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VIA EMAIL - rbjolley@blm.gov

June 12, 2014

Mr. Robert B. Jolley
U.S. Department of the Interior
Bureau of Land Management
801 S. Fillmore, Suite 500
Amarillo, TX 79101

Dear Mr. Jolley:

The purpose of this letter is to provide comments on the Bureau of Land Management's (BLM) Notice of Proposed Action: Implementation of Helium Stewardship Act Sales and Auctions (referred to hereafter as the "NOPA") as published on May 16, 2014 in the Federal Register. We appreciate the opportunity to provide these comments as it has become clear that prompt action is required if the goals of the HSA are to be met. Our comments are:

1. Qualified Buyers for Phase B Sales. The NOPA states (Federal Register /Vol. 79, No. 95 / Friday, May 16, 2014 /Notices 28541) that only refiners as defined in the notice are able to participate in the Phase B sales, including the forward sale of FY 2016 helium. This interpretation goes beyond the language and intent of the HSA by restricting non-refiners from purchasing large volumes of conservation helium at attractive prices. We do not believe this meets the intent of the HSA in maximizing the returns to taxpayers for the helium sold as this is simply a continuation of the *status quo ante* HSA.

2. Redelivery of Phase A Non-Allocated Sales Material and Phase B Auction Material. In the NOPA the BLM has proposed a method of determining relative priorities for the different kinds of helium in storage at the Federal Helium Reserve. This method prioritizes Phase B Auction material over Phase A Allocated/Non-allocated and Phase B sold helium, and combines the Phase A Allocated/Non-allocated helium and with the Phase B sold helium in the same priority class. We believe this penalizes the non-refiners who participated in the Phase A Non-allocated Sales. Since the refiners have already had a chance to remove their Phase A Allocated Sales material we suggest that the Phase A Non-allocated Sales material be prioritized above the redelivery of any Phase B material, whether sales or auction. Accordingly, we suggest the following prioritization:

1. In-kind helium
2. Phase A Non-allocated Sales helium
3. Phase B Auctioned helium
4. Phase A Allocated (if any remains) and Phase B sold helium
5. Pre-HSA purchased helium stored under a helium storage contract

In this way those non-refiners who purchased helium in the Phase A Non-allocated Sales will be able to access this material as the refiners have already done.

We hope these comments are helpful and will provide guidance for the BLM to improve the implementation of the HSA.

Sincerely,



Michael L. Molinini
CEO, Airgas, Inc.



David Joyner
President,
Air Liquide Helium America, Inc.

**Bureau of Land Management
Amarillo Field Office
801 S Fillmore, Suite 500
Amarillo, TX 79101
Attention: Helium Sale and Auction**

Air Liquide Helium America, Inc. (“Air Liquide”) appreciates the opportunity to submit comments in response to the Bureau of Land Management (BLM)’s *Notice of Proposed Action: Implementation of Helium Stewardship Act Sales and Auctions* published in the Federal Register on May 16, 2014 (the “Notice”). We support the Helium Stewardship Act’s (HSA) goals of ensuring a safe and reliable supply of helium for domestic end-users and a better return for U.S. taxpayers. However, as Congress recognized in the HSA, to achieve these goals, the market for federal crude helium must have greater participation and greater competition. This increases supply security and reliability for end-users and also provides a better return to U.S. taxpayers on a federal resource. It is with this goal in mind that we submit the following comments on the Notice for your consideration:

1. Non-Auction Quantities of Crude Helium in Phase B Sales

Congress passed and the President signed into law the HSA encouraging more competition in the market for crude helium sold from the Federal Helium Reserve in a manner that would ensure stability for helium end-users and a fairer return for taxpayers. Since enactment, Air Liquide has participated in the non-allocated portion of the two sales of crude helium for fiscal year 2014 (“Phase A sales”). These Phase A non-allocated sales doubled the number of participants in the federal helium market and sent important signals to end-users that the system would afford them greater reliability and security via broader supply options.

Under the HSA, Phase B sales of federal crude helium contain both an auction and as wells as continuing a non-auction component. For the non-auction Phase B sales (which will comprise 90 percent of the total volumes sold in the initial sale), section 6(b)(1) states the following:

- (1) IN GENERAL.—The Secretary shall offer crude helium for sale in quantities not subject to auction under paragraph (2), after completion of each auction, at not less than the minimum price established under paragraph (7), and under such terms and conditions as the Secretary determines necessary—
- (A) to maximize total recovery of helium from the Federal Helium Reserve over the long term;
 - (B) to maximize the total financial return to the taxpayer;
 - (C) to manage crude helium sales according to the ability of the Secretary to extract and produce helium from the Federal Helium Reserve;
 - (D) to give priority to meeting the helium demand of Federal users in the event of any disruption to the Federal Helium Reserve; and
 - (E) to carry out this subsection with minimum market disruption.¹

¹ *Helium Stewardship Act of 2013*, Public Law 113-40, 127 Stat. 534, 536-37 (Oct. 2, 2013).

Despite this provision, the Notice states that “[o]nly those who are refiners” may purchase helium in the non-auction Phase B sales.² This would eliminate the long standing policy of allowing non-refiners to participate in a percentage of these sale volumes. Restricting the non-auction Phase B sales to refiners does not “maximize the total financial return to the taxpayer” as required by the HSA as Members of Congress from both parties made it abundantly clear that greater competition in the market for federal crude helium maximizes the total financial return to taxpayers. This decision is also disruptive to the helium market as it negates the progress achieved through the Phase A sales.

If this decision stands, three companies will again receive 100 percent of fixed-price federal crude helium allocations provided them with the only assured volumes to support a dedicated supply chain and now they will also be able to bid on the remaining 10 percent available in the auction using the built-in price advantage afforded them by not having to pay tolling costs. Far from injecting more competition into the market as Congress intended, such a system would result in fewer market participants, lower prices for helium, and a loss of revenues for taxpayers. Accordingly, BLM should maintain a non-allocated sale portion of the Phase B non-auction volumes sold under this section at the same percentage as the sales in fiscal year 2014.

2. Definition of “Excess Refining Capacity”

Getting an accurate report of the refiners’ “excess refining capacity” is essential as this capacity is central to the tolling condition in the HSA. Section 6(b)(8)(B) of the HSA states the following:

(B) CONDITION.—As a condition of sale or auction to a refiner under subsection (a)(1) and paragraphs (1) and (2), effective beginning 90 days after the date of enactment of the Helium Stewardship Act of 2013, the refiner shall make **excess refining capacity** of helium available at commercially reasonable rates to—

- (i) any person prevailing in auctions under paragraph (2); and
- (ii) any person that has acquired crude helium from the Secretary from the Federal Helium Reserve by means other than an auction under paragraph (2) after the date of enactment of the Helium Stewardship Act of 2013, including non-allocated sales.³

We are encouraged by and support BLM’s proposed formulation, which would have refiners report their operational capacity and subtract out the demand for crude relevant to that particular refinery; however, the reference to ‘demand’ is ambiguous. The component that should be subtracted should be referenced as the amount of committed crude helium available to the refinery. While we are hopeful this formula will lead to accurate reporting, we urge BLM to

² 79 Fed. Reg. 28540, 28543 (May 16, 2014).

³ HSA, *supra* note 1, at 538.

examine these reports closely and retain the option of auditing refineries on the federal helium pipeline, if necessary.

3. Action on Tolling Condition

As the leaders of the Senate Committee on Energy and Commerce and the House Committee on Natural Resources noted in their March 13, 2014 letter to the U.S. Government Accountability Office (GAO) (the “GAO Letter”), “[a] key component of facilitating new competition into the helium program is the condition that current refiners who hold access to the Reserve make available tolling capacity at commercially reasonable rates.”⁴ On this issue, section 6(b)(8)(B) of the HSA states:

(B) CONDITION.—As a condition of sale or auction to a refiner under subsection (a)(1) and paragraphs (1) and (2), effective beginning 90 days after the date of enactment of the Helium Stewardship Act of 2013, the refiner shall make excess refining capacity of helium available at commercially reasonable rates to—

- (i) any person prevailing in auctions under paragraph (2); and
- (ii) any person that has acquired crude helium from the Secretary from the Federal Helium Reserve by means other than an auction under paragraph (2) after the date of enactment of the Helium Stewardship Act of 2013, including nonallocated sales.⁵

As the GAO letter states, “[f]ailure by BLM to enforce these provisions will result in fewer auction participants, lower prices for helium, and a loss of revenues for taxpayers.”⁶ We agree with this assessment and further note that there is no “transitional” period in the HSA. Refiners must comply with this condition or, under the statute, be unable to participate in the program. We therefore find it troubling that, post-enactment, refiners continue to refuse to make tolling capacity available at commercially reasonable rates on an ongoing committed basis and there has been no reaction from BLM to enforce the condition in the statute. To this point, post-enactment, this situation has effectively stranded 61 M/scf of helium from end-users.

BLM has set forth information that it will request reports from refiners on the nature of any tolling agreements. However, the Notice does not lay out any process for enforcing the statutory condition or withholding allocations of crude helium from any refiners who cannot demonstrate compliance with section 6(b)(8)(B) of the HSA.

⁴ Chairman Doc Hastings, et al., *Letter to The Honorable Gene Dodaro*, U.S. Government Accountability Office, (March 13, 2014).

⁵ HSA, *supra* note 1, at 538.

⁶ GAO Letter, *supra* note 4.

4. Timely Delivery of Helium Purchased in Phase A Sales

Section 5(e)(2)(B) of the HSA requires the Secretary to establish a schedule for the transportation and delivery of helium that “ensures **timely** delivery of helium acquired from the Secretary from the Federal Helium Reserve by means other than an auction ... including non-allocated sales[.]”⁷ (emphasis added). As stated above, Air Liquide participated in both Phase A Sales and has not received a pipeline delivery allocation for these volumes from BLM.

We share BLM’s belief that proper implementation of this statutory requirement will incentivize tolling agreements among stakeholders and enable greater participation in the federal helium program. Accordingly, we support BLM’s recent proposal that, beginning in October 2015, BLM will offer priority delivery allocations for the Phase A sale volumes before any volumes in storage that were purchased pre-enactment of the HSA.

5. BLM’s Role in Defining Commercially Reasonable Tolling Rates

As we have stated, no refiner offered adequate committed available tolling service on an ongoing basis at commercially reasonable rates for volumes purchased in the recent IFO. One Refiner has offered tolling services on an “as available” basis only and at a rate that is almost four times the rate for historical tolling services—well above what should be considered “commercially reasonable.” Based on comments at the Public Meeting, this experience seems consistent with that of other non-refiners.

On this issue, once again, Air Liquide’s view is that this is not an issue with multiple options—the law must be followed. BLM must develop clear guidance to stakeholders on what are considered “commercially reasonable” tolling rates. Rates should be based on the market data that BLM receives, which includes pricing from past tolling agreements between all participants in the domestic helium market (including refiners that receive tolling services from other refiners from FY 2013 forward), as well as the actual cost of tolling to ensure that there is no undue market distortion that would ultimately harm end-users and make the overall cost commercially impracticable. If “commercially reasonable” rates are not being offered, the law requires BLM to enforce the conditions in the Act⁸. As stated in the recent GAO Letter:

“Rigorous enforcement by BLM is essential as helium refiners on the pipeline that are currently granted a non-competitive allotment of an overwhelming majority of helium from the Reserve have a significant incentive to drive buyers out of the auction and encourage lower prices. This subjugates the interests of the federal government, taxpayers, the fair market, and the competitive spirit embodied in the Helium Stewardship Act.”⁹

⁷ HSA, *supra* note 2, at 536.

⁸ *Helium Stewardship Act of 2013*, *supra* note 1, at 534.

⁹ See GAO Letter, *supra* note 4.

6. Contingency Volumes

The BLM proposed that 10% of the forecasted production be withheld from the sales and also from delivery allocations in case there are any unplanned production interruptions during each fiscal year. However, in the event that there are no production interruptions and this volume does become available, the volumes should be offered to all Buyers in accordance with the percentages specified in the HSA, and not offered exclusively to Refiners only.

We appreciate BLM's consideration of these comments and invite you to direct any questions or requests for information to David Joyner at (713)402-2112.

Sincerely,

A handwritten signature in black ink, appearing to read "David Joyner", with a long horizontal flourish extending to the right.

David Joyner

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June 16, 2014

Via E-Mail to rbjolley@blm.gov

Mr. Robert Jolley
Bureau of Land Management
Amarillo Field Office
801 S. Fillmore, Suite 500
Amarillo, TX 79101

RE: Helium Sale and Auction – Comments to Federal Register Notice 2014-11410

Dear Mr. Jolley:

Air Products LLC (“Air Products”) hereby submits the following comments on the Bureau of Land Management’s (“BLM”) Notice of Proposed Action: Implementation of Helium Stewardship Act Sales and Auctions published in the Federal Register on May 16, 2014 (the “Notice”) Vol. 79, No. 95, Notice 2014-11410.

Respect for contract rights: Air Products has supported the development of comprehensive helium legislation and we appreciate the efforts of the BLM to effectively implement the procedures necessary to support the new legislation. Transitioning from the old program to the new during 2014-2015 will pose challenges. We expect the BLM, however, while implementing the tenants of the new HSA, to continue honoring the mutual commitments and obligations set forth in our Helium Storage Contract. In our letter of 23 May 2014 to the BLM, Air Products sought assurance that the BLM would comply with all procedural requirements prior to exercising its authority under Article 2.4 of the Contract, which does not terminate until 1 October 2015. Changing the pipeline delivery methodology as described in the FRN 2014-1140, Vol. 79, No. 95 for FY2015 deliveries is in conflict with our existing Contract. As such, it is also in conflict with Section 8(a) of the HSA, which expressly preserves preexisting rights and obligations of helium storage contract parties.

Changing market conditions: The Notice does not adequately address changes in market conditions that may impact helium supply/demand dynamics and the specific demand on the Federal Helium System. The BLM must develop policy and procedures to address “Shortage” vs “Over-supply” modes of operation for the Federal Helium System. On 30 May 2014 – the BLM announced that Shortage and Over-supply provisions would be developed and incorporated into the final FRN 2014-1140, Vol. 79, No. 95.

Volumes for sale in 2014: FRN 2014-1140, Vol. 79, No. 95, section 1.04 states in Table 1 that the forecasted 2014 production capability (per NITEC) minus the 10% operating contingency is 1,344,600 Mcf; the BLM, however, has announced that it will only sell 610,000 Mcf in FY2014, which is 734,600 Mcf less than the Minimum Quantity set forth in SEC 6. (f)(2) of H.R. 527 (the “Helium Stewardship Act of 2013” or “HSA”). Limiting the FY2014 sales to 610,000 Mcf will result in the loss of \$69.8 million in helium sales revenue to the U.S. Treasury.

Prioritization for helium delivery: FRN 2014-1140, Vol. 79, No. 95, section 3.02, introduces a new prioritization for helium delivery that is in conflict with SEC 5. (e)(2) the Helium Stewardship Act of 2013. The HSA states that priority access will be granted to Federal "In-Kind" Helium and that timely delivery shall be granted to helium sold in auction, or helium sold by means other than auction including non-allocated and allocated sales. The FRN is in direct conflict with the HSA by establishing a new four (4) tier prioritization: (1) In-Kind helium, (2) phase B auctioned helium, (3) phase A&B allocated/non-allocated sales and (4) Pre-HSA purchased helium in storage. This prioritization scheme guarantees that privately owned helium already purchased and currently stored in the BLM's storage system will *never* be delivered, constituting a blatant taking by the BLM.

Tolling incentive/credit: FRN 2014-1140, Vol. 79, No. 95, section 3.03, introduces a 2 for 1 credit to be added to a tolling refiners' subsequent monthly delivery volume, which would be granted priority delivery over currently stored helium. Given the increasing auction amounts and the forecasted declining production capacity of the system, this reallocation scheme virtually guarantees that privately owned helium already purchased and currently stored in the BLM's storage system will *never* be delivered, constituting a blatant taking by the BLM. On 30 May 2014 – BLM announced that this tolling incentive/credit provision would be eliminated from the final FRN.

Delivery schedule: FRN 2014-1140, Vol. 79, No. 95, section 3.04 provides a hypothetical example for a single month Delivery Schedule; this section and example, however, do not adequately explain how the 10% contingency and 20% available for private storage delivery would be administered. Please expand on this section and add a second month to the example to fully explain the proposed methodology including carryover and the 30% holdback application.

Air Products respectfully requests that the BLM reconsider its proposed approach to prioritization of redelivery during 2015 implement an approach that is consistent with the HSA and avoids breaching the terms of the existing Helium Storage Contracts.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter L. Nelson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Walter L. Nelson
Vice President



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Helium Stewardship Act Of 2013

Global Gases' Recommendations On
Implementation Of Tolling Provisions

Phil Kornbluth – March 6, 2014

Introduction

- One of the intents of the Helium Stewardship Act (HSA) is that helium refiners will make their excess refining capacity available for third-party tolling by non-refiners
- The HSA states...
 - As a condition of sale or auction to a refiner under subsection (a)(1) and paragraphs (1) and (2), effective beginning 90 days after the date of enactment of the Helium Stewardship Act of 2013, the refiner shall make **excess refining capacity** of helium available at **commercially reasonable rates**
- Global Gases believes that the tolling language is extremely vague and requires careful definition in two key areas to successfully achieve the legislative intent



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Key Issues

1. How will “excess refining capacity” (ERC) be determined?
2. How will “market competitive rates” (MCR) be determined?



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Determination Of Excess Refining Capacity

- Each refiner will need to forecast its own ERC
- BLM needs to provide a simple methodology for the calculation
- BLM needs to aggregate the refiners' calculations
- Refiners may seek to estimate demand high and supply from non-BLM sources (including across the fence crude supply) low to minimize ERC
- BLM needs a mechanism to ensure that the refiners forecast ERC in good faith



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Elements Of ERC Calculation

1. BLM determines pipeline production capacity and each refiner's CHE redelivery allocation as the first step in each year's calculation
2. Refining capacity [RC] = Each refiner's BLM allocation + across the fence CHE supply, if any
3. Each refiner estimates their global Demand [GD]
4. Each refiner forecasts Supply From Non-BLM Sources [S]
5. Demand [GD] - Supply From Non-BLM Sources [S] = Demand From BLM sources [DBLM]
6. **If refining capacity [RC] > Demand from BLM sources [DBLM], then ERC = RC - DBLM**



Sample Form & Calculation Example

Calculation Of Excess Refining Capacity				
Company Name _____				Volumes in million scf/yr
Fiscal Year _____				
		<u>Refiner's Forecast</u>	<u>Year End Actuals</u>	<u>Forecast vs Actual</u>
Refiner's Allocation Of Crude Helium Redelivery		600		
Plus: Crude Helium Delivered Across The Fence		200		
Equals: Refining Capacity		800		
Global Demand For Helium		1500		
<i>Supply From Non-BLM Sources</i>				
Source No.1 _____		300		
Source No. 2 _____		200		
Source No. 3 _____		300		
Source No. 4 _____				
Source No. 5 _____				
Source No. 6 _____				
Less: Total Supply From Non-BLM Sources		800		
Equals: Demand From BLM Sources		700		
Excess Refining Capacity		100		

Enforcement Methodology

- At the end of each year, refiners complete year end actual calculations and reconcile forecasted ERC vs actual
- If a refiner's estimate of ERC is less than actual ERC by more than X MMCF, refiner would be subject to a reduction of their CHe redelivery allocation for the then current year
- Reduction in allocation = 2X the error in forecasted ERC
- The refiner's reduced allocation would be shared among those refiners who forecasted ERC accurately to reward accuracy



Determination Of “Market Competitive Rates”

- Helium refiners and the companies who want to purchase tolling capacity are likely to have very different views of the meaning of “market competitive rates”
- It will not be possible to develop a fixed price for tolling that will satisfy all of the affected parties
- A better approach would be to determine the prices for tolling by employing “free market principles”
- Global Gases believes that the best way to allocate tolling capacity among the companies who desire to purchase it would be to utilize a price auction process



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How Would Price Auctions Work?

- Qualified bidders for tolling services would submit bids for:
 1. The quantity of tolling services they want to purchase, and
 - Bidders would only be allowed to bid for quantities less than or equal to the quantity of crude helium in their BLM storage account at the time of the bid
 2. The price that they are willing to pay
- Tolling services would be awarded to the highest bidder first, to the 2nd highest bidder next, the third highest bidder next, and so on, until all of the ERC had been awarded
- A minimum price for tolling could be established by the BLM to ensure that refiners earned at least a minimum profit on tolling services
 - Global Gases suggests a floor price equal to ~2X the cost of tolling or \$25/MCF
 - Actual bids are likely to be considerably higher than the floor price



Other Considerations

- Frequency of tolling auctions should coincide with the BLM's crude helium sales and auctions
- The BLM should develop a standard tolling agreement that would be utilized for the sale of tolling services by all refiners
 - Tolling agreements should be identical, except for quantity and price, to prevent individual refiners from imposing onerous conditions
- After each auction, the BLM would allocate the tolling services among those refiners who forecasted that they would have ERC
- The provision of tolling services would have equal priority to the refiners' other customers for helium



Global Gases

Via email:

Based on what we see in the May 16th **Notice of Proposed Action: Implementation of Helium Stewardship Act Sales and Auctions** ("Notice"), Global Gases is surprised and disappointed by the laissez faire approach that the BLM has chosen to take relative to implementing the tolling provisions of the Helium Stewardship Act.

Specifically;

1. The Notice provides absolutely no guidance or direction to Refiners on how to calculate Excess Refining Capacity other than the broad definition that appears on page 3. The calculation of Excess Refining Capacity is left entirely to each Refiner's discretion. Given the Refiners' collective history of trying to avoid third-party tolling obligations of any kind during the process leading up to passage of the HSA as well as recent experience with Refiners' extremely conservative estimates of Excess Refining Capacity, the result of a laissez faire approach by the BLM is likely to be very conservative (i.e. low) estimates of Excess Refining Capacity by the Refiners.

2. The Notice is completely silent on the process by which the Refiners and Non-Refiners are supposed to come to terms on "commercially reasonable rates" for the Tolling of crude helium. Based on recent experience, the Refiners, as a group, have not demonstrated their willingness to provide Tolling services to Non-Refiners at commercially reasonable rates. Without a more well defined process for determining commercially reasonable rates, it is quite possible that gaining access to Tolling will be prohibitively expensive for Non-Refiners.

When comments #1 and #2 are taken together, Global Gases' conclusion is that due to the uncertainty surrounding the Non-Refiners' ability to secure Tolling capacity at commercially reasonable rates, Non-Refiners will be reluctant participants in Phase B auctions and the price of crude helium sold by the BLM will be lower than it would have been had the BLM implemented more robust guidelines/processes for both the determination of Excess Refining Capacity and commercially reasonable rates for Tolling. Consequently, access to the Federal Helium Reserve will continue to be controlled almost exclusively by the Refiners, which is contrary to the intent of the HSA.

Global Gases has previously provided detailed input to the BLM on processes for determining Excess Refining Capacity and commercially reasonable rates for Tolling that, in our view, would do a far better job at achieving the intent of the Tolling provisions of the Helium Stewardship Act.

Global Gases is generally in agreement with the remaining aspects of the Notice, although we have some questions about portions of the "Phase B Sales and Auctions" section which appear on pages 6 and 7 of the Notice.

Looking specifically at Section 2.04, it appears that the 2015 Phase B Sales Price will be determined based on giving a 10% weighting to the Average Auction Price (AAP) and a 90% weighting to the previous sales price of \$95, as adjusted by the APPI. Given the low inflation environment that the U.S. economy has been experiencing and the low weighting assigned to the AAP, the result will surely be a very minimal change to the FY 2015 Phase B Sales Price when compared to the previous price of \$95/Mcf. This could possibly be to the detriment of the U.S. Treasury. We also noted that the survey of qualifying transactions called for in the HSA is given zero consideration, presumably (?) because there is insufficient time to conduct the survey. Given the fact that this survey could be completed in a minimal amount of time (1-2 weeks), we question why the survey is not included as part of the price determination. Finally, we noted some inconsistency in 2.04 where the term APPI is defined as the average Production (?) Price Index. We assumed that this was a typo and the intention was for this to be defined as the Producer

Price Index. If that assumption is correct, the APPI should be defined as the change in the average PPI when compared to a defined base period.

One final minor comment is that the BLM has tentatively scheduled the FY 2015 Phase B auction for June 30th in Amarillo. We suggest that the auction be pushed back by one day to July 1st, to avoid making folks travel to Amarillo on a Sunday during the Summer.

Via email:

Global Gases has reviewed the draft forms that were circulated by Carole James and offers the following comments:

- We think that asking the Helium Refiners to complete a form for purposes of calculating their excess refining capacity is a step in the right direction. However, we think that the draft form for Calculation of Excess Refining Capacity should request more detailed information from the Helium Refiners to help to ensure consistent calculations by the Refiners. There are quite a number of assumptions/calculations that the Refiners will need to make to develop their estimates of **Planned Demand** and we think that the BLM's form should request additional details of these calculations, similar to what Global Gases previously advocated in Slide #6 of the attached presentation. Without the additional detail, there is no assurance of consistent calculations by the Refiners.

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May 22, 2014

Mr. Robert Jolley
Bureau of Land Management
Amarillo Field Office
801 S. Fillmore, Suite 500
Amarillo, TX 79101

Re: Implementation of Helium Stewardship Act Sales and Auctions

Dear Mr. Jolley:

The purpose of this letter is to submit comments from Linde North America in response to the Notice of Proposed Action published by the Bureau of Land Management (BLM) in the Federal Register on May 16 regarding implementation of the Helium Stewardship Act. Linde has substantial concerns regarding both the procedures for carrying out Phase A of the Helium Stewardship Act in Fiscal year 2014 and Phase B of the Helium Stewardship Act beginning in Fiscal Year 2015. Linde is concerned that the procedures outlined for both Phase A and Phase B will add to instability in the helium marketplace and are in need of revision. Because Fiscal Year 2014 is already more than half completed and there is limited time to address these issues, this letter will focus on our concerns regarding Phase A. In a following letter, we will detail our equally serious concerns about Phase B procedures.

Comments Regarding Phase A:

We appreciate BLM's good-faith efforts to carry out the far-reaching reforms required by the Helium Stewardship Act in a very short period of time. BLM has been a responsible steward of the nation's helium resources over many years, and we value our partnership with the BLM team. While there are a number of elements of the proposed plan for helium sales that we support, we have specific concerns about critical parts of the proposal.

Our principal concern regarding Phase A is that the BLM is not producing a sufficient amount of crude helium to meet the requirements of the Helium Stewardship Act and prevent disruptions in the marketplace. Preventing disruptions in the marketplace was a clear focus of the Act, which contains seven separate admonitions to prevent such disruptions.

To achieve this goal, the Act requires the BLM to offer for sale or auction each fiscal year an amount of helium that is the lesser of the total production capacity of the system or the amount offered for sale in Fiscal Year 2012 (2.1 billion cubic feet). The BLM has projected that the system has the capacity to produce 1.494 billion cubic feet of helium in the current fiscal year. However, the BLM is only offering for sale 780 million cubic feet (549 mmcf allocated/61 mmcf non-allocated/170 mmcf In-Kind). This amount falls 714 million cubic feet short of the Act's requirement.

One principal cause of this shortfall was the lack of any sales of crude helium from the system from October to December 2013. The BLM's ability to sell crude helium during this period (immediately following passage of the Helium Stewardship Act) can be debated. However, it cannot be debated that the lack of delivery of helium during this three month period was a serious setback to meeting the goals of the Act, and caused storage contract holders to draw down their helium inventories by a substantial amount.

The lack of sales during the first quarter of the fiscal year, however, is not the only reason the BLM is falling short of the law's requirements for Phase A. Several other features of the plan for are contributing to the shortfall in sales for Fiscal Year 2014, adding to the risk of market disruption. These features include:

- An unnecessary "engineering contingency" volume of 149.4 million cubic feet;
- An unnecessary volume of 156.6 million cubic feet set aside for additional private storage delivery; and
- An unnecessarily large estimate of in-kind sales (170 million cubic feet).

While it is too late to address the lack of crude helium sales at the end of 2013, there is still time to address the three issues raised above. With only four months remaining in the fiscal year, it is urgent that BLM do so immediately.

It is unclear what type of engineering contingency BLM is addressing with the 10% set-aside included in Table 1. It is clear that if no such contingency occurs, an additional 149 million cubic feet of capacity will go unutilized. Absent a compelling explanation, this amount should be shifted to allocated and non-allocated sales.

Along the same lines, we believe that the 156.6 million cubic feet set aside for additional private storage delivery should be transferred to allocated and non-allocated sales. Storage contract holders have already drawn down more than 400 million cubic feet from their inventories as a result of the lack of sales in the first quarter. Under these circumstances, such a large set-aside for additional inventory drawdowns is unnecessary.

Finally, 170 million cubic feet of crude helium for in-kind users appears to be well in excess of historical experience. We believe that a lower estimate is justified.

Corrective Actions for Phase A:

Addressing the shortcomings detailed above would better comply with the requirements of the Act, and contribute to greater stability in a marketplace that is critical to American manufacturers. Addressing the first two points alone would allow the BLM to sell an additional 300 million cubic feet of crude helium in Fiscal Year 2014, which would help prevent disruptions that would be harmful to the U.S. economy.

We urge you to take the following corrective actions without delay:

- Eliminate the 10% “engineering contingency” for Phase A and transfer that amount to allocated and non-allocated sales;
- Eliminate the 156.6 million cubic feet set aside for additional private storage delivery and transfer that amount to allocated and non-allocated sales; and
- Develop a more realistic estimate for the volume of in-kind sales, reduce this amount accordingly, and transfer the remaining amount to allocated and non-allocated sales.

Thank you for considering these recommendations. With approximately four months remaining in the fiscal year, it is urgent that these matters be addressed quickly. Doing so will benefit high-tech manufacturers across the country, the American economy, and the taxpayers. We would be happy to discuss these issues with you in more detail, and we also look forward to sharing our additional concerns regarding the plans that have been outlined for Phase B.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph J. Horn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph J. Horn
President
Linde Global Helium, a division of Linde Gas NA LLC

Linde Global Helium
575 Mountain Avenue
Murray Hill, NJ 07974
Telephone 908-508-4009
Fax 908-771-1138

June 3, 2014

Mr. Robert Jolley
Bureau of Land Management
Amarillo Field Office
801 S. Fillmore, Suite 500
Amarillo, TX 79101

Re: Implementation of Helium Stewardship Act Sales and Auctions

Dear Mr. Jolley:

The purpose of this letter is to submit additional comments from Linde North America in response to the Notice of Proposed Action published by the Bureau of Land Management (BLM) in the Federal Register on May 16 regarding implementation of the Helium Stewardship Act.

In our earlier letter, dated May 22, we raised issues related to BLM's proposal for implementing Phase A of the Helium Stewardship Act, the "Allocation Transition." In this letter, we will raise additional concerns about BLM's proposal for implementing Phase B of the Act, the "Auction Implementation." Our primary concerns related to the proposed plan for Phase B are that BLM is making an insufficient amount of crude helium available for sale, and that the plan for prioritization of crude helium delivery is flawed. We believe that, if left uncorrected, these provisions risk causing market distortions, and may lead to unintended disruptions in the helium marketplace.

Comments Regarding Phase B:

We applaud BLM's effort to implement the changes required by this complex piece of legislation in a timely manner. For the most part, we believe that BLM has made good progress in advancing the transition required by Congress. However, we believe that it is essential that BLM address the key issues raised below. Doing so will bring BLM's plan more fully into compliance with the Act, and help ensure a smooth functioning marketplace.

1. Projected Crude Helium Deliveries for FY 2015 – FY 2021:

Issue: We do not believe that the proposed volumes of helium to be offered for sale in Phase B meet the requirements of the Act. Our concerns here are substantially similar to the concerns we raised in our earlier letter regarding Phase A. The Act [Section 6(f)] requires that BLM offer for sale each fiscal year an amount of helium that is the lesser of:

- The total production capacity of the system, or
- The amount offered for sale in Fiscal Year 2012 (2.1 billion cubic feet).

For each fiscal year under Phase B, BLM proposes to sell substantially less helium than the projected capacity of the system (and, as expected, much less than in FY 2012). The primary reason for this shortfall is the large amount of system capacity being set aside for contingencies (10%) and private storage delivery (20%). Between these two categories, the BLM's plan proposes to reduce crude helium sales by a full 30% of the system's delivery capacity. In Fiscal Year 2015, this equates to a reduction of more than 335 million cubic feet. Over the projected seven-year life of Phase B, crude helium sales are reduced by nearly 1.5 billion cubic feet below system capacity. This is unwarranted and unwise.

Discussion: As we all know, the Cliffside Reservoir is in decline, and the capacity of the BLM system to produce crude helium will gradually fall of its own accord. This has been a matter of serious concern to the many industries that rely on helium as an essential component of their products. Partially as a result of this decline, the marketplace for helium over the last few years has been marked by periodic shortages, rationing, and unpredictable price spikes. Given this history, it is essential that the Helium Stewardship Act be implemented in a manner that minimizes such disruptions in the future. We believe that arbitrarily reducing helium sales by 30% below delivery capacity in this environment will cause market distortions and disruptions that are preventable.

In addition, the volumes proposed to be made available for sale by the BLM do not comply with the Helium Stewardship Act's requirements (noted above). The provision requiring the BLM to offer for sale as much helium as the system can produce, or an amount equal to Fiscal Year 2012's production, must be seen in light of the Act's many admonitions to avoid market disruption. There was a clear concern on the part of Congress that disruptions in supply to key industries be avoided while very significant reforms are being phased in.

Finally, the proposed plan is almost certain to reduce the proposed return to the taxpayer. Section 6(b)(1)(B) of the Act requires the Secretary "to maximize the total financial return to the taxpayer." Reducing the volume of crude helium to be sold by 30% below system capacity for seven consecutive years will certainly reduce these returns. It is not clear what type of contingencies the BLM is anticipating in setting aside 10 percent for this purpose. However, there appears to be no provision for making these amounts available for sale if no such contingency occurs.

We believe that there may be some merit in reserving a portion of the system's delivery capacity for private storage delivery. This would allow storage contract holders to access their helium in the event that they are unable to acquire helium through auction, or if necessitated by other circumstances. However, given the other important considerations discussed above, we believe that a 20% reservation for this purpose is excessive.

Proposed Resolution: For each year under Phase B, the 10% set-aside for contingencies should be eliminated, and the set-aside for private storage delivery should be scaled back significantly. Taking these steps will minimize the potential for market disruptions, maximize the return to the taxpayer, and more fully comply with the law.

2. Delivery Prioritization:

Issue: The delivery prioritization plan proposed by the BLM arbitrarily penalizes storage contract holders who own blocks of Crude Helium acquired by means other than at auction.. Specifically, the proposal to deliver allocated and unallocated helium on a "best-efforts basis" while other categories of helium are

assured of 100% delivery is unwarranted and unnecessary. This provision adds another measure of uncertainty into the marketplace. In the event that system capacity becomes constrained, all categories of helium except in-kind helium for federal users should be prorated on an equal basis.

Discussion: The BLM plan states that, if the system is unable to deliver all helium that is requested, in-kind helium and auctioned helium will be assured delivery, while allocated and unallocated helium will be prorated as necessary. This plan does not appear to comply with the Act. In setting out requirements for helium storage and delivery in Section 5(e), the Act provides for priority delivery of only one category of helium – in-kind helium for federal users. The law places auctioned helium, allocated helium, and non-allocated helium on an equal footing, requiring the establishment of a schedule that “ensures timely delivery” of each category of crude helium. When the Act assigns an equal level of priority to each class of helium, it is inappropriate for the BLM to do otherwise.

In addition, it is clear that Congress spent a great deal of time considering this issue. Different versions of the legislation at various points in the legislative process contained differing provisions on delivery prioritization. The legislation passed by the House had detailed provisions assigning a higher level of priority to delivery of auctioned helium over non-auctioned helium. The House provisions were rejected in the final version of the bill. Instead, the enacted version of the legislation included prioritization provisions that matched those of the Senate committee-approved bill. These provisions assign an equal priority level to auctioned, allocated and non-allocated helium. Given the significant amount of time Congress spent on this issue, this legislative history should not be ignored.

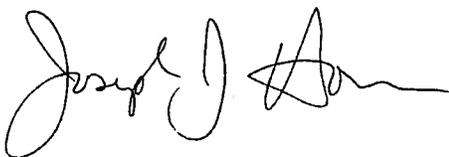
Finally, the BLM may have considered the higher priority assigned to auctioned helium desirable to encourage greater participation in the auctions under Phase B. However, more-than-adequate inducements for participation in the auctions already exist. Additional benefits that are not envisioned under the law are unnecessary.

Proposed Resolution: If the system is unable to deliver all of the helium requested, all categories of helium except in-kind helium should be prorated on an equal basis. This will provide the highest level of certainty and predictability to the marketplace and most closely follow the requirements of the Act.

Conclusion:

Thank you for the opportunity to submit these comments. We believe that the implementation of the remedies proposed in these comments will provide greater protections against marketplace disruptions, and ensure a reliable supply of helium to critical industries. Again, we appreciate your efforts to expeditiously implement the requirements of the Helium Stewardship Act, and we look forward to discussing these issues with you in greater detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph J. Horn". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Joseph J. Horn
President
Linde Global Helium, a division of Linde Gas NA LLC

Comments by Linde on Bureau of Land Management FRN 4310-FB

Date: 6/12/2014

General Comments:

1. Timeline: The BLM has not provided an adequate timeline to allow for comments and subsequent revision of the FRN between the date of publishing and the scheduled date of the first Auction. Linde requests that the BLM push out these dates to enable time for adequate incorporation of changes and revision of the FRN.
2. Flywheel concept – The HPA introduced a key concept for the helium industry of enabling the Federal Helium system to act as the industry flywheel, and in this manner was able to minimize market disruption for many years. The process envisaged for allocating and delivering helium following a “use it or lose it” principle in the FRN does not accommodate this concept. We strongly urge the BLM to include the ability to turn down refineries in periods of excess supply without the penalty of losing access to delivery and to operate at higher rates in times of shortage, which is important to minimize market disruption.
3. Actual Sales and hence delivery are not linear – The BLM’s proposals around sales and delivery produce a linear volume on a monthly basis in order to deliver volumes of product sold by the BLM. Since Helium is a global commodity and the Federal Reserve is still the only site worldwide that has the capability to “store” helium that has been purchased from the BLM, purchasers require helium to be delivered according to its requirements – ie sales. Each purchaser is impacted by global market fluctuations, and also by other global sources of Helium which results in a demand profile that is not linear, and consequently the BLM delivery mechanism needs to factor this into its formula, providing flexibility to all purchasers in the event this is required without punitive actions in the event a user does not take delivery of its most recent entitlement.
4. Inventory Stranding – According to the proposed sale schedule and delivery prioritization developed by the BLM, there is the distinct possibility of stranding of privately held inventory. This will de-prioritize contract holders for having purchased helium under the HPA, which was never intended by congress in developing the HSA.
5. Excess supply – the FRN does not adequately deal with the current situation of excess supply and Linde recommends that the BLM publishes a description about how volumes will be apportioned during a period of excess industry supply, and how the HEU will be operated in this situation.
6. Apparently the FRN applies only to volumes delivered in FY 2015, until the current storage contracts expire. Linde recommends that the FRN is modified to state that the FRN applies only to FY 2015 volumes sold and delivered.
7. Linde feels it is important to obtain the BLM’s proposals for the FRN for 2016 as soon as possible in order to enable planning and discussion of these to commence.

Specific clauses which require modification:

Number	Clause	Comment
1	1.02	<p>Definition of Excess Refining Capacity – As produced volumes reduce, it is expected that there will be reduction in refinery capacity, as refiners decommission or mothball refining capacity, and the definition needs to incorporate this possibility. As the reported capacity is likely to change over time, as refiners de-rate plants to meet expected deliveries from the BLM. Furthermore this will change at short notice because of outages at other plants. Linde proposes that a range of excess capacity is adequate. Since according to the FRN, the BLM will never auction more than about 300 mmscf in any year, the amount likely needing to be tolled will be less than that figure, as it is expected that refiners will make their own purchases at auction. So as long as industry shows an excess capacity more than the amount purchased by non-refiners, that's should be adequate. In Linde's opinion, it should be adequate for refiners to simply declare that more than a certain volume is available for tolling, such as for example more than 100 mm is available. This approach will reduce the administrative burden on refiners and provide understanding that tolling capacity is available.</p>
2	1.04	<p>Table 1 shows proposed volumes to be sold by the BLM that are in contradiction of the HSA directive of offering a minimum quantity for sale that is as a minimum, the volumes indicated as "Forecasted Production Capability". Not offering the contingency volume for sale will impact returns for the taxpayer. By offering lower volumes for sale, this impacts directly the volumes to be made available for all purchasers.</p> <p>In Kind volumes of 170 mmscf which will be withheld from the total volumes to be sold are significantly higher than the current In Kind volumes actually being delivered, which are about 125 mmscf annualized.</p> <p>The 20% available for Private Storage Delivery is not adequate to deliver the current volumes held in storage over time. The possibility of stranding a portion of this volume exists. Linde proposes a different allocation methodology that enables access to these molecules to be provided, as described below in #8.</p>
3	2.04	<p>We believe the formula for calculating the price in FY2015 Phase B sale is incorrect. This is because the Producer Price Index is generally provided as a number. It also needs to be expressed relative to some base index. Accordingly the formula should read:</p> $\text{FY 2015 Sales Price} = (10\% * \text{AAP}) + (90\% * ((\text{PPI}_n / \text{PPI}_b) * \$95))$ <p>Where the PPI_n is PPI in year n and PPI_b is the base PPI.</p>
4	2.07	<p>Linde believes that the time frame provided in this clause is inadequate to enable feedback on the FRN to be adequately incorporated. In fact the 30 day comment period is due after the FRN auction notice for the Phase B auction is published. Linde recommends the auction and sale program is delayed in accordance with the HSA.</p>
5	2.11	<p>Auction lots – The HSA clearly defines "Qualifying Domestic Helium Transactions" as being at least 15 mmscf. These transactions are then used in the determination of the crude helium price. Based on this fact, the BLM should then exclude any transactions of below this volume from its calculation of helium prices. Linde therefore recommends that minimum lot sizes of 15 mmscf are sold.</p>
6	3.02	<p>The Delivery priority established by the BLM is not in accordance with the HSA,</p>

		<p>which does not provide for differing delivery priorities except for In Kind helium. The HSA clearly states that (sec 5(e) "... the Secretary shall.... establish a schedule for transportation and delivery of helium... that ensures timely delivery of helium acquired from the Secretary... by means other than an auction... including non-allocated sales."</p> <p>By Prioritizing Auctioned Helium above non auctioned Helium and Pre HSA purchased helium, Linde believes the BLM is not following the guidance provided by the HSA and requests that this schedule be changed to reflect the requirements of the HSA. Linde's letter to the BLM of June, 2014 addresses this issue in detail.</p>
7	3.03	<p>Delivery Prioritization</p> <p>Linde believes the proposed delivery mechanism is untenable for a number of reasons:</p> <ol style="list-style-type: none"> 1. Putting PHSA molecules on an "as available" delivery basis could result in stranding of the molecules. 2. PHSA delivered at up to 3% each month - Please provide clarity of what the 3% refers to. 3. As tolled volumes grow, the 2 for 1 credit applied to determine the refiners AL_R, could become impractical to implement, thereby disadvantaging refiner's ability to obtain delivery of their own inventory. It appears as if BLM has decided to abandon this concept, which Linde supports. 4. By implementing a "use it or lose it" principle for deliveries, this does not enable refiners to undertake plant maintenance shutdowns, both planned and unplanned, on to enable ongoing servicing of customers. This is a highly punitive proposal, which is likely to lead to market disruptions, a concept which should be avoided, as mentioned on numerous occasions in the HSA. 5. The proposed delivery prioritization system does not cater for instances where any users do not require product, such as in the event of new plant start-ups, or in the inverse, when there are plant shutdowns. 6. There is no allowance in the process in the event that complete volumes of product are not able to be taken by Tollers – for example the BLM offers integer volumes for sale delivery and the product is delivered in Iso container loads, which will result in small overages or under takes in the Toller's balance. There is not accounting provision in the BLM's calculation for this eventuality. 7. Based upon the conference call of May 5, the BLM proposed yet another punitive system for refiners by withholding of their inventory for delivery in the event that tolling services are not offered. Linde opposes this proposal, which will not provide a positive incentive for Tolling. Linde believes the goal should be to stimulate completion for tolling services by Refiners, which is most likely to occur in the scenario where delivery priority is as per the formula below in #8. 8. The BLM should clarify that the delivery prioritization is only implemented when there is a shortage in the system and the BLM is unable to meet demands on its supply. 9. It is Linde's understanding that the delivery prioritization proposed in the FRN is only for the period ending on September 30, 2015 and requests that

		the BLM clarifies this point.
8	3.03	<p>Linde proposes that the following delivery priority is followed for the revised storage contract effective FY 2016 onwards:</p> <p>Delivery volume for any user = In kind purchases for user + (total production rate – in kind rate)*% of total inventory that user has in storage.</p> <p>This will ensure that Tollers have a portion of the total delivered volume and Refiners will be incentivized to compete for tolling business. It will also ensure that a competitive market develops for bidding for helium to obtain access to larger volumes of helium, which directly translates into larger delivered volumes for that user, if required. Conversely, when Tollers or refiners do not require their helium, their inventory will remain in storage with fair access when they require it. Any party requiring a higher “delivery allocation of helium” will simply have to bid aggressively for a larger block of helium at the next auction.</p>

----- Forwarded message -----

From: **Bigham, John** <jbigham@mathesongas.com>

Date: Thu, May 22, 2014 at 1:49 PM

Subject: Helium Sale & Auction

To: rjolley@blm.gov

Cc: "Lynch, Kevin" <klynch@mathesongas.com>

MATHESON COMMENTARY on Notice of Proposed Action: Implementation of Helium Stewardship Act Sales and Auctions of May 16, 2014

Following our review of the “Notice of Proposed Action: Implementation of Helium Stewardship Act Sales and Auction” (“FRN”), Matheson is deeply concerned that the BLM has failed to address a number of fundamental issues. We believe that the sale/auction provisions and lack of BLM oversight regarding tolling as described in the FRN will perpetuate a system that favors the Helium refiners, and will fail to achieve the stated goal of the HSA to increase taxpayer returns by selling crude helium at market-driven prices.

Matheson has commented at some length on the implementation of the HSA in the past. If the BLM is willing to consider further revisions to the FRN, we remain willing to participate in the process. However, given the timeline published in section 2.07 of the FRN, it does not appear that the BLM has left sufficient time to make any substantive revisions. With that in mind, Matheson will focus these comments on the major deficiencies we see in the FRN:

- The BLM has not provided any specific details regarding how “Excess Refining Capacity” will be measured and monitored to ensure that responses submitted by each refiner are accurate and calculated on a consistent basis. Given that the apportionment among the refiners will be based on their respective percentage share of the total refining capacity as of October 1, 2000, for the sake of consistency, we believe that the same basis should also be used to validate the reported Excess Refining Capacity by taking into consideration each refiner’s annual planned production vs. their respective October 1, 2000 total refining capacities.
- The FRN does not contain any mechanism for establishing “commercially reasonable” rates for tolling services, and it does not appear that the BLM intends to play an active oversight role to ensure that the tolling provisions set forth in the HSA actually occur. Matheson provided testimony on this topic previously, including a proposed tolling methodology whereby the BLM would act as the clearinghouse to match refiners and non-refiners (see attached). We continue to believe such a system would be much more efficient than the BLM’s apparent preference to let the parties reach (or fail to reach) terms on tolling entirely without guidance or assistance.

We note further in regard to securing tolling services at commercially reasonable rates that BLM representatives have made comments (including at the March 6, 2014 Public Scoping meeting in Amarillo) about non-refiners who fail to reach tolling agreements taking legal action and “letting the courts decide” what is a commercially reasonable rate for tolling services. We encourage you to consider the following points: 1) The BLM stockpile of crude helium is projected to last in a commercially accessible amount for only several more years; 2) In each succeeding year, an ever greater proportion of BLM crude helium will be auctioned; 3) It is likely that non-refiners who fail to secure reasonable tolling deals early in the implementation of the HSA will be extremely reluctant to offer high prices for large volumes of auctioned helium in future years with the tolling issue unresolved; and 4) The legal process is expensive, with uncertain outcomes, and the possibility of appeals. It can be made to last a long time. We believe

that by the time the courts would adjudicate the tolling issue to completion, it is likely that there will be very little BLM crude helium left to toll. In the intervening years, many non-refiners would likely have sat out the auctions. That scenario would not likely result in the BLM receiving the highest possible price for the auctioned crude helium.

- Historically, each conservation sale offered by the BLM has included an allocated and non-allocated component, with non-refiners eligible to participate in the non-allocated sale. Following enactment of the HSA, both of the Phase A FY2014 sales included allocated and non-allocated components. We see nothing specific in the HSA that prohibits the BLM from offering a portion of the Phase B FY2015 and FY2016 one-time sales on a non-allocated basis. We recommend that the BLM include non-allocated sales within the non-auctioned portion of helium sold throughout Phase B. Failure to do so will only increase the advantage held by refiners in the form of exclusive access to BLM helium sold under advantageous terms.
- The FRN only offered one example of how the delivery schedule would be implemented in Section 3.04. For clarification purposes, we would like to see some additional examples to help understand how this system will work 1) if the volume requested by the refiners is less than the total production available for sale/auction or delivery; and 2) if the total volume requested (both refiners & non-refiners) exceeds the total production available for sale/auction or delivery. The FRN indicates that when planned delivery exceeds available delivery capacity, the allocated helium delivery (after prior month corrections) will be prorated based on refiner/non-refiner total helium in storage. This statement appears to conflict with the prioritization for helium delivery set forth in section 3.02.
- In a scenario where non-refiners are unable to secure tolling agreements with the refiners, what happens to the subsequent delivery allocation available to the refiners? The BLM's Tim Spisak said during the April 4, 2014 public conference call regarding the implementation of the HSA, that with respect to tolling, "If none of the refiners toll, that gas will accumulate and be held back from period to period (month to month or quarter to quarter) and will not be available..." Our understanding of the delivery prioritization methodology described in the FRN contradicts that statement. It appears to us that if no refiners toll, more pipeline capacity will be available for all the refiners to take delivery of allocated sale volume or other helium volume for their own benefit. It appears that refiners are in fact incentivized not to toll for non-refiners in order to preserve access to BLM helium for refiners only. We recommend that any unused delivery allocation prioritized for non-refiners should be set aside or held back, rather than redistributed among the refiners.
- How does the BLM intend to prioritize Pre-HSA inventory held in a non-refiner's storage account? The FRN indicates that the helium will be delivered in proportion to each "refiner's" volume in storage up to 3% each month. There is no mention of "non-refiner's" volume in storage. The volumes stored by non-refiners are typically much smaller than those stored by refiners. As a result, 3% of a non-refiner's stored helium may be so low as to make it commercially unviable for tolling. We recommend that the greater quantity of 3% of stored helium or 5 MMCF/month for Pre-HSA inventory should be considered for non-refiners.

There are also two minor points of clarification for the BLM to consider:

- In the definition listed in the FRN for Federal in-kind crude helium, Matheson believes that the references to "private refiners" and "refiner" should be modified to reference "storage contract holder(s)".

- The estimated price of \$100/MCF does not reflect the percentage change in PPI for the period from September 2013 – March 2014. The specific PPI index to be used should be referenced, but “Total Manufacturing” PPI for that period yields an increase of 0.9%, resulting in a price of \$95.83/MCF. Matheson believes that the PPI used should be closer to 1% than the 5% used to develop the \$100/MCF estimate.

Lastly, with respect to timing, Matheson suggests that the BLM consider delaying the auction until July 15th. Given the delayed release of the FRN on May 16th, this would allow the BLM additional time to review comments received and consider potential changes. Additionally, we recommend that the BLM consider hosting the annual storage contract holders meeting on July 16th (or some other consecutive dates for the auction and annual meeting). For people in some parts of the country, travelling to Amarillo takes a lot of time and money. Combining the auction and annual meeting would eliminate the need for two separate trips within a three week period. Moving the auction back should not impact the BLM’s ability to meet the August 1, 2014 deadline set forth in the HSA. If required, the BLM could run the FY2015 Phase B and FY2016 one-time sale concurrently.

If Matheson can provide additional information or help to clarify our comments, please do not hesitate to contact us.

Respectfully,

John Bigham
Vice President, Global Helium

Kevin Lynch
Senior Vice President, Specialty Gas & Helium

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Helium Tolling Rulemaking: Proposal on Determining Excess Capacity & Market Price

Mathson Tri-Gas, Inc.

8 November, 2013

Summary: The Helium Stewardship Act of 2013 (HR 527) mandates as a condition of sale or auction to Helium Refiners that the Helium Refiners “shall make excess refining capacity available at commercially reasonable rates” to non-Refiners who purchase BLM crude helium at auction or through other means. The wording leaves two critical details undefined, namely i) how to determine what is “excess refining capacity”, and ii) how to determine what are “commercially reasonable rates” for tolling.

As history as shown, Refiners are unwilling to toll crude helium for their competitors. The Refiners may feel motivated to demonstrate that it is pointless for non-Refiners to buy crude helium from the BLM because the non-Refiners will never be able to convert the crude helium to pure helium and reap the economic benefit from the crude helium they have purchased. In so doing, the Refiners will have eliminated numerous potential competitors from the crude helium auction, thereby continuing their near-exclusive access to BLM crude helium. By this logic, helium Refiners are incentivized to minimize or eliminate the apparent existence of any “excess” refining capacity, and to elevate the benchmark of what may be considered “commercially reasonable rates” for tolling services.

The federal government has thus far resisted employing a prescriptive methodology wherein the government would dictate tolling volumes and/or tolling prices to Refiners, and the Refiners have attacked this concept as an unconstitutional “taking” of their private property (i.e. the use of their privately owned refining plant capacity.)

We propose a mechanism whereby without coercion or a prescriptive mandate on tolling volumes and prices, the BLM can act as a market-maker for helium refining services, matching willing sellers to willing buyers. The system relies on a double auction, one for buyers and one for sellers, the provision of economic incentives to Refiners to participate in good faith, and the underlying possibility of investigation and punishment if Refiners are thought to be stonewalling the process.

The Process

Assume a bi-annual auction of tolling services to refine BLM crude helium (“Tolling Auction”).

Refiners “Sell” Auction

No later than the day of the Tolling Auction, each Refiner must submit to the BLM a confidential bid stating :

- A quantity the Refiner is willing to toll during the coming 6-month tolling period at one of its US Refining plants connected to the BLM pipeline. (Assume that the tolling will be done in 6 substantially equal monthly installments.)

- The minimum price at which the prospective Seller (Refiner) is willing to provide such tolling services.

Non-Refiners “Buy” Auction

No later than the day of the Tolling Auction, qualified non-Refiners must submit to the BLM a confidential bid stating:

- A quantity of tolling service volume that the non-Refiner is willing to purchase during the coming 6-month tolling period at one of the US Refining plants connected to the BLM pipeline. (Assume that the tolling will be done in 6 substantially equal monthly installments.)
- The maximum unit price that the prospective Buyer (non-Refiner) is willing to pay for such tolling services.

Conditions on the non-Refiners’ participation

- The non-Refiner must provide standard helium containers of no less than 11,000 gallon nominal capacity in proper working order for filling with tolled volume at the Refining plant selected for tolling.
- Refiners offering tolling services have no obligation to provide helium containers or transportation services for the non-Refiners requesting helium services. Refiners are required to provide container cool-down and nitrogen shielding and other such customary services as needed at the Refiner’s standard rates used with its own customers.
- The maximum volume for which a non-Refiner may bid on buying tolling services is the volume of crude helium that the non-Refiner has in its storage account with the BLM ***as of the date of the Tolling Auction***. In other words, a non-Refiner may not bid in a speculative manner for tolling services required for crude helium that the non-Refiner does not yet own.
- Helium Refiners are ineligible to bid to purchase tolling services through this auction.
- **Question: Credit risk/performance bond requirements as part of qualification?**

Matching Buyers and Sellers

Within 15 days of receiving the bids to buy and the bids to sell tolling services, the BLM will perform the following tasks:

Rank-order the Offers to Sell Refining Services

- The BLM will rank the offers to sell tolling services from lowest price offer to highest price offer, with the lowest Sell offer ranked #1, the next lowest #2, and so on.

Rank-order the Offers to Buy Refining Services

- The BLM will rank the offers to buy tolling services from highest price Buy offer to lowest price Buy offer, with the highest Buy offer ranked #1, the next highest #2, and so on.

Match Offers to Sell with Offers to Buy

- The BLM will match the highest price “Buy” bids with the lowest price “Sell” bids in the following manner:
 - The BLM will examine the #1 (highest price) buy offer and the #1 (lowest price) sell offer.
 - If the offered Buy price equals or exceeds the offered Sell price, the BLM will assign the volume of the #1 buy bid to be tolled under the #1 sell bid, until either:
 - The offered buy volume from the #1 Buy offer is fully satisfied, or
 - The offered sell volume from the #1 Sell offer is fully consumed.
 - The BLM will then move to the next tier of “unmatched” buy volume and look at the next tier of “unmatched” sell volume, and perform the same actions, matching progressively lower-priced Buy offers with progressively higher-priced Sell offers until whichever of the following occurs:
 - All Buy offer volume is matched with Sell offer volume at prices such that no prospective buyer is required to pay more than the Buy offer made by such prospective buyer, and no prospective seller is required to sell any tolling volume for less than the Sell offer made by such prospective seller.
 - If any Buy offer volume remains unassigned to a Sell bid, while any Sell bid remains unassigned, it is because the price associated with the unmatched Buy volume is lower than the prices associated with all of the unmatched Sell volume.
 - If the highest Buy offer price is less than the lowest Sell offer price (or if there is no Buy offer volume or no Sell offer volume), no tolling offers will be matched within this auction.

Example:

- The BLM receives the following Sell Offers:
 - Refiner A offers to toll 20 units at a price no lower than \$5/unit.
 - Refiner B offers to toll 10 units at price no lower than \$2/unit.
 - Refiner C offers to toll 30 units at a price no lower than \$3/unit.

- Simultaneously, the BLM receives the following Buy Offers:
 - Buyer A offers to buy 20 units of tolling at \$4/unit.
 - Buyer B offers to buy 20 units of tolling at \$5/unit.
 - Buyer C offers to buy 50 units of tolling at \$1/unit.
 - Buyer D offers to buy 10 units of tolling at \$10/unit.
 - Buyer E offers to buy 20 units of tolling at \$7/unit.

- The BLM rank orders the 3 bids representing 60 total units of Sell offers, with #1 (Refiner B) at \$2/unit, and #3 (Refiner A) at \$5/unit.

- The The BLM rank orders the 5 bids representing 120 total units of Buy offers, with #1 (Buyer D) at \$10/unit, and #5 (Buyer C) at \$1/unit.

The ranking of Buy and Sell offers is shown below.

SELLER- Offered Volume at Price Will ACCEPT NO LESS THAN		BUYER- Offered Volume at Price WILL PAY		
				Bid Rank
		Buyer D: 10 units @ \$10/each		1
		Buyer E: 20 units @ \$7/each		2
		Buyer B: 20 units @ \$5 each		3
		Buyer A: 20 units @ \$4 each		4
Bid Rank				
1	Refiner B: 10 units @ \$2/Each			
2	Refiner C: 30 Units at \$3/Each	Buyer C: 50 units @ \$1 Each		5
3	Refiner A: 20 units at \$5/Each			

The BLM will match the following volumes:

Buyer D will pay \$10/unit for 10 units of tolling to Refiner B.

Buyer E will pay \$7/unit for 20 units of tolling to Refiner C.

Buyer B will pay \$5/unit for 10 units of tolling to Refiner C.

Buyer B will pay \$5/unit for 10 units of tolling to Refiner A.

At this point, Refiner A has 10 units of refining capacity unmatched by a Buy offer, which Refiner A is willing to toll at a price no less than \$5/unit. However, the highest price available from an unmatched Buy offer is \$4/unit from Buyer A. Since Buyer A will pay no more than \$4/unit and Refiner A will accept no less than \$5/unit, there is no more volume to be matched.

Pictorially, the volume assignment looks like this:

MATCHED TOLLING VOLUMES				
SELLER- Offered Volume at Price Will ACCEPT NO LESS THAN		BUYER- Offered Volume at Price WILL PAY		
Bid Rank				Bid Rank
1	Refiner B: 10 units @ \$2/Each	10 units @ \$10	Buyer D: 10 units @ \$10/each	1
2	Refiner C: 30 Units at \$3/Each	20 units @ \$7	Buyer E: 20 units @ \$7/each	2
		10 units @ \$5	Buyer B: 20 units @ \$5 each	3
3	Refiner A: 20 units at \$5/Each	10 units @ \$5		Buyer A: 20 units @ \$4 each
		UNMATCHED		
		UNMATCHED		
		UNMATCHED	Buyer C: 50 units @ \$1 Each	5

In this example, the following things happened:

- Buyers requested 120 units of tolling at various prices.
- Sellers offered 60 units of tolling at various prices.
- The Refiner offering the cheapest price was matched with the prospective Buyer offering the highest price.
- The price offered by the prospective Buyer was the price paid in all transactions. The Refiners are incentivized to offer as low a price as they can accept, because the price offered by the Buyer is what will govern the transaction. Bidding the lowest Sell price moves the Refiner’s volume to the head of the line to be matched with the highest-price Buy price, thus maximizing the Refiner’s profit on the transaction.
- No Refiner was required to accept a price for tolling lower than the price it offered through the Sell auction.
- No Buyer was required to pay a price for tolling higher than the price it offered through the Buy auction.
- 10 units of tolling offered by the Refiners was left unutilized because the price offered by the highest unmatched Buy bid was lower than the price required by the lowest unmatched Sell bid.

Announcing Matched Volumes

Within 30 days after the Tolling Auction, the BLM will notify all tolling bidders in the Buy Auction and the Sell Auction, to let them know how much, if any, of their bid volume was matched with counterparty offers.

In that communication, the BLM will notify successful buyers and sellers of the following:

- Buyer's identity, Seller's Identity, tolling volume, price to be paid.

This information will be kept confidential, except to the Buyer and Seller engaged in each transaction.

Contracting for the Tolling Services

The bids to Buy tolling services and the bids to Sell tolling services will be considered by the BLM to be binding offers on the bidders. If the BLM matches a Buy offer with a Sell offer in accordance with the methodology described herein, the matched parties will enter into a contract within 60 days after the date of the Tolling Auction.

On the Buyer side, the contract will be considered a 100% Take-or-Pay obligation, meaning that the Buyer must offer crude helium to the Refiner for tolling, or pay the price for tolling of any helium not offered to the selected Refiner during the 6-month tolling period. (Force Majeure is the only exception.)

On the Sell Side, the contract will be considered a 100% Deliver-or-Pay obligation, meaning that the Seller must provide tolling services up to the "matched" volume (assuming that the Buyer makes the crude helium available for tolling by the Seller) or pay a penalty equal to the contracted tolling price for each unit volume of helium offered by the Buyer, up to the full contract quantity, and not tolled by the Refiner during the 6-month tolling period.

Other inducements to Toll at Market Competitive Rates

The BLM shall reserve from the Allocated sale volume an amount equal to 10% of the Allocated sale volume that shall not be assigned to a Refiner on the normal basis, which is determined by Refiner plant capacity connected to the BLM pipeline system. (This reserved volume is called "Tolling Incentive Volume".) Instead, this portion of the Allocated sale volume will be allotted during each crude helium allocation period to the Refiners who successfully entered into tolling arrangements through the Tolling Auction in the previous 12 month period, in proportion to the share of tolling volume provided by each Refiner through the previous 12-months.

Example: If 90 Units are available as Allocated volume, 9 units will be set aside as Tolling Incentive Volume. During the previous 12 months of Tolling auctions, Refiner A tolled 3 units, Refiner C tolled 2 units, and Refiner B tolled 0 units, for a total of 5 units tolled. As a result, Refiner A's allotment of Tolling Incentive Volume will be $3/5 = 60\% * 9 \text{ units} = 5.4 \text{ units}$. Refiner C's allotment of Tolling

Incentive Volume will be $2/5 = 40\% * 9 \text{ units} = 3.6 \text{ units}$. Refiner B's allotment of Tolling Incentive volume will be 0.

The advantage to be gained by a Refiner in the form of an increased Allocation volume is meant to encourage the Refiners to compete with each other to offer tolling volume at attractive prices in order to increase their probability of successfully entering into a Tolling arrangement.

Questions and Other considerations

What happens if a Refiner claims it has no extra refining capacity (submits an offer to sell 0 tolling volume or submits no offer at all)?

- In addition to the Refiner's missing out on the economic benefit of tolling, the BLM will have the right to investigate this claim in light of the Refiner's stated refining capacity (as stated in the calculation that determines Allocation volumes), other sources, and reported demand.
- If the BLM determines in its judgment that the Refiner has mis-represented the facts in order to reduce or avoid any obligation to toll for Non-Refiners, the BLM may revoke or reduce the Refiner's right to receive Allocated helium volume in the following supply period.
- Note: Instead of BLM investigating, it could be done by GAO.

What happens if a Refiner bids a tolling offer price so high that no Buyer offer can succeed?

- In addition to the Refiner's missing out on the economic benefit of tolling, the BLM will have the right to investigate this claim in light of the Refiners' reported cost to refine, and other Refiners' reported cost to refine.
- If the BLM determines in its judgment that the Refiner has bid very high in order to reduce or avoid any obligation to toll for Non-Refiners, the BLM may revoke or reduce the Refiner's right to receive Allocated helium volume in the following supply period.
- Note: Instead of BLM investigating, it could be done by GAO.

What happens if a willing Buyer is matched with a willing Seller (Refiner), and yet the parties cannot agree on a contract within 60 days of the Tolling Auction?

- Either party may refer the matter to the BLM for adjudication. If the BLM determines that one or both parties did not negotiate in good faith, the party or parties found "guilty" may be punished by the BLM. "Guilty" Buyers may be excluded from participating in the next Tolling Auction. "Guilty" Refiners may have their Allocated volume reduced or zeroed out altogether in the next Allocation Sale.
- Note: Instead of BLM reviewing the case, it could be referred to Federal Mediation Service for a binding ruling.

Other Issues/Question:

1. Should tolling for in-kind helium be treated differently than tolling for commercial helium?
2. BLM issue a standardized tolling contract form that all buyers/sellers use?



**COMMENTS ON BLM'S NOTICE IMPLEMENTING
THE HELIUM STEWARDSHIP ACT OF 2013**

June 16, 2014

Helium Sale and Auction
Bureau of Land Management
Amarillo Field Office
801 S. Fillmore, Suite 500
Amarillo, TX 79101

Submitted via email to rbjolley@blm.gov

Re: Notice of Proposed Action: Implementation of the Helium Stewardship Act of 2013
Sales and Auctions (79 Fed. Reg. 28540 (May 16, 2014)).

Dear Mr. Jolley:

Praxair appreciates the opportunity to comment on the Bureau of Land Management's ("BLM") notice implementing the Helium Stewardship Act of 2013, Pub. L. No. 113-140, 127 Stat. 534 ("the Act"). Praxair, Inc. ("Praxair" or "the Company"), is an American multinational corporation and the largest industrial gas company in North and South America. Praxair is headquartered in Danbury, Connecticut and employs 25,000 people worldwide with approximately 10,000 employees in more than 500 facilities across the United States. The company manufactures, sells, and distributes atmospheric, process, and specialty gases. Praxair products, services, and technologies bring productivity and environmental benefits to a wide range of industries including aerospace, chemicals, food and beverage, electronics, healthcare, manufacturing, and metals, among others.

Praxair has been in the helium business for nearly 100 years serving private industry, researchers, and federal agencies. The company supplied the helium used by NASA to launch space shuttles into orbit, the helium-oxygen breathing mixtures used by the Navy to keep them safe while performing deep-dive operations, and the helium used by the Air Force each time a space vehicle is launched to provide our intelligence community with the information necessary to protect our citizens. Praxair's investments in a robust global supply chain and a diverse set of helium sources have made it a world leader in helium production and distribution. These investments include over \$500 million of capital investments in plants and equipment to access, refine, and deliver to market crude helium sourced from the Federal Helium Reserve operated by the BLM. Praxair is also a refiner of crude helium from the Federal Helium Reserve.

Praxair appreciates BLM's work to draft and propose a plan to implement the Act. The BLM has conducted itself in an open and transparent manner, soliciting views and perspectives from a

variety of stakeholders. While Praxair has several concerns with the Notice published in the *Federal Register* on May 16, 2014, it is important to note that Praxair supports BLM's plan to conduct the FY 2016 one-time sale. Indeed, Praxair encourages BLM, in all cases, to implement the Act in accordance with its express terms and clear congressional intent where there is any ambiguity.

Praxair also supports BLM's intention to establish a 10% engineering contingency reserve of helium as a hedge against future production and delivery problems. This is a prudent measure that is consistent with the Act's mandate that the transition to a full auction be accomplished with as little adverse impact to the global helium market as possible. Finally, Praxair thanks BLM for carefully describing the ways in which an organization or an individual may participate in the Federal In-Kind program. BLM's discussion about the Federal In-Kind program will help address any confusion that may exist among federal grantees and contractors about the program.

I. Procedural Concerns

As an initial matter, our principal concern with BLM's Notice is a procedural one. Although the Act introduces a host of new concepts and procedures into the federal helium sale and allocation process, it provides little detail with respect to actual implementation. This responsibility falls to BLM and demands full compliance with the rulemaking procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*

BLM's Notice is unquestionably a substantive rule that must be promulgated in compliance with the notice-and-comment rulemaking procedures of the APA, 5 U.S.C. § 553, as well as in compliance with other related statutes and Executive Orders ("E.O.") applicable to federal agency rulemaking. Only full compliance with these legal processes, including full notice and opportunity for public comment *before* adopting final rules, as well as preparation of economic impact analyses, can ensure that BLM takes into account all of the implications of its proposed helium sale and auction procedures and achieves a fair, predictable, and legally defensible outcome.

The fact that BLM has styled this publication as a "notice of proposed action" published in the "Notices" section of the *Federal Register* instead of a "notice of proposed rulemaking" in the "Rules and Regulations" section, cannot convert the proposed federal helium sale and auction procedures from a substantive rule to a mere administrative notice.¹ This is because BLM's "Notice" does more than clarify statutory terms, track statutory language, or reiterate pre-existing statutory duties.² Rather, it binds the future conduct of sale and auction participants as well as BLM, affects participants' substantive rights, and imposes new duties on industry that are not compelled by the plain language of the statute and that did not exist before. These are the

¹ See *Phillips Petroleum Co. v. Atlantic Richfield Co.*, 22 F.3d 616, 619 (5th Cir. 1994) ("[T]he label that the particular agency puts upon its given exercise of administrative power is not conclusive; rather it is what the agency does in fact.").

² See *id.*; *Enesco Offshore Co. v. Salazar*, 2010 U.S. Dist. LEXIS 111226, *17 (E.D. La., Oct. 19, 2010) [hereinafter *Enesco*].

hallmarks of a substantive rule.³ As a result, BLM must comply with the substantive rulemaking procedures of the APA *before* adopting federal helium sale and auction procedures.⁴

In skirting its obligation to comply with the APA's substantive rulemaking procedures, BLM is also impermissibly shirking its duty to comply with other statutory and procedural safeguards associated with the rulemaking process that are accomplished through review of proposed regulatory actions by the Office of Management and Budget. These obligations include analyzing the impacts of the rule on industry and others pursuant to the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, E.O. 12630 (requiring consideration of the rule's takings implications), E.O. 12988 (requiring consideration of the burden placed on the judicial system), and E.O. 12891 (requiring consideration of environmental justice issues), among others. These are all indispensable components of the federal rulemaking process, essential for ensuring due process for those affected by the rule and ensuring that the agency duly considers the consequences of its proposal before taking action. In sidestepping these procedural safeguards, BLM is risking uninformed decisionmaking and exposing whatever auction procedures it ultimately adopts to legal challenge.

Additionally, BLM's failure to observe the procedural requirements of the APA is in direct contravention of its congressional mandate. Congress clearly intended that BLM implement the Act by promulgating APA-compliant regulations. Section 9 of the Act provides that

[t]he Secretary of the Interior shall promulgate such regulations as are necessary to carry out this Act and the Amendments made by this Act, including regulations necessary to prevent unfair acts and practices.

The Act's legislative history confirms Congress' expectation that BLM would implement the Act through rulemaking. In a September 27, 2013 Senate floor colloquy with Kansas Senator Jerry Moran, Senate Energy and Natural Resources Committee Ranking Member and one of the principal sponsors of the bill, Alaska Senator Lisa Murkowski, stated:

Yes, it is our expectation that BLM will consider economic impacts throughout the implementation of this bill and develop regulations for this [definition of "excess refining capacity"] and other provisions in the bill accordingly.

We are aware that conducting an APA-compliant rulemaking process could take considerable time. Fortunately, Congress contemplated precisely this circumstance. Section 6(a)(3)(B) of the Act gives BLM considerable discretion to hold "Phase A" helium sales "under such terms and conditions as the Secretary determines necessary" for "any period during which the sales of

³ See *EnSCO*, *supra* note 2, at *17; *Davidson v. Glickman*, 169 F.3d 996, 999 (5th Cir. 1999).

⁴ See *EnSCO*, *supra* note 2, at *17 (invalidating the Department of the Interior's adoption of a Notice to Lessees ("NTL") in the absence of the APA rulemaking process because the NTL imposed new requirements on offshore oil and gas lessees "that were not in place before [and did] not simply track statutory language or reiterate existing duties.").

helium under subsection (b) [Phase B: Auction Implementation] is delayed or suspended.”⁵ According to the legislative history, the primary purpose of Section 6(a)(3)(B) is to allow enough time for BLM to complete the necessary rulemaking process:

During Phase A, BLM would continue to operate the Federal Helium Reserve with minimal changes for one year (through September 30, 2014) *in order to give BLM the time to put new rules into place for conducting auctions, setting prices, and ensuring continuity of supply.*⁶

Consequently, delay associated with rulemaking should not preclude BLM from continuing to hold helium sales in the interim under Section 6(a) of the Act. Praxair therefore recommends that BLM move forward with interim “Phase A” helium sales under Section 6(a) of the Act, and issue an APA-compliant Notice of Proposed Rulemaking for the development of helium auction and other rules under Section 6(b).

II. Substantive Concerns With the Notice’s Implementation Plan

BLM’s implementation plan presents several key structural policy concerns that will adversely impact the global helium market, revenue generated from the program, and diverge from clear congressional direction. Praxair’s principal substantive concerns with BLM’s Notice are prioritized as follows: (1) the restricted amount of production made available by BLM for sale or auction; (2) a pipeline prioritization schedule that restricts access to helium and destabilizes the helium market; and (3) a definition of the term “excess refining capacity” that does not adequately account for non-BLM sourced refining commitments and refiner capacity contingencies. Praxair also notes generally that the BLM implementation plan is impractical and unworkable because it fails to account for the realities of shifts in global supply-demand balances as evidenced by substantially less demand for BLM helium today after 3 years of shortage conditions.

1. BLM is Improperly Restricting Amounts of Helium Made Available for Sale or Auction.

Section 6(a) of the Act governs the manner in which crude helium is to be sold by the government upon passage of the Act, but prior to auction implementation. While Section 6(a)(1) grants the Secretary some level of discretion in establishing sale quantities (“[t]he Secretary shall offer crude helium for sale in such quantities . . . as the Secretary determines necessary . . .”), Section 6(f) establishes a minimum quantity or floor for the amount of helium that the Secretary must offer each fiscal year for sale or auction:

(f) **MINIMUM QUANTITY.**—The Secretary shall offer for sale or auction during each fiscal year under subsections (a) [Phase A, Allocation Transition], (b) [Phase B, Auction Implementation], and (c) [Phase C,

⁵ See also S. Rep. No. 113-83, at 11 (reiterating that the Senate Committee on Energy and Natural Resources adopted this amendment to “allow the extension of helium sales under Phase A (Section (6)(a)) if helium sales under Phase B (Section 6(b)) are delayed or suspended.”).

⁶ *Id.*, at 12 (emphasis added).

Continued Access for Federal Users] a quantity of crude helium that is the lesser of—

(1) the quantity of crude helium offered for sale by the Secretary during fiscal year 2012;⁷ or

(2) *the maximum total production capacity* of the Federal Helium System.

(emphasis added). BLM has explained to industry that it is not making the statutorily-required minimum volume of helium available for sale because it is setting aside 20% of field production capacity for the delivery of inventoried helium (i.e., helium that is stored in the BLM system but owned by private parties). Indeed, in a recent conference call with industry, BLM conceded that it is acting in a manner inconsistent with the Act, but nevertheless argued that perceived liability for failure to deliver this helium to its owners trumps the Act. According to BLM, the 20% inventory set-aside is necessary to ensure that owners of inventoried helium are able to drawdown their supplies before the program terminates.

BLM’s restricted helium sales are the result of applying an overly broad reading of the term “maximum total production capacity of the Federal Helium System”⁸ that is inconsistent with the Act. BLM has effectively determined that the phrase means both (1) unsold and (2) inventoried crude helium that is owned by private parties. BLM therefore arbitrarily construes the Federal Helium System’s “production capacity” to include not only unsold reserve helium owned by the federal government, which is appropriate, but also privately-owned inventoried helium stored by the government, which is not.

There is no basis in the Act for this reading, and implementation of the Act in this fashion will have negative consequences. Moreover, it is not the best approach to mitigating BLM’s perceived liability regarding non-delivery of inventoried helium. Restricting the amount of helium sold or auctioned will generate less revenue for the federal government, and will either leave stranded a considerable amount of unsold federal helium in the ground or result in extending Federal Helium Reserve operations beyond FY 2022—longer than Congress intended.

Figure 1 below describes how BLM’s proposed plan does not mitigate the government’s liability on undelivered inventory and ultimately results in missed revenue. The BLM’s plan means that the Act’s Phase D: Disposal of Assets provision⁹ will be triggered before Phase C: Continued Access for Federal Users¹⁰ would occur—where Congress contemplated a strategic reserve of 3 Bcf exclusively for federal use. Therefore, contrary to Congress’ expectation, there would remain unsold federal helium beyond the date that BLM must dispose of all the facilities related to the Federal Helium System.

⁷ In FY 2012, the BLM sold 2.1 Bcf of crude helium in open market sales.

⁸ Helium Stewardship Act of 2013, § 6(f)(2) .

⁹ *Id.*, at § 6(d)(1) (“Not earlier than 2 years after the date of commencement of Phase C described in subsection (c) and not later than September 30, 2021, the Secretary shall designate as excess property and dispose of all facilities, equipment, and other real and personal property, and all interests in the same, held by the United States in the Federal Helium System.”)

¹⁰ *Id.*, at § 6(c).

Figure 1: Comparison of Helium Sales & Auction Revenue Upon Reaching 3Bcf

Method	Year 3Bcf Reached	Anticipated Revenue
Maximum Production Pursuant to the Act	FY 2018	\$584,000,000
20% Inventory Set Aside Method	FY 2022	\$510,000,000

The legislative history makes clear that the purpose of the Act is to “ensure the near-term stability of helium supplies,” establish “market-based pricing...[,]” and maximize taxpayer value. Since the passage of the Act, however, the BLM has not offered for sale the minimum quantity it is statutorily required to offer, and it proposes to continue its failure to do so in the future. In FY 2014, BLM has offered only 610 MMcf for sale of the 1.3 Bcf that is available for sale. This amount, while less than the 2.1 Bcf that was offered in FY 2012, is not equal to the “maximum total production capacity” of the Federal Helium System in FY 2014. The BLM’s failure to sell the full 1.3 Bcf statutory minimum volume in this fiscal year will result in a loss of \$50 million in revenue.

Under the proposed FY 2015 plan, BLM will sell less than what was offered in FY 2012 (which was 2.1 Bcf), but it again intends to sell less than the “maximum total production capacity” of the Federal Helium System. BLM will therefore again miss revenue-generating opportunities amounting to \$25 million because it is selling only 850 MMcf, 200 MMcf less than the minimum required by law.

Finally, the above analysis is based on an assumption that the market purchases 100% of what the BLM offers for sale during Phase B. The realities of changing market conditions and the market at times choosing not to purchase 100% of the volume BLM offers for sale ultimately exacerbates the impact and risk of missed revenue opportunities through the BLM’s restriction of volumes being offered.

BLM’s approach is not only inconsistent with the Act and costly to the taxpayer, it is also unnecessary, as a variety of other policy options provided by Congress are available for BLM’s use. Inventoried helium amounts to more than 1.5 Bcf, and Congress recognized the potential liability created by this significant stockpile. Congress consequently authorized the BLM to increase fees on stored inventory.¹¹ The decision by a holder of inventory to drawdown on inventory is a commercial decision and the design the of BLM’s system offers holders of inventory the flexibility to make these commercial decisions and manage their respective inventories. BLM can instead influence such commercial decisions with the economic levers granted it in the Act. This approach would maximize taxpayer return and prevent the unintended consequence of incentivizing inventory holders to hold more inventory.

Furthermore, BLM may, if necessary, transfer or dispose of any remaining liabilities during the sale of the Federal Helium Reserve. The Act states that “the disposal of the property...shall be in accordance with subtitle I of title 40, United States Code.” The relevant section of the Code

¹¹ *Id.*, at § 5, Storage, Withdrawal, and Transportation.

(Sec. 545 – Procedure for Disposal) allows for negotiation, which would allow BLM to develop terms associated with the remaining liabilities when a sale occurs.

Finally, Congress contemplated that inventoried helium would still remain in the Reserve at the conclusion of the auction process. Section 6(b)(4)(B) of the Act explains that the auction process will conclude

ending on the date on which the volume of recoverable crude at the Federal Helium Reserve (other than privately owned quantities of helium stored temporarily at the Federal Helium Reserve under section 5 and this section) is 3,000,000,000 standard cubic feet.

Ultimately, BLM has an opportunity to exceed Congressional Budget Office expectations, but it instead has chosen to purposely miss expectations. BLM should adhere to the Act’s minimum sale requirements, eliminate the 20% set aside for inventory, make available for sale and auction all the helium that the field can produce, and impose a market-based storage fee on inventoried product.

2. BLM’s Pipeline Prioritization Schedule is Inconsistent with the Act.

In Section 3.02, the Notice establishes a proposed prioritization schedule for helium delivery that BLM represents is “in accordance with the HSA and existing storage contract language.” This provision is neither. To the contrary, this provision directly contravenes the Act and vitiates existing contracts with refiners.

The Notice establishes the following priority for helium delivery:

- (1) In-kind helium;
- (2) Phase B auctioned helium;
- (3) Phase A allocated/non-allocated and Phase B sold helium; and
- (4) Pre-HSA purchased helium stored under a helium storage contract.

In Section 3.03 of the Notice, BLM explains how the pipeline prioritization will actually function through presentation of an equation. In the definition of the equation’s terms, BLM explains that In-Kind TOLLERS and Refiners, and Auction TOLLERS and Refiners “will be fulfilled at 100% capacity.” Providing In-Kind TOLLERS and Refiners with 100% access is appropriate because the In-Kind program is an important component of the federal helium program. Moreover, the volumes are relatively small, approximately 13% of the total annual pipeline throughput projected for FY 2015. However, BLM’s preferential treatment for auction buyers, regardless of BLM production and operations circumstances, is unjustifiable and may open the federal government to liability for breach of contract damages for any period in which property of storage contract holders is inaccessible.

The BLM system does not always produce at planned daily capacity and it is at times subject to inadvertent or accidental shutdown, scheduled maintenance outages, mechanical failure and so forth. Under BLM’s priority system, owners of inventoried helium would have the lowest

priority, and because of the higher preference for In-Kind and Auction Tollers and Refiners, could have their capacity reduced substantially. BLM's priority scheme is unreasonable and unlawful, potentially rising to the level of a constitutionally impermissible taking as it deprives Praxair of the ability to use its refinery for the principal purpose for which it was built and requires instead that Praxair make its plant capacity available disproportionately, or even exclusively, to its competitors. This forced easement is a taking of property. It also has plain anti-competitive consequences for the same reasons since it allows Praxair's competitors to remain active in the refined helium market while, as a lower priority recipient, Praxair could be shut out. Therefore, the risks faced with BLM's production system should be borne proportionally by all parties other than the In-Kind Tollers and Refiners.

The Act and the legislative history are clear on this issue. A pipeline priority provision contained in H.R. 527, as introduced, was rejected in the final compromise that ultimately became the law because of the risk that it could subject the federal government to a breach of contract or unconstitutional takings claim by owners of purchased helium stored in the Reserve since they have contracts in place guaranteeing delivery of their stored helium. Rather than take the legal risk, the Act's drafters set forth several parameters meant to ensure delivery of helium through the pipeline. Section 5(e)(2) of the Act requires BLM to develop a schedule that provides for "priority access" only for In-Kind sales for federal users, and ensures "timely delivery" of crude helium sold at auction and allocated sale. The proposed priority pipeline schedule does not ensure timely delivery of helium not sold at auction because it is placed 3rd and 4th in line, and impermissibly shifts the burden and risk of BLM production and delivery problems from the auction winners to the refiners. All commercial purchasers of federal helium should equitably share in the risk. BLM should not, as a matter of policy, unfairly advantage one party to the detriment of another. The BLM instead should adopt a set of pipeline allocations where a guaranteed set aside is provided for Federal In-Kind volume, and auctioned helium is assured delivery.

Predictability in the BLM pipeline delivery and refining system is critical to preserving market stability because refiners must be able to plan and maintain their refining infrastructure and thereby maintain refining capacity that can be made available for tolling. Praxair's alternative allocation approach, which is explained further below, has the distinct advantage of being proportionally based and practical while being entirely consistent with the Act's objectives.

3. BLM's definition of "Excess Refining Capacity" Negatively Impacts Refiners' Commercial Operations.

A third significant concern arises from BLM's definition in Section 1.02 of the term "excess refining capacity" as "the reported total refining capacity of the refiner, minus the volume of refined helium delivery commitments for a particular fiscal year." This definition impermissibly places all of the burden and risk of operational uncertainty on the refiners.

The Act's condition that refiners make excess refining capacity available to parties that have not invested in refining capacity on the Federal Helium System was among the most contentious and thoroughly discussed issues in Congress during consideration of the bill. Refiners acquiesced to this tolling mandate as a compromise meant to ensure that the helium auction was indeed

meaningful. In recognition of the significant capital investments, durable contracts, and longstanding public-private partnership that is the Federal Helium Program, Congress set forth important parameters for operation of this tolling condition and specifically intended it to refer only to capacity that is in excess of a refiner's "operational needs."

Congress recognized that refining capacity fluctuates with regularity based on a variety of reasons such as regularly scheduled maintenance, refining for non-BLM sourced feedstock, or unplanned shutdowns (partial or full). Refiners like Praxair have agreements in place with third-party suppliers that require Praxair to take delivery of any crude helium gas the supplier may produce daily—and those amounts may vary. Praxair's refineries also take delivery of self-sourced crude helium gas and the amounts of those daily deliveries also vary. The success of these projects is dependent on a refiner's ability to ensure that all of its feedstock is processed. Refiners must therefore plan for such variability by establishing contingencies in its refining production capabilities.

Congress understood these operating imperatives and thus intended the term "excess refining capacity" to mean "capacity that is available in excess of refiners' operational needs...." which would allow for such contingencies.¹² Congress also did not envision this definition would change over the course of the program's implementation.¹³ The definition of the term "excess refining capacity" should be revised to mean the "reported total refining capacity of the refiner, minus the capacity reserved for operational needs."

III. Other Concerns With BLM's Notice

1. Helium Lots For Auction: In Sections 2.10 and 2.11 of the Notice, BLM plans to auction lots consisting of 5 MMcf and 10 MMcf and explained that the quantity of lots will be as follows: 5 lots of 10 MMcf each; 5 lots of 5 MMcf each; 1 lot of 6,452 Mcf. As contemplated by the Act, auction prices for these lots are to be used to approximate real-time market pricing. However, these lots of helium are neither commercially meaningful nor a valid reference for market pricing, as they do not meet the minimum threshold as a "qualifying domestic helium transaction" under the Act.¹⁴ Further, BLM's auction structure will result in BLM and refiners having to administer more than a dozen different storage, delivery, and potentially tolling agreements, as well as having to manage crude helium ownership into individual refineries for ultimate tolled delivery of liquid to the owners of that crude. BLM

¹² See S. Rep. No. 113-83, at 13.

¹³ In a September 27, 2013 Senate floor colloquy with Kansas Senator Jerry Moran, Senate Energy and Natural Resources Committee Ranking Member and one of the principal sponsors of the bill, Alaska Senator Lisa Murkowski stated:

Yes, it is our expectation that BLM will consider economic impacts throughout the implementation of this bill and develop regulations for this and other provisions in the bill accordingly. I do not anticipate that the definition of "excess refining capacity" would change over the course of the law's implementation, however. Our intent is to ensure that refiners with excess refining capacity make that capacity available at commercially reasonable rates. As the auction system is phased in, I look forward to working with my Senate colleagues and the BLM to ensure that market disruptions are avoided and American taxpayers are protected.

¹⁴ Helium Stewardship Act of 2013, § 2(10).

instead must auction volumes of at least 15,000,000 standard cubic feet so that the transactions are “qualifying domestic helium transactions” as defined and used in the Act.

2. Inventory Allocation: In section 3.03, the Notice states:

PHSA – Pre-Helium Stewardship Act is the monthly amount of helium purchased before the HSA, remaining in storage. This helium will be delivered in proportion to each refiner’s volume in storage up to 3 percent each month.

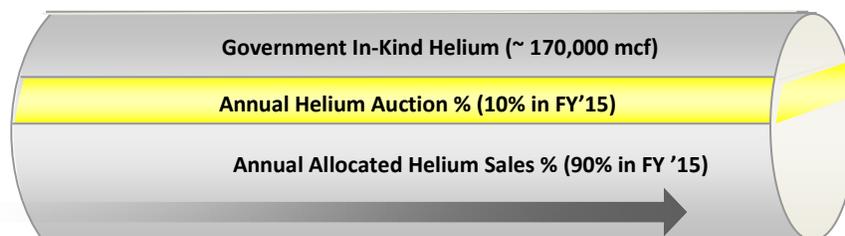
This section is not clear. The definition could be read to mean either: (1) up to 3% of the monthly allotment is allocated for PHSA delivery; or (2) up to 3% of the total PHSA amount in storage can be delivered each month. Without clarification, the definition creates the opportunity for PHSA deliveries in excess of 3% over the course of the year. Further, and as stated above, this contradicts the intention of the Act. An inventory allocation would not be necessary if BLM adopted Praxair’s alternative pipeline allocation plan described below.

3. Tolling Incentive: In Section 3.03, the Notice describes a 2-1 tolling incentive for refiners who toll for non-refiners. This incentive is unnecessary and risks compounding existing inventory concerns. In addition, it creates preferential treatment for large inventory holders to the immediate economic detriment of refiners who have maintained low inventories, and to the long-term detriment of the U.S. taxpayer. A tolling incentive would not be necessary if BLM adopted Praxair’s alternative pipeline allocation plan discussed below.

IV. Alternative Pipeline Allocation Plan

A simple alternative pipeline set-aside prioritizing Federal In-Kind helium, and focused on delivery of auctioned helium would maximize value for the taxpayer and ensure that helium auctions are indeed meaningful. It would also ensure that inventory risks are not borne by BLM or the taxpayer but by the inventory holder, and it would enhance the predictability for all.

Figure 2: Proposed Alternative Pipeline Allocation Plan



As illustrated in Figure 2, total production would first prioritize Federal In-Kind helium. Of the remaining production, the BLM would establish a pipeline set-aside percentage for auction buyers equal to the percentage of total helium volumes offered for sale which are mandated for auction in a given fiscal year with the balance being assigned to allocated buyers based on their

respective refining capacity percentages. For example, in FY 2015, Federal In-Kind would be an absolute number of approximately 170,000 Mcf and the balance of pipeline production would be distributed to auction buyers and allocated buyers based on the relative proportions mandated under the Act: 10% for auction buyers and 90% for allocated buyers. The proportion of production set aside for allocated buyers would then be distributed to refiners based on the capacity percentage for each refiner as applied today, roughly in thirds. Further and critically, this plan allows for asset owners to manage inventories by not prescribing deliveries based on amounts of volume purchased while preserving a predictable delivery methodology. Attachment 1 describes in more detail how BLM's monthly delivery schedule would operationalize under this proposal.

By implementing this alternative allocation plan, pipeline capacity for auctions would be based upon refiners' allocations, thereby creating capacity in both the pipeline and in refineries for auctioned helium. This would mean that auction bidders would have a real and timely delivery opportunity for auction blocks. Under this market-based plan, refiners would have an incentive to compete with each other for tolling contracts because it would mean additional pipeline capacity and the opportunity to fully maximize production capacity at their refineries for tolled, purchased, or inventoried helium.

This alternative plan would ensure that federal users are not adversely impacted, particularly if a substantial drawdown were required for events like a Department of Defense or NASA rocket launch. The plan could also easily track the Act's auction schedule, and the percentages between auction sales and allocated sales would allow peak needs to be met while still meeting BLM's obligations under the Act and existing contracts. In addition, this plan would not require additional mandates such as pipeline priorities or set-asides. Market forces, not government directives, would drive priority for auctions and inventory. Under this plan, the burden of managing inventory would rest on individual inventory owners and not on BLM or the taxpayer. Finally, this plan will be easier to understand, manage, and predict, thereby supporting a more workable and functional system.

V. Conclusion

Praxair respectfully requests that BLM withdraw the Notice and commence a proper rulemaking. In the proposed rule, BLM should modify its implementation plan in light of the comments provided.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'A. Akhras', with a stylized flourish at the end.

Amer Akhras, Ph.D.
General Manager, Global Helium and Rare Gases

**ATTACHMENT 1: EXAMPLE MONTHLY DELIVERY SCHEDULE & PIPELINE ALLOCATION FOR
PRAXAIR'S PROPOSED ALTERNATIVE PLAN**

Assumptions

- Fiscal Year 2015: Auctioned volume: 10% of total sale; Allocated volume: 90% of total sale
- 100% of auction volumes awarded to 2 parties (Auction Buyer A and Auction Buyer B) with each awarded 50%
- Month: January 2015
- Total Daily BLM Helium Production Allocation: 3,500 MCFD
- In Kind Volume: 250 MCFD

Allocation of Total Production for Month "X"

Production allocated for In Kind – 250 MCFD

Remaining production for auction and allocated buyers: 3,500 MCFD – 250 MCFD = 3,250 MCFD

Production allocated for auction buyers: 3,250 MCFD X 10% = 325 MCFD

- Allocation for Auction Buyer A: 325 MCFD x 50% = 162.5 MCFD
- Allocation for Auction Buyer B: 325 MCFD x 50% = 162.5 MCFD

Allocation of Production for "Allocated" Buyers (Refiners): 3,250 x 90% = 2,925 MCFD

- Allocation for Refiner A: 36% x 2,925 MCFD = 1,053 MCFD
- Allocation for Refiner B: 34% x 2,925 MCFD = 994.5 MCFD
- Allocation for Refiner C: 24% x 2,925 MCFD = 702 MCFD
- Allocation for Refiner D: 6% x 2,925 MCFD = 175.5 MCFD

Example Summary of Production Allocations

January 2015 Total Helium Production Allocation	3, 500 MCFD
Allocation of Production	
Allocation of Production for In-Kind	250 MCFD
Allocation of Production for Auction Buyers	
Auction Buyer A	162.5 MCFD
Auction Buyer B	162.5 MCFD
Allocation of Production for Auction Buyers	
Refiner A	1,053 MCFD
Refiner B	994.5 MCFD
Refiner C	702 MCFD
Refiner D	175.5 MCFD
Total	3,500 MCFD