8/25/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
NELLO SANTACROCE	)	**Docket No. TSCA-09-89-0014**
	)	
and	)	
	)	
DOMINIC FANELLI	)	
d/b/a	)	
	)	
GILROY ASSOCIATES,	)	
	)	
Respondents	)	

No violation found of section 15(1)(C) of the Toxic Substances Control Act, 15 U.S.C. § 2614(1)(C), and the pertinent regulations promulgated thereunder, for the reason that the transformer in issue was not "owned and operated" by respondents.

INITIAL DECISION AND ORDER

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: August 25, 1992

Appearances:

For Complainant:
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INTRODUCTION

This matter is brought pursuant to section 16 of the Toxic Substances Control Act (sometimes Act or TSCA), 15 U.S.C. § 2615, as amended, to assess civil penalties for purported violations of the aforementioned statute. The United States Environmental Protection Agency (sometimes complainant or EPA) in a three count administrative complaint charged Nello Santacroce (Santacroce) and Dominic A. Fanelli (Fanelli), a partnership, doing business as Gilroy Associates (sometimes respondents or Gilroy), with violating section 15(1)(C) of the Act, 15 U.S.C. § 2614(1)(C), and pertinent regulations promulgated thereunder. Each of the complaint's three counts alleges that respondents "owned and operated" a specific Westinghouse PCB (polychlorinated biphenyls) transformer. In substance, the complaint alleges use, marking and recordkeeping violations. Count 1 maintains that respondents failed to conduct quarterly PCB inspections, to maintain records of quarterly PCB inspections, or to register the PCB transformers with the fire department in violation of 40 C.F.R. § 761.30(a). The penalty sought for Count 1 is $13,000. Count 2 states that respondents failed to mark the PCB transformer and access it with the PCB caution M_L, in violation of 40 C.F.R. § 761.40. The penalty sought here is $10,000. Count 3 asserts that respondents neglected to prepare PCB annual documents in violation of 40 C.F.R. § 761.180(a). EPA seeks a penalty in this instance of $6,000. The

total penalty proposed by EPA is $29,000. Counsel for respondents in his answer denied the allegations in the three counts, asserted affirmataive defenses and demanded a formal evidentiary hearing.

To be determined here is whether or not the alleged violations are supported by the preponderance of the evidence.[1] "Preponderance of the evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the undersigned Administrative Law Judge (ALJ), or not considered of sufficient import for the resolution of the principle issues involved.

FINDINGS OF FACT

A few days before the commencement of the hearing, the parties entered into the following stipulation of facts, set out verbatim below:

"1. Gilroy Associates is a California general partnership.

2. Nello Santacroce and Dominic Fanelli are general partners doing business as Gilroy Associates.

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[1] The applicable section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24, provides, in pertinent part, that: "Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of evidence."

3. A place of business located at 205 Leavesley Road in the City of Gilroy, State of California, was conveyed to Gilroy Associates by a Grant Deed filed September 24, 1975.

4. Gilroy Associates operates a storage facility and a recreation vehicle park for hire at its place of business located at 205 Leavesley Road in the City of Gilroy, State of California.

5. Gilroy Associates is a "person" within the definition set forth at 40 C.F.R. § 761.3.

6. There is a PCB Transformer located at 205 Leavesley Road in the City of Gilroy, State of California.

7. The PCB Transformer that is located at 205 Leavesley Road in the City of Gilroy, State of California, was manufactured by Westinghouse Corporation.

8. The serial number on the PCB Transformer located at 205 Leavesley Road in the City of Gilroy, State of California, is 6335051."

The Inspection

On February 17, 1989, EPA conducted what it designates as a "for cause" inspection of the respondents' facility. Such an inspection is one conducted when EPA receives a complaint from an informant alleging a possible violation. These inspections are conducted without giving prior notice to the facility or respondent. The allegations against respondents were received from an anonymous source in November 1988, and the information was imparted to Mona Ellison (Ellison). She has been employed by EPA for approximately 12 years. In that time, she was a PCB field

inspector for two and a half years, and was acting apparently in that capacity at the time the information was received anonymously. It was Ellison's understanding that the information had been conveyed by someone who, at the time, was parking a recreational vehicle on that part of respondents' facility used as a storage lot. (TR 17-18, 20-21, 24)

During the inspection, Ellison was accompanied by Mary Grisier (Grisier), who, at the time of the inspection, was also a PCB field inspector. (TR 26, 59) On the inspection date, Ellison and Grisier went to the respondents' facility, and a mobile home located thereon, where they introduced themselves to Christine Riggins (Riggins), who Ellison had been told was the resident manager or caretaker of the facility. In actuality, Riggins' husband was the caretaker or property manager, but he was ill in the mobile home at the inspection time. Riggins was acting in her husband's stead because of his infirmity. She is an elderly lady, who was 72 years of age at the time of the hearing. Ellison or Grisier presented their EPA credentials and discussed the purpose of the inspection and went over a couple of forms which Riggins signed. One of the documents was a Notice of Inspection which outlines EPA's authority to conduct inspection under section 11 of the Act, 15 U.S.C. § 2610. The other form signed by Riggins was a TSCA Inspection Confidentiality Notice. The inspectors suggested to Riggins that she forward the documents to respondents Santacroce and Fanelli. (CX 2; TR 27, 30, 50, 246). The TSCA Inspection Confidentiality Notice form presented to and signed by Riggins does

not contain language that it is granting consent or advising someone of their right to consent to inspection. The inspectors explained to Riggins that she was not necessarily responsible for the property and that she was simply respondents' "resident manager," and she could forward the forms to the owners. "So, she did sign." The inspection went forward and lasted about an hour and a half. Inspector Grisier in her training at EPA was never taught to ask for consent to enter property. "If someone asks us to leave, we would leave, but if they don't, we don't ask their permission to be there." The inspectors, however, were "absolutely not" taught to avoid the issue of consent. Neither Ellison or Grisier asked permission to enter the premises. The inspectors did not "talk" Riggins into signing the aforementioned documents. She understood she could sign them without being personally responsible. The inspectors did not explain to Riggins that if she did not sign the papers, they could come back with a warrant. (TR 62-63, 67, 70, 72, 74). In this regard, Ellison was of the view that once an inspector explains the purpose of the inspection during the opening conference, the burden then shifts to the representative of the facility. "Mrs. Riggins could have either jumped up right there and called Mr. Santacroce if she was unsure whether or not to let us on the property. She did not do that." The inspectors did not tell Riggins, who they conceded is an elderly woman, that she had the legal right to tell them to leave the premises. Riggins never stated expressly to the inspectors that they had permission to go on the property. She was of a mind

that by submitting "this form"[2] the inspector is asking permission to come on the property. Ellison admits that Riggins was a "little nervous" when the inspectors first got to the premises but later "it was fine." So "fine" that the inspectors were playing with Riggins' cat. (TR 47-49, 249) Riggins did not request the inspectors get in touch with respondents before proceeding with the inspection, but told them that she believed they were located at Aptos, California. Neither respondent was contacted by the inspectors before proceeding with the inspection, but a telephone call was made by Ellison to Santacroce during the inspection, who in the course of the conversation related that he was unaware of any transformer. He did not ask Ellison to leave the premises, as Ellison recalls the conversation, nor was there a denial that Riggins was the resident manager, or lacked authority. This telephone conversation took place after the inspectors had viewed the transformer. When Riggins spoke to Santacroce on the telephone, she was crying. When Ellison got on the telephone, he "wasn't very nice to her because she wasn't very nice to Ms. Riggins." Santacroce was distressed particularly because he was of the view that Ellison should have telephoned him first "so we could have allowed her to go on the property." In the Ellison/Santacroce conversation, the former did not ask for consent to go on the property and the latter did not grant such. (CX 2 at 5, 7, 9; RX 7; TR 27, 30, 40, 50, 220-34, 245)

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[2] The record is unclear whether Ellison was making reference to the Notice of Inspection or the TSCA Inspection Confidentiality Notice by the term "this form".

The transformer could be seen at a distance, from Riggins' mobile home, being enclosed within a chain link fence. The subsequent closer inspection did not reveal any PG&E signs on the fence. After the initial meeting with Riggins, she and the inspectors went to the transformer, but the former left to return to the mobile home, as she was concerned about her husband who was ill. (TR 71, 77-78)

The respondents' facility contains a total of eight warehouses. The transformer is used to downgrade PG&E voltage from 5000 to 440 for use by the entire facility, and power can be reduced further where needed. It is located about five feet from the east side of Building Three within a bermed chain linked enclosure with a padlock on the access gate. Riggins did not have a key to the padlock. Due to visual problems, because of distance, the inspectors used binoculars to read the PG&E identification on the transformer's nameplate. At this phase of the inspection, the marking violations were detected for the reason that the appropriate PCB caution label was not on the transformer. The nameplate on the transformer stated that it had a capacity of 493 gallons of Inerteen, a PCB, and its serial number was 6335051. (CX 2 at 4-5; CX 6; TR 32-33, 38, 41, 196) There was other electrical equipment at the approximate center of the facility. It is enclosed with a PG&E inventory number or identification on it, but PG&E disavows its ownership, even though it has a PG&E lock on the

gate to the enclosure. It is locked because of the high voltage going into this transformer and the potential hazard. (TR 37, 97-99)

The inspection disclosed that the transformer in issue was not marked with the prescribed M_L PCB marking label, nor was same found on the chain link fence. (CX 2; TR 33) After the inspection, Ellison got in touch with the Gilroy Fire Department to determine if the transformer was registered with it. Mr. Olds of the Fire Department said no such registration was filed. (CX 2; TR 39) The inspection also disclosed that there were no periodic inspections of the transformer or maintenance of such records. (CX 2; TR 33)

On March 2, 1989, Ellison received a telephone call from Fanelli. In that conversation, he related that copies of the EPA forms left with Riggins were received, and Ellison discussed the alleged violations she observed during inspection. Fanelli did not tell Ellison that the Gilroy Associates owned the transformer. (TR 39-41)

The Transformer

Ellison attempted to verify ownership of the transformer. Immediately following the inspection, she spoke with Stuart Svensson, who was associated with PG&E, concerning the transformer. He sent someone into the field to investigate. Ellison requested some information in writing, and he complied. In a letter to her, dated September 14, 1989, it was stated that PG&E did not own the transformer; that physical examination of the site and of PG&E's

records indicated that it was owned and maintained by Gilroy All-Storage Company. (CX 3; TR 41-42, 52)

John Parrinello (Parrinello) is employed by PG&E in the capacity of area manager for San Jose, Gilroy, Morgan Hill and County area, California. He was examined at the hearing. There was submitted concomitantly his affidavit (CX 4), which was admitted into evidence. The affidavit states, in significant part, that "I have asked . . . to research the ownership of the Gilroy All-Storage Transformer and provide documentation to show PG&E's non-ownership." (CX 4 at 1; emphasis supplied)

Reduced to its essentials, the affidavit and related evidence is as follows: That all transformers owned by PG&E are reflected on the utilities records and are provided with an identification number when placed into service; that the Gilroy All-Storage Transformer (transformer) is not shown on PG&E records; that the utility records indicate that in 1953 PG&E began to supply primary electrical service to a business named Cal-Can, which was then located at respondents' facility; that Cal-Can had to have its own transformer to reduce the electrical current to 480 volts; that to accommodate Cal-Can's needs, PG&E purchased the transformer from Westinghouse Corporation, which had 1,000 incoming kilovolt amperes, which could be reduced to 480; that there exists no written document, however, stating that the transformer was purchased for Cal-Can rather than PG&E; that the transformer bore the serial number 6335051 and purchase order 73493; that the equipment was delivered by Westinghouse to Gilroy, California; that

the customer must reduce the incoming voltage using customer-owned equipment; that PG&E's electrical distribution map of respondents' property does not show the transformer as part of PG&E's electric distribution system; that PG&E's records do not disclose whether it, or Cal-Can's electrician, installed the transformer; that Parrinello was advised that in 1975 Cal-Can ceased doing business, and that the facility was purchased by Gilroy Associates, with Fanelli being its representative; that in 1985, PG&E upgraded the primary voltage serving Gilroy All-Storage from 4,160 to 21,000 volts; that at this time PG&E got in touch with Fanelli concerning the increase in the primary voltage and he was presented with three specific service options; that since PG&E alleged that it did not own the transformer it had to give the customer options (TR 170); that Fanelli accepted the option that PG&E would rewire to service the transformer at no cost to Gilroy All-Storage, but this would mean the loss of the primary voltage discount; that PG&E then installed 21,000/480 volt three-phase step-down transformers, then "step-up" feeding 480/4160 volt transformers to maintain the 4,160 volt primary service to the transformer; that this was done in order that Gilroy All-Storage could retain its existing equipment and not have to replace the transformer; that on or about July 7, 1989, PG&E was requested to take and analyze an oil sample from the transformer; that in this process, the PG&E employee could not locate the transformer and he called Fanelli who explained where it was located; that upon locating the transformer the PG&E employee, Carl Love (Love), discovered the chain link fence enclosing the

transformer was secured with a non-PG&E lock; that the lack of a PG&E lock is inconsistent with PG&E ownership of the transformer; that Love told Fanelli at the time that he did not know if the transformer were his [Fanelli's] or PG&E's (TR 145, 148-49); that Fanelli did not have a key to the lock, but he authorized the cutting of the lock; that the sample was taken back to PG&E, but a search of PG&E maps did not disclose the transformer. Parrinello conceded, however, there were times when maps were incorrect because they were not updated. (TR 112) Fanelli was advised by PG&E that it did not own the transformer; that he would have to pay for the transformer sampling; and that the transformer belonged to Gilroy All-Storage. Fanelli inquired how he was supposed to know if it was his transformer, and the PG&E employee agreed to have the question researched further; a review by PG&E of its records was conducted and Fanelli was advised that the transformer belonged to Gilroy All-Storage; Parrinello was informed that Fanelli understood the situation and told PG&E to bill him for the costs associated with taking the sample and having same analyzed; that the sample from the transformer was obtained on August 10, 1989; that on September 14, 1989, PG&E advised Ellison in writing that PG&E had examined the site and its records, which revealed that PG&E did not own the transformer; and that the transformer is owned and maintained by Gilroy All-Storage Company.

There exists no written records showing that the PG&E transferred ownership of the transformer to Cal-Can; that Parrinello was not aware personally of PG&E's practices in 1953

regarding purchase of transformers for its then customers; and that there exists no written document showing the installation of the original transformer in 1953. (TR 117-18, 142)

Returning to the enclosure and the equipment inside it, there is a conflict concerning identification and ownership. On the fence enclosing the transformer in issue, there is currently a PG&E lock, with PG&E and the respondents each having a key. PG&E put its lock on the fence enclosing the transformer for safety purposes due to the high voltage associated with the transformer and it visited the facility a week prior to the hearing, stating it has a right to go to any facility where its equipment is located. On the facility it has a meter and poles; the meter on the outside of the facility, a couple of hundred feet away from the transformer. Parrinello was of the opinion that the PG&E did not own the transformer, but he did not know who owned it. The investigation of PG&E into the ownership has a focus, however. It was to show that it did not own the facility.[3] There are times when PG&E facilities are not used anymore, and they may be left for a period of time before being removed from a customer's property. Such equipment usually includes poles, but very seldom would it involve transformers because they are reusable, and have value. The transformer in question, however, would not have been reused because newer transformers are available. (TR 98-104, 111) If there were a mechanical problem with the transformer, PG&E would

[3] Apparently, in examination of the witnesses, sometimes the word "facility" is used also to mean the word "transformer".

not repair it, because it denies ownership of the equipment. PG&E was unable to answer the question who paid the municipal tax, if any, on the transformer. (TR 187-89) Parrinello provided an answer that was unenlightening. It was that the tax that PG&E pays is based on facilities that "are either in the air or on the ground, and it's a percentage" involving some formula. Parrinello was unable to answer whether the transformer itself was taxed, and who paid the tax, if any. (TR 186-87)

The occupation of respondent Santacroce is that of a general contractor. He is president of Sobey Development (Sobey), whch has been engaged in the development of properties for many years. He is also a general partner in Gilroy Associates (Gilroy), whose sole asset is that of the Gilroy property. In the early history of the facility, a company known as BG manufactured farm implements on it before World War II, and during that conflict it manufactured equipment for the Army. BG continued the manufacture of unidentified items after World War II. The record does not reflect when or how it went out of business. Sobey acquired the property in the following manner: In 1972, Santacroce made a loan to Dukor Modular Systems (Dukor), with only the real property as collateral for same. At the time of this transaction, Dukor was not required to furnish a list of the buildings or personal property. Santacroce only received the realty as security, as personal property could be removed and he did not know who owned same. When Dukor left the property, there was no agreement or acknowledgement concerning the transformer or any other personal property.

However, the deed of trust or mortgage involved with the transaction would have conveyed buildings and fixtures attached to the realty. Dukor went bankrupt. George K. Bissell (Bissell) was president of Dukor. When Dukor defaulted on the loan, it moved off the property in 1975. No bankruptcy trustee was appointed for Dukor. At the time Sobey/Santacroce entered into an agreement with Bissell for the property not to be included in the bankruptcy property, and all the buildings. Bissell, in his affidavit, Respondent's Exhibit 7, states that Dukor did not own the transformer; that it could not convey the transformer to Sobey, and at the time of sale no discussion was had concerning whether or not the transformer was included in the transaction. When Dukor abandoned the premises, it took the heavy equipment associated with its erstwhile business of manufacturing pre-built houses, but it made no attempt to remove the transformer. Upon acquiring the property, Sobey leased it to California Canners and Growers (Cal-Can). This company was on the property from about 1970 to 1981 when it became bankrupt. At this juncture, it is observed that Parrinello in his affidavit relates that "PG&E's records indicate that in 1953 PG&E began to supply primary service to Cal-Can . . . . " (CX 4 at 2) Cal-Can did not use heavy equipment on the property. The only personal property with which it was involved was tin cans associated with its canning operation. Sobey did not acquire any of Cal-Can's property. (RX 7; TR 220-27)

At the time of the hearing, the property comprised 16 acres and had 186,000 square feet of dead storage. There is in deposit

currently empty or full one-gallon cans of tomato paste and tomatoes. This personal property belongs to San Benito Foods and Gilroy Canning, the current lessees. (TR 227-29)

In 1975, Gilroy was formed and Fanelli became a general partner with Santacroce in that enterprise. At the time, no mention was made of the transformer. In Santacroce's 30 years of experience in development of property he had never known a property owner to own a transformer. Based upon his lengthy experience, Santacroce never considered a transformer to be a "fixture." It was also his impression that the PG&E equipment inside and near the center of the facility was PG&E equipment. Prior to the February 1989 inspection, he had never received any indication from PG&E that it did not own the transformer; that he did not even know the transformer was there; that he never had a key to the transformer enclosure; that prior to the hearing he always assumed the lock on the enclosure belonged to PG&E; that to Santacroce's knowledge there are no signs on the enclosure indicating ownership of the transformer; that Gilroy maintained the facility doing such things as general maintenance, remodeling work and painting; that such maintenance does not embrace the area within the enclosure because respondents could not enter same; that the transformer is not listed on Gilroy's tax bill; and that the local fire department inspected the property many times and the question of the transformer was not raised. (TR 228-29, 232-34, 243-44, 252)

Fanelli is a retired certified public accountant, and had been in that profession for about 35 years, having his own firm for 23

years. He is a general partner in Gilroy with Santacroce who he has known about 30 years. The partnership was formed for the sole purpose of owning the facility at 205 Leavesley Road and it is the sole asset of Gilroy. At the time the property was listed for sale, the sales agent involved when showing the facility said nothing about the transformer being part of the property purchased. If Gilroy had purchased the transformer, it would have expected it to be listed somewhere in one of the documents related to the sale of the property, because it would be highly unusual for such equipment to pass with the title. It was not so listed.

Around 1985, Fanelli had some conversations concerning the transformer. These were with PG&E regarding conversion of service, because the power source then existing was greater than Gilroy required. Several options were offered to Fanelli, one of which was the removal of the transformer by PG&E for a $17,000 removal charge. Fanelli declined the option for removal of the transformer, instead selecting a different type of service. It was not related to Gilroy that it owned the transformer, nor did PG&E refer to it as "your transformer." Fanelli always believed that PG&E owned the transformer.

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 deparment 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. As of the time of the hearing, Gilroy is performing quarterly, or other inspections, of the transformer. Also, respondents have marked access to the transformer with the appropriate symbols, and are developing annual documents concerning the equipment; and that respondents are currently complying with the law pertaining to transformers. This evidence was admitted merely to show current compliance and not as an admission by respondents that they have ownership and control concerning the transformer. Respondents' understanding is that they have no control over the transformer.

Also, respondents have no history of violations of environmental laws. (TR 256-73)

DISCUSSION AND CONCLUSIONS OF LAW

The ALJ turns first to the inspection issue. Section 11(a) of the Act, 15 U.S.C. § 2610(a) authorizes inspections. In pertinent part, it provides that "[S]uch inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator or agent in charge of the premises . . . to be inspected" (emphasis added). To assist inspectors in carrying out their duties in a legal manner, EPA has published Fundamentals of Environmental Compliance Monitoring Inspections, February 1989 (Fundamentals). The publication is used in the basic training course for EPA inspectors/field investigators. Part 7 of the Fundamentals addresses generally "Entry and Information." The "Legal Basis for Entry" is discussed in Part 7A, and pertinent to this proceeding, Part 7B is concerned with "Consensual Entry." Relying upon the Fundamentals, at 7-9, respondent argues that the inspector made no attempt to identify either of the owners as the agent-in-charge of the property; that Riggins was neither the facility owner or agent-in- charge; and that she did not have the authority to permit entry to the property. (Resp. Op. Br. at 22) Complainant counters this by citing the same Consensual Entry section of the Fundamentals which relates that notwithstanding the statutory authority to enter a regulated facility, EPA's policy is to obtain access by consent; that EPA solicits consent as a matter

of courtesy; and that it is not required to do so as a matter of law "since it has statutory rights of entry, search, inspection, sampling, etc." (Comp. R. Br. at 7) It is observed here that the Fundamentals are guidelines, being educational in nature. They are also not regulations. It is the statutory language which is of moment in resolving the question of the inspection. On the facts of this case, consent is not of great legal significance. The pertinent section of the Act does not mention the word "consent," but does speak of "agent-in-charge," and this is where attention must dwell to resolve the inspection issue.

Respondent argues with iron-hard insistence that Riggins was not the agent-in-charge of the facility. It is urged that Riggins lacked legal authority to be the agent-in-charge, that she had neither actual or apparent authority to be such; that the inspector never inquired of Riggins if she had authority to permit the inspection; and that respondent's evidence shows that she was not officially made a manager. She assumed the manager's duties because her husband was sick. (Resp. Op. Br. at 22; Resp. R. Br. at 8)

Notwithstanding respondent's disavowal of an agency relationship with Riggins, it is obstensive from the evidence that such a situation existed, and it can be construed that she was the agent-in-charge of the facility at the time of the inspection. During the illness of her husband, Riggins acted in his stead as agent on behalf of the respondents. She engaged in duties at the facility for respondents' benefit during her husband's illness.

Respondents cannot assume the benefits to them flowing from Riggins' functions and then deny she had authority. Along with advantages, a principal must take the responsibilities from the relationship. The first legal theory that can be employed is that an implied agency relationship existed at the time of the inspection. It is hornbook learning that the relation of agency need not depend upon express appointment and acceptance but may be implied from the conduct of the parties and the circumstances of the particular case. If, from the facts and circumstances, there was at least an implied intention to create it, the relation may be held to exist notwithstanding the denial by the alleged principal.[4] During the illness of Mr. Riggins, when he could not perform his agent-in-charge functions, respondents did not appoint a new agent-in-charge, or announce to third parties that Riggins did not have authority to act in their behalf. In this regard, it is to be noted that in the inspector/respondent telephone conversation during the inspection the latter did not deny that Riggins was the resident-manager. The affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. University Marketing and Consulting, Inc. v. Hartford Life and Accident Insurance Company, 413 F. Supp. 1250, 1260 (E.D. PA 1976).

Allied to the doctrine of implied authority is that of apparent authority. Defined roughly, such authority is found where a principal holder permits an agent to exercise, or to represent himself as possessing authority under such circumstances as to

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[4] 2A C.J.S. Agency § 52.

estop the principal from denying its existence. It has generally been held that apparent authority exists where a principal knowingly permits a person to act in his behalf and where a reasonably prudent man, using diligence and discretion, would naturally suppose that the agent had the power to act as such.[5] Mr. Riggins, the "official" agent-in-charge was ill, his wife was acting in his capacity. Under the facts, it was not unreasonable or imprudent for the inspector to suppose Riggins had authority. Assuming arguendo that there was no authority, the facts support the conclusion that by respondents' conduct they, at least by implication, adopted or confirmed the actions of Riggins as agent-in-charge, while waiting for the latter during his illness. Stated otherwise, respondents ratified any purported unauthorized authority by Riggins.[6] It is concluded that the inspection was made "upon the presentation of appropriate credentials and of written notice . . . to the agent-in-charge of the premises . . . to be inspected."

However, the agent-in-charge issue in this matter pales before the wrenching question of whether or not respondents "owned and operated" the transformer as charged in the complaint. We begin with the basics. The pertinent section of Part 22 of the Consolidated Rules of Practice (Rules), provides as follows:

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[5] Id. § 157.

[6] Id. § 63.

§ 22.24 Burden of presentation; burden of persuasion.

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 the Presiding Officer upon a preponderance of the evidence.

The burdens of presentation and persuasion were addressed recently in a cleanly crafted, well-researched, initial decision by the Honorable Henry B. Frazier, III, Chief Administrative Law Judge. He held that a complainant has the initial burden of establishing a prima facie case, the burden of proof and the ultimate burden of persuasion with respect to the violations alleged in the complaint. Once the respondent comes forward with rebutting evidence, the entire record must be evaluated to determine whether or not complainant has established by the preponderance of the evidence that respondent committed the alleged violations. In the Matter of Department of Veterans Affairs, Medical Center, [MWTA] RCRA Docket No. I-90-1084 at 24-25 (March 11, 1992). In a Final Decision, the then Chief Judicial Officer of EPA also met the question In the Matter of Sandoz, Inc., RCRA (3008) Appeal No. 85-7 (February 27, 1987). It was stated there:

In the abstract, the term "burden of proof" is ambiguous and encompasses two separate concepts:

> One is the burden of going forward with the evidence, which is a procedural device for the orderly presentation of the 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 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. (At 22, n.23, emphasis added.)

The parties have not directed the attention of the ALJ to where "owner" or "operator" are defined either in TSCA or the regulations, and an examination by the ALJ has failed to disclose definitions. The core conundrum is whether or not complainant has carried its burden of proof, with particular reference to burden of persuasion, showing respondent to be either the "owner" or "operator" of the transformer in issue.[7]

Complainant proceeds from the premise that TSCA regulates "use and not ownership." Citing a treatise addressing California real estate law,[8] complainant opines that property consists not only of ownership and possession but unrestricted right of use, enjoyment,

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[7] The ALJ is not unaware that the complaint states "owner and operator" and not "owner or operator."

[8] Miller and Starr, Current Law of California Real Estate, 2d Ed., Vol. 6, Sec. 19.1 at 492 (1989).

and disposal; that where there is the exclusive right of possession, enjoyment and disposition of a thing, it follows that he has its use; and that the exclusive right of user follows as a natural sequence of the right itself. Complainant relates further that section 6(e) of TSCA, 15 U.S.C. § 2605(e), is the only section of the Act which speaks directly to the regulations of a specific chemical (PCBs) and that, in pertinent part, it mentions "processing, distribution in commerce, use, . . . " From this, complainant reasons that TSCA regulates the use of the Inerteen, the PCB fluid in the transformer, and not the transformer; and that "The charge in each count of the complaint that Respondents 'owned and operated' the PCB Transformer is a variant way of saying that Respondents had the exclusive 'right of user and used' the transformer." (Comp. Op. Br. at 18, 19.) While this thesis rubs thinking patterns against the grain, it is based upon erroneous facts and faulty theory. The PCB fluid does not have any meaningful existence independent of the transformer. It is a unit. Further, the complaint charges that respondents "owned and operated" the transformer and the respondents defended themselves on that basis. Notwithstanding, in complainant's opening brief, in what appears to be a flash of legal legerdemain, it is asserted that it is the use of PCBs by the respondents that is the tantamount consideration in establishing liability. It is conceded that under special circumstances in some leases or bailment the use of property may be construed as ownership for a term. On the facts of this case, and the property involved, "use" is not tantamount to

"ownership." The evidence shows that respondents received some "use," by means of electrical power from the transformer. It is also conceded that, as asserted by complainant, the use of the electric power flowing from the transformer to respondents' tenants amounts to the equipment being used. Complainant then overreaches and opines that because respondents used the transformer then "the concern with whether respondents have a property interest in the PCB transformer is of less significance." (Comp. Op. Br. at 20) This lacks the alloy of facts which would harden complainant's contention. The single irreducible fact is that the complaint charged, and the basis upon which respondents defended themselves, was that they "owned and operated" the transformer. This is the sole question to be resolved.

The term "owner" is a general term having a variety of meanings depending on the context and the circumstances in which it is used. Speaking broadly, an "owner" is "one who has such dominion over a thing that he has the right to enjoy or do with it as he pleases, even to spoiling or destroying it, or that right in it by which it belongs to him in particular to the exclusion of all others."[9] The word "operate" is defined variously as meaning "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

[9] 73 C.J.S. Property § 25, at 204-05.

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."[10]

The evidence establishes that respondent owns the real property on which the transformer rested, and that title to the facility passed through previous owners with the equipment located upon it. However, the evidence is scant and unconvincing that the transformer was intended to be permanently affixed to the land. Parrinello, complainant's own witness, admitted that seldom would a transformer be left on property because they have reusable value. Fanelli, with many years in tax practice, testified convincingly that the transformer is not a fixture for tax purposes. Also, when the ALJ broached the question to Parrinello concerning whether PG&E paid taxes on the equipment, the explanation was Delphic. Testifying persuasively, Santacroce, with many years in property development also, was of the firm view that the transformer located on the property was owned by the utility.

There is an ignored corner of the record worth pursuing briefly. In U.S. Environmental Protection Agency v. New Orleans Public Service, Inc., 826 F.2d 361, 364 (5th Cir. 1987), the court discussed Equibank v. United States Revenue Service, 746 F.2d 1176 (5th Cir. 1985). The question in the latter case was whether or not antique chandeliers were moveables or immoveables under Louisiana law. In the court's opinion, one of the factors to be considered is the "societal expectation" with regard to whether a

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[10] 67 C.J.S. Operate § 67, at 873-74.

thing was an electrical installation within the meaning of the pertinent Louisiana code. 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.

Complainant's principal witness concerning the ownership and operation of the transformer is Parrinello, through his affidavit and testimony. He conceded that PG&E was involved in the original acquisition of the transformer, purportedly as an agent for Cal-Can. Complainant stresses that the evidence offered by Parrinello showed that the transformer was not shown on PG&E maps; that it does not have a PG&E transformer identification number; that the fence surrounding the transformer did not have a PG&E lock until the inspection of the dielectric fluid. This evidence, however, does not establish that respondents owned the transformer. One clinching consideration is that Parrinello, though steadfast in his belief that PG&E did not own the transformer, conceded <u>that he did not know</u> who owned it. Also, the evidence proferred by Parrinello cannot be considered completely objective, for if respondents did not own the transformer the burden may be on PG&E to show it did

not own it. In this regard, it is significant to iterate here that Parrinello stated he was requested to do research and provide documentation to show PG&E's nonownership of the transformer. Parrinello's affidavit also contained inaccuracies. He states that PG&E purchased the transformer on behalf of Cal-Can from Westinghouse Corporation (CX 3 at 3); and that PG&E began to provide service to Cal-Can in 1953. (CX 3 at 2) However, the evidence shows that Cal-Can operated approximately from 1970 to 1981. Further, in that PG&E was involved initially with the purchase of the transformer and the documents associated with the transaction, it had the responsibility to maintain accurate records concerning ownership.

Complainant also argues stoutly that when Fanelli responded to options for service presented by PG&E, he elected to continue certain service, but retaining the use of the transformer. 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. Also, when PG&E took the sample of the transformer fluid, it placed a PG&E lock on the fence. 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.

In addition to the general definition of "own" and "operate" supra, there are other considerations which bear examination on the question of ownership; for example, the existence of any written agreements between respondents and PG&E, or between the owners of the property in transferring title concerning the transformer. The record shows that none existed. Also, who customarily serviced the transformer? The evidence shows respondent did not, but that PG&E would do the servicing concerning any option exercised by respondents. Also to be weighed is who had access to the transformer. The record is clear respondents did not, as the lock had to be cut when PG&E wanted access to the transformer.

The single issue before the ALJ is whether or not the respondents "owned and operated" the transformer as charged in the complaint, or even "owned or operated" same. When the evidence is ruthlessly pruned, it shows that complainant fell far short in its burden of persuasion, for respondents' evidence was just as persuasive, if not greater, concerning its non-ownership of the transformer, as that of complainant's regarding the former's alleged ownership and operation.

ULTIMATE CONCLUSION

Viewing the totality of evidence in this matter, and for the reasons mentioned above, complainant has not established by the preponderance of the evidence that respondents either "owned and operated" or "owned or operated" the transformer in question.

ORDER [11]

IT IS ORDERED that the complaint in this matter be **DISMISSED**.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 25, 1992

[11] In accordance with section 22.27(c) of the Rules, this initial decision will become the final order of the Environmental Appeals Board within 45 days after its service, unless appealed in accordance with section 22.30 of the Rules.