

Position Paper
Section 390 Categorical Exclusions
January 2010



At a time when the Obama administration should be embracing policies to increase employment, stimulate the economy, and increase production of American clean energy, Interior continues to make decisions that increase uncertainty and put at risk jobs and economic development tied to the production of natural gas and oil in the West. Rockies producers have achieved balanced energy development by providing 27% of America's natural gas while occupying only 0.07% of public lands.

Efforts to create additional burdens such as limiting the use of categorical exclusions, which Congress specifically mandated in the Energy Policy Act of 2005, will significantly undermine the ability of independent producers to utilize these important, common-sense tools. Your policy changes not only violate federal law, a law which you and President Obama both voted for in the Senate, but they are also inconsistent with the administration's stated goals for an American energy policy that provides jobs and strengthens national security.

Congressman Dan Boren (D-OK)

January 7, 2010

- Under the Energy Policy Act of 2005, Congress directed BLM to use categorical exclusions (CX) under Section 390 to encourage energy development where the environmental impact is minimal, and where drilling was previously analyzed in an environmental document. CXs simply eliminate redundant environmental analysis and encourage companies to minimize surface impacts. DOI's announced policy to severely limit the use of categorical exclusions by requiring 'extraordinary circumstances' review is unlawful.
- DOI cannot pick and choose which laws to follow. Congress, including then Senators Barack Obama and Ken Salazar, mandated the use of CXs in five circumstances where the environmental impact is minimal or where environmental analysis has already been completed; it did not provide Interior with discretion in their use. The law clearly mandates the use of CXs when the criteria are met.
- Section 390 CXs are statutory, not administrative. Extraordinary circumstances review is an administrative process. There is nothing in the statutory language that even mentions extraordinary circumstances. Rather, the language is straightforward in mandating the use of CXs when one of five criteria is met. DOI is not at liberty to decide which laws they choose to follow.
- CXs are considered to be one of the success stories of the Energy Policy Act and their use has resulted in more time available for field staff to increase environmental inspections while more efficiently processing Applications for Permit to Drill (APD). According to a study from the Western Organization of Resource Councils (WORC), an environmental advocacy

group, the number of environmental inspections performed by BLM generally increased over the last decade until 2006 to 2008, when inspections more than doubled. It's no coincidence that the dramatic increase in BLM inspections corresponds with full implementation of CXs in 2006.

- Field personnel appreciate having CXs in their management toolkit, as CXs allow them to efficiently process permits in a timely manner while freeing staff from paperwork and enabling them to engage in on-the-ground environmental protection.
- IPAMS supports the issuance of new guidance to address issues of consistency raised by the Government Accountability Office (GAO) in its report on the use of these categorical exclusions,¹ but DOI has decided to use a sledgehammer where a scalpel would suffice. We agree with GAO's recommendation that the errors they identified can be cleared up with revised guidance, implementation templates, and better oversight from state offices. It is not necessary to circumvent the intent of Congress by screening 390 CXs for extraordinary circumstances or removing the use of environmental documentation from Resource Management Plans as the basis for CXs.
- The GAO report found many examples where BLM failed to use CXs or applied additional restrictions, which highlights the cautious and overly conservative use of CXs by BLM. CXs are not discretionary, yet GAO didn't attempt to quantify one major abuse of BLM's implementation — frequent violation of the law when CXs were not used for projects that met the criteria mandated by Congress.
- We stand ready to work with DOI to address how to ensure consistency in the use of this valuable permitting tool while protecting the environment, enhancing our nation's energy supplies, and creating further opportunities for economic development and jobs in the West.

¹ United States Government Accountability Office, *Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development Under Section 390 of the Act*, GAO-09-872, September 2009.