THE ENERGY POLICY ACT AND ITS CATEGORICAL EXCLUSIONS: 
WHAT HAPPENED TO THE EXTRAORDINARY CIRCUMSTANCE EXCEPTION?

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I. INTRODUCTION

In 1969 Congress passed the National Environmental Policy Act with the intention
to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.1

A few years later, Congress passed the Federal Land Policy and Management Act, which directed that

public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.2

These acts are evidence that Congress recognized the importance of public land protection in conjunction with development of our natural resources. However, as this country continues to grow, demand for natural resources is increasing. Specifically, oil and gas development has dramatically increased, causing unavoidable impacts to air, water, and wildlife. The competing values of land protection and natural resource extraction have come to a head and the oil

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and gas industry is winning the battle in Congress. Critics of NEPA are accusing it of being “a stick in the spokes of the wheels of progress” and contrary to natural resource development goals. Evidence of this new trend toward an emphasis on development can be found within the language of the National Energy Policy Act of 2005 (EPAct). Specifically, § 390 allows land management agencies to apply categorical exclusions (CXs) on projects, eliminating NEPA review without a caveat for extraordinary circumstances. Agencies commonly use CXs for minor actions that will not significantly affect the environment. However, federal regulations that control the use of CXs, contain a caveat for extraordinary circumstances that bars the normal application of a CX when there are sensitive areas at issue such as a crucial habitat area or migration corridor. The CXs prescribed by § 390 of the EPAct do not have a similar safety valve to ensure sensitive areas and resources are not overlooked when a CX is applied.

The following sections will analyze the decision Congress made in establishing the CXs under § 390 and why this might not be the best option for handling the increasing demand for oil and gas production. In the face of global climate change and ever-dwindling open space, processes that evaluate the environmental consequences of development projects are of critical importance. The EPAct and § 390 are problematic because the Congressionally established CXs do not provide an extraordinary circumstance exception to their application and are too broad in their scope and application.

II. THE NEPA PROCESS

NEPA has been touted as the first “modern environmental statute” and as the “Magna Carta of environmental law.” Its goal is to restore and maintain

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4 Id.
7 40 C.F.R. § 1508.4 (2007).
8 40 C.F.R. § 1507.3 (2007).
9 As will be discussed further infra at A. 1., (40 C.F.R. § 1507.3 does not apply to the statutorily created CXs under § 390).
environmental quality in the face of the “profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances.” The statute itself provides few directions about how the process of environmental review is to be carried out. The Council on Environmental Quality has been authorized by executive order to adopt regulations implementing NEPA and has filled the ambiguities in the act with regulations to guide agencies in NEPA compliance. The following paragraph is a condensed summary of the process agencies follow when evaluating the environmental impacts of federal projects.

First, CXs are available for actions “which do not individually or cumulatively have a significant effect on the human environment.” Agencies are given the authority to conduct a rulemaking process to determine which types of actions will qualify for a CX. Second, if an agency is not sure whether a project will pose a significant effect on the environment, an Environmental Assessment (EA) may be completed. An EA is a “concise public document” which is designed to “briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI).” The Agency prepares a FONSI if it determines that a full impact statement is not necessary because of the lack of impact on the environment. Finally, if the EA shows that a significant impact may occur, the agency must prepare a Notice of Intent (NOI) that an EIS will be prepared. An EIS is then prepared when a “major federal action” may have a “significant”

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15 40 C.F.R. §1500 et seq. (these regulations contain specific procedures for impact statement development as well as additional decision making requirements under NEPA).
18 40 C.F.R. § 1508.9 (2007).
22 Major federal action includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency-action. (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of
effect on the environment. The EIS must consider multiple uses of an area that may be affected by the project as well as the environmental impact. In addition, it must identify and provide alternatives to the proposed action that may produce less environmental problems. There are several stages that must occur before a

such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions. 40 C.F.R. § 1508.18 (2007).

23 “Significantly” as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. §§ 1508.27 (2007).


25 Id.
final EIS is complete. First, a Draft EIS must be completed.\(^{26}\) This Draft EIS is then published for comment and a final EIS is created, taking into consideration the comments made on the draft.\(^{27}\) Because of these multiple stages and the detail required in an EIS, the process can take years and significant amounts of money.

Early in NEPA’s history, some Supreme Court justices recognized the substantive nature of NEPA mandates.\(^{28}\) The courts gave weight to the policy directives of § 101 and the national commitment to environmental protection.\(^{29}\) However, in subsequent cases, the Supreme Court acknowledged that while Congress did announce broad substantive policy goals of environmental protection, “NEPA itself does not mandate particular results but simply prescribes the necessary process.”\(^{30}\) In other words, the Act creates an “action forcing procedure that departments must comply with.”\(^{31}\) Therefore, it is acceptable if an agency’s substantive result is not the best overall alternative for the protection of the environment, as long as the agency complied with the procedural requirements and “considered” the other alternatives.\(^{32}\)

\[A. \text{ Judicial enforcement of NEPA}\]

Soon after NEPA was adopted, the District of Columbia Court of Appeals held that NEPA was judicially enforceable against federal agencies.\(^{33}\) The court emphasized that the Atomic Energy Commission was not only permitted but compelled to take environmental values into account.\(^{34}\) This court gave NEPA significant power when it stated “that perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to \textit{consider} environmental issues just as they consider other matters within their mandates.”\(^{35}\) This holding may have surprised the drafters of NEPA because they probably

\(^{26}\) 40 C.F.R. § 1502.9(a) (2007).

\(^{27}\) 40 C.F.R. § 1502.9(b) (2007).

\(^{28}\) \textit{Adler, supra} note 12, at 130, (citing Aberdeen & Rockfish R.r. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP II), 422 U.S. 289, 331 (1975) (Douglas, J., dissenting) (“NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment.”)).

\(^{29}\) \textit{Id.}

\(^{30}\) Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). (Environmental Assessment done by the ski area was adequate under NEPA even though there was no mitigation plan or a worst cases scenario analysis. NEPA does not require a specific result but rather a process to be followed that will likely affect decision making).


\(^{32}\) \textit{Id.}

\(^{33}\) Calvert Cliffs’ Coordinating Comm., Inc. v. Atomic Energy Comm’n, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

\(^{34}\) \textit{Id.}

\(^{35}\) \textit{Id.}
believed that the act would not be judicially enforceable towards agencies and their compliance with the NEPA mandates.36

In another early NEPA case, *Environmental Defense Fund v. Tennessee Valley Authority*,37 the 6th Circuit demonstrated in its opinion the power NEPA could have in the years to follow. Although this case is more famously known as the Endangered Species Act case where the infamous snail darter prevented the operation of a nearly complete Tellico Dam,38 earlier in the dam’s construction there was a dispute about whether the Tennessee Valley Authority (TVA) was subject to the NEPA directive to prepare an EIS.39 The case revolved around the TVA’s Tellico Project on the Little Tennessee River.40 The project was started before the passage of NEPA and therefore TVA argued that it was not subject to the NEPA directive.41 TVA relied on a “ball of wax” theory, arguing that the construction is continuing in “a unified operation rather than in separate stages; and that the entire project was one-third complete [before NEPA was passed].”42 The petitioners pointed out the quality of the trout fishery on the Little Tennessee River and the presence of major sites of archaeological and historical significance that would be significantly affected by the project.43 This, they argued, and the fact that the Tellico project was a “continuing federally operated project,” required NEPA review.44 The Court agreed with the petitioners that § 102 of NEPA applied to the Tellico project regardless of when the construction began and therefore consideration of environmental values must be part of the decision-making process.45 The case demonstrates this court’s dedication to the goals of NEPA even though there was a strong argument against NEPA compliance because the project was already nearly complete and had begun before NEPA was enacted.

Thirty years later in a similar case, the strength of NEPA was again confirmed. In *Southern Utah Wilderness Alliance v. Norton*,46 the plaintiffs argued that the BLM violated NEPA when they relied on outdated Resource Management Plans (RMPs) and EISs when they authorized the 2003 sale of leases on land that had wilderness qualities.47 The BLM did not consider a no-lease alternative in their assessments and ignored new information about “wilderness values and characteristics of all sixteen [lease] parcels.”48 Additionally, the Utah BLM did

37 See generally Envt. Def. Fund, 468 F.2d at 1164.
39 Envtl. Def. Fund, 468 F.2d at 1172.
40 Id. at 1167.
41 Id. at 1172.
42 Id.
43 Id. at 1169.
44 Id.
45 Id. at 1176.
47 Id. at 1254.
48 Id.
not consider the wilderness qualities identified in their own FLPMA inventory when they included certain areas in the sale.\textsuperscript{49} Agencies must consider new information or changed conditions in order to keep their NEPA evaluations current before approving new projects.\textsuperscript{50} The court held that the BLM violated NEPA by failing to consider the new information available and remanded the case for further consideration.\textsuperscript{51} The obligation under NEPA is not static; it requires an agency to use the best available information in making decisions about land use. This decision is indicative that the policy goals of NEPA are still being applied as is evident in the following court statement:

\begin{quote}
BLM cannot know what the environment[al] effects of leasing and development will be to the specific wilderness values, in these specific places, if it declines to undertake the necessary supplemental analysis to evaluate whether its current leasing categories adequately protect these newly identified resources.\textsuperscript{52}
\end{quote}

Prior to the passage of § 390 of the EPAct, the application of administrative CXs to federal projects was not inconsistent with this requirement for careful review because the class of actions eligible for these CXs posed insignificant impacts. Moreover, administratively authorized CXs include safeguards that limit CX application when sensitive lands or resources are at issue. The CXs established by Congress in the EPAct are different because there are no safeguards for extraordinary circumstances. As will be discussed further, the absence of safeguards in the Congressionally created CXs can preclude consideration of significant negative environmental impacts.

III. THE NATIONAL ENERGY POLICY ACT OF 2005

Congress passed the EPAct in 2005 to address perceived problems with domestic energy development. Under § 390 of the EPAct, Congress created five new categorical exclusions with the intention to streamline NEPA review of various oil and gas exploration and development.\textsuperscript{53} CXs have been defined through administrative regulation as:

\begin{quote}
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,
\end{quote}

\textsuperscript{49} Id. at 1256-1257.
\textsuperscript{50} 40 CFR § 1502.9(c)(ii) (2007).
\textsuperscript{51} Id. at 1269.
\textsuperscript{52} Id. at 1266.
neither an environmental assessment nor an environmental impact statement is required.\textsuperscript{54}

The new Congressionally created categorical exclusions for oil and gas development under § 390 of the National Energy Policy Act are as follows:

(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.\textsuperscript{55}

The problem with the application of these five CXs is the inability for an agency to require a hard look at impacts and alternatives when sensitive resources are at stake and significant impacts are probable. Additionally, the CXs allow an agency to rely on potentially outdated or inadequate NEPA documentation when making decisions about development projects. This can create serious environmental habitat problems.

\textit{A. Perceived benefits of § 390 CXs}

The EPAct was passed in a climate of fear about this country’s dependence on foreign oil and the uncertainty of this future supply. Provisions like the five new CXs allow for rapid development of local oil and gas reserves, thereby reducing the foreign dependence. Strengthening this country’s domestic oil and

\textsuperscript{54} 40 C.F.R. § 1508.4 (2007).
gas supply can lead to an increase in homeland security, something that is politically very popular.

There are many supporters of the § 390 CXs, such as former Republican Congressman Richard W. Pombo, who stated that, “the accumulation of requests for exemptions for energy, transportation, defense and domestic security projects signaled the need for a thorough reexamination of the law.”

He further commented that, “everyone is complaining about the way NEPA works.” The logical benefit of a CX is that it allows for an easier, cheaper, quicker way to approve a particular project, which saves the involved agency and requesting party valuable time and resources.

For example, Utah mining executive Luke Russell called NEPA “a monster devouring millions of dollars and years of time needlessly on redundant studies, conflicting requirements and wasteful litigation.” This comment came after his company had to spend $11 million on an environmental impact study for a gold mine on federal land in Alaska, and by the time the agency had finished reviewing the project, the price of gold had dropped so much that the project was no longer economically viable. Oil and gas developers can avoid some of these costly studies by application of a § 390 CX. For example, the BLM issued 1,361 permits to drill under categorical exclusions in an eight month period in 2006, which reduced time and increased energy security by providing a predictable consistent process that eliminated “unreasonable or harassing objections that serve only to add costly delays.” In further support of categorical exclusions, Henri Bission, deputy director of the BLM, has reported that the BLM had saved more than $8 million since the beginning of 2006 by applying CXs resulting in less redundant paperwork. However, acceleration of project approval must not come at the price of failing to consider the environmental impacts of those projects. As stated by a University of Minnesota professor in response to implementation of the § 390 CXs, “the general thrust of the administration’s proposals is not to produce information more efficiently but to produce less information . . . we should be more efficient not less informed.”

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56 Riterman, supra note 13.
57 Id.
58 Id.
59 Id.
61 Jean Chemnick, Rahall gets an earful about his bid to rescind some EPAct provisions, INSIDE ENERGY WITH FEDERAL LANDS, May 28, 2007 at 5.
62 Riterman, supra note 13.
B. Problems with § 390 CX Application

1. Absence of an Extraordinary Circumstance Exception

Shortly after the 2005 EPAct was passed, the BLM issued an Instruction Memorandum that outlined the use of § 390 categorical exclusions for oil and gas development.63 One of the directives stated that the use of CXs is not dependent on the CEQ process for approving new CXs including 40 CFR 1507.3.64 This regulation as applied to other types of CXs “precludes their use when there are extraordinary circumstances.”65 Because the BLM has directed field offices not to apply this regulation, projects on land areas with extraordinary circumstances do not get the requisite hard look that normally is required with administrative CXs. This means, for example, when an oil and gas development project that falls under a § 390 CX is in a sensitive habitat area, there is no exception to the CX application. The BLM is not required under the EPAct to consider the impacts the project might have on a sensitive habitat area or how it might block a significant migration corridor. Moreover, it may lack discretionary authority to require a harder look even if it believes more information is needed to make a decision about future development.

a. It is Unreasonable for the BLM to Omit the Extraordinary Circumstance Exception

In practice, the § 390 CXs are presumed validly applied and only subject to rebuttal.66 However, there is no directive within the BLM Instruction Memorandum or in the EPAct itself that contains a definition of the rebuttal standard.67 The statute does say that the rebuttable presumption relates to the use of the CXs “under the National Energy Policy Act.”68 This indicates that Congress intended for the EPAct and NEPA to work in conjunction with one another. Under NEPA and the CEQ regulations that instruct agencies how to comply with NEPA mandates, CXs may only be applied when extraordinary circumstances do not exist.69 This is perhaps the rebuttable presumption that Congress was alluding to.

64 Id. at Attachment 2.
65 Id. at 2-1.
67 Id.; see also Pub. L. No. 109-58, 119 Stat. 594 (2005); see also BUREAU OF LAND MANAGEMENT, supra note 63.
within the language of § 390. It is possible that Congress intended to exclude the application of § 390 CXs when extraordinary circumstances exist because that is what is normally done “under” NEPA. This is a likely argument because CXs are not defined within the EPAct, but are defined under CFRs relating to NEPA and included within that definition is the extraordinary circumstance exception. 70 Assuming Congress left ambiguity within the “rebuttable presumption” language, the BLM felt it was necessary to fill the gap. The BLM chose to interpret the interaction of NEPA and the EPAct as excluding the applicability of the CEQ regulations for NEPA compliance. This choice may be challenged in court.

It is also entirely possible that Congress did not intend to allow an extraordinary circumstance exception and the absence of any such language within the statute is clear intent of this position. However, for the sake of argument and the following critique of the BLM’s decision to exclude CFRs within its Instruction Memorandum, let us assume the first scenario, that there was ambiguity within the language of § 390.

Usually an agency is afforded a great deal of deference when a statute is ambiguous and the agency decision has the force of law. 71 However, when agency interpretations have not gone through formal notice and comment rule-making, but are more like “interpretations contained in policy statements, agency manuals and enforcement guidelines, all of which lack the force of law” those interpretations will not warrant “Chevron-style deference.” 72 The BLM Instruction Memorandum is a guidance document and the argument below will show it does not have the force of law and should be given less deference than is usually given under Chevron.

(i) The Force of Law Question

There is no bright line rule to the question of whether an agency decision, regardless of where and how it is published, carries the force of law. 73 The absence of a formal rule-making procedure will not alone determine force of law, 74 and courts will employ different tests to determine whether an agency has enacted a legislative rule that carries the force of law or whether the agency has

70 See Id.
71 See Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (when a statute is ambiguous, Chevron deference is given to the agency decision which is held to a reasonable standard).
73 See Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1108-09 (D.C. Cir. 1993) (court describes the determination of force of law as “enshrouded in considerable smog”); see also American Hospital Association v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (calling the line between interpretive and legislative rules “fuzzy”); Community Nutrition Institute v. Young, 818 F.2d 943, 946 (D.C.Cir.1987) (quoting authorities describing the present distinction between legislative rules and policy statements as “tenuous,” “blurred,” and “baffling”).
simply issued an interpretive rule or general policy statement. In *United States v. Mead Corp.*, the court used a three part test to evaluate an agency decision: “(1) whether Congress has prescribed relatively formal procedures; (2) whether Congress has authorized the agency to adopt rules or precedents that generalize to more than a single case; and (3) whether Congress has authorized the agency to prescribe legal norms that apply uniformly throughout its jurisdiction.”75 While the BLM has been charged generally with authority to adopt rules with relatively formal procedures, under § 390 of the EPAct there are no such authorizations.76

Another approach is to determine whether the agency decision has “legal effect,” which is ascertained by asking “(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.”77 If the answer to any of these questions is in the affirmative then “we have a legislative, not an interpretive rule.”78 Under this evaluation, the BLM decision to exclude the extraordinary circumstances would be an interpretive rule and not have “legal effect.” First, the absence of the BLM decision does not eliminate the legislative basis for CX application. Second, the BLM did not publish this rule in the Code of Federal Regulations, but in an internal Instruction Memorandum. Third, there was no express legislative authority for this type of decision within the EPAct.79 Finally, the rule within the Instruction Memorandum does not make any mention of its effect on another rule so there is no amendment to a prior legislative rule.80

A third approach to this question about force of law is to first determine the agency’s characterization of the rule and then look at other distinctions.81 The general distinction between interpretive and legislative rules is that

an interpretive rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to

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77 American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

78 Id.


80 See BUREAU OF LAND MANAGEMENT, *supra* note 62.

create new law, rights, or duties, the rule is properly considered to be a legislative rule.82

The BLM characterized its Instruction Memorandum under the “purpose” section of the document, as “guidance for improved NEPA compliance in oil, gas, and geothermal exploration and development operations on public lands.”83 Specifically with regard to the § 390 CXs, the agency calls the directive an “interim guidance on the application and use of statutory NEPA categorical exclusions (CX), as granted in Section 390 of the Energy Policy Act of 2005.”84 This language is evidence that the BLM considered its memorandum would set forth interpretive rules rather than legislative rules that carry the force of law.

Based on the application of these force of law tests, when the BLM decision to exclude the extraordinary circumstance exception is challenged, a court should find that the rule is interpretative and therefore does not have the force of law. Because of this the BLM should not be afforded *Chevron* deference. Instead, a court should use the *Skidmore* deference standard to evaluate the BLM’s decision.85

(ii) *Skidmore* Deference

*Skidmore* provides the appropriate test for deference when an agency decision does not carry the force of law and therefore is beyond the “pale” of *Chevron*.86 *Skidmore* deference is on a “sliding scale from great respect on one end . . . to near indifference at the other.”87 The weight a court gives to a particular agency decision “will depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”88 A court will determine what level of deference to give the BLM when a challenge is brought. The BLM should not be given deference for its decision to exclude an extraordinary circumstance exception because that was not a reasonable way to interpret the interaction between NEPA and the EPAct. In all other situations where administrative CXs are applicable, under NEPA, an extraordinary exception is provided. The BLM, therefore, has been inconsistent with earlier pronouncements by not including an extraordinary exception when it applies the five new § 390 CXs. A court would likely view the lack of an

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82 Id.
83 *BUREAU OF LAND MANAGEMENT*, *supra* note 62.
84 Id.
85 For a more in depth discussion about the decision whether to apply *Chevron* deference or *Skidmore* deference and the better approach to take in the future, see Amy Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877 (2006).
86 Id. at 1886-87.
87 Id. at 1887 (citing *Mead*, 533 U.S. at 228).
exception unreasonable given the BLM’s charge to manage lands responsibly and to follow the policy goals and mandates of NEPA.

2. Outdated NEPA Documents and Cumulative Impacts

While all of the § 390 CXs are problematic because of the absence of an extraordinary circumstance exception, there are two in particular that pose more serious potential problems. First, CX (1) does not have any restriction on the age of the previously completed NEPA document. Theoretically any type of NEPA document of any age could be used to approve a new five-acre development project. The NEPA document could be “site specific” but still not address the particular impacts of an oil and gas proposal. Under the language of the CX (1), a NEPA document that evaluated mountain biking trails in a five acre plot could suffice as a proper NEPA document to qualify for the new Congressional CX (1) and not require any further impact evaluation. An even more alarming scenario occurs when the previously completed NEPA document is a another CX. In this situation you could have multiple CXs validating subsequent projects with no updated environmental impact information.

While five acres may not seem like a large impact, when multiple five acre projects are approved in this way, the cumulative impacts of these projects are not adequately considered. Additionally, if the particular five acre parcel overlays the only migration corridor through a mountain pass or through a congested area like Interstate 70 in Colorado, the impacts could be devastating to wildlife. The CEQ regulations indirectly require a discussion of cumulative impacts to be included within an EIS but there may not be an EIS available or it may be severely outdated. The following law review article excerpt about wetland permitting decisions illustrates why the consideration of cumulative impacts is important:

Each of the some ten thousand permit applications processed each year is a localized event, taking one-half acre, three acres, twenty-one acres of wetlands, for this pier, that channel, a sand and gravel pit, or a building site. The indirect effects of even these individual takings—how much they will pollute, subside, or slowly asphyxiate their surroundings—are uncertain, and in any event will not be witnessed for years. The cumulative effects of these and similar activities—of one more marina on Galveston Bay, of one more logging road on the grizzly bear—may be far greater than the sum of the parts, and are even less susceptible to proof.91

89 Id.
90 Mandelker, supra note 36, at § 10.42.
Without individual project NEPA documentation, the cumulative effect of these small projects is never evaluated. Hypothetically, if a thirty-year old EIS is used as the qualifying prior NEPA document, there may not have been any other development in the area at the time the EIS was completed, so consideration of cumulative effects would have been impossible to include.

The Pinedale, Wyoming area offers a compelling example of why considering cumulative impacts is essential. In the Pinedale anticline, oil and gas development, as well as residential growth, is moving at an alarmingly rapid pace. The BLM is planning to approve an additional 7,836 new wells in the area over the next ten to fifteen years, almost tripling the wells already in place. Along with abundant oil and gas reserves, this area is home to big game populations as well as sage grouse, whose breeding grounds and habitat are being destroyed by the oil and gas development. According to a fragmentation analysis, the valley’s road networks do not allow much room for core habitat. This situation will only worsen as more projects are approved. Without an extraordinary circumstance exception to § 390 CXs, small five acre developments will continue to be approved without consideration of the cumulative effects these projects can have on the wildlife in the area. The state and federal agencies, including state departments of fish and wildlife, will be unable to step in and stop project approval.

3. Insufficiency of Resource Management Plans for Site-Specific Analysis

The third categorical exclusion within the EPAct is also especially problematic because it allows a regional Resource Management Plan (RMP) to suffice as NEPA documentation for site-specific project approval. RMPs generally encompass millions of acres. Because of the large area these plans must cover, it is impossible for the plan to evaluate the environmental impacts of drilling in site-specific areas. While a plan may prescribe areas that would be suitable for oil and gas drilling, and the stipulations applicable to development, the

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93 Id.
95 Id.
broad level analysis often misses central areas that depend on extraordinary circumstances recognition for protection. If such resources and critical areas exist, the BLM cannot override the CX application because there is no exception. This is troubling for states that are concerned with protecting their sensitive wildlife habitat corridors, and as will be discussed, is the reason the Western Governors Association is calling for an amendment of the § 390 CXs.

There is no doubt that the application of this CX can save the BLM and other agencies time and money. However, what are the costs associated with that savings? The wildlife in these drilling areas bears the greatest burden. The mule deer in the Pinedale anticline area have experienced a 27% decline since development started. Additionally, the sage grouse numbers that had been increasing in 2004 through 2006 have stopped increasing within the gas fields and at least four of their leks were abandoned. John Emmerich, the Deputy Director of the Wyoming Fish and Game Department, stated in testimony before the Energy and Minerals Resources Subcommittee that “the level of analysis, disclosure and recommended mitigation that is appropriate for sensitive wildlife corridors and crucial habitat is not provided in programmatic land use plans such as RMPs or Forest Plans, [this] can only be achieved through the more in depth analysis provided by an EA or in most cases an EIS.” This type of in-depth analysis will not be done when RMPs are used as the sole source of NEPA documentation under § 390 CX (3). The result will be that the sensitive wildlife corridors and crucial habitat will not be taken into consideration at the development approval stage of the process.

IV. SOLUTIONS TO THE PROBLEMS OF THE § 390 CATEGORICAL EXCLUSIONS FOR OIL AND GAS DRILLING

A. Amend § 390 CX(3) of the National Energy Policy Act of 2005

The Western Governors Association (WGA) drafted a Policy Resolution in February of 2007 which requested an amendment to § 390(b)(3) “to remove the categorical exclusion for NEPA reviews for exploration or development of oil and gas in wildlife corridors and crucial wildlife habitat on federal lands.” This

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100 Hearing, supra note 98 at 2 (testimony of John Emmerich).

101 Id.

102 Id at 3.

103 WESTERN GOVERNORS ASSOCIATION, supra note 99.
amendment, they propose, would reinstate appropriate environmental site analysis that should be done to protect “crucial wildlife habitat” and “significant migration corridors.” State agencies are charged with protection of the wildlife resources within their state. They are unable to do this if projects are being approved through a CX without any exception for extraordinary circumstances. In other agency-directed CX applications, a state agency can designate a crucial habitat area that is not open to CX application through the extraordinary circumstance exception.

There are several acts currently sitting before Congress that would satisfy this request for an amendment. The first of these is H.R. 2337 which would limit the rebuttable presumption of the application of CXs under NEPA by excluding locations with crucial wildlife habitat or significant migration corridors. Additionally, the bill would require the adherence to the CEQ regulations regarding CXs, including 40 C.F.R. 1507.3 and 1508.4. Currently this bill is in the House, but has been scheduled for debate and placed on the Union Calendar. This bill would satisfy the requested amendments the WGA had asked for in their policy resolution.

Another bill that addresses this issue is H.R. 3221 § 7104, which would also limit the rebuttable presumption of the application of CXs. The difference in this bill is the absence of the language about precluding the use of CXs in crucial habitat areas or in significant migration corridors. It does, however, include the application of the CEQ regulations, specifically 40 C.F.R. 1507.3 and 1508.4,
which would prevent the use of CXs in extraordinary circumstances. This bill has passed the House of Representatives, has been read twice in the Senate, and has been placed on the legislative calendar under general orders. This bill would also likely satisfy the resolution produced by the WGA. Applications of the named CFRs would preclude the use of CXs in special cases where the WGA believes further environmental review would be necessary to preserve habitat and corridors. The proposed amendments address these concerns by adhering to C.F.R.s already in place.

The problem with the extraordinary exception regulation is that it requires agency identification of particular areas that should not be considered for these CXs. This may provide protection for areas an agency has been alerted to or those that have historically been in danger. However, with the rapid pace of oil and gas development some areas may not get the hard look needed to identify them as crucial habitat areas. Additionally, the BLM is getting thousands of drilling permits each year and the number is increasing. With this kind of workload, the BLM cannot identify crucial habitat areas and it will be up to state agencies to recognize an extraordinary circumstance. Therefore, the ultimate success of this provision may depend on public notice and close cooperation between multiple federal and state agencies. The Western Governors Council thinks the agencies are up to this challenge.

B. Develop a Companion Process for the BLM to Implement Along with CX Application Under Subpart (b)(3)

A similar solution that does not require further legislation would be for the BLM to develop a policy that would require a “companion process” with application of CX (3). This companion process would allow the state fish and wildlife agencies the opportunity to review permits and provide an informal environmental assessment of the project. This option would ensure that projects

115 Id.
116 Id.
117 Id.
118 See Our View, supra note 92.
120 See generally Western Governors Association, supra note 99.
121 Subpart (b)(3) of § 390 reads: “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.” 42 U.S.C. § 15942 (2006).
122 Hearing, supra note 98, at 4 (testimony of John Emmerich).
in sensitive wildlife corridors and crucial habitat are specifically considered for
their potentially damaging impacts. The state environmental agencies have
statutory obligations to “conserve and manage the fish and wildlife resources,
which are so important to the economy, culture and heritage . . . ” Unless these
agencies are included in the permitting process (which currently is not happening
under CX application) then they cannot fulfill these directives.

The potential problem with this solution is that the “companion process”
could be considered ultra vires. The BLM does not have direct authority with
the EPAct to impose its own conditions on the application of the five CXs
identified in § 390. In other words, an agency cannot supersede Congressional
mandates under the doctrine of ultra vires. However, the language of the statute
reads, “with respect to any of the activities described in subsection (b) of this
section 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. (emphasis added)” “Shall”
is defined as “must; is or are obliged to.” This definition leaves little room for
agency discretion in applying a CX to an application for a permit to drill for oil
and gas. While there is no discretion in the approval of the permit, there is
potentially discretion in the contents of the permit. The agency could apply the
companion process to writing the permit and include the suggestions from state
agencies in the details of where and how a permitee may drill his wells. This
would avoid the ultra vires problem but would not eliminate the drilling
completely in sensitive areas. Therefore, amendment or repeal of § 390 would
provide a better solution.

C. Repeal of § 390 and the New Categories of CXs

A repeal of § 390 is not likely to receive much support on Capitol Hill
because the current Administration has made it clear that this country needs to
promote energy development in order to rely less on foreign sources. The CXs

123 Id.
124 Id.
125 Id.
126 Ultra Vires is defined as “unauthorized; beyond the scope of power allowed or
granted by the corporate charter or by law” (BLACK’S LAW DICTIONARY 741 (3d pocket
ed. 2006)).
128 Id.
129 WEBSTER’S COLLEGE DICTIONARY 1187 (2d ed. 1998).
130 Trout Unlimited, 320 F.Supp.2d at 1108, (citing Executive Orders 13212 &
13211) (the orders directed federal agencies to expedite energy related projects and to
prepare a statement of energy effects for actions that could affect energy development.
Taken together, these orders identified oil and gas development as the most important
give the BLM discretion to quickly move through oil and gas drilling authorizations in compliance with the Administration’s goal of energy independence.\textsuperscript{131} However, this comes at the expense of impacts to wildlife habitat and corridors that are not adequately addressed by regional land use plans.\textsuperscript{132}

A repeal might receive support by some members of Congress if lobbying groups can point out the conflict between the application of § 390 CXs with the policy goals of FLPMA. Compliance with § 390 of the EPAct makes it difficult for agencies to meet their statutory responsibilities under FLPMA. One requirement of FLPMA is that, “The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 202 of [FLPMA].”\textsuperscript{133} When CXs are used to approve oil and gas drilling permits, automatic preference is given to that specific use over any others identified in the land use plan. Without any further evaluation of the project and its impacts or whether another activity might be preferable, the drilling permit trumps all other uses when a CX is applied. This seems to contradict a multiple use framework where all uses are weighed equally.

FLPMA also mandates that agencies manage public lands in a way that will preserve their natural condition for habitat and species preservation and additionally protect the quality of “scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archeological values.”\textsuperscript{134} Can this be done when CXs for oil and gas drilling trump all other uses when that activity has been designated as foreseeable?\textsuperscript{135} Arguably not, and this might be enough to convince a majority of the members of Congress that enacting this section of the EPAct was a mistake and it should at least be amended, if not repealed.

\textit{D. Create Definitions for Ambiguities within the Act that Limit the Scope of the §390 CXs}

Within the language of the new Congressional CXs there are ambiguous terms that are the source of many of the problems identified. First, it is unclear what Congress meant by “site specific NEPA documentation” within CX (1).\textsuperscript{136} There are two different interpretations that arise from this language. It could

\begin{itemize}
\item \textsuperscript{131} Riterman, \textit{supra}, note 13.
\item \textsuperscript{132} Dave Freudenthal, \textit{Governor Freudenthal urges balance on Public Lands Near Pinedale}, \textit{U.S. State News}, June 18, 2007.
\item \textsuperscript{133} 43 U.S.C. 1732(a) (2006).
\item \textsuperscript{134} 43 U.S.C. 1701(8) (2006).
\item \textsuperscript{135} \textit{Testimony to the Energy and Minerals Subcomm., House Natural Resources Comm.}, 5-6, 110th Cong. (2007) (Statement of Ann J. Morgan, Vice President of the Public Lands Campaign, the Wilderness Society), available at \url{http://wilderness.org/Library/Documents/MorganTestimonyApril07.cfm}.
\item \textsuperscript{136} 42 U.S.C. § 15492 (2006).
\end{itemize}
mean that the NEPA documentation must have analyzed previous oil and gas activity in the specific site. However, it could also mean that any type of analysis specific to the particular site would be adequate. This could include all types of activities such as the building of a rodeo grounds, a nature walk, or bike paths, all of which are significantly different from an oil or gas development project. All of these activities also produce different impacts on the land. To remedy this potentially confusing and damaging loophole, the BLM could issue guidelines that require the “site specific NEPA documentation” to have considered the same activity as what is being proposed under the CX.

Second, CX (3) is ambiguous as to the level of analysis that will satisfy the language “reasonably foreseeable” with regard to drilling activity in the area.137 Does the previous analysis simply have to be part of a broad statement that many activities are possible in the area? Does the language of the environmental document have to specifically list drilling as the primary activity foreseeable in the area? There are many interpretations that could lead to different results in application of the CX. The BLM could again issue guidelines that specify more detailed language that must be required to fulfill this aspect of the CX.

Third, it is unclear whether a previously applied administrative CX would qualify as “any prior document prepared pursuant to NEPA” within the language of CX (3).138 Using a CX to suffice for adequate environmental impact evaluation for another CX seems unreasonable. It is a slippery slope towards complete elimination of environmental impact review. This completely undermines the goals and purpose of NEPA. Because there is ambiguity, the BLM could narrow the scope of the documents that would qualify for CX (3).

Finally, the BLM would be able to create these necessary guidelines because Congress has left ambiguity in the statute and thereby left room for the BLM to fill these gaps under their implied authority to implement this statute. The BLM could give itself more discretion in the application of the five new CXs. Additionally, they could create these clarifications through a formal rule and comment procedure that would carry the force of law.139 This, as previously discussed, would afford the BLM Chevron deference and would make it difficult to challenge the interpretation in court. However, depending on the political sentiment of the BLM agency head, these clarifications may never be made. The BLM could just as easily accept any type of NEPA document, evaluating any type of activity, which would expedite the oil and gas project approval rate. This is ultimately perhaps exactly what Congress was hoping for in passing § 390.

V. CONCLUSION

There are circumstances that warrant the use of a CX. The decision to paint an old structure on federal land or to put a guard rail around an oil well should not

137 Id.
138 Id.
139 Amy Wildermuth, supra note 82 at 1886-87.
be the kinds of actions that trigger a full NEPA process. However, the CXs in § 390 of the EPAct have the potential to allow action that does have a significant effect without much recourse to challenge the application. This is problematic and it has state officials, as well as environmentalists worried about the integrity of our public lands.

There is a place for categorical exclusions. They can eliminate repetitive analysis, reduce workload, and save valuable time and money. However, these useful qualities of CXs are lost when they are applied in an irresponsible fashion where there is no check on their rampant application. There are some solutions to avoid the problems the § 390 CXs pose. Amendment of the EPAct, repeal of the §390 CXs, and a legal challenge under the Skidmore deference standard are all viable options to solve the problems. Additionally, the BLM potentially has some discretion to limit the scope of CX application. While in the rush to strengthen our national independence on oil and gas, Congress should not ignore the environmental safeguards they have already put in place such as NEPA and FLPMA. They should recognize the usefulness of the Council on Environmental Quality who has put in place regulations to ensure responsible use of CXs. Congress needs to trust the process already in place and adhere to the environmental protections that, at one time, were important.