

Exhibit B

2014-05-01 Memo Regarding CDPHE Clarifications Related to  
Lowry Vista



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**EXTERNAL MEMO**  
**regarding CDPHE clarifications related to Lowry Vista**

This memo supplements and further clarifies the November 15, 2013 memo titled CDPHE assurance from USAF (attached) and addresses only some of the outstanding legal issues and proposals related to the United States Air Force requirements for OU2 at the Lowry Air Force Base, also referred to as Lowry Vista. This memo in no way should be viewed as an exhaustive list of outstanding requirements and is not meant to provide any assurances or approvals.

**1. Restrictive Covenant in the Deed between USAF and LERA (the Deed).**

The Restrictive Covenant in the Deed reads: “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.”

**Issue:** IRGI’s request for approval of the soil stockpile plan, the cap penetration plan and the field investigation work plan as well as any future requests related to the proposed development at Lowry Vista are not related to the post closure care obligations or other remedial obligations for the property, which are currently the responsibility of LAC and USAF under the Consent Agreement, Corrective Action Plan and Enforceable Agreement. The requests from IRGI are

specifically related to future potential uses on the property and such activities are not necessary to comply with the requirements of the regulations of CDPHE.

While approval of the plans by CDPHE is required to perform the actions requested in the plans, the actions themselves are not required. Approval of these plans would be in direct violation of the Restrictive Covenant set forth in the Deed.

The Restrictive Covenant must be modified or terminated prior to CDPHE's approval. Under the Deed, "the Grantee or its successors and assigns may request that the Air Force approve a modification or termination of any of the Restrictive Covenants. [...] 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."

**Proposal:**

a. The USAF can provide a signed and notarized confirmation that they agree to modify this Restrictive Covenant and provide specific language for the modification of the Restrictive Covenant, which in accordance with the Enforceable Agreement Section III.F, will require CDPHE approval. This signed and notarized confirmation will need to be recorded in the real property records in order to provide notice to future owners that this Restrictive Covenant has been changed. Please also refer to Section 3 below related to Community Involvement.

b. The USAF and IRGI can record a modification to the Deed, which specifies the release or revisions to the Restrictive Covenant, which in accordance with the Enforceable Agreement Section III.F, will require CDPHE approval. Please also refer to Section 3 below related to Community Involvement.

## **2. Enforceable Agreement between CDPHE and USAF.**

The Enforceable Agreement holds USAF responsible for funding all necessary remedial or response actions on OU2 as set forth in the Consent Agreement and holds USAF liable “for contamination that remains at LAFB except to the extent that these liabilities are assumed and satisfied by LERA and LAC under the Consent Agreement and/or the Cooperative Agreement.” See Enforceable Agreement Section III.L. “LERA assumes responsibility for the completion of the Environmental Services required by the First Amendment to the Cooperative Agreement in accordance with and subject to the terms of this Agreement and the Consent Agreement.” See First Amendment to the Cooperative Agreement Section 301. In 2005/2006 CDPHE approved the closure of OU2 as LAC completed the active remedial obligations for OU2 as required under the Consent Agreement. OU2 is currently in post-closure care for ongoing operation and maintenance requirements.

The Enforceable Agreement limits USAFs commitments to the remediation under the Consent Agreement. The current activities proposed by IRGI are not remedial actions and not covered under the Consent Agreement. The Consent Agreement does not contemplate the activities proposed by IRGI.

**Issue:** While USAF expressly remains responsible for the “Non-Covered Conditions” and “Air Force Obligations” under both the Consent Agreement and the Enforceable Agreement, as well as the ongoing post closure care requirements, its liability for funding and obligations for continued remediation of the contamination above what has already been completed by LAC (i.e. the Environmental Services defined by the Cooperative Agreement) are exempted under the Enforceable Agreement.

As the activities proposed by IRGI are not remedial obligations of USAF, LAC or LERA and are for the property in which active remediation in accordance with the Consent Agreement have been completed, CDPHE requires a written assurance from USAF that USAF will remain responsible for the cleanup and costs to cleanup as a result of IRGI’s activities. This requirement is further necessary as the Department of Defense’s *Policy on Responsibility for Additional*

*Environmental Cleanup After Transfer of Real Property* 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). See Attachment 1.

**Proposal:**

a. USAF and CDPHE can enter into a new Enforceable Agreement specifically related to OU2 which provides that USAF will remain liable for cleanup and costs of any remedial action necessary to return the property to a manner that is considered by the State protective of human health and environment related to the existing contamination resulting from IRGI’s proposed activities.

b. USAF and CDPHE can amend the existing Enforceable Agreement through an amendment or addendum which provides that USAF will remain liable for cleanup and costs of any remedial action necessary to return the property to a manner that is considered by the State protective of human health and environment related to the existing contamination resulting from IRGI’s proposed activities.

c. USAF can provide written confirmation that the proposed activities for Phase 1 (the Soil Stockpile Plan, Cap Penetration Plan and Field Investigation Work Plan) are within the existing scope of work covered by the Enforceable Agreement and then enter into a new Enforceable Agreement for Phase 2 (development of the property) in accordance with either proposal a or b, above.

**3. Community Involvement**

The Consent Agreement requires active public involvement during all phases of the site characterization, corrective actions, long-term monitoring, and site close-out at LAFB. The proposed activities will have an effect on the existing remedy and/or be a change to the existing remedy at a future date. Pursuant to CERCLA, public participation is required in the selection of

the remedy. The remedy chosen for OU2 was a presumptive remedy and included community participation in this determination. The proposed activities are a significant change to the remedy and now require additional community outreach. Additionally, LAC is required to comply with the 2009 Community Involvement Plan which promotes continued communication and involvement between LAC and interested community members.

**Issue:** As IRGI is not a party to the Consent Agreement or Enforceable Agreement, either LAC or USAF will be responsible for ensuring that the public involvement requirements set forth in the Paragraph 52 of the Consent Agreement and under CERCLA are achieved. The Enforceable Agreement holds USAF responsible for performance of the Consent Agreement should LAC or LERA default. Therefore, if LAC does not perform the community involvement obligations, CDPHE will require USAF to takeover this obligation.

**Proposal:** IRGI prepare and implement a community involvement plan to take over the community involvement requirements set forth in the Consent Agreement and 2009 Community Involvement Plan related to OU2.



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November 15, 2013

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**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.

## **DoD Policy on Responsibility for Additional Environmental Cleanup after Transfer of Real Property**

**Background.** This policy is instituted within the framework established by land use planning practices and land use planning authorities possessed by communities, and the environmental restoration process established by statute and regulation. The land use planning and environmental restoration processes - two separate processes - are interdependent. Land use planners need to know the environmental condition of property in order to make plans for the future use of the land. Similarly, knowledge of land use plans is needed in order to ensure that environmental restoration efforts are focused on making the property available when needed by the community and that remedy selection is compatible with land use. This policy does not supplant either process, but seeks to integrate the two by emphasizing the need to integrate land use planning assumptions into the cleanup, and to notify the community of the finality of the cleanup decisions and limited circumstances under which DoD would be responsible for additional cleanup after transfer.

**Cleanup Process.** The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 USC 9601 et seq.) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP, 40 CFR 300) establish the requirements and procedures for the cleanup of sites that have been contaminated by releases of hazardous substances. CERCLA, furthermore, requires that a deed for federally owned property being transferred outside the government contain a covenant that all remedial action necessary to protect human health and the environment has been taken, and that the United States shall conduct any additional remedial action "found to be necessary" after transfer. Within the established restoration process, it is DoD's responsibility, in conjunction with regulatory agencies, to select cleanup levels and remedies that are protective of human health and the environment. The environmental restoration process also calls for public participation, so that the decisions made by DoD and the regulatory agencies have the benefit of community input.

**Land Use Assumptions in Cleanup Process.** Under the NCP, future land use assumptions are developed and considered when performing the baseline risk assessment, developing remedial action alternatives, and selecting a remedy. The NCP permits other-than-residential land use assumptions to be considered when selecting cleanup levels and remedies, so long as selected remedies are protective of human health and the environment. The U.S. Environmental Protection Agency (EPA) further amplified the role of future land use assumptions in the remedy selection process in its May 25, 1995, "Land Use in the CERCLA Remedy Selection Process" directive (OSWER Directive No. 9355.7-04).

**Development of Land Use Plans.** By law, the local community has been given principal responsibility for reuse planning for surplus DoD property being made available at Base Realignment and Closure (BRAC) installations. That reuse planning and implementation authority is vested in the Local Redevelopment Authority (LRA) described in the DoD Base Reuse Implementation Manual (DoD 4165.66-M). The DoD Base Reuse Implementation Manual calls for the LRA to develop the community redevelopment plan to reflect the long term needs of the community. A part of the redevelopment plan is a

"land use plan" that identifies the proposed land use for given portions of the surplus DoD property. The DoD is committed to working with local land use planning authorities, local government officials, and the public to develop realistic assumptions concerning the future use of property that will be transferred by DoD. The DoD will act on the expectation that the community land use plan developed by the LRA reflects the long-range regional needs of the community.

**Use of Land Use Assumptions in the Cleanup Process.** DoD environmental restoration efforts for properties that are to be transferred out of federal control will attempt, to the extent reasonably practicable, to facilitate the land use and redevelopment needs stated by the community in plans approved prior to the remedy selection decision. For BRAC properties, the LRA's redevelopment plan, specifically the land use plan, typically will be the basis for the land use assumptions DoD will consider during the remedy selection process. For non-BRAC property transfers, DoD environmental restoration efforts will be similarly guided by community input on land use, as provided by the local government land use planning agency. In the unlikely event that no community land use plan is available at the time a remedy selection decision requiring a land use assumption must be made, DoD will consider a range of reasonably likely future land uses in the remedy selection process. The existing land use, the current zoning classification (if zoned by a local government), unique property attributes, and the current land use of the surrounding area all may serve as useful indicators in determining likely future land uses. These likely future land uses then may be used for remedy selection decisions which will be made by DoD (in conjunction with regulatory agencies) in accordance with CERCLA and the NCP.

DoD's expectation is that the community at-large, and in particular the land use planning agency, will take the environmental condition of the property, planned remedial activities, and technology and resource constraints into consideration in developing their reuse plan. The February 1996 "Guide to Assessing Reuse and Remedy Alternatives at Closing Military Installations" provides a useful tool for considering various possible land uses and remedy alternatives, so that cost and time implications for both processes can be examined and integrated. Obviously, early development of community consensus and publication of the land use plan by the LRA or the land planning agency will provide the stability and focus for DoD cleanup efforts.

Applicable guidelines in EPA's May 25, 1995, "Land Use in the CERCLA Remedy Selection Process" Directive should be used in developing cleanup decisions using land use assumptions. For a remedy that will require restrictions on future use of the land, the proposed plan and record of decision (ROD) or other decision documents must identify the future land use assumption that was used to develop the remedy, specific land use restrictions necessitated by the selected remedy, and possible mechanisms for implementing and enforcing those use restrictions. Examples of implementation and enforcement mechanisms include deed restrictions, easements, inspection or monitoring, and zoning. The community and local government should be involved throughout the development of those implementation and enforcement mechanisms. Those mechanisms must also be valid within the jurisdiction where the property is located.

**Enforcement of Land Use Restrictions.** The DoD Component disposal agent will ensure that transfer documents for real property being transferred out of federal control reflect the use restrictions and enforcement mechanisms specified in the remedy decision

document. The transfer document should also include a description of the assumed land use used in developing the remedy and the remedy decision. This information required in the transfer documents should be provided in the environmental Finding Of Suitability to Transfer (FOST) prepared for the transfer. The DoD Component disposal agent will also ensure that appropriate institutional controls and other implementation and enforcement mechanisms, appropriate to the jurisdiction where the property is located, are either in place prior to the transfer or will be put in place by the transferee as a condition of the transfer. If it becomes evident to the DoD Component that a deed restriction or other institutional control is not being followed, the DoD Component will attempt to ensure that appropriate actions are taken to enforce the deed restriction.

The DoD expects the transferee and subsequent owners to abide by restrictions stated in the transfer documents. The DoD will reserve the right to enforce deed restrictions and other institutional controls, and the disposal agent will ensure that such language is also included in the transfer documents. If DoD becomes aware of action or inaction by any future owner that will cause or threaten to cause a release or cause the remedy not to perform effectively, DoD also reserves the right to perform such additional cleanup necessary to protect human health and the environment and then to recover costs of such cleanup from that owner under the terms of the transfer document or other authority.

**Circumstances Under Which DoD Would Return to do Additional Cleanup.** A determination may be made in the future that the selected remedy is no longer protective of human health and the environment because the remedy failed to perform as expected, or because an institutional control has proven to be ineffective, or because there has been a subsequent discovery of additional contamination attributable to DoD activities. This determination may be made by DoD as a part of the remedy review process, or could be a regulatory determination that the remedy has failed to meet remediation objectives. In these situations, the responsible DoD Component disposing of the surplus property will, consistent with CERCLA Section 120(h), perform such additional cleanup as is both necessary to remedy the problem and consistent with the future land use assumptions used to determine the original remedy. Additionally, after the transfer of property from DoD, applicable regulatory requirements may be revised to reflect new scientific or health data and the remedy put in place by DoD may be determined to be no longer protective of human health and the environment. In that circumstance, DoD will likewise, consistent with CERCLA Section 120(h), return to perform such additional cleanup as would be generally required by regulatory agencies of any responsible party in a similar situation. Also note that DoD has the right to seek cost recovery or contribution from other parties for additional cleanup required for contamination determined not to have resulted from DoD operations.

**Circumstance Under Which DoD Would Not Return to do Additional Cleanup.** Where additional remedial action is required only to facilitate a use prohibited by deed restriction or other appropriate institutional control, DoD will neither perform nor pay for such additional remedial action. It is DoD's position that such additional remedial action is not "necessary" within the meaning of CERCLA Section 120(h)(3). Moreover, DoD's obligation to indemnify transferees of closing base property under Section 330 (of the Fiscal Year 1993 Defense Authorization Act) would not be applicable to any claim arising from any use of the property prohibited by an enforceable deed restriction or other appropriate institutional control.

**Changes to Land Use Restrictions after Transfer.** Deed restrictions or other institutional controls put in place to ensure the protectiveness of the remedy may need to be revised if a remedy has performed as expected and cleanup objectives have been met. For example, the specified groundwater cleanup levels have been reached after a period of time. In such a case, the DoD Component disposing of the surplus property will initiate action to revise the deed restrictions or other institutional controls, as appropriate.

DoD will also work cooperatively with any transferee of property that is interested in revising or removing deed restrictions in order to facilitate a broader range of land uses. Before DoD could support revision or removal, however, the transferee would need to demonstrate to DoD and the regulators, through additional study and/or remedial action undertaken and paid for by the transferee, that a broader range of land uses may be undertaken consistent with the continued protection of human health and the environment. The DoD Component, if appropriate, may require the transferee to provide a performance bond or other type of financial surety for ensuring the performance of the additional remedial action. The transferee will need to apply to the DoD Component disposal agent for revision or removal of deed restrictions or other institutional controls. Effective immediately, the process for requesting the removal of such restrictions by a transferee should be specified by the disposal agent in the documents transferring property from DoD.

Making those revisions or changes will be considered by DoD to be an amendment of the remedy decision document. Such an amendment will follow the NCP process and require the participation by DoD and regulatory agencies, as well as appropriate public input.

**Disclosure by DoD on Using Future Land Use in Remedy Selection.** A very important part of this policy is that the community be informed of DoD's intent to consider land use expectations in the remedy selection process. At a minimum, disclosure shall be made to the Restoration Advisory Board (or other similar community group), the LRA (if BRAC) or other local land use planning authority, and regulatory agencies. The disclosure to the community for a specific site shall clearly communicate the basis for the decision to consider land use, any institutional controls to be relied upon, and the finality of the remedy selection decision, including this policy. In addition, any public notification ordinarily made as part of the environmental restoration process shall include a full disclosure of the assumed land use used in developing the remedy selected.