

**Planning, Analysis, and  
Competitiveness  
Subcommittee  
Recommendations**

## Subcommittee Proposing Recommendation: Non-Fossil Working Group (PAC)

### Recommendation: ENSURING A CONSISTENT OFFSHORE WIND SUPPLY

The Secretary shall plan a wind leasing program to bring at least twenty additional gigawatts from offshore wind to the United States over the decade beginning in 2024. This goal shall be achieved by leasing at least two gigawatts annually through at least four lease sales on the United States Outer Continental Shelf (OCS) of at least five hundred megawatts each.

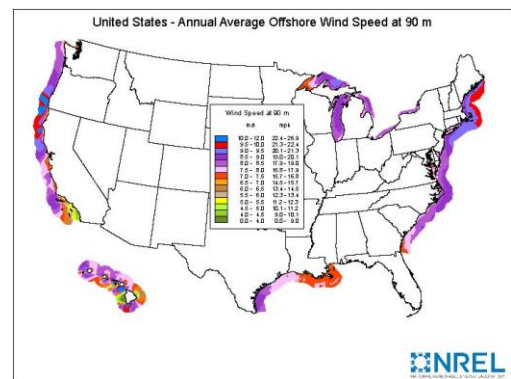
**STAKEHOLDER EDUCATION** – Prior to beginning the program, the Secretary shall establish a stakeholder education and engagement process to ensure the leasing program is an open and transparent procedure that allows all stakeholders with interests in the OCS an opportunity to comment and engage prior to the leasing process. Stakeholders include, but are not limited to, States and Territories, the Department of Defense, commercial and recreational fishing, United States Coast Guard, maritime transportation industry, and offshore oil and gas. This process shall be a supplement to the regular public review and participation periods related to the environmental reviews related to offshore energy development.

**Nature of change:** Secretarial Order

### Background:

America’s energy future demands an aggressive “All of the Above” energy strategy in the OCS. This includes the responsible development of offshore wind power to support the energy needs of our coastal communities. This development will spur investments in local economies -- creating job growth and avoiding the need to export hard-earned energy dollars outside the region.

So far the federal government, forward-thinking state leaders, industry pioneers, and engaged stakeholders are focusing on



this immense energy resource. The first handful of leases offered by BOEM has put in place leases for the first generation offshore wind, which is generally enough to meet the market demand (supported by state policies) through roughly 2030. However, that market demand is expected to grow, requiring the next generation of leasing and a commitment to a broader plan and the next generation of investment.

Harnessing and engaging this industry requires a significant commitment from the agencies responsible for leasing and opening the OCS. There should be no doubt about the amazing resource available in the US both in the Atlantic, Gulf Mexico, the Pacific Coasts and our Nation's territories.

Experience from Europe has shown that an industrial commitment of two gigawatts of development is necessary to establish a significant and competitive supply chain for the offshore wind industry. In order to ensure that the benefits and opportunity for development is spread across the US OCS the Secretary shall conduct at least one sale in each of these four areas annually:

1. North Atlantic, from Maine to New Jersey;
2. South Atlantic, from Maryland to Florida;
3. Gulf of Mexico and Atlantic Territories, from Florida to Texas, including the territories of Puerto Rico and United States Virgin Islands;
4. Pacific, from Washington to California, including Alaska and Hawaii, and the territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

### **Analysis:**

This level of federal commitment, planning and investment of resources by the Federal Government, will spur follow on investment from States, industries, and researchers nationwide. Too often major energy projects, particularly in new areas, suffer from a "chicken and the egg" syndrome. For offshore wind this means no leasing, without power contracts, but no power

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contracts without leasing. By ensuring that the Federal Government is making an active effort to plan, prepare and initiate leasing of areas of the OCS, the Department of the Interior creates an important benefit of signaling that the Federal resources are open and available for investment and development.

Considering that a single lease can take as long as 5 years to prepare and plan prior to an actual lease sale, initiating a plan now to begin in 2024 puts us right on schedule for kick starting an American energy future with offshore wind all over the US OCS.

### **Possible Language of Secretarial Order:**

Subject: Supporting and Augmenting the Federal Offshore Wind Leasing Program by Establishing a Consistent and Significant Leasing Program

Sec. 1. Purpose. This Order is intended to ensure that the United States establishes an adequate leasing system allowing the United States to establish a competitive supply chain in the offshore wind industry.

In administering millions of acres of the Federal OCS, the Bureau of Ocean Energy Management (BOEM) has a responsibility to make federal wind resources available for leasing in an effective and timely fashion.

The Outer Continental Shelf Lands Act (OCSLA) states that “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.”

The law makes it clear that Federal wind resources offshore should be made available for the benefit of citizens of the United States.

In issuing this Order, I am taking action as a responsible public steward to strengthen American energy security and create American jobs.

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Sec. 2. Authorities. This Order is issued under the authority of section 2 of reorganization Plan No. 3 of 1950, 64 Stat. 1262, as amended. Other statutory authorities for this Order include, but are not limited to, the following:

- (a) Outer Continental Shelf Lands Act 40 U.S.C. §§ 1332.

Sec. 3. Directive. Consistent with principles of responsible public stewardship entrusted to this office, with due consideration of the critical importance of American energy security, job creation, conservation stewardship, and the economies of affected states, the following actions shall be taken by BOEM:

- (a) establish a broad national stakeholder program for the development of an OCS-wide wind leasing program in all waters of the United States;
- (b) prepare a plan to hold at least four lease sales of an area sufficient to install at least five hundred megawatts of offshore wind energy each year beginning in 2024, and support and improve the implementation of the oil and gas quarterly lease sale
- (c) at least one lease sale will be planned in each of these areas each year:
  - a. North Atlantic, from Maine to New Jersey;
  - b. South Atlantic, from Maryland to Florida;
  - c. Gulf of Mexico and Atlantic Territories, from Florida to Texas, including the territories of Puerto Rico and United States Virgin Islands;
  - d. Pacific, from Washington to California, including Alaska and Hawaii, and the territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Sec. 4. Implementation. The Assistant Secretary – Land and Minerals Management (ASLM) and the Director, Bureau of Ocean Energy Management (BOEM), shall report to the Counselor to the Secretary for Energy Policy within 180 days of the date of this Order on:

- (a) options identified to improve Federal offshore wind leasing;
- (b) a strategy to establish and identify the broad stakeholder group to prepare planning, including the potential for establishing an advisory group for such a process;
- (c) identify any provisions in existing policy and guidance documents

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that would impede BOEM's preparation to carry out the leasing program.

Sec. 5. Effect of the Order. This Order is intended to improve the long term planning and management of the Department. This Order and any resulting reports or recommendations are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees or any other person. To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 6. Expiration Date. This Order is effective immediately. It will remain in effect until it is amended, superseded, or revoked.

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## **Subcommittee Proposing Recommendation:** Non-Fossil Working Group

**Recommendation:** In order to ensure the benefits of offshore energy and mineral development to all Americans it is necessary to expand the reach of the Outer Continental Shelf Lands Act (OCSLA) to the United States Territories; Guam, American Samoa, U.S. Virgin Islands, Commonwealth of the Northern Marianas and Puerto Rico.

**Nature of change:** Secretary will submit to Congress a proposed legislative amendment to OCSLA.

Proposed text:

APPLICATION OF OUTER CONTINENTAL SHELF LANDS ACT WITH RESPECT TO TERRITORIES OF THE UNITED STATES.

(1) in paragraph (a), by inserting after “control” the following: “or lying within the United States exclusive economic zone and the Continental Shelf adjacent to any territory of the United States”;

(2) in paragraph (p), by striking “and” after the semicolon at the end;

(3) in paragraph (q), by striking the period at the end and inserting “; and”; and

(4) by adding at the end the following:

“(r) The term ‘State’ includes each territory of the United States.”

**Background:** The effort to expand the OCSLA to the territories has passed one body or the other in Congress several times over the last decade, most recently in the SECURE Act (Scalise-LA), HR 4239. The Obama Administration issued a strong statement of support and the Trump Administration has continued that support. That statement reads:

“The Department supports the intent of Title V to expand the OCS Lands Act to include the Exclusive Economic Zone (EEZ) offshore the Territories of the United States. This would provide a statutory structure for procedures to manage the energy and mineral resources in areas of United States jurisdiction that are not currently covered by existing offshore energy and mineral resources law.

“Currently no Federal agency has the authority for overseeing energy, including renewable energy, and mineral development in the EEZ offshore of the U.S. territories. The Federal government is unable to evaluate potential resources in conjunction with the territorial governments for potential resources until OCSLA is extended to these areas. The same rules and limitations that exist in terms of the EEZ surrounding the continental U.S. would apply to the U.S. territories. Expanding the Secretary’s authority and responsibility under OCSLA provides a comprehensive process for evaluating, planning and developing, as appropriate,

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any potential conventional energy, renewable energy and mineral resources in consultation and coordination with the territorial governments. “

In addition, including the U.S. territories and possessions under the leasing authority of OCSLA will result in:

- Potential Economic Activity
  - Income and Employment: An effective and active minerals development plan for the territories would be expected to generate incremental revenue, income and employment in the economically-challenged territories.
  - Domestic Production of Strategic Minerals: There are a number of strategic minerals that the U.S. imports from abroad. Domestic minerals production would be of strategic value in reducing the U.S. dependence on foreign mineral imports.
  - Economic Diversification: Most of the territories are heavily dependent on only one or two key industries. Should offshore minerals mining become a significant industry, this could help to diversify the territorial economies.
  - Renewable Energy Potential: The renewable energy program could be applied equally to the territories. This would enable expanded employment and economic activity, as well as the growth of other enterprises that could benefit from reduced electrical costs derived from renewable energy.
  - Enable Sand and Gravel Program: Given that some territories are heavily dependent on tourism, the ability to maintain and replenish their beaches could be potentially valuable to some U.S. territories, particularly those in the Caribbean.
- Revenues
  - Increased Federal Revenues: If mineral leasing were to take place in the territories, the Federal government would obtain royalties, rents and bonus bids on minerals leased in the territories, all of which would be new income sources.
  - Increased Territorial Revenues: Under this initiative, the territories with submerged lands could obtain revenues from renewable energy projects leased within three miles of the boundary of their submerged lands and see employment benefits from development activities if the areas are ultimately leased and developed.
- Increased Scientific Research and Incentive for Improved Technology
  - Increased Knowledge of Resource Base: Exploration would provide the government new data which would increase its knowledge as to the available resources offshore the territories and also how to best develop these resources. There is a possibility, of course, that such exploration would determine that the resources are less than expected and not viable for economic exploitation.
  - Improved Environmental Knowledge: All of the processes and procedures used by BOEM (e.g., NEPA) to evaluate the environmental impacts of any proposed development needing BOEM approval would apply to activities

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offshore territories. New research would be undertaken to better understand the natural environments offshore the territories. The assessments would also ensure the protection of fragile habitats from unrestrained resource extraction activities.

- Improved Technology: Active interest in the new areas would expand knowledge of seabed mineral deposits where little or no exploration has previously occurred, which may lead to encouraging the exploration and development of deposits in other deep seabed areas. Also opening up the area offshore the territories to this kind of mineral exploration and development may help advance technologies for both exploration and development of minerals in the deep ocean floors, particularly for U.S. companies.

Finally, both the rebuilding of the electrical grid of Puerto Rico as part of the recovery from the hurricanes of 2017 and the significant investment of resources by the Department of Defense into Guam provide unique opportunities for energy investment in the OCS if the Department of Interior is given the opportunity to plan offshore energy development.

**Analysis:** According to the Congressional Budget Office enacting this provision could increase federal revenues by \$20 million over the 2018-2027 period.

Specifically, CBO says in analysis of HR 4239 that “Renewable Energy Leases on the OCS. H.R. 4239 would direct DOI to study the potential for production of electricity generated by wind off the coasts of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands. If those studies showed that developing offshore wind resources was feasible, the bill would direct DOI to conduct lease sales in those areas. CBO estimates that implementing those provisions would increase offsetting receipts by \$20 million over the 2018-2027 period, net of payments to states and territories. (<https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr4239.pdf>)

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## **Subcommittee Proposing Recommendation:** Planning, Analysis, and Competitiveness

**Recommendation:** The Committee recommends that the Secretary direct the National Office of the Bureau of Land Management to issue an Instruction Memorandum, or other mechanism, to update and clarify solar energy right-of-way (ROW) acreage rent schedules, megawatt (MW) capacity fees, lease and grant renewal processes, bond requirements, and application priority for projects in the six southwestern states subject to BLM's Western Solar Plan (Arizona, California, Colorado, Nevada, New Mexico, and Utah), including guidance on the implementation of the rule on Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, 81 Fed. Reg. 92,122 (Dec. 16, 2016) (the "Rule").

**Nature of change:** Instruction Memorandum

**Background:** America's multiple use public lands in six southwestern states offer some of the best solar resources in the nation and have been identified by the BLM as highly suitable and potentially suitable for such use. However, despite a solar boom on America's private lands, prevailing federal land solar policies discourage solar development on public lands. Clarifications to and guidance on current policy should be made to ensure that multiple-use federal lands are made competitive with private lands.

The BLM authorizes ROW grants and leases for solar energy projects under Title V of the Federal Land Policy and Management Act (FLPMA) and its implementing regulations at 43 CFR Part 2800. Outside Designated Leasing Areas (DLA), the BLM issues ROW grants to authorize solar energy development on BLM-administered lands. Inside DLAs, the BLM issues ROW leases to authorize solar energy development on BLM-administered lands.

Consistent with the regulations at 43 CFR 2806.50, the BLM has developed a schedule to calculate rental fees for both solar energy grants and solar energy ROW leases. Rents include a base rent for the acreage of public land included within a solar energy ROW authorization and an additional phased-in megawatt (MW) capacity fee based on the total authorized MW capacity for the approved solar energy project. The MW capacity fee varies depending on the size and technology of the solar energy development project. The BLM's rental rates for solar energy grants are calculated consistent with the provisions of 43 CFR 2806.52 and the rental rates for solar energy leases are calculated consistent with the provisions of 43 CFR 2806.54.

ROW grant and lease holders must make payments, including acreage rent and a MW capacity fee, in consideration for their authorized use of the public lands for solar generation facilities. The current payment schedules for solar energy ROW authorizations were updated with the issuance of IM 2017-096 on September 14, 2017, and are effective through 2021. Both the Rule and IM 2017-096 provide that BLM may adjust the conditions imposed by the Rule, including, but not limited to, the payment terms on an individual basis or on a regional basis after receiving concurrence from the

Washington Office Assistant Director of Energy, Minerals, and Realty Management. Rental adjustments are to be based on changes in fair market value as determined by the application of sound business management principles.

Instruction Memorandum IM 2017-096 set forth guidance for implementation of the Rule that resulted in strong economic disincentives for solar project developers to seek to develop solar power plants on federal lands. If elements of IM 2017-096 are not superseded and clarification to the Rule not made, conditions will continue to prevail which result in a less than optimal use of public lands in the region identified for such development, inconsistent with objectives to use public lands to further American energy dominance.

## **Analysis:**

### **1. Acreage Rent**

The rent escalation terms specified in 43 CFR 2806.52 (grants) and 43 CFR 2806.54 (leases), whether standard (subdivision a) or scheduled (subdivision d) have proven to be untenable in the region covered by these recommendations for large-scale solar projects. The revenue for these projects is uniquely fixed by the terms of their Power Purchase Agreements, which must be negotiated with a utility (or other offtaker) after prevailing in a highly competitive bidding process, and then approved by a state Public Utilities Commission. The resulting price establishes a set revenue stream that can only be revised with the offtaker's consent and further regulatory approval, which cannot be obtained in a declining market. Solar energy generation facilities have no means for adjusting their costs or profits to account for changes in rental rates. In addition, applicants cannot calculate the net present value of the total rental cost under a variable rent structure, which is necessary for purposes of selling and financing the project.

Permitting the acreage rent to periodically adjust to unknowable national index values for irrigated farmland, or any other unknown and limitless number, is unworkable given the business model described above. To the extent that the Rule offers a fixed escalator, the rates offered – 20% every 5 years over the term of a grant or 40% every 10 years over the term of a lease specified in 43 CFR 2806.52(d)(2)(ii) and 43 CFR 2806.54(d)(2), respectively – are well above the market for non-irrigated rangeland private leases. To remain competitive with private land options in the region, a more modest, almost fixed escalation factor, specifically, the IPD-GDP rate as defined in 43 CFR 2806.22, should be applied.

To further remain competitive with prevailing market conditions, the obligation to pay rent should commence once the BLM issues a Record of Decision or Decision Record, as appropriate, approving the terms of development. Paying rent before the developer is authorized to occupy the premises and begin development, as potentially required by

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43 CFR § 2806.12, would make development on public lands uncompetitive in this region.

## **2. MW Capacity Fee**

The MW capacity fee component of the annual grant and lease payments identified in 43 CFR 2806.52 and 43 CFR 2806.54, respectively, create a strong disincentive for solar project developers to seek to use public land for development, resulting in a less than optimal use of public lands in the region identified for such development and inconsistent with objectives to use public lands to further American energy dominance, consistent with executive and secretarial orders. Furthermore, given the cost of land for private developments, it is clear that the annual per-acre zone rent in accordance with 43 CFR 2806.52 and 43 CFR 2806.62 is sufficient to capture the fair-market value of the property while facilitating its highest and best use of the land for solar development. The MW capacity fee should not be added to the annual payment owed for solar grants and leases in the area covered by the Western Solar Plan.

## **3. ROW Grant and Lease Renewal**

43 CFR § 2807.22 provides that if a ROW grant or lease includes renewal provisions, the BLM “will renew the grant or lease if you are in compliance with the renewal terms and conditions; the other terms, conditions, and stipulations of the grant or lease; and other applicable laws and regulations.” If renewal provisions are omitted, the BLM may renew the lease or grant. The ability to extend leases and grants beyond the standard 30 year maximum duration provided in the Rule would make public lands more competitive with private lands for solar energy generation projects. Accordingly, for leases and grants in the area of the Western Solar Plan, the BLM should allow, after compliance with the National Environmental Policy Act (NEPA), a 10 year extension of a 30-year ROW grant or lease according to the same terms as the original ROW grant or lease to the full extent permitted by law.

## **4. Bond Rates for Solar Grants and Leases**

The minimum per-acre bonding rate of \$10,000 per acre for solar energy ROW grants specified in 43 CFR 2805.20(b) is well above market in the area covered by the Western Solar Plan, which disincentivizes solar development on federal land inconsistent with the goal of American energy dominance. The minimum bond amount should not be imposed where an engineer has prepared a reclamation cost estimate (RCE), inclusive of salvage value, to calculate the bond required for a project. In addition, to ensure the timely permitting of projects in areas programmatically identified for development, the BLM Field Office Manager or District Office Manager should respond to a proposed performance bond within 60 days of submittal of a reasonable RCE by a project proponent and approval of the RCE and corresponding bond shall not be unreasonably withheld.

## **Variance Application Processing**

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The Rule provides that lands outside of the designated leasing areas *may* be made available through a competitive leasing process. 43 CFR 2804.23. Because the BLM has already identified the best locations within the Western Solar Plan area for development and designated these areas as Solar Energy Zones (SEZs), developers that have the skills to find a good site within the remaining variance lands should be first in line to process the application for that site. If company A's expenditure of resources to find the site simply allows companies B and C to outbid company A for the site, then the BLM would be rewarding deep pockets over skilled developers and would risk awarding development rights to inexperienced speculators. The BLM has discretion to hold a competitive bidder selection process, or not, when more than one ROW application is filed on the same variance process lands. Recognizing that the ROW grant application program has worked well for solar development on public lands and wanting to avoid discouraging development by creating site control uncertainty for developers, the BLM should not hold a competitive lease auction for the land subject to an original application in good standing.

## **Subcommittee Proposing Recommendation: Planning, Analysis and Competitiveness**

### **Recommendation**

The Royalty Policy Committee recommends that the Secretary issue a Secretarial Order that grandfathers projects which were under construction, development, or for which an application had been accepted by the Bureau of Land Management (BLM) at the time the BLM issued its “Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections (81 Fed. Reg. 92122 (December 19, 2016))”.

### **Nature of change**

81 FR 92164 (Section 2806.12(d)) of the Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections (Rule) acknowledges that the Secretary may take action that could affect rents and fees through issuance of a Secretarial Order. This provision gives the Secretary authority to accomplish this recommendation.

The Secretarial Order may incorporate the following provisions to make this change:

- 1) Definition of Project.--The term "project" means a system described in section of title 43 CFR 2801.9(a)(4).
- 2) Unless agreed to by the owner of a project, the rule shall not apply to projects that applied for a right-of-way under section 501 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761) on or before December 19, 2016.
- 3) The owner of a project that applied for a right-of-way under section 501 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1761) on or before December 19, 2016, shall be obligated to pay with respect to the right-of-way all rents and fees in effect before the effective date of the rule described in subsection (b).

These three changes would allow for projects under development at the time the Rule was issued to be grandfathered in under the prior regulatory structure in place. While a change like this would be subject to alteration by another Secretary, it provides regulatory consistency to developers that had projects under construction or in development at the time this new rule was issued. Developers to which this change would apply will be subject to the rules and conditions in place prior to issuance of this rule. These changes will not affect new projects.

### **Background**

In 2016, the BLM issued this new rule. Prior to this rule, developers were subject to a capacity fee. However, the new rule instituted an additional acreage fee and changed how the capacity fee is calculated.

While it does have aspects that are positive for newly proposed wind and solar projects, it carries significant financial burdens for projects that were under development at the time of issuance.

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This was a significant and common issue brought up by a number of commenters, including the American Wind Energy Association, the Solar Energy Industries Association and many others.

For example, please see AWEA comments, page 21 and other

- **Link:** <https://www.regulations.gov/document?D=BLM-2014-0002-0029>
- **Text**
  - o BLM should clarify the grandfathering provisions of the Proposed Rule: AWEA encourages BLM to make clear that the Proposed Rule does not have a retroactive effect on existing ROWs. If applied to existing projects, certain provisions of the Proposed Rule would breach existing ROW agreements. To that end, we believe that if BLM moves to finalize this rule, it should provide that holders of existing ROWs would be grandfathered in under the current rules. We support the following limited grandfathering language in the draft rule: “Applications for . . . wind energy development filed on lands outside of designated leasing areas, which subsequently become designated leasing areas: (1) Will continue to be processed by the BLM and are not subject to the competitive leasing offer process of this subpart, if such applications are filed prior to the publication of the notice of availability of the draft or proposed land use plan amendment to designate the . . . wind leasing area. . . .” While we support this language, it should be expanded so that it clearly provides grandfathering to holders of all existing ROWs both inside and outside of DLAs, and not just applications therefor.

## **Analysis**

Making this change, the U.S. Treasury can expect to see the same level of revenue from projects. It will not affect projects applying with Interior after the issuance date of the Rule. At most, without this change the impacts of the new rule may put at risk projects that were under development at the time of its issuance. At the least, this change will allow projects under development at the time of Rule issuance to play under the same regulatory system that was in effect when projects first started permitting with Interior. Projects considered under development were referenced above through 43 CFR 2801.9(a)(4).

The important factor with this recommendation is providing equity to projects that were under development at the time of Rule issuance. Making this change continues Interior’s commitment to advancing renewable projects on federal lands and can provide some certainty to upcoming projects that the rules of the game will not change during the course of permitting.

## **Subcommittee Proposing Recommendation:**

### **Recommendation:**

BLM should issue an Instruction Memorandum (IM) directing all field offices to issue Categorical Exclusions (CX) when any of the Energy Policy Act of 2005 (EPAAct 2005) Section 390 criteria are met, unless specifically rebutted.

### **Nature of change:**

Issuance of policy guidance in the form of an IM. The suggested draft IM from new Mexico Governor Martinez and North Dakota Governor Burgum could be used as a starting point (attached.)

### **Background:**

Lengthy Application for Permit to Drill (APD) timeframes often occur because BLM is conducting redundant NEPA analysis rather than granting CXs when companies meet the criteria under Section 390 of the EPAAct. BLM should issue guidance that CXs must be used when a company meets any of the statutory Section 390 criteria, as below.

### **SEC. 390. NEPA REVIEW.**

(a) NEPA REVIEW.—Action by the Secretary of the Interior in managing the public lands, or the Secretary of Agriculture in managing National Forest System Lands, with respect to any of the activities described in subsection (b) shall be subject to a rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply if the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil or gas.

(b) ACTIVITIES DESCRIBED.—The activities referred to in subsection (a) are the following:

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

**Analysis:**

The Section 390 CXs are mandated, unless specifically rebutted, by EPAAct 2005 and should not be discretionary. Use of CXs would reduce APD processing time by avoiding redundant NEPA analysis. Currently, [BLM data](#) show APDs take 260 days on average. Often, a large portion of the time involves NEPA-related activities, and CXs could be used to reduce the NEPA burden and free staff to focus on projects not covered by one of the CXs.



January 4, 2018

The Honorable Ryan K. Zinke  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Dear Mr. Secretary:

Two options to expedite permitting on federal acreage for mineral extraction currently exist in federal statutes but need a new Instruction Memorandum (IM) for uniform application among Bureau of Land Management (BLM) offices. Use of categorical exclusions and Determination of National Environmental Policy Act (NEPA) Adequacy would result in an immediate decrease in permitting cycle times.

President Bush signed into law the Energy Policy Act of 2005 (the "Act") to address long-term energy policy challenges, including significant delays inherent in the BLM oil and gas permitting scheme. Under Section 390 of the Act, when the BLM determines that proposed activities have no significant environmental impact — categorical exclusions — then the BLM needs no additional NEPA documentation.

The BLM issued Instruction Memorandum No. 2005-247 (IM 2005-247) in September 2005, which provided guidance to BLM field offices regarding the implementation of Section 390 categorical exclusions. Under IM 2005-247, the BLM approved almost 7,000 drilling and associated oil and gas development activities from Fiscal Year 2006 through Fiscal Year 2008.

However, litigation filed in 2008 by radical environmental organizations challenged IM 2005-247 and resulted in a settlement by the Obama Administration and a new BLM Instruction Memorandum (IM 2010-118). Under the agreement and IM 2010-118, the BLM committed to review for extraordinary circumstances when applying Section 390 categorical exclusions, an administrative process not contemplated by the Act.

Shortly thereafter in 2011, a federal district court determined that IM 2010-118 was invalid. Largely due to uncertainty and a lack of guidance, the BLM and its field offices have taken little initiative to reimplement the statutory Section 390 categorical exclusions since that time.

We request that you restore implementation of the Section 390 categorical exclusions by directing the BLM to issue a new Instruction Memorandum, instructing BLM field offices regarding the Section 390 categorical exclusions and the separate but related process of determining that adequate NEPA has already been conducted (Determination of NEPA Adequacy).

To that end, we have attached draft language for your consideration as you prepare a new Instruction Memorandum addressing this critical issue.

Sincerely,

  
Susana Martinez  
Governor of New Mexico

  
Doug Burgum  
Governor of North Dakota

**Department of the Interior  
Bureau of Land Management**

**43 CFR Part \_\_\_\_\_**

**Bureau of Land Management  
Discretion to Apply Categorical Exclusions  
Under the National Environmental Policy Act**

**Summary**

The Bureau of Land Management (BLM) is proposing regulations which limit and clarify BLM's discretion to apply categorical exclusions under the National Environmental Policy Act (NEPA) and the Energy Policy Act of 2005. The Energy Policy Act of 2005 contains five statutory categorical exclusions (Section 390 Categorical Exclusions), which are categories of actions that Congress has determined do not normally result in individually or cumulatively significant environmental effects. These proposed regulations establish the process by which BLM shall apply the Section 390 Categorical Exclusions. This proposed rule does not apply to lands held by the United States in trust for Native American tribes or tribal members.

The use of statutory categorical exclusions can reduce paperwork and delay, so that agency resources are made available to focus on areas where categorical exclusions do not apply. Categorical exclusions are not exemptions or waivers of NEPA review; instead the use of a categorical exclusion may be used to help satisfy the NEPA review process, including efficient and streamlined approval of agency actions that will not result in individually or cumulatively significant impacts to the human environment. However, these efficiencies are lost when extensive agency analysis is required to determine whether to apply categorical exclusions. The changes proposed in this proposed rule would allow BLM to more efficiently manage its mineral resources for the benefit of the citizens of the United States. BLM proposes this rule to comply with Executive Order 13783, titled "Promoting Energy Independence and Economic Growth," which requires agencies to immediately review all agency actions, including regulations and guidance documents, that potentially burden the development or use of domestically produced energy resources, especially oil, natural gas, coal, and nuclear energy resources. This proposed rule is also consistent with and furthers the purpose of Secretarial Order No. 3354, titled "Supporting and Improving the Federal Onshore Oil and Gas Leasing Program and Federal Solid Mineral Leasing Program," which directs federal agencies to take immediate and specific action to alleviate or eliminate burdens on domestic energy development.

**Dates**

Send your comments on this proposed rule to the BLM on or before\_\_\_\_\_. The BLM is not obligated to consider any comments received after the above date in making its decision on the final rule.

## **Addresses**

*Mail:* U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 2134 LM, 1849 C St., NW., Washington, DC 20240, Attention: 1004-AE15. *Personal or messenger delivery:* 20 M Street SE., Room 2134LM, Washington, DC 20003. *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions at this Web site.

## **For Further Information Contact:**

[BLM to Insert]

## **Supplementary Information**

I. Public Comment Procedures

II. Background

III. Discussion of the Proposed Rule

### **I. Public Comment Procedures**

If you wish to comment on the proposed rule, you may submit your comments by any one of several methods specified (see ADDRESSES above). If you wish to comment on the information collection requirements, you should send those comments directly to the OMB as outlined (see ADDRESSES); however, we ask that you also provide a copy of those comments to the BLM.

Please make your comments as specific as possible by confining them to issues for which comments are sought in this notice and explain the basis for your comments. The comments and recommendations that will be most useful and likely to influence agency decisions are:

1. Those supported by quantitative information or studies; and
2. Those that include citations to, and analyses of, the applicable laws and regulations.

The BLM is not obligated to consider or include in the Administrative Record for the rule comments received after the close of the comment period (see DATES) or comments delivered to an address other than those listed above (see ADDRESSES).

Comments, including names and street addresses of respondents, will be available for public review at the address listed under ADDRESSES during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask

us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

## **II. Background**

The Department of the Interior (DOI) recognizes that development of energy resources on public lands increases the nation's domestic energy supply, provides alternatives to overseas energy resources, generates revenue, creates jobs, and enhances national security. To this end, DOI has been directed to and is eliminating harmful regulations and unwarranted policies that unnecessarily burden the development of our nation's energy resources. In 2017, the DOI issued seven Secretarial Orders aimed at improving domestic onshore and offshore energy production and increasing efficiencies within the regulatory approval process. BLM is the bureau within the DOI charged with administering over 245 million surface acres and 700 million acres of subsurface mineral development. BLM's policies for complying with NEPA are included within BLM Handbook 1790-1 and the DOI NEPA implementing regulations are located within 43 CFR Part 46. In conjunction, these regulations, manuals, and handbooks establish the policies and procedures BLM follows when conducting land use planning and NEPA compliance, including specific actions related to energy and mineral development. Pursuant to the Secretarial Memorandum of March 27, 2017, entitled "Improving the Bureau of Land Management's Planning and National Environmental Policy Act Processes," the BLM has been identifying potential actions it could take to streamline its planning and NEPA review procedures, which include expressly limiting the discretion of BLM field offices when applying categorical exclusions – particularly the congressionally-enacted Section 390 Categorical Exclusions.

NEPA is a tool enacted by Congress to analyze environmental, economic, and social values associated with significant actions taken by federal agencies. Under NEPA, federal agencies are mandated to evaluate the environmental impacts of their proposed actions before deciding to approve permits or take other forms of agency action. Many federal actions do not result in significant effects on the environment. When BLM and other federal agencies identify categories of activities that do not pose a potential for individually or cumulatively significant impacts, they may establish a categorical exclusion for those activities. Regulations adopted by the Council on Environmental Quality (CEQ) provide the basic elements for establishing and using categorical exclusions. Section 1508.4 of the CEQ Regulations define a "categorical exclusion" as a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment (EA) nor an environmental impact statement (EIS) is required. The applicability of these regulatory categorical exclusions can be limited, under the existing CEQ regulations, by the existence of "extraordinary circumstances." Such extraordinary circumstances may exist when there are factors or circumstances that pose significant environmental effect, and which require further analysis in either an EA or an environmental impact statement EIS.

Congress has enacted legislation finding that certain federal actions will not significantly affect the human environment. These statutory categorical exclusions differ from regulatory categorical exclusions promulgated by agencies such as BLM in both formation and application. An example of such legislation is Section 390 of the Energy Policy Act of 2005. This Act established five

statutory categorical exclusions that apply to oil and gas exploration and development activities taking place on federal oil and gas leases, pursuant to the Mineral Leasing Act. When BLM receives a request for agency action that falls within the scope of a Section 390 Categorical Exclusion, no further NEPA compliance is required. Unlike regulatory categorical exclusions, statutory categorical exclusions do not require review for extraordinary circumstances under the Council for Environmental Quality (CEQ) regulations. This is because statutory categorical exclusions are established by Congress and, as a result, their application is governed by a specific statute apart from NEPA. CEQ has not specifically been delegated discretion to interpret the Energy Policy Act of 2005.

Despite long-standing recognition of the differences between statutory and regulatory categorical exclusions, in 2010, BLM implemented informal policies in Instruction Memorandum IM 2010-118, which required the agency to review the existence of extraordinary circumstances when applying statutory categorical exclusions enacted under the Energy Policy Act of 2005 (Section 390 CXs). This IM directs that “field offices are directed to conduct a review for extraordinary circumstances when considering use of any of the Section 390 CXs.” On August 12, 2011, the United States District Court for the District of Wyoming invalidated this IM because it had not undergone a notice and comment process and imposed significant new legislative requirements. *See Western Energy Alliance v. Salazar*, No. 10-CV-237F, 2011 WL 3738240 (D. Wyo. Aug. 12, 2011). The IM was officially rescinded by BLM on April 27, 2012 by Instruction Memorandum No. 2012-110, which concludes that no review for extraordinary circumstances is required when Section 390 Categorical Exclusions are applicable. As a result of the issuance of the 2010 and 2012 IMs, there has been confusion and lack of uniformity amongst BLM field offices regarding application of Section 390 Categorical Exclusions, reducing the efficiencies sought to be gained by the statutory categorical exclusion process.

Field offices have been applying Section 390 Categorical Exclusions inconsistently based on discretionary decisions. The discretionary application of the Section 390 Categorical Exclusions by BLM has led to increased regulatory burdens on the agency which have unreasonably increased permit approval times and resulted in deferred royalty payments to the federal government. Furthermore, the discretionary use of the Section 390 Categorical Exclusions may be based on an erroneous application of CEQ regulations, which specifically pertain to regulatory categorical exclusions. Current CEQ regulations provide that even when a proposed activity fits within the definition of a regulatory categorical exclusion and does not raise extraordinary circumstances, BLM may, at its discretion, decide “to prepare an environmental assessment \* \* \* in order to assist agency planning and decision making.” 40 C.F.R. § 1508.4. This proposed rulemaking clarifies that the discretionary application of categorical exclusions does not apply when a proposed activity falls within the scope of a statutory categorical exclusion under the Energy Policy Act of 2005 because the statute does not vest BLM with discretion to disregard the application of the Section 390 Categorical Exclusions.

Prior to drafting this proposed rule, BLM worked with stakeholder groups including state and local elected officials and groups, the Western Governors’ Association, and the National Association of Counties. Once implemented, this proposed rule will reduce the time and/or cost of complying with NEPA when evaluating proposed actions and will provide greater consistency to the application of the Section 390 Categorical Exclusions. The proposed rule also provides a more-

standardized analysis in BLM's NEPA reviews at the land use plan and project level. The reduction in burden is measured and evaluated in terms of processing times and/or costs of authorizing energy development.

### **III. Discussion of the Proposed Rule**

#### **A. General Overview**

##### *Which categorical exclusions are governed by the proposed rule?*

This proposed rule applies to five different categorical exclusions contained within the Energy Policy Act of 2005 (the "Act") for oil and gas development and operations. Congress enacted the Energy Policy Act of 2005 in part to expedite oil and gas development within the United States. The Act specifically authorizes BLM, for certain oil and gas activities, to approve projects without preparing environmental analysis, which would normally be required under NEPA. These categorical exclusions—commonly referred to as "Section 390 CXs"—define specific conditions under which Congress has determined that BLM does not need to prepare an EA or EIS. As originally implemented, projects approved with Section 390 CXs were not subject to any screening for extraordinary circumstances. Subsection (a) of the Act states:

NEPA Review.—Action by the Secretary of the Interior in managing the public lands or the Secretary of the Agriculture in managing National Forest System Lands, with respect to any of the activities described in subsection (b) shall be subject to a rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply if the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil and gas.

Subsection (b) of the Act then outlines five categories of activities to be considered statutory categorical exclusions. These Section 390 CXs (referred to as Section 390 CX1, CX2, CX3, CX4, and CX5) include:

- (1) Individual surface disturbances of less than 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 or gas well at a location or well pad site at which drilling has occurred previously within 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 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 5 years prior to the date of placement of the pipeline.



- (5) Maintenance of a minor activity, other than any construction of major renovation or a building or facility.

This proposed rule would limit BLM's discretion to complete an EA or EIS in lieu of applying these five categorical exclusions, and further clarifies how BLM will apply Section 390 CXs going forward.

***Is screening for extraordinary circumstances required when Section 390 CXs are applied?***

Screening for extraordinary circumstances is not required when Section 390 CXs are applicable. This position coincides with BLM precedent and the plain language included with in the Energy Policy Act of 2005. In Instructional Memorandum No. 2012-110, BLM instructed field offices that reviews for extraordinary circumstances do not apply when Section 390 CXs are applicable. Such guidance agrees with the statutory text of the Energy Policy Act of 2005, which is silent as to BLM's discretion to conduct reviews for extraordinary circumstances when applying categorical exclusions under the Act.

In addition, BLM's NEPA Handbook, H-1790-1 has long-stated that reviews for extraordinary circumstances should not be undertaken in conjunction with the application of Section 390 CXs. BLM, however, must still ensure that agency actions and approvals comply with the Endangered Species Act and National Historic Preservation Act.

***Is the use of Section 390 CXs discretionary?***

The plain text of the Energy Policy Act of 2005 does not vest BLM with discretion to decide whether additional environmental analysis should be applied. Instead, the statutory text states that the Section 390 CXs are presumed to apply unless rebutted. The purpose of the Act was to "ensure jobs for our future with secure, affordable, and reliable energy." 109 P.L. 58, 119 Stat. 594. To this end, the DOI has recently announced a strong interest in reducing regulatory burdens in order to increase domestic oil and gas production. As a consequence, BLM proposes in this rulemaking to limit its discretion when applying Section 390 CXs. The text of the proposed rule provides that when a Section 390 CX applies, the authorized officer shall apply the Section 390 CX and shall not prepare an EA or EIS. This proposed language is intended to streamline the application of Section 390 CXs for BLM field offices and to provide uniformity in their application.

***What is the rebuttable presumption applied under the Energy Policy Act of 2005 when a Section 390 CX is considered?***

The express language contained within the Energy Policy Act of 2005 states that a Section 390 CX applies unless the presumption of applicability has been rebutted. Nothing within the statute, however, specifically defines how the presumption that a Section 390 CX is rebutted. Pursuant to the authority delegated to BLM, the agency proposes to define the scope of this rebuttable presumption and how it will be applied by the agency. These new definitions and regulatory requirements were developed after engaging in discussions with stakeholders including industry members, local communities, state and local governments, and interested citizens.

Under the rule, the statutory presumption that a Section 390 CX applies can be rebutted only by showing that the authorized officer has found in writing that:

- (1) the proposed activity will not comply with the requirements contained within a Section 390 CX;
- (2) the well is not part of an activity pursuant to the Mineral Leasing Act; or
- (3) the well is not for the purpose of exploration or development of oil or gas.

When an authorized officer determines that one of the above factors applies, he is required to provide notice to the applicant that explains that the presumption of applicability has been rebutted and provides a reasoned explanation for that decision. This written decision issued by the authorized officer will be appealable under the DOI's regulations.

#### ***When does Section 390 CX1 apply?***

The first categorical exclusion in Section 390 of the Energy Policy Act of 2005 applies when there 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." 42 U.S.C. § 15942(b)(1).

BLM, and other agencies applying this exclusion, have historically applied the following factors when determining whether Section 390 CX1 is applicable:

- (1) a 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.

Reliance on this categorical exclusion requires the authorized officer to consider the following:

(1) Five-acre disturbance threshold – The authorized officer must determine 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.

(2) 150-acre unreclaimed disturbance limit – The authorized officer must determine that the current unreclaimed surface disturbance 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 officer must determine that a site-specific NEPA document exists which 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.

***When does Section 390 CX2 apply?***

The second categorical exclusion in Section 390 of the Energy Policy Act of 2005 applies when there 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.” 42 U.S.C. § 15942(b)(2).

BLM, and other agencies applying this exclusion, have applied the following factors when determining whether Section 390 CX2 is applicable:

- (1) drilling at a location or well pad previously drilled, and
- (2) five-year limitation from previous drilling.

Reliance on this categorical exclusion requires the authorized officer to consider the following:

(1) Drilling at a location or well pad previously drilled – The authorized officer must determine that the action under consideration will occur on an oil and gas location or well pad that had previous drilling, including a drilling pad or well pad which has been reclaimed through interim reclamation. Drilling includes drilling operations, reworking operations that involve a drilling rig, completion operations, or any plugging operations. A previous location or well pad will be recognized only where a previously constructed well pad was constructed. 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.

(2) Five-year limitation from previous drilling – The authorized officer must determine that the previous drilling 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.

### ***When does Section 390 CX3 apply?***

The third categorical exclusion in Section 390 of the Energy Policy Act of 2005 applies when there 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.” 42 U.S.C. § 15942(b)(3).

BLM, and other agencies applying this exclusion, have applied the following factors when determining whether Section 390 CX3 is applicable:

- (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.

Reliance on this categorical exclusion requires the authorized officer to consider the following:

(1) Proposed drilling is within a developed oil or gas field – The authorized officer must determine that the action under consideration is within a developed oil or gas field. A developed field consists of 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 officer must determine that a NEPA document exists which addresses reasonably foreseeable activity at issue (*i.e.*, drilling). For the purposes of this categorical exclusion, the NEPA document can be of any type, 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 CX3. It is adequate if the proposed well is in the general geographic vicinity of the predicted development disclosed in the prior NEPA document.

(3) Five-year limitation from when the aforementioned NEPA document was finalized or supplemented – The authorized officer must determine 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.

### ***When does Section 390 CX4 apply?***

The fourth categorical exclusion in Section 390 of the Energy Policy Act of 2005 applies when there 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.” 42 U.S.C. § 15942(b)(4).

BLM, and other agencies applying this exclusion, have applied the following factors when determining whether Section 390 CX4 is applicable:

- (1) an approved right-of-way corridor, and
- (2) five-year limitation from corridor approval.

Reliance on this categorical exclusion requires the authorized officer to consider the following:

(1) Approved right-of-way corridor – The authorized officer must determine that 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). This term is not limited to those corridors authorized under 43 C.F.R. Part 2800 but is a more generalized term that applies to any type of corridor or right-of-way approved under any authority or vehicle of the BLM. The authorized 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. The extent of additional disturbance or width needed to properly or safely install the new pipeline is at the discretion of the authorized officer 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. The approved right-of-way corridor may be either on or off lease. However, if off lease, 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 – The authorized officer must determine that use of the right-of-way or corridor, referred to in criteria 1 above, was approved 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) which 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.

#### ***When does Section 390 CX5 apply?***

The fifth categorical exclusion in Section 390 of the Energy Policy Act of 2005 applies when there is: “Maintenance of a minor activity, other than any construction or major renovation of a building or facility.” 42 U.S.C. § 15942(b)(5).

BLM, and other agencies applying this exclusion, have applied the following factors when determining whether Section 390 CX5 is applicable:

- (1) Maintenance of a minor activity.

Reliance on this categorical exclusion requires the authorized officer to consider the following:

- (1) Maintenance of a minor activity – The authorized officer must determine that the activity under consideration constitutes maintenance of a minor activity. Actions would include maintenance of a well, wellbore, road, well pad, or production facility having surface disturbance. Actions would not include construction or major renovation of a building or facility. Road maintenance is considered a minor maintenance activity within the scope of Section 390 CX5. Road reconstruction or construction is not considered a minor activity for use of this categorical exclusion.

DRAFT

**SUMMARY AND PURPOSE:** This rule provides regulations governing the application of categorical exclusions issued under the Energy Policy Act of 2005. The purpose of this rule is to allow the BLM to more efficiently and consistently apply categorical exclusions enacted by Congress in the Energy Policy Act of 2005.

- 1. Issuing Agency:** The Bureau of Land Management (BLM).
- 2. Scope:** This rule applies to those activities described at 42 U.S.C. 15942(b)
- 3. Statutory Authority:** The Mineral Leasing Act, as amended and supplemented (30 U.S.C. 181 et seq.), the Act of May 21, 1930 (30 U.S.C. 301-306), the Mineral Leasing Act for Acquired Lands, as amended (30 U.S.C. 351-359), the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), the Federal Oil and Gas Royalty Management Act of 1982, as amended by the Federal Oil and Gas Royalty Simplification Act of 1996 (30 U.S.C. 1701 et seq.), and the Energy Policy Act of 2005 (42 U.S.C. § 15942).
- 4. Duration:**
- 5. Effective Date:**
- 6. Objective:** To authorize more efficiently those categorical exclusions which meet discrete criteria complying with the Energy Policy Act of 2005 and to allow the efficient, necessary development of oil and gas on federal lands.
- 7. Definitions:**
  - a. APD: Application for permit to drill or re-enter.
  - b. Authorized Officer: any person authorized to perform the duties prescribed by BLM.
  - c. Developed Field: Any field in which a confirmation well has been completed.
  - d. Drilling Operations: The actual drilling or re-entry of a well.
  - e. Extraordinary Circumstances: those circumstances for which the Department has determined that further environmental analysis is required for an action, and therefore an EA or EIS must be prepared.
  - f. Section 390 CX: A categorical exclusion issued by Congress in 42 U.S.C. § 15942.
- 8. Presumption that Section 390 CXs Apply.**
  - a. As provided by 42 U.S.C. § 15942(a), actions with respect to the following Section 390 CXs are presumed to be categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement:
    - i. Individual surface disturbances of less than 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.

- ii. Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well.
- iii. 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 5 years prior to the date of spudding the well.
- iv. Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline.
- v. Maintenance of a minor activity, other than any construction or major renovation or a building or facility.

## **9. Rebuttable Presumption.**

- a. The presumption that the activities under Section 8 are categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement can only be rebutted by a written finding of the authorized officer that:
  - i. the proposed activity will not comply with the requirements contained within a Section 390 CX.
  - ii. showing that the well is not part of an activity pursuant to the Mineral Leasing Act; or
  - iii. showing that the well is not for the purpose of exploration or development of oil or gas.

## **10. Notice of Rebuttable Presumption.**

- a. If the presumption that a Section 390 CX applies is rebutted by BLM, the applicant shall be provided written notice of BLM's decision that the presumption of applicability has been rebutted, and that the Section 390 CX does not apply. Such notice shall be sent by BLM to the applicant via certified mail return receipt requested. Applicant shall be afforded the opportunity to appeal this decision, pursuant to 43 C.F.R. Part 4.

## **11. Application of Section 390 CXs.**

- a. **Section 390 CX1.** Section 390 CX1 shall apply when the following is established:
  - i. The authorized officer has determined that each individual action under consideration will disturb less than five acres on the proposed site. If more than one activity is proposed for a lease, each activity is counted separately, and each activity must disturb less than five acres.



- ii. The authorized officer has determined that the current unreclaimed surface disturbance on the entire leasehold will not be greater than 150 acres, including the action under consideration. This determination includes consideration of disturbances 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 may 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).
  - iii. The authorized officer has determined that a site-specific NEPA document exists, which previously analyzed oil or gas exploration and/or development. For the purposes of this categorical exclusion, the site-specific NEPA document may 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, or similar approval. 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.
- b. **Application of Section 390 CX2.** Section 390 CX1 shall apply when the following is established:
- i. The authorized officer has determined that the action under consideration will occur on an oil and gas location or well pad that had previous drilling, including a drilling pad or well pad which has been reclaimed through interim reclamation. Drilling includes drilling operations, reworking operations that involve a drilling rig, completion operations, or any plugging operations. A previous location or well pad will be recognized only where a previously constructed well pad was constructed. Previous drilling may have occurred on *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.
  - ii. The authorized officer has determined that the previous drilling 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.

- c. **Application of Section 390 CX3.** Section 390 CX3 shall apply when the following is established:
  - i. The authorized officer has determined that the action under consideration is within a developed oil or gas field. A developed field consists of any field in which a confirmation well has been completed.
  - ii. The authorized officer has determined that a NEPA document exists which addresses reasonably foreseeable activity at issue (*i.e.*, drilling). For the purposes of this categorical exclusion, the NEPA document can be of any type, regardless of which agency prepared the analysis and may include land management plans when such an analysis was performed. It is adequate if the proposed well is in the general geographic vicinity of the predicted development disclosed in the prior NEPA document.
  - iii. The authorized officer has determined that the NEPA document, referred to in criteria (ii) 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.
  
- d. **Application of Section 390 CX4.** Section 390 CX4 shall apply when the following is established:
  - i. The authorized officer has determined that 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). This term is not limited to those corridors authorized under 43 C.F.R. Part 2800 but is a more generalized term that applies to any type of corridor or right-of-way approved under any authority or vehicle of the BLM. 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. The extent of additional disturbance or width needed to properly or safely install the new pipeline is at the discretion of the authorized officer 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.
  - ii. The approved right-of-way corridor may be either on or off lease. However, if off lease, 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.

- iii. The authorized officer has determined that use of the right-of-way or corridor, referred to in criteria (i and ii) above, was approved 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) which 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.

- e. **Application of Section 390 CX5.** Section 390 CX5 shall apply when the following is established:

- i. The authorized officer has determined that the activity under consideration constitutes maintenance of a minor activity. Actions would include maintenance of a well, wellbore, road, well pad, or production facility having surface disturbance. Actions would not include construction or major renovation of a building or facility. Road maintenance is considered a minor maintenance activity within the scope of Section 390 CX5. Road reconstruction or construction is not considered a minor activity for use of this categorical exclusion.

## **12. Council on Environmental Quality Regulations Shall Not Apply.**

- a. The presumed categorical exclusions in Section 8 are not subject to the Council on Environmental Quality (CEQ) Regulations, including, without limitation, any additional review for extraordinary circumstance. The authorized officer shall not apply an extraordinary circumstances analysis, such as that contained in the 516 Department Manual.

## **13. The Application of Section 390 CXs is Not Discretionary.**

- a. If an activity fits within one of the five categories listed under subsection (a), the authorized officer shall apply the applicable statutory categorical exclusion and shall not prepare an environmental assessment or an environmental impact statement.

## **14. Special Provisions.**

- a. The categorical exclusions listed in Section 8 (a)(ii) and (iii) are not conditioned on the existence of prior activity-level or project-specific NEPA documents and pertain to those activities necessary to drill and produce oil or gas as described in an approved Application for Permit to Drill (APD) and subsequent modifications to the approved APD, so long as the subsequently modifying activity occurs entirely within the location, site, or field specified in the original APD.

**15. Forms.**

- a. When determining whether a Section 390 CX applies, the authorized officer shall complete Form 31 -\_.

DRAFT

**Categorical Exclusion Determination for Section 390 CXs**

<b>Application Serial Number:</b>	_____
<b>Applicant Address</b>	_____ _____
<b>Agent Address:</b>	_____ _____
<b>Application for (facility/well name)</b>	_____
<b>API No.</b>	_____
<b>Location</b>	_____

<b>Section 390 CX1</b>			
Five-Acre Individual Disturbance	Will each individual action under consideration disturb less than 5 acres?	Yes	No
150-Acre Disturbance Limit	Is the un-reclaimed surface disturbance on the entire leasehold less than 150 acres?	Yes	No
Site-Specific Oil and Gas Analysis in Prior NEPA	Does a site-specific NEPA document exist which previously analyzed oil and gas development?	Yes	No

**If the answer to all of the above questions is yes, a Section 390 CX applies.**

<b>Section 390 CX2</b>			
Drilling at a Location or Well Pad Previously Drilled	Will the activities occur on an oil and gas location or well pad that had previous drilling?	Yes	No
5-Year Limitation From Previous Drilling	Will the date of spudding the proposed well occur within 5 years of the previous drilling?	Yes	No

**If the answer to all of the above questions is yes, a Section 390 CX applies.**

<b>Section 390 CX3</b>			
Proposed Drilling in a Developed Field	Will the activity take place in a field in which any confirmation wells have been completed?	Yes	No
Analysis of Drilling as Reasonably Foreseeable in a NEPA documents	Has a NEPA document been prepared for lands within the general geographic vicinity which analyze the impacts of oil and gas drilling activities?	Yes	No
5-Year Limitation From the Date of the NEPA Document	Was the NEPA document completed within 5 years prior to the date the proposed well is spudded?	Yes	No

**If the answer to all of the above questions is yes, a Section 390 CX applies.**

<b>Section 390 CX4</b>			
Approved ROW Corridor	Will the activity take place within an approved right-of-way corridor?	Yes	No
5-Year Limitation From the Date of the NEPA Document	Was use of the right-of-way corridor approved within 5 years prior to the date of the proposed pipeline placement?	Yes	No

**If the answer to all of the above questions is yes, a Section 390 CX applies.**

<b>Section 390 CX5</b>			
Maintenance of a Minor Activity	Does the activity at issue constitute maintenance of a minor activity?	Yes	No

**If the answer to all of the above questions is yes, a Section 390 CX applies.**

Section 390 CX \_\_\_\_\_ applies and satisfies the National Environmental Policy Act.

Prepared By: \_\_\_\_\_

Date: \_\_\_\_\_

Approved By: \_\_\_\_\_

Date: \_\_\_\_\_

Authorized Officer

**Subcommittee Proposing Recommendation:** PAC Subcommittee, Onshore Working Group

**Recommendation:**

BLM should use the opportunity as it updates IM 2009-78 *Processing Oil and Gas Applications for Permit to Drill for Directional Drilling into Federal Mineral Estate from Multiple-Well Pads on Non-Federal Surface and Mineral Estate Locations* (otherwise known as the fee-fee-fed IM) to avoid unnecessary NEPA analysis of impacts to nonfederal surface when multi-well pads develop both federal and nonfederal minerals from off-lease, nonfederal surface locations. Similar, this guidance should avoid unnecessary analysis of horizontal wells that develop a minority of federal minerals.

**Nature of change:** Issuance of policy guidance in the form of an IM.

**Background:**

The law is clear that NEPA analysis need not consider impacts from nonfederal actions that would occur independently of a federal authorization. Therefore, when a multi-well pad is sited on off-lease, nonfederal surface to access nonfederal minerals, NEPA analysis need not consider the surface impacts of the well pad, even if a federal well will be drilled from the pad. BLM should provide concrete guidance for distinguishing between situations in which multi-well pads are and are not determined by access to the federal mineral estate. In particular, there should be a presumption that a multi-well pad developing both federal and nonfederal minerals has been sited to access the nonfederal minerals, unless specific facts demonstrate otherwise.

Under this same rationale, NEPA analysis need not consider all impacts of drilling a well that develops a minority of federal minerals. BLM should establish clear guidance for analyzing impacts of horizontal wells that develop a minority mineral interest.

Current guidance supports this interpretation, but the guidance is not being followed in the field offices. Therefore, clearer, more specific guidance is necessary.

**Analysis:**

NEPA can delay approvals of Applications for Permits to Drill (APDs), slowing development of wells that are primarily nonfederal and delaying revenue to private mineral owners. BLM should not conduct unnecessary analysis of impacts from nonfederal actions that would occur regardless of whether BLM approves an APD.

**Subcommittee Proposing Recommendation:** PAC Subcommittee, Onshore Working Group

**Recommendation:**

In an effort to reduce NEPA processing timelines and increase regulatory certainty on public lands, project-specific NEPA documents should be scoped to the actual impact of projects and limited to best-available information, tiering to existing environmental analyses already analyzed in prior NEPA documents. Project proponents should not be required to fund new research to produce data that go beyond the scope of the project.

**Nature of change:**

Guidance to NEPA planning staff

**Background:**

Project NEPA documents can take several years, and are often the longest source of delay to oil and natural gas projects. Project NEPA can take as long as eight to ten years for larger projects, and even small project NEPA documents can take three to five years. These NEPA delays hold up development, thereby delaying the return of royalties to the federal government. Long permitting and NEPA timelines also discourage many companies from even considering developing on federal lands, which further limits the potential to grow federal royalties. The Royalty Policy Committee should be concerned with reducing NEPA and other approval timelines in order to encourage more development and hence, increase royalty revenue.

NEPA documents should also be scoped to best available information. Processing of NEPA documents should not be put on hold while waiting for new research to be completed. In addition, often companies are asked to produce new data or redo studies multiple times, which adds years to the NEPA process. Examples where companies have been required to conduct research beyond the scope of their proposed projects include:

1. EPA Region 8 routinely requires companies to conduct additional air quality analysis to expand regional modeling data under the BLM-EPA NEPA MOU.
2. Colorado BLM requires companies to submit APD specific emission inventory data under the guise of permit requirements for purposes of building out its regional air model.
3. Through the NEPA and Section 7 consultation processes, USFWS imposes significant survey and research requirements or mitigation funding for research that extends far beyond the parameters of projects.



**Analysis:**

In order to implement Secretarial Order 3355 and reduce NEPA timelines to one year and page counts to 150, proper scoping of NEPA documents is necessary to keep the analysis focused on actual impacts of the projects and not speculative impacts beyond the scope of the proposed project. NEPA documents can be completed in a reasonable timeframe and page length by tiering to existing environmental analyses, thereby eliminating repetitive discussions of the same resource issues already analyzed in prior NEPA documents.

NEPA gives agencies the authority to tier to related NEPA documents, which allows incorporation of discussion and review of prior environmental analyses, and does not generally require an agency preparing an Environmental Assessment for a project to reevaluate the analyses included in relevant underlying Environmental Impact Statements.

**Subcommittee Proposing Recommendation:** PAC Subcommittee, Onshore Working Group

**Recommendation:**

The Department of the Interior should revise Onshore Orders 43 CFR 3173, 3174, and 3175 by giving due consideration to applicable API standards and GPA standards.

**Nature of change:**

Full rulemaking process.

**Background:**

BLM should rewrite the onshore orders to reduce their overly burdensome nature and to adopt API and GPA standards. The Onshore Working Group recommends the rulemaking also fix the retroactive aspects of the rule that threaten existing unitization and commingling agreements, which can make older fields uneconomic.

- **Recommended Overall Policy and Approach:** The simplest and most equitable means of modifying the regulations would be to adopt the American Petroleum Institute (API) and GPA Midstream (GPA) standards in their entirety. The API and GPA standards are based on proven measurement technologies and constitute the consensus of industry's foremost experts in oil and gas measurement. These standards are prescribed and can be validated through audit. Participation by government agency representatives in the API standards program allows for input by these representatives on the standards referenced by BLM.
- **Continue to honor all variances, commingling agreements, and off-site measurement agreements approved prior to the effective dates of the new rules.** The new rules should only be applied to applications submitted after the effective date of the new rules.
- **Existing Commingling and Allocation Approval:** The practice of commingling offers a number of operational benefits. Adding unnecessary operational barriers and/or costs to commingling would result in otherwise recoverable oil and gas reserves being left in the ground, a matter of physical and economic waste for both operators and the federal government as the steward of public lands and collector of royalty and other revenues therefrom on behalf of the nation. BLM should incorporate into the rule a definition of "economically marginal" that would establish when commingling of production is always allowed from a property meeting that definition.

**Analysis:**

There are several portions of the rules which are over burdensome with no benefit to the American people or the regulated community. In some cases, the rules are

scientifically unsound and can cause detrimental effects to the measurement and resultant values. Re-opening the rules for adjustments would be beneficial to all stakeholders.

## Subcommittee Proposing Recommendation: PAC

**Recommendation:** This follows on the previous recommendation for **Royalty relief for late life or challenging assets** by adding specificity as committed in the last full RPC meeting. Offshore committee recommends appropriate DOI/agency personnel consider, in their review of potential avenues for improved achievability of existing statutory royalty relief options, such factors as enhanced oil recovery (EOR); high pressure/high temperature wells (HPHT); and reservoir depths. (*NOTE: 20,000 feet TVDSS is a common marker for exceptionally challenging reservoir depth.*)

**Nature of change:** This change is within the discretion of the DOI under existing authorities. It is likely that no more than an NTL would be sufficient agency action to effectuate the policy should the Secretary elect to advance the recommendation.

**Background:** It is the committee's understanding that royalty relief is technically available to certain challenging and/or late life projects, but official dialogue at the last full RPC meeting confirmed that there has been little to no successful application for such relief in many years.

The linked DOI data seems to substantiate the absence of such successful policy application in modern OCS operations:

<https://www.data.boem.gov/Other/DataTables/RoyaltyReliefApplications.aspx>

**Analysis:** Where there are risks that certain projects either would not materialize, would materialize sub-optimally (i.e. likely to produce substantially lower EURs), or would face earlier than optimal end of asset life/abandonment *but for* certain royalty relief, there is a public interest in seeking the “win/win” wherein greater production volumes and associated revenues and associated benefits continue to flow to the taxpayer, government, and employment markets. Creating improved certainty and accessibility for those situations would remedy the identified risks.