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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

ENVIR. APPEALS BOARD

**VIA FEDERAL EXPRESS**

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G. Street , NW, Suite 600
Washington, D.C. 20005

May 4, 2005

Re: *In the Matter of Ronald H. Hunt, et al.*
TSCA Appeal No. 05-01

Dear Madam:

Enclosed please find for filing in the above-captioned matter, the original and five copies of the Reply of Complainant to the Notice of Appeal and Appeal Brief from Respondents Ronald H. Hunt, *et al.* ("Appellee's Response Brief").

Because EPA Region III did not receive Respondents' Notice of Appeal through overnight delivery, EPA Region III has until May 6, 2005 to file its Response Brief. Therefore, EPA Region III is filing this Response Brief at this time.

Sincerely,

James Heenehan

James Heenehan
Sr. Assistant Regional Counsel

Enclosures

cc: Regional Hearing Clerk - Region III (3RC00)
The Honorable Susan L. Biro (1900L)
Bradley P. Marrs, Esq.
Christopher G. Hill, Esq.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ENVIRONMENTAL APPEALS BOARD**

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| **In the Matter of:** | **TSCA Appeal No. 05-01** |
| **RONALD H. HUNT, *ET AL.*** | |
| **Docket No. TSCA-03-2003-0285** | |

**Appeal by Respondents Ronald H. Hunt, *et al.*,**
**from an Initial Decision by Chief Administrative Law Judge**
**Susan L. Biro, Dated March 8, 2005**

# APPELLEE'S RESPONSE BRIEF

**May 4, 2005**

**COUNSEL FOR COMPLAINANT:**

**James T. Heenehan (3RC30)**
**Joseph J. Lisa (3RC00)**
**Assistant Regional Counsels**
**U.S. Environmental Protection Agency**
**1650 Arch Street**
**Philadelphia, PA 19103-2029**
**(215) 814-2640**
**(215) 814-2479**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ENVIRONMENTAL APPEALS BOARD**

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| **In the Matter of:** | ) | |
| **RONALD H. HUNT, *ET AL.*** | ) | **TSCA Appeal No. 05-01** |
| **Docket No. TSCA-03-2003-0285** | ) | |

## APPELLEE'S RESPONSE BRIEF

## I. AUTHORITY

Complainant/Appellee submits Appellee's Response Brief in response to Respondents'/Appellants' April 11, 2005 Notice of Appeal ("Respondents' Appeal Brief" or "Appeal Brief"). Appellee's Response Brief ("Response Brief") is submitted pursuant to Sections 22.30(a) and (b), 22.16, 22.7 and 22.6 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. §§ 22.30(a) and (b), 22.16, 22.7 and 22.6.

## II. STATEMENT OF THE ISSUES ON APPEAL

Respondents Ronald H. Hunt, Patricia L. Hunt, David E. Hunt, J. Edward Dunivan and Genesis Properties, Inc. ("Appellants" or "Respondents"), have appealed the penalty assessments set forth in the Initial Decision by the Presiding Officer, the Honorable Susan L. Biro, Chief Administrative Law Judge,

in this matter.[1] Respondents are not contesting liability for any of the thirty-two counts at issue in this case.[2] Respondents raise five issues on appeal (two of which are listed as I.A and I.B in the Appeal Brief) in addition to their conclusion challenging the overall penalty assessed by the Presiding Officer.[3] These issues are:

A. Did the Presiding Officer Erroneously Refuse to Consider Alleged Penalty Precedents From Other Administrative Cases when Analyzing the Proportionality of the Fine Imposed? [Appeal Brief Issue I.A.];[4]

B. Did the Presiding Officer Improperly Multiply the Fines in this Matter without the Use of Discretion or Common Sense [Appeal Brief Issue I.B.];[5]

C. Should the Presiding Officer Have Granted a Larger Discount for Respondents' Remediation Work at the Properties Given the Lack of Documented Harm to the Tenants? [Appeal Brief Issue II.];[6]

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[1]Respondents have mischaracterized Judge Biro's four sets of penalty assessments for the five Respondents as one overall penalty of $84,224.80. In fact, these penalties are a joint and several penalty for Respondents Ronald H. Hunt and Patricia L. Hunt of $27.504.40, a joint and several penalty of $15,840.00 for Respondents David E. Hunt and Patricia L. Hunt, a penalty of $9,856.00 for Respondent J. Edward Dunivan and a penalty of $31,024.40 for Respondent Genesis Properties, Inc. Respondent Patricia L. Hunt is jointly and severally liable for two different sets of such penalties, bringing her total joint and several penalty to $43,344.40.

[2]See page 6 of the April 11, 2005 Appellant's Appeal Brief: "For their part, respondents do not dispute that technical violations of the Act occurred,... The sole issue that remained after the hearing of September 14, 2004 was the proper level of a fine."

[3]Respondents' arguments listed in their Notice of Appeal are stated in a different order than in the "Issues on Appeal" section of the Appeal Brief (p. 3), and in yet another order in the "Argument" section of the Brief (pp.6-19). There are also discrepancies in the way some of these issues have been phrased. Compare, e.g., the way the Barton Ave. alleged encapsulation issue is presented in the Notice of Appeal (#1) versus the "Issues on Appeal (#5) versus the "Argument" (#II) itself.

[4]Issues I.A and I.B are listed under the heading of "The fines imposed by the Presiding Officer in this case are totally out of proportion with the infractions committed." Appeal Brief at 6. Issue I.A. in the Appeal Brief is Issue #5 in the Notice of Appeal.

[5]Issues I.A and I.B are listed under the heading of "The fines imposed by the Presiding Officer in this case are totally out of proportion with the infractions committed." Appeal Brief at 6. Respondents refer to this as an "unwarranted multiplication of charges" as Issue #4 in their Notice of Appeal.

[6] Respondents' argument on remediation is somewhat confusing. This issue is listed as Issue #1 in the Notice of Appeal and is limited to whether the Presiding Officer improperly determined that no lead abatement work was done at 3015 Barton Ave.

D. Was the 10% Downward Penalty Adjustment for Respondents' Cooperation Proposed by Complainant and Confirmed by the Presiding Officer an Insufficient Downward Adjustment and, if so, what Should the Downward Adjustment be in this Case? [Appeal Brief Issue III.];[7]

E. Did the Presiding Officer Improperly Fail to Award Respondents a Downward Adjustment for their Alleged Lack of Culpability in the Violations Committed in this Case and, if so, what Should the Downward Adjustment be in this Case? [Appeal Brief Issue IV];[8] and

F. Did the Presiding Officer Improperly Assess a Penalty Higher than is Warranted by the Violations in this Case? [Conclusion].[9]

## III. SYNOPSIS OF APPELLEE'S RESPONSE

The Presiding Officer's Initial Decision, including her Findings of Fact, Conclusions of Law, and Penalty Order, should be sustained in its entirety. Judge Biro's Initial Decision is based on a careful review of an extensive evidentiary record. In calculating penalties for Respondents, Judge Biro utilized EPA's February 23, 2000 *Section 1018 Disclosure Rule Enforcement Response Policy* ("EPA Lead ERP", "Lead ERP", or "ERP" [CX-16]), with one deviation from one adjustment factor. EPA's Penalty Policy takes into account the statutory penalty factors set forth in Section 16 of the Toxic Substances Control Act, 15 U.S.C. § 2615.[10]

Complainant notes for the record that Respondents have not argued that the EPA improperly calculated the proposed penalties using the Lead ERP and TSCA statutory factors, nor have Respondents

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[7]Issue #4 in Respondents' Notice of Appeal.

[8]Issue #3 in Respondents' Notice of Appeal.

[9]Respondents list this as Issue #6 in both their Notice of Appeal and in the section styled "Issues on Appeal/Assignment of Error" in the beginning of the Appeal Brief.

[10]CX-16 at EPA 0153 and 0158.

argued that the Presiding Officer misapplied the Lead ERP and the TSCA statutory factors in calculating the penalties she assessed in this case. In fact, Respondents never mention the Lead ERP or TSCA's statutory factors in their Notice of Appeal and Appeal Brief.

Complainant believes that any discussion of the appropriateness of the penalties assessed by the Presiding Officer should start with a review of the Presiding Officer's penalty analysis and especially her reliance on the EPA Lead ERP in making her penalty determinations. Therefore, Complainant's first responsive argument is a review of the Chief Administrative Law Judge penalty determinations. Complainant will then address Respondents' issues in the order set forth above. Specifically, Complainant will demonstrate:

A. The Penalties Assessed by the Presiding Officer against Respondents Should be Affirmed because She Calculated the Penalties Pursuant to the EPA Lead ERP and TSCA Statutory Factors and such Penalties are Appropriate given the Facts and Law;

B. Contrary to Respondents' Assertions, the Cases Cited by Respondents are not Penalty Precedents Controlling on the Instant Case, are not Relevant to the Presiding Officer's Penalty Determinations, and Fail to Support Respondents' Claim that the Presiding Officer's Penalty Assessments are Inconsistent with the Penalties Set forth therein;

C. Neither the Lead Disclosure Rule Regulations nor Existing Caselaw Support Respondents' Penalty Multiplication Argument;

D. Respondents' Lead-Based Paint Response Actions at their Properties do not Warrant any Additional Penalty Reductions Beyond those Assessed by the Presiding Officer;

E. The Presiding Officer Properly Applied a 10% Downward Penalty Adjustment for Respondents' Cooperation in this Case;

F. Respondents' Alleged Lack of Culpability does not Warrant an Adjustment to the Penalties Assessed by the Presiding Officer; and

G. The Presiding Officer's Four Sets of Penalties for the thirty-two (32) Lead Disclosure Rule Violations by Respondents which Collectively Total $84,224.80 are Fair and Appropriate Penalties for these Violations.

## IV. FACTUAL AND PROCEDURAL BACKGROUND

On July 18, 2003, Complainant filed an Administrative Complaint and Notice of Opportunity against Respondent Lessors Ronald H. Hunt, Patricia L. Hunt, David E. Hunt and J. Edward Dunivan, and Respondent Agent Genesis Properties, Inc., in which the Associate Director for Enforcement, Waste and Chemicals Management Division, United States Environmental Protection Agency Region III ("Complainant", the "EPA" or "Appellee") alleged that Respondents had violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), 42 U.S.C. § 4852d, and the federal regulations promulgated thereunder as set forth at 40 C.F.R. Part 745, Subpart F (also known as the "Disclosure Rule" or "Lead Disclosure Rule"). More specifically, Complainant alleged in forty-seven (47) Counts in the Complaint that Respondent Lessors Ronald H. Hunt, Patricia L. Hunt, David E. Hunt and J. Edward Dunivan, by and through their agent, Respondent Agent Genesis Properties, Inc., failed to make disclosures concerning lead-based paint to the prospective Lessees of the target housing as required by the Disclosure Rule, 40 C.F.R. Part 745, Subpart F in connection with ten (10) leases for four (4) target housings in Richmond, Virginia.[11] The street addresses of these properties are 1124 N. 28th St. [Leases #1

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[11] The violations for which EPA is pursuing penalties in this case against the applicable Respondent Owner/Lessors (Respondents Ronald H. Hunt, Patricia L. Hunt, David E. Hunt and J. Edward Dunivan) are:

A. Respondents' failure to provide Lessees #1 & #3 - #10, with any records or reports available to the Lessors pertaining to lead-based paint and/or lead-based paint hazards in the target housing before such Lessees are obligated under contract to lease such target housing, in violation of 40 C.F.R. §745.107(a)(4);

B. Respondents' failure to disclose the presence of known lead-based paint and/or lead-based paint hazards in the target housing, either as an attachment to or within the contract to lease such target housing, as required by 40 C.F.R. § 745.113(b)(2) for Leases #1 & #3 - #10; and

C. Respondent Lessors Ronald H. Hunt and Patricia L. Hunt's failure to provide Lessees for Lease #2, as an attachment to or within the lease, a list of any records or reports available to the Lessor pertaining to lead-based paint and/or lead-based paint hazards in the Lease #2 target housing before the Lessee is obligated under any contract to lease such target housing, in violation of 40

& 2], 1813 N. 29th St. [Leases #3-5], 3015 Barton Ave. [Lease #6-8], and 2405 Third Ave. [Leases #9 & 10].

The tenants for all ten leases had at least one child. Five of the ten lessees had children under the age of six who are particularly subject to lead-based paint and/or lead-based paint hazards.[12] See also EPA Region III Toxicologist Dr. Samuel Rotenberg's Expert Report on the health risks posed by exposure to lead-based paint (CX-94). The ages of the children for these ten leases is broken down by lease (and target housing) as follows:[13]

| Lease 1 (28th St.) | Lease 2 (28th St.) | Lease 3 (29th St.) | Lease 4 (29th St.) | Lease 5 (29th St.) |
|---|---|---|---|---|
| 4, 6 & 8 | 7 & 12 | 10 | 5 & 14 | 7, 12 & 16 |

| Lease 6 (Barton Ave.) | Lease 7 (Barton Ave.) | Lease 8 (Barton Ave.) | Lease 9 (3rd Ave.) | Lease 10 (3rd Ave.) |
|---|---|---|---|---|
| 1, 10 & 12 | 15 | 7 & 9 | 5, 6, 8 & 17 | 2, 5, 9 & 10 |

On July 2, 2004, the Presiding Officer issued an Order on EPA's Motion for Accelerated Decision, Motion to Withdraw, and Motion to Reschedule Hearing ("July 2, 2004 Liability Order") granting, *inter alia*, Complainant's Motion to Withdraw fifteen (15) counts from the Complaint and

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C.F.R. § 745.113(b)(3).

In addition, Complainant is pursuing penalties against Respondent Agent Genesis Properties, Inc., for violations of 40 C.F.R. § 745.115(a) for failing to ensure compliance with 40 C.F.R. §§ 745.107(a)(4), and .113(b)(2) and (3) in connection with Leases #1, #2 and #6 - #10.

[12]Initial Decision, slip op. at 26 - 27.

[13]The basis for the Lessee's age of children is derived from Respondents's June 26, 2003 TSCA Subpoena Response (CX-32 at EPA(R) 0719-0720) and Lease Number 4 (CX-4 at EPA(R) 0037). Lease Number 4 contains the age of the fourteen year old niece which seems to have been inadvertently omitted in the narrative response to the TSCA Subpoena question asking for the age of the children residing in the target housing at the time of these leases. See page 10 of Complainant's November 23, 2004 Post-Hearing Brief, Joint Exhibit 1 (Joint Stipulation 1) at JX-05 - 06, and CX-100 generally.

Complainant's Motion for Accelerated Decision on the remaining thirty-two (32) Counts.[14]

The nine pairs of Lead Disclosure Rule violations committed by the Respondent Owner/Lessors are failure to include in or attach to the leases a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards, or lack of knowledge of such presence, in violation of 40 C.F.R. § 745.113(b)(2), and the failure to provide the lessees with any records or reports available to them pertaining to lead-based paint or lead-based paint hazards in the dwelling, in violation of 40 C.F.R. § 745.107(a)(4). Respondent Agent Genesis Properties, Inc. failed to ensure compliance with both requirements for Leases #1, #5 - #10, each failure being a separate violation of 40 C.F.R. § 745.107(a)(4).

Respondent Owner-Lessors Ronald H. Hunt and Patricia L. Hunt also failed to include in Lease #2 for the 1124 N. 28th St. property a list of any records or reports available to the Hunts pertaining to lead-based paint and/or lead-based paint hazards that were provided to the lessee prior to entering into the lease as required by 40 C.F.R. § 745.113(b)(2). Respondent Agent Genesis Properties, Inc. also failed to ensure compliance with this requirement concerning Lease #2, a violation of 40 C.F.R. § 745.107(a)(4).

The above violations are summarized below by Respondents, target housing, Disclosure Rule regulation, Counts and Lease:

A. Ronald H. Hunt & Patricia L. Hunt: 1124 N. 28th St. & 1813 N. 29th St.

1. 40 C.F.R. § 745.113(b)(2) - Failure to Disclose the presence of Lead.

   a. Count 5 (Lease 1);

   b. Count 6 (Lease 3);

[14]Respondents Ronald H. Hunt and Patricia L. Hunt were found liable for violations alleged in Counts 5-13 of the Complaint; Respondents David E. Hunt and Patricia L. Hunt were found liable for violations alleged in Counts 17-22 of the Complaint; Respondent J. Edward Dunivan was found liable for violations alleged in Counts 25-28 of the Complaint; and Respondent Genesis Properties, Inc. was found liable for violations alleged in Counts 35-47 of the Complaint.

c. Count 7 (Lease 4); and

d. Count 8 (Lease 5).

2. 40 C.F.R. § 745.107(a)(4) - Failure to Provide Copies of Lead-Based Paint Records.

a. Count 9 (Lease 1);

b. Count 10 (lease 3);

c. Count 11 (Lease 4); and

d. Count 12 (Lease 5).

3. 40 C.F.R. § 745.113(b)(3) - Failure to Include in Lease a List of Lead-Based Paint Records and Reports Provided to Tenant.

a. Count 13 (Lease 2).

B. David E. Hunt & Patricia L. Hunt: 3015 Barton Ave.

1. 40 C.F.R. § 745.113(b)(2) - Failure to Disclose the presence of Lead.

a. Count 17 (Lease 6);

b. Count 18 (Lease 7); and

c. Count 19 (Lease 8).

2. 40 C.F.R. § 107(a)(4) - Failure to Provide Copies of Lead-Based Paint Records.

a. Count 20 (Lease 6);

b. Count 21 (Lease 7); and

c. Count 22 (Lease 8).

C. J. Edward Dunivan: 2405 Third Ave.

1. 40 C.F.R. § 745.113(b)(2) - Failure to Disclose the presence of Lead.

a. Count 25 (Lease 9); and

b. Count 26 (Lease 10).

2. 40 C.F.R. § 745.107(a)(4) - Failure to Provide Copies of Lead-Based Paint Records.

a. Count 27 (Lease 9); and

b. Count 28 (Lease 10).

D. Genesis Properties, Inc.: 1124 N. 28th St., 3015 Barton Ave. & 2405 Third Ave.

1. 40 C.F.R. § 745.115(a) - Failure to Ensure Compliance with 40 C.F.R. § 745.113(b)(2).

a. Count 35 (Lease 1);

b. Count 36 (Lease 6);

c. Count 37 (Lease 7);

d. Count 38 (Lease 8);

e. Count 39 (Lease 9); and

f. Count 40 (Lease 10).

2. 40 C.F.R. § 745.115(a) - Failure to Ensure Compliance with 40 C.F.R. § 745.107(a)(4).

a. Count 41 (Lease 1);

b. Count 42 (Lease 6);

c. Count 43 (Lease 7);

d. Count 44 (Lease 8);

e. Count 45 (Lease 9); and

f. Count 46 (Lease 10).

3. 40 C.F.R. § 745.115(a) - Failure to Ensure Compliance with 40 C.F.R. § 745.113(b)(3).

a. Count 47 (Lease 2).

Complainant calculated proposed civil penalties for the above violations by using the EPA Lead ERP (CX-16). The Lead ERP sets forth a two stage process for determining a penalty for Lead Disclosure Rule violations. The first step is to determine a "Gravity-Based Penalty," which refers to the overall seriousness of the violation taking into account the nature of the violation as varied by the violation's "circumstances" and "extent of harm." These factors are incorporated into a penalty matrix called the "Gravity-Based Penalty."[15] The second stage of the penalty calculation involves various upward or downward adjustments to the gravity-based penalty based on the violator's ability to pay/continue in business, history of prior violations, degree of culpability, other factors as justice may require, and voluntary disclosure.[16]

As noted above, the ERP's gravity-based penalty is based on the nature, circumstances, extent, and gravity of the violations. The critical factor for determining the extent level for the violations in this case is the age of the youngest occupant. [17] Five of the ten leases (Lease s #1, 4, 6, 9 & 10)[18] at issue in this case involved children under the age of six so all Lead Disclosure Rule violations are deemed "major" extent level violations under the ERP. The remaining five leases (#2, 3, 5, 7 & 8)[19] had children between 6 and 17 residing in the target housing during the lease term resulting in a "significant" extent of violation

[15]CX-16 at EPA 0153 - 0157.

[16]CX-16 at EPA 0158 - 0162.

[17]CX-16 at EPA 0154 - 0155, 0175.

[18]CX-1, CX-4, CX-6, CX-9 & CX-10.

[19]CX-2, CX-3, CX-5, CX-7 & CX-8.

under the ERP.[20]

The violations in this case all fall into one of three "Circumstance" categories under the ERP: High (Levels 1 and 2), Medium (levels 3 & 4), or Low (Levels 5 & 6). Those violations concerning the Owner/Lessors' failure to disclose the presence of lead-based paint within the lease and the failure of the Agent to ensure such disclosure (40 C.F.R. § 745.113(b)(2))[21] are classified as Level 3 "medium" impairment violations under the ERP.[22] The ERP classifies the failure by Owner/Lessors to provide lessees with copies of records or reports pertaining to lead-based paint and the failure of the Agent to ensure inclusion of such copies are provided (40 C.F.R. § 745.107(a)(4))[23] as Level 1 "high" impairment violations.[24] The ERP also specifies that the failure by Owner/Lessors to include within the lease a list of any such records or reports provided to prospective tenants and the Agent's failure to ensure such a list of such records or reports in the lease (40 C.F.R. § 745.113(b)(3))[25] as Level 5 "low" impairment violations. There are two Level 5 Counts in the Complaint (Counts 13 and 47 which are also significant extent level violations). All other counts are some combination of major/significant extent and circumstance level 1/level 3 violations under the ERP. The Gravity-Based Matrix for all counts is set forth below:

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[20]CX-16 at EPA 0175. CX-16 at 0175. See Joint Stipulation No. 1 (Joint Ex. No. 1) for the ages of the lessees' children.

[21]This requirement applies to the agent via 40 C.F.R. §745.115(a).

[22]CX-16 at EPA 0154, 0175.

[23]This requirement applies to the agent via 40 C.F.R. §745.115(a).

[24]CX-16 at EPA 0154, 0175.

[25]This requirement applies to the agent via 40 C.F.R. §745.115(a).

| **Circumstance Level 3/Major Extent** *40 C.F.R. § 745.113(b)(2)* | **Circumstance Level 1/Major Extent** *40 C.F.R. § 745.107(a)(4)* |
|---|---|
| Counts: 5, 7, 17, 25, 26, 35, 36, 39 & 40 | Counts: 9, 11, 20, 27, 28, 41, 42, 45 & 46 |
| **Circumstance Level 3/Significant Extent** *40 C.F.R. § 745.113(b)(2)* | **Circumstance Level 1/Significant Extent** *40 C.F.R. § 745.107(a)(4)* |
| Counts: 6, 8, 18, 19, 37 & 38 | Counts: 10, 12 , 21, 22, 43 & 44 |
| **Circumstance Level 5/Significant Extent** *40 C.F.R. § 745.113(b)(3)* | |
| Counts: 13 & 47 | |

The proposed penalties set forth in the ERP's gravity-based matrix for violations slotted into the above-referenced circumstance/extent factors are as follows:

a. Circumstance Level 3/Major Extent (*40 C.F.R. § 745.113(b)(2)*): $ 6,600

b. Circumstance Level 3/Significant Extent (*40 C.F.R. § 745.113(b)(2)*): $ 4,400

c. Circumstance Level 5/Significant Extent (*40 C.F.R. § 745.113(b)(3)*): $ 1,430

d. Circumstance Level 1/Major Extent (*40 C.F.R. § 745.107(a)(4)*): $11,000

e. Circumstance Level 1/Significant Extent (*40 C.F.R. § 745.107(a)(4)*): $ 6,600

See Appendix B of the ERP for the above proposed penalty amounts.[26] Complainant's penalty witness, Mr. Daniel Gallo, testified at hearing how EPA followed the ERP[27] in calculating the nature, circumstances, extent and gravity factors for these violations and then determining the appropriate penalty amount using the ERP gravity-based matrix.[28] Mr. Gallo also testified that the only adjustment factor that

[26]CX-16 at EPA 0175.

[27]Mr. Gallo also testified that he believed that the Lead ERP also incorporated the statutory factors set forth in Section 16(a)(2)(B) of TSCA to determine the appropriate size of penalty dor any such violations. (Transcript at page 65, line 18 through page 66, line 15 (T at 65:18 - 66:15)).

[28]See T at pages 53-57, CX-15, CX-100 and pages 13-40 of Complainant's November 23, 2004 Post-Hearing Brief; see also Initial Decision, slip op. at 14 - 26.

EPA determined was appropriate for the violations in this case was a 10% downward adjustment for Respondents' cooperation throughout this process.[29]

Finally, Mr. Gallo also testified that because of the apparently close relationship between the Respondent Agent Genesis Properties, Inc. and the Respondent Owner/Lessors emanating from the properties and property management company being apparently part of the Hunt family-owned and operated business, EPA exercised its prosecutorial discretion to reduce the proposed penalties by 50% for both the Respondent Owner/Lessors and Respondent Agent Genesis Properties, Inc. when a Lead Disclosure Rule violation charged both the Owner/Lessor and Agent with Lead Disclosure Rule violations (i.e., all leases except #3-5 pertaining to the 1813 N. 29th St. property.[30]

As a result of these ERP penalty calculations, the civil penalties sought by Complainant for Respondents' violations of the Disclosure Rule alleged in the Complaint were as follows: Respondent Lessors Ronald H. Hunt & Patricia L. Hunt: $44,204 (joint & several); Respondent Lessors David E. Hunt & Patricia L. Hunt: $17,820 (joint & several); Respondent Lessor J. Edward Dunivan: $15,840; and Respondent Agent Genesis Properties, Inc.: $42,224.[31]

The Honorable Susan L. Biro, Chief Administrative Law Judge, presided over an administrative hearing on September 14, 2004 in Richmond, Virginia, to determine an appropriate penalty for the thirty-two violations at issue in this case. Complainant presented the oral testimony of two witnesses at the hearing, EPA Region III Lead Enforcement Coordinator Daniel Gallo, and Lead-Safe Richmond inspector

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[29]See T at pages 57-65 for Mr. Gallo's discussion of the adjustment factors as well as CX-15, CX-100, and pages 13-40 of Complainant's November 23, 2004 Post-Hearing Brief; see also Initial Decision slip op. at 14-26.

[30]See T at pages 65-67, CX-15, CX-100 and pages 13-40 of Complainant's November 23, 2004 Post-Hearing Brief; see also Initial Decision, slip op. at 14 - 26.

[31]CX-15.

Lonnie Sims, and submitted the written testimony of two additional witnesses, EPA Region III GIS Team Leader Donald Evans concerning the demographic statistics of the area in which the target housing is located (CX-93) and EPA Region III Toxicologist Dr. Samuel Rotenberg on the toxicological effects of lead on people, especially children (CX-94). In addition, in lieu of further oral testimony from Mr. Gallo, the Complainant submitted its penalty calculation summary (CX-100).[32]

Respondents submitted the oral testimony of two witnesses, Respondent Ronald H. Hunt, the co-owner of two of the four properties at issue, and his son, Michael Hunt, an employee of Respondent Genesis Properties, Inc. ("Genesis Properties, Inc.") who signed the leases at issue on behalf of Genesis Properties, Inc.

The parties also entered into two Joint Stipulations which were admitted into the record at hearing (Joint Exhibits 1 and 2) as were 57 of Complainant's Exhibits (CX-1-19; 21-32; 41-49; 52; 57; 65-70; 83 (Appendix 1 only); 84-87; 93-95; and 100) and 17 exhibits offered by Respondents (Respondents Exhibits 5-21, "RX-5-21").[33]

On March 8, 2005, the Presiding Officer issued her Initial Decision in this matter, in which she assessed penalties for each Respondent as follows: Ronald H. Hunt & Patricia L. Hunt (joint and several) -

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[32]See Initial Decision, slip op. at 4 - 5, 17 in which the Presiding Officer notes that EPA's penalty analysis set forth as CX-100 would serve as written testimony in lieu of oral testimony by Dan Gallo, EPA's expert penalty witness, consistent with Mr. Gallo's penalty testimony already provided at hearing.

Complainant was also prepared to enter the testimony of Joan Meyer of Industrial Economics relevant to the issue of Respondents' ability to pay the proposed penalties. However, the Presiding Officer ruled that she had previously determined that Complainant had properly considered Respondents' ability to pay the requested penalties and that Respondents had agreed that ability to pay was no longer an issue in this case. (See T. at pages 14-15) and the Presiding Officer's August 3, 2004 Order denying Complainant's Motion for Discovery concerning Respondents' financial assets.

[33] RX-5 - 6 and RX-20 - 21are subject to the Presiding Officer's August 3, 2004 Protective Order and are filed under seal. Many of Complainant's Exhibits are redacted versions of the exhibits because of the Protective Order. At hearing the Presiding Officer determined that the redacted exhibits would be the ones entered into evidence at hearing. (T at 13:23 through 14:6)).

$27, 504.40; David E. Hunt & Patricia L. Hunt (joint and several) - $15,840.00; J. Edward Dunivan - $9,856.00; and Genesis Properties, Inc. - $31,024.40. The total amount of such penalties for all five Respondents is $84,224.80. *In the Matter of Ronald H. Hunt, et al.*, Docket No. TSCA-03-2003-0285, slip op. at 41-42 (ALJ, March 8, 2005).

On April 12, 2005, the Environmental Appeals Board received an appeal from Respondents challenging the overall penalty in this matter although Respondents do not distinguish between the Respondent-specific penalties assessed by Judge Biro in this matter.

## V. STANDARD OF REVIEW

In the case at hearing, EPA bears the burden of demonstrating that its proposed penalty amount is appropriate. *In re Titan Wheel Corporation of Iowa*, 10 E.A.D. 526, 566 (EAB 2002), *aff'd Titan Wheel Corp. of Iowa v. EPA*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd Titan Wheel Corp. of Iowa v. EPA*, No. 04-1221 (8th Cir., Nov. 23, 2004) (unpublished); *In re Carroll Oil Company*, 10 E.A.D. 635, 653 (EAB 2002); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). Once EPA has established its *prima facie* case, the burden shifts to the respondent to demonstrate the penalty is inappropriate. The Respondent must do this by either (1) introducing evidence that EPA had failed to consider the statutory penalty factors, or (2) introducing evidence that, despite consideration of the statutory factors, the recommended penalty is nonetheless inappropriate. *Titan Wheel* at 566; *New Waterbury* at 538-39. Respondents also bear the burden of presentation and persuasion in making any affirmative defense. *In re Morton L. Friedman and Schmitt Construction Company*, CAA Appeal No. 02-07, slip op. at 18 (EAB, Feb. 18, 2004). In reviewing penalty appeals, the Board applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). E.g., *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D.

522, 529-30 (EAB 1998).

Generally, the Environmental Appeals Board will review an administrative law judge's factual and legal conclusions on a *de novo* basis. *In re Donald Cutler*, CWA Appeal No. 02-01, slip op. at 11 (EAB, September 2, 2004); *In re Billy Yee*, 10 E.A.D. 1, 11 (EAB 2001). However, in doing so, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based on such credibility determinations. *Id.*

In cases where the penalty assessed by the administrative law judge falls within the range suggested by the applicable penalty policy for the violations at issue, the Environmental Appeals Board "will generally not substitute its judgment for that of the [ALJ] *absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty.*" *In re Morton L. Friedman and Schmitt Construction Company*, CAA Appeal No. 02-07, slip op. at 53 (EAB, Feb. 18, 2004), citing *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *accord In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re B&R Oil Co.*, 8 E.A.D. 39, 64 (EAB 1998); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998); *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994). *Emphasis supplied.*[34]

Therefore, to be consistent with prior Board precedent, if the Board finds that the Presiding Officer assessed penalties against the Respondents for their Lead Disclosure Rule violations in accordance with the EPA Lead ERP, Respondents should be required to prove that the Presiding Officer committed an abuse of discretion or otherwise committed clear error for the Board to substitute its penalty judgment for

[34]Respondents argue on page 4 of their Appeal Brief that because all of the alleged errors identified by Respondents are "errors of law", the Board need not show deference for the Initial Decision. The line of cases cited in the text refutes Respondents' unsubstantiated assertion. Moreover, Respondents claim that all alleged errors are errors of law is also incorrect since, for example, the issue as to whether Respondents applied Lead Block to the Barton Ave. property (Issue #1 in Respondents' Notice of Appeal) is an issue of fact.

that of Judge Biro.

## VI. RESPONSE TO APPELLANTS' ARGUMENTS ON APPEAL

### A. The Penalties Assessed by the Presiding Officer against Respondents Should be Affirmed because She Calculated the Penalties Pursuant to the EPA Lead ERP and TSCA Statutory Factors and such Penalties are Appropriate given the Facts and Law.

The Board has consistently held that the Agency's penalty policies, such as the Lead ERP, serve to incorporate and facilitate the application of the penalty criteria set forth in the statute in question (the "statutory factors"). *See Carroll Oil Company,* 10 E.A.D. 635, 656(EAB 2002); *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002); *In re Chempace Corp.*, 9 E.A.D. 490, 119 (EAB 2000); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 515 (EAB 1994).

The Board explained in *M.A. Bruder* why it has a preference for penalty assessments based on the various Agency penalty policies and why administrative law judges who base their penalty assessments on such policies will receive deference from the Board while those that do not will be closely scrutinized by it:

> While...there is clearly no legal obligation to follow an Agency penalty policy, we think there are good reasons to apply a penalty policy whenever possible. Such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner. Therefore, in reviewing an ALJ's penalty assessment in circumstances where the ALJ has chosen not to apply the policy at all – rather than, for example, applying the policy differently than advocated by the complainant – we will closely scrutinize the ALJ's reasoning for choosing not to apply the policy to determine if they are compelling.

10 E.A.D. at 613 (*see also Carroll Oil at* 5 E.A.D. 656).

In the case at bar, the Presiding Officer noted that the EPA Lead ERP, with minor exceptions,

incorporates the TSCA statutory penalty factors.[35] Judge Biro then used the EPA Lead ERP to calculate the penalties assessed against Respondents for their Lead Disclosure Rule violations.[36] Her penalty analysis is similar to that proposed by EPA as outlined in Section IV of this Response Brief, with two differences. The Presiding Officer made a 10% downward penalty adjustment for Respondents' good faith efforts to comply as provided by one of the three "attitude" adjustment factors set forth in the ERP.[37] She also revised the "risk of exposure" adjustment factor to allow for partial downward penalty adjustments when Respondents have taken measures to reduce the hazards posed by lead-based paint and where there is no evidence of lead poisoned children in the target housing.[38]

In performing her penalty analysis the Presiding Officer considered Respondents' claims that their alleged encapsulation efforts at the four properties in question reduced the risk of exposure from lead-based paint, their claim that because of their cooperation and attitude, they should have a greater downward penalty adjustment than the 10% recommended by EPA, and their claim that Respondents deserve additional penalty mitigation because the violations were "unintentional paperwork snafus".[39]

Judge Biro agreed that Respondents had applied a Lead Block-like substance to encapsulate the lead-based paint in three of the four properties in question[40] and, "although the ERP does not provide for

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[35]Initial Decision, slip op. at 15.

[36]See Initial Decision, slip op. at 14-26.

[37]Initial Decision, slip op. at 34-35.

[38]Initial Decision, slip op. at 32-24. See especially page 32 n. 44 which suggests there be a finding of no lead poisoned children in addition to a finding that Respondents engaged in lead-based paint hazard reduction activities to qualify Respondents for "risk of exposure" penalty mitigation. Complainant takes no position on the Presiding Officer's deviation from the ERP "risk of exposure" adjustment factor.

[39]Initial Decision, slip op. at 35 citing to page 2 of Respondents' Post-hearing Brief. See also pages 18-19 of Appeal Brief.

[40]The Presiding Officer found that no such work was performed on the lead-based paint at 3015 Barton Ave. property. Initial Decision, slip op. at 30-32.

it," reduced the penalties for Lead Disclosure Rule violations for the three non-Barton Ave. properties by 30% based on her deviation from the Lead ERP's "Risk of Exposure/ Other Factors as Justice May Require."[41] She declined to grant Respondents more than the 10% downward adjustment for cooperation that Complainant had recommended but did determine that Respondents qualified for a second 10% downward adjustment for a second "attitude" factor, that of "prompt compliance".[42]

However, she rejected Respondents' arguments that they should get a further penalty reduction based on what Respondents have characterized as "unintentional paperwork snafu" and related arguments, finding them unpersuasive.[43] She also rejected Respondents' "penalty range" and "count multiplication" arguments[44] as is more fully discussed in the sections of this Response Brief concerning these specific arguments.

As is demonstrated above, the Presiding Officer carefully considered EPA's penalty analysis and the underlying penalty calculations in the Lead ERP. She agreed with Respondents in adding a 10% reduction for good faith efforts at prompt compliance while also making a single deviation to the EPA Lead ERP to provide for a 30% penalty reduction for the non-Barton Ave. Lead Disclosure Rule violations because of Respondents' encapsulation activities at these properties ( the "Risk of Exposure" deviation).

Therefore, it is clear that the Presiding Officer assessed the penalties in this case within the range suggested by the EPA Lead ERP and her penalty assessments should be accorded the deference the Board

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[41]Initial Decision, slip op. at 32, 34.

[42]Initial Decision, slip op. at 34-35.

[43]Initial Decision, slip op. at 35-37. After reviewing the various reasons why Respondents knew these properties contained lead-based paint and why they knew or should have know of their corresponding Lead Disclosure Rule obligations for such properties, the Presiding Officer concluded, "[b]ased on the record as a whole, I do not deem Respondents to be entitled to any penalty reduction based upon the violations not having been 'willful.'" *Id.* at 37.

[44]Initial Decision at pages 37-40 of slip opinion.

has provided to administrative law judges who apply the applicable penalty policies in determining their penalties. *In re Morton L. Friedman and Schmitt Construction Company*, CAA Appeal No. 02-07, slip op. at 53 (EAB, Feb. 18, 2004).

**B. Contrary to Respondents' Assertions, the Cases Cited by Respondents are not Penalty Precedents Controlling on the Instant Case, are not Relevant to the Presiding Officer's Penalty Determinations, and Fail to Support Respondents' Claim that the Presiding Officer's Penalty Assessments are Inconsistent with the Penalties Set forth therein.**

Respondents' first argument for penalty mitigation is that the cumulative penalty assessed by the Presiding Officer[45] is excessive and should be reduced because it is significantly higher than penalties assessed in other Lead Disclosure Rule administrative cases. Respondents' Appeal Brief cites ten cases which they identify as "***every published court precedent***" concerning lead-based paint disclosure violations.[46] Respondents claim that these ten cases represent the legally appropriate range for assessing penalties for Lead Disclosure Rule violations. They argue:

> These cases – several of which involved circumstances much more egregious than those before this Board – assessed fines as low as $4,070.00 but never higher than $37,037.00. The Presiding Officer erred by summarily dismissing these precedents as non-controlling and even unpersuasive, despite their close factual relationship to the issues in the matter before the Board. Respondents respectfully submit that these precedents carry the force of law and, thus, they set the boundaries for what the Board should

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[45] Respondents have mischaracterized the penalties assessed by Judge Biro as a single penalty of $84,224.80. In fact, she assessed four sets of penalties for the Lead Disclosure Rule violations at issue in this case as is explained in the text.

In addition, Respondents' Appeal Brief contains various mischaracterizations of Complainant's actions and statements in this matter. These include Respondents' portrayals of EPA's penalty position [p.4], EPA's withdrawal of certain counts [p.5], the resolution of certain cases cited by Respondent such as *In re Greak* [p.8], Respondents' confusion over references to penalty amounts in settlements versus complaints [p.7 n.11], and that EPA supposedly "admitted" Judge Biro's penalty is "out of kilter"[p.11]. Complainant disagrees with such assertions, but as these claims are largely irrelevant to the issues presented to the Board on appeal, Complainant refrains from responding to them here. Many of the above mischaracterizations have been previously addressed in Complainant's Post-Hearing Brief and December 29, 2004 Post-Hearing Reply Brief.

[46] Page 6 of Appeal Brief, *emphasis in the original.*

> consider as the appropriate amount of fine to be assessed against them in this case.[47]

As a preliminary matter, Respondents' argument is flawed since Judge Biro assessed four sets of penalties for the five Respondents in this case rather than one overall penalty. The penalties for every Respondent, except Patricia L. Hunt do, in fact, fall within the penalty range suggested by Respondents.[48]

Respondents cite no cases in support of their penalty range argument – perhaps because the penalty range argument is unsound. The argument's primary flaw is that the Environmental Appeals Board has consistently ruled that 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. For example, in *In re Chem Lab Products, Inc.*, 10 E.A.D. 711 (EAB 2002), the Environmental Appeals Board vacated a $50,000 penalty assessed by an Administrative Law Judge ("ALJ") that was based, in part, on the ALJ's consideration of an EPA settlement with another Respondent for similar violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, instead imposing the full $132,000 penalty requested by EPA. In its decision, the Environmental Appeals Board noted, "[t]he 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 fate of another.'" 10 E.A.D. at 728 quoting *In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999) (ALJ did not err in failing to address penalties assessed in other cases when calculating penalty amounts in the instant case), *aff'd* 231, F. 3d 204 (5 Cir. 2000).

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[47]Pages 6-7 of Appeal Brief.

[48]The penalties assessed for Respondents J. Edward Dunivan, David E. Hunt and Ronald H. Hunt range from $9,856.00 to $27,504.40. The latter two are joint and several penalties with Patricia L. Hunt. The penalty for Genesis Properties, Inc. is $31,024.40. The joint and several penalties for Patricia L. Hunt total $43,334.40. See Initial Decision at pages 42-43.

The Board gives three reasons for rejecting such comparative penalty analysis in *Chem Lab Products*. First, 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 meaningful comparisons.[49] 10 E.A.D. at 728. Secondly, such comparisons hinder judicial economy by encouraging Respondents to present detailed re-examinations of other allegedly similar penalty cases by which 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. Thirdly, such comparisons are discouraged because unequal treatment under the law is not an available basis for challenging law enforcement proceedings. *Id.* Therefore, Respondents' arguments that the penalties assessed against them for Lead Disclosure Rule violations are more severe than those for other Disclosure Rule violators is without merit.

The Environmental Appeals Board also rejected a similar penalty range argument in *In re Titan Wheel Corporation of Iowa*, 10 E.A.D. 526, RCRA (3008) Appeal No. 01-3 (EAB 2002); *aff'd Titan Wheel Corp. of Iowa v. EPA*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd Titan Wheel Corp. of Iowa v. EPA*, No. 04-1221 (8th Cir., Nov. 23, 2004) (unpublished). Respondents had challenged a penalty calculated pursuant to the Agency's RCRA Penalty Policy which Respondents claimed was at variance with penalties for similar violations assessed by state agencies authorized to administer the RCRA program. The Board rejected this argument on a number of grounds, stating at one point in its opinion:

> As the Supreme Court has stated, "[t]he employment of a sanction within the authority of an administrative agency is ... not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973), *reh'g denied*, 412 U.S. 933 (1973). *See also Newell Recycling Co., Inc. v. United States Environmental Protection Agency*, 231 F. 3d 204, 210 n.5 (5th Cir. 2000) (an administrative penalty need not resemble those assessed in

[49] "...or even with bits and pieces of the record..." 10 E.A.D. at 728.

> other cases); *Cox v. United States Dept. of Agric.*, 925 F. 2d 1102, 1107 (8 Cir. 1991)(where a sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases).

10 E.A.D. at 532-33.

The Board noted that "comparing penalties between disparate cases does not account for the multiplicity of factors that may impact a penalty determination" such as litigation risk, demands on Agency enforcement resources, size of Respondent's business, Respondent's ability to pay and a history of violations. 10 E.A.D. at 533.

Respondents in *Titan Wheel* appealed the Board's Final Decision to the District Court for the Southern District of Iowa, arguing that the penalty imposed by the Administrative Law Judge and upheld by the Board was excessive when compared to penalties for similar violations assessed by RCRA authorized state agencies given that one of RCRA's goals is "to ensure that RCRA civil penalties are assessed and applied in a fair and consistent manner." 291 F. Supp. 2d at 911. The District Court rejected such arguments, stating:

> First, this language cannot be read in isolation to imply the EPA is *mandated* to consider penalties assessed in other cases. Second, other language in RCRA's Penalty Policy suggests the opposite is true; that is penalty assessment in each case will vary according to the circumstances surrounding the violation.

*Id.*

The District Court also noted that the RCRA gravity-based penalty "may be adjusted upward or downward *to reflect particular circumstances surrounding the violation.*" *Id. Emphasis supplied by the*

*District Court.*[50] This same concept is inherent to the EPA Lead ERP which states:

> This Enforcement Response Policy acknowledges that no two cases are exactly alike. Unique circumstances other than those taken into account by the factors discussed in the previous sections [nature, circumstances and extent of violation; i.e. the elements making up the "gravity-based matrix"] may be significant in determining the appropriateness of a penalty.[51]

This is one of the problems with Respondents' review of the ten lead disclosure penalties cited in their Appeal Brief. The Lead ERP provides for consistent penalties for violations that have similar conditions. Without a detailed review of the facts and circumstances at play in each case, such penalty comparisons are meaningless. For example, a Lead Disclosure Rule penalty for violations concerning one lease will be inherently different (and probably smaller) than a penalty for failure to comply with Lead Disclosure Rule requirements for nine or ten leases even if the same requirements are at issue.

Moreover, even if the violations are the same and the number of leases at issue are the same, the penalties can vary widely under the Lead ERP depending upon the age of the children living in the target housing at the time of Lead Disclosure Rule violation.[52] Respondents' Lead Disclosure Rule penalty case review omits any reference to the specific Lead Disclosure Rule violations at issue or the ages of the affected children. For example, in *In re Harpoon Partnership,* Docket No. TSCA-05-2002-0004 (ALJ, May 27, 2004), one of the few cases where the Respondents were charged with Lead Disclosure Rule

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[50]The District Court decision was upheld by the 8th Circuit in an unpublished *per curiam* decision. *Titan Wheel Corp. of Iowa v. EPA*, No. 04-1221 (8th Cir., Nov. 23, 2004) (unpublished).

[51]Page 14 of the EPA Lead ERP (CX-16 at EPA 0158). The text of the Lead ERP then continues with a discussion of the various adjustment factors.

[52]For example, an Owner-Lessor's failure to provide tenants with records or reports pertaining to lead-based paint or lead-based paint hazards prior to entering into the lease, a violation of 40 C.F.R. § 745.107(a)(4), would either be assessed as an $11,000 penalty if children under the age of six were present, $6,600 if children between the ages of six and seventeen were present, or $2,200 if such occupants were all eighteen years or older. See CX-16 at EPA 172, 174.

violations for multiple leases,[53] only one of the nine leases at issue had children under the age of six residing in the associated target housing at the time of violation, and only one other lease involved children between the ages of six and seventeen. Seven of the leases involved no occupants under the age of eighteen, which resulted in significantly lower penalties than is the case here where five of the leases at issue involved children under the age of six and the remaining five involved children between six and seventeen.[54] As importantly, many of the violations in *Harpoon* are different from those in the case at bar. In *Harpoon*, Respondents were charged with violations of 40 C.F.R. § 745.113(b)(1) which is not a count in the case at bar while there are no § 745.107(a)(4) counts in *Harpoon* as there are in this case.[55]

Yet, Respondents would have the Board gloss over these distinctions[56] and require the penalty in the instant case to be based on Lead Disclosure Rule cases which have significantly fewer leases or sales

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[53]Seven of the ten cases cited by Respondents concern Lead Disclosure Rule violations for a single lease or home sale whereas the case at bar concerns Lead Disclosure Rule violations for ten leases. See Initial Decision, slip op. at 39 and page 46 of Complainant's Post-Hearing Brief. Respondents apparently suggest that penalties for multiple Lead Disclosure Rule violations for ten leases for four dwellings should be the same as for the same violations for one lease for one dwelling. Nine of the ten cases cited by Respondents average five counts per Complaint. See pages 7-10 of Appeal Brief. The instant case has 32 counts. Common sense suggests that the cumulative penalty for 32 violations would be significantly larger than that for 5 counts, all else being equal.

[54]See *Harpoon Partnership*, slip op. at 21-23.

[55] See *Harpoon Partnership*, slip op. at 2-3. Note that the one count in *Harpoon* that cites the Respondent for failure to include a statement in the lease disclosing the known presence of lead-based paint or lead-based paint hazards as required by 40 C.F.R. § 745.113(b)(2), where a child between six and seventeen is present, the ERP gravity-based penalty proposed by EPA and adopted by the Presiding Officer (prior to the adjustment factors) is $6,600 - the same gravity-based penalty amount proposed by EPA and adopted by the Presiding Officer for this violation when a child between six and seventeen is present in the case at bar. See *Harpoon Partnership*, slip op. at 3, 8, and 22 (on page 3, the Presiding Officer mistakenly cites this as a violation of 113(b)(1) but from the text it is clear that 113(b)(2) was meant) and the Initial Decision for the case at bar, slip op. at 18 - 19.

Because many of the violations in *Harpoon* are less significant than in the case at bar and because most of the affected tenants in *Harpoon* did not have children, the gravity-based penalties calculated by EPA under the ERP for most of the *Harpoon* violations are relatively low, ranging as low as $220 per count. See *Harpoon Partnership*, slip op. at 22. Because all the tenants had young (often very young) children in the case at bar, the penalties for such violations as mandated by the Lead ERP are significantly higher.

[56]The various adjustment factors listed in the Lead ERP such as "ability to pay," "history of prior such violations," etc., provide possible explanations for other differences in penalties for seemingly similar Lead Disclosure Rule violations. See CX-16 at EPA 0158-0162.

at issue, significantly fewer counts, significantly fewer children and, indeed, significantly different regulatory violations. Judge Biro considered and rejected Respondents' penalty range argument for these very reasons, ruling:

> The penalty heretofore crafted in this case is based upon the specific facts of this case as derived from the testimony and documents placed into evidence. I am not persuaded by Respondents that the penalty should be modified based on 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.

Initial Decision, slip op. at 40.

Clearly, Judge Biro's rejection of Respondents' proportionality argument as to the facts of the instant case is not an abuse of discretion or a clear error in assessing the penalty.

### C. Neither the Lead Disclosure Rule Regulations nor Existing Caselaw Support Respondents' Penalty Multiplication Argument.

Respondents argue that the Presiding Officer has multiplied the penalties for Respondents' Lead Disclosure Rule violations "without the use of discretion or common sense."[57] Respondents suggest a more "enlightened" and "objective" penalty analysis is to group such penalties by property.[58] Respondents

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[57]Appeal Brief at 11. As part of this argument, Respondents also criticize Judge Biro because she "incorrectly began her analysis at the point reached through the EPA's inflated analysis and worked backwards from there, thereby failing to begin her review with a fresh look at the EPA analysis as required by *New Waterbury, supra.*" Appeal Brief at 15.

However, this argument ignores the requirements of 40 C.F.R. § 22.27(b) which requires the Presiding Officer to "consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." Nothing in *New Waterbury* suggests that the Presiding Officer should disregard the relevant penalty policy or the Agency's penalty analysis as mandated by 40 C.F.R. § 22.27(b).

[58]Appeal Brief at 11-12.

suggest that all Lead Disclosure Rule violations emanate from four "minor paperwork" violations – one for each property.[59] Respondents cite to no caselaw, regulation, or guidance to support their "penalty-by-property" proposal.

Under Respondents' theory, all Lead Disclosure Rule violations (or at least the ones in the instant case) for any given property become a single violation regardless of the number of leases affected by such non-disclosure, how many tenants have their lead disclosure rights violated, and how many different Lead Disclosure Rule requirements are dispensed with by Respondents. Yet, this argument ignores the plain wording of the regulations at issue. The lead disclosure obligations of 40 C.F.R. §§ 745.107(a) and .113(b) are each lease-based requirements.[60] Therefore, a failure to comply with these *requirements* for each *lease* is a separate violation subject to a separate civil penalty. And the logic of this requirement is simple. The disclosure law is designed to protect the lessees and purchasers of target housing and not the target housing itself.[61]

Respondents claim that the failure to include a clause in the lease that lead-paint is present in the target housing and failure to provide lead-based paint documents to such tenants prior to signing the leases (or failure to ensure such disclosures were done in the case of Genesis Properties, Inc.) stem from the

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[59] Appeal Brief at page 15. Complainant disagrees with the characterization of these important lead disclosure obligations as "minor paperwork" requirements. Indeed, Respondents' belief that the Lead Disclosure Rule requirements are only minor paperwork violations may be part of the reason why Respondents violated these requirements in the first place – they do not take such requirements as seriously as Congress did when it enacted the RLBPHRA.

[60] 40 C.F.R. § 745.107(a) states, "The following activities shall be completed before the purchaser or lessee is obligated under any contract to purchase or lease target housing...." 40 C.F.R. § 745.113(b) reads, "*Lessor requirements*. Each contract to lease target housing shall include...." These requirements are applicable to Respondent Agent, Genesis Properties, Inc., through 40 C.F.R. 745.115.

[61] Penalties based on a per requirement/per lease approach is also suggested by the EPA Lead ERP (CX-16).

same act and therefore ought to have a lower penalty.[62] However, this is not the case. One can include a provision in the lease that lead-based paint is present in the target housing and fail to provide records of lead-based paint and vice versa.

Another flaw in Respondents' multiplication argument is that Respondents' premise – that each set of violations for each property stemmed from a single misplaced document, *i.e.*, the applicable Richmond NOV for that property – is incorrect. In addition to the lead-paint NOVs which the City of Richmond sent to the Respondent Owner/Lessors concerning these properties (CX-21, CX-23, CX-24 and CX-25), Lead-Safe Richmond also sent Respondent Owner/Lessors the following documents:

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| 1. | Ronald and Patricia Hunt: | a November 24, 1998 letter enclosing another copy of the 1997 lead inspection report which had previously been sent to them with the 1997 NOV for the 1124 N. 28th St. property (CX-22); |
| 2. | Ronald and Patricia Hunt: | a May 11, 1998 Compliance Letter for the exterior of the1813 N.29th St. property (CX-52); |
| 3. | J. Edward Dunivan: | an August 4, 1997 Compliance Letter for the exterior of the 2405 Third Ave. property (CX-57); and |
| 4. | J. Edward Dunivan: | a July 19, 1998 Notice of Non-Hazardous Lead-Based Paint for the exterior of the 2405 Third Ave. property (CX-57). |

In addition, on September 30, 1998 EPA sent TSCA Subpoena No. 358 (CX-27) to Respondent Owner/Lessors David E. Hunt and Patricia L. Hunt concerning their compliance with their Lead Disclosure Rule obligations for their 3015 Barton Ave. property. Coming only a year after Richmond

[62] T at 239:8 - 242:1. Appeal Brief at pages 12-15. While Respondents never specifically state such penalties should be assessed on a property-by-property basis, that is the clear implication that the fines have been improperly "multiplied" [Appeal Brief, page 11]. See, for example, "A more enlightening analysis can be undertaken by looking at the facts in groupings by property, a more objective approach than simply adopting the agency's 32-count framework," [Appeal Brief, page 12], and "As is clearly shown in the above outline, the EPA took four minor paperwork errors on four properties and multiplied those offenses in an effort to justify $120,088 in fines," [Appeal Brief, page 15].

issued its June 30, 1997 lead-based paint NOV to David E. Hunt and Patricia L. Hunt for this same property (CX-24), these Respondents should have been reminded that this property contained lead-based paint.[63]

Each of these documents sent to the respective Owner/Lessors indicated the presence of lead-based paint in these dwellings and therefore triggered a lead-based paint disclosure as required by 40 C.F.R. §745.113(b)(2). Each of these documents should have been provided to the tenants in question pursuant to 40 C.F.R. § 745.107(a)(4) or included in the list of documents provided to the tenants pursuant to 40 C.F.R. §745.113(b)(3). These lead disclosure obligations also apply to the Agent, Genesis Properties, Inc., via 40 C.F.R. § 745.115(a)(2).

Not only must the original NOVs have somehow been misplaced sometime after their receipt by the owners and prior to their receipt by Genesis Properties, Inc., we must now also believe that the above additional four pieces of correspondence affecting three of the properties were also, somehow, misplaced. In addition, the owners of the other property, 3015 Barton Ave., received an EPA TSCA Subpoena concerning their Lead Disclosure Rule compliance for this property in the fall of 1998 (CX-27) which would have, but apparently did not, remind them[64] of the Richmond lead-based paint NOV for this property they had received the previous year (CX-24).

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[63]Certainly, the Presiding Officer thought David E. Hunt and Patricia L. Hunt's receipt of the September 30, 1998 TSCA Subpoena No. 358 put such parties on notice about their Lead Disclosure Rule obligations concerning this property. "Despite the subpoena raising Respondents' awareness of the lead disclosure issues, thereafter, GENESIS PROPERTIES, INC. [Genesis Properties, Inc.] nevertheless entered into three more leases for the Barton Ave. property (Leases # 6-8) and as to each failed to provide the required notice... 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." Initial Decision, slip op. at 37. *Emphasis in the original.*

[64]And Respondent Ronald H. Hunt who answered the TSCA Subpoena. See CX-28. See the Initial Decision, slip op. at 37, for the Presiding Officer's views on the significance of this subpoena relevant to the Barton Ave. owners vis a vis lead disclosure.

In addition to the above correspondence, Respondents encapsulated the lead-based paint at the non-Barton Ave. properties. Since someone had to arrange for either contractors or Respondents' painters[65] to come in and apply Lead Block to these three dwellings, the Respondent Owner/Lessors knew, or should have known, that their dwellings contained lead-based paint since one can expect the property owners to know about maintenance work being done on their own property.[66] Yet none of this additional information made it into the lead-based paint folders maintained by Genesis Properties, Inc. to ensure that prospective tenants were notified of such lead-based paint prior to entering into a lease for these dwellings.[67]

So that when Respondents claim that EPA took "four minor paperwork violations on four properties" which it then multiplied "in an effort to justify $120,088.00 in fines",[68] it is actually more accurate to say, "Respondents violations stem from them ignoring at least eight and perhaps twelve or more documents concerning lead-based paint at these four properties," assuming one were in agreement

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[65]T at 209:12-18.

[66]Even if the work was done by the property management firm, the owners would have been charged for the cost of the encapsulation material and labor.

[67]See the testimony of Respondent Ronald H. Hunt who testified that, as the manager of these properties [T at 205:6 - 9], he kept a file on all these properties in his office. "And I think what happened is it [the NOV/inspection report] got filed in there and never made it to Genesis Properties, because we went through the files, Genesis didn't have any record of those four properties being inspected by the city." T at 210:9 - 211:1.

Genesis Properties, Inc. employee Michael Hunt stated, "[w]ell, I keep a record of all the lead-based paint... And I have a file on all those properties to disclose with them. And when the -- when we looked at the suit, I pulled my records and did not have anything on the inspections on those houses that lead was found in them to disclose to the tenants." T at 218:3 - 10.

Since NOV reminder letters (enclosing lead-based paint inspection reports), and NOV compliance letters are relevant to the Richmond inspections *and are the types of documents that must be provided to tenants pursuant to 40 C.F.R. §§ 745.107(a)(4) and 115(a)(2)*, the Owner/Lessors either failed to provide Genesis Properties, Inc. with such documents or they were given to Respondent Ronald H. Hunt who failed to forward such documents to Genesis Properties, Inc. just as he failed to forward the Richmond lead-based paint NOVs. Regardless, Michael Hunt testified that no documents relevant tot he Richmond lead-based paint inspections were in his files.

[68]At hearing, Respondents counsel referred to this as, " One simple mistake being repeated four times..." (T at 241:20-21). Complainant, again, disagrees with the characterization of these important lead disclosure obligations as "minor paperwork" requirements.

with this line of reasoning, which Complainant is not. Complainant's position remains that as stated in the Lead Disclosure regulations. Respondents committed thirty-two Lead Disclosure Rule transgressions which is the basis for the thirty-two counts in the Complaint.

Respondents' "ripple effect"[69] argument was also made by the Respondent Owner/Lessor in *In the Matter of Harpoon Partnership,* Docket No. TSCA-05-2002-0004 (ALJ, May 27, 2004) in which it argued that the five counts EPA cited for each lease were cumulative in nature. The Presiding Officer summarized Respondent's argument as, "[i]n other words, when a Respondent cannot produce the Disclosure Form, there are five separate violations rather than one violation."[70] However, the Presiding Officer did not mitigate the proposed penalty for Respondent based on Respondent's cumulative penalty theory.[71] This argument was also specifically rejected by the Presiding Officer in *Ric Temple and Paul Nay & Associates,* Docket No. TSCA-5-99-015 (ALJ July 7, 2000).[72]

The Presiding Officer cited to both opinions in rejecting Respondents' "penalty multiplication"

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[69] See, for example, opposing' counsel's argument concerning Counts 5 and 9 for the 1124 N. 28th St. target housing:"Now, of course, as the evidence has explained, the only reason the collateral documentation was not provided is basically the same problem that led to the incorrect completion of the form. So we have basically the incorrect completion of the form and its ripple effect now totaling up to $15,840." (T at 239:17 - 240:1).

[70] Initial Decision, slip op. at 23.

[71] While the "cumulative violation" argument is similar to the one used by Respondents at bar, it should be noted that violations of 40 C.F.R. §745.107(a)(4) were not alleged in *Harpoon Partnership.* See *Harpoon Partnership*, slip op. at 2-3, for a list of the violations at issue in that case.

[72] The Presiding Officer ruled: "Although I have some question as to the redundancy or lessor 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. Accordingly, the total civil penalty assessed in this decision will be $29,700, the amount sought in the Complaint." *Ric Temple*, Initial Decision, slip op. at 2-3. This case concerned seven lead disclosure violations resulting from a single sale of a residential dwelling. While Respondent made a similar "cumulative violation" argument as Respondents in the case at bar, the violations are different than the lead disclosure violations at issue in the case at bar. See *Ric Temple,* Initial Decision, slip op. at 7 - 8 for a list of the violations in that case.

objection.[73] She also ruled that Respondents are not entitled to any penalty reduction based on multiple counts of violation against both the Respondent Owner/Lessors and Respondent Agent.[74] Judge Biro's rejection of Respondents' multiplication argument cannot be deemed an abuse of discretion or a clear error in assessing the penalty.

### D. Respondents' Lead-Based Paint Response Actions at their Properties Do not Warrant any Additional Penalty Reductions Beyond those Assessed by the Presiding Officer.

Respondents' argument on remediation is somewhat confusing. Although Respondents state this issue in their Appeal Brief as a question of whether the Presiding Officer should have granted a larger discount for the encapsulation work allegedly performed at their various properties, Respondents seem to really be arguing that the Presiding Officer erred in her decision that no such work had been done at 3015 Barton Ave. The lead sentence to Respondents' remediation argument is:

> The Presiding officer erred in her failure to grant a higher discount to the respondents for the remediation work performed at the Barton Ave. property.[75]

Moreover, the corresponding issue in Respondents' Notice of Appeal (Issue #1) is solely concerned with whether the Presiding Officer was correct in her determination that no encapsulation work had been done at Barton Ave.[76]

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[73] See Initial Decision at page 31.

[74] Initial Decision, slip op. at 38. Respondents belittled EPA's exercise of its prosecutorial discretion by reducing proposed penalties by 50% when both the Respondent Owner/Lessor and Respondent Agent were charged for Lead Disclosure Rule violations for a given lease because of the apparently close relationship between the owners and agent in this case. Had they not been so interconnected, no such reduction would have been made. *See* pages 8-9 of Complainant's Post-Hearing Reply Brief. The Presiding Officer agreed with Complainant's analysis. Initial Decision, slip op. at 38.

[75] Page 15 of Respondents' Appeal Brief.

[76] "The Presiding Officer improperly found that insufficient evidence of encapsulation activities was presented at the hearing on this matter and improperly rejected testimony based on absence of documentation of such activities." Notice of Appeal, page 1.

Finally, the Respondents state in their Appeal Brief that the Presiding Officer's downward penalty adjustment based on the encapsulation activities for the three non-Barton Ave. properties is correct:

> The Presiding Officer properly determined that no harm befell any of the tenants and properly granted a 10% [sic] discount for each of the three of the four properties at issue, excluding the Barton Avenue property.[77]

Yet, in a footnote to the above sentence, Respondents ask "whether 10% per property is in fact the limit of such possible discount , and ask this Board to consider a greater discount."[78]

Because Respondents have broadly stated the issue of penalty reduction for property remediation in the Appeal Brief argument heading and assuming Respondents' footnote is actually requesting a further downward adjustment to the 30% discount provided by Judge Biro rather than the 10% cited by Respondents, Complainant will address both this issue and that of whether Judge Biro properly decided that Respondents did no encapsulation work to the Barton Ave. property.

Starting with Respondents' broader penalty mitigation/encapsulation issue, Respondents' argument for additional penalty mitigation appears to be summarized in the closing paragraph for this argument which nonetheless seems to be something of a hybrid with Respondent's Argument I.A concerning penalty proportionality. Respondents state:

> Unlike the facts of the cases cited above in which the larger fines were imposed, no harm occurred to any of the tenants of the properties owned or managed by the respondents, and the respondents encapsulated the lead paint at their properties. As such, the respondents' case is truly one of harmless error and therefore should be considered at the lower end of the

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[77]Appeal Brief at page 16. Complainant assumes Respondents are referring to the 30% reduction for remediation work granted by the Presiding Officer for the three non-Barton Ave. properties rather than the 10% reduction cited by Respondents (Judge Biro also provided 10% penalty reductions for cooperation or immediate good faith efforts to comply).

[78]Appeal Brief at page 16 n. 18.

range of penalties imposed in lead paint disclosure cases.[79]

To the extent that Respondents are making a variation of the penalty range argument set forth in their Issue I.A, Complainant refers to its response in Section VI. B. of this Brief. As to whether the Presiding Officer erred in allocating a 30% penalty reduction for lead-based paint encapsulation work for the three non-Barton Ave. homes when there is no evidence of lead poisoned children living in the leases at issue concerning such homes, Complainant refers to Judge Biro's penalty analysis. Judge Biro begins her encapsulation/penalty mitigation review with the TSCA statutory factors which include "gravity of the violation[s]."[80] Judge Biro then decides that regardless of whether the EPA Lead ERP provides for actual harm or risk of harm, these are factors that must be considered in determining the "gravity" of the violation.[81] After assessing the testimony in this case, Judge Biro determined that Respondents' application of the Lead Block-type encapsulant to the non-Barton Ave. properties significantly reduced the lessees' risk of exposure to lead hazards at these properties.[82] Again returning to the Lead ERP, she notes that the ERP only provides an 80% reduction if the responsible parties provide EPA with documentation that the property is certified to be lead-based paint free by a certified inspector (the "No known Risk of Harm Adjustment" factor).[83] Judge Biro then gives three reasons why Respondents do not qualify for an

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[79]Appeal Brief at 17.

[80]Initial Decision, slip op. at 30.

[81]Initial Decision, slip op. at 30. Complainant takes no position at this time on Judge Biro's decision to deviate from one the Lead ERP adjustment factors.

[82]Initial Decision, slip op.at 32.

[83]Initial Decision, slip op. at 33.

80% reduction:[84]

1. The encapsulation work by Respondents does not remove the underlying lead-based paint;
2. The evidence as to what encapsulation activities occurred and when is unclear - and in particular there is no evidence how Respondents' encapsulation activities reduced the risk of lead-based paint exposure in friction surfaces such as windows and door jambs for which Lead Block-type encapsulation products are ineffective; and
3. Respondents provided no evidence of monitoring and maintenance of the surfaces treated with Lead Block, without which the protective coatings could fail almost immediately or within a few months of application.[85]

Respondents do not submit any information to challenge the reasons stated by Judge Biro for limiting her generous penalty reductions to 30% for this factor and therefore Complainant suggests that no further such reductions are warranted for such work.[86]

Complainant now returns to the Barton Ave. component of Respondents' encapsulation argument. Respondents state in their Notice of Appeal that while the Presiding Officer "properly granted" a 30% penalty reduction to Respondents for three of the four properties at issue due to Respondents' lead-based

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[84]In the Initial Decision, slip op. at 33 n. 46, Judge Biro interprets the 80% ERP reduction for certified lead-based paint-free target housing to presumably "only apply to those cases where housing is inspected and certified to be lead based paint free *after* the leases were signed." *emphasis in original.* The Presiding Officer is correct in that the inspection and certifications would occur after the leases have been signed but the work to make the target housing lead-based paint free must have occurred prior to such leases being signed.

[85]Initial Decision, slip op. at 33-34.

[86]See also argument VII.F in Complainant's Post-Hearing Brief. Complainant is especially concerned that Respondents failed to produce any bills, receipts, letters documents or affidavits attesting to such encapsulation work. The only testimony comes from Ronald Hunt who was not present during the encapsulation activities. Respondents do not even name their employees and outside company that supposedly did such encapsulation work on these properties, nor do they make any showing that they canvassed their current employees and firms in the Richmond area that do encapsulation work to see if such employees or firms could confirm that they did such work for Respondents on what dates for what properties and allow Complainant to examine them to determine how thorough was their encapsulation work.

paint hazard reduction activities, she improperly declined to do so for the Barton Ave. property.[87] Respondents claim:

> However, the Presiding Officer improperly failed to allow such a reduction for the property found at Barton Avenue. The Presiding Officer improperly found that insufficient evidence of encapsulation activities was presented at hearing on this matter and improperly rejected testimony based upon absence of documentation of such activities.[88]

Respondents state that Respondent Ronald Hunt specifically testified that Respondents paid to have these properties encapsulated and that "EPA offered no evidence to rebut the Respondents' testimony that remediation also occurred at the Barton Avenue property."[89] Respondents acknowledge that Complainant presented testimony from Mr. Lonnie Sims, a State trained, certified and licensed lead paint inspector with the Richmond Department of Public Health[90] in an effort to rebut Mr. Hunt's testimony. Respondents briefly summarize aspects of Mr. Sims' testimony but omit any mention of his testimony about why he is certain Respondents never performed encapsulation activities at the 3015 Barton Ave. property.[91] This is odd since Mr. Sims was the Richmond inspector who did the June 26, 1997 lead-based paint inspection of 3015 Barton Ave. which was the basis for the June 30, 1997 Richmond lead-based paint NOV to the owners of this property, David E. Hunt and Patricia L. Hunt (CX-24). Mr. Sims also did follow-up inspections of the property in subsequent years. Mr. Sims' testimony on these points is nonetheless instructive.

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[87]Respondents correctly cite to Judge Biro's 30% reduction for encapsulation in the Notice of Appeal which Complainant assumes is what Respondents meant instead of the 10% reference on page 16 and in footnote 18 of Respondents' Appeal Brief.

[88]Appeal Brief, Issue #5, page 3.

[89]Appeal Brief at 16.

[90]See Initial Decision, slip op. at 31 and T at 154-161.

[91]Page 16 of Appeal Brief.

Mr. Sims testified that neither he nor anyone else at the Department's Lead-Safe Richmond offices was ever contacted by either the property owners or anyone else connected with Respondents after the June 30, 1997 NOV was issued.[92] Mr. Sims inspected the exterior of 3015 Barton Ave. in July of 1997 and did similar inspections in May, June, and September 2004.[93] Mr. Sims testified that no changes had occurred in the condition of the lead-based paint for these exterior surfaces since the time of his June 27, 2997 lead-based paint inspection.[94] During these inspections, he testified that he could see the front and rear walls (walls #1 and #2) of the dwelling and the front porch.[95] Mr. Sims was asked how he could tell that Lead Block had never been applied since his initial 1997 inspection. Mr. Sims responded:

> Well, the characteristics of lead encapsulant or Lead Block paint makes a surface appear glossed or shiny. The paint on the columns and the paint on the windows is pretty much still in the same condition it was then, meaning its flaking, its chipping and it has an irregular shaped surface area on the wood itself.
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> And with a lead encapsulant, being the nature of paint, its consistency is glue. It's almost painting with glue. It will adhere to whatever it's placed on and it fills in cracks.[96]

At hearing, Complainant's counsel then noted that Mr. Sims had not worked for Lead-Safe Richmond from August 1998 until January 2004 and asked Mr. Sims if the Lead Block could have been applied sometime after he left Lead-Safe Richmond in 1998 and over the intervening years, the painted

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[92]T at 170:10 - 171:1.

[93]T at 171:2 - 172:2. Mr. Sims testifies he thinks he may have done a second inspection in July 1997 but is certain he did at least one. T at 171:22 - 172:1.

[94] T at 172:2 - 173:12. Mr. Sims testified that he did not examine the interior of the premises as the tenants were not there when he came by and he did not have access to the inside of the property. (T at 172:16-19). He also testified that the property was "posted" during his May 2004 inspection which Complainant understood to mean with "No Trespassing" signs while during later visits he did not see anyone to give him access to the interior of the dwelling. (T at 174 :8-17).

[95]T at 172:2-11; 173:13-17.

[96]T at 173:18 - 174:7.

surfaces could have deteriorated to the conditions he had just described. Mr. Sims again responded:

> No Sir. Because of the consistency and the elements of the Lead Block paint itself, once it is applied to a surface, it's readily known or it's easy to tell it's on there. And from the surface – for surfaces that I have seen, wooden surfaces on the house, no Lead Block has been applied to it.[97]

In addition to Mr. Sims' property inspection testimony, unlike the other three properties, the City of Richmond Department of Health never sent the Barton Ave. property owners a Compliance Letter stating that the lead-based paint hazards cited in its June 30, 1997 NOV had ever been corrected, nor is there any record of any such compliance in the Department of Heath's Lead-Safe Richmond office or databanks.[98]

Respondents only testimony opposing that of Mr. Sims was that of Respondent Ronald H. Hunt. Mr. Hunt is not the owner of this property.[99] 3015 Barton Ave. is one of the hundreds of units Ronald Hunt claims to manage. He submitted no receipts, bills, letters or other documents detailing how and when this encapsulation was performed.[100]

Judge Biro reviewed the above testimony and associated documentation and arguments by the parities and concluded that Mr. Sims' testimony was more credible on this issue than was Mr. Hunt's

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[97]T at 174:18 - 175:5.

[98]See pages 64-69 of Complainant's Post-Hearing Brief and the testimony references in the transcript therein, especially T at pages 170-177 .

[99] See Initial Decision, slip op. at 31 and T at page 208. The owners are David Hunt and Patricia Hunt. See property deed (CX-13).

[100]See Initial Decision, slip op. at 30-31. See also pages 58-61 of Complainant's Post-Hearing Brief. Mr. Hunt testified that he had encapsulation done for these properties "with some of those people who are licensed" and, in the case of Barton Ave., he claims "we just used some of our painters" to do a second application. T at 209:12-18. Yet Respondent make no showing that they asked their employees who do such painting whether they worked on Barton Ave. or remembered who did nor did they attempt to contact the Richmond area firms "who are licenced" to do encapsulation work to see if they had records of doing any such work on Barton Ave.

testimony[101] and therefore determined that Respondents did not perform any encapsulation work at the 3015 Barton Ave. property.[102]

As noted earlier, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based on such credibility determinations. *In re Donald*, CWA Appeal No. 02-01, slip op. at 11 (EAB, September 2, 2004); *In re Billy Yee*, 10 E.A.D. 1, 11 (EAB 2001). The Presiding Officer's determination that no encapsulation work was done by Respondents at 3015 Barton Ave. is one of witness credibility and therefore ought to be sustained by the Board. Certainly, her finding of no encapsulation work at the Barton Ave. property is not an abuse of discretion or a clear error in assessing the penalty.

### E. The Presiding Officer Properly Applied a 10% Downward Penalty Adjustment for Respondents' Cooperation in this Case.

The Presiding Officer was correct in not assigning more than the 10% downward adjustment authorized by the EPA Lead ERP for Respondents' cooperation in this matter.[103]

Complainant agrees that Respondent has been cooperative with EPA 's investigation into the violations at issue in this case. This is why Complainant reduced its proposed penalties by the full 10%

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[101]"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 occurred at all." Initial Decision, slip op. at 32.

[102]Initial Decision, slip op. at 31-2.

[103]Although the Presiding Officer states on page 35 of the Initial Decision's slip opinion that Respondents are entitled to a "20% penalty reduction on all counts based upon their 'cooperation,'" it is clear she means "attitude" which is the ERP adjustment factor heading for this discussion. On page 34, she notes that EPA may reduce a proposed civil penalty by a maximum of 30% for "attitude" which consists of three components: (a) cooperation, (b) immediate good faith efforts to comply, and (c) early settlement. After explaining why Respondents warrant a 10% downward adjustment for cooperation, she states "Respondents are also entitled to the second 10% reduction provided under subsection (b) above based on their immediate good faith efforts to comply with the Disclosure Rule...." Initial Decision, slip op. at 35. See page 16 of the ERP for the "Attitude" adjustment factors. CX-16 at EPA 0160.

authorized by the Lead ERP when it made its penalty recommendations for this case.[104] However, the ERP does not provide for a greater than 10% reduction. The Board encourages the administrative law judges to consider the ERP in making their penalty calculations, which the Presiding Officer did in making her 10% adjustment for Respondents' cooperation,[105] and the Board has said it will defer to the Presiding Officer when such penalties are based on the relevant penalty policies absent a showing that the administrative law judge has committed an abuse of discretion or a clear error in assessing the penalty. *In re Morton L. Friedman and Schmitt Construction Company*, CAA Appeal No. 02-07, slip op. at 53 (EAB, Feb. 18, 2004); *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); and *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998). Respondents have presented no cases or evidence in opposition to this long-standing EAB penalty approach.

Respondents argue that they merit an additional "cooperation" reduction above and beyond the 10% awarded by Judge Biro because "they performed voluntary remedial actions" for these properties.[106] Such work is inapplicable to a consideration of a downward adjustment for cooperation.

First, such work was not voluntary. It was ordered by the City of Richmond under a threat of $1,000 fine if such work was not done in a timely fashion.[107] Secondly, Respondents only did encapsulation work for the three of the four properties for which the City of Richmond sent Respondents

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[104] CX-15 at EPA 0141; CX-16 at EPA 0160; and CX-100.

[105] Initial Decision, slip op. at 34-35.

[106] Appeal Brief at 18. Note that the Presiding Officer ruled that such work had only occurred at 3 of the 4 properties.

[107] See the four Richmond Notices of Violation included as CX-21, CX-23 - 25. The boilerplate provision at the end of each NOV reads, "Failure to comply with the requirements of this notification will result in the issuance of a summons requiring your personal appearance in the city's General District Court – Criminal Division, where if found guilty you may be fined up to One Thousand Dollars ($1,000.00) per violation." See CX-21 at EPA 0352 for an example of this warning.

lead-based paint NOVs.[108] Finally, the City of Richmond had to send out a follow-up letter a year later for the 1124 N. 28th St. property before such work was implemented.[109]

While Complainant appreciates that Respondents complied with three of the four City of Richmond NOVs to mitigate lead-based paint hazards at these four properties, partial compliance with enforcement orders from the City of Richmond Department of Health are not the legal proceedings at issue in this case and should be irrelevant to the issue of Respondents' cooperation with EPA's investigation in the instant case. *See In re M.A. Bruder and Sons, Inc.*, 10 E.A.D. 598, 607-8, 616 (EAB 2002).[110] Furthermore, EPA appreciates Respondents' cooperation in responding to its three TSCA subpoenas – which is why EPA reduced the penalties it was seeking against them by the 10% set forth in the ERP. But Complainant suggests that it is somewhat disingenuous to attribute a larger penalty reduction to

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[108]Respondents did not do encapsulation at the Barton Ave. property, Initial Decision, slip op. at 32.

[109]See the November 4, 1998 Richmond letter concerning the 1124 N. 28th St. property (CX-22) and compare with Richmond's October 21, 1997 NOV for this property (CX-21). Put differently, all the Owner/Lessor Respondents other than Owner/Lessor J. Edward Dunivan either failed to respond to a Richmond NOV (David E. Hunt and Patricia L. Hunt ) or took over a year to respond to such NOVs (Ronald H. Hunt and Patricia L. Hunt). As agent, the cooperation argument is either inapplicable to Genesis Properties, Inc. (since the NOVs were addressed to the property owners), or else share the same mixed response record as do the owners due to Genesis Properties, Inc.'s near contemporaneous knowledge of the NOVS (see Initial Decision, slip op. at 36-37).

Nonetheless, for the other reasons set forth in the text, Respondent J. Edward Dunivan's cooperation mitigation should remain at the 10% penalty reduction authorized by the ERP. Complainant respectfully suggests that the Presiding Officer's statement that "in general, upon receiving NOVs, [the Respondents] promptly undertook compliance activity voluntarily," overstates the case on this issue.

[110]In *M A Bruder* the Presiding Officer departed from the applicable penalty policy in that case and issued a significantly lower penalty for certain RCRA violations than requested by EPA. Part of his penalty decision was based on the fact that Respondents' timely response to two EPA information requests demonstrated good faith efforts towards prompt compliance. While EPA had proposed a 10% good faith adjustment in this penalty, it had argued that "complying with legal obligations that are not related to the legal obligation forming the basis of the violation should not lead to penalty mitigation." 10 E.A.D. 608. The Board agreed with the Region on this issue, limiting the good faith adjustment to the 10% suggested by EPA. 10 E.A.D. 616.

Although cooperation was not the adjustment factor at issue in *M.A. Bruder*, the concept is the same. Respondents' partial compliance with Richmond lead-based paint NOVs is relevant to Respondents' cooperation with the Richmond authorities - not to Respondents' cooperation with EPA on an entirely different enforcement action.

Respondents for responding to subpoenas that they were legally required to respond to in the first place.[111]

Finally, Respondents have already received a generous 30% downward penalty adjustment from the Presiding Officer for the three properties for which Respondents encapsulated the lead-based paint as part of her "risk of exposure/other factors as justice may require" penalty reduction.[112] Adding a second downward adjustment above and beyond the 10% provided for by the ERP because of Respondents' partial compliance with a series of NOVs issued by the City of Richmond for this very work would result in double-counting the benefits of such work. No such additional reduction for cooperation is warranted for Respondents based on their partial compliance with Richmond's NOVs.

Respondents have not demonstrated that they deserve a larger downward adjustment for their cooperation than provided by the Lead ERP and approved by the Presiding Officer. Judge Biro's decision to limit her downward penalty adjustment to the 10% amount recommended by EPA and authorized by the Lead ERP cannot be considered an abuse of discretion or a clear error in assessing the penalty.

### F. Respondents' Alleged Lack of Culpability does not Warrant a Downward Adjustment to the Penalties Assessed by the Presiding Officer.

Respondents argue that their proposed penalties should be further reduced because the Presiding Officer failed to mitigate their penalties as a result of Respondents' alleged "lack of culpability and unintentional nature of the violations." Respondents cite to two other cases in which the Respondents allege the violators knowingly tried to conceal the presence of lead-based paint in their properties, yet received no penalty modification for culpability. These cases are *In re Leonard G. Greak*, TSCA-07-2003-0019 (ALJ, April 6, 2001) and *In re Billy Yee*, TSCA-7-99-0009 (ALJ, June 6, 2000) *aff'd* by E.A.B

[111] See the discussion of this very same issue in *M.A Bruder* in the preceding footnote.

[112] Initial Decision, slip op. at 34.

in *In re Billy Yee*, 10 E.A.D. 1 (EAB 2001).[113] Respondents claim that if people who knowingly violate their Disclosure Rule requirements do not receive any penalty adjustment for culpability, then their "unintentional " violations should receive a downward adjustment.[114]

*Leonard Greak* and *Billy Yee* do not stand for the proposition claimed by Respondents. Specifically, *Leonard Greak* concerned Complainant's Motion for Accelerated Decision as to Liability (which was granted by the Presiding Officer) and did not discuss the penalty ramifications of Respondents' knowledge or ignorance of their Lead Disclosure Rule obligations.[115]

In *Billy Yee,* Respondent Billy Yee claimed he was unaware of his Lead Disclosure Rule obligations prior to entering into the lease in question. Based on this assertion, EPA did not make a finding of culpability and, hence, made no associated penalty increase for this factor.[116] After the hearing, the Presiding Officer determined, based on a careful review of the evidence, that Mr. Yee was probably aware of his Lead Disclosure Rule obligations shortly after, if not before, he entered into the lease at issue in the case. Nonetheless, she declined to increase Respondent's penalty based on such culpability, "since Complainant did not make this specifically part of its penalty calculations and Respondent, therefore, did not prepare to respond to this issue, no increase in the penalty seems warranted." *In re Billy Yee*, TSCA-7-

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[113]See Appeal Brief at page 18.

[114]Appeal Brief at pages 18-19. Although the administrative law judges have the discretion to deviate from the various EPA penalty policies, the EPA Lead ERP normally allows for only upward adjustments (25%) based on "culpability." See CX-16 at EPA 0159. In addition, the ERP states that any person who knowingly or willingly commits Lead Disclosure Rule violations is subject to criminal sanctions of imprisonment for up to one year and penalties of up to $25,000 per day of violation. CX-16 at EPA 0151; see also the criminal penalty provision os Section 16(b) of TSCA, 15 U.S.C. § 2616(b).

[115]Contrary to Respondents' statement on page 8 of their Appeal Brief, *Leonard Greek* was subsequently settled by Respondent and EPA (Consent Agreement and Final Order entered with Region III Regional Hearing Clerk on on September 17, 2001) and so a penalty was never litigated in this matter.

[116]*In re Billy Yee*, TSCA-7-99-0009, slip op. at 19 (ALJ, June 6, 2000).

99-0009, slip op. at 19-20 (ALJ, June 6, 2000).

Therefore, neither *Leonard Greak* nor *Billy Yee* can be cited for the proposition that Respondents who had intentionally or knowingly committed Lead Disclosure Rule violations were not assessed an upward culpability penalty adjustment since this issue was not before the presiding officer in either case.

Another stumbling block to Respondents' lack of culpability argument is that Respondents' violations are anything but unintentional. In her Initial Decision, Judge Biro reviewed the evidence that documented Respondents' awareness of lead-based paint in the target housing in question and their awareness of their Lead Disclosure Rule obligations prior to their entering into the leases at issue in this case concerning the instant Lead Disclosure Rule violations. The Presiding Officer pointed out that both Respondent Ronald Hunt (for all four dwellings) and Respondent Genesis Properties, Inc. (for the three dwellings relevant to its liability) acknowledged being aware of the presence of lead-based paint in these dwellings shortly after the City of Richmond issued its lead-based paint NOVs for such properties and prior to entering into the leases at issue in this case.[117]

On September 30, 1998, EPA also issued TSCA Subpoena No. 358 to the owners of the 3015 Barton Ave. property, David E. Hunt and Patricia L. Hunt (CX-27), which should have alerted them (and Ronald H. Hunt, who received a copy of the subpoena and actually replied to it [CX-28]) to the presence of lead-based paint in this dwelling. Yet, subsequent to this subpoena, these Respondent Owner/Lessors and their agent, Respondent Genesis Properties, Inc., entered into three more leases (CX-6 - 8) for this dwelling without complying with such Lead Disclosure Rule requirements at issue in this case.[118]

As the Presiding Officer concluded, "[b]ased on the record as a whole, I do not deem Respondents

[117]See Initial Decision slip op. at 36-37. See also CX-32 at EPA(R) 0720.

[118]See Initial Decision, slip op. at 35-37

to be entitled to any penalty reduction based upon the violations having not been 'willful.'"[119]

Respondents' Appeal does not address any of the findings in Judge Biro's careful analysis in her Initial Decision documenting Respondents awareness of lead-based paint in these properties prior to entering into the leases at issue in this case for which Respondents committed Lead Disclosure Rule violations.[120] For the above reasons, Judge Biro's decision not to make a downward adjustment in Respondents' penalty for their Lead Disclosure Rule violations is neither an abuse of discretion nor a clear error in assessing the penalty.[121]

### G. The Presiding Officer's Four Sets of Penalties for the Thirty-Two (32) Lead Disclosure Rule Violations by Respondents which Collectively Total $84,224.80 are Fair and Appropriate Penalties for these Violations.

Respondents' Conclusion is a summary of their foregoing points raised in their Appeal Brief. Therefore, Complaint's previous responses to these arguments are also relevant to Respondents' summation that the penalties assessed by the Presiding Officer are too high. However, a critical element of the Disclosure Rule's importance when considering applicable penalty assessment not yet discussed in Respondents' Appeal Brief or this Reply Brief is that the Lead Disclosure Rule is a proactive, preventive regulatory requirement. EPA should not be required to wait until children have been lead-poisoned before taking action. Complainant believes that appropriate, yet significant, penalties for such violations should be assessed, regardless of whether such violations lead to lead-poisoned children, to ensure compliance and *to prevent* children from becoming lead poisoned.

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[119]Initial Decision, slip op. at 27.

[120]Apart from the text, the Presiding Officer also states that EPA's 50% penalty reduction for violations common to both the Respondent Owner/Lessors and Respondent Genesis Properties, Inc. addresses any potential penalty mitigation issued based on the alleged passive ownership arguments raised earlier in this proceeding by Respondents. Initial Decision, slip op. at 26 n.37.

[121]See also pages 69-76 of Complainant's Post-Hearing Brief generally on this issue as well as the Initial Decision, slip op. at 26 note 37.

The cornerstone of this proactive regulatory scheme is to require owners and property management firms to provide tenants with known information about lead-based paint and lead-based paint hazards for such properties so that parents can make an informed decision about whether to expose their children to lead-based paint risks the parents might otherwise consider unacceptable.[122] Respondents' argument for minimal penalties in the case at bar suggests that prospective tenants don't really need to make their own decisions about acceptable levels of lead-based paint in their prospective homes. Rather, the tenants can rely on Respondents' determination on whether the property is sufficiently safe for the tenants' children – the very Respondents whose actions (or inaction) caused Lead-Safe Richmond to issue the lead-based paint NOVs to Respondents in the first place.

What some parents might consider to be an acceptable level of risk for their children might not be considered an acceptable level of risk by another set of parents. At a minimum, Respondents' failures deprived parents of their right to make that decision. Complainant believes that is wrong. Ten different families who had twenty-five children were denied their rights to make an informed decision about whether to expose these children to the lead-based paint contained in Respondents' rental properties. Respondents deserve the penalties assessed by the Presiding Officer for such violations.

For the reasons set forth above, Complainant respectfully requests this Board to uphold the following penalties assessed by the Presiding Officer for the Respondents for their Lead Disclosure Rule

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[122]See the Preamble to the Lead Disclosure Rule. By requiring the disclosure of information about lead-based paint, "consumers can make more informed decisions concerning home purchase, lease, and maintenance to protect their families from lead hazard exposure." 61 Fed. Reg. 9064 (March 6, 1996). Also, "Congress mandated that sellers and lessors disclose not just lead-based paint hazards *but also the presence of lead-based paint*, a far more inclusive mandate (since not all lead-based paint is necessarily a hazard)." *Emphasis supplied.* 61 Fed. Reg. at 9069. CX-17 at EPA 0193, 0198.

violations in this case:

| | |
|---|---|
| Ronald H. Hunt and Patricia L. Hunt (9 counts, joint & several): | $27,504.40 |
| David E. Hunt and Patricia L. Hunt (6 counts, joint & several): | $15,840.00 |
| J. Edward Dunivan (4 counts): | $ 9,856.00 |
| Genesis Properties, Inc.(13 counts): | $31,024.40 |
| (Total) | ($84,224.80) |

## VII. CONCLUSION

Although the Board has often stated that it will review an administrative law judge's factual and legal conclusions on a *de novo* basis, it has also indicated that it will provide deference to the presiding officer on the issue of witness credibility (and the judge's factual determinations based on such credibility). *In re Donald Cutler*, CWA Appeal No. 02-01, slip op. at 11 (EAB, September 2, 2004); *In re Billy Yee*, 10 E.A.D. 1 (EAB 2001). The Board will also defer to the presiding officer on penalty assessments when such assessments are based on the relevant penalty policy, "absent a showing that the [ALJ] has committed an abuse of discretion or a clear error in assessing the penalty." *In re Morton L. Friedman and Schmitt Construction Company*, CAA Appeal No. 02-07, slip op. at 53 (EAB, Feb. 18, 2004), citing *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994).

In challenging the penalties assessed against Respondents by the Presiding Officer, the Respondents have raised only one real issue of fact – whether she erred in her determination that Respondents did not encapsulate the lead-based paint cited in the City of Richmond's June 30, 1997 NOV for the 3015 Barton Ave. dwelling (CX-24) prior to the relevant Respondents entering into the three leases at issue for this property (CX-6-8). However, that issue turns on the Presiding Officer's determination as

to who was the more credible witness – Respondent Ronald Hunt or City of Richmond inspector Lonnie Sims. The Presiding Officer determined that Mr. Sims was the more credible witness on the issue of whether the lead-based paint was encapsulated prior to the effective dates of the three leases at issue for this property and based her finding of no such encapsulation work largely on his testimony. Therefore, the Board should defer to the Presiding Officer's credibility determination and affirm her finding that Respondents failed to perform any such encapsulation of the 3015 Barton Ave. property.

Respondents also argue that the penalties assessed by the Presiding Officer are too large. Yet, it is clear that the Presiding Officer followed the EPA Lead ERP an TSCA statutory factor with one departure from one ERP adjustment factors that favored the non-Barton Ave. Respondents.[123] Nor do Respondents contest that the Presiding Officer based her penalty assessments on the Lead ERP and TSCA statutory factors. Therefore, the Presiding Officer's penalty assessments for the case at bar warrant deference from the Board absent a showing that she committed an abuse of discretion or clear error in assessing these penalties.

Respondents have failed to document any penalty decision of the Presiding Officer in this case as an abuse of discretion or clear error. Respondents have argued that the Presiding Officer ought to have deviated from the ERP and Lead Disclosure Rule regulations in determining how many Lead Disclosure Rule violations were committed by Respondents and that she should have provided greater penalty reductions for Respondents' alleged culpability and cooperation than are authorized under the ERP. However, such arguments do not provide a basis for the Board for overturning the Presiding Officer's

[123] Complainant takes no position at this time on the Presiding Officer's ERP adjustment providing the non-Barton Ave. Respondents with a 30% reduction for the encapsulation work done on such properties other than to note it is not appealing this aspect of the Presiding Officer's decision. Aside from whether Complainant agrees with all aspects of the decision, Complainant believes the decision o be thoughtful, well-reasoned and, therefore, not subject to challenge by these Respondents.

penalty assessments because Respondents have not demonstrated that her findings on such issues (and subsequent penalty assessment under the Lead ERP) were an abuse of discretion or a clear error of judgement.

Finally, Respondents claim that the penalties assessed in this case ought to be reduced because the Presiding Officer allegedly erred in her decision to assess penalties in a larger *cumulative* amount than had been assessed (or cited) [124] in ten prior proceedings.[125] Judge Biro dismissed Respondents' penalty range argument noting that none of the cases cited by Respondents is so similar to the facts of this case that an inconsistency in penalty assessment would be considered arbitrary, capricious, or constitute an abuse of discretion. Complainant has cited to caselaw that supports Judge Biro's rejection of Respondents' penalty range argument. Respondents have not. Complainant requests the Board to uphold the Presiding Officer's decision that the administrative cases put forward by Respondents as a penalty range in this case are not precedents for the penalties she has assessed for the violations at issue in this case.

With respect to assessing a civil penalty for each of the Respondents in this case, the Presiding Officer correctly followed the EPA Lead ERP:

1. She assessed a joint and several penalty for Respondents Ronald H. Hunt and Patricia L. Hunt totaling $27,504.40 for nine Lead Disclosure Rule Counts concerning five leases at two target housings;
2. She assessed a joint and several penalty for Respondents David E. Hunt and Patricia L.

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[124]Only eight of the ten cases cited concerned final penalty assessments. See *In re Greak* and *In re Minor Ridge* listed on pages 8-9 of Respondents' Appeal Brief. The former concerned an Order on a Motion for Accelerated Decision while the latter concerned an Order on a Motion to Dismiss.

[125]In fact, the penalties assessed against Respondents Ronald H. Hunt, David E. Hunt, J. Edward Dunivan and Genesis Properties, Inc., all are below the $37,037 cap suggested by Respondents, ranging from $9,856.00 for J. Edward Dunivan to $31,024.40 for Genesis Properties, Inc. Respondent Patricia L. Hunt is jointly and severally liable with Ronald H. Hunt and David E. Hunt for different portions of her penalty totaling $43,344.40.

Hunt totaling $15,840.00 for six Lead Disclosure Rule Counts concerning three leases at one target housing;

3. She assessed a penalty for Respondent J. Edward Dunivan totaling $9,856.00 for four Lead Disclosure Rule Counts concerning two leases at one target housing; and

4. She assessed a penalty for Respondent Genesis Properties, Inc. totaling $31,024.40 for thirteen Lead Disclosure Rule Counts concerning ten leases at three target housings.

The total aggregate penalty assessed by the Presiding Officer for these violations is $84,224.80. Given the totality of circumstances and the preponderance of evidence, in conjunction with the deference given the Presiding Officer for her witness credibility determinations and penalties assessed in accordance with the Lead ERP, the penalties assessed by the Presiding Officer in this matter are fair, reasonable and consistent with the seriousness of the violations committed by Respondents in failing to comply with their Lead Disclosure Rule obligations in this matter.

Therefore, as a penalty for these transgressions and to deter future noncompliance by Respondents and other property owners and property management firms in the greater Richmond, Virginia area, Complainant respectfully requests the Board to uphold *in their entirety* the Presiding Officer's penalty assessments for Respondents' thirty-two Lead Disclosure Rule violations.

Respectfully submitted,

Date: 5/4/05

By: James Heenehan
James Heenehan
Joseph J. Lisa III
Senior Assistant Regional Counsels
U.S. EPA Region III

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date provided below, I mailed by federal express the original and five true and correct copies of *Appellee's Response Brief* (TSCA Appeal No. 05-01) to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G. Street , NW, Suite 600
Washington, D.C. 20005

I also certify that on the date provided below, I served true and correct copies of *Appellee's Response Brief* (TSCA Appeal No. 05-01) on the following parties in the manner set forth below:

**Hand-Delivery:** Regional Hearing Clerk
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

**Federal Express:** The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Mail Code 1900L
1099 14th St., N.W., Suite 350
Washington, D.C. 20460

Bradley P. Marrs, Esq.
Christopher Hill, Esq.
Meyer, Goergen & Marrs, PC
7130 Glen Forest Dr., Suite 305
Richmond, Va 23226

Respectfully submitted

Date: 5/4/05

By: James Heenehan

James Heenehan
Joseph J. Lisa III
Senior Assistant Regional Counsels
U.S. EPA Region III
Counsels for Complainant