



COLORADO

Department of Public
Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

December 23, 2015

Mr. Peter Goffstein
IRG Redevelopment I, LLC
c/o Lowry Development Group
11100 Santa Monica Boulevard, Suite 850
Los Angeles, California 90025

RE: Lowry Air Force Base Landfill, Operable Unit 2
Response to IRG Redevelopment I, LLC ("IRG") Letter dated November 23, 2015
Former Lowry Air Force Base, Colorado

File: DMA LWY 13 OU2 15.8

Dear Mr. Goffstein:

This correspondence is in response to your November 23, 2015 letter regarding the Former Lowry Air Force Base OU2 Landfill (the "IRG Letter"). The Colorado Department of Public Health and Environment (CDPHE) has worked cooperatively with IRG since 2008, in an attempt to move the Lowry Air Force Base OU2 Landfill ("OU2 Landfill" or the "Property") redevelopment project ("Lowry Vista") forward. Through this collaborative effort between CDPHE and IRG, a three-phase approach to the project was envisioned.

Background

The first phase, Phase 0, involved conducting an Electromagnetic Survey (EM Survey) on the Property, with the stated goal of identifying the location and extent of individual waste-filled trenches to help guide future redevelopment plans. The EM Survey Work Plan was approved with conditions by CDPHE on April 27, 2015, and work was performed in June 2015. The results of the EM Survey were provided to CDPHE on August 13, 2015.

The second phase, Phase 1, involved limited pre-development activities including the soil stockpile plan (SSP) (Attachment C to the IRG Letter), the cap penetration plan (CPP) (Attachment D to the IRG Letter) and the field investigation work plan (FIWP) (Attachment E to the IRG Letter). Collectively, the SSP, CPP and FIWP are referred to as the "Work Plans". CDPHE approvals of these three plans were provided to IRG on December 31, 2013, December 23, 2013 and December 31, 2013, respectively (collectively, the "CDPHE Work Plan Approvals"). Conditions set forth in these approvals, without limitation, required CDPHE and IRG to negotiate a modification to the existing State Environmental Covenant and craft an enforceable document to create an enforceable structure for completion of any remedial obligations related to the proposed limited pre-development activities. CDPHE and IRG have agreed in concept and in terms for both the Phase 1 environmental covenant and enforceable document, in the form of a consent agreement between IRG and CDPHE, more particularly described below.

Another condition of the Phase 1 CDPHE Work Plan Approvals requires a modification by the United States Air Force (USAF) to the restrictive covenant set forth in the Colorado Deed (Attachment G to the IRG Letter) between the USAF and IRG related to the use of the OU2 Landfill. The restrictive covenant in the Colorado Deed prohibits disturbing the integrity of the landfill cover unless necessary to comply with the requirements in the regulations of CDPHE. Given that the proposed activities defined in the Work Plans are not requirements of the



regulations of CDPHE, as they are not necessary remedial actions, any disturbance to the landfill cover would be in violation of the restrictive covenant in the Colorado Deed.

Similar to the condition of modification to the restrictive covenant in the Colorado Deed, approval of the Work Plans is also conditioned on CDPHE and USAF amending or creating a new Enforceable Agreement related to the change in remedy at the OU2 Landfill based on the new proposed activities. Alternatively, CDPHE has consented that IRG may meet this condition of approval if USAF provides written verification that the proposed Phase 1 limited pre-development activities fall within the scope of the existing Enforceable Agreement between CDPHE and USAF related to the former Lowry Air Force Base.

The third phase, Phase 2, involved the development activities which, as previously discussed with IRG, would require, without limitation, approval from the USAF of the change in remedy at OU2, modification to the Restrictive Covenant in the Deed, a Phase 2 modification to the State's Environmental Covenant, a new Enforceable Agreement between USAF and CDPHE, and a Phase 2 consent agreement between CDPHE and IRG to structure the ongoing remedial obligations related to the change in remedy.

Remediation of the OU2 Landfill was completed pursuant to a complicated legal structure agreed to by the State and USAF in accordance with the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Colorado Hazardous Waste Act and its accompanying regulations, the Colorado Governor's Executive Order 013-98, and the Joint Policy Establishing Evaluation Guidelines and Review Procedures Pertaining to Deferral Requests. As a result, CDPHE entered into governing documents to detail the remedial obligations of the USAF for the OU2 Landfill. Specifically, CDPHE entered into two (2) agreements: (1) the Consent Agreement with the Lowry Economic Redevelopment Authority (LRA) and Lowry Assumption, LLC (LAC), which set forth all remedial actions and associated land use restrictions necessary for the protection of human health and the environment (the "LAC Consent Agreement"); and (2) the Enforceable Agreement with USAF, which governed USAF's commitments to ensure that all remedial actions and associated land use restrictions necessary to protect human health and the environment would be put into place (the "Enforceable Agreement"). Remedy implementation for the OU2 Landfill was completed in accordance with the Phase 2 Corrective Action Plan and the LAC Consent Agreement. The Completion Report was approved by CDPHE on September 8, 2006. The outstanding obligations for the OU2 Landfill are those related to post-closure operations, maintenance and monitoring.

Recent requests from IRG attempt to change the remedy at the OU2 Landfill by modifying the existing landfill cover and changing the land use restrictions. As IRG's proposed activities are not remedial actions necessary for the protection of human health and the environment and not covered under the LAC Consent Agreement or the Enforceable Agreement, CDPHE requires specific conditions be achieved prior to the implementation of the Work Plans. These conditions have consistently been provided to IRG in each of the CDPHE Work Plan Approvals, as well as in the November 15, 2013 memo from Jennifer Robbins entitled "*CDPHE assurances from USAF*", attached hereto and incorporated herein as **Exhibit A**, and the May 1, 2014 External Memo from Jennifer Robbins entitled "*CDPHE clarifications related to Lowry Vista*", attached hereto and incorporated herein as **Exhibit B**.

This letter reiterates CDPHE's position related to IRG's proposed activities at the OU2 Landfill.

Environmental Covenant

CDPHE and IRG agreed to terms for the modification of the use restrictions set forth in the State's environmental covenant for the Phase 1 limited pre-development activities. The negotiated terms for the Phase 1 modified environmental covenant provided IRG with the mechanism necessary to perform the Work Plans, while providing the State with the necessary assurances of the protection of public health and the environment. Attached hereto



and incorporated herein as **Exhibit C** is the modified environmental covenant that was approved by CDPHE and agreed to by IRG. See also **Exhibit D**, attached hereto and incorporated herein, email string dated September 10, 2015 and September 17, 2015 between Jennifer Robbins, Colorado Assistant Attorney General, and Howard Kenison, attorney for IRG, which states the changes are acceptable. The position of the State is that the request to modify the environmental covenant was already approved under the terms of the September 17, 2015 email. The modifications previously agreed upon allow IRG to perform the proposed Phase 1 limited predevelopment activities.

The November 23, 2015 IRG letter requests an action from the State to approve a modification to the environmental covenant for Phase 2, the development phase of the project. As the State has previously informed IRG, the State cannot approve a change in the use restrictions without first changing the approved CERCLA remedy. The approved remedy for the OU2 Landfill, pursuant to CERCLA and the Governor's approval, designated the area as open space in order for the Property to be considered protective of public health and the environment. Accordingly, prior to any approval of a change in remedy, which would include a modification to the environmental covenant that lifts the open space/non-irrigated park use restriction, CDPHE must review sufficient documentation that evidences the proposed new use restrictions remains protective of human health and the environment. To date, IRG has only provided a statement¹ that risks will be reduced because an extra landfill cover will be placed over the current OU2 Landfill cover. No documentation, technical data, or risk assessment to support this assertion has been provided. (Attachment J to the IRG letter). Further, the State does not agree with IRG's position that the placement of additional soil on the OU2 Landfill cap will necessarily be more protective of human health and the environment than the existing remedy. The existing remedy includes an environmental covenant which restricts human exposure pathways by limiting the property use to open space. By expanding the uses of the Property, as proposed by IRG, human exposure pathways currently not present will exist.

Nevertheless, assuming that a change in remedy was warranted through the appropriate process that allowed for the proposed Phase 2 development activities, the requested modification remains unacceptable to CDPHE. The Environmental Covenant (Attachment I to the IRG Letter) changes the use restriction language in paragraph (1)(a) to read "Unless this Environmental Covenant is modified in accordance with the State's statute and regulation, the Property (OU2) may be developed in accordance with land use and development plans approved by local governments with jurisdiction over the Property."

The purpose of the State's environmental covenant statute is to ensure that environmental remediation projects protect human health and the environment. Environmental covenants are used to provide use restrictions when the State allows remedial obligations to cease even though contamination remains on site at levels unsafe for particular uses. At the OU2 Landfill, waste was left in place. The presumptive remedy chosen pursuant to CERCLA was to cap the landfill and restrict the use of the property to open space/non-irrigated park, in order to limit necessary remedial obligations and provide the USAF with a more cost-efficient cleanup plan for the property. As the State is tasked with the responsibility to ensure the protection of human health and the environment, the language proposed by IRG is unacceptable as it would be adverse to the legislative intent and inconsistent with the State's responsibility for the protection of public health and environment.

Local government decisions are determined based on compliance with the local regulations. Accordingly, local governments may not be equipped or tasked with ensuring the protection of public health and the environment. As CDPHE is tasked with ensuring the protection of human health and the environment by the Colorado State

¹ On November 3, 2015, CDPHE received the Benefits Memo provided to USAF on December 9, 2014. IRG relies on this Benefits Memo to support its assertion that the proposed development activities are protective of human health and environment. CDPHE has not completed its review or provided comments on this Benefits Memo.



legislature, CDPHE cannot agree to the proposed language for the environmental covenant provided in Attachment I. Accordingly, after IRG provides CDPHE with the conditions required for the Phase 1 and 2 activities, CDPHE will be able to adequately assess the risk to human health and the environment and assist IRG in a revision to the Environmental Covenant consistent with any approved change in remedy.

As such, in reference to IRG's request to approve the modified environmental covenant, as stated in the November 23, 2015 IRG letter, the CDPHE is approving the modified environmental covenant (Attachment I in the IRG Letter), with modifications. More specifically, CDPHE is approving the modified environmental covenant provided in Exhibit C that was previously approved by CDPHE and agreed to by IRG in September 2015, to meet the environmental covenant condition required in each CDPHE Work Plan Approval.

Restrictive Covenant

The IRG Letter requests the State approve the proposed changes to the Restrictive Covenant set forth in the January 4, 2006 Colorado Deed between USAF and IRG. CDPHE is not a party to the Colorado Deed nor does the State have any ownership interest in the property to provide it with authority to approve the change in Restrictive Covenant in the Colorado Deed. IRG references Section III.F of the Enforceable Agreement in its request for the State's approval; however, this provision relates only to the State's environmental covenant and does not provide any authority to the State to approve a change to the Restrictive Covenant in the Colorado Deed.

Consent Agreement

As part of the Phase 1 discussions, CDPHE and IRG negotiated the terms of a new consent agreement (the "Phase 1 Consent Agreement"). However, the Phase 1 Consent Agreement attached as Attachment B to the IRG letter, which was drafted solely for the Phase 1 limited predevelopment activities, does not include the suggested changes made by Assistant Attorney General Jennifer Robbins on September 10, 2015 and accepted by Howard Kenison, attorney for IRG, on September 17, 2015. See Exhibit D, in which suggested changes made by Jennifer Robbins on September 10, 2015 were accepted by Howard Kenison on September 17, 2015, which are not reflected in Attachment B to the IRG letter. See attached Exhibit E and Exhibit F, the clean and red-lined IRG Consent Agreement reflecting the agreed to terms and conditions of IRG and CDPHE. As the terms are inconsistent with the agreed upon language, CDPHE cannot sign Attachment B.

As such, in reference to IRG's request to execute the Phase 1 Consent Agreement, as stated in the November 23, 2015 IRG letter, the CDPHE is approving the Phase 1 Consent Agreement (Attachment B in the IRG Letter), with modifications. More specifically, CDPHE is approving the Phase 1 Consent Agreement provided in Exhibit E that was previously agreed upon by CDPHE and IRG in September 2015, to meet the consent agreement condition required in the CDPHE Work Plan Approvals. However, CDPHE will not execute the Phase 1 IRG Consent Agreement until all other Phase 1 conditions have been met, at which time CDPHE will sign all related documents simultaneously.

CDPHE consistently informs IRG that the proposed Phase 2 development activities will require a separate consent agreement that will be executed simultaneously with a second modification to the environmental covenant and an amended or new enforceable agreement between the USAF and CDPHE, reflecting the change in remedy and additional liabilities. As the Phase 2 consent agreement will be contingent upon an approved change in remedy to the site, the terms of this document will need to be negotiated between the appropriate parties at a later date.



Air Force Warranties

The State does not accept the Air Force's affirmation of its CERCLA Section 120 obligations to satisfy CDPHE's condition of approval that the Air Force provide written confirmation that the proposed activities will not affect the warranties in the Colorado Deed or pursuant to CERCLA. CERCLA 120(h) provides that the Air Force may defer the remedial requirements of CERCLA Section 120 for a facility not listed on the National Priorities List (NPL) if the Governor determines the property is suitable for transfer based on particular findings including, without limitation:

- (1) the property is suitable for transfer for use intended by the transferee, and the intended use is consistent with protection of human health and the environment; and
- (2) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances warranting that all remedial action necessary to protect human health and the environment with respect to any substance remaining on the property has been taken before the date of transfer and additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.

The CERCLA Section 120(h) transfer was approved by the Governor pursuant to CERCLA, the Governor's Executive Order 013-98, and the Joint Policy Establishing Evaluation Guidelines and Review Procedures Pertaining to Deferral Requests. State approval of the deferral of the OU2 Landfill included in its evaluation the warranties in the Colorado Deed, the State's Environmental Covenant, the LAC Consent Agreement, and the Enforceable Agreement. Specifically, the covenants placed on the OU2 Landfill at the time of the transfer restricted the use of the property, with the restrictive covenant preventing any disturbance to the integrity of the landfill cover, and the State's environmental covenant restricting use of the OU2 Landfill to open space/non-irrigated park.

IRG's proposed activities are not necessary remedial actions or requirements under CERCLA. Nor are they required under the LAC Consent Agreement or the Colorado Hazardous Waste Act and its accompanying regulations. As the proposed activities are not requirements under the LAC Consent Agreement, the Enforceable Agreement or CERCLA, they fall outside the scope of the required CERCLA Covenants defined in the Enforceable Agreement. While USAF continues to remain liable for the waste left in place and must take the necessary remedial actions for the protection of public health and the environment, affirmation by USAF of its CERCLA Section 120(h) obligations does not necessarily include USAF funding or performing any obligations detailed in the Work Plans or proposed development activities.

Further, the Enforceable Agreement only requires USAF to fund the performance of necessary remedial response actions as set forth in the LAC Consent Agreement and comply with the covenants following regulatory closure under the LAC Consent Agreement, including making adjustments to land use controls in order to be in compliance with the CERCLA Covenants defined by the Enforceable Agreement. As none of the governing documents related to the early transfer contemplate IRG's proposed activities, there are no required USAF actions or commitments under the Enforceable Agreement that the State can rely on to satisfy CDPHE's condition of approval. Similarly, for USAF to meet the CERCLA Section 120 warranties, USAF was required to include the restrictive covenant in the Colorado Deed, grant a State environmental covenant, agree to the remedial obligations set forth in the Consent Agreement and enter into the State's governing document, the Enforceable Agreement, all of which were or are being accomplished under the existing framework. As CERCLA sets forth requirements for remedial and removal actions, the CERCLA Section 120 obligations may not apply to IRG's proposed non-remedial or response activities. Accordingly, the State has conditioned its approval on written confirmation from USAF that the warranties under CERCLA Section 120 will continue and USAF will



remain liable for contamination that remains in the OU2 Landfill during and after the proposed IRG non-remedial activities.

Work Plan Implementation

IRG has not satisfied the conditions of approval set forth in the aforementioned December 2013 CDPHE Work Plan Approvals. Until such time as the conditions of each approval have been met, implementation of the Work Plans would be in violation of such approval.

Conclusion

As further discussed above, below is CDPHE's formal response to the five requests identified in the IRG Letter:

- i. CDPHE is approving the modified environmental covenant (Attachment I in the IRG Letter), with modifications. More specifically, CDPHE is approving the modified environmental covenant provided in Exhibit C that was previously approved by CDPHE and agreed to by IRG in September 2015 to meet the environmental covenant condition required in each CDPHE Work Plan Approval.
- ii. CDPHE is not a party to the Colorado Deed nor does the State have any ownership interest in the property to provide it with authority to approve the change in Restrictive Covenant in the Colorado Deed.
- iii. CDPHE is approving the Phase 1 Consent Agreement (Attachment B in the IRG Letter), with modifications. More specifically, CDPHE is approving the Phase 1 Consent Agreement provided in Exhibit E that was previously agreed upon by CDPHE and IRG in September 2015 to meet the consent agreement condition required of in the CDPHE Work Plan Approvals. However, CDPHE will not execute the Phase 1 IRG Consent Agreement until all other Phase 1 conditions have been met, at which time CDPHE will sign all related documents simultaneously.
- iv. As further described above, CERCLA sets forth requirements for remedial and removal actions. The CERCLA Section 120 obligations may not apply to IRG's proposed non-remedial or response activities. Accordingly, the State has conditioned its approval on written confirmation from USAF that the warranties under CERCLA Section 120 will continue, and USAF will remain liable for contamination that remains in the OU2 Landfill during and after the proposed IRG non-remedial activities.
- v. IRG has not satisfied the conditions of approval set forth in the aforementioned December 2013 CDPHE Work Plan Approvals. Until such time as the conditions of each approval have been met, implementation of the Work Plans would be in violation of such approval.

Please note that the Department is authorized to bill for its review of technical submittals. The Department will bill its time pursuant to Section 1.7 of the Regulations. An invoice for the Department's review of the above-referenced document will be transmitted under separate cover.

If there are any questions concerning this letter, or if you would like to discuss this letter, please contact Tracie White at (303) 692-3452 (email: tracie.white@state.co.us) or Curt Stovall at (303) 692-2295 (e-mail: curtis.stovall@state.co.us).

Sincerely,



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Attachments: Exhibits A through F

cc: Cynthia Stephens, USAF SAF/GCN-SA
Steve Termaath, USAF AFCEC/CIB

ec: Paul Carroll, USAF AFCEC/CIBE
Stanley Pehl, USAF AFCEC/CIBW
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