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Sent via email IGaston@bop.gov

October 28, 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
Final Supplemental Revised 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") and the Letcher Governance Project ("LGP") concerning the final supplemental revised environmental impact statement ("FSREIS") issued by the Bureau of Prisons ("BOP") on September 29, 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 is 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.

LGP's members are made up of local residents who are deeply concerned with the gradual increase of prisons in the central Appalachian region, and advocates for a regional economy that is not built on fossil fuel industries and prisons.

In addition to these comments, ALC incorporates by reference all prior comments that it, as well as the Letcher Governance Project ("LGP") and its members, the Human Rights Defense Center ("HRDC"), the Sierra Club, the Ohio Valley Environmental Coalition ("OVEC"), Citizens United for Rehabilitation of Errants ("CURE"), the Center for Biological Diversity, Mitchum Whitaker, Jonathan Hootman, Tim Gravette, Dr. Lauren Ross, Eastern Kentucky University Professors, and the numerous federally incarcerated individuals who have submitted to the BOP about this project. As well, ALC and LGP 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.[1] 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.[2]

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.[3] In total, officials have twenty-nine state and federal prisons in central Appalachia since 1989.[4]

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."[5] 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."[6] 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."[7]

Appalachia's experience reflects this national trend. Prison growth has expanded rapidly, yet growth of this sector has not contributed to economic development.[8] 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

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[1] Harry M. Caudill, Night Comes to the Cumberlands: A Biography of a Depressed Area (1962), at 325.

[2] *Id*.

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

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

[5] *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.

[6] 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).

[7] 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*.

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

> 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 low-paying and to lack benefits.[9]

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 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."[10]

ALC and LGP's membership have 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 and LGP offers additional information and comment about the several legal deficiencies in the FSREIS that the BOP must consider and account for prior to the issuance of any Record of Decision ("ROD") and 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 FSEIS, as published on September 29, 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.[11] 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.[12] 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.[13] An EIS is required for all "major federal actions significantly affecting the quality of the human environment."[14] 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."[15] This

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

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

[11] *See* J.B. Ruhl et al., *The Practice and Policy of Environmental Law* 406 (3d. 2014).

[12] 42 U.S.C. §§ 4321, 4332(2)(C) (2006); 40 C.F.R. §§ 1501.2, 1502.5.

[13] *See* 40 C.F.R. parts 1500-1508.

[14] 42 U.S.C. § 4332(C) (2006); 40 C.F.R. § 1501.4 (2011).

[15] 42 U.S.C. § 4332(C).

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."[16] The document must "devote substantial treatment to each alternative."[17]

In addition to the required alternatives analysis required under NEPA, an EIS must conduct a cumulative effectives analysis (CEA). CEQ guidance outlines eleven items for an agency to consider 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.[18]

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

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 . . ."[23] All federal departments also have an affirmative duty to further the purposes of the ESA.[24] 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."[25]

The Act requires the Secretary of the Interior to identify which species are endangered and list them

[16] 40 C.F.R. § 1502.14 (2011).
[17] *Id.* § 1502.14(b).
[18] REIS at § 60-1.
[19] 42 U.S.C. § 4331(b).
[20] *Id*. § 4332(C).
[21] 40 C.F.R. § 1508.14.
[22] *Id*. § 1508.8.
[23] *See* 16 U.S.C. § 1531(b).
[24] *Id.* § 1531**.**
[25] 16 U.S.C. § 1531(a).

accordingly.[26] 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.[27] 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 in such conduct.[28]

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."[29] 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."[30]

The Endangered Species Act also includes protections for listed species' habitat, where the FWS has designated "critical habitat" for a species.[31] 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.[32]

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."[33] 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.[34]

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.[35] 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.[36]

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

[26] 16 U.S.C. § 1533.
[27] 16 U.S.C. § 1538.
[28] 16 U.S.C. § 1532 (19).
[29] 50 C.F.R. § 17.3.
[30] *Id*.
[31] 16 U.S.C. § 1533(a)(3)(A).
[32] 16 U.S.C. § 1536.
[33] 50 C.F.R. § 402.13.
[34] *Id*. (emphasis added).
[35] *Id.* § 402.14(a).
[36] *Id.* § 402.14.

("ACHP") the opportunity to comment.[37]

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 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.[38]

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

D. The Administrative Procedures Act

The Administrative Procedure Act ("APA") establishes the default rules for federal administrative law.[41] 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.[42] Additionally, this legislation authorizes judicial review and provides a private right of action for "a person suffering a legal wrong because of agency action."[43]

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."[44] 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."[45] 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.[46]

"In order for an agency decision [pursuant to NEPA] to pass muster under the APA's 'arbitrary and capricious' test the reviewing court must determine that the decision 'makes sense.' Only by 'carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision' can the court 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'"[47] In *Dubois*, the court found that the Forest Service acted arbitrarily and capriciously when it had not

[37] *See* 16 U.S.C. § 470f.
[38] *See* 36 C.F.R. § 800.3.
[39] *See* 36 C.F.R. §§ 800.3-8000.6.
[40] *Id*.
[41] 5 U.S.C. § 551 *et seq*.
[42] *Id.*
[43] *Id*. § 702.
[44] 5 U.S.C. § 706(2)(A).
[45] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(internal citations omitted).
[46] *Id*.
[47] *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1285 (1st Cir. 1996) (internal citations omitted).

"rigorously explored all reasonable alternatives," including the one put forward by an environmental organization.[48]

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.[49] After preparing its draft EIS and before finalizing the document, the BOP is legally required "request comments from the public" and must affirmatively solicit "comments from those persons or organizations who my be interested or affected."[50]

Furthermore, BOP's own internal policies require that "Federal Register documents . . . pertaining to the Bureau and to the U.S. Parole Commission are to be maintained in the institution's inmates law libraries. Maintaining these documents in the inmate law libraries is intended to ensure that inmates have the opportunity to participate in the rulemaking process."[51]

Individuals now in the custody of the BOP are members of the social sector that will be the profoundly impacted by this particular agency action, 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 individually 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, the Draft Supplemental Revised EIS, and now the FSREIS. Internal agency policy requires the BOP to provide inmates with such notice. Just as the agency provided hard copies of the register notice and its EIS documents in Letcher County public libraries, the agency could have complied with this essential procedural and democratic notice requirement of NEPA by placing the Register Notice and a copy of its EIS documents in the law libraries of its facilities.

Consequently, BOPs 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. 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.

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[48] *Id.* at 1288.
[49] 40 C.F.R. § 1501.7(a)(1).
[50] 40 C.F.R. § 1503.1(a)92)(4).
[51] *See* U.S. Department of Justice, Program Statement No. 1315.07 § 9 (Attached as Exhibit 1).

The BOP's response to this issue in its FSREIS is that it

> provided public notice of the proposal to construct a new prison in Letcher County in accordance with applicable laws and regulations. It is worth noting that if the decision is made to proceed with this project in the next year, it will then take approximately 5 to 6 years before this new facility would be able to accept inmates. Identifying which inmates might be transferred to Letcher County 5 or 6 years in the future is not possible.[52]

This perspective is flawed and disregards the requirements of NEPA and the BOP's Program Statement 1315.07.

Until BOP remedies this severe procedure flaw, this FSREIS and its finalized version will not have complied with the notice requirements of NEPA.

B. The BOP's Stated Purpose and Need for the Proposed Action Is Inaccurate

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.[53] The FSREIS indicates that the BOP still intends to build a FPC in this project.[54] The planned FPC facility would cover 65,262 square feet, and would contribute to all the negative environmental impacts associated with the larger project.[55] 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 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."[56]

In the BOP's DSEIS released in March 2017, it no longer asserts a need for additional medium-security bedspace.[57] 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.[58]

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[52] *See* FSREIS, Appendix J, p. 35.
[53] FEIS, § ES-i; DSEIS, § ES-i.
[54] *See e.g.* FRSEIS §§ ES, 1.
[55] *See* FRSEIS § 2-1.
[56] FEIS, § ES-i.
[57] DSEIS, § ES-i.
[58] *Id*.

Once again, the current FRSEIS provides absolutely no discussion or rationale as to the purpose or need of this particular aspect of BOP's proposed action.[59] Specifically there is no discussion as to whether the minimum-security facilities in the Mid-Atlantic region are operating at capacity or not. Nonetheless, capacity figures may be found in the 2016 Prison Rape Elimination Act (PREA) Audits and Reports and compared to current figures displaced on BOP's webpage and are summarized below:

FCI Morgantown, Morgantown, West Virginia	
capacity	1,305 inmates[60]
current population	944 inmates[61]
	under capacity by 361 inmates

Big Sandy Satellite Camp, Inez, Kentucky	
capacity	128 inmates[62]
current population	69 inmates[63]
	under capacity by 59 inmates

Hazelton Satellite Camp, Bruceton Mills, WV	
capacity	128 inmates[64]
current population	111 inmates[65]
	under capacity by 17 inmates

Lee Satellite Camp, Pennington Gap, Virginia	
capacity	110 inmates[66]
current population	105 inmates[67]
	under capacity by 5 inmates

McCreary Satellite Camp, Pine Knot, KY	
capacity	149 inmates[68]

[59] *See e.g.* FRSEIS, §§ ES, 1.
[60] FCI Morgantown PREA, Audit at * 2, *available at* https://www.bop.gov/locations/institutions/mrg/MRG_prea.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 2).
[61] *See* BOP, FCI Morgantwon, https://www.bop.gov/locations/institutions/mrg/ (screenshot attached as Exhibit 3).
[62] FCI Big Sandy, PREA, Audit at * 3 https://www.bop.gov/locations/institutions/bsy/BSY_prea.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 4).
[63] *See* BOP, Big Sandy, https://www.bop.gov/locations/institutions/bsy/(screenshot attached as Exhibit 5).
[64] USP Hazelton, PREA, Audit at * 2, https://www.bop.gov/locations/institutions/haf/HAF_prea2.pdf (last visited Oct. 27, 2017(Attached as Exhibit 6).
[65] *See* BOP, USP Hazelton, https://www.bop.gov/locations/institutions/haz/ (screenshot attached as Exhibit 7).
[66] USP Lee, PREA, Audit at * 2, https://www.bop.gov/locations/institutions/lee/LEE_prea2.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 8).
[67] *See* BOP, USP Lee, https://www.bop.gov/locations/institutions/lee/ (screenshot attahced as Exhibit 9).

current population	161 inmates[69]
	over capacity by 12 inmates

A review of this data indicates that at the current date, in the Mid-Atlantic region, the BOP has capacity for **an additional 430 minimum-security inmates in this region**.

In addition, a review of the current data for minimum-security facilities across the BOP shows a similar result in that the agency does not have an over-capacity issue for this particular classification of inmate:[70]

FPC Duluth, Duluth, Minnesota	
capacity	881 inmates[71]
current population	672 inmates[72]
	under capacity by 209 inmates

FPC Montgomery, Montgomery, Alabama	
capacity	920 inmates[73]
current population	837 inmates[74]
	under capacity by 83 inmates

FPC Pensacola, Pensacola, Florida	
capacity	708 inmates[75]
current population	691 inmates[76]
	under capacity by 17 inmates

FPC Yankton, Yankton, South Dakota	
capacity	684 inmates[77]
current population	579 inmates[78]
	under capacity by 105 inmates

[68] USP McCreary, PREA, Audit at * 2, *available at* https://www.bop.gov/locations/institutions/mcr/MCR_prea2.pdf (lat visited Oct. 27, 2017)(Attached as Exhibit 10).
[69] *See* BOP, USP McCreary, https://www.bop.gov/locations/institutions/mcr/ (screenshot attached as Exhibit 11).
[70] ALC acknowledges that the data it reviewed excluded facilities that house female inmates, as the BOP proposed action is to house male inmates at a high security USP and a minimum-security satellite camp.
[71] FPC Duluth, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/dth/dth_prea.pdf (Attached as Exhibit 12).
[72] *See* BOP, FPC Duluth, https://www.bop.gov/locations/institutions/dth/ (screenshot attached as Exhibit 13).
[73] FPC Montgomery, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/mon/MON_prea.pdf (last visited Oct. 27, 2017)(attached as Exhibit 14).
[74] *See* BOP, FPC Montgomery, https://www.bop.gov/locations/institutions/mon/ (screenshot attached as Exhibit 15).
[75] FPC Pensacola, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/pen/PEN_prea.pdf (Attached as Exhibit 16).
[76] *See* BOP, FPC Montgomery, https://www.bop.gov/locations/institutions/pen/PEN_prea.pdf (screenshot attached as Exhibit 17).
[77] FPC Yankton, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/yan/yan_prea_0717.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 18).
[78] *See* BOP, FPC Yankton, https://www.bop.gov/locations/institutions/yan/ (screenshot attached as Exhibit 19).

Therefore, in total, BOP does not have a capacity issue for its minimum-security population and has capacity to hold an **additional 414 inmates** classified at minimum-security.

Even if you include numbers from the additional satellite camps that house minimum-security prisoners at USPs, it is clear that there is not a need for an additional facility that houses minimum-security inmates:

Atwater Satellite Camp, Atwater, California	
capacity	unknown[79]
current population	97 inmates[80]

Beaumont Satellite Camp, Beaumont, Texas	
capacity	512 inmates[81]
current population	574 inmates[82]
	over capacity 62 inmates

Canaan Satellite Camp, Waymart, PA	
capacity	160 inmates[83]
current population	120 inmates[84]
	under capacity 40 inmates

Florence Prison Camp, Florence, Colorado	
capacity	590 inmates[85]
current population	494 inmates[86]
	under capacity by 96 inmates

FPC Pollock, Pollock, Louisiana	
capacity	unknown[87]
current population	250 inmates[88]

[79] The PREA report for this facility does not specifically indicate the capacity for the satellite camp.
[80] *See* BOP, USP Atwater, https://www.bop.gov/locations/institutions/atw/ (screenshot attached as Exhibit 20).
[81] USP Beaumont, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/bmp/BMX_prea.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 21).
[82] *See* BOP, USP Beaumont, https://www.bop.gov/locations/institutions/bmp/ (screenshot attached as Exhibit 22).
[83] USP Canaan, PREA, Audit at *2, *available at* https://www.bop.gov/locations/institutions/caa/CAA_prea2.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 23).
[84] *See* BOP, USP Canaan, https://www.bop.gov/locations/institutions/caa/ (screenshot attached as Exhibit 24).
[85] Florence, PREA, Audit at *3, *available at* https://www.bop.gov/locations/institutions/flp/FLP_prea2.pdf (Attached as Exhibit 25).
[86] *See* BOP, Florence, https://www.bop.gov/locations/institutions/flf/ (screenshot attached as Exhibit 26).
[87] Of note, the PREA report for Pollock, Louisiana does not designate capacity for the prison camp, *see* Pollock, PREA, Audit, available at https://www.bop.gov/locations/institutions/pom/POM_prea2.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 27).
[88] *See* BOP, Pollock, https://www.bop.gov/locations/institutions/pol/ (screenshot attached as Exhibit 28).

FPC Terra Haute, Terra Haute, Indiana	
capacity	324 inmates[89]
Current population	352 inmates[90]
	over capacity by 28 inmates

FPC Tucson, Tucson, Arizona	
capacity	128 inmates[91]
current population	144 inmates[92]
	over capacity by 16 inmates

FPC Victorville, Victorville, California	
capacity	256 inmates[93]
current population	275 inmates[94]
	over capacity by 19 inmates

FPC Yazoo City, Yazoo City, Mississippi	
capacity	324 inmates[95]
current population	249 inmates[96]
	under capacity by 75 inmates

Again at the satellite camps associated with USP, there is capacity for an **additional 86 inmates** classified at minimum-security.

Overall, the BOP has capacity to accommodate **an additional 930 inmates** classified as minimum-security. Consequently, the lack of any analysis in the FRSEIS related to the satellite camp that BOP wants to build is because there is no documented purpose or need for such a structure.

In response to ALC's comments to the BOP's DRSEIS regarding this issue, the agency states that:

> A USP is not a stand-alone facility and typically includes additional supporting facilities that are integral to its operation. Such facilities, for example, include an FPC, staff training center, warehouse, and powerhouse. The FPC for the proposed project, just like FPCs at existing USPs, is an integral part of the USP because it houses minimum-security inmates that provide a work cadre needed to help maintain the USP facilities and grounds.[97]

[89] Terra Haute, PREA, Audit at *3, *available at https://www.bop.gov/locations/institutions/tha/THA_prea.pdf* (last visited Oct. 27, 2017)(Attached as Exhibit 29).
[90] *See* BOP, Terra Haute, https://www.bop.gov/locations/institutions/tha/ (screenshot attached as Exhibit 30).
[91] USP Tucson, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/tcn/TCN_prea051217.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 31).
[92] *See* BOP, USP Tucson, https://www.bop.gov/locations/institutions/tcp/ (screenshot attached as Exhibit 32).
[93] Victorville, PREA, Audit at *1, *available at* https://www.bop.gov/locations/institutions/vim/VIM_preaa.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 33).
[94] *See* BOP, Victorville, https://www.bop.gov/locations/institutions/vvm/ (screenshot attached as Exhibit 34).
[95] Yazoo City, PREA, Audit at *2, *available at* https://www.bop.gov/locations/institutions/yaz/YAX_prea.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 35).
[96] *See* BOP, Yazoo City, https://www.bop.gov/locations/institutions/yaz/ (screenshot attached as Exhibit 36).
[97] *See* FRSEIS, Appendix J at 36.

As a preliminary matter, a USP does not require a FPC. For instance, the Allenwood USP does not have an attached FPC.[98] Second, this proposed economic model that requires inmate labor in order to operate, calls into question BOP's entire operations.

Since there is no documented need in the FRSEIS, as well as the data demonstrates that BOP does not need additional minimum-security bedspace, BOP must adjust its current footprint and proposed project in order to comply with NEPA.

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. 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.

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.[99] 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."[100] 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."[101] The BOP has made this statement to Congress in every annual budget submission that is publicly available, going back to 2012.[102]

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[98] *See* Allenwood, PREA, Audit, *available at* https://www.bop.gov/locations/institutions/alp/ALP_prea.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 37).

[99] DSEIS, Project Background at § 1-2.

[100] FY 2018 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, 9b, *available at* https://www.justice.gov/file/968461/download (last visited Oct. 28, 2017)(Attached as Exhibit 38).

[101] *Id*.

[102] 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 Oct. 27, 2017)(Attached as Exhibit 39); 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_letcher.pdf (last visited Oct. 27 2017)(Attached as Exhibit 40); 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-letcher-county.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 41); 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-letcher-county.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 42); FY 2013 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher

When the BOP completed its "Alternatives Analysis" for this project in 2005, it had 102 facilities with a rated capacity of 106,732.[103] The BOP confined 145,780 people in 2005, and its facilities were 37 percent over-capacity. As of October 26, 2017, the BOP incarcerates 154,069 people in 122 facilities.[104] The BOP's FY 2017 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.[105]

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 8,289 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.[106]

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."[107] This change was made retroactive and has already led to the release of many prisoners, but it will also result in a large number of prisoners exiting the system sooner. The decline in federal prisoners has also been attributed to Supreme Court rulings, which "resulted in sentence reductions for about 1,200 inmates," with many other cases being reviewed in the District Courts.[108] The number of federal criminal cases in 2016 dropped to the "lowest total since fiscal year 1998, also contributing to the decline in the federal prison population."[109]

In prior iterations of the EIS for the Letcher County project, the BOP has projected population declines. However, in this FSREIS the BOP changes it projection to show an increase of prisoners of all security classifications. This projection is entirely based on changes in DOJ prosecution priorities, which "may result in an increase, rather than a slow decrease, in the high-security inmate population." The BOP projections in the FSREIS shows a possible increase of 530 high-security prisoners, or less than one percent, who would be incarcerated in 17 USPs across the United States, not only in the Mid-Atlantic.

County, KY, Part 1, 9b, *available at* https://www.justice.gov/sites/default/files/jmd/legacy/2013/09/08/bop-2013-usp-letcher-county.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 43); FY 2012 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part III: Non-IT Capital Investments, Section A,2, *availabel at* https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/10/bop_2012_usp_letcher_county.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 44).

[103] 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 Oct. 27, 2017)(Attached as Exhibit 45).

[104] Population of inmates in BOP custody as of October 26, 2017 was listed at https://www.bop.gov/about/statistics/population_statistics.jsp; U.S Department of Justice, "FY 2018 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities," *available at* https://www.justice.gov/jmd/page/file/968276/download (last visted Oct. 28, 2017)(Attached as Exhibit 46).

[105] 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)(Attached as Exhibit 47).

[106] 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 (Attached as Exhibit 48).

[107] 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.

[108] *Id.*

[109] *Id*.

Importantly, the entirety of this projected increase in high-security prisoners could be accommodated with the full utilization of AUSP Thomson and still have capacity to decrease high-security overcrowding, as the DOJ and BOP have indicated in their budget submissions to Congress.

It is too soon to tell what difference changes DOJ prosecution priorities will have, but there is no reason to believe that these will alter the direction or impact of sentencing reform in the judicial and legislative branches of government. The BOP does not take account of any of the other factors causing the population decrease in the federal prison system, such as changes to the sentencing guidelines, and an increasingly reform-minded Supreme Court. Neither does it consider the potential for legislative reforms, which are still being advanced.[110] The BOP's projections are unreliable, due to its incomplete analysis of the various factors causing the decrease in the federal prisoner population besides prosecutorial priorities.

Despite BOP projections of a population increase, the trend of decreasing numbers of high-security prisoners continues in the 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.[111] In contrast, the combined population cited in the DSEIS published in March 2017 was 5,118,[112] which further fell to 5,029 in the most recent FSREIS.[113] From 2015 to the current date, the four USPs in the Mid-Atlantic Region saw their combined high-security inmate populations decline by 715 prisoners, which is more than a 12 percent decline.

Today the combined population at these USPs is 5,087 inmates.

INSTITUTION	INMATE POPULATION OCT. 26, 2017
Big Sandy USP, Kentucky	1222 inmates
Hazelton USP, West Virginia	1291 inmates
Lee USP, Virginia	1279 inmates
McCreary USP, Kentucky	1295 inmates
TOTAL	**5,087 inmates**

Additionally, the July 2015 FEIS stated that the total rated capacity for these USPs was 3,400 prisoners, but the FRSEIS indicates that this capacity had risen to 3,821.[114] The BOP however does not indicate how it determines this "rated capacity" figure. A review of PREA reports would indicate that these facilities actually have a higher capacity:

BOP FACILITY	LISTED PREA CAPACITY[115]	FRSEIS LISTED CAPACITY
USP Hazelton	960 inmates	957 inmates
USP Lee	1451 inmates	960 inmates
USP Big Sandy	949 inmates	949 inmates
USP McCreary	1500 inmates	955 inmates
TOTAL	**4,860 inmates**	**3,821 inmates**

[110] Ted Gest, *Federal Sentencing Reform Alive Senators Insist*, THE CRIME REPORT, Oct. 27, 2017, *available at* https://thecrimereport.org/2017/10/27/federal-sentencing-reform-alive-senators-insist/ (Attached as Exhibit 49).
[111] FEIS, Table 1-1.
[112] DSEIS, Table 1-1.
[113] *See* FRSEIS at § 1-3 (Table 1.1).
[114] *See* FRSEIS at § 1-3 (Table 1.1).
[115] These numbers do not include the bed-space designated for the satellite prison camp for minimum-security inmates.

BOP Program Statement 1060.11 defines the difference between "rated capacity" and "total capacity:"[116]

> a. Rated Capacity means an institution's total capacity less hospital/infirmary, administrative detention, and disciplinary segregation. (The medical bedspace at the medical referral centers is to be included in the rated capacity for these institutions). Rated capacity is not necessarily the same as any institution's design or operating capacity. It is the objective measurement of inmate housing space without regard to items such as institution age, location, or infrastructure.
>
> b. Total Capacity means an institution's rated capacity plus the capacity of housing used for medical and special housing purposes. This includes administrative detention and disciplinary segregation.[117]

Understanding these determinations is essential, however the BOP absolutely fails to account for how it determined its overcapacity figures. For instance, McCreary is currently housing 1,295 inmates. However, if some of those inmates are actually being housed in a hospital, administrative or disciplinary segregation then it is absolutely feasible that this facility is actually running at or below its rated capacity. The same could be true for the remaining three USP.

By not appropriately accounting for the manner in which an inmate is housed (ie administrative seg v. general population) in determining its population numbers, the BOP cannot actually determine whether its purported "purpose and need" for this facility is accurate. At a minimum it needs to reconsider its 2005 Alternatives Analysis in light of the last twelve years of declining populations and the BOP's inaccurate determinations of its mid-Atlantic population.

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."[118] Here, the BOP steadfastly advances the proposition that it needs a new prison based on an Alternatives Analysis completed twelve 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. Furthermore, its use of "rated capacity" figures in comparison to actual inmate population provides a screwed picture of overcrowding in that region.

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.

iii. The Department of Justice's FY2018 and Sworn Testimony to Congress Indicate This Prison Is Unnecessary

The United States Department of Justice (DOJ), FY2018 Performance Budget on FY 2018 specifically calls for the rescission of the $444 million previously appropriated in FY2016 to build the proposed USP in Letcher County.[119] Pertinent sections of this document describe why rescission is important:

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[116] BOP Program Statement 1060.11, *available at* https://www.bop.gov/policy/progstat/1060_011.pdf (last visited Oct. 27, 2017)(Attached as Exhibit 50).

[117] *Id*. at 2.

[118] 463 U.S. 29, 43 (1983).

[119] USDOJ, FY 2018 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities, p. 28, *available at* https://www.justice.gov/file/968981/download (last visited Oct. 27, 2017)(Attached as Exhibit 51).

> Description of Item: The budget proposes to rescind $444,000,000 in unobligated New Construction balances originally appropriated in FY 2016 for the construction of a facility in Letcher County, KY. This proposal will result in stoppage of any major site work, preliminary project work and/or planned contract activities for this construction project.
> Justification: For FY 2018, the budget proposes a rescission of $444,000,000 in unobligated prison construction balances. Rather than investing in new construction, the budget includes funding to expand prison capacity in more efficient and cost-effective ways. In Salaries and Expenses, $80 million is requested to activate the Thomson, IL facility, which would provide additional capacity to reduce crowding without the need for new construction. In addition, the BOP is able to leverage contracts with private facilities to house additional inmates, particularly at the low-security level.[120]

Furthermore, DOJ Deputy A.G. Rod Rosenstein gave sworn testimony to the House of Representatives Committee on Appropriations supporting DOJ's position that there is no need for its subagency (BOP) to build a USP in Letcher County.[121] There Deputy A.G. Rosenstein states:

> the FBOP population has precipitously declined over the last years 30,000 inmates or 14% over the last four years. So, the decision of where we need future prisons is made based on information we receive from the FBOP. The FY2018 budget does request 80 million dollars to open a prison that has already been built and this will add 2500 high-security beds. So, what we are doing Congressman is prioritizing or spending given the tight budget. But, we would certainly be open to working with the committee in the future if there were a need for additional bed-space. Given the projections and needs the FBOP just didn't feel that we needed that facility at this time.[122]

Despite this clear directive form the DOJ, the BOP states in its FRSEIS that the

> **[t]he purpose of and need** for the proposed federal correctional facility in Letcher County, Kentucky, **has not changed** since the issuance of the March 2016 RFEIS. The purpose of the project is to provide an additional high-security penitentiary and an associated prison camp to increase capacity for current inmate populations in the Mid-Atlantic Region. The need for the proposed facility is that the current inmate populations of the USPs in the Mid-Atlantic Region are exceeding their rated capacity and their associated FPCs are at or near capacity. **The Bureau has determined that there is a need for additional high-security facilities within this region to reduce the demonstrated overcrowding** in the USPs in the Mid-Atlantic Region that compromises the mission of the Bureau.[123]

This purpose and need statement directly contradicts the agency's statements in testimony to Congress and in submission to the House Budget Committee without explanation. With its 2018 Budget Request, the DOJ and the BOP make clear that a new prison at the Roxana site is not needed.

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[120] *Id*.
[121] *See* House Committee on Appropriations hearing on the Department of Justice's FY2018 budget, June 13, 2017, *available at* https://www.youtube.com/watch?v=dSsF5vNndes.
[122] *Id*. at 32:57.
[123] FRSEIS at ES-i (emphasis added).

Moving forward with this proposed action without accounting for these clear discrepancies and contradictions within the agency would be an unreasonable, arbitrary and capricious decision by the BOP.[124]

C. BOP's Alternatives Discussion is Incomplete and Not Reasonable

The BOP alternatives analysis as discussed in the most recent FSREIS still does not comply with NEPA. An EIS must describe and analyze alternatives to the proposed action.[125] Indeed, the alternatives analysis section is the "heart of the environmental impact statement."[126] The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal.[127] The existence of reasonable but unexamined alternatives renders an EIS inadequate.[128]

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.[129] 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 within the FSREIS for this project, or has only considered as part of an analysis completed in November 2005, over twelve years ago and in a very different context with regards to trends in the federal prison system.

Although a proper Alternatives Analysis is not to be found in this FSREIS, the DOJ and BOP did provide a reasonable and much cheaper alternative to building a new prison at the Roxana site earlier this year. As noted above, in its FY2018 Budget Request the DOJ makes clear that the full activation of an already existing high-security facility would have the desired effect of significantly reducing crowding in high-security prisons, while costing taxpayers only $80 million instead of the more than $444 million that would be required to build a new prison at the Roxana site.[130] This alternative would have lower impacts than building a new facility at Roxana because the alternative facility (AUSP Thomson) has already been built and is partially operational.[131]

Beyond explaining why the alternative provided in its FY2018 Budget Request has not been discussed in this FSREIS, the BOP must also enter into the record an analysis of the following additional alternatives in order to meet its obligations under NEPA.

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[124] *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (en banc) (holding that issuance of a NEPA record of decision that contradicted the agency's findings in a previous record of decision without explanation was arbitrary and capricious);

[125] *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

[126] 40 C.F.R. § 1502.14.

[127] *See Idaho Conservation League,* 956 F.2d at 1520.

[128] *See Alaska Wilderness Recreation & Tourism Ass'n,* 67 F.3d at 729.

[129] *Supra* nn. 60-62.

[130] U.S. Department of Justice, "2018 Budget Summary," *available at* https://www.justice.gov/jmd/page/file/968216/download (last visited Oct. 29, 2017) (Attached as Exhibit 52);U.S Department of Justice, "FY 2018 Performance Budget, Congressional Submission, Federal Prison System, Buildings and Facilities," *available at* https://www.justice.gov/jmd/page/file/968276/download (last visited Oct. 28, 2017)(Attached as Exhibit 53); FY 2018 Exhibit 300: Capital Asset Plan and Business Case Summary, USP Letcher County, KY, Part 1, 5, *available at* https://www.justice.gov/file/968461/download (last visited Oct. 28, 2017)(Attached as Exhibit 54).

[131] AUSP Thomson, *available at* https://www.bop.gov/locations/institutions/tom/ (last visited Oct. 28, 2017).

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 had excess capacity for inmates across its non-high-security facilities in the Mid-Atlantic Region in May, 2017.[132] The BOP could consolidate its non-high-security prisoners into facilities with excess capacity, thereby opening up facilities for renovation into high-security prisons.

In fact, as discussed by Tim Gravette in his comments, the BOP has a history of converting facilities to accommodate different classification needs.[133] For instance, USP Lompoc, USP Atlanta, USP Marion, and USP Leavenworth were all at one point high-security penitentiaries. However, they all now house medium-security inmates. One of these facilities could be converted again to run as a penitentiary (likely for a fraction of the cost of building a new USP) to address overcrowding issues that the BOP has.

Additionally, the BOP's website says that it is contracting to hold 1,182 of its prisoners at the privately operated Correctional Institution (CI) Rivers in the Mid-Atlantic Region.[134] According to the operator of CI Rivers, the BOP is the sole client for the prison, which has a capacity of 1,450 prisoners.[135] 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 does not meet the BOP's obligations under NEPA.

TABLE 1

[132] Table 1 does not include the BOP's female institutions, its medical prisons, or its private contract prisons in the Mid-Atlantic Region.
[133] *See* Exhibit 55.
[134] Federal Bureau of Prisons, *CI Rivers*, https://www.bop.gov/locations/ci/riv/.
[135] Geogroup, *CI Rivers*, https://www.geogroup.com/FacilityDetail/FacilityID/78.

Facility	Security Level	Population [136]	Rated Capacity [137]	Extra Capacity
Ashland FPC	Minimum	237	296	59
Beckley FPC	Minimum	178	384	206
Big Sandy FPC	Minimum	69	128	59
Hazelton FPC	Minimum	111	128	17
Lee FPC	Minimum	105	128	23
Lexington FPC	Minimum	281	349	68
McCreary FPC	Minimum	161	128	-33
McDowell FPC	Minimum	76	128	52
Memphis FCP	Minimum	269	296	27
Petersburg FPC 1	Minimum	281	296	15
Butner FCI & FPC 1	Medium/Minimum	1001	1111	110
Cumberland FCI & FPC	Medium/Minimum	1298	1395	97
Gilmer FCI & FPC	Medium/Minimum	1397	1536	139
Manchester FCI & FPC	Medium/Minimum	1117	1030	-87
Beckley FCI	Medium	1492	1502	10
Butner FCI 2	Medium	1425	1152	-273
Hazelton FCI	Medium	1375	960	-415
McDowell FCI	Medium	1087	1726	639
Memphis FCI	Medium	1021	1012	-9
Morgantown FCI	Medium	944	1305	361
Petersburg FCI 2	Medium	1613	1894	281
Ashland FCI	Low	1063	747	-316
Butner FCI 0	Low	1319	992	-327
Petersburg FCI 1	Low	1053	1210	157
TOTAL		**18973**	**19833**	**860**

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."[138] 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 current sentencing guidelines."[139] As discussed above, the United States Sentencing Commission

[136] 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.

[137] 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.

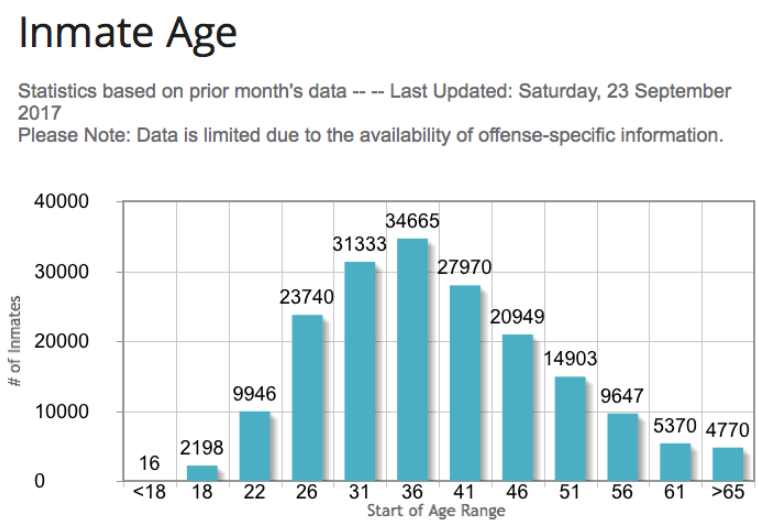
[138] 42 U.S.C. § 4332(E).

[139] Revised Final EIS, Appendix E at E1-37.

(USSC) has already taken steps to reform sentencing, in part leading to the substantial decrease in federal prisoners witnessed over the last few years.[140] 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.[141] 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.[142] BOP also has certain authority to release prisoners to residential facilities or home confinement.[143] 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.

Tim Gravette discusses in detail the use of compassionate release in his comments. BOP has an aging population and the authority to work to move these inmates out of its custody. There are approximately 4,770 elderly inmates who could qualify for sentencing reductions.[144]



An 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.[145] The report also indicated that there is an increasing opportunity for the BOP to reduce its population by providing compassionate and medical release to elderly prisoners.[146] According to this report, prisoners over the age of 50 "were the fastest growing segment" of the population incarcerated by the BOP.[147] These prisoners are also significantly less likely to commit misconducts while imprisoned, which suggests that as the BOP's

[140] *See* United States Courts *supra* n. 68.
[141] 18 U.S.C. § 3582(c)(1)(A).
[142] *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).
[143] 18 U.S.C. § 3624(c).
[144] *See* BOP, Inmate Age, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (providing graph posted above).
[145] *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 Oct. 28, 2017)(Attached as Exhibit 56).
[146] *Id*.
[147] *Id.* at i.

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."[148]

Increasing staff support to reduce this population, would without doubt ease the financial and logistical burdens associated with BOP's inmate population. The BOP's failures on this account continue to face criticism at the highest levels of government, most recently in a letter from 11 senators of both parties pressing for increased use of compassionate release.[149]

In addition, 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.[150] 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. This is a significant number that needs to be addressed. Holding individuals over their sentences is not only inappropriate, but continues to place an unnecessary strain on an already burdened corrections system. Prior to building any new facility, BOP should determine how reducing the number of untimely releases would impact its stated purpose and need in the FRSEIS.

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.[151] 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.

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.[152] By expanding its system of

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[148] *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.").

[149] Lydia Wheeler, *Senators push federal prisons to expand compassionate release*, THE HILL, Aug. 8, 2017, *available at* http://thehill.com/regulation/345210-senators-push-federal-prisons-to-expand-compassionate-release (Attached as Exhibit 57)

[150] *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 Oc. 27, 2017)(Attached as Exhibit 58).

[151] *See Natural Resources Defense Council, Inc. v. Morton*, 458 F2d 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).

[152] *See* Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations*

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. Many inmate comments provide concrete evidence that the BOP overclassifies individuals. Prior to finalizing any decision to build a new high-security prison, BOP must consider the alternative of updating its antiquated classification system. Properly classifying inmates would more than likely reduce the current percentage of high security inmates.

Instead of providing concrete population projections and candidly discussing the use of sentence reduction strategies, security designations or pre-release alternatives to incarceration, the FRSEIS 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 has repeatedly 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.'"[153] 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 FRSEIS insufficient, because the agency's analysis appears to be little more than "a pro forma ritual."[154]

iv. The DSEIS Does Not Comply with CEQ Guidelines

The FRSEIS 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, Kentucky. These alternatives are still located 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."[155] 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"

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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).

[153] *Simmons v. U.S. Army Corps of Eng'rs.*, 120 F3d 664, 669 (7th Cir. 1997).

[154] *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").

[155] 40 C.F.R. § 1500.2(e)(emphasis added).

- "Include appropriate mitigation measures not already included in the proposed action or alternatives."[156]

As such, the BOP's FRSEIS 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 and LGP find 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.

In its response to ALC's DSEIS comments concerning this issue, the BOP simply responded that it has "considered and evaluated several locations during the NEPA process."[157] While the BOP has considered a few locations in this process – they have all been within Letcher County and were all hand-selected by the Letcher County Planning Commission.

The BOP outlines the process it used in determining its alternatives analysis in regards to site selection:

> The Letcher County Planning Commission identified potential sites for development for a new USP and FPC in Letcher County, and contacted the Bureau to determine if the Bureau had an interest in developing a new facility at one of the locations. In 2008, the Bureau initiated a site reconnaissance study of the suitability for development of four sites in Letcher County that had been offered to the Bureau by members of the community. The four sites included: Meadow Branch, Payne Gap, Roxana, and Van/Fields.[158]

The BOP then ranked these sites, and moved forward with its analysis with the Payne Gap and Roxana sites.[159]

What the BOP fails to account for is who the Letcher County Planning Commission is, what are its and its members relationships with Representative Hal Rogers, and why this private organization was given so much power in determining the site and county of this massive government undertaking?

The Letcher County Planning Commission is a private organization.[160] It remains unclear, why the BOP would initiate such a large project at the behest of non-government agency.[161] What is even more disturbing is that multiple portions of land that the BOP intends to be acquired appear to be owned by members or family members of the Letcher County Planning Commission. For instance, these individuals are members of the Letcher County Planning Commission:

- Ted Adams
- Shad Baker

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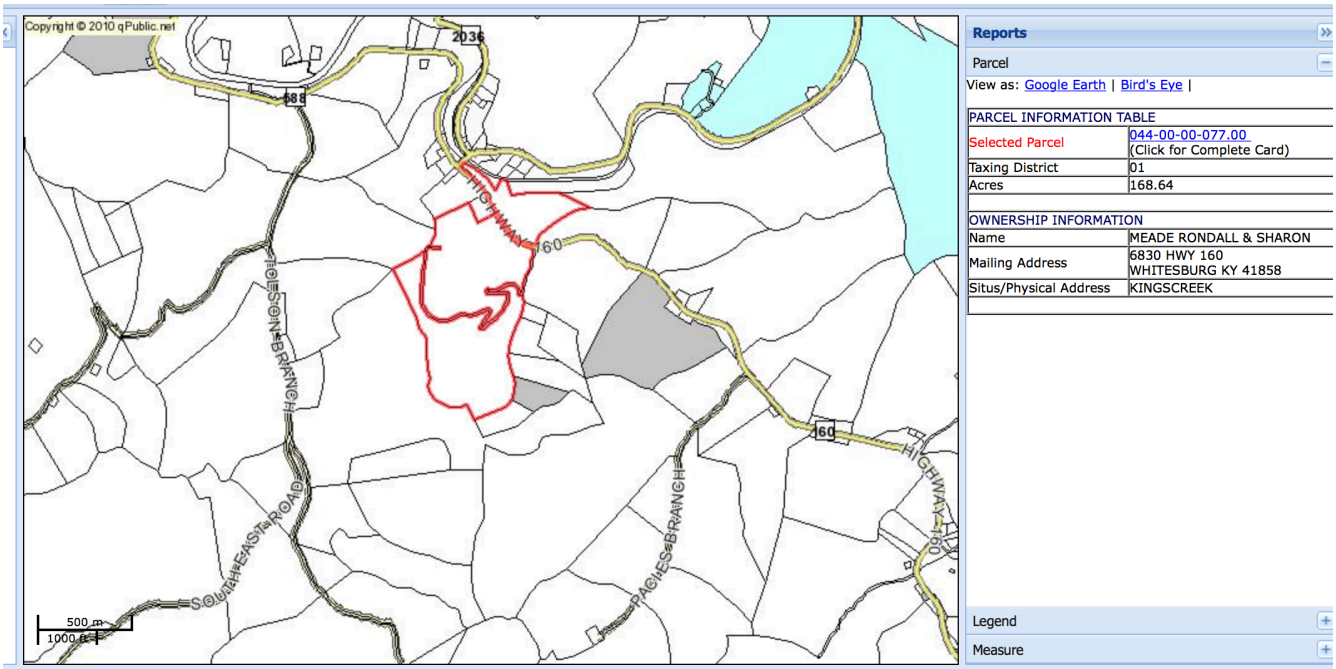
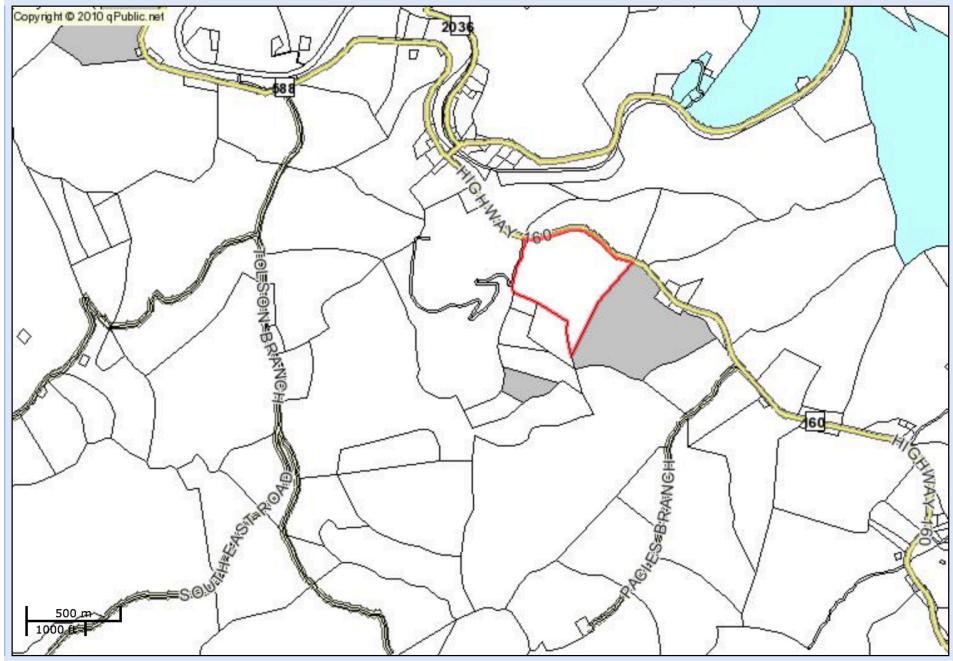
[156] *See* 40 C.F.r. § 1502.14.
[157] FRSEIS, Appendix J, p. 43.
[158] FRSEIS, ES-v.
[159] *Id*.
[160] *See* Exhibit 59, Incorporation Documents for Letcher County Planning Commission.
[161] *See* FRSEIS, 2-3 (stating "the Bureau was contacted by the Letcher County Planning Commission with an offer of potential sites for a new USP and FPC in Letcher County, Kentucky."

- Daryl Boggs
- ***Mike Caudill***
- ***Reed Caudill***
- Don Childers
- Elwood Cornett
- Joe Depriest
- Mike Genton
- Margaret Hammond
- ***Sandy Hogg***
- Jeannette Ladd
- ***Eugene Meade***
- David Narramore
- Tony Sergent
- Will Smith
- Dena Sparkman
- Denise Yonts
- Debra Young[162]

Of the land expected to be sold to the BOP, several pieces are owned by individuals with last names in italics on this list:



[162] *See* Letcher County Planning Commission, http://www.whyletchercounty.org/letcher-county-planning-commission.html (Attached as Exhibit 60).



Reports

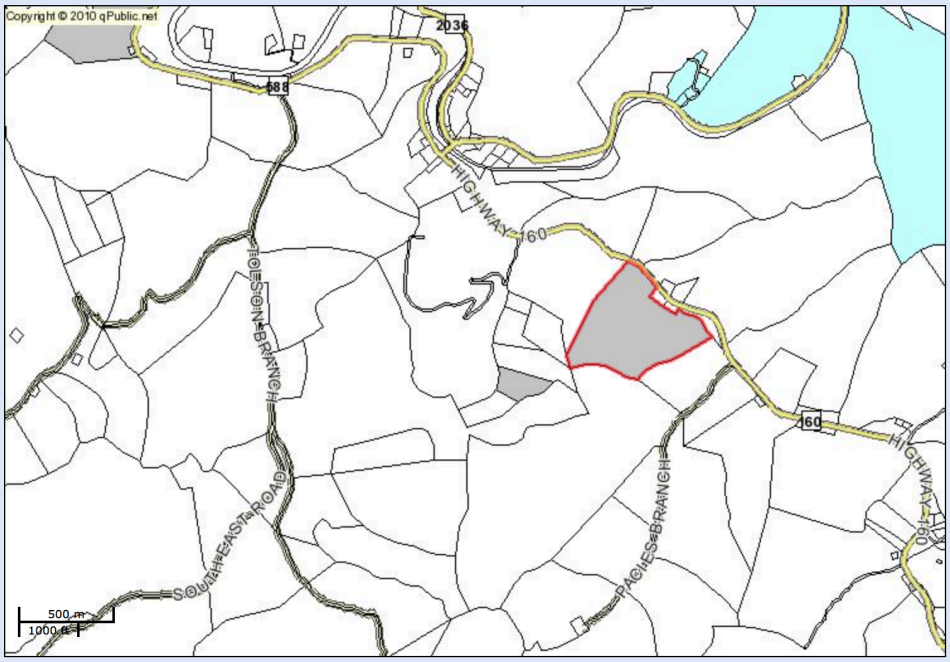
Parcel

View as: Google Earth | Bird's Eye |

PARCEL INFORMATION TABLE	
Selected Parcel	060-00-00-011.01 (Click for Complete Card)
Taxing District	01
Acres	0
OWNERSHIP INFORMATION	
Name	HOGG JOHN C
Mailing Address	101 KENT PLACE SPARTANBURG SOUTH CAROLINA 29307
Situs/Physical Address	KINGSCREEK

Legend

Measure



Reports

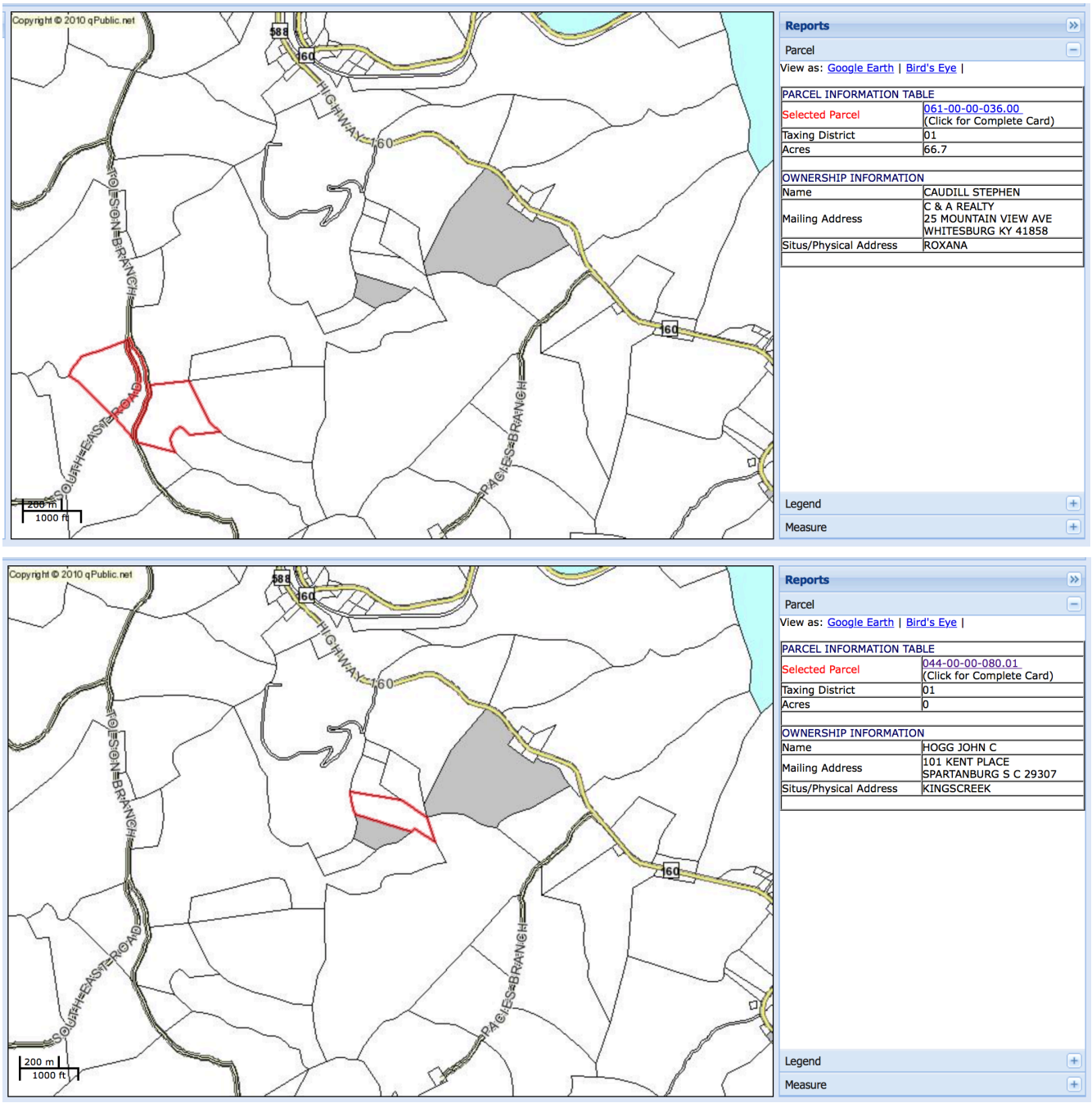
Parcel

View as: Google Earth | Bird's Eye |

PARCEL INFORMATION TABLE	
Selected Parcel	060-00-00-011.00 (Click for Complete Card)
Taxing District	01
Acres	200
OWNERSHIP INFORMATION	
Name	HOGG JANICE
Mailing Address	101 KENT PLACE SPARTANBURGE SC 29307
Situs/Physical Address	KINGSCREEK

Legend

Measure



While ALC and LGP are not asserting impropriety at this stage, in light of these concerns, our organizations find it imperative that the BOP release any and all information regarding the financial interests that the members of Letcher County Planning Commission have in this project.

As long as these questions remain unanswered, the integrity and transparency of this project remains suspect. ALC has repeatedly raised concerns that the actual selection of the site in Roxana 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.

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

NEPA requires that an EIS address impacts on the "human environment,"[163] 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."[164]

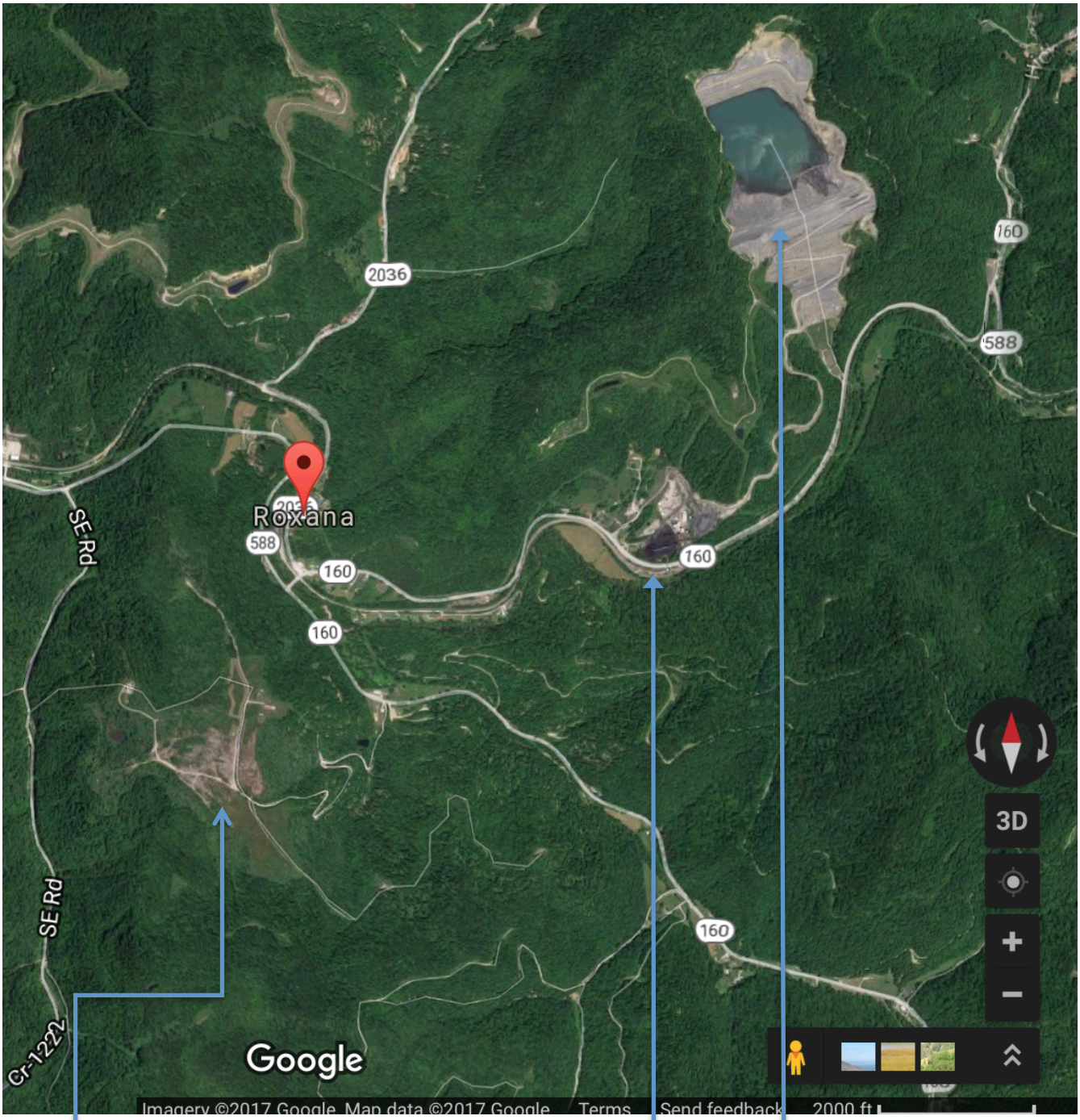
NEPA explicitly references human health, and covers all people—there is no "prisoner exclusion." Thus, the BOP must consider potential health impacts on prisoners (as well as their families and prison staff) as part of the EIS. This is especially true in light of BOP's legal responsibility to provide for the health and welfare, and constitutional conditions of confinement for the prisoners in its custody.[165]

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.

BOP continues to skirt this issue with a cursory examination of the overall health impacts that placing this facility at the site in Roxana on the health of inmates and correctional staff. For instance, the BOP has responded to this comment that sufficient analysis was done in the 2016 REIS in section 5.12.1.2. However, ALC and LGP find the conclusions from this section to be meritless and without citation as to how that conclusion can be drawn. There, the BOP states "[n]o currently active mines were found within a 1-mile radius of the proposed correctional facility site. Therefore, coal mining in the area does not affect the environment of the Roxana site."[166] How the BOP came to use this arbitrary number of a 1-miles radius remains suspect as again this conclusion was made without citation or from a scientific basis. And despite repeated questioning by ALC and other commenters, the BOP has not addressed how it came to this decision.

Mining in the area of Letcher County should be a significant concern and the overall health impacts experienced by residents of this area should be accounted for in making the decision to build a USP in the region. It is undisputed that there are five active coalmines in proximity to the preferred Roxana site (all of which are within the North Fork River Watershed).[167] 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).

[163] 42 U.S.C. § 4332(2)(C).
[164] 40 C.F.R. § 1508.14.
[165] *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).
[166] 2016 REIS § 5.12.1.2.
[167] *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.[168] Another study concluded that chronic cardiovascular disease mortality is more prevalent in mountaintop removal areas.[169] 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.[170] 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.[171]

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.[172]

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.[173]

Despite this substantial body of scientific evidence, the FRSEIS 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. Failing to respond to these concerns and present some analysis regarding these issues renders the FRSEIS incomplete. In addition, failing to consider an alternative site outside of a region known to be plagued by public health problems due to the coalmining industry violates NEPA.

iii. Water Quality

The REIS, DSEIS and now the FRSEIS all state that preferred site would receive water from the Letcher County Water & Sewer District ("LCWSD"). The water to the preferred site would be purchased from the Knott County Water and Sewer District ("KCWDS"), and that the utility itself will be expanding water service to the eastern property boundary.[174]

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[168] 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))(Attached as Exhibit 61).; *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)(Attached as Exhibit 62).

[169] Laura Esch & Michael Hendryx, *Chronic Cardiovascular Disease Mortality in Mountaintop Mining Areas of Central Appalachian States*, J. OF RURAL HEALTH (2011), at 1-8.)(Attached as Exhibit 63).

[170] 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).)(Attached as Exhibit 64).

[171] 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).)(Attached as Exhibit 65).

[172] Dustin S. McDaniel, et al., *No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette* (Feb. 2015).

[173] 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 (Attached as Exhibit 66); (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])(Attached as Exhibit 67).

[174] *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."[175] 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.[176]

While the BOP promises that Knott County has addressed its water problems, as November 18, 2016, the *New York 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.'[177]

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.

In addition, this FRSEIS does not address 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.[178] 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.[179]

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 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.[180]

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[175] *Id*.
[176] LCWSD, Water Quality Report for 2013.
[177] 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.
[178] "Five years after coal-ash spill, little has changed," USA Today, Dec. 22, 2013.
[179] *The Untold Story Of What Happened At An Overcrowded West Virginia Jail After The Chemical Spill,* THINK PROGRESS, May 21, 2014.
[180] *Martin County Sludge Spill*, SOURCEWATCH.ORG, http://www.sourcewatch.org/index.php/Martin_County_sludge_spill.

By siting this prison at the preferred site, the BOP, without a documented reason, is unnecessarily exposing the inmate population and correctional officers to the risk of enduring the ramifications of such accidents. NEPA requires agencies to directly address potential impacts. While the agency may opine on the probability of negative impacts, it is nevertheless still 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."[181]

In response to the concerns raised in past comments, the BOP's FRSEIS has conducted a cursory examination of LCWSD's and KCWDS' water quality. This examination is simply a summary of various violations that the two companies have received in recent years. The FRSEIS still lacks any discussion as to how the facility would respond to a scenario of water contamination. It simply says that "[i]f drinking water standards cannot be met a public health advisory would be issued and consumers would be advised as to how to further treat the water at home (i.e., boiling) or a consumption ban would be implemented and consumers would be provided with bottled water."[182] Boiling water for over 1,216 inmates and staff seems like an absolutely unrealistic solution in the case of a failure in the potable water system.

The BOP should be well aware that it is constitutionally required to provide potable drinking water to inmates.[183] Consequently, to knowingly provide tap water from a public system that exceeds (or could exceed) EPA standards to inmates is impermissible.

Consequently, this current NEPA document is missing essential information required to provide the "thoughtful and probing reflection of the possible impacts associated with the proposed project" as required under NEPA.[184]

Furthermore, Letcher County's and Appalachia's historical problems with access to potable drinking water again calls into question the completeness and thoroughness of the BOP's alternatives' analysis. Once again, ALC and LGP question why the alternatives analysis was so limited to just two former coal mining sites in this particular County of the Mid-Atlantic.

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. The FRSEIS still does not provide any discussion related to this point, and the BOP ignored this issue in its response to past

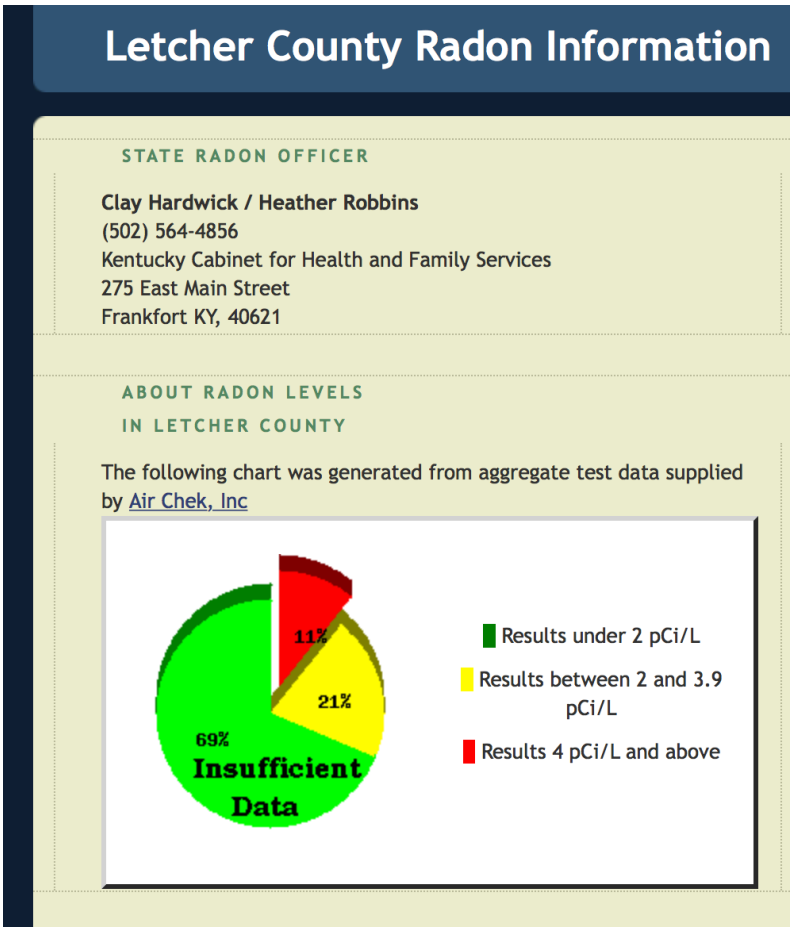
[181] *Southern Oregon Citizens against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983)(citations and quotations omitted).
[182] FRSEIS at 3-22.
[183] *See e.g. Cole v. Livingston*, 4:14-CV-1698 (S.D. Tex. June 21, 2016).
[184] *Comm. to Preserve Boomer Lake Park v. Dept. of Transp.,* 4 F.3d 1543, 1553 (10th Cir. 1993).

comments Appendix J. Why does BOP refuse to collect this data? As federal courts have explained, the BOP "may not omit the analysis only because it believes that the worst case is unlikely."[185]

iv. Radon

The REIS states that the EPA classifies Letcher County as having potential for radon intrusion.[186] This 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.

In Appendix J of this FSREIS, the BOP indicates that "[o]f the available information, there is no indication that radon levels at the Roxana site would exceed USEPA action levels."[187] It refers to a study indicating that "the data available from the Kentucky Cabinet for Health and Family Services, substantially more homes tested in Letcher County did not contain radon levels that exceeded the USEPA action level of 4 pCi/L than those that did."[188] This is a disingenuous summary of that study, where in nearly 70% of the homes studied did not have sufficient data to make any conclusion.[189] The chart below shows a more accurate account of this study:



The pie graph clearly shows that 11% of the homes tested exceed EPA standards for radon. The failure

[185] *Southern Oregon Citizens against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983)(citations and quotations omitted).
[186] REIS § 4.12.1.3.
[187] FRSEIS, Appendix J at 49.
[188] *Id*.
[189] *See* http://county-radon.info/KY/Letcher.html.

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).[190] As such, this study actually should lead to the conclusion that additional testing for radon should occur at the preferred site, and must be accounted for in the EIS in order for the BOP to comply with NEPA.

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

ALC's and LGP's position that additional testing should be done at the site. In its last comments, ALC provided sufficient evidence that the BOP 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.[191] BOP responded that it consulted with the "Kentucky Department for Environmental Protection and was advised to use the Kentucky Guidance for Ambient Background Assessment to determine background concentrations for the site. Establishing site-specific background concentrations was beyond the scope of the Phase II ESA."[192] While ALC and LPG appreciate understanding that the reasoning for its determination to use statewide background concentrations for arsenic, in light of Mr. Gold's comment, this justification is unsatisfactory. BOP is required to make its decision and develop its EIS based on accurate information. Moving forward with this project without a more comprehensive understanding of the arsenic levels on site on the potential direct, indirect and cumulative impacts related to arsenic will violate NEPA.

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,[193] the people most likely to be housed in this BOP prison would meet the criteria to be considered an Environmental Justice community.

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

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[190] *Id*.

[191] *See* Exhibit B, Letter of Daniel Gold, ALC Comments May 8, 2017 (Attached as Exhibit 68).

[192] FRSEIS, Appendix J at 50.

[193] "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, 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).

incarceration trends have been referred to as the new Jim Crow.[194] The BOP reports 41% percent of its population to be of non-white "minority" status,[195] whereas this racial demographic only makes up approximately 25% of the entire U.S. population.[196]

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."[197]

ALC presented similar comments in its submission about the FEIS, REIS, and DSEIS. Prior federal agency actions in Appalachia have conducted an environmental justice analysis.[198] 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. *Excluding an environmental justice discussion from this FRSEIS violates 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.[199] Mitigation includes avoiding the adverse impacts altogether, minimizing impacts by limiting the degree or magnitude of the action, rectifying the impact by repairing, rehabilitating or restoring the affected environment, reducing or eliminating the impact over

[194] *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.").

[195] Current BOP statistics do not include specific numbers for Latino or Hispanic prisoners (*see* 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."

[196] U.S. Census Bureau, "The White Population 2010."

[197] Final EIS, Appendix E, p.43.

[198] *See e.g. Kentuckians for the Commonwealth v. U.S. Army*, 746 F.3d 698 (6th Cir. 2014).

[199] 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).

time, and compensating for the impact by replacing or providing substitute resources or environments.[200]

Once again, the BOP continues to ignore mitigation with respect to any health-related impacts for inmates, their families and prison staff. The most obvious shortcoming of the FSREIS 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."[201] 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"[202]; 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."[203]

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 FRSEIS Does Not Adequately Discuss Broader, External Environmental Impacts

i. Endangered Species: Indiana Bat, Northern Long-Eared Bat and Gray Bat

ALC and LGP renews and incorporates all of its past concerns regarding the three endangered bat species that will be impacted by this project. As well, ALC and LGP incorporates all comments submitted by Jonathan Hootman and Eastern Kentucky University professors. ALC and LGP wish to raise the following concerns explained by Mr. Hootman in his comments:

- Other USFWS field offices have called into question the scientific validity of the Imperiled Bat Conservation Fund (IBCF) and entities that are required to have federal permitting for their projects will no longer be able to use this option (http://www.smithmanage.com/usfws-kentucky-office-mitigation-policy-change/). This in and of itself is justification to agree that even if the mitigation for this project was carried out correctly, it would still be flawed. Yet, the mitigation for this project is woefully undervalued.

[200] 40 C.F.R. § 1508.20.
[201] U.S. CONST. amend. VIII.
[202] *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).
[203] *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

- Copperhead (2016) concluded that 251 acres of habitat exist within the project area and the BOP claims that it will only disturb 120.6 acres of habitat within the project area. Both of these estimates fail to include the grassland/wetland/shrub-scrub habitat that is going to be disturbed. In both the BA and the BO this type of habitat is dismissed as unimportant and not used by the endangered bat species assessed in these documents. However, Indiana bat habitat can consist of grassland/wetland/shrub-scrub habitat. Brack (1983) has observed Indiana bats foraging over old fields and pastures and observed that most foraging occurred along habitat edges(Menzel et. al. 2001). Most Myotid bats are opportunistic foragers, as they have been observed foraging in open fields, and forage along habitat edges (Belwood and Fenton 1976; Fenton and Morris 1976; Whitaker 1995; Menzel 2001). The non-forested area of the project area must be considered habitat, and properly assessed in order to fully understand the impact that this project will have on endangered species.
- The Facility's Perimeter and Security Fence: Neither the BA or the BO adequately address the impact that the perimeter and security fence will have on the endangered bat species found in the area where the BOP wants to build a new prison. This fence, however, will have a negative impact on the bats in the following ways:
- The overall tree removal currently projected by the BOP does not account for trees that will be removed from the project area for the fence. A fence that consists of 3 parallel fences and is adorned with razor wire will need a lot of trees cleared in order to be installed and to be effective.
- The BA states that the fence will be 3.6 meters high with razor wire and this is within the foraging height of Indiana and NLEB's (Humphrey et al. 1977; USFW 2015). These bat species could be drawn to the corridor created by the fence to use it as a flyway and foraging area. This could prove fatal due to the razor wire. Especially for the NLEB since it has been documented using cluttered habitat and often gleans its prey from the limbs of trees and bushes (USFWS 2015). NLEB's could easily mistake the razor wire for cluttered limbs and this has the potential for high rates of casualties.
- Critical habitat is defined in ESA section 3(5)(A)] as: "(1) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (constituent elements) (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species." Based on this definition the project area must be considered critical habitat. Not only is it critical summer habitat, but it is considered swarming habitat for a priority 1 hibernaculum. This is the highest valued winter habitat for Indiana bats. What this all means is that the project area provides critical habitat for Indiana and NLEB's for 3 out of the 4 seasons. This is extremely rare when considering forested roosting potential. And of the 3 bat species of concern, only 1, the Indiana bat, even has critical habitat designated! At a time when White Nose Syndrome (WNS) is ravaging bat populations, especially NLEB's, and wind farms are causing high numbers of bat fatalities, everything must be done within our power to protect these species from any more harm. It is only prudent as stewards of biological diversity to protect such critical habitat in order to give the species a chance at survival.
- The action area of the project is 10,484 acres. Yet not all of this was surveyed for potential winter habitat. Due to the remoteness of east Kentucky, new caves and entrances are still being discovered. And with the knowledge that a priority 1 hibernacula exists just 7.2 miles away, we have to assume that there is a possibility of other undiscovered hibernacula within the action

area. While desktop analysis of the entire action area is essential, it cannot be used to replace physical on-the-ground surveys for winter habitat. For example, potential winter habitat for the Indiana and Gray Bat was found by Copperhead during the actual survey of the site in Roxana. This habitat consists of a rock shelter in a rock outcrop. This potential winter habitat was not identifiable through desktop analysis. Similarly, Mr. Hootman recently found a fissure on a property (See Abolitionist Law Center's comments on the DSEIS within the "action area" that the Kentucky Field Office with US Fish and Wildlife concluded could be potential winter habitat for endangered bat species. This site was not visible through desktop analysis. Consequently, the determination of bat population and possible winter habitat in the action area is based on incomplete data. An actual survey of the entire "action area" and not just the footprint of the proposed project is needed to accurately determine how a new prison will impact endangered bat species of the area. Furthermore, the "action area" as described in the BA and BO clearly overlaps with the Lilly Cornett Woods. This region of old-growth and undeveloped forest presents a unique habitat for endangered bat species that is not found in many other locations within these bat's range. Therefore, without actual physical surveys for winter and summer habits throughout the actual "action area" the BA and BO will be an incomplete analysis of the direct and indirect impacts this project will have on endangered bat species. Couple this with the fact that the biologists weren't even able to survey the entire project area due to access issues, and it is unconscionable to move forward with this project without a much more thorough investigation into the potential winter habitat for all three species.

- Lighting: Despite the BOP's claim that all lights will have a top on them that keeps light from going skyward, it's obvious that the proposed prison will be well light throughout the project area. Indiana bats use streams and rivers during migration (Copperhead unpublished data; (This comes straight from the BA as well)) and Copperhead (unpublished data (also contained in the BA)) observed that Indiana bats also avoid heavily lit areas while migrating. With the presence of a priority 1 hibernacula so close to the project area, the well lit proposed prison will have a deleterious effect on migrating Indiana bats that use the North Fork of the Kentucky River as a travel corridor.
- Tree clearing is not to take place during June and July in an effort to protect the newly born bat pups and their mothers. But again, this just isn't enough protection for species that are at such a high risk for extinction. Both Indiana and NLEB pregnant females roost in trees in April and May. Disturbing them during this crucial gestation period with tree clearing, eliminating their roosting habitat, would have obvious negative effects to the species.

In addition, the United States Fish and Wildlife Kentucky Field Office's discontinued use of the Imperiled Bat Conservation Fund renders the Biological Opinion and Biological Assessment incomplete.[204] Mitigation is legally required under Endangered Species Act and NEPA when federal agencies take action that could threaten the existence of protected species. In addition, the public is entitled to know what the agency's proposed mitigation will be and to have the opportunity to comment on such mitigation. If use of the Imperiled Bat Conservation Fund is unavailable, the BOP and USFWS must revise their respective BA and BO, and in turn the BOP must account for these changes in its NEPA documents. Until the BOP accounts for this change, and the public has the opportunity to comment on its proposed mitigation, it cannot move forward with this action.

ii. Community Facilities and Public Services

[204] *See* http://www.smithmanage.com/usfws-kentucky-office-mitigation-policy-change/ (Attached as Exhibit 69).

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.[205] There is no further discussion about a MOU in the DSEIS or FRSEIS, and the only mention of this issue is that there will be "less than significant impacts."[206] In response to this inquiry, the BOP asserted that it does not need to release an MOU and that it has coordinated appropriately with local law enforcement.[207]

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. The pubic has the right to see what the actual coordination plan is with local law enforcement, and to provide comment about such planning. BOP has not discharged its duty under NEPA by simply releasing communications about potential future plans.

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.[208] Correctional officers have a higher rate of divorce than the general population.[209] As well, studies show that correctional officers commit high rates of domestic violence.[210] In 2011, an anonymous survey conducted with correctional officers by Caterina Spinaris showed that 34 percent of them met the criteria for PTSD.[211]

While BOP has indicated that there are some resources available to its employees,[212] this reference in the FSREIS is not a sufficient analysis as required under NEPA. To take NEPA's required "hard look" at the human environment, the EIS must actually analyze the impacts that this facility will have on local courts, hospitals and law enforcement as referenced above.

I. Cardno's Conflict of Interest Statement

The BOP failed to actually release Cardno's Conflict of Interest Statement, despite repeated efforts and requests for it by ALC, LGP and other members of the public. Allegedly, the BOP released a conflict of interest statement in Appendix K of its FRSEIS. However, as illustrated by the attachment, the BOP

[205] *See e.g.* REIS § 4.4.2.1.
[206] DSEIS at 1.5.
[207] FRSEIS, Appendix J at 54.
[208] *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/.
[209] *See Corrections Officers*, http://americanaddictioncenters.org/rehab-guide/corrections-officers/.
[210] *Id*.
[211] *Id.*
[212] *See* FRSEIS, Appendix J at 54.

released one piece of paper from an unknown and unaccounted for document.[213] It is unclear as to whether this is a conflict of interest statement from Cardno or another entity.

ALC and LGP request that the entirety of this document be released with proper explanation as to what it is. Furthermore, upon its release, the BOP should reopen another comment period so that the public can review this document and provide comments, as it is entitled to under NEPA.

J. Underlying Documents Must Be Released

ALC and LGP is concerned that not all documents related to this project have been released for public review and comment. In particular, it has been asked for the BOP to release 1) all Communication with the Letcher County Planning Commission; and 2) all documents related to the required property acquisition for the project, including expected cost for land acquisition.

As discussed above, their appears to be a significant conflict of interest with the Letcher County Planning Commission, its members and potential economic benefits they and their family members may gain from this project. ALC and LGP are disturbed that the BOP would not take it upon itself to be transparent and forthcoming about the request for these documents. Without them, the veracity of BOP's purported "purpose and need" for this project is suspect.

IV. CONCLUSION

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

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 its NEPA documents.

In conclusion, for the reasons stated herein, the FRSEIS 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

[213] FRSEIS, Appendix K, Attached as Exhibit 70.