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

April 22, 2014

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

VIA HAND-DELIVERY

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, N.W.
WJC East Building, Room 3334
Washington, D.C. 20004

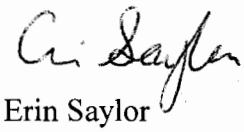
Re: Complainant Environmental Protection Agency's Surreply Brief in Response to Respondent Elementis Chromium's Reply Brief; Docket No. TSCA-HQ-2010-5022.

Dear Clerk of the Board:

Please find enclosed and served upon you for filing the Surreply Brief of Complainant Environmental Protection Agency in response to Elementis Chromium, Inc.'s Reply Brief; Docket No. TSCA-HQ-2010-5022.

EPA also wishes to clarify that the instant case is a Headquarters' enforcement action. The Board has previously referred to this as a regional matter.

Sincerely,



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Enclosure

cc: John J. McAleese (by U.S. mail and email)
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Headquarters Hearing Clerk (by U.S. mail and email)
Honorable Susan L. Biro (by U.S. mail)

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.	)	

SURREPLY BRIEF OF COMPLAINANT ENVIRONMENTAL PROTECTION AGENCY

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I. ARGUMENT

Respondent Elementis Chromium, Inc. (Elementis) has largely ignored Complainant Environmental Protection Agency's (EPA's) principal arguments, the applicable case law, and Environmental Appeals Board ("Board" or "EAB") precedent on the statute of limitations issue. Even now, Elementis does not concern itself with the two-part test adopted by the Board in In re Harmon Electronics, Inc., 7 E.A.D. 1 (EAB 1997). Rather, Respondent ignores the Board's determination since Harmon that Congress contemplated continuing violations under the Toxic Substances Control Act (TSCA) given TSCA Section 16(a), which provides that each day a violation continues constitutes a separate violation. Further, Elementis insists on reading TSCA Section 8(e) in a manner that is starkly at odds with the statutory language and Congress' concern for the timely and full reporting of substantial risk information. Finally, in the face of Supreme Court and EAB precedent to the contrary, Respondent argues that it is improper to even consider the policy and history behind Section 8(e).

A. ELEMENTIS' VIOLATION OF TSCA SECTION 8(e) WAS NOT COMPLETE FOR PURPOSES OF INITIATING THE STATUTE OF LIMITATIONS UNTIL IT SUBMITTED THE INFORMATION TO THE AGENCY

The applicability of the continuing violations doctrine ultimately is a matter of congressional intent, which may be discerned through various means. See Reading Co. v. Koons, 271 U.S. 58, 61-62 (1926) (stating that the word "accrued" should be "interpreted in the light of the general purposes of the statute and its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought"); see also Harmon, 7 E.A.D. at 25-26. Following Supreme Court and EAB case law, the Chief Administrative Law Judge engaged in a methodical statutory analysis. First, as the Presiding Officer correctly noted, TSCA generally provides for continuing violations because TSCA Section 16(a) states that each day "a violation continues shall, for purposes of this

subsection, constitute a separate violation . . . ." 15 U.S.C. 2615(a). The Board has twice concluded that this language indicates Congress' intent to provide for continuing violations under TSCA. (See Order at 6; see also In re Lazarus Inc., 7 E.A.D. 318 (EAB 1997); In re Newell Recycling Co., Inc., 8 E.A.D. 598 (EAB 1999), aff'd Newell Recycling Co., Inc. v. EPA, 231 F.3d 204 (5th Cir. 2000)). Second, the language of Section 8(e), TSCA legislative history, the purpose of Section 8(e), and EPA guidance all support the Presiding Officer's conclusion that a violation of Section 8(e) begins when significant risk information is not "immediately" submitted to EPA and continues until the Administrator is adequately informed of that information. Under this analysis, Elementis' Section 8(e) violation began when it obtained and failed to submit the report to EPA and that violation continued until 2008 when it finally submitted the report. Complainant's action was initiated two years later, well within the five-year statute of limitations period.[1]

Nothing Elementis raises in its Reply Brief undermines Chief Administrative Law Judge Biro's decision. Respondent continues to predicate its argument on the notion that the term "immediately" in Section 8(e) means that the failure to submit substantial risk information at one specific moment renders the violation "complete," and thus the violation does not "continue" beyond that moment. As such, Elementis draws an irrelevant distinction between when a violation is "complete" for purposes of initiating the statute of limitations and when a statutory obligation is discharged. (See Resp't Reply Brief at 1). Respondent is, in effect, arguing that the violation is "complete" when it has, in fact, just begun. Even though Elementis was certainly in

[1] Elementis protests that it never claimed that the Section 8(e) reporting requirement both arises and is discharged "immediately." It is certainly true that Elementis did not characterize the violation in this way, but Elementis' protest ignores the logical import of its position. If Elementis were to admit that a Section 8(e) violation continues beyond the "immediately" time frame, then it would be admitting that it committed a continuing violation. However, Elementis's claim that the violation does not continue past "immediately" can only be read logically as a claim that the violation is over and done with once the "immediately" time frame passes, which can only mean that the violation is over the very instant it arises.

violation of TSCA Section 8(e) in 2002, under the continuing violations doctrine, the violation is complete for purposes of the statute of limitations only when the obligation is discharged, so the course of the violation was not complete until the violation ended in 2008.

Further, Elementis still insists that the word "immediately" sets a temporal limitation for starting and ending the Section 8(e) reporting obligation, while ignoring other language in Sections 8(e) and 16(a), TSCA legislative history and purpose, and EPA policy which supports the opposite conclusion. There is nothing in TSCA to indicate that the Section 8(e) reporting requirement may only be discharged by the initial deadline (i.e., immediately), and, in fact, the clear imperative in TSCA that EPA be provided with substantial risk information at the earliest possible time, together with Congress' explicit provision in TSCA for continuing violations, are a strong indication that Congress intended that a violation of Section 8(e) was to continue each day until the information was provided to EPA. In Lazarus, the Board stated:

> Under the special rule of accrual, the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete. Thus, if the doctrine of continuing violations applies to any of the counts at issue in this case, an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased.

Lazarus, Inc., 7 E.A.D. at 364-65 (emphasis added). As the Presiding Officer held, and as EPA has argued, Elementis' violation began when it obtained the Final Report in 2002 and continued until it submitted the report to the Agency in response to a subpoena in 2008. (See Order at 12; Compl't Brief in Opp. to Resp't Appeal at 9-18.) Thus, under the continuing violations doctrine, the violation was not complete for purposes of initiating the statute of limitations and the obligation to report was not discharged until 2008.

Moreover, as the Presiding Officer held, and as EPA has argued, the term "immediately" in the statute does not provide a temporal limitation for completing the reporting obligation,

rather it provides a starting point. Congress employed the term "immediately" to emphasize the importance that the Agency receive Section 8(e) information as soon as possible. To argue that Congress intended "immediately" to also act as the end point for the reporting obligation simply does not make sense given congressional intent that the Agency receive "'timely access to information regarding health and safety studies concerning chemicals covered by the Act.'" (See Compl't Brief in Opp. to Resp't Appeal at 15-16 (citing Order at 11 (quoting S. Rep. No. 94-698, at 6, 8; as reprinted in 1976 U.S.C.C.A.N. 4491, 4496, 4498))).

Finally, Chief Administrative Law Judge Biro and Complainant extensively cited to TSCA's legislative history and purpose to inform the analysis of congressional intent, consistent with the second step of the Board's test in Harmon and numerous federal court cases. Elementis describes this analysis as "policy-based arguments – claims that the sky will fall if violations are not deemed continuing – [that] do not trump the competing policy goals that statute of limitations serve . . . ." (Resp't EAB Brief at 10). Section 8(e) is intended to protect lives by ensuring that the Agency has information regarding substantial risks to human health and the environment – hardly a subject appropriate for a Chicken Little comparison. Given the subject, it is difficult to believe that Congress did not intend to ensure a better deterrent for failing to provide critical substantial risk information than a one-day penalty not to exceed $37,500. Importantly, Section 8(e) sufficiently protects against stale claims – a primary purpose of statutes of limitation – by providing that substantial risk information need not be submitted if the Administrator is already adequately informed of that information. See Lazarus, 7 E.A.D. at 365.

B. ELEMENTIS RELIES ON DISTINGUISHABLE CASE LAW AND SUMMARILY DISMISSES CASE LAW RELIED ON BY CHIEF JUDGE BIRO

Respondent continues to argue that United States v. Illinois Power Co., 245 F.Supp. 2d 951 (S.D. Ill. 2003) involved violations analogous to Section 8(e). (Resp't Reply Brief at 6). As

EPA discussed in its Brief in Opposition to Respondent's Appeal, that case, which does not represent the position of the EPA, involved what that court characterized as pre-construction requirements under the Clean Air Act (CAA); requirements that, according to the court, apply by a specific deadline, i.e., before construction begins. Moreover, whether EPA agrees with the holding in that case or not, and regardless of the number of courts that are part of the split among the circuits and district courts, it remains that this decision regarding these CAA requirements is not relevant to the reporting obligation under Section 8(e). The theory behind the court's decision in Illinois Power was that the CAA established a deadline after which there was no ongoing need to comply with the preconstruction requirements; yet, Section 8(e) contains no such deadlines. While the obligation to submit information under Section 8(e) begins immediately, it ends only upon submission of the information to the Administrator or actual knowledge that the Administrator has already been informed of that information. (See Compl't Brief in Opp. to Resp't Appeal at 21-22).

Elementis devoted a good portion of its Reply Brief to discussing the Supreme Court case of Toussie v. United States, 397 U.S. 112 (1970). Toussie provides that it is proper to consider legislative history and purpose to determine congressional intent regarding continuing violations. However, beyond those propositions, the facts supporting the Court's holding in Toussie are clearly distinguishable from the facts in this case. The statute considered by the Court in Toussie required men ages 18-26 to register for the military draft on days and times as prescribed by the President. Toussie, 397 U.S. at 113. Finding no clear intent as to whether the statute itself provided for continuing violations, the Court engaged in a thorough analysis of the history of the various "Draft Acts" and their implementation, dating back to 1917. Id. at 116-17. For many years, draft registration was accomplished only when the President specified one

particular day when men were required to register and provided no alternative process for registration, and thus is was impossible to comply with the requirement at any time other than on the single specified day. Id. After years of single-day draft registrations and similarly-limited registration periods, the registration period was eventually modified to provide that everyone must register no later than five days after their 18th birthday. Id. at 117. However, the Court determined that given the long history of single day registrations and the deadlines on specific dates provided for under later iterations of the law, Congress most likely intended failure to register to be a single criminal offense. Id. at 119. At the least, the history of registrations created substantial ambiguity, and, employing the canon of statutory construction that ambiguities in criminal statutes of limitations should be resolved in favor of the defendant, the court concluded the continuing violations doctrine did not apply.[2] See id. at 114-15, 121, 122-23. As the Board discussed in Harmon, "[t]he Supreme Court's decision in Toussie was based, inter alia, on its conclusion that the Draft Act required a person to register within a particular time frame." Harmon, 7 E.A.D. at 28. However, as EPA has argued, unlike the "Draft Act" with its longstanding implementation history of requiring draft registration during and only during specified periods, Section 8(e) does not impose a specific time frame which is the exclusive period during which reporting of substantial risk information may occur.

[2] Respondent contends that any ambiguities regarding the statute of limitations in this case should be resolved in its favor because a violation of Section 8(e) is subject to both civil and criminal penalties. (See Resp't Reply Brief at 5 n.1). Although Respondent cites no cases to support this argument, Complainant assumes it is referring to decisions that have extended the "rule of lenity," a canon traditionally employed when interpreting criminal statutes, to civil cases. See United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-18 (1992). EPA does not concede that there is any ambiguity in this case, or that a criminal violation of Section 8(e) would not be a continuing violation. Nevertheless, consideration of that canon in civil cases is only appropriate if an interpretation of an ambiguity would apply equally in both the civil and criminal context. Criminal violations of Section 8(e) are governed by TSCA Section 16(b), not Section 16(a), and are subject to a separate statute of limitations at 18 U.S.C. § 3282. Therefore, there is no reason why a determination regarding the continuing violations doctrine in this civil case would necessarily apply in a criminal action as well.

Elementis objects to EPA's citation of the Sixth Circuit's decision in United States v. Canal Barge Co., Inc., 631 F.3d 347 (6th Cir. 2011), which the Presiding Officer discussed at length in her Order on Respondent's Motion for Judgment on the Pleadings. (See Order at 11). Respondent takes issue with the fact that the case involved a venue question, not statute of limitations — a fact that the Presiding Officer was clear about in her Order. Elementis cites to no other cases to suggest that a venue analysis could not inform a statute of limitations analysis. On the contrary, other circuit courts have suggested that it would not be inappropriate to use venue cases to inform a statute of limitations analysis. See United States v. Dunne, 324 F.3d 1158 (10th Cir. 2003)("[a]lthough issues of venue are obviously different from issues involving statute of limitations, the two concepts are clearly related.... Thus, these cases cannot be entirely ignored"). In this instance, the Canal Barge case is indeed relevant because the court was interpreting language very similar to that in TSCA section 8(e). See Canal Barge, 631 F.3d at 351 (holding that a violation of a requirement to "immediately notify" the Coast Guard of any hazardous conditions aboard a vessel was a continuing violation for venue purposes).

C. CHEVRON ANALYSIS IS NOT AN ISSUE AT THIS STAGE OF THE PROCEEDINGS

Respondent argues in its Reply Brief that EPA's interpretation of TSCA is not to be afforded deference under Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) in response to a comment on page 18 of Complainant's brief noting that EPA's longstanding interpretation of Section 8(e) as giving rise to continuing violations would be given deference if and when the EAB chooses to adopt that longstanding interpretation. Because there has yet to be a "final agency action" in this proceeding, a Chevron analysis is not appropriate at this stage. See In re Ocean State Asbestos Removal, Inc./Ocean State Building Wrecking and Asbestos Removal Co., Inc., 7 E.A.D. 522, 543 n.22 (EAB 1998) ("[b]ecause we serve as the final

decision maker for the Agency in this adjudication, [the second part] of Chevron deference does not apply in our review; instead, we perform our own "independent review and analysis of the issue")(citing In re Mobil Oil Corp., 5 E.A.D. 490, 508-09 n.30 (EAB 1994). Moreover, as discussed above, the history and purpose of Section 8(e) and the specific provision in TSCA for continuing violations make it clear that Congress intended that the term "immediately" was meant to be a starting point to the Section 8(e) reporting obligation, not an end point. The language of the statute is clear that the violation begins immediately and continues until the information is submitted to EPA or the Administrator has been adequately informed of the information. In the absence of statutory ambiguity, it is not necessary to conduct a Chevron analysis.

II. CONCLUSION

Complainant respectfully requests that the Board affirm the Presiding Officer's March 28, 2012 Order on the statute of limitations issue and November 12, 2013 Initial Decision.[3]

Respectfully submitted,

Date: April 22, 2014

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[3] EPA wishes to clarify that the instant case is a Headquarters' enforcement action, and not a Region 8 matter.

CERTIFICATE OF SERVICE

I certify that the foregoing *Surreply Brief of Complainant Environmental Protection Agency* in Docket No. TSCA-HQ-2010-5022, dated April 22, 2014, was sent this day in the following manner to the addresses listed below:

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