

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

11/30/89



In the Matter of

ALM CORPORATION,

Respondent

Docket No. 11 TSCA-IMP 13-36-0121

Judge Greene

OPINION AND ORDER DENYING MOTION TO DISMISS
AND GRANTING PARTIAL "ACCELERATED DECISION"

This matter arises under §§ 15 and 16 of the Toxic Substances Control Act, (TSCA, or "the Act"), 15 U.S.C. §§2614 and 2615, which provide for the assessment of civil penalties for violations of the Act and regulations issued pursuant to authority contained therein.

The complaint charges respondent with failing to provide to the United States Customs Service ("Customs"), in violation of 19 CFR §12.121(a), certification that seven shipments of certain materials into the United States were "subject to TSCA and complied with all applicable rules and orders thereunder;" and with falsely certifying that two shipments were not subject to the Act, also in violation of 19 C.F.R. §12.121(a). Promulgated by the U. S. Treasury Department's Customs Service, 19 C.F.R. §12.121(a) implements §13 of TSCA, 15 U.S.C. §2612, which requires the Treasury Secretary to refuse entry into the customs territory of the United States to "any chemical substance, mixture, or article containing a chemical substance or mixture" that fails to comply with TSCA and regulations in effect under TSCA. By way of implementation, 19 CFR §12.121(a) provides that an importer of a "chemical substance in bulk or part of a mixture" must certify to Customs either that each shipment of such a substance complies with TSCA and all applicable rules and orders issued pursuant to TSCA, or that the shipment is not subject to TSCA. In order to comply with §12.121(a), therefore, every shipment of a "chemical substance imported in bulk or as part of a mixture" must carry certification as to

compliance with TSCA and effective regulations, or certification that TSCA does not apply to the shipment. 1/

Respondent moved to dismiss on several grounds, including: (1) Since 19 CFR §12.121(a) was promulgated by Customs, it can be enforced only by Customs -- not by the United States Environmental Protection Agency (EPA); (2) sanctions for failure to comply with 19 CFR §12.121(a) (assuming the failure is detected by Customs at the time the goods are offered for entry) are limited to those set out in §13 of TSCA, 15 U.S.C. §2612, i. e. refusal

1/ 19 CFR §12.121(a) provides, in pertinent part, that:

Reporting requirements. (a) All chemical substances in bulk or mixtures. The importer of a chemical substance, imported in bulk or as part of a mixture, shall certify to the district director at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA. The importer, or his authorized agent, shall sign one of the following statements:

I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.

I certify that all chemicals in this shipment are not subject to TSCA.

The certification, which shall be filed with the district director at the port of entry before release of the shipment, may appear as a typed or stamped statement . . . (0)n an appropriate entry document or commercial invoice

of entry of the goods, and provisions for charging the bond of the importer under certain circumstances; 2/ and (3) that the materials

2/ 15 U.S.C. §2612, Entry into customs territory of the United States, provides, in pertinent part that:

(a) In general. -- (1) The Secretary of the Treasury shall refuse entry into the customs territory of the United States . . . of any chemical substance, mixture, or article containing a chemical substance or mixture offered for such entry if --

(A) it fails to comply with any rule in effect under this chapter, or

(B) it is offered for entry in violation of section 2604 and 2605 of this title, a rule or order under section 2604 or 2605 of this title, or an order issued in a civil action brought under section 2604 or 2605 of this title.

(2) If a chemical substance, mixture, or article is refused entry under paragraph (1), the Secretary of the Treasury shall notify the consignee of such entry refusal, shall cause its disposal or storage (under such rules as the Secretary of the Treasury may prescribe) if it has not been exported by the consignee within 90 days from the date of receipt of notice of such refusal, except that the Secretary . . . may, pending a review by the Administrator of the entry refusal, release to the consignee such substance, mixture, or article on execution of bond for the amount of the full invoice of such substance, mixture, or article (as such value is set forth in the customs entry), together with the duty thereon. On failure to return such substance, mixture, or article for any cause to the custody of the Secretary of the Treasury when demanded, such consignee shall be liable to the United States for liquidated damages equal to the full amount of such bond. All charges for storage, cartage, and labor on and for disposal of substances, mixtures, or articles which are refused entry or release under this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future entry made by such owner or consignee.

(b) Rules. -- The Secretary of the Treasury, after consultation with the Administrator, shall issue rules for the administration of subsection (a) of this section.

imported here were not "chemical substances" within the meaning of §3 of the Act, 15 U.S.C. §2602, but are "articles" not subject to import certification requirements under 19 CFR §12.121(a) at the time the complaint issued.

Complainant opposed the motion to dismiss, and cross-moved for "accelerated decision" as to all issues except penalty.

Taking first respondent's argument that EPA may not seek civil penalties for violations of 19 CFR §12.121(a) because it is a Customs regulation, an examination of pertinent provisions of the Act reveals the following:

1. Section 2 of TSCA, 15 U.S.C. §2601, Findings, Policy and Intent, declares at subsection (c) that "(I)t is the intent of Congress that the Administrator [of EPA] shall carry out this chapter [TSCA] in a reasonable and prudent manner. . . ." This language and other provisions throughout the Act make clear that Congress intended the Administrator of the EPA to administer TSCA, even if certain other officials are directed to carry out limited functions in aid of TSCA's regulatory design, and that it is the Administrator who has enforcement authority in connection with violations of TSCA provisions.

2. Section 13 of TSCA, 15 U.S.C. §2612, provides that the Secretary of the Treasury shall refuse entry into the customs territory of the United States to any chemical substance if offered for entry in violation of certain sections of TSCA or if a shipment "fails to comply with any rule in effect under this chapter."

Section 13 further directs the Treasury Secretary to issue rules to implement the refusal of entry provisions of §13, after consultation with the EPA Administrator.

3. 19 CFR §12.121(a), which requires certification for the importation of chemical substances, was issued by Customs pursuant to the direction of Section 13 of TSCA, in consultation with the EPA Administrator, and is therefore a "rule in effect under this chapter." 3/ It requires information (in the form of certification) as to whether the shipment to which the certification is attached complies with TSCA, or is not subject to TSCA.

4. Section 15 of TSCA, 15 U.S.C. §2614, provides that "it shall be unlawful for any person" to "fail or refuse to submit reports, notices or other information . . . as required by this Chapter or a rule thereunder". (Emphasis supplied). It is noted that the caption to 19 CFR §12.121(a), a rule issued under "this Chapter," consists of the words "Reporting requirements". 4/

5. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), provides that "(A)ny person who violates a provision of section 2614 [15 U.S.C. §2614, Section 15 of TSCA] of this title shall be liable to the United States for a civil penalty . . . (A) civil penalty for a violation of section 2614 of this title shall be assessed

3/ Section 13 of TSCA, 15 U.S.C. §2612 (a)(1)(A). The words "this Chapter" refer to Chapter 53 of the United States Code, Control of Toxic Substances.

4/ See note 1, supra, page 3.

by the Administrator".

These provisions leave no doubt that the Administrator has authority to impose civil penalties for violations of rules issued pursuant to the Act -- as 19 CFR §12.121(a) was. The failure or refusal "to submit reports . . . or other information as required by this Chapter or a rule thereunder" is a "prohibited act" under §15 (3)(B) of TSCA, 15 U.S.C. §2614(3)(B), for which civil penalties are to be assessed pursuant to §16 of TSCA (15 U.S.C. §2615) by the Administrator. Where, as here, the specific information or report required is a condition of entry of goods into the country, failing which entry shall be refused, it is Customs officials who are equipped to refuse entry. But it is EPA which has specific authority to assess penalties for the failure to provide information or reports required by a TSCA rule. In short, the violation of a TSCA rule, whether the rule was promulgated by EPA or by Customs, constitutes a violation of §15(3)(B) of TSCA, for which EPA "shall" 5/ assess civil penalties.

Turning to respondent's argument that the penalties for failure to comply with 19 CFR 12.121(a) are limited to those set forth in §13 of TSCA (i. e. refusal of entry and certain bond charging provisions, see note 2, page 4, supra), a reading of §13 (15 U.S.C. §2612) makes clear that refusal of entry for uncertified goods is

5/ Section 16(a) of TSCA, 15 U.S.C. §2615(a).

not a penalty, although it may seem so to importers. Rather, it is an expression of public policy that unknown (uncertified or falsely certified) chemical substances may not enter the United States. Refusal of entry specifically furthers the regulatory schema set out in TSCA for the control of toxic substances and the protection of human health in the United States. The bond charging provisions of §13 relate to the administration and handling of goods which are refused entry. For instance, the bond is charged if the Treasury Secretary decides to release a detained shipment to the consignee while EPA is reviewing the refusal of entry. 6/ In another provision, the bond would be charged if a consignee fails to return the goods to the Secretary upon demand, following the Administrator's determination that such goods may not enter.7/ Bond charging in this instance might be considered a penalty for failure to surrender the goods, but not for failure to certify compliance with TSCA. These provisions are ministerial in nature, and, as set out at §13 of TSCA, assure that the United States will not bear expense in connection with items that have

6/ See generally 19 CFR §12.122(b)(1), (c), and (d); and 19 CFR §12.123(a), (b), and (c). Customs "shall give prompt notice" to the Administrator upon detaining shipments under TSCA. The Administrator then will review the detention and notify Customs within 30 days notify Customs whether to permit or refuse entry.

7/ 15 U.S.C. §2612(a)(2). See note 2, supra, page 4, for the text of this provision.

been refused entry. The absence in §13 of a specific penalty for violation of §13 merely conforms to the structure of TSCA and many other statutes in which civil penalty provisions are set out elsewhere in the statute. In TSCA, the civil penalty provisions are set forth at §§15-16, 15 U.S.C. §§2614-2615. Conversely, the presence in §13 of entry refusal and bond charging provisions, even if these are considered penalties, does not preclude the assessment of civil penalties authorized in §§15-16 of TSCA, if civil penalties are clearly assessable for violations of regulations issued pursuant to §13. Here, it is clear that §§15-16 penalties can be assessed for failure or refusal to submit reports and other information required by TSCA regulations. Respondent's argument on this point, if it were to prevail, would have an interesting consequence: if Customs failed to note the absence of certification and permitted entry, and if TSCA §§15-16 civil penalties could not be assessed because sanctions were limited to the refusal of entry and bond charging provisions of §13, there would be no penalty for violations of §12.121(a) after the fact. And in the case of false certification (that the shipment was not subject to TSCA), which Customs might not be able to detect, again in the absence of civil penalties, there would be no sanctions as the goods would have already come in. Settled principles of statutory interpretation require avoidance of a result which runs counter to the broad goals which Congress intended to effectuate, in the absence of an

unmistakable directive that is lacking here. See FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968), National Petroleum Refiners Ass'n v. FTC, 482 F. 2d 672, 689 (D. C. Cir. 1973). Application of the statutory construction maxim expressio unius est exclusio alterius, urged by respondent, would create such a result. 8/

The third ground of respondent's motion to dismiss the complaint is that, in its view, the materials imported without certification (Counts 1-7 of the complaint) or with allegedly false certification (Counts 8 and 9 of the complaint) 9/ are

8/ Expressio unius est exclusio alterius is merely an auxiliary rule of construction, not a rule of law. It is applied only to assist in arriving at the real legislative intent, where such intent is not manifest. It may not be used to create an ambiguity, or to override clear expression of legislative intent. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 15 (1981); Neuberger v. Commissioner, 311 U.S. 83; Springer v. Philippine Islands, 277 U.S. 189; Robb v. Ramey Associates, 14 A. 2d 394, 40 Del. 520; Crancer v. Lowden, 121 F. 2d 645, aff'd. 315 U.S. 631. It should be applied with great caution, U. S. v. Katz, 78 F. Supp. 21. Further, the maxim is "increasingly considered unreliable in statutory construction," National Petroleum Refiners Ass'n v. Federal Trade Commission, 482 F.2d 672, 676 (D. C. Cir. 1973). See also Carter v. Director, OWCP, 751 F. 2d 1398, 1401 (D. C. Cir., 1985).

In this case, application of the maxim would require total disregard of the clear language of §15(3)(B), 15 U.S.C. §2614(3)(B), thereby creating an ambiguity where none existed, and would overlook straightforward legislative intent to provide penalties for failure or refusal to submit reports and other information pursuant to TSCA rules. Finally, expressio unius est exclusio alterius does not apply here because refusal of entry and bond charging provisions are not penalties for violations of the reporting requirements of 19 CFR §12.121(a).

9/ Stipulation of Facts #3, attached and made a part hereof.

not "chemical substances" within the meaning of 15 U.S.C. §2602, §3 of TSCA; they are "articles." As such, they are not subject to the certification requirements pursuant to 19 CFR §12.121(a).

Five of the seven shipments which carried no TSCA certification consisted of between 43,313 and 48,510 pounds of tiny (about three millimeters across) pellets referred to on the invoices as "nylon 6.6 chips 'polynil' P-50"; another shipment was 33,124 pounds of "Delrin 100," and still another consisted of "nylon 7460 K" and "Delrin 100/107," totalling 40,674 pounds. Two shipments certified as not subject to TSCA each consisted of about 94,200 pounds of "nylon 6.6 chips 'polynil' P-50".^{10/} According to respondent, the technical name for Delrin is polyacetal methylene thermoplastic polymer; its chemical formula is $O-CH_2O-CH_2-O-CH_2$; its Chemical Abstract Services (CAS) registry number is 66455-31-0.^{11/} It is used to make the water contact parts of plumbing equipment, and has been approved by the Food and Drug Administration for contact with food.^{12/} Nylon is a polyamide; its chemical formula is $CONH$.^{12/} Its CAS number is 32131-17-2.

^{10/} Complainant's Exhibits 3-a to 3-i, and 9.

^{11/} A CAS registry number identifies chemical substances on the basis of their chemical structure. Affidavit of Nora Lopez, page 6.

^{12/} Complainant's Exhibit 9, a letter dated August 25, 1986, from respondent's counsel to an EPA attorney.

During the manufacturing process, the pellers are introduced into a feed hopper, then dropped into a chamber where they are heated. When the material becomes molten (at 172° to 184°C for Delrin and 490-510°F for nylon, 13/) it is forced into molds of the finished product 14/ and cooled. Both nylon and Delrin were listed on the TSCA Chemical Substances Inventory when the complaint herein was issued. 15/

TSCA does not define "article". However, Customs regulations at 19 CFR 12.120(a)(1) define "article" as:

- (1) a manufactured item which:
 - (i) Is formed to a specific shape or design during manufacture,
 - (ii) Has end use functions dependent in whole or in part upon its shape or design during end use, and
 - (iii) Has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article . . . except that fluids and particles are not considered articles regardless of shape or design

13/ Material Safety Data Sheet for Delrin Acetal Resin dated October, 1985, issued by DuPont (Polymer Products Department), Affidavit of Nora Lopez, Attachment 1. This document notes that containers of Delrin should be opened only in well-ventilated areas, and that formaldehyde is released "in small quantities during hot processing".

14/ Respondent's motion to dismiss, page 9.

15/ Affidavit of Nora Lopez, page 7; stipulation of facts #4.

The term "chemical substance" is defined in §3 of TSCA, 15 U.S.C. §2602, and at 40 CFR §710.2(h) of the Chemical Substances Inventory reporting [(pursuant to §8(b) of TSCA)] regulations as:

"Chemical substance" means any organic or inorganic substance of a particular molecular identity, including any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and any chemical element or uncombined radical. . . .

The definition continues by listing exceptions, such as tobacco, pesticides, food, firearms, and other materials not relevant to a consideration of whether respondent's nylon and Delrin pellets are "articles" or "chemical substances". Complainant urges that respondent's pellets should be held to be "particles;" particles are explicitly excluded from the 19 CFR §12.120(a)(1) definition of "article". Complainant further points out that EPA's interpretation of the term "article" has consistently included the idea of a "finished form" or "finished product". Under that analysis, the pellets cannot be articles because they are used in respondent's manufacturing process to make finished products; the parties have stipulated that Delrin and nylon are imported by respondent in bulk form, classified by respondent under the Tariff Schedule as "Item #408.6100, Thermoplastic resins: polyamide resins, nylon type" with the intent to manufacture them into finished products (Stipulations #7, #9).

It is held that respondent's pellets are "chemical substances"

within the meaning of TSCA §3 and 40 CFR 710.2(h), and that they are subject to the reporting requirements of 19 CFR §12.121(a). The definition of "chemical substance" includes to any "organic or inorganic substance of a particular molecular identity" Delrin and nylon are organic or inorganic substances having a particular identity. Respondent may be correct in noting that nearly everything falls within this broad definition. However, as long as there is no doubt that these particular materials fall within the definition, and since they are not among the listed exceptions, it must be held that they are "chemical substances."^{16/} Further, the definition of "article" as having ". . . end use functions dependent in whole or in part upon its shape or design during the end use . . . ," 19 CFR 12.120(a)(1), appears to exclude these pellets. In the shape in which they are imported, they do not really have end use functions that depend upon their specific shape, although apparently they must be quite small to be accommodated by the machinery into which they are fed for melting. Therefore, both because the pellets fall within the definition of "chemical substances," and because they are not "articles," they must be held to be "chemical substances."

Accordingly, respondent's motion to dismiss is denied.

^{16/} Nylon and Delrin (CAS registry numbers) appear on the Toxic Substances Control Act Chemical Substances Inventory compiled by the Administrator pursuant to §8(b) of TSCA, 15 U.S.C. 2607(b). See also Stipulation #4.

Turning to complainant's motion for "accelerated decision" as to respondent's liability for violations alleged in the complaint, stipulations and documents provided by counsel in pre-trial exchange, which have been made part of the record, reveal that the facts have been agreed upon. It is concluded, based upon determinations made in connection with respondent's motion to dismiss and the record in this matter, that complainant's motion for accelerated decision as to liability should be granted.

Findings of Fact and Conclusions of Law

1. Respondent ALM Corporation operates a facility at 55 Haul Road, Wayne, New Jersey, for the manufacture and distribution of various types of plastic materials for use in the production of plastic articles, (Stipulation #1) and is subject to TSCA.

2. Respondent was the importer of record of the nylon 6.6 chips polynil P-50, Nylon 7460K, Delrin 100, and Delrin 100/107 materials in the shipments set out in Counts 1 through 9 of the amended complaint. (Stipulation #2, attached hereto and made a part hereof). These materials, shaped into small pellets (about three millimeters across) were imported in bulk and classified by respondent under the tariff schedule of the United States as Item #408.6100, thermoplastic resins: polyamide resins, nylon type.

3. The shipments listed in Counts 1 through 7 of the amended complaint were not accompanied by certification as required by

19 CFR §12.121(a). (Stipulation #3) The shipments set out in Counts 8-9 of the amended complaint were accompanied by certifications that the merchandise was not subject to TSCA.

5. Nylon 6.6 chips polynil P-50, Delrin 100, Delrin 107, and Nylon 7460K are "chemical substances" within the meaning of §3 of TSCA, not "articles" as defined at 19 CFR §12.120(a)(1); as imported by respondent, they do not have end use functions dependent upon their shape or design during end use, which is one of the characteristics of an "article," 19 CFR §12.120(a)(1)(ii).

6. EPA has authority to enforce §13 of TSCA, 15 U.S.C. §2614, and regulations issued pursuant thereto; 19 U.S.C. §12.121 is a regulation issued pursuant to §13 of TSCA. EPA has authority to assess civil penalties, pursuant to §§15-16 of TSCA, for violations of 19 CFR §12.121(a).

7. Penalties provided at §§15-16 of TSCA, 15 U.S.C. §2614-§2615, are assessable for violations of 19 CFR §12.121(a) despite the presence in §13 of TSCA of refusal of entry and bond charging provisions.

8. In failing to provide certification as required by 19 CFR §12.121 for nylon and Delfin materials, and in erroneously certifying that nylon materials (Counts 8 and 9 of the amended complaint were not subject to TSCA, respondent violated §15 of

TSCA, 15 U.S.C. §2614, in that respondent failed to submit reports or other information as required by 19 CFR §12.121, a regulation issued pursuant to §13 of TSCA, and is liable for a civil penalty in an amount not to exceed \$25,000 per violation in accordance with §16 of TSCA, 15 U.S.C. §2615.

Respondent's motion to dismiss is hereby denied. Complainant's motion for "accelerated decision" as to liability is hereby granted. Remaining to be determined in this matter is the amount of civil penalty, if any, to be assessed for the violations found.

It is ORDERED that the parties shall confer upon the possibility for settlement of this matter, and shall report upon their efforts during the week of January 22, 1990.

A handwritten signature in black ink, appearing to read 'J. F. Greene', is written over a horizontal line.

J. F. Greene
Administrative Law Judge

November 30, 1989
Washington, D. C.