UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
RONALD H. HUNT, *ET AL.*	**)**	**Docket No. TSCA-03-2003-0285**
	)	
Respondents.	**)**	

INITIAL DECISION

DATED: March 8, 2005

TSCA: Pursuant to Section 409 of the Toxic Substances Control Act, 15 U.S.C. § 2689, Respondents are variously assessed, individually and/or jointly, a aggregate penalty of $ 84,224.80 for 32 violations of Federal regulations promulgated under the Residential Lead Based Paint Hazard Reduction Act based upon: (a) their failure to include in or attach to leases a statement disclosing their knowledge of the presence of lead based paint and/or lead based paint hazards in violation of 40 C.F.R. § 745.113(b)(2); (b) their failure to provide lessees with available records or reports pertaining to lead based paint and/or lead based paint hazards in violation of 40 C.F.R. § 745.107(a)(4); (c) their failure to include in or attach to leases a list of available records or reports pertaining to lead based paint and/or lead based paint hazards in violation of 40 C.F.R. § 745.113(b)(3); and/or (d) as agent, the failure to comply with the foregoing regulations or ensure the owners' compliance therewith in violation of 40 C.F.R. § 745.115(a)(2).

PRESIDING OFFICER: CHIEF ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

For Complainant:
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For Respondents:
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I. PROCEDURAL HISTORY

This proceeding was instituted on July 22, 2003, by the Associate Director for Enforcement, Waste and Chemicals Management Division, United States Environmental Protection Agency, Region 3 ("Complainant"), pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA),15 U.S.C. § 2615(a). The Complaint alleges in 47 counts that the five named Respondents – Ronald H. Hunt, Patricia L. Hunt, David E. Hunt, J. Edward Dunivan, and Genesis Properties, Inc. – violated Section 409 of TSCA, 15 U.S.C. § 2689, Section 1018 of the Residential Lead Based Paint Hazard Reduction Act of 1992 (the "Act"), 42 U.S.C. § 4852d, and the Federal regulations promulgated thereunder, codified at 40 C.F.R. Part 745, Subpart F (the "Disclosure Rule").[1] Specifically, the Complaint alleges that various individual Respondents own the residential dwellings in Richmond, Virginia identified as 1124 North 28th Street, 1813 North 29th Street, 3015 Barton Avenue, and 2405 Third Avenue; that those dwellings were constructed prior to 1978; and, as "lessors," those Respondents entered into a total of ten written leases for the dwellings through their agent, Respondent Genesis Properties, Inc. ("GPI"). The Complaint alleges further that the dwellings are "target housing" containing lead based paint, that Respondents knew at all relevant times that the dwellings contained lead based paint and/or lead based paint hazards, and that they failed to make the legally required disclosures concerning lead based paint to their prospective lessees.[2]

The first 13 Counts of the Complaint pertain to two dwellings owned by Respondents Ronald H. Hunt and Patricia L. Hunt, involving two consecutive leases of one dwelling and three consecutive leases of the other. Specifically, in Counts 1-4, Ronald and Patricia Hunt are charged with failure to disclose to four of those lessees the known presence of lead based paint and/or lead based paint hazards prior to entering into the leases, in violation of 40 C.F.R. § 745.107(a)(2). In Counts 5-8, Ronald and Patricia Hunt are charged with failure to include in or attach to those four leases a statement disclosing either the presence of any known lead based paint and/or lead based paint hazards, or the lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). In Counts 9-12, Ronald and Patricia Hunt are charged with failing to

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[1] The Complaint did not propose an exact penalty for the violations alleged therein but set forth criteria for determining the penalty under both Section 16 of TSCA, 15 U.S.C. § 2615, and EPA's Real Estate Notification and Disclosure Rule: Final Enforcement Response Policy dated February 23, 2000, a copy of which was enclosed with the Complaint and introduced into evidence at the hearing as Complainant's Ex. 16.

[2] The Act and the Disclosure Rule promulgated pursuant thereto require, *inter alia*, a lessor and/or agent thereof, to disclose to a lessee of housing constructed prior to 1978 (known as "target housing") the presence of any known lead based paint and/or lead based paint hazards therein and to list and provide available records and reports pertaining to any known lead based paint and/or lead based paint hazards therein *before* the lessee is obligated under a contract to lease target housing. *See* 42 U.S.C. § 4852d; 40 C.F.R. §§ 745.100, 745.103, 745.107, 745.113(b).

provide those four lessees with any records or reports available to the Hunts pertaining to lead based paint or lead based paint hazards in the dwellings, in violation of 40 C.F.R. § 745.107(a)(4). In Count 13, Ronald and Patricia Hunt are charged with failing to include, in another lease of one of the dwellings, a list of any records or reports available to the Hunts pertaining to lead based paint or lead based paint hazards in that dwelling, or an indication in the lease that no such records or reports were available, in violation of 40 C.F.R. § 745.113(b)(3).

Counts 14 through 22 pertain to three consecutive leases of a dwelling owned by Respondents David E. Hunt and Patricia L. Hunt. In Counts 14 through 16, David Hunt and Patricia Hunt are charged with failing to disclose the known presence of lead based paint or lead based paint hazards to three lessees, in violation of 40 C.F.R. § 745.107(a)(2). In Counts 17 through 19, David Hunt and Patricia Hunt are charged with failing to include in or attach to those three leases a statement disclosing either the presence of any known lead based paint and/or lead based paint hazards, or the lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). In Counts 20 through 22, David Hunt and Patricia Hunt are charged with failing to provide those three lessees with any records or reports available to the Hunts pertaining to lead based paint or lead based paint hazards in the dwelling in violation of 40 C.F.R. § 745.107(a)(4).

Counts 23 through 28 allege the same types of violation, but pertain to two consecutive leases of a dwelling owned by Respondent J. Edward Dunivan. Counts 23 and 24 allege that Mr. Dunivan failed to disclose the known presence of lead based paint or lead based paint hazards to the two lessees, in violation of 40 C.F.R. § 745.107(a)(2). Counts 25 and 26 allege that Mr. Dunivan failed to include in or attach to those two leases a statement disclosing either the presence of any known lead based paint and/or lead based paint hazards, or the lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2). Count 27 and 28 allege that Mr. Dunivan failed to provide those two lessees with any records or reports available to him pertaining to lead-based paint or lead-based paint hazards in the dwelling in violation of 40 C.F.R. § 745.107(a)(4).

Counts 29 through 46 allege that GPI, as the leasing agent, failed to comply with, or to ensure that the lessors complied with, each of the three regulatory requirements referenced above, 40 C.F.R. §§ 745.107(a)(2), 745.113(b)(2) and 745.107(a)(4), in regard to six of the leases mentioned above. Count 47 alleges that GPI failed to ensure that the lessors performed the requirement of 40 C.F.R. § 745.113(b)(3) for the lease referenced in Count 13, in violation of 40 C.F.R. § 745.115(a)(2).

On October 1, 2003, Respondents collectively filed an Answer to the Complaint, admitting many of the factual allegations, but denying liability, and raising various defenses. Thereafter, the parties participated in an alternative dispute resolution process, but were unable to amicably resolve this matter, so on February 11, 2004, the undersigned was designated to preside over the hearing of the Complaint. In response to a Prehearing Order, the parties then filed their Prehearing Exchanges. In its Prehearing Exchange, Complainant proposed to assess

Respondents Ronald Hunt and Patricia Hunt, jointly and severally, a penalty of $ 44,204, Respondents David Hunt and Patricia Hunt, jointly and severally, a penalty of $ 17,820, J. Edward Dunivan a penalty of $15,840, and GPI a penalty of $ 42,224, for a aggregate penalty of $120,088.[3]

On May 24, 2004, Complainant filed a Motion for Accelerated Decision as to Liability, requesting accelerated decision as to the liability of Ronald Hunt and Patricia Hunt on Counts 5-13, as to the liability of David Hunt and Patricia Hunt on Counts 17-22, as to the liability of J. Edward Dunivan on Counts 25-28, and as to the liability of GPI on Counts 35-47 of the Complaint. Respondents submitted a Response to EPA's Motion for Accelerated Decision on June 7, 2004, conceding Respondents' liability on those Counts and withdrawing inability to pay as a defense, but stating that they were not waiving the "passive owner" defense of David Hunt and J. Edward Dunivan, and requesting that this case proceed directly to hearing on the issue of penalty assessment.

On June 9, 2004, Complainant submitted an unopposed Motion to Withdraw the remaining 15 counts of the Complaint (Counts 1-4, 14-16, 23, 24, and 29-34), all of which allege failure to disclose the known presence of lead based paint or lead based paint hazards, in violation of 40 C.F.R. § 745.107(a)(2).

By Order dated July 2, 2004, Complainant's Motion for Accelerated Decision as to the 32 counts and Motion to Withdraw the remaining 15 counts were granted.[4]

A hearing was held in this matter before the undersigned on September 14, 2004, in Richmond, Virginia, to resolve the remaining issue in the case, that of the appropriate penalty to be assessed against the various Respondents for the 32 counts on which they had been found liable. Complainant presented the oral testimony of two witnesses at the hearing, Daniel T. Gallo and Lonnie Sims, and submitted the written testimony of two additional witnesses, Donald Evans (marked as Complainant's Exhibit 93) and Dr. Samuel Rotenberg (marked as Complainant's Exhibit 94). In addition, in lieu of further oral testimony from Dr. Gallo, the Complainant submitted its penalty calculation worksheets (marked as Complainant's Exhibit

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[3] In calculating the proposed penalty in connection with its Prehearing Exchange, the Complainant excluded proposing penalties for those 15 counts (Counts 1-4, 14-16, 23, 24, and 29-34) which it subsequently withdrew. *See*, Complainant's Hearing Exhibit No. 15.

[4] The Order on the Motion for Accelerated Decision discussed at some length the Respondents' "passive owner defense," concluding that the claim that some of the individual Respondents were merely "passive owners" did not raise an issue of fact that is material to a determination of liability. *See*, Order on EPA's Motion for Accelerated Decision, Motion to Withdraw and Motion to Reschedule Hearing, 2004 EPA ALJ LEXIS 132*22-25 (EPA ALJ, 2004).

100). Respondents also presented the oral testimony of two witnesses: Respondent Ronald H. Hunt and Michael Hunt. The parties' two sets of Joint Stipulations (respectively signed August 12/13, 2004 and August 23/25, 2004) were admitted into evidence as Joint Exhibits 1 and 2. In addition, admitted into the record were 57 exhibits, nos. 1-19, 21-32, 41-49, 52, 57, 65-70, 83 (Appendix 1 only), 84-87, 93-95, and 100, offered by Complainant (hereinafter cited as "C's Ex. __"), and 17 exhibits, nos. 5-21, offered by Respondents (hereinafter cited as "Rs' Ex. __").[5]

The transcript of the hearing was received by the undersigned and the parties on or about October 6, 2004.[6] The parties submitted post-hearing briefs and the record was closed on December 29, 2004 with the filing of Complainant's post-hearing reply brief.

II. FACTUAL FINDINGS

Respondent Ronald H. Hunt has been engaged in the mortgage industry and real estate business as an investor/developer and manager of properties for almost thirty years. Tr. 203. Mr. Hunt's business is quite substantial. Individually, and with or through other persons or entities, he owns over 100 properties in the Richmond, Virginia area. Rs' Exs. 5, 6, 20, and 21. Moreover, Mr. Hunt testified at hearing that he currently manages about 250 rental properties, involving 1,000 leases. Tr. 203-04.

The other individually named Respondents are various members of Ronald Hunt's family and friends who are engaged in the real estate business with him. C's Exs. 42, 43; Jt. Ex. 1-Stip. 54, 62, 64, 66, 68. Respondent Patricia L. Hunt is Ronald Hunt's wife and business partner and co-owner of various properties with her husband and others. Tr. 204, Rs' Ex. 20. Respondent David Hunt is Ronald Hunt's brother and his certified public accountant and, by himself and together with Ronald or Patricia Hunt and others, is also a co-owner of various properties. Rs' Ex. 6; C's Ex. 42; Tr. 205. Respondent J. Edward Dunivan is Ronald Hunt's friend and business partner and a real estate investor who lent him "a lot of money over the years." Rs' Ex. 5; C's Ex. 43; Tr. 204. Respondent GPI is a Virginia corporation which is co-owned by Ronald and Patricia Hunt. Tr. 204; Jt. Ex. 1-Stip. 75; C's Exs. 32, 44.

At hearing, Ronald Hunt testified that, regardless of how the four properties at issue here are legally titled among the various Respondents, he maintains "100 percent" control over their management. Tr. 205. Mr. Hunt exercises such management responsibilities through GPI. *Id.*

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[5] Pursuant to a Joint Motion, on August 3, 2004 a Protective Order was entered with regard to disclosure of information claimed confidential in Complainant's Prehearing Exchange Exs. 1-10, 28, 30, 32, 36, 38-41, 61, 72-83 and Respondent's Prehearing Exchange Exs. 5, 6, 20, and 21. Most of those exhibits were admitted into evidence at hearing identified by the same exhibit numbers and the Protective Order remains in effect.

[6] Citation to the transcript of the hearing will be in the following form: "Tr. __".

GPI holds itself out on its internet website as managing "four apartment communities and over 250 single family homes and duplexes" in the Richmond area. C's Ex. 47; *see also* C's Ex. 28, and App. 1 to C's Ex. 83. It performs such management activities for the Respondents as well as for other property owners. Tr. 205-06, 228; C's Exs. 45-48; Jt. Ex. 1-Stips. 77-80. Although Patricia Hunt is the President of GPI (Jt. Ex. 1-Stip. 49; C's Ex. 44), Ronald Hunt directs all phases of GPI's business activities and makes most of its decisions. C's Ex. 32. Moreover, for the past 8 years, GPI's actual day-to-day operations have been carried out by Ronald and Patricia's son, Michael Hunt, who is a licensed real estate broker. Tr. 205-06, 214, 216-17. Michael Hunt testified at hearing that such day-to-day operations involve leasing out apartments, managing them, doing returns, and collecting rents. Tr. 216. More specifically, Michael Hunt acknowledged that he has authority to execute leases and is responsible for "lead disclosure."[7] Tr. 217.

A. **The 1124 North 28th Street Property Leases**

The property known as 1124 North 28th Street, Richmond, Virginia, consists of a two story house, built around 1912, which Ronald and Patricia Hunt have owned since 1995. C's Exs. 11, 30, 32; Jt. Ex.1-Stips. 1, 46, 51.

In the fall of 1997, the City of Richmond's Department of Public Health ("RDPH") conducted an inspection of the property and sampled the paint from the interior and exterior of the premises.[8] C's Exs. 21, 29, 30. Testing revealed that in 41 out of 57 samples, including those taken from the living room, kitchen, bedroom, and bathroom, the paint significantly exceeded the lead standard of 1.0 milligrams per square centimeter (mg/cm^2) (or 0.5% lead by weight) contained in the City's Building Maintenance Code.[9] C's Exs. 21, 22; Tr. 95-97. The rate of lead in the paint was as high as over 20.7 mg/cm^2 on the porch.[10] *Id.*; Tr. 96; C's Ex. 21 (Preliminary

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[7] Ronald Hunt testified at hearing that it is the managers or leasing agents of "Hunt Investments, LLC" who are responsible for providing lead disclosures to tenants; however he also testified that Hunt Investments, LLC's employees "for all intents and purposes, . . . are Genesis [GPI] employees." Tr. 206. It appears that in this case, all of the lead disclosures were performed by Michael Hunt on behalf of GPI. Tr. 217.

[8] The exact date of the inspection is unclear in that the Notice of Violation dated October 21, 1997 indicates that the premises were inspected on October 20, 1997; however, the Lead based Materials Report (also dated October 21, 1997) accompanying the Notice indicates that the inspection occurred on *September 8, 1997*. *See* C's Ex. 21. In response to an EPA Subpoena, GPI represented that it received "a risk assessment" in October 1997. *See* C's Ex. 32.

[9] This is also the Federal standard defining "lead based paint." *See* 40 C.F.R. § 745.223; C's Ex. 49, p. 7-iii.

[10] Testimony at the hearing was given that the City inspectors use an x-ray floroscopy

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XRF results report on sample action no. 12339). As a result, on October 21, 1997, RDPH issued an Official Notice of Violation (NOV) to the Hunts requiring that they commence lead abatement activities by November 20, 1997. C's Exs. 21; Jt. Ex. 1-Stip. 25. Specifically, the Hunts were advised that they were required to remove or cover all surface coatings containing lead over the limit "in an approved manner." C's Ex. 21. The NOV indicated that their property would be reinspected after the abatement commencement date of November 20, 1997, and if satisfactory progress had occurred by that time, a final abatement compliance date would be set. *Id*. The NOV warned that failing to comply could result in the imposition of a criminal fine of up to $1,000. *Id.*

Ronald Hunt testified at hearing that he was "upset" to receive the NOV and discover that he was in violation of the City Code. Tr. 206. In response to the NOV, he promptly hired a licensed lead abatement contractor at a cost of $5,000-$7,000 to "encapsulate" the lead paint on the premises. Such encapsulation involved the application of a product such as "Lead Block," which is a liquid substance with a rubbery glue type consistency, over the lead paint, and painting regular house paint over that layer. Tr. 207, 141-42. After engaging in such abatement, Ronald Hunt said he notified the City so that a follow-up inspection could occur. Tr. 213-14. Documents in the record indicate that RDPH reinspected the property approximately a year later, on November 17, 1998, and found the violations satisfactorily corrected.[11] Rs' Ex. 17.

Around the same time, on November 4, 1998, RDPH issued a letter to Ronald and Patricia Hunt notifying them of their legal obligation from then on to disclose the existence of lead based paint and lead based paint hazards in connection with lease transactions involving the property. C's Exs. 22, 32; Jt. Ex. 1-Stip. 26, Tr. 98-99. The City enclosed with the letter the Preliminary XRF testing results advising the Hunts that the results "should be used in accordance with all lead based paint disclosure requirements." C's Ex. 22; *see also* Jt. Ex. 1-Stip. 26.[12]

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[10](...continued)
("XRF") machine to conduct on-site preliminary tests of lead levels in paint, and then submit paint samples to an independent testing laboratory for verification. Tr. 163-64. The XRF uses "gamma radiation to blast protons and neutrons from their orbit as it relates to lead. The return echo is then read in either K-Shell or L-Shell radiation." Tr. 164. The K-Shell radiation is a reading of the very first few layers of paint or other medium on the surface and the L-Shell is a reading of deeper levels of material. Tr. 166. *See also*, C's Exs. 49 and 67.

[11] The record does not contain a contemporaneously issued Compliance Letter regarding the results of the reinspection but does contain a Compliance Letter dated July 9, 2003, direct to Sam Wilson c/o Hunt Investments, indicating that based upon an inspection conducted over four and a half years earlier, specifically on November 17, 1998, that "the previously cited lead hazards were found to be satisfactorily corrected." Rs' Ex. 17; Jt. Ex. 1-Stip. 31.

[12] Although the letter suggests that RDPH also enclosed therewith a sample government issued brochure regarding lead paint for distribution, the letter as introduced into evidence at
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Approximately 15 months later, on January, 28, 2000, GPI, identified as "the Landlord," leased to a tenant the 1124 North 28th Street premises for the period beginning February 1, 2000 and ending February 28, 2001 ("Lease #1") at a rate of $625 per month. C's Exs. 1, 29, 30, 32; Rs' Ex. 7. Accompanying the lease was a printed form entitled "DISCLOSURE OF INFORMATION Lead based PAINT AND/OR Lead based PAINT HAZARDS," (hereinafter referred to as a "Lead Disclosure Form") certified as accurate and signed by the "Lessor" and "Agent" on February 1, 2000.[13] C's Exs. 1, 29, 30, 32. By handwritten checkmarks and initials adjacent to certain typed statements, the Lead Disclosure Form represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that the "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing."[14] *Id.*; Jt. Ex. 1-Stip. 5, C's Exs. 1, 29, 30, 32. Although not specified in the lease, it is uncontested that during the term of this lease three children, ages 4, 6 and 8, were among the occupants of the premises. C's Exs. 29, 30; Jt Ex. 1-Stip. 15.

About a year later, on December 4, 2000, GPI entered into another lease for the 1124 North 28th Street property covering the term from February 22, 2001 through February 28, 2002 at the same rate of rent but with a different tenant ("Lease #2"). C's Exs. 2, 29, 30, Rs' Ex. 8. The Lead Disclosure Form accompanying this lease, executed by the Lessor on December 4, 2000, is at best unclear in its representations as to whether the lessor knows of lead based paint and/or lead based paint hazards in the housing and whether the lessor has or has not provided the leasee with available records and reports pertaining to lead based paint and/or lead based paint hazards, in that *all* of the various alternative option boxes the lessor can mark on the form to reflect either

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[12](...continued)
hearing does not contain the brochure as an attachment. *See* C's Ex. 23.

[13] Above the signature lines for the Lessor, Lessee and Agent on this and all the other Lead Disclosure Forms at issue in this case is a "Certification of Accuracy" which states: "The following parties have reviewed the information above and, certify, to the best of their knowledge, that the information they have provided is true and accurate." *See*, C's Exs. 1-10. None of the Lead Disclosure Forms at issue in this case identify the "Lessor" or "Agent" by name. *Id.* However, at the hearing, Michael Hunt testified that he signed all the various leases and Lead Disclosure Forms at issue here, and the signatures and initials for the "Lessor" and "Agent" appear to be the same. Tr. 217. In addition, Ronald Hunt identified GPI as the "Brokerage Firm" and Michael Hunt and Robert Sael as "Agent" in regard to the leases at issue here in response to an EPA Subpoena no. 412. C's Ex. 30. It is further noted that the printing font on the various Lead Disclosure Forms at issue here vary slightly, but the substance of the forms remain consistent. *See*, C's Exs. 1-10.

[14] This and all the other Lead Disclosure Forms at issue in this case also indicate by virtue of initials adjacent thereto that the "Agent has informed the lessor of the lessor's obligations under 42 U.S.C. 4852d and is aware of his/her responsibility to ensure compliance." C's Ex. 32 reflects that by letter dated February 3, 2000 GPI provided a copy of the Lead Disclosure Form regarding Lease #1 to the property's new tenants.

knowledge or lack thereof, and provision of records/reports or lack thereof, bear a handwritten mark.[15] *Id.*, Tr. 229-31. It is uncontested that during the term of this lease two children, ages 7 and 12, resided in the property. Jt. Ex. 1-Stip.16; C's Exs. 2, 29, 30, 32.

B. **The 1813 North 29th Street Property Leases**

The 1813 North 29th Street, Richmond, Virginia property is a two story, single family house, built around 1915, which Ronald and Patricia Hunt have also owned since 1995. C's Exs. 12, 30, 32, 48; Jt. Ex. 1-Stips. 46, 51.

On April 16, 1996, RDPH conducted an inspection of this property, but sampled only paint from the *exterior* of the premises such as from the porch and its ceiling and hand railings. C's Exs. 23, 29; Jt. Ex. 1-Stip. 27; Tr. 106-07. The inspector reported that the paint was generally in "poor" and "peeling" condition. C's Ex. 23. Testing revealed that essentially all of the samples exceeded the lead standard of 1.0 mg/cm^2 contained in the City's Building Maintenance Code. *Id.*; Tr. 106. In fact, the rate of lead in the paint was as high as 32.4 mg/cm^2 (K-Shell) on a porch wood column/post. C's Exs. 23 (Preliminary XRF Results, lab action #17), 29. As a result, on April 29, 1996, RDPH issued an NOV to the Hunts requiring that they commence lead abatement activities. C's Ex. 23; Stip. 27.

As was the case with the 1124 North 28th Street property, Ronald Hunt testified at hearing that, in response to this NOV, he promptly hired a licensed lead abatement contractor to encapsulate the lead paint on the premises. Tr. 209. On May 11, 1998, over two years after the initial inspection, RDPH reinspected the property and reported, in a written Compliance Letter issued to the Hunts the same day, that the "previously cited lead hazards on the **exterior**, were found to be satisfactorily corrected."[16] C's Ex. 52 (emphasis in original), Jt. Ex. 1-Stip. 33.

Approximately six months later, on January 8, 1999, GPI entered into a lease for the 1813 North 29th Street property covering the term from January 8, 1999 through January 31, 2000 at a rental rate of $450 per month ("Lease #3"). C's Exs. 3, 29, 30, Rs' Ex. 9. The Lead Disclosure Form accompanying this lease, executed by the "Lessor" and "Agent" on January 8, 1999,

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[15] In his response to EPA Subpoena No. 412, Ronald Hunt indicated that information regarding the City's inspection was given to the tenant leasing the premises on December 4, 2000 as well as in connection with a prior lease dated January 15, 1998. C's Ex. 30 (response to question no. 9). It is not clear from the record exactly what this representation was based upon other than perhaps the most favorable reading of the multiple inconsistent representations on the form itself.

[16] On July 9, 2003, the City of Richmond issued yet another Compliance Letter to Sam Wilson c/o Hunt Investments stating that based upon a re-inspection conducted on May *19*, 1998 "the previously cited lead hazards were found to be satisfactorily corrected." Rs' Ex. 18; Jt. Ex. 1-Stip. 32.

represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* Although not reflected in the lease itself, it is uncontested that during the term of this lease two children, ages 10 and 18, resided in the premises. Jt. Ex. 1-Stip.17; C's Exs. 29, 30, 32.

On April 11, 2000, GPI entered into another lease with a different tenant for the 1813 North 29th Street property covering the term from April 11, 2000 through April 30, 2001 at a rental rate of $625 per month ("Lease #4"). C's Exs. 4, 29, 30, Rs' Ex. 10. The Lead Disclosure Form accompanying this lease, executed on February 28, 2000, again represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* It is uncontested that during the term of this lease two children, ages 5 and 14, resided in the premises. Jt. Ex. 1-Stip. 18, C's Exs. 4, 29, 30.

On July 2, 2001, GPI entered into yet a third lease with a different tenant for the 1813 North 29th Street property covering the term from July 16, 2001 through July 31, 2002 again at a rental rate of $625 per month ("Lease #5"). C's Exs. 5, 29, 30, 32, Rs' Ex. 11. The Lead Disclosure Form accompanying this lease, executed by the Lessor and Agent on a date unstated, for a third time represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* It is uncontested that during the term of this lease three children, ages 7, 12 and 16, occupied the premises. Jt. Ex. 1-Stip. 19, C's Exs. 5, 29, 30, 32.

C. **The 3015 Barton Avenue Property Leases**

By Deed dated November 14, 1994, Respondents David E. Hunt and his sister-in-law Patricia L. Hunt are the joint legal title holders of the premises located at 3015 Barton Avenue, Richmond, Virginia, which was built around 1920.[17] C's Exs. 13, 30, 32, Jt. Ex. 1-Stip. 58.

On or about June 26, 1997, Lonnie Sims, a lead paint inspector with RDPH, in response to a tenant inquiry, conducted an inspection of the Barton Avenue property and took paint samples from the interior and exterior of the premises. Tr. 127, 162-63; C's Exs. 24, 29, 30. Mr. Sims reported that the paint was generally in "poor" or "average" condition, but testing revealed that in 66 out of 115 samples, the paint exceeded the lead standard of 1.0 mg/cm^2. Tr. 163-165; C's Ex. 24, 29, 30. The rate of lead found in the paint was as high as 23.225 mg/cm^2 (K-Shell) on a porch

[17] While the Deed reflects that David Hunt and Patricia Hunt hold legal title to the property, in response to EPA Subpoena No. 358, Ronald Hunt represented that he was "the owner in fact," and that "[n]either David nor Patricia have ever seen this property or even know where it is located. They purchased it for me when I could not obtain financing myself. I am the person who rents, leases, repairs etc. to the property [sic]." C's Ex. 28.

wood window. *Id*.; C's Ex. 24 (Reports of Preliminary XRF test results, Action # 3423); Tr. 167-68.[18] As a result, on June 30, 1997, Mr. Sims issued an NOV to Respondents David Hunt and Patricia Hunt requiring that they commence lead abatement activities by July 28, 1997. C's Ex. 24; Tr. 162; Jt. Ex. 1-Stip. 28.

As with the other properties, at the hearing Ronald Hunt testified to specifically abating the lead paint hazards at the Barton Avenue property by having the lead paint encapsulated with a Lead Block type product applied by a licensed contractor.[19] Tr. 207. However, he acknowledged that unlike the other properties, he has no documentary evidence that any reinspection ever occurred and has never been issued a Compliance Letter by RDPH in regard to this property, although he testified that he submitted the evidence of compliance to the City of Richmond, and met with City officials concerning obtaining a Compliance Letter. Tr. 208; Jt. Ex. 1-Stip. 28; C's Ex. 24. Moreover, in further support of his claimed compliance, Mr. Hunt testified that he has never received a summons or paid a fine for failing to comply with the NOV in connection with this property. Tr. 208.

On September 30, 1998, EPA issued TSCA Subpoena No. 358 to "Patricia and David Hunt" inquiring about lead disclosures made to tenants of the 3015 Barton Avenue property. C's Ex. 27; Jt. Ex. 1-Stip. 36. Ronald Hunt responded to the Subpoena on behalf of his wife and brother on October 8, 1998. C's Ex. 28; Jt. Ex. 1-Stip. 37. Attached to the response were two leases entered into by GPI, one dated before and one dated after the inspection and the accompanying Lead Disclosure Forms, neither of which disclosed the Lessors' knowledge of lead based paint or lead based paint hazards in the premises or existence of the RDPH inspection report. C's Ex. 28.[20]

Approximately a year later, on August 11, 1999, GPI entered into another lease for the 3015 Barton Avenue property covering a term from October 1, 1999 through August 31, 2000 at a

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[18] *See also*, C's Ex. 30 containing the Laboratory Analysis Report from Schneider Laboratories indicating that a wipe sample of paint from the bedroom sill had a lead concentration rate of 9,010.3 µg (micrograms)/ft^2 where the Federal Lead standards for Lead Dust Clearance by wipe sampling for interior window sills is 500µg /ft^2.

[19] In fact, at the hearing Ronald Hunt asserted that he had an encapsulant applied at the Barton Avenue property on two different occasions. Tr. 207.

[20] EPA subsequently issued to Ronald Hunt a second Subpoena (No. 412) on August 30, 2001 in regard to the four properties at issue here and numerous others. C's Ex. 29. Ronald Hunt responded to this Subpoena by letter dated October 9, 2001. C's Ex. 30. EPA also issued a third Subpoena (No. 425) to GPI on May 28, 2003 regarding just the four properties at issue here (C's Ex. 31), to which GPI (Michael Hunt) responded on June 26, 2003 (C's Ex. 32). *See also*, C's Ex. 70.

rental rate of $625 per month ("Lease #8").[21] C's Exs. 8, 29, 30; Rs' Ex. 14. Despite the NOV, alleged responsive abatement activities, and EPA Subpoena, the Lead Disclosure Form accompanying this lease, executed by Michael Hunt on behalf of the "Lessor" and "Agent" in September 1999, again represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* Although not reflected in the Lease, it is uncontested that during the term of this lease two children, ages 7 and 15, resided in the premises. Jt. Ex. 1-Stip. 22.

On December 7, 2000, GPI entered into another lease for the 3015 Barton Avenue property covering the term from December 11, 2000 through December 31, 2001 at the same rental rate ("Lease #7"). C's Exs. 7, 29, 30; Rs' Ex. 13. The Lead Disclosure Form accompanying this lease, executed by the Lessor and Agent on December 11, 2000, again represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* It is uncontested that during the term of this lease one child, age 15, resided in the premises. Jt. Ex. 1-Stip. 21; C's Exs. 7, 29, 30, 32.

On June 13, 2001, GPI entered into a third consecutive lease for the 3015 Barton Avenue property covering the term from July 1, 2001 through July 31, 2002 at the same rental rate ("Lease #6"). C's Exs. 6, 29, 30, 32; Rs' Ex. 12. Once again, the Lead Disclosure Form accompanying this lease (executed by Michael Hunt on behalf of the Lessor and Agent on a date unstated), represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* It is uncontested that during the term of this lease three children, ages 1, 10, and 12, resided in the premises. Jt. Ex. 1-Stip. 20; C's Exs. 6, 29, 30, 32.

D. **The 2405 Third Avenue Property Leases**

The property known as 2405 Third Avenue, Richmond, Virginia, is a single family brick

[21] It is not clear why Complainant in this proceeding identified the three leases for the Barton Avenue property in inverse chronological order, however, for the sake of consistency, they are kept in that order here. Also, the record contains a fourth lease for this property, dated January 14, 1998, for a two week term from February 13 to 28, 1998, with a Lead Disclosure Form which also fails to make any disclosures about lead based paint on the premises. *See* C's Ex. 28. It is noted that the Disclosure Rule does not apply to "[s]hort-term leases of 100 days or less, *where no lease renewal or lease extension can occur*," (40 C.F.R. § 745.101(c)(emphasis added)). In any event, no violations regarding this lease have been pled in this case.

home built around 1926, which Respondent J. Edward Dunivan has owned since 1992.[22] C's Exs. 14, 32, 30; Jt. Ex. 1-Stip. 71.

On April 3, 1997, RDPH inspected the exterior of this property only, and took paint samples. C's Ex. 25. Of the 11 paint samples tested, 8 exceeded the lead standard of 1.0 mg/cm2, with the highest sample (taken from a porch window) exhibiting a 5.955 mg/cm^2 (K-Shell) lead rate. *Id.;* Tr. 130. Five days later, RDPH issued to Mr. Dunivan an NOV requiring that lead abatement activities be initiated within a month. C's Ex. 25 (Preliminary XRF tests results action # 530); Jt. Ex. 1-Stip. 29. As with the other properties, Respondent Ronald Hunt testified that in response to the NOV he arranged to have the lead paint encapsulated. Tr. 209. On June 12, 1997, RDPH reinspected the premises and found it to be in compliance. C's Ex. 57. On August 4, 1997, RDPH issued a "Compliance Letter" to Mr. Dunivan confirming that upon reinspection conducted on June 12, 1997, the previously cited lead hazards on the exterior were found to be "satisfactorily corrected."[23] *Id.*; Jt. Ex. 1-Stip. 34; Rs' Ex. 19; C's Ex. 57. Almost a year later, on or about June 13, 1998, RDPH again inspected the property for lead based paint. In response to this inspection, RDPH contemporaneously issued to Mr. Dunivan a "Notice of Non-Hazardous Lead based Paint," which states that, while upon inspection the property was found to be "positive" for lead based paint, "the paint was found to be in a non-hazardous condition. This means that the paint was not deteriorating, peeling, chipping, or flaking." The Notice advised Mr. Dunivan that he needed to inspect the premises quarterly to ensure that the paint remains "non-hazardous and in good condition." C's Exs. 26, 29, 30, 32; Jt. Ex. 1-Stip. 30.

On December 1, 1999, GPI leased the 2405 Third Avenue property for a term beginning December 8, 1999 through December 31, 2000, at a rental rate of $615 per month ("Lease #9"). C's Exs. 9, 29, 30; Rs' Ex.15. The Lead Disclosure Form accompanying this lease, executed on December 8, 1999, represented that the "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that the "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* As reflected in the Lease, during the term thereof, four children, ages 5, 6, 8, and 17, resided in the premises. Jt. Ex. 1-Stip. 23; C's Exs. 9, 29, 30, 32.

On January 16, 2001, GPI entered into another lease for the 2405 Third Avenue property covering a term from March 1, 2001 through February 28, 2002 at a rental rate of $700 per month

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[22] C's Ex. 14, the Deed giving title to the property to J. Edward Dunivan, reflects that he purchased the property in 1992 from Respondent Patricia L. Hunt. In his response to EPA Subpoena 412 (C's Ex. 30), Ronald Hunt indicated that since December 30, 1992 the property has been owned by "Ed Dunivan-Ronald Hunt-Partnership."

[23] On July 9, 2003, the City of Richmond issued another compliance letter with regard to the 2405 Third Avenue property, this one addressed to Sam Wilson c/o Hunt Investments, stating that based upon re-inspection conducted June *17*, 1997 "the previously cited lead hazards were found to be satisfactorily corrected." Rs' Ex. 19; Jt. Ex. 1-Stip. 35.

("Lease #10"). C's Exs. 10, 29, 30, 32; Rs' Ex. 16. The Lead Disclosure Form accompanying this lease, executed by the Lessor on January 16, 2001, again represented that the "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that the "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.* As reflected in the Lease, the occupants of the premises during the term of this lease included four children, ages 2, 5, 9, and 10. Jt. Ex. 1-Stip. 24; C's Exs. 10, 29, 30, 32.

III. PENALTY CRITERIA AND PROPOSED PENALTY CALCULATIONS

As stated above, Respondents' liability has already been determined and the sole issue remaining in the instant proceeding is the appropriate civil penalties to be assessed, if any. The assessment of civil administrative penalties in this context is governed by the Consolidated Rules of Practice. 40 C.F.R. Part 22. The Consolidated Rules of Practice provide in pertinent part that:

> [i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

Respondents have been found to have violated the Residential Lead based Paint Hazard Reduction Act of 1992 ("the Act"), 42 U.S.C. §§ 4851-56. Section 1018 of the Act provides that a violation of any of its requirements "shall be a prohibited act under section 409 of the Toxic Substances Control Act (TSCA) [15 U.S.C.A. § 2689] . . . [and] the penalty for each violation under section 16 of that Act [15 U.S.C.A. § 2615] shall not be more than $10,000."[24] 42 U.S.C. § 4852d(b)(5). The applicable statutory criteria for the assessment of a penalty are, therefore, delineated in TSCA.

Section 16 of TSCA provides that "[i]n determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue in business, any history of such prior violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2615(a)(2)(B).

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[24] The Civil Monetary Penalty Inflation Adjustment Rule increased the maximum penalty of $10,000 by ten percent to a maximum penalty of $11,000 for violations of Section 1018 of the Residential Lead based Paint Hazard Reduction Act of 1992 occurring after July 28, 1997. *See Civil Monetary Penalty Inflation Adjustment Rule*, 62 Fed. Reg. 35,038 (Jun. 27, 1997) (codified at 40 C.F.R. Pt. 19 (1998)).

In February 2000, EPA's Office of Regulatory Enforcement, Toxic and Pesticide Enforcement Division issued its Section 1018 - Disclosure Rule Enforcement Response Policy ("ERP").[25] C's Ex. 16. This policy, with minor exceptions, follows the penalty factors set forth in TSCA.

The ERP begins by outlining the extremes regarding penalty assessment, specifically that:

> [A] violator can generally expect to pay the maximum civil penalty [$11,000 per violation] if a child under six with an elevated blood level ("EBL") is present in target housing where notification has not been provided, or where a previous order to abate lead hazards from a federal, state or local authority has been ignored by the responsible party. EPA may also seek the maximum penalty where it has been determined that a pregnant woman or child under six lived in the target housing during the period of noncompliance. In addition, under certain circumstances, the appropriate enforcement response generally is to issue a civil administrative complaint with an adjusted [reduced] penalty [] . . . if the target housing is certified to be lead based paint free by the responsible party.

C's Ex. 16 at 7 and Memorandum regarding corrections attached thereto (Feb. 23, 2000). Further, the ERP notes that:

> [i]n lieu of a civil administrative complaint, EPA may issue a Notice of Noncompliance ("NON") as determined on a case-by-case basis when justice would best be served . . . . [such as where] a violator has essentially complied with the requirements of the Disclosure Rule and timely notification has been made.

C's Ex. 16 at 6.

The ERP then sets forth a two stage process for determining a more exact penalty amount

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[25] At the hearing, Complainant represented that it relied upon this ERP to calculate all the proposed penalties in this case, even though some of the violations occurred prior to its issuance in February 2000, noting that the ERP provides that "This Disclosure Rule Enforcement Response Policy is immediately applicable and will be used to determine the enforcement response and to calculate penalties in administrative enforcement actions concerning violations of the Disclosure Rule." C's Ex. 16 at 3; Tr. 135-36, 140. Prior to the issuance of the 2000 ERP, the EPA had in effect an Interim Enforcement Response Policy which it issued in January 1998. *See Billy Yee*, 2000 EPA ALJ LEXIS 51, *7-8 (ALJ, Jun. 6, 2000). Testimony given at the hearing by Complainant's witness, Dr. Gallo, indicated that the Agency's penalty calculations in this case would not have changed had the prior ERP been utilized as guidance therefor. Tr. 141. Respondent did not argue in its Post-Hearing Brief that the application of the Interim Enforcement Policy to those violations predating February 2000 is warranted or that it would result in a significantly different penalty calculation.

against "responsible parties."[26] The first step is the determination of a "Gravity-Based Penalty," referring to the overall seriousness of the violation, taking into account the nature of the violation as varied by the "circumstances" of the violation and the "extent" of harm that may result from a given violation. C's Ex.16 at 9. These factors are incorporated into a penalty matrix (the Gravity-Based Penalty Matrix) which specifies the appropriate gravity-based penalty. C's Ex. 16 at 9, App. B. The second stage involves the upward or downward adjustment of the gravity-based penalty in consideration of the violators' ability to pay/continue in business, history of prior violations, degree of culpability, "such other factors as justice may require" and voluntary disclosure. C's Ex. 16 at 9, 14-18.

The ERP characterizes the "circumstances" of violations at various levels reflecting the *probability of harm* resulting from a particular type of Section 1018 violation - the harm being that a lessee will be uninformed about the hazards associated with lead based paint and, consequently, the greater likelihood of a child being exposed to lead based paint hazards. Those violations which have a *high* probability of impairing a lessee's ability to access the information required to be disclosed regarding the hazards associated with lead based paint in the housing are classified as "Level 1 or 2 violations;" violations having a *medium* impact of impairing the ability to access the information are "Level 3 or 4 violations;" and violations having a *low* impact on the ability to access the information required to be disclosed are "Level 5 or 6 violations." C's Ex. 16 at 10.

The ERP uses "extent" to consider the "degree, range, or scope of a violation." It characterizes the extent of a violation as "Major" where there is potential for "serious" damage to human health or the environment, "Significant" where there is the potential for a significant amount of damage to human health or the environment, and "Minor" where there is a potential for a "lesser" amount of damage to human health or the environment. C's Ex. 16 at 10. Only two measurable factors are used in the ERP to determine the extent level of violations: (1) the age of the youngest child living in the target housing; and (2) whether a pregnant woman lives in the target housing. C's Ex. 16 at 11. Where a child under age six or a pregnant woman resides in the housing, the extent of the violation is always "major," when a child between the ages of 6 and 18 resides in the premises, the violation is always deemed "significant," and where the occupants are all over 18 years of age the extent is categorized as "minor." C's Ex. 16 at 11; Memorandum regarding corrections to ERP, attached thereto (Feb. 23, 2000); App. B at B-4.

Finally, the ERP notes with regard to calculating the gravity based penalty that EPA considers each requirement of the Disclosure Rule a separate violation and each lease a "stand alone" transaction and therefore it assesses each lease separately with regard to each requirement

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[26] The ERP notes that under the Disclosure Rule, both lessors and agents are responsible for complying with its requirements and that EPA reserves the right to exercise its "enforcement prosecutorial discretion" when issuing enforcement actions against responsible parties, giving consideration to "who has direct control over the practices for disclosure and who should be aware of the requirement of the Disclosure Rule." *See* C's Ex. 16 at 5, App. A (defining "Responsible Party" under the ERP).

of the Disclosure Rule. C's Ex. 16 at 12-13.

As to the second stage of the process, the ERP sets forth specific circumstances under which EPA will adjust the gravity based penalty downward or upward in consideration of the violators' ability to pay/continue in business, history of prior violations, degree of culpability, and "such other factors as justice may require," including no known risk of exposure, attitude, supplemental environmental projects, audit policy, voluntary disclosure, size of business, small independent owners and lessors and/or economic benefit of non-compliance. C's Ex. 16 at 14-18.

In this proceeding, Complainant proposed a total combined penalty of $120,088, based upon its application of the ERP to Respondents' 32 violations. Dr. Daniel Gallo, through his testimony and supporting documents, C's Ex. 100, explained the process utilized by EPA in calculating the proposed penalties.[27] In determining the proposed penalties, Dr. Gallo began by noting that EPA made the calculations required under the first stage of the ERP to determine an appropriate "gravity-based penalty" and then, under the second stage, only adjusted the penalty downward in consideration of Respondents' "attitude," finding all the other adjustment factors inapplicable to this case. Specifically, Dr. Gallo testified that, during the course of this proceeding, Complainant had obtained certain records relating to the Respondents' financial circumstances and, after consideration of them, made no downward adjustment in the proposed penalty based upon the factor of Ability to Pay/Continue in Business. Tr. 58-59.[28] As to the factor

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[27] Dr. Daniel Gallo is the Lead Enforcement Coordinator and Lead Compliance Office for EPA Region III's Waste and Chemical Management Division in the Toxic Programs and Enforcement Branch. Tr. 37-38; C's Ex. 95. Based upon his education, training and experience, he was qualified without objection at the hearing as an expert in the field of penalty calculations for violations of the Disclosure Rule using EPA's ERP. Tr. 41. During the hearing, Dr. Gallo provided the Court with detailed testimony regarding the penalty calculations for a number of counts, and then the parties stipulated that his testimony with regard to further counts would be consistent with his prior testimony, and that the Agency's penalty analysis as detailed in its Exhibit 100 would serve as Dr. Gallo's written testimony. Tr. 116-22.

[28] The burden of proof with regard to the ability to pay a penalty was discussed by the Environmental Appeals Board (EAB) in *Chempace Corp.*, 9 E.A.D. 119 (EAB 2000). The EAB stated therein as follows:

> the Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the Complainant must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

(continued...)

of "History of Prior Violations," Dr. Gallo noted that the ERP provides only for an upward adjustment of the penalty based upon such a history and such a factor was not relevant in regard to the Respondents here. Tr. 59-60. As to the adjustment factor of Culpability, Dr. Gallo noted that the ERP provides for an upward adjustment on this basis if the violator acts with knowledge of the Disclosure Rule requirements such as where a prior notice of noncompliance was issued, and again he determined that this factor was inapplicable in this case. Tr. 60. As to "Other Factors as Justice May Require," Dr. Gallo stated that he made no downward adjustment based upon "No Known Risk of Exposure" because under the ERP that factor requires that the property be certified as "lead free," which was not the case here. Further, Dr. Gallo made no downward adjustment for Supplemental Environmental Projects because that factor is applicable only to settlements. Dr. Gallo also made no downward adjustment based upon the Audit Policy, Voluntary Disclosure, or Size of Business because those factors all require self-disclosure of violations, which did not occur in this case. Tr. 62-64, 136-37. Finally, Dr. Gallo testified that the downward adjustment factor for Small Independent Owners and Leasors was inapplicable because the Respondents owned more than one rental unit, and that the upward adjustment factor for Economic Benefit of Noncompliance was inapplicable because there was no documentation evidencing that Respondents accrued any financial gain due to the violations. Tr. 61-65.

As to the factor of Attitude, Dr. Gallo stated that he did grant the Respondents a downward penalty adjustment of 10% of the gravity-based penalty based upon their cooperation, but no further adjustment based upon this factor because EPA had no "documented knowledge of immediate good faith compliance," and because there was no settlement reached before the Complainant's prehearing exchange was filed. Tr. 61-62.

Dr. Gallo testified in more detail that Complainant's penalty calculations were as follows:

COUNTS AGAINST RONALD AND PATRICIA HUNT

Counts 5-8

In Counts 5-8, Respondents Ronald and Patricia Hunt were found liable for failing to include in or attach to Lease # 1 (1124 N. 28th St.) and Leases # 3, 4, and 5 (1813 N. 29th St.), *a statement* disclosing the presence of known lead based paint and/or lead based paint hazards, in violation of 40 C.F.R. § 745.113(b)(2). Tr. 71, 77-78, 82, 85.

Following the ERP Circumstance Level Matrix, Complainant characterized the

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[28](...continued)
Chempace Corp., 9 E.A.D. 119, 133 (EAB 2000) (footnotes omitted).

In this case, the Complainant met its initial burden of production on this issue and, in response, Respondents indicated prior to and at the hearing that they were not challenging the penalty proposed in this case based upon ability to pay or continue in business. Tr. 14-15.

circumstances (probability of causing harm, *i.e.* lack of knowledge about lead-paint hazards) of all these violations as "Medium, Level 3." C's Ex. 16, App. B at B-1; C's Ex. 100; Tr. 72, 78-79, 83, 86. Using the Extent Category Matrix it characterized the extent of the violations with regard to Leases # 1 and 4 (Counts 5 & 7) as "Major" because children under the age of six were present in the housing and Leases # 3 and 5 (Counts 6 & 8) as "Significant," because children between the ages of 6 and 18 were present in the housing. C's Ex. 16, App. B at B-4; C's Ex. 100; Tr. 72-73, 79-80, 83, 87.

Then, plugging those factors into the Gravity-Based Penalty Matrix set forth in the ERP, (C's Ex. 16, App. B at B-4), EPA designated a gravity based penalty for Counts 5 and 7 (Level 3 circumstance/major extent) as $6,600 per violation, and for Counts 6 and 8 (Level 3 circumstance/significant extent) as $4,400 per violation. C's Ex. 100; Tr. 73, 80, 84. It then adjusted the penalties downward 10% under the "other factors as justice may require" in light of Respondent's cooperative attitude, thus reducing the penalties by either $ 660 or $ 440, respectively. C's Ex. 100; Tr. 73-74, 80-81, 84, 92. As to Count 5 *only*, EPA divided the proposed penalty in half between the lessors (Ronald and Patricia Hunt) and the agent (GPI),[29] to propose a joint and several penalty against Respondents Ronald and Patricia Hunt for these Counts as follows:

Count 5 - $ 2,970
Count 6 - $ 3,960
Count 7 - $ 5,940
Count 8 - $ 3,960
Total = $16,830 - Proposed penalty against Ronald and Patricia Hunt on Counts 5-8

See C's Ex. 100; Tr. 70-75, 77, 81-82, 84-85, 92-93.

Counts 9-12

In Counts 9-12, Respondents Ronald and Patricia Hunt were found liable in connection with Lease # 1 (1124 N. 28th St.) and Leases # 3, 4, and 5 (1813 N. 29th St.) for failing to *provide available records or reports* pertaining to the presence of known lead based paint and/or lead

[29] *See* discussion regarding Count 35, *infra*, and Tr. 75-77. Dr. Gallo indicated that GPI, as agent, was only charged with failing to ensure regulatory compliance with the Disclosure Rule where EPA had obtained evidence through its subpoenas that it was on notice as to the presence of lead at the property. Tr. 68. GPI denied it had such notice in regard to the 1813 North 29th Street property, and so it was not charged with a violation in regard to that property although it was the leasing agent. *Id.* Further, Dr. Gallo stated EPA exercised its prosecutorial discretion to divide a single penalty between the owner and agent, and thereby give each a 50% penalty reduction, based upon the close relationship between the owner and agent in this case and the fact that the Agency charged the owner and agent in separate counts with the same violation concerning an individual lease transaction. Tr. 69.

based paint hazards, such as the NOV, lead inspection report, or follow-up letters, to potential lessees in violation of 40 C.F.R. § 745.107(a)(4). Tr. 93-94, 105, 110.

Applying the Circumstance Level Matrix, Complainant characterized of all these violations as "High, Level 1." C's Ex. 16, App. B at B-1; C's Ex. 100; Tr. 100-01, 107-08, 111. Using the Extent Level Matrix, it characterized the violations with regard to Leases # 1 and 4 (Counts 9 and 11) as "Major" because children under the age of six were present in the housing, and Leases # 3 and 5 (Counts 10 and 12) as "Significant" because children between the ages of 6 and 18 were present in the housing. C's Ex. 16, App. B at B-4; C's Ex. 100; Tr. 101, 108, 111-12.

Utilizing the Gravity-Based Matrix in the ERP, EPA designated an initial penalty for Counts 9 and 11 (Level 1/Major) as $11,000 per violation, and for Counts 10 and 12 (Level 1/Significant) as $6,600 per violation. C's Ex. 16, App. B at B-4; C's Ex. 100; Tr. 101, 110, 112. It then adjusted the penalty downward 10% under the "other factors as justice may require" in light of Respondent's cooperative attitude, thus reducing the violations by $1,100 and $660, respectively. C's Ex. 100; Tr. 101-02, 108-09, 112. As to Count 9 *only*, EPA divided the proposed penalty in half between the lessors (Ronald and Patricia Hunt) and the agent (GPI),[30] to propose a joint and several penalty against Respondents Ronald and Patricia Hunt for these Counts as follows:

Count 9 - $ 4,950
Count 10 - $ 5,940
Count 11 - $ 9,900
Count 12 - $ 5,940
Total = $26,730 - Proposed penalty against Ronald and Patricia Hunt on Counts 9-12.

See, C's Ex. 100; Tr. 93, 102, 105, 109, 110, 112.

Count 13

In Count 13, Respondents Ronald and Patricia Hunt were found liable for failing to include in or attach to Lease # 2 (1124 N. 28th St.) *a list* of available records or reports pertaining to the presence of known lead based paint and/or lead based paint hazards, in violation of 40 C.F.R. § 745.113(b)(3). Tr. 123.

In accordance with the ERP, Complainant characterized the circumstances of this violation as "Low, Level 5." C's Ex. 16, App. B at B-2; C's Ex. 100. It characterized the extent of the violation as "Significant" because children between the ages of 6 and 18 were present in the housing. C's Ex. 16, App. B at B-4; C's Ex. 100.

Utilizing the ERP's Gravity-Based Penalty Matrix, EPA designated a gravity based penalty

[30] *See* discussion of Count 41, *infra*, and Tr. 102.

for Count 13 (Level 5/Significant) as $1,430 per violation. C's Ex. 16, App. B at B-4; C's Ex. 100. It adjusted the penalty downward 10% (*i.e.* by $143) under the "other factors as justice may require" in light of Respondents' cooperative attitude, and then divided the proposed penalty in half between the lessors (Ronald and Patricia Hunt) and the agent (GPI),[31] to propose a joint and several penalty against Respondents Ronald and Patricia Hunt for this Count of $644. C's Ex. 100.

Thus, Complainant proposes a total penalty against Respondents Ronald and Patricia Hunt on the 9 Counts on which they were found liable as follows:

Count 5	- $ 2,970	(failure to disclose info of known lead presence Lease #1)
Count 6	- $ 3,960	(failure to disclose info of known lead presence Lease #3)
Count 7	- $ 5,940	(failure to disclose info of known lead presence Lease #4)
Count 8	- $ 3,960	(failure to disclose info of known lead presence Lease #5)
Count 9	- $ 4,950	(failure to provide records re: lead presence Lease #1)
Count 10	- $ 5,940	(failure to provide records re: lead presence Lease #3)
Count 11	- $ 9,900	(failure to provide records re: lead presence Lease #4)
Count 12	- $ 5,940	(failure to provide records re: lead presence Lease #5)
Count 13	- $ 644	(failure to list records available re: lead presence Lease #2)
Total =	$44,204	- Proposed penalty against Ronald and Patricia Hunt on Counts 5-13

See C's Ex. 100.

COUNTS AGAINST DAVID HUNT AND PATRICIA HUNT

Counts 17-19

In Counts 17-19, Respondents David Hunt and Patricia Hunt were found liable for failing to include in Leases # 6, 7 and 8 (3015 Barton Avenue), or attach thereto, *a statement* disclosing the presence of known lead based paint and/or lead based paint hazards, in violation of 40 C.F.R. § 745.113(b)(2).

In accordance with the ERP, Complainant characterized the circumstances of all these violations as "Medium, Level 3." C's Ex. 16, App. B at B-1; C's Ex. 100. It characterized the extent of the violations with regard to Lease #6 (Count 17) as "Major" because children under the age of six were present in the housing, and Leases #7 and 8 (Counts 18 and 19) as "Significant" because children between the ages of 6 and 18 were present in the housing. C's Ex. 16, App. B at B-4; C's Ex. 100.

Utilizing the Gravity-Based Matrix, EPA designated a gravity-based penalty for Count 17 (Level 3/Major) as $6,600 per violation, and for Counts 18 and 19 (Level 3/significant) as $4,400

[31] *See* discussion of Count 47, *infra*.

per violation. C's Ex. 16, App. B at B-4; C's Ex. 100. It adjusted the penalty downward 10% under the "other factors as justice may require" in light of Respondents' cooperative attitude, thus reducing the penalty by $660 and $440, respectively. C's Ex. 100. As to all three Counts, it divided the proposed penalty in half between the lessors (David Hunt and Patricia Hunt) and the agent (GPI),[32] to propose a joint and several penalty against Respondents David Hunt and Patricia Hunt for these Counts as follows:

Count 17 - $ 2,970
Count 18 - $ 1,980
Count 19 - $ 1,980
Total = $ 6,930 - Proposed penalty against David Hunt and Patricia Hunt on Counts 17-19.

See C's Ex. 100.

Counts 20-22

In Counts 20-22, Respondents David Hunt and Patricia Hunt were found liable in connection with Leases # 6, 7 and 8 (3015 Barton Avenue), for failing to *provide the available records* or reports pertaining to the presence of known lead based paint and/or lead based paint hazards, in violation of 40 C.F.R. § 745.107(a)(4).

Complainant characterized the circumstances of all these violations as "High, Level 1." C's Ex. 16, App. B at B-1; C's Ex. 100. It characterized the extent of the violations with regard to Lease #6 (Count 20) as "Major" because children under the age of six were present in the housing, and Leases #7 and 8 (Counts 21 and 22) as "Significant" because children between the ages of 6 and 18 were present in the housing. C's Ex. 16, App. B at B-4; C's Ex. 100.

Utilizing the ERP's Gravity-Based Matrix, EPA designated an initial penalty for Count 20 (Level 1/Major) as $11,000 per violation, and for Counts 21 and 22 (Level 1/Significant) as $6,600 per violation. C's Ex. 16, App. B at B-4; C's Ex. 100. It adjusted the penalty downward 10% for attitude, reducing the penalties by either $1,100 or $660, and divided the proposed penalty in half between the lessors (David Hunt and Patricia Hunt) and the agent (GPI),[33] to propose a joint and several penalty against Respondents David Hunt and Patricia Hunt for these Counts as follows:

Count 20 - $ 4,950
Count 21 - $ 2,970
Count 22 - $ 2,970
Total = $10,890 - Proposed penalty against David Hunt and Patricia Hunt on Counts

[32] *See* discussion regarding Counts 36-38, *infra*.

[33] *See* discussion of Counts 42-44, *infra*.

See C's Ex. 100.

Thus, Complainant proposes a total joint and several penalty against Respondents David Hunt and Patricia Hunt on the 6 Counts on which they were found liable as follows:

Count 17 - $ 2,970
Count 18 - $ 1,980
Count 19 - $ 1,980
Count 20 - $ 4,950
Count 21 - $ 2,970
Count 22 - $ 2,970
Total = $17,820 - Proposed penalty against David Hunt and Patricia Hunt on Counts 17-22.

See C's Ex. 100.

COUNTS AGAINST J. EDWARD DUNIVAN

Counts 25 & 26

In Counts 25 and 26, Respondent J. Edward Dunivan was found liable for failing to include in Leases # 9 and 10 (2405 Third Avenue), or attach thereto, a statement disclosing the presence of known lead based paint and/or lead based paint hazards, in violation of 40 C.F.R. § 745.113(b)(2).

Following the ERP, Complainant characterized the circumstances of these two violations as "Medium, Level 3" and the extent of the violations as "Major" because children under the age of six were present in the housing. C's Ex. 16, App. B at B-1, B-4; C's Ex. 100.

Utilizing the Gravity-Based Matrix, EPA designated a gravity-based penalty for these two counts of $6,600 per violation. C's Ex. 16, App. B at B-4; C's Ex. 100. It adjusted the penalty downward 10% for attitude, thus reducing the penalty for each count by $660. C's Ex. 100. It then divided the proposed penalty in half between the lessors (J. Edward Dunivan) and the agent (GPI),[34] to propose a penalty against Mr. Dunivan for these Counts as follows:

Count 25 - $ 2,970
Count 26 - $ 2,970
Total = $ 5,940 - Proposed penalty against J. Edward Dunivan on Counts 25 and 26.

Id.

[34] *See* discussion regarding Counts 36, 37 and 38, *infra*.

Counts 27& 28

In Counts 27 and 28, Respondent J. Edward Dunivan was found liable in connection with Leases # 9 and 10 (2405 Third Avenue) for failing to provide the available records or reports pertaining to the presence of known lead based paint and/or lead based paint hazards, in violation of 40 C.F.R. § 745.107(a)(4).

Complainant characterized the circumstances of these two violations as "High, Level 1" and the extent of the violations as "Major" because children under the age of six were present in the housing. C's Ex. 16, App. B at B-1, B-4; C's Ex. 100.

Relying upon the ERP's Gravity-Based Matrix, Complainant calculated a penalty for these two counts of $11,000 per violation. C's Ex. 16, App. B at B-4; C's Ex. 100. It then adjusted the penalty downward 10% or $990 for attitude and divided the proposed penalty in half between the lessors (J. Edward Dunivan) and the agent (GPI),[35] to propose a penalty against Mr. Dunivan for these Counts as follows:

Count 27 - $ 4,950
Count 28 - $ 4,950
Total = $ 9,900 - Proposed penalty against J. Edward Dunivan on Counts 27 & 28.

C's Ex. 100.

Thus, Complainant proposes a penalty against Respondent J. Edward Dunivan on the 4 Counts on which he was found liable as follows:

Count 25 - $ 2,970
Count 26 - $ 2,970
Count 27 - $ 4,950
Count 28 - $ 4,950
Total = $15,840 - Proposed penalty against J. Edward Dunivan on Counts 25-28.

C's Ex. 100.

COUNTS AGAINST GPI

Counts 35-47

Counts 35 through 40 alleged that, in violation of 40 C.F.R. § 745.115(a)(2), as an agent,

[35] *See* discussion regarding Counts 36-38, *infra*.

GPI failed to comply or ensure the various lessors' compliance with 40 C.F.R. § 745.113(b)(2) regarding disclosing known lead paint or lead paint hazards with regard to Leases #1, 6-10, respectively.[36] Tr. 71; C's Ex. 100.

Counts 41 through 46 alleged that, in violation of 40 C.F.R. § 745.115(a)(2), GPI failed to comply or ensure the lessors' compliance with 40 C.F.R. § 745.107(a)(4) regarding providing records or reports regarding lead paint or lead paint hazards with regard to Leases #1, 6-10, respectively. Tr. 94; C's Ex 100.

Count 47 alleged that GPI failed to ensure compliance with 40 C.F.R. § 745.113(b)(3) regarding listing available records or reports pertaining to lead based paint in Lease # 2. C's Ex. 100.

Complainant calculated the penalties for these Counts with regard to GPI and the various lessors together and, as indicated above, divided the penalty equally between them. *See* C's Ex. 100; Tr. 75-77, 104. Thus, Complainant proposes a penalty against GPI on the 13 Counts on which it was found liable as follows:

Count 35 - $ 2,970	Correlates with Count 5 against Ronald Hunt & Patricia Hunt
Count 36 - $ 2,970	Correlates with Count 17 against David Hunt & Patricia Hunt
Count 37 - $ 1,980	Correlates with Count 18 against David Hunt & Patricia Hunt
Count 38 - $ 1,980	Correlates with Count 19 against David Hunt & Patricia Hunt
Count 39 - $ 2,970	Correlates with Count 25 against J. Edward Dunivan
Count 40 - $ 2,970	Correlates with Count 26 against J. Edward Dunivan
Count 41 - $ 4,950	Correlates with Count 9 against Ronald Hunt & Patricia Hunt
Count 42 - $ 4,950	Correlates with Count 20 against David Hunt & Patricia Hunt
Count 43 - $ 2,970	Correlates with Count 21 against David Hunt & Patricia Hunt
Count 44 - $ 2,970	Correlates with Count 22 against David Hunt & Patricia Hunt
Count 45 - $ 4,950	Correlates with Count 27 against J. Edward Dunivan
Count 46 - $ 4,950	Correlates with Count 28 against J. Edward Dunivan
Count 47 - $ 644	Correlates with Count 13 against Ronald Hunt & Patricia Hunt
Total = $42,224 -	Proposed penalty against GPI on Counts 35-47

See C's Ex. 100; Tr. 70, 93, 103-05.

[36] Respondents admitted in their Answer that GPI was under contract with the other Respondents to lease the dwellings at issue and was an "agent" within the meaning of the Disclosure Rule, 40 C.F.R. § 745.103. Answer at ¶ 36. The Disclosure Rule requires that "[e]ach agent shall ensure compliance with all requirements of this subpart." 40 C.F.R. § 745.115(a).

Total Penalties for each Respondent:

Ronald Hunt & Patricia Hunt (jointly and severally):	$ 44,204
David Hunt & Patricia Hunt (jointly and severally):	$ 17,820
J. Edward Dunivan	$ 15,840
GPI	$ 42,224
Total Penalty Proposed for all Respondents:	**$120,088**

See C's Ex. 100; Tr. 131-32.

IV. DISCUSSION

At hearing and in their brief, Respondents raise a number of issues challenging Complainant's proposed penalty, including lack of harm, cooperativeness, lack of willfulness, multiple violations, and comparison of penalties imposed in other cases. Each of these issues will be discussed in detail below.[37]

A. HARM

In support of the proposed penalties, Complainant submitted as written testimony the Expert Report of Samuel Rotenberg, Ph.D., Regional Toxicologist with EPA, Region 3, on the health risks posed by exposure to lead based paint. C's Ex. 94. The Report states that lead paint exposure can occur through inhalation, ingestion, in utero, and direct dermal contact, and Dr. Rotenberg opines that "the degree of uncertainty about the health effects of lead is quite low." *Id.* Studies have shown that lead produces many toxic effects, ranging from life threatening toxicity to subtle neurological effects, depending on level of exposure, and that, while some of the effects are reversible when exposure ceases, some are not. Children age 6 and less, including developing fetuses, are the population most sensitive to the effects of lead because of their developing nervous systems, Dr. Rotenberg claims. *Id.* at 2. Children exposed to lead, even low level lead exposure,

[37] As indicated in the Procedural History section above, at certain points in this litigation the Respondents raised a "passive owner" defense, *i.e.*, that none of them save Ronald Hunt were actively involved in the day-to-day management and leasing of these properties. The evidence of record, specifically the testimony at hearing of Ronald Hunt and Michael Hunt, seems to support this to be the case (Tr. 205) except that GPI, perhaps as directed by Ronald Hunt, was clearly responsible for the day-to-day management and leasing of the properties. However, Respondents do not appear to make this particular mitigation argument in their Post-Hearing Reply Brief, although Complainant raised the issue as not justifying mitigation in its Initial Post-Hearing Brief. C's Initial Post-Hearing Brief pp. 69-72. Upon consideration of all the facts of this case, particularly the fact that the Agency mitigated the penalty against the owners and GPI where a claim of violation was made against both based upon the same lack of disclosure, no further reduction based upon "passive ownership" is warranted.

suffer neurobehavioral developmental delays and reduced intelligent quotient (IQ) scores resulting in intellectual and academic performance deficits. Further, the report suggests that this IQ reduction is particularly significant for those whose scores are otherwise reduced due to lower socioeconomic status. *Id.* at 4. Moreover, persons residing in urban areas have an even greater risk because of exposure to lead both in their older homes formerly coated with lead paint and lead in the surrounding soil. *Id.* at 7. The findings contained in Dr. Rotenberg's report are consistent with the findings made by Congress some thirteen years ago which lead to the enactment of the Residential Lead based Paint Hazard Reduction Act.[38] *See,* 42 U.S.C. § 4851.

Buttressing the significance of Dr. Rotenberg's testimony, Complainant submitted various maps, charts and demographic tables regarding the properties at issue in this case. *See* C's Exs. 84-87, 93. Taken as a whole, those charts evidence that the four properties at issue in this case are situated in areas of high population density, which is overwhelmingly minority (80-100%), with poverty levels of 40-60% (about 5 times the state average), with a large percentage of old housing, and a higher than state average percentage of children and elderly, and within the state average for pregnancy and low educational attainment. *Id.*

Choosing not to challenge the accuracy of Dr. Rotenberg's report, Respondents did not submit any rebuttal expert or lay testimony regarding the health or other deleterious effects of lead paint exposure nor did they challenge the accuracy of Complainant's demographic data. Rather, in response to this evidence, Respondents make two points. First, that "neither the testimony nor the voluminous documentary evidence produced at trial by the agency showed that any [*actual*] harm befell any of the tenants who occupied the four houses in question." Rs' Post-Hearing Brief at 2.

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[38] Those findings included the following: 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; (2) at low levels, lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems; (3) pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead based paint; (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; (5) the health and development of children living in as many as 3,800,000 American homes is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes; (6) the danger posed by lead based paint hazards can be reduced by abating lead based paint or by taking interim measures to prevent paint deterioration and limit children's exposure to lead dust and chips; (7) despite the enactment of laws in the early 1970's requiring the Federal Government to eliminate as far as practicable lead based paint hazards in federally owned, assisted, and insured housing, the Federal response to this national crisis remains severely limited; and (8) the Federal Government must take a leadership role in building the infrastructure--including an informed public, State and local delivery systems, certified inspectors, contractors, and laboratories, trained workers, and available financing and insurance--necessary to ensure that the national goal of eliminating lead based paint hazards in housing can be achieved as expeditiously as possible. 42 U.S.C. § 4851.

Second, Respondents argue that their violations did not even create a significant "*risk of harm*" in that, before any of the leases at issue were entered into, and the requisite lead disclosure in regard thereto forgotten, they had undertaken encapsulation measures to remediate the risk of harm to their tenants from lead paint. Respondent's Post-hearing Brief at 2. Those encapsulation measures, Respondents assert, "reduces the lead paint risk to zero on first application." Further, Respondents suggest that the risk to their tenants was maintained at this non-existent level by virtue of the fact that the "encapsulation work has been repeated on a regular basis . . . at an expense of between $5,000.00 and $7,000.00 per application." Moreover, Respondents suggest that they should be particularly rewarded for this pre-violation abatement activity since it is exceptional, in that City of Richmond inspector Lonnie Sims testified at the hearing that he has rarely seen a landlord undertake encapsulation.[39] Rs' Post-hrg Brief at 8.

Respondents' factual basis for their arguments regarding the lack of actual harm and risk of harm in this case is well supported by the record. Complainant has neither alleged nor proved in this proceeding that any actual harm resulted from Respondents' violations, and absent from the record is documentation evidencing that any person incurred elevated blood lead levels, or any of the deficits which Dr. Rotenberg opines can result from lead exposure, as a result of living in any of the four properties at issue in the case.[40] Tr. 137-38. Further, the evidence of record does support that Respondents engaged in lead abatement activities in at least three of the four properties prior to the violations incurring and that such activities, involving the application of a "Lead Block" product, does significantly decrease the risk of lead exposure.

At the hearing, Respondent Ronald Hunt testified that upon receiving the NOVs regarding the four properties, he did whatever was necessary to satisfy and correct the violations concerning the presence of lead based paint at the properties. Tr. 206. Specifically, he stated that, as required by the City, he hired a licensed contractor, at a cost of $5-7,000 per property to "abate the property" and "encapsulate" the lead paint by applying "Lead Block," over the lead paint and then applying regular paint over the Lead Block. Tr. 207-209. Then he contacted the City and arranged for them to re-inspect the property to document that abatement had occurred. Tr. 213. Consistent with this testimony, the record contains Compliance Letters, albeit some not contemporaneously dated, from RDPH for all of the properties at issue here, *except the Barton Avenue property*, reflecting that subsequent to the issuances of the NOVs (but prior to the leases at issue), the City reinspected the properties and found the violations satisfactorily corrected. Rs' Ex.

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[39] Mr. Sims testified that in his entire career he has only inspected perhaps 20 properties where encapsulation has been accomplished. Tr. 196-97.

[40] It is noted, however, that Dr. Gallo did testify at the hearing that Complainant had "some evidence that two of the children at Barton Avenue did have levels of 2 or 3 while they were residing in that property, which is considered a low level, below the level of concern, but that level is still readable and can, under current studies, possibly be considered as effecting reduced intelligence quotient." Tr. 137. Nevertheless, Dr. Gallo acknowledged at the hearing that Complainant has not raised an allegation of harm in this proceeding and Complainant chose not to introduce any evidence into the record supporting this assertion of harm. Tr. 137-38.

17 (1124 N. 28th St.), C's Ex. 52 (1813 N. 29th St.), and C's Ex. 57 (2405 Third Ave.).

Furthermore, Mr. Sims, the RDPH lead paint inspector, testified that, correctly applied, an encapsulant such as "Lead Block" reduces the risk of someone coming into contact with lead paint underlying the surface to "minimal," "very minimal," or "zero." Tr. at 192. Moreover, while he disagreed with the alleged manufacturers' claim that the effectiveness of Lead Block lasts 15-20 years (Tr. 190), Mr. Sims opined that the risk of lead contact during the first three to four years after application only increases 10-15%. Tr. 192-93. Further, Mr. Sims testified that applying regular paint over the Lead Block continues to reduce risk of exposure because it builds up a barrier between the lead paint and the surface. Tr. 193.

Similarly, Dr. Rotenberg opined in his report that "[e]ncapsulation, the adhesion of a protective coating to a suitable lead surface, can dramatically reduce the exposure from lead based paint provided that the original lead paint surface is properly prepared, the encapsulating material properly applied, and the encapsulated lead paint areas are reasonably maintained since even non-vigorous activities such as opening or closing windows can release fine paint particles containing lead." C's Ex. 94 at 7.

During his testimony, Dr. Gallo also acknowledged that application of an encapsulant does, at least temporarily, reduce the risk of lead exposure. Tr. 145-46. He stated the length of time the risk reduction lasts depends upon the surface to which it is applied. Tr. 146. In his testimony, Dr. Gallo drew a distinction between lead "abatement" and lead "hazard reduction" activities. He stated that "abatement" is the actual removal of lead paint from premises.[41] Tr. 144. Encapsulation, involving applying a thick coating such as Lead Block over the existing lead paint, constitutes only a "lead hazard reduction measure." *Id.* Moreover, he noted that a Lead Block type product cannot be used on friction surfaces, like windows and doors, because it breaks down in a manner similar to paint. Therefore, Dr. Gallo opined that to truly achieve encapsulation or hazard reduction on a friction surface such as a window or door jamb, those surfaces have to be removed and replaced. Tr. 144-45.

Although Complainant acknowledges in its brief that "Respondents applied Lead-Block to 1124 N. 28th St. and some portion of 1813 N. 29th Street, and 2405 Third Avenue dwellings," it argues that the penalty should not be mitigated on this basis of lack of actual harm or risk of harm.

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[41] Mr. Sims testified that the properties such as Barton Street at issue here, which were built in the early 20th century, were probably originally painted with lead paint and such paint continued to be applied periodically to the dwellings up until 1972. Tr. 193-94. Over time, the lead in the paint leached back into wooden structural building frame, so that even stripping all of the paint from the structure would not make the premises "lead free." Tr. 194. However, encapsulation with a product such as Lead Block provides a barrier because the lead in the paint or structure does not leach forward into the newly applied coatings. Tr. 195-96. Further, he testified that encapsulation can be accomplished not only by applying Lead Block, but also by the application of siding, sheet rock, or drywall over the lead painted areas, and by removing baseboards, doors and windows. Tr. 190-91.

First, as to actual harm, Complainant asserts that while there is no evidence that any of the twenty-five children who lived in the properties developed elevated lead levels, there is also no evidence that they did not, and "it would impose a difficult, if not impossible burden, for EPA to go back and track down tenants who had lived in such target housing at the time of violation but had since moved away in order to determine whether any of their children had elevated blood-lead levels." EPA states "[t]his is one reason why the ERP does not make evidence of elevated blood-levels of the residents an aggravating factor for penalty calculations, nor does it make the absence of such information a mitigating factor." C's Brief at 68-69. I am not persuaded by this argument. Complainant has the burden of proving all elements of the charge, including the appropriateness of the penalty proposed. 40 C.F.R. 22.24(a). The fact that it may have difficulty garnering that proof does not relieve EPA of this obligation, nor does it shift the burden to Respondents to prove lack of harm. Moreover, it is not "impossible" to prove actual harm has occurred and in fact EPA has done so in other cases before the undersigned. *See, Billy Yee*, 2000 EPA ALJ LEXIS 51,*45-46 (ALJ, 2000).

As to "risk of harm," Complainant argues that encapsulation should not mitigate the proposed penalty because the ERP does not provide for mitigation on this basis. C's Initial Brief at 56. Administrative Law Judges are not compelled to apply penalty policies such as the ERP. *See e.g., Employers Ins. of Wausau,* 6 E.A.D. 735, 758-9 (EAB 1997) (The ALJ's "penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty . . ."). In determining the appropriate penalty, TSCA requires that "the nature, circumstances, extent, gravity of the violation[s]" be taken into account. 15 U.S.C. § 2615(a)(2)(B). Thus, regardless of whether the ERP provides for it or not, actual harm, or risk of harm, or lack thereof, are factors which must be considered in determining at least the "gravity" of the violation.

Complainant also argues against mitigation based on Respondents' encapsulation activities by challenging the level of encapsulation activity engaged in by Respondents, particularly at the Barton Avenue property. C's Initial Brief at 56. EPA argues that while there is evidence from RDPH that both the interior and exterior of the 1124 N. 28th Street property were encapsulated, the RDPH only inspected and issued an NOV as to lead paint found on the exterior of the 1813 N. 29th St. and 2405 Third Avenue properties, and so the compliance letters only evidence abatement of lead paint in the exterior, and not the interior, of these premises.[42] C's Initial Brief at 57-58. Further, Complainant notes that Respondents failed to produce any receipts, bills, letters or documents detailing how and when the encapsulation work was performed, arguing that if Ronald Hunt's testimony about applying Lead Block every 7 to 10 years to properties which he knows have lead paint is true, he should have such records. C's Initial Brief at 59. Furthermore, Complainant vigorously challenges Respondents' claim that encapsulation work was performed at all on the Barton Avenue property, relying primarily upon the testimony of Lonnie Sims. C's

[42] Of course, it must be noted here that, while it is likely to be the case, there is no evidence in the record that there was, in fact, any lead paint in the interior of these particular premises. The Complainant's proof as to the existence of lead paint on the premises at issue here comes solely from RDPH inspection reports of the exterior of those premises.

Initial Brief at 59-6, 64-68.

Mr. Sims is a State trained, certified and licensed lead paint inspector with RDPH. Tr. 154-57. At hearing, Mr. Sims testified that he has performed 200-300 lead inspections over the course of his career, and that he personally performed the inspection of the outside of the 3015 Barton Avenue property on June 26, 1997 and issued the resulting Notice of Violation to Respondents David Hunt and Patricia Hunt. Tr. 161-63. He stated that normally an owner responds to an NOV by contacting the inspector to discuss a viable work plan to remediate the lead according to the building maintenance code. Tr. 169. However, Mr. Sims stated that neither he nor anyone else in his department were contacted by property owners or someone on their behalf in response to this NOV. Tr. 170. Further, Mr. Sims testified that he conducted "drive-by" reinspections of the outside of the property on at least one occasion in July 1997, once again in May or June 2004, and once again the day prior to the hearing, and that "[n]othing had been done." Tr. 171-72. Specifically, he saw no evidence of Lead Block having even been applied to the outside of the property such as the porch. Tr. 173. Mr. Sims stated he could tell because Lead Block paint makes the surface appear glossy and fills in cracks, but the surface looked the same, with flaking and chipping. Tr. 173-74. Finally, Mr. Sims confirmed that no post-NOV compliance letter had ever been issued by RDPH for this property. Tr. 175-77.

Upon consideration of the relevant testimony of Messrs. Hunt and Sims and the other evidence of record, I am sufficiently persuaded that lead abatement activities were performed at the properties at issue, except for the Barton Avenue property. As to the Barton Avenue property, the only evidence in the record suggesting that abatement activities were performed at this property some seven years ago is the uncorroborated testimony of Ronald Hunt, who admittedly is responsible for the management of hundreds of units. Tr. 204. Unlike the other properties, the record does not contain a Compliance Letter from RDPH confirming that abatement occurred in regard to the Barton Avenue property. Tr. 208. Further, Ronald Hunt's testimony regarding conducting abatement at the Barton Avenue property – specifically, his testimony suggesting that he privately hired a contractor and paid for the abatement, just as he did the other properties – is not completely consistent with other evidence in the record which suggests that he might have tried to undertake abatement at the Barton Avenue property differently. Mr. Sims testified that upon receipt of an NOV an owner can either hire a certified or trained contractor to do the abatement or apply to the City for assistance to do the work. Tr. 169. In his response to EPA's Subpoena No. 412, Ronald Hunt indicated, *only as to the Barton Avenue property*, that it "was abated through [a] program with the City of Richmond." C's Ex. 30. Complainant's Ex. 32 indicates that in early 1998, about six months after the NOV for the property was issued and the time for compliance had expired, David and Patricia Hunt, in fact, contacted RDPH regarding the "Lead-Safe Richmond grant process," which provided financial assistance for such work, and they completed an application in April 1998. C's Ex. 32. The record does not contain similar documentation for the other properties and does not contain any evidence as to whether this application was approved and/or the work done. At hearing, Mr. Hunt alleged that he supplied evidence of his compliance with the Barton Avenue NOV, *i.e.*, undertaking abatement activities, to the City, but still never received a Compliance letter. Tr. 208. However, he never proffered any such evidence in connection with this case nor did he proffer the testimony of any abatement

contractor or City employee to buttress his testimony concerning abatement.[43] Thus, what evidence there is in the record suggests to me that, contrary to Ronald Hunt's testimony, he did not promptly and privately undertake lead abatement activities in regard to the Barton Street property in the same manner as was conducted on the other properties and that, consistent with Mr. Sims testimony, such abatement activities might never actually have occurred at all.

The ERP indicates that "[t]he intent of the Disclosure Rule is to help prevent exposure to lead based paint or lead based paint hazards by requiring disclosure and notification." C's Ex. 16 at 6. Such disclosure and notification ensures that individuals and families receive the information necessary to "make informed housing decisions to reduce their risk of exposure to lead hazards." C's Ex. 16 at 2. However, neither the Act nor the Disclosure Rule requires that an owner take any action to actually reduce lead based paint hazards in housing. 40 C.F.R. § 745.61. Undertaking such measures thus goes above and beyond the requirements of the Federal Disclosure Rule, although perhaps not beyond the requirements of State lead reduction regulations.

In this case, Complainant does not allege that Respondents failed to provide their tenants with the requisite lead warning statement and pamphlet which provided *general* information regarding the hazards of lead paint. Indeed, Ronald Hunt testified that Respondents did not ignore "the requirement to disclose," but rather "gave [the tenants] the [lead disclosure] pamphlet and form." Tr. 212-13. *See also*, C's Ex. 30. Thus, Respondents' lessees were generally informed of the risks of lead paint. Instead, the allegations are that the Respondents failed to provide information regarding the existence of lead paint in these specific premises - premises as to which Respondents had previously actually undertaken lead hazard reduction activities, which the testimony at hearing suggests possibly reduced the lessees' risk of exposure to lead hazards to perhaps as low as "zero." Therefore, although the ERP does not provide for it, I believe Respondents are entitled to downward penalty reduction based upon their pre-violation lead paint hazard reduction activity in regard to the properties other than Barton Avenue.[44]

The issue then is the appropriate extent of reduction. Under the adjustment factor of "No Known Risk of Exposure," the ERP provides:

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[43] In further support of his claim that encapsulation was undertaken at the Barton Street property, Mr. Hunt testified that he has never been fined in regard to this property, thereby suggesting that the encapsulation must have been done. Tr. 215. He says he knows that the City of Richmond is not lenient on environmental violations and has seen people thrown in jail for such violations. *Id.* The connection between these two events, however, is too weak to reach such a conclusion, especially where in this case Mr. Sims testified that RDPH was periodically suffering from a fiscal crisis reducing its staff of inspectors from 7 to 1. Tr. 158.

[44] Reducing the penalty downward is particularly appropriate to distinguish this case from others in which a landlord neither provides disclosure of any type nor performs pre-violation abatement or hazard reduction, and where there is evidence that this results in illness in children. *Compare Billy Yee*, 10 E.A.D. 1 (EAB 2001).

> EPA will adjust the proposed penalty downward 80% if the responsible party provides EPA with appropriate documentation (e.g. reports for lead inspection conducted in accordance with HUD guidelines) that the target housing is certified to be lead based paint free by a certified inspector.[45]

C's Ex. 16 at 16.[46]

It is not appropriate to grant Respondents a similar 80% reduction in the penalties based upon their lead abatement activities for a number of reasons. First, as Dr. Gallo indicated, there is no evidence in the record that any of the four properties at issue in this case were "lead based paint free," and in fact, the evidence shows exactly the opposite; that each of these housing units had at one time been painted with lead based paint and that such paint was never completely removed from the units. Tr. at 61.

Second, the evidence as to exactly what encapsulation activities occurred, and when, is not precisely clear.[47] In particular, there is no evidence as to if or how Respondents reduced the risk of lead paint exposure in the friction areas such as windows or door jambs which are not remediable through the mere application of a Lead Block type product.

Third, as noted by Complainant in its Initial Brief, there is no specific evidence in the record of the monitoring and maintenance of the surfaces treated with Lead Block. Complainant cites in its Initial Post-Hearing Brief from a United States Department of Housing and Urban Development Report (C's Ex. 19) that coatings such as Lead Block may remain intact for "up to 3 years," or may "fail immediately after application or within a period of months." C's Initial Brief at 62.

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[45] The Disclosure Rule defines "lead based paint free housing" as "target housing [i.e. housing built before 1978] that has been found to be free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight." 40 C.F.R. § 745.103.

[46] The Disclosure Rule actually *completely exempts* from all of its disclosure and notification requirements "[l]eases of target housing that *have been* found to be lead based paint free by an inspector certified under a federally accredited State or tribal certification program." 40 C.F.R. § 745.101(b) (emphasis added). Thus, presumably this limited adjustment under the ERP would only apply to those cases where the housing is inspected and certified to be lead based paint free *after* the leases were signed.

[47] All of the leases in this case were entered into within approximately a five year period after the NOVs were issued. In that the date(s) the encapsulation activity occurred is not provided, it is impossible to determine how "fresh" the encapsulation was prior to the lease. From the evidence of the reinspections and compliance letters, one can only determine that an encapsulant was at least adequately applied sometime prior to the leases being entered into.

Upon consideration of all the foregoing relating to Respondents engaging in lead paint hazard reduction activities shortly preceding the occurrence of the violations, I deem Respondents to be **entitled to a 30% reduction** in the penalties as to the violations at all of the properties at issue, except those relating to Barton Avenue, taking into account the extent, circumstances and gravity of this violation not otherwise accounted for under the ERP and/or as an adjustment under the category of "other factors as justice may require."[48]

B. ATTITUDE

Respondents also proffer that they are entitled to a greater downward adjustment in the proposed penalty based upon their cooperation and attitude. Rs' Post-Hearing Brief at 8.

The ERP provides that EPA may reduce the proposed civil penalty by a maximum of 30% for "attitude," which consists of three components: (a) cooperation, (b) immediate steps taken to comply with the Disclosure Rule; and (c) early settlement. C's Ex. 16 at 16. In light of the fact that this case went through the hearing process, cooperation and immediate compliance are the only applicable factors to be considered.[49] The ERP provides that:

> (a) The EPA may reduce the base penalty up to 10% based upon a respondent's cooperation throughout the entire compliance, case development, and settlement process; and
>
> (b) The EPA may also reduce the base penalty up to 10% based upon a respondent's immediate good faith efforts to comply with the Disclosure Rule and the speed and completeness with which it comes into compliance;

C's Ex. 16 at 16.

As indicated above, Dr. Gallo acknowledged at hearing that throughout the enforcement process Respondents have had a cooperative attitude. Tr. 138. Therefore, based upon Respondents' positive "attitude," Complainant reduced the penalty for the various counts by 10%, presumably in reference to subsection (a) above. Based upon the record in this case, I think such an adjustment is well justified. Even before this action was instituted, the record as a whole suggests that Respondents cooperated with enforcement authorities and in general, upon receiving NOVs, promptly undertook compliance activity voluntarily. They also responded in an appropriate and timely manner to the three subpoenas issued by the Agency seeking information

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[48] Thus, no reduction is being made on this basis with regard to Counts 17-22 against David and Patricia Hunt or Counts 36-38 and 42-44 against GPI, all of which relate to the Barton Avenue property.

[49] The "early settlement" criterion permits a penalty reduction of 10% if the case is settled before the filing of the prehearing exchange. This case was tried rather then settled, so this criterion is inapplicable.

regarding compliance with the Lead Disclosure Rule. Respondents and their counsel have been eminently reasonable in the litigation of this case. They did not oppose the entry of accelerated decision as to liability, they entered into a variety of stipulations allowing for a more efficient hearing, they withdrew certain defenses such as inability to pay, and they cooperated at trial in terms of moving exhibits into evidence. On the whole, from the perspective of the Tribunal, the Respondents and their counsel were exceptionally honest, direct and cooperative. As such, a 10% reduction for cooperation during the proceeding seems, if anything, insufficient.

Moreover, based upon the record in this case, I conclude that Respondents are also entitled to ***the second 10% reduction*** provided under subsection (b) above based upon their immediate good faith efforts to comply with the Disclosure Rule and the speed and completeness with which they came into compliance. Ronald Hunt testified at hearing that Respondents conducted an audit of the files in response to receipt of the EPA Subpoenas and that upon discovering the errors in the Lead Disclosure Forms in the leases, he made the proper disclosure.[50] Tr. 211-13; C's Ex. 32. Complainant has not proffered any evidence challenging or contradicting this assertion. Therefore, I believe the Respondents are entitled to a 20% penalty reduction on all counts based upon their "cooperation."

C. CULPABILITY

Respondents also claim entitlement to a downward adjustment, noting that as testified to by Dr. Gallo, there is no evidence that any of the violations were willful. Tr. 138, 212. Specifically, Respondents argue that "[t]he uncontradicted testimony at trial was that the non-disclosures were unintentional paperwork snafus, and rare ones at that." Rs' Post-Hearing Brief at 2.

The evidence in the record shows that Ronald Hunt and GPI maintain offices on separate floors in the same building located at 11511 Allecingie Parkway, Richmond, which is owned by Ronald and Patricia Hunt, and is used as a business address by the other Respondents as well. Tr. 226-27; C's Exs. 42, 43; Jt. Ex. 1-Stips. 43, 48, 55, 60. Michael Hunt testified that Ronald Hunt and GPI maintain separate files on the properties they respectively own and/or manage and that documents related thereto are carried from office to office by employees, as necessary. Tr. 227-28. It is Ronald Hunt with whom the City of Richmond corresponds regarding the properties; GPI does not directly receive correspondence from the City. Tr. 210, 218. Further, Ronald Hunt said it was his normal practice, after receiving the NOV and after complying with the requirements thereof by, for example, undertaking encapsulation, and after receiving the compliance letter, to give "the papers" to his son Michael at GPI, so that GPI could distribute them in connection with

[50] Complainant's Exhibit 32 dated June 26, 2003 (GPI's response to EPA Subpoena No. 425 issued to GPI on May 28, 2003) reflects that for all of the properties, except 1813 N. 29th Street, notice was given to the tenants by GPI shortly after the NOVs were received by Ronald Hunt. As to the 1813 N. 29th Street property, the giving of the notice was delayed by GPI not receiving notice of the NOV until May of 2003, when it received the subpoena regarding the properties, and at that point it "immediately notified the present tenant and gave them the appropriate documents as required for proper disclosure."

leases. Tr. 210. In this case, however, Ronald Hunt testified that it appeared that the papers on the four properties merely "got filed" in his files and "never got to Genesis Properties, because when we went through the files, Genesis didn't have any record of those four properties being inspected by the city." Tr. 210-11. As a result, Respondent argues that GPI did not have written documentation regarding the presence of lead paint in the properties in its files when it came time to lease them and so did not disclose the presence of lead or provide the records relating thereto in connection with such leases. Tr. 211. Ronald Hunt testified that Respondents only realized this error when they conducted an audit of their files in response to receiving EPA's subpoena. *Id*. Thus, he attributed the violations to "clerical error." Tr. 210-211. Ronald Hunt stated that the errors were not intentional and they were not trying to mislead tenants. Tr. 212.[51]

In his testimony, Michael Hunt confirmed his father's testimony to the effect that the non-disclosure was a result of GPI not having received documents regarding lead based paint in the subject properties from Ronald Hunt. Tr. 225-26. Michael Hunt stated "I keep a record of all the lead based paint," which he claimed he consults in connection with leases. He asserted that the incorrect boxes on the form were checked because he "did not have information that we had found lead based paint in them." Tr. 218.

Even accepting as true the testimony of the Hunts to the effect that GPI did not receive actual copies of the documents pertaining to lead paint in the properties in the normal course of business prior to entering into the leases at issue, a reduction in the penalty on the grounds of lack of culpability is not warranted. Ronald Hunt, who holds himself out as having "100 percent" control over the management of the properties (Tr. 205), acknowledges that *he had* actual knowledge of the presence of lead paint in the properties before the leases were entered into, *and so did GPI*. In the response to EPA's Subpoena No. 425, GPI represented that it was "*verbally* made aware of the lead presence" at all of the properties, except for 1813 N. 29th Street, by Ronald Hunt "soon after" he received the NOVs.[52] C's Ex. 32. Further, GPI's claim at hearing that it did not receive copies of the NOVs prior to entering into the leases is inconsistent with its responses to the Subpoena where it specifically represented that it had received the copies of the NOV for the 1124 North 28th Street, Barton Avenue and Third Street properties prior to the time those leases were entered into. C's Ex. 32, response to inquiry no. 12 ("GENESIS received a copy of the NOV [for 1124 N. 28th Street] in November 1998," "Genesis received a copy of the NOV [for Barton

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[51] To rebut GPI's assertion that it had not received copies of the NOVs from Ronald Hunt prior to entering into the leases, Complainant at the hearing noted that the top right hand side of the November 4, 1998 inspection report of the 1124 N. 28th Street property, as introduced into evidence, contains a handwritten notation made by Ronald Hunt to his son Michael Hunt stating "MH: Here's another one we need to put in computer for disclosure to future tenants. R," bearing the date of January 31, 1999. C's Ex. 30. This evidence, however, equally supports Ronald Hunt's testimony that it is his practice to forward such records to GPI and, by itself, does not evidence GPI's *receipt* of the records.

[52] GPI represented in its Response to EPA Subpoena that it had no record in its files of the presence of lead paint. C's Ex. 32.

Street] in July 1997," "Genesis received a copy of the NOV [for Third Street] in June 1998." "All of the above NOVs were addressed to and received by Ronald H. Hunt. Mr. Hunt forwarded the NOV's to Genesis Properties Inc. for action and compliance." (Except it appears this was not done on 1813 N. 29th St.)).[53] Thus, as to at least three of the four properties, GPI was on verbal, if not written, notice of the presence of lead paint prior to entering into the leases.

Furthermore, the record shows that on September 30, 1998, EPA issued TSCA Subpoena No. 358 to Patricia Hunt and David Hunt inquiring about lead disclosures made to tenants of the 3015 Barton Avenue property. C's Ex. 27; Jt. Ex. 1-Stip. 36. Ronald Hunt responded to the Subpoena on behalf of his wife and brother on October 8, 1998. C's Ex. 28; Jt. Ex. 1-Stip. 37. Despite the subpoena raising Respondents' awareness of the lead disclosure issues, thereafter, GPI nevertheless entered into three more leases for the Barton Avenue property (Leases # 6-8) and as to each failed to provide the required notice. *See* discussion regarding Barton Avenue property in Section IIC above. Failing to give the requisite notice, *after receipt of a subpoena from EPA* regarding lead paint disclosures on the property, evidences at least a negligent, if not wilful, disregard of the requirements of the Act.

Based upon the record as a whole, I do not deem Respondents to be entitled to any penalty reduction based upon the violations having not been "willful."

D. MULTIPLE VIOLATIONS

At hearing and in their Post-Hearing Brief, Respondents have argued that Complainant has abused its discretion and common sense by turning a few "minor paperwork errors" as to only four properties into 32 counts of violations. Rs' Post-hrg brief at 3, 7; Tr. 139. Respondents also suggest that Complainant's penalty calculations reflect a monetary sleight of hand which fails to actually decrease the penalty based upon the mitigation factors and, instead, artificially escalates the penalty. Respondents note that as to the two leases relating to the 1124 N. 28th Street property, Complainant has stated a total of *6 Counts* (#5, 9, 13, 35, 41, & 47), against *three Respondents* - Ronald Hunt, Patricia Hunt and GPI. Respondents claim that Complainant generously halves the penalty based upon joint and several liability only after it has already doubled it by suing the owner and leasing agent separately, effectively not decreasing the penalty at all. Rs' Post-Hrg Brief at 4. Respondents' Brief contains a similar analysis for various other violations. Rs' Brief at 4–7. On this basis, Respondents ask this Tribunal to exercise its discretion and reduce the penalty to reflect the "relatively minor nature of the offenses, and the fact that the offenses were far from widespread." Rs' Post-hrg Brief at 3.

For its part, Complainant states that Respondents have engaged in 32 separate violations of

[53] GPI's response to EPA Subpoena No. 425 (as submitted into evidence in this case) is unsigned. C's Ex. 32. Complainant's Ex. 70 suggests that upon e-mail inquiry by Complainant, Michael Hunt subsequently signed the response on behalf of GPI, and the parties stipulated in connection with this action that the response was from GPI. *See*, C's Ex. 32 and Jt. Ex. 1-Stip. 41.

the lead disclosure requirements. It points out that it only sought penalties against both the owner and leasing agent in regard to those counts where the evidence warranted, and then exercised its prosecutorial discretion to reduce the penalty where the owner and leasing agent were interconnected. Had the owners and GPI not been so interconnected, EPA suggests it would have sought the full penalty allowed against each of them. C's Post-Hrg Reply Brief 8-9.

Complainant further notes out that Respondents' cumulative violations argument was similarly made by the Respondent owner/lessor in *Harpoon Partnership,* 2003 EPA ALJ LEXIS 52 (Order Granting Complainant's Request for Partial Accelerated Decision and Denying Respondent's Request for Partial Accelerated Decision, Aug. 4, 2003)(attached to Initial Decision, May 27, 2004). In that case, based upon the absence of a disclosure form, Respondent was charged with five separate violations with an aggregate penalty of $15,840. In response, my colleague Judge Barbara Gunning held that both the owner and leasing agent individually bear the responsibility for fulfilling the disclosure requirements regardless of their relationship, contractual or otherwise. Thus, if the disclosure requirements are not fulfilled, depending on the facts of the case, both may be held fully liable. *Id*. at *34, *40. Similarly, my former colleague Judge Andrew Pearlstein, in *Ric Temple and Paul Nay & Associates,* 2000 EPA ALJ LEXIS 47(Initial Decision and Default Order, July 7, 2000), when faced with seven counts of non-disclosure in connection with the sale of a home, including separate penalties for failing to offer the purchasers an opportunity for a lead inspection and for failing to obtain an attestation by the purchasers that they were offered such an opportunity, stated "[a]lthough I have some question as to the redundancy or lesser included nature of several counts, I cannot find that assessing separate penalties for those counts would be clearly inconsistent with the record of this proceeding or the Act." *Id*. at *4 - 5.

The same can well be said in this case. Based upon the record as a whole, I do not deem Respondents to be entitled to any penalty reduction based upon the multiple counts of violations against both the owners and leasing agent.

E. COMPARABLE CASE PENALTIES

Respondents' final argument in mitigation of the proposed penalty is that the penalty of $120,085 proposed against the five of them on the 32 counts of violations is far above all other penalties assessed in lead disclosure cases; in fact, four times the highest administrative penalty ever assessed in a reported case. They assert that the penalty imposed in this case should be on the low end of the spectrum, ranging from the lowest penalty previously imposed ($4,070) to the highest penalty previously imposed ($37,037). Rs' Post-hrg Brief at 8-12.

In response, Complainant states that Respondents' penalty range argument is unsupported by prevailing case law and is misleading. With regard to prevailing case law, Complainant asserts that the "Environmental Appeals Board has consistently ruled penalty calculations for specific violations are too case-specific to be used as a litmus test as to what penalties ought to be for similar violations in other cases," citing *Chem Lab Products, Inc.*, 10 E.A.D. 711, 728 (EAB 2002) ("The Board and its predecessors have consistently held, in a number of statutory contexts, that 'penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one

case cannot determine the fact of another.'") (*quoting Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999))). C's Brief at 42. Complainant states that the EAB has proffered three reasons for its ruling in this regard: (1) each penalty inquiry is unique unto itself so that a simple abstract comparison of dollar figures for different penalties in different cases without the unique record for these cases does not allow for a meaningful comparison (*Chemlab*, 10 E.A.D. at 728); (2) such comparisons hinder "judicial economy" by encouraging Respondents to present detailed re-examination of other allegedly similar penalty cases such that "the [EAB] and ALJs would soon be awash in a sea of minutiae pertaining to cases other than the ones immediately before them,"(*Id.* at 729); and (3) such comparisons are discouraged because "unequal treatment under the law is not an available basis for challenging law enforcement proceedings," (quoting *Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995) (other citations omitted)). C's Brief at 42-43.

With regard to Respondents' argument being misleading, Complainant notes that it is not seeking a single $120,088 penalty in this case, but rather is seeking four sets of smaller penalties - independent penalties of varying amounts for a variety of violations against the various Respondents ranging from $15,840 against Respondent J. Edward Dunivan to a total of $62,024 against Respondent Patricia L. Hunt. Further, Complainant argues that the suggestion that $37,037 is the upper limit for penalties in lead disclosure cases is untrue. Complainant asserts that it has sought penalties over $100,000 in a number of other cases. Moreover, it notes that in seven of the ten cases cited by Respondent the full penalty requested by EPA was assessed, and where it was not, the penalty was reduced on case specific grounds. Further, seven out of ten of the cases cited by Respondent involved violations for a single sale or lease transaction, whereas here, ten leases are involved.

The Agency utilized the ERP, its penalty policy for Disclosure Act violations, in order to calculate the penalty in this case. A major purpose of penalty policies is to create some uniformity across the country and from violator to violator with regard to *proposed* penalties for similar violations. *See, M.A. Bruder & Sons*, 10 E.A.D. 598, 610 (EAB, 2002)(penalty policies "are designed to assure that penalties are assessed in a fair and consistent manner."). However, Administrative Law Judges are not compelled to apply such penalty policies in their decisions and may, and frequently do, depart from them and impose an alternative *final* penalty based upon the particular facts of the case before them. *See U.S. Army, Ft. Wainwright Central Heating and Power Plant,* 2003 EPA App. LEXIS 6, *113 (EAB 2003) ("the Part 22 regulations and the Board's decisions, however, make clear that the ALJ has significant discretion to assess a penalty other than that calculated pursuant to a particular penalty policy."); *see also, Employers Ins. of Wausau,* 6 E.A.D. 735, 758-9 (EAB 1997) (The ALJ's "penalty assessment decision is ultimately constrained only by the statutory penalty criteria and by any statutory cap limiting the size of the assessable penalty . . .").

The penalty heretofore crafted in this case is based upon the specific facts of this case as derived from the testimony and documents placed in evidence.[54] I am not persuaded by

[54] Credibility as discerned from a witness' testimony at hearing can, for example, play a (continued...)

Respondents that the penalty should be modified based upon previous decisions in other Disclosure Rule cases, in that none of those cases can be said to be so similar to the facts of this case that an inconsistency in penalty would be arbitrary, capricious, or constitute an abuse of discretion. Those cases simply do not support Respondents' claim that the penalty assessed in this case is inappropriate in light of the facts of this case.

V. CONCLUSION

In light of all of the factors of this case, I find it appropriate to impose against Respondents, individually and/or jointly for their 32 violations of Federal regulations promulgated under the Residential Lead Based Paint Hazard Reduction Act, an aggregate civil penalty in the amount of $84,224.80. This aggregate total penalty is based upon: (a) Respondents' failure to include in or attach to leases a statement disclosing their knowledge of the presence of lead based paint and/or lead based paint hazards in violation of 40 C.F.R. § 745.113(b)(2); (b) Respondents' failure to provide lessees with records or reports available to them pertaining to lead based paint and/or lead based paint hazards in violation of 40 C.F.R. § 745.107(a)(4); (c) Respondents' failure to include in or attach to leases a list of records or reports available to lessees pertaining to lead based paint and/or lead based paint hazards in violation of 40 C.F.R. § 745.113(b)(3); and/or (d) Respondents' failure as agent to comply with the foregoing regulations or ensure the owners' compliance therewith in violation of 40 C.F.R. § 745.115(a)(2).[55]

The $84,224.80 total aggregate penalty shall be allocated as follows:

Ronald and Patricia Hunt, jointly and severally, are assessed a total penalty of $27,504.40,

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[54](...continued)
significant part in an ALJ determining an appropriate final penalty. *See e.g.*, *Harpoon P'ship*, 2004 EPA ALJ LEXIS 111, *24 (ALJ, 2004) ("I note that Mr. Zugalj's testimony concerning compliance with the Lead Disclosure Rule was self-serving and is not considered credible or probative, particularly in light of his 1993 conviction under the Federal Frauds and Swindles Statute"); *Billy Yee*, 2000 EPA ALJ LEXIS 51,*45-46 (ALJ, 2000) ("After listening to the testimony of the witnesses, observing their demeanor at the hearing, and considering the evidence admitted into the record, I find Mr. Yee's claim that $ 12,000 is representative of his general annual income to be inherently incredible, unsupported by the record and inconsistent with the evidence proffered.").

[55] In reaching this penalty amount, consideration has also been given to the other arguments made by the parties in mitigation or support of the penalty but not discussed in detail herein, including Complainant's arguments that a significant penalty is necessary to deter future violations and that there is no evidence that Respondents have put into place reform measures in terms of their operations to prevent reoccurrence of same or similar violations. I believe the penalty imposed is sufficient to encourage voluntary compliance in the future by the Respondents and others.

allocated among the nine Counts on which they were found liable as follows:

Violations of 40 C.F.R. § 745.113(b)(2):
Count 5: $6,600 - (30% of 6,600) = 4,620, minus (20% of 4,620) = 3,696, divide by 2 = $1,848.00.
Count 6: $4,400 - (30% of 4,400) = 3,080, minus (20% of 3,080) = $2,464.00.
Count 7: $6,600 - (30% of 6,600) = 4,620, minus (20% of 4,620) = $3,696.00.
Count 8: $4,400 - (30% of 4,400) = 3,080, minus (20% of 3,080) = $2,464.00.

Violations of 40 C.F.R. § 745.107(a)(4):
Count 9: $11,000 - (30% of 11,000) = 7,700, minus (20% of 7,700) = 6,160, divide by 2 = $3,080.00.
Count 10: $6,600 - (30% of 6,600) = 4,620, minus (20% of 4,620) = $3,696.00.
Count 11: $11,000 - (30% of 11,000) = 7,700, minus (20% of 7,700) = $6,160.00.
Count 12: $6,600 - (30% of 6,600) = 4,620, minus (20% of 4,620) = $3,696.00.

Violation of 745.113(b)(3):
Count 13: $1,430 - (30% of 1,430) = 1,001, minus (20% of 1,001) = 8,00.80, divide by 2 = $400.40.

David Hunt and Patricia Hunt, jointly and severally, are assessed a total penalty of $15,840.00, allocated among the six Counts on which they were found liable as follows:

Violations of 40 C.F.R. § 745.113(b)(2):
Count 17: $6,600 - (20% of 6,600) = 5,280, divide by 2 = $2,640.00.
Count 18: $4,400 - (20% of 4,400) = 3,520, divide by 2 = $1,760.00.
Count 19: $4,400 - (20% of 4,400) = 3,520, divide by 2 = $1,760.00.

Violations of 40 C.F.R. § 745.107(a)(4):
Count 20: $11,000 - (20% of 11,000) = 8,800, divide by 2 = $4,400.00.
Count 21: $6,600 - (20% of 6,600) = 5,280, divide by 2 = $2,640.00.
Count 22: $6,600 - (20% of 6,600) = 5,280, divide by 2 = $2,640.00.

J. Edward Dunivan, individually, is assessed a total penalty of $ 9,856.00, allocated among the four Counts on which he was found liable as follows:

Violations of 40 C.F.R. § 745.113(b)(2):
Count 25: $6,600 - (30% of 6,600) = 4,620, minus (20% of 4,620) = 3,696, divide by 2 = $1,848.00
Count 26: $6,600 - (30% of 6,600) = 4,620, minus (20% of 4,620) = 3,696, divide by 2 = $1,848.00.

Violations of 40 C.F.R. § 745.107(a)(4):
Count 27: $11,000 - (30% of 11,000) =7,700, minus (20% of 7,700) = 6,160, divide by 2 =

$3,080.00.

Count 28: $11,000 - (30% of 11,000) =77,00, minus (20% of 7,700) = 6,160, divide by 2 = $3,080.00.

GPI, individually, is assessed a total penalty of $31,024.40, allocated among the thirteen Counts on which it was found liable for violating 40 C.F.R. § 745.115(a)(2) as an agent for failing to comply or insure the lessors' compliance with 40 C.F.R. §§ 745.113(b)(2), 745.107(a)(4), 745.113(b)(3) as follows:

Count 35 (correlates with Count 5 against Ronald Hunt & Patricia Hunt)	$ 1,848.00
Count 36 (correlates with Count 17 against David Hunt & Patricia Hunt)	$ 2,640.00
Count 37 (correlates with Count 18 against David Hunt & Patricia Hunt)	$ 1,760.00
Count 38 (correlates with Count 19 against David Hunt & Patricia Hunt)	$ 1,760.00
Count 39 (correlates with Count 25 against J. Edward Dunivan)	$ 1,848.00
Count 40 (correlates with Count 26 against J. Edward Dunivan)	$ 1,848.00
Count 41 (correlates with Count 9 against Ronald Hunt & Patricia Hunt)	$ 3,080.00
Count 42 (correlates with Count 20 against David Hunt & Patricia Hunt)	$ 4,400.00
Count 43 (correlates with Count 21 against David Hunt & Patricia Hunt)	$ 2,640.00
Count 44 (correlates with Count 22 against David Hunt & Patricia Hunt)	$ 2,640.00
Count 45 (correlates with Count 27 against J. Edward Dunivan)	$ 3,080.00
Count 46 (correlates with Count 28 against J. Edward Dunivan)	$ 3,080.00
Count 47 (correlates with Count 13 against Ronald Hunt & Patricia Hunt)	$ 400.40
	$31,024.40

In sum, the total penalties assessed against the Respondents in this cases are as follows:

Ronald H. Hunt and Patricia L Hunt -	$ 27,504.40
David E. Hunt and Patricia L. Hunt -	$ 15,840.00
J. Edward Dunivan -	$ 9,856.00
Genesis Properties, Inc. -	$ 31,024.40
	$ 84,224.80

ORDER

1. A civil penalty in the amount of $27,504.40 is assessed, jointly and severally, against Respondents Ronald H. Hunt and Patricia L. Hunt; a civil penalty in the amount of $15,840.00 is assessed, jointly and severally, against Respondents Patricia L. Hunt and David E. Hunt; a civil penalty in the amount of $9,856.00 is assessed against Respondent J. Edward Dunivan; and a civil penalty in the amount of $31,024.40 s assessed against Respondent Genesis Properties, Inc.

2. Payment of the full amount of these civil penalties shall be made within thirty (30)

days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

Mellon Bank
EPA - Region 3
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondents' names and addresses, must accompany the check(s).

4. If Respondents fail to pay the penalties within the prescribed statutory period after entry of this Order, interest on the penalties may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. §22.30(b).

_____
Susan L. Biro
Chief Administrative Law Judge

Date: March 8, 2005
Washington, D.C.

In the Matter of Ronald H. Hunt, Et Al., Respondents
Docket No. TSCA-03-2003-0285

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated March 8, 2005, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: March 8, 2005

Original and One Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk (3RC00)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Pouch Mail to:

James Heenehan, Esquire
Joseph J. Lisa, Esquire
Assistant Regional Counsels
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Certified Mail Return Receipt to:

Bradley P. Marrs, Esquire
Christopher G. Hill, Esquire
Meyer, Goergen & Marrs, P.C.
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Richmond, VA 23226