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,	)	
City of Winooski,	)	
Intervenor-Plaintiff,	)	
v.	)	Civil Action No. 5:14-cv-132
Deborah Lee James, Secretary of the Air Force,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR JUDGMENT ON THE RECORD AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE RECORD

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vigor to the historic properties located in Winooski. Accordingly, the Air Force had no obligation to assess the prospect that historic properties would be purchased and demolished.

V. "NO MILITARY AIRCRAFT" AT BURLINGTON AGS IS NEITHER THE PROPER NO ACTION ALTERNATIVE, NOR A REASONABLE ALTERNATIVE [COUNT FIVE]

Plaintiffs' Count Five argues that the Air Force violated NEPA by failing to evaluate an alternative that anticipated the retirement of Burlington's current F-16s, and thus included neither F-16s nor F-35As. Dkt. No. 47 at 49. According to Plaintiffs, this "no military aircraft" alternative should have been the no action alternative, or was at least a reasonable alternative that should have been considered in the FEIS.[32] *Id.* at 49-50; 51-53. Both arguments fail. Both rest on unfounded speculation that had Burlington not been selected to host the F-35A, the Air Force "expected" that there would have been no military aircraft at Burlington. *Cf.* Dkt. No. 47 at 53. More importantly though, the Air Force properly used the *status quo*, *i.e.*, continuation of the current flying mission, as the no action alternative for each base evaluated and an alternative with no military aircraft at Burlington was not a reasonable alternative.

A. Plaintiffs' Speculation that the Air Force Expected the Potential Retirement of the F-16s to Result in No Military Aircraft Being Stationed at Burlington is Baseless.

Plaintiffs attempt to support their speculation with hearsay statements allegedly made by the Commander of the VTANG and a City Council Member at a Burlington City Council Meeting, and a PowerPoint presentation the VTANG made in 2010 at meetings with

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[32] Plaintiffs also note that they submitted a comment requesting an SEIS evaluating this no military aircraft alternative. Dkt. No. 47 at 44-48. As required by its regulations, the Air Force considered the request. The agency dismissed the request because, as is discussed below, a no military aircraft alternative was not the proper no action alternative. *See* AR10450 (ROD 3) (noting comments were considered).

elected officials and staff of the municipalities surrounding BIA and the news media.[33] *Id.* at 47-49. Plaintiffs' speculation is baseless because Plaintiffs have conflated the fact that individual aircraft have a finite service life with a decision to effectively close or radically repurpose the VTANG—a logical leap that has no basis in the record.

The VTANG's PowerPoint did inform those elected officials that the average flight time on the F-16s at Burlington is approximately 5,650 hours, out of an original design specification of 8,000 hours. AR41201. The VTANG explained that the Air Force's present policy is to retire F-16s at 8,000 equivalent flight hours, AR41204, a threshold that Burlington's F-16s are expected to reach in approximately 2018. AR41212. However, conspicuously absent from the VTANG's presentation was *any* suggestion that once those aircraft were retired the VTANG would abandon its decades old mission of flying fighter jets. *See* AR41186-220 (PowerPoint).

In any event, the Air Force directly addressed public comments asking what might happen to Burlington AGS if it was not selected to host the F-35A. The Air Force's response was clear: "if there is no F-35A operational beddown at Burlington AGS *the current mission would continue.*" AR8552 (RDEIS at PA-47) (emphasis added). As the name implies, the mission of the VTANG's 158th Fighter Wing is to fly fighter aircraft. *See id* ("The beddown of the F-35A at Burlington AGS would represent a continuation of the 158 [Fighter Wing]'s current mission. . .").

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33 The PowerPoint was presented to civic leaders of South Burlington, Burlington, Williston, Winooski, Essex, Essex Junction and Colchester and members of the news media. *See* AR41128, AR41053, AR41182-83.

B. The Air Force Properly Identified the No Action Alternative as Continuation of the Present Operations.

An EIS must "[i]nclude the alternative of no action," regardless of whether that alternative will meet the agency's purposes. 40 C.F.R. 1502.14(d). A no action alternative is required because it allows agencies to "compare the potential impacts of the proposed major federal action to the known impacts of maintaining the *status quo*. In other words, *the current level of activity is used as a benchmark.*" *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014) (quoting *Custer Cty. Action Ass'n v. Garvey,* 256 F.3d 1024 (10th Cir. 2001)) (emphasis added).

Here the proposed action being evaluated by the Air Force was to beddown and operate F-35A aircraft. AR10508-09 (FEIS 1-6 - 1-7). At each base considered, the Air Force defined the baseline or "no action" alternative as a continuation of the *status quo,* the operation of the aircraft presently at the base. AR10572 (FEIS 3-2); AR10629-30 (FEIS BR4-3 - BR4-4, Burlington); AR10848 (FEIS JX4-4, Jacksonville); AR10938 (FEIS MC4-4, McEntire). The Air Force's use of the *status quo* as the no action alternative must be affirmed because it is consistent with both CEQ guidance on NEPA and well established case law.

As Plaintiffs acknowledge, the CEQ's Forty Most Asked Questions guidance paper "explains that 'no action' means 'no change from the current management direction' and 'continuing with the present course of action *until that action is changed.*'" Dkt. No. 47 at 49. (quoting *Mem. to Agencies Containing Answers to Forty Most Asked Questions to CEQ's NEPA Regulations,* 46 Fed. Reg. 18,026, 18027 (Mar. 23, 1981)) (emphasis added). This guidance

instructs that the *status quo* is the appropriate no action alternative, and continues to be so until there is an affirmative decision to change the present course of action.[34]

In any event, court after court has recognized that the "*status quo*" is an appropriate no action alternative. *See e.g.*, *Ctr. for Biological Diversity v. U.S. Dep't. of Interior,* 623 F.3d 633, 642 (9th Cir. 2010); *Custer Cty,* 256 F.3d at 1040. Indeed, courts have found agencies violate NEPA when their no action alternative does not accurately represent the *status quo*. *E.g.*, *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1247 (W.D. Wash. 2009). Here, the Air Force made it clear in its response to comments that it expected Burlington to continue to fly military aircraft if it was not selected to host the F-35A. AR8552 (RDEIS PA-47). Therefore, without more, Plaintiffs' argument should be rejected because there is no question that the *status quo* at Burlington was the operation of F-16 aircraft analyzed in the EIS.

Plaintiffs nonetheless argue that the Air Force should have examined a "no action alternative" including "the absence of F-16s *and* F-35s" because the Air Force's NEPA regulations require the agency to assess "predictable actions" resulting from no action. Dkt. 47 at 49-50 (citing 32 C.F.R. § 989.8(d)) (emphasis in original). The Air Force's comments in adopting its regulations provide some insight as to what is properly considered a "predictable action" requiring incorporation into the no action alternative. The comments note that in some circumstances the "existing environment" may include "expected future conditions as well as existing conditions." *Envtl. Impact Analysis Process,* 64 Fed. Reg. 38,127, 38,127-28 (July 15, 1999). But because the decision-making context is critical, the Air Force explained that it "prefers that those performing the analysis apply judgment about this on a case-by-case basis,

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[34] Indeed, NEPA serves to provide a framework through which an agency can evaluate a proposed action and decide whether to change the *status quo*.

taking into account the nature and context of the proposed action." *Id.* at 38,128 (emphasis added).

Here the proposed action was to find a home for the F-35A, not consider all possible basing permutations at Burlington.[35] Further, while the F-16s currently assigned to Burlington are approaching the end of their service life, what might have happened when those aircraft reach the end of their service life is a matter of pure speculation. As an Air Force basing official observed in an e-mail, "not replacing the Burlington F-16's with F-35s means that at some point in the future, something else will happen. We just don't know yet what it is." AR64410. Many F-16s are being retrofitted to extend their service life, AR63556, and "integrating the F-35 into the Air Force fleet is leading to a massive redistribution of F-16s throughout the fleet, including active, National Guard and reserve locations." AR59247. Had the Air Force not decided to base the F-35A at Burlington, the present F-16s could well have been replaced with other F-16s.[36] But as the Air Force basing official observed, had the F-35A not been selected to replace the F-16s, there could have been "any number" of reasonable alternatives available to the Air Force on how to configure Burlington. AR64410.

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[35] Given the limited purpose of its action, the Air Force did not address the subsequent redistribution of the aircraft that would be displaced by the F-35A. Rather, the EIS simply informed the public that those aircraft "would be either reassigned *or retired* by the Air Force." AR4972 (DEIS at 2-3) (emphasis added).

[36] Plaintiffs' reference to an EIS done by the Marines for the basing of the F-35B on the East Coast is inappropriate and misplaced. It is inappropriate because that EIS is not in the Administrative Record and Plaintiffs never provided it during the NEPA process. It is misplaced because, in that case, all of the Marines' present aircraft were being replaced *and the operational squadrons flying those aircraft were being deactivated*. Marines FEIS at 1-2, 2-1, & 2-17. Thus, for the Marines, and unlike the Air Force here, a "no military aircraft" alternative was both "authorized [and] reasonably expected." *Cf.* Dkt. No. 47 at 50 (quoting Final U.S. Marine Corps East Coast F-35 Basing Decision Environmental Impact Statement (Oct. 2010)). The Marine Corps FEIS is available at http://www.mcieast.marines.mil/JointStrikeFighterBasing.aspx (last visited February 24, 2016.)

C. No Military Aircraft at Burlington Was Not a Reasonable Alternative.

"Under NEPA, an agency's discussion of alternatives to the proposed action forms the heart of the environmental impact statement." *NRDC v. FAA*, 564 F.3d at 556 (internal quotation marks and citations omitted). But like every obligation under NEPA, an agency's duty to examine alternatives is bounded by the rule of reason. An agency need not consider every conceivable alternative. Rather, the agency need evaluate only "reasonable alternatives."[37] *Id.*; *Senville*, 327 F. Supp. 2d at 347.

It is well established that an "alternative is unreasonable if it does not fulfill the purpose of the project." *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 550 (8th Cir. 2006) (quotation marks and citations omitted); *see also e.g., NRDC v. F.A.A.*, 564 F.3d at 568-69 (FAA did not act arbitrarily in excluding alternatives that did not meet its purposes and needs); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011). This rule is an application of common sense. As the Ninth Circuit and other courts have explained, "[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which

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[37] Plaintiffs suggest a "viable but unexamined alternative renders [the] environmental impact statement inadequate." Dkt. No. 47 at 51-52 (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999)). No court outside of the Ninth Circuit has ever applied "viable" as the standard. That is not surprising because it is inconsistent with the bedrock rule of reason and the NEPA regulations which expressly require only consideration of reasonable alternatives, *i.e. those that meet the agency's purpose and need.* 40 C.F.R. § 1502.14(a). It appears that the Ninth Circuit cases rotely repeating the statement that an unexamined viable alternative renders an EIS inadequate use "viable" as a synonym for reasonable. *See Ctr. for Sierra Nevada Conservation v U.S. Forest Service,* 832 F. Supp. 2d 1138, 1157 (E.D. Cal. 2011). Even so, the Ninth Circuit cases with more nuanced discussion make it clear that an alternative must be both viable *and* reasonable before it requires discussion. *See e.g., Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1059 (9th Cir. 2011) (agency violated NEPA "[b]y failing to examine a viable and reasonable alternative"); *Nw. Coal. for Alternatives to Pesticides v. Lyng,* 844 F.2d 588, 592 (9th Cir. 1988) ("[I]t is the scope of the program that influences any determination of what alternatives are viable and reasonable.").