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

Before the
House Natural Resources Subcommittee on Energy and Mineral Resources

"*Impacts to Onshore Jobs, Revenue and Energy:*
Review and Status of Section 390 Categorical Exclusions
***of the Energy Policy Act of 2005*"**

September 9, 2011

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.