

# **ATTACHMENT K**

**November 23, 2015 Letter,  
IRGI to Dr. Stephen TerMaath  
U.S. AIR FORCE**

**ENFORCEABLE AGREEMENT (“EA”)**

# **ATTACHMENT L**

**November 23, 2015 Letter,  
IRGI to Dr. Stephen TerMaath  
U.S. AIR FORCE**

**MODIFIED ENVIRONMENTAL COVENANT  
("MODIFIED EC")**

# **ATTACHMENT M**

**November 23, 2015 Letter,  
IRGI to Dr. Stephen TerMaath  
U.S. AIR FORCE**

**MODIFIED RESTRICTIVE COVENANT  
("MODIFIED RC")**

# **ATTACHMENT N**

**November 23, 2015 Letter,  
IRGI to Dr. Stephen TerMaath  
U.S. AIR FORCE**

**LETTER, JULY 24, 2015, BURNS & MCDONNELL TO  
IRGI (“ASSURANCE LETTER”)**



July 24, 2015

Peter Goffstein  
IRG Redevelopment I, Inc.  
1100 Santa Monica Boulevard  
Suite 850  
Los Angeles, CA 90025

Re: Development and Post Development Financial Assurance Cost Estimate, OU2 Landfill,  
Lowry Vista Project, Denver, Colorado

Dear Mr. Goffstein:

Burns & McDonnell Engineering Company, Inc. (Burns & McDonnell) is transmitting on behalf of IRG Redevelopment I, LLC (IRGI) the enclosed financial assurance cost estimates for the Lowry Vista development project. Two estimates are included: 1) An estimate of remediation during development (During Development Scenario or DDS) and; 2) An estimate of remediation after development (Post-Development Scenario or PDS). The RS Means Cost Works 2015, 19th Annual Edition was used for the majority of the construction cost estimating. Vendor/contractor estimates and Burns & McDonnell's professional remediation and site experience was used for the remainder.

The DDS and PDS cost estimates are presented on the attached Tables 1 and 2, respectively. Both scenarios are believed to have a reasonable maximum likelihood of occurring. Each scenario is described in detail in the paragraphs below. Multiple discoveries may arise during the course of development; however, the scenarios presented assume that the developer will abandon the project, leaving the burden of affecting the remediation on the state of Colorado. This will only occur once, thus only one scenario is presented for each phase of development.

### **During Development Scenario**

The DDS assumes that drums of chlorinated solvents are discovered during waste excavation at the northwest corner of the site and that IRGI then stops work and does not provide for the remediation. The following assumptions have been made for this scenario:

- **Site Setting**
  - During the redevelopment process, waste excavation from the northern end will occur in an orderly manner that minimizes the amount of exposed waste at any one time. It is anticipated the maximum amount of exposed waste at any one time will be about 20,000 square feet (sf). All waste will be excavated from a given open area and the site regraded prior to penetrating the cap to excavate another 20,000 sf. The northern remaining end of the existing cap will be transitioned to the new grade as the excavation progresses
  - At the time of encountering the drummed waste, it is assumed that IRGI completes or has completed the majority of the excavation of the exposed waste, and constructs temporary storm water controls, and installs the cap transition in the 1-acre area affected. This would leave a



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cordoned off area of drums and solvent-contaminated waste/soil/debris and a 100 foot length of cap to be extended to the post excavation grade.

- **Procurement and Design**

- It is assumed that the Colorado Department of Public Health and Environment (CDPHE) would hire an environmental consulting firm and an environmental contractor to manage the removal and disposal of the hazardous waste. Their scope would consist of work plan preparation, field implementation, and Construction Quality Assurance (CQA) certification report preparation.
- The work plan is assumed to cost \$10,000.
- CDPHE will review and approve the work plan and report at a cost of \$125/hour. It is assumed that 40 labor hours will be expended to procure the engineer and review the work plan and report.
- CDPHE will also procure a remediation contractor to perform the excavation and disposal. It is estimated that 20 labor hours will be expended to procure the remediation contractor.

- **Site Preparation**

- Mobilization and demobilization were estimated at a total of ten percent (5 percent each) of the total field construction costs. This covers the cost to deliver and pick up a field trailer and heavy equipment from the site and to establish and remove a staging area and decontamination area.
- Workers will be required to enter the excavation to handle drums and place solvent-contaminated soil in drums. It is assumed the workers will be performing the work in Level C personal protective equipment (PPE) and will be entering and exiting the area through a contamination reduction zone (CRZ).
- It is assumed a CRZ of approximately 500 square feet will be established and shower unit will be provided.
- Storm water controls will be upgraded to allow equipment access and to accommodate the Level C exclusion zone and CRZ.

- **Hazardous Waste Management**

- 10 intact drums of liquid chlorinated solvent are assumed to be encountered during the waste excavation on the north side of the site.
- The chlorinated solvent drums and immediately adjacent waste/debris/soil that has been contaminated by the solvent are assumed to classify as hazardous and require incineration for disposal.
- It is assumed 200 55-gallon drums (~50 cy) of solvent-contaminated waste/debris/soil will be excavated and containerized.
- Drums containing liquid and soil will be transported to the Clean Harbors Kimball Incineration Facility in Kimball, Nebraska for disposal.



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- An additional 200 cy of non-hazardous waste/soil/debris will be encountered during the excavation and require off-site disposal. This material will be trucked in 20 cy containers and disposed of at the Denver Arapahoe Disposal Site (DADS) Landfill in Aurora, Colorado.
- It is assumed partial dewatering of the excavation will be necessary for the removal of the drums and soil. The groundwater will be lowered using two well points pumping at 4 gallons per minute (gpm) each. Groundwater will be pumped into tanks before being treated using granular activated carbon and reinjected to groundwater through a third well point. A Class V groundwater injection permit will be obtained from US Environmental Protection Agency.
- **Site Reclamation**
  - The cap extension design is assumed to consist of sloping the waste/debris/soil at the transition at a 3:1 (horizontal:vertical) or flatter slope, placing 18 inches of intermediate cover over the waste, installing a geomembrane-backed geosynthetic clay liner (GCL) over the slope and then placing three feet of clean soil cover over the GCL.
  - It is assumed that 10 acres of excavated area will remain after remediation of the chlorinated solvents. This area will require minimal regrading and then revegetation.
- **Management and Oversight**
  - It is assumed that the environmental consultant will have field engineers/scientists at \$120/hour who will spend 200 hours total to oversee the site remediation, the cap extension, and site reclamation. They will also provide confirmation testing, and help prepare the certification report.
  - The environmental consultant will also have a construction quality assurance (CQA) engineer/project manager who will oversee the entire project and prepare and certify a completion report. It is assumed that the CQA Engineer will need 50 hours total on the project at \$190/hour.
  - CDPHE will visit the site three times and review and approve the CQA Report at a cost of \$125/hour (assumed 25 hours needed).

The estimated cost for the DDS in 2015 dollars is \$390,000. A detailed breakdown of the estimate is provided on Table 1.

### **Post Development Scenario**

The PDS assumes an area of waste that cannot be excavated begins contaminating the groundwater and must be remediated using groundwater treatment. Specifically the scenario is based on the release of approximately 50 gallons of chlorinated solvent. The release will not be discovered until the development is complete and groundwater contamination is detected at the current down gradient monitor wells. As with the DDS, it is assumed that IRGI (or the planned Lowry Vista Metro District) does not provide for the remediation. The following assumptions have been made for this scenario:



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- **Site Setting**

- It is assumed that the groundwater detections occur on the west half of the property, immediately downgradient of a planned big-box developer.
- At the time of the groundwater detections, construction of all buildings, utilities, roadways, and landscaping completed.
- All buildings in the development will be constructed with a passive vapor intrusion system consisting of the Cupolex or similar style “aerated” concrete floor. The passive systems will be tied into a blower and power. Thus if an active system is required, only a switch will need flipped. The Cupolex system ([www.cupolex.com](http://www.cupolex.com)) is a patented concrete forming system that utilizes interlocking plastic platforms (similar in shape to a footstool) on top of which a concrete slab is poured. The resulting very large void space beneath the concrete slab provides effective passive venting and, if an active system is required, a vacuum can be applied by a very small blower size.
- The source of the solvent release is assumed to be located beneath the Walmart, making excavation of the source not possible.

- **Procurement and Design**

- It is assumed that CDPHE would hire an environmental consulting firm to determine the nature and extent of the contamination as well as a remediation work plan. Their scope would consist of:
  - Planning and performance of a field investigation to identify the nature, extent, and source of the release.
  - Preparation of an investigation report and remediation work plan.
  - Implementation of the remediation work plan.
  - Long-term monitoring of the affected area.
- CDPHE’s cost is \$125/hr. It is assumed that 150 labor hours will be expended to procure the consultant, oversee the investigation and review the investigation report and remediation work plan.

- **Remediation**

- Mobilization and demobilization were estimated at a total of 5 percent of the total field costs. This covers the cost to deliver and pick up equipment from the site, stormwater controls, and to establish and remove a staging area.
- The groundwater treatment system will include both pumping and injection wells to maintain control of groundwater and accelerate solvent removal by increasing the gradient through the source. Two pumping wells and three injection wells will provide efficient capture and improved recovery. The pumping wells will be located in the excavated area north of Walmart and the injection wells will be located in the parking lot south of Walmart.
- Four monitoring wells will be installed downgradient of the pumping wells to monitor groundwater flow downgradient.

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- Hydraulic conductivity based on data collected during the OU2 investigation is assumed to be approximately 1 ft/day.
- Thickness of the water bearing unit is assumed to be variable based on topographic setting but generally less than 30 feet.
- Using these hydrogeologic assumptions, an analytical groundwater model was used to estimate that 2 wells with a combined extraction rate of 6 to 8 gpm would capture the contaminant plume resulting from the release scenario.
- Based on distance from the source and anticipated behavior for the solvent, the extracted groundwater is assumed to contain an initial concentration of 10 ppm.
- As pumping progresses the expected concentration will decrease and the long term average concentration is assumed to be 1 ppm for the purpose of estimating operation lifetime.
- Using the total volume of release, pore volume removal of the extraction system and the assumed average removal concentration the time of pump and treat operation is calculated to be 17 years.
- Acceleration of cleanup will be achieved by enhancing the pump and treat system through the injection of potassium permanganate. Two injections will be performed to optimize the enhancement of the removal system. This enhancement is conservatively assumed to reduce operating time for the system to 10 years.
- It is assumed that the treatment system components and all controls and instrumentation will be placed in a permanent building.
  
- **Operation and Maintenance**
  - It is assumed the groundwater pumping and treatment system will be operated for 10 years. The system will require periodic operation and maintenance and sampling. Based on our experience on similar projects, we conservatively estimate this cost to be \$60,000/year, which would include costs for periodic equipment replacement/repair.
  - Sampling of groundwater, extracted water and treated water on a quarterly basis is also included for the 10 year lifetime.
  - Rehabilitation of both extraction and injection wells will be required on a two year rotation beginning two years after installation. Rehabilitation will include removal of any down-hole equipment, chemical treatment, physical scrubbing and pumping to maintain design extraction and/or injection rates.
  
- **Management and Oversight**
  - The environmental consultant is assumed spend \$30,000 per year to download and evaluate system data, troubleshoot problems, perform periodic inspections, and prepare an annual monitoring report
  - CDPHE is assumed to spend 100 hours during remediation and 20 hrs/year of monitoring to oversee the project.

The estimated cost for the PDS in 2015 dollars is \$2,700,000. A detailed breakdown of the estimate is provided on Table 2.



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***Required Financial Assurance***

Prior to beginning development, IRGI will submit a financial assurance instrument suitable to CDPHE to cover the cost estimate for the DDS described above. Once the development is substantially complete, IRGI will submit a financial assurance instrument suitable to CDPHE to cover the cost estimate for the PDS described above.

***Closing***

Please feel free to contact Brad Coleman at (303) 362-2335 or [bacoleman@burnsmcd.com](mailto:bacoleman@burnsmcd.com) or Ira Star at (303) 638-4987 or [ira\\_star@yahoo.com](mailto:ira_star@yahoo.com) if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Joshua Lee".

Joshua L. Lee, PE  
Senior Engineer

A handwritten signature in cursive script that reads "Brad Coleman".

Bradley A. Coleman, PE  
Project Manager

JLL/mdg

Enclosures

- Table 1 – Financial Assurance Cost Estimate, During Development Scenario
- Table 2 – Financial Assurance Cost Estimate, Post-Development Scenario

cc: Ira Star, Impaired Real Estate Assessment & Management

**TABLE 1**  
**Financial Assurance Cost Estimate**  
**Remediation During Development Scenario**  
**Lowry Vista Redevelopment**

Item Description	Quantity	Unit	Unit Cost	Reference	Cost	Remarks
<b>Base Quantities</b>						
Assumed Liquid Drum Quantity	10	drums				
Assumed Non-aqueous Drum Quantity	200	drums				200 55 gall drums of soil/waste/debris equates to roughly 50 cy of material
Efficiency Reduction for Level C PPE	50%			Professional Experience		
Drum and Soil Handling Duration (Level D PPE)	8	days		RS Means Item 3123161315000 - Crew A9		RS Means states 1 worker can hand load 4 cy/day of soil. As this will be soil/waste/debris loading into a barrel. It is assumed that one worker can load 1 cy/day. It is assumed that 6 workers will be working each day.
Drum and Soil Handling Duration (Level C PPE)	17	days		RS Means Item 3123161315000 - Crew A9		6 workers at 0.5 CY/day/worker, 50 CY total
Additional Days Needed to Complete Reclamation	3	days		Professional Experience		Cap extension work and site grading is assumed to occur at the same time as the remediation
<b>Total Duration</b>	<b>20</b>	<b>days</b>				
<b>Procurement and Design</b>						
CDPHE Consultant Procurement and Work Plan Review	40	hours	\$125	CDPHE review cost/hour	\$5,000	base assumption
Work plan Preparation	1	lump sum	\$10,000	Professional Experience	\$10,000	base assumption
CDPHE Contractor Procurement	20	hours	\$125	CDPHE review cost/hour	\$2,500	base assumption
				<b>Subtotal</b>	<b>\$12,500</b>	
<b>Site Preparation</b>						
Mobilization	1	lump	\$17,130	Professional Experience	\$17,200	5% of Total Construction Cost
Demobilization	1	lump	\$17,130	Professional Experience	\$17,200	5% of Total Construction Cost
				<b>Subtotal</b>	<b>\$34,400</b>	
<b>Hazardous Waste Management</b>						
Storm water controls	1	lump	\$5,000	Professional Experience	\$5,000	
Decontamination Area	1	lump	\$5,200	RS Means Items 028213420450 + 028213411600	\$5,200	\$1,425 Shower Unit, Personal Decon Station \$7.55 S F at 500 square feet
PPE Daily Costs	17	days	\$140	RS Means Item 028213412000	\$2,400	Cartridge \$5/day; inner gloves \$1/day; outer gloves \$5/day; hooded disposal coveralls \$3/day. Assume respirators, and other PPE is \$6/day. 6 Laborers and 1 CQA Monitor each day
Waste Removal	816	hours	\$80	RS Means Item 3123161315000 Crew A9	\$65,300	Assumes six laborer for 17 days at 8 hrs/day
Chlorinated Solvents Disposal	10	barrels	\$240	Clean Harbors Estimate	\$2,400	Assumed 10 intact barrels of liquid solvent for incineration, includes transportation
Contaminated Soil Disposal	200	barrels	\$600	Clean Harbors Estimate	\$120,000	Assumed 200 barrels of solvent-contaminated soil/waste, includes transportation
Obtain UIC Permit	1	lump	\$5,000	professional experience	\$5,000	class V, USEPA
Install Well Point System	75	linear foot	\$75	Recent Project Estimate	\$5,700	3-25' wells 2 days total
Supply, Installation, and Removal of Piping/Pumping System	300	linear foot	\$41	RS Means Item 312319400110	\$12,200	Supply, installation, and removal of 300 linear feet of header pipe and pumps around excavation
Operate Well Point System	17	day	\$1,725	RS Means Item 312319400410	\$28,800	2 - 4gpm wells, 11,520 gal/day; Pump operation at 4-6 hour shifts, incl fuel and labor
Water Storage	17	day	\$1,135	Rainforrest Estimate	\$19,000	3 - 21,000 gallon tanks including drop-off, pickup and hookup
Water Treatment	1	lump	\$4,902	Rainforrest Estimate	\$5,000	2000 pound granular activated carbon vessel, up to 100 gpm flow rate
Water Testing	3	sample	\$180	eAnalytics Estimate	\$600	24 hour turnaround
				<b>Subtotal</b>	<b>\$276,600</b>	
<b>Site Reclamation</b>						
Grade waste at transition	1	lump	\$1,000	Professional Experience	\$1,000	
Place and Grade Temporary Cover	278	cubic yard	\$2.66	RS Means Item 312323203014	\$800	assume 100'L x 50'wide x 1.5' deep
Place GCL	5,500	square ft	\$0.85	Professional Experience	\$4,700	assume 100'L x 50'wide plus 10% for anchoring
Place Cover Soil on GCL	556	cubic yard	\$1.66	RS Means Item 312323203014	\$1,000	assume 100'L x 50'wide x 3' deep
Regrade Reclaimed Area	10	acre	\$1,000	Professional Experience	\$10,000	base assumption
Revegetate Reclaimed Area	10	acre	\$1,175	RS Means Item 32921930020	\$11,800	base assumption
				<b>Subtotal</b>	<b>\$29,300</b>	
<b>Management and Oversight</b>						
CQA Engineer/Project Manager	50	hours	\$190	professional experience	\$9,500	project mgmt. and report finalization/certification
Field Engineer/Scientist	200	hours	\$120	professional experience	\$24,000	field coordination and oversight
CDPHE Management and Oversight	25	hours	\$125	CDPHE review cost/hour	\$3,200	assumes two 4 hr visit
				<b>Subtotal</b>	<b>\$36,700</b>	
<b>Total Cost Estimate</b>				<b>Total</b>	<b>\$390,000</b>	

**TABLE 2**  
**Financial Assurance Cost Estimate**  
**Remediation Post-Development Scenario**  
**Lowry Vista Redevelopment**  
**IRG Redevelopment I, LLC**

Item Description	Quantity	Unit	Unit Cost	Unit Cost Reference	Cost	Remarks
<b>Procurement and Design</b>						
CDPHE Procurement and Review	150	hours	\$125	CDPHE review cost/hour	\$18,800	base assumption
Field Investigation	1	lump sum	\$350,000	Recent Project Experience	\$350,000	Preparation and implementation of a work plan to identify nature & extent of the release.
				<b>Subtotal</b>	<b>\$368,800</b>	
<b>Remediation</b>						
Design, Permitting, and Planning	1	lump sum	\$150,000	Recent Project Experience	\$150,000	Based on Georgia project
Fieldwork Mobilization/Demobilization	1	lump sum	\$38,425	Recent Project Experience	\$38,500	5% of remediation field costs
Drill Well Point System	300	linear foot	\$75	Recent Project Experience	\$22,500	2 pumping wells, 3 injection wells, 4 monitoring wells all at 35 feet, 9 days. Assumes 1 day per well with sampling, 300 total feet of drilling. Divided total cost by total feet of well being drilled.
Pipe Trenching and Backfill	2,000	linear foot	\$25	Recent Project Experience	\$50,000	Trenching for well pumping, treatment and injection system. Rough dimensions of area from extraction wells, around walmart to treatment, back to injection wells
Survey Building and Wells	1	lump sum	\$4,000	Recent Project Experience	\$4,000	Similar NE project in 2011, adjusted for inflation
Process Electrical/Plumbing/Mechanical Pumping	1	lump sum	\$20,000	Recent Project Experience	\$20,000	Similar NE project in 2011, adjusted for inflation
Components/Controls/Instrumentation	1	lump sum	\$92,000	Recent Project Experience	\$92,000	Similar NE project in 2011, adjusted for inflation
Treatment Building	1	lump sum	\$80,000	Recent Project Experience	\$80,000	Similar NE project in 2011, adjusted for inflation
Power Installation to Site	1	lump sum	\$100,000	Recent Project Experience	\$100,000	Similar NE project in 2011, adjusted for inflation
Permanganate Injection and Monitoring	2	lump sum	\$200,000	Recent Project Experience	\$400,000	Injection of and monitoring for permanganate and solvent constituents - one time, ID project
				<b>Subtotal</b>	<b>\$957,000</b>	
<b>Operation and Maintenance</b>						
Operation, Maintenance and Field Sampling	10	year	\$60,000	Recent Project Experience	\$600,000	Similar GA project in 2012
Analyze Water Samples	10	year	\$720	eAnalytics Estimate	\$7,200	\$180/sample @ 4 samples/year, routine quarterly sampling for 10 years
Electrical	10	year	\$4,000	Recent Project Experience	\$40,000	4k per year for 10 years. GA 2012 project
Disposal of Spent Media	10	year	\$4,000	Clean Harbour Estimate	\$40,000	16000 pounds per year of hazardous material. Disposal cost is \$0.25/pound per Clean Harbors
Well Rehabilitation	5	event	\$40,000	Professional Experience	\$200,000	5 wells At \$8k/well. Biannual rehabilitation of wells
Operation and Maintenance of Walmart Vapor Intrusion System	10	year	\$7,750	Geosyntec (CEMS presentation)	\$77,500	150k sf bldg @ \$ 05/yr. Cupolex floors, incl electrical cost
				<b>Subtotal</b>	<b>\$964,700</b>	
<b>Management and Oversight</b>						
Consultant Support/Reporting	10.0	year	\$30,000	Professional Experience	\$300,000	Downloading system data, analyze, reporting, oversight
CDPHE Management and Oversight	250	hours	\$125	CDPHE review cost/hour	\$31,300	Assumes 100 hrs during remediation and 20 hrs/year during monitoring
				<b>Subtotal</b>	<b>\$331,300</b>	
<b>Total Cost Estimate</b>					<b>Total</b>	<b>\$2,700,000</b>

**Modification to Restrictive Covenants**  
**Colorado Deed**  
**(January 4, 2006)**  
**Between Air Force and LERA**

Section VII.D.2.(b) of the Colorado Deed shall be revised to read:

(b) The Restrictive Covenant associated with OU2 is as follows:

(i) 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 (the "Restrictive Covenants") unless:

(x) the Restrictive Covenants are modified or terminated as set forth in this sub-section;

(y) allowed or provided for in permits, plans, or other written approvals from the Colorado Department of Public Health and Environment in accordance with applicable laws, statutes, and regulations; or,

(z) necessary to comply with the requirements in the statutes and regulations of the Colorado Department of Public Health and Environment.

(ii) 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 Grantee that the Grantor will retain the right to enforce the Restrictive Covenants through the chain to title, in addition to any State law that permits the State to enforce the Restrictive Covenants.

(iii) 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 regarding the proposed modification or termination of the Restrictive Covenants.

(iv) In addition, Grantor recognizes that future Grantees may change the Environmental Covenants in accordance with the Environmental Covenant Statute, including but not limited to providing for disturbance of the final cover of OU2. Grantor agrees to consider such changes set forth in the Environmental Covenant for modification or termination of its Restrictive Covenant.

(v) 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 property is subject to an Environmental Covenant held by the  
Colorado Department of Public Health and Environment  
pursuant to section 25-15-321, C.R.S.**

**MODIFIED  
ENVIRONMENTAL COVENANT**

IRG Redevelopment I, LLC ("IRGI" or "OWNER" or "Grantor") grants this Modified Environmental Covenant ("Covenant") this \_\_\_\_\_ day of \_\_\_\_\_, 2015, to the Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and the Environment ("the Department" or "Grantee") pursuant to § 25-15-321 of the Colorado Hazardous Waste Act, § 25-15-101, *et seq.* The Department's address is 4300 Cherry Creek Drive South, Denver, Colorado 80246-1530.

WHEREAS, IRGI is the owner of certain property commonly referred to as the Lowry Landfill OU2, located at the former Lowry Air Force Base ("LAFB") in Denver, Colorado, more particularly described in Attachment A, attached hereto and incorporated herein by reference as though fully set forth (hereinafter referred to as "the Property");

WHEREAS, the Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and the Environment ("the Department"), is authorized to approve Environmental Covenants pursuant to § 25-15-320 of the Colorado Hazardous Waste Act, § 25-15-101, *et seq.*;

WHEREAS, pursuant to Consent Agreement Number 01-08-07-02, the Property is the subject of enforcement and remedial action pursuant to the Colorado Hazardous Waste Act, § 25-15-301, *et. seq.* ("CHWA"). The Property was the former base landfill (also known as Operable Unit 2 (OU2)). OU2 was historically used for disposal of Air Force waste, and associated construction waste and debris primarily from training activities conducted at LAFB. OU2 has been closed in accordance with the Phase 2 Corrective Action Plan for the Operable Unit 2 Landfill Closure at Lowry;

WHEREAS, the purpose of this Covenant is to ensure protection of human health and the environment by minimizing the potential for exposure to any hazardous substance, hazardous waste, hazardous constituents, and/or solid waste that remains in the landfill on the Property. The Covenant will accomplish this by prohibiting those activities that may interfere with the landfill cover or its monitoring or control systems and by creating a review and approval process to ensure that any such intrusive activities are conducted with appropriate precautions to avoid or eliminate any hazards;

WHEREAS, it is the intent of IRGI and the Department that this Modified Environmental Covenant shall restate and replace the Environmental Covenant entered into between the United States of America, acting by and through the Secretary of the Air Force, and the Department

dated January 4, 2006 and recorded in the real property records of Denver County on January 18, 2006, at Reception No. 2006011845; and

WHEREAS, IRGI desires to subject the Property to certain covenants and restrictions as provided in Article 15 of Title 25, Colorado Revised Statutes, which covenants and restrictions shall burden the Property and bind IRGI and all persons now or subsequently having any right, title or interest in the Property, or any part thereof, and any persons using the land, as described herein, for the benefit of the Department, and OWNER.

NOW, THEREFORE, IRGI hereby grants this Environmental Covenant to the Department, and declares that the Property as described in Attachment A shall hereinafter be bound by, held, sold, and conveyed subject to the following requirements set forth in paragraphs 1 through 11, below, which shall run with the Property in perpetuity and be binding on Grantor and all persons now or subsequently having any right, title or interest in the Property, or any part thereof, and any persons using the land, as described herein. As used in this Environmental Covenant, the term OWNER means the then current record owner of the Property and, if any, any other person or entity otherwise legally authorized to make decisions regarding the transfer of the Property or placement of encumbrances on the Property, other than by the exercise of eminent domain.

1) Use restrictions. The Property is subject to the following restrictions:

a) 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.

b) In general, the OWNER shall not use or conduct any activity on OU2 that will adversely affect:

- i. the integrity of the cover;
- ii. the effectiveness of drainage or erosion controls;
- iii. slope stability; or
- iv. groundwater or gas monitoring or control systems.

Specifically, no activity shall be conducted or permitted by the OWNER, nor shall the OWNER use OU2 in any manner that is inconsistent with the use designated in this paragraph or that is not in compliance with the requirements of section 3.6.1(A) of 6 CCR 1007-2, Part 1 or the Department-approved Phase 2 Corrective Action Plan for the Operable Unit 2 Landfill Closure at Lowry dated November 2003, as amended or otherwise set forth herein or approved by the Department.

c) OWNER shall not extract or utilize in any manner whatsoever any water from the upper aquifer below the surface of the ground within OU2 for any purpose whatsoever unless the OWNER shall first have obtained the prior written approval of the Department. This limitation shall not apply to a qualified environmental professional, obtaining ground water samples for

analysis from existing monitoring wells located on the Property or other future monitoring wells installed on the Property, as approved by the Department.

d) Any plans for soils disturbance activities or cap penetration, including, without limitation, excavation, grading, construction, geotechnical or environmental investigations, soil stockpiling, or other contact-intensive activity on the Property that will adversely affect the integrity of the cover, the effectiveness of drainage or erosion control systems, slope stability, or groundwater or gas monitoring or control systems, except pursuant to the Department- approved Soil Stockpile Plan, Cap Penetration Plan, and Field Investigation Work Plan, must receive written approval from the Department prior to initiation of such activities.

e) For the duration of this covenant, the Air Force shall perform all of the requirements set forth in the Post-Closure Operation and Maintenance Plan, Appendix E of the Phase 2 Corrective Action Plan for the Operable Unit 2 Landfill Closure at Lowry dated November 2003, or subsequent modifications approved by the Department.

2) Modifications. This Covenant runs with the land and is perpetual, unless modified or terminated pursuant to this paragraph. OWNER may request that the Department approve a modification or termination of the Covenant. The request shall contain information showing that the proposed modification or termination shall, if implemented, ensure protection of human health and the environment. The Department shall review any submitted information, and may request additional information. If the Department determines that the proposal to modify or terminate the Covenant will ensure protection of human health and the environment, it shall approve the proposal. No modification or termination of this Covenant shall be effective unless the Department has approved such modification or termination in writing. Information to support a request for modification or termination may include one or more of the following:

- a) a proposal to perform additional remedial work;
- b) new information regarding the risks posed by the residual contamination;
- c) information demonstrating that residual contamination has diminished;
- d) information demonstrating that an engineered feature or structure is no longer necessary;
- e) information demonstrating that the proposed modification would not adversely impact the remedy and is protective of human health and the environment; and
- f) other appropriate supporting information

3) Conveyances. OWNER shall notify the Department at least fifteen (15) days in advance of the closing on any proposed sale or other conveyance of any interest in any or all of the Property.

4) Notice to Lessees. OWNER agrees to incorporate either in full or by reference the restrictions of this Covenant in any leases, licenses, or other instruments granting a right to use the Property.

- 5) Notification for proposed construction and land use. The OWNER and/or its transferees shall notify the Department simultaneously when submitting any application to a local government for a building permit or change in land use.
- 6) Inspections. The Department shall have the right of entry to the Property at reasonable times with prior notice for the purpose of determining compliance with the terms of this Covenant. Nothing in this Covenant shall impair any other authority the Department may otherwise have to enter and inspect the Property.
- 7) Third Party Beneficiary. The OWNER of the Property is a third party beneficiary with the right to enforce the provisions of this Covenant as provided in §25-15-322, C.R.S.
- 8) No Liability. The Department does not acquire any liability under State law by virtue of accepting this Covenant.
- 9) Enforcement. The Department may enforce the terms of this Covenant pursuant to §25-15-322. C.R.S. OWNER may file suit in district court to enjoin actual or threatened violations of this Covenant.
- 10) Owner's Compliance Certification. OWNER shall execute and return a certification form provided by the Department, on an annual basis, detailing OWNER's compliance, and any lack of compliance, with the terms of this Covenant.
- 11) Notices. Any document or communication required under this Covenant shall be sent or directed to:

Federal Facilities Remediation and Restoration Unit Leader  
Hazardous Materials and Waste Management Division  
Colorado Department of Public Health and the Environment  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530

Peter M. Goffstein, Senior Vice President  
IRG Redevelopment I, LLC  
8044 Montgomery Road, Suite 710  
Cincinnati, OH 45236



Accepted by the Colorado Department of Public Health and Environment this \_\_\_\_ day of \_\_\_\_\_, 2015 .

By:

Title: Director, Hazardous Materials and Waste Management Division

STATE OF COLORADO )

) ss:

COUNTY OF )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ by \_\_\_\_\_ on behalf of the Colorado Department of Public Health and Environment.

My Commission expires: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

Address: \_\_\_\_\_  
\_\_\_\_\_

Enforceable Agreement

Between

State of Colorado Department of Public Health and Environment

and

United States Air Force

Pursuant to Colorado Executive Order D 013-98

I Purpose.

- A. This Enforceable Agreement ("Agreement") sets forth the United States Air Force ("USAF") commitment to ensure that all remedial action necessary to protect human health and the environment with respect to a particular parcel of property ("Parcel") at the former Lowry Air Force Base site, in Denver, Colorado ("LAFB") will be taken. The Parcel, as defined in the Consent Agreement ("Consent Agreement") between the Colorado Department of Public Health and Environment (the "Department"), the Lowry Assumption, LLC ("LAC") and the Lowry Economic Redevelopment Authority ("LERA"), is more particularly described in Exhibit A, attached hereto. The Parcel is the subject of this Agreement and is being transferred to the "LERA" in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 120(b)(3)(C). The Parcel has contamination remaining above regulatory standards, which may present a potential risk to human health or the environment.
- B. The Department, and LAC and LERA have entered into a Consent Agreement, (which is incorporated by reference to this Agreement) of substantially even date herewith which sets forth the manner in which LERA and LAC will fulfill the remediation obligations of the USAF under CERCLA with regard to the Parcel. These obligations will be fulfilled by LERA and LAC pursuant to the Colorado Hazardous Waste Management Act, §§ 25-15-301 through 327 C.R.S. and the Colorado Hazardous Waste Regulations, 6 CCR 1007-3. The Consent Agreement contains, among other provisions, time schedules, clean-up standards and termination provisions. LERA is a party to the Consent Agreement for the limited purpose of ensuring that funding provided to LERA under the Cooperative Agreement will be utilized to fund the performance of required tasks under the Consent Agreement.
- C. The USAF and LERA have entered into a Cooperative Agreement for Environmental Services ("Cooperative Agreement"), which, among other things, provides for the funding to LERA, which will be utilized for the completion of the environmental clean-up of the Parcel pursuant to the Consent Agreement.

- D. This Agreement delineates the USAF's cleanup responsibilities, including operation and maintenance, monitoring, and reporting related to this Parcel following the termination of the Consent Agreement or default by LAC or LERA of their respective obligations under the Consent Agreement.
- E. This Agreement reiterates the USAF's commitment under the Cooperative Agreement to fund LERA to perform environmental services which are intended to satisfy the obligations under the Consent Agreement, including stakeholder involvement related to this Parcel.
- F. This Agreement provides a mechanism for the Department to enforce the USAF's remaining remediation obligations with regard to the Parcel, including, without limitation, the USAF's obligations to (i) complete the cleanup of "Non-Covered Conditions" and "the Air Force Obligations" at the Parcel, as said terms are defined in the Cooperative Agreement, and (ii) complete the cleanup of the Parcel following the termination, or other default by LAC or LERA of their obligations, under the Consent Agreement.
- G. The USAF agrees not to challenge the issuance of this Agreement or the Consent Agreement; the factual and legal determinations made by the Department in this Agreement or the Consent Agreement; and the Department's authority to bring, or the authority of a court of competent jurisdiction to hear, any action to enforce the terms of this Agreement or the Consent Agreement.
- H. Nothing in this Agreement paragraph shall preclude the Department from imposing additional requirements necessary to protect human health or the environment. Nor shall anything in this Agreement preclude the Department from imposing additional requirements in the event that new information is discovered that indicates such requirements are necessary to protect human health or the environment.
- I. This Agreement also provides that the USAF will reimburse the Department for its oversight activities hereunder and under the Consent Agreement in accordance with the terms of the Department of Defense and State of Colorado Memorandum of Agreement ("DSMOA") or other appropriate funding mechanism as agreed upon by the USAF and the Department; and not inconsistent with the provisions of 10 U.S.C. § 2701(d)(1). It is understood that the Department will seek such changes to Colorado law prior to June 30, 2004, as needed to enable it to accept oversight payments directly from the LERA without constraining the Department's ability to provide services.

## II Legal Basis for the Agreement.

### A. Background.

1. Congress enacted CERCLA § 120(h), 42 U.S.C. § 9620 to protect citizens and communities from the costs of cleaning up contamination on land transferred to them by federal agencies. CERCLA requires the United States to grant a covenant

indicating that all remedial action necessary to protect human health and the environment, with respect to any hazardous substances remaining on the federal property has been taken prior to transfer of the property. However, CERCLA § 120(h)(3)(C) authorizes the deferral of this covenant and the "early" transfer of the property before all necessary remedial action has been taken at the federal property if certain conditions are met. Among other things, "early" transfers of contaminated federal property not listed on the National Priorities List (NPL) are subject to the approval of the governor of the state where the property is located.

2. To implement the provisions of CERCLA 120(h)(3)(C) the Governor of Colorado issued Executive Order D 013-98 requiring that, among other things, the Director of the Colorado Statewide Defense Initiatives (the "Director") together with the Department develop evaluation criteria and review procedures for requests by federal agencies to transfer property prior to final remediation. In response to the Executive Order, the Director and the Department issued the "Joint Policy Establishing Evaluation Guidelines and Review Procedures Pertaining to Deferral Requests" ("Joint Policy").
3. Pursuant to the Executive Order D 013-98 and the Joint Policy the USAF has requested a CERCLA section 120(h)(3)(C) covenant deferral for an "early" transfer of the Parcel. This Agreement fulfills, in part, the requirements of the Executive Order and provides a legal mechanism for the Department to enforce the terms of this Agreement and the enforceable clean-up plan set forth in the Consent Agreement dated August 7, 2002 among the Department, LAC and LERA relative to this Parcel, and to provide technical and legal oversight of the remediation, and long-term operation and maintenance related to the remediation of this parcel.

B. Basis for the Department's Enforceability.

1. CERCLA 120(h)(3)(A)(ii) requires that any deed transferring property owned by a federal agency on which hazardous substances was stored, released or disposed of contain a covenant warranting that: 1) the federal agency has concluded all necessary remediation before the date of transfer and 2) the federal agency is responsible for all future remediation found to be necessary after the date of transfer. In the event, however, that the federal agency desires to transfer the property prior to the completion of all remediation, CERCLA § 120(h)(3)(C) requires the federal agency to include in the conveyance document or deed certain assurances that the agency will fully remediate the property. These assurances are designed to protect human health and the environment and include provisions for: 1) all necessary restrictions on the use of the property, including those that will ensure that remedial investigations, response actions, and oversight activities will not be disrupted, and 2) all necessary response actions, including the identification of schedules for investigation and completion of such actions. Pursuant to § 25-15-308 C.R.S., these assurances are enforceable as a "standard, regulation, condition, requirement, or order" of Part 3 of the Colorado Hazardous Waste Management Act ("CHWMA") §§ 25-15-301 through 327, C.R.S. Accordingly, the Department has

the authority to enforce the commitments of the USAF as set forth in Section III hereof.

2. The State, acting by and through the Department, will be included as a third-party beneficiary in the transfer deed for the Parcel given to LERA by the USAF ("Deed"). The Deed will include the covenants and assurances mandated by sections 120(h)(3)(A)(ii)(II) and 120(h)(3)(C)(ii) of CERCLA (hereinafter collectively referred to the "CERCLA Covenants") and environmental covenants as required by § 25-15-321 of the Colorado Hazardous Waste Act. Such environmental covenants are enforceable by the Department pursuant to § 25-15-322, C.R.S. or otherwise provided by applicable law.

### III Commitments of the USAF

- A. The USAF commits to fund the performance of all necessary remedial or response actions that are taken with respect to the Parcel as set forth in the Consent Agreement, including the remediation of OU2 and OU5. Furthermore, the USAF agrees to grant and comply with the CERCLA Covenants following the achievement of regulatory closure under the Consent Agreement, and to make any adjustments to land use and/or institutional controls required by compliance with the CERCLA Covenants.
- B. If the Consent Agreement is terminated in accordance with its terms, the USAF agrees to (i) within thirty (30) days of the receipt of written notice from the Department of such termination, initiate the completion, and thereafter complete the environmental clean-up of the Parcel, including, without limitation, all operation and maintenance, long-term monitoring and reporting requirements, (a) in accordance with Section 120(h) of CERCLA and the schedules set forth in the Corrective Action Requirements section of the Consent Agreement unless otherwise mutually agreed upon by the USAF and the Department, or (b) in accordance with the terms of the Consent Agreement; (ii) prior to and following the completion of the cleanup, grant and comply with the CERCLA Covenants with regard to the Parcel, including, without limitation, make any adjustments to the institutional controls and/or land use controls required by compliance with the CERCLA Covenants; and (iii) enforce any enforceable provisions of any insurance policies acquired by LERA or LAC pursuant to the Cooperative Agreement which provide for remediation activities at the Parcel following the transfer thereof to LERA.
- C. The USAF commits to fund the costs associated with all aspects of the environmental remediation under the Consent Agreement, including stakeholder involvement related to this Parcel, as provided in the Cooperative Agreement.
- D. In addition, the USAF agrees to reimburse the Department in accordance with the terms of the DSMOA or other appropriate funding mechanism as agreed upon by the USAF and the Department; and not inconsistent with the provisions of 10 U.S.C. § 2701(d)(1), to cover costs for the Department to provide technical services and oversight for activities associated with this Agreement. It is understood that the

Department will seek such changes to Colorado law prior to June 30, 2004, as needed to enable it to accept oversight payments directly from the LERA without constraining the Department's ability to provide services.

- E. The USAF commits that the funding as provided in paragraphs III. A, C, and D, above will be provided for via the USAF's established annual budget request process. The Parties agree that the USAF reserves the right, in any administrative or judicial proceeding seeking to enforce the requirements of this Agreement, to raise as a defense that any failure or delay was caused by the unavailability of appropriated funds. In particular, nothing herein shall be construed as precluding the USAF from arguing that any provision of this Agreement requires the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1301 or 1341. While the State disagrees that an Anti-Deficiency Act defense, or any other defense based on lack of funding exists, the Parties agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense.
- F. The Deed(s) shall specify that any environmental covenant or institutional controls at the parcels shall run with the land in perpetuity and remain in-place regardless of site ownership. Such environmental covenant or institutional control may be modified or terminated only with the prior written agreement of the Department.
- G. The Parties agree that the Department may enforce the terms of the environmental covenants contained in the deed, pursuant to §25-15-322, C.R.S., and any named beneficiaries of these covenants may file suit in State district court to enjoin actual or threatened violations of this covenants. Nothing in this agreement shall be construed to preclude the United States from removing suit filed in a State district court to the appropriate Federal court should the United States be named as a party or join in the suit. The USAF concurs with the State of Colorado requirement that the United States, State of Colorado, and local governing bodies are third-party beneficiaries for the purposes of enforcing the land use restrictions contained in the Deed until such time as the restrictions are removed.
- H. The Deed shall provide the United States and the State of Colorado, or their designees access to the parcel to perform oversight or cleanup activities as required by the Consent Agreement, this Agreement or by § 120(h) of CERCLA or applicable law. A copy of such access provisions are attached to this Agreement as Attachment B.
- I. The Deed shall include the appropriate CERCLA Covenants, that specify that the USAF remains responsible for conducting any additional necessary remedial actions for previously unknown contamination attributed to its activities on the site, and that LERA and its transferees, successors, assigns or lessees will be responsible for conducting remedial actions related to contamination caused by their activities subsequent to date of the deed transfer. Remediation of such subsequently created contamination is not within the scope of this Agreement.
- J. The USAF commits that it will comply with this Agreement and to the extent

required by applicable law, will not raise sovereign immunity as a defense to any action to enforce this Agreement.

- K. The USAF acknowledges that its Request for Deferred Remediation at the Parcel, in accordance with federal law, shall not increase, diminish, or affect in any manner any rights or obligations of the DOD (including any rights or obligations under Sections 106, 107 and 120 of CERCLA) existing prior to transfer with respect to the Parcel.
- L. The USAF is not released from any liability for contamination that remains on LAFB except to the extent these liabilities are assumed and satisfied by LERA and LAC under the Consent Agreement and/or the Cooperative Agreement. With specific regard to "Non-Covered Conditions" or "Air Force Obligations" in the Cooperative Agreement, the USAF agrees to either (i) complete the clean-up thereof under Section 120(h) of CERCLA in accordance with the schedule attached hereto as Exhibit B, or in accordance with applicable law; or (ii) if such "Non-Covered Condition" or "Air Force Obligation" is currently unknown and subsequently discovered, complete the remediation thereof in accordance with the provisions of Section 120(h) of CERCLA, Paragraph III. B. above, or in accordance with applicable law.
- M. The Deed will contain appropriate references to the indemnification provisions in Section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended.

The undersigned warrant that they are authorized to bind legally their respective principals to this Agreement. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Agreement.

\_\_\_\_\_  
Albert F. Lowas, Jr. Director

Air Force Base Conversion Agency

The United States Air Force

Date \_\_\_\_\_

\_\_\_\_\_  
Douglas H. Benevento

Director, Office of Environmental Programs

Colorado Department of Public Health and Environment

Date \_\_\_\_\_