

September 2009

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

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Highlights of [GAO-09-872](#), a report to congressional requesters

Why GAO Did This Study

The Energy Policy Act of 2005 was enacted in part to expedite oil and gas development. Section 390 of the act authorized the Department of the Interior's Bureau of Land Management (BLM) to use categorical exclusions to streamline the environmental analysis required when approving certain oil and gas activities. Numerous questions have been raised about how and when BLM should use these section 390 categorical exclusions. GAO was asked to report on (1) the extent to which BLM has used section 390 categorical exclusions and the benefits, if any, associated with their use; (2) the extent to which BLM has complied with the act and agency guidance; and (3) key concerns, if any, associated with section 390 categorical exclusions. GAO analyzed documents from all 26 BLM field offices that have used this new tool, including a nongeneralizable random sample of 215 section 390 categorical exclusion decision documents.

What GAO Recommends

Congress may want to consider amending the act to clarify section 390. In addition, GAO recommends that BLM take steps to improve the implementation of section 390 by clarifying agency guidance, standardizing decision documents, and ensuring compliance through more oversight. The Department of the Interior concurred with our recommendations and stated that it will take immediate steps to ensure that the use of section 390 categorical exclusions is consistent with the act and BLM guidance.

View [GAO-09-872](#) or [key components](#). For more information, contact Robin M. Nazzaro at (202) 512-3841 or nazzaro@gao.gov.

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

What GAO Found

GAO's analysis of BLM field office data shows that section 390 categorical exclusions were used to approve approximately 6,100 of 22,000 applications for drilling permits (about 28 percent) and about 800 other actions—mostly modifications to existing permits—from fiscal years 2006 to 2008. GAO is reporting about 1,150 more instances in which BLM approved section 390 categorical exclusions than had been reported by BLM headquarters, largely because many field offices erroneously used single decision documents to approve multiple oil and gas wells. While section 390 categorical exclusions increased the efficiency of certain operations, some BLM field offices benefited more than others. The differences in benefits stem from a variety of factors and circumstances, such as whether an office had recent and site-specific National Environmental Policy Act (NEPA) documentation.

BLM's use of section 390 categorical exclusions has frequently been out of compliance with both the law and BLM's guidance. First, GAO found several types of violations of the law, including approving more than one oil or gas well under a single decision document, approving projects inconsistent with the law's criteria, and drilling a new well after time frames had lapsed. Second, GAO found numerous examples—in 85 percent of the field offices sampled—where officials did not correctly follow guidance, most often by failing to adequately justify the use of a categorical exclusion. A lack of clear guidance and oversight contributed to the violations and noncompliance. While many of these are technical in nature, others are more significant and may have thwarted NEPA's twin aims of ensuring that BLM and the public are fully informed of the environmental consequences of BLM's actions.

A lack of clarity in section 390 and BLM's guidance has raised serious concerns about the use of section 390 categorical exclusions.

- First, fundamental questions about what section 390 categorical exclusions are and how they should be used have led to concerns that BLM may be using these categorical exclusions in too many—or too few—instances. For example, there is disagreement as to whether BLM must screen section 390 categorical exclusions for extraordinary circumstances which would preclude their use, whether their use is mandatory, and how the public can challenge their use and on what grounds.
- Second, specific concerns have arisen about key concepts underlying the law's description of certain section 390 categorical exclusions. For example, some have raised concerns that section 390 categorical exclusions allow BLM to exceed development levels—such as number of wells to be drilled—analyzed in supporting NEPA documents without conducting further analysis.
- Third, vague or nonexistent definitions of key terms in the law and BLM guidance that describe the conditions to be met when using a section 390 categorical exclusion—such as “individual surface disturbances” or “maintenance of a minor activity”—have led to varied interpretations among field offices and concerns about misuse and a lack of transparency.

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Abbreviations

APD	Application for Permit to Drill
BLM	Bureau of Land Management
FLPMA	Federal Land Policy and Management Act of 1976
NEPA	National Environmental Policy Act of 1969

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United States Government Accountability Office
Washington, DC 20548

September 16, 2009

The Honorable Nick J. Rahall, II
Chairman
Committee on Natural Resources
House of Representatives

The Honorable James Costa
Chairman
Subcommittee on Energy and Mineral Resources
Committee on Natural Resources
House of Representatives

The Honorable Jeff Bingaman
Chairman
Committee on Energy and Natural Resources
United States Senate

Oil and natural gas production from federal lands is critical to meeting our nation's energy needs. From fiscal year 2006 to fiscal year 2008, the Department of the Interior's (Interior) Bureau of Land Management (BLM) approved more than 22,000 new oil and gas drilling permits across 20 states, largely in the mountain West. Like many projects on federal land with possible environmental impacts, oil and gas development activities are typically subject to environmental review under the National Environmental Policy Act of 1969 (NEPA).¹ In addressing long-term energy challenges, Congress enacted the Energy Policy Act of 2005, in part to expedite oil and gas development within the United States.² This law authorizes BLM, for certain oil and gas activities, to approve projects without preparing new environmental analyses that would normally be required by NEPA.

Under NEPA, federal agencies evaluate the likely environmental effects of projects they are proposing using an environmental assessment or, if projects are likely to significantly affect the environment, a more detailed environmental impact statement. If, however, the agency determines that activities of a proposed project fall within a category of activities the

¹Pub. L. No. 91-190, 83 Stat. 852 (1970).

²Pub. L. No. 109-58, 119 Stat. 594 (2005).

agency has already determined has no significant environmental impact—called a categorical exclusion—then the agency generally need not prepare an environmental assessment or environmental impact statement. The agency may instead approve projects that fit within the relevant category by using one of the predetermined categorical exclusions, rather than carrying out a project-specific environmental assessment or environmental impact statement. For a project to be approved using a categorical exclusion, the agency must determine whether any extraordinary circumstances exist in which a normally excluded action or project may have a significant effect. NEPA has two principal purposes: (1) to ensure that the agency carefully considers detailed information concerning significant environmental impacts and (2) to ensure that this information will be made available to the public.³ It does not, however, require any particular substantive result.⁴

Interior and BLM have categorical exclusions in place for numerous types of activities, such as constructing wildlife perches and constructing snow fences for safety purposes. To use such an “administrative” categorical exclusion in approving a project on BLM land,⁵ the agency screens each proposed project for extraordinary circumstances, such as significant impacts to threatened and endangered species, historic or cultural resources, or human health and safety or potentially significant cumulative environmental effects when coupled with other actions. When one or more of the extraordinary circumstances exists, BLM guidance precludes staff from using an administrative categorical exclusion for the project.

Section 390 of the Energy Policy Act of 2005 established five new categorical exclusions specifically for oil and gas development.⁶ These categorical exclusions—referred to in this report as section 390 categorical exclusions—define specific conditions under which BLM need not prepare any new NEPA analysis, such as an environmental assessment or environmental impact statement, which would ordinarily be required for oil and gas projects. As with administrative categorical exclusions,

³See, for example, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁴See, for example, *Department of Transportation v. Public Citizen*, 541 U.S. 752, 756 (2004).

⁵Throughout this report, we refer to categorical exclusions developed under the NEPA regulations as administrative categorical exclusions.

⁶Pub. L. No. 109-58, § 390, 119 Stat. 747 (2005), codified at 42 U.S.C. § 15942.

BLM's *National Environmental Policy Act Handbook* requires staff to document their decisions and rationale for using any section 390 categorical exclusion to approve an oil or gas project. Projects approved with section 390 categorical exclusions are not subject to any screening for extraordinary circumstances, according to BLM officials.⁷ Numerous questions have been raised—by western state governors, environmental groups, industry representatives, and others—about how and when BLM should use section 390 categorical exclusions in approving oil and gas projects. Moreover, disagreements with BLM's interpretation that the use of section 390 categorical exclusions is not subject to a screening for extraordinary circumstances, among other issues, are central to ongoing litigation by a coalition of environmental and historic preservation groups concerning BLM's use of section 390 categorical exclusions near Nine Mile Canyon in Utah.⁸

In this context, we were asked to report on (1) the extent to which BLM has used section 390 categorical exclusions each fiscal year from 2006 through 2008 and the benefits, if any, associated with their use; (2) the extent to which BLM has used section 390 categorical exclusions in compliance with the Energy Policy Act of 2005 and internal BLM guidance; and (3) key concerns, if any, associated with section 390 categorical exclusions.

To conduct this work, we reviewed relevant laws, regulations, and Interior and BLM guidance. We interviewed officials in BLM headquarters and in the 11 BLM field offices (and their associated state offices) that processed the most applications for permit to drill (APD) from fiscal year 2006 through fiscal year 2008. Specifically, we visited and interviewed officials in three BLM state offices (Colorado, Utah, and Wyoming) and 8 BLM field offices (Glenwood Springs, in Colorado; Price/Moab and Vernal in Utah; Buffalo, Casper, Pinedale, and Rawlins in Wyoming; and Farmington in New Mexico) and interviewed by telephone officials in two additional state offices (California and New Mexico) and 3 additional field offices (Bakersfield, California; Carlsbad/Hobbs, New Mexico; and White River, Colorado). We also interviewed representatives from industry, historic

⁷BLM, Instruction Memorandum No. 2005-247: National Environmental Policy Act (NEPA) Compliance for Oil, Gas, and Geothermal Development, attachment 2 (Sept. 30, 2005); and BLM, *National Environmental Policy Act Handbook H-1790-1* (Washington, D.C.: 2008). We refer in this report to the second document as BLM's NEPA handbook.

⁸*Nine Mile Canyon Coalition v. Stiewig*, Civ. No. 08-586, D. Utah (filed Aug. 6, 2008).

preservation groups, and environmental groups about benefits and concerns—both actual and potential—associated with section 390 categorical exclusions. To determine the extent to which BLM has used section 390 categorical exclusions each fiscal year from 2006 through 2008, we compared the data supplied by BLM headquarters with the data supplied by BLM field offices to identify and explain discrepancies. To ascertain the benefits of using section 390 categorical exclusions, we conducted semi-structured interviews with the 11 BLM field offices that processed the most ADPs from fiscal year 2006 through fiscal year 2008. To determine the extent to which BLM has used section 390 categorical exclusions in compliance with the Energy Policy Act of 2005 and internal BLM guidance, we analyzed documents from all 26 BLM field offices that used section 390 categorical exclusions, including a review of a nongeneralizable random sample of 215 section 390 categorical exclusion decision documents. To determine the key concerns, if any, associated with section 390 categorical exclusions, we reviewed relevant land-use-planning documents, including resource management plans and environmental impact statements, and synthesized information gathered during interviews. Appendix I presents a more detailed description of our scope and methodology.

We conducted this performance audit from September 2008 through September 2009, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

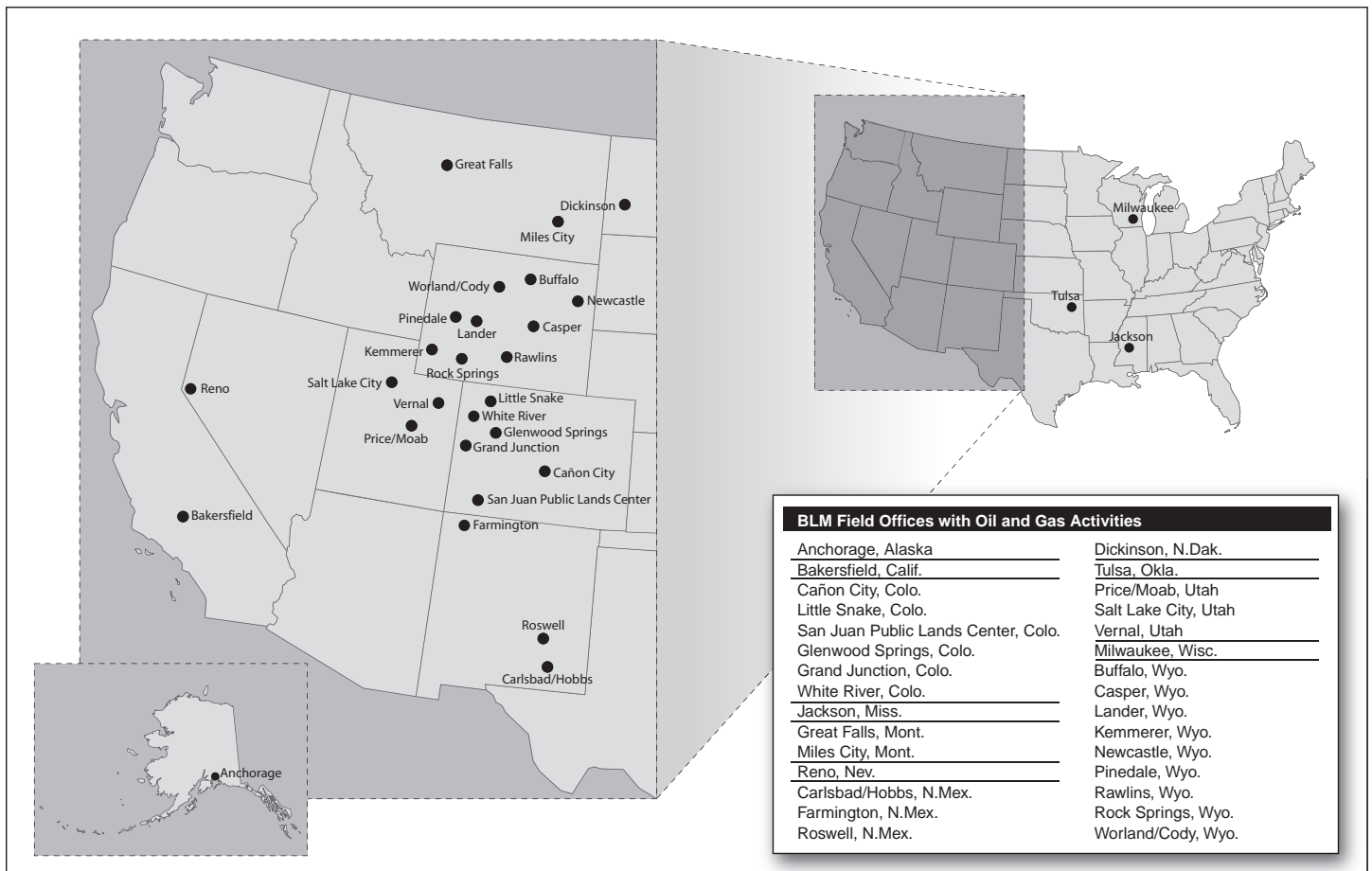
Background

Under the Federal Land Policy and Management Act of 1976, as amended (FLPMA),⁹ BLM manages more than 261 million acres of federal land for multiple uses, including recreation; range; timber; minerals; watershed; wildlife and fish; and natural scenic, scientific, and historical values; as well as for the sustained yield of renewable resources. In addition, the Mineral Leasing Act of 1920 charges Interior with the responsibility for oil and gas leasing on federal and private lands where the federal government has retained mineral rights. BLM is responsible for managing approximately 700 million mineral onshore acres, which include the

⁹Pub. L. No. 94-579, 90 Stat. 2743 (1976), codified as amended at 43 U.S.C. § 1701 et seq.

acreage leased for oil and gas development. To manage its responsibilities, BLM administers its programs through its headquarters office in Washington, D.C.; 12 state offices; 38 district offices; and 127 field offices. BLM headquarters develops guidance and regulations for the agency, while the state, district, and field offices manage and implement the agency's programs. Only 30 BLM field offices are involved in oil and gas development, and they are located primarily in the mountain West (see fig. 1).

Figure 1: BLM Field Offices with Oil and Gas Activities



Source: BLM and Map Resources.

FLPMA requires the Secretary of the Interior to develop land use plans (called resource management plans); evaluated for potential revision at least every 5 years,¹⁰ these plans identify areas that will be available for oil and gas development. The environmental impact statement associated with a resource management plan analyzes the potential impacts that may result from the decisions and management actions the agency makes in the plan. To estimate what cumulative impacts may be expected from decisions in the plan, BLM uses a “reasonably foreseeable development scenario” for oil and gas development. These scenarios estimate outcomes, such as the number of wells and likely surface disturbance for analysis purposes, as well as establish monitoring protocols and right-of-way corridors, among other things. Consistent with the resource management plans, BLM can accept bids from private companies and operators to lease BLM land for access to and extraction of oil and gas resources. Before approving an oil and gas lease, BLM determines if any restrictions (called stipulations) need to be added, among other reasons, to mitigate the environmental effects of expected oil and gas production on that lease. As provided by BLM regulations, if stipulations are necessary, they are incorporated into the lease.¹¹

To drill for oil or natural gas on leased lands, a company must submit an APD to BLM.¹² APDs are used to approve drilling and all related activities on land leased by a company, including road building; digging pits to store drilling effluent; placing pipelines to carry oil and gas to market; and building roads to transport equipment, personnel, and other production-related materials.¹³ After an APD is approved, operators can submit proposals to BLM, in the form of a sundry notice, for modifications to their approved APD. Sundry notices may involve activities like moving the location of a well, adding an additional pipeline, or adding remote communications equipment.

¹⁰Revisions to resource management plans are necessary if monitoring and evaluation findings, new data, new or revised policy, or changes in circumstances indicate that decisions for an entire plan or a major portion of a plan no longer serve as a useful guide for resource management. BLM, *Land Use Planning Handbook H-1601-1*, p. 46 (2005).

¹¹43 C.F.R. § 3101.1-3.

¹²43 C.F.R § 3162.3-1(c).

¹³Companies may also be required to submit a right-of-way application for related activities, such as adding pipelines, that take place on land for which they do not own a lease. See 43 C.F.R. § 2881.7.

Before enactment of section 390 of the Energy Policy Act of 2005, all APDs and sundry notices that proposed additional surface disturbance underwent an environmental review process as outlined in BLM’s NEPA handbook. As part of that process, BLM evaluates APDs to ensure that they conform to the land use plan and applicable laws and regulations, such as the Endangered Species Act and the National Historic Preservation Act. BLM inspects proposed drilling sites with on-site reviews and may add site-specific restrictions or conditions of approval if deemed necessary to protect the environment or cultural resources. The process includes developing alternatives to proposed projects, which are analyzed for their environmental and cultural impacts. BLM typically identifies and analyzes these alternatives using (1) an environmental assessment or (2) a more detailed environmental impact statement when significant environmental impacts appear likely. In some cases, BLM relies on existing NEPA analyses and uses a process called determination of NEPA adequacy to document the rationale for concluding that there will be no new significant environmental impact that would require preparation of additional analysis.¹⁴ Regulations also direct BLM to make diligent efforts to involve the public in preparing and implementing the NEPA process, including providing opportunities for the public to comment on proposed projects and alternatives.¹⁵

During review, BLM may determine that a proposed project falls within a group of activities—categorical exclusions—that have been defined in NEPA regulations as:

“...a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”¹⁶

¹⁴A determination of NEPA adequacy is a NEPA compliance document stating that the environmental impacts of the current project have been assessed under previously prepared NEPA documentation.

¹⁵40 C.F.R. § 1506.6.

¹⁶40 C.F.R. § 1508.4.

In such cases, BLM may approve a project using an administrative categorical exclusion instead of preparing traditional NEPA documents such as an environmental assessment or environmental impact statement, or preparing a determination of NEPA adequacy. In most cases, staff must document this decision, along with their rationale for choosing to use an administrative categorical exclusion. Historically, each categorical exclusion available to BLM was submitted by either Interior or BLM for review by the Council on Environmental Quality, the office within the Executive Office of the President that is responsible for establishing NEPA regulations and that works with agencies and other White House offices to develop environmental policies and initiatives. None of the current administrative categorical exclusions developed under NEPA regulations specifically applies to approving APDs.¹⁷

BLM guidance details a checklist of 12 extraordinary circumstances staff must screen proposed projects against when considering the use of an administrative categorical exclusion (see app. II). The existence of one or more of these extraordinary circumstances precludes BLM from using a categorical exclusion and therefore necessitates reliance on traditional NEPA documents in approving the proposed project.

Section 390 of the Energy Policy Act of 2005 authorizes BLM to forgo environmental assessments and impact statements for oil and gas projects under certain circumstances. Specifically, subsection (a) states:

¹⁷According to BLM officials, before 1989, administrative categorical exclusions existed that covered APDs, sundry notices, and oil and gas rights-of-way, although these are no longer in effect.

“NEPA Review.—Action by the Secretary of the Interior in managing the public lands or the Secretary of the Agriculture in managing National Forest System Lands, with respect to any of the activities described in subsection (b) shall be subject to a *rebuttable presumption* that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply if the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil and gas.”¹⁸ [emphasis added]

Subsection (b) outlines five new categories of activities to be considered categorical exclusions. These section 390 categorical exclusions (referred to in this report as section 390 CX1, CX2, CX3, CX4, and CX5) include:

“(1) Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.

(2) Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well.

(3) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.

(4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline.

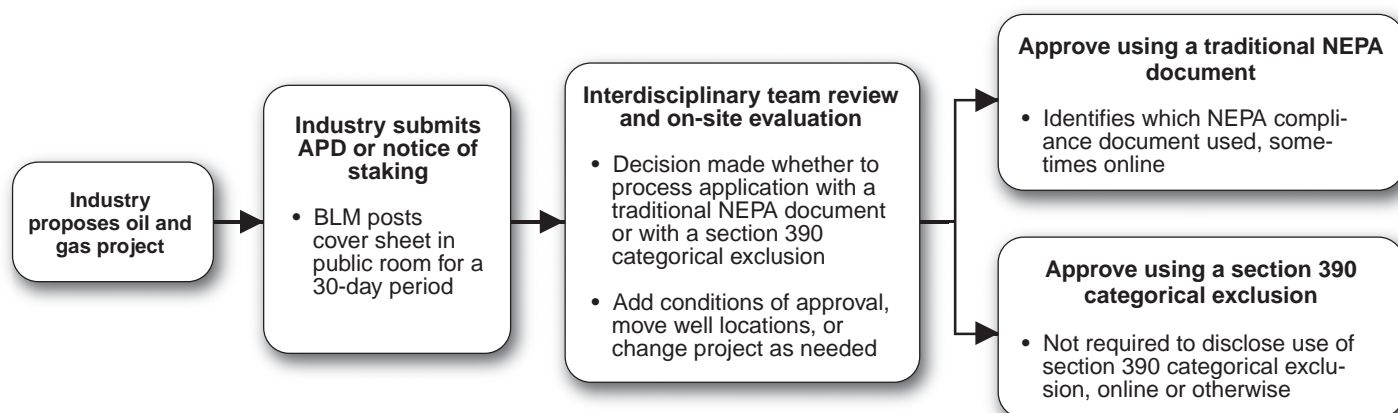
(5) Maintenance of a minor activity, other than any construction or major renovation or [sic] a building or facility.”

In its process for approving oil or gas projects, BLM guidance provides that the agency can now use a section 390 categorical exclusion when a project meets the conditions set forth for any of the five types of section 390 categorical exclusions (see fig. 2). BLM guidance still directs staff to

¹⁸Pub. L. No. 109-58, § 390(a), 119 Stat. 747 (2005), codified at 42 U.S.C. § 15942(a). Although the Energy Policy Act of 2005 authorizes both BLM and the Department of Agriculture’s U.S. Forest Service to use section 390 categorical exclusions, this report examines only BLM’s use of section 390 categorical exclusions. The exact meaning of the phrase “shall be subject to a rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply” is in dispute in a lawsuit pending in federal court. *Nine Mile Canyon Coalition v. Stiewig*, Civ. No. 08-586, D. Utah (filed August 6, 2008). We accordingly do not attempt to interpret this language in our report.

document their decision and rationale for using a specific section 390 categorical exclusion. Furthermore, BLM guidance directs its staff when using section 390 categorical exclusions to comply with the Endangered Species Act and the National Historic Preservation Act; to conduct on-site reviews for all APDs; and to add site-specific restrictions or conditions of approval if deemed necessary to protect the environment or cultural resources.

Figure 2: BLM’s Process for Approving Oil and Gas Projects



Source: GAO.

BLM headquarters has developed and issued the following three primary pieces of internal guidance on how and when to use section 390 categorical exclusions to approve oil and gas development.

- *Instruction Memorandum No. 2005-247*, issued on September 30, 2005, approximately 2 months after passage of the Energy Policy Act of 2005, set forth preliminary guidance on the application of section 390 categorical exclusions. The memorandum directed BLM staff to use a section 390 categorical exclusion if the proposed project met the conditions for one of the five types of section 390 categorical exclusions.
- *BLM’s National Environmental Policy Act Handbook H-1790-1, appendix 2: “Using Categorical Exclusions Established by the Energy Policy Act of 2005,”* issued in January 2008, superseded Instruction Memorandum No. 2005-247. BLM’s NEPA handbook repeats the memorandum’s guidance on how to use and document the rationale for

using a section 390 categorical exclusion. Unlike Instruction Memorandum No. 2005-247, the appendix does not explicitly direct BLM staff to use a section 390 categorical exclusion if one is applicable.¹⁹

- *Instruction Memorandum No. 2008-166*, issued August 6, 2008, transmits a technical correction to BLM’s NEPA handbook. The memorandum specifies, among other instructions, that (1) section 390 CX1 and CX3 are the types of section 390 categorical exclusions that require reference to previous NEPA analyses and documents and (2) for each type of section 390 categorical exclusion, field offices must apply the same or better environmental mitigating measures contained in the supporting NEPA documents for previous oil and development at the same site.

In addition, BLM issued supplemental information on how and when to use section 390 categorical exclusions, such as a presentation titled “Energy Policy Act of 2005 Section 390 [Categorical Exclusions] 101,” which was created to explain the use of section 390 categorical exclusions for BLM state offices,²⁰ as well as other informal guidance.²¹ Furthermore, Onshore Oil and Gas Order No. 1, issued on October 21, 1983, and revised on March 7, 2007, specifies that: (1) BLM cannot approve an APD until the requirements of certain other laws and regulations, including NEPA, the National Historic Preservation Act, and the Endangered Species Act, have been met; (2) a 30-day public posting period is required for all APDs; and (3) an approved APD is valid for 2 years, with the possibility of a 2-year renewal.

¹⁹BLM’s NEPA handbook includes several additional appendices, such as a list of administrative categorical exclusions, a list of extraordinary circumstances used to screen the use of administrative categorical exclusions, and templates for documenting NEPA compliance and the use of administrative categorical exclusions.

²⁰The presentation was first created in late 2007 and continuously updated until September 2008 by BLM officials to reflect evolving policies and questions about using section 390 categorical exclusions. BLM also developed another presentation in 2006, titled *NEPA for Fluid Minerals*, which also addressed how to use section 390 categorical exclusions.

²¹BLM has issued two other pieces of supplemental guidance: (1) a brochure titled “Energy Policy Act of 2005 Section 390 Categorical Exclusions: Environmental Protections and Process Improvements,” which summarizes the five section 390 categorical exclusions and BLM’s related policy procedures and was issued in 2007 for BLM staff—specifically NEPA coordinators—other federal agencies, and external stakeholders (such as environmental organizations), and (2) question-and-answer guides prepared by BLM headquarters to further synthesize information on what conditions need to be present to use a section 390 categorical exclusion and how to document the rationale for using one of the exclusions.

BLM Field Offices Have Used Section 390 Categorical Exclusions for Over One-Quarter of Their APDs, Although Benefits of Use Vary Widely across Field Offices

BLM field offices used section 390 categorical exclusions to approve almost 6,900 oil-and-gas-related activities from fiscal year 2006 through fiscal year 2008, including nearly 6,100 APDs, or over one-quarter of all APDs approved in this period. The benefits of using section 390 categorical exclusions, mainly in the form of faster processing times for APDs, varied among offices, depending on a variety of factors and circumstances.

From Fiscal Year 2006 through Fiscal Year 2008, More Than One-Quarter of APDs Were Approved Using Section 390 Categorical Exclusions, Although BLM's Data Were of Questionable Reliability

Our analysis of data supplied by BLM field offices showed that 26 of the 30 field offices with oil and gas activities used almost 6,900 section 390 categorical exclusions to approve oil-and-gas-related activities from fiscal year 2006 through fiscal year 2008. Of these, BLM field offices used section 390 categorical exclusions to approve nearly 6,100 APDs (about 28 percent of approximately 22,000 federal wells approved by BLM) during this period (see table 1). Three BLM field offices (Pinedale, Wyoming; Farmington, New Mexico; and Vernal, Utah) accounted for almost two-thirds of section 390 categorical exclusions used to approve APDs. Section 390 CX3 accounted for more than 60 percent of the section 390 categorical exclusions used to approve APDs.

Table 1: Number of Section 390 Categorical Exclusions Used to Approve APDs, Fiscal Years 2006 through 2008

BLM field office	Section 390 CX1	Section 390 CX2	Section 390 CX3	Section 390 CX4	Section 390 CX5	Total
Pinedale, Wyo.	82	672	744	0	0	1,498
Farmington, N.Mex.	143	25	1,221	0	0	1,389
Vernal, Utah	62	22	1,065	0	0	1,149
Glenwood Springs, Colo.	171	207	35	0	0	413
Buffalo, Wyo.	18	221	143	0	0	382
Casper, Wyo.	13	0	267	0	0	280
Rawlins, Wyo.	154	24	21	0	0	199
Bakersfield, Calif.	58	27	113	0	0	198
Price/Moab, Utah	45	57	20	0	0	122
Dickinson, N.Dak.	0	0	92	0	0	92

BLM field office	Section 390 CX1	Section 390 CX2	Section 390 CX3	Section 390 CX4	Section 390 CX5	Total
White River, Colo.	15	37	18	0	0	70
Worland/Cody, Wyo.	23	0	38	0	0	61
Jackson, Miss.	51	5	0	0	0	56
Grand Junction, Colo.	3	26	19	0	0	48
Kemmerer, Wyo.	33	0	0	0	0	33
Tulsa, Okla.	0	25	0	0	0	25
Anchorage, Alaska	3	10	1	0	2	16
Carlsbad/Hobbs, N.Mex.	0	11	0	0	0	11
Lander, Wyo.	3	4	2	0	0	9
Little Snake, Colo.	3	5	0	0	0	8
Salt Lake, Utah	5	3	0	0	0	8
Reno, Nev.	2	5	0	0	0	7
San Juan Public Lands Center, Colo.	0	0	7	0	0	7
Milwaukee, Wisc.	0	1	3	0	0	4
Cañon City, Colo.	2	0	0	0	0	2
Total	889	1,387	3,809	0	2	6,087

Source: GAO analysis of data obtained from BLM field offices.

Notes: The five other BLM field offices with oil and gas activities not listed in the table—Great Falls and Miles City, Montana; Newcastle and Rock Springs, Wyoming; and Roswell, New Mexico—indicated to us that they did not use any section 390 categorical exclusions to approve APDs from fiscal year 2006 through fiscal year 2008. In addition, the count by section 390 categorical exclusion number is subject to errors, in part because of the way BLM field offices recorded instances where more than one of the five types of categorical exclusions was used. We did not estimate any resulting potential effect on the data.

In addition, our analysis of BLM field office data found that BLM used section 390 categorical exclusions to approve more than 800 nondrilling projects from fiscal year 2006 through fiscal year 2008 (see table 2). These approvals—many of which were submitted to BLM as sundry notices—were for a wide range of activities, such as moving a well location, adding new pipelines, and doing road maintenance. The Buffalo, Wyoming, field office was the most prominent user of section 390 categorical exclusions for these purposes, approving more than 250 nondrilling projects with section 390 categorical exclusions. Ten of the BLM field offices that used section 390 categorical exclusions in this period did not use them to approve any nondrilling actions.

Table 2: Number of Section 390 Categorical Exclusions Used to Approve Nondrilling Actions, Fiscal Years 2006 through 2008

BLM field office	Section 390 CX1	Section 390 CX2	Section 390 CX3	Section 390 CX4	Section 390 CX5	Total
Buffalo, Wyo.	165	5	13	24	49	256
Casper, Wyo.	38	0	2	2	56	98
Bakersfield, Calif.	3	0	86	2	0	91
Glenwood Springs, Colo.	40	0	3	17	1	61
Rawlins, Wyo.	20	0	3	23	14	60
Carlsbad/Hobbs, N.Mex.	4	3	0	50	0	57
Worland/Cody, Wyo.	13	0	8	0	33	54
Vernal, Utah	8	0	11	21	0	40
Lander, Wyo.	19	1	0	7	1	28
Pinedale, Wyo.	6	0	5	5	8	24
White River, Colo.	3	0	0	6	3	12
Grand Junction, Colo.	2	0	0	6	0	8
Little Snake, Colo.	5	0	0	3	0	8
Jackson, Miss.	1	0	6	0	0	7
Kemmerer, Wyo.	0	0	0	1	4	5
Great Falls, Mont.	1	0	0	0	0	1
Total	328	9	137	167	169	810

Source: GAO analysis of data obtained from BLM field offices.

Notes: The 10 other BLM field offices that used section 390 categorical exclusions from fiscal year 2006 through fiscal year 2008—Anchorage, Alaska; Cañon City and San Juan Public Lands Center in Colorado; Reno, Nevada; Farmington, New Mexico; Dickinson, North Dakota; Tulsa, Oklahoma; Price/Moab and Salt Lake, Utah; Milwaukee, Wisconsin—indicated to us that they did not use any section 390 categorical exclusions for these types of activities. In addition, the count by section 390 categorical exclusion number is subject to errors, in part because of the way BLM field offices recorded instances where more than one of the five types of categorical exclusions was used. We did not estimate any resulting potential effect on the data.

Data reported by BLM headquarters on the number and type of section 390 categorical exclusions used by its field offices from fiscal year 2006 through fiscal year 2008 varied considerably from our analysis of data supplied to us directly by the field offices. In total, the data reported by BLM headquarters showed over 1,100 fewer instances than our analysis for field office use of section 390 categorical exclusions (see table 3).

Table 3: Difference between the Number of Section 390 Categorical Exclusions Reported by BLM Headquarters and GAO’s Analysis, Fiscal Years 2006 through 2008

BLM field office	GAO analysis	BLM headquarters data	Difference
Glenwood Springs, Colo.	474	189	285
Vernal, Utah	1,189	973	216
Bakersfield, Calif.	289	126	163
Buffalo, Wyo.	638	495	143
Rawlins, Wyo.	259	176	83
Casper, Wyo.	378	296	82
Pinedale, Wyo.	1,522	1,443	79
White River, Colo.	82	32	50
Farmington, N.Mex.	1,389	1,341	48
Dickinson, N.Dak.	92	69	23
Tulsa, Okla.	25	8	17
Worland/Cody, Wyo.	115	101	14
Grand Junction, Colo.	56	42	14
Carlsbad/Hobbs, N.Mex.	68	54	14
Lander, Wyo.	37	28	9
Kemmerer, Wyo.	38	30	8
San Juan Public Lands Center, Colo.	7	2	5
Little Snake, Colo.	16	13	3
Anchorage, Alaska	16	13	3
Milwaukee, Wisc.	4	3	1
Cañon City, Colo.	2	2	0
Miles City, Mont.	0	0	0
Newcastle, Wyo.	0	0	0
Price/Moab, Utah	122	123	(1)
Reno, Nev.	7	8	(1)
Salt Lake, Utah	8	9	(1)
Great Falls, Mont.	1	5	(4)
Jackson, Miss.	63	89	(26)
Roswell, N.Mex.	0	29	(29)
Rock Springs, Wyo.	0	49	(49)
Total	6,897	5,748	1,149

Source: GAO analysis of data obtained from BLM headquarters and field offices.

Note: While we took extensive steps to obtain accurate data, such as obtaining data directly from the field offices and aggregating the data in a standardized way, we did not trace each field office's data back to original documentation. As a result, some inaccuracies may remain in the summary data.

The discrepancies between our analysis of BLM field office data and data reported by BLM headquarters resulted from a variety of record keeping errors. The most significant error resulted from a number of field offices using a single section 390 categorical exclusion decision document to approve multiple APDs. These field offices counted these cases as a single use of a section 390 categorical exclusion, while we counted each approved APD as a separate section 390 categorical exclusion, in accordance with BLM guidance. This type of counting error by the field offices accounts for more than 800 uses of section 390 categorical exclusions not reported by BLM headquarters.

We found numerous other errors that contributed to the differences between BLM headquarters data and our analysis of field office data. Among these were:

- environmental assessments mislabeled as section 390 categorical exclusions,
- section 390 categorical exclusion decision documents with missing approval dates,
- section 390 categorical exclusion decision documents where multiple section 390 categorical exclusions were used to approve a single project, and
- cases where the date of the project application's receipt was recorded instead of the date of the signed approval document.

In addition, confusion over whether to count section 390 categorical exclusions approved by the U.S. Forest Service in the data given to BLM headquarters accounted for an undercounting of more than 50 section 390 categorical exclusions in one office.²²

²²The Forest Service is separately responsible for authorizing activities affecting the above-ground use of their lands. However, BLM independently evaluates the approval of the above-ground use, including section 390 categorical exclusions, and is ultimately responsible for approving the overall project proposal, including the below-ground activities.

We also found a lack of consistency in how the data are collected from the field offices, including the lack of uniform and consistent data collection and aggregation processes, possibly resulting in further errors. For instance, in Colorado, the field offices are expected to periodically update a centralized record keeping file—accessible and shared by each field office—containing the offices’ section 390 categorical exclusion data. In other states, by contrast, field offices receive periodic requests to e-mail section 390 categorical exclusion summary data to the state office, according to BLM officials.

Many field offices were unable to explain the differences between the information they provided us and the totals reported by BLM headquarters. When asked about the discrepancies, some field office officials pointed to high staff turnover and the lack of a central point of contact for record keeping at their office, while others stated that they were simply unable to account for differences in the data. When we asked BLM headquarters to account for the discrepancies, they supplied us with data files showing that they aggregated only the data provided to them by the various BLM state offices.

Benefits of Using Section 390 Categorical Exclusions Depend on a Variety of Factors and Circumstances

Although the vast majority of BLM officials we spoke with told us that using section 390 categorical exclusions expedited the application review and approval process, the amount of time saved by field offices depended on a variety of factors and circumstances influencing the extent to which field offices used the exclusions. A frequently cited factor contributing to these efficiency gains was the extent to which proposed projects fit the specific conditions set forth in each section 390 categorical exclusion. For example, BLM officials told us that when a new well is proposed in a developed field and a NEPA document less than 5 years old covers that action, the default document for processing that application is a section 390 CX3. In such a circumstance, according to officials, use of the section 390 categorical exclusion is generally straightforward. These conditions were found, for example, in the Farmington, New Mexico, field office, which—until September 2008—had an existing environmental impact statement on file that had been approved recently enough to be valid to support the use of a section 390 CX3. Similarly, officials in field offices where directional drilling techniques are used—meaning that new wells can be drilled from existing well pads—told us that section 390 CX2 can be used to readily approve new wells. We found this type of use in some BLM field offices, such as Price/Moab, Utah, and Glenwood Springs, Colorado (see fig. 3).

Figure 3: Multiple Wells on a Single Well Pad in Glenwood Springs, Colorado (February 2009)



Source: GAO.

BLM officials identified other factors that contributed to their ability to use section 390 categorical exclusions, including the field office resource specialists' familiarity with the area of the proposed action, the area's environmental sensitivity, the extent of the area's cultural resources, and the proposed action's extent of surface disturbance. Specifically, BLM officials told us that section 390 categorical exclusions are regularly used to approve projects in areas where sensitive environmental or cultural concerns are few (no threatened or endangered species, or limited cultural resources in the area, for instance); where the resource specialists are familiar with the location of the proposed action; or where the proposed project is not unusual or will have minimal impact on the local environment. For example, officials in the Pinedale, Wyoming, field office stated that their oil and gas fields are extensively developed, the staff is very familiar with the areas of development, and environmental and cultural concerns are well known and extensively mapped. Given this familiarity, according to field office staff, they are generally comfortable assuming that section 390 categorical exclusions are appropriate for certain locations, unless proven otherwise. For example, officials from several BLM field offices—including Bakersfield, California, and Pinedale, Wyoming—told us that such familiarity with environmentally or culturally

sensitive areas under their jurisdiction has generally enabled them to consider certain areas as open or closed to approving projects with section 390 categorical exclusions.

Additionally, field office policies can contribute to how often section 390 categorical exclusions are used. For instance, some field offices use them to approve sundry notices and nondrilling activities, while others do not. The Buffalo, Wyoming, field office used section 390 categorical exclusions more than 250 times to approve sundry notices and nondrilling activities, while other offices relied solely on environmental assessments or determinations of NEPA adequacy for such approvals. The differences in office policies result from field office managers' comfort with the section 390 categorical exclusions and their interpretations of appropriate use. In addition, some BLM officials said that not having to respond to public comments makes the use of section 390 categorical exclusions more predictable, and thus more efficient, than a traditional NEPA document.²³ Other factors cited by BLM officials include how much staff turnover occurs in an office—which contributes to familiarity with processing APDs—and whether the office has created a template to facilitate the application and documentation of section 390 categorical exclusions.

The overall increase in efficiency of processing applications for oil and gas projects at a given field office depends on how often proposed actions meet the criteria for using a section 390 categorical exclusion. Officials told us that while a particular use of a section 390 categorical exclusion does not, in most cases, save substantial time, the cumulative time savings from processing multiple actions with section 390 categorical exclusions can be, and has been, significant. Specifically, many BLM officials said that a typical use of a section 390 categorical exclusion saves just a few hours of total staff time over completing traditional NEPA analysis and documentation for a proposed project, because the traditional NEPA process in these cases is usually straightforward and concise. According to these officials, the time savings generally comes in the form of a less

²³Regulations issued by the Council on Environmental Quality require all federal agencies to make diligent efforts to involve the public in implementing the agencies' NEPA procedures. 40 C.F.R. § 1506.6(a). The regulations also direct agencies to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected. 40 C.F.R. § 1506.6(b). While the regulations specifically require agencies to respond to public comments on environmental impact statements, 40 C.F.R. § 1503.4(a), they contain no similar requirement for responding to comments on environmental assessments. Nevertheless, some BLM officials indicated that they do respond to such comments.

detailed narrative required to support approval of a section 390 categorical exclusion approval as compared with a traditional NEPA document. According to officials, while individual resource specialists—wildlife biologists or archeologists, for instance—do the same analysis, the documentation of that analysis is less rigorous when a section 390 categorical exclusion is used to approve a project than when a traditional NEPA document is prepared. Officials stated that in many cases, section 390 categorical exclusions are replacing an environmental assessment or a determination of NEPA adequacy. In these cases, each resource specialist will save somewhere between a half hour and an hour in documenting his or her concurrence with a project, and the natural resource specialist will save an hour or two in preparing the final document, according to officials.

In other cases, according to officials, section 390 categorical exclusions have been used to approve APDs that, without the exclusions, would have normally been approved using a more detailed environmental assessment. In addition, officials in some offices told us that the use of section 390 categorical exclusions saved time in some cases because cumulative impact analysis or response to public comments—which sometimes would have occurred in the absence of section 390 categorical exclusions—were avoided. For instance, a BLM official in the Pinedale, Wyoming, field office told us that adding wells to one of its fields by means of traditional NEPA analysis and documentation would have required additional cumulative impact analysis because of the proximity of the well pads to one another.²⁴ With the section 390 categorical exclusions, on the other hand, according to this official, this office was able to approve a number of wells and their associated roads one at a time without this additional analysis, since section 390 categorical exclusions do not require cumulative impact analysis even when many wells are approved for one geographic area. Other BLM officials told us that, while section 390 categorical exclusions do not include cumulative impact analysis, this analysis is generally relatively minor in the traditional environmental assessment, so the difference between using section 390 categorical exclusions and traditional NEPA documentation was less significant. Moreover, in the absence of section 390 categorical exclusions, according to BLM officials,

²⁴According to some BLM officials, however, conducting cumulative impacts analyses for environmental assessments is redundant, given that the agency carries out cumulative impacts analyses at the programmatic level, such as in the environmental impact statement associated with a resource management plan or an oil and gas field development plan. As such, some BLM officials believe that the use of section 390 categorical exclusions do not result in the loss of important information on cumulative environmental impacts.

public comments on such analyses may lead BLM to alter approved development actions, making the timing of the APD approvals a great deal less predictable.

Because it is not always clear how oil and gas development would have proceeded in the absence of section 390 categorical exclusions, BLM officials told us that estimating the amount of time saved by using the exclusions is difficult. In field offices where section 390 categorical exclusions are used to approve APDs or nondrilling actions relatively infrequently—to add a small number of wells to a previously existing pad or to add a few pipelines in right-of-way corridors, for instance—officials told us that a typical section 390 categorical exclusion approval document saved a few hours of total staff time. Offices that used the section 390 categorical exclusions in this manner told us that the overall time savings was not great, simply because the exclusions were not used that often. In contrast, in field offices where section 390 categorical exclusions were used more often, the time savings was cumulatively more significant. Officials in these field offices told us that while the savings for a single APD did not by itself mean that the APD was approved in fewer calendar days, the total number of APDs processed in the office in a given period was probably larger because of the cumulative time saved by using section 390 categorical exclusions. Such savings probably did accrue in these field offices because staff hours saved in processing APDs were directed toward processing additional APDs rather than toward other activities.

Industry officials with whom we spoke stated that BLM's use of section 390 categorical exclusions has generally decreased APD-processing times, although these officials also stated that this increased efficiency was more pronounced in some field offices than in others. While acknowledging that the type of development and availability of NEPA documents are both critical factors, they also stressed that differences in field office policies, field office operations, and field management personalities generally influence how readily a given BLM field office will use section 390 categorical exclusions. For example, according to industry officials, some field offices are conservative and cautious, reluctant to use section 390 categorical exclusions if even minimal environmental or cultural resource concerns exist. This tendency runs counter to what some industry officials told us is their interpretation of the law—namely, that they believe that section 390 categorical exclusions should be used whenever a project meets the required conditions. Industry officials told us that in some cases BLM is overly cautious in applying section 390 categorical exclusions, in part because BLM fears litigation from environmental groups. Although industry officials complained about lack of consistency among BLM field

offices in how section 390 categorical exclusions are used, overall, these officials told us, section 390 categorical exclusions are a useful tool and have contributed to expedited application processing. They applaud the exclusions for reducing redundant and time-consuming NEPA documentation and making APD application processing more predictable and flexible.

According to BLM, section 390 categorical exclusions are an important tool for increasing efficiency of field office operations, which has freed staff time for other activities. These other activities may include additional environmental inspections, at the discretion of the field office. BLM data indicated that the total number of environmental inspections, as well as the total number of environmental inspection hours, has increased since section 390 categorical exclusions were introduced, but we were unable to correlate increased use of section 390 categorical exclusions with this increase in environmental inspections. A variety of factors other than section 390 categorical exclusions probably contributed to the increase. Perhaps most significant, BLM hired approximately 200 full-time employees from fiscal year 2006 through fiscal year 2008, including inspectors, as part of an oil and gas federal streamlining pilot project under the Energy Policy Act of 2005.²⁵ In addition, BLM officials told us, the amount of time office staff spend doing environmental inspections in a given year is a decision made by each field office when balancing staffing levels with competing priorities, such as the need to process additional APDs. According to officials, although section 390 categorical exclusions did free up staff time, the decision in many field offices was to use the time to process backlogged APDs. Now that the demand for energy development has subsided in many areas, according to some BLM officials, they might dedicate additional staff time toward environmental inspections.

²⁵Pub. L. No. 109-58, §365, 119 Stat. 723 (2005).

BLM’s Use of Section 390 Categorical Exclusions Has Frequently Been Out of Compliance with Both the Law and BLM’s Implementing Guidance

BLM’s field offices used section 390 categorical exclusions to approve oil and gas activities in violation of the law and also failed to follow agency guidance. A lack of clear guidance and oversight by the agency contributed to both violations of law and noncompliance with guidance.

BLM Has Approved Oil and Gas Activities in Violation of the Law

In our review of BLM’s section 390 decision documents, we found six types of violations of the Energy Policy Act of 2005 (see table 4).

Table 4: Summary of Violations of Section 390 of the Energy Policy Act of 2005

Violation	BLM field office(s) where violation was found	Criteria from the Energy Policy Act of 2005, section 390	Findings^a
Using a section 390 CX2 or CX3 to approve more than one well ^b	Bakersfield, Calif. Buffalo, Wyo. Casper, Wyo. Craig, Colo. Glenwood Springs, Colo. Grand Junction, Colo. Price/Moab, Utah Tulsa, Okla. Vernal, Utah White River, Colo. Worland/Cody, Wyo.	The law defines section 390 CX2 and CX3 as “drilling an oil or gas well” [emphasis added]. Thus, each of these categorical exclusions is to be used for approving a single well on a well pad. In practice, a field office must prepare one decision document that outlines the rationale for a proposed new activity. Well pads can have multiple wells operating at the same time, but for wells approved with a section 390 CX2 or CX3, each new well must be approved using a separate decision document.	We found 31 instances (at 11 field offices) that used a single section 390 CX2 and/or CX3 decision document to approve more than one well. For example, the Glenwood Springs, Colorado, field office approved 8 new wells on one well pad using a section 390 CX3 decision document. Overall, we added more than 800 uses of section 390 categorical exclusions to BLM’s count to adjust for field offices’ approving multiple wells with a single decision document. ^b

Violation	BLM field office(s) where violation was found	Criteria from the Energy Policy Act of 2005, section 390	Findings ^a
Using a section 390 CX2 or CX3 to approve an activity other than drilling an oil or gas well	Bakersfield, Calif. Buffalo, Wyo. Carlsbad/Hobbs, N.Mex. Casper, Wyo. Glenwood Springs, Colo. Jackson, Miss. Lander, Wyo. Pinedale, Wyo. Rawlins, Wyo. Vernal, Utah Worland/Cody, Wyo.	The law states that a section 390 CX2 or CX3 applies to “drilling an <i>oil or gas</i> well” [emphasis added].	We found numerous examples at 11 field offices that used a section 390 CX2 or CX3 to approve an activity other than drilling an oil or gas well. Specifically, we found 7 instances at 5 field offices from our sample, as well as more than 140 other instances at the 11 field offices from our analysis of BLM field office summary data on their use of section 390 categorical exclusions. Violations we found in our sample included using a section 390 CX2 to approve the drilling of three wells to store water (for use during oil or gas drilling), approving a right-of-way corridor, or the installation of electrical lines.
Drilling a new well approved using a section 390 CX2, CX3, or CX4 beyond the applicable 5-year time frame ^c	Dickinson, N.Dak. Grand Junction, Colo. Rawlins, Wyo.	<p>The law establishes a 5-year time frame for section 390 CX2, CX3 and CX4.</p> <ul style="list-style-type: none"> • Section 390 CX2 restricts new drilling to a “location or well pad site at which drilling has [previously] occurred within 5 years.” • Section 390 CX3 limits the approval of a new well to a site that has “an approved land use plan or any environmental document prepared pursuant to NEPA, . . . so long as such plan or document was approved within 5 years” of the drilling date of the new well. • Section 390 CX4 confines the “placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of the placement of the pipeline.” 	We found 3 instances (at 3 field offices) where activities approved with either a section 390 CX2, CX3, or CX4 occurred beyond the law’s 5-year time frame. For example, the Grand Junction, Colorado, field office approved a section 390 CX2 decision document for a new well close to the end of the 5-year time frame, and the new well was drilled about a month after the 5-year time frame elapsed. We also found a well, approved by the Dickinson, North Dakota, field office using a section 390 CX3, where the drilling started 2 months after the 5-year time frame elapsed. In addition, we found that the Rawlins, Wyoming, field office in 2007 used a section 390 CX4 to approve placement of a new pipeline in a right-of-way corridor approved in October 1994. The new pipeline was approved 8 years after the end of the allowable 5-year time frame. ^c

Violation	BLM field office(s) where violation was found	Criteria from the Energy Policy Act of 2005, section 390	Findings ^a
Approving a new oil or gas well at a site that had not yet been drilled	Glenwood Springs, Colo. Rawlins, Wyo.	The law limits a well approved using a section 390 CX2 to “a location or well pad at which drilling has occurred.”	We found 5 instances (at 2 field offices) that used a section 390 CX2 to approve new wells on sites that did not have any wells started or drilled. We found one instance at the Rawlins, Wyoming, field office as part of our sample, and we found four instances at the Glenwood Springs, Colorado, field office as a result of separate follow-up discussions. As part of our follow-up with the Glenwood Springs, Colorado, field office we reviewed all section 390 CX2 decision documents approved from fiscal year 2006 through fiscal year 2008. We found four section 390 CX2 decision documents that clearly stated that the oil or gas company leasing the site had not drilled any other wells.
Using section 390 CX5 for ineligible activities	Anchorage, Alaska Worland/Cody, Wyo.	The law limits use of section 390 CX5 to projects for “maintenance of a minor activity.” BLM guidance further defines minor activities as “maintenance of the wells or wellbore, a road, well pad or a production facility” and does not allow “construction or major renovation of a building or facility.”	We found 4 instances (at 2 field offices) of using section 390 CX5 to approve (1) drilling wells to store natural gas (two instances), (2) installation of a pipeline to transport water, and (3) a request for a 1-year extension of three APDs.
Approving a section 390 CX3 without sufficient supporting NEPA documentation	Jackson, Miss.	The law restricts a well approved using section 390 CX3 to one that is “within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA” has been prepared. Therefore, new wells are limited to locations that the field office previously analyzed in an approved NEPA document.	We found one instance (at a field office) of using a section 390 CX3 to approve a new well without having an approved NEPA document as support.

Source: GAO analysis of section 390 of the Energy Policy Act of 2005, a sample of section 390 categorical exclusion decision documents, and related follow-up interviews with BLM officials.

^aWe reviewed a nongeneralizable random sample of 215 section 390 categorical exclusion decision documents and followed up with officials from specific field offices if this review surfaced additional issues.

^bApproving more than one well through a single decision document for section 390 CX1 is also out of compliance with BLM guidance (see following section).

^cApproving an activity outside of the 5-year time frame set forth in section 390 CX2, CX3, and CX4 is also out of compliance with BLM guidance (see following section).

BLM Frequently Failed to Follow Its Guidance in Using Section 390 Categorical Exclusions

In our review of BLM section 390 decision documents, we found numerous examples of noncompliance with BLM’s guidance—specifically, with Instruction Memorandum No. 2005-247 and BLM’s NEPA handbook, appendix 2—including inaccurate documentation or lack of justification for the use of the section 390 categorical exclusion (see table 5). Specifically, decision documents from 17 field offices lacked sufficient information to ascertain compliance with the law or BLM guidance.

Table 5: Summary of Noncompliance with BLM Guidance

Noncompliance	BLM field office(s) where noncompliance was found	Criteria from BLM guidance	Findings ^a
Noncompliance related to specific section 390 categorical exclusions			
Using section 390 CX1 to approve more than one well	Bakersfield, Calif. Buffalo, Wyo. Casper, Wyo. Craig, Colo. Glenwood Springs, Colo. Pinedale, Wyo. Price/Moab, Utah Salt Lake, Utah Vernal, Utah	BLM guidance states that any of the five types of 390 categorical exclusions applies to one APD (representing one activity). Therefore, only one activity related to oil and gas exploration can be approved with a single section 390 CX1.	We found 15 instances (at 9 field offices) that approved more than one activity—multiple wells in all instances—using section 390 CX1. For example, the Bakersfield, California, field office approved 23 new wells under one section 390 CX1 decision document. In addition, the field office categorized each of the 23 new wells under a single NEPA number. ^b The Price/Moab, Utah, field office approved 16 new wells on 8 different leases under one section 390 CX1 decision document.

Noncompliance	BLM field office(s) where noncompliance was found	Criteria from BLM guidance	Findings ^a
Noncompliance related to allowable 5-year time frames			
Using incorrect expiration dates for activities approved with a section 390 CX2 or CX3	Bakersfield, Calif. ^c Glenwood Springs, Colo. ^c Pinedale, Wyo. Price/Moab, Utah White River, Colo.	BLM guidance states that drilling a new well or placement of a new pipeline using a section 390 CX2 must be based on the drill date of the previous well. Therefore, BLM guidance requires each section 390 CX2 decision document to include the date when work on the site's prior well ended. This date becomes the start date for the 5-year time frame in which drilling must begin for any new well approved using section 390 CX2.	<p>We found 6 instances (at 3 field offices) of using an incorrect date to calculate the start of the 5-year time frame for drilling a new well. Instead of citing dates associated with work on the sites' previous wells, the decision documents generally based the expiration dates on the dates the decision documents were authorized. In addition, one section 390 CX2 decision document from the White River, Colorado, field office based the time frame on dates listed for a NEPA document rather, than for the site's existing wells.</p> <p>In addition, as a result of discussions with 3 field offices—Bakersfield, California, as well as Glenwood Springs and White River, Colorado—we found that incorrect office-wide policies were promulgated on how to reconcile the 5-year time frame in the law with the normal APD time frame. (For a more detailed discussion of the confusion between the time frames in the law and the normal APD time frames, see app. III.)</p>

Noncompliance	BLM field office(s) where noncompliance was found	Criteria from BLM guidance	Findings ^a
Failing to include required text defining expiration dates for APDs or nondrilling actions approved using section 390 CX2, CX3, or CX4	Anchorage, Alaska Bakersfield, Calif. Buffalo, Wyo. Carlsbad/Hobbs, N.Mex. Casper, Wyo. Craig, Colo. Dickinson, N.Dak. Farmington, N.Mex. Glenwood Springs, Colo. Grand Junction, Colo. Jackson, Miss. Lander, Wyo. Price/Moab, Utah Rawlins, Wyo. Salt Lake, Utah San Juan Public Lands Center, Colo. Tulsa, Okla. Vernal, Utah White River, Colo. Worland/Cody, Wyo.	BLM guidance requires section 390 CX2, CX3, and CX4 decision documents to include specific text defining the last day the a new project can begin. ^d Specifically: <ul style="list-style-type: none"> • A section 390 CX2 decision document must include text that defines the new project's end date in relation to a date that activity last occurred on the site. • A section 390 CX3 decision document must include text that defines the new project's end date in relation to the approval date of the associated NEPA documentation. • A section 390 CX4 decision document must include an end date by which the approved pipeline must begin to be placed in relation to the date the existing corridor was approved. 	We found 95 instances (in 20 field offices) without the required expiration dates. Specifically, <ul style="list-style-type: none"> • 27 instances (in 13 field offices) for section 390 CX2 decision documents, • 39 instances (in 14 field offices) for section 390 CX3 decision documents, and • 29 instances (in 12 field offices) for section 390 CX4 decision documents.
Noncompliance related to documentation			
Applying the extraordinary circumstances checklist for section 390 categorical exclusion decisions	Anchorage, Alaska Carlsbad/Hobbs, N.Mex. Jackson, Miss.	BLM guidance directs field office staff not to follow the extraordinary circumstances checklist when using section 390 categorical exclusions.	We found 21 instances (at 3 field offices) where projects were reviewed using the extraordinary circumstances checklist and the results were included in their respective section 390 categorical exclusion decision documents.

Noncompliance	BLM field office(s) where noncompliance was found	Criteria from BLM guidance	Findings ^a
Lack of adequate justification to ascertain compliance with use of section 390 CX1, CX2, CX3, or CX4	Anchorage, Alaska Bakersfield, Calif. Buffalo, Wyo. Carlsbad/Hobbs, N.Mex. Casper, Wyo. Craig, Colo. Dickinson, N.Dak. Glenwood Springs, Colo. Grand Junction, Colo. Jackson, Miss. Kemmerer, Wyo. Pinedale, Wyo. Rawlins, Wyo. Tulsa, Okla. Vernal, Utah White River, Colo. Worland/Cody, Wyo.	BLM guidance includes a requirement that the approval documentation contain a brief rationale justifying why the section 390 categorical exclusion applies for a section 390 CX1, CX2, CX3, or CX4.	We found 17 field offices whose decision documents contained inadequate supporting information for us determine whether the use of the section 390 categorical exclusion was justified. In most cases, the missing information was technical in nature and related to the specific conditions that must be met when using a section 390 categorical exclusion. For example, a section 390 CX3 decision document from the Vernal, Utah, field office did not state whether the project would occur in a developed oil field. Although we requested additional supporting information from field offices when questions arose, we did not review the entire APD file in every case to determine if the missing supporting information or documentation was included somewhere else in the file.

Source: GAO analysis of section 390 of the Energy Policy Act of 2005, a sample of section 390 categorical exclusion decision documents, and related follow-up interviews with BLM officials.

^aWe reviewed a nongeneralizable random sample of 215 section 390 categorical exclusion decision documents and followed up with officials from specific field offices if this review surfaced additional issues.

^bEach decision document includes a number—referred to as a NEPA number—that is a unique identifier for the project approved using a section 390 categorical exclusion.

^cWe did not find any section 390 decision documents at the Bakersfield, California, and Glenwood Springs, Colorado, field offices with incorrect expiration dates. As a result of discussion with these two field offices, however, along with the White River, Colorado, field office, we found that they all had promulgated incorrect office-wide policies on how to reconcile the 5-year time frame in the law with the normal APD time frame. Had their section 390 decision documents included expiration dates calculated in accordance with their respective office policies, the expiration dates would have fallen outside of the 5-year time frame stated in the law. The three field offices reported using section 390 CX2, CX3, or CX4 a total of 551 times (see app. III).

^dBLM's Instruction Memorandum No. 2005-247, appendix 2, and BLM's NEPA handbook, appendix 2, both give sample wording for text defining the end date of a section 390 CX2 and CX3 project. For example, "If the well has not been spudded [drilled] by (the date the categorical exclusion is no longer applicable), this APD will expire and the operator is to cease all operations related to preparing to drill the well."

Lack of Clear Guidance and Oversight Contributed to Violations of the Law and Noncompliance

Overall, we found many more examples of noncompliance with guidance than violations of the law. We did not find intentional actions on the part of BLM staff to circumvent the law; rather, our findings reflect what appear to be honest mistakes stemming from confusion in implementing a new law with evolving guidance.

Nevertheless, even though some of the violations of law—such as approving multiple wells with one decision document—were technical in nature, they must still be taken seriously. Assuming that wells were all located on the same well pad and that appropriate approvals were obtained regarding endangered species and cultural resources, coming into compliance may simply have involved assigning a unique NEPA number to each well. The action would still have been approved under a section 390 categorical exclusion, with comparable environmental analyses completed for the proposed projects. Also, if any of the activities we identified as violations of the law met conditions for using a section 390 categorical exclusion other than the one used to approve them, such activities could have been legally approved under that other exclusion, again without any additional environmental review. In some instances, however, violations we found may have thwarted NEPA's twin aims of ensuring that both BLM and the public are fully informed of the environmental consequences of BLM's actions. For example, approval of multiple wells on one or more well pads could have required an environmental assessment or environmental impact statement, which would likely have provided additional information on the environmental impacts of approving multiple wells. According to BLM officials, the outcome of the NEPA process likely would have yielded the same result. Nevertheless, the purpose of NEPA is to provide better information for decision making, not necessarily to alter the decisions ultimately made. Although the projects would likely have been approved, the specific location and conditions of approval might have been different, and BLM and the public might have had more detailed information on the environmental impacts of the approvals.

A lack of definitive and clear guidance from BLM, as well as lack of oversight of field offices' actions, has contributed to the violations of law and noncompliance with BLM's existing guidance. Although BLM has provided several key guidance documents—including Instruction Memorandum No. 2005-247, issued 2 months after the law's passage, and its NEPA handbook issued in 2008—this guidance lacks the specificity and examples needed to clearly direct staff in the appropriate use and limits of section 390 categorical exclusions. Specifically, BLM's guidance says little, if anything, about (1) the documentation needed to support a decision to use a section 390 categorical exclusion or (2) the proper circumstances for using section 390 categorical exclusions to approve sundry notices. Furthermore, BLM headquarters and state offices we spoke with have generally not provided any oversight or review of the field offices' actions in using section 390 categorical exclusions that would ensure compliance with the law or BLM guidance.

BLM guidance says little about the information field offices must include in documenting their decisions to use section 390 categorical exclusions. As a result, the type and level of documentation staff provide when using section 390 categorical exclusions to approve projects varies widely. Although BLM's primary guidance documents state that staff should include a written rationale justifying how a particular section 390 categorical exclusion applies, the guidance does not describe how specific this justification must be and gives little direction on the type of information field offices should include in the decision document. BLM guidance directs staff to include specific information in decision documents only for section 390 CX2, CX3, and CX4, and these directions are limited to requiring inclusion of a term or condition of approval stating when authorization of a project will expire or be suspended if a new well is not drilled or a new pipeline is not placed within the 5-year window provided in the law. BLM guidance does not require staff to include any other specific information when documenting a decision to use a section 390 categorical exclusion. For example, the guidance contains no requirement that staff include the name of either the land use plan or the applicable NEPA document when using a section 390 CX3. While some of the decision documents we analyzed contained enough information for us to determine whether the proposed activity met the conditions for using a particular section 390 categorical exclusion, we found examples at most field offices where we could not ascertain compliance.

Some field offices have developed their own formal and informal templates for documenting their use of section 390 categorical exclusions; these templates differ greatly among field offices, however, and some staff acknowledged to us that mistaken applications of section 390 categorical exclusions may have been compounded by the continued use of faulty templates. Several field offices told us that they developed their own templates to expedite documentation. For example, the Farmington, New Mexico, field office developed a template calling for summary information on the project, as well as a listing of required conditions that must be met, with blank spaces for staff to enter supporting information, such as date and underlying NEPA document for section 390 CX3.²⁶ Similarly, the Buffalo, Wyoming, and Carlsbad, New Mexico, field offices developed separate templates for those types of section 390 categorical exclusions they commonly used. According to BLM officials, the templates used by

²⁶The Farmington, New Mexico, field office used mostly section 390 CX3s in fiscal years 2006 through 2008.

field offices were not generally reviewed or approved by either BLM headquarters or, in some cases, the applicable BLM state office, although BLM headquarters officials were aware of their development and use. In contrast, officials in the Bakersfield, California, field office told us they used an informal template—copying a recent section 390 decision document and replacing the previous project-specific information—to document their use of that section 390 categorical exclusion. While these templates may have helped expedite documentation, many of the templates have failed to include important information, and others have resulted in the inclusion of information based on erroneous interpretations of the law or guidance. For example, templates from some field offices do not include a statement indicating that an authorization will expire or be suspended at the end of the 5-year time frame, while others included an expiration date based on incorrect calculations of the 5-year time frame called for by section 390 CX2 and CX3. When faulty templates are used, the template itself reinforces potentially erroneous decisions, exacerbating concerns that BLM may be inappropriately using section 390 categorical exclusions.

In contrast, BLM has developed official checklists and templates for use when documenting other NEPA decisions, including environmental assessments, determinations of NEPA adequacy, and administrative categorical exclusions.²⁷ According to BLM headquarters officials, these checklists and templates are additional tools to help ensure compliance with NEPA requirements. The tools may also help ensure consistency and serve as helpful aids for staff new to the process.

BLM guidance is also silent about the circumstances under which section 390 categorical exclusions can be used to approve sundry notices—an omission acknowledged by BLM officials. For instance, although section 390 CX2 and CX3 are limited to approving oil and gas drilling, according to BLM headquarters officials, BLM guidance fails to specify that section 390 CX2 and CX3 should not be used to approve sundry notices seeking to modify previously approved drilling permits, such as requests to drill water injection wells. BLM field offices reported 9 such ineligible uses for section 390 CX2 and 137 for section 390 CX3. Moreover, BLM guidance on section 390 CX1 fails to provide examples of situations where it is allowable to use section 390 CX1 to approve a sundry notice—such as

²⁷These templates are found in BLM's NEPA handbook, appendixes 9, 8, and 6, respectively.

adding a compressor to the well pad site—and, in fact, fails to mention whether section 390 CX1 can properly be used to approve sundry notices at all. Similarly, BLM’s guidance fails to clearly state that section 390 CX4 and CX5 can be used only for rights-of-way or sundry notices and not for APDs, since, according to BLM headquarters staff, APDs are not the proper tool to seek approval for laying pipelines or conducting maintenance. In our analysis of decision documents, we found at least two such ineligible uses of section 390 CX5. BLM’s failure to provide information on when and if it is appropriate to use section 390 categorical exclusions to approve sundry notices has raised concerns for some that BLM field offices are using the exclusions inappropriately and that BLM is not being transparent about how the section 390 categorical exclusions are used.

Similarly, BLM guidance is silent about what activities are allowed as “drilling an oil or gas well” with a section 390 CX2 and CX3. For example, BLM’s primary guidance does not state whether the proposed drilling is limited only to those activities needed to drill and produce oil or gas as described in the approved APD, or whether subsequent modifications to an approved APD and not initially envisioned—such as the placement of a pipeline or drilling water storage wells—are also allowable. BLM guidance provides few, if any, examples related to when it is appropriate to approve activities not part of the original drilling plan, an omission leading some field offices to approve ineligible activities. Such approvals have raised concerns that BLM is allowing too broad an array of activities and is therefore, again, not being transparent about its use of section 390 categorical exclusions.

Gaps and shortcomings in BLM’s guidance notwithstanding, having the guidance is one thing, and enforcing it is another. BLM headquarters and state offices have generally provided no oversight of the implementation of the new law to ensure that field offices are implementing either the law or existing guidance properly. BLM’s implementing guidance is silent on what oversight is required for decisions to use section 390 categorical exclusions, and we found no directions for how or when section 390 categorical exclusion decisions should be systematically reviewed for compliance with either the law or guidance. BLM headquarters staff told us that no such oversight exists on a national level. While we found that BLM’s Colorado state office initially conducted a cursory review of section 390 categorical exclusion decisions by its field offices, this review was temporary and did not focus on whether uses of section 390 categorical exclusions were consistent with BLM guidance or the law; moreover, it is unclear what checks this review performed. For example, the review

failed to catch that two Colorado field offices misinterpreted the 5-year time limit associated with section 390 CX2 and CX3. Furthermore, BLM headquarters staff acknowledged that although they would like to include a review of how section 390 categorical exclusions have been used as part of an annual policy review, they have not had the resources to do so.

Lack of Clarity in the Law and in BLM Guidance Has Raised Serious Concerns

Lack of clarity in section 390 of the Energy Policy Act of 2005 and in BLM's implementing guidance has raised serious concerns about when and how section 390 categorical exclusions should be used to approve oil and gas development. Specifically, concerns raised by industry, environmental groups, BLM officials, and others relate to (1) fundamental questions about what section 390 categorical exclusions are and how they should be used, (2) a lack of clarity in key concepts used to describe one or more of the five types of section 390 categorical exclusions, and (3) vague or nonexistent definitions—in the law and BLM guidance—of key terms describing the conditions to be met when using section 390 categorical exclusions.

The Energy Policy Act of 2005 Provides Little Direction, Raising Fundamental Questions on How BLM Should Implement Section 390 Categorical Exclusions

Key elements of section 390 of the Energy Policy Act of 2005 are undefined, leading to fundamental questions about what section 390 categorical exclusions are and how they should be used. This lack of direction leaves these elements open to differing interpretations, debate, and litigation and has, more generally, led to serious concerns that BLM is using section 390 categorical exclusions in too many—or too few—instances. BLM officials, environmental groups, industry groups, and others have raised serious concerns with the law as a whole. These concerns relate to four key elements: (1) the definition of “categorical exclusion” and whether the screening for extraordinary circumstances is required, (2) whether the use of section 390 categorical exclusions is mandatory or discretionary, (3) the meaning of the phrase “rebuttable presumption,” and (4) the level of public disclosure required for section 390 categorical exclusions.

What Are Section 390 Categorical Exclusions, and Are They Subject to Extraordinary Circumstances?

The Energy Policy Act of 2005 does not specifically address the extent to which section 390 categorical exclusions are similar or dissimilar—or to what extent—to administrative categorical exclusions. Administrative categorical exclusions do not apply where extraordinary circumstances are present.²⁸ The Energy Policy Act of 2005 does not specifically state

²⁸See 40 C.F.R. § 1508.4.

whether section 390 categorical exclusions are subject to extraordinary circumstances. Moreover, according to BLM officials, section 390 categorical exclusions differ substantively from administrative categorical exclusions: whereas administrative categorical exclusions must have no significant environmental impact, there is no specific requirement that section 390 categorical exclusions have no such impact. To this end, BLM officials and environmental groups alike acknowledge that, to the extent that section 390 categorical exclusions function differently than administrative categorical exclusions, identifying the activities listed in section 390 as “categorical exclusions” is confusing, and they should have been given a different name.

A key disagreement and concern involving the phrase “categorical exclusion” is whether section 390 categorical exclusions should be subject to the same test for extraordinary circumstances that administrative categorical exclusions are subject to. These extraordinary circumstances exist where a normally excluded action may have a significant environmental effect. Several environmental groups, historic preservation groups, concerned citizens, government officials, and others told us that section 390 categorical exclusions cannot be used where extraordinary circumstances are present. This interpretation stems from the law’s use of the phrase “categorical exclusion”—which under NEPA is subject to extraordinary circumstances—and the inherent potential for significant individual or cumulative environmental impacts associated with oil and gas activities.

In contrast to those who interpret the law as inherently requiring section 390 categorical exclusions to be subject to screening for extraordinary circumstances, Interior and BLM have taken the position that extraordinary circumstances do not apply to section 390 categorical exclusions because they are authorized in statute rather than in regulation. Specifically, it is BLM’s policy that staff do not screen projects considered for approval with section 390 categorical exclusions using the extraordinary circumstances checklist required for administrative categorical exclusions. Officials told us that the NEPA documents underlying field office decisions to use section 390 categorical exclusions already analyze the potential impacts of oil and gas activities, and BLM has therefore already considered cumulative impacts and extraordinary circumstances. Moreover, although BLM guidance directs field office staff not to follow the extraordinary circumstances checklist when using section 390 categorical exclusions, BLM officials stated that staff formally or informally consider some of the issues covered on the checklist. For example, BLM cannot approve an APD until the requirements of the

National Historic Preservation Act and the Endangered Species Act, among others, have been met.²⁹ The presence of endangered species or historic resources that may be significantly affected by oil and gas activities are two potential extraordinary circumstances identified on BLM's checklist. In addition, we found three field offices that formally used the extraordinary circumstances checklist in documenting their use of section 390 categorical exclusions, despite guidance to the contrary. BLM officials in headquarters and several field offices also acknowledged that staff informally consider many of the extraordinary circumstances when reviewing projects, even though doing so may result in the need to develop a new NEPA document to approve the project when an extraordinary circumstance is present. Even so, many see developing new NEPA documentation as more expedient than using a potentially controversial section 390 categorical exclusion that may be litigated.

Of the various extraordinary circumstances, concerns about the cumulative impacts of additional oil or gas development—especially adverse effects of such development on air quality—have been among the most widespread and potentially serious. Environmental groups and government agencies alike have raised concerns that section 390 categorical exclusions exacerbate air quality problems and threats by not subjecting projects to screening for extraordinary circumstances. According to the Environmental Protection Agency and others, ozone levels around at least three field offices—Farmington, New Mexico; Pinedale, Wyoming; and Vernal, Utah—have reached or exceeded allowable levels, in part because of the release of nitrogen oxides from additional wells approved with section 390 categorical exclusions. Under such circumstances, many have alleged that if BLM had considered how the wells individually or cumulatively would have affected air quality, it would not have been able to approve all the wells without more rigorous environmental analyses. Another concern related to cumulative impacts, according to BLM officials and at least one environmental group, is that the drilling of additional oil or gas wells using section 390 categorical exclusions has led to a spider-web pattern of development, resulting in the fragmentation of critical habitat and disruption of migration corridors for certain species such as sage grouse, prong-horn antelope, and elk (see fig. 4).

²⁹During our review, we found two instances in which, according to BLM documents, the White River, Colorado, field office approved an APD using a section 390 categorical exclusion for which the analysis required under section 106 of the National Historic Preservation Act appears to be erroneous or improperly conducted.

Figure 4: Spider-web Pattern of Development (c. 2004) and Antelope in Front of Wells in a Wildlife Corridor in Pinedale, Wyoming (October 2008)



Source: Linda Baker, Upper Green River Valley Coalition (left), and GAO (right).

These uncertainties and disagreements are central to an ongoing lawsuit filed against BLM over its use of section 390 categorical exclusions.³⁰ In the litigation, an historic preservation group and two environmental groups have asserted that BLM should have considered the indirect, as well as the direct, cumulative impacts of drilling, such as corrosive dust released into the air and onto neighboring rock art panels in Nine Mile Canyon, Utah (see fig. 5). BLM has responded that it properly analyzed the effects of dust on the canyon's rock art panels and took measures to mitigate these impacts, including imposing—through conditions of approval on the relevant APDs—dust suppression measures on truck traffic through the canyon.

³⁰*Nine Mile Canyon Coalition v. Stiewig*, Civ. No. 08-586, D. Utah (filed Aug. 6, 2008).

Figure 5: Warning Sign and the Great Hunt Panel in Nine Mile Canyon, Utah (October 2008)



Source: GAO.

Note: The Great Hunt Panel is one of thousands of pictographs in Nine Mile Canyon.

Are Section 390 Categorical Exclusions Mandatory?

The law does not specifically state whether the use of section 390 categorical exclusions is mandatory for every project meeting the conditions set forth in the law. The legislative history for section 390 of the Energy Policy Act of 2005 is virtually nonexistent and sheds little light on whether Congress intended that section 390 categorical exclusions be mandatory or discretionary. While the language in a House version of the bill specifically exempted from additional NEPA analysis activities similar to those meeting the conditions for a section 390 categorical exclusion as described in the law—meaning that use of the new provisions would have been mandatory—the law as enacted contained no such specific exclusion. Instead, the law contains a qualification that the activities in question “shall be subject to a rebuttable presumption” that they are categorically excluded from further NEPA review.³¹ Whatever this language means, it certainly differs from the mandatory exemption language that existed in the House bill. Without additional congressional

³¹During Senate floor debates on the conference version of the bill, which ultimately became law, one of the bill’s supporters stated that the bill “does not include categorical waivers for NEPA for oil and gas developments.” 151 Cong. Rec. S9340 (daily ed. July 29, 2005) (statement of Senator Akaka).

clarification, disagreements over the meaning of the provision will continue, a situation acknowledged by BLM.

Although one of BLM's key guidance documents—Instruction Memorandum No. 2005-247—includes language that can be interpreted to mean that BLM must use a section 390 categorical exclusion whenever a project meets the required conditions, mandatory use is not the current position of BLM headquarters. BLM headquarters' 2006 and 2008 presentations on how to use section 390 categorical exclusions clearly direct staff to approve projects using determinations of NEPA adequacy if using a section 390 categorical exclusion would not save time, and they advocate caution when deciding to use section 390 categorical exclusions. Such directions demonstrate that BLM has taken the position that, in practice, some level of discretion is warranted when considering section 390 categorical exclusions. Despite this position, BLM headquarters officials acknowledged that state offices have the authority to mandate the use of section 390 categorical exclusions by their field offices. The interpretation by some BLM offices that section 390 categorical exclusions are mandatory has raised concerns for some environmental groups and others that BLM is using section 390 categorical exclusions too often and when more appropriate methods for approving a project could better protect the natural resources. At the same time, some industry representatives believe that BLM must use section 390 categorical exclusions whenever a project meets the conditions for one and thus BLM is not using them often enough.

We found that many field offices are using section 390 categorical exclusions with some level of discretion, such as choosing to do an environmental assessment in cases where projects seem politically controversial or may have a significant effect on wildlife. For example, the Farmington and Carlsbad, New Mexico, field offices prohibit staff from using section 390 categorical exclusions in areas formally classified as sensitive, such as areas of critical environmental concern.³² In contrast, the Vernal, Utah, field office approved section 390 categorical exclusions for activities located in areas of critical environmental concern. In addition, some officials told us they interpreted the law and BLM's

³²This prohibition is a statewide policy of BLM's New Mexico state office. Areas of critical environmental concern are areas within the public lands where special management attention is required to protect and prevent irreparable damage to important historic, cultural, or scenic values; fish and wildlife resources; or other natural systems or processes or to protect life and safety from natural hazards. 43 C.F.R. § 1601.0-5(a).

What Does the Phrase
“Rebuttable Presumption”
Mean?

guidance to mean that section 390 categorical exclusions are mandatory whenever a project meets the conditions for one of the five types of section 390 categorical exclusions, regardless of whether another NEPA compliance approach, such as an environmental assessment or administrative categorical exclusion, would also have been applicable. For example, according to officials from the Carlsbad, New Mexico, field office, they used section 390 CX4 even in situations where they said an administrative categorical exclusion would have been applicable and quicker, for example, despite the time-consuming effort needed to verify that a project fits within the 5-year time limitation for a section 390 CX4.

The Energy Policy Act of 2005 does not specify what the “rebuttable presumption” provision in section 390 means or how BLM is supposed to implement it, which has led to serious disagreements over how to interpret the phrase. The law does not clearly explain the meaning of the presumption or how to rebut the presumption. Section 390(a) states:

“[a]ction by the Secretary of the Interior in managing the public lands, or the Secretary of Agriculture in managing National Forest System Lands, with respect to any of the activities described in subsection (b) shall be *subject to a rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply* if the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil or gas.”³³ [emphasis added]

Consequently, opinions differ as to what rebuttable presumption refers to; what items are open to rebuttal; and in what forum any public challenges to the use of section 390 categorical exclusions can be made, if any.

According to Interior officials, the phrase “rebuttable presumption” is not typically used in NEPA or environmental case law; both Interior and BLM officials have characterized the meaning of the phrase in section 390 as murky. According to Interior officials, section 390 categorical exclusions are allowable as long as there is no convincing rebuttal.³⁴ Interior has interpreted this section to mean that when a drilling activity proposed in an APD appears to meet the requirements of section 390, BLM presumes that a section 390 categorical exclusion will comply with NEPA unless this presumption is rebutted by showing that one or more of the required

³³Pub. L. No. 109-58, § 390(a), 119 Stat. 747 (2005), codified at 42 U.S.C. § 15942(a).

³⁴Proposed activities must also be conducted pursuant to the Mineral Leasing Act and meet the conditions for one or more of the five types of section 390 categorical exclusions.

conditions are not present. For example, the presumption that a section 390 CX2 applies to a given project could be rebutted by showing that the well described in the APD is not on a location or well pad site at which previous drilling has occurred within 5 years before the date the proposed well is to be spudded. In contrast, environmental groups and others told us that the presumption means that significant environmental impacts are presumed unlikely to result from the proposed project. They told us that they believe the presumption can be rebutted by showing that any extraordinary circumstances are present. This rebuttable presumption element has given rise to litigation pending in the federal district court in Utah.

Besides the confusion and disagreement over what the rebuttable presumption is, uncertainty exists because the law fails to specify the process under which any rebuttal can take place. The law does not set forth procedures for challenging section 390 categorical exclusion decisions during the decision process. Public challenges to the use of section 390 categorical exclusions are complicated by the possibility that drilling may have already occurred, and the adverse effects may already have begun, by the time the public finds out about a project. As a result, serious concerns exist as to what part, if any, of a section 390 categorical exclusion decision is open to rebuttal and in what way the public can challenge BLM's use of section 390 categorical exclusions.

What Level of Public Disclosure Is Required for Section 390 Categorical Exclusions?

Section 390 of the Energy Policy Act of 2005 does not specify procedures for involving or informing either the public or other government agencies when section 390 categorical exclusions are used. According to Interior and BLM officials, there is no requirement to publicly disclose that BLM used a section 390 categorical exclusion to approve a project or to disclose approved section 390 categorical exclusion decision documents. In this context, the public depends on the discretion of each field office for such disclosure. As with the initial 30-day disclosure of summary information related to an APD before its approval,³⁵ BLM field offices have different degrees and methods of disclosing information related to decisions on section 390 categorical exclusions. For example, some field offices, such as White River and Glenwood Springs, Colorado, publicly disclose online which APDs they approved with section 390 categorical exclusions, much as they disclose decisions to use environmental assessments or administrative categorical exclusions. Some field offices,

³⁵ 43 C.F.R. § 3162.3-1(g).

such as Farmington, New Mexico, and Vernal, Utah, told us they have also developed mailing lists for disseminating certain information related to section 390 categorical exclusion decisions to interested persons, upon request, and the Buffalo, Wyoming, field office posts certain approved section 390 categorical exclusion decision documents online. In contrast, other field offices, such as Price/Moab, Utah, and Pinedale, Wyoming, do not publicly disclose their decisions to use section 390 categorical exclusions and, in fact, require the public to file Freedom of Information Act requests to identify which projects BLM approved using section 390 categorical exclusions and to obtain copies of approved section 390 categorical exclusion decision documents.³⁶ In some cases, it is difficult for other governmental agencies—including state environmental agencies—and the public to determine whether BLM has used a section 390 categorical exclusion until it is too late to comment on, or challenge, BLM's action.

When the public and other federal and state agencies do not have a reliable or consistent way of determining which projects have been approved with section 390 categorical exclusions, they lack a fundamental piece of information needed to hold BLM accountable for their use. This point is particularly important given that the public generally has 20 days to request a state director review of APD approvals.³⁷ According to officials from both federal and state agencies, government officials outside of BLM also do not know when projects are being approved using section 390 categorical exclusions—a situation that can hamper federal or state agencies responsible for monitoring natural resources affected by drilling and energy production, such as air quality, endangered species, or other wildlife.

³⁶Because of concerns over inappropriate release of confidential information and overburdening of field office staff, BLM's Utah and Wyoming state offices both require that the public submit requests under the Freedom of Information Act to obtain information related to an APD besides what is available in the public book during the initial 30-day posting.

³⁷43 C.F.R. § 3165.3(b).

Key Concepts Underlying One or More Types of Section 390 Categorical Exclusions Have Sparked Debate

In addition to the fundamental concerns with the law as a whole, the law's descriptions of the five types of section 390 categorical exclusions have prompted more specific concerns about how to appropriately use one or more of the five types of section 390 categorical exclusions. These concerns relate to (1) the adequacy of NEPA documents supporting the use of a particular section 390 categorical exclusion, (2) consistency with existing NEPA documents, (3) the rationale for the 5-year time frame used in some but not all types of section 390 categorical exclusions, and (4) the piecemeal approach to development fostered by using section 390 categorical exclusions.

Adequacy of Supporting NEPA Documents

Individuals and groups, both inside and outside BLM, have raised serious concerns about the adequacy of the NEPA documents required to support the use of certain types of section 390 categorical exclusions. For example, environmental groups and other government agencies question the appropriateness of including a land use plan as one of the prerequisite environmental analysis documents under section 390 CX3, because such resource management plans (and their associated environmental impact statements) are the broadest type of analysis of potential impacts—a concern that BLM officials acknowledged. By their nature, these plans generally do not analyze environmental effects of a specific project or at a specific location. BLM officials characterized land use plans as a “30,000-foot analysis” of possible development, as compared with the analysis the agency generally carries out for an APD, which is a much more thorough examination of a specific project in a specific location. Furthermore, several groups have alleged that by allowing BLM to tie a section 390 categorical exclusion solely to higher-level analyses, such as resource management plans and their associated environmental impact statements, the law has allowed a shell-game to occur: that is, at the planning stage BLM can defer site-specific NEPA analyses and documentation until the project approval stage, and at the project approval stage,³⁸ it can then avoid performing such site-specific analysis by using a section 390 CX3 supported by the resource management plan. For example, while the 2003 resource management plan in effect for the Farmington, New Mexico, field office during our review explicitly states that site-specific environmental impacts were not assessed by the environmental impact statement and will be deferred to the APD stage, section 390 CX3 allowed this field office to approve individual projects

³⁸The deferred site-specific NEPA analysis and documentation are typically associated with environmental assessments, according to BLM.

without carrying out this site-specific analysis. According to some environmental groups, this shell-game is of particular concern with the recent approval of a number of controversial new resource management plans, such as those released at the end of 2008 for six BLM field offices in Utah. Furthermore, while some industry and BLM officials we spoke with told us that certain resource management plans contained an adequate analysis of potential impacts of oil and gas development, other BLM officials and environmental groups advocated for a change in the law's wording to specifically exclude resource management plans from the list of allowable NEPA documents for section 390 CX3—a position that BLM headquarters officials acknowledged has merit.

Environmental groups have raised similar concerns over the site specificity of NEPA documents supporting decisions to use section 390 CX1. BLM has explicitly listed the various NEPA documents it considers as site specific under this categorical exclusion—such as an exploratory environmental impact statement—but we were told repeatedly by environmental groups and others that site specificity is appropriately satisfied only by environmental assessments covering individual projects or small areas.

Concerns have also arisen about whether BLM has approved environmental assessments despite knowing that the assessment did not cover the full number of wells the operators expected to drill in the area for which section 390 categorical exclusions were used to approve APDs. We found at least one instance in which a field office approved an initial environmental assessment nearly 2 months after the office began the approval process for 18 additional wells in that location using section 390 CX2. Although these 18 additional wells were approved with section 390 CX2 shortly after the initial environmental assessment itself was approved, it appears that BLM staff knew that the operator intended to drill these 18 wells before they approved the environmental assessment, even though the wells were not included in the scope of that environmental assessment. Approval of an environmental assessment that was, in effect, outdated before it was signed raises troubling questions about the extent to which BLM is using section 390 categorical exclusions in a manner that undermines NEPA's purposes of fully informing the agency itself and the public of the environmental consequences of proposed actions.

Consistency with Existing NEPA Documents

Another serious concern is whether section 390 categorical exclusions allow BLM to approve projects that are not consistent with the NEPA documents to which they are tied, thus allowing BLM to approve development in excess of the development scenarios analyzed in the

supporting NEPA documents. Environmental impact statements associated with resource management plans and field development projects, as well as environmental assessments for multiwell projects, generally contain a reasonably foreseeable development scenario that (1) includes long-term projections of the number of wells to be drilled and the acres to be disturbed and (2) may trigger the agency to consider conducting additional NEPA analysis in approving activities exceeding these projected development levels. Serious concerns have arisen, however, that BLM's interpretation and use of section 390 categorical exclusions have resulted in approval of well numbers and surface disturbances beyond the development levels analyzed in existing NEPA documents.

Section 390 specifically requires the existence of underlying NEPA documents only for section 390 CX1 and CX3. BLM guidance states that only section 390 CX1 and CX3 are tied to an underlying NEPA document—a position that BLM reiterated when it issued a correction to its 2008 NEPA handbook. BLM guidance states that section 390 CX2 does not refer to any underlying NEPA document. According to at least one BLM official and one industry representative, this position has allowed the Price/Moab, Utah, field office to approve section 390 CX2s for more new wells than the number analyzed in the existing environmental assessment for the West Tavaputs area. Because the law uses the language “pursuant to NEPA” only in reference to section 390 CX1 and CX3, several people we interviewed expressed concerns that the law provides BLM with a mechanism to authorize development in excess of the reasonably foreseeable development scenarios BLM analyzed under NEPA, without performing any further NEPA analysis.

To address concerns that section 390 categorical exclusions enable BLM to exceed the limits of the underlying NEPA documents, the Governor of Wyoming proposes changing the law from “pursuant to NEPA” to “consistent with NEPA”—a change acknowledged as beneficial and supported by BLM headquarters staff with whom we spoke. Similarly, given concerns about oil and gas development inconsistent with reasonably foreseeable development scenarios, the Western Governors' Association and the Association of Fish and Wildlife Agencies propose changing the law to limit the use of section 390 CX3 so as to better protect wildlife. Furthermore, several BLM officials we spoke with told us that such language should be applied to all five types of section 390 categorical exclusions.

Rationale for the 5-year Time
Frames in Some but Not All
Section 390 Categorical
Exclusions

The inconsistent application of a time limit to some, but not all, types of section 390 categorical exclusions has led to claims that such constraints are both too long and too short, as well as to concerns that uniform time constraints should be applied to all types of section 390 categorical exclusions if they apply to any. Some BLM officials we spoke with expressed confusion over why section 390 CX2, CX3, and CX4 may be used only within 5 years of specified analyses or actions, while section 390 CX1 and CX5 do not have such constraints. The reasons for constraining some types of section 390 categorical exclusions but not others—especially given that well drilling is allowed under section 390 CX1—were not specified in the law. Nor does the law make clear how and why time limits were set at 5 years, although at least one official we spoke with assumed this limit was supposed to represent the average period NEPA analyses remained up-to-date. According to some BLM officials we spoke with, NEPA analyses generally become stale or irrelevant after several years as the landscape and resource circumstances change. In this light, some expressed concerns that 5 years was too long, since the energy boom led to development in certain areas far beyond what the NEPA analyses considered foreseeable. Consequently, for those who see the 5-year time limit as too long, such as the Bakersfield, California, field office, the validity of section 390 categorical exclusions throughout the 5-year window may mean that some activities or projects approved as section 390 categorical exclusions might be more appropriately approved using new and more rigorous NEPA analyses.

At the same time, others expressed concern that imposing a 5-year time limit on certain section 390 categorical exclusions was too short, in part, because NEPA analyses may stay relevant for longer than 5 years, especially given that staff always conduct on-site inspections of the proposed drilling site as part of the APD review and approval process. Consequently, for those who see the 5-year time limit as too short, such as the Rawlins, Wyoming, field office, the inability to use section 390 categorical exclusions after the statutory time limit has passed causes them to resume carrying out what they consider to be redundant NEPA analyses. Finally, numerous BLM officials and others told us that the law's mention of a time limit for section 390 CX2, CX3, and CX4—but not section 390 CX1—seemed arbitrary. For example, while the law allows the Pinedale, Wyoming, field office to use an environmental assessment from 1991 as support in approving an APD with a section 390 CX1, it would not allow that same 18-year-old environmental assessment to support the same APD if approved with a section 390 CX3.

Piecemeal Approach to Development

The law's focus on individual wells and projects has raised concerns that section 390 categorical exclusions foster a piecemeal approach to oil and gas development, which may undermine strategic planning efforts that aim, in part, to consider cumulative impacts. Some field offices, such as Buffalo, Wyoming, and Glenwood Springs, Colorado, use master development plans or other tools that group together multiple wells for development. But section 390 categorical exclusions are limited to individual wells, thus creating a disincentive, in some cases, to approve development according to such master planning techniques. The fostering of a piecemeal approach further exacerbates concerns about whether (1) BLM can use section 390 categorical exclusions to approve the drilling of wells exceeding the number analyzed under NEPA, (2) section 390 categorical exclusions allow BLM to bypass the analyses of cumulative impacts done to mitigate effects on wildlife and other resources, and (3) section 390 creates an incentive to conduct shortsighted environmental assessments that will quickly become obsolete with the approval of additional wells using section 390 categorical exclusions.

Both the Law and BLM's Implementing Guidance Lack Clear Definitions of Some Key Terms

BLM officials, industry representatives, environmental groups, and others have raised numerous concerns about how to interpret and apply key terms that describe the conditions that must be met when using a section 390 categorical exclusion. In particular, each of the five types of section 390 categorical exclusions contain terminology that is undefined in the law and for which BLM has not provided clear or complete guidance. Specifically:

- *“Individual surface disturbances”* under section 390 CX1. The law does not clarify what is allowable under section 390 CX1's “individual surface disturbances” condition. In addition, while the law uses the term “individual”—which is singular—it also uses the term “disturbances”—which is plural. This mixture has caused confusion and disagreement over whether the law allows BLM to use a section 390 CX1 to approve multiple wells. According to BLM headquarters officials and presentations they developed in 2006 and 2008 for state and field offices, BLM interprets this term to mean that each APD requires its own, separate section 390 CX1

decision.³⁹ Nevertheless, BLM’s field office officials we spoke with relied on Instruction Memorandum No. 2005-247, which contained confusing and seemingly contradictory guidance. The instruction memorandum gives an example of two or more wells to describe activities allowable under “individual surface disturbances”—implying that multiple wells may be allowable. The same guidance, however, also directs BLM to consider each APD separately, even in cases where an operator proposes multiple wells under a single application—implying that only one well is allowable. In light of such confusing guidance from BLM and vague terminology in the law, BLM field offices have wide-ranging interpretations about when it is appropriate to use section 390 CX1, with some prohibiting and many others erroneously approving multiple wells under a single section 390 CX1. Moreover, despite this confusion, BLM did not clarify its guidance—and in fact kept the same wording—when it revised this guidance in 2008 as part of its NEPA handbook.

- “*Maintenance of a minor activity*” under section 390 CX5. Neither the law nor BLM’s primary guidance clearly defines “maintenance of a minor activity.” Numerous BLM officials we spoke with told us they did not have a clear sense of what activities fell under “maintenance of a minor activity.” The concerns are varied and include (1) uncertainty as to what is considered maintenance that would need additional NEPA analysis for which a section 390 categorical exclusion could apply; (2) uncertainty as to what BLM considers minor; and (3) how it is possible to conduct maintenance on an activity at all, and thus what would be appropriate under section 390 CX5. Further, BLM headquarters’ presentations on section 390 categorical exclusions question the need for this exclusion and whether any situations exist that would meet this condition. In this context, many field offices have never or rarely used section 390 CX5 to approve oil or gas activities, with several telling us that they did not understand when it should be used or thought it was too risky to use. Nonetheless, several BLM field offices broadly interpreted this condition and used section 390 CX5 to approve activities, such as closing well locations and relocating discharge pits in the Worland/Cody and Buffalo, Wyoming, field offices respectively. And at least two BLM field offices approved activities, such as drilling a gas storage well or installing a

³⁹These presentations further show that this one-to-one ratio of section 390 categorical exclusion decisions to APDs applies to all five types of section 390 categorical exclusions. Each section 390 categorical exclusion applies to a single APD. Moreover, each well requires its own APD. BLM regulations state that “the operator shall submit to the authorized officer for approval an Application for Permit to Drill for *each well*.” 43 C.F.R. § 3162.3-1(c) [emphasis added].

pipeline, using section 390 CX5 in violation of the law. The inconsistency in how field offices interpret and use section 390 CX5, and the sense that field offices are approving ineligible projects under section 390 CX5, have raised concerns that BLM is not providing adequate oversight of section 390 categorical exclusions.

- *“Construction or major renovation or [sic] a building or facility”* under section 390 CX5. The law does not define what should be considered as construction or major renovation. Confusion stems from the fact that this phrase can be read two different ways—to refer (a) to either the construction of a building or facility or the major renovation of a building or facility or (b) to any construction or the major renovation of a building or facility. While BLM’s key guidance provides some direction as to what activities are allowable—by excluding the addition of a compressor or gas-processing plant—it does not address this confusion, in that it fails to clarify whether all construction is prohibited or just the construction of a building or facility. Furthermore, it fails to provide examples of activities that are allowable, such as whether drilling gas storage wells can be included. This lack of clarity has led several BLM field offices to use section 390 CX5s sparingly, if at all. At the same time, other field offices have used it more widely despite the confusion, causing some to question whether BLM is using section 390 CX5 in cases where it should not—such as to permit drilling certain types of auxiliary wells associated with oil and gas production—and where more rigorous environmental analysis and public disclosure might have been warranted.
- *“Location” under section 390 CX2.* The law provides no definition or additional explanation of what a “location” is and how it is similar to or different from a well pad site. Similarly, BLM’s primary implementing guidance fails to distinguish between the two terms. In fact, BLM guidance defines both “well pad site” and “location” the same way—as a previously disturbed or constructed well pad used in support of drilling a well. In addition, limitations set forth in the guidance also fail to distinguish between “location” and “well pad site.”⁴⁰ While the term “well pad site” is generally understood, BLM has not explained how or if that term differs from “location” and whether “location” includes surfaces previously analyzed but not disturbed—or subsequently reclaimed—by the initial drilling. Such an omission has led some to raise concerns that BLM is

⁴⁰The guidance also requires any associated surface disturbance or expansion of the well pad be connected to the original well pad or location and excludes new well sites that are simply in the vicinity.

approving projects under section 390 CX2 that disturb more area—and thus the resident wildlife—than should be allowed.

- “*Right-of-way corridor*” under section 390 CX4. The law does not define what a right-of-way corridor is or how it differs from, or is similar to, a specific right-of-way. In contrast, BLM’s key implementing guidance sets out some parameters for what does and does not constitute a right-of-way corridor, including stating that any type of existing right-of-way corridor can be used for new pipeline placement under section 390 CX4 and clarifying that it sees a right-of-way corridor as not limited to rights-of-way authorized solely under FLPMA. Despite this guidance, however, we repeatedly heard concerns from BLM staff that they were confused by, and uncomfortable using, section 390 CX4 because of confusion over how to interpret “corridor.” Consequently, some field offices used section 390 CX4 sparingly, if at all. In addition, according to an official from the Bakersfield, California, field office, because it is the staff’s understanding that only right-of-way corridors authorized legislatively are allowable under section 390 CX4—such as the West-wide Energy Corridor, which designates energy corridors in 11 western states—they were unable to use section 390 CX4 at all.

The failure of both the law and BLM guidance to clearly define key conditions that projects must meet to be eligible for approval with a section 390 categorical exclusion has caused confusion among BLM officials, industry, and the public over what activities qualify for section 390 categorical exclusions. This confusion has also exacerbated concerns that using section 390 categorical exclusions decreases the transparency of decisions, especially in cases where BLM decides that certain projects meet the required conditions for using section 390 categorical exclusions—such as approving the drilling of dozens of wells as allowable “individual surface disturbances” under section 390 CX1 or permitting the drilling of an oil or gas well as “maintenance of a minor activity” under section 390 CX5. Moreover, concerns have arisen that when BLM approves ineligible activities, it may be more likely that the agency is overlooking adverse environment effects. For example, certain projects erroneously approved as section 390 categorical exclusions may have required more rigorous environmental analyses—such as environmental assessments or environmental impact statements—which could have assessed the need to mitigate potentially adverse effects on natural resources like wildlife and air quality. BLM recognized the potential for controversy and confusion in using section 390 categorical exclusions when it developed internal guidance to communicate its interpretation of the new law and to clarify certain required conditions that projects must meet to be eligible for

section 390 categorical exclusions. It did not, however, choose to issue this information as an official agency regulation—a mechanism that would have been open to public review and comment, would have required BLM to respond to concerns raised, and likely would have held BLM to a higher standard in terms of oversight.

Conclusions

BLM is a multiple-use agency, and oil and gas development is one of the many uses that occur on public lands. As a large landowner in the mountain West, BLM stands at the center of controversy between protecting the nation's natural resources and developing the nation's energy and mineral resources to help alleviate dependence on foreign sources of oil. Section 390 of the Energy Policy Act of 2005, in part, has been interpreted by some to shift the agency's priorities more heavily toward resource extraction at the expense of certain other agency missions, especially protecting its environmental resources. It is unclear, however, whether this shift was intended by the legislation. Virtually no legislative history exists that sheds light on how section 390 of the Energy Policy Act of 2005 should be interpreted. The lack of clarity in key provisions and phrases in the law itself and this lack of a clarifying legislative history have thus left virtually every key provision of section 390 open to conflicting interpretations. In some cases, BLM as the main implementing agency has made legal interpretations in an effort to clarify guidance for its state and field offices, but in other cases it has not. Interior and BLM have decided that the extraordinary circumstances checklist should not be used for section 390 categorical exclusions and that the use of section 390 categorical exclusions can only be "rebutted" on the grounds that BLM is not following the law. These issues, among others, are currently being litigated in one of the first cases in federal court on section 390 categorical exclusions. Litigation can be costly and time-consuming, and it may not put to rest or resolve all the questions about the law.

The problems with section 390 have not gone unnoticed in Congress. Several bills were introduced in the last Congress and in the current one that would address the rebuttable presumption issue.⁴¹ Consideration of

⁴¹For example, H.R. 2828, § 1714(h), introduced on June 11, 2009, would strike the rebuttable presumption language, so that the law would state that the relevant activities "shall be subject to a categorical exclusion" under NEPA. A bill introduced in the previous Congress, H.R. 2337, § 106(c), would have required BLM and the U.S. Forest Service to adhere to Council on Environmental Quality regulations, specifically those involving extraordinary circumstances, in administering section 390.

bills such as these would give Congress the opportunity to clarify this language and other murky provisions in section 390. Regardless of the confusion surrounding certain elements of the law as currently written, BLM is responsible for ensuring that its field offices use section 390 categorical exclusions appropriately. We found numerous instances of both violations of the law and noncompliance with BLM's existing guidance. The primary guidance documents BLM headquarters disseminated to its state and field offices provided some useful information on implementing section 390 of the Energy Policy Act of 2005 but failed to provide explicit and sufficient guidance on how and when to use section 390 categorical exclusions. Without corrections to the gaps and shortcomings in BLM's existing guidance, compliance problems will likely persist that may thwart NEPA's twin aims of ensuring that both BLM and the public are fully informed of the environmental consequences of BLM's actions, field offices will continue to interpret section 390 categorical exclusions inconsistently and sometimes incorrectly, and the public's confidence and trust in BLM's decision making will continue to erode.

One technique that has proven helpful in ensuring compliance with NEPA decision-making processes has been the development of standardized templates for field office staff to follow. While BLM has developed and disseminated templates to its field offices for documenting certain NEPA decisions, such as environmental assessments and administrative categorical exclusions, it has no such agencywide template for section 390 categorical exclusions. As a result, some field offices have developed informal or formal templates of their own. These templates differ greatly from field office to field office, however, and some staff have acknowledged that mistaken use of section 390 categorical exclusions has been compounded by continued use of faulty templates. BLM management acknowledges that a standardized document would be helpful in ensuring that section 390 categorical exclusions are used appropriately and had hoped to develop such a template—especially in light of the varied and particular criteria required by each of the five types of section 390 categorical exclusions—but BLM has not done so to date. Without consistent minimum information included in decision documents for section 390 categorical exclusions, the public lacks the information needed in many cases to not only understand BLM's rationale for using a particular type of section 390 categorical exclusion, but also to rebut the agency's presumption in using a section 390 categorical exclusion. This variability undermines BLM's implementation of section 390 of the Energy Policy Act of 2005, as well as public understanding of and confidence in BLM's actions.

Furthermore, BLM must ensure that its guidance is followed. Implementing a new law can be a high-risk endeavor requiring intensified oversight in the start-up years to help ensure compliance until the processes become standard. Without a plan or mechanism for BLM management at the headquarters or state level to oversee the use of section 390 categorical exclusions by its field offices, BLM lacks basic tools to ensure compliance with either the Energy Policy Act of 2005 or its own guidance. Consequently, noncompliance with the law and BLM guidance—such as policies that allow, in practice, drilling after the 5-year time limit has expired or that allow inappropriate nondrilling activities to be approved—has been allowed to persist. Oversight is needed to help ensure that section 390 categorical exclusions are used appropriately—neither under- nor overused—and to ensure that the agencies adequately further NEPA’s purposes.

Matter for Congressional Consideration

This report has identified a number of significant issues with respect to section 390 of the Energy Policy Act of 2005 that have become a source of confusion for BLM and its field offices as they implement the law. Congress should consider amending section 390 to clarify and resolve some of the key issues identified in this report, including, but not limited to (1) clearly specifying whether section 390 categorical exclusions apply even in the presence of extraordinary circumstances and (2) clarifying what the phrase “rebuttable presumption” means and how BLM must implement it in the context of section 390.

Recommendations for Executive Action

In the interim, to improve BLM field offices’ implementation of section 390 categorical exclusions—to reduce noncompliance and clarify how and when section 390 categorical exclusions are to be used—we recommend that the Secretary of the Interior direct the Director of BLM to take the following three actions:

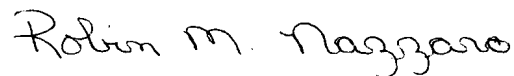
- issue detailed and explicit guidance that addresses the gaps and shortcomings in its present guidance;
- provide standardized templates or checklists for each of the five types of section 390 categorical exclusions, which would specify, at minimum, what documentation is required to justify their use; and
- develop and implement a plan for overseeing the use of section 390 categorical exclusions to ensure compliance with both law and guidance.

Agency Comments

We provided a draft of this report to the Department of the Interior for review and comment. The department concurred with our recommendations and stated that it and BLM will take immediate steps to ensure that the use of section 390 categorical exclusions is consistent with the Energy Policy Act of 2005 and BLM guidance. The department also provided several technical clarifications, which we incorporated as appropriate. Appendix IV contains the Department of the Interior's comment letter.

We are sending copies of this report to the appropriate congressional committees, the Secretary of the Interior, the Director of the Bureau of Land Management, the Administrator of the Environmental Protection Agency, and other interested parties. In addition, this report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff members have any questions about this report, please contact me at (202) 512-3841 or nazzaror@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix V.



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Appendix I: Objectives, Scope, and Methodology

This report examines (1) the extent to which the Department of the Interior's Bureau of Land Management (BLM) has used section 390 categorical exclusions each fiscal year from 2006 through 2008 and the benefits, if any, associated with their use; (2) the extent to which BLM has used section 390 categorical exclusions in compliance with the Energy Policy Act of 2005 and internal BLM guidance; and (3) the key concerns, if any, associated with section 390 categorical exclusions. We included the use of section 390 categorical exclusions on the Department of Agriculture's U.S. Forest Service lands in the data summarizing the extent to which BLM used section 390 categorical exclusions,¹ because although the Forest Service is responsible for approving all aboveground use of their lands, BLM independently evaluates and approves the applications for permit to drill (APD), in accordance with a memorandum of understanding between the two agencies. Section 390 categorical exclusions are not used on Indian trust lands.

For all three report objectives, we reviewed relevant laws, regulations, and Department of the Interior and BLM guidance. We interviewed officials in BLM headquarters and the 11 BLM field offices (and their associated state offices) that processed the most APDs from fiscal year 2006 through fiscal year 2008. Specifically, we visited and interviewed officials in three BLM state offices (Colorado, Utah, and Wyoming) and 8 BLM field offices (Glenwood Springs, in Colorado; Price/Moab and Vernal, in Utah; Buffalo, Casper, Pinedale, and Rawlins in Wyoming; and Farmington, in New Mexico), and interviewed by telephone officials in two additional state offices (California, New Mexico) and 3 additional field offices (Bakersfield, California; Carlsbad/Hobbs, New Mexico; and White River, Colorado). In addition, we interviewed representatives from industry, historic preservation groups, citizens' groups, and environmental groups about actual and potential benefits and concerns related to section 390 categorical exclusions or BLM's use of the exclusions. In addition, we collected and analyzed data from BLM's Automated Fluid Minerals Support System database, and we reviewed section 390 categorical exclusion decision documents provided to us by BLM field offices.

¹We did not include these U.S. Forest Service section 390 categorical exclusions in our sample of reviewed decision documents because BLM initially indicated to us that Forest Service section 390 categorical exclusions should not be counted as a BLM action. After we drew our sample and conducted our file reviews, BLM reversed itself and decided that the Forest Service section 390 categorical exclusions should be counted as a BLM action.

To determine the extent to which BLM used section 390 categorical exclusions each fiscal year from 2006 through 2008, we requested data from BLM headquarters and all 30 BLM field offices that processed APDs during this period. In addition, we contacted officials in many of these field offices to explain, clarify, and correct incomplete or possibly erroneous data in the summary data files they provided us. We compared the data supplied by BLM headquarters with those supplied by each of the 30 BLM field offices and sought clarification and explanation for data discrepancies. In addition, our review of more than 300 section 390 categorical exclusion decision documents (see detailed explanation below) identified a small number of record-keeping errors in field office data, which we corrected in the summary data files where possible. The small number of discrepancies identified during our review of specific section 390 categorical exclusion decision documents did not appear to be systemic and do not affect the overall accuracy of the summary data presented in this report.

To determine the benefits of using section 390 categorical exclusions, we conducted semi-structured interviews with the 11 BLM field offices that processed the most APDs during fiscal years 2006 through 2008. For these interviews, we spoke with a natural resource specialist—a BLM official typically leading the team analyzing proposed oil and gas projects—from each field office. We used a standardized interview protocol, in which respondents were asked a standard set of open-ended questions. We asked these officials to identify factors that contribute to, and factors that hinder, their ability to use section 390 categorical exclusions to expedite processing of APDs and sundry notices for oil and gas projects, as well as how much time, if any, is saved by using section 390 categorical exclusions instead of environmental assessments or determinations of NEPA adequacy. To find concrete examples of the factors contributing to or hindering the use of section 390 categorical exclusions, we also discussed specific cases in which field offices used section 390 categorical exclusions.

In addition to these interviews, we also analyzed data on processing time and environmental inspections in an attempt to determine whether processing times decreased or inspection frequencies increased as a result of using section 390 categorical exclusions. Adequate data were not available to support any conclusions, however. We analyzed data from BLM's Automated Fluid Minerals Support System database but found that the database's available data elements were not sufficient to isolate changes in processing times resulting from the use of section 390 categorical exclusions, primarily because this database does not identify

whether an APD was approved with a section 390 categorical exclusion or other NEPA compliance document, such as an environmental assessment or determination of NEPA adequacy. This analysis was also hampered because field offices used different protocols for entering information into certain data fields, making it unfeasible to compare changes in APD processing times. With data on environmental inspections, we attempted to determine whether use of section 390 categorical exclusions correlated with increased environmental inspections, while accounting for change in full-time staff. But BLM was unable to supply us with personnel data showing the number of full-time-equivalent employees working at each field office from fiscal year 2006 through fiscal year 2008. Therefore, although we were able to determine the number of environmental inspections and the number of hours spent on environmental inspections at each BLM field office, we were unable to isolate the contribution of time saved using section 390 categorical exclusions to any increase in environmental inspections.

To determine the extent to which BLM's use of section 390 categorical exclusions was in compliance with the Energy Policy Act of 2005 and internal BLM guidance, we reviewed a nongeneralizable random sample of section 390 categorical exclusion decision documents. To obtain a balanced assessment of the extent of any violations, we selected these decision documents at random from each of the 26 BLM field offices that used section 390 categorical exclusions during fiscal years 2006 through 2008. While we did not design our sample to be generalizable, and therefore our results cannot be used to estimate the overall number of such violations, we reviewed at least a small sample of each type of section 390 categorical exclusion decision document from each office that used them. Specifically, we drew our sample as follows: (1) if a field office used fewer than 10 of a particular section 390 categorical exclusion in fiscal years 2006 through 2008, we randomly chose two decision documents; (2) if a field office used 11 through 100 of a particular section 390 categorical exclusion, we randomly chose three decision documents; and (3) if a field office used more than 100 of a particular section 390 categorical exclusion, we randomly chose five decision documents. For a variety of reasons—some field offices were unable to locate decision documents, some had mislabeled decision documents, and some were unable to provide them within the time frame necessary for our analysis—we were not able to obtain all the decision documents from this initial request. To ensure to the greatest extent possible that our sample covered each field office's uses of section 390 categorical exclusions, we supplemented the initial sample by requesting additional decision documents from selected offices. In total, we analyzed 215 section 390

categorical exclusion decision documents from the 26 BLM field offices that used them from fiscal year 2006 through fiscal year 2008. The sample was not designed to project an overall compliance rate for all uses of section 390 categorical exclusions during the period, but rather to provide a general sense of whether any decisions violated the law or were not in compliance with BLM guidance on implementing section 390 categorical exclusions and, if so, to identify the types of such violations or noncompliance. To ensure we analyzed each document consistently, we used a standardized data collection instrument to review these decision documents and any associated conditions of approval or other material supplied by BLM field offices as part of their justifications for using each section 390 categorical exclusion. In cases where we found actual or apparent violations or noncompliance, we followed up with individual field offices to ascertain if such instances were isolated or systemic. This follow-up included conversations with field office officials, requests for and review of clarifying documentation on particular issues such as conditions of approval, as well as requests for additional section 390 categorical exclusion decision documents beyond those originally included as part of the sample of 215. In total, we reviewed more than 300 section 390 categorical exclusion decision documents. We categorized and summarized violations of the law and noncompliance with BLM guidance on the basis of this review.

Table 6: Sample Sizes of Section 390 Categorical Exclusions from BLM Field Offices

BLM field office	Total APDs and nondrilling actions (number sampled)					Total
	Section 390 CX1	Section 390 CX2	Section 390 CX3	Section 390 CX4	Section 390 CX5	
Buffalo, Wyo.	183 (5)	226 (5)	156 (5)	24 (5)	49 (5)	638 (25)
Rawlins, Wyo.	174 (5)	24 (3)	24 (4)	23 (3)	14 (3)	259 (18)
Pinedale, Wyo.	88 (3)	672 (4)	749 (6)	5 (2)	8 (2)	1,522 (17)
Glenwood Springs, Colo.	211 (4)	207 (4)	38 (5)	17 (3)	1 (1)	474 (17)
Carlsbad/Hobbs, N.Mex.	4 (0)	14 (6)	0 (0)	50 (6)	0 (0)	68 (12)
White River, Colo.	18 (2)	37 (3)	18 (1)	6 (2)	3 (2)	82 (10)
Vernal, Utah	70 (4)	22 (1)	1,076 (2)	21 (2)	0 (0)	1,189 (9)
Casper, Wyo.	51 (2)	0 (0)	269 (5)	2 (1)	56 (1)	378 (9)
Bakersfield, Calif.	61 (4)	27 (0)	199 (3)	2 (2)	0 (0)	289 (9)
Price/Moab, Utah	45 (3)	57 (3)	20 (3)	0 (0)	0 (0)	122 (9)
Worland/Cody, Wyo.	36 (3)	0 (0)	46 (3)	0 (0)	33 (3)	115 (9)
Lander, Wyo.	22 (2)	5 (2)	2 (2)	7 (2)	1 (1)	37 (9)
Grand Junction, Colo.	5 (2)	26 (2)	19 (2)	6 (2)	0 (0)	56 (8)

Appendix I: Objectives, Scope, and Methodology

BLM field office	Total APDs and nondrilling actions (number sampled)					Total
	Section 390 CX1	Section 390 CX2	Section 390 CX3	Section 390 CX4	Section 390 CX5	
Jackson, Miss.	52 (4)	5 (1)	6 (2)	0 (0)	0 (0)	63 (7)
Anchorage, Alaska	3 (2)	10 (2)	1 (1)	0 (0)	2 (2)	16 (7)
Kemmerer, Wyo.	33 (3)	0 (0)	0 (0)	1 (1)	4 (2)	38 (6)
Little Snake, Colo.	8 (2)	5 (2)	0 (0)	3 (2)	0 (0)	16 (6)
Farmington, N.Mex.	0 (0)	0 (0)	1,221 (5)	0 (0)	0 (0)	1,221 (5)
Reno, Nev.	2 (2)	5 (3)	0 (0)	0 (0)	0 (0)	7 (5)
Salt Lake, Utah	4 (2)	3 (2)	0 (0)	0 (0)	0 (0)	7 (4)
Dickinson, N.Dak.	0 (0)	0 (0)	29 (3)	0 (0)	0 (0)	29 (3)
Tulsa, Okla.	0 (0)	25 (3)	0 (0)	0 (0)	0 (0)	25 (3)
Milwaukee, Wisc.	0 (0)	1 (1)	3 (2)	0 (0)	0 (0)	4 (3)
San Juan Public Lands Center, Colo.	0 (0)	0 (0)	7 (2)	0 (0)	0 (0)	7 (2)
Cañon City, Colo.	2 (2)	0 (0)	0 (0)	0 (0)	0 (0)	2 (2)
Great Falls, Mont.	1 (1)	0 (0)	0 (0)	0 (0)	0 (0)	1 (1)
Roswell, N.Mex.	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)
Rock Springs, Wyo.	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)
Miles City, Mont.	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)
Newcastle, Wyo.	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)
Total	1,073 (57)	1,371 (47)	3,883 (56)	167 (33)	171 (22)	6,665 (215)

Source: GAO.

Note: On the basis of initial discussions with BLM officials, we did not include section 390 categorical exclusion decision documents approved by the U.S. Forest Service in our sample. After we had analyzed our sample, however, BLM changed its position and told us that section 390 categorical exclusions approved by the Forest Service should have been included. We therefore included these in tables 1, 2, and 3 of this report, which present the overall number of categorical exclusions used in fiscal years 2006 through 2008, but not in this table, which presents the totals in each office from which we drew our sample.

To determine the key concerns, if any, associated with section 390 categorical exclusions, we reviewed relevant land-use-planning documents, including resource management plans and environmental impact statements. We interviewed BLM headquarters, state, and field office officials; industry representatives; environmental groups; citizens' groups; historic preservation groups; and officials from state government and federal regulatory agencies involved in oil and gas development on federal land. We synthesized the information gathered during these

interviews to identify the concerns raised by these parties.² To ascertain and understand the legal interpretations of section 390 of the Energy Policy Act of 2005, we also spoke with officials from Interior's Office of the Solicitor.

We conducted this performance audit from September 2008 through September 2009, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

²During our review, we also received two allegations of inappropriate activities related to oil and gas development which we referred to Interior's Office of Inspector General for further investigation. The first involved the Farmington, New Mexico, field office's oil and gas activities in general, and the second involved the White River, Colorado, field office's compliance with section 106 of the National Historic Preservation Act in general.

Appendix II: List of Extraordinary Circumstances for Administrative Categorical Exclusions

BLM's NEPA handbook,¹ appendix 5, contains the follow list of extraordinary circumstances that apply to administrative categorical exclusions.

"Before any non-Energy Act [categorical exclusion] is used, you must conduct sufficient review to determine if any of the following extraordinary circumstances apply (516 DM 2, Appendix 2). If any of the extraordinary circumstances are applicable to the action being considered, either an environmental assessment or an environmental impact statement must be prepared for the action. Part 516 of the Departmental Manual (516 DM 2, Appendix 2) states that extraordinary circumstances exist for individual actions within [categorical exclusions] which may:

2.1 Have significant impacts on public health or safety.

2.2 Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (Executive Order 11990); floodplains (Executive Order 11988); national monuments; migratory birds; and other ecologically significant or critical areas.

2.3 Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA Section 102(2)(E)].

2.4 Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

2.5 Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

2.6 Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

2.7 Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office.

2.8 Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.

¹BLM, *National Environmental Policy Act Handbook H-1790-1* (Washington, D.C.: 2008).

**Appendix II: List of Extraordinary
Circumstances for Administrative Categorical
Exclusions**

2.9 Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

2.10 Have a disproportionately high and adverse effect on low income or minority populations (Executive Order 12898).

2.11 Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (Executive Order 13007).

2.12 Contribute to the introduction, continued existence, or spread of noxious weeds or nonnative invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and Executive Order 13112)."

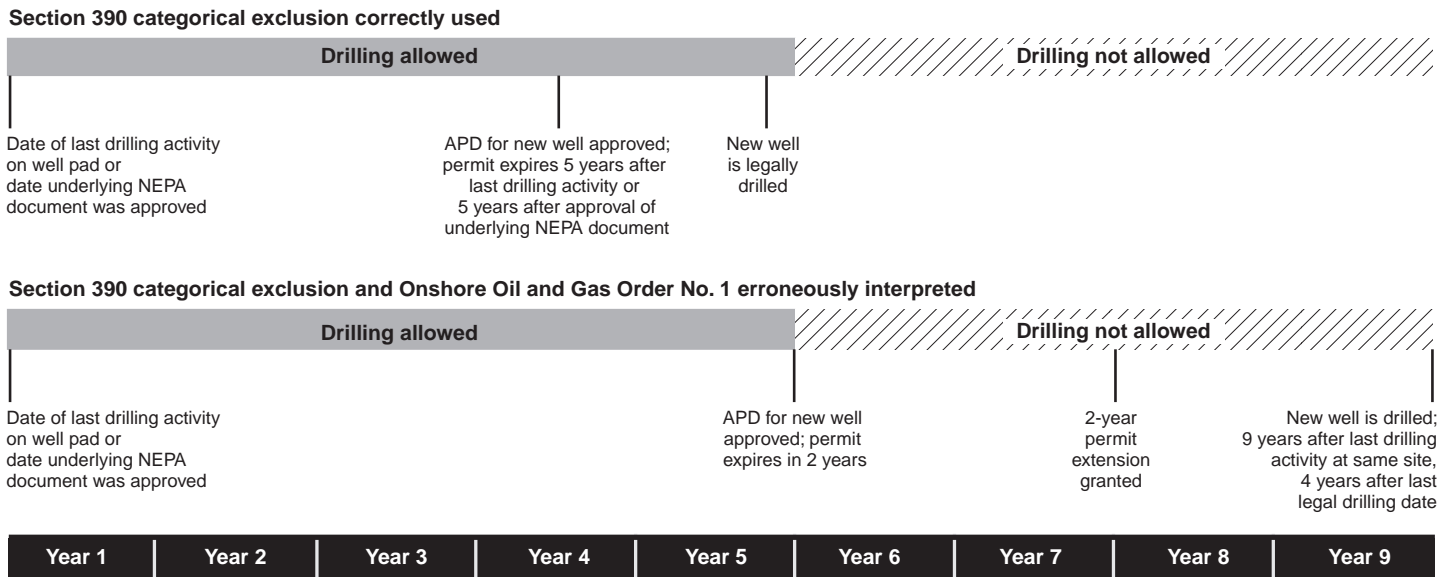
Appendix III: Confusion between Section 390 Categorical Exclusions and Onshore Oil and Gas Order No. 1

We found confusion at three BLM field offices over how long an APD approved using section 390 CX2 and CX3 remains valid. A new well approved using a section 390 CX2 may be drilled anytime within 5 years after a previously approved drilling activity has occurred on the same site. In contrast, BLM's Onshore Oil and Gas Order No.1, issued on October 21, 1983, and revised on March 7, 2007, states that an APD approval is generally valid for 2 years from the date that it is approved. If the operator submits a written request before the original approval expires, BLM may extend the APD's validity for up to 2 additional years. Thus, the APD approved with section 390 CX2 is valid until whichever of these dates comes first. We found two BLM field offices, however—Bakersfield, California, and Glenwood Springs, Colorado—that interpreted Section 390 CX2 as requiring that the APD be approved within 5 years of the last drilling activity on the same site. In both offices, officials told us that they set the expiration date 2 years from the date of APD approval with a possible 2-year extension, in accordance with Onshore Oil and Gas Order No. 1, regardless of whether the 5 years for the section 390 categorical exclusion had elapsed. If a field office applied this erroneous interpretation of the law and BLM guidance, it could allow drilling of a new well up to 9 years after the last drilling activity, and up to 4 years after such new drilling ceased to be legal under section 390 CX2 of the Energy Policy Act of 2005. A similar misinterpretation of the time frames associated with section 390 CX3 is also possible (see fig. 6). In this case, the expiration of the section 390 CX3 is tied to the approval date of the NEPA document underlying the APD approval. We found one BLM field office—White River, Colorado—that interpreted section 390 CX3 in this way.

Although we did not find examples where misinterpretation of the law and BLM guidance for section 390 CX2 or CX3 resulted in the drilling of new wells after the 5-year time frames associated with the law expired, we did find that these three field offices approved section 390 decision documents including erroneous expiration dates resulting from this misinterpretation.

**Appendix III: Confusion between Section 390
Categorical Exclusions and Onshore Oil and
Gas Order No. 1**

Figure 6: Depiction of the Confusion Surrounding the 5-Year Time Frames for Section 390 CX2 and CX3



Source: GAO.

Appendix IV: Comments from the Department of the Interior



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



SEP 08 2009

Ms. Robin M. Nazzaro
Director, Natural Resources and Environment
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548-0001

Dear Ms. Nazzaro:

Thank you for the opportunity to review and comment on the Government Accountability Office draft report entitled, "*ENERGY POLICY ACT of 2005 Greater Clarity Needed to Address Concerns with Section 390 Categorical Exclusions for Oil and Gas Development*," (GAO-09-872).

The Department of the Interior appreciates GAO's recognition of the Bureau of Land Management's role in contributing to a secure and domestic source of energy. We also appreciate your understanding of the difficulty presented in implementing a law without a precedent that would provide a context to guide the BLM in executing the requirements of section 390 of the Energy Policy Act of 2005.

We concur with the GAO's recommendations. However, we found technical errors and incomplete statements within the report related to BLM's overall National Environmental Policy Act (NEPA) compliance process for oil and gas development. The Department of the Interior and the BLM will take immediate steps to ensure that the use of the section 390 categorical exclusions is consistent with the law and BLM policy. The enclosure provides technical and specific comments related to the draft report. We hope these comments will assist you in preparing the final report.

If you have any questions or concerns regarding this response, please contact Steve Salzman, Chief, Division of Fluid Minerals, at (202) 912-7143 or LaVanna Stevenson-Harris, BLM Audit Liaison Officer, at (202) 912-7077.

Sincerely,

Wilma A. Lewis
Assistant Secretary
Land and Minerals Management

Enclosure

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

Robin M. Nazzaro (202) 512-3841 or nazzaror@gao.gov

Staff Acknowledgments

In addition to the contact named above, Jeffery D. Malcolm, Assistant Director; Mark A. Braza; Ellen W. Chu; Heather E. Dowey; Richard P. Johnson; Michael L. Krafve; and Tama R. Weinberg made key contributions to this report. Also contributing to the report were Armetha Liles and Kyle M. Stetler.

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