IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFE SKIES CLEAN WATER WISCONSIN, INC.,	)	
Plaintiff,	)	
v.	)	Case 1:21-cv-00634-CKK
UNITED STATES AIR FORCE, et al.,	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now Plaintiff and pursuant to Fed. R. Civ. P. 56, and LCvR7(h), moves the Court for summary judgment in that there is no dispute as to material facts and Plaintiff is entitled to judgment as a matter of law. In support of this motion, Plaintiff submits a Memorandum in Support, Declarations and Exhibits. As explained in detail in the Memorandum, Plaintiff is entitled to summary judgment on its claims that Defendants violated the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., and Council on Environmental Quality and Department of the Interior implementing regulations, 40 C.F.R. parts 1500–1508, 43 C.F.R. part 46; and the Administrative Procedure Act, 5 U.S.C. § 706.

WHEREFORE, Plaintiff respectfully requests that the Court grant its motion for summary judgment and enter judgment:

1. Declaring that:

A. Defendants, in issuing an EIS and ROD, failed to comply with NEPA by having a predetermined outcome;

B. Defendants failed to take a hard look at detrimental noise impacts in violation of NEPA and its implementing regulations;

C. Defendants violated NEPA by failing to adequately consider the cumulative impacts of increased PFAS on already-polluted drinking, ground surface water and fish in the Starkweather Creek and Yahara chain of lakes watersheds water;

D. Defendants violated NEPA by failing to adequately consider environmental justice impacts in violation of NEPA and its implementing regulations;

E. Defendants violated NEPA by failing to take a hard look at air quality impacts of the F-35As;

F. Defendants violated NEPA by failing to adequately address alternatives;

G. Defendants violated NEPA by failing to adequately consider climate change;

H. Defendants violated NEPA and the APA by failing to provide adequate notice and public participation;

I. Defendants violated NEPA and the APA by failing to produce a Supplemental Environmental Impact Statement;

J. Defendants violated NEPA by failing to take a hard look at impacts on wildlife in violation of NEPA and its implementing regulations;

K. Defendants violated the APA by failing to comply with NEPA; and

L. Defendants' actions and proposals are arbitrary, capricious, an abuse of discretion, in excess of statutory jurisdiction, authority, and limitations, without observance of procedure required by law, unsupported by substantial evidence and unwarranted by the facts, in violation of the APA.

2. Enjoining the defendants and all others acting in concert with them from carrying on or permitting any activities in furtherance of the construction of the Proposed Action until such time

as the defendants prepare an adequate EIS and a supplemental EIS, the sufficiency of the environmental impact statements to be determined by this Court.

3. Awarding plaintiff such other and further relief as the Court may deem just and proper, including costs, attorneys' fees, expert witness fees and other expenses of litigation;

Awarding such other relief as the Court deems just and proper.

Dated this 12th day of December, 2022.

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

December 12, 2022

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TABLE OF CONTENTS

Introduction....6

Jurisdiction....8

Venue....8

Standard of Review....9

Parties....9

Factual Background....12

Argument....12

I. Defendants Violated NEPA by Predetermining the Outcome....12

II. Defendants Violated NEPA by Failure to Take a Hard Look at the Detrimental Noise Impacts that F-35As will have on the Quality of Life of People in Madison, WI....17

III. Defendants Violated NEPA by Failing to Consider Cumulative Impacts of Increased PFAS and other Pollutants on Already Polluted Drinking and Groundwater....26

IV. Defendants Violated NEPA by Failing to Adequately Consider Environmental Justice....28

V. Defendants Violated NEPA by Failing to Take a Hard Look at Air Quality Impacts of Criteria and Hazardous Air Pollutants....32

VI. Defendants Violated NEPA by Failing to Adequately Address Alternatives....33

VII. Defendants Violated NEPA by Failing to Adequately Consider Climate Change....36

VIII. Defendants Violated NEPA and the APA by Failing to Provide Adequate Notice and Public Participation....37

IX. Defendants Violated NEPA and the APA by Failing to Produce a Supplemental Environmental Impact Statement Taking Action that is Arbitrary and Capricious and an Abuse of Discretion....41

X. Defendants Violated NEPA by Failing to Take a Hard Look at Impacts on Wildlife....41

XI. Defendants Violated the APA by Taking Actions that are Arbitrary and Capricious....43

Conclusion....44

TABLE OF AUTHORITIES

Cases

Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd., 663 F.3d 476 (D.C. Cir. 2011) 16

Andrus v. Sierra Club, 442 U.S. 347, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979).....16

Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172 (9th Cir. 2008) 36

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).....9

City of Los Angeles v. NHTSA, 912 F.2d 478 (D.C. Cir.1990).....36

City of Olmsted Falls v. FAA, 292 F.3d 261 (D.C. Cir. 2002).....42

Coliseum Square Ass'n, Inc., v. Jackson, 465 F.3d 215, 232 (5th Cir. 2006) 28

Committee of 100 on Federal City v. Foxx, 87 F.Supp.3d 191 (D.D.C. 2015) 26

Del. Riverkeeper Network v. F.E.R.C., 753 F.3d 1304 (D.C. Cir.2014).....26

Flaherty v. Bryson, 850 F.Supp.2d 38 (D.D.C. 2012) 16, 33

Fla. Audubon Soc. v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996).....37

Forest Guardians v. U.S. Fish and Wildlife Serv., 611 F.3d 692 (10th Cir.2010) 13, 16

Friends of Capital Crescent Trail v. Federal Transit Administration, 877 F.3d 1051 (D.C. Cir. 2017) 41

Grand Canyon Trust v. F.A.A., 290 F.3d 339 (D.C. Cir. 2002).....26, 27

Hammond v. Norton, 370 F. Supp. 2d 226 (D.D.C. 2005) 9

Hausrath v. US Dep. of the Air Force, 491 F. Supp. 3d 770 (D. Idaho 2020). 43

*Kleppe v. Sierra Clu*b, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976) 38

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) 43

* *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016).....17, 32

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) 32, 38

Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) 28

**Washington v. United States Department of the Navy*, 2021 WL 8445582, slip op. (W.D. WA Dec. 10, 2021) 15, 16, 21, 33, 37

Winter v. National Resources Defense Council, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) 15, 16

Wyoming v. U.S. Dept. of Agri., et al, 277 F. Supp. 2d 1197 (D. Wyo 2003) 40

Wyoming v. U.S. Dept. of Agriculture, 661 F.3d 1209 (10th Cir. 2011) 13

Statutes

5 U.S.C. § 701 - 706 ..... 6, 8

5 U.S.C. § 702 8

5 U.S.C. § 706 17

5 U.S.C. § 706(2)(A), (C), (D), (E), (F) 43

28 U.S.C. § 1331 8

28 U.S.C. 1391(e) 8

28 U.S.C. 2201-2202 8

28 U.S.C. § 2412 8

28 U.S.C. § 2412(d) 6

42 U.S.C. § 4321 *et seq* 6

42 U.S.C. §§ 4331 *et seq* 8

42 U.S.C. § 4332(2)(c) 8

Regulations

32 C.F.R. Part 989 11

40 C.F.R. Parts 1500 to 1508 11

40 C.F.R. § 1501.7(a) 40

40 C.F.R. § 1503.1 38

40 C.F.R. § 1508.25 26

40 C.F.R. § 1508.7 37

40 C.F.R. § 1508.8 26

40 C.F.R. § 1508.8(b) 36

Table of Acronyms

ANG ..... Air National Guard

dB ..... Decibel

dBA ..... Decibels Measured in A-Weighting

DNL ..... Day-Night Average Sound Level

EAJA ..... Equal Access to Justice Act

HAP ..... Hazardous Air Pollutant

Lmax ..... Maximum Sound Level

NGB ..... National Guard Bureau

POI ..... Point of Interest

PFAS ..... Per- and Polyfluoroalkyl Substances

SEL ..... Sound Exposure Level

WDNR ..... Wisconsin Department of Natural Resources

INTRODUCTION

Safe Skies Clean Water Wisconsin, Inc. ("Safe Skies") challenges a decision of the U.S. Air Force ("USAF") and the National Guard Bureau ("NGB") selecting the Air National Guard ("ANG") location at the 115th Fighter Wing Installation, Dane County Regional Airport, Madison, Wisconsin (also known as Truax Field ("Truax")), for Operational Beddown of F-35A Aircraft following the issuance of an Environmental Impact Statement ("EIS").

Safe Skies' claims arise under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.; the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d); and the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq*.

The NGB, on behalf of the ANG, prepared one EIS to evaluate the potential consequences to the human and natural environment in each of five locations that would result from implementation of the Beddown of the ANG F-35A combat fighter jet. AR0000085.The five locations and the Fighter Wings there are: Madison, WI (115th FW); Boise, ID (124th FW); Jacksonville, FL (125th FW); Mt. Clemens, MI (127th FW); and Montgomery, AL (187th FW). AR0000077; AR0000043.

The USAF issued the final EIS on February 28, 2020 (AR0001516), and the Record of Decision ("ROD") on April 14, 2020 (AR0001525), selecting Truax Air Field in Madison, WI, and Montgomery Airport in Montgomery, Alabama. AR0001517.

Truax Air Field is a passenger airport as well (AR0000115), and is located in the City of Madison in a well-populated area. AR0000270; AR0000274; AR0000276. The Airport is just five miles from the downtown business district. AR0000239.

Madison is well-known as a great midsize city and "much of what is wonderful about life here happens outdoors. The beautiful lakes and parks, networks of bike paths, outdoor concerts

and peaceful backyards are important to attracting tourists and new employees as well as to those already living [in Madison].” AR0069429.

The 115th Fighter Wing (“115 FW”) is a unit of the Wisconsin Air National Guard, (“ANG”) which is stationed at Truax Field Air National Guard Base, Madison, Wisconsin, that currently has F-16 fighter jets based at it. Defendants’ Answer, ECF 13, ¶5.

The USAF proposes to replace the F-16s with F-35As (“the Proposed Action”). AR0000095. The purpose of the Proposed Action is to ensure, “availability of combat-ready pilots in the most advanced fighter aircraft in the world.” AR0000008.

The proposed F-35A fighter jets are significantly louder, and will fly much more frequently than the F-16 jets currently based at Truax Field. AR0000020. There will be 6,222 F-35A arrivals and departures per year, compared to 4,900 arrivals and departures of the F-16s currently in Madison. AR0000013. For several years, after the F-35As arrive, Madison will have 6,222 yearly flights of F-35As, PLUS 968 flights of F-16s, for a total of 7,190 annual flights. AR0001324. This will be a 47% increase in military operations at the airfield for several years (this would drop to 27% once the F-35A adopts the alert mission). AR0000024.

The F-35As will produce noise of 119 dB at take-off and 100 dB at landing. AR0001358. This will happen 6,222 times per year. AR0000014. That is equal to 17.05 take-offs and landings every day of the year – seventeen times a day of hearing noise that exceeds safe noise levels and is deafening when heard for long periods. That is a lot of times to suffer shaking houses, classroom disruptions, broken phone calls and zoom meetings, fear, annoyance and anger.

The F-16s greatly annoy people and disrupt learning and they produce noise of 115 dB at take-off and 93 at landing. AR0001358. Since they fly 4,900 times per year, or the equivalent of 13.4 times daily, they already cause a great deal of harm to children and adults.

The noise from the current F-16 jet testing and training is already unacceptable to many of Safe Skies' members. Declaration of Steven Klafka (Klafka Decl.), ¶ 32; Declaration of Tehmina Islam ("Islam Decl."), ¶ 16; Declaration of Edward Blume ("Blume Decl."), ¶¶ 17, 18.

The USAF and NGB acted illegally by a) failing to adequately study and disclose the major and significant environmental effects of the Proposed Action as required by NEPA, 42 U.S.C. § 4332(2)(c); and b) acting arbitrarily, capriciously and with abuse of discretion, or otherwise not in accordance with the law, and without observance of procedure required by NEPA and the APA.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1331, because this action arises under the laws of the United States, including the National Environmental Policy Act, 42 U.S.C. §§ 4331 *et seq*.; the Administrative Procedure Act, 5 U.S.C. §§ 701-706; the Declaratory Judgment Act, 28 U.S.C. 2201-2202; and the Equal Access to Justice Act, 28 U.S.C. § 2412.

An actual, justiciable controversy exists between plaintiff and defendants. The requested declaratory judgment and injunctive relief are therefore proper under the Declaratory Judgment Act, 28 U.S.C. 2201-2202; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

The United States has waived sovereign immunity with respect to the claims raised herein under 5 U.S.C. § 702. Plaintiff has exhausted all administrative remedies and has no adequate remedy at law.

VENUE

Venue is proper in this Court under 28 U.S.C. 1391(e).

STANDARD OF REVIEW

A reviewing court must "undertake a 'thorough, probing, in-depth review' of the agency's decision and then decide whether it was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Hammond v. Norton*, 370 F. Supp. 2d 226, 238 (D.D.C. 2005) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)).

PARTIES

Safe Skies Clean Water Wisconsin, Inc. is a nonprofit corporation organized under the laws of Wisconsin. Klafka Decl. ¶ 9. Safe Skies' purpose is to educate the public concerning the dangers inherent in the Beddown of F-35A Joint Strike Fighter jets at Truax Air National Guard base in Madison as well as the need for the NGB, ANG and USAF to clean-up existing contamination of groundwater, surface water, drinking water and soils, caused by the use of fire-fighting foams and other materials on the base. Klafka Decl. ¶¶ 20, 26.

Safe Skies accomplishes its mission by informing the local citizenry of the USAF and NGB's plans and their potential negative environmental and socioeconomic impacts on the community by means of a website, newsletters, forums, and public activity. It has a mailing list of over 2,000 people. Klafka Decl. ¶ 28. Since 2019, Safe Skies has sponsored a series of public forums, appeared on radio shows, and brought speakers to Madison for presentations, press conferences and interviews. Klafka Decl. ¶ 29.

Safe Skies and its members are concerned about the noise that F-35As produce, and the negative effects this long-term extremely loud noise will have on members who live in and near the flight paths of the F-35As. Klafka Decl ¶¶31-33; Islam Decl. ¶¶17-19; Blume Decl ¶¶ 22, 23.

Many of Safe Skies' members reside very near Truax Field and in the flight paths of current and proposed fighter jets. Klafka Decl. ¶¶ 30, 31. Many members of Safe Skies live within the current 65 dB DNL noise contour ("DNL" is the day-night average sound level), and the 65 dB DNL contour predicted after the arrival of the proposed F-35A fighter jets. Klafka Decl. ¶ 31; Islam Decl. ¶ 14; Blume Decl. ¶ 21.

Many of Safe Skies' members are already injured by the F-16s in that when the F-16s fly in and out of Truax, their houses shake; they cannot hear people in routine conversation when indoors, outdoors, on the phone, or on computer calls, meetings or school; they become stressed; they suffer detrimental personal, physical, mental health, educational, and economic impacts from the noise and vibrations. Klafka Decl. ¶ 32; Islam Decl. ¶¶ 15, 16; Blume Decl. ¶ 18.

These injuries will be more severe and more frequent when F-35As are in place. Klafka Decl. ¶ 33; Islam Decl. ¶ 18; Blume Decl. ¶ 22.

Safe Skies' members who live in current and proposed 65 dB, and higher, DNL levels will suffer injury in fact from the increased noise the F-35As will bring to Madison. Klafka Decl. ¶ 33; Islam Decl. ¶¶ 18, 19; Blume Decl. ¶¶ 22, 23. Safe Skies' members will be injured because the F-35As will produce noise that will interfere with members' enjoyment of their homes, health, and the education of their children. Klafka Decl. ¶ 32.

Safe Skies is also concerned about the large amount of per- and polyfluoroalkyl substances ("PFAS") emitted from the base and known to be polluting municipal wells, particularly in low-income neighborhoods near the airport, as well as the groundwater, soils, Starkweather Creek, Lake Monona, and the Yahara chain of lakes. Klafka Decl. ¶ 34.

Many of Safe Skies' members reside in locations that have and will suffer the impacts of the increased emissions of PFAS that will result from the activities authorized in the EIS in that

they drink from wells that already have PFAS in them, and eat fish from Starkweather Creek that also have PFAS in them. Klafka Decl. ¶ 35; Islam Decl. ¶¶ 26, 27; Blume Decl. ¶¶ 32, 33.

Safe Skies' members also live near and recreate in the Cherokee Marsh Area, located approximately one mile from Truax. Klafka Decl. ¶ 36.

Safe Skies members are concerned that emissions from fighter jets will interfere with community efforts to reduce global warming. Klafka Decl. ¶ 37.

This Court can redress the injury of Plaintiff by requiring the USAF to complete an adequate EIS and a Supplemental EIS. Klafka Decl. ¶ 60; Islam Decl. ¶ 31; Blume Decl. ¶ 37.

The USAF is the agency that issued the "United States Air Force F-35a Operational Beddown Air National Guard Environmental Impact Statement" and Record of Decision, which are the subject of this lawsuit. ECF 13, ¶27. John P. Roth is the Acting Secretary of the USAF. He is named as a defendant in his official capacity. ECF 13, ¶28.

The NGB is a joint activity of the Department of Defense (DOD Directive 5105.77). ECF 13, ¶29. The NBG and USAF are co-lead agencies for the preparation of the EIS. AR0000091.

The ANG is a federal military reserve force of the USAF. ECF 13, ¶30. The NBG and USAF are co-lead agencies for the preparation of the EIS. AR0000091.

The USAF and NGB, as agencies of the federal government, are required to comply with various laws and regulations, including the National Environmental Policy Act ("NEPA"; 42 U.S.C. §§ 4321 *et seq*.), the Council on Environmental Quality's NEPA regulations, 40 C.F.R. Parts 1500 to 1508, and the USAF's own NEPA-implementing regulations, 32 C.F.R. Part 989. AR0000079. General Daniel R. Hokanson is the current Chief of the National Guard Bureau. He is named as a defendant in his official capacity. ECF 13, ¶33.

FACTUAL BACKGROUND

The Air Force Listed Effects of F-35As in Five Locations in one Environmental Impact Statement Three Years After Two Locations Had Already Been Selected for the F-35As

The USAF and NGB have placed F-16s at Truax Air Field in Madison, WI, since 1992. ECF 13, ¶34. On **May 9, 2016,** the Secretary of the USAF selected Truax Air Field in Madison, WI, to receive F-35As in place of F-16s. AR0068771.

In December, 2016, the USAF announced it had selected five locations as semi-finalists for locating F-35A jets: Madison, WI; Boise, ID; Jacksonville, FL; Mt. Clemens, MI; and Montgomery, AL. ECF 13, ¶35.

Madison has F-16s in it currently; Boise has A-10 fighter jets; Jacksonville has F-15s; Mt. Clemens, MI has A-10s, and Montgomery, AL has F-16s. AR0000096.

On December 21, 2017, well before preparing an EIS, the USAF announced publicly it selected Madison's Truax Field, home of the 115th Fighter Wing of the Air National Guard, and Montgomery, Alabama, home of the 187th Fighter Wing of the ANG, as the two sites that would receive the F-35A aircraft. AR0019459. Those are the two sites with F-16s. AR0000096.

In August, 2019, almost three years *after* selecting Madison for the F-35A, the USAF released a draft Environmental Impact Statement discussing five locations. AR0046806.

The USAF issued the final EIS on February 28, 2020 (AR0001516), and the Record of Decision on April 14, 2020 (AR0001525), reaffirming its selection of the same two sites it had selected in 2016. AR0019459.

ARGUMENT

I. Defendants Violated NEPA by Predetermining the Outcome

NEPA requires that federal agencies do not set out with predetermined outcomes when preparing Environmental Impact Statements. 42 U.S.C. § 4332(2)(c). "'[I]f an agency

predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously.'" *Wyoming v. U.S. Dept. of Agriculture*, 661 F.3d 1209, 1263 (10th Cir. 2011), citing *Forest Guardians v. U.S. Fish & Wildlife Serv*., 611 F.3d 692, 713 (10th Cir.2010).

On May 9, 2016, the Secretary of the Air Force selected Truax Air Field in Madison, WI, to receive the F-35As. AR0068771. It was not until December, 2016, that the USAF announced to the public that it had selected five locations as semi-finalists for locating F-35A jets: Madison, WI; Boise, ID; Jacksonville, FL; Mt. Clemens, MI; and Montgomery, AL. AR0019458, AR0019459. This was not entirely true – as the Secretary had already signed off on Madison receiving the F-35As but that decision had not been made public.

On December 21, 2017, defendants announced publicly that the F-35As are coming to a low-income, heavily minority community in Madison, Wisconsin. AR0019459.

The official scoping period began on February 7, 2018. AR0000007. This is almost *two years after* the May 9, 2016, decision was made. In 2018 and 2019, defendants undertook an exercise of listing noise and environmental impacts at locations in five states, but **failed** to select the sites that would have the *least harmful impacts on the fewest number of people*. AR0000020 - AR0000038.

In the 2020 EIS, the USAF stated that, "The goal of F-35A basing and fielding is to continue to provide optimum Combatant Commander support and to efficiently meet regional and global receiver demands *while replacing the existing F-15, F-16, or A-10* fighter attack aircraft (emphasis added)." AR0000043.

The remaining several hundreds of pages of the EIS do not discuss the need to replace the F-16s. However, in the ROD the USAF states in the "Decisions" paragraph that summarizes the EIS and ROD that, "Both selected installations have **aging F-16** aircraft in need of replacement…(emphasis added)." AR0001525.

The USAF failed to disclose in the DEIS what are the ages and conditions of the F-16s at Truax and the public could not comment on those factors. The USAF failed to consider alternatives that would have addressed the age and condition, other than replacement of all F-16s with F-35As. The EIS and ROD make it clear the outcome was predetermined and based a desire to replace F-16s with F-35As.

The decision was pre-ordained and the comments were a meaningless exercise. Thousands of people filed comments opposing Madison as a site for the F-35As. AR0001318. The EPA filed comments showing the Madison study was flawed, stating: "The discussion of alternatives selection criteria and the rationale for each alternative location to be retained or eliminated does not fully describe how children's health and Environmental Justice (E.J.) impacts were factored into the final decision…The DEIS includes a well-designed EJ analysis which concludes that there is potential for significant and disproportionately high and adverse impacts at the Madison and Montgomery sites. However, it does not fully discuss steps that will be taken to avoid or reduce impacts to those communities; and does not discuss proactive outreach to impacted communities during alternatives development or preliminary selection." AR0004428-AR0004429.

The Wisconsin Department of Natural Resources ("WDNR") sounded the alarm about the harmful effects of the Project. AR0005810.

The Madison School Board ("MMSD") filed comments showing children's educational needs would suffer with the louder jets here. AR0005476. The School Board summarized its findings by stating that, "MMSD Board of Education concludes that the issues identified in the draft EIS will negatively impact learning in our schools, reduce the property tax base, decrease school enrollment in the affected area, and disproportionately affect children and families of color and people with low incomes." AR0005477.

Truax is located in an urban area where many more people will be impacted by the F-35A jets than would be in the other sites named in the EIS. AR0005540; AR0005549.

The USAF was deaf to all of these concerns, and selected the sites that will harm the greatest number of people; the greatest number of low-income people; and the greatest number of children. AR0000020 – AR0000039. The USAF made **no** substantive alterations to its plans during or after the comment period. The Tables of Impacts in the DEIS and EIS have no substantive changes. AR0000020 – AR0000039; AR0045280 - AR0045298. It proceeded bull-headedly to select the two communities in which the largest number of people would suffer because its goal was to replace F-16s.

Courts are reluctant to exercise their constitutional authority to review military agencies. In *Winter v. National Resources Defense Council* (555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), the Supreme Court discussed the great deference accorded to senior military officials' judgments that training under challenged circumstances was critical to the national defense. However, a court recently stopped the US Government from forcing deafening military jets on local citizens. In *Washington v. United States Department of the Navy*, 2021 WL 8445582, slip op. (W.D. WA Dec. 10, 2021), the Court found that when the Navy authorized the expansion of EA-18G "Growler" aircraft operations at the Naval Air Station at Whidbey Island,

"The Navy selected methods of evaluating the data that supported its goal of increasing Growler operations…at the expense of the public and the environment, turning a blind eye to data that would not support this intended result. Or, to borrow the words of noted sports analyst Vin Scully, the Navy appears to have used certain statistics 'much like a drunk uses a lamppost: for support, not illumination.'" *Washington v. U.S. Dept. of the Navy*, 2021 WL 8445582, at ¶1, p. 2.

In this case the USAF used the EIS as a meaningless exercise, and turned a blind eye to data that would not support its predetermined and intended result.

"Predetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome." *Forest Guardians v. U.S. Fish and Wildlife Serv*., 611 F.3d 692, 714 (10th Cir. 2010) (emphasis in original); see also *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd*., 663 F.3d 476, 488 (D.C. Cir.2011) (" 'strong' evidence of 'unalterably closed minds' [is] necessary to justify discovery into the Board's decisionmaking process" on the basis of prejudgment)." *Flaherty v. Bryson*, 850 F.Supp.2d 38, 70 (D.D.C. 2012).

Furthermore, "An EIS must be prepared 'early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'" *Winter,* 555 U.S. at 48 (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 351-2, n.3, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979).

The EIS in this case did not serve practically as an "important contribution to the decision-making process." The EIS was not even used to "rationalize or justify decisions already made." It was just a required exercise, and was a monumental exercise in futility.

The USAF has offered an explanation in one sentence: that it wants to replace F-16s with F-35As, and that explanation leaves only one decision, which runs counter to the evidence before

it. The evidence shows that Madison has a large number, a significant number, and the greatest number of people who will be adversely affected, of all five sites listed in the EIS.

This outcome was predetermined and violated NEPA.

II. Defendants Violated NEPA by Failing to Take a Hard Look at the Detrimental Noise Impacts that F-35As will have on the Quality of Life of People in Madison, WI

NEPA requires agencies to take a "hard look" at significant impacts of their actions and consequences of their actions. 5 U.S.C. § 706. *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016).

Defendants failed to take a hard look at the significant harms the noise from the F-35As will cause on the well-being of thousands of people in Madison, WI. There are 60,000 people who live within three miles of Truax Field and who will be adversely impacted by the F-35As. AR0005549. Three miles is the distance in which the county airport regulates new construction. Klafka Decl. ¶ 39.

A. The Air Force's Methods of Computing Noise Levels

Sounds is measured in decibels, but, "Because of the logarithmic nature of the decibel unit, sound levels cannot simply be added or subtracted.… If a sound's intensity is doubled, the sound level increases by 3 dB, regardless of the initial sound level. For example: 60 dB + 60 dB = 63 dB…." AR0001351.

Defendants rely on a table made in 1979 to show what are harmful sound effects. AR0001354. This table shows that the threshold of hearing is at 0 dBA; quiet urban daytime is at 45 dBA; a vacuum cleaner is just under 70 dBA; a garbage disposal is about 75 dBA; a nightclub is at 110 dBA, which is 16 times louder than a sound of 70 dBA. That study considers a level of 70 dBA to be "moderately loud," and a nightclub at 110 dBA to be "uncomfortable."

AR0001354. The USAF uses dB interchangeably with dBA. A refers to A-weighting. AR0001352.

"The highest A-weighted sound level measured during a single event in which the sound changes with time is called the … Maximum Sound Level and is abbreviated Lmax." AR0001358. "On takeoff through 1,000 feet … the F-35A [has]… 111 dB Lmax." AR0001358.

"Sound Exposure Level (SEL) combines both the intensity of a sound and its duration. For an aircraft flyover, SEL includes the maximum and all lower noise levels produced as part of the overflight, together with how long each part lasts. It represents the total sound energy in the event. …. Because aircraft noise events last more than a few seconds, the SEL value is larger than Lmax. It does not directly represent the sound level heard at any given time, but rather the entire event. SEL provides a much better measure of aircraft flyover noise exposure than Lmax alone." AR0001359. "At 1,000 feet above ground level…the F-35A [has] 119 dB SEL." *Id*.

"Day-Night Average Sound Level (DNL) is a cumulative metric that accounts for all noise events in a 24-hour period." AR0001361. "DNL represents the average sound level for annual average daily aircraft events." AR0001361.

"The decibel summation nature of these metrics causes the noise levels of the loudest events to control the 24-hour average. As a simple example, consider a case in which only one aircraft overflight occurs during the daytime over a 24-hour period, creating a sound level of 100 dB for 30 seconds. During the remaining 23 hours, 59 minutes, and 30 seconds of the day, the ambient sound level is 50 dB. The DNL for this 24-hour period is 65.9 dB. Assume, as a second example that 10 such 30-second overflights occur during daytime hours during the next 24-hour period, with the same ambient sound level of 50 dB during the remaining 23 hours and 55 minutes of the day. The DNL for this 24-hour period is 75.5 dB." AR0001362.

"A feature of the DNL metric is that a given DNL value could result from a very few noisy events or a large number of quieter events. For example, 1 overflight at 90 dB creates the same DNL as 10 overflights at 80 dB." AR0001362.

"DNL does not represent a level heard at any given time, but represents long-term exposure. Scientific studies have found good correlation between the percentages of groups of people highly annoyed and the level of average noise exposure measured in DNL (Schultz 1978; USEPA 1978)." AR0001362.

"The Number of Events Above (NA) metric gives the total number of events that exceed a noise level threshold (L) during a specified period of time. Combined with the selected threshold, the metric is denoted NAL. The threshold can be either SEL or Lmax, and it is important that this selection is shown in the nomenclature. When labeling a contour line or point of interest (POI), NAL is followed by the number of events in parentheses. For example, where 10 events exceed an SEL of 90 dB over a given period of time, the nomenclature would be NA90SEL(10). Similarly, for Lmax it would be NA90Lmax(10). The period of time can be an average 24-hour day, daytime, nighttime, school day, or any other time period appropriate to the nature and application of the analysis." AR0001363.

B. The USAF Failed to Take a Hard Look at the Harmful Effects of Noise on Children

The defendants' data shows that F-35As will produce noise levels of as high as 119 dB at take-off and 100 dB at landing. AR0001358. F-16s produce noise of 115 dB at take-off and 93 at landing. AR0001358. There will be 7,190 annual flights of F-35As and F-16s for "several years." AR0001324. The pilots do not fly every day of the week, 365 days a year, but if they did, nearby residents would hear these loud noises 19.69 times every day.

In the EIS, the USAF lists total loud events that will happen at some near-by locations, called Points of Interest ("POIs"), including schools, residences, churches, and a health center. AR0000231; AR0000229 - AR0000234.

Many schools are in the flight paths and hundreds of children will be adversely impacted. AR0000232. "…Under the Proposed Action Alternative, the increase in the NA50 number of speech-interrupting events per school day hour would remain similar to the affected environment *except* Lake View Elementary and the Richardson School would experience *one additional event per average hour. Play Haven, Northside Kinder Care, Lake View Elementary, Madison Baptist Academy, and Richardson School would all experience more than two interfering events per hour. All of the POIs* would experience a range of 1 to 4 minutes of time above 50 dB per school day. The causation of speech interference at schools with increased noise levels *may hinder the ability of students (including low-income and minority students) to learn, which would constitute an adverse impact to children to include low-income and minority children* (emphasis added)." AR0000279.

"Two of the POI schools located within the Region of Influence (ROl) would experience an increase in the number of events causing speech interference with levels reaching up to **seven per hour** at the Richardson School with windows open (emphasis added)." AR0000239. Instead of hearing 19.69 deafening noises daily, some teachers and children will be interrupted in class up to *7 times per hour* during the school day. AR0000238. The Richardson School serves children with autism and learning disabilities, categories already making learning more difficult. AR0005557.

Imagine if a courtroom were interrupted seven times per hour, every weekday, forever, with no end in sight. A judge would have the interrupter escorted from the courtroom. This

would not be happening in just one courtroom, but in the entire building – all the judges would be similarly interrupted. Teachers in schools have no options of having the noise escorted from the room and have no expectations of continuing class with no further interruptions.

Airplane noise harms children in many ways. Studies included in the Record show that airport noise is "linearly associated with impaired reading comprehension." AR00043878. Another study finds, "Chronic aircraft noise exposure was associated with higher levels of noise annoyance and poorer reading comprehension.: AR0071898. And, "High levels of environmental noise are inversely related to reading ability in elementary school children." AR0071953. "Chronic exposure to aircraft noise impaired long-term memory, reading comprehension and problem-solving skills in children ages 8 through 14." AR0044355. Airport noise also causes lack of motivation, stress, and elevated blood pressure in children. AR0044355 – AR0044358.

Yet after noting there can be harmful impacts and stating that many children will be affected, the USAF states: "The current state of scientific knowledge cannot yet support inference of a causal or consistent relationship between aircraft noise exposure and non-auditory health consequences for exposed residents. It is not yet possible to establish a quantitative cause and effect based on the currently available scientific evidence." AR0001325.

This is not taking a hard look. A court has found this evasion a violation of NEPA. In *Washington*, "the Navy acknowledged numerous studies that concluded that aircraft noise would measurably impact learning but then arbitrarily concluded that because it could not quantify exactly how the increased operations would interfere with childhood learning, no further analysis was necessary." *Washington*, slip op., ¶ 1, p. 2. The Court held that, "It was arbitrary and capricious not to further evaluate the extent of the impact on child learning, based on the Navy's own summary of the scientific literature." *Id.*, ¶ 8, p. 9.

The USAF has made the same conclusion here, and arbitrarily and capriciously failed to take a hard look at the impact of the Project on child learning.

C. The USAF's Project will Increase the Numbers of People Harmed

"Under the Proposed Action at the 115 FW installation, F-35A aircraft operations at the airfield would *increase* off-base acreage contained within the 65 dB DNL and greater noise contours by *1,320* acres. There would be an *estimated addition of 1,019 households and 2,215 people would reside within the 65 dB DNL contour*, where residential land use is considered conditionally compatible. Predicted changes in the DNL at POIs range from -1 to +9 dB with levels at three representative POIs exceeding 65 dB. AR0000238.

The USAF does not select the sites where fewer people would be affected: In Florida, "the number of households located within the 65 dB DNL contour would **decrease by 4** and the **number of people exposed would decrease by 15** (emphasis added)." AR0000238. (All of the other cities show fewer numbers of affected people than Madison.) AR0000238. The USAF also does not discuss ways of minimizing the numbers of people impacted.

D. The USAF's Methods are Outdated and Do Not Show Most Harmful Impacts of Noise

Defendants used an outdated daily average noise standard of 65 dB DNL when other airports use 55dB and 60 dB. AR0005549. The 65 dB DNL standard is over 50 years old, and has not been updated. AR0005549; Klafka Decl. ¶ 38. Furthermore it was designed to predict annoyance, not learning impairment. AR0001362.

Defendants failed to acknowledge that a lower dB level is advised for schools. "The initial ANSI classroom noise standard (ANSI 2002) and American Speech-Language-Hearing Association (1995) guidelines concur, recommending at least a 15 dB signal-to-noise ratio in classrooms. If the teacher's voice level is at least 50 dB, the background noise level must not

exceed an average of 35 dB." AR0001373. "While WHO (1999) only specifies a background Lmax criterion, they also note the SIL frequencies and that interference can begin at around 50 dB." AR0001373. "Other than the FAA (1985) 45 dB Lmax criterion, they are consistent with a limit on indoor background noise of 35-40 dB Leq and a single event limit of 50 dB Lmax. It should be noted that these limits were set based on students with normal hearing and no special needs. At-risk students may be adversely affected at lower sound levels." AR0001373.

By using the outdated standard, defendants fail to account for impacts of noise including stress, sleep disturbance, damage to the eardrum and cochlea hair cells of children, development of irreversible post-traumatic stress disorder, and a reduction in the educational performance of children, all of which have been shown to occur at lower levels in the 50 years since that standard was announced. AR0005555 – AR0005559.

Defendants fail to acknowledge that noise does not stop at the 65 contour dBA line. "FAA policy regards noise to be so intrusive on one side of that pencil-thin line on a map that Federal funding is provided to sound insulate or possibly acquire residences and other noise-sensitive structures, such as schools, churches and hospitals; but outside that line on the map the Federal guidelines suggest that noise sensitive development is perfectly acceptable without restriction. *Clearly, it is not the intent of Federal policy to communicate that noise stops at that boundary*…" AR0044281.

By using the outdated 65 dB DNL noise standard, defendants failed to account for noise exposure of low-income and minority populations living just outside this predicted noise contour, but who will suffer greatly from the noise. AR0005723.

Defendants failed to take a hard look at the impacts that will be felt by 60,000 people who live within three miles of Truax Field and are already adversely impacted by F-16 flights.

AR0005549. In fact, people living as many as five miles from the airport had conversations stopped by the noise of an F-35A when one did fly in and out of town. AR0069098.

E. The USAF Failed to Take a Hard Look at the Impacts of Afterburners

Defendants failed to take a hard look at the impacts of the use of afterburners. AR0005553. "Afterburner is used on some military aircraft to provide the increase in speed needed to safely lift off from a runway, and as needed in the training airspace to achieve high speeds quickly. Use of afterburner consumes large amounts of fuel, so its use is typically limited to those times when it is absolutely necessary for flight safety (additional thrust is needed) or to achieve higher acceleration rates." AR0000100. Defendants used an assumption of a 5% afterburner usage (AR0000200; AR0000225), but the USAF is operating the F-35As using afterburners 50% of the time for takeoffs at Hill Air Force Base in Utah, making it seem unlikely there would be such a lower amount of usage at Truax. AR0069745.

The use of afterburners increases the noise levels and will increase the harms suffered by Plaintiff's members. Klafka Decl. ¶ 42; AR1001068; AR0005663.

The USAF refused to conduct additional modeling of the greater use of afterburners.

F. The USAF Failed to Provide Short Term Noise Contours which would inform People How Many Distressing Events They Will Suffer with the 7,190 Annual Flights the USAF is Forcing on Them

Defendants failed to provide short-term noise contours that would show the distance impacts of the noise will extend from Truax field; and failed to divulge the more informative short-term noise exposure and how many events people in the community will hear daily. People do not speak of their "daily average": what bothers them are the multiple short term extremely loud noises. The USAF failed to show the peaks that people hear. AR0005550.

G. The USAF Undercounted the Number of People who will Suffer from the Harmful Effects of the Noise from F-35As

Defendants failed to list all the schools and churches that are in the affected zones. The School Board pointed out that: "Three MMSD ["Madison Metropolitan School District"] elementary schools—Hawthorne, Lake View and Sandburg—are situated immediately outside the 65 decibel noise contour shown in the draft EIS; and… in 2018-19, 73 percent of students attending these schools were students of color, 42 percent were English language learners, and 72 percent were considered low-income; and…*the draft EIS states that increased noise levels resulting from the proposed action may interrupt speech and hinder the ability of students to learn and, contrary to the District's commitment to Black excellence and racial equity, constitute an adverse impact on children, including low-income and minority children; and…the draft EIS omits Hawthorne and Sandburg Elementary Schools from its analysis and therefore underestimates the adverse impact of the proposed action on children* (emphasis added)." AR0005476. The Final EIS was not changed.

Defendants arbitrarily used assumptions when drawing the contour lines which conveniently omit some low-income communities such as the Truax apartments. The City of Madison stated: "It should also be noted that there are several concentrations of poverty and persons of color just outside the 65 db contour, including the CDA Truax housing, CDA Webb-Rethke townhomes and other housing near Worthington Park, and near the intersection of Packers Avenue and Northport Drive." AR0005724.

G. The USAF's Analysis in the EIS is Inadequate and Violates NEPA

After stating some of the harmful impacts in the Draft and Final EISs, defendants did not select a city that would not have these harmful impacts; nor did they change flight patterns; nor decrease the frequency of flights, nor alter their plans in any way to mitigate these harms. They

listed some harmful impacts, showed people would be affected, and did nothing further. Defendants failed to take a hard look at the noise and its impacts. This failure violates NEPA and shows that the selection of Madison is an arbitrary and capricious decision.

III. Defendants Violated NEPA by Failing to Consider Cumulative Impacts of Increased PFAS and other Pollutants on Already Polluted Drinking and Groundwater

CEQ regulations require an agency to consider the "direct," "indirect," and "cumulative" impacts of a proposed action. 40 C.F.R. § 1508.25. "Effect includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8.

"A cumulative effects analysis must identify the area of study; expected impacts from the proposed project; other expected actions in the same area and their impacts; and the overall cumulative impact that can be expected if the individual effects are allowed to accumulate. *Del. Riverkeeper*, 753 F.3d 1304, 1319 (D.C. Cir.2014) (citing *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 345 (D.C. Cir. 2002)). In evaluating cumulative effects, courts assume a 'worst case' scenario in which reasonably foreseeable projects that could lead to incremental impacts but are not currently under review would take place. *Coal. on Sensible Transp.*, 826 F.2d at 71 (incorporating the effects of other highway projects that had been previously approved by assuming they would be completed). *Committee of 100 on Federal City v. Foxx*, 87 F.Supp.3d 191, 214 (D.D.C. 2015).

The USAF and NGB violated NEPA by failing to consider the cumulative impacts of the Proposed Action on the environment and the public health. Truax Air Field is already known to be a source of PFAS contamination that is leaching off the site and into drinking, groundwater and surface water throughout Dane County. AR0005728; AR0005810 – AR0005813. Defendants

failed to take a hard look at the effects of increased long-term pollutants on the environment and human health.

The WDNR has ordered defendants to further investigate the extent of the contamination of PFAS and to clean up this contamination. AR0005728. The City has complained that defendants failed to comply, and continue to fail to comply, with this Order. AR0005728.

Ignoring the extensive contamination that has already occurred, the NGB and ANG will continue to use fire-fighting foam that contains PFAS in its routine operations of the F-35As. AR0000256. Defendants failed to consider the cumulative impacts of the continued use of materials containing PFAS. AR0005728. The City already had to shut down one well that provides residents with drinking water due to PFAS contamination. AR0005728. Increased PFAS discharges from F-35A-related activities will migrate into Starkweather Creek, Lake Monona, the Yahara chain of lakes and into public drinking water systems, and fish consumed by the public. AR0005566.

Defendants failed to take a hard look at the cumulative negative environmental impacts on water from other chemicals that will be released during routine operations from F-35As, including fuels, oils, cadmium, copper-beryllium, and hydrazine. AR0004690 – AR0004691; AR0004692 – AR0004694.

Although the USAF claims that the discharges of some of these pollutants would be less with F-35As than with F-16s (AR0000318 – AR0000319), the USAF fails to acknowledge the cumulative impact of these discharges on the soils and groundwater.

Here, the challenged cumulative impacts are predictable and the USAF violated NEPA by failing to take a hard look at them. *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 345-347 (D.C. Cir. 2002).

IV. Defendants Violated NEPA by Failing to Adequately Consider Environmental Justice

Executive Order 12,898 requires federal agencies to determine whether a Proposed Action will have a disproportionately adverse effect on minority and low-income populations. 59 Fed. Reg. 7629 (Feb. 16, 1994). An agency is: "Not required to select the course of action that best serves environmental justice, only to take a 'hard look' at environmental justice issues," *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017). Courts have looked at "administrative insensitivity to racial or economic inequality" in evaluating environmental justice challenges. *Coliseum Square Ass'n, Inc., v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006).

Here, defendants show extreme insensitivity to racial and economic inequality by arbitrarily and capriciously selecting Madison and Montgomery, the only two of the five sites supposedly under consideration, that **will have "*significant* disproportionate impacts to low-income and minority populations as well as children**." Defendants arbitrarily and capriciously failed to select any of the three sites that would have "***no significant* disproportionate impacts** to low-income or minority populations (emphasis added)." AR0000030; AR0000127.

A. Defendants' Own Data Showed Disproportionate Impacts to Low-Income and Minority Populations, and to Children

Defendants concluded that: "Therefore, cumulative impacts to the health or safety of environmental justice populations or children **would be** significant." AR0000332. "Four block groups, located south of the airport, are considered low-income population areas and would be newly exposed to noise levels of 65 dB DNL or higher. One block group located west of the airport is both a minority and low-income community and would be newly exposed. **The increase in noise exposure to the south and west of the airport would disproportionately impact low-income areas and the increase in noise exposure to the east of the airport would disproportionately impact a low-income minority population.** (emphasis added)."

AR0000277. (The US Census Bureau defines Block Group as "statistical divisions of census tracts, are generally defined to contain between 600 and 3,000 people, and are used to present data and control block numbering.")

The number of people that will be impacted is large. The USAF considers the 65-75 dB range as "potentially incompatible for residential use." AR0000265; AR0000270 . The USAF showed that an "additional 1,923 people will be in the 65-70 dB level, 292 people will be in the 70-75 dB level, or 1,019 households."AR0000229. This was not changed from the Draft EIS to the Final EIS, even though many people commented about this being unacceptable. AR0005663.

Furthermore, approximately 199 acres of additional residential land use would be included in the 65-75 dB DNL noise contour, rendering this acreage potentially incompatible for residential land use, which would be considered a significant impact. AR0000270. In addition, 887 households would be added to 65 – 70 dB DNL range and 132 households added to 70-75 range; this equals 1,923 plus 292 people in those ranges that would be adversely impacted. AR0000229.

B. Defendants Failed to Include Significant Numbers of Affected People in their Analysis

Alderwoman Russel commented that, "It should also be noted that there are several concentrations of poverty and persons of color just outside the 65 dB contour, including the CDA Truax housing, CDA Webb-Rethke townhomes and other housing near Worthington Park, and near the intersection of Packers Avenue and Northport Drive. While these areas will experience *virtually identical noise exposure as residents who live on the contour line*, they will not be eligible for federal sound mitigation funding through the Noise Compatibility Program. If Truax is selected for future F35s, it is a reasonable conclusion that non-mitigated areas immediately adjacent to but outside the 65 dB contour may experience more significant impacts than

mitigated (soundproofed) residences inside the impacted area. If nearly 800 subsidized low-income housing units are within 1,500 feet of the 65 dB contour, but not potentially not eligible for remediation, does environmental justice become a mockery?" AR0005667.

The City also pointed out that the USAF undercounted the block groups. The Mayor wrote: "The EIS used 20% of the population in poverty and 50% of the population identifying as a minority as thresholds to flag impacted block groups. While the 50% minority rate may be a national standard for environmental impact statements, it appears to be a very high bar for measuring impacts on communities of color particularly in Madison and Dane County, where persons of color make up 26% and 20% of the population respectively. Using this metric, the only block groups flagged for having a minority population are west of the airport, generally outside the 65 db curve. Nearly every impacted area within the City of Madison belongs to a census tract with rates of persons of color well above the city- and county-wide averages. The block group with the largest expansion of the impacted area (Carpenter Ridgeway) is comprised of 43.9% persons of color. While the EIS acknowledges it has a disproportional impact on persons of color, its methodology results in this issue being understated. The threshold for poverty appears more in line with Madison (26%) and Dane County (20%) averages. Like the persons of color statistic above, nearly every block group within the impacted area has poverty rates above the city-wide average." AR0005724.

The City's contour map showing the disproportionate number of people of color impacted is startling. AR0005732. Between 40 to 50% of the people in the closest neighborhoods are people of color. The City filed this map with its Comments, but again, the USAF made no substantive changes to the Final EIS from the draft EIS after receiving Comments. The map

showing the poverty rates of the people most impacted is equally startling. AR0005733. The USAF is forcing this harmful Project on low-income people and people of color.

C. Defendants Failed to Take a Hard Look at the Disproportionate Impact the PFAS will have on Low-Income and Minority People

Defendants failed to take a hard look at the disproportionate impact the PFAS continuing to migrate off-base will have on low-income and minority populations who live near Truax, drink from the City water, fish in Starkweather Creek, and live and recreate near the contaminated soil. AR0004686 – AR0004687.

D. The USAF Violated NEPA by Scorning Environmental Justice

Although defendants find there **would be *significant*** detrimental impacts, they fail to take a hard look at the impacts of the Proposed Action on low-income and minority communities; fail to discuss mitigating measures; and fail to choose an alternative that would not have significant detrimental impacts on minority and low-income populations. They responded callously to the thousands of comments calling this unjust by saying, "*Environmental Justice and children's health were not and are not required to be considered in the identification of the preferred alternatives* (emphasis added)." AR0001328. There was nothing anyone could say that would change the USAF's mind. People might as well have been talking to a brick wall. All of the hours the WDNR, EPA, City, Safe Skies' members, dozens of organizations, and thousands of people, spent examining the DEIS and drafting comments were a colossal exercise in futility. The USAF showed extreme administrative insensitivity to both racial and economic inequality. The decision to place the F-35As in the worst location possible should not receive deference from the courts.

V. Defendants Violated NEPA by Failing to Take a Hard Look at Air Quality Impacts of Criteria and Hazardous Air Pollutants

"Agencies must take a 'hard look' at the environmental effects of a major federal action '*and consequences* of that action' [italics added]." *Public Employees*, 827 F.3d at 1083, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). In *Public Employees*, the Court held the defendants' failure to gather enough scientific data violated NEPA. 827 F.3d at 1083.

Defendants failed to take a hard look at the impacts from the increased amounts of criteria air pollutants they will cause to be released. Defendants listed amounts and concluded the impacts will be insignificant. AR0000248. By failing to evaluate hazardous air pollutant emissions and their impacts on nearby residents, the NGB obscured the fact that Truax Field was the worst location for the jets of the five sites named. The USAF's failure to take a hard look thereby avoided showing that Truax Field, which had already been selected, was not a good location because so many people live in close proximity to the airport.

Defendants used no readily available analysis tools to determine the air quality impacts of the project on near-by residents. They set up no monitors. They conducted no dispersion models. They did not look at the impacts to air quality on near-by residents who will suffer through 7,190 flights landing and taking off yearly. AR0000199. Defendants made a simple conclusion that, "The increase in criteria pollutant emissions would not have a significant impact on area air quality." AR0000248.

The impacts are not insignificant: studies have shown that criteria air pollutants emitted from airports increase exposure to surrounding residents and the increased emissions from F-35As will have a detrimental impact on people living near the base and county airport.

AR0005566 – AR0005567. By refusing to look, defendants will not find the harmful impacts. Their refusal should not be upheld.

Commenters asked the USAF to include the following: "a) A complete list of all the chemicals, solvents, lubricants, etc. required for F-16 and F-35 maintenance and operations, b) A full delineation of the vertical and lateral extents of the groundwater VOC contamination currently at the site and how far it has traveled offsite in all directions, c) Complete testing for chemicals used and/or released on the site that have not been assessed or inadequately tested to date, including: TCE, PCE, PAHs, PCBs, metals, PFOA/PFAS, radioactive compounds, d) Evaluation of how the chemicals used/spilled/released at the site (including those in "c" above) migrated (via ditches, storm drains, utilities, sewers, etc.) and how they could affect humans, waterways, wildlife and other receptors,…" AR0004690.

The USAF's response was to state that hazardous materials are stored and used on the base. AR0000311. Furthermore those pollutants would not create significant or adverse health risks and are not evaluated. AR0001326.

A court has held an agency's refusal to disclose and discuss emissions violates NEPA. *Washington*, slip op. at ¶ 7, p. 9. Similarly here, the USAF's failure to disclose quantities of and evaluate effects of emissions violates NEPA.

VI. Defendants Violated NEPA by Failing to Adequately Address Alternatives

An EIS, "must include consideration of reasonable alternatives." *Flaherty v. Bryson*, 850 F.Supp.2d at 71. If the "no action" alternative is in fact no alternative at all, then it does not meet the requirements for taking a hard look. *Id*. at 72-73.

Defendants failed to take a hard look at the alternatives. Even though defendants listed impacts to five sites, it did so *three years after* Madison and Alabama had been selected. The EIS

was a sham. The other three sites were not under consideration for being selected for the F-35As – two sites had already been selected.

The alternative three sites would cause less harm to fewer numbers of people. Defendants' own data shows that locating F-35As at Truax will adversely impact the *greatest number of people* of the five locations. In Madison, 292 people will be located in the 70-75 DNL contour where housing is incompatible; this compares to 199 people in Idaho, **zero** in Florida, 130 in Michigan and 35 in Alabama. AR0000020. Zero in Florida. The USAF offers no explanation for failing to select Florida. The only reason is that Florida was never seriously under consideration.

Defendants' data shows that locating F-35As at Truax will adversely impact the *greatest number of low-income* people of the five locations studied. In Madison, **ten** *new block groups* would be exposed, *including ones exceeding 50% minority and almost 50% in poverty*; as compared to **three** block groups in Idaho, **zero** in Florida, **six** in Michigan and **two** in Alabama. AR0000279-AR0000280; AR0000423; AR0000567; AR0000719; AR0000865. Again, **zero** in Florida and it was not selected.

Defendants' data shows that the Proposed Action will increase by the *second largest number the acres* that will be newly exposed to noise levels exceeding the 65 dB DNL. In Madison, 199 acres will be exposed; 74 in Idaho; **zero** in Florida; 475 in Michigan, and 37 in Alabama. AR0000028. Again, it makes zero sense that Florida was not selected when the F-35As will have zero harmful impacts there.

Defendants' data shows that the Proposed Action will *decrease by the second largest amount the property value percentage of the tax base* of the County selected for the installation: **.03-.27** for Dane County; compared to **.01-.13** in Idaho; **.01-.01** in Florida; **.04-.038** in Michigan;

and **.01-.14** in Alabama. AR0000030. This difference is not insignificant: the USAF shows Madison and Dane County will lose over $3 million annually in property tax values. The USAF's disdain for Madisonians is chilling.

Despite providing data that shows that placing the F-35As in Florida will have **NO** harmful impacts, the USAF gave no serious consideration to altering its 2016 decision to select Florida, or any of the three locations that do not have F-16s. The USAF's own data shows that Madison is the worst site to select in that there will be the most harmful impacts on the greatest number of people.

In addition to the USAF not showing any intention to consider altering its 2016 decision, the USAF did not consider another location in Wisconsin which the USAF already utilizes for training for the F-16s. Volk Field is the primary training range, and is located far away from Madison in a sparsely populated rural area. AR0000115; AR0000206.

Alderwoman Rummel filed Comments stating that, "Truax is not an acceptable location. Was there ever any consideration for moving 115 FW to Volk Field?" AR0005663. Yet there is **no** discussion of moving the operations to Volk Field.

Another alternative defendants failed to consider was retiring the F-16s and not replacing them with other jets, but with giving the 115th Fighter Wing another mission. "The EIS should explain what flying and non-flying roles the Air National Guard at Truax Field could fulfill if it is not selected for the F-35A fighter jet squadron." AR0005572. The USAF refused to look at other roles for the 115th Fighter Wing. AR0001322.

The only alternative Defendants listed for Madison was a no-action alternative. AR0000116. However, since the Secretary had selected Madison in 2016, there is no evidence that the USAF seriously considered not replacing F-16s with F-35As.

Defendants' failure to seriously consider alternatives is arbitrary and capricious and violates NEPA.

VII. Defendants Violated NEPA by Failing to Adequately Consider Climate Change

Defendants' table shows F-35As will emit almost 22,000 tons/year of CO_2, and the F-16s will emit 9,263 tons/year. AR0000248; AR0000249. "The annual airfield CO2 emissions would increase by approximately 12,478 tons or 135 percent. This is equivalent to adding an additional 2,438 passenger vehicles onto roads, driving 11,500 miles per year on average." AR000249.

Defendants gloss over the significance of their actions by saying that these emissions will "contribute incrementally to the global warming that produces the adverse effects of climate change." AR0000249.

Disclosing only the volume of climate change causing emissions tells the public and decisionmakers nothing about the scale of the project's "ecological" impacts, as NEPA requires, 40 C.F.R. § 1508.8(b), or the "significance" of such impacts.

It is common knowledge that we are losing the war against climate change. AR0069454 – AR00065456. The USAF failed to take a hard look at the climate change causing pollutants the F-35As will emit.

In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), the 9th Circuit Court of Appeals held that a federal agency violated NEPA, in part because the agency failed to quantify the cumulative impacts of the greenhouse gas emissions. 538 F.3d at 1217. "'**[W]e cannot afford to ignore even modest contributions to global warming.** If global warming is the result of the cumulative contributions of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees?', *City of Los Angeles v. NHTSA*,

912 F.2d 478, 501 (D.C. Cir. 1990) (Wald, C.J., dissenting), overruled on other grounds by *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996)(emphasis added)." 538 F.3d at 1217.

Another Court held the Navy violated NEPA by failing to disclose its climate change causing pollutants for its Growler Jets. *Washington*, slip op. at ¶ 7, p. 8.

This Court should not allow defendants to implement a harmful project without doing a full analysis of the impacts of their actions on global climate change. 40 C.F.R. § 1508.7 requires agencies to analyze foreseeable impacts and defendants have not done so here.

Without some actual analysis of the incremental impacts, it is impossible for defendants to know whether a change in climate change causing emissions will be a significant step toward averting the tipping point and irreversible adverse climate change.

Defendants acknowledge that impacts of climate change on the region will include severe rain events and flooding, but trivialize it by stating that the severe effects could impact the mission activities rather than looking at the effects on the region. AR0000331.

Defendants fail to take a hard look at the serious impact of the Proposed Action on climate change and this Court should require a hard look.

VIII. Defendants Violated NEPA and the APA by Failing to Provide Adequate Notice and Public Participation

Defendants violated the public participation and notice requirements of NEPA and implementing regulations by failing to inform the public of its proposed action and failing to allow for meaningful and timely public involvement.

"The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences and that provide for *broad dissemination* of relevant environmental information

(emphasis added)." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350, quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

"The broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Id*.

40 C.F.R. § 1503.1 states that an agency "shall" request comments of, "The public, affirmatively soliciting comments *in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action*."

From the onset in 2018, for the first "scoping meeting," the notices were designed to *not* bring members affected to the meetings. For that March 8, 2018, scoping meeting (AR0000212), the USAF placed a notice in the *Milwaukee* Journal Sentinel on February 11, and one in the Wisconsin State Journal (which serves Madison) on March 4, 2018, exactly four days ahead of the meeting. AR0000089. Milwaukee is *77 miles* from the site and the affected residents would have no reason to see a notice there.

In 2019, the USAF continued its lack of gaining meaningful input by the affected citizens. The meeting on the Draft Environmental Impact Statement was held on September 12, 2019, at the Alliant Energy Center, which is located 8 miles from the Project site. AR0000090. This location takes more than one hour to get to by bus from the affected neighborhoods. AR0000090. The public hearing should have been held at a site near the affected households. There are plenty of schools, churches, and libraries near the affected communities as the defendants know because they listed some of them in their contour maps discussion.

In addition, the USAF presented all materials in English. Alderwoman Kemble filed Comments stating that, "Schools located just outside the 65 dB noise contour that serve children who live within the contour have a student population of 37% English Language Learners. This

means their non-English speaking families who will he most impacted have not had access to this vital information." AR0005758.

Defendants never implemented a detailed community outreach strategy aimed at gaining local input from all communities that would be affected. They did not bother to set up targeted activities to reach low-income and/or minority communities. AR0000212, AR0000213; AR0004684 – AR0004688; AR0005545 – AR0005548. The City mailed postcards to residents within and near the 65 dB contour map and got hundreds of people to a meeting. AR0005667. The USAF did not do this.

The media strategy was designed to **not** reach the people most affected. The lists of news outlets reveal that the USAF purposefully placed many more news items in the three sites that **did not have F-16s** than in the two sites with F-16s. In Madison, the USAF placed notices in a total of **8** outlets: 1 newspaper that is *not* distributed free of charge; 0 weeklies; 0 free papers; 0 alternatives; 4 television stations; and 3 radio stations which do not include religious or public radio. AR0066564. In Idaho, the USAF placed notices in **34** outlets: 17 newspapers including weeklies, alternatives, and free papers; 5 television stations, and 12 radio outlets including religious and public radio stations. AR0066542. In Florida, the USAF sent notices to **51** reporters at **42** different outlets: 26 newspapers including weeklies, alternatives and free papers; 7 television stations; and 9 radio stations including AM and public radio. AR0066557. In Michigan, the USAF sent notices to **32** reporters at 31 different outlets: 16 newspapers including weeklies and alternatives; 6 television stations; and 9 radio stations. AR0066650. In Alabama, the USAF placed notices in **9** different outlets: 1 subscription newspaper; 1 quarterly publication designed for businesses to advertise in; 1 online newspaper 1 online magazine; 3 television stations and 2 radio conglomerates. AR0066625.

The difference is striking and startling. In the communities that were not under consideration, the USAF sent notices to *637 and 567 percent* more outlets than the communities preselected years earlier. (Florida compared to Madison and Alabama.)

The wide variety of media outreach in Florida, Idaho and Michigan, shows the USAF has the ability to place notices in locations other than the expensive city paper, but did not do so in the pre-selected communities.

Furthermore, the USAF withheld important documents from the public. The USAF requested the FAA to be a cooperating agency. AR0004270. The FAA agreed. AR0004461. The FAA conducted a review of the EIS and said *it could not comply with its own NEPA and its Comments were not resolved*. AR0004434. In the entire 71,897 pages of the record, *the FAA's Comments are not included*. Defendants claimed the Comments are "inter-agency deliberative materials," and this Court upheld their claim. However, Plaintiff believes the comments are like other agency comments, such as those filed by the EPA, and must be released.

The withheld documents would show that *a lead agency is ignoring a cooperating agency*. The Court should require defendants to inform Plaintiff of the reasons the FAA believes the Project is unlawful. It should raise a huge red flag about the harmfulness of the Project that the FAA does not believe it complies with NEPA.

"The clear import of § 1501.7(a)'s mandatory language is that the agency undertaking the action shall engage with other governmental entities in an open and public manner so that they may work together in preparing the EIS. 40 C.F.R. § 1501.7(a). When a federal agency is required to invite the participation of other governmental entities and allocate responsibilities to those governmental entities, that participation and delegation of duty must be meaningful." *Wyoming v. U.S. Dept. of Agri., et al*, 277 F. Supp. 2d 1197, 1219 (D. Wyo 2003).

The USAF invited the FAA as required by statute and the FAA's participation shall be "open and public." The USAF should not be allowed to withhold the FAA's reasons for stating the Project violates NEPA.

Defendants' failure to provide adequate public participation is arbitrary, capricious, an abuse of discretion, and not in accordance with the law under NEPA and the APA.

IX. Defendants Violated NEPA and the APA by Failing to Produce a Supplemental Environmental Impact Statement

Defendants violated the law by failing to produce a Supplementary Environmental Impact Statement ("SEIS") which would provide an estimate of the cost to and timeframe for the USAF and ANG to investigate and remediate the existing PFAS contamination of groundwater and surface waters caused by the trainings at Truax Field.

The City and WDNR have asked the NGB to clean up the PFAS contamination for years. AR0005728. "Groundwater samples for PFOS/PFOA exceeded the USEPA Lifetime Health Advisory of 70 parts per trillion (ppt) for drinking water at all three locations within the planned construction area." AR0000323. The USAF claims the construction projects will comply with the law. AR0000323. These claims are not believable in light of the fact the NGB has failed to stop PFAS from getting in Madison's drinking wells, lakes, rivers, and fish. In addition, the USAF does not quantify or discuss the effects of additional PFAS emitted from fire-fighting foams that will be used on the F-35As. This Court should require the USAF to complete a Supplement EIS to fully investigate and disclose the quantity of PFAS that will be emitted and divulge the number of additional city drinking wells that will be closed due to the USAF.

"Completion of the EIS, however, does not always mark the end of the NEPA process. If 'new information' arises that presents 'a seriously different picture of the environmental landscape,' then the agency must prepare a supplemental EIS ("SEIS"). *Friends of Capital*

Crescent Trail v. Federal Transit Administration, 877 F.3d 1051, 1055 (D.C. Cir. 2017), quoting *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002).

The new information that must be disclosed is the increased amounts of PFAS the NGB will emit into already-polluted soils and waters.

X. Defendants Violated NEPA by Failing to Take a Hard Look at Impacts on Wildlife

Defendants failed to take a hard look at impacts on Cherokee Marsh Conservation Park and Cherokee Marsh State Natural Area (an urban refuge located approximately 1 mile from Truax Field) (together, "Cherokee Marsh").

Cherokee Marsh is a 2,000-acre wetland area owned and managed for nature conservation and outdoor recreation by the WDNR, City of Madison, and Dane County. Cherokee Marsh is home to dozens of species of threatened and endangered birds, plants and wildlife. AR0000299. The WDNR found that 107 acres would be added to the 70-75 dB DNL range, and that 550 acres would be added to the 65 dB DNL range. The USAF failed to discuss Cherokee Marsh in the Draft EIS, and the WDNR criticized the USAF for this failure. AR0005812. The WDNR requested the USAF to examine the effects on the wildlife, birds, migrating birds, and native plants. AR0005812.

However, the USAF refused to make Cherokee Marsh a "Point of Interest" AR0000222. The POIs are the only areas for which the USAF provides estimates of sound, so failing to make this huge nature preserve a POI is a major omission.

The USAF discussed wildlife at the airport and the 115 FW installation properties, and unsurprisingly concluded everything there is "accustomed to elevated noise levels" AR0000300. But they did not evaluate the birds and wildlife in the property that is not owned by the airport, including Cherokee Marsh and its dozens of species of birds that inhabit it or migrate through it.

A Court held that the USAF violated NEPA in a different case with facts similar to this, when the USAF failed to consider natural areas. The Court held, "Upon a review of the record, the Court finds the USAF's analysis and conclusion that the Urban CAS training program will have no significant impact upon the urban areas' soundscapes is arbitrary and capricious, for two reasons. First, the EA makes no attempt to explain the effect of aircraft noise upon areas that are outside the urban core. The USAF relies upon the premise that there is but one DNL applicable to an entire 30 NM CAS wheel, despite acknowledging that the nine urban areas contain natural soundscapes, like the Boise Foothills." "The USAF's analysis and resulting conclusion does not take into account that aircraft noise over natural or quieter soundscapes may appear louder than it would to persons in the city center." Second, "There is no explanation in the record why the USAF chose to utilize an estimate based upon population density, and then apply it to a 30 NM area." *Hausrath v. US Dept. of the Air Force*, 491 F. Supp. 3d 770, 788, 789 (D. Idaho 2020).

Here, defendants did not take any measurements or conduct any studies in Cherokee Marsh, and failed to take into account the fact that, "Aircraft noise over natural or quieter soundscapes may appear louder than it would to persons in the city center."

Again, defendants' EIS was arbitrary and capricious and violated the law.

XI. Defendants Violated the APA by Taking Actions that are Arbitrary and Capricious

The actions of defendants as described above are arbitrary, capricious, and an abuse of discretion; in excess of statutory jurisdiction, authority, or limitations; without observance of procedure required by law; unsupported by substantial evidence; and unwarranted by the facts. 5 U.S.C. § 706(2)(A), (C), (D), (E), (F). Under the APA, a reviewing court may set aside agency action for these reasons. *Motor Vehicle Ass'n v. State Farm Mutual Auto. Ins*., 463 U.S. 29, 43,

103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). This Court should find that defendants' actions are arbitrary and capricious and set them aside.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court grant summary judgment in its favor and find that Defendants violated NEPA and the APA.

Respectfully submitted this 12th day of December, 2022.

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