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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA AT ANCHORAGE**

ALASKA COMMUNITY ACTION ON TOXICS, )  
COOK INLET KEEPER, THE CHICKALOON )  
VILLAGE TRADITIONAL COUNCIL, JANET )  
DANIELS, RICHARD MARTIN, and THE )  
MILITARY TOXICS PROJECT )

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE )  
ARMY, UNITED STATES DEPARTMENT OF )  
DEFENSE, and DONALD RUMSFELD IN HIS )  
OFFICIAL CAPACITY AS UNITED STATES )  
SECRETARY OF DEFENSE, )

Defendants.

Civil Action No:

**AMENDED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

## AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs allege as follows:

### NATURE OF THE CASE

1. This is a citizens' suit brought pursuant to the provisions of Clean Water Act 33 U.S. C. §1251, *et seq.*, the Solid Waste Disposal Act, 42 U.S. C. §6901, *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*

### JURISDICTION

2. This Court has jurisdiction over the subject matter of the First Count herein pursuant to 33 U.S.C. §1365(a)(1). Defendants have waived sovereign immunity to the First Count pursuant to 33 U.S.C. §§1323(a) and 1365(a)(1).

3. This Court has jurisdiction over the subject matter of the Second Count pursuant to 42 U.S.C. §6972(a)(1)(A). The Defendants have waived sovereign immunity to the Second Count pursuant to 42 U.S.C. §§6961(a) and 6972(a)(1)(A).

4. This Court has jurisdiction over the subject matter of the Third Count pursuant to 42 U.S.C. §9659(a)(1). The Defendants have waived sovereign immunity to the Third Count pursuant to 42 U.S.C. § 9659(a)(1).

5. By letter dated June 15, 2001, the Plaintiffs gave notice of their intent to commence this action as required by 33 U.S.C. § 1365(b)(1) and 42 U.S.C. §§ 6972(b)(1) and 9659(d)(1). Shortly following the Defendants' receipt of said letter, the Plaintiffs and Defendants commenced negotiations aimed at reaching a settlement of the claims asserted herein. At the request of the Defendants, Plaintiffs agreed that they would not commence this action until such time as the Plaintiffs and Defendants ceased their negotiations. By letter dated

about April 10, 2002, the Defendants terminated said negotiations. Plaintiffs commenced this action as soon as possible thereafter.

### **THE PLAINTIFFS**

6. Plaintiff, Alaska Community Action on Toxics (“ACAT”) is a non-profit corporation incorporated under the laws of the State of Alaska. The purposes for which ACAT exists include ensuring that the environment of the State of Alaska is safe and healthful for its members and that the environment is suitable for recreation and enjoyment by its members. Members of ACAT have consumed and/or continue to consume fish and game taken from the waters and the lands in the area of the upper Cook Inlet in the vicinity of the Eagle River, the Eagle River Flats and the Knik Arm. As a result of the land and water pollution resulting from the Army’s discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, said members have reduced their consumption of fish and/or game taken from these areas. If the relief requested herein were granted, said members would consume somewhat greater amounts of fish and/or game taken from these areas. The members of ACAT also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Knik Arm. As a result of the water pollution resulting from the Army’s discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members’ opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members’ opportunity to watch, and their enjoyment in watching, animals in these areas would be increased.

7. Plaintiff, Cook Inlet Keeper, is a non-profit corporation. The purposes of Cook

Inlet Keeper include protection of the lands and waters in the vicinity of Cook Inlet against pollution and/or other degradation. Members of Cook Inlet Keeper have consumed and/or continue to consume fish and game taken from the waters and the lands in the area of the upper Cook Inlet in the vicinity of the Eagle River, the Eagle River Flats and the Knik Arm. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, said members have reduced their consumption of fish and/or game taken from these areas. If the relief requested herein were granted, said members would consume somewhat greater amounts of fish and/or game taken from these areas. The members of Cook Inlet Keeper also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Knik Arm. As a result of the water pollution resulting from the Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members' opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members' opportunity to watch, and their enjoyment in watching, animals in these areas would be increased.

8. Plaintiff, the Chickaloon Village Traditional Council ("Chickaloon"), is a federally recognized native American tribe. As a traditional part of the Chickaloon cultural heritage, the Chickaloon members engaged in hunting of water fowl and the gathering of water fowl eggs in and on lands and waters in the near vicinity of Fort Richardson, the Eagle River, Eagle River Flats and the Knik Arm. As a result of the water and land pollution described below, the members of the Chickaloon have substantially reduced and/or altogether eliminated

their traditional hunting and egg gathering in these areas. Members of the Chickaloon have also traditionally eaten fish taken from waters in the vicinity of the upper Cook Inlet, including without limitation the waters in the vicinity of the Knik Arm and the streams and rivers adjacent thereto. As a result of the pollution of lands and waters described below, the members of the Chickaloon have reduced their consumption of fish caught in such areas. If the relief requested herein were granted, the members of the Chickaloon would increase their hunting of water fowl and egg gathering in these areas, and would consume greater amounts of fish taken from these areas.

9. Plaintiff, Janet Daniels is an individual who is a member of Plaintiffs ACAT, Cook Inlet Keeper, Chickaloon and MTP. Ms. Daniels has consumed and/or does consume fish taken from waters in the vicinity of the Eagle River, Eagle River Flats and/or the Knik Arm, including without limitation fish taken from Moose Creek and fish caught at a native fish camp in Eklutna. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, Ms. Daniels has reduced and/or eliminated her consumption of fish taken from these areas. For example, Ms. Daniels has completely eliminated her consumption of fish taken at the native fish camp near Eklutna. Even when Ms. Daniels consumes fish taken from areas such as Moose Creek, her enjoyment of said fish is greatly reduced due to her fear that the fish contain harmful levels of toxic or otherwise hazardous substances resulting from the Army's activities. If the relief requested herein were granted, Ms. Daniels would consume greater amounts of fish taken from these areas.

10. Plaintiff, Richard Martin, is an individual and a member of Plaintiffs ACAT and Chickaloon. Mr. Martin has consumed and/or does consume fish taken from waters in the

vicinity of the Eagle River, Eagle River Flats and/or the Knik Arm, including without limitation fish taken from Peters Creek and areas nearby. As a result of the land and water pollution resulting from the Army's discharge of munitions and/or the constituents and/or byproducts and/or residues of munitions as described below, Mr. Martin has reduced and/or eliminated his consumption of fish taken from these areas. If the relief requested herein were granted, Mr. Martin would consume greater amounts of fish taken from these areas.

11. Plaintiff, Military Toxics Project ("MTP"), is a non-profit organization formed for the purpose of, among other things, protecting the health and welfare of its members from environmental pollution caused by the activities of the United States military. While MTP has members nationwide, MTP has members that live in the vicinity of Fort Richardson and who consume fish and/or game taken from the lands and/or waters in the vicinity and who have reduced or eliminated their consumption of such fish and/or game as a result of the pollution of the lands and/or waters on or near Fort Richardson described below. If the relief requested herein were granted, said members would, once again, consume greater amounts of fish and/or game taken from these areas. The members of MTP also have engaged and continue to engage in watching animals, particularly waterfowl and other wildlife, in areas very near the Eagle River, Eagle River Flats and the Knik Arm. As a result of the water pollution resulting from the Army's discharge of munitions and/or the constituents and/or by-products and/or residues of munitions as described below and the adverse effects of said pollution on animals, said members' opportunities to watch, and their enjoyment when watching, the animals has been reduced. If the relief requested herein were granted, these members' opportunity to watch, and their enjoyment in watching, animals in these areas would be increased.

### **FIRST COUNT**

## VIOLATIONS OF CLEAN WATER ACT

12. Plaintiffs hereby incorporate each of the foregoing allegations by reference as though fully set forth in this cause of action.

13. This First Count is brought against Defendants, United States Department of the Army and the United States Department of Defense only.

14. Each of the Plaintiffs is a “citizen” as said term is defined in 33 U.S.C. § 1365(g), in that they are persons having an interest which is or may be adversely affected by the actions of the Defendants described in this First Count. Each of the Plaintiffs likewise has one or more interests that are or may be adversely affected by the actions or inactions of the Defendants described in the Second and Third Counts below.

15. Defendants, United States Department of the Army and United States Department of Defense (collectively the “Army”), maintain jurisdiction and/or control over a military installation consisting of approximately 60,000 acres known as Fort Richardson, located north of Anchorage, Alaska. Fort Richardson lies within this district.

16. As part of its operations at Fort Richardson, beginning at a time currently unknown to the Plaintiffs and continuing to the present, the Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, in to and on various lands and waters on and/or in the vicinity of Fort Richardson.

17. The Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, into waters and/or on to lands on or in the vicinity of Fort Richardson, using cannons, rifles, artillery and/or other point sources.

18. The waters into which the Army has and/or continues to and/or plans to discharge munitions, and the constituents and/or by-products and/or residues of munitions, include the

waters of the Eagle River, Eagle River Flats and/or Knik Arm.

19. The Army has not applied for, nor has it been issued, a permit from the United States Environmental Protection Agency (“EPA”) authorizing the discharge of munitions into waters as described in this First Count.

20. The Army therefore has violated, continues to violate and/or threatens to violate 33 U.S.C. §§1311(a) and 1323(a), as well as 40 C.F.R. §122.21.

21. The waters of the Eagle River on and in the vicinity of Fort Richardson violate the water quality standards established by 18 Alaska Administrative Code 070.20(b) in that among other things such waters contain toxic or otherwise hazardous substances at levels exceeding the water quality standards, and said toxic or otherwise hazardous substances pose a danger to the health or well being of fish, birds, mammals, other animals, and plants, and many of said substances are capable of accumulating, and do accumulate, in fish, birds, mammals, other animals and plants, thereby posing a health risk to persons who consume the fish and/or birds and/or mammals or other animals. Said toxic or otherwise hazardous substances are and/or threaten to be transported by natural processes such as currents, tides, and ice movement, in to the waters of the Cook Inlet and the streams and/or rivers in the vicinity thereof. The waters of the Eagle River also violate the water quality standards in other ways that will be proven at trial.

22. The Army’s discharge of munitions and/or the constituents and/or by-products and/or residues of munitions into and on lands and waters as described herein, has caused and/or contributed, and continue to cause and/or contribute, to violations of Alaska water quality standards in the Eagle River. The Army therefore has violated and continues to violate 18 Alaska Administrative Code 070.10 and 33 U.S.C. §1323(a). The State of Alaska has identified the Army’s military activities as the cause for the Eagle River’s violation of the quality

standards.

23. The Army's discharge of munitions and the constituents, by-products and/or residues of munitions as described herein, has polluted and/or added to the pollution of the land and/or waters on and/or in the vicinity of Fort Richardson. Said lands and/or waters include lands and/or waters in, on and/or under the Eagle River, Eagle River Flats, and/or the Knik Arm. The Army's actions therefore have violated and continue to violate Alaska Statutes 46.03.710 and 33 U.S.C. § 1323(a).

24. As a result of the Army's actions, large amounts of munitions and the constituents and/or by-products and/or residues of munitions now exist in and on the lands and waters in and near the Eagle River. These munitions and the constituents and/or by-products and/or residues of munitions have been, are being, and threaten to be released to the Eagle River and such release has caused and continues to cause the waters of the Eagle River to violate the Alaska water quality standards.

25. The Army has never adopted or carried out any plan to clean up the munitions and constituents and/or by-products and/or residues of munitions from these lands and waters. By failing to adopt and carry out such a clean-up plan, the Army has caused and contributed, and continues to cause and contribute, to violations of the water quality standards in the Eagle River; and therefore has violated and continues to violate 18 A.A.C. 070.10 and 33 U.S.C. § 1323(a).

## **SECOND COUNT**

### **VIOLATIONS OF SOLID WASTE DISPOSAL ACT**

26. Plaintiffs hereby incorporate each of the foregoing allegations by reference as though fully set forth in this cause of action.

27. This Second Count is brought against Defendants, United States Department of

the Army and the United States Department of Defense only.

28. As described in the First Count above, the Army has violated and continues to violate Alaska Statutes §§46.03.710.

29. The Army's violations of Alaska Statutes §§46.03.710 constitute a violation of 42 U.S.C. §6961(a).

### **THIRD COUNT**

#### **VIOLATIONS OF CERCLA**

30. Plaintiffs hereby incorporate each of the foregoing allegations by reference as though fully set forth in this cause of action.

31. This Third Count is brought against all of the Defendants named above.

32. In 1994, due to a high level of pollution, the Environmental Protection Agency placed Fort Richardson on the National Priorities List, a list of the nation's most polluted facilities that are to be given priority for cleanup.

33. Shortly thereafter, the EPA, the State of Alaska, and the Army entered into an "interagency agreement" (as that term is used in 42 U.S.C. §9620(e)) entitled "Federal Facility Agreement Under CERCLA Section 120 Administrative Docket Number 1092-05-02-120" (hereinafter the "FFA") regarding Fort Richardson.

34. Unexploded ordnance, also referred to as ordnance and explosives ("OE") exists in, on, and/or under the lands and/or water on Fort Richardson, including without limitation the lands and/or waters of the Eagle River, Eagle River Flats and/or the Knik Arm, as well as the lands and/or waters in an area of Fort Richardson referred to by the Army as the OB/OD pad. OE may also exist in, on, and/or under other lands and/or waters on or in the vicinity of Fort Richardson. The Army caused this OE to be released to the lands and/or waters as described

above. The Army intends to allow this OE to remain in and/or on the lands and/or waters permanently, and the Army does not intend to clean up or remove this OE.

35. As a result of the release of OE in and/or on the lands and/or waters described above, toxic or otherwise hazardous substances (including without limitation explosive compounds and heavy metals) have been, are being, and/or threaten to be released to the waters and lands on Fort Richardson. These toxic or otherwise hazardous substances pose a danger to the health or well being of fish, birds, mammals, other animals, and plants, and many of said substances are capable of accumulating, and do accumulate, in fish, birds, mammals, other animals and plants, thereby posing a health risk to persons who consume the fish and/or birds and/or mammals or other animals. Said toxic or otherwise hazardous substances are being and/or threaten to be transported by natural processes such as currents, tides, and ice movement, in to the waters of the Cook Inlet and the streams and/or rivers in the vicinity thereof. Natural processes also have transported and/or threaten to transport unexploded ordnance off of Fort Richardson and in to and/or on lands or waters in the vicinity of Fort Richardson, thereby posing an explosive danger to persons and wildlife off of Fort Richardson.

36. This OE in, on and/or under the lands and/or waters of Fort Richardson constitutes and contains “hazardous substances” and/or “pollutants or contaminants” as those terms are defined in 42 U.S.C. §§9601(17) and 9601(33). The Army, however, has taken, and continues to take, the position that this OE neither constitutes nor contains “hazardous substances” and/or “pollutants or contaminants” as those terms are defined in 42 U.S.C. §§9601(17) and 9601(33).

37. The Army has never commenced, nor has it performed, a remedial investigation or feasibility study (RI/FS) regarding OE on Fort Richardson.

38. The Army's failure to commence or perform such an RI/FS has violated and continues to violate 42 U.S.C. §9620(e)(1) as well as paragraphs 8.8 and 8.9 and Attachment 1 of the FFA (including without limitation section 3.1 of Attachment 1).

39. The Army has never adopted a plan for remediation of the OE described above; nor has the Army commenced or performed remediation of such OE. The Army therefore has violated and continues to violate 42 U.S.C. §§9620(e)(2)-(e)(4) as well as ¶8.10 and Attachment 1 to the FFA.

### **REQUEST FOR RELIEF**

Plaintiffs respectfully request the following relief:

40. Declare that the Army's discharge of munitions into waters as described in the First Count herein has violated and continues to violate 33 U.S.C. §§1311(a) and/or 1323(a).

41. Order the Army to stop discharging munitions into any waters, including the waters of the Eagle River, Eagle River Flats and/or the Knik Arm until such time as the Army obtains a permit authorizing the discharge from the EPA.

42. Declare that the Army's discharge of munitions and the constituents and/or by-products and/or residues of munitions to lands and waters as described in the First and Second Counts herein has violated and/or continue to violate 18 A.A.C. §070.10, Alaska Statutes §§46.03.710 and/or 33 U.S.C. §1323(a) and/or 42 U.S.C. §6961(a).

43. Issue appropriate injunctive relief prohibiting the Army from continuing to discharge munitions and the constituents and/or by-products and/or residues of munitions to lands and waters as described in the First and Second Counts in violation of 18 A.A.C. §070.10, AS §§46.03.710 and/or 33 U.S.C. §1323(a) and/or 42 U.S.C. §6961(a).

44. Declare that the Army's failure to adopt or implement a plan to clean-up

munitions in and on lands and waters as described in the First Count herein has violated and continues to violate 18 A.A.C. §070.10 and 33 U.S.C. § 1323(a).

45. Issue appropriate injunctive relief requiring the Army to adopt and implement a plan to clean up munitions so as to reduce and/or eliminate violations of Alaska's water quality standards.

46. Declare that the OE in, on, and/or under the lands and waters on Fort Richardson constitutes and contains "hazardous substances" and/or "pollutants or contaminants" as those terms are defined in CERCLA, 42 U.S.C. §§9601(17) and 9601(33).

47. Order the Army to commence and fully perform an RI/FS regarding OE on Fort Richardson.

48. Order the Army to pay the Plaintiffs' costs and attorneys fees as provided by statute, including 33 U.S.C. §1365(d) and 42 U.S. §§ 6972(e) and 9659(f).

49. Order the Army to pay appropriate civil penalties as provided by 33 U.S.C. § 1319(d), 42 U.S. C. § 6928(g), 42 U.S.C. §§ 9609(a)(1)(E), 9609(b)(5), 9622(l), and/or 9659(c).

50. Issue other and further relief as the court deems just and proper.

Dated: June 26, 2002

COX & MOYER

By: \_\_\_\_\_

SCOTT J. ALLEN  
Attorneys for Plaintiffs

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