United States Department of Agriculture **Forest Service** **Washington Office** **1400 Independence Avenue, SW Washington, DC 20250**

File Code: 1950 **Date:** March 13, 2006
Route To: (2820)

Subject: Energy Policy Act of 2005
Use of Section 390 Categorical Exclusions for Oil and Gas Activities

To: Regional Foresters

Section 390 of the Energy Policy Act of 2005 establishes categorical exclusions under NEPA that apply to five categories of oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act (30 U.S.C. et seq., as amended).

In Section 390, Congress replaced the standard procedural mechanism for compliance with NEPA. It prescribed that applicability of the Section 390 categorical exclusions is presumed, but subject to rebuttal. The Act uses the term "rebuttable presumption" to place the burden of proceeding on the party challenging the presumption that one or more of the statutory criteria for the exclusion has not been met. For example, the presumption could be rebutted in the case of Category 2 by showing that more than five years has elapsed since the previous drilling. The presumption cannot be rebutted by showing the presence of "extraordinary circumstances" or other factors extraneous to the terms of Section 390.

Initial Forest Service guidance on use of the Section 390 categorical exclusions was provided by letter on November 22, 2005, see enclosure 1. Supplemental guidance is now being provided in response to questions received from the field, see enclosure 2.

Both the initial and supplemental guidance is in effect until subsequent direction is provided.

For further information contact Tony Ferguson at (703) 605-4785.

/s/ Frederick Norbury (for)
JOEL D. HOLTROP
Deputy Chief for National Forest System

Enclosures

United States Department of Agriculture | **Forest Service** | **Washington Office** | **1400 Independence Avenue, SW Washington, DC 20250**

File Code: 1950 **Date:** November 22, 2005
Route To: (2820)

Subject: Energy Policy Act of 2005,
Use of Section 390 Categorical Exclusions for Oil and Gas

To: Regional Foresters

Section 390 of the Energy Policy Act of 2005 establishes categorical exclusions under NEPA that apply to five categories of oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act (30 U.S.C. et seq., as amended) on Federal oil and gas leases. (See enclosure 1: Energy Policy Act of 2005, excerpt.)

In Section 390, Congress replaced the standard procedural mechanism for compliance with NEPA. The enclosed instructions provide guidance on use of the new statutory category exclusions. (See enclosure 2: Energy Policy Act Use of Section 390 Categorical Exclusions for Oil and Gas Activities.) Authorized Forest Officers are to incorporate these instructions in the consideration and review of oil and gas projects. This guidance is in effect until subsequent direction is provided.

In Earth Island Institute v. Ruthenbeck, the Federal District Court for the Eastern District of California ordered that categorically excluded timber sales and ten specific categorically excluded activities are subject to notice, comment, and appeal under the 36 CFR 215 rules. (See enclosure 3: Chief's letter of October 20th 2005.) Therefore, if use of the Energy Policy Act categorical exclusions include activities specified by the court, then notice, comment, and appeal is currently required. Conversely, if activities specified by the court are not included, then notice, comment, and appeal pursuant to 36 CFR 215 does not apply.

For further information contact Mike Greeley at 703-605-4785.

/s/ Frederick Norbury (for)
JOEL D. HOLTROP
Deputy Chief for National Forest System

Enclosures

(2) in section 5006(c), by striking "October 1, 2012" and inserting "1 year after the date on which the Secretary, in consultation with the Secretary of the Interior, determines that oil and gas exploration, development, and production in the State of Alaska have ceased,".

SEC. 390. NEPA REVIEW.

(a) NEPA REVIEW.—Action 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.

(b) ACTIVITIES DESCRIBED.—The activities referred to in subsection (a) are the following:

(1) Individual surface disturbances of less than five (5) acres so long as the total surface disturb-

ance 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 five (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 five (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 five (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 a building or facility.

ENERGY POLICY ACT OF 2005
USE OF SECTION 390
CATEGORICAL EXCLUSIONS FOR OIL AND GAS ACTIVITIES

INTRODUCTION

Section 390 of the Energy Policy Act of 2005 (Section 390) establishes categorical exclusions under NEPA that apply to five categories of oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act (30 U.S.C. et seq., as amended) on Federal oil and gas leases. Section 390 took effect on the date of enactment, August 8, 2005. The purpose of these instructions is to provide guidance on immediate implementation of this new authority.

Section 390 prescribes categorical exclusions under NEPA for oil and gas activities in the following five categories:

1. *Individual surface disturbances of less than five (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 and gas location or well pad at a site at which drilling has occurred within five (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 drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (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 five (5) years prior to the date of placement of the pipeline.*

5. *Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility.*

GENERAL APPLICABILITY AND USE

The categorical exclusions addressed in this guidance apply exclusively to oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act (30 U.S.C. et seq., as amended) on Federal oil and gas leases. They do not apply to geothermal leases.

In Section 390, Congress replaced the standard procedural mechanism for compliance with NEPA. The categorical exclusions addressed in this guidance are established by statute and not under the Council for Environmental Quality (CEQ) procedures pursuant to 40 CFR 1507.3 and 1508.4. Therefore, their use is not dependent on the CEQ process for approving new categorical exclusions or other NEPA procedures.

In reviewing an Application for a Permit to Drill (APD), Surface Use Plan of Operations (SUPO), or pipeline application involving a proposed activity that meets all the criteria for any of the five categories, the Authorized Forest Officer should apply the applicable categorical exclusions identified in Section 390. When an activity qualifies for exclusion under both Section 390 and agency NEPA procedures in effect prior to August 8, 2005, agency NEPA procedures are not to be used in lieu of Section 390.

If a proposed activity meets the criteria of any of the five categories for categorical exclusion, it is also presumed that no further NEPA analysis is required. Specifically, if one or more of the five statutory categorical exclusions applies to a proposed activity, agency categorical exclusion direction (FSH 1909.15, Chapter 30) or the extraordinary circumstances contained therein are not to be used.

It is critical to note that use of Section 390 in no way limits or diminishes the Forest Service's substantive authority or responsibility regarding review and approval of a SUPO conducted pursuant to 36 CFR 228.107-108. The Authorized Forest Officer will continue to assure that operations on leaseholds on National Forest System lands will minimize effects on surface resources and prevent unnecessary or unreasonable surface resource disturbance, including effects to cultural and historical resources and fisheries, wildlife and plant habitat. Best management practices are to be applied as necessary to reduce impacts of any actions approved under these categorical exclusions.

When a review of a SUPO has been completed, the Authorized Forest Officer shall promptly notify the operator and the appropriate BLM office, that: (i) the plan is approved as submitted, (ii) the plan is approved subject to specified conditions, or (iii) the plan is disapproved for the reasons stated.

CATEGORY SPECIFIC GUIDANCE, CATEGORY 1

The first categorical exclusion in Section 390 is: *"Individual surface disturbances of less than five (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."*

The only applicable factors for review in determining applicability for use pursuant to Section 390 are the following three criteria, as explained in further detail below: 1) individual five-acre disturbance threshold, 2) 150-acre unreclaimed disturbance limit, and 3) site-specific analysis of oil or gas exploration/development in a NEPA document.

Use of this category requires the Authorized Forest Officer to do the following three things:

1) Individual five-acre disturbance threshold – The Authorized Forest Officer must determine and document that the action under consideration will disturb less than five acres on the site. If more than one activity is proposed for a lease (e.g., two or more wells), each activity is counted separately and each may disturb up to five acres. Similarly, the five-acre limit should be applied separately to each action requiring discrete agency action, such as each APD, even though for processing efficiency purposes the operator may submit for review a large Plan of Development (POD) addressing many wells.

2) 150-acre unreclaimed disturbance limit – The Authorized Forest Officer must determine and document that the current unreclaimed surface disturbance readily visible on the entire leasehold is not greater than 150 acres, including the action under consideration. This would include disturbance from previous rights-of-way issued in support of lease development. If one or more Federal leases are committed to a BLM approved unit or communitization agreement, the 150 acre threshold applies separately to each lease. For larger leases, the requirement for adequate documentation would be satisfied with a copy of the most recent aerial photograph in the file with an explanation of recent disturbance that may not be shown on the aerial photos. Maps, tally sheets, or other visuals may be substituted for aerial photographs.

3) Site-specific analysis of oil or gas exploration/development in a NEPA document – The Authorized Forest Officer must determine and document that a site-specific NEPA document exists that analyzes oil or gas exploration and/or development. For the purposes of this categorical exclusion, the site-specific NEPA document can be: an exploration and/or development EA/EIS, an EA/EIS for a specific plan of development (POD), a multi-well EA/EIS, or an individual permit approval EA/EIS. The NEPA document must have analyzed the exploration and/or development of oil and gas (not just leasing) and the proposed activity must be within the general boundaries of the area analyzed in the EA or EIS. The NEPA

document need not have addressed the specific permit or application being considered.

This categorical exclusion may also be applied to geophysical exploration activities provided the above criteria are met.

The same or better mitigating measures considered in the parent NEPA documents must be applied to all actions approved under this categorical exclusion.

CATEGORY SPECIFIC GUIDANCE, CATEGORY 2

The second categorical exclusion in Section 390 is: *"Drilling an oil and gas location or well pad at a site at which drilling has occurred within five (5) years prior to the date of spudding the well."*

The only applicable factors for review in determining applicability for use pursuant to Section 390 are the following two criteria, as explained in further detail below: 1) drilling at a location or well pad previously drilled, and 2) five-year limitation from previous drilling.

Use of this category requires the Authorized Forest Officer to do the following two things:

1) Drilling at a location or well pad previously drilled – The Authorized Forest Officer must determine and document that the action under consideration (drilling) would occur on an oil and gas location or well pad that had previous drilling. A location or well pad is defined as a previously disturbed or constructed well pad used in support of drilling a well. Previous drilling refers to any drilled well including injection, water source, or any other service well. Additional disturbance or expansion of the existing well pad is not restricted as long as it is tied to the original location or well pad. This exclusion does not extend to new well sites merely in the general vicinity of the original location or well pad.

2) Five-year limitation from previous drilling – The Authorized Forest Officer must determine and document that the previous drilling has occurred within five years prior to the date of spudding the proposed well. The five-year constraint is based on when the most recent previous drilling occurred. This means that the most recent drilling activity resets the time period clock for determining the five year limit. Documentation for determining the five-year constraint must include the date when the last applicable previous drilling activity was completed.

If delays in spudding the new well and the time period between the previous well completion and spudding exceeds the five-year limitation, preparation for drilling operations must be suspended until appropriate NEPA compliance occurs for the proposed well and a new decision is issued. Therefore, a condition of approval (COA)

must state that, "If the well has not been spudded by _____ (the date the categorical exclusion is no longer applicable)_____, this approval will expire and all operations related to preparing to drill the well must cease."

CATEGORY SPECIFIC GUIDANCE, CATEGORY 3

The third categorical exclusion in Section 390 is: *"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 drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well."*

The only applicable factors for review in determining applicability for use pursuant to Section 390 are the following three criteria, as explained in further detail below: 1) proposed drilling is within a developed oil or gas field, 2) analysis of drilling as a reasonably foreseeable activity in a NEPA document, and 3) five-year limitation from when the aforementioned NEPA document was finalized or supplemented.

Use of this category requires the Authorized Forest Officer to do the following three things:

1) Proposed drilling is within a developed oil or gas field – The Authorized Forest Officer must determine and document that the action under consideration (drilling) is within a developed oil and gas field. A developed field is any field in which a confirmation well has been completed.

2) Analysis of drilling as a reasonably foreseeable activity in a NEPA document – The Authorized Forest Officer must determine and document that a NEPA document exists addressing reasonably foreseeable activity (40 CFR 228.102, sections c3 and c4) broad enough to encompass the action under consideration (drilling). For the purposes of this categorical exclusion, the site-specific NEPA document can be of any type that analyzed drilling, including that supporting a land use plan, regardless of whether it was prepared by the agency. The activity under consideration must be reasonably foreseeable in either the land use plan EIS or subsequent developmental EA or EIS.

3) Five-year limitation from when the aforementioned NEPA document was finalized or supplemented – The Authorized Forest Officer must determine and document that the NEPA document, referred to in criteria 2 above, was completed within five years prior to the date of spudding the proposed well. The five-year constraint is based on when the most recent NEPA document was finalized or supplemented. This means that the most recent NEPA document resets the time period clock for determining the five year limit. Documentation for determining the five-year constraint must include the date of the last applicable NEPA document.

Full field development EISs do not have to be prepared where the development envisioned was analyzed in the land use plan EIS. As long as the development foreseen does not exceed the surface disturbance analyzed in the prior NEPA document, no additional NEPA documentation is required because of changes in the density of development.

The same or better mitigating measures considered in the parent NEPA documents must be applied to all actions approved under this categorical exclusion.

If delays in spudding the new well and the time period between the previous well completion and spudding exceeds the five-year limitation, preparation for drilling operations must be suspended until appropriate NEPA compliance occurs for the proposed well and a new decision is issued. Therefore, a condition of approval (COA) must state that, "If the well has not been spudded by _____ (the date the categorical exclusion is no longer applicable)_____, this approval will expire and all operations related to preparing to drill the well must cease."

CATEGORY SPECIFIC GUIDANCE, CATEGORY 4

The fourth categorical exclusion in Section 390 is: *"Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline."*

The only applicable factors for review in determining applicability for use pursuant to Section 390 are the following two criteria, as explained in further detail below: 1) approved right-of-way corridor, and 2) five-year limitation from corridor approval (or amendment).

Use of this category requires the Authorized Forest Officer to do the following two things:

1) Approved right-of-way corridor – The Authorized Forest Officer must determine and document that part of the action under consideration would occur within an approved right-of-way corridor. Use of the term "right-of-way corridor" is a generic term that applies to any type of corridor or right-of-way (whether on or off lease) approved under any authority or vehicle of the agency. Approved right-of-way corridors of any type may be used for new pipeline placement, such as the burial of a pipeline or pipeline conduit in an existing road bed or along a power line right-of-way. Additional disturbance or width needed to properly or safely install the new pipeline may be authorized under this exclusion. Creation of a new right-of-way completely outside and not overlapping into a portion of the existing corridor is not authorized.

2) Five-year limitation from corridor approval (or amendment) – The Authorized Forest Officer must determine and document that use of the corridor, referred to in criteria 1 above, was approved or amended within 5 years prior to the date of the proposed pipeline placement. Determination of the five-year constraint is based on when the most recent decision (NEPA or permit authorization) was approved to allow use of the corridor. The time period extends to the date placement of any portion of the new pipeline is concluded, provided that placement activities began within the five-year constraint. Documentation for determining the five-year constraint must include the date of the last applicable corridor approval or amendment.

If the operator delays in beginning to place the pipeline and the time period between the approval of the corridor and placement exceeds the five-year limitation, the Authorized Forest Officer must suspend the right-of-way authorization until the appropriate NEPA compliance occurs for the proposed right-of-way use and a new decision is issued. Therefore, the right-of-way approval must contain a condition of approval (COA) that provides for the suspension of the authorization if placement does not begin before the last date that the categorical exclusion is available, thus requiring the operator to obtain a new right-of-way if placement has not occurred.

CATEGORY SPECIFIC GUIDANCE, CATEGORY 5

The fifth categorical exclusion in Section 390 is: *"Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility."*

The only applicable criterion for review in determining applicability for use pursuant to Section 390 is the following, as explained in further detail below: 1) Maintenance of a minor activity.

Use of this category requires the Authorized Forest Officer to do the following one thing:

1) Maintenance of a minor activity – The Authorized Forest Officer must determine and document that the activity under consideration constitutes maintenance of a minor activity. Actions would include maintenance of a well, wellbore, road, wellpad, or production facility having surface disturbance. Actions would not include construction or major renovation of a building or facility.

DOCUMENTATION

NEPA documentation is not to be prepared in lieu of appropriately applying the statutory categorical exclusions.

The following documentation by the Authorized Forest Officer must be in the project record to demonstrate use of the categories apply to the activities under consideration:

1. Identification of the categories used.

2. A brief narrative stating the rationale for making the determination that use of the categorical exclusion(s) applies to the activity under consideration, specifically addressing the applicable review criteria.

3. Copies or reference to materials used to support use determination.

United States Department of Agriculture | **Forest Service** | **Washington Office** | **1400 Independence Avenue, SW Washington, DC 20250**

File Code: 1570 **Date:** October 20, 2005
Route To:

Subject: Earth Island Institute v. Ruthenbeck Ruling of October 19, 2005

To: Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs, WO Staff Directors

On August 5, the Deputy Chief for National Forest System issued instructions for complying with this lawsuit. On September 23, I issued further instructions. This memorandum supersedes the instructions contained in those documents.

Yesterday, the Federal District Court for the Eastern District of California issued a clarification in Earth Island Institute v. Ruthenbeck. The court ordered that categorically excluded timber sales and the following categorically excluded activities are subject to notice, comment, and appeal under the 36 CFR 215 rules.

1. Projects involving the use of prescribed burning;
2. Projects involving the creation or maintenance of wildlife openings;
3. The designation of travel routes for off-highway vehicle (OHV) use which is not conducted through the travel management planning process as part of the forest planning process;
4. The construction of new OHV routes and facilities intended to support OHV use;
5. The upgrading, widening, or modification of OHV routes to increase either the levels or types of use by OHVs (but not projects performed for the maintenance of existing routes);
6. The issuance or reissuance of special use permits for OHV activities conducted on areas, trails, or roads that are not designated for such activities;
7. Projects in which the cutting of trees for thinning or wildlife purposes occurs over an area greater than 5 contiguous acres;
8. Gathering geophysical data using shorthole, vibroseis, or surface charge;
9. Trenching to obtain evidence of mineralization;
10. Clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities.

The district court expressly indicated that permits for short-term special uses, such as state-licensed outfitters and guides or gathering forest products for personal use, need not be subject to notice, comment, and appeal.

Therefore, any categorically excluded activity that does not fall within the categories the judge listed above does not require notice, comment and appeal, whether issued before or after July 7, 2005. Any actions or authorizations that were suspended under the prior instructions and that do not fall within the above categories should be immediately reinstated. In those situations where notice, comment, and/or appeal opportunity was initiated for a project under the previous

instructions, but because of the court's clarification is no longer required, the local line officer may determine if it is in the best public interest to continue to provide notice, comment, and an opportunity for appeal.

I know we still have work necessary for us to carry out our mission affected by the judge's clarifying order, including prescribed burning and fuels treatment in the wildland interface. These projects will still be subject to notice, comment and appeal and therefore necessarily be delayed. This is a challenging situation which affects our employees, partners, local communities, and individuals who use the national forests and grasslands. I appreciate and am proud of all our employees' efforts to comply with the court's order, serve the public, and take the steps necessary to implement important resource work under difficult circumstances.

Your contact in the Washington Office is Steve Segovia at 202-205-1066.

DALE N. BOSWORTH
DALE N. BOSWORTH
Chief

Enclosure

ENERGY POLICY ACT OF 2005
USE OF SECTION 390
CATEGORICAL EXCLUSIONS FOR OIL AND GAS ACTIVITIES

INTRODUCTION

Initial Forest Service guidance on use of Section 390 Categorical Exclusions (CEs) was provided by letter on November 22, 2005. This document provides supplemental guidance.

GENERAL APPLICABILITY AND USE

Citation / Reference: The legal citation for the CEs is Section 390 of the Energy Policy Act of 2005, Pub. L. No. 109-58 (119 Stat. 594).

Application of Non-NEPA Laws, Regulations, and Policies: All applicable non-NEPA laws, regulations, and policies apply to projects approved via Section 390.

Application of Agency Appeal Regulations:

36 CFR 215 - Agency appeal regulations at 36 CFR 215 may apply to activities approved via Section 390. Although the rules at 36 CFR 215 provide for notice, comment, and appeal (by individuals or organizations) of project and activity decisions implementing a Land and Resource Management Plan for which an environmental assessment or environmental impact statement is prepared, in Earth Island Institute v. Ruthenbeck the Federal District Court for the Eastern District of California ordered that categorically excluded timber sales and the following ten categorically excluded actions are also subject to 36 CFR 215. If an activity approved via Section 390 includes a timber sale or any of the following ten actions, it would correspondingly be subject to the rules at 36 CFR 215.

1. Projects involving the use of prescribed burning;
2. Projects involving the creation or maintenance of wildlife openings;
3. Designating travel routes for off-highway vehicle (OHV) use that is not conducted through the travel management planning process as part of the forest planning process;
4. Constructing new OHV routes and facilities intended to support OHV use;
5. Upgrading, widening, or modifying OHV routes to increase either the levels or types of use by OHVs (but not projects performed for the maintenance of existing routes);
6. Issuing issuance or reissuing special use permits for OHV activities conducted on areas, trails, or roads that are not designated for such activities;
7. Projects in which the cutting of trees for thinning or wildlife purposes occurs over an area greater than 5 contiguous acres;
8. Gathering geophysical data using shorthole, vibroseis, or surface charge;
9. Trenching to obtain evidence of mineralization;
10. Clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities.

36 CFR 251 - Agency appeal regulations at 36 CFR 251 may apply to activities approved via Section 390. The rules at 36 CFR 251 provide for appeals of decisions related to occupancy and use of National Forest System Lands by those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System land.

Application of CEQ NEPA Regulations at 40 CFR 1500: CEQ NEPA regulations do not apply to activities approved via Section 390.

Application of Agency NEPA Procedures at FSH 1909.15: Agency NEPA procedures do not apply to activities approved via Section 390.

Schedule of Proposed Actions (SOPA) - Because Agency NEPA procedures do not apply to the Section 390 CEs, they are not to be tracked in the Planning, Appeals, and Litigation System (PALS) or listed in the SOPA it generates. However, at the Responsible Official's discretion, notice of use of the Section 390 CEs may be made in conjunction with a SOPA distribution (e.g., in a cover letter or attachment to the SOPA). Subsequent upward reporting of use of the Section 390 CEs would likely be coordinated by the Washington Office Minerals Staff.

Scoping - Because Agency NEPA procedures do not apply to the Section 390 CEs, scoping does not apply to their use. However, at the Responsible Official's discretion, public notice or involvement may be conducted as he or she deems appropriate.

Correction, Supplementation, or Revision of Environmental Documents and Reconsideration of Decisions to Take Action - Environmental documentation for implementation of existing site-specific decisions may be reviewed to determine if it should be corrected, supplemented, or revised.

Inventoried Roadless Areas - Because Agency NEPA procedures do not apply to the Section 390 CEs, the requirement to prepare an EIS for "[p]roposals that would substantially alter the undeveloped character of an inventoried roadless area of 5,000 acres or more (FSH 1909.12)" does not apply to their use.

Extraordinary Circumstance - Because Agency NEPA procedures do not apply to the Section 390 CEs, considering extraordinary circumstances does not apply to their use.

Significance - Significance is not a criterion for use of the Section 390 CEs. However, use of Section 390 in no way limits or diminishes the Agency's substantive authority or responsibility regarding review and approval of a SUPO conducted pursuant to 36 CFR 228.107-108. The Authorized Forest Service Officer will minimize effects on surface resources and prevent unnecessary or unreasonable surface resource disturbance, including effects to cultural and historical resources and fisheries, wildlife, and plant habitat. Best Management Practices are also to be applied as necessary to reduce impacts of any actions approved under the Section 390.

Federal Leases: Agency guidance, provided by letter on November 22, 2005, states that Section 390 applies exclusively to oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. et seq., as amended) on Federal oil and gas leases. The following clarification is made to the statement "on Federal oil and gas leases":

> Applicability extends to off-lease activities authorized pursuant to the Mineral Leasing Act (e.g., pipeline authorized under the Mineral Leasing Act).
>
> Applicability extends to split estate lands where the oil and gas estate is federally owned and leaseable under the Mineral Leasing Act.
>
> Applicability extends to acquired lands where the oil and gas estate are federally owned and leaseable under the Mineral Leasing Act for Acquired Lands of August 7, 1947 (Pub. L. No. 80-382, Ch. 513, 61 Stat. 913 as amended: 30.U.S.C. 351(note), 351-360).
>
> Applicability does not extend to Indian leases.
>
> Applicability does not extend to Federal Petroleum Reserves.
>
> Applicability does not extend to private or outstanding rights.

CATEGORY 1

The first categorical exclusion in Section 390 is: *"Individual surface disturbance of less than five (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."*

> Individual five-acre disturbance threshold -
>
> The five-acre disturbance threshold is per APD. It includes all surface disturbance associated with the proposed action on the lease and off the lease if the off-lease activities are authorized pursuant to the Mineral Leasing Act. For example in the case of an APD, the five-acre threshold would include disturbances for construction of the well pad, roads, utilities, and production facilities.
>
> Proposed impacts to existing unreclaimed disturbed areas do not count towards the individual surface five-acre disturbance constraint (e.g., maintenance of an existing road would not be counted).

150-acre unreclaimed disturbance threshold -

The 150-acre unreclaimed disturbance threshold includes only disturbance associated with oil and gas activities and associated rights-of-ways regardless of surface ownership. It does not include disturbance from other activities.

Activities without surface disturbance or successfully reclaimed surface areas would not be included in the 150-acre constraint (e.g., an above ground pipeline).

CATEGORY 2

The second categorical exclusion in Section 390 is: *"Drilling an oil and gas location or well pad at a site at which drilling has occurred within five (5) years prior to the date of spudding the well."*

No questions have been asked by the field about how to apply this category.

CATEGORY 3

The third categorical exclusion in Section 390 is: *"Drilling an oil or gas well within a developed field for which an approved land use plan or environmental document prepared pursuant to NEPA analyzed drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well."*

Proposed drilling is within a developed oil or gas field -

A developed field will be as defined by the BLM Field Office where activity is proposed.

Analysis of drilling as a reasonably foreseeable activity in a NEPA document -

The statute makes no requirement of detail for use of this Section 390 CE. Use does not depend on the level of detail describing the reasonably foreseeable activity in the NEPA document. If the proposed well is in the general vicinity of the predicted development disclosed in the prior NEPA document, it fits this category.

CATEGORY 4

The fourth categorical exclusion in Section 390 is: *"Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline."*

Approved right-of-way corridor -

The approved right-of-way corridor may be either on or off lease. *However, if off lease the new action (placement of a pipeline) must be authorized under the Mineral Leasing Act.*

There is no requirement for the approved right-of-way to be in use or occupied.

The extent of additional disturbance or width needed to properly or safely install the new pipeline is at the discretion of the Responsible Official.

CATEGORY 5

The fifth categorical exclusion in Section 390 is: *"Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility."*

Maintenance of a minor activity -

Road maintenance, as defined in Agency Transportation System procedures at FSM 7705, is considered a minor maintenance activity for use of this Section 390 CE. Road reconstruction or construction is not considered a minor activity for use of this CE.

Road maintenance may be either on or off lease. *However, if off lease the new action (road maintenance) must be authorized under the Mineral Leasing Act.*

DOCUMENTATION

The only documentation required to demonstrate use of the categories apply to the activities under consideration are those listed in the Agency's initial guidance. However, the Responsible Official is expected to prepare any additional information required to demonstrate compliance with all applicable laws, regulations, and policies in the project record (e.g., Biological Assessment/Biological Evaluation, cultural/heritage resource clearance, etc.).

ENERGY POLICY ACT OF 2005
USE OF SECTION 390
CATEGORICAL EXCLUSIONS FOR OIL AND GAS ACTIVITIES

INTRODUCTION

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GENERAL APPLICABILITY AND USE

Citation / Reference: The legal citation for the CEs is Section 390 of the Energy Policy Act of 2005, Pub. L. No. 109-58 (119 Stat. 594).

Application of Non-NEPA Laws, Regulations, and Policies: All applicable non-NEPA laws, regulations, and policies apply to projects approved via Section 390.

Application of Agency Appeal Regulations:

36 CFR 215 - Agency appeal regulations at 36 CFR 215 may apply to activities approved via Section 390. Although the rules at 36 CFR 215 provide for notice, comment, and appeal (by individuals or organizations) of project and activity decisions implementing a Land and Resource Management Plan for which an environmental assessment or environmental impact statement is prepared, in Earth Island Institute v. Ruthenbeck the Federal District Court for the Eastern District of California ordered that categorically excluded timber sales and the following ten categorically excluded actions are also subject to 36 CFR 215. If an activity approved via Section 390 includes a timber sale or any of the following ten actions, it would correspondingly be subject to the rules at 36 CFR 215.

1. Projects involving the use of prescribed burning;
2. Projects involving the creation or maintenance of wildlife openings;
3. Designating travel routes for off-highway vehicle (OHV) use that is not conducted through the travel management planning process as part of the forest planning process;
4. Constructing new OHV routes and facilities intended to support OHV use;
5. Upgrading, widening, or modifying OHV routes to increase either the levels or types of use by OHVs (but not projects performed for the maintenance of existing routes);
6. Issuing issuance or reissuing special use permits for OHV activities conducted on areas, trails, or roads that are not designated for such activities;
7. Projects in which the cutting of trees for thinning or wildlife purposes occurs over an area greater than 5 contiguous acres;
8. Gathering geophysical data using shorthole, vibroseis, or surface charge;
9. Trenching to obtain evidence of mineralization;
10. Clearing vegetation for sight paths from areas used for mineral, energy, or geophysical investigation or support facilities for such activities.

36 CFR 251 - Agency appeal regulations at 36 CFR 251 may apply to activities approved via Section 390. The rules at 36 CFR 251 provide for appeals of decisions related to occupancy and use of National Forest System Lands by those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System land.

Application of CEQ NEPA Regulations at 40 CFR 1500: CEQ NEPA regulations do not apply to activities approved via Section 390.

Application of Agency NEPA Procedures at FSH 1909.15: Agency NEPA procedures do not apply to activities approved via Section 390.

Schedule of Proposed Actions (SOPA) - Because Agency NEPA procedures do not apply to the Section 390 CEs, they are not to be tracked in the Planning, Appeals, and Litigation System (PALS) or listed in the SOPA it generates. However, at the Responsible Official's discretion, notice of use of the Section 390 CEs may be made in conjunction with a SOPA distribution (e.g., in a cover letter or attachment to the SOPA). Subsequent upward reporting of use of the Section 390 CEs would likely be coordinated by the Washington Office Minerals Staff.

Scoping - Because Agency NEPA procedures do not apply to the Section 390 CEs, scoping does not apply to their use. However, at the Responsible Official's discretion, public notice or involvement may be conducted as he or she deems appropriate.

Correction, Supplementation, or Revision of Environmental Documents and Reconsideration of Decisions to Take Action - Environmental documentation for implementation of existing site-specific decisions may be reviewed to determine if it should be corrected, supplemented, or revised.

Inventoried Roadless Areas - Because Agency NEPA procedures do not apply to the Section 390 CEs, the requirement to prepare an EIS for "[p]roposals that would substantially alter the undeveloped character of an inventoried roadless area of 5,000 acres or more (FSH 1909.12)" does not apply to their use.

Extraordinary Circumstance - Because Agency NEPA procedures do not apply to the Section 390 CEs, considering extraordinary circumstances does not apply to their use.

Significance - Significance is not a criterion for use of the Section 390 CEs. However, use of Section 390 in no way limits or diminishes the Agency's substantive authority or responsibility regarding review and approval of a SUPO conducted pursuant to 36 CFR 228.107-108. The Authorized Forest Service Officer will minimize effects on surface resources and prevent unnecessary or unreasonable surface resource disturbance, including effects to cultural and historical resources and fisheries, wildlife, and plant habitat. Best Management Practices are also to be applied as necessary to reduce impacts of any actions approved under the Section 390.

Federal Leases: Agency guidance, provided by letter on November 22, 2005, states that Section 390 applies exclusively to oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. et seq., as amended) on Federal oil and gas leases. The following clarification is made to the statement "on Federal oil and gas leases":

> Applicability extends to off-lease activities authorized pursuant to the Mineral Leasing Act (e.g., pipeline authorized under the Mineral Leasing Act).
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> Applicability extends to split estate lands where the oil and gas estate is federally owned and leaseable under the Mineral Leasing Act.
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> Applicability extends to acquired lands where the oil and gas estate are federally owned and leaseable under the Mineral Leasing Act for Acquired Lands of August 7, 1947 (Pub. L. No. 80-382, Ch. 513, 61 Stat. 913 as amended: 30.U.S.C. 351(note), 351-360).
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> Applicability does not extend to Indian leases.
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> Applicability does not extend to Federal Petroleum Reserves.
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> Applicability does not extend to private or outstanding rights.

CATEGORY 1

The first categorical exclusion in Section 390 is: *"Individual surface disturbance of less than five (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."*

> Individual five-acre disturbance threshold -
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> The five-acre disturbance threshold is per APD. It includes all surface disturbance associated with the proposed action on the lease and off the lease if the off-lease activities are authorized pursuant to the Mineral Leasing Act. For example in the case of an APD, the five-acre threshold would include disturbances for construction of the well pad, roads, utilities, and production facilities.
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> Proposed impacts to existing unreclaimed disturbed areas do not count towards the individual surface five-acre disturbance constraint (e.g., maintenance of an existing road would not be counted).

150-acre unreclaimed disturbance threshold -

The 150-acre unreclaimed disturbance threshold includes only disturbance associated with oil and gas activities and associated rights-of-ways regardless of surface ownership. It does not include disturbance from other activities.

Activities without surface disturbance or successfully reclaimed surface areas would not be included in the 150-acre constraint (e.g., an above ground pipeline).

CATEGORY 2

The second categorical exclusion in Section 390 is: *"Drilling an oil and gas location or well pad at a site at which drilling has occurred within five (5) years prior to the date of spudding the well."*

No questions have been asked by the field about how to apply this category.

CATEGORY 3

The third categorical exclusion in Section 390 is: *"Drilling an oil or gas well within a developed field for which an approved land use plan or environmental document prepared pursuant to NEPA analyzed drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well."*

Proposed drilling is within a developed oil or gas field -

A developed field will be as defined by the BLM Field Office where activity is proposed.

Analysis of drilling as a reasonably foreseeable activity in a NEPA document -

The statute makes no requirement of detail for use of this Section 390 CE. Use does not depend on the level of detail describing the reasonably foreseeable activity in the NEPA document. If the proposed well is in the general vicinity of the predicted development disclosed in the prior NEPA document, it fits this category.

CATEGORY 4

The fourth categorical exclusion in Section 390 is: *"Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline."*

Approved right-of-way corridor -

The approved right-of-way corridor may be either on or off lease. *However, if off lease the new action (placement of a pipeline) must be authorized under the Mineral Leasing Act.*

There is no requirement for the approved right-of-way to be in use or occupied.

The extent of additional disturbance or width needed to properly or safely install the new pipeline is at the discretion of the Responsible Official.

CATEGORY 5

The fifth categorical exclusion in Section 390 is: *"Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility."*

Maintenance of a minor activity -

Road maintenance, as defined in Agency Transportation System procedures at FSM 7705, is considered a minor maintenance activity for use of this Section 390 CE. Road reconstruction or construction is not considered a minor activity for use of this CE.

Road maintenance may be either on or off lease. *However, if off lease the new action (road maintenance) must be authorized under the Mineral Leasing Act.*

DOCUMENTATION

The only documentation required to demonstrate use of the categories apply to the activities under consideration are those listed in the Agency's initial guidance. However, the Responsible Official is expected to prepare any additional information required to demonstrate compliance with all applicable laws, regulations, and policies in the project record (e.g., Biological Assessment/Biological Evaluation, cultural/heritage resource clearance, etc.).