DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
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APR 15 2014

Ms. Cynthia Giles
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Giles:

This letter responds to the U.S. Environmental Protection Agency ("EPA") Unilateral Administrative Order issued under the Resource Conservation and Recovery Act ("RCRA") §7003 dated March 18, 2014 ("UAO"). The United States Department of the Army ("Army") received the UAO on March 28, 2014. The U.S. Army objects to the UAO because it is based upon inaccurate factual findings and the misapplication of the laws governing Army procurement actions and hazardous waste.

In this matter, the Army entered into a binding contract with a private firm for the demilitarization of artillery propelling charges and the sale for re-use of useful munitions components by the contractor for non-military commercial operations. This contract provided for the transfer of title to the useful materials that were available after the demilitarization of the artillery propelling charges to the contractor once the demilitarization was complete. These materials, including the propellant, constituted useful products, for which there was and remains a known commercial market. After demilitarization, all materials became the property of the contractor and the Army had no authority to further inspect or monitor the progress of the commercial activities associated with the demilitarized materials. The Army disputes any contention that it had any duty of oversight over the demilitarized materials once title passed to the contractor. The legal responsibility for these useful products post-demilitarization was strictly a matter between the contractor and those entities in the stream of commerce.

The Army intends to continue to support the statutory purposes of the RCRA in its future operations. The Army is unable to comply with this UAO because the materials that are the subject of the UAO are not owned by the Army and not located on real property owned by the U.S. The materials in question are now owned by the Louisiana Military Department ("LMD") and located on real property owned by the State of Louisiana and managed by the LMD for the State. Acceptance of this UAO would implicate important Federal legal, fiscal, and policy considerations regarding future Army demilitarization operations.

It is requested that EPA withdraw the UAO, and engage in a cooperative effort with the LMD to transfer the useful materials at Camp Minden that are the subject of the

UAO to businesses who are interested in acquiring them. The Army stands ready to provide technical recommendations and assistance to facilitate the productive use of these materials.

Pursuant to paragraph 145 of the UAO, I request an opportunity to confer with the EPA Assistant Administrator regarding the Army's objections. In addition, I invoke the Army's right pursuant to 42 U.S.C. § 6961(b)(2) to confer with the EPA Administrator before an order becomes final. This letter provides a detailed explanation of our objections.

I. FACTS

EPA Region 6's allegations in the UAO of the facts surrounding the contractual relationship between Explo Systems Inc. ("Explo") and the Army are inaccurate and incomplete. Because this is a matter of Federal acquisition and contract administration by the Army, the analysis of these actions is within the expertise and authority of the Army. The Army awarded four contracts to Explo during the period from 2005 to 2011 to perform services for demilitarization of specific military munitions. The contract identified in the UAO is contract number W52P1J10C0025 (the "contract"). This contract was issued by the Army as a firm, fixed price contract for the demilitarization of a fixed number of 155mm M119A2, DODIC D533 propelling charges ("prop charges"). It was issued to Explo, whose place of business stated in their offer was located at Minden, LA. The Defense Contract and Management Agency ("DCMA"), an agency of the Department of Defense ("DoD") that performs contract services for DoD, and the DCMA Ammunition Group, administered the performance of this Army contract. The contract between the Army and Explo was solicited as a Small Business set-aside. The purpose of the contract was to demilitarize prop charges and, after the demilitarization process, the contractor was allowed to take title to and recover and recycle the propellant and other components of munitions for non-military use by sales to other parties. The demilitarization of prop charges under the contract does not constitute a contract for the disposal of solid waste within the meaning of RCRA.

In January 2010, Explo Systems Inc. submitted a proposal to the Army for this contract for the demilitarization of prop charges as part of the implementation of the Army's initiative to reuse, recycle, and reclaim ("R3 Initiative") materials from the demilitarization process, including the M6 propellant ("propellant"). The R3 Initiative promotes the reuse and sale of munitions components recovered from the demilitarization process as an alternative to the generation and disposal of solid waste after the demilitarization process. Under the contract, Explo was paid to demilitarize the prop charges and then took title to the recovered propellant and other components for recycling and/or reutilization in accordance with its proposal and subsequent demilitarization plan. In its proposal, Explo described its storage capability at Camp Minden and its plan to sell the propellant to purchasers for use in the mining industry including, but not limited to, Kentucky Powder. The storage of propellant was not the subject of the contract.

After the contract was awarded, Explo submitted a Safety Site Plan dated April 19, 2010, which was required before the first shipment of the propelling charges for demilitarization. Explo's safety plan provided details of its operational area for the demilitarization of the prop charges and indicated, among other things, that Explo would send empty bags to a landfill or to be destroyed in a SDC-1200 (static detonation chamber). The fact that the SDC-1200 was not built does not indicate that this contract was intended by the Army for anything other than R3 of the prop charge components. Stability testing reports were sent to the Army, and the Army is not aware of sending cartridges that contained propellant that would be categorized as Category D (i.e. propellant requiring disposal after demilitarization rather than recycling for re-use). Explo was required to conduct stability monitoring of the recyclable propellant as part of the contract, and Explo never identified any propellant as Category D.

In its proposal, Explo indicated it planned on sending propellant to a slurry facility in Kentucky to be sold for use in mining operations. Explo's plans to sell recovered commercial product to a slurry facility in Kentucky are outside the scope of the contract between Explo and the Army. Such plans are the subject of a contract between Explo and a buyer, unrelated to the Army.

Explo also submitted an Ammunition Demilitarization and Disposal Plan (ADDP). Once the ADDP was approved, Explo could proceed with prop charge demilitarization operations. Under paragraph 1.1 of the contract, Explo was required to provide all the necessary material, equipment, property, licenses, and personnel to demilitarize the prop charges.

Once Explo represented that demilitarization and recovery operations were complete, a DCMA Quality Assurance Representative reviewed Explo's signed acknowledgment and performed occasional walkthrough inspections of the pre-demilitarization storage and operational demilitarization areas. Other areas that Explo maintained were not allowed to be inspected because Explo represented that those areas were a part of Explo's commercial operation and therefore not subject to DCMA inspection. After the DCMA representative signed the certificates of demilitarization/destruction (COD), ownership of, and responsibility for, the propellant transferred to Explo. Oversight of the handling and storage of the propellant by Explo was the responsibility of the leasing and licensing agencies for Explo, which had authority over the Explo commercial operations at Camp Minden. These leasing and licensing agencies include the State of Louisiana through LMD and the Louisiana State Police ("LSP") and Louisiana Department of Environmental Quality ("LDEQ"), the U.S. Bureau of Alcohol, Tobacco and Firearms ("ATF"), and EPA. Explo reportedly held licenses from the LSP and the LDEQ, including a RCRA permit for a small hazardous waste storage area in its commercial operational area where it stored waste materials to be sent for disposal elsewhere.

Under paragraph 4.7 of the contract between the Army and Explo, the Army's review of Explo's proposal, procedures, and any other technical documentation was only intended to ensure Explo had the technical ability to perform the contract. The contract

does not provide a warranty that Explo would meet all required health, safety, and environmental laws and regulations in its subsequent operations. Compliance with all such laws and regulations throughout the demilitarization process, and the subsequent commercial resale operations, remained the sole responsibility of Explo.

Additionally, pursuant to paragraph 13.4 of Section C of the contract, the signing of the COD signified the transfer of ownership of the demilitarized prop charge components from the Army to Explo and served as the basis for full payment to Explo under the contract. After the transfer of ownership, paragraph 13.4 provides that Explo "assumes complete responsibility and liability for the disposition completion of the recovered materials/components. The contractor shall hold the Government harmless for any liability for the damages (consequential or otherwise) or injuries resulting from the contractors [sic] use or disposition of the components or materials." Under the contract, DCMA only had responsibility to verify that the prop charge demilitarization process was complete. The contract did not provide for DCMA involvement after title to the material/components passed to Explo. This allowed Explo to proceed with the resale of the recovered materials and retain profits made from those sales. At the time that ownership of the propellant transferred from the Army to Explo, the propellant was suitable for commercial reuse. It was a useful product and not solid waste.

The contract did require Explo to provide End Use Certificates ("EUCs") to the Army. EUCs are certifications to the U. S. that the sale is between the contractor and a third party, qualified buyer of items. This is derived from the definition of controlled items under the Arms Export Control Act, a law administrated by the U.S. Departments of State and Commerce, with assistance from DoD. *See* 22 U.S.C. § 2778. The purpose of the EUC is for the transferee of certain controlled materials to certify that it is reselling the controlled material to a qualified buyer within the meaning of this law and its implementing regulations. DoD is required to obtain the EUCs for controlled items that are subject to Trade Security Controls. The EUC form, DLA Form 1822, is required by DoD, along with demilitarization, by DoD Instruction 2030.08, Implementation of Trade Security Controls for Transfer of DoD U.S. Munitions List ("USLM") and Commerce Control List Personal Property to Parties Outside DoD Control, May 23, 2006. Arrangements for the pick-up and delivery of propellant were between Explo and its customers, and not the responsibility of the Army. The contract required that disposition (sale/transfer) of residual components occur within 12 months after prop charge demilitarization is complete. Monthly progress reports were required by the contract to be submitted by Explo, and were submitted, reflecting the prop charge demilitarization quantities and the designated buyers of the recovered components. One month of demilitarization could yield up to one million pounds of propellant. The government has EUCs from Explo accounting for the sale of approximately 17.7 million pounds of propellant, and monthly progress reports showing Explo's intended resale of the prop charge components, including the propellant and other recovered materials. The Army contracting records indicated that Explo carried out the required prop charge demilitarization, assumed title to the components, and had specific plans and designated buyers for the components from the prop charges.

In October 2012, there was an explosion of materials stored in an igloo in the Explo commercial leased area. Investigation by the LSP and others indicated that the explosion did not involve propellant but black powder stored by Explo as part of its commercial activities at the facility outside the area where demilitarization occurred under the Army prop charge contract. During the course of the investigation, propellant was discovered to have been stored by Explo throughout the area leased from the LMD, including some outside buildings and in makeshift shelters. This propellant belonged to Explo and was part of Explo's commercial activities. The DoD and Army provided, upon request of LMD, two technical assistance teams to visit Camp Minden and provide recommendations to the State of Louisiana. These reports reflected recommendations and conditions observed at Camp Minden in April and May 2013, to evaluate conditions after the October 2012 explosion. The first Army report to the LMD in April 2013 recommended moving all Explo materials into igloos. The second Army report to the LMD in May 2013 noted that the materials had been moved into the igloos and recommended that the State initiate a stability monitoring program for the stored materials.

The two reports concluded that, with proper stability monitoring, the materials could be stored for several years without an "explosive event." Contrary to EPA's assertion that the propellant could explode at any time, the report from the second visit indicates that there was a minimal chance for ignition (not explosion) within two years and a somewhat higher chance for ignition within two to ten years as the stabilizers degrade over time.

In June 2013, the LMD called the Army Explosives Ordnance Detachment ("EOD") at Fort Polk, LA and asked it to send a team to Camp Minden to destroy items that presented an explosion hazard. The EOD team from Fort Polk was sent to Camp Minden and conducted some tests of other explosives material owned by Explo, found no explosion hazard, and offered advice that LMD monitor the stability of all remaining explosive materials at Camp Minden. These efforts were provided by the Army and DoD to the LMD at no cost based on LMD's requests under the DoD Defense Support to Civil Authorities regulations, 32 CFR Part 185.

In addition, prior to the LSP and LMD moving the propellant to igloos, the DoD's Joint Munitions Command ("JMC") delivered two Near Infrared ("Near IR") propellant testing systems to detect remaining effective stabilizer ("RES"). JMC trained State personnel in the use of the Near IR. Reportedly, the LSP tested the propellant and, to the Army's knowledge, did not find any unstable propellant. Despite the recommendations in the second DoD/Army report, the Army is unaware of any stability monitoring program established by the LMD or LSP for the propellant at Camp Minden since the propellant was moved into protective igloos. Stability monitoring is still technically feasible with available technology and would allow a determination of the years of stable shelf life that remain for the propellant owned by the LMD at Camp Minden.

In response to an EPA request for assistance with the demilitarized materials that Explo shipped to Camden, AR, the Army provided information on testing protocols that could be used to establish baseline stability for any lot. This testing was apparently conducted on the propellant at Camden, AR by Austin Powder, working with a commercial testing laboratory. According to the UAO at paragraph 34 of the Findings of Fact, 200,000 pounds of the propellant at Camden "was later sold."

On September 23, 2013, upon the State's motion to the court and as part of a settlement between Explo and the State of Louisiana, title to all propellant stored on Camp Minden was transferred to the State of Louisiana. To date, the propellant is the property of the State of Louisiana and remains stored in facilities at Camp Minden that are also owned by the State of Louisiana.

The leases between the LMD and Explo were entirely independent agreements to which the Army was not a party and had no input. The lease was in place before the contract in question was awarded. The rent dispute that led to the LMD terminating the Explo lease was a dispute between those parties, and the Army had no role in that disagreement. The condition of the structures on the leasehold was the responsibility of the land owner, LMD for the State. The Army had no authority over or responsibility for the condition of the structures on the leasehold, and the DCMA inspectors were not allowed by Explo to enter areas of the leasehold beyond the Explo prop charge demilitarization operations.

The criminal charges the local prosecutor brought against Explo officers and employees in June 2013 did not involve the Army in any way. It is axiomatic that a U.S. government agency is not responsible for the wrongful criminal acts of its contractors, and there has been no allegation, nor is there any evidence, that the Army had any role in the operations of Explo after it took title to the recovered components and engaged in whatever actions took place in regard to those commercial resale activities. Rather, the record indicates that documents and reports were repeatedly submitted to the Army by Explo stating that it had arrangements with buyers for large portions of the prop charge components. The Army is not responsible under RCRA or any other law for the wrongful acts of Explo in managing those materials.

II. THE ARMY POSSESSES NO FISCAL AUTHORITY TO COMPLY WITH THE UAO

Paragraph 144 of the UAO specifically states that the UAO shall not require the Respondent to violate the Anti-Deficiency Act ("ADA"). In spite of this provision, compliance with the UAO would violate the ADA because the Army possesses no fiscal authority to provide funds to conduct the work described in the UAO.

Congress has authorized the DoD to conduct certain Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") response actions in statutes authorizing the Defense Environmental Restoration Program ("DERP"). *See* 10 U.S.C.A. § 2700 *et seq.* However, the DERP statutes only allow environmental response actions at a "facility or site owned by, leased by, or otherwise possessed by the United States and under the jurisdiction of the Secretary," or at a

"facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States **at the time of actions leading to contamination**... ." 10 U.S.C.A. § 2701(c)(1)(A) and (1)(B) (emphasis added).

The U. S. does not currently own, lease, or otherwise possess any facility at Camp Minden. The State of Louisiana accepted the quitclaim deed for Camp Minden from the Army on December 13, 2004, and filed and recorded the conveyance of title from the U. S. to the State in 2005. Because of this conveyance, there is no authority under Section 2701(c)(1)(A) for the Army to conduct a response action for the propellant at Camp Minden. In addition, the U. S. did not own, lease, or otherwise possess Camp Minden when Explo improperly stored the propellant in the area leased from the LMD. This fact precludes DERP authority under Section 2701(c)(1)(B). Without authority under the DERP, there is no authority for the Army to use appropriated funds for the purposes set out in the UAO. Therefore, the obligation of any funds by the Army on the actions demanded in the UAO would violate the ADA.

III. THE REQUIRED ELEMENTS TO ISSUE A RCRA SECTION 7003 ORDER ARE NOT MET

Applicable law does not support the EPA's argument that the Army should be legally responsible for removing the propellant from Camp Minden under RCRA. To establish a *prima facie* case for a RCRA order under Section 7003, the EPA must prove three elements: (1) the conditions at the site present an imminent and substantial endangerment to health or the environment; (2) the endangerment stems from the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste; and (3) the defendant has contributed to or is contributing to that handling, storage, treatment, transportation, or disposal of the hazardous or solid waste. *United States v. Bliss*, 667 F.Supp. 1298, 1313 (E.D. Mo. 1987), citing 42 U.S.C.A. § 6973. None of these elements is established as a result of Army action. Nevertheless, even if an imminent and substantial endangerment may be present, the material was not a solid waste, nor has the Army "contributed to" the handling of solid waste at the Explo leased area on Camp Minden.

i. <u>There Is No Imminent and Substantial Endangerment</u>

A risk is "imminent and substantial" when there is reasonable cause for concern that someone or something may be exposed to a risk of harm by the threatened release if remedial action is not taken. *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007). In this case, the DoD and Army explosives safety advisory team that visited Camp Minden in 2013 found that over the course of ten years, there is an increased probability of "auto-ignition." However, the safety team also made recommendations to the State of Louisiana regarding the proper storage and monitoring of the propellant, which limits the danger of ignition. Therefore, any endangerment from the propellant is remote, based on its long-term storage, and can be mitigated with proper stability monitoring by the owner of the material, LMD, or by EPA.

ii. The Army's Contract with Explo Was for Demilitarization and Reuse of a Useful Product and Not for the Handling, Storage, Treatment, or Disposal of Solid Waste

The Army never had title to, or control over, "solid waste" at any time in the prop charge demilitarization process. Federal regulations address the particular issue of when military munitions constitute "solid waste." Specifically, 40 C.F.R. § 266.202(a) states that:

> A military munition is not a solid waste when:
>
> (2) An unused munition, or component thereof, is being repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subjected to materials recovery activities, unless such activities involve use constituting disposal as defined in 40 CFR 261.2(c)(1), or burning for energy recovery as defined in 40 C.F.R. § 261.2(c)(2).[1]

In this case, the EPA's claim against the Army is based on the manner in which the recovered propellant was handled and stored, not the manner in which the prop charges were demilitarized. Pursuant to 40 C.F.R. § 266.202(a), the Army never owned substances that constituted "solid waste" at any point in the demilitarization process. From 2010 until the end of 2012, CODs were signed by a DCMA official several times per month. Throughout the demilitarization process, the prop charges and the separated components were considered by the Army and the contractor to be valuable commercial products and not discarded materials. Thus, title to the propellant transferred to Explo on a regular basis and at no point during or after the demilitarization process did the Army have title to, or control over, any "solid waste."

The propellant now in storage at Camp Minden has not been shown to be a solid waste by EPA. It is in storage and remains a marketable and useful product, as demonstrated by the sale of the propellant by Explo from its commercial operations at Camp Minden, and the propellant at Camden, AR, which EPA allowed to be sold according to UAO paragraph 34. The LMD has not discarded the propellant in the igloos, or abandoned the propellant there, nor have they sought a permit from EPA or the LDEQ for a solid or hazardous waste disposal unit in the igloos where the propellant is now stored. The UAO even allows the propellant to be sold and/or reused. UAO,

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[1] Military munitions may be "solid waste" if "used in a matter constituting disposal." 40 C.F.R. § 261.2(c)(1). "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C.A. § 6903. All the Army prop charges were disassembled for materials recovery and not for disposal within the meaning of RCRA. Thus, 40 C.F.R. § 261.2(c)(1) cannot be used by the EPA to argue that Army munitions were actually "used in a matter constituting disposal" because this dispute is based on the handling and storage of the propellant by Explo after the demilitarization process.

para. 73. EPA has not demonstrated, nor do the facts indicate, that the propellant has been converted from being a useful product available for resale to other commercial entities to being a solid waste subject to RCRA.

Courts have long held that valuable commercial products that have not been discarded are not solid waste, and materials "destined for beneficial reuse or recycling" are considered useful products. *American Mining Congress v. EPA*, 824 F.2d 1177, 1180 and 1187 (D.C. Cir. 1987). EPA must make a reasoned justification for determining when materials that may be reused become discarded and may be considered solid waste under RCRA. *American Petroleum Institute v. U.S. EPA,* 216 F. 3d 50, at 58 (D.C. Cir. 2000).

In this case, the prop charges were unequivocally useful products that were never discarded but intended for reuse under the R3 Initiative. In addition, the propellant was a useful product and not "solid waste" throughout the period of Explo operations at Camp Minden. The EUCs identify companies willing to purchase the propellant and the UAO acknowledges that at least some of the propellant was sold to third parties. UAO, Paras 29-30, and 34. Chuck Barnes, the EPA's RCRA Enforcement Officer who visited Camp Minden in January and April, 2013, also concluded in his Record of Communication dated October 31, 2013 that the propellant "can/may be legitimately recycled" and there is a market for the propellant. Moreover, the LDEQ under its authorized RCRA authority only required Explo to obtain a RCRA hazardous waste storage unit permit for a small part of the large area leased by Explo from LMD for propellant storage and commercial sale operations. LDEQ obviously determined that the Explo management, storage, and sales of the propellant and other components were commercial operations involving useful products, with small quantities of materials determined to be not useful and placed into the hazardous waste storage unit to be sent for disposal off site.

Finally, the Demilitarization and Ammunition Peculiar Equipment ("APE") Management Division of the JMC has identified at least one company that is currently interested in acquiring the propellant. Officials from Orica USA, Inc. have expressed interest in making an arrangement with the LMD to trade stable M31A1 propellant that the company no longer needs for double the amount of M6 propellant currently stored at Camp Minden and for which a commercial market exists. Orica reportedly has made an offer to the LMD but has been told the LMD could not enter into such an agreement because of the legal proceedings related to the M6 propellant. This is compelling evidence that the propellant remains a useful product, cannot be considered "solid waste," and, because it is not a solid waste, the Army cannot be ordered to dispose of it under RCRA.

iii. <u>The Army Did Not Contribute to the Handling, Storage, or Disposal of Solid Waste</u>

The Army did not generate or contribute to the handling, storage, or disposal of "solid waste." The phrase "contributed to" refers to an affirmative action, rather than

passive conduct. *Sycamore Ind. Park Associates v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008). To prove a party "contributed to" the disposal of waste, there must be evidence that there was some active involvement in the handling or storage of the materials in question, with a direct connection to the waste itself. *Hinds Investments v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011); *Sycmore*, 546 F.3d at 854. A RCRA claim should be dismissed without evidence of a defendant's continuing control over waste disposal. *Hinds*, 654 F.3d at 851. As the UAO acknowledges, title to the recovered materials passed to Explo after the prop charge demilitarization operations were completed and a Certificate of Destruction ("COD") was signed. (UAO, Paragraphs 23-25). After the COD was signed, the propellant became the property of Explo and was stored at Camp Minden on property owned by the State of Louisiana and leased to Explo by the LMD. Therefore, the Army did not have the requisite control over the propellant to sustain a legally valid claim of RCRA liability based on the theory that the Army contributed to handling, storage, or disposal of solid waste.

In this case, the EPA insists that the Army's alleged lack of oversight contributed to the improper handling and storage of the propellant. (UAO, Paragraphs 2, 45). Specifically, the EPA claims that "Explo failed to handle the M6 propellant as a valuable product. Contrary to the safety requirements of the Contract, Explo stored the M6 propellant outside where it was exposed to heat and humidity, which increases the degradation of the stabilizers in the M6 propellant. Explo failed to implement a stability monitoring program and failed to maintain lot integrity for the M6 propellant stored at the Explo Site." UAO, Para. 45. These allegations implicate Explo, not the Army.

Any failure on the part of Explo to safely manage the recovered propellant it then owned is not attributable to the Army, nor was it subject to the control, direction, or authority of the Army. DCMA inspectors were only authorized to inspect the area at Camp Minden where Explo demilitarized the prop charges, not the areas on the leasehold where Explo conducted its commercial operations to package, store, and eventually transport the recovered propellant to its buyers. There is no affirmative action on the part of the Army or DoD that establishes the Army was contributing to any acts by Explo that involved the handling, storage, or disposal of solid waste after title to the recovered components vested in Explo.

If any government entity had authority over the Explo commercial operations at Camp Minden, it was not the Army. The LDEQ issued a RCRA Permit to Explo to operate a small hazardous waste storage unit at Camp Minden as recently as June 15, 2012, and the ATF issued Explo a license to handle explosives as recently as November 9, 2012. The authority to inspect and permit Explo to conduct all of its operations at Camp Minden was with these two agencies who had enforcement authority, not the Army. The legal proceedings by the State to terminate the Explo lease in June 2013, and the revocation by the ATF of the Explo licenses issued by that agency in June 2013 demonstrate that those agencies had the authority and capability to regulate and even terminate the Explo commercial operations at Camp Minden when they decided to do so. The Army, however, only had the authority to cease shipping additional prop charges to Explo, and this action was taken by the Army in the fall of

2012 under the contract. The Army never had authority to direct, control, or terminate the Explo operations on Camp Minden involving the recovered propellant, which in fact continued for months after new shipments of prop charges by the Army had ceased.

iv. The Slurry Facility in Kentucky is Irrelevant to Any RCRA Issue Related to Camp Minden

The EPA further implies that the Army failed to adequately inspect a slurry facility in Kentucky. UAO, Paras 21-22). The Army's contract with Explo was for the demilitarization of prop charges and not storage of Explo's commercial product. Storage of the useful products recovered from demilitarizing the prop charges was not the subject of the contract and not the Army's responsibility. The Army did not own the recovered useful components and any arrangements or plans that Explo may have had to resell useful product to buyers in Kentucky was outside the scope of the contract as it involved Explo's commercial activities. The Army had no authority to inspect or exercise control over any area in Kentucky, or anywhere else, where Explo had operations involving the recovered components owned by Explo.

v. Holding the Army Responsible for the Removal of Propellant at Camp Minden Would Be Contrary to the Purpose of RCRA, and Federal Policies on Pollution Prevention

RCRA was enacted "in an effort to help states deal with the ever-increasing problem of solid waste disposal by encouraging the search for and use of alternatives to existing methods of disposal (including recycling)...." *American Mining Congress v. EPA*, 824 F.2d 1177, 1185-87 (D.C.Cir. 1987). In this case, the Army's demilitarization contracts expressly fulfill this purpose by selecting an alternative to disposal. The adoption of the EPA's position in its UAO would jeopardize the Army's demilitarization program because it would eliminate the Army's incentive to demilitarize munitions. Instead, the Army would simply treat, most likely by open burn and open detonation, which is the only available large-scale treatment process for waste munitions, and then dispose of unneeded munitions without seeking to make them available for commercial use. This would be contrary to RCRA's intended purpose.

In a series of Executive Orders ("EO") issued over the past 20 years, Presidents have directed Federal agencies to reduce their quantities of waste materials, in particular hazardous waste, and seek ways to reuse, recycle, or convert for other beneficial use the materials that would otherwise be waste. *See* EO 12873, Federal Acquisition, Recycling, and Waste Prevention, Oct. 20, 1993, replaced and revoked by EO 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, Sep. 14,1998, and EO 13423, Strengthening Federal Environmental, Energy, and Transportation Management, Jan. 24, 2007. EO 13423 is still in effect and requires the Army to ensure that it "(i) reduces the quantity of toxic and hazardous chemicals and materials acquired, used, or disposed of by the agency, (ii) increases diversion of solid waste as appropriate, and (iii) maintains cost-effective waste prevention and recycling programs in its facilities." EO 13423, Section 2(e). The

duty to carry out these policies is assigned to the head of the agency, including "pollution and waste prevention and recycling." EO 13423, Section 3(a). Under the current administration, EO 13514, Federal Leadership in Environmental, Energy and Economic Performance, Oct. 5, 2009 was issued to establish specific goals for reduction of various activities that affect the environment. Included among the goals are requirements to "eliminate waste by ... (ii) diverting at least 50 percent of non-hazardous solid waste, excluding construction and demolition debris, by the end of fiscal year 2015; ... [and] (v) reducing and minimizing the quantity of toxic and hazardous chemicals and materials acquired, used, or disposed of." EO 13514, Section 2(e). DoD has also issued policies that impose waste reduction requirements on the Army, including requirements to provide for reduction of waste, and reuse or recycling of materials that would otherwise be disposed as waste. *See* DoD Instruction 4715.4, Pollution Prevention, as revised on July 6, 1998.

The R3 program is a major element of the Army's waste reduction plan for its munitions management program. The goals imposed by several Presidents and DoD could not have been achieved, especially during the period of active engagement in national security contingency operations as ordered by the Presidents over the past 13 years, without the R3 program. This program has succeeded in diverting millions of pounds of useful components from being designated as waste and destroyed. The program has ensured these useful components have instead been used in the commercial markets of the U. S. As the Army is downsizing now and in the coming years, hundreds of thousands of tons of demilitarized munitions components will have to be excessed by the Army, and either disposed as waste to the harm of the environment and at taxpayer expense, or recovered for sale to contractors as useful products in the commercial marketplace. The use of contractors who have businesses that provide these materials to the commercial markets is an essential part of the R3 program. The UAO would severely undermine the R3 program, if it were to be accepted, by imposing on the Army the responsibility to address actions by contractors in the stream of commerce after transfer of ownership of materials from the Army to third parties. Not only does RCRA not allow for this, but seeking to impose such a requirement is contrary to well-established Federal policy on waste reduction.

IV. CONCLUSION

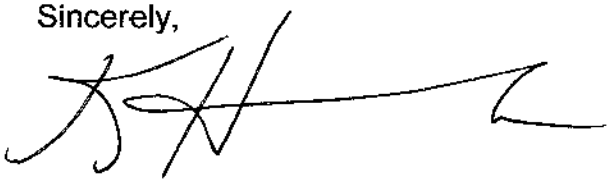
The UAO is based upon inaccurate factual findings and incorrect legal interpretations of the Army's contract and hazardous waste laws. The Army does not have funds that could be used to comply with the UAO by taking materials owned by the State of Louisiana and located on land owned by the State of Louisiana to be destroyed. Not one of the required elements for a valid order under RCRA Section 7003 is present in this situation. Additionally, compliance with the UAO would undermine important policy considerations regarding future Army demilitarization and waste reduction operations and run contrary to RCRA's primary purpose. For these reasons, EPA should withdraw the order and encourage the LMD to commence stability monitoring of the propellant at Camp Minden to prevent any possible ignition due to degradation over the ensuing years. Since there is still commercial interest in the propellant held by LMD

at Camp Minden, EPA should facilitate an arrangement that will allow for those materials to be put to useful purpose. This option benefits the environment and the public.

I request an opportunity to confer on behalf of the Army under paragraph 145 of the UAO with the EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance regarding the serious issues raised in this response. In addition, I invoke the Army's right pursuant to 42 U.S.C. § 6961(b)(2) to confer with the EPA Administrator if the UAO has not been withdrawn and before it becomes final.

My point of contact on this matter is the Deputy Assistant Secretary of the Army for Environment Safety and Occupation Health, Mr. Hew Wolfe. He may be contacted at 703-697-2014. The Army's attorney for this matter is Ms. Ann Wright, Associate Deputy General Counsel. She may be contacted at 703-697-5127.

Sincerely,



Katherine Hammack