

Exhibit A

2013-11-15 Memo Regarding CDPHE Assurances from USAF



John W. Suthers
Attorney General

Cynthia H. Coffman
Chief Deputy Attorney General

Daniel D. Domenico
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW
Office of the Attorney General

Ralph L. Carr
Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

November 15, 2013

Prepared by: Jennifer Robbins, Assistant Attorney General

RE: CDPHE assurances from USAF

The requirements set forth are limited only to the activities set forth in the Soil Stockpile Plan (SSP) and Cap Penetration Plan (CPP) and do not contemplate or address any activities not specifically reviewed and approved in the SSP and CPP. Future disturbances will result in new requirements and assurances.

Before the Colorado Department of Public Health and Environment (CDPHE) can provide final approval of IRG's Soil Stockpile Plan (SSP) and Cap Penetration Plan (CPP), the United States Air Force (USAF) must provide a number of written assurances set forth herein. These assurances must be provided by a USAF representative with authority to provide such assurances.

- 1. USAF needs to provide assurance to CDPHE that any additional remediation that may be required as a result of IRG's proposed activities will continue to be the liability of the USAF.**

The current activities proposed by IRG are not remedial actions and not covered under the Enforceable Agreement. The proposed activities will have an impact on the existing remedy, which may result in future remedial activities necessary not contemplated by the Consent Agreement or Enforceable Agreement. As the USAF remains responsible for the waste left in place on the property, USAF needs to provide assurance to CDPHE that any additional remediation that may be required as a result of IRG's proposed activities will continue to be the liability of the USAF.

CDPHE requires this written assurance as it conflicts with the Department of Defense (DoD) *Policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property*. Under this policy, the DoD specifically takes the position that they will not pay for or perform remedial actions that are required to facilitate a use prohibited by deed restriction or other appropriate institutional control as such additional remedial action is not "necessary" within the meaning of CERCLA Section 120(h)(3).

The deed transferring the property from the United States of America to the Lowry Economic Development Authority (LERA) recorded in the real property records for the

City and County of Denver on January 18, 2006 at Reception No. 2006011849 (the “Deed”) excludes the United States from performance or payment of remedial actions necessary that is required to facilitate use of the Property for uses and activities prohibited by those environmental use restrictive covenants set forth on the Deed. The Restrictive Covenant for OU2 in the Deed prohibits the disturbance of the integrity of the final cover, liner and any other component of the containment system or functioning of the monitoring systems unless necessary to comply with the requirements in the regulations of CDPHE. IRG’s proposed activities are not requirements within the regulations of CDPHE.

Further, the USAF placed an Environmental Covenant on the property restricting the land use to open space / non-irrigated park.

This assurance may come in the form of a letter agreement between USAF and CDPHE that confirms USAF continued liability for additional remediation requirements that may result from IRG’s activities. Alternatively, this assurance may come in the form of a modification to the existing Enforceable Agreement including IRG’s activities within the scope of the existing Enforceable Agreement.

- 2. USAF will be responsible for any remedial actions necessary to return the property to a manner that is considered protective of human health and the environment as a result of IRG’s proposed activities.**

The Enforceable Agreement further limits USAFs commitments to the remediation under the Consent Agreement. The current activities proposed by IRG are not remedial actions and not covered under the Consent Agreement. IRG is not a party to the Consent Agreement. The Consent Agreement also does not contemplate the activities proposed by IRG.

CDPHE requires written confirmation that USAF will be responsible for any remedial actions necessary to return the property to a manner that is considered protective of human health and the environment as a result of IRG’s proposed activities.

Similar to Paragraph 1, above, this assurance may come in the form of a letter agreement between USAF and CDPHE that confirms USAF continued liability for additional remediation requirements that may result from IRG’s activities. Alternatively, this assurance may come in the form of a modification to the existing Enforceable Agreement including IRG’s activities within the scope of the existing Enforceable Agreement.

- 3. USAF needs to provide written approval to modify the Restrictive Covenants set forth in the Deed as required by the Deed.**

The Restrictive Covenant in the Deed is as follows:

“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 CDPHE.”

Any change in the Restrictive Covenant in the Deed may only be modified or terminated pursuant to the Deed provision as follows:

“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.”

This assurance can come in the form of signed and notarized confirmation from USAF that they agree to modify this Restrictive Covenant and provide specific language for the modification of the Restrictive Covenant. Alternatively, this assurance may come in the form of a recorded document in the real property records of the City and County of Denver modifying the Restrictive Covenant.

4. USAF also needs to provide written verification that USAF has received and reviewed the modified Environmental Covenant, as required by the Deed.

The Deed states:

“The Grantee shall notify the United States if the Grantee requests a modification of the Environmental Covenants under the State Environmental Covenant Statute, in accordance with C.R.S. §25-15-321.”

This assurance may come in the form of a letter from USAF confirming their notification and review of the modified Environmental Covenant.