

1   **INDEMNIFICATION AND DEFENSE AGREEMENT**

2                   THIS INDEMNIFICATION AND DEFENSE AGREEMENT (“Agreement”) is  
3 entered into this August 22, 2023 (“Effective Date”), by and between the COUNTY OF  
4 FRESNO, a political subdivision of the State of California (“COUNTY”), and CEMEX  
5 Construction Materials Pacific, LLC, a Delaware limited liability company registered to do  
6 business in the State of California (“APPLICANT”), whose principal address on file with the  
7 California Secretary of State is 1720 Centerpark Drive East, West Palm Beach, FL 33401.  
8 COUNTY and APPLICANT are each a “Party” and together the “Parties” to this Agreement.

9   **RECITALS**

- 10 A.       APPLICANT has applied to COUNTY for Unclassified Conditional Use Permit (“CUP”)  
11       Nos. 3755-A and 3755-B (for purposes of this Agreement, together, certain “Land Use  
12       Approvals,” as further defined below), allowing for a four (4) year extension to the  
13       APPLICANT’s operation of an aggregate surface mine and concrete batch plant  
14       previously allowed under CUP Nos. 367, 2032, 2209, 2235, 2241, 3063, and 3093.
- 15 B.       On June 8, 2023, COUNTY’s Planning Commission, in Resolution No. 12996, approved  
16       CUP Nos. 3755-A and 3755-B.
- 17 C.       COUNTY’s Planning Commission Resolution 12996 requires that APPLICANT, as a  
18       condition of the approval of CUP Nos. 3755-A and 3755-B, “shall enter into an agreement  
19       indemnifying the County for all legal costs associated with its approval of [ ]CUP No.  
20       3755 and provide security in an amount determined by the County for any such legal  
21       costs incurred.”
- 22 D.       On July 18, 2023, COUNTY’s Board of Supervisors considered an appeal of Planning  
23       Commission Resolution 12996, brought by the City of Fresno, and upheld the  
24       determination of the Planning Commission to conditionally approve CUPs 3755-A and  
25       3755-B, extending the existing CUPs listed in Recital A for a period of three (3) years.
- 26 E.       Litigation challenging the granting or issuance of land use approvals by governmental  
27       bodies is proliferating, and such litigation exposes COUNTY to potential liability for  
28       damages, costs, and attorneys’ fees.

- 1 F. In such litigation, the person or entity receiving land use approvals is named as a real  
2 party in interest and is the party that primarily and directly benefits from the granting or  
3 issuance of the land use approvals.
- 4 G. COUNTY's Board of Supervisors is an objective decision-making body and, therefore,  
5 has no special interest in the approval or denial of land use applications, or the outcome  
6 of litigation arising from such grant or denial, except as to those which promote important  
7 public policy.
- 8 H. COUNTY could incur great expense in the active defense of such litigation and, if  
9 unsuccessful, may also be required to pay the attorneys' fees and costs of a challenger, if  
10 the court determines that the challenger is the prevailing party.
- 11 I. Fairness and sound fiscal policy require that the person or entity receiving the benefits of  
12 a land use approval should also bear the burden of the liability for potential injuries and  
13 the expense of such litigation.
- 14 J. APPLICANT and COUNTY mutually desire to enter into this Agreement, by which  
15 APPLICANT shall indemnify, defend at COUNTY's request, save, and hold harmless  
16 the "Indemnified Parties" (as defined herein) as required herein, in order that the  
17 Indemnified Parties shall bear no fiscal or financial burden whatsoever resulting from any  
18 litigation challenging COUNTY's grant or issuance of any of the Land Use Approvals,  
19 defined below, to APPLICANT.

## 20 **AGREEMENT**

21 In consideration of COUNTY granting APPLICANT's application for CUP Nos. 3755-  
22 A and 3755-B and other consideration the receipt and sufficiency of which is hereby  
23 acknowledged, COUNTY and APPLICANT agree as follows:

### 24 **1. EFFECTIVE DATE; TERM**

25 This Agreement shall become effective as of the Effective Date, and shall  
26 continue in full force and effect until all obligations of APPLICANT hereunder are complete to  
27 the satisfaction of COUNTY and the "litigation period has expired" as stated in COUNTY's  
28 Planning Commission Resolution No. 12996, as upheld by the Board of Supervisors.

1           **2.     INCORPORATION OF RECITALS**

2           The Recitals set forth above are incorporated herein by this reference and are  
3 made a part of this Agreement as if set forth in their entirety.

4           **3.     DEFINITIONS**

5           a)       “APPLICANT” means the person or entity to whom the Land Use  
6 Approvals has been, or will be, granted or issued, and his, her, or its heirs, assigns or successors  
7 in interest.

8           b)       “Business Day” means the business day of the Party required to perform  
9 an obligation herein, provided however, a business day of Party who is an individual shall mean  
10 Monday through Friday, inclusive. Any reference in this Agreement to a major requirement of  
11 the “Escrow Agent” (as defined herein) under the “Escrow Agreement” (as defined herein) shall  
12 mean the business days of the Escrow Agent to perform a major requirement thereunder. If this  
13 Agreement specifies a day or date by which a certain action is to be taken or notice to be given,  
14 then the action to be taken or notice to be given must be completed by 5:00 p.m. (Pacific time)  
15 on such date.

16           c)       “Cash Security” means and includes the then-current amount of the cash,  
17 which shall be irrevocably delivered by the APPLICANT to the Escrow Agent and held on  
18 deposit by the Escrow Agent under the Escrow Agreement, or any portion thereof, including any  
19 increases of the cash as a result of interest income earned on the cash, all as held on deposit by  
20 the Escrow Agent for the sole benefit of COUNTY thereunder, less any COUNTY drawings of  
21 the cash under the Escrow Agreement.

22           d)       “COUNTY” means the County of Fresno, a political subdivision of the  
23 State of California.

24           e)       “COUNTY Business Day” means Monday through Friday, inclusive, but  
25 excluding any day which is recognized as a legal holiday by COUNTY.

26           f)       “Day” means a calendar day unless specified to the contrary in this  
27 Agreement or the Escrow Agreement, as applicable.

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1           g)     “Director” means the Director of COUNTY’s Department of Public  
2 Works and Planning.

3           h)     “Escrow Agent” means a financial institution, appointed jointly by  
4 APPLICANT and COUNTY (or otherwise, if necessary, by a court of competent jurisdiction),  
5 that receives the Cash Security from APPLICANT, and is authorized under the Escrow  
6 Agreement to hold the Cash Security, and to disburse the Cash Security to COUNTY upon  
7 COUNTY’s drawing thereunder.

8           i)     “Escrow Agreement” means an agreement by and among APPLICANT,  
9 COUNTY, and the Escrow Agent, which is the arrangement by which APPLICANT shall  
10 irrevocably deposit the Cash Security with the Escrow Agent, for the sole benefit of COUNTY,  
11 to enable APPLICANT to secure its faithful performance of its obligations under this Agreement.

12          j)     “Final Disposition” means a dismissal with prejudice of a Legal Action or  
13 a final judgment in a Legal Action, including any available appeals and/or writs to a court(s) of  
14 higher or supervisory jurisdiction.

15          k)     “Land Use Approvals” shall include any benefit arising from any of the  
16 following: the grant of an amendment to COUNTY’s general plan or a rezoning; the issuance of  
17 a variance, a conditional use permit, a review and approval permit issued by the Director (also  
18 known as a “director’s review and approval”), or other discretionary land use permit; the approval  
19 of a parcel, tentative, or final subdivision map; and any other document prepared pursuant to the  
20 Surface Mining and Reclamation Act (“SMARA”), or the California Environmental Quality Act  
21 (“CEQA”). “Land Use Approvals” do not include a ministerial permit or this Agreement.

22          l)     “Legal Action” means a lawsuit, petition, claim, action, cause of action,  
23 or other legal proceeding initiated in a court, including an appeal(s) and/or writ(s) to a court of  
24 higher jurisdiction, which seeks to attack, set aside, void, remand to a lower jurisdiction, or annul  
25 any of the Land Use Approvals for the Project.

26          m)     “Project” means the use of the land authorized by the following Land Use  
27 Approvals: CUP Nos. 3755-A and 3755-B.

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1           **4. APPLICANT’S INDEMNIFICATION, DEFENSE AND HOLD**  
2 **HARMLESS OBLIGATIONS**

3           a) APPLICANT hereby agrees to save, indemnify, hold harmless and, at  
4 COUNTY’s request, defend COUNTY, its officers, agents, employees, and attorneys, and  
5 experts and consultants engaged by such attorneys, the Fresno County Board of Supervisors, each  
6 member of the Fresno County Board of Supervisors, the Fresno County Planning Commission,  
7 and each member of the Fresno County Planning Commission (each an “Indemnified Party,” and  
8 collectively, the “Indemnified Parties”), from and against any and all demands, liabilities, causes  
9 of action, claims, losses, expenses, costs (including but not limited to court costs, attorneys’ fees  
10 and costs, and fees and costs of any experts or consultants engaged by such attorney), or damages  
11 of any nature or kind whatsoever asserted against, or occurring or resulting to, any of the  
12 Indemnified Parties, including, but not limited to, attorneys’ fees and costs of the persons,  
13 organizations or entities bringing any Legal Action, or their respective officers, agents, and  
14 employees, arising, from resulting from, or in connection with any COUNTY action in granting,  
15 issuing, or approving any Land Use Approvals for the Project.

16           b) When defending any or all of the Indemnified Parties as required herein,  
17 APPLICANT shall be solely responsible to engage the attorney(s), subject to approval by the  
18 County Counsel, which approval shall not be unreasonably withheld, who will represent the  
19 Indemnified Parties in their defense to the Legal Actions and shall be solely responsible to pay  
20 all attorneys’ fees and costs (including but not limited to court costs, and fees and costs of any  
21 experts or consultants engaged by such attorney) related to the defense in any Legal Action  
22 brought against any or all of the Indemnified Parties, except for any fees and costs directly  
23 incurred by COUNTY in its own defense of the Legal Action, as provided in Section 9 of this  
24 Agreement. Prior to entering into the fee agreement with the attorney(s) to be retained to  
25 represent the Indemnified Parties in their defense to the Legal Actions, APPLICANT shall inform  
26 such attorney(s) to be retained of APPLICANT’s foregoing payment obligations under this  
27 Section 4(b) as well as County Counsel’s right to approve APPLICANT’s engagement of the  
28 attorney(s). Within five (5) COUNTY Business Days after the execution of this Agreement,

1 APPLICANT shall deliver to the COUNTY at the address set forth in Section 12 of this  
2 Agreement a copy of the fee agreement (without any redaction of its provisions) between the  
3 APPLICANT and the attorney(s) retained to represent the Indemnified Parties in their defense to  
4 the Legal Actions. County Counsel's right to approve APPLICANT's engagement of such  
5 attorney(s) under this Section 4(b) shall apply to any replacement attorneys whom APPLICANT  
6 may engage after the initial engagement of any attorney(s), but in no event will the County  
7 Counsel's approval be unreasonably withheld.

8 c) APPLICANT understands and acknowledges that there shall be no limit  
9 whatsoever on the amount of attorneys' fees and costs (including but not limited to court costs,  
10 and fees and costs of any experts or consultants engaged by such attorney) the APPLICANT is  
11 required to pay to COUNTY or incur to satisfy its obligations under this Agreement.

12 d) APPLICANT's obligations under this Agreement shall apply whether or  
13 not there is concurrent, active, or passive negligence, or other liability, on the part of the  
14 Indemnified Parties, or any of them. APPLICANT's obligations under this Agreement shall be  
15 fully effective regardless of whether any or all Land Use Approvals issued by COUNTY  
16 regarding the Project remain valid or are invalidated, or are modified, in whole or in part by any  
17 court.

## 18 5. CASH SECURITY

19 a) As security to COUNTY for APPLICANT'S faithful performance of all  
20 of APPLICANT'S obligations to defend, indemnify, and hold harmless the Indemnified Parties  
21 as required herein, APPLICANT shall, and shall cause an Escrow Agent, not later than thirty  
22 (30) business days subsequent to the execution of this Agreement by the Parties, enter into an  
23 Escrow Agreement among APPLICANT, COUNTY, and the Escrow Agent. The Cash Security  
24 for the Escrow Agreement shall be in the minimum amount of **Two-Hundred Thousand Dollars**  
25 **(\$200,000.00)**. The amount of the Cash Security is not a limitation on APPLICANT's  
26 obligations to defend, indemnify, and hold harmless the Indemnified Parties as required herein.

27 b) The Escrow Agreement shall be in a form and substance acceptable to  
28 COUNTY in its sole discretion. The Escrow Agent shall be acceptable to COUNTY in its sole

1 discretion, provided however, COUNTY shall not have any liability, either directly or indirectly,  
2 in respect of such decision or the performance or failure to perform of the Escrow Agent in  
3 relation to the Escrow Agreement or the Cash Security. Without limiting the generality of the  
4 foregoing requirements of the Escrow Agreement and Escrow Agent, APPLICANT shall, and  
5 shall cause the Escrow Agent, to enter into an Escrow Agreement among APPLICANT,  
6 COUNTY and the Escrow Agent in compliance with the following major requirements of the  
7 Escrow Agreement, which major requirements are not an exhaustive list of requirements for the  
8 Escrow Agreement:

9           i)       Upon APPLICANT's, COUNTY's, and the Escrow Agent's execution of  
10       the Escrow Agreement, APPLICANT shall irrevocably deliver to the Escrow Agent the  
11       amount of **Two-Hundred Thousand Dollars (\$200,000.00)**, as the Cash Security for the  
12       exclusive purposes of the Escrow Agreement. The Escrow Agent shall receive, and upon  
13       receipt immediately deposit, and hold the Cash Security only in a savings deposit account  
14       of the Escrow Agent for the exclusive purposes of the Escrow Agreement. A "savings  
15       deposit account" does not include a money market account, certificate of deposit, or any  
16       account which is not immediately liquid. The Escrow Agent shall cause the Cash  
17       Security, while on deposit with the Escrow Agent under the Escrow Agreement, to be  
18       interest-bearing, at a rate available to members of the public, and fully insured by the  
19       Federal Deposit Insurance Corporation (FDIC) up to the lesser of (i) the amount of the  
20       Cash Security while on deposit with the Escrow Agent under the Escrow Agreement; or  
21       (ii) the then-current maximum FDIC insurance coverage available for an FDIC-insured  
22       deposit account. The Cash Security shall be maintained by the Escrow Agent as a separate  
23       deposit account with its own ownership classification as being for the sole benefit of  
24       COUNTY, which deposit account shall be distinct from any and all other accounts or  
25       funds of the APPLICANT that might be maintained or held by the Escrow Agent or its  
26       parent or affiliates, to ensure that the FDIC insurance coverage available for an FDIC-  
27       insured deposit account shall apply completely to the Cash Security. COUNTY shall not  
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1 have any liability, either directly or indirectly, in respect of any loss of any principal of,  
2 or any earnings on, the Cash Security.

3 ii) APPLICANT shall promise, covenant, and warrant to COUNTY and the  
4 Escrow Agent that the Cash Security is not and shall not at any time be subject to any  
5 attachments, seizures, garnishments, pledges, liens, encumbrances, levies, security  
6 interests, claims of any creditors, or writs, or court orders, judgments or decrees, all of  
7 which shall be of every nature whatsoever; and if any such conditions occur,  
8 APPLICANT shall immediately remove, cure, or satisfy such conditions with funds or  
9 resources other than the Cash Security and promptly give COUNTY and the Escrow  
10 Agent notice thereof.

11 iii) Upon COUNTY's presentation of its instructions for drawing upon the  
12 Cash Security to the Escrow Agent, under the Escrow Agreement, the Escrow Agent  
13 shall, solely by examining the face of COUNTY's drawing instructions for compliance  
14 with the requirements in the Escrow Agreement for making drawings, pay COUNTY  
15 according to the terms of such COUNTY drawing in immediately available United States  
16 currency up to the then-current amount of the Cash Security within three (3) business  
17 days of such presentation to the Escrow Agent. COUNTY's place of presentation of its  
18 written instructions for drawing upon the Cash Security to the Escrow Agent shall be at  
19 a location or locations reasonably accessible to COUNTY, one of which locations shall  
20 be within the City of Fresno. Partial and multiple drawings, or a single drawing, by  
21 COUNTY upon the Cash Security, up to the then-current amount of the Cash Security,  
22 shall be permitted under the Escrow Agreement. Within one (1) COUNTY business day  
23 after COUNTY's receipt of any drawing, COUNTY shall give written notice thereof to  
24 APPLICANT.

25 iv) APPLICANT shall promise, covenant, and warrant to COUNTY and the  
26 Escrow Agent that that if COUNTY attempts to draw upon, or draws upon, the Cash  
27 Security, APPLICANT (including APPLICANT's successors or assigns, or anyone  
28 claiming through APPLICANT, or any other persons, firms, or entities acting at the



1 direction, or under the authority, of APPLICANT) shall not in any way whatsoever, either  
2 directly or indirectly, defeat, interfere with, obstruct, or cause delay to said right of  
3 COUNTY to do so, including, but not limited to, demanding the Escrow Agent not to  
4 honor or pay COUNTY on any draw upon the Cash Security, or taking any legal action  
5 against COUNTY, Indemnified Parties, and/or the Escrow Agent, including the Cash  
6 Security, to stay, enjoin, or prevent COUNTY from drawing upon the Cash Security, or  
7 taking any legal action against COUNTY, Indemnified Parties, and/or the Escrow Agent,  
8 including the Cash Security, to seek to suspend, invalidate, make unenforceable, or  
9 terminate the Escrow Agreement, provided however, nothing in this section 5(b)(iv)  
10 precludes APPLICANT from any subsequent legal action against COUNTY, after  
11 COUNTY has made a drawing upon the Cash Security, on the ground that such drawing  
12 violated this Agreement, provided further however, COUNTY shall not be precluded  
13 from bringing any cross-action against APPLICANT relating to same.

14 v) The Escrow Agreement shall have requirements regarding APPLICANT's  
15 obligations for indemnifying and defending COUNTY and the Escrow Agent, the Escrow  
16 Agent's compensation which shall be payable solely by APPLICANT (and in any event  
17 shall not be payable from the Cash Security or by the COUNTY), and COUNTY's right  
18 to receive and have access to reports of all account activities, including without limitation  
19 interest income on, and disbursements of, the Cash Security, all of which requirements  
20 shall be acceptable to COUNTY.

21 vi) COUNTY shall have the right, based upon its determination, in its sole  
22 discretion, to give the Escrow Agent and APPLICANT notice that (i) all of the Cash  
23 Security has, according to the terms and conditions of the Escrow Agreement, been paid  
24 to COUNTY, or (ii) the Cash Security no longer is needed by COUNTY, and in the event  
25 that there is, to COUNTY's knowledge, any remaining Cash Security at the time of such  
26 notice, COUNTY's notice shall state that COUNTY releases its interest under the Escrow  
27 Agreement in such remaining Cash Security.  
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1           vii) APPLICANT shall be solely responsible for all federal income tax  
2 compliance and reporting, and payment of all income taxes (including, but not limited to,  
3 late payments, interest, penalty or other cost or expense) with respect to the earnings of  
4 the Cash Security, as well as all representations to Escrow Agent or the Federal  
5 Government with regard to such federal income tax compliance and reporting and  
6 payment of income taxes, except that COUNTY will have the sole obligation of providing  
7 its tax identification number by furnishing an appropriate form W-9 to the Escrow Agent  
8 as requested by the Escrow Agent.

9           viii) To the extent that the Escrow Agent and/or COUNTY becomes liable for  
10 the payment of any taxes in respect of income derived from the Cash Security,  
11 APPLICANT shall indemnify, defend and hold the Escrow Agent and COUNTY  
12 harmless, including their respective officers, agents, and employees, from and against any  
13 and all taxes, late payments, interest, penalty or other cost or expense (including  
14 attorneys' fees and expenses) that may be assessed against the Escrow Agent and/or  
15 COUNTY, on or with respect to the Cash Security and the interest thereon unless such  
16 taxes, late payments, interest, penalty or other expense was directly caused by the gross  
17 negligence or willful misconduct of the Escrow Agent and/or COUNTY, as applicable.

18           c) If APPLICANT has not completed the performance of all of its obligations  
19 under this Agreement, as determined by COUNTY, the termination of an Escrow Agreement,  
20 shall not, by itself, be a limitation on APPLICANT's obligations to maintain the Cash Security  
21 under an Escrow Agreement, as required herein. APPLICANT shall cause the Cash Security to  
22 be maintained by the Escrow Agent under an Escrow Agreement, as provided herein, or  
23 immediately under any replacement Escrow Agreement to be maintained by any new Escrow  
24 Agent, as provided herein, without interruption in coverage, so that APPLICANT's performance  
25 of its obligations under this Agreement to defend, indemnify, and hold harmless the Indemnified  
26 Parties as required herein is continuously secured by a Cash Security either by an Escrow  
27 Agreement or a replacement Escrow Agreement during the term of this Agreement. The  
28 requirements, above, for an Escrow Agreement shall apply to any replacement Escrow

1 Agreement, and the requirements, above, for the Escrow Agent shall apply to any new Escrow  
2 Agent. In the event that there should be a need for a replacement Escrow Agreement, the  
3 determination whether a proposed replacement Escrow Agreement is acceptable to COUNTY,  
4 COUNTY may consider whether the proposed replacement Escrow Agreement complies  
5 substantially with the form and substance of the then-current Escrow Agreement.

6 **6. DEFAULT**

7 For purposes of this Agreement, the occurrence of any one or more of the  
8 following events shall constitute an “Event of Default” by APPLICANT under this Agreement:

9 a) If a court makes one or more orders that COUNTY shall pay any  
10 attorneys’ fees and costs (including but not limited to any court costs, and/or fees and/or costs of  
11 any experts or consultants engaged by such attorney) of any parties challenging the Project,  
12 and/or any other amounts to such parties, and APPLICANT fails to reimburse COUNTY within  
13 ten (10) Business Days for such attorney’s fees and/or costs, and/or amounts upon COUNTY’s  
14 written request for payment thereof;

15 b) APPLICANT fails to promptly defend, indemnify, and hold harmless the  
16 Indemnified Parties, as required under this Agreement;

17 c) APPLICANT fails to timely pay any amount due or owed by  
18 APPLICANT to COUNTY under this Agreement (including, but not limited to, APPLICANT  
19 fails to promptly pay COUNTY for the amount of attorneys’ fees and costs (including but not  
20 limited to court costs, and fees and costs of any experts or consultants engaged by such attorney)  
21 in excess of the Cash Security), or any amount due or owed by APPLICANT to the Escrow Agent  
22 under an Escrow Agreement;

23 d) APPLICANT fails to, and fails to cause the Escrow Agent to, timely enter  
24 into the Escrow Agreement and irrevocably deposit the Cash Security with the Escrow Agent for  
25 the exclusive purposes of the Escrow Agreement, or fails to, or fails to cause a new Escrow  
26 Agent, to timely enter into a replacement Escrow Agreement and irrevocably deposit the Cash  
27 Security with the replacement Escrow Agent for the exclusive purposes of the replacement  
28 Escrow Agreement, as required by Section 5 of this Agreement;

1 e) APPLICANT's breach or default under the Escrow Agreement or  
2 replacement Escrow Agreement;

3 f) The breach or default in the performance of any other obligations in this  
4 Agreement, or falsity of any representations or warranties, of APPLICANT in this Agreement  
5 for a period of thirty (30) days after COUNTY provides written notice to APPLICANT, stating  
6 the obligation APPLICANT has failed to perform, or the apparently false representation or  
7 warranty of APPLICANT, provided however, if the nature of the breach or default or false  
8 representation or warranty is such that APPLICANT cannot reasonably cure the breach or  
9 default, or correct the false representation or warranty within thirty (30) calendar days,  
10 APPLICANT shall have an additional reasonable time to cure or correct, as applicable, subject  
11 to APPLICANT commencing to cure or correct, as applicable, within the thirty (30) day period  
12 and diligently pursuing the cure or correction, as applicable, to completion and completing the  
13 cure or correction, as applicable, not later sixty (60) days from the date of COUNTY's notice of  
14 such failure to perform or apparently false representation or warranty. Notwithstanding anything  
15 to the contrary in this Agreement, this subsection 6(f) shall not apply to any of APPLICANT's  
16 obligations under Sections 4 and/or 5 of this Agreement; or

17 g) Bankruptcy, liquidation, arrangement, insolvency, receivership or  
18 conservatorship proceedings, or other proceedings for relief under any bankruptcy or similar law  
19 or laws for the relief of debtors, are instituted by or against APPLICANT, and are not dismissed  
20 within ninety (90) days of institution, or there is an assignment by APPLICANT for the benefit  
21 of creditors, or any similar action taken by or against APPLICANT, or APPLICANT is insolvent;

22 h) APPLICANT, if it is an entity, ceases to be an entity lawfully doing  
23 business in the United States, or if it is an individual, ceases to be permanently and lawfully  
24 residing in the United States or dies, or in either such case, if not subject to service of process in  
25 California, ceases having an agent for service of process in California.

26 Upon occurrence of an Event of Default, COUNTY shall have the right to declare  
27 that APPLICANT is in material breach of this Agreement, and (unless COUNTY is otherwise  
28 relieved herein of the necessity of providing such notice to APPLICANT, in which case

1 COUNTY shall be entitled to immediately proceed in enforcing its remedies herein) deliver  
2 written notice thereof to APPLICANT. In such event, if the Event of Default is not cured by  
3 APPLICANT within fifteen (15) COUNTY Business Days of the delivery of COUNTY's written  
4 notice, COUNTY thereupon shall be entitled under the Escrow Agreement to immediately draw  
5 upon the Cash Security, or from time to time immediately make partial draws upon the Cash  
6 Security, which partial draws shall permanently reduce the total amount of the Cash Security  
7 pursuant to Section 5 of this Agreement. Notwithstanding anything to the contrary herein, in the  
8 event that there is an Event of Default under subsection 6(a), subsection 6(c), and/or subsection  
9 6(g) of this Agreement, or there are, in COUNTY's determination, any circumstances beyond  
10 COUNTY's control that would frustrate COUNTY's ability to provide any notice to  
11 APPLICANT that is necessary for an Event of Default and/or any notice to APPLICANT that  
12 APPLICANT is in material breach of this Agreement, then (i) such notice(s) shall not be required  
13 to be provided by COUNTY to APPLICANT, (ii) COUNTY shall have the right to immediately  
14 declare that an Event of Default has occurred, and COUNTY shall memorialize such declaration,  
15 and (iii), COUNTY thereupon shall be entitled to immediately draw upon the Cash Security, or  
16 from time to time immediately make partial draws upon the Cash Security, which partial draws  
17 shall permanently reduce the total amount of the Cash Security pursuant to Section 5 of this  
18 Agreement.

19           The occurrence of an Event of Default shall entitle COUNTY to all any and all  
20 remedies available under this Agreement and under the law, including but not limited to, specific  
21 performance and damages. Moreover, and without limiting COUNTY's remedies hereinabove,  
22 the occurrence of an Event of Default under subsection 6(a), 6(b), 6(c), 6(d), 6(e), and/or 6(f) of  
23 this Agreement shall constitute grounds upon which the COUNTY decision-making body may  
24 rescind the issuance of any of the Land Use Approvals associated with the Project in accordance  
25 with COUNTY's adopted ordinances and procedures..

26           **7. TERMINATION OF ESCROW AGREEMENT**

27           If one or more Legal Action is initiated which challenges COUNTY's issuance of  
28 any of the Land Use Approvals for the Project, then following the Final Disposition of all Legal

1 Actions, on or after the earlier of thirty (30) days past the expiration of the applicable appeal  
2 period or passage of two hundred (200) days from the Final Disposition of the last Legal Action  
3 to reach Final Disposition, APPLICANT may submit a written request to the Director to  
4 terminate the Escrow Agreement, provided that there is not any occurrence of an Event of Default  
5 by APPLICANT, and if the Director determines that APPLICANT has satisfied APPLICANT'S  
6 obligations under this Agreement to defend, indemnify, and hold harmless the Indemnified  
7 Parties as required herein, the Director, within thirty (30) COUNTY Business Days after  
8 receiving such a written request, shall give written notice of COUNTY's determination as to the  
9 Cash Security to APPLICANT and the Escrow Agent pursuant to Subsection 5.b.vi, above.

10 **8. NOTIFICATIONS AND COOPERATION BY COUNTY**

11 COUNTY shall notify APPLICANT in writing within ten (10) COUNTY  
12 Business Days of its receipt of any demand, claim, action, proceeding, or litigation in which any  
13 of the Indemnified Parties is to be indemnified, defended, and held harmless by APPLICANT as  
14 required herein. If COUNTY requests that APPLICANT defend any of the Indemnified Parties,  
15 it shall notify APPLICANT in writing within ten (10) COUNTY Business Days of its receipt of  
16 any such demand, claim, action, proceeding, or litigation. In the event COUNTY provides such  
17 notice later than such ten (10) COUNTY Business Days, COUNTY's rights under this  
18 Agreement shall not be defeated, but, shall be preserved as of such date. COUNTY shall  
19 cooperate fully in such defense.

20 **9. COUNTY PARTICIPATION IN DEFENSE**

21 Nothing contained herein shall prohibit COUNTY, in its sole discretion, from  
22 participating in the defense of any Legal Action. If COUNTY elects to also so defend, it shall  
23 do so in good faith and COUNTY shall bear its attorneys' fees and costs. In no event shall  
24 COUNTY's participation in the defense of any Legal Action affect the obligations imposed upon  
25 APPLICANT in Section 4 of this Agreement.

26 **10. REIMBURSEMENT OF COST OF ADMINISTRATIVE RECORD**

27 COUNTY acknowledges that it will make reasonable efforts to look to any party  
28 which has initiated a Legal Action challenging the Project for payment of costs associated with

1 preparation of administrative record as provided by law. However, if a party which has initiated  
2 a Legal Action challenging the Project refuses to pay on or before the date judgment is entered  
3 by the superior court, APPLICANT agrees to reimburse COUNTY for its actual cost incurred,  
4 including, but not limited to, COUNTY staff and attorney time expended, for certifying and/or  
5 preparing the administrative record in connection with any litigation/ proceedings related to the  
6 subject matter of this Agreement.

7 **11. SEVERABILITY**

8 If any provision of this Agreement is determined to be invalid in a final judgment  
9 by a court of competent jurisdiction, each and every other provision hereof shall remain in full  
10 force and effect.

11 **12. NOTICES**

12 All notices, consents, approvals, requests, correspondence, documents, reports,  
13 demands and other communications (collectively, "Notice") which the Parties are required or  
14 desire to serve upon or deliver to one another shall be in writing and shall be sent by any of the  
15 following methods: (a) personal delivery, in which case notice is effective upon delivery; (b)  
16 certified or registered United States mail, return receipt requested, in which case notice shall be  
17 deemed delivered upon receipt if delivery is confirmed by a return receipt; or (c) nationally  
18 recognized overnight courier, with charges prepaid or charged to the sender's account, in which  
19 case notice is effective on delivery if delivery is confirmed by the delivery service addressed in  
20 the appropriate manner for the method of service, as set forth below:

21 **COUNTY:**

22 County of Fresno  
23 **ATTENTION:** Director of Public Works and Planning  
24 2220 Tulare Street, Sixth Floor  
25 Fresno, CA 93721

26 Copies of notices to COUNTY shall also be given to:

27 Office of the Fresno County Counsel  
28 **ATTENTION:** Deputy County Counsel Assigned to Land Use Matters  
2220 Tulare Street, Suite 500  
Fresno, California 93721

**APPLICANT:**

CEMEX Construction Materials Pacific, LLC  
**ATTENTION:** General Counsel  
1720 Centrepark East  
West Palm Beach, FL 33401

Copies of notices to APPLICANT shall also be given to:

Patrick Mitchell, Esq.  
Mitchell Chadwick LLP  
3001 Lava Ridge Court, Suite 120  
Roseville, CA 95661

For all claims arising out of or related to this Agreement, nothing in this Section 12 establishes, waives, or modifies any claims presentation requirements or procedures provided by law, including but not limited to the Government Claims Act (Division 3.6 of Title 1 of the Government Code, beginning with section 810).

**13. APPLICANT's AGENT FOR SERVICE OF PROCESS**

APPLICANT represents to COUNTY that APPLICANT's agent for service of process in California, and that such agent's address for receiving such service of process in California, which information APPLICANT shall maintain with the office of the California Secretary of State, is as follows:

CORPORATE CREATIONS NETWORK, INC.  
Registered Corporate 1505 Agent  
5901 W. Century Blvd.  
Los Angeles, CA 90045

APPLICANT further represents to COUNTY that if APPLICANT changes its agent for service of process in California, or APPLICANT's agent for service of process in California changes its address for receiving such service of process in California, which changed information APPLICANT shall maintain with the office of the California Secretary of State, APPLICANT shall give COUNTY written notice thereof within five (5) calendar days thereof pursuant to Section 5 of this Agreement.

**14. MODIFICATION**

This Agreement may not be altered, amended, or modified in any respect, except by a writing duly executed by the Parties.



1           **15.    NON-ASSIGNMENT**

2 Neither party shall assign, transfer or sub-contract this Agreement nor their rights or obligations  
3 under this Agreement without the prior written consent of the other party.

4           **16.    AUTHORIZATION TO EXECUTE**

5           Each Party represents, covenants, and warrants to the other Party that such Party  
6 is duly authorized and empowered to execute, enter into, and perform its obligations set forth in  
7 this Agreement, and that the individual signing this Agreement on behalf of such Party has been  
8 duly authorized to execute this Agreement on behalf of such Party, and will, by signing this  
9 Agreement on such Party’s behalf, legally bind such Party to the terms and conditions of this  
10 Agreement. Each Party further represents, covenants, and warrants to the other Party that no other  
11 person or entity is required to give its approval or consent to this Agreement in order for such  
12 Party to authorize, enter into, and perform its obligations under this Agreement, or that if such  
13 approval or consent to this Agreement is required, that such approval or consent has been  
14 obtained.

15           **17.    AUTHORITY OF DIRECTOR**

16           The Director is hereby authorized by COUNTY to give any Notices on behalf of  
17 COUNTY, make any determinations or declarations on behalf of COUNTY including with  
18 respect to any Event of Default or material breach of this Agreement, or to take any action, or  
19 enforce any right, on behalf of COUNTY under this Agreement, including any action relating  
20 to the Cash Security and/or the Escrow Agreement (including any replacement Escrow  
21 Agreement and/or new Escrow Agent), and any other actions necessary or appropriate in the  
22 administration or enforcement of this Agreement, and/or the Escrow Agreement, on behalf of  
23 COUNTY.

24           **18.    HEADINGS; CONSTRUCTION; STATUTORY REFERENCES;**  
25           **TIME IS OF ESSENCE**

26           The headings of the sections and paragraphs of this Agreement are for  
27 convenience only and shall not be used to interpret this Agreement.

28

1 This Agreement is the product of negotiation between the Parties, as assisted by  
2 their respective attorneys. The language of this Agreement shall be construed as a whole  
3 according to its fair meaning and not strictly for or against any Party. Any rule of construction to  
4 the effect that ambiguities are to be resolved against the drafting party shall not apply in  
5 interpreting this Agreement. All references in this Agreement to particular statutes, regulations,  
6 ordinances or resolutions of the United States, the State of California, or County of Fresno shall  
7 be deemed to include the same statute, regulation, ordinance or resolution as hereafter amended  
8 or renumbered, or if repealed, to such other provisions as may thereafter govern the same subject.

9 It is understood that time is of the essence in APPLICANT's performance of all  
10 of his obligations under this Agreement.

11 **19. GOVERNING LAW AND VENUE**

12 This Agreement shall be deemed to have been entered into in Fresno County, and  
13 shall be interpreted under, and enforced by the laws of the State of California. The Agreement  
14 and obligations of the parties are subject to all laws, orders, rules, and regulations of the  
15 authorities having jurisdiction over this Agreement (or the successors of those authorities). Any  
16 suits brought pursuant to this Agreement shall be filed and heard in courts having jurisdiction  
17 and located in the Fresno County, State of California.

18 **20. NO THIRD PARTY BENEFICIARIES**

19 Notwithstanding anything else to the contrary herein, the Parties acknowledge and  
20 agree that no other person, firm, corporation, or entity shall be deemed an intended third-party  
21 beneficiary of this Agreement.

22 **21. COUNTERPARTS**

23 This Agreement may be executed in two or more counterparts, each of which shall  
24 be deemed to be an original, and all of which taken together shall constitute one and the same  
25 instrument.

26 **22. INTEGRATED AGREEMENT**

27 This Agreement contains the sole, complete, and entire agreement and  
28 understanding of the Parties concerning the matters contained herein and may not be altered,

1 modified, or changed in any manner except by a writing duly executed by the Parties, stating that  
2 such writing is by its express terms an amendment to this Agreement. Except as stated herein,  
3 none of the Parties are relying on any representations by any other Party in executing this  
4 Agreement.

5 (Signature page follows.)  
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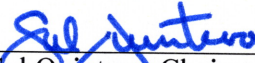
APPLICANT and COUNTY hereby execute this Agreement as of the Effective Date.

**APPLICANT: CEMEX Construction Materials Pacific, LLC, a Delaware limited liability company**

**COUNTY OF FRESNO, a political subdivision of the State of California**



By \_\_\_\_\_




By \_\_\_\_\_  
Sal Quintero, Chairman of the Board of Supervisors of the County of Fresno

Name: Alejandro Ortiz Robles

Title: VP

BERNICE E. SEIDEL,  
Clerk to the Board of Supervisors  
County of Fresno, State of California



By \_\_\_\_\_

Deputy

## CERTIFICATION OF AUTHORIZED SIGNER

Mike F. Egan, in my capacity as Secretary of CEMEX Construction Materials Pacific, LLC, a Delaware limited liability company ("Applicant"), certifies to the County of Fresno ("County") that (1) Alejandro Ortiz, a Vice President of Applicant, is duly authorized by, to execute and deliver for and on behalf of Applicant to County that certain Indemnification and Defense Agreement ("Agreement") to be between Applicant and County, (2) the signature of such person appearing on page no. 20 of the Agreement is authentic, (3) the Agreement has been duly authorized by Applicant, (4) no other authorization, approval, or consent is required for such person's execution and delivery of the Agreement to County, or for Applicant's authorization of the Agreement, (5) the Agreement shall be deemed executed by such person, once signed in handwriting or by any electronic means, including delivery by electronic means, pursuant to the Agreement, and (6) the Agreement shall be valid, enforceable, and binding upon Applicant once the agreement is executed by County.

BY: MEFG

NAME: Mike F Egan

TITLE: Secretary