



Highlights of [GAO-11-941T](#), a testimony before the Subcommittee on Energy and Mineral Resources, Committee on Natural Resources, House of Representatives

## 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.

View [GAO-11-941T](#). For more information, contact Mark Gaffigan at (202) 512-3841 or [gaffiganm@gao.gov](mailto:gaffiganm@gao.gov).

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## ENERGY POLICY ACT OF 2005

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

## 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 violations 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 rule-making 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.