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# United States Senate

COMMITTEE ON  
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

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October 15, 2009

The Honorable Ken Salazar  
Secretary  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Dear Secretary Salazar:

I am writing to request that you review the Bureau of Land Management's implementation of section 390 of the Energy Policy Act of 2005. I am concerned that BLM's actions to carry out this section are not in conformity with the regulations of the Council on Environmental Quality (CEQ) or the Department of the Interior. At the time of enactment of this provision, it was my understanding that section 390 would be implemented in accordance with the existing regulations.

Section 390 established a "rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply" to five types of activities relating to the exploration and development of oil and gas on public lands. The BLM has issued an Instruction Memorandum that provides that in applying section 390 categorical exclusions, situations presenting "extraordinary circumstances" are not subject to additional review and in-depth environmental analysis. This is contrary to the long-standing requirements in the CEQ regulations and the Department's own NEPA rules codified in the Departmental Manual regarding categorical exclusions.

First, given that these regulations and this interpretation of categorical exclusion was in effect at the time that section 390 was enacted, I am disturbed that BLM's implementation of section 390 does not provide for further environmental analysis of situations that present extraordinary circumstances. It is a fundamental rule of statutory construction that where Congress borrows a term of art in which there is an understood legal meaning, it presumably knows and adopts the meaning. Morisette v. United States, 342 U.S. 246, 243 (1952).

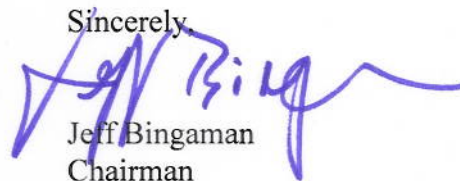
Secondly, by making the use of the categorical exclusions subject to a "rebuttable presumption," Congress intended to give BLM some discretion in whether a categorical exclusion should apply. I am concerned that the current instruction memorandum does not provide adequate discretion in this regard. Finally, it appears that the provision has been interpreted in a manner that thwarts public notice and participation. For all of these reasons, I

hope that you will review BLM's implementation of section 390.

The need for such a review is underscored by the recent Government Accountability Office (GAO) report ("Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act" GAO-09-872 (September 2009)), which indicates that the section 390 categorical exclusions have been widely used in the past two years and that a "lack of clarity" and disagreement exist with respect to the law and BLM's guidance. While legislative action with respect to this section may be warranted, I would appreciate your providing me with your plans to address the recommendations for executive action in that report. I think it important that as an immediate step in responding to the GAO recommendations, the BLM conform its implementation of section 390 to the applicable CEQ and Department of the Interior rules regarding categorical exclusions, as noted above.

Thank you for your attention to this matter. I look forward to continuing to work with you to facilitate the responsible development of our Nation's oil and gas resources on public lands.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Bingaman", with a stylized flourish extending to the right.

Jeff Bingaman  
Chairman