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C O U N S E L O R S   A T   L A W

**William S. Pufko**  
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April 7, 2011

**VIA HAND DELIVERY**

Headquarters Hearing Clerk (1900L)  
United States Environmental Protection Agency  
Office of Administrative Law Judges  
1200 Pennsylvania Avenue NW  
Washington, DC 20450

**Re:   In the Matter of Elementis Chromium, LP**  
**Docket No. TSCA-HQ-2010-5022**

Dear Sir or Madam:

This firm represents Elementis Chromium Inc. (formerly Elementis Chromium, LP) in the above matter. Enclosed please find two (2) copies of **Respondent's Motion Requesting The Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Environmental Appeals Board** ("Motion"). Please file the Motion and return one time-stamped copy in the enclosed self-addressed stamped envelope.

Please call me if you have any questions. Thank you for your attention to this matter.

Very truly yours,



William S. Pufko

WSP\tp  
Enclosures

cc:   Hon. Susan L. Biro, Chief Administrative Law Judge, USEPA (via FedEx)  
      Mark A.R. Chalfant, Esq., USEPA (via email and FedEx)  
      Karin Koslow, Esq., USEPA (via email and FedEx)

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

_____	)	
IN THE MATTER OF:	)	
	)	Docket No. TSCA-HQ-2010-5022
	)	
Elementis Chromium, L.P.,	)	
	)	
	)	
Respondent.	)	
_____	)	

**RESPONDENT’S MOTION REQUESTING THE PRESIDING OFFICER TO  
RECOMMEND INTERLOCUTORY REVIEW OF THE MARCH 25, 2011 ORDER BY  
THE ENVIRONMENTAL APPEALS BOARD**

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.29(a), Respondent Elementis Chromium Inc.<sup>1</sup> (“Elementis”) hereby files this motion requesting that the Presiding Officer recommend interlocutory review of the March 25, 2011 Order by the Environmental Appeals Board. The grounds of the instant motion are as follows:

1. On December 17, 2010, Respondent filed a Motion for Judgment on the Pleadings, arguing that the September 2, 2010 Complaint filed by the United States Environmental Protection Agency under TSCA § 8(e), 15 U.S.C. § 2607(e), is barred by the five-year statute of limitations.
2. On March 25, 2011, the Presiding Officer denied Respondent’s Motion for Judgment on the Pleadings. In doing so, the Presiding Officer ruled that a TSCA § 8(e) violation

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

is not subject to the well-settled rule that claims accrue when they “first occur,” but rather is in the nature of a “continuing violation.”

3. The Presiding Officer’s finding that a TSCA § 8(e) violation is a continuing violation wholly undercuts the purpose of the statute of limitations, essentially holding that the limitations period does not begin to run until EPA discovers that a person obtained “substantial risk” information – no matter how far in the future EPA obtains that knowledge. The Presiding Officer’s ruling also disregards the precedential holdings of the United States Supreme Court concerning “continuing violations” in Toussie v. United States, 397 U.S. 112 (1970), the United States Court of Appeals for the District of Columbia Circuit concerning the impact of EPA’s ability to discover violations in 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), and the consideration by the Environmental Appeals Board of analogous factual circumstances in In re Lazarus, Inc., 7 E.A.D. 318 (EAB 1997).

4. TSCA § 8(e) unambiguously requires that a person who obtains substantial risk information “shall immediately inform the Administrator” of such information unless the person has actual knowledge that the Administrator has been adequately informed of the information.

5. The Presiding Officer’s ruling is contrary to any reasonable interpretation of “immediately,” after which the limitations period begins to run. Nor is it consistent with EPA’s own guidance that TSCA § 8(e) information must be provided to the agency within 30 days.

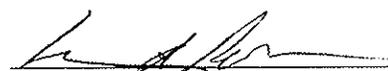
6. Although the Presiding Officer erred in holding that the use of the word “immediately” in TSCA § 8(e) does not provide a requirement that must be fulfilled within a particular time frame, the Presiding Officer noted the structure and context of TSCA § 8(e) is susceptible to other interpretations. The Presiding Officer acknowledged that nothing in TSCA makes it unlawful to continue to use or manufacture a substance if the person has not complied

with the requirements of TSCA § 8(e). As such, the Presiding Officer held that TSCA § 8(e) is an “independent obligation,” which weighs against it being continuing in nature.

7. Whether a violation under TSCA § 8(e) is continuing in nature is an important legal question of general applicability and the significant differences of opinion and interpretations are demonstrated in the March 25, 2011 Order.

8. The consideration of this dispositive issue by the Environmental Appeals Board will promote administrative economy. The disposition of this issue by the Environmental Appeals Board in favor of Respondent will materially advance the ultimate termination of the proceeding.

**WHEREFORE**, for all the foregoing reasons, Elementis respectfully requests that the Presiding Officer forward the March 25, 2011 Order to the Environmental Appeals Board for interlocutory review.

  
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Ronald J. Tenpas  
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*Attorneys for Respondent Elementis  
Chromium Inc.*

**CERTIFICATE OF SERVICE**

I, William S. Pufko, hereby certify that on April 7, 2011, I served a copy of **Respondent's Motion Requesting the Presiding Officer to Recommend Interlocutory Review of the March 25, 2011 Order by the Environmental Appeals Board** and supporting documents, via e-mail and Federal Express on the following:

Mark A.R. Chalfant, Esquire  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
U.S. Environmental Protection Agency  
1595 Wynkoop Street (Mailstop: 8ENF-L)  
Denver, CO 80202-1129

Karin Koslow, Esquire  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Mail Stop 2224A  
Washington, DC 20460-2001

  
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William S. Pufko