UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
ENVIRONMENTAL INFORMATION

J. Daniel Berry, Esq.
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Dear Mr. Berry:

This letter responds to your April 23, 2001, letter to the Office of General Counsel (OGC) on behalf of the National Mining Association (NMA), concerning the EPCRA section 313 reporting obligations for mining facilities in light of Judge Nottingham's rulings in National Mining Association v. U.S. Environmental Protection Agency (Civil No. 97-N-2665; D. Colo.). According to your letter, NMA "believes that its members presently are not legally required to include, in their calculations of the amount of toxic chemicals that are 'processed' or 'manufactured' at mining facilities, toxic chemicals that are present in ores during extraction and beneficiation activities." Your letter further states that NMA is distributing a copy of this April 23, 2001, letter to its affected member companies to advise them of this position. On May 10, 2001, you and Mr. Rod Dwyer, Deputy General Counsel for NMA, met with OGC and Program staff to discuss TRI reporting obligations for the mining sector, and in particular, to discuss the reporting expectations for reporting year 2000 for which facilities must file their reports by July 2, 2001. At that meeting, you provided your understanding that at the present time mining facilities are not legally obligated to report on any manufacturing that may take place during beneficiation. In light of these representations, the Agency believes the following response is needed to clarify the extent and effect of the Court's Order.

Unless the Court's order addresses a particular EPCRA section 313 reporting requirement, the reporting requirements remain unaffected. As you are aware, the Judge's Order of Clarification, dated March 30, 2001, provides:

> Defendant (EPA's) definition and interpretation of the term "process" as including the extraction and beneficiation of naturally occurring, undisturbed ores is hereby set aside and defendants are enjoined from enforcing that definition (emphasis added).

The Court's order only addresses EPA's interpretation that undisturbed ores had been "manufactured" by natural forces, and that, therefore, the extraction and beneficiation of those ores constituted the "processing" of the toxic chemicals contained in that ore. It is this interpretation alone that the Court set aside, and of which the Agency chose not to seek reconsideration.

In its original opinion, the Court explicitly declined to reach the question of whether manufacturing that occurs during the course of extraction and beneficiation activities is a threshold activity. This is distinct from whether the extraction and beneficiation activities themselves constitute a particular threshold activity, which was the issue presented in this litigation, and which is the subject of the statements you quote from EPA's briefs. Nor does the Order in any way address the question of whether facilities can manufacture toxic chemicals within the same listed category; this issue also was not raised in this litigation. ("EPA states that plaintiffs' facilities conduct additional activities which are subject to the 'manufacturing' and 'otherwise use' thresholds contained in the Right-to-Know Act. Because plaintiffs have not challenged EPA's findings as to these other activities, and I have already concluded that EPA properly added the facilities in SIC codes ten and twelve to those SIC codes already subject to section 313's reporting requirements, plaintiffs may still be subject to the TRI reporting requirements to the extent that the other activities fall within the coverage of The Right-to-Know Act." January 16, 2001, Order and Memorandum of Decision, p. 12-13).

Moreover, as you are aware, the Court specifically revised its original order, deleting its reference to "manufacturing" to ensure that it could not be interpreted as reaching a broader interpretation of "manufacture." The revised order only addressed the narrow issue NMA challenged. See, March 30, 2001, Order of Clarification, p. 3. Accordingly, facilities must continue to consider toward their manufacturing thresholds any toxic chemicals generated during extraction and beneficiation that were not present in the naturally occurring, undisturbed ores.

Finally, the Agency would like to provide the following in response to your request for guidance on whether extraction and beneficiation activities at mining facilities constitute the "processing" or "manufacture" of toxic chemicals in ore. As you doubtless recall, in its complaint and briefs, NMA acknowledged that "beneficiation is the preparation of ores," and never challenged EPA's determination that their activities constitute the "preparation" of the toxic chemicals contained in the ore. Indeed the Court specifically found that beneficiation, at a minimum, constitutes preparation (January 16, 2001, Order and Memorandum of Decision, p. 4). In that regard, EPA notes that under EPCRA section 313's plain language, "preparation" of a toxic chemical is explicitly identified as a threshold activity, and must be considered toward threshold calculations:

> (C) For purposes of this section–
>
> (i) The term "manufacture" means to produce, prepare, import, or compound a toxic chemical.

(ii) The term "process" means the preparation of a toxic chemical, after its manufacture, for distribution in commerce.

42 U.S.C. § 11023(b)(1)(C). See also, 42 U.S.C. § 11023 (a), (b)(1), and (g)(1).

In the near future the Agency intends to initiate rulemaking to adopt a revised interpretation that will allocate extraction and beneficiation activities between these two statutory terms. However, until this rulemaking is completed, EPA will not definitively resolve whether a particular activity is best characterized as "manufacturing" or as "processing." For now, individual facilities will remain responsible for determining whether their preparation of the toxic chemicals in the ore is better characterized as "manufacturing" or "processing." The Agency hopes to complete its rulemaking before the reporting deadline for the 2002 reporting year.

As noted above, in your letter and at our May 10, 2001, meeting it appeared that there may be confusion on the part of NMA on the issue of whether facilities must continue to consider toward their manufacturing thresholds, the creation of any toxic chemicals that were not present in the naturally occurring, undisturbed ores, that occurs during the course of extraction and beneficiation activities. To avoid any further confusion on this issue, I have provided a brief statement of guidance on what EPA has consistently considered to be "manufacturing" in the course of extraction and beneficiation activities.

I. Manufacturing of Toxic Chemicals During Beneficiation

If a specific toxic chemical is generated through beneficiation activities, then that newly generated toxic chemical must be considered toward the facility's manufacturing threshold for that chemical. 40 C.F.R. § 372.3. For example, assume a quantity of copper sulfide is present in a range of copper compounds in ore extracted from the ground. Through beneficiation activities the copper sulfide is converted to copper sulfate and then ultimately, to elemental copper. In this example, these quantities of copper sulfate and elemental copper were not present in the naturally occurring, undisturbed ores, but rather were generated through the human activity of beneficiation. Because copper sulfate and the elemental copper were created through beneficiation, the quantities generated would be considered by the facility toward its manufacture thresholds for copper compounds and elemental copper.

EPA has consistently interpreted manufacturing to include the generation of a toxic chemical compound from another compound within the same compound category, regardless of valence state changes (*e.g.*, copper sulfide to copper sulfate), as well as the generation of one listed toxic chemical from another, separately listed toxic chemical (*e.g.*, copper sulfate to elemental copper). *See* 62 FR 23849-23850, May 1, 1997; EPCRA Section 313 Industry Guidance for Metal Mining Facilities, p. 3-11 (EPA 745-B-99-001, January 1999).

II. Reporting Requirements Once a Threshold has Been Exceeded at the Facility

Once a threshold for a toxic chemical or chemical category has been exceeded, the release and other waste management calculations for that chemical or chemical category must reflect all non-exempt quantities of the toxic chemical or chemical category at the facility. 40 C.F.R. § 372.30; 40 C.F.R. § 372.85. In other words, unless a specific quantity of a toxic chemical is eligible for an exemption (*e.g.*, the *de minimis* exemption), release and other waste management activities are reportable from all sources of that chemical at the facility so long as a threshold for that chemical is exceeded somewhere at the facility; just because a particular quantity of a toxic chemical does not have to be considered toward an activity threshold (*e.g.*, processing) does not mean that releases of that particular quantity of the toxic chemical are not reportable if an activity threshold for that same toxic chemical is exceeded elsewhere at the facility. Consider storage, which is not, by itself, a threshold activity. Nevertheless, releases from storage are reportable if an activity threshold for the chemical in storage is exceeded elsewhere at the facility. (*See* Q&A 87 in the 1998 EPCRA Section 313 Questions and Answers document (EPA 745-B-98-004, December 1998); Q&A 52 in the 1997 EPCRA Section 313 Questions and Answers document (EPA 745-B-97-008); and *see also*, Q&A 160 in the 1990 Toxic Chemical Release Inventory Questions and Answers document (EPA 560/4-91-003, January 1991)).

Similarly, with regard to the mining scenario described above, if greater than 25,000 pounds of copper sulfate are generated in the leach pad, then the facility has exceeded the manufacturing threshold for the copper compounds category and should report the release and other waste management activities for all copper compounds at the facility. This would include the copper sulfate generated in the leach pad, as well as the copper sulfide in the leach pad, and any copper compounds found in the waste rock and all other non-exempt materials extracted from the ground. And, of course, for the separately listed elemental copper, this same analysis would apply to all non-exempt sources of copper (*e.g.*, copper in the leach pad, copper in the waste rock) at the facility once a threshold (*e.g.*, manufacturing) for copper has been exceeded.

Thank you for your letter explaining NMA's position. The Agency is committed to making sure the TRI Program meets the statutory requirements, provides useful information to the public, and at the same time looks for ways to reduce the TRI reporting burden. If you have any questions, or would like to further discuss this matter, please call Dr. Maria J. Doa, Director, TRI Program Division at (202) 260-9592.

Sincerely,

Elaine G. Stanley, Director
Office of Information Analysis and Access