

In The Matter Of:

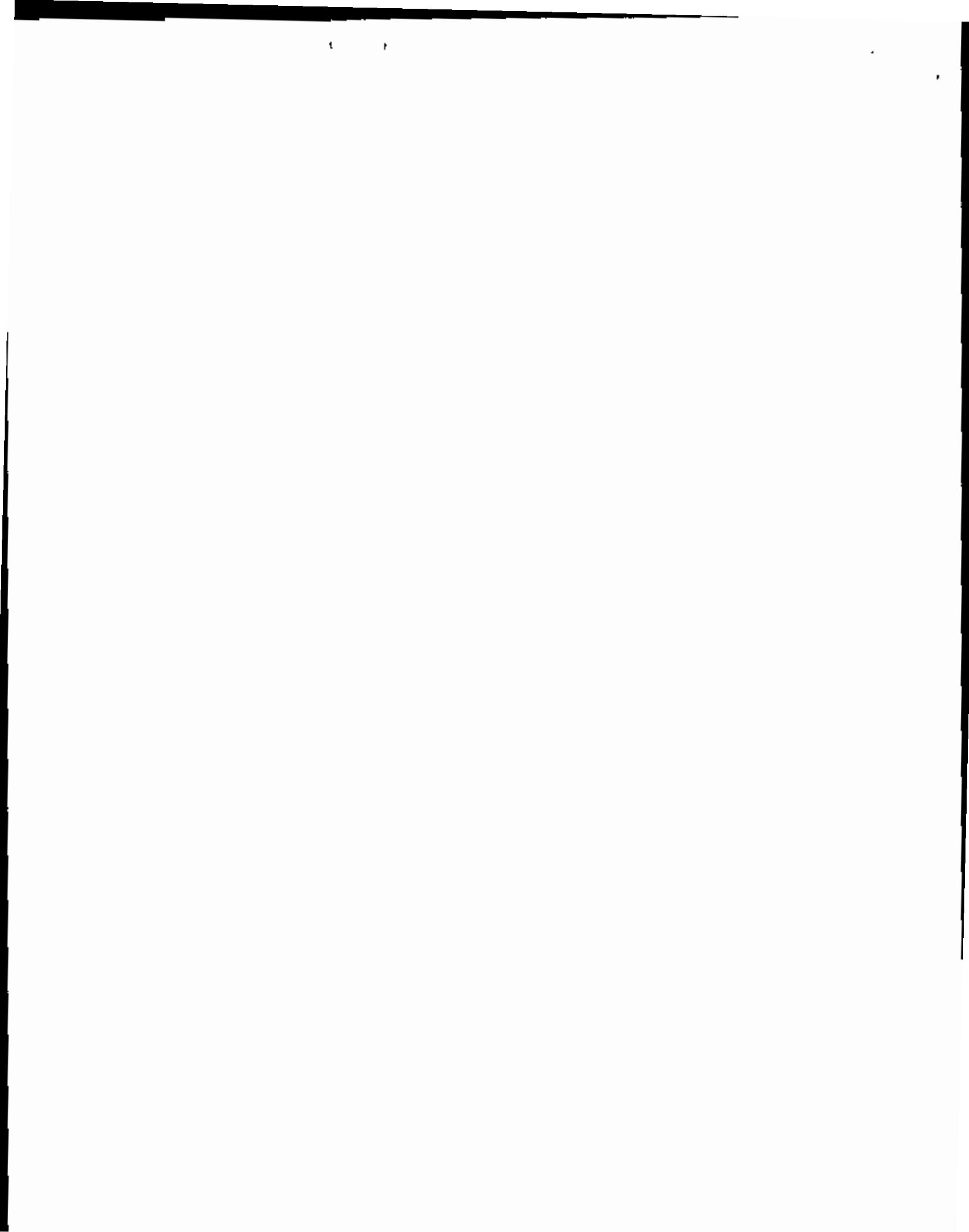
*U.S. Environmental Appeals Board
In the Matter of Ronald H. Hunt, et al*

*Hearing
September 29, 2005*

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

In the matter of: :
Ronald H. Hunt, et al., : Docket No.
: TSCA-03-2003-0285
Respondents. :TSCA Appeal No. 05-01

Environmental Protection Agency
East Building
1201 Constitution Avenue, N.W.
Washington, D.C.

Thursday, September 29, 2005

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

BEFORE:

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

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APPEARANCES:

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PROCEEDINGS

(1)
(2) THE CLERK: All rise. The Environmental
(3) Appeals Board of the United States Environmental
(4) Protection Agency is now in session for the purpose
(5) of hearing oral argument in the matter of Ronald H.
(6) Hunt, et al. Docket No. TSCA-03-2003-0285. Appeal
(7) No. TSCA-05-01.

(8) The Honorable Judges Scott Fulton, Anna
(9) Wolgast, and Edward Reich presiding.
(10) Please be seated.

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

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

(19) ORAL ARGUMENT OF BRADLEY MARRS
(20) ON BEHALF OF THE RESPONDENTS

(21) MR. MARRS: Thank you, Your Honor.
(22) I am Brad Marrs. Along with my co-counsel

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

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

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

(12) The facts of the case are that Ronald Hunt
(13) is the central figure involved in the counts
(14) brought by the EPA. Genesis is the property
(15) management company that Mr. Hunt controls, also run
(16) by his son Michael Hunt. Mr. Hunt, along with his
(17) wife, his brother, and some business associates,
(18) the Duntivans, were the owners of the property.
(19) Genesis managed all of those properties,
(20) and all affairs of the rental properties were run
(21) through the Genesis management offices. Genesis
(22) actually manages over 100 rental properties. Only

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

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

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

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

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

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[1] than as attached to the lease?

[2] **MR. MARRS:** That is admittedly correct.

[3] **JUDGE REICH:** Thank you.

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

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

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

[22] In this case this morning, I will make two

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

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

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

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

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

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

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

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

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

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

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

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

[1] broke this down into 32 counts.

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

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

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

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

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

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

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

[1] than the lower cases.

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

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

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

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

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

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

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

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

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

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

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

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[1] say, but they are not the final arbiter.

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

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

[10] JUDGE FULTON: Do you—

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

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

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

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

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

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

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

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

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

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

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

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

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

(16) **MR. MARRS:** From the city.

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

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

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

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

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

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

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

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

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

(13) **MR. MARRS:** I'm sorry, I don't understand
(14) the question.

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

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

(22) **JUDGE WOLGAST:** No, I'm referring to—I

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

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

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

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

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

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

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[1] with?

[2] **MR. MARRS:** I think—I'm not sure they
[3] drew a distinction between the two.

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

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

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

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

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

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

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

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

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[1] involved, albeit on being reminded by the city.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[4] JUDGE REICH: Thank you.

[5] MR. MARRS: Thank you.

[6] JUDGE WOLGAST: Mr. Heenehan?

[7] ORAL ARGUMENT ON BEHALF OF THE
[8] ENVIRONMENTAL PROTECTION AGENCY

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

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

[1] Properties, Inc.

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

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

[22] Judge Biro's penalties here substantially

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

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

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

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

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

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

(7) **JUDGE WOLGAST:** Well, before we go to that
(8) argument—

(9) **MR. HEENEHAN:** Yes?

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

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

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

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

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

(22) **JUDGE REICH:** In the analysis you did, is

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

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

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

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

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

(21) **JUDGE REICH:** It's one. Okay.

(22) **MR. HEENEHAN:** I should also note that of

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

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

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

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

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

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

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

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

(17) JUDGE REICH: Okay.

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

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

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

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

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

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

(4) JUDGE FULTON: Does that suggest there
(5) might be a need to update or change the ERP?
(6) MR. HEENEHAN: I don't think it suggests
(7) that, Your Honor.

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

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

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

(20) JUDGE FULTON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

(22) **MR. HEENEHAN:** The respondents have raised

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

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

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

(1) **MR. HEENEHAN:** Yes. Your Honor—

(2) **JUDGE FULTON:** Is that true?

(3) **MR. HEENEHAN:** Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(11) As to the larger issue of—

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

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

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(1) inspections themselves.

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

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

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

(19) **JUDGE FULTON:** Yes.

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

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(1) respondents.

(2) **JUDGE FULTON:** Okay. Thank you.

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

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

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

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(1) potential thousand dollar penalties for
(2) noncompliance.

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

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

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

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

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

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

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(1) was also what Judge Biro based her decision on.

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

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

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

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

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

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

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

(9) I thank you, Your Honors.

(10) **JUDGE WOLGAST:** Mr. Marrs?

(11) **REBUTTAL ARGUMENT OF BRADLEY MARRS
(12) ON BEHALF OF THE RESPONDENTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

(22) **JUDGE REICH:** Did you object to his expert

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(1) witness status?

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

(7) **JUDGE REICH:** Mm-hmm.

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

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

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

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

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