IMPACTS TO ONSHORE JOBS, REVENUE, AND ENERGY: REVIEW AND STATUS OF SEC. 390 CATEGORICAL EXCLUSIONS OF THE ENERGY POLICY ACT OF 2005

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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OVERSIGHT HEARING ON "IMPACTS TO ONSHORE JOBS, REVENUE, AND ENERGY: REVIEW AND STATUS OF SEC. 390 CATEGORICAL EXCLUSIONS OF THE ENERGY POLICY ACT OF 2005."

Friday, September 9, 2011
U.S. House of Representatives
Subcommittee on Energy and Mineral Resources
Committee on Natural Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 1324, Longworth House Office Building, Hon. Doug Lamborn [Chairman of the Subcommittee] presiding.

Present: Representatives Lamborn, Duncan, Johnson, Flores, Costa, and Holt.

STATEMENT OF HON. DOUG LAMBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. LAMBORN. The Subcommittee will come to order. The Chairman notes the presence of a quorum, which under Committee Rule 3(e) is two Members, and I note that the Ranking Member, Representative Holt of New Jersey, is detained because he is presenting an amendment on the Floor. He will be here as soon as he is able, and when he comes, he will be given discretion to give his opening statement whenever it fits his schedule the best.

The Subcommittee on Energy and Mineral Resources is meeting today to hear testimony on an oversight hearing on the "Impacts to Onshore Jobs, Revenue, and Energy: The Review and Status of Section 390 Categorical Exclusions of the Energy Policy Act of 2005."

Under Committee Rule 4(f), opening statements are limited to the Chairman and Ranking Member of the Subcommittee. However, I ask unanimous consent to include any other Members' opening statements in the hearing record if submitted to the clerk by close of business today. Hearing no objection, so ordered.

And I now recognize myself for 5 minutes. Today the Subcommittee is meeting to examine the use of categorical exclusions for onshore oil and natural gas development. In 2005 the Energy Policy Act of 2005 was signed into law. In order to expedite the development of domestic energy production and the creation of American jobs, Section 390 of the Energy Policy Act directed the Bureau of Land Management to use categorical exclusions to expedite energy supplies by limiting redundant environmental analysis and red tape. Categorical exclusions are only used on land where the environmental impact is minor, the fields have already been developed, or where drilling was already analyzed under the National

Environmental Policy Act. In order to lessen our dependence on foreign oil, create jobs for Americans, and secure our energy future, Congress should take steps to streamline the process and enable energy projects to move forward without being subject to unnecessary bureaucratic delays as well as costly litigation and a burdensome permitting process.

Categorical exclusions are just one tool Congress has given the Bureau of Land Management in order to accomplish this goal. Western States, such as Wyoming, Utah, and New Mexico, have greatly benefited from the use of categorical exclusions. A 2009 GAO report showed that Section 390 categorical exclusions were used to approve approximately 6,100 of 22,000 applications for drilling permits. In Wyoming alone, 87 percent of new gas wells drilled in the Upper Green River Basin from 2007 to 2010 qualified for expedited development under categorical exclusions. Each of these wells brought increased domestic energy production and American jobs to the region.

Categorical exclusions have been successful in expediting American energy production and are an essential part of streamlining an already overly burdensome bureaucratic energy permitting process. The Obama Administration took full advantage of categorical exclusions after passing the $787 billion American Recovery and Reinvestment Act when the Administration used more than 179,000 categorical exclusions for projects funded by stimulus money. Oddly enough, while categorical exclusions were good enough to use to quickly make the Administration's taxpayer-funded stimulus projects shovel ready, the Obama Administration apparently does not find them acceptable for American oil and natural gas energy projects.

In 2010, conceding to pressure from environmental groups, the Obama Administration adopted new rules to essentially halt the use of Section 390 categorical exclusions for energy projects, and they reinstated the burdensome and duplicative review process that has plagued the energy industry with delays, lengthy review processes, and onerous lawsuits. Fortunately, these rules were overturned by a U.S. district judge that rejected the Obama Administration's arguments and reinstated the categorical exclusion provisions.

Today's hearing will focus on the use of categorical exclusions and their impacts on onshore jobs, revenue, and American energy production. I want to thank the witnesses for taking the time to appear before our Committee today, and I look forward to your testimony.

[The prepared statement of Mr. Lamborn follows:]

Statement of The Honorable Doug Lamborn, Chairman, Subcommittee on Energy and Mineral Resources

Today the Subcommittee is meeting to examine the use of categorical exclusions for onshore oil and natural gas development.

In 2005, the Energy Policy Act of 2005, or EPAct, was signed into law. In order to expedite the development of domestic energy production and the creation of American jobs, section 390 of EPAct directed the Bureau of Land Management to use categorical exclusions to expedite energy supplies by limiting redundant environmental analysis and red tape. Categorical exclusions are only used on land where the environmental impact is minor, the fields have already been developed

or where drilling was already analyzed under the National Environmental Policy Act.

In order to lessen our dependence on foreign oil, create jobs for Americans, and secure our energy future, Congress should take steps to streamline the process and enable energy projects to move forward without being subject to bureaucratic delays, costly litigation, and a burdensome permitting process. Categorical exclusions are just one tool Congress has given the Bureau of Land Management in order to accomplish this goal.

Western states such as Wyoming, Utah, and New Mexico have greatly benefitted from the use of categorical exclusions. A 2009 GAO report showed that Section 390 categorical exclusions were used to approve approximately 6,100 of 22,000 applications for drilling permits. In Wyoming alone, 87% of new gas wells drilled in the Upper Green River Basin from 2007 to 2010 qualified for expedited development under categorical exclusions. Each of these wells brought increased domestic energy production and American jobs to the region. Categorical exclusions have been successful in expediting American energy production and are an essential part of streamlining an already overly burdensome, bureaucratic, energy permitting process.

The Obama Administration took full advantage of categorical exclusions after passing the $787 billion American Recovery and Reinvestment Act, when the Administration used more than 179,000 categorical exclusions for projects funded by stimulus money.

While categorical exclusions were good enough to use to quickly make the Administration's taxpayer funded stimulus projects "shovel ready," the Obama Administration apparently did not find them acceptable for American oil and natural gas energy projects. In 2010, conceding to pressure from environmental groups, the Obama Administration adopted new rules to essentially halt the use of section 390 categorical exclusions for energy projects and reinstated the burdensome and duplicative review process that has plagued the energy industry with delays, lengthy review processes, and onerous lawsuits.

Fortunately, these rules were overturned by a US District judge that rejected that Obama Administration's arguments and reinstated the categorical exclusion provisions.

Today's hearing will focus on the use of categorical exclusions and their impacts on onshore jobs, revenue, and American energy production. I want to thank the witnesses for taking the time to appear before our committee today and look forward to your testimony.

Mr. LAMBORN. We will now hear from our witnesses, and for the sake of consolidating the time because we are going to unfortunately have a series of votes from about 10:30 or 10:40, as late as possibly to noon, so I want to ask that we have all the witnesses come forward. There are a total of four. They will include Mr. Mike Pool, Deputy Director of the Bureau of Land Management; Mr. Randy Bolles, Manager, Regulatory Affairs of Devon Energy; Miss Kathleen Sgamma, Director of Governmental Affairs, Western Energy Alliance; Mr. W. Jackson Coleman, Managing Partner and General Counsel of EnergyNorthAmerica LLC; and Mr. Mark Gaffigan, Managing Director, Natural Resources and Environment Division of the U.S. Government Accountability Office. Excuse me, I guess that is five total.

Like all our witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statement to 5 minutes, as outlined in our invitation letter to you, and under Committee Rule 4(a).

Our microphones are not automatic, so you have to press the button to turn them on. I will explain how the timing lights work. When you begin talking, we will start the timer and a green light will appear. After 4 minutes, a yellow light comes on, and after 5 minutes a red light comes on. You may complete your sentence, but at that time I ask that you stop.

Mr. Pool, you may begin. Thank you for being here.

STATEMENT OF MIKE POOL, DEPUTY DIRECTOR, BUREAU OF LAND MANAGEMENT

Mr. POOL. Mr. Chairman and members of the Subcommittee, thank you for the opportunity to discuss the Bureau of Land Management's use of categorical exclusions established by Section 390 of the Energy Policy Act of 2005. The Mineral Leasing Act of 1920 establishes the statutory framework to promote the exploration and development of oil and natural gas from the Federal onshore mineral estate. Secretary of the Interior Ken Salazar has emphasized that as we move forward toward the new energy frontier, the development of conventional energy resources from BLM-managed public lands will continue to play a critical role in meeting the Nation's energy needs.

Facilitating the safe, responsible, and efficient development of these domestic oil and gas resources is the BLM's responsibility, and part of the Administration's broad energy strategy to protect consumers and help reduce our dependence on foreign oil.

The BLM is responsible for protecting the resources and managing the uses of our Nation's public lands. In Fiscal Year 2010, onshore oil production from public lands increased by 5 million barrels from the previous fiscal year as more than 114 million barrels of oil were produced from BLM managed mineral estate, the most since 1997. At the same time, the nearly 3 trillion cubic feet of natural gas produced from public lands made 2010 the second most productive year in natural gas production on record. In 2010 conventional energy development from public lands produced 14.1 percent of the Nation's natural gas and 5.7 percent of its domestically produced oil.

The Energy Policy Act of 2005 was enacted in part to promote and expedite oil and gas development. Section 390 of the Energy Policy Act establishes statutory authority for the use of categorical exclusions for five types of oil and gas development activities. The purpose of Section 390 CXs is to streamline approval of exploration and development of oil and gas on public lands and U.S. Forest Service managed lands by allowing designated actions to proceed without the need for further environmental analysis.

In 2009, the Government Accountability Office issued a report entitled "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." The report found that use of Section 390 CXs by BLM field offices was inconsistent and recommended that the BLM issue detailed and explicit guidance to address the gaps and shortcomings in its Section 390 guidance. The report also recommended that Congress consider amending the Act to clarify Section 390 of the Energy Policy Act. According to the GAO, whether or not the Energy Policy Act required the BLM to conduct an extraordinary circumstances review for applications for permit to drill remains an open question.

On October 21st, 2010, the Western Energy Alliance filed suit against BLM, challenging its guidance on the application of Section 390 CXs. Without deciding the merits of WEA's challenge to BLM's interpretation of Section 390 of the Energy Policy Act, the U.S. Dis-

trict Court for Wyoming did decide on August 12, 2011, that the BLM had failed to give the public notice and an opportunity to comment on the proposed changes before making the May 2010 guidance effective.

The court's order directed BLM to stop using the May 2010 guidance when considering an applicant's request to undertake activities described in Section 390. This guidance had directed BLM field offices to determine whether further environmental reviews were required. The BLM informs its field offices of the court's direction on August 19, 2011, effectively reverted back to the 2008 policy.

In the near term, BLM plans to initiate a rulemaking effort to establish guidelines for using the Section 390 CXs as part of the BLM's oil and gas regulations. The regulatory process includes public notice and opportunity for comment.

Consistent with the framework presented by the President's blueprint for a secure energy future, the BLM is working to secure our energy future by ensuring that potential oil and gas development on our public lands is realized.

Mr. Chairman, thank you for the opportunity to testify on BLM's use of the Energy Policy Act of 2005, Section 390 CX authorities. I will be pleased to answer any questions you may have.

[The prepared statement of Mr. Pool follows:]

Statement of Mike Pool, Deputy Director, Bureau of Land Management, U.S. Department of the Interior

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to discuss the Bureau of Land Management's (BLM) use of Categorical Exclusions (CX) established by Section 390 of the Energy Policy Act of 2005 (EPAct). These CXs establish a rebuttable presumption that certain oil or gas exploration and development activities conducted under the Mineral Leasing Act are categorically excluded from additional National Environmental Policy Act (NEPA) review.

Background

The Mineral Leasing Act of 1920 establishes the statutory framework to promote the exploration and development of oil and natural gas from the Federal onshore mineral estate. Secretary of the Interior Ken Salazar has emphasized that as we move toward the new energy frontier, the development of conventional energy resources from BLM-managed public lands will continue to play a critical role in meeting the Nation's energy needs. Facilitating the safe, responsible, and efficient development of these domestic oil and gas resources is the BLM's responsibility and part of the Administration's broad energy strategy—outlined in the President's *Blueprint for a Secure Energy Future*—that will protect consumers and help reduce our dependence on foreign oil. Well-paying jobs are often associated with oil and gas exploration and development, and provide needed revenues and economic activity in many communities. Royalties from onshore public land oil and gas development exceeded $2.5 billion in Fiscal Year 2010. Approximately half of that total was paid directly to the states in which the development occurred.

The BLM is responsible for protecting the resources and managing the uses of our nation's public lands, which are located primarily in 12 western states, including Alaska. The BLM administers over 245 million surface acres and approximately 700 million acres of onshore subsurface mineral estate throughout the Nation. In fiscal year 2010, onshore oil production from public lands increased by 5 million barrels from the previous fiscal year as more than 114 million barrels of oil were produced from the BLM-managed mineral estate—the most since 1997. At the same time, the nearly 3 trillion cubic feet of natural gas produced from public lands made 2010 the second-most productive year of natural gas production on record. In 2010, conventional energy development from public lands produced 14.1 percent of the Nation's natural gas and 5.7 percent of its domestically-produced oil.

As of August 1, 2011, the BLM processed more applications for permit to drill (APD) than had been received during the year, thereby continuing to reduce the number of pending applications. Approximately 7,000 APDs on BLM and Indian lands have been approved by BLM, but have not yet been drilled by industry. We

are achieving these permitting milestones by continuing to work to process APDs in a timely fashion.

Fundamental to all of the BLM's management actions—including authorization of oil and gas exploration and development—is the agency's land use planning and NEPA processes. These open, public processes are ones in which proposals for managing particular resources are made known to the public in advance of taking action. The BLM is committed to providing the environmental review and public involvement opportunities required by NEPA for proposals for the use of BLM-managed lands. As required under the Federal Land Policy and Management Act, the BLM strives to achieve a balance between oil and gas production and development of other natural resources and protection of the environment; the land-use planning and NEPA processes are vital tools used to achieve this statutory mandate.

Energy Policy Act

The Energy Policy Act of 2005 was enacted in part to promote and expedite oil and natural gas development. Section 390 of the Energy Policy Act establishes statutory authority for the use of "categorical exclusions" (CXs) from further analysis under NEPA for five types of oil and gas development activities. The purpose of Section 390 CXs is to streamline approval of exploration and development of oil and gas on BLM public lands and U.S. Forest Service lands, by allowing designated actions to proceed without further environmental analysis.

On September 30, 2005, the BLM issued formal guidance (IM 2005–247) directing field offices that the use of these Section 390 CXs was mandatory. This guidance was issued without providing public notice and an opportunity to comment. The guidance specified that unlike categorical exclusions administratively established under NEPA, the new Section 390 CXs were established by statute and not subject to the Council on Environmental Quality's (CEQ's) NEPA implementing regulations. Additionally, the guidance stated that no review for "extraordinary circumstances" was required—i.e., circumstances when further review under NEPA would still be warranted despite the activity falling into a category that is otherwise excluded from such review.

In 2008, the policy was modified to clarify that use of the Section 390 CXs under the EPAct is discretionary, rather than mandatory. This policy was incorporated into the BLM's 2008 NEPA Handbook. However, the 2008 NEPA Handbook retained a provision that eliminates the requirement to conduct an "extraordinary circumstances" review when applying CXs to these statutorily-identified oil and gas development activities.

In 2009, the Government Accountability Office (GAO) issued a report entitled "*Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act"* (GAO–09–872). The report found that the use of Section 390 CXs by BLM field offices was somewhat inconsistent and recommended that Congress consider clarifying Section 390 of EPAct. The GAO also recommended that the BLM issue detailed and explicit guidance to address the gaps and shortcomings in its Section 390 guidance. Commenting specifically on the use of extraordinary circumstances reviews, the GAO report noted that, although EPAct does not state whether Section 390 CXs are subject to extraordinary circumstances review, the lack of direction in EPAct has led to "differing interpretations, debate, and litigation, and more generally, led to serious concerns that BLM is using section 390 categorical exclusions in too many—or too few—instances."

Court Actions

In 2008, the Nine Mile Canyon Coalition, together with the Southern Utah Wilderness Alliance and the Wilderness Society, challenged the BLM's decision to issue 30 permits to drill gas wells in Utah without requiring further environmental review, consistent with agency's 2005 Section 390 CX guidance. The BLM settled this litigation, agreeing, in part, to issue guidance directing its field offices to consider whether a particular proposal covered by a Section 390 CX presented "extraordinary circumstances" that would require further environmental analysis.

Further, the BLM agreed that the agency would not use a Section 390 CX in Utah until it issued the guidance directing field offices to consider whether a proposal covered by a Section 390 CX presented "extraordinary circumstances." The BLM included these terms, as well as more specific provisions, in its May 17, 2010 guidance to its field offices (IM 2010–118). In response, the Western Energy Alliance (WEA) sued to prevent the BLM from implementing its May 2010 guidance.

Without deciding the merits of WEA's challenge to BLM's interpretation of Section 390 of the Energy Policy Act, the U.S. District Court for Wyoming did decide on August 12, 2011, that the BLM had failed to give the public notice and an opportunity

to comment on the proposed changes before making the May 17, 2010, changes effective. The Court's order directed the BLM to stop using the May 2010 guidance when considering an applicant's request to undertake activities described in Section 390—guidance that directed BLM field offices to determine whether further environmental reviews were required. The BLM issued the Court's direction to its field offices on August 19, 2011.

Current Status

In the near term, the BLM plans to initiate a rulemaking effort to establish guidelines for using the Section 390 CXs as part of the BLM's oil and gas regulations. The regulatory process includes public notice and opportunity for comment, and we anticipate a high level of interest and participation. We look forward to a continued dialogue with many interested parties.

Conclusion

The BLM remains committed to encouraging the safe, responsible, and efficient development of energy resources on public lands. Mr. Chairman, thank you for the opportunity to testify on the BLM's use of the Energy Policy Act of 2005 Section 390 CX authorities. I will be pleased to answer any questions you may have.

Mr. LAMBORN. Thank you for your testimony. I would now like to recognize the Ranking Member for his opening statement.

STATEMENT OF HON. RUSH D. HOLT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. HOLT. I thank the Chair for his courtesy, and by way of explanation I should point out that I had an amendment on the Floor of the House at exactly the time this Committee convened. It just happened that way. So I thank the witnesses for appearing today, and I just wanted to set the hearing in some context.

The National Environmental Policy Act allows all interested Americans to have their voices heard on how their public lands are managed and allows for agencies like the Bureau of Land Management to make informed decisions about potential environmental impacts of their actions. When Congress takes steps to limit NEPA review, what often results is environmental harm, less public participation, and more litigation, which everyone should want to avoid.

Section 390 of the Energy Policy Act of 2005 is an example of this kind of policy. The categorical exclusions established in Section 390 to expedite the approval of oil and gas drilling permits were unnecessary and unwise. They are unnecessary because the industry is producing oil and gas on really a small fraction, less than 30 percent, of the public lands that are under lease on shore. In 2010, for example, BLM approved approximately 4,100 new permits to drill, but the oil and gas industry only drilled 1,500 wells. There is no shortage of places where the oil and gas industry could be drilling or could start drilling right away.

Section 390 was also unwise because oil and gas exploration has real environmental impacts. There is no question that the industry has made great strides in safety and environmental sensitivity. Under NEPA the BLM has the authority to establish categorical exclusions for activities that don't, quote, individually or cumulatively have a significant effect on the human environment.

However, in Section 390 of the bill, of the Act, Congress established a set of legislative categorical exclusions for activities that have been documented by the Government Accountability Office to have environmental impacts, such as ozone levels that have

reached or exceeded allowable levels, habitat fragmentation that have clearly harmed wildlife.

The GAO has documented that BLM's implementation of Section 390 was inconsistent from one office to another, often resulted in violations of NEPA. The previous Administration also actually prohibited the BLM from considering extraordinary circumstances, which they are supposed to consider when deciding whether a categorical exclusion applies.

So as a result of the deficiencies found by the GAO and others, the current Administration in 2010 issued a new policy on Section 390 that vastly improved the BLM's implementation of that provision of the law. The 2010 policy required the BLM to make sure that no extraordinary circumstances are present like threats to public health—we would all hope they would consider such things—or threats to endangered species prior to granting a categorical exclusion under NEPA for a drilling permit.

Now, where extraordinary circumstances exist, the BLM is required to conduct a more rigorous review, as we should want. As a result of the Obama Administration's policy and better planning from the start, protests of leases have declined. Only 12.5 percent of tracts have been contested in 2011 as opposed to 47 percent in 2009 and 40 percent in 2010. So this is what I was saying before. If we do it right and by the book, we will have less litigation.

However, earlier this year the Obama Administration's policy was struck down by a Federal Court for procedural reasons, and I am pleased that the BLM is announcing today that it will conduct a formal rulemaking process for using Section 390 categorical exclusions.

I am concerned that the BLM must now revert to using the previous policy which the GAO had concluded was inadequate in ensuring that BLM meets its obligations under NEPA. As a result, today Ranking Member Markey and I are sending a letter to the Department of Justice urging an appeal of this decision. An appeal and a stay of the court's ruling would remove any uncertainty while the BLM completes its rulemaking which will ensure that BLM can conduct oil and gas drilling in an environmentally responsible way.

I thank the Chair. I hope that puts this hearing in some perspective.

[The prepared statement of Mr. Holt follows:]

Statement of The Honorable Rush D. Holt, Ranking Member, Subcommittee on Energy and Mineral Resources

Thank you, Mr. Chairman.

The National Environmental Policy Act (NEPA) allows Americans from all across the Nation to have their voices heard on how their public lands are managed and allows for agencies like the Bureau of Land Management to make informed decisions about potential environmental impacts of their actions. When the Congress takes steps to limit NEPA review, what often results is unanticipated environmental harm, less public participation in land management decisions, and more litigation challenging agency decisions.

Section 390 of the Energy Policy Act of 2005 is an example of this kind of bad policy. The categorical exclusions established in Section 390 to expedite the approval of oil and gas drilling permits were unnecessary and unwise. They are unnecessary because industry is producing oil and gas on less than 30 percent of the public lands under lease onshore. For example, in 2010, the BLM approved approximately 4,100 new permits to drill, but the oil and gas industry only drilled 1,500 wells. There

is no shortage of places where the oil and gas industry could start drilling right now.

Section 390 was also unwise because oil and gas exploration has real environmental impacts. Under NEPA, the BLM has the authority to establish categorical exclusions for activities that do not "individually or cumulatively have a significant effect on the human environment." However, in section 390 of EPACT, Congress established a set of legislative categorical exclusions for activities that have been documented by the Government Accountability Office (GAO) to cause environmental impacts, such as ozone levels that have reached or exceeded allowable levels and habitat fragmentation that has harmed elk, antelope and other wildlife in the West.

The GAO has documented that BLM's implementation of Section 390 was inconsistent from one office to another and resulted in violations of NEPA. The Bush Administration also actually prohibited the BLM from considering "extraordinary circumstances" when deciding whether a categorical exclusion applies.

As a result of the deficiencies found by the GAO, the Obama administration in 2010 issued a new policy on Section 390 that vastly improved the BLM's implementation of that provision of the law. The 2010 policy required the BLM to make sure that no extraordinary circumstances are present, like threats to public health or threats to endangered species, prior to granting a categorical exclusion under NEPA for a drilling permit. Where extraordinary circumstances exist, the BLM is required to conduct a more rigorous environmental review.

As a result of the Obama Administration's policy, and better planning from the start, protests of leases have declined. Only 12.5 percent of tracts have been contested in 2011 as compared with 47 percent in 2009 and 40 percent in 2010.

However, earlier this year Obama Administration's policy was struck down by a Federal Court for procedural reasons. I am pleased that the BLM is announcing today that it will conduct a formal rulemaking process for using the Section 390 categorical exclusions. However, I am concerned that the BLM must now revert to using the Bush administration's policy, which the GAO had concluded was grossly inadequate in ensuring that the BLM meets its obligations under NEPA, while that rulemaking is ongoing.

As a result, today Ranking Member Markey and I are sending a letter to the Department of Justice urging an appeal of this decision. An appeal and stay of the court's ruling would remove any uncertainty while the BLM completes its rulemaking, which will ensure that the BLM can conduct oil and gas drilling in an environmentally responsible manner.

I look forward to hearing from our witnesses.

Mr. LAMBORN. OK, thank you, Mr. Holt. We will now go to the next witness, Mr. Randy Bolles, Manager of Regulatory Affairs, Devon Energy.

STATEMENT OF RANDY BOLLES, MANAGER, REGULATORY AFFAIRS, DEVON ENERGY

Mr. BOLLES. Thank you, Mr. Chairman, Ranking Member Holt, members of the Subcommittee. My name is Randy Bolles, I am an employee of Devon Energy Corporation, headquartered in Oklahoma City, Oklahoma. I am pleased to be here today to share my perspective on how Section 390 categorical exclusions can help preserve the environment while also benefiting local, State, and Federal economies. More specifically, I will discuss how Devon has used categorical exclusions in the Washakie Basin in Wyoming and how Devon's drilling efforts there have been affected by the Bureau of Land Management's May 2010 guidance.

As this Subcommittee knows, the 2005 Energy Policy Act provided five specific exclusions from review under the Environmental Policy Act. In 2010, BLM provided guidance that virtually eliminated categorical exclusions Devon used to drill over 260 wells in Wyoming. When categorical exclusions are utilized, each well is still subject to public notice and comment procedures and site specific reviews that are conducted by BLM resource staff. In addition,

categorical exclusions encourage multi-pad well drilling which reduces surface disturbance, and as you can see, Mr. Chairman, categorical exclusions provide BLM with the ability to offer a practical environmental review while avoiding a lengthy and often duplicative NEPA effort that had previously been completed. Simply put, it is a common sense approach.

Let me give you an example of our activity as it relates to categorical exclusions. In 2009, before BLM restricted categorical exclusions, the Rawlins field office authorized 75 applications for permit to drill submitted by Devon based on Section 390 categorical exclusions. Devon was able to obtain timely BLM approval of those applications because of categorical exclusions. If they had not existed, the BLM would have been required to conduct a NEPA analysis on all 75 applications, and those applications would have taken much more time and might have led Devon to consider dedicating its resources to more timely projects in other areas of the country.

Even within Devon there is major competition to deploy capital, and we are going to deploy that capital in areas where we have the least likelihood or burdensome environment to work in. That result ends up in less Federal royalties and less taxes being paid to the local, State, and Federal economies.

When considering not only the 75 wells that we drilled in 2009 but the more than 260 wells that Devon drilled since EPAct was approved in 2005, the economic impact is significant. A report released by a consulting firm called SWCA extrapolated the 260 wells that we drilled translates into about 6,838 jobs, about $598 million in employment earnings, and over the life of the well about $35 million in annual government revenue. While these numbers are significant, so is the toll that is taken when drilling comes to a standstill.

Following the BLM guidance that restricted Devon's ability to use congressionally approved categorical exclusions, Devon reassigned one of its two rigs drilling in the Washakie Basin to other areas where we are drilling on fee and State lands.

This is just one of the BLM restrictions that make it difficult, extremely difficult for Devon to drill, produce, and maintain its wells. Burdensome wildlife stipulations and timing restrictions, when coupled with the prohibition on the use of categorical exclusions, make it almost impossible to develop the resources in an economic fashion.

Devon believes in environmental stewardship, and believe me I live it every day, and it is a core value of our company, and has been recognized for its efforts to protect and preserve habitat and wildlife. However, BLM should give consideration to practical aspects of developing Federal resources.

In conclusion, Mr. Chairman, Devon Energy Corporation works to do its part to preserve and protect the areas in which we operate, and we truly wish to see them grow. As I mentioned earlier, the jobs and revenue that occur with new well development can leave a significant hole in local economies if they are not considered in the regulatory process.

Devon is dedicated to production on Federal lands and will continue to produce on Federal lands. However, the level of regulatory

burden will determine not only our activity but also the economic benefit received by Federal, State, and local economies.

Again, thank you very much for allowing me to testify today. It is truly an honor, and I stand for any questions.

[The prepared statement of Mr. Bolles follows:]

Statement of Randy Bolles, Manager, Regulatory Affairs—Western Division, Devon Energy Corporation

Chairman Lamborn, Ranking Member Holt, and members of the Subcommittee, my name is Randy Bolles, and I am employed by Devon Energy Corporation. I am pleased to share my perspective on how Section 390 categorical exclusions can help preserve the environment while benefiting local, state and federal economies. More specifically, I will discuss how Devon has used categorical exclusions in the Washakie Basin of Wyoming and how Devon's drilling efforts there have been affected by the Bureau of Land Management's May 2010 guidance.

Devon Energy Corporation is an Oklahoma City-based independent energy company engaged in oil and natural gas exploration and production. Devon is a leading U.S.-based independent oil and gas producer and is included in the S&P 500 Index. I am responsible for regulatory affairs in Montana, Wyoming, Colorado, New Mexico, Utah and West Texas. My staff and I spend our time working with local, state and federal agencies to resolve issues related to regulation so that Devon may gain access to minerals on fee, state and federal lands. To the point of today's topic, I am part of the management team responsible for all aspects of the permitting process in the Washakie Basin.

Mr. Chairman, Devon works hard to be a good neighbor and maintain a strong relationship with all landowners. Because about 26 percent of Devon's leased minerals in the Western Division are on federal lands, Devon's relationship with the federal government is particularly important to us. As a result, Devon strives to comply with or exceed all environmental regulations and seek all necessary approvals to drill. To Devon, it is not just about complying with regulations. It's about taking meaningful environmental steps and assuring the communities where we work that Devon wants to partner in their growth.

As this Subcommittee knows, the 2005 Energy Policy Act (EPAct) provided five specific exclusions from review under the National Environmental Policy Act. In 2010, the BLM provided guidance that virtually eliminated categorical exclusions Devon had used over 260 times prior to the regulatory action by BLM.

When categorical exclusions are utilized, each well is still subject to public notice and comment procedures and site-specific reviews to ensure other resources are adequately protected. The exclusions allow Devon to drill multiple wells from an existing pad, or to drill directionally in a field previously approved for vertical wells. This practice reduces surface disturbance. The categorical exclusion provides BLM with the ability to offer a practical environmental review while avoiding a lengthy, often duplicative NEPA effort that was previously completed. Simply put, it is a commonsense approach.

Let me provide an example of our activity and applications using categorical exclusions: In 2009—before BLM restricted categorical exclusions—the BLM field office in Rawlins, Wyoming, authorized 75 applications for permits to drill submitted by Devon based on the section 390 categorical exclusions. Devon was able to obtain timely BLM approval of those applications because of the categorical exclusions.

If the exclusions had not existed in 2009, and BLM was required to prepare NEPA analyses on those 75 applications, the applications would have taken much more time. As a result, it would have taken Devon more than an additional year to develop the leases. Many of the applications simply involved drilling additional wellbores from existing well pads. In these cases, the delay would have been unreasonable and might have led Devon to consider dedicating its resources to more timely projects in other areas of the country.

When considering not only the 75 wells drilled in 2009, but the more than 260 wells Devon drilled since EPAct was approved in 2005, the economic impact is significant. A report released by SWCA Environmental Consultants this past March, when extrapolated to the more than 260 wells Devon drilled under section 390, translated to 6,838 jobs, $598 million in employment earnings and, over the life of the well, $35 million in annual government revenue. A copy of this study is attached to my prefiled written testimony.

While these numbers are significant, so is the toll that is taken when drilling comes to a standstill. Following the BLM guidance that restricted Devon's ability to use the Congressionally-approved categorical exclusions, Devon reassigned one of

its two drilling rigs in the Washakie field to other areas where that rig could be used.

This is just one of the BLM restrictions that make it extremely difficult for Devon to drill, produce and maintain its wells. Burdensome wildlife stipulations and timing restrictions, when coupled with a prohibition on the use of categorical exclusions, make it almost impossible to develop the resources in an economic fashion. Devon believes in environmental stewardship and has been recognized for its efforts to protect and preserve habitat and wildlife. However, BLM should give consideration to the practical aspects of developing federal resources.

In conclusion, Mr. Chairman, Devon Energy Corporation works to do its part to preserve and protect the areas we operate. Moreover, Devon is an active part of the communities in which we operate, and we truly wish to see them grow. As I mentioned earlier, the jobs and revenue that occur with new well development can leave a significant hole in local economies if they are not considered in the regulatory process. Devon is dedicated to production on federal lands and will continue to produce on federal lands. However, the level of regulatory burden will determine not only our activity, but also the economic benefit received by federal, state and local governments.

Thank you very much for your time.

[NOTE: The study has been retained in the Committee's official files. It can be found at http://westernenergyalliance.org/wp-content/uploads/2011/10/SWCA–Report-Wyoming-NEPA-delay-impacts.pdf]

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August 17, 2012

Honorable Doug Lamborn, Chairman
Subcommittee on Energy and Mineral Resources
Attn: Tim Charters, Staff Director
1324 Longworth House Office Building
Washington, DC 20515

Dear Chairman Lamborn:

Per your request, included are the supplemental answers to the testimony I offered on September 9, 2011 at the oversight hearing on "Impacts to Onshore Jobs, Revenue, and Energy: Review and Status of Sec. 390 Categorical Exclusions of the Energy Policy Act of 2005."

Sincerely,

Randy Bolles
Regulatory Affairs Manager
Devon Energy Corporation

cc: Sophia Varnasidis via email: Sophia.Varnasidis@mail.house.gov

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Response to questions submitted for the record by Randy Bolles, Regulatory Affairs Manager, Devon Energy Corporation

1. Mr. Bolles, in your testimony you say that in 2009 75 applications for permits to drill have been approved using categorical exclusions. Can you explain the difference in the approval timeline when categorical exclusions are used versus when you have to go through the usual approval process? Can you discuss the job creation and energy production that accompany the expedited approval process?

It is important to reiterate that oil and gas operators must submit the same type, quality and quantity of information to the BLM when preparing an Application for Permit to Drill (APD) package. The use of statutory categorical exclusions to streamline this permitting process is an internal decision made by the BLM.

Ultimately, execution of the categorical exclusions process is an internal BLM process. The BLM determines whether valid, existing environmental analyses are appropriate, in which case, Thus, Devon cannot state with specificity or quantify exactly how use of the categorical exclusions expedited the approval timeframe for cer-

tain oil and gas operations that qualified for one of the statutory exclusions. By way of example, in Wyoming, if an APD is submitted and the BLM conducts a standard, non-categorical exclusion review, that process could take from 60 to 360 days. If, however, a statutory categorical exclusion can be utilized, the APD review process can be reduced to 45 to 90 days. Time efficiencies are gained because the BLM is able to utilize valid, existing environmental, archeological and wildlife analyses instead of requiring duplicative and overlapping documentation of certain areas, much of which is often unnecessary. These statutory categorical exclusions helped Devon continue our drilling program. Without these approvals, Devon would have been forced to release drilling rigs and terminate the jobs that follow the drilling and completion process. In fact, as was mentioned in testimony Devon reassigned a rig in Wyoming at least in part due to BLM guidance that restricted Devon's ability to use the Congressionally-approved categorical exclusions. That particular rig has since been release and is no longer drilling for Devon.

It is difficult to quantify energy production that accompanies the expedited approval process but it does assist in obtaining approved APDs and retaining rigs and preparing a continuous drilling program. This in turn creates jobs related to drilling, completion, development and production operations. For example, in Wyoming, each oil or gas rig creates about 125 jobs on average. These jobs include—in addition to the drilling, completion, and oilfield service contractors—jobs such as welders, waste management companies, roustabouts, electricians, food service contractors, and truck drivers, just to name a few. Each well in the Washakie area of Wyoming costs about $3 million to drill, complete and hook up to the sales pipeline. However, this cost is not the norm; Washakie is an established field and drilling efficiencies have been maximized. Newer, developing areas can see drilling and completion costs that are closer to $5–8 million per well.

2. Mr. Bolles, in your testimony you say that the categorical exclusion are just one of the BLM restrictions that make it difficult to drill and produce. Can you elaborate on some of the other restrictions that make it difficult for you to conduct your business and what impact these restrictions have on job creation and energy production?

BLM has many policies and regulations in place that affect companies' ability to access, develop and produce federal minerals.[1] For example, BLM created a new leasing policy in 2010 that requires additional and redundant NEPA analyses to determine if leasing should occur. [BLM Instruction Memorandum 2010–117 (May 17, 2010).] Currently, BLM has Resource Management Plans (RMP) in place that went through a rigorous Environmental Impact Statement (EIS) analysis. This analysis determines areas within the field office's jurisdiction that are available for leasing, and if the area is available for leasing, which stipulations or other restrictions should be included within the lease. In addition to the EIS analysis, BLM Instruction Memorandum 2010–117 also requires the BLM develop repetitive and duplicative second NEPA analyses prior to each lease sale, regardless of whether new or additional information is available or whether a secondary analysis will facilitate the BLM's leasing process. This additional Environmental Assessment (EA)[2] or even an EIS[3] for a Master Leasing Plan could take several years to prepare.

While requiring this duplicative analysis may not seem overly burdensome, in reality, the BLM removes lease parcels within these areas from inclusion on the lease sale while the NEPA analysis is being conducted. Thus, new areas may be prohib-

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[1] To illustrate the complex regulatory requirements mandated by BLM, see attachment entitled "Federal Onshore Oil and Gas Leasing and Permitting Process," prepared by the American Petroleum Institute.

[2] An Environmental Analysis, or EA, is required by the National Environmental Policy Act (NEPA) 40 C.F.R. Part 1501. An agency conducts an EA to determine whether the action will cause a significant impact. If the finding of the EA shows that there will not be a significant impact, then the EA is sufficient, and the agency issues a Finding of No Significant Impact (FONSI). 40 C.F.R. § Part 1501. If the EA determines that the action will cause a significant impact, then a full EIS is required. For an oil and gas project, an EA typically takes anywhere from 60 days to five years to conduct.

[3] An Environmental Impact Statement, or EIS, is also required by NEPA 42 U.S.C. 4332. An EIS is mandated if the EA determines that the action will cause a significant impact. An EIS is a more detailed and time consuming process. An EIS typically has four sections: Introduction, which includes a statement of the Purpose and Need of the Proposed Action, a description of the Affected Environment, a Range of Alternatives to the proposed action, including a "No Action" alternative, and a robust analysis of the environmental impacts of each of the possible alternatives, including impacts to threatened or endangered species, air and water quality, historic and cultural sites, and a cost analysis for each alternative, including costs to mitigate expected impacts. A contractor is secured to complete the EIS, which typically takes several years to complete.

ited from being leased permanently, or at a minimum, delayed considerably, which hurts companies' ability to lease and access those areas for development.

Since the implementation of the new leasing process in 2010, the BLM's leasing has dramatically slowed across most of the United States. According to recently released information, Federal onshore oil and natural gas leasing was down significantly in the Rocky Mountain region in Fiscal Year 2011, which ended on September 30th. According to the Western Energy Alliance, the number of lease parcels offered has declined by 70% the total amount of acreage leased has decreased by 81%, and revenue generated by Federal onshore oil and gas lease sales has declined by 44% since 2008. Because almost half of the revenue generated from Federal onshore oil and gas lease sales is returned to state in which the lands are located, the Federal government and state and local governments are all suffering as a result of these declines.

In addition, the cumulative impacts of overlapping stipulations for the protection of wildlife makes it extremely difficult to manage a comprehensive and year-round drilling plan. For example, in Wyoming, many overlapping wildlife stipulations can occur on a lease from November 15 through August 1 if an area has Big Game Winter Range Stipulations (November 1—April 30) or Sage Grouse and Raptor Stipulations (February 1—August 1). These restrictions leave companies only a three month drilling or completion window—August 1—November 15—to conduct operations. These policies and stipulations make it increasingly difficult to conduct energy operations on federal lands. Additionally, special interest groups further delay lease development by protesting and appealing the BLM's decisions, generally with the sole purpose of delaying or preventing oil and gas development on public lands.

The timeframes necessary for the BLM to approve oil and gas development projects and field-wide NEPA analysis for oil and gas projects is also a significant concern. Currently, there are six oil and gas projects proposed on lands managed by five Wyoming BLM field offices. EISs are being prepared for each of the six projects. The NEPA planning processes (and Record of Decision (ROD) that follows the completion of the EIS) for each of the projects are currently experiencing delays. On average the planning process for each EIS was originally estimated to take two to three years. However, due to a range of issues that have arisen with each project, the RODs have been delayed one to five years. The Table below highlights the six EISs currently under development with the Wyoming BLM. These delays are significant, prevent operators from committing the resources necessary to begin operations, and delay the development of new high-paying jobs.

Six Oil and Gas EISs Underway in Wyoming BLM Field Offices.

Pending EIS	BLM Field Office	ROD Delay*	Project Originally Proposed	Current Status
Beaver Creek	Lander	18 months	July 29, 2008	No Draft EIS Issued
Continental Divide – Creston	Rawlins	56 months	September 8, 2005 March 3, 2006	No Draft EIS Issued
Gun Barrel, Madden Deep, Iron Horse	Lander	34 months	June 5, 2008	No Draft EIS Issued
Hiawatha	Rock Springs	56 months	September 6, 2006	No Draft EIS Issued
LaBarge Platform	Pinedale	Unknown	August 3, 2009	No Draft EIS Issued
Moxa Arch	Kemmerer	60 months	October 7, 2005	Draft EIS released in October of 2007; BLM preparing a Revised Draft EIS.

*ROD delay was based on the estimated completion date compared to the original EIS schedule.

Additionally, Devon is concerned that BLM budgets have been or will be significantly reduced in the near future, while at the same time, the agency is required to respond to an ever-increasing workload and other "national priorities." Staff shortages and an inability to hire or retain quality employees is a constant problem in multiple BLM offices. Employees are often prevented from working on oil and gas related projects to comply with other priorities set by the national office, including

preparing additional and often duplicative documentation and reports for the national office.

3. Mr. Bolles, can you provide any examples where CXs enabled your company to continue development and create jobs that it would not otherwise created?

In an area of development for our company, statutory categorical exclusions enabled Devon to continue drilling operations where while a project-level NEPA analyses were delayed. This area that had already heavily developed and the appropriate level of NEPA analysis had occurred in order to meet the criteria of the statutory categorical exclusion. The categorical exclusion permitted Devon to continue a modest drilling program while additional project level NEPA was underway.

Mr. LAMBORN. OK, thank you for your testimony. The next witness is Ms. Kathleen Sgamma, Director of Government and Public Affairs for Western Energy Alliance.

STATEMENT OF KATHLEEN M. SGAMMA, DIRECTOR OF GOVERNMENT & PUBLIC AFFAIRS, WESTERN ENERGY ALLIANCE

Ms. SGAMMA. Good morning, Mr. Chairman, Ranking Member Holt, and members of the Committee. Thank you for the opportunity to appear before you.

Section 390 categorical exclusions, cat exes, are important tools for encouraging domestic energy production, thereby creating jobs, growing Federal revenue, and spurring American economic activity. Western Energy Alliance represents more than 400 small businesses and independent producers that operate on public lands in the West.

Our members are proud to provide 27 percent of the Nation's natural gas and 14 percent of the Nation's oil production while disturbing only 0.07 percent of public lands. Our Blueprint for Western Energy Prosperity finds that by 2020 we could produce as much oil and natural gas in the West as the U.S. currently imports from Russia, Iraq, Kuwait, Saudi Arabia, Venezuela, Algeria, Nigeria, and Colombia combined, while creating an additional 70,000 jobs and $3.5 billion in government revenues, just in six producing States in the West alone. We hope to achieve that potential if government red tape doesn't stand in the way.

Oil and gas has a small and temporary impact on the land, and operators comply with thousands of very detailed regulations under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Endangered Species Act, and National Historic Preservation Act, to name just a few, as well as State and local regulations and numerous BLM regulations.

With EPAct 2005, Congress intended to ensure jobs for our future with secure, affordable, and reliable energy. Cat exes are an important part of achieving those goals by encouraging domestic oil and gas development in very limited ways. By eliminating the requirement for redundant environmental analysis in five specific circumstances in which the environmental impact is minimal and/or where development was previously analyzed in an environmental document, Congress hoped to create jobs and encourage domestic energy. Companies must still comply with all other regulations when using a CX.

Almost all the criticism of categorical exclusions has been about missing a layer of environmental analysis, no matter how redun-

dant, as if oil and gas development is not highly and aggressively constrained and regulated. Despite the limited scope of cat exes and their success in reducing environmental impact, cat exes have been under attack from day one. That criticism would be highly appropriate if cat exes absolved companies from all environmental regulations, but they do not. They merely remove a redundant layer of NEPA analysis.

A 2009 GAO report found that BLM regularly did not use cat exes in many situations even to the point that five BLM offices refused to use them. However, GAO didn't highlight that breach of the law or the impact on jobs, the economy, and government revenue. Rather, GAO highlighted a very few examples where BLM incorrectly uses cat ex. There was no systematic look at the energy development and job creation prevented from the government's refusal to use categorical exclusions.

While there is coordinated outrage from the environmental lobby about the fact that one layer of redundant analysis has been removed, where is the loud response about the fact that government reluctance to utilize a legal tool has prevented economic activity and jobs? History has shown again and again that wealthy societies are best able to protect the environment and poor countries are the ones with the most devastating environmental conditions. The best way to ensure we continue to improve our environment is to grow the economy and create high-paying jobs. American development of oil and natural gas is a proven path to that prosperity.

It is important to note that the use of cat exes doesn't mean less protection for the environment. It just means less redundant analysis and bureaucratic process. In fact, effective use of cat exes can enable BLM staff to spend less time behind a desk and more time in the field monitoring and inspecting. According to a study from the Western Organization of Resource Councils, an environmental advocacy group, BLM doubled the number of environmental inspections after the implementation of cat exes in 2006. A recent analysis by SWCA, a respected environmental consulting firm, finds that delays from just six oil and gas projects in Wyoming are preventing the creation of over 30,600 jobs, $2.6 billion in labor earnings, and $157 million in annual royalty and tax revenue. Those numbers are stark evidence of how redundant red tape can prevent jobs and revenue. Cat exes are one solution to that problem.

Thank you very much.

[The prepared statement of Ms. Sgamma follows:]

Statement of Kathleen Sgamma, Director of Government & Public Affairs, Western Energy Alliance (formerly IPAMS)

Mr. Chairman and Members of the Committee—thank you for the opportunity to appear before you today. Section 390 Categorical Exclusions (CX) are important tools for encouraging domestic energy production, thereby creating jobs, growing federal revenue and spurring American economic activity.

Western Energy Alliance (formerly the Independent Petroleum Association of Mountain States IPAMS) represents 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. Alliance members are small businesses and independent producers that operate on public lands in the West.

Our members are proud to produce 27% of America's natural gas and 14% of its oil production while disturbing only 0.07% of public lands. Our *Blueprint for Western Energy Prosperity* finds that by 2020 we could produce as much oil and natural gas in the West as the U.S. currently imports from Russia, Iraq, Kuwait, Saudi Ara-

bia, Venezuela, Algeria, Nigeria, and Colombia combined, while creating an additional 70,000 jobs and $3.5 billion in government revenue. We hope to achieve that potential if government red tape doesn't stand in the way.

Oil and natural gas development has a small and temporary impact on the land, and operators comply with thousands of very detailed regulatory requirements under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Endangered Species Act, National Historic Preservation Act, Occupational Safety & Health Act, Emergency Planning and Community Right to Know Act, Environmental Response, Compensation & Liability Act, and Toxic Substances Control Act, to name a few, as well as state and local regulations and numerous Bureau of Land Management (BLM) policies and procedures.

With the Energy Policy Act of 2005, Congress intended "to ensure jobs for our future with secure, affordable, and reliable energy." Section 390 CXs are an important part of achieving those goals by encouraging domestic oil and natural gas development in very limited ways. By eliminating the requirement for redundant environmental analysis in five specific circumstances in which the environmental impact is minimal, and/or in which oil and gas development was analyzed previously in a NEPA document, Congress hoped to create jobs and increase government revenue while encouraging domestic production. Companies must still comply with all other regulations when a CX is used.

Almost all the criticism directed at CXs has been about missing a layer of environmental analysis, no matter how redundant, as if oil and gas development is not highly and aggressively constrained and regulated. Despite the limited scope of Section 390 CXs and their success in reducing environmental impact, CXs have been under attack from day one. That criticism would be highly appropriate if CXs absolved companies from all environmental compliance, but they do not—they merely remove a redundant layer of National Environmental Policy Act (NEPA) analysis in specific situations where the impact is minimal or where environmental analysis has already been done.

A 2009 Government Accountability Office report (*Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development Under Section 390 of the Act,* GAO–09–872, September 2009) found that BLM regularly did not use CXs in many situations, even to the point that five BLM field offices simply refused to use them at all. However, GAO didn't highlight that breach of the law, or the impact on jobs, the economy and government revenue. Rather, GAO highlighted a very few examples where BLM incorrectly used a CX. While GAO recognized they were unintentional errors from implementing a new program that are easily corrected administratively, there was no systematic look at all the energy development and job creation prevented from the government's refusal to use CXs.

Where's the criticism of the government's failure to use CXs which discourages energy development? While there's coordinated outrage from the environmental lobby about the fact that one layer of redundant analysis has been removed, where's the loud response about the fact that government reluctance to utilize a legal tool has prevented economic activity and job creation? History has shown again and again that wealthy societies are best able to protect the environment, and poor countries are the ones with the most devastating environmental conditions. The best way to ensure we continue to improve our environment is to grow the economy and create high-paying jobs. American development of oil and natural gas is a proven path to that prosperity.

Developing oil and natural gas from federal lands is a very time consuming and expensive process compared to development on state and private lands. The normal regulatory requirements mentioned above are augmented with a lengthy federal bureaucratic process and requirements under the NEPA. NEPA requires detailed analysis of environmental impacts at several stages of the process—the land use planning process, leasing, seismic exploration, project planning, and permitting. NEPA analysis for large projects can take seven years, and even small projects of a few wells can be held up for a few years by analysis.

Furthermore, permitting times are extremely long for drilling federal wells. While states take about a month on average to process and approve a drilling permit, the federal government routinely takes six months to two years, depending on the field office. Timely permitting enables rigs to keep running, thus enabling companies to execute efficient development programs and create jobs. And each rig running creates about 125 jobs. When companies cannot get federal permits in a timely manner, they must move onto state and private lands or lay down rigs and send jobs elsewhere. Either way, the federal government has denied itself considerable royalty revenue.

CXs are a means to eliminate redundant analysis in certain circumstances. By using CXs, BLM can approve permits in a more timely manner, putting more people to work and creating government revenue. A recent analysis by SWCA, a respected environmental consulting firm that regularly conducts NEPA and other analysis for the federal government, finds that delays from just six oil and natural gas projects are preventing the creation of over 30,600 jobs, $2.6 billion in labor earnings and $157 in annual royalty and tax revenue in Wyoming alone.

However, this Interior Department has slowed development of oil and natural gas, and last year issued BLM Instruction Memorandum 2010–118 that rewrote the criteria for Section 390 CXs, rendering them virtually ineffective. Fortunately, Judge Nancy Freudenthal in Wyoming Federal District Court overturned the policy in our successful lawsuit. Western Energy Alliance is hopeful that as a result of her imposition of a nationwide injunction of IM 2010–118, BLM will again use CXs more effectively, thereby creating more jobs and economic growth.

The use of CXs doesn't mean less protection for the environment—it just means less redundant analysis and bureaucratic process. In fact, effective use of CXs can enable BLM and Forest Service staff to spend less time behind a desk pushing paper and more time in the field monitoring and inspecting. According to a study from the Western Organization of Resource Councils (WORC), an environmental advocacy group, the number of environmental inspections performed by BLM generally increased over the last decade until 2006 to 2008, when inspections more than doubled. It's no coincidence that the dramatic increase in BLM inspections corresponded with full implementation of CXs in 2006. Furthermore, CXs only remove the need for a redundant layer of NEPA analysis. They do not remove any other regulatory requirements or tools like BMPs and voluntary measures to protect natural resource values.

In conclusion, we can use limited, balanced tools like CXs to develop American oil and natural gas on public lands, or we can continue to make it more difficult for producers to operate on federal lands and forego economic activity and job creation. Thank you for the opportunity to testify today.

Response to questions submitted for the record by Kathleen Sgamma, Western Energy Alliance

Questions from Subcommittee Chairman Lamborn

Can you elaborate on the usual NEPA process and how exactly categorical exclusions streamline this process?

Attached is a flowchart from API showing the Standard Onshore Oil & Gas Leasing Process. This concisely shows all the points in the process that NEPA is conducted at.

Leasing Process (shown in Blue)

1) Actually, the first NEPA analysis is done during the Resources Management Planning before the leasing process can even be started, although it's shown in the flowchart under the blue leasing section. The Environmental Impact Statements (EIS) that are done along with RMPs can take several years, at least five years usually.
2) The second is a Master Leasing Plan (MLP) that is a new requirement as of May 17, 2010. BLM may determine that some areas should have an MLP, which will result in an amendment to an RMP. Although an MLP has not been completed yet, I estimate at least three years will be added to the process, since amendments to RMPs can also take several years.
3) If an MLP is not required, BLM conducts a leasing NEPA analysis, usually an EA. I believe this is largely redundant with the EIS done as part of the RMP. At the leasing stage it is not known what type of project might be proposed, the number of wells, infrastructure required and many other details, or even whether the lease parcel contains economic quantities of oil or gas. Therefore, the leasing EA is not site specific and largely just duplicates the work done for the RMP EIS.

APD Process (shown in Peach, the section under "BLM/FS Initiates NEPA Review").

4) In the flowchart, the project NEPA is included in the overall Application for Permit to Drill (APD) process, but it could be thought of as another full section of NEPA Project Approvals. Companies propose projects of a few wells to hundreds of thousands of wells. Smaller projects usually require an Environmental Assessment, and larger projects require an EIS document, both prepared according to NEPA. EAs are supposed to take about six months,

but there are many cases where they can take three to five years. EISs are supposed to take about three years, but many outstanding EISs are taking the government over seven years. Sometimes, even if a project EIS is in place, BLM may require further NEPA analysis that may result in an EA.

5) If an APD is submitted for a well within a Master Development Plan EA or project EIS, BLM makes a determination of NEPA adequacy and approves the APD. If not but there's NEPA from a land use plan or the well is from an existing pad, for example, a categorical exclusions (CX) should be issued.
6) If 4) or 5) are not applicable, BLM determines whether an EA or EIS is necessary, and begins to conduct that NEPA analysis. Often, BLM will require an EA even if the APD meets the criteria for a CX.

As you can see from the flowchart and the steps outlined above, there are up to six points at which NEPA analysis is conducted in the process. CXs are designed to eliminate NEPA analysis at simply one or two of those six points. In addition to NEPA, the flowchart shows many other steps that must be complied with such as cultural surveys under the National Historic Preservation Act, and consultation under the Endangered Species Act. Despite all the intricacies of the process illustrated by the flowchart, it simplifies other regulatory processes. Various actions required to comply with federal, state and local regulations, such as air and water permits are all grouped together in just one box.

Out of the entire multi-step process for operating on federal lands, CXs eliminate just one or two levels of NEPA, but not all the other regulatory requirements. The only instance where they may eliminate two levels of NEPA is very limited—in cases where an EIS completed as part of an RMP is less than five years old. That CX was crafted to take advantage of the years of effort that go into RMP EISs, which include analysis of what lands are appropriate for oil and gas development, but only for a limited time. In that case, a CX will eliminate site-specific NEPA

Do you have an approximation of the time saved in the permitting process?

Unfortunately the actual time saved is often opaque to industry because of generally long permitting times. BLM is not complying with notification requirements specified in Section 366 of the Energy Policy Act of 2005, so operators often don't know why their permits are taking so long. Often operators don't even know whether an APD was approved with a CX or if BLM conducted a single well EA even if the well met one of the criteria for a CX. We do know that even small EAs can take years and open companies to legal challenge under NEPA, so the time savings could be potentially significant. Many single well EAs are fairly perfunctory and do not take BLM lots of time, but even a small savings of time and paperwork should be welcome by an agency that struggles to meet all its obligations, especially at a time of tight budgets. CXs can help reduce the time spent pushing paper, and free up time for in-the-field monitoring.

Questions from Committee Ranking Member Markey

In 2005, the Bush administration published Instruction Memorandum No. 2005–247. This memorandum went through the exact same process within BLM as the 2010 Instruction memorandum. Under Judge Freudenthal's reasoning, would the 2005 instruction memorandum also be illegal since the BLM failed to undertake a formal rulemaking process with notice and comment pursuant to the Administrative Procedures Act (APA)?

Judge Freudenthal issued a very balanced judgement which was not meant to be so sweeping and expansive that it would require all instruction memoranda (IM) to undergo public notice and comment. If so, not just the original Bush Administration IM 2005–247 but all IMs issued by the Obama administration Interior Department would have to undergo public notice and comment.

One of the main points ruled on by the judge when she overruled the Obama administration's CX policy IM 2010–118 was whether it constitutes a "legislative" rule or an "interpretive" rule which can be adopted without public notice and comment. I quote directly from the judge's ruling

> "If a challenged agency action creates a 'legislative rule,' then full compliance with the APA's notice and comment processes is required. . .For the reasons that follow, the court agrees with WEA and concludes the issuance of the 2010 Instructions violated 5 U.S.C. §553 (requiring that legislative rules be issued only after public notice and an opportunity for comment)."

The reason the judge found IM 2010–118 to be legislative and not a standard interpretive rule was because it was an obvious rewrite of the plain language of Section 390 of EPAct. In her words:

". . .there is no path from Section 390 to the 2010 Instructions and in some instances there is no obvious consistency between Section 390 and the 2010 Instructions. As legislative rules, the Federal Respondents had no authority to issue the 2010 Instructions without public notice and an opportunity for comment."

Whereas there was a direct "path" from the statute to the guidance issued in IM 2005–247, there was no direct path in IM 2010–118 because the federal government simply rewrote the plain language of Section 390 which Congress had carefully crafted to be precise and limited in scope. This is the key difference and why IM 2005–247 does not need public notice and comment, nor do the majority of IMs issued under this and other administrations that conform to the laws passed by Congress.

Do you believe that the 2005 Instruction Memorandum was procedurally deficient and should also be repealed?

The 2005 IM was not procedurally deficient for the same reasons presented in the answer to the question immediately above—because it follows the plain language of the law. 2005–247 and the majority of IMs issued under this and other administrations that conform to the laws passed by Congress are not procedurally deficient and should not be repealed.

Mr. LAMBORN. Thank you for your testimony, and I think we have time for one more of the remaining two witness statements. No matter how we structured this, it was not possible to get either of the original panels done before the break, and we can't do the combined panel before the voting break, either. So we will come back. This is an important topic. Thank you for your indulgence while we go over there for 60 to 90 minutes. There is a lengthy series of votes, so it is probably closer to at least 60-plus minutes. So thank you for your patience while we do that.

We will hear one more witness, but when I hear the GAO witness at the end when we come back, I will want to hear the response to what Ms. Sgamma said about the report that was issued earlier.

So the next witness will be Mr. Coleman.

STATEMENT OF W. JACKSON COLEMAN, MANAGING PARTNER AND GENERAL COUNSEL, ENERGYNORTHAMERICA, LLC

Mr. COLEMAN. Thank you, Mr. Chairman, Ranking Member Holt, and members of the Subcommittee. My name is Jack Coleman, I am Managing Partner and General Counsel of EnergyNorthAmerica, an energy consulting firm in Washington, D.C., and Denver, Colorado. About 2 years ago I retired from the Federal Government after 27 years, the last 6 years of which was spent working for this Committee, and my last 2 years I was Republican General Counsel of the Committee. However, in 2005 with the passage of the Energy Policy Act, I was the Energy and Minerals Counsel for the Committee, and I was directly involved in the deliberations and the negotiations and drafting of Section 390, which became Section 390.

My work in the House followed 14 years as a Senior Attorney at the Interior Department, first as the Senior Attorney for Environmental Protection for the Department for about 3-1/2 years, and then Senior Attorney for Offshore Minerals.

In my written testimony I detailed the history of this provision. It started as a provision in H.R. 6, which passed the House on April 21st, 2005. It originated as a Member amendment in the markup of the Resources Committee. Congressman Peterson from

Pennsylvania put this forward as an amendment, and the staff and the Members of the Committee thought it was a very outstanding amendment, and we supported and worked toward its passage from that point.

There have been many, many, I think, misunderstandings unfortunately or maybe intentional misunderstandings or stated misunderstandings of this provision. The House passed it with seven categories. I think it is best to go through the history of how this was dealt with in the conference report. Staff in the House and Senate worked together to try to resolve differences between the House and Senate bills. If they were not able to resolve these differences at the staff level, then these differences were kicked up to what is called the Big Four, Gang of Four, whatever you want to call them, and that was the Chairman and Ranking Member of the Energy and Commerce Committee in the House and the Chairman and Ranking Member of the Senate Energy Committee. And so they were not able to get staff agreement on this provision that was in the House bill, and so it was moved to the four leaders of the conference.

This is where a tremendous amount of review took place. I was designated to be the staff person to represent the Committee on Resources in these discussions, and an attorney for Senator Bingaman represented the Democrat staff. We had basically a moot court frankly, several hours of discussion of the law back and forth in front of all of these two Congressmen and two Senators and with other staff present. This was, as I said, hours of discussion. Finally, the decision was made by these four leaders that a provision based on the House provision should be included in the conference report, and the Senate staffer and I were sent out of the room, told to try to come up with a negotiated agreement that we both could recommend back to the leaders, and that is what we did.

So we eliminated two of the provisions, two of the categories, cut back from seven to five, and there were some other changes that were made. As I stated in my written testimony, we went over every word, every word. If a word is in there, it is meant to be in there. If it is not in there, it is meant not to be there.

So that is what has been irritating to me, frankly, by the BLM's recent reinterpretation of this language and also the GAO's report. Both of them have done a disservice to the work of the Congress. Frankly, they seem to be thinking they can write what should have been. This was closely analyzed, and these words were determined to be, and one of the things I will point out, this is mandatory, the whole question of rebuttable presumption, it is a question as to whether or not the activity that you are proposing fits within the category. That is what can be rebutted. The whole idea, and I know there has been this discussion about extraordinary circumstances review. Let me point out, I have been a NEPA law practitioner since 1978 when I became a lawyer in the Army JAG Corps. I was the environmental law officer for Fort Meade, Maryland. This is not something I am new to. Categorical exclusions that are administrative have an extraordinary circumstances review. That is the way it is under the NEPA regulations. That is not necessary for a statutory categorical exclusion that Congress decides to set up, and

no extraordinary circumstance review was included in this statute. So people should not read into this statute what is not there.

Thank you for the opportunity to testify.

[The prepared statement of Mr. Coleman follows:]

Statement of W. Jackson Coleman, Managing Partner and General Counsel, EnergyNorthAmerica, LLC

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 pursu-

ant 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.

Response to questions submitted for the record by W. Jackson Coleman, Managing Partner and General Counsel, EnergyNorthAmerica, LLC

Questions from Chairman Doug Lamborn

1. Mr. Coleman, can you explain for the Committee the permitting, economic, and domestic energy production scenario the Committee was facing in 2005 that led to the Committee putting the categorical exclusions in EPAct and if you believe these provisions have improved the situation?

Answer: The Committee has long known that lands owned by the Federal Government, both onshore and offshore, are endowed with vast quantities of oil and natural gas. I reference the Committee to a long line of resource assessments and reports by the United States Geological Survey and the former Minerals Management Service which document these resources. These assessments and reports document resource numbers which are limited, however, by the lack of sufficient seismic data upon which to provide higher resource assessment volumes. Given the great energy needs of the Nation and the large contribution that these Federal lands can provide to help meet these energy needs, the Congress has acted a number of times to expedite energy production on these lands, while taking care to guard against unwarranted impacts on the environment.

In 2005, the Committee was cognizant of a number of things which caused the Committee to initiate enactment of statutory NEPA categorical exclusions. First, for a number of years prior to 2005 the relationship of the Nation's supply of natural gas and the demand for it had become very tight. This caused swings in prices with a significant upward trend. Second, environmental groups had become very aggressive in challenging leasing and permits to drill for oil and gas exploration and production on public lands, even though expansive environmental reviews had been conducted for leasing and permitting, and much greater environmental protections had been placed on such exploration and production. This was having an adverse effect on the potential for energy production from public lands, particularly for natural gas, thereby unnecessarily exacerbating the natural gas price upward trend. Environmental groups almost always included a challenge to NEPA review in their challenges. Third, the frustration level among Members of Congress and Committee staff had continued to rise for several years prior to 2005. More and more the desire to effect rational policy changes that would increase energy production from public lands, while providing for essential environmental protections, had grown.

So, in 2005 the Committee included a number of reform provisions in the House precursor to the Energy Policy Act of 2005 having the objective of expediting leasing and permitting of all types of public lands energy resources. One of them was Section 390—NEPA statutory categorical exclusions related to oil and gas production. As stated in my testimony at the hearing, the purpose of these categorical exclusions was to describe categories of activities for which significant impacts would not reasonably be foreseeable, and therefore no further environmental analysis would be necessary. This action would expedite production in a number of ways—shortening the time required for issuing a permit and eliminating litigation about the adequacy of environmental reviews.

Prior to the decision of the current Administration not to implement Section 390 as written by the Congress, it had significantly achieved the objectives that the Committee had for it. However, the Administration's implementation of the provision had in essence repealed it.

Mr. LAMBORN. OK, thank you for your testimony. I stated earlier we will be in recess for 60 to 90 minutes. Thank you for your patience, and we will see you soon. This is such an important subject, we will have multiple rounds of questioning. We will be in recess.

[Recess.]

Mr. LAMBORN. The Subcommittee will please come back to order. I want to thank the witnesses and everyone else in attendance for your patience while we did that series of votes. It was lengthy, like I thought it was. But we should be done with any interruptions. So we will finish with our testimony and then have time for a lot of questions. I hope a lot of Members can rejoin us. I apologize for the delay and how some had to now start their travel plans, going back to their families and their districts. But those of us who are here are going to have a lot of questions because this is such an important topic.

So now we will hear from the gentleman from the GAO and you may continue.

STATEMENT OF MARK GAFFIGAN, MANAGING DIRECTOR, NATURAL RESOURCES AND ENVIRONMENTAL DIVISION, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; ACCOMPANIED BY JEFF MALCOLM, ASSISTANT DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. GAFFIGAN. Chairman Lamborn, thank you. And with 10 minutes to spare, let me say good morning. I won't think of myself so much as being the last batter but maybe delude myself with, you have saved the best for last. Thank you.

I am pleased to be here to discuss Section 390, categorical exclusions, or cat exes, for oil and gas development. My testimony today is based on our 2009 report on this issue and some notable events since then; namely, BLM's subsequent response to our report's recommendations and some recent court decisions.

In 2009, as you pointed out at the beginning, we have reported that BLM had used the Section 390 cat exes to approve about 6,100 of the 22,000 applications that had come through between Fiscal Year 2006 and Fiscal Year 2008. That is about 28 percent of the whole total. BLM reported benefits of increased efficiency that varied across offices depending on a number of different factors, but those benefits were not easy for us to quantify. But we did find that not unexpectedly for a new law there were some instances of noncompliance with either the law or agency guidance. Now our findings reflect what appear to be honest mistakes with a new law. And while many were technical in nature, they may thwart NEPA's twinnings of ensuring that BLM and the public are fully informed of the potential environmental impact of oil and gas development.

We noted that a lack of clarity in the law and lack of BLM guidance and oversight contributed in large part to the inconsistencies that we found and raised cautions amongst all the stakeholders, including industry, environmental groups and BLM. Regarding the law, four key questions were raised about Section 390 CXs: Are they subject to extraordinary circumstances? Two, are they mandatory? And Ms. Sgamma was talking about whether GAO noted violations of the use of these as not being mandatory. The reason we did not do that is it wasn't clear to us that the law said this was mandatory.

The third question was, what does rebuttable presumption mean? And fourth, what level of public disclosure is required?

Regarding the BLM guidance and oversight, the concerns included three things: One, the need to issue more detailed and explicit guidance for some of the terminology that is undefined in the law; two, the need for some standardized guidance, including some documentation required to justify the categorical exclusion use; and, three, the need for BLM to implement an oversight plan for ensuring compliance with the law and guidance in a consistent manner.

Accordingly, our report suggested that Congress might want to clarify the law and resolve the questions raised. In addition, we recommend that BLM issue more detailed guidance, provide some standard templates or checklists for each of the categorical exclusions that at a minimum specifies what kind of justification is re-

quired to be documented, and last that BLM develop an oversight plan.

Since our report 2 years ago, despite efforts to address the need for clarity in the law and BLM attempts to provide additional guidance, the bottom line is that today the situation is unchanged. The law, with its questions, remains unaltered. And BLM's attempt to provide further guidance in a May 2010 instruction memorandum has been recently blocked by a court decision that held that this guidance constituted a regulation that was adopted without using proper procedures. In short, today we are right back where we were 2 years ago when we issued our report.

In conclusion, no matter where it occurs, oil and gas development can be a high risk, high reward endeavor with numerous potential benefits and costs for the economy and ecosystems. For years oil and gas development under Federal jurisdiction has faced challenges in its efforts to strike the balance between development and environmental protection. While the challenges that may be brought are largely out of its control, the Federal Government can control the quality and integrity of its permitting environmental analysis process. Uncertainty and questions about this process only increases the vulnerability to challenges from all sides. Anything that can be done to reduce this uncertainty and resolve questions decreases this vulnerability and enhances the government's credibility among all stakeholders, as it strives to achieve the balance between oil and gas development and environmental protection.

Mr. Chairman, thank you for your time. This concludes my opening statement. I am happy to answer any questions you might have.

[The prepared statement of Mr. Gaffigan follows:]

Statement of Mark Gaffigan, Managing Director, Natural Resources and Environment, United States Government Accountability Office (GAO)

Chairman Lamborn, Ranking Member Holt, and Members of the Subcommittee: I am pleased to be here today to participate in your hearing on the categorical exclusions established by section 390 of the Energy Policy Act of 2005. As you know, oil and natural gas production from federal lands is critical to meeting our nation's energy needs. From fiscal year 2006 through fiscal year 2010, the Department of the Interior's Bureau of Land Management (BLM) approved more than 30,600 new oil and gas drilling permits across 24 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]

Under NEPA, federal agencies evaluate the likely environmental effects of projects they are proposing by preparing either 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 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. [2] The agency may instead approve projects that fit within the relevant category by using one of the predetermined administrative cat-

[1] Pub. L. No. 91-190, 83 Stat. 852 (1970). 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. See, for example, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). It does not, however, require any particular substantive result. See, for example, Department of Transportation v. Public Citizen, 541 U.S. 752, 756 (2004).

[2] Throughout this testimony, we refer to categorical exclusions developed under the NEPA regulations as administrative categorical exclusions.

egorical exclusions, rather than carrying out a project-specific environmental assessment or environmental impact statement.

To address long-term energy challenges, Congress enacted the Energy Policy Act of 2005, in part to expedite oil and gas development within the United States.[3] This law authorizes BLM, for certain oil and gas activities, to approve projects without preparing the new environmental analyses that would normally be required by NEPA. Section 390 of the Energy Policy Act of 2005 established five categorical exclusions specifically for oil and gas development.[4] These categorical exclusions—referred to in this testimony 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. For a project to be approved using an administrative categorical exclusion, the agency must determine whether any extraordinary circumstances exist under which a normally excluded action or project may have a significant effect. As originally implemented, projects approved with section 390 categorical exclusions were not subject to any screening for extraordinary circumstances, according to BLM officials.[5]

In September 2009, we reported on BLM's first 3 years of experience—fiscal years 2006 through 2008—using section 390 categorical exclusions.[6] My testimony today will summarize the finding of our September 2009 report, along with some recent updates. Specifically, I will discuss (1) the extent to which BLM 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 used section 390 categorical exclusions in compliance with the Energy Policy Act of 2005 and internal BLM guidance; (3) key concerns, if any, associated with section 390 categorical exclusions; and (4) how BLM has responded to the recommendations in our September 2009 report and other recent developments.

For our report, we reviewed relevant laws, regulations, and Interior and BLM guidance. We also reviewed BLM headquarters and field office documents and data for each fiscal year from 2006 through 2008. 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. We also interviewed representatives from industry, historic preservation groups, and environmental groups about benefits and concerns—both actual and potential—associated with section 390 categorical exclusions. Other recent developments are based on our review of court decisions that have been decided since we issued our September 2009 report. The report was a performance audit conducted in accordance with generally accepted government auditing standards. A detailed description of our scope and methodology in presented in appendix I of the September 2009 report.

Background

Under the Federal Land Policy and Management Act of 1976, as amended (FLPMA),[7] BLM manages about 250 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 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 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; 45 district offices; and 128 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. Thirty BLM field offices, located primarily in the mountain West, were involved in oil and gas development.

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[3] Pub. L. No. 109-58, 119 Stat. 594 (2005).

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

[5] Bureau of Land Management, ″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).

[6] GAO, Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act, GAO-09-872 (Washington, D.C.: Sept. 16, 2009).

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

To drill for oil or natural gas on leased lands, a company must submit an APD to BLM.[8] 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.[9] 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 changing the location of a well, adding an additional pipeline, or adding remote communications equipment.

Interior and BLM have administrative categorical exclusions in place for numerous types of activities, such as constructing nesting platforms for wild birds and constructing snow fences for safety. To use such an administrative categorical exclusion in approving a project on BLM land, 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 extraordinary circumstances exist, BLM guidance precludes staff from using an administrative categorical exclusion for the project.

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

"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."[10] [emphasis added]

Subsection (b) outlines five new categories of activities to be considered categorical exclusions. These section 390 categorical exclusions (referred to in this testimony 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's original guidance provided that the agency can 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. BLM guidance still directs staff to document their decision and rationale for using a specific section 390 categorical exclusion. Furthermore, BLM guidance directed 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.

BLM Field Offices Used Section 390 Categorical Exclusions for More Than One-Quarter of Their APDs, Although Benefits of Use Varied Widely across Field Offices

In September 2009, we reported 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

[8] 43 C.F.R. § 3162.3-1(c).

[9] Companies 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.

[10] Pub. 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, our September 2009 report examined only BLM's use of section 390 categorical exclusions.

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. 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. BLM also used section 390 categorical exclusions to approve more than 800 nondrilling projects from fiscal year 2006 through fiscal year 2008. These approvals were for a wide range of activities, such as changing 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.

The vast majority of BLM officials we spoke with told us that using section 390 categorical exclusions expedited the application review and approval process, but 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. BLM officials also 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 were regularly used to approve projects in areas where sensitive environmental or cultural concerns were few (e.g., no threatened or endangered species, or limited cultural resources in the area), where the resource specialists were familiar with the location of the proposed action, or where the proposed project was not unusual or was likely to have minimal impact on the local environment. Additionally, field office policies could contribute to how often section 390 categorical exclusions were used. The differences in office policies result from field office managers' comfort with the use of section 390 categorical exclusions and their interpretations of appropriate use.

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 was difficult. In field offices where section 390 categorical exclusions were seldom used to approve APDs or nondrilling actions, officials told us that a typical section 390 categorical exclusion approval document saved a few hours of total staff time. In contrast, in field offices where section 390 categorical exclusions were used more often, the time savings were cumulatively more significant, although officials could not quantify them. 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.

Industry officials with whom we spoke also agreed that BLM's use of section 390 categorical exclusions had generally decreased APD-processing times and that this increased efficiency was more pronounced in some field offices than in others. Acknowledging that the type of development and the availability of NEPA documents were both critical factors, they also stressed that differences in field office policies, field office operations, and field management personalities generally influenced how readily a given BLM field office used section 390 categorical exclusions. For example, according to industry officials, some field offices were conservative and cautious and therefore reluctant to use section 390 categorical exclusions if even minimal environmental or cultural resource concerns existed. This tendency ran counter to what some industry officials told us was their interpretation of the law—namely, that they believed that section 390 categorical exclusions should be used whenever a project meets the required conditions. Industry officials told us that in some cases BLM was overly cautious in applying section 390 categorical exclusions, in part because BLM feared litigation from environmental groups. Industry officials commented on the lack of consistency among BLM field offices in how section 390 categorical exclusions were used but overall told us that section 390 categorical exclusions were a useful tool and have contributed to expedited application processing. They applauded the exclusions for reducing redundant and time-consuming NEPA documentation and making APD application processing more predictable and flexible.

BLM's Use of Section 390 Categorical Exclusions from Fiscal Year 2006 through Fiscal Year 2008 Often Did Not Comply with Either the Implementing Statute or Agency Guidance

In September 2009, we reported that 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. Specifically, we found six types of violations of the Energy Policy Act of 2005 and fives types of noncompliance with BLM guidance (see table 1).

Table 1: Types of Violations of the Energy Policy Act of 2005 and BLM Guidance

Six types of violations of section 390 of the Energy Policy Act of 2005	Five types of noncompliance with BLM guidance
• Using a section 390 CX2 or CX3 to approve more than one well	• Using section 390 CX1 to approve more than one well
• Using a section 390 CX2 or CX3 to approve an activity other than drilling an oil or gas well	• Using incorrect expiration dates for activities approved with a section 390 CX2 or CX3
• Drilling a new well approved using a section 390 CX2, CX3, or CX4 beyond the applicable 5-year time frame	• Failing to include required text defining expiration dates for APDs or nondrilling actions approved using section 390 CX2, CX3, or CX4
• Approving a new oil or gas well at a site that had not yet been drilled	• Applying the extraordinary circumstances checklist for section 390 categorical exclusion decisions
• Using section 390 CX5 for ineligible activities	• Lack of adequate justification to ascertain compliance with use of section 390 CX1, CX2 CX3, or CX4
• Approving a section 390 CX3 without sufficient supporting NEPA documentation	

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.

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 reflected 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 be taken seriously. In some instances, violations we found may have thwarted NEPA's twin aims of ensuring that both BLM and the public were 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. The projects would likely have been approved, but the specific location and conditions of approval might have differed, 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, contributed to the violations of law and noncompliance with BLM's existing guidance. At the time of our report, BLM had provided several key guidance documents; we found, however, that this guidance did not contain the specificity and examples needed to clearly direct staff in the appropriate use and limits of section 390 categorical exclusions. Specifically, BLM's guidance at the time said 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 modifications to existing APDs through "sundry notices." Furthermore, BLM headquarters and state offices we spoke with had generally not provided any oversight or review of the field offices' actions in using section 390 categorical exclusions that could have ensured compliance with the law or BLM guidance.

Lack of Clarity in the Law and in BLM Guidance Raised Serious Concerns about Section 390 Categorical Exclusions

We reported in September 2009 that the lack of clarity in section 390 of the Energy Policy Act of 2005 and in BLM's implementing guidance led to serious concerns on the part of industry, environmental groups, BLM officials, and others about when and how section 390 categorical exclusions should be used to approve oil and gas development. Specifically, these concerns included the following:

- Key elements of section 390 of the Energy Policy Act of 2005 were undefined, leading to fundamental questions about what section 390 categorical exclusions were and how they should be used. This lack of direction left these elements open to differing interpretations, debate, and litigation, leading to serious concerns that BLM was using section 390 categorical exclusions in too

many—or too few—instances. BLM officials, environmental groups, industry groups, and others raised serious concerns with the law as a whole. These concerns related to four key elements: (1) the definition of "categorical exclusion" and whether the screening for extraordinary circumstances was required, (2) whether the use of section 390 categorical exclusions was mandatory or discretionary, (3) the meaning of the phrase "rebuttable presumption," and (4) the level of public disclosure required for section 390 categorical exclusions.

- The law's descriptions of the five types of section 390 categorical exclusions prompted more specific concerns about how to appropriately use one or more of the five types of section 390 categorical exclusions. These concerns related 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.
- 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 had not provided clear or complete guidance. Specifically, the ambiguous terms included (1) "individual surface disturbances" under section 390 CX1, (2) "maintenance of a minor activity" under section 390 CX5, (3) "construction or major renovation or [sic] a building or facility" under section 390 CX5, (4) "location" under section 390 CX2, and (5) "right-of-way corridor" under section 390 CX4. Vague or nonexistent definitions of key terms in the law and BLM guidance led to varied interpretations among field offices and concerns about misuse and a lack of transparency.

In September 2009, we reported that 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 caused confusion among BLM officials, industry, and the public over what activities qualified for section 390 categorical exclusions. As a result, we suggested that Congress consider amending section 390 to clarify and resolve some of the key issues that we identified, 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. In addition, to improve BLM field offices' implementation of section 390 categorical exclusions, we recommended that BLM take the following three actions:

- issue detailed and explicit guidance addressing the gaps and shortcomings in its 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.

BLM Took Actions in Response to Litigation and Our Report, but These Actions Have Been Affected by a Recent Court Decision

While we were working on our September 2009 report, 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" was in dispute in a lawsuit in federal court.[11] In Nine Mile Coalition v. Stiewig, environmental groups sued BLM, alleging that the phrase meant that BLM was required to avoid using a section 390 categorical exclusion in approving a project where extraordinary circumstances were present. BLM settled the case in March 2010, agreeing, among other things, to issue a new instruction memorandum stating that the agency would not use section 390 categorical exclusions where extraordinary circumstances were present.

In May 2010, BLM issued "Instruction Memorandum No. 2010–118,"[12] which was the first in a series of guidance documents BLM planned to issue to address the recommendations in our September 2009 report. BLM's May 2010 instruction memorandum announced several key reforms to the way BLM staff can use section

[11] Nine Mile Canyon Coalition v. Stiewig, Civ. No. 08-586, D. Utah (filed August 6,2008).

[12] Bureau of Land Management, ″Instruction Memorandum No. 2010-118: Energy Policy Act Section 390 Categorical Exclusion Policy Revision″ (May 17, 2010).

390 categorical exclusions. These reforms substantially addressed the gaps and shortcomings in BLM's guidance that we identified in our report, directing that, for example, section 390 CX2 or CX3 no longer be used to approve drilling wells after the law's allowed 5-year time frame or that section 390 CX3 not be used to approve drilling a well without sufficient supporting NEPA documentation. The memorandum explicitly identified the types of NEPA documents needed to adequately support the use of section 390 categorical exclusions to approve new wells and directed that any supporting NEPA analysis must be specific to the proposed drilling site. The memorandum also directs BLM field offices to ensure that all oil and gas development approved with a section 390 categorical exclusion conform to the analysis conducted in the supporting land use plan and come within the range of environmental effects analyzed in the plan and associated NEPA documents. In addition, the May 2010 instruction memorandum implemented the settlement in Nine Mile Coalition v. Stiewig by requiring BLM field offices to screen for the presence of extraordinary circumstances—such as for cumulative impacts on air quality or critical habitat—whenever considering the use of a section 390 categorical exclusion.

According to BLM officials, the agency developed a second instruction memorandum in 2011 to address our recommendation that it standardize templates and checklists its field offices use in approving each of the five types of section 390 categorical exclusions to specify, at a minimum, the documentation required to justify their use. This draft second instruction memorandum was undergoing review by the department when, on August 12, 2011, a decision was reached in Western Energy Alliance v. Salazar.[13] In this case, an oil and gas trade association sued BLM, alleging, among others, that the agency issued its May 2010 instruction memorandum without following proper rule-making procedures and that the instruction memorandum's provision concerning extraordinary circumstances violated section 390. The court held that the instruction memorandum constituted a regulation that BLM adopted without following proper rule-making procedures, and the court issued a nationwide injunction blocking implementation of the memorandum. The court did not address whether the instruction memorandum was consistent with section 390; neither did it address the meaning of the phrase "rebuttable presumption" in section 390. According to a BLM official, the ruling has prevented BLM from implementing the parts of the May 2010 instruction memorandum directly related to extraordinary circumstances and the use of section 390 CX2 and CX3 and also called into question the issuance of the second instruction memorandum aimed at further addressing our recommendations.

In conclusion, it is now uncertain what actions BLM may take in response to the most recent court decision. These actions could include, but are not limited to, moving forward and issuing the May 2010 instruction memorandum as a regulation or possibly appealing the decision.

Chairman Lamborn, Ranking Member Holt, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to answer any questions that you may have at this time.

GAO Contacts and Staff Acknowledgments

For further information about this testimony, please contact Mark Gaffigan or Anu K. Mittal at (202) 512–3841 or gaffiganm@gao.gov and mittala@gao.gov, respectively. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. 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 testimony.

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[13] Civ. No. 10-237F (D. Wyo. 2011).

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GAO Highlights

September 9, 2011

ENERGY POLICY ACT OF 2005

BLM's Use of Section 390 Categorical Exclusions for Oil and Gas Development

Why GAO Did This Study

The Energy Policy Act of 2005 was enacted in part to expedite domestic 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 under the National Environmental Policy Act of 1969 (NEPA) when approving certain oil and gas activities. Numerous questions have been raised about how and when BLM should use these section 390 categorical exclusions. In September 2009, GAO reported on BLM's first 3 years of experience—fiscal years 2006 through 2008—using section 390 categorical exclusions.

This testimony is based on GAO's September 2009 report (GAO–09–872) and updated with information on court decisions that have been reached since the report was issued. The testimony focuses on (1) the extent to which BLM used section 390 categorical exclusions and the benefits, if any, associated with their use; (2) the extent to which BLM complied with the Energy Policy Act of 2005 and agency guidance; (3) key concerns, if any, associated with section 390 categorical exclusions; and (4) how BLM has responded to GAO's recommendations and other recent developments. For its September 2009 report, GAO analyzed a nongeneralizable random sample of 215 section 390 categorical exclusion decision documents from all BLM field offices that used section 390 categorical exclusions and interviewed agency officials and others.

GAO is making no new recommendations at this time.

What GAO Found

GAO's analysis of BLM field office data showed that section 390 categorical exclusions were used to approve almost 6,900 oil-and-gas-related activities from fiscal year 2006 through fiscal year 2008. Nearly 6,100 of these categorical exclusions were used for drilling permits and the rest for other nondrilling activities. Most BLM officials GAO spoke with said that section 390 categorical exclusions increased the efficiency of certain field office operations, but it was not possible to quantify these benefits.

GAO reported that BLM's use of section 390 categorical exclusions through fiscal year 2008 often did not comply with either the law or BLM's guidance. First, GAO found several types of violations of the law, including approving projects inconsistent with the law's criteria and drilling a new well after mandated time frames had lapsed. Second, GAO found numerous examples where officials did not correctly follow agency guidance, most often by failing to adequately justify the use of a categorical exclusion. A lack of clear guidance and oversight contributed to the viola-

tions and noncompliance. Many instances of noncompliance were technical in nature, whereas others were 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.

In September 2009, GAO reported that a lack of clarity in section 390 and BLM's guidance had caused industry, environmental groups, BLM officials, and others to raise serious concerns about the use of section 390 categorical exclusions. First, fundamental questions about what section 390 categorical exclusions were and how they should be used led to concerns that BLM might have been using these categorical exclusions in too many—or too few—instances. Second, specific concerns were raised about key concepts underlying the law's description of certain section 390 categorical exclusions. 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 led to varied interpretations among field offices and concerns about misuse and a lack of transparency. As a result, GAO suggested that Congress may want to consider amending the act to clarify section 390, and GAO recommended that BLM clarify its guidance, standardize decision documents, and ensure compliance through more oversight. The Department of the Interior concurred with GAO's recommendations.

In May 2010, in response to a court settlement and GAO's recommendations, BLM issued a new instruction memorandum substantially addressing the gaps and shortcomings in BLM's guidance that GAO had identified. In addition, BLM was developing a second instruction memorandum to address GAO's recommendation that it standardize decision documents when, on August 12, 2011, a decision was reached in *Western Energy Alliance v. Salazar*. The court held that the May 2010 instruction memorandum constituted a regulation that BLM adopted without using proper rulemaking procedures and issued a nationwide injunction blocking the memorandum's implementation. According to a BLM official, the ruling has prevented BLM from implementing key parts of the memorandum and called into question the issuance of the second memorandum aimed at further addressing GAO's recommendations.

Response to questions submitted for the record by Mark Gaffigan, Managing Director, Natural Resources and Environment, GAO

Questions for the Record Submitted by Ranking Member Edward J. Markey

Question 1: During the period between now and when the rulemaking is complete, BLM must now revert to the Bush Administration's 2005 policy on categorical exclusions. What might be the implications of returning to the Bush Administration's policy? Will it lead to uncertainty and inconsistency among BLM field offices regarding the implementation of Section 390?

GAO Response:

In the absence of the clarifying guidance and templates that we recommended in our September 2009 report,[1] and in the absence of clarifying amendments to section 390 of the Energy Policy Act of 2005, the implementation of section 390 categorical exclusions will likely continue to raise the same questions and concerns that we identified in our report. We reported that BLM field offices had frequently implemented section 390 categorical exclusions in a manner inconsistent with the law and BLM's 2005 guidance. We recommended that BLM issue additional guidance and conduct vigilant oversight to ensure that section 390 categorical exclusions are used appropriately—neither over- nor under-used.

Question 2: Will going back to the Bush Administration's policy in the interim lead to the possibility of additional habitat fragmentation or harm to wildlife?

GAO Response:

The environmental effects of oil and gas development can vary based on a number of site-specific factors. For example, adding a new well to an existing well-pad is unlikely to cause additional habitat fragmentation or harm to wildlife. In contrast, drilling a well in a new location could possibly lead to additional habitat fragmentation or harm to wildlife. Going back to BLM's 2005 guidance on the use of section

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[1] GAO, *Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act,* GAO–09–872 (Washington, D.C.: Sept. 16, 2009).

390 categorical exclusions, however, may not have a substantive affect on habitat fragmentation or wildlife because as we reported in September 2009, according to BLM officials the applications for permit to drill (APD) not approved using a section 390 categorical exclusion would likely have been approved under BLM's regular approval process following the National Environmental Policy Act (NEPA).

Question 3: Could returning to the Bush Administration's Section 390 policy make it more likely that there could be additional damage to Native American cultural sites throughout the West?

GAO Response:

As stated above, the environmental effects of oil and gas development can vary based on a number of site-specific factors. An important factor in this case would be the level of official status or recognition that a particular Native American cultural site may have, if any. We reported in September 2009 that 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. BLM's overturned May 2010 instruction memorandum directed BLM field office staff to screen for the presence of extraordinary circumstances—such as significant impacts on (1) such natural resources and unique geographic characteristics as historic or cultural resources and (2) properties listed, or eligible for listing, on the National Register of Historic Places—whenever considering the use of a section 390 categorical exclusion.[2] The overturned guidance sought to prevent the use of a section 390 categorical exclusion when an extraordinary circumstance was present.

Question 4: The GAO found that three field offices—the Pinedale, Wyoming office, the Farmington, New Mexico office, and the Vernal, Utah office—accounted for almost two-thirds of section 390 categorical exclusions used to approve APDs. In these three areas, the Environmental Protection Agency found that ground level ozone levels exceeded EPA air quality standards in these three areas. Could returning to the Bush Administration's 2005 Section 390 policy lead to adverse air quality impacts where cumulative impacts are not analyzed?

GAO Response:

Yes. We reported in September 2009 that 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. We reported that environmental groups and government agencies alike had raised concerns that section 390 categorical exclusions exacerbate air quality problems and threats by not subjecting projects to screening for extraordinary circumstances such as cumulative impacts. To the extent that new decisions by BLM to approve APDs with section 390 categorical exclusions do not consider cumulative impacts such as air quality, the concerns we cited in our report would persist. Moreover, as we noted in our report, 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. Without the additional guidance we recommended, the potential for similar errors would persist.

Question 5: Given the ambiguities in Section 390's statutory language, would it be important for BLM to develop a consistent policy that allows for the consideration of extraordinary circumstances such as the cumulative impacts of drilling?

GAO Response:

We have not taken position on whether the use of section 390 categorical exclusions should be subject to a screening for the presence of extraordinary circumstances. However, this issue is subject to interpretation and, as our September

[2] Bureau of Land Management, "Instruction Memorandum No. 2010–118: Energy Policy Act Section 390 Categorical Exclusion Policy Revision" (May 17, 2010). On August 12, 2011, in a decision in the Western Energy Alliance v. Salazar case, the court held that the instruction memorandum constituted a regulation that BLM adopted without following proper rule-making procedures, and the court issued a nationwide injunction blocking implementation of the memorandum. Civ. No. 10–237F (D. Wyo. 2011).

2009 report noted, there are conflicting interpretations of section 390 of the Energy Policy Act of 2005 with respect to this issue. Furthermore, in our report we suggested that Congress should consider amending section 390 to clarify and resolve some of the key issues that we identified in the report, including, but not limited to, clearly specifying whether section 390 categorical exclusions apply even in the presence of extraordinary circumstances.

Question 6: Another concern identified by GAO regarding Section 390 was the large amount of variation among BLM field offices in how they each implemented this section. Do you think it's important to standardize the application of Section 390 as part of BLM's new rule?

GAO Response:

Yes. BLM field offices should be consistently implementing section 390 of the Energy Policy Act of 2005 in accordance with the law and BLM's internal agency guidance. Specifically, in our September 2009 report, we recommended that BLM

- issue detailed and explicit guidance that addresses the gaps and shortcomings in its 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.

Question 7: Please explain the problems BLM has had in interpreting each of the five categorical exclusions contained in Section 390 due to ambiguities in the statutory language of the Act.

GAO Response:

Section 390 of the Energy Policy Act of 2005 authorizes BLM to forgo environmental assessments and environmental impact statements for oil and gas projects under certain circumstances. Specifically, subsection (b) outlines five new categories of activities to be considered categorical exclusions. These section 390 categorical exclusions (which we refer to 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."

We reported in September 2009 that the lack of clarity in section 390 of the Energy Policy Act of 2005 and in BLM's implementing guidance led to serious concerns on the part of industry, environmental groups, BLM officials, and others about when and how section 390 categorical exclusions should be used to approve oil and gas development. Specifically, some of those concerns included the following:

- *The law's descriptions of the five types of section 390 categorical exclusions prompted concerns about how to appropriately use one or more of the five types of section 390 categorical exclusions.* These concerns related 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.
- *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 had not provided clear or complete guidance. Specifically, the ambiguous terms included (1) "in-

dividual surface disturbances" under section 390 CX1, (2) "maintenance of a minor activity" under section 390 CX5, (3) "construction or major renovation or [sic] a building or facility" under section 390 CX5, (4) "location" under section 390 CX2, and (5) "right-of-way corridor" under section 390 CX4. Vague or nonexistent definitions of key terms in the law and BLM guidance led to varied interpretations among field offices and concerns about misuse and a lack of transparency.

Question 8: Please explain the difficulties in enacting Section 390 of the Energy Policy Act with respect to the phrase "subject to rebuttable presumption"? How should a BLM field office decide whether a rebuttable presumption exists if that office cannot consider extraordinary circumstances?

GAO Response:

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" was in dispute in a lawsuit in federal court during the preparation of our report.[3] The court in the *Nine Mile* case did not reach a decision on this issue, but the government still could appeal the ruling. Accordingly we are not in a position to interpret this language.

However, in terms of the "rebuttable presumption" language, we reported in September 2009 that it was unclear what presumption was rebuttable and how that presumption was to be rebutted. Consequently, we stated that Congress should consider amending section 390 to clarify and resolve some of the key issues identified in our report, including, but not limited to clarifying what the phrase "rebuttable presumption" means and how BLM must implement it in the context of section 390.

Moreover, in our September 2009 report we noted that the language in a House version of the bill would have specifically exempted from additional NEPA analysis activities similar to those meeting the conditions for a section 390 categorical exclusion—meaning that use of the new provisions would have been mandatory. The law as enacted, however, contained no such specific exclusion, and instead included the rebuttable presumption language.[4] Whatever this language means, it certainly differs from the mandatory exemption language that existed in the House bill.

Question 9: During its investigation, GAO discovered that BLM had actually used Section 390 categorical exclusion over 6,100 times, while BLM believed that it had only used these exclusions about 5,000 times. Has BLM implemented a system yet to fully track the uses of these categorical exclusions?

GAO Response:

We are not aware that BLM has implemented such a system.

Question 10: Please explain the benefits of a standardized checklist for all BLM offices to follow with respect to these categorical exclusions? Do you believe that BLM could still develop a standardized checklist on how to use Section 390 exclusions?

GAO Response:

As we stated above in our response for Question 6, we believe BLM field offices should be consistently implementing section 390 of the Energy Policy Act of 2005 in accordance with the law and BLM's internal agency guidance. In our September 2009 report, we recommended that BLM

- issue detailed and explicit guidance that addresses the gaps and shortcomings in its 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.

We still believe that it is important that BLM continue to pursue implementing these recommendations.

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[3] Nine Mile Canyon Coalition v. Stiewig, Civ. No. 08–586, D. Utah (filed August 6, 2008).

[4] During 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).

Question 11: The 2006 BLM guidance did not address the documentation needed to support the use of a section 390 categorical exclusion or even whether BLM field offices had to disclose how often these categorical exclusions were used. What did GAO recommend with respect to documenting the use of these categorical exclusions?

GAO Response:

With regard to documenting the use of section 390 categorical exclusions, we recommended in our September 2009 report that BLM provide standardized templates or checklists for each of the five types of section 390 categorical exclusions, which would specify, at a minimum, what documentation is required to justify their use.

Question 12: GAO also recommended the development of a BLM oversight plan to ensure compliance with EPACT, NEPA, and agency guidance documents. Has BLM done this yet?

GAO Response:

As far as we know, BLM has not yet developed an oversight plan as we recommended in our September 2009 report. As we noted in our testimony,[5] BLM was in the process of developing a second instruction memorandum in 2011 when the court overturned their May 2010 instruction memorandum. BLM has had to adjust their plans as a result of the August 12, 2011 court decision.

Mr. LAMBORN. Thank you for your testimony. We will now go to our rounds of questions. And because yet another one of the Members of the Committee is on a tighter time schedule for traveling back to the district, I am going to defer to Mr. Flores and let him go first. So I recognize the gentleman from Texas.

Mr. FLORES. Thank you, Mr. Chairman. I will try to get through as many questions as I can as quickly as I can.

Mr. Coleman, you were I think fairly adamant that the law was very clear, that the legislative intent and legislative history of EPAct '05 was very clear. But your friend to the right of you is saying that it wasn't. Can you guys reconcile this for me? Mr. Gaffigan, I am going to ask you for your comments. Why don't you give me your comments first? Mr. Gaffigan.

Mr. GAFFIGAN. I think in general when we talked to a lot of people when we did this study, and we tried to look through the legislative history, and we are GAO auditors. We are trying to understand what went behind some of the words that are in there. A lot of folks are not sure what some of the key terms in the law referred to. And in searching the legislative history we couldn't find much evidence of that. I know Mr. Coleman is pretty clear that he felt it was clear as to what was intended. And I think that if you talk to some others who were involved—because he did have some other friends who were helping him with the legislation, you will probably hear a different version of what might have been clear.

All we are pointing out is that a lot of folks have raised this question. It has already been subject to litigation, and we suspect that it probably will be in the future, no matter what the outcome of further guidance is.

Mr. FLORES. Mr. Coleman.

Mr. COLEMAN. I appreciate you asking that question. As we talked, Mr. Gaffigan and I have and others, these issues that were raised in the GAO report, some of them about lack of clarity I didn't think were really appropriate. Congress does not define

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[5] GAO, *Energy Policy Act of 2005: BLM's Use of Section 390 Categorical Exclusions for Oil and Gas Development,* GAO–11–941T (Washington, D.C.: Sept. 9, 2011).

every term that is in a bill. These have to be interpreted based on their common usage or experience. The whole question is—and I go back to the testimony that I gave earlier, what has been attempted is to read some words into this bill which were not in there, like extraordinary circumstances; and read some words out of there that are clearly in there, like having a categorical exclusion for NEPA based on a land use plan. That is clearly in there. We have went over that in great detail.

Frankly, there was only one other person that really negotiated this. Now I am not sure if she would agree with me on everything. But that one she would have to agree that we went over every one of those words. So I know we can't have a disagreement on that. Every one of these words is what we intended to be in there. As a lawyer, we have certain rules of statutory construction that we use to interpret statutes. We do not have to write all that out. And as I mentioned to others, at one time the Congress used to have a habit of writing detailed report language. This is not what we were doing in EPAct 2005. So we tried to write in terms that were going to be clearly understood. And I think the people who were against this law, mostly environmental groups, wanted to raise these issues to create a problem which didn't really exist.

Mr. FLORES. OK. More questions for Mr. Gaffigan. Were there any substantive problems? It sounds like we had paperwork problems, inconsistencies. Were there substantive problems?

Mr. GAFFIGAN. I would say no. Most of them were sort of technical in nature, but we felt they were serious enough to point out. As you know, lawsuits can be lost or criminal cases when they are brought can be lost in terms of a technicality. So we wanted to make clear that to put us in the best position of not being vulnerable to challenges that all these things were important to address.

Mr. FLORES. Was NEPA violated at any time?

Mr. GAFFIGAN. Not in anything that we have found, no.

Mr. FLORES. So as far as we know, none of these mistakes or inconsistencies caused a pollution incident or a loss of life or damage to property or anything of that nature?

Mr. GAFFIGAN. Well, there was a challenge and there were some in the Nine Mile Canyon case that were challenged that there was a categorical exclusion brought there. Some environmentalists brought a lawsuit challenging that. And that is what sort of led to a settlement where BLM came out with more further detailed guidance.

Mr. FLORES. That doesn't answer my questions. Was there any pollution incident or loss of life or damage or injury or anything because of the inconsistencies in the way the paperwork was processed?

Mr. GAFFIGAN. Not in the paperwork.

Mr. FLORES. OK. Ms. Sgamma, your testimony was pretty compelling to me. And Mr. Chairman, may I have a couple more minutes?

Mr. LAMBORN. Yes. I will recognize myself now, but I will yield to you.

Mr. FLORES. Thank you, Mr. Chairman. Ms. Sgamma, you went through some metrics pretty quickly. You talked about this SWCA analysis or study. You gave us some numbers, jobs, payrolls, gov-

ernment revenues, things like that. Can you repeat those quickly for me?

Ms. SGAMMA. Sure. In Wyoming, because of delays to six NEPA documents, six environmental impact statements, 30,600 jobs have been prevented, $2.6 billion in labor earnings, and $157 million in annual royalty and tax revenue. And that is just in Wyoming. If you would like, I can leave that study.

Mr. FLORES. OK. And this is just because the environmentalists felt like there was a missing layer of NEPA analysis which the law provides that that could be subject to a categorical exclusion, is that right?

Ms. SGAMMA. Well, I was actually bringing up merely to make the point that NEPA can take a long time. In the case of these six EISs, they are over 6 years. They are at about the 6-year mark with no draft in sight. So when we look at categorical exclusions once that EIS is done, they are a way to enable one additional layer of redundant NEPA to be avoided. So my point was that NEPA does, indeed, cost and delays to doing NEPA can cost time, money, and more importantly, jobs and government revenue.

Mr. FLORES. And to continue on the jobs and government revenue for a minute. You talked about small businesses and producers. If they were allowed to continue I guess under the older rules, the original interpretation of the CXs, that we could be producing what percentage of our domestic oil and gas and using what percentage of public lands?

Ms. SGAMMA. Well, currently we provide in the West—and by the West, I mean basically the Rocky Mountain States, not including California. But just in the Rocky Mountain States, we are producing 27 percent of the Nation's natural gas, 14 percent of the oil production, and we are disturbing less than 0.1 percentage of public lands. So of the 700 million acres of Federal mineral estate, there is about, as best we know—because the last time BLM put out a number was 2007—as best we know there are about 500,000 acres of actual surface disturbance and that equates to less than a tenth of a percentage.

Mr. FLORES. OK. And 70,000 jobs is part of that. And what was the government revenue as well?

Ms. SGAMMA. Well, we did our blueprint study which finds that by 2020, we could produce as much in the West—and I can leave a copy of that as well—as we import from several nations such as Saudi Arabia, the Middle East, and Venezuela. And if government policies don't get in the way, we are able to produce that by 2020 and create about 70,000 jobs and $58 billion worth of additional investment in the West.

Mr. FLORES. And I think the answer to my next question is obvious, we can do that without any government stimulus, is that correct?

Ms. SGAMMA. That is correct. That is pretty much a projection that doesn't look at high, medium and low levels of additional regulations. That is kind of the status quo now. Or if we can use things like categorical exclusions.

Mr. FLORES. Essentially we get government out of the way and then Main Street America can do its job and create revenues and

grow payrolls and produce more revenues to the Federal Government?

Ms. SGAMMA. Absolutely.

Mr. FLORES. As well as State and local governments. Thank you. That is the end of my question. I yield back to you, Mr. Lamborn.

Mr. LAMBORN. Thank you. We will now start our second round of questions. And thank you for allowing us to do multiple rounds of questions. And whoever is here will have that opportunity. This is such an important topic.

Deputy Director Pool, I would like to go straight to you because you hold a very important position in the Administration. And first of all, just a simple, hopefully a yes or no answer—and I think I know what you are going to say. The purpose of categorical exclusions are to streamline the permitting process and expedite American energy production and job creation. And do you believe that we accomplish this goal with categorical exclusions?

Mr. POOL. I think generally speaking we do.

Mr. LAMBORN. Thank you. Now more specifically, this is a technical question, and I know you will be able to follow it. I don't know if everyone will be able to follow it but nevertheless your answer is critical to this question.

In light of the court's recent ruling that was discussed earlier and the statement that we heard this morning that BLM plans to issue a rulemaking process for categorical exclusions, can you tell us if you intend on putting IM 2010 118—that is BLM's 2010 policy that includes the extraordinary circumstances provision and a rewrite of two of the five categorical exclusion categories and that would reinstate duplicative regulatory reviews for energy projects, which as we know, the President said that is one of the things we should guard against in his speech last night, burdensome regulations. Do you intend to put this out for notice and comment? Or do you plan on putting out a policy that complies with Section 390 as it was originally passed into law in 2005?

Mr. POOL. Chairman, in reference to the two CXs that we had readdressed in the IM that was rescinded by the courts in addition to the application of extraordinary circumstances, those three items will be taken into consideration in terms of a rulemaking process, and that rulemaking process will involve public notification and comment.

Mr. LAMBORN. So it will be put out for public notice and comment?

Mr. POOL. That is correct.

Mr. LAMBORN. OK. Let me shift to Mr. Bolles. Can you provide any examples where categorical exclusions enabled your company to continue development and create jobs that would not otherwise have been created?

Mr. BOLLES. Thank you, Mr. Chairman. Yes, as I mentioned in my testimony, Devon Energy is involved in a field in Wyoming called Washakie Basin where we have an active drilling program as well as a production going on there. We have used in the past categorical exclusions to gain applications for permit to drill in that field. We had a situation—I think as I mentioned where we had two what we call fit for purpose rigs, drilling wells in this basin, and those two rigs were drilling basically the same amount of foot-

age or wells as seven rigs prior to these new generation rigs. And so we kind of created an efficient machine, if you will, of infield drilling within this particular field. And in order to keep those rigs busy, in order to keep them—because we are paying $25,000 to $30,000 a day to keep these rigs busy, whether they are working or whether they are not, that alone equates to a number of jobs. Not just Devon employees but jobs, the local welder, the road grader, the local restaurants that are all helping to provide services to all of these people. We had to at one point—at least part of the reason for us to eliminate the use of one of those rigs on these particular lands in Carbon County, Wyoming was related to the BLM's decision to not grant APDs using categorical exclusions. Obviously part of the reason was also the price of natural gas declined. But that rig has moved on, and it is currently working on fee lands in another part of Wyoming and soon will be not employed by Devon any longer.

Mr. LAMBORN. OK. Thank you.

Mr. Gaffigan, in your written testimony you say that in some cases, "BLM was overly cautious in applying Section 390 categorical exclusions in part because BLM feared litigation from environmental groups." Could you elaborate on that, please?

Mr. GAFFIGAN. Well, I think, again, because of some of the uncertainty in the language of both the law and their guidance, if they could see a situation where they could approve an APD without using a categorical exclusion they would go that route rather than jeopardize potential challenge under the uncertainty associated with categorical exclusions. I think that is the basic mindset that they were going through.

Mr. LAMBORN. OK. Thank you. I would now recognize the gentleman from California, Mr. Costa, the former Chairman of this Subcommittee in the previous Congress, for 5 minutes.

Mr. COSTA. Thank you very much, Mr. Chairman. Thank you for holding today's hearing, as we try to deal with the host of challenges on increasing our opportunities for energy development of all kinds, as we use all the energy tools in our energy toolbox. It is our proposal to discuss the impacts of the regulatory framework that is involved in our energy policy in total because there is a very important hand-in-glove, I think, relationship there.

Let me first ask Mark Gaffigan, in yesterday's Natural Resources Committee hearing on jobs and offshore energy development, I learned of Scott Mitchell's comments from Wood McKenzie, who mentioned that slowing activities in drilling comes at great cost. Now we know if we look at the last 11-year cycle from drilling domestically to a decrease in the mid part of the last decade to what has been a very rapid increase in the last 2 years that these changes—and from those changes, you could draw examples. But he talked about the Gulf of Mexico that showed that if permitting paces were restored to the prelevel Macondo levels, the estimation is it would create an additional 200,000-plus jobs in 2012, or $8.4 million. And I am not sure that number is correct. When we look at the royalty structure, it must be billion, I would think and roughly additional significant revenues to States. What is your assessment, Mr. Gaffigan, of jobs that might be recovered if the Administration were to again use categorical exclusions?

Mr. GAFFIGAN. You know it is very difficult to quantify that. But there is no doubt there has always been a boom and bust cycle in oil and gas development. And there have always been a lot of reasons for why development—as far as categorical exclusions go, in our work, we did see some benefit. We focused on the permitting process in the offices. I think what is hard to quantify is what would have happened if the categorical exclusion were——

Mr. COSTA. Let me ask the question this way then, because I think you ought to provide the Committee with a detailed response, notwithstanding the various circumstances. We would like to have that. I think I would like to have that. With the President's desire, both last night and in previous statements that have been made by both he and the Secretary, are you going to focus on removing various regulatory burdens? And do they include categorical exemptions as a part of that consideration?

Mr. GAFFIGAN. At GAO, I don't think we are going to be making any decisions.

Mr. COSTA. No, I know that. I would like the Administration to—Mr. Pool, you are representing the Administration?

Mr. POOL. Yes, sir, I am.

Mr. COSTA. And that question was noted more appropriately placed toward you.

Mr. POOL. Sure. Thank you. Well, let me just add that BLM has used categorical exclusions for many, many years. We use about 80 administrative CXs that cover, you know, nine BLM program areas which also includes other aspects of oil and gas and geothermal development. We think the CXs are a valuable tool in terms of managing land surface activities.

Mr. COSTA. You are saying in contrary that you think the use of categorical exclusions has added significant delays to leasing lands in intermountain West?

Mr. POOL. I don't think it has added significant delays. I think that—some of the challenges we have in various provinces of the West depends on the environmental considerations that are being addressed through NEPA. Many of these planned well developments on a much larger scale does require more extensive NEPA evaluation.

Mr. COSTA. My time is running out. I want to ask this same question to the other witnesses here. So you are going to do it on a case-by-case basis? How are you going to approach regulatory reform in this instance?

Mr. POOL. I think that the leasing reforms that have been initiated by this Administration, as previously mentioned in the early part of this hearing, that prior to the leasing reforms, many of our oil and gas leases were being protested, appealed, or litigated, as high as 50 percent. It wasn't serving the public interest. It wasn't serving industry's interest. So as a result of leasing reforms, we are up front, the BLM, in cooperation with industry and the conservation community and State and local governments, were spending more time in evaluating landscapes such that when we offer them for lease that we receive fewer protests. And prior to the leasing reform, our protests were as high as 50 percent bureau-wide.

Mr. COSTA. And so how much have they been reduced?

Mr. POOL. We think they have been reduced down to 12 to 14 percent, and that is because of the quality up front work.

Mr. COSTA. Could you provide the Subcommittee with that information, please?

Mr. POOL. Yes. I would be a glad to.

Mr. COSTA. My time has expired. Mr. Chairman, I don't know if you think it is warranted but whether or not the private sector participation here would want to respond to——

Mr. LAMBORN. We will have a second round of questions, another round of questions.

I would like to ask either Ms. Sgamma or Mr. Coleman, if BLM issues IM 2010 118 that we discussed earlier for public comment, do you feel that that would be in compliance with the recent court ruling? Either one of you.

Ms. SGAMMA. Well, I believe that Mr. Pool said just now that they would not just simply turn around and issue 118 for comments but actually consider the judge's ruling as far and that rewrite of the two CXs. So it didn't sound, if I was understanding Mr. Pool correctly, that they are just going to turn around and issue that 118 for public comment. Well, we would have a problem with that. If you looked at the judge's ruling—and although she didn't rule on the merits specifically, she did say that there was not a direct path from the statute to the regulation that was put out—that 2010 118. So I thought Mr. Pool's answer was encouraging, that they are not just going to turn around and issue that.

Mr. LAMBORN. Mr. Pool, was that a correct understanding?

Mr. POOL. That is a correct understanding. And in fact that directive has been vacated and currently we have gone back to the standards in our NEPA handbook of 2008. And based on the judge's decision, we will reconsider some of the areas that we readdressed in that directive, including two of the CX modifications in addition to the review of extraordinary circumstances in a rulemaking, and that will be designed for public notice and comment.

Mr. LAMBORN. OK. Thank you. And Mr. Coleman.

Mr. COLEMAN. I think that is what it calls for. Hopefully BLM will have an open mind on these now, particularly in view of the legal issues of changing their interpretation of the statute. They had had a pretty clear interpretation early on of what this statute said and then they did an about-face that has real legal problems with doing that. So I hope they will go back to the previous version and work from there.

Mr. LAMBORN. Thank you. And Ms. Sgamma, I have another question for you. As you have heard discussed to date, BLM offices are sometimes hesitant to use categorical exclusions—this is what we heard from the GAO—due to a fear of litigation by environmental groups. Is this fear of environmental litigation something that your members are often faced with when developing energy projects?

Ms. SGAMMA. Absolutely. There are several points at which an energy project can be litigated. And we face litigation at almost any one of those points, at the R&D stage, at the leasing stage. There are protests at the project stage, project-level NEPA and even sometimes at the APD level, the permit level. So that certainly is a valid concern.

However, I sometimes think that the interpretation of Interior on the validity of some of these suits is unwarranted. A lot of times we see environmental lawsuits that are cut-and-paste from one to the next, cut-and-paste language that doesn't apply or that case law clearly supports the BLM's decision. So often we would wish that BLM would stand up for their decisions that they make rather than continuing to delay making those decisions in the hopes of bulletproofing every decision that they make.

For example, what we are seeing now with all those jobs being delayed in Wyoming, for example, because of delays to NEPA, we are seeing BLM take a long time because they are trying to—they are almost practicing preventive medicine. They are trying to bulletproof their decisions so that they don't get sued.

Well, they are going to get sued because there is a group out there that is going to sue them no matter how frivolous the lawsuit or how specious the grounds or how shaky the grounds.

So case law does support responsible oil and gas development on public lands. For example, the categorical exclusions. So we would just hope that we could get on, move on, and not let that litigation bog down the entire process.

Mr. LAMBORN. Thank you. Mr. Coleman?

Mr. COLEMAN. Mr. Chairman, I just wanted to add that one of the reasons that the committee was interested in doing the statutory categorical exclusions was, with the administrative categorical exclusions, which BLM has talked about how they have used for such a long time for various things, you still get to litigate that. What you do is, you litigate whether or not that extraordinary circumstances document. You do an extraordinary circumstances review. And the environmentalists litigate whether that has done an adequate look of whether there were extraordinary circumstances. That is one of the reasons the Congress wanted to pass a statutory categorical exclusion, so we did not have these extraordinary circumstances review lawsuits.

Mr. LAMBORN. All right. Thank you. I would like to recognize the gentleman from California for up to 5 minutes.

Mr. COSTA. I don't think I will take that long, but maybe the witnesses might in their response. The question that I asked earlier to the private sector participants, I would like the three of you to give me your take on whether or not you think the exclusion of the use of categorical exclusions adds significant delays to interleasing mountains and I guess, Kathleen, you just spoke of that in your last response as an example. Obviously you have a lot of real hands-on experience on this kind of stuff.

And I concur with your comment. There is a group out there in many instances that will sue as a pro forma because it is part of the agenda that they have and their philosophy. And I think we should do due diligence to make all of our permitting process as bulletproof as possible and obey the law and protect the environment in that process. But clearly that is not going to prevent folks who just don't believe we ought to be using public lands in this fashion from suing.

So would you please, the three of you, respond on the categorical exclusions. How much do they add in delays, if they do?

Ms. SGAMMA. Do you mean how much is not using them adding to delays?

Mr. COSTA. Right.

Ms. SGAMMA. Well, I mean we have put together several instances where companies clearly met the criteria in one or more of the criteria in Section 390. And rather than using it, a CX, the BLM, the field office said, no, go ahead and do an EA, an environmental assessment. And sometimes that can take a couple of years. I mean usually an EA for a couple of wells doesn't take that long or shouldn't take that long, but there are cases where it can take years. And so time is money. And what happens also is you might have to lay down a rig. You might not be able to go and create jobs, about 125 per rig running, if you have to lay down that rig because you can't get a permit.

But I guess Randy has probably some better examples.

Mr. BOLLES. Yes, sir. I think I mentioned before that in this particular—I am just using it as an example—this particular field in Wyoming in Washakie Basin, where we had a situation where we utilized—or BLM approved applications for permit to drill utilizing categorical exclusions. That particular area called the Washakie Basin is under an extensive EIS review right now, environmental impact statement, that began in 2004 for Devon. And to date—what are we, September of 2011—we still don't have a draft document.

Mr. COSTA. Are there some distinctions here—and this is way out of my realm here—but between natural gas fields and oil fields in some of the areas? I know in Colorado we rely heavily on California on a lot of our natural gas because of our air quality issues. It is the energy de jure. Is it more problematic in some instances versus others?

Mr. BOLLES. I am not sure I understand your question, sir.

Mr. COSTA. With pursuing these efforts in natural gas fields versus oil, are the delays—are they the same, I guess, is what I am trying to get to.

Mr. BOLLES. I think there are different instances or different issues in developing oil versus developing gas. And in the particular situation I am talking about, it is actually a development of both. It is oil and gas coming from the same stream. So I don't know that it makes any difference whether it is oil or gas. The NEPA work is done on Federal lands, whether they are oil fields or gas fields.

Mr. COSTA. So the delays—the bottom line—relate to months and years?

Mr. BOLLES. Yes, sir. I was going to give the example of this particular environmental impact statement. We don't have a draft document. It is almost 8 years. It worked well for a company like Devon who used categorical exclusions to be able to continue to develop that field and drill—it is an infield drilling project where we are drilling—maybe we had six wells in a particular section and we needed to drill three or four more wells in order to—our reservoir engineers had determined that would fully drain that particular reservoir in that particular area. In order for us to do that, we were able to use categorical exclusions to get permits to drill those additional three wells inside of this field. And that allowed us to

have—and we had less surface disturbance because technology allowed us to drill off of one pad instead of three or four different pads. So those delays—I guess that is an example of——

Mr. COSTA. Yeah. It doesn't make any sense.

Mr. BOLLES. Right.

Mr. COLEMAN. And I would just add, Congressman, that just as a fundamental matter of how the litigation takes place, frankly, we normally don't get—we should not get a litigation on the statutory—and we do have some. But we did not have a lot of litigation on these statutory categorical exclusions, yet we do on these regulatory ones because, as I said earlier, that delays things—the regulatory ones do—because you get to litigate whether or not that extraordinary circumstance review has been done properly. And certainly if you do an EA, if you are forced to do an EA, then that takes a whole lot longer from an administrative processing point of view before you get your permits.

Mr. COSTA. Thank you. Thank you, Mr. Chairman.

Mr. LAMBORN. OK. I will now recognize myself.

Mr. Pool, earlier this year Director Bob Abbey and Secretary Ken Salazar announced that BLM would be increasing oil and gas permits by 44 percent this year to 7,200 from 5,000 in 2010. Is BLM on track to meet that goal for Fiscal Year 2011?

Mr. POOL. Are we talking about applications for permit to drill?

Mr. LAMBORN. Yes.

Mr. POOL. Yeah. Currently we have issued APDs approved from 7/10 to 6/30 of 2011 is around 4,156. So we are a little bit shy of that goal. But I also might add that we have issued 7,000 APDs that have yet to be drilled, and we have been able to really address some of our backlog situation. We only have 680 plus APDs from backlog status, and most of those reside in Utah. They are a planned development scale involving maybe several hundred wells. The same may hold true in Colorado. But I just want to point out that there have been 7,000 APDs that have yet to be drilled.

Mr. LAMBORN. Thank you. Mr. Gaffigan, the GAO's categorical exclusion report discussed concerns with CXs from an environmental standpoint only. Why didn't GAO address the lack of utilization of CXs and the impact on jobs and the economy?

Mr. GAFFIGAN. In terms of our objectives as far as benefits go, we try to address the benefits of actually using those for BLM's use of the categorical exclusions. And we did talk about the benefits of reduced time and efficiency that the BLM offices were achieving through their use of categorical exclusions.

Mr. LAMBORN. OK. Mr. Coleman, do you have any theories why BLM would not make greater use of categorical exclusions and thereby stand in the way of more job and revenue creation?

Mr. COLEMAN. Mr. Chairman, I don't know what would go through individual BLM office directors' minds on this. I find it very curious that you had various offices that made extensive use of these statutory categorical exclusions and others who didn't do anything with them. It points out a problem that I have had with BLM of not really having good strong central management sometimes to make sure that you have proper implementation across BLM of policies. I will say again, as I said in my testimony, the use of these categorical exclusions is not optional. And yet it should

have been made mandatory by oversight from BLM management to make sure that the agency was implementing this across the board as it should have been.

Mr. LAMBORN. OK. And Ms. Sgamma, in your testimony, you discussed the redundant and overlapping environmental analysis that categorical exclusions are supposed to eliminate.

Can you elaborate on the usual NEPA process and how CXs streamline the process and do you have an approximation of time saved in the permitting process when they are used versus when they are not used?

Ms. SGAMMA. It is hard to give specific statistics on time saved because often a company doesn't even know whether an APD was approved under a categorical exclusion or not. We have members telling us about instances where they know they have met the criteria and didn't get a CX because they were asked to do an EA. So I mean I have some anecdotal evidence but it is hard to get at the specific time saved. I actually haven't seen categorical exclusion numbers in a couple of years now. So I don't even know how many have been issued in the last couple of years, and I am hoping that BLM will issue those numbers soon. But I am sorry, Chairman, I don't have a specific date on that.

Mr. LAMBORN. OK. Thank you. And Ms. Sgamma, you I believe live in Colorado, and so you are familiar with along the Front Range where there is more development, private residential development, when there is oil and gas exploration or development, there can be friction between the surface owner and the mineral rights owner. And the more densely populated an area, that is more of an issue, especially when we are talking about private lands versus public lands.

Is it a fair statement to say that the less that public lands are able to be used for oil and gas development, that puts more pressure on the need to find private land places for development, hence increasing the friction between the surface owners and the mineral rights owners?

Ms. SGAMMA. What happens with companies when they can't get permits from the BLM but they can get a State permit in about 30 days versus up to years in some cases from the BLM. Often companies will go to adjacent private or State lands. So often adjacent private and State lands see more development than public lands because the process is just more burdensome on Federal lands. If you look at areas—you mentioned the Front Range, Congressman. You look at, for example, the Niobrara in Colorado and Wyoming. I don't think we would be seeing the production and the job creation there in eastern Colorado as much if that had been primarily public lands. I think we are seeing more development today because most of that is private lands. So it does enable us to develop oil in this case much faster than if it were on public lands, just like the Bakken in North Dakota. That is primarily private lands. We weren't able to develop that area, nor the Niobrara even just 5 years ago. And we are able to explore and develop and produce that and increase American oil production in such a quick and timely fashion because that has been primarily on private lands.

Mr. LAMBORN. All right. Thank you. And then as we wrap up here, do any of you have any comments that you want to make as

we conclude here based on what anyone else has said or you think is needed to complete the record for our hearing today? And I will open this up to any one of the five of you.

Ms. SGAMMA. I would just like to make one correction from something that was said earlier by a Member. And that is that incorrectly stated that we are developing on less than 30 percent of the leases. That is incorrect information. In March of this year, Interior did a leasing utilization report and they found that in fact companies are producing on 43 percent of the Federal leases, not less than 30 percent, as was said earlier. And that equates to about—of the 38 million acres currently under lease about 16 million are in production. And we continue to hear the old numbers on that which are just false. So I am just hoping that those corrections can be made.

Mr. LAMBORN. OK. Thank you. Anyone else before we conclude? Mr. Coleman.

Mr. COLEMAN. Thank you, Mr. Chairman. And I want to say, I congratulate you on having this hearing. I want to reiterate, if NEPA is trivialized by continuing to have to have environmental assessments over very minor activities and minor impacts, then you will just bog everything down. And that is not what NEPA was intended to do. It is supposed to focus on the potential for significant impacts. And we felt very strongly when we were working on this legislation that these were categories that did not have that kind of risk of having significant impacts and something that the Congress could do on its own, not wait on an Administration, any Administration. You could clarify these things because we knew that these things would not have significant impacts. So otherwise you risk trivializing NEPA and bogging everything down in litigation.

Mr. LAMBORN. OK. Thank you. Any final comments? Mr. Pool, Mr. Bolles, or Mr. Gaffigan? If not, thank you all for being here. This has been a very important subject. I appreciate your travel and your time here.

I would note that it is about 12:35. Had we not had our 80-minute delay for voting—we started at 10:00. We would have been done by, I think, 11:15. So it is spread out longer than we had to, but we were only here apparently about 80 minutes or so. Thank you very much for your testimony. And if there is no other business to come before the Subcommittee, seeing none, we will be adjourned.

[Whereupon, at 12:38 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

Response to questions submitted for the record by BLM Deputy Director Mike Pool

Questions submitted by Chairman Doug Lamborn (CO)

1. Deputy Director Pool, BLM has, in the past, made significant modifications to administrative requirements to which oil and natural gas operators on public lands are subject, without recourse to formal rulemaking processes with provision for notice and comment. This was the case with IM 2010–117, describing revisions to BLM land use planning and lease parcel reviews, and with IM 2010–118, describing revisions to BLM policy regarding use of EPAct05 Section 390 Categorical Exclusions. Please explain the agency's rationale for pursuing this course of action. How does the agency make a distinction between subject matter that merits an administrative rulemaking process, and subject matter that may be addressed by internal guidance to agency staff in the form of an instructional memorandum.

Response to 1:

The BLM engages in rulemaking when it is imposing a requirement or revising a requirement previously imposed, that confers a new privilege or duty upon a member of the public. In general, an instruction memorandum is used to direct BLM employees how to perform their program work, as in this case NEPA analysis, or to provide clarification and interpretation of existing regulations.

2. Deputy Director Pool, the purpose of categorical exclusions are to streamline the permitting process and expedite American energy production and job creation. Do you believe that categorical exclusions accomplish this goal?

Response to 2:

Certain actions are categorically excluded from NEPA review because the class of actions has been determined to typically not raise the potential for significant environmental impacts. Categorical exclusions can, when appropriately applied to a specific proposed action, provide an efficient tool to reduce paperwork and potential delay by eliminating the BLM's need to conduct and prepare further, more detailed, environmental analysis and documentation—EA/FONSIs or EISs—to support the authorization of specific Federal activities. This tool is used by the local office where appropriate and where it makes sense. BLM line managers have the best information to make decisions that match the appropriate level of NEPA review for a proposed activity to the conditions on the ground.

Some BLM field offices have made use of Section 390 CXs more than others. The differences stem from a variety of factors and circumstances, such as whether an office has recently completed any site-specific NEPA documentation, the level of confidence the authorized officer has in using a Section 390 CX, and the level of understanding the resource specialist has about the environmental sensitivity in the area where the project would take place. While a particular use of a Section 390 CX does not, in most cases, save substantial time, the cumulative time savings from processing multiple actions with Section 390 CXs can be significant.

3. Deputy Director Pool, despite the fact that the GAO report on categorical exclusions did not recommend their elimination, but instead recommended simply that clarification be provided on how they would be used. Why did BLM then choose to essentially eliminate of the use of categorical exclusions?

Response to 3:

The BLM's Section 390 CX reform policy did not eliminate the agency's ability to use the Section 390 CXs. The policy made the process for using Section 390 CXs consistent with the agency's existing environmental review process for using administrative CXs, including the need to conduct a review for extraordinary circumstances. If extraordinary circumstances associated with an action are identified, there is an indication that this particular proposed action could raise significant environmental impacts and therefore it is not appropriate to use an administrative categorical exclusion and further NEPA review, either an Environmental Assessment or and Environmental Impact Statement, is required. The BLM's policy to review the potential for significant impacts based on the site and project specific circumstances before proceeding with the Section 390 CX, aligned the use of Section 390 CX with all other BLM CXs, was supported by the Council on Environmental Quality and was responsive to a legal challenge, concerns raised by members of

Congress, and information identified in the GAO's report which recommended that the BLM issue detailed and explicit guidance that addresses the gaps and shortcomings in its Section 390 guidance.

As part of BLM's multiple-use mission, the BLM seeks to protect all resource values as it administers the development of domestic energy resources such as oil and gas on public lands. This is achieved, in part, by ensuring that adequate reviews are conducted before authorizing oil and gas development activities, including the identification of appropriate mitigation measures. Environmental analysis documents associated with land use plans do not generally include an analysis that adequately evaluates the effects of specific oil and gas development proposals.

For these reasons, the BLM issued a policy in 2010 that required a review of extraordinary circumstances to help ensure impacts that may be significant were adequately evaluated before authorizing the development of federal oil and gas resources.

4. Deputy Director Pool, as I'm sure you know, the Administration used categorical exclusions over 179,000 times to advance the progress of taxpayer funded stimulus projects. Can you please explain to the Committee why the Administration found categorical exclusions acceptable to use for stimulus projects, but categorical exclusions were not acceptable for oil and gas projects that have previously gone through extensive environmental reviews?

Response to 4:

The Department of the Interior and the BLM are able to categorically exclude some types of activities (most of which are unrelated to federal oil and gas development) from the preparation of an environmental analysis document. Stimulus projects covered a wide array of activities that fit into one or more of the categories that could qualify for an administrative categorical exclusion. All categorical exclusions used for an American Recovery and Reinvestment Act (ARRA) project were reviewed for extraordinary circumstances, and in the absence of extraordinary circumstances the project proceeded based on the CX. The range of categorical exclusions used for ARRA projects was much broader than the five types of narrowly defined oil and gas activities that may be categorically excluded by a Section 390 CX. Also, criteria used to identify projects appropriate for stimulus funding included the need for proposed projects to be "shovel ready." Essentially these projects were prescreened to determine if they raised potentially significant environmental concerns and would therefore merit additional, more extensive environmental analysis, before they could be undertaken. Most projects that had a potential for significant environmental issues were not selected for stimulus funding in the first place.

5. Deputy Director Pool, can you explain whether the agency's experience with implementation of the Energy Leasing Reforms indicates staffing and budget are adequate at Field, District and State Offices to execute the new Reform plan and to fulfill other agency mandates.

Response to 5:

The Secretary's oil and gas reforms, announced in 2010, establish a more orderly, open, consistent, and environmentally sound process for developing oil and gas resources on public lands. The BLM continues to implement these key policy changes that include an upfront investment in site visits, environmental documentation, and public participation. This has strengthened the BLM's ability to document its decision-making process. Initial indications are that protests for oil and gas leasing are decreasing but not eliminated. We continue to create these and other efficiencies.

In these times of increasing fiscal constraint, the BLM is initiating its reforms within current budgets to the extent practical by adjusting program funding and priorities. The BLM is committed to doing its part to implement these policy changes within appropriated funding levels for 2012.

a. Are backlogs developing in BLM Offices with respect to required prelease or leasing actions, with respect to issuance of permits, or with respect to other agency actions?

Response to 5a:

No. The BLM issued 2,188 leases during fiscal year (FY) 2011. This is 116 more than were issued in FY 2009 and 880 more than were issued in FY 2010. Using the Leasing Reform Policy, the BLM continues to process expressions of interest and issue leases in areas where oil and gas development is appropriate. At the end of FY 2011, there were more than 7,000 APDs approved for operations on BLM and tribal lands, but not yet drilled by industry. At the end of FY 2011, there were 730

APDs pending longer than 30 days for a BLM decision to approve or deny the application.

b. What are the potential impacts of these backlogs to the public lands and resources, and how and when will these backlogs be eliminated?

Response to 5b:

With over 7,000 APDs approved, but not yet drilled, opportunities remain to develop resources on the public lands. Nonetheless, the BLM continued to process more applications for permit to drill than had been received during the year, thereby continuing to reduce the number of pending applications, including those that are in "backlog" status.

c. Do you believe that using categorical exclusions would be a sufficient way to eliminate some of these backlogs?

Response to 5c:

There are a variety of options the BLM utilizes to fulfill its NEPA requirements. The Section 390 CXs are one of those options that are beneficial in circumstances where they are applicable. However, in order to use a Section 390 CX, activities must meet the particular criteria of a given category, such as proposing to drill a new well on an existing well pad or proposing surface disturbance that is no greater than 5 acres.

The design features of projects to develop federal oil and gas resources are not driven by the criteria associated with the Section 390 CXs. Therefore, not all proposals to develop federal oil and gas resources fall within the criteria of the Section 390 CXs. For example, many proposals do not entail drilling a new well on an existing well pad or disturbing less than 5 surface acres and, therefore, do not qualify for a Section 390 CX. Compliance with NEPA would need to be accomplished through other means, such as the preparation of an Environmental Assessment and Finding of No Significant Impact (EA/FONSI) or an EIS as appropriate.

6. Deputy Director Pool, can you please provide the Committee with a full set of numbers of categorical exclusions (CX) issued by field office and state beginning with 2006 when the statutory CXs were first implemented through the end of fiscal year 2011? This includes, for each field office, total CXs used by type (#1, #2, #3, #4, and #5), total APDs approved, the percentage of total CXs used, and total APD's approved.

Response to 6:

The data presented in the table below is from periodic data requests that did not always coincide with a fiscal year, is not maintained in a database that can be queried or manipulated, and is complete through June 30, 2011. The table summarizes the number of categorical exclusions (CXs) issued by each field office and state beginning with FY 2006 through June 30, 2011 to approve APDs. The percentage of total Section 390 CXs used to approve APDs is calculated using the sum of approvals that relied on CX#1 (individual surface disturbance less than five acres), CX#2 (drilling at a location at which drilling has previously occurred within the last five years), and CX#3 (drilling in a developed field for which an environmental document, approved within the last five years, analyzed drilling as a reasonably foreseeable activity). This is because these three CXs are the only CXs that may be used to support the BLM's APD approval. Section 390 CX#4 (placement of a pipeline within a right of way corridor approved within the last five years) and CX#5 (maintenance of a minor activity) may be used to support the approval of other authorizations provided for under the Mineral Leasing Act (MLA), such as MLA Rights-of-Way (ROW) and Sundry Notices (SN).

PERIOD: Fiscal Year 2006 to 3rd Quarter of Fiscal Year 2011 (October 1, 2005 - June 30, 2011)									
State	Field Office	Total CX #1 Used	Total CX #2 Used	Total CX #3 Used	Total CX #4 Used	Total CX #5 Used	Total CXs Used	Total APDs Approved	Percentage of APDs Approved with CXs
AK	Anchorage	4	17				21	37	57%
	Alaska	**4**	**17**				**21**	**37**	**57%**
CA	Bakersfield	18	3	182			203	1375	15%
	California	**18**	**3**	**182**			**203**	**1375**	**15%**
CO	Canon City			2			2	142	1%
	Little Snake	6	5	1	5		17	181	9%
	San Juan/Durango	1			1		2	335	1%
	Glenwood Springs	61	158	50	18	1	288	1580	18%
	Grand Junction	6	19	21	6	1	53	453	12%
	White River	6	48	5	6	7	72	862	8%
	Colorado	**80**	**230**	**79**	**36**	**9**	**434**	**3553**	**12%**
ES	Jackson	22	29	32	2	4	89	255	35%
	Milwaukee			3			3	31	10%
	Eastern States	**22**	**29**	**35**	**2**	**4**	**92**	**286**	**32%**
MT	Dickinson			103			103	781	13%
	Great Falls	2	3	60	5	11	81	392	21%
	Miles City		2	45	2		49	349	14%
	Montana	**2**	**5**	**208**	**7**	**11**	**233**	**1522**	**15%**
NV	Reno (Mineral Res. Div.)	2	5			1	8	37	22%
	Nevada	**2**	**5**			**1**	**8**	**37**	**22%**
NM	Carlsbad	19	12	5	40	2	78	2582	3%
	Farmington	58	30	970	12		1070	2689	40%
	Hobbs	47	11	443	11	1	513	1009	51%
	Albuquerque							37	
	Roswell	13	2	17	14		46	267	17%
	Tulsa		20				20	478	4%
	New Mexico	**137**	**75**	**1435**	**77**	**3**	**1727**	**7062**	**24%**
UT	Moab/Price	51	71	19	1	4	146	492	30%
	Salt Lake	7	6				13	38	34%
	Vernal	42	41	1170	39	17	1309	4418	30%
	Utah	**100**	**118**	**1189**	**40**	**21**	**1468**	**4948**	**30%**
WY	Buffalo	168	208	344	43	46	809	8129	10%
	Casper	44	46	389		19	498	636	78%
	Rock Springs			49			49	442	11%
	Kemmerer	38		7			45	187	24%
	Lander	9	29	9	28	3	78	379	21%
	Newcastle							194	
	Pinedale	90	685	1706	5	9	2475	3135	79%
	Rawlins	163	24	36	1	5	229	1296	18%
	Worland/Cody	33	1	40		38	112	202	55%
	Wyoming	**545**	**973**	**2580**	**77**	**120**	**4295**	**14800**	**29%**
	Nationwide	**910**	**1455**	**5708**	**239**	**169**	**8158**	**33420**	**24%**

Questions submitted by Ranking Member Edward J. Markey

1. Can you please explain how the 2010 policy guidance issued by the Obama Administration addressed some of the problems with the Bush Administration's policy for implementing the categorical exclusions for some oil and gas permits under Section 390?

Response to 1:

As part of BLM's multiple-use mission, the BLM seeks to protect all resource values as it administers the development of oil and gas resources on public lands. This is achieved, in part, by ensuring that adequate NEPA reviews are conducted prior to authorizing oil and gas development activities, and appropriate mitigation measures are identified. Environmental analysis documents associated with land use plans cover broad areas and do not generally include an analysis that adequately evaluates the effects of site-specific oil and gas development proposals.

The BLM's policy to review the potential for significant impacts based on the site and project specific circumstances before proceeding with the Section 390 CX, aligned the use of Section 390 CX with all other BLM CXs, was supported by the Council on Environmental Quality and was responsive to a legal challenge, concerns raised by members of Congress, and information identified in the GAO's report which recommended that the BLM issue detailed and explicit guidance that addresses the gaps and shortcomings in its former Section 390 guidance. For these reasons, the BLM issued a new policy that requires a review of extraordinary circumstances to help ensure impacts that may be significant are adequately evaluated before authorizing the development of federal oil and gas resources.

2. The BLM announced on September 9th that it would be moving forward with a formal rulemaking. However, given the August 12 court decision, it is my understanding that the BLM will be operating under the Bush administration's policy for Section 390 categorical exclusions, while the rulemaking is ongoing. How will BLM operations in its field offices during the period between now and when the rulemaking is completed?

Response to 2:

On August 19, the BLM complied with the Court's Order to stop using the Section 390 CX guidance in Instruction Memorandum (IM) 2010–118 to the extent it limited the application of Section 390 CXs in specific ways. The BLM directed its field offices to resume following the guidance outlined in the 2008 BLM NEPA Handbook when considering the application of Section 390 CXs. This includes:

- Documenting, and incorporating into the well file or case file, the decision-maker's rationale as to why one or more Energy Policy Act CXs apply;
- Not conducting a review for extraordinary circumstances when considering the use of a Section 390 CX; and
- Clarifying that other procedural requirements still apply, such as consultation under the Endangered Species Act and National Historic Preservation Act.

It is still the BLM's policy to maintain a structured, multi- or interdisciplinary permit review and approval process, conduct onsite exams for 100 percent of proposed well and road locations, comply with other procedural requirements required by other environmental statutes, such as the National Historic Preservation Act and the Endangered Species Act, and apply appropriate mitigation and BMPs to all permitted actions even when using a Section 390 CX.

3. Your testimony states that BLM plans to initiate rulemaking in "the near term." How quickly do you anticipate BLM being able to begin the rulemaking process and how quickly do you anticipate finalizing the rulemaking?

Response to 3:

When the BLM determines how best to address the Court's order and implement Section 390 of the Energy Policy Act of 2005 (EPAct), it will initiate a rulemaking effort. The BLM expects the rulemaking process to take approximately 18 months.

4. The GAO has found that the implementation of the Bush Administration's policy was inconsistent amongst BLM offices and documented harm to air quality and wildlife habitat as a result of over-use of these exclusions. Will returning to the Bush Administration's policy while the rulemaking process is ongoing lead to the same problems?

Response to 4:

The BLM's policy is still to maintain a structured, multi- or interdisciplinary permit review and approval process, conduct onsite exams for 100 percent of proposed well and road locations, comply with other procedural requirements required by other statutes, such as the Federal Land Policy and Management Act, Clean Air Act, Clean Water Act, and Endangered Species Act, and apply appropriate mitigation and BMPs to all permitted actions even when using a Section 390 CX.

The BLM's interim direction is to follow the guidance outlined in the 2008 BLM NEPA Handbook when considering the application of Section 390 CXs. .

5. The Bush Administration policy prevented BLM from even considering whether there were extraordinary circumstances, such as threats to public health and safety, impacts to endangered species or cumulative impacts that would warrant additional environmental review when a Section 390 exclusion was utilized. Do you think it's important for BLM's rule to allow for a review of extraordinary circumstances? If so, why?

Response to 5:

The review of extraordinary circumstances helps to identify those circumstances where other substantive environmental requirements, such as the Clean Air Act and the Endangered Species Act, must be satisfied before the proposed action can proceed. As previously mentioned during the Deputy Director Mike Pool's testimony, one of the options the BLM will be considering as part of the agency's rulemaking effort would be those elements of its 2010 guidance the Court vacated, which include a review of extraordinary circumstances. The BLM will provide notice and an opportunity for the public to comment, consistent with the Administrative Procedure Act (APA), as part of its rulemaking effort.

6. Another concern raised by the GAO regarding Section 390 was the large amount of variation among the BLM field offices in how they each implemented Section 390. This led to a great deal of uncertainty, and a large number of protests challenging BLM's actions. Do you think it's important to standardize the permit application process of Section 390 as part of the new rule?

Response to 6:

The Section 390 CXs are used to support decisions to authorize specific oil and gas permits issued by the BLM. An example of such a permit includes an Application for Permit to Drill (APD). Unlike decisions to issue a federal oil and gas lease, which may be protested administratively, decisions to issue a specific permit to develop federal or Indian oil and gas resources are subject to legal appeal under procedures outlined in 43 CFR Part 4.

The application for a permit to drill is a standardized process. The BLM Authorized Officer has the final decision-making authority with respect to the appropriate form of analysis needed before a decision can be made on a drilling application. BLM application review policies provide a framework for management. These policies are not site-specific prescriptions but guide responsible energy and mineral development. The policies enable local review to account for site specific resources, resource uses, industry interests, and community needs. This flexibility is needed to be responsive to different combinations of these factors. Nonetheless, the APD outcomes may vary somewhat when compared regionally because of accounting for specific local conditions. The outcomes, however, comply with laws, regulations, and policy.

7. The GAO's 2009 report noted that significant impacts to air quality and wildlife habitat had occurred in areas where Section 390 categorical exclusions were heavily utilized, especially in Wyoming, Utah, and New Mexico. How does the BLM plan on reviewing drilling permits where these environmental impacts have occurred in light of the current court ruling?

Response to 7:

On August 19, the BLM complied with the Court's Order by directing its field offices to stop using the Section 390 CX guidance in IM 2010–118 and resume using the guidance outlined in the 2008 BLM NEPA Handbook when considering the application of Section 390 CXs.

It is still the BLM's policy to maintain a structured, multi- or interdisciplinary permit review and approval process, conduct onsite exams for 100 percent of proposed well and road locations, comply with other procedural requirements required by other environmental statutes, such as the Clean Air Act and the Endangered Species Act, and apply appropriate mitigation and BMPs to all permitted actions even when using a Section 390 CX.

8. Does BLM still plan on developing a standardized checklist for the review and use of Section 390 categorical exclusions, as the GAO recommended? Or will this be part of a new rulemaking process?

Response to 8:

The BLM is considering long-term options for regulations to address the Court's order, which range from reverting to the previous policy outlined in the 2008 BLM NEPA Handbook to proposing those elements of IM 2010–118 the Court vacated and enjoined the agency's ability to implement. The BLM's rulemaking effort will address the Court's concern that BLM provide notice and an opportunity for the public to comment before BLM adopts procedures that would bind the agency and impose or affect individual rights and duties.