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Re: In The Matter of Elementis Chromium, Inc.
Docket No. TSCA-HQ-2010-5022

Dear Sir or Madam:

Enclosed for filing, please find the Reply Brief of Respondent, Elementis Chromium Inc., in the above-referenced matter.

Thank you for your assistance and cooperation.

Respectfully submitted,

John J. McAleese III

JJM:drw

Enclosure

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Elementis Chromium Inc., f/k/a Elementis Chromium, L.P.,	)	Docket No. TSCA-HQ-2010-5022
Respondent.	)	

REPLY BRIEF OF RESPONDENT ELEMENTIS CHROMIUM INC.

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I. INTRODUCTION

The issues presented in this appeal have been extensively briefed and argued since the United States Environmental Protection Agency ("EPA") initiated the action in 2010. There are essentially two issues for the Environmental Appeals Board's review. First, when does the applicable 5-year statute of limitations for a violation of Section 8(e) of the Toxic Substances and Control Act ("TSCA"), 15 U.S.C. § 2607(e), begin to run? Is it when the information is not provided "immediately" or is it when the information is not provided "immediately" *and* each and every day thereafter, extending indefinitely the period commencing the applicable 5-year statute of limitations? Second, was the information reasonably supporting the conclusion that hexavalent chromium presents a substantial risk of injury to human health obtained by Respondent Elementis Chromium Inc. ("Elementis") already known to EPA and thus not reportable under Section 8(e)? In this Reply Brief, Elementis will only focus on the first issue.

Elementis requested the opportunity to file this Reply Brief because, in EPA's Brief in Opposition to Respondent's Appeal ("Response Brief"), EPA raises several arguments not addressed in Elementis's opening Appeal Brief or not relied upon in Chief Judge Biro's Initial Decision. First, throughout the Response Brief, EPA incorrectly states that Elementis argues that "its obligation to submit Section 8(e) information is discharged the instant it obtains the information but fails to report it...." See, e.g., Response Brief at 18. Clearly, an obligation cannot be "discharged" by failing to do what the law requires, and that is not Elementis's argument. Rather, Elementis argues simply that a Section 8(e) violation is *complete* for the purposes of initiating the statute of limitations after information reportable under Section 8(e) is not provided "immediately." Thus, it is irrelevant to the EAB's analysis in this appeal when an obligation under Section 8(e) is ever "discharged." Instead, the EAB only must determine

whether Congress provided a temporal limitation for completing the reporting obligation because, if Congress did, the offense is not "continuing." And, in turn, if Elementis is correct, then EPA has failed to bring its enforcement action against Elementis within the requisite 5 years mandated by 28 U.S.C. § 2462, and the action must be dismissed.

Second, in support of its position that Section 8(e) describes a continuing violation, EPA contends that it is to be accorded deference as the agency charged with administering the statute. However, under the principles set forth by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., et al.,* 467 U.S. 837, 104 S. Ct. 2778 (1984) and cases that have followed, EPA's interpretation is not entitled to deference, for several reasons. First, the statute is clear that Section 8(e) is not a continuing violations statute. Thus, the second step in the *Chevron* deference analysis is never reached. Second, even if the statute is ambiguous, resolving that ambiguity does not call for an exercise of any special agency expertise. Rather, it presents straight-forward questions of statutory construction and canons of statutory interpretation. Thus, again, there is no reason to defer to the Agency. Rather, exercising the generalized expertise necessary to reading statutes demonstrates that the Agency's interpretation cannot be sustained.

II. ARGUMENT

A. Elementis Has Not Taken The Position That The Obligation To Report Under Section 8(e) Is Discharged 30 Days After Receipt Of The Reportable Information, And A Correct Recognition Of Elementis's Position Shows That Elementis Prevails.

Throughout its Response Brief, EPA repeatedly mischaracterizes Elementis's position regarding the reporting obligation of Section 8(e) of TSCA. In an effort to paint Elementis's position as absurd or nonsensical, EPA frequently states that Elementis's position is that the

obligation to report under Section 8(e) "no longer exists" or is "discharged" after 30 days have passed from obtaining reportable information. *See e.g.,* Response Brief at 10, 13 and 18.

This is not Elementis's argument at all. Rather, Elementis's position is only that the violation of Section 8(e) has *occurred and is complete* once immediate reporting has failed to occur, and that, at minimum, the immediate period for reporting concluded no more than 30 days from the time a person obtains information deemed reportable. In making the duty to report "immediate," Congress thereby foreclosed that a violation of Section 8(e) is a "continuing" violation. In turn, as argued in Elementis's Appeal Brief, the 5-year limitations period set forth in 28 U.S.C. § 2462 begins to run on the 31st day after receipt of the reportable information, and any enforcement action must be brought within five years from that date. Appeal Brief at 11-13. EPA refuses to focus on this clear statutory text and instead simply argues that because such a result would be a "bad outcome" the statutory text should be ignored or tortured, an argument directly contrary to controlling legal authority.

In doing so, EPA emphasizes that the doctrine of continuing violations "is a distinct doctrine, long recognized by the Supreme Court and applied in numerous decisions by federal courts and the EAB *in cases much like this one*." Response Brief at 23 (emphasis added). Tellingly, EPA cites to *Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858 (1970), a case in which the Supreme Court *rejected* the government's argument that a violation was continuing in nature. In doing so, the Court also rejected the temptation of using the consequences of failing to enforce as a justification for finding a continuing violation. Given that the Agency acknowledges *Toussie* is a case "much like this one," the result here should mirror *Toussie* – the continuing violation theory is rejected.

In *Toussie*, Mr. Toussie was convicted for failing to register for the draft. Pursuant to regulation, Mr. Toussie was required to register for the draft within five days after his eighteenth birthday, or by June 28, 1959. 397 U.S. at 113, 90 S. Ct. at 859. Mr. Toussie never registered for the draft and was indicted on May 3, 1967, almost eight years later, even though the statute of limitations for the crime was five years after commission. 397 U.S. at 114, 90 S. Ct. at 860. The Supreme Court reversed Mr. Toussie's conviction, holding that there was nothing in the draft registration statute indicating that the obligation to register for the draft was a continuing obligation. 397 U.S. at 122, 90 S. Ct. at 864. The violation therefore occurred and was complete on June 28, 1959, and any indictment of Mr. Toussie for this crime had to have been brought by June 28, 1964. 397 U.S. at 123, 90 S. Ct. at 864. As it was not brought by that date, the Supreme Court overturned his conviction. 397 U.S. at 124, 90 S. Ct. at 865.

As to the government's argument that if the draft registration requirement was not determined to be continuing, people like Mr. Toussie could evade the draft if they were able to avoid prosecution for five years, the Supreme Court responded that such a concern was not relevant to the determination:

> It should be emphasized that this conclusion does not mean that the gravity of this offense is in any way diminished. Failure to register for the draft is subject to heavy criminal penalties. The only question is whether those penalties must result from a prosecution begun within five years or whether they can be delayed for a longer period. . . . If Congress had felt otherwise it could easily have provided for a longer period of limitations. It has not yet done so.
>
> . . . But while Congress has said that failure to register is a crime, it has also made prosecution subject to the statute of limitations. "Every statute of limitations, of course, may permit a rogue to escape," *Pendergast v. United States*, 317 U.S. 412, 418, 63 S. Ct. 268, 271, 87 L. Ed. 368 (1943), but when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished."...

Id. at 123-124.

This case is much like *Toussie* as the Agency recognizes.[1] Here, a manufacturer, processor or distributor of a chemical substance or mixture must provide to EPA information reasonably supporting the conclusion that the chemical substance or mixture presents a substantial risk of injury to human health or the environment "immediately," which EPA has told the regulated community is within 30 days of receipt. However, there is absolutely nothing in the statute that says this obligation to report repeats or continues after "immediately." No doubt, there is a violation of Section 8(e) in such a circumstance, just as Mr. Toussie had violated the draft registration statute. No doubt, the government can bring an enforcement action beginning on Day 31 (as EPA has defined "immediately" as being within 30 days), and seek a penalty for the Section 8(e) violation that occurred, just as in *Toussie* the government could have prosecuted Mr. Toussie on the sixth day after his eighteenth birthday. Thus, just as in *Toussie*, the *violation* occurs and is complete on Day 31, and the statute of limitations period for enforcement begins to run. However, as mandated by the Supreme Court in *Toussie*, *there is also no doubt* that the government's right to seek penalties for the Section 8(e) violation ends five years later.

EPA has made much of TSCA's goal of assuring that EPA has pertinent information about chemicals, and this goal cannot be denied. EPA has also stated that a rogue chemical manufacturer, distributor or processor could obtain information about substantial risk of injury to human health that is not already known by EPA and successfully hide that information for more

[1] *Toussie* involved a criminal statute and the Court also noted that, to the degree there was any ambiguity as to whether the offense was continuing or not, the Court had to favor the non-continuing interpretation. 397 U.S. at 115, 90 S. Ct. at 860. While this specific enforcement action is not criminal, a knowing or willful violation of Section 8(e) can be criminal. See TSCA Section 15(3) and Section 16(b), 15 U.S.C. §§ 2614(3) and 2615(b). Thus, even if Section 8(e) is ambiguous on the point of whether it creates a continuing violation, because this decision will govern both future civil and criminal enforcement (the same statutory language certainly cannot be both continuing and non-continuing depending on whether the enforcement is civil or criminal), the same presumption against it being a continuing violation would apply here.

than five years, thereby evading prosecution under Section 8(e) of TSCA. No one can argue that would be undesirable.

But, similarly, it cannot be denied that the United States had a vital interest in time of war that eligible persons register for the draft. *Nonetheless*, the Supreme Court made absolutely clear in *Toussie* that, despite the underlying vital import of the registration requirement, if Congress did not clearly state that a violation was continuing, the underlying policy interest was not sufficient to impute a continuing violation that Congress did not create. That is precisely the case here and, as such, the limitations period begins to run when the violation is complete. Under Section 8(e) of TSCA, that is on the 31st day after the reportable information is received. In this case, EPA's action against Elementis was brought long after the five year limitations period had expired. Therefore, just as Mr. Toussie was set free because he was not prosecuted within five years after having failed to meet the registration duty, so must this enforcement action against Elementis be dismissed.

Elementis's position is not novel, and has been applied, rather consistently, to similar environmental statutes. In its Appeal Brief, Elementis cited to several lines of environmental cases where courts had found that violations analogous to Section 8(e) were not continuing violations. Appeal Brief at 21-26. In one case, *United States v. Illinois Power Co.*, 245 F. Supp. 2d 951 (S.D. Ill. 2003), the district court held that a power company's failure to obtain a construction permit was not a continuing violation, even though the construction was undertaken after the point at which a permit should have been secured (see 42 U.S.C. § 7475(a) – "No major emitting facility may be constructed unless . . . a permit has been issued."). In the Response Brief EPA states that "*Illinois Power* is a single district court opinion which EPA believes to be

wrongly decided and is inconsistent with EPA's position regarding whether these preconstruction requirements are continuing in nature." Response Brief at 22.

Unfortunately for EPA, the undeniable truth is that although the *Illinois Power* decision is from one district court, Elementis cited it *as an example* -- there are no less than three circuit courts and at least eight district courts that have come to the exact same conclusion. *See United States v. Midwest Generation, LLC*, 720 F.3d 644 (7th Cir. 2013) ("Nothing in the text of § 7475 even hints at the possibility that a fresh violation occurs every day until the end of the universe..."); *Nat'l Parks and Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 502 F.3d 1316, 1322 (11th Cir. 2007), *Sierra Club v. Otter Oil Power Co.*, 615 F.3d 1008, 1017 (8th Cir. 2010) (Clean Air Act preconstruction permit requirement only applied to construction, and failure to obtain permit was not a continuing violation after construction was completed); *United States. v. U.S. Steel Corp.*, ___ F. Supp. 2d ___, 2013 WL 4495665, *4 (N.D. Ind. 2013) (failure to obtain new source review construction permit is not a continuing violation); *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003) (continuing violations doctrine did not extend limitations period for violations of requirement to obtain preconstruction permit); *United States v. Cinergy Corp.*, 397 F. Supp. 2d 1025, 1030 ("a violation of the preconstruction permit regulations is complete at the time the construction project is completed"); *United States v. S. Ind. Gas & Elec. Co.*, 2002 WL 1760752, *4-5 (S.D. Ind. 2002) ("a violation of 42 U.S.C. § 7475 occurs when construction is commenced, but does not continue on past the date when construction is completed"); *United States v. Westvaco*, 144 F. Supp. 2d 439, 443 (D. Md. 2001) ("a violation for failure to obtain a construction permit does not continue once the unpermitted construction is completed"); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1083-84 (W.D. Wis. 2001) ("[T]he statute of limitations for a

violation of the preconstruction permit requirements under 42 U.S.C. § 7475 begins to run at time of construction and does not continue through the operational life of the modified source"); *United States v. Brotech Corp*, 2000 WL 1368023, *3 (E.D. Pa 2000); *United States v. Campbell Soup Co.*, 1997 WL 258894, *2 (E.D. Cal. 1997) (a violation of the PSD construction permit accrues when the facility is modified).

EPA does cite to three decisions from other tribunals that are contrary to this overwhelming modern viewpoint; however, two of those decisions are from 1985, and the third decision, *United States v. Canal Barge Co., Inc.*, 631 F.3d 347 (6th Cir. 2011), is inapposite. In *Canal Barge*, the defendant's barge developed a leak of benzene on the Mississippi River in Illinois. 631 F.3d at 350. The barge operator was able to temporarily patch the crack which caused the leak, and the barge continued downriver. *Id.* However, when the barge was in Kentucky, the patch failed and the leak started again. *Id.* The barge operator did not immediately notify the Coast Guard of the crack and was charged with having violated the Ports and Waterways Safety Act, which provides in relevant part that:

> Whenever there is a hazardous condition either aboard a vessel or caused by a vessel or its operation, the owner, agent, master, operator, or person in charge shall immediately notify the nearest Coast Guard Sector Office or Group Office.

631 F.3d at 351-352. The United States brought the enforcement action in federal district court in the Western District of Kentucky, and the defendant successfully argued that it must be acquitted because venue was improper. 631 F.3d at 350. The Sixth Circuit reversed on the grounds that failure to immediately notify the Coast Guard was a continuing violation and thus venue was proper in any district where the violation started, continued or ended. 631 F.3d at 351.

EPA points to this decision as supporting its position. *See* Response Brief at 22. However, the Canal Barge case is not addressing a statute of limitations, but rather venue. Whether the court in Canal Barge would have reached the same conclusion if the prosecution had been brought eight years after the barge had completed its journey down the Mississippi is complete speculation. In fact, the Canal Barge court expressly recognized that its determination of whether a violation is continuing for venue purpose was not transferable to the determination of whether a violation is continuing for statute of limitations purpose:

> These cases are distinguishable because they involve statutes of limitations, not questions of venue. Of course, questions of venue, like statutes of limitations, involve a temporal element. However, the distinction is sensible in light of the different consequences that attach to a determination that a crime is a continuing offense for statute of limitations purposes as opposed to venue purposes. If the crime is deemed to be a continuing offense for venue purposes, the defendant is merely exposed to prosecution in a different district. But if the crime is a continuing offense for statute of limitations purposes, the defendant may be prosecuted after a time at which he would otherwise have no exposure whatsoever. Thus, interpreting a crime as a continuing offense for statute of limitations purposes has more serious consequences than it does in the context of venue. Indeed, the Supreme Court was sensitive to this concern in *Toussie*, observing that construing failure to register for the draft as a continuing offense "could effectively extend the final date for prosecution until as late as 13 years after the crime is first complete." *Toussie*, 397 U.S. at 122, 90 S. Ct. 858. The Court specifically distinguished *Cores* and *Armour Packing Co. v. United States*, 209 U.S. 56, 28 S. Ct. 428, 52 L. Ed. 681 (1908), two cases that dealt with venue and did not involve the statute of limitations. *Toussie*, 397 U.S. at 121, 90 S. Ct. 858.

631 F.3d at 353.

In the Section 8(e) context, the implication of EPA's position in this case is that it could initiate enforcement actions 10, 20, 50, even 100 years – eternally, not temporally - after a company obtains information that the company may honestly believe is not reportable. Avoiding such outrageous outcomes is exactly why Congress enacts statutes of limitations such as 28 U.S.C. § 2462. It is clearly time for EPA to acknowledge the consistent case law that recognizes

that the Agency's policy-based arguments – claims that the sky will fall if violations are not deemed continuing -- do not trump the competing policy goals that statute of limitations serve and that such concerns cannot justify ignoring clear statutory provisions that Congress enacts.

B. EPA's Interpretation Of Whether A Violation Of Section 8(e) Of TSCA Is A Continuing Violation Is Not To Be Accorded Deference.

EPA's Response Brief contends that EPA is entitled to deference in its interpretation that TSCA Section 8(e) describes a "continuing" violation. *See* Response Brief at 18. However, close inspection of when judicial deference is accorded to Agency interpretations reveals that, in this case, EPA is not entitled to deference.[2]

The Supreme Court comprehensively addressed judicial deference to executive agency interpretations of statutory provisions in *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., et al.,* 467 U.S. 837, 104 S. Ct. 2778 (1984). In *Chevron*, the Supreme Court was faced with EPA's interpretation of the definition of "stationary source" in the federal Clean Air Act. The court employed a two-step test in reviewing EPA's interpretation. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43, 104 S. Ct. at 2781. But, if the statute is silent or ambiguous as to the specific issue, then the court must determine whether the agency's interpretation is reasonable. 467 U.S. at 844, 104 S. Ct. at 2782. Moreover, deference to an agency's interpretation is not absolute. First, as noted above (*see* Fn. 1), ambiguous statutes with potential criminal implications must, given the potential implications for those subject to them, be interpreted in a manner that favors the defendant. *Toussie,* 397 U.S.

[2] It is instructive to note that Chief Judge Biro did not rely on EPA's interpretation of Section 8(e) in her finding that violations of Section 8(e) were continuing in nature.

at 115, 90 S. Ct. at 860. Second, even as to ambiguous statutes deference is only appropriate when "the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron,* 467 U.S. at 844, 104 S. Ct. at 2783.

In other words, in determining whether an agency is entitled to deference, courts have focused on the specific provisions and whether understanding or implementing such provisions are within the agency's special expertise. *See Bamidele v. Immigration & Naturalization Serv.*, 99 F.3d 557 (3d Cir. 1996); *Asika v. Ashcroft*, 362 F.3d 264, 271 n.8 (4th Cir. 2004) (addressing statute of limitations under the Immigration and Nationality Act); *Intermountain Ins. Serv. of Vail v. Comm'n of Internal Revenue Serv.*, 650 F.3d 691, 707 (D.C. Cir. 2011). Thus, for example, in *Bamidele*, the Third Circuit found that no deference should be granted to the Immigration & Naturalization Service's interpretation of the statute of limitations in § 246(a) of Immigration and Nationality Act, 8 U.S.C. § 1256(a), because the "statute of limitations is a general legal concept with which the judiciary can deal at least as competently as can an executive agency." 99 F.3d at 562. Similarly, the Fourth Circuit has recognized that only when the statute of limitations is "embedded within complex and deeply interconnected regulatory systems," is deference to the agency's interpretation appropriate because that is "the sort of agency expertise to which *Chevron* requires the courts to defer." *Asika*, 362 F.3d at 271, n.8.

Given this judicial authority, for multiple reasons, no deference is warranted to the Agency's claim that Section 8(e) creates a continuing violation. First, the statute is not at all

ambiguous as to whether Congress intended to create a discrete, or continuing, violation.[3] As set out in Elementis's Appeal Brief at 14-26, the language Congress selected clearly admits of only one interpretation. In sum (and as argued in Elementis's Appeal Brief), the statute of limitations begins to run once the cause of action first accrues and the normal five year period will be ignored only where "Congress has told us otherwise in the legislation at issue." *AKM LLC db Volks Constructors v. Secretary of Labor*, 675 F.3d 752, 755 (D.C. Cir. 2012). Congress has not said otherwise in Section 8(e) and, thus, a continuing violation was not created.

Second, even if it were thought that the statute is ambiguous, resolving that ambiguity requires no special expertise of the Agency. It involves, instead, a straightforward consideration of what is established by the common words "immediately inform" with respect to the violation's temporal component. It presents a simple issue of statutory interpretation and of applying associated judicial canons of statutory construction, such as those disfavoring continuing violation readings. Thus, resolving any ambiguity, even assuming there is one, falls outside the zone in which Agency expertise has special relevance.

As a result, courts have routinely reviewed as a matter of law, without deference to the Agency, claims that a statute creates a continuing violation. *See*, e.g., multiple cases cited at Elementis's Appeal Brief at 17-19. Thus, in this case it is a question simply of interpreting the plain language of the statute, much the same as the determination that the failure to obtain a

[3] Respondent notes that there may be some ambiguity as to how much time can pass before "immediately" has occurred – e.g. is it five days, ten or thirty. The Agency's determination on that may be entitled to some deference such as in a case, for example, where a report was filed within 45 days and the party then claimed it met the "immediate" requirements. But that is not the issue in this case. The Agency has announced that 30 days is the limit. The issue here is whether the statute provides that the violation continues on and repeats itself forever once that deadline is missed. This appeal presents that latter question and, on that question, the statute is not at all ambiguous.

construction permit under the Clean Air Act is not a continuing violation (discussed in Section II.A above) was a legal question determined without reference to the Agency's asserted position.

III. CONCLUSION

WHEREFORE, Elementis Chromium Inc. respectfully requests that the Environmental Appeals Board dismiss the Complaint with prejudice for having been filed beyond the applicable statute of limitations, or, in the alternative, issue an order that Elementis did not violate Section 8(e) of TSCA by not immediately submitting the Final Four Plant Report to EPA.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, John J. McAleese, III, hereby certify that on this 8th day of April, 2014, I served a copy of the foregoing Reply Brief of Respondent, Elementis Chromium Inc. via e-mail and Federal Express on the following:

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