IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Igor Zbitnoff et al.

v.

Civil Action No. 5:14-cv-132

Deborah Lee James, Secretary of the Air Force,
Defendant

PLAINTIFFS' REPLY MEMORANDUM

Defendant Omits Two Key Aspects of the Standard of Review under NEPA, but Even Under Defendant's Standard of Review a New EIS is Required

Defendant argues that the "rule of reason" applies to any claim that contends an EIS lacks sufficient information to satisfy NEPA. Memo pp.22-23. Defendant correctly paraphrases the caselaw but disregards two key components of the rule of reason -- the duty to *fully disclose to the public* all of the factors relevant to the decision, and the duty to follow all *procedures* required by the statute and by the Council on Environmental Quality regulations.

As to the need for full disclosure to the public, the law of this circuit is that an EIS is adequate *if*:

> … it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm ... against the benefits to be derived. The purpose of an EIS is to "compel the decision-maker to give serious weight to environmental factors" in making choices, *and to enable the public to "understand and consider meaningfully the factors involved."*

Town of Huntington v Marsh, 859 F.2d 1134, 1140-41 (2d Cir. 1988) (emphasis added).

As to the duty to adhere to NEPA procedures, the Court in Senville explained that "'[I]mplicit in this rule of reason is *the overriding statutory duty of compliance with impact statement procedures to the fullest extent possible.*' " Senville v. Peters, 327 F.Supp.2d 335, at 347, (D.Vt. 2004), aff'd 331 Fed Appx. 848 (2nd Cir. 2009) (quoting Dubois v. United States

Dep't of Agric., 102 F.3d 1273, 1287 (1st Cir. 1996) (emphasis added). Since NEPA is essentially a procedural statute, the issue in Senville was whether the agency had "complied with NEPA's statutory mandate and procedural requirements." ("To require compliance with the strictures of NEPA … procedures is not pettifoggery.") The Court made clear that the determination as to whether the agency had neglected to comply with those requirements was subject to the "not in accordance with law" standard of the APA. 5 U.S.C.A. § 706(2)(A), and not the arbitrary and capricious standard that would apply in determining whether new information would likely have a significant impact on the environment. Senville v. Peters, 327 F.Supp.2d at 370. Judge Sessions held that the FEIS in that case was inadequate because it had failed to comply with CEQ regulations 40 C.F.R. § 1502.16 in that it had merely referred to projects that, taken together, could cause cumulative impacts, but had failed to include a discussion of those cumulative impacts in the FEIS. 327 F.Supp.2d at 348-349, 365.

The Court in Marsh, also applying the rule of reason, found an EIS inadequate for failing to include sufficient data as to the types, quantities, and cumulative effects of the waste that would be dumped at the project site, as required by CEQ regulations and the Ocean Dumping Act. Town of Huntington v. Marsh, 859 F.2d 1134, 1141-43 (citing 40 CFR § 1508.25). This, the Court held, was "not in accordance with the law" and violated NEPA. Marsh at 1143. Courts in other circuits agree.[1]

[1] See, *e.g.,* Natural Resources Defense Council, Inc. v. S.E.C., 606 F.2d 1031, 1048-54 (D.C. Cir. 1979)(applying the standard "without observance of procedure required by law" in its "exacting review" to ensure SEC complied with NEPA's procedural standards in relation to its consideration of alternatives and consultation with CEQ; in contrast the Court applied the arbitrary and capricious standard to its decision as to whether to promulgate rules); Dubois v. United States Dept. of Agriculture, 102 F.3d 1273, 1287 (1st Cir. 1996)(Court held EIS inadequate for failure to rigorously explore all reasonable alternatives as required by NEPA regulations, and thus found that agency's decision to issue permit was "not in accordance with law")("implicit in this rule of reason is the overriding statutory duty of compliance with impact

Defendant argues that the "not in accordance with law" standard applies only if the EIS lacks "any" environmental document that addresses a required disclosure. Memorandum n.7. Although Defendant oversimplifies the standard, the F-35A EIS does not include "any" disclosure of the effectiveness or cost of soundproofing homes (Count 1), nor "any" disclosure of whether the project would be inconsistent with the objectives and standards of local land use laws and plans (Count 2), nor "any" disclosure of the no-action alternative that the Air Force actually used in making its decision (Counts 5 and 10), nor "any" disclosure of whether the Runway Protection Zones that the EIS relies upon to address public safety in the event of an F-35A crash actually have been implemented (Count 6), nor "any" disclosure of the "overall cost" concept relied on in the ROD (Count 10). Each of these disclosures had been sought by timely comments from members of the public, including plaintiffs, but the Defendant chose to remain silent. The arbitrary and capricious standard does not govern these lapses. The EIS fails the Defendant's own interpretation of the "not in accordance with law" standard.

Defendant's brief (p.22) criticizes Plaintiffs for not mentioning the "rule of reason," but does not acknowledge that the precedents from this Circuit which apply the rule are relied upon in Plaintiff's initial Brief, particularly Senville, which summarized Second Circuit law. See Plaintiffs' Brief at, e.g., pp.1-2, 13-16, 19-21. The leading treatise, D. Mandelker, NEPA Law and Litigation § 10:16 (2015) notes that courts using the "rule of reason" rubric do not always identify the actual standard of review they are applying, and gives examples of how the term is applied differently in various circuits. The principles summarized in Senville provide more

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statement procedures to the fullest extent possible. The agency must "squarely turn[ ]" all "procedural corners" in its EIS.") (quoting Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C.Cir.1973) (quotations omitted); Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 59 F.3d 284, 290 (1st Cir.1995)(quoting Adams v. U.S. EPA, 38 F.3d 43, 49 (1st Cir.1994))).

reliable guidance than does talismanic reference to the "rule of reason."

COUNTS 1 & 3 — MITIGATION

The Air Force's summary of what its EIS disclosed about soundproofing homes boils down to this:

● The EIS made clear that despite all operational mitigation measures, F-35A basing will expand the area that will suffer 65 db DNL noise pollution – this expansion is "an unavoidable consequence of basing the F-35A" at Burlington. (p.26)

● The EIS stated that the City plans to update its NCP to address F-35 operations, and if it does so the update "may" address "sound insulation, and land based noise mitigation measures." (p.19)

● The EIS stated that the NCP program is "completely voluntary," the City has to "elect" to participate, and once the program is approved the City then has to apply for federal grants to implement it (pp.15, 18-20).

● The Air Force has not been given funds for, has no control over, and does not decide whether there will be any soundproofing or other land-based mitigation. (p.20).

The Air Force's legal argument is that the EIS complies with Robertson because "the EIS identified actions that could be taken by the local government to mitigate the adverse effects…" If the EIS had gone beyond just stating that soundproofing might happen, the EIS would have consisted of "speculation" that would have misled the public. (pp.20-.21).

The Air Force defends its position that it need only "identify" soundproofing as possible mitigation by means of a curious argument – "Plaintiffs fail to identify a single decision interpreting Robertson" to require actual consideration of the comparative costs and benefits of mitigation measures that may lie outside the agency's jurisdiction. Memo p. 17. But Plaintiffs' position is not an "interpretation" of Robertson. It is a direct quotation from Robertson, which requires a "reasonably complete discussion" of the costs and benefits of mitigation alternatives, including those which will be paid for with "private resources." 490 U.S. at 351-352.

Otherwise, "neither the agency nor other affected groups and individuals can properly evaluate the severity of the adverse impacts." *Id.*

Homeowners, municipalities, state agencies, members of the General Assembly, and in particular members of Vermont's Congressional delegation would have benefitted from knowing the effectiveness and cost of soundproofing the affected homes. Not only would that knowledge inform their comments to the Air Force but if soundproofing is shown to be effective and the price is shown to be reasonable, homeowners may choose to invest in soundproofing, and the Congressional delegation may choose to seek funding to reimburse them. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 235 F.Supp.2d 1143, 1154 (W.D.Wash.2002) ("An agency's refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA's intent to provide options for both agencies and Congress."); Natural Res. Def. Council v. Morton, 458 F.2d 827, 836 (D.C.Cir.1972) ("The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch.") and Kilroy v. Ruckelshaus, 738 F.2d 1448, 1454 (9th Cir.1984) ("In some cases an alternative may be reasonable, and therefore required by NEPA to be discussed in the EIS, even though it requires legislative action to put it into effect.").

The mitigation measures which the Supreme Court in Robertson held were properly discussed included mitigation measures by nonfederal agencies, obviously outside the authority of the Forest Service to undertake. *Id.* at 351-352.

Plaintiffs' position also is the position of the agency which is charged by law with administering NEPA. Section 1502.14(c) of CEQ's regulations states that the alternatives to be

considered "shall…include reasonable alternatives not within the jurisdiction of the lead agency." See, e.g., Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb, 944 F.Supp.2d 656, 670 (D. Wis. 2013) (finding EIS faulty because it did not include "reasonable alternatives not within the jurisdiction of the lead agency.") Sections 1502(f) and 1504.23(c)(2)(vi) of the CEQ regulations treat "mitigation measures" as one type of "alternative."[2] CEQ's Forty Most Asked Questions, Answer 19.b, reiterates that "mitigation measures" outside the jurisdiction of the lead agency, as with other alternatives, must be assessed.

Defendant offers a second, equally flawed argument – that mitigation alternatives are not really alternatives, but "measures," and therefore only "reasonable" consideration of mitigation measures is required. Mere listing of a mitigation measure that others might or might not undertake suffices as "reasonable" consideration, Defendant argues. Memo p.16-17. As an argument against evaluating the effectiveness and cost of soundproofing homes to mitigate otherwise unavoidable, severe noise impacts from the proposed action, this argument: 1) ignores the CEQ regulations which treat mitigation measures as alternatives; 2) ignores the CEQ's explanation of its own regulations in Forty Most Asked Questions Answer 19.b; 3) is supported by no precedent; and 4) conflicts with Robertson's admonition that an EIS must include a "reasonably complete discussion of possible mitigation measures." 490 U.S. 351-352. The decisions from the lower courts cited in Plaintiffs' initial brief (pp.14-16, 19-21) reject the

[2] 40 C.F.R. § 1502.14 is captioned "Alternatives including the proposed action." Subsection (a) requires rigorous exploration and objective evaluation of alternatives. Subsection (c) requires that an EIS include reasonable alternatives not within the jurisdiction of the lead agency. Subsection (f) requires that an EIS include "appropriate mitigation measures not already included in the proposed action or alternatives." Section1504.3(c)(2)(vi) calls upon other federal agencies, when referring a dispute to the CEQ, to specify any "mitigation alternative" that the referring agencies believe should be considered.

proposition that merely listing of possible mitigation measures suffices. Defendant has not identified any precedent for holding that merely listing potential mitigation measures does suffice.

Defendant's final argument about soundproofing is that discussion of soundproofing would be speculative and the courts do not require assessment of speculative possibilities -- but soundproofing of homes is not a speculative means of mitigating noise. The VTANG presented soundproofing to the Winooski City Council as a practical means of mitigating noise that is already in use around other airports. AR 52809 (at other airports "sound insulation of homes" and of "noise-sensitive institutions" has been provided). Its cost and effectiveness are just the kind of information an EIS should be providing. The only uncertainty is whether homeowners, municipalities, the state, the BIA or Congress will fund it. The argument that reasonable mitigation already in use elsewhere is unacceptably speculative because an agency other than the lead agency would have to fund the mitigation has been rejected by CEQ's regulations, by Robertson itself and by the other caselaw noted above.

Defendant's arguments about mitigation through home purchase and razing suffer from the same flaws as its arguments about soundproofing, with two additional flaws – factual incompleteness and federal preemption. Defendant argues that under the current NCP, one page of which Defendant cites, BIA has agreed not to engage in land acquisition without the consent of the applicable jurisdiction, and that Winooski will be able to apply "local" and "state" laws to stop the program. Memo pp.23-24 citing AR 25155. Defendant fails to recognize that the current NCP is based on the noise modeling done for F-16 jets and by its terms does not apply to mitigation of the noise from F-35A jets; there is no NCP in effect for F-35A jets and the FAA does not require that any new NCP include local consent. See the entire NCP found at AR

25127-25186 and the FAA regulations governing NCPs, 14 CFR § 150.23. Defendant's reliance on Vill. of Grand View v. Skinner, 947 F.2d 651, 659 (2d Cir. 1991) hinges on the right of Winooski to veto home purchases caused by F-35 noise -- a right which may or may not exist under a future NCP.

Defendant also argues that Grand View applies because Winooski can assert state and local law to stop home purchases. The Supreme Court of Vermont has ruled that all state and local laws that might be invoked to mitigate airport noise are preempted by federal law. In re Request for Jurisdictional Opinion re Changes in Physical Structure and Use at Burlington International Airport for F-35A, 2015 VT 41, -- Vt --, 117 A.3d 457.

Unlike the Grand View situation, here there is track record. The sole Part 150 sound mitigation method used by BIA to mitigate military aircraft noise *for decades* is home purchase and demolition. The EIS failed to consider the consequences of applying that track record to homes affected by F-35 noise.

COUNT 2— STATE AND LOCAL LAND USE LAW AND PLANS

Defendant's brief (p.28) admits that "the FEIS did not expressly identify local land use law and plans." It would be more accurate to state that the FEIS was written as if none exist. CEQ regulation § 1502.16(c) mandates discussion of "conflicts between the proposed action and the objectives of" local laws and plans. Section 1506.2(d) requires discussion of any inconsistency with local laws and plans. Since the local laws and plans are not mentioned, and their objectives are not mentioned, the FEIS did not meet either standard.

Nonetheless, without citation to any legal authority, the Defendant claims that the FEIS "did provide the public with the information it needed…" The Defendant's position is that the Air Force decision-maker, and the public, did not need to know anything about local laws and

plans in order to satisfy themselves that there was no conflict between the project and the unknown laws and plans.

Defendant then proceeds to engage in the analysis that by law was supposed to occur in the FEIS and be subject to public comment – and there would have been much comment, because the analysis was deeply flawed. The analysis begins by saying there was no conflict with Act 250 because Act 250 is preempted. But a federal project which exercises federal sovereignty to override local laws is subject to more, not less, scrutiny in an EIS than those which conform to local law. Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029, 1036-37 (D.C.Cir. 1973). Section 1506.2(d) required discussion of any "inconsistency" with a local law such as Act 250. The EIS failed to provide that discussion. The decision-maker and the public were never informed of Act 250 and the conflict between its standards and the project.

The Defendant argues that the South Burlington noise ordinance did not merit discussion because it applies to "persons" and the federal government is not a person -- but the regulations require examination of "inconsistency" with local laws, not discussion of whether a federal agency could be held accountable in court for violating a local standard. The EIS was silent about this inconsistency as well.

The Defendant argues that there is no inconsistency with the South Burlington Comprehensive Plan because the basing does not violate any specific requirement of the Comprehensive Plan. Section 1502.16(c) states that every EIS shall include discussion of "possible conflicts between the proposed action and the objectives of" state and local plans. The "objectives" of a law or plan do not contain specific requirements. It is § 1506.2(d) that calls for examination of conflict with legal standards – such as the noise standard in Act 250 and the

South Burlington nuisance ordinance -- rather than objectives. As set forth in Plaintiffs' initial brief, the project will undermine the housing objectives of the Comprehensive Plan, a conflict that the EIS did not address.

COUNT 4 –HISTORIC RESIDENCES

Defendant cites North Idaho Community Action Network v. U.S. Dept. of Transportation, 545 F.3d 1147, 1156 (9th Cir. 2008) for the proposition that NEPA has no 'independent" requirement that an agency examine impacts on historic resources. That ruling, however, proceeds to apply the NEPA regulations that require consideration of impacts on historic resources. The court's point was that, standing alone, without other environmental harms, impacts on historic properties may not suffice to trigger NEPA review. That argument is irrelevant to the present case, where traditional environmental harm has required an EIS.

The Defendant's brief (pp. 43-46) provides a detailed explanation of why noise impacts were found to be acceptable. None of this explanation can be found in the EIS, which dismissed the subject on the basis that only damage to the historic structures required consideration because it is the nature of the structure, not its use, that makes a building historic. Under the Defendant's logic, an unbearably loud federal project next to a historic church, rendering it unfit for use as a church (while leaving its physical structure unharmed), requires no consideration in an EIS. Only a direct effect, such as harm to the church structure, requires consideration. No cases support this extreme view. If accepted, this view would effectively repeal 40 C.F.R. §§ 1502.16(b) and (c) and 1508.8(b), which set forth detailed requirements that an EIS consider "indirect effects."

COUNT 5 – F-16 AIRCRAFT TO BE RETIRED IN 2018

Defendant characterizes as "unfounded speculation," supported only by "hearsay," that the retirement of Burlington's F-16 fleet, regardless of whether or not F-35s are based in Burlington, was the no-action alternative to basing F-35 aircraft at BIA. Defendant's position is inexplicable. Defendant's own Record of Decision relied on this no-action alternative – otherwise empty hangars at Burlington, unlike McEntire and Jacksonville – as the cost-savings justification for electing Burlington.

There is no need to find that the Secretary of the Air Force misled the public or that there was internal confusion within the Air Force during the EIS process. NEPA does not require proof of *scienter* or negligence. The required full disclosure of the comparison of project impacts against the impacts of the no-action baseline never occurred, and the public was assured of a different baseline than the real one. The EIS, according to Defendant's own brief, "made it clear … that it expected Burlington to continue to fly military aircraft if it was not selected to host the F-35A." (Memo p. 49).

Defendant defends the EIS by arguing that there was no need to disclose the real no-action plan. Alternatives analysis is confined to alternatives that serve the purpose of a project, the Defendant argues, and retirement of the F-16s was irrelevant to the purpose of the project. Memo pp.49-50. The Defendant could not be more wrong. The no-action alternative by its nature is not dependent on or confined by the purpose of the project. Mandelker, NEPA Law and Litigation, *supra*, § 10.29 ("That a no-action alternative will not meet the needs to be served by a proposed project is obvious.") The purpose of the no-action alternative is to establish a baseline so that the impacts going forward with the project can be compared to the impacts of not going forward with the project. This is the most basic function of an EIS. Despite all of the hours invested in the process by the Air Force and the public, that never happened.

COUNTS 6 & 9 - RISKS IN THE EVENT OF CRASH OF AN F-35

Defendant Has Not Rebutted the Erroneous RPZ that Was the Basis for the EIS

Defendant argues that the added risk to the public and first responders from the composites and from stealth coatings was adequately considered by its staff -- but Defendant has not challenged Plaintiff's claim that the risk *to the public* was left unaddressed. The key public safety protection relied on by the EIS was the Runway Protection Zones, where crashes are most likely, and in which there is supposed to be no incompatible development. The EIS states there is no incompatible development within BIA's RPZ. According to the AR, Defendant's staff knew the EIS was not correct. Incompatible development has occurred within the RPZ. Members of the public had commented on this error. Defendant decided not to correct the error. The EIS falsely assures the decision-maker and the public that there is no incompatible development in the area of greatest F-35 crash risk, the RPZ. All of Defendant's arguments about suitable training and equipment for first responders are immaterial to the risk to the public in the RPZ. See Plaintiffs' Initial Brief at pp. 56-58 and 61, which Defendant's Brief has not responded to. This risk was swept under the rug. See County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1384-1385 (2d Cir. 1977) (cited with approval in National Audubon Society v. Hoffman, 132 F.3d 7, 15 (2d Cir. 1997).[3] Judgment should be granted to Plaintiffs on Count 6.

Defendant's Brief Relies on Record Evidence About Composites to Dismiss Expert Concerns Raised by Mr. Sprey about Stealth Materials

[3] The Defendant unfairly dismisses Plaintiffs' concerns about public safety by criticizing Plaintiffs' reference to Class A mishaps as crashes. Memo pp. 53-54. The FEIS refers to crashes as Class A mishaps and bases its analysis on that data. FEIS pp. 3-25 -27. The Defendant also unfairly criticizes reference to F-22 crashes rather than F-16. The FEIS states that the F-22 Class A mishap data may be more reliable than F-16 data for predicting the F-35 crash rate. BR 4-51.

Defendant's memorandum at p.58 purports to summarize the AR. The third block paragraph summarizes Lt. Colonel Caravello's conclusion as follows: "Nor does the presence of stealth materials require following procedures not already required for a fire burning advanced composite materials. AR 65428." However, AR 65428, a memo by Lt. Col. Caravello, actually states "Various metals and low observable coating materials pose significant health risk in the terms of toxic gases (including carcinogenic materials). Although these risks are significant, they do not necessarily require any special procedures not being followed for advanced composite materials." (Emphasis added). The "not necessarily" caveat goes to the heart of Count 9. Are special procedures and equipment needed to address stealth coatings or are the procedures and equipment needed to address composites sufficient? Mr. Sprey and Ms. Greco's report said that the risks to the public and to first responders are much greater, and different, and that the response must differ. Nowhere in the record is an answer to Mr. Sprey and Ms. Greco set forth.[4] Therefore 40 C.F.R. §§ 1502.22(b) and 1502.9(c) required a SEIS. There is nothing in the record to substantiate that a hard look was taken before rejecting the request for a SEIS, and the decision not to issue a SEIS was arbitrary and capricious.

COUNT 10 – OVERALL COST

Defendant argues that mission criteria were the pre-eminent considerations and were weighted more heavily than the environmental and cost factors in its basing decision; thus any errors or omissions in the cost evaluation in the EIS were unimportant and corrections are not required under NEPA. Memo pp. 70-71

[4] Similarly, Chief of Fire Emergency Services Randy Caratachea is cited on p. 59 as concluding that the F-35 does not present any new challenges for first responders, citing AR 65402. On page 60, Defendant states that this conclusion applies to both composites and stealth materials. The Defendant states that its "stable" of experts have addressed all the issues. But AR 65402 is silent about stealth coatings. It refers to composites. And it does not address risk to the public, just first responders.

Notwithstanding Defendant's protestations in her brief, the Record of Decision and the Administrative Record amply demonstrate that the "mission criteria" actually favored the alternative sites and that the cost savings from moving F-35s into the otherwise empty Burlington hangars played a substantial role in the decision. The ROD does not say that mission factors alone favored Burlington. The ROD states that Burlington was the "best mix of infrastructure, airspace and overall cost"– not singling out any one factor. The AR includes a table comparing each site, and *Burlington scored lower in almost every category in this table, including those related to mission – weather, airspace, and range*. AR65329. See also basing criteria definitions at AR39697-39702, AR64646, AR65953.

Explanations by knowledgeable members of Defendant's staff corroborate that mission factors did not favor Burlington, contrary to Defendant's memorandum. The Chief of Operational Basing wrote: "*there really were no 'operational reasons as to why Burlington is designated as the preferred ANG alternative.' Not from an airspace and range perspective anyways.*" AR61626 (emphasis added) (Email from Chief of Operational Basing, Jul 18, 2013). One report showed the Adirondack range that the VT ANG uses for training received the lowest assessment among those used by the alternative ANG bases. *2012 Report to Congress on Sustainable Ranges,* at 246[5]; see FEIS at 2-14.

The argument that cost savings did not affect the outcome appears for the first time in the memorandum Defendant submitted to this Court.

Defendant further argues that the difference in overall costs among the alternatives was small and therefore did not impact the fair consideration of the project's adverse environmental

[5] *2012 Report to Congress on Sustainable Ranges*, referenced in FEIS at 2-45 and available at http://www.denix.osd.mil/sri/upload/SRR2012-Web.pdf (compare VT ANG's Adirondack Range; to Jacksonville's Avon Park and Townsend Ranges; and McEntire's Poinsett and Townsend Ranges).

effects. Defendant points to the table at AR 63529. Memo pp. 72-73 (Citing AR65329, from 11/19/13). The table does show that the costs for the three sites had become similar – but Burlington ceased being the most expensive choice only when the Defendant added to the equation the new concept of overall savings (considering the savings from using Burlington's hangars that were going to be empty anyway, and comparing those savings to the costs of building replacement facilities for the aircraft displaced at the other two sites). In the EIS, Burlington's $4.7 million cost had been $3.6 million more than McEntire and $4.3 million more than Jacksonville. Tables BR2.1-2, Mc2.1-2, JX2.1-2. Failure to include in the EIS any disclosure or examination of the "overall cost" factor that Defendant subsequently relied upon in the ROD to choose the most environmental harmful alternative, was a violation of a legal duty set out in NEPA. The decision to omit "overall cost" from the FEIS but rely upon it in the ROD also was arbitrary and capricious. Defendant failed to meet the standards of § 706(2)(A) and (D). See City of New York v Shalala, 34 F.3d 1161 (2d Cir. 1994); Senville v. Peters, 327 F.Supp.2d 335 (D.Vt. 2004), aff'd 331 Fed Appx. 848 (2nd Cir. 2009).

CONCLUSION

The Court is respectfully asked to issue a Declaratory Judgment that the basing decision was in violation of law and arbitrary and capricious.

Date: April 4, 2016

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