

**IRG Redevelopment I, LLC
c/o Lowry Development Group
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November 23, 2015

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Via Regular and Electronic Mail

Re: Former Lowry Air Force Base OU2 Landfill
Formal Request

- Modification of Environmental Covenant Use Restrictions
- Modification of Deed Restrictive Covenants

Dear Dr. TerMaath:

This letter seeks to resolve the impasse that exists between the United States Air Force (“Air Force”) and the Colorado Department of Public Health (“Department” or “CDPHE”) regarding the Lowry Vista redevelopment project (“Project”) located on Operable Unit 2 (“OU2” or “Landfill”) - the former Lowry Air Force Base landfill. Despite IRG Redevelopment I, LLC’s (“IRGI”) repeated and express willingness to undertake studies, investigations and to provide financial assurances to move the Project forward, this governmental impasse has effectively halted development of the Project.

Therefore, this letter serves as IRGI’s formal request that the Air Force approve modifications to the Use Restrictions in Colorado’s Environmental Covenant and modifications to the Restrictive Covenants in the 2006 Deed.

IRGI has submitted a formal application to CDPHE requesting (i) modification of the Environmental Covenant, (ii) approval of the modified Deed Use Restrictions and (iii) approval to allow IRGI to implement the Work Plans. (See, **Attachment A**, letter from Peter Goffstein to CDPHE, November 23, 2015 “**CDPHE Letter**”).

Approval of the modifications to the EC and Deed by the Air Force and CDPHE will remove the legal hurdles that the Department claims prevent it from using its lawful authority and responsibility to oversee the redevelopment of the Landfill and will result in financial assurances to the Air Force in the event of the discovery of unknown conditions at the Landfill

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during and post-development. In addition, these approvals will allow IRGI to move forward with the Work Plans and development of the Project.

We look forward to your earliest response to the requests in this letter.

I. Background

A. Efforts to Obtain Air Force Cooperation

In 2006, when OU2 was transferred to IRGI, the Air Force was fully aware that IRGI proposed to redevelop the landfill. Indeed, in 2008 IRGI invested considerable time and monies to obtain the necessary local government entitlements and approvals to allow development of Lowry Vista.

Since at least 2012 IRGI has been in continual discussions with Air Force staff and legal counsel as well as CDPHE to obtain approval for IRGI to perform certain limited investigation activities on OU2 and to develop the Project.

These efforts include:

(i) December 27, 2012 - Email correspondence to the Air Force from the Colorado Attorney General's Office ("AGO") providing a detailed list of documents that CDPHE requires to "move forward with the Lowry Vista proposed development" (*See Attachment B*, email from J. Robbins to P. Carroll and S. Rupe);

(ii) November 18, 2013 - Correspondence from the AGO repeating CDPHE's position regarding the need for Air Force approvals of IRGI's proposed pre-development investigation activities on OU2 (*See Attachment C*, letter from J. Robbins to S. Rupe);

(iii) December 12, 2013 - Correspondence from IRGI to the Air Force describing in detail the status of the Project, which also requested your agency's approval of the pre-development investigations (*See Attachment D*, letter from B. Anderson to S. Pehl);

(iv) September 2014 - Meetings with Air Force staff in San Antonio to discuss the pre-development investigations, approvals and development of the Project;

(v) December 9, 2014 - Submittal of an extensive memorandum, requested by the Air Force, outlining the benefits and potential liabilities of redevelopment of the landfill (*See Attachment E*, Memorandum to S. TerMaath from IRGI, "**Benefits Memorandum**"); and,

(vi) 2014 - 2015 - Numerous email exchanges and phone calls with Air Force staff and legal counsel seeking Air Force review and approval of IRGI's pre-development investigations.

Unfortunately, and despite our good faith efforts, we have been unable to get the Air Force to focus on the Project. Despite the Air Force's assertions that it wishes to cooperate with IRGI, we believe that nearly three years seeking Air force involvement, commitments and approvals, is an unreasonable delay and has effectively halted IRGI's ability to proceed with the Project. This delay has resulted in significant increased costs and risk to the Project.

B. Work Plans and Conditional Approvals

IRGI has requested approval from CDPHE and the Air Force of certain pre-development Work Plans and activities. These include, among other items, the performance of a Revised Plan to Stockpile Soil on the OU2 landfill cap ("SSP"), a Lowry Vista Cap Penetration Plan ("CPP") and a Field Investigation Work Plan ("FIWP") (collectively "Work Plans").¹

In December, 2013, CDPHE conditionally approved these Work Plans, in three separate letters to IRGI. (See **Attachment F**; **Attachment G**; **Attachment H**, respectively, SSP, CPP, FIWP, **conditional approval letters**).² The Department imposed three conditions requiring Air Force action before IRGI could proceed with these limited, but important, environmental investigations. The Air Force Conditions are:

First, that the Air Force provide "written confirmation" that the Work Plans are "consistent with the ... Restrictive Covenants in the Deed;"

Second, that the Air Force provide "written confirmation" that the activities proposed under the Work Plans "will not affect the Air Force's warranties in the Deed;" and,

Third, that the Air Force provide "written approval" of the Work Plans before IRGI may commence the work.

While IRGI does not necessarily agree with the Department's position that the Air Force Conditions are legally required, we have made a good faith effort to obtain the requested approvals from the Air Force. Nonetheless, the Air Force has taken the position that it has no requirement to, and will not, approve the Work Plans and will not provide the written confirmations requested by the Department.

This impasse between the state and federal governments has, unfortunately, halted IRGI's efforts to proceed with these important environmental investigations and IRGI's plans for development of Lowry Vista.

¹ As a result of these investigations, there may be additional follow-on activities, studies and work plans to be performed on and around the OU2 landfill.

² IRGI first advised the Air Force of these approvals in December, 2013 and the Department has copied the Air Force on its approval letters. Moreover, these conditions are essentially the same as those indicated in the December 2012 correspondence from the Colorado Attorney General's office to the Air Force.

C. Environmental Covenant - Use Restrictions

The 2006 Deed was issued in conjunction with a recorded Environmental Covenant granted to the State of Colorado. (See **Attachment I**, Environmental Covenant “**EC**”; see also **Attachment J**, Deed § VII.D.1.)

The current land Use Restriction in the EC states: “*Unless the Covenant is modified in accordance with the State’s statute and regulations*, OU2 will only be used as open space/non-irrigated park following closure.” (EC§1.a, emphasis added.) In addition, the EC includes restrictions that limit activities that might impact the final cover and remedy on OU2. (EC §1.b)

Pursuant to the Deed, the Air Force “recognizes that [IRGI] may change the [EC] in accordance with [Colorado’s] Environmental Covenant Statute including but not limited to providing for limited disturbance of the final cover of OU2.” (Deed §VII.D.2(b)). The Air Force “agrees to consider such changes set forth in the Environmental Covenant for its Restrictive Covenant.” (*Id.*) The Deed also provides that the Air Force is to be notified if IRGI requests a modification of the EC. (Deed §VII.D.1).

D. Deed - Restrictive Covenants

The Deed³ includes a separate Restrictive Covenant associated with OU2 (“RC”). Under the RC, IRGI, as the owner, “shall not disturb the integrity of the final cover ... unless necessary to comply with the requirements in the regulations of the Colorado Department of Public Health and Environment.” (Deed § VII.D.2(b)).

IRGI may, however, “request that the Air Force approve a modification or termination of any of the Restrictive Covenants” and the Air Force is obligated to “review any submitted information and may request additional information.” (*Id.*) No modification of the RC is effective unless the Air Forces approves of same; provided, however, that such “approval *shall not be unreasonably withheld or delayed.*” (*Id.*, emphasis added.)

E. Enforceable Agreement

The Enforceable Agreement between the Department and the Air Force includes the Air Force’s commitments that “all remedial action necessary to protect human health and the environment ... will be taken.” The EA allows the Department to enforce these commitments against the Air Force. (See **Attachment K**, Enforceable Agreement, “**EA**”)

The EA includes a provision that arguably requires the Department’s review and approval of the particular modification to the Deed RC’s sought by IRGI. (EA §III.F.)

³ The Deed was subsequently transferred to IRGI by Bargain and Sale Deed on January 19, 2006.

Importantly, IRGI's Modified RC and Modified EC do not alter, in any way, the Air Force's ultimate remedial obligations under the EA (or, for that matter, under CERCLA⁴); nor do the proposed changes modify in any way the Department's ability to enforce the Air Force's EA commitments.

II. Modifications to EC and Deed

In an effort to resolve this impasse, our environmental consultant and our environmental counsel recently spoke with Ms. Cynthia Stephens. As a result of that discussion we are providing this letter as IRGI's formal request that the Air Force:

- (1) Approve modifications to the Use Restriction in the Environmental Covenant;
- (2) Approve a modification of the Restrictive Covenant in the Deed; and,
- (3) Provide written confirmation that the Work Plans will not affect the Air Force's warranties in the Deed.

A. Notice To Air Force - Modification to Environmental Covenant

As indicated above, this letter serves as formal notice to the Air Force that, contemporaneously with this letter, IRGI is submitting an application to CDPHE for a Modified EC pursuant to Colorado's Environmental Covenant Statute and as required by certain agreements related to OU2. *See* C.R.S. § 25-15-317, *et seq.*

The current Use Restriction states: "Unless the Covenant is modified in accordance with the State's statute and regulations, OU2 will only be used as open space/non-irrigated park following closure."

IRGI's proposed modification states: "Unless this Environmental Covenant is modified in accordance with the State's statute and regulations, the Property (OU2) may be developed in accordance with land use and development plans approved by local governments with jurisdiction over the Property." (*See* **Attachment L**, "**Modified EC**," §1.a.)

The Modified EC also includes provisions to allow IRGI to conduct investigation activities on OU2. This modification is intended to allow the disturbance of the final cover and other components of the OU2 remedy, *where such activities are allowed and approved by CDPHE* pursuant to applicable laws and regulations. (Modified EC, §§1.c. and d.).

Pursuant to the Deed, the Air Force "shall not" unreasonably withhold or delay its approval of the proposed modification to the EC. (Deed §VII.D.2.(b)).

⁴ The Comprehensive Environmental Response Compensation and Liability Act, a/k/a, Superfund.

1. **Supporting Information – Modified EC**

IRGI has provided the Department with supporting information and data to show that the proposed change in land use will ensure protection of human health and the environment during development and post-development (CDPHE Letter §II.A). For example, development of Lowry Vista will essentially create “two impermeable caps over much of the surface area of the landfill,” which will, in turn, reduce pathways from residual waste materials to the public. Moreover, once the Project is completed, long-term risks will be addressed with mitigation measures such as vapor barriers, no groundwater use, no surface ponding of water, and on-going monitoring. (Benefits Memorandum, pp. 2, 5.)

Moreover, as we have previously discussed with the Air Force, the long-term operation and monitoring costs will be borne by the Lowry Vista Metro District, which has statutory authority to impose taxes to pay for environmental obligations related to development and future uses of the Landfill. (Benefits Memorandum, §2) In short, the current remedy for OU2 will be significantly enhanced and improved by development of the Project and provide long-term protection of human health and environment.

B. Formal Request to Air Force - Modification Deed Restrictive Covenant

IRGI is formally requesting that the Air Force approve a modification of the Restrictive Covenant in the Deed. (Deed §VII.D.2(b)). This modification is intended to allow the disturbance of the final cover and other components of the OU2 remedy, *where such activities are allowed and approved by CDPHE* pursuant to applicable laws and regulations. (See **Attachment M, “Modified RC”**).

This modification, if approved by the Air Force and CDPHE, expressly authorizes the Department to approve, *without further involvement of the Air Force*, work plans that may disturb the integrity of the final OU2 remedy, as long as such plans *are allowed and approved by CDPHE* pursuant to applicable laws and regulations. (Modified RC §VII.D.2(b)(i))

We believe that approval by the Air Force and CDPHE of the Modified EC would address the Department’s condition that the Work Plans be “consistent” with the RC and remove any need for the Air Force to approve the Work Plans or future work plans and activities.

Of course, no modification of the RC is effective unless the Air Forces approves of same; provided, however, that such “approval *shall not be unreasonably withheld or delayed.*” (Deed §VII.D.2(b)). Although it is not clear that CDPHE must approve a change to the Restrictive Covenants, in the interests of transparency and cooperation, IRGI has requested that the Department review and approve the Modified RC. (CDPHE Letter §III; EA §III.F)

IRGI believes that Air Force and Department approval of the Modified EC and RC will resolve the Department’s first and third Air Force Conditions.

III. Deed Warranties

A. Air Force Written Confirmation

With regard to the second Air Force Condition, we note that the Deed warranties essentially restate the law as set forth in CERCLA §120(h)(3)(A)(ii)(II), namely, that “any additional remedial action found to be necessary after the date of ...transfer shall be conducted by the [Air Force].” The Air Force’s obligation to comply with CERCLA §120’s warranty requirements are statutory and perpetual; these obligations cannot be obviated by the Air Force.

Although IRGI does not believe further confirmation is necessary, it appears that the Air Force can readily satisfy the Department’s second Air Force Condition by a written confirmation reaffirming the agency’s requirement to comply with CERCLA §120.

B. Financial Assurances – Unknown Conditions

To provide an additional layer of financial protection, over and above the Air Force’s CERCLA § 120 obligations, IRGI is prepared to provide financial assurances to the Air Force and the Department. (*See, Attachment N*, Letter from Burns & McDonnell to Peter Goffstein, IRGI, July 24, 2015, “**Assurance Letter**”)⁵

The Assurance Letter develops worst case scenarios that assume: (i) a “reasonable maximum likelihood” of discoveries of contaminants during and post-development; and, (ii) that IRGI abandons the Project. Cost estimates are established for each of these worst case scenarios. Prior to beginning Project development and once substantial development is complete, IRGI will submit to CDPHE and the Air Force financial instruments suitable to cover the cost estimates for each scenario.

IV. Financial Considerations – Change in Land Use

During our recent call, Ms. Stephens also indicated that the Air Force may require “financial considerations” for any change in land use from the current open space to development. As you know, Lowry Economic Redevelopment Authority made a substantial payment for the landfill property. We are unaware, however, of any provision of applicable law that would require IRGI to provide additional financial considerations to the Air Force for a change in land use restrictions. Nonetheless, IRGI is willing to discuss further financial considerations with the Air Force. To assist us we ask that the Air Force provide us with any legal authority that would support the agency’s request for additional financial consideration.

⁵ These assurances are in addition to the financial requirements set forth in the approved Work Plans. Note that the Assurance Letter is also being submitted in support of IRGI’s application to the Department for the Modified EC.

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V. Conclusion

IRGI hereby formally requests that the Air Force:

- (i) Approve the Modified RC;
- (ii) Approve the Modified EC; and,
- (iii) Provide the Department with written confirmation reaffirming the Air Force's obligation to comply with CERCLA §120 and the EA.

Of course, IRGI is available at your earliest convenience to meet and discuss this application with you, your legal counsel and the Department.

Very truly yours,



Peter Goffstein

cc via email only:

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