

## Position Paper

Government Accountability Office Study on  
Section 390 Categorical Exclusions  
September 2009

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### Summary

- The Government Accountability Office (GAO) study on Section 390 Categorical Exclusions (CX)<sup>1</sup> has been mischaracterized in the press as showing widespread abuse by the Bureau of Land Management's (BLM).
- The report actually provides reasonable recommendations for BLM to exercise oversight of the program, and details mostly administrative errors, not major violations of the law.
- IPAMS believes GAO completely missed one major abuse of BLM's implementation – BLM's discretionary use of CXs even when companies meet all the criteria mandated by Congress.

### IPAMS Analysis of the Report

- The report overstates violations of the law in some places, and then concludes that “...our findings reflect what appear to be honest mistakes stemming from confusion in implementing a new law with evolving guidance.”
- A careful reading of the report shows that from a random sample of 300 approved CXs, the following violations of the law were found:
  - Using CX2, CX3, or CX4 beyond the five-year timeframe: 3 instances, a 1% sample error rate
  - Using CX2 or CX3 to approve an activity other than an oil or gas well: 7 instances, 2.3% error rate
  - Using CX2 on a well pad that did not have an existing well: 5 instances, 1.7% error rate
  - Using CX5 for projects that are not “maintenance of a minor activity”: 4 instances, 1.3% error rate
  - Using CX 3 without an approved environmental document: 1 instance, 0.3% error rate
  - Cumulative sample error rate of 6.7%.
- While we're concerned with any violation of the law, we agree with GAO that these errors stem from confusion over implementing a new program, which is not uncommon with any new government program. These errors can be cleared up with revised guidance, implementation templates, and better oversight from state offices, as recommended by GAO.

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<sup>1</sup> United States Government Accountability Office, *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.

- GAO also provides details on several other problems with implementation, but these are clearly administrative, and did not result in violations of the law. **The last two cases cited below resulted in more restriction on the CXs and environmental protection than required by law.** The administrative errors include:
  - Using one form to document CXs for multiple wells, all of which individually were legitimate uses of CXs – 15 instances
  - Documents without the expiration date stated, but with no legal violations: 95 instances
  - CX decision documents that did not adequately provide supporting documentation – no number of instances given
  - Using the incorrect date to start the five-year timeframe, resulting in less time for using the CX than that allowed by law: 6 instances, 2% error rate
  - Applying the extraordinary circumstances checklist, which is not required for statutory CXs: 21 instances, 7% error rate.
- Again, these administrative errors can be easily cleared up with training, oversight, improved guidance documents, and documentation templates.

### Deficiencies in the GAO Report

- IPAMS believes GAO’s analysis of the CX sample is methodical and illuminating, but the report overall suffers when it does not adhere to that rigor. At times the document appears to advance a political agenda rather than remain a straightforward analysis of the implementation of the program. The text diverges into highlighting ‘disagreements’ from government officials and other groups interviewed in the course of the study. General concerns and expressed opinions are not germane to the intent of the study, except when they relate to concerns about the implementation of the law.
- Individuals may disagree with a law, but that disagreement should not advise a study on how the law is applied. The Energy Policy Act of 2005 that codifies the Section 390 CXs is the law of the land, and disagreements with it are not appropriate subjects for a GAO study until translated into new laws. GAO should not be in the business of advancing a particular political viewpoint, particularly with the following mission statement: “Our Mission is to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people. We provide Congress with timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced.”<sup>2</sup>
- GAO ignored BLM’s frequent violation of the law when CXs were not used for projects that met the criteria mandated by Congress. CXs are not discretionary. GAO found many examples where BLM failed to use them, but did not even attempt to systematically document those violations of the law. GAO didn’t investigate why five field offices that process APDs - Miles City, MT; Great Falls, MT; Rock Springs, WY; Newcastle, WY; and

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<sup>2</sup> GAO website, <http://gao.gov/about/index.html>.

Roswell, NM – failed to approve a single CX.

- The report includes a discussion on whether the Section 390 CXs are subject to review for “extraordinary circumstances,” as administrative CXs are. Section 390 CXs are statutory, not administrative. There is nothing in the statutory language that even mentions extraordinary circumstances; rather the language is straightforward in mandating the use of CXs. For GAO to review CXs from this perspective is an overreach of the intent of the law.
- Further, the report questions the “rebuttable presumption” language and questions whether Section 390 CXs are mandatory. Congress intended that the 390 CXs are mandatory, and would not have bothered to pass Section 390 if it were just another administrative review. In our input into the study, we provided the contact information for the House Natural Resources Committee staff member who wrote the language. Questions about the meaning of the language and the legislative history could have been cleared up with him. Instead, GAO did not contact him, and as a result, has missed an opportunity to clear up confusion on the issue. Rather than shedding objective light on the subject, GAO has chosen to sow more doubt.
- The discussion on page 36 about ozone levels is simply incorrect – “According to the Environmental Protection Agency and others, ozone levels around at least three field offices—Farmington, New Mexico; Pinedale, Wyoming; and Vernal, Utah—have reached or exceeded allowable levels, in part because of the release of nitrogen oxides from additional wells approved with section 390 categorical exclusions.” This statement is incorrect on a number of accounts:
  - Ozone levels have exceeded National Ambient Air Quality Standards (NAAQS) in the vicinity of Pinedale. However, that is not the case for Vernal and Farmington, which EPA has not declared to be in non-attainment for ozone. Farmington is close, at 95% of the standard, but for Vernal, monitoring data doesn’t even show levels of ozone approaching the NAAQS limit of 75 ppb.
  - There are many sources for ozone, including boundary conditions, biogenic sources, coal fired power plans, oil and gas sources, and other industries that have caused northwest New Mexico to approach the standard. Source apportionment studies can generally show how much is related to various sources in broad terms, but certainly cannot determine contribution from CXed wells in the small proportion of the ozone exceedance that is attributable to oil and gas.
  - The situation in Pinedale is similar, where the area is in non-attainment for ozone. However, the majority of CXs used in Pinedale are based on detailed Environmental Impact Statements (EIS) that specifically analyzed the contributions of wells to air quality.
  - The investigators should have focused on issues related to the report, not on air quality which is beyond the scope of the report.
- The implication on page 37 about development in Pinedale being a spider web again addresses issues beyond the scope of the study, and reflects a misunderstanding of the situation there. In fact, the report contains a picture from an environmental activist, Linda Baker, with an agenda of stopping oil and gas development in southwest Wyoming. The

majority of CXs in Pinedale are based on environmental analysis that is extremely protective of wildlife and the environment, or from multi-well pads to ensure impact is minimal. A small area is being developed intensely in a careful, phased manner specifically to protect wildlife using directional drilling to minimize surface disturbance. Pinedale should be held up as an area where CXs have been successfully used to develop vast supplies of natural gas while being extremely protective of the environment, not called into question as in the GAO report.

- Highlighting the Nine Mile Canyon lawsuit on page 37 is another case that is not central to the study, and the discussion in the report does not reflect accurately the situation. The existence of a lawsuit is not an indication of confusion with BLM's use of categorical exclusions. Lawsuits are routinely used by obstructionist groups, who often fail to win their legal challenges when they are finally heard in court. In the Nine Mile Canyon case, the judge has not ruled on the merits of the case, and in fact it is unlikely the plaintiffs would prevail, since BLM has analyzed the effects of dust on the canyon's rock art panels and instituted mitigation measures. The existence of a lawsuit is not evidence of confusion with the law, but merely evidence of a deliberate strategy to use litigation to stop energy development.
- The GAO report wades into a discussion of the appropriateness of using land use plans as the basis for CXs. The fact that this has sparked debate is not germane to what should be a rigorous study. Section 390 is the law, and government agencies do not have discretion to pick and choose which laws to follow. In a democratic system, those who want to change the law can do so through the legislative process. GAO should stick to ensuring the law is implemented properly.
- The report contains a section on consistency with NEPA Documents. While environmental groups would like the situation to be otherwise, reasonably foreseeable development scenarios are used for purposes of analyzing and disclosing environmental impact, and are not caps to development, whether for an EIS or for the statutory CXs. The Secretary of the Interior, through the Interior Board of Land Appeals (IBLA), has made clear in nine separate decisions that the RFD Scenario is not a limit on future development.<sup>3</sup>

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<sup>3</sup> *Wyoming Outdoor Council, et al.*, 176 IBLA 15, 45 (2008); *Biodiversity Conservation Alliance, et al.*, 174 IBLA 1, 9 – 13 (2008) (holding with respect to the Great Divide RMP that the RFD Scenario is not a limitation on development); *Deborah Reichman*, 173 IBLA 149, 157 – 158 (2007) (holding with respect to the Dakota Prairie Grasslands Little Missouri National Grasslands RMP that the RFD Scenario is not a limitation on development); *National Wildlife Fed'n*, 170 IBLA 240, 249 (2006) (holding with respect to the Great Divide RMP that the RFD Scenario is not a limitation on development); *Wyoming Outdoor Council, et al.*, 164 IBLA 84, 99 (2004) (holding with respect to the Pinedale RMP that the RFD Scenario does not establish “a point past which further exploration and development is prohibited”); *Southern Utah Wilderness Alliance*, 159 IBLA 220, 234 (2003) (holding that the Book Cliffs RMP did not establish a well limit); *Theodore Roosevelt Conservation Partnership, et al.*, IBLA Docket No. 2007-208, Order at \*22 (Sept. 5, 2007); *Wyoming Outdoor Council, et al.*, IBLA Docket No. 2006-155, Order at \*26 - 27 (June 28, 2006) (determining RFD Scenario for Pinedale RMP is not a limitation on future development); *Biodiversity Conservation Alliance, et al.*, IBLA No. 2004-316, Order at \*7 (Oct. 6, 2004) (citing *Southern Utah Wilderness Alliance*, 159 IBLA at 234) (holding with respect to the Great Divide RMP that the “RFD scenario cannot be considered to establish a limit on the number of oil and gas wells that can be drilled in a resource area.”). As indicated by the number of decisions cited above, the purpose of the RFD Scenario continues to be a source of confusion and litigation. Even now multiple appeals are pending before the IBLA and federal courts across the nation in which groups opposed to continued energy development are attempting to argue the RFD Scenario as a cap to preclude further domestic energy development.