

ENVIRONMENT BRIEFING

Site closures: managing the environmental issues

The stream of UK industrial site closures and decommissionings shows no signs of letting up. Recent announcements of UK closures have included a tyre factory and chemical plants, as well as a number of conventional power stations. When considering whether to close or mothball a facility, a number of strategic decisions need to be made and, for an industrial site, many of these concern environmental issues.

As environmental issues are a key part of the decision-making process, it is essential that they are managed and addressed at an early stage; ideally, even before the closure is announced. It is important not to underestimate the environmental issues which, if not addressed correctly, can lead to prolonged delays and costs for the departing entity and can present a major distraction for any ongoing business for some years.

Preparation is key

When a business is considering closing a site, a variety of legal implications need to be thought through (see box "Other legal issues"). From the environmental perspective, it is important to establish at the outset the aims of the closure process and the business intentions for the site in the future; for example, whether the intention is to close the site or to obtain planning permission for a change of use and sell the site.

Establishing the team. Establishing a close-knit team that is experienced in managing site closures, decommissionings or plant mothballing is essential. It is a big advantage to have a team that has already worked together on other sites. The team often consists of environmental consultants, valuers, agents and legal advisers as well as site and business management. In the early stages, however, there is often sensitivity around disclosing and discussing options for a site within the wider business because of the fear of instability for the workforce and sending wrong messages to stakeholders.

An internal and external steering group team that has worked together before on closures will be familiar with these issues and sensitivities, and will be used

Other legal issues

Environmental issues in relation to a site closure or decommissioning cannot be divorced from other key issues that the business faces when vacating a site. Experienced advisers will appreciate this and factor these considerations in to the programme. The key issues include:

- Employees; for example, redundancy consultations or issues relating to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), where relevant.
- Security at the site, including the risk of trespassers and protestor action.
- The sale of the plant and machinery.
- Health and safety legislation.
- Tax issues, such as the availability of any tax relief.
- Contractual issues, such as whether the closure or decommissioning is a termination event under related contracts or constitutes a default under any related finance agreements.
- The application of any industry-specific legislation.

to drafting the appropriate confidentiality protections.

The appointment of external advisers to the team needs to be properly documented with a review of their contract terms to ensure that the business and other parties, such as future owners of the site, are able to rely on the consultants' advice, surveys, reports and warranties.

Property issues. Understanding how the property is held is key to a whole variety of issues. If the site is held under a lease that will need to be surrendered to the landlord, this is likely to have an impact on the standard of any clean-up that will need to take place. Effectively, this means that there is another major stakeholder, as well as the environmental regulators, to satisfy. While the regulators may be comfortable with the standard of clean-up that is proposed, a landlord will have its own opinion and aims for the site, which can lead to protracted surrender negotiations.

Often, the willingness of the landlord to accept surrender can be overestimated by the

business. It is important to get legal advice on any surrender or yielding-up provisions in the lease and on the law surrounding this area to enable the business to understand its negotiating position.

Regulator input. To decommission the site successfully, particularly if it is subject to an environmental permit, there will need to be significant negotiations not just with any landlord, but also with environmental regulators such as the Environment Agency (EA) and the local authority (LA). Understanding the mindset of those bodies and the interactions of the particular individuals within those bodies is important. They may each have a different attitude to risk and while the business will, as a minimum, need to meet legislation governing what level of remediation is required, the final works will inevitably come down to satisfying the views of key individuals and stakeholders, particularly if the business wants to exit the site in an orderly and timely manner.

Project management. Time spent at the outset in pulling all of the relevant

information and documents together is time well spent. The management team or steering group should collect together all of the relevant documents and information on the site that will be needed by advisers and others to assess what needs to be done to exit the site. This will include, for example, all property documents, permits, details of operating history and environmental audits.

It is also important to understand at the outset which key personnel within the business should ideally remain at the site and with the business until the site has been decommissioned. It is usually a great help to have an experienced project manager and someone who knows the history of the site on hand until the site is decommissioned and surrendered. Often, contracts need to be reworked or put in place to lock in these key people to perform this function.

Contractual issues. An understanding of the key commercial, supply, services and raw materials contracts that need to be fulfilled or terminated is important. For example, the site may have a key supply contract obliging it to produce and deliver products up to a certain date. Planning a closure in advance of that date is either fruitless or counterproductive in terms of cost and reputation to the business. It may also mean that environmental ground investigations at the site cannot be started until those contracts have expired because plant and machinery cannot be disturbed.

Environmental liability. The business needs to be clear on its own environmental policy and what its aims are in terms of managing the exit and any ongoing legacy environmental liability for the site. Often, businesses aim to achieve a clean break from a site without risk of ongoing environmental liability but to achieve that, a strategy needs to be put in place to deal with any contamination that is present, or pass on the risk of environmental liability to a buyer on a sale, or back to the landlord on a surrender.

The feasibility of achieving this within the timescales for intended closure of the site needs to be considered. There are a whole variety of legal methods to limit environmental liability based on conduct and contract and, to do this meaningfully, it is essential to have experienced environmental lawyers as part of the team.

Permit surrenders

For most industrial sites, a key driver to closure will be the surrender of the environmental permit. Before the EA will accept surrender or partial surrender of an environmental permit it must be satisfied that the permit holder has taken measures to avoid any pollution risk resulting from the operation of a regulatory facility and to return the site regulatory facility to a satisfactory state having regard to the condition of the site before the permit was granted (*regulation 25 and paragraph 14, Schedule 5, Environmental Permitting (England and Wales) Regulations 2010*) (SI 2010/675) (2010 Regulations).

The test laid out in the 2010 Regulations is often misconstrued. There is a tendency to think that, as long as the site is remediated back to the state it was in when the business first obtained the environmental permit, a surrender will naturally follow. However, that is not necessarily the case and the EA often takes a wide view on the works that are needed to avoid pollution risk and return a site to a satisfactory state. There will inevitably be consultation, debate and discussions on this, with the reality that the EA is in a strong position to force through its views. This is where an experienced team of environmental consultants and lawyers advising the business can, once again, pay dividends.

Another key area to look at is whether any permits need to remain in place. Depending on the intentions for the site, it may be advisable to maintain permits, particularly if the site can be sold as an existing facility. There may be aspects of a permit that need

to remain in place post-remediation; for example, to allow continued water discharges or to allow ongoing remediation techniques to continue. Some environmental consents can be a valuable commodity and therefore a business may want to preserve them in order to sell or transfer them to the new owner of the site. A good example of this type of permit would be water abstraction licences.

Surrendering an environmental permit is often a complex mix of agreement from both the EA as well as the LA and, as highlighted above, those entities often have different concerns. While the business may be in a hurry to exit the site, the LA and EA may have a whole variety of issues on their agendas at any specific point and a particular surrender may not be at the top of their priority list.

Planning permission and requirements

Alongside surrender of the environmental permit, thought will need to be given to planning law requirements. It is always worth checking the planning permission for the site as it may contain decommissioning conditions. If decommissioning requirements are included in the planning permission, they may pose additional, often more onerous, obligations on an occupier and operator than those attaching to the surrender of the environmental permit.

Planning law may also require the business to obtain permissions to carry out the remediation works as part of the surrender process. The planning position is further complicated if the operator is looking to sell the site as a redevelopment opportunity with a new permission attached. In those circumstances, regardless of the aims for the surrender of the environmental permit, the business will need to factor in what needs to be done to clean up the site to a standard suitable for its future use.

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