

ENERGY POLICY ACT OF 2005
USE OF SECTION 390
CATEGORICAL EXCLUSIONS FOR OIL AND GAS ACTIVITIES

June 9, 2010

INTRODUCTION

Section 390 of the Energy Policy Act of 2005 (42 U.S.C. 15942, hereafter Section 390) directs that certain activities “shall be subject to a rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] (NEPA) would apply if the activity is conducted pursuant to the Mineral Leasing Act [30 U.S.C. 181 et seq.] for the purpose of exploration or development of oil or gas.”The purpose of these instructions is to provide revised policy guidance on future implementation of this authority.

Section 390 identifies five categories of activities that are subject to the statutory categorical exclusion:

1. *Individual surface disturbances of less than five (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 and gas well at a location or well pad site at which drilling has occurred previously within five (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 five (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 five (5) years prior to the date of placement of the pipeline.*
5. *Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility.*

GENERAL APPLICABILITY AND USE

The categorical exclusions addressed in this guidance apply exclusively to oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act (30 U.S.C. et seq., as amended) on Federal oil and gas leases. They do not apply to geothermal leases.

The Authorized Forest Officer should carefully apply the applicable categorical exclusions identified in Section 390 in reviewing any Application for a Permit to Drill (APD), Surface Use Plan of Operations (SUPO), or pipeline application involving a proposed activity that meets all the criteria for any of the five categories.

It is critical to note that use of Section 390 in no way limits or diminishes the Forest Service's substantive authority or responsibility regarding review and approval of a SUPO conducted pursuant to 36 CFR 228.107-108. The Authorized Forest Officer will continue to assure that operations on leaseholds on National Forest System lands will minimize effects on surface resources and prevent unnecessary or unreasonable surface resource disturbance, including effects to cultural and historical resources and fisheries, wildlife and plant habitat. Best management practices are to be applied where appropriate to reduce impacts of any actions approved under these categorical exclusions.

Citation / Reference: The legal name and citation for the CEs is Section 390 of the Energy Policy Act of 2005, 42 U.S.C. 15942.

Application of Laws, Regulations, and Policies: All projects approved via Section 390 are subject to all applicable laws, regulations, and policies.

Application of Agency Appeal Regulations:

36 CFR 215 - Apply applicable provisions of 36 CFR 215 and current policy instructions to determine if the activity being authorized pursuant to a Section 390 categorical exclusion is appealable.

36 CFR 251 - Agency appeal regulations at 36 CFR 251 may apply to activities approved via Section 390. The rules at 36 CFR 251 provide for appeals of decisions related to occupancy and use of National Forest System Lands by those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System land.

Application of Agency NEPA Procedures at 36 CFR 220 and FSH 1909.15: Agency decisions that apply the Section 390 categorical exclusions are subject to agency NEPA procedures. The guidance below clarifies key NEPA requirements.

Scoping - Although the Council on Environmental Quality (CEQ) regulations require scoping only for environmental impact statement (EIS) preparation, the agency has broadened the concept to apply to all proposed actions subject to section 102 of NEPA.

Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (§220.6). (36 CFR 220.4(e)(1))

The process of scoping is an integral part of environmental analysis. Scoping includes clarifying and refining the proposed action, identifying preliminary issues, identifying possible use of a CE, and identifying interested and affected persons. Effective scoping depends on all of the above as well as presenting a coherent proposal. The results of scoping are used to clarify public involvement methods, if any; refine issues; where applicable, select an interdisciplinary team; establish analysis criteria; and explore possible alternatives and their probable environmental effects.

In short, scoping is important to discover information that could point to the need for an EA or EIS versus a CE (FSH 1909.15, Chapter 11.6) as well as to inform the public. Scoping complexity should be commensurate with project complexity, which is determined by the Responsible Official.

Public Involvement – Agency regulations require that the public be kept informed of agency actions. Scoping initiates public involvement.

Public involvement should be commensurate with the scale and complexity of the project. Because there is no prescribed method for scoping, tailor the public involvement to the project and the interested and affected publics. It can be as simple as an e-mail or a phone call to an individual or two, or it can be as complex as holding a series of public meetings.

In addition to the notice requirements set out in 36 CFR 228.115, actions that rely on Section 390 will be noticed to the public on a forest's web page associated with (but not on) the quarterly Schedule of Proposed Action (SOPA). The notice will contain at a minimum, project name, brief description, proposed implementation date, and contact.

Extraordinary Circumstance – A review of Extraordinary Circumstances (FSH 1909.15, Chapter 30) must be made in considering the use of Section 390 CEs.

Federal Leases: Section 390 applies exclusively to oil and gas exploration and development activities conducted pursuant to the Mineral Leasing Act of 1920 (30 U.S.C. et seq., as amended) on Federal oil and gas leases. The following clarification is made to the statement “on Federal oil and gas leases”:

Applicability extends to off-lease activities authorized pursuant to the Mineral Leasing Act (e.g., pipeline authorized under the Mineral Leasing Act).

Applicability extends to split estate lands where the oil and gas estate is federally owned and leaseable under the Mineral Leasing Act but does not apply to split

estates where the oil and gas is privately owned as a reserved or outstanding property interest.

Applicability extends to both reserved public domain lands and acquired lands where the oil and gas estate are federally owned and leaseable under the Mineral Leasing Act for Acquired Lands of August 7, 1947 (Pub. L. No. 80-382, Ch. 513, 61 Stat. 913 as amended: 30.U.S.C. 351(note), 351-360).

CATEGORY SPECIFIC GUIDANCE, CATEGORY 1

The first categorical exclusion in Section 390 is: *“Individual surface disturbances of less than five (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.”*

The factors for determining the availability of Section 390(b)(1) are the following three criteria: , 1) individual five-acre disturbance threshold, 2) 150-acre unreclaimed disturbance limit, and 3) prior site-specific analysis of oil or gas exploration/development in a NEPA document.

Use of this category requires the Authorized Forest Officer to consider the following three things:

- 1) Individual five-acre disturbance threshold – The Authorized Forest Officer must determine and document that each individual action under consideration will disturb less than five acres on the site. If more than one activity is proposed for a lease (e.g., two individual wells or when reviewing a Master Development Plan (MDP) collectively adding several wells), each activity is counted separately and each must disturb less than five acres.

The five-acre disturbance threshold is per SUPO - It includes all surface disturbance associated with the proposed action on the lease and off the lease if the off-lease activities are authorized pursuant to the Mineral Leasing Act. For example in the case of an APD, the five-acre threshold would include disturbances for construction of the well pad, roads, utilities, and production facilities.

Proposed impacts to existing unreclaimed disturbed areas do not count towards the individual five-acre surface disturbance constraint (e.g., maintenance of an existing road would not be counted since it represents an existing disturbance).

- 2) 150-acre unreclaimed disturbance limit – The Authorized Forest Officer must determine and document that the current unreclaimed surface disturbance readily visible on the entire leasehold is not greater than 150 acres, including the action under consideration. This would include disturbance from previous rights-of-way issued in support of lease development. If one or more Federal leases are committed to a BLM approved unit or communitization agreement, the 150 acre

threshold applies separately to each lease. For larger leases, the requirement for adequate documentation would be satisfied with a copy of the most recent aerial photograph in the file with an explanation of recent disturbance that may not be shown on the aerial photos. Maps, tally sheets, or other visuals may be substituted for aerial photographs.

The 150-acre unreclaimed disturbance threshold includes only disturbance associated with oil and gas activities and associated rights-of-ways on the leasehold regardless of surface ownership. It does not include disturbance from other activities.

Activities without surface disturbance or successfully reclaimed surface areas would not be included in the 150-acre constraint (e.g., an above ground pipeline).

- 3) Site-specific analysis of oil or gas exploration/development in a prior NEPA document – The Authorized Forest Officer must determine and document that a site-specific NEPA document exists that previously analyzed oil or gas exploration and/or development. For the purposes of this categorical exclusion, the site-specific NEPA document can be: an exploration and/or development EA/EIS, an EA/EIS for a specific Master Development Plan (MDP), a multi-well EA/EIS, or an individual permit approval EA/EIS. The NEPA document must have analyzed the exploration and/or development of oil and gas (not just leasing) and the proposed activity must be within the general boundaries of the area analyzed in the EA or EIS. The NEPA document need not have addressed the specific permit or application being considered.

This categorical exclusion may also be applied to geophysical exploration activities provided the above criteria are met.

The same or better mitigating measures considered in the parent NEPA documents must be applied to all actions approved under this categorical exclusion.

CATEGORY SPECIFIC GUIDANCE, CATEGORY 2

The second categorical exclusion in Section 390 is: *“Drilling an oil and gas well at a location or well pad site at which drilling has occurred previously within five (5) years prior to the date of spudding the well.”*

The factors for determining the availability of Section 390(b)(2) are the following two criteria: 1) drilling at a location or well pad previously drilled, and 2) five-year limitation from previous drilling.

Use of this category requires the Authorized Forest Officer to consider the following two things:

- 1) Drilling at a location or well pad previously drilled – The Authorized Forest Officer must determine and document that the action under consideration (drilling) would occur on an oil and gas location or well pad that had previous drilling. A previous location or well pad will be recognized only where a previously disturbed or constructed well pad was used in support of drilling a well. Previous drilling refers to any drilled well including injection, water source, or any other service well. Additional disturbance or expansion of the existing well pad is not restricted as long as it is tied to the original location or well pad. This exclusion does not extend to new well sites merely in the general vicinity of the original location or well pad.
- 2) Five-year limitation from previous drilling – The Authorized Forest Officer must determine and document that the previous drilling has occurred within five years prior to the date of spudding the proposed well. The five-year constraint is based on when the most recent previous drilling occurred. This means that the most recent drilling activity resets the time period clock for determining the five year limit. Documentation for determining the five-year constraint must include the date when the last applicable previous drilling activity was completed.

If delays in spudding the new well and the time period between the previous well completion and spudding exceeds the five-year limitation, preparation for drilling operations must be suspended until appropriate NEPA compliance occurs for the proposed well and a new decision is issued. Therefore, a condition of approval (COA) must state that, "If the well has not been spudded by _____ (the date the categorical exclusion is no longer applicable) _____, this approval will expire and all operations related to preparing to drill the well must cease."

CATEGORY SPECIFIC GUIDANCE, CATEGORY 3

The third categorical exclusion in Section 390 is: *“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 five (5) years prior to the date of spudding the well.”*

The factors for determining the availability of Section 390(b)(3) are the following three criteria: 1) proposed drilling is within a developed oil or gas field, 2) analysis of drilling as a reasonably foreseeable activity in a NEPA document, and 3) five-year limitation from when the aforementioned NEPA document was finalized or supplemented.

Use of this category requires the Authorized Forest Officer to consider the following three things:

- 1) Proposed drilling is within a developed oil or gas field – The Authorized Forest Officer must determine and document that the action under consideration

(drilling) is within a developed oil or gas field. A developed field will be recognized as: (a) defined by the BLM Field Office where activity is proposed, or (b) any field in which a confirmation well has been completed.

- 2) Analysis of drilling as a reasonably foreseeable activity in a NEPA document – The Authorized Forest Officer must determine and document that a NEPA document exists addressing reasonably foreseeable activity (see 36 CFR 228.102(c)(3-4)) that encompasses the action under consideration (drilling). For the purposes of this categorical exclusion, the site-specific NEPA document can be of any type that analyzed such drilling as reasonably foreseeable regardless of which agency prepared the analysis and may include land management plans when such an analysis was performed.

The statute identifies no particular requirement regarding the degree or specificity of detail required for use of Section 390(b)(3). Ensure that the NEPA document provides an adequate consideration of effects of such drilling and the proposed activity is within the range of identified environmental effects for oil or gas development. It is adequate if the proposed well is in the general geographic vicinity of the predicted development disclosed in the prior NEPA document. The same or better mitigating measures considered in the parent NEPA documents must be applied to all actions approved under this categorical exclusion.

- 3) Five-year limitation from when the aforementioned NEPA document was finalized or supplemented – The Authorized Forest Officer must determine and document that the NEPA document, referred to in criteria 2 above, was completed within five years prior to the date of spudding the proposed well. The five-year constraint is based on when the most recent NEPA document was finalized or supplemented. This means that the most recent NEPA document resets the time period clock for determining the five year limit. Documentation must identify the date and title of the last applicable NEPA document.

If delays in spudding the new well and the time period between the previous well completion and spudding exceeds the five-year limitation, preparation for drilling operations must be suspended until appropriate NEPA compliance occurs for the proposed well and a new decision is issued. Therefore, a condition of approval (COA) must state that, "If the well has not been spudded by _____ (the date the categorical exclusion is no longer applicable) _____, this approval will expire and all operations related to preparing to drill the well must cease."

CATEGORY SPECIFIC GUIDANCE, CATEGORY 4

The fourth categorical exclusion in Section 390 is: *“Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline.”*

The factors for determining the availability of Section 390(b)(4) are the following two criteria: 1) an approved right-of-way corridor, and 2) five-year limitation from corridor approval (or amendment).

Use of this category requires the Authorized Forest Officer to consider the following two things:

- 1) Approved right-of-way corridor – The Authorized Forest Officer must determine and document the action under consideration would occur within an approved right-of-way corridor. The term “right-of-way corridor” is a general term that includes any preexisting or approved corridor or right-of-way (whether on or off lease). The Authorized Forest Officer is not limited to any particular types of corridors or rights of way but should identify the date, location and underlying authority for the approval or authorization in the documentation. Approved right-of-way corridors of any type may be used for new pipeline placement, including those approved for the burial of a pipeline or pipeline conduit in an existing road bed or along a power line right-of-way. Minor variations that allow additional disturbance or width needed to properly or safely install a new pipeline are permissible under this exclusion. Creation of a new right-of-way outside and not materially overlapping the existing corridor is not permissible. The extent of additional disturbance or width needed to properly or safely install the new pipeline is at the discretion of the Responsible Official who shall assure that any variation will minimize effects on surface resources and prevent unnecessary or unreasonable surface resource disturbance, including effects to cultural and historical resources and fisheries, wildlife and plant habitat. There is no requirement for the approved right-of-way to be currently in use or occupied.

For purposes of Section 390(b)(4), the approved right-of-way corridor may be either on or off lease. *However, if off lease, the this categorical exclusion is only available where approval and placement of the pipeline is authorized pursuant to the Mineral Leasing Act and does not include instances where a pipeline is approved pursuant to other general authorities.*

- 2) Five-year limitation from ROW corridor approval (or amendment) – The Authorized Forest Officer must determine and document that use of the right-of-way or corridor, referred to in criteria 1 above, was approved or amended within 5 years prior to the date of the proposed pipeline placement. Determination of the five-year constraint is based on when the most recent decision (NEPA or permit authorization, as applicable) was approved to allow use of the corridor. The time period extends to the date placement (installation) of any portion of the new pipeline is concluded, provided that placement activities began within the five-year constraint. Documentation for determining the five-year constraint must include the date of the last applicable corridor approval or amendment.

If the operator delays in beginning to place the pipeline and the time period between the approval of the corridor and placement exceed the five-year limitation, the Authorized

Forest Officer must suspend the right-of-way authorization until the appropriate NEPA compliance occurs for the proposed right-of-way use and a new decision is issued. Therefore, the right-of-way approval must contain a condition of approval (COA) that provides for the suspension of the authorization if placement does not begin before the last date that the categorical exclusion is available, thus requiring the operator to obtain a new right-of-way if placement has not occurred. Therefore, a condition of approval (COA) must state that, "If installation of the pipeline has not begun by _____ (the date the categorical exclusion is no longer applicable) _____, this approval will expire and all operations related to preparing to pipeline installation must cease."

CATEGORY SPECIFIC GUIDANCE, CATEGORY 5

The fifth categorical exclusion in Section 390 is: "*Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility.*"

The factor in determining the availability of Section 390(b)(5) is: 1) Maintenance of a minor activity.

Use of this category requires the Authorized Forest Officer to consider the following:

- 1) Maintenance of a minor activity – The Authorized Forest Officer must determine and document that the activity under consideration constitutes maintenance of a minor activity. Actions would include maintenance of a well, wellbore, road, wellpad, or production facility having surface disturbance. Actions would not include construction or major renovation of a building or facility.

Road maintenance, as defined in Forest Service Transportation System procedures at FSM 7705, is considered a minor maintenance activity within the scope of Section 390(b)(5). Road reconstruction or construction is not considered a minor activity for use of this CE. For off-lease road maintenance, determine if 36 CFR 220.6(d)(4) applies.

DOCUMENTATION

A Decision Memo is not required for Section 390 CEs. However, the following documentation by the Authorized Forest Officer must be in the project record to demonstrate the activities under consideration are within those authorized by Section 390:

- 1) Identification of the applicable categories.
- 2) A brief narrative stating the rationale for making the determination that use of the categorical exclusion(s) applies to the activity under consideration,

specifically addressing the applicable review criteria, including extraordinary circumstances.

- 3) Any additional information required to demonstrate compliance with all applicable laws, regulations, and policies (e.g., Biological Assessment/Biological Evaluation, cultural/heritage resource clearance, etc.).
- 4) Copies or reference to materials used to support the determination.