

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Igor Zbitnoff , Eileen Andreoli, Jeffrey Frost,
Richard Joseph, Juliet Beth Buck, David Deslauriers, Sr.,
Ray Gonda, And Stop the F-35 Coalition,
Plaintiffs

v.

Docket No. _____

Deborah Lee James, Secretary of the Air Force,
Defendant

COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF

Plaintiffs Igor Zbitnoff, Eileen Andreoli, Jeffrey Frost, Richard Joseph, Juliet Beth Buck, David Deslauriers, Sr., Ray Gonda and Stop the F-35 Coalition, by and through the Law Office of James A. Dumont, Esq., PC, allege as follows.

Introduction

This action challenges the issuance of a decision by the Secretary of the Air Force to select the Vermont Air National Guard (VANG) to operate F-35 fighter-bomber jets at the Burlington International Airport (BIA). According to the Defendant's Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS), these jets will produce noise that will cause thousands of additional Chittenden County residents to experience noise exceeding 65 db DNL – that is, thousands more residents than currently experience noise at this level because of operation of the VANG's aging squadron of F-16 jets. Under Department of Defense and Federal Aviation Administration (FAA) standards, noise exceeding the 65 db DNL standard is incompatible with residential use. Many of the homes that will experience noise in excess of 65 db DNL consist of

federally subsidized low income housing or have been listed by the Advisory Council on Historic Preservation (ACHP) on the National Register of Historic Places (NRHP). Defendant failed to conduct the requisite “hard look” under the National Environmental Policy Act of 1969 by failing to identify and evaluate: *i)* any mitigation other than operational constraints; *ii)* conflict with the goals and standards of state and local land use plans and law, such as the goal of South Burlington’s and Winooski’s municipal plans of protecting low income housing, and the Act 250 residential noise standard; *iii)* socioeconomic impacts that will affect thousands of Vermonters for decades, such as the razing of blocks of residential neighborhoods in the 65 db DNL zone; *iv)* how the predicted noise levels would affect the *use* of historic properties as residences (the EIS examined only whether the noise would cause *physical damage* to residential structures) or would lead to demolition of historic properties; *v)* the current management practice of the Air Force to imminently discontinue operation of the oldest F-16 jets, specifically including the VANG’s F-16 jets, and therefore whether the no-action alternative that was required to be evaluated consisted of no F-35 jet noise and no F-16 jet noise at BIA rather than continued F-16 jet noise; and *vi)* the low-probability but catastrophic consequences of the crash of an aircraft constructed out of carbon fibers and stealth-technology coatings which, when burned, produce extraordinarily toxic particulates and fumes to which the public and first-responders would be exposed.

The Defendant also relied upon a supplemental mitigation plan that was published, made part of the record and now is being implemented, without first making available a draft for public comment and then responding to the public comment. The Defendant also failed to consult with the ACHP as required by the National Historic Preservation Act.

The Secretary’s decision was made on December 2, 2013 and announced on December 3, 2013,

following issuance of a Final Environmental Impact Statement (FEIS) dated September, 2013. The record of decision included a plan to provide a supplemental study of mitigation alternatives (Mitigation Report); that report was issued on April 18, 2014.

Jurisdiction

1. This is a Complaint under the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C.A. § 4321 et seq., and the National Historic Preservation Act, as amended (NHPA), 16 U.S.C.A. § 470 et seq. The Court has jurisdiction under 28 U.S.C.A. § 1331 and 28 U.S.C.A. § 1361 and may issue a declaratory judgment and further relief under 28 U.S.C.A. §§ 2201 and 2202.

The Parties

2. Igor Zbitnoff is a resident of Winooski. He owns and occupies the residence at 20 Mansion Street.
3. Eileen Andreoli is a resident of Winooski. She is an owner of and occupies the residence at 36 Hood Street.
4. Jeffrey Frost is a resident of Winooski. He is an owner of and occupies the condominium residence at 110 West Canal Street.
5. The building that includes Mr. Frost's property, 110 West Canal Street, is listed on the National Register of Historic Places.
6. Richard Joseph is a resident of Winooski. He owns and occupies property at 9 Champlain Place.
7. Juliet Beth Buck is a resident of South Burlington. She owns and occupies property at 3 Woodbine Street with her family, including minor children.

8. David Deslauriers, Sr., is a resident of South Burlington. He owns and occupies the residence at 1 Delaware Street.
9. Ray Gonda is a resident of South Burlington. He owns and occupies property at 31 Berkley Street. He is retired and spends most of the day at home.
10. Stop the F-35 Coalition (Coalition) is an unincorporated association of citizens. The Coalition was formed to protect its members and other residents of Winooski, South Burlington, Burlington, Williston and surrounding areas from the noise, health risks, housing impacts, crash risk, loss of property value, and other harms and risks associated with introduction of F-35 aircraft to the BIA; to obtain just compensation for homeowners whose property values will be affected by operation of F-35 jets; and also to help redirect national policy towards more constructive use of federal funds. Coalition uses political advocacy, litigation and public education to protect the interests of its members. Coalition has met once a month, and often more frequently, to carry out these purposes and use these methods, for over four years.
11. The Coalition's members reside in locations that would suffer the noise, health risks, housing impacts, crash risk, loss of property value, and other harms and risks associated with introduction of F-35 aircraft to the BIA, including members who will experience noise in excess of 65 db DNL.
12. The property of each individual Plaintiff currently experiences noise from the F-16 jets now in use by the VANG at the BIA.
13. The noise experienced by each individual Plaintiff and their property from commercial and general aviation and from helicopters at BIA is minimal.

14. The noise from F-16 jets is the principal source of loud aircraft noise at each individual Plaintiff's property.
15. FAA and Department of Defense studies have concluded that residential land uses normally are not compatible with noise above 65 db DNL. The FEIS relies upon this standard. DEIS/FEIS p.C-13.
16. With the exception of Mr. Gonda's and Mr. Deslauriers' property, the current noise level at each individual Plaintiff's property from the F-16 jets does not exceed 65 db DNL. At Mr. Gonda's and Mr. Deslauriers' property, it does.
17. According to the data in the DEIS and FEIS, Mr. Zbitnoff's residence will experience noise exceeding 70 db DNL noise under each of the two F-35 operational alternatives identified and evaluated in the FEIS for the VANG -- operation of 18 F-35 jets and operation of 24 F-35 jets.
18. According to the DEIS and FEIS, Ms. Andreoli's residence will experience noise in excess of 65 db DNL under each of the two operational alternatives considered in the FEIS.
19. According to the DEIS and FEIS, Mr. Frost's historic residence will be immediately adjacent to the 65 db DNL zone if 18 F-35 jets are placed in operation and will experience noise exceeding 65 db DNL if 24 F-35 jets are placed in operation.
20. Based on data in the DEIS and FEIS, Mr. Joseph's residence will be approximately 400 feet from the area predicted to experience 65 db DNL impacts and approximately 1000 feet from the area predicted to experience 70 db DNL impacts if 18 F-35 jets are placed in operation, and will be approximately 75 feet from the area predicted to experience 65 db

DNL impacts if 24 F-35 jets are placed in operation.

21. Mr. Joseph's residence will experience substantially greater noise levels than if neither operational alternative were selected.
22. Mr. Joseph regularly uses those parts of Winooski that, according to the DEIS and FEIS, will suffer the most severe noise impacts – the areas predicted to suffer noise exceeding 65 db DNL and 70 db DNL. He walks, shops, eats at restaurants or makes other uses of this area on a daily basis.
23. Ms. Buck, her family and her residential property would suffer more intrusive, more disturbing, louder noise from the F-35 jets, when measured under the Lmax (nonaveraged) standard, if 18 F-35 jets are placed in operation or if 24 F-35 jets are placed in operation.
24. Mr. Gonda and his residential property would suffer more intrusive, more disturbing, louder noise from the F-35 jets, when measured under the Lmax (nonaveraged) standard, under each F-35 operational alternative, than he experiences with the F-16 jets.
25. According to the DEIS and FEIS, Mr. Gonda's property will experience noise in excess of 65 db DNL if 18 F-35 jets are placed in operation and also if 24 F-35 jets are placed in operation.
26. Mr. Deslauriers' property currently experiences noise in excess of 75 db DNL. According to the DEIS and FEIS, under either operational alternative Mr. Deslauriers will experience noise in excess of 75 db DNL.
27. Peer-reviewed scientific studies have found that at noise levels exceeding 65 db DNL, there is increased risk of cardiovascular disease, hearing impairment and childhood

cognitive impairment.

28. Mr. Zbitnoff's, Ms. Andreoli's, Mr. Frost's, Mr. Joseph's, Mr. Gonda's and Mr.

Deslauriers' health, and that of many Coalition members will be placed at risk by the noise of operating 18 or 24 F-35 jets at the BIA, if these peer-reviewed scientific studies are correct.

29. The DEIS and FEIS state that there is reliable evidence of health effects at 75 db DNL but not below 75 db DNL.

30. Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Ms. Buck, Mr. Gonda and Mr.

Deslauriers have been placed in reasonable fear of risk to their health and that of their families by the selection of the VANG to operate F-35 jets, and will suffer continued reasonable fear if 18 or 24 F-35 jets are placed in operation at BIA.

31. Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Ms. Buck, Mr. Gonda and Mr.

Deslaurier will suffer substantial loss of enjoyment of their daily lives from the noise of 18 F-35 jets or 24 F-35 jets based at BIA. The enjoyment of the daily lives of many of Coalition's members will also be harmed.

32. The real estate owned by Mr. Zbitnoff, Ms. Andreoli, Mr. Frost and Mr. Gonda may no longer qualify for federal Housing and Urban Development construction assistance, subsidies and insurance involving new construction, and will qualify for a reduced amount of funds available to prospective purchasers under certain federally sponsored loan programs, because these properties will experience noise in excess of 65 db DNL.

33. Under Vermont common law and the Rules of the Vermont Real Estate Commission, the selection of the VANG to operate F-35 jets obligates Mr. Zbitnoff, Ms. Andreoli, Mr.

Frost, Mr. Gonda and Mr. Deslauriers (and their real estate agents) to advise any prospective purchaser of their residences that the predicted noise will render these residences unsuitable for residential use under FAA standards.

34. The value of the property of Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Gonda and Mr. Deslaurier has been and will be significantly impaired because of the noise impacts of the selection of either F-35 operational alternative.
35. But for the selection of the VANG to operate F-35 jets at the BIA, each Plaintiff would not suffer these personal and financial risks and harms.
36. Some of the risk and harm that each Plaintiff would suffer could be reduced by reasonable mitigation measures. These measures were proposed in comments submitted to Defendant. These measures are set out in Count 1 below.
37. These measures were not considered in the DEIS, the FEIS or the Mitigation Plan.
38. But for the failure of the DEIS, the FEIS and the Mitigation Plan to consider reasonable mitigation measures, each Plaintiff would not suffer the increased level of risk and harm that will be caused by failure to adopt reasonable mitigation.
39. The DEIS and FEIS disclosed that if the F-35 jets are selected for the VANG, the existing F-16 jets would be removed.
40. The detailed analysis of environmental impacts set forth in the DEIS and FEIS uses the noise impacts of F-16 jets as the baseline that would continue to affect the public if the VANG were not to be selected for the F-35 jets.
41. Three months after the close of the comment period on the Draft EIS, the VANG disclosed to members of the Burlington City Council that the current management

practice of the Air Force is to remove from service all of the oldest F-16s from service by the time the F-35 jets are placed into service, regardless of whether F-16s are replaced by F-35s at the particular bases where the oldest F-16s have been located – and that the VANG’s aging F-16s are in this category that will be removed from service regardless of whether the VANG operates F-35s. These facts are alleged in detail in Count 5.

42. If the F-35 jets were not selected for the VANG, under the current management practice of the Air Force there would remain only the relatively minor noise from commercial and general aviation fixed wing airplanes and from military, commercial and general aviation helicopters.
43. The noise levels that Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Ms. Buck, Mr. Gonda and Mr. Deslauriers would experience from operation of F-35 jets will be much greater than the noise levels they currently experience, but would differ dramatically from the noise levels that they would experience were F-35 jets not placed in operation -- the absence of noise from either F-16 jets or F-35 jets.
44. The selection of the VANG to operate F-35 jets will proximately cause Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Ms. Buck, Mr. Gonda and Mr. Deslauriers, and members of the Coalition, to suffer dramatically increased noise levels as compared to the noise levels that they would experience were F-35 jets not placed in operation -- the absence of noise from either F-16 jets or F-35 jets.
45. The selection of the VANG to operate F-35 jets will proximately cause Mr. Deslauriers to continue to suffer the increased risk of cardiovascular disease, hearing impairment and other disorders associated with 75 db DNL noise, which he will no longer suffer from

VANG's aging squadron of F-16 jets once when they are imminently retired.

46. The residences of Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Mr. Deslauriers and many Coalition members lies under or nearly under the proposed flight path of the F-35 jets.
47. F-35 jets are constructed of carbon fiber and stealth technology coatings.
48. Any crash of an F-35 would produce extraordinarily toxic particulates and fumes because of these components.
49. Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Mr. Deslauriers and any person to whom they sold their property would be at greatly increased risk of harm should an F-35 crash, as compared to the risk of harm should an F-16 or a commercial airplane crash.
50. The Record of Decision states that the Defendant and/or her predecessor selected the first operational alternative, which will cause 18 F-35 jets to be operated out of the BIA.
51. The Record of Decision does not limit the Defendant to the first operational alternative; at a later date the second operational alternative, involving 24 F-35 jets, may be selected without any supplemental FEIS or other additional review under NEPA.
52. Mr. Zbitnoff, Ms. Andreoli, Mr. Frost, Mr. Joseph, Ms. Buck, Mr. Gonda, Mr. Deslauriers and members of the Coalition have been injured in fact by the Defendant's actions and will be injured further if the relief requested in this Complaint is not granted.
53. Deborah Lee James is the Secretary of the Air Force. The environmental studies, FEIS and consideration of impacts on historic properties at issue in this matter were conducted under her supervision or that of her predecessor; any relief that the Court may order would be directed to the Secretary of the Air Force.

Factual Background

54. The Defendant's predecessor issued a Draft Environmental Impact Statement (DEIS) in March of 2012, the purpose of which was to disclose and evaluate various alternatives of deploying the F-35 jet at listed Air Force and Air National Guard bases around the nation, the environmental impacts of each alternative and possible mitigation.
55. The VANG was listed as one potential host for the F-35 jets. Two operational alternatives were disclosed – one involving 18 F-35 jets and one involving 24 F-35 jets. Impacts of basing the jets at the BIA, and of a “no-action” alternative consisting of continued basing of F-16 jets at the BIA, were disclosed and evaluated.
56. In May of 2013, the Defendant's predecessor issued a second DEIS to replace the first DEIS.
57. Again, the VANG was listed as one potential host for the F-35 jets and two operational alternatives were disclosed and evaluated. Again, impacts of basing the jets at the BIA, and of a “no action” alternative consisting of continued basing of F-16 jets, were disclosed and evaluated.
58. The DEIS and later the FEIS predicted in Table 2-12 (at page 2-32) that operational alternative 1 would cause an additional 289 acres to experience 65 db DNL noise. Within this area, an additional 2,061 individuals and an additional 997 households would experience 65 db DNL noise as compared to existing F-16 noise. Seventy of the additional 289 acres would experience noise in excess of 75 db DNL, according to Table BR 3.10-2 (page BR4-67).
59. The DEIS and later the FEIS predicted in Table 2-12 (at page 2-32) that operational alternative 2 would cause an additional 672 acres to experience 65 db DNL noise. Within this area, an

additional 3,117 individuals and an additional 1,444 households would experience 65 db DNL noise as compared to existing F-16 noise. Of the 672 additional acres, 175 acres would experience noise in excess of 75 db DNL, according to Table BR3.10-2 (page BR4-67).

60. A substantial number of homes listed on the National Register of Historic Places lie with the additional hundreds of acres that would experience noise in excess of 65 db DNL under both operational alternatives.
61. On information and belief, a substantial number of federally subsidized low-income housing units lie within the additional hundreds of acres that would experience noise in excess of 65 db DNL under both operational alternatives.
62. According to Table 3.2-1 of the DEIS and the FEIS (page BR4-23), at certain locations the F-35 will be 21 dB louder than the F-16 on take-off, 22 dB louder than the F-16 on arrival, and 25 dB louder than the F-16 on Low Approach and Go.
63. Each 10 dB increase means a doubling in loudness, so a 20 dB increase means the noise will be perceived by the human ear as four times louder than the F-16. (DEIS/FEIS p.3-7).
64. The DEIS and later the FEIS (p.BR4-78) reported that in Chittenden County as a whole the average annual number of residential building permits for the past decade has been 573.
65. The number of additional residential units rendered incompatible with residential use, by introduction of F-35 jets, would be the equivalent of 1.7 years (operational alternative 1) or 2.4 years (operational alternative 2) of new construction of homes in all of Chittenden County.

**Count 1 – Failure to Adequately Address
Mitigation under NEPA**

66. Paragraphs 1-65 are incorporated by reference.

67. Sections 2.6, BR2.6, BR 2.7 and BR 2.8 of the DEIS and FEIS discussed possible mitigation at the BIA. The DEIS and later the FEIS disclosed only a limited set of mitigation measures that consisted of scheduling of aircraft flights and education of pilots to minimize noise during take-off and landing.
68. The DEIS and later the FEIS also noted that the City of Burlington might extend its FAA “Part 150” buyout of homes to include homes impacted by the F-35.
69. The Part 150 buyout referred to includes razing of homes after they are purchased.
70. The DEIS and later the FEIS contained no plan by the proponent of the project, the Defendant, or by the City, to institute any buy-out, nor any identification of how many homes might be purchased and razed, nor any disclosure of the cost, nor any date of completion.
71. Section 989.22 of the Air Force’s NEPA regulations state (emphasis added):

§ 989.22 Mitigation.

(a) When preparing EIAP documents, indicate clearly whether mitigation measures (40 CFR 1508.20) must be implemented for the alternative selected. If using Best Management Practices (BMPs), identify the specific BMPs being used and include those BMPs in the mitigation plan. Discuss mitigation measures in terms of “will” and “would” when such measures have already been incorporated into the proposal. Use terms like “may” and “could” when proposing or suggesting mitigation measures. Both the public and the Air Force community need to know what commitments are being considered and selected, and who will be responsible for implementing, funding, and monitoring the mitigation measures.

(b) The proponent funds and implements mitigation measures in the mitigation plan that is approved by the decision-maker. Where possible and appropriate because of amount, the proponent should include the cost of mitigation as a line item in the budget for a proposed project. The proponent must ensure compliance with mitigation requirements, monitoring their effectiveness, and must keep the EPF informed of the mitigation status. The EPF reports its status, through the MAJCOM, to HQ USAF/A7CI when requested. Upon request, the EPF must also provide the results of relevant mitigation monitoring to the

public....

(d) For each FONSI or ROD containing mitigation measures, the proponent prepares a plan specifically identifying each mitigation, discussing how the proponent will execute the mitigations, identifying who will fund and implement the mitigations, and stating when the proponent will complete the mitigation. The mitigation plan will be forwarded, through the MAJCOM EPF to HQ USAF/A7CI for review within 90 days from the date of signature of the FONSI or ROD.

72. The Council on Environmental Quality (CEQ) regulations define mitigation as including “Rectifying the impact by repairing, rehabilitating, or restoring the affected environment” and “Compensating for the impact by replacing or providing substitute resources or environments.”
73. The DEIS and later the FEIS did not identify, evaluate or commit to mitigation measures that would rectify or compensate for the harm predicted by the DEIS/FEIS, such as providing retrofit of homes to add soundproofing, or providing hearing protection for children and adults living in homes exceeding 65 db DNL, or providing medical monitoring or medical treatment to children and adults living in homes exceeding 65 db DNL or 75 db DNL, or compensating homeowners for lost value of their homes.
74. Although the DEIS and later the FEIS disputed the likelihood of health effects at levels below 75 db DNL, the DEIS and FEIS agreed that harmful health effects are likely to be suffered by persons experiencing noise in excess of 75 db DNL and the DEIS and the FEIS predicted that F-35 operation is likely to cause noise levels in excess of 75 db DNL in some communities.
75. However, the DEIS and FEIS offered no mitigation measures to address the medical harm that the DEIS and FEIS predicted would will occur, to those persons experiencing noise

in excess of 75 db DNL.

76. The Plaintiffs submitted comments pointing out these shortfalls.
77. The FEIS and Mitigation Plan did not correct these shortfalls or provide any justification for failing to do so. The detailed comments submitted were not responded to.
78. The statutory command that the agency prepare a detailed statement on “any adverse environmental effects which cannot be avoided should the proposal be implemented,” requires that the EIS discuss the extent to which adverse effects *can* be avoided through reasonable mitigation.
79. The intent of the NEPA to be “action-forcing” also requires that the EIS provide a reasonably complete discussion of possible mitigation actions.
80. The Defendant abused her discretion and acted arbitrarily and capriciously in failing to disclose and evaluate reasonable mitigation and in failing to explain why she was not doing so.

WHEREFORE, Plaintiffs pray that this Honorable Court:

- (a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to adequately disclose and evaluate mitigation in the FEIS;
- (b) Issue a mandatory injunction requiring Defendant to comply with NEPA;
- (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised EIS is prepared that adequately discloses and evaluates mitigation;
- (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
- (e) Grant such other and further relief as the Court deems just and proper.

**Count 2 – Failure to Address Conflict with
State and Local Law under NEPA**

81. Paragraphs 1-65 are incorporated by reference.

82. Section 4 of the South Burlington Nuisance ordinance states:

It shall be unlawful for any person to make or cause to be made any loud or unreasonable noise. Noise shall be deemed to be unreasonable when it disturbs, injures or endangers the peace or health of two or more unrelated people or when it endangers the health, safety or welfare of the community. Any such noise shall be considered to be a noise disturbance and a public nuisance.

83. The South Burlington Comprehensive Plan states: “Existing and developing residential neighborhoods shall be identified and protected through appropriate zoning and responsible site planning. Many of these residences constitute an irreplaceable, lower cost segment of the City’s housing stock.” Other parts of the Plan reiterate this point, for example stating that “providing for housing is a fundamental element of the Plan.”

84. One of the objectives of the Winooski Municipal Plan is protection of housing availability and quality, in particular protection of affordable housing subsidized by government programs.

85. The Winooski Municipal Plan states that noise from the BIA jeopardizes this housing goal.

86. Vermont’s Act 250 has consistently been interpreted by the Environmental Board and then the Environmental Division of the Superior Court to include a 55 db (lmax) standard for protection of residential areas under Criterion 8.

87. The proposed operation of 18 F-35 jets (alternative 1) will place 562 subsidized housing units within Winooski within the zone exceeding 65 db DNL, considered unsuitable for residential use under FAA and Department of Defense standards.

88. The proposed operation of 24 F-35 jets (alternative 2) will place 570 subsidized housing units within Winooski within the zone exceeding 65 db DNL, considered unsuitable for residential use under FAA standards.
89. Noise predicted in the DEIS and later the FEIS for the F-35 exceeding 65 db DNL or exceeding 55 db Lmax would violate the South Burlington Nuisance ordinance, and would conflict with the South Burlington Comprehensive Plan, the Winooski Municipal Plan and the noise standards established under Criterion 8 of Vermont's Act 250.
90. Section 1502.16 of the CEQ regulations states that an EIS "shall" include discussion of "(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)"
91. Section 1506.2(d) states:
- To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.
92. The Draft EIS contained no disclosure or analysis of state and local land use plans, policies and controls.
93. The Plaintiffs submitted detailed comments pointing out the failure of the DEIS to address state and local land use plans, policies and controls.
94. The FEIS and Mitigation Plan did not correct this error, nor did they explain why no correction was needed.
95. The purposes of NEPA and its mandate that there be full disclosure of environmental impacts

required that the EIS disclose and evaluate the extent to which the proposed operation of F-35 jets would conflict with state and local land use plans, policies and controls.

96. The Defendant abused her discretion and acted arbitrarily and capriciously in failing to disclose and evaluate the extent to which the proposed operation of F-35 jets would conflict with state and local land use plans, policies and controls, and in failing to explain why she was not doing so.

WHEREFORE, Plaintiffs pray that this Honorable Court:

- (a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to adequately disclose and evaluate the extent to which the proposed operation of F-35 jets would conflict with state and local land use plans, policies and controls;
- (b) Issue a mandatory injunction requiring Defendant to comply with NEPA;
- (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised EIS is prepared that adequately discloses and evaluates the extent to which the proposed operation of F-35 jets would conflict with state and local land use plans, policies and controls;
- (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
- (e) Grant such other and further relief as the Court deems just and proper.

**Count 3 – Failure to Address Socioeconomic
Impacts Under NEPA**

97. Paragraphs 1-65 are incorporated by reference.

98. The DEIS, while relying on potential buy-out and razing of homes under the FAA Part 150

mitigation program, did not disclose or evaluate the impact on residential neighborhoods if homes in the areas exceeding 65 dB DNL are purchased and razed, leaving vacant blocks in what are now residential areas.

99. The DEIS, while relying on potential buy-out and razing of homes under the FAA Part 150 mitigation program, did not disclose or evaluate the impacts on Winooski of losing millions of dollars from its tax base, or the effect on the character of the historic City of Winooski if substantial portions of its historic core were to be purchased and razed as part of a Part 150 program.

100. The DEIS did not disclose or evaluate any mitigation of the financial impact on the City of Winooski.

101. The DEIS did not disclose or evaluate the financial impact on homeowners whose homes fall within the zone exceeding 65 db DNL but are not purchased and razed under the FAA Part 150 mitigation program.

102. The DEIS did not disclose or evaluate any mitigation of the financial impact on homeowners whose homes fall within the zone exceeding 65 db DNL but are not purchased and razed under the FAA Part 150 mitigation program. For example, voluntary financial payments by the State or by the City of Burlington, or the potential for legal redress or for lack of legal redress (because of sovereign immunity or other defenses) for these losses was not disclosed or evaluated.

103. Section 1502.16 of the CEQ regulations requires that an EIS evaluate all environmental consequences from the proposed action, both direct and indirect. The CEQ regulations flesh out the meaning of “the human environment” and what must be examined

in an EIS. Section 1508.14 states:

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of “effects” (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

104. Plaintiffs submitted detailed comments raising the failure to address these socioeconomic impacts.
105. Included with Plaintiffs’ comments was a report from a licensed appraiser. The appraiser found an average loss of value of \$33,534 per home in those areas of South Burlington already affected by 65 db DNL of military aircraft noise.
106. The DEIS predicted over 997 additional homes under F-35 operational alternative 1 and 1,444 additional homes under operational alternative 2 would experience noise in excess of 65 db DNL.
107. Based on the average impact of existing 65 db DNL noise, the losses to property values in the community from the proposed operation of the F-35 would be \$33 million for alternative 1 and \$48 million for alternative 2.
108. The FEIS and Mitigation Plan did not correct this error, nor did they explain why no correction was needed.
109. The purposes of NEPA and its mandate that there be full disclosure of environmental impacts required that the EIS disclose and evaluate these socioeconomic impacts, which are reasonably foreseeable and which may substantially alter existing neighborhoods and the

financial health of thousands of Vermonters.

110. The Defendant abused her discretion and acted arbitrarily and capriciously in failing to disclose and evaluate the socioeconomic impacts of the proposed operation of F-35 jets, and in failing to explain why she was not doing so.

WHEREFORE, Plaintiffs pray that this Honorable Court:

- (a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to adequately disclose and evaluate the socioeconomic impacts extent of the proposed operation of F-35 jets;
- (b) Issue a mandatory injunction requiring Defendant to comply with NEPA;
- (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised EIS is prepared that adequately discloses and evaluates the socioeconomic impacts of the proposed operation of F-35 jets;
- (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
- (e) Grant such other and further relief as the Court deems just and proper.

**Count 4 – Failure to Identify and Evaluate Harm
to Historic Properties Under NEPA**

111. Paragraphs 1-65 are incorporated by reference.
112. The F-35 DEIS referred generically to two historic districts that would experience noise in excess of 65 db DNL. It did not identify the individual properties within these districts or determine the number of those individual properties.
113. The DEIS did not assess the impacts on the use of these unidentified properties from

noise. Instead it addressed only whether jet noise might cause physical damage to the buildings.

114. The DEIS reported that the State Historic Preservation Officer (SHPO) had verbally concurred in the Defendant's conclusion of no adverse impact on historic properties.

115. In fact, the Vermont SHPO had not concurred. The DEIS was erroneous.

116. Prior to issuance of the second DEIS, on May 29, 2012, the Vermont SHPO had submitted written comments stating that the project is located in a heavily populated area containing historic buildings and districts "many of which are listed on or eligible for listing on" the NRHP.

117. The SHPO's May 29, 2012, letter stated that to date, approximately 144 homes that were already within the BIA 65 db DNL corridor had been "purchased and demolished" under the FAA's Part 150 noise mitigation program in order to minimize incompatible land use. It stated that because the majority of the homes already demolished were less than 50 years old, there had not been any issues with the demolition of historic structures.

118. The SHPO's May 29, 2012, letter stated that "The expanded noise map for the F-35s, however, may expose numerous historic structures and districts to noise levels above 65 dB."

119. The SHPO's May 29, 2012, letter explicitly raised the potential for physical harm to historic homes through purchase and demolition, once these homes become subject to 65 db DNL noise from the F-35jets.

120. The SHPO's May 29, 2012, letter explicitly sought from the Defendant disclosure of whether the Defendant, the VANG or the BIA will utilize the Part 150 program to demolish historic homes.

121. The SHPO's letter made clear that the level of disclosure in the first DEIS was inadequate. Her concerns included but were not limited to physical harm to historic homes caused by the vibrations of jet aircraft. Her letter criticized the Defendant's conclusion, in the first DEIS, that there would be no adverse impacts because it had failed to take into account "the potential for significant adverse impacts on historic resources if houses within the expanded 65 dB will become candidates for purchase and demolition" as well as vibration impacts. Her comment concluded: "Will the final EIS take into account these potential effects?"
122. The SHPO's May 29, 2012, letter also sought from the Defendant disclosure of "the level of effort and documentation" that would be undertaken "to identify and evaluate historic buildings within the expanded 65 dB noise contour."
123. The second DEIS did not address the SHPO's request for disclosure of the level of effort and documentation that would be undertaken to identify and evaluate historic buildings.
124. The second DEIS did not address the SHPO's request for disclosure of whether historic homes within the expanded 65 dB would become candidates for purchase and demolition.
125. The second DEIS did not address the SHPO's request for disclosure of whether the Defendant, the VANG or the BIA will utilize the Part 150 program to demolish historic homes.
126. The Secretary of the Vermont Agency of Commerce and Community Development submitted a comment on the second DEIS stating that the second DEIS erroneously had

reported that the Vermont SHPO had concurred.

127. The Secretary of the Vermont Agency of Commerce and Community Development also informed the Defendant that additional historic properties, outside the two districts mentioned in the second DEIS, would experience noise in excess of 65 db DNL as shown on the second DEIS maps. These include a third historic district, an entire historic block of the City of Winooski, and three individually identified historic properties.

128. The Secretary of the Vermont Agency of Commerce and Community Development also informed the Defendant that in the opinion of the Division for Historic Preservation the fact that there has already been aircraft noise in Winooski had led the Division to conclude that the impacts of the F-35 would not be adverse.

129. The letter from the Secretary of the Vermont Agency of Commerce and Community Development did not state that the SHPO – who had criticized the first DEIS – had concluded that the impacts of the F-35 would not be adverse.

130. Under NEPA, the substantial criticisms raised by the Vermont SHPO of inadequate disclosure of impacts on historic resources in a DEIS required a reasoned response by the Defendant.

131. The second DEIS did not respond to the concerns raised by the SHPO about the first DEIS.

132. The Plaintiffs also submitted comments on the second DEIS, including comments from Mr. Frost, as an owner of a property listed on the NRHP and located with the 65 db DNL zone shown on the noise contour maps in the DEIS.

133. Plaintiffs' comments included the same objection that the SHPO had raised in 2012 –

the second DEIS failed to address the effect on the character of the historic City of Winooski if substantial portions of its historic core were to be purchased and razed as part of a Part 150 program.

134. Plaintiffs' comments cited to CEQ regulations §§ 1502.15 and 1502.16, which require disclosure of effects on historic resources, and which require that the data and analysis in an EIS be commensurate with the importance of the impact.

135. Plaintiffs' comments noted that the DEIS did not disclose the number of historic sites that would be affected, whether they be one or one hundred.

136. Plaintiffs cited the requirements found in the regulations issued by the ACHP. These mandate that historic properties be identified, that the impacts on these identified properties be assessed by considering the impacts of noise on the *use* of the property, that a mitigation plan be developed for each adversely affected property and that, upon request, the Defendant must consult with the ACHP.

137. Plaintiffs requested that individual historic properties be identified, that the impacts on these identified properties be assessed by considering the impacts of noise on the *use* of the property, and that a mitigation plan be developed for these each adversely affected property and that the Defendant consult with the ACHP.

138. The FEIS did not address the SHPO's request for disclosure of the level of effort and documentation that would be undertaken to identify and evaluate historic buildings.

139. The FEIS did not address the SHPO's request for disclosure of whether historic homes within the expanded 65 dB zone would become candidates for purchase and demolition.

140. The FEIS did not reasonably address the SHPO's request for disclosure of whether the Defendant, the VANG or the BIA will utilize the Part 150 program to demolish historic homes within the 65 db DNL zone that would be created by the operation of F-35 jets.
141. Instead, in a response, the Defendant stated only that the Congress has authorized the FAA to do so in the past, which had already been stated in the SHPO's letter.
142. The FEIS continued to fail to identify any particular historic properties that would experience noise exceeding 65 db DNL.
143. The FEIS continued to fail to identify how many historic properties would experience noise exceeding 65 db DNL.
144. The FEIS did not ascertain, disclose or assess the cumulative impact of loss or impairment of use of the large number of historic residential properties listed in Plaintiffs' comments and in the letter from the Secretary of the Vermont Agency of Commerce and Community Development that would be exposed to noise exceeding 65 db DNL.
145. The FEIS responded to the statement by the Secretary of the Vermont Agency of Commerce and Community Development that the Vermont SHPO had not concurred by stating that the SHPO had conditionally concurred, withholding final concurrence until review of "the next version of the EIS."
146. The FEIS did not respond to the submission by the Secretary of the Vermont Agency of Commerce and Community Development that a third historic district, an entire historic block of the City of Winooski, and three individually identified historic properties would experience noise in excess of 65 db DNL. The body of the EIS was not revised, and the section containing responses to comments did not acknowledge that a third historic district,

an entire historic block of the City of Winooski, and three individually identified historic properties would experience noise in excess of 65 db DNL.

147. The FEIS responded to the statement by the Secretary of the Vermont Agency of Commerce and Community Development that the Division for Historic Preservation had concurred by stating “The Air Force thanks the Vermont SHPO for its review of the EIS and concurrence.”

148. The FEIS continued to rely on the absence of physical damage to historic properties from aircraft as the reason for finding no adverse impact, and continued to ignore impacts on the use of historic properties and ignore the potential intentional demolition of historic properties.

149. The FEIS failed to reasonably respond to the SHPO’s comments and Plaintiffs’ comments about historic properties.

150. The fundamental full-disclosure purpose of NEPA, and the intent of the CEQ regulations implementing NEPA, required that the Defendant take a “hard look” at the impacts on historic properties and the potential means of mitigating those impacts. The Defendant’s failure to disclose the identity and number of historic properties that would be affected by 65 db DNL noise, failure to assess the reasonably likely impacts on the use of these properties of 65 dB DNL noise, failure to address whether the properties would be intentionally demolished once they become subject to 65 dB DNL noise, failure to consider any mitigation measures that would avoid or reduce these impacts, and failure to provide reasonable responses to the SHPO’s letter and to the Plaintiff’s comments, were an abuse of discretion and arbitrary and capricious.

WHEREFORE, Plaintiffs pray that this Honorable Court:

- (a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to adequately disclose and evaluate impacts on historic properties from the proposed operation of F-35 jets;
- (b) Issue a mandatory injunction requiring Defendant to comply with NEPA;
- (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised EIS is prepared that adequately discloses and evaluates the impacts of the proposed operation of F-35 jets on historic properties, and potential mitigation for those impacts;
- (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
- (e) Grant such other and further relief as the Court deems just and proper.

Count 5 – Failure to Consider the Current Management Practice of Discontinuing the Vintage of F-16 Jets Located at BIA as the No-Action Alternative or a Reasonable Alternative under NEPA

- 151. Paragraphs 1-65 are incorporated by reference.
- 152. The DEIS and eventually FEIS both explained that if the F-35 jets are selected for the VANG, the existing F-16 jets would be removed. These EIS documents treated the noise from the F-16 jets as the baseline that would continue to affect the public if the VANG were not to be selected for the F-35 jets. The DEIS and FEIS considered only the incremental noise as relevant.
- 153. On October 28, 2013, three and a half months after the close of the comment period,

Vermont Adjutant General Cray attended a meeting of the Burlington City Council. Adjutant General Cray is the commanding officer of the Vermont National Guard, including the VANG.

154. Adjutant General Cray spoke to the City Council, as did many other uniformed VANG officers who spoke in Adjutant General Cray's presence.

155. They informed the City Council that without the F-35, the 158th Fighter Wing will lose its mission and the VANG's pilots and mechanics will have to relocate elsewhere, because the F-16s based at BIA in fact will not remain in service.

156. City Council Member Karen Paul told the City Council and the public that she had met with the officials of VANG prior to the City Council meeting.

157. City Council Member Paul described at length the detailed information she had received from the VANG as to Air Force practice and policy in managing its aging fleet of F-16 jets. Ms. Paul described what had been disclosed to her by the VANG about this practice and policy:

- a. F-16 squadrons that consist of newer versions of the F-16 jets will remain in service as the F-35 jets are placed into operation.
- b. The oldest vintage of the F-16 jets currently in operation will cease to be used by the time that F-35 jets are placed in operation over the coming several years.
- c. All of the F-16 jets operated by the VANG at BIA are of the oldest vintage.
- d. All of the F-16 jets at the BIA will be removed from operation by the time F-35 jets are placed in operation, regardless of whether the VANG is selected for operation of F-35 jets, because of Air Force policy.

158. The Defendant's NEPA regulations state, in § 989.8(d), as follows:

(d) Except in those rare instances where excused by law, the Air Force must always consider and assess the environmental impacts of the "no action" alternative. "No action" may mean either that current management practice will not change or that the proposed action will not take place. If no action would result in other predictable actions, those actions should be discussed within the no action alternative section. The discussion of the no action alternative and the other alternatives should be comparable in detail to that of the proposed action.

159. The current management practice is to remove F-16 jets of the age of the VANG's F-16 jets from service, at or prior to the date that F-35 jets are placed in operation regardless of whether the VANG is selected to operate F-35 jets.

160. The actual no-action alternative divulged by VANG officers would result in very large reductions in noise and other harms that will be experienced by Plaintiffs and others, because neither F-16 jets nor F-35 jets will be in operation at the BIA.

161. Regardless of whether discontinuance of F-16 jets at BIA is the no-action alternative, it was a reasonable alternative known to Defendant and her predecessor.

162. The baseline upon which the FEIS evaluated and compared impacts -- the "no action" alternative -- erroneously consisted of the continued noise, safety and other environmental and socioeconomic impacts of the F-16.

163. Table 2-12 ("Comparative Summary of Environmental Consequences") of the FEIS and most of Chapters BR 2 and BR 3 of the FEIS, and their charts and tables are incorrect, because they are based upon an incorrect no-action alternative and do not include the reasonable alternative of neither F-16 jets nor F-35 jets.

164. The alternative consisting of no military jets at BIA was not discussed and its impacts were not disclosed in detail comparable to that of the proposed action.

165. By letter dated October 30, 2013, Plaintiffs brought these facts to the attention of the Defendant and sought a supplemental, corrected EIS, followed by a comment period.
166. Plaintiffs quoted § 1502.9(c) of the CEQ regulations, which state that agencies “shall” prepare supplements to draft or final EIS’s if “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” Plaintiffs also cited § 989.20 of the Defendant’s NEPA regulations, which states that comments received after the comment period “must be considered in determining final decisions such as identifying the preferred alternative, appropriate mitigations, or if a supplemental analysis is required.”
167. The Record of Decision demonstrates that no supplemental EIS was prepared which responded to Plaintiffs’ request.
168. The Record of Decision demonstrates that neither the FEIS nor the Mitigation Plan disclosed the alternative known to the Defendant of no F-16 jets and no F-35 jets at the BIA and neither the FEIS nor the Mitigation Plan evaluated the comparative impacts of that known alternative.
169. The Record of Decision demonstrates that the Defendant did not take a hard look at the environmental impacts of the proposed operation because the Defendant’s disclosure and consideration of alternatives and their impacts was fundamentally flawed.
170. On information and belief, the facts disclosed at the Burlington City Council meeting were known to Defendant or her predecessor at the time the Draft EIS was prepared and the FEIS was prepared. Plaintiffs’ letter did not inform the Defendant or her predecessor of any relevant information of which Defendant had been unaware.

171. On information and belief, Defendant or her predecessor informed one or more elected officials of the Defendant's policy and practice of retiring the oldest F-16 jets regardless of whether they would be replaced, and informed these elected officials that all of the VANG F-16s were of the vintage that would be retired regardless of whether they would be replaced.
172. On information and belief, Defendant or her predecessor did so prior to the issuance of the first Draft EIS.
173. On information and belief, Defendant or her predecessor did so prior to the issuance of the FEIS.
174. On information and belief, Defendant and her predecessor knowingly withheld from disclosure to the public in the DEIS and the FEIS its current management practice, which it had disclosed to one or more elected officials.
175. On information and belief, Defendant and her predecessor did not conduct an objective, good faith disclosure and evaluation of the no-action alternative or other reasonable alternative consisting of neither F-16 jets nor F-35 jets at the BIA, and the impacts of that alternative, as required by NEPA.
176. On information and belief, Defendant or her predecessor selected the operation of F-35 jets by the VANG as its preferred alternative prior to issuance of either of the two Draft EIS's, prior to consideration of the contents of the 2 DEIS's, and prior to consideration of the public's comments on the DEIS's.
177. The Defendant or her predecessor abused their discretion and acted arbitrarily and capriciously in failing to disclose and evaluate the alternative consisting of no F-16 jets and no F-35 jets at the BIA.

178. The Defendant or her predecessor abused their discretion and acted arbitrarily and capriciously in selecting the preferred alternative prior to review of comments on the DEIS and prior to formulation of the final FEIS.

179. Under § 1502.9(c) of the CEQ regulations, agencies “shall” prepare supplements to draft or final EIS’s if “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” Under § 989.20 of the Defendant’s NEPA regulations, comments received after the comment period “must be considered in determining final decisions such as identifying the preferred alternative, appropriate mitigations, or if a supplemental analysis is required.”

180. The Defendant abused her discretion and acted arbitrarily and capriciously in failing to issue a supplemental Draft EIS in response to Plaintiffs’ letter and in failing to explain why she had chosen not to do so.

181. WHEREFORE, Plaintiffs pray that this Honorable Court:

(a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to adequately disclose and evaluate the impacts of the no-action or other reasonable alternative consisting of no F-16 jets and no F-35 jets at the BIA, in failing to provide a supplemental DEIS to provide this disclosure and evaluation, and in failing to explain why she was not doing so;

(b) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to conduct an objective, good-faith disclosure and evaluation of the no-action alternative or the other reasonable alternative of no F-16 jets and no F-35 jets at BIA;

(c) Issue a mandatory injunction requiring Defendant to comply with NEPA;

- (d) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised EIS is prepared that adequately discloses and evaluates the impacts of no F-16 jets and no F-35 jets at the BIA;
- (e) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
- (f) Grant such other and further relief as the Court deems just and proper.

Count 6 – Failure to Consider the Low-Probability Catastrophic Impacts of Exposure of the Public to the Extraordinarily Toxic Particulates and Fumes of Burning Carbon Fiber and Stealth Coatings under NEPA

- 182. Paragraphs 1-65 are incorporated by reference.
- 183. The F-35 is constructed of composite materials and stealth coatings.
- 184. The use of composite materials in aircraft manufacture is relatively recent.
- 185. The use of stealth coatings on aircraft based in heavily populated neighborhoods is unprecedented.
- 186. There is substantial danger to Plaintiffs and other members of the public, as well as firefighters and first-responders, from the toxic particulates and fumes generated by the burning of composite materials in aircraft that have crashed.
- 187. There is extraordinary danger to Plaintiffs and other members of the public, as well as firefighters and first-responders, from the extraordinarily toxic particulates and fumes generated by the burning of stealth coatings on aircraft that have crashed. The crash of an F-35 jet in an urban area such as surrounds the BIA could cause catastrophic illness and loss of life.
- 188. The Draft EIS recognized that the F-35 will have a crash rate on take-off or landing

that substantially exceeds that of commercial aircraft.

189. The Draft EIS did not disclose the hazards to persons who live in the path of take-offs and arrivals, members of the public, or firefighters and first-responders, from the potentially catastrophic impacts of the crash of an F-35 jet.
190. The Draft EIS did not disclose whether the Burlington Air Guard Station, the Fire Departments of Burlington, South Burlington, Winooski and Williston, and local first responders will have the special training and equipment needed to respond to these catastrophic impacts, the cost of necessary training and equipment, or the potential cost to the public of a catastrophic event.
191. Plaintiffs learned of these hazards after the close of the comment period.
192. On information and belief, Defendant and/or her predecessor know of these hazards prior to issuance of the DEIS.
193. Plaintiffs submitted a letter to Defendant on October 17, 2013, raising these issues and asking that a supplemental EIS be prepared to disclose and evaluate these impacts.
194. The FEIS and Mitigation Report did not respond to the Plaintiffs' letter.
195. The purposes of NEPA and its mandate that there be full disclosure of environmental impacts require disclosure and evaluation of low-probability events with potentially catastrophic consequences such as these.
196. Under § 1502.9(c) of the CEQ regulations, agencies "shall" prepare supplements to draft or final EIS's if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Under § 989.20 of the Defendant's NEPA regulations, comments received after the comment period "must be

considered in determining final decisions such as identifying the preferred alternative, appropriate mitigations, or if a supplemental analysis is required.”

197. The Defendant abused her discretion and acted arbitrarily and capriciously in failing to disclose and evaluate these potentially catastrophic impacts, in failing to issue a supplement DEIS when requested to do so, and in failing to explain why she was not doing so.

WHEREFORE, Plaintiffs pray that this Honorable Court:

- (a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by failing to adequately disclose and evaluate the potentially catastrophic impacts that may result from basing F-35 jets in an urban area, failing to issue a supplemental DEIS disclosing and evaluating this potential, and failing to explain why she had chosen not to do so.
- (b) Issue a mandatory injunction requiring Defendant to comply with NEPA;
- (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised EIS is prepared that adequately discloses and evaluates the potentially catastrophic impacts of the proposed operation of the F-35 jets at the BIA;
- (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
- (e) Grant such other and further relief as the Court deems just and proper.

Count 7 – Adoption of the Mitigation Report
Without Notice to the Public as Required by NEPA

198. Paragraphs 1-65 are incorporated by reference.
199. The Defendant's Record of Decision relies upon the Mitigation Report to evaluate alternatives in the manner required by NEPA. Defendant is now implementing the Mitigation Report.
200. The Mitigation Report was not made available to the public or other agencies for review or comment prior to its adoption.
201. The Mitigation Report did not address the alternative of no military jets at BIA which by then had been disclosed to the Burlington City Council and the public by the VANG.
202. NEPA required Defendant or her predecessor to provide notice of issuance of a draft of the report to the public and other agencies, establish a comment period, and respond to comments.
203. Defendant abused her discretion and acted arbitrarily and capriciously in issuing and implementing the Mitigation Report.

WHEREFORE, Plaintiffs pray that this Honorable Court:

- (a) Issue a declaratory judgment declaring that the Defendant has violated NEPA by adopting and implementing the Mitigation Report without notice to the public and other agencies, and opportunity to comment;
- (b) Issue a mandatory injunction requiring Defendant to comply with NEPA;
- (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until a supplemental or revised Mitigation Report is prepared after notice to the public and other agencies, with opportunity to comment;
- (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28

U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and
(e) Grant such other and further relief as the Court deems just and proper.

Count 8 – Violation of NHPA

204. Paragraphs 1-65 and 112-151 are incorporated by reference.
205. Defendant and her predecessor violated the NHPA by:
- a. failing to identify historic properties that would be located within the 65 db DNL zone that would be created by operation of F-35 jets at BIA;
 - b. failing to assess the individual and cumulative impacts on these identified properties, including the impacts of noise on the *use* of the property and including the impacts of demolition of these properties through the Part 150 mitigation program;
 - c. failing to develop, consult with regard to, and negotiate a memorandum of agreement for adversely affected properties as required by § 800.6 of the ACHP regulations, and
 - d. failing to consult with the ACHP.
206. Defendant abused her discretion and acted arbitrarily and capriciously.
207. WHEREFORE, Plaintiffs pray that this Honorable Court:
- (a) Issue a declaratory judgment declaring that the Defendant has violated NHPA;
 - (b) Issue a mandatory injunction requiring Defendant to comply with NHPA;
 - (c) Issue an injunction prohibiting the Defendant from operation of F-35 jets at the BIA until the NHPA has been complied with;
 - (d) Allow Plaintiffs to recover the costs of this action, including attorneys fees, under 28 U.S.C.A. § 2412, the Equal Access to Justice Act and F.R.C.P. 54(d); and

(e) Grant such other and further relief as the Court deems just and proper.

Date: June 30, 2014

Igor Zbitnoff et al.

BY:

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