Testimony of W. Jackson Coleman
before the
Subcommittee on Energy and Mineral Resources
Of the
United States House of Representatives Committee on
Natural Resources
On
"Impacts to Onshore Jobs, Revenue, and Energy: Review and Status of Sec. 390 Categorical Exclusions of the Energy Policy Act of 2005"

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I. Introduction

Chairman Lamborn, Ranking Member Holt, and Members of the Subcommittee, my name is Jack Coleman and I am Managing Partner and General Counsel of EnergyNorthAmerica, LLC, a energy consulting firm with offices in Washington, DC, and Denver, CO. I appreciate the invitation to present my views at this hearing on "Impacts to Onshore Jobs, Revenue, and Energy: Review and Status of Sec. 390 Categorical Exclusions of the Energy Policy Act of 2005." Early in 2009 I retired after a career of almost 27 years in the federal government – the last six of which were spent working in the House of Representatives. From February 2007 until March 2009, I was the Republican General Counsel of the House Committee on Natural Resources, and prior to that I served from May 2003 until late 2006 as the Energy and Minerals Counsel for the House Committee on Resources. While working in the House, I drafted many bills, including the Deep Ocean Energy Resources Act passed by the House in 2006, and significant parts of the Energy Policy Act of 2005. Relevant to today's hearing, I was the House staff member most directly involved in the conference deliberations, negotiations, and other activities related to the decision to include Section 390 in the Energy Policy Act of 2005. I will explain that in significant detail later in this testimony.

My work in the House followed my previous fourteen years as a senior attorney at the Department of the Interior. From September 1992 until May 2003, I served as a senior attorney in the Office of the Solicitor with the Minerals Management Service (MMS) as my primary client, and prior to that, from January 1989 until September 1992, I served as Senior Attorney for Environmental Protection and legal advisor to the Department's Office of Environmental Affairs. My first work on offshore oil and gas issues began during the period from March 1982 until August 1985 when I was Special Assistant to the Associate Administrator of the National Oceanic and Atmospheric Administration.

Prior to my service at NOAA, I served on active military duty as an Army Judge Advocate General's Corps Captain from June 1978 until March 1982. My post-secondary education was completely at the University of Mississippi, except for graduate work in legislative affairs at the George Washington University. I received a Juris Doctor degree from the University of

Mississippi School of Law in 1978 and a Bachelor of Business Administration in Accountancy degree from the University of Mississippi in 1975. I am a member of the Mississippi Bar.

II. History of Section 390 Provisions.

The focus of this hearing is on Section 390 of the Energy Policy Act of 2005. The House of Representatives passed HR6, its version of the Energy Policy Act of 2005, on April 21, 2005. Included within HR6 was a provision from the House Committee on Resources, Section 2055, which was the precursor of Section 390 which was enacted into law. The Senate bill did not contain a corresponding provision. Section 2055 follows directly below and may be found on page 975 of the enrolled HR6 as passed by the House:

"SEC. 2055. LIMITATION ON REQUIRED REVIEW UNDER NEPA.

(a) LIMITATION ON REVIEW.—Action by the Secretary of the Interior in managing the public lands with respect to any of the activities described in subsection (b) shall not be subject to review under section 102(2)(C) the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), if the activity is conducted for the purpose of exploration or development of a domestic Federal energy source.

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

(1) Geophysical exploration that does not require road building.

(2) Individual surface disturbances of less than 5 acres.

(3) Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously.

(4) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to the National Environmental Policy Act of 1969 analyzed such drilling as a reasonably foreseeable activity.

(5) Disposal of water produced from an oil or gas well, if the disposal is in compliance with a permit issued under the Federal Water Pollution Control Act.

(6) Placement of a pipeline in an approved right-of-way corridor.

(7) Maintenance of a minor activity, other than any construction or major renovation of a building or facility."

A comparison of House Section 2055 (hereinafter Section 2055) and the language enacted as EPACT Section 390 (hereinafter Section 390) reveals a number of differences. First, in Subsection (a) of Section 390:

1. The Conference Committee expanded the section to apply to the Secretary of Agriculture in managing the National Forest System Lands. As passed by the House, Section 2055 had only applied to the Secretary of the Interior in managing the public lands.

2. The Conference Committee added the qualifier that application of the statutory categorical exclusions under (b) would "be subject to a *rebuttable presumption* that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply." Section 2055 had merely said that the activity would not be subject to any type of review under NEPA.

3. The Conference Committee added the limitation that the activity on public lands subject to the categorical exclusion must be conducted under the Mineral Leasing Act. This change eliminated activities taking place under the authority of other laws authorizing energy production activities on public lands. For example, this change excluded the use of the section 390 categorical exclusions from the National Petroleum Reserve-Alaska.

4. The Conference Committee added the limitation that the activity on public lands subject to the categorical exclusion must be for "the purpose of exploration or development of oil and gas." Section 2055 had been broader and would have applied to "exploration or development of a Federal energy resource." This would have applied to other energy resources, including alternative energy.

Second, in Subsection (b) of Section 390 the Conference Committee made a number of changes, including reducing from seven (7) to five (5) the number of categories of activities which would be subject to the statutory categorical exclusions:

1. The Conference Committee deleted Section 2055 categories (b)(1) (geophysical exploration) and (b)(5) (disposal of produced water).

2. Section 2055 category (b)(2) became Section 390 category (b)(1), but a limitation was added – "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."

3. Section 2055 category (b)(3) became Section 390 category (b)(2), but the Conference Committee added a limitation—"within 5 years prior to the date of spudding the well."

4. Section 2055 category (b)(4) became Section 390 category (b)(3), but the Conference Committee added a limitation—"so long as such plan or document was approved within 5 years prior to the date of spudding the well."

5. Section 2055 category (b)(6) became Section 390 category (b)(4), but the Conference Committee added a limitation—"so long as the corridor was approved within 5 years prior to the date of placement of the pipeline."

6. Section 2055 category (b)(7) became Section 390 category (b)(5) without change.

III. Discussion.

As I stated earlier, at the time of the passage of the Energy Policy Act of 2005, I was the Energy & Minerals Counsel for the House Committee on Resources. I was directly involved in the action on Section 2055 at the committee level prior to consideration by the House. This provision was offered as an amendment by a member at mark-up. The Committee adopted it. Then the Committee defended this provision during passage by the House. The reason – it is a commonsense provision which has the effect of focusing the attention of limited staff on matters that really matter. We also believed that this provision would prevent trivializing of NEPA and would likely encourage drilling from an already used drill site, reducing environmental impacts. The intent of NEPA is to review actions that may have a "significant" impact on the environment. It is clear to me, and was apparently clear to the Conference Committee, that these 5 categories included in Section 390 are highly unlikely to ever cause a "significant" impact on the environment.

The EPACT Conference Committee worked like this – the staff would consider provisions in the House and Senate bills which were not identical. If the staff could not come to a resolution of the differences, the matter was reserved for the "Gang of Four" – the Chairman and Ranking Member of the House Energy and Commerce Committee and the Chairman and Ranking Member of the Senate Energy Committee. The staff could not agree on House Section 2055, so the matter of NEPA categorical exclusions was kicked-up to the Gang of Four. During consideration of this matter by the Gang of Four, I was the only Majority staff member present for the discussions/deliberations. In addition, no Member of the Resources Committee was present or participated in these discussions – not even the Chairman. I and a Democrat Senate staff counsel were asked to discuss/debate, in front of the Gang of Four, the legal issues related to House Section 2055. These discussions/debate between myself, the Senate staff counsel, and the members of the Gang of Four took several hours over several sessions. The Gang of Four finally decided to include Section 2055 in the Conference Report, but with changes to the language. The Senate staff counsel and I were directed to negotiate changes that we could agree to and bring them back to the Gang of Four for approval. We did this and those negotiations resulted in the changes that I outlined above.

Other than removing the two categories related to geophysical surveys and disposal of produced water, most of the other changes involved limitations on House-passed language, such as 5-year limitations on some, and an acreage limitation on another. Each one of these five categories was extensively debated and discussed by staff and the members of the Gang of Four. Every word was considered. When words were left out of some categories but included in others, this was intentional. As someone who was the House staff most involved in the derivation of these provisions, I have been very disappointed by the GAO report and by recent actions by the current Administration to, in essence, legislate words into or out of these provisions through implication and/or settlement of litigation.

This section is mandatory as written, not optional. After enactment, this right to the use of these categorical exclusions became part of the bundle of rights that lessees acquire upon obtaining a lease from the government. Discussion of why that is so is beyond the scope of this hearing.

There has been much discussion about the meaning of the term "rebuttable presumption" as used in Section 390. Let me make clear, my understanding of this term when it was added in negotiations with my Senate counterpart was the same interpretation that BLM adopted in its first implementing instructions. That is, it is presumed that an activity that fits the description of the activity listed within the category is the activity that is subject to the categorical exemption. However, whether or not the subject activity fits the description is subject to be rebutted. The rebuttal would only address whether or not the subject activity fit the categorical exemption, not whether or not the activity would cause significant impacts. If it had meant the latter, then a NEPA document would need to be developed which would defeat the purpose of the section.

In addition, there has been much discussion about whether these Section 390 categorical exclusions should be subject to an extraordinary circumstances review. First, there is no mention of the need for an extraordinary circumstances review in Section 390. Second, what would be the purpose of Congress legislating a categorical exclusion which was really still just a regulatory categorical exclusion? I have practiced NEPA law since 1978. Other staff and counsel involved in negotiating this provision were very aware of NEPA law. The intent of Congress in negotiating these statutory categorical exclusions was to fast-track approvals for this very limited number of categories. Congress has long been concerned about extensive unwarranted delays because of NEPA litigation. Certainly we knew that extraordinary circumstances reviews lead to litigation. This is why the Congress legislated these exclusions rather than leaving them to the agency to promulgate through regulations.

Thank you for the opportunity to testify and I would be pleased to answer any questions.