IN THE MATTER OF NELLO SANTACROCE & DOMINIC FANELLI d/b/a GILROY ASSOCIATES

TSCA Appeal No. 92–6

FINAL DECISION

Decided March 25, 1993

Syllabus

The complainant in this action is U.S. EPA Region IX. Complainant is appealing an Initial Decision dismissing a complaint against respondents Nello Santacroce and Dominic Fanelli, doing business as Gilroy Associates ("Gilroy"). The complaint alleged violations of the Toxic Substances Control Act and implementing regulations covering use, marking and reporting requirements of transformers containing polychlorinated biphenyls ("PCBs"). The complaint was dismissed, after a hearing, because the presiding officer concluded that complainant had not established by a preponderance of the evidence that respondents owned or operated the transformer.

On appeal, issues were raised as to the validity of the EPA inspection documenting the alleged violations, ownership and operation of the transformer, and the penalty calculations.

Held: Complainant failed to establish that respondents either owned or operated the transformer. The transformer was purchased by the utility serving the site and there is no documentary evidence that it was purchased on behalf of the site owner, as complainant alleged. Complainant also has failed to establish that the transformer is a fixture under California law that would have passed with the fee of the land to subsequent purchasers of the land. In addition, the actions of respondents which complainant asserts show ownership of the transformer are inconclusive and do not prove ownership. Finally, complainant has not established that Gilroy operated the transformer since the mere use of electricity flowing through the transformer does not constitute operation of the transformer.

Because complainant has not met its burden of proof in establishing that respondents either owned or operated the transformer, the complaint was properly dismissed. In light of this determination, respondents' other objections need not be reached.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

U.S. EPA Region IX, the complainant in this action, has appealed the Initial Decision of the presiding officer in this case. That decision, rendered on August 25, 1992, dismissed the complaint against respondents Nello Santacroce and Dominic Fanelli, doing business as Gilroy Associates ("Gilroy"). The complaint had alleged that respondents violated certain provisions of the Toxic Substances Control Act ("TSCA") and implementing regulations regulating polychlorinated biphenyls ("PCBs"). The alleged violations relate to a transformer containing PCBs as a dielectric fluid which is located on the Gilroy Associates property at 205 Leavesley Road, Gilroy, California.

In the proceedings below, Gilroy raised a number of objections to the complaint. Gilroy objected to the validity of the inspection which formed the basis of the complaint, the determination that Gilroy either owned or operated the transformer at issue, and the appropriateness of the penalty calculation. In his Initial Decision, the presiding officer upheld the validity of the inspection but dismissed the complaint because complainant had not established by a preponderance of the evidence that respondents Gilroy and Fanelli either "owned and operated" or "owned or operated" the transformer in question.[1] Having dismissed the complaint, the presiding officer did not reach the penalty calculation issues.

Region IX filed an appeal of the Initial Decision,[2] which the Environmental Appeals Board has authority to consider under 40 C.F.R. §§22.30 and .31. The appeal identified as issues presented for review those issues relating to the validity of the inspection, the determination of whether respondents owned and operated the PCB transformer, and whether a civil penalty should be assessed.[3] Respondents filed a reply reasserting their position on these issues.[4] For the reasons discussed below, we conclude that complainant has not established by a preponderance of the evidence that respondents owned or operated the transformer and, therefore, the complaint must be dismissed.

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[1] Initial Decision, at 31.

[2] Notice of Appeal, dated September 23, 1992.

[3] *Id.* at 19–20.

[4] Respondents' Reply to Complainant's Appeal, dated October 13, 1992.

I. *BACKGROUND*

Gilroy Associates is a partnership which owns a storage facility and recreational vehicle park in the city of Gilroy, California. The partnership was created by Nello Santacroce and Dominic Fanelli as general partners expressly for the purpose of owning and operating that particular site.

The parties have stipulated to the fact that there is a PCB transformer on the Gilroy site.[5] The parties do not agree on the ownership of that transformer. It is undisputed that the transformer in question is subject to regulation under the Toxic Substances Control Act, particularly Section 6(e), 15 U.S.C. § 2605(e), and implementing regulations at 40 C.F.R. Part 761. These regulations establish manufacturing, processing, distribution and use limitations on PCBs and PCB items. This particular transformer is subject to regulation because it contains Inerteen, a dielectric fluid with a high concentration of PCBs.

On February 17, 1989, two EPA inspectors conducted a "for cause" inspection of the Gilroy site. It was considered "for cause" because it was prompted by receipt of an anonymous complaint of a possible violation.[6] Because it was "for cause," no prior notice was given to the facility.[7]

The inspection was conducted by two Region IX inspectors, Mona Ellison and Mary Grisier. Upon arriving at the site, they went to a mobile home located thereon and introduced themselves to a Mrs. Christine Riggins. Mrs. Riggins' husband was the property manager of the site but was very ill at that time. After discussing the purpose of their visit with Mrs. Riggins, they obtained her signature on two documents, a Notice of Inspection and a TSCA Inspection Confidentiality Notice. They then proceeded to inspect the transformer at issue.

The Initial Decision contains an extensive description of the inspection which will not be repeated here.[8] Respondents contest the validity of the inspection under the Fourth Amendment to the U.S. Constitution and EPA's own inspection policies. Among other arguments, respondents assert that Mrs. Riggins was not an "agent in

[5] Initial Decision, at 4.

[6] Tr. at 24–25.

[7] *Id.* at 21.

[8] Initial Decision, at 4–9.

charge" of the facility[9] and that the inspectors failed to obtain consent to the inspection as allegedly required by the Fourth Amendment and EPA policy. The Initial Decision found that Mrs. Riggins was an agent in charge and that the inspection was lawful. Region IX, despite prevailing upon this issue below, identified it as an issue presented for review in this appeal. However, because we determine that Region IX has not proven that Gilroy either owned or operated the transformer, we need not reach this issue, obviating the need for an extensive discussion of the inspection itself.

The transformer was located about five feet from one of the warehouse buildings on the property, Building Three. It was contained within a chain link fence enclosure, with a padlock on the access gate. Mrs. Riggins did not have a key to the padlock so the inspectors used binoculars to read the identification on the transformer's nameplate. It was identified as being manufactured by the Westinghouse Corporation, serial number 6335051, with a capacity of 493 gallons of Inerteen.[10] The inspection showed that neither the transformer nor the fence was marked with the required M_L PCB marking label.[11]

After the inspection, inspector Ellison determined that the transformer was not registered with the Gilroy Fire Department. The inspection also disclosed that there had been no periodic inspections of the transformer or maintenance of records.[12]

Ms. Ellison then attempted to verify ownership of the transformer. She contacted Pacific Gas and Electric Company ("PG&E"), the utility that supplies electric power to the Gilroy facility. After an investigation and inspection, PG&E advised Ellison that PG&E did not own the transformer and that PG&E's records show that it was owned by "Gilroy All Storage Company."[13] PG&E's position is detailed in a January 31, 1990 affidavit executed by John J.

[9] TSCA § 11, 15 U.S.C. § 2610, allows inspections only "upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected." The only notice provided prior to inspecting the transformer was that given to Mrs. Riggins.

[10] Initial Decision, at 8.

[11] *Id.* at 9.

[12] *Id.*

[13] Letter from Stuart Svensson, Manager, San Jose Division, PG&E to Mona Ellison, dated September 14, 1989. (Complainant's Exhibit 3.)

Parrinello, its South County Area Manager for the San Jose Division,[14] which will be discussed at some length later in this opinion.

Apparently satisfied with Gilroy's liability in this matter, Region IX issued a TSCA complaint to Mr. Santacroce and Mr. Fanelli, doing business as Gilroy Associates. The complaint, dated July 18, 1989, alleged that Gilroy Associates "owned and operated" the PCB transformer and in so doing committed the following violations of the TSCA PCB regulations:

(1) failure to perform quarterly inspections from May 1981 through the date of inspection in violation of 40 C.F.R. § 761.30(a)(1)(ix);

(2) failure to maintain a record of inspections and the maintenance history of the transformer in violation of 40 C.F.R. § 761.30(a)(1)(xii);

(3) failure to register the transformer with fire response personnel in violation of 40 C.F.R. § 761.30(a)(1)(vi);

(4) failure to mark the transformer with the PCB caution label in violation of 40 C.F.R. § 761.40(c)(1);

(5) failure to mark the surrounding fence with the PCB caution label in violation of 40 C.F.R. § 761.40(j); and

(6) failure to prepare PCB annual documents for the years 1978 through 1987 in violation of 40 C.F.R. § 761.180(a).[15]

The complaint assessed a proposed penalty of $29,000 for these violations. Respondents contested the complaint, resulting in a hearing before Administrative Law Judge Frank Vanderheyden as presiding officer on January 15, 1991, and the Initial Decision which is the subject of this appeal.

II. *DISCUSSION*

A. *Procedural Objection*

Initially, it should be noted that Gilroy has objected to this appeal on procedural grounds. Specifically, it asserts that the petition was untimely and was incorrectly addressed to the EPA Adminis-

[14] Complainant's Exhibit 4.

[15] Complaint, at 2–5.

trator rather than to the Environmental Appeals Board. The applicable provision regarding appeal of initial decisions is 40 C.F.R. § 22.30(a)(1), which states in pertinent part:

> Any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties.

Gilroy also points to the following language in 40 C.F.R. § 22.04(a), which discusses the powers and duties of the Environmental Appeals Board:

> The Administrator delegates authority under the Act to the Environmental Appeals Board to perform the functions assigned to it in these rules of practice. An appeal or motion under this part directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered.

The provisions quoted above, in their present form, reflect amendments adopted by EPA on February 13, 1992, effective as of March 1, 1992 (57 Fed. Reg. 5320 *et seq.*).

In this case, the Notice of Appeal states that complainant "hereby appeals to the Administrator" from the Initial Decision. The appeal is dated September 23, 1992, precisely 20 days after service of the Initial Decision on September 3, 1992. It was filed with the Hearing Clerk in accordance with the version of § 22.30(a)(1) that preceded the February 13 amendments. The Notice of Appeal was forwarded to the Board by the Hearing Clerk and date stamped as received by the Board on September 25 at 9:49 a.m. Counsel for respondents was properly served with the Notice of Appeal and filed a timely reply. There has been no assertion that respondents were in any way prejudiced by the Region's styling its appeal as being "to the Administrator." Under these circumstances, the failure to address the Notice of Appeal to the Board (and the fact that it was stamped received on September 25) amounted to harmless error at most. The Board will consider the appeal as if properly filed.[16]

[16] *See American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532, 539 (1970) (Agency may relax procedural rules when justice so requires). *See also In*

Continued

B. *Applicability of PCB Regulations*

Turning to the substance of the appeal, we begin by examining the relevant statutory and regulatory provisions. As previously noted, polychlorinated biphenyls are regulated under Section 6(e) of TSCA, 15 U.S.C. § 2605(e). That section provides for the comprehensive regulation of the manufacture, processing, distribution in commerce, and use of PCBs. That section also authorizes the Administrator to adopt implementing regulations. Section 15 of TSCA, 15 U.S.C. § 2614, makes it unlawful for "any person" to fail or refuse to comply with any such rule. Section 16, 15 U.S.C. § 2615, provides that "any person" who violates a provision of Section 15 shall be liable for a civil penalty not to exceed $25,000 per violation.

The pertinent implementing regulations are in 40 C.F.R. Part 761. The alleged violations are of provisions relating to use (Subpart B), marking (Subpart C) and reporting (Subpart J). A threshold question is to whom do these various requirements apply.

Under the statute, it is unlawful for "any person" to violate a regulation. The PCB regulations define "person" to mean "any natural or judicial person including any individual, corporation, partnership, or association * * *."[17] There is no question that respondents are persons within the meaning of this definition.

More difficult is determining whose conduct is intended to be governed by each of the regulatory provisions. Certain provisions are specific as to their applicability and some are not. In the first category is 40 C.F.R. § 761.180, which requires "each owner or operator of a facility, other than a commercial storer or disposer of PCB waste" using or storing PCBs in specified quantities to develop and maintain certain records, including the annual document which Gilroy is cited for failing to prepare.

However, less specific are the various use restrictions in 40 C.F.R. § 761.30(a), which are introduced with the following language:

> PCBs at any concentration may be used in transformers * * * subject to the following conditions.

Similarly, the marking requirements in 40 C.F.R. § 761.40 provide in part that:

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re House Analysis & Associates, CAA Appeal No. 93–1, at 6 n.15 (EAB, Feb. 2, 1993).

[17] 40 C.F.R. § 761.3.

> (c) As of January 1, 1979, the following PCB Articles shall be marked with mark M_L as described in § 761.45(a):
>
> (1) All PCB Transformers not marked under paragraph (a) of this section [marking of PCB-Contaminated Electrical Equipment is not required];
>
> * * * * * * * *
>
> (j) PCB Transformer locations shall be marked as follows:
>
> (1) Except as provided in paragraph (j)(2) of this section, as of December 1, 1985, the vault door, machinery room door, fence, hallway, or means of access, other than grates and manhole covers, to a PCB Transformer must be marked with the mark M_L as required by paragraph (a) of this section.

Thus, for the use and marking requirements, the regulations specify *what* requirements apply but do not specifically define *to whom* the requirements apply.

A similar problem was presented with respect to the PCB disposal regulations (Subpart D) in *In re City of Detroit,* TSCA Appeal No. 89–5 (CJO, Feb. 6, 1991). In that case, the Chief Judicial Officer ("CJO") noted that "[t]he disposal requirements are written in the passive voice, stating *how* PCBs must be disposed of, but not saying *who* is responsible for an improper discharge of PCBs." [18] In a footnote to that statement, the CJO observed that "[g]enerally, the use of the passive voice in a regulation creates vagueness and confusion about the persons who are subject to the regulation." [19] The CJO then proceeded to analyze how the disposal requirements are meant to apply, providing guidance which is useful here as well.

The CJO stated that "[b]ecause Part 761 is divided into separate subparts governing, *inter alia,* use, storage and disposal, it is evident that the regulations on use apply to those who use PCBs; the regulations on storage apply to those who store PCBs; and the regulations on disposal apply to those who dispose of PCBs." [20] In analyzing

[18] *City of Detroit,* at 13 (emphasis in original).

[19] *Id.* at 13 n.21.

[20] *Id.* at 15 (footnote omitted).

whether the disposal requirements apply to a person who owns the property onto which PCBs have been spilled, the CJO concluded as follows:

> Similarly, the owners of facilities that use or store PCBs will be subject to the regulations governing the use and storage of PCBs, because they are the persons to whom the activities of using and storing will normally be attributed. The unifying characteristic of all of the enterprises listed above is that they all engage in a regulated *activity,* such as using, manufacturing, storing and disposing of PCBs. In contrast, a mere title holder to a piece of property who neither owns nor controls any PCB sources does not engage in any of those activities.[21]

Using this analysis, we conclude that the use and marking regulations apply to both owners and operators of a regulated transformer. The requirements do not apply to an owner of property on which a transformer is located if that owner neither owns nor controls (*i.e.,* operates) that transformer.[22]

C. *Burden of Proof*

Having determined that ownership and operation of the transformer, as the regulated PCB Article, are central issues, it is important to reiterate that the Region ultimately bears the burden of proof on these issues. The applicable provision of the Consolidated Rules of Practice provides:

> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by

[21] *Id.* at 17 n.26 (emphasis in original).

[22] Since we conclude that the Region has failed to prove that Gilroy either owned or operated the transformer, we need not address Gilroy's arguments that a person must be both an owner *and* operator for liability to attach, or that the Region must prove that respondents both "owned and operated" the transformer because that was the way the complaint was framed.

> the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24.

The respective burdens of the parties was elaborated upon by the Administrator in *In re 170 Alaska Placer Mines, More or Less,* NPDES Appeal No. 79–1, at 12 (Adm'r, Mar. 10, 1980), as follows:

> The term "burden of proof" is ambiguous. *See* McCormick, Handbook of the Law of Evidence, § 336 (1972). It encompasses two separate concepts. *Ambrose* v. *Wheatly*, 321 F. Supp. 1220, 1222 n.6 (D. Del. 1971); Wigmore, Evidence, §§ 2485–87 (3rd ed.). One is the burden of going forward with the evidence, which is a procedural device for the orderly presentation of evidence. It may shift back and forth as the trial progresses. Once a party having the burden of going forward with the evidence has satisfied that burden by making out an affirmative case in favor of its position, the burden of going forward with the evidence then shifts to the opposing party to rebut that evidence with evidence in favor of its own position. The other "burden of proof" is the burden of persuasion, which is a matter of substantive law. It never shifts from one party to the other at any stage of the proceedings. It has also been described as the risk of non-persuasion. Wigmore, Evidence § 2486 (3rd ed.). In other words, the party having the burden of persuasion must bear the risk of not having his position sustained if the opposing party's evidence is as persuasive as his own on any disputed issue of fact. Which party bears the burden of persuasion (or the risk of non-persuasion) therefore becomes a significant question only where the evidence on an issue is evenly balanced or if the trier is in doubt about the facts.

These concepts become particularly important where, as here, the evidence is scant, contradictory, and subject to varying interpretations. In this case, the complainant bears the burden of persuasion by a preponderance of the evidence that Gilroy owned or operated the subject transformer.

D. *History of the Gilroy Site*

The history of the Gilroy site as detailed in the administrative record is somewhat incomplete. A company called BG Industries used the site to manufacture farm implements before the Second World War. During the war, it manufactured equipment for the army. It continued to remain there after the war but at some point vacated the site.[23]

The administrative record does not show who occupied the site, if anyone, from the time BG ceased operations there until approximately 1970, when it was occupied by the California Canners and Growers ("Cal-Can"). Cal-Can leased the property from approximately 1970 until 1981, when it went bankrupt.[24] Most significantly, the administrative record does not show who either owned or operated the property in 1953, when the transformer was installed.[25]

Respondent Santacroce's involvement with the site began in approximately 1972. At that time, Mr. Santacroce was a general contractor and president of Sobey Development ("Sobey"). Sobey made a loan to a company called Dukor Modular Systems ("Dukor") with the real property at the Gilroy site as collateral.[26] At the time, Dukor was not required to furnish a list of the buildings or personal property because the loan was secured only by the realty, under a deed of trust.[27]

Dukor subsequently went bankrupt. It defaulted on the loan and moved off the property in 1975. At that time, Sobey entered into an agreement with Dukor for the property not to be included in bankruptcy proceedings.[28] Dukor transferred the property to a company called Peninsula Development which immediately transferred it to Sobey.[29] Dukor's president, in his affidavit, Respondents' Exhibit 7, states that Dukor did not own the transformer and, therefore,

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[23] Initial Decision, at 14; Tr. at 226.

[24] Tr. at 225.

[25] PG&E indicated that Cal-Can was on the site in 1953 (Parrinello affidavit, Complainant's Exhibit 4, at 2) but Gilroy has refuted this (Respondent's Reply to Complainant's Appeal, at 4 n.1; Tr. at 225–226; lease attached as Exhibit A to Respondents' Prehearing Exchange).

[26] Dukor purchased the property from Hess Oil in 1970. Respondents' Exhibit 7, at 1. The administrative record does not show how or when Hess Oil acquired the property.

[27] Initial Decision, at 14–15; Tr. at 220–221.

[28] Initial Decision, at 15.

[29] Grant Deed attached as Exhibit B to Complainant's Motion to Strike Affirmative Defenses.

that Dukor could not convey ownership of the transformer to Sobey. There was no discussion of the transformer at the time.

In 1975, Mr. Santacroce formed Gilroy Associates with Dominic Fanelli, and Sobey conveyed the property to Gilroy on September 23, 1975.[30] There was no discussion of the transformer between Mr. Santacroce and Mr. Fanelli at that time.[31]

E. *Parrinello Affidavit and Testimony*

As previously noted,[32] inspector Ellison contacted PG&E after the inspection in an attempt to determine ownership of the transformer. She was advised that PG&E did not own the transformer, and that PG&E believed it was owned by Gilroy.[33] The affidavit and testimony of John J. Parrinello of PG&E was a cornerstone of the complainant's case.

Parrinello indicated that PG&E's records show that PG&E began to supply service to Cal-Can at the site in question in 1953.[34] Cal-Can took primary metered service at the then-prevailing distribution voltage of 4,160 volts, presumably to receive a rate discount. To obtain this service, according to Parrinello, Cal-Can would have to have had its own transformer to step down the voltage to 480 volts. Therefore, PG&E purchased a transformer "on behalf of Cal-Can" from Westinghouse Corporation.[35]

The transformer was delivered to the Gilroy site by Westinghouse. There is no indication whether PG&E installed the transformer or Cal-Can had its own electrician do it. Normally, this would be the customer's responsibility if it owned the transformer. The transformer is not shown on PG&E maps, and does not have a PG&E identification number.[36]

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[30] Exhibit A to Respondents' Prehearing Exchange.

[31] Initial Decision, at 16.

[32] *See* notes 13 and 14 and accompanying text.

[33] Complainant's Exhibit 3.

[34] As discussed in note 25 *supra*, Cal-Can apparently was not the tenant in 1953. However, since the Parrinello affidavit speaks in terms of Cal-Can, we will use that reference as well.

[35] Complainant's Exhibit 4, at 2–3. While the parties speak of "PG&E" as purchasing the transformer, it appears that it was actually purchased by a utility named Coast Counties Gas and Electric which was the utility providing power in the Gilroy area in 1953. Coast Counties was subsequently acquired by PG&E. Notice of Appeal, at 27; Respondents' Reply to Complainant's Appeal, at 11.

[36] Complainant's Exhibit 4, at 2.

It should be noted that while the Parrinello affidavit identifies the purchase order number for the transformer, Parrinello acknowledged during the hearing that he had never seen the purchase order, that he didn't think that the fact that it was being purchased for "Cal-Can" would have been on the purchase order, and that there are no documents to show that it was purchased on behalf of the customer.[37] Parrinello further admitted that while he testified that purchase of a transformer on behalf of a customer was not an unusual practice for PG&E, he was not personally aware of what the practice was in 1953.[38]

Thus, the Region's contention that Gilroy must be the owner is based largely on PG&E's assertions that PG&E does not own the transformer. While it may seem self evident, it is worth reiterating that it is part of the complainant's burden to show that it was the respondents that committed the violation. As the CJO stated in *In re City of Detroit*, TSCA Appeal No. 89–5 (Order on Motion for Reconsideration and on Motion to Supplement the Record) (CJO, July 9, 1991), at 6–7:

> It is true that by showing an uncontrolled discharge of PCBs in a concentration of 50 ppm or greater, the Agency can establish that *someone* committed a disposal violation. To make a case against a particular respondent, however, it is not enough to show that someone committed a violation. The Agency must also show that the Respondent is responsible for the violation. The Agency's prima facie case, therefore, must include a nexus between the Respondent and the violation.

(Emphasis in original.) As such, even if it were shown that PG&E is not responsible for the transformer, this does not, by itself, prove that Gilroy is.

In the letter from Stuart Svensson of PG&E,[39] the company states that its records show that the transformer was owned by "Gilroy All Storage Company." However, in Mr. Parrinello's testimony, he was less definitive. While still insistent that PG&E did not own the transformer, Mr. Parrinello engaged in the following

[37] Tr. at 117–118.

[38] Tr. at 118.

[39] *See* note 13 and accompanying text.

dialogue with Jeffrey Lawson, counsel for Gilroy, and Judge Vanderheyden.

> BY MR. LAWSON:
>
> Q. Well, let's put it this way. If Gilroy Associates does not own that transformer, who owns it?
>
> A. Not PG&E.
>
> JUDGE VANDERHEYDEN: That wasn't the question.
>
> THE WITNESS: Okay. Sorry. I do not know.
>
> JUDGE VANDERHEYDEN: That wasn't—you don't know who owns it.
>
> THE WITNESS: No.
>
> JUDGE VANDERHEYDEN: That's it. That's your answer.
>
> He doesn't know.

Tr. at 103–104.

It should also be recognized that PG&E has interests at least arguably adverse to that of Gilroy. If PG&E were proven to be the owner of the transformer, it would be exposed to liability under TSCA for the violations at issue. Telling in this regard is a note that Mr. Parrinello wrote to a co-worker asking for certain records relating to the installation of the electric system for Gilroy. In that note, Mr. Parrinello indicates that he needs this information "for a law suit EPA *& PG&E* vs. Gilroy All Storage." (Emphasis added.)[40] Respondents also point to the statement in the Parrinello affidavit in which he states that he had been asked "to research the ownership of the subject Gilroy All Storage Transformer and provide documentation to show PG&E's non-ownership."[41] When asked at the hearing whether his investigation had a focus, Mr. Parrinello responded "[y]es, it did, to show that we did not own the facility."[42]

[40] Respondents' Exhibit 2.

[41] Complainant's Exhibit 4, at 1.

[42] Tr. at 111.

In his Initial Decision, Judge Vanderheyden discusses this evidence in concluding that "the evidence proffered by Parrinello cannot be considered completely objective."[43]

F. *Respondents' Actions as Indicative of Ownership*

The Region points to various actions taken by respondents relative to the transformer as being indicative of Gilroy's ownership of it. The first relates to the dealings between Mr. Fanelli and PG&E at the time PG&E upgraded its main power line. The second relates to the sampling of the transformer's dielectric fluid subsequent to the Region IX inspection.

The first of these events occurred in 1985. At that time, Dominic Fanelli had some conversations concerning the transformer with representatives of PG&E. Because of a change in the operations of PG&E concerning the main power line, increasing the primary voltage, Gilroy was presented with several options relative to changes in their service. One option was removal of the transformer for a $17,000 removal charge. (It is uncontested that Gilroy does not need the capability provided by the transformer, though the power currently runs through it to the warehouse and some rewiring would be required if the transformer were removed.) Gilroy chose a different option, which left the transformer in place, with a slightly higher rate for the power.[44]

The Region asserts that the fact that Gilroy had to make this election shows that Gilroy was the owner of the transformer. It contends that, if PG&E had owned the transformer, it would have had an ongoing obligation to provide power to the facility at 480 volts as before and thus any election by Gilroy would have been unnecessary.[45] As we understand it, what the Region is saying is that if PG&E owned the transformer, then its obligation was to provide power at the voltage produced by the transformer, i.e., 480 volts. The fact that there was an incompatibility between the new primary voltage (21,000 volts) and the primary voltage with which the transformer was compatible (4,160 volts) would be PG&E's problem.

On the other hand, if PG&E's responsibility were merely to provide power at the primary voltage to Gilroy, and Gilroy was relying

[43] Initial Decision, at 28–29. Judge Vanderheyden also notes that the Parrinello affidavit contained inaccuracies, such as the statement that Cal-Can was the customer to whom PG&E began to provide service in 1953. Id. at 29.

[44] Initial Decision, at 11.

[45] Complainant's Post Hearing Brief, at 23.

on its own transformer to convert the primary voltage to 480 volts, then the fact that there was a change in the primary voltage causing an incompatibility between the new, higher primary voltage and the transformer was Gilroy's problem to deal with. To resolve this incompatibility, PG&E presented various options to Gilroy and Gilroy chose to have additional transformers installed, thus maintaining 4160 volt service to the transformer in question.[46] This was done to allow continued utilization of the transformer at issue. This was done at no cost to Gilroy, but Gilroy lost the primary voltage discount, because the voltage on the top side of "Gilroy's" transformer (4160 v.) was no longer the same as that on the service line (21,000 v.). The Region thus argues that this course of events shows that both Gilroy and PG&E were acting as if the transformer belonged to Gilroy.

Respondents deny that this election is indicative of their ownership of the transformer. Respondents assert that Mr. Fanelli was merely responding to options presented by PG&E. He was not told at the time that PG&E believed Gilroy owned the transformer or that the choices being presented were predicated on Gilroy's alleged ownership. He was aware only that rate increases for utilities were a common occurrence and he chose the cheapest alternative for continued service.[47]

In weighing this evidence, the presiding officer concluded as follows:

> Complainant postulates that exercising the service option is inconsistent with respondents' denial of ownership and operation. (Com. Op. Br. at 22, 23) This is transparent legal jugglery. On this record, a user of the transformer, standing alone, cannot be converted into the owner or operator of same. It is perfectly plausible on the facts as found in this proceeding that respondent, or any other user of equipment, could request a modification, or no modification in service, without having ownership in the equipment.

Initial Decision, at 29. We agree that while this transaction may show that PG&E believed that Gilroy owned the transformer, it does

[46] Complainant's Exhibit 4, at 4–5.

[47] Respondents' Reply Brief, at 13.

not show either that Gilroy believed it was the owner or that in fact it was the owner.

The other alleged inconsistency between respondents' actions and its denial of ownership relates to the sampling of the dielectric fluid. The facts, as found by the presiding officer, were as follows:

> Following the inspection, and telephone conversations with EPA, Fanelli was advised that the PCB fluid in the transformer should be tested, and that equipment should be recorded with the fire department and quarterly reports be made to it. Fanelli called PG&E regarding the taking of a sample and testing the PCB fluid as he assumed the utility owned the transformer. The samples from the transformer were taken at Fanelli's request, and Gilroy paid for the subsequent testing. When Fanelli first asked PG&E to obtain the sample from the transformer, it was with the understanding that the utility would do so at its own expense. Also, at the time of the telephone conversation with PG&E, Fanelli was not aware of the position of PG&E that it denied ownership of the transformer; and that it was only after Fanelli's conversation with the Edendale office of PG&E that he was made aware that the respondents would have to pay for the sample. PG&E thereafter put its own lock on the enclosure. Fanelli telephoned the Edenville office of PG&E following the taking of the sample; he was advised that PG&E did not have the facilities for testing and Gilroy would have to send it to a certified laboratory for such a procedure. He got in touch with such a laboratory that went to the facility, took a sample and tested it. The person to whom Fanelli spoke with at the Edenville office of PG&E never denied the utility owned the transformer.

Initial Decision, at 17–18.

Mr. Fanelli discussed his communications with PG&E relative to the sampling during the hearing.[48] He indicated that in discussing the inspection with Ms. Ellison, he determined that the transformer should be tested. He called PG&E because he assumed it was their

[48] Tr. at 264–268.

transformer and they sent someone out to take the sample. This person (Carl Love) called Mr. Fanelli after arriving on site because the transformer was in a locked enclosure and he did not have a key. Mr. Fanelli indicated that he didn't have a key either because "we always thought it was your lock." Mr. Fanelli authorized Mr. Love to cut the lock, and replace it with a PG&E lock.[49] Mr. Love then took a sample.

Mr. Fanelli also described a conversation with a man in the Edenvale office of PG&E.[50] According to Mr. Fanelli, he called to find out the status of the sample. He was advised that PG&E did not have the facilities to test the sample and it would have to be sent to a certified laboratory. The PG&E man gave Mr. Fanelli the names of several such labs. Mr. Fanelli called one such company, which picked up the sample from PG&E and tested it at Gilroy's expense. In response to a question, Mr. Fanelli indicated in his testimony at the hearing that the man in the Edenvale office never indicated that PG&E denied ownership of the transformer.

Mr. Parrinello also discusses this occurrence in his affidavit.[51] Mr. Parrinello's affidavit provides some additional, and in some respects contradictory, detail. The actual sampling of the transformer is described in terms similar to that of Mr. Fanelli, although Mr. Parrinello emphasizes that Mr. Love noted the lack of any PG&E identification on the transformer and fence and the non-PG&E lock. However, there is some divergence in the stories after that.

Mr. Parrinello's affidavit contains the following chronology. Upon returning from the Gilroy site, Mr. Love researched PG&E maps and could not find the transformer on them. Mr. Love then went to a Ms. Davis of PG&E and informed her that the transformer did not belong to PG&E and that Gilroy would therefore have to pay for the taking of the sample and the sample analysis. Ms. Davis then ostensibly contacted Mr. Fanelli and told him that the transformer was owned by Gilroy and thus Gilroy would have to pay for the sampling and analysis. Mr. Fanelli asked how he was sup-

[49] Mr. Love apparently put a PG&E lock on the enclosure because of the hazard potential of the high voltage going into the transformer. Tr. at 99.

[50] Mr. Fanelli could not remember this person's name but it apparently was a Mr. Ulloa.

[51] Complainant's Exhibit 4, at 5–7.

posed to know if it was his transformer and Ms. Davis agreed to have the issue researched further.[52]

According to the Parrinello affidavit, Ms. Davis asked PG&E Voltage Coordinator Marco Ulloa to research the ownership of the transformer. Mr. Ulloa reviewed PG&E's records and contacted Mr. Fanelli to advise him that Gilroy owned the transformer. Mr. Fanelli then agreed to pay for having the sample tested. Mr. Ulloa informed Mr. Fanelli that he should make arrangements with a laboratory to pick up the sample and analyze it. This, Mr. Fanelli did.

Comparing Mr. Parrinello's affidavit with Mr. Fanelli's statement, the most significant discrepancy is whether anyone at PG&E ever advised Mr. Fanelli that they believed Gilroy owned the transformer. According to the Parrinello affidavit, both Ms. Davis and Mr. Ulloa so advised Mr. Fanelli. Mr. Fanelli, however, specifically denied that Mr. Ulloa ever advised him that the transformer was not owned by PG&E[53] and never mentioned being contacted by Ms. Davis. Mr. Fanelli also indicated that the reason he was given for PG&E's not doing the sample analysis was that PG&E did not have the facilities,[54] whereas the implication in the Parrinello affidavit is that PG&E did not do the analysis because they did not own the transformer.

The parties dispute how the foregoing events should be interpreted. Respondents emphasize that Mr. Fanelli asked PG&E to sample the transformer because he believed PG&E owned it. If PG&E did not believe they owned it, why would they come out to sample it? Respondents assert that they paid for the analysis because they were faced with an EPA enforcement action, and were investigating the transformer as required by EPA in an attempt to comply.[55] This, they argue, cannot be used as proof of ownership.[56]

The Region argues that Gilroy's actions, in paying for the testing, was inconsistent with its denial of ownership.[57] The Region states

[52] In his testimony at the hearing, Mr. Fanelli did not mention any conversation with Ms. Davis. He apparently recalled only a conversation with Mr. Ulloa. Tr. at 266.

[53] Tr. at 267.

[54] Tr. at 266.

[55] At the hearing, evidence was admitted to show that respondents were then in compliance with the law, without prejudice to their position that they dispute liability. Tr. at 270–272.

[56] Respondents Reply Brief, at 14–15.

[57] Complainant's Post Hearing Brief, at 24.

that "[i]f Respondents then believed that they did not own the PCB Transformer they would have made demands on PG&E to determine the nature of the fluid. No such demands have been made to date."[58]

In evaluating this evidence, the presiding officer rejected it as indicating ownership by Gilroy, concluding as follows:

> While respondents paid for the sampling, this is not a persuasive consideration to saddle them with ownership of the equipment. It is reasonable on the facts to conclude that respondents paid for the sampling then and there rather than to get into a squabble concerning ownership of the transformer, an issue which could be resolved at another time. Also, if PG&E was denying ownership, why did it come at all to the transformer to take a sample of the fluid? Also, Love of PG&E, who took the sample, was unable to say the transformer was not PG&Es.

Initial Decision, at 29–30.

We agree with the presiding officer that these circumstances are ambiguous. It appears that PG&E agreed to sample the transformer because, at that time, the PG&E representatives had not realized that it was not listed as one of their transformers. Thus, their responding to Mr. Fanelli's request does not show PG&E's ownership. As to Mr. Fanelli's agreeing to pay for the sampling, it is plausible, as the presiding officer found, that Mr. Fanelli simply chose not to delay analysis of the sample by disputing, at that point, ownership of the transformer. Thus, we agree that this evidence is too inconclusive to support the Region's argument.

G. *California Law of Fixtures*

Region IX also argues that under California law, the transformer is a fixture which became affixed to the land and thus was conveyed with the land even though not specifically mentioned in the documents of conveyance. The Region is correct that if the transformer is a fixture, it became a part of the land and passed to each subsequent purchaser with the fee of that land.[59]

[58] *Id.*

[59] *Southern Pac. Co.* v. *Riverside County,* 35 Cal. App. 2d 380, 386 (Fourth Dist. 1939).

The term "fixtures" is defined under California law at Section 660 of the California Civil Code in pertinent part, as follows:

> A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws * * *.

However, despite the seemingly exclusive focus on the method of attachment, the definition as interpreted is actually more complex.

It is well settled under California law that whether an article constitutes a fixture is based on a consideration of three factors: the manner of its annexation to the realty; its adaptability to the use and purpose for which the realty is used; and the intention with which the annexation is made.[60] In the *Seatrain Terminals* case, the court elaborated on the relative weight of these factors as follows:

> In resolving whether an article placed on the premises constitutes a fixture of personal property, the aforelisted three elements do not play equal parts. In making the determination in a particular case the element of intent is regarded as a crucial and overriding factor, with the other two criteria being considered only as subsidiary ingredients relevant to the determination of the intent. As succinctly stated in *M.P. Moller, Inc.* v. *Wilson* (1936)8 Cal. 2d 31, 37 [63 P.2d 818], "*This court* has recognized the test of intention to make the article a permanent addition to the realty as manifested by the physical facts, and *has accepted the character of the annexation and the use for which the article is designed as subsidiary elements employed for the purpose of testing the intention of permanency.*"

Seatrain Terminals at 75 (emphasis in original). Intent, of course, can be difficult to ascertain, particularly 40 years after the fact.

[60] *Security Data, Inc.* v. *County of Contra Costa,* 145 Cal. App. 3d 108, 117 (First Dist. 1983); *Seatrain Terminals of California* v. *County of Alameda,* 83 Cal. App. 3d 69,74 (First Dist. 1978).

We believe the relevant intention was that of the owner in 1953, when the transformer was first installed. As noted, this issue is complicated still further by the dispute over who owned the transformer in 1953.

If the owner was the property owner of the Gilroy site in 1953, as the Region contends, then it is likely that that owner intended the transformer to be "a permanent addition to the realty." The transformer served a particular need at the Gilroy site and would have been of questionable use elsewhere. More importantly, the transformer was in fact left at the site. There is no indication from the admittedly spotty administrative record that any owner tried to profit from the sale of the transformer, apart from the sale of the land, as personalty.

If the owner of the transformer was PG&E, it is unlikely that PG&E intended for the transformer to be a fixture. That would, in effect, be abandoning the equipment. In testifying as to PG&E practice, Mr. Parrinello indicated that while the company might leave idle facilities behind, "[v]ery seldom would there be transformers, because transformers are reusable. * * * [L]eaving equipment that has value, and reusable value out in the field, * * * that is not a normal practice."[61] For the same reason, it is unlikely that PG&E would give up ownership of a new transformer by having it become a fixture to the property.[62]

Respondent, in attempting to explain why PG&E would have abandoned the transformer it owned, references Mr. Parrinello's response to the question of whether PG&E would use this transformer today. Mr. Parrinello respond that "if we owned that transformer, no, we would not have used that transformer, reused that one" because there are newer transformers on the market.[63] Respondents thus reason that since the transformer would not be reused, it has no value and that is why PG&E would have decided not to remove it.[64] However, while this may be true now, it has no relevance as to what would have been intended when the transformer was first installed.

[61] Tr. at 113–114.

[62] Under Section 1013 of the California Civil Code, when a person intentionally affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he requires the former to remove it.

[63] Tr. at 114.

[64] Respondents' Post-Hearing Brief, at 12.

With respect to the method of annexation, the transformer is bolted to a concrete pad.[65] However, despite the wording of Section 660 of the California Civil Code, the method of annexation is not determinative.[66] There is no question that transformers, while not easily moved, can be moved with modern equipment.[67] In fact, as Mr. Parrinello testified, transformers are typically removed when no longer needed.[68] Therefore, this factor tends to support a conclusion that a transformer is not normally a fixture.

As to the final factor, its adaptability to the use and purpose for which the realty is used, this also suggests that the transformer is not a fixture. While it was needed to meet the power needs of a particular customer at the site now owned by Gilroy some forty years ago, it is not essential to the operation of the site itself. It is not needed by Gilroy or any of the current tenants and could be removed, with power being supplied to the warehouse directly. There is nothing in the design of the property that was done with the express purpose of accommodating the transformer. The transformer could be removed without destroying it. Physical connections between the transformer and the warehouse are minimal. This tends to support a conclusion that the transformer is not a fixture.[69]

Thus, after a review of the factors relevant under California law, we conclude that a transformer typically would not be considered a fixture and the Region has not provided persuasive evidence that it should be so considered here.[70]

Before leaving this subject, we take note of the case of *U.S. Environmental Protection Agency* v. *New Orleans Public Service, Inc.*, 826 F.2d 361 (5th Cir. 1987), cited in the Initial Decision. The presid-

[65] Tr. at 255.

[66] *Kruse Metals Mfg. Co.* v. *Utility Trailer Mfg. Co.*, 206 Cal. App. 2d 176, 180 (Second Dist. 1962).

[67] Tr. at 269.

[68] *See* note 61 and accompanying text.

[69] *See Security Data, Inc.* v. *County of Contra Costa, supra* at 118–119 (computer components found not to be fixtures in part because the building was not specifically to accommodate them, they were not essential to the purpose of the building, and they could be moved without being destroyed). Contrast this with the situation in *Bank of America* v. *County of Los Angeles,* 224 Cal. App. 2d 108 (Second Dist. 1964), where the court emphasized the physical integration of certain equipment into the building and the design of the building to accommodate the equipment as factors in concluding that the equipment was properly determined to be a fixture. *Id.* at 113.

[70] We note that both Mr. Santacroce and Mr. Fanelli testified that, based on their experience, a transformer would not be classified as a fixture. Tr. at 252, 258.

ing officer notes that one of the factors used by the court in that case in determining the status of certain property is the "societal expectation" of whether that property was an electrical installation under the Louisiana code.[71] Applying a similar concept here, the presiding officer states the following:

> In the instant matter, absent evidence to the contrary, the societal expectation or understanding is a factor to be weighed concerning ownership or control of the transformer. Equipment associated with the home, such as electrical, gas, water and other meters located on a person's property are viewed generally by society as not being owned by the person having title to the property. Even with larger equipment, such as a fenced-in-transformer, as here, absent persuasive evidence showing otherwise, the societal understanding is that such equipment is owned, operated and controlled by the utility.

Initial Decision, at 28. In its Notice of Appeal, the Region takes exception to the presiding officer's reliance on this factor, because only California law should be used in determining the nature of the property.[72]

The *New Orleans Public Service* case, arising out of a TSCA enforcement action, focused on whether certain transformers were "movables" under Louisiana law. By definition, the Louisiana Code classified "electrical or other installations" as immovables. In discussing the issue, the court relied upon an analysis in *Equibank* v. *United States Internal Revenue Service,* 749 F.2d 1176 (5th Cir. 1985), dealing with the status of antique crystal chandeliers. The court in *New Orleans Public Service* cites five factors discussed in *Equibank*. The first three derive from the Louisiana Civil Code and the remaining two, including societal expectation, "while not specifically enunciated in the Code, logically flowed from the precepts therein contained."[73]

While there is some logic to the concept of societal expectations, we do not rely upon it in making our determination. The Region is correct that the operative law here is that of the State of California. The court in *New Orleans Public Service* relied on this factor because

[71] Initial Decision, at 27–28.

[72] Notice of Appeal, at 24–25.

[73] *New Orleans Public Service* at 364.

it "flowed" from the Louisiana Code. We find no basis for engrafting this concept upon the California law.

Nevertheless, for the other reasons discussed previously, we determine that the transformer is not a fixture.

H. *Conclusions as to Ownership of the Transformer*

It is important to keep in mind that the issue before us is not who owns the transformer. It is whether the Region, by a preponderance of the evidence, has proven that Gilroy is the owner. As previously noted, we conclude that it has not.

In the absence of any proof to the contrary, it would have been reasonable for the Region to assume that the transformer, situated on the site for forty years, was Gilroy's property. Thus, Gilroy had the burden of going forward with some evidence to the contrary. However, the production by Gilroy of the purchase order showing that the transformer was purchased by PG&E was sufficient to meet this burden, shifting the burden back to the Region to show that, notwithstanding this purchase order, Gilroy is the true owner of the transformer. This, the Region failed to do.

To prove that Gilroy is the owner of the transformer, the Region would have to have shown that Gilroy acquired title to the transformer. Absent some documentation of the purchase of the transformer itself, Gilroy could have acquired title if the transformer were a fixture under California law which conveyed with the land. Actions taken by respondents relative to the transformer, as cited by the Region, may be indicative of whether Gilroy thought it was the owner but it is clear that such actions would not, by themselves, convert the transformer into a fixture under California law or vest ownership in Gilroy where it didn't otherwise exist. (However, such actions might be relevant to a determination of whether Gilroy was an operator of the transformer.)

There is no allegation that the transformer was specifically identified in any of the title transfer documents when Gilroy (or even Sobey) purchased the Gilroy site.[74] Therefore, since the Region has not advanced any plausible alternative theory for vesting title in Gilroy,[75] Gilroy could have acquired the transformer only if it were

[74] *See* deeds attached as Exhibit B to Complainant's Motion to Strike Affirmative Defenses and Exhibit A to Respondents' Prehearing Exchange.

[75] While it may have been possible for the Region to attempt to argue that Gilroy acquired title through other processes, such as abandonment by a previous owner,

a fixture and conveyed with the realty under the deed without needing to be specifically identified.

There are two basic weaknesses in the case as presented by the Region. First, there is no documentary evidence to confirm that when PG&E purchased the transformer, it did so on behalf of the customer on the site. The only record showing title to the transformer is the purchase order showing that PG&E bought the transformer from Westinghouse. This document, according to PG&E's own witness, did not show that it was being purchased for, and title transferred to, anyone else. While PG&E has testified to that effect, it is obviously not a disinterested party, given its own potential liability.

There clearly are indicia that PG&E does not consider the transformer to be its property. These include the absence of a PG&E lock and PG&E markings on the transformer and enclosure, the fact that the transformer is not shown on PG&E's maps, and PG&E's interaction with Gilroy on the rate to be charged for power. We do not question that PG&E genuinely believes that it does not own the transformer. However, mistakes do occur. This is shown, for example, by PG&E's misidentification of the purchaser for whom it allegedly purchased the transformer. The likelihood of a mistake is compounded by the fact that the transformer was purchased by Coast Counties, whose mapping and identification procedures may have been different than those used by PG&E.[76] We do not believe that the lack of PG&E identification, by itself, allows us to conclude that the transformer was purchased on behalf of, and title vested in, an unknown customer when there is not documentary evidence to support this.

In addition, even if the transformer had been owned by an earlier occupant of the site, it would have conveyed to Gilroy by virtue of the deeds, through various owners of the site, only if it were a fixture. As previously discussed, we do not believe the Region has shown the transformer to be a fixture under California law.

Therefore, we conclude that the presiding officer was correct in concluding that the Region failed to meet its burden of proof in establishing that respondents owned the transformer.

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or accession to the real estate, or a combination of abandonment and accession, it has not pursued those alternative theories in the presentation of its case, and we see no reason for our analysis of the case to go beyond the rationale already presented in the text above.

[76] There was no evidence presented at the hearing or otherwise included in the administrative record on the practices followed by Coast Counties.

I. *Operation of the Transformer*

The term "operate" is not defined in either the statute or the regulations. In the Initial Decision, the presiding officer establishes a definition of "operate" to mean "to put into, or continue in operation or activity; or put into activity; to put in action and supervise the working of; to cause to function; to manage; to control or manage authoritatively. It is defined as meaning to conduct; to carry out; to carry out or through; to work, as to operate a machine; to run; to act or work continuously; to perform a work or labor; to direct to an end; or it may also be appropriately defined as to direct or supervise the working of."[77] Both parties have accepted this definition for purposes of this appeal.

Region IX argues that Gilroy is subject to the requirements of TSCA as an operator. It argues that Gilroy "uses" the transformer because the electric power passes through the transformer and if the transformer were inoperative, there would be no power to the warehouse.[78] The Region then argues that the word "use" relative to the transformer "is on all fours with the words 'put into operation' and 'cause to function'" expressed in the definition of "operate" set forth in the Initial Decision.[79]

Respondents argue that the Region has failed to prove that Gilroy in any way operated the transformer. They point out that neither of Gilroy's owners had a key to the transformer enclosure or any control over it. They state further that Mr. Santacroce was never even aware of the transformer prior to the February 1989 inspection.[80]

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[77] Initial Decision, at 26–27, quoting 67 C.J.S. Operate § 67, at 873–74.

[78] Tr. at 14. Gilroy does not dispute that, without another hook-up to the warehouse, operation of the transformer is needed to continue providing power to the warehouse. However, Gilroy asserts that it does not need power *in the form as provided by the transformer,* only some source of electricity, and the Region has not disputed this. Tr. at 13.

[79] Notice of Appeal, at 23. In its Post Hearing Brief, the Region argued that it was the use of the PCB dielectric fluid rather than the use of the transformer which was determinative. Post Hearing Brief, at 19. This argument was properly rejected by the presiding officer (Initial Decision, at 25) and does not appear to be maintained on appeal.

[80] Respondents' Reply to Complainant's Appeal, at 17. Respondents fail to mention that Mr. Fanelli must have been aware of the transformer at least as early as 1985, since removal of the transformer was one of the options presented to him at the time of PG&E's power upgrade.

Respondents specifically urge rejection of the Region's argument that "use" of the transformer by having electricity pass through it equates to "operation" for regulatory purposes. They argue that operation requires some activity. The "passive nature" of having electricity flow through the transformer to the building is insufficient. They further reason that "[i]f the mere fact that electricity flowing through a device constitutes operation of that device, then every consumer of electricity is an operator of the entire electrical grid."[81]

In the Initial Decision, the presiding officer concludes that such use as Gilroy receives from the transformer is insufficient to establish its liability. He states that "[o]n this record, a user of the transformer, standing alone, cannot be converted into the owner or operator of same."[82] We agree. We think the argument that respondents are operators simply because electricity flows through the transformer, without more, is unpersuasive. It is not at all uncommon for landowners to have utility-owned equipment on their property which presumably serves that property. Making all such landowners the "operators" of such equipment would potentially extend TSCA liability far beyond the scope of persons to whom the activities contemplated by the regulations could be reasonably attributed.[83]

As previously noted, actions taken by a non-owner which may not establish ownership may be relevant to show that the non-owner was an operator. To establish operator status would require proof of active management of the transformer itself. In this case, the evidence presented by the Region does not establish active management of the transformer. The undisputed evidence shows that, until the Region's inspection, that respondents had no contact with, and took no actions regarding, the transformer. Indeed, they didn't even have access to the transformer, since they lacked a key to the enclosure in which it was kept. Thus, respondents cannot be considered as operators on this basis either.

For these reasons, we find that respondents are not operators of the transformer, and that the presiding officer properly found no liability based on their alleged operator status.

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[81] *Id.* at 18.

[82] Initial Decision, at 29.

[83] *See* note 21 and accompanying text.

III. *CONCLUSION*

Based on a review of the totality of the evidence, and for the reasons previously discussed, we conclude that complainant has not established by a preponderance of the evidence that respondents either owned or operated the transformer.[84] Complainant has thus failed to establish liability on the part of the respondents and the complaint in this matter is ordered dismissed with prejudice.

So ordered.

[84] In light of this conclusion, it is unnecessary to address the other issues noticed on appeal.