING AND PROCESSING AGREEMENT

This Agreement is made this Aug. 19 day of 2009, by and between the City of Oceanside, a municipal corporation (hereinafter "City") and Hanson Aggregates Pacific Southwest, Inc. (hereinafter "Hanson"). This Agreement is made and entered into with respect to the following recitals and in consideration of the following covenants and conditions:

1.0 THE AGREEMENT

- 1.1 **City as Party.** The City is a municipal corporation of the State of California. Pursuant to the Surface Mining and Reclamation Act of 1975 (SMARA) the City adopted Ordinance 099-97 related to surface mining and reclamation activities. Said Ordinance allows the City to be designated the lead agency for purposes of administering a Reclamation Plan on Sites within the City and, in certain circumstances, outside the City's boundaries.
- 1.2 **Hanson as Party.** Hanson is a corporation and is authorized to conduct business in the State of California. The signatory to this Agreement represents that he/she is authorized to execute this Agreement on behalf of Hanson Aggregates Pacific Southwest, Inc.
- 1.3 **No Third Party Beneficiaries.** There are no other parties to this Agreement, express or implied, direct or indirect.
- 1.4 **Prior Work Performed by the City.** The City has already processed documents in conjunction with the Plan, for which it has not yet been fully reimbursed by Hanson.
- 1.5 **Purpose of the Agreement.** The purpose of this Agreement is to assure Hanson fully reimburses the City for all work performed to date processing the Plan as well as provide Hanson ongoing access to professional staff to process environmental documents and all other documents necessary to bring Hanson's Reclamation Plan to a public hearing based upon Hanson's representation that such work is necessary to implement Hanson's project. Although portions of the project are located in the neighboring jurisdiction of Carlsbad, California, that jurisdiction is not a SMARA approved lead agency, and therefore, the City of Oceanside was designated by the State of California to be the lead agency for the entire site, and may process all portions of the project, even those existing outside its typical jurisdiction.

2.0 RECLAMATION PLAN

- 2.1 Hanson is the owner of certain real property located in the City of Carlsbad, which together with other property located in the City of Oceanside is the subject of a proposed Amendment to the existing Reclamation Plan, all as

more specifically described in the Draft Environmental Impact Report for the Hanson amended Reclamation Plan (The Property, or the Site).

2.2 The Site is located primarily in the City of Carlsbad (104.2 acres) with 4.1 acres of the Site in the City of Oceanside. The Site was previously used as a hard rock quarry and is currently the subject of a comprehensive restoration effort authorized by State reclamation statutes.

2.3 In order to process the proposed Amendment to Reclamation Plan (“Plan”), the City of Oceanside has been designated by the State of California as the Lead Agency for purposes of SMARA and has agreed to process all the entitlement documents, including those documents pertaining to land within the jurisdictional boundaries of the City of Carlsbad.

3.0 PROJECT ENTITLEMENTS

3.1 **Submitted by Hanson.** The project entitlements, permits and approvals that Hanson shall submit to the City for processing include but are not limited to: The Plan and all related environmental documents.

3.2 **Environmental Review.** Any environmental review which may be required for the Plan pursuant to the California Environmental Quality Act (“CEQA”), the CEQA guidelines and the City’s Environmental Review Procedures shall be processed by the City in the manner required by law, and any environmental documents prepared as a result of the project are included within the definition of the Project Entitlements.

3.3 **No Obligation to Approve.** Hanson understands and agrees that future decisions of the Planning Commission and/or City Council on the Project Entitlements described in this Agreement are discretionary actions, and that the City may not enter into an agreement to obligate the Planning Commission and/or City Council to exercise its discretion in a particular manner or for a particular result. This Agreement does not, therefore, in any way create a contractual, legal or equitable obligation or commitment by the City or the Planning Commission and/or City Council to approve the Project Entitlements described in this Agreement.

3.4 **Project Schedule.** The City will process the Project Entitlements with reasonable diligence. However, City shall have no liability to Hanson for the failure to process Hanson’s Project Entitlements, or for failure to process the same within time frames requested by Hanson. Both parties agree to use their reasonable best efforts to process the Project Entitlements in a timely manner. Nothing herein shall be construed to modify the provisions of the Permit Streamlining Act, Government Code Sections 65920-65963.1.

4.0 STAFFING

4.1 **Retention and Assignment of Staff.** The City is solely and exclusively responsible for the hiring and/or assigning of the Project Staff. Hanson

shall not have any involvement in the City's final hiring or assigning decisions, or the City's employment relationship with the Project Staff. The City shall retain full rights to supervise the work of those staff to ensure that they exercise full and complete independence from Hanson in connection with work performed on the Project Entitlements.

- 4.2 **Access to Project Staff.** The City shall endeavor to take all reasonable steps necessary to ensure that Hanson has regular and continuous access to the Project Staff during the processing of the Project Entitlements.

5.0 COSTS AND PAYMENT

- 5.1 **Deposit.** Hanson shall place a deposit with the City in the amount of \$45,290 (forty-five thousand, two hundred and ninety dollars) from which the City will immediately withdraw \$35,290 (thirty-five thousand, two hundred and ninety dollars) to compensate the City for all prior work performed on the Project Entitlements. Additionally, the City may withdraw, pursuant to the terms of this Agreement, any additional amounts owed to the City by Hanson for processing the Project Entitlements. Hanson shall receive a credit against the amount of the initial Deposit, placed with the City, in an amount equal to value of the funds that Hanson has already deposited for processing the Project Entitlements. Hanson shall not receive a credit for any amounts provided to the City for consultant contracts or security deposits. Hanson shall maintain and continue to replenish said Deposit with the City during the term of this Agreement. Upon the termination of this Agreement, if any portion of the Deposit remains, the City shall return the Deposit balance to Hanson without interest thereon. In no event shall the account be allowed to have less than \$5,000 (five thousand dollars). Hanson agrees that the City may use the Deposit to pay the City any amounts due the City pursuant to the terms of this Agreement.

- 5.2 **Payment for Project Staff.** Hanson shall pay the City for the time incurred by the Project Staff, at the billing rates set forth in Exhibit "A" for processing the Project Entitlements, including expenses and all of the City's direct and overhead costs related thereto. The billing rates for the Project Staff, which includes the City's direct and overhead costs, are shown on Exhibit "A". Such rates are subject to change from time to time based on staff assignments, salaries, and/or changes to the City's full cost recovery rate. The City shall notify Hanson in advance of such changes. All consultants who perform work on the Project shall be paid by Hanson in accordance with said consultants' contracts. In the event the City's Project Staff works more than 40 hours per week on the Project Entitlements, Hanson shall pay for the additional time, costs and expenses in accordance with the per hour billing rates set forth in Exhibit "A".

- 5.3 **Deposit Withdrawal.** At the end of each quarter, the City shall determine the amount owed by Hanson for the time and costs incurred by the Project Staff for work on the Project Entitlements for that period. Within fifteen (15) days thereafter the City shall withdraw from the Deposit said amount due the City and shall send Hanson a billing statement that shows the time and costs incurred by the Project Staff and the amount withdrawn from the Deposit.
- 5.4 **Billing Statements.** Each quarterly billing statement shall be based on the Project Staff's bi-weekly time sheets. The time sheets to be used shall be in substantial compliance with the City's standard bi-weekly time sheet form. The City shall provide copies to Hanson of the bi-weekly time sheets within a week after they are prepared, for Hanson's review and the opportunity to ask questions about their contents. The quarterly billing statement shall be accompanied by copies of any remaining such time sheets not already provided. Each quarterly billing statement shall identify the services performed, the time spent on each item, the specific costs incurred, the amount withdrawn from the Deposit and the Deposit balance.
- 5.5 **Replenish Deposit.** Hanson shall replenish the Deposit within 30 days of being notified by the City that the Deposit has decreased to \$5,000 (five thousand dollars).
- 5.6 **Disputes.** In the event Hanson has a dispute with the City over the billing, Hanson shall notify the City in writing describing Hanson's objections to such quarterly billing statement(s). If the amount withdrawn from the Deposit for any given month is determined to be incorrect, the City shall deposit the amount owed Hanson into the Deposit within fifteen days of such determination.
- 5.7 **Suspend Processing.** The City shall have the right to suspend processing of the Project Entitlements in the event that Hanson fails to maintain the Deposit as specified in this Agreement. The City shall also have the right to terminate the Agreement if Hanson's Deposit account contains less than one-half of the initial deposit.
- 6.0 **TERM OF AGREEMENT, TERMINATION RIGHTS AND DEFAULT**
- 6.1 **Effective Date.** This Agreement shall become effective on the Effective date identified above, and unless earlier terminated pursuant to the terms of this Agreement, shall continue in effect until December 31, 2010 or when the processing of the Project Entitlements have been completed, whichever occurs first. In the event the parties determine that a longer period is necessary to complete processing of the Project Entitlements, the term of the Agreement may be extended by the further written agreement of the parties.
- 6.2 **City's Right to Terminate.** Notwithstanding the term of this Agreement as provided in Section 6.1, the City shall have the unilateral right to

terminate this Agreement for any reason upon thirty (30) days written notice to Hanson.

- 6.3 **Default.** Hanson agrees that a default under this Agreement shall be deemed to have occurred in the event that Hanson fails to maintain the Deposit as specified in this Agreement. After notice and an opportunity to cure of not less than ten business days, if Hanson still fails to maintain the deposit as set forth above, the City may terminate the Agreement pursuant to Paragraph 6.2 above.

7.0 **OTHER PROVISIONS**

- 7.1 **Integrated Agreement.** This Agreement constitutes the final Agreement between the parties and supersedes all prior oral or written negotiations, discussions, communications, promises, covenants, understandings or representations between the City and Hanson regarding the subject of this Agreement. Notwithstanding the foregoing, the parties acknowledge that the provisions of any other mutual written agreements shall remain in full force and effect.
- 7.2 **Modifications and Amendments to be in Writing.** This Agreement may not be modified or amended except by a writing duly executed by both parties to this Agreement.
- 7.3 **Construction and Interpretation of the Agreement.** Both parties to this Agreement acknowledge that they have been represented by counsel in respect to the negotiation and drafting of this Agreement, and that no provision of this Agreement shall be construed or interpreted by reference to the extent to which either party participated in the drafting of this Agreement, or any part thereof.
- 7.4 **Notices.** All notices, billing statements, letters or any other documents required or delivered in accordance with, or with respect to this Agreement, shall be made or contemporaneously confirmed in writing and shall be personally delivered or deposited in the United States mail, addressed as follows:

To the City of Oceanside:
City Planner
300 North Coast Hwy, South Building
Oceanside, CA 92054

With a Copy to:
City Attorney
300 North Coast Hwy
3rd Floor North Building
Oceanside, CA 92054

To Hanson:
Hanson Aggregates Pacific Southwest, Inc.
P.O. Box 639069
San Diego, CA 92163-9069

With a copy to:
Legal Department
Lehigh Hanson, Inc.
300 E. John Carpenter Fwy. Ste. 1645
Irving, TX 75062

If written notices under this Agreement are delivered by depositing them in the United States mail, they shall be deemed to have been received by the other party on the fifth (5th) working day following the day on which they were mailed.

Either party may change the address to which notice is to be given under this Agreement by delivery of a written notice to the other party specifying the new notice address and referencing this Section.

- 7.5 **No Waiver of any Default.** No waiver of any default by any party to this Agreement shall be implied from any omission by any other party to take any action in respect of such default. No such waiver shall be effective unless expressly evidenced by a writing duly executed by the party waiving the default. No waiver of any default shall be deemed to be a waiver of any other or subsequent default.
- 7.6 **Interpretation and Governing Law.** This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California.
- 7.7 **Force Majeure.** Hanson agrees that the City shall not be deemed to be in default where failure or delay in performance of any of the City's obligations under this Agreement to process the Project Entitlements is caused by floods, earthquakes, or other Acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond the City's control, government regulations, court actions (such as restraining orders or injunctions) or other causes beyond the City's control. If any such events shall occur, the term of this Agreement and the time for performance by the City of its obligations hereunder shall be extended by the period of time that such events prevented such performance provided that the term of this Agreement shall not be extended under any circumstances for more than three years.
- 7.8 **Hold Harmless.** Hanson shall defend, indemnify and hold harmless the City, its elected and appointed officers and employees, from and against any claims, suits, actions or proceedings, judicial or administrative, for

writs, orders, injunction or other relief, damages, liability, cost and expense (including without limitation attorneys' fees) arising from this Agreement and the City's actions in processing or issuing Hanson's permits, or in exercising any discretion related thereto including, but not limited to, the giving of proper environmental review, the holding of public hearings, and the extension of due process rights; provided, however, that if a court of competent jurisdiction determines that the City's negligence or willful misconduct contributed to or caused the claims, suit, action or proceeding, then Hanson shall not be required to indemnify or hold harmless the City, its officers or employees, for that portion of any claims, suits, actions or proceedings determined by the court to arise from the negligence or willful misconduct of the City. Hanson's indemnification shall include any and all costs, expenses, attorneys' fees and liability incurred by the City, its officers, agents or employees in defending against such claims, whether the same proceed to judgment or not, except to the extent of the City's responsibility in accord with the preceding sentence. Further, Hanson at its own expense (except to the extent of the City's responsibility in accord with the preceding sentences), shall, upon written request by the City, defend any such suit or action brought against the City, its officers, agents or employees. Hanson's indemnification of City shall not be limited by any prior or subsequent declaration by Hanson. At its sole discretion, the City may participate, at its own expense, in the defense of any such action, but such participation shall not relieve Hanson of any obligation imposed by this Agreement.

- 7.9 **Agreement Executed in Counterparts.** So that each of the parties may have an executed original of this Agreement, this Agreement may be executed in counterparts, all of which shall constitute a single agreement.
- 7.10 **Agreement binding upon Successors.** This Agreement shall be binding upon and inure to the benefit of the successors, assigns and interests of the parties as to any or all of the Property until released by the mutual consent of the parties.
- 7.11 **Exhibits.** All exhibits attached hereto and referred to herein are incorporated as a part of this Agreement.

SIGNATURES. The individuals executing this Amendment represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Amendment on behalf of the respective legal entities of the CONSULTANT and the CITY.

IN WITNESS WHEREOF the parties hereto being duly authorized on behalf of their respective entities to execute this Amendment, do hereby agree to the covenants contained in the Agreement, including this Amendment and have caused this Amendment to be executed by setting hereunto their signatures this 15 day of July, 2009.

HANSON AGGREGATES PACIFIC
SOUTHWEST, INC.

CITY OF OCEANSIDE

By: Marvin E. Howell
Name/title Assistant Secretary

By: _____
Peter Weiss, City Manager

By: Mark Longman
Name/Title MARK T LONGMAN

APPROVED AS TO FORM:

Employer ID No.

Deborah M. DePue
City Attorney

NOTARY ACKNOWLEDGMENTS OF CONSULTANT MUST BE ATTACHED.

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of San Diego }

On July 15, 2009 before me, Cyndi Cunningham
Date Here Insert Name and Title of the Officer

personally appeared Marvin E. Howell
Name(s) of Signer(s)

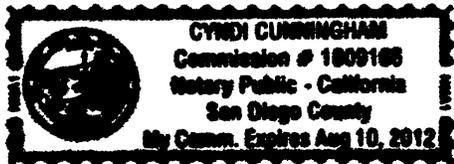
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Cyndi Cunningham
Signature of Notary Public

Place Notary Seal Above



OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

- Individual
- Corporate Officer — Title(s): _____
- Partner — Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
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Signer's Name: _____

- Individual
- Corporate Officer — Title(s): _____
- Partner — Limited General
- Attorney in Fact
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- Guardian or Conservator
- Other: _____

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CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

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County of San Diego

On July 15, 2009 before me, Cyndi Cunningham
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Name(s) of Signer(s)

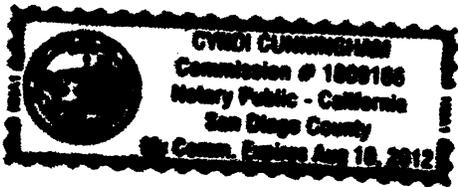
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I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Cyndi Cunningham
Signature of Notary Public

Place Notary Seal Above



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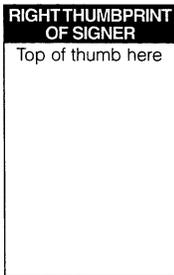
Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

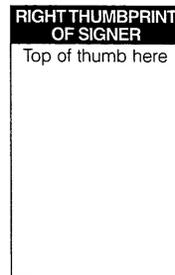
- Individual
- Corporate Officer — Title(s): _____
- Partner — Limited General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: _____



Signer Is Representing: _____

Signer's Name: _____

- Individual
- Corporate Officer — Title(s): _____
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- Trustee
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- Other: _____



Signer Is Representing: _____