UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. TSCA-05-2009-0004**
	)	
Kathryn Y. Lewis-Campbell	)	
Springfield, Ohio	)	
	)	
	)	
U.S. EPA ID #: OHD 106 483 522	)	
	)	
Respondent	)	
_____	)	

MEMORANDUM IN SUPPORT OF THE PENALTY AMOUNT PROPOSED

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This memorandum is submitted as a component of the Motion for Accelerated Decision on Liability and Penalty filed by the Administrator's Delegated Complainant.

I. LAW AND POLICY AFFECTING PENALTY AMOUNT DETERMINATION

In Section 16(a) of TSCA, 15 U.S.C. § 2615(a), Congress invests in the Administrator authority to assess a civil penalty for violations of Section 409 of TSCA, 15 U.S.C. § 2689. By Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. § 4852d(b)(5), Congress makes a violation of any rule or order issued under Section 1018 of the Act, 42 U.S.C. §4852d, a violation of Section 409 of TSCA, 15 U.S.C. § 2689, setting the penalty amount for each violation at not more than $10,000.[1] Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), provides that, regarding violations of TSCA:

> 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 alleged 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 factors as justice may require.
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> Congress further provides in TSCA, that:
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> Before issuing such order, the Administrator shall give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such person an opportunity to request, within 15 days of the date the notice is received by such person, such a hearing on the order.

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B).

Federal reviewing courts have recognized that the determination of an appropriate amount of civil penalties for violations of a federal environmental statute is not "fact finding," but rather

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[1]The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations, 40 C.F.R. Part 19, increase the statutory maximum penalty to $11,000 for each violation occurring after January 31, 1997.

an exercise of discretion by the agency:

> The assessment of a penalty is particularly delegated to the administrative agency. Its choice of a sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.' [Citations omitted.] The assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power.

Panhandle Co-op Ass'n v. U.S. EPA, 771 F.2d 1149, at 1152 (8th Cir. 1985). Citing prior U.S. Supreme Court decisions, the Tenth Circuit has held that "once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion." Robinson v. United States, 718 F.2d 336, at 339 (10th Cir. 1983). As "the agency" here is "the Administrator,"[2] it is the "policy and discretion" of "the Administrator" that is to inform the determination of penalty amounts that she will assess for violations of TSCA.

In a published decision issued by her Chief Judicial Officer, the Administrator has recognized the distinction between facts upon which a penalty amount determination is based and

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[2]"Agency" is defined under the APA as "each authority of the Government of the United States[.]" Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that "'[a]uthority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 9 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, 488 U.S. 204, at 218 (1988) (Scalia, J., concurring). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) ("The Attorney General's Manual [on the Administrative Procedure Act] is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). As it is "the Administrator" that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the CAA, "the Administrator" is the "authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

the actual calculation of the penalty amount. In re Chautauqua Hardware Corp., 3 E.A.D. 616, 622-23 (CJO 1991). This decision is precedent governing this case.[3] While the "quantity" of a particular chemical may be a "factual issue" bearing on the appropriateness of a penalty, as may be the "ability of the company to continue in business," whether the policy should impose a separate penalty for each chemical not reported, or whether an appropriate penalty dollar amount was selected for each box of the policy matrix "is a legal or policy issue." Id. at 623.

Though determining the amount of civil penalty for violations of TSCA is an exercise of discretion by the Administrator, that discretion is not open-ended, without limits. In Section 706 of the APA, Congress provides that, on judicial review, final decisionmaking of an agency, which includes final penalty orders of the Administrator, "shall" be held "unlawful and set aside" if its findings and conclusions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[4] Consequently, given that she must act through his officers and staff,

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[3]Addressing Section 556(c) of the APA, and citing legislative history, the Attorney General of the United States, whose office played an active role in the development of the APA, has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Attorney General's Manual on the Administrative Procedure Act, at 5 and 75 (1947). The Circuit Court of Appeals for the District of Columbia has held that, while an ALJ must "conduct the cases over which he presides with complete objectivity and independence[,]" at the same time "he is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and these precedents include ". . . Agency regulations [and] the agency's policies as laid down in published decisions. . . ." Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993), quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin. L. Rev. 9, 12-13 (1973).

[4]The Court of Appeals for the District of Columbia has held that:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. [Footnote omitted.] This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies

the Administrator informs her decisionmaking process through the rules she has promulgated, and the policies that she has adopted, interpreting statutory penalty criteria and establishing penalty calculation methodologies based upon those interpretations.[5]

In recognition of his obligation to assure that his final orders assessing a civil penalty for violations of the federal environmental statutes, such as TSCA, are fair and consistent, and penalty amounts not arrived at in an "arbitrary and capricious" manner, the Administrator has exercised his discretion as Chief Executive Officer of the Agency, and, through his delegated policy-making officers, adopted penalty policies incorporating his interpretation of the various statutory criteria, and setting forth penalty calculation methodologies to guide those who must determine appropriate

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> effectuate general standards, applied without unreasonable discrimination. [Footnote omitted.]

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, at 851 (D.C. Cir. 1970). The Court emphasized that it has maintained a "rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." Id. at 852. The Court observed that "in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." Id. at 853.

[5] The United States Supreme Court has recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress[,]" Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, at 843 (1984), and that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. Moreover, in reviewing final agency action, the Court has held that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law." Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992).

penalty amounts for him to assess for violations of those statutes.[6]

Consistent with the enforcement goals identified in #GM-21 and #GM-22, in December 2007, the Administrator, by authority delegated to the Assistant Administrator for Enforcement and Compliance Assurance and the Director of the Toxics and Pesticides Division, issued the Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy ("the 1018 Policy").[7] Under this

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[6]In 1984, for the purpose of assuring that the his penalty assessment process would result in assessed penalties which meet goals of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems," the Administrator, through his Assistant Administrator for Enforcement and Compliance Monitoring, directed that each division of the Agency issue media specific penalty policies, based upon Agency-wide principles announced on February 16, 1984. U.S. Envt'l Protection. Agency, Policy on Civil Penalties (#GM-21), reissued on December 1, 1994, as PT1.1; and U.S. Envt'l Protection Agency, A Framework for Statute-Specific Approaches to Penalty Assessment (#GM-22), reissued on December 1, 1994, as PT1.2. It was further directed that:

> In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty action should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented.

#GM-21, at 1. The "consistent application of a penalty policy" was found important:

> because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

Id. at 4. It was also recognized that "[t]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment." #GM-22, at 27.

[7]The Assistant Administrator for Enforcement and Compliance Monitoring is the principal adviser to the Administrator "in matters concerning enforcement and compliance; and provides the principal direction and review of civil enforcement activities for air, water, waste, pesticides, toxics and radiation." 40 C.F.R. § 1.35. This Assistant Administrator also "reviews the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and consistent enforcement and compliance monitoring program." Id. The predecessor to this Assistant Administrator issued #GM-21 and #GM-22, directing that each appropriate Assistant

policy, the Administrator provides that her staff and officers are to first determine a gravity based penalty ("GBP") for a particular violation by considering the evidence relating to the "nature" and "circumstances" and "gravity" of the violation, three statutory penalty criteria relating to the violation itself, which Congress, in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the Administrator consider in determining an appropriate amount of penalty for violations. 1018 Policy, at 11. Once a GBP is determined for a violation, the Administrator provides that the amount of penalty may be adjusted upward or downward, in consideration of the evidence relating to the specific violator's: ability to pay/ability to continue in business; history of prior violations; degree of culpability; such other factors as justice may require; and voluntary disclosure. Id. All but the last are, again, statutory criteria which Congress requires the Administrator to consider in determining an appropriate amount of penalty for violations. The dollar amount resulting will be the total amount of penalty for the violation.

The 1018 Policy constitutes the Administrator's interpretation of a statute which Congress entrusts the Administrator with administering, federal reviewing courts will give deference to the interpretation.[8]

Administrator issue a statute-specific penalty policy for the statutes which for which they are responsible. The 1018 Policy is responsive to the directive of #GM-21 and #GM-22.

[8]The U.S. Supreme Court has recognized a "fundamental principle" that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, at 185-86 (1973). Furthermore, as noted "the power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron U.S.A., Inc., 467 U.S. at 843. Courts have recognized this deference in upholding penalty amounts assessed by the Administrator which were determined by the application of her adopted penalty policies. Newell Recycling Co. v. U.S. EPA, 231 F.3d 204 (5th Cir. 2000); and Catalina Yachts, Inc. v. U.S. EPA,

Given the clear instructions from the Administrator on how she would have penalty amounts determined in her name, and her obligation to meet APA requirements, her delegated complainant in this matter has analyzed the evidence in the record in consideration of the TSCA statutory penalty criteria, as interpreted in the Administrator's 1018 Policy, using the calculation methodologies of those policies to arrive at an appropriate amount of penalty to propose she assess for each violation alleged in the Administrative Complaint.

II. THE VIOLATIONS

In September 2006, Respondent, Kathryn Lewis-Campbell, entered into a Real Estate Purchase Agreement (the "Agreement") with Donald Freeman, Jr., conveying to Mr. Freeman certain real property, including a house, located in Springfield, Ohio 45505, at 137 East Southern Avenue, and further described in the Agreement. Proposed Finding of Fact ("PFOF") No. 2.[9] The real property subject to the Agreement included a house, which was constructed prior to 1978. PFOF No.4. At the time Mr. Freeman purchased the property described in the Agreement he had four children residing with him, including twin girls four years old. PFOF No. 15. Inspections, sampling and analysis of materials in the house revealed that lead paint was present in the house. PFOF No. J.

The house is "target housing," as defined in Section 1004(27) of the Act, 42 U.S.C. § 4851b(27); and 40 C.F.R. § 745.103. The Motion, at 21-23. By entering into the Agreement, Respondent became a "seller," as defined in 40 C.F.R. § 745.103, and Mr. Freeman became a

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112 F. Supp. 2d 965 (C.D. Cal.2000).

[9]Any reference herein to a PFOF is to "Findings of Fact" set forth in Complainant's Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability and Penalty ("the Motion"), at 11-15.

"purchaser," as defined in 40 C.F.R. § 745.103.

In promulgated rules, the Administrator has set out certain substantive requirements which implement the provisions of the Residential Lead-Based Paint Hazard Reduction Act of 1992. These rules ("Lead Disclosure Rules") are codified at 40 C.F.R. Part 745. In the Complaint filed in this matter, Respondent is alleged to have violated the following rules in her sale of property memorialized in the Agreement:

Count I	Violation of 40 C.F.R. § 745.107(a)(1) for Respondent's failure to provide Donald Freeman, Jr., with an EPA-approved lead hazard information pamphlet.
Count II	Violation of 40 C.F.R. § 745.113(a)(1) for Respondent's failure to include as an attachment to the Agreement a Lead Warning Statement consisting of language set out in 40 C.F.R. § 745.113(a)(1)).
Count III	Violation of 40 C.F.R. § 745.113(a)(2) for Respondent's failure to include as an attachment to the Agreement a statement of Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the property she was selling, or indicating that she had no knowledge of the presence of lead-based paint and/or lead-based paint hazards in the property.
Count IV	Violation of 40 C.F.R. § 745.113(a)(3) for Respondent's failure to include as an attachment to the Agreement a list of any records or reports available to Respondent pertaining to lead-based paint hazards in the property she was selling, or a statement that no such records or reports were available to her.
Count V	Violation of 40 C.F.R. § 745.113(a)(4) for Respondent's failure to include as an attachment to the Agreement a statement from Donald Freeman, Jr., affirming his receipt of the information identified in 40 C.F.R. § 745.113(a)(2) and (3), and the lead hazard information pamphlet required under 40 C.F.R. § 745.107(a)(1).
Count VI	Violation of 40 C.F.R. § 745.113(a)(5) for Respondent's failure to include as an attachment to the Agreement a statement by Donald Freeman, Jr., that he has either received the opportunity to conduct the risk assessment or inspection required by 40 C.F.R. § 745.110(a), or that he was waiving the opportunity to do so.

III. DETERMINATION OF AN APPROPRIATE AMOUNT OF PENALTY

In determining the appropriate amount of penalty for the Administrator to assess against Respondent, Complainant has evaluated the evidence in this matter in consideration of the TSCA penalty criteria, as interpreted by the Administrator in her 1018 Policy, applying the calculation methodologies of that policy. The use of the 1018 Policy in determining penalty amounts to be assessed for violations of the Lead Disclosure Rules has been specifically approved by the Administrator in published decisions issued by the Environmental Appeals Board ("the Board"). See In re Vidiksis, 14 E.A.D. ___, TSCA Appeal No. 07-02 (EAB April 22, 2009); and In re Harpoon P'ship, 12 E.A.D. 182 (EAB 2005).

Given the clear instructions from the Administrator on how she would have penalty amounts determined in her name, and her obligation under Section 706 of the APA,5 U.S.C. § 706, to be fair and consistent in her decisionmaking and not "arbitrary" or "capricious," her delegated complainant in this matter has analyzed the evidence in the record in consideration of the TSCA statutory penalty criteria, as interpreted in the Administrator's 1018 Policy and TSCA Policy, using the calculation methodologies of those policies to arrive at an appropriate amount of penalty to propose she assess for each violation alleged in the Administrative Complaint.

A. The Structure of the 1018 Policy

Initially, a Gravity Based Penalty (GBP) amount must be determined based upon the TSCA "gravity" penalty criteria. Once that amount is determined, and upward or downward adjustment of that amount may made, ir warranted, in consideration of the TSCA "adjustment" penalty criteria.

(i) Gravity Based Penalty

Under the Administrator's TSCA Policy, the "**nature**" of the violation, a statutory criteria she is required to consider in determining an appropriate penalty amount, is interpreted to mean the "essential character of a thing: quality or qualities that make something what it is," that is, its essence. TSCA Policy, at 45 Fed. Reg. 59,771 (Sept. 10, 1980). The Lead Disclosure Rule is intended to provide to lessees and purchasers of residential property both general information on the potential harm presented by lead-based paint, and specific information regarding the presence of lead-based paint on property they may lease or purchase. In the "context of penalty assessment," the "nature" criteria "indicates which specific penalty guideline should be used to determine appropriate matrix levels of "extent" and "circumstances." Id. The "nature" of Lead Disclosure Rule violations is considered to be "hazard assessment," and is accounted for by applying the 1018 Policy, which specifically addresses the determination of a penalty amount for violations of this "hazard assessment" requirement.[10] 1018 Policy, at 12.

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[10] In the Section 1018(a)(1) of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. § 4852d(a)(1), Congress mandated that the Secretary of Housing and Urban Development ("Secretary") and the Administrator "promulgate regulations" for the "disclosure of lead-based paints hazards in target housing." Such rules were promulgated on March 6, 1996. 61 Fed. Reg. 9,064, and codified at 40 C.F.R. Part 745. It must be emphasized that findings have already been made, both by Congress and the Administrator, as to the seriousness of the harm to the environment and human health caused by lead paint in residential buildings. Among other findings, Congress itself noted that:

> (1) low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under age 6, with minority and low-income communities disproportionately affected;
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> (2) at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduce attention span, hyperactivity, and behavior problems; . . .

Regarding the "**circumstances**" of a particular violation, a statutory criteria the Administrator is required to consider in determining an appropriate penalty amount, the Administrator's 1018 Policy provides that "the primary circumstance to be considered is the Purchaser's and Lessee's ability to properly assess and weigh the factors associated with human health risk when purchasing or leasing target housing[,]" and that:

> [t]he greater the deviation from the regulations (such as no disclosure), the greater the likelihood that the Purchaser and Lessee will be uninformed about the hazardous associated with lead-based paint and, consequently, the greater the likelihood of a child being exposed to lead-based paint hazards.

1018 Policy, at 12.

Regarding the "**extent**" level of particular violations, the Administrator's policy provides

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> (4) the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children[.]

Section 1002 of the Act, 42 U.S.C. § 4851. In promulgating the Lead Disclosure Rule, the Secretary and the Administrator noted that "[s]tudies suggest that lead exposure from deteriorated residential lead-based paint contaminated soil, and lead in dust are among the major existing sources of lead exposure among children in the United States." 61 Fed. Reg. at 9,064. They found that "[b]lood-lead levels as low a 10 ug/dL have been associated with learning disabilities, growth impairment, permanent hearing and visual impairment, and other damage to the brain and nervous system[,]" and "lead exposure before or during pregnancy can also alter fetal development and cause miscarriages." Id. at 9,065. Though the Consumer Product Safety Commission banned lead-based paints from residential use in 1978, by EPA and HUD estimates "approximately 64 million homes may contain lead-based paint that may pose a hazard to the occupants if not managed properly." Id. at 9,066. Human beings can come into contact with, and ingest, lead in exterior paint which "can flake off or leach into the soil around the outside of a home," contaminating children's playing areas; dust caused "during normal lead-based paint wear (especially around windows and doors) can create a hard-to-see film over surfaces" in a house; "cleaning and renovation activities can increase the threat of lead-based paint exposure by dispersing fine lead dust particles in the air and over accessible household surfaces"; and if managed improperly, "both adults and children can receive hazardous exposures by inhaling the fine dust or by ingesting paint dust during hand-to-mouth activities." Id. at 9,066.

that the "the measure of the 'extent' of harm will focus on the overall intent of the rule, which is to prevent childhood lead poisoning." Id. at 12. Consequently, the extent factor is base upon two measurable facts: (1) "the age of any children who live in target housing" involved in the violation; and (2) "whether a pregnant woman lives in the target housing." Id. at 13. The **"extent"** level is to be registered as minor, significant or major, depending upon the potential for damage to human health or for damage to the environment. Id.

(ii) Adjustment Criteria

After determining an appropriate gravity based penalty amount, that amount of penalty is to be adjusted, upward or downward, if appropriate, based upon specific statutory adjustment criteria. These criteria are (a) ability to pay/ability to continue in business; (b) history of prior such violations; (c) degree of culpability; and (d), other factors as justice may require. 1018 Policy, at 17-23.

B. The Administrator's Use of the 1018 Policy

In the Administrator's published decision in Vidikis, the Board adopted as the final penalty determination of the Administrator the penalty determination of the ALJ's initial decision. In re Vidiksis, 14 E.A.D. ___, TSCA Appeal No. 07-02 (EAB April 22, 2009). In this case the ALJ found a $97,545 penalty appropriate for 69 Disclosure Rule violations. Id. at 16. Respondent appealed that initial decision to the Board, challenging the appropriateness of the ALJ's penalty calculation. The Board rejected the Respondent's challenge to the ALJ's penalty amount determination, and adopted that determination in the final decision of the Administrator. In support of the penalty determination, the Board noted that "the ALJ expressly based his analysis on the Lead Disclosure ERP's guidance as the means for considering each of the statutory penalty

factors," and had found that there "no reason to depart from the ERP with regard to the gravity-based penalty"; that "there is no basis to reduce the penalty sought by EPA"; and that enforcement staff's "application of the penalty policy to the facts is supportable and justified." Id. at 20-21. As under Section 706 of the APA, 5 U.S.C. § 706, final penalty orders of the Administrator are "unlawful" if "arbitrary" and "capricious," see above, at 3-4, the application of the TSCA penalty criteria to Kathryn Y. Lewis-Campbell must be consistent with the application of those criteria to John P. Vidikis, unless there are articulated reasons for applying the criteria in a different manner to Ms. Lewis-Campbell. Complainant is aware of no such reasons.[11]

C. The "Gravity" Penalty Calculation for Respondent Kathryn Lewis-Campbell

Count I -- Violation of 40 C.F.R. § 745.107(a)(1) for Respondent's failure to provide Donald Freeman, Jr., with an EPA-approved lead hazard information pamphlet.

Congress has specifically required that the Administrator, in consultation with the Secretary of the Department of Housing and Urban Development, and the Secretary of the Department of Health and Human Services, publish a Lead Hazard Information Pamphlet to

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[11]While John P. Vidikis was a lessor, and found in violation of rules applicable to lessors, 40 C.F.R. § 745.113(b), and Kathryn Lewis-Campbell is alleged to be in violation of rules applicable to sellors, 40 C.F.R. § 113(a), the substance of the rules applicable to each is essentially the same, as is the interest sought to be protected by the rules. Consequently, the holdings in the Vidikis published decision are "applicable and controlling precedents" as to the methodology to be use in the determining penalty amount for alleged violations of Kathryn Lewis-Campbell. See Iran Air, 996 F.2d, at 1260. As agencies -- which include "the Administrator," see supra, note 2 -- "are subject to the requirements that they not act arbitrarily or capriciously, see 5 U.S. C. § 706(2)(A) (1976)," they have " an obligation to render consistent opinions and to either follow, distinguish or overrule their own precedent." Chisholm v. Defense Logistics Agency, 656 F.2d 42, at 47 (3d Cir. 1981). "It is axiomatic that an administrative agency either must conform with its own precedents or explain its departure from them." Ohio Fast Freight, Inc., v. United States, 574 F.2d 316, at 319 (6th Cir. 1978). An agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways[.]" Garrett v. F.C.C., 513 F.2d 1056, at 1060 (D.C. Cir. 1975).

address the health risks associated with exposure to lead and lead based paint in certain housing; methods for evaluating and reducing lead-based paint hazards; steps to take to assess the risk in particular housing; and other information deemed appropriate by the Administrator. Section 406(a) of TSCA, 15 U.S.C. § 2686(a). On consideration of the critical importance of the information that was to be made available in the pamphlet, this pamphlet was the product of considerable developmental work and deliberation.[12]

The pamphlet informs the reader of the risks presented to humans, especially children and other especially vulnerable population groups, by the presence of lead-based paint in their dwelling places, and the steps that might be taken to avoid, eliminate or reduce those risks. Providing this notice to prospective purchasers (and lessees) is at the heart of the Congressional effort to protect its citizen population from potential injuries to their health presented by lead based paint in residential housing. Without being aware of the risk, prospective purchasers of residential property have no opportunity to make an informed decision regarding their purchase or lease of housing, or an opportunity to assess the need for remedial action being taken to alleviate the level of risks presented by the housing they may purchase or lease.

The evidence discloses that the house purchased by Mr. Freeman from Respondent did, in fact, contain lead based paint, PFOF No. 16, and that he did, in fact, have two children residing with him who were four years of age. PFOF No. 15. Under the circumstances, Mr. Freeman had a great need to be aware of the information contained in the pamphlet, and Respondent's failure to

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[12]The pamphlet was published by the Administrator after her staff and officers worked closely with more than a dozen other agencies and the Federal Interagency Task Force on Lead Poisoning Prevention. On a draft of the statement being published and an invitation made for public comment, approximately 70 comments were received and commented upon by the Administrator's staff. In addition, her staff conducted focus tests to obtain feedback on the pamphlet's readability. 60 Fed. Reg. 39,167, at 39,168 (Aug. 1, 1995).

provide this information to him severely impaired Mr. Freeman's ability to assess the potential problems that he and his family would confront in purchasing the lead contaminated residential property Respondent was selling. Consequently, as the need for the information was great, the failure of Respondent to provide the Lead Hazard Information Pamphlet must be viewed as a **"Circumstance Level 1"** violation. 1018 Policy, at 12 and 27.

As Respondent's failure to inform Mr. Freeman of the information disclosed in the pamphlet was total -- that is, no such information at all was provided to Mr. Freeman -- the violation was total. As a consequence of Respondent's failure to provide him the pamphlet, two young children under the age of four were, in fact, exposed to lead based paid in the house sold by Respondent, and a very real "potential for serious damage to human health" created by Respondent's omission. Consequently, the failure of Respondent to provide the Lead Hazard Information Pamphlet must be viewed as a **"Major Extent"** violation. 1018 Policy, at 12.

A gravity based civil penalty of $11,000 for this violation, alleged in Count I, is appropriate.

Count II-- Violation of 40 C.F.R. § 745.113(a)(1) for Respondent's failure to include as an attachment to the Agreement a Lead Warning Statement consisting of language set out in 40 C.F.R. § 745.113(a)(1)).

Generally, the Administrator considers that violations of 40 C.F.R. 745.113(a)(1), where a sellor fails to include with a sale of target housing the required Lead Warning Statement, is quite serious, and assigns a "Level 2" registration for such a violation. 1018 Policy, at 27. This level of "circumstances" reflects the fact that, without the Lead Warning Statement, there is a high probability of impairing a purchaser's ability to assess the information required to be disclosed. Id. at 12. The Lead Warning Statement and acknowledgment language "documents the disclosure

and acknowledgment process, and serves as the primary confirmation tool for all parties in ensuring full compliance with the regulatory requirements." 61 Fed. Reg. at 9,072. It "provides a record that sellers, lessors, and agents can use to confirm that purchasers and lessees have received the necessary disclosure materials." Id. The Lead Warning Statement's language was specified by Congress in the Act, see 42 U.S.C. § 4852d(a)((3), and provides context to enable the purchaser to better understand the additional components of the disclosure documentation which the Act requires at the time of the purchase. Given its importance to the regulatory framework, it is appropriate that the Administrator considers a seller's failure to provide a purchaser the Lead Warning Statement with a property sale contract a **"Circumstance Level 2"** violation. 1018 Policy, at 12 and 27.

Again, Respondent's failure to provide Mr. Freeman the lead warning statement was total, that is, no such information at all was provided at all to Mr. Freeman. As a consequence of Respondent's failure to provide him any lead warning statement, two young children under the age of four were, in fact, exposed to lead based paid in the house sold by Respondent, and a very real "potential for serious damage to human health" created by Respondent's omission. Consequently, the failure of Respondent to provide the lead warning statement must be viewed as a **"Major Extent"** violation. 1018 Policy, at 12.

A gravity based civil penalty of $10,316 for this violation, alleged in Count II, is appropriate.

Count III **Violation of 40 C.F.R. § 745.113(a)(2) for Respondent's failure to include as an attachment to the Agreement a statement of Respondent disclosing the presence of known lead-based paint and/or lead-based paint hazards in the property she was selling, or indicating that she had no knowledge of the presence of lead-based paint and/or lead-based paint hazards in the property.**

Generally, the Administrator considers that violations of 40 C.F.R. 745.113(a)(2), where a sellor fails to include as an attachment to a contract to purchase target housing a statement disclosing the Seller's knowledge of the presence of lead-based paint hazards at the property, or a Seller's statement that he has no knowledge of any such hazard, to be **Circumstance Level 3** violations. 1018 Policy, at 12 and 27. This is so because the Administrator considers such violations to have a "medium" impact on the purchaser's ability to assess information that the purchaser should know. Id. at 10.

As with the violations alleged in Counts I and II, Respondent's failure to provide Mr. Freeman a statement of Respondent's knowledge of lead-based paint hazards -- or her lack of any such knowledge -- at the property she was selling to him was total, that is, no such information at all was provided at all to Mr. Freeman. As a consequence of Respondent's failure to provide him such a statement, two young children under the age of four were, in fact, exposed to lead based paid in the house sold by Respondent, and a very real "potential for serious damage to human health" created by Respondent's omission. Consequently, the failure of Respondent to provide the lead warning statement must be viewed as a **"Major Extent"** violation. 1018 Policy, at 12.

A gravity based civil penalty of $7,737 for this violation, alleged in Count III, is appropriate.

Count IV **Violation of 40 C.F.R. § 745.113(a)(3) for Respondent's failure to include as an attachment to the Agreement a list of any records or reports available to Respondent pertaining to lead-based paint hazards in the property she was selling, or a statement that no such records or reports were available to her.**

Generally, the Administrator considers that violations of 40 C.F.R. 745.113(a)(3), where a seller fails to include as an attachment to a contract to purchase target housing a list of any records or reports available to the Seller that pertain to lead hazard information -- or to indicate that no such records or reports exist -- to be **Circumstance Level 5** violations. 1018 Policy, at 12 and B-2. This is so because, while the information might be helpful for the purchaser know, the Administrator considers such violations to have a "low" impact on the purchaser's ability to assess information -- that is, to know the significance of the information -- required to be disclosed to the purchaser. Id. at 12.

As with the violations alleged in Counts I through III, in evaluating for penalty purposes Respondent's failure to provide to Mr. Freeman as an attachment to the Agreement a list of records she might have relating to lead- based paint in the target housing which was the subject of the Agreement -- or a statement that she had no such records -- the presence of children must be considered. As a consequence of Respondent's failure to provide the required attachment to the Agreement, two young children under the age of four were, in fact, exposed to lead based paid in the house sold by Respondent, and a very real "potential for serious damage to human health" created by Respondent's omission. Consequently, the failure of Respondent to provide the lead warning statement must be viewed as a **"Major Extent"** violation. 1018 Policy, at 12.

A gravity based civil penalty of $2,579 for this violation, alleged in Count IV, is appropriate.

Count V **Violation of 40 C.F.R. § 745.113(a)(4) for Respondent's failure to include as an attachment to the Agreement a statement from Donald Freeman, Jr., affirming his receipt of the information identified in 40 C.F.R. § 745.113(a)(2) and (3), and the lead hazard information pamphlet required under 40 C.F.R. § 745.107(a)(1).**

Generally, the Administrator considers that violations of 40 C.F.R. 745.113(a)(5), where a sellor fails to include as an attachment to a contract to purchase target housing a statement from the purchaser acknowledging receipt of the information the seller, by law, was required to provide the purchaser, to be **Circumstance Level 4** violations. 1018 Policy, at 12 and 28. This is so because the Administrator considers such violations to have a "medium" impact on the purchaser's ability to assess information required to be disclosed to the purchaser. Id. at 12. While commission of the violation itself does not deprive the purchaser of information the law requires that he receive, the requirement does provide a check-point for the seller to assure that the information the seller was required to provide the purchaser was, in fact, received by the purchaser.

As with the violations alleged in Counts I through IV, in evaluating for penalty purposes Respondent's failure to include an attachment to the Agreement a statement of Mr. Freeman confirming his receipt of the information the seller was required, by law, to provide him, the presence of children must be considered. As a consequence of Respondent's failure to include an attachment to the Agreement of the required statement, two young children under the age of four were, in fact, exposed to lead based paid in the house sold by Respondent, and a very real "potential for serious damage to human health" created by Respondent's omission. Consequently, the failure of Respondent to provide the lead warning statement must be viewed as a **"Major Extent"** violation. 1018 Policy, at 12.

A gravity based civil penalty of $5,158 for this violation, alleged in Count V, is

appropriate.

Count VI **Violation of 40 C.F.R. § 745.113(a)(5) for Respondent's failure to include as an attachment to the Agreement a statement by Donald Freeman, Jr., affirming either his receipt of notice of an opportunity to conduct a risk assessment or inspection, or his waiver of such an opportunity.**

Generally, the Administrator considers that violations of 40 C.F.R. 745.113(a)(5), where a seller fails to include as an attachment to the Agreement a statement by a purchaser, affirming either his receipt of notice of an opportunity to conduct a risk assessment or inspection, or his waiver of such an opportunity, to be **Circumstance Level 4** violations. 1018 Policy, at 12 and 28. This is so because the Administrator considers such violations to have a "medium" impact on the purchaser's ability to assess information required to be disclosed to the purchaser. Id. at 12.

As with the violations alleged in Counts I through IV, in evaluating for penalty purposes Respondent's failure to include as an attachment to the Agreement a statement by a purchaser affirming either his receipt of notice of an opportunity to conduct a risk assessment or inspection, or his waiver of such an opportunity, the presence of children must be considered. As a consequence of Respondent's failure to provide the required notice, or waiver of notice, two young children under the age of four were, in fact, exposed to lead based paid in the house sold by Respondent, and a very real "potential for serious damage to human health" created by Respondent's omission. Consequently, the failure of Respondent to provide the lead warning statement must be viewed as a **"Major Extent"** violation. 1018 Policy, at 12.

A gravity based civil penalty of $5,158 for this violation, alleged in Count II, is appropriate.

D. Adjusting the Gravity Based Penalty

Congress requires that, in determining the amount of penalty to assess for any violation of TSCA, the Administrator consider several "adjustment"criteria with regard to the specific violator, Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), and she addresses those "adjustment" criteria in her adopted policy. 1018 Policy, at 17-23. Complainant has considered these "adjustment" criteria, and, at this time, based upon the evidence, finds that no downward adjustment in any gravity based civil penalty amount is warranted.

Considering Respondent's "**ability to pay/continue in business**," as it related to the penalty amount of $43,238 proposed, Id. at 17, no adjustment has been made to the gravity based penalty amount at this time. In its Amended Answer of April 22, 2009, Respondent raises a claim of its "inability to pay" the penalty amount proposed. Complainant, on April 28, 2009, requested that Respondent provide her with certain financial records to allow the Administrator's enforcement staff to evaluate her claim. No such records have thus far been produced by Respondent. Consequently, consistent with the Administrator's instructions in In re New Waterbury, Ltd., 5 E.A.D. 529 (EAB 1994), the Administrator's delegated complainant will presume that Respondent has an ability to pay the penalty amount proposed.

Regarding a respondent's "**history of prior violations**," the Administrator's adopted policy only provides for an increase in the gravity based penalty in those matters where the respondent has a "history of prior such violations." 1018 Policy at 18. Moreover, the gravity based penalty matrix of the TSCA Policy "is designed to apply to 'first offenders.'" TSCA Policy, 45 Fed. Reg., at 59,733. As Respondent in this case has no such history of prior violations, no adjustment is made to their gravity based penalty amount in consideration of this penalty criteria.

Regarding a respondent's "**degree of culpability**," the Administrator's adopted policy only provides for an increase in the gravity based penalty in those matters where "the violator intentionally commits an act which he knew would be a violation of the Disclosure Rule or hazardous to health, or has been issued a prior [Notice of Non-Compliance."] 1018 Policy, at 19. A violator's knowledge of a particular requirement and degree of control over events have long been circumstances on which the Administrator has evaluated a violator's "degree of culpability." TSCA Policy, 45 Fed. Reg. at 59,733. However, the Administrator has made clear that "the Agency has no intention of encouraging ignorance" of lawful requirements of strict liability statutes, Id., and there is no evidence that anything beyond her control prevented Respondent in this case from providing the EPA-Approved lead hazard information pamphlet, Lead Warning Statement, and acknowledgment language to Mr. Freeman at the time she sold him the property.

Regarding "**other factors as justice may require**," the policy of the Administrator directs its attention toward a consideration of the fact that: a violator can provide appropriate certification that the "target housing" involved in the violations is lead free; a violator's "attitude" toward compliance; any "supplemental environmental projects" which a violator may agree to undertake; if appropriate, a violator's willingness to undertake a "audit" and "self-disclose" any violations uncovered; the violations having been discovered by the Agency through the violator's self-disclosure; if appropriate given the size of his business, a violator's willingness to participate in a "compliance assistance" program; an "adjustment for small independent owners and lessors," where only one unit of "target housing" is involved; and, if a violator has benefitted from his non-compliance, a consideration of the amount of "economic benefit" realized by the violator. 1018 Policy, at 19-23.

In this matter, as Respondent has provided no information that the subject "target housing" is lead free, and denies that the law applied to the house that she sold, there is no opportunity to allow for any reduction in the proposed penalty amount for "attitude" toward compliance, or anything that would require Respondent's initiative, such as supplemental environmental projects, and audit with self-disclose, participation in a "compliance assistance program." Nor does it appear that economic is a factor in the case.

Also, regarding Respondent's "attitude," any adjustment requires that three criteria be considered: (1) cooperation; (2) immediate steps taken to comply with the Disclosure Rule; and (3) early settlement. Id. at 22-23. Again, given Respondent's response to the Complaint, no downward adjustment in the gravity based penalty is warranted in consideration of these factors.

Finally, regarding its "size of business" and any potential "compliance assistance program," Respondent cannot be said to "ha[ve] made a good faith effort to comply with the applicable environmental requirements" when, as here, she denies entering into any agreement to sell residential property.

E. Total Penalty Amount

Count I	**$ 11,000**
Count II	**$ 10,316**
Count III	**$ 7,737**
Count IV	**$ 2,579**
Count V	**$ 5,158**
Count VI	**$ 5,158**
Total	**$ 43, 238**

IV. CONCLUSION

The civil penalty amount that is proposed has been determined by analyzing the evidence before the Administrator in consideration of each statutory penalty criteria identified in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), as interpreted by the Administrator in her adopted penalty policies, and by an application of the penalty calculation methodologies adopted by the Administrator in her penalty policy.

The analysis here provided, and resulting penalty amount determination, is based upon substantial evidence, and manifests the application of "agency policies" which "effectuate general standards, applied without unreasonable discrimination," and a "conjunction of articulated standards and reflective findings, in furtherance of even handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." See Greater Boston Television Corp., 444 F.2d at 851-52. Consequently, it is a penalty determination that, in a final order of the Administrator, would meet the standards of review of Section 706 of the APA ("agency action" shall be held "unlawful" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), applicable to final actions of agencies, including orders of the Administrator assessing civil penalties for violations of Federal environmental statutes. It is a penalty determination that is "warranted in law and justified in fact," entitled to being upheld by Federal reviewing courts. Glover Livestock Comm'n Co., 411 U.S. at 185-186 ("where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence. . . . [and the] choice of sanction [i]s not to be overturned unless the Court of Appeals might find it 'unwarranted in law or . . . without justification in fact . . . .'"). See also Sultan

Chemists, Inc. v. U.S. EPA, 281 F.3d 73 (3d Cir. 2002); Newell Recycling Company v. U.S. EPA, 231 F.3d 204 (5th Cir. 2000); and Catalina Yachts, Inc. v. U.S. EPA, 112 F. Supp. 2d 965 (C.D. Cal. 2000), where, in each case, a penalty amount determined in a final order of the Administrator by applying the statutory penalty criteria interpretations and calculation methodologies of the Administrator's adopted penalty policies was upheld.

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Table of Authorities

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