BEFORE THE ENVIRONMENTAL APPEALS BOARD

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

+ + + + +

ORDER SCHEDULING ORAL ARGUMENT

IN THE MATTER OF:	:	
ELEMENTIS CHROMIUM, INC. f/k/a ELEMENTIS CHROMIUM L.P.,	:	TSCA Appeal No. 13-03
Docket No. TSCA-HQ-2010-5022	:	

Thursday,
October 30, 2014

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on for hearing, pursuant to notice, at 10:30 a.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge

and

THE HONORABLE LESLYE M. FRASER
Environmental Appeals Judge

ORIGINAL

APPEARANCES:

On Behalf of the Elementis Chromium, Inc.:

RONALD J. TENPAS, ESQ.
of: Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5435
(202) 739-3001 fax

and

JOHN J. McALEESE, ESQ.
of: McCarter & English, LLP
BNY Mellon Center
1735 Market Street, Suite 700
Philadelphia, PA 19103-7501
(215) 979-3800
(215) 979-3899 fax

On Behalf of the Environmental Protection Agency Region IIX:

MARK A. R. CHALFANT, ESQ.
Environmental Protection Agency
of: Office of Civil Enforcement
Region 8
1595 Wynkoop Street
Mail Code 8ENF-L
Denver, CO 80202
(303) 312-6177

and

APPEARANCES (continued):

On Behalf of the Environmental Protection Agency Region IV:

PETER RAACK, ESQ.
Environmental Protection Agency
of: Office of Civil Enforcement
1200 Pennsylvania Avenue, NW
Mail Code 2249
Washington, DC 20460
(202) 564-4075

ALSO PRESENT:

Eurika Durr, Clerk of the Board

P-R-O-C-E-E-D-I-N-G-S

(10:30 a.m.)

JUDGE STEIN: Good morning, Counselors. Thank you for being here today. We appreciate very much your participation and we very much appreciate the extensive briefing that you have already done in this case.

If you could now state your appearances, please, starting first with counsel of Elementis.

MR. TENPAS: Yes, Your Honor. Ronald Tenpas for Elementis, and I will be the sole attorney presenting argument. But seated with me at counsel table is John McAleese, who is also counsel for Elementis in this matter, who also -- there's two attorneys who represent Elementis below at the front.

JUDGE STEIN: And will you be reserving five minutes of you time for rebuttal?

MR. TENPAS: Yes, Your Honor, we'd like to reserve five, and I made that

arrangement with your deputy. Thank you.

JUDGE STEIN: Thank you. EPA?

MR. RAACK: Good morning, Your Honors. Peter Raack with Office of Enforcement.

MR. CHALFANT: Good morning, Your Honors. Mark Chalfant for the complainant.

JUDGE STEIN: And how will you be allocating your argument?

MR. RAACK: I'm going to go first, Your Honor, and take 30 minutes of our time, and leave 15 minutes for Mr. Chalfant.

JUDGE FRASER: There are seats over here for people on this side.

JUDGE STEIN: Mr. Chalfant, are you with the Office of Enforcement also?

MR. CHALFANT: I am here on behalf of the Office of Enforcement today, Your Honor.

JUDGE STEIN: Before we begin, let me just make a few observations for those of you who have never appeared before the Board,

which is that we're often best described as a rather hot or active bench.

You can assume that we read the briefs and are fairly familiar with the record, and the reason we're holding argument is really in an effort to try to get answers to some questions that we are considering.

We recognize that this is a very important case. It's very important to Elementis and it's very important to members of the regulated community who are charged with complying with TSCO. We also recognize that this is a very important case for the Environmental Protection Agency.

Our challenge today is really to look at the appeal that's been filed to see whether the Appellant is correct that the Administrative Law Judge erred in her decision and to decide this case based on the facts as they were presented as the issues that you framed on appeal.

We had to ask for some

supplemental briefs in this case, specifically relating to the statute of limitations issue that we directed in a prior order. Those briefs are due on November 10th.

I would like those briefs to be no more than 25 pages long. And in those briefs you are free to address anything else that comes up with the argument that you feel needs our attention. We're not looking for repetitive briefs. We're not looking for extra things to read. But if you have something important to say we would like to hear it by the 10th of November.

The initial appeal was filed last January so this case will be a priority for us to move forward with, following the argument. With that, counsel for Elementis.

MR. TENPAS: Thank you, Your Honor. Again, Ron Tenpas from Morgan, Lewis & Bockius on behalf of Elementis. It is a fact of the matter that EPA's enforcement powers extend only so far in the supplemental

time as Congress has authorized.

And the Agency's position here, therefore, depends on the claim that Congress or an AD5 Agency that has authorized the case to be dropped forever is the impact of their assertion that it is a continuing violation.

If the information is never filed and an action, a civil enforcement action such as this can be brought at any moment in time and however far into the future, we think that that approach basically devalues and fundamentally ignores the important benefits that the statute of limitations are thought to provide and are presumed to provide by filing here and today which somebody who regulates in this who knows that they are subject to enforcement.

JUDGE FRASER: Excuse me, Mr. Tenpas, could you move the microphone a little closer?

MR. TENPAS: Sorry, Your Honor.

JUDGE FRASER: Thank you.

MR. TENPAS: It was my fault. The floor here, I mean, I'm running into the -- I will try to scoot forward.

JUDGE FRASER: All right. Okay.

MR. TENPAS: So just two years ago the Supreme Court in the Gabelli case spoke forcefully and strongly to the role of an endpoint at which one knows they are no longer subject to enforcement.

And it spoke of endpoints as being fundamental to promoting justice and described them as vital to the welfare of society. It noted in particular reasons that was the case, is that endpoints does value reprisal, provide things like repose, they ensure the elimination of stale claims. They provide certitude about disclosure that protect against the risk that a case brought far into the future would suffer from loss of evidence, loss of witnesses, lack of memory that can hurt. And as they --

JUDGE STEIN: Am I correct that

the value of this case at discovery and EPA does not perceive them in the discovery with your theory in this case. Is that correct?

MR. TENPAS: That's correct, Your Honor. Certainly Gabelli involved a different idea of why the same statute of limitations that is at issue here, 2462, should be thought not to, you know, trigger an end at the normal five-year point when the claimant first approved but to some point in the future.

JUDGE STEIN: What I'm really focused on is let's assume hypothetically, just for purposes of discussion, that I agree with you that as to anything other than what was brought within five years of the complaint being filed.

So September 2010, minus five years, possibly just for the towing agreement, but that anything else before that is barred from the statute of limitations. If I agree with you then why -- and I'm not saying I do. I'm just saying this hypothetically. Why

wouldn't 16(a) which Congress specifically said that for violations that continue, each violation is a separate violation, why would we not look that as an expression of Congress' intent that for TSCA, for violations covered by 16(a), that for a violation which continues, which I understand is a separate question, that you wouldn't be looking at an exception to the statute of limitations but you would be within the limitations period set by Congress?

MR. TENPAS: I think there are two pieces to that, Your Honor. I guess we're going to jump into the hard one with some of the questions the Court already asked us to particularly address.

First, that provision, I think, is important to note, has a very specific delimiter. It does not say that violations continue. It says for purposes of this subsection, a violation that continues, in which case, it'll be a continuing violation.

And so that language, that delimiter, we think, is pretty critical in understanding what and how to read to that provision 16(a)(1). It says each day such a violation continues shall, for purposes of this subsection, constitute a separate violation.

So we acknowledge that if you have a violation that continues, and if you have a case that has been timely brought and one can conclude that there were some violations that continued as to that case where it was timely brought within that case, then, yes, this allows you to kind of break it up into separate daily chunks.

But what this doesn't say, and clearly is not meant to say, is that 8(e) or any other provision is a continuing violation such that you apply the continuing violations doctrine to determine whether the case was brought in time.

JUDGE FRASER: When do you think

your violation ended?

MR. TENPAS: We think the violation was complete on the -- essentially the day we got the report plus 30 days, understanding there's some discussion or dispute about 15, 30, using that as a shorthand for immediately.

Our violation was complete at the time Elementis received the report and did not immediately inform the Administrator. I think even the Agency believes that. They believe that on Day 31, Day 32 however you kind of mark it there, they at least had, at that point, the authority to bring a case, saying that we had --

JUDGE FRASER: They didn't have the authority to bring the case earlier or they chose to exercise an enforcement discretion, not to bring it before Day 31?

MR. TENPAS: I can't infer. These purposes, it doesn't --

JUDGE FRASER: It's a very

important distinction -- an exercise of enforcement discretion versus the authority to bring a case in the first place.

MR. TENPAS: Right. Well, that only, I think, furthers our point that perhaps they think they could have brought this case on the day after. Maybe they think they could have brought it within hours of Elementis receiving the report and not bringing it.

But the point is, at that moment, maybe earlier than 30 days, but certainly they agree at least by Day 31 could ask the Court to bring --

JUDGE STEIN: So your position is -- okay, so the earliest day that you think EPA could have brought this case is Day 31. And on Day 31 --

(Simultaneously speaking.)

MR. TENPAS: Well, it could have --

JUDGE STEIN: Day 31 --

MR. TENPAS: We might even call it

-- it could be a little bit earlier that, depending on how you think about it.

JUDGE STEIN: Okay, so if EPA were to bring this case on Day 35 -- well, I don't mean bring this case, but in other words allege that on Day 35 there was also a violation from failure to submit the report immediately.

The first day of EPA's enforcement discretion it might have been due was Day 31. But if they were to file it on Day 35 or Day 40, you're saying that's too late, that there was only one date and time by which this company was obligated to submit this report?

MR. TENPAS: No, the action is not too late because if they bring it on Day 35 they have brought it within five years. They brought it five days --

JUDGE STEIN: But on what date did the violation occur in your --

MR. TENPAS: As I said it occurred on, at the moment they did not immediately

inform. They had, I think, for purposes of this case, acknowledged that that time had -- that date had passed at least by Day 31.

Taking Your Honor's point, maybe in another case you will get the question, well, could they have even brought it on Day 15? But even the Agency maintains and believes that by Day 31 we had a violation because we did not need anything for them and they could have brought the case on that date. And we accept that they could have brought the case on that date.

JUDGE STEIN: But if I'm the Environmental Protection Agency and I bring an enforcement action against a company and I file a complaint, don't I need to specify somewhere in the complaint or during the trial the date on which the violation occurred or a range of dates?

I mean, if I understand you correctly, what you're saying is if they brought the case within five years of Day 31

it's timely. But if they brought the case within five years of Day 35 it's untimely. Is that my, is that a correct understanding?

MR. TENPAS: Yes, five years to the day. At a minimum, if they don't bring it within five years of, let's say, Day 31 it is untimely. Yes, that's --

JUDGE STEIN: As to the violation that occurred on Day 31. Is it also untimely as to a violation that may have occurred on Day 35?

MR. TENPAS: Well, I think that takes us, maybe, to the heart of this. We don't regard there as having been a new violation that occurred on Day 35.

JUDGE STEIN: And you reason for that is?

MR. TENPAS: Because the statute says it doesn't -- at no point does the statute say each day shall -- of a failure to report -- shall be a new violation. It --

JUDGE STEIN: No, but the Board

will interpret the statutory provisions. And we will examine in this case, as we have in other cases, whether the underlying violation is one which continues or not.

I understand that that's a separate question from the statutory language, but the mere fact I think we have to look at what 8(e) says. And I think we have to look at the same kind of analysis we've done in other cases.

But the mere fact that it says to inform immediately in the present tense, doesn't automatically, to me, say that it's only a one-day violation. Can you give me your best argument for why it's only one day?

MR. TENPAS: Yes, several things, Your Honor. First, respectfully, we think you do start with statutory language and we do think it denotes that because to inform is a distinct act.

Thus, this language is quite different from what the Court has confronted,

for example, in other circumstances where the statute or the regulation has implied, carries with it the necessary notion of continuous action over time -- to have a permit, to not operate without a permit, you know, you shall not dispose of, store.

But that kind of language, all -- those verbs -- necessarily bring with them the idea that you have a duty each day.

I think the other point we would make, Your Honor, here is this is not sort of a case -- and I guess I'm mindful of the baseball game last night -- where a tie goes to the runner. That is, if the statute could be read a couple of different ways, it gets read in the Agency's favor.

That the guidance from the Supreme Court, the D.C. Circuit and all the appellate courts says, look, a continuing-violations reading of the statute is highly disfavored. It is the exception.

And they have said it takes clear

language from Congress to get you to read something the other way. We have no set, clear language and there are plenty of examples where Congress has, in statute, made this clear.

I mean, just as an example, one of the cases that the Agency has itself cited is the Dunne case. And the Dunne case actually mentions in it an example of this, 18 USC 3284, which has language, the concealment -- it relates to bankruptcy -- but the concealment of assets of the debtor shall be deemed to be a continuing offense.

You have no language at all like this. And you have, layered on top of it, you know, in our view two strong affirmative signals that suggest, that are practically dispositive that it could not be a continuing violation.

JUDGE FRASER: Are you familiar with the Center for Biological Diversity case of the Center against BP Oil? And it's an

EPCRA case. It's not a TSCA case. But the language there was a duty to file an emergency notice as soon as practicable.

And, to put it in their terms, that that was a continuing violation, and it was an ongoing violation to provide that report. So how would you distinguish that along the lines of cases that you have here? Why should not the Board look to that similar reporting complication, similar purpose of protecting human health and the environment?

MR. TENPAS: A couple of those, I mean, some of those, Your Honor, I think, frankly, we have to just say we don't think they're -- we disagree. They involve different statutes. There are maybe other aspects of the statute that indicate, suitably, that Congress must have meant for this to be a continuing violation.

Our point here is in the context of this particular statute, working against the background rules and presumptions the

Court will accept, you do not have that kind of clear language. You have -- and, as I say, I think, clearly, from our purpose and I guess maybe one other point with respect to BP, I think you need to address this case in light of totality and what it has to say.

And, again, we know it's a fraud case but it doesn't talk at length about why one should not readily extend a statute of limitations from within this particular statute to allow a late, you know, a much bigger time for brought action than the basic five years.

And one of the points it makes is that a civil enforcement matter is a particularly suspect place to take that approach, where you don't provide a firm end date. This is a civil enforcement case.

The second piece, I think we would point to, is the other -- that even in a world of ambiguity we think, as we say, that time is not going to be with the Agency. But you have

an affirmative marker here.

It's a civil enforcement case where that is then especially disfavored. In addition, you have the word immediately, and we think both this Board's prior jurisprudence and the jurisprudence of the courts has indicated as for this verdict.

If there is a temporal element to the requirement, that, is an affirmative signal from Congress that it is a violation that is complete and that, from that moment forward, your statute of limitations begins to run.

And we could, as did Judge Biro particularly said in here, we think there was a moment in her decision where she was not faithful to that description because, rather than talking about whether the statute provided a temporal limitation, she made the point, it doesn't apply to dates certain. Those are two different things.

JUDGE STEIN: Could you tell me

where in the Board's jurisprudence it has addressed specifically the term immediately? I'm certainly familiar with the Lazarus opinion where we talked about reports that had to be filed on a date certain.

But I don't recall off the top of my head here that Lazarus or Newell addressed a situation involving interpretation of the term immediately.

MR. TENPAS: Oh, we don't maintain that you have and, frankly, I don't think that we have a case that takes on the word immediately.

JUDGE STEIN: Okay.

MR. TENPAS: And we acknowledge that. But the logic of what the Board considered and what it had to say there was, again, when there is a temporal limitation or a temporal requirement by when one must make the filing, make the record, do the report, that that indicates it is not simply that it's kind of mutual case but Congress affirmatively

intended it not to be a continuing violation.

JUDGE STEIN: Yes, let me --

MR. TENPAS: And it provides that.

JUDGE STEIN: Let me try to break some of this apart for a moment because I think the term continuing violation is being thrown around a lot. And I think, when you read the cases, the courts use it in many different ways.

And there may be a continuing violation for purposes and an exception to the statute of limitations which you were describing the Supreme Court addressing in Gabelli, in the discovery.

But there are also continuing violations for other purposes -- for citizenship purposes, for statutory purposes a la 16(a), for venue purposes.

And it's not clear to me that the words continuing violation in those contexts have the same connotation that you're suggesting as an exception to the statute of

limitations. Do you agree with that?

MR. TENPAS: Absolutely, Your Honor. I think we absolutely agree with that. So I think that's an important -- why it's important to tease out and think about the particular context in which you are going to make the decision is this a continuing violation.

JUDGE STEIN: Now it's also my understanding that when you're looking at an exception to the continuing violation doctrine in the statute of limitations context, that might authorize you to go back to the first date of violation.

But then if you're looking at a violation that continues and you're only seeking five years of penalties, you're really not looking at an exception to the statute of limitations. Is that correct also?

MR. TENPAS: Well, I think we would agree that if you are in a circumstance where you have a series of discrete

violations, each one separate, but that repeat themselves. And I think that's where we're close to the third question, perhaps, that the Court sent for us.

You agree, you felt you can go back five years to reach the first of those discrete and separate violations. Our point here would be to say this is -- 8(e), is not such a statute.

It does not define a violation in that way. It does not say each day is a separate violation. 16(a)(1) says if you have a continuing violation, you can break it up into separate days once you get to the penalty portion.

But, again, if, apropos the Board's comment, that is only once you get to a penalty analysis and, of course, one can't get to a penalty analysis unless you have a timely brought original action, and that requires you to consider what was that nature of that violation and was it continuing for

statute of limitations purposes.

JUDGE FRASER: I want -- kind of I want to go to a basic question. So, Elementis receives the report on Day 1.

MR. TENPAS: Mm-hmm.

JUDGE FRASER: They have an obligation within the statute to turn it over, and they don't. Putting aside the 30 day piece right now, they tell you they haven't turned it over. Potential violation. Day 3, potential violation.

Day 30, which is where the grace period comes in, or however you want to interpret it, violation. Day 31, violation. So where do you count the violations occurring? The violation occurred on Day 1? The violation occurred on Day 31?

Day 35, they no longer had a obligation because they didn't turn it over on Day 31? So on Day 35 that obligation has gone away? I'm struggling with how you're finding what day is the violation.

MR. TENPAS: Well, I mean, technically, the violation occurred at the point they did not immediately inform. And for this case, one doesn't need to get too caught up in that because if you go back and you take their complaint and move back five years and allow for -- so roughly five years, 241 days, I think is how we calculate it. And through 2010 back to 2005 --

JUDGE FRASER: I think you're missing what's --

MR. TENPAS: Nobody --

JUDGE FRASER: -- important though because whatever we articulate the statute means here, it applies moving forward to every other person who manufactures a chemical substance.

So if we don't have a statute of limitations problem or issue via grace in a case, if we're within that five-year period, and we're articulating the basis of whether it's a discrete violation, a continuing

violation, it is important to figure out, I think, when the violation occurred.

And it seems to me, unless I'm misunderstanding the essence of your argument, taking away the statute of limitations question, is that the violation happened on Day 31. So as long as they're between Day 31 and five years plus a bit, there's no obligation on Day 35? There's no obligation on Year 2?

MR. TENPAS: Well, we think, yes, that Day 31 certainly is the point at which the statute is to run. That is the date on which the claim first accrues. That is the language of 2462. They have five years from the date on which it first accrues.

We believe that there are various legal considerations that would still cause a company to have significant incentives to report even past Day 31 if they realize, for example, that they have to report it and it should have gone in and didn't.

It bear directly, for example, on the penalty, given the broad set of circumstances that the Agency and the Board can consider in factoring penalties. So it is not as if they get a kind of free ride, that there are no additional consequences for not reporting on Day 35, on Day 36 --

JUDGE FRASER: I'm trying separate the consequences of those actions where people could make calculated judgment calls -- and I'm not saying that's what's happening here -- but I'm not trying to deal with the consequences as much as I'm trying to deal with the legal construct of the statute.

And so, is the point that on Day 35 on Year 1 there is no legal obligation under the statute? And that's what Congress intended, that, however the Agency interpreted immediately meeting, that once that time period, since they set it as 15 days initially and then on this one it was 15 days, so on Day 16 there is nothing -- the obligation went

away and the Agency had the authority to change immediately into 15-year limit or 30-day limit?

MR. TENPAS: I'm not sure I follow -- I'm sorry, Your Honor. I'm not sure I follow the last piece of that.

JUDGE FRASER: What I'm trying to get at, you took -- you were responding to Judge Stein's question that this was not a continuing or ongoing or not a series of discrete violations.

And so I'm trying to probe that, what are the implications of that point? And so it would seem to me an argument could be made that if you're saying the cutoff is on Day 30, because that's how the Agency has defined or, given enforcement discretion, what it's comfortable with --

MR. TENPAS: Right.

JUDGE FRASER: -- that, arguably, that would say they have said, Day 40, there is no longer an obligation. So that if you're

not within five years of Day 31, then there is no obligation on Day 40.

MR. TENPAS: We agree that if it's not brought within five years of that Day 30 you are outside what the statute of limitations permits. I guess that I'm struggling a little bit with the notion of there was no obligation.

We think there are things that there would be potential legal consequences for not doing so, for example, penalties. So in that sense I would think, once you say there is a legal obligation because if they don't --

JUDGE FRASER: There's a legal consequence.

MR. TENPAS: Well, I mean --

JUDGE STEIN: But in your construct, the maximum penalty that could ever be assessed civilly for failure to turn over information, very significant information, is a one-day violation of, whether it's $25,000,

$27,000.

So that for this particular violation, irrespective of how long the company has information that it either doesn't turn over or that the Administrator doesn't have knowledge of, the maximum is you got to hit that one magic day. And after that you're home free? You don't have to turn that information over?

MR. TENPAS: We actually don't think that that's the case. I mean, first, we'd say that's not a question you need to reach here, because if it's untimely it doesn't matter what the potential time it could've been, it is untimely.

JUDGE STEIN: No, I understand that. But I'm trying to figure out, for this kind of violation, whether the maximum penalty one could ever seek is a one-day violation.

MR. TENPAS: We don't think you need to reach that conclusion --

JUDGE STEIN: I understand that.

MR. TENPAS: -- and here is why, Your Honor. It goes back to the point that you made, that this phrase, continuing violation, it is kind of thrown away and it used in lots of different contexts.

It's used to talk about statute of limitations. It's used to talk about venue issues. And, in this particular case, it is a phrase, "a violation that continues," is used in the penalty decision.

And we think it would be open to this Board in future cases to say we know that for statute of limitations purposes we describe 8(e) as not subject to the continuing violations doctrine, and that's because there are lots of special concerns about old cases being brought.

That doesn't preclude you from saying, for a case that was brought within five years, we will say all of the days that occurred is not circumstance where the violation continues as that is meant in terms

of 8(e).

So we think it's possible that you could -- and that is not at all unusual. I mean, the courts are doing that, as Your Honor pointed out. They say, look, we can call something -- we can say that something does not qualify for the continuing violations doctrine when we're looking at statute of limitations, but we do think they can be for purposes of venue.

This just represents another example of that principle. You could say we're not going to call it a continuing violation of statute of limitations analysis because we've got language like "immediately," language like "report," which seems to be discrete, and we've got all this guidance from the courts that propose other things are really important.

But once you're in the circumstance where a case has been brought within five years, you know, to take Your

Honor's hypothetical, go out 4 years, 364 days beyond 31. In that case, the issues and the concerns about proposed, unfairness aren't present.

And so it seems to us you are a lot freer than that timely case having been brought to say are we going to penalize this on a day-by-day basis, 325 a day? Because 16(a)(1), that second sentence, authorizes that to occur. It says, for purposes of this subsection, i.e., for purposes of penalties, we can treat a violation that continues each day as a separate offense.

So it's sort of a long answer but, Your Honor, we don't -- it obviously concerns you and we want to be clear that there is not an implication from deciding that it's not a continuing violation for statute of limitations purposes, that you can't then get multiple day penalties for a case that is timely brought.

JUDGE STEIN: So we're going to

want to switch to the other issue, and we'll probably add some time -- I think we're going to add some time because we still have some questions.

But if, on Day 31, you get a draft of a report and a year later you get a final report, similar but not quite the same, do you have an obligation a year later, if the information in that report is substantial risk information within the meaning of the statute, notwithstanding the fact that you didn't turn over the draft of the report, do you have an obligation to turn over the report?

MR. TENPAS: I think it would likely depend on whether the risk information is identical in the two. I mean, it doesn't seem right that, for example, if the same report is bouncing back and forth and then a company attaches it to emails to a consultant, that kind of -- each time that report comes in with the same -- whatever is the information that reasonably supports the finding of risk

is the same, that you would have, that each of those receipts would trigger a new. So I think if you --

JUDGE STEIN: So the failure to turn it over on Day 31 forever immunizes the company from having to turn over the information?

MR. TENPAS: Well, if --

JUDGE STEIN: Is that what I'm -- am I understanding you correctly?

MR. TENPAS: It doesn't immunize you, Your Honor, because, as I say, the consequences from turning it over or not turning it over can still be significant. It is hardly immunization.

I mean, you know, immunity means you can never be pursued for that violation. But the failure to turn it over doesn't immunize you from ever being pursued. It is the case that if the Agency doesn't pursue you within five years, yes, the company --

JUDGE STEIN: But my hypothetical

was different. My hypothetical referred to a draft of report that contains substantial risk information and a final report. And just so that I'm clear, you're saying that because it's similar to the other report there is no legal obligation that, in the form of -- in other words, it would not be a violation not to turn that in?

MR. TENPAS: I'm sorry, Your Honor, don't mean to go as far as to suggesting that if it is just similar. I think we have to do a more particular analysis than that and decide, okay, what is he information in the report that conveys substantial, you know, that reasonably supports the conclusion that there is substantial risk here?

And if the information in the report is identical in each of them, then, I think, you would go back to the first moment you received that information.

If the reports are different in

describing the level of that risk, or how certain one is of that risk, then I think that is new information. It is different information than you would receive, and so you have the duty to immediately inform of that information.

JUDGE STEIN: Let me just go ahead and ask Ms. Durr, if you could please add 15 minutes to Counsel's time here, and we'll do the same for EPA.

MR. TENPAS: Your Honor, give me a moment. I'll take that as my cue to move on.

JUDGE FRASER: That's actually a good segue to the next set of questions. So, presuming we find that the statute of limitations doesn't apply here and reach the merits of the case, I would like to walk through the various components of the statute as I read them.

Because it seems to me that, in large part, in briefs there's a discussion of the statute of limits that I'm reading a

little differently. And so, as I read the components of Section 8(b), there's five segments I'd like to talk with you about.

The first is the manufacturer obtains information. So I'd like to talk about what was information.

The second is there is a conclusion that kind of represents a substantial risk of injury to health or the environment.

The third is the information reasonably supports that conclusion.

Fourth is, immediately inform the Administrator of such information.

And then the fifth is the affirmative defense of actual knowledge of such information.

So I'd like to walk through each of those. But the first one's --

MR. TENPAS: Your Honor, could I trouble you -- could you give me the third one again?

JUDGE FRASER: The third one is the information reasonably supports their conclusion. And I note that on Page 28 of your brief, as I've articulated the second and third, you also said that you had four elements, and those were your second and third elements there. If those were your first and second, they're my second and third.

So the first question I had for you is, what do you think information means as it's used in this statute? Just the word "information," because it starts off with a manufacturer who obtains information.

MR. TENPAS: Information means facts. I mean --

JUDGE FRASER: Well, to be more specific, it seems like the debate has been, and the underlying decision by Judge Biro, had a quite extensive definition. She cited from the dictionary, information could be facts or it could be a study, it could be data.

It seems like a lot of the debate

here is, is there a new scientific finding here? That it's being narrowed much more than what I would think is the common definition of information. So I'm trying to parse what is Elementis' position as to what does information mean here in the statue?

MR. TENPAS: Right. I think, and you may not -- our job is as advocates in front of you. I guess my sense of this is we don't dispute, I don't think, that there is a lot in the report that is information. It is information if it describes, to some degree, how the study is done. So I think our emphasis here is more that Congress didn't craft a statue that says any information you get about a chemical, report it.

It put significant limits. And to it has to be information of a particular sort, information that reasonably supports the conclusion that the mixture presents a substantial risk, so --

JUDGE FRASER: So information

could be the entire study itself, not just the particularized findings within the study. There's a lot of discussion in both briefs about time, and in the initial decision, teasing apart what is new, what is the same.

And, I mean, the step before that is, does information also include the entire study?

MR. TENPAS: Your Honor, I think fairly that -- as we thought about or as I thought it, I think that's a fair point, that that perhaps gets to, really, the nub of the question.

And in our view, no, you cannot view the whole report and every paragraph in it as information that reasonably supports the conclusion. I mean, they're simply descriptions of what reasonably supports the conclusion.

The fact that X number of workers were studied somewhere does not support any conclusion. So those portions of the report

that simply describe "that's what we did," are not information that reasonably supports.

JUDGE FRASER: So you think a fair construct of the statute would be a manufacturer gets a report, does a study, gets a final report, selects and excerpts just sort of paragraphs or pages that is newer information that reasonably supports and everything else they get to retain, that that was what was intended?

MR. TENPAS: Yes, I think the manufacturer could do that and it would be in compliance. And in that circumstance, Your Honor, obviously then the Agency has the significant alert that there is a report study. If it thinks it needs more, if it wants more, it's got a variety of tools that it can then use to try to secure that.

JUDGE FRASER: And that would be a helpful disclosure? You believe that scientists would say, just give me the finding without the protocol, the number of persons

studied, the conditions under which they were studied? That might not be new information but it is the foundation of the findings that are being presented, that only the findings have to be disclosed under the statute?

MR. TENPAS: Well, we would agree. The scientists might probably love a lot more. In fact, this case was rich in testimony from experts about all the things they would like to have and ways they would like to use the data.

But the difficulty there is that is not the statute that Congress wrote. It did not say provide all that information which scientists might find helpful. It wrote a statute that's very particular, very specific in providing limits. And the information that needs to be provided is that which reasonably supports a conclusion of risk.

JUDGE FRASER: And so in the Mundt study itself, what would you say is that information which reasonably supports a

finding of risk?

MR. TENPAS: It is found that -- the Mundt study is Exhibit 1. It is found at Pages 89 and 90 of the study. And just a footnote to help the bench, the pages are numbered at the bottom. But then there are Bates numbers at the top. We use throughout the numbers at the top. So when you go into the report don't look for 89, 90 at the bottom. Look up at the top. And there is the conclusion reflected there. If the Court will indulge me just a moment.

We identified an increase in lung cancer mortality among those with the highest cumulative exposure. That's it in a nutshell. That is the only place where this report says exposure to hexavalent chromium created any -- was closely associate with any higher risk of cancer than the normal population were those with the highest exposure.

That's the information that identifies --

JUDGE FRASER: So, just to try to understand, your party's position is that, were we to reach the merits, a company could discharge its obligation by providing that one or two pages out of the report to EPA and that would be it?

MR. TENPAS: Yes, Your Honor.

JUDGE FRASER: Okay. And how would you reconcile that position with the 1999 penalty policy? You rely on the penalty policy and the reporting guidelines for the 30 days. But the penalty policy says complete and accurate information is essential. Each report omitted or incompletely reported will be treated as a separate non-reporting violation.

MR. TENPAS: Two things, Your Honor. I do want to back up. We have relied on, for example, the 30-day only for the point that even the Agency maintains, you know, at least by Day 31 it had an action. So we've only relied on it for that very limited

proposition.

As we discussed, it'd be another case for a future day if somebody would say, well, in this particular context, "immediately" should have been faster than that. That's just an act of grace, not a requirement, so our reliance on that is pretty limited.

I think the second piece, as to the guidance: it is guidance; it is not the statute. And I think, end of the day, if the Agency wanted it to be as binding as that, it has procedures for going through notice of comment for regulation. It has procedures for making that the requirement, and it is persuasive only insofar as it carries this Board or carries it forward in that kind of setting. And we just think it is not persuasive, given the underlying statute.

In fairness, we would acknowledge, yes, to the degree there were places where some of that guidance is favorable it's, in

essence, a concession against interest by the Agency. But that doesn't mean we have to acknowledge or do acknowledge that it is legally binding or controlling on the regulated community once we get to a contested case.

JUDGE FRASER: And then, so, the statute is reading any person who obtains information which reasonably supports the conclusion that this chemical presents a substantial risk of injury to health or to the environment shall immediately inform the Administrator of such a condition.

And your contention is that it is a limited, specific finding that is providing the reasonable support.

MR. TENPAS: Yes, and I think another way of saying that, from our perspective, Your Honor, would be, as I emphasized a moment ago, the statute just doesn't require reporting any or all information. It's limited to information that

meets certain criteria.

It's information that reasonably supports a conclusion. And so when a statute refers back to such information it's got to be referring to the information with all of those modifiers attached to it. It's not, that is to say, it is not such information. It's information that doesn't reasonably support. I mean, you've got to read those to --

JUDGE FRASER: Okay, thank you.

MR. TENPAS: -- in tandem, and so I think our --

JUDGE FRASER: Thank you. It may have been my reading but you articulated it a little clearer to me there than the briefs perhaps did --

MR. TENPAS: Well, I --

JUDGE FRASER: -- which was getting into particular findings, so thank you.

MR. TENPAS: I apologize for that but hopefully we've been useful today.

JUDGE FRASER: And then when we get to the affirmative defense, that same -- such use of such information, would be the same exact, such information, as both.

MR. TENPAS: Right, I mean, we don't seek -- when you say such information, it's got to be reference to the information as it was delineated earlier in the statute which is information with a set of modifiers, constraints, for a particular place.

JUDGE FRASER: Okay, the other half of the affirmative defense is there is no duty to disclose if the company has actual knowledge of this well-established -- or actual knowledge of such information. And then it is your contention that there was new confirmative -- supporting information on those two pages you cited in the Mundt study.

If I back up, a little bit ago you said look at Pages 89 and 90, I believe.

MR. TENPAS: Right.

JUDGE FRASER: And that was

information that supported the conclusion of the linkage between hexavalent chromium and lung cancer. That was the supporting information that had to be reported.

MR. TENPAS: Right, because if it identified at least a correlation -- I mean the testimonies of careful epidemiologists will never say they've established causation. They've established correlation between high cumulative and a higher than what I would, in shorthand, describe normal rate of cancer if you looked at populations from that region who weren't working in the plant.

JUDGE FRASER: So you just told me a minute ago that such information in the affirmative events was the same such information that was in the first part of the statute.

But if I understood your briefs correctly you were saying even if the statute of limitations didn't apply the company had no duty to disclose those two pages of the Mundt

study, under your contention, because the Agency already knew of that such information.

I'm not following how you say the Agency was aware of what was in the Mundt study, the information that reasonably supports it, that you found in the study. If those same such information causes are the same how is the Agency actually aware of that?

MR. TENPAS: Because what it reported was a correlation between certain levels of cumulative hexavalent chromium exposure and increased rates of cancer. That's what it found, is with this level -- and I won't do the numbers exactly right, but this indicated for an exposure level of 100 cumulative, people who were higher than that or more had higher than expected rates of cancer compared to the normal population.

Again, it's implication. What Gibb had already found in the EPA funded study was people with an exposure of 50 had -- lifetime exposure of 50, had higher than

expected rates of exposure. So the Agency was already aware of information that at 100 or more, higher than expected rates because Gibb had found it at 50, 60, 70 --

JUDGE FRASER: But you've just changed the meaning of such information in that. There is a conclusion that the Gibb study found at 50 --

MR. TENPAS: Mm-hmm.

JUDGE FRASER: -- in your example. You had information in the Mundt study that reasonably supports the conclusion that the Gibb study found. The such information, as we just discussed, is that such information that was in the Mundt study is reasonably supportive of what the Gibb study found.

It seems to me your argument is now changing. The second such information becomes the Gibb study conclusion not supporting information of that conclusion.

MR. TENPAS: I guess that gets to another thing I think maybe where we disagree,

is the document in which the information is found may differ in the Gibb study or the Mundt study.

But the information is the same. It is that at 100 or more lifetime exposure, higher risk of cancer.

JUDGE FRASER: That still is changing. Starting from the beginning, a manufacturer obtains information and has -- that reasonably supports a conclusion. There is a conclusion that has been made by the Gibb study.

A manufacturer has obtained information that is supportive of that conclusion and has a duty to disclose such information that is the confirmed data or the supportive information unless they know the Administrator already has such information.

The Administrator -- such information here, seemed to me -- the plain reading of the statute would be that such information that they had a duty to disclose

is the same such information that reasonably supported our conclusion at this earlier date. It could be every day.

MR. TENPAS: I'm not -- again, I'm not sure I can describe it other than we think the such information is 100 or more higher incidents. It's founded in -- yes, it's founded in a different report.

So if you're going to take with you just -- of course, by being in different reports is different information that sort of takes us back to perhaps --

JUDGE FRASER: I didn't say different information. I said the statute says there is a conclusion that it's reasonably -- let's go back to the exact language.

It says there is information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health. So there is information that supports this conclusion.

And unless the Administrator is aware of such information which is the information that supports this conclusion, the conclusion is already made. This is allowing and requiring more supportive studies to be submitted to the Administrator, not that just because the Administrator knows from one study that they have no -- there's no obligation for any other confirmatory study to be submitted to the Agency.

That seems to me to be the gist of your argument, that confirmatory studies do not have to be submitted.

MR. TENPAS: I think we do have the view that if it is entirely confirmatory and if -- the information that can support the conclusion of risk. And the information that supports a conclusion here is -- it didn't conclude that hexavalent chromium causes cancer.

It concluded there is a correlation. There is a higher incidence for

highly exposed workers, a higher incidence for cancer. That fact, that information has been known to the Agency.

And I guess my -- what I would observe, Your Honor, if you go in the direction that you're suggesting, there is, for example, no such thing as an epidemiological report that does not need to be disclosed because every study is going to have a different group of workers and it's going to vary a little bit, one to one.

And we don't think the statute can -- it's hard to imagine any report because all of them will differ in some degree in terms of who was studied, what was studied and in what context that you could ever have anything other than every report literally needs to be sent in.

And one -- I think one thing I just observed, there may be a certain reaction of well, okay, so what. I mean, how hard is it to send in a report. And I think what the

Board needs to be cautious of and I imagine part of what Congress was cognizant of here was when you set up that kind of regime you are creating disincentives for the very conduct that you want to encourage.

You want people to undertake these studies. I mean, Elementis was the smallest in a group of companies. The only that got prosecuted, but it was the smallest in a group of companies who voluntarily undertook this study.

If you announced to the regulated community essentially every study that ever identifies any kind of risk you're going to have to put a stamp on it and you're going to have to send it to EPA. Thereby it's public information for use in a variety of contexts. You are actually creating a serious disincentive to the very conduct you want to promote and encourage.

JUDGE FRASER: But didn't the Agency create that exception in the guidance

for that very -- to address that very issue? And that is where in the guidance it said if it is a well-established finding then you no longer need the confirmatory studies.

So the guidance gives a card out for that very situation.

MR. TENPAS: Well, if the Court is going to actually announce, and it is opinion, and we, being wrapped onto the statute that the sort of notion that it's -- that there's an exception if it's well-established, I would -- that provides a little bit of protection.

But that's actually a narrower protection than what the statute itself provides, which says if it's information that reasonably supports and is known. It doesn't have to be well-established. This says simply if the information is known.

JUDGE FRASER: No, this says if the company has actual knowledge that the Administrator has such information. So I could posit a scenario where there is a study

that's done on rats and new chemical X. There is a conclusion from that study that chemical X causes some adverse health effect.

Five other manufacturers who are involved with chemical X do five different studies and it confirms that same finding. Would that not be of benefit to the Agency, and what Congress intended here, that there be submission to the Agency so that as they're deciding how to address potential health effects there's strength in the number of studies that may have been conducted across different workers, different populations, different size populations?

MR. TENPAS: It might be of some help to the Agency, but it is not the statute that Congress crafted.

JUDGE FRASER: It is --

MR. TENPAS: It says if the Agency has the information it --

JUDGE STEIN: I'm not sure that's actually what the statute says.

MR. TENPAS: Hey, I'm trying --

JUDGE STEIN: I --

MR. TENPAS: I'm working on the --

JUDGE STEIN: I think the statute says unless such person has actual knowledge that the Administrator has been adequately informed of such information. So it appears that manufacturer must possess, has actual knowledge that the Administrator has been -- not just is aware of but that there's been some act of adequately informing the Administrator.

MR. TENPAS: Okay, I mean, if the -- it's hard for me to posit how the Administrator could be informed without having been informed by somebody. But, again, I think I -- I apologize for maybe short-handing unfairly.

But if, again, is the statute that Congress wrote is if the Administrator is informed of the information it's not -- the test is not will this new stuff be potentially

helpful or useful. It's has --

JUDGE FRASER: I'm reading the statute and the statute says the manufacturer has obtained information, has to turn over such information unless they have actual knowledge the Administrator has been informed of such information.

So the track the information has to be disclosed whether it's the entire study as the Agency may contend or the two pages as you articulated here, the plain language of the statute is -- going back to what Congress wrote -- is as long as that information reasonably supports a conclusion that the chemical is causing adverse health effects such information has to be disclosed to the Administrator.

MR. TENPAS: Your Honor, this is, if you will indulge me, I see we're well over time, but I think your question maybe illuminated something that either I didn't say precisely enough or wasn't clear enough.

You asked me the question if they sent the two pages in would that have been enough, and I said yes. There are other ways that they could have conveyed the information. They could have written a letter that says we have a study and information that a tie, at these exposures rates, that there is an increased incidence of cancer.

And the reason I posit that is that highlights to me the point -- that what's critical is the information. And that information -- it's not the two pages. The information that supports the conclusion is the information that, you know, at the exposure of 100 you have higher rates of cancer.

And that information was -- the Administrator was adequately informed of through Gibb and the company had knowledge, actual knowledge that the opinion --

JUDGE FRASER: You've turned -- you've changed in my mind how you're

interpreting such information in the first clause where is was information the manufacturer that -- Elementis did not obtain the Gibb study and make a decision whether to disclose the Gibb study to the Administrator.

Elementis obtained the Mundt study that confirmed a conclusion or supported it, reasonably supported a conclusion of linkage of hexavalent chromium to lung cancer. And that was the such information, the confirmatory study is the such information, is my question to you.

You're changing the last such information to go back to belaboring that finding. They need a conclusion.

MR. TENPAS: No, I hope that what I'm doing is identifying the first such information and being consistent throughout in saying the such information here that reasonably supports that conclusion is the information that -- and exposures of 200 or more, cumulative exposures of 200 or more, you

get a higher rate of cancer.

That is the information that supports the conclusion. That correlation exists. And that correlation was already in the hands of the Administrator, informed through them having the Administrator having the Gibb study which found that correlation at much lower levels.

I think -- and so in our view we are being consistent in saying, what's the information? It's the information of the correlation. It's not the little or two pages, but that information. And why did the Administrator already have it? Because he got that same information through the Gibb study.

JUDGE FRASER: And do you think that's the only reading of that statutory reading, only fair reading?

MR. TENPAS: We think that's the best reading, Your Honor.

JUDGE STEIN: Let me ask you -- were you done?

JUDGE FRASER: Yes.

JUDGE STEIN: If I understand you correctly, what you're telling us is we should be looking at the statute, not the guidance. Is that correct?

MR. TENPAS: I think our view is the guidance is non-binding.

JUDGE STEIN: Right.

MR. TENPAS: And so it is culpable. Understanding we're not in federal court, but in a sort of federal court language our reference is it is helpful only in so far as its ability to persuade.

JUDGE STEIN: Okay. So at the time that the events in this case were going on, EPA had the Gibb study because it did the Gibb study. Was it Elementis' contention that the conclusions of the Gibb study were well-established?

MR. TENPAS: We believe, yes. It was, I mean, in answer to your question, yes, because -- I mean, the Gibb study was the

preeminent study. It was --

JUDGE FRASER: Didn't Elementis and other companies randomly criticize the Gibb study during the OSHA rulemaking?

MR. TENPAS: They criticized aspects of it but not this aspect of, you know --

JUDGE FRASER: They criticized the linear relationship and said we don't believe there's enough evidence of that linear relationship. We think it's a threshold level for hexavalent chromium linkage.

MR. TENPAS: Right, so all the way down to the bottom, at the lowest levels, yes, there was a dispute, but not as to this highest level. And I do want to turn back to Your Honor's question. Well-established, I guess our concern again is that's not the language of the statute.

JUDGE FRASER: If I could just explore -- and thank you for how you articulated the information and how you're

reading it. So just to see how that may play out, so if there is a study.

Let's say the EPA, totally different case, in this hypothetical. They had a chronic rat study showing cancer effects. If a manufacturer does a study with mice that shows similar cancer effects would they have to report it or would you say, no, it doesn't have to report it because they've already shown linkage between the chemical and the cancer?

MR. TENPAS: And so I'm clear, the distinction between the studies is rats versus mice --

JUDGE FRASER: Right.

MR. TENPAS: -- as subjects?

JUDGE FRASER: Yes, the first one was rats and then somebody has now done mice.

MR. TENPAS: I think that is likely to be new information, Your Honor, because what you will have in that case, it sounds to me like the information you would

have is -- and I'm not sure you would have causation at least in this epidemiological world.

What you would have is a finding that rats, given certain amounts of exposure to a certain chemical, I guess, develop cancer or die at increased rates from your standard population. Then you would have another study that says the same as to -- I forget the order you were doing it -- mice and rats, rats and mice -- but you would -- that would be, I think, in our view it would tentative new information.

JUDGE FRASER: And if you -- if one was an inhalation study and one was a dietary study is that new information that would have to be recorded?

MR. TENPAS: I think, probably. I mean, one of the things that is unique about this case is that all the experts agree the way you should think about this is the cumulative lifetime exposures.

So Gibb thought about it and analyzed it in those terms. Mundt did it. So it strikes me that when you start to talk potentially about really different kinds of studies as you described there, then, yes, you get -- much more likely to get potentially new information.

JUDGE FRASER: And what if one is done with a small set of rats and the other one has 50 times the number of rats in their study?

MR. TENPAS: I think in that case, if you basically get an identical finding about -- if the small rat study found a problem at exposure levels of 5 and the big rat study found a problem only at exposures of 100, I don't think the latter one is necessarily reportable there.

I mean that is not -- again, that would not be information that -- the fact that you could have a higher incidence of cancer or whatever on B in your rat at 100 would not be

information which the Administrator is not already adequately informed because I assume the working hypothesis is the first one he did in his administration.

Obviously, if the first one isn't in the hands of the Administrator then a different answer.

JUDGE FRASER: Right, assuming the first one is the EPA study, EPA did the first rat study. So it is more if we have different species, yes. But, in your mind, just confirming the same species, same effect even with different resulting numbers is not reportable. It's only the conclusion, that here is a linkage between adverse effects and the chemical?

MR. TENPAS: Well, to be clear, I mean, even here, there is not necessarily a conclusion that chromium (VI) causes cancer.

JUDGE FRASER: Reasonably supports it.

MR. TENPAS: It reasonably

supports such a conclusion. So where you have kind of same species and what you see is a risk identified at lower -- at a higher exposure -- only showing up at a higher exposure level than has already been identified, I think, again, the answer is no, it doesn't need to be reported.

My simplistic analogy, you know, is this world, might be in the current world, okay, a study comes out 100 packs. You smoke ten packs of cigarettes a week, high incidence of cancer. Not reportable because there's already a report in the hands and the Agency acknowledged in that -- Agency that 1 pack a week you have a problem.

JUDGE STEIN: Thank you very much. We apologize for going over. I will give EPA additional time. I think we gave you an extra half an hour, but --

MR. TENPAS: It seemed like barely two minutes, Your Honor.

JUDGE STEIN: But I think it

reflects the complexity of this case. It reflects the importance of this case. And we appreciate your bearing with us as we work our way through the challenges this case presents.

MR. TENPAS: Well, hopefully I still get five minutes to come back and rebut.

JUDGE STEIN: You do get to rebut. I'm going to suggest that we start with EPA on the issue that we were just covering. Is that okay with you, so that we -- and then we'll flip back to the statute of limitations after that.

MR. CHALFANT: Yes, Your Honor. Your Honors, may it please the Board, I'm going to re-introduce myself. My name is Mark Chalfant and represent the Office of Civil Enforcement and specifically the Complainant in this matter.

As we turn to case on the merits and the issues that Judge Fraser was just probing, the central issue is Respondent's affirmative defense. And that affirmative

defense comes down to two credible issues we would submit.

What substantial risk information was before the Administrator prior to Respondent's study and, secondly, how did Respondent's study differ from what she had before her?

In a nutshell, Respondent's study contains new reportable substantial risk information that was not available to the Administrator for the earlier EPA study that was referred to as the Gibb study hearing.

JUDGE FRASER: Can I stop you right there because it seems to me -- I just wanted to confirm. You are seemingly interpreting statute in the same way that Elementis' counsel did, that information is limited to what is different as opposed to the broader context that EPA made the study itself.

MR. CHALFANT: Your Honor, as the presiding officer found her initial decision,

the term Information, as it's used in the statute, is a broad one. It's employed to keep the Agency as apprised as possible of the risks from chemicals.

I think the critical thing here is that information is, that term as it is found in the statute is then modified by the words that follow -- Reasonably supports the conclusion that a chemical substance or mixture presents a substantial risk of injury to human health and the environment.

JUDGE FRASER: I'm sorry, sir. Was that a yes, you're interpreting it to be the specific finding that is reasonably supportive of the conclusion? Or is it -- it seems to me you just kind of teed up the questions in the beginning when you said what SOI was before the Administrator and how did that substantial risk information from what she had, that, going back to the example you used before, if there are only two pages in that report that had these findings, those

were -- that information, the two pages, whether it's communicated by letter, or excerpted from the pages and sent in to them, it is the Agencies position that you agree that that's the only information that was required to be disclosed?

MR. CHALFANT: Your Honor, that was not our position. Our position is that any information in a response that reasonably supports the conclusion is subject to Section 8(e) and needed to have been reported to the Administrator.

JUDGE FRASER: Thank you.

MR. CHALFANT: You're welcome.

JUDGE STEIN: Can I ask a question? When companies typically turn over 8(e) information do they typically submit a study? Do they submit a paragraph? Is there some established protocol or does it just range the gamut?

And I'm asking -- I don't know, but is there a typical practice?

MR. CHALFANT: The typical practice, Your Honor, is where the Agency receives the study in its entirety. And I think the reason for that practice is if you reduced the study to a single line or a couple of pages, as Respondent suggests, then it would essentially handicap our risk assessors from being able to interpret the results of the study.

In some ways the way we think about it is it would be like asking an attorney to apply, withholding in one case to another case without understanding the underlying facts and the rationale for the first decision.

JUDGE STEIN: Thank you.

MR. CHALFANT: So Respondent essentially argues it's an affirmative defense that because the Administrator had before her the EPA study, the Gibb study, that Respondent was not required here to submit their study.

And essentially, what Respondent

argued in the briefs and on the Board, is that there is nothing new. I think they even used the term, Absolutely nothing new. And that's a proposition the presiding officer soundly rejected.

The parties have stipulated that in Respondent's study are finding are an excess lung cancer risk among the most highly exposed workers as opposing counsel noted. And the parties further stipulated that that finding constitutes substantial risk information.

Setting aside that finding, the parties sharply disagreed about whether a Respondent's study has new additional substantial risk information that is subject to Section 8(e) that was not available through the EPA study.

Although both parties would agree that the EPA study also made a find of excess lung cancer mortality risk among those highly exposed workers, the studies differ in

material, relevant ways in terms of the underlying information and the underlying data which reasonably supports those two studies prior to these.

Let me offer you a few examples. And I think we would submit that any one of these examples is enough for Complainant to prevail here. In the initial decision the presiding officer cited a series of five concrete examples of substantial risk information.

One of those concerned her finding that Respondent's study provides different risk information given the influence of short-term workers in the EPA study. And I'm referring to Page 67 of the initial decision.

The presiding officer moreover noted that the inclusion of short-term workers in the EPA study was rampantly criticized by most sources in the record.

Complainant tendered an expert, Dr. Speizer. Dr. Speizer was the only

physician. He was the only Professor of Medicine. And he was the only expert qualified in the field of pulmonary medicine. And he testified that it's very hard, and I'm referring again to Page 66 in the initial decision -- it's Transcript Pages 530-31.

He testified it is very difficult from a biological perspective to anticipate or expect that the risk of lung cancer might be related to exposures of less than six months.

And yet, if we look at Complainant's Exhibit 1, the Respondent's study, Page 30, it reads, the Gibb study included many very short-term workers. Over half those workers worked less than six months, 42 percent worked less than 90 days.

JUDGE FRASER: Mr. Chalfant, before you go further --

MR. CHALFANT: Yes.

JUDGE FRASER: -- we have read the initial decision and Judge Biro's comparison of what's new and the different findings that

she made.

So taking that as true, for purposes of this discussion and it is true all of those findings are differences, how do you respond to Mr. Tenpas' argument that even if that's true, all it does is support that same conclusion that the Agency already knew that there is a linkage between, a potential linkage between hexavalent chromium and lung cancer?

And so it's not -- he's not necessarily at this stage arguing about the differences as much as arguing about the Agency already was aware of the conclusion between the chemical and named effect, one that reasonably supports the conclusion.

MR. CHALFANT: Well, there's no question, Your Honor, that the association between Hexavalent chromium exposure and lung cancer rates has been well-established for decades, relative for either of these studies, going back to 1948.

The issue is whether or not the potency of that human carcinogen was well-established at low exposure levels.

JUDGE FRASER: But how, if you're a manufacturer and they're looking at a statute, how the a manufacturer to know, based on the statute -- they have information that supports the conclusion that there is a substantial risk of injury which you just said has been well-established for decades, they have determined that the Administrator has knowledge of such information.

How are they to know that -- here you're using potency -- that the potency information has to be turned over, by reading of the statute. What is your interpretation of guidance or where should they look to see that?

MR. CHALFANT: I would encourage Your Honor to look at Complainant's Exhibit 17, which is the original 1978 guidance. It was signed by the Administrator. It was

published in the Federal Register.

And there, that's where the Agency for the first time, at the very beginning of the 8(e) program, stated his interpretation of the key words in the statute -- substantial risk of injury to health or the environment.

Specifically, with the engagements he stated is the Agency interprets this statutory language of substantiality of risk to mean that it's a function of two things. And this appears at both Pages 1 and 2 of Complainant's Exhibit 17.

It states that substantiality of risk is the function of the seriousness of the effect and the factor of the probability of its existence. So really the first prong goes to the fact there's been this knowing, there's been this association well-established going back many decades between exposure to Hexavalent chromium and lung cancer.

This case is all about that second prong. It's about probability of the

occurrence of lung cancer.

JUDGE FRASER: But the company is saying you already had that probability. In fact, you had the probability of a lower exposure level than what they found. They found a higher exposure level.

By definition, the Agency, therefore, knew if it was -- if you achieved it at a lower level you likely, more likely than not, would have had the same impact as higher. So, to read back about this, but so what, even reading that guidance, whether they would say to you or say to the company that, if I read the statute and I read the guidance, doesn't the Agency already know about that relationship? They've already articulated it's a linear relationship.

MR. CHALFANT: I think the important thing to note, Your Honor, is that, in terms of that mirror dose-response relationship, it's an assumption that our risk assessors use here at EPA. OSHA risk

assessors use it as well.

But it's an assumption that is vigorously challenged before OSHA, when the EPA studies became available. It continues to be a matter of controversy whether it's a threshold below which there is no lung cancer risk from Hexavalent chromium exposure.

And what Complainant's experts testified herein is that Respondent's study offers additional information that helps to quantify the dose-response relationship. And that's valuable information.

JUDGE FRASER: I think, as Mr. Tenpas would have said earlier in response to my question, is while it may be valuable to the Agency and there may be even disagreement about the finding to able to, the question in terms of this reliability, if they're looking at the statute and looking at the guidance, how were they supposed to understand or know that filling in the gaps was the Agency's support that provided that confirmatory

information or additional information on a well-established linkage is reportable under Section 8(e)?

MR. CHALFANT: Your Honor, I would submit that the National Task Enforcement Office has been very clear about what needs to be reported here. If you look at the 1991 Reporting Guide which is at Complainant's Exhibit 21, if we look at Page 12 of that Reporting Guide, it describes data -- and I emphasize data, not findings or conclusions, but data is extremely valuable input for hazard identification and risk assessment.

So the supporting data that goes to the probability of an occurrence of an adverse effect is something that we have signaled clearly to the regulated community needs to be submitted to the Administrator.

JUDGE STEIN: How do you respond to counsel for Elementis' argument that under the Agency's reading of the statute the Agency would be flooded with studies and that every

new epidemiological study was to be submitted to the Agency?

MR. CHALFANT: Your Honor, I think the thing to keep in mind here is that there are not a flood of studies. Referring to the context of Hexavalent chromium there are a number of studies going back many, many decades in the record. But we're not talking hundreds of studies. We're talking dozens.

And so it's a very limited universe so we're not talking about the Agency being flooded with studies.

JUDGE STEIN: Does your guidance address epidemiologic studies at all or is it principally focused on animal studies?

MR. CHALFANT: The guidance, as it was written in 1991 and earlier in 1978, the Agency level, there are some references, epidemiological studies but the primary focus seems to be animal studies, particularly about 1991 reporting record.

JUDGE FRASER: So what guidance is

there for the manufacturer with respect to epidemiological studies in reporting priorities? Are they going to infer the same applies or what are they to look for?

MR. CHALFANT: Well I think it goes back, Your Honor, to the statutory language, recently supports the conclusion of a substantial risk or injury to human health or the environment. And how the Agency is to interpret it, those key statutory words in terms of the seriousness of the effect and the probability of the effect's occurrence.

In the 1991 Reporting Guide the Agency stated that if we're to term whether information constitutes the substantial risk information one needs to consider both of those factors.

And so it's our position that we have clearly communicated that new information -- and I refer to information broadly again in terms of exposure information and data -- that goes to the probability of the effect's

occurrence is reported.

JUDGE STEIN: Does the Agency ever get calls from manufacturers or counsel as to whether or not a study should be submitted or do you generally get either a study or no study?

MR. CHALFANT: Your Honor, if I speculate about --

JUDGE STEIN: If it's a speculation then don't bother.

MR. CHALFANT: Yes, I can't speculate about that.

JUDGE FRASER: Elementis and other industry challenged the Gibb study during the OSHA ruling and the study was submitted late to the OSHA process as I understand it at the time or period that closed.

Did OSHA -- didn't OSHA say in response or as part of its comments in the preamble that they didn't see there was anything new in the Mundt study that warranted different outcome?

MR. CHALFANT: The answer is yes, Your Honor. But there was an important context for that. OSHA is charged by Congress for setting workplace standards chemicals and that includes hexavalent chromium.

One of the key constraints on OSHA's ability to set and replace standards is technological and economic concerns. And a representative from OSHA testified in a hearing that OSHA, in reducing the workplace standard that was set many decades ago down to 5 micrograms and driven that number down as far as they could in light of economic constraints.

Financial, economic analysis is part of their rule making requirement. So Ms. Edens, who testified on behalf of OSHA indicated that this information wouldn't have made a difference in terms of further lowering it because that's something they could not do as a matter of law.

JUDGE FRASER: Would it have been

reasonable or unreasonable in your mind for the company hearing or its reading OSHA's response to that to determine that there was, therefore, no need to submit the report to EPA whole or in part even if there was an ongoing obligation or a continuing violation?

MR. CHALFANT: I don't think that's a fair conclusion to draw, Your Honor, because Elementis as well as other industry manufacturers were intimately involved in the rulemaking before OSHA.

They knew the standards that that agency was charged with following in promulgating a new workplace standard. And they certainly knew that technological and economic constraints were an important part of that. So that should not have played a role in assessing whether or not to report this information to this Agency.

Moreover, there's no indication from the record, as the presiding officer noted, that Respondent ever contacted this

Agency to inquire about reportability.

JUDGE STEIN: I think that's all the questions we have on this area.

JUDGE FRASER: I do actually have a question.

JUDGE STEIN: Oh, I'm sorry.

JUDGE FRASER: I do. On the well-established effects, Mr. Tenpas made a point of saying that that's not part of the statutory language at all, that that statutory language is just such information and that this is only an Agency guidance.

So what is the basis for the carve-out that the Agency has in the guidance document for that they would not reportable for those studies -- information or well-established?

MR. CHALFANT: That, Your Honor, first came about beginning the first guidance that was issued in 1978 that's Exhibit 17. It was an effort to narrow and clearly communicate to industry instances where the

Administrator considered to stop running guideline forms of the information that's otherwise reportable under Section 8(e).

So there is a, what the presiding officer called, a exception for well-established adverse effects. That's in Section 7. And that was an attempt to come down, there was roughly 7 or so, examples such as complication of a scientific term.

JUDGE STEIN: I think that's all the questions we have on this area. And if Mr. Raack could come forward we'll add 20 minutes to his time if he needs it. And I added 10 to yours, so that should just about even everybody out.

MR. RAACK: Thank you, Your Honors.

JUDGE STEIN: So, if you could take us back to the statute of limitations questions and begin by responding and addressing the questions that the Board issued in its Supplemental Order.

MR. RAACK: Sure. Well, may it please the Board, let me introduce myself as Peter Raack. I'm an attorney with Waste and Chemical Enforcement. I appreciate the opportunity this morning.

So, I'll go right to the questions that the Board has issued in the order from earlier this month. I'm going to spend a moment giving context and background for our position on the responses to those questions.

The Board's questions implicate essentially three analyses, including violations section to the statute of limitations, a series of extreme violations, and a multi-day penalty assessment analysis.

And we would suggest that each of these analyses involve similar factors and considerations, but that they are separate and distinct analyses.

There is a required sequence for undertaking these analyses. The first analysis that must be done is to figure out

first whether you have valid claims that are not time-barred. So, there you're talking about statute of limitations analysis.

Once you answer whether or not you have claims that are not time-barred, and if they aren't, then you proceed to a penalty assessment, whether multi-day penalties are appropriate.

These are distinct analyses, and while there is some crossover of these considerations, at that point we would have decided and already determined that your claims are valid and not time-barred. You put away your five-year slide rule, because that's not relevant to the multi-day penalty assessment. Operating on a 60-day --

JUDGE STEIN: I don't understand that.

MR. RAACK: Well, when you're doing a statute of limitations analysis, 2462 provides the five-year measure, for the date and the day back to capture claims that are

valid.

Once you get to that question in the sequence that you do have valid claims or there's a case to be brought and you are proceeding to a penalty assessment phase, and you don't have a duration of time under 16(a)(1) in which to measure that penalty, the number of days in the penalty, whether it be one year or five years or seven years, if you've already answered the first question. And again, these are sequentially analytical. That's how we would suggest this plays out.

JUDGE STEIN: Well, I'm just a little confused, because it seems to me that when you look at a violation, the first alleged violation may have occurred in 2002, when the company got the report and didn't turn it over 30 days later.

And one could argue, as Elementis has in this case, that by failure to bring a claim within five years of that date, that the Agency is barred from bringing any claim.

You could also, one could look at it as that particular violation continued each and every day up until the time that the company submitted the report under the subpoena. That the violations ended, you know, or alleged violations, ended no later than that date in 2008.

But wouldn't your allegations of violations that took place five years prior to the filing of a complaint be on sounder ground than the violations that go all the way back?

I mean, I don't understand how, if I'm understanding you correctly, you say I look at statute of limitations. And once I've done that, I don't look back. That the only purpose of 16(a) is to determine the penalty.

MR. RAACK: Yes. I think, personally, I think you're correct, that you have to establish sound ground for the claims that you're alleging in the complaint.

So, if the violation extends more than five years, you need a valid legal

theory. Here, as the presiding officer concluded, valid legal theories including violations exception to the five-year SOL accomplishing that, that it --

JUDGE STEIN: And is that still viable in light of the numerous courts, including the Supreme Court, that have cast serious doubt on how difficult it is to overcome that?

MR. RAACK: Yes, we believe it is. But, for example, the Gabelli case, which was talked about earlier this morning, as you pointed out, it's a case that didn't give rise to continuing violations, underlying purposes rationale. It was about discovery and a very different kind of exception to Section 8(b).

Second of all, it didn't involve an obligation, statutory or regulatory. It didn't involve meeting an obligation.

But it also was, when you read the Court's ruling, it was about extending beyond five years after the misdeed, on some amount

of time over which the threat of prosecution would hang on the a potential defendant's head.

And here we're not seeking that. Here we're seeking an application of the five years after the misdeeds occur. The misdeeds occurred up until they submitted in applying the law.

JUDGE STEIN: But aren't you seeking -- I mean, I guess I'm trying to clarify, is the Agency seeking penalties going back five years from the complaint, adjusted for the tolling agreement, or is it seeking penalties for the entire period of time?

MR. RAACK: The calculation that we put forward, and the presiding officer adopted, includes penalties that cover the entire period from 2002 to 2008. That's what we're seeking in this case.

JUDGE STEIN: And you're continuing to seek that in this case?

MR. RAACK: We're continuing to

seek that this case, that's right.

JUDGE FRASER: Why doesn't Gabelli apply here, in light of the use of the word "immediately" in the statute?

MR. RAACK: I'm sorry, in light of the Gabelli case?

JUDGE FRASER: Why would not Gabelli apply here in light of the use of the word "immediately" in the statute in terms of the reporting obligation? Why isn't that kind of speaking to a specific point in time as to when a report should be submitted, if it were covered?

MR. RAACK: Well, we don't think -- let's talk about the word "immediately." So, we think immediately doesn't provide, as Respondent's counsel discussed, a temporal limitation on when this information comes due.

We actually believe that "immediately" provides a sort of temporal trigger on how imperative it is that this information come in to the Agency. It doesn't

view that same sort of end to time or one-time obligation disclosure that Respondent suggests here.

In fact, earlier, whether this Board has had a chance to look into this, in the Mobil Oil case in 1994, the Respondent there offered that the word immediate in a reporting requirement, Directive 304, actually limited the failure to keep that timeframe to a one-day violation.

And the Court concluded that, no, every day they didn't make the report and prepare the report was actually a continued violation.

JUDGE FRASER: I'm not saying you aren't following that, I'm just asking how does Gabelli impact that line of cases?

MR. RAACK: Well, we think Gabelli wasn't about meeting a government obligation. It wasn't about compliance with their affirmative obligation as is said in the law, and the fact that it was under the discovery

rule really doesn't offer much support in any event.

JUDGE FRASER: So, you think the use of the word "immediately" gives more leeway than use of submit within 30 days or submit within 10 days?

MR. RAACK: Well, I don't know if that's what -- what Respondent does here, Your Honor, is choosing a compliance deadline with some sort of temporal limitation on the obligation. So you really have to look at it to see whether or not the provision at all has any sort of timely reference.

If you look at it, what is the obligation? And I think this Board, in a number of opinions, has said that the key inquiry here is what's the underlying obligation?

In Lazarus, the Board faced the question whether the compliance deadline, five months after the promulgation of the rule, established exactly that kind of cutoff, and

the Board said no.

The fact that the Agency provides the compliance deadline doesn't change the underlying nature of the obligation. If the underlying Agency obligation is one that itself lends itself to an ongoing requirement and has no other obligations and the statute that's bounded in this case allows for continuing violations then the obligation is one that's ongoing and not one that's one day of a limited duration.

JUDGE FRASER: So, in totally different case, if there were a report or study of Chemical X and the Agency found out 20 years later that the study had not been turned over and additionally you still didn't have information in that regard, your argument would be that this statutory provision would still allow that claim would be brought because it's a continuing violation?

MR. RAACK: That's right.

JUDGE STEIN: Is it your position

that it would be improper for the Board -- or not the correct legal construct -- to look at this as a series of discrete, repetitive violations that began in 2002 and continued up until 2008?

MR. RAACK: It's not our position that it would be incorrect legal ground to find continuing violations here.

JUDGE FRASER: I'm sorry, can you say that again?

MR. RAACK: Sure, sorry. We would agree that there's a valid legal theory that would allow us to find a separate and discrete violations. We think this is a different kind of case than the case that was cited with regard to the CSC case, which was a transaction-based case where the sale of a illegal device gave rise to violations.

Here it is not a transaction-based violation. It's not a period of some compliance and intermittent non-compliance. It's not a period where somebody reviewed and

did something like operate a different type of machine. And those are more discrete violations.

But we would think there is a valid legal theory and we would rely on to say every day they didn't in information, every time they did work and still had some information in our possession but we didn't turn it over, is a failure to comply with 8(e).

JUDGE STEIN: If the Board were to conclude that, in its view, this case follows most closely or could most correctly be characterized as a series of repetitive violations of the same provision, interpreting 16(a) as a violation that continues and therefore is a separate violation, why would it be necessary for the Board to reach the question of whether or not these are continuing violations as an exception to the statute of limitations?

MR. RAACK: I don't think it would be. The short answer is I don't think it would

be. I think the finding that these are a set or a series of discrete daily violations, that this is a tendency of violations, is essentially a finding that it's not a continuing violation. And I don't think you would have to reach that. I think those are alternative arguments that allow you to reach a duration of violations in this case.

JUDGE STEIN: I mean, I think it's fair to say that the Board, in the 15 or so years since Lazarus and Newell were decided, that a number of courts have looked at this exception to the continuing violations doctrine.

And while Gabelli was a discovery rule, I think it's fair to say that a unanimous Supreme Court has said that it is very difficult to establish an exception to the statute of limitations.

And some courts that have looked at that issue have described the circumstances in which you can do that as only discrimination

cases, or as only cases in which the character of the violation is not known to be fully understood until that course of conduct is complete.

Does this case fit either of those categories?

MR. RAACK: I don't think it fits either of those categories. We don't think the case law is foreclosing any other scenario or set of facts which are particular violations. And we would fully agree with the Supreme Court and D.C.'s Circuit Court has said that exceptions to a general rule ought to be construed extremely narrowly and very carefully. We would agree with that. We think this is one such occasion.

We have a situation with a statutory requirement as important as 8(e), so important that Congress essentially built it off of findings and policies that establish a timeframe to comply as immediately, as soon as possible, that this is the kind of scenario

that would allow for continuing violations.

JUDGE FRASER: Would that not be true of many of our statutes, that they are important policies that are being implicated and isn't that one of the areas that Gabelli addressed, the rationale or the basis for the statute that that's what is intended? So in using this brief we're doing the very thing that the Supreme Court should not be used as the rationale. How do you respond to that?

MR. RAACK: Well, it may be that environmental law, because of the very nature of the laws itself, and the meaning and the purpose behind each act, by the kinds of things, protection of health and the environment, decreasing or limiting exposure to dangerous chemicals, ensuring people don't have dirty water to drink, that people's air is clean enough to breathe, are the kinds of things that fall into that narrow category of the places and proper time to assign continuing violations.

The Supreme Court speaks about lots of statutes over lots of agencies and lots of kinds of laws. But I think that, to the extent that this is to read narrowly, we suggest that those kinds of scenarios where human health and the environment and the protection of those is the responsibility, ought to be the kind of things that would lead one to look very closely at the continuing violations exception.

JUDGE STEIN: Well, as a policy matter, I hear you. But as a strictly legal matter, I hear the Supreme Court saying that even in cases of fraud involving the very statute of limitations that is before the Board, that they have some pause.

And under the EPRA statute, which has very similar language to 16(a), is it necessary to reach a continuing violations theory in order to recover?

MR. RAACK: It is --

JUDGE STEIN: Continuing -- let me

clarify that -- continuing violation as an exception to the statute of limitations.

MR. RAACK: In a scenario where the violations begin, or are alleged to begin no more than five year prior to the filing of the complaint, then you don't need to find a continuing violations exception to apply multi-day because the continuing violations exception is exactly that. It's an exception to the statute of limitations and thus goes into play for multi-day penalty.

JUDGE STEIN: But why is that it an exception to the statute of limitations? Why isn't simply a statutory provision that defines offenses separately?

I mean, I can't tell you when I look at 16(a) which says separate violations, is there a legislative history that says that was intended as an exception to the statute of limitations?

MR. RAACK: No, we haven't found any legislative history that helps instruct

what Congress might have had in mind. But the very phrase, "where violations are continuing," it started off the sentence that contains that, the term you're talking about. It says, "where violations are continuing." For the purpose of this subsection, the section on civil penalties, every one is treated as a separate violation. Because they had just said that each violation was $25,000 per violation. Congress was trying to make that clear that it wasn't a one-time, per violation assessment, it is a cumulative penalty that ought to -- where violations continue.

If Congress was trying cut off the notation of continued violations under 16(a)(1), it likely wouldn't have used the very terms that was then leading to that conclusion where violations are continuing. They likely would have left some legislative history, given how significant that shift that would have been in the case law since the

doctrine was already well-established at that point.

JUDGE FRASER: Is there any place in legislative history, Agency guidance, where there is an interpretation that immediately -- going back to the position that articulated earlier -- that the "immediately" was to put an impetus upon the manufacturer to turn it over? Or is there some place where Congress or the Agency has articulated that this is viewed as an ongoing obligation that continues everyday?

MR. RAACK: Well, in 1980, in the penalty guidelines, in the Administration Enforcement Policy published in the Federal Register, the Agency took that position that continuing violations were available. And since that time, the penalty policy the Agency promulgated was taking the position that 8(e) was particular is the kind of violation that is such a continuing and ongoing obligation. Therefore the failure to comply with it is an

ongoing violation as well.

JUDGE STEIN: You earlier said that in the boxes that you put things in you first look at statute of limitations and after that you look at 16(a). Given that the Board interpreted 16(a) and Lazarus and Newell as allowing for the possibility of continuing violations, why wouldn't you look at 16(a) in the context of determining whether or not your claim is viable?

MR. RAACK: I missed the last part of your question. Sorry.

JUDGE STEIN: Why wouldn't you look at 16(a) in the first instance in determining whether you have a viable claim?

MR. RAACK: I think we do. The Board's analytical framework that you've been given is first you see whether the statute in general suggests or contemplates continuing violations. And there we have a number of places, and 16(a) is one of those places, where Congress seemed use terms to suggest the

possibility exists.

Then we're told to look at the specific provision in question, and we returned to 8(e) after we've determined that, yes, it contemplates the possibility of continuing violations.

Now, is that kind of question, you know, is the violation that is the subject to a particular case one that is continuing in nature? And the real question here is, and I still remain confused because the briefs seem to be of both sides. The real question is whether the obligation here continues, whether the obligation that is provided in 8(e) is one that continues -- not whether the violation, or there's some way to divorce an ongoing obligation from an ongoing violation, but it's whether the obligation is in the Board's previous decisions, that's the key question.

And where there has been an ongoing obligation found, accordingly the violation continues and therefore, the violation is

continuing as well.

And so I think really the crux of the issue is whether you've got an ongoing obligation. And I don't understand and I can't reconcile how you might have an ongoing obligation that isn't complied with over a number of years, but you want us to assess this one day, one-time violation.

Certainly there's no cases that the Respondent cites for divorcing those two concepts. And we can't find any basis in any kind of case or legal sort of rationale jurisprudence on how to divorce those two concepts.

JUDGE STEIN: If Congress chose the words "separate violations," and think one of the things the Board didn't do in Lazarus was to focus on the words "separate violation." Is there anything about the use for the word "separate" that suggests that it's not a continuing violation for statute of limitations purposes?

MR. RAACK: We don't read anything of the sort into "separate." We think it's important to look at it in the context of what Congress had written just before, which was each violation is subject to a penalty, max of $25,000.

And so separate violations merely increase the likelihood that each day equals a separate violations --

JUDGE STEIN: So separate goes forward but not necessarily back?

MR. RAACK: Well, it goes forward from when the violation first occurs. I think the Board was very clear about not confusing first accrued with first occurred, and it goes forward from the first occurring. And it says the rule for 2462 comes later in time. In continuing violations theory, the accepted case law is that accrual happens at the end of that period of time. But "separate" essentially is forward-looking. It's from when the violation begins. And every day is a

separate violation for the purposes of calculating the penalty.

JUDGE FRASER: How do you respond to Elementis' claim that, under the statute and the guidance, that the Agency has issued this case is a close call, that they were justified in not submitting the study, and that under the circumstances the penalty that the Agency is seeking is exorbitant?

MR. RAACK: Well, for the reasons is we talk about, we don't necessarily believe it was a close call. But in any event, our penalty calculation has taken into account mitigating factors of what the use of the information was and how the Agency was going to potentially use it.

But, really, I think the penalty, in our case, was only calculated, as the presiding officer affirmed, is for seven years' worth of violations for failure to report a truly important fear. The penalty is appropriate under those circumstances.

JUDGE STEIN: If the Board were to conclude that the violations can best be viewed as a series of repetitive violations going five years back, as opposed to seven, and decide it's unnecessary to reach this further question that you're asking us to reach, does this record contain sufficient facts on which an appropriate penalty can be assessed?

MR. RAACK: Yes, it does. The calculation that we put in, and the one that the presiding officer relied upon, includes the number of days as part of that calculation. So I don't think it's too difficult to, and we'll be happy to provide more information in our supplemental briefing, if the Board would like it, to figure out the number of days that would be captured by that timeframe, including adjusting for the 23.

So I think that -- I think, yes, to answer your question.

JUDGE STEIN: So a remand to the

Administrative Law Judge would not be necessary in that event?

MR. RAACK: We don't think so.

JUDGE STEIN: I'll ask the same question of Counsel when he has an opportunity for rebuttal.

Anything else? You have about two and a half more minutes, so you can use that time as you see fit.

MR. RAACK: Okay. I think I touched on all the important elements. I want to make sure that I answered your questions correctly. I guess I'll just conclude by borrowing a phrase from Board's rule and decision, which is that we simply discern no textual or logical basis, and nor does Respondent suggest one, that we ought to regard this failure to respond to essentially a statutory informational request as being limited to, for accrual purposes, a particular day, a particular time, or any other duration. And that we look forward to submitting more

information in our supplemental briefs. Thank you.

JUDGE STEIN: Thank you.

JUDGE FRASER: Thank you.

JUDGE STEIN: And, so, for Elementis, you're down to your last five.

(Laughter.)

MR. TENPAS: Thank you. Let me take up the last question first. I think we are likely in agreement in terms of the record. That is, if the Board's approach were to conclude each day is a separate violation, at least in our view, essentially what that means is you look at the date of the complaint. You go back five years, so that puts you roughly in 2005. There is a little increment that you have because it was tolled, and we think that is 241 days. And I think that all could be drawn out of the record.

And I would suggest, if there's some ambiguity or uncertainty about that, without having consulted with Counsel, I

suspect we could even get to a kind of stipulation for you to find that tolling agreement period.

Because that's the only thing that's at risk of not being in the record. So you take the day the complaint was filed, you go back five years. That basically puts you into 2005. So you start on -- in our view it would be you start on that day in 2005 and then you go up through the date in 2008 when Elementis turned in the report.

And that would be your window. So sort of an explanation of how we think the analysis would work, and an explanation of why it is we believe the problem can be managed on this record, or with a little additional cooperation and consultation by both sides.

A couple of quick points. Your Honor, I think there is a question that begged to be answered when you asked, is there a position you could bring a case 20 years later? And they acknowledge, yes.

I mean, we've always taken that to be their position following this. And they think they get 20 years of penalties. So it's not that you can bring it 20 years later, but they get to go back and basically add it up for 20 years. That is a pretty dramatic and significant way to read the statute. And I won't belabor the validity of the other cases, but we think it is very, very difficult to reconcile that outcome with those cases.

The second, there is an issue about the importance of human health and the environment here, but that, I think the thrust of the cases has been from the Supreme Court -- well before Gabelli and all the way back to Toussie -- to say, look, agencies and enforcement authorities, that's not your role. It is not your role to decide which ones are the most important or so important that.

I mean, Toussie cautions against that. Prober registration, an important thing. But we are not going sort of substitute our

judgment for Congress's, particularly in a context where there is a date for compliance.

And I note there's nice little parallel aspect of Toussie as well. Toussie, the actual obligation to register wasn't a date-certain. It's your 18th birthday plus 5 days. So Toussie makes the point, well, for every different person that could arise at a different time.

And then it didn't focus on there's a date in the calendar. That's just like anybody faces here. It arises not only at your 18th birthday, but when you get the information. And then you trigger from there. So that kind of level of lack of calendar date-certain is not a bar here and it works in our favor.

Third point as the statute of limitations, on this point there's a procedural aspect of this that is significant. Elementis was not charged with 1,000, 1,500, 1,200 violations, which, if you do the

separate violations, that's, as I understand what the Court is suggesting, is where you go.

The complaint in Paragraph 50 is very clear. It says they committed a violation. And in 52 it talks of continuing violations. So we do think there is -- that may be the right theory. It may not be something, though, that can then support the penalty in this case because Elementis has never been charged with a thousand, 1,200 violations.

JUDGE STEIN: Let me interrupt you on that. But I've looked at the complaint and I thought I had understood that you were charged with a single violation that continued. Am I right?

MR. TENPAS: Well, the complaint -- sorry, Your Honor. In 50, it says "a violation," so very clearly it does charge a single violation. And in 52, it notes or alleges that the obligation to disclose continued. So they have charged it as one

violation, saying the way that they get within the statute of limitations is because it's continuing subject to this document.

JUDGE STEIN: But didn't Judge Biro determine, in effect, the number of days of violation, that in her penalty assessment -- I mean, I understand the point you're making about the complaint, but I'm just -- in terms of the proof that was established and that was before her, I'm assuming you got to the penalty assessment of over $2 million not based on one violation but based on multiple days of violations.

MR. TENPAS: Well, it was based on multiple days. It's not clear that it was based on multiple violations. In fact, we think probably -- there was no finding that there were multiple violations and we were never charged, as I say, with multiple violations.

The provision in 16(a) that basically says, look, if it's continuing, you

can break it up into multiple days provided a sound foundation. And we didn't argue with that point. And I'm not suggesting that, but if you go the separate violations route then you can't compute the number of days.

My point is there's no charging document and it would be anomalous to assess a penalty for violations, a thousand violations when that has never been charged.

I do want to just quickly turn to two points as to the 8(e) kind of merits piece of it. Just two quick points on that. There was some discussion about how the report, the Gibb study, was heavily criticized by the experts' aspect of this.

Again, the statute doesn't call for the regulated community to think about the information that the Administrator has. And if it's there, then speculate. But, you know what, maybe somebody thinks that information didn't really emerge from a sound study, a good study.

So while all of that critique, the point is, was post hoc and in the hearing, it was not available and wasn't an aspect that Elementis had in front of it at the time it received the Mundt report. Similarly, although Mundt had talked about the data, I think it is important to just hit the factual points.

What they had was the report. They did not have the underlying data, Dr. Mundt, the spreadsheets, the number of workers, how they were coded, anything like that. So, again, the notion that if you read it, even as requiring the report, that that, you know, solves the data, I don't think those go together.

And, again, it's a bit of a red herring to talk about, well, this is the vehicle to get data because, even in this case, I don't see how that would have played out.

Summing up, and as far as stepping

back again just for a moment on the big picture, I think it's just useful to think about the case in these broad terms. Nearly 8 years ago, nearly 8 years after Elementis received the report, EPA brings its case.

We've got a statute of limitations that says bring the case within five years from when the claim first accrued. And they certainly don't maintain that was the date they could have first, you know, the two -- they maintain they could have brought it in 2002 in some period. So that's certainly not the moment within five years of when it first accrued.

It was a report that Elementis voluntarily commissioned, with other parties, other parties bigger than it that never were pursued. An employee looked at the report, obviously Judge Biro got the analysis, and he wasn't knowledgeable enough about 8(e), but there's no question he looked at it, he thought about it, compared the data and

concluded that it didn't show anything new and that he knew it was in possession of the Agency.

Dr. Mundt goes out and speaks publicly about the report, goes to a major event in Europe, delivers the report, testifies. He was pretty criticized about some aspects of the report, that it didn't quite hang together.

And so, ultimately, he ends up breaking it up into two, but there was no effort to suppress it. In fact, it was publicly discussed. And to this day, as the Court pointed out, there's been no regulatory change premised on this report and this information.

It just seems to us, when you put all that together, and yet Elementis is looking at a $2.5 million penalty here, something has gone awry. And we would submit what has gone awry here today is an excessively expansive look at the statute of

limitations and an excessively expansive understanding of what the statute requires. And if you were going to useful information and helpful information, those kinds of things. And we would simply urge this Board that this is the moment where you have to step in and set this right. Thank you very much.

JUDGE STEIN: Thank you.

MR. TENPAS: Could we have the Panel's indulgence for just one moment? We had talked about something beforehand and I think we need to consult here.

JUDGE STEIN: Sure.

(Pause.)

MR. TENPAS: Your Honors, if I might, I'm sort of the delegate for the collective here. We had some discussion in advance of the hearing, and I think it has confirmed in our minds, with the Court's indulgence, we would jointly request your consideration of giving us one additional week beyond the current deadline for the

submission.

That is premised on we covered an awful lot of ground here. Obviously we've all thought to some degree about the questions that were posed. But I think all counsel feel like we can do a better job for you if you would indulge us with one more week than we currently have for this follow-up briefs.

JUDGE STEIN: Your request will be granted.

MR. TENPAS: Thank you.

JUDGE STEIN: We're obviously anxious to proceed with the case, because it's been here, but I think we'd rather have your best foot forward. And you don't need to repeat argument that are already in the existing briefs.

But I do want to thank everybody for their time and for their preparation. The caliber of the argument has been excellent. It's been very informative to the Board. And at this point we will take the case under

advisement, subject to the supplemental briefs that will be coming out.

MR. TENPAS: Thank you.

(Whereupon, the hearing in the above-entitled matter was concluded at 12:56 p.m.)