

May 9, 2014

VIA ELECTRONIC FILING

Clerk of The Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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Re: In The Matter of Elementis Chromium, Inc.
Docket No. TSCA-HQ-2010-5022

Dear Sir or Madam:

Enclosed for filing, please find the Request for Oral Argument of Respondent, Elementis Chromium Inc., in the above-referenced matter.

Thank you for your assistance and cooperation.

Respectfully submitted,



John J. McAleese III

JJM:drw

Enclosure

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cc: Regional Hearing Clerk (via Overnight Courier & E-mail)
Mark A. R. Chalfant, Esq. (via Overnight Courier & E-mail)
Erin K. Saylor, Esq. (via Overnight Courier & E-mail)

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

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

REQUEST FOR ORAL ARGUMENT

Respondent, Elementis Chromium, Inc. (“Elementis”), through its undersigned counsel, hereby requests oral argument on the appeal in this matter. In support of this request, Elementis states:

1. On November 25, 2013, Elementis filed a Notice of Appeal of the Initial Decision of Chief Administrative Law Judge Susan Biro dated November 12, 2013. On January 15, 2014, Elementis filed its Appeal Brief. On February 24, 2014, Complainant, the United States Environmental Protection Agency (“EPA”), filed its Brief in Opposition to Elementis’s Appeal (“Response Brief”). On April 8, 2014, Elementis filed a Reply Brief, and EPA filed a Surreply Brief on April 22, 2014. The briefing, plus Chief Judge Biro’s decision (which alone totaled 96 pages of single-spaced type), totals close to 150 pages of facts and argument. In addition, the hearing in the matter lasted three full days, producing a very sizeable original record.

2. In addition, through the briefing provided to the Board, it appears that EPA has changed or abandoned several of its arguments. For instance, in its Response Brief, EPA argues that its view of whether Congress intended for violations Section 8(e) of TSCA should be

afforded deference. See Response Brief p. 18 (“EPA’s longstanding interpretation that Section 8(e) requirements are continuing violations is entitled to deference.”). However, in its Surreply Brief, EPA appears to recant that position and to no longer rest its claims on deference owed to the Agency, acknowledging that “instead, [the Board] perform[s] [its] own ‘independent review and analysis of the issue’” (citing *In re Mobil Oil Com.*, 5 E.A.D. 490, 508-09, n. 30 (EAB 1994).” The Agency further goes on to state that rather than resting on claims of deference owed on ambiguous language, it instead is contending that “[t]he language of the statute is clear.” See Surreply Brief, p. 8.

3. Similarly, in the Response Brief, EPA cites to the Supreme Court decision *Toussie v. United States*, 397 U.S. 112, 90 S. Ct. 858 (1970) in support of its statement that “[t]he doctrine of continuing violations is a distinct doctrine, long recognized by the Supreme Court and applied in numerous decisions by federal courts and the EAB *in cases much like this one.*” See Response Brief, p. 23 (emphasis added). Yet, in its Surreply Brief, EPA claims that it cited *Toussie* for the proposition that it is proper to consult legislative history and purpose to determine Congressional intent, but that *Toussie* is otherwise “distinguishable.” See Surreply, p. 5. Oral argument will allow the Board the opportunity to clarify EPA’s positions on these and other issues. It will also allow Elementis to address such modifications of EPA’s position, which Elementis has not been able to do through written briefing because the changes emerged only in the Agency’s final brief.

4. In light of this record, Elementis believes that oral argument will greatly assist the Board because it will allow the parties to concisely present their positions, address all issues as finally presented, and provide the Board with the opportunity to question the parties on issues raised in their respective arguments.

5. Elementis sought EPA's concurrence with this request. Counsel for the EPA indicated it opposes this request for oral argument.

WHEREFORE, Elementis respectfully requests that the Environmental Appeals Board set this matter for Oral Argument.

Respectfully submitted,

/s/
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