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Richard A. Cohn, Chief
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Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

VIA FACSIMILE (202-616-6024) AND EMAIL (racohn@bop.gov)

Re: Environmental Assessment, "Short Term Sentences Acquisition"

Dear Mr. Cohn:

Pursuant to the Federal Register notice of February 1, 2011, I submit the following comments in response to the environmental assessment ("EA") prepared by the Bureau of Prisons ("BOP").[1] Although the EA says that it is for "Short Term Sentences Acquisition," ("STS") this appears to simply be a new name for the long-running contracting initiative that BOP has henceforth referred to as the "Criminal Alien Requirement." ("CAR")[2]

As explained below, the EA published on January 25, 2011, is inadequate in multiple regards. Accordingly, I request that BOP issue an environmental impact statement ("EIS") that remedies the deficiencies described herein.

I. BOP Has Not Examined a Sufficient Range of Alternatives

Agency consideration of alternatives is the "heart of the environmental impact statement."[3] Indeed, this process is so crucial that agencies are statutorily required to consider alternatives even if a formal EIS is not prepared.[4] Most importantly, when deciding what alternatives to consider, an agency may not "limit the scope of the agency's analysis to what the applicant says it needs."[5]

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[1] Although the Federal Register notice designates February 28 as the close of the comment period, BOP delayed transmission of the environmental assessment to the undersigned by twenty-one days. Pursuant to the undersigned's request, BOP employee Issac Gaston extended the comment period through and including March 10, 2011, as compensation for BOP's unreasonable delay.

[2] According to the EA, the preferred alternative relates to BOP's procurement action RFP-PCC-0018. EA Appx. A, at 15. A review of the documents associated with that RFP (available through the fbo.gov website) reveals that the procurement action is identical to the earlier CAR contracts in all material respects.

[3] 40 C.F.R. § 1502.14.

[4] 42 U.S.C. § 4332(E); *see also Southern Utah Wilderness Alliance v. Norton*, 237 F.Supp.2d 48, 52 (D.D.C. 2002) (§ 4332(E) requires consideration of alternatives as part of an environmental assessment).

[5] *Southern Utah Wilderness Alliance*, 237 F.Supp.2d at 53.

A. The No-Action Alternative Lacks Necessary Information

When considering alternatives, an agency must include "the alternative of no action."[6] The no-action alternative is not simply a "do nothing" alternative, but rather must entail an actual discussion of the environmental consequences of an agency's decision to take no action.[7] Federal courts have found agency NEPA analyses insufficient when the agency fails to discuss or evaluate the no-action alternative.[8]

The current EA fails to provide any meaningful information on the no-action alternative. Indeed, BOP's cursory discussion of the no-action alternative raises more questions than it answers. The BOP describes the no-action alternative as "continu[ing] the current and long-standing arrangement whereby federal, low-security, adult male, criminal alien populations are housed in facilities owned and operated by the BOP as well as with state, local, and private community correctional centers and in alternative confinement."[9]

But the EA fails to provide any information about the BOP's "current and long-standing" practices. For example, how large of a population is currently housed under such arrangements? How is that population expected to increase or decrease in coming years? With how many facilities does the BOP have contracts, and is there additional available capacity in those facilities? Most importantly, what are the "alternative confinement" options that BOP mentions? To the extent that alternative confinement would allow BOP inmates to serve their sentences in non-institutional settings, the impact on the inmates' social and family environments would clearly be less adverse. Even if BOP were to continue holding inmates in existing facilities under the no-action alternative, the EA must contain information about were such facilities are and what their available capacity is.

Without answering these questions, BOP cannot take a "hard look" at the environmental impacts of the project, as required by NEPA.[10] An agency finding of no significant impact in the present case would be based on inadequate consideration of the no-action alternative thus would be vulnerable to reversal because it is not founded on an adequate administrative record.[11]

B. BOP Has Not Considered Fee-Simple Acquisition of Facilities

BOP's preferred alternative is to issue contracts for housing BOP inmates at one or more pre-existing, non-federally-owned, contractor-operated facilities. BOP has not considered acquiring the facilities in fee simple (or under a long-term lease) and operating the prisons with agency staff. Such an alternative must be considered because it would have materially different impacts on the socio-economic environment.

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[6] 40 C.F.R. § 1502.14.
[7] *See e.g., Young v. Gen. Servs. Admin.*, 99 F.Supp.2d 59, 74-75 (D.D.C. 2000).
[8] *E.g., City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990).
[9] U.S. Dept. of Justice, Fed. Bureau of Prisons, "Short-Term Sentences Acquisition: Environmental Assessment" (Jan. 2011) [hereafter "EA"], at II-2.
[10] *Young*, 99 F.Supp.2d at 68.
[11] *See* 5 U.S.C. § 706(2)(A).

BOP claims that the preferred alternative would have "beneficial impacts on local and regional economies."[12] Yet such economic benefits are far from proven, particularly in the context of privately-operated prisons.[13] Because approximately 65-75% of a typical prison budget is spent on labor, private operators typically enhance profit margins by spending less on employee compensation than government corrections agencies.[14] Accordingly, if BOP were to acquire and operate the facilities, the local economic impact (and associated secondary impacts on community facilities, such as healthcare and social services) would be materially different than under the preferred alternative. Not only has BOP failed to consider the fee-simple acquisition alternative, it has not even discussed the reasons for eliminating this alternative, which in itself is a violation of NEPA's implementing regulations.[15]

C. BOP Has Not Considered Alternatives to Incarceration

The preferred and no-action alternatives both assume, without explanation, that the population housed in CAR/STS facilities must serve their sentences in a prison. As many states have shown in recent years, low security offenders can effectively and safely serve their sentences in non-prison settings.[16] To the extent that such alternatives would allow BOP inmates to reside in their home communities, preserve family structures, and maintain employment, the impact to both the natural and human environment is significantly less than housing three thousand inmates in one secure, concentrated facility.

Alternatives to incarceration are highly relevant to the current project for two reasons. First, the CAR/STS facilities house low-security inmates,[17] a population which is more amenable to serving sentences in non-prison settings. Second, the CAR/STS facilities house immigrants, a population which has been subject to a marked trend of over-incarceration in recent years.[18] Although the CAR/STS population does consist of inmates who have been convicted of criminal offenses (not merely immigration violations), it is nonetheless a low-security population that should be eligible for the same types of alternative sentencing arrangements that are becoming more common among the states, as correctional budgets are cut in light of revenue shortfalls.[19]

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[12] EA, at II-2.
[13] *See* Stephen Raher, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 Richmond J.L. & Pub. Int. 209, 246 n. 268 and accompanying text (2010) (listing research on poor economic development associated with rural prison siting).
[14] James Austin & Garry Coventry, U.S. Dept. of Justice, Bureau of Justice Assistance, *Emerging Issues on Privatized Prisons* 16 (2001).
[15] 40 C.F.R. § 1502.14(a) ("for alternatives which were eliminated from detailed study, [the agency must] briefly discuss the reasons for their having been eliminated.").
[16] *See e.g.,* Vera Institute of Justice, *The Continuing Fiscal Crisis in Corrections: Setting a New Course* (Oct. 2010) (available at http://www.vera.org/download?file=3072/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf).
[17] EA, at II-2.
[18] *See* Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 Fordham Urb. L.J. 217, 235-239 (2010).
[19] Vera Inst., *supra* note 16, at 16.

BOP's refusal to discuss alternatives to imprisonment is not just indicative of the agency's lack of imagination, but also flies in the face of NEPA's requirement to "study, develop, and describe appropriate alternatives to recommended courses of action."[20] Recent innovations have shown that alternatives to incarceration can be reasonably implemented and can save scarce financial and human resources. Such alternatives could avoid the negative environmental impacts which would arise from BOP's preferred alternative. Accordingly, BOP's failure to consider such alternatives is grounds for finding the EA insufficient, since the agency's analysis appears to be little more than "a pro forma ritual."[21]

II. BOP's Consideration of Environmental Impacts is Inadequate

An environmental assessment may be brief, but it *must* include "discussions . . . of the environmental impacts of the proposed action and alternatives."[22] Such discussion must be based on specific factual evidence and "[u]nsubstantiated determinations or claims lacking in specificity can be fatal."[23] In five important respects, the BOP's EA does not provide crucial evidence concerning reasonably foreseeable impacts. These five categories are discussed in turn.

A. The EA Does Not Adequately Acknowledge the Current Status of the Facilities

The Diamondback and Great Plains facilities are both currently vacant.[24] According to the EA, the Willacy County facility is at one-third capacity.[25] The EA points out that there would be no impact from construction (because the prisons have already been built), but it generally ignores the fact that two of the facilities would (but for the proposed alternative) be vacant and thus have minimal operational impact on the environment. Although the EA purports to discuss various types of impacts, it generally fails to quantify the impacts of facility activation and compare the results to the impacts of vacant facilities (i.e., the no-action alternative). Activation of non-operating facilities (or, in the case of Willacy County, a population increase of 66%) clearly constitutes a significant impact within the meaning of NEPA, and requires the preparation of an EIS.

B. The EA Does Not Adequately Address Impacts on Water Resources

Prisons use substantial water resources. The BOP's EA fails to describe, with sufficient detail, the increase in water usage that would result from bringing wholly or partially vacant facilities online.

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[20] 42 U.S.C. § 4332(E).
[21] *See Southern Utah Wilderness Alliance*, 237 F.Supp.2d at 52 ("Considering environmental costs means seriously considering alternative actions to avoid them.").
[22] 40 C.F.R. § 1508.9(b).
[23] *Comm. to Preserve Boomer Lake Park v. Dept. of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993).
[24] EA, at II-4—II-5.
[25] *Id.* at II-8.

Moreover, the EA uses internally inconsistent figures for estimating water-resource impact. When discussing the Diamondback facility, the EA uses a usage assumption of 169 gallons per inmate per day.[26] Yet, the analysis of the Willacy County facility assumes a total usage of two hundred thousand gallons per day,[27] which (for a three thousand bed facility[28]) equates to only 67 gallons per inmate per day. This disparity is particularly concerning because using the 169-gallon figure (which is closer to generally accepted estimates of prison water-usage) yields a total usage of 507,000 gallons per day for the Willacy County facility, which would deplete 68% of the unused municipal water supply, leaving a reserve of only 9% of total capacity.[29]

Meanwhile, the discussion of the Great Plains facility only notes that the prison is served by "wells that are significantly below permitted withdrawal levels."[30] Yet BOP provides no data to substantiate this claim. The only information concerning the Great Plains water usage impact is in the form of a hand-written document which is reproduced in an illegible format,[31] thus defeating NEPA's policy of "permit[ting] the public and other government agencies to react to the effects of a proposed action at a meaningful time."[32]

As discussed *infra*, at 7-8, along with a facility's water usage comes a collateral impact on local wastewater treatment systems. BOP has failed to provide sufficient information on the impacted systems' compliance records with applicable water quality laws.

The BOP's failure to provide specific data concerning water usage calls into question the EA's adequacy. NEPA reviews must "foster both informed decision-making and informed public participation."[33] An EA cannot meet this standard if it does not clearly disclose and quantify an alternative's environmental impact. In the case of water resources, BOP must use evidence-based estimates of facility water usage and apply such estimates consistently across the proposed alternatives (absent specifically-described exceptional circumstances). In addition, BOP must disclose the quantitative impact of the expected usage on the water-supply system serving each facility. The incomplete and inconsistent information contained in the EA does not meet this standard.

C. The EA Does Not Adequately Address Impacts on Community Facilities and Public Services

Correctional facilities have many collateral impacts on local law enforcement agencies, social service providers, and healthcare facilities. The EA does not contain a thorough description of such

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[26] *Id.* at IV-4.
[27] EA Appx. C, at 10.
[28] EA, at II-8.
[29] *See id.* at 10 (City of Raymondville reports capacity of 2.75 million gallons and peak usage of 2 million gallons per day).
[30] EA, at IV-6.
[31] *See* EA, Appx. B, at 78 (illegible handwritten letter from Keith Wright).
[32] *Marsh v. Ore. Natural Resources Council*, 490 U.S. 360, 371 (1989).
[33] *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992).

impacts, and fails to acknowledge that reactivation of the vacant facilities would increase such impacts. Without such a discussion, the BOP has not provided 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."[34]

Local law enforcement agencies are typically responsible for investigating and prosecuting criminal activity occurring in privately-operated correctional facilities. The increased workload attributable to local correctional institutions must be addressed in the NEPA review process. Indeed, the EA even acknowledges that the Hinton Police Department incurs overtime costs as a result of responding to criminal activity at the Great Plains facility,[35] but it does not quantify the impact. Nor does EA provide any information regarding similar questions with respect to the other proposed sites. To discharge its duty under NEPA, BOP should answer obvious questions regarding the potential impact of the preferred alternative. What is the historical rate of facility-related offenses and prosecutions at other BOP contractor-operated prisons? At CAR/STS facilities? At BOP-operated prisons? What are the comparable figures for the three proposed facilities (assuming they have been operational in the past)?

Local agencies are also called upon to respond to escapes. In fact, municipal police officers from two cities responded to a recent escape from MTC's Willacy County facility.[36] Although MTC includes a letter of support from Willacy County Sheriff Larry Spence, the letter is conspicuously void of any detail concerning the facility's impact on law enforcement workloads.[37] While Spence expresses his personal support for MTC, he does not provide any details about relevant impacts on law enforcement, instead choosing to voice a narrow opinion concerning "historical, cultural, or environmental issues."[38] The EA should answer such questions as: How common are escapes from CAR/STS facilities? When escapes have occurred, how often are local agencies involved in the resulting investigation and apprehension activities? How much personnel time and financial resources are required for these activities?

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. Indeed, it is particularly curious that such impacts are not mentioned in connection with Willacy County, since that jurisdiction is home to a privately operated prison which was the site of the 2001 murder of Gregorio de la Rosa. The murder led to a record verdict of $47 million (upheld on appeal) in favor of Mr. de la Rosa's surviving relatives.[39] The verdict was rendered after a two-week jury trial in the 404th Judicial District Court in Willacy

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[34] *Comm. to Preserve Boomer Lake*, 4 F.3d at 1553.
[35] EA Appx B, at 84-85.
[36] Michael Brajas, "Detainee escapes from agents during doctor's appointment," *Valley Morning Star*, Sept. 1, 2010 (available at http://www.valleymorningstar.com/news/harlingen-79720-agents-appointment.html).
[37] EA Appx. C, at 4.
[38] *Id.*
[39] *Wackenhut Corr. Corp. v. de la Rosa*, 305 S.W.3d 594 (2009).

County.[40] It is difficult to imagine how the impact of such a complex, lengthy, and high-profile case in a county of twenty thousand people[41] could not be considered "significant" for purposes of NEPA. The EA must discuss historical rates of prison-related criminal and civil court filings for both CAR/STS facilities in general and the three proposed facilities in particular. 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 EA 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 three 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.[42] What programs (if any) are available for employees in CAR/STS 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 EA should (but does not) answer these questions.

D. The EA Does Not Adequately Address Impacts on Public Utilities

Because of prisons' substantial water usage, such facilities can also have significant impact on sewage and wastewater treatment infrastructure. In fact, the U.S. Environmental Protection Agency has noted that local wastewater treatment plants in prison communities commonly violate their Clean Water Act permits due to facility-related discharge.[43]

BOP has not provided adequate information concerning the impact of the preferred alternative on the relevant local treatment plants. The EA conspicuously lacks meaningful and accurate data about wastewater treatment infrastructure. NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed action."[44] BOP has failed to discharge this duty in general, and with respect to public utilities in particular, because the EA reveals neither the expected demands stemming from the preferred alternative, nor local utilities' available capacity.

Perhaps the best example of BOP's perfunctory treatment of the NEPA review process comes with the Great Plains facility. The drafters of the EA attempted to evaluate waste water impacts by sending a survey to Keith Wright, the Public Works Director for the Town of Hinton.[45] The survey

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[40] *See* Brief of Appellant at xv, *Wackenhut Corr. Corp. v. de la Rosa*, 305 S.W. 3d 594 (2009) (No. 13-06-00692-CV) (2007 WL 2892510).
[41] EA Appx. C, at 33.
[42] Peter Finn, U.S. Dept. of Justice, Nat'l. Inst. of Justice, *Addressing Correctional Officer Stress: Programs and Strategies* 16 (Dec. 2000).
[43] U.S. Envtl. Protection Agency, News Release: EPA helps prisons get up to speed on environmental compliance (available at http://www.epa.gov/region3/compliance_assistance/pressrelease/prison-initiative.htm).
[44] *Comm. to Preserve Boomer Lake*, 4 F.3d at 1554 (*quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983) (internal quotation marks omitted)).
[45] EA Appx. B, at 78-79 (The letter to Mr. Wright claims that its purpose is to measure "the effects of the proposed actions on the Department of Public Works ability to provide potable water and wastewater services to the *Town of*

asks Mr. Wright "At what percentage capacity is the wastewater treatment plant?" Unfortunately, Mr. Wright's answer is simply "Lagoon."[46] The survey also asks Mr. Wright whether there were "any problems or incidents noted related to the previous detention facility." Mr. Wright answers "Yes,"[47] but nowhere in the EA is there any discussion of what these problems were or if they are likely to recur upon selection of the Great Plains alternative. These deficiencies not only indicate carless preparation of the EA, but it also clearly show that BOP has failed to gather meaningful data, and thus has not "considered environmental concerns in its decisionmaking process."[48]

So too are there problems with the EA's discussion of the Willacy County wastewater impact. According to officials with the municipal utility system, the system has unused capacity of 600,000 gallons per day. However, as noted *supra* at 5, the EA assumes a highly inaccurate estimate of 67 gallons of water usage per inmate per day.[49] Using the more reliable 169-gallon usage estimate, and assuming that the wastewater impact would be 150 gallons per day, 75% of the excess capacity would be consumed by activation of the prison—clearly a significant impact which is not disclosed in the EA.

E. The EA Does Not Adequately Address Air Quality Impacts

Prisons frequently include boilers or incinerators which are subject to air emissions regulations.[50] At least one of the proposed facilities in the present EA utilizes diesel-powered emergency generators which may be subject to the Clean Air Act's New Source Review permitting program.[51] The EA contains no meaningful discussion of air quality impacts, simply saying that any impact is "expected" to be minor.[52] Without providing evidence to support this entirely conclusory discussion, BOP has not "reasonably [set] forth sufficient information to enable the decisionmaker to consider the environmental factors and make a reasoned decision."[53]

III. BOP Has Not Adequately Disclosed and Analyzed the Cumulative Impacts of the Project

When carrying out its obligations under NEPA, an agency must consider "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should

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Hudson, Colorado and the site." (emphasis added). The reference to Hudson appears to be a typographical error, but it is indicative of the lack of care with which the EA was prepared).

[46] *Id.*

[47] *Id.*

[48] *Comm. to Preserve Boomer Lake*, 4 F.3d at 1554.

[49] EA Appx. C, at 10.

[50] U.S. EPA, *supra* note 43.

[51] EA, Appx. B, at 91.

[52] *E.g.*, EA at IV-11 ("Minor impacts to air quality are anticipated over time resulting from operation of the permanent air emitting equipment within the correctional facility.").

[53] *Ore. Envtl. Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987) (*quoting Northwest Indian Cemetery Protective Assn. v. Peterson*, 795 F.2d 688, 695 (9th Cir. 1986)).

therefore be discussed in the same impact statement."[54] As explained previously, the "Short Term Sentences Acquisition" is clearly a continuation of the BOP's "Criminal Alien Requirement," (CAR) under a new name.[55] Although BOP has been extremely parsimonious in releasing information concerning the CAR contracts, available data indicates that the total series of contracts may encompass up to twenty-two thousand prison beds.[56] Under no reasonable interpretation can the imprisonment of that many people be considered to *not* have a significant impact on the environment. Yet the EA utterly fails to discuss *any* impacts of the CAR series as a whole, instead conducting cumulative impact analyses on a facility-by-facility basis and tersely declaring that there are no cumulative impacts within the local communities surrounding the three alternative sites.[57]

The Court of Appeals for the District of Columbia Circuit has ruled that an "agency's EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum."[58] This type of evasive action which has been proscribed by the D.C. Circuit is precisely what BOP has done in the present EA—despite the fact that the cumulative impacts of the total CAR/STS procurement is doubtlessly "significant" within the meaning of NEPA, BOP has broken the project into a dozen or more phases, and now argues that each phase by itself has insignificant impacts. This BOP cannot do. Without even a pro forma discussion of cumulative impacts across the entire CAR/STS series of contracts, the EA is insufficient on its face. BOP must provide detailed information (in an EIS) concerning the *entire* CAR/STS series of contracts and the concomitant environmental impacts.

IV. Conclusion

For the reasons stated above, BOP has failed to take a hard look at impacts of the preferred alternative and has not considered reasonable alternatives. In addition, BOP's staging of the CAR/STS contracts indicates an unfair manipulation of the procurement process in order to avoid the legally required analysis of the project's cumulative impacts. Accordingly, the EA is inadequate and the undersigned requests that BOP prepare an EIS that remedies the aforementioned deficiencies.

Sincerely,

Stephen Raher

Stephen Raher

cc: Issac Gaston (via email: igaston@bop.gov)

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[54] 40 C.F.R. § 1508.25(a)(2). *See also* 40 C.F.R. § 1508.25(a)(3), mandating consideration of the closely-related category of "[s]imilar impacts, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together."
[55] *See supra*, n. 1 and accompanying text.
[56] Raher, *supra* note 13, at 227.
[57] EA, at IV-13—IV-14.
[58] *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002).