



# Human Rights Defense Center

*DEDICATED TO PROTECTING HUMAN RIGHTS*

August 31, 2015

**SENT VIA EMAIL (igaston@bop.gov)**

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

**Re: Proposed USP/FPC Letcher County Final Environmental Impact Statement**

Dear Mr. Gaston:

Please accept the following comments concerning the final environmental impact statement (“EIS”) issued by the Bureau of Prisons (“BOP”) on July 31, 2015.

The Human Rights Defense Center (“HRDC”) is a non-profit organization that advocates on behalf of the human rights of people held in U.S. prisons, jails, immigration detention centers, civil commitment facilities and other institutions. As an advocate for incarcerated people throughout the United States, HRDC is particularly concerned about the environmental impacts of prisons—both the impacts felt by prisoners and prison employees, as well as impacts on the external social, economic and ecological environment—and view these concerns in the context of their cumulative impacts on society and biology.

HRDC filed a comment to the draft EIS on March 30, 2015, along with 23 other organizations and individuals. Although we raised various significant concerns which the BOP could have addressed in order to provide a sufficiently thorough review, as required under the National Environmental Policy Act (“NEPA”), the agency chose to dismiss or ignore our concerns, altering virtually nothing of substance between the draft and final EIS on the majority of the issues we raised.

As such, we are renewing our previous concerns. We are also adding additional concerns which have come to light in reviewing the inadequacy of the BOP’s responses to comments in the draft EIS by our organization as well as others, including federal agencies such as the Environmental Protection Agency (“EPA”).<sup>1</sup>

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<sup>1</sup> Final EIS, Appendix E, pp.7–26.

The EPA rated the draft EIS an “EC-2,” noting a wide array of issues that have remained unresolved with the final EIS and indicating insufficient information to fully assess environmental impacts that should be avoided. Among other issues, the EPA notes the failure to provide a time schedule for start and finish dates; failure to comply to the maximum degree with recommendations made by recipients on the DEIS list; failure to provide an explicit response to the check list of items provided by the EPA in Appendix E, p.23; and perhaps the most blatant disregard for NEPA, *a failure to individually evaluate the preferred alternative*.

As discussed in more detail below, the EIS continues to fail in numerous respects to adequately identify environmental impacts and describe mitigation efforts. The proposed activity cannot proceed unless BOP complies with the requirements of NEPA and the Administrative Procedure Act.<sup>2</sup>

The BOP proposes to construct a mixed-security facility, housing approximately 1,200 prisoners, in the Eastern Kentucky coalfields. In the words of Harry Caudill, this is a region that has long suffered from an “economic malaise” due in large part to the fact that

It has exported its resources, all of which—timber, coal, and even crops—have had to be wrested violently from the earth. The nation has siphoned off hundreds of millions of dollars’ worth of its resources while returning little of lasting value. For all practical purposes the [Cumberland Plateau] has long constituted a colonial appendage of the industrial East and Middle West, rather than an integral part of the nation generally. The decades of exploitation have in large measure drained the region.<sup>3</sup>

The EIS announces BOP’s plans to continue with a new type of extractive activity. BOP’s proposed project would take 1,200 prisoners, extracted from their homes and neighborhoods, and import them into Letcher County. Despite the EIS’s glib promises of employment and economic activity, Letcher County and surrounding communities would be forced to absorb the substantial environmental consequences of importing 1,200 people into highly-concentrated group quarters. Meanwhile, the prisoners and prison staff would be exposed to various adverse environmental conditions that are entirely unaddressed in the EIS.

## **I. BOP has Failed to Meet Public Notice Requirements**

HRDC has received correspondence from other signatories to our above-mentioned draft EIS comment, as well as individuals who requested notice of the final EIS document but did not receive notice as required under NEPA. On April 1, 2015, Issac Gaston of the BOP sent an email stating “The 23 organizations and individuals that signed your comment letter will be added to the Final EIS notification list and will be notified of the availability of the Final EIS via e-mail or postal notification.” We have received confirmation from individuals and organizations which

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<sup>2</sup> See generally 5 U.S.C. § 702 (providing for judicial review of agency action).

<sup>3</sup> Harry M. Caudill, *Night Comes to the Cumberland: A Biography of a Depressed Area* (1962), at 325.

signed our comment but did not receive notice of the final EIS.<sup>4</sup> Other comments were not even noted in the final EIS.<sup>5</sup>

## II. BOP has Not Examined a Sufficient Range of Alternatives

The BOP alleges that this facility is needed to reduce national prison overcrowding. According to the EIS, high-security facilities operated by the BOP “are currently 52 percent overcrowded and are operating at above rated capacity.”<sup>6</sup> The other four Mid-Atlantic USP facilities referenced in the EIS are on average between 400–600 people over capacity, totaling 2,400 prisoners (not including prisoners in special programs).<sup>7</sup>

While the BOP presents this as if it is an urgent matter, it has actually come to represent a standard state of affairs for the BOP. Even with BOP’s Letcher County proposal being the largest of its kind in the region, potentially warehousing over 1,200 people at the cost of \$200-300 million for pre-construction activities alone,<sup>8</sup> this still leaves the Mid-Atlantic facilities overcrowded by over 1,200 prisoners.

Building new prisons to alleviate overcrowding has followed a similar trend as building new roads to alleviate heavy traffic or building more cemeteries to remedy infectious diseases. Without proper analysis and assessment of alternatives, these costly measures rarely address the underlying problems, and more prisons, like roads and cemeteries, are claimed to be needed at a constant pace which cannot be sustained indefinitely.

The assessment of alternatives is one of the primary reasons for the existence of the EIS process. BOP’s refusal to discuss alternatives to imprisonment is not just indicative of the agency’s lack of accountability to the taxpayers, but also flies in the face of NEPA’s requirement to “study, develop, and describe appropriate alternatives to recommended courses of action.”<sup>9</sup>

Recent innovations have shown that alternatives to incarceration can be reasonably implemented and can save scarce financial and human resources,<sup>10</sup> as well as reduce the epidemic levels of recidivism,<sup>11</sup> by developing programs that keep people charged with crimes closer to their

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<sup>4</sup> These include, but are not limited to: the Abolitionist Law Center, Prison Books Collective of Chapel Hill, Raphael Sperry of Architects/Designers/Planners for Social Responsibility, Judah Schept and Dan Berger. All provided email or mailing addresses for the requested notification, as evidenced by the HRDC comment on record in Appendix E, pp.51-53 of the final EIS.

<sup>5</sup> An additional 23 individuals sent letters of concern via an online comment form, which HRDC has confirmation of being sent, but those letters did not appear in the final EIS as public comments. Meanwhile, the BOP included 7 pages of anonymous form letters in support of the project (Appendix E, pp.295–302 of the final EIS).

<sup>6</sup> EIS § 1.3.

<sup>7</sup> EIS Table 1-1.

<sup>8</sup> EIS Table ES-1.

<sup>9</sup> 42 U.S.C. § 4332(E).

<sup>10</sup> For example, drug offenses accounted for 48.5% of BOP prisoners as of 2012. Reforms surrounding how these types of charges are dealt with could substantially alleviate the overpopulation of BOP facilities.

<sup>11</sup> [The Congressional Research Service \(CRS\) Report on Offender Reentry](#), by Nathan James, published January 2015.

families and communities, and by providing specialized treatment rather than incarceration. Viewed in this light, the problem is not overcrowding but over-incarceration.

Such alternatives could avoid the negative environmental impacts which would arise from either of BOP's proposed building sites. Accordingly, BOP's failure to consider such alternatives is grounds for finding the EIS insufficient, because the agency's analysis appears to be little more than "a pro forma ritual."<sup>12</sup>

**In response to HRDC's Draft EIS Comment:** HRDC explicitly discussed the BOP's failure to consider alternatives to incarceration, yet the BOP attempts to deflect attention from its inadequate performance by simply stating, "[t]he Bureau is not the agency responsible for developing sentencing guidelines or alternatives to current sentencing guidelines."<sup>13</sup> This response inappropriately misconstrues the original comment. HRDC's comment did not mention "sentencing guidelines"; rather, HRDC pointed to the need for BOP to consider alternatives to building new secure facilities such as the proposed Letcher County prison.

Presumably, the author of the response to our comment is deflecting this responsibility to the U.S. Sentencing Commission. But the BOP is not intended to operate as an isolated or rogue agency of the federal government. It is an arm of the U.S. Department of Justice ("DOJ"). For instance, the DOJ's Director of the Criminal Division's Office of Policy and Legislation sits as a commissioner on the U.S. Sentencing Commission.

Further, the BOP undisputedly has powers to reduce prison populations, and has repeatedly come under fire for failing to utilize those powers. Notably, BOP has significant power to recommend reductions in sentences for extraordinary and compelling circumstances.<sup>14</sup> Such sentence reductions can be based on either medical or non-medical conditions that justify a reduction in sentence.<sup>15</sup>

Numerous reports have criticized BOP for failing to utilize this power or develop a standardized system to evaluate extraordinary and compelling circumstances.<sup>16</sup> Notwithstanding these calls to action, BOP has failed to finalize a rule for compassionate release, and has utterly neglected to acknowledge its power to use § 3582(c) for non-medical situations. In addition, BOP has certain authority to release prisoners to residential facilities or home confinement.<sup>17</sup>

Instead of providing concrete population projections and candidly discussing the use of sentence reduction strategies, security designations or pre-release alternatives to incarceration, the final EIS simply denies BOP's power to reduce the federal prison population and acts as if an ever-

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<sup>12</sup> See *Southern Utah Wilderness Alliance v. Norton*, 237 F.Supp.2d 48, 52 (D.D.C. 2002) ("Considering environmental costs means seriously considering alternative actions to avoid them").

<sup>13</sup> Final EIS, Appendix E, p.35.

<sup>14</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>15</sup> U.S. Sentencing Guidelines Manual § 1B1.13, cmt. 1(A) (2014).

<sup>16</sup> E.g., U.S. Dept. of Justice, Ofc. of Inspector General, "[The Federal Bureau of Prisons' Compassionate Release Program](#)" (Apr. 2013, Rpt. I-2013-006); Stephen R. Sady & Lynn Deffebach, "[Second Look Resentencing under 18 U.S.C. § 3582\(c\) as an Example of Bureau of Prisons' Policies that Result in Over-Incarceration](#)" (Dec. 2008).

<sup>17</sup> 18 U.S.C. § 3624(c).

growing population is a *fait accompli*. This refusal to discuss alternatives is not the “hard look” that NEPA requires.

### III. BOP’s Stated Need for the Proposed Prison Siting is Suspect

At the outset, the EIS seems to distort or deviate from BOP policies concerning prisoner placement. As part of the stated justification for the proposed project, the EIS claims that “[w]hen considering placement of an individual, the Bureau considers the origin of the inmate and attempts to place the inmate in an institution that is within the region of the inmate’s origin.”<sup>18</sup> The EIS then attempts to justify BOP’s proposed project by stating that “[t]he opportunity to provide additional [prison] bedspace in Letcher County would . . . afford the Bureau continued management of inmates originating from the region, and allow those inmates to remain close to family and friends.”<sup>19</sup>

While the BOP alleges that the Mid-Atlantic Region was chosen in an attempt to place prisoners in Letcher County in order to provide “greater opportunity for visitation with family, which aides in the rehabilitation process,” the EIS did not provide any demographics or geographic analysis as to where the existing prisoners in overcrowded facilities in the Mid-Atlantic would be coming from, and what affordable transportation options are available to them for visitation. There is no public transportation, bus station, train station or airport within a 90-mile radius of Whitesburg, Kentucky, making it virtually impossible for families that do not own, or cannot afford to rent, a private vehicle to make the trip. Building prisons in remote rural areas far from the urban areas that generate most prisoners only serves to further isolate and alienate prisoners from their families by making visitation difficult or impossible.

BOP’s professed interest in family unity comes as somewhat of a surprise in light of its published management procedures. The EIS claims that the proposed facility would serve prisoners from the BOP’s Mid-Atlantic Region. This region is comprised of Kentucky, West Virginia, Tennessee, Virginia, Maryland, Delaware and North Carolina.<sup>20</sup> Yet BOP’s Program Statement 5100.08 does not specify that prisoners should be housed close to family and friends, but rather provides that placing a prisoner within *500 miles* of his or her anticipated release area is one of dozens of factors that determine where a prisoner is placed.<sup>21</sup> The 500-mile radius surrounding Whitesburg, Kentucky includes numerous areas that are not “close” (under any reasonable definition) to the proposed prison, including Detroit, Michigan; St. Louis, Missouri; Philadelphia, Pennsylvania; Buffalo, New York; Jacksonville, Florida; Montgomery, Alabama; Scranton, Pennsylvania; and Chicago, Illinois.<sup>22</sup>

It is troublesome enough that BOP proposes importing 1,200 people into a facility constructed on an abandoned mining site. For the agency to claim it is implementing this plan in the name of family unity is disingenuous. If BOP has developed a new protocol to emphasize placement of

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<sup>18</sup> EIS § 1.3.

<sup>19</sup> EIS § 2.3.

<sup>20</sup> See Fed. Bureau of Prisons, [Map of Mid-Atlantic Region](#).

<sup>21</sup> PS 5100.08, ch. 5 at 3. See [http://www.bop.gov/policy/progstat/5100\\_008.pdf](http://www.bop.gov/policy/progstat/5100_008.pdf).

<sup>22</sup> Locations within the 500-mile radius are based on a [map generated by FreeMapTools.com](#).

prisoners close to their families, then the EIS should reference that protocol; otherwise, the BOP should not use families and loved ones as pawns in a public relations charade.

**In response to HRDC’s Draft EIS Comment:** The BOP cites its own Program Statement 5100.08, which suggests that attempts to locate the inmate within the region of origin provides greater opportunity for visitation. As stated above, we found no indication in 5100.08 that locating people geographically closer but *logistically more difficult* provides any benefit to improving community ties or reducing recidivism. To the contrary, interviews with prison staff in nearby facilities have presented this region as a form of punishment, explicitly intended to isolate prisoners from visitation.<sup>23</sup>

#### IV. Lack of Consideration for Public Involvement During Scoping Period

The EIS states that public involvement is an extremely valuable tool in the successful completion of NEPA documents. It also states that “scoping comments were in support of the project with no major issues or concerns raised.” From reviewing the media reports published in close proximity to the scoping period of this BOP proposal, it appears that the presentation of public input from the scoping period is being skewed, if not outright falsified. HRDC has confirmed that at least three individuals submitted critical comments during the scoping period that are reflected *nowhere* in the presentation of public input in the EIS.<sup>24</sup> We are disturbed that a federal law enforcement agency would lie and distort comments made during the public hearings process; such behavior undermines respect for authority and calls into question the legitimacy of the agency that would commit and condone such behavior.

In other examples, a regional news source based in Whitesburg, Kentucky, *The Daily Yonder* (produced by the Center for Rural Strategies), published an article during the scoping period which included the following comments:

“People have been promised pie in the sky,” says Sylvia Ryerson, a [former] Letcher County resident and a journalist for WMMT-FM. The jobs involved in building a prison are temporary, she says, and they can’t transform the economy in a meaningful way. By taking short term jobs, she claims Appalachia is harming its community in the long term. “I think it is helpful to think of prison construction as a continuation of the industrial recruitment strategies of the 1990s, where economic development officials looked outside the region, for some new big thing to come in and fix everything that’s wrong. And just as industrial recruitment failed to bring the region out of poverty, so will prison recruitment. It’s a race-to-the-bottom strategy, not based on meeting the needs and cultivating the

<sup>23</sup> See interview from documentary film *Up the Ridge*, starting at 13:26:

<https://www.youtube.com/watch?v=gPvJHTTEZ20#t=448>. “...I’m sorry if they have family members; they’re not going to see them. A lot of people think that they should be shipped out onto a barge or an island, this is probably the best thing we got to it.” (In reference to prisoners transferred from New Mexico to Wallens Ridge prison).

<sup>24</sup> Sylvia Ryerson, Elizabeth Sanders and Stephen Raher all confirmed submitting written comments which were not supportive of the project. Ryerson stated that she believed others did as well. Raher’s comment, filed on August 26, 2013, stated among other points that “[t]he Letcher County EIS should thoroughly explain the types of settings in which BOP houses different inmate populations, and should give meaningful consideration to community-based alternatives to incarceration.” This was never even remotely addressed in the EIS.

skills of a particular community, but rather forcing marginalized communities to compete for the kinds of industries that no one else wants. And the effects are disastrous.”

Some might argue that even if the jobs are temporary, they are a stopgap solution that otherwise wouldn't exist. Ryerson maintains that the evidence shows the opposite to be true. “[F]rom looking at studies as well as our neighboring counties, ... prisons make poor communities poorer.” Appalachia needs a vibrant, diversified and skilled economy. Prisons discourage those businesses, making Appalachia a less attractive place. “Many prison host communities have seen increases in drug abuse, domestic violence and divorce rates following the prisons opening.” Additionally, in a region struggling to keep its young people at home, she worries about the unspoken message building a prison sends. “Is this what we want to be telling young people may be their best option if they want to stay home and have a good paying job?”

Furthermore, prisons create their own very dangerous economy. In order for a prison to become economically viable, it needs more and more prisoners. “[M]ass incarceration targets poor people of all colors,” Ryerson says. “The more our economy here in eastern Kentucky depends on insanely high incarceration rates nationwide, the more people from here in eastern Kentucky will end up going to prison.”<sup>25</sup>

In an excerpt from another *Daily Yonder* article, the author provides background on other prison facilities in the region and the failing economic impacts they continue to have:

It's been 21 years since the federal prison opened in Clay County, a decade since the prison opened in Martin County, and nine since opening day at the McCreary prison – and none of the promises of Dorworth [the federal prison official] have been fulfilled. Clay, McCreary and Martin remain three of the poorest counties in one of the nation's poorest Congressional districts.

Central Appalachia's experience is not unique. Prisons don't work as economic development engines, researchers say. One study analyzed data on every rural county in the United States, with or without a prison, from 1969-2004. The report concluded: “We find no evidence that prison expansion has stimulated economic growth. In fact we provide evidence that prison construction has impeded economic growth in rural counties that have been growing at a slow pace.”<sup>26</sup>

The same study found that counties facing the toughest economic conditions are the ones most likely to be hurt, not helped, by prison construction. These counties are more willing to offer up scarce financial resources to entice the prisons to come, yet have the lowest number of residents who meet the job qualifications. They also are less likely to offer the amenities that attract transferring prison employees to stay within the county.<sup>27</sup>

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<sup>25</sup> April 30, 2013; see <http://www.dailyyonder.com/region-worth-more-its-mountaintops/2013/04/30/5876>.

<sup>26</sup> [The Prison Industry: Carceral Expansion and Employment in U.S. Counties.](#)

<sup>27</sup> Feb 20, 2013; see [Speak Your Piece: Prison Progress.](#)

The notice for the public comment period regarding the draft EIS<sup>28</sup> states that “interested groups and individuals are encouraged to provide comments in person at the public meeting or in writing anytime during the public comment period. At the public meeting, attendees will be able to submit comments in writing and orally to a stenographer who will transcribe comments. All comments received during the public comment period will be given equal consideration.” Additionally, it says, “All statements, both written and oral, submitted during the public comment period will become part of the public record[.]”

Yet this has not been the case for comments submitted during the scoping period.<sup>29</sup>

Issues raised in this comment have been raised before and ignored. Not only has this cost us much of our faith and trust in the public process surrounding this project, it also places the EIS in the category of insufficient, and possibly in violation of NEPA’s requirement of public involvement.

**In response to HRDC’s Draft EIS Comment:** The BOP cites to Section 1.7.4, which includes merely *one single line* dedicated to the above-mentioned concerns, stating, “Issues raised in the letters that did not support the project included: socioeconomic, previous mining activities, infrastructure, and alternatives.” BOP then alleges that these areas of concern raised during scoping were analyzed in the draft EIS. Our review of both the draft and final EIS indicates that they were never analyzed nor have they been made available for public review.

## V. The EIS Fails to Consider Environmental Impacts on Prisoners in the Proposed Facility

It is important to remember that the EIS is prepared under NEPA, a law that requires federal agencies to “use all practicable means” to “assure for *all* Americans safe, *healthful*, productive, and esthetically and culturally pleasing surroundings.”<sup>30</sup> In addition, NEPA requires that an environmental impact statement address impacts on the “human environment,”<sup>31</sup> and agencies are required to “comprehensively” interpret the phrase “human environment” to “include the natural and physical environment and the relationship of people with that environment.”<sup>32</sup>

NEPA explicitly references human health, and covers all people—there is no “prisoner exclusion.” Thus, the BOP must consider potential health impacts on prisoners as part of the EIS. This is especially true in light of BOP’s legal responsibility to provide for the health and welfare of the prisoners in its custody.<sup>33</sup>

<sup>28</sup> [Federal Register notice of public meeting on BOP Draft EIS for Letcher County.](#)

<sup>29</sup> HRDC staff person Panagiotti Tsolkas was told by BOP representative Isaac Gaston, via email on March 30, 2015, that the 2013 scoping period public comments were not available for review.

<sup>30</sup> 42 U.S.C. § 4331(b)(2) (emphasis added).

<sup>31</sup> 42 U.S.C. § 4332(2)(C).

<sup>32</sup> 40 C.F.R. § 1508.14.

<sup>33</sup> BOP has both a constitutional and statutory duty to provide inmate healthcare. U.S. Const., Amdt. 8 (prohibition on cruel and unusual punishment); *Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) (deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment); 18 U.S.C. § 4042(a)(2), (3) (statutory responsibilities of the bureau); *accord U.S. v. Jones*, 91 F.3d 623, 624 (3d Cir. 1996) (recognizing legal duty of BOP to provide care for inmates).



## A. Impact of Mining Activities

Both of the BOP's proposed sites are at locations that once hosted mining activities.<sup>34</sup> The EIS does not directly address mining activity elsewhere in the local area, but certain statements suggest that mining activity is widespread in the vicinity of the proposed sites.<sup>35</sup> Despite the self-evident concerns that arise from housing over 1,200 people at a former mining site surrounded by active coal mines, the EIS lacks any discussion of potential impacts to prisoners.

The EIS gives no indication that BOP conducted research concerning the proximity of coal mining waste sites. Numerous studies have indicated that communities hosting coal mining in general, and mountaintop removal mining in particular, are susceptible to increased health hazards. For example, a 2011 study of Appalachian localities found that even after controlling for socioeconomic factors, residents of counties with mountaintop removal mining suffered significantly higher rates of poor physical and mental health than other Appalachian communities.<sup>36</sup> Another study concluded that chronic cardiovascular disease mortality is more prevalent in mountaintop removal areas.<sup>37</sup> A water-quality study published in 2011 found increased concentrations of selenium, sulfate, magnesium and other inorganic solutes in rivers downstream from active and reclaimed mining sites.<sup>38</sup> And a 2010 study of coal mining counties in West Virginia found that, even after controlling for cigarette smoking, cancer mortality rates increased for residents who lived near mining operations.<sup>39</sup>

Since submitting comments on the draft EIS, four region-specific scientific health studies additional to those mentioned above have been brought to our attention.<sup>40</sup>

Scientific literature makes clear that there are health risks connected with simply living in proximity to coal mining, especially surface mines that are common in Eastern Kentucky. Despite this substantial body of scientific evidence, the EIS does not even make passing mention

<sup>34</sup> EIS, at §§ 4.2.1 (Alternative 1: "The topography at Payne Gap has been significantly affected by strip mining activities, which historically occurred on site") and 5.2.1 (Alternative 2: "The topography at the Roxana site has been significantly impacted by mountaintop removal coal mining").

<sup>35</sup> See e.g., EIS § 4.3.1.2 ("Letcher County is part of the largest coal producing area in eastern Kentucky").

<sup>36</sup> Keith J. Zullig & Michael Hendryx, *Health-Related Quality of Life Among Central Appalachian Residents in Mountaintop Mining Counties*, 101 Am. J. of Pub. Health 848 (May 2011); see also Michael Hendryx, *Mortality from Heart, Respiratory, and Kidney Disease in Coal Mining Areas of Appalachia*, 82 Int'l Archives of Occupational Env'tl Health 243 (2009).

<sup>37</sup> Laura Esch & Michael Hendryx, *Chronic Cardiovascular Disease Mortality in Mountaintop Mining Areas of Central Appalachian States*, J. of Rural Health (2011), at 1-8.

<sup>38</sup> T. Ty Lindberg, et al., *Cumulative Impacts of Mountaintop Mining on Appalachian Watershed*, 108 Proc. of the Nat'l Acad. of Sciences 20929 (Dec. 27, 2011).

<sup>39</sup> Michael Hendryx, Evan Fedorko & Andrew Anesetti-Rothermel, *A Geographical Information System-Based Analysis of Cancer Mortality and Population Exposure to Coal Mining Activities in West Virginia, United States of America*, 4 Geospatial Health 243 (2010).

<sup>40</sup> The following additional health-related studies indicate regional issues which should have been taken into consideration in regard to cumulative health impacts, and specifically potential impacts to prisoners: (1) *Exploring geographic variation in lung cancer incidence in Kentucky using a spatial scan statistic: elevated risk in the Appalachian coal-mining region*, 2011; (2) *Concentrations of arsenic, chromium, and nickel in toenail samples from Appalachian Kentucky residents*, 2011; (3) *Adult tooth loss for residents of US coal mining and Appalachian counties*, 2012; (4) *A Population-based Case-control Study of Lung Cancer in Appalachian Kentucky: The Role of Environmental Carcinogens*, 2014, ongoing. [See Figures 5 and 6 on p. 30 of this document].

of possible health impacts on residents of the proposed prison. An environmental impact statement must contain a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of a proposed project.<sup>41</sup> Highlighting positive economic benefits of a proposed prison while utterly ignoring probable health dangers does not satisfy BOP’s statutory duty to analyze and balance environmental impacts, costs and alternatives in good faith.<sup>42</sup>

Prisons located near other coal-related processing facilities have resulted in widespread prisoner health problems including respiratory illnesses, gastrointestinal problems, dermatological conditions and thyroid disorders,<sup>43</sup> indicating health impacts which affect prisoners in a unique way related to their conditions of confinement.

Indeed, the EIS is inadequate on its face due to the BOP’s failure and refusal to candidly discuss opposing viewpoints. The “Enhanced Utility Investigation Report” attached as Appendix D to the EIS states that “[t]he *Site Investigation Trip* memo (KCI 2010) recommended that the Payne Gap site be removed from consideration due to ‘significant concerns with its locations, past mining, and excavation.’”<sup>44</sup> The EIS’s discussion of the Payne Gap site does not contain any disclosure of concerns related to past mining and excavation activity, even though the site investigation memo indicates that such concerns have been directly presented to BOP. Oblique reference to the site investigation memo is not an acceptable substitute for a candid disclosure of risks.<sup>45</sup>

Other potential impacts to incarcerated populations which the EIS should consider look like the December 2008 dike failure at TVA's Kingston Fossil Plant, where 5.4 million cubic yards of coal ash cascaded into the Emory and Clinch rivers, smothering about 300 acres of land. The breach released a slow-moving wave of toxic sludge and polluted water into the river in what remains the nation's largest coal-ash spill in history.<sup>46</sup> Or like the January 2014 chemical spill related to a coal processing facility in West Virginia which resulted in prisoners at a county jail being forced to drink contaminated water long after other area residents in the surrounding region were relieved with clean water deliveries.<sup>47</sup>

Further, HRDC was remiss not to mention the example of the Martin County, Kentucky coal slurry spill in our comment on the draft EIS:

<sup>41</sup> *Seattle Audubon Society v. Espy*, 998 F.2d 699, 703 (9th Cir. 1993) (quoting *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)).

<sup>42</sup> *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (“NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. . . . [I]f [an agency] decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse”).

<sup>43</sup> Dustin S. McDaniel, et al., [No Escape: Exposure to Toxic Coal Waste at State Correctional Institution Fayette](#) (Feb. 2015).

<sup>44</sup> EIS, Appendix D, at p.10.

<sup>45</sup> See 40 C.F.R. § 1502.21 (“No material may be incorporated [into an EIS] by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment”).

<sup>46</sup> [“Five years after coal-ash spill, little has changed.” USA Today](#), Dec. 22, 2013.

<sup>47</sup> [“The Untold Story Of What Happened At An Overcrowded West Virginia Jail After The Chemical Spill.” Think Progress](#), May 21, 2014.

The Martin County Sludge Spill occurred after midnight on October 11, 2000 when the bottom of a coal sludge impoundment owned by Massey Energy in Martin County broke into an abandoned underground mine below. The slurry came out of the mine openings, sending an estimated 306 million gallons of sludge down two tributaries of the Tug Fork River. By morning, Wolf Creek was oozing with the black waste; on Coldwater Fork, a ten-foot (3 m) wide stream became a 100-yard (91 m) expanse of thick sludge.

According to the EPA, the “spill” was 30 times larger than the Exxon Valdez oil spill (12 million gallons) and one of the worst environmental disasters ever in the southeastern United States, comparable to the TVA Kingston Fossil Plant coal ash spill in 2008. The spill was over five feet deep in places and covered nearby residents' yards. The spill polluted hundreds of miles of the Big Sandy and Ohio Rivers. The water supply for over 27,000 residents was contaminated, and all aquatic life in Coldwater Fork and Wolf Creek was killed. Heavy metals were found in the sludge, including mercury, lead, arsenic, copper and chromium.<sup>48</sup>

Indeed, the existence of a site investigation memo proves that qualified professionals have expressed concern about the dangers posed by former mining activity. BOP has subsequently published the EIS, blithely ignoring this contrary viewpoint and without providing any hard data or analysis that suggests mining activity will *not* have a negative impact on the proposed facility. As federal courts have explained, “NEPA requires that the public receive the underlying environmental data from which” government experts derive their opinions.<sup>49</sup> In addition, NEPA requires agencies to directly address potential impacts—although the agency may opine on the probability of negative impacts, it “may not omit the analysis only because it believes that the worst case is unlikely.”<sup>50</sup>

Accordingly, BOP cannot proceed with the proposed project until it provides a full and fair discussion of mining-related health risks and reopens the comment period to allow for an informed public discourse on that issue.

**In response to HRDC’s Draft EIS Comment:** The BOP alleges that “no health and safety impacts are anticipated.” This can only be because these potential impacts were not subjected to an adequate review. For example, the BOP’s reply contains two website links which lead to a Sierra Club page and an EPA page tracking coal ash waste from power plants. While the BOP’s response did attempt a cursory, narrow look at coal ash waste sites in the region, it wrongly attributes the listed EPA website to slurry ponds, using this to allege that there are “no slurry ponds located within Letcher County.”<sup>51</sup>

The BOP also notes that “there are no active coal mines on either proposed site,” but does not indicate the active mining occurring or anticipated in the broader watershed of the North Fork of

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<sup>48</sup> [“Martin County Sludge Spill.”](#) *Sourcewatch.org*, last checked Aug. 29, 2015.

<sup>49</sup> *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); *see also* 40 C.F.R. § 1502.24 (agencies must insure the scientific integrity of the discussions and analysis in a NEPA analysis).

<sup>50</sup> *Southern Ore. Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983).

<sup>51</sup> Final EIS, Appendix E, pp.38 and 39.

the Kentucky River, which is the source of the water plant that this prison will, in some part, rely upon if constructed.

*See attached Figures 1-4 of coal mining slurry ponds and mining in Letcher County, as well as in surrounding counties, which may impact common water sources. See Figures 5 and 6 re: disproportionate health concerns in the region.*

## **B. Water Quality**

The EIS states that both proposed alternative sites would receive water from the Letcher County Water & Sewer District (“LCWSD”).<sup>52</sup> Yet the EIS is curiously uninformative concerning the quality of water that will be delivered to the hundreds of prisoners who would be housed at the new facility. The EIS indicates that water service to at least one of the proposed sites would come from LCWSD’s Whitesburg treatment plant.<sup>53</sup> The Whitesburg plant draws from the North Fork of the Kentucky River.<sup>54</sup>

The public record indicates that there is valid reason for concerns about the water quality in the North Fork, which:

originates in Letcher County and supplies water to Whitesburg and many downstream communities in the state. Advisories against swimming in the river, prompted by high levels of fecal coliform bacteria, have been in place since intensive testing began in 1991. Even simple contact with the river water is considered a health hazard. Health statistics indicate that the average annual incidence of hepatitis A, a waterborne disease, is significantly higher in Letcher County than in Kentucky and nearly double the national incidence. The leading sources of the bacterial contamination are defective septic systems and illegal straight pipes.<sup>55</sup>

In addition, a 2000 study sponsored by Eastern Kentucky PRIDE<sup>56</sup> concluded that “Letcher County has significant water quality problems related to both straight pipes and AMD [acid mine drainage] sites.”<sup>57</sup>

Although the area (particularly through the efforts of the LCWSD) has improved water quality over time, the EIS fails to address the *current* level of risk posed to water users and how that risk would change with the increased demand associated with the proposed prison siting. Recent testing shows that LCWSD water contains four contaminants (total trihalomethanes, total haloacetic acids, aluminum and lead) in amounts that exceed health guidelines.<sup>58</sup> The LCWSD’s

<sup>52</sup> EIS §§ 4.8.1.1 and 5.8.1.1.

<sup>53</sup> EIS, Appendix D § 4.0 (alternative site 2 is served by LCWSD’s Whitesburg wastewater treatment plant).

<sup>54</sup> Letcher County Water & Sewer Dist., [Water Quality Report for 2013](#). (Appears there may now be problems with retrieving this file. The source of this document is: <http://lcwsdist.com/> )

<sup>55</sup> Jeff Hughes, et al., [Drinking Water and Wastewater Infrastructure in Appalachia: An Analysis of Capital Funding and Funding Gaps](#) (July 2005), Appendix E at 61 (footnotes omitted).

<sup>56</sup> Eastern Kentucky PRIDE (“Personal Responsibility in a Desirable Environment”) was launched in 1997 by Rep. Hal Rogers and Gen. James Bickford, see <http://kypride.org/about/>.

<sup>57</sup> Univ. of Kentucky Water Research Institute, *Letcher County Water Quality Assessment* (Feb. 2001), at 27.

<sup>58</sup> Env'tl Working Group, [Drinking Water Quality Report: Letcher County Water District – Jackhorn, KY](#) (2009).

own reporting states that “[t]he susceptibility of contamination for the Whitesburg treatment plant is high based upon recent fuel leaks which impacted water quality.”<sup>59</sup>

In the same report, LCWSD explains that water quality is threatened by numerous activities including “roads and bridges; railroad; mining activities, oil and gas wells, untreated sewage; and solid waste,”<sup>60</sup> yet the EIS contains no meaningful discussion of these activities and their impact on water quality. In addition, as discussed below, LCWSD purchases water from the neighboring Knott County Water & Sewer District, and in 2012 that district was twice found in violation of applicable drinking water standards for turbidity exceedance.<sup>61</sup>

In addition to the water quality concerns related to coal mining activity, HRDC is concerned about the impacts on water quality associated with the fifteen gas wells currently active on the Roxana site and other gas wells in the vicinity,<sup>62</sup> which were not assessed in the EIS.

Despite LCWSD’s candid admission of the risks associated with drinking water, the BOP apparently feels no need to acknowledge these issues or discuss potential impact or mitigation measures in the EIS. Without such a discussion, the BOP has failed to provide a “thoughtful and probing reflection of the possible impacts associated with the proposed project . . . provid[ing] a reviewing court with the necessary factual specificity to conduct its review.”<sup>63</sup>

Along with the broad protections provided by NEPA’s review process, the EIS also indicates that prisoners’ drinking water is protected by the Safe Drinking Water Act.<sup>64</sup>

**In response to HRDC’s Draft EIS Comment:** BOP simply re-stated state law in Appendix E, p.41, which does not satisfy an in-depth analysis of the concerns raised.

### C. Radon Intrusion

The EIS states that the EPA classifies Letcher County as having potential for radon intrusion.<sup>65</sup> This may be from the coal mining and/or gas extraction under and surrounding both proposed sites, but the EIS does not identify the source of this intrusion or address mitigation.<sup>66</sup>

**In response to HRDC’s Draft EIS Comment:** Appendix E, p.42 states that text was added which further explains the serious effects of radon exposure, and lists voluntary measures to lessen these impacts (which the BOP did not imply it would be following). It also did not state the obvious—that the presence of this hazard is related to siting a facility on disturbed soil from a mining site which would not be present if not for the selected location chosen as a preferred alternative.

<sup>59</sup> LCWSD, Water Quality Report, *supra* note 54.

<sup>60</sup> *Id.*

<sup>61</sup> LCWSD, Water Quality Report, *supra* note 54.

<sup>62</sup> [“4 states confirm water pollution from drilling: Associated Press review of complaints casts doubt on industry view that it rarely happens.” USA Today](#), Jan. 5, 2014.

<sup>63</sup> *Comm. to Preserve Boomer Lake Park v. Dept. of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993).

<sup>64</sup> EIS § 3.10.3, 42 USC §§ 300 et seq.

<sup>65</sup> EIS § 4.12.1.3.

<sup>66</sup> “[C]oal... and natural gas contain[] radon”; see <http://www.radon.com/radon/granite.html>.

## D. Environmental Justice

The proposed prison facility is a heavy industrial use comprised of human warehouses which are very demanding of local utility resources, including a massive quantity of water use and sewage discharge, along with a diesel-burning power-generating facility and a UNICOR factory.<sup>67</sup>

Under the Environmental Justice guidelines of NEPA,<sup>68</sup> and according to the EIS, the people most probable to be in BOP custody if this facility was built are very likely to meet the criteria for members of Environmental Justice communities.

The racial demographics and socioeconomic status of prisoners projected to populate the facility can be reasonably based on the demographics of other BOP facilities across the country. Racial minorities are disproportionately represented in the nationwide prison population to such an extreme extent that incarceration trends have been referred to as the new Jim Crow.<sup>69</sup> The BOP reports 41% percent of its population to be of non-white “minority” status,<sup>70</sup> whereas this racial demographic only makes up approximately 25% of the entire U.S. population.<sup>71</sup>

The EIS also says nothing of prisoners’ status as an almost entirely low-income population.<sup>72</sup>

While mass incarceration in its current form represents an environmental justice dilemma that can stand alone, there have been several additional incidents in recent years that point to some of the unique health and safety hazards related to environmental conditions in Appalachian coal mining regions as previously mentioned. The EIS must look at the probability that incidents like this will impact prisoners residing at the proposed Letcher County facility. The EIS must review environmental risks such as this in a thorough manner, uninfluenced by the industry interests in the region, in order to assess the impacts to the incarcerated population which will be considered residents of the local community by the Census Bureau.<sup>73</sup>

<sup>67</sup> The EIS does not include any information on the sort of operations it will conduct in the UNICOR facility.

<sup>68</sup> “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (Executive Order 12898) directs each Federal Agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” In light of Executive Order 12898, the Council on Environmental Quality’s (CEQ) issued [Environmental Justice: Guidance Under the National Environmental Policy Act \(December 1997\)](#).

<sup>69</sup> “Now and then a book comes along that might in time touch the public and educate social commentators, policymakers, and politicians about a glaring wrong that we have been living with that we also somehow don’t know how to face. [The New Jim Crow: Mass Incarceration in the Age of Colorblindness](#) by Michelle Alexander is such a work.”

<sup>70</sup> [Current BOP statistics](#) do not include specific numbers for Latino or Hispanic prisoners, though they do report 19% of BOP prisoners are citizens of Latin American countries. A 2010 report stated that 33% are “Hispanic from any race.”

<sup>71</sup> U.S. Census Bureau, “[The White Population 2010](#).”

<sup>72</sup> This is in large part due to the fact that the BOP views prisoners as slave-laborers, as per the U.S. Constitution’s 13<sup>th</sup> Amendment, as they are unable to earn sufficient wages to provide for themselves or their families. *Also see* “Prisons of Poverty,” Prison Policy Initiative, July 9, 2015 at [www.prisonpolicy.org/reports/income.html](http://www.prisonpolicy.org/reports/income.html).

<sup>73</sup> “[A]lthough people in prison can’t vote, and remain legal residents of their home communities under the laws of most states, the Census Bureau currently tabulates people in prison as residents of their prison cells, not their homes.” [The Census Count and Prisoners: The Problem, The Solutions and What the Census Can Do](#), by Ben Peck, Oct. 2012.

**In response to HRDC’s Draft EIS Comment:** The BOP simply stated that it “does not concur with the assertion that federal inmates of mixed background (as to ethnicity, race and income) to be housed in the proposed facilities constitute either a minority or low income population for the purposes [of] EO12898.”<sup>74</sup>

This position has been taken by the BOP with no assessment of the anticipated population of incarcerated people who will fill the proposed facility.

The above-listed health-related issues should be additionally viewed through the NEPA-required Environmental Justice analysis of EO12898 for the demographic of prisoners who are from communities of color and disproportionately low-income, based on federal and state-wide prison population analyses.<sup>75</sup>

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

As detailed in the preceding sections, the proposed prison siting will likely result in adverse environmental impacts for the hundreds of residents of the proposed facility. Federal agencies must use all practicable means to restore and enhance the quality of the environment and to avoid or minimize any possible adverse environmental effects of their actions.<sup>76</sup> Mitigation includes avoiding the adverse impacts altogether, minimizing impacts by limiting the degree or magnitude of the action, rectifying the impact by repairing, rehabilitating or restoring the affected environment, reducing or eliminating the impact over time, and compensating for the impact by replacing or providing substitute resources or environments.<sup>77</sup>

The EIS utterly fails to discuss mitigation with respect to any health-related impacts. The most obvious shortcoming of the EIS is the lack of any discussion of potential environmental impacts that arise from housing over a thousand people at a reclaimed mining site. Without identifying the health risks, the BOP is in no position to propose a meaningful mitigation plan.

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

### **A. Wastewater**

The EIS contains contradictory or incomplete information concerning wastewater treatment at both proposed sites, especially the first alternative site.

In regard to the Payne Gap site, the utilities report states that the site would be served by the City of Jenkins’ wastewater treatment plant and that the city has reported it “has sufficient capacity to

<sup>74</sup> Final EIS, Appendix E, p.43.

<sup>75</sup> The following reputable reports utilize census data and data from other agencies, all of which are readily available to the BOP and should be a part of assessing environmental justice impacts:

[www.prisonpolicy.org/reports/rates.html](http://www.prisonpolicy.org/reports/rates.html) and [www.prisonpolicy.org/reports/income.html](http://www.prisonpolicy.org/reports/income.html).

<sup>76</sup> 40 C.F.R. § 1500.2(f); *see also id.* §§ 1502.14(f) (requiring alternatives section to include all appropriate mitigation measures), and 1502.16(h) (requiring the environmental consequences section to include a discussion of the means to mitigate adverse environmental impacts).

<sup>77</sup> 40 C.F.R. § 1508.20.

handle the proposed volume from the proposed BOP Facility.”<sup>78</sup> Yet the body of the EIS states that operation of the prison would cause the City of Jenkins to exceed its treatment plant’s design capacity and “[a]s a result, the proposed action would result in significant impacts.”<sup>79</sup> Despite having identified this substantial negative impact, the EIS is bereft of any discussion of a mitigation plan, in derogation of BOP’s duties under NEPA.<sup>80</sup>

As to the Roxana site, wastewater treatment would be provided by LCWSD’s Whitesburg wastewater treatment plant. The EIS claims that no adverse impact would occur because the prison would increase usage of the Whitesburg plant to 524,000 gallons per day, out of a total permitted capacity of 600,000 gallons.<sup>81</sup> These figures indicate that the prison would bring the Whitesburg plant to nearly 90% of its permitted capacity. While the prison alone *may* arguably not have a substantial impact, the significance of the prison can only be determined by reference to anticipated future demand for wastewater treatment in Whitesburg, as is required by NEPA’s cumulative impact review.

Notably, one of the catalysts for the creation of LCWSD was the plethora of problems arising from the estimated three to six thousand illegal straight-pipe discharges in Letcher County.<sup>82</sup> To the extent that local leaders intend to mitigate the impact of straight pipes by expanding homeowner access to the LCWSD sewer system, these plans could be thwarted given that the proposed prison will bring the system dangerously close to its maximum capacity.

Because the EIS does not address the substantial negative impacts associated with the first alternative site, nor acknowledge the potential for negative impacts resulting from the second alternative site, the EIS is not adequate.

## B. Water Quality

When addressing water-related impacts, the EIS focuses exclusively on “existing permitted capacity” without defining that term or discussing water sources. For example, the EIS states that “The existing permitted capacity for water is 4,000,000 gallons per day.”<sup>83</sup> The unanswered question is: the capacity of what? This statement is contained in a paragraph discussing LCWSD, which is a system that purchases water from three sources that rely on separate treatment facilities.<sup>84</sup> Thus, it is unclear whether the “permitted capacity” refers to the entire system, the specific facility that will provide water to the proposed sites or some other unit of reference.

Due to an inadequate local water supply, LCWSD obtains excess water from neighboring Knott County.<sup>85</sup> The EIS contains no information concerning the quality of Knott County water, the

<sup>78</sup> EIS, Appendix D, at p.10.

<sup>79</sup> EIS § 4.8.2.2.

<sup>80</sup> See *supra*, text accompanying notes 75 and 76.

<sup>81</sup> EIS § 5.8.2.2.

<sup>82</sup> Hughes, *supra* note 55, at 61-62.

<sup>83</sup> EIS § 4.8.1.1.

<sup>84</sup> LCWSD, Water Quality Report, *supra* note 54.

<sup>85</sup> LCWSD, Water Quality Report, *supra* note 54; see also Hughes, *supra* note 55, Appendix E at 69 (at the formation of LCWSD, local water supplies were “nearly strained to capacity,” thus the agency required external water and eventually joined the Carr Creek Water Commission to obtain water from Knott County).



impact of increased draw on that water source, or how much water LCWSD can realistically obtain from external sources. Simply stating there is available permitted capacity to handle the proposed prison siting does not adequately discuss the specific impact of increasing LCWSD's water usage by approximately 264,160 gallons per day.<sup>86</sup>

### C. Endangered Species

Indiana bats and gray bats are found in second-growth forests in Letcher County,<sup>87</sup> and both species are listed as endangered.<sup>88</sup> The proposed project would entail clearing substantial forest acreage at either proposed site.<sup>89</sup> The Payne Gap site is home to second-growth forests and has been identified as housing summer and winter habitat.<sup>90</sup> Despite choosing Roxana as the preferred alternative site, the EIS does not include a survey of potential habitat at the Roxana site,<sup>91</sup> and BOP has therefore failed to comply with the Endangered Species Act ("ESA").<sup>92</sup> Nonetheless, given the prevalence of both species in the area, the Roxana site should be presumed to house habitat unless proven otherwise.<sup>93</sup>

Although email correspondence with the U.S. Fish and Wildlife Service ("FWS") has been added to the final EIS Appendix, it does not make the referenced survey, in which habitat that was assessed above 100 acres dropped to below 93 acres, available for public review. For this reason, we have preserved the ESA concern related to impacts on the imperiled bat species.

Additionally, being that Appalachia is home to some of the most biodiverse forest ecosystems in the U.S., both sites are providing potential habitat for approximately 60 other species of plants and animals also listed for varying levels of state and federal protection, which have only been minimally addressed.<sup>94</sup>

#### 1. BOP Must Disclose and Mitigate Impacts to Listed Species

The ESA requires *every* agency of the federal government to refrain from harassing, harming, pursuing, wounding, or killing endangered species.<sup>95</sup> In addition, the ESA provides that "[a]ll . . . Federal agencies shall . . . utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species."<sup>96</sup> The legislative history behind this statute "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species

<sup>86</sup> See EIS § 4.8.2.1.

<sup>87</sup> Lindsay R. Conley, *Bat Species Diversity in Old-Growth vs. Second Growth Forests in Lilley Cornett Woods, Letcher County, Kentucky* (2011), at 13.

<sup>88</sup> EIS, Appendix A at p.3.

<sup>89</sup> EIS §§ 2.4 & 2.5.

<sup>90</sup> EIS §§ 2.4 & 4.11.2.3.

<sup>91</sup> EIS § 5.11.2.3.

<sup>92</sup> 16 U.S.C. § 1536(c)(1) (when listed species is present in area, agency must prepare a biological assessment to determine whether the species or their critical habitat may be affected by action).

<sup>93</sup> See generally, Conley, *supra* note 87.

<sup>94</sup> EIS Table 4-17.

<sup>95</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184-185 (1978).

<sup>96</sup> 16 U.S.C. § 1536(a)(1).

legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”<sup>97</sup>

## 2. Indiana and Gray Bats are Subject to Severe Threats

Indiana bats and gray bats are among the six species of bat that are lethally affected by white-nose syndrome (“WNS”). WNS is a devastating new disease that originated in upstate New York in 2006, and has since spread to bat populations in 19 states and 4 Canadian provinces. The decline of bat populations in states afflicted the longest with WNS has been staggering. Biologists estimate that 70 percent of the Indiana bat population in the Northeast has been lost to WNS since 2007.<sup>98</sup> Rangelwide, the Indiana bat population has held steady the last few years, but substantial losses will almost certainly occur in the near future as the disease takes hold in the core range of the species, in states that include Indiana, Kentucky and Missouri.

On January 17, 2012, the FWS issued a press release estimating that “at least 5.7 million to 6.7 million bats have now died from white-nose syndrome. Biologists expect the disease to continue to spread.”<sup>99</sup> The same press release quoted agency director Dan Ashe as saying, “This startling new information illustrates the severity of the threat that white-nose syndrome poses for bats, as well as the scope of the problem facing our nation. Bats provide tremendous value to the U.S. economy as natural pest control for American farms and forests every year, while playing an essential role in helping to control insects that can spread disease to people.”<sup>100</sup>

The FWS has promulgated a national plan for managing WNS, which states:

White-nose syndrome (WNS) is a disease responsible for unprecedented mortality in hibernating bats in the northeastern U.S. This previously unrecognized disease has spread very rapidly since its discovery in January 2007, and poses a considerable threat to hibernating bats throughout North America.<sup>101</sup>

Indiana bats have a tendency to return repeatedly to the same area. They may use the same roost trees in successive years as long as they remain standing, and are known to move from one roost tree to another if the previously-used tree is no longer useable.<sup>102</sup>

Working in Illinois, James Gardner and his colleagues raised concerns that disturbing roosts may cause bats to expend additional energy searching for new roosts at a time when the bats’ energy

<sup>97</sup> *TVA v. Hill*, 437 U.S. at 185.

<sup>98</sup> Gregory G. Turner, et al., [A Five-Year Assessment of Mortality and Geographic Spread of White-Nose Syndrome in North American Bats and a Look to the Future](#), 52 *Bat Research News* 13 (2011).

<sup>99</sup> U.S. Fish & Wildlife Serv., [“North American bat death toll exceeds 5.5 million from white-nose syndrome”](#) (Jan. 17, 2012).

<sup>100</sup> *Id.*

<sup>101</sup> U.S. Fish & Wildlife Serv., [A National Plan for Assisting States, Federal Agencies, and Tribes in Managing White-Nose Syndrome in Bats](#) (May 2011).

<sup>102</sup> U.S. Fish & Wildlife Serv., *Recovery Plan for the Indiana Bat* (1983); James E. Gardner, et al., [Summer Roost Selection and Roosting Behavior of \*Myotis sodalis\* \(Indiana Bat\) in Illinois](#) (Feb. 1991).

should be used for rearing young. They found a high degree of within-season site fidelity to specific trees by individual bats.<sup>103</sup>

Meanwhile, utilizing data from Kentucky, researcher Mark Gumbert found both roost tree and roost site fidelity.<sup>104</sup> Specific roost trees may be used repeatedly by a colony for several years until the trees are no longer available, but the colony will continue to use the general area for years. Thus, the impact of the proposed site on endangered bat species must be considered.

### 3. The EIS Fails to Explain Proposed Mitigation Measures

Both proposed sites are home to endangered bat species, and the project would destroy habitat at a time that the bats are under substantial threat from WNS. Thus, BOP is under a duty to refrain from destroying habitat or to aggressively mitigate any adverse impacts to the species. Instead, BOP has issued an EIS which cursorily mentions that mitigation measures *could potentially* be taken, without discussing what BOP actually intends to do.<sup>105</sup> Making matters even worse, the EIS mentions a “mitigation fund” but provides no information as to what this money would be spent on.<sup>106</sup> These types of vague “plans” do not discharge BOP’s duties under NEPA.<sup>107</sup>

Most shockingly, even though the Payne Gap site has been identified as containing *both* summer and winter habitat, the EIS proposes establishing a “[m]itigation fund for habitat removal *based on time of year habitat is removed*,”<sup>108</sup> and the BOP’s budget for ESA mitigation is “based only on summer habitat impacts.”<sup>109</sup> To be clear, the season in which habitat is destroyed is irrelevant—if both summer and winter habitat are destroyed, then BOP must provide mitigation for *both* types of destroyed habitat, regardless of whether construction occurs in June or December.

Until such time as the BOP, in consultation with FWS, develops a meaningful mitigation plan, it cannot proceed with the project due to the negative impacts on endangered bat habitat at both proposed building sites.

### D. Community Facilities and Public Services

While the EIS does review impacts on local law enforcement agencies, social service providers and healthcare facilities, it does not contain a thorough description of some of the most significant impacts.

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<sup>103</sup> Gardner, *supra* note 102.

<sup>104</sup> Mark W. Gumbert, et al., “Roost Fidelity in Kentucky,” *The Indiana Bat: Biology and Management of an Endangered Species* (Allen Kurta & Kim Kennedy, eds.) (2002).

<sup>105</sup> EIS § 4.11.4 (“Mitigation measures *may include*... “ (emphasis added)).

<sup>106</sup> EIS § 4.11.4.

<sup>107</sup> *See Foundation on Economic Trends v. Weinberger*, 610 F.Supp. 829, 841 (D.D.C. 1985) (“Merely reciting the safety features of a proposed facility without carefully analyzing the possible environmental dangers associated with the proposal does not constitute the type of environmentally informed decisionmaking that the drafters of NEPA had in mind. An environmental assessment must offer something more than a ‘checklist’ of assurances and alternatives. It must indicate, in some fashion, that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns”).

<sup>108</sup> EIS § 4.11.4 (emphasis added).

<sup>109</sup> EIS at ES-iii (tbl. ES-1).

Local law enforcement agencies are often called upon to assist in responding to large-scale incidents at federal facilities. The EIS cursorily states local law enforcement agencies are “willing to discuss” a memorandum of understanding on interagency coordination, and that local officials “indicated” that there would be no impact from the proposed project.<sup>110</sup> These vague assurances do not provide sufficiently definite information. To discharge its duty under NEPA, BOP should answer obvious questions regarding the potential impact of the proposed facility on local law enforcement agencies, particularly by discussing historical rates of facility-related offenses, riots, escapes and prosecutions at BOP-operated prisons.

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

The EIS also fails to address the impact of job-related stress among correctional officers, and the impact that such stress will have on medical and social service providers in the communities surrounding the alternative sites. The U.S. Department of Justice has noted that correctional officer occupational stress can lead to physical illness, substance abuse and domestic problems, including abuse.<sup>111</sup>

What programs (if any) are available for employees in BOP facilities? How are these programs evaluated and what are their success rates? What external resources are available for prison staff and their families? To take NEPA’s required “hard look” at the human environment, the EIS must answer these questions—but it does not.

**In response to HRDC’s Draft EIS Comment:** The BOP alleges that “prisons do not bring litigation.” HRDC disagrees with this finding, and the EIS presents no data in support. On the contrary, litigation surrounding human-made environmental health hazards in particular are of increasing interest, as has been noted in a forthcoming study of the subject, which concludes:

The government may be wise to consider the potential costs of failing to account for environmental hazards at the outset. By being cognizant of possible hazards, prisons can mitigate health concerns with preventative care, or, for those prisons not yet built, can choose property sites away from environment industries with hazardous side effects.... Human-made environmental hazards should constitute a basis for Eighth Amendment unconstitutional conditions claims. Compelling policy arguments and the evolving nature of the Eighth Amendment support the need for such claims. Moreover, as seen from the

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<sup>110</sup> EIS § 4.4.2.1.

<sup>111</sup> Peter Finn, U.S. Dept. of Justice, Nat’l. Inst. of Justice, *Addressing Correctional Officer Stress: Programs and Strategies*, 16 (Dec. 2000).

excessive heat cases [filed against state prison systems], environmental hazards already form the basis for successful claims.<sup>112</sup>

### **E. UNICOR Activities Have Not Been Addressed**

The EIS indicates that the proposed prison will include a 14,800-square foot UNICOR warehouse, but does not state what sort of industrial activity will occur there or how any hazardous materials will be handled.

UNICOR, also known as Federal Prison Industries, has a documented history of importing toxic waste for processing in its facilities,<sup>113</sup> including violations resulting in the endangerment of prisoners, prison employees and surrounding communities. According to the U.S. Office of Special Counsel:

Despite a stated policy of “provid[ing] a safe and healthful environment for all employees and inmates,” the Federal Bureau of Prisons (BOP) and Federal Prison Industries (FPI) managers recklessly, and in some cases knowingly, exposed inmates and staff to unsafe levels of lead, cadmium, and other hazardous materials over a period of years.<sup>114</sup>

EPA inspections of prison facilities conducted in Region 3 (which shares states with the BOP’s Mid-Atlantic Region) have found a steady stream of environmental violations from prison-related industrial activities over the past fifteen years, including BOP facilities, specifically related to regulations on the containment and disposal of hazardous materials covered in the Resource Conservation and Recovery Act, as well as Spill Prevention Control and Countermeasure (SPCC) plans and the Clean Air Act.<sup>115</sup>

**In response to HRDC’s Draft EIS Comment:** The BOP states “[c]urrently, there are no plans for a UNICOR operation at this facility.” This position is inconsistent with Table D on pg. 177 and text on pg. 189, which indicates anticipation of a 14,800-square foot UNICOR warehouse. Even if the BOP is not planning a UNICOR facility as an immediate priority, any possibility for adding a UNICOR facility in the foreseeable future should be assessed for cumulative or secondary impacts.

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<sup>112</sup> Brenna Helppie-Schmieder, Note, *Human-Made Environmental Health Hazards: A Ripe Area for Unconstitutional Prison Conditions Claims*, 110 Northwestern University Law Review (forthcoming 2016).

<sup>113</sup> [“A Review of Federal Prison Industries’ Electronic-Waste Recycling Program,”](#) U.S. Dept of Justice, October 2010.

<sup>114</sup> [OSC File No. DI-04-2815.](#)

<sup>115</sup> “Region III has over 100 prisons which have been found to commonly violate RCRA-C, SPCC and other environmental regulations. The Office of Enforcement, Compliance and Environmental Justice has targeted overcrowded, older facilities with industrial shops suspected of causing environmental damage.” See [http://www.epa.gov/region03/compliance\\_assistance/prisons.htm](http://www.epa.gov/region03/compliance_assistance/prisons.htm) (No longer available online, but available from HRDC).

## F. Environmental Justice in Surrounding Community

External impacts will be felt primarily by low-income communities. As the EIS indicates, Letcher County, and the city of Jenkins particularly, have higher levels of poverty than the state of Kentucky's average.<sup>116</sup> They also have a higher rate of unemployment.<sup>117</sup>

All of the above-mentioned concerns must be reviewed in the context of NEPA's Environmental Justice guidelines.<sup>118</sup>

## G. Additional Socioeconomic Impacts

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

Specifically, BOP should address the census crediting of incarcerated persons from all over the country to an impoverished, predominately white rural congressional district in order to enhance the weight of a vote in that district, which dilutes all other votes in the state. While incarcerated populations are disproportionately Black and Latino, most prisons are built in disproportionately white areas. Using Black and Latino prisoners to pad the populations of white legislative districts dilutes minority voting strength state-wide.<sup>119</sup>

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

## H. Lilley Cornett Woods ECU Natural Area

This location is not mentioned in the EIS, or by the Dept. of the Interior comment.<sup>120</sup> See the attached image, Figure 5, entitled "Lilley Cornett Woods of ECU," which indicates that this site is within 3–4 miles of the Roxana site. The following text is from the ECU's website:

Located in Letcher County in the southeastern corner of Kentucky, Lilley Cornett Woods (LCW) encompasses 554 acres of mixed mesophytic forest. A portion of the total acreage, 252 acres, is designated as "old-growth" forest; a forest which has not undergone any manmade changes in 150 years. Biodiversity of plants and animals abound at LCW. There are over 530 species of flowering plants and an estimated 700

<sup>116</sup> EIS Table 4-7.

<sup>117</sup> EIS Table 4-3. Additional sources: "[How the census measures poverty](#)" and "[Poverty Guidelines, 2013.](#)"

<sup>118</sup> EPA's Environmental Justice strategy and Presidential Executive Order 12898, *see* <http://www.epa.gov/environmentaljustice/resources/policy/#order>

<sup>119</sup> "The way the Census Bureau counts people in prison creates significant problems for democracy and for our nation's future. It leads to a dramatic distortion of representation at [local](#) and [state levels](#), and creates an inaccurate picture of community populations for [research and planning purposes](#)." Prison Policy Initiative's Prison Gerrymandering Project. *see* <http://www.prisonersofthecensus.org/impact.html>

<sup>120</sup> EIS, Appendix E, p.27.

breeding pairs of birds present. In addition, a variety of small mammals, amphibians and reptiles call Lilley Cornett Woods home.

Due to the unique nature of this ecosystem, it is an ideal location for ecological and environmental research. Thirty six completed studies have been documented, ranging from small animal surveys to hydrological investigation and archeological assessments of rock shelters. One of the most important investigations has been the decadal forest composition research which has taken place over the past 40 years ... LCW is a U.S. Department of the Interior registered national landmark and a registered natural area of the Society of American Foresters. Also, LCW is a designated State Wildlife Refuge.<sup>121</sup>

This is a very significant oversight in regard to wildlife impacts and recreational/research-oriented use in the area of impact should the proposed prison be built.

## VII. Cumulative Impacts

Many of the issues addressed in this comment, but not by the EIS, trigger the need for additional and deeper review of the cumulative nature of each issue. Several examples include:

- Assessing the severity of increased water pollution in areas where water has already been contaminated by previous mining, gas and other operations, and identifying how long these activities are anticipated to continue;
- Assessing UNICOR operations contributing towards an overall increase in the base level of hazardous materials and pollution over the projected lifespan of the facility;
- Assessing air emission calculations which include indirect sources, such as the fuel source for the significant requirement of electricity for constant lighting, electric fencing, etc. (including greenhouse gases).<sup>122</sup>

## VIII. Conclusion

The BOP's only attempt at providing any semblance of mitigation for the above-listed concerns (aside from monetary compensation for loss of endangered species) appears to be the socio-economic benefits that the BOP alleges will occur as a result of this project.<sup>123</sup> In doing so, they must provide a comparative analysis based on the socioeconomic benefits alleged during the EIS process for the neighboring Martin, McCreary and Clay facilities, in order to fulfill the duties of a "reasonably thorough discussion of the significant aspects" of the project.<sup>124</sup>

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<sup>121</sup> <http://naturalareas.eku.edu/lilley-cornett-woods-appalachian-ecological-research-station>.

<sup>122</sup> See Appendix C "Air Emission Calculations," the assessment of emissions associated with "operations" only appear to include use of back-up generators and boilers, but not overall power supply for daily operations.

<sup>123</sup> See EIS Table ES-1.

<sup>124</sup> *Supra* note 32.

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

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

The BOP should not only consider No Action as a viable option, but as the preferred option for this site, based on the BOP’s research presented in the EIS and the questions presented in this comment which remain unanswered.

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

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

Sincerely,



Paul Wright.  
Executive Director, HRDC

*The following organizations and individuals signed on to HRDC’s comment on the draft EIS:*

**Kentuckians For The Commonwealth**

Dana Beasley Brown, chairperson  
250 Plaza Drive, Suite 4  
Lexington, KY 40503  
(859) 276-0563

**Abolitionist Law Center**

P.O. Box 8654  
Pittsburgh, PA 15221  
(412) 654 9070  
abolitionistlawcenter.org

**Black Lives Matter Kentucky**

3208 W. Broadway  
Louisville, KY 40211  
[standuplouisville@gmail.com](mailto:standuplouisville@gmail.com)



**Black Lives Matter Kentucky (Lexington Group)**

2369 Aristocracy Circle  
Lexington, KY 40509  
[ybwsocialjustice@gmail.com](mailto:ybwsocialjustice@gmail.com)

**Center for Biological Diversity**

Lori Ann Burd, Environmental Health Director  
Portland, OR  
(971) 717-6405  
[laburd@biologicaldiversity.org](mailto:laburd@biologicaldiversity.org)

**Virginia Organizing**

Sandra A. Cook, Chairperson  
703 Concord Avenue  
Charlottesville, VA 22903-5208  
(434) 984-4655 ext. 222

**Architects / Designers / Planners for Social Responsibility**

Raphael Sperry, President  
(415) 519-7027  
[raphael@adpsr.org](mailto:raphael@adpsr.org)

**Global Justice Ecology Project**

Anne Petermann, Executive Director  
Buffalo, NY  
(716) 931-5833  
[anne@globaljusticeecology.org](mailto:anne@globaljusticeecology.org)

**Stop Mass Incarceration KY**

2369 Aristocracy Circle  
Lexington, KY 40509  
[stopmassincarcerationnetworkky@gmail.com](mailto:stopmassincarcerationnetworkky@gmail.com)

**Stories from South Central WV**

Chris Gang  
[chrisgang@gmail.com](mailto:chrisgang@gmail.com)  
681-214-0884

**Radical Action for Mountain Peoples' Survival (RAMPS)**

Kim Ellis  
PO Box 121  
Rock Creek, WV 25174  
[info@rampscampaign.org](mailto:info@rampscampaign.org)  
304-854-0956,

**Prison Books Collective**

Chapel Hill, NC  
(919) 443-9238  
[prisonbooks@gmail.com](mailto:prisonbooks@gmail.com)

**Women In Transition**

PO BOX 1808  
Louisville, KY 40201  
[witkyinfo@gmail.com](mailto:witkyinfo@gmail.com)

**Working Narratives**

1512 Orange Street  
Wilmington, NC 28401

*Individual Signers*

Preston Elrod, Ph.D.  
Professor and Division Chair,  
Undergraduate Studies  
School of Justice Studies  
Eastern Kentucky University  
Richmond, KY 40475 USA  
(859) 622-1160

Bill McClanahan  
Louisville, KY  
[wwmcl@essex.ac.uk](mailto:wwmcl@essex.ac.uk)

Victoria E. Collins, Ph.D.  
Co-Director, International State Crime Research Center  
Assistant Professor  
School of Justice Studies  
Eastern Kentucky University  
Richmond, KY 40475  
[Victoria.Collins@eku.edu](mailto:Victoria.Collins@eku.edu)

Judah Schept, Ph.D.  
Assistant Professor  
School of Justice Studies  
Eastern Kentucky University  
[Judah.schept@eku.edu](mailto:Judah.schept@eku.edu)

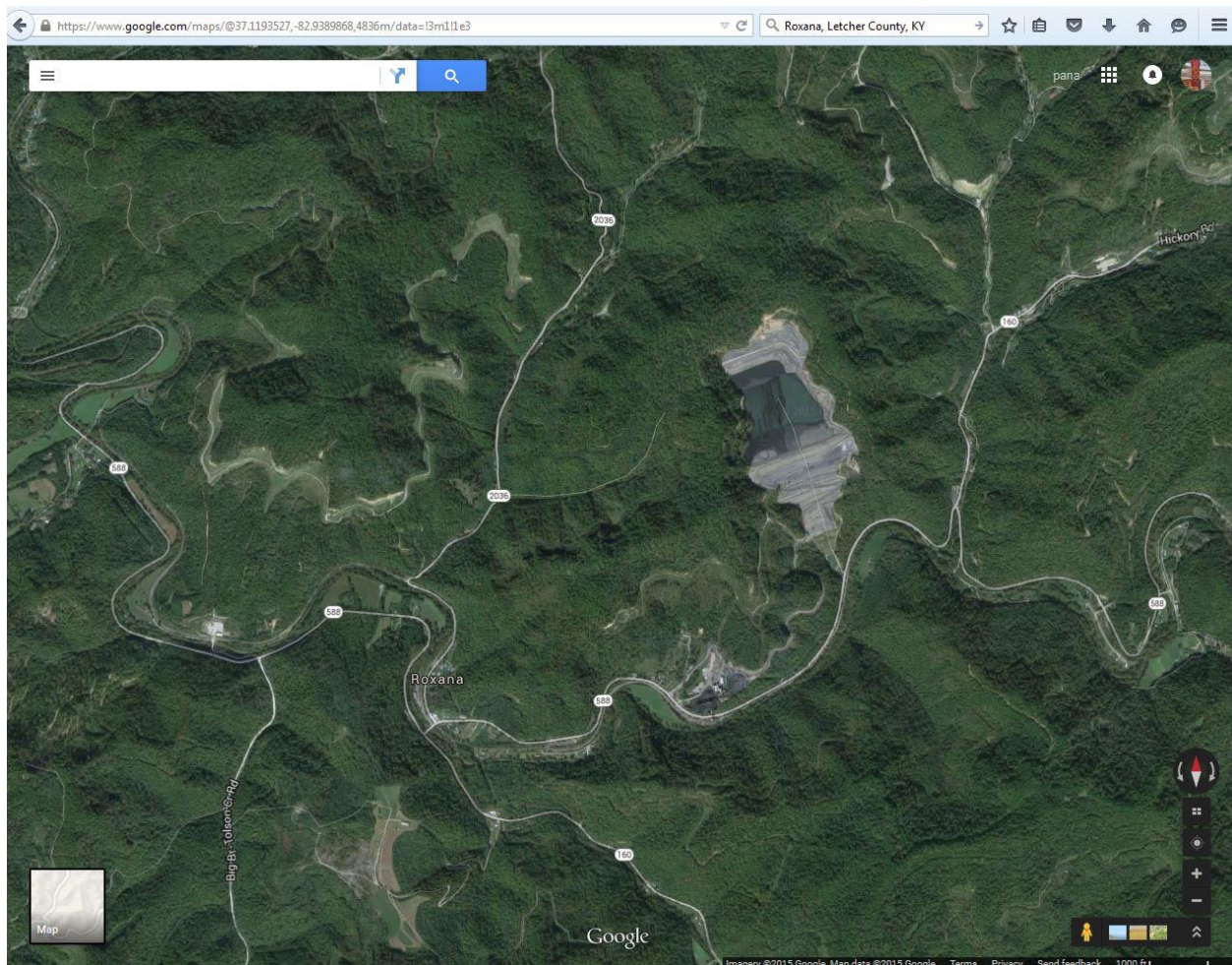
Jordan E. Mazurek  
3401 Gatewood Ct. Apt 56  
Lexington, KY 40517  
Eastern Kentucky University  
Criminal Justice, MSc (2016)  
(817) 944-0966  
[j.e.mazurek12@gmail.com](mailto:j.e.mazurek12@gmail.com)

Dan Berger, Ph.D.  
School of Interdisciplinary Arts and Sciences  
University of Washington Bothell  
[daberger@uw.edu](mailto:daberger@uw.edu)

Stephen Raher  
Portland, OR  
[stephen.raher@gmail.com](mailto:stephen.raher@gmail.com)

Panagioti Tsolkas  
HRDC's Prison Ecology Project  
Lake Worth, FL  
(561) 360-2523  
[ptsolkas@prisonlegalnews.org](mailto:ptsolkas@prisonlegalnews.org)

## ATTACHMENTS



**Figure 1 - Apparent coal slurry impoundment in the immediate vicinity of Roxana, the preferred BOP site, but not mentioned in the EIS. Source: Google Map**



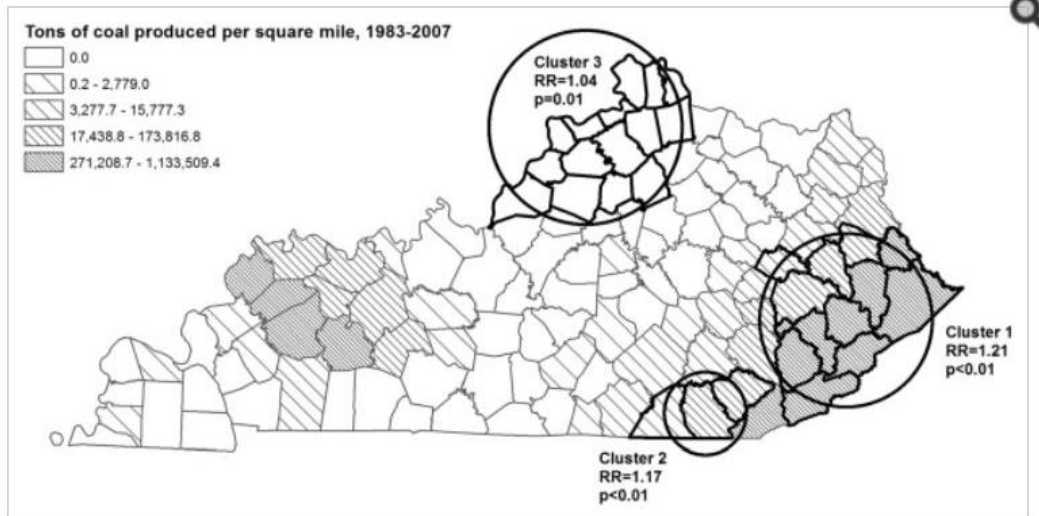
**Figure 2 - Mountaintop removal at Oven Fork, near Whitesburg (Letcher County, KY). Source: [www.mountainroadshow.com](http://www.mountainroadshow.com)**



**Figure 3 - Mountaintop removal near Hazard, in neighboring Perry County, KY. Source: [www.mountainroadshow.com](http://www.mountainroadshow.com)**



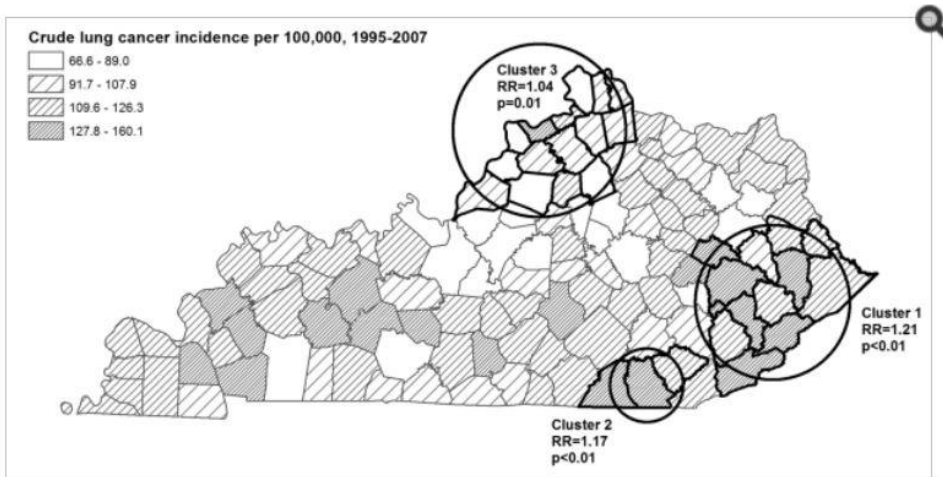
Figure 4 - Coal sludge near Whitesburg, Letcher County, KY. Source: [www.mountainroadshow.com](http://www.mountainroadshow.com)



Coal production among Kentucky counties (1983–2007), with high-rate clusters<sup>a</sup> identified by spatial scan statistic

<sup>a</sup>Circles and bold outlines indicate counties in high-rate clusters.

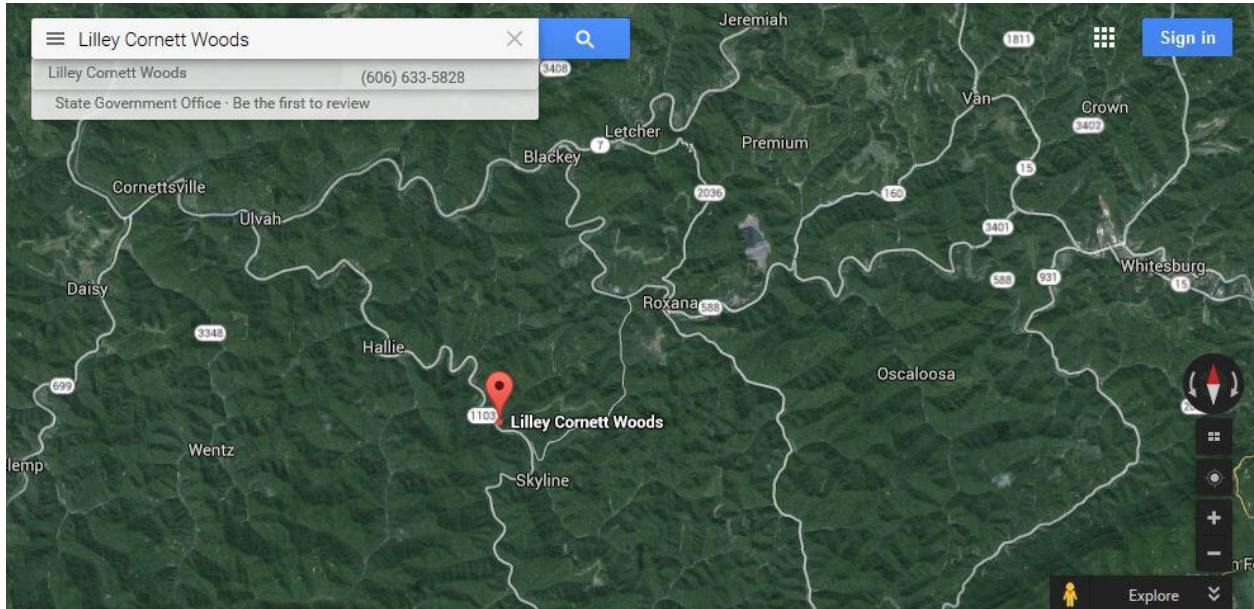
Figure 5



Unadjusted lung cancer incidence rates in Kentucky by county (1995–2007), with high-rate clusters<sup>a</sup> identified by spatial scan statistic

<sup>a</sup>Circles and bold outlines indicate counties in high-rate clusters.

Figure 6



**Figure 7 - Lilley Cornett Woods of EKU, 3–4 miles from Roxana. Source: Google Map**