

Responding to the downturn: mothballing or decommissioning manufacturing plants

THE SECOND HALF OF 2008 SAW A NUMBER OF manufacturers announce reductions in production capacity and, in some cases, plant closure in attempts to manage the unwanted effects of the economic downturn. Most manufacturing businesses are looking closely at their plants for cost savings. Sadly, some plants will not survive this scrutiny.

Plants can be sold or leased out as a going concern, sold for redevelopment, fully decommissioned or mothballed for an interim period, delaying any final decision on the future of the site to see how long and deep the recession is.

There are many legal factors to bear in mind when taking these steps. This article examines the key commercial, environmental and health and safety issues that will be relevant to in-house lawyers advising their businesses on the legal process of decommissioning or mothballing plants. The law in the UK varies slightly between England, Wales, Scotland and Northern Ireland, so it is important to establish which jurisdiction governs the site. This article will focus on the law as it relates to England. The issues are broken down into the relevant stages from the initial decision to implement the action to the final completion.

NOTIFICATION

Before taking the decision to shut down an operation, the business will need to consider which environment, health and safety regulators need to be notified of the decision, within what timescales and the costs this will lead to. The requirements of notification are largely covered by the express conditions of the site or company's permits, consents and licences. A good starting point is to look at the site's environmental management system and particularly any register of environmental legislation and permits that the site holds. The permits for any plant should ideally be kept in an easily accessible place and be complete (however minor the permit). This will verify who needs to be notified.

Notifying a regulator that a site is about to close – whether temporarily or permanently – will often

lead to a greater level of attention from the regulators in relation to site activities and the potential impact that mothballing or closure will have on the environment. This is why it is key to control and manage who you need to notify and when. Once such a notice is made, the decision is likely to be in the public domain.

Environmental permits

Pollution prevention control and waste management licensing regimes of old have now been grouped together under the umbrella of the Environmental Permitting Regulations 2007 that came into force on 6 April 2008.

If the use of the site is to be changed (including shutting down or mothballing), then the operator will need to decide whether any environmental permits need to be varied or even surrendered. Often, permits will contain express conditions requiring notice of changes in process. If there is a possibility of selling on the facility with continuity of operation of the permitted activity, then the permit will have a great value to the new user and should be transferred rather than surrendered.

Environmental permit surrender

If a site is being mothballed, the business will generally want to avoid having to surrender permits and it will need to work out a strategy to try to achieve this. If a site is to shut, surrender of the permits will often be needed and desirable. While the permit is in force, it will impose ongoing monitoring and reporting requirements and expensive compliance issues that the business will want to release itself from as quickly as possible. Surrender of an environmental permit may simply require notification in writing to the regulator, though this method is generally restricted to environmental permits for plants that are smaller and hold fewer concerns for the regulator. More environmentally problematic plants require applications for surrender to be made, which means the regulator can decide whether or not to allow the surrender. Before a regulator will accept the surrender or partial surrender of an environmental



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permit, it must satisfy itself that the necessary measures have been taken:

- to avoid any pollution risk resulting from the operation of the regulated facility; and
- to return the site of the regulated facility to a 'satisfactory state', having regard to the state of the site before the facility was put into operation.

There is an interesting dynamic here in that the business will want a swift and cost-effective surrender. The regulator, on the other hand, will be reluctant to allow a surrender until its environmental aims have been achieved and while the permit is in existence there are clear criminal offence weapons open to the regulator to force through those aims.

In order to satisfy the 'satisfactory state' test, a high threshold has been set by the regulator. When applying to surrender an environmental permit, an operator should consider whether it might be required to carry out land remediation under Part IIA of the Environmental Protection Act 1990 and, if so, whether it would be more cost effective to carry out operations that meet both regimes' obligations at the same time.

The general requirement for surrender of an environmental permit is that the operator is obliged to remove any contamination on site that arose during its operation. This will be assessed by reference to a baseline environmental audit, which was available at or soon after the permit was granted. In reality, the regulator will assume the operator is responsible for most contamination unless it can be convinced that the contamination was caused before the environmental permit or its predecessor was issued. Refused applications for surrender can be appealed.

It is possible to surrender part of the environmental permit. This can be a useful tool and it is the only method of reducing the extent of the site covered by the permit. Where there is a partial surrender, the regulator may need to amend the permit conditions to reflect this.

Environmental permit variation

If an express environmental permit condition can no longer be complied with, or the business does not want to be bound by it during a mothballing period, an operator must apply for a variation.

The key point here is whether the obligations to be varied have a significant negative effect on human beings or the environment. If they do, then the site will become embroiled in public participation

through consultation of those likely to be affected by, or interested in, the variation.

Public participation consultations can be a hindrance to a swift mothballing or decommissioning programme and the regulator may decide that certain information must be included on the public register.

It is worth the business forming a view and having its own evidence to try to liaise with the regulator on whether there will be 'negative effects'. There is no provision in the regulations to appeal the regulator's decision to call for a public participation consultation, although the operator will be notified of its decision.

Subsistence fees

Maintaining the permit, even if amended during a mothballing, will require continued, watchful compliance and payment of subsistence fees. The express terms of the permit should also be consulted when considering a variation in terms of the obligation to pay subsistence fees to the regulator. The exact amount will be set out in the permit but failure to pay these fees can lead to sanctions.

Notification to other regulatory bodies

Depending on the business's particular industry, there are a number of regulations that have different notification requirements. Particular attention should be paid to the Construction (Design and Management) Regulations 2007, Control of Major Accident Hazards Regulations 1999, the Notification of Cooling Towers and Evaporative Condensers Regulations 1992 and the Dangerous Substances (Notification and Marking of Sites) Regulations 1990. To give more specific advice on potential closure liabilities such as notification to the relevant authorities, it is necessary to draw up a list of the regulations that apply to the plant. Again, the site's register of environmental legislation can help here, assuming it has been kept up to date. It is, however, worth doing a verification exercise on this using an expert.

PLANNING CONSIDERATIONS

Existing planning consents may impose stringent conditions on the cessation – temporary or otherwise – of the operations on the site. These conditions will determine the actions that may be taken and an application to vary the use of the site may be avoided in some circumstances.

A point to look out for arises when the operator does not have an express planning permission, but instead operates under, or is looking to apply for, a certificate of lawfulness of existing use or development (CLEUD). Section 191 of the Town and Country Planning Act 1990 says that any person

can apply for a CLEUD to the local planning authority if it wishes to ascertain whether any existing use of buildings or other land is lawful. That person will need to specify the land and describe the use over the legal period of ten years previous to the application. If a plant occupier is looking to apply for a CLEUD but has not yet established its use for the statutory ten-year period, mothballing a site may jeopardise such an application because there will be a break in the established use of the site.

DISCHARGE CONSENTS AND ABSTRACTION LICENCES

There is no obligation to take any proactive steps to surrender a discharge consent, although there is a requirement to notify the Environment Agency in the event that the consent is to be transferred to a third party. Abstraction licences have potential value to new users of land and should not be surrendered without first checking the value to a future purchaser of the site. However, if they are surrendered, any abstraction well or borehole should be decommissioned and sealed to avoid future pollution risk.

WHAT SHOULD WE DO TO CLEAN UP?

Aside from the permit surrender issue, a business will want to look ahead, ask what the site needs in terms of any environmental clean-up, why, and whether it makes economic sense. A starting point is legal liabilities for contaminated land.

The basic principle under the UK's contaminated land regime is that the polluter is responsible for the costs of remediating the site. While the permit is in force, regulators generally tend to, and in some cases have to, use their powers under those permits to achieve acceptable clean-up. Achieving acceptable clean-up through the permit surrender process provides a lot of comfort that the site should not pose significant threats to the environment in the short term. However, once permit surrender is achieved, the contaminated land regime has severely impacted a number of historic operators when problems come to light years later. This, of course, assumes that the operating company has survived the downturn and is still in existence in one shape or form.

Under the regime, the regulator (local authorities or the Environment Agency) may decide the site is contaminated and pursue the historic operator for clean-up. The regulator's powers will be enhanced by the new Environmental Liability Directive, which is expected to be transferred into national law in February 2009, although it should be noted that this regime only deals with new pollution occurring after implementation. After consultation, the regulator can serve a remediation notice forcing

the old operator to pay for clean-up. If the notice is not complied with there can be criminal sanctions, clean-up by the regulator and recovery of costs, and even charging notices placed over the site.

In practice, remediation requirements are more frequently imposed by planners as part of the conditions set on site redevelopment. The contaminated land regime is unlikely to prevent or delay the closure of the site, but the business will need to evaluate what it does at the time of closure to try to avoid action in later years irrespective of its permit surrender obligations. It is not all bad news, however, since any works may enhance the value of the property when ultimately sold.

PRE-CLOSURE SITE ASSESSMENTS

Unless the conditions of any permit requires it, pre-closure site assessments will not be necessary but may be preferable for the purposes of benchmarking the level of any contamination at the site and avoiding the risk of incurring liability in respect of any contamination caused by subsequent occupiers.

If such an assessment shows that an environmental offence is being committed (for example, the pollution of groundwater) measures should be taken to solve the cause and remedy the damage. However, in the absence of permit conditions requiring it, there is no requirement for regulators to be notified of pollution. This position will change with the implementation of the Environmental Liability Directive.

DEALING WITH LEASE OBLIGATIONS.

In addition to any statutory obligations, lawyers should check the terms of any site lease. Any lease should therefore be examined to make sure that all contractual obligations – from standard covenants to leave the site in a good state of repair to specific environmental clauses – are met both during and following the decommissioning of the plant.

Businesses should be aware of the risk of incurring liability for environmental damage caused by the tenant in circumstances where the tenant has ceased using the plant. Particular attention needs to be paid to the user covenants and how they deal with any environmental incidents at times when the site is not in use. It is also important to investigate whether there is sufficient security backing the other party's obligations under the lease, such as parent company guarantees.

DISCLOSING INFORMATION FOR DECOMMISSIONING ENERGY INSTALLATIONS

The Energy Act 2008 (the 2008 Act) was given royal assent on 26 November 2008 and strengthens >

statutory provisions involved in decommissioning energy installations in three sectors: nuclear, offshore renewable and oil and gas. These provisions aim to minimise the risk of liabilities falling on the government.

With regard to oil and gas installations, the 2008 Act amends the Petroleum Act 1998 and widens the range of persons who are subject to a duty to serve a decommissioning programme when requested by the Secretary of State. The 2008 Act also provides new protection funds set aside for the purposes of a decommissioning programme for oil and gas installations so that, in cases of insolvency, an insolvency practitioner cannot claim these funds for the benefit of creditors. Instead they are to be used for decommissioning purposes. Also, the Secretary of State may request the publication of specified information about the protected assets and information on the financial affairs of the persons submitting the decommissioning programme. The 2008 Act addresses the same issues in relation to renewable offshore plants and has made similar changes to the Energy Act 2004.

Under Chapter 4 of the 2008 Act, the Secretary of State may require specific information about decommissioning of wells in relation to a person who has drilled, or commenced drilling, a well in pursuance of a petroleum licence or a combustible gas storage and unloading licence under s4 of the 2008 Act. This article does not examine these aspects but this will be the subject of a further briefing.

DURING CLOSURE

Additional permitting

A point often overlooked is that the decommissioning process itself may mean that the site owners have to obtain additional permits or consents to carry out certain work. For example, it may be necessary to obtain a further discharge consent, environmental permit or Groundwater Regulations authorisation.

The majority of environmental prosecutions brought by the Environment Agency relate to the pollution of controlled waters, which is a strict liability offence under s85 of the Water Resources Act 1991. It is therefore extremely important that during the course of any decommissioning exercise, care is taken not to allow any polluting matters to enter controlled waters, which includes any streams, rivers, lakes, ponds and groundwater.

Throughout the site decommissioning process high standards of record-keeping are essential and lawyers should advise that competent consultants are instructed to advise plant managers throughout the process.

Compliance with internal policy

An increasing number of organisations are voluntarily adopting environmental management standards and environmental auditing procedures such as ISO 14001, which may in practice commit a company to go beyond the minimum legal requirements. Lawyers and plant managers will need to check whether there are any internal policies that may indirectly dictate the procedures that need to be followed during decommissioning, otherwise the organisation risks losing such accreditation and will suffer adverse publicity.

Decommissioning contractors

Consultants and contractors appointed to manage or carry out any part of the decommissioning or dismantling works must be suitably qualified to carry out these tasks and suitable provisions should be included within any appointment documentation. Particular care should be taken in carrying out asbestos surveying, removal and disposal. Further thought should also be given to realising capital value in the reuse or sale of equipment on site. As a condition of the sale, it may be possible to require the purchaser to carry out and pay for the dismantling of the plant and disposal of any waste residue. Such works would require appropriate contractual protection. If decommissioning is not closely controlled, substantial liabilities can build up as a result of irresponsible plant removal that does not deal with wet wastes and the disconnection of main services.

Site safety

Since site safety is the occupier's liability when considering whether to shut down a plant, one crucial thing to ensure is that the plant itself is left in a safe condition for both legitimate visitors and trespassers. The Occupier's Liability Act 1957 applies where acts or omissions create a dangerous condition that later causes harm to a visitor. Therefore, appropriate practical safeguards should be put in place so that visitors to the site are not exposed to any dangerous situations during the decommissioning exercise. Particular care should be taken in circumstances where the plant is mothballed, because there will be longer periods when few employees will be on site to ensure the safety of visitors.

Occupiers of the plant also owe a restricted duty of care in respect of personal injury to trespassers under the Occupier's Liability Act 1984. Plant managers should therefore assess the likelihood of trespassers entering the premises and take appropriate steps to prevent them from doing so. In most circumstances, an occupier will often be able to discharge its common duty of care to visitors and trespassers by fencing off dangers on the land. It

is also prudent to place warning signs on perimeter fences and to highlight particular on-site dangers.

Plant occupiers also need to avoid the risk of being liable for certain environmental offences caused by trespassers. In *Environment Agency v Empress Car Company (Abertillery) Ltd* [1999] the defendant was successfully prosecuted under s85(1) of the Water Resources Act 1991 after an unknown person opened an unlocked tap to a large diesel tank on the defendant's premises, polluting a nearby river.

An occupier of a site may also be liable to pay damages to an injured third party if it fails to make any reasonable means to end a nuisance caused by a trespasser (per Lord Maugham in *Sedleigh-Denfield v O'Callaghan* [1940]).

NON-UK OBLIGATIONS

Another consideration is the obligations placed on businesses with parent companies governed by other jurisdictions. For example, the Financial Accounting Standards Board in the US requires businesses to recognise and disclose the fair value of a liability for assets due to retire, such as a decommissioning plant. It is important to ensure that both local and international obligations applying to retiring a business's assets have been determined.

PREPARING THE SITE FOR ONWARD SALE OR REDEVELOPMENT

Following the decommissioning of the plant, owners may wish to assess whether the site is suitable for alternative uses that would increase the value of the land. Planning restrictions will obviously dictate these opportunities to a large extent and expert advice should be taken at an early stage to maximise the potential value of the site. The local authority or the Environment Agency is likely to require a level of remediation that renders the site suitable for its intended future use. If remediation is to be carried out following the decommissioning of plant at a site (for example, as a condition of surrendering an environmental permit), the site owner may wish to carry out more extensive remediation at the same

time that goes beyond the minimum required to persuade the Environment Agency that the site is suitable for a more sensitive use. Depending upon the circumstances the additional costs of doing so may reap rewards, as the site may then be more attractive to potential developers.

Purchasers of land that has been used for industrial purposes will often seek indemnities from the seller in relation to environmental liabilities. From this perspective, if the seller has carried out their own investigations into the condition of the site, they may feel more comfortable giving such indemnities, potentially making the site easier to sell.

CONCLUSION

When contemplating either mothballing or decommissioning a plant there is often a fairly long environmental health and safety checklist to go through. Many laws change during the operational phase of a plant and extra duties need not be applied until the change of use occurs. Often, those charged with responsibility for closing down an operation may have never been confronted with the specific challenges that decommissioning raises. Therefore, sitting down with experienced professionals at the earliest opportunity to draw up a definitive list of issues is an essential starting point. The points set out above give a very broad outline of some of the decisions and actions that need to be taken and so commercial and technical advice will prove invaluable in drawing up the right decommissioning strategy for your plant.

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Environment Agency v Empress Car Company (Abertillery) Ltd [1999] 2 AC 22

Sedleigh-Denfield v O'Callaghan [1940] AC 880

Burges Salmon and consultants at ERM Ltd will be broadcasting a live webinar at 4pm on 4 March 2009 to expand on the issues highlighted here. If you wish to attend this free webinar, please go to www.burges-salmon.com and follow the simple links from the homepage to register.