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ATTORNEYS FOR THE UNITED STATES

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

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

Plaintiffs,

v.

Civil Action No. 5:14-cv-132

Deborah Lee James, Secretary of the Air Force,

Defendant.

DEFENDANTS' ANSWER

Defendants answer the allegations in Plaintiffs' Amended Complaint [ECF No. 3]

("Complaint") as follows:

The headings and numbered paragraphs below conform to the headings and numbered paragraphs of the Complaint. Defendants deny any and all allegations of the Complaint, whether express or implied, which are not specifically admitted herein

Introduction

First Unnumbered Paragraph. The allegations are denied except to admit that the Complaint challenges the issuance of a decision by the Secretary of the Air Force to select the Vermont Air National Guard to operate F-35 jets at the Burlington International Airport and that the decision is estimated to result in approximately 2,000 additional people being affected by noise in excess of 65 dB.

Second Unnumbered Paragraph. The allegations are denied except to admit that Defendants have produced and are now implementing a mitigation plan and that the mitigation plan was not made available for public comment.

Third Unnumbered Paragraph. The allegations are admitted except to deny Plaintiffs' characterization of the F-35A Operational Basing Environmental Impact Statement Mitigation And Management Plan issued on April 18, 2014 as "a supplemental study of mitigation alternatives."

Jurisdiction

1. The allegations of the first sentence are Plaintiffs' characterization of the action to which no response is required. To the extent a response is required, Defendants admit the Complaint brings claims 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.* Defendants admit that the Court has jurisdiction over the Complaint and the authority to issue declaratory and other relief but deny that Plaintiffs are

entitled to any relief.

The Parties

2. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

3. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

4. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

5. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

6. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

7. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

8. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

9. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

10. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

11. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

12. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

13. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

14. The allegations are denied except to admit that the FEIS states that, for the purpose of assessing the noise impacts of proposed aircraft operations on local land use patterns, “[i]n general, residential land uses normally are not compatible with outdoor DNL values above 65 dB.”

15. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

16. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

17. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

18. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

19. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

20. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

21. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

22. Defendants lack sufficient knowledge to form a belief about the truth of the

allegations and therefore deny the allegations.

23. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

24. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

25. Upon information and belief the allegations are denied except to admit that studies exist suggesting that high levels of aircraft noise are associated with increased risk of cardiovascular disease and childhood cognitive impairment and that continuous exposure to high noise levels well in excess of 65 dB will damage human hearing

26. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

27. The allegations are denied except to admit that the FEIS cites a study by the United States Environmental Protection Agency which found 75 dB “is the lowest level at which adverse health effects could be credible.”

28. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

29. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

30. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

31. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

32. The allegations are denied.

33. The allegations are denied.

34. The allegations of the first sentence are admitted. The allegations of the second sentence are denied except to admit that Plaintiff submitted comments including “mitigation measures” and that those measures are summarized in Count 1 of the Complaint.

35. The allegations are denied.

36. The allegations are denied.

37. The allegations are admitted.

38. The allegations are admitted.

39. The allegations are denied except to admit that Count 5 of the Complaint addresses the disclosure alleged in this paragraph.

40. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

41. The allegations are denied except to state that Defendants lack sufficient knowledge to form a belief about the noise levels that would result if the F-35 was not placed in operation at Burlington International Airport.

42. Defendants lack sufficient knowledge to form a belief about the noise levels that would result if the F-35 was not placed in operation at Burlington International Airport and therefore deny the allegations.

43. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

44. The allegations are denied except to admit that F-35 aircraft incorporate carbon fiber and use advanced composite materials and low observable materials to reduce the aircraft’s visibility to radar and other sensors.

45. The allegations are denied.
46. The allegations are denied.
47. The allegations are admitted.
48. The allegations are denied.
49. The allegations are denied.
50. Defendants admit the allegations and aver that no relief is warranted.

Factual Background

51. The allegations are admitted.
52. The allegations are admitted.
53. The allegations are admitted.
54. The allegations are admitted.
55. The allegations are admitted except to aver that Table BR 3.10-2 identifies sixty-nine acres as experiencing noise in excess of 75 db DNL.
56. The allegations are admitted.
57. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.
58. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.
59. The allegations are admitted.
60. The allegations are admitted.
61. The allegations are admitted.
62. The allegations are denied.

Count 1 – Failure to Adequately Address Mitigation Under NEPA

63. The responses to paragraphs 1 through 62 are incorporated by this reference as though fully set forth here.

64. The allegations of the first sentence are admitted. The allegations of the second sentence are denied.

65. The allegations are admitted.

66. The allegations are denied except to admit that homes purchased pursuant to Part 150 may be razed after acquisition.

67. The allegations are admitted.

68. Defendants admit that the allegations accurately quote a portion of 32 C.F.R. § 989.22 and aver that the content of the regulation speaks for itself.

69. Defendants admit that the allegations accurately quote a portion of 40 C.F.R. § 1508.20 and aver that the content of the regulation speaks for itself.

70. The allegations are denied.

71. The allegations are admitted except Defendants deny that “the DEIS and FEIS agreed that harmful health effects are likely to be suffered by persons experiencing noise in excess of 75 db DNL.”

72. The allegations are denied.

73. The allegations are denied except to admit that Plaintiffs submitted comments regarding mitigation measures.

74. The allegations are denied.

75. Defendants admit the allegations as a generally accurate paraphrase of a statement from *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989):

“Implicit in NEPA's demand that an agency prepare a detailed statement on ‘any adverse environmental effects which cannot be avoided should the proposal be

implemented,’ * 42 U.S.C. § 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided.”

76. Defendants admit the allegations as a generally accurate paraphrase of a statement from *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989):

“[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA.”

77. The allegations are denied.

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

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

78. The responses to paragraphs 1 through 77 are incorporated by this reference as though fully set forth here.

79. Defendants admit the allegations accurately quote a portion of Section 4 of the South Burlington Noise Ordinance and aver that the content of the Ordinance speaks for itself.

80. Defendants admit the allegations accurately quote portions of the South Burlington Comprehensive Plan and aver that the content of the Plan speaks for itself.

81. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

82. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

83. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

84. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

85. Defendants lack sufficient knowledge to form a belief about the truth of the

allegations and therefore deny the allegations.

86. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

87. Defendants admit the allegations accurately quote 40 C.F.R. § 1502.16(c) and aver that the content of the regulation speaks for itself.

88. Defendants admit the allegations accurately quote 40 C.F.R. § 1502.2(d) and aver that the content of the regulation speaks for itself.

89. The allegations are denied.

90. Defendants deny the allegations except to admit that Plaintiffs submitted comments regarding state and local land use plans, policies and controls and to aver that the content of Plaintiffs' comments speaks for itself.

91. The allegations are denied.

92. The allegations are denied.

93. The allegations are denied.

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

Count 3 – Failure to Address Socioeconomic Impacts Under NEPA

94. The responses to paragraphs 1 through 93 are incorporated by this reference as though fully set forth here.

95. The allegations are denied.

96. The allegations are denied.

97. The allegations are admitted.

98. The allegations are admitted.

99. The allegations are admitted.

100. Defendants admit that the allegations accurately quote 40 C.F.R. § 1508.14, aver that the content of the regulation speaks for itself; admit that 40 CFR 1502.16 provides, in pertinent part:

[an EIS] will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:
(a) Direct effects and their significance (§ 1508.8).
(b) Indirect effects and their significance (§ 1508.8).

and aver that the content of the regulation speaks for itself.

101. The allegations are denied except to admit that Plaintiffs submitted comments regarding socioeconomic impacts.

102. The allegations are admitted except to aver that the content of the appraiser's report speaks for itself.

103. The allegations are denied except to admit that the DEIS predicted 997 additional household would be affected by noise in excess of 65 dB DNL under Alternative 1 and 1,444 additional households would be affected by noise in excess of 65 dB DNL under Alternative 2.

104. The allegations are denied.

105. The allegations are denied.

106. The allegations are denied.

107. The allegations are denied.

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

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

108. The responses to paragraphs 1 through 107 are incorporated by this reference as though fully set forth here.

109. The allegations are admitted.

110. The allegations are denied.

111. The allegations are admitted.

112. The allegations are admitted.

113. Defendants admit the allegations and aver that the content of the letter speaks for itself.

114. Defendants admit the allegations and aver that the content of the letter speaks for itself.

115. Defendants admit the allegations and aver that the content of the letter speaks for itself.

116. Defendants admit the allegations and aver that the content of the letter speaks for itself.

117. Defendants deny the allegations except to admit that the SHPO's May 29, 2012 letter states:

1. If the F-35s are based at the Burlington Air Guard Station, will the Department of the Air Force, the Vermont Air National Guard and/or the Burlington International Airport have access to and utilize the "Part 150, Airport Noise Compatibility Planning" program to purchase and demolish homes within the expanded 65 dB noise contour?

2. What level of effort and documentation will be undertaken by the Department of the Air Force, the Vermont Air National Guard and/or the Burlington International Airport to identify and evaluate historic buildings within the expanded 65 dB noise contour?

118. The allegations of the first sentence are denied. The allegations of the second, third and fourth sentences are denied except to admit the SHPO letter questioned whether

vibrations could adversely affect historic buildings, noted that the draft EIS did not address the potential for “effects on historic resources if houses within the expanded 65 dB will become candidates for purchase and demolition, or if vibrations have the potential to adversely affect historic structures over a long period of time” and asked if the final EIS would “take into account these potential effects.”

119. The allegations are denied except to admit that the letter states:

2. What level of effort and documentation will be undertaken by the Department of the Air Force, the Vermont Air National Guard and/or the Burlington International Airport to identify and evaluate historic buildings within the expanded 65 dB noise contour?

120. The allegations are admitted.

121. The allegations are admitted.

122. The allegations are admitted.

123. The allegations are admitted.

124. The allegations are admitted.

125. The allegations are denied except to admit the letter stated:

When evaluating potential effects on historic resources, we consider both direct (physical destruction or alteration) and indirect (visual, atmospheric or audible) effects. As stated above, there will be no direct effects on buildings at the Burlington AGS because none of them are listed or eligible for listing in the NRHP. As for indirect effects, the introduction of audible elements should be taken into consideration. The historic resources located under the airspace, however, are significant for their architectural and/or historic associations and are located in developed urban areas. The presence of aircraft within the airspace over these areas is long established, and the proposed project will not introduce audible elements that are not already present. As such, the audible elements related to the undertaking will not diminish the integrity of historically significant features of resources located under the airspace.

126. The allegations are denied.

127. The allegations are denied.

128. The allegations are admitted.

129. The allegations are denied except to admit that Mr. Frost submitted a comment letter and to aver that Defendant lacks sufficient knowledge to form a belief regarding whether Mr. Frost owns property within 65 dB DNL zone shown on the noise contour maps in the DEIS.

130. The allegations are denied except to admit that comments submitted by Plaintiffs' attorney stated "the DEIS is silent about: . . . 5) 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."

131. The allegations are denied except to admit that comments submitted by Plaintiffs' attorney cited to CEQ regulations §§ 1502.15 and 1502.16; and that 40 C.F.R. § 1502.15 states, in pertinent part, "Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced;" and that 40 C.F.R. 1502.16 states, in pertinent part, an EIS "shall include discussions of . . . g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures."

132. The allegations are admitted except to aver that the comments were submitted by Plaintiffs' attorney.

133. The allegations are denied except to admit that comments submitted by Plaintiffs' attorney cited the regulations issued by the Advisory Council on Historic Preservation ("ACHP") and to aver that the content of the ACHP regulations speaks for itself.

134. The allegations are admitted except to aver that the comments were submitted by Plaintiffs' attorney.

135. The allegations are admitted

136. The allegations are denied.

137. The allegations are denied.

138. Defendants are uncertain what “response” the allegations refer to and therefore lack sufficient information to respond and deny the allegations on that basis.

139. The allegations are denied except to admit that the FEIS did not identify particular historic properties that would experience noise exceeding 65 dB DNL.

140. The allegations are denied except to admit that the FEIS did not identify how many historic properties would experience noise exceeding 65 dB DNL.

141. The allegations are denied.

142. The allegations are admitted.

143. The allegations are admitted.

144. The allegations are admitted.

145. The allegations are denied.

146. The allegations are denied.

147. The allegations are denied except to admit that NEPA requires a “hard look” at the environmental consequences, including those to historic resources, of a proposed major federal action and that CEQ regulations require that the agency discuss “[m]eans to mitigate adverse environmental impacts.”

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

Count 5 – Failure to Consider the Current Management Practice of Discontinuing the Vintage F-16 Jets Located at BIA...

148. The responses to paragraphs 1 through 147 are incorporated by this reference as though fully set forth here.

149. The allegations are admitted.

150. The allegations of the first sentence are admitted. The allegations of the second sentence are denied.

151. Upon information and belief the allegations are denied except to admit that Adjutant General Cray addressed the Burlington City Council.

152. Upon information and belief, the allegations are denied.

153. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

154. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

155. Defendants admit the allegations accurately quote 32 C.F.R. § 989.8(d) and aver the content of the regulation speaks for itself.

156. The allegations are denied.

157. The allegations are denied.

158. The allegations are denied.

159. The allegations are denied.

160. The allegations are denied.

161. The allegations are admitted.

162. The allegations are denied except to admit that Plaintiffs requested a supplemental EIS by letter dated October 20, 2013 and to aver that the content of the letter speaks for itself.

163. The allegations are denied except to admit that Plaintiff's letter dated October 20, 2013 cited 40 C.F.R. § 1502.9(c) and 32 C.F.R. § 989.20, and to aver that the content of those regulations speaks for itself.

164. The allegations are admitted.

165. The allegations are denied except to admit that neither the FEIS nor the Mitigation Plan discussed an alternative with no F-16 jets and no F-35 jets at the BIA.

166. The allegations are denied.

167. The allegations are denied.

168. The allegations are denied.

169. The allegations are denied.

170. The allegations are denied.

171. The allegations are denied.

172. The allegations are denied.

173. The allegations are denied.

174. The allegations are denied.

175. The allegations are denied.

176. Defendants admit that the allegations accurately quote portions of 40 C.F.R. § 1502.9(c) and 32 C.F.R. § 989.20 and aver that the content of the regulations speaks for itself.

177. The allegations are denied.

178. The allegations are denied.

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

Count 6 – Failure to Consider the Low-Probability Catastrophic Impacts...

179. The responses to paragraphs 1 through 178 are incorporated by this reference as though fully set forth here.

180. The allegations are denied except to admit that among the materials used in the F-35 are composite materials and stealth coatings.

181. The allegations are denied.

182. The allegations are denied.

183. The allegations are denied.

184. The allegations are denied except to admit that the crash of an F-35 jet could cause injury or loss of life.

185. The allegations are denied.

186. The allegations are denied.

187. The allegations are admitted.

188. Defendants lack sufficient knowledge to form a belief about the truth of the allegations and therefore deny the allegations.

189. The allegations are denied except to admit that Defendants were aware of safety risks associated with the F-35.

190. The allegations are denied except to admit that Plaintiffs requested a supplemental EIS by letter dated October 17, 2013 and to aver that the content of the letter speaks for itself.

191. The allegations are admitted.

192. The allegations are denied.

193. Defendants admit that the allegations accurately quote portions of 40 C.F.R. § 1502.9(c) and 32 C.F.R. § 989.20 and aver that the content of the regulations speaks for itself.

194. The allegations are denied.

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

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

195. The responses to paragraphs 1 through 194 are incorporated by this reference as though fully set forth here.

196. The allegations are denied except to admit that aspects of the Mitigation Plan not directly related to the F-35 are being implemented.

197. The allegations are admitted.

198. Upon information and belief, the allegations are denied except to admit that the Mitigation Report did not address the alternative of no military jets at BIA.

199. The allegations are denied.

200. The allegations are denied.

WHEREFORE paragraph. Defendants deny that Plaintiffs are entitled to any relief.

Count 8 – Violation of NHPA

201. The responses to paragraphs 1 through 200 are incorporated by this reference as though fully set forth here.

202. The allegations are denied.

203. The allegations are denied.

204. Defendants deny that Plaintiffs are entitled to any relief.

WHEREFORE, Defendants request that the Complaint be dismissed with prejudice, that Plaintiffs take nothing thereby, and that Defendants be awarded their costs of court and such other and further relief as may be just and proper.

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DATED this 28th day of August 2014.

Respectfully submitted,

TRISTRAM J. COFFIN
United States Attorney
NIKOLAS P. KEREST
Assistant United States Attorney

SAM HIRSCH
Acting Assistant Attorney General

/s/David W. Gehlert
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

ATTORNEY FOR PLAINTIFF

James A. Dumont , Esq.
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