



PUBLIC COMMENT
TO THE FEDERAL BUREAU OF PRISONS

ON THE FINAL ENVIRONMENTAL IMPACT STATEMENT
FOR THE PROPOSED FEDERAL CORRECTIONAL INSTITUTE
AND FEDERAL PRISON CAMP IN
LETCHER COUNTY, KENTUCKY

SUBMITTED BY

ABOLITIONIST LAW CENTER, CONCERNED LETCHER COUNTIANS,
DREAM.ORG, INSTITUTE TO END MASS INCARCERATION, KENTUCKY
RESOURCES COUNCIL, INC., and VOICE OF THE EXPERIENCED

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Sent via email KSHudson@bop.gov

August 12, 2024

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

RE: Public Comment
Final Environmental Impact Statement
Proposed Federal Correctional Institute and Federal Prison Camp
Letcher County, Kentucky

Dear Ms. Hudson:

Please accept the following comments on behalf of the Concerned Letcher Countians (“CLC”), Voice of the Experienced (“VOTE”), Kentucky Resources Council, Inc. (“KRC”), Dream.org, the Institute to End Mass Incarceration (“IEMI”), and Abolitionist Law Center (“ALC”) concerning the Final Environmental Impact Statement (“FEIS”) issued by the Bureau of Prisons (“BOP”) on July 12, 2024 for the proposed development of a new Federal Correctional Institute (“FCI”) and Federal Prison Camp in Letcher County, Kentucky.

CLC is a membership based non-profit group of citizens centered in Letcher County, working to protect the future of the county, particularly for youth. CLC wants them to have a place to live, thrive, work, enjoy and be safe. They seek a sustainable community that provides education, healthcare, senior care, and environmental growth and protection. None of these goals includes a federal prison.

KRC is a statewide public-interest environmental law and advocacy organization. It works to protect Kentucky’s natural resources, promote policies for healthy communities, and assure that those who pollute Kentucky’s land, air or water are held to account. KRC’s members and constituents live and work in areas potentially impacted by FBOP’s proposed project and its

impacts.

VOTE is a non-profit membership-based organization based in Louisiana, a state with one of the highest incarceration rates in the United States. VOTE is an organization founded and led by formerly incarcerated individuals working to change the system of mass incarceration. Through grassroots organizing and education, VOTE works to restore the voting rights of the formerly incarcerated, advocates for improved health care and conditions inside of correctional facilities, and supports the employment and housing rights of the formerly incarcerated. Building a facility in this specific remote location will adversely harm our members who will be forced to live at this former coal mine, hundreds (if not thousands) of miles away from their support systems.

Dream.Org is a national nonprofit organization working to close prison doors and open doors of opportunity in the advocacy, tech and climate sectors. Dream.org uses a common ground approach to bring together unlikely allies to make the American dream a reality – for everyone. Dream.org envisions a world where we eradicate the harmful impacts of prisons, poverty, pollution and polarization. Dream.org opposes the construction of the new \$505 million prison in Letcher County, Kentucky - on top of a contaminated former coal mine.

IEMI is an organization dedicated to the eradication of the root causes of mass incarceration and the promotion of new approaches to dealing with harm and safety in our communities. Working alongside and in support of community-led movements, IEMI's research and advocacy examines the harmful impacts of carceral infrastructure projects across myriad communities, including those where prisons are built and those whose members are sent to fill them.

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

on the “external” social, economic and ecological environments.

In addition to these comments, our organizations incorporate by reference all prior comments that we have submitted; as well as any and all comments submitted by Dream.Org, Kentucky Resource Council, Kentuckians for the Commonwealth, Forward Justice Action Network, the Institute to End Mass Incarceration (IEMI), the Sierra Club, the Campaign to Fight woToxic Prisons, Dr. Artie Ann Bates, Dr. Beverly May, Dr. David Simonton, Jonathan Hootman, Hugh Hurwitz, Dr. David Pello, Casey Sweker, Jordan E. Martinez-Mazurek, Richard A. Thomas, Dr. David N. Pellow, Wayne Whitaker, and Mitch Whitaker, and the numerous federally incarcerated individuals who have submitted to the BOP about this project. We also incorporate the comments of Linda Egbers, Cinquan Muhammad, Damon Donelson, James Carpenter, Daniel Kinard, Regina Coates, and Edward Hunter submitted as oral testimony at the March 28, 2024 Public Hearing. As well, our organizations specifically request 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.

Our organizations are opposed to the construction of FCI/FPC Letcher. We each submitted comments during the open comment period regarding the Draft Environmental Impact Statement (DEIS) and now do so during the open comment period regarding the Final Environmental Impact Statement (FEIS).

As you are aware, the FEIS has few differences from the DEIS except for the multitude of letters in opposition to the prison and the FBOP’s responses to those letters. It is with grave concern for not only Letcher County, but also for the thousands of men who would be housed in this location, their friends and family who will travel to Roxana, and the hundreds of individuals who

would work and travel there, that we challenge the Federal Bureau of Prisons' (FBOP) Final Environmental Impact Statement (FEIS) for failing to comply with the statutory requirements mandated by the National Environmental Policy Act (NEPA).

The FBOP does not provide in its FEIS a legally sufficient "purpose and need statement" to construct the prison. In support of its statutorily mandated "purpose and need statement," the FBOP erroneously relies not only on an incorrectly cited, non-binding Congressional directive, but contradicts repeated public statements by DOJ statements that the prison is unnecessary. It also has conducted a bare minimum alternatives analysis that plainly violates NEPA. The FEIS further fails to disclose and respond to multiple substantive opposing comments on the DEIS in violation of federal regulations. It violates the NHPA by failing to provide notice to multiple Native tribal nations with a cultural interest in the area. Finally, the FEIS relies on flawed data, does not sufficiently account for natural disasters, and ignores the recommendations of experts cited within its own appendices. Ultimately, the FEIS' decision to pursue the Roxana Proposed Action is arbitrary and capricious because FBOP makes unreasonable conclusions in its FEIS that are not supported, and in many instances contradicted, by the administrative record.

While the FBOP's responses in the FEIS may have attempted to allay concerns about this prison project, nothing in the FEIS convinces our organizations that the prison is justified, thus, we demand that the FBOP choose the No Action route for FCI/FPC Letcher and NOT build it.

Detailed below are CLC, VOTE, KRC, Dream.Org, IEMI, and ALC's detailed and timely comments:

I. INTRODUCTION

A. History of Environmental Impact Statements Concerning Roxana

On July 26, 2013, the FBOP opened its initial scoping period and 30 day window for public

comments on its proposed action to build a United States Penitentiary (USP) in Letcher County, Kentucky.¹ During this scoping period, the FBOP hosted just one public scoping meeting, which was in Letcher County.²

On February 10, 2015, the BOP published in the Federal Register that on February 13, 2015, it would be making its Draft Environmental Impact Statement (DEIS) available for the public to review about its intent to build a new federal penitentiary. The agency opened a 45-day public comment period on February 13, 2015 so that the public could submit comments concerning the DEIS' content. The FBOP held just one public meeting to discuss the DEIS on March 12, 2015 at Letcher County Central High School in Whitesburg, Kentucky.³ There was no public scoping meeting held in any other community whose residents may be housed in the proposed facility. Specifically, there was no hearing held in Washington D.C., or at any Tribal Nation, whose residents are disproportionately impacted and housed in the FBOP.

In July of 2015, the FBOP published its first final EIS and accepted comments concerning its content for a thirty-day window within which the public could submit comments to be considered by the Bureau prior to and in connection with a Record of Decision ("ROD") for the proposed action.

The FBOP withdrew the July 2015 Final EIS after consideration of comments received following its publication and to correct inconsistencies in the Final EIS. As a result of comments received following release of the Final EIS, the FBOP concluded that written notice of availability of the Final EIS had not been directly provided to at least 22 parties who had requested it.

In March 2016, the FBOP then published a Revised FEIS and opened another 30-day

¹ 78 Fed. Reg. 45277-45278 (Jul. 26, 2013).

² *Id.*

³ 80 Fed. Reg. 7497-7498 (Feb. 10, 2015).

window for the public to comment about for consideration prior to the issuance of any ROD. On March 24, 2017, the FBOP published a Draft Supplemental Revised Final Environmental Impact Statement (DSRFEIS), and opened up a 45-day period for the public to provide comments to the FBOP about the content of the document. Yet again, the FBOP held only one public meeting on April 12, 2017 at Letcher County Central High School in Whitesburg, Kentucky.⁴ The FBOP failed to host a public meeting in any other community whose residents may be housed in the proposed facility. Specifically, the FBOP neglected to host a public hearing in Washington D.C., or with any Tribal Nation, whose residents are disproportionately impacted and housed in the FBOP. Notice of the public comment period was published in the Federal Register.

In September of 2017, the FBOP published its Final Supplemental Revised Environmental Impact Statement (FSREIS) and opened another 30-day window for the public to comment about for consideration prior to the issuance of any ROD. On March 30, 2018, the FBOP published a Record of Decision (ROD) describing its rationale for selecting a site and moving forward with the construction of USP Letcher.

In November of 2018, local Eastern Kentucky residents and incarcerated people joined together to file litigation against the FBOP for violating the National Environmental Policy Act (NEPA). Less than a year later, the FBOP withdrew its ROD in response to the litigation brought against it. The prison construction project stalled out until the BOP issued a notice of intent in September 2022 to publish a new DEIS. This time around, the BOP intends to build a federal correctional institute (FCI) and federal prison camp (FCP) in Letcher County. The FBOP published a DEIS on March 1, 2024, and made available its FEIS on July 10, 2024. The public comment period for this new FEIS is now open.

⁴ 82 Fed. Reg. 15070-15071 (Mar. 24, 2017).

B. There is Strong Community Opposition to FCI/FCP Letcher

Concerned Letcher Countians, LLC (CLC) is a non-profit group of citizens centered in Letcher County, working to protect the future of the county, particularly for the region's youth. CLC wants them to have a place to live, thrive, work, enjoy and be safe. CLC seeks a sustainable community that provides education, healthcare, senior care, and environmental growth and protection. None of these goals include a federal prison. In fact, a prison will adversely affect the future of the county, particularly its youth. It is in grave concern for Letcher County that CLC and its members challenge the Federal Bureau of Prisons (FBOP) Final Environmental Impact Statement (FEIS).

As opponents of this FCI/FPC Letcher, and as voting, tax paying citizens, CLC's concerns should have been just as important to the FBOP, a tax-supported government agency, as those in favor. However, the FBOP has clearly favored proponents of the prison. For instance, FBOP's website indicates that the public agency hosted two unannounced and unnoticed meetings with the Letcher County Planning Commission (LCPC)⁵ (July 19, 2023 and December 5, 2023).⁶ When CLC learned of these meetings with LCPC, it requested to have a meeting with FBOP.⁷ The FBOP declined CLC's request to meet in December 2023.⁸ CLC and other groups submitted a public

⁵ The Letcher County Planning Commission, Inc. (LCPC) is a private, non-profit organization incorporated in Kentucky. Despite its name, it does not represent all Letcher Countians, is not a public entity, and its relationship with the local county government remains unclear.

⁶ *Update on the Proposed FCI/FPC Letcher County, KY, Project*, Federal Bureau of Prisons (July 21, 2023), https://www.proposed-fci-letchercountyky.com/_files/ugd/5947b2_4be0696df6294619b8f20462b18af2ef.pdf ("The Federal Bureau of Prisons (BOP) and WSP (BOP's contractor) held a virtual meeting with the Letcher County Planning Commission (LCPC) on Wednesday, July 19, 2023"); *Update concerning the Proposed Federal Correctional Institution and Federal Prison Camp – Letcher County, Kentucky*, Federal Bureau of Prisons (Dec. 6, 2023), https://www.proposed-fci-letchercountyky.com/_files/ugd/5947b2_4be0696df6294619b8f20462b18af2ef.pdf ("The Federal Bureau of Prisons (BOP) held a virtual meeting with the Letcher County Planning Commission (LCPC) on Wednesday, December 6, 2023").

⁷ See Exhibit A, Letter from CLC to FBOP (Dec. 5, 2023).

⁸ *Id.*

letter to FBOP Director Colette Peters noting these troubling irregularities on December 13, 2023, and never received a response.⁹

Responsive records to a Freedom of Information Act (FOIA) request from VOTE¹⁰ likewise revealed FBOP's bias toward the LCPC.¹¹ These records show phone conversations by at least one member of the LCPC with FBOP staff regarding this prison and additional confidential meetings between FBOP, WSP¹² and LCPC members (May 2 and June 7-9, 2022).¹³ LCPC also had e-mail communications with the FBOP stressing the mayor of Jenkins' intention to pursue the tourism industry as a reason to choose the Roxanna site.¹⁴ These secret communications are the only details now in the record that makes sense of the otherwise inexplicable lack of analysis regarding the Payne Gap site. Importantly, and likely in violation of state and federal law, the FBOP did not make those meetings and conversations public until this FOIA request.

When the FEIS says there has been “consistent, continuous, and unwavering support expressed by Letcher County's elected representatives, community leaders, members of local

⁹ *RE: Irregularities Concerning the Proposed FCI Letcher*, Letter from Dr. Artie Ann Bates et al. to FBOP Director Colette Peters (Dec. 14, 2023),

<https://drive.google.com/file/d/1Jr6yJTyNUtZU4yzwKhqx5yTIpMhfem76/view>

¹⁰ FOIA Request From VOTE to FBOP,

<https://static1.squarespace.com/static/6697d11874bfc401dacf7545/t/66b3a6a045032d5dfac5105d/1723049632827/2023-06-30+VOTE+FOIA+to+BOP+about+LPC.pdf>.

¹¹ *See generally*, Responsive Records, Building Community Not Prisons,

https://static1.squarespace.com/static/6697d11874bfc401dacf7545/t/66ba44d44cb5a24e8feb1cc7/1723483363518/Records+2023-03988*.pdf.

¹² The BOP hired WSP USA Inc., a consulting firm, to complete the Environmental Site Assessments, Cultural Historical Surveys, and Archaeological Assessments found in the FEIS appendix.

¹³ FBOP Sign-In Sheet, Responsive Records, Building Community Not Prisons, pp. 50-58,

https://static1.squarespace.com/static/6697d11874bfc401dacf7545/t/66ba44d44cb5a24e8feb1cc7/1723483363518/Records+2023-03988*.pdf.

¹⁴ FBOP Email - Phone Call from Mr. Cornett - Letcher County, June 29, 2022; Letcher County Planning Commission email, FOIA Response 2023-03988, Responsive Records, Building Community Not Prisons, pp. 59-60 (Sep. 7, 2022),

https://static1.squarespace.com/static/6697d11874bfc401dacf7545/t/66ba44d44cb5a24e8feb1cc7/1723483363518/Records+2023-03988*.pdf.

institutions and businesses, and the general public,” that is a bold and unfounded statement.¹⁵ The FBOP also maintains this assertion verbatim in its FEIS despite acknowledging opposition expressed in thousands of comments, including from Letcher based individuals, leaders and organizations.¹⁶ In truth, the members of the “general public” and several “elected representatives” have expressed concern or have kept quiet, as have many other “community leaders” in Letcher County.

While the FEIS attempts to minimize public opposition to this project, a review of the Record demonstrates that the FBOP’s position that everyone in Letcher County wants this prison is simply not supported. For instance, both at the FBOP Scoping Meeting on November 17, 2022, and the recent Public Comments Meeting on March 28, 2024, local Letcher County residents presented significant and substantive testimony in opposition to this prison.¹⁷ FBOP lacks an accurate understanding of the position of the local Letcher Countians who will arguably be some of the most impacted people by this project.

Landowners at the Roxana site are among the most directly-impacted Letcher County residents and their opinion should weigh strongly in FBOP’s alternatives analysis. According to FBOP, “the interest and cooperation of property owners is another key factor in determining a site’s potential for development.”¹⁸ The FEIS states that “owners of the sites should be supportive

¹⁵ FEIS, p. 16.

¹⁶ See e.g. Response to Building Community Not Prisons Coalition, FEIS p. 219; Response to Emily H. Posner, Voice of the Experienced, Dustin S. McDaniel, Abolitionist Law Center, Concerned Letcher Countians, FEIS p. 249; Response to Kandia Milton, FEIS p. 257 (and referencing “many attendees at the March 28, 2024 public meeting” who “expressed opposition”); Response to Joan Steffen, National Lawyers Guild Chicago, FEIS p. 266; Response to Artie Ann Bates, FEIS p. 280; Response to Billie Caudill, FEIS p. 287; Response to c/o FCI Miami, FEIS p. 293; Response to Jason Palacios, FEIS p. 323; Response to Kelli Taylor, FEIS p. 338; Response to David Morales Zenquis, FEIS p. 346; Response to Individual Comments Submitted by Everycustomaction.org, FEIS p. 378.

¹⁷ Videos available at *Communications*, Proposed Federal Correctional Institution and Federal Prison Camp: Letcher County, Kentucky, <https://www.proposed-fci-letchercountyky.com/communications>.

¹⁸ FEIS, p. 36.

of correctional facility development,”¹⁹ but at least two landowners submitted public comments raising serious concerns about this project. FBOP simply ignored them and their desire to question the proposed use of their land. One of the landowners who would be affected by the proposed Roxana FCI, Linda Egbers, spoke in opposition to the prison at the Public Meeting on March 28, 2024;²⁰ she is neither acknowledged in the section averring “consistent, continuous, and unwavering support” nor in the section averring that no property owners showed interest in participating in a discussion with the BOP based on limited outreach in 2022.²¹

Landowner Wayne Whitaker also submitted comments by mail and via FBOP’s website in response to the DEIS. He questioned the suitability of local road infrastructure, the failure to adequately test for toxins, the impact on hunting near the prison, the effects on local tourism, the negative impact on local property values, the potential impact of endangered species and birds of prey, and the potential destruction of a general store constructed by his ancestors. Mr. Whitaker’s concerns are not included in the FEIS and they remain unanswered by FBOP. Other landowners have privately reported feeling intimidated into cooperating with the project.

Other Letcher Countians have expressed their opposition to elected officials. On June 2, 2023, local residents requested a meeting with Fifth Congressional District Representative Hal Rogers. His southeast representative, Andrea Begley, attended the meeting on Congressman Rogers’ behalf, which was held in the basement of the Harry M. Caudill Library in Whitesburg. As per her request, this meeting was not recorded nor was the press allowed to be present. Still, twenty-four (24) local citizens came to the meeting, several having missed work to attend. All in attendance gave statements and presented data about why this prison is bad for Letcher County.

¹⁹ FEIS, p. 34.

²⁰ *Id.*

²¹ FEIS, p. 36.

What was Representative Rogers’ response? On July 12, 2023, he inserted Section 219 into the Commerce, Justice, Science and Related Agencies appropriations bill, a fast-tracking rider that would have cut out the NEPA process of public input and subverted the right to judicial review in the “construction or operation” of the prison.²² In response, over 200 organizations and small businesses, and thousands of individuals from every state in the country reached out to the Congressional Representatives to remove Section 219.²³

Congress eventually passed the FY24 Budget without Section 219.²⁴ However, this year, Congressman Hal Rogers has inserted a new rider into the FY25 Budget.²⁵ This newest Rogers’ Rider again seeks to manipulate the separation of powers doctrine to ensure the construction of this prison. Opponents, from Letcher County and beyond, have again been forced to mobilize against this undemocratic bill.²⁶ While the FY25 Budget has not yet passed, the presence of Rogers’ Rider clearly demonstrates that the Congressman is actively trying to stymie the voice of local opponents to his unpopular prison project. Rogers behavior exemplifies that there simply IS NOT “consistent, continuous, and unwavering support expressed by Letcher County’s elected representatives, community leaders, members of local institutions and businesses, and the general

²² Department of Justice Appropriation Act, 2024, H.R. 5893 (Introduced in House 10/19/2023); *See also Proposed East KY Federal Prison Would Have Devastating Environmental Impacts*, Forward Kentucky (July 28, 2023), <https://forwardky.com/proposed-east-ky-federal-prison-would-have-devastating-environmental-impacts/> (linking to the original draft bill dated July 12, 2023). <https://docs.house.gov/meetings/AP/AP19/20230714/116251/BILLS-118--AP--CJS-FY24CJSSubcommitteeMark.pdf?ref=forwardky.com>).

²³ Letter to Kay Granger, et al. (Sep. 19, 2023), https://static1.squarespace.com/static/6697d11874bfc401daf7545/t/66ba469f729f2c32e3debb7b/1723483807517/1+70fd21_b0fa47038d7c4b6fb9404c31994adb53.pdf.

²⁴ Consolidated Appropriations Act, 2024, Pub. L. 118-42, H.R. 4366 (2023).

²⁵ Commerce, Justice, Science, and Related Agencies Appropriations Act, 2025, H.R. 9026 (Introduced in House July 11, 2024).

²⁶ Artie Ann Bates, Judah Schept, & Attica Scott, *Hal Rogers is Using Political Tricks to Force an Unneeded Federal Prison in Letcher*, Lexington Herald-Leader (July 30, 2024), <https://www.kentucky.com/opinion/op-ed/article290566924.html>; see also *48 Organizations Sign Letter Opposing Legislation to Shield Prison in Eastern Kentucky from Lawsuits*, Letcher County Community News-Press, July 24, 2024.

public”²⁷ for the prison. In conclusion, opposition to this prison continues to grow, and until the FBOP fully assesses that fact, it is disingenuous, arbitrary and capricious for the agency to rely on the assertion that there is “unwavering” support for FCI Letcher. The Record shows that this so-called “support” is limited to supporters of Congressman Rogers and the LCPC.

The evidence is scant if even existent as to why this prison should even be built. *Inter alia*, the following list suggests several reasons why constructing this prison is a terrible idea:

1. The BOP has simply failed to provide ANY legitimate reason or need for this prison project in the FBOP system. The federal prison population has declined by 26% over the last dozen years.²⁸ Aging prisons that currently exist already have the needed infrastructure to support them. Therefore, the preferable and fiscally responsible action would be to upgrade these buildings rather than build new ones in Letcher County. The DOJ, FBOP’s parent agency, has requested “rescission of new construction funds,” indicating that your agency does not want to build FCI/FPC Letcher.²⁹ The FBOP and former acting Attorney General Rod Rosenstein retracted this project’s prior Record of Decision (ROD) in 2019.³⁰ FBOP should follow its own precedent and withdraw this plan.
2. Understaffing will be a prohibitive factor in fully executing this prison plan, as former BOP director, Hugh Hurwitz laid out in his DEIS comment.³¹ FBOP’s non sequitur response was that the agency’s understaffing issue was NOT due to “the design and condition” of the buildings at USP McCreary, USP Big Sandy or FCI Manchester because they are “among the more recent facilities” across the country.³² However, FBOP’s statutory obligations under NEPA are not just to consider the environmental impacts from the “design and condition” of a proposed project. In fact, the FBOP is mandated to consider a full range of impacts on this facility, which includes the economic and public health impacts of this project.³³

Further, the FEIS states that “problems associated with insufficient staff are well known and would need to be addressed before activation of a new FCI/FPC in

²⁷ FEIS, p. 16.

²⁸ *Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/mobile/about/population_statistics.jsp#old_pops.

²⁹ FEIS, p. 266.

³⁰ Withdrawal of Record of Decision: Proposed United States Penitentiary and Federal Prison Camp, Letcher County, Kentucky, s. Hugh J. Hurwitz (June 5, 2019), https://www.proposed-fci-letchercountyky.com/_files/ugd/1be27f_5047f1b6fc1a4a2fb2aaeff1ce70709c.pdf

³¹ FEIS, p. 304-08.

³² FEIS, p. 309.

³³ 40 C.F.R. § 1508.1(i)(4).

Letcher County can occur.”³⁴ Doesn’t that mean that with the current staffing shortages in those three facilities, building a fourth facility should be null and void? Again, considering FBOP cannot legally proceed under NEPA until it accounts for this staffing issue.

Until FBOP can establish the reason that these three prisons remain understaffed (USP McCreary has 36 vacancies, USP Big Sandy and FCI Manchester each have 27 for a total of 90 vacancies in southeast Kentucky alone), then building a fourth facility under Congressman Rogers’ false promise that FCI Letcher is a jobs project,³⁵ is simply indefensible.³⁶ Specifically, and in direct contradiction to Congressman Rogers’ statements, the FEIS repeatedly says that the purpose of this project is not to create jobs.³⁷ In addition, the FEIS even states, without evidence, that the “beneficial” impacts of this project would be “widely dispersed and not significantly contribute to the economy of any one jurisdiction.”³⁸

Study after study that has looked at the economic impacts of the prisons in rural regions show that this industry does not bring communities economic stability.³⁹ Furthermore, the other three nearby federal prisons have continued to see lower

³⁴ FEIS, p. 309.

³⁵ *Congressman Rogers Applauds Next Step Toward a Federal Prison and Camp in Letcher County*, Mar. 1, 2024, Congressman Hal Rogers, <https://halrogers.house.gov/2024/3/congressman-rogers-applauds-next-step-toward-building-a-federal-prison-and-camp-in-letcher-county>; *Prison to ‘Proceed as Planned,’ Rogers Says*, Whitesburg Mountain Eagle (Apr. 13, 2016), <https://www.themountaineagle.com/articles/prison-to-proceed-as-planned-rogers-says/> (“These jobs will be good paying jobs, federal benefits, retirement, health, security,” said Rogers. “The prisons will not be bothered by a recession.”)

³⁶ FEIS, p. 91.

³⁷ FEIS, p. 98 (“only a small portion of the permanent workforce needed to operate the FCI/FPC is expected to be filled by current Letcher County residents”); Response to Emily H. Posner, Voice of the Experienced, Dustin S. McDaniel, Abolitionist Law Center, Concerned Letcher Countians, FEIS p. 245 (“The FBOP does not develop new correctional facilities as a jobs or economic development program”); Response to Kandia Milton, FEIS p. 256; Response to Individual Comments Submitted by Everycustomaction.org (same), FEIS p. 378; Response to Ashley Spalding, FEIS p. 262 (“the necessity for a facility’s development to house Adults in Custody (AIC) was the stated purpose and not its value as a jobs or economic development program.”)

³⁸ FEIS, p. 98.

³⁹ Dae-Young Kim, *Prison-Based Economic Development: What the Evidence Tells Us*, 7 Int’l J. of Rural Criminology 3, 367 (2023) (a meta-analysis finding that “[o]verall, the empirical evidence failed to corroborate the effectiveness of prisons as a means of long-term economic development in rural areas”); Gregory Hooks et al., *The Prison Industry: Carceral Expansion and Employment in U.S. Counties, 1969-1994*, 85 Soc. Sci. Q. 1, 37 (2004) (“We find no evidence that prison expansion has stimulated economic growth”); Gregory Hooks et al., *Revisiting the Impact of Prison Building on Job Growth: Education, Incarceration, and County-Level Employment, 1976-2004*, 91 Soc. Sci. Q. 1, 228 (2010) (“We provide evidence that prison construction impedes economic growth in rural counties, especially in counties that lag behind in educational attainment”).

employment statistics, further outmigration, continued poverty rankings,⁴⁰ and remain “distressed” by Appalachian Regional Commission criteria.⁴¹

For decades, prison proponents have fed the local population a steady diet of misinformed promises that this prison will bring jobs.⁴² However, the FEIS explicitly contradicts this assertion. In fact, the FEIS says the hires from Letcher County in construction, operation, and permanent workforce will be “small,” and that any help to a particular jurisdiction will be negligible.⁴³ The empty promise of economic benefit runs counter to overwhelming evidence and the FEIS’s own findings, and would be an arbitrary and capricious basis for rendering a decision.⁴⁴

3. CLC members and the greater Letcher County community suffered from a major flood event on July 28, 2022, whose impacts were greatly exacerbated due to the ecological devastation from strip mining in the region.⁴⁵ Letcher County and its residents have not fully recovered. What’s more, studies show that a significant risk exists that it will happen again.⁴⁶ The FEIS says that, in that event, plans will be made to store food, water, and supplies on site for the incarcerated people and staff who would be stranded at the prison.⁴⁷ But there was no clear plan defined nor one for medical emergencies requiring evacuation that might arise during such an event. What happens if someone falls and breaks an ankle, or has a heart attack? This scenario alone begets the wisdom of the decision to place this prison on a mountaintop removal site. In an age where extreme weather events are a regular

⁴⁰ Ashley Spalding, Jason Bailey, & Dustin Pugel, *Facts Don’t Support Argument for Proposed Federal Prison in Letcher County*, Kentucky Center for Economic Policy, May 19, 2023, <https://kypolicy.org/wp-content/uploads/2023/09/Facts-Dont-Support-Economic-Argument-for-Proposed-Federal-Prison-in-Letcher-County-.pdf>

⁴¹ “Classifying Economic Distress in Appalachian Counties,” Appalachian Regional Commission, 2024, <https://www.arc.gov/classifying-economic-distress-in-appalachian-counties/>

⁴² *Congressman Rogers Applauds Next Step Toward a Federal Prison and Camp in Letcher County* (Mar. 1, 2024), Congressman Hal Rogers, <https://halrogers.house.gov/2024/3/congressman-rogers-applauds-next-step-toward-building-a-federal-prison-and-camp-in-letcher-county>; Elwood Cornett, *Prison Detractors Should Say How They Would Bring Jobs to Letcher County’s Unemployed Coal Miners*, Lexington Herald Leader (May 2, 2018), <https://www.kentucky.com/opinion/op-ed/article210254554.html>; *Federal Prison Project Wins Final Approval*, Harlan Enterprise (Apr. 2, 2018), <https://www.harlanenterprise.net/2018/04/02/federal-prison-project-wins-final-approval/>.

⁴³ FEIS, p. 90-91.

⁴⁴ *See, e.g., Red Lake Band of Chippewa Indians v. United States Army Corps of Engineers*, 636 F. Supp. 3d 33, 53 (D.D.C. 2022) (“an agency cannot...‘offer[] an explanation for its decision that runs counter to the evidence’ before it”) (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, (1983)).

⁴⁵ William C. Haneberg, *Precipitation Patterns, Mountaintop Removal Mining, and the July 2022 North Fork Kentucky River Flood*, 30 J. Env’t. & Eng’g Geoscience 3: 131-145 (2024); W. Jay Christian, Beverly May, & Jeffrey E. Levy, *Flood Fatalities in Eastern Kentucky and the Public Health Legacy of Mountaintop Removal Coal Mining*, J. of Maps (2023), <https://doi.org/10.1080/17445647.2023.2214159>.

⁴⁶ Arian Campo-Flores & Cameron McWhirter, “Flooding Hits American Towns Far From Oceans and Big Rivers,” Wall Street Journal, June 19, 2023, https://www.wsj.com/us-news/climate-environment/flooding-inland-climate-change-kentucky-3ed2c7fb?mod=Searchresults_pos3.

⁴⁷ FEIS, p. 59.

occurrence, why would the federal government choose to put a facility that houses a vulnerable population in a place that could easily be cut off from medical services in a flood or forest fire?

The FEIS's inadequate response is that the

Roxana Site is not located in an area that is considered particularly vulnerable to climate change and associated weather or other physical impacts. The project site is not located within the 100- and 500-year flood zones and, therefore, is not vulnerable to hydrologic changes resulting from climate change. Furthermore, the proposed site is located in southeastern Kentucky, well inland from the Atlantic and Pacific coastlines and other large water bodies, and therefore is not vulnerable to sea level rise. The impacts on Letcher County from climate change have not been specifically determined, and the actual implications during the lifespan of the proposed FCI/FPC are not fully known.⁴⁸

It is disingenuous to say that risks from the climate crisis, including inland flooding in Letcher County and the Roxana community, are not known. In prior DEIS comments, which CLC members provided the FBOP, there appears a June 19, 2023 *Wall Street Journal* article that clearly explains Letcher County's severe risk of inland flooding.⁴⁹ This WSJ article relies on data from the First Street Foundation.⁵⁰ NEPA mandates that FBOP account for this climate change information. Until it does so, the agency's FEIS will be deficient and not in compliance with NEPA.

4. Housing is sorely needed in Letcher County, not only in areas impacted by the flood relief, but also throughout the county.⁵¹ Letcher County does not have enough safe and affordable housing for its current residents.⁵² The FEIS fails to account for how

⁴⁸ FEIS, p. 130.

⁴⁹ Arian Campo-Flores & Cameron McWhirter, "Flooding Hits American Towns Far From Oceans and Big Rivers," *Wall Street Journal* (June 19, 2023), https://www.wsj.com/us-news/climate-environment/flooding-inland-climate-change-kentucky-3ed2c7fb?mod=Searchresults_pos3

⁵⁰ *Letcher County*, Flood Factor: First Street, https://riskfactor.com/county/letcher-county-ky/21133_fsid/flood

⁵¹ See Sam Adams, *Neon Buys Land for New Housing*, *Whitesburg Mountain Eagle* (Nov. 8, 2023), <https://www.themountaineagle.com/articles/neon-buys-land-for-new-housing/> (noting a housing crisis prior to the 2022 flood and the likelihood that a correctional institution would exacerbate the long-standing shortage).

⁵² See Liam Niemeyer, *'We Desperately Need Something: ' Kentucky Lawmakers Urged to Put \$200 Million into Housing*, *Kentucky Lantern* (Jan. 9, 2024), <https://kentuckylantern.com/2024/01/09/we-desperately-need-something-kentucky-lawmakers-urged-to-put-200-million-into-housing/>; John McGary, *Beshear Expected to Make 'Major' Housing Announcement in Letcher County Thursday*, *WEKU* (Oct. 25, 2023), <https://www.weku.org/the-commonwealth/2023-10-25/beshear-expected-to-make-major-housing-announcement-in-letcher-county-thursday> ("Letcher County had a housing shortage before the July '22 flood and now needs between 15-hundred and 3-thousand homes.")

the influx of workers in construction, maintenance, and permanent operation will impact the area's housing needs. The FEIS simply states, without evidence, that the influx of workers in construction, maintenance, and permanent operation will be small and not worsen the housing crisis.⁵³ This unproven assertion without an evidentiary basis is a violation of NEPA.

5. The FEIS fails to provide adequate studies that it relied on to determine the effects of this prison on the local population. Both the DEIS and FEIS say that, “[g]iven their small population size, detailed demographic statistics for Whitesburg and other communities in Letcher County are unavailable.”⁵⁴ In turn, the FBOP assumes that the population characteristics of Whitesburg, Jenkins, Fleming and Roxana are representative of the county as a whole.

There are, however, significant challenges that rural residents in Letcher County face that are different from city residents. For instance, many areas of rural Letcher County have no municipal water or sewer services, therefore these residents use well water and septic tanks.⁵⁵ If a Letcher County resident does not have access to city sewer and water connections, they must get water from wells. Often wells require filtration and conditioners such as routine administration of salt. Homes that use septic systems also require periodic emptying that costs around \$200/clean.

Another difference is that rural county children ride the bus to and from school for markedly longer periods each day than their town counterparts. Because these rural children live far from their school in Whitesburg, they have limited access to after-school sports and activities due to busing limitations. In turn, their parents must provide transportation, driving the cost of these activities up for rural families, and therefore participation is often impossible.

Consequently, it is inaccurate to extrapolate city data to the rural areas of the county. But the FEIS admits to not having that data *even* for the four communities in the county that would be most impacted by this prison.⁵⁶ Without this essential data, the FEIS fails to assess these aspects of rural Letcher County life. The FBOP has not properly conducted an impacts and alternatives analysis as required under NEPA.

6. Letcher County and Central Appalachia have a serious staffing shortage to provide mental health and substance use disorder services.⁵⁷ Coincidentally, the same is true

⁵³ FEIS, p. 103-106.

⁵⁴ FEIS, p. 87.

⁵⁵ See, e.g., Sam Adams, *1,800 Homes Still Lack Public Water in Letcher County*, Whitesburg Mountain Eagle (Dec. 8, 2021), <https://www.themountaineagle.com/articles/1800-homes-still-lack-public-water-in-letcher-county/>

⁵⁶ FEIS, p. 87.

⁵⁷ *What Access to Mental Health Care Looks Like in Letcher County, Kentucky*, Stacker (Jan. 19, 2024), <https://stacker.com/kentucky/letcher-county-ky/what-access-mental-health-care-looks-letcher-county-kentucky>

for the FBOP.⁵⁸ To put a prison where more than 40% of the incarcerated population will have mental illnesses and substance use disorders into a county lacking those services for its own population, is ill-advised. CLC member, Dr. Artie Ann Bates, submitted a comment during the DEIS comment period to the FBOP regarding the mental health staffing shortages.⁵⁹ In violation of the NEPA process, the FEIS fails to respond to this substantive comment from Dr. Bates.⁶⁰

7. The FBOP's plan to rely on Letcher County Water and Sewer District (LCWSD) for sewage treatment is untenable, as pointed out by multiple members of the Energy and Environment Cabinet.⁶¹ In all likelihood, the FBOP would require LCWSD to construct a new sewage treatment plant or otherwise expand its technical capacity. The FBOP is already burdening the LCWSD with a current water line extension project.⁶² Additionally, the insufficient consideration of sewage treatment in the FEIS leaves us unable to evaluate how the construction of this plant and its effluence would adversely impact the water quality of the nearby North Fork of the Kentucky River, as well as its Kings Creek tributary, the residents downstream, and the wildlife habitat dependent on the North Fork and Kentucky Rivers. The FEIS does not adequately account for the ecological impacts of sewer treatment, rendering the document deficient under NEPA. Further, the development of such a project also raises profound concerns about violations of the Clean Water Act.⁶³
8. Traffic on Highways 588 and 160, the small roads leading to and from the prison, will be unmanageable. The FEIS says that those roads will go from less than "50 vehicles" per hour to "276 vehicles total" between 3:30 pm to 4:30 pm.⁶⁴ This time is when children are on school buses going home. Those roads are small and curvy; they are already dangerous with coal trucks before adding more than five times the

⁵⁸ Christie Thompson & Taylor Elizabeth Eldridge, *Treatment Denied: The Mental Health Crisis in Federal Prisons*, The Marshall Project (Nov. 21, 2018), <https://www.themarshallproject.org/2018/11/21/treatment-denied-the-mental-health-crisis-in-federal-prisons>; Meg Anderson, *Lawmakers Push for Federal Prison Oversight After Reports of Inadequate Medical Care*, NPR (Dec. 12, 2023), <https://www.npr.org/2023/12/12/1218627629/lawmakers-push-for-federal-prison-oversight-after-reports-of-inadequate-medical->, *Inspection of the Federal Bureau of Prisons' Federal Correctional Institution Sheridan*, Department of Justice: Office of the Inspector General (May 2024), https://oig.justice.gov/sites/default/files/reports/24-070_0.pdf

⁵⁹ See Exhibit B.

⁶⁰ FEIS, pp. 200-319 (failing to account for Dr. Artie Ann Bates' Comment); 40 C.F.R. § 1503.4.

⁶¹ Comment of Kentucky Energy and Environmental Cabinet, Watershed Management Branch, Appendix B to FEIS, FEIS Merged Appendices, p. 183-84 ("only Knott County would likely be capable of accommodating the additional demands ... the distribution system, Letcher County Water & [sic] Sewer District, as noted has been cited for disinfection byproducts and has a reported water loss"); Comment of Kentucky Energy and Environmental Cabinet, Water Infrastructure Branch, Appendix B to FEIS, FEIS Merged Appendices, p. 189 ("Assuming they'll be using Letcher Co. Water District, the last Sanitary Survey (2022) shows that they had no deficiencies but lacked technical capacity").

⁶² See *Water Project to Begin*, Whitesburg Mountain Eagle (July 10, 2024), 1.

⁶³ 33 U.S.C. § 1251 *et seq.*

⁶⁴ FEIS, p. 121.

amount of traffic during the hour after school lets out. How does FBOP justify this traffic risk, not only to local school children, but to the community as a whole?

The FEIS's deficient response to this concern is that the FBOP will coordinate with the Kentucky Department of Transportation and consider a "dedicated left turn lane," on Highway 588.⁶⁵ The FBOP then claims that since local traffic patterns are "relatively low," that the addition of prison traffic "is not expected to have a significant adverse effect on roadway capacity or traffic safety."⁶⁶

This lack of insight is all too common in the FEIS. Highway 588 is a narrow road with essentially one lane, but is wide enough for oncoming traffic to pass one another with caution. However, passing oncoming traffic on this highway requires each vehicle to slow, and in some areas come to a full stop for the other vehicle. The FBOP acknowledges that traffic will increase by five times, yet the current road simply cannot accommodate this change. The FEIS fails to adequately study this matter, and FBOP's negligence to fully consider the impacts of this important issue is not compliant with NEPA.

Furthermore, building a left turn entrance on Highway 588 will not address the extra traffic leading to and from that one tiny area. The impact of the additional traffic on local bridges, especially from the 3:30-4:30 pm, has not been adequately addressed.

The Blackey Bridge where Highway 588 starts is a 90-year-old bridge that is currently closed for repairs. It is also a one-lane bridge. Blackey residents are severely impacted by the closure of this bridge, just as they will be by the congestion of prison traffic. Further, there is the Blackey Head Start preschool beside Highway 588. There the road is one-lane wide, with very small children crossing. Again, the FEIS fails to adequately study this matter, and FBOP's negligence to fully consider the impacts of this important issue is not equivalent to compliance with NEPA.

The FEIS fails to account for the Roxana site's infrastructure deficits. For example, on page 244, in response 002-4, the FBOP says that "supporting infrastructure is critically important" in the care of those who are incarcerated, yet the Roxana site could not be more inconvenient for establishing this type of infrastructure. As a reclaimed surface mine site, this area is now mostly wilderness after lying dormant for more than twenty years. It is almost inaccessible for water lines from below, and for sewage treatment services. The undersigned remain extremely concerned that the community surrounding the prison will be plagued with water line ruptures and water infrastructure problems like those experienced by the community surrounding USP Big Sandy.⁶⁷ Yet this FEIS fails to explain how this prison would

⁶⁵ FEIS, p. 245.

⁶⁶ FEIS, p. 245.

⁶⁷ Katie Myers, *Water Struggles Continue in Martin County, Ky. as Federal Funding Trickles In*, Louisville Public Media (Apr. 11, 2022), <https://www.lpm.org/news/2022-04-11/water-struggles->

be different from USP Big Sandy, which was also built on a former surface mine. NEPA requires the FBOP to conduct such analysis and ensure that the ongoing water problems experienced by Martin Countians are not replicated in Letcher County.

9. Congressman Hal Rogers has a history of warehousing incarcerated people in his district, and these individuals are counted by the decennial census and considered members of the local region, yet cannot vote or participate in democratic processes that impact them. This practice is called prison gerrymandering, and has given Congressman Rogers outsized power.

The Prison Gerrymandering Project explains that

[b]ecause prisons are disproportionately built in rural areas but most incarcerated people call urban areas home, counting prisoners in the wrong place results in a systematic transfer of population and political clout from urban to rural areas. For example: 40% of people incarcerated in Maryland prisons are from Baltimore, yet 90% of them are counted outside the city.

When this data is used to draw legislative districts, the impact is startling. Many districts that contain prisons have a significant percentage of their “residents” behind bars: After the 2010 redistricting, there were 24 state house districts across the country where prisons accounted for 10% or more of the districts' population.

Using prisons to enhance votes in individual districts within one region cumulatively gives the whole region additional representation. For example: Before New York ended prison gerrymandering in 2010, the unadjusted Census data used in redistricting added an extra district in the upstate region, giving the constituents there more political representation than their counterparts in other areas. Without using prison populations as padding, seven state senate districts would have had to be redrawn, causing line changes throughout the state.

When districts with prisons receive enhanced representation, every other district . . . without a prison sees its votes diluted. And this vote dilution is even larger in the districts with the highest incarceration

[continue-in-martin-county-ky-as-federal-funding-trickles-in](https://www.lpm.org/news/2021-05-17/with-infrastructure-funding-on-horizon-beleaguered-martin-county-looks-to-raise-water-rates-again); Jeff Young & Katie Myers, *With Infrastructure Funding on Horizon, Beleaguered Martin County Looks To Raise Water Rates Again*, Louisville Public Media (May 17, 2021), <https://www.lpm.org/news/2021-05-17/with-infrastructure-funding-on-horizon-beleaguered-martin-county-looks-to-raise-water-rates-again>; Stephen George & Benny Becker, *Troubled Waters: A Coalfield County Loses Trust in Water and Government*, Louisville Public Media (Jan. 30, 2017), <https://www.lpm.org/news/2017-01-30/troubled-waters-a-coalfield-county-loses-trust-in-water-and-government>

rates. Thus, the communities that bear the most direct costs of policing and incarceration are the communities that are the biggest victims of prison gerrymandering.⁶⁸

The FEIS continues to tout this prison gerrymandering as something positive.⁶⁹ The agency's response to CLC's complaint is weak and feckless, saying only that the DEIS "provides information about the implications of having AIC housed within Letcher County."⁷⁰

10. There are landowners in Roxana who do not want to sell their land but are intimidated and afraid of speaking out. They fear they will be forced to sell. Many citizens in Letcher County and surrounding areas oppose this prison, but fear retribution from politicians, government officials, non-profit agencies and business people. Other landowners have serious concerns about the project that have gone unanswered. By FBOP's own statements, landowner sentiments are a critical component of site selection.⁷¹ However, it is clear that the FBOP is out of step and unaware of landowner concerns.
11. As described above, despite FBOP's claims, there is not "consistent, continuous, and unwavering support,"⁷² either locally, statewide or nationally. Two recent examples of the opposition to this prison are a front-page article in one of the Letcher County newspapers, News-Press,⁷³ and an opinion piece in the Lexington Herald-Leader,⁷⁴ both within the last week. The FBOP should recognize and acknowledge the growing opposition to this prison.

The FBOP must stand against ill-advised projects, even those promoted by a powerful legislator, and instead strive to do what is best for the incarcerated population under its care, as well as for the communities where it operates. Its proposed prison project for Letcher County fails

⁶⁸ *The Problem*, Prison Gerrymandering Project, <https://www.prisonersofthecensus.org/impact.html> (last visited Aug. 10, 2024).

⁶⁹ FEIS, p. 92.

⁷⁰ FEIS, p. 246.

⁷¹ The FEIS states that "the interest and cooperation of property owners is a key factor in determining a site's potential for development." FEIS, p.36. The FBOP also excluded the Meadow Branch and Van/Fields sites from its alternatives analysis due to "changes with the offeror." *Id.* at 35. Failing to consider mounting opposition from landowners at Roxana when it is a stated factor for consideration and "changes with the offeror" have excluded other viable sites is a plainly arbitrary and capricious manner of conducting an alternatives analysis.

⁷² FEIS, p. 16, 38.

⁷³ *48 Organizations Sign Letters Opposing Legislation to Shield Proposed Prison in Eastern Kentucky from Lawsuits*, Letcher County Community News-Press, July 24, 2024.

⁷⁴ Artie Ann Bates, Judah Schept, & Attica Scott, *Hal Rogers is Using Political Tricks to Force an Unneeded Federal Prison in Letcher*, Lexington Herald-Leader (July 30, 2024), <https://www.kentucky.com/opinion/op-ed/article290566924.html>.

to meet this most basic principle, and for this reason alone the FBOP should scrap this project, and use this money in a more fiscally, ecologically, and socially responsible way.

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.⁷⁵ With the intention 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.⁷⁶ 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.⁷⁷ An EIS is required for all “major federal actions significantly affecting the quality of the human environment.”⁷⁸ An EIS must “include a statement of purpose and need that briefly summarizes the underlying purpose and need for the proposed agency action.”⁷⁹ An “agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”⁸⁰

NEPA’s “twin aims” are to ensure that the agency (1) “consider[s] every significant aspect of the environmental impact of a proposed action, and to consider reasonable alternatives that could mitigate those impacts”; and (2) “inform the public that it has indeed considered

⁷⁵ See J.B. Ruhl et al., *The Practice and Policy of Environmental Law* 406 (3d. 2014).

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

⁷⁷ See 40 C.F.R. parts 1500-1508

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

⁷⁹ 42 U.S.C. § 4336a(d).

⁸⁰ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

environmental concerns in its decisionmaking process.”⁸¹ “By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decision-making by agencies. . . .” and “public involvement” in those decisions.⁸² “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b).

EIS must also 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.”⁸³ This assessment is referred to as a “hard look” analysis that must be done by the agency in its EIS.⁸⁴ An EIS’s alternatives analysis is referred to as the “heart of the environmental impact statement.”⁸⁵ The document must “devote substantial treatment to each alternative.”⁸⁶

The mandate of NEPA to conduct a thorough alternatives analysis is not limited by Congressional restrictions in other laws. The Council on Environmental Quality has clearly stated that an

alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies.⁸⁷

⁸¹ *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (citation omitted).

⁸² *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009).

⁸³ 42 U.S.C. § 4332(C).

⁸⁴ 42 U.S.C. §4332(2)(c); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

⁸⁵ 40 C.F.R. § 1502.14 (2011).

⁸⁶ *Id.* § 1502.14(b).

⁸⁷ CEQ FAQ, 46 Fed. Reg. at *18027 (citing 40 C.F.R. § 1500.1(a); cited by *Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 943 (D. Or. 2016) (finding agency action arbitrary and capricious due to, *inter alia*, insufficient alternatives analysis and outdated data analysis)).

As explained in detail below, the FBOP’s limitation on review of sites outside Letcher County is based on an incorrect citation and a fundamentally flawed view of the appropriations process. However, even in cases where Congress directs a specific agency action such as construction by legal mandate within the text of a statute, courts scrutinize the extent to which the agency takes a “hard look” within environmental impact statements to alternatives that would “conflict with the congressional mandate.”⁸⁸

Pursuant to NEPA’s “hard look” requirement, agencies must disclose all direct and indirect, foreseeable impacts from projects.⁸⁹ Direct effects are “caused by the action and occur at the same time and place,” whereas indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁹⁰ Cumulative effects are “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”⁹¹ NEPA requires a federal agency to consider all relevant factors relating to the direct and indirect effects of the proposed project, and to articulate a rational connection between the facts found and the choice made.⁹²

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

⁸⁸ *Izaak Walton League v. Marsh*, 655 F.2d 346, 372 (D.C. Cir. 1981).

⁸⁹ 40 C.F.R. §1502.16; *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

⁹⁰ 40 C.F.R. § 1508.8.

⁹¹ *Id.* § 1508.7.

⁹² *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

- 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.⁹³

To satisfy NEPA’s hard look and public disclosure and participation requirements, an agency must evaluate in detail a project’s potential site-specific impacts. Without quantified, site-specific information, “neither the courts nor the public . . . can be assured that the [government] provided the hard look that it is required to provide.”⁹⁴

Under NEPA, information used by the agency for its review of environmental impacts must be of high quality.⁹⁵ Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.⁹⁶ The NEPA regulations also require agencies to ensure the scientific integrity of the discussions and analyses.⁹⁷ NEPA analysis “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.”⁹⁸

NEPA requires an EIS to “include appropriate mitigation measures not already included in the proposed action or alternatives,”⁹⁹ and to “include discussions of . . . [m]eans to mitigate adverse

⁹³ Council on Environmental Quality (CEQ). “Considering Cumulative Effects Under NEPA,” <https://ceq.doe.gov/docs/ccenepa/sec1.pdf>.

⁹⁴ *Neighbors of Cuddy Mt. v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998).

⁹⁵ 40 C.F.R. § 1500.1(b).

⁹⁶ *Id.*

⁹⁷ 40 C.F.R. §1502.24.

⁹⁸ *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

⁹⁹ 40 C.F.R. § 1502.14(f)

environmental impacts (if not fully covered under § 1502.14(f)),”¹⁰⁰ The EIS must contain “a reasonably complete discussion of possible mitigation measures” to avoid “undermin[ing] the ‘action-forcing’ function of NEPA.”¹⁰¹ Under NEPA, mitigation includes:

- (1) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (5) Compensating for the impact by replacing or providing substitute resources or environments.¹⁰²

Furthermore, NEPA established as a goal “the preservation of historic [and] cultural . . . aspects of our natural heritage.”¹⁰³ NEPA protects the “human environment,”¹⁰⁴ which is a term that must be interpreted “comprehensively.”¹⁰⁵ Under NEPA, an analysis of the “effects” on the “human environment” must include impacts on “aesthetic, historic, [and] cultural” resources.”¹⁰⁶

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....”¹⁰⁷ All federal departments also have an affirmative duty to further the purposes of

¹⁰⁰ 40 C.F.R. § 1502.16(h).

¹⁰¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)

¹⁰² 40 C.F.R. § 1508.1.

¹⁰³ 42 U.S.C. § 4331(b).

¹⁰⁴ *Id.* § 4332(C).

¹⁰⁵ 40 C.F.R. § 1508.1(r).

¹⁰⁶ *Id.* § (i)(4).

¹⁰⁷ *See* 16 U.S.C. § 1531(b).

the ESA.¹⁰⁸ 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.”¹⁰⁹

The Act requires the Secretary of the Interior to identify which species are endangered and list them accordingly.¹¹⁰ 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.¹⁸¹¹¹ 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.¹¹²

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.”¹¹³ 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.”¹¹⁴

The Endangered Species Act also includes protections for listed species’ habitat, where the FWS has designated “critical habitat” for a species.¹¹⁵ Consequently, under the ESA all federal agencies must adhere to procedural safeguards to ensure that their actions do not “result in the

¹⁰⁸ *Id.* § 1531.

¹⁰⁹ 16 U.S.C. § 1531(a).

¹¹⁰ 16 U.S.C. § 1533

¹¹¹ 16 U.S.C. § 1538.

¹¹² 16 U.S.C. § 1532 (19).

¹¹³ 50 C.F.R. § 17.3.

¹¹⁴ *Id.*

¹¹⁵ 16 U.S.C. § 1533(a)(3)(A).

destruction or modification” of the designated habitat of a species.¹¹⁶

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.”¹¹⁷ 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.¹¹⁸

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.¹¹⁹ 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.¹²⁰

C. The National Historic Preservation Act

Section 106 of the National Historic Preservation Act (“NHPA”) mandates federal agencies to take into account the impact of certain undertakings on properties that are or are eligible for listing on the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation (“ACHP”) the opportunity to comment.¹²¹

Before beginning any undertaking potentially subject to § 106, a federal agency must take

¹¹⁶ 16 U.S.C. § 1536.

¹¹⁷ 50 C.F.R. § 402.13.

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.* § 402.14(a).

¹²⁰ *Id.* § 402.14.

¹²¹ *See* 16 U.S.C. § 470f.

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, including Indian tribes that might attach religious and cultural significance to the affected area; and 4) develop a plan for public involvement.¹²²

Once an agency has determined that § 106 applies, the following four requirements from the ACHP on Historic Preservation guide the agency's compliance.¹²³ These requirements are to 1) initiate the process; 2) identify historic properties affected; 3) evaluate the adverse effects; and 4) resolve the adverse effects.¹²⁴

Under the NHPA and NEPA, federal agencies are required to consult with any "Indian tribes ... that might attach religious and cultural significance to historic properties that may be affected by an undertaking."¹²⁵ Agencies must "make a reasonable and good faith effort to identify any Indian tribes ... that might attach religious and cultural significance to historic properties," and consultation should commence "early in the planning process."¹²⁶ This consultation should provide a tribal nation with a "reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."¹²⁷ Consulting parties shall be involved "during NEPA scoping, environmental analysis, and the preparation of NEPA

¹²² See 36 C.F.R. § 800.3.

¹²³ See 36 C.F.R. §§ 800.3-8000.6.

¹²⁴ *Id.*

¹²⁵ 36 C.F.R. § 800.2(ii) (citing 16 U.S.C. § 470a(d)(6)(B)).

¹²⁶ 36 C.F.R. § 800.2(c)(2)(ii)(A).

¹²⁷ 36 C.F.R. § 800.2(c)(2)(ii)(a).

documents,”¹²⁸ and should have the opportunity to assist in developing “alternatives and proposed measures that might avoid, minimize, or mitigate any adverse effects of the undertaking on histories properties.”¹²⁹

D. The Administrative Procedures Act

The Administrative Procedure Act (“APA”) establishes the default rules for federal administrative law.¹³⁰ 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.¹³¹ Additionally, this legislation authorizes judicial review and provides a private right of action for “a person suffering a legal wrong because of agency action.”¹³²

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.”¹³³ 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.”¹³⁴ 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.¹³⁵

“In order for an agency decision [pursuant to NEPA] to pass muster under the APA’s

¹²⁸ 36 C.F.R. § 800.8(1)(iii).

¹²⁹ 36 C.F.R. § 800.8(1)(v).

¹³⁰ 5 U.S.C. § 551 et seq.

¹³¹ *Id.*

¹³² *Id.* § 702.

¹³³ 5 U.S.C. § 706(2)(A).

¹³⁴ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations omitted).

¹³⁵ *Id.*

‘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.’”¹³⁶ In *Dubois*, the court found that the Forest Service acted arbitrarily and capriciously when it had not “rigorously explored all reasonable alternatives,” including the one put forward by an environmental organization.¹³⁷

E. Executive Orders (“EO”)

i. EO 12898

Passed in 1994 by Pres. Bill Clinton, Executive Order 12,898 strongly encourages federal agencies to consider the human and environmental impacts of their programs, especially with regard to the effects on low-income and minority communities along with Indian tribes (otherwise known as “environmental justice communities”).¹³⁸ Under Executive Order 12,898, a federal agency shall “[t]o the greatest extent practicable and permitted by law... 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.”¹³⁹ The order requires that each agency develop an agency-specific environmental justice strategy to address these disproportionate impacts.¹⁴⁰ It also formed the foundation for the environmental justice analysis federal agencies undertake as part of their environmental reviews pursuant to NEPA.

¹³⁶ *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1285 (1st Cir. 1996) (internal citations omitted).

¹³⁷ *Id.* at 1288.

¹³⁸ *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017).

¹³⁹ Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994), amended by Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 25, 2021). *See also Kingman Park Civic Ass’n v. Gray*, 956 F. Supp 2d 260, 265 (D.D.C. Aug. 26, 2013) (finding that Executive Order 12,898’s environmental justice aims do not place any burdens on state or local government).

¹⁴⁰ Exec. Order No. 12,898, 59 Fed. Reg. at 7630 (Feb. 16, 1994).

Shortly after Executive Order 12,898 was issued, the Council on Environmental Quality (CEQ) promulgated a guidance on how agencies should apply the executive order's environmental justice principles to NEPA.¹⁴¹ One portion of the guidance serves to define terms used in the executive order. According to the CEQ, an agency must identify low-income and minority populations within the affected area of a proposed project.¹⁴² A low-income population is defined in accordance with annual poverty thresholds from the Bureau of the Census' Current Population Reports, and can refer to groups of people who live in close proximity to one another or who share a common experience (i.e. migrant workers, Native Americans).¹⁴³ A minority population meets the CEQ's standards if it either exceeds 50 percent of the affected area's population or is "meaningfully greater than the minority population in the general population or other appropriate unit of geographic analysis."¹⁴⁴ The guidance gives an agency flexibility in choosing the geographic unit of analysis, as long as the chosen unit "does not artificially dilute or inflate the affected minority population."¹⁴⁵

The CEQ's guidance also provides a definition for Executive Order 12,898's "disproportionately high and adverse" language, which serves as the benchmark in an agency's environmental justice analysis (although such a finding does not preclude an agency action from going forward). 1997 CEQ Guidance at 10. Under the guidance, an agency can determine whether

¹⁴¹ Council on Env't Prot., *Environmental Justice Under the National Environmental Policy Act* (1997) [hereinafter 1997 CEQ Guidance], <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>.

¹⁴² *Id.* at 25.

¹⁴³ *Id.* See also U.S. Env't Prot. Agency, EPA 300-B-16001, *Promising Practices For E.J. Methodologies In NEPA Reviews* 26 (2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf [hereinafter Promising Practices] (recommending that agencies identify a low-income community if the tract's percentage of low-income people is equal or greater than that of the county).

¹⁴⁴ 1997 CEQ Guidance at 25. See also *Promising Practices* at 27 (defining "meaningfully greater" as where the minority population of a given census tract either exceeds 50% of the population or is 10% larger than the aggregate minority population percentage in the county).

¹⁴⁵ 1997 CEQ Guidance at 26.

a project has “disproportionately high and adverse human health effects” by considering three factors: first, whether the health effects (which is construed to include bodily impairment, illness, and death) are significant (as defined by NEPA) or above generally accepted norms; second, whether the risk of hazard exposure by an environmental justice community is significant or “appreciably exceeds or is likely to appreciably exceed” the risk to the general population; and third, whether the health effects occur in an environmental justice community that is already affected by “cumulative or multiple adverse exposures from environmental hazards.”¹⁴⁶ The CEQ’s guidance gives three additional factors for agencies to consider when determining whether an action has “disproportionately high and adverse environmental effects”: first, whether there will be an impact that “significantly (as employed by NEPA) and adversely affects a[n environmental justice community], which can include “ecological, cultural, human health, economic or social impacts” when those impacts are interrelated to impacts on the physical environment; second, whether the environmental impacts are significant and may have an adverse impact on environmental justice communities that “appreciably exceeds or is likely to appreciably exceed” the general population; and third, whether the environmental impact occur in an environmental justice community that is already affected by “cumulative or multiple adverse exposures from environmental hazards.”¹⁴⁷

The CEQ’s 1997 guidance also sets guidelines for agencies to consider environmental justice within each step of the NEPA process. The guidance states that “In preparing an EIS or an EA, agencies must consider both impacts on the natural or physical environment and related social, cultural, and economic impacts.”¹⁴⁸ This includes the recognition of the “interrelated cultural,

¹⁴⁶ *Id.* at 26. See also *Promising Practices* at 42 (summarizing specific agency steps for undertaking the disproportionately high and adverse impacts analysis).

¹⁴⁷ 1997 CEQ Guidance at 26–27. See also *Promising Practices* at 42.

¹⁴⁸ 1997 CEQ Guidance at 8.

social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action.”¹⁴⁹ This guidance recommends that agencies determine the presence of environmental justice communities within the scoping process and develop a public engagement strategy for such populations. When an agency identifies a disproportionately strong and adverse effect from an action, it should discuss whether that effect is present in alternative courses of action.¹⁵⁰ In weighing this factor, the agency should also consider feedback from affected communities along with the magnitude of the project’s effect when compared to the magnitude of alternatives that have a less disproportionate impact on environmental justice communities.¹⁵¹ The agency must record the presence of disproportionately high and adverse effects in their record of decision.¹⁵²

The D.C. Circuit has interpreted the Executive Order 12,898 to “require that agencies conduct environmental justice analyses” by collecting information on the race, national origin, income status, and other demographic information for areas surrounding sites.¹⁵³ Though Executive Order 12,898 does not create a private right of action in court, “a petitioner may challenge an agency’s environmental justice analysis as arbitrary and capricious under NEPA and the APA.” *Id.* at 1330 (D.C. Cir. 2021).¹⁵⁴

An agency must “reasonably and adequately” explain its decisions under Executive Order 12,898’s environmental justice analysis and offer “a rational connection between the facts and the decision made.”¹⁵⁵ As a result, there are some cases in the D.C. Circuit in which courts have

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Vecinos para el Bienestar de la Comunidad Costera v. FERC (Vecinos)*, 6 F.4th 1321, 1326 (D.C. Cir. 2021).

¹⁵⁴ *See also Cmtys. Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

¹⁵⁵ *Cmtys. Against Runway Expansion v. FAA*, 355 F.3d at 689.

deemed an agency’s environmental justice analysis deficient under NEPA.¹⁵⁶

ii. EOs 13990 and 13834

EO 13990 and EO 13834’s Section 6 (“Duties of the Federal Chief Sustainability Officer”), Section 7 (“Duties of Heads of Agencies”), and Section 11 (“General Provisions”) remain active today.¹⁵⁷ EO 13990 aims “to reduce greenhouse gas emissions” and “to bolster resilience to the impacts of climate change.”¹⁵⁸ The order takes several steps to undo previous decisions by the Trump administration, directing agencies to review actions under the Trump administration and providing specific instructions to halt the Keystone XL Pipeline, activities in the Arctic National Wildlife Refuge, and other critical environmentally-damaging projects.¹⁵⁹ Furthermore, EO 13990 reestablishes an “Interagency Working Group on the Social Cost of Greenhouse Gases” (“Working Group”).¹⁶⁰ The Working Group is tasked with assessing the social costs of carbon, methane, and nitrous oxide emissions, with the goal of capturing the full costs of GHG emissions for agency cost-benefit analyses.¹⁶¹ EO 13990 also directs the Council on Environmental Quality (CEQ) to review and update guidance on the consideration of greenhouse gas emissions and climate change in National Environmental Policy Act reviews.¹⁶²

Although EO 13834 has largely been overturned, three sections continue to be relevant. Section 6 creates the position of Federal Chief Sustainability Officer, appointed by the President,

¹⁵⁶ See *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th at 1330–31 (holding that an agency’s decision to only consider census blocks within two miles of a project site was arbitrary, given that the agency had projected more widespread environmental impacts from the project). See also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017), *rev’d in part on other grounds*, 985 F.3d 1032 (D.C. Cir. 2021) (holding that an agency’s failure to consider beyond a cursory analysis the adverse human and environmental effects of a potential oil spill failed NEPA’s “hard look” test).

¹⁵⁷ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

¹⁵⁸ *Id.* § 1.

¹⁵⁹ *Id.* § 1, 4, 6.

¹⁶⁰ *Id.* § 5.

¹⁶¹ *Id.*

¹⁶² *Id.* § 7.

to head an Office of Federal Sustainability.¹⁶³ The duties of the Federal Chief Sustainability Officer are to: “(a) monitor progress and advise the Chairman of CEQ on agency performance and implementation of this order; (b) lead the development of programs and policies to assist agencies in implementing the goals of this order; and (c) chair, convene, and preside at meetings and direct the work of the [Federal Interagency Sustainability] Steering Committee.”¹⁶⁴ Section 7 requires each agency to designate an agency Chief Sustainability Office who is responsible for implementing the executive order.¹⁶⁵ This officer reports to the Chairman of CEQ and the Director of Director of the Office of Management and Budget (OMB) on agency progress towards the goals of the order.¹⁶⁶ Finally, Section 11 provides general provisions that the order does not infringe upon the executive authority or the functions of the OMB, the order shall be implemented in a consistent manner with applicable law and availability of appropriations, and does not confer any right or benefit.¹⁶⁷

Following EO 13990, the Interagency Working Group (IWG) on the Social Cost of Greenhouse Gases produced a technical support document on the social cost of carbon, methane, and nitrous oxide.¹⁶⁸ Under the order, the IWG was “tasked with first reviewing the SC-GHG estimates currently used by the USG and publishing interim estimates within 30 days of the E.O. that reflect the full impact of GHG emissions, including taking global damages into account.”¹⁶⁹

The support document provides the initial findings of the IWG analysis, as well as interim

¹⁶³ Exec. Order No. 13834, 80 Fed. Reg. 15869 § 6.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § 7.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 11.

¹⁶⁸ *See* Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 (Feb. 2021).

¹⁶⁹ *Id.* at 3.

estimates of the SC-CO₂, SC-CH₄, and SC-N₂O that should be used by agencies until a comprehensive review and update is developed in line with the requirements in E.O. 13990. Additionally, the IWG seeks to continue updating these analyses to reflect the best available science and methodologies. In the EIS documents that agencies have submitted, the IWG estimates are often used as the baseline methodology for calculation of social cost of GHGs.

III. DETAILED LEGAL AND TECHNICAL COMMENT

A. The FEIS Does Not State a Legally Sufficient Purpose and Need to Construct FCI Letcher

i. The statement of purpose and need does not comply with NEPA due to its absolute deference to a nonbinding Congressional directive

The FBOP repeatedly claims that its investigation is limited to Letcher County because of a Congressional directive that requires the agency to build a prison in Letcher County, Kentucky. This position is legally wrong. A review of Congress' appropriations bills reveals no such geographical limitation, and even enacted statutes do not supersede obligations under NEPA.

An EIS must “include a statement of purpose and need that briefly summarizes the underlying purpose and need for the proposed agency action.”¹⁷⁰ An “agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”¹⁷¹

In this case, the FBOP’s justification for limiting its environmental review and analysis to sites only in Letcher County is facially incorrect. This limitation is built directly into the FBOP’s discussion of its project’s “purpose and need,” where it incorrectly claims that Congress has mandated that the agency build a prison in Letcher County. For instance, the FBOP states that

¹⁷⁰ 42 U.S.C. § 4336a(d).

¹⁷¹ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[i]n 2006, Congress directed the FBOP to initiate various investigations for development of a new federal correctional institution in Letcher County, Kentucky (Congressional authorization: P.L. 109-272). In conformance with that directive, the FBOP has focused its attention and resources upon the 339-square-mile area comprising Letcher County at the exclusion of other areas of the Mid-Atlantic Region and the U.S. as a whole.¹⁷²

This citation to Pub. L. 109-272 as FBOP's justification for geographically limiting the project's purpose and need and resulting alternatives analysis is repeated in responses to several comments.¹⁷³ However, the FBOP's reliance on Pub. L. 109-272 is nonsensical; Pub. L. 109-272 is actually an Act "to preserve the Mt. Soledad Veterans Memorial in San Diego, California."¹⁷⁴ This Act for a memorial in San Diego is entirely unrelated to the prison project proposed for Letcher County.

In fact, the relevant Public Law appropriating funds for fiscal year 2006 is Pub. L. 109-108. This Act appropriates a lump sum for all planning, acquisition, construction, and remodeling of the Federal Prison Systems' Buildings and Facilities. Furthermore, the language of this appropriations bill puts no geographical restriction on the FBOP to build a prison in Letcher County, Kentucky. Rather it states the appropriation is

[f]or planning, acquisition of sites and construction of new facilities; purchase and acquisition of facilities and remodeling, and equipping of such facilities for penal and correctional use, including all necessary expenses incident thereto, by contract or force account; and constructing, remodeling, and equipping necessary buildings and facilities at existing penal and correctional institutions, including all necessary expenses incident thereto, by contract or force account, \$90,112,000, to remain

¹⁷² DEIS, p. 15; FEIS, p. 15.

¹⁷³ See Response to Emily H. Posner, Voice of the Experience, Dustin S. McDaniel, Abolitionist Law Center, Concerned Letcher Countians, FEIS p. 244 (citing "a directive" in 2006 specifying "Letcher County"); Response to Hugh J. Hurwitz, FEIS p. 309 (citing P.L. 109-272); response to William James Jones, III, LTC, U.S. Army, Retired, FEIS p. 316 (citing P.L. 109-272); response to Jason Palacios, FEIS p.323 (citing "a directive" specifying "Letcher County"); response to Andres, Nadira, Isabelle, and Maddie School of Natural Resources and the Environment, FEIS p. 330 (citing "a directive" in 2006 specifying "Letcher County"); response to David Zenquis, FEIS p. 346 (citing "a directive" specifying "Letcher County"); response to Individual Comments Submitted by Everycustomaction.org, FEIS p. 382 (citing "a directive" in 2006 specifying "Letcher County").

¹⁷⁴ An Act to preserve the Mt. Soledad Veterans Memorial in San Diego, California, by providing for the immediate acquisition of the memorial by the United States, Pub. L. No. 109-272, 120 Stat. 770 (2006).

available until expended, of which not to exceed \$14,000,000 shall be available to construct areas for inmate work programs.¹⁷⁵

Nothing in Pub. L. 109-108 geographically limits the FBOP “to initiate various investigations for development of a new federal correctional institution”¹⁷⁶ to Letcher County, Kentucky. Moreover, with the Supreme Court striking down of *Chevron* deference, the FBOP lacks the agency discretion to interpret the law in a manner that limits its environmental review to Letcher County of its proposed action to build a new federal prison.¹⁷⁷

Perhaps the FBOP’s belief that Congress has mandated it to build a prison in Letcher County is rooted in H.R. Rep. No. 109-272, the Conference Report that accompanies Pub. L. 109-108. This Conference Report does earmark \$5,000,000 of the appropriated funds as dedicated to “a Federal Correctional Institution in Letcher County, KY.”¹⁷⁸ This may be a directive from Congress to earmark \$5,000,000 of the appropriation, but it **cannot justify a limitation** on the FBOP’s statutory obligations under NEPA.

The distinction between a public law and a legislative report is legally meaningful. The United States Supreme Court has clearly stated that a

fundamental principle of appropriations law is that where ‘Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on’ the agency.¹⁷⁹

¹⁷⁵ Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, H.R. 2862, 119 Stat. 2290, 2297 (2005).

¹⁷⁶ DEIS, p. 15; FEIS, p. 15.

¹⁷⁷ See *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2273 (2024).

¹⁷⁸ H.R. Rep. No. 109-272, at 83 (2005) (Conf. Rep.).

¹⁷⁹ *Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993) (citing, *inter alia*, *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975); *American Hospital Assn. v. NLRB*, 499 U.S. 606, 616 (1991) (statements in committee reports do not have the force of law)); see also *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 633 (2005) (“restrictive language in Committee Reports is not legally binding”).

Furthermore, “[a]s a matter of law, instruction in committee reports and other legislative history as to how funds should or are expected to be spent do not impose any legal requirements on federal agencies. Only directives that are specified in the law itself are legally binding.”¹⁸⁰ Without doubt, “[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress.”¹⁸¹

The legislative history of the Appropriations Act of 2006, Pub. L. No. 109-108, further demonstrates that this piece of legislation does not restrict the appropriated funds to a prison project in Letcher County, Kentucky. One earlier Senate Amendment to the appropriations bill for fiscal year 2006 had included \$5,000,000 specifically designated “for site planning and development of a Federal Correctional Institution in the Mid-Atlantic region.”¹⁸² However, this geographical restriction within the bill itself was actually stricken and replaced with a pure lump-sum appropriation. The Conference Committee chose to earmark funds within the non-binding Conference Report, and not the binding statutory text.¹⁸³ When Congress intends to *legally* restrict the use of appropriated funds to geographical areas as specific as Letcher County, Kentucky, it is free to include this specification within the text of the statute, as it has done in the past with Emergency Highway Restoration appropriations.¹⁸⁴ Congress’ decision to place the earmark solely in the legislative history indicates intentional flexibility for spending the funds.

¹⁸⁰ U.S. Gov’t Accountability Off., GAO-08-209, *Congressional Directives: Selected Agencies’ Processes for Responding to Funding Instructions*, 10 (2008) (citing 55 Comp. Gen. 307 (1975), *Shannon v. United States*, 512 U.S. 573, 583 (1994)).

¹⁸¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

¹⁸² Senate’s Proposed Amendments to H.R. 2862 (Sep. 15, 2005), at 20
<https://www.govinfo.gov/content/pkg/BILLS-109hr2862eas/pdf/BILLS-109hr2862eas.pdf>.

¹⁸³ H.R. Rep. No. 109-272, at 1, 9 (2005) (Conf. Rep.) (The committee of conference . . . have agree to recommend and do recommend to their respective Houses . . . that the House recede from its disagreement to the amendment of the Senate to the text, and agree to the same with an amendment, as follows: In lieu of the matter stricken and inserted by said amendment, insert” the final text that became Pub. L. No. 109-108, which includes *no* geographical restriction on appropriations).

¹⁸⁴ See Supplemental Appropriations Act, 2001, Pub. L. No. 107-20, 115 Stat. 155, at 187 (2001) (providing that “\$9,100,000 shall be for U.S. 119 over Pine Mountain in Letcher County, Kentucky.”)

The FBOP’s claim – “Congress passed a public law (P.L. 109-272) that directed the FBOP to plan for a new correctional facility in Letcher County, a directive that remains unchanged and in effect in 2024 which the FBOP is responsible for implementing” – is categorically incorrect.¹⁸⁵ House Reports are not laws. A Congressional directive within a conference report not textually incorporated into the appropriations bill itself **has never been “in effect”¹⁸⁶ as a matter of law, and does not “remain in effect”¹⁸⁷** in 2024. It cannot limit the agency’s statutory requirement under NEPA to have 1) a legitimate purpose and need statement; and 2) conduct a robust required alternatives analysis.

The FBOP’s stated purpose and need for a new FCI and FPC cites to the nonbinding “Congressional directive” to justify restricting its alternatives analysis to Letcher County, alongside the much broader and legitimate need for “modern institutions and infrastructure.”¹⁸⁸ It has so restricted its analysis of alternatives that might serve the need for modernization that the FEIS is nothing more than an arbitrary, capricious, and “foreordained formality.”¹⁸⁹ The FBOP is wrongfully relying on a nonexistent statutory restriction to justify its noncompliance with NEPA.

As the following sections in this comment demonstrate, the proposed FCI Letcher fails to fulfill the otherwise legitimate purpose and need for modern institutions. As explained below, the arbitrarily restrictive geographical limitation on the statement of purpose and need has also rendered the FEIS’s alternatives analysis woefully deficient.

ii. The FEIS’ stated purpose and need for a new FCI is contradicted by the DOJ, the FBOP’s parent agency

The FBOP’s stated purpose and need conflicts with the DOJ’s and FBOP’s public position

¹⁸⁵ Response to William James Jonas III, LTC, U.S. Army, Retired, FEIS p. 316.

¹⁸⁶ FEIS, p. 3 (emphasis added).

¹⁸⁷ FEIS, p. 15 (emphasis added).

¹⁸⁸ FEIS, p. 15.

¹⁸⁹ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

in their budget submissions for the last several years. In its 2015-2017 round of EIS preparation, the FBOP claimed that an overpopulation issue was the agency’s “need” for a new institution within Letcher County.¹⁹⁰ Now, the FBOP states that the Purpose and Need for the proposed prison construction is to address the need for “modern institutions and infrastructure” in a cost-effective manner, citing an OIG Audit Report from 2023.¹⁹¹ Left out of the FEIS is the OIG Audit Report’s acknowledgment of DOJ’s consistent requests to rescind the funding for a federal prison in Letcher County.¹⁹² These are effectively requests from FBOP’s parent agency to cancel the FCI/FPC Letcher project, repeated year after year across two different presidential administrations.¹⁹³ The most recent appeal for rescission of the funding for FCI Letcher appears in the DOJ’s Budget Request for FY 2025.¹⁹⁴

The FBOP’s rationale for canceling the project is provided in the OIG’s Audit Report,

¹⁹⁰ Fed. Bureau of Prisons, *Final Supplemental Revised Final Environmental Impact Statement for Proposed United States Penitentiary and Federal Prison Camp: Letcher County, Kentucky* ES-i (2017).

¹⁹¹ FEIS, p. 3, 15, 22; *Audit of the Federal Bureau of Prisons’ Effort to Maintain and Construct Institutions*, Department of Justice: Office of the Inspector General (May 2023), https://oig.justice.gov/sites/default/files/reports/23-064_1.pdf (hereafter OIG Audit).

¹⁹² OIG Audit, p. 20 (“In each of the last 5 years, the BOP requested and Congress declined to return, or rescind, all unobligated funds for the [Letcher County] project”).

¹⁹³ See U.S. Dep’t of Just., U. S. Department of Justice, FY 2018 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 28 (last updated November 14, 2023); U.S. Dep’t of Just., U. S. Department of Justice, FY 2019 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 15 (last updated November 14, 2023); U.S. Dep’t of Just., U.S. Department of Justice, FY 2020 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 14-15 (last updated November 14, 2023); U.S. Dep’t of Just., U. S. Department of Justice, FY 2021 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 11 (last updated November 14, 2023); FY 2022 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 12 ,30 (last updated November 14, 2023); FY 2023 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 13 ,20 (last updated November 14, 2023); FY 2024 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 22 (visited June 12, 2024); FY 2025 Performance Budget Congressional Submission Federal Prison System Buildings and Facilities 7,12,14,34 (visited June 12, 2024); FY25 Biden Budget, DOJ, Performance Budget, Congressional Submission at pp. 7, 12, 14, 34.

¹⁹⁴ *Buildings and Facilities: FY 2025 Performance Budget: Congressional Submission*, United States Department of Justice: Federal Prison System (March 2024), https://www.justice.gov/d9/2024-03/bop_bf_fy_2025_pb_narrative_3.6.24_omb_cleared_final_1.pdf (hereafter BOP FY25 Budget Request), at 7.

where it lists “two major factors.”¹⁹⁵ The first factor is increased costs and significant delays related to the “unique topography” at the Roxana Sites.¹⁹⁶ Paraphrasing FBOP staff from the Construction and Environmental Review Branch, the Audit Report notes the difficulties specific to the Roxana Site, including its “remoteness, elevation and significant soil remediation requirements.”¹⁹⁷ The OIG then concludes that “it is unclear whether the FBOP will be able to identify a site within Letcher County that will allow for the safe and cost-effective construction and operation of a new BOP institution.”¹⁹⁸ **Indeed, whether a prison can be built in Letcher County in a cost-effective manner that meets the FBOP’s needs is repeatedly cast into doubt by the OIG.**

In contrast, the OIG acknowledges that a separate prison construction project (FCI Leavenworth) “more obviously addresses the FBOP’s Purpose and Need Statement . . . which states that new facilities should help address the issue of aging facilities.”¹⁹⁹ Of note, FCI Leavenworth would replace an existing facility at the same site, rather than constructing a brand new facility at a new location void of any infrastructure. **The clear implication is that in its own estimation, the Roxana Site is not a safe and cost-effective site for a new prison.** This is an estimation that accords with many of the facts in the FEIS and its incorporated documents, as well as facts on the ground that have not been adequately accounted for, such as the extreme risk of major weather events like severe flooding and forest fires in the region.

As concerned citizens from around the country, the undersigned parties have already experienced FBOP’s failure to properly state a purpose and need that complies with NEPA. In the last iteration of FBOP’s attempt to build a different prison at the Roxana Site, the agency ultimately

¹⁹⁵ OIG Audit, p. 22.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

withdrew its ROD in part based on concerns that the stated Purpose and Need in the last EIS did not comply with NEPA. Specifically, the claimed Purpose and Need for FBOP's prior EIS was to address overcrowding. At the end of the day, this was an untenable position given the considerable, documented and continuing decline in the number of incarcerated people in FBOP's care.²⁰⁰

Once again, the FBOP is forced to try to fit a round peg into the square hole to appease Congressman Hal Rogers' agenda to force the construction of this unneeded prison on the FBOP. **The FBOP cannot state a meaningful and legally compliant purpose or need for building a new facility in this location – because one simply does not exist.**

B. The FEIS' Alternatives Analysis is Deficient

i. The current FEIS' alternatives analysis is too narrow

As discussed previously, 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.”²⁰¹ This assessment is referred to as a “hard look” analysis that must be done by the agency, and then thoroughly discussed in its EIS.²⁰² An EIS's alternatives analysis is referred to as the “**heart of the environmental impact statement.**”²⁰³ The document must

²⁰⁰ *Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/mobile/about/population_statistics.jsp#old_pops; see also John Gramlich, *Under Trump, the Federal Prison Population Continued its Recent Decline*, Pew Research (Feb. 17, 2021), <https://www.pewresearch.org/short-reads/2021/02/17/under-trump-the-federal-prison-population-continued-its-recent-decline/>

²⁰¹ 42 U.S.C. § 4332(C).

²⁰² See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

²⁰³ 40 C.F.R. § 1502.14 (2011) (emphasis added).

“devote substantial treatment to each alternative.”²⁰⁴

To carry out its obligations under NEPA, the FBOP should have included a fully elaborated and researched alternatives section in the FEIS that explores the possibility of meeting its stated needs by modernizing and repairing current facilities. This hard look alternatives analysis also should have assessed the efficacy of demolishing antiquated buildings and replacing them at currently existing facilities. However, in violation of the NEPA, the FBOP engages in an alternatives analysis that is limited to a comparison of a single county and a “no action alternative.” This narrow analysis, limited to just one site in Letcher County, does not comply with NEPA.

Former FBOP Director Hugh Hurwitz submitted a comment on the DEIS about this particular issue.²⁰⁵ He lays out a range of “alternatives not considered” in the FEIS that would better “solve its staffing crisis and control the growing cost of operating an aging system.”²⁰⁶ Specifically, Mr. Hurwitz suggests that the FBOP could “repair the existing facilities;” in the alternative, “any new prison construction should take place where the old existing prison can be torn down and replaced.”²⁰⁷

From the jump, the FBOP’s statement of purpose and need unreasonably limited the scope of its alternatives analysis by arbitrarily and capriciously excluding all possible sites outside of Letcher County, Kentucky. The FBOP claims in its FEIS that federal appropriations law mandates this geographical restriction. In turn, the FBOP wrongly claims, it is justified in putting a geographical limitation on 1) purpose and need statement; and 2) its hard look alternatives comparison. However, as described above, FBOP’s position is legally incorrect, and there is no federal appropriations law that limits this funding to constructing a prison in Letcher County.

²⁰⁴ *Id.* § 1502.14(b) (emphasis added).

²⁰⁵ Comment of Hugh Hurwitz, FEIS, p. 307.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

By failing to actually account for the legitimate alternative of renovating and modernizing existing facilities, and by failing to conduct any meaningful review of sites other than those in Letcher County, the FBOP is clearly not devoting “substantial treatment to each alternative” and failing to meet its obligation to taking a “hard look” at each alternative before making a decision. The FEIS is legally deficient. It must be corrected, and the public should be given the opportunity to comment on any and all such corrections before an ROD issues.

i. The FBOP must consider alternatives outside Letcher County

By incorporating a nonbinding Congressional directive into its statement of purpose and need, the FBOP has needlessly, arbitrarily and capriciously, limited the geographical scope of its alternatives analysis to sites in Letcher County. The FBOP has excluded countless other sites across the nation, in particular sites that already have a federal prison, that would more appropriately serve the legitimate purposes of pursuing “modern institutions and infrastructure.” This extremely narrow alternatives analysis renders the FEIS process a “foreordained formality.”²⁰⁸ The FBOP must redo its FEIS to account for alternatives outside of Letcher County, Kentucky that fulfill the purpose and need of modern institutions and infrastructure.

The OIG report cited in the FEIS offers several concrete alternatives that the FBOP ignores in its alternatives analysis.²⁰⁹ Notably, the OIG report does not recommend building new prisons to address the FBOP’s needs regarding “modernization and repair” (M&R). Rather, the report recommends that FBOP develop a “well defined infrastructure strategy” to determine what its needs are and how best to meet those needs.²¹⁰ The OIG states that the lack of such an infrastructure

²⁰⁸ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

²⁰⁹ FEIS, p. 22.

²¹⁰ *Audit of the Federal Bureau of Prisons’ Effort to Maintain and Construct Institutions*, Department of Justice: Office of the Inspector General (May 2023), https://oig.justice.gov/sites/default/files/reports/23-064_1.pdf (hereafter OIG Audit), p. ii-iii.

strategy is a “key factor” in the FBOP’s failure to address the deterioration of older facilities.²¹¹

This lack of a “thorough and proper assessment” of the FBOP’s needs and how best to meet them is also noted in the Comment Letter submitted by Hugh Hurwitz, former Acting Director for the Bureau of Prisons.²¹² “Rather than rush to issue an EIS and begin construction in Letcher County, the FBOP has the opportunity (and obligation to the taxpayers) to thoroughly examine its current and future needs.”²¹³ A thorough review of existing FBOP “facilities infrastructure” and fact-based projections for future needs is lacking, and would allow the FBOP to properly evaluate construction of “newer, more cost-effective [facilities] in well-suited locations” as well as the need “to repair the remaining facilities.”²¹⁴

According to both of these authoritative sources, the FBOP cannot know if building a new prison would meet its M&R needs better than upgrading and repairing current facilities, or building new facilities at pre-existing FBOP sites, until it completes a thorough review of exactly that question. As the OIG puts it, a “well-defined infrastructure strategy” is required before the FBOP can know “how specific new construction and expansion projects would, or would not, fit with the FBOP’s infrastructure goals and mission needs.”²¹⁵

Citing the National Research Council, the Audit Report also notes the “potential negative outcomes” of taking action without having completed this internal review of the agency’s needs, including the development of “cost-inefficient facilities that waste available resources”²¹⁶ Nonetheless, having failed to complete the foregoing review, the FBOP states that the purpose of building a prison at the Roxana Site is to meet the need for “modern federal correctional facilities

²¹¹ *Id.* at 8.

²¹² Comment of Hugh J. Hurwitz, FEIS p. 308.

²¹³ *Id.* at 307.

²¹⁴ *Id.*

²¹⁵ OIG Audit at i, iii.

²¹⁶ *Id.* at 9.

and infrastructure,” and that FCI Letcher will meet that need in a cost-effective manner.²¹⁷ The FBOP provides no evidence that it can meet its M&R needs at FCI Letcher in a cost-effective manner. Considering the contrary evidence in the OIG Report and Mr. Hurwitz’s Comment, this hollow FBOP claim is clearly unsubstantiated. In the absence of a meaningful alternatives analysis, this claim is indefensible, and not compliant under NEPA

In turn, for the FEIS to comply with NEPA, the FBOP must actually take a “hard look,” and review the alternative of replacing existing institutions through new construction. While appropriations such as the Consolidated Appropriations Act of 2016 specify that “\$444,000,000 shall be available only for costs related to construction of new Facilities . . .”²¹⁸ this language—like the appropriation for fiscal year 2006 – is not limited in *geographic* scope.²¹⁹ As explained at length above, this is no reason for the FBOP to limit its NEPA analysis to Letcher County alone. At FCI Leavenworth, the FBOP is currently engaging in a project of modernizing an existing institution by replacing it with a new facility on the same site.²²⁰ Like in Leavenworth, nothing is restricting the FBOP from using the \$444,000,000 from decommissioning an antiquated prison, and replacing it at a site with supporting infrastructure. The FBOP should consider similar projects at other sites throughout the country where old facilities could similarly be decommissioned and replaced within their own existing property.

Notwithstanding Congress’s legal mandate to use funds for construction, the review of

²¹⁷ FEIS, p. 21.

²¹⁸ Pub. L. 114-113, H.R. 2029 at 9, 129 Stat. 2242, 2303 (2015).

²¹⁹ Some nonbinding, post hoc statements in committee hearings mention the ostensible earmarking of these funds for Letcher County, but there appears to be no geographical limitation even within relevant committee reports, House and Senate prints, or the Joint Explanatory Statement for the Consolidated Appropriations Act of 2016. For post hoc references to Letcher, *see* Statement on Prison Construction Before the Appropriations Committee, 114 Cong. 14 (2017) (Statement of Attorney General Loretta Lynch).

²²⁰ OIG Audit, p. 23.

sites outside of Letcher County should also include a “hard look” at M&R of existing institutions. “Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable.”²²¹ An “environmentally preferable alternative may be the proposed action, the no action alternative, or a reasonable alternative.”²²² M&R of existing penal facilities is eminently reasonable in light of the FBOP’s recognition of the need for “modern institutions” and the existing demands acknowledged in the FEIS of “facility repairs” and “continuous maintenance.”²²³ Presenting M&R alternatives would work towards fulfilling 1) the FBOP’s need for a “well defined infrastructure strategy” as recommended by the OIG²²⁴ and former BOP Acting Director Hurwitz,²²⁵ 2) a benchmark against which to measure the FBOP’s own repeated requests for rescission of Letcher County earmarked funding, and 3) the clear statutory mandates of NEPA.

A full and NEPA compliant alternatives analysis would take into account the alternative of replacing old facilities with new buildings on existing FBOP property, like what the FBOP is doing at Leavenworth. As well, a sufficient EIS would explore the alternative of necessary and expensive repairs to existing facilities. The FBOP cannot legally rely on a FEIS that fails to account for such

²²¹ CEQ FAQ, 46 Fed. Reg. at *18027; *see also Nat'l Wildlife Fedn v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 943 (D. Or. 2016), *Izaak Walton League v. Marsh*, 655 F.2d 346, 372 (D.C. Cir. 1981) (citing to Pub. L. 95-902 § 101(j), which specifically and statutorily mandated designs “to provide for possible future expansion” of an inland waterways system, in addition to legislative history at H.R. Rep. No. 95-545 and S. Rep. No. 95-215, and concluding that the relevant agency took a “hard look” at a “rehabilitation alternative” in lieu of the statutorily described expansion by citing to seven pages in the FEIS, thirty-two pages within an RDSEIS, and twelve separate cites to “conflicting viewpoints on rehabilitation” within an FEIS. After significant analysis, the agency determined that “massive rehabilitation would be necessary,” the “costs of rehabilitation without interrupting traffic were believed to be comparable to or greater than the costs of replacements,” there was “an unacceptably high risk that rehabilitation would encounter insoluble engineering problems,” and “a rehabilitated facility would never be as structurally sound as a new facility.”).

²²² 40 C.F.R. § 1502.14(f).

²²³ FEIS, p. 21-22.

²²⁴ OIG Audit, p. ii-iii.

²²⁵ Comment of Hugh J. Hurwitz, FEIS, p. 308.

alternatives, including renovation or on-site replacement of existing facilities outside of Letcher County, Kentucky. Until the FBOP addresses these concerns in a new FEIS, a ROD must not issue.

ii. The FBOP conducted an insufficient review of alternative sites in Letcher County

The agency's alternatives analysis also is legally deficient because it fails to consider alternative site locations within Letcher County. The current FEIS only compares the Roxana Site to the No Action alternatives. This is a categorically deficient alternatives analysis under NEPA, especially in light of the existence of Payne Gap as a site that possibly could meet the FBOP's requirements. To comply with NEPA, the FBOP should revisit the Payne Gap alternative and conduct a full alternative analysis. However, any such future analysis would require the FBOP to robustly update the initially limited data used to exclude Payne Gap, which is now obsolete with the passage of time, and other significant changes to conditions throughout Letcher County.

Furthermore, the FBOP has omitted crucial facts from the record. A FOIA request from VOTE yielded documents that revealed the contents of a phone call between the FBOP and Mr. Elwood Cornett of LCPC, which disclosed that the main reason Payne Gap was discarded as a potential site was because the mayor of Jenkins wanted to pursue tourism there.

[Mr. Cornett] stated that the Mayor does not want a prison built in Jenkins due to their expansion of tourism activities. He is concerned that if a prison is built in Jenkins it would impact tourism. Mr. [Cornett] stated again that he thinks that Roxanna is the best and possibly the only place to build the prison.²²⁶

The LCPC later sent the FBOP an email arguing that "the Federal Correctional Institution should be at Roxana" because "representatives of the Jenkins area are in the process of developing

²²⁶ Federal Bureau of Prisons Email "Phone Call from Mr. Cornett - Letcher County," June 29, 2022, FOIA Response 2023-03988, 59, available at Building Communities Not Prisons, https://static1.squarespace.com/static/6697d11874bfc401dacf7545/t/66ba44d44cb5a24e8feb1cc7/1723483363518/Records+2023-03988*.pdf.

impressive and significant tourism sites and activities.”²²⁷

NEPA does not permit major environmental decisions to be made behind closed doors. Rather, the statute requires that evidence used by the agency in rendering its decision be disclosed to the public, so that the public may provide substantive and meaningful comment.²²⁸ The environmental explanations offered for the cursory exploration of Payne Gap in this FEIS run “counter to the evidence before the agency” and presented to the public,²²⁹ raising the obvious inference that the FBOP has relied on these undisclosed statements to an impermissible degree. While economic factors are relevant in a NEPA analysis, one mayor’s intention to pursue tourism, communicated by a private group in an undisclosed meeting, cannot limit the FBOP’s paramount obligations under NEPA to “rigorously explore and objectively evaluate reasonable alternatives.”²³⁰ NEPA requires a “cumulative” analysis that allows the public to holistically weigh environmental issues, “socioeconomic resources, human health, recreation, quality of life issues, and cultural and historical resources.”²³¹ Privately communicated, solely economic concerns do not trump the rest of NEPA.

The current FEIS contains information that significantly alters the elements relied upon by the FBOP to exclude Payne Gap and settle on Roxana as the preferred alternative. For instance, the acreage and linear feet of wetlands and streams newly delineated at the Roxana Site have

²²⁷ *Id.* at 60 (Letcher County Planning Commission email, Sep. 7, 2022).

²²⁸ *See, e.g., National Environmental Policy Act*, U.S. Army Corps of Engineers, <https://www.sam.usace.army.mil/Missions/Planning-Environmental/ACF-Master-Water-Control-Manual-Update/ACF-NEPA-Process/> (“NEPA is a ‘full disclosure’ law with provisions for public access and full participation”); *NEPA and Project Documentation*, U.S. Department of Transportation: Federal Highway Administration, <https://www.environment.fhwa.dot.gov/nepa/documentation.aspx> (“Documentation (along with dissemination) is an essential component of the NEPA project development process . . . The purpose of documenting the NEPA process provides for complete disclosure to the public”).

²²⁹ *Motor Vehicle Mfrs.*, 463 U.S. at 43.

²³⁰ 40 C.F.R. § 1502.14(a).

²³¹ U.S. Env’t Prot. Agency, EPA 315-R-99-002, *Consideration of Cumulative Impacts in EPA Review of NEPA Documents* (1999).

increased significantly, such that Payne Gap now has potentially fewer impacts on jurisdictional wetlands than Roxana. The FEIS notes that the Roxana Site development “would result in direct permanent impacts to approximately 6,290 linear feet of streams and 1.99 acres of wetlands.”²³² This evaluation is significantly different from the 2017 Final Supplemental Revised Final Environmental Impact Statement, which found 5,610 linear feet of streams and 2.44 acres of wetlands.²³³ At the time of Final Supplemental Revised FEIS in 2017, Payne Gap was found to have 10,512 linear feet of streams and 2.40 acres of wetlands impacted.²³⁴ When FBOP first evaluated Payne Gap’s wetlands, their acreage was approximately equivalent to the Roxana site. The significantly smaller area of impact at the Roxana site shown in a more recent analysis meaningfully changes the comparison between the two sites. However, the Payne Gap site was not reevaluated in preparation for the 2024 DEIS or FEIS. The failure to do so renders the current FEIS deficient under NEPA.

Elsewhere the FEIS notes the newly discovered existence of NRHP eligible sites at Roxana, one of which has been evaluated as being impacted with an adverse effect.²³⁵ In contrast, there are no known NRHP eligible sites at Payne Gap. Resolving adverse effects under the NHPA requires a process of consultation “to develop and evaluate *alternatives* or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”²³⁶ In combination with the NEPA process, selection of an “environmentally preferable alternative” must take into account “protecting, preserving, and enhancing historic ... resources.”²³⁷ On the record

²³² FEIS, p. 57.

²³³ Fed. Bureau of Prisons, *Final Supplemental Revised Final Environmental Impact Statement for Proposed United States Penitentiary and Federal Prison Camp: Letcher County, Kentucky* ES-xii (2017).

²³⁴ *Id.*

²³⁵ FEIS, Table 3-8, p. 77-78.

²³⁶ 36 C.F.R. § 800.6(a) (emphasis added).

²³⁷ 40 C.F.R. § 1502.14(f).

that has been established, Payne Gap appears “preferable” to Roxana in terms of protecting NRHP-eligible historic resources.

In other words, the prior comparison between Payne Gap and Roxana is no longer valid because the facts that were weighed have changed. Given the passage of time and the significant impacts of the 2022 floods, it is reasonable to expect that other comparators between the two sites may have changed. A new comparison with updated information for both sites is now necessary to fulfill the requirements of NEPA, not the preferences of either the LCPC or the mayor of Jenkins.

The FBOP should also revisit the Meadow Branch and Van/Fields sites as potential alternatives. These sites were removed from consideration twelve years ago due to a “change with the offeror.”²³⁸ Given that there were “no conditions identified that would prevent development” at the sites, they could still meet the BOP’s needs.²³⁹ Whatever the prior changes with the offerors were that caused the FBOP to remove them from consideration – changes that are never explained – there may have been subsequent changes in the last twelve years that now make them available for reconsideration. New concerns raised by owners at the Roxana site also influence the alternatives analysis for landowners opinion. There is nothing in the FEIS to indicate that these alternative sites have been reconsidered.

The sufficiency of the 2022 review of Other Alternative Locations is unclear based on the limited information in the FEIS. On page 35 of the DEIS, the final sentence describing the outcome of attempts to contact landowners trailed off without explanation.²⁴⁰ After this deficiency was pointed out in a comment to the DEIS, the FEIS now reflects that in mid-2022 “none of the

²³⁸ FEIS, p. 35.

²³⁹ *Id.*

²⁴⁰ DEIS, p. 35.

property owners approached showed any interest in participating in such a discussion.”²⁴¹ This clarification, while now a grammatically complete sentence, still fails to articulate whether there were clear statements of opposition from landowners at these Other Alternative Locations, or whether the FBOP even got as far as receiving a response from landowners. Importantly, the Roxana Site itself has significant landowner opposition. This opposition relates to properties both within the current site plan, directly adjacent to it, and in nearby communities. How does the outreach and resulting feedback from the landowners at these Other Alternative Locations compare to the effort with the Roxana Site? More so, why is this outreach not discussed in the FEIS, like it is with regards to landowner issues at other sites? If there is landowner opposition to selling at the Roxana Site, why is the FBOP not removing Roxana as an option as it did Meadow Branch and Van/Fields sites? Failing to answer these questions yields the FEIS as incomplete.

The FEIS also states the Other Alternative Locations were excluded based on physical characteristics, such as the need for “significant topographical alterations.”²⁴² However, the Roxana Site also requires significant topographical alterations, with the cost of excavation and leveling projected at over \$466 million.²⁴³ Indeed, according to the OIG’s 2023 Audit Report, **the difficulties created by the topography of the Roxana Site are a key reason the FBOP gives for its repeated requests to rescind funding and cancel the project.**²⁴⁴ Despite FBOP’s legitimate concerns about this site, records from the BOP-LCPC FOIA response indicate that Elwood Cornett of LCPC told the FBOP in a phone call that “he has been in contact with Congressman Rogers office regarding the possibility of additional costs to build on the Roxanna Site” and that “Congressman Rogers office informed him that if additional money is needed, they

²⁴¹ FEIS, p. 36.

²⁴² FEIS, p. 36.

²⁴³ FEIS, p. 96.

²⁴⁴ OIG Audit, p. 21-22.

would make that happen.”²⁴⁵ As described above, if FBOP is relying on this promise in its decision to choose the Roxana site for this promise, these types of communications must be disclosed to the general public and made a part of the administrative record in this case.

If these Other Alternative Locations were given the required level of consideration under NEPA, whatever topographical issues that exist would be compared in both scope and cost to the same issues at the Roxana, Payne Gap, Meadow Branch, and Van/Fields sites. In all cases, the FBOP cannot say what those impacts and costs would be without geotechnical studies of the sites.

NEPA requires federal agencies to “rigorously explore and objectively evaluate reasonable alternatives” and “discuss each alternative considered in detail.”²⁴⁶ They must “devote substantial treatment to each alternative.”²⁴⁷ The previous environmental impact reviews completed substantially fewer studies of Payne Gap, and included no studies at Meadow Branch or Van/Fields. Likewise, the Other Alternative Locations that the FBOP researched in 2022 were given only the most superficial consideration, and are neither named nor described in any detail in either the DEIS or FEIS.²⁴⁸ In order to do a proper alternatives analysis, the FBOP needs data that allows for apples-to-apples comparisons between sites. The FBOP must gather new information d about Payne Gap and Roxana, and must match the effort given to investigation of the Roxana Site by completing the same studies and analyses for both sites.

The agency must also reconsider Meadow Branch and Van/Fields, comparing the issues cited when FBOP excluded these sites from the alternatives analysis to the same factors at the

²⁴⁵ FBOP Email - Phone Call from Mr. Cornett - Letcher County, June 29, 2022, FOIA Response 2023-03988, Responsive Records, Building Community Not Prisons, p. 59, https://static1.squarespace.com/static/6697d11874bfc401dacf7545/t/66ba44d44cb5a24e8feb1cc7/1723483363518/Records+2023-03988*.pdf.

²⁴⁶ 40 C.F.R. § 1502.14(a)-(b).

²⁴⁷ 40 C.F.R. § 1502.14(b).

²⁴⁸ FEIS, p. 36-37.

Roxana Site. Similarly, the FBOP must provide a detailed account of the facts that were the basis for excluding the Other Alternative Locations from consideration. Before proceeding, the FBOP must provide equivalently reasonable and detailed facts in its comparison and analysis to establish the validity of excluding these sites from consideration.

In conclusion, to carry out its obligations under NEPA, the FBOP must include as fully elaborated alternatives 1) the possibility of meeting its stated needs by modernizing and repairing current facilities, 2) the efficacy of replacing prisons at currently existing facilities, and 3) the possibility of other construction sites, both within and beyond Letcher County. These alternatives must be weighed against the other alternatives considered in the FEIS; and the public should be given the opportunity to comment on such essential changes that must be made to the FEIS. Until such an alternatives analysis is completed, an ROD must not issue.

C. The FEIS Is Not NEPA Compliant Because the FBOP Fails to Disclose Opposing Substantive Viewpoints That Are Central to Its Determination.

The FEIS violates NEPA's disclosure regulations because it fails to disclose and respond to DEIS commenters' opposing scientific evidence. These comments directly challenge the basis for FBOP determination to proceed with a prison construction project at the Roxana Site. Federal courts understand that

NEPA's public comment procedures are at the heart of the NEPA review process. NEPA requires responsible opposing viewpoints to be included in the final EIS. **This reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision.** To effectuate this aim, NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action.²⁴⁹

²⁴⁹ *State of Cal. v. Block*, 690 F.2d 753, 770–71 (9th Cir. 1982) (internal citations omitted) (emphasis added).

NEPA and its implementing regulations, 40 C.F.R. §§ 1503.4(a), 1502.9(c), explicitly require an agency to publish, consider, and respond to opposing substantive opinions.²⁵⁰ An agency “shall consider substantive comments timely submitted during the public comment period” on the DEIS, and “shall respond to individual comments or groups of comments.”²⁵¹ “An agency shall append or otherwise publish all substantive comments received on the draft statement, or summaries thereof where the response has been exceptionally voluminous.”²⁵² These are plain, mandatory requirements, and make no distinction between written or spoken comments, as long as they are “substantive.”

Opposing viewpoints of scientific nature are given special weight. “The ‘mere presence of [rebuttal] information in the record alone does not cure’ a failure to address this information in the final statement.”²⁵³ Rather, the agency must disclose and respond to “commenters’ evidence and opinions” when it “directly challenges the scientific basis upon which the Final EIS rests.”²⁵⁴

²⁵⁰ 40 C.F.R. § 1503.4 (a) (“An agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period. The agency shall respond to individual comments or groups of comments”); 40 C.F.R. § 1502.9 (b) (“To the fullest extent practicable, the draft statement must meet the requirements established for final statements in section 102(2)(C) of NEPA and in the regulations in this subchapter... At appropriate points in the draft statement, the agency shall discuss all major points of view on the environmental effects of the alternatives, including the proposed action”); 40 C.F.R. § 1502.9 (c) (“Final environmental impact statements shall consider and respond to comments as required in part 1503 of this subchapter. At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised”).

²⁵¹ 40 C.F.R. § 1503.4(a).

²⁵² 40 C.F.R. § 1503.4(b).

²⁵³ *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, CV 12-9861-GW(SSX), 2016 WL 4650428, at *52 (C.D. Cal. Feb. 1, 2016) (quoting *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167–68 (9th Cir. 2003)).

²⁵⁴ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167–68 (9th Cir. 2003). See *Seattle Audubon Soc’y v. Espy*, 998 F.2d 699, 704 (9th Cir.1993) (finding that the Forest Service was required to address in the final environmental impact statement scientific criticisms opposing evidence upon which the final statement’s management strategy rested); *Sierra Club v. Bosworth*, 199 F.Supp.2d 971, 981 (N.D.Cal.2002) (concluding that a reasoned discussion of major scientific objections must be disclosed in the final impact statement); 40 C.F.R. § 1502.9(b).

In *Center for Biological Diversity v. U.S. Forest Service*, the Ninth Circuit found that Forest Service violated NEPA's disclosure regulation.²⁵⁵ Specifically, the Forest Service failed to disclose and respond to opposing scientific viewpoints in FEIS concerning whether the agency's amended forest land management plan would affect the habitat of northern goshawk. Although comments were submitted demonstrating that the Service's recommendations rested on inaccurate scientific data about the goshawks' habitat, those opposing scientific viewpoints were omitted from the environmental impact statement.²⁵⁶ The Ninth Circuit found that "[b]ecause the commenters' evidence and opinions directly challenge[d] the scientific basis" central to the FEIS determination, the Forest Service was required to "respond to such viewpoints in the final impact statement itself."²⁵⁷

The Ninth Circuit found the Forest Service's purported response to the opposing scientific viewpoint in the administrative record and summary comment was inadequate because the summary failed to "identify and discuss the concern at issue" that was raised by opposing commenters.²⁵⁸ The Court stated the "summary comment does not mention or even allude to the habitat specialist/generalist debate. Instead, it generally states that there are opposing views to the agency's proposed standards and guidelines" but "neglects to specifically point out which standards and guidelines are opposed."²⁵⁹ The Court also found the Forest Service response was inadequate because it "completely fails to address or refute the concern presented. The Service's response indicates that the management recommendations derive from the best science available,

²⁵⁵ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1160 (9th Cir. 2003).

²⁵⁶ *Id.* at 1167.

²⁵⁷ *Id.* at 1167–68.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

but it fails to indicate how that evidence supports its conclusion that goshawks are habitat generalists.”²⁶⁰

Similarly, the FBOP’s FEIS fails to disclose and respond to numerous respectable opposing scientific viewpoints central to the determination for constructing and operating a prison and ancillary facilities at Roxana site in Letcher, Kentucky. Although the full scale of FBOP’s non-compliance with its disclosure obligation is unknown, undersigned has found that the FEIS omits several commenters who submitted opposing scientific viewpoints in key areas. These scientific comments undermine the FBOP’s conclusion that the Proposed Action will have no significant adverse impact to the environment, wildlife, and persons residing in the community, involved in the facility’s construction, or those incarcerated at the prison.

i. Jonathan Hootman

For instance, Jonathan Hootman is an endangered bat biologist with 24 years of experience.²⁶¹ On April 15, 2024, he submitted a comment in which he identifies numerous scientific deficiencies in the DEIS concerning adverse impacts on endangered bat species that went unaddressed in FEIS.²⁶² According to Mr. Hootman, the determination is critically flawed because of the failure to conduct timely bat surveys of the potential habitat areas.²⁶³ “No endangered bat surveys have been completed for the proposed prison in the last five years, therefore investigating the proposed prison site for the presence of threatened or endangered bat is incomplete.”²⁶⁴ Mr. Hootman states that prior surveys were also inadequate because they did not account for the

²⁶⁰ *Id.*

²⁶¹ *See* Exhibit C, Comment from Hootman to FBOP (April 15, 2024), at 2.

²⁶² *Id.* at 1.

²⁶³ *Id.* at 2.

²⁶⁴ *Id.*

endangered bats' winter habitat,²⁶⁵ failed to cover the area recommended by FWS,²⁶⁶ and failed to investigate areas near "a priority 1 hibernacula" that were disregarded because of their inaccessibility.²⁶⁷

Mr. Hootman explains the FBOP's calculation of habitat disturbance is inaccurate because the Copperhead 2016 report on which it is based "fail[s] to include/grassland/wetland/shrub-scrub habitat" that is used by Indiana bats.²⁶⁸ He states the habitat calculation is also flawed because the FBOP "does not account for the trees that will be removed from the project area" for the security fence.²⁶⁹ On top of diminishing the bats' habitat, the razor fence has the "potential for high rates of casualties" for the Indiana and Northern long-eared bats, who will attempt to use the fence "as a flyway and foraging area" or mistake the razor wire for cluttered limbs.²⁷⁰

Mr. Hootman also objects to FBOP's claim that the facility's lighting plan will not impact the bats.²⁷¹ He states that because the project area will always be well-lit, this will have a deleterious effect on migrating Indiana bats, who avoid heavily lit areas.²⁷² Mr. Hootman also states the limit on tree clearing is insufficient because it fails to include trees in April and May, which Indiana and Northern long-eared pregnant females use to roost.²⁷³ The FEIS does not address these specific and detailed concerns raised by Mr. Hootman, rendering it deficient under NEPA.

ii. Dr. D. Scott Simonton

²⁶⁵ *Id.* at 4.

²⁶⁶ *Id.* at 3.

²⁶⁷ *Id.* at 4.

²⁶⁸ *Id.* at 3.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 4.

²⁷² *Id.*

²⁷³ *Id.*

The FEIS omits the opposing scientific viewpoints concerning the Proposed Action’s deleterious effect on stormwater runoff and flooding. D. Scott Simonton, PE, PhD is a Professor in the College of Engineering and Computer Science at Marshall University.²⁷⁴ On April 15, 2024, Dr. Simonton submitted to BOP a comment about the DEIS, objecting to the project due to its stormwater runoff and flooding concerns.²⁷⁵ Dr. Simonton asserts the “DEIS does not adequately assess the potential impacts of the projects on stormwater runoff characteristics before, during, and after construction.”²⁷⁶ Dr. Simonton states the failure to conduct a comprehensive stormwater study “is a critical omission” in light of Letcher County’s flooding history, including inundation at the Roxana project site.²⁷⁷

Dr. Simonton also identifies several failures in DEIS analysis, including (1) failing to “analyze the existing storm drainage patterns on the project site and surrounding areas”; (2) failing to “quantify the potential increase in impervious surfaces due to construction (buildings, roads, parking lots) and how this will affect stormwater runoff volume and velocity”; (3) failing to provide “details regarding the post-construction stormwater management plan, including best management practices to mitigate runoff and prevent flooding”; and (4) failing to “assess the potential impact of increased runoff on downstream waterways, including stream bank erosion, sedimentation, and aquatic habitat degradation.”²⁷⁸ The FEIS asserts that “future floods are not expected” and only vaguely states that stormwater infrastructure will be adequate without addressing the specific concerns raised by Dr. Simonton.²⁷⁹

iii. Carlton E. Williams

²⁷⁴ See Exhibit D, Comment from Dr. D. Scott Simonton to FBOP (April 15, 2024), at 1.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 2-3.

²⁷⁹ FEIS, p. 59.

Carlton E. Williams, an Assistant Professor at Cornell Law School, submitted a comment on the DEIS on April 15, 2024.²⁸⁰ Professor Williams objects to the FBOP project due to the failure to conduct proper geological studies of the project area, which are necessary to assess the risks caused by previous mining and seismic activities that pose a threat during the construction and operation of the prison.²⁸¹ Professor Williams notes the DEIS states “there is a two percent probability of earthquakes in 50 years” but it fails to provide the “data and methodologies” relied on to arrive at this number, which still isn’t provided in the FEIS.²⁸² Professor Williams argues that BOP’s determination of no adverse effects from mining is unsupported because there is no indication that the geological survey was completed by a geologist or geoscientist or that the data from 2011 was updated for 2024 and still relevant for DEIS determination.²⁸³ The FEIS does not address the specific concerns raised by Professor Williams.

iv. Dr. Beverly May

FEIS omitted opposing scientific views of Dr. Beverly May, MSN, DrPH, concerning risks of silica²⁸⁴ and radon²⁸⁵ exposure due to the FBOP project. On April 13, 2024, Dr. May submitted a comment opposing the prison, citing the DEIS failure to account for the “potential for higher levels of radon migration” from previous surface mining and future fracturing at the project site.²⁸⁶ She states that the DEIS recognizes risks of radon exposure to workers and incarcerated persons but fails to commit to continuous “monitoring for radon accumulation after the buildings are inhabited.”²⁸⁷ She also noted significant methodological issues with the FBOP’s radon analysis:

²⁸⁰ See Exhibit E, Comment from Assistant Professor Carlton E. Williams to FBOP (April 15, 2024), at 1.

²⁸¹ *Id.* at 2

²⁸² *Id.* at 3.

²⁸³ *Id.*

²⁸⁴ See Exhibit F, Comment from Dr. Beverly May to FBOP (April 15, 2024).

²⁸⁵ See Exhibit G, Comment from Dr. Beverly May to FBOP (April 13, 2024).

²⁸⁶ *Id.* at 2.

²⁸⁷ *Id.* at 2.

while the EIS correctly noted that Letcher County was a Zone 2 region with average radon screening levels falling below the EPA action level of 4pCi/L, Dr. May referenced multiple scientific studies conducted on a more granular level that had documented radon levels “as high as 19.5 pCi/L” in Eastern Kentucky.²⁸⁸ The DEIS and FEIS do not analyze radon on-site at Roxana.²⁸⁹ Dr. May additionally raised the need for an assessment of “*site-specific* radon levels” at the public meeting on March 28, 2024.²⁹⁰

On April 15, 2024, Dr. May submitted another comment, arguing that the DEIS failed to adequately address the harm from potential silica exposure during the construction and operation of BOP’s project.²⁹¹ Dr. May states that DEIS notes significant excavation of rock and valley fills will be needed to create a level and stable construction pad and that blasting may be used for site preparation.²⁹² However, she says the DEIS fails to acknowledge that the site is predominantly composed of sandstone, which is “90% crystalline quartz silica.”²⁹³ She states, “airborne quartz is the most toxic to humans.”²⁹⁴ “If inhaled, these fine particles embed in the lower lungs and cannot be cleared, leading to chronic inflammation and scarring.”²⁹⁵ Dr. May explains blasting and drilling activities have been found to be a major contributor to coal mining dust lung disease and notes that there has been a “precipitous rise in progressive massive fibrosis cases” in the region.²⁹⁶ Dr. May states the DEIS fails to identify precautions to address the risk of respiratory silica

²⁸⁸ *Id.* at 2 (citing Stacy R. Stanifer et al., *Home Radon Testing in Rural Appalachia*, 38 J. Rural Health 1 (2020), doi: 10.1111/jrh.12552).

²⁸⁹ DEIS p. 129-131; FEIS p. 130-132.

²⁹⁰ March 28, 2024 Public Meeting, *Communications*, Proposed Federal Correctional Institution and Federal Prison Camp: Letcher County, Kentucky, <https://www.proposed-fci-letchercountyky.com/communications> (hereafter Public Meeting Recording), 1:56:45-2:00:05.

²⁹¹ *See* Ex. F at 2.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

exposure for construction workers.²⁹⁷ The DEIS also fails to provide a plan to prevent exposure of “fugitive dust from the site, either airborne or carried by truck traffic” to the workers and surrounding community.²⁹⁸ The FEIS does not address the specific concerns about radon and silica exposure raised by Dr. May.

v. Institute to End Mass Incarceration

The FEIS fails to respond to opposing viewpoints in an April 15, 2024 comment by the Institute to End Mass Incarceration (“IEMI”).²⁹⁹ The IEMI’s comment states that DEIS fails to address the many ways incarcerating people at extreme distances from their home will harm both the individuals themselves and also the Letcher County community.³⁰⁰ IEMI explains that incarcerated “individuals will be harmed by severe isolation from family, which leads to mental and physical harm; by racial and cultural displacement, which compounds other harms; and by lack of access to adequate mental and physical health resources while incarcerated.”³⁰¹ Again, the FEIS fails to rebut these criticisms from IEMI and ignores the supporting research cited in the comment.

IEMI also points out that the DEIS inappropriately concludes that there will be no significant adverse impact on local air quality.³⁰² In fact IEMI shows this conclusion is unsupported because the DEIS’s calculations fail to “consider [] visitor traffic nor the extreme distances that visitors will need to drive to visit Letcher” while admitting that “[t]he commuting patterns of prison staff alone would increase ... vehicle emissions by nearly 200%.”³⁰³ Despite

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *See* FEIS, pp. 199-391.

³⁰⁰ *See* Exhibit H, Comment from Institute to End Mass Incarceration (IEMI) to FBOP (April 15, 2024).

³⁰¹ *Id.* at 5.

³⁰² *Id.* at 16.

³⁰³ *Id.* at 16-17.

these notable discrepancies, the FEIS does not address any of the specific concerns raised by IEMI.³⁰⁴

vi. Campaign to Fight Toxic Prisons

Members of The Campaign to Fight Toxic Prisons (“CFTP”) submitted a comment opposing this project to the FBOP due to its adverse impacts on the environment, and failures to account for environmental justice concerns.³⁰⁵ This comment was drafted by Jordan E. Martinez-Mazurek, M.A., Richard A. Thomas, and Dr. David N. Pellow.³⁰⁶ In this comment, CFTP advances several arguments that FBOP should have responded to. For instance, CFTP argues that the FBOP project risks exposing the surrounding community and those incarcerated in the prison to hazardous levels of arsenic.³⁰⁷ CFTP asserts that “CEJST data, which is the new federal standard for Environmental Justice screening, the census tract that hosts Roxana is considered ‘disadvantaged’ due to being in the 96th percentile for flood risk.”³⁰⁸ In addition to citing the improper standard, CFTP states the DEIS relies on FEMA flood maps drawn decades ago; thus, failing to accurately assess the flood risks to the project area.³⁰⁹ The FEIS fails to address any of the concerns raised by CFTP in its comment.

vi. Dr. Artie Ann Bates

Dr. Artie Ann Bates submitted two comments on the DEIS. One of these comments, an email from March 11, 2024 addressing flood risk, employment, and the drug epidemic in Letcher County.³¹⁰ This comment is appended and responded to in the FEIS.³¹¹ However, Dr. Bates also

³⁰⁴ See FEIS, pp. 199-391.

³⁰⁵ See Exhibit I, Comment from Campaign to Fight Toxic Prisons to FBOP (April 15, 2024).

³⁰⁶ *Id.* at 1.

³⁰⁷ *Id.* at 11.

³⁰⁸ *Id.* at 12.

³⁰⁹ *Id.*

³¹⁰ FEIS, p. 279-280.

³¹¹ *Id.*

timely submitted an additional substantive comment on April 15, 2024 at 1:37 PM.³¹² Incorporating twenty years of professional experience as a psychiatrist in Letcher County, Dr. Bates notes that the DEIS fails to appropriately consider the severe shortage of mental health providers in the area, which will become more acute as the volume of patients increases due to the FBOP's presence.³¹³ She points out that the DEIS references the FBOP's obligations under the First Step Act to provide "cognitive behavioral treatment" and "substance abuse treatment." However, she articulates that this cursory acknowledgment does not connect the FBOP's First Step Act obligations to the impacts analysis in the FEIS.³¹⁴ Dr. Bates cites multiple scientific and government publications establishing the dire state of mental health services in Letcher County, Appalachia more broadly, and the FBOP nationwide. In violation of NEPA, the FEIS does not consider or respond to Dr. Bates' additional substantive comment, and contains the same cursory section on the First Step Act.³¹⁵

vii. Directly-Impacted People from Washington, DC

Additionally, many members of the public made substantive comments on the DEIS at the March 28, 2024 public meeting.³¹⁶ Again in violation of 40 C.F.R. § 1503.4(a), the FBOP fails to "consider" and "respond to" these opposing comments. An agency producing an FEIS "must

³¹² Exhibit B.

³¹³ *Id.*

³¹⁴ *Id.* at 1; DEIS, p. 24-25.

³¹⁵ FEIS, p. 25-26.

³¹⁶ The comments were "published" in the sense that they are available in video form on *Communications*, Proposed Federal Correctional Institution and Federal Prison Camp: Letcher County, Kentucky, <https://www.proposed-fci-letchercountyky.com/communications>, but they are not acknowledged or responded to within the FEIS, unlike written comments.

provide a good faith, reasoned analysis in response”³¹⁷ to the conflicts raised by opposing viewpoints, including from citizens raised at a public hearing.³¹⁸

Seven directly-impacted people from Washington, DC traveled over nine hours to speak at this meeting regarding their or their loved ones’ experiences of incarceration in federal prisons. They raised crucial, substantive points about the personal and environmental impact of remote, toxic prisons on sending communities like Washington, D.C. They also provided comments and testimony about the reentry challenges that people incarcerated in the FBOP system face because they are housed at extreme distances from their support systems. Their comments were entirely ignored in the FEIS.

Cinquan Muhammad, speaking from 30 years of experience incarcerated in federal prisons including USP Big Sandy, McCreary, and Lee, pointed out his concerns over the “complete lack of discussion of family visitation” in the DEIS.³¹⁹ He discussed the impact that his incarceration in remote Kentucky had on his wife Ronneice by way of lost income, travel expenses, racism, and discrimination on every visit. The FEIS does not consider or respond to Mr. Muhammad’s comment.

James Carpenter, speaking from 24 years of experience incarcerated in federal prison, 10 of which were in the Appalachian Mountains, raised concerns over the lack of notice provided to sending communities like Washington, D.C. in the NEPA process.³²⁰ He also objected to the DEIS’s omission of family visitation as a substantive matter to consider, and specifically pointed out the eight-hour drive between D.C. and Kentucky that would “necessarily increase travel

³¹⁷ *Sierra Club v. U.S. Dep’t of Transp.*, 310 F.Supp.2d 1168, 1194 (D. Nev. 2004) (quoting *State of Cal. v. Block*, 690 F.2d 753, 773 (9th Cir.1982)).

³¹⁸ *Id.* at 1194, n. 9 (citizens criticized the widening of the freeway, arguing that it would not satisfy the project’s goals because the freeway would become congested and obsolete soon after completion).

³¹⁹ Public Meeting Recording, 1:11:55-1:16:40.

³²⁰ Public Meeting Recording, 1:33:00-1:35:10.

emissions.” The FEIS does not consider or respond to Mr. Carpenter’s comment, and continues to downplay the environmental impact of visitors’ vehicular emissions on its mandatory GHG analysis.³²¹

Damon Donelson, speaking from 26 years of experience incarcerated, also challenged the BOP’s assertion that it would “foster a humane and secure environment”³²² with his knowledge of rampant stress, understaffing, and poor mental health treatment in neighboring federal prisons.³²³ He emphasized the small number of jobs advertised by the EIS that would actually go to Letcher Countians. The FEIS does not consider or respond to Mr. Donelson’s comment.

Daniel Kinard, speaking from 33 years and 8 months of experience incarcerated in federal facilities, raised concerns about the serious risk of heavy metals contaminating drinking water, as he had observed during his incarceration.³²⁴ He raised issues of systemic inadequate medical care and difficulties in hiring faced by many federal facilities, and the unlikelihood that jobs would go to Letcher Countians. The FEIS does not consider or respond to Mr. Kinard’s comment.

Regina Coates spoke of her experience receiving and reading thousands of letters from people incarcerated in federal facilities.³²⁵ She pointed out the unique and disproportionate impact that the federal prison system has on the sending community of Washington, D.C. She objected to the DEIS’s claim that the FCI/FPC would not result in adverse impacts to children, describing the unique “financial and emotional strain,” “trauma and hardship” that incarceration in remote facilities places on both children and single parent households. The FEIS does not consider or respond to Ms. Coates’ comment.

³²¹ See FEIS, p. 129.

³²² DEIS, p. 19.

³²³ Public Meeting Recording, 1:50:45-1:56:20.

³²⁴ Public Meeting Recording, 1:27:10-1:32:15.

³²⁵ Public Meeting Recording, 1:17:05-1:19:25.

Edward Hunter, speaking from 25 years of experience incarcerated in federal facilities, objected to the DEIS's failure to address the "emotional or mental health impacts" of incarceration in an area already affected by coal mining, the opioid crisis, and disastrous floods.³²⁶ He described the epidemic of suicides in prisons and the impact FCI/FPC Letcher would have on the "quality of life of Letcher County residents." The FEIS does not consider or respond to Mr. Hunter's comment.

The FBOP's failure to disclose and respond to the aforementioned opposing substantive viewpoints violates NEPA and its implementing regulations thus rendering the FEIS inadequate. Before proceeding, the FBOP must address these deficiencies in a new FEIS, and provide a statutory compliant amount of time to comment.

D. The FEIS Violates the NHPA by Failing to Provide Notice to Indian Tribes with a Historic Interest in Letcher County, Kentucky

The FEIS is fundamentally flawed because FBOP did not meet its NEPA and NHPA obligations to notify and consult the United Keetoowah Band of Cherokee Indians tribe, the Shawnee Tribe, the Absentee-Shawnee Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Kialegee Tribal Town (collectively "the excluded Tribes"). The excluded Tribes would be directly impacted by the FCI/FCP Letcher facility, both because of the disproportionately high incarceration rates of Native people and the Tribes' right to be consulted on their historical, religious, and cultural ties to the land where FBOP proposes to build these prisons.

iii. i. If built, FCI/FCP Letcher would have a disproportionately harmful impact on the excluded Tribes and other native people.

FBOP's Record of Decision will impact Native people because they are incarcerated in

³²⁶ Public Meeting Recording, 1:39:10-1:42:25.

federal prisons at disproportionately high rates. Native people are significantly undercounted in prisons and jails, in part because many identify as more than one ethnicity, and because being Native can be understood as both an ethnicity and a political status.³²⁷ Nonetheless, available data shows that in 2022, people identifying as American Indian or Alaskan Native were incarcerated in the federal system at 4.3 times the rate of white people, 11 times the rate of Asian people, and 1.9 times the rate of Latino/a people.³²⁸ The average federal sentence for Native people also increased by more than 30 percent between FY2018 and 2022.³²⁹ Native people are also particularly vulnerable to incarceration in federal prisons because Indian Country³³⁰ falls under the jurisdiction of federal prosecutors.³³¹ The FEIS is deficient because it fails to specifically consider how incarceration in FCI/FPC Letcher would affect Native people.

iv. ii. FBOP is obligated to include Native Tribes with historical and religious ties to the land in the EIS process and consider how the project would impact the excluded Tribes.

Under the NHPA, the FBOP was required to consult with any “Indian tribes ... that might attach religious and cultural significance to historic properties that may be affected by an undertaking.”³³² It was the FBOP’s responsibility to “make a reasonable and good faith effort to identify any Indian tribes ... that might attach religious and cultural significance to historic

³²⁷ Prison Policy Initiative, Native incarceration in the U.S. (October 8, 2021), <https://www.prisonpolicy.org/profiles/native.html#flawed>.

³²⁸ E. Ann Carson & Rich Kluckow, Prisoners in 2022 – Statistical Tables 9 (U.S. Dep’t. of Just., Bureau of Just. Stat. Nov. 2023)

³²⁹ U.S. Sent’g Comm’n, Quick Facts — Native American Federal Offenders 2 (June 2023), <https://www.ussc.gov/research/quick-facts/native-american-offenders>

³³⁰ Indian Country includes “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151.

³³¹ 18 U.S. Code § 1152; 18 U.S. Code § 1153.

³³² 36 C.F.R. § 800.2(ii) (citing 16 U.S.C. § 470a(d)(6)(B)).

properties,” and consultation should have commenced “early in the planning process” that is now almost completed.³³³

FBOP misinterprets the criteria for identifying Traditional Cultural Properties (TCPs) at the Roxana and Payne Gap sites. Despite acknowledging that “[u]nder Section 106 of the NHPA, a federal agency is required to give consideration to issues of traditional religious or cultural areas concerning Native American groups,” FBOP concluded that “No TCPs have been identified within the project [area of potential effects] *based on there being no federally recognized tribes within Kentucky.*”³³⁴ As defined in the FEIS, a Traditional Cultural Property (TCP) includes: “resources associated with the cultural practices and beliefs of a living community that link that community to its past and help maintain its cultural identity. TCPs may include archaeological resources, locations of historic events, sacred areas, sources of raw materials for making tools, sacred objects, or traditional hunting and gathering areas.”³³⁵ Nothing in this definition restricts the identification of TCPs to solely those federally recognized Tribes in the same state as the proposed project. Courts also have not limited TCP evaluations to Native Tribes within the project state.³³⁶ Based on its flawed analysis, FBOP identified no TCPs at the Payne Gap and Roxana sites. Because FBOP arbitrarily and capriciously limited its TCP evaluation to federally recognized Tribes *within the state of Kentucky*, the FEIS does not comply with NHPA requirements.

Further, when identifying the environmentally preferable alternative(s), an agency is

³³³ 36 C.F.R. § 800.2(c)(2)(ii)(A).

³³⁴ FEIS Appendices, p. 4-26 (emphasis added).

³³⁵ FEIS Appendices, p. 3-6.

³³⁶ ...[A]n agency must consult with *any* Native American Tribe “that attaches religious and cultural significance to [the affected] property.” *Tohono O’Odham Nation v. United States DOI*, 2024 U.S. Dist. LEXIS 68807, 6 (D. Az. 2024) (emphasis added) (quoting 36 C.F.R. § 800.2(c)(2)(ii)). “Designation as a TCP is based on an Indian tribe’s historical connection to a particular location and only requires the tribe claim an area as a TCP.” *Battle Mt. Band v. United States BLM*, 2016 U.S. Dist. LEXIS 115093, fn. 4 (D. Nev. 2016); *Battle Mt. Band v. United States BLM*, 2018 U.S. Dist. LEXIS 51743, fn. 4 (D. Nev. 2018)

specifically directed to maximize environmental benefits, including by addressing adverse effects on communities with environmental justice concerns; cultural, natural and tribal resources; and the rights of Tribal Nations reserved through treaties, statutes, or Executive Orders.³³⁷ Federal regulations explicitly note that the No Action alternative might best maximize benefits.³³⁸

As noted above, the NHPA also requires notice to and consultation with Native tribes. The Supreme Court has held that “[i]n light of the substantial overlap between the NHPA and the National Environmental Policy Act...an environmental impact statement should include consideration of the likely effects on historic properties.”³³⁹ In fact, the FEIS acknowledges that “In consideration of 36 CFR 800, federal agencies are required to consult with the State Historic Preservation Officer (SHPO), *Indian Tribes*, representatives of local governments, and the public in a manner appropriate to the agency planning process for the planned action (undertaking) and to the nature of the undertaking and its potential to cause effects on historic properties.”³⁴⁰ Consulting parties shall be involved “during NEPA scoping, environmental analysis, and the preparation of NEPA documents,”³⁴¹ and should have the opportunity to assist in developing “alternatives and proposed measures that might avoid, minimize, or mitigate any adverse effects of the undertaking on histories properties.”³⁴² FBOP is obligated to consider the project’s impact on Tribal Nations and invite impacted Tribes to act as consultants during the EIS process.

iii. Land at the proposed Roxana construction site is religiously and historically significant to the excluded Tribes.

The FBOP did not make a “reasonable and good faith effort” to identify Indian tribes that

³³⁷ 40 C.F.R. § 1502.14(f).

³³⁸ *Id.*

³³⁹ *Oglala Sioux Tribe v. U.S. NRC*, 45 F.4th 291, 295 (2022).

³⁴⁰ FEIS, p. 76 (emphasis added).

³⁴¹ 36 C.F.R. § 800.8(1)(iii).

³⁴² 36 C.F.R. § 800.8(1)(v).

attach religious and cultural significance to the land at the proposed Roxana site.³⁴³ While FBOP states that it provided “Public Scoping Meeting information and other project-related announcements and material ... [to] Native American tribes...”,³⁴⁴ the agency excluded at least four tribes with ancestral ties to the site from its outreach efforts. The FBOP fell short of its obligations under the NHPA and NEPA by failing to notify and request consultation from all impacted Tribes.

The property where FBOP seeks to build FCI/FPC Letcher is part of the ancestral land of the excluded Tribes. The Shawnee Native people historically resided in Eastern Kentucky,³⁴⁵ as did the Cherokee people.³⁴⁶ A 2009 NEPA review for a cell tower in Whitesburg, Letcher County, Kentucky also shows that the excluded Tribes all have a historic interest in the Roxana site.³⁴⁷ “[U]sing available mapping and other data available from the Department of the Interior ... [the NEPA consultants identified] [s]even (7) Native American Tribes registered as having a potential

³⁴³ 36 C.F.R. § 800.2(c)(2)(ii)(A).

³⁴⁴ FEIS, p. 30.

³⁴⁵ “The Absentee Shawnee Tribe of Indians of Oklahoma History,” the Absentee Shawnee Tribe, <https://www.atribe.com/about-us> (“Originally, the Shawnee Indians lived in the northeastern parts of the United States in areas now known as the states of Ohio, Indiana, Illinois, Kentucky, Tennessee, Pennsylvania, and neighboring states.”); “About the Eastern Shawnee Tribe,” Eastern Shawnee Tribe of Oklahoma; <https://estoo-nsn.gov/eastern-shawnee-history/> (“most archaeologists and historians agree [the Shawnee Tribe’s] original homeland was the middle Ohio Valley, between modern Louisville, Kentucky, and West Virginia”);

³⁴⁶ See “History of the Cherokee Nation,” Cherokee Nation, <https://www.cherokee.org/about-the-nation/history/> (“...in 1540... the Nation held dominion over a sprawling territory comprised of much or most of the modern states of West Virginia, Kentucky, Virginia, North Carolina, Tennessee, South Carolina, Georgia and Alabama”; “Cherokee in Kentucky?,” Southern Cherokee Nation of Kentucky, <https://southerncherokeemnationky.com/cherokee-in-kentucky/> (“Before European colonization, Kentucky was a significant part of the Cherokee country, representing the northern quarter of the Cherokee Nation since time immemorial”); Tim Talbot, “Cherokees in Kentucky,” Kentucky History, <https://explorekyhistory.ky.gov/items/show/565>; “Cherokee Indians are believed to have lived and hunted in what became Kentucky for hundreds of years before the first known white explorers made their way through the mountain passes. The Cherokee primarily settled in the southern Appalachian Mountain region.”).

³⁴⁷ *NEPA Assessment*, Francis, Kendrick, & Francis (Oct. 20, 2009), http://psc.ky.gov/PSCSCF/2009%20cases%5C2009-00064%5C20091020_East_KY_Networks_NEPA_Assessment_of_Dry_Fork.PDF

interest in the geographic area of the project”: the United Keetoowah Band of Cherokee Indians tribe, the Shawnee Tribe, the Absentee-Shawnee Indians of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Kialegee Tribal Town, (along with the Tribes that *did* receive notice from FBOP - the Cherokee Nation and the Eastern Band Cherokee) .³⁴⁸ Each of these Tribes was provided notice and opportunity to consult in this recent NEPA review involving land in nearby Whitesburg.³⁴⁹ The Shawnee Tribe and United Keetoowah Band of Cherokee Indians both elected to consult in the NEPA process for the cell tower project.³⁵⁰

If the excluded Tribes had an interest in the geographic area of a cell tower in Whitesburg, they surely have an interest in the Roxana site. The site of the cell tower examined in the 2009 NEPA study is less than 10 miles from the proposed Roxana site. Further, the new cell tower was much smaller in scale and involved significantly less permanent destruction of historic lands than plans to level, deforest, blast, and pave 200 acres for a \$500 million federal prison. The FBOP cannot proceed to a Record of Decision without providing the excluded Tribes an opportunity to consult on their historic interests.

FBOP’s omission of the United Keetoowah Band of Cherokee Indian is particularly egregious. The Distribution Lists for both the DEIS and the FEIS include the Cherokee Nation and the Eastern Band of Cherokee Indians, but omit the United Keetoowah Band Cherokee from outreach efforts.³⁵¹ It is arbitrary and capricious to include two of three federally-recognized Cherokee tribes without providing any rationale for excluding the United Keetoowah Band Cherokee Tribe.

E. The FEIS Unreasonably Relies on Flawed Data

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ DEIS p. 154-55; FEIS p.156.

The FBOP unreasonably relies on studies and information that failed to address critical environmental factors and disregarded new data from other agencies and scientific commenters that were essential to its FEIS determinations.

[A]gencies do not have free rein to use inaccurate data. An agency is required to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. If an agency fails to examine the relevant data—which examination could reveal, *inter alia*, that the figures being used are erroneous—it has failed to comply with the APA. Moreover, an agency cannot “fail[] to consider an important aspect of the problem” or offer[] an explanation for its decision that runs counter to the evidence before it. These requirements underscore that an agency cannot *ignore* new and better data.³⁵² Thus, agencies “have an obligation to deal with newly acquired evidence in some reasonable fashion.”³⁵³ [A]n agency's reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary.³⁵⁴

In the context of NEPA, an agency's proposed action can be challenged when the agency unreasonably relies on a deficient study or when the study is facially flawed.³⁵⁵ Thus an EIS determination is insufficient if the information it relied on improperly narrowed the action area,³⁵⁶ disregarded indirect impacts and cumulative effects,³⁵⁷ used methods or data that are unreliable,³⁵⁸ or omitted new information integral to the analysis.³⁵⁹

³⁵² *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C. Cir. 2015) (internal citations omitted).

³⁵³ *Id.* at 57 (quoting *Catawba Cnty., NC v. EPA*, 571 F.3d 20, 46 (D.C.Cir.2009)).

³⁵⁴ *Id.* (quoting *New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C.Cir.1992)).

³⁵⁵ *Ctr. for Biological Diversity v. Regan*, CV 21-119 (RDM), 2024 WL 1602457, at *37–39 (D.D.C. Apr. 12, 2024), *judgment entered*, CV 21-119 (RDM), 2024 WL 1591671 (D.D.C. Apr. 12, 2024).

³⁵⁶ *Regan*, CV 21-119 (RDM), 2024 WL 1602457, at *40 (“the relevant ‘action area’ is not limited to areas that are directly affected by the agency action but also includes areas indirectly affected, including areas outside the “immediate area involved in the action.” 50 C.F.R. § 402.02.); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1179–80 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003).

³⁵⁷ *Def's. of Wildlife v. Babbitt*, 130 F.Supp.2d 121, 137–39 (D.D.C. 2001); *Citizen's Alert Regarding Env't v. U.S. Dep't of Justice*, CIV. A. 95-1702 (GK), 1995 WL 748246, at *8–10 (D.D.C. Dec. 8, 1995).

³⁵⁸ *See* 40 C.F.R. § 1502.15; *Utahns for Better Transp.*, 305 F.3d 1152, 1180 (10th Cir. 2002).

³⁵⁹ *Regan*, CV 21-119 (RDM), 2024 WL 1602457, at *38–39; *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006).

i. The FEIS Studies are based on a different project

The FEIS is based on information gathered to study the impacts of a substantially different project: the construction and operation of a high security United States Penitentiary (“USP”). The FBOP abandoned that proposal in 2019 when the FBOP withdrew its Record of Decision. Among the differences between the prior and current EIS, the FBOP now asserts a different purpose and need. The prior and current project have different site plans. They have different population sizes, with the new proposal expected to hold hundreds of more individuals than the older plan. Given the significant differences between these proposed actions, it is unreasonable for FBOP to rely on the prior studies and analysis that fail to consider this new information. In turn, as discussed in *Ctr. for Biological Diversity*, these studies are deficient and facially flawed, rendering the current iteration of the FEIS statutorily incomplete.³⁶⁰ The FBOP cannot issue an ROD until the agency addresses this problem.

ii. The Environmental Site Assessments are deficient and fatally flawed

Additionally, many of the studies FEIS is based on are flawed because they unreasonably limited the scope of the action area and failed to consider new information pertinent to the environmental impact analysis. The FBOP reuses the Phase I and II Environmental Site Assessments from 2015 and 2016,³⁶¹ even though ASTM standards limit the viability of Phase I and II Environmental Site Assessments to one year.³⁶² The first Phase I Environmental Site Assessment was based on a survey completed in 2014. The only Phase II Environmental Site Assessment in the record is based on that same decade old 2014 survey and a subsequent survey

³⁶⁰ *Ctr. for Biological Diversity v. Regan*, CV 21-119 (RDM), 2024 WL 1602457, at *37–39 (D.D.C. Apr. 12, 2024), *judgment entered*, CV 21-119 (RDM), 2024 WL 1591671 (D.D.C. Apr. 12, 2024).

³⁶¹ Appendix E to FEIS, FEIS Merged Appendices, p. 710-996.

³⁶² ASTM E1527-21, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, ASTM International, <https://www.astm.org/e1527-21.html>

completed in 2016. While the FEIS contains an updated WSP survey from April 2024, the assessment is still based overwhelmingly on antiquated data. The only new information developed in the last two Environmental Site Assessments are from digital database searches and two superficial site visits. This falls far short of FBOP's obligations.

Moreover, while the previous WSP survey from February 2024 was labeled a complete "Phase I Environmental Site Assessment," the more recent April 2024 version is labeled a "Draft," suggesting that the FBOP moved forward with an FEIS despite clear indication that its expert assessors had yet to complete their assessments.³⁶³ Additionally, among the only substantive changes to WSP's Phase I Environmental Assessment Report between its February 2024 version (appended to the DEIS) and the April 2024 "Draft" version (appended to the FEIS) is that the newer version notes "soil staining" in another site visit. Specifically, WSP personnel determined it was "unknown if these impacted soils have been excavated and therefore WSP considers this release to be an REC [Recognized Environmental Condition]."³⁶⁴ With a single site visit between the ostensibly final February and admittedly "Draft" April versions already revealing additional, uninvestigated soil concerns, it is clear that further environmental assessments of the Roxana site must be conducted before the FBOP can proceed with this project. Thus the FBOP acted unreasonably in failing to consider this new information. Again, the evidence in WSP's own Environmental Site Assessment demonstrates that this assessment is deficient and facially flawed. In addition, the FBOP must conduct environmental site assessment of each of the other ignored Letcher County site alternatives identified by the FBOP, but not reviewed in this DEIS or FEIS.

iii. The Biological Assessments and Biological Opinion are deficient and fatally flawed

³⁶³ Appendix E to FEIS, FEIS Merged Appendices, p. 712; Appendix E to DEIS, p. 3.

³⁶⁴ Appendix E to FEIS, FEIS Merged Appendices, p. 715.

An agency’s studies and investigations concerning endangered species under the ESA must satisfy an even higher bar. The agency must base its decisions on the “best scientific and commercial data available.”³⁶⁵ An agency’s biological opinion (“BO”) must similarly rely on the “best scientific [] data available.”³⁶⁶ Moreover, an agency is not justified in continuing to rely on a BO when new information comes to light that would give the agency a basis for doubting the BO’s conclusions.³⁶⁷ Additionally, a BO is considered legally flawed if it fails to consider information or conduct the proper analysis as required law.³⁶⁸

The FBOP fails to satisfy these rigorous standards by not using the “best scientific data available” or properly considering a new endangered species. Instead, FBOP relies on BO completed in 2017, drafted to comply with the Endangered Species Act (“ESA”). The United States Fish and Wildlife Service (“FWS”) developed the 2017 BO based on surveys completed in 2014 and 2016. The BOP’s FEIS fails to explain how it can rely on a BO that is seven years old and based on surveys that are 8-10 years old – especially when the listing of a new species as endangered renders re-initiation “required,” as explained further below. Additionally, FWS guidelines require bat surveys to be conducted every five years.³⁶⁹ Thus, the BO is also insufficient

³⁶⁵ 50 C.F.R. § 402.14(d) (Service’s “[r]esponsibility [is] to provide best scientific and commercial data available”).

³⁶⁶ 50 C.F.R. § 402.14(g)(8) (“In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available”).

³⁶⁷ *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (Tacoma does not claim that it presented FERC with new information that was unavailable to the Fisheries Service or the Fish and Wildlife Service and that would give FERC a basis for doubting the expert conclusions in the BiOps those agencies prepared... Because Tacoma did not assert new information that called into question the factual conclusions of the BiOps, FERC was justified in relying on the BiOps and did not act arbitrarily and capriciously in doing so”).

³⁶⁸ *Regan*, CV 21-119 (RDM), 2024 WL 1602457, at *38–39 (“To the contrary, major swaths of what the ESA and its governing regulations require a consulting agency to consider in a BiOp are simply absent. Indeed, for example, the BiOp makes no effort to undertake *any* species-specific effects analyses whatsoever”).

³⁶⁹ *Meeting Summary: Proposed Federal Correctional Institution – Letcher County, Kentucky*, in Appendix B to FEIS, FEIS Merged Appendices, p. 133 (“the need to resurvey is required for greater than

for failing to comply with the standard methodology for surveying the species. In order to comply with NEPA and the ESA, FBOP must conduct new surveys and prepare a new Biological Assessment, so FWS can properly complete a valid Biological Opinion.

Moreover, the FEIS violates the Endangered Species Act by failing to conduct the necessary habitat assessments for a BO in light of additional listed species and updated FWS guidelines. The Roxana Site is known to contain habitat for multiple endangered species, such as the Indiana bat, the gray bat, and the northern long-eared bat. Since the last EIS published in 2017, the northern long-eared bat has been officially listed as endangered,³⁷⁰ and the agency has proposed rulemaking to list the tricolored bat as endangered as well.³⁷¹ Reinitiation of agency consultation is “required” “if a new species is listed ... that may be affected by the identified action.”³⁷² However, the surveys informing the 2017 BO do not consider the changing status of these species under the ESA, much less consider the best scientific information available. The tricolored bat was not considered at all in the prior surveys, while the cost of mitigation for the other species of bat will have changed in the intervening years. The amount of habitat for endangered and threatened species will also have changed as vegetation continued to grow at both Roxana and Payne Gap. Notably, Jonathan Hootman, a bat biologist with two decades experience submitted a comment to DEIS, noting that the FBOP determination of the bats’ winter habitat is inaccurate and fails to consider how the prison’s fence and lighting would harm Indiana and Northern long-eared bats.³⁷³

5 years [old] data”); *Range-Wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines*, U.S. Fish and Wildlife Service (March 2024), https://www.fws.gov/sites/default/files/documents/2024-04/final_usfws_rangewide_ibat-nleb_survey_guidelines_508-compliant_.pdf.

³⁷⁰ Endangered Species Status for Northern Long-Eared Bat (Final Rule), 87 Fed. Reg. 73488, (Nov. 30, 2022) (codified at 50 C.F.R. 17).

³⁷¹ Endangered Species Status for Tricolored Bat (Proposed Rule), 87 Fed. Reg. 56381 (Sep. 14, 2022), (codified at 50 C.F.R. 17).

³⁷² 50 C.F.R. § 402.16.

³⁷³ See Ex. C.

While the prior surveys found only habitat and no listed species living at either site, these surveys are outdated under FWS guidelines, do not rely on the best science available, and thus cannot be relied upon in order to comply with the ESA.

The reliance on data and analysis created for a substantially different project with different cumulative effects and based on an investigation that fails to account new information not previously considered renders the FEIS deficient. It is therefore not compliant with NEPA. The ESA and FWS guidelines mandate that FBOP conduct new surveys and investigations that use the best scientific information available to ensure compliance with the ESA. It must then take the data gathered from those investigations and use them to consider the impacts of this substantially different project, and determine the level of mitigation that must occur to insure the longevity of these endangered species. Failure to do so renders this FEIS and any Record of Decision based on it clearly deficient under NEPA.

F. The FEIS Fails to Sufficiently Identify and Analyze Impacts to Aquatic Resources

The FEIS fails to sufficiently identify and analyze impacts to aquatic resources, including wetlands. The FBOP has submitted a request to USACE for Preliminary Jurisdictional Determination, and the upcoming Jurisdictional Determination should be scrutinized for sufficiency.

i. The wetland assessment is inadequate

The 2023 wetlands and stream assessment for the Roxana site is inadequate and deficient under NEPA. This assessment was completed in just three days. The Roxana Site has 500 acres of rough, forested, and mountainous terrain with limited access to slopes. In the professional experience and opinion of KRC staff, the field review for a wetlands assessment of this size and with these conditions should take at least a week, not days like was done here.

All streams and wetlands on this property are required to be accounted for by the FEIS as filling in streams and wetlands does have a significant effect on the human environment both economically and ecologically. At this time there is not a sufficient accounting of the aquatic resources present and until further field work is done, the DEIS fails to consider cumulatively the significance of these environmental impacts.

ii. The FEIS has inconsistencies with wetland delineation forms

Several notable inconsistencies have been observed in the wetland delineation forms. WSP states it performed the wetland delineation pursuant to the guidance outlined in the Regional Supplement to the Corps of Engineers Wetland Delineation Manual, Eastern Mountains and Piedmont Region, Version 2.0 (August 2010).³⁷⁴ However, Chapter 2 of this guidance, *Hydrophytic Vegetation Indicators*,³⁷⁵ provides methods on vegetation sampling and analysis that WSP did not follow in the 2023 wetland delineation forms. For instance, definitions of strata state that all vegetation is to be listed and only those that fall under the 5% of total cover will not be used in calculations for the dominance test unless it is the only stratum present.³⁷⁶ The sizes and shapes of plots may be modified as appropriate to adapt to site conditions and should be recorded on the field data form.³⁷⁷

The 4 stratum and their suggested plot sizes are listed below:

1. *Tree stratum* – Consists of woody plants, excluding vines, 3 in. (7.6 cm) or more in diameter at breast height (DBH), regardless of height. 30 ft radius;
2. *Sapling/shrub stratum* – Consists of woody plants, excluding vines, less than 3 in. DBH and greater than or equal to 3.28 ft (1 m) tall. 15 ft radius;

³⁷⁴ See FBOP, *Appendix D: Wetland Delineation Report*, FEIS Merged Appendices, p. 457-709.

³⁷⁵ *Regional Supplement to the Corps of Engineers Wetland Delineation Manual*, Eastern Mountains and Piedmont Region, available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p266001coll1/id/7607>

³⁷⁶ *Id.* at 19.

³⁷⁷ *Id.* at 21.

3. *Herb stratum* – Consists of all herbaceous (non-woody) plants, regardless of size, and all other plants less than 3.28 ft tall. 5 ft radius;

4. *Woody vines* – Consists of all woody vines greater than 3.28 ft in height. 30 ft radius.³⁷⁸

Deviations from these recommendations are required to be recorded on the field data form (aka wetland delineation forms).³⁷⁹ Plot sizes and shapes sometimes need to be changed related to the occurrence of the plant community, but the area sampled should remain equivalent to the radius recommended.³⁸⁰

The wetland delineation forms do not follow the recommendations for plot size and many times do not even contain a plot size or report any vegetation. There are no notes that indicate why the assessment has a reduced plot size. Consequently, the public did not have all the information needed to review WSPs data and assessments for entire groups of plants. Notably egregious is the omission of any listed plot size for the Woody Vine section in most of the wetland delineation forms.³⁸¹ Also of concern is nearly half of the Tree Section has no plot size and many of them do not have any trees recorded despite obviously being located in a forested area from aerial views.³⁸²

In addition, it should be noted that in a mostly forested area, WSP identified only 8 species of trees, and 3 species of woody vines.³⁸³ In a region known for biodiversity, this seemingly low

³⁷⁸ *Id.* at 19.

³⁷⁹ *Id.* at 21.

³⁸⁰ *Id.*

³⁸¹ See FBOP, *Appendix D: Wetland Delineation Report, Wetland Determination Forms, FEIS Merged Appendices: 567-701*. For wetland determination forms listing a woody vine stratum plot size outside of recommended ranges and failing to explain the deviation, see p. 583 (plot size 10'x10'), 586 (plot size 10'), 592 (plot size 10'), 607 (plot size 10'). For compliant wetland determination forms listing the 30' plot size but explicitly noting the absence of woody vines, see 649, 652, 655, 658, 661, 664. For wetland determination forms with no information whatsoever for woody vine strata and no listed plot size, see 568, 571, 574, 577, 580, 589, 595, 598, 601, 604, 610, 613, 616, 619, 622, 625, 628, 631, 634, 637, 640, 643, 646.

³⁸² For forms without trees, see *Id.*, pp. 568, 571, 574, 580, 604, 607, 610, 613, 616, 619, 622, 625, 628, 630, 634, 637, 649, 652, 655, 658, 661, 664.

³⁸³ *Id.*, For woody vines, see p. 583, 586, 592, 607 (*Parthenocissus quinquefolia*, *toxicodendron radicans*, and *clematis virginiana*). For trees, see p. 577, 583, 586, 589, 592, 640, 646 (*platanus occidentalis*, *fagus*

count of trees and woody vines is tremendously suspect, and seemingly reflective of a rushed and sloppy field investigation. The FEIS itself acknowledges at least 72 woody plant species in the Lilley Cornett Woods, 1.3 miles from Roxana.³⁸⁴

Another obvious deficiency in WSP's delineation forms is that not every identified wetland has a picture associated with it.³⁸⁵ Also, the existing pictures do not properly correspond with the wetland delineation form, which is required. Furthermore, KRC's comment to the DEIS noted that the pictures provided by WSP actually show many different species of vegetation types that the consultant simply fails to include in the wetland delineation forms.³⁸⁶

Lastly, the following problems exist in WSP's data:

- There are no corresponding wetland delineation forms to all upland forms to indicate that size of the wetlands was completed based on the actual formation of wetlands.³⁸⁷
- There are multiple forms with identical latitude and longitude, but different wetlands listed.³⁸⁸
- There are wetland forms with no latitude or longitude and no indication of their location.³⁸⁹

The FBOP's non sequitur response to these concerns is

Although some data forms did modify the size of the vegetative plot sample, the revised size was noted and all species recorded, with some data forms listing up to 17 plant species per strata, showing the field delineator's detailed observations, and appropriate field notes and determinations. The 2023 delineation has been submitted to the U.S. Army Corps of Engineers (Corps) for a response and any

grandifolia, liriodendron tulipifera, fraxinus pennsylvanica, pinus virginiana, betula nigra, ulmus rubra, magnolia tripetala).

³⁸⁴ FEIS, p. 111; William H. Martin & Chris Shepherd, *Trees and Shrubs of Lilley Cornett Woods, Letcher County, Kentucky*, 38 *Castanea* 4 (1973).

³⁸⁵ *Id.*, p. 498-510 (WET020 absent. Additionally, WET102 has only a single image of a soil pit on p. 504, but no overview image).

³⁸⁶ FEIS, p. 269.

³⁸⁷ *Id.*, p. 666-701.

³⁸⁸ *Compare, e.g., Id.*, p. 594 (listing a Lat. of 37.0990288 and Long. of 82.9585503 for WET011), with p. 597 (listing an identical Lat. of 37.0990288 and Long. of 82.9585503 for WET012).

³⁸⁹ *See, e.g., id.*, p. 651, 657.

necessary follow-up is pending completion of their review. The FBOP will rely upon the Corps to determine the thoroughness and accuracy of the delineation and its supporting documentation.³⁹⁰

In fact, this answer just simply ignores most of the concerns raised in the Kentucky Resource Center Comment. Instead it brushes them aside, and states that it will only update the delineation forms if USACE requires such changes. However, the deficiencies pointed out by KRC are serious. WSP and FBOP's failure to properly present the data in which it is relying upon for its decision, deprives the public from its statutory right to meaningfully participate in the NEPA process. An ROD cannot issue until this data is completed, these forms are corrected, and the public has an opportunity to review it and submit comments.

iii. The FEIS insufficiently assesses and considers the quality and value of wetlands at the site

The FEIS fails to consider and discuss the economic and ecological valuable services that wetlands at the proposed site provide to the surrounding human and natural communities. These wetlands provide habitat to all animals that would normally use a wetland area for drinking, spawning, feeding, habitat, and foraging.

In a comment to the DEIS, senior malacologist Casey D. Swecker noted multiple threatened or endangered species that live in the wetlands - "state listed crayfish" that live in upland habitats the FBOP intends to fill with excavated material, the "federally listed Kentucky arrow darter" that is "known to live in tributaries of the North Fork Kentucky River," and a newly described crayfish, *Cambarus hazardi*, that scholars have indicated "should be listed as vulnerable (V) using the American Fisheries Society criteria."³⁹¹ Additionally, the wetland (WET006), that appears as a mud hole in a service road was reported in the wetland delineation form as containing

³⁹⁰ Response to Ashley Wilmes, FEIS, p. 274.

³⁹¹ Comment of Casey D. Swecker (Apr. 15, 2024), FEIS pp. 334-35.

“numerous frogs.”³⁹² While this may seem insignificant to some, this evidence demonstrates the ecological health of the proposed site location because amphibians are a significant link in the region’s food chain. Specifically, many predator species, like snakes and raptors, rely on amphibians as food sources. Further, amphibians such as frogs are an “indicator” of environmental health; due to their permeable skins and susceptibility to pollutants, they “often drop in numbers before other species.”³⁹³

The most economically valuable services that wetlands provide have been studied thoroughly and reported by government agencies. Wetlands soak up rain runoff, hold water and slowly release it, reducing the frequency and intensity of flooding.³⁹⁴ “Maintaining only 15% of the land area of a watershed in wetlands can reduce flood peaks by as much as 60%,” saving enormous costs on flood damage.³⁹⁵ “After peak flood flows have passed, wetlands slowly release the stored waters, reducing property damage downstream. One reason floods have become more costly is that over half of the wetlands in the United States have been drained or filled.”³⁹⁶ Most of these wetlands have been drained and filled with the Army Corp of Engineers approval and many were not mitigated despite the known cost of property damage that will occur in the future. Furthermore, studies have shown that wetlands can remove a quantity of pollutants equal to that of a water treatment plant.³⁹⁷ It has been proven over and over that wetlands improve water quality

³⁹² Appendix D: Wetland Delineation Report, FEIS Merged Appendices, pp. 500, 579.

³⁹³ Kayle Fratt, *How Do Amphibians Breathe?* Earth.com, <https://www.earth.com/earthpedia-articles/how-do-amphibians-breathe/>; see also Steven Price, *Salamanders of Kentucky*, Kentucky Woodlands, pp. 8-9 (Aug. 2013), https://kywoodlandsmagazine.ca.uky.edu/sites/kywoodlandsmagazine.ca.uky.edu/files/8.2_kwm_web.pdf (describing the vulnerability and environmental value of amphibians whose “thin, permeable skin allows pollutants to enter freely.”)

³⁹⁴ U.S. Env’t Prot. Agency: Office of Water, EPA843-F-06-004, *Economic Benefits of Wetlands* (2006), https://www.epa.gov/sites/default/files/2021-01/documents/economic_benefits_of_wetlands.pdf

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ U.S. Env’t Prot. Agency: Office of Wastewater Management, EPA832-R-93-005, *Constructed Wetlands for Wastewater Treatment and Wildlife Habitat: 17 Case Studies* (1993),

to the point that they are now being constructed for the purposes of improving water quality and for wastewater management.³⁹⁸

Despite this clear scientific literature on the importance of wetlands, the FEIS does not actually discuss anywhere what would be the effects on the human environment from the destruction of these particular wetlands. This substantive absence of information renders the FEIS deficient. Furthermore, the no action alternative needs to be clear that ALL wetlands that are on this property will continue to exist and continue to provide this valuable economic service for the foreseeable future if they are left alone. They will require little to no upkeep and will serve the people of Letcher County by providing improved water quality and reduced flooding.

Considering the foregoing, the impacts of wetlands loss was not sufficiently analyzed and considered by the FBOP. Without this essential information, the alternative analysis that favors the Roxana action is being made without incomplete information. This type of foreordained conclusion is prohibited under NEPA. Until the alternatives analysis is complete, the FBOP should not issue an ROD.

iv. The FEIS fails to adequately analyze mitigation and related impacts to aquatic impacts.

The FBOP fails to take a hard look at the adverse environmental impacts this project is likely to have on aquatic resources, including wetlands, and fails to provide a reasonably complete discussion of possible mitigation measures, within the context of avoiding and mitigating harm.³⁹⁹

https://www.epa.gov/sites/default/files/2018-07/documents/constructed_wetlands_for_wastewater_treatment_and_wildlife_habitat_17_case_studies_epa832-r-93-005.pdf

³⁹⁸ *Id.*; See also U.S. Env't Prot. Agency: Office of Water, EPA 843-F-03-013, *Constructed Treatment Wetlands* (2004), <https://nepis.epa.gov/Exe/ZyPDF.cgi/30005UPS.PDF?Dockey=30005UPS.PDF>.

³⁹⁹ See 40 C.F.R. § 1508.1. Although the mitigation analysis required by NEPA is separate, it is pertinent to consider mitigation requirements under CWA §404 as it pertains to wetlands. The governing principle of the Section 404(b)(1) Guidelines is that, in general, “no discharge of dredged or fill material” is permitted where it would “cause or contribute to significant degradation of the waters of the United

First, FBOP failed to properly analyze and consider avoidance as a means of mitigation. Every single wetland and stream within this project's 100 foot buffer line is shown as permanently impacted.⁴⁰⁰ Proposed grading contours are on top of streams and wetlands.⁴⁰¹ Outdoor and recreational areas show permanently impacted streams and wetlands.⁴⁰² The FEIS just simply shows that the FBOP plans to conduct NO AVOIDANCE as a mitigation strategy within the 100 foot buffer line shown..

Second, the FBOP fails to analyze and consider sufficient minimization efforts.⁴⁰³ Minimization limits the “degree or magnitude of the action and its implementation;”⁴⁰⁴ is achieved through the incorporation of appropriate and practicable design and risk avoidance measures.⁴⁰⁵ Again the FEIS just does not consider minimization as mitigation. For instance, the FBOP could create more grading contours on top of streams and wetlands that are not risk averse. There is other land without streams and wetlands that can be used for this purpose, but there are no observable minimization efforts made for wetlands or streams. Finally, there are also no observable design considerations that would minimize the impact of this project.

Third, the FBOP fails to provide an accurate assessment of present aquatic resources and fails to provide a means of mitigation that would replace or provide a substitute for the aquatic resources on this site. This site’s history as an underground mine and mountaintop removal site

States.” 40 C.F.R. § 230.10(c). The goal is “no overall net loss to wetlands.” CWA § 404(b)(1) Guidelines, 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990). To that end, the U.S. Army Corps of Engineers performs a three-step sequential analysis of (i) avoidance, (ii) minimization, and (iii) compensatory mitigation. *See id.* at 9212; Memorandum of Agreement regarding Mitigation under CWA Section 404(b)(1) Guidelines Between the Department of the Army and the Environmental Protection Agency.

⁴⁰⁰ *See* Exhibit 3-8: Waterway Impacts, FEIS p. 73.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ 40 C.F.R. § 1508.1.

⁴⁰⁵ *Types of Mitigation under CWA Section 404: Avoidance, Minimization, and Compensatory Mitigation*, Environmental Protection Agency (last updated Apr. 1, 2024), <https://www.epa.gov/cwa-404/types-mitigation-under-cwa-section-404-avoidance-minimization-and-compensatory-mitigation>

should trigger the FBOP to appropriately mitigate the harm caused by constructing at this specific location. For instance, wetlands are needed along the remaining streams outside of the 100 foot buffer, but still within the project's area. Stream enhancement is also needed outside of the 100 foot buffer, but still within the project's area. Invasive species removal is needed throughout the property and will continue to be needed during and after construction. These types of best management would reduce the likelihood that heavy metals find their way into downstream areas and drinking water.

Even though the FBOP has a responsibility to not adversely impact water quality, the agency's FEIS just fails to sufficiently identify and analyze appropriate mitigation measures to avoid or minimize impacts to aquatic resources, including wetlands.

v. The FEIS is missing mining records and reflects insufficient knowledge of Site

The FBOP has failed to get all of the records related to mining on this site. The lack of available records related to this mine is common in Kentucky. FBOP representatives need to take sufficient measures to obtain those records, including going to the Kentucky Department of Natural Resources, finding the physical files associated with this property, and making these records available to the public. What is known is there are 8 sediment ponds associated with mining permit 867-029, and there should be KPDES records and DNR records of the abatement process on file. They will not be in TEMPO, but they are still there in physical form.

In addition, there are water quality samples that have exceeded water quality standards in Sulfate and Total Dissolved Solids right up to the end of their permitted time.⁴⁰⁶ Just because there are no known reports of violations, that does not mean there were no violations. Knowledge of the

⁴⁰⁶ Section 3.4: Historic Site Water Quality, in *Appendix G: Results of Investigation of Materials to be Excavated* (2016), FEIS Merged Appendices p. 1060-1061.

history of this property would better prepare the FBOP for the required abatement, best management practices and engineering work that will need to be done to make this project work.

KRC raised all of these issues in its comment to the FBOP.⁴⁰⁷ In turn, the FBOP responded with the following:

While available records indicate that underground coal mining was conducted on the Roxana Site (EDR 2023), no underground mining is known to have occurred beneath the planned development zone. Nonetheless, additional effort will be made to gather records to confirm this understanding. In addition, an extensive geotechnical boring program will be undertaken during the design stage to ensure that the structures and other features are developed on a solid rock foundation without any voids related to past underground mining.⁴⁰⁸

This response is problematic for several reasons. First, the FBOP acknowledges that it does not have sufficient mining records and that it will make an additional effort to gather more information about underground mining at the site. While undersigned appreciate FBOP's candor on this subject, to proceed with an ROD under such circumstances would violate NEPA. Second, this response is the first time that FBOP mentions the phrase "geotechnical boring." Geotechnical boring is used to "explore the subsurface conditions to document the physical properties of the site materials. The information provides the project team with a clear understanding of the type of material that the project will be built on."⁴⁰⁹ The fact that FBOP is choosing to proceed with this project at this particular site, when it does not yet "have a clear understanding of the type of material that the project will be built on" is not only negligent – it is undoubtedly a NEPA violation.

vi. The FEIS failed to sufficiently identify and analyze groundwater and surface water impacts

⁴⁰⁷ FEIS, p. 271.

⁴⁰⁸ FEIS, p. 274.

⁴⁰⁹ See *Drilling Services*, <https://www.csikentucky.com/drilling-services/#:~:text=What%20Is%20Geotechnical%20Drilling%3F,project%20will%20be%20built%20on>. (last visited Aug. 11, 2024).

The FEIS does not sufficiently analyze groundwater and surface water impacts related to the investigation of material to be excavated.⁴¹⁰ For instance, the FBOP's consultant, Cardno, does not follow protocol for Water Quality testing. Samples were not properly collected, preserved or stored. There is no indication that any calibration methods were used on field instruments used for field measurements. No project quality assurance and control efforts were made. The basic requirement of supplying blanks and duplicates for quality assurance also was not performed.

Cardno's water analysis was conducted by Research Environmental & Industrial Consultants, Inc. (REIC) at that company's laboratory.⁴¹¹ REIC used method EPA 200.7 Rev. 4.4 (1994) to do its Total Metals by ICP test, and its Dissolved Metals by ICP test.⁴¹² This method has very specific guidelines.⁴¹³ However, Cardno's report does not show that REIC followed these guidelines. Specifically, REIC did not properly complete section 8.0 which mandates the following:

8.0 SAMPLE COLLECTION, PRESERVATION, AND STORAGE

8.1 The pH of all aqueous samples must be tested immediately prior to aliquoting for processing or "direct analysis" to ensure the sample has been properly preserved.

8.2 For the determination of the dissolved elements Acidify the filtrate with (1+1) nitric acid immediately following filtration to pH <2.

8.3 For the determination of total recoverable elements in aqueous samples, samples are not filtered, but acidified with (1+1) nitric acid to pH <2 (normally, 3 mL of (1+1) acid per liter of sample is sufficient for most ambient and drinking water samples.⁴¹⁴

⁴¹⁰ Appendix G: Results of Investigation of Materials to be Excavated (2016), FEIS Merged Appendices.

⁴¹¹ *Id.*, p. 1059.

⁴¹² *Id.*

⁴¹³ *Method 200.7 Determination of Metals and Trace Elements in Water and Wastes by Inductively Coupled Plasma-Atomic Emission Spectrometry* (1994), <https://www.epa.gov/sites/default/files/2015-06/documents/epa-200.7.pdf>.

⁴¹⁴ *Id.* at 22.

Neither REIC or Cardno provide lab sheets or field sheets that document the requirements for preservation of samples. The pH of no sample is shown to be below 2.0 pH and therefore would not be able to be used for analysis. HNO₃ is added to samples to reduce adsorption to container walls and microbial degradation is minimized. As well, the pH is recorded in the lab as being between 7.22 and 8.23 effectively showing that the metals samples did not have enough HNO₃ added to properly preserve the samples.⁴¹⁵ As to subsection “8.5 For aqueous samples, a field blank should be prepared and analyzed as required by the data user. Use the same container and acid as used in sample collection,”⁴¹⁶ There are no field blanks indicated on lab sheets or field sheets, thus making analysis unacceptable because field blanks are required for the review of both metal and dissolved metal samples. Therefore, the REIC report is unacceptable.

KRC notes in their DEIS that there also is no Water Quality sampling related to Quality Control. There are no equipment blanks recorded for the filtering process used for the dissolved metals. Examples of laboratory quality control samples are method blanks, laboratory duplicates, and laboratory control samples; field quality control samples are field blanks, trip blanks, field duplicates, and matrix spikes. In turn, these samples are unacceptable for analysis, and the FEIS is not complete and an ROD should not issue.

Additionally, all Water Quality Samples were collected throughout the day on November 11, 2015 and were not delivered to the lab in Beaver West Virginia until November 13, 2015.⁴¹⁷ During this 48-hour hold time there was no custody seal intact and no indication that samples were kept secured. Also, during this time there was no indication that water quality samples were

⁴¹⁵ Appendix G: Results of Investigation of Materials to be Excavated (2016), FEIS Merged Appendices, p. 1061.

⁴¹⁶ *Method 200.7 Determination of Metals and Trace Elements in Water and Wastes by Inductively Coupled Plasma-Atomic Emission Spectrometry* (1994), 22.

⁴¹⁷ *Id.* at 1059.

monitored for temperature, had water drained or ice added, kept separate from one another to prevent contamination, or was securely stored in an area that it could not be tampered with.

Given that the results of this invalid water quality analysis were used to incorrectly state that “no concentrations of metals at levels of human health concern in water that has migrated through the rubblized rock material,”⁴¹⁸ the FBOP has failed to supply a valid water quality analysis for this project. In turn, new sampling must be done by qualified individuals that adhere to the standards put forth by the EPA related to Water Quality Ambient Sampling. Without new sampling, it is impossible for the FBOP to make a NEPA compliant decision based because it does not have sufficient information about the presence of heavy metals at the Roxana site, and how the point of concentrations of these metals will impact 1) human health concern; 2) the water quality of nearby streams and wetlands; 3) wildlife in the area.

Despite the clear, evidenced based concerns raised by KRC, the FBOP simply responded with the following statement that it is

confident in the thoroughness and accuracy of the sampling conducted as part of the “Results of Investigation of Materials to be Excavated” study, which was conceived as a phased investigation, with the results of each stage dictating the need for or level of effort to be applied in a subsequent stage. As an initial phase, additional sampling and analysis will be performed if deemed necessary.⁴¹⁹

This is not a NEPA compliant response that is thorough, and based on evidence in the record. Furthermore, what does the FBOP mean that “additional sampling and analysis will be performed if deemed necessary.”⁴²⁰ Who makes the decision that more sampling is necessary? Is not the serious concerns raised by KRC enough to show that more water sampling must be done before the FBOP can decide to move forward with the Roxana alternative.

⁴¹⁸ *Id.* at 1060.

⁴¹⁹ FEIS, p. 274.

⁴²⁰ *Id.*

vii. The FBOP failed to consider other relevant information related to water quality

FBOP failed to sufficiently analyze the old underground mine portal – the immediate area at the Roxana that is the most likely to adversely impact the area’s water quality. Cardno states that “[t]he old underground mine portal was visited and confirmed to exhibit no surface discharge.”⁴²¹ The FEIS provides no other documentation of another attempt by the consultants or FBOP employees to visit, survey or test the portal. One attempt to take a sample of potential acid mine drainage is not adequate for the FBOPs environmental review. This site should have been visited multiple times over the years, specifically after rains, to ascertain 1) the water quality coming from the underground mine; and 2) if there is surface discharge at the portal.

Furthermore, the suite of metals tested for was inadequate to determine if this site can handle having the materials currently present resuspended, exposed to rain (having low pH), and brought to the surface to be oxidized. Metals in the water can be present in either a dissolved (soluble) or particulate (insoluble) state. The FBOP mostly tested for dissolved metals, limiting the discussion that can be had about what the current analysis shows. Furthermore, this limitation means there is not enough information to inform the FBOP on what Best Management Practices will be required to protect the area’s water quality standards.

There is also no mention of how testers calibrated their instruments, or what instruments they used to gather field data. Given the high conductivity levels throughout the Roxana site, it is required to use a calibration standard that is higher than is normally used. However, Cardno’s report fails to mention 1) calibration, 2) the presence of a calibration log; and 3) assurances that

⁴²¹ Appendix G: Results of Investigation of Materials to be Excavated (2016), FEIS Merged Appendices, p. 1059.

the field data collection was done with any sort of standard. In light of the foregoing, it is clear that the data and sampling relied on by FBOP is insufficient.

As mentioned in the previous section, the FBOP's response is that it is confident in the thoroughness and accuracy of the sampling conducted as part of the "Results of Investigation of Materials to be Excavated" study, which was conceived as a phased investigation, with the results of each stage dictating the need for or level of effort to be applied in a subsequent stage. As an initial phase, additional sampling and analysis will be performed if deemed necessary.⁴²²

Again, this is not a NEPA compliant response to the very real, well-documented, substantiated and substantive comment from KRC.

G. The FEIS Fails to Provide a Sufficient Analysis of the Proposed Prison's Impact on Climate Change

The FEIS completely fails to account for the amount of GHG emissions during construction and maintenance of the proposed prison in Letcher County. It also fails to conduct an analysis of the social cost of greenhouse gas (GHG) emissions. This failure to properly assess the impact of climate renders the FEIS deficient and incomplete.

To conform with the mandate of 40 CFR 1502.16(6) that an EIS section on environmental consequences "shall include an analysis of ... climate change-related effects, including, where feasible, quantification of greenhouse gas emissions," the CEQ's 2023 draft guidance states that federal agencies "should quantify the reasonably foreseeable gross GHG emissions increases and gross GHG emission reductions for the proposed action, no action alternative, and any reasonable alternatives over their projected lifetime, using reasonably available information and data."⁴²³

⁴²² FEIS, p. 274.

⁴²³ Council on Environmental Quality: National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1201 (Jan. 9, 2023) (citing 40 CFR 1502.16(6)). *See also* Council on Environmental Quality: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, Memorandum for Heads of Federal Departments and Agencies (Aug. 1, 2016).

These quantifications should generally be broken down “individually by GHG, as well as aggregated in terms of total CO2 equivalence.”⁴²⁴ The guidance notes that “quantification and assessment tools are widely available and already in broad use in the Federal Government and private sector,” and provides links to multiple tools that could have produced an estimated quantification of GHGs.⁴²⁵

i. The FEIS fails to fully account for emissions from vehicular traffic.

The FEIS does not contain a single quantified estimate of GHGs for any of the alternatives proposed. If this is a “rare instance” where the FBOP has determined “that tools, methodologies, or data inputs are not reasonably available to quantify GHG emissions associated with a specific action,” it “should explain why such an analysis cannot be done, and should seek to present a reasonable estimated range of quantitative emissions for the proposed action alternatives,” or a “qualitative analysis and its rationale for determining that a quantitative analysis is not possible.”⁴²⁶

The FEIS’s section on construction activities contains neither a quantification, an explanation of impossibility and reasonable estimation, nor a qualitative analysis paired with an explanation for the absence of quantification, beyond a description of fugitive dust.⁴²⁷ The section on construction and operation activities approximates an explanation of impossibility by claiming that “at this time, it is not possible to predict the commuting patterns of the workforce.” It provides neither a reasonable estimation of GHGs nor a qualitative analysis of GHGs beyond a conclusory reference to the “growing acceptance of electric vehicles.”⁴²⁸ But the FEIS provides specific

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 1202.

⁴²⁷ FEIS, p. 126-27.

⁴²⁸ *Id.*, p. 128-29.

projections for the increased number of vehicles involved in daily commutes, 325,⁴²⁹ and even predicts the time of day when they would be most active, between 3:30 and 4:30 PM.⁴³⁰ The FBOP provides itself an upper bound for commute distance, assuring concerned commenters that “the claim that the average daily commute of a FBOP employee is 100-150 miles [is] untrue.”⁴³¹ It cites pages of the FEIS for data on ZIP codes of current FBOP employees in southeastern Kentucky from which to calculate average commute.⁴³² And yet the FBOP throws up its hands at the GHG estimation mandated by federal regulations. This is patently insufficient and warrants a revised FEIS before the FBOP issues an ROD.

Even in its half-hearted attempt at a qualitative analysis of GHG emissions during construction and operation, the FBOP fails to consider one of the most extreme sources of emissions that its placement in remote Roxana, KY will produce – vehicular emissions of visitors to the prison. The FEIS does recognize the effect of motor vehicle operation on the environment, acknowledging (but failing to quantify or adequately describe) the impact of emissions from “workforce commutes” and “to a lesser degree . . . visitors.”⁴³³ Visitors traveling to their loved ones in prison, particularly from major metro areas such as Washington, D.C., will both produce and be impacted by emissions to a far *greater* degree. The drive from the District to Roxana, Kentucky is at minimum around 450 miles and can take 8 hours with light traffic. Even with a higher-than-average rate of 30 mpg, a single round trip of 900 miles would burn 30 gallons of gas and emit over 250,000 grams of CO₂.⁴³⁴ The vehicular emissions of sending communities and visitors

⁴²⁹ *Id.*, p. 129.

⁴³⁰ FEIS, p. 121.

⁴³¹ Response to Ashley Spalding, FEIS p. 262.

⁴³² *Id.*; *see also* FEIS, p. 91.

⁴³³ FEIS p. 128-29.

⁴³⁴ *Greenhouse Gas Equivalencies Calculator*, EPA.gov, <https://www.epa.gov/energy/greenhouse-gases-equivalencies-calculator-calculations-and-references#>.

should be given adequate weight in, at minimum, a qualitative description of GHG emissions, and should be quantified using the CEQ’s provided tools or a reasonable estimation. As noted above, the need to consider emissions from visitors to the prison was raised in a substantive written comment by the Institute to End Mass Incarceration and a spoken comment by James Carpenter that the FBOP failed to consider or respond to, in violation of 40 C.F.R. § 1503.4(a). This noncompliant GHG analysis renders the FEIS insufficient.

ii. The FEIS does not comply with EO 13990

EO 13990 provides further rationale for the FBOP to use a social cost analysis of its greenhouse gas emissions. The order instructs that an accurate social cost of carbon and other GHGs as “essential for agencies to accurately determine the social benefits of reducing greenhouse gas emissions when conducting cost-benefit analyses of regulatory and other actions.”⁴³⁵ This strengthens the language in the CEQ’s 2023 draft guidance, which states that an agency must quantify the social cost of greenhouse gas “in most circumstances” after quantifying emissions, “even if no other costs and benefits are monetized.”⁴³⁶

The FEIS is absent of quantifying GHG emissions. The FEIS also fails to conduct a social cost analysis of how increased GHG emissions in the area will impact wildlife, undeveloped areas and the region’s residents, especially those with chronic lung diseases such as Black Lung, COPD, and emphysema. There was no cost-benefit analysis, and no understanding of how this project will increase emissions. The FBOP’s failure to present a social cost analysis on which the public has opportunity to comment, the flouting of CEQ guidelines on a compliant GHG analysis, and the omission of substantive comments informing the environmental impact of the prison render the current FEIS insufficient under NEPA. The issuance of an ROD under such circumstances would

⁴³⁵ Exec. Order No. 13990, 86 Fed. Reg. 7037.

⁴³⁶ 2023 CEQ Guidance, 88 Fed. Reg. 1196, 1202 (Jan. 9, 2023).

be illegal under NEPA.

H. The FEIS Does Not Sufficiently Account for Flooding and Other Natural Disasters

As noted previously and in multiple comments on the DEIS, the 2022 floods were extremely destructive and caused severe and long-term negative impacts to Letcher County and surrounding counties. In response to multiple comments about the risk of catastrophic flooding, the FBOP inserted a paragraph into its FEIS addressing impeded “vehicle access:”

... the FBOP will prepare an Adverse Weather Plan and Institution Evacuation Plan that will, among other things, define the food and other provision, emergency equipment, fuel, and similar necessities to be stockpiled on-site at all times to maintain uninterrupted operation and safeguard AICs and FBOP employees who would remain at their posts for the duration of the flood (or other severe weather event) and its aftermath.⁴³⁷

This is simply not a sufficient response to such immense risks, and has come far too late in the NEPA process to be of practical use. The failure to properly consider the risk of natural disasters earlier in the FEIS rendered many of its basic assumptions unreasonable. It has fundamental flaws not addressed by stockpiled food.

It may be the starkest example of how the FEIS “alternatives analysis” is woefully deficient without the alternative of renovating or replacing existing facilities. Existing facilities are simply not in locations as vulnerable to natural disasters as Letcher County. These currently used sites (hopefully) already have an “Adverse Weather Plan and Institution Evacuation Plan.” A truly sufficient FEIS would be able to compare the financial, social, public health and environmental costs of implementing these plans at Roxana to the benefits of a pre-existing site.

The growing threat of natural disasters cannot be addressed in a paragraph. In a location as vulnerable as Letcher County, this threat should have been a fundamental precondition informing

⁴³⁷ FEIS, p. 59; Response to Emily Posner, et al., FEIS p. 247; Response to Artie Ann Bates, MD, FEIS p. 280; Response to Individual Comments Submitted by Everycustomaction.org, FEIS p. 381.

every part of the DEIS. As one brief example, the FBOP is planning to build an on-site 500,000-gallon water tank to meet a projected demand of 300,000 gallons *per day*.⁴³⁸ The 2022 floods knocked out water lines across Eastern Kentucky and left many communities without water for *weeks to months*.⁴³⁹ The on-site water supply contemplated by the FEIS would last less than 48 hours in a crisis. No Adverse Weather Plan centering vehicle access can cure this basic deficiency.

Beyond the Adverse Weather Plan paragraph, the FBOP's FEIS mentions the 2022 floods in passing only a handful of times. It doesn't seriously consider the impact on the availability of local resources needed to support a federal prison. For example, when discussing housing resources in the region, the FBOP cites statistics from 2020, while noting the impact of the 2022 floods is "not reflected in the statistics that follow."⁴⁴⁰ Among the consequences of the 2022 floods was the loss of over 9,000 homes.⁴⁴¹ Despite this, the FBOP's analysis of the proposed action's impacts and related mitigation continues to be based on the housing statistics from 2020. With the loss of 9,000 homes, where does the BOP anticipate the staff for the prison to live, and how would FBOP staff transferred to the region impact the local housing market? Housing experts in Whitesburg have already forecasted that a federal prison would increase need, worsening the existing crisis.⁴⁴²

All community services and facilities were severely impacted by the 2022 flood, which

⁴³⁸ FEIS, p. 115.

⁴³⁹ Beth Musgrave & Bill Estep, *Thousands in Eastern Kentucky Still Without Water: Towns Wonder How They'll Pay for Repairs*, Lexington Herald-Leader (Aug. 5, 2022), <https://www.kentucky.com/news/weather-news/article264131601.html> ("Beshear cautioned that it could take months to restore some systems that have seen significant damage").

⁴⁴⁰ FEIS, p. 103.

⁴⁴¹ Eric Dixon & Rebecca Shelton, *Housing Damages from the 2022 Kentucky Flood*, Ohio River Valley Institute (Feb. 21, 2023), <https://ohiorivervalleyinstitute.org/wp-content/uploads/2023/02/Housing-Damage-from-KY-2022-Flood.pdf>; Matt Klesta, *Resilience and Recovery: Insights from the July 2022 Eastern Kentucky Flood*, Federal Reserve Bank of Cleveland, Sep. 27, 2023, <https://www.clevelandfed.org/publications/cd-reports/2023/20230927-resilience-and-recovery>

⁴⁴² Sam Adams, *Neon Buys Land for New Housing*, Whitesburg Mountain Eagle (Nov. 8, 2023), <https://www.themountaineagle.com/articles/neon-buys-land-for-new-housing/>.

shut down multiple counties in eastern Kentucky for weeks, and disrupted regular life for months and in many cases for years. These disruptions affected law enforcement, medical, transportation, utilities, and education resources. The Letcher County Volunteer Fire Department had its main station destroyed and all of its firetrucks were damaged.⁴⁴³ Three of Letcher Emergency Medical Services' five ambulances were swept away.⁴⁴⁴ The impacts of the 2022 flood touched everything in eastern Kentucky. It is truly a “before and after” event.

The impacts were not limited to community services and facilities. Flooding of this severity and scope impacts everything in an area. It alters wildlife habitat, knocking down trees, potentially creating new roosting sites for endangered bats. Flooding can increase and decrease the availability of food for different species of wildlife. It can cause changes to migration and breeding patterns. Flooding can alter plant biodiversity, creating space for some species to flourish while dealing other species significant setbacks. Beyond the impacts on biological resources, floods can alter groundwater and surface waters in terms of channeling, sedimentation, and water quality. Floodings can also weaken the stability of slopes, setting the stage for later failures.

The 2022 flood is neither the beginning nor the end of the story in terms of the impacts and risks of natural disasters in the region. Articles in Letcher County's local press tell of damage caused by additional flooding and storms in 2018⁴⁴⁵ and 2021,⁴⁴⁶ on top of the devastating flooding

⁴⁴³ Sam Adams, *Flood Leaves Local Police, Fire Agencies Needing Help*, Whitesburg Mountain Eagle (Aug. 3, 2022), <https://www.themountaineagle.com/articles/flood-leaves-local-police-fire-agencies-needing-help/>; Dianne Gallagher, Wesley Bruer, & Theresa Waldrop, *Kentucky Flood Survivors Hope for Another Miracle as They Brace for More Rain*, CNN (Aug. 6, 2022), <https://www.cnn.com/2022/08/06/us/kentucky-flooding-survivor-stories/index.html>.

⁴⁴⁴ Adams, *Flood Leaves Local Police*.

⁴⁴⁵ Justin Kase, *County Officials to Survey Flooding Damage in Letcher County*, WYMT Mountain News (May 15, 2018), <https://www.wymt.com/content/news/Flash-flood-tears-through-Letcher-County-communities-482745271.html>; *Federal Assistance Unlikely for Letcher Flood Victims*, Mountain Top Media, (May 18, 2018), <https://mountain-topmedia.com/federal-assistance-unlikely-for-letcher-flood-victims/>.

⁴⁴⁶ Sam Adams, *Flooding Largely Damaged Rural Roads, Bridges Here*, Whitesburg Mountain Eagle (Mar. 3, 2021), <https://www.themountaineagle.com/articles/flooding-largely-damaged-rural-roads->

in 2022. In February of 2023, Letcher County saw yet more dangerous flooding.⁴⁴⁷ According to an article published by the Federal Reserve Bank of Cleveland, from 1967-2021, thirteen counties in eastern Kentucky each saw between 17 and 33 federally declared disasters.⁴⁴⁸ This amounts to a disaster declaration every three years, at the low end of that range.

The issue is not limited to past instances of flooding. According to *First Street*, a widely cited authority on disaster risks, Letcher County has an “extreme risk of flooding” in the future, with anticipated severe impacts to roads, housing, businesses, and critical infrastructure.⁴⁴⁹ As the FBOP recognizes in the FEIS, flooding is expected to be more frequent and more severe as a consequence of climate change. Given these facts, it is entirely foreseeable that any prison built in Letcher County will be impacted by significant flooding several times during the lifespan of the facility.

These storms and floods not only cut off electricity and shut off water services to thousands across the region, but also shut down roads and damaged buildings. As the FEIS notes in passing, the 2022 floods destroyed a massive number of houses in the region, the consequences of which are not seriously considered in the FEIS.⁴⁵⁰ Local emergency services were severely limited as facilities and equipment were damaged or destroyed, while many areas became inaccessible to those first responders who were still equipped to act.

[bridges-here/](#).

⁴⁴⁷ Evan Hatter, *Multiple Counties Declare States of Emergency*, WYMT Mountain News (Feb. 17, 2023) (describing “flooding, rockslides, and road washouts in Letcher County”),

<https://www.wymt.com/2023/02/17/state-emergency-declared-letcher-county/>; Sam Adams, *Latest Flood Brings New Damages to Many Already Troubled Homes*, Whitesburg Mountain Eagle (Feb. 22, 2023), <https://www.themountaineagle.com/articles/latest-flood-brings-new-damages-to-many-already-troubled-homes/>.

⁴⁴⁸ Matt Klesta, *Resilience and Recovery: Insights from the July 2022 Eastern Kentucky Flood*, Federal Reserve Bank of Cleveland (Sep. 27, 2023), <https://www.clevelandfed.org/publications/cd-reports/2023/20230927-resilience-and-recovery>.

⁴⁴⁹ *Letcher County*, Flood Factor: First Street, https://riskfactor.com/county/letcher-county-ky/21133_fsid/flood

⁴⁵⁰ FEIS, p. 59.

The FBOP dismisses the direct risks of flooding to the proposed prison by noting that the facility would be built above the floodplain. However, the highwater mark on the 2022 floods was well above the recognized floodplain. Even though the prison itself may not ever flood, its location makes it undeniably prone to the loss of utilities, road access, and local emergency services with any future flooding.⁴⁵¹ In 2022, entry points on both ends of the bridge near the proposed prison that crosses the North Fork River were inundated with water, making it impassable. Once again, the Roxana Site is in a region that already has an exceptionally high risk of flooding, and climate change is expected to only increase the frequency and severity of flooding in the future. Considering the foregoing, it is foreseeable that major disruption to the operation of any prison at the Roxana Site would occur repeatedly during the lifetime of the facility. If that bridge is obstructed again, how will staff come and go, and how will the FBOP guarantee that the prisons operations will not be interrupted? What happens in a medical emergency, for instance if a correctional officer or incarcerated person has a stroke? How will food and essential supplies reach the facility? Assuring that the FBOP “will prepare an Adverse Weather Plan,” future tense, answers none of these questions.⁴⁵²

Similarly, the BOP’s inordinate requirements for electricity, gas, water, sewage, and solid waste disposal may not create severe impacts during normal operations, but in an emergency when these systems are disrupted or damaged an overall reduction in capacity for utilities would occur. In this situation, the needs of the prison could end up competing against the needs of the wider community, while also leading to uncontrolled discharges from the prison. This is particularly

⁴⁵¹ First Street notes that 90.5% of critical infrastructure in Letcher County is at great risk of becoming inoperable due to flooding, the most at-risk county in the state. *The 3rd National Risk Assessment: Infrastructure on the Brink*, First Street Foundation, Sep. 2021, <https://assets.firststreet.org/uploads/2021/09/The-3rd-National-Risk-Assessment-Infrastructure-on-the-Brink.pdf>

⁴⁵² FEIS, p. 59.

foreseeable where the current proposal anticipates pushing utilities demands near their existing limits.

For example, the FEIS states that the LCWSD wastewater treatment plant has 300,000 gpd of unused capacity.⁴⁵³ However, FCI Letcher is projected to produce an average of 255,000 gpd of wastewater. The LCWSD system is known to have significant “water loss,” which, if considered, would likely reduce the estimated capacity.⁴⁵⁴ Moreover, the FEIS states that at times of peak use, wastewater flowing from FCI Letcher would be three and a half times the average gpm flow that currently exists.⁴⁵⁵ This seems to be cutting it rather close, even during normal operations, but in the context of foreseeable flooding, a reduction in capacity caused by those floods could have dire consequences for the health of incarcerated people, staff, residents and the natural environment. This issue of utilities capacity in the context of foreseeable natural disasters must be properly addressed in the FEIS, not only with respect to wastewater, but for all critical utilities and services. The FEIS reiterates that “the FBOP is not proposing to construct and operate a new wastewater treatment facility and instead will rely on the Letcher County Water and Sewer District.”⁴⁵⁶ Its Adverse Weather Plan does not account for these risks.

Additionally, the development of a prison on the Roxana Site is likely to significantly contribute to the severity of flooding for adjacent and nearby properties. It is already well known that mountain-top removal strip mining worsens stormwater runoff, contributing to the severity of flash flooding.⁴⁵⁷ According to news reports and studies conducted in the wake of the 2022 floods,

⁴⁵³ FEIS, p. 114.

⁴⁵⁴ *Staff Report on Letcher County Water and Sewer District*, Case No. 2017-00211, Letcher County Water and Sewer District (Oct. 17, 2017) (noting, *inter alia*, that “Letcher County’s water loss percentage exceeds the threshold of 15 percent as set” by local regulations), https://psc.ky.gov/pscscf/2017%20Cases/2017-00211//20171017_STAFF_REPORT.pdf.

⁴⁵⁵ FEIS, p. 115.

⁴⁵⁶ Response to Emily Posner et al., FEIS, p. 245.

⁴⁵⁷ James Bruggers, *Appalachia’s Strip-Mined Mountains Face a Growing Climate Risk; Flooding*, Inside

strip mining sites have little to no water retention, due to stripping of soil and vegetation from mountain surfaces, moving the upper layers of soil and rock into head-of-hollow fills, and compacting the dirt on the remaining plateau.⁴⁵⁸ These conditions substantially increase stormwater flow from these sites causing flash flood events to be more severe than they would be otherwise. Since reclamation cannot restore a removed mountaintop or the watershed, the problem persists even after “reclamation” of these post-mining sites. Importantly, the magnified severity of flash floods near strip mining sites has been linked to increased fatalities during flooding events.⁴⁵⁹

FBOP’s proposed action would worsen the already severe and potentially life-threatening conditions known to exist at former strip mines, like the Roxana Site, and make them much worse. First, the FBOP’s plan is to strip off 200 acres of forested land, which if left intact would slow and retain significant amounts of stormwater.⁴⁶⁰ Secondly, the FBOP plans to essentially repeat the process of strip mining by excavating millions of tons cubic yards of rock and soil and then

Climate News (Nov. 21, 2019), <https://insideclimatenews.org/news/21112019/appalachia-mountains-flood-risk-climate-change-coal-mining-west-virginia-extreme-rainfall-runoff-analysis/>;

⁴⁵⁸ James Bruggers, *Drowning Deaths Last Summer From Flooding in Eastern Kentucky’s Coal Country Linked to Poor Strip-Mine Reclamation*, Inside Climate News (Feb. 14, 2023),

<https://insideclimatenews.org/news/14022023/kentucky-flood-coal-strip-mine-reclamation/>; John McCracken, *How Coal Mining Increased Eastern Kentucky’s Flood Risk*, Grist (Aug. 8, 2022),

<https://grist.org/energy/how-coal-mining-increased-east-kentuckys-flood-risk/>; James Bruggers, *Strip Mining Worsened the Severity of Deadly Kentucky Floods, Say Former Mining Regulators. They are Calling for an Investigation*, Inside Climate News (Aug. 7, 2022),

<https://insideclimatenews.org/news/07082022/strip-mining-flooding-kentucky/>; Phil McCausland, *Abandoned. Mines and Poor Oversight Worsened Kentucky Flooding, Attorneys Say*, NBC News (Aug. 6, 2022), <https://www.nbcnews.com/news/us-news/lack-regulation-abandoned-mines-worsened-kentucky-flooding-attorneys-s-rcna41716>;

Liam Niemeyer, *KFTC Seeks Investigation of Surface Mining’s Role in Deadly Kentucky Floods*, Kentucky Lantern (Feb. 13, 2023), <https://kentuckylantern.com/2023/02/13/kftc-seeks-investigation-of-surface-minings-role-in-deadly-kentucky-floods/>.

⁴⁵⁹ William C. Haneberg, *Precipitation Patterns, Mountaintop Removal Mining, and the July 2022 North Fork Kentucky River Flood*, 30 J. Env’t. & Eng’g Geoscience 3: 131-145 (2024); W. Jay Christian, Beverly May, & Jeffrey E. Levy, *Flood Fatalities in Eastern Kentucky and the Public Health Legacy of Mountaintop Removal Coal Mining*, J. of Maps (2023), <https://doi.org/10.1080/17445647.2023.2214159>.

⁴⁶⁰ FEIS, p.71.

compacting what remains in order to grade and stabilize the ground for building the prison.⁴⁶¹ Third, the FBOP plans to put in place acres of impermeable surfaces at the site.⁴⁶² In other words, the FBOP's proposal would significantly decrease the current ability of the site to retain and slow stormwater, while drastically increasing the amount of stormwater flowing off impermeable surfaces. Despite this, the FEIS does not consider the ways in which the Roxana Site has abnormal stormwater problems, or the way in which the proposed action would substantially increase these problems. In light of the foreseeability of extreme flooding near the Roxana Site, the FEIS must investigate and account for the ecological significance of the planned alterations, the severe impacts on stormwater drainage, and the potentially life-threatening consequences of this project. Relying on generic BMPs for stormwater management at a site with exceptional challenges, which would be greatly exacerbated by the FBOP's proposed action, is insufficient and must be properly addressed before the FBOP can proceed to a ROD.

Finally, while flooding in Letcher County is a major concern, it is not the only foreseeable natural disaster which would likely impact FCI Letcher, were it to be built. According to *First Street*, Letcher County also has a "major risk of wildfires," with 99% of all properties projected to be at "some risk of being affected by wildfire" within the next 30 years.⁴⁶³ In addition to damaging structures, wildfires can cut off utilities, disrupt access to emergency services, and cause hazardous levels of air pollution. Moreover, a significant secondary effect of wildfires is the destabilization of slopes previously secured by vegetation, leading to landslides.⁴⁶⁴ The landslide risk would be

⁴⁶¹ FEIS, p. 51; *see also* FEIS, p. 96 (stating that "[o]utside of the mining industry, there are few projects involving the nature and scale of the site preparation required to develop the proposed FCI/FPC.")

⁴⁶² FEIS, p. 127 (describing steel, concrete, and reinforced concrete foundations), 142 (describing the material resources of cement, aggregate, steel, asphalt, and other materials to be used on 200 acres of development).

⁴⁶³ *Letcher County*, Fire Factor: First Street, https://firststreet.org/county/letcher-county-ky/21133_fsid/fire?from=riskfactor.com

⁴⁶⁴ *What Should I Know About Wildfires and Debris Flows?*, United States Geological Survey,

significantly greater in the area around the Roxana Site given the FBOP’s planned destruction of hillside vegetation, and the additional inevitability of heavy rainfall and flooding.

According to the USGS⁴⁶⁵ and EPA,⁴⁶⁶ increased temperatures are believed to be making wildfires more frequent and more severe in the area. In fact, in 2023, wildfires occurred in Letcher County.⁴⁶⁷ Challenges from fire are expected to increase as a consequence of unmitigated climate change. Despite Letcher County being recognized as having a “major wildfire risk,” the FEIS includes no consideration of the likely impacts to the proposed prison.

These omissions render the FEIS insufficient under NEPA. Fundamental deficiencies do not call for a single-paragraph allusion to a not-yet-created Adverse Weather Plan. They call for a full Environmental Impact Statement that properly takes adverse weather risk into account from the beginning.

I. The FEIS Fails to Consider Agency and Expert Recommendations

In preparing for the publication of this FEIS, the BOP consulted with several agencies. However, in multiple instances the FBOP ignored agency recommendations regarding the need for updated investigation and analysis of alternatives. As discussed herein, the FBOP’s failure to properly consult with other federal, state and local agencies renders the FEIS deficient.

i. United States Fish and Wildlife Service (FWS)

<https://www.usgs.gov/faqs/what-should-i-know-about-wildfires-and-debris-flows>.

⁴⁶⁵ *Will Global Warming Produce More Frequent and More Intense Wildfires?*, United States Geological Survey, <https://www.usgs.gov/faqs/will-global-warming-produce-more-frequent-and-more-intense-wildfires#publications> (“researchers have found strong correlations between warm summer temperatures and large fire years, so there is general consensus that fire occurrence will increase with climate change”).

⁴⁶⁶ *Climate Change Indicators: Wildfires*, U.S. Env’t Prot. Agency, <https://www.epa.gov/climate-indicators/climate-change-indicators-wildfires#ref2> (“Multiple studies have found that climate change has already led to an increase in wildfire season length, wildfire frequency, and burned area”).

⁴⁶⁷ Buddy Forbes, *‘What We Need is Rain’: Letcher County Sees Slew of Forest Fires*, WYMT Mountain News (Nov. 9, 2023), <https://www.wymt.com/2023/11/09/what-we-need-is-rain-letcher-county-sees-slew-forest-fires/>; Olivia Cafee, *KDF: Zero Active Fires in Kentucky After More Than Two Week Battle*, WYMT Mountain News (Nov. 20, 2023), <https://www.wymt.com/2023/11/20/kdf-zero-active-fires-ky-after-more-than-two-week-battle/>

For example, on October 27, 2022, the FWS provided scoping comments to the FBOP, which noted that the new proposal to build an FCI “differs greatly” from the prior plan to build a USP, “with potential environmental impacts of its development and operation correspondingly different.”⁴⁶⁸ The FWS recommended that the effects of the project be re-evaluated and consultation with FWS re-initiated, if changes in the current proposal would result in impacts on several species, including *Myotis sodalis*, *Myotis septentrionalis*, *Myotis grisescens*, and *Etheostoma spilotum*. The FWS also provided notice that reinitiation is *required* in the event of a new species being listed or the Action being modified in a manner that causes effects not considered in the opinion.⁴⁶⁹ For its part, the EPA scoping comments recommended that the FBOP also consider impacts on the blackside dace and big sandy crayfish.⁴⁷⁰ FWS additionally noted that a new species had been proposed for listing since the 2017 BO, which might be affected by the project, and recommended that “the effects of the project on the tricolored bat... be analyzed to determine whether authorization under ESA section 7 or 10 is necessary.”⁴⁷¹ If this wasn’t clear enough, FWS ends its 2022 comments by stating that “[b]ased on the proposed project modifications and the recent proposal to list the tricolor bat, the Service recommends that the [BOP] re-initiate consultations.”⁴⁷² Finally, in a follow up meeting with FWS held in June 2023, the agency stated that “the need to resurvey is required for greater than 5 years [old] data.”⁴⁷³

⁴⁶⁸ Letter from Virgil Lee Andrews, Jr. to Kimberly S. Hudson (Oct. 27, 2023), *in* Appendix B to FEIS, FEIS Merged Appendices, p. 130-31.

⁴⁶⁹ Biological Opinion: Federal Bureau of Prisons’ Proposed Construction and Operation of a U.S. Penitentiary and Federal Prison Camp in Letcher County, Kentucky, *in* Appendix H to FEIS, FEIS Merged Appendices, p. 1531.

⁴⁷⁰ Letter from Terry Adelsbach to Kimberly S. Hudson (Oct. 24, 2023), *in* Appendix A, Attachment 7 to FEIS, FEIS Merged Appendices p. 95-98.

⁴⁷¹ Letter from Virgil Lee Andrews, Jr. to Kimberly S. Hudson (Oct. 27, 2023), *in* Appendix B to FEIS, FEIS Merged Appendices, p. 131.

⁴⁷² *Id.*

⁴⁷³ *Meeting Summary: Proposed Federal Correctional Institution – Letcher County, Kentucky*, *in* Appendix B to FEIS, FEIS Merged Appendices, p. 133.

As noted previously, FBOP is not relying on the best scientific data available or considering the cumulative impact from the Proposed Action on endangered species, despite expert input and the ways in which the current project “differs greatly” from the previous one. Moreover, it is reasonable to expect significant changes to the environment of a site during an eight-to-ten-year time period. In fact, there is a near certainty of significant changes given the severity of the 2022 floods. Nonetheless, the FBOP ignores the recommendation of the FWS to re-evaluate impacts previously considered at the site. Moreover, the FWS’s recommendation for a review of impacts on the tricolored bat are clear and unambiguous: as the site “contains known swarming habitat for tricolored bat,” which was “recently proposed for listing and was not addressed in the previous Biological Opinion,” and “potential impacts to this species *need to be evaluated*.”⁴⁷⁴ A resurvey of habitats for Indiana and northern long-eared bats is “required” for data older than five years.⁴⁷⁵ With respect to all of these recommendations, the FBOP fails to reevaluate impacts as required and recommended by the FWS.

ii. United States Army Corps of Engineers

The FBOP also engaged the United States Army Corps of Engineers (USACE) in a meeting held on June 28, 2023. In this meeting USACE explained that they would need to review a “range of alternatives.”⁴⁷⁶ This accords with the feedback BOP received the Environmental Protection Agency in October 2022, which noted that under regulations governing USACE permitting, the FBOP is required to select “the least environmentally damaging practicable alternative that would

⁴⁷⁴ *Id.* (emphasis added).

⁴⁷⁵ Meeting Summary: Proposed Federal Correctional Institution – Letcher County, Kentucky, in Appendix B to FEIS, FEIS Merged Appendices, p. 133 (“the need to resurvey is required for greater than 5 years [old] data”); Range-Wide Indiana Bat & Northern Long-Eared Bat Survey Guidelines, U.S. Fish and Wildlife Service, March 2024, https://www.fws.gov/sites/default/files/documents/2024-04/final_usfws_rangewide_ibat-nleb_survey_guidelines_508-compliant_.pdf.

⁴⁷⁶ *Meeting Summary: Proposed Federal Correctional Institution – Letcher County, Kentucky*, Appendix B to FEIS, FEIS Merged Appendices, p. 128.

avoid or minimize the impacts . . . that meets the purpose and the need for the proposed project.”⁴⁷⁷ However, the FBOP has proceeded without a proper alternatives analysis. The most obvious alternative to consider, which would allow the FBOP to meet the guidance of the USACE and the EPA, would be to review the delineation of jurisdictional waters at Payne Gap. When the last review of Payne Gap occurred, it was found to have 2.84 acres of wetlands and 13,317 linear feet of streams. On the other hand, after the most recent survey in 2023, the Roxana Site contains 25,338 linear feet of streams and 2.73 acres of wetlands. It is now recognized that there are substantially more jurisdictional waters at the Roxana site.

The FBOP’s most recent Delineation Report describes 25,338 linear feet of streams and 2.73 acres of wetlands at Roxana within the study area around the proposed prison.⁴⁷⁸ Note, there is a difference between the evaluation in the Delineation Report and the number of feet and acres subject to “direct permanent impacts” that the BOP cites in the FEIS.⁴⁷⁹ There is no explanation provided or criteria explained in the FEIS or appendices for “direct permanent impacts.” Who made this determination, and on what basis?

Critically, the recent ruling in *Sackett v. EPA* will require a reassessment of the amount of jurisdictional waters at Roxana. The FBOP states that this will further reduce the amount of jurisdictional waters impacted by the site. At the same time, they do not have a Preliminary Jurisdictional Determination from USACE. The form appended to the 2023 Delineation report is still unsigned and doesn’t include a listing of the wetlands that are estimated to exist at the site or

⁴⁷⁷ Letter from Terry Adelsbach to Kimberly S. Hudson (Oct. 24, 2024), in Appendix A, Attachment 7 to FEIS, FEIS Merged Appendices, p. 96.

⁴⁷⁸ *Wetland Delineation Report and Jurisdictional Determination Request: Proposed Development of a New Federal Correctional Institution and Prison Camp – Letcher County, Kentucky*, Federal Bureau of Prisons, Appendix D to FEIS, FEIS Merged Appendices, p. 462.

⁴⁷⁹ The FEIS describes only 6,290 linear feet of streams and 1.99 acres of wetlands as affected by “direct permanent impacts . . . requiring mitigation.” FEIS, p. 57-60.

would be impacted by the construction project.⁴⁸⁰ USACE apparently has not applied its revised wetlands delineation rules under *Sackett* in order to help determine exactly what waters might be excluded, so the FBOP's assessment on this question is effectively an overstepping of its expertise, amounting to little more than a guess. However, guessing an answer does not make that answer compliant under NEPA.

Importantly, if applying *Sackett* would reduce the number of acres and linear feet impacted at Roxana, then it very well could impact the estimates of impacted waters at Payne Gap. It is entirely possible that once regulations are completed defining *Sackett*, and the USACE is fully engaged, the Payne Gap site has less impact on jurisdictional waters than Roxanna. Moreover, given the USACE's requirement for an actual alternatives analysis, a reconsideration of Payne Gap is required as part of the USACE's review of the full "range of alternatives."

iii. Kentucky Energy and Environment Cabinet

The FBOP also ignores recommendations from the relevant state agencies. For example, during consultation with subdivisions of the Kentucky Energy and Environment Cabinet (EEC) dealing with water permitting, multiple issues are noted, which the FBOP does not address in the FEIS. For instance, the EEC's Watershed Management Branch recommended that only the Knott County Water & Sewer District would be "capable of accommodating the additional demands [of the prison] due to source and system issues with other suppliers."⁴⁸¹ This branch's comment further notes that FBOP will "need to develop a Groundwater Protection Plan... for the protection of groundwater resources within [the] area."⁴⁸² The Division of Water repeated the need for a

⁴⁸⁰ Appendix D to FEIS, FEIS Merged Appendices, p. 492.

⁴⁸¹ Comment of Kentucky Energy and Environmental Cabinet, Watershed Management Branch, Appendix B to FEIS, FEIS Merged Appendices, p. 183.

⁴⁸² *Id.*, p. 184.

Groundwater Protection Plan in its formal comment to the DEIS.⁴⁸³ While the FBOP acknowledged this need, it did not address the prior concerns about the inability of the Letcher County Water and Sewer District to handle the prison’s additional needs.⁴⁸⁴ The Floodplain Management Section of the Water Resources Branch, responding to the FBOP’s plan to widen the roads and bridges for access to the prison, states that FBOP will have to “describe how the bridge abutments will be installed, the thickness of the bridge deck and the height of the lowest point of the bridge...”⁴⁸⁵ The EEC’s Water Infrastructure Branch noted that Letcher County Water and Sewer District “lacked technical capacity,” based on the most recent Sanitary Survey from 2022.⁴⁸⁶ The same branch also noted that approvals obtained from the Branch in 2021 “did not include the 300,000 gallon water storage tank...” and that plans for it will “need to be submitted for review and approval...”⁴⁸⁷ Indeed, in the FEIS, the FBOP’s plans are now to construct water storage for “approximately 500,000 gallons.”⁴⁸⁸ The Water Infrastructure Branch or its engineering and municipal subdivisions that raised prior concerns do not appear to have contributed to the EEC’s formal comment to the DEIS.⁴⁸⁹ Has the relevant branch of the Kentucky EEC been consulted on this?

iv. WSP

The FBOP even ignores the recommendations of its own expert and consultant, concerning the likelihood of archaeological impacts. The WSP’s Cultural and Historic Survey, as well as its

⁴⁸³ Appended to the FEIS, p. 212.

⁴⁸⁴ FEIS, p. 215.

⁴⁸⁵ Comment of Kentucky Energy and Environmental Cabinet, Water Resources Branch: Floodplain Management Section, Appendix B to FEIS, FEIS Merged Appendices, p. 187.

⁴⁸⁶ Comment of Kentucky Energy and Environmental Cabinet, Water Infrastructure Branch, Appendix B to FEIS, FEIS Merged Appendices, p. 189.

⁴⁸⁷ *Id.*

⁴⁸⁸ FEIS, p. 115.

⁴⁸⁹ FEIS, p. 212-14.

Archaeological Survey, repeatedly note that the project will increase traffic in the area, and may cause impacts related to capacity, noise, and vibration. The need to widen roads “will have an Adverse Effect” on nearby sites that are eligible for NRHP listing.⁴⁹⁰ While it is not clear if the Ira Frazier Cemetery qualifies for NRHP listing, this cemetery contains the eponymous grave of Letcher County resident who was a veteran of both the Spanish-American War and World War I. This historical cemetery would be adversely impacted by the widened road. The report repeatedly recommends that “further studies related to these concerns should be conducted to address these potential effects.”⁴⁹¹ In passing, it should also be noted that the Archaeological Report fails to account for the potentially significant rockshelter that was discovered on the site during biological surveys.⁴⁹² The FBOP attempts to sidestep the issue of impacts on these NRHP sites by being

⁴⁹⁰ *Cultural Historic Survey for the Proposed Construction and Operation of a Federal Correctional Facility along KY-588/KY-160 within Roxana, Letcher County, Kentucky*, WSP Cultural Report of Investigations, Appendix C to FEIS, FEIS Merged Appendices, p. 212. Curiously, while adopting the above archeological report “in full,” Executive Director and State Historic Preservation Officer Craig A. Potts ignored this finding of an adverse effect and required mitigation, instead “concur[ring] with the finding of No Adverse Effect” because “plans [that involve the widening of KY-160, which is adjacent to LR-331, and would likely introduce direct effect] are not firmly established.” Letter from Craig A. Potts to Kimberly Hudson (Feb. 21, 2024), Appendix B to FEIS, FEIS Merged Appendices, p. 119. Craig A. Potts did submit a comment to the DEIS noting that if the BOP determined roadwork would be necessary at LR-331, he “look[ed] forward to further consultation on the mitigation of adverse effects,” FEIS p. 216, his erroneous conclusion of “No Adverse Effect” is still included in the Appendix to the FEIS. This speculation as to the likelihood or necessity of directly impacting LR-331, which the WSP had found *would* have an “adverse effect,” precludes such a finding of No Adverse Effect and calls for further study and a revised EIS. It should also be noted that the federal ACHP objected to the BOP’s submission of its DEIS directly to the Executive Director; the ACHP did “not have any substantive comments on the DEIS at this time,” in part due to the insufficiency of the method of notice. Comment of Chris Daniel, ACHP, FEIS, p. 204. The ACHP must be given an opportunity to review and submit substantive comments prior to any federal action.

⁴⁹¹ *Cultural Historic Survey for the Proposed Construction and Operation of a Federal Correctional Facility along KY-588/KY-160 within Roxana, Letcher County, Kentucky*, WSP Cultural Report of Investigations, Appendix C to FEIS, FEIS, FEIS Merged Appendices, p. 212, 224, 342, 362, 370.

⁴⁹² The archeological report states that “terrain visibility was excellent for identifying the location of possible cemeteries and rockshelters” yet concludes that “no rockshelters or additional cemeteries were identified during the pedestrian survey.” *Cultural Historic Survey for the Proposed Construction and Operation of a Federal Correctional Facility along KY-588/KY-160 within Roxana, Letcher County, Kentucky*, WSP Cultural Report of Investigations, Appendix C to FEIS, FEIS Merged Appendices, p. 439. This directly contradicts the USFWS Endangered Species Act Consultation, which discovered at least one rock shelter onsite at Roxana, Appendix D to FEIS, FEIS Merged Appendices, p. 1300, situated

ambivalent about the need to widen bridges and access roads to the site, but the FBOP's own traffic analysis all but compels this action,⁴⁹³ making it a reasonably foreseeable impact for further investigation, as advised in the FBOP's appended reports.

IV. CONCLUSION: Selection of the Roxana Site is Predetermined and Arbitrary

The deficiencies of the FEIS demonstrate that the outcome of FBOP's decision making process was predetermined by the agency in favor of a new prison at the Roxana Site. The Purpose and Need Statement is arbitrarily and capriciously limited due to the agency's misinformed reliance on a non-binding Congressional directive. The Purpose and Need Statement is also directly contradicted by DOJ and FBOP statements and actions elsewhere. The FEIS relies on outdated information, created for a substantially different proposal. It lacks a sufficient and NEPA compliant alternatives analysis. In multiple instances the FEIS cites data that directly undercuts the asserted analysis of impacts and mitigation. It ignores the advice of consulting agencies, and fails to consult with Native Tribes and governmental agencies having relevant expertise and jurisdiction. It omitted and failed to respond to a number of substantive comments to the DEIS. More fundamentally, the record shows that the Roxana Site is not a good fit for the FBOP's stated needs, and the FBOP is itself aware of this fact. For all of these reasons, the FEIS is insufficient under NEPA. It cannot legally serve as a valid basis to issue a Record of Decision to authorize this project to proceed. The FEIS is a perfunctory review aimed at checking off a procedural box to clear a path towards wasting half a billion dollars to appease Congressman Hal Rogers.

on map at 1306, pictured at 1324. The US FWS additionally concluded that it was "reasonable to assume that other caves, rock shelters, and/or abandoned underground mines may occur within the project area" and serve as habitats for endangered Indiana bats, Letter from Virgil Lee Andrews to Deborah Henson (Aug. 7, 2014), Appendix D to FEIS, FEIS Merged Appendices, p. 1226, and gray bats, *Id.* at 1228.

⁴⁹³ The DEIS itself explicitly contemplates "proposed improvements to either KY 160 or KY 588," DEIS at 81, the absence of which is required for a finding that the project has "no adverse effect" on archeological or historical sites. Letter from Craig A. Potts to Kimberly Hudson (Feb. 21, 2024), Appendix B to FEIS, FEIS Merged Appendices, p. 119.

Sincerely,

/s/ Emily H. Posner

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/s/ Joan Steffen

Attorney
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joan@endmassincarceration.org

/s/ Dr. Artie Ann Bates

Secretary

Concerned Letcher Countians

PO Box 166

Blackey, Kentucky 41804

info@concernedletchercountians.org

Fwd: [EXTERNAL] Meetingartie bates <artieannbates@gmail.com>

Wed 8/7/2024 6:34 PM

To: Emily Posner <emily@voiceoftheexperienced.org>

Here's the next day declining CLC's request for a meeting.

----- Forwarded message -----

From: **BOP-IPP-PublicAffairs (BOP)** <BOP-IPP-PublicAffairs@bop.gov>

Date: Wed, Dec 6, 2023 at 10:42 AM

Subject: Re: [EXTERNAL] Meeting

To: artie bates <artieannbates@gmail.com>

Good Morning,

While we decline your offer for a Zoom meeting, we will continue to remain committed to providing periodic updates on the project website for all interested stakeholders.

Thank you,
Benjamin

Office of Public Affairs

Office of Congressional and Public Affairs

Federal Bureau of Prisons

(202) 514-6551 - phone

(202) 514-6620 - fax

From: artie bates <artieannbates@gmail.com>**Sent:** Tuesday, December 5, 2023 10:42 AM**To:** BOP-IPP-PublicAffairs (BOP) <BOP-IPP-PublicAffairs@bop.gov>**Subject:** Re: [EXTERNAL] Meeting

Dear Mr. O'Cone,

The Concerned Letcher Countians requests a meeting with the Bureau of Prisons and its contractor for an update on the FCI Letcher project, please.

We can join via zoom, and either you or I can host the meeting, as you see fit and per BOP guidelines. If you could send some possible dates and times, I will consult with the group so we can arrive at the most opportune one.

Thank you.

Sincerely,
Artie Ann Bates, MD

EXHIBIT A

Secretary, Concerned Letcher Countians, LLC

On Tue, Dec 5, 2023 at 9:28 AM BOP-IPP-PublicAffairs (BOP) <BOP-IPP-PublicAffairs@bop.gov> wrote:

Good Morning,

Yes, a meeting was held with the Letcher County Planning Commission (LCPC) on July 19, 2023, to provide the LCPC with an update on the proposed FCI/FPC Letcher County, KY, project. Shortly thereafter, a meeting summary was posted on the project website at the following link <https://www.proposed-fci-letchercountyky.com/communications>.

The Federal Bureau of Prisons remains committed to providing periodic updates on the project website for all interested stakeholders.

Thank you,
Benjamin O'Cone

Office of Public Affairs

Office of Congressional and Public Affairs
Federal Bureau of Prisons
(202) 514-6551 - phone
(202) 514-6620 - fax

From: artie bates <artieannbates@gmail.com>
Sent: Friday, December 1, 2023 4:42 PM
To: BOP-IPP-PublicAffairs (BOP) <BOP-IPP-PublicAffairs@bop.gov>
Subject: [EXTERNAL] Meeting

Dear Mr. O'Cone,

It was recently brought to my attention that on July 19, 2023, the Bureau of Prisons and their contractor, WSP had a "virtual meeting with the Letcher County Planning Commission" and the purpose was to "provide the LCPC an update on the proposed FCI/FPC Letcher County, KY, project."

I am confused about this meeting because it was my understanding, based on BOP directions, that no public input was to take place until the DEIS comes out in February, after which there would be a 45 day input period, as well as a public meeting in Whitesburg.

Further, since requests for information about this proposed prison are referred to BOP's website, how was it that the LPC obtained a private meeting?

And is such a meeting an option for the Concerned Letcher Countians and other groups with questions about this project?

This BOP/WSP meeting with LPC might raise a question of conflict of interest, particularly if members of the LPC stand to benefit in any way from the proposed prison. And access to BOP by one group of citizens should translate to access for ALL citizens, as the LPC is NOT a government entity.

I look forward to your response as this is a very concerning discovery.

Sincerely,

Artie Ann Bates, MD
1350 Blackey, KY 41804

DEIS comment

artie bates <artieannbates@gmail.com>

Mon 4/15/2024 1:37 PM

To:kshudson@bop.gov <kshudson@bop.gov>

Cc:Dustin McDaniel <ops@alcenter.org>;Emily Posner <emily@voiceoftheexperienced.org>;Joan Steffen <joan@endmassincarceration.org>

 1 attachments (35 KB)

DEIS 2024 Mental Health comment revised 4 12 24.docx;

Dear Kimberly,

This is a comment that is submitted regarding the DEIS 2024 about FCI/FPC Letcher. Please include it in the record under the opposition.

Thank you,
Artie Ann Bates, MD

EXHIBIT B

DEIS 2024 Mental Health comment

The Federal Bureau of Prisons (BOP) plans to build a federal correctional institute and federal prison camp in Letcher County, Kentucky. Having released the Draft Environmental Impact Statement (DEIS) for [FCI/FPC Letcher 2024](#) on March 1, 2024, this document has 199 pages of text and over 1,500 pages of appendices. It discusses topography, the rise and fall of coal, archeology, environmental engineering charts, tables, and graphs, and the county's continued population loss exacerbated by the devastating 2022 flood. As a plan for a massive federal project that will exceed in cost all other United States federal prisons, the DEIS gives short shrift to the mental health of the people who would live inside its walls, and those outside.

As a psychiatrist from Letcher County, having practiced here in the field of mental health for over twenty years in both community and inpatient psychiatric settings, I can attest to the area's shortage of providers. When I began working locally as a new psychiatrist, in 2001, our public mental health agency had four psychiatrists and a psychiatric nurse practitioner for an eight-county area development district that included Letcher; now, over twenty years later, I am the lone psychiatrist with this agency and several psychiatric nurse practitioners provide care. Why bring a prison with distressed individuals to an area with such mental health service shortages? No figures of environmental consequences are complete without an in-depth exploration of its effect on the human cost of untreated mental illness in both the incarcerated population as well as the local community.

Given that the FBOP across the agency has yet to successfully grapple with the substance misuse disorder in its facilities, especially opioids, to then locate a federal prison in a geographic area of Kentucky and the United States with the most severe rates of drug overdose deaths per 100,000 residents, is curious. Considering that bringing a population of individuals with a high incidence and prevalence of mental illness to a geographic area with documented mental health care manpower shortages, and by an agency, the BOP, with deficits in their own clinical staff is worrisome. Would it not make more sense, if such a prison facility is necessary, to locate it in areas with adequate mental health services and substance misuse treatments? Would it not make sense to keep these vulnerable individuals close to family and community?

This DEIS has only a cursory glance at the First Step Act on page 24, mentioning that it "may include...Cognitive behavioral treatment... and Substance abuse treatment" and only three short paragraphs titled "Medical Services," on page 109. Nor does it address the mental health distress in Letcher County, an area of the country with dire unmet treatment needs. A 2018 report by the [American Psychiatric Association \(APA\)](#) describes that "Appalachians have disproportionately higher rates of mental health problems, compared to the U.S. population." Yet, "the number of mental healthcare professionals per 100,000 residents was 35% lower than the national average. In the southern and north central sub-regions of Appalachia, it further decreases to 50% fewer mental healthcare professionals than the national average."

Studies suggest that increased rates of mental health problems in areas like Letcher County in rural Central Appalachia are in fact partly due to the “lower supply of mental health providers than the national average,” per the [Appalachian Regional Commission \(ARC\)](#). As the ARC report states, “most mental health professionals practice in metropolitan counties,” yet, BOP has already placed three federal prisons in distressed southeastern Kentucky counties. FCI Letcher would be yet another prison in a “[distressed](#)” county, and the ARC reports that the “supply of mental health providers in the Appalachian Region’s distressed counties is six percent lower than the supply in non-distressed counties.” In fact, ARC states, “There are 130 mental health providers per 100,000 population in the Appalachian Region, which is 35 percent lower than the national average of 201 per 100,000 population.” And “All five Appalachian subregions have a lower supply of mental health providers than the national average.”

BOP Director Collette Peters’ testified in an [address to the Senate Judiciary Committee](#), that “As corrections professionals, we have known for decades that we are a health care organization.” She says in September 2023, “For instance, of those under our care 27.6% experience mental health conditions compared to 22.8% of the U.S. general population. . . individuals in our care meeting the clinical criteria for one or more substance use disorders is significantly higher in the FBOP population, at 31.8%, when compared to 16.5% in the general U.S. population.” With those statistics, as a physician, I expected the DEIS would at least mention how it will provide treatment for mental health and substance misuse disorders, perhaps a mitigation plan for how these lead to higher rates of suicide, and how that acuity may actually rise due to placing this prison in an underserved area.

The DEIS says any need for outside “medical services” to be “rare,” but it is unclear whether this includes mental health and substance misuse care, thus is the reader to roll them into one category of care? Is a heart attack equivalent to a suicide attempt? To a drug overdose? If this prison will need community mental health services, they need to acknowledge in print that the area has a mental health manpower shortage. [Dr Michael Hendryx](#), the noted rural health epidemiologist published in The Journal of Rural Health that, “Seventy percent of Appalachian nonmetropolitan counties were mental health professional shortage areas, significantly higher than non-Appalachian, nonmetropolitan counties in the same states.” Does BOP know this? Why not acknowledge this in over 1,700 pages of the DEIS charts, graphs, and data?

Further, the estimates of the incidence of mental health issues inside federal prisons exceeds Director Peters’ figure of “27.6%.” The [APA](#) attests that “According to the Prison Policy Initiative, over 40% of people in jails and prisons have been diagnosed with a mental health disorder... (and) incarceration is associated with subsequent depression and bipolar disorder. Additionally, placing individuals in solitary confinement, particularly if they have severe mental illness, can be very detrimental psychologically.” And racially, “Black people make up only 13% of the U.S. population but 38% of people in prisons and... are more likely to be arrested than white Americans with mental health disorders.”

The [American Psychological Association](#) quotes a US Department of Justice (DOJ) 2017 report that also exceeds Director Peters' quote, saying that approximately "37 percent of people in prison have a history of mental health problems. . . More than 24 percent have been previously diagnosed with major depressive disorder, 17 percent with bipolar disorder, 13 percent with a personality disorder and 12 percent with post-traumatic stress disorder." And that the "percentage of (incarcerated people) with mental illness . . . increased, with rates more than quadrupling from 1998 to 2006." The increase is due, in part, to the "Deinstitutionalization of mentally ill individuals, which began in the 1960s . . . as mental hospitals across the country closed their doors."

A [DOJ OIG report in February 2024](#) states that from FY 2014-2021, "inmate suicides . . . accounted for just over half of the 344 inmate deaths we reviewed." That's over 172 suicides in federal prisons in a seven-year period. The OIG found "potentially inappropriate Mental Health Care Level assignments for some inmates who later died by suicide." Further, this OIG report states that "one or more other longstanding operational challenges—staffing shortages; an outdated security camera system; staff failure to follow BOP policies and procedures; and an ineffective, untimely staff disciplinary process—were contributing factors in many of the inmate deaths. . . These challenges continue to present a significant and critical threat to the BOP's safe and humane management of the inmates in its care and custody."

Director Peters' testified in another hearing that, "Systemwide, [clinical healthcare professionals are staffed at approximately 80%](#). At individual institutions, healthcare staffing rates range from fully staffed to less than 50%," thus, one can deduce that the FBOP has difficulty maintaining a healthcare manpower team for medical and mental health care. Director Peters has no magic wand, therefore seeking services from outside providers will likely be necessary, yet these at-risk individuals will be placed where, per the [APA](#), "The region's suicide rate is 17% higher than the national rate, and residents in Appalachia's rural counties are 21% more likely to commit suicide than those living in the region's large metro counties."

In fact, "This is a region that was literally raped by coal and lumber companies while the rest of the country stood by and did nothing," said [James Griffith, M.D.](#), chair of the Department of Psychiatry at George Washington University. This history of exploitation was not limited to coal and timber. Central Appalachia was targeted by opioid manufacturers such as Purdue Pharma. The [APA's Health Disparities](#) report references that there was "deliberate targeting of Appalachia by the pharmaceutical manufacturers of opioids with increased advertising and provision of samples," particularly oxycontin. This opioid was eventually limited, after many deaths by overdose, or as the ARC calls it, "[Poisoning Mortality](#)," but then fentanyl emerged, as described by the KY Office of Drug Control Policy (ODCP).

Published in its [2021 Overdose Fatality Report](#), the ODCP reports that of the 2,250 drug overdose deaths in Kentucky, that an "opioid was involved in 90%" of the cases, fentanyl was "identified" in "72.8%" and methamphetamine was "identified" in "47.8% of the total drug

overdose deaths.” By county, while Letcher was not one of the five “with the Highest Rates of Drug Overdose Deaths in 2021,” two of the five are adjoining counties: Knott and Perry. In fact, four of the five counties with the highest rates of death by drug overdose are in KY’s 5th congressional district, the location of FCI/FPC Letcher.

Addressing how the community affects prisons, Director Peters states in her [Senate Judiciary testimony](#) in September 2023 that “Opioid Use Disorder (OUD), in particular, affects approximately 2.7 million Americans and thus presents a significant challenge within our facilities. From a security perspective, dangerous substances like illicitly made fentanyl can pose a health risk to FBOP employees and those in our custody... (thus)we have incorporated evidence-based treatments like Medications for Opioid Use Disorder (MOUD) and substance use disorder treatment programming.” But the [OIG report](#) states “Our site visits to three different institutions also yielded evidence of understaffing, particularly in the critical areas of Health Services and Psychology Services... Separately, another Staff Psychologist who administered the Medication Assisted Treatment (MAT) Program there told us that he could not administer MAT to every inmate who qualified for the program because there were not enough clinicians or medical staff to prescribe and administer the medication.”

A [Marchall Project report](#) in December, 2022 found that “Forty-seven (47) incarcerated people died of overdoses in federal prison from 2019 through 2021...The data does not specify how many of these overdose deaths were caused by opioids and could have been prevented by medications like Suboxone. However, ...During the same period, correctional staff administered Narcan — a drug that reverses opioid overdoses — almost 600 times in federal prisons.” This same report says, regarding First Step Act implementation, that the BOP is “treating only a fraction-less than 10%-of the roughly 15,000 prisoners who need it.”

Has the BOP examined the data in Kentucky and Letcher County? The DEIS does not demonstrate it. The ARC in their [Creating a Culture of Health in Appalachia](#) studies, with data from the National Center for Health Statistics, reports that “The poisoning mortality rate in the Appalachian Region is 37 percent higher than the national rate. All five Appalachian subregions have higher poisoning mortality rates than the national rate. The poisoning mortality rate in Central Appalachia is 146 percent higher than the nation as a whole.” ARC affirms the “struggle of many Appalachian communities in addressing drug dependence and other related issues—especially in southern West Virginia and eastern Kentucky—has been well-documented by the national media.” The local media, [The Mountain Eagle](#), (ME) documents that while the [2021 Overdose Fatality Report](#) reported that Letcher County had “16” overdose deaths in that entire year, this 2023 ME article lists “19” deaths in the first seven months alone, which the county coroner attributed to drugs.

In conclusion, as a physician in Letcher County, my concerns include both those incarcerated and local populations. Has BOP considered that locating a prison in Letcher County may worsen the county’s drug traffic as contraband and illicit drugs are traded both inside and

outside? And that this increased traffic will increase the overdose deaths both inside and out. Further, if the BOP cannot provide adequate mental health staffing, and must consume local community services, the transport itself will allow contact with local dealers.

This DEIS is insufficient in addressing that to build FCI/FPC Letcher will worsen the load on an understaffed local mental health system and constitutes, in my view, a willful indifference to the incarcerated people and the Letcher County community.

Artie Ann Bates, MD
Blackey, KY 41804

FCI Letcher DEIS

Jonathan Hootman <jhootman@borealisbiological.com>

Mon 4/15/2024 11:31 PM

To:kshudson@bop.gov <kshudson@bop.gov>

 2 attachments (2 MB)

Hootman_borealis Resume Final.pdf; FCI Letcher Hootman.pdf;

Ms. Hudson,

Please see my attached comments pertaining to the DEIS for the proposed correctional facility in Letcher County Kentucky. My CV is attached as well.

Sincerely,

Jonathan

Biologist | COO

[borealis Biological](#)

167 Briarwood Ln.

Mars Hill, NC 28754

Ph: 304-533-0999

Exhibit C

Sent via email kshudson@bop.gov

April 15, 2024

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

**RE: Public Comment
Draft Environmental Impact Statement
Proposed Federal Correctional Institute and Federal Prison Camp
Letcher County, Kentucky**

Dear Ms. Hudson:

My name is Jonathan Hootman. I am an endangered bat biologist with 24 years of experience working with these unique mammals.

I have reviewed the Bureau of Prisons Draft Environmental Impact Statement (DEIS) and would like to offer the following comment:

On September 13, 2022 the U.S. Fish and Wildlife Service announced a proposal to list the tricolored bat (*Perimyotis subflavus*) as endangered under the Endangered Species Act. The bat faces extinction due to the impacts of [white-nose syndrome](#), a deadly disease affecting cave-dwelling bats across the continent. (United States Fish and Wildlife Service, 2022)

The brutality of white-nose syndrome is evident by how quickly the tricolored bat went from having a stable population to being proposed to be listed as endangered. When white nose syndrome was first detected in 2006. The Tricolored bat was one of the most common bats in North America. Since then, it has become one of the most imperiled bat species in the United States, joining other critically endangered bats such as the Indiana bat, northern long-eared bat (NLEB), and grey bat.

What do all of these proposed and listed bat species have in common? They could all be potentially negatively impacted by the construction and continued existence of the FCI Letcher prison project. All four species could potentially use the area and surrounding areas impacted by FCI Letcher as foraging habitat and 3 of the 4 species could potentially use the area as roosting habitat. **No endangered bat surveys have been completed for the proposed prison in the last 5 years, therefore investigating the proposed prison site for the presence of threatened or endangered bats is incomplete.** And the last time surveys were conducted, they didn't survey for the newly proposed tricolored bat. I have included the United States Fish and Wildlife

Service's IPAC (Information for Planning and Consultation) that includes all the species that need to be considered before commencing construction at FCI Letcher.

The United Fish and Wildlife Service (FWS) has also recommended to the BOP that it conduct new surveys in the area in order to comply with the Endangered Species Act. However, the DEIS is absent as to why the BOP is simply ignoring FWS's recommendation.

It is also my understanding that the BOP plans to use the old biological assessment (BA) and biological opinion (BO) from the first time they tried to build a facility at this location. Not only is this approach inadequate to accurately assess the biological impact of the project in 2024, the BA and BO were insufficient in several areas concerning the conservation of endangered bat species at the time or their (now outdated) publication. A few examples of how the two documents fail to properly protect at risk bat species are outlined below:

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. In Brack (1983) has observed Indiana bats foraging over old fields and pastures and observed that most foraging occurred along habitat edges. Most Myotis bats are opportunistic foragers (Fenton, Belwood, Fullard, & Kunz, 1976); Fenton and Morris 1976; Whitaker 1995), as they have been observed foraging in open fields, and forage along habitat edges. The non-forested area of the project area must be considered habitat, and properly assessed 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 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 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, 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 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. 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. 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 (Sanders and Chengler 2001; Butchkoski 2004; 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.

All of these issues add up to mean that the current mitigation effort meant to offset the impact of the proposed prison is terribly insufficient. The only action that truly protects these three imperiled bat species is the “No Action Alternative.”

Sincerely,

X Jonathan R. Hootman

Jonathan Hootman
Senior Biologist
Signed by: 24bce4d8-e5db-46c5-b3ad-132a50b30dab

Works Cited

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Sanders, C., Chengler, J., & Denlinger, B. (2001). Williams Lake telemetry study: New York Indiana bat spring migration tracking study. Report for Bat Conservation and Management. 21 pp.

[media/supplemental-information-migratory-birds-and-bald-and-golden-eagles-may-occur-project-action](#)

What does IPaC use to generate the potential presence of bald and golden eagles in my specified location?

The potential for eagle presence is derived from data provided by the [Avian Knowledge Network \(AKN\)](#). The AKN data is based on a growing collection of [survey, banding, and citizen science datasets](#) and is queried and filtered to return a list of those birds reported as occurring in the 10km grid cell(s) which your project intersects, and that have been identified as warranting special attention because they are a BCC species in that area, an eagle ([Eagle Act](#) requirements may apply). To see a list of all birds potentially present in your project area, please visit the [Rapid Avian Information Locator \(RAIL\) Tool](#).

What does IPaC use to generate the probability of presence graphs of bald and golden eagles in my specified location?

The Migratory Bird Resource List is comprised of USFWS [Birds of Conservation Concern \(BCC\)](#) and other species that may warrant special attention in your project location.

The migratory bird list generated for your project is derived from data provided by the [Avian Knowledge Network \(AKN\)](#). The AKN data is based on a growing collection of [survey, banding, and citizen science datasets](#) and is queried and filtered to return a list of those birds reported as occurring in the 10km grid cell(s) which your project intersects, and that have been identified as warranting special attention because they are a BCC species in that area, an eagle ([Eagle Act](#) requirements may apply), or a species that has a particular vulnerability to offshore activities or development.

Again, the Migratory Bird Resource List includes only a subset of birds that may occur in your project area. It is not representative of all birds that may occur in your project area. To get a list of all birds potentially present in your project area, please visit the [Rapid Avian Information Locator \(RAIL\) Tool](#).

What if I have eagles on my list?

If your project has the potential to disturb or kill eagles, you may need to obtain a permit to avoid violating the [Eagle Act](#) should such impacts occur. Please contact your local Fish and Wildlife Service Field Office if you have questions.

Migratory birds

Certain birds are protected under the Migratory Bird Treaty Act¹ and the Bald and Golden Eagle Protection Act².

Any person or organization who plans or conducts activities that may result in impacts to migratory birds, eagles, and their habitats³ should follow appropriate regulations and consider implementing appropriate conservation measures, as described in the links below. Specifically, please review the "[Supplemental Information on Migratory Birds and Eagles](#)".

1. The [Migratory Birds Treaty Act](#) of 1918.
2. The [Bald and Golden Eagle Protection Act](#) of 1940.

Additional information can be found using the following links:

- Eagle Management <https://www.fws.gov/program/eagle-management>
- Measures for avoiding and minimizing impacts to birds <https://www.fws.gov/library/collections/avoiding-and-minimizing-incident-take-migratory-birds>
- Nationwide conservation measures for birds <https://www.fws.gov/sites/default/files/documents/nationwide-standard-conservation-measures.pdf>
- Supplemental Information for Migratory Birds and Eagles in IPaC <https://www.fws.gov/media/supplemental-information-migratory-birds-and-bald-and-golden-eagles-may-occur-project-action>

The birds listed below are birds of particular concern either because they occur on the [USFWS Birds of Conservation Concern \(BCC\)](#) list or warrant special attention in your project location. To learn more about the levels of concern for birds on your list and how this list is generated, see the FAQ [below](#). This is not a list of every bird you may find in this location, nor a guarantee that every bird on this list will be found in your project area. To see exact locations of where birders and the general public have sighted birds in and around your project area, visit the [E-bird data mapping tool](#) (Tip: enter your location, desired date range and a species on your list). For projects that occur off the Atlantic Coast, additional maps and models detailing the relative occurrence and abundance of bird species on your list are available. Links to additional information about Atlantic Coast birds, and other important information about your migratory bird list, including how to properly interpret and use your migratory bird report, can be found [below](#).

For guidance on when to schedule activities or implement avoidance and minimization measures to reduce impacts to migratory birds on your list, see the PROBABILITY OF PRESENCE SUMMARY below to see when these birds are most likely to be present and breeding in your project area.

NAME	BREEDING SEASON
Chimney Swift <i>Chaetura pelagica</i> This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.	Breeds Mar 15 to Aug 25
Wood Thrush <i>Hylocichla mustelina</i> This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.	Breeds May 10 to Aug 31

Probability of Presence Summary

The graphs below provide our best understanding of when birds of concern are most likely to be present in your project area. This information can be used to tailor and schedule your project activities to avoid or minimize impacts to birds. Please make sure you read "[Supplemental Information on Migratory Birds and Eagles](#)", specifically the FAQ section titled "Proper Interpretation and Use of Your Migratory Bird Report" before using or attempting to interpret this report.

Probability of Presence (■)

Each green bar represents the bird's relative probability of presence in the 10km grid cell(s) your project overlaps during a particular week of the year. (A year is represented as 12 4-week months.) A taller bar indicates a higher probability of species presence. The survey effort (see below) can be used to establish a level of confidence in the presence score. One can have higher confidence in the presence score if the corresponding survey effort is also high.

How is the probability of presence score calculated? The calculation is done in three steps:

1. The probability of presence for each week is calculated as the number of survey events in the week where the species was detected divided by the total number of survey events for that week. For example, if in week 12 there were 20 survey events and the Spotted Towhee was found in 5 of them, the probability of presence of the Spotted Towhee in week 12 is 0.25.
2. To properly present the pattern of presence across the year, the relative probability of presence is calculated. This is the probability of presence divided by the maximum probability of presence across all weeks. For example, imagine the probability of presence in week 20 for the Spotted Towhee is 0.05, and that the probability of presence at week 12 (0.25) is the maximum of any week of the year. The relative probability of presence on week 12 is $0.25/0.25 = 1$; at week 20 it is $0.05/0.25 = 0.2$.
3. The relative probability of presence calculated in the previous step undergoes a statistical conversion so that all possible values fall between 0 and 10, inclusive. This is the probability of presence score.

To see a bar's probability of presence score, simply hover your mouse cursor over the bar.

Breeding Season (■)

Yellow bars denote a very liberal estimate of the time-frame inside which the bird breeds across its entire range. If there are no yellow bars shown for a bird, it does not breed in your project area.

Survey Effort (|)

Vertical black lines superimposed on probability of presence bars indicate the number of surveys performed for that species in the 10km grid cell(s) your project area overlaps. The number of surveys is expressed as a range, for example, 33 to 64 surveys.

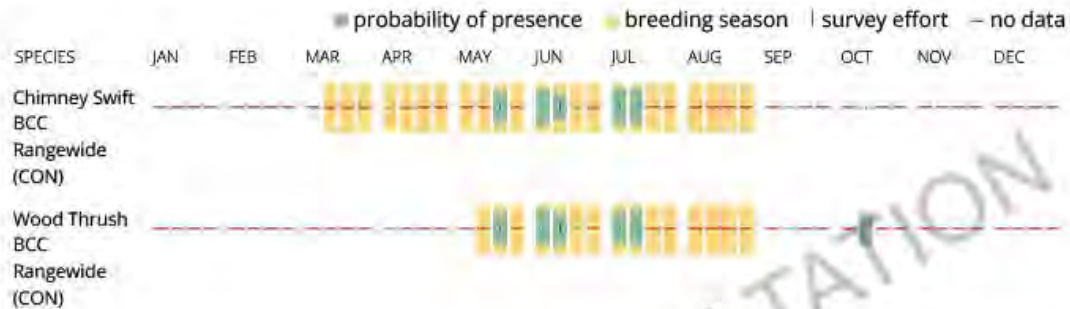
To see a bar's survey effort range, simply hover your mouse cursor over the bar.

No Data (-)

A week is marked as having no data if there were no survey events for that week.

Survey Timeframe

Surveys from only the last 10 years are used in order to ensure delivery of currently relevant information. The exception to this is areas off the Atlantic coast, where bird returns are based on all years of available data, since data in these areas is currently much more sparse.



Tell me more about conservation measures I can implement to avoid or minimize impacts to migratory birds.

[Nationwide Conservation Measures](#) describes measures that can help avoid and minimize impacts to all birds at any location year round. Implementation of these measures is particularly important when birds are most likely to occur in the project area. When birds may be breeding in the area, identifying the locations of any active nests and avoiding their destruction is a very helpful impact minimization measure. To see when birds are most likely to occur and be breeding in your project area, view the Probability of Presence Summary. [Additional measures](#) or [permits](#) may be advisable depending on the type of activity you are conducting and the type of infrastructure or bird species present on your project site.

What does IPaC use to generate the list of migratory birds that potentially occur in my specified location?

The Migratory Bird Resource List is comprised of USFWS [Birds of Conservation Concern \(BCC\)](#) and other species that may warrant special attention in your project location.

The migratory bird list generated for your project is derived from data provided by the [Avian Knowledge Network \(AKN\)](#). The AKN data is based on a growing collection of [survey, banding, and citizen science datasets](#) and is queried and filtered to return a list of those birds reported as occurring in the 10km grid cell(s) which your project intersects, and that have been identified as warranting special attention because they are a BCC species in that area, an eagle ([Eagle Act](#) requirements may apply), or a species that has a particular vulnerability to offshore activities or development.

Again, the Migratory Bird Resource list includes only a subset of birds that may occur in your project area. It is not representative of all birds that may occur in your project area. To get a list of all birds potentially present in your project area, please visit the [Rapid Avian Information Locator \(RAIL\) Tool](#).

IPaC**U.S. Fish & Wildlife Service**

IPaC resource list

This report is an automatically generated list of species and other resources such as critical habitat (collectively referred to as *trust resources*) under the U.S. Fish and Wildlife Service's (USFWS) jurisdiction that are known or expected to be on or near the project area referenced below. The list may also include trust resources that occur outside of the project area, but that could potentially be directly or indirectly affected by activities in the project area. However, determining the likelihood and extent of effects a project may have on trust resources typically requires gathering additional site-specific (e.g., vegetation/species surveys) and project-specific (e.g., magnitude and timing of proposed activities) information.

Below is a summary of the project information you provided and contact information for the USFWS office(s) with jurisdiction in the defined project area. Please read the introduction to each section that follows (Endangered Species, Migratory Birds, USFWS Facilities, and NWI Wetlands) for additional information applicable to the trust resources addressed in that section.

Location

Letcher County, Kentucky



Local office

Kentucky Ecological Services Field Office

- ☎ (502) 695-0467
- 📠 (502) 695-1024
- ✉ kentuckyes@fws.gov

J C Watts Federal Building, Room 265
330 West Broadway
Frankfort, KY 40601-8670

NOT FOR CONSULTATION

Endangered species

This resource list is for informational purposes only and does not constitute an analysis of project level impacts.

The primary information used to generate this list is the known or expected range of each species. Additional areas of influence (AOI) for species are also considered. An AOI includes areas outside of the species range if the species could be indirectly affected by activities in that area (e.g., placing a dam upstream of a fish population even if that fish does not occur at the dam site, may indirectly impact the species by reducing or eliminating water flow downstream). Because species can move, and site conditions can change, the species on this list are not guaranteed to be found on or near the project area. To fully determine any potential effects to species, additional site-specific and project-specific information is often required.

Section 7 of the Endangered Species Act **requires** Federal agencies to "request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action" for any project that is conducted, permitted, funded, or licensed by any Federal agency. A letter from the local office and a species list which fulfills this requirement can **only** be obtained by requesting an official species list from either the Regulatory Review section in IPaC (see directions below) or from the local field office directly.

For project evaluations that require USFWS concurrence/review, please return to the IPaC website and request an official species list by doing the following:

1. Draw the project location and click CONTINUE.
2. Click DEFINE PROJECT.
3. Log In (if directed to do so).
4. Provide a name and description for your project.
5. Click REQUEST SPECIES LIST.

Listed species¹ and their critical habitats are managed by the [Ecological Services Program](#) of the U.S. Fish and Wildlife Service (USFWS) and the fisheries division of the National Oceanic and Atmospheric Administration (NOAA Fisheries²).

Species and critical habitats under the sole responsibility of NOAA Fisheries are **not** shown on this list. Please contact [NOAA Fisheries](#) for [species under their jurisdiction](#).

1. Species listed under the [Endangered Species Act](#) are threatened or endangered; IPaC also shows species that are candidates, or proposed, for listing. See the [listing status page](#) for more information. IPaC only shows species that are regulated by USFWS (see FAQ).
2. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office

of the National Oceanic and Atmospheric Administration within the Department of Commerce.

The following species are potentially affected by activities in this location:

Mammals

NAME	STATUS
<p>Gray Bat <i>Myotis grisescens</i></p> <p>Wherever found</p> <p>This species only needs to be considered if the following condition applies:</p> <ul style="list-style-type: none"> The project area includes potential gray bat habitat. <p>No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/6329</p>	Endangered
<p>Indiana Bat <i>Myotis sodalis</i></p> <p>Wherever found</p> <p>This species only needs to be considered if the following condition applies:</p> <ul style="list-style-type: none"> The project area includes known 'swarming 1' habitat. <p>There is final critical habitat for this species. Your location does not overlap the critical habitat. https://ecos.fws.gov/ecp/species/5949</p>	Endangered
<p>Northern Long-eared Bat <i>Myotis septentrionalis</i></p> <p>Wherever found</p> <p>No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/9045</p>	Endangered
<p>Tricolored Bat <i>Perimyotis subflavus</i></p> <p>Wherever found</p> <p>No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/10515</p>	Proposed Endangered

Fishes

NAME	STATUS
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Kentucky Arrow Darter *Etheostoma spilotum* Threatened
 Wherever found
 There is **final** critical habitat for this species. Your location does not overlap the critical habitat.
<https://ecos.fws.gov/ecp/species/9063>

Insects

NAME	STATUS
Monarch Butterfly <i>Danaus plexippus</i> Wherever found No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/9743	Candidate

Critical habitats

Potential effects to critical habitat(s) in this location must be analyzed along with the endangered species themselves.

There are no critical habitats at this location.

You are still required to determine if your project(s) may have effects on all above listed species.

Bald & Golden Eagles

There are no documented cases of eagles being present at this location. However, if you believe eagles may be using your site, please reach out to the local Fish and Wildlife Service office.

Additional information can be found using the following links:

- Eagle Management <https://www.fws.gov/program/eagle-management>
- Measures for avoiding and minimizing impacts to birds <https://www.fws.gov/library/collections/avoiding-and-minimizing-incident-take-migratory-birds>
- Nationwide conservation measures for birds <https://www.fws.gov/sites/default/files/documents/nationwide-standard-conservation-measures.pdf>
- Supplemental Information for Migratory Birds and Eagles in IPaC <https://www.fws.gov/>

What does IPaC use to generate the probability of presence graphs for the migratory birds potentially occurring in my specified location?

The probability of presence graphs associated with your migratory bird list are based on data provided by the [Avian Knowledge Network \(AKN\)](#). This data is derived from a growing collection of [survey, banding, and citizen science datasets](#).

Probability of presence data is continuously being updated as new and better information becomes available. To learn more about how the probability of presence graphs are produced and how to interpret them, go to the Probability of Presence Summary and then click on the "Tell me about these graphs" link.

How do I know if a bird is breeding, wintering or migrating in my area?

To see what part of a particular bird's range your project area falls within (i.e. breeding, wintering, migrating or year-round), you may query your location using the [RAIL Tool](#) and look at the range maps provided for birds in your area at the bottom of the profiles provided for each bird in your results. If a bird on your migratory bird species list has a breeding season associated with it, if that bird does occur in your project area, there may be nests present at some point within the timeframe specified. If "Breeds elsewhere" is indicated, then the bird likely does not breed in your project area.

What are the levels of concern for migratory birds?

Migratory birds delivered through IPaC fall into the following distinct categories of concern:

1. "BCC Rangewide" birds are [Birds of Conservation Concern](#) (BCC) that are of concern throughout their range anywhere within the USA (including Hawaii, the Pacific Islands, Puerto Rico, and the Virgin Islands);
2. "BCC - BCR" birds are BCCs that are of concern only in particular Bird Conservation Regions (BCRs) in the continental USA; and
3. "Non-BCC - Vulnerable" birds are not BCC species in your project area, but appear on your list either because of the [Eagle Act](#) requirements (for eagles) or (for non-eagles) potential susceptibilities in offshore areas from certain types of development or activities (e.g. offshore energy development or longline fishing).

Although it is important to try to avoid and minimize impacts to all birds, efforts should be made, in particular, to avoid and minimize impacts to the birds on this list, especially eagles and BCC species of rangewide concern. For more information on conservation measures you can implement to help avoid and minimize migratory bird impacts and requirements for eagles, please see the FAQs for these topics.

Details about birds that are potentially affected by offshore projects

For additional details about the relative occurrence and abundance of both individual bird species and groups of bird species within your project area off the Atlantic Coast, please visit the [Northeast Ocean Data Portal](#). The Portal also offers data and information about other taxa besides birds that may be helpful to you in your project review. Alternately, you may download the bird model results files underlying the portal maps through the [NOAA NCCOS Integrative Statistical Modeling and Predictive Mapping of Marine Bird Distributions and Abundance on the Atlantic Outer Continental Shelf](#) project webpage.

Bird tracking data can also provide additional details about occurrence and habitat use throughout the

year, including migration. Models relying on survey data may not include this information. For additional information on marine bird tracking data, see the [Diving Bird Study](#) and the [nanotag studies](#) or contact [Caleb Spiegel](#) or [Pam Loring](#).

What if I have eagles on my list?

If your project has the potential to disturb or kill eagles, you may need to [obtain a permit](#) to avoid violating the Eagle Act should such impacts occur.

Proper Interpretation and Use of Your Migratory Bird Report

The migratory bird list generated is not a list of all birds in your project area, only a subset of birds of priority concern. To learn more about how your list is generated, and see options for identifying what other birds may be in your project area, please see the FAQ "What does IPaC use to generate the migratory birds potentially occurring in my specified location". Please be aware this report provides the "probability of presence" of birds within the 10 km grid cell(s) that overlap your project; not your exact project footprint. On the graphs provided, please also look carefully at the survey effort (indicated by the black vertical bar) and for the existence of the "no data" indicator (a red horizontal bar). A high survey effort is the key component. If the survey effort is high, then the probability of presence score can be viewed as more dependable. In contrast, a low survey effort bar or no data bar means a lack of data and, therefore, a lack of certainty about presence of the species. This list is not perfect; it is simply a starting point for identifying what birds of concern have the potential to be in your project area, when they might be there, and if they might be breeding (which means nests might be present). The list helps you know what to look for to confirm presence, and helps guide you in knowing when to implement conservation measures to avoid or minimize potential impacts from your project activities, should presence be confirmed. To learn more about conservation measures, visit the FAQ "Tell me about conservation measures I can implement to avoid or minimize impacts to migratory birds" at the bottom of your migratory bird trust resources page.

Facilities

National Wildlife Refuge lands

Any activity proposed on lands managed by the [National Wildlife Refuge](#) system must undergo a 'Compatibility Determination' conducted by the Refuge. Please contact the individual Refuges to discuss any questions or concerns.

There are no refuge lands at this location.

Fish hatcheries

There are no fish hatcheries at this location.

Wetlands in the National Wetlands Inventory (NWI)

Impacts to [NWI wetlands](#) and other aquatic habitats may be subject to regulation under Section 404 of the Clean Water Act, or other State/Federal statutes.

For more information please contact the Regulatory Program of the local [U.S. Army Corps of Engineers District](#).

Please note that the NWI data being shown may be out of date. We are currently working to update our NWI data set. We recommend you verify these results with a site visit to determine the actual extent of wetlands on site.

This location overlaps the following wetlands:

FRESHWATER POND

[PUBHh](#)

A full description for each wetland code can be found at the [National Wetlands Inventory website](#)

NOTE: This initial screening does **not** replace an on-site delineation to determine whether wetlands occur. Additional information on the NWI data is provided below.

Data limitations

The Service's objective of mapping wetlands and deepwater habitats is to produce reconnaissance level information on the location, type and size of these resources. The maps are prepared from the analysis of high altitude imagery. Wetlands are identified based on vegetation, visible hydrology and geography. A margin of error is inherent in the use of imagery; thus, detailed on-the-ground inspection of any particular site may result in revision of the wetland boundaries or classification established through image analysis.

The accuracy of image interpretation depends on the quality of the imagery, the experience of the image analysts, the amount and quality of the collateral data and the amount of ground truth verification work conducted. Metadata should be consulted to determine the date of the source imagery used and any mapping problems.

Wetlands or other mapped features may have changed since the date of the imagery or field work. There may be occasional differences in polygon boundaries or classifications between the information depicted on the map and the actual conditions on site.

Data exclusions

Certain wetland habitats are excluded from the National mapping program because of the limitations of aerial imagery as the primary data source used to detect wetlands. These habitats include seagrasses or submerged aquatic vegetation that are found in the intertidal and subtidal zones of estuaries and nearshore coastal waters. Some deepwater reef communities (coral or tubercid worm reefs) have also been excluded from the inventory. These habitats, because of their depth, go undetected by aerial imagery.

Data precautions

Federal, state, and local regulatory agencies with jurisdiction over wetlands may define and describe wetlands in a different manner than that used in this inventory. There is no attempt, in either the design or products of this inventory, to define the limits of proprietary jurisdiction of any Federal, state, or local government or to establish the geographical scope of the regulatory programs of government agencies. Persons intending to engage in activities involving modifications within or adjacent to wetland areas should seek the advice of appropriate Federal, state, or local agencies concerning specified agency regulatory programs and proprietary jurisdictions that may affect such activities.

NOT FOR CONSULTATION



Résumé

Jonathan Hootman

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Mars Hill, NC 28754

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EDUCATION

M.A. Cultural Anthropology, California Institute of Integral Studies, 2007

B. S. Wildlife Management, Ohio State University, 2001

CERTIFICATIONS AND PERMITS

- Federal collection permit: Indiana bat (*Myotis sodalis*), northern long-eared bat (*M.septentrionalis*), and gray bat (*Myotis grisescens*)
- Qualified Indiana bat surveyor, Pennsylvania Game Commission
- State permits held in West Virginia, Wisconsin, Kentucky, Ohio, Michigan, North Carolina, Iowa, Kansas, Missouri, and Alabama (More can be added at any time).

QUALIFICATIONS AND EXPERIENCE

Acoustic Experience:

- Using Kaleidoscope Pro for Bat Auto-ID. 2020
- Evaluating Acoustic Bat Surveys for ESA Compliance (5-day USFWS course). 2019
- Sonobat workshop. 2019
- Private acoustics class with Dr. Eric Britzke at ESI main office. 2004
- Mr. Hootman has been setting out acoustic detectors and analyzing calls since 2001.

Mr. Hootman has worked as a wildlife biologist with an emphasis on endangered bat surveys since 2001. He has held a federal permit since 2004 and has participated in projects involving Indiana bats, northern myotis bats, gray bats, and many state listed bat species. These surveys have occurred in a variety of places, including surveys in West Virginia, Virginia, Pennsylvania, Ohio, Michigan, Missouri, Tennessee, New York, Maryland, New Jersey, Nebraska, Wisconsin, Illinois, Indiana, Arkansas, Kentucky, and South Carolina. Mr. Hootman has concentrated on land development projects, specifically wind, mine and gas pipeline development projects. Mr Hootman has also participated in many research projects involving bat migration. He is proficient in the use of mist net surveys and Global Position Systems (GPS) to investigate the presence, distribution, and habitat use of endangered species. He is also a highly skilled radio telemetry operator and has radio tagged hundreds of bats.

Mr. Hootman has been active in outdoor activities and field biology for many years. He has worked as a field biologist on a variety of projects and has worked nine years for Environmental Solutions and Innovations and has worked five years for Apogee

Environmental and Archaeological. Since then, he has started an Environmental Consulting Firm (Borealis Biological) with Michelle Gilley and has been working as the COO ever since. Mr. Hootman's field expertise includes mist net and summer habitat surveys and assessments for endangered bats, radio telemetry, rare bird surveys, habitat assessment and delineation, navigating with GPS and topographic maps, animal handling, Padi certified scuba training, fish sampling using a "backpack shocker" and general equipment operation, including operation of 4-wheel drive and all terrain vehicles.

Mr. Hootman is proficient and experienced in the application of the following equipment and techniques as they relate to the capture and handling of bats:

- Mist nets
- Bat harp traps
- Bat roost tree identification
- Spring/autumn cave/mine (hibernacula) entrance surveys
- Winter bat count surveys
- Summer bat habitat suitability assessment
- Ultrasound detectors; including deployment and call analysis
- Radio Telemetry; including affixing radio tags
- Bat banding

SELECTED NEPA/ESA DOCUMENTS:

Lemen, C., J. White, P. Freeman, H. Otto, B. Andersen, and **J. Hootman**. 2017. Autumn Migration of *Myotis septentrionalis* in Nebraska: Documentation of Fall Activity, Migratory Timing, and Distance Using Radio-telemetry. Transactions of the Nebraska Academy of Sciences and Affiliated Societies 37 (2017), pp. 40–46.

Hootman, J. 2016. A winter habitat assessment and survey for the federally endangered Indiana bat (*Myotis sodalis*) and federally threatened northern long-eared bat (*Myotis septentrionalis*) at a proposed federal prison in Letcher County, Kentucky. Final report submitted to the US Fish and Wildlife Service, Frankfort, KY.

Beverly, J., **J. Hootman**, K. Cowden, and W. Webb. 2012. A summer survey and winter habitat assessment for the federally endangered Indiana bat (*Myotis sodalis*) at a proposed project area near Grassy Branch, Pike County, KY (Application No. 898-0603 Am. 3). Final report submitted to the US Fish and Wildlife Service, Frankfort, KY.

Beverly, J., **J. Hootman**, K. Cowden, and W. Webb. 2012. A summer survey and winter habitat assessment for the federally endangered Indiana bat (*Myotis*

sodalis) at a proposed project area near Panther Branch, Pike County, KY (Application No. 898-0712 Am. 1). Final report submitted to the US Fish and Wildlife Service, Frankfort, KY.

Beverly, J., **J. Hootman**, K. Cowden, and W. Webb. 2012. A summer survey and winter habitat assessment for the federally endangered Indiana bat (*Myotis sodalis*) at a proposed project area near Beetree Branch, Morgan County, KY (Application No. 877-0202 Am. 1). Final report submitted to the US Fish and Wildlife Service, Frankfort, KY.

Beverly, J., **J. Hootman**, K. Cowden, and W. Webb. 2012. A summer survey and winter habitat assessment for the federally endangered Indiana bat (*Myotis sodalis*) near known maternity colony trees, Boone County, WV (Application No. S-5012-00 & S-5023-00). Final report submitted to the US Fish and Wildlife Service, Elkins, WV.

Beverly, J., **J. Hootman**, K. Cowden, and W. Webb. 2012. A summer survey and winter habitat assessment for the federally endangered Indiana bat (*Myotis sodalis*) at a proposed Crooked Run Refuse Facility, Boone County, WV (permit pending). Final report submitted to the US Fish and Wildlife Service, Elkins, WV.

Beverly, J., **J. Hootman**, W. Webb, and K. Owens. 2012. A summer survey and winter habitat assessment for the federally endangered Indiana bat (*Myotis sodalis*) near a known colony, Kanawha & Fayette Counties, WV (permit pending). Final report submitted to the US Fish and Wildlife Service, Elkins, WV.

PROJECT EXPERIENCE

Biologist/Project Manager – borealis Biological, 2022. Conducted habitat assessments, mist net surveys, and winter habitat searches and surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for an AEP power line improvement project in West Virginia, Virginia, Kentucky, and Ohio. Borealis Biological was a sub-contractor for GAI.

Biologist/Project Manager – borealis Biological, 2021. Conducted habitat assessments, mist net surveys, and winter habitat searches and surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for an AEP power line improvement project in West Virginia, Virginia, Kentucky, and Ohio. Borealis Biological was a sub-contractor for GAI.

Biologist/Project Manager – borealis Biological, 2020. Conducted mist net surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for

a proposed powerline ROW extension in Kentucky and Tennessee. Subcontracted by EnviroScience.

Biologist/Project Manager - borealis Biological, 2020. Conducted acoustic presence/absence surveys for endangered bats in Illinois, Indiana, Kansas, Missouri and Ohio. Analyzed call data with automated bat acoustic software and manually vetted calls identified as *Myotis*. Subcontracted by PARS environmental.

Biologist/Project Manager – borealis Biological, 2019. Conducted habitat assessments, mist net surveys, and winter habitat searches and surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for an AEP power line improvement project in Ohio. Borealis Biological was a sub-contractor for GAI.

Biologist/Project Manager – borealis Biological, 2018. Conducted habitat assessments, mist net surveys, and winter habitat searches and surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for an AEP power line improvement project in West Virginia and Kentucky. Borealis Biological was a sub-contractor for GAI.

Biologist/Project Manager – borealis Biological, 2018. Conducted mist net surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for a proposed MarkWest natural gas pipeline in West Virginia. Borealis Biological was a sub-contractor for Civil and Environmental Consultants (CEC).

Biologist/Project Manager – borealis Biological, 2018. Conducted point counts and nest searches for migratory birds along a proposed gas pipeline (Mountain Valley Pipeline) in Virginia and West Virginia. Borealis Biological was a sub-contractor for Environmental Solutions and Innovations (ESI).

Biologist – EnviroScience, 2016. Conducted fall portal surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) using mist nets, harp traps, and acoustic detectors for a proposed interstate bypass in Pennsylvania.

Biologist – Jackson Group, 2016. Conducted presence/absence surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for a wind energy project in central Michigan.

Biologist – Department of Defense, 2016. Conducted baseline bat surveys at General Mitchell International Airport, Volk Field, and Hardwood Weapons Range in Wisconsin.

Biologist – Independent Contractor, 2016. Conducted spring cave surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for a private landowner affected by a proposed federal prison in Letcher County Kentucky.

Biologist – University of Nebraska, 2015. Conducted a fall migration study on NLEB (*Myotis septentrionalis*) using passive radio telemetry. Bats were captured in Fontanelle Forest and telemetry towers were placed strategically throughout eastern Nebraska.

Biologist – Kentucky Bat Working Group Volunteer, 2015. Volunteered during the annual meeting at Carter Caves State Park. We conducted harp trapping at two different known hibernacula for endangered Indiana bats (*Myotis sodalis*) and threatened NLEB (*Myotis septentrionalis*). I assisted with setup, identification, and helped conduct a test for people hoping to improve their I.D. skills.

Biologist – Copperhead Consulting, 2015. “Effectiveness of Acoustic Lures For Increasing capture success of Indiana bats (*Myotis sodalis*)” Ballard Wildlife Management Area (Ballard), La Center, Kentucky. Conducted research looking at the capture difference of using an acoustic lure versus using traditional mist netting.

Biologist – Rover Pipeline, 2015. Conducted presence/absence surveys for endangered Indiana bats (*Myotis sodalis*) and NLEB (*Myotis septentrionalis*) for a natural gas pipeline across Ohio.

Biologist – Copperhead Consulting/USFWS, 2015. Conducted a spring migration project for endangered Indiana bats (*Myotis sodalis*). Assisted with erecting the harp trap, capturing and identifying bats, and affixing radio transmitters to them. Lead biologist as part of a ground crew responsible for finding roost trees during bats' migration route.

Biologist – Sunoco, 2014. Conducted presence/absence surveys for endangered Indiana bats (*Myotis sodalis*) for a natural gas pipeline across Pennsylvania.

Field Supervisor – Civil and Environmental Consultants, 2013. Supervised multiple crews on various projects throughout Ohio, West Virginia, Kentucky, and Pennsylvania while conducting presence/absence surveys for endangered Indiana bats (*Myotis sodalis*) for the Bluegrass natural gas pipeline project.

Project Supervisor – Alpha Natural Resources, Black Castle: 2012. Lead eight teams of two conducting mist netting, and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in the mountains of West Virginia.

Project Supervisor – Alpha Natural Resources, Long Branch: 2012. Lead eight teams of two conducting mist netting, radio telemetry, and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in the mountains of West Virginia.

Project Supervisor – Alpha Natural Resources, Eagle Number Two: 2012. Lead ten teams of two conducting mist netting, and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in the mountains of West Virginia.

Project Supervisor – REIC, Mayben: 2012. Lead four teams of two conducting mist netting, and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in the mountains of West Virginia.

Project Supervisor – Civil and Environmental Consulting: 2012. Lead six teams of two conducting mist netting for endangered Indiana bats (*Myotis sodalis*) in West Virginia.

Project Supervisor – Clintwood Elkhorn: 2012. Lead one team of two conducting mist netting and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in eastern Kentucky.

Project Supervisor – Roadway Unlimited: 2012. Lead two teams of two conducting mist netting and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in eastern Kentucky.

Project Supervisor – Apex Panther Branch: 2012. Lead one team of two conducting mist netting and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in eastern Kentucky.

Project Supervisor – Jackson Environmental: 2012. Lead two teams of two conducting mist netting and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in eastern Kentucky.

Field Supervisor – Mark West Gulf Port Trunk: 2012. Lead two teams of two conducting mist netting and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in eastern Ohio.

Project Supervisor – Clintwood Elkhorn: 2012. Lead two teams of two conducting mist netting and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in eastern Kentucky.

Project Supervisor – Alpha Natural Resources: 2011. Lead eight teams of two conducting mist netting, radio telemetry, and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in the mountains of West Virginia.

Project Supervisor – Various coal companies: 2011. Conducted mine portal surveys for endangered Indiana bats (*Myotis sodalis*) and Grey bats (*Myotis grisescens*).

Field Technician – Various coal companies: 2011. Conducted fish surveys using backpack electroshocking and seining techniques.

Project Supervisor – Massey Energy Company: 2010. Lead 6 teams of two conducting mist netting, radio telemetry, and mine portal searches for endangered Indiana bats (*Myotis sodalis*) in the mountains of West Virginia.

Biologist – Copperhead Consulting/USFWS, 2009. Conducted a spring migration project for endangered Indiana bats (*Myotis sodalis*). Assisted with erecting the harp trap, capturing and identifying bats, and affixing radio transmitters to them. Worked as part of a ground crew responsible for finding roost trees during bats' migration route.

Field Biologist – West Virginia: 2007-2009. Conducted a multi-year delineation of Cheat threetooth land snail habitat in the Cheat River Valley of northeastern West Virginia. This project involved the delineation and GIS mapping of critical habitat located within 1,000 acres of the Snakehill Wildlife Management and approximately 8,000 acres owned by a private timber interest.

Field Supervisor – Fort Drum, NY: 2007. Lead a crew of four, mist netting, then tracking endangered Indiana bats (*Myotis sodalis*). The bats foraging patterns were then monitored using radio-telemetry.

Field Supervisor – Union Pacific: 2006. 5-mile railroad right-of-way (ROW) netting surveys and diurnal and night time foraging telemetry conducted as a result of four endangered bat captures.

Team Leader – Allegheny National Forest Bat Survey: 2006. Conducted 55-site bat survey in Allegheny National Forest covering potentially impacted areas in Elk, Forest, McKean, and Warren counties, Pennsylvania.

Team Leader – I-66 Endangered Bat Survey: 2006. Assisted field efforts for an Indiana and gray bat survey for a proposed interstate construction project in central Kentucky. Performed reconnaissance of mist net sites and directed mist netting efforts for one research team.

Team Leader – Millenium Pipeline: 2005. Conducted mist net surveys along natural gas pipeline right-of-way.

Team Leader – Dominion Northeast Storage Project. Conducted mist net surveys along natural gas pipeline right-of-way.

Team Leader– Dominion TL-536 Line. Conducted mist net surveys along 9.5 mile natural gas pipeline right-of-way.

Team Leader – Dominion TL-453 Line. Conducted mist net surveys along 11.5 mile natural gas pipeline right-of-way.

Team Leader – Columbia Gas Line A-5 Replacement Project. Conducted mist net surveys along natural gas pipeline right-of-way.

Biologist II – Indiana Bat Surveys for Tier 2 Studies of the I-69 corridor. Conducted autumn harp trap surveys for bats at cave openings in Indiana.

Biological Technician – Newport Chemical Depot. Conducted mist net surveys and radio telemetry to locate diurnal roosts on the Newport Chemical Depot, Indiana.

Team Leader – Indiana Department of Natural Resources Habitat Conservation Plan. Conducted summer and autumn surveys and radio telemetry microhabitat studies for the endangered Indiana bat for incorporation into the IDNR’s Habitat Conservation Plan in Harrison-Crawford State Forest, Harrison and Crawford counties, Indiana.

Biological Technician – ODOT Route 33 Nelsonville Bypass. Completed spring bat survey of mine portals using bat traps, mist nets and Anabat for road improvement project.

Biologist II – Chippewa National Forest, Sensitive Bird Survey. Participated in a playback survey for rare birds on nearly 7,000 acres in Minnesota.

Team Leader – Conducted mist net surveys and summer habitat assessments for endangered bats for a 220-mile natural gas transmission line development in Virginia and West Virginia.

Field Director – Conducted mist net surveys and summer habitat assessments for endangered bats for 3 sites of 296.31 acres, 838.58 acres, and 601 acres for a coal mine development in Logan County, West Virginia.

Biologist I – Ohio Department of Transportation project BUT-747.03 at Millikin Road and State Route 747. Conducted roost tree emergence count and Anabat survey for road expansion project in Butler County, Ohio.

Field Assistant – Upper Kanawha Valley Development Corporation. Conducted Indiana bat mist net surveys and summer habitat assessments on a 231-acre tract in West Virginia.

Field Assistant – Conducted Indiana bat mist net surveys and summer habitat assessments for a highway development project in Scioto County, Ohio.

Field Assistant – Completed summer mist net survey and summer habitat assessment for US Route 68/KY 80 Lake to Canton project, Trigg County, Kentucky.

Field Assistant – Completed summer mist net survey and summer habitat assessment for KY 30 London (Jackson County), Kentucky.

Field Assistant – Completed summer presence/absence mist net survey and summer habitat assessment for the Indiana bat on Camp Dawson, West Virginia.

Field Assistant – Completed Indiana bat summer mist net survey and summer habitat assessment for KY Route 70, Kentucky.

Field Assistant – Completed endangered Indiana bat summer mist netting survey at a surface coal mining site in Pike County, Kentucky.

Field Assistant – Completed endangered Indiana bat summer mist netting survey at a surface coal mining site in Logan and Mingo counties, West Virginia.

Field Assistant – Completed summer mist net survey and summer habitat assessment for endangered Indiana bats along an 11-mile pipeline corridor in central Illinois.

Field Assistant – Conducted mist net surveys and summer habitat assessments for a commercial development in Morris County, New Jersey. This development was within 5 miles of known hibernacula for the federally endangered Indiana bat.

Field Assistant – Conducted mist net surveys and summer habitat assessments for a sub-surface coal mine development in Wise County, Virginia.

Fw: Public Comment Draft Environmental Impact Statement Proposed Federal Correctional Institute and Federal Prison Camp Letcher County, Kentucky

Simonton, David <simonton@marshall.edu>

Mon 8/12/2024 10:35 AM

To: Emily Posner <emily@voiceoftheexperienced.org>

 2 attachments (386 KB)

CV24-1.pdf; 2024-04-15 Simonton Comment.pdf;

Here you go.

D. Scott Simonton, PE, PhD
Professor
College of Engineering and Computer Science
Marshall University
304-746-2045

From: Simonton, David
Sent: Monday, April 15, 2024 11:04 AM
To: kshudson@bop.gov <kshudson@bop.gov>
Subject: Public Comment Draft Environmental Impact Statement Proposed Federal Correctional Institute and Federal Prison Camp Letcher County, Kentucky

Please see attached letter and CV.

Thank you -

Scott

D. Scott Simonton, PE, PhD
Professor
College of Engineering and Computer Science
Marshall University
304-746-2045

Exhibit D

Sent via email kshudson@bop.gov

April 15, 2024

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

**RE: Public Comment
Draft Environmental Impact Statement
Proposed Federal Correctional Institute and Federal Prison Camp
Letcher County, Kentucky**

Dear Ms. Hudson:

I am writing to submit comments on the Environmental Impact Statement (EIS) for the proposed federal prison construction project in Letcher County, Kentucky. I appreciate the opportunity to provide public input on this project. My name is D. Scott Simonton. I am Professor in the College of Engineering and Computer Science at Marshall University. I have attached a copy of my C.V. to support my comment and concerns about the Draft Environmental Impact Statement (DEIS). Please find my following comments:

I. Stormwater Runoff and Flooding Concerns

My primary concern regarding the DEIS is that it lacks a comprehensive stormwater runoff and flooding study. The DEIS does not adequately assess the potential impacts of the project on stormwater runoff characteristics before, during, and after construction. This is a critical omission, as Letcher County has a history of flooding events. Most recently, in 2022, a serious flood inundated the county, including Roxana where the Bureau of Prisons (BOP) has indicated is its preferred site.

II. Specific Concerns

- The DEIS fails to analyze the existing stormwater drainage patterns on the project site and surrounding areas.
- The DEIS does not quantify the potential increase in impervious surfaces due to construction (buildings, roads, parking lots) and how this will affect stormwater runoff volume and velocity.
- The DEIS lacks details regarding the post-construction stormwater management plan, including best management practices (BMPs) to mitigate runoff and prevent flooding.

- The DEIS does not assess the potential impact of increased runoff on downstream waterways, including stream bank erosion, sedimentation, and aquatic habitat degradation.

III. Recommendations

I urge the BOP to address these shortcomings in the current DEIS by:

- Conducting a comprehensive stormwater runoff and flooding study that considers pre-construction conditions, potential impacts during construction, and post-construction mitigation strategies.
- Including detailed information on the post-construction stormwater management plan, including the types of BMPs that will be used to manage runoff volume and velocity.
- Assessing the potential impact of increased runoff on downstream waterways and incorporating measures to address any negative impacts.

I believe that these shortcomings should be addressed by the BOP and a new DEIS issued for the public to present comment on before the lead agency proceeds to finalizing its environmental review.

IV. Conclusion

A thorough stormwater runoff and flooding study is essential to ensure that the federal prison construction project does not exacerbate existing flooding problems in Letcher County. I urge the lead agency to revise the DEIS to include this critical information before proceeding with the project.

Thank you for your time and consideration.

Sincerely,

D. Scott Simonton, PE, PhD
Professor
College of Engineering and Computer Science
Marshall University

D. Scott Simonton, PE, PhD
1091 Haines Branch Rd.
Sissonville, WV 25320
(304) 552-7488
e-mail:simonton@marshall.edu

EDUCATION:

Ph.D. in Engineering, Department of Civil Engineering, University of New Mexico, 2002
Concentrations: Environmental Engineering, Environmental Microbiology, Geochemistry
Dissertation: *Stability of Arsenic and Selenium Immobilized by In-Situ Microbial Reduction*
Advisor: Dr. Bruce Thomson

M.S. in Environmental Engineering, College of Information Technology and Engineering, Marshall University, 1997
Concentration: Groundwater Hydrology, Water Quality
Project: *Design of a Compressor Station Wastewater Treatment System Incorporating Peat Biofilters*
Advisor: Dr. William Kroesser

Graduate Study, College of Engineering, Idaho State University, 1994-1995
Concentration: Hazardous Waste Management

B.S. in Civil Engineering, College of Engineering, West Virginia Institute of Technology, 1991

ACADEMIC EXPERIENCE:

Marshall University, College of Engineering and Computer Science
Professor, Department of Mechanical and Industrial Engineering, 2001 – present
Program Coordinator, MS Environmental, Safety and Health, 2001 – present
Program Coordinator, MS Mine Safety, 2023-Pres

Tenured faculty. Teach graduate level environmental science and engineering courses; undergraduate mechanical engineering and aviation science courses; advise graduate Environmental, Safety and Health students, serve(d) on university committees. Currently Member, Marshall University Graduate Council; CECS Personnel Committee; Chair, MIE Personnel Committee; Member, CECS Deans Advisory Council. Conduct research, program development.

University of New Mexico, Department of Civil Engineering
Research Assistant/Doctoral Candidate, 1999-2001

Coursework and research emphasis on bioremediation, geochemistry and waste containment. Primary research was in groundwater/soil bioremediation and long term stability of toxic metals and radionuclides; conducted USDOE funded research to determine removal and stability of metals, metalloids and radionuclides using in-situ biological processes in groundwater and engineered systems. Conducted studies of acid-mine drainage generation and control.

PROFESSIONAL EXPERIENCE:

Ashby-Tucker Environmental, LLC

Principal Engineer, 2003 - present

Provide extensive professional consulting, design and litigation support to various concerns. Specialize in regulatory compliance and permitting, environmental site and risk assessment, human exposure, hydrology,



environmental engineering design, and litigation support/expert testimony for complex environmental and exposure cases involving mining and industry.

Fayette County WV Board of Health

Special Agent and Investigator, 2017 – Present

State of West Virginia, Environmental Quality Board

Member, Vice-Chairman, 2002 – 2017

The 5-member West Virginia Environmental Quality Board (EQB) is appointed by the Governor, with Senate approval. Prior to 2005, the Board issued rules that set the water quality standards for West Virginia's surface and ground waters. The Board also had the authority to grant a variance from these water quality standards for re-mining activities. The second function of the EQB, and the only current function, is to hear appeals regarding the issuance or denial of permits, permit conditions, or enforcement actions rendered by the WV Department of Environmental Protection's Division of Water Resources and Division of Waste Management.

Triad Engineering, Inc.

Senior Engineer, 2001-2002

Provided environmental consulting, field engineering, project management compliance and design services to local, regional and national clients. Conducted site investigations and assessments, remedial design, and risk assessment, especially those pertaining to state-led voluntary remediation programs.

Terradigm, Inc.

Project Engineer/Manager, 2000-2001

Provided environmental consulting and project management to federal government clients, particularly DOE. Projects included the upgrades for the Radioactive Liquid Waste Treatment Facility at the Los Alamos National Lab, and the review of the DOE Off-Site Source Recovery Program.

Fluor Daniel GTI/IT Corporation

Project Engineer/Manager, 1998-1999

Provided environmental consulting, compliance, field engineering, project management and design services to national clients, including: risked based corrective actions and closures; pilot plant design, construction, testing and operation; waste and material handling system development; wastewater treatment system design and operation; pollution controls; site assessments; permitting and regulatory services. Additionally, served as employers Registered Individual in Responsible Charge for West Virginia operations.

Earth Tech

Project Engineer/Manager, 1997-1998

Provided environmental consulting, compliance, project management and design services to industrial and manufacturing clients, including: prepared bids and cost estimates; developed contracts; managed personnel, equipment, and subcontractors; managed all budgetary aspects of projects; provided on-site supervision; maintained existing client base as well as developed new ones. Additionally, provided permitting and regulatory services; recommended and designed remediation systems; conducted site assessments and UST closures.

Terradon Corporation/Potesta and Associates

Project Engineer/Manager, 1995-1997

Provided environmental consulting, compliance, project management and design services to municipal, industrial and manufacturing clients, including: permitting and regulatory services with emphasis in remediation, air and water pollution; recommended and designed wastewater treatment and collection systems; recommended and designed soil and groundwater remediation systems; managed client permitting and compliance; conducted training in sampling procedures and permit compliance; conducted facility audits for discharge minimization/elimination; prepared pollution prevention plans, groundwater protection plans, and stormwater management plans; wrote draft permits for state agencies.



Idaho Division of Environmental Quality

Southeast Idaho Regional Office, Remediation Section

Leaking Underground Storage Tank Program Manager, 1993-1995

Primary responsibility was overseeing all aspects of the Regional LUST Program, including: site assessment and identification of groundwater/soil contamination and sources; identification of responsible parties; review and approval of site assessments, risk assessments and corrective action plans; provide technical guidance on site assessment, risk assessment and remediation; review sampling data and remediation effectiveness; review and approve site closure requests; initiation and oversight of Consent Orders, Compliance Schedules, and Notices of Violation. In addition, I performed duties with the Regional Emergency Response Team; provided assistance regarding risk assessment, groundwater, surface water, and soil to other programs, including CERCLA and RCRA; responded to problems not specifically covered by other programs.

Prevention/Certification Section

Water Quality Specialist, Drinking Water Program, 1993

Primary responsibility was providing oversight and guidance to drinking water systems for pollutant monitoring; enforced monitoring regulations and tracked compliance; reviewed and approved monitoring waiver applications. Additionally, provided comments to Federal agencies regarding 401/404 permit applications and performed general water quality duties.

West Virginia Division of Environmental Protection

Office of Water Resources

Water Quality Engineer, 1992-1993

Primary duty was writing NPDES permits for industrial point source and stormwater discharges. These duties included: application review; industrial process and pollutant source review; recommend, review and approve treatment and disposal systems; conduct site inspections, field reviews, and sampling; perform limited benthic and environmental impact surveys; conduct statistical evaluations and develop discharge limitations; determine requirements for and approve BMP's, remediation, and site investigations; enforce State and Federal laws and regulations.

PROJECT EXPERIENCE AVAILABLE UPON REQUEST

LITIGATION EXPERIENCE/LIST OF CASES AVAILABLE UPON REQUEST

MILITARY EXPERIENCE:

West Virginia Army National Guard

Detachment 1, Troop A, 1/150 Armored Cavalry

Detachment Commander, 1992-1993

Company D, 1/150 Armored Cavalry

Executive Officer, Safety Officer, 1991-1992

Platoon Leader, 1986-1991

United States Marine Corps

Weapons Company, 3rd Battalion, 2nd Marines

Infantryman, Squad Leader, Training NCO, 1982-1986



PUBLICATIONS, PRESENTATIONS

Presentation, World Environmental & Water Resources Congress, *Evaluation of Anoxic Bioreactor Efficacy for Reducing Selenium Fish Tissue Accumulation in Mining Influenced Streams*; Henderson, NV June 2023

Surber, S.J. and Simonton, D.S. *Disparate impacts of coal mining and reclamation concerns for West Virginia and central Appalachia*; Resources Policy, Volume 54, December 2017, Pages 1-8

Eckstein, Y. and Simonton, D., *Coal Mining Waste as a Source of Heavy Metals in Surface and Groundwater*; Presentation/Abstract, Geological Society of America Annual Conference, November 2015

Simonton, D. and Eckstein, Y. *Mining Impacted Groundwater as a Source of Hydrogen Sulfide Gas in Homes*; Presentation and Abstract, The Geological Society of America Annual Conference, November 2015

Wait, I.W. and Simonton, D.S.: *Calibration of Time of Concentration Models for Steep, Rural Watersheds*, Presentation and proceedings of EWRI Congress, May 2015

Huffman, D.R.; Surber, S.J.; Simonton, D.S.: *Economic Sustainability Concerns for the Public Arising from Large Scale Surface Mining*, Presentation and proceedings of NAEP Conference, April 2015

Proceedings and Presentation, World Environmental & Water Resources Congress; *Hydrogen Sulfide Exposure and Human-Health Risk in Mining-Impacted Regions*; Portland, OR, June 2014

Simonton, D.S.; King S.; *Hydrogen Sulfide Formation and Potential Health Consequences in Coal Mining Regions*; Water Quality, Exposure and Health, March 2013

Presentation, Appalachian Studies Association, *Coal Mining Waste Disposal Practices and Human Health Risk: A Case Study*; Boone, NC March 2013

Presentation, Environmental Health 2013: Science and Policy to Protect Future Generations (Elsevier); *Hydrogen sulfide gas exposure in Appalachian coal-field communities*; Boston, MA March 2013

Simonton, D.S.; *Report: An Alternative for Solid Waste Management in Developing Countries*; Proceedings of the Global Waste Management Symposium, November 2008

Simonton, D.S., Spears, M.; *Human Health Effects from Exposure to Low-Level Concentrations of Hydrogen Sulfide*; Occupational Hazards, October 2007

Presentation, Air and Waste Management Association Seminar: 2005 Issues in Environmental Risk Assessment and Toxicology; *Designing the Site Characterization to Meet Risk Assessment Objectives*, Charleston, WV, September, 2005

Presentation, Air and Waste Management Association Seminar: 2004 Issues in Environmental Risk Assessment and Toxicology; *Risk Assessment and Toxicology in the Development of Water Quality Standards*, Manhattan, KS, September, 2004

Simonton, S., Thomson, B., Barton, L.L. and Dimsha, M., *Long Term Stability of Metals Immobilized by In-situ Bioremediation Processes*. Proceedings of the 2000 Conference on Hazardous Waste Research, Great Plains/Rocky Mountain Hazardous Waste Research Center, Denver, CO, February 2001

B. Thomson, D. Simonton, L. Barton, *Stability of Arsenic and Selenium Immobilized by In Situ Microbial Reduction*, Proceedings of the 2001 Conference on Hazardous Waste Research, Great Plains/Rocky Mountain Hazardous Waste Research Center, February 2002

PEER REVIEWER, JOURNALS

Environment, Development and Sustainability, Springer
Environmental Earth Sciences, Springer

COURSES TAUGHT, MARSHALL UNIVERSITY (with latest semester in which taught)

AVSC 310	Aerodynamics and Performance	Sp24
ES 550	Environmental Law and Policy	F23
ES 674	Epidemiological Health Research Techniques	F19
ES 620	Environmental Management Systems	Sp21
ES 582	SpTp: Sustainable Energy Systems	Sp11
ES 582	SpTp: Energy and the Environment	F18
ES 585	Introduction to Environmental Science	Sp15
ES 602	A Study of the WV Environment	Sp20
ES 603	Seminar in Current Environmental Issues	F17
ES 604	Air Pollution	S22
ES 610	Environmental Sampling	F19
ES 614/514	Environmental Risk Assessment	Sp22
ES 626	Remote Sensing and Map Use	F07
ES 630	Environmental Site Assessment	Sp18
ES 640	Groundwater Principles	Sp20
ES 646	Dynamics of Ecosystems	Sp03
ES 650	SpTp: Sustainability	F14
ES 652	SpTp: Water Policy and Conflict	F22
ES 652	SpTp: Mining and the Environment	Sp22
ES 652	SpTp: Environmental Remediation	F21
ES 652	SpTp: Land Management in the American West	F20
ES 655	Environmental Ethics	F21
ES 662	Environmental Policy	F14
ES 651	Environmental Microbiology	F09
ES 646	Dynamics of Ecosystems	Sp03
ES 665	Water Resources Management	F11
ES 670	Sustainable Energy	F23
IST 423	Applied Statistics	Sp02
ENVE 617	Physiochemical Treatment of Water and Wastewater	Sp08
ENVE 650	Air Pollution Control	Sp04
ENVE 681	Environmental Engineering Design	Sp13
ENVE 625	Hazardous Waste Management	F07
ENVE 650	Energy and the Environment	F08
ENVE 670	Hydrology and Sedimentology	Sp04
ENVE 682	Environmental Remediation Technologies	F05
ENVE 683	Environmental Geotechnology	Sp07
ME 305	Aircraft Systems	Sp23
ME 453/453	Mechanical Engineering Capstone I/II	Sp24
MSF 526	Industrial Toxic Airborne Contaminants	Sp24

GRADUATE SUPERVISION

To date I have supervised over 150 graduate projects/theses.



PROFESSIONAL ASSOCIATIONS

- American Society of Civil Engineers
 - Member - Energy, Environment, and Water Policy Committee
- ASCE Environment and Water Resources Institute
- American Association of Reclamation Sciences

CERTIFICATIONS

Registered Professional Engineer (Environmental), WV, MS, KY, VA (Active); NM, TN (Inactive)

ADDITIONAL EDUCATION, AWARDS, NONPROFESSIONAL ASSOCIATIONS, VOLUNTEER

Marshall University 2021-2022 Distinguished Service Award

Marshall University 2019-2020 John and Frances Rucker Outstanding Graduate Advisor Award

FAA Certified Commercial Pilot, Instrument Rated

FAA Certified Drone Pilot

Volunteer Pilot, Southwings 2009-Pres

Solar Electric Systems and Grid-direct Design, 8/10

OSHA 1910.120 40 Hour HAZWOPER, 5/94; 8 Hour Refresher Annually

OSHA 1910.120 8 Hour HAZWOPER Supervisor 10/98;

OSHA Lead in Construction Awareness Training, 1/98

ASTM Risk Based Corrective Action Courses, 2/95, 3/95

U.S. Army Nuclear, Biological, Chemical Defense Course, 3/93

USEPA NPDES Permit Writers Course, 1/93

U.S. Army Armor Officer Basic Course, 8-12/89

AOPA

Please find attached a letter in re: FCI - Letcher

Carlton E Williams <carltonwilliams@cornell.edu>

Mon 4/15/2024 11:39 PM

To:kshudson@bop.gov <kshudson@bop.gov>

 1 attachments (171 KB)

Letcher .pdf;

See attached.

Exhibit E



Monday, April 15, 2024

To Whom It Concerns;

I am writing to oppose the construction of the Federal Correctional Institute Letcher in Letcher County, Kentucky. On March 1st, the federal Bureau of Prisons released its Draft Environmental Impact Study, which began a 45-day period for open comments on the proposal.

These are my comments & questions in response to reviewing this Draft study:

It is mentioned that blasting and other means may be required to excavate the site and create a stable foundation. No details are provided on how this would be conducted to ensure that the surrounding natural area is not affected by this. How would blasting an unstable site not result in extremely dangerous conditions for the site and surrounding areas? What would be done to mitigate this? Furthermore, who would be held accountable if such mitigation measures fail?

The recommended mitigation measures include an engineering study of subsurface conditions. Has this not already been done to determine if the site is suitable for this kind of large-scale project? The viability of the site would surely depend on the results of such a study. Why was this not addressed in the report?

The report mentions that seismic activity is a moderate concern for the development of the Roxana Site. Why would this site be considered if there is a concern for seismic activity, given that the site is near/on old mines, wetlands, floodplains, etc? Complications before, during, and after construction of this unwanted and unneeded prison are inevitable and dangerous. What steps will be taken to ensure the safety of the inmates and surrounding community in the event of seismic activity?

Why select a site where the potential for damage from seismic activity is a moderate concern?

The EDR report identified multiple sealed and abandoned mines within the vicinity of the project site. Since the exact extent of the mines' underground networks are unknown, they should be considered a potential risk to the site.

Why was a Professional Geoscientist (P.G.) not consulted when determining the effects previous mining may have on the site? Will additional studies be conducted to assess the potential risk posed by this?

A structural geologist should be consulted to determine the potential impacts previous mining activities may pose to the project site. Why hasn't this expertise been sought out already?

In the report, no Professional Geoscientist or even a Geoscientist-In-Training are listed. In 2008 to gather data, a geologic survey was started and was completed in 2011 however there is not a geologist, or a geoscientist listed. How was this survey conducted and by who? Furthermore, is this survey still relevant to the DEIS in 2024? What steps have been taken to update the geological data to ensure its relevance?

It is mentioned that the physiographic region extends from New York to Alabama, what does this have to do with Letcher County?

Under geology, there is discussion of a concept; 'seismicity'. It is stated that there is a two percent probability of earthquakes in 50 years. What data and methodologies were used to arrive at this number?

The map presented under the alternatives, when discussing geology, is shown to have a 'study area' which would require a geologist to study.

With recent earthquakes across the nation happening, particularly the one in New York, is new research required to measure the severity of seismic hazards such as ground rupture and liquefaction?

I am asking that the BOP choose the "No Action Alternative Option" in the DEIS and choose to not construct this unnecessary prison. If no action is taken, we wouldn't have to consider this construction and the questions that I am posing here.

Sincerely,

A handwritten signature in black ink, appearing to read "Carlton E. Williams". The signature is fluid and cursive, with a long horizontal stroke at the end.

Carlton E. Williams

Fwd: DEIS Letcher Comment - Silica

Lolo Serrano <lolo@alcenter.org>

Wed 8/7/2024 4:34 PM

To: Emily Posner <emily@voiceoftheexperienced.org>

 1 attachments (20 KB)

DEIS Letcher Comment - Silica.docx;

For exhibit - proof of timely submission of Dr. Beverly May silica comment (huge!), referenced on p.46-47 of our draft.

----- Forwarded message -----

From: **beverly may** <beverlyannmay@gmail.com>

Date: Tue, Jul 30, 2024 at 10:54 AM

Subject: Fwd: DEIS Letcher Comment - Silica

To: <lolo@alcenter.org>

Beverly May

400 Wilson Creek, Langley Ky 41645

(606) 791-0966 home/office

beverlyannmay@gmail.com

----- Forwarded message -----

From: **beverly may** <beverlyannmay@gmail.com>

Date: Mon, Apr 15, 2024 at 9:45 AM

Subject: DEIS Letcher Comment - Silica

To: <kshudson@bop.gov>

April 15, 2024

To: Kimberly Hudson

Chief, Construction and Environmental Review Section

United States Bureau of Prisons

kshudson@bop.gov

Exhibit F

Re: Silica Comments Draft EIS Letcher County Federal Prison and Work Camp

In the draft environmental impact statement (DEIS) regarding the proposal federal prison and work camp in Letcher County, Kentucky the potential for airborne silica exposure during construction and operation is inadequately addressed.

The DEIS notes that during surface mining in the 1980's and 1990's "native earthen material" was removed to head-of-hollow fills. Following removal of the coal seam, the remaining geology (Hyden, Pikeville and Four Corners Formations) is comprised largely of sandstone. Further the DEIS notes that significant excavation of rock and valley fills will be needed to create a level and stable construction pad and that blasting may be used for site preparation.

The DEIS does not acknowledge that the construction site's sandstone is around 90% crystalline quartz silica. Of the sandstone types, airborne quartz is the most toxic to humans. Quartz which has been fractured by blasting or drilling, rather than eroded through geologic eons, is particularly toxic (Castranova, 2000). If inhaled, these fine particles embed in the lower lungs and cannot be cleared, leading to chronic inflammation and scarring. Blasting and drilling into quartz-rich seams during both surface and underground coal mining has been found to be a major contributor to the resurgence of coal mining dust lung disease (CMDLD), or "black lung" in east Kentucky (Cohen, 2016). Most disturbing is the region's precipitous rise in progressive massive fibrosis cases (Antao, 2005). PMF is a previously rare form of black lung, characterized by rapid onset of disease, rapid physical decline and high mortality, even in younger coal miners (Blackley, 2016). CMDLD, including PMF, have been found in coal workers who have only worked in surface mines, with workers involved in blasting and drilling particularly at risk. East Kentucky coal fields are a well-established "hot spot" for CMDLD among surface miners (Laney, 2012).

The DEIS does not address the risk of respiratory silica exposure for construction workers involved in site preparation at the proposed site. There is no indication they will be informed that silica "is not just dust" but an irreversible harm. Nor is there an indication that respiratory precautions specific to this location will be promoted and enforced.

Further, there is no stated plan for preventing "fugitive dust" from the site, either airborne or carried by truck traffic. Consequently, the risk of silica exposure extends not just to the workers but to the surrounding community, which is not addressed in the DEIS assessment of air pollution.

References

Antao, V. Petsonk, E. Sokolow, L. (2005) Rapidly progressive coal workers' pneumoconiosis in the United States: geographic clustering and other factors. *Occupational and Environmental Medicine* 62: 670-674.

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Blackley, D. Crum, J. Halldin, C. Stoney, E. Laney, A. (2016) Resurgence of progressive massive fibrosis in coal miners- Eastern Kentucky, 2016. *Morbidity and Mortality Weekly Report* 65(49): 1385-1389.

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Castranova, V. Vallyathan, V. (2000) Silicosis and coal workers' pneumoconiosis. *Environmental Health Perspectives* 108(4): 675-684.

Cohen, R. Petsonk, E. Rose, C. (2016) Lung pathology in U.S. coal workers with rapidly progressive pneumoconiosis implicates silica and silicates. *American Journal of Respiratory Critical Care Medicine* 193(6): 673-680.

Laney, A. Wolfe. A. Petsonk, E. (2012) Pneumoconiosis and advanced occupational lung disease among surface coal miners-16 states, 2010-2011. *Morbidity and Mortality Weekly Report* 61(23): 431-434.

-

Given that this preventable harm to workers and the surrounding community from respirable silica is not addressed in the DEIS, I urge that the DEIS be revised. Given the difficulties of preventing exposure during construction of the Letcher County prison and work camp, the proposal should ideally be withdrawn.

Sincerely,

Beverly May, MSN, DrPH

400 Wilson Creek

Langley, Ky 41645

beverlyannmay@gmail.com

Fwd: Letcher Co Prison DEIS Comments - Radon

Lolo Serrano <lolo@alcenter.org>

Wed 8/7/2024 4:33 PM

To: Emily Posner <emily@voiceoftheexperienced.org>

 1 attachments (19 KB)

DEIS Radon Comments.docx;

For exhibit - proof of timely submission of Beverly May Radon comment, referenced on p.46 of our draft.

----- Forwarded message -----

From: **beverly may** <beverlyannmay@gmail.com>
Date: Tue, Jul 30, 2024 at 10:53 AM
Subject: Fwd: Letcher Co Prison DEIS Comments - Radon
To: <lolo@alcenter.org>

Beverly May
400 Wilson Creek, Langley Ky 41645
(606) 791-0966 home/office
beverlyannmay@gmail.com

Artie Ann asked me to send you the dates for my submissions on radon, silica and subsidence. Here's radon April 13. I'll also forward the other 2. Thanks for all you do! Bev

----- Forwarded message -----

From: **beverly may** <beverlyannmay@gmail.com>
Date: Sat, Apr 13, 2024 at 10:18 AM
Subject: Letcher Co Prison DEIS Comments - Radon
To: <kshudson@bop.gov>

: Kimberly Hudson
Chief, Construction and Environmental Review Section
United States Bureau of Prisons
kshudson@bop.gov

Re: Radon Draft EIS Letcher County Federal Prison and Work Camp

Exhibit F

In the draft environmental impact statement (DEIS) regarding the proposal federal prison and work camp in Letcher County, Kentucky the potential for radon exposure is inadequately addressed.

The DEIS correctly states that “radon gas can migrate through rock and permeable soils...escaping into fractures and openings...Radon gas may migrate into buildings through construction joints and foundation cracks, etc.” However, the DEIS fails to discuss the uncertainty of radon gas migration given that the site has been previously surface mined. To remove the coal and create the current level site, high impact explosives were used to blast away the sandstone and shale strata above the coal, also fracturing the newly exposed geologic strata beneath. The potential for higher levels of radon migration owing to the fractured substrata is not accounted for in the DEIS. Home radon levels in east Kentucky have not been adequately studied (Haneberg, 2020), but the available research is based on homes which are rarely located on previous mine sites. As has been observed at the Big Sandy Federal Correctional Facility, which is also situated on a former mine site, subsidence of the unstable rock and soils can result in foundation cracking and settling which can thwart construction practices designed to control radon gas migration into the facility such as a concrete slab base and vapor barrier.

The EPA radon map presented on page 130 correctly identifies Letcher County as a Zone 2 region with moderate average radon screening levels falling below the EPA action level of 4pCi/L. However, it should be noted that this average contains a range of data points with a portion of those exceeding 4pCi/L. For example, a study comparing 306 Kentucky home levels with Kentucky Geologic Survey geologic rock formation categories, found that the categories with median levels contained homes with levels ranging from 2.75 to 8.10 pCi/L (Hahn, 2015). Homes with radon accumulation exceeding the EPA action level have been documented in east Kentucky, with one study documenting levels as high as 19.5 pCi/L (Stanifer, 2022).

Further, the DEIS states that “the FBOP shall ensure that the architects/engineers...apply codes and standards and incorporate features to minimize potential for radon to accumulate. This could include ventilation systems...”

Given the high level of uncertainty in radon exposure on the proposed site, as previously noted, and the risk that workers and inmates may be exposed before detection and mitigation, “This could include ventilation systems, etc.” should read “This will include ventilation systems, etc” in order to adequately protect the population. Given the likelihood of subsidence of the underlying strata and the potential for acceptable levels of radon exposure to elevate after subsidence, the DEIS should also affirm that monitoring for radon accumulation after the buildings are inhabited will be continuous.

References

Hahn, E. Gokun, Y. Andrews, W. Overfield, B. Robertson, H. Wiggins, A. Rayens, M. (2015) Radon potential, geologic formations, and lung cancer risk. *Preventive Medicine Reports*, Vol 2, 342-346.

Haneberg, W. C., Wiggins, A., Curl, D. C., Greb, S. F., Andrews, W. M. Jr., Rademacher, K., et al. (2020). A geologically based indoor-radon potential map of Kentucky. *GeoHealth*, 4, e2020GH000263. <https://doi.org/10.1029/2020GH000263>

Stanifer SR, Rayens MK, Wiggins A, Gross D, Hahn EJ.(2022) Home Radon Testing in Rural Appalachia. *J Rural Health*. Jan;38(1):251-261. doi: 10.1111/jrh.12552.

Given the inadequacy of the DEIS to assess and plan for mitigation of radon, I recommend the Letcher County

prison and work camp proposal be withdrawn.

Sincerely,

Beverly May, MSN, DrPH

400 Wilson Creek

Langley, Ky 41645

beverlyanmay@gmail.com

FW: FCI Letcher DEIS Comment - Institute to End Mass Incarceration

Crespo, Andrew <acrespo@law.harvard.edu>

Wed 7/10/2024 12:29 PM

To:Joan Steffen <joan@endmassincarceration.org>;Premal Dharia <premal@endmassincarceration.org>

 1 attachments (395 KB)

FCI Letcher DEIS Comments - Institute to End Mass Incarceration.pdf;

Andrew Manuel Crespo

Morris Wasserstein Public Interest Professor of Law | [Harvard Law School](#)
Executive Faculty Director | [Institute to End Mass Incarceration](#)
Founding Editor | [Inquest](#)

1525 Massachusetts Avenue | Cambridge, MA 02138 | 617.495.3168
Admitted in Massachusetts and the District of Columbia
Authorized to Practice Pending Admission in Kentucky (SCR 2.117)

From: Crespo, Andrew
Sent: Monday, April 15, 2024 6:24 PM
To: 'kshudson@bop.gov' <kshudson@bop.gov>
Cc: Johnson, Devon-HLSCLINICS <djohnson.jd25@hlsclinics.org>; Mackey, Kennedy-HLSCLINICS <kmackey.jd25@hlsclinics.org>; Williams, Christina-HLSCLINICS <cwilliams.jd25@hlsclinics.org>
Subject: FCI Letcher DEIS Comment - Institute to End Mass Incarceration

Dear Chief Hudson,

Attached please find a public comment regarding the Draft Environmental Impact Statement for the proposed FCI Letcher.

Sincerely,

Andrew Manuel Crespo

Morris Wasserstein Public Interest Professor of Law | [Harvard Law School](#)
Executive Faculty Director | [Institute to End Mass Incarceration](#)
Founding Editor | [Inquest](#)

1525 Massachusetts Avenue | Cambridge, MA 02138 | 617.495.3168
Admitted in Massachusetts and the District of Columbia
Authorized to Practice Pending Admission in Kentucky (SCR 2.117)

April 15, 2024

Kimberly Hudson
Chief, Construction and Environmental Review Section
U.S. Department of Justice
Bureau of Prisons
320 First St., NW
Washington, DC 20534

**Re: Public Comment
Draft Environmental Impact Statement
Proposed Development of a New Federal Correctional Institution and Federal
Prison Camp – Letcher County, Kentucky**

Via email to kshudson@bop.gov

Dear Chief Hudson:

We write on behalf of the Institute to End Mass Incarceration in response to the Federal Bureau of Prisons’ proposed construction of a new Federal Correctional Institute and Prison Camp in Letcher County, Kentucky (FCI Letcher). The Bureau’s stated mission is “to foster a humane and secure environment” for incarcerated individuals and to “ensure public safety by preparing [such] individuals for successful reentry into society.”¹ But unfortunately, the recently released Draft Environmental Impact Statement (DEIS) for this proposed prison fails to account for the many ways in which incarcerating people at extreme distances from their homes and families will directly undermine the Bureau’s mission.

The importance of ensuring that people confined in federal facilities are not incarcerated far from home cannot be overstated. In landmark bipartisan legislation, Congress recently reaffirmed this principle, codifying 500 miles as the absolute outer bound at which people in federal facilities may be incarcerated away from their home communities. *See* 42 U.S.C. §3621(b). Making clear that 500 miles is indeed an *outer* limit, the First Step Act goes on to require that individuals must be transferred “to facilities that are closer to [their] primary residence *even if* the prisoner is already in a facility within 500 driving miles of that residence.” *Id.* (emphasis added). Given these statutory requirements, the Bureau itself has appropriately recognized that the First Step Act was enacted “to require BOP to house inmates in facilities *as close to their primary residence as possible*,” and

¹ Federal Bureau of Prisons, *Draft Environmental Impact Statement on Proposed Development of a New Federal Correctional Institution and Federal Prison Camp – Letcher County, KY*, 3 (February 2024), [*hereinafter* DEIS] https://www.proposed-fci-letchercountyky.com/files/ugd/5947b2_6cd3ea7da5044517b0a31a636019012f.pdf.

Bureau Director Colette Peters has recently promised that the agency will “undergo mission changes” to effectuate this mandate.²

And yet now, in direct contravention of these principles, the Bureau proposes to build a new federal prison in the remote mountains of Eastern Kentucky, in a county with a population of 20,000 people that is hundreds of miles away from the major population centers of the Bureau’s Mid-Atlantic Region. If built, FCI Letcher would be 495 miles away from Virginia Beach, the largest city in Virginia. It would be 478 miles from Baltimore, the largest city in Maryland. It would be 466 miles from the Washington, D.C. metropolitan area, home to the nation’s capital and to over six million people.

Over the span of its nearly 200 pages, the DEIS never once mentions these essential facts.

This is a crucial oversight not only because the failure to account for FCI Letcher’s extreme distance from the region’s major cities contravenes congressional intent and Bureau policy, but because prison location is as impactful as sentence length in determining the punitive effects of incarceration.³ Given the demographic composition of the federal incarcerated population, which is predominantly nonwhite and overwhelmingly poor, the intense harms associated with incarceration at extreme distances will have “disproportionately high and adverse human health . . . effects . . . on minority and low-income populations” in ways that the DEIS—in contravention of Executive Order 12898—wholly fails to acknowledge or address.

Moreover, because the DEIS fails to recognize that people incarcerated at FCI Letcher would be incarcerated many hundreds of miles away from their homes and families, the DEIS fails to account for multiple environmental consequences flowing from the decision to locate this prison so far from the communities whose members would fill it.

As you know, under the National Environmental Policy Act, “it is the continuing responsibility of the Federal Government to use all practicable means” to “assure for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331 (emphasis added). Because the Bureau has failed to consider the important factors discussed above and elaborated below, any decision to proceed with the proposed construction of FCI Letcher would violate the National Environmental Policy Act as well as the Bureau’s own stated mission, and would thus be “arbitrary

² Federal Bureau of Prisons, *An Overview of the First Step Act*, <https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=Confinement,practicable%2C%20within%20500%20driving%20miles> (emphasis added); Walter Pavlo, *Bureau Of Prisons Changes In Works To Comply With First Step Act*, *Forbes* (June 23, 2023), <https://www.forbes.com/sites/walterpavlo/2023/06/23/bureau-of-prisons-changes-in-works-to-comply-with-first-step-act/?sh=6952940f5847>.

³ See generally Steven Arrigg Koh, *Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment*, 46 *Vand. J. Transnat’l L.* 1267, 1317 (2013).

and capricious, insufficiently reasoned, and unsupported by substantial evidence” as a matter of law. *Am. Rivers v. Fed. Energy Reg. Comm’n*, 895 F.3d 32, 49, (D.C. Cir. 2018) (holding that an agency’s actions “will pass muster” under NEPA and the Administrative Procedure Act, 5 U.S.C. §706, “only if it undertook a ‘well-considered’ and ‘fully informed’ analysis of the relevant issues and opposing viewpoints”).

The remainder of this comment describes how the DEIS fails to consider the ways in which FCI Letcher’s incarceration of individuals at extreme distance from their homes and families would affect four key stakeholders: (1) incarcerated people at FCI Letcher; (2) the families and supporters of people incarcerated at FCI Letcher; (3) the general public; and (4) the community in Letcher County, KY.

I. Incarceration at Extreme Distance Will Harm People Incarcerated at FCI Letcher

Incarceration at extreme distance will harm the people who would be incarcerated at FCI Letcher in several ways that the DEIS fails to consider. Specifically, these individuals will be harmed by severe isolation from family, which leads to mental and physical harms; by racial and cultural displacement, which compounds other harms; and by lack of access to adequate mental and physical health resources while incarcerated.

A. Increased Harm from Isolation

Incarceration at extreme distance is correlated with a significant drop in family visitation, which in turn has several negative effects on incarcerated individuals.⁴ As recently noted by Yale University scholar Sylvia Ryerson:

As a federal prison, [FCI Letcher] will incarcerate people from across the entire United States. Letcher County has no bus station, no train station, no public transportation access at all, and there is no airport within a hundred miles. It will simply be impossible for most families to get to this prison to visit their loved ones inside.⁵

Ample scholarly research confirms Ryerson’s observations. According to one 2015 study, “[l]ocking people up far from home has the unfortunate but strong effect of discouraging visits,” with the number of visits “fall[ing] as the distance from home increases.”⁶ In fact, a peer-reviewed study from 2024 found that an increase in distance of 100 miles reduces the likelihood of visitation

⁴ See Valerie A. Clark & Grant Duwe, *Distance Matters: Examining the Factors That Impact Prisoner Visitation in Minnesota*, 44 *Crim. J. & Behav.* 184, 199 (2017).

⁵ Sylvia Ryerson, *Building Community*, Inquest (Mar. 28, 2024), <https://inquest.org/building-community/>.

⁶ Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, *Separation by Bars and Miles: Visitation in State Prisons* (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html>.

by 7.4% and decreases the monthly frequency of visits by 17.8%.⁷ For prisons like FCI-Letcher, located many hundreds of miles away from the communities whose members they incarcerate, the impact can be dramatic: Visitation rates fall to 14.5% for people incarcerated 500 miles from home.⁸ Importantly, these distance-related drops in visitation—like so much else regarding American incarceration—fall disproportionately along racial lines. According to a 2016 study, “Black and Latino [people] on average [are] housed farther away from their home communities than [are] White [people]” and, as a result, are “less likely to be visited than White [people].”⁹

As further research confirms, “distal prison placements ... may hinder inmates’ ability to maintain social bonds with family, friends, and community,” which, according to multiple studies, can “create a profound sense of social isolation.”¹⁰ Moreover, people incarcerated at extreme distances from home are “less likely to receive social support, such as assistance or visits from community agencies or family, that may help them to negotiate prison life.”¹¹

Predictably, this severing of familial and social bonds can have several negative consequences—including, perhaps most notably, an increase in antisocial and violent behavior. According to one 2019 study, “prisoners receiving more visits as a result of their relatively close proximity to friends and family are less likely to commit misconduct and, potentially as a direct result, serve less time in prison. One additional visit per month is expected to reduce misconduct by 14% and days incarcerated by 11%.”¹² Relatedly, a 2024 study recently found:

[W]hen in-person visits were banned at the jail in Knox County, Tennessee ... incarcerated people lost the opportunity to maintain healthy social connections. As a result, *assaults between incarcerated people and assaults on staff increased* in the months after the ban on visits was implemented. Data also show[s] that ... disciplinary infractions in the jail increased after the ban.¹³

⁷ Yuki Otsu, *Does Visitation in Prison Reduce Recidivism?*, 43 J. Policy Anal. & Management 126, 143 (2024).

⁸ *Id.* (reporting that visitation rates remain low, at only 25.9%, for individuals incarcerated between 101 and 500 miles from home).

⁹ Joshua C. Cochran et al., *Spatial Distance, Community Disadvantage, and Racial and Ethnic Variation in Prison Inmate Access to Social Ties*, 53 J. Res. Crime & delinquency 220, 224 (2016).

¹⁰ Andrea M. Lindsey et al., *In Prison and Far from Home: Spatial Distance Effects on Inmate Misconduct*, 63 Crime & Delinquency 1043, 1048, 1057 (2017); *see also* Cochran, *supra* n. 9, (observing that “the distance that inmates reside from their home communities ... may have important consequences, and, in particular, may reduce inmates’ access to social ties outside the prison walls”); Rebecca Cooper, *Far From Home, The Additional Punishment of D.C.’s Out-of-State Detention Policy and Opportunities for Reform Notes*, 55 Am. Crim. L. Rev. 789 (2018) (reporting that “[incarceration at] long distances from home imperil[s] ties with family and community members and lead[s] to increased feelings of isolation”)

¹¹ Lindsey, *supra* n. 10.

¹² Logan M. Lee, *Far from Home and All Alone: The Impact of Prison Visitation on Recidivism*, 21 Am. L. & Econ. Rev. 431, 465 (2019).

¹³ Leah Wang, Prison Policy Initiative, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families* (2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/.

At the same time, incarcerated people who experience increased isolation have greater difficulties adjusting to prison, are at a heightened risk for mental illness, and engage in more self-harming behavior.¹⁴ For example, national data on 5,552 incarcerated people found that being incarcerated more than 50 miles from home is associated with increased depression.¹⁵ Further, the increased violence inside the prison that may result from increased feelings of isolation can itself have the effect of worsening incarcerated peoples’ mental health as well, as “exposure to violence in prisons and jails can exacerbate existing mental health disorders or even lead to the development of post-traumatic stress symptoms like anxiety, depression, avoidance, hypersensitivity, hypervigilance, suicidality, flashbacks, and difficulty with emotional regulation.”¹⁶

In sum, the DEIS fails to account for the severe harms that incarceration at extreme distances imposes on incarcerated people, whose inability to maintain family and social relationships leads to increased violence, increased antisocial behavior, and exacerbated mental health deterioration. Siting a prison hundreds of miles away from incarcerated people’s home communities makes the prisons *substantially* less safe—for everyone inside the prison, including both incarcerated individuals and guards, in direct contravention of the Bureau’s stated mission “to foster a humane and secure environment” within the walls of its facilities.¹⁷

B. Increased Harm from Racial and Cultural Displacement

The DEIS also fails to account for the fact that a large portion of the people who will potentially be incarcerated at FCI Letcher would come from communities of color. As of January 2023, there are 158,949 people incarcerated in the Federal Bureau of Prisons, of whom nearly two-thirds are either Black or Hispanic.¹⁸ “The majority of men who are locked up inside USP McCreary,” another federal prison in southeastern Kentucky, “are African American.”¹⁹ Letcher County, by contrast, is 97.9% white.²⁰

According to one study, this starkly divergent demographic reality means that people incarcerated far from home in facilities like the proposed FCI Letcher are effectively “forcibly removed from

¹⁴ Cochran, *supra* n. 9.

¹⁵ Timothy G. Edgemon & Jody Clay-Warner, *Inmate Mental Health and the Pains of Imprisonment*, 9 *Society & Mental Health* 33, 44 (2019).

¹⁶ Katie Rose Quandt & Alexi Jones, Prison Policy Initiative, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health* (2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/>.

¹⁷ DEIS at 2.

¹⁸ U.S. Sentencing Commission, *Quick Facts: Federal Offenders in Prison 1*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2023.pdf (reporting 34.6% of incarcerated people in federal prisons are Black, 31.8% are Hispanic).

¹⁹ Askia Afrika-ber, *Hunger and Violence Dominate Daily Life at USP McCreary, Where D.C. Men Are Incarcerated*, *Wash. City Paper* (Jan. 19, 2024), <https://washingtoncitypaper.com/article/660142/hunger-and-violence-dominate-daily-life-at-usp-mccreary-where-d-c-men-are-incarcerated/>.

²⁰ U.S. Census Bureau, *Quick Facts: Letcher County, KY*, <https://www.census.gov/quickfacts/fact/table/letchercountykentucky/PST045222>.

their home communities and relocated in ‘foreign’ territories” that are not only unfamiliar, but oftentimes hostile—including along explicitly racial lines. As the same study observes, many rural prisons struggle to attract staff members of color “from outside the immediate area” due to overt racism within the institution.²¹

Some African-American staff who have tried to live in the area told of having their car tires slashed and rocks thrown at their home windows. They, and others, recounted racist remarks and insults directed at them by some white staff.... [One recent study] documents numerous incidents of racism in rural prisons around the country [that] include race-based threats, racist remarks and insults, the displaying of racist symbols such as KKK tattoos at work, retaliation against staff who complain about the incidents, and tolerance of such behavior by managers.²²

If matters are this difficult for *staff members* of color, the experience for incarcerated individuals of color—a group marked for special concern under Executive Order 12898—can only be worse.

To be clear, we do not mean to suggest that the residents of Letcher County writ large are racist. But the Bureau’s complete failure in the DEIS to account for the well-documented potential for extreme racism within rurally sited prisons is a severe oversight that will have “disproportionately high and adverse human health . . . effects . . . on minority and low-income populations.” Executive Order 12898. These concerns are only heightened by recent reports of violent racist behavior on the part of guards within Federal Bureau of Prisons facilities, including in neighboring Big Sandy.²³

C. Increased Harm from Inadequate Healthcare

Finally, it is important to note that the harms described thus far—including increased mental health precarity and increased exposure to violence, all resulting from incarceration at extreme distance—are compounded by the fact that people incarcerated far from home suffer from lack of access to adequate healthcare systems. To quote one recent report:

²¹ Leo Carroll, *Prison Siting, Rural Development, Racism, and Justice Reinvestment*, 3 *Criminology & Public Policy* 481, 481 (2004).

²² *Id.*

²³ See U.S. Dep’t of Justice, *Two Former Federal Correctional Officers in Kentucky Sentenced for Assaulting Federal Inmates and Conspiring with a Supervisor to Cover It Up*, <https://www.justice.gov/opa/pr/two-former-federal-correctional-officers-kentucky-sentenced-assaulting-federal-inmates-and> (reporting that guards assaulted a white person incarcerated at Big Sandy because they considered him a “race traitor” for affiliating with Black people); see also Wash. Lawyers’ Cmte. for Civil Rights & Urban Affairs, *Cruel and Usual: An Investigation into Prison Abuse at USP Thomson 3* (2023) (reporting that racism “was rampant” in the Special Management Unit at USP Thomson, where “White SMU staff commonly targeted Black individuals in the SMU, hurling egregious racial slurs such as ‘boy,’ ‘n****r,’ or ‘Black bitch’ while committing acts of violence against them, and even made threats to ‘make you the next George Floyd’”), <https://www.washlaw.org/wp-content/uploads/2023/07/Cruel-and-Usual-An-Investigation-Into-Prison-Abuse-at-USP-Thomson.pdf>

[People incarcerated] in rural regions do not have reliable access to care services, such as mental health or addiction counselling (Deslich, Thistlewaite, & Coustasse, 2013). This is not particularly surprising, as rural regions in general suffer from difficulties in accessing these types of care (Stanton-Tindall, Harp, Minieri, Oser, Webster, Havens, & Leukefeld, 2015). The relatively limited access to health or mental care services in these rural areas additionally reduces the services available for rural prisons (Stanton-Tindall et al., 2015). Many individuals entering rural prisons score highly on need assessments, showing that they need to be able to receive help for issues such as drug abuse histories, mental health problems, or traumatic incidents. Those with higher score on need assessments have a greater need for services, meaning that the lack of available services does have a serious impact on the inmates (Stanton-Tindall et al., 2015). On a similar note, the distance from urban centers reduces the ease of access to medical care, which could have serious consequences if an inmate suffers from a severe incident requiring emergency care beyond the ability of the correctional facility to provide (Courtright et al., 2010).²⁴

The Bureau's wholesale failure to acknowledge these concerns in its DEIS fails to satisfy its legal "responsibility," under NEPA "to use all practicable means" to "assure for *all* Americans safe, healthful . . . surroundings" and to avoid "risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331.

II. Incarceration at Distance Fundamentally Harms Families of Incarcerated Folks

In addition to harming incarcerated individuals themselves, incarceration at long distances also fundamentally harms their families. The DEIS fails to account for many of the hardships these families would be forced to endure if FCI Letcher were to be constructed. These hardships include harms stemming from the isolation and remoteness of distant incarceration for those unable to visit incarcerated loved ones, and also the burdens and costs of travel to distant prison sites for those who are able to attempt the journey.

²⁴ Matthew D. Vanden Bosch, *Rural Prison Siting: Problems and Promises*, 19 Mid-Southern J. Crim. Just. 1, 4-5 (2002) (citing Deslich, et al. *Telepsychiatry in correctional facilities: Using technology to improve access and decrease costs of mental health care in underserved populations*, 17 *Permanente* 80-86 (2013); Stanton-Tindall et al., *An exploratory study of mental health and HIV risk behavior among drug using rural women in jail*, 38 *Psychiatric Rehabilitation Journal* 45-54 (2015); and Courtright et al., *Prisons and rural Pennsylvania communities: Exploring the health of the relationship and the possibility of improvement* 90 *Prison Journal* 69-93 (2010)); cf. Eric J. Wodahl, *The Challenges of Prisoner Reentry from a Rural Perspective*, 7 *Western Criminology Rev.* 32 (2006).

A. Harms from Isolation for Families

As noted above, incarceration at extreme distance substantially exacerbates the difficulty—already inherent in incarceration itself—of maintaining familial relationships. In addition to harming incarcerated individuals, this separation and isolation imposes negative harms on family members, often termed “secondary prisonization.”

Secondary prisonization refers to “the process through which the prison alters the routines, relationships, emotions, appearance, and worldview of” people whose loved ones are incarcerated, such that they experience “restricted rights, diminished resources, social marginalization, and other consequences of penal confinement.”²⁵ Though free, these family members are forced to suffer consequences as a result of their loved one’s incarceration—and many of these consequences are most extremely suffered by those who are socio-economically disadvantaged. In fact, researchers using a nationally-representative sample of incarcerated people found that lower income parents are less likely to be visited by their children due to the ways economic disadvantage shapes the impacts of distance from home.²⁶ In this way again, proposed FCI Letcher violates Executive Order 12898, insofar as it disproportionately harms lower income communities by making it harder for their members to visit incarcerated loved ones.²⁷

Importantly, secondary prisonization causes well-documented and substantial negative effects on mental health. According to one study, “as compared with [a] control group, parents with sons/daughters in remote prisons showed higher depressive, anxious, and stress-related symptomatology [and] lower levels of positive mental health.”²⁸ According to another study, about 80% of fathers reported difficulty keeping in touch with their children and other family members while incarcerated—and cited distance between the prison and their families’ residence as the greatest barrier to ongoing contact.²⁹ The Survey of Prison Inmates completed by the Bureau of Justice Statistics corroborated this finding, confirming that the most common reason why incarcerated parents do not receive visits from their children is extreme distance between home and prison.³⁰

²⁵ Boppre, Dehart, & Shapiro, “*The Prison System Doesn’t Make It Comfortable to Visit*”: *Prison Visitation from the Perspectives of People Incarcerated and Family Members*, 49(10) *Criminal Justice and Behavior* 1474, 1476 (2022).

²⁶ Batya Y. Rubenstein, Elisa L. Toman & Joshua C. Cochran, *Socioeconomic Barriers to Child Contact with Incarcerated Parents*, 38 *Justice Quarterly* 725, 741 (2021).

²⁷ DEIS at 97.

²⁸ Luixa Reizabal et al., *Psychological Effects of Secondary Prisonization on Older Parents*, 31 *Trends In Psych.* 16 (2023); see also Venezia Michalsen, Jeanne Flavin & Tanya Krupat, *More than Visiting Hours: Maintaining Ties Between Incarcerated Mothers and Their Children*, 4 *Sociology Compass* 576, 579 (2010).

²⁹ See Muentner & Charles *Family reunification after fathers are released from prison: Perspectives on children’s adjustment* 72 *Family Relations* 1068, 1074 (2023).

³⁰ See Leah Wang, Prison Policy Initiative, *Both Sides of the Bars: How Mass Incarceration Punishes Families* (2022), https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/.

A wealth of empirical research suggests that children of incarcerated folks in particular suffer immeasurably from the reality of life with an incarcerated parent, and that such impacts are exacerbated when distance further strains a child’s relationship with an incarcerated parent. For instance, one study found that children of incarcerated individuals are more likely to misbehave in school, drop out of school, develop learning disabilities, suffer from psychological and physical disorders, and experience homelessness.³¹ Just as more visitation is shown to have positive impacts for incarcerated individuals, the same is true for their children. A report of 50 years of empirical studies found that increased and consistent contact between incarcerated individuals and their families, most notably through in-person visitation, resulted in positive impacts for everyone—including better health and improvement in school for children.³² More specifically, a study focusing on California’s incarcerated populations found that visiting parents in prison can decrease children’s feelings of loss or separation, help dissolve fear or fantasies about prison by seeing it firsthand, and encourage discussion of the situation and address issues that could lead to shame or fear.³³

Parents of incarcerated individuals are similarly negatively impacted by distant incarceration, with one study finding marked impacts on “older parents whose sons or daughters are incarcerated in remote prisons.”³⁴ Though they are less likely to depend on the incarcerated individual in the same way that a child depends on a parent, fundamental themes of the parental relationship are strained—acutely so for aging parents who struggle both physically and financially to maintain a relationship with their incarcerated child through visitation. A study of older parents of incarcerated individuals found that distant incarceration caused increased risk of anxiety, risk of depression, and stress-levels while decreasing overall well-being.³⁵

Finally, spouses and partners of incarcerated individuals share in many, if not all, of the sociopsychological effects discussed above and thus likewise experience secondary prisonization that is aggravated by incarceration at extreme distances. Indeed, for spouses and partners who also co-parent with incarcerated loved ones, the stresses and mental health ramifications are only compounded—as they both directly experience secondary prisonization at extreme distance, and also have the added stress of caring for children suffering from these harms.

B. Burdening Costs of Travel for Families

Most family members and loved ones of incarcerated individuals desperately want to see their incarcerated loved ones as often as they can. But when those loved ones are incarcerated at extreme

³¹ See Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, (Dec. 15 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/>.

³² Wang, *supra* n. 13.

³³ Koklas, *The Impact of Family Separation for the Loved Ones of California’s Incarcerated Population*, ProQuest Dissertations Publishing (2021).

³⁴ Reizabal, *supra* n. 28.

³⁵ *Id.*

distances, as would be the case with FCI Letcher, the cost of visitation can be overwhelming. Following a survey and interviews of 200 individuals, the *Marshall Project* reported that many respondents “said they didn’t have the time, money, childcare or car to make the journey to these facilities as often as they would like. Others said they could not afford to visit at all.”³⁶

For those who do try to make the journey to FCI Letcher, the cost of visitation will be exacerbated by the remoteness and isolation of the site. As the DEIS recognizes, there are no modes of public transit operating in Letcher County.³⁷ Members of our Institute can attest from firsthand experience that even individuals with financial means struggle to travel to Letcher County from far away, as the journey requires a serious investment of time and money. Flying into town is not an option as the nearest airport is over 100 miles and many hours away, and inaccessible by public transit.

But of course, most of the families of the people slated to be imprisoned at FCI Letcher will be low-income. As a result, even airfare is not always an option. Rather, as recent experience shows, the people who would be traveling to FCI Letcher from the places where its incarcerated prisoners live will routinely have to drive “eight or nine hours to be [t]here.”³⁸ Given that extreme distance, they will invariably need to extend their time in the area by staying overnight, which will only add to the costs of the trip due to the need to pay for lodging accommodations. At the same time, myriad other costs—like paid childcare—can be anticipated, all to be borne primarily by low-income people of color, a group that Executive Order 12898 directs the Bureau to carefully account for in the DEIS.

In addition to increased financial burdens, the remoteness of FCI Letcher and associated need for overnight stays will require longer absences from daily responsibilities like school and work. The negative consequences of regular or extended absence from school or work are immeasurable and grave. And once again, these absences are especially burdensome for low-income people already facing financial strain and employment insecurity. This is especially true for spouses who are already working to support a household alone due to the incarceration of their partner.

Finally, as noted above, people of color often encounter cultural challenges—including overt racism—when traveling through some areas very remote from where they live.³⁹ Just like the incarcerated folks sent to these remote areas, families traveling to visit their loved ones will face increased risk of and exposure to these negative impacts.

³⁶ Beatrix Lockwood & Nicole Lewis, *This Is What It's Like to Visit a Family Member in Prison*, The Marshall Project (Dec. 18, 2019), <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison>.

³⁷ DEIS at 119.

³⁸ Katie Myers, *Back to Appalachia*, Inquest (Apr. 11, 2024), <https://inquest.org/back-to-appalachia/>.

³⁹ Carroll, *supra* n. 21.

III. Incarceration at Distance Creates Negative Externalities For the General Public

The consequences of incarcerating individuals extremely far away from their homes are not limited to incarcerated people and their families. Serious negative externalities, unaccounted for in the DEIS, will also befall the general public. These include increased recidivism among people incarcerated at extreme distance following their release, antidemocratic distortions to our political system, and adverse environmental impacts associated with travel over extreme distances.

A. Recidivism

While professing the Bureau’s mission of “preparing individuals for successful reentry into society,” the DEIS fails to acknowledge the wealth of empirical research showing that incarceration at extreme distance leads to reduced visitation which, in turn, negatively impacts reentry.⁴⁰ This is because lack of visitation not only causes increased anti-social behavior and psychological distress while people are incarcerated—it also makes their re-entry following release less successful.

In particular, it is imperative to recognize—as the DEIS does not—that individuals who are incarcerated at extreme distances are more likely to engage in new criminal activity upon release.⁴¹ As discussed previously, maintaining meaningful and prosocial connections with family members while incarcerated at extreme distance is extraordinarily difficult. For incarcerated people lacking the opportunity for such visitation, recidivism rates are markedly higher. In fact, a peer-reviewed meta-analysis found that incarcerated men who experienced visitation experienced a 53% decrease in recidivism upon release.⁴² Indeed, “[a] rigorous Minnesota Department of Corrections study found that a *single* visit reduces recidivism by 13% for new crimes and 25% for technical violations.”⁴³ The Bureau’s utter failure to account for these well documented findings runs entirely counter to its mission as stated in the DEIS. Rather than “ensure public safety by preparing [incarcerated] individuals for successful reentry into society,” the proposal to site this prison hundreds of miles away from those individuals’ homes poses a risk not only to them but to the general public, which would bear the potentially devastating consequences of the Bureau’s proposed criminogenic policies.

The Bureau’s failure to account for the increased recidivism risks associated with incarceration at extreme distance is even more glaring when compared to what the DEIS *does* claim about the

⁴⁰ DEIS at 2.

⁴¹ See generally Meghan M. Mitchell et al., *The Effect of Prison Visitation on Reentry Success: A Meta-Analysis*, 47 *Journal of Criminal Justice* 74 (2016).

⁴² *Id.*

⁴³ Rabuy & Kopf, *supra* n. 6 (citing Minnesota Department of Corrections, *The Effects of Prison Visitation on Offender Recidivism* (St. Paul, MN: Minnesota Department of Corrections, November 2011) (emphasis added); see also Wang, *supra* n. 13 (finding that in Florida prison each additional visit during incarceration lowered the odds of two-year recidivism by 3.8 percent).

Bureau’s reentry programming. In an apparent effort to indicate compliance with the correctional reforms legislated by Congress in the First Step Act, the DEIS discusses evidence-backed programs shown to reduce recidivism, including those promoting “family relationship building, structured parent-child interaction, and parenting skills” and “reintegrative community services.”⁴⁴ But these are the very types of programming that the remoteness of FCI Letcher would make unavailable to the people incarcerated in the proposed facility. Indeed, scholarship demonstrates that “the likelihood of such programming being successful is increasingly limited as incarcerated folks are farther from home and administrators are less familiar with local services” in the distant communities to which they will return.⁴⁵ The DEIS itself concedes that “Federal AIC are not released to the host community (i.e. Letcher County) at the completion of their sentence” and that “Federal AIC and their dependents also generally do not return to the place of incarceration upon release.”⁴⁶ This makes the DEIS’s suggestion that “reintegrative community services” will occur at FCI Letcher a complete farce. Letcher County is hundreds of miles from incarcerated individuals’ home communities and thus entirely ill-positioned to employ staff capable of connecting the people it would incarcerate with post-release services such as housing, employment, and treatment in the communities to which they will return.

In sum, by incarcerating people hundreds of miles from their home communities, the BOP is simultaneously increasing their risk of recidivism and denying them any legitimate hope at meaningful reentry programming. The predictable harms of this proposed decision will befall not only the incarcerated individuals who may find themselves back in prison, but the community members they will return to upon release. Put more simply, FCI Letcher is guaranteed to be criminogenic—its existence will produce more crime in the world, and thus more harm. An agency invested in supporting family relationships and reintegrative community services would not and should not construct a new prison that would sequester incarcerated people hundreds of miles from their home communities.

B. Prison Gerrymandering

By proposing the construction of FCI Letcher, the BOP is also actively proposing needless harms to our democracy caused by prison gerrymandering.

Under currently applicable policy, the U.S. Census Bureau “generally locates people where it deems them to ‘live and sleep most of the time.’ For people in prison, this means the site of their incarceration rather than their home communities, even though in most cases they have no

⁴⁴ DEIS at 24.

⁴⁵ Cooper, *supra* n. 10.

⁴⁶ DEIS at 91.

meaningful connection to that area.”⁴⁷ This policy predictably inflates the political representation of mostly white and rural communities that host prisons, at the expense of urban minority sending communities—who lose not only the physical presence of loved ones and community members, but also the voting representation and federal aid and investment flowing from an artificially “declining” population.⁴⁸ This practice contravenes the basic principles of the Equal Protection Clause’s one-person one-vote doctrine and exacerbates racial disparities in electoral power.⁴⁹ Moreover, prison gerrymandering dehumanizes incarcerated people, who are counted in the census but who largely cannot vote and have neither a future nor a past in the place where they are incarcerated. The people slated to be incarcerated at FCI Letcher would, in short, be “ghost constituents.”⁵⁰ Their interests will be ignored by the elected officials in Kentucky who will claim credit for pork off their backs but will never have to answer to them at the ballot box or represent their interests in the legislature.⁵¹ Indeed, prison gerrymandering provides these elected officials with a perverse incentive to oppose criminal justice reforms—including by supporting a broadly unpopular prison project consistently opposed by both the Trump and Biden administrations, in an effort to aggrandize their own political power.

And yet, the DEIS perversely describes FCI Letcher’s distortions of the democratic process as a benefit:

Federal AIC are considered to be residents of the area in which they are housed and are counted as such by the U.S. Census Bureau at the time of the decennial census. Therefore, federal AIC, when housed within a local jurisdiction during the decennial census, can act to increase the community’s population which may benefit the host community in some state and federal aid programs without consuming any housing or increasing the burden on community services.⁵²

This statement is a celebration of prison gerrymandering, plain and simple. It treats the bodies of incarcerated individuals—who will disproportionately be people of color—as chattel enrichments for white, rural Letcher County at the expense of the communities where they and their families live. It is beneath the Bureau, it is beneath the Biden Administration, and it is shameful.

⁴⁷ Garrett Fisher, Taylor King & Gabriella Limón, *Prison Gerrymandering Undermines Our Democracy*, (2021), <https://www.brennancenter.org/our-work/research-reports/prison-gerrymandering-undermines-our-democracy> (quoting Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525 (Feb. 8, 2018)).

⁴⁸ Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 Stan. L. Rev. 1473, 1473 (2017).
⁴⁹ *Id.*

⁵⁰ Erika L. Wood, *One Significant Step: How Reforms to Prison Districts Begin to Address Political Inequality*, 49 U. Mich. J.L. Reform 179, 184 (2015)

⁵¹ *Id.* at 1484.

⁵² DEIS at 91.

C. Environmental Impacts

Finally, because the DEIS fails to acknowledge the fact that FCI Letcher would incarcerate people extremely far from their homes, it fails to account for the full scope of environmental impacts caused by the proposed project. Because there are no public transit options available in Letcher County, the DEIS rightly observes that “motor vehicle operations represent another potential source of project-related air quality impacts.”⁵³ Still, the DEIS confidently declares that “the volume of operation-related traffic is not expected to result in a contravention of NAAQS or in a significant adverse impact.”⁵⁴

But this assertion is incorrect, because the DEIS’s calculations consider neither visitor traffic nor the extreme distances that visitors will need to drive in order to visit FCI Letcher. Indeed, while the DEIS acknowledges that staff members will commute to the prison, it merely asserts—without explanation or analysis—that vehicle traffic will be impacted “to a lesser degree by visitors traveling to the facility.”⁵⁵ To be sure, for the reasons noted above, visitation to FCI Letcher will be severely hampered by its extremely remote location. But visitation will not be *zero*. And for those who do visit, they will invariably have to drive *hundreds* of miles in *both* directions for every visit. The Bureau’s failure to calculate, or even estimate, the impact on air quality that these long drives will have on air quality throughout the region renders the DEIS incomplete and statutorily inadequate.

IV. Negative Externalities from the Proposed Construction Will Disproportionately Impact the Letcher County

The negative environmental externalities associated with FCI Letcher described above will be compounded and acutely felt by the people of Letcher County. But again, these harms are unacknowledged in the DEIS.

Two harms in particular bear emphasis. First, the DEIS section on housing (section 3.13) acknowledges a “lack of available and suitable housing and hotel and motel accommodations [that] will likely limit the number of workers and their families from relocating to Letcher County during construction.”⁵⁶ But the report fails to acknowledge that there will be a need to build new long-term and short-term housing *after* construction is completed. There will undoubtedly be housing needs for many of the 325 employees who may wish to relocate to Letcher to avoid long commutes. Further, given the extreme distance at which many of the men incarcerated at FCI will be from home, some loved ones may choose to permanently relocate to Letcher County to facilitate

⁵³ *Id.* at 128.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 89.

continuing family connectedness. And for those who do not move, visitors will need overnight accommodations given the hundreds of miles they will be required to drive in each direction to visit the prison. But as the DEIS acknowledges, major construction projects (like the proposed prison) have meaningful and myriad environmental impacts. The DEIS evaluates some of those impacts for the prison itself, but it does not analyze at all the environmental impacts stemming from the need to build all the other many buildings necessary to accommodate migration to this remote site.

Second, because the prions is sited for a rural location without any public transportation, everyone who commutes to the prison will have to drive. According to the DEIS's own estimates, "[t]he proposed FCI/FPC workforce is expected to total approximately 325 employees who will travel to and from the facility over a 24-hour period, seven days a week."⁵⁷ Using a "conservative estimate," this means that approximately 325 single-occupancy vehicles would be on the roads to transport staff to and from the prison each day.⁵⁸ The Roxana Site is accessed via KY 588. According to Annual Average Daily Traffic counts performed along KY 588, this route averaged 371 vehicles per day in 2020.⁵⁹ In other words, the commuting patterns of prison staff *alone* would increase the vehicle traffic along this route, and therefore vehicle emissions, by nearly 200%, before even accounting for increased traffic from visitors. And yet, while the DEIS's own calculations show a major increase in local traffic, the report asserts without analysis or justification that there will be no significant adverse impact on local air quality.

These failures to account for the acute environmental impacts on the local Letcher Community are yet another example of the DEIS's failure to heed the mandate Executive Order 12898, which requires "identifying and addressing disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations."⁶⁰ According to the DEIS, "Approximately 28.7 percent of Letcher County's population is living below the poverty line which is higher than the state (16.5 percent) and considerably higher than the U.S. (12.8 percent)."⁶¹ These economic hardships have only increased in the wake the devastation caused by historic flooding in 2022.⁶² Given these extreme poverty rates and economic hardships, the Bureau's lack of analysis regarding the locally concentrated negative externalities flowing from the construction of FCI Letcher raise serious environmental justice concerns.

⁵⁷ *Id.* at 128.

⁵⁸ *Id.*

⁵⁹ *Id.* at 118.

⁶⁰ *Id.* at 97.

⁶¹ *Id.* at 94.

⁶² See Tarence Ray, *After the Flood*, The Baffler (Nov. 9, 2023), <https://thebaffler.com/latest/after-the-flood-ray>.

V. Conclusion

For the reasons stated above, the Institute to End Mass Incarceration strongly opposes the Federal Bureau of Prison’s proposed construction of a new Federal Correctional Institute and Prison Camp in Letcher County, Kentucky. In clear contravention of the Bureau’s stated mission “to foster a humane and secure environment” for incarcerated individuals and to “ensure public safety by preparing [such] individuals for successful reentry into society,” the DEIS fails to account for a multitude of harms to incarcerated people, their families, the general public, and the community in Letcher County.⁶³ For those whom the prison would incarcerate at extreme distances from home—and for their families and loved ones left behind—the consequences would be dire: increased violence and mental-health deterioration for those inside the prison, increased financial and psychosocial burdens for those suffering from secondary prisonization hundreds of miles back home. At the same time, the prison will make society less safe and secure because incarcerating individuals so far from home is a proven way to increase recidivism when people are released. Finally, the proposed prison will distort democracy by stealing representational voice and federal investments from the communities that send their members to this rural site—all while increasing the environmental burdens on the local community.

The National Environmental Policy Act requires the Bureau to conduct “a ‘well-considered’ and ‘fully informed’ analysis of the relevant issues and opposing viewpoints.” *Am. Rivers v. Fed. Energy Reg. Comm’n*, 895 F.3d 32, 49, (D.C. Cir. 2018). To do that, the Bureau must at the very least *acknowledge* the essential and serious harms associated with building a prison at an extremely remote location far removed from the homes of the people it will incarcerate. Once those harms are factored into the analysis, it is self-evident that the proposal to build this new prison contravenes the “responsibility of the Federal Government to use all practicable means” to “assure for *all* Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331 (emphasis added). For that reason, the only appropriate record of decision that can be supported on the current record is the “no action alternative.” *Id.* §4332. As the administrations of both President Trump and President Biden—the current and immediately preceding chief executives, and the two men running for President today—have repeatedly and consistently concluded, this prison simply should not be built.

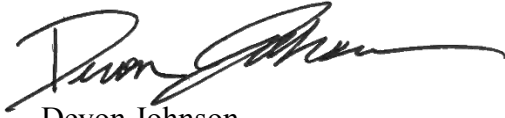
Respectfully submitted,



Andrew Manuel Crespo

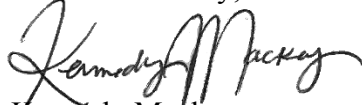
Executive Faculty Director, Institute to End Mass Incarceration

⁶³ DEIS at 2.



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Emily Posner <emilyposnerlaw@gmail.com>

Fwd: DEIS Comment - FCI Letcher

1 message

Fight Toxic Prisons <fighttoxicprisons@gmail.com>
To: Emily Posner <emilyposnerlaw@gmail.com>

Fri, Aug 9, 2024 at 5:00 PM

----- Forwarded message -----

From: **Fight Toxic Prisons** <fighttoxicprisons@gmail.com>
Date: Mon, Apr 15, 2024, 11:58 PM
Subject: DEIS Comment - FCI Letcher
To: <kshudson@bop.gov>

Hello Mrs. Hudson,
Please accept the attached comment on the FCI Letcher DEIS.

Sincerely,
Fight Toxic Prisons

 **EJ Comment - FCI Letcher DEIS - Martinez-Mazurek, Thomas, Pellow.pdf**
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Exhibit I

To the Federal Bureau of Prisons,

In this comment we will lay out multiple glaring deficiencies in the Draft Environmental Impact Statement for the proposed FCI Letcher prison and its prison camp regarding the DEIS' analysis and considerations around environmental justice matters.

While the DEIS references the USEPA definition of environmental justice alongside sections of EO's 12898 and 14096, as experts in environmental justice we find the DEIS' engagement to be incredibly surface level at best, and willfully ignoring key components of environmental justice practice and policy at worst. The definition of environmental justice cited in the DEIS, "(EPA 2022)" appears outdated and it is difficult to confirm where this definition was pulled from as there is no "EPA 2022" document in the list of references provided in the DEIS. This poses serious concerns and an immediate question that needs to be answered: Why is the DEIS using an incomplete and outdated definition of environmental justice? From this standpoint alone the entirety of the Environmental Justice section needs to be re-written and brought up to current Federal standard.

Further, nowhere in the DEIS sections covering environmental justice is the most directly impacted community considered: current Federal BOP prisoners who will be transferred to FCI Letcher and its prison camp. Furthermore, no "sending communities", families, or loved ones of those incarcerated were consulted within the 500-mile BOP transfer radius. This raises more serious questions that the Final EIS must address: Why does the DEIS willfully ignore prisoners in its environmental justice analysis when that is the primary population the BOP is responsible for? Why did the BOP not engage whatsoever with communities in major population centers within the 500-mile radius where prisoners will come from, including DC, Chicago, Atlanta, Nashville, Louisville, and more?

At the initial Public Scoping meeting in 2022, and again at the DEIS Public Hearing in Letcher County the BOP representatives made a concerted point that DEIS will include environmental justice considerations. Given the shockingly superficial level of engagement with the very concept of environmental justice, one that willfully ignores the incarcerated population that will be the most directly impacted by this prison, a much more pointed question is raised. Do the DEIS drafters and the BOP itself not consider prisoners people? Completely ignoring prisoners, much less their communities and loved ones, within the environmental justice analysis of the DEIS would suggest so. If the drafters of the DEIS and the BOP do, in fact, consider prisoners people then why are they not mentioned whatsoever in the environmental justice sections of the DEIS?

Due to the outdated definitions provided in the DEIS we will use the current definitions on Environmental Justice provided both on the EPA website and in Executive Order 14096.

On its website the USEPA provides the following definitions in regards to Environmental Justice:

“Environmental justice means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

- are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and
- have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

Meaningful engagement means:

- providing timely opportunities for members of the public to share information or concerns and participate in decision-making processes;
- fully considering public input provided as part of decision-making processes;
- providing technical assistance, tools, and resources to assist in facilitating meaningful and informed public participation, whenever practicable and appropriate;
- seeking out and encouraging the involvement of persons and communities potentially affected by Federal activities by:
- ensuring that agencies offer or provide information on a Federal activity in a manner that provides meaningful access to individuals with limited English proficiency and is accessible to individuals with disabilities;
- providing notice of and engaging in outreach to communities or groups of people who are potentially affected and who are not regular participants in Federal decision-making; and
- addressing, to the extent practicable and appropriate, other barriers to participation that individuals may face.”

Executive Order 14096 “Revitalizing Our Nation's Commitment to Environmental Justice for All”, Under Section 2 “Definition”, sub-bullet b, offers the same definition of Environmental Justice as the EPA:

“Sec. 2. Definitions. As used in this order: ...

(b) “Environmental justice” means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

(i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.”

And in Section 3 “Government Wide Approach to Environmental Justice” further expands upon the Meaningful Engagement definition provided by the EPA directing each Federal agency to pursue the following:

Sec. 3 . Government-Wide Approach to Environmental Justice. (a) Consistent with section 1–101 of [Executive Order 12898](#) and each agency's statutory authority, each agency should make achieving environmental justice part of its mission. Each agency shall, as appropriate and consistent with applicable law:

(i) identify, analyze, and address disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns;

(ii) evaluate relevant legal authorities and, as available and appropriate, take steps to address disproportionate and adverse human health and environmental effects (including risks) and hazards unrelated to Federal activities, including those related to

climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns;

(iii) identify, analyze, and address historical inequities, systemic barriers, or actions related to any Federal regulation, policy, or practice that impair the ability of communities with environmental justice concerns to achieve or maintain a healthy and sustainable environment;

(iv) identify, analyze, and address barriers related to Federal activities that impair the ability of communities with environmental justice concerns to receive equitable access to human health or environmental benefits, including benefits related to natural disaster recovery and climate mitigation, adaptation, and resilience;

(v) evaluate relevant legal authorities and, as available and appropriate, take steps to provide, in consultation with unions and employers, opportunities for workforce training and to support the creation of high-quality and well-paying jobs, including union jobs, for people who are part of communities with environmental justice concerns;

(vi) evaluate relevant legal authorities and, where available and appropriate, consider adopting or requiring measures to avoid, minimize, or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities on communities with environmental justice concerns, to the maximum extent practicable, and to address any contribution of such Federal activities to adverse effects—including cumulative impacts of environmental and other burdens—already experienced by such communities;

(vii) provide opportunities for the meaningful engagement of persons and communities with environmental justice concerns who are potentially affected by Federal activities, including by:

(A) providing timely opportunities for members of the public to share information or concerns and participate in decision-making processes;

(B) fully considering public input provided as part of decision-making processes;

(C) seeking out and encouraging the involvement of persons and communities potentially affected by Federal activities by:

(1) ensuring that agencies offer or provide information on a Federal activity in a manner that provides meaningful access to individuals with limited English proficiency and is accessible to individuals with disabilities;

(2) providing notice of and engaging in outreach to communities or groups of people who are potentially affected and who are not regular participants in Federal decision-making; and

(3) addressing, to the extent practicable and appropriate, other barriers to participation that individuals may face; and

(D) providing technical assistance, tools, and resources to assist in facilitating meaningful and informed public participation, whenever practicable and appropriate;

(viii) continue to engage in consultation on Federal activities that have Tribal implications and potentially affect human health or the environment, pursuant to [Executive Order 13175](#) of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), the Presidential Memorandum of January 26, 2021 (Tribal Consultation and Strengthening Nation-to-Nation Relationships), and the Presidential Memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation), and fulfill obligations established pursuant to [Executive Order 13007](#) of May 24, 1996 (Indian Sacred Sites);

(ix) carry out environmental reviews under the National Environmental Policy Act (NEPA), [42 U.S.C. 4321](#) *et seq.*, consistent with the statute and its implementing regulations and through the exercise of the agency's expertise and technical judgment, in a manner that:

(A) analyzes direct, indirect, and cumulative effects of Federal actions on communities with environmental justice concerns;

(B) considers best available science and information on any disparate health effects (including risks) arising from exposure to pollution and other environmental hazards, such as information related to the race, national

origin, socioeconomic status, age, disability, and sex of the individuals exposed; and

(C) provides opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action, including when establishing or revising agency procedures under NEPA;

(x) in accordance with Title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d](#), and agency regulations, ensure that all programs or activities receiving Federal financial assistance that potentially affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, policies, practices, or methods of administration that discriminate on the basis of race, color, or national origin;

(xi) ensure that the public, including members of communities with environmental justice concerns, has adequate access to information on Federal activities, including planning, regulatory actions, implementation, permitting, compliance, and enforcement related to human health or the environment, when required under the Freedom of Information Act, [5 U.S.C. 552](#); the Government in the Sunshine Act, [5 U.S.C. 552b](#); the Clean Air Act, [42 U.S.C. 7401 et seq.](#); the Clean Water Act, [33 U.S.C. 1251 et seq.](#); the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), [42 U.S.C. 11001 et seq.](#); or other environmental statutes with public information provisions;

(xii) improve collaboration and communication with State, Tribal, territorial, and local governments on programs and activities to advance environmental justice;

(xiii) encourage and, to the extent permitted by law, ensure that Government-owned, contractor-operated facilities take appropriate steps to implement the directives of this order;

(xiv) consider ways to encourage and, as appropriate, ensure that recipients of Federal funds—including recipients of block grant funding—and entities subject to contractual, licensing, or other arrangements with Federal agencies advance environmental justice;

(xv) develop internal mechanisms to achieve the goals of this order, including by:

- (A) creating performance metrics and other means of accountability;
- (B) identifying and dedicating staff, funding, and other resources; and
- (C) providing appropriate professional development and training of agency staff; and

(xvi) consistent with section 2–2 of [Executive Order 12898](#), ensure that Federal activities do not have the effect of:

- (A) excluding persons, including populations, from participation in Federal activities on the basis of their race, color, or national origin;
- (B) denying persons, including populations, the benefits of Federal activities on the basis of their race, color, or national origin; or
- (C) subjecting persons, including populations, to discrimination on the basis of their race, color, or national origin.

(b) The Administrator of the Environmental Protection Agency (EPA) shall:

(i) in carrying out responsibilities under section 309 of the Clean Air Act, [42 U.S.C. 7609](#), assess whether each agency analyzes and avoids or mitigates disproportionate human health and environmental effects on communities with environmental justice concerns; and

(ii) report annually to the Chair of the Council on Environmental Quality (CEQ) and the White House Environmental Justice Interagency Council (Interagency Council) described in section 7 of this order on EPA's Clean Air Act section 309 reviews regarding communities with environmental justice concerns and provide recommendations on legislative, regulatory, or policy options to advance environmental justice in Federal decision-making.

(c) In carrying out assigned responsibilities under Executive Order 12250 of November 2, 1980 (Leadership and Coordination of Nondiscrimination Laws), the Attorney General shall assess agency efforts to ensure compliance with civil rights laws in programs and activities receiving Federal financial assistance that potentially affect human health or the

environment and shall report annually based on publicly available information to the Chair of CEQ regarding any relevant pending or closed litigation.

Let us take the definition and mandates provided to each agency within EO 14096 line by line and compare it to the current DEIS.

“Sec. 2. Definitions. As used in this order: ...

(b) “Environmental justice” means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

(i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.”

It is fundamentally necessary to proactively consider and engage incarcerated people in the DEIS and consider the unique status of prisons from an Environmental Justice lens. First, the enduring environmental justice reframing of “the environment” as those spaces where we “live, work, play, learn, and pray” is particularly true in the prison system since, unlike ‘free persons,’ prisoners do all of those things in a single place where they have little choice to do otherwise. As such, we might revise and expand that definition of the environment so that it reads, where we “live, work, play, learn, pray . . . and do time.” The question of space, race, and environment is much starker given the immobilizing effects of prison — insofar as prisoners’ mobility is almost entirely determined by prison authorities. This is particularly relevant considering the longstanding debate in environmental justice (EJ) studies about the relative freedom of choice that people of color have to move in and out of contaminated neighborhoods. Paul Mohai and Robin Saha have presented strong evidence that the “minority move-in” hypothesis (the claim that environmental racism is largely the result of people of color moving into already polluted neighborhoods in order to access cheap housing)

is misguided, since the vast majority of cases of environmental racism occur when polluting facilities follow residents of color, not the other way around. In the case of the prison system, this is essentially a moot point since prisoners have virtually no say in where they serve time and are therefore, entirely at the mercy of the courts and prison authorities. Sources; David N. Pellow & Jasmine Vazin, *The Intersection of Race, Immigration Status, and Environmental Justice*, 11 SUSTAINABILITY 1, 4 (2019). See U.S. Dep't of Just., *Change Notice, Inmate Security Designation and Custody* (Sept. 4, 2019) at 1 ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment . . ."). Paul Mohai and Robin Saha, *Which Came First, People or Pollution?* 10 ENV'T RSCH. LETTERS 1, 15. 2015.

The U.S. imprisons more people than any other nation on earth, and the vast majority of prisoners in the prison and jail system are people of color and low-income persons; the fastest growing group of prisoners is women (Alexander 2012 [49]; Cole 1999 [50]; Pellow 2017 [51]); and foreign nationals (immigrants) are being detained in prisons throughout the nation where environmental threats abound as well. Sources: Alexander, M. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*; The New Press: New York, NY, USA, 2012. Cole, D. *No Equal Justice: Race and Class in the American Criminal Justice System*; New Press: New York, NY, USA, 1999.

In the last several years, a small number of scholars have begun to study the relationship of environmental and climate risks on carceral institutions in the United States. This research has found, for example, that prisons, jails, juvenile detention facilities, and immigrant detention centers are often sites where water contamination, hazardous waste exposure, and food insecurity are commonplace and that these carceral institutions are themselves sources of environmental risk. This body of scholarship has also begun to uncover trends that suggest that the effects of climate change are being disproportionately visited upon prisoners and other incarcerated persons via extreme heat and cold, flooding, wildfire exposure, and the fact that mass incarceration is significantly associated with greenhouse gas emissions in the United States." (p. 345, Gribble, Emily C. and David N. Pellow. 2022. *Climate Change and Incarcerated Populations: Confronting Environmental and Climate Injustices behind Bars*. *Fordham Urban Law Journal* vol. XLIX: 2: 341-370). Possible sources to support the above: See Rose Braz & Craig Gilmore, *Joining Forces: Prisons and Environmental Justice in Recent California Organizing*, 96 RADICAL HIST. REV. 95, 95–98 (2006); see also David N. Pellow. *What is Critical Environmental Justice?* (2017); Tara Opsal & Stephanie A. Malin, *Prisons as LULUs: Understanding the Parallels between Prison Proliferation and Environmental Injustices*, 90 SOCIO. INQUIRY 579, 586–90 (2019); Robert Todd Perdue, *Linking Environmental and Criminal Injustice: The Mining to Prison Pipeline in Central Appalachia*, 11 ENV'T JUST. 177, 180–81 (2018); Julius Alexander

McGee, Patrick Trent Greiner & Carl Appleton, Locked into Emissions: How Mass Incarceration Contributes to Climate Change, 8 SOC. CURRENTS 326, 333–34 (2021).

So again we ask, why were prisoners, much less their loved ones and the sending communities from which they came not included in the Environmental Justice considerations or analysis of the DEIS? Why were neither prisoners or the sending communities they come from proactively engaged in the outreach the BOP did to draft the DEIS?

Sec. 3 . Government-Wide Approach to Environmental Justice. (a) *Consistent with section 1–101 of [Executive Order 12898](#) and each agency's statutory authority, each agency should make achieving environmental justice part of its mission. Each agency shall, as appropriate and consistent with applicable law:*

While the DEIS states an outdated definition of Environmental Justice and gives that definition a surface level engagement, it does not provide any evidence that the BOP has actually integrated Environmental Justice into its mission in any meaningful way. Simply stating that environmental justice is part of the BOP's mission is inadequate, especially considering the BOP does not appear take into consideration the very incarcerated people who were left out of the DEIS' considerations around environmental justice. The Final EIS must provide compelling evidence as to how the BOP is integrating environmental justice into its mission. How is the BOP ensuring that its consideration of environmental justice when it comes to incarcerated people in it's care is more than a single bullet point on a public scoping slideshow?

(i) identify, analyze, and address disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns;

(ii) evaluate relevant legal authorities and, as available and appropriate, take steps to address disproportionate and adverse human health and environmental effects (including risks) and hazards unrelated to Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns;

On page 100 of the DEIS it states, "Much of Letcher County, including the Roxana Site itself, has been mined for coal using mountain top removal methods with populations in proximity to such locations exposed to the health and other adverse

effects of such mining. Currently, the area surrounding the Roxana Site is not undergoing mountain top removal, nor does it contain hazardous waste, treatment, storage, or disposal facilities, stationary sources of air pollution, **or other potentially hazardous conditions.**” Meanwhile, page 80 of the EIS states that “A Phase II ESA was conducted in 2016 (Cardno, 2016) which identified the concentrations of arsenic, which was detected at all locations on the subject property at concentrations well above the USEPA Regional Screening Level.” Exactly how “well above” USEPA Regional Screening levels the arsenic on the property is remains difficult to determine as the Phase II study was not provided in the appendices of the DEIS. While arsenic is naturally occurring in limestone, that does not dismiss the BOP or DEIS drafters need under Environmental Justice directives such as EO 14096 to identify, analyze, and address its potential impacts on human health. Why was no analysis given to how construction could spread already high levels of arsenic around the surrounding community of Roxana causing cumulative environmental impacts? Why was no analysis given to how such high levels of arsenic might impact people incarcerated at the site?

On arsenic in carceral water systems see: Rempel, Jenny, Isha Ray, Ethan Hessel, Jasmine Vazin, Zehui Zhou, Shin Kim, Xuan Zhang, Chiyu Ding, Ziyi He, David Pellow, and Alasdair Cohen. 2022. The Human Right to Water: A 20-Year Comparative Analysis of Arsenic in Rural and Carceral Drinking Water Systems in California. Environmental Health Perspectives DOI 10.1289/EHP10758.

The EJ sections of the DEIS provide no analysis around potential impacts of climate change caused by FCI Letcher. Why is the DEIS intentionally sidestepping the issue of climate change? Julius McGee, Patrick Greiner, and Carl Appleton published a paper (2020) based on a study demonstrating that mass incarceration contributes significantly to global greenhouse gas emissions. In other words, the carceral system is a major contributor to anthropogenic climate change. Compounding these realities, the very populations that are facing climate injustice—that is, the people of color, Indigenous, and low wealth communities experiencing greater impacts associated with climate change—around the nation and the world—are the same persons who are overrepresented in carceral systems—so they are harmed by climate injustice and environmental injustices on both sides of the prison walls, thus producing multiple layers of negative climate impacts on already vulnerable and marginalized groups. Since the United States is a signatory to the Paris Agreement and a number of other global climate change accords, the continued construction and expansion of the prison system is a violation of the spirit and intent of those agreements, since mass incarceration is a significant driver of greenhouse gas emissions. Thus, the construction of the prison in Letcher County would be grossly inconsistent with the U.S. government’s stated goals and commitment to fighting climate change, and it would be in violation of the Biden

Administration's Justice40 Initiative, which seeks to promote climate change solutions while also providing critical resources to frontline communities. "Front line" and "fence line" communities are those communities that are spatially proximate to and/or most heavily impacted by sites of environmental and climate harm—which includes mining operations and fossil fuel extraction and distribution sites, among others. In the Letcher County prison case, since the proposed location is on a site where coal extraction has deeply scarred the landscape and polluted the surrounding ecosystem, the people who are facing potential incarceration there should also be considered a frontline/fence line community, which means they should be considered an impacted, environmental justice community.

Additionally using CEJST data, which is the new federal standard for Environmental Justice screening, the census tract that hosts Roxana is considered "disadvantaged" due to being in the 96th percentile for flood risk. The FEMA flood maps used within the DEIS were drawn decades ago. Why is the DEIS willfully referencing outdated data to assess flood risk when the Federal government is using CEJST for Environmental Justice considerations? Additionally there is no consideration of the potential cumulative effects of climate change on flood risk, why? The DEIS mentions some plans to mitigate flood risk through onsite stormwater management with little details provided. Similarly, the DEIS mentions evacuation planning with little details provided. Given the potential cumulative effects of flood risks, climate change, and arsenic levels, why are these details not being explicitly stated within the environmental justice considerations?

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2023.pdf

(iii) identify, analyze, and address historical inequities, systemic barriers, or actions related to any Federal regulation, policy, or practice that impair the ability of communities with environmental

justice concerns to achieve or maintain a healthy and sustainable environment;

One of the most glaring oversights in the draft environmental impact statement is that it lacks any analysis of the historical inequities, systemic barriers, and federal regulations/ policies that inhibit the ability of impacted communities to achieve a healthy and sustainable environment. Particularly, the community most impacted by these policies and practices are those who are currently behind bars & those who will be sent to this new facility. There has been no analysis of this environmental impact from an environmental justice lens on prisoners. Historically, many prisoners have been placed in areas where they are frequently exposed to high levels of pollution or near hazardous waste sites. Prisoners face significant exposure to harmful toxins, water contamination, exposure to asbestos & other harmful substances from industrial sites. What measures are being taken to limit the exposure of prisoners to any of these harmful substances that have historically put them at increased health risks? Given other concerns about the use of potential water contamination, shortages, & even access to clean water resources, what are the measures that will be taken to ensure prisoners have access to clean drinkable water on a daily basis?

Prisoners have also faced other health risk from facility construction including poor living conditions that exacerbate other health hazards from an environmental justice lens. For example, The normal deleterious health impact of overcrowding is compounded by inadequate ventilation that increases risks for respiratory illnesses & exposure to airborne pollutants. What are measures that are being taken to reduce prisoner risks to airborne pollutants? What are the measures being taken to ensure the facility has proper ventilation? What are measures being taken to prevent prison overcrowding?

In addition, these facilities rely on the labor of incarcerated populations to function. History also shows that prison labor is often exploited and subsequently increases the exposure of incarcerated populations to hazardous environmental conditions. They are more likely to be exposed to pesticides if they have agricultural or industrial jobs that inhale harmful chemicals at alarming rates. What measures are being taken to limit exposure of prison laborers in the course of their work day to harmful chemical & environmental hazards? Given that prisoners will be exposed to more health hazards, how will they be able to have access to healthcare resources for medical treatment?

The draft environmental impact statement also fails to address any of the systemic barriers that are an environmental justice concern for people who are currently incarcerated. Prisoners most often do not have access to legal resources to advocated for their environmental rights due to the limited economic resources and other restriction

on how they can use legal counsel. There can be serious consequences including but not limited to retaliation for prisoners who file suit against government agencies, prison facilities, or other prison authorities. How are the legal rights of prisoners to live in environmentally sustainable conditions being addressed? How are prisoners being provided an opportunity to advocate for their own environmental rights without the fear of retaliation? Typically another barrier that incarcerated individuals face is the lack of meaningful representation in the decision making process related to environmental issues. How are the concerns of prisoners being taken into consideration for this environmental impact statement? Is there a measure to get a large number of incarcerated individuals to provide their input into the many environmental conditions that the facility will impact? Also, even if prisoners are given input into the policies that will impact what will ensure that policies will be dutifully enforced at the facility? How will you ensure that the facility will maintain compliance with acceptable environmental standards? Subsequently, what plan will be in place if the facility does meet or at some point fails to meet compliance for safe environmental standards?

Finally, federal policies and practices can dramatically impact the prisoner population. There are certain federal regulations that create loopholes that allow correctional facilities to operate without adhering to the same environmental standards as other institutions. This practice in and of itself is a form of environmental injustice that is perpetuated towards incarcerated populations. What plan is in place to account for access to these loopholes & ensure prisoner safety & exposure to environmental harms? Furthermore, the potential for budgetary constraints is a natural part of any project. This can lead to cost-saving measures that supersede environmental protection. This resulted in inadequate funding for pollution control measures and other environmental monitoring with the facility. What measures are being taken to prevent cost-saving activities that will negatively impact the exposure of prisoners to harmful environmental conditions?

Here are a few question remaining questions pertaining to this:

- How does the BOP ensure that the environmental concerns of incarcerated individuals are adequately considered in the development and implementation of policies and practices within correctional facilities?
- What mechanisms are in place to identify and address environmental injustices experienced by prisoners, particularly those stemming from historical mistreatment or systemic barriers?
-

- How does the BOP incorporate feedback and complaints from prisoners regarding environmental conditions into its decision-making processes, and what steps are taken to address valid grievances?
- What measures has the BOP taken to ensure transparency and accountability in the enforcement of environmental regulations within correctional facilities, particularly regarding issues such as toxic exposure and poor living conditions?

(vi) evaluate relevant legal authorities and, where available and appropriate, consider adopting or requiring measures to avoid, minimize, or mitigate disproportionate and adverse human health and environmental effects (including risks) and hazards of Federal activities on communities with environmental justice concerns, to the maximum extent practicable, and to address any contribution of such Federal activities to adverse effects—including cumulative impacts of environmental and other burdens—already experienced by such communities;

As detailed above, the DEIS' EJ section is woefully inadequate. Why does the DEIS give no consideration to the cumulative environmental impacts and other burdens that federal prisoners face? That the local community in Roxana faces? Why is no consideration given to the environmental conditions of the sending communities where prisoners are coming from as part of the cumulative environmental impact? Why is there no analysis around measures to avoid, minimize, or mitigate disproportionate impacts of arsenic, flood risks, and other environmental hazards that prisoners will face?

(vii) provide opportunities for the meaningful engagement of persons and communities with environmental justice concerns who are potentially affected by Federal activities, including by:

(A) providing timely opportunities for members of the public to share information or concerns and participate in decision-making processes;

Yet another glaring oversight of the DEIS is the blatant racist transplanting of black and brown marginalized communities to a carceral facility in an area that is vastly different from the demographic of the prison population. Transplanting these prisoners will keep them thousands of miles away from their friends, family, and community. There was no input to understand the demographics of the local population in the area. Furthermore, the environmental racism from this decision making process will only create even more barriers for the black and brown communities once they are released from the Federal facility. Many without economic resources will not be able to travel back to their communities and increase their risks of recidivism. Why was there no engagement of sending communities by the BOP where incarcerated people in the Federal BOP system in central Appalachia are coming from? Why was the same level of consideration for the 97% white community of Letcher not given to the disproportionately Black, brown, and non-white communities that make up the Federal prison system?

(B) fully considering public input provided as part of decision-making processes;

We will remind you of this point in the Final EIS.

(C) seeking out and encouraging the involvement of persons and communities potentially affected by Federal activities by:

Sending communities and prisoners were not sought out or encouraged to be involved in the process. BOP's involvement and encouragement in Letcher county only included direct communication and outreach to a private pro-prison lobby, besides the single DEIS public hearing. Why is the only active "seeking out and encouraging involvement" that the BOP engaged in solely from a non-governmental, private pro-prison lobby through a series of private meetings? Why was this same consideration not afforded to the members of Roxana and Letcher County opposing the prison? Why was this same consideration not given Federal prisoners? Or the communities from which they come? Hundreds of those very prisoners, both inside and outside the Federal system wrote into and petitioned against the Letcher prison wrote into the original EIS process. An entire van-load of formerly incarcerated people and loved ones from DC found this situation an important enough impact on their community to drive 20 hours round-trip to Letcher county to participate in the DEIS Public Comment Hearing last month. Clearly these people see this issue as directly impacting their communities. So

why did the BOP and drafters of the DEIS ignore them entirely? Both in the content of the EJ components of the EIS, but also ignored them entirely when it came to seeking them out and encouraging involvement? Indeed the insurmountable barriers that family members and loved ones face in DC and across the region to visiting their incarcerated loved ones in Central Appalachia were matched by the same insurmountable barriers to providing in-person comment on the DEIS process. Why is that? And why is it that the barriers to visitation are also not considered from an Environmental Justice perspective?

(1) ensuring that agencies offer or provide information on a Federal activity in a manner that provides meaningful access to individuals with limited English proficiency and is accessible to individuals with disabilities;

On page 99 of the DEIs it states “that 99 percent of the population in Letcher County speaks English with only one percent speaking Spanish at home (USEPA 2023).” Why does the DEIS not mention that 13.2% of federal prisoners are not native English speakers(Source: https://www.bop.gov/foia/docs/BOP_Stats_Under_FSA.pdf)? The DEIS was not translated into any language other than English when provided to prison law libraries. Why was the DEIS not made accessible to Federal prisoners who are not native English speakers?

(2) providing notice of and engaging in outreach to communities or groups of people who are potentially affected and who are not regular participants in Federal decision-making; and

Again, why was there no notice given or engagement with any sending communities where prisoners in the Federal system come from? Especially when they found it important enough to drive 20 hours round trip to provide testimony against the prison in person at the Public Comment Hearing in Letcher County in March of 2024?

(3) addressing, to the extent practicable and appropriate, other barriers to participation that individuals may face; and

Why was no consideration given in the DEIs or by the BOP to the barriers Federal prisoners face in submitting comments, such as cost of emails and stamps?

(D) providing technical assistance, tools, and resources to assist in facilitating meaningful and informed public participation, whenever practicable and appropriate;

Why was the only technical assistance, tools, and resources to assist in facilitating meaningful and informed public participation in the DEIS process only given to members of the Letcher County community, and not members of the sending communities from which prisoners are coming from?

(D) providing technical assistance, tools, and resources to assist in facilitating meaningful and informed public participation, whenever practicable and appropriate;

(viii) continue to engage in consultation on Federal activities that have Tribal implications and potentially affect human health or the environment, pursuant to [Executive Order 13175](#) of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), the Presidential Memorandum of January 26, 2021 (Tribal Consultation and Strengthening Nation-to-Nation Relationships), and the Presidential Memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation), and fulfill obligations established pursuant to [Executive Order 13007](#) of May 24, 1996 (Indian Sacred Sites);

According to the Prison Policy Initiative, “In the United States, Native people are vastly overrepresented in the criminal legal system. Native people are incarcerated in state and federal prisons at a rate of 763 per 100,000 people. This is double the national rate (350 per 100,000) and more than four times higher than the state and federal prison incarceration rate of white people (181 per 100,000). These disparities exist in jails as well, with Native people being detained in local jails at a rate of 316 per 100,000. Nationally, the incarceration rate in local jails is 192 per 100,000, and for white people, the jail incarceration rate is 157 per 100,000. (Source: <https://www.prisonpolicy.org/profiles/native.html>). Given the disproportionate level of incarceration of indigenous people across the country and in the Federal prison system, why were indigenous communities not engaged in the DEIS process beyond being notified of the DEIS? Given native prisoners are going to be incarcerated in region with

almost no native people present, why are they as prisoners not being given consideration in the EJ components of the DEIS?

(ix) carry out environmental reviews under the National Environmental Policy Act (NEPA), [42 U.S.C. 4321](#) *et seq.*, consistent with the statute and its implementing regulations and through the exercise of the agency's expertise and technical judgment, in a manner that:

(A) analyzes direct, indirect, and cumulative effects of Federal actions on communities with environmental justice concerns;

(B) considers best available science and information on any disparate health effects (including risks) arising from exposure to pollution and other environmental hazards, such as information related to the race, national origin, socioeconomic status, age, disability, and sex of the individuals exposed; and

(C) provides opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action, including when establishing or revising agency procedures under NEPA;

As stated previously, why did the DEIS willfully ignore prisoners and sending communities in regards to this? Why was there an utter failure to engage sending communities?

(x) in accordance with Title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d](#), and agency regulations, ensure that all programs or activities receiving Federal financial assistance that potentially affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, policies, practices, or methods of administration that discriminate on the basis of race, color, or national origin;

As referenced above, Given that prisoners and the communities they come from were willfully ignored by the BOP and the drafters in the DEIS' EJ sections; and given that the community of Roxana is 98% white while the Federal prison system is 34.6%

are Black, 31.8% are Hispanic, 29.5% are White, and 4.1% are Other races according to the BOP's own data (Source: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_January2023.pdf); it seems apparent that in the practices and methods the BOP is using to draft the DEIS it is discriminating on the basis of race in violation of Title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d](#). If the BOP is not willfully discriminating on the basis of race in its DEIS, then why were disproportionately Black, Hispanic, and non-white prisoners not considered or the communities they come from considered in the EJ components of the DEIS?

(xi) ensure that the public, including members of communities with environmental justice concerns, has adequate access to information on Federal activities, including planning, regulatory actions, implementation, permitting, compliance, and enforcement related to human health or the environment, when required under the Freedom of Information Act, [5 U.S.C. 552](#); the Government in the Sunshine Act, [5 U.S.C. 552b](#); the Clean Air Act, [42 U.S.C. 7401 et seq.](#); the Clean Water Act, [33 U.S.C. 1251 et seq.](#); the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), [42 U.S.C. 11001 et seq.](#); or other environmental statutes with public information provisions;

Why was this not provided to sendign communities?

(xii) improve collaboration and communication with State, Tribal, territorial, and local governments on programs and activities to advance environmental justice;

Why was there no consultation with local EJ experts or EJ organization in Central Appalachia or Kentucky when drafting the DEIS?

(xv) develop internal mechanisms to achieve the goals of this order, including by:

(A) creating performance metrics and other means of accountability;

(B) identifying and dedicating staff, funding, and other resources; and

(C) providing appropriate professional development and training of agency staff; and

Given the blatant issues in the DEIS around EJ considerations so far, not least of which it's complete lack of consideration of the prisoners it is supposed to be providing care for the BOP must provide the internal mechanisms and metrics it is using to achieve Environmental Justice. Does the BOP even have these internal mechanisms and metrics?

(xvi) consistent with section 2-2 of [Executive Order 12898](#), ensure that Federal activities do not have the effect of:

- (A) excluding persons, including populations, from participation in Federal activities on the basis of their race, color, or national origin;
- (B) denying persons, including populations, the benefits of Federal activities on the basis of their race, color, or national origin; or
- (C) subjecting persons, including populations, to discrimination on the basis of their race, color, or national origin.

And lastly, based on the racial discrimination outlined above that is being practiced by the BOP and the drafters of the EIS it is clear that there is an explicit exclusion and discrimination against prisoners happening. Given the racial makeup of prisoners, the final EIS must how is this not willful exclusion and discrimination based on race?

Given the extremely problematic engagement of Environmental Justice by the BOP and DEIS drafters, we look forward to a necessarily thorough and robust response to the above questions and concerns that are raised.

Sincerely,

Jordan E. Martine-Mazurek, Director of Campaigns - The Campaign to Fight Toxic Prisons

Richard A. Thomas - Director of Research - The Campaign to Fight Toxic Prisons

Dr. David N. Pellow - Chair of the Global Environmental Justice Project at UC Santa Barbara