8/30/90

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

90 SEP 11 A7:30

In the Matter of

ALM CORPORATION

Respondent

Docket No. II TSCA-IMP 13-86-0121

Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2614 and 2615. In this action for violations of 19 C.F.R. §12.121(a), a U. S. Customs regulation which implements §13 of TSCA, 15 U.S.C. § 2612, wherein the Treasury Secretary is required to refuse entry into the customs territory of the United States to any chemical substance which fails to comply with TSCA and regulations issued pursuant thereto, a civil penalty of $19,500 was found to be appropriate.

Terry Sullivan, Esquire, Office of Regional Counsel, Region II, United States Environmental Protection Agency, 26 Federal Plaza, New York, New York 10278, for complainant.

James A. Geraghty, Esquire, Donohue and Donohue, 26 Broadway, New York, New York 10004, for respondent.

Before: J. F. Greene, Administrative Law Judge

DECISION AND ORDER

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 charged respondent with failing to provide to the United States Customs Service ("Customs"), in violation of 19 C.F.R. § 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). This section, promulgated by the U. S. Treasury Department's Customs Service, implements § 13 of TSCA, 15 U.S.C. § 2612, which requires the Secretary of the Treasury 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, or that the shipment is not subject to TSCA. Therefore, in order to be in compliance with TSCA, every shipment of a

"chemical substance imported in bulk or as part of a mixture" must carry certification that it complies with TSCA, or, alternatively, must carry certification that the shipment is not subject to TSCA.

Respondent moved to dismiss on the following grounds:

> 1. 19 CFR § 12.121(a) was promulgated by Customs, and can be enforced only by Customs.
>
> 2. Sanctions for failure to comply with 19 CFR § 12.121(a) are limited to those set forth in § 13 of TSCA, 15 U.S.C. § 2612, i. e. refusal of entry of the goods, and provisions for charging the bond of the importer under certain circumstances;
>
> 3. The materials imported 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 moved for judgment in its favor as to all issues except penalty. By Opinion and Order Denying Motion to Dismiss and Granting Partial "Accellerated Decision" of November 30, 1989, it was held that 19 CFR § 12.121(a) could be enforced by U.S. EPA; that penalties provided at §§ 15-16 of TSCA, 15 U.S.C. § 2614 - 2615 may be assessed for violations of 19 CFR § 12.121(a), and that the materials imported are "chemical substances" within the meaning of § 3 of TSCA. It was also held that complainant was entitled to judgment as to all issues except penalty.

Thereafter, the penalty issue could not be settled by the

parties, and went to hearing on May 2, 1990. Complainant seeks a civil penalty in the amount of $6000 for each of the nine violations charged in the complaint and determined in the November 30, 1989, Order to have been established. 1/

In these proceedings, the amount of any civil penalty to be assessed must be determined in accordance with criteria relating to civil penalties that are set forth in the Act; 2/ further, relevant civil penalty guidelines issued pursuant to the Act must be considered, 40 CFR § 22.27(b).

The record discloses that complainant proposed a penalty in accordance with U. S. EPA guidelines then applicable. The proposal is consistent with current guidelines. 3/

1/ Opinion and Order Denying Motion to Dismiss and Granting Partial "Accellerated Decision," November 30, 1989, 16-17, at ¶ 8.

2/ § 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B) provides as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

3/ U. S. EPA issued guidelines in September, 1980, for the assessment of civil penalties under § 16 of the Act, TR 29-30, and, on July 12, 1984, a penalty policy developed for § 13 violations was issued. It is this version that applies to this action. Later, on May 15, 1987, a final enforcement response policy for § 13 violations was issued.

Respondent argues that the penalty must be reduced because Customs did not detain the shipments which carried no certification. Further, respondent contends, U. S. EPA knew this and did nothing to change the situation. This "contributory negligence" theory, as respondent calls it [TR 98] must be rejected as having no application to these proceedings. While the theory has superficial appeal, TSCA provides strict liability for violations of § 13.

Respondent argues further that, because the shipments consisted of materials that are not toxic, are on U.S. EPA's "inventory," and could have been certified accurately as being in compliance with TSCA, the potential for harm is nonexistent. Therefore, the penalty should be greatly reduced. This argument is appealing, and has been considered very carefully. However, it must be held that the applicable penalty policy does not take toxicity into account, [CX 7, TR 62] inasmuch as it is U. S. EPA's position that the "harm is really for a failure to certify violation of section 13, or any improper certification or false certification is that the agency is not provided with the assurance that the importer is fulfilling their responsibility to determine that the chemicals are in compliance." [TR 67] Further,

> We have a more difficult job as an agency in monitoring compliance with imported chemicals than . . . [those] that are manufactured domestically. For a domestically manufactured chemical we can go to the com-

> pany . . . review their records of production and make an independent determination whether or not the actual chemicals are or are not in compliance because we can look at the specific ingredients in the reactions.
>
> For an imported chemical, we really don't have that ability. The products are made outside the country, they're imported usually under a trade name and we really have no idea whether or not they're in compliance . . . and that's the reason behind the requirement for certification on the part of the importer, to acknowledge, provide notice . . . that they have investigated the chemicals that they are importing and have, in fact, determined that they're in compliance with TSCA. 4/

The question of whether the penalty policy ought to address the question of toxicity is an interesting one, but need not be reached here because of a determination that the interests of justice require reduction of the penalty for other reasons.

The penalty policy provides for a notice of noncompliance for a first violation. Such a notice was issued in this case, apparently on November 26, 1985. [TR 36, 85, CX 5]. However, respondent's president testified credibly that he never saw the notice, and does not know what happened to it. A return receipt was signed by a guard at the gate at the facility in which respondent is located, but there are six or seven different corporations located at the facility other than respondent. 5/ Under these

---

4/ TR 67-68.

5/ TR 86-87. Respondent pays a part of the guard's salary.

circumstances, it is unfair to apply the full amount of the penalty provided in the penalty policy. Respondent's testimony is found credible particularly since there was little to gain, in view of the fact that the shipments consisted of material that is on the "inventory," by not providing certification. The amount to be assessed for each charge of the complaint, therefore, will be reduced to $2500, and it is found that this amount is appropriate under the circumstances of this case.

With respect to the certification that TSCA did not apply to two shipments, respondent's president testified that, after receiving the complaint herein, he telephoned U. S. EPA to inquire about the matter. He was informed by the office to which he was ultimately referred that if the material was not toxic, he could say that the shipments are not subject to TSCA. [TR 88-89] Following this advice, two shipments were certified as not subject to TSCA. His testimony is credible, particularly since the "false" certifications (that the shipments were not subject to TSCA) did in fact occur following the issuance of the complaint. This testimony will be relied upon in further lowering the penalty for violations in connection with the two shipments which were so certified. It must be understood, however, that inaccurate advice received from someone at U. S. EPA, possibly an outside contractor, does not excuse violations of TSCA. In the particular circumstances of this case, and with respect to these two counts only,

this occurrence serves to reduce the fine to $1000 each. Accordingly, it is found that respondent's testimony is credible and constitutes a basis for a reduction of penalties sought, in the interests of justice.

ORDER

A civil penalty in the amount of $19,500 is hereby assessed against respondent ALM Corporation for the violations of the Act and regulations found in the Opinion and Order Denying Motion To Dismiss and Granting Partial "Accellerated Decision" of November 30, 1989, a copy of which is attached hereto and made a part hereof, for the reasons stated herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of this order upon respondent unless. Payment shall be made by forwarding a cashier's check or certified check payable to "Treasurer of the United States" to the United States Environmental Protection Agency, Region II, Post Office Box 360188M, Pittsburgh, Pennsylvania 15251. A copy of the transmittal of payment should be sent to the Regional Hearing Clerk, United States Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 10278.

J. F. Greene
Administrative Law Judge

August 30, 1990
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order and five (5) copies were sent to the Regional Hearing Clerk on September 10, 1990.

Shirley Smith

SHIRLEY SMITH
SECRETARY TO JUDGE J. F. GREENE

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

In the Matter of

ALM CORPORATION,

Respondent

Docket No. II TSCA-IMP 13-86-0121

Judge Greene

OPINION AND ORDER DENYING MOTION TO DISMISS
AND GRANTING PARTIAL "ACCELLERATED 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 . . . . (O)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 Adminisrator 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 cival 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 exclusivo 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. Commisioner, 311 U.S. 83; Springer v. Phillippine 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 methelene thermoplastic polymer; its chemical formula is O-CH2O-CH2-O-CH2; 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 pellets 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 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 "accellerated decision" as to respondent's liability for violations alleged in the complaint, stipulations and documents provided by counsel in pretrial 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 accellerated 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 Delrin 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 "accellerated 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.

J. F. Greene
Administrative Law Judge

November 30, 1989
Washington, D. C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION II

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II, Complainant,	:	
v.	:	DOCKET NO. II TSCA-IMP-13-86-0121
ALM CORPORATION, Respondent.	:	

STIPULATION OF FACTS

It is stipulated and agreed by and between the United States Environmental Protection Agency (EPA) Region II, complainant, and ALM Corporation, respondent, through counsel for the parties, that the following facts are admitted to be true and accurate and not to be disputed for purposes of the above captioned proceeding:

1) ALM Corporation operates a facility at 55 Haul Road, Wayne, New Jersey 07470 for the manufacture and distribution of various types of plastic materials for use in the production of plastic articles.

2) Respondent was the importer of record of the merchandise identifiable as follows:

ENTRY NO.	Import and/or ENTRY DATE	DESCRIPTION
1001-86-875861-7	10/10/85	Nylon 6.6 chips polynil P-50
1001-86-876559-0	01/07/86	Delrin 100
1001-86-876558-7	01/13/86	Nylon 7460K and Delrin 100/107
1001-86-975120-2	03/23/86	Nylon 6.6 chips polynil P-50

1001-86-975416-0	04/27/86	Nylon 6.6 chips, polynil P-50
1001-86-975415-7	04/27/86	Nylon 6.6 chips polynil P-50
1001-86-975499-5	05/16/86	Nylon 6.6 chips polynil P-50
1001-86-722206-3	05/29/86	Nylon 6.6 chips polynil P-50
1001-86-311557-2	08/16/86	Nylon 6.6 chips polynil P-50
1001-86-397680-5	08/28/86	Nylon 6.6 chips polynil P-50

3) The entires enumerated in Paragraph 2 did not contain the certification prescribed in 19 C.F.R. § 12.121(a) except that entries 1001-86-311577-2 and 1001-86-397680-5 contained certifications that the merchandise was not subject to the Toxic Substances Control Act.

4) All of the merchandise covered by the entries enumerated in Paragraph 2 were on the EPA "inventory" at all times pertinent, that is, such merchandise complied with all applicable rules or orders under TSCA, to the extent that the merchandise can be deemed to be a chemical substance within the meaning of and subject to 15 U.S.C. §§ 2601 et seq.

Respectfully submitted,

James A. Geraghty, Esq.
Donohue and Donohue
Counsel for Respondent
26 Broadway
New York, New York 10004
(212) 269-2330

Miriam E. Villani, Esq.
United States Environmental
Protection Agency
Region II
Office of Regional Counsel
Counsel for Complainant
26 Federal Plaza
New York, NY 10278
(212) 264-5687

CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on December 15, 1989.

Shirley Smith
Secretary to Judge J. F. Greene

Ms. Karen Maples
Regional Hearing Clerk
Region II - EPA
26 Federal Plaza
New York, New York 10278

Dean Applefield, Esq.
Office of Regional Counsel
Region II - EPA
26 Federal Plaza
New York, New York 10278

James A. Geraghty, Esq.
Donohue and Donohue
Counsel for Respondent
26 Broadway
New York, New York 10004