

Bureau of Land Management - Amarillo Field Office
Draft Federal Register Notice, 07/2015 – Consolidated Comments

SOURCE	SECTION	COMMENT	Response and Action
Source A	1.01	<p>The Helium Stewardship Act (HSA) requires that the BLM use four factors to determine the Phase B sale price - the auction price, price recommendations from an independent third party, the volume weighted average of qualifying domestic helium transactions, and the cost of converting crude helium to pure helium [HSA, Sec. 6(b)(7)]. While the law allows the BLM to give the auction price the highest priority, it does not give BLM the authority to ignore the other factors, as the proposed approach would do. Source A firmly believes all four of these factors are relevant in setting the new sales price, and none should be excluded from consideration.</p>	Noted – The BLM will evaluate under the four criteria in statute, as applicable.
Source A	1.01	<p>The HSA states in multiple locations that the BLM should avoid market disruptions. Setting the average auction price as the new sale price is likely to increase the potential for market disruptions. The pricing in many helium contracts around the world is tied to the BLM sales price. Under the proposed formula, the BLM would cause a relatively small volume of helium sold at auction (300 mm scf or less than 5% of industry capacity) to largely determine the future market price of large volumes of helium. Unexpected fluctuations in the auction could have a major impact on global wholesale helium pricing, which in turn could disrupt important sectors of the global economy. Significant price increases in the auction would ripple rapidly through the entire helium market. Following the provisions of the HSA would reduce the likelihood of such a market disruption.</p>	Noted – The BLM will evaluate under the four criteria in statute, as applicable.
Source A	1.01	<p>Another important policy priority laid out by Congress was maximizing returns to the taxpayer. In contrast to the scenario described in the previous point, prices achieved at auction could be unexpectedly low under current market conditions (an excess in supply). Under this scenario, the BLM’s proposed method for setting the Phase B sales price would minimize the expected return to the taxpayer.</p>	Noted – The BLM will evaluate under the four criteria in statute, as applicable.
Source A	1.01	<p>The pricing formula laid out in the proposed plan would amplify shifts in price established at auction and increase risks to both the markets and the taxpayers. In establishing four criteria for setting the price for Phase B sales, Congress sought to reduce such destabilizing risks. For this reason Source A urges the BLM to follow the well-thought-out procedures prescribed in the HSA. Adding strength to this argument is the fact that the BLM followed the HSA’s requirements in its 2014 sale, and the outcome was a clear success. This is a compelling argument for following the HSA’s directions again in FY’16.</p>	Noted – The BLM will evaluate under the four criteria in statute, as applicable.

Source B	1.01	<p>Section 1.01 of the Notice states that the BLM will calculate the FY 2016 Phase B sale price using the weighted average price of the crude helium sold in the FY 2016 Phase B auction. This proposed methodology for calculating the FY 2016 sale price is in direct conflict with the Helium Stewardship Act. Under the HSA, the sale price of crude helium in auctions held by the Secretary may not be considered as the sole determinant of the Phase B sale price, but must be considered in concert with the other components listed.</p>	Noted – The BLM will evaluate under the four criteria in statute, as applicable.
Source C	1.01	<p>The Process For Arriving At Price For Helium To Be Sold At the Phase B Auction and Sale: In section 1.01, the Notice establishes that “BLM will calculate the FY 2016 Phase B sale price using the weighted average price of crude helium sold in the FY 2016 Phase B auction.” Adding further that “[i]f there are no successful sales during the FY 2016 Phase B auction, all helium offered in the auction will be added to the Phase B sale at a market-based survey price or calculated average price under 50 U.S.C. 167(b)(7)(B) or (C) respectively.” Congress underpinned the Act with the mandate that BLM maximize returns for the taxpayer and the Act therefore grants BLM significant discretion in determining how the price of non-auctioned helium will be sold. Given the state of the global helium market and the potential resurrection of the pre-Helium Act “non-allocated” sale program, Source C urges caution. There is presently an oversupply of helium on the market and BLM is once again serving its historical role as a supply fly-wheel, meaning deliveries from BLM’s system are down substantially. As interest in the BLM’s supply is down, it is appropriate to anticipate that interest in the FY 2016 auction will be weak. In addition, reinstating the non-allocation program—as currently being contemplated in communications between the BLM and Congress—will drive non-refiners presently sourcing from nongovernmental suppliers away from the auction and undermine bidding in the auction resulting in weak pricing for non-auctioned helium sales. Non-refiners (for whom the auction was established in order to provide them with free market access to the Helium Reserve) would have no interest in competing in a free market auction if they can be guaranteed a block of helium at a BLM-set price. For these reasons, we recommend BLM keep open all pricing options consistent with the priority order established by Congress in under 50 U.S.C. 167(b)(7).</p>	Noted – The BLM will evaluate under the four criteria in statute, as applicable.
Source A	1.03	<p>The BLM should make a dedicated effort to complete the process of negotiating new storage contracts prior to the FY’16 auction. As noted in the Notice of Proposed Action, the storage contracts govern critical issues such as how helium delivery is prioritized, how fees are assessed, delivery guarantees and liability. Resolving important questions on these issues and finalizing new storage</p>	Noted – the BLM has set the date for the Auction at August 26, which is the latest reasonable time, which will allow for revenue collection prior to October 1. The BLM plans to issue the third iteration of the storage contract prior to the auction.

		contracts will provide enhanced certainty into the marketplace and encourage greater participation in the upcoming auction and sale. Source A strongly recommends postponing the scheduled Auction until after the new storage contract has been finalized and signed by the various participants	
Source C	1.04	The Format of the Auction: In section 1.04, the Notice establishes the auction format describing it as a live auction that will include pre-qualification procedures. The auction is a central feature of the Act, which explicitly requires that the method “maximizes revenue to the Federal government.” Further, the Auction is the central vehicle through which the prior method of sale would come to an end and all market participants would have an opportunity to compete for crude helium sales. While the pre-qualification procedures are cumbersome, the format is exceedingly successful in meeting the Act’s foremost goal of generating value for the tax payer through increased competition. The Act’s authors, who championed open competition in helium sales not only agreed but applauded the result citing no criticism of BLM’s auction method. The FY 2014 auction attracted more buyers, generated robust and vigorous bidding, and substantially increased the price of crude helium sold by the BLM. Any modifications to the auction format will require a compelling demonstration that alternative methods will generate the same rate of return for the taxpayer as the FY 2015 auction. In addition, before modifying the auction format, BLM should explore other tools provided by Congress in the Act to increase competition and generate a market-based return for the taxpayer. Source C thus recommends that BLM use its discretion to set prices using a variety of factors and to adjust the amounts auctioned.	In accordance with BLM’s approach of following all four sale options is the HSA, BLM has engaged a team of economists to study on auction formats and make recommendations. The results will be reflected in the FRN.
Source D	2.01	The HSA specifically envisioned the non-allocated sale remaining in place... As we predicted in our comment on this decision last year, by excluding non-refiners from the Phase B non-auction sale that constituted 90 percent of the federal crude helium being sold, BLM once again allocated 100 percent of federal crude helium to a handful of refiners. These refiners took the fixed price allocation and bid on the remaining 10 percent available in the auction using the built-in price advantages of the lower price paid for non-auction volumes plus the lack of tolling costs. Accordingly, at the first-ever helium auction on in July 2015, the entire auction amount was purchased by two refiners... We believe that time remains for BLM to alter its course and establish the type of open and transparent system that Congress envisioned. To achieve this, we completely endorse the recommendation contained in Chairman Bishop and Ranking Member Grijalva's June 30th letter to BLM that calls for immediately reinstating a 10 percent non-allocated sale portion	The BLM has determined that reinstating the non-allocated sale increases participation in the FHP and over the long-term should maximize total financial return to the federal taxpayer.

		of any future Phase B non-auction sales. This will ensure the federal helium market is populated by more than three private companies and establish some competitive balance to future auction sales.	
Source E	2.01	<p>Paragraph 2.01 “Who will be allowed to purchase helium in the FY2016 Phase B sale? Suggestion: Bring back the non-allocated sale</p> <p>As proposed, the BLM intends to reserve Phase B sale helium to those entities “<i>with the ability to accept delivery of crude helium from the Federal Helium Pipeline...</i>” We believe that a reasonable portion of the Phase B Sale (“non- allocated helium”) should be made available to any qualified company that desires to own it and to store said helium within the system on terms, conditions and fees set forth by the BLM. Given this year’s framework for pricing (weighted average auction price vs. market-based survey price), there is a chance that Phase B Sale helium could be priced lower than the weighted average price at the auction (in similar fashion to the 2014 auction). And in a circumstance where lower priced helium is available for purchase in the Phase B Sale, then we believe that the existing refiners should not be the sole beneficiaries.</p>	The BLM has determined that reinstating the non-allocated sale increases participation in the FHP and over the long-term should maximize total financial return to the federal taxpayer.
Source F	2.01	<p>During the auction and sale process last year, 100% of the crude helium sold by the BLM for FY2015 and FY2016 Advanced Sale was purchased by refiners. As one of the stated objectives of the HSA is to increase competition, Source F requests that the BLM re-introduce a Non-Allocated sale component to assure access for non-refiners. We suggest the same format that the BLM used in the past, where 10% of the volume available for sale is offered as Non-Allocated to non-refiners and the remaining 90% is offered as Allocated to refiners during the upcoming FY2016 Phase B Helium sale. From a fairness perspective, adding a Non-Allocated sale component will prevent a situation where non-refiners are again completely shut out of the auction and sale process.</p>	The BLM has determined that reinstating the non-allocated sale increases participation in the FHP and over the long-term should maximize total financial return to the federal taxpayer.
Source C	2.01	<p>Permissible Purchasers of Helium in the FY 2016 Phase B Sale:</p> <p>The history of the Federal Helium Program is one of public-private partnership. The Federal Government invited private industry to invest in an infrastructure that monetized the Government’s resource by efficiently bringing crude helium to the market through an expansive network of pipelines and infrastructure. The legacy of this infrastructure of helium refineries is that it remains the most efficient means of bringing value to the Government’s resource and the Act recognizes this fact in creating the auction program to open the Helium Reserve to all parties, not just refiners and in continuing to permit BLM to sell helium directly to refiners. Thus, Congress appreciated the imperative to structure the transition to a 100 per cent auction carefully and authorized BLM to sell un-auctioned helium to those parties best positioned to bring crude helium to the market.</p>	The BLM has determined that reinstating the non-allocated sale increases participation in the FHP and over the long-term should maximize total financial return to the federal taxpayer.

		<p>This non-market disrupting policy is working as it continues to drive investment in a refining infrastructure on BLM system by private companies. The fact that some of the world's largest and most profitable industrial gas companies continue to elect to not invest in the Federal helium program does not justify suspending the helium sale parameters described at Section (6)(b)(1). BLM is therefore required to analyze and demonstrate that selling helium to any party other than refiners is consistent with the Act.</p>	
Source D	2.02	<p>As BLM's negotiations on new storage contracts proceeded, we saw some hopeful signs that progress could be made to ensure a pipeline delivery allocation for non-refiner volumes which is a necessary prerequisite to being able to obtain tolling from refiners. We supported BLM's recent proposal for a delivery schedule that gives first priority to federal users; then to post-enactment volumes purchased by non-refiners; and finally allocates the remaining pipeline capacity on a pro-rata basis according to volumes held in storage. Such a delivery schedule would indeed incentivize tolling, allow greater competition, and ensure a better price for taxpayers.</p> <p>We are therefore deeply disappointed by BLM's decision to back away from this proposal and return to the old system that allows refiners to, once more, be the gatekeepers of access to the Federal Helium Reserve. We urge BLM to fulfill its statutory obligations and Congress' intent and reinstate its previous proposal.</p>	<p>The BLM has determined that reinstating the non-allocated sale increases participation in the FHP and over the long-term should maximize total financial return to the federal taxpayer</p>
Source F	2.02	<p>Along those lines, we think that it would be helpful if the BLM provided examples of the FY2016 conservation price calculation under the following scenarios: 1.) The auction is fully subscribed with an average price of \$120/MCF; 2.) The auction is fully subscribed with an average price of \$103/MCF; and 3.) The auction is undersubscribed and only 150 MMCF is sold at an average price of \$106/MCF.</p> <p>Can the BLM please provide a specific example of how the Phase B sale price will be determined if there are no successful sales during the Phase B auction? If there are no successful sales, this would indicate that market pricing is below the \$100 Phase B auction reserve price. In such a case how will the BLM determine the Phase B sale price? One suggestion is that the BLM consider implementing a reverse auction for any unsold lots to help encourage matching of FY2016 sales volume with BLM's forecasted FY2016 production capacity in an effort to avoid a potential mismatch in future years.</p> <p>With regard to the Phase B sale, how is the reported operational capacity of each participant verified by the BLM?</p>	<p>As stated in our response to 1.01, the BLM will evaluate under the four criteria in statute, as applicable. If there are no sales at auction, the criteria direct consideration of the survey price survey price.</p> <p>Refiners have a requirement to self-report operational capacity.</p>

Source C	2.02	<p>The Process For Allocating Helium For the FY 2016 Phase B Sale: In a recent letter and hearing, the House Committee on Natural Resources indicated its belief that the Act requires BLM to hold non-allocated sales in its upcoming FY 2016 Phase B helium auction and sale. Although BLM’s Notice in no way indicates that the agency is contemplating setting aside any volume for non-allocated sale, a July 7, 2015 letter from the agency to the Committee Chairman intimates that BLM might reconsider whether to set aside a non-allocated sales volume in the upcoming sale. Although the Act plainly does not require it, if BLM is considering including a non-allocated sale, the agency must first circulate a proposal for stakeholder input. Contrary to the assertions of the Committee, the Act nowhere requires BLM to include a non- allocated sale.</p> <p>The Act places no restrictions on the sale method or format. In the absence of any affirmative requirement compelling BLM to sell helium via non-allocated sale, the agency need not include a non-allocated sale in the FY 2016 auction and sale. In fact, BLM cannot properly and lawfully implement a non-allocated sale at this late date. In the first Phase B sale, BLM did not include a non-allocated sale. The June 12 Notice for the FY 2016 sale similarly makes no mention of a non-allocated sale. Source C is only aware that BLM is considering a non-allocated sale because we attended the House Natural Resources Committee hearing and obtained copies of correspondence between BLM and Congressional members. Most stakeholders other than Source C likely are completely unaware BLM is even considering such an option. Under these circumstances, for BLM to include a non-allocated component in the upcoming sale, the agency must, at a minimum, first propose a non-allocated sale and obtain public comment. To do otherwise would undermine the very purpose of public notice and comment by blindsiding affected stakeholders with a surprise non-allocated sale on which they had no opportunity to comment.</p> <p>The obligation to provide affected stakeholders the opportunity to comment on proposed agency actions is a hallmark of informal rulemaking, and we believe the same principle applies here. This is particularly true where, as described above, BLM is already sidestepping its statutory responsibility to promulgate regulations. BLM should not compound the problem created by its failure to engage in the rulemaking process by playing fast and loose with the notice and comment process for individual sales that it currently provides. Nor should it rely on incidental notice via congressional testimony and correspondence – or other comments submitted in response to the proposed auction and sale – as a substitute for actual notice and comment provided by the agency</p>	Comment noted.
----------	------	---	----------------

		<p>itself.</p> <p>If BLM were to include a non-allocated portion in the August sale without <u>first</u> providing the affected stakeholders notice of its change in practice, and an opportunity to comment on that change, BLM's action would be arbitrary, capricious, and unlawful. Accordingly, if BLM is considering introducing a non-allocated sale in its proposed FY 2016 Part B sale and auction, it must first propose doing so and seek public comment.</p>	
Source E	2.03	<p>Paragraph 2.03 "How does a person apply for access to the Federal Helium Pipeline" Suggestion: Make the process clearer</p> <p>We have stated in the past the need for precision and/or clarity on the process to be used for a new entrant to tap and access the BLM helium pipeline. The Draft Helium Storage Contract has no recognition or summary of the process for new entrants. BLM can and should do a better job of encouraging new entrants by inviting their participation and providing the necessary information.</p>	Refer to website on accessing pipeline
Source F	2.06	<p>Section 2.06 indicates that a hypothetical example of how the FY 2016 Phase B Sale will be conducted is available at the Helium Operations website. We have not been able to find such a document. Similarly, other supplementary documents as identified in the FRN are also not available. Please provide an updated link that is active and send out these examples to all storage contract holders via email.</p>	Website updated and checked
Source B	3.02	<p>[The] proposed methodology is in direct conflict with the HSA, where following the delivery of Federal Helium – the remaining helium must be delivered "timely". With one exception, we support the priority delivery mechanism proposed in Section 2.6(b) of the June 30, 2015 draft storage contract. While we believe this inventory pro-rata methodology is fair and reasonable, calculating the allocation percentage once a year effective on the preceding October 1 is not accurate enough. The BLM has all of the information necessary to make this calculation on a monthly basis and BLM should be required to report the allocation percentage to each storage contract holder monthly.</p> <p>We believe this mechanism to be consistent with the intent and goals of the HSA, however, if the new storage contract is not adopted and executed by the time the Notice is finalized, we would advocate for including in the Notice a clear statement of the priority delivery mechanism to be used in FY 2016, rather than inclusion by reference to a storage contract that is not yet final.</p>	This will be deferred to storage contract discussion.
Source E	3.02	<p>Paragraph 3.02 "Delivery of Helium in FY2016". Suggestion: Re-establish priority access to helium purchased at the auction [Referenced the Congressional Hearing] The re-establishment of priority access for auctioned helium will make for a better auction. Such a change would especially help new refiners, like SOURCE E,</p>	Refer back to statutory language to in-kind

		that are contemplating joining the refiner community. Priority access to auctioned helium will help any new refiner as they attempt to introduce competition into the (until now) closed-system as Congress intended	
Source C	General	While Source C has concerns with the proposed plan for calculating the price of helium sold at Phase B of the auction and sale, it does support the Notice's auction format, the manner in which BLM determines who is allowed to purchase helium in the FY 2016 Phase B sale, and the process for allocating helium in the FY 2016 Phase B sale. These measures are indeed consistent with the letter of the law and certainly the intent of Congress. <i>Indeed, Source C encourages BLM, in all cases, to implement the Act in accordance with its express terms and clear congressional intent where there is any ambiguity.</i>	Noted
Source C	Procedural: APA	As an initial matter, Source C reiterates its principal procedural concern with BLM's implementation of the Act: BLM is required to issue regulations and BLM is failing to do so. The Act has introduced a host of new concepts and procedures into the federal helium sale and allocation process but provides little detail with respect to actual implementation and subjects the program to the fancies of special interests. The responsibility of implementation and substantive regulatory development falls to BLM and demands full compliance with the rulemaking procedures of the Administrative Procedure Act. [Followed by lengthy annotated discussion.]	Comment noted
Source D	Tolling	Since enactment, refiners have plainly not complied with this [tolling] condition and there has been no response from BLM. Failing to enforce the tolling condition is not only in contravention of the Act, it is enabling a non-competitive market. With no guarantee of tolling at a reasonable rate, non-refiners will have great difficulty competing for any federal crude helium. Without non-refiners competing in the program, the best return to the U.S. taxpayer will not be achieved. We ... support Chairman Bishop and Ranking Member Grijalva's recommendation in their June 30th letter to BLM that BLM enforce the tolling provisions contained in the Act.	This will be dealt with through the storage contract, including reporting requirements, and how helium will be apportioned – more details to be provided (positive effects)