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).
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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.).