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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
U.S. ENVIRONMENTAL APPEALS BOARD

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In the matter of: :
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Ronald H. Hunt, et al., : Docket No.
: TSCA-03-2003-0285
Respondents. : TSCA Appeal No. 05-01
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Environmental Protection Agency
East Building
1201 Constitution Avenue, N.W.
Washington, D.C.

Thursday, September 29, 2005

Oral argument in the above-entitled matter
convened, pursuant to notice, at 10:05 a.m.

BEFORE:

SCOTT C. FULTON, ANNA L. WOLGAST, AND
EDWARD E. REICH

Environmental Appeals Judges.

APPEARANCES:

On Behalf of the Respondents:

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C O N T E N T S

ORAL ARGUMENTPageBradley Marrs, On behalf of
the Respondents

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James Heenehan, On behalf of the
Environmental Protection Agency

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Rebuttal Argument by Bradley Marrs
On behalf of the Respondents

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1 P R O C E E D I N G S

2 THE CLERK: All rise. The Environmental
3 Appeals Board of the United States Environmental
4 Protection Agency is now in session for the purpose
5 of hearing oral argument in the matter of Ronald H.
6 Hunt, et al. Docket No. TSCA-03-2003-0285. Appeal
7 No. TSCA-05-01.

8 The Honorable Judges Scott Fulton, Anna
9 Wolgast, and Edward Reich presiding.

10 Please be seated.

11 JUDGE WOLGAST: Welcome. We're here today
12 to hear argument pursuant to the board's order of
13 July 28th. And under that order, both Hunt and the
14 region have 30 minutes per side for argument.

15 And Mr. Marrs, would you like to begin and
16 introduce yourself for the record and advise the
17 board as to whether you'll be reserving any time
18 for rebuttal, please?

19 ORAL ARGUMENT OF BRADLEY MARRS

20 ON BEHALF OF THE RESPONDENTS

21 MR. MARRS: Thank you, Your Honor.

22 I am Brad Marrs. Along with my co-counsel

1 seated at appellant's table, Chris Hill, I am here
2 on behalf of the respondents below--the appellants
3 here, the property owners, and their management
4 agency company.

5 I believe I'll be able to reserve five
6 minutes for rebuttal.

7 May it please the Court, the standard of
8 review in this case is de novo. The sole issue
9 before the Court is the amount of the fine that has
10 been set by the Administrative Law Judge below a
11 bit over \$84,000.

12 The facts of the case are that Ronald Hunt
13 is the central figure involved in the counts
14 brought by the EPA. Genesis is the property
15 management company that Mr. Hunt controls, also run
16 by his son Michael Hunt. Mr. Hunt, along with his
17 wife, his brother, and some business associates,
18 the Dunivans, were the owners of the property.

19 Genesis managed all of those properties,
20 and all affairs of the rental properties were run
21 through the Genesis management offices. Genesis
22 actually manages over 100 rental properties. Only

1 four were found to have violations, and those are
2 the four properties with which we are concerned
3 here.

4 First, we'd like to acknowledge what we've
5 acknowledged below, which is that Genesis and the
6 respondents generally admit that errors were made
7 with respect to these four properties in checking
8 the wrong boxes on the disclosure forms given to
9 tenants.

10 JUDGE REICH: Can I ask one question? I
11 noticed that the agency amended its complaint and
12 dropped the counts that related to actual giving of
13 notice. Do the respondents admit that they, in
14 fact, did not give notice, as well as committing
15 the paperwork violations?

16 MR. MARRS: What we would say it's all the
17 same nucleus of fact. Because the wrong box was
18 checked, the management agent then did not have the
19 notice he would normally have to himself to go and
20 find the documents and present further information.

21 JUDGE REICH: So there's no representation
22 that you gave oral notice or in some form other

1 than as attached to the lease?

2 MR. MARRS: That is admittedly correct.

3 JUDGE REICH: Thank you.

4 MR. MARRS: In some of these properties,
5 what would happen is that Genesis would go back to
6 its property files upon re-leasing them and, having
7 made the mistake once, that mistake was compounded
8 as some tenants renewed and, in some cases, as new
9 tenants came in. All of that is admitted below.

10 But it's important to note that there is
11 no evidence or no contention, I don't believe, at
12 this point that there was any intent on the
13 respondents' part to deceive or mislead. There was
14 no harm to any person proved or alleged below.

15 It's been noted, including by the Judge
16 below, that the respondents have been remarkably
17 cooperative, and there is ample evidence in the
18 record of remediation efforts by these respondents
19 to an unusual extent on all the properties, an
20 extent that was deemed unusual by one of the local
21 enforcement officers.

22 In this case this morning, I will make two

1 principal arguments. The first is that we believe
2 that, in going through these count by count, we
3 have lost sight of the forest for the trees. We
4 think, generally, that the \$84,000 total fine is
5 far too high, especially in view of the reported
6 case precedents in published opinions from prior
7 Administrative Law Judge and EAB decisions.

8 What we ask for is a proportionate and
9 reasonable result. We acknowledge that we have to
10 pay a fine. We merely want it to be proportionate
11 and reasonable under the precedents and relevant to
12 the conduct that's established in the record.

13 Secondly, we'd like to discuss several of
14 the individual bases, individual errors we believe
15 were made below that potentially could provide the
16 specific mechanical means for this Court to grant
17 relief as requested.

18 Turning first to the issue of
19 proportionality, the EPA has argued on brief that
20 we should not be able to use the published case
21 precedents. And in support of that proposition,
22 they have cited cases that rely on reports of

1 settlements the EPA has reached, and they argue,
2 among other things, that settlements are sometimes
3 influenced by worry about whether or not the case
4 can actually be proved at trial.

5 Now we're not dealing with a case like
6 that here. We're dealing with a case that has been
7 proved and, in fact, in large part on the facts has
8 been admitted and even stipulated to. But surely
9 we can rely on the published opinions of judges and
10 of this appeals board under the principle of stare
11 decisis that we believe should apply in any
12 judicial proceeding.

13 JUDGE WOLGAST: Can I ask you, is your
14 argument that the Administrative Law Judge was
15 required as a matter of law to follow these
16 precedents or that she erred in her exercise of
17 discretion in calculating the penalty?

18 MR. MARRS: I would say that she erred as
19 a matter of law because while the agency can
20 certainly make its contentions under its own
21 policies internally, it's important that the public
22 have some sort of positive law notice of what type

1 of exposure it has. And where there are published
2 opinions in disputed cases that are resolved by
3 tribunals, those become the positive law that is
4 available to the public and that provides notice to
5 the public to anyone who would consult counsel or
6 have any effort to determine what their exposure
7 would be.

8 This case has become the outlier. It has
9 become an award that by the EPA's own admission is
10 more than twice as large as the most egregious
11 previously reported case, a previously reported
12 case involving substantially more violations and
13 substantially more egregious violations.

14 JUDGE WOLGAST: And that's the case only
15 if you look at the penalty in the aggregate, as
16 opposed to the penalty that was assessed to the
17 various respondents. Correct?

18 MR. MARRS: That is true. But that also
19 goes to one of our second arguments here today, but
20 I guess I can address that at this point. We
21 believe that Judge Biro erred also in following the
22 EPA's "trees approach," if you will, where they

1 broke this down into 32 counts.

2 If you're going to deal with each
3 individual owner, individually and separately, and
4 then the management company separately, you can
5 lose sight of the fact that we're dealing with 10
6 leases on 4 properties. We have 32 counts, but
7 there are 10 leases at issue on 4 properties.

8 We think that is one of the reasons why--
9 and that's one of the things we refer to as
10 multiplication of the counts, or multiplicity. In
11 some cases, we're assessing penalties multiple
12 times for what is essentially the same nucleus of
13 common fact, and that is how this award got so far
14 away from the range that is established in the 10
15 published case precedents.

16 JUDGE REICH: Let me ask about that.
17 Assuming we could do a comparison, and I think the
18 board case law you referred to certainly goes
19 beyond just a question of settled cases. But
20 assuming we could do a comparison, then the
21 question occurs how do you do that comparison?
22 You're obviously "so they're taking the aggregate

1 total for all the respondents and putting it
2 together."

3 I know you've made the argument in your
4 brief that we ought to look at the violations on a
5 property-by-property basis. It would seem to me
6 that since the essence of the violations really go
7 to the notice that you've given to a particular
8 person or group of persons under a given lease
9 that, as a minimum, you would be looking at it on a
10 lease-by-lease basis. And the data I've seen
11 suggests that, according to your notice of appeal,
12 the highest penalty per lease was \$15,840.

13 I've seen a few cases that had penalties
14 in the \$30,000 range for a single lease. So if I
15 look at it on a per-lease basis, it doesn't seem to
16 me that the penalty assessed here is out of line
17 with the precedent that you cite.

18 MR. MARRS: With all due respect, we would
19 disagree. In our brief, we have arranged the cases
20 from low to high. And I think if you review those
21 cases in that order, you'll see that the higher
22 cases are generally more egregious circumstances

1 than the lower cases.

2 For example, the Harpoon Partnership case,
3 which is the highest previous award, involves, I
4 believe, some indication of harm to the tenants
5 and, in addition, involved 45 counts, not even the
6 32 counts. Even if we take the EPA's number of 32
7 counts, the Harpoon Partnership case involved none
8 of the mitigating factors that are present here,
9 more counts than are present here, and yet it had a
10 \$37,000 award, less than half of what's been
11 assessed against the respondents here.

12 So I think, if you arrange those cases and
13 look through them number by number, you'll find
14 that somewhere in the middle of that spectrum is
15 where the facts of our case would fall. But surely
16 we would ask that we should not be made the example
17 of, that we--basically, at this point, as is shown
18 in Exhibit A to our brief, EPA is now bragging of
19 the size of the award that was given in this case.
20 And basically, we would say that is a dubious honor
21 that we would ask to be relieved of, and our hope
22 is in you.

1 JUDGE REICH: Let me just make a comment
2 on that, and then I don't really want to pursue it
3 further because I question the validity of the
4 whole analysis. But you're right as to Harpoon in
5 terms of the number of violations and the size of
6 the penalty.

7 Given that that decision was mine, I'm
8 relatively familiar with the facts. And I think
9 while you may have some mitigating circumstances
10 they didn't have there, you have some very
11 substantial aggravating circumstances in the number
12 of children and young children that they didn't
13 have in that case, which is exactly the kind of
14 reason you can't do those kinds of comparisons.

15 But there are also cases with a somewhat
16 lower total penalty where there was a singular
17 lease. So if you look at it on a per-lease basis,
18 you do find penalties higher than we have in this
19 case. But this, I don't think I really want to
20 pursue that any further at this time.

21 JUDGE FULTON: Have you cited any
22 precedent in your brief for this kind of

1 comparative analysis that you're suggesting that we
2 do? I understand that you think consistency is
3 important, but I don't think that our jurisprudence
4 on this is out of line with the jurisprudence in
5 the federal courts either.

6 That generally there is a reluctance to
7 get into a comparison of sort of penalty or
8 sanctions in cases as a meaningful guide for what
9 ought to happen in a given case. Do you cite any
10 authority for this proposition?

11 MR. MARRS: I haven't cited any
12 specifically. But with all due respect, I think
13 the burden is on the EPA to cite to the contrary.
14 I would assume that when we have published case
15 precedents, that the principles of stare decisis
16 would apply.

17 JUDGE FULTON: I think what EPA would say
18 is that the Enforcement Response Policy that the
19 agency has is intended to serve as the vehicle for
20 encouraging consistency in outcomes, taking into
21 account the variables in individual cases.

22 MR. MARRS: I know that's what they would

1 say, but they are not the final arbiter.

2 JUDGE FULTON: Why is that not a rational
3 response to your concern?

4 MR. MARRS: Because, Your Honor, they are
5 not the final arbiter. The courts are. And
6 ultimately, it's what the courts do that become the
7 law in the case. The EPA is an adversarial party
8 to us in this case, and they cannot be both our
9 judge, jury, and executioner.

10 JUDGE FULTON: Do you--

11 MR. MARRS: We have to have some impartial
12 body to go to for some proportionality and
13 reasonableness, and that body is here.

14 JUDGE FULTON: I understand that that's
15 where the decision needs to occur. Are you
16 challenging, as part of this, the rationale that's
17 set forth in the Enforcement Response Policy that
18 generally guides penalty calculations in these
19 cases? And if so, what is the nature of that
20 challenge? What's your issue with that piece of
21 guidance?

22 MR. MARRS: I think the ERP can be used,

1 but it's not the gospel and it's not the final
2 word. In cases as in this one, where the fairly
3 tedious analysis that was undertaken at trial leads
4 to a result that is so far out of the range and,
5 frankly, exorbitant relative to the misconduct
6 that's been proved, that there is some need for a
7 third-party arbiter to come in and exercise
8 discretion and to bring some justice and
9 reasonableness to the situation.

10 And that's why I think if you look at the
11 decision, it says--and Judge Biro stated in her
12 opinion that while the ERP can be guidance as to
13 how to go forward, it's not controlling, and the
14 Court ultimately makes the decision of what's
15 proportionate and what's not.

16 I don't know how else a Court would do
17 that except my reference to published case
18 precedents. Otherwise, we're simply grasping at
19 thin air. And my concern here is I'm not sure what
20 we've done except grasp at thin air because we have
21 a number of precedents out there, and this one is
22 so far out of that range.

1 So it makes no sense to us that we become,
2 as it were, the guinea pig for a new ERP
3 formulation that seems to put us at a level of fine
4 that is exorbitantly higher than what has been
5 found before in much more egregious cases. And I
6 agree that there are many of the leases here that
7 involve relatively young children. However, no
8 harm to those children was alleged or proved.

9 We did make a clerical error. Because it
10 was a clerical error, the question of whether we're
11 dealing with relatively younger children versus
12 relatively older children versus adults is not
13 something that crossed our collective mind. And as
14 a result, it has no bearing on the willfulness or
15 the conduct that needs to be fined.

16 If the purpose of the fine--since it's not
17 remedial, if the purpose of the fine here is to
18 deter future conduct and to give an incentive and
19 notice to other landlords that they need to come
20 into compliance, I can assure the Court that our
21 attention has been gotten on this point and that
22 these kinds of mistakes are things that we have no

1 intention of making in the future. But it doesn't
2 require \$84,000 to do that.

3 JUDGE FULTON: And of course, this is
4 intended to be a preventive program. So it really
5 depends on your attention before the violation is
6 identified rather than after.

7 MR. MARRS: But a very important aspect to
8 notice is that the preventive aspect of this had to
9 do with the paperwork. With respect to actual
10 prevention in the field, with respect to three of
11 the properties, Judge Biro accepted our evidence
12 that we had performed encapsulation remediation
13 even before the EPA got involved.

14 JUDGE FULTON: Well, that was after you
15 received a notice of violation, though, right?

16 MR. MARRS: From the city.

17 JUDGE FULTON: Can you tell me, what was
18 your client's standard operating procedure, prior
19 to this enforcement action taking off, with respect
20 to both encapsulation at not just the properties at
21 issue here, but the myriad properties that are
22 under your client's control?

1 MR. MARRS: I don't know that I have that
2 in the record, Your Honor. So I'm not sure that I
3 can answer that question on the record.

4 JUDGE FULTON: Well, there's some
5 suggestion that every 7 to 10 years, encapsulation
6 procedures were followed. Was that sort of
7 standard operating procedure? And if so, how did
8 these particular buildings fall outside of that?

9 And also, what was the standard operating
10 procedure with respect to notice? There is some
11 indication that pamphlets may have been distributed
12 that sort of generally talked about lead-related
13 issues, but there was something distributed. What
14 was the procedure, and why wasn't it followed here?

15 MR. MARRS: I'm not sure how much of this-
16 -well, this is a relatively small, family-owned
17 business. And as a result, we're not heavily
18 bureaucratized and proceduralized, I regret to say,
19 and that may be our downfall in this particular
20 case.

21 With respect to some of these properties,
22 they had only been owned for a few years prior to

1 the time this happened, and yet some of them had
2 already been brought to our attention by the local
3 authorities and had been addressed. With respect
4 to the fourth one, we, frankly, submit that while
5 Judge Biro was not satisfied with our evidence--
6 this with respect to the Barton Avenue property--
7 our evidence was competent and was unrefuted.

8 And we feel it's an error, in the face of
9 competent, unrefuted evidence, to disregard our
10 testimony as to encapsulation there as well.

11 JUDGE WOLGAST: I thought it was refuted
12 by Mr. Sims, the inspector for the region?

13 MR. MARRS: I'm sorry. I don't understand
14 the question.

15 JUDGE WOLGAST: I thought the oral
16 testimony of Mr. Hunt as to Barton Avenue was
17 refuted by the region's inspector?

18 MR. MARRS: I don't believe that's true.
19 The reputation is sort of a negative, pregnant
20 implication drawn by EPA as to paperwork by the
21 city not being issued. And--

22 JUDGE WOLGAST: No, I'm referring to--I

1 thought there was testimony that he had gone by the
2 property and, in his judgment, that he didn't
3 believe that encapsulation had been conducted.

4 MR. MARRS: To be honest, Your Honor, I do
5 not recall that specific testimony, and I apologize
6 if I'm mistaken. But I don't recall that specific
7 testimony relative to Barton Avenue. I apologize
8 if I may be misremembering that. I don't mean to
9 mislead the Court.

10 JUDGE FULTON: I believe in Judge Biro's
11 decision, she talks about a visual observation that
12 was conducted by Mr. Sims of the porch area, which
13 indicated, at least in his view, that it had not
14 been recently painted or coated.

15 MR. MARRS: I think that may be where I'm
16 confusing it because I believe Mr. Sims did not go
17 inside the property, for example, and did not
18 conduct a detailed examination.

19 JUDGE FULTON: I think that is true that
20 he didn't go inside.

21 JUDGE REICH: Well, wasn't the notice
22 premised on the exterior of the building to begin

1 with?

2 MR. MARRS: I think--I'm not sure they
3 drew a distinction between the two.

4 JUDGE REICH: I think in the initial
5 decision, they seemed to. But if you want to
6 refresh your memory, it's on page 31 of the initial
7 decision. And it's also discussed in the
8 complainant's reply brief. So if you want to look
9 at it and have any further comments to make on
10 rebuttal, you can certainly do, you know?

11 MR. MARRS: I will address it on rebuttal,
12 Your Honor. Thank you.

13 JUDGE REICH: Can I ask is there anything
14 in the record that indicates whether the
15 respondents, once they were notified of the
16 violations, then went ahead and notified the people
17 who had not received the violations so that they
18 would have, for instance, had the ability to get
19 their children tested if they had wanted to?

20 MR. MARRS: I think that was done on
21 renewal of the leases from that point out. We
22 corrected the filings and the materials--

1 JUDGE REICH: So anyone who had an expired
2 lease would never have known that they had
3 potential exposure?

4 MR. MARRS: I believe that's true. But
5 the potential exposure was for a period of, I
6 believe, a year or two at the maximum. And I'm not
7 sure in some cases that we even knew where those
8 people were. We're dealing with relatively low-
9 income rental properties in an urban environment,
10 and locating them is not necessarily an achievable
11 task.

12 But to answer your question specifically,
13 I don't believe there is any information in the
14 record to that effect, but I think that's why.

15 We have mentioned the multiplication of
16 the counts. We have mentioned the lack of evidence
17 of any intent to violate, any willfulness, any
18 intent to conceal or mislead. Judge Biro herself
19 cited our exceptionally honest and direct attitude
20 with respect to cooperation, and we've mentioned,
21 of course, the lack of harm and the fact that we
22 had encapsulation activities before EPA became

1 involved, albeit on being reminded by the city.

2 With these factors in mind and bearing in
3 mind that we're not dealing with a situation of
4 harm, we're not dealing with deliberate and willful
5 misconduct, but merely dealing with an error in our
6 handling of paperwork, which we assure you is now
7 being addressed, and we're being very, very
8 careful, we would ask for this Court's intervention
9 to bring reasonableness and proportionality to
10 these fines.

11 JUDGE WOLGAST: Let me ask you a question
12 about the multiplicity argument. In working this
13 through, it seems to me this blows from the
14 regulations themselves. Obviously, the statute
15 sets out criteria for assessing of penalty. But
16 then the regs themselves say that failure to comply
17 with any provision of the subpart results in a
18 violation.

19 And so, my question is doesn't this derive
20 from the regs? I don't see how we would get to a
21 property-by-property analysis or an analysis that
22 looks somehow other than at each of the

1 transactions at issue in looking this regulatory
2 provision?

3 MR. MARRS: I think that's the difference
4 between how the EPA would first assess it and how a
5 court would review it. I think if you look at
6 these opinions in, for example, the Harpoon case--
7 the Reich's decision--you will find that where the
8 rigid application of the formula would lead to an
9 excessive result, the courts have intervened in
10 order to grant a sense of reasonableness to the
11 overall result in the case. And that is what we
12 have requested from the outset.

13 We're still--we have always said, and
14 we've said before Judge Biro and again here, we
15 understand we will have to pay a fine. We
16 understand that fine will be substantial.
17 Certainly a fine in the tens of thousands of
18 dollars is a substantial fine to a small business
19 of this nature, managing, you know, rental
20 properties.

21 But a fine of \$84,000, an amount of that
22 exceeds a great deal of the population's total

1 annual income, is, we think, out of whack. We
2 think it's out of proportion to what happened here,
3 and that's why we're imploring the courts for some
4 relief.

5 JUDGE WOLGAST: And Judge Biro did go
6 outside the penalty policy, did she not, to take
7 into account some of the circumstances that you are
8 pointing to as the mitigating circumstances?

9 MR. MARRS: She did. As of the time of
10 our hearing, EPA had reduced its demand to
11 approximately \$121,000. And without those actions
12 that you describe, it would have been that amount.
13 But again, that is so far above--it kind of depends
14 on where you start. When we started this case, we
15 were being sued for nearly \$400,000. Relative to
16 that number, \$84,000 seems fairly reasonable.

17 But relative to experience with this law
18 prior to our case being filed, the \$84,000 is,
19 again, more than twice any previous award, and we
20 think it's well out of proportion.

21 I thank you and hope that you will
22 intervene on our behalf.

1 JUDGE FULTON: If I could ask you a
2 question before you sit down? You've mentioned
3 several times the underlying problem here as a
4 paperwork problem or paperwork snafu or mistake of
5 some kind. Can you, in your own words, just re-
6 describe what you think transpired here? I assume
7 that we can find a basis for it in the record. But
8 just succinctly, what was the confusion here?

9 MR. MARRS: There is a form that gives two
10 options for a box to check in a form that is given
11 to the tenant. The form either says "I have no
12 knowledge that there is lead in the property" or
13 "there may be lead in the property and here is
14 information, supplemental documentation about lead
15 risks." May I continue to answer your question?
16 Thank you.

17 The error was that the rental agent
18 mistakenly checked the box saying that there was no
19 knowledge of lead when, in fact, there was
20 knowledge of lead, albeit encapsulated lead.
21 Because it was encapsulated, we think what we did
22 is we failed to give them notice of a nonexistent

1 risk. The risk was nonexistent because we had
2 adequately encapsulated it and were maintaining it.

3 But we did give the wrong paperwork, and
4 there's never been any contention to the contrary.
5 And upon re-releasing the property and pulling our
6 file and looking at what we had said before, we
7 relied on that and made the same mistake repeatedly
8 in some cases.

9 But we don't think there was any
10 opportunity for harm to occur because in each of
11 those cases we were dealing with an encapsulated
12 lead, not an open friable type of lead situation.

13 JUDGE FULTON: So the confusion then was
14 about what your obligation was in a circumstance in
15 which you had encapsulated? Was that the
16 confusion? Or was it that one person didn't know
17 what the other person knew?

18 MR. MARRS: I believe it's the latter.
19 That there were files in one location in the
20 office, I believe it was Ronald Hunt's testimony,
21 that the rental agent failed to get access to. It
22 may have been sloppy record-keeping in that sense

1 that the files should have been consolidated so
2 that someone could have opened the file and seen
3 all the records in one place.

4 I believe the testimony was that some of
5 the records were in Ronald Hunt's office. Others
6 were in Michael Hunt's office. And Michael Hunt,
7 in filling out the forms, was simply not aware of
8 what was in his father's office.

9 JUDGE REICH: Can I ask one last question
10 prompted by something you just said? Do you
11 disagree with the statement the ALJ makes that
12 encapsulation does not work on friction surfaces?

13 MR. MARRS: I would disagree with that
14 based on the evidence. I think the evidence is
15 that it does not last forever, but it can work for
16 a period of years and that it has to be attended
17 to. You can look at the surfaces to see if the
18 paint has worn.

19 The testimony with respect to
20 encapsulation is that there is an encapsulating
21 paint that has very much of a glue-like texture
22 when it's put on, and then an overlayer of ordinary

1 paint is placed over that for cosmetic purposes.
2 So it's possible to see when that paint has worn
3 off.

4 JUDGE REICH: Thank you.

5 MR. MARRS: Thank you.

6 JUDGE WOLGAST: Mr. Heenehan?

7 ORAL ARGUMENT ON BEHALF OF THE
8 ENVIRONMENTAL PROTECTION AGENCY

9 MR. HEENEHAN: Good morning, Your Honors.

10 My name is Jim Heenehan, and I am the attorney that
11 will be doing the oral argument for the plaintiff,
12 who is the Associate Director for Enforcement of
13 the Waste and Chemicals Management Division for EPA
14 Region III. At counsel table with me are my
15 associates, Joseph Lisa and Gary Jonesi.

16 We believe that Judge Biro's four sets of
17 penalties totaling \$84,224 ought to be affirmed for
18 the following reasons. The four penalties are fair
19 and reasonable for respondents' 32 collective lead
20 disclosure rule violations concerning 10 leases at
21 4 properties. The penalties range from \$9,856 for
22 J. Edward Dunivan to \$31,024 for Genesis

1 Properties, Inc.

2 Judge Biro's penalty analysis is based on
3 statutory factors supported in Section 16(a)(2)(B)
4 of TSCA. With one exception, Judge Biro's penalty
5 analysis follows the EPA February 2000 Section 1018
6 disclosure rule, environmental response policy, and
7 for that one exception provides a reasonable
8 explanation for such deviation, even if the agency
9 would prefer its originally suggested penalty.

10 The board has said on several occasions
11 that the ERPs incorporate the statutory factors of
12 the relevant statutes. See Carroll Oil and M.A.
13 Bruder & Sons. And while the EAB conducts a de
14 novo review of the presiding officer's penalty
15 decisions, the board has also stated on several
16 occasions that it will not overturn a penalty by
17 the presiding officer who substantially follows the
18 ERP unless there is clear error or abuse of
19 discretion shown. See Morton L. Friedman and
20 Schmitt Construction Company and M.A. Bruder &
21 Sons.

22 Judge Biro's penalties here substantially

1 follow the ERP, and respondents have not shown any
2 clear error or abuse of discretion. And therefore,
3 the EPA requests the board to affirm Judge Biro's
4 penalties in full.

5 I'd like to briefly respond to
6 respondents' arguments and then get back to a more
7 detailed discussion of them if time permits. I
8 will be responding to them in the order that they
9 are set forth in the text of their appeal brief.
10 That order differs somewhat from the notice of
11 appeal, and I'll identify them as we go along.

12 Of the five issues raised in that brief,
13 two of them are set forth as 1(a) and 1(b).
14 Argument 1(a) is what respondents had referred to
15 as their penalty range argument, and we believe
16 that this argument is without merit for a variety
17 of reasons, but mostly because that none of the
18 cases cited state that there is an absolute limit
19 of \$37,037 for lead disclosure rule violations in
20 all penalty cases.

21 Moreover, as the board has said on several
22 occasions, every case is unique, and the penalties

1 from one case should not limit the penalties in the
2 second case, even if the violations are similar.
3 See Titan Wheel Corporation of Iowa and Chem Lab
4 Products.

5 Argument 1(b) is their penalty
6 multiplication argument--

7 JUDGE WOLGAST: Well, before we go to that
8 argument--

9 MR. HEENEHAN: Yes?

10 JUDGE WOLGAST: --how would you compare
11 these facts, the facts of Harpoon and some of the
12 other recent cases?

13 MR. HEENEHAN: The facts in the cases--
14 actually, if you look at the cases, from what I
15 have done, seem to be absolutely consistent with
16 the ERP, that if you had the same age of children,
17 the same violations in this case, from what I can
18 understand, you would end up with the same penalty.
19 But the facts are all very fact-specific. You have
20 to look at things like ability to pay, whether
21 there was prior violations by the respondents,
22 whether there was disclosure.

1 In the Harpoon case, which the respondents
2 have alluded to and is the one that superficially
3 most closely resembles this case, you have 9 leases
4 versus the 10 in case at bar. And the penalty is
5 substantially lower than the aggregate penalty set
6 forth in this case.

7 However, in that case, you only had one
8 set of families with children under the age of 6
9 and only one family with children between the ages
10 of 6 and 17. The occupants of the other seven
11 leases were all adults, 18 or older. In this case,
12 we have five families with children under the age
13 of 6, and the other five have children between the
14 ages of 6 and 17.

15 If you look at Complainant's Exhibit 94,
16 the toxicology report, you will see that children
17 under the age of 6 are especially sensitive to lead
18 poisoning. And this is why the ERP for lead has a
19 much higher penalty for violations where young
20 children are present than if adults are present in
21 the same situation.

22 JUDGE REICH: In the analysis you did, is

1 the presence of the greater number of children, and
2 particularly younger children, the main thing that
3 drove the distinction between what was assessed in
4 Harpoon and what you sought here?

5 MR. HEENEHAN: No, Your Honor. We could
6 actually go into this in some depth. There's
7 different counts.

8 For example, the Section 107(a)(4) count
9 that we've cited here, which carries the highest
10 penalty in this matter, was not assessed--I believe
11 it was not assessed in Harpoon. And that is
12 failure to give documents, copies of documents with
13 lead-based paint to the tenants prior to signing of
14 the leases.

15 JUDGE REICH: That's fine. I don't want
16 to get into it any more deeply than that. So the
17 presence of a greater number of children wasn't the
18 main determinant in the difference between the
19 penalties?

20 MR. HEENEHAN: It is one of the main ones.

21 JUDGE REICH: It's one. Okay.

22 MR. HEENEHAN: I should also note that of

1 the 10 cases cited by respondents, 7 concern single
2 leases. We have 10 leases here. Common sense
3 would dictate that violations for a single lease,
4 all things being equal, would be substantially
5 lower than violations for 10 leases. There's a lot
6 of differences between the two.

7 JUDGE REICH: Is there a cumulative effect
8 of exposure to lead? That is, if I'm in a property
9 for two years, is my risk greater than if I were
10 there for one year, in which case maybe it's worse
11 to have fewer leases longer term than a
12 multiplicity of short-term leases?

13 MR. HEENEHAN: Well, in certain instances.
14 Obviously, it's worse depending upon the lead
15 conditions. For example, if you have a lease that
16 has lead block applied to it. If the lead block is
17 not applied properly--and there's a variety of
18 things that could go wrong with the application of
19 the lead block--it could be effective for a period
20 of six months or a year.

21 But as the HUD guidelines state, which are
22 the 1995 guidelines for the evaluation of lead

1 hazards to residential housing, they state that
2 with focusing on lead block, there's not a lot of
3 data. It can be effective for up to three years,
4 they say, but it also could break down within a
5 matter of months, depending upon how it's applied.

6 So, yes, if you were to move into the
7 house and are there for two years, the lead block
8 supply that's not done properly, your second year
9 could be more at risk than your first year.

10 JUDGE REICH: So it's not a given that in
11 terms of actual harm, a multiplicity of short-term
12 leases, which would lead to a higher penalty, is
13 worse than people who are there on longer term
14 leases?

15 MR. HEENEHAN: No, that's not a given,
16 Your Honor.

17 JUDGE REICH: Okay.

18 JUDGE FULTON: I have a question just
19 before you go further about encapsulation and its
20 efficacy. Is encapsulation viewed as one of the
21 preferred remedial measures for lead-based paint in
22 residential buildings?

1 MR. HEENEHAN: It is one of the methods of
2 addressing lead-based paint in residential
3 buildings. I'm not sure if I'd use the term
4 "preferred." The HUD guidelines speak that there
5 is relatively limited data on the long-term
6 effectiveness on it.

7 But it is--they also acknowledge that a
8 lot of landlords do, in fact, use that for the lead
9 problems.

10 JUDGE FULTON: What's the EPA's policy
11 orientation on encapsulation versus abatement,
12 given some of the I would assume environmental
13 problems that are probably inherent in the process
14 of abatement? Does the agency have a policy view
15 on--

16 MR. HEENEHAN: Well, if you're asking in
17 terms of what the penalties should be, given the
18 types of remediation that is addressed, the only
19 mitigation that the agency has given under the ERP
20 is that there is complete lead paint removal. And
21 therefore, it would not--it does not acknowledge or
22 grant any kind of mitigation for a lead block

1 application where there has been a failure to
2 follow the lead disclosure regulations that are
3 required.

4 JUDGE FULTON: Does that suggest there
5 might be a need to update or change the ERP?

6 MR. HEENEHAN: I don't think it suggests
7 that, Your Honor.

8 JUDGE FULTON: It did strike me as a
9 little strange, as I was reading the decision, that
10 encapsulation, this whole notion of establishing
11 some sort of barrier between the lead-based paint
12 and receptors only finds a place in the ERP in the
13 mitigation arena, and there not very clearly.

14 Is it true that the extent of exposure is
15 not addressed by the ERP in assessing the gravity
16 of the violation? Am I reading it correctly?

17 MR. HEENEHAN: When you say the exposure
18 and the risk, I assume you're talking about the
19 risk to physical contact?

20 JUDGE FULTON: Yes.

21 MR. HEENEHAN: Well, first, we see risk as
22 on a broader front than that. We also see this as

1 a statute where it gives parents a right to make an
2 informed decision about where they wish to have
3 their children live. And that is, even if you as a
4 parent might feel that it's okay to live in an
5 apartment with lead-based paint that has been
6 coated with lead block, another parent might not
7 feel that that is okay.

8 And by not advising the second parent of
9 the actual situation in that house, her rights have
10 been violated. And therefore, that is a harm--

11 JUDGE FULTON: No, no. I understand all
12 that, and I think that's important. I guess my
13 question is why the ERP does not draw a distinction
14 between the circumstance in you've got a non-
15 encapsulated surface and one that is encapsulated?

16 MR. HEENEHAN: Your Honor, I think they
17 wanted a bright-line test. I can tell you that
18 there has been an ERP work group committee, working
19 for the past year and a half, reviewing the entire
20 ERP. And amongst the issues under discussion is
21 whether there should be any mitigation granted for
22 such kinds of work and, if so, what are the minimum

1 levels of proof one would need to establish in
2 order to get any mitigation were one to go down
3 that road. But it has not gotten beyond the
4 talking point stage at this point.

5 JUDGE FULTON: Just that the statute talks
6 about the gravity of the violation, and it would
7 appear as though, in trying to figure out whether a
8 situation is grave or not, that that might be a
9 consideration.

10 MR. HEENEHAN: Yes, Your Honor. I assume-
11 -I would believe that those discussions had taken
12 place at the agency when they made up their ERP.
13 But I think what they decided to do was establish
14 at that time a bright-line test as to whether or
15 not you're going to get mitigation only if the
16 property is made completely lead free. And they
17 decided not to go down that road.

18 JUDGE FULTON: Well, if a property is lead
19 free, why are you even dealing with disclosure? Do
20 you still have a disclosure obligation if there's
21 been abatement and a certification that it's lead
22 free?

1 MR. HEENEHAN: Yes. It would--no, this
2 is--actually, you're using the term, I think, in
3 two different ways. In one, if it's certified lead
4 free and you have that on record prior to signing
5 the lease, I don't believe you have to comply with
6 the lead disclosure rule requirement at that point.

7 However, if you do not know if it's lead
8 free, sign a lease, don't give your disclosure
9 notices to the tenants, and action is brought, you
10 then go back and hire somebody to find out. And it
11 turns out that the prior landlord, let's say, had
12 done a complete lead abatement of the property, and
13 it is, in fact, certified lead free and you can
14 prove that to the agency, you get an 80 percent
15 reduction.

16 You still get some penalty because you
17 still should have given your disclosure rule
18 notifications to the tenants so that they can have
19 a right to know.

20 JUDGE FULTON: Thank you. I was confused
21 about that.

22 MR. HEENEHAN: The respondents have raised

1 a penalty multiplication argument that was alluded
2 to earlier. As Your Honors have pointed out, the
3 regulations specify that these are base
4 requirements, and there are specific things that
5 need to be done for each of these leases and that
6 this is very clear. The reason why they are lease-
7 based rather than property-based is to protect the
8 tenants of the leases, not the properties of the
9 owners.

10 And therefore, each failure here is a
11 separate violation. You failed to give the
12 notification that it's lead-based paint in the
13 lease. You also failed to give documents, copy of
14 the documents to these tenants coming in so they
15 could see the areas where lead paint was areas of
16 concern in that property.

17 JUDGE FULTON: Could you shed any light on
18 this statement in Judge Biro's decision where she
19 talks about Mr. Hunt? Let's see if I can put my
20 hands on it here. Mr. Hunt testified that
21 respondents gave the tenants the lead disclosure
22 pamphlet and form.

1 MR. HEENEHAN: Yes. Your Honor--

2 JUDGE FULTON: Is that true?

3 MR. HEENEHAN: Yes, sir.

4 JUDGE FULTON: With respect to all of
5 these leases?

6 MR. HEENEHAN: Yes, Your Honor. We
7 believe that is correct.

8 JUDGE FULTON: What is that piece of
9 information that the tenants were given?

10 MR. HEENEHAN: It says that if you have
11 old housing prior to 1978, it may contain lead-
12 based paint. There's hazards here, and here are
13 things you can do to address those hazards.

14 JUDGE FULTON: I see. But in the agency's
15 view, that misses the more detailed information
16 that allows people to both make a measured decision
17 about whether to enter into the lease and then how
18 to conduct themselves once they're on the premises?

19 MR. HEENEHAN: Your Honor, I would draw a
20 distinction between being told that the property
21 may contain lead-based paint and saying it actually
22 does contain lead-based paint.

1 By the way, one thing I should also
2 mention on Harpoon, there is a mention in there
3 that there is no--there is harm to the tenants in
4 Harpoon. If you will go back and read the
5 decision, there is no harm alleged in terms of
6 physical harm to tenants. There's no children with
7 elevated blood lead levels that was referenced in
8 that decision.

9 JUDGE WOLGAST: On this issue of
10 multiplication of violations or penalties, in facts
11 like these, can't the violation attributed to the
12 agent be subsued within the violation attributed to
13 the lessor? I mean, here, in several instances at
14 least, aren't we talking about "I, Mr. Ronald Hunt,
15 as GPI failed to ensure that I, Ronald Hunt, did
16 the proper disclosures?"

17 MR. HEENEHAN: Your Honor, the preamble to
18 the lead disclosure rule regulations states pretty
19 clearly that the obligation for lead disclosure
20 falls primarily, to use its word, on the owners.
21 And if they have an agent, as is the case in most
22 situations, it also is on them as well. So I don't

1 see this as one where the agent is primarily
2 responsible and the other ones are of the secondary
3 role.

4 Having said that, in those cases where the
5 agent was also assessed or addressed for similar
6 violations as to the lessors in this case because
7 it's a closely knit family operation, we exercised
8 our prosecutorial discretion to only assess
9 penalties of 50 percent of what they could have
10 been under ERP for both the lessors and for the
11 agent.

12 We're not taking the view that agents
13 should get all of it and the lessors none of it.
14 Had these parties been independent parties, we
15 would have gone after a strict 100 percent for each
16 of them. So given the context of this particular
17 situation, we only--we gave 50 percent reductions.

18 And that is something that was noted by
19 Judge Biro in the context of what could be termed a
20 passive owner penalty mitigation argument. And I
21 think it's Footnote 37 of her opinion, where she
22 says to the extent that there is any issue being

1 raised along these lines, there's been more than
2 enough mitigation for the 50 percent reductions.

3 JUDGE WOLGAST: Are you aware of any other
4 case that presents similar facts where the agent
5 and the lessor are essentially the same person?

6 MR. HEENEHAN: Are essentially the same
7 person, where you basically have the owners as also
8 basically the principal for? No, I'm trying to
9 think if Harpoon had--no, Harpoon was actually a
10 different situation. So, no, I'm not aware at this
11 moment of that type of situation.

12 Respondents have challenged Judge Biro's
13 ruling that the Barton Avenue property was never
14 coated with lead paint. I should note here that in
15 all these challenges, Judge Biro has followed the
16 ERP. There has to be a showing of clear error or
17 abuse of discretion. In none of respondents'
18 arguments to date have I heard anywhere that Judge
19 Biro made a clear error or abuse of discretion in
20 any of her decisions.

21 As to the Barton Avenue property, this is
22 really an issue of witness credibility. And

1 there's two witnesses that Judge Biro, she reviewed
2 the testimony of. One was Ronald Hunt for
3 respondents. The other was Risk and Department of
4 Health lead inspector Lonnie Sims. There is 16
5 pages in the record of testimony from Lonnie Sims
6 on why the Barton Avenue property was not
7 encapsulated, and I believe it's pages 161 through
8 177 of the transcript.

9 Witness credibility is an issue of
10 culpability, is one that the board has said on many
11 occasions it will defer to the presiding officer on
12 this particular issue, and we are going to request
13 that they do so here. As to what Lonnie Sims's
14 testimony was, he said that he was the inspector.
15 He went out and did the original inspection back, I
16 believe, in 1997, found lead paint, which was the
17 basis for the 1997 NOV for this property.

18 Went back subsequently that summer to the
19 property and checked the exteriors of the property,
20 the porch and the exterior walls. Came back again
21 three different months in 2004, checked it again.
22 When we asked Mr. Sims what was his conclusion

1 after these inspections, he said nothing had been
2 done.

3 When we asked him what was the basis for
4 that determination, he said, well, if you apply
5 lead block, it has a glue-like coating, and it
6 fills in cracks and makes for a smooth surface. In
7 fact, the properties here still had flaking and
8 peeling, just like they did in 1997. And
9 therefore, he concluded that there had, in fact,
10 been no lead block applied.

11 As to the larger issue of--

12 JUDGE REICH: Can I ask just--the record
13 ultimately will speak for itself, but do you
14 remember whether Mr. Sims was cross-examined on
15 that aspect of his testimony?

16 MR. HEENEHAN: I know Judge Biro did ask
17 him certain questions, as did opposing counsel. I
18 think opposing counsel's questioning was more on
19 the line of whether there had been penalties issued
20 or penalty action taken against respondents for
21 their failure to comply. Judge Biro, I think,
22 asked certain follow-up questions on the actual

1 inspections themselves.

2 We went through, I thought, fairly
3 thoroughly, though, since Mr. Sims was away from
4 the Richmond Department of Health for a two- or
5 three-year period, we also asked him how he could
6 be sure that there hadn't been something applied in
7 the interim period between when he initially left
8 the Richmond Department of Health and when he
9 returned. And he explained that the texture of the
10 lead block substance would have held up during that
11 interim period, and the integrity of it should not
12 have changed to the point where it would be peeling
13 and flaking, when he returned in 2004.

14 JUDGE FULTON: Who had the burden of proof
15 on this question that we have these competing
16 witnesses on?

17 MR. HEENEHAN: As to whether or not there
18 had been lead block applied to these properties?

19 JUDGE FULTON: Yes.

20 MR. HEENEHAN: It is the agency's position
21 that this is in the nature of affirmative defense,
22 and the burden of proof should be on the

1 respondents.

2 JUDGE FULTON: Okay. Thank you.

3 MR. HEENEHAN: As to respondents' argument
4 that there had been--that they were cooperative and
5 that deserves more than 10 percent mitigation that
6 Judge Biro assessed, we simply note that the ERP
7 provides for a 10 percent cap on cooperation.
8 Judge Biro applied the ERP in applying with the 10
9 percent mitigation.

10 That the board has said several times that
11 the judge substantially follows the ERP, and
12 there's no clear error of abuse of discretion,
13 they're not going to overturn the presiding
14 officer's decision. And we believe that is what
15 the case is here.

16 We should also note that while the agency
17 believes that, overall, respondents have been
18 cooperative, there are elements of respondents'
19 cooperation that I think perhaps are overstated.
20 When they suggest that they did this remediation
21 work voluntarily, I should note that it was done
22 pursuant to a notice of violation carrying

1 potential thousand dollar penalties for
2 noncompliance.

3 Respondents' culpability penalty
4 mitigation argument we believe is also without
5 merit. The respondents claim that they should have
6 gotten some mitigation for their alleged lack of
7 culpability. First, the ERP does not provide for a
8 downward adjustment based on lack of culpability,
9 only an upward adjustment.

10 Judge Biro followed the ERP in her
11 application of the penalty adjustments. She also
12 noted that respondents Ronald Hunt and Genesis
13 Properties, Inc., all acknowledged getting the
14 notices of violation prior to entering into the
15 leases at question for this particular case.

16 She then pointed out that for the Barton
17 Avenue property, respondents David Hunt and
18 Patricia Hunt, the owners of that property, also
19 got a TSCA subpoena from the EPA in I think it's
20 1998, asking for information about their lead
21 disclosure rule compliance for the Barton Avenue
22 property. And despite receiving this TSCA

1 subpoena, Judge Biro noted they entered into three
2 more leases for this property, which are at issue
3 here today, and that they failed to comply with the
4 lead disclosure rule obligations.

5 And Judge Biro thought that this was
6 negligent, if not worse, on their part for failure
7 to do so and concluded ultimately that respondents
8 cannot be cited to have their penalty reduced for
9 having lack of culpability in this matter. In
10 fact, the implication was they, in fact, are
11 culpable for their actions and deserve the penalty
12 that was assessed under the ERP for these. Again,
13 there has been no clear error or abuse of
14 discretion demonstrated for Judge Biro's decision
15 on the culpability aspect of this matter.

16 In terms of the application of lead block
17 to the various properties--again, the three
18 properties that were done and the one property,
19 Barton Avenue, that we believe was never done.
20 There is problems with that that ought to be take
21 into account concerning the application of lead
22 block that the Court ought to be aware of, and it

1 was also what Judge Biro based her decision on.

2 Judge Biro found, concerning the
3 application of lead block, in this particular case
4 that the encapsulation did not remove the
5 underlying lead-based paint. The evidence as to
6 what encapsulation activities occurred and when is
7 not precisely clear, that there is no evidence if
8 or how respondents reduced lead risk to friction
9 surfaces such as windows or door jambs that cannot
10 be remediated via lead block.

11 There is no specific evidence of operation
12 and maintenance for the encapsulated surfaces at
13 the houses. And that the 1995 HUD guidelines for
14 the evaluation and treatment of lead hazards in
15 residential housing state that lead block can be
16 effective for up to three years or can fail
17 immediately, depending upon how it's applied.

18 Therefore, when you say that there was
19 lead block applied to these properties, we don't
20 know how it was applied. We don't know whether the
21 surfaces were appropriate. There are a lot of
22 potential problems with lead block. And based on

1 the simple assertions of Mr. Hunt, who was not
2 present at the time that this was done--these were
3 done by an outside firm in one case, or their
4 employees--there's no evidence to evaluate how--
5 what the quality of the work was done here.

6 So we suggest is that while we're not
7 taking issue with Judge Biro's penalty mitigation
8 of 30 percent for these three properties, we would
9 suggest that there is no rationale whatsoever for
10 going beyond the 30 percent in this instance.

11 In closing, I'd like to state that Judge
12 Biro's four penalties totaling \$84,224 are fair and
13 reasonable penalties for respondents' 32 lead
14 disclosure rule violations for these 10 leases at
15 the 4 properties in question. That these 32
16 violations failed to alert 10 families that the
17 homes they were thinking of moving into contained
18 lead-based paint, a significant potential health
19 threat since 10 of these families collectively had
20 25 children, and half the families had children
21 under the age of 6, who are especially vulnerable
22 to lead poisoning.

1 That Judge Biro substantially followed the
2 ERP in making her penalty decisions. That
3 respondents have not shown that Judge Biro
4 committed any clear error or abuse of discretion in
5 making her penalty determinations and that,
6 therefore, EPA requests the board to affirm in full
7 Judge Biro's four sets of penalties against the
8 respondents totaling \$84,244.

9 I thank you, Your Honors.

10 JUDGE WOLGAST: Mr. Marrs?

11 REBUTTAL ARGUMENT OF BRADLEY MARRS

12 ON BEHALF OF THE RESPONDENTS

13 MR. MARRS: Without restating previously
14 made arguments, I'd like to address two narrow
15 parts. First of all, with apologies to Mr.
16 Heenehan, he is correct. I misspoke in the
17 reference to children with elevated blood levels
18 should not have been to the Harpoon Partnership
19 case.

20 There are two, however, that are cited in
21 our brief. One of them is the Yee case, which is
22 the only one of the 10 actually cited by

1 Environmental Appeals Board. That case involved
2 four children shown to have elevated lead levels in
3 their blood. The fine there by the board was found
4 at \$29,700.

5 Also in the Buescher case, if I'm
6 pronouncing that correctly, that one decided by
7 Administrative Law Judge, there were at the time of
8 move-in, two children ages 1 and 2, and the mother
9 was pregnant. Subsequently, the child was born.
10 So there were three children in the home. The
11 newborn and the youngest of the other two were
12 found to have elevated blood levels. That resulted
13 in a fine of \$33,000.

14 With respect to the Barton Avenue
15 property, to make one other point as to whether our
16 evidence there was refuted or unrefuted, it's true
17 that Mr. Heenehan asked Mr. Sims some questions
18 about Barton Avenue. However, Mr. Sims testified--
19 and this is in the record at page 157 of the
20 transcript--that he was laid off from the program
21 in 1998, and he ventured to other jobs in other
22 localities.

1 It's a little bit unclear, but reading the
2 record as a whole, Mr. Sims testified that he
3 returned to employment with the City of Richmond in
4 the year 2001, but he did not actually return to
5 re-employment with the Lead Safe Richmond Program--
6 this again on page 157 at lines 22 and 23--"in
7 January of this year." "This year," at the time he
8 was testifying, being 2004.

9 In sum, Mr. Sims was gone for somewhere
10 between five and six years and is simply not
11 competent to provide testimony as to what may have
12 happened in his absence. That's why we believe
13 that, substantially, Mr. Hunt's testimony on that
14 point was unrefuted.

15 JUDGE WOLGAST: Was that argument put to
16 the Administrative Law Judge?

17 MR. MARRS: I think it was in the sense
18 that we made that point on cross-examination, and I
19 don't know that anyone was specifically arguing Mr.
20 Sims's testimony. The opinion came out relying on
21 Mr. Sims's testimony, and I think what it does is
22 it infers something from his lack of knowledge.

1 I think the strongest statement that can
2 be made about Mr. Sims is that he is unable to
3 corroborate Mr. Hunt's testimony. He is also
4 unable to contradict Mr. Hunt's testimony. He
5 simply wasn't there.

6 What he testified to is that there were
7 seven lead paint inspectors under the program of
8 the City of Richmond. Because of reductions in
9 force, they were cut down to one. Some of the
10 paperwork was lost track of. But he did find it
11 significant that there was no summons issued by the
12 city, no fine by the city, and there was some
13 negative inference that because of that it must
14 have been okay at some point.

15 JUDGE REICH: I assume he testified as a
16 fact witness as opposed to an expert witness?

17 MR. MARRS: I think--I think there was
18 some matters of expertise, where he was allowed to
19 give opinion. For example, the testimony regarding
20 the visual appearance of lead paint, encapsulation
21 paint, and thus I presume would be--

22 JUDGE REICH: Did you object to his expert

1 witness status?

2 MR. MARRS: I did not and do not now.
3 However, I think his mere visual examination of
4 merely the porch of the building several years
5 after the fact is the extent of his testimony that
6 he can offer on that point.

7 JUDGE REICH: Mm-hmm.

8 MR. MARRS: Thank you, Your Honor. I ask
9 for your relief.

10 JUDGE WOLGAST: Thank you. Thank you,
11 counsel in the cases submitted.

12 THE CLERK: All rise. This session of the
13 Environmental Appeals Board now stands adjourned.

14 [Whereupon, at 11:04 a.m., the proceedings
15 were concluded.]