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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SAFE SKIES CLEAN WATER WISCONSIN, Complainants, v. WISCONSIN AIR NATIONAL GUARD, ADJUTANT GENERAL OF THE WISCONSIN AIR NATIONAL GUARD MAJ. GEN. PAUL E. KNAPP, WISCONSIN GOVERNOR TONY EVERS, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN DEPARTMENT OF NATURAL RESOURCES SECRETARY PRESTON COLE, DANE COUNTY, DANE COUNTY EXECUTIVE JOE PARISI, DANE COUNTY REGIONAL AIRPORT, AIRPORT DIRECTOR KIMBERLY JONES, CITY OF MADISON, and CITY OF MADISON MAYOR SATYA RHODES-CONWAY Recipients.	**COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964**

Complainants:

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Ex. (6), 7(C)

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I. INTRODUCTION

Environmental discrimination in the United States sadly continues today. In cities across the country, low-income communities and communities of color often bear the burden of pollution from new facilities, industries, and governmental projects. Today, in Madison, Wisconsin, we see the same unjust burdens repeated, which is frustrating because processes exist that should allow these communities to have agency in decision-making that profoundly impacts their lives.

In the early1980s, a grassroots environmental justice movement developed in this country, which forced the government to consider the effects of centuries of policy that created significant disparities in the health, safety, and well-being of overburdened communities. Accordingly, the EPA has defined "Environmental Justice" as

> the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.[1]

[1] Environmental Protection Agency, *Environmental Justice* (last visited Nov. 11, 2021), https://www.epa.gov/environmentaljustice.

Title VI of the Civil Rights Act of 1964 provides important avenues for overburdened communities to address newly introduced environmental burdens.

However, environmental justice communities must still play an active role in the fight against disparate exposure to environmental hazards due to laws, regulations, and policies that fail to protect them. The Wisconsin Air National Guard ("Wisconsin ANG"), the Wisconsin Department of Natural Resources ("Wisconsin DNR"), Dane County, the Dane County Regional Airport, the City of Madison and their respective leaders have failed to protect overburdened communities in Madison, Wisconsin, against further and disparate exposure to noise, pollution, and economic harm. This failure is evidenced by the approval, support, or acquiescence to locating a new squadron of F-35 fighter jets at Truax Field, Dane Country Regional Airport in Madison, Wisconsin, a source of existing water and noise pollution.

The 115th Fighter Wing at Dane County Regional Airport in Madison, Wisconsin, was selected by the United States Air Force ("USAF") and the National Guard Bureau ("NGB") as one of the two units to receive a squadron of eighteen F-35 fighter jets, with an expected arrival date of early 2023.[2] As mandated by the National Environmental Policy Act ("NEPA"), USAF published the Final Environmental Impact Statement ("FEIS") on February 28, 2020, and signed the Record of Decision ("ROD") on April 14, 2020.[3]

The stationing of the F-35 fighter jets will result in disproportionate impacts to low-income people and families of color living in communities adjacent to the base. This Com-

[2] *See e.g.*, Meg Jones, *Wisconsin ANG unit in Madison awarded fleet of F-35 fighter jets, the military's newest,* MILWAUKEE JOURNAL SENTINEL (Apr. 15, 2020), https://www.jsonline.com/story/news/local/wisconsin/2020/04/15/f-35-fighter-jets-come-madison-air-national-guard-unit/5138151002/.

[3] Record of Decisions for the Environmental Impact Statement United States Air Force F-35A Operational Beddown Air National Guard, 85 Fed. Reg. 22724 (Apr. 23, 2020), https://www.federalregister.gov/documents/2020/04/23/2020-08597/record-of-decisions-for-the-environmental-impact-statement-united-states-air-force-f-35a-operational.

plainant alleges that Recipients violated Title VI and EPA's implementing regulations by selecting, supporting, or otherwise approving the 115th Fighter Wing in Madison, Wisconsin, as a Beddown for the F-35 fighter jets. Complainants request that EPA's External Civil Rights Compliance Office ("ECRCO") investigate the allegations set forth hereafter and take all actions necessary to ensure the Recipients comply with the governing law and regulations.

II. THE PARTIES

A. The Complainants

1. Safe Skies Clean Water Wisconsin, Inc.

Safe Skies Clean Water Wisconsin ("Complainants") is a not-for-profit, community-based organization. Safe Skies represents a coalition of several thousand community members and over fifty organizations opposed to the Beddown of the F-35 Joint Fighter Jets at Truax Field base in Madison, Wisconsin.[4] It is dedicated to educating the public regarding the risks inherent in the Beddown of F-35 Joint Fighter Jets at Truax Air National Guard base in Madison. Safe Skies further aims to force cleanup of existing contamination of the groundwater and surface water emanating from the base surrounding the Dane County Airport.[5]

This mission is accomplished by informing citizens of relevant environmental harms and communicating through websites, newsletters, forums, and public activity; and with a mailing list of over 2,000 people.[6] Many of Safe Skies' members Ex. (6), 7(C)

Ex. (6), 7(C) ."[7] In fact, many of Safe Skies' members Ex. (6), 7(C)

[4] Safe Skies Clean Water Wisconsin (last visited Oct. 2, 2021), https://www.safeskiescleanwaterwi.org/about/.
[5] *Id.*
[6] Complaint for Declaratory, Injunctive, and Other Relief (Mar. 10, 2021), https://www.courthousenews.com/wp-content/uploads/2021/03/wis-jets.pdf.
[7] *Id.*

Ex. (6), 7(C) described in the project's FEIS and "the 65 dB DNL contour predicted after the arrival of the proposed F-35 Fighter Jets."[8]

B. Named Recipients

1. Wisconsin Air National Guard/Maj. Gen. Paul E. Knapp, Adjutant General of the Wisconsin Air National Guard, and Wisconsin Governor, Tony Evers as Commander in Chief of the Wisconsin Air National Guard

Maj. Gen. Paul E. Knapp is Wisconsin's Adjutant General. He commands the Wisconsin National Guard and is responsible for Emergency Management.[9] The Governor of Wisconsin appoints the Adjutant General of the Wisconsin ANG.

The Wisconsin ANG's legal status is a state and federal hybrid. The Wisconsin ANG has three main bases across Wisconsin located in Camp Douglas, Madison, and Milwaukee. "They perform seven unique missions training and preparing the citizen-airman to respond to the Governor of Wisconsin for state emergencies…"[10] "[T]he 115th Fighter Wing supports many domestic operations missions. These missions include a world-class fatality search and rescue, explosive disposal, firefighting and emergency response for the Dane County Regional Airport, debris clearance removal, and other domestic and local missions as assigned and requested by the Governor of Wisconsin."[11] The Governor of Wisconsin is the Commander-in-Chief of the Wisconsin ANG.

2. Wisconsin Department of Natural Resources

The Wisconsin DNR is a state government agency responsible for conserving and managing Wisconsin's natural resources. The Wisconsin DNR's stated mission is

> to protect and enhance our natural resources: our air, land, and water; our wildlife, fish and forests and the ecosystems that sustain all life. To provide a healthy, sustainable environment and a full range of outdoor opportunities. To ensure the right of all people to use and enjoy these resources in their work and leisure. To work

[8] *Id.*
[9] Wisconsin Dept. of Military Affairs (last visited Oct. 12, 2021), https://dma.wi.gov/DMA/knapp.
[10] Air National Guard – Wisconsin (last visited Oct. 12, 2021), https://www.goang.com/locations/wisconsin.html.
[11] Wisconsin Air National Guard (last visited Oct. 12, 2021), https://ng.wi.gov/about/wiang.

> with people to understand each other's views and to carry out the public will, and in this partnership, consider the future and generations to follow.[12]

3. Dane County/Dane County Executive, Joe Parisi

Dane County Executive Joe Parisi is the chief elected leader and governs the county and the Dane County Board of Supervisors. Dane County is home to over 500,000 residents in more than 60 cities, villages, and towns.[13] Dane County is home to the Dane County Regional Airport and the Beddown of the F-35 Joint Fighter Jets at Truax Field base in Madison, Wisconsin.

4. Dane County Regional Airport/Airport Director, Kimberly Jones

The Dane County Regional Airport functions both as a civilian and military airport.[14] The Truax Field Air National Guard base is located at the Dane County Regional Airport in Madison, Wisconsin, and houses the Wisconsin Air National Guard's 115th Fighter Wing. Kimberly Jones is the Airport Director for the Dane County Regional Airport.[15] The Dane County Regional Airport is led by the Dane County Executive Joe Parisi, Airport Director Kimberly Jones, and the Dane County Airport Commission.[16]

5. City of Madison/City of Madison Mayor, Satya Rhodes-Conway

The City of Madison is the location of the Dane County Regional Airport and Truax Field. The city controls planning, zoning, and development adjacent to the airport. Madison is home to many residents, especially low-income and families of color, who live adjacent to the airport. Madison's stated values include equity, well-being and stewardship.[17]

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[12] Wisconsin Department of Natural Resources (last visited Oct. 12, 2021), https://dnr.wisconsin.gov/about/mission.
[13] Dane County (last visited Oct. 12, 2021), https://www.countyofdane.com/government/about-dane-county.
[14] Dane County Regional Airport, *History of the Dane County Regional Airport* (last visited Nov. 15, 2021), https://www.msnairport.com/about/facilities_maps/history.
[15] Dane County Regional Airport, *Contact Us* (last visited Nov. 15, 2021), https://www.msnairport.com/about/contact/contact_us.
[16] Dane County Regional Airport, *Leadership* (last visited Nov. 15, 2021), https://www.msnairport.com/about/contact/leadership.
[17] *Vision & Mission Our Madison: Inclusive, Innovative, & Thriving*, CITY OF MADISON, (last visited Jan. 8, 2022), https://cityofmadison.com/vision-awards.

III. JURISDICTION

A. Program or Activity

A "program or activity" includes "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government; or the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government."[18] "[I]f any part of a listed entity receives federal funds, the entire entity is covered by Title VI."[19]

The Wisconsin ANG "operates on an annual budget of about $82 million -- with $22 million coming from the State of Wisconsin…."[20] The NGB, the federal administrator for the Air National Guard, is one of the lead agencies that conducted the Environmental Impact Statement pursuant to 40 C.F.R. §§ 1501.5 and 1508.5. The Governor appoints the Adjutant General of the Wisconsin ANG and commands the Wisconsin ANG.

The Wisconsin DNR is a regulatory agency of the State of Wisconsin. The Wisconsin DNR is tasked with conserving and managing Wisconsin's natural resources. Among other key players, the "Federal Aviation Administration [("FAA")], Dane County Regional Airport, and [Wisconsin

[18] 40 C.F.R. § 7.25.
[19] *Ass'n of Mexican-Am. Educators v. California*, 195 F.3d 465, 475 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (citing *Grimes v. Superior Home Health Care*, 929 F. Supp. 1088, 1092 (MD Tenn. 1996)).
[20] Wisconsin Department of Military Affairs (last visited Oct. 12, 2021), https://dma.wi.gov/DMA/about/dma.

DNR] have worked closely together" on introducing and implementing the F-35 fighter jet project.[21]

In 2019, the Wisconsin DNR named Dane County, the Dane County Regional Airport, the City of Madison, and the Wisconsin ANG responsible for remediating pre-and poly-fluoroalkyl substances ("PFAS") contamination at the airport.[22] Dane County has a "lease and a joint-use agreement" with the Air National Guard ("ANG").[23] Dane County is also a "co-permittee with the ANG on a [Wisconsin Pollutant Discharge Elimination System] stormwater permit issued by the WDNR in 2015."[24] Accordingly, because the offices, agencies, and elected officials' operations meet the definition of a "program or activity" under Title VI, they must comply with Title VI in implementing all its regulatory activities.

B. Recipient

The above-named parties are recipients of federal financial assistance as defined in EPA's Title VI regulations. These regulations define a 'recipient' as "any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient."[25]

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[21] *See* Safe Skies Clean Water (last visited Oct. 12, 2021), https://www.safeskiescleanwaterwi.org/lots-of-ceremony-but-no-comment-about-the-impact-on-the-community-madisons-115th-fighter-wing-breaks-ground-on-first-f-35-project/.

[22] *See* Abigail Baker, *Dane County supervisor seeks options to regulate airport PFAS remediation*, THE CAPITAL TIMES (June 25, 2021), https://madison.com/ct/news/local/govt-and-politics/dane-county-supervisor-seeks-options-to-regulate-airport-pfas-remediation/article_f5b91b4c-2ca4-5170-9fc8-a27b78a2ead5.html; *see also* Wisconsin DNR Letter to Dane County Regional Airport (Oct. 11, 2019), https://dnr.wi.gov/botw/DownloadBlobFile.do?docSeqNo=132418&docName=20191011_2_RP_Ltr.pdf.

[23] *See e.g.,* Safe Skies Clean Water (last visited Oct. 12, 2021*),* https://www.safeskiescleanwaterwi.org/tom-boswell-county-resolution-on-f-35-joint-strike-fighter-jets/.

[24] *Id.*

[25] 40 CFR § 7.25.

EPA regulations further define "federal financial assistance as any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance guaranty) or any other arrangement by which EPA provides or otherwise makes available assistance in the form of funds, services of personnel; or real or personal property or any interest in or use of such property."[26] Recipients are prohibited from "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin or sex."[27]

Further, the Wisconsin ANG and their Adjutant General are subject to Title VI due to their permits or personnel assistance from Dane County[28] and the Wisconsin DNR, both of which are recipients of EPA financial assistance.[29] Additionally, the Air National Guard receives EPA financial assistance and guidance for the superfund site at Truax Air National Guard Base[30] and for various superfund sites across the country.[31] The Wisconsin ANG and the Dane County Regional Airport have received legal guidance from Wisconsin DNR personnel for remediation projects on the Truax Air National Guard base.[32]

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[26] *Id.*
[27] 40 CFR §7.35(b).
[28] *See e.g.,* Safe Skies Clean Water (last visited Oct. 12, 2021), https://www.safeskiescleanwaterwi.org/tom-boswell-county-resolution-on-f-35-joint-strike-fighter-jets/.
[29] *Grant Awards Database*, EPA (last visited Oct. 16, 2021), https://yosemite.epa.gov/oarm/igms_egf.nsf/allgrantsnarrow?SearchView&Query=Wisconsin&SearchOrder=1&SearchMax=250&SearchWV=false&SearchFuzzy=false; *Grant Awards Database*, EPA (last visited Oct. 16, 2021), https://yosemite.epa.gov/oarm/igms_egf.nsf/allgrantsnarrow?SearchView&Query=dane+county&SearchOrder=1&SearchMax=&SearchWV=false&SearchFuzzy=false&Start=1&Count=500.
[30] Senior Master Sgt. Paul Gorman, *115th Fighter Wing Public Affairs Open House provides PFAS remediation update at Truax Field*, Air National Guard (Jan. 13, 2022), https://www.ang.af.mil/Media/Article-Display/Article/2898421/open-house-provides-pfas-remediation-update-at-truax-field/.
[31] *See e.g.,* Environmental Protection Agency, *Superfund Site Information (*last visited, Oct. 12, 2021), https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0502699.
[32] *See* Wisconsin DNR Letter to Wisconsin ANG (Apr. 26, 2018), https://mejo.us/wp-content/uploads/2018/05/2018.4.26.-DNR-RP-Letter-for-Truax-PFAS.pdf, *see also* Wisconsin DNR Letter to Dane County Regional Airport

Dane County, a public division of Wisconsin, receives federal assistance from the EPA.[33] As a political leader and assignee of Dane County funds, the Dane County Executive's office receives federal assistance from the EPA. The City of Madison receives EPA funding directly. In 2021, the EPA provided $400,000 for the cities of Madison and Milwaukee to fund environmental justice initiatives.[34] Accordingly, the named Recipients are subject to Title VI and the EPA's Title VI implementing regulations.[35]

C. Timeliness of the Complaint

The Complaint alleges that Recipients are in continuing violation of Title VI. As detailed below, all Recipients have either currently or recently provided approval of, support for, were directly involved with or developed plans to construct the expansion of the Wisconsin ANG's F-35 fighter jet project. Although Recipients are in continuing violation of Title VI, under EPA regulations, a complaint alleging discrimination under a program or activity receiving EPA funding must be filed within 180 calendar days of the alleged discriminatory act.[36] Alternatively, "[t]he External Civil Rights Compliance Office may consider extending the 180-day timeframe for filing, for good cause shown, under certain circumstances."[37] In August of 2021, Madison's 115th Fighter Wing broke ground on its' first F-35 project.[38] While the construction for the F-35 project has only

(Oct. 11, 2019), https://dnr.wi.gov/botw/DownloadBlobFile.do?docSeqNo=132418&docName=20191011_2_RP_Ltr.pdf.

[33] *Grant Awards Database*, EPA (last visited Oct. 16, 2021), https://yosemite.epa.gov/oarm/igms_egf.nsf/allgrantsnarrow?SearchView&Query=dane+county&SearchOrder=1&SearchMax=&SearchWV=false&SearchFuzzy=false&Start=1&Count=500.

[34] *EPA Announces $400,000 for Milwaukee and Madison to Fund Environmental Justice Initiatives*, EPA (last visited Jan. 6, 2022), https://www.epa.gov/newsreleases/epa-announces-400000-milwaukee-and-madison-fund-environmental-justice-initiatives.

[35] 40 C.F.R. § 7.25.

[36] Environmental Protection Agency - External Civil Rights Compliance Office, *HOW TO File a Complaint OF Discrimination*, https://19january2021snapshot.epa.gov/sites/static/files/2017-08/documents/how-to-file-a-complaint-of-discrimination-brochure.pdf.

[37] *Id.*

[38] Staff Sgt. Cameron Lewis, *Madison's 115th FW breaks ground on first F-35 project*, 115th Fighter Wing, (Aug. 17, 2021), https://www.115fw.ang.af.mil/Media/Article-Display/Article/2734270/madisons-115th-fw-breaks-ground-on-first-f-35-project/.

just commenced, the first fighter jet is expected to be stationed in early 2023. As detailed below, Recipients' discriminatory actions are in effect and ongoing. As such, this Complaint is timely filed.

D. Requirements for EPA Administrative Complaints

A complaint must be (1) in writing, signed, and include: names, addresses, and telephone numbers for contact, (2) describe the alleged discriminatory act that violates EPA's Title VI regulations, (3) be filed within 180 calendar days of the alleged discriminatory act, and (4) identify the EPA financial assistance recipient which committed the discrimination.[39]

IV. FACTUAL BACKGROUND

Seeking to replace the aging F-16 aircraft, the Joint Strike Fighter Program was developed to produce the F-35 Lightning II Joint Strike Fighter Aircraft. In December 2017, the USAF and the NGB selected the Truax Field Air National Guard Base in Madison, Wisconsin, as one of the two preferred locations out of five considered for two Air National Guard F-35 bases.[40] This action would involve the "Beddown of one F-35 squadron consisting of 18 Primary Authorized Aircraft with 2 Backup Aircraft Inventory at each of the two selected locations."[41] The five locations evaluated for the Beddown included the 115th Fighter Wing at Truax Field, the 124th Fighter Wing at Boise Air Terminal in Boise, Idaho; the 125th Fighter Wing at Jacksonville International Airport in Jacksonville, Florida; the 127th Wing at Selfridge Air National Guard Base in Michigan; and

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[39] Environmental Protection Agency - External Civil Rights Compliance Office, *How To File a Complaint of Discrimination*, https://19january2021snapshot.epa.gov/sites/static/files/2017-08/documents/how-to-file-a-complaint-of-discrimination-brochure.pdf.

[40] Capt. Leslie Westmont, *Truax Field selected to receive F-35 Joint Strike Fighter* (Apr.15, 2020), https://www.115fw.ang.af.mil/Media/Article-Display/Article/2151068/truax-field-selected-to-receive-f-35-joint-strike-fighter/.

[41] Executive Summary Final United States Air Force F-35A Operational Beddown Air National Guard Environmental Impact Statement, Executive Summary (Feb. 2020), https://www.safeskiescleanwaterwi.org/wp-content/uploads/2020/02/Final_F-35A_EIS_Executive_Summary_Feb_2020.pdf.

the 187th Fighter Wing at Montgomery Regional Airport in Montgomery, Alabama.[42] The 115th Fighter Wing was selected as one of the preferred locations, and the 187th Fighter Wing in Montgomery, Alabama, was announced as the second.

The draft Environmental Impact Statement was released in August of 2019, and the Final Environmental Impact Statement ("FEIS") was released on February 28, 2020.[43] The selection of the 115th Fighter Wing at Truax Field Air National Guard base was announced on April 15, 2020.[44] The ROD was signed on April 14, 2020, formalizing the 115th Fighter Wing as the following location to receive an F-35 Lightning II aircraft fleet, with expected arrival in early 2023.[45]

The FEIS concluded that the two sites chosen for the F-35 fighter jets, Madison and Montgomery, are the only two sites where there will be disproportionate impacts to low-income, minority populations, and children.[46] Among other concerns, the Wisconsin DNR has approved the project without developing a comprehensive plan with other Recipients to remediate existing PFAS contamination caused by firefighting training or to limit the existing and increased exposure to dangerous sound levels.

V. LEGAL AUTHORITY

A. Title VI of the Civil Rights Act of 1964

According to § 601 of Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

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[42] *Id.*
[43] Safe Skies Compl. Regarding F-35 Environmental Impact Statement at 6 (last visited Oct. 12, 20201), https://www.safeskiescleanwaterwi.org/wp-content/uploads/2020/12/Safe-Skies-Complaint-Filed-Against-F-35-Environmental-Assessment-120720.pdf.
[44] *Id.*
[45] Mayor's Office, *The F-35 Final Environmental Impact Statement, Additional Information and Timeline* (Feb. 27, 2020), https:// www.cityofmadison.com/mayor/blog/the-f-35-final-environmental-impact-statement-additional-information-and-timeline.
[46] Safe Skies Clean Water Wisconsin, *Evaluate a New Mission for Truax Field (*last visited Oct. 2, 2021), https://www.safeskiescleanwaterwi.org/find-a-new-mission-for-truax-field/.

subjected to discrimination under any program or activity receiving Federal financial assistance."[47] Additionally, § 602 requires federal agencies that have the power to dispense of federal financial assistance to issue rules, regulations, or orders of general applicability "which shall be consistent with the achievement of the objectives" of Title VI.[48]

B. EPA's Title VI Regulations and Environmental Justice

According to EPA regulations, a recipient of federal financial assistance "shall not use criteria or methods of administering its programs which have the effect of subjecting individuals to discrimination because of their race, color, national origin or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program concerning individuals of a particular race, color, national origin or sex."[49] As recipients of federal financial assistance, Recipients are bound by Title VI of the Civil Rights Act of 1964 and the implementing regulations.

Communities most impacted by environmental risks are referred to as environmental justice (EJ) communities or, as the EPA defines them, "overburdened communities."[50] Several factors help identify environmental justice communities, including "(1) where there is a disproportionate exposure to environmental hazards and (2) increased vulnerability to said hazards."[51]

Title VI permits environmental justice communities to "file administrative complaints with the federal departments and agencies that provide financial assistance alleging discrimination"

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[47] 42 USCS § 2000d.
[48] 42 USCS § 2000d-1.
[49] Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7; Protection of Environment, 40 C.F.R. §§ 7, 735(b) (2010).
[50] Environmental Protection Agency, *Glossary* (last visited Oct. 12, 2021), https://www.epa.gov/environmentaljustice/ej-2020-glossary.
[51] *See e.g.*, *What Does An Environmental Justice Community Even Mean?,* Foresight Design Initiative (July 19, 2017), https://www.foresightdesign.org/blog/2017/7/19/xcd8aq95i73fy933hw4ppjappv346t#:~:text=How%20do%20we%20define%20an%20%E2%80%9Cenvironmental%20justice%20community%E2%80%9D%3F&text=The%20term%20describes%20situations%20where,to%20persistent%20environmental%20health%20disparities.

based on the grounds listed.[52] Often, "discrimination results from policies and practices that are neutral on their face but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is a no less discriminatory alternative."[53]

As authorized to extend federal financial assistance, the EPA has developed Title VI regulations pursuant to § 602.[54] EPA's Title VI Regulations apply to Respondents as recipients of EPA assistance.[55] This Complaint demonstrates that the support and approval of locating the F-35 fighter jets at the Truax Field will increase the Complainants' level of disproportionate exposure to environmental hazards, and less discriminatory alternatives could have been developed.

C. Applicable Caselaw

1. Liability of State Environmental Agencies, Who Are Recipients of Federal Financial Assistance, Under Title VI

In the case of *South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection*, a community organization successfully brought a Title VI action against the New Jersey Department of Environmental Protection ("NJDEP").[56] In that case, South Camden Citizens claimed that a proposed cement processing facility would have racially disparate impacts. The citizens claimed that NJDEP violated its Title VI obligations when it issued air pollution permits

[52] Environmental Protection Agency, *Title VI and Environmental Justice*,(last visited Oct. 2, 2021), https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice.
[53] Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (Feb. 5, 1998).
[54] 40 CFR 7.35; 40 C.F.R. Part 7 ("EPA's Title VI Regulations").
[55] 40 CFR 7.15.
[56] 274 F.3d 771 (3d Cir. 2001).

for the continuance of the facility.[57] The surrounding community was comprised mainly of "African American and Hispanic groups."[58] Given "the community's existing health problems and cumulative environmental burdens, the operation of the cement processing facility would have adverse impacts on the health of residents."[59]

The District Court found that the NJDEP was a recipient of federal funding and is obligated under Title VI to prevent disproportionate impacts on minority groups.[60] The court noted that this obligation exists "even if avoiding such impacts requires the recipient to go beyond ensuring compliance with existing laws." The court held that the plaintiff organization satisfied a prima facie case of disparate impact discrimination as the surrounding minority community would face disparate harms from the facility's emissions.[61] Accordingly, if a state environmental protection agency receives federal financial assistance, it is obligated to prevent disproportionate impacts on minority groups under Title VI of the Civil Rights Act.

2. State Legal Status of the Wisconsin ANG and the Adjutant General of the Wisconsin ANG

In *Don't Ruin Our Park v. Stone*,[62] the court held that the Adjutant General of the Pennsylvania National Guard could be enjoined as a defendant in a Title VI complaint due to their state legal status. In that case, "associations brought an action for declaratory and injunctive relief regarding the relocation of National Guard aviation support facility and aviation . . . ."[63] To determine whether the Adjutant General was a federal or non-federal entity, the court determined that because "[t]he only effective control exercised by the federal government and the regular armed

[57] *Id.* at 482.
[58] *Id.*
[59] *Id.* at 484.
[60] *Id.* at 450.
[61] *Id.* at 495.
[62] 749 F. Supp. 1386 (M.D. Pa. 1990).
[63] *Id.*

forces relative to organizing, equipping, training and policies of the National Guard of any of the states comes from the control of funds which may be granted to or withheld from the National Guard units pursuant to granting or withdrawing federal recognition."[64] Accordingly, following this analysis, the Adjutant General, and presumably, the Wisconsin ANG, is similarly a non-federal entity for the purposes of a Title VI complaint.

D. Additional Environmental Justice Mandates

In addition to Title VI requirements, in 1994, President Clinton issued Executive Order N.12898 ("EO") on Environmental Justice. This order requires that Federal agencies, "to the greatest extent practicable and permitted by law . . . make achieving environmental justice part of its mission."[65] The order further requires agencies to identify and address the "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[66]

In light of the EO, Complainants allege that Recipients have not appropriately addressed the disproportionate effects, as outlined in this Complaint, during the preparation stages and early implementation of the project. Moreover, the Biden Administration has "pledged an aggressive, broad-based approach to achieve environmental justice."[67] The President has formalized his commitment to overburdened communities 'to make environmental justice a part of the mission of every agency by directing federal agencies to develop programs, policies, and activities to address

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[64] *Id.* at 1388.
[65] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Executive Order 12898 (Feb. 11, 1994).
[66] *Id.*
[67] Rebecca Hersher, *Hope and Skepticism as Biden Promises To Address Environmental Racism*, National Public Radio (Jan. 29, 2021), https://www.npr.org/2021/01/29/956012329/hope-and-skepticism-as-biden-promises-to-address-environmental-racism.

the disproportionate health, environmental, economic, and climate impacts on disadvantaged communities.'"[68] Complainants ask the President and his Administration to stay true to their word.

E. Disparate Impact Standard

Based on EPA's Title VI Regulations, the agency must determine whether a facially neutral policy or practice resulted in an "unjustified adverse disparate impact."[69] The agency must determine whether an agency's decision had a discriminatory effect using a four-step analysis. The four steps are to (1) identify the specific policy (or policies) at issue,[70] (2) establish adversity/harm,[71] (3) establish disparity,[72] and (4) establish causation.[73]

If Complainants can present evidence to establish a prima facie case, there must be a finding in their favor. The burden then shifts to the opposing party to produce a "substantial legitimate justification" for the challenged policy or practice.[74] This justification is not as simple as providing

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[68] *FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government*, WHITE HOUSE (Jan. 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/.

[69] Environmental Protection Agency, *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* (Appendix 7), 65 Fed. Reg. 39,650 (June 27, 2000).

[70] *Texas Dep't of Hour. & Cmty. Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2523 (2015). ("A disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.").

[71] *E.g.*, *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446, 487, *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J.) (discussing the methods used to "evaluate the 'adversity' of the impact" and considering whether the impacts at issue were "sufficiently adverse" to establish a prima facie case), rev'd on other grounds, 274 F.3d 771 (3d Cir. 2001).

[72] *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576–77 (2d Cir. 2003).

[73] *Flores v. Arizona*, 48 F.Supp. 2d 937, 952 (D. Ariz. 1999).

[74] *N.Y. Urban League*, 71 F.3d at 1036, *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999) (citing *Georgia State Conf.*, 775 F.2d at 1417).

any reason. Here, the reason must be clear and specific.[75] To constitute a "substantial legitimate justification," the reason must be related to a significant and legitimate goal. Respondents' policy implementation is then weighed against the substantial public interest in preventing discrimination.[76]

The agency is then tasked with determining if "less discriminatory alternatives" are available than the policy or policies in question.[77] If the available evidence demonstrates that "less discriminatory alternatives" exist, then the policy or policies must be found to violate Title VI. This is true even if the agency demonstrates a "substantial legitimate justification" for its discriminatory actions.[78]

"It is possible to have a violation of Title VI or EPA's Title VI regulations based solely on discrimination in the procedural aspects of the permitting process (e.g., public hearings, translations of documents) without a finding of discrimination in the substantive outcome of that process (e.g., discriminatory human health or environmental effects). Likewise, it is possible to have a violation due to discriminatory human health or environmental effects without the presence of discrimination in the public participation process."[79]

The EPA has recognized that Title VI concerns are regularly raised by communities that "believe they are suffering from adverse effects caused by multiple sources."[80] In these instances,

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[75] *NAACP v Med. Ctr., Inc*., 657 F.2d 1322, 1350 (3d Cir. 1981) (en banc) ("The content of the rebuttal or justification evidence cannot be determined in the abstract. It must be related to the precise impacts suggested by the plaintiffs' evidence.").*See Texas Dep't of Cnty, Affairs v. Burdine*, 450 U.S. 248, 254-55, 258 (1981).
[76] *Gashi v. Grubb & Ellis Property Management Servs*., 801 F. Supp. 2d 12, 16 (D. Conn. 2011) (citing Huntington Branch, *NAACP v. Town of Huntington*, 844 F.2d 929, 937 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) ("After the defendant presents a legitimate justification, the court must weigh the defendant's justification against the degree of adverse effect shown by the plaintiff.").
[77] *Elston v. Talladega Cty. Bd. of Educ*., 997 F.2d 1394, 1407-1413; Georgia State Conf., 775 F.2d at 1417.
[78] *See, e.g., Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984). (conducting a thorough review of alternative sites for highway or other methods, such as light rail or public transportation).
[79] Environmental Protection Agency, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39,650 (June 27, 2000).
[80] *Id.*

a community uses the Title VI process as "a way to focus attention on the cumulative impacts."[81] Therefore, cumulative impacts (or, in other words, an evaluation of the aggregate exposure to numerous environmental threats from numerous sources) should be considered in a Title VI analysis.[82]

Finally, a violation of Title VI and EPA's implementing regulations is found only by a mere preponderance of the evidence.[83] Therefore, if the alleged facts are more than 50% likely to be true, there must be a finding of discrimination.

F. Complaint

As detailed below, Recipients are in Violation of 40 C.F.R Part 7 (§§ 7.30 and 7.35(b)), due to their support, approval, and implementation of the F-35 fighter jet program at the Truax Field, at the Dane County Regional Airport.

1. Noise Pollution

The FEIS failed to sufficiently assess harmful noise impacts caused by the F-35s on thousands of individuals in certain areas of Madison, Wisconsin. Due to current F-16 fighter jets based at Truax Field, existing noise exposure already generates significant complaints to the Dane County Airport.[84] A recent fighter jet noise survey by Safe Skies Clean Water Wisconsin generated many reports of adverse noise effects.[85] Complainants also contend that the USAF applied an outdated 65 dB day-night average sound level ("DNL") for airport noise in assessing existing and future noise exposure.

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[81] *Id.*
[82] *Id.*
[83] *In Re Genesee Power Station. Complaint* No. 01R-94-R5. Environmental Protection Agency (2017). https://www.documentcloud.org/documents/3410925-FINAL-Letter-to-Genesee-Case-Complainant-Father.html.
[84] Airport Noise Abatement (last visited Oct. 2, 2021), https://www.msnairport.com/about/ecomentality/Noise-Abatement.
[85] Safe Skies Clean Water Wisconsin (last visited Oct. 2, 2021), https://www.safeskiescleanwaterwi.org/f-16-noise-survey-results/.

In contrast, other airports apply 55 and 60 dB standards, as the 65 dB DNL standard is over 50 years old.[86] Further, the standard is based on daily average noise exposure and fails to account for the instantaneous noise levels, which may damage the hearing of the exposed public. The FAA is currently reviewing the adequacy of the outdated 65 dB DNL noise standard.[87] The FAA conducted a Neighborhood Environmental Survey in 2015 at various airports around the country and found far more significant impacts at the 65 dB DNL than those used to establish the standard initially. Additionally, the FEIS concluded that after the F-35s are installed, a total of 1,318 households and 2,766 people would be within the 65 dB DNL zone.[88] Outside of the airport property, there would be 949 acres exposed to 65-70 dB DNL, 320 acres exposed to 70-75 dB DNL, and 51 acres exposed to 75-80 dB DNL.[89]

Using the outdated 65 dB DNL noise standard, the FEIS failed to account for the additional adverse noise exposure to low-income and minority populations living just outside this noise contour that will suffer significantly from the increased noise. In the draft Environmental Assessment, the USAF stated that "minority populations and low-income populations outside the boundaries of the installation and airport will not be significantly impacted" by the location of the F-35A Beddown.[90] Complainants contend that this conclusion is false and unsupported. The F-35s will be four times louder than the current F-16 jets and fly 47% times more often.[91] Using the outdated

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[86] *See e.g., Effects of Noise Exposure,* https://www.scottsdaleaz.gov/Assets/ScottsdaleAZ/Airport/NCPReport_TIP03.pdf.

[87] *Overview of FAA Aircraft Noise Policy and Research Efforts: Research Activities to Inform Aircraft Noise Policy*, Federal Aviation Administration (Jan. 12, 2021), https://www.regulations.gov/document/FAA-2021-0037-0001.

[88] Abigail Becker, *Opponents of F-35 fighter jets continue sounding alarm*, CAPITAL TIMES (last visited Nov. 17, 2021), https://www.safeskiescleanwaterwi.org/opponents-of-f-35-fighter-jets-continue-sounding-alarm/.

[89] *Id.*

[90] Environmental Assessment for Construction and Demolition Projects at the 115th Fighter Wing Installation, Dane County Regional Airport, Madison, Wisconsin at 27. https://mejo.us/wp-content/uploads/2019/04/2019.4.115-FW-Draft-EA.pdf.

[91] Shelley K. Mesch, *Report: More than 1,000 Madison homes would be 'incompatible for residential use' with F-35 jets*, WI STATE JOURNAL (Aug. 11, 2019), https://madison.com/wsj/news/local/govt-and-politics/report-more-than-1-000-madison-homes-would-be-incompatible-for-residential-use-with-f/article_c14eb50f-08d6-568b-852d-d31cc029cdd1.html.

65 dB DNL standard, the USAF fails to account for noise impacts, 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.[92]

Federal workplace standards for protection from hearing loss allow a time-average level of Equivalent Continuous Sound Pressure Level (LEQ) of 90 dB over 8 hours, or LEQ 85 dB averaged over 16 hours.[93] Other criteria suggest a time-averaged sound level of DNL 70 dB over 24 hours.[94] There are properties outside the airport consisting of 949 acres exposed to 65-70 dB DNL, 320 acres exposed to 70-75 dB DNL, and 51 acres exposed to 75-80 dB DNL. Accordingly, individuals located in these zones are at risk of hearing damage, even according to federal workplace standards.

Notably, the noise created by the F-35s is an impulse sound which is a brief, deafening noise.[95] Impulse noise causes more severe hearing loss than steady-state noise.[96] This is because the human body has a reflex mechanism that protects the ear when exposed to loud, continuous noise. The reflex is slow and thus does not protect the ear against sudden impulsive sounds.[97]

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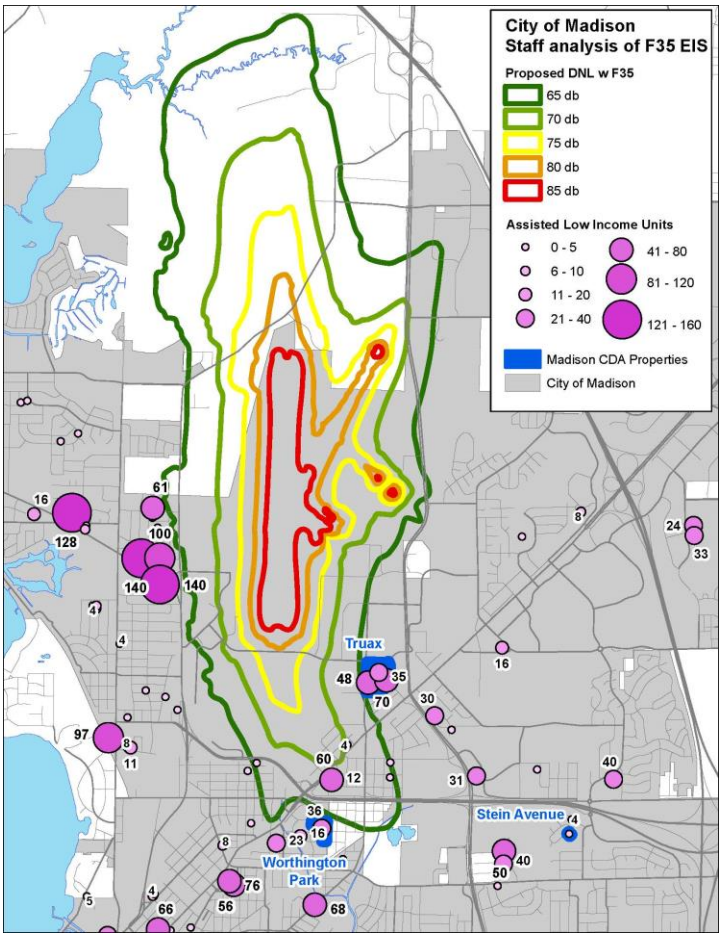
[92] *See e.g.,* National Institute of Deafness and Other Communication Disorders, (last visited Dec. 20, 2021), https://www.nidcd.nih.gov/health/noise-induced-hearing-loss; *see also* Australian Academy of Science, (last visited Dec. 20, 2021), https://www.science.org.au/curious/earth-environment/health-effects-environmental-noise-pollution.
[93] Draft Environmental Impact statement for the Colorado Airspace Initiative at G-10. (last visited Oct. 27, 2021), https://books.google.ca/books?id=Vd03AQAAMAAJ&pg=RA6-PA10&lpg=RA6PA10&dq=%22Hearing+Loss+Noiseinduced+hearing+loss+is+probably+the+best+defined+of+the+potential+effects+of+human+exposure+to+excessive+noise%22&source=bl&ots=MMhGp4mfzf&sig=ACfU3U0eu32jZNTR640ZBBp2ObUTTif8Q&hl=en&sa=X&ved=2ahUKEwjUvvKFtonwAhVTsp4KHfc9CIgQ6AEwAHoECAQQAw#v=onepage&q=%22Hearing%20Loss%20Noiseinduced%20hearing%20loss%20is%20probably%20the%20best%20defined%20of%20the%20potential%20effects%20of%20human%20exposure%20to%20excessive%20noise%22&f=false.
[94] *Id.*
[95] Dr. Elizabeth Neary, *Dr. Elizabeth Neary: If we care about children, we should oppose F-35s in Madison*, THE CAP TIMES (Oct. 31, 2019), https://madison.com/ct/opinion/column/dr-elizabeth-neary-if-we-care-about-children-we-should-oppose-f-35s-in-madison/article_4b9450a5-d84d-5a0b-bd29-b32fbcfd9ba8.html.
[96] *Id.*
[97] *Id.*

Therefore, the average DNL measured over 24 hours in the draft FEIS does not measure the true impact of noise on the human body.[98]

Further, the Madison Community Development Authority ("CDA") submitted comments to the USAF on the draft EIS. The CDA governs the city's 857 public and multi-family housing units. This housing focuses on providing "decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities."[99] There are multiple CDA properties and many low-income housing units within or very near to the 65 dB contour.[100] More specifically, the Truax Park Apartments and the Webb-Rethke townhomes are located on the border of the 65 dB contour, and according to the City of Madison Staff Analysis, "head of household demographics at Truax and Webb-Rethke are 70% persons of color, 100% low income, 45% disabled and 14% elderly.[101] There are approximately twelve K-12 schools



Map: City of Madison Staff analysis

[98] *Id.*
[99] *Community Development Authority Statement on F-35's for Truax/Madison*, Safe Skies Clean Water Wisconsin (last visited Oct. 2, 2021), https://www.safeskiescleanwaterwi.org/community-development-authority-statement-on-f-35s-for-truax-madison/.
[100] City Madison Mayor: Comments on Draft F-35 EIS at 6, https://www.cityofmadison.com/mayor/documents/F35document.pdf.
[101] *Id.*

and fifteen childcare centers in the vicinity of Truax Field, where the sound will be the greatest.[102] According to a 2018 neighborhood study by the City of Madison, kids in the Truax area already struggle, even before starting school, with only 48% considered "kindergarten ready."[103]

The draft EIS shows that three Madison Metropolitan School District Board of Education ("MMSD") elementary schools are immediately outside the 65 dB noise contour.[104] These schools are Hawthorne, Lake View, and Sandburg Elementary.[105] In 2018-2019, 73% of students attending these schools were students of color, 42% were English language learners, and 72% were considered low-income.[106] Hawthorne and Sandburg Elementary Schools were omitted from the final EIS analysis undermining the adverse impacts on children, including low-income and minority children. Further, a recent study by The National Assessment of Educational Progress shows that Wisconsin has the widest achievement gap between black and white students of any state.[107] Accordingly, the expansion of this base will only continue to widen this striking racial disparity.

Additionally, because these severely impacted schools are just outside the 65 dB noise contour, Madison property taxpayers may bear the cost of soundproofing these schools. The MMSD Board of Education has concluded that the issues outlined in the draft EIS will negatively impact learning in schools, reduce the property tax base, decrease school enrollment in the affected area, and disproportionately affect children, families of color, and low-income families.[108] Another

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[102] Maria C. Powell, *Faith Leaders Oppose F-35 Fighter Jets*, WI STATE JOURNAL (Aug. 3, 2020), https://mejo.us/faith-leaders-oppose-f-35-fighter-jets-wisconsin-state-journal-7-29-2020/.
[103] *Id.*
[104] Community Development Authority Statement on F-35's for Truax/Madison, Safe Skies Clean Water Wisconsin (last visited Oct. 2, 2021), https://www.safeskiescleanwaterwi.org/community-development-authority-statement-on-f-35s-for-truax-madison/.
[105] *Id*.
[106] *Id.*
[107] Rich Kremer and The Associated Press, Wednesday, *Wisconsin Has Widest Achievement Gap On Nation's Report Card,* WISCONSIN PUBLIC RADIO (Oct. 30, 2019), https://www.wpr.org/wisconsin-has-widest-achievement-gap-nations-report-card.
[108] *Id.*

school that is likely to suffer extensively from the noise impact is the Richardson School, which currently experiences a noise exposure of 68 dB DNL, likely increasing to 70 after the F-35s arrive.[109] With increased noise exposure, this project will significantly affect students with autism and other special needs who attend school directly adjacent to the airport runway.[110]

In Madison and Dane County, people of color comprise 26% and 20% of the population, respectively.[111] However, the neighborhoods that will experience the most significant environmental impacts caused by the F-35 fighter jets have a far more significant proportion of people of color. As previously noted, 70-80% of the residents living around Truax Field and the Dane County Airport qualify as environmental justice communities. The following list indicates the nearby housing and schools where at-risk individuals reside or frequently visit all year round near the 115th Fighter Wing installation site:[112]

1. The Community Development Authority ("CDA") provides Public Housing for residents only in the City of Madison. Public Housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. These properties are federally funded through the Department of Housing and Urban Development and administered by the Housing Operations Division.
2. Public housing located on the Northeast side of Madison near the Truax Airfield includes Truax Park Apartments located at the intersection of Wright Street and Straubel Street and the Wright Street Townhomes located at 1600 Wright Street.
3. Project-Based Section 8 housing is located along Wright Street and Straubel Street. The Truax Section 8 locations consist of 24 units of family housing extensively rehabbed in 2011 through federal low-income housing tax credits awarded to the CDA by the Wisconsin Housing and Economic Development Authority.
4. Bordering the Truax Field at 1701 Wright Street is the Madison Area Technical College, a public technical and community college based in Madison. It serves students in parts of 12 counties in south-central Wisconsin.

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[109] Complaint for Declaratory, Injunctive, and Other Relief (Mar. 10, 2021), https://www.courthousenews.com/wp-content/uploads/2021/03/wis-jets.pdf.
[110] *Id.*
[111] Memorandum from Nan Fey, Interim Director, Dep't of Planning & Cmty & Economic Development, to Satya Rhodes-Conway, Mayor, Madison, WI, *F35 EIS Staff Analysis* 2 (Sept. 10, 2020), https://www.cityofmadison.com/mayor/documents/F35%20EIS%20staff%20analysis%209-10-19.pdf.
[112] Letter from Satya Rhodes-Conway, Mayor, Madison, WI, to Ramon Ortiz, Environmental Engineer, U.S. Air Force, Comments Regarding F-35 Draft Environmental Impact Statement FR #2018-02468 (Nov. 1, 2019), http://www.cityofmadison.com/mayor/documents/ F35document.pdf.

5. Bordering the airport are the following neighborhoods (listed west to east): Majestic Oaks, Berkley Oaks, Sherman, Carpenter-Ridgeway, Truax, Hawthorne, Mayfair Park, and Greater Sandburg.

Almost every impacted area with projected noise exposure greater than 65 dB DNL within Madison belongs to a census tract with "rates of persons of color well above the city and county-wide averages.[113] For example, the Carpenter Ridgeway, which comprises 43.9% persons of color, would increase 9 dB DNL.[114]The city has not acted to correct this problem. Before or after the proposed Beddown of the F-35 fighter jets, it has not adopted any restrictions on the construction of new low-income housing adjacent to the airport.[115] The City of Madison continues to allow developers to plan and propose new housing adjacent to the airport that would target low-income and families of color.[116]

At the cost of $100 million per F-35 jet and a squadron of 18 jets with two additional in reserve, the total cost proposed project at Truax Field is roughly $2 billion. Despite the extensive noise impacts caused by the proposed squadron of F-35 fighter jets, there have been no comprehensive plans or sufficient funding devoted to mitigating these harmful noise impacts. Additionally, no meaningful noise mitigation plans have been provided for public review. While Madison is represented on the Airport Commission and Airport Noise Subcommittee, the city has failed to promote modern noise abatement procedures to protect low-income and families of color living

[113] Ramon Ortiz, *Final United States Air Force F-35A Operational Beddown Air National Guard Environmental Impact Statement Executive Summary* ES-3-ES-4 (2020).
[114] Letter from City of Madison, WI, to Ramon Ortiz, Environmental Engineer, U.S. Air Force, *FR#2018-02468* 1 (Sept. 24, 2019), https://www.cityofmadison.com/mayor/documents/F35document.pdf.
[115] Wisconsin State Journal, Madison unlikely to ban future housing in area to be affected by F-35 jet noise, December 17, 2021, https://madison.com/wsj/news/local/govt-and-politics/madison-unlikely-to-ban-future-housing-in-area-to-be-affected-by-f-35-jet/article_05c484ac-aa6a-5ceb-96ed-57f80702ca0b.html
[116] Wisconsin State Journal, Non-profit proposes $50 million low-cost housing project on industrial site near Truax Field on North Side, January 24, 2022.

adjacent to the airport. In contrast, the City of Minneapolis sued the Minneapolis St. Paul International Airport to improve noise abatement for residents.[117]

In a 2020 letter from the Mayor of Madison to federal legislators, the Mayor stated that "[w]hile the FAA's Airport Noise Compatibility Planning program (14 C.F.R. Part 150) could provide noise mitigation resources in the long-term, there is no certainty of action, particularly in the short term when residents are anticipated to experience much more frequent flights and greater noise exposure."[118] In Burlington, Vermont, which has already received a squadron of F-35 jets, the Burlington International Airport estimated it would require $4.5 million per year and over 50 years to provide noise insulation to impacted homes.[119] Instead of providing solutions or alternatives, the FEIS simply recognizes the USAF's reliance on the Dane County Airport and FAA to evaluate noise impacts once the fighter jets arrive at Truax Field and determine whether noise mitigation funds are for relocating residents or not insulating homes or schools are necessary and justified.[120] The USAF, NGB, and other Respondents' reliance on FEIS provided the faulty foundation for Respondents' violation of 40 C.F.R. Part 7 in the approval, support, and implementation of the F-35 project.

2. Pre-and Polyfluoroalkyl Substances (PFAS) Contamination

The FEIS also failed to consider further potential water contamination resulting from its project to the Starkweather Creek, Lake Monona, and Yahara chain of lakes. The Truax Airfield

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[117] *Minneapolis-St. Paul International Airport Noise Fuels Lawsuit*, Aviation Pros (Mar. 18, 2005), https://www.aviationpros.com/home/news/10436185/minneapolisst-paul-international-airport-noise-fuels-lawsuit.
[118] City of Madison Mayor Satya Rhodes-Conway Letter to Senator Baldwin, Senator Johnson, and Representative Pocan, *The Federal Government Must Mitigate the Impacts of any F-35 Deployment (*Nov. 9, 2020), https://www.cityofmadison.com/mayor/blog/the-federal-government-must-mitigate-the-impacts-of-any-f-35-deployment.
[119] *Noise Mitigation Implementation Plan*, BURLINGTON INTERNATIONAL AIRPORT, 1, 6 (July 2021), https://www.btvsound.com/wp-content/uploads/sites/4/2021/07/BTV-NIP-FINAL-JULY-2021.pdf
[120] Executive Summary Final United States Air Force F-35A Operational Beddown Air National Guard Environmental Impact Statement, Executive Summary (Feb. 2020), https://www.safeskiescleanwaterwi.org/wp-content/uploads/2020/02/Final_F-35A_EIS_Executive_Summary_Feb_2020.pdf.

is currently a source of PFAS contamination that has spread into local drinking water, groundwater, and surface water throughout Dane County.

CEQ regulations require an agency to consider the "direct," "indirect," and "cumulative" impacts of a proposed action.[121] "Effect includes ecological (such as the effects on natural resources and the components, structures, and functioning of affected ecosystems), aesthetic, historical, cultural, economic, social, or health, whether direct, indirect, or cumulative."[122] PFAS are a group of largely unregulated synthetic compounds found in firefighting foam and various consumer products.[123]

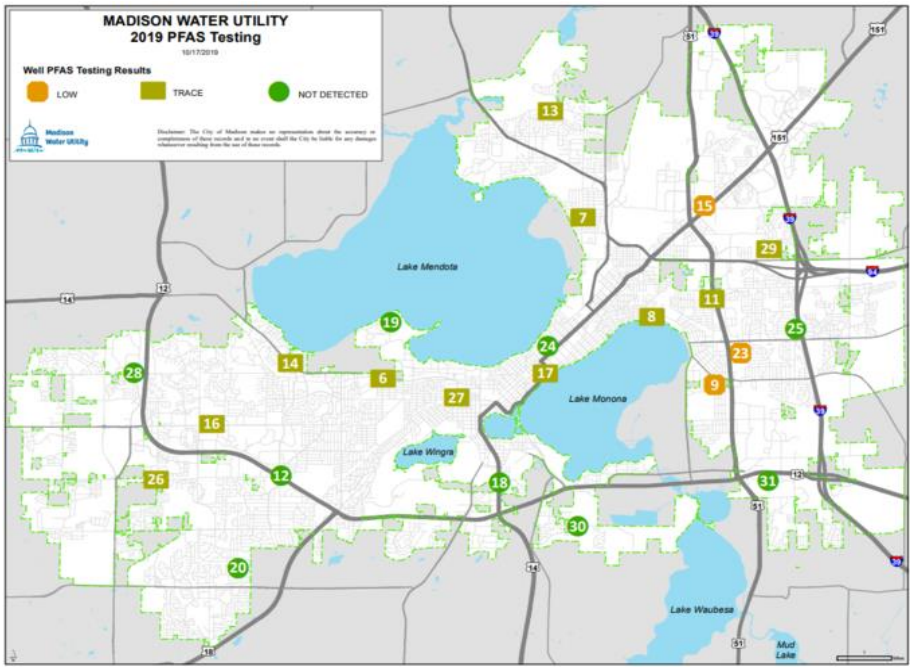

Photo: Madison Water Utility

[121] 40 C.F.R. § 1508.25.
[122] 40 C.F.R. § 1508.8.
[123] *County finds high levels of PFAS in groundwater under Madison airport*, WI State Journal Article, https://madison.com/wsj/news/local/environment/county-finds-high-levels-of-pfas-in-groundwater-under-madison-airport/article_89a2cae0-3b73-5b98-b7b5-982d10509e74.html.

This photo shows a volunteer firefighter demonstrating firefighting techniques in 1960 in Maple Bluff Wisconsin. The foam likely contained PFAS. Photo credit: Wisconsin Historical Society.

After contamination of a particular area, PFAS may be found in drinking water, groundwater, surface water, soil, sediments, air, fish, wildlife, and human blood samples.[124] PFAS are shown to increase the risk of cancer and other ailments and are known as "forever chemicals" that "do not break down in the environment."[125]

PFAS contamination will disproportionately impact low-income and minority populations living near Truax, drinking from the city water, fishing, and living and recreating near the contaminated soil.[126] These residents will be highly vulnerable to the health problems caused by the PFAS contamination. PFAS compounds are associated with an increased risk of slowed development in children, lower fertility, hormonal disruptions, high cholesterol, immune system deficiencies, and several kinds of cancer.[127]

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[124] *Id.* at 4.
[125] *Id.* at 4.
[126] Included in this population are African American, Latinx, and Hmong. Many of these residents fish for subsistence. Jim Powell, *Survey: Shoreline Anglers Eat A Lot of Fish* (June 1, 2008), https://app.box.com/s/3g0gia26ars6lwk38x7n0q6r8zr2pcer/file/774907798358.
[127] *Discarded deadlines let polluted plume from military base spread unchecked*, WI State Journal. https://madison.com/wsj/news/local/govt-and-politics/discarded-deadlines-let-polluted-plume-from-military-base-spread-unchecked/article_c4fb8b21-420c-5bb1-b289-0f3c0ce752cf.html.

Ex. (6), 7(C)

Left: "Truax neighborhood Ex. (6), 7(C) *s . . . stand on a storm drain near Starkweather Creek in Madison. The*Ex. (6), 7(C) *learned about the creek's contamination by working with* Ex. (6), 7(C) *, the* Ex. (6), 7(C) Ex. (6), 7(C) *The*Ex. (6), 7(C) *want to see more urgency from public officials to clean up the creek. 'No one takes action because it's in a low-income neighborhood,' says [one of the teenagers]. "Of course, no one is going to care about that because it is (people of color). It's poor people here,' [says another teenager]." Right:* Ex. (6), 7(C) *fishes with his* Ex. (6), 7(C) Ex. (6), 7(C) *, where Starkweather Creek enters Lake Monona in Madison, Wis., on Aug. 2, 2021.* Ex. (6), 7(C) *and enjoys fishing the creek — occasionally bringing home notable catches to eat.* Ex. (6), 7(C) *e understood that the creek was polluted but was not specifically aware of PFAS contamination until a reporter mentioned it."* Ex. (6), 7(C)

In a 2018 letter, the Wisconsin DNR informed "the 115th Fighter Wing, along with the Dane County Regional Airport and the City of Madison, that they were responsible for possible PFAS contamination at former firefighter training sites — known as burn pits — near the base."[128] The letter stated that the legal responsibilities for the Wisconsin ANG are "defined both in statute and in administrative codes."[129] The letter quoted the hazardous substances spill law, § 292.11 (3) found in Wisconsin Statutes, which states that a "responsible person" is "[a] person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands, or waters of the state."[130]

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[128] Chris Hubbuch, *DNR says Air National Guard in violation for failing to clean up PFAS contamination at Truax,* WISCONSIN STATE JOURNAL (Nov. 6, 2019), https://madison.com/wsj/news/local/environment/dnr-says-air-national-guard-in-violation-for-failing-to-clean-up-pfas-contamination-at/article_d6b348ff-847b-5fdd-89c7-1dcf442a1d20.html; *See* Letter to Wisconsin ANG (Apr. 26, 2018), https://mejo.us/wp-content/uploads/2018/05/2018.4.26.-DNR-RP-Letter-for-Truax-PFAS.pdf, *see also* Letter to Dane County Regional Airport (Oct. 11, 2019), https://dnr.wi.gov/botw/DownloadBlobFile.do?docSeqNo=132418&docName=20191011_2_RP_Ltr.pdf.
[129] *Id.*
[130] *Id.*

Further, the letter stated that Wisconsin Administrative Code chapters NR 700 through NR 754 "establish requirements for emergency and interim actions, public information, site investigations, design and operation of remedial action systems, and case closure. Wisconsin Administrative Code Chapter NR 140 establishes groundwater standards for contaminants that reach groundwater."[131] Accordingly, the letter clarifies that the Wisconsin DNR determined that the Wisconsin ANG is in violation of Wisconsin law and is responsible for the PFAS contamination on the Truax Airfield.

The local health department in Dane County also acknowledges that "[i]n the City of Madison, known sources of PFAS contamination are Truax Field Air National Guard Base and the Regional Airport due the use of firefighting foams at the sites."[132] The department's website also states that the Wisconsin DNR has chosen Starkweather Creek for PFAS testing "because the headwaters of the West Branch of Starkweather Creek originate on or near Truax Field Air National Guard Base and the Dane County Regional Airport, known sources of PFAS contamination."[133]

"Foam found on the banks of Starkweather Creek showed high concentrations of a contaminant called PFAS." Photo: Wisconsin DNR; Text: Abigail Becker/Cap Times.

[131] *Id.*
[132] Public Health, Madison and Dane County, *PFAS News & Actions in Dane County*, (last visited Nov. 15, 2021), https://www.publichealthmdc.com/environmental-health/environmental-hazards/per-and-polyfluoroalkyl-substances-pfas-1.
[133] *Id.*

Despite Wisconsin DNR recognizing that the Wisconsin ANG and other responsible parties have not complied with these pollution laws, the Wisconsin DNR recently approved the 115th Fighter Wing's Truax Field management plan for building construction.[134] The approval was made in a recent email,[135] in which the Wisconsin DNR expressed its approval of the ANG's building construction plan absent a robust remediation plan. In the same email, the Wisconsin DNR acknowledged measured groundwater contamination for PFAS at 2,000 times the Wisconsin DNR groundwater standard.[136] However, the Wisconsin DNR suggested that simply covering up the contamination would be sufficient.[137] This assumption is dubious and does not consider the persistent nature of PFAS spread and contamination. Accordingly, the Wisconsin DNR has expressed approval and allowed the continued construction of a project without holding the Wisconsin ANG, Dane County, and other responsible parties accountable for failing to ensure proper remediation of known risks to drinking water, groundwater, and surface water to overburdened communities surrounding the Truax Airfield.

The USAF's FEIS stated that the proposed installation's surface water runoff would be absorbed by the soil and enter Starkweather Creek and Lake Monona through stormwater drainage.[138] The FEIS noted the history of Starkweather Creek's water contamination through "source discharges of many different toxic substances in the 1960s and early 1970s," as well as its current

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[134] *See e.g.,* Chris Hubbuch*, F-35 opponents challenge environmental review; DNR says National Guard not complying with pollution laws*, WISCONSIN STATE JOURNAL (Apr. 2, 2020), https://madison.com/wsj/news/local/environment/f-35-opponents-challenge-environmental-review-dnr-says-national-guard-not-complying-with-pollution-laws/article_7f518bcd-befd-5a68-84d2-579bcd010786.html; *see also* Letter from DNR to Adjutant General of the Wisconsin DNR (Oct. 26, 2021), https://dnr.wi.gov/botw/DownloadBlobFile.do;jsessionid=w5X2ZNiTJVAd0yK6jgRHqt0CRz2pAQM6sFj-JAAM_5doyHoO-YlJ!-2130892532?docSeqNo=212090&docName=20211026_99_MMP_Approval_B426.pdf.
[135] *Id.*
[136] *Id*.
[137] *Id.* Community members are deeply concerned that further PFAS contamination will make its way to, as an example, Starweather Creek.
[138] Executive Summary Final United States Air Force F-35A Operational Beddown Air National Guard Environmental Impact Statement, Executive Summary (Feb. 2020), https://www.safeskiescleanwaterwi.org/wp-content/uploads/2020/02/Final_F-35A_EIS_Executive_Summary_Feb_2020.pdf.

placement on the 2018 Wisconsin Impaired Waters List for multiple pollutants.[139] The FEIS acknowledges that these water bodies are impaired; however, it does not mention or discuss the details of the current impairments within Starkweather Creek and Lake Monona.[140] The FEIS does not mention or discuss how the proposed action may affect these impairments,[141] even though these water bodies are already classified as impaired under § 303(d) of the Clean Water Act[142] and will be further polluted by the increased amounts of PFAS and other toxins that will migrate from the base into surrounding groundwater, surface water, and stormwater.[143]

Unfortunately, it seems that the NGB and ANG will continue to use firefighting foam containing PFAS to suppress fires with their F-35 project.[144] If so, PFAS discharges from the base, and F-35-related activities will continue to migrate into Starkweather Creek, Lake Monona, and the Yahara chain of lakes. As PFAS have been found in all Madison lakes, the Wisconsin DNR has conducted studies and determined that fish are contaminated and has provided consumption recommendations for certain people.[145] The Wisconsin ANG and other Respondents have thus far failed to complete, or ensure, a site investigation, cleanup feasibility study, and comprehensive remediation plans for the PFAS contamination.[146]

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[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] 33 U.S.C. §1251 et seq. (1972).
[143] Complaint for Declaratory, Injunctive, and Other Relief (Mar. 10, 2021), https://www.courthousenews.com/wp-content/uploads/2021/03/wis-jets.pdf.
[144] *Id.* at 10.
[145] Wisconsin Department of Natural Resources, Consumption Advisories and PFAS (last visited Nov. 17, 2021), https://dnr.wisconsin.gov/topic/PFAS/Advisories.html.
[146] *Reported Contamination at WANG - 115th Fighter Wing, Madison*, WI DNR BRRTS Activity # 02-13-581254 1 (June 22, 2018), https://dnr.wi.gov/botw/DownloadBlobFile.do?docSeqNo=86948&docName=201806222RP7_Ltr.pdf. In late 2019, foam containing extremely high levels of PFAS was found at the mouth of Starkweather Creek and Lake Monona.

As recently as early 2020, water sampling showed significantly elevated levels of PFAS contamination in fish and surface water in various water bodies surrounding the Truax Airfield.[147] Under § 291.11(3) of the Wisconsin Statutes, the organization that possesses or controls a hazardous substance that is discharged or causes the discharge of the hazardous substance must take the actions necessary to restore the environment and minimize the harmful effects from the discharge to the lands and waters.[148] However, the Wisconsin ANG, the Dane County Regional Airport and the City of Madison have not complied with their obligations as explained in the DNR responsible party letter.[149] Four years after Wisconsin DNR notified the Wisconsin ANG that it is responsible for investigating and cleaning up the PFAS contamination, the ANG has only recently announced a public meeting to discuss its remediation plans.[150] Further, the Wisconsin DNR has not ensured that these responsible parties have complied with Wisconsin State law. As a result, Respondents have violated 40 C.F.R. Part 7.

In 2021, the City of Madison's Common Council president Syed Abbas, created the Presidents' Work Group on Environmental Justice to provide policy recommendations to the council on how to mitigate the impacts of PFAS and F-35s on existing and future developments and to create a PFAS outreach strategy and a plan for the City's role in addressing these environmental issues. However, this work group has so far not included the very low-income communities it seeks to protect, and has concluded it will not place restrictions on the construction of low-income

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[147] *DNR Sampling Shows Elevated Levels of PFAS Contamination in Fish and Surface Water in Starkweather Creek and Lake Monona*, Dep't of Nat. Res. (Jan. 15, 2020), https://dnr.wi.gov/topic/Contaminants/documents/pfas/Starkweather20200115.pdf.
[148] *See e.g.,* https://law.justia.com/codes/wisconsin/2014/chapter-291/section-291.11/.
[149] *See* https://mejo.us/wp-content/uploads/2018/05/2018.4.26.-DNR-RP-Letter-for-Truax-PFAS.pdf.
[150] Lucas Robinson, *Open house on PFAS investigation set for next month, Air National Guard says*, WI STATE JOURNAL (Dec. 29, 2021), https://madison.com/wsj/news/local/environment/open-house-on-pfas-investigation-set-for-next-month-air-national-guard-says/article_576f73ec-088d-5895-9d27-b0c25c138073.html.

housing in the neighborhoods impacted by PFAS contamination and noise from the county airport and fighter jet training.[151]

The proposed action involves construction, demolition, and renovation activities at the 115th Fighter Wing facilities at Truax Field, resulting in the disturbance of already-contaminated soils.[152] The environmental assessment shows a projected 26 acres of soil disturbance, which the NGB claims is solely for the existing F-16 jets.[153] However, the EIS shows another seven acres of soil disturbance needed for the F-35 jets.[154] In total, there will be an estimated twenty-seven demolition and infrastructure improvement projects. Although Recipients are aware of the environmental hazards from increased contamination due to construction to accommodate the new F-35 fighter jets, they have decided to cooperate with, support, or otherwise approve of the implementation of the F-35 project.[155]

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[151] Maria C. Powell, *Midwest Environmental Justice Organization, Madison's upside-down environmental justice approach = environmental injustice (The MLK Jr. Madison would prefer we forget, Part II)*. Madison Environmental Justice (Feb. 1, 2022), https://mejo.us/madisons-upside-down-environmental-justice-approach-the-mlk-jr-madison-would-prefer-we-forget-part-ii/.

[152] EPA Comments - 115 FW Projects Truax Field 5-15-2019: RE: Draft Environmental Assessment for Proposed Construction, Renovation, and Demolition of Facilities at the 115th Fighter 'Wing, Truax Field, Madison, Dane County, Wisconsin.

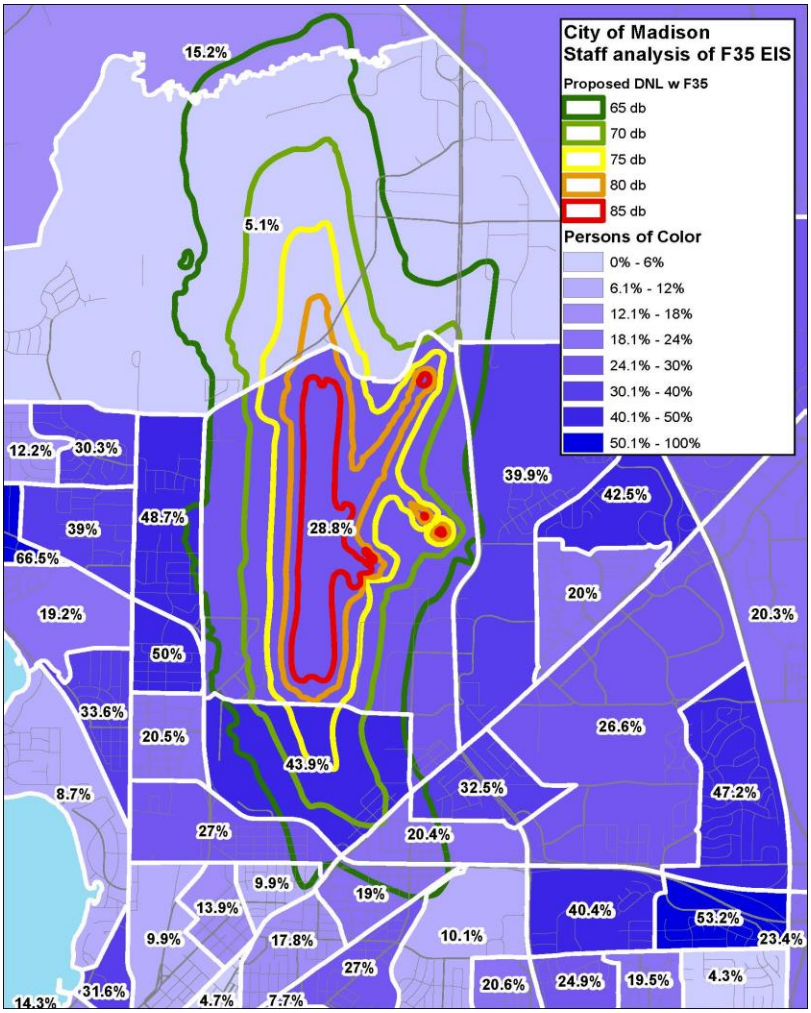
[153] *Environmental Assessment for Construction and Demolition Projects at the 115th Fighter Wing Installation, Dane County Regional Airport, Madison*, *Wisconsin*, Madison Environmental Justice, 27 https://mejo.us/wp-content/uploads/2019/04/2019.4.115-FW-Draft-EA.pdf.

[154] Executive Summary Final United States Air Force F-35A Operational Beddown Air National Guard Environmental Impact Statement, Executive Summary (Feb. 2020), https://www.safeskiescleanwaterwi.org/wp-content/uploads/2020/02/Final_F-35A_EIS_Executive_Summary_Feb_2020.pdf.

[155] According to Safe Skies' Complaint Filed Against F-35 Environmental Impact Statement, there will be additional negative environmental impacts on water quality from other chemicals released during routine operations from F-35s, including fuels, oils, cadmium, copper-beryllium, and hydrazine.

3. Housing Impacts

Locating F-35 fighter jets at the Truax Airfield will also lead to the loss of affordable housing and lessen the desirability for new construction. The FEIS determined that over 1,000 homes would be considered incompatible with residential use due to the negative environmental impacts.[156] Further, a recent study looked into "2019 tax assessments for every domicile found within the Environment Impact Statement map which the USAF provided."[157] This analysis showed that a "minimum of $255 million in residential property value will be negatively affected."[158] These numbers are notable because the rental and home values inside the 65 dB DNL contour are significantly more affordable than the city as a whole. As stated, nearly every impacted area within the 65 dB DNL in Madison belongs



Map: City of Madison Staff analysis

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[156] *See e.g.,* Shelley K. Mesch, *Report: More than 1,0000 Madison homes would be 'incompatible for residential use' with F-35 jets*¸ WI STATE JOURNAL (Aug. 11, 2019) https://madison.com/wsj/news/local/govt-and-politics/report-more-than-madison-homes-would-be-incompatible-for-residential/article_c14eb50f-08d6-568b-852d-d31cc029cdd1.html.

[157] Darcy Haber & Jesse Pycha-Holst*, Madison Real Estate Firm Tallies F35-Affected Property Values Assessments add another component to Fighter Jet Debate*, Safe Skies Clean Water Wisconsin (Nov. 11, 2019), https://www.safeskiescleanwaterwi.org/madison-real-estate-firm-tallies-f35-affected-property-values/.

[158] *Id.*

to a census tract with persons of color above the city and countywide averages.

An assessment of the homes and condominiums inside the impacted area show they have a median value of $174,400 compared to the Madison median of $254,900.[159] Additionally, the rent prices near the base are "generally 10-20% lower than Madison's median rent according to the census block level five-year data."[160] There are many low-income housing units within the impacted area, most of which are in the Rethke Terrace, a recently built development, where formerly homeless individuals are provided housing.[161] Research by City of Madison staff shows that nearly "800 subsidized low-income housing units are within 1,500 feet of the 65 dB contour."[162] There are areas identified in the FEIS that would reach a higher daily average noise level of about 70 dB DNL. While the threshold described by the USAF is described as 65 dB DNL, analyses show that "about 200 acres of residential land near Truax Field is expected to be brought above this level and more than 130 homes closest to the military facility located at the Dane County Regional Airport would likely be above a 70 dB DNL threshold average."[163]

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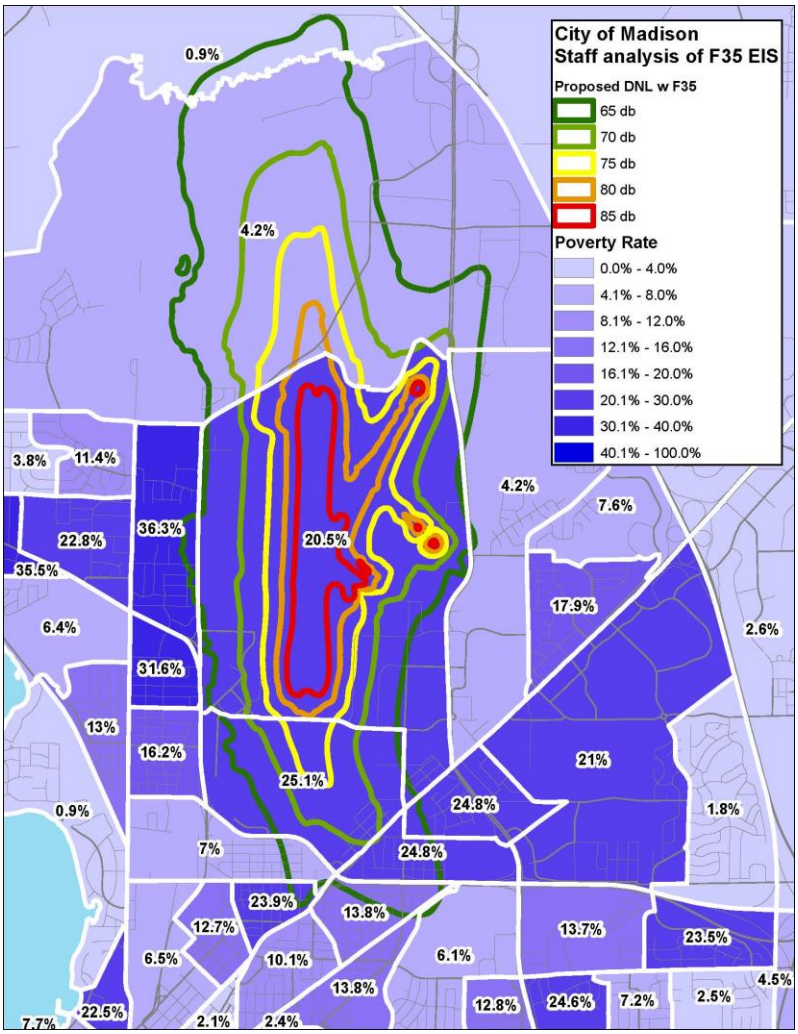
[159] Executive Summary Final United States Air Force F-35A Operational Beddown Air National Guard Environmental Impact Statement, Executive Summary (Feb. 2020), https://www.safeskiescleanwaterwi.org/wp-content/uploads/2020/02/Final_F-35A_EIS_Executive_Summary_Feb_2020.pdf.
[160] *Id.*
[161] Howard Hardee, *Housing Madison's homeless: Did the city pick the right landlord for its ground-breaking program?* (Jan. 10, 2010), https://isthmus.com/news/cover-story/housing-madisons-homeless/.
[162] Brenda Konkel, *City's Analysis of F-35s Impact on Madison*, FORWARD LOOKOUT (Sept. 10, 2019), https://www.forwardlookout.com/2019/09/citys-analysis-of-f-35s-impact-on-madison/27645.
[163] Shelley K. Mesch, *Report: More than 1,000 Madison homes would be 'incompatible for residential use' with F-35 jets*, WI STATE JOURNAL (Aug. 11, 2019), https://madison.com/wsj/news/local/govt-and-politics/report-more-than-1-000-madison-homes-would-be-incompatible-for-residential-use-with-f/article_c14eb50f-08d6-568b-852d-d31cc029cdd1.html.



Map: City of Madison Staff analysis

A significant percentage of low-income housing communities exist just outside the 65 dB DNL contour, including Truax Park Apartments and 36 townhomes owned by the Community Development Authority and other housing near Worthington Park and near the intersection of Packers Avenue and Northport Drive. As noted above, the Truax Park Apartments and the Webb-Renthke Townhomes are located on the border of the 65 dB DNL contour, and the "head of household demographics at Truax and Webb-Renthke are 70% persons of color and 100% low income."[164] While these housing units are not within the threshold, Complainants believe these communities will experience nearly identical noise exposure.

Across Madison, housing costs are rising rapidly, and affordable neighborhoods are becoming more and more scarce. If the F-35 project continues and neighborhoods become non-livable, drastic impacts will be inflicted on Black and Brown people and low-income communities.

[164] *Id*. at 3.

As a result, real estate within the project area may depreciate and devalue. Not surprisingly, documented reduction in property values already exists due to aircraft noise.[165] While many socio-economic factors must be assessed regarding property values, research conducted in this area has found harmful effects from aviation noise, with "effects ranging from a 0.6 to 2.3 percent decrease in property value per dB increase of cumulative noise exposure."[166] The expectation of noise impacts due to the F-35 jets has already slowed Madison's construction of affordable housing.[167]

In sum, even if it was not Respondents intent, the disparate impacts of PFAS and noise pollution will disproportionately affect low-income, minority residents who live in areas close to the Truax Field. From housing instability to the widening of the already extensive education gap, the disparate impacts of this expansion will further bring harm to nearby residents and create a Title VI issue on behalf of Respondents.

G. Previous Inaction

On May 15, 2019, EPA Region 5 submitted comments on the draft Environmental Assessment prepared by the NGB at Truax Field. These comments were included in the second letter from the EPA and repeated requests to improve the environmental justice section of the Environmental Assessment. In the letter, EPA requested that the Wisconsin ANG sample the contaminants in fish eaten by the impacted population. EPA also noted the inability of traditional stormwater protection measures to control PFAS runoff. The EPA further asked for the following changes:

1. To identify the EJ communities near Truax that were not mentioned in the E.A.

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[165] Statement from Chamber, https://www.cityofmadison.com/council/district/districtfiles/district1/documents/Statement%20from%20Chamber.pdf.

[166] Steven J. Newman & Kristy R. Beattie, *Aviation Noise Effects*, Prepared for U.S. Department of Transportation, Federal Aviation Administration, Office of Environmental and Energy, Washington, D.C., Report No. FAA-EE-85-2 (Mar. 1985).

[167] Chris Hubbuch, *Future noise concerns could scuttle housing along planned transit corridor*, WISCONSIN STATE JOURNAL (Oct. 3, 2021), https://madison.com/wsj/news/local/govt-and-politics/future-noise-concerns-could-scuttle-housing-along-planned-transit-corridor/article_0072b092-39ff-54e3-bb59-41232279382d.html.

2. Fish sampling should be conducted in concert with the DNR, and then both should release a public report for bioaccumulated toxics.
3. Engage collaboratively with the residents and, or their appointed representative(s) of the EJ communities.
4. Identify mitigation measures for capturing PFAS from erosion and stormwater that will address the disproportionate impacts in a timely manner.[168]

Complainants contend that the NBG and Wisconsin ANG never meaningfully addressed these comments in their Environmental Assessment.

Further, on September 20, 2019, the EPA provided comments to the USAF on the draft EIS. As previously stated, although USAF is not listed in this Complaint, Recipients have cooperated with the USAF, acquiesced to, or approved of the implementation of the F-35 project. The EPA set out specific instructions relating to the environmental justice responsibilities of the USAF. However, the USAF failed to act on these directives. The seven recommendations were as follows:

1. Discussion of alternative selection criteria in the FEIS should address how EJ and children's health impacts were weighted when identifying the preliminary preferred alternative.
2. EPA recommended outreach to all impacted communities with EJ concerns regarding selecting alternatives so that NGB can identify mitigation that reflects community input. Information about outreach and community input into the alternatives selection and mitigation measure development process to be included in the FEIS.
3. NBG should work with each airport sponsor and FAA to consider mitigation measures, such as limiting noise- and vibration-inducing events when children are present (i.e., during the school day when in session) and working with the school to identify physical improvements to reduce the impact of noise (such as new windows). The FEIS should address potential health impacts and proposed mitigation relating to children.
4. To effectively reach the most vulnerable populations and identify considerations that can be addressed in the DEIS, outreach should begin early. To support the design of effective outreach to vulnerable populations, consider "Promising Practices for Environmental Justice Methodologies in NEPA Reviews."
5. Collaboration with each airport operator, the FAA, and potentially impacted communities to hold public information-gathering sessions that provide the opportunity to consider and provide comment on any proposed noise mitigation.
6. The FEIS should include a comprehensive noise analysis and monitoring program to ensure that the ongoing noise impacts from military flight training, including the proposed F-35 operation, are assessed, appropriately addressed, and mitigated. To enable ongoing

[168] EPA Comments - 115 FW Projects Truax Field 5-15-2019, https://mejo.us/wp-content/uploads/2021/03/2019.5.15.EPA-Comments-115-FW-Projects-Truax-Field-5-15-2019.pdf. (Interestingly EPA notes traditional stormwater best management practices are not sufficient for capturing PFAS.).

evaluation, sensitive areas within the impacted noise contours, such as schools, hospitals, daycare centers, and EJ areas, should be equipped with remotely monitored noise sensors.

7. The DEIS identifies residential land use "within areas outside the boundary of each candidate airport that are anticipated to experience routine exposure to noise at or above 65 dBs. The DEIS classifies these areas as "possibly incompatible for residential land use which would be considered a significant impact." The FEIS should explain how the expected significant noise impacts were considered in selecting the proposed action.

In addition to failing to reach out to impacted EJ communities, the USAF held its draft EIS informational hearing and public hearing on September 12, 2019, at inaccessible locations to the most impacted EJ neighborhoods around Truax Field. The public hearing was held at a location more than 8 miles from the site and at a location that takes more than one hour to reach by bus.[169] The USAF should have held the public hearing at a location within close proximity to the affected households.

VI. RELIEF REQUESTED

Based on the foregoing reasons, Complainants request that the Environmental Protection Agency Office of Civil Rights accept this Complaint and conduct an investigation to determine whether Wisconsin ANG, the Wisconsin DNR, and other listed Recipients violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7 in the selection, approval, and implementation of the 115th Fighter Wing F-35 fighter jets project despite pre-existing, unaddressed health concerns surrounding Truax Field.

The most effective solution would be to stop the Beddown of the F-35 jets at Truax Field. This urban location is not appropriate for fighter jet training and the Air National Guard provides more than 40 alternative missions with less environmental impacts.[170] The Dane County Regional Airport has existed within the city for over 80 years. Madison is the fastest growing metropolitan

[169] Complaint for Declaratory, Injunctive, and Other Relief (Mar. 10, 2021), https://www.courthousenews.com/wp-content/uploads/2021/03/wis-jets.pdf.
[170] *See e.g.,* https://www.goang.com/discover-ang/missions.html.

area in Wisconsin but the city has not considered the environmental benefits of relocating the airport out of the city and eliminating its impacts on city residents. In contrast, in 1994, Austin, Texas, relocated its 64-year old Robert Mueller Municipal Airport, and replaced it with the pedestrian-oriented Mueller Community, reusing many of the former airport buildings.[171]

If the expansion project cannot be prevented, there must be adequate mitigation to prevent the anticipated impacts of the proposed Beddown of F-35 fighter jets. A community remediation program should be developed. The first part of this program would be a voluntary relocation program as implemented at other airports.[172] In this scenario, sufficient financial and administrative support must be provided for relocation, home purchases, mental healthcare, employment assistance, and education resources due to displacement. It is of utmost importance that the program must be voluntary and that compensation must allow families to relocate to areas that will better the health, safety, and well-being of the program's participants.

Further, the community remediation program must provide soundproofing of any impacted homes, schools, and other affected buildings. Finally, the community remediation program must provide: (1) adequate water filters[173] (for homes, schools, affected buildings, private and public wells), (2) a program for exchanging clean fish for contaminated fish caught in Starkweather Creek and the Yahara chain of lakes, and (3) cessation of F-35 project construction until a comprehensive and meaningful PFAS remediation program to investigate and cleanup the PFAS contamination is completed. These programs must be the product of negotiation with affected community members.

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[171] *See* https://en.wikipedia.org/wiki/Mueller_Community
[172] *See e.g.,* https://www.flylouisville.com/corporate/sdf-history/.
[173] Environmental Protection Agency, *Treating PFAS in Drinking Water* (last visited Nov. 11, 2021), https://www.epa.gov/pfas/treating-pfas-drinking-water.

Sincerely,

On behalf of Safe Skies Clean Water Wisconsin

Ex. (6), 7(C)

Ex. (6), 7(C)

Madison, WI 53703
Ex. (6), 7(C)

Ex. (6), 7(C)

Ex. (6), 7(C)

Detroit, MI 48226
Ex. (6), 7(C)

The following community organizations support this complaint and its goals to protect the marginalized low-income and families of color who will be impacted by the proposed Beddown the F-35 fighter jet squadron:

350 Madison

Board of Education - Madison Metropolitan School District

Building Unity Wisconsin

Ex. (6), 7(C)

Family Farm Defenders

First Unitarian Society of Madison

Four Lakes Green Party

Interfaith Peace Working Group

Madison Teachers Inc.

Madison Teachers Inc. - Retired

Midwest Environmental Advocates

Midwest Environmental Justice Organization

Physicians for Social Responsibility Wisconsin

Safe Skies Action Faction

Solidarity Realty

Ex. (6), 7(C)

UW American Civil Liberties Union Student Alliance

UW Environmental Law Society

UW Social and Environmental Business Advocates

Veterans for Peace

Veterans for Peace-Madison

Wisconsin Environmental Health Network

Wisconsin Faith Voices for Justice

Wisconsin Greens

Wisconsin Network for Peace & Justice

Wisconsin Student Climate Action Coalition