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Testimony

Before the Subcommittee on Energy and Mineral Resources, Committee on Natural Resources, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
September 9, 2011

ENERGY POLICY ACT OF 2005

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

Statement of Mark Gaffigan, Managing Director
Natural Resources and Environment

U.S. Government Accountability Office

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YEARS

1921-2011

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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.

September 9, 2011

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.

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 categorical 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,

¹Pub. 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).

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

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

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

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

⁵Bureau 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).

⁶GAO, *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).

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 is 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.

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-

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

⁸43 C.F.R. § 3162.3-1(c).

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]

⁹Companies 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.

¹⁰Pub. 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.

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 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 five 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
<ul style="list-style-type: none"> • Using a section 390 CX2 or CX3 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 • Drilling a new well approved using a section 390 CX2, CX3, or CX4 beyond the applicable 5-year time frame • Approving a new oil or gas well at a site that had not yet been drilled • Using section 390 CX5 for ineligible activities • Approving a section 390 CX3 without sufficient supporting NEPA documentation 	<ul style="list-style-type: none"> • Using section 390 CX1 to approve more than one well • Using incorrect expiration dates for activities approved with a section 390 CX2 or CX3 • Failing to include required text defining expiration dates for APDs or nondrilling actions approved using section 390 CX2, CX3, or CX4 • Applying the extraordinary circumstances checklist for section 390 categorical exclusion decisions • Lack of adequate justification to ascertain compliance with use of section 390 CX1, CX2, CX3, or CX4

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 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

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

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

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

¹³Civ. No. 10-237F (D. Wyo. 2011).

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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