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Bob Abbey
Director, Bureau of Land Management
1849 C Street NW, Room 5665
Washington DC 20240

October 2, 2009

**Re: BLM Analysis & Oversight of Oil and Gas Development
GAO CX Report on Section 390 of EPACT of 2005**

Dear Director Abbey:

The September 2009 Report to Congress by the Government Accountability Office concluded that “BLM's use of section 390 categorical exclusions has frequently been out of compliance with both the law and BLM's guidance.” Accordingly, we request that the Bureau of Land Management immediately suspend the application of Section 390 categorical exclusions (390 CXs) pursuant to the Energy Policy Act of 2005 (EPAct), pending a full internal review.

We are encouraged by GAO's statement that “the Department of Interior concurred with [GAO's] recommendations and stated that it will take immediate steps to ensure that the use of section 390 categorical exclusions is consistent with [EPAct] and BLM guidance.” DOI rightly recognizes the existence of a problem and the need to correct it.

When oil and gas development proceeds on federal lands, it must be done right pursuant to comprehensive environmental review that includes quality cumulative impacts analyses. But Section 390 has regularly resulted in uninformed decision-making without meaningful opportunities for public involvement – at the expense of other values and users of our public lands.

From 2006-08, BLM used 390 CXs to approve nearly 6,100 of 22,000 total Applications for Permit to Drill (approximately 28%). GAO Report at 12. GAO reported about 1,150 more instances in which BLM approved 390 CXs than had been documented by BLM, largely because many field offices erroneously used single decision documents to

approve multiple oil and gas wells. Widespread inconsistency, confusion and abuses documented by GAO and others establish the need for an immediate timeout.

GAO stated three broad concerns in its summary of the Report:

1. Fundamental questions have been raised “about what section 390 categorical exclusions are and how they should be used[.]”
2. Specific questions have been raised about “key concepts underlying [EPA]’s description of certain” 390 CXs, including whether the CXs have been used to exceed development levels absent adequate environmental analysis.
3. “[V]ague or nonexistent definitions of key terms in the law and BLM guidance [. . .] have led to varied interpretations among field offices and concerns about misuse and a lack of transparency.”

Approving drilling projects without full compliance with the National Environmental Policy Act or public involvement impacts air quality, water quality, wildlife habitat, public health, outdoor recreation, private property owners, and communities.

The new GAO Report is only the most recent condemnation of 390 CXs. First, a 2007 Resolution of the Western Governor’s Association (Att. 1) requested that Congress amend section 390 because the application of 390 CXs was compromising basic Western values. According to the Governors:

Large intact and functioning ecosystems, healthy fish and wildlife populations, and abundant public access to natural landscapes are a significant contributing factor to the West's economic and in-migration boom as well as quality of life.

Second, on March 14, 2007, Senator Jeff Bingaman, Chairman of the Senate Committee on Energy and Natural Resources, wrote former Secretary Kempthorne to state that he shares the Governors’ concerns, and to request a review of the implementation of 390 CXs. Att. 2. However, DOI did not act. Third, Congressmen Nick Rahall (Chairman of the House Committee on Natural Resources) and James Costa (Chairman of the House Subcommittee on Energy and Mineral Resources) joined Senator Bingaman in requesting the GAO study released on September 16, 2009 following a comprehensive investigation.

Among the most damning GAO findings is the tendency for some BLM offices to play a “shell game” to evade the requirements of the National Environmental Policy Act. According to Wyoming Governor Dave Freudenthal’s comments on the GAO Report (Att. 3):

On one hand, we heard that the land use plans should not be detailed because the details would be worked out in the project-level analysis. With the passage of these categorical exclusions, we were told that the project-level analysis would

not be done in favor of using categorical exclusions, relying on the land use plan level analysis they told us we didn't need in the first place. I don't really care how the analysis is done - I just want it done.

The biggest offender on the shell game has been the Farmington Field Office in northwest New Mexico, which issued 1,221 “CX3s” relying on an RMP that did not purport to provide site-specific analysis of future drilling projects. GAO Report at 12, 59. Other field offices could be poised to follow suit under newly approved RMPs in Utah and elsewhere, with potentially far-reaching and unacceptable consequences. GAO Report at 44.

390 CXs across the West are defeating NEPA’s goals of informed decision-making and public involvement. For example, the Pinedale Field Office in Wyoming approved 1,498 Section 390 CXs from 2006-08, or more than 80% of all APDs issued by Pinedale. GAO Report at 12. The results speak for themselves: this rural landscape is in nonattainment with ozone pollution standards, visibility is deteriorating, wildlife habitat is being devastated, and RMP standards are not being met. Other offices experienced similar results.

Because Section 390 has failed the American public and our federal lands, we support its repeal consistent with H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2009. Pending repeal and subject to an immediate moratorium on 390 CXs, BLM should issue an Instruction Memorandum and other policy guidance as follows:

- Existing Council on Environmental Quality and Department of Interior rules and policies must be applied to 390 CXs, meaning that “extraordinary circumstances” which indicate that significant impacts could occur makes a drilling project ineligible for a CX.
- The public has a right to know what projects are proposed for public lands. BLM should standardize the practices used by the Glenwood Springs and White River field offices in Colorado by requiring timely posting and access to proposed CXs – and other oil and gas projects -- by uniformly directing Field Offices to post such information online.
- Instead of allowing piecemeal development to proceed CX by CX, BLM should encourage common-sense planning approaches such as Master APD Packages with Master Drilling Plans, Geographic Area Development Plans, or Geographic Area NEPA documents.

Immediate National Office guidance is urgently needed. Notwithstanding GAO’s damning findings, the Wyoming State Office has stated its intent to continue with

“business as usual” on 390 CXs (Casper Star Tribune, 9/28/09) and Utah field offices continue to process APDs as 390 CXs. Rather than continuing to apply a failed program, BLM should revisit pending 390 CX approvals that have not yet been acted on.

Thank you for your time and consideration. We look forward to working with you to ensure compliance with the letter and spirit of NEPA. Please contact Dave Alberswerth with The Wilderness Society or Mike Chiropolos with Western Resource Advocates to further discuss this issue.

Very sincerely,

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cc: Wilma Lewis, Assistant Secretary for Land and Minerals Management
Ned Farquhar, Deputy Assistant Secretary for Land and Minerals Management
Senator Jeff Bingaman
Congressman Nick Rahall

- Attachment 1: Western Governors' Assn Policy Resolution 07-01 on Section 390
- Attachment 2: Senator Bingaman letter to Secretary Dirk Kempthorne
- Attachment 3: Governor Freudenthal comments on GAO Report