Subcommittee on Energy and Mineral Resources
Doug Lamborn, Chairman
Hearing Memo

July 6, 2015

To: All Natural Resource Committee Members

From: Subcommittee on Energy and Minerals Staff (x5-9297)

Subject: Oversight hearing on "*The Helium Stewardship Act and the Path Forward"*

The subcommittee will hold an oversight hearing on "*The Helium Stewardship Act and the Path Forward"* on **Wednesday, July 8, 2015 at 10:00 A.M. in Room 1324 Longworth House Office Building.** This hearing will focus on how the Bureau of Land Management (BLM) has implemented the Helium Stewardship Act, and how the BLM's management of the federal helium reserve could better align with the goals of the Act.

Policy Overview

- Helium is an essential element used in MRI's, air-to-air missile guidance systems, and as a tracer for leaks; as such, a steady helium supply is critical for American medical, defense, and energy industries.

- The Helium Stewardship Act of 2013, passed with overwhelming bipartisan support, was aimed at preventing the closure of the federal helium reserve, while ensuring the development of a competitive domestic helium market.

- The BLM's misinterpretation and misapplication of the Helium Stewardship Act has driven several long-time purchasers of helium from the BLM to obtain helium from Algeria, Qatar, and Russia.

- The BLM has multiple opportunities in upcoming months to ensure that the Helium Stewardship Act's goals are achieved, and thereby reinvigorate competition within the federal helium reserve and the American helium market.

Witnesses Invited

Ms. Anne-Marie Fennell
Director, Natural Resources and Environment Team
U.S. Government Accountability Office
Washington, DC

Dr. William Halperin
John Evans Professor of Physics
Department of Physics, Northwestern University, Evanston, IL

Mr. David Joyner
President
Air Liquide Helium America, Inc., Houston, TX

Mr. Walter Nelson
General Manager – Global Helium
Air Products & Chemicals, Inc., Allentown, PA

Mr. Tim Spisak
Senior Advisor for Minerals and Realty Management
Bureau of Land Management
U.S. Department of the Interior
Washington, DC

<u>Hearing Focus</u>

This hearing will examine the BLM's questionable interpretation of the Helium Stewardship Act (HSA or Act), and how the BLM can improve and expand competition in the helium market as envisioned by Congress and the Act. Specifically, the HSA had sought to "complete the privatization of the federal helium reserve in a competitive market fashion that ensures stability in the helium markets."[1] However, in the two years since the Act's passage, it is clear the BLM's interpretation of the HSA has led to results counter to the intent of the Act.

<u>Background</u>

Refined helium continues to serve as an essential element of America's economy--including the defense and medical industries. Historically, these industries have met their sales needs of helium directly from the federal helium reserve. Indeed, the BLM predicts the federal helium reserve supplies "enough helium to meet more than 40 percent of domestic demand for the gas."[2] The federal helium reserve was first developed in 1926 to keep pace with global advancements in military technologies, and today the BLM Reserve is managed through a reservoir and pipeline system that sprawls across the panhandle of Texas, Oklahoma, and Kansas.

Before enactment of the HSA, the BLM offered helium for sale to two separate groups of helium users and suppliers. One group, collectively known as the refiners, operates refineries connected to the federal helium pipeline. The other group, known as the non-refiners, are dependent upon the refiners to ensure the refinement and delivery of any helium procured from the Federal Helium Reserve. The BLM's historic sales were split such that 94 percent of the helium sold went to the refiners in an "allocated sale" and six percent in a "nonallocated sale" to the nonrefiners.

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[1] H.R. Rep. No. 113-42, at 1, 8 (2013).
[2] News Release, Bureau of Land Management, BLM Announces a Proposed Plan and Schedule for FY 2016 Sale and Auction of Federally Owned Helium (June 15, 2015) *available at* http://www.blm.gov/nm/st/en/info/news_releases0/2015/june/blm_announces_a_proposed.html.

In 2013, to avoid the closure of the reserve, which would have resulted in massive supply constraints to the helium market, Congress passed the Helium Stewardship Act of 2013. The HSA provided a market based approach to sell off the remaining helium within the federal helium reserve. The Act established a phased sales system in which the BLM would gradually replace the annual allocated and nonallocated sales with open auctions. These auctioned allotments would increase over time, such that by fiscal year 2021, all helium disbursed by the BLM would be auctioned to interested helium users and suppliers.

For the non-auctioned sales amounts, the Act required the BLM to:

(A) maximize total recovery of helium from the Federal Helium Reserve over the long term;

(B) maximize the total financial return to the taxpayer;

(C) manage crude helium sales according to the ability of the Secretary to extract and produce helium from the Federal Helium Reserve;

(D) give priority to meeting the helium demand of Federal users in the event of any disruption to the Federal Helium Reserve; and

(E) carry out this subsection with minimum market disruption.[3]

Importantly, the Act did not limit to whom the BLM could offer helium for sale.

Finally, to guarantee that all purchasers of federal helium would have access to refining and pipeline capacity, the HSA established tolling provisions. These provisions require refiners to "make excess refining capacity of helium available at commercially reasonable rates to" "any person prevailing in auctions" and "any person that has acquired crude helium . . . from the Federal Helium Reserve by means other than an auction . . . after the date of enactment of the Helium Stewardship Act of 2013, including nonallocated sales."[4] If refiners refuse to make excess refining capacity available at commercially reasonable rates, then the BLM shall not sell helium to them.[5]

GAO Report

Last year, to ensure the BLM would properly enforce and interpret the HSA, a bipartisan, bicameral letter[6] was sent to the GAO requesting it study the BLM's implementation of the provisions of the HSA. Recently, the GAO issued its final report which specifically examined the outcomes of the BLM's first helium auction and subsequent sales and analyzed how the BLM was administering the HSA's tolling provisions.

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[3] 50 U.S.C. § 167d(b)(1).
[4] 50 U.S.C. § 167d(b)(8)(B).
[5] *See* 50 U.S.C. § 167d(b)(8)(B).
[6] The original request was signed by then Chairman Hastings and Ranking Member DeFazio of the House Committee on Natural Resources and then Chairman Landrieu and Ranking Member Murkowski of the Senate Committee on Energy and Natural Resources.

The first auction occurred on July 30, 2014, and generated $15 million in revenue for the federal government. The average price per thousand cubic feet of helium purchased at the auction was $161.[7] Thirteen companies participated in the auction, yet only two refiners ultimately purchased all of the auctioned helium due to the "outrageously high" prices those parties bid for the helium.[8] Two weeks after the auction, the BLM offered 100 percent of the remaining helium available in that fiscal year exclusively to the refiners in an allocated sale, pricing the helium at $106 per thousand cubic feet.[9]

The GAO provided four explanations for why the refiners bid so "outrageously high":

(1) The refiners were able to bid so high since their costs for refining crude are lower than those of the nonrefiners;
(2) Nonrefiners did not bid higher because they did not know the costs and delivery terms for tolling;

(3) Refiners expected to pay less at the allocated sale, and therefore hedged the higher prices against the much lower allocated sale price; and

(4) The BLM had prioritized pipeline access for helium purchased at auction.[10]

Due to the refiners' bidding process at the auction, and the BLM's misinterpretation of the HSA, "the number of companies purchasing helium from BLM for delivery in fiscal year 2015 compared with fiscal year 2014 decreased from eight to four."[11] Consequently, the nonrefiners were unable to purchase any of the helium offered for delivery in fiscal year 2015.

Regarding the tolling provisions of the Act, the GAO report concluded that the BLM "does not have full assurance that refiners are satisfying the tolling provision."[12] Indeed, the GAO highlighted that the BLM has not "obtained all relevant information about refiners' efforts to satisfy the tolling provision . . . defined or identified criteria for a commercially reasonable rate, . . . [or] determined what to do if a refiner does not satisfy the tolling provision."[13]

As such, the GAO concluded the "nonrefiners have raised concerns that BLM's unwillingness to act . . . may result in less competition in helium auctions."[14] To reiterate, less competition in the auctions would directly translate into less revenue for the federal government.

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[7] U.S. Government Accountability Office, Bureau of Land Management: More Information Needed to Implement the Helium Stewardship Act of 2013, GAO-15-394, at 11 (2015).
[8] *Id.* at 12.
[9] *Id.* at 15.
[10] *Id.* at 14-15.
[11] *Id.* at 17.
[12] *Id.* at 18.
[13] *Id.* at 19.
[14] *Id.*at 18.

Ongoing Concerns

Last month, the BLM issued a notice in the *Federal Register* entitled: "Notice of Proposed Action: Crude Helium Sale and Auction for Fiscal Year 2016 Delivery."[15] This notice seeks comments on how the BLM should determine the sale price of helium, what the auction format should be, who should be allowed to purchase helium, and how the BLM should follow for allocating helium.[16] The notice is open for comment through July 13, 2015.

Recognizing the importance of ensuring competition in future helium sales by the BLM, Chairman Bishop and Ranking Member Grijalva sent a bipartisan letter to BLM's Director on June 30th, acknowledging the BLM's notice, and requesting the BLM to implement the plain language of the HSA. Chiefly, the letter asked the BLM to reinstate the nonallocated sales, and to enforce the tolling provisions. Although the BLM acknowledged receipt of the letter, it has not responded substantively to the Chairman and Ranking Member's letter.

The BLM is also in the process of renegotiating the storage contracts for those who hold helium within the federal helium reserve. The most disputed provision is how the BLM will prioritize pipeline access for contract holders during a helium shortage. Initially, the BLM had proposed granting priority access for those nonrefiners that had successfully obtained tolling agreements. The refiners balked at this proposal, and the BLM has since reformatted the draft contracts to grant access to the pipeline based on the *pro rata* share of helium owned within the federal helium reserve.[17]

However, the *pro rata* approach is also contentious, as certain users of the federal helium reserve have historically used the reserve as a "helium bank" and amassed quantities of helium that would provide them a significant advantage for pipeline access in the event of a helium shortage. Many are concerned if the BLM proceeds with this *pro rata* approach, a helium shortage would likely lead to dramatically decreased competition in the helium market.

Finally, it is unclear how the BLM will enforce the tolling provisions of the Act. As discussed, the GAO identified fallacies in BLM's attempt to obtain information concerning the refiners' attempts to offer "excess refining capacity" and urged the BLM to adopt a rule that would clarify the tolling process. However, the BLM has declined to proceed with a rulemaking, citing the time consuming aspects of such a process.[18] The BLM had instead argued it would address the tolling issue within the renegotiated contract – but such a proposal has yet to be seen.

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[15] 80 Fed. Reg. 33548.
[16] *Id.*
[17] For instance, if a refiner owned 62.5% of helium within the reserve, said refiner would have access to 62.5% of the pipeline's capacity in the event of a helium shortage.
[18] U.S. Government Accountability Office, at 21.