



## EPA Analysis of Decision in Barrick Goldstrike Mines, Inc. v. Whitman

On April 2, 2003, Judge Thomas P. Jackson of the District Court for the District of Columbia issued a decision in *Barrick Goldstrike Mines, Inc. v. Whitman*, (Civ. Action No. 99-958 (TPJ)), regarding the TRI reporting obligations of mining facilities. The decision discussed four issues, however, only two may affect your reporting obligations:

### Issues Where Your Obligations Will Not Change:

**Intra-Category Manufacture:** The Court upheld EPA's interpretation that the creation of one member of a toxic chemical category from another member of the same toxic chemical category constitutes a reportable "manufacture" of the toxic chemical category. This means that if during beneficiation "naturally occurring" copper sulfide is transformed into copper oxide, you must consider the amount of copper oxide created as manufactured and apply this amount toward the manufacturing threshold for copper compounds. In addition, if the copper oxide is further prepared for distribution in commerce, you must also report the entire amount of copper oxide created in the process stream (*e.g.*, the leach pad) as processed.

**Reporting on Toxic Chemicals in Tailings:** The Court upheld EPA's interpretation that because tailings are separated from the process stream as a byproduct they are not eligible for the *de minimis* exemption. Therefore, if a threshold is exceeded for a toxic chemical in tailings (including a "naturally occurring" toxic chemical), all release and other waste management activities for that chemical must be reported.

### Issues Where Your Obligations May Change:

**Reporting of Impurities:** The Court's opinion is limited to the reporting of "naturally occurring" impurities. Therefore, you must continue to report the impurities that you have manufactured, *e.g.*, via intra-category production (either intentionally or coincidentally) as manufactured and as processed if they are prepared for distribution in commerce. When reporting the amount of an impurity as processed, report the entire amount of the impurity in the process stream (*e.g.*, the leach pad), not merely the amount actually distributed.

In addition, if the toxic chemical impurities are "naturally occurring" - those chemicals that are in exactly the same form as they were when they were extracted from the ground - the facility may still have reporting obligations. EPA defines beneficiation as a preparatory activity and the plain language of EPCRA requires facilities to report on their preparatory activities. Until EPA completes its upcoming rulemaking on certain preparatory activities, individual mining facilities will remain responsible for determining whether their preparation of toxic chemicals in ore is better characterized as "manufacturing" or "processing." Finally, if a threshold is exceeded and toxic chemical impurities are released (*e.g.*,

the toxic chemicals in the leach pad when the leach pad is retired) or otherwise managed as waste, they must be reported regardless of whether they are manufactured or "naturally occurring" (assuming no exemptions apply).

**Reporting on Toxic Chemicals in Waste Rock:** Although "naturally occurring" toxic chemicals in waste rock are not exempt from TRI reporting obligations, the Court determined that non-PBT chemicals present in the waste rock below concentrations of 1% (or 0.1% for OSHA carcinogens) are eligible for the *de minimis* exemption. Note, however, that concentrations of certain toxic chemicals in waste rock may be above *de minimis* levels for certain mining facilities. 62 Fed. Reg. 23834, 23858-59 (May 1, 1997).

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