

## **COMMENTS TO FEDERAL REGISTER NOTICE ON PROPOSED CONSERVATION HELIUM SALE**

The following are responses to notice requesting comments to proposed conservation helium sale. The notice was posted in the November 8, 2002, Federal Register, page 68152. Comment period ended December 9, 2002. The following comments have been edited to remove information concerning the identification of respondents, extraneous information, or to provide clarity. Please contact Timothy R. Spisak, (806) 356-1002 or email AMFOFMO@blm.gov, for further information.

### **Respondent # 1**

Respondent # 1's overall view is that the BLM did an excellent job of drafting the crude helium sales process. Although we have several comments which are detailed below, it would be acceptable to us if the crude sales process were to be implemented exactly as proposed. Although the price of the conservation helium will be much higher than the current price in the commercial market, we believe that the proposed sales process can be implemented without undue market disruption. While helium market prices will surely rise as a result of the BLM's sale of crude, the crude pricing levels are predictable (because of the sale at posted prices) and that should enable market participants to adjust to a new equilibrium pricing level within a year or two. At the same time, the high price of BLM crude will encourage the development of new sources of helium that will be needed to replace US mid-continent production that will be declining due to Hugoton Field depletion and eventually, due to the sale of the stockpile.

Respondent # 1's specific comments and questions are as follows:

1.01 - In paragraph 1.01, you state that the January 2003 crude sale "...is the first of 12 annual sales." From a planning standpoint, it would be helpful if the BLM clarified the intended timing of future crude sales. Respondent # 1's preference would be for an annual sale each January. An annual sale held each October, commencing October 2003, would also be acceptable.

1.01 - The last sentence of paragraph 1.01 says "...with subsequent sales adjusted as needed." Although we recognize that the crude sales process might need to be revised if there are unexpected problems with the 2003 sale, hope is that once the crude sales process is in place, it will remain largely unchanged unless there is a very compelling reason to change it. The impending sale of conservation helium created a great deal of uncertainty for helium business and we are hoping that we will be able to plan around a very similar crude sales process in future years. In the event that changes to the sales process are deemed necessary, the BLM should provide as much notice as possible and we request that the BLM consult with the private helium industry to avoid helium market disruption just as you have this time around.

1.04 - We are pleased that the BLM is planning to offer the conservation helium for sale at the BLM's

posted price for crude helium. Although the BLM's posted price is far higher than current market prices for crude helium (75%- 100% premium vs private transactions), we much prefer the sale at a predictable posted price to a less predictable auction mechanism. Although there has been some market disruption in anticipation of the sale of conservation helium, it would be far more disruptive if the conservation helium were sold via a price auction.

3.04 - The last sentence of paragraph 3.04 states that.. .“The exact ratio of allocated to non-allocated sales volumes may change for subsequent annual conservation helium sales.” Our comment is the same as the comment that we made with respect to paragraph 1.01 and the possibility that the crude sales process could change in future years. If a change is contemplated to the allocated vs non-allocated sales ratio, a maximum amount of notice should be given, the private helium industry should be consulted to minimize market disruption, etc.

3.08 - This paragraph states that “ the excess amount will not be sold and will be held in storage for future sales.” agrees that any volume of conservation helium that goes unsold should remain in the stockpile for future sales. Our further recommendation is that the volume of conservation helium to be offered for sale in future years should be recalculated to reflect the fact that this unsold helium should be sold during the remaining years prior to 2015. Without this slight adjustment, the HPA's goal of selling all of the conservation helium in excess of 600 MMCF by 2015 will not be realized.

In closing, I want to commend the BLM for developing a sound process for the sale of conservation helium that will allow the BLM to accomplish the objectives of the HPA of 1996, without undue disruption to the helium marketplace.

### **Respondent # 2**

*(information edited)*

After careful review of the proposed method for selling helium from the Cliffside Field near Amarillo, TX and corresponding discussions with BLM personnel, I feel the need to make our Company's views known regarding the pending action by your agency.*(information edited)* Due to our large annual requirement of the gas, we are very sensitive to the dynamics affecting market supply and demand.  
*(information edited)*

The first problem that I noted in your draft proposal is the allocation of 90% of the annual sales volume to the four refiners connected to the pipeline. If we assume that the four existing refiners will exercise the right to buy the entire 90% allocated to them, for all practical purposes, competition is eliminated. From our perspective on the helium market and our knowledge of the other world helium sources currently available, it seems unlikely that the refiners will elect to buy less than the 90% afforded them under your plan. If one purchaser were able to buy the entire remaining 10% (approximately 210 million feet), that operator would have difficulty justifying the construction of a refining plant to process this rather limited quantity of helium.

This leads to my second and greater concern with your proposed plan. To effectively compete and to

justify the substantial investment in a plant and the related infrastructure to distribute the refined product, the purchaser of the crude helium would need to contract with the BLM for more than one year at a time. By limiting the sale to one-year contracts, you are again, for all practical purposes, eliminating competition and assuring the four current refiners\* continued domination of the domestic helium industry.

Now that I have voiced our concerns, let me propose a solution: reduce the allocation to the existing refiners to 60%-70% of the annual sales volume. The unallocated volume would then be sufficient to justify the investment in an additional plant and infrastructure. There is also the possibility of the new (non-refiner) buyer(s) contracting with one or more of the existing refiners to process the crude gas for a fee, particularly if the existing refiners have unused, excess plant capacity.

As to the term of the gas sale contracts, I would suggest at least seven years for the first term. If twelve years still appears to be the correct time period for completion of the total sale required by the Helium Privatization Act of 1996, the buyers should have an option to extend the agreement for the remaining period. Naturally, a mechanism would have to be put in place to provide for price adjustments during the term of the contract.

I realize our concerns and suggestions are highly summarized. This matter is very important to Respondent # 2 and I would be pleased to meet with appropriate members of the BLM staff to discuss all of the items in greater detail. Please call me at if such a discussion would be helpful.

### **Respondent # 3**

Respondent # 3 would like to offer for consideration the following items. Of tantamount concern to Respondent # 3 is the disproportionate share the BLM has given to the crude refiners with a presence along the pipeline system.

#### 1) Ratio of Allocated to Non-Allocated Sales Volumes

While Respondent # 3 recognizes that the BLM, in accordance with the terms of the HPA, must conduct the stockpile sale in a manner not to cause undue disruptions to the helium market, the 90/10 ratio appears to dramatically place non-refiners at a severe market disadvantage. Please keep in mind that non-refiners must also pay a premium to refiners for the tolling of crude helium. There exists the opportunity for refiners to take advantage of their position along the pipeline at the expense of non-refiners.

#### 2) Equal Status of Crude Refiners in Non-Allocated Sale Apportionment

In Section 2.05 of the Federal Summary, it is stated that refiners who request in excess of the amount available to them in the allocated sale will be carried over to the non-allocated sale and considered a separate bid under the non-allocated sale rules. In this scenario, non-refiners ability to purchase crude is

again diminished in favor of refiners. Instead, any excess requests by refiners should be considered in the non-allocated sale if and only if there is any excess available once the non-refiners have made their requests.

While Respondent # 3 appreciates the “balance” that the BLM is trying to achieve in its execution of the HPA, it does not appear that this balance has been achieved in the BLM’s most recent proposal. Finally, Respondent # 3 proposes that the BLM delay the bid date to allow for a complete review of comments received and initiate changes as needed.

#### **Respondent # 4**

Respondent # 4 generally supports the proposed regulations as reasonably designed, in accordance with the Helium Privatization Act of 1996, to foster an orderly sale of the conservation helium stored at the Cliffside facility. However, Respondent # 4 proposes one change and suggests several clarifications to the proposed regulations.

1) The proposed regulations should be revised to permit a crude helium refiner to assign to a qualified bidder all or a portion of the refiner’s share of the allocated sale.

The proposed regulations correctly allocate the majority of the initial sale to the crude helium refiners in order to minimize market disruption. And, under the provisions of proposed Section 2.04, a crude helium refiner’s share of the allocated sale is reasonably based on its refining capacity (as of October 1, 2000) as a percentage of the total refining capacity of all crude helium refiners connected to the BLM system. However, a crude helium refiner may not yet have the right to use all of its available processing capacity. That is because refiners typically enter into agreements to process (“toll”) crude helium for third parties. Tolling agreements generally set aside a portion of the refining capacity for the third party’s helium. Thus, to the extent a crude helium refiner has entered into tolling agreements, it may be unable to use its entire share of the allocated sales — at least immediately.

Under the proposed regulations, if a crude helium refiner requests less than its share of the allocated sale, that portion becomes available for purchase by other crude helium refiners. While Respondent # 4 does not object to this provision, BLM should amend the proposed regulations to first allow a crude helium refiner the opportunity to assign all or a portion of its share of the allocated sale to any third party who maintains a tolling agreement with the refiner (or to any third party that meets the qualifications of a bidder in the non-allocated sale.) That way, if the crude helium refiner cannot request its full share of the allocated sale because it has entered into tolling agreements (which utilize its excess capacity), it has the ability to assign its share of the right to buy the allocated sale to the other party to the tolling agreement. That would avoid placing the refiner in the position, in order to avoid foregoing the purchase of its full share, of either buying helium that it must either immediately resell or store. Respondent # 4 believes that this proposed change is consistent with the BLM expressed intent in establishing the allocated sale and provides a means for all crude helium refiners to utilize their shares of the allocated sales if they wish.

2) The derivation of the price for the initial sales should be clarified.

Section 1.04 of the proposed regulations states that the price (\$52.50 per Mcf) for the initial sale of crude helium is set at the same price as sales of in-kind crude helium. It is not clear to Respondent # 4 how setting the price in this manner comports with the requirement of the Helium Privatization Act of 1996 [now found in 50 U.S.C. §167d(c)] that the price must “be adequate to cover all costs incurred in carrying out the provisions of this chapter and to repay to the United States by deposit in the Treasury, all funds required to be repaid to the United States as of October 1, 1995 under this section...” Nor is it clear how the BLM determined that the proposed price is at or above the minimum amount prescribed by the formula in the statute. The BLM should consider setting forth such an explanation.

3) Section 1.05 of the proposed regulations, setting forth bidder qualifications, should be clarified.

The language of proposed Section 1.05 should be clarified in two respects. First, the language in the last sentence of the section that reads: “or have a third party agreement in place with a valid storage contract holder” should be clarified to expressly include a tolling agreement as an approved type of “third party agreement” As explained above, tolling agreements are commonly entered into by helium refiners with third parties who have helium processing needs but do not own their own plants (or lack the plant capacity) to fit their needs. BLM presumably had this situation in mind in referring to “a third party agreement” and should simply make that clear.

Second, the statement “a consumer of pure helium” appears to be overly broad, in that it could include anyone who has ever purchased a helium balloon. The BLM may wish to consider including some kind of minimum consumption threshold or other qualifier to this portion of Section 1.05 (such as a limitation to industrial consumers) to minimize the possibility of the receipt of numerous bids from small consumers each seeking de minimis amounts of helium.

### **Respondent # 5**

Respondent # 5 has commitments to a vast array of industry sectors in the United States that would be significantly, adversely impacted if the helium market were disrupted. Market instability would cast a substantial shadow over many of our customers, such as in the manufacture and utilization of MRIs, which are dependent on the availability of helium for serving the diagnostic needs of the populace. Additionally, manufacturers of semiconductors and fiber optic cable as well as a wide array of other helium users would face similar problems in serving their customers and in facilitating advances in technology in the event of an unstable, unpredictable helium market.

The BLM has indicated its intention to carry out its responsibilities under the Helium Privatization Act (“HPA”) in a manner structured to avoid market disruption while accomplishing the HPA’s other objectives. In particular, Respondent # 5, on behalf of its customers, takes great comfort from the BLM’s decision to proceed with the initial sale of crude helium supplies in January 2003 to insure

stable, reliable domestic sourcing of helium in the near term. This reflects not only the recognition that such sales carry out the congressional intent of the HPA, but also the critical importance in maintaining domestic equilibrium in light of tightening global helium supplies. In addition, Respondent # 5 supports the 90/10 ratio of “allocated to non-allocated sales” from the reserves.

Finally, the proposed sales regulations do not appear to address hydrocarbon or native helium sales. We request clarification on how the BLM intends to recognize and account for the sale of the native hydrocarbon gas as well as the original native helium gas in the Cliffside reserve. These expected production co-products of the Cliffside Field reserves sale would generate revenues that should be allocated against the government helium debt to partially offset a portion of such debt since the original funds applied to the acquisition of the Cliffside Field for “Helium Conservation” storage purposes also acquired these co-products.

We appreciate the opportunity to comment on this important issue and look forward to working with BLM and other affected parties in the future.

### **Respondent # 6**

Respondent # 6 supports BLM\*s recent announcement that it is moving forward with sales of conservation helium from the Cliffside Field, as required by the HPA. As discussed more fully below, Congress has issued a clear mandate that directs BLM to take this action. The 1996 Act requires that BLM sell government-owned crude helium into the marketplace in a manner that satisfies two primary criteria: (1) the crude helium must be priced in a manner that will allow for the recovery of the outstanding government debt associated with BLM\* s helium-related expenditures, and (2) the helium sale must proceed in a manner that will not disrupt the helium market.

BLM has proposed a procedure for selling crude helium that satisfies all of these legal requirements in a fair, open and efficient manner. On the issue of price, for example, BLM has announced its intention to move forward with sales that are initially priced at \$52.50 per Mcf, a significantly above-market price that satisfies the HPA\* s mandate to recover all helium related governmental debt. BLM does not propose auctioning off its crude helium supplies. Pricing established via auction would significantly increase market disruption compared to the sale at relatively predictable posted prices each year and would force significant structural changes in worldwide helium markets.

In addition to addressing the price issue appropriately, BLM has proposed to structure its crude helium sales in a way that will provide access to government supplies to all interested buyers while, at the same time, ensuring that the large majority of helium is made available to companies that have the capability and physical capacity to refine the crude helium. This approach maximizes the likelihood that crude helium will be successfully sold into the marketplace, as required by the HPA, while reducing the opportunity for market hoarding or speculation by companies that do not have the ability to take and refine the product. In addition, the pipeline delivery system is currently operating at full capacity.

Finally, Respondent # 6 supports BLM\*'s decision to move forward with the initial sale of crude helium supplies in January 2003. Although the HPA requires that sales begin no later than 2005, we believe that Congress clearly intended that privatization move forward as soon as practicable. In light of tightening global market supplies, it is important that sales proceed in early 2003. These sales will help maintain stability in the helium marketplace, one of Congress\* primary goals in establishing the framework for BLM sales.

BLM has heeded Congress\* message on the timing and allocation issue. It has recognized that the helium industry is facing a potential shortfall in crude helium supplies in the short term and, as a result, it is moving forward with an initial round of crude helium sales in January 2003. BLM has recognized that the current marketplace combination of increased demand, declining crude helium extraction, and the unlikelihood that significant new sources of helium will be brought to the market before 2005, has the potential to disrupt the market.<sup>2</sup> BLM has become aware of these facts through consultations with members of Respondent # 6 and other industry representatives (as explicitly called for in the HPA), and the Bureau is responding forthrightly, and consistently with the 1996 Act, by scheduling the initial sale of crude helium supplies in early 2003. For these reasons, it is very important that BLM follow through on this schedule and complete the first round of sales in January 2003.

A similar analysis applies to BLM\*'s proposed sale of crude helium in separate "lots," as authorized by Section 8(a)(2) of the 1996 Act. In this case, BLM has recognized that because its crude helium supplies must be refined before they can be beneficially used, and because the refining can only be undertaken in facilities that are physically connected to the BLM pipeline, BLM must make the large majority of crude helium available to customers who are in a position to actually refine and distribute the helium. Structuring sales in any other manner would promote arrangements under which helium is purchased and held for speculative purposes, thereby constraining supply, influencing market prices, or otherwise disrupting the normal functioning of the market – the exact result that Congress took great efforts to avoid.

### SPECIFIC COMMENTS

In addition to providing general comments on the key elements of BLM\*'s proposed approach, Respondent # 6 offers the following specific comments on certain elements of BLM\*'s proposal:

1.01 - BLM indicates that its planned sale for January 2003 will be the first of 12 annual sales under the 1996 Act. The Bureau also suggests that the first sale "will be used to test the disposal process with subsequent sales adjusted as needed."

Respondent # 6 agrees that the upcoming sale should be followed by subsequent annual sales. The Group also understands BLM\*'s interest in evaluating the results of the initial sale. Nonetheless, we encourage BLM to maintain a debt recovery structure for sales on a going-forward basis that will continue to keep crude helium prices at a level which the marketplace can take into account and rely

upon. Respondent # 6 believes that only the emergence of a serious problem with the debt recovery sales approach or with other aspects of the BLM's proposed sales program should prompt BLM to revisit the process by which it sells its crude helium supplies.

1.03 - The amounts identified for sale by BLM are appropriate and consistent with the 1996 Act. These sales do not include native helium supplies that are under the control of the government. Respondent # 6 encourages BLM to initiate a dialog regarding appropriate mechanisms for the future disposition of native crude helium supplies.

1.04 - It would be helpful for BLM to clarify that the price for future sales is anticipated to continue to be based on debt recovery principles.

2.02 - The cross reference to part 1.01 of the notice includes a typographical error. The correct cross reference is part 1.02.

2.04 - BLM has proposed a rational, straight-forward approach to apportion helium sales among refiners. At the margin, however, some mathematical rounding questions may arise regarding the calculation of potential crude helium allocations among interested buyers. Respondent # 6 suggests that BLM clarify this issue as follows:

Each crude helium refiner's percentage share of refining capacity as of October 1, 2000, as referenced in Section 2.04, should be expressed as a whole percentage, with no significant digits to the right of the decimal (e.g. 36%, 34%).

If one or more refiners request less than their allocated share as contemplated in Section 2.05 and illustrated in Section 2.07, the proportionate shares of other refiners requesting more than their share should be rounded to the nearest 1/10th of 1%, with values of 5/100th of a percent or greater rounded up to the next 1/10th of 1% (25.26% - 25.3%).

When multiplying a crude helium refiner's percentage share by the volume of Conservation Helium to be apportioned, the volume of crude helium resulting from that calculation shall be rounded to the nearest 1 MCF.

For Section 3 calculations, we suggest that the same rounding methodology be applied. In other words, bidders' shares should be rounded to the nearest 1/10th of 1% and volumes of crude helium should be rounded to the nearest 1 MCF.

2.05/2.06 - BLM's proposal to make available unbid-for allocations of crude helium supplies to other refiners, based on proportionate shares of remaining refining capacities, is appropriate, and should assist in selling the government stocks. Likewise, for the same reason, BLM's proposal to allow refiners to bid for non-allocated sale volumes is appropriate. And Respondent # 6 does not have a philosophical objection to adding unsold refiner volumes to non-allocated sales. However, any unsold volumes that remain at the completion of each year's sale should be made available for sale in future

annual crude helium sale events. For example, if only 1.8 Bcf of the 2.1 Bcf offered for sale in January 2003 is sold, the volume offered for sale in the remaining 11 annual sale events would be increased by 300/11, or 27.3 MMcf. This adjustment will bring much needed crude helium into the marketplace, while ensuring that the HPA's goal of selling all of the conservation helium in excess of 600 MMcf by 2015 is realized.

3.04 - BLM's rationale for selecting a 90/10 ratio of allocated to non-allocated sales volumes is sound, and is consistent with both the language and spirit of the HPA, as discussed at length above.

Respondent # 6 understands the rationale for BLM's caveat that the exact ratio of allocated to non-allocated sale volumes may change for subsequent annual helium sales. Nonetheless, as noted above, we strongly encourage BLM to maintain the current structure for sales on a going-forward basis so that the marketplace can take into account, and rely on, the continued implementation of the HPA on these terms, thereby bringing stability into the helium marketplace. Respondent # 6 believes that only the emergence of a serious problem with the allocated/non-allocated ratio should prompt BLM to adjust the ratio in the future.

### **Respondent # 7**

One of the main objectives for the sale of conservation helium is to ensure that this sale is performed in a way, that it will not disrupt the market. In regard to meeting this objective, Respondent # 7 has concerns with some of the rulings as they are currently published for comment.

The rules, as they are proposed now, have a potential to perpetuate the existing dominating position of the existing refiners and would allocate wholesale volume to the refiners. This in fact could mean the disturbance of a free market and jeopardise a healthy end-user market.

There is a good reason to pre-allocate a certain proportion of the crude helium to the refiners. This is to make sure, that the existing refiners have enough crude helium available in order to keep the refining plants fully loaded (if demand allows) and therefore achieve the required result from their investment. However, with the allocation modus proposed, a large portion of the conservation helium sold could, in the short to middle term, not go to the market because of the limitation of the refining capacity and the other sources still producing. Thus, this helium will be controlled, as excess stock, by the refiners. If the refiners are put into the position to control the excess helium which may result out of the sale of the conservation helium, they will control the molecules as well as the refining capacity they hold right now. This will undermine all competition in that field and could severely disturb the end-user market.

More than 30% of the helium product from the refining plants is currently sold to wholesalers and only less than 70% is directly sold into the end-user market of the refiner companies (within the US and abroad).

Allocating a 90% share to the refiners would largely misrepresent this ration and prevent all other helium trading companies from tendering for fair tolling arrangements.

Therefore Respondent # 7 is proposing the following ruling:



than the in-kind price.

Our concerns are discussed in detail below. We recognize that the BLMs proposal is limited to the BLM plans for next year. Many of our concerns involve longer term issues that the BLM may already plan to address with respect to future sales.

#### Market Disruption

The proposal provides that the sale of conservation helium can and should be made to prevent disruption of the helium end-user and refining markets that might otherwise result from a shortage of crude helium. While this may be a desirable outcome from the sale of conservation helium and permissible under other terms of the Helium Act, the HPA provides that the BLM should consider the potential disruption of the helium market that could result from the sale of conservation helium. We have proposed language to recognize that the potential disruption of the entire helium market, including the producer market, has been considered and that the BLM has determined, after consulting with private industry, that the sale can be made with minimum market disruption as required by the HPA.

#### Sell-off versus Offer for Sale

The detailed language and the procedures in the BLM\*s proposal recognize that the HPA\*s mandate is to offer for sale conservation helium, which is different from mandating an actual sale. The summary language should be changed to reflect the detailed language.

#### Conservation Premium

The BLM indicated that it was considering charging a modest premium above the minimum price to encourage the conservation of helium. We believe that such a conservation premium is appropriate to encourage the private sector to invest in new helium sources. The BLM may have determined that a premium at this time would unduly disrupt the market. If that is the case, Respondent # 8 suggests that it would be a good idea to say so and that the issue will be revisited with each sale. Also, because the pricing formula under the HPA could lead to decreases in the crude helium price just as helium becomes more scarce, the BLM needs to make clear that the price could be other than the minimum price. Respondent # 8 believes that the BLM could realize more from the sale of the conservation helium if all of the helium for sale was available to all bidders that have a helium storage agreement, rather than allocating helium at the minimum price first to refiners and then to other interested parties, all at the minimum price. Opening the process to all bidders would help ensure that the helium went to those that valued it the most.

As mentioned earlier, we realize that many of our comments go beyond the BLM\*s planned sale in 2003. Since this sale could set a precedent for future sales, however, we think it wise to address these issues in the BLM\*s 2003 sale.

#### **Respondent # 9**

The BLM has indicated that 90% of the crude helium will be sold in the allocated sale. Only crude

helium refiners will qualify as bidders in the allocated sale. Respondent # 9 stated in an earlier letter that it believes that all helium should be sold by the government under competitive bids submitted by any person or entity wishing to submit such a bid. Only in this manner will the U.S. Government achieve the market price for its helium. Numerous markets have been opened to competition in the last decade. Competition is good for the consumer and the seller in that the market price is determined and the correct price signals are sent to all parties in the relevant market. Respondent # 9 continues to encourage the Bureau of Land Management to adopt a competitive bidding process open to all wishing to submit a bid, not just crude helium refiners. It is patently discriminatory to limit the sale to crude helium refiners.