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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,

City of Winooski,

Intervenor-Plaintiff,

v.

Deborah Lee James, Secretary of the Air Force,

Defendant.

Civil Action No. 5:14-cv-132

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE RECORD

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potential impacts to the "use" of those properties.[10] Accordingly, the Air Force is entitled to judgment on Count Four.

IV. PLAINTIFFS HAVE NOT SHOWN THE AIR FORCE USED AN IMPROPER NO ACTION ALTERNATIVE [COUNT FIVE].

Defendant's Opening Memorandum demonstrated that: (1) Plaintiffs' speculation that the potential retirement of the F-16s presently flying out of Burlington would result in no military aircraft being stationed at Burlington is meritless, Dkt. 55 at 56-57; (2) the Air Force properly identified the present operations (*i.e.*, the *status quo*) as the no action alternative, *id.* at 58-60, and (3) Plaintiffs were wrong in asserting a "no military aircraft alternative" was a reasonable *action* alternative that should have been considered in the EIS.[11] *Id.* at 61-62.

Plaintiffs do not dispute that case law and CEQ guidance both demonstrate that the "status quo" is an appropriate no action alternative. *See* Dkt. No. 55 at 58-60. Nor do Plaintiffs dispute that the "status quo" at Burlington is the operation of F-16s. Instead, Plaintiffs take one record fact—that the F-16s currently assigned to Burlington are approaching the end of their productive lifespan—and leap to the conclusion that absent the F-35A, Burlington would have been left with "empty hangars." Dkt. No. 60 at 14. Empty hangars, Plaintiffs contend, was the "real no action" alternative. *Id.*

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[10] Plaintiffs' argument also ignores the fact that the EIS did analyze the impact of noise on the use of residences. *See* Dkt. No. 55 at 44-45 (discussing AR10650-60 (FEIS 2-34 - 2-44)). That analysis allowed the reader to have an understanding of the impact of F-35A noise on the "use" of historic buildings as residences (and for other purposes). *See* Dkt No. 55 at 54.

[11] Defendant's argument did not expressly use the term "action alternative," but in responding to Plaintiffs' contention that "no military aircraft" was "at least a reasonable alternative," the memorandum addressed the standards applicable to alternative actions an agency considers (as opposed to the "no action" alternative). Plaintiffs appear to have abandoned that argument as their Reply does not even attempt to argue that "no military aircraft" would be a reasonable action alternative.

As explained in Defendant's Opening Memorandum, and as should be self-evident, the scheduled retirement of the F-16 aircraft currently stationed at Burlington does not inevitably lead to "empty hangars at Burlington." *See* Dkt. 55 at 46-50. Burlington's history proves that. Through the years particular aircraft have come and gone, but the military mission has remained. *See* AR33541 (recounting eight different airframes flown by the VTANG over its 70 year history).

Plaintiffs' contention that the Record of Decision ("ROD") relied on those allegedly "empty hangars" is equally untenable. The ROD did note that the F-16s presently at Burlington are scheduled to retire, AR 10448 (ROD at 3), but nothing in the ROD suggests the Air Force expected the retirement of those aircraft to leave Burlington's hangars empty. To the contrary, the Air Force informed the public that if Burlington was not selected, the base's "current mission would continue." Dkt. No. 55 at 57 (quoting AR8552 (RDEIS PA-47)).

In short, Plaintiffs' speculation regarding "empty hangars at Burlington" is unfounded, and Plaintiffs have failed to show the Air Force used an improper no action alternative. Consequently, the Air Force is entitled to judgment on Plaintiffs' Count Five.

V. PLAINTIFFS HAVE NOT SHOWN THAT THE AIR FORCE'S DISCUSSION OF SAFETY OR ITS DECISION NOT TO DO AN SEIS WAS ARBITRARY AND CAPRICIOUS [COUNTS SIX AND NINE].

Defendant's Opening Memorandum demonstrated that the Air Force engaged in a careful analysis of safety generally, and Plaintiffs' request for an SEIS in particular. Dkt. No. 55 at 52-65. In reply, Plaintiffs offer two contentions: (1) the Runway Protection Zones ("RPZs") were inaccurately described in the EIS and thus the risk to the public residing in the RPZs was "swept under the rug," Dkt. 60 at 12; and (2) the Air Force relied on record evidence regarding