



Qs & As Analyzing the Decision in Barrick Goldstrike Mines, Inc. v. Whitman

Do I have to consider "naturally occurring" toxic chemicals when reporting to TRI?

Yes. "Naturally occurring" toxic chemicals - those chemicals that are in exactly the same form as they were when they were extracted from the ground - are not exempt from the TRI reporting requirements. Once a threshold is exceeded for a toxic chemical, all quantities of the toxic chemical released (*e.g.*, upon retirement of the leach pad) or otherwise managed as a waste that are not subject to an exemption are required to be reported, including quantities of the toxic chemical that were "naturally occurring." This is true even if the quantities of the toxic chemical that were released were not themselves manufactured, processed, or otherwise used.

In addition, EPCRA's definitions of the term "manufacture" and "process" require facilities to report their preparation of listed toxic chemicals, including any quantities of listed toxic chemicals that may be "naturally occurring." 42 U.S.C. §§ 11023(b)(1)(C)(i)&(ii). EPA's regulations define beneficiation as "the preparation of ores" (emphasis added), and EPA concluded in 1997 that extraction and beneficiation are preparatory activities. 40 C.F.R. § 372.3. Although EPA has not been able to allocate particular preparatory activities as "manufacturing" or "processing" since the NMA decision, it intends to initiate a rulemaking on certain preparatory activities. Until EPA completes this rulemaking, individual mining facilities will remain responsible for determining whether their preparation of toxic chemicals in ore is better characterized as "manufacturing" or "processing."

When beneficiating my ore, metal compounds change from one compound to another (*e.g.* copper sulfide to copper oxide). Do I have to consider that?

Yes. The Court's order reaffirmed EPA's position that the production of a toxic chemical constitutes the manufacture of that toxic chemical, regardless of what the new toxic chemical was produced from. For example, if during autoclaving "naturally occurring" copper sulfide is transformed into copper oxide, this is considered the production of copper oxide and therefore production of copper compounds. This must be considered as the manufacture of copper compounds.

Do I have to consider toxic chemical impurities when reporting?

Yes. Impurities are not exempt from the TRI reporting requirements. First, if impurities are produced during the beneficiation process, they must be reported as manufactured. Second, if those manufactured impurities are then prepared for distribution in commerce, they must also be reported as processing. 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. Third, if the toxic chemical impurities are "naturally

occurring," the facility may still have reporting obligations. EPA's regulations define beneficiation as "the preparation of ores," 40 C.F.R. § 372.3 (emphasis added), and EPA concluded in 1997 that extraction and beneficiation are preparatory activities, while the plain language of EPCRA requires facilities to report on their preparatory activities. 42 U.S.C. §§ 11023(b)(1)(C)(i)&(ii). Until EPA completes its 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 or otherwise managed as waste, they must be reported (assuming an exemption does not apply) regardless of whether they are manufactured or "naturally occurring."

Do I have to consider chemicals in my waste rock when reporting to TRI?

Yes. Toxic chemicals in waste rock are not exempt from the TRI reporting requirements. However, when considering toxic chemicals in waste rock, it is important to be aware of the following limitation. 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).

Do I have to consider tailings or other byproducts when reporting to TRI?

Yes. Tailings and byproducts are not exempt from the TRI reporting requirements. In addition, because tailings and other byproducts are separated from the process stream, toxic chemicals in tailings and byproducts 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.

LAST UPDATED ON NOVEMBER 14, 2016