

Use of Section 390 Categorical Exclusions for Oil and Gas Development

Section 390 of the Energy Policy Act of 2005 (the “Act”) establishes statutory categorical exclusions (CX) under the National Environmental Policy Act (NEPA) that apply to five categories of oil and gas exploration and development on Federal oil and gas leases. Section 390 does not apply to geothermal leases. This section of the Act took effect on the date of enactment, August 8, 2005.

The use of the new statutory CXs is not dependent on the Council for Environmental Quality (CEQ) process for approving new CXs. Additionally, the CXs established by Section 390 are not subject to the requirement in 40 CFR 1507.3 that would preclude their use when there are extraordinary circumstances. This is because the CXs addressed in this guidance are established by statute and not under the CEQ procedures pursuant to 40 CFR 1507.3 and 1508.4.

This guidance provides direction to the Field and State Offices on the immediate implementation of this new authority. This is interim guidance and may be modified when BLM promulgates a revision to Onshore Oil and Gas Order No. 1.

The law prescribes that for five categories of oil and gas operations, applicability of the Section 390 categorical exclusions is presumed, but subject to rebuttal. The five categories are:

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 location or well pad at a site at which drilling has occurred 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 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.*

In reviewing an Application for Permit to Drill (APD), Surface Use Plan of Operations, or pipeline application involving a proposed activity that fits into one of the above-described five categories, the appropriate CX is to be applied, and it may be presumed that no further NEPA analysis is required. Specifically, if one or more of five statutorily-created CXs applies to a proposed activity, Field Officials are not to use the existing CX review process or

apply the extraordinary circumstances in 516 Departmental Manual. The Authorized Officer should apply the CX unless the activity does not meet the standard prescribed in the law to qualify for the exclusion. The Authorized Officer must include a brief narrative in the well file stating the rationale for making the determination that the categorical exclusion applies. If more than one CX is applicable, the rationale for the determination for each CX needs to be included in the well file. Field Offices are advised not to prepare a NEPA document in lieu of appropriately applying the statutory CXs. Environmental Best Management Practices (BMP) and other suitable mitigation are to be applied to permit approvals in accordance with current national policy. The application of site-specific measures does not require additional NEPA documentation.

Nothing in the Act or these instructions precludes the use of the Documentation of NEPA Adequacy (DNA) process, where appropriate. Moreover, when a DNA can be justified based on existing NEPA documents (i.e., EA or EIS), it may be employed even if the document is not as recent or the disturbance so minor as to qualify for one of these CXs.

Specific instruction for each new CX is stated below:

1. The first categorical exclusion in the Act applies to: *“(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.”*

This requires the Authorized Officer to do three things before applying this exclusion to any authorization. First, the Authorized Officer must determine that the action under consideration will disturb less than five acres on the site. If more than one action is proposed for a lease (e.g., two or more wells), each activity is counted separately and each may disturb up to five acres. Similarly, the five-acre limit should be applied separately to each action requiring discrete BLM action, such as each APD, even though for processing efficiency purposes the operator submits for BLM review a large Plan of Development (POD) addressing many wells.

Second, the Authorized Officer must determine that the current unreclaimed surface disturbance readily visible on the entire leasehold is not greater than 150 acres, including the proposed action. 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.

Finally, this categorical exclusion includes the requirement of a site-specific NEPA document. For the purposes of this categorical exclusion, a site-specific NEPA analysis can be either an exploration and/or development EA/EIS, an EA/EIS for a specific POD, 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 action/activity being considered 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 CX may also be applied to geophysical exploration activities provided the above requirements have been met. For example, if an oil and gas exploration and development EIS analyzes the site-specific impacts of 3D geophysical exploration within the oil and gas field, this CX may apply to subsequent 3D geophysical activities conducted within the field.

The above requirements, that is, the five acre threshold, 150 acre unreclaimed disturbance limit, and a site-specific NEPA document that addressed oil and gas development are the only applicable factors for review pursuant to this statute, but all must be satisfied in order to use this CX.

2. The second exclusion applies to *“Drilling an oil and gas location or well pad at a site at which drilling has occurred within five (5) years prior to the date of spudding the well.”*

The well file narrative to support use of this CX must state the date when the previous well was completed or the date the site had workover operations involving a drilling rig of any type or capability; this also includes completion of any plugging operations. A “location or well pad” is defined as a previously disturbed or constructed well pad used in support of drilling a well. “Drilling” in the context of, “Drilling has occurred within five (5) years” 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.

If the operator delays in spudding the new well and the time period between the previous well completion and spudding exceed 5 years, the operator must suspend preparation for drilling operations until the BLM completes NEPA compliance for the proposed well and issues a new decision on the APD. Therefore, the APD must contain a condition of approval (COA) stating that "If the well has not been spudded by (the date the CX is no longer applicable), this APD will expire and the operator is to cease all operations related to preparing to drill the well.”

The above requirements, that is, the drilling of a well at an existing location or well pad and the five year limitation are the only two applicable factors for review pursuant to this statute, but must both be satisfied in order to use this CX.

3. The third exclusion applies to *“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 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.”

This may become one of the most commonly used CX established by the Act. The proposed well must be within a developed oil and gas field. A developed field is any field in which a “confirmation well” has been completed. Normally, this is after the third well in a field. The pending APD must also be within the reasonably foreseeable development scenario (RFD) used in either a land use plan EIS or subsequent developmental EA or EIS. Finally, the new well must be spudded within 5 years of that previous NEPA document. This provision applies to “any environmental document” that analyzed drilling, meaning any document adopted by any Federal agency pursuant to NEPA, regardless of whether it was adopted by the BLM. Because the 5-year period is again tied to the spudding of the pending well, the APD must contain a COA that if no well is spudded by the date the CX is no longer applicable, the APD will expire, thus requiring the operator to obtain a new APD. For example, “If the well has not been spudded by (the date the categorical exclusion is no longer applicable), this APD will expire and the operator is to cease all operations related to preparing to drill the well.”

Full field development EISs do not need to be prepared where the development envisioned was analyzed in the land use plan EIS. As long as the development foreseen does not exceed the number of wells and/or surface disturbance analyzed in the prior NEPA document, no additional NEPA documentation is required because of changes in the density of development.

All of the following requirements must be met to use this CX:

- 1) The proposed APD is within a developed oil or gas field. A developed field is defined as any field in which a confirmation well has been completed.
- 2) There is an existing NEPA document (including that supporting a land use plan) that contains a reasonably foreseeable development scenario broad enough to encompass this action.
- 3) The NEPA document was finalized or supplemented within five years of spudding the well.
4. The fourth exclusion applies to: *“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 5-year time period is to be calculated from the most recent date that a decision (NEPA or permit authorization) was approved to allow use of the corridor. This means that more recent amendments to the corridor may have reset the time period clock. The time period extends to the date placement of any portion of the new pipeline is concluded, provided that placement activities began within the 5-year period. If the operator delays in beginning to place the pipeline, and the time period between the approval of the corridor and placement exceeds five years, the authorized officer must

suspend the right-of-way authorization until the BLM completes NEPA compliance for the proposed right-of-way and issues a decision. To avoid problems, the right-of-way must contain a term or condition that provides for the suspension of the authorization if placement does not begin before the last date that the CX is available, thus requiring the operator to obtain a new right-of-way.

Existing right-of-way corridors of any type can be used for new pipeline placement, such as the burial of a pipeline or pipeline conduit in an existing roadbed or along a power line right-of-way, could qualify for the exclusion. The term “right-of-way corridor” in Section 390 is not limited to those authorized under 43 CFR 2800, but is a more generalized term that applies to any type of corridor or right-of-way (whether on or off lease) approved under any authority or vehicle of the BLM, including Sundry Notices. Additional disturbance or width needed to properly or safely install the new pipeline may be authorized under this exclusion if it is within the approved right-of-way corridor. Creation of a new right-of-way completely outside and not overlapping into a portion of the existing corridor is not authorized.

The above requirements, that is, the placement of a pipeline in an existing corridor of any type and placement of the pipe within five years of approval (or amendment) are the only two applicable factors for review pursuant to this statute and must both be satisfied to use this CX.

Other types of new right-of-way applications cannot be excluded from NEPA analysis under this exclusion, for example, above ground power lines, or new roads; however, existing right-of-way corridors, such as roads, may be used for new pipeline or pipeline conduit in an existing roadbed.

5. The fifth exclusion applies to “*Maintenance of a minor activity, other than any construction or major renovation o(f) a building or facility.*”

This CX applies to maintenance of minor activities, such as maintenance of the well or wellbore, a road, wellpad, or production facility. The exclusion does not cover construction or major renovation of a building or facility. The addition of a compressor or a gas processing plant would therefore not be eligible for this CX.

Please Note: The CX (1) and (3) reference previous NEPA documents. Field Offices must apply the same or better mitigating measures considered in the parent NEPA documents to all actions approved under any CX. Additionally, BMPs are to be applied as necessary to reduce impacts to any authorization issued, regardless of the NEPA analysis or exclusion used.