

Exhibit D

2015-9-10 and 2015-9-17 Email String Regarding Changes to
Consent Agreement

From: [Howard Kenison](#)
To: [Jennifer Robbins](#)
Subject: RE: IRGI Pre-Development Activities - Former Lowry Air Force Base - OU 2 Landfill
Date: Thursday, September 17, 2015 3:54:05 PM
Attachments: [image001.png](#)

Jennifer – This responds to your comments on the draft Consent Agreement and the Modified EC in your email of 9.1.0.15.

Consent Agreement

Your suggested changes are acceptable.

Rather than send you the full document, however, I have inserted the revised paragraphs 7 and 10 to be sure the corrections are, well, correct.

Your comment 1.a:

7. On December 6, 2013, IRGI submitted to the Department a *Field Investigation Work Plan* for OU2 and on December 19, 2013, IRGI submitted a *Field Investigation Work Plan Financial Assurance Cost Estimate for OU2* (“FIWP”). The FIWP outlines a scope of subsurface boring investigations on OU2. The Department approved the FIWP with conditions on December 31, 2013.

I deleted the language that referenced “redevelopment.”

Your comments 1.b and 1.c:

10. IRGI shall provide financial assurance in accordance with the Colorado Hazardous Waste Regulations (“the Regulations”), 6 CCR 1007-3, Part 266, related to its activities associated with its CPP and SSP, both as approved by the Department. The mechanism for IRGI’s financial assurance must be approved by the Department prior to commencement of any pre-development activities. The amount of financial assurance required will be the amount necessary to: (1) restore OU2 to its current closure condition, as set forth in the Phase 2 Corrective Action Plan, (2) cover the costs to repair and restore OU2 in response to the activities performed under the CPP, (3) cover the costs to repair and restore OU2 in response to the activities performed under the SSP, and (4) include costs that will be incurred by the Department for regulatory oversight to repair and restore OU2.

I corrected what was an inadvertent deletion on my part of the “SSP” from the third line and made subparagraphs 2 and 3 consistent with the balance of the paragraph.

Your comments 1.d and 1.e:

I am working with client to be sure we have the correct information for mailing and will insert that in the next draft.

Will be sure next draft has signature block for Gary B.

Modified EC:

I will make sure we have the correct address information for mailing and include that in the next draft.

If these changes are acceptable, I will revise the Consent Agreement and Modified EC and get them signed and forwarded to you.

You indicated in a separate email that you did not receive the signed CA and EC. I am not sure why you didn't receive the attachments, as others copied on the email did receive all attachments. Nonetheless, in light of your comments and the revisions, I will not resend those signed documents.

Please call if you have any questions, Howard.



Howard Kenison | Partner | 303.454.0505 | hkenison@lindquist.com | [Biography](#)

Legal Administrative Assistant: Lorri Parker | 303.454.0531 | lparker@lindquist.com

From: Jennifer Robbins [mailto:Jennifer.Robbins@state.co.us]

Sent: Thursday, September 10, 2015 1:22 PM

To: Howard Kenison

Cc: White, Tracie (tracie.white@state.co.us); Lee J. Pivonka (Lee.Pivonka@state.co.us); Monica Sheets (monica.sheets@state.co.us)

Subject: RE: IRGI Pre-Development Activities - Former Lowry Air Force Base - OU 2 Landfill

Howard: As per our conversation earlier today, this email is in response to the August 11, 2015 email you sent me with the documentation listed below.

1. [Consent Agreement:](#)
 - a. The changes proposed in Paragraph 7 that read “to support IRGI’s redevelopment of the site” must be deleted. CDPHE will only approve regulatory requirements to ensure protection of human health and the environment and cannot approve the redevelopment of the site.

b. Proposed Paragraph 10 financial assurance remains a requirement for the soil stockpile plan (SSP). Financial assurance is required because the stockpile will need to be graded, reseeded, etc., should the development not proceed. Therefore, the removal of the reference to “SSP, both,” on line 3 is unacceptable to my Client.

c. Proposed paragraph 10 item (3). Your suggested change from SSP to CPP is unacceptable. Not only does the change make it so item number (2) and (3) are identical but it eliminates the financial assurance requirement for the SSP. See comment 1(b) above.

d. The address for notices goes to a Cincinnati address but the address of the entity on file with the Colorado Secretary of State is the Littleton address. Other notifications on file with CDPHE go to a California address. Please clarify the principal mailing address of the entity IRGI Redevelopment, LLC. The notice will go to the address of record with the secretary of state and a copy can go to a separate address to Peter Goffstein.

e. Signatures for the State will be for Gary Baughman, Director of the Hazardous Materials Waste Management Division. Neither Curt Stovall or Tracie White have signing authority for this consent agreement.

2. Modified Environmental Covenant: same comment as (1)(d) above regarding the notice contact information.

3. Air Force Letter:

a. The letter provided by the Air Force does not sufficiently meet the conditions required by the Soil Stockpile Plan approval letter dated December 31, 2013.

b. The Air Force does not state that the proposed activities do not impact the integrity of the cover. Instead the Air Force states that it is “our understanding [...] based on the information you provided in your letter” that the SSP will not impact the integrity of the current final cap on the landfill. The letter sent to the Air Force is a representation from IRG only that the landfill cap will remain undisturbed because the material will be placed on the top of existing landfill and vegetation. However, the CDPHE and AGO repeatedly have stated that the landfill cover will be disturbed by the proposed activities and the proposed activities are considered a change in the selected remedy, neither of which are provided in the letter to the Air Force. I prepared a letter dated November 15, 2013 which specifically states “the proposed activities will have an impact on the existing remedy, which may result in future remedial activities not contemplated by the Consent Agreement or Enforceable Agreement.” In previous meetings between CDPHE and IRG this position has continuously been reiterated.

c. The Air Force letter only states that if the proposed activities do not disturb the integrity of the cover then the activities will not violate the restrictive covenant or impact the warranties. However, CDPHE’s position remains that the proposed

activities will impact the cover. Further, the proposed activities are not being conducted to comply with the requirements of the CDPHE regulations and therefore automatically violate the restrictive covenant. The USAF statement is not sufficient to meet CDPHE's conditions 1 and 2 from the December 31, 2013 approval letter.

d. The Air Force letter states that it does not have legal authority to approve the SSP. CDPHE does not agree with this statement. The SSP is a significant change to the remedy. As the waste in place remains the responsibility of the USAF, any resulting remedial obligations will remain with the Air Force pursuant to CERCLA, and the Cooperative Agreement. USAF has legal authority under CERCLA to approve the SSP and any other plan that will have ongoing effects to the waste left in place. I have tried to discuss with the USAF attorney, Cindy Stephens, but she has not returned my calls.

4. Signed documents: I did not receive any signed documents from Peter Goffstein as indicated in your email from August 11, 2015

It remains CDPHE's position that USAF must approve the SSP prior to IRG performing any work described in the SSP. As previously suggested by IRG and CDPHE, we believe the best path forward is to meet with the USAF and discuss these issues collaboratively in order for IRG to be able to move forward with its requests under the SSP. A meeting without USAF participation will not resolve the above identified issues related to the Air Force approval. Accordingly, I do not believe we need to meet on September 17, 2015 as originally planned. We should, however, schedule a joint meeting with USAF as early as possible.

Please contact me if you would like to discuss this further or to set up a time we can discuss with the USAF.

Jennifer Robbins

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From: Howard Kenison [<mailto:hkenison@lindquist.com>]
Sent: Tuesday, August 11, 2015 3:12 PM
To: Jennifer Robbins
Cc: 'Peter Goffstein'; 'Wayne Dorband'; 'ira star'
Subject: IRGI Pre-Development Activities - Former Lowry Air Force Base - OU 2 Landfill

Jennifer: I hope your summer has been going well.

This email follows up our meeting of June 16 at CDPHE at which we discussed the limited "Phase I –Pre-Development" activities of IRGI on the Lowry Air Force Base OU 2 Landfill and the documentation your client requested to allow IRGI to proceed with the Soil Stockpile Plan (SSP) and, ultimately, the other pre-

development investigations.

In that regard I offer the following:

1. Consent Agreement: Attached is a pdf of the Consent Agreement (CA) signed by Mr. Goffstein. This version updates the CA I received from you dated March 7, 2013. I have attached a redline comparison version, which allows you to see the changes between the revised and original CA versions. I trust that you will find the revisions acceptable. I will forward the original signed CA by regular mail for signature by CDPHE personnel.
2. Modified Environmental Covenant: Attached is a .pdf of the Modified Environmental Covenant (MEC) signed by Mr. Goffstein. This signed version is revised to show the proper location of the original EC in the Denver Clerk's office. I have attached a redline comparison version which compares the signed MEC with CDPHE's version that you emailed to me on February 13, 2015. I will forward the original signed CA by regular mail for signature by CDPHE personnel.
3. Air Force Letter: Finally, I attach a .pdf of a letter dated July 31, 2015 from Dr. Stephen TerMaath, Chief of the BRAC Program Management Division of the Air Force, along with a copy of IRGI's undated letter sent on June 15, 2015 and received by the Air Force on July 8. As you will read, the Air Force is fully aware of the activities proposed by the SSP and believes that such activities "will not violate the restrictive covenants or impact the warranties in the OU 2 deed."

The regulatory oversight under the Consent Agreement signed by Mr. Goffstein confirms the Department's ability to protect the public health and environment during IRGI's limited pre-development activities.

Therefore, we believe these signed documents in conjunction with the Air Force letter provide the Department with the legal basis to approve IRGI proceeding with the limited pre-development activities on the landfill, including the SSP.

Of course, IRGI understands that to move forward with the "Phase 2 - Development" activities on OU 2, the Deed will need to be amended to remove the use restrictions on the Landfill and the Environmental Covenant will need to be further amended.

We are available to discuss these items with you and your clients as needed and look forward to your earliest response.

Best regards, Howard.

LINDQUIST

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