

STATE OF COLORADO

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

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Colorado Department
of Public Health
and Environment

December 23, 2013

Mr. Brent Anderson, Esq.
President
IRG Redevelopment I, LLC
7991 Shaffer Parkway, Suite 300
Littleton, CO 80127

RE: *CDPHE Approval with Conditions of the Revised Lowry Vista Cap Penetration Plan for Subsurface Soil Borings on the Landfill Zone, Operable Unit 2 (OU2), Former Lowry Air Force Base, Colorado*

File: DMA LWY 13 OU2 15.8

Dear Mr. Anderson:

The Colorado Department of Public Health and Environment (“CDPHE”), Hazardous Materials and Waste Management Division (“the Department”) has completed its review of the above-referenced revised Cap Penetration Plan (dated December 10, 2013, received via email December 10, 2013) [“Revised CPP”]. The Revised CPP was prepared by IRG Assumptions, LLC for IRG Redevelopment I, LLC (“IRGI”). The Revised CPP was prepared in response to the Department’s letter dated February 26, 2013, which provided comments on IRGI’s original CPP (an undated document received by the Department on February 6, 2013).

As background, the Department and IRGI are negotiating a Consent Agreement to establish a regulatory framework between the Department and IRGI. Additionally, the Department and IRGI are negotiating a Modified Environmental Covenant in accordance with the Colorado Environmental Covenants Statute, Colorado Revised Statute §25-15-317 to §25-15-326, that would allow IRGI to execute the Revised CPP under the conditions of approval described herein. A draft version of the Modified Environmental Covenant is included as Attachment A to the Revised CPP.

The former Lowry Air Force Base Landfill Zone, Operable Unit 2 (“OU2”) was transferred by deed from the United States Air Force (“the Grantor”) to Lowry Economic Redevelopment Authority (“the Grantee”) via a Finding of Suitability for Early Transfer (“FOSET”) in January 2006 (“the Deed”). In addition to the above-referenced draft Modified Environmental Covenant, the FOSET and the Deed include environmental protection provisions to ensure protection of human health and the environment and to preclude any interference with ongoing or completed remediation activities.

Section VII.B. of the Deed includes the following United States Air Force warranty on OU2:

Pursuant to section 120(h)(3)(A)(ii)(II) of CERCLA, the United States covenants and warrants that any additional remedial action found to be necessary after the date of this Deed for contamination on the Property existing prior to the date of this Deed will be conducted by the United States. This warranty will not apply in any case in which any grantee of the Property, or any part thereof, is a potentially responsible party with respect to the Property before the date on which any grantee acquired an interest in the Property, or is a potentially responsible party as a result of an act or omission affecting the Property. For the purposes of this warranty, the phrase "remedial action necessary" does not include any performance by the United States, or payment to the Grantee from the United States, for additional remedial action that is required to facilitate use of the Property for uses and activities prohibited by those environmental use restrictive covenants set forth in section VII.D. below, as may be modified or released pursuant to section VII.D(3).

Section VII.D(2)(b)(i) of the Deed places the following Restrictive Covenants on OU2:

The Grantee shall not disturb the integrity of the final cover, liner(s), or any other components of the containment system, or the function of the monitoring systems unless necessary to comply with the requirements in the regulations of the Colorado Department of Public Health and Environment.

It is the intent of the Grantor and Grantee that these Restrictive Covenants bind the Grantee and shall run with the land and are perpetual, unless modified or terminated pursuant to this paragraph. It is also the intent of the Grantor and the Grantee that the Grantor will retain the right to enforce the Restrictive Covenants through the chain of title, in addition to any State law that permits the State to enforce the Restrictive Covenants. The Grantee or its successors and assigns may request that the Air Force approve a modification or termination of any of the Restrictive Covenants. The Air Force shall review any submitted information and may request additional information. Grantor recognizes that future Grantees may change the Environmental Covenants in accordance with the Environmental Covenant Statute including but not limited to providing for limited disturbance of the final cover of OU2. Grantor agrees to consider such changes set forth in the Environmental Covenant for its Restrictive Covenant. No modification or termination of a Restrictive Covenant shall be effective unless the Air Force has approved such modification or termination in writing, which approval shall not be unreasonably withheld or delayed.

The Department's conditions of approval for the Revised CPP are as follows:

Condition 1. The Air Force must provide written confirmation that the proposed activities contemplated under the Revised CPP, including the draft Modified Environmental Covenant (Attachment A of the Revised CPP), are consistent with the above-referenced Restrictive Covenants in the Deed.

Condition 2. The Air Force must provide written confirmation that the proposed activities contemplated under the Revised CPP, including the draft Modified Environmental Covenant (Attachment A of the Revised CPP), will not affect the Air Force's warranties in the Deed.

Condition 3. The Air Force must provide written approval of the Revised CPP before any work under the Revised CCP can commence.

- Condition 4.** The above-referenced Consent Agreement and Modified Environmental Covenant must be fully executed and recorded before any work under the Revised CPP can commence.
- Condition 5.** IRGI must provide financial assurance to the Department in accordance with the Colorado Regulations Pertaining to Solid Waste Sites and Facilities (“the Regulations”), 6 CCR 1007-2, Part 1, prior to commencement of any work under the Revised CPP.
- Condition 6.** IRGI must provide proof of its environmental insurance policy (referenced on page 6 of the Revised CPP) to the Department prior to commencement of any work under the Revised CPP.
- Condition 7.** Following satisfaction of Conditions 1 through 6 (above), IRGI must provide the Department with written notification of at least five calendar days identifying the planned start date for any work under the Revised CPP. Additionally, as part of the written notification, IRGI must provide the name, phone number, address and email address of the IRGI Project Manager (described on page 12 of the Revised CPP).
- Condition 8.** Condition 8 is a modification to the Revised CPP. The first sentence of Section 4.4.1, IDW Containers, of the Revised CPP states the following: *“Soil destined for off-site disposal will be placed in lined, U.S. Department of Transportation (DOT) approved 55 gallon drums that will be kept in the designated area.”* The word “soil” in this sentence may be misleading. As stated in Section 4.4 of the Revised CPP, *“All material brought to the surface below the upper two feet from ground surface will be considered IDW.”* As such, it is not only “soil” that requires containerization, characterization, and off-site disposal; rather, it is all material brought to the surface below the upper two feet that must be containerized and properly disposed.

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 Curt Stovall at (303) 692-2295 (e-mail: curtis.stovall@state.co.us).

Sincerely,

Curt Stovall, P.E., Project Manager
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