

By Lisa A. Binder

Making Sense of the EPA's Reactivation Policy

An industrial plant that shuts down temporarily may be considered new when it reopens

Imagine that the operator of a large industrial facility (for example, a forging company or a wood processing plant) is forced one day to halt operations, perhaps due to an economic downturn or a major industrial accident. The operator plans on starting again as soon as possible. The facility's equipment is mothballed, but regular inspections and maintenance continue. A guard or two are constantly at the site to make sure all is in order, and the operator continues to pay permit fees. A year or more later, the operator is ready to resume operations. The plant's permits are still current. The equipment will be ready to run as soon as some maintenance work is done. The facility may not be fully ready, however, to resume production.

Under the reactivation policy that has been established by the EPA, stationary sources that shut down, even temporarily, may be deemed new sources upon reactivation. In particular, if potential emissions meet the regulatory thresholds defining a "major"

source, the facility may become subject to the New Source Review (NSR) or the Prevention of Significant Deterioration (PSD) permitting programs under the federal Clean Air Act.¹ When applied, these programs require a reactivated source to install control technology on every single emissions unit and may, in practical terms, prevent the source from resuming operations.

Although the EPA has applied the reactivation policy to sources since 1978, it has never published the policy in the *Federal Register* for public comment and review. In fact, until recently the EPA relied only on a patchwork of memoranda and letters to private parties and local permitting agencies to explain the scope and applicability of the policy. Without a definitive written summary of the policy, the EPA was free to revise the policy over time to affect an increasing number of sources. These revisions have

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been subject to controversy. The EPA's air permitting programs, for example, are currently the topic of serious debate at the agency and may be revised to allow sources to operate with enhanced flexibility. Regardless of the political and legal rationales for the EPA's evolving and seemingly ad hoc policy, sources that cease operations may face regulatory complications when they seek to restart operations. However, there are steps that sources can follow to

reduce their chances of triggering NSR or PSD.

These two permitting programs concern ambient air pollution and apply to the construction of major new sources and major modifications to existing sources.² The PSD provisions apply to pollutants for which the area has attained the national ambient air quality standards, and the NSR provisions apply to pollutants for which the area has not attained ambient air quality standards. The PSD permitting program requires new and modified

sources to install the best available control technology (BACT) and undertake an air impacts analysis.³ NSR requires sources to install pollution control technology that meets the lowest achievable emission rate (LAER). This is more stringent and costly than the BACT standard. Additionally, NSR requires a source to obtain offsets to ensure that the project will not result in increased emissions in the area.⁴

Under the Clean Air Act and current federal regulations, a major source typically triggers



NSR or PSD only if it meets one of two conditions: It is a major new source, or it is an existing major source that is undergoing a nonexempt modification that will result in a significant net emissions increase.⁵ The federal regulations do not define what a new source is, thereby leaving unresolved the status of preexisting, reactivated sources. The regulations provide that a modification is a "physical change" or a "change in method operation" and establish specific exemptions that do not, by themselves, constitute a modification.⁶ These exemptions include routine maintenance activities⁷ and increases in hours of operation and production rates, to the extent that such increases are not prohibited by an enforceable permit condition.⁸ (State permitting programs, which must be approved by the EPA before they can be incorporated into the State Implementation Plan, generally employ this federal framework as a model.)

Expanding Reactivation's Reach

The EPA's reactivation policy is a hodgepodge of more than 20 years of letters and memoranda to local agencies and the EPA regions regarding the status of reactivated sources. Over the years, the EPA has expanded the scope of its policy to bring more sources into the PSD and NSR programs. The EPA's earliest statements suggest that reactivated sources do not generally trigger NSR or PSD.⁹

For example, in 1977 the EPA concluded that the reactivation of a steel plant that had been shut down the previous year would not trigger NSR permitting requirements.¹⁰ The EPA's conclusion was based on the following three factors: 1) the plant had closed at its own discretion and the applicable State Implementation Plan (also known as a SIP) allowed its continued operation, 2) the plant would not emit more than its allowable limits, and 3) the state had continued to maintain the source in its active emission inventory and control strategy.¹¹ However, the EPA soon developed a more comprehensive approach.

One year later, the EPA concluded that sources that had been permanently deactivated were, upon reactivation, new sources. In a September 1978 memo the EPA addressed the issue of what constitutes permanent deactivation:

Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. A shutdown lasting for two years or more, or resulting in removal of the source

from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent.¹²

The EPA has rejected proposed state plans that are less rigorous than this permanent shutdown analysis, and various states have adopted the EPA's methodology.¹³ (De facto, California applies the EPA's guidelines.)

This permanent shutdown approach has yielded mixed results; many sources have triggered NSR or PSD, but others have satisfied the EPA's intent-based standard. For example, an incinerator that had been shut down for five years and removed from the state's emissions inventory was presumed new upon reactivation.¹⁴ Similarly, the closure of a kiln was deemed permanent after the unit had been inoperative for four years, the owner had stated that the shutdown was permanent, and the emissions had been removed from the state's inventory.¹⁵ A reactivated acid plant was deemed a new source after the unit had been shut down for 10 years, the owner had surrendered the permits, and the emissions from the plant had been deleted from the state inventory.¹⁶ The owner of the acid plant was unable to overcome the two-year presumption, even though he presented a previous statement of intent for long-term operation and evidence of custodial maintenance and searches for materials to restart operations.¹⁷

Other sources have been able to persuade the EPA that their shutdowns were not intended to be permanent. The EPA concluded in 1982 that a refinery's eight-year shutdown of boilers and a fluid catalytic cracking unit was not intended to be permanent.¹⁸ In 1991, the EPA determined that a power plant had not been permanently shut down, although the units had been on "cold standby" status for 10 years and the source had allowed its operating permits to expire.¹⁹ The agency relied on the owner's consistent and longstanding expressions of intent to resume operations, the presence of two full-time employees on the site, the periodic testing and maintenance of the system, and the minimal amount of time and capital needed to resume operations. However, the EPA cautioned, "This is a unique situation given the very long period of the shutdown."²⁰

In 1999, the EPA explained that it would examine, in order to determine whether a reactivated source is new for purposes of PSD or NSR, factors including:

- The amount of time the facility was out of operation.
- The reason for the shutdown.
- Statements by the owner or operator

regarding intent.

- The cost and time required to reactivate the facility.
- The status of the facility's permits.
- The record of maintenance and inspections during the shutdown.²¹

The EPA also noted that owners or operators of facilities that have been shut down "must continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future...."²² This explanation may be of somewhat limited use to plant operators that are seeking guidance on what will and will not trigger PSD or NSR, but for the present it offers a measure of direction. Previously, the EPA's standard of review seemed to many critics of the agency to fluctuate according to the political influences in effect at the moment.

The Modification Analysis

In the late 1980s, the EPA diverged from its 1978 conclusion that sources that had been permanently deactivated were, upon reactivation, new sources. The agency announced that reactivated sources may trigger NSR or PSD because they are modified rather than new. EPA Region IX, which includes California, adopted this new standard, dubbed the modification analysis, in 1987, when it reviewed the applicability of PSD to the resumption of operations at an acid plant. The EPA had originally concluded that the acid plant was a new source because it had been permanently shut down.²³ Following a change in ownership at the source, the agency revisited the issue and confirmed in a letter (known as the Cyprus Casa Grande Letter) that the source was subject to PSD not only under a new source analysis but also under a modification analysis.²⁴ The EPA explained that the reactivation was a nonroutine physical change (resumption of operations would involve four months of maintenance work and equipment replacement at a cost of approximately \$805,000) and a nonexempt change in method of operation (resumption of operations was deemed a de facto operational change).²⁵

Although some subsequent EPA guidance appears to disregard this modification analysis,²⁶ the EPA recently reaffirmed it. In June 1999, then-EPA Administrator Carol Browner issued the Monroe Electric Order,²⁷ which required PSD permits for the reactivation of three boilers that had not been regularly operated since 1981. The source had initiated activities in September 1988 to prepare the units for an extended reserve shutdown, including draining, disconnecting, and covering the equipment. The owner maintained the existing air permits, applied for required new permits, and continued to pay air quality



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maintenance fees. In 1996, after the boilers had been offline for between 8 and 15 years, the owner sought approval to restart the units. Reactivation would cost approximately \$5.3 million and entail some physical work, including the replacement and repair of various components.

Despite the evidence of the owner's longstanding intent to restart the facility, the EPA concluded that the reactivation did, in fact, trigger PSD because it was a nonexempt change in the method of operation. The EPA noted, "The mere fact that the plant is changing from a lengthy 'non-operational' and 'unmanned' condition, to one in which the plant is fully operational, fits the common sense meaning of a 'change in the method of operation.'"²⁸ The EPA also reaffirmed its position that reactivation activities do not fall under the exemption afforded to an increase in hours and production rate, because the exemption was intended to address the responses of sources to short-term fluctuations in markets.²⁹ As a result, the owner could not reactivate the plant without first undergoing PSD review.³⁰

Few options are available to sources that seek to avoid PSD or NSR liability under the modification theory. Sources may be able to avoid triggering PSD or NSR under the physical change prong of the modification theory, but only if they persuade the agency that the work associated with reactivation is routine. The EPA's broad application of the "change in method of operation" prong is more problematic. Sources may be able to avoid PSD or NSR under this theory if they can persuade the agency that their reactivation will not result in a significant net emissions increase. However, such a showing would likely be difficult, because the source's prereactivation emissions baseline is likely to be low.³¹

Since the mid-1990s, the EPA has been preparing a reform package for NSR and PSD permitting programs.³² In a prior proposal, the EPA expressed its willingness to allow states to adopt plantwide applicability limits, or PALs, that would give sources greater flexibility in modifying their individual emissions units.³³ The agency has also proposed allowing states to look to earlier emissions as a means of establishing premodification baselines³⁴ and exempting emissions units from NSR and PSD requirements if the units had installed BACT or LAER plans in the previous 10 years.³⁵ If the EPA adopts these proposals and if local air districts revise their rules to reflect these more lenient requirements, sources may be less likely to trigger the reactivation policy.

However, recent statements suggest that the EPA remains committed to NSR and PSD enforcement actions under the existing rules.

For instance, the agency is proceeding with actions against utilities and refineries around the country for failing to obtain permits for activities that the EPA considers nonroutine modifications, and some of these cases are proceeding to trial.³⁶ The agency also appears committed to the reactivation policy and (at least for now) to the modification analysis established in the Cyprus Casa Grande Letter and the Monroe Electric Order.³⁷ In addition to drafting additional opinion letters on the policy, the EPA and, in some cases, private plaintiffs have commenced enforcement actions against reactivated sources.³⁸ Although the policy may be subject to challenge on a variety of grounds, including the Administrative Procedure Act and the fair notice doctrine, at least one court has suggested that the policy may be enforceable.³⁹ As a result, until the validity of the policy is determined by the courts or until the EPA revises its permitting programs to accommodate source reactivation, sources may find themselves subject to the older, less flexible policies regarding NSR and PSD.

Reducing the Risk

At the present time, no foolproof method exists by which reactivated sources can avoid NSR or PSD. However, there may be ways to reduce the risks. At the outset, a source should review the SIP and local rules to determine whether any permitting or notification requirements affect its deactivation and reactivation activities. In addition, those managing the source may wish to consider the following measures:

- Compile helpful documentation.
- Document intentions to resume operations (in correspondence, internal memoranda, annual reports, press releases, and other documents) and avoid any expressions of contrary intent.
- Document efforts to resume operations (by securing financing, making repairs, and obtaining necessary equipment).
- Maintain existing permits and pay air quality fees.
- Monitor permit status and apply for new permits as required.
- Maintain the site's emissions on the state emissions inventory.
- Keep the facility in good condition.
- Minimize the duration of the shutdown— to less than two years, if possible.
- Maintain periodic operations at the site, particularly operations related to the primary purpose of the facility.
- Maintain some air emissions from the facility.
- Conduct regular inspections of and maintenance on the deactivated equipment.
- Keep deactivated equipment at the site.

- Undertake decommissioning and mothballing activities in ways that will minimize the effort required to bring equipment back into service.
- Treat the equipment in a way that comports with the stated intent to resume operations at some specific point in the future.
- Retain personnel on the site.
- Minimize the costs, work, and time needed for reactivation.
- Avoid combining reactivation work with other projects unnecessary for the reactivation.
- Work with the permitting agency to ensure that the reactivation complies with applicable requirements.
- Consider the potential benefits and risks of obtaining a determination of nonapplicability from the EPA.

These measures may reduce the likelihood that the agency will consider the shutdown to be permanent. They may also help persuade the agency that the reactivation is a routine physical change and hence not subject to PSD or NSR. Unfortunately, these measures will be less helpful if the permitting agency decides to apply an operational modification analysis to the reactivation project.

The EPA's reactivation policy has serious potential repercussions for plants that are being reactivated. Until the EPA revises its policy or the courts rule on the validity of the policy, sources may be able to reduce the risks of triggering the requirements by documenting a specific intention to resume operations, maintaining the source's equipment and permits, and minimizing the work involved in bringing the equipment back online. ■

¹ Clean Air Act, 42 U.S.C. §§7401 *et seq.*

² See 42 U.S.C. §7475 (PSD requirements) and §7503 (NSR requirements). See also 40 C.F.R. §51.166(i)-(r) and §52.21(i)-(r) (PSD); 40 C.F.R. §51.165(a)(2) and §52.24 App. S (NSR).

³ See, e.g., 42 U.S.C. §7475(a); 40 C.F.R. §51.166(j), (k), (m) and §52.21(j), (k), (m).

⁴ See, e.g., 42 U.S.C. §7503(a)(2), (c) and 40 C.F.R. §51.165(a)(2); §52.24 App. S.

⁵ See 42 U.S.C. §7502(c)(5) (NSR); 40 C.F.R. §51.166(i) and §52.21(i) (PSD).

⁶ See 40 C.F.R. §51.166(b)(2) and §52.21(b)(2) (PSD); 40 C.F.R. §51.165(a)(1)(v) and §52.24(f)(5) (NSR).

⁷ See 40 C.F.R. §51.166(b)(2)(iii)(a), §52.21(b)(2)(iii)(a) (PSD); 40 C.F.R. §51.165(a)(1)(v)(C)(1), §52.24(f)(5)(iii)(a) (NSR).

⁸ See 40 C.F.R. §51.166(b)(2)(iii)(f), §52.21(b)(2)(iii)(f) (PSD); 40 C.F.R. §51.165(a)(1)(v)(C)(6), §52.24(f)(5)(iii)(f) (NSR).

⁹ Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Howard R. Heim, Chief, Air Programs Branch, re Interpretation of Offset Policy, Sept. 15, 1977 [hereinafter the Heim Memorandum]. Record of Communication—Phone Call, from Rich Biondi to Roger Pfaff re Old Sources Being Brought On Line—PSD Applicability, June 18, 1980 (Retention of a deactivated source's emissions

on the state's inventory would be sufficient to exempt the source from PSD permitting upon reactivation—even if the source had been deactivated for longer than two years.) These EPA guidance documents are available on the EPA Region VII's database: <http://www.epa.gov/region07/programs/artd/air/policy/search.htm>.

¹⁰ Heim Memorandum, *supra* note 9, at 1.

¹¹ *Id.*

¹² Memorandum from Director, Division of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, EPA Region II 1 (Sept. 6, 1978).

¹³ See, e.g., 52 Fed. Reg. 38787 (Oct. 19, 1987) (rejecting a Virginia SIP provision more lenient than the EPA's policy); Memorandum from Ruben Herrera, Technical Specialist, Texas Natural Resource Conservation Commission, to Victoria Hsu, NSRP Division Director, Texas Natural Resource Conservation Commission, re PSD and Non-Attainment (NA) Applicability to Restart of Sources that Are Down for More Than Two Years (Aug. 4, 1998) (outlining permanent shutdown analysis).

¹⁴ Memorandum from Edward E. Reich, Director, Stationary Source Enforcement Division, to William K. Sawyer, General Enforcement Branch, EPA Region II, re PSD Applicability Determination: Babylon 2 (Aug. 8, 1980).

¹⁵ Memorandum from Edward E. Reich, Director, Stationary Source Enforcement Division, to Sandra S. Gardebring, Director, Enforcement Division, EPA Region V, re PSD and NSPS Applicability to a Reactivated Source (Oct. 3, 1980).

¹⁶ Memorandum from John S. Seitz, Director, Stationary Source Compliance Division, to David Howekamp, Director, Air Management Division, EPA Region IX, re Reactivation of Noranda Lakeshore Mine's RLA Plant

and PSD Review (May 27, 1987).

¹⁷ *Id.* at 3.

¹⁸ Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Conrad Simon, Director, Air and Waste Management Division, EPA Region II, re Reactivation of Amerada Hess Corporation's Port Reading Facility and PSD Review (July 9, 1982).

¹⁹ Memorandum from John B. Rasnic, Director, Stationary Source Compliance Division, to Douglas M. Skie, Chief, Air Programs Branch, re Applicability of PSD to Watertown Power Plant, South Dakota, Shutdown for Nine Years (Nov. 19, 1991) [hereinafter Watertown Power Memo].

²⁰ *Id.* at 2.

²¹ In re Monroe Electric Generating (Petition No. 6-99-2), EPA Order Partially Granting and Partially Denying Petition for Objection to Permit 10 (June 11, 1999) [hereinafter Monroe Electric Order].

²² *Id.*

²³ See note 16, *supra*.

²⁴ Letter from David Howekamp, Director, Air Management Division, EPA Region IX to Robert T. Connery, Holland & Hart, re Supplemental PSD Applicability Determination Cyprus Casa Grande Copper Mining and Processing Facilities (Nov. 6, 1987).

²⁵ *Id.* at 6.

²⁶ See, e.g., Watertown Power Memo, *supra* note 19 (relying solely on a permanent shutdown analysis to conclude that source reactivation does not per se trigger PSD).

²⁷ See Monroe Electric Order, *supra* note 21.

²⁸ *Id.* at 22.

²⁹ *Id.* at 13.

³⁰ The EPA did not decide whether the reactivation was a nonroutine physical change sufficient to trigger PSD.

See *id.* at 21-22.

³¹ See 40 C.F.R. §51.166(b) (21) and §52.21(b) (21) (iv) (PSD); 40 C.F.R. §51.165(a) (1) (xii) and §52.24(f) (13) (NSR); Monroe Electric Order, *supra* note 21, at 15 ("EPA...has applied its discretion narrowly in assigning representative periods other than the two years immediately preceding the physical or operational change.").

³² See 61 Fed. Reg. 38250 (July 23, 1996) (notice of proposed rulemaking regarding NSR and PSD reforms).

³³ 61 Fed. Reg. at 38264.

³⁴ 61 Fed. Reg. at 38258.

³⁵ 61 Fed. Reg. at 38255.

³⁶ See, e.g., *New Source Review a High Priority at Justice Department, Official Says*, Daily Envtl. Rep. (BNA), Mar. 28, 2002, at A-1.

³⁷ Letter from R. Douglas Neeley, Chief, Air and Radiation Technology Branch, the EPA Region IV, to Ronald Methier, Chief, Air Protection Branch, Georgia Environmental Protection Division, re Southern LNG, Inc., Elba Island Terminal, Draft Air Quality Permit and PSD Preliminary Determination 2 (Dec. 13, 2000) (local agency must undertake modification analysis).

³⁸ EPA Region IX recently settled a reactivation enforcement action against Cenco Refining Company. 2001 EPA Consent LEXIS 23 (Jan. 18, 2001). In November 2000, EPA Region V settled a reactivation claim against Detroit Edison for resuming operations of boilers that had been mothballed for 10 years. 2000 EPA Consent LEXIS 598 (Nov. 9, 2000).

³⁹ *Communities for a Better Env't v. Cenco Refining Co.*, 179 F. Supp. 2d 1128, 1143 (C.D. Cal. 2001) (concluding that the plaintiff made a "strong showing that the Reactivation Policy is a reasonable interpretation of the Clean Air Act regulations that does not conflict with any terms of the NSR program").

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