IN RE JOHN P. VIDIKSIS

TSCA Appeal No. 07-02

FINAL DECISION AND ORDER

Decided April 22, 2009

Syllabus

John P. Vidiksis appeals from an Administrative Law Judge's Initial Decision arising out of U.S. Environmental Protection Agency, Region 3's civil administrative complaint against Mr. Vidiksis. The Administrative Law Judge ("ALJ") found Mr. Vidiksis liable for 69 violations of Toxic Substances Control Act ("TSCA") section 409, 15 U.S.C. § 2689, for Mr. Vidiksis' failure to comply with the regulatory requirements of the "Disclosure Rule" found at 40 C.F.R. part 745, subpart F, "Disclosures of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property." The ALJ assessed a civil administrative penalty against Mr. Vidiksis in the aggregate amount of $97,545 for the sixty nine Disclosure Rule violations.

The ALJ found that Mr. Vidiksis committed violations of Disclosure Rule section 745.107(a)(3) and (4) and section 745.113(b)(1), (2), and (6). Mr. Vidiksis appeals the thirty violations of section 745.113(b)(1), which requires that the lease contain a "Lead Warning Statement" and provides specific terminology for such statement. Mr. Vidiksis also appeals the thirty-four violations of section 745.113(b)(2), which requires that the lease disclose the lessor's knowledge, or indicate no knowledge, regarding the presence of lead-based paint and/or lead-based paint hazards in the housing. Mr. Vidiksis' leases did not contain the precise Lead Warning Statement language set forth in the regulations, but instead contained different language referred to as a "Lead Paint Notice." Mr. Vidiksis argues that his leases' language was equivalent to and exceeded both the regulation's Lead Warning Statement and the regulation's requirement for him to disclose his knowledge regarding the presence of lead-based paint or lead-based paint hazards in the housing. Mr. Vidiksis also requests review of the ALJ's $97,545 penalty assessment.

HELD: The Board rejects Mr. Vidiksis' arguments and affirms the ALJ's liability finding and penalty assessment.

Based on the regulation's plain meaning, context and history, the Board concludes that the test for compliance with 40 C.F.R. § 745.113(b)(1) is whether the lease includes a Lead Warning Statement with the exact language (i.e., a verbatim recitation of the precise words) set forth in the regulation. Because Mr. Vidiksis' thirty leases at issue did not contain that precise language, the Board rejects Mr. Vidiksis' appeal and sustains the ALJ's decision finding Mr. Vidiksis liable for thirty violations of 40 C.F.R. § 745.113(b)(1) and TSCA section 409.

The Board also concludes that section 745.113(b)(2) required Mr. Vidiksis to fully disclose in his leases what he knew about lead-based paint hazards in the housing or, alternatively, to affirmatively state that he had "no knowledge of the presence of lead-based paint and/or lead-based paint hazards" in the housing. Mr. Vidiksis' characterization of section 745.113(b)(2), as allowing him to state no more than that the leased housing "*may have been* constructed before 1978 and *may contain* lead-based paint," would render subparagraph (b)(2) redundant with part of subparagraph (b)(1)'s required Lead Warning Statement, which includes the statement that "Housing built before 1978 may contain lead-based paint." The Board rejects Mr. Vidiksis' arguments, which fail to give effect to the regulation's plain terms and would render those terms meaningless or redundant. Because Mr. Vidiksis' leases neither disclosed his knowledge nor affirmatively stated that he had no knowledge, the Board rejects Mr. Vidiksis' appeal and sustains the ALJ's decision finding Mr. Vidiksis liable for all 34 violations of 40 C.F.R. § 745.113(b)(2) and TSCA section 409.

Finally, the Board upholds the ALJ's $97,545 penalty assessment. The Board concludes that the ALJ properly considered the Region's proposed penalty and the Agency's penalty guidelines for violations of the Lead Disclosure Rule and, in so doing, the ALJ properly considered the statutory penalty factors. Accordingly, following applicable Board precedent, the Board does not substitute its judgment for the ALJ's decision absent a showing that the ALJ committed an abuse of discretion or a clear error in assessing the penalty, which Mr. Vidiksis has not demonstrated in this case.

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

John P. Vidiksis appeals from the Initial Decision that Administrative Law Judge William B. Moran ("ALJ") issued on October 10, 2007, arising out of U.S. Environmental Protection Agency, Region 3's civil administrative complaint against Mr. Vidiksis. In his Initial Decision, the ALJ found that Mr. Vidiksis[1] is liable for 69 violations of Toxic Substances Control Act ("TSCA") section 409, 15 U.S.C. § 2689, for his failure to comply with the regulatory requirements of the "Disclosure Rule" found at 40 C.F.R. part 745, subpart F, "Disclosures of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property." The ALJ assessed a civil administrative penalty against Mr. Vidiksis in the aggregate amount of $97,545 for the 69 Disclosure Rule violations. Mr. Vidiksis appeals from both the ALJ's liability finding and his penalty assessment. For the reasons explained below, we reject Mr. Vidiksis' arguments and we affirm the ALJ's finding of liability and assessment of a $97,545 civil administrative penalty.

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[1] The Region originally filed its complaint against both Mr. Vidiksis and Kathleen E. Vidiksis. The ALJ's Initial Decision found only Mr. Vidiksis liable because Ms. Vidiksis entered into a Consent Agreement and Final Order on September 30, 2006, resolving her liability in this matter. Init. Dec. at 2 n.4.

I. *BACKGROUND*

Congress passed Title X of the Housing and Community Development Act of 1992 under the common name of the "Residential Lead-Based Paint Hazard Reduction Act of 1992" ("RLBPHRA"), Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in part in chapters 15 and 42 of the United States Code). RLBPHRA's stated purposes are, among other things, "to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible" and "to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards." 42 U.S.C. § 4851a(1), (7). Among other things, RLBPHRA amended the Toxic Substance Control Act ("TSCA"), *see* RLBPHRA § 1021(a), 15 U.S.C. §§ 2681-2692. As amended, TSCA section 409 provides that it is "unlawful for any person to fail or refuse to comply with a provision of this subchapter [Subchapter IV – Lead Exposure Reduction] or with any rule or order issued under this subchapter." 15 U.S.C. § 2689. Civil penalties for violations of TSCA section 409 may be imposed pursuant to TSCA section 16(a). *Id.* § 2615(a).

RLBPHRA also required the U.S. Environmental Protection Agency Administrator (the "Agency" or "EPA") and the Secretary of the Department of Housing and Urban Development ("HUD") to promulgate regulations governing disclosure of lead-based paint hazards in "target housing"[2] offered for "sale or lease." *See* RLBPHRA § 1018(a), 42 U.S.C. § 4852d(a). In March 1996, EPA and HUD issued joint regulations known as the "Real Estate Notification and Disclosure Rule." *See* Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing; Final Rule, 61 Fed. Reg. 9064 (Mar. 6, 1996). EPA's regulations are codified at 40 C.F.R. part 745, subpart F – "Disclosures of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (which we are referring to as the "Disclosure Rule"), and HUD's regulations are codified at 24 C.F.R. part 35, subpart H.

The Disclosure Rule imposes obligations on lessors and sellers under sections 745.107 and 745.113. 40 C.F.R. §§ 745.107, .113. As relevant to the present case, section 745.107(a)(3) and (4) require that, before a lessee is obligated under a lease of target housing, lessors must disclose the presence of any known lead-based paint and/or lead-based paint hazards in the target housing and must provide to lessees any available records or reports pertaining to lead-based paint

[2] Both RLBPHRA and the Disclosure Rule broadly define "target housing" as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." *Compare* 42 U.S.C. § 4851b(27) *with* 40 C.F.R. § 745.103.

or lead-based paint hazards in the target housing. *Id.* § 745.107(a)(3), (4).[3] In addition, section 745.113(b) requires that the lease contain six elements, three of which are relevant to the ALJ's liability determination in this case: a "Lead Warning Statement" with language provided in the regulations; a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards; and the lessor's signature certifying to the accuracy of the statements. *Id.* § 745.113(b)(1), (2) & (6).[4]

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[3] Section 745.107 states in relevant part as follows:

(a) The following activities shall be completed before the purchaser or lessee is obligated under any contract to purchase or lease target housing that is not otherwise an exempt transaction pursuant to § 745.101. * * *

* * *

(3) The seller or lessor shall disclose to each agent the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards. The seller or lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.

(4) The seller or lessor shall provide the purchaser or lessee with any records or reports available to the seller or lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being sold or leased.* * *

40 C.F.R. § 745.107(a).

[4] Section 745.113(b) states as follows:

> (b) Lessor requirements. Each contract to lease target housing shall include, as an attachment or within the contract, the following elements, in the language of the contract (e.g., English, Spanish):
>
> (1) A Lead Warning Statement with the following language:

Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

> (2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location

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In the present case, the Region alleged in its complaint, and the ALJ found, that Mr. Vidiksis committed 69 violations of Disclosure Rule sections 745.107 and 745.113. Init. Dec. at 1, 3. 68 of the violations arose out of 34 lease transactions and one violation arose out of a sales transaction. *Id.* at 1, 4. The ALJ found that Mr. Vidiksis committed one violation of Disclosure Rule section 745.107(a)(3), one violation of section 745.107(a)(4), thirty violations of section 745.113(b)(1), thirty-four violations of section 745.113(b)(2), and three violations of section 745.113(b)(6). Init. Dec. at 2-3 & nn.5-9.[5]

The violations relate to sixteen residential properties located in York, Pennsylvania. Through stipulations, Mr. Vidiksis and the Region agreed that these properties are within the definition of "target housing" and were owned by Mr. Vidiksis at relevant times. *Id.* at 4 n.11. In addition, the ALJ found that, between 1995 and 1999, Mr. Vidiksis received notice from an agency of the City of York, Pennsylvania, regarding its inspections of four of the sixteen properties and the presence and locations in those housing units where lead concentrations exceeded local limits. *Id.* at 5-6. Mr. Vidiksis entered into the leases and sales contracts at issue in this case after receiving those notices. *Id.* at 6. In the sales transaction, Mr. Vidiksis certified that he had no knowledge of the presence of

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> of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.
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> (3) A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee. If no such records or reports are available, the lessor shall so indicate.
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> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. § 2696.
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> (5) When one or more agents are involved in the transaction to lease target housing on behalf of the lessor, a statement that:
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> > (i) The agent has informed the lessor of the lessor's obligations under 42 U.S.C. § 4852d; and
> >
> > (ii) The agent is aware of his/her duty to ensure compliance with the requirements of this subpart.
>
> (6) The signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

40 C.F.R. § 745.113(b).

[5] The ALJ appears to have made a typographical error in that the texts of footnote 7 and 8 should be interchanged. The ALJ referred to the correct complaint counts in his discussion found at Initial Decision pages 6, 9, and 17.

lead-based paint and/or lead-based paint hazards and he stated that he did not have any records or reports pertaining to lead-based paint or lead-based paint hazards. *Id.* at 6. Mr. Vidiksis' leases also did not contain the precise Lead Warning Statement language set forth in the regulations at 40 C.F.R. § 745.113(b)(1), but instead contained what the leases referred to as a "Lead Paint Notice," *id.,* which employed different language.

In the trial proceedings before the ALJ, Mr. Vidiksis argued that his leases' language was equivalent to and exceeded both the Lead Warning Statement language set forth in the regulations and the regulation's requirement for him to disclose his knowledge pertaining to lead-based paint or lead-based paint hazards in the housing. *Id.* The ALJ rejected these contentions. *Id.* at 6-22. Mr. Vidiksis appeals and requests that we reverse the ALJ and find that Mr. Vidiksis' leases satisfied the regulatory requirements of 40 C.F.R. § 745.113(b)(1) and (2). Brief on Behalf of Appellant at 2 (Jan. 3, 2008) ("Mr. Vidiksis' App. Br."). Mr. Vidiksis has not appealed from the ALJ's liability findings with respect to violations of 40 C.F.R. § 745.107(a)(3) and (4) and section 745.113(b)(6). Mr. Vidiksis does, however, request that we review the ALJ's assessment of a $97,545 penalty. For the following reasons, we reject Mr. Vidiksis' arguments and sustain both the ALJ's liability determination and his penalty assessment.

II. *DISCUSSION*

A. *Liability for Violations of 40 C.F.R. § 745.113(b)(1) – Lead Warning Statement*

The ALJ found that Mr. Vidiksis committed thirty violations of 40 C.F.R. § 745.113(b)(1) because Mr. Vidiksis entered into thirty lease agreements with tenants where the leases did not contain as an attachment or within the body of the lease the Lead Warning Statement language set forth in section 745.113(b)(1). Init. Dec. at 9-17. On appeal, Mr. Vidiksis does not contend that the leases contained the precise language specified by the regulations. Instead, Mr. Vidiksis contends that the "tenants were provided all core elements of the mandated lead health risk information" and that "[i]ndisputably, Mr. Vidiksis properly informed his tenants with a warning that was equivalent in its informational content, scope and candor to the EPA's preferred statement." Mr. Vidiksis' App. Br. at 6, 7.

We begin our analysis, as we must, with the regulatory text. Section 745.113(b)(1) states as follows:

> (b) Lessor requirements. Each contract to lease target housing shall include, as an attachment or within the con-

> tract, the following elements, in the language of the contract (e.g., English, Spanish):
>
> (1) A Lead Warning Statement with the following language:
>
> Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

40 C.F.R. § 745.113(b)(1).

This regulation is mandatory in that it states the lease "shall include * * * the following elements," and the regulation identifies with precision and detail the first element that must be included in the lease: "A Lead Warning Statement *with the following language*." *Id.* (emphasis added). The most natural reading of this text is that lessors must use the exact language set forth in the regulation.[6] The text does not provide lessors discretion to satisfy the lessor's obligation with substitute or alternative language for the required Lead Warning Statement. Moreover, the regulatory text does not provide Mr. Vidiksis a defense or allow him to mitigate his liability based on "substantial compliance." *See Smith v. Coldwell Banker Real Estate Serv.,* 122 F.Supp. 2d 267, 272-73 (D. Conn. 2000) (rejecting "substantial compliance" defense with respect to a seller's failure to provide a lead-paint report in connection with a sales transaction).

Our plain reading of the regulatory text is supported by the regulatory context and history. The lessor's requirements set forth in section 745.113(b)(1) are preceded in the text by the seller's requirements set forth in section 745.113(a). 40 C.F.R. § 745.113(a)(1). The precise language of the Lead Warning Statement required to be given by sellers and lessors, however, is not exactly the same, although the meaning is substantially the same.[7] EPA explained in the regulatory

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[6] *U.S. v. Easter*, 553 F.3d 519, 525-26 (7th Cir. 2009) ("We interpret a statute by giving it its most natural reading")(citing *U.S. v. Ressam*, 533 U.S. 272, 274-75 (2008) ("There is no need to consult dictionary definitions of the word 'during' * * * . The term 'during' denotes a temporal link; that is surely the most natural reading of the word as used in the statute.")

[7] In contrast to the language required by section 745.113(b)(1), section 745.113(a)(1) requires the following language to be included in sales contracts or attachments: "Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that

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preamble that EPA and HUD carefully considered the precise wording of the Lead Warning Statement required for leasing transactions: "EPA and HUD received a considerable amount of comments regarding the language of the Lead Warning Statement used in the leasing disclosure attachment. EPA and HUD have developed a modified Lead Warning Statement for leasing transactions that *uses simpler words and syntax* than the purchase warning statement * * * ." Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064, 9073 (Mar. 6, 1996) (emphasis added). EPA and HUD's careful attention to the lessor's Lead Warning Statement's "words and syntax" confirms that EPA intends lessors to use verbatim the Lead Warning Statement language as set forth in the regulation.

In addition, the Lead Warning Statement language required to be included in sales contracts is a verbatim restatement of the language Congress set forth in the statute at RLBPHRA section 1018, 42 U.S.C. § 4852d(a)(3). EPA explained in the regulatory preamble as follows: "Congress mandated this language in section 1018(a)(3) of Title X. While several commenters recommended providing simpler language, EPA and HUD are constrained by the mandate and have retained the statement as proposed." 61 Fed. Reg. at 9073. Thus, EPA's conclusion that it did not have authority to modify the seller's Lead Warning Statement confirms that the directive language EPA used in section 745.113(a)(1) to introduce the seller's Lead Warning Statement – i.e., "shall include * * * the following elements * * * : (1) A Lead Warning Statement consisting of the following language" – mandates that sellers must recite verbatim the language set forth in the regulation. Likewise, although EPA exercised its discretion to use simpler language for the Lead Warning Statement required in leasing transactions, EPA's use of nearly identical directive language introducing the lessor's Lead Warning Statement in section 745.113(b)(1) – i.e., "shall include * * * the following elements * * * A Lead Warning Statement with the following language" – also confirms EPA's intention that, just like sellers must recite the section 745.113(a)(1) language verbatim, lessors also must recite verbatim in their leases the language set forth in section 745.113(b)(1) and that lessors do not have discretion to modify the warning statement's language. Accordingly, we must reject Mr. Vidiksis' argument that the regulation allows a lessor to satisfy the requirement of section 745.113(b)(1) by lease language that uses different words and syntax than the

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such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase."

Lead Warning Statement language set forth in the regulation even if such alternative language were to, as Mr. Vidiksis alleges here, "provide all core elements of the mandated lead health risk information." Mr. Vidiksis' App. Br. at 6.

Thus, we reject as irrelevant for the reasons stated above Mr. Vidiksis' assertion that the testimony of the Region's witness, Daniel T. Gallo, "establishes conclusively that the Respondent's tenants were provided all core elements of the mandated lead health risk information." *Id.* Mr. Vidiksis' leases unquestionably did not contain either as an attachment or in the body of the leases the Lead Warning Statement language mandated by the regulations. Instead, Mr. Vidiksis' leases contained the following "lead paint notice":

> **Lead Paint Notice.**Tenant acknowledges that the leased premises may have been constructed before 1978, and may contain lead-based paint. Ingestion of paint particles containing lead may result in lead poisoning which can cause major health problems, especially in children under 7 years of age. In the event the Tenant or any family members or guests should develop lead poisoning, and it is determined that corrective measures are required to remedy the source of the lead poisoning, the cost of such remedy shall be at the sole expense of the Tenant. In the event that Tenant is either unwilling or unable to perform corrective measures, Tenant shall have the option at the discretion of the Landlord to terminate the lease with a written 30 day notice and providing Landlord with written verification of source of lead.

CX1-CX31, ¶ 44. This "Lead Paint Notice" is not a verbatim recitation of the "Lead Warning Statement" language required by 40 C.F.R. § 745.113(b)(1). Accordingly, this lease language did not satisfy section 745.113(b)(1)'s requirement.[8]

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[8] Both the ALJ in his Initial Decision and the Region in its appellate brief provided a sentence-by-sentence comparison of Mr. Vidiksis' Lead Paint Notice with the regulation's Lead Warning Statement language to demonstrate that Mr. Vidiksis' language is substantially inferior to the regulatory language. *Compare* Init. Dec. at 14-17 *with* Region's App. Br. at 10-16. These sentence-by-sentence comparisons are unnecessary given the regulation's plain meaning requiring verbatim use of the regulatory prescribed language. Nevertheless, the ALJ's and Region's sentence-by-sentence analysis illustrates the waste, inefficiency, and confusion that would result under the rule-of-decision Mr. Vidiksis advocates. If we were to misconstrue the regulation and allow any language that purports to contain the "core elements," then every enforcement case would require a time-consuming analysis of whether the lease contained somewhere within its four corners or in its attachments each of the "core elements" of the regulation's Lead Warning Statement. Not only would allowing such language slippage impose unnecessary litigation costs on both the public and enforce-

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We similarly reject Mr. Vidiksis' suggestion that he achieved substantial compliance by providing to lessees the Agency's informational pamphlet, titled *Protect Your Family From Lead in Your Home* ("EPA Lead Pamphlet"). *See* Mr. Vidiksis' App. Br. at 4-5, 6-7. The regulation's plain language requires that lessors provide to lessees both the Lead Warning Statement *and* the EPA Lead Pamphlet. The lessor's obligation to provide the Lead Warning Statement is set forth in 40 C.F.R. § 745.113(b)(1), and the lessor's obligation to provide the EPA approved pamphlet is separately set forth in 40 C.F.R. § 745.107(a)(1). In addition, the prescribed language for the Lead Warning Statement specifically states that "Lessees must *also* receive a federally approved pamphlet on lead poisoning prevention." 40 C.F.R. § 745.113(b)(1) (emphasis added). Thus, providing the pamphlet is a separate and additional obligation, and satisfying one obligation does not satisfy the other.[9]

Accordingly, we hold that the test for compliance with 40 C.F.R. § 745.113(b)(1) is whether the contract to lease target housing includes, as an attachment or within the contract, a Lead Warning Statement with the language (i.e., a verbatim recitation of the precise words) set forth in the regulation. Because the thirty leases at issue did not contain that precise language either in the body of the contract or in an attachment, we reject Mr. Vidiksis' appeal and sustain the ALJ's decision finding Mr. Vidiksis liable for thirty violations of 40 C.F.R. § 745.113(b)(1) and TSCA section 409.

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ment agencies as a foreseeable consequence of disputes fomented over whether a particular lease's language is or is not sufficiently "equivalent" to the regulatory text, but allowing such language slippage necessarily would also undermine the clarity of the warning contemplated by the regulation and render superfluous the attention EPA paid in crafting the precise wording and syntax of the language set forth in section 745.113(b)(1). Further, to the extent that this bright-line rule may produce a harsh result on the particular facts of a specific case, an adjustment may be taken into account when setting the appropriate penalty for the violation, which is what both the Region and the ALJ did in the present case. *See* Part II.C(1) below.

[9] Mr. Vidiksis argues that a guidance document EPA issued implies that providing the EPA Lead Pamphlet to lessees satisfies the Lead Warning Statement. Mr. Vidiksis' App. Br. at 6-7. The question in the guidance document that Mr. Vidiksis points to, however, only addresses whether "the pamphlet [may] be provided in an 8 ½ x 14 format" rather than in the booklet format. Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, *Interpretative Guidance for the Real Estate Community on the Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing* at 11 (Aug. 20, 1996). Thus, this guidance does not address the question at issue in this case regarding whether providing the EPA Lead Pamphlet satisfies the lessor's duty to provide the Lead Warning Statement. Moreover, a guidance document cannot, in any event, alter the plain meaning of the regulatory text, which in this case requires the lessor to use verbatim the regulatory prescribed language for the Lead Warning Statement. *See, e.g., In re Harpoon Partnership,* 12 E.A.D. 182,191-92 (EAB 2005) (fair notice of a regulation's meaning may be obtained "in the most obvious way of all: by reading the regulations").

B. *Liability for Violations of 40 C.F.R. § 745.113(b)(2) – Lessor's Statement Either Disclosing Known Lead-Based Paint or Indicating No Knowledge*

The ALJ found that Mr. Vidiksis committed 34 violations of 40 C.F.R. § 745.113(b)(2) because Mr. Vidiksis entered into 34 lease transactions where the leases did not contain as an attachment or within the contract one of the two alternative statements required by section 745.113(b)(2). Init. Dec. at 17-22. The lease must include "a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards." 40 C.F.R. § 745.113(b)(2).[10] The ALJ concluded that Mr. Vidiksis' leases' language "avoids the lessor/landlord's duty to faithfully disclose its actual knowledge on these questions." Init. Dec. at 18-19.

Both in the trial proceedings before the ALJ and now on appeal, Mr. Vidiksis argues that his leases' language exceeded the regulation's requirement. Mr. Vidiksis contends that his leases' language, which he quotes in his brief as follows, satisfied section 745.113(b)(2)'s requirement:

> Tenant acknowledges that the leased premises *may have been* constructed before 1978 and *may contain* lead-based paint.
>
> * * *
>
> By signing on the following line, I acknowledge that I have received notice and have been informed of the *possibility* of lead-based paint being on the premises.

Mr. Vidiksis' App. Br. at 8 (emphasis added). Although this language appears in all of Mr. Vidiksis' leases, Mr. Vidiksis appeals only 26 of the 34 violations that the ALJ found. *Id.* at 7. Mr. Vidiksis has excluded from his appeal the leasing transactions for which the Region produced evidence that Mr. Vidiksis had, in fact, received notice from the City of York that his rental units contained lead-based paint and/or lead-based paint hazards but did not disclose that information in the leases. *Compare* Init. Dec. at 5.& nn. 13, 14 *with* Mr. Vidiksis' App. Br. at 7. For the remaining violations that Mr. Vidiksis does appeal, he argues that the Region's demand for a "know nothing" statement is less informative than the

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[10] If the lessor has knowledge of lead-based paint or lead-based paint hazards, the lessor must also disclose additional information, "such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces." 40 C.F.R. § 745.113(b)(2).

statement Mr. Vidiksis gave regarding the *possibility* of lead-based paint or lead-based paint hazards in Mr. Vidiksis' rental housing. Mr. Vidiksis' App. Br. at 7-8.

We reject Mr. Vidiksis' argument and conclude, as we must, that the regulation's plain language requires the landlord to either disclose what the landlord knows about lead-based paint in the housing or to affirmatively state that the landlord has "no knowledge of the presence of lead-based paint and/or lead-based paint hazards" in the housing. 40 C.F.R. § 745.113(b)(2). The regulation's plain terms do not allow the landlord to substitute some other form of disclosure, including Mr. Vidiksis' statement that the housing may possibly contain lead-based paint.[11]

Moreover, Mr. Vidiksis' characterization of his obligation under section 745.113(b)(2) would render subparagraph (b)(2) redundant with part of subparagraph (b)(1)'s required Lead Warning Statement. Specifically, the Lead Warning Statement that Mr. Vidiksis was required to provide under section 745.113(b)(1) includes the statement that "Housing built before 1978 may contain lead-based paint." 40 C.F.R. § 745.113(b)(1). Thus, Mr. Vidiksis' interpretation of section 745.113(b)(2) as allowing him to state no more than that the leased housing "*may have been* constructed before 1978 and *may contain* lead-based paint," Mr. Vidiksis' App. Br. at 8 (emphasis added), would render subparagraph (b)(2) redundant with the disclosure already required under subparagraph (b)(1). "Under well accepted cannons of construction, a rule should be read in a manner that gives effect to all of its parts rather than in a way that renders some of its terms meaningless or redundant." *In re Beckman Prod. Servs.*, 8 E.A.D. 302, 310 (EAB 1999).

Accordingly, we conclude that section 745.113(b)(2) required Mr. Vidiksis to fully disclose in his leases or in a lease attachment what he knew about lead-based paint and lead-based paint hazards in the target housing or, alternatively, to affirmatively state that he had "no knowledge of the presence of lead-based paint and/or lead-based paint hazards" in the housing. 40 C.F.R. § 745.113(b)(2). Because Mr. Vidiksis' leases neither disclosed his knowledge nor affirmatively stated that he had no knowledge, we must reject Mr. Vidiksis' appeal and sustain the ALJ's decision finding Mr. Vidiksis liable for all 34 violations of 40 C.F.R. § 745.113(b)(2) and TSCA section 409.

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[11] EPA observed in the regulatory preamble that "Congress recognized * * * the fact that the seller or lessor might have actual knowledge of lead-based paint and/or lead-based paint hazards above and beyond that present in available reports." 61 Fed. Reg. at 9076. As we explain in the text, section 745.113(b)(2) requires the lessor to fully disclose to the prospective tenant the full state of his knowledge including, if applicable, an affirmative statement of no knowledge. Mr. Vidiksis failed to do that in the present case.

C. *The ALJ's Penalty Assessment*

The ALJ assessed a civil administrative penalty against Mr. Vidiksis in the aggregate amount of $97,545 for the 69 Disclosure Rule violations.[12] Mr. Vidiksis appeals the ALJ's penalty assessment, arguing generally that the ALJ's penalty determination cannot be upheld because the ALJ failed to "make affirmative findings, supported by a preponderance of the evidence" for the statutory penalty factors. Mr. Vidiksis' App. Br. at 8-9. In addition to this general challenge to the ALJ's analysis, Mr. Vidiksis challenges three discrete parts of the ALJ's penalty assessment. First, he argues with respect to the thirty violations of 40 C.F.R. § 745.113(b)(1)[13] that the ALJ erred when taking into account the "extent" and "gravity" of the violations, their "nature" and "circumstances," the violator's degree of "culpability," and prior history of violations. Mr. Vidiksis' App. Br. at 8-16. Second, Mr. Vidiksis argues with respect to 26 of the 34 violations of 40 C.F.R. § 745.113(b)(2)[14] that the ALJ's penalty assessment is "premised exclusively upon * * * non-evidence of the hypothetical notion that Respondent might have known of the lead paint in the subject apartments * * * ." Mr. Vidiksis' App. Br. at 19. Mr. Vidiksis contends that this determination is not supported by the record. *Id.* Finally, Mr. Vidiksis argues that the Region engaged in litigation abuses that warrant recognition and downward adjustment of the penalty under the "circumstances as justice may warrant" statutory penalty factor. *Id.* at 19-20.

For the reasons set forth in detail below, we find that none of Mr. Vidiksis' arguments demonstrates that the ALJ committed an abuse of discretion or clear error in his penalty assessment. Accordingly, we uphold the ALJ's penalty assessment.

1. *General Standards Governing the ALJ's Penalty Assessment*

Mr. Vidiksis argues generally that the ALJ "failed to comport his penalty assessment to [the] discrete statutory mandates, such that no individualized or generic basis exists for upholding this Initial Decision." Mr. Vidiksis' App. Br. at 9. In essence, Mr. Vidiksis argues that the ALJ was required, but failed, to "make affirmative findings, supported by a preponderance of evidence" individually for

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[12] The ALJ assessed a civil administrative penalty of $36,264 for the section 745.113(b)(1) violations; $57,024 for the section 745.113(b)(2) violations; $297 for the section 745.113(b)(6) violation; $1,980 for the section 745.107(a)(3) violations; and $1,980 for the section 745.107(a)(4) violations, for a total aggregate civil administrative penalty of $97,545. Init. Dec. at 30.

[13] The ALJ assessed a civil administrative penalty of $36,264 for the section 745.113(b)(1) violations. Init. Dec. at 30.

[14] The ALJ assessed a civil administrative penalty of $57,024 for the section 745.113(b)(2) violations. Init. Dec. at 30. As discussed below in the text accompanying footnote 22, Mr. Vidiksis does not challenge $8,200 of this penalty.

each of the following statutory penalty factors: the nature, extent, and gravity of the violation, the violator's degree of culpability, any history of prior violations, and such other matters as justice may require. *Id.* at 8-9 (citing TSCA § 16(a)(2)(B),15 U.S.C. § 2615(a)(2)(B)).[15] Mr. Vidiksis argues further that, although EPA has issued guidelines for the assessment of penalties, those guidelines "are not binding upon the [ALJ] and the final determination of a penalty assessment enforceability, depends exclusively upon the [ALJ's] adherence to the TSCA statute's penalty standards * * * ." *Id.* at 9.

Mr. Vidiksis' arguments do not fully align with the law governing administrative penalty assessments applicable to this case. Mr. Vidiksis is correct that the ALJ must "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). However, contrary to Mr. Vidiksis' suggestion that the ALJ must "make affirmative findings, supported by a preponderance of evidence" individually for each of the statutory penalty factors, Mr. Vidiksis' App. Br. at 8-9, we have not required this level of specificity from the ALJs in their analysis. Instead, we have compared the specificity required of the ALJ to the Region's burden of proof as described in *In re New Waterbury, Ltd.,* 5 E.A.D. 529, 538 (EAB 1994). *In re FRM Chem, Inc.*, 12 E.A.D. 739, 751 (EAB 2006) (finding that the discussion in *New Waterbury* regarding "the Region's burden of proof is instructive regarding the specificity required of ALJs in articulating their penalty rationale"). In *New Waterbury* we held that "although the Region bears the burden of proof as to the *appropriateness* of the penalty, it does not bear a separate burden on each of the TSCA § 16 factors." *New Waterbury*, 5 E.A.D. 529, 538 (EAB 1994) (emphasis added). In *FRM*, we explained that, similar to the Region's burden of proof, "[t]he ALJ must demonstrate that he or she applied the statutory penalty criteria and explain any increase or decrease from the penalty proposed by the complainant. However, the ALJ need not justify each penalty factor separately by creating a numerical value for each factor." *FRM Chem*, 12 E.A.D. at 751.

In addition, while Mr. Vidiksis is correct that the Agency's penalty policies or guidelines do not bind the ALJ, Mr. Vidiksis fails to note the regulatory requirement that the ALJ must "consider any civil penalty guidelines issued under the Act" and "[i]f the [ALJ] decides to assess a penalty different in amount from the penalty proposed by complainant, the [ALJ] shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). Although the Board has discretion to review the ALJ's penalty assessment on a

[15] The statute states 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." TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

de novo basis and assess a penalty that may be "higher or lower than the amount recommended to be assessed in the [Initial D]ecision * * * or from the amount sought in the complaint," 40 C.F.R. § 22.30(f), nevertheless we have long held that "in cases where the ALJ assessed a penalty that 'falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty.'" *In re Friedman,* 11 E.A.D. 302, 341 (EAB 2004) (quoting *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)); *accord In re Martex Farms, S.E.,* 13 E.A.D. 464, 493 (EAB 2008), *aff'd Martex Farms, S.E. v. U.S. EPA,* Dkt No. 08-1311 (1st Cir. Mar. 5, 2009); *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Slinger Drainage, Inc.*, 8 E.A.D. 644, 669 (EAB 1999) ("[w]e see no obvious errors in the [ALJ's] penalty assessment and, therefore, we see no reason to change his penalty assessment"), *appeal dismissed*, 237 F.3d 681 (D.C. Cir. 2001); *In re B & R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994).[16]

EPA has issued two penalty policies providing penalty assessment guidelines under TSCA section 16: the Guidelines for Assessment of Civil Penalties Under Section 16 of TSCA, 45 Fed. Reg. 59,770 (Sept. 10, 1980), and the U.S. Environmental Protection Agency, Office of Regulatory Enforcement, *Section 1018 – Disclosure Rule Enforcement Response Policy for the Lead Paint Disclosure Rule* (Feb. 2000) (hereinafter, "Lead Disclosure ERP").[17] The latter provides penalty assessment guidance specific to violations of the Disclosure Rule and, therefore, is applicable to the present case. The Region's witness on penalty calculation testified that the Region's proposed penalty was calculated using the Lead Disclosure ERP's guidance as the means for specifically considering each of the statutory penalty factors. Trial Tr. Vol. 2 at 184-196. The ALJ followed the Re-

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[16] We have also held that the Board "'reserves the right to closely scrutinize substantial deviations from the relevant penalty policy and may set aside the ALJ's penalty assessment and make its own de novo penalty calculations where the ALJ's reasons for deviating from the penalty policy are not persuasive or convincing.'" *Friedman,* 11 E.A.D. at 341 (quoting *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003)); *see also In re CDT Landfill Corp.*, 11 E.A.D. 88, 118-19 (EAB 2003); *In re Chem Lab Prods.*, 10 E.A.D. 711, 724 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's reason for departure was based on an impermissible comparison of penalties derived in a settlement context with the penalty to be assessed in a fully litigated case); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002) (rejecting ALJ's penalty assessment where ALJ's departure from penalty policy was based on ALJ's misunderstanding as to how the penalty policy should be applied); *In re Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002); *Birnbaum*, 5 E.A.D. at 124.

[17] These penalty guidelines have been issued in accordance with the following: (1) U.S. EPA, *Policy on Civil Penalties: EPA General Enforcement Policy #GM-21* (Feb. 16, 1984); and (2) U.S. EPA, *A Framework for Statute-Specific Approaches to Penalty Assessments: EPA General Enforcement Policy #GM-22* (Feb. 16, 1984).

gion's proposed penalty calculation finding, among other things, "no reason to depart from the ERP with regard to the gravity-based penalty" and further that "there is no basis to reduce the penalty sought by EPA and that its application of the penalty policy to the facts is supportable and justified." Init. Dec. at 33.

Accordingly, because the ALJ expressly based his analysis on the Lead Disclosure ERP's guidance as the means for considering each of the statutory penalty factors, we reject Mr. Vidiksis' general contention that the ALJ's penalty analysis was not sufficiently grounded on the individual statutory penalty factors. We will next consider Mr. Vidiksis' three discrete challenges to the ALJ's penalty assessment under the foregoing standards to determine whether Mr. Vidiksis' arguments demonstrate that the ALJ committed an abuse of discretion or clear error in his penalty assessment or otherwise persuade us to adjust the ALJ's penalty assessment.

2. *Penalty for the Section 745.113(b)(1) Violations*

a. *Summary of the ALJ's Penalty Assessment*

The ALJ assessed an aggregate penalty of $36,264 for Mr. Vidkisis' thirty violations of section 745.113(b)(1). Init. Dec. at 30. The ALJ's penalty rationale accepted as a "logical and fair" starting point the Region's recommendation (which was based on the Lead Disclosure ERP) that the penalty's "gravity" component is $89,540. *Id.* at 28. The ALJ, then, consistent with the Region's recommendation, reduced that figure by 10% to take into account Mr. Vidiksis' cooperation, and reduced the penalty further, by 55%, to take into account the fact that Mr. Vidiksis' leases made some attempt to provide lead-based paint information to tenants.

The ALJ's penalty rationale accepted as "logical and fair" the Region's recommendation that the "gravity" component should take into account both the violations' "extent" and the violations' "circumstances" in the manner described in the Lead Disclosure ERP. Init. Dec. at 26-29. The Lead Disclosure ERP employs a matrix to establish the penalty's gravity component. Lead Disclosure ERP at B-4. The vertical axis consists of different "circumstances" as expressed on a numerical scale ranging from level one to level six, and the horizontal axis consists of different "extent" levels as expressed on a scale of "major," "significant," and "minor." *Id.* Different penalty amounts are recommended in the boxes corresponding to the row identified by the circumstance level and the column identified by the extent level. *Id.*

The ALJ's penalty rationale accepted as "logical and fair" the Region's recommendation that the assessment of the "extent" factor should take into account whether children were potentially affected by the violations. *Id.* at 26-27. This corresponds to the Lead Disclosure ERP's guidance that "the extent factor is based

on two measurable facts: 1) the age of any children who lived in the target housing; and 2) whether a pregant woman lives in the target housing." Lead Disclosure ERP at 11. Applying that criteria to the thirty violations of section 745.113(b), the ALJ concluded that five of the violations should be considered "major," three violations should be considered "significant," and that the remaining section 745.113(b)(1) violations should be considered "minor." Init. Dec. at 27. The ALJ also accepted the Region's proposed categorization of the section 745.113(b)(1) violations as "Level 2" circumstance violations. *Id.* at 28. This is consistent with the Lead Dislcosure ERP's guidance that the failure to include the required Lead Warning Statement is a "Level 2" circumstance. Lead Disclosure Rule at B-1. The ALJ concluded, consistent with the Lead Disclosure ERP's guidance for Level 2 violations, that the major violations each received a gravity-based penalty of $8,800, significant violations each received a $5,500 gravity-based penalty, and minor violations each received a $1,320 gravity-based penalty. *Id.* at 28. The ALJ, thus, assessed $89,540 as the initial "gravity" component of the penalty for the section 745.113(b)(1) violations.

The ALJ reduced this gravity-based penalty by 10%[18] to recognize Mr. Vidiksis' cooperation. Init. Dec. at 29. The ALJ explained that, in his view, the reduction on account of cooperation could have been "less generous," but nonetheless accepted the Region's recommendation. *Id.* The ALJ also accepted the Region's recommendation that the gravity component should be reduced by 55% ($49,247) to take into account the fact that Mr. Vidiksis made some attempt in his leases to provide lead-based paint information to tenants. Although the ALJ accepted the Region's recommendation, the ALJ referred to Mr. Vidiksis' leases' language as "deficient and misleading," and stated that he "could easily have taken a dimmer view of this very significant downward adjustment." *Id.* at 29-30; *see also id.* at 14-16 (discussing the deficiencies of Mr. Vidiksis' leases' language). The ALJ accepted the Region's recommendation that no downward or upward adjustment should be made on account of Mr. Vidiksis' culpability or prior violation history. *Id.* at 29-30, 33.

As noted above, Mr. Vidiksis argues that the ALJ erred in his penalty assessment when taking into account the violations' "gravity" – specifically the violations' "extent," "nature," and "circumstances." Mr. Vidiksis' App. Br. at 8-16. Mr. Vidiksis also contends that the ALJ erred in assessing the violator's degree of "culpability," and prior history of violations. *Id.* We find Mr. Vidiksis' arguments unpersuasive for the following reasons.

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[18] Although the ALJ discussed this 10% reduction first, it appears that the ALJ applied this 10% reduction after applying the 55% reduction discussed below (the ALJ stated that the 55% reduction equals $49,247, which is 55% of the full gravity-based penalty). Accordingly, the 10% reduction when taken after applying the 55% reduction is a reduction of $4,029. Changing the order of applying the two reductions does not change the final penalty of $36,264 for the section 745.113(b)(1) violations.

b. *Mr. Vidiksis' Arguments Regarding the Violations' "Gravity" Including the Violations' "Extent"*

Mr. Vidiksis challenges the ALJ's $36,264 penalty assessment for the section 745.113(b)(1) violations by arguing that the "extent and gravity" of the thirty violations should be considered "de minimis" because, in Mr. Vidiksis' opinion, the wording differences between his leases' language and the required "Lead Warning Statement" language are minor. Mr. Vidiksis' App. Br. at 10. Mr. Vidiksis' argument, however, wholly ignores the basis for the ALJ's penalty determination. At bottom, the ALJ's determination took into account both the fact that Mr. Vidiksis' leases included some attempt to provide lead-based paint information as well as other facts the ALJ considered relevant. *See* Init. Dec. at 27-29.

As noted above, the ALJ accepted the Region's recommendation, based on the Lead Disclosure ERP, that the "extent" factor should take into account whether children were potentially affected by the violations, Init. Dec. at 26-27, as well as the Region's categorization of these section 745.113(b)(1) violations as "Level 2" Disclosure Rule violations. *Id.* at 27. Mr. Vidiksis' appellate brief does not in any way discuss or provide any rationale for why the ALJ's analysis constitutes clear error. Moreover, Mr. Vidiksis' effort to demonstrate that the ALJ committed clear error by not accepting Mr. Vidiksis' characterization of his leases' language as "convey[ing] the exact same quality and extent of health risk information" is unpersuasive, particularly given the fact that the ALJ expressly (1) considered the similarity and differences of the lease language to the regulatory required language, (2) found Mr. Vidiksis' lease language "deficient and misleading," and (3) nevertheless included a 55% penalty reduction recognizing that Mr. Vidiksis made some attempt at compliance with his "deficient and misleading" disclosure. Init. Dec. at 29-30, 33.[19] The ALJ's determination thus has far more nuance and takes into account additional relevant facts not discussed by Mr. Vidiksis in his appellate brief. We find no clear error or abuse of discretion in this aspect of the ALJ's penalty assessment.

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[19] Although, as discussed above in footnote 16, we reserve the right to closely scrutinize an ALJ's substantial deviations from the relevant penalty policy, we do not find that the ALJ's acceptance of the Region's recommendation of a 55% downward departure from the penalty policy in this case warrants such close scrutiny. The ALJ, in effect, gave deference to the Region's enforcement discretion in initially setting the requested penalty. We find that a sufficient basis for deferring to the ALJ's decision, although we, like the ALJ, question whether it may have been too large of a reduction given the misleading and deficient nature of Mr. Vidiksis' lease language. We are particularly disturbed by Mr. Vidiksis' leases' language's shifting to the tenant the burden to remedy any lead-based paint hazards. *See* CX1-CX31, ¶ 44 (Mr. Vidiksis' lease states "In the event the Tenant or any family member or guests should develop lead poisoning, and it is determined that corrective measures are required to remedy the source of the lead poisoning, the cost of such remedy shall be at the sole expense of the Tenant.").

c. *Mr. Vidiksis' Arguments Regarding the Violations' "Nature," "Circumstances," and "Culpability"*

Mr. Vidiksis also challenges the ALJ's $36,264 penalty assessment for the section 745.113(b)(1) violations by arguing that the ALJ should have recognized under "nature," "circumstances," or "culpability" that Mr. Vidiksis "retained the services of one of the leading real estate brokerage firms" and that the Region, in Mr. Vidiksis' view, failed to present testimony regarding Mr. Vidiksis' "personal knowledge of or control of the lease language." Mr. Vidiksis' App. Br. at 11-15. Mr. Vidiksis argues that the ALJ was required to, but did not, make a determination that distinguished among Mr. Vidiksis, the properties' co-owner Mrs. Kathleen Vidiksis, and the real estate agent with respect to these factors and, indeed, that the Region failed to satisfy its burden of proof because it failed to make a particularized evidentiary showing as to Mr. Vidiksis. *Id.* at 14.

Notably, it does not appear that Mr. Vidiksis made this "burden of proof" argument in his post-trial briefing to the ALJ or at any other point in the trial proceedings. *See* Respondent's Post-Trial Brief (Nov. 17, 2006); Respondent's Post-Trial Reply Brief (Dec. 4, 2006). We generally do not consider arguments raised for the first time on appeal. *In re Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 764 (EAB 1998); *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994); *In re Genicom Corp.*, 4 E.A.D. 426, 440 (EAB 1992) (rejecting respondent's contention that an issue had been raised below). The Consolidated Rules of Practice, 40 C.F.R. § 22.30(a), authorize appeals from an ALJ's (or presiding officer's) adverse rulings or orders. "Because the Presiding Officer cannot issue an adverse order or ruling on an issue that was never raised during the proceedings below, it follows that section 22.30(a) does not contemplate appeals of such issues." *Lin*, 5 E.A.D. at 598. Accordingly, we will not consider Mr. Vidiksis' arguments made for the first time on appeal regarding the burden of proof.[20]

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[20] In any event, Mr. Vidiksis' argument to the effect that "the Region has the statutory burden of proof as to Mr. Vidiksis' alleged degree of individual culpability," such that he had no "obligation to prove his own lack of any culpability," Mr. Vidiksis' App. Br. at 14, lacks merit. We have held that "although the Region bears the burden of proof as to the *appropriateness* of the penalty, *it does not bear a separate burden on each of the TSCA § 16 factors*." *In re New Waterbury, Ltd.,* 5 E.A.D. 529, 538 (EAB 1994) (emphasis added). "More specifically, the burden of proof goes to the appropriateness of the penalty taking *all* factors into account. Thus, for the Region to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in Section 16 and that its recommended penalty is supported by its analysis of those factors." *Id.* This much the Region did in the present case (*see e.g.,* Trial Tr. Vol. 2 at 194), and in doing so, the Region introduced evidence we discuss in the text that speaks directly to Mr. Vidiksis' culpability in so far as he was generally aware of RLBPHRA's requirements governing lead-based paint disclosure and warning. *See, e.g.,* Trial Tr. Vol. 1 at 123. This was sufficient to sustain the Region's burden of proof that it considered the culpability factor in its proposed penalty, and without any controverting evidence introduced by Mr. Vidiksis, it is sufficient to support the ALJ's penalty decision.

Mr. Vidiksis did, however, argue to the ALJ that the Region's proposed penalty analysis should, but did not, take into account "Mr. Vidiksis' absence of culpability for even a single alleged violation." Respondent's Post-Trial Brief at 12. The ALJ rejected this contention, finding instead that he could not accept Mr. Vidiksis' "claim that the penalty should be reduced based on an absence of culpability." Init. Dec. at 33. The ALJ explained that, following the Lead Disclosure ERP's guidance, he would consider the statutory "culpability" factor with respect to Mr. Vidiksis' prior knowledge of the regulatory requirements and his degree of control over the violative condition in assessing an appropriate penalty. Init. Dec. at 29 (citing Lead Disclosure ERP at 15). The ALJ concluded that he "could justify an increase" in the penalty based on the culpability factor but that he "would not disturb" the Region's recommendation that the penalty not be increased on account of this factor. *Id.* Specifically, the ALJ found that Mr. Vidiksis "cannot argue that he was unaware of regulations governing lead-based paint" and that Mr. Vidiksis had the ability to act and correct identified hazards. *Id.* The ALJ found that Mr. Vidiksis had received notices regarding lead-based paint in his properties as early as 1995. *Id.* The ALJ also reasoned with respect to Mr. Vidiksis' legally deficient lease language regarding "lead paint notice" that "even the use of a defective notice demonstrates awareness of the obligation to provide notice." *Id.*

Upon review, we find no clear error or abuse of discretion in the ALJ's decision not to reduce the penalty based on Mr. Vidiksis' claimed lack of culpability.[21] We find no error in the ALJ's inference that Mr. Vidiksis' use of a defective "lead paint notice" in his leases evidences that Mr. Vidiksis was aware that regulations existed requiring lead-paint warning and disclosure.[22] In addition, although not specifically cited in his Initial Decision, the ALJ's conclusion is also supported by additional evidence in the record that Mr. Vidiksis was specifically advised through letter notices regarding the existence of RLBPHRA's lead-paint

[21] We note that the Lead Disclosure ERP's approach uses "culpability" to increase the amount of the penalty when a violator is found to have a higher degree of culpability. Lead Disclosure ERP at 15. In this sense, the unadjusted gravity-based penalty represents a penalty for the least culpable violator. The ALJ accepted this approach. Init. Dec. at 29. We consider this approach to be a rational means for taking the "culpability" factor into account in setting an appropriate penalty. Moreover, in the present case, other than Mr. Vidiksis' use of language in his leases providing some lead-paint notice that the ALJ described as "misleading and defective," Mr. Vidiksis has not pointed to any evidence in the record that would establish that he had a low culpability for the violations at issue. Because, as discussed above, the ALJ already allowed a sizable reduction in the gravity-based penalty on account of Mr. Vidiksis' defective lead-paint notice language, no further reduction is warranted in any event under the "culpability" or "nature" and "circumstances" penalty factors.

[22] Mr. Vidiksis cannot simultaneously, first, argue that he should not be found liable for the violations on the grounds that his leases' language provided all of the required notice, Mr. Vidiksis' App. Br. at 6-7, and, second, dispute the ALJ's inference that his attempted compliance through that deficient language evidences a general awareness of the regulatory obligation to disclose and warn tenants regarding lead-based paint.

regulatory requirements. *See* Trial Tr. Vol 1 at 123 (witness reading from letter dated June 9, 1999, advising Mr. Vidiksis regarding RLBPHRA's disclosure requirements). Because the leases at issue in this case are all dated from 2001 to 2005, after the letter notice regarding RLBPHRA, we must sustain the ALJ's conclusion that Mr. Vidiksis "cannot argue that he was unaware of regulations governing lead-based paint." Init. Dec. at 33. Accordingly, we find no clear error or abuse of discretion in this aspect of the ALJ's penalty assessment.

d. *Mr. Vidiksis' Arguments Regarding His Compliance History*

Finally, Mr. Vidiksis challenges the ALJ's $36,264 penalty assessment for the section 745.113(b)(1) violations by arguing that the ALJ should have reduced the gravity-based penalty on account of Mr. Vidiksis' lack of prior non-compliance history. Mr. Vidiksis' App. Br. at 16. He acknowledges that the Region's recommendation, and the ALJ's decision, treats history of prior violations as a basis for increasing the gravity-based penalty, but argues that the failure to provide a reduction where there is no history of prior violations "de facto repeals a portion of the TSCA statutory penalty provision." *Id.* We disagree. The statute only requires that the penalty factor be taken into account, which the ALJ did when he followed the Lead Disclosure ERP's guidance by establishing a gravity-based penalty that is appropriate for first time violators. This approach does, in fact, take the statutory factor into account, and it is an approach that we have frequently sustained as used in many of the Agency's penalty policies. *See e.g., In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 540-57 (EAB 1998); *In re Pacific Ref. Co.*, 5 E.A.D. 607, 616 (1994); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 519 (EAB 1994); *In re Port of Oakland*, 4 E.A.D. 170, 183 (EAB 1992). Accordingly, we find no clear error or abuse of discretion in this aspect of the ALJ's penalty assessment, and we sustain the ALJ's $36,264 aggregate penalty assessment for the thirty section 745.113(b)(1) violations.

3. *Penalty for the Section 745.113(b)(2) Violations*

The ALJ assessed an aggregate penalty of $57,024 for Mr. Vidkisis' 34 violations of section 745.113(b)(2)'s requirement that Mr. Vidiksis either disclose what he knew about lead-based paint in the leased property or state that he had no knowledge. Init. Dec. at 30. Mr. Vidiksis argues that the Region's witness made an assertion during his testimony that "is blatantly untrue." Mr. Vidiksis' App. Br. at 16. Mr. Vidiksis characterizes the Region's witness as having testified that a landlord's "no knowledge" statement "informed the tenant of the probable absence of lead hazards and consequent safety of renting the dwelling." Mr. Vidiksis' App. Br. at 16. Mr. Vidiksis argues further that the Region's post-trial brief hypothesized that "Mr. Vidiksis might well have known of lead paint in one or more of those apartments." *Id.* at 18. Without quoting or citing the ALJ's Initial Decision, Mr. Vidiksis concludes that "the Presiding Officer's Initial Decision, as well as his

proposed egregiously excessive penalty of $54,000.00 is premised exclusively upon this non-evidence of the hypothetical notion that Respondent might have known of the lead paint in the subject apartments, no factual basis in this trial record supports that erroneous determination." *Id.* at 19.

We must reject Mr. Vidiksis' argument. Mr. Vidiksis' appellate argument focuses on what he refers to as the "know nothing" statement and the 26 violations for which the Region did not introduce evidence regarding prior notice to Mr. Vidiksis of lead-based paint or lead-based paint hazards in the properties. *See* Mr. Vidiksis' App. Br. at 16-19.[23] We see no indication in the ALJ's decision, and Mr. Vidiksis points to none, that the ALJ adopted what Mr. Vidiksis refers to as the "hypothetical notion" that he knew of lead-based paint in the properties associated with these 26 violations. Thus, as we explain below, because Mr. Vidiksis' appellate argument lacks any relevant foundation in the ALJ's decision, it must be dismissed as not showing any error whatsoever, much less clear error, in that decision.

First, the ALJ's finding of liability for the 26 section 745.113(b)(2) violations at issue does not in any way refer to, or rely upon, a hypothetical notion that Mr. Vidiksis knew about lead-based paint or lead-based paint hazards in the properties associated with the 26 violations. The ALJ explained that Mr. Vidiksis' leases' language "avoids the lessor/landlord's duty to faithfully disclose its actual state of knowledge on these questions," which the ALJ described as choosing only from one of two possible options: disclosing the lessor's "knowledge, or no knowledge." Init. Dec. at 17-18. Thus, the ALJ's liability finding does not refer to the "hypothetical notion" upon which Mr. Vidiksis constructs his appellate argument, and instead relies on Mr. Vidiksis' statement that the properties "might" contain lead-based paint. Likewise, the ALJ's one-paragraph description of the "gravity" component of the penalty for the section 745.113(b)(2) violations does not refer to any such hypothetical notion. Instead, the ALJ notes that these violations fall into the category of "'[v]iolations having a medium impact of impairing the ability to assess the information.'" Init. Dec. at 28 (quoting the Lead Disclosure ERP at 10 (alterations made by the ALJ)). We find this statement to be correct: Mr. Vidiksis' failure to state that he did not know whether the properties contained lead-based paint and his substitution of a warning that the properties might possibly contain lead-based paint impaired the tenants' ability to assess the state of Mr. Vidiksis' knowledge regarding the presence or absence of lead-based paint. Accordingly, we find no merit whatsoever in Mr. Vidiksis' argument and

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[23] For the eight section 745.113(b)(2) violations not at issue, the ALJ assessed an aggregate penalty of $8,118. This amount was derived from the ALJ's assessment of a gravity component of $4,400 for count 10, and $660 for each of counts 2, 4, 6, 61, 63, 65, and 66. Init. Dec. at 28. The ALJ reduced this gravity-based penalty by 10% in recognition of Mr. Vidiksis' cooperation. *Id.* at 29.

sustain the ALJ's penalty rationale and decision to assess a $48,824[24] penalty for Mr. Vidiksis' failure to include a statement disclosing what he knew, or stating that he knew nothing, with respect to the 26 section 745.113(b)(2) violations at issue.

4. *Mr. Vidiksis' Argument that the Region Engaged in Litigation Abuse Warranting a Downward Penalty Adjustment*

Mr. Vidiksis argues that the statutory penalty factor providing for a penalty adjustment based on "circumstances as justice may warrant" should be used to adjust the penalty downward on account of "the manner in which Complainant conducted this litigation." Mr. Vidiksis' App. Br. at 19. Mr. Vidiksis points to two incidents that he characterizes as "litigation abuse" warranting a downward penalty adjustment. First, Mr. Vidiksis argues that the Region filed a "frivolous" motion for discovery, or alternatively motion in limine, regarding Mr. Vidiksis' ability to pay. *Id.* Second, Mr. Vidiksis argues that he was forced to file a motion in limine to prevent the Region from introducing at trial privileged and confidential settlement communications referenced in Complainant's Exhibit 86. *Id.*

We find Mr. Vidiksis' request for a penalty reduction on account of the referenced events to, itself, be frivolous. First, Mr. Vidiksis points to no law allowing this penalty factor to provide adjustment on account of "litigation abuse." However, more importantly, what Mr. Vidiksis points to as "litigation abuse" does not deserve that characterization. First, the Region's motion for discovery or alternative motion in limine cannot be viewed as abusive from the perspective of either the burden on Mr. Vidiksis or the reasonableness of the Region's actions. Mr. Vidiksis' response to the Region's ability-to-pay discovery/in limine motion was a total of two pages. That cannot be characterized as having created an abusive burden on Mr. Vidiksis. *See* Respondent, John Vidiksis' Reply to Complainant's Frivolous Motion for Discovery Or In the Alternative Motion in Limine (July 10, 2006). Mr. Vidiksis' argument also fails to acknowledge that Mr. Vidiksis initially premised his waiver of the ability-to-pay defense in a way that suggested it might disappear and reappear at Mr. Vidiksis' bidding – he initially premised his waiver on his belief that the ALJ would award only a small penalty – which clearly the Region did not concede. *Id.* Thus, it was not unreasonable for the Region to believe that filing a protective motion for discovery or in limine was necessary.

Mr. Vidiksis' arguments concerning Complainant's Exhibit 86 are equally without merit. Specifically, contrary to Mr. Vidiksis' argument on appeal, the ALJ denied Mr. Vidiksis' motion in limine. *See* Order on Respondent's Motion in

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[24] *See* note 23 above regarding violations not challenged by Mr. Vidiksis' arguments discussed in this section.

Limine at 3 (Aug. 2, 2006). Thus, it was not improper for the Region to introduce its Exhibit 86 at trial. Moreover, the subsequent colloquia at trial that resulted in a partial redaction of Exhibit 86 can hardly be characterized as burdensome or the product of abusive litigation tactics. *See* Trial Tr. Vol. 1 at 176-80. Accordingly, we deny Mr. Vidiksis' argument that the ALJ's penalty assessment should be reduced on account of alleged litigation abuse by the Region.

III. *CONCLUSION*

In accordance with the above discussion and pursuant to TSCA section 16(a), 15 U.S.C. § 2615(a), and RLBPHRA section 1018, we hereby sustain the ALJ's Initial Decision and assess a civil administrative penalty against Mr. John Vidiksis of $97,545[25] for his 69 violations of the regulations at 40 C.F.R. part 745, subpart F. Mr. Vidiksis shall pay the full amount of the penalty within 30 days of this final decision and order. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

U.S. Environmental Protection Agency, Region 3
Fines and Penalties
P.O Box 979077
St. Louis, MO 63197-9000

So ordered.

[25] *See* footnote 14 above.