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Testimony before House Committee on Natural Resources
Oversight hearing on
“The Past, Present and Future of the Federal Helium Program”
February 14, 2013

Chairman Hastings, Ranking Member Markey, distinguished Members of the
Committee,

My name is Kevin Lynch, and I am the Senior Vice President of Specialty Gases and Helium with Matheson Tri-Gas, a global leader in the industrial gases industry. I thank you for having this important hearing today, and for allowing me to testify on behalf of Matheson on an issue that so dramatically impacts the global supply of helium.

Matheson was founded in the U.S. 1927, and is now a subsidiary of Tokyo-based Taiyo Nippon Sanso Corporation, which is the fifth largest industrial gases company in the world. Matheson has helium operations within the U.S. in Wyoming, Texas, Nebraska, California, Florida, and Pennsylvania, and we have retail locations in 40 states. We are the sixth-largest supplier of helium within the US, and globally.

Matheson is a “Non-Refiner” of helium – meaning that we do not have a helium purification plant connected to the BLM crude helium pipeline system. Instead, we receive our refined helium through transactions with private parties that are unconnected to the Federal Helium Reserve or the BLM Pipeline.

Therefore, while we are a significant player in the global helium industry, our interests in the debate over the fate of the helium in the Federal Helium Reserve are slightly different from those of some of the organizations represented by my fellow witnesses today. Of course, like all industrial gases companies, we are concerned about global helium supply, and as a good corporate citizen we want a fair and efficient helium market worldwide. However, the fortunes of our company are not tied so directly to the continued operation of the Federal Helium Reserve and the Pipeline System.

We hope this slightly different perspective allows us to look at any proposed legislation through a slightly different prism – not how it affects one company but how it affects the helium industry overall. In our view, any legislation that comes out of Congress dealing with the Federal Helium Reserve and BLM Pipeline system should lead to a fairer and more efficient helium market worldwide.

As you know, today the operation of the Federal Helium Reserve and BLM Pipeline System is governed by provisions set out in the Helium Privatization Act of 1996.

The 1996 Act has largely achieved its purpose of selling down the Federal stockpile of crude helium, and it has by and large created conditions of stability and predictability in the helium market. On the negative side, the global helium market has developed considerably since the passage of the 1996 Act. Shortages have pushed crude helium prices up globally, and the BLM's method for pricing its sales of crude helium has become detached from global market conditions. The 1996 Act has resulted in the existence of a cost advantage for the four companies buying crude helium from the Federal Helium Reserve for purification in their refining facilities along the pipeline. This represents a significant cost advantage by these helium Refiners, and a significant disadvantage for their competitors. Worse, it means that the American taxpayer is shortchanged as well.

With the legislative authority in the 1996 Helium Privatization Act about to sunset later this year, Congress has a chance to ensure that sales from the Federal Helium Reserve are conducted in a fair and efficient manner following the passage of new legislation. Since the BLM Pipeline System supports two-thirds of world supply with nearly a third of global helium supply coming directly from the Federal Helium Reserve, the new legislation enacted this year will have a profound effect on the global helium industry for at least the rest of the decade.

With respect to the H.R. 527, we offer the following comments.

First, the stated goals of the legislation are to “ensure stability in the helium markets while protecting the interests of the American taxpayer.”

Matheson enthusiastically supports both of these goals.

We believe that both of these goals will be advanced through the fostering of greater access by Non-Refiners to the Federal Helium Reserve, which is a concept that motivates several provisions of the bill.

Matheson is also strongly in favor of the increased reporting requirements for the BLM as set forth in H.R. 527. The type of information that the BLM will be required to share more openly is of value to all market participants and should be made available to all industry participants at the same time it is made available to the helium Refiners. Today, important data is made available to the Refiners well before the rest of the industry, thus giving those companies yet another advantage over their industry competitors.

It should be noted that Matheson feels so strongly about these provisions that we included them in the Petition for Rulemaking we filed with the U.S. Department of the Interior in January, 2010. We are pleased to see them included in H.R. 527.

Unfortunately, despite its good intentions, we believe that H.R. 527 as currently drafted subverts the goal of market stability and does not sufficiently address the issue of access by Non-Refiners to the Federal Helium Reserve.

First, about market stability: The global helium industry is built on long-term sourcing and sales contracts with annual escalators and renegotiations that are generally spaced several years apart. Efficient distribution of helium requires investment in very expensive, specialized long-lived assets. In order to plan accordingly, buyers and sellers of helium need to have reasonable assurance that they will have access to helium from their supplier over the duration of a long-term contract.

The auction system proposed in H.R. 527, under which all of the Federal Reserve's crude helium would be auctioned a minimum of twice per year, will create conditions of great uncertainty in terms of helium price and availability. How could a helium user confidently sign a long-term contract with a supplier, if that supplier may lose access to helium or pay a dramatically higher price for it every six months? How could a helium supplier confidently make the investments required in distribution assets and other infrastructure, if that supplier has only a six-month view as to how much helium he will have access to and at what price?

In addition to the concerns about the sales of helium from the Federal Helium Reserve, another fact of the industry is that many of the largest private helium sourcing transactions are linked to the BLM Posted Price for crude Helium. Under the proposed price auction system, the BLM Posted Price would no longer exist, and those contracts would need to be renegotiated.

For these reasons, we believe that the proposed auction system would result in much greater volatility in price and availability, and would be disruptive to world helium markets.

In order to accomplish the worthy goal of increasing access to the Federal Helium Reserve's crude helium stockpile, H.R. 527 attempts to open the bidding to parties who can demonstrate that they have their own refining capacity or tolling agreements for refining in place.

There are several factors to keep in mind here. First, to be commercially useful, virtually all helium sold into the market must be refined into pure helium. Second, practically speaking, the only companies who are positioned to convert Federal Helium Reserve crude helium into pure helium are the four Refiners who have purification plants linked to the BLM Pipeline. Third, those Refiners will be competing against the Non-Refiners for access to the Federal Helium Reserve crude helium. And fourth, there is no mechanism in this bill that either requires or strongly incentivizes the Refiners to offer tolling services at a reasonable price to companies who are competing against them for access to the Federal Helium Reserve crude helium. This is a significant flaw in H.R. 527.

We submit, therefore, that commercially reasonable tolling deals of significant size will continue to be unavailable to Non-Refiners, and access to the Federal Helium Reserve will remain very strongly dominated by the helium Refiners. This is not the intention of H.R. 527, but it will be its practical result.

Matheson's views on this topic have been shaped from our own unhappy experience with third-party tolling. In 2007, Matheson successfully purchased crude helium from the Federal Helium Reserve. In 2009, we subsequently attempted to purchase tolling services from all four of the helium Refiners and we received "NO BID" replies from each. Therefore, the crude helium that we purchased six years ago still sits in the Federal Helium Reserve and on Matheson's Balance Sheet as an unutilized asset today. Our unsuccessful attempt to secure third-party tolling is what gave rise to our decision in January, 2010 to file our "Petition for Rule Making" with the U.S. Department of Interior which I mentioned a moment ago.

Another way that the bill seeks to address the issue of access is to state that any party may build a helium refining plant attached to the BLM Pipeline, and gain access to crude helium on equal terms with the existing refining plants. This

removes a structural impediment in the current system, which gives privileged allocation of helium to the existing plants.

However, the legislation would not change economic reality. Helium purification plants cost tens of millions of dollars, and generally require a long life to generate acceptable financial returns. They typically take two years to build and commission and it is customary, as part of the investment decision, to have a long-term commitment in hand on a stable supply of crude helium for the facility.

Any party building a new plant to attach to the BLM Pipeline would want to make sure this law was passed before he would begin building. Two years of construction time would put an optimistic on-stream date sometime in mid-2015. At current inventory levels and expected draw-down rates, that may give an expected useful plant life of five years. And, under the proposed auction system, there is a total lack of certainty as to whether the new plant's owner would ever have access to crude helium to refine, and if so, at what price. It is therefore highly unlikely that any new refining plants will be added to the BLM Pipeline which cannot even support the existing installed refining capacity. The existing Refiners will continue to have the only refining capacity on the BLM Pipeline until the stockpile is depleted.

On a positive note, we believe the bill can be improved substantially to achieve the goals we all share. With some adjustments, H.R. 527 can achieve the goals of greater access and market stability, while still generating fair returns for the American taxpayer on the government's investment in helium infrastructure.

The outline of a plan that we think would work looks like this:

- Continue with the concept of Allocated and Non-Allocated sales of Crude Helium, and a Posted Price. The "Allocated" amount of crude helium would be available only to the Refiners.
- The Allocated Sale percentage would be reduced from its current share of the total crude helium to a lower share. For discussion, let's say 80%.
- The Allocated Sale price would continue to be a Posted Price (or Market Price), with the Market Price determined by a robust market survey similar to the one described in H.R. 527. All Refiners buying under the Allocated sale would pay the same price for the BLM's crude helium, as they do today.

But the posted price would be much closer to the current market price than the BLM Posted Price is today, ensuring greater fairness across the market and a greater return for the American taxpayer.

- The remaining portion of crude helium would be auctioned to all qualified bidders in a “Non-Allocated” sale. These bidders would include Non-Refiners and other qualified parties. In this example, the Non-Allocated portion would be 20%.
- The results of the Non-Allocated Auction would be considered as data points in the determination of the Market Price.
- As a condition of participation in the Allocated Sale, Refiners would be required to set aside sufficient capacity for tolling by Non-Refiners, who would be eligible to bid on crude helium in the Non-Allocated Sale.
- Third-party tolling services would be performed for Non-Refiners at a price which would allow the Refiners to earn a fair profit while enabling Non-Refiners to obtain pure helium without being priced out of the market.
- When a Refiner provides tolling services to a Non-Refiner, it would be allocated a like quantity of Crude Helium by the BLM during the same time period that the Refiner provides tolling services, in order to be “kept whole” on its Allocated Volume.

This hybrid approach, utilizing both price surveys and auctions, would have several benefits – greater access to the Federal Helium Reserve, a fair return for the American taxpayer, and no disruptions to helium supply. It would ensure that the helium purchased at auction actually gets refined and is brought to market, and it would contribute to a fairer and more efficient global helium market.

We at Matheson applaud the Committee for thinking creatively about how the federal government manages the continued sell-off of the Federal Helium Reserve. We suggest changes to H.R. 527 in the spirit of cooperation. We look forward to continuing our work with the Committee on this important legislation, in order to achieve the goals of fairness and equity – for the helium industry, for the federal government and for the American taxpayer.

BEFORE THE UNITED STATES DEPARTMENT OF THE INTERIOR

Petition for Rule Making

The Honorable Ken Salazar }
Secretary of the Interior }
Washington, D.C. }

In the Matter of Amending the Bureau of }
Land Management Rule 43 C.F.R. Part }
3195, Helium Contracts }

RM No. _____

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e), and Department of the Interior regulations, 43 C.F.R. Part 14, petitioner Matheson Tri-Gas, Inc. ("Petitioner") respectfully petitions the Bureau of Land Management ("BLM") to amend its regulations at 43 C.F.R. Part 3195, Helium Contracts, to provide that:

- (1) the price for crude helium sold from the Federal Helium Reserve ("Reserve") be based upon the market price of crude helium when that market price exceeds the statutory minimum price for sales from the Reserve; and
- (2) crude helium refiners tied to the BLM Crude Helium Pipeline and Storage System ("BLM Pipeline") be required to set aside a percentage of their refining capacity for third-party tolling as a condition of their exclusive participation in certain crude helium sales from the Reserve.

Attached hereto as Appendix A is Petitioner's proposed amendment.

Petitioner's proposed amendment would provide for the sale of crude helium from the Reserve at market prices and would generate tens of millions of dollars for the United States Treasury, which it is currently unnecessarily foregoing. The amendment also would increase competition for sales of helium to Federal agencies and the open market. Such increased competition will make greater quantities of helium available to Federal agencies and government

contractors. It will also potentially reduce the price they pay for helium by ensuring that refining capacity is available to helium sellers that cannot currently obtain refining capacity for required in-kind purchases of crude helium from the Reserve. Under Petitioner's proposed amendment, that refining capacity would be made available by the four companies ("Helium Refiners" or "Refiners") that own and control all of the helium refining capacity connected to the BLM Pipeline and have preferential access to the crude helium offered for sale from the Reserve.

PETITIONER

Petitioner Matheson Tri-Gas, Inc. is located at 150 Allen Road, Basking Ridge, New Jersey 07920. For over 80 years, Petitioner has been at the forefront of providing commercial-grade specialty gases. In 1999, Matheson Gas Products merged with Tri-Gas, Inc. to combine the specialty gas and equipment supply strengths of Matheson Gas with the liquid/bulk and industrial cylinder gas supply capabilities of Tri-Gas. As the United States subsidiary of Tokyo-based Taiyo Nippon Sanso Corporation, Petitioner is part of one of the world's largest suppliers of gases and gas-handling equipment.

BACKGROUND

Congress enacted the Helium Privatization Act in 1925 to ensure that helium would be available for this country's defense needs. Shortly thereafter and pursuant to the Act, the Bureau of Mines¹ constructed a large helium extraction and purification plant in Amarillo, Texas. The plant went into operation in 1929 and, until 1960, the United States government was the sole domestic producer of helium.

¹ In 1997, authority over the Federal Helium Program was transferred from the Bureau of Mines to the BLM.

In 1960, Congress amended the Helium Privatization Act in response to a growing demand for helium and in anticipation that helium use would continue to increase. Among other changes, the 1960 amendments:

- provided incentives for private operators to strip crude helium from natural gas and to sell it to the United States;
- provided the Secretary of the Interior with the authority to borrow money from the United States Treasury to purchase crude helium, some of which was used by Federal agencies but most of which was stored in the Reserve at Cliffside, Texas (“Cliffside Facility”);²
- required the Bureau of Mines to manage the Reserve and to set prices on the helium it sold to cover the costs of the Federal Helium Program and to repay its debt to the United States Treasury;
- required that the debt to the United States Treasury be repaid within 25 years; and
- sought to foster the development of a private helium industry.

After passage of the 1960 amendments, the BLM Pipeline was constructed between the Cliffside Facility and Bushton, Kansas for the transport of crude helium. Six facilities³ were constructed on the BLM Pipeline with the capacity to refine up to 4 billion cubic feet (“Bcf”) of crude helium per year. The United States entered into 22-year contracts with the owners of these facilities to purchase crude helium.

The United States prematurely terminated the 22-year contracts in 1973 after the anticipated need for helium failed to materialize and the United States had accumulated a stockpile of 35 Bcf of crude helium in the Reserve. Thereafter, private industry was allowed to store crude helium at the Cliffside Facility. By the early 1990s, the Federal Helium Program

² The Reserve is the volume of helium owned by the United States and stored at the Cliffside Facility, which includes the helium facility owned by the United States.

³ Those facilities are currently owned and operated by only four companies (“Refiners”).

owed over \$1 billion to the United States Treasury on the funds it borrowed to acquire crude helium pursuant to the 1960 amendments.

In response to the growing debt, and for other reasons, in 1996 Congress again amended the Helium Privatization Act. Among other changes, the 1996 amendments:

- authorized the Department of the Interior to continue with its ownership and operation of the Cliffside Facility and BLM Pipeline, but mandated the closure and sale of the government's helium purification and liquefaction plant located near Amarillo, Texas;
- authorized the Secretary of the Interior to begin offering crude helium from the Reserve for sale by no later than January 1, 2005 ("Conservation Sales") so as to achieve the sale of the entire stockpile, less 600 million cubic feet, on a straight-line basis by January 2015;
- set a statutorily-prescribed minimum price ("Statutory Minimum Price") for the crude helium sold from the Reserve;
- required that the Statutory Minimum Price for crude helium be sufficient to retire the Program's debt to the United States Treasury; and
- required entities supplying helium to Federal agencies to purchase like quantities of crude helium from the BLM ("In-Kind Sales").

In January 2003, the BLM conducted its first Conservation Sale. Since that time, the BLM has conducted six more Conservation Sales.

PETITIONER'S PROPOSAL TO ADDRESS PROBLEMS ASSOCIATED WITH THE CURRENT STRUCTURE OF THE FEDERAL HELIUM PROGRAM

Implementation of the 1996 amendments has created two issues that the BLM should address through rulemaking. First, the BLM's pricing structure for crude helium sales unnecessarily deprives the United States Treasury of tens of millions of dollars annually. Second, current BLM policy, in conjunction with existing market conditions, confers a significant competitive advantage on the Helium Refiners that own and operate the six helium facilities connected to the BLM Pipeline. This competitive advantage has created an unanticipated market dislocation resulting in reduced competition for refined helium sales to

Federal agencies as well as reduced cost competitiveness of those helium marketers that are not Helium Refiners (“Non-Refiners”) in both domestic and non-U.S. helium markets.

I. MARKET PRICING

A. BLM’s Pricing Structure for Reserve Helium Sales Unnecessarily Deprives the Treasury Department of Tens of Millions of Dollars Annually

For both In-Kind and Conservation Sales, the BLM has elected to set the posted price for crude helium (“BLM’s Posted Price”) at the Statutory Minimum Price, which sets the price of crude helium at “not less than the amount determined by the” BLM by dividing the debt owed to the United States Treasury by the total volume of the United States’ crude helium stored at the Cliffside Facility at the time of the sale. 50 U.S.C. § 167d(c). The Statutory Minimum Price must be adjusted periodically by the Consumer Price Index, *id.*, which has no connection to the market price of helium. The BLM regulations do not establish a pricing mechanism; BLM has simply adopted the Statutory Minimum Price for In-Kind and Conservation Sales with no administrative rationale to explain its choice.

When sales from the Reserve commenced in 2003, the Statutory Minimum Price exceeded the market price for crude helium and, therefore, Conservation and In-Kind Sales during this period were very favorable to the Treasury. However, as a result of a worldwide helium shortage which occurred in 2006-2007, helium market prices have risen and the Statutory Minimum Price is now substantially below market levels. In other words, the BLM’s Posted Price for crude helium now provides a significant discount to market prices, resulting in unnecessary and significant foregone revenue to the United States Treasury. Furthermore, as market-based contracts that were contractually linked to the BLM’s Posted Price are renegotiated in the coming years, the gap between the market price and the Statutory Minimum Price will likely widen. Therefore, the differential between what the United States Treasury could recover

if it sold crude helium at market price and what it would recover from helium sales at the Statutory Minimum Price will also widen.

B. Petitioner's Proposal Will Optimize Revenue for the Treasury Department While Adhering to Statutory Guidelines

Petitioner proposes that the price for crude helium sold from the Reserve be based upon the market price of crude helium when that market price exceeds the Statutory Minimum Price. At current market prices and based on the volume offered for sale from the Reserve each year, adoption of Petitioner's proposal could generate as much as an additional \$30 million per year for the United States Treasury. There is no good reason for the United States to forego this revenue, particularly as one of the purposes of the 1996 amendments was to "generate optimum revenue to the United States Treasury from helium ... sales." *Helium Refining and Marketing Operations Reform: Hearing Before the Subcomm. on Forests and Public Land Management of the S. Comm. on Energy and Natural Resources*, 104th Cong. 104-276 (1995) ("Helium Hearing") (statement of Rhea Graham, Director, United States Bureau of Mines).

Although the BLM currently uses the Statutory Minimum Price for all sales, it is not required to do so. The 1996 amendments require prices to be "not less than" the statutorily-prescribed amount. See 50 U.S.C. § 167d(c). Such language is simply a floor price, and not a prescribed formula for what the BLM should be charging. See, e.g., United States v. Binghamton Constr. Co., Inc., 347 U.S. 171, 177-78 (1954) (finding that "not less than" language in federal contract "presupposes the possibility that the contractor may have to pay higher rates"); Fordyce v. United States, 650 F.2d 1191, 1193-94 (Ct. Cl. 1981) (construing "not less than" language in federal contract to provide "a floor under and not a ceiling upon the compensation to be paid"); Sonat Exploration Co., 105 IBLA 97, 115 (1988) (construing "not less than" language in the Outer Continental Shelf Lands Act to mean that "royalties payable

under existing state leases may not be less than the stated minimum but may be more”). In other words, the BLM can charge more than the Statutory Minimum Price, but can never charge less. Petitioner’s proposal is consistent with the Helium Privatization Act, allowing the BLM to use the market rate only when it exceeds the Statutory Minimum Price.

II. TOLLING CAPACITY

A. Current BLM Policy and Market Conditions Confer a Significant Competitive Advantage on the Refiners

BLM conducts two categories of sales of crude helium from the Reserve. First, Conservation Sales are designed to sell down the Reserve over the next six years to the minimum volume prescribed in the 1996 amendments. BLM’s current practice is to reserve 94% of its Conservation Sales volumes for Refiners (“Allocated Sales”), while the remaining six percent is available to Non-Refiners (“Non-Allocated Sales”). The Allocated versus Non-Allocated Sales structure benefits Refiners, which have both preferential access to a steady supply of Federal helium and exclusive access to the BLM Pipeline (meaning that only they have guaranteed capability to process crude helium from the Reserve without a third-party agreement). That benefit has increased dramatically with the rise in market prices, as Refiners’ preferential access to crude helium at below market prices confers an increasing advantage over their competitors.

Second, the 1996 amendments require In-Kind Sales whereby entities selling purified helium to a Federal agency must purchase a like quantity of crude helium from the Reserve. This is not an issue for the small group of Helium Refiners that have exclusive control over refining capacity tied to the BLM Pipeline. Non-Refiners, however, can only refine their crude helium from the Reserve by securing an agreement with one of the Helium Refiners for processing capacity (known as a tolling agreement).

Refiners currently are not required to toll for third-parties, which have no other means to refine their helium. If Non-Refiners are unable to secure tolling services for crude helium purchased from the Reserve, they are effectively foreclosed from being able to process the crude helium they must purchase pursuant to the In-Kind Sales requirement. In fact, Petitioner recently received four “no bid” replies to a request for proposal for tolling services to be provided on an “as available” basis despite Refiners’ significant spare capacity. As a result of this inability to access tolling services, Petitioner and similarly-situated Non-Refiners may choose not to compete for sales of helium to Federal agencies (or to minimize participation), and such reduced competition may result in reduced availability of helium to Federal Government users and could result in higher prices.

B. Petitioner’s Proposal Will Help Level the Playing Field

Petitioner proposes that the BLM condition Refiners’ participation in the preferential Allocated Sales program on a corresponding obligation to offer a limited amount of tolling capacity to Non-Refiners. Each participating Refiner would be required to offer approximately six percent of its refining capacity to Non-Refiners for a price that would provide Non-Refiners with bulk liquid helium at a market competitive cost while producing a reasonable profit for the Refiners. Adoption of Petitioner’s proposal will provide a guaranty for Non-Refiners that, should they choose to sell helium to a Federal agency, they will not be required to hold crude helium purchased pursuant to the In-Kind Sales requirement that they are either unable to refine or forced to resell to a Refiner at a discount to the BLM’s Posted Price. As a consequence, competition for sales to Federal agencies will increase, consistent with the purpose of the 1996 amendments. See, e.g., Statement of Sen. Craig, Chair, S. Comm. on Energy and Natural

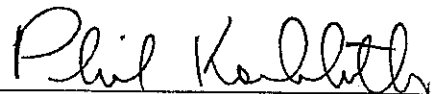
Resources at Helium Hearing (“the time has come to ... allow the private sector to provide helium to the Federal Government on a competitive basis.”)

Further, Refiners will not be disadvantaged by Petitioner’s proposal, as they still would enjoy a significant competitive advantage due to their exclusive access to the BLM Pipeline and preferential access to the Allocated Sales. Moreover, as the Hugoton Field depletes, Refiners’ surplus refining capacity will likely increase, meaning that an obligation to toll Non-Refiners’ helium will not create an economic burden for the Refiners but rather an economic benefit as it will result in reduced incremental costs and additional profits.

CONCLUSION

Petitioner requests that the Secretary amend 43 C.F.R. Part 3195 according to Appendix A, and asks that it be informed should the Secretary decide to publish the proposed changes in the Federal Register for comment or hold hearings regarding the proposed changes.

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cc: Assistant Secretary, Land and Minerals Management
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APPENDIX A

Designate the existing portions of 43 C.F.R. Part 3195 as Subpart A -- Helium Contracts, and include new subparts B and C:

Subpart B - Sales Price of Crude Helium from the Federal Helium Reserve

Sec. 3195.40 What is the Purpose of this Subpart?

This subpart establishes the procedures BLM will use to determine the sales price for Crude Helium that BLM sells from the Federal Helium Reserve on or after October 1, 2011. BLM will use the sales price determined under this subpart for Allocated Sales, Non-Allocated Sales, and In-Kind Sales of Crude Helium.

Sec. 3195.41 What Definitions Apply to this Subpart?

The following definitions apply to this subpart:

Allocated Sale means the BLM's sale of Conservation Helium to Refiners.

BLM means the Bureau of Land Management, U.S. Department of the Interior.

BLM Pipeline means the BLM's Crude Helium Pipeline and Storage System which runs from the Cliffside Field near Amarillo, Texas to Bushton, Kansas and connects the six helium purification and liquefaction plants and multiple natural gas processing plants that extract Crude Helium to the BLM's Facility.

Bulk Liquid Helium means liquid helium produced at a helium purification/liquefaction plant and filled into 11,000 gallon or larger containers.

Conservation Helium means the Crude Helium that BLM is required to sell pursuant to 50 U.S.C. § 167d.

Crude Helium means a helium gas mixture that is in impure form and is sold for further processing, primarily into Bulk Liquid Helium.

Ex-Works has the meaning defined in the International Chamber of Commerce's Incoterms.

Facility means the Cliffside Facility that BLM operates for the storage of Crude Helium owned by BLM and by third parties.

Fiscal Year means October 1 through September 30.

In-Kind Sale means BLM's sale of Crude Helium from the Reserve to a purchaser pursuant to this part.

Non-Allocated Sale means the BLM sale of Conservation Helium other than Allocated Sales.

Non-Refiner means an entity that markets helium and that is not a Refiner.

Qualifying Transaction means any agreement entered into between a purchaser and seller of Crude Helium or Bulk Liquid Helium. This includes a new agreement, renewal of an existing agreement, or a price renegotiation pursuant to an existing agreement, but does not include price adjustments pursuant to a formula or other price adjustment mechanism in a previously existing contract. Qualifying Transactions do not include purchases of Bulk Liquid Helium from a Refiner.

Reserve means the Federal Helium Reserve managed by BLM at Cliffside, Texas.

Refiner means any of the four entities that own and control the six helium refineries on the BLM Pipeline.

Statutory Minimum Price means the price BLM calculates for Crude Helium from the Reserve pursuant to 50 U.S.C. § 167d(c).

Toll or *Tolling* means the purification and liquefaction of Crude Helium into Bulk Liquid Helium.

Tolling Fee means the fee a Refiner charges for Tolling Services.

Tolling Services means the services provided by a Refiner when it tolls Crude Helium for a third party.

Sec. 3195.42 How Will BLM Determine the Sales Price for Crude Helium From the Reserve?

- (a) For all Allocated Sales, Non-Allocated Sales and In-Kind Sales of Crude Helium from the Reserve during a Fiscal Year, BLM must use the higher of the Statutory Minimum Price or the market price determined pursuant to this subpart for that Fiscal Year.
- (b) On or before June 30, BLM will publish in the Federal Register the Statutory Minimum Price and market price applicable to sales of Crude Helium from the Reserve in the next Fiscal Year.

Sec. 3195.43 How Will BLM Calculate the Statutory Minimum Price?

BLM will calculate the Statutory Minimum Price pursuant to 50 U.S.C. § 167d(c).

Sec. 3195.44 How Will BLM Calculate the Market Price?

- (a) BLM will use this section to calculate the market price applicable to Crude Helium sales from the Reserve for the Fiscal Year.
- (b) (1) On or before March 31, or such other date that BLM approves, any person
 - (i) that is a party to a contract for storage of Crude Helium at the Facility; and
 - (ii) that agreed to purchase Crude Helium or Bulk Liquid Helium pursuant to a Qualifying Transaction that went into effect during the preceding two calendar years,

must report to BLM the purchase price under each such Qualifying Transaction in accordance with subsection (c). Beginning with the second annual report required under this subsection, you are only required to report prices from Qualifying Transactions for the preceding calendar year.

- (2) For purposes of this subpart, the term "person" includes any affiliate of that person as defined in 30 C.F.R. § 206.151.
- (c) A price established pursuant to a Qualifying Transaction must be reported to BLM even if no actual purchase or sale occurred pursuant to that agreement during the calendar year covered by the report.
 - (d) The report of Qualifying Transaction prices must include:
 - (1) Only prices under arm's-length agreements for the purchase and sale of Crude Helium or Bulk Liquid Helium produced in the United States;
 - (2) Only transactions for volumes of at least 100 MMCF per year;
 - (3) Only the first sale of Crude Helium or Bulk Liquid Helium and not any resales;
 - (4) For Crude Helium sales, the price at the point of delivery; and
 - (5) For Bulk Liquid Helium sales, the Ex-Works price at the Bulk Liquid Helium production facility.
 - (e) For each Qualifying Transaction, the prices reported to BLM must include the total consideration for Crude Helium or Bulk Liquid Helium under the purchase and sale agreement.

- (f) BLM will issue reporting standards to ensure consistent price reporting for each Qualifying Transaction.
- (g) BLM may reject any price reported for a Qualifying Transaction that it determines is not *bona fide*.
- (h) To determine the market price for Crude Helium:
 - (1) BLM will convert prices under Qualifying Transactions for Bulk Liquid Helium to an equivalent price for Crude Helium by subtracting the cost of purification and liquefaction of the Crude Helium. For Qualifying Transactions in calendar years 2009 through 2013, BLM will use a fixed adjustment factor of \$12.50 per MCF as the full cost of purification and liquefaction. On or before February 28, 2015, BLM will publish in the Federal Register a revised adjustment factor for calendar years 2014 through 2018 based upon its determination of the full cost of purification and liquefaction of Crude Helium. BLM also will recalculate and publish a revised adjustment factor in the Federal Register every five years thereafter;
 - (2) BLM will calculate the simple arithmetic average of all prices reported for Qualifying Transactions in a calendar year. BLM will use the prices reported for both Crude Helium and Bulk Liquid Helium (after conversion pursuant to subparagraph (1)); and
 - (3) BLM will calculate the market price per MCF for the next Fiscal Year using the formula: $MP = .7P(N-1) + .3P(N-2)$, where
MP = Market Price;

P(N-1) = The annual average price BLM calculated for Qualifying Transactions in the prior calendar year; and

P(N-2) = The annual average price BLM calculated for Qualifying Transactions in the calendar year before the prior calendar year.

- (i) If there are no Qualifying Transactions reported to BLM for a calendar year, then the market price for the next Fiscal Year will be the market price in effect for the immediately preceding Fiscal Year.
- (j) Confidentiality. BLM will maintain the confidentiality of prices reported for Qualifying Transactions to the extent authorized under applicable law.

Sec. 3195.45 What Reporting Requirements Will BLM Include in My Helium Storage Contract?

BLM will include in any contract for storage of Crude Helium in the Reserve, or any amendment to any existing contract, a requirement that the person holding such contract report Qualifying Transactions to BLM in accordance with section 3195.44 of this subpart.

Sec. 3195.46 What if I Fail to Report My Qualifying Transactions to BLM?

If you do not report your Qualifying Transactions to BLM by the date required in section 3195.44(b):

- (a) BLM may bar you from participating in sales of Conservation Helium in the next Fiscal Year;
- (b) BLM may bar you from In-Kind Sales of Crude Helium from the Reserve in the next Fiscal Year, which disqualifies you from selling helium to Federal agencies as a Federal helium supplier under this part; and

- (c) you may be liable for breach of your contract for storage of Crude Helium in the Reserve.

Subpart C - Tolling Service Requirements for Refiners

Sec. 3195.50 What Definitions Apply to this Subpart?

Terms used in this subpart have the same meaning as in subpart B.

Sec. 3195.51 What Tolling Services Must Refiners Provide to Non-Refiners?

Any Refiner that purchases Conservation Helium from the Reserve must make available six percent (6%) of its annual refining capacity, subject to adjustment pursuant to section 3195.52(c), to provide Tolling Services for Crude Helium that Non-Refiners purchase from BLM.

Sec. 3195.52 How Will BLM Determine Each Refiner's Set-Aside Obligation?

- (a) Refining Capacity Determination. Each Refiner's annual refining capacity for purposes of this subpart is the same capacity that BLM uses to determine that Refiner's proportionate share of Allocated Sales volumes.
- (b) Base Set-Aside Obligation. Each Refiner's base set-aside obligation to provide Tolling Services for Non-Refiners is six percent (6%) of its annual refining capacity.
- (c) Adjusted Set-Aside Obligation. If a Refiner is a party to an existing, voluntary agreement with a Non-Refiner to provide Tolling Services for Crude Helium that the Non-Refiner purchased from BLM through either a Non-Allocated Sale or an In-Kind Sale, BLM will subtract those agreement volumes from the base set-aside obligation to determine that Refiner's adjusted set-aside obligation. To qualify for the adjustment, the Refiner must report to BLM any existing, voluntary

agreement volumes for the succeeding calendar year on or before September 30. Any voluntary agreement reported after September 30 does not qualify for adjustment.

Sec. 3195.53 How Do Non-Refiners Nominate Tolling Volumes?

- (a) Volume Nominations for Tolling Services. On or before September 30, any Non-Refiner that acquired, or has agreed to acquire, Crude Helium from BLM through a Non-Allocated Sale or In-Kind Sale must notify BLM of the volumes of such Crude Helium for which it will nominate Tolling Services from Refiners in the succeeding calendar year.
- (b) Allocation of Nominations.
- (1) If the total volume of Tolling Services that Non-Refiners nominate is less than the total adjusted set-aside capacity of the Refiners, determined under section 3195.52, BLM will equitably allocate the nominations for Tolling Services among the Refiners.
 - (2) If the total volume of Tolling Services that Non-Refiners nominate exceeds the total adjusted set-aside capacity of the Refiners, determined under section 3195.52, BLM will reduce each Non-Refiner's nominations in the same proportion that total nominations exceed the available adjusted set-aside capacity. BLM will then equitably allocate the adjusted nominations for Tolling Services among the Refiners.
 - (3) BLM is not required to equitably allocate Tolling Services nominations under this section using a straight proportionate allocation. Instead, BLM may consider several factors including:

- (i) The volumes each Non-Refiner is nominating for Tolling;
 - (ii) Matching volumes nominated with a Refiner's adjusted set-aside obligation; and
 - (iii) Avoiding to the extent possible, requiring a Non-Refiner to obtain Tolling Services from more than one Refiner.
- (c) A Refiner may notify BLM that it will agree to provide Tolling Services for volumes that exceed its adjusted set-aside obligation. BLM will include such additional volumes in its equitable allocation of Tolling Services nominations.
- (d) Report of Nomination. On or before October 31, BLM will notify each Refiner and each Non-Refiner nominating Tolling Services of the volumes each Refiner must toll for each Non-Refiner during the next calendar year.

Sec. 3195.54 What Terms Apply to Tolling Services Agreements?

- (a) (1) The purchaser of Tolling Services made available under this section must pay a Tolling Fee equal to two times the fixed adjustment factor of \$12.50 per MCF, or any modification of that adjustment factor, determined under section 3195.44(h) of subpart B.
- (2) Payment of the Tolling Fee required under this section includes all costs associated with use of the BLM Pipeline and any helium volume losses incurred during Tolling. The Tolling Fee does not include the Refiner's cost to provide any additional services associated with sales of Bulk Liquid Helium, including LIN shield top-off, cooling of warm containers, reprocessing of excess helium residuals, helium purity analyses, or other services for which it is usual and customary for the purchaser to pay an

additional fee. A Refiner's charge for such additional services cannot exceed standard rates for such services.

- (b) The purchaser of Tolling Services made available under this section must provide:
 - (1) Crude Helium for refining through a transfer from the purchaser's BLM Crude Helium storage account to the Refiner's Crude Helium storage account, or by other agreement between the parties; and
 - (2) 11,000 gallon or larger containers suitable for filling with Bulk Liquid Helium.
- (c) The Refiner must deliver to the purchaser a volume of Bulk Liquid Helium equivalent to the volume of Crude Helium the purchaser provided.
- (d) A Non-Refiner that enters into an agreement for Tolling Services under this subpart is required to take the full capacity nominated under the agreement or to pay for that capacity.
- (e) Other Terms. BLM will publish in the Federal Register a standard agreement for Tolling Services that includes the following provisions:
 - (1) A term that does not exceed one calendar year;
 - (2) Purity specifications;
 - (3) Billing and payment, *force majeure*, delivery requirements, and fees for ancillary services not included in the Tolling Fee; and
 - (4) Other general provisions usual and customary for the industry.