

Provisions governing . . .	Are in the following sections of the TROA . . .
Recitals, Definitions	Recitals 1 through 9. Definitions (1) through (106).
Satisfaction of provisions of law, general operational principles, protection of water rights, imported water, remaining water of the Truckee River, and emergencies.	Sections 1.A through 1.F.
Administration	Sections 2.A through 2.C.
Accounting, reporting, forecasting, and monitoring	Sections 3.A through 3.E.
Incorporation of certain provisions of the preliminary settlement agreement	Sections 4.A through 4.G.
Operation of Floriston Rate and Project Water	Sections 5.A through 5.E.
Truckee River and Lake Tahoe Basin Allocation and Accounting	Sections 6.A through 6.E.
Credit Water Establishment, Storage, and Conversion	Sections 7.A through 7.H.
Priorities and Rules for Operations Following Impoundment or Accumulation of Water in Reservoirs	Sections 8.A through 8.V.
Beneficial Uses of Water for Instream Flows and Recreation in California	Sections 9.A through 9.F.
Design of Water Wells in the Truckee River Basin in California	Sections 10.A through 10.H.
Scheduling	Sections 11.A through 11.H.
Effectiveness of the TROA	Sections 12.A and 12.B.
Relation of TROA to Settlement Act, Adjustments to Operations and Changes to Agreement	Sections 13.A through 13.E.
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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2300

[LLWO35000.L14300000.PN0000.24-1A]

RIN 1004-AE05

Land Withdrawals; Amendment of Regulations Regarding Emergency Withdrawals

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: This final rule amends the Bureau of Land Management's (BLM) emergency withdrawal regulation to remove language that directs the Secretary of the Interior (Secretary) to immediately make an emergency withdrawal upon notification by one of two congressional committees. Constitutional questions have arisen when this regulation and corresponding provisions in Section 204(e) of the Federal Land Policy and Management Act (FLPMA) have been used by a congressional committee to direct Secretarial action. A district court, however, found it unnecessary to rule on the constitutionality of the committee-directed provision in Section 204(e) of FLPMA because the Secretary had bound himself through regulations regarding special action on emergency withdrawal. This final rule removes from regulations only the provision that has been the subject of past constitutional questions.

DATES: This rule is effective January 5, 2009.

FOR FURTHER INFORMATION CONTACT: For information on the substance of the rule, please contact Jeff Holdren at 202-452-7779 or Vanessa Engle at 202-452-7776. For information on procedural matters, please contact Jean Sonneman at 202-785-6577. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact the above individuals. FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of the Final Rule
- III. Discussion of Public Comments
- IV. Procedural Matters

I. Background

Section 204(e) of FLPMA provides that the Secretary of the Interior shall withdraw lands immediately upon a determination, either by the Secretary or by either of two committees of the Congress, that an emergency exists and that extraordinary measures need to be taken to protect natural resources or resource values that otherwise would be lost. The congressional notification authority may be exercised by the Committee on Natural Resources of the House of Representatives or by the Committee on Energy and Natural Resources of the Senate. 43 U.S.C. 1714(e). The BLM's regulations at 43 CFR 2310.5 state that the Secretary shall immediately withdraw lands when the Secretary determines, or when the Secretary is notified by a Committee, that an emergency exists and that extraordinary measures must be taken to protect natural resources or resource values that would otherwise be lost.

Over the years the Secretary has rarely invoked his authority to make an

emergency withdrawal. In addition, the committee-directed emergency withdrawal provision has been controversial; the constitutionality of Section 204(e) has been the subject of litigation.

In 1991, the BLM published a proposal to remove all regulations in 43 CFR part 2300 related to emergency withdrawals (56 FR 59914 (Nov. 26, 1991)). In addition to raising the constitutional issue, the preamble for that proposed rule included an explanation that the first sentence of Section 204(e) is redundant, since public lands can be protected rapidly through the normal exercise of the general withdrawal authority, without invoking FLPMA Section 204(e). That proposed rule was never finalized, and it was withdrawn from the Semi-Annual Regulatory Agenda in 1993.

The BLM published another proposed rule on October 10, 2008 (73 FR 60212 (2008)) that would remove all regulations that provide for emergency withdrawals. The rationale for that proposed rule was the same as that for the 1991 proposal—i.e., that the existing regulations are redundant and that the committee-directed withdrawal presents constitutional issues. The public comment period on the proposed rule closed on October 27, 2008.

We received approximately 800 comments during the comment period. All comments were carefully reviewed. More than 90 percent of the comments were form letters or duplicates, some of which opposed the proposed rule, and some of which supported it. All relevant comments are discussed below.

In response to many of these comments and after additional internal deliberation, we are now promulgating a final rule that, instead of removing the BLM's regulations regarding emergency withdrawals in their entirety, removes

only that portion of 43 CFR 2310.5 that implements the committee-directed withdrawal provision of Section 204(e) of FLPMA. As set forth more fully below, the BLM continues to believe that the Secretary-initiated emergency withdrawal regulations are redundant and unnecessary. However, in response to public comments desiring minimal changes to the Secretary's regulatory authority, the BLM has decided not to amend the regulations as they relate to the Secretary's authority to make emergency withdrawals. In addition to removing language pertaining to committee-directed withdrawals, this rule makes clarifying changes that do not affect the substance of the emergency withdrawal regulation (43 CFR 2310.5).

II. Discussion of the Final Rule

The proposed rule would have removed the BLM's emergency withdrawal regulations in their entirety, although the statutory authority for those withdrawals would have remained in place. Part of the rationale for the proposed rule was that the emergency withdrawal process is redundant, as the BLM can protect public lands quickly via the segregative effect contained in the conventional withdrawal process found in Section 204 of FLPMA and in the BLM's regulations at 43 CFR part 2300.

More specifically, the BLM's view is that the conventional withdrawal process results in the protection of lands quickly and just as effectively as the emergency withdrawal process. Conventional procedures enable the BLM to protect public lands, without substantial delay, for as long as 2 years by requiring that the BLM publish a **Federal Register** notice of the filing of a withdrawal application or proposal. Such publication temporarily segregates the public lands from settlement, sale, location, or entry under the public land laws, including the mining laws, to the extent specified in the notice. 43 CFR 2310.2(a). The 2-year segregation period ends when an order is published withdrawing the lands, or when the Secretary denies or cancels a withdrawal application. 43 CFR 2310.2-1.

If a petition seeks an emergency withdrawal, the petition is filed simultaneously with an application for withdrawal. 43 CFR 2310.1-3(d). If the Secretary approves a petition for an emergency withdrawal, the publication and notice provisions pertaining to emergency withdrawals are applicable. 43 CFR 2310.1-3(e). Those provisions, at 43 CFR 2310.5, include the immediate issuance of a withdrawal

order signed by the Secretary which is effective when signed, does not exceed 3 years in duration, and may not be extended by the Secretary. 43 CFR 2310.5(a). The Secretary also must send a notice of the emergency withdrawal to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate the same day it is signed, and send a report to both committees within 90 days. 43 CFR 2310.5(b) and (c).

The 2-year segregation that occurs immediately upon notice of a conventional withdrawal proposal or application has the same effect as the first 2 years of a 3-year emergency withdrawal. However, the conventional process permits the extension of a withdrawal that is granted during the 2-year segregative period, if warranted by the purpose for which the withdrawal was first made. 43 CFR 2310.4(a). In addition, public notice and opportunities for comment under conventional withdrawal procedures (43 CFR 2310.3-1(b)(2)(iv)-(v) and (c)) do not occur for emergency withdrawals. Unlike the emergency process, the conventional process ensures that the BLM casts a wide net for information and takes appropriate account of, and considers the interests of, persons with legally recognized interests in land or other natural resources. An additional difference between segregation and an emergency withdrawal is that along with the notice to Congress, the Secretary must also undertake certain steps set forth at 43 U.S.C. 1714(c)(2) within 3 months after an emergency withdrawal is made. Those steps are not required for segregation. An emergency withdrawal may not be extended by the Secretary. 43 CFR 2310.5(a). Lands involved in an emergency withdrawal may continue to be withdrawn past the expiration of the emergency withdrawal only via the conventional withdrawal procedures. *Id.* Thus, in sum, the emergency withdrawal process is unnecessary because of the segregative effect provided by the conventional withdrawal process.

As set forth more fully in Part III below, many comments opposed the proposed rule out of a concern that the BLM was removing the authority granted to it by Congress to protect public lands on an emergency basis and that the emergency withdrawal regulations were not redundant. The BLM does have a strong desire to preserve its regulatory authority to protect public lands and continues to believe that such protection can occur quickly and just as effectively through the conventional process, with the

added benefit of providing more opportunity for the public to participate. However, the assertion of redundancy did not resonate with some of the commenters. Therefore, the BLM has decided not to remove the emergency withdrawal regulations in their entirety. After today's rule becomes effective, the Secretary's regulatory authority to make emergency withdrawals (or any withdrawals, for that matter) remains unchanged. The regulations will continue to provide a procedure whereby the Secretary can protect natural resources or other values quickly via either the conventional or emergency withdrawal process.

The rule, instead, removes the committee-directed withdrawal provision of the regulation. Constitutional questions about Section 204(e) have arisen in some instances when a congressional committee has directed the Secretary to make an emergency withdrawal. By removing the corresponding provision in the regulation, a potential impediment to a judicial resolution of the issue of the constitutionality of the statutory provision is removed. As noted above, the Secretary's ability to protect lands via the conventional and emergency withdrawal process will remain unchanged by this rule.

Two previous committee notices (both from the House Committee on Interior and Insular Affairs) led to litigation in which the constitutionality of Section 204(e) was challenged. See *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Montana 1981); *National Wildlife Federation v. Watt*, 571 F. Supp. 1145 (D.D.C. 1983) (granting preliminary injunction); *National Wildlife Federation v. Clark*, 577 F. Supp. 825 (D.D.C. 1984) (granting summary judgment).

In *Pacific Legal Foundation*, the Secretary and other parties argued that FLPMA Section 204(e) was unconstitutional because its application through unilateral action by the committee: (a) Violated the separation of powers doctrine; (b) delegated executive power to the committee; (c) violated the requirement of bicameralism (i.e., legislation must be approved by both Houses of Congress); and (d) deprived the President of his veto power (known as the presentment requirement). At the time of that case, the U.S. Court of Appeals for the Ninth Circuit had set aside, as unconstitutional, a statutory provision that authorized either House of Congress to execute a legislative veto over decisions made by the Attorney General. *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980). Relying in part on that

decision, the U.S. District Court in Montana held that, but for one distinguishing feature of Section 204(e), the Ninth Circuit's ruling in *Chadha* would have "compelled" the district court to declare Section 204(e) unconstitutional. *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982, 1002 (D. Montana 1981). According to the district court, the saving feature of Section 204(e) was Secretarial discretion to determine the scope and duration of an emergency withdrawal. *Id.* at 1000.

Subsequently, the Supreme Court affirmed the Ninth Circuit's decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). The breadth of the Supreme Court's ruling casts doubt on the validity of the Montana court's decision. For example, the Court stated, "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto." 462 U.S. at 953 n.16.

The second case in which the constitutionality of FLPMA Section 204(e) was at issue, *National Wildlife Federation v. Watt*, began when plaintiffs brought suit against the Secretary seeking review of a notice to receive and accept bids for the sale of coal leases. The plaintiffs argued that the notice was in contravention of a resolution adopted by the Interior and Insular Affairs Committee of the House of Representatives, directing the Secretary to withdraw certain lands from coal leasing temporarily. The court held that a forced withdrawal, like the legislative veto that was invalidated by the Supreme Court in *Chadha*, would probably be held to be legislative in character, since it alters the legal rights and duties of the Secretary of the Interior. Accordingly, the court found that the plaintiffs' attempt to distinguish Section 204(e) from an invalid legislative-veto provision, on the grounds that the withdrawal was temporary, was unlikely to succeed. *National Wildlife Federation v. Watt*, 571 F. Supp. 1145, 1155 (D.D.C. 1983). However, the court found that the plaintiffs were likely to prevail on the merits of their claim that the emergency-withdrawal regulation (43 CFR 2310.5) was binding on the Secretary irrespective of the validity of Section 204(e), since no action had been taken to remove the regulation through notice-and-comment procedures. 571 F. Supp. at 1158. In a subsequent decision granting the plaintiffs' motion for summary judgment, the court found that it was unnecessary to reach the

constitutional question, and instead required that the Secretary "honor his own regulation unless and until he has rescinded or amended it after an appropriate rulemaking proceeding, or until the Committee has vacated its Resolution." *National Wildlife Federation v. Clark*, 577 F. Supp. 825, 828-29 (D.D.C. 1984).

Thus, whenever a congressional committee directs the Secretary to withdraw lands immediately, issues with regard to the constitutionality of that action are likely to arise. Such issues do not arise when the Secretary initiates and utilizes his conventional emergency withdrawal authority. This rulemaking is not a forum for resolving the validity of the committee-directed withdrawal provision of Section 204(e). However, in view of the district court's ruling in *National Wildlife Federation v. Clark*, the existing committee-directed provision of the emergency-withdrawal regulation may be an impediment to resolving that question in the future in an appropriate forum. Further, as a matter of policy, the BLM does not wish to implement a statute of such questionable constitutionality. However, the statutory language in FLPMA Section 204(e) for a committee-directed emergency withdrawal remains unchanged by this rulemaking and does remain in effect. We should note that we received a June 25, 2008 communication from the House Committee on Natural Resources, citing the committee-directed provision in FLPMA Section 204(e) and the BLM's corresponding regulation at 43 CFR 2310.5. As discussed above, this rule is prospective and only affects the regulation, not the statute. Thus, this rule has no impact on the June 25, 2008 communication.

In addition to removing language pertaining to committee-directed withdrawals, this rule makes clarifying changes that do not affect the substance of the emergency withdrawal regulation.

This final rule is a "logical outgrowth" of the proposed rule and the public has therefore had adequate notice and opportunity for comment. The proposed rule would have eliminated all of the emergency withdrawal regulations, including the portion implementing the committee-directed withdrawal provision of FLPMA Section 204(e) that is removed by today's rule. Today's rule, in response to comments and upon further deliberation, implements a portion of what was proposed. The public has therefore had adequate notice and opportunity to comment on the removal of the committee-directed withdrawal provision of the regulation.

III. Discussion of Public Comments

Difficulty Submitting Comments

One comment complained of trying for 3 days to fax comments from several locations, but was never able to get a fax through, and remarked that it was convenient for the BLM to be able to say that they received little public comment on this matter.

This commenter successfully submitted comments by one of the methods provided for in the proposed rule: Hand-delivery, postal mail, or posting on the Internet at regulations.gov. We believe that the commenter received a BLM fax number from an organization that, at our invitation, had faxed a copy of a letter to us. Subsequently, the organization distributed the fax number widely to prospective comments. When we began to receive comments by fax, we advised the organization that we normally do not accept comments that are sent by fax. A representative of that organization said a message would be sent that comments should not be submitted by fax.

In any event, while we normally do not accept faxed comments and faxing was not one of the methods for submitting comments provided for in the proposed rule, in the circumstances of this rulemaking we have included paper copies of all the faxed comments in the administrative record and have considered the substance of the comments in our deliberations. We will also post representative samples of repeated faxed comments, as well as unique faxed comments, on regulations.gov.

Length of the Comment Period

Several comments indicated that the comment period should be longer than the 15 days provided in the proposed rule. Generally, those comments claimed that Executive Order 12866, Section 309(e) of FLPMA, or the Administrative Procedure Act (APA) require longer periods. They also claimed that the fact that the public already had a chance to comment on the 1991 proposed rule was not an adequate justification for the 15-day comment period. In addition, two organizations sent letters requesting that the comment period be extended. Our letters denying those organizations' requests are posted at regulations.gov.

For several reasons, these comments have not been adopted and the comment period was not extended. First, as discussed in the preamble to the proposed rule, Executive Order 12866 does not apply because the Office of Management and Budget ("OMB") has

determined that the rule is not "significant" as defined in that Order. More specifically, one comment stated that the rule is "significant" and the comment period should be extended because the rule may adversely affect the environment (including historical, cultural, and governmental resources) across the West. The comment specifically referenced a June 25, 2008 communication from the Chairman of the House Natural Resources Committee directing the Secretary to withdraw certain lands surrounding the Grand Canyon from mineral location and entry.

As explained in the preamble to the proposed rule, segregation of lands provided for in the conventional withdrawal process is equally as effective to protect resources as are emergency withdrawals. Moreover, contrary to the comments' suggestion, the rule does not have any on-the-ground effects. The rule does not open or close any lands to or from any public land laws; rather, this rule simply removes the procedure for a committee-directed emergency withdrawal of lands from the BLM's regulations. This rule is prospective only and will have no effect on the June 25, 2008 communication from the House Committee Chairman. Several commenters appear to believe that this rule will have environmental effects because an as-yet-unidentified tract of land may not be withdrawn in the future. But the amendment of the regulation to remove the committee-directed withdrawal portion is not tied to a particular tract of land and to link this rule with effects that may occur in the future is purely speculative. In any event, as explained above, we have chosen not to eliminate the Secretary-driven emergency withdrawal process from the regulations. Therefore, the Secretary's authority to make emergency withdrawals remains unchanged by this rule.

Second, the APA does not prescribe a minimum comment period for informal rulemaking. The BLM believes a reasonable amount of time has been provided in this instance because the proposed rule is not complex. The proposed change removes regulatory text that sets forth a process that is articulated in FLPMA. The rule does not alter the relevant FLPMA language. Finally, the BLM believes the comment period was also reasonable in light of the 1991 rulemaking. At that time, the public had the opportunity to comment on the 1991 proposed rule. Those comments have been reviewed as part of this rulemaking. The substance of the proposed rule was identical to the rule proposed in 1991, and the issues remain

the same. Furthermore, this final rule only implements a portion of that proposed rule. For these reasons, we also disagree with the comments indicating that the 1991 process is irrelevant.

The Constitutional Issue

Some comments not in favor of the proposed rule argued that the statute was not unconstitutional and that the constitutional issue was not a valid reason for the proposed rule. In contrast, some comments in favor of the rule stated that Section 204(e) is unconstitutional. Some of those comments noted that the Department of Justice's Office of Legal Counsel (OLC) issued an opinion in 1983 stating that the committee-directed withdrawal provision of FLPMA Section 204(e) is unconstitutional.

The BLM disagrees that the recurring constitutional questions that have been raised during the history of these regulations is not a valid reason for this rule. History has demonstrated that whenever a congressional committee directs the Secretary to withdraw lands immediately, issues with regard to the constitutionality of that action are likely to arise. The committee-directed withdrawal provision of the regulation implements a portion of FLPMA Section 204(e) that is of questionable constitutionality under *Chadha*, 462 U.S. 919, as a committee-directed withdrawal arguably alters the legal rights and duties of the Secretary of the Interior. This rulemaking is not the forum to finally resolve that issue. It is a decision for the courts. However, as noted above, under a DC District Court decision, the regulation itself is a potential impediment to judicial resolution of that issue. See *Clark*, 577 F.Supp. at 828–29. The BLM wishes to remove the regulation so as to avoid implementing a statute that is of such questionable constitutionality, and to remove a potential impediment to a future Court decision on that issue. Again, however, we note that this rule would have no effect on the relevant statutory language. The BLM believes that without the change, the uncertainty surrounding the constitutionality of the statute and the respective roles of the Legislative and Executive Branches will continue.

Some comments stated that the Executive Branch has the duty to faithfully execute the laws and should therefore not challenge the constitutionality of a statute. They also stated that the BLM should leave the committee-directed emergency withdrawal provisions in place in order

to maintain a harmonious relationship with Congress.

The BLM disagrees with these comments. First, in this rulemaking the BLM is removing a potential impediment to judicial resolution of the constitutional issue based on past litigation on the provision, and is not making a direct constitutional challenge to the statute. Second, the Executive Branch has in the past taken the position that a statute is unconstitutional. In fact, that was exactly the position of the Executive Branch in *Chadha*, in which the Supreme Court agreed with the executive that the statute in that case was unconstitutional. As for maintaining a harmonious relationship with Congress on this topic, the BLM believes that by promulgating this final rule and thus potentially facilitating future resolution of this issue, there will be an opportunity to establish clearer expectations regarding committee-directed emergency withdrawals.

Redundancy

The BLM's view is that the conventional withdrawal process results in the protection of lands quickly and just as effectively as the emergency withdrawal process. This is because the conventional process authorizes the BLM to quickly segregate the lands from the public land laws, including the mining laws, while the withdrawal is considered. Segregation has the same practical effect as a withdrawal. Thus, natural resource values can be protected quickly by way of the conventional withdrawal process. In addition, the conventional withdrawal process is preferred because, unlike the emergency withdrawal process, it provides for substantial public participation and input.

Several comments disagreed that the emergency withdrawal regulations were redundant, stating that the committee-directed withdrawal provision is not part of the conventional withdrawal process, and segregation under conventional withdrawal procedures does not provide the same level of protection as an emergency withdrawal. One comment argued that the two procedures do not provide the same level of protection because validity exams (i.e., examinations by the appropriate agency to determine the validity of a particular mining claim) are only required on withdrawn lands and are at the agency's discretion on segregated lands. Another comment stated that the conventional withdrawal procedures and emergency withdrawal procedures are not redundant because the Secretary must seek approval to

conventionally withdraw lands under the jurisdiction of another agency, while there is no such requirement for an emergency withdrawal. Another comment stated that the rule creates an inconsistency between the statute and the regulations and confuses Congress and the public and that the removal of the emergency regulations will seriously undermine the capacity of the Federal government to act quickly in extraordinary circumstances that threaten irreplaceable public resources. Other comments stated that the Secretary should not voluntarily remove one of the tools granted to him by Congress to protect public lands.

Although the BLM disagrees with the conclusions of those comments they do highlight an area of possible confusion. The BLM agrees that the committee-directed withdrawal provision of the regulation (43 CFR 2310.5) is not redundant in the sense that there is no analogous provision in the conventional withdrawal process. However, the same goal can be met by the Secretary; that is, he can "preserve values that might otherwise be lost" on an emergency basis via segregation. The remainder of the emergency withdrawal regulation (i.e., the emergency withdrawals made by the Secretary without direction from a congressional committee) is clearly redundant because of the BLM's authority to segregate the lands during the conventional withdrawal process. As pointed out above, segregation does in fact have the same effect as an emergency withdrawal whether the Secretary is reacting to a committee-directed withdrawal or on his own: it closes the specified land to application of the mining laws in the particular area at issue to the extent specified. See, e.g., Preamble to the BLM's final rule amending mining regulations, 65 FR 69998, at 70026 (2000) ("there is no difference between 'segregated' lands and 'withdrawn' lands during the period of the segregation"). In other words, if the Secretary believes that an emergency situation exists, he can protect the lands quickly and effectively through the conventional withdrawal process (because the lands will be segregated while the withdrawal is considered) as he could by invoking his authority to make an emergency withdrawal. Of course, a segregation is limited to 2 years, while an emergency withdrawal can be up to 3 years. However, the protection of the lands at the end of the segregation period can be continued if the lands are in fact withdrawn. In addition, the validity examination process is in fact applicable to both withdrawn and

segregated lands. As pointed out in the preamble to the mining regulations referenced above, the BLM will examine the purpose of the segregation to determine if a validity exam is necessary on segregated lands; and, if so, perform that validity exam. 65 FR at 70026. A determination of invalidity has the same effect on both withdrawn and segregated lands.

Finally, for similar reasons, the BLM disagrees with the comment stating that the two processes are not redundant because the Secretary must seek approval of conventional withdrawals on lands under another agency's jurisdiction. This comment compares the conventional withdrawal to an emergency withdrawal. The proper comparison is between an emergency withdrawal and segregation, which is part of the conventional withdrawal process. The Secretary need not seek the approval of another agency to segregate the lands while a conventional withdrawal is considered. Thus, just as he can through the emergency withdrawal process, the Secretary, through segregation, can remove lands from the operation of the public land laws on a temporary emergency basis without the consent of any other agency.

However, although the BLM continues to believe that it can protect natural resource values quickly and effectively via the conventional withdrawal process, in response to the concerns raised by these comments and a desire to make minimal changes to the regulations, we have decided not to remove the regulations in their entirety. Thus, today's rule has no effect on the regulations dealing with the Secretary's authority to make emergency or conventional withdrawals. Both of these regulatory tools will remain at the Secretary's disposal.

General Environmental Concerns

Some comments opposed to the rule expressed environmental concerns about mining and specifically about opening Federal lands to mining. Some of these comments specifically referenced uranium mining near Grand Canyon National Park and a June 25, 2008 communication from the Chairman of the House Natural Resources Committee directing the Secretary to withdraw certain lands surrounding the Grand Canyon from mineral location and entry under FLPMA Section 204(e).

The BLM appreciates the concerns raised in these comments but disagrees that they are relevant to this rulemaking. First, the rule merely removes one regulatory process in order to remove a potential barrier to judicial resolution of FLPMA Section 204(e)'s

constitutionality. The rule does not open any lands to mining. Further, the rule is prospective only and therefore does not have any effect on the June 25, 2008 communication relating to lands surrounding the Grand Canyon. Finally, as discussed more fully above, the final rule leaves in place the regulations authorizing the Secretary to, on his own initiative, effect an emergency withdrawal to protect natural resource or other values that might otherwise be lost. Amending the regulation to remove the portion addressing committee-directed withdrawals does not affect the Secretary's ability to protect lands, including park lands, on an emergency basis either through an emergency withdrawal or through the conventional withdrawal process.

National Environmental Policy Act

Some comments stated that the proposed rule violated the National Environmental Policy Act (NEPA). Several comments stated that the Categorical Exclusion invoked in the proposed rule (516 DM, Chapter 2, Appendix 1, CX 1.10) is not applicable and therefore an Environmental Assessment or Environmental Impact Statement is required in order to comply with NEPA. Specifically, comments stated that the elimination of the committee-directed withdrawal provision is not "of an administrative, financial, legal, technical, or procedural nature" because it would have "on-the-ground effects." In this regard, several comments referred to the June 25, 2008 communication from the Chairman of the House Natural Resources Committee directing the Secretary to make a withdrawal of certain lands surrounding the Grand Canyon from mineral location and entry and claimed that those lands would be affected by the removal of this regulation. Comments also claimed that the effects are not "too broad, speculative, or conjectural to lend themselves to meaningful analysis" because of environmental impacts from mining exploration or development in areas that would be withdrawn or segregated under FLPMA Section 204(e) and the implementing regulations. Finally, one comment stated that numerous activities that would occur in withdrawn or segregated areas, such as mining exploration activities less than 5 acres, would not later be subject to NEPA requirements.

The categorical exclusion is applicable to this rule. First, we note that the categorical exclusion at issue has been amended effective November 14, 2008, to exclude from NEPA review:

Policies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

73 FR 61292, 61319 (Oct. 15, 2008); 43 CFR 46.210 (emphasis added). As explained in the preamble to the rule amending the categorical exclusion, the exclusion was modified in error in 2004 to include an "and" after the first clause. The recent rulemaking corrects that error by inserting the word "or." Thus, if this rule meets either the first or second part of the categorical exclusion, the exclusion will apply.

Second, this rule is of both a legal and procedural nature. As explained above, it does not have any on-the-ground effects. The rule does not open or close any lands to or from any public land laws; rather, this rule simply removes one procedure for the withdrawal of lands from the BLM's regulations. Moreover, this rule is prospective only and will have no effect on the June 25, 2008 communication from the House Committee Chairman. Several comments appeared to believe that the proposed rule will have environmental effects because an as-yet-unidentified tract of land may not be withdrawn in the future. But the removal of the committee-directed provision of the emergency withdrawal regulation is not tied to a particular tract of land and to link this rule with effects that may occur in the future is purely speculative.

One comment also stated that even if the categorical exclusion applies by its terms, extraordinary circumstances exist that preclude its use. More specifically, that comment stated that extraordinary circumstances exist because the lands covered by the June 25, 2008 communication contain properties eligible for listing under the National Historic Preservation Act (NHPA), including Indian Sacred Sites, and are in close proximity to the Grand Canyon. Thus, the comment claimed that two of the BLM's extraordinary circumstances apply: (1) Actions that may have significant impacts on properties listed or eligible for listing under the NHPA and (2) actions that may have significant impacts on natural resources and unique geographic characteristics.

None of the extraordinary circumstances applies to this rule. As noted above, this rule in no way affects the June 25, 2008 communication relating to lands surrounding the Grand Canyon. This rule removes the committee-directed emergency withdrawal procedure from the BLM's

regulations. While mining in a particular area may affect properties listed or eligible for listing under NHPA, or might affect the natural and cultural resources or sites present in that area, this rule does not open or close any lands to the operation of the public land laws, including mining laws. Therefore, the comment's statement that the rule will impact any particular area, including the lands covered by the June 25, 2008 communication, is incorrect.

Endangered Species Act

Some comments stated that the proposed rule violated the Endangered Species Act (ESA) because the BLM did not enter into consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding the rule. One of the comments stated that mineral operations "implicated" by the promulgation of the rule "may affect" threatened or endangered species. The comment again referred to the June 25, 2008 communication as an example.

Consultation under the ESA is not required for two reasons. Under the ESA and its implementing regulations, the consultation requirement only applies to "actions" of Federal agencies, which are further defined as all "activities or programs" authorized, funded, or carried out by an agency. 15 U.S.C. 1536; 50 CFR 402.02. Here, amendment of the regulations to remove a certain procedure (i.e., committee-directed emergency withdrawals) is not an "activity or program" of the BLM; it is simply removing a certain procedure. While the ESA regulations include "promulgation of regulations" in the definition of "action," this does not mean that every rule necessitates consultation. Here, the amendment of the emergency withdrawal regulation to remove the portion dealing with committee-directed withdrawals does not authorize, fund, or carry out an activity or program. As such, the ESA does not apply. Second, even if the amendment of the regulation is an "action" for purposes of Section 7 of the ESA, it will have no effect on listed species or designated critical habitat because the removal of this procedure from the BLM's regulations will not cause any environmental effects whatsoever. As explained above, this rule does not open any lands to mining. Nor does the rule alter the Secretary's authority to protect lands and resources through an emergency or conventional withdrawal. As such, this rule will not cause any direct effects or any indirect effects that are reasonably certain to occur. See 50 CFR 402.02.

National Historic Preservation Act

Some comments stated that the BLM is required to conduct consultation under the National Historic Preservation Act (NHPA) with affected Native American Tribes because Native American sacred, cultural and historical sites and land would potentially be affected by the rule.

The consultation requirement of the NHPA applies only to "undertakings" of a Federal agency, which are defined as a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 36 CFR 800.16(y). The amendment of the emergency withdrawal regulation to remove that portion dealing with committee-directed withdrawals is not a "project, activity, or program" as defined by the regulations of the Advisory Council on Historic Preservation. Accordingly, the Act does not apply.

FLPMA

Some comments stated that the proposed rule violates FLPMA 204(e) because FLPMA directs the Secretary to promulgate rules and regulations to implement the Act and the Act contains an emergency withdrawal provision. One of these comments also stated that the proposed rule does not comply with the FLPMA requirement to prevent "unnecessary or undue degradation" of the public lands.

The rule does not violate FLPMA. FLPMA does not require that the BLM issue regulations to implement each and every provision of FLPMA; instead, it requires the Secretary to issue regulations that are necessary to implement the Act. 43 U.S.C. 1733(a). As explained herein and in the proposed rule, the BLM does not believe that the emergency withdrawal regulations are necessary to implement the Act. However, although the BLM continues to believe that the conventional withdrawal process can provide effective protection to resources or resource values on an emergency basis, we have decided to leave in place the regulations dealing with the Secretary-initiated emergency withdrawal process. The comment has not explained how the rule would cause "unnecessary or undue degradation," and no such causal link can be made between the rule and any on-the-ground effects.

Keeping Lands Open to Mining

Some commenters supported the proposed rule because they believe it will open lands to mining. For example, one comment supported the proposed

rule as a means of ensuring the reasonable entry of mining on the plateaus on the north and south side of the Grand Canyon. Similarly, some comments were in favor of the proposed rule because they have a vested interest in ensuring that lands remain open to mineral entry, and were of the view that the rule will protect access to mineral deposits on public lands open to mineral entry, and protect the right to use and occupy those lands for prospecting, mining, and processing operations and all uses reasonably incident thereto. These comments also stated that it is important for the United States to utilize and produce domestic sources of the minerals required to maintain our economy, our national security and our standard of living. Some of these comments stated that for national security and national economic security reasons, withdrawal should always be the last approach for protection of public lands.

Although the BLM appreciates the concerns raised by these comments, this rule does not open or close any lands to the operation of the public land laws, including mining laws. Nor does the rule protect access to mineral deposits or the right of claimants to prospect or mine. As explained above, this rule merely amends the emergency withdrawal regulation to remove that portion dealing with the committee-directed emergency withdrawals. Through this rule, the BLM is not taking any position on when a withdrawal—emergency or otherwise—is appropriate.

Opportunity for Public Input

Some comments which supported the proposed rule stated that removal of the emergency withdrawal regulations is long overdue. They stated that the emergency withdrawal process, unlike the conventional withdrawal process, does not provide public notice and opportunities for comment by people who own or have other interests in the land and its natural resources and that select congressional committees should not be allowed to bypass or restrict the valuable input of those affected, and leave them with little recourse.

The BLM agrees that the conventional withdrawal process provides more opportunities for public input than does the emergency withdrawal process and that this may be a reason to use conventional withdrawal procedures instead of the emergency withdrawal process. Although today's rule does not remove the emergency withdrawal regulations in their entirety as proposed, it does not affect the BLM's ability to choose the conventional procedure to protect lands and values quickly so as

to allow for greater public input. The Secretary and the BLM are free, as they have been in the past, to choose either procedure.

Executive Order 13132, Federalism

Some comments objected to the finding in the proposed rule that this rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the levels of government. One comment stated that the rule will limit the ability of the national Legislative Branch to directly represent the desires of the states and their citizens. Another commented that states are well situated—perhaps better than distant Federal officials—to recognize that an emergency situation exists regarding resource values on Federal lands within a state.

The BLM disagrees with this comment. The committee-directed emergency withdrawal provision in FLPMA itself (Section 204(e)) is not removed by operation of this rule. Moreover, although removal of the regulation providing for a committee-directed withdrawal may potentially affect relations between branches of the Federal Government, it does not have a substantial direct effect on the relationship between the Federal Government and the states.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Some comments objected to the finding in the proposed rule that tribal governments will not be unduly affected by this rule, and claim that effects on tribal governments would have been revealed if the BLM had consulted with tribes under the National Historic Preservation Act.

The BLM disagrees with these comments. As explained above, the consultation requirement of the NHPA applies only to “undertakings” of a Federal agency, which are defined as a “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.” 36 CFR 800.16(y). The removal of the committee-directed emergency withdrawal provision of the regulation is not a “project, activity, or program” as defined by the regulations of the Advisory Council on Historic Preservation. Moreover, this rule has no bearing on trust lands, or on lands for which title is held in fee status by Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs. Thus, this rule will not result in

significant changes to BLM policy, and tribal Governments will not be unduly affected by this rule.

Executive Order 13352, Facilitation of Cooperative Conservation

One comment objected to the finding in the proposed rule that this rule facilitates cooperative conservation by announcing a policy of using the conventional withdrawal process, which provides for public participation. The comment stated that the proposed rule eliminates a path to public involvement through the Legislative Branch.

Although the BLM disagrees with this comment, it no longer is announcing a policy to use the conventional process as opposed to the emergency withdrawal process. As discussed above, this final rule does not amend the regulations relating to the Secretary's authority to make an emergency withdrawal. The Secretary may choose either the conventional or emergency withdrawal process. Moreover, the committee-directed emergency withdrawal provision in FLPMA itself (43 U.S.C. 1714(e)) is not removed by operation of this rule. Also, this rule does not in any way affect Congress's ability to pass legislation to withdraw lands. Thus, this rule does not impede the facilitation of cooperative conservation. This rule takes appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decisionmaking process; and provides that the programs, projects, and activities of the agency are consistent with protecting public health and safety.

IV. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not a “significant regulatory action” within the meaning of Executive Order 12866. Some comments expressed disagreement with this determination. This comment does not affect the validity of this rule, since Executive Order 12866:

Is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

E.O. 12866, section 10. The determination of the OMB reflects the following findings:

- This rule will not have an annual effect on the economy of \$100 million or more, and will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.

- This rule will not create any serious inconsistency or otherwise interfere with any action taken or planned by another agency.

- This rule will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients.

- This rule will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

National Environmental Policy Act

This rule is categorically excluded from environmental review under Section 102(2)(C) of the National Environmental Policy Act (NEPA). In accordance with the Department's NEPA regulations (43 CFR 46.205; 43 CFR 46.210) this categorical exclusion excludes from NEPA review:

Policies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by case.

This rule is of a legal and procedural nature and is covered by the categorical exclusion. Moreover, no extraordinary circumstances exist that would prevent use of the categorical exclusion. See 43 CFR 46.205; 43 CFR 46.215.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The BLM has determined that this rule removing the provision for committee-directed emergency withdrawals will not have a significant economic impact on a substantial number of small entities under the RFA.

Small Business Regulatory Enforcement Fairness Act

This rule is not a “major rule” as defined at 5 U.S.C. 804(2) because it will not have an annual effect on the economy greater than \$100 million; it will not result in major cost or price increases for consumers, industries, government agencies, or regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on state, local, or tribal governments or the private sector, in the aggregate, of \$100 million or more per year; nor does the rule have a significant or unique effect on state, local, or tribal governments. The rule would impose no requirements on these entities. The changes in this rule would not have effects approaching \$100 million per year on the private sector. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Executive Order 12630, Government Action and Interference With Constitutionally Protected Property Rights (Takings)

This rule is not a government action capable of interfering with constitutionally protected property rights. Therefore, the BLM has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The BLM has determined that this rule does not have a substantial direct effect on the relationship between the Federal Government and the states. Therefore, in accordance with Executive Order 13132, the BLM has determined that this rule does not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

The BLM has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

The removal of the committee-directed portion of the emergency-withdrawal regulation is not a “project, activity, or program” as defined by the regulations of the Advisory Council on Historic Preservation. Moreover, this rule has no bearing on trust lands, or on lands for which title is held in fee status by Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs. Therefore, in accordance with Executive Order 13175, the BLM has determined that this rule will not result in significant changes to BLM policy and that tribal Governments will not be unduly affected by this rule.

Information Quality Act

In developing this rule, the BLM did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554).

Executive Order 13211, Effects on the Nation's Energy Supply

This rule has no implications under Executive Order 13211.

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM has determined that this rule is administrative in content, involving only changes affecting issuance of emergency withdrawals. Secretarial authority for making conventional and emergency withdrawals remains unchanged by this rule. Thus, this rule does not impede the facilitation of cooperative conservation; takes appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources; properly accommodates local participation in the Federal decision-making process; and provides that the programs, projects, and activities are consistent with protecting public health and safety.

Paperwork Reduction Act

The BLM has determined that this rule does not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Authors

The principal authors of this rule are Jeff Holdren and Vanessa Engle of the Division of Lands, Realty, and Cadastral Survey, BLM Washington Office (WO), with assistance from the Division of

Regulatory Affairs (WO) and the Office of the Solicitor, Department of the Interior.

List of Subjects in 43 CFR Part 2300

Administrative practice and procedure, Electric power, Federal Energy Regulatory Commission, Public lands—withdrawal.

C. Stephen Allred,

Assistant Secretary of the Interior, Land and Minerals Management.

■ Under the authorities cited below, part 2300, group 2300, subchapter B, chapter II of title 43 of the Code of Federal Regulations is amended as follows:

PART 2300—LAND WITHDRAWALS

■ 1. The authority citation for part 2300 continues to read as follows:

Authority: 43 U.S.C. 1201; 43 U.S.C. 1740; Executive Order No. 10355 (17 FR 4831, 4833).

Subpart 2310—Withdrawals, General: Procedure

■ 2. Section 2310.5 is revised to read as follows:

§ 2310.5 Special action on emergency withdrawals.

(a) When the Secretary makes an emergency withdrawal under Section 204(e) of the Act (43 U.S.C. 1714(e)), the withdrawal will be made immediately and will be limited in scope and duration to the emergency. An emergency withdrawal will be effective when signed, will not exceed 3 years in duration, and may not be extended by the Secretary. If it is determined that the lands involved in an emergency withdrawal should continue to be withdrawn, a withdrawal application should be submitted to the Bureau of Land Management in keeping with the normal procedures for processing a withdrawal as provided for in this subpart. Such applications will be subject to the provisions of Section 204(c) of the Act (43 U.S.C. 1714(c)), or Section 204(d) of the Act (43 U.S.C. 1714(d)), whichever is applicable, as well as Section 204(b)(1) of the Act (43 U.S.C. 1714(b)(1)).

(b) When an emergency withdrawal is signed, the Secretary must, on the same day, send a notice of the withdrawal to the two Committees of the Congress that are specified for that purpose in Section 204(e) of the Act (43 U.S.C. 1714(e)).

(c) The Secretary must forward a report to each of the aforementioned committees within 90 days after filing with them the notice of Secretarial emergency withdrawal. Reports for all

such withdrawals, regardless of the amount of acreage withdrawn, will contain the information specified in Section 204(c)(2) of the Act (43 U.S.C. 1714(c)(2)).

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BILLING CODE 4310-84-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 05-312; FCC 08-256]

Digital Television Distributed Transmission System Technologies

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules for the use of distributed transmission system (“DTS”) technologies in the digital television (“DTV”) service. The rules adopted in this Report and Order will allow DTV station licensees and permittees to use DTS technologies where feasible in place of a single transmitter to provide service as authorized. We find that these rules will improve some DTV stations’ ability to serve more of their viewers within their service areas. For example, we expect that DTS will be especially useful in mountainous areas where single transmitters have been unable to reach viewers in valleys or those blocked by elevated terrain. Furthermore, DTS may be a useful tool for stations to prevent some loss of service to existing analog viewers resulting from changes to the station’s service area in the transition to digital service. These rules will apply to post-transition operations (*i.e.*, operations after February 17, 2009). DTS proposals related to pre-transition operations will continue to be evaluated under the Commission’s interim policy. **DATES:** Effective January 5, 2009, except § 73.626(f) which contains information collection requirements that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing when OMB approval for this information collection has been received and this rule will take effect.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact Evan Baranoff, *Evan.Baranoff@fcc.gov*, of the Media Bureau, Policy Division, (202) 418-2120; or John Gabrysch, *John.Gabrysch@fcc.gov*, or Gordon Godfrey, *Gordon.Godfrey@fcc.gov*, of the

Engineering Division, Media Bureau at (202) 418-7000. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams on (202) 418-2918, or via the Internet at *PRA@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s *Report and Order*, FCC 08-256, adopted on November 3, 2008, and released on November 7, 2008. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission’s copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission’s Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Final Paperwork Reduction Act (“PRA”) Analysis

This Report and Order was analyzed with respect to the Paperwork Reduction Act of 1995 (“PRA”) and contains modified information collection requirements, including changes to FCC Forms 301 and 340 to accommodate applications for DTS systems. (The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. 104-13, 109 Stat. 163 (1995) (*codified in* Chapter 35 of Title 44 U.S.C.)) The information collection requirements adopted in this Report and Order will be submitted to OMB for final review under Section 3507(d) of the PRA, and OMB and the public will be afforded an opportunity to file comments on the modified information collection requirements contained in this proceeding. (See 44 U.S.C. 3507(d).) The Commission will publish a separate **Federal Register** notice seeking the PRA comments. In addition, pursuant to the Small Business Paperwork Relief Act of 2002 (“SBPRA”), the Commission sought specific comment in the *DTS NPRM* on how it might “further reduce the information collection burden for small business concerns with fewer than 25