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Sent via email IGaston@bop.gov

May 8, 2017

U.S. Department of Justice  
Bureau of Prisons  
ATTN: Isaac Gaston, Site Selection Specialist  
320 First St., NW  
Washington, DC 20534

**RE: Public Comment  
Revised Draft Supplemental Environment Impact Statement  
Proposed United States Penitentiary and Federal Prison Camp**

Dear Mr. Gaston:

Please accept the following comments on behalf of the Abolitionist Law Center (“ALC”) concerning the draft supplemental environmental impact statement (“DSEIS”) issued by the Bureau of Prisons (“BOP”) on March 24, 2017 for a proposed United States Penitentiary and Federal Prison Camp in Letcher, County.

ALC is a non-profit organization that advocates on behalf of people held in U.S. prisons and jails. As an advocate for incarcerated people, ALC is concerned about the environmental impacts of prisons – both the impacts felt by prisoners themselves, as well as the impacts on the “external” social, economic and ecological environments.

In addition to these comments, ALC incorporates by reference all prior comments that it, as well as the Letcher Governance Project (“LGP”), the Human Rights Defense Center (“HRDC”), the Sierra Club, the Ohio Valley Environmental Coalition (“OVEC”), Citizens United for Rehabilitation of Errants (“CURE”), Mitchum Whitaker, and the numerous federally incarcerated individuals who have submitted to the BOP about this project. As well, ALC specifically requests that the full document of each citation that it references in both this, and past comments be included in the administrative record of the file related to the BOP’s proposed action to build a penitentiary and prison camp in Roxana, Kentucky.

Detailed below are ALC’s specific issues and comments:

## **I. INTRODUCTION**

The BOP’s intention to construct a United States Penitentiary and Federal Prison Camp (hereinafter referred to as “the new BOP prison” or “BOP prison”) presents a federal construction project that further perpetuates the “economic malaise” suffered by the Eastern Kentucky coalfield’s communities.<sup>1</sup>

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<sup>1</sup> Harry M. Caudill, *Night Comes to the Cumberland: A Biography of a Depressed Area* (1962), at 325.

Best explained by Harry Caudill, the economic disparity and underdevelopment of the region began with the exportation of

its resources, all of which—timber, coal, and even crops—have had to be wrested violently from the earth. The nation has siphoned off hundreds of millions of dollars' worth of its resources while returning little of lasting value. For all practical purposes the [Cumberland Plateau] has long constituted a colonial appendage of the industrial East and Middle West, rather than an integral part of the nation generally. The decades of exploitation have in large measure drained the region.<sup>2</sup>

And as other industry's drained the resources of Eastern Kentucky and Appalachia, the prison industrial complex emerged with promises to the region that constructing prisons would mend the economic hardships of the area. Today ALC believes that are now three federal prisons in eastern Kentucky alone, and six have been built in Central Appalachia since 1992.<sup>3</sup> In total, officials have twenty-nine state and federal prisons in central Appalachia since 1989.<sup>4</sup>

Development indicators, however, all point to the conclusion that prisons “appear to have a negligible, or perhaps negative impact on economic development in rural communities.”<sup>5</sup> One study found that “[i]n rural counties, for both income per capita and total earnings, those without a prison grew at a faster pace, and employment grew more slowly in counties in which a new prison was built.”<sup>6</sup> A different researcher determined that “[c]onsidering economy-wide impacts, based on a diversity measure for both earnings and employment by industry sector, it appears that prisons have very little sectoral impact on the county economy; therefore, prison development is not a good way to stimulate diverse economic growth.”<sup>7</sup>

Appalachia's experience reflects this national trend. Prison growth has expanded rapidly, yet growth of this sector has not contributed to economic development.<sup>8</sup> For instance, one recent study found that prison counties in Central Appalachia have lower per capita income and higher poverty rates than counties without a prison. On the other hand, our analysis seems to support the claims that prisons can create jobs, as we find that prison counties have lower rates of unemployment than counties without a prison. Combined with the negative income and poverty findings, however, it appears likely that these are not the higher-paying management and correctional positions that would boost local economies. As noted earlier, other researchers have found that the “good” jobs typically go to those from outside the area who have the training and skills necessary to fill these positions. In short, while jobs may be created to serve the industry, they are likely to be

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<sup>2</sup> *Id.*

<sup>3</sup> Beyond Coal. *Speak Your Piece: Prison Progress?*, Feb. 20, 2013, <http://www.dailyonder.com/speak-your-piece-prison-progress/2013/02/20/5651/#comments> (last visited May 6, 2017).

<sup>4</sup> Robert T. Perdue, et al. *Imprisoning Appalachia: The Socio-Economic Impacts of Prison Development*. JOURNAL OF APPALACHIAN STUDIES, p. 67 (2016).

<sup>5</sup> See e.g. Deborah M. Tootle, *The Role of Prisons in Rural Development: Do They Contribute to Local Economies?*, Apr. 2004, available at <https://www.prisonlegalnews.org/media/publications/Prisons%20as%20Rural%20Development%20Economic%20Study%20Deborah%20M.%20Tootle%202004.pdf>.

<sup>6</sup> Clayton Mosher, et al. *Don't Build it Here – The Hype Versus the Reality of Prisons and Local Employment*, PRISON LEGAL NEWS, p. 14 (Jan. 2005).

<sup>7</sup> Tracey L. Farrigan, et al. *The Economic Impacts of the Prison Boom on Persistently Poor Rural Places*, p. 23, available at [https://static.prisonpolicy.org/scans/prison\\_development.pdf](https://static.prisonpolicy.org/scans/prison_development.pdf).

<sup>8</sup> See e.g. Sylvia Ryerson, *Speak Your Piece: Prison Progress*, DAILYONDER.COM (Feb. 13, 2014), <http://www.dailyonder.com/speak-your-piece-prison-progress/2013/02/20/5651/#comments>.

low-paying and to lack benefits.<sup>9</sup>

Today, the BOP wants to build another prison in Roxana, Kentucky -- this one atop a former mountaintop removal (“MTR”) site. This construction project presents multiple social, environmental, economic and legal concerns, which (ALC contends) outweigh the miniscule economic growth the prison *may* bring to the area. These concerns are grounded in data that support a perspective that the region’s prison economy builds upon a long history of profiteering in the region, as well as “the exploitation not only of land but also of people.”<sup>10</sup>

ALC has consistently addressed these social, environmental, economic and legal problems via comments on the various EIS iterations that the BOP has offered to the public for review. Today, ALC offers additional information and comment that the BOP must consider and account for in its final Supplemental EIS and prior to any decision to move forward with this unnecessary project. Just as before, ALC asserts that this particular NEPA document fails to fulfill BOP’s statutory obligations under the National Environmental Protection Act (“NEPA”), the Endangered Species Act (“ESA”), the National Historic Preservation Act (“NHPA”), and the Administrative Procedure Act (“APA”). In short, the DSEIS, as published on March 24, 2017, remains wholly deficient and not in compliance with federal law.

## II. STATUTORY BACKGROUND

### A. The National Environmental Policy Act

Originally signed into law in 1970, the National Environmental Policy Act (NEPA) was the first environmental law of the modern era.<sup>11</sup> With the intentions of promoting efforts to “prevent or eliminate environmental damage,” NEPA requires Federal agencies to fully consider and disclose the environmental consequences of any agency action before proceeding with that action.<sup>12</sup> NEPA also created the Council on Environmental Quality (CEQ) to oversee the NEPA process. CEQ has implemented procedural provisions to which all federal agencies must adhere.<sup>13</sup> An EIS is required for all “major federal actions significantly affecting the quality of the human environment.”<sup>14</sup> In addition, an EIS must address “the environmental impact of the proposed action, alternatives to the proposed action, the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”<sup>15</sup> This assessment is referred to as a “hard look” analysis that must be done by the agency in its EIS. An EIS’s alternatives analysis is referred to as the “heart of the environmental impact statement.”<sup>16</sup> The document must “devote substantial treatment to each alternative.”<sup>17</sup>

In addition to the required alternatives analysis required under NEPA, an EIS must conduct a cumulative effects analysis (CEA). CEQ guidance outlines eleven items for an agency to consider

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<sup>9</sup> Robert T. Perdue, et al. *Imprisoning Appalachia: The Socio-Economic Impacts of Prison Development*. JOURNAL OF APPALACHIAN STUDIES, p. 67 (2016)(citations omitted).

<sup>10</sup> Melissa Ooten, et al. *From the Coal Mine to the Prison Yard*, APPALACHIA REVISITED, p. 171, ed: William Schumann (2016).

<sup>11</sup> See J.B. Ruhl et al., *The Practice and Policy of Environmental Law* 406 (3d. 2014).

<sup>12</sup> 42 U.S.C. §§ 4321, 4332(2)(C) (2006); 40 C.F.R. §§ 1501.2, 1502.5.

<sup>13</sup> See 40 C.F.R. parts 1500-1508.

<sup>14</sup> 42 U.S.C. § 4332(C) (2006); 40 C.F.R. § 1501.4 (2011).

<sup>15</sup> 42 U.S.C. § 4332(C).

<sup>16</sup> 40 C.F.R. § 1502.14 (2011).

<sup>17</sup> *Id.* § 1502.14(b).

when drafting a Cumulative Effects Analysis (CEA) for a proposed action, including:

1. Identify the significant cumulative effects issues associated with the proposed action and define the assessment goals.
2. Establish the geographic scope of the analysis.
3. Establish the timeframe for the analysis.
4. Identify the other actions affecting the resources, ecosystems, and human communities of concern.
5. Characterize the resources, ecosystems, and human communities identified in scoping in terms of their response to change and capacity to withstand stress.
6. Characterize the stresses affecting these resources, ecosystems, and human communities and their relation to regulatory thresholds.
7. Define a baseline condition for the resources, ecosystems, and human communities.
8. Identify the important cause-and-effect relationships between human activities and resources, ecosystems, and human communities.
9. Determine the magnitude and significance of cumulative effects.
10. Modify or add alternatives to avoid, minimize, or mitigate significant cumulative effects.
11. Monitor the cumulative effects of the selected alternative and adapt management.<sup>18</sup>

Furthermore, NEPA establishes as a goal “the preservation of historic [and] cultural . . . aspects of our natural heritage.”<sup>19</sup> NEPA protects the “human environment,”<sup>20</sup> which is a term that must be “interpreted comprehensively.”<sup>21</sup> Under NEPA, an analysis of the “effects” on the “human environment” must include impacts on “aesthetic, historic, [and] cultural” resources.<sup>22</sup>

## **B. The Endangered Species Act**

The purpose of the Endangered Species Act (“ESA”) is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . .”<sup>23</sup> All federal departments also have an affirmative duty to further the purposes of the ESA.<sup>24</sup> The ESA recognizes that certain species of wildlife face extinction due to depleted populations, and that these species hold “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”<sup>25</sup>

The Act requires the Secretary of the Interior to identify which species are endangered and list them accordingly.<sup>26</sup> The Secretary fulfills this obligation through the Fish and Wildlife Service (“FWS”). It is unlawful for any person within the United States to “take” any member of a species that has been listed as endangered.<sup>27</sup> To “take” a species, as defined by the Act, means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” an individual animal of that species, or attempt to engage

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<sup>18</sup> REIS at § 60-1.

<sup>19</sup> 42 U.S.C. § 4331(b).

<sup>20</sup> *Id.* § 4332(C).

<sup>21</sup> 40 C.F.R. § 1508.14.

<sup>22</sup> *Id.* § 1508.8.

<sup>23</sup> *See* 16 U.S.C. § 1531(b).

<sup>24</sup> *Id.* § 1531.

<sup>25</sup> 16 U.S.C. § 1531(a).

<sup>26</sup> 16 U.S.C. § 1533.

<sup>27</sup> 16 U.S.C. § 1538.

in such conduct.<sup>28</sup>

The Department of the Interior has defined the term “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”<sup>29</sup> It has defined the term “harm” to mean “an act which actually kills or injures wildlife, which can include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>30</sup>

The Endangered Species Act also includes protections for listed species’ habitat, where the FWS has designated “critical habitat” for a species.<sup>31</sup> Consequently, under the ESA all federal agencies must adhere to procedural safeguards to ensure that their actions do not “result in the destruction or modification” of the designated habitat of a species.<sup>32</sup>

Most notably, section 7 of the ESA requires federal agencies to enter into consultation with the FWS for any action that may affect a threatened species or its designated critical habitat. To determine the necessary level of input from the FWS, the action agency may elect to undergo “informal consultation,” which is defined as “an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required.”<sup>33</sup> If the action agency determines that a project is not likely to adversely affect a protected species “*with the written concurrence of the Service,*” then informal consultation concludes.<sup>34</sup>

However, if an action is likely to adversely affect a protected species, then the action agency must enter into the more rigorous process of formal section 7 consultation.<sup>35</sup> Formal consultation requires extensive participation by FWS and culminates in a biological opinion as to whether the project will likely jeopardize the continued existence of a protected species or destroy or adversely modify its critical habitat.<sup>36</sup>

### **C. The National Historic Preservation Act**

Section 106 of the National Historic Preservation Act (“NHPA”) mandates federal agencies to take into account the impact of certain undertakings on properties that are or are eligible for listing on the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation (“ACHP”) the opportunity to comment.<sup>37</sup>

Before beginning any undertaking potentially subject to § 106, a federal agency must take certain, clearly defined steps to determine the scope of application of § 106, and to create a plan for

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<sup>28</sup> 16 U.S.C. § 1532 (19).

<sup>29</sup> 50 C.F.R. § 17.3.

<sup>30</sup> *Id.*

<sup>31</sup> 16 U.S.C. § 1533(a)(3)(A).

<sup>32</sup> 16 U.S.C. § 1536.

<sup>33</sup> 50 C.F.R. § 402.13.

<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> *Id.* § 402.14(a).

<sup>36</sup> *Id.* § 402.14.

<sup>37</sup> *See* 16 U.S.C. § 470f.

compliance. These steps are 1) an evaluation of the projects, programs and activities to determine if they are undertakings subject to § 106; 2) coordinate with agency reviews required by other federal statutes (*i.e.* NEPA); 3) identify consulting parties; and 4) develop a plan for public involvement.<sup>38</sup>

Once an agency has determined that § 106 applies, the following four requirements from the ACHP on Historic Preservation guide the agency's compliance.<sup>39</sup> These requirements are to 1) initiate the process; 2) identify historic properties affected; 3) evaluate the adverse effects; and 4) resolve the adverse effects.<sup>40</sup>

#### **D. The Administrative Procedures Act**

The Administrative Procedure Act ("APA") establishes the default rules for federal administrative law.<sup>41</sup> It governs the "internal proceedings" for agencies such as public information, and open meetings. These proceedings include, but are not limited to, rulemaking, adjudications, permitting and sanctions.<sup>42</sup> Additionally, this legislation authorizes judicial review and provides a private right of action for "a person suffering a legal wrong because of agency action."<sup>43</sup>

A court can set aside an agency action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>44</sup> In making decisions, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."<sup>45</sup> A reviewing court will find an agency decision to be arbitrary and capricious if:

- the agency relied on factors which Congress did not intend it to consider;
- the agency entirely failed to consider an important aspect of the problem;
- the agency offered an explanation for its decision that runs counter to the evidence before the agency; or
- the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>46</sup>

### **III. DETAILED LEGAL COMMENTS**

#### **A. BOP Failed to Meet Public Notice Requirements**

Again, the BOP failed to notify inmates currently incarcerated in the federal criminal justice system about its proposed activities in Letcher County. NEPA's implementing regulations require the BOP to "invite the participation" of "interested persons" during its scoping process.<sup>47</sup> After preparing its draft EIS and before finalizing the document, the BOP should "request comments from the public" and must affirmatively solicit "comments from those persons or organizations who may be interested or

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<sup>38</sup> See 36 C.F.R. § 800.3.

<sup>39</sup> See 36 C.F.R. §§ 800.3-8000.6.

<sup>40</sup> *Id.*

<sup>41</sup> 5 U.S.C. § 551 *et seq.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* § 702.

<sup>44</sup> 5 U.S.C. § 706(2)(A).

<sup>45</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(internal citations omitted).

<sup>46</sup> *Id.*

<sup>47</sup> 40 C.F.R. § 1501.7(a)(1).

affected.”<sup>48</sup>

Individuals now in the custody of the BOP are members of the social sector to be most profoundly impacted by the BOP’s actions, as they face the risk of being relocated against their will to the new facility. Consequently, they are the most likely to face adverse health risks from living atop of a former mining site in a region plagued by unsafe drinking water and widespread environmental pollution.

Since federal inmates do not have meaningful and regular access to Federal Register notices, the BOP should have taken affirmative steps to notify federal inmates about this project for each and every public comment period, and also provided them with copies of the Draft EIS, Final EIS and Revised EIS, and now the Draft Supplemental Revised EIS. The BOP’s failure to recognize and invite this “affected group” into the scoping process and for commenting during the EIS process contravenes the democratic principles of NEPA.

To date, ALC has been able to notify a small percentage of federal inmates about this EIS process. Of those that ALC has contacted, an overwhelming majority of inmates have then decided to submit comments to the BOP.<sup>49</sup> The burden of informing this essential population, however, should not fall upon the shoulders of a small non-profit. And ALC’s actions are not considered notice within the meaning of NEPA. Consequently, it is incumbent upon the BOP to inform each and every federal inmate about the EIS process regarding its intention to build a new BOP prison in Roxana, Kentucky.

*Until BOP remedies this severe procedure flaw, this DSEIS and its finalized version will not have complied with the notice requirements of NEPA. If the BOP decides not to inform the individuals in its custody about the FSEIS and its commenting period, ALC specifically requests that the Final SEIS present the legal rationale for not notifying BOP’s inmate population.*

## **B. The BOP’s Stated Purpose and Need for the Proposed Action Remains Suspect**

### **i. BOP Provides No Justification for the Minimum-Security Federal Prison Camp**

The Proposed Action in the Final Environmental Impact Statement for Proposed United States Penitentiary and Federal Prison Camp (FEIS) issued in July 2015, as well as the DSEIS released in March 2017, has been to build both a United States Penitentiary (USP) to hold 960 high-security prisoners, and a Federal Prison Camp (FPC) to incarcerate an additional 256 minimum-security prisoners.<sup>50</sup> The planned FPC facility would cover 65,262 square feet, and would contribute to all the negative environmental impacts associated with the larger project. The BOP has never addressed why it needs to build this minimum-security facility or how doing so would achieve its “Purpose and Need” of reducing overcrowding in Mid-Atlantic Region high-security prisons.

In the “Purpose and Need” section of the FEIS issued in July 2015, the BOP stated that

“The purpose of the proposed federal correctional facility in Letcher County, Kentucky, is to develop additional high-security and medium-security facilities to increase capacity for current inmate populations in the Mid-Atlantic Region based on an identified need

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<sup>48</sup> 40 C.F.R. § 1503.1(a)(92)(4).

<sup>49</sup> Undersigned counsel will continue to submit comments she receives from inmates about this project, even if they arrive to her office after the May 8, 2017 deadlines. She respectfully requests the agency to make these comments apart of BOP’s administrative record for this process.

<sup>50</sup> FEIS, Executive Summary at ES-i; DSEIS, Executive Summary at ES-i.

for additional bedspace. The Bureau has determined that there is a need for additional high-security and medium-security facilities within this region to reduce the demonstrated overcrowding that compromises the mission of the Bureau.”<sup>51</sup>

In the BOP’s DSEIS released in March 2017, it no longer asserts a need for additional medium-security bedspace.<sup>52</sup> The BOP has provided no rationale for creating additional minimum-security bedspace in any of its prior iterations of the EIS. In the 2017 DSEIS, the BOP makes an unsubstantiated claim that the FPCs adjacent to the four USPs in the Mid-Atlantic Region are ”operating at or near capacity,” but it provides no discussion as to why such a situation, even if it were true, would require the building of a new 256-bed minimum-security facility.<sup>53</sup>

In the DSEIS, the BOP does not analyze the rated capacities and current populations of the FPCs associated with its four Mid-Atlantic Region USPs. Nonetheless, capacity figures may be found in the 2016 Prison Rape Elimination Act (PREA) Audits and Reports related to some of these facilities. The capacity of the FPC at Big Sandy is 128 prisoners.<sup>54</sup> On the other hand, the population of the FPC at Big Sandy, as of May 4, 2017, is 77 minimum-security inmates.<sup>55</sup> With respect to the FPC attached to USP Hazelton, publicly available documents from the lead architect/engineer for the prison states that its capacity is 128 minimum-security prisoners.<sup>56</sup> There are currently 104 minimum-security prisoners in the FPC at Hazelton.<sup>57</sup> We were unable to find the design capacity of the FPCs associated with USPs Lee and McCreary, but according to the BOP they can only be “at or near capacity,” and the current minimum-security populations at these institutions are 115 and 159 inmates respectively.<sup>58</sup>

According to *Motor Vehicles Manufacturers Ass’n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43 (1983), an agency action is arbitrary and capricious when an agency offers “an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Here, the BOP offers no explanation for why it needs to build a facility to house 256 minimum-security prisoners.

At no time during this NEPA process has the BOP asserted a need for minimum-security bedspace in its prison system within the Mid-Atlantic Region, or nationally. It does not provide an analysis of what the rated capacities of the FPCs attached to its Mid-Atlantic USPs are, or why operating them “at or near capacity” presents a problem. The plan to build an FPC should be abandoned, as building it would further contribute to the negative environmental impacts of the larger project, and the BOP has provided no justification for those apparently unnecessary impacts. *The site plan should be redrawn to exclude the FPC, and a new EIS should be prepared reflecting this change.*

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<sup>51</sup> FEIS, Executive Summary at ES-i.

<sup>52</sup> DSEIS, Executive Summary at ES-i.

<sup>53</sup> *Id.*

<sup>54</sup> USP Big Sandy PREA Audit at \*3, available at [https://www.bop.gov/locations/institutions/bsy/BSY\\_prea.pdf](https://www.bop.gov/locations/institutions/bsy/BSY_prea.pdf) (last visited May 8, 2017).

<sup>55</sup> Federal Bureau of Prisons, *USP Big Sandy*, <https://www.bop.gov/locations/institutions/bsy/>.

<sup>56</sup> USP Hazelton PREA Audit at \*2, available at [https://www.bop.gov/locations/institutions/haf/HAF\\_prea2.pdf](https://www.bop.gov/locations/institutions/haf/HAF_prea2.pdf) (last visited May 8, 2017).

<sup>57</sup> Federal Bureau of Prisons, *USP Hazelton*, <https://www.bop.gov/locations/institutions/haz/>.

<sup>58</sup> Federal Bureau of Prisons, *USP Lee*, <https://www.bop.gov/locations/institutions/lee/>; Federal Bureau of Prisons, *USP McCreary*, <https://www.bop.gov/locations/institutions/mcr/>.



**ii. BOP's Analysis of Alternatives to Building a New Prison was Completed in 2005, and Does Not Account for the Decline in Population or Increase in Capacity in the Last Decade**

According to the BOP's DSEIS, this project was initiated in 2008.<sup>59</sup> However, in its most recent annual budget submission to Congress the BOP states that the "Alternatives Analysis" for whether or not to build a new prison in the Mid-Atlantic Region was completed in "November 2005."<sup>60</sup> That 2005 analysis found that "[c]onstructing a new facility was the alternative determined to provide the greatest benefit to taxpayers and ultimately be more cost effective than the other alternatives."<sup>61</sup> The BOP has made this statement to Congress in every annual budget submission that is publicly available, going back to 2012.<sup>62</sup>

When the BOP completed its "Alternatives Analysis" for this project in 2005, it had 102 facilities with a rated capacity of 106,732.<sup>63</sup> The BOP confined 145,780 people in 2005, and its facilities were 37 percent over-capacity. As of May 4, 2017, the BOP incarcerates 153,937 people in 122 facilities.<sup>64</sup> The BOP's annual budget submission to Congress estimated that its facilities would have a rated capacity of 135,291 people in FY2017, and that its facilities would be 13 percent overcrowded.<sup>65</sup>

Since its determination in November 2005 that building a new prison in Letcher County was the best means of managing its population, the BOP has built 20 new prisons and increased its overall capacity by 28,559 prisoners, a 26.7 percent increase. On the other hand, the BOP only incarcerates 8,157 more people in 2017 than it did in 2005, an increase of 5.6 percent. Overall, the federal prison population has declined by more than 30,000 prisoners since its peak in 2013, a "14 percent reduction," and the overcapacity rate has fallen from 37 percent to 13 percent during the same time period.<sup>66</sup>

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<sup>59</sup> DSEIS, Project Background at § 1-2.

<sup>60</sup> FY 2017 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, 9b, *available at* <https://www.justice.gov/jmd/file/822471/download> (last visited May 7, 2017).

<sup>61</sup> *Id.*

<sup>62</sup> FY 2016 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, 9b, *available at* [https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/18/2016\\_cong\\_-\\_usp\\_lecher.pdf](https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/18/2016_cong_-_usp_lecher.pdf) (last visited May 7, 2017); FY 2015 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, *available at* 9b, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/26/usp-lecher-county.pdf> (last visited May 7, 2017); FY 2014 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, 9b, *available at* <https://www.justice.gov/sites/default/files/jmd/legacy/2014/08/10/usp-lecher-county.pdf> (last visited May 7, 2017); FY 2013 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, 9b, *available at* <https://www.justice.gov/sites/default/files/jmd/legacy/2013/09/08/bop-2013-usp-lecher-county.pdf> (last visited May 7, 2017); FY 2012 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part III: Non-IT Capital Investments, Section A,2, *available at* [https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/10/bop\\_2012\\_esp\\_lecher\\_county.pdf](https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/10/bop_2012_esp_lecher_county.pdf) (last visited May 7, 2017).

<sup>63</sup> Stephan, James J., *Census of state and federal correctional facilities, 2005*. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2008), *available at* <https://www.bjs.gov/content/pub/pdf/csfcf05.pdf> (last visited May 7, 2017).

<sup>64</sup> Population of inmates in BOP custody as of May 4, 2017 was listed at [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp); U.S Department of Justice, "FY 2017 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities," *available at* <https://www.justice.gov/jmd/file/821371/download> (last visited May 7, 2017).

<sup>65</sup> U.S Department of Justice, "FY 2017 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities" at 5, *available at* <https://www.justice.gov/jmd/file/821371/download> (last visited May 7, 2017).

<sup>66</sup> United States Courts, *Policy Shifts Reduce Federal Prison Population* (Apr. 25, 2017), *available at* <http://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population>.

The trend of a declining prison population is set to continue. The BOP expects its prison population to fall by an additional 1,975 prisoners by September 30, 2017.<sup>67</sup> Changes to sentencing guidelines by the U.S. Sentencing Commission (USSC) decreased the length of sentences by “about 25 percent” for drug crimes, which make up “nearly a third of all criminal filings in federal courts.”<sup>68</sup> Additionally, the number of federal criminal cases in 2016 dropped to the “lowest total since fiscal year 1998.”<sup>69</sup>

These trends are also reflected in the specific population and capacity numbers for the BOP’s Mid-Atlantic Region USPs. For example, the FEIS published in July 2015 stated that the combined high-security population for USPs Hazelton, Lee, Big Sandy, and McCreary was 5,802 people.<sup>70</sup> In contrast, the combined population cited in the DSEIS published in March 2017 was 5,118.<sup>71</sup> Furthermore, the July 2015 FEIS stated that the total rated capacity for these USPs was 3,400 prisoners, but as of February 28, 2017, this capacity had risen to 3,821 prisoners. From 2015 to 2017 the four USPs in the Mid-Atlantic Region saw their combined inmate populations decline by 684 prisoners, a nearly 12 percent decline, while their capacity increased by 12 percent in the other direction, or by 421 prisoners.

To summarize, overcrowding in the Mid-Atlantic Region was cut in half in less than two years, from 70 percent to 34 percent overcrowded, and structural changes to the number of criminal cases being brought in federal courts, as well as decreases in the length of sentences, means that this trend of declining numbers of federal prisoners is likely to persist for some time. The BOP’s reason for building a new USP in Letcher County is no longer valid, and at a minimum it needs to reconsider its 2005 Alternatives Analysis in light of the last 11 years of changing circumstances.

As discussed earlier, according to *State Farm* an agency action is arbitrary and capricious when an agency offers “an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>72</sup> Here, the BOP steadfastly advances the proposition that it needs a new prison based on an Alternatives Analysis completed eleven years ago, which flies in the face of the last four years of declining populations at federal prisons and accelerating reform efforts to reduce mass incarceration. *On this record, proceeding with construction of a new USP and FPC in Letcher County, Kentucky would be “arbitrary and capricious” and a clear violation of NEPA.*

### **C. BOP’s Alternatives Discussion is Incomplete and Not Reasonable**

The BOP alternatives analysis as discussed in the most recent DSEIS still does not comply with NEPA. An EIS must describe and analyze alternatives to the proposed action.<sup>73</sup> Indeed, the alternatives analysis section is the “heart of the environmental impact statement.”<sup>74</sup> The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal.<sup>75</sup> The

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<sup>67</sup> Bureau of Prisons, *Federal Inmate Population Declines*, (Oct. 4, 2016), [https://www.bop.gov/resources/news/20161004\\_pop\\_decline.jsp](https://www.bop.gov/resources/news/20161004_pop_decline.jsp).

<sup>68</sup> United States Courts, *Policy Shifts Reduce Federal Prison Population*, (Apr. 25, 2017), <http://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population>.

<sup>69</sup> *Id.*

<sup>70</sup> FEIS, Table 1-1.

<sup>71</sup> DSEIS, Table 1-1.

<sup>72</sup> 463 U.S. 29, 43 (1983).

<sup>73</sup> See *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

<sup>74</sup> 40 C.F.R. § 1502.14.

<sup>75</sup> See *Idaho Conservation League*, 956 F.2d at 1520.

existence of reasonable but unexamined alternatives renders an EIS inadequate.<sup>76</sup>

The BOP's analysis of whether or not building a new prison was the best method of dealing with overcrowding was completed in November 2005.<sup>77</sup> That analysis came to the conclusion that a new prison was the best way to address overcrowding, and ever since the BOP has limited the scope of its Alternatives Analysis in the NEPA process to a selection of different sites to build the new prison on, or a "No Action Alternative" of not building a new prison. However, there is a range of alternatives to constructing a new prison that the BOP has failed to consider, or has only considered as part of an analysis completed in November 2005, over eleven years ago and in a very different context with regards to trends in the federal prison system. At a minimum, the BOP needs to enter into the record an analysis of the following alternatives in order to meet its obligations under NEPA.

**i. BOP Could Renovate Existing Facilities to Increase High-Security Capacity**

The BOP should consider repurposing lower-security facilities in the Mid-Atlantic to house high-security prisoners. As Table 1 indicates, the BOP currently has excess capacity for 814 prisoners across its non-high-security facilities in the Mid-Atlantic Region.<sup>78</sup> The BOP could consolidate its non-high-security prisoners into facilities with excess capacity, thereby opening up facilities for renovation into high-security prisons.

Additionally, the BOP's website says that it is contracting to hold 1,064 of its prisoners at the privately operated Correctional Institution (CI) Rivers in the Mid-Atlantic Region.<sup>79</sup> According to the operator of CI Rivers, the BOP is the sole client for the prison, which has a capacity of 1,450 prisoners.<sup>80</sup> By shifting more of its non-high-security population to contract prisons in the Mid-Atlantic Region, the BOP could further facilitate the renovation of an existing facility to hold high-security prisoners.

The BOP must take account of where in its system it currently has excess capacity, and whether consolidating its non-high-security population into fewer facilities would allow for already existing prisons to be renovated to hold high-security prisoners. This alternative would have a much smaller environmental impact than building and operating new facilities on undeveloped and remote land, and it would likely save millions of dollars in taxpayer money.

**ii. BOP Could Build New High-Security Capacity at Already Existing Facilities**

The BOP should consider whether building additional high-security structures at its current facilities in the Mid-Atlantic would serve its stated need, without creating all of the negative environmental impacts at issue with a new facility at the Roxana site. On the current record, there is no evidence that BOP has given sufficient consideration to this alternative. For instance, there is no analysis of whether or not sufficient acreage is available at current facilities in the Mid-Atlantic Region to build additional high-security cellblocks. The BOP should consider whether it would be possible to build additional high-security cellblocks at any or all of the currently existing USPs in the Mid-Atlantic Region, or at any other facility in the region, and thereby meet its stated need of decreasing overcapacity for high-security prisons in the region. The complete lack of an analysis of this alternative is unreasonable, and

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<sup>76</sup> See *Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 729.

<sup>77</sup> *Supra* nn. 60-62.

<sup>78</sup> Table 1 does not include the BOP's female institutions, its medical prisons, or its private contract prisons in the Mid-Atlantic Region.

<sup>79</sup> Federal Bureau of Prisons, *CI Rivers*, <https://www.bop.gov/locations/ci/riv/>.

<sup>80</sup> Geogroup, *CI Rivers*, <https://www.geogroup.com/FacilityDetail/FacilityID/78>.

does not meet the BOP’s obligations under NEPA.

**TABLE 1**

<b>Facility</b>	<b>Security Level</b>	<b>Population<sup>81</sup></b>	<b>Rated Capacity<sup>82</sup></b>	<b>Extra Capacity</b>
Ashland FPC	Minimum	224	296	72
Beckley FPC	Minimum	305	384	79
Big Sandy FPC	Minimum	77	128	51
Hazelton FPC	Minimum	104	128	24
Lee FPC	Minimum	115	128	13
Lexington FPC	Minimum	321	349	28
McCreary FPC	Minimum	159	128	-31
McDowell FPC	Minimum	74	128	54
Memphis FCP	Minimum	252	296	44
Petersburg FPC 1	Minimum	299	296	-3
Butner FCI & FPC 1	Medium/Minimum	1032	1111	79
Cumberland FCI & FPC	Medium/Minimum	1299	1395	96
Gilmer FCI & FPC	Medium/Minimum	1450	1536	86
Manchester FCI & FPC	Medium/Minimum	1086	1030	-56
Beckley FCI	Medium	1498	1502	4
Butner FCI 2	Medium	1412	1152	-260
Hazelton FCI	Medium	1353	960	-393
McDowell FCI	Medium	1130	1726	596
Memphis FCI	Medium	1035	1012	-23
Morgantown FCI	Medium	807	1305	498
Petersburg FCI 2	Medium	1531	1894	363
Ashland FCI	Low	1028	747	-281
Butner FCI 0	Low	1317	992	-325
Petersburg FCI 1	Low	1111	1210	99
<b>TOTAL</b>		<b>19019</b>	<b>19833</b>	<b>814</b>

**iii. BOP Could Take Administrative Actions to Reduce its Population and/or Reduce Classification of Prisoners as High-Security**

The assessment of alternatives is one of the primary reasons for the existence of the EIS process. BOP’s refusal to discuss alternatives to imprisonment is contrary to NEPA’s requirement to “study, develop, and describe appropriate alternatives to recommended courses of action.”<sup>83</sup> Recent innovations have shown that alternatives to building new prisons can be reasonably implemented and can save scarce financial and human resources. In order to meet its obligations under NEPA, BOP must consider such alternatives to building new prisons such as the proposed Letcher County USP and FPC.

The BOP attempts to deflect attention from its inadequate performance on this count by simply stating, “[t]he Bureau is not the agency responsible for developing sentencing guidelines or alternatives to

<sup>81</sup> All population numbers for Table 1 were taken from the BOP website and are up to date as of May 4, 2017, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp)

<sup>82</sup> Rated capacity numbers were gathered from PREA Reports available at BOP’s website, except for the numbers for the FPCs at Lee and McCreary, which are estimates based on the capacity ratings for similar facilities linked to USPs Big Sandy and Hazelton. Copies of the PREA Reports are on file with ALC, and are available upon request.

<sup>83</sup> 42 U.S.C. § 4332(E).

current sentencing guidelines.”<sup>84</sup> As discussed above, the United States Sentencing Commission (USSC) has already taken steps to reform sentencing, in part leading to the substantial decrease in federal prisoners witnessed over the last few years.<sup>85</sup> However, the BOP undisputedly has powers to reduce prison populations on its own, and has repeatedly come under fire for failing to utilize those powers. Notably, BOP has significant power to recommend reductions in sentences for extraordinary and compelling circumstances.<sup>86</sup> For instance, such sentence reductions can be based on either medical or non-medical conditions that justify a reduction in sentence.

Numerous reports have criticized BOP for failing to utilize this power or develop a standardized system to evaluate extraordinary and compelling circumstances.<sup>87</sup> BOP also has certain authority to release prisoners to residential facilities or home confinement.<sup>88</sup> Additionally, as the BOP’s population continues to grow older, it should have more opportunities to use its discretion to safely reduce sentences and release prisoners.

A recent Office of Inspector General (OIG) Report found that there were 4,340 untimely releases of prisoners from the BOP system between 2009 and 2014.<sup>89</sup> The OIG investigation was stymied by the manner in which BOP tracks untimely releases, so that detailed information on 4,183 of these errors was not available. This is because the BOP’s system for handling mistakes in sentence computations only reviews for BOP staff error. If an untimely release is deemed to have been caused by another agency, then the BOP notes as much, but nothing more. Of the 157 untimely releases that were listed as caused by BOP staff error, the vast majority led to prisoners serving *more* time than they had been sentenced to, and in several cases more than a year.

Federal courts have concluded that the alternatives analysis required by NEPA are not limited to those that the agency may adopt, and must consider reasonable alternatives not within the agency’s competence or legal authority.<sup>90</sup> The OIG made several recommendations that the BOP act in a proactive manner by working with other agencies and authorities to prevent untimely releases, something that the BOP does not do. If the BOP were to deal with the issue of untimely releases in a proactive manner and focus significant resources on the problem, it would be able to reduce capacity utilization at its prisons by ensuring that hundreds of people are not imprisoned past the end of their sentences.

Another OIG Report discussed the aging of the BOP’s prisoner population, and how this situation lends itself to reducing the security classifications of thousands of prisoners.<sup>91</sup> The report also indicated that there is an increasing opportunity for the BOP to reduce its population by providing compassionate and

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<sup>84</sup> Revised Final EIS, Appendix E at E1-37.

<sup>85</sup> See United States Courts *supra* n. 68.

<sup>86</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>87</sup> E.g., U.S. Dept. of Justice, Ofc. of Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program* (Apr. 2013, Rpt. I-2013-006); Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons’ Policies that Result in Over-Incarceration* (Dec. 2008).

<sup>88</sup> 18 U.S.C. § 3624(c).

<sup>89</sup> See U.S. Dept. of Justice, Ofc. of Inspector General, *Review of the Federal Bureau of Prison’s Untimely Releases of Inmates* (May 2016), <https://oig.justice.gov/reports/2016/e1603.pdf> (last visited May 8, 2017).

<sup>90</sup> See *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (DC Cir. 1972)(noting that “the mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion” in an EIS).

<sup>91</sup> See U.S. Dept. of Justice, Ofc. of Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (May 2015) <https://oig.justice.gov/reports/2015/e1505.pdf> (last visited May 8, 2017).

medical release to elderly prisoners.<sup>92</sup> According to this report, prisoners over the age of 50 “were the fastest growing segment” of the population incarcerated by the BOP.<sup>93</sup> These prisoners are also significantly less likely to commit misconducts while imprisoned, which suggests that as the BOP’s population ages, fewer and fewer prisoners should qualify for “high-security” classification. Additionally, the OIG found that by relaxing the eligibility requirements for its compassionate release program -- thereby increasing the number of prisoners released through this program -- the BOP would achieve “significant cost savings... as well as assist in managing the inmate population.”<sup>94</sup>

Finally, the BOP already uses incentives to help prisoners reduce their security risk classification. According to a report by Charles Colson Task Force on Federal Corrections (Colson Report), the BOP reduced the security level classification of “45 percent of those initially classified as high risk” and “21 percent of those initially classified as medium risk” during FY 2014.<sup>95</sup> By expanding its system of incentives and privileges, as recommended by the Colson Report, the BOP could further reduce security risk classifications for prisoners held at high-security facilities, thereby reducing overcrowding at those facilities.

Instead of providing concrete population projections and candidly discussing the use of sentence reduction strategies, security designations or pre-release alternatives to incarceration, the DSEIS simply denies BOP’s power to reduce the federal prison population and acts as if an ever-growing population is a *fait accompli* despite the multi-year trend of fewer federal prisoners. This refusal to discuss alternatives is not the “hard look” that NEPA requires.

The ALC addressed this issue in its past comments regarding failing to account for BOPs ability to reduce its prison population without relying on the development of a new prison. Yet, the BOP remains committed that a new prison in Letcher County is needed to address overcrowding. Nonetheless, the agency “cannot restrict its [environmental] analysis to those ‘alternative means by which a particular applicant can reach its goals.’”<sup>96</sup> The alternatives discussed above could avoid the negative environmental impacts that would arise from either of BOP’s proposed building sites. Accordingly, BOP’s failure to consider such alternatives is grounds for finding the DSEIS insufficient, because the agency’s analysis appears to be little more than “a pro forma ritual.”<sup>97</sup>

#### **iv. The DSEIS Does Not Comply with CEQ Guidelines**

The DSEIS continues to consider the same three alternatives as in its past NEPA documents. This updated document now open for comment still considers the same two build alternatives, this time it just updated data for its preferred alternative to build in Roxana, Ky. These alternatives are still located

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at i.

<sup>94</sup> *Id.* at iii; See also *Compassionate Release and the Conditions of Supervision: Hearing Before the U.S. Sentencing Comm’n* (2016) (statement of Inspector General Michael E. Horowitz) (“[W]e found serious issues with how the [BOP] was running this program and concluded that an efficiently-run compassionate release program combined with modifications to the program’s eligibility criteria could expand the pool of eligible candidates, reduce overcrowding in the federal prison system, and result in cost savings for the BOP.”).

<sup>95</sup> See Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* (January 2016) <http://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf> (last visited May 8, 2017).

<sup>96</sup> *Simmons v. U.S. Army Corps of Eng’rs.*, 120 F3d 664, 669 (7th Cir. 1997).

<sup>97</sup> See *Southern Utah Wilderness Alliance v. Norton*, 237 F.Supp.2d 48, 52 (D.D.C. 2002) (“Considering environmental costs means seriously considering alternative actions to avoid them”).

in the same geographic region that has been ecologically and economically compromised for decades by the corporate coal mining industry.

CEQ regulations, however, require the agency “. . . to identify and assess reasonable alternatives to the proposed action *that will avoid or minimize adverse effects* of these actions on the quality of the human environment.”<sup>98</sup> CEQ guidelines further state that the alternatives analysis is also required to:

- “Include the alternative of no action”
- “...explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated”
- “Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits”
- “Include reasonable alternatives not within the jurisdiction of the lead agency”
- “Identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference”
- “Include appropriate mitigation measures not already included in the proposed action or alternatives.”<sup>99</sup>

As such, the BOP’s DSEIS does not even come close to NEPA compliance because it continues to uphold BOP’s perspective that the agency needs to *only* assess two alternatives (besides its “alternative of no action”) despite the fact that these alternatives will have nearly identical ecological impacts.

There remains no discussion of the possibility of a reasonable alternative that would include building a facility that does not have the same potential health impacts (discussed in greater detail below) to inmates, their families and prison staff, that wouldn’t require the extensive development of utility infrastructure, and wouldn’t be located in such a remote and undeveloped area.

In addition, there is no discussion of a reasonable alternative “not within the jurisdiction of the lead agency.” Within this vein, BOP does not discuss or present proof that it explored the possibility of purchasing land from another federal agency.

Consequently, ALC finds the BOP’s assertion disingenuous that there is not one other piece of property in the mid-Atlantic, besides the two properties in Letcher County to build this new prison and that could be considered within this document’s alternatives section.

*Instead the agency should be more forthright in its reasoning to restrict its alternatives discussion to these sites in Letcher County. The reality is that the selection of these sites was not about finding a reasonable location to site a federal prison, but rather to appease the area’s Congressional Representative – Mr. Hal Rogers – as well as the Letcher County Planning Commission – a private organization despite its public sounding name. Mr. Rogers and the Letcher County Planning Commission (LCPC) openly admit to soliciting the BOP to build a prison in this reason. While the support of these individuals for this project is (dis)heartening, it alone is not sufficient or reasonable under NEPA.*

**D. The DSEIS Fails to Consider Environmental Health Impacts on Prisoners, their families and Staff from the Preferred Site**

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<sup>98</sup> 40 C.F.R. § 1500.2(e)(emphasis added).

<sup>99</sup> See 40 C.F.R. § 1502.14.

NEPA requires that an EIS address impacts on the “human environment,”<sup>100</sup> and agencies are required to “comprehensively” interpret the phrase “human environment” to “include the natural and physical environment and the relationship of people with that environment.”<sup>101</sup>

NEPA explicitly references human health, and covers all people—there is no “prisoner exclusion.” Thus, the BOP must consider potential health impacts on prisoners (as well as their families and prison staff) as part of the EIS. This is especially true in light of BOP’s legal responsibility to provide for the health and welfare, and constitutional conditions of confinement for the prisoners in its custody.<sup>102</sup>

ALC has raised this issue in prior comments, and yet the BOP continues to refuse to comply with NEPA by conducting a *comprehensive analysis* of the proposed activity’s impacts on the human health of the inmates, their families and prison staff, all individuals who will be living, visiting and working at the prison.

Below are immediate concerns of serious potential impacts to the human environment that must be addressed by the BOP in its final EIS:

**i. Mining in the Area**

The DSEIS does not directly address how mining activity in the local area will impact the human environment created by the prison project. There are five active coalmines in proximity to the preferred Roxana site (all of which are within the North Fork River Watershed.<sup>103</sup> In fact, at least one active coalmine operates just down the road from the Roxana site where BOP wishes to build its prison (see below graphic on following page).

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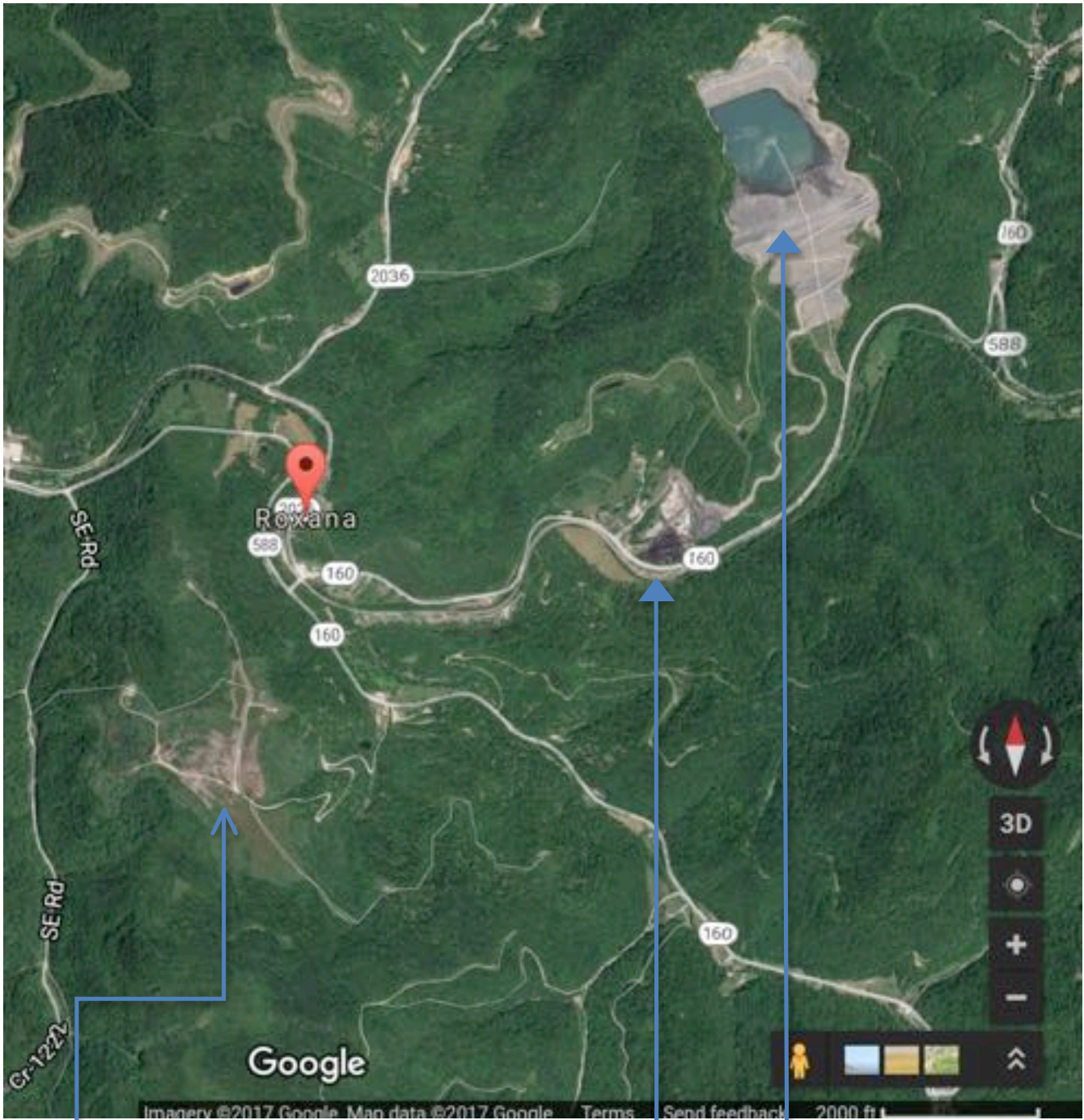
<sup>100</sup> 42 U.S.C. § 4332(2)(C).

<sup>101</sup> 40 C.F.R. § 1508.14.

<sup>102</sup> See Kelsey D. Russell, *Cruel and Unusual Construction: The Eighth Amendment as a Limit on Building Prisons on Toxic Waste Sites*, 165 U. PA L. REV. 741, 751 (2017)(The “Supreme Court [has] ushered in the modern jurisprudent of inmates’ rights, making it clear that conditions of confinement were subject to Eighth Amendment scrutiny in a line of cases starting with *Estelle v. Gamble*.” (quotations omitted); also 18 U.S.C. § 4042(a)(2), (3) (statutory responsibilities of the bureau).

<sup>103</sup> See DSEIS at 3-27.





Proposed BOP Prison Site in Roxana, Ky

Active Coal Mining Operation

Coal Slurry Pond

Scientific literature and past events in Appalachia’s coal country demonstrate that there are clear potential health impacts and risks from living within the close proximity of coalmines.

For example, a 2011 study of Appalachian localities found that even after controlling for socioeconomic factors, residents of counties with mountaintop removal mining suffered significantly

higher rates of poor physical and mental health than other Appalachian communities.<sup>104</sup> Another study concluded that chronic cardiovascular disease mortality is more prevalent in mountaintop removal areas.<sup>105</sup> A water-quality study published in 2011 found increased concentrations of selenium, sulfate, magnesium and other inorganic solutes in rivers downstream from active and reclaimed mining sites.<sup>106</sup> And a 2010 study of coal mining counties in West Virginia found that, even after controlling for cigarette smoking, cancer mortality rates increased for residents who lived near mining operations.<sup>107</sup>

In addition, it is documented that prisons located near other coal-related processing facilities have resulted in widespread prisoner health problems including respiratory illnesses, gastrointestinal problems, dermatological conditions and thyroid disorders.<sup>108</sup>

In the time that ALC has begun to submit comments to the BOP's various NEPA documents, four additional region-specific scientific health studies additional to those mentioned above have been brought to our attention.<sup>109</sup>

*Despite this substantial body of scientific evidence, the DSEIS still completely fails to account for the possible health impacts on inmates, their families and prison staff if this prison is built within such close proximity to active coalmines.*

### iii. Water Quality

The EIS and DSEIS both state that preferred site would receive water from the Letcher County Water & Sewer District ("LCWSD").<sup>110</sup> This DSEIS provides little assurance that the BOP can provide safe drinking water to the human environment created by this project.<sup>111</sup> Since the first announcement of BOP's proposed prison, it has finally been learned that water to the preferred site would be purchased from the Knott County Water and Sewer District ("KCWSD"), and that the utility itself will be expanding water service to the eastern property boundary.<sup>112</sup>

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<sup>104</sup> Keith J. Zullig & Michael Hendryx, *Health-Related Quality of Life Among Central Appalachian Residents in Mountaintop Mining Counties*, 101 AM. J. OF PUB. HEALTH 848 (May 2011); see also Michael Hendryx, *Mortality from Heart, Respiratory, and Kidney Disease in Coal Mining Areas of Appalachia*, 82 INT'L ARCHIVES OF OCCUPATIONAL ENVTL HEALTH 243 (2009).

<sup>105</sup> Laura Esch & Michael Hendryx, *Chronic Cardiovascular Disease Mortality in Mountaintop Mining Areas of Central Appalachian States*, J. OF RURAL HEALTH (2011), at 1-8.

<sup>106</sup> T. Ty Lindberg, et al., *Cumulative Impacts of Mountaintop Mining on Appalachian Watershed*, 108 PROC. OF THE NAT'L ACAD. OF SCIENCES 20929 (Dec. 27, 2011).

<sup>107</sup> Michael Hendryx, Evan Fedorko & Andrew Anesetti-Rothermel, *A Geographical Information System-Based Analysis of Cancer Mortality and Population Exposure to Coal Mining Activities in West Virginia, United States of America*, 4 GEOSPATIAL HEALTH 243 (2010).

<sup>108</sup> Dustin S. McDaniel, et al., *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette* (Feb. 2015).

<sup>109</sup> The following additional health-related studies indicate regional issues which should have been taken into consideration in regard to cumulative health impacts, and specifically potential impacts to prisoners:

(1) Exploring geographic variation in lung cancer incidence in Kentucky using a spatial scan statistic: elevated risk in the Appalachian coal-mining region, 2011; (2) Concentrations of arsenic, chromium, and nickel in toenail samples from Appalachian Kentucky residents, 2011; (3) Adult tooth loss for residents of US coal mining and Appalachian counties, 2012; (4) A Population-based Case-control Study of Lung Cancer in Appalachian Kentucky: The Role of Environmental Carcinogens, 2014, ongoing. [See Figures 5 and 6 on p. 30 of this document].

<sup>110</sup> See generally DSEIS at § 3.5.

<sup>111</sup> See DSEIS at 3.5.2.1 (stating "[t]he LCWSD has assured the Bureau that the Knott County Water and Sewer District, the supplier of potable water to the LCWSD for the Roxana site, has resolved past water quality issues and should not have further violations of drinking water quality standards.").

<sup>112</sup> See DSEIS at 3.5.1.1.

In the same report, LCWSD explains that water quality is threatened by numerous activities including “roads and bridges; railroad; mining activities, oil and gas wells, untreated sewage; and solid waste.”<sup>113</sup> In addition, as discussed below, LCWSD purchases water from the neighboring Knott County Water & Sewer District, and in 2012 that district was twice found in violation of applicable drinking water standards for turbidity exceedance.<sup>114</sup>

While the BOP promises that Knott County has addressed its water problems, as November 18, 2016, the *New York Times* ran an op-ed that reported a

‘do not drink the water’ warning is above every drinking fountain in the Knott County Opportunity Center in Kentucky, which houses a community college, a Head Start program and the county library — and that the warning has been necessary for a decade. . . Brent D. Hutchinson, who directs the Hindman Settlement School in Knott County, said of the water: ‘Some of it is brown. Some of it is yellow. Some of it smells like sulfur. We only drink filtered or bottled water in my house, just in case. At the school, we still serve only filtered or bottled water to our students and guests.’<sup>115</sup>

In light of such recent reporting, BOP’s promise that the prison’s water will be safe appears disingenuous and without statistical or anecdotal data to support its conclusion.

Without more information about the water supply and abilities of KCWDS to provide safe water to the preferred site, any final document generated by the BOP will fail to provide the “thoughtful and probing reflection of the possible impacts associated with the proposed project” as required under NEPA.<sup>116</sup>

In addition, this DSEIS fails to incorporate the negative impacts that the region’s mining industry has had on local communities’ drinking water. For instance, a December 2008 dike failure at TVA's Kingston Fossil Plant resulted in 5.4 million cubic yards of coal ash cascading into the Emory and Clinch rivers. The breach released a slow-moving wave of toxic sludge and polluted water into the river in what remains the nation's largest coal-ash spill in history.<sup>117</sup> Another example is the January 2014 chemical spill from a coal processing facility in West Virginia that resulted in prisoners at a county jail being forced to drink contaminated water long after other area residents in the surrounding region were relieved with clean water deliveries.<sup>118</sup>

Lastly, in October 2000 coal slurry occurred in Martin County, Kentucky. There the bottom of a coal sludge impoundment owned by Massey Energy in Martin County broke into an abandoned underground mine below. The slurry came out of the mine openings, sending an estimated 306 million gallons of sludge down two tributaries of the Tug Fork River. By morning, Wolf Creek was oozing with the black waste; on Coldwater Fork, a ten-foot (3 m) wide stream became a 100-yard (91 m) expanse of thick sludge.

According to the EPA, the “spill” was 30 times larger than the Exxon Valdez oil spill (12 million gallons) and one of the worst environmental disasters ever in the southeastern United States, comparable to the TVA Kingston Fossil Plant coal ash spill in 2008. The spill was over five feet deep in places and covered nearby residents' yards. The spill polluted hundreds of

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<sup>113</sup> *Id.*

<sup>114</sup> LCWSD, Water Quality Report for 2013.

<sup>115</sup> Ron Rash, *Appalachia's Sacrifice*, THE NEW YORK TIMES (Nov. 18, 2016), [https://www.nytimes.com/2016/11/19/opinion/appalachias-sacrifice.html?\\_r=0](https://www.nytimes.com/2016/11/19/opinion/appalachias-sacrifice.html?_r=0).

<sup>116</sup> *Comm. to Preserve Boomer Lake Park v. Dept. of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993).

<sup>117</sup> “Five years after coal-ash spill, little has changed,” USA Today, Dec. 22, 2013.

<sup>118</sup> *The Untold Story Of What Happened At An Overcrowded West Virginia Jail After The Chemical Spill*, THINK PROGRESS, May 21, 2014.

miles of the Big Sandy and Ohio Rivers. The water supply for over 27,000 residents was contaminated, and all aquatic life in Coldwater Fork and Wolf Creek was killed. Heavy metals were found in the sludge, including mercury, lead, arsenic, copper and chromium.<sup>119</sup>

By siting this prison at the preferred site, the BOP, without a documented reason, is unnecessarily exposing the inmate population in its custody to the risk of enduring the ramifications of such accidents. NEPA requires agencies to directly address potential impacts—although the agency may opine on the probability of negative impacts, it is required to “prepare a worst case analysis” and indicat[e] to the decisionmaker the probability or improbability of its occurrence. The agency may not omit the analysis only because it believes that the worst case is unlikely.”<sup>120</sup> *Consequently, by not addressing such possible impacts should such a coalmining disaster impact the water supply for the Roxana prison, any NEPA document produced by the BOP will not comply with statute.*

### **iii. The Preferred Site**

As discussed in its past comments, ALC has expressed concerns (with supporting documentation) that the past mining activity at the preferred site will negatively impact the health of inmates, their families that visit them, and prison staff. ALC continues to assert that BOP has not taken a “hard look” at this impact or the cumulative impacts associated with this concern. A more robust analysis would require gathering data from other similarly situated prisons, including but not limited to Wallens Ridge State Penitentiary (Va.), Red Onion State Penitentiary (Va.) and SCI Fayette (Pa.). These facilities are built near existing coal operations, and Wallens Ridge and Red Onion are built on former MTR sites. A study that compares health data of these inmates and staff to those of facilities not in the heart of coal country is needed before any final decision about the siting of this facility.

ALC believes that a “site investigation trip memo” exists for the Roxana site that discusses these types of concerns based on a reference in a past NEPA document of one that exists concerning the Payne Gap site.<sup>121</sup> *ALC requests that the Payne Gap “site investigation trip memo,” as well as one for the Roxana site be made available to the public with the release of the Final Supplemental EIS as required by 40 C.F.R. § 1502.21 (“No material may be incorporated [into an EIS] by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment”).* These site memos should be made available prior to the finalization of any NEPA document.

Indeed, the existence of a site investigation memo proves that qualified professionals have expressed concern about the dangers posed by former mining activity. BOP has subsequently published the EIS, a REIS and now a DSEIS, but still ignores this contrary viewpoint. It provides no hard data or analysis that suggests the sites past mining activity will not have a negative impact on the proposed facility. As federal courts have explained, the BOP “may not omit the analysis only because it believes that the worst case is unlikely.”<sup>122</sup>

### **iv. Radon**

The REIS states that the EPA classifies Letcher County as having potential for radon intrusion.<sup>123</sup> This

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<sup>119</sup> *Martin County Sludge Spill*, SOURCEWATCH.ORG, [http://www.sourcewatch.org/index.php/Martin\\_County\\_sludge\\_spill](http://www.sourcewatch.org/index.php/Martin_County_sludge_spill).

<sup>120</sup> *Southern Oregon Citizens against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983)(citations and quotations omitted).

<sup>121</sup> EIS, Appendix D, at p.10.

<sup>122</sup> *Southern Oregon Citizens against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983)(citations and quotations omitted).

<sup>123</sup> REIS § 4.12.1.3.

may be from the coal mining and/or gas extraction under and surrounding both proposed sites. There is no indication in either the REIS or this newly released DSEIS as to what the radon levels are at the preferred site in Roxana, KY.

The failure for the BOP to do any testing at the preferred site for radon is disturbing considering that the agency admits that Letcher County has a predicted average indoor radon screening level between 2 and 4 picocuries per liter (pCi/L).<sup>124</sup>

BOP must present evidence from testing that inappropriate levels of radon do not exist at the site prior to the finalization of any NEPA document.

The likelihood of the presence of this hazard is related to siting a facility on disturbed soil from a mining site, which would not be present if not for the selected location chosen as a preferred alternative. As such, the possibility of radon exposure buttresses ALC's argument that the BOP's alternatives analysis must include the possibility of siting a prison in a non-mining location.

#### **v. Arsenic**

BOP's Phase II Environmental Site Assessment discovered elevated levels of arsenic in the soils at the proposed construction site.<sup>125</sup> The levels of arsenic encountered were many times above Environmental Protection Agency (EPA) Regional Screening Levels (RSA).<sup>126</sup> As discussed further in the attached letter as Exhibit A from Daniel Gold, the Phase II ESA used an erroneous method for calculating background levels in order to dismiss the elevated arsenic discovered in its soil samples and determine that no further investigation of soil-arsenic levels was needed at the site.<sup>127</sup> Arsenic is a carcinogen, with significant negative health effects possible with very small amounts, depending on duration of exposure.<sup>128</sup> Given that construction of this project plans to create hundreds of tons of air emissions, moving millions of tons of potentially high-arsenic laden mine spoils, it is necessary that the BOP conduct a thorough soil survey of the site to establish whether arsenic levels present a human-health hazard and what if any mitigation measures must be taken before disturbing the site.<sup>129</sup>

#### **vi. Environmental Justice**

The proposed prison facility is a combined residential and industrial use of land comprised of massively warehousing federal inmates. The prison will greatly increase demand of local utility resources, including a massive quantity of water use and sewage discharge, along with a diesel-burning power-generating facility and a UNICOR factory.

Under the Environmental Justice guidelines of NEPA,<sup>130</sup> the people most likely to be housed in this BOP prison would meet the criteria to be considered an Environmental Justice community.

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<sup>124</sup> *Id.*

<sup>125</sup> RFEIS, Appendix G, Phase II Environmental Site Assessment for Proposed United States Penitentiary and Federal Prison Camp, Executive Summary (Feb. 2016).

<sup>126</sup> *Id.* at 13-15.

<sup>127</sup> Exhibit B, Letter of Daniel Gold

<sup>128</sup> Agency for Toxic Substances and Disease Registry (ATSDR). 2007. Toxicological profile for Arsenic. Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

<https://www.atsdr.cdc.gov/ToxProfiles/TP.asp?id=22&tid=3> (last visited May 8, 2017).

<sup>129</sup> DSEIS at ES-vii, §3-10 to 3-11.

<sup>130</sup> "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (Executive Order 12898) directs each Federal Agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs,

The racial demographics and socioeconomic status of prisoners projected to populate the facility can be reasonably based on the demographics of other BOP facilities across the country. Racial minorities are disproportionately represented in the nationwide prison population to such an extreme extent that incarceration trends have been referred to as the new Jim Crow.<sup>131</sup>

The BOP reports 41% percent of its population to be of non-white “minority” status,<sup>132</sup> whereas this racial demographic only makes up approximately 25% of the entire U.S. population.<sup>133</sup>

While mass incarceration in its current form represents an environmental justice dilemma that can stand alone, there have been several additional incidents in recent years that point to some of the unique health and safety hazards related to environmental conditions in Appalachian coal mining regions as previously mentioned. The DSEIS continues to ignore the probability that environmental incidents could impact inmates housed at the prison, their families who visit, and the staff who work in the prison.

In response to HRDC’s Draft EIS Comment, the BOP simply stated that it “does not concur with the assertion that federal inmates of mixed background (as to ethnicity, race and income) to be housed in the proposed facilities constitute either a minority or low income population for the purposes [of] EO12898.”<sup>134</sup>

ALC presented similar comments in its submission about the FEIS and REIS. However, the BOP maintains its position with no assessment of the anticipated population of incarcerated people who will fill the proposed facility.

In turn, ALC renews its position that the above described health-related issues should be additionally viewed through the NEPA-required Environmental Justice analysis of EO12898 because the demographic of prisoners who are from communities of color and disproportionately low-income. *Any final SEIS that excludes such a discussion will not comply with NEPA.*

## **F. BOP’s Failure to Discuss Mitigation**

As detailed in the preceding sections, the proposed prison siting will likely result in adverse environmental health impacts for the hundreds of residents of the proposed facility, their family members who visit, and staff who operate the prison. Federal agencies must use all practicable means to restore and enhance the quality of the environment and to avoid or minimize any possible adverse environmental effects of their actions.<sup>135</sup> Mitigation includes avoiding the adverse impacts altogether, minimizing impacts by limiting the degree or magnitude of the action, rectifying the impact by

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policies, and activities on minority populations and low-income populations.” In light of Executive Order 12898, the Council on Environmental Quality’s (CEQ) issued Environmental Justice: Guidance Under the National Environmental Policy Act (December 1997).

<sup>131</sup> See NEW YORK REVIEW OF BOOKS (Mar. 2011)(stating “[n]ow and then a book comes along that might in time touch the public and educate social commentators, policymakers, and politicians about a glaring wrong that we have been living with that we also somehow don’t know how to face. The New Jim Crow: Mass Incarceration in the Age of Colorblindness by Michelle Alexander is such a work.”).

<sup>132</sup> Current BOP statistics do not include specific numbers for Latino or Hispanic prisoners (*see* [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp)), though they do report 19% of BOP prisoners are citizens of Latin American countries. A 2010 report stated that 33% are “Hispanic from any race.”

<sup>133</sup> U.S. Census Bureau, “The White Population 2010.”

<sup>134</sup> Final EIS, Appendix E, p.43.

<sup>135</sup> 40 C.F.R. §§ 1500.2(f), 1502.14(f) (requiring alternatives section to include all appropriate mitigation measures), 1502.16(h) (requiring the environmental consequences section to include a discussion of the means to mitigate adverse environmental impacts).

repairing, rehabilitating or restoring the affected environment, reducing or eliminating the impact over time, and compensating for the impact by replacing or providing substitute resources or environments.<sup>136</sup>

*The DSEIS continues to ignore mitigation with respect to any health-related impacts for inmates, their families and prison staff. The most obvious shortcoming of the DSEIS is the lack of any discussion of potential environmental health impacts that arise from housing over a thousand people at a reclaimed mining site. Without identifying the health risks, the BOP is in no position to propose a meaningful mitigation plan.*

### **G. The Preferred Site Selection Violates the Eighth Amendment**

Under the Eighth Amendment to the United States Constitution, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>137</sup> Courts assess Eighth Amendment claims through the following a two-prong assessment: 1) there must be an objective showing that a condition is sufficiently serious so as to deprive a prisoner “minimal civilized measure of life’s necessities”<sup>138</sup>; and 2) there must be a subjective showing that the deprivation is the result of deliberate indifference on the part of prison officials—that officials both knew of and disregarded “an excessive risk to inmate health or safety.”<sup>139</sup>

ALC contends that plethora of information that it and other concerned citizens and organization have provided to BOP demonstrate the unjustifiable health risks that inmates will face if housed at the preferred site in Roxana, KY. Forcing an individual in your custody to reside in a former mine and amongst active mines unconstitutionally and unnecessarily subjects inmates to health risks.

While there may be differing opinions as to when an Eighth Amendment claim by an inmate is ripe for review, without doubt at this point moving forward with building this prison demonstrates BOP’s and the US Government’s subjective deliberate indifference to federal inmates and their right to constitutional conditions of confinement.

### **H. The EIS Does Not Adequately Discuss Broader, External Environmental Impacts**

#### **i. Potable and Wastewater**

The DSEIS still contains incomplete information concerning wastewater treatment at the preferred site.

As to the Roxana site, the BOP has changed its decision to use LCWSD’s Whitesburg wastewater treatment plant for the prison’s wastewater. The DSEIS has now announced that the LCWSD will be constructing a new wastewater facility in Roxana.<sup>140</sup> The citation for this announcement is simply a reference to the personal communication with Mark Lewis, the General Manager of the Letcher County Water and Sewer District<sup>141</sup> and a personal communication with Alan Bowman of Bell Engineering.<sup>142</sup>

This drastic change requires more detailed information to be disclosed to the public. Who will bear the burden of financing the construction of this new wastewater facility?

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<sup>136</sup> 40 C.F.R. § 1508.20.

<sup>137</sup> U.S. CONST. amend. VIII.

<sup>138</sup> See *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

<sup>139</sup> See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

<sup>140</sup> DSEIS at 3-21.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 6-6.

In addition, the DSEIS completely omits any mitigation discussion as to how the facility will implement water conservation measures. More troubling, however, is the DSEIS omission of any discussion of cumulative impacts related to this new wastewater treatment plant that will provide services to the Roxana site. NEPA requires that the BOP consider the cumulative impacts (including but not limited to land use, water quality, endangered species, greenhouse gas emissions, and noise).

There remains no discussion as to how construction activity to expand potable water service will cumulatively impact the project's overall greenhouse gas emissions.

Lastly, there is no discussion as to the cumulative impacts related to the increased energy needs for the potable and wastewater utilities to provide services to the preferred alternatives.

In the United States, domestic and industrial wastewater treatment is cited as the sixth highest contributor to atmospheric CH<sub>4</sub> and human sewage is cited as the fourth highest contributor to atmospheric N<sub>2</sub>O. As such, many regulators and rate payers are turning their attention to GHG's from this sector and anticipate future emission limits that will impact some portion of the water industry.<sup>143</sup>

*Without a more robust discussion about such cumulative impacts and information about the construction of a new wastewater treatment facility in Roxana, any final NEPA document will be deficient.*

## **ii. Endangered Species: Indiana Bat, Northern Long-Eared Bat and Gray Bat**

ALC renews and incorporates all of its past concerns regarding the three endangered bat species that will be impacted by this project.

Of greatest concern is the fact that BOP has conducted three endangered species assessments related to this project, and yet none of them have been released to the public for consideration and comment during the NEPA process.<sup>144</sup> In order for the BOP to comply with NEPA, *it must release these underlying documents* that it is using to make its ESA findings. The public is entitled ample time to review these documents and provide comment to the agency about their findings.

In addition, ALC remains concerned that the habitat assessments have only included the immediate site where BOP intends to build. However, ALC asserts that habitat assessments must also include nearby environments where these endangered bat species may live, and would probably be harassed and/or taken due to construction of a new facility.

ALC attaches to these comments as Exhibit B, a habitat assessment conducted on a property directly adjacent to the proposed site. The acoustic survey detected Indiana and Northern Long-Eared Bats.<sup>145</sup> Consequently, it is highly probable that these bat species residing on property adjacent to the prison will be negatively impacted by the prison's construction. The Biological Opinion needs to account for these impacts, and BOP's mitigation efforts must reflect such impacts.

Lastly, ALC notes that BOP has adjusted the number of impacted endangered species habitat acreage from 93 to 121.<sup>146</sup> This increase in number loss will greatly disturb Indiana bats, which have a tendency to return repeatedly to the same area. They may use the same roost trees in successive years

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<sup>143</sup> Robyn McGuckin et al. *Toolbox for Water Utility Energy and Greenhouse Gas Emission Management* (2013), available at <http://www.waterrf.org/PublicReportLibrary/4224.pdf> (last visited May 7, 2017).

<sup>144</sup> See DSEIS at 7-1 and 7-2 (listing a 2015 Habitat Survey, a 2016 Habitat Assessment, and a 2017 Biological Assessment completed by Copperhead Environmental Consulting).

<sup>145</sup> ALC notes that this habitat survey was turned over the Kentucky Field Office of US Fish and Wildlife, and fully expects that it will be utilized in developing the agency's biological opinion.

<sup>146</sup> See DSEIS at 3-40.



as long as they remain standing, and are known to move from one roost tree to another if the previously used tree is no longer useable.<sup>147</sup> Nevertheless, data from Kentucky found both roost tree and roost site fidelity with these bats.<sup>148</sup> Specific roost trees may be used repeatedly by a colony for several years until the trees are no longer available, but the colony will continue to use the general area for years.

Considering site fidelity of Indiana Bats, ALC contends that a summer survey *must be conducted* to identify particular roost trees for this species. From there, an assessment must be done to determine if these roost trees can be spared during the construction process.

In turn, the habitat loss of 121 acres is significant. BOP is under a duty to aggressively mitigate these impacts, and is required to disclose for public comment more than just bullet points of its mitigation plan. More data needs to be gathered about the summer habitat patterns of endangered bats at the preferred site. And the public is entitled to know the details of all such planned mitigation efforts.

### iii. Community Facilities and Public Services

While the EIS does review impacts on local law enforcement agencies, social service providers and healthcare facilities, it does not contain a thorough description of some of the most significant impacts. In turn, ALC renews and reincorporates past comments concerning this issue. Local law enforcement agencies are often called upon to assist in responding to large-scale incidents at federal facilities. The REIS cursorily states local law enforcement agencies are “willing to discuss” a memorandum of understanding on interagency coordination, and that local officials “indicated” that there would be no impact from the proposed project.<sup>149</sup> There is no further discussion about a MOU in the DSEIS, and the only mention of this issue is that there will be “less than significant impacts.”<sup>150</sup>

These vague assurances do not provide sufficiently definite information. To discharge its duty under NEPA, BOP should answer obvious questions regarding the potential impact of the proposed facility on local law enforcement agencies, particularly by discussing historical rates of facility-related offenses, riots, escapes and prosecutions at BOP-operated prisons.

Court systems are also impacted by local prison-related caseloads. Not only are facility-based criminal charges tried in local courts, but prisons also bring related civil litigation, such as civil rights complaints, malpractice actions against prison healthcare providers, and negligence or wrongful death claims against prison employees. The REIS must discuss historical rates of prison related criminal and civil court filings for comparable BOP facilities. In addition to total filings, the BOP should provide additional information on case dispositions and the resources necessary for local courts, prosecutors and public defenders to handle such cases.

The DSEIS continues to fail to address the impact of job related stress among correctional officers, and the impact that such stress will have on medical and social service providers in the communities surrounding the alternative sites. For example, a 2009 New Jersey State Police Task Force Study (PDF) found that corrections officers have a suicide rate that is *twice* as high as the rate of police officers and the general population.<sup>151</sup> Correctional officers have a higher rate of divorce than the general

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<sup>147</sup> U.S. Fish & Wildlife Serv., Recovery Plan for the Indiana Bat (1983); James E. Gardner, et al., *Summer Roost Selection and Roosting Behavior of Myotis sodalis (Indiana Bat) in Illinois* (Feb. 1991).

<sup>148</sup> Mark W. Gumbert, et al., “Roost Fidelity in Kentucky,” *The Indiana Bat: Biology and Management of an Endangered Species* (Allen Kurta & Kim Kennedy, eds.) (2002).

<sup>149</sup> See e.g. REIS § 4.4.2.1.

<sup>150</sup> DSEIS at 1.5.

<sup>151</sup> See Dr. Michael Pittaro, *Suicide Among Corrections Officers: It’s Time for an Open Discussion* (Jan. 5, 2015), <http://inpublicsafety.com/2015/01/suicide-among-corrections-officers-its-time-for-an-open-discussion/>.

population.<sup>152</sup> As well, studies show that correctional officers commit high rates of domestic violence.<sup>153</sup> In 2011, an anonymous survey conducted with correctional officers by Caterina Spinaris showed that 34 percent of them met the criteria for PTSD.<sup>154</sup>

What programs (if any) are available for employees in BOP facilities? How are these programs evaluated and what are their success rates? What external resources are available for prison staff and their families?

To take NEPA's required "hard look" at the human environment, the EIS must answer these questions and account for their impacts on the human environment.

#### **v. Additional Socioeconomic Impacts**

In accordance with NEPA's requirement that BOP assess socioeconomic impacts as part of the environmental review, ALC reiterates its concerns regarding electoral accuracy as a socioeconomic impact of great concern which has not been addressed in the DSEIS.

Specifically, BOP should address the census crediting of incarcerated persons from all over the country to an impoverished, predominately white rural congressional district in order to enhance the weight of a vote in that district, which dilutes all other votes in the state. While incarcerated populations are disproportionately Black and Latino, most prisons are built in disproportionately white areas. Using Black and Latino prisoners to pad the populations of white legislative districts dilutes minority voting strength statewide.<sup>155</sup>

**In response to HRDC's Draft EIS Comment:** In Appendix E, p.50, the BOP states, "[w]ith regard to potential dilution or other voting impacts, the incarceration of non-voting inmates at the proposed facility, regardless of where they come from, is believed to be a less than significant impact." [Emphasis added].

ALC again raises this because it disagrees with this opinion.

#### **vi. Lilly Cornett Woods**

The REIS only once references the Lilley Cornett Woods (LCW).<sup>156</sup> The Department of Interior also fails to reference the LCW. Subsequently, the REIS fails to conduct any environmental assessment as required under NEPA as to how the BOP's proposed action will impact the LCW -- a national registered landmark.

The Division of Natural Resources at Eastern Kentucky University describes the LCW as

Located in Letcher County in the southeastern corner of Kentucky, Lilley Cornett Woods (LCW) encompasses 554 acres of mixed mesophytic forest. A portion of the total acreage, 252 acres, is designated as "old-growth" forest; a forest which has not undergone any manmade changes in 150 years. Biodiversity of plants and animals abound at LCW. There are over 530

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<sup>152</sup> See *Corrections Officers*, <http://americanaddictioncenters.org/rehab-guide/corrections-officers/>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> "The way the Census Bureau counts people in prison creates significant problems for democracy and for our nation's future. It leads to a dramatic distortion of representation at local and state levels, and creates an inaccurate picture of community populations for research and planning purposes." Prison Policy Initiative's Prison Gerrymandering Project. see <http://www.prisonersofthecensus.org/impact.html>

<sup>156</sup> See REIS at 5.1.1

species of flowering plants and an estimated 700 breeding pairs of birds present. In addition, a variety of small mammals, amphibians and reptiles call Lilley Cornett Woods home.

Due to the unique nature of this ecosystem, it is an ideal location for ecological and environmental research. Thirty-six completed studies have been documented, ranging from small animal surveys to hydrological investigation and archeological assessments of rock shelters. One of the most important investigations has been the decadal forest composition research which has taken place over the past 40 years ... LCW is a U.S. Department of the Interior registered national landmark and a registered natural area of the Society of American Foresters. Also, LCW is a designated State Wildlife Refuge.<sup>157</sup>

This is a very significant oversight in regard to wildlife impacts and recreational/research-oriented use in the area of impact should the proposed prison be built. In particular those short-term, long-term, and cumulative effects related to increased traffic, as well as noise and light pollution – from building a large federal prison in such close proximity to the LCW.

ALC recognizes that the DSEIS preliminarily indicates that noise and light from the project would not impact Lilley Cornett Woods. However, ALC contends that the DSEIS references to these forms of pollution do not meet NEPA's "hard-look" requirement because they are cursory.

Further, the DSEIS does not address how increased traffic and increased vibration will impact surrounding wildlife, including that which utilizes LCW.

#### **vii. Failure to Address Energy Needs**

The DSEIS still does not address the energy needs of the facilities. What will be the source of the facility's electrical needs, and what mitigation measures will the prison employ to reduce its greenhouse gas emissions.

#### **I. The BOP Has Not Complied With § 106 of the National Historic Preservation Act**

ALC believes that within the definition of the NHPA that the preferred site contains properties that are eligible for listing on the National Register of Historic Places. At the minimum these properties include the possibility of different family cemeteries on the property. *The BOP references its consultation process in the DSEIS, but has yet to make any of its documentation available to the public for review, which it must do prior to any final decision.*

#### **J. Underlying Documents Must Be Released**

ALC respectfully asks that the following documents be released for the public to fully consider before the final supplement environmental impact statement:

- Cardno's Conflict of Interest Statement
- Copperhead Environmental Consulting's 2015 Desktop Analysis and Habitat Survey for the Indiana Bat, Gray Bat and Northern Long-eared Bat
- Copperhead Environmental Consulting's 2016 Habitat Assessment for the Indiana Bat, Gray Bat, and Northern Long-eared Bat for the Proposed U.S. Penitentiary and Federal Prison Camp

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<sup>157</sup> See <http://naturalareas.eku.edu/lilley-cornett-woods-appalachian-ecological-research-station>.

- Copperhead Environmental Consulting’s 2017 Biological Assessment Potential Effects on Species Under the Jurisdiction of the U.S. Fish and Wildlife Service from Construction and Operation of a Proposed U.S Penitentiary and Federal Prison Camp Letcher County, Kentucky.
- All Consultation Documents Related to §106 of NHPA
- All Communication with the Letcher County Planning Commission
- All Communication and documents related to mitigation efforts with the Imperiled Bat Conservation Fund
- All documents related to the required property acquisition for the project, including expected cost for land acquisition.

Considering these documents have not yet been released to the public, ALC respectfully requests that the public be granted more than 30 days to comment when the final supplemental EIS is released.

#### **IV. CONCLUSION**

After reviewing proposed site alternatives presented, assessing alleged need for the project and analyzing the benefits intended to mitigate impacts, ALC submits the No Action Alternative is the only responsible option presented in the DSEIS.

The BOP wrongly asserts that the No Action Alternative would leave existing USPs overcrowded and that it is “not considered a viable alternative.” The population numbers presented by ALC clearly presents data that affirms the opposite. Addressing the larger issue of over-incarceration and over-classification would be a more time-efficient and cost-efficient way to address overcrowding than providing a short-term Band-Aid solution by building this facility in a location that has suffered long-term environmental degradation and which should not have to contend with a prison at a time when ecological and economic health is a regional priority.

The BOP should not only consider No Action as a viable option, but as the preferred option for this site, based on the BOP’s research presented in the DSEIS and all prior NEPA documents.

In conclusion, for the reasons stated herein, the DSEIS does not contain a detailed discussion of environmental impacts as required by law, and therefore the proposed alternatives of this project cannot proceed until BOP issues an EIS that complies with applicable law.

If you have questions or require additional information, please do not hesitate to contact me.

Sincerely,



Emily Posner  
Attorney at Law