UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. Background

On September 2, 2010, the United States Environmental Protection Agency ("EPA" or "Agency"), Waste and Chemical Enforcement Division, Office of Civil Enforcement ("Complainant"), filed a Complaint pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, against Elementis Chromium, Inc. ("Respondent").[1] The Complaint alleges that Respondent, a chromium manufacturer, violated TSCA § 8(e), 15 U.S.C. § 2607(e), by failing to immediately inform the EPA Administrator of information which reasonably supports the conclusion that hexavalent chromium presents a substantial risk of injury to health, information which it obtained on October 8, 2002 via receipt of a report entitled "Collaborative Cohort Mortality Study of Four Chromate Production Facilities, 1958-1998 - FINAL REPORT" ("Final Report").

On October 4, 2010, Respondent's Answer and Affirmative Defenses to Complaint and Notice of Opportunity for Hearing ("Answer") was filed. In its Answer, Respondent admitted obtaining the Final Report on October 8, 2002, denied that it did not immediately inform EPA of the information in the Final Report, and alleged that EPA had adequate knowledge of the information contained in the Final Report at the time of Respondent's receipt thereof. In addition, Respondent raised various affirmative defenses including the statute of limitations.

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[1] The Complaint identified the Respondent as "Elementis Chromium, L.P." However, in its Answer, Respondent represented that Elementis Chromium LP was merged into Elementis Chromium GP Inc. on September 10, 2010 and then changed its name to "Elementis Chromium Inc." The caption of this case is hereby amended to be consistent with the Respondent's current corporate name.

On December 17, 2010, Respondent filed a Motion for Judgment on the Pleadings ("Motion"). Complainant filed a Motion in Response to Respondent's Motion for Judgment on the Pleadings ("Response") on January 7, 2011. On January 24, 2011, Respondent filed a Reply Memorandum of Law in Support of Respondent's Motion for Judgment on the Pleadings ("Reply").

II. Arguments of the Parties

A. The Motion

In its Motion, Respondent argues that it is entitled to judgment because this proceeding is barred by the statute of limitations. Specifically, it asserts that the claim made against it in the Complaint filed on September 2, 2010 - that it violated TSCA § 8(e) when it failed to "immediately" inform EPA of the information in the Final Report upon its receipt on October 8, 2002 - is subject to the five-year statute of limitations set forth at 28 U.S.C. § 2462, citing in support *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994), *In re Lazarus, Inc.*, 7 E.A.D. 318, 364 (EAB 1997) and *In re Newell Recycling Co.*, 8 E.A.D. 598, 614 (EAB 1999) *aff'd Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000). Motion ("Mot.") at 4. Such five-year limitations period began to run "when the claim first accrued," which, Respondent argues, was when the company failed to "immediately" inform the agency of the Final Report. Mot. at 5 citing 15 U.S.C. § 2607(e). Relying upon EPA guidance (accessible at http://www.epa.gov/oppt/tsca8e), Respondent states that the term "immediately" means a period of 30 days, and therefore, the alleged violation accrued on or about November 7, 2002, which is 30 days after it received the Final Report. Mot. at 6. As such, Respondent concludes, the five year limitations period expired on or about November 7, 2007, almost three years before this case was instituted. Mot. at 9. Moreover, Respondent notes that its conclusion is not affected by the fact that Respondent and Complainant entered into an agreement on June 30, 2009 to toll claims from that date onward. To be covered by such agreement, Respondent observes, would require the term "immediately" to be interpreted to mean a period of over 20 months, from October 8, 2002 to June 29, 2004, such that five years from the latter date would fall within the tolled period. Mot. at 6.

Additionally, Respondent argues that any assertion by EPA that this violation is a continuing one, such that the limitations period does not "begin to run until the illegal course of conduct is complete," is erroneous. Mot. at 6-7, quoting *Lazarus*, 7 E.A.D. at 364. Continuing violations are breaches of requirements imposing mandatory conditions for continued use, for example registering PCB transformers with the fire department, the absence of which makes the operation of the transformer illegal, Respondent asserts. Mot. at 7, citing *Lazarus*, 7 E.A.D. at 368-76. But violations of requirements that have certain time frames, such as preparing annual reports by July 1 of each year, are not continuing because they are independent obligations and not conditions of use. Mot. at 8, citing *Lazarus*, 7 E.A.D. at 377-379. Respondent argues that

the statute's requirement that information be submitted "immediately" unambiguously sets a certain time frame within which Respondent was to inform the agency, and does not indicate that submission of such information is a condition of continued use. Mot. at 9.

B. The Response

Complainant's Response to the Motion begins by declaring that Respondent violated its "mandatory statutory duty" under TSCA § 8(e) by not informing EPA of the information in the Final Report received on October 8, 2002, until November 17, 2008, when Respondent responded to a subpoena the Agency issued to it under TSCA, and that it "now seeks to benefit from the very delay it is wholly responsible for." Response ("Res.") at 1-2, 5. Nevertheless, Complainant agrees with Respondent that the general five-year statute of limitations at 28 U.S.C. § 2462 applies to administrative actions under TSCA § 8(e), and that the running of the statute turns on when the claim "first accrued." Res. at 6, 10 n. 11. However, as anticipated by Respondent, Complainant takes the position that the "special rule of accrual known as the doctrine of continuing violations" applies to TSCA § 8(e) so that the claim first accrues "on the last day of the violative act." Therefore, in this instance, Complainant asserts, Respondent's violation continued from October 8, 2002 through November 17, 2008, on which day it first accrued, and therefore the five-year limitations statute would not expire until November 16, 2013. Res. at 8.

This conclusion, Complainant proclaims, is supported by the "well-established" "two-prong" test for determining whether a violation is continuing which was adopted by the Environmental Appeals Board (EAB) in *In re Harmon Electronics*, *Inc*., 7 E.A.D. 1, 22 (EAB 1977), *rev'd on other grounds*, *Harmon Indus., Inc. v. EPA*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999). The first prong of the test, Complainant asserts, looks to the general language of the statute and legislative history to determine whether the statute contemplates continuing violations. Res. at 7, 11-13. Noting that the EAB has twice concluded that Congress anticipated continuing violations under TSCA, and asserting that such "precedent is binding in this proceeding," Complainant claims that the first prong of the test is satisfied. *Id.* citing *Lazarus*, 7 E.A.D. at 368, and *Newell*, 8 E.A.D. at 615-16. In any case, Complainant suggests that "[a] reading of the plain language of TSCA's section 8(e), as supported by a review of the general provisions in TSCA, the statute's purpose and legislative history, Agency policy, and case law, undeniably supports" a conclusion that the violation is continuing. Res. at 8. First, Complainant asserts, EPA has long treated TSCA § 8(e) violations as continuing because of the seriousness thereof, noting that its Enforcement Response Policy (ERP) places no cap on the number of years for which a penalty can be assessed. Resp. at 13, citing EPA ERP for Reporting and Recordkeeping Requirements for TSCA Sections 8, 12 and 13 (1999). Second, that there is a "continuing duty to inform" is consistent with the statute, noting section 2(a) thereof states that chemicals "are constantly being developed and produced" and exposures occur "each year," and the 2(b) Policy statement placing on chemical manufacturers the responsibility for the development of data on the effects of substances on human health. Resp. at 14. Third, TSCA's legislative history, indicating that it arose out of a concern that the

industry was not routinely sharing information with the Agency, supports the "expectation that information continues to flow to the Agency as it is being developed." Res. at 15-16. Fourth, the Agency notes the remedial nature of the statute, suggesting that for TSCA § 8(e) to "operate efficiently as an early warning system" it must require the continual flow of information to the Agency rather than a "single snap-shot in time." Res. at 15-16.

The second prong of the *Harmon* test for continuing violations analyzes the specific violation to determine whether the statute suggests it is continuing in nature, Complainant explains. Resp. at 7-8, 16-17, citing *Harmon*, 7 E.A.D. at 23. The plain language of TSCA § 8(e) "is clear and unambiguous" that the mandatory statutory duty to inform is continuous in nature, Complainant proclaims. The word "inform" means to impart knowledge, and thus the reporting duty continues until the information has been imparted. Res. at 17. The "exclusive" limitation on such duty is when the person has knowledge that the Administrator has already been adequately informed. Res. at 17-18. The term "immediately" only evinces the beginning of the statutory duty to inform and reflects the importance Congress gave to timely submission. Where a statute contains no certain deadline or time frame within which to inform, the failure to report has been held to constitute a continuing violation, Complainant states. Res. at 18, citing *Interamericas Invs. Ltd. v. Board of Governors of the Fed. Reserve Sys.*, 111 F. 3d 376, 382, revised, 1997 U.S. App. LEXIS 12695 (5th Cir. 1997).

Further, Complainant advises that other tribunals have found TSCA § 8(e) or analogous language to impose a continuing violation, citing two decisions pre-dating *3M* and *Harmon*, namely *Union Carbide Corp*., EPA Docket No. TSCA 85-H-02, 1985 EPA ALJ LEXIS 13 (ALJ, October 3, 1985) (TSCA § 8(e) reporting requirement continuous) and *United States v. Advance Machine Co.*, 547 F. Supp. 1085 (D. Minn. 1982)("immediate" reporting requirement under section 15(b) the Consumer Protection Safety Act (15 U.S.C. § 2064(b)) continuing). Res. at 20-24.

C. Reply

In its Reply memorandum, Respondent argues that Complainant's position disregards: (1) the purpose of statutes of limitation, *i.e*. to avoid prosecution of stale claims; (2) the operative language of TSCA § 8(e), *i.e.*, *immediately*; and (3) the nature of a continuing violation, which is that it continues until it is stopped by an act of compliance. Reply at 1-2. Analogizing to the *Lazarus* case finding that a PCB annual reporting violation was not continuous, Respondent notes that similarly, once a party fails to "immediately" report under TSCA § 8(e) the violation has occurred, and there is no act it can take to stop the violation. Reply at 2-3. Further, the *Harmon* case upon which Complainant relies so heavily, Respondent asserts, found the violation there continuing based not upon the notification provision itself which had a 90 day deadline but upon other provisions prohibiting hazardous waste activities in the event the notification was not provided. Reply at 3-4. TSCA § 8(e) contains no such prohibitions on any activity in the event of a failure to inform, it notes. Reply at 4. Finally, Respondent reasserts that Complainant's position is inconsistent with its own section 8(e) reporting policy guidance which clarified the

term "immediately" to provide a 30 day time frame for compliance. Reply at 4-5.

III. The Applicable Rules and Standards

Respondent's Motion for Judgment on the Pleadings is essentially a motion to dismiss under Rule 22.20(a) of the Rules of Practice at 40 C.F.R. Part 22 ("Rules") which govern this proceeding. That Rule provides as follows:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

A motion to dismiss under Rule 22.20(a) may be analyzed under the standards for a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *Ghartey v. St John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989)(A motion to dismiss on the basis that an action is barred by the statute of limitations is analyzed under FRCP 12(b)(6)). Accordingly, decisions rendered regarding such rule may be looked to for guidance. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 188 n.10 (EAB 2003) (FRCP may be used as guidance when the Consolidated Rules of Practice do not clearly resolve a procedural issue).

Motions to dismiss are commonly said to "test the legal sufficiency of a claim." *See e.g., Two Jinn, Inc. v. Green*, No. CV06-268-S-EJL, 2007 U.S. Dist. LEXIS 16363, *7 (D. Idaho 2007)("A motion to dismiss under [FRCP] 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint."). To resolve a motion to dismiss, a court assumes the veracity of all "well-pleaded factual allegations" in the complaint and "then determine[s] whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). A statute of limitations bar is an affirmative legal defense. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir.2004). If "it is apparent from the face of the complaint that the claim is time-barred," dismissal is appropriate under FRCP 12(b)(6). *Id.*

IV. Discussion

There is no disagreement that the general five-year statute of limitations is applicable to administrative penalty actions brought under TSCA. *3M Co. v. Browner*, 17 F.3d 1453, 1457-58 (D.C. Cir. 1994)(28 U.S.C. § 2462 is applicable to TSCA administrative enforcement actions). Such statute bars the Government from commencing an action for penalties more than "five years from the date when the claim first accrued." 28 U.S.C. § 2462. "A claim normally accrues when

the factual and legal prerequisites for filing suit are in place." *3M*, 17 F.3d at 1460 (*citing United States v. Lindsay*, 346 U.S. 568, 569 (1954)). Claims generally "first accrue" on the date the violation "first occurs." *3M*, 17 F.3d at 1462. There are, of course, exceptions to this general rule, and the EAB has held that "[t]he doctrine of continuing violations provides a special rule for determining when a violation first accrues." *In re Lazarus, Inc*., 7 E.A.D. 318, 364 (EAB 1997) citing *Toussie v. United States*, 397 U.S. 112, 115 (1970). "Under the continuing violations doctrine, a statute of limitations is tolled for a claim that otherwise would be time-barred where the violation giving rise to the claim continues to occur within the limitations period." *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380-81 (1982). Or, stated differently, under this "special accrual rule," "the limitations period for continuing violations does not begin to run until the illegal course of conduct is complete." *Lazarus*, 7 E.A.D. at 364. Therefore, where the doctrine of continuing violations applies, a penalty action may be initiated from the moment the violation first occurs up and until five years after the violation has been completed. *Lazarus*, 7 E.A.D. at 364-65.

As indicated in Respondent's Motion, to determine whether a violation is continuing in nature and so subject to this special accrual rule, the EAB has set forth a two-step test: first examine whether the statute "itself contemplates the existence of continuing violations," and then examine "whether the specific violations alleged are continuing in nature." *Harmon*, 7 E.A.D. 1, 22. In *Lazarus,* the EAB found that TSCA's penalty provision, § 16(a)(1) (15 U.S.C. § 2615(a)(1)), which authorizes separate penalties per day of violation "evidence[s] that Congress contemplated the *possibilit*y of continuing violations of TSCA." *Lazarus*, 7 E.A.D. at 368 (italics in original). Citing such holding in *Lazarus,* the EAB in *Newell Recycling Co., Inc*., 8 E.A.D. 598, 615 (EAB 1999), *aff'd Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204 (5th Cir. 2000), another TSCA case, moved directly on to the second step of the test, *i.e*. determining whether the specific violations were continuing in nature, noting as it did in *Lazarus*, that merely because the statute generally contemplates the possibility of continuing violations "does not transform every violation of TSCA into a continuing violation." *Newell*, 8 E.A.D. at 614-15 (quoting *Lazarus*, 7 E.A.D. at 368).

In light of *Lazarus* and *Newell*, the same abbreviated analysis process can be applied in the instant case. In *Newell*, the EAB stated that in examining a particular regulatory requirement or prohibition for indicia of whether it is continuing in nature "[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature . . . [whereas] a continuing nature may be negated by requirements that must be fulfilled within a particular time frame." *Newell*, 8 E.A.D. at 615-16. Thus in *Newell,* the EAB held that a PCB disposal requirement (40 C.F.R. § 761.60(a)(4)), which "on its face carries no temporal limitation," and indicates that the obligation is only discharged with the occurrence of a specific event, *i.e.* proper disposal, was continuing. 8 E.A.D. at 616-17. In *Newell*, the EAB also observed that the existence or absence of such words and phrases can lead to "divergent applications of the limitations bar," even within the confines of a narrow regulatory area such as TSCA PCB regulations. *Id.,* 8 E.A.D. at 616. For example, in *Lazarus*, the EAB found that the obligations to register a PCB transformer and mark a transformer room were continuing on the

basis that those obligations did not indicate a specific time frame for compliance and the statute provided that unless such obligations were complied with, the use of the PCB transformer was illegal. *Lazarus,* 7 E.A.D. at 370-376. On the other hand it also held that the obligation to prepare and maintain yearly records on PCB disposition by "July 1" was not continuing but an independent obligation which was not a condition of use of PCBs. *Lazarus*. 7 E.A.D. at 377-379.

The reporting requirement of TSCA at issue here, TSCA § 8(e) provides:

> Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment *shall immediately inform the Administrator* of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

15 U.S.C. § 2607(e)(italics added)..

Respondent argues that the term "immediately" is a "temporal limitation" of a "requirement that must be fulfilled within a particular time frame," to use the language of *Newell*, 8 E.A.D. at 617, similar to that of the annual reporting requirement in *Lazarus*, and so is not continuing. Complainant, on the other hand, argues that the statute merely provides a temporal starting point for a continuing obligation not "discharged or extinguished simply with the passage of time," but "only with the occurrence of a specified event," that is, informing the Administrator. *Id*.

In regard to whether "immediately" represents a "temporal limitation," it is observed that the word means -

> Present; at once; without delay; not deferred by any interval of time. In this sense, the word, *without any very precise signification*, denotes that action is or must be taken either instantly or without any considerable loss of time. *A reasonable time in view of the particular facts and circumstances of the case under consideration*.

Black's Law Dictionary 675 (5th Ed. 1979)(italics added).

Thus, the term "immediately" reflects not a date certain but a imprecise *relation in time*, variable according to facts and circumstances. Webster's Third New International Dictionary 1129 (2002). *See also*, *United States v. Martin*, 618 F.3d 705, 715 (7th Cir. 2010)("immediately" under 18 U.S.C. § 2818(8) in regard to sealing wiretaps means "as soon as practical"); *United States v. Reed*, 575 F.3d 900, 913 (9th Cir. 2009)("immediately" under 18 U.S.C. § 2818(8) means "within one or two days" and "any delay beyond that certainly calls for explanation."); *Stout v. Gulf Underwriters Ins. Co.*, 326 Fed. Appx. 435, 436 (9th Cir. 2009) ("'immediately'

[under insurance policy] means with reasonable diligence and in a reasonable length of time."); *United States v. C. M.*, 485 F.3d 492, 500 (9th Cir. 2007)(the phrase "immediately notify" under parental notification provision 18 U.S.C. §5033 was violated by six hour delay after juvenile taken into custody); *MBO Labs., Inc. v. Becton, Dickinson & Co.,* 385 F. Supp. 2d 88, 105 (D. Mass. 2005) ("immediately" in patent claim means "simultaneously); *Hartford Fin. Servs. Group, Inc. v. Cleveland Pub. Library*, 168 Fed. Appx. 26, 34 (6th Cir. 2006)("immediately" under Ohio law means "within a reasonable time under the circumstances of the case."); *Resolution Trust Corp. v. Firstcorp (In re Firstcorp)*, 973 F.2d 243, 247 (4th Cir. 1992) ("immediately" for the purposes of bankruptcy provision 11 U.S.C. § 365(o) differs from the term "promptly," and means "on the day the case is filed."); *Greco v. Guss*, 775 F.2d 161, 165 (7th Cir. 1985)("'immediately' means promptly" for purposes of state distraining property)(citing *Schoenfeld v. Kulwinsky*, 197 Ill. App. 472, 474 (1916)); *Hauser v. Krupp Steel Producers*, 761 F.2d 204, 209 (5th Cir. 1985)(with regard to driver placing flares "'"immediately means only that it be put out with reasonable and proper diligence, or promptly under all the facts and circumstances of the case.")(citing *Stong v. Freeman Truck Line, Inc.*, 456 So. 2d 698 (Miss.1984)); *Singleton v. Jackson Municipal Separate School Dist.*, 425 F.2d 1211, 1219 (5th Cir. 1970)(dissent)("'Turn off the light immediately!' means one interval of time if it is directed to a man standing by the light switch. It means an interval many times longer when the same words are addressed to one who must enter a locked house and climb the stairs to reach the switch. There is yet another and a completely different time meaning to the word when it is used to command a man with a shovel to move a mountain. . . . But some measurable period of time is necessarily involved. Is it 'Eight weeks'? 'Minimum time necessary'? 'Not later than February 1, 1970'?").

Implicitly acknowledging the vagueness of the word's meaning, Respondent cites to EPA interpretive enforcement guidance providing that the term immediately means "30 days" in an effort to give it the requisite definitiveness to be a "temporal limitation." Mot. at 6, citing http://www.epa.gov/oppt/tsca8e. However, such enforcement guidance is discretionary, and cannot add a definitive time limit to a statute where none exists. *Cf., Garcia v. Concannon*, 67 F.3d 256, 258 (9th Cir. 1995)(regulations deferring disqualification under Food Stamp Program until violator found eligible conflicts with statutory language providing ineligibility begin "immediately"). Thus, unlike the July 1 annual reporting requirement at issue in *Lazarus*, the term "immediately" in TSCA § 8(e) does not impose a "temporal limitation," which suggests that the obligation thereunder is continuing in nature.

On the other hand, unlike the requirements to register and mark PCB transformers at issue in *Lazarus*, nothing in TSCA makes it unlawful for a chemical manufacturer to continue to use a chemical or operate its facility in whole or in part if it has not complied with the information disclosure requirement of TSCA § 8(e). *Lazarus,* 7 E.A.D. at 370-376. As such, it appears that the information provision is an "independent obligation," which weighs against it being continuing in nature.

Complainant suggests in its Response that, in essence, this tie in interpretation is broken

in its favor by the fact that the statute provides that the obligation to inform is only discharged upon occurrence of a specific event, that is, providing the information. Res. at 17. As such, EPA implies the non-provision of the information would fall within the general definition of a continuing offense - "one that involves a prolonged course of conduct" with "the proscribed course of conduct continu[ing] into the limitations period." *Harmon*, 7 E.A.D. at 20)(quoting *United States v. Rivera-Ventura*, 72 F.3d 277 281 (2d Cir. 1995) and *United States v. Collins*, 1991 U.S. App. LEXIS 3575, at *47 (6th Cir. Feb. 26, 1991)). A typical example of such conduct is the unpermitted discharge of fill material in violation of the Clean Water Act which has been held to be continuing (with each day being a new violation) for as long as the fill remains. *United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996)(citing *Sasser v. Administrator, United States EPA*, 990 F.2d 127, 129 (4th Cir. 1993)). The problem with this analysis as perceived by Respondent, is that the plain language of the statute indicates that once the act of "immediately" non-informing has occurred, nothing can stop the event, the "illegal course of conduct is complete." However, the same could be said for the unpermitted discharges - the day the bulldozer first dumps the pollutant in the water, the initial violation has occurred, and no action short of going back in time can undo the violation. From that date on, until the pollutant is removed, even in the absence of additional dumping, the courts have held that the illegal act occurs day after day, thus making the violation a continuing one. Similarly, as Complainant suggests, the illegal act due to failing to inform as required by TSCA § 8(e) can be seen to occur "immediately" and continue thereafter, as long as the information remains withheld from the Administrator.

As the Complainant notes in its Response, long ago, when faced with the same issue, my honorable former colleague Judge Gerald Harwood concluded that TSCA § 8(e) reporting requirements were continuous in *Union Carbide Corp*., EPA Docket No. TSCA 85-H-02, 1985 EPA ALJ LEXIS 13 (ALJ, October 3, 1985). In that action initiated on February 27, 1985, the Agency alleged that for six years (from September 16, 1977 until September 26, 1983) the company failed to disclose information it had that diethyl sulfate presented a substantial risk to human health. 1985 EPA ALJ LEXIS 13 at *1-2. Assuming, *arguendo*, that the five-year statute of limitations applied, Judge Harwood found the language of TSCA Section 16(a), 15 U.S.C. § 2615(a), that "each day such violation continues shall, for purposes of this subsection, constitute a separate violation," indicated that the failure to notify under TSCA § 8(e) was a continuing violation. 1985 EPA ALJ LEXIS 13 at *9. Judge Harwood bolstered his holding by distinguishing *Toussie v. United States,* 397 U.S. 112 (1970), wherein it was held that a criminal action for failing to register for the draft was not a continuing violation, and following *United States v. Advance Machinery Co.*, 547 F. Supp. 1085 (D. Minn. 1982), a civil action to assess penalties for violation of a reporting requirement of the Consumer Product Safety Act. In doing so, he observed that the wording of TSCA § 8(e) was similar to that at issue in *Advance Machinery*, and that there -

> The court in finding that the failure to report was a continuing violation observed that the reporting requirement would be frustrated if a manufacturer could successfully hide evidence of a product defect for five years. 547 F. Supp. at 1090. That same reasoning seems equally applicable here. While Union Carbide

> contends that such a result could lead to unfair or excessive penalties, it would seem that Respondent is adequately protected against this by the requirement that in determining the penalty, consideration must be given to the nature, circumstances, extent and gravity of the violation, the degree of culpability of the violator, its financial condition, and such other matters as justice may require. TSCA, Section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B).

1985 EPA ALJ LEXIS 13 at *10-11 (EPA ALJ 1985)(footnote omitted).

The language of the provision being interpreted in *Advance Machinery* was as follows:

> Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product --
>
> > (1) fails to comply with an applicable consumer product safety rule; or
> >
> > (2) contains a defect which could create a substantial product hazard described in subsection (a) (2).
>
> shall *immediately inform* the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

United States v. Advance Machine Co., 547 F. Supp. 1085, 1089-1090 (D. Minn. 1982)(quoting 15 U.S.C. § 2064(b))(emphasis added).

The court in *Advance Machinery* found that –

> The clear import of the underscored language is that a manufacturer, possessing information that its product contains a defect which could create a substantial product hazard, has a *continuing duty* to inform the Commission unless the Commission has been adequately informed of such defect. Although the regulations define "immediately" as 24 hours, 16 C.F.R. § 1115.14(c), this does not extinguish the continuing statutory duty, but merely provides guidance to manufacturers. To argue, as defendant does, that the duty to report expires after 24 hours runs contrary to the last clause of section 2064(b) and the purposes of the Act.
>
> In enacting 15 U.S.C. § 2064(b), Congressional intended to increase the likelihood that a substantial product hazard will come to the attention of the Commission in a timely fashion so that it could act swiftly to protect the consuming public. *See generally,* S. Rep.No. 94-251, 94th Cong., 2d Sess. 2 (1975), *as reprinted in* [1976] U.S. Code Cong. & Ad. News 993, 994. Under

> defendant's interpretation, this goal would be frustrated since a manufacturer could violate the reporting requirement without fear of punishment if it could successfully hide the evidence of the product defect from the Commission for five years. A manufacturer's incentive would thus be to obfuscate rather than to inform.

Advance Machine, 547 F. Supp. at 1090 (emphasis added).

The same can be said of TSCA. In enacting 15 U.S.C. § 2607(e), Congress intended to ensure that the regulators received "timely access to information regarding health and safety studies concerning chemicals covered by the Act" to avoid the situation where "human health and the environment is protected only after serious injury has occurred." *See* S. REP NO. 94-698, at 6, 8; *as reprinted in* 1976 U.S.C.C.A.N. 4491, 4496, 4498. Under Respondent's interpretation, this goal would be frustrated because "a manufacturer could violate the reporting requirement without fear of punishment if it could successfully hide the evidence ... for five years." *Advance Machine*, 547 F. Supp. at 1090.

Other courts have interpreted similar language the same way. For example in *United States v. Canal Barge Co.*, 631 F.3d 347, 352 (6th Cir. 2011), the Sixth Circuit held that a violation of regulation requiring that vessels "immediately notify" the Coast Guard of a hazardous condition was a a continuing offense for venue purposes under 18 U.S.C. § 3237(a), explaining:

> The time for complying with this obligation clearly starts "immediately," which means that any delay is against the regulation. Contrary to the interpretation urged by the defendant and accepted by the district court, however, the "immediate" start of the obligation does not mean that the obligation ceases as soon as there has been some delay in reporting. The natural reading of the regulation, instead, is that the obligation to report starts immediately when the relevant actor has the relevant knowledge, and continues at least until a report is made or the Coast Guard otherwise becomes aware of the condition. Stated differently, the purpose of the word "immediately" is simply to preclude a defense that the duty was discharged by giving notice several hours—or in this case, days—after the hazard was discovered.
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> * * *
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> In addition to being the most textually plausible, this reading of the regulation is also the most sensible. It would frustrate the purpose of the PWSA if the duty to report were not ongoing, because the need to notify the Coast Guard of a hazardous condition does not dissipate over time. The harm from an unreported hazard is more likely to increase rather than to decrease from the continued lack of a report. Moreover, an unreported hazard may cause harm in more than one district. And each district through which a hazard passes has an interest in preventing that hazard from causing injury or environmental damage within the

district.

Canal Barge Co., 631 F.3d at 352.

Similarly here, the harm from a chemical presenting a substantial risk of injury to health or the environment does not dissipate over time. Rather, its continued use, if not by the chemical company with the information, by the others without such information, perhaps under other circumstances and/or without taking the necessary precautionary measures, may spread or increase the risk and/or resultant damage. Moreover, unlike an annual filing obligation, there is no subsequent event which necessarily overtakes such disclosure, making it moot.

Therefore, it is concluded that the TSCA 8(e) disclosure requirement is continuing in nature.

ORDER

Respondent's Motion for Judgment on the Pleadings is hereby **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Date: March 25, 2011
Washington, D.C.