

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF:)

) Docket No. TSCA-HQ-2010-5022

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Elementis Chromium, L.P.,)

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Respondent.)
_____)

**REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.16(b), Respondent Elementis Chromium Inc.¹ ("Elementis") hereby submits this Reply Memorandum of Law in support of its Motion for Judgment on the Pleadings.

I. EPA's Argument Misinterprets the Applicability of the Continuing Violations Doctrine.

EPA's argument disregards both the language of TSCA § 8(e) and the purpose of the statute of limitations in its erroneous interpretation of the application of the continuing violations doctrine. According to EPA, a TSCA § 8(e) violation is stopped only when EPA receives the substantial risk information, no matter that TSCA § 8(e) unambiguously requires that the such information be submitted "immediately." Thus, under EPA's interpretation of TSCA § 8(e), the agency would be allowed to pursue an enforcement action 30, 40 or even 50 years from the date

¹ Elementis Chromium LP was merged into Elementis Chromium GP Inc. on September 10, 2010. Elementis Chromium GP Inc. then changed its name to Elementis Chromium Inc.

a party receives – and is required to submit – substantial risk information. Statutes of limitation, however, are enacted to prevent such an absurd result. See In re Lazarus, Inc., 7 E.A.D. 318, 365 (1997) (citing Toussie v. United States, 397 U.S. 112, 114 (1970)) (“The principal purpose of a statute of limitations is to avoid prosecution of stale claims. Passage of time between the date of violation and the date of prosecution may serve to obscure basic facts through lost evidence and faded memories.”). Moreover, EPA arrives at this interpretation only by improperly disregarding the operative language of TSCA § 8(e), *i.e.*, “immediately,” to support its assertion that the claim accrual date is open-ended. See In re Coast Wood Preserving, Inc., 11 E.A.D. 59, 77 (2003) (“Having concluded that Congress intended such a result, we are not free to disregard the terms of the statute it enacted into law.”).

The nature of a continuing violation is that the violation, by its nature, continues until it is stopped by performing some requirement to come into compliance. To the contrary, once a party fails to “immediately” report under TSCA § 8(e), there is no act that the violator can take that stops the violative conduct, as the violation is already complete. Similarly, as the Board in Lazarus held, if a party prepares a PCB annual report under TSCA by July 2, it has not stopped the violation because the report was required to be prepared on July 1 – a date certain. A cause of action for violation of the PCB reporting requirement accrues on July 2 given that July 1 has passed and there is nothing a party can do to stop the violation. The same analysis applies to TSCA § 8(e) in that once a party fails to “immediately” report, the violation accrues and there is no act that will stop the violation. That is, the immediate timeframe under the terms of the statute has passed so there is no violative conduct that thereafter can be ceased.

The Board in Lazarus recognized that application of the continuing violations doctrine is the exception to analyzing the accrual date – *not the rule* – and that it is not applicable when a

statute or regulation provides a timeframe within which to submit required reports under TSCA. While it is true that the Board in Lazarus held that some TSCA violations were continuing, the Board also plainly held that the PCB annual reporting violation, which is analogous to the § 8(e) reporting requirement, was not. EPA glosses over this significant finding in Lazarus, instead relying upon general statements in legislative history and other provisions in TSCA that are irrelevant to the § 8(e) statute of limitations analysis. Thus, EPA's many general statements regarding Congress's purported intention that violations under TSCA could be continuing, are inapposite.

Moreover, the Board in In re Harmon Electronics, Inc., 7 E.A.D. 1 (1997), upon which EPA extensively relies in its response, recognized the significance of a clear regulatory deadline for purposes of analyzing the statute of limitations. Harmon involved, in pertinent part, a violation of RCRA § 3010, 42 U.S.C. § 6930, which requires notification to the EPA regarding the identification and location of hazardous waste activities “[n]ot later than ninety days after promulgation of regulations under section [3001].” Harmon, 7 E.A.D. at 38. The Board noted that the “regulation requires action within a particular timeframe and does not expressly provide that the obligation to take such action continues beyond that timeframe.” Id. Although the Board held that the violation of § 3010 was continuing, it did so because of the regulation's *additional* prohibition on hazardous waste activities in the event the required notification has not been provided. Id. Notably, the Board stated that Harmon's argument that the specific 90-day deadline renders the violation non-continuing based on the Supreme Court's holding in Toussie and other cases “might well be persuasive” if the additional prohibition on hazardous waste activities were not included in § 3010. Id. Indeed, the Board noted that RCRA § 3010 describes two separate requirements and held that Harmon's violation of § 3010 was continuing, not

because it failed to submit the required notice within 90 days, but because it continued to violate the prohibition on hazardous waste activity by repeatedly disposing of hazardous waste without having filed the required notification. *Id.* Unlike RCRA § 3010, TSCA § 8(e) does not contain a prohibition on any activity in the event of a failure to immediately report substantial risk information. Thus, *Harmon* does not support – and in fact undermines – EPA’s argument that a TSCA § 8(e) violation is continuing in nature.

II. EPA’s Argument is Wholly Inconsistent with Its Own Policy Regarding Reporting Under TSCA § 8(e).

EPA’s argument that Elementis’s alleged violation of TSCA § 8(e) is a continuing violation is inconsistent with its own published policy that to “immediately” report requires that information be submitted within 30 days of receipt. See <http://www.epa.gov/tsca8e/>. EPA cannot have it both ways. EPA cannot establish, on one hand, a 30-day timeframe for submission of substantial risk information, and, on the other, argue that for purposes of claim accrual the timeframe within which to bring an enforcement action does not begin on day 31, but rather is open-ended.

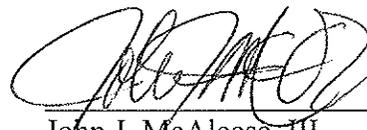
Although the plain language of TSCA § 8(e) and EPA’s own policy indicate a time frame for “immediate” reporting of information, EPA inexplicably argues that “[o]ther than stressing the term ‘immediately,’ Respondent points to no language in section 8(e) to suggest that Congress authorized this mandatory duty to expire within a certain time frame because there is none.” EPA Br. at 19. Elementis does not need to point to other language because “immediately” – which EPA has clarified through its own guidance – provides the time frame for compliance. Once a party fails to “immediately” report, it has breached its duty and violated the statute. EPA’s interpretation for purposes of claim accrual improperly reads the term “immediately” right out of the statute. By contrast, EPA’s policy clarifying the term

“immediately” provides express recognition of Congress’s intent to provide a time frame within which parties must comply. No contorted arguments by EPA now can avoid the clear language of the statute, guiding case law, and EPA’s own policy establishing a time frame for compliance.

III. CONCLUSION

For the foregoing reasons and those stated in the Memorandum of Law in Support of Respondent’s Motion for Judgment on the Pleadings, Elementis respectfully requests that the Presiding Officer grant its Motion for Judgment on the Pleadings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, John J. McAleese, III, hereby certify that on January 21, 2010, I served a copy of Respondent's Motion for Judgment on the Pleadings and supporting documents, via e-mail and first class mail on the following:

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