THE EPA'S REACTIVATION POLICY IN COURT

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I. INTRODUCTION

The United States Environmental Protection Agency (EPA) first articulated its Reactivation Policy in 1978 to subject facilities that had long-suspended operations to the recently promulgated New Source Review (NSR) provisions of the Clean Air Act.[1] The EPA has applied the Reactivation Policy consistently over the past 23 years, but until recently, the Policy had not been subjected to any judicial review. However, on September 26, 2001, the United States District Court for the Central District of California issued an order, acknowledging and formally applying the Reactivation Policy. That order granted a preliminary injunction in favor

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[1] Memorandum from EPA Director of the Division of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief General Enforcement Branch, Region II (Sept. 6, 1978) (on file with author) [hereinafter EPA Dvorkin Memo].

of an environmental justice organization suing a Southern California oil refinery that failed to apply New Source Review before beginning construction and operation of a facility shut down for over five years.[2]

II. BACKGROUND

A. A Brief History of NSR

The Clean Air Act Amendments of 1970 restructured the CAA to establish a regulatory program that would cover new and existing sources of pollution in response to the growing recognition of air pollution as a grave national problem.[3] The program centered on the creation of federally promulgated NAAQS.[4] NAAQS represent the maximum permissible concentrations of certain air pollutants in a region.[5] The Act anticipated the use of pollution control measures on major new or existing sources to attain NAAQS and required the enforcement of NAAQS by the states through the development of State Implementation Plans (SIPs) for each "air quality control district" ("air district").[6] The SIP represents the state or air district's plan for the achievement or maintenance of NAAQS. The 1970 Amendments to the Act mandated that each SIP include a provision for pre-construction review of any new sources to assure the speedy attainment of NAAQS.[7] However, these amendments did not mention explicitly the appropriate form of review in the event that the air district already had achieved NAAQS.

In 1974, in *Fri v. Sierra Club*[8], the Supreme Court affirmed a ruling by the District Court of Columbia[9] that the Act required the "prevention of significant deterioration" of air quality in areas already in attainment of ambient standards. Congress responded to the Supreme Court's affirmation of *Sierra Club v. Ruckelshaus*, by enacting PSD regulations, which it strengthened with the 1977 CAA Amendments by designating increments of permissible air quality degradation and including addi-

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2 Communities for a Better Env't v. Cenco Ref. Co., No. CV 00-5665 AHM (AIJx), 2001 U.S. Dist. LEXIS 16249 (C.D. Cal. Sept. 26, 2001) (order granting temporary injunction) [hereinafter Cenco Order].

3 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1971).

4 42 U.S.C. § 7409 (1994). The Act requires the EPA to establish "National primary ambient air quality standards. . . the attainment and maintenance of which in the judgment of the Administrator. . . are requisite to protect the public health." The following provision requires the establishment of secondary NAAQS "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." *Id.* at § 7409(b)(2)

5 *See id.*

6 42 U.S.C. § 7410 (1994).

7 *Id.*

8 Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D. D.C. 1972), *aff'd sub nom* Fri v. Sierra Club, 412 U.S. 541 (1974).

9 40 C.F.R. §§ 52.21, 51.166 (2001).

tional control technology requirements to assure protection of ambient standards.[10]

In addition to the PSD requirements, the 1977 CAA Amendments established strict requirements for areas where NAAQS have not yet been attained.[11] The Act defines a "nonattainment area" as an air quality region in exceedance of any pollutant regulated under the NAAQS.[12] These areas are required to implement nonattainment NSR, (just as regions in attainment of NAAQS must apply PSD review,) to any new facility or any existing facility making a major modification that will result in a significant increase in emissions.[13] Congress added the PSD and nonattainment NSR to the CAA with the intention that they apply to industrial changes that might significantly increase pollution in an area.[14]

Practically, NSR and PSD review and permitting is required before construction of any new major stationary source or modification of a major stationary source commences. New sources are targeted for review because of an implicit recognition of the efficiency of implementing pollution control measures during construction; modifications are similarly treated because they may result in facility-wide higher emissions, and pollution control can be installed during construction if necessary.[15] A major stationary source is defined as a plant with a potential to emit either 100 or 250 tons per year of a regulated pollutant.[16] Major modifications are physical or operational changes that will cause a "significant net emissions increase,"[17] but exclude "routine maintenance, repair and replacement."[18] To determine the applicability of review, a plant's baseline emissions, equivalent to the average rate of "past actual emissions" within two years before the proposed modification, are compared with the future potential emissions of the post-modification or post-construction source.[19] For example, if the post-change emissions of a source lo-

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10 The EPA adopted a PSD program in response to the Sierra Club decision in 1974. *See* 39 Fed. Reg. 42,510 (Dec. 5, 1974). The administrative program was superseded by the 1977 amendments, adding Part C (sections 160-60, CAA sections 7470-79) to the Clean Air Act. Pub. L. No. 95-95, 91 Stat. 685.

11 *See id.* The 1977 CAA amendments also added to § 171 in Part D, CAA 7501 to define "nonattainment."

12 42 U.S.C. § 7501 (1994).

13 42 U.S.C. § 7503 (2000).

14 40 C.F.R. §§ 51-52 (2000).

15 45 Fed. Reg. 52,676, 52,688. *See also* 54 Fed. Reg. 27,274, 27,277.

16 40 C.F.R. §§ 51.165, 51.166.

17 40 C.F.R. § 51.166(b)(2)(i).

18 40 C.F.R. § 51.166(b)(2)(iii)(a).

19 The EPA modified the meaning of future potential emissions for steam-generating units to equal the "representative actual annual emissions of the unit following the physical or operational change." *See* 40 C.F.R. § 52.21(b)(21)(v). The EPA concluded that the comparison of past actual to future actual emissions was a suitable method for evaluating emissions changes because the EPA's "extensive experience

cated in a nonattainment region exceed the emissions previously allowed by the site's permit by an increment determined in the regulations, the source will be required to implement nonattainment NSR. Nonattainment NSR includes meeting the Lowest Achievable Emissions Reductions ("LAER"), providing an alternatives analysis, demonstrating that other sources within the state owned by the owner or operator of the proposed site are in compliance with the regulatory program, and acquiring sufficient emission credits to offset the proposed increase.[20]

B. The NSR Program of the Clean Air Act and Power Producers

One of the most frustrating aspects of the Clean Air Act ("CAA" or "Act") may very well be the New Source Review provisions embodied in Parts C and D of the Act.[21] New Source Review generally refers to the Act's construction permit program for major sources. New Source Review includes two separate programs with specific requirements to be implemented according to an air district's achievement of satisfactory air quality: nonattainment NSR and Prevention of Significant Deterioration (PSD). The nonattainment NSR applies in areas with poor air quality as determined by the failure to achieve the National Ambient Air Quality Standards (NAAQS) for a regulated pollutant as established under the Act. PSD applies to the construction of or on major sources in areas in attainment of NAAQS.

Power producers, including oil refiners, tend to resent the NSR process under the "command and control" approach of the Act because procuring permits is time-consuming and delays the commencement of construction, operation or emissions.[22] Additionally, the CAA regulates new sources more stringently than existing sources expecting continuous air quality improvement as old sources are taken off-line.[23]

However, Congress built several escape devices into the Act, which facilities have exploited skillfully, and which have earned the disapproval of some environmentalists.[24] For instance, power generators prefer to

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with electric utilities and the similar nature of operations within [the] source category" would allow a sufficient basis from which to predict future actual emissions. *See also* 40 C.F.R. §§ 51-52 (2000).

20 40 C.F.R. § 51.165.

21 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1971).

22 EPA, NSR 90-DAY REVIEW BACKGROUND PAPER 11 (2001), *available at* http://www.epa.gov/air/nsr-review/background.html. ("Permitting can be a costly process that negatively impacts ROR [rate of return for the power sector]. Most developers describe permitting as an extremely complex and time-consuming process. The financial impacts from permitting (including NSR) can change the economic feasibility of the project.")

23 ARNOLD W. REITZE, AIR POLLUTION LAW 60-61 (1995).

24 EPA Requirements for Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. § 52.165 (2001); EPA Approval and Promulgation of Implemen-

call any changes at their facilities "routine maintenance or repair"[25] or "an increase in the hours of operation"[26] to exempt their actions from the permitting process.[27] Furthermore, facilities have undermined the expectation of continuous air quality improvement by maintaining existing sources beyond their anticipated life spans.[28] Through these actions, power producers have further complicated the permit process and compromised the goals of its enactment.

While the NSR process may be complex, its enforcement provides a degree of protection to the nation's air quality (as well as those living in and breathing the air) when the process succeeds in requiring the implementation of pollution control measures. Indeed, the stringency of the nonattainment NSR requirements reflects the purpose of the Act itself: to protect the public health and welfare from unhealthy air quality.[29] In a report commissioned by the Clean Air Task Force, Abt Associates, the consulting firm relied on by the EPA to determine prospective health benefits of regulatory programs, data confirmed that between 5,500 and 9,000 premature deaths are "attributable to fine particle pollution from 51 plants" that are targets of NSR enforcement proceedings.[30] As a result, when a facility successfully argues that a major change is a replacement, repair or any other exception to the rule and, therefore, free from New Source Review permitting, everyone must share the burden of living in dirtier air.[31]

With this short and intentionally skeletal background on PSD and NSR in place, this note will proceed to discuss a recent order of the United States District Court in the Central District of California, recognizing a longstanding EPA policy. The EPA's Reactivation Policy inter-

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tation Plans, 40 C.F.R. § 52.21 (2000). *See* Thomas J. Graff, *Harnessing Market Forces to Protect Our Environment*, ENVTL. DEF. FUND NEWSL., Feb. 1989, at 3, *available at*, http://www.environmentaldefense.org/pubs/EDF-Letter/1989/Feb/i_market.html.

25 40 C.F.R. § 51.165; 40 C.F.R. § 52.21.

26 *Id.*

27 *See* Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901(7th Cir. 1990) (replacement of several steam drums is more than the exception qualifies); Puerto Rican Cement Co. v. U.S. EPA, 889 F.2d 292 (1st Cir. 1989) (replacement of cement kiln that increased efficiency and emissions is not a like-kind replacement).

28 REITZE, *supra* note 23, at 61.

29 42 U.S.C. § 7401 (1994).

30 ABT ASSOCIATES, INC., THE PARTICULATE-RELATED HEALTH BENEFITS OF REDUCING POWER PLANT EMISSIONS (2000) (on file with author) [hereinafter Abt Report]. *See also* CLEAN AIR TASK FORCE, DEATH AND DISEASE FROM POWER PLANTS CHARGED WITH VIOLATING THE CLEAN AIR ACT (2001), *available at*: http://clnatf.org/resources.

31 In addition to reporting on avoidable premature deaths, the Abt Associates estimated that compliance with pollution control standards required under nonattainment NSR and PSD permit programs would result in the avoidance of between 4,300 and 7,000 premature deaths. *See* Abt Report.

prets the CAA to impose PSD or nonattainment NSR on any source that has been permanently shut down for a period over 2 years. A minimal grasp on PSD and nonattainment NSR is necessary to understand the importance of the EPA's policy, and the Court's decision to acknowledge it, because the policy effectively closes a potential loophole of the PSD and NSR permit provisions by treating a reactivated source as a "new source" under the Act.

This note also will address the consistent application and enforcement of the Reactivation Policy by the EPA, as well as the deference due to the Reactivation Policy as a permissible and reasonable standard to apply in interpreting the Act. Though an extremely necessary and relevant point of discussion, this note will not discuss the changes to the NSR program proposed by the current Bush administration, nor the Reactivation Policy's position within a cap-and-trade regulatory scheme.[32]

III. The Order in *Communities for a Better Environment v. Cenco Refining Co.*

On September 26, 2001, the United States District Court in the Central District of California granted a motion for a preliminary injunction in favor of Communities for a Better Environment ("CBE") against the Cenco Refining Company ("Cenco").[33] In so holding, the district court ordered that the Cenco Refining Company was precluded preliminarily from performing any construction or operation of its crude oil refinery without first applying nonattainment NSR to its facility as required by the CAA.[34] The district court acknowledged that CBE had made a strong showing that the EPA's Reactivation Policy would mandate that the Cenco refinery, out of operation since 1995, be treated as a new

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[32] The Reactivation Policy is clearly relevant to a cap-and-trade scheme illustrated by *CBE v. Cenco Ref. Co.* Cenco Refinery is located in the South Coast basin, and therefore regulated by the State Implementation Plan of the South Coast Air Quality Management District. The SCAQMD SIP includes the RECLAIM program, a system of emission trading credits required to offset facility emissions. S. Coast Air Quality Mgmt. Dist., Regulation 20: Regional Air Incentives (RECLAIM) (1993), *available at* http://www.aqmd.gov/rules/html/r2000.html. The Reactivation Policy applied to this case to determine that the facility must complete New Source Review as a "new source"" under the CAA before construction or operation. Included in the SCAQMD NSR program is the mandatory purchase of RECLAIM Trading Credits to offset the emissions resulting from the facility's operation. For a comprehensive discussion of the dangers of a pollution trading scheme, *See* Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Protection,* 9 Duke Envtl. L. & Pol'y F. 231 (Spring 1999).

[33] Communities for a Better Env't v. Cenco Ref. Co., No. CV 00-5665 AHM (AIJx), 2001 U.S. Dist. LEXIS 16249 (C.D. Cal. Sept. 26, 2001).

[34] Cenco Order at 35.

source, and therefore subject to the NSR program for a nonattainment region.[35]

A. EPA's Reactivation Policy

To best understand the Reactivation Policy, it is convenient to imagine a major polluting source—usually an oil refinery or a power plant, but possibly a wood pulping mill or a cement plant, among other facilities—in full operation. Tall stacks predominate the facilities' landscapes sending steam plumes or occasional flares into the air. The emissions released by these facilities are regulated under the Act's NAAQS. The facility is permitted to release a certain number of tons per year of regulated pollutants through the NSR and PSD regulations. If a facility chooses to upgrade its facility or to construct a new source within its facility, under the mandate of the CAA, it must apply for a new permit under NSR and PSD if the emissions resulting from the modification or new source construction will result in a "significant increase in emissions" compared with the baseline emissions.[36]

But what happens if the source discontinues its operations for an extended period of time? The plumes disappear and the flares no longer burn off emissions. If the source ceases operations, there is a presumption that its emissions discontinue as well. Should the source decide to reactivate operations after a time, the EPA's Reactivation Policy treats the reactivated source as a new source under the CAA if it satisfies a number of factors demonstrating that the initial shutdown was permanent.[37] As a new source, the facility is required to apply NSR or PSD review and permitting processes before undertaking any activity to restart operations.

The first expression of the EPA's Reactivation Policy appeared in a 1978 memo addressing the applicability of PSD requirements to a source that had been shut down for over four years.[38] In response to concern about the applicability of PSD to a source that had been shut down for 4 years, the EPA's Director of the Division of Stationary Source Enforcement wrote:

> 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

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35 *Id.* at 3. *See also id.* at 35.

36 40 C.F.R. §§ 52.21, 51.166.

37 *See* Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit, Petition No. 6-99-2, ("Order Partially Granting and Partially Denying Petition for Objection to Permit") (EPA June 11, 1999), *available at* http://www.epa.gov/ttn/oarpg/tlpfpr.h [hereinafter Monroe Electric].

38 EPA Dvorkin Memo, *supra* note 1.

> showing that the shutdown was not permanent, and of overcoming any presumption that it was. Under the facts you have given us, we would presume that the shutdown was permanent, since it has already lasted about four years. Consequently, unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source for PSD purposes.[39]

Since 1978, the Reactivation Policy has been further clarified through the EPA's consistent and repeated enforcement of its mandate.[40]

The Reactivation Policy explicitly considers the permanence of a shutdown facility as a "key determination" as to whether the facility will be treated as a new source for purposes of PSD and NSR.[41] The permanence of a shutdown "depends on the intention of the owner or operator at the time of shutdown based on all facts and circumstances."[42] To assist

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[39] *Id.*

[40] *See e.g.,* Memorandum from Edward Reich, Director, Stationary Source Enforcement Division to William K. Sawyer, General Enforcement Branch, Region II (Aug. 8, 1980) (on file with author) (municipal waste incinerator shut down for five years must be treated as a new source because of the duration of the shutdown and the State removed the incinerator from its emission inventory) [hereinafter EPA Babylon 2 Memo]; Memorandum from Edward Reich, Director, Stationary Source Enforcement Division to Sandra S. Gardebring, Director, Enforcement Division, Region V (Oct. 3, 1980) (on file with author) (cement kiln shut down for over three years, removed from State's emissions inventory, and described by the owner as permanently closed is to be considered a new source upon reactivation, requiring NSR and PSD permitting) [hereinafter EPA SME Cement Memo]; Memorandum from Edward Reich, Director, Stationary Source Enforcement Division to Conrad Simon, Director, Air and Waste Management Division, Region II (July 9, 1982) (on file with author) (refinery is not subject to PSD as a new source though shut down for over five years because owner provided adequate evidence that the shutdown was not intended to be permanent; PSD may apply for any significant net emissions increases over its baseline emissions) [hereinafter EPA Amerada Hess Memo]; Memorandum from John S. Seitz, Director Stationary Source Compliance Division, Office of Air Quality Planning and Standards to David P. Howekamp, Director Air Management Division, Region IX (May 27, 1987) (on file with author) (shut down leach acid plant must be considered new source when reopening because emissions removed from State's inventory and several hundred thousand dollars worth of work required to become operable) [hereinafter EPA Noranda Lakeshore Memo]; Letter from David Howekamp, Director, Air Management Division, Region IX to Robert Connery, Holland & Hart (Nov. 7, 1987) (on file with author) (transfer of ownership "represents further attenuation. . . between shutdown and prospective reactivation" and, though not determinative, is probative of permanence) [hereinafter EPA Cyprus Casa Grande Letter]; Memorandum from John Resnic, Director, Stationary Source Compliance Division, OAQPS, to Douglas Skie, Director Air Programs Branch (Nov. 19, 1991) (on file with author) (reactivation of power plant did not trigger PSD because statements of intent by owners were supported by maintenance documentation and an ability to reactivate the plant easily).

[41] *See* Monroe Electric, *supra* note 37.

[42] *Id.* at 8.

in evaluating intent, Carol Browner, former EPA Administrator, listed the following factors in *Monroe Electric*:

> the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits, and ongoing maintenance and inspections that have been conducted during shutdown. No single factor is likely to be conclusive in the Agency's assessment of these factors, and the determination will often involve a judgment as to whether the owner's or operator's actions at the facility during the shutdown support or refute any express statements regarding the owner's or operator's intentions.[43]

B. The Shutdown of the Cenco Refinery

The Cenco facility is a crude oil refinery located in Santa Fe Springs in southeastern Los Angeles County.[44] Prior to Cenco's purchase of the refinery in August 1998, Powerine Oil Company ("Powerine") owned the facility.[45] Operations at the facility started on the site in approximately 1936, and the site ultimately came into the control and ownership of Powerine.[46] In June 1995, Powerine informed the South Coast Air Quality Management District ("SCAQMD") that it would be shutting down the refinery[47] and laying off the majority of its workforce in the first week of July 1995.[48] On July 3, 1995, Powerine terminated all refining operations and has not refined crude oil since that day.[49]

In September 1995, Castle Energy, the parent company of Powerine, entered a contract with Kenyen Projects Ltd. ("Kenyen") for the sale of the refinery equipment.[50] Kenyen publicly announced that, under the terms of the contract, the refinery would be dismantled and the equipment shipped to India.[51] One month later, Powerine wrote to SCAQMD to inform them that they were "in the process of shutting down the refinery for its ultimate dismantling."[52] In the same month, Powerine also applied to SCAQMD to obtain emission reduction credits resulting from

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43 *Id.* at 9.
44 Cenco Order at 3.
45 Cenco Order at 7.
46 Brief of Communities for a Better Environment, Communities for a Better Env't v. Cenco Ref. Co., at 3, *supra* note 34 [hereinafter CBE Brief]. *See also* Certain Underwriters at Lloyd's London v. Superior Court, 24 Cal.4th 945, 947 (2001).
47 Cenco Order at 3.
48 CBE Brief at 3.
49 Cenco Order at 3.
50 *Id.*
51 CBE Brief at 3.
52 *Id.*.

the permanent shutdown of the refinery equipment.[53] Additionally, Powerine repeatedly requested that SCAQMD defer its regulatory reporting requirements based on its suspension of operations.[54]

By December 1995, Powerine informed a number of state entities of the possibility that the refinery would resume crude oil processing.[55] The then Chief Financial Officer of Powerine stated that though Powerine had accepted the Kenyen deal, the Powerine management was concerned that the agreement would not be successful.[56] Powerine then engaged in negotiations with Energy Merchant Corporation who, in January 1996, purchased Powerine's stock, divesting Castle Energy of ownership. In February 1996, Powerine sent another letter to SCAQMD asking for the cancellation of the earlier request for Emissions Reduction Credits because the Energy Merchant Corporation intended to operate the refinery again.[57]

Despite the renewed interest in crude oil refining, at some point after the termination of operations in 1995, Powerine "demolished a 28,000 square foot main office building, a warehouse, truck fuel loading racks, tanks and associated equipment, and sold the property on which the equipment was located."[58] In 1997, Powerine notified SCAQMD that the fuel feed lines had been disconnected and a process feed line had been disconnected and flanged.[59] In August 1998, Cenco purchased the refinery from Powerine.[60] In a 1998 letter to the Securities and Exchange Commission, Cenco stated, "the refinery has had no operations since July 1995" and that "currently the refinery has a skeleton staff that oversees the maintenance of its assets, which consist of an oil refinery and related assets."[61] Additionally, the California Supreme Court found in 2001 that since 1995, the Cenco "facility has not been operated at all, and only a skeleton crew of employees has remained, primarily for environmental compliance and equipment purposes."[62]

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53 *Id.* The RECLAIM program of the South Coast Air Quality Management District intends to reduce air pollution by allowing industry the flexibility to take advantage of the market by purchasing and selling RECLAIM Trading Credits ("RTCs") as it increases or reduces its emissions. The purpose and efficiency of the RECLAIM market-based program is frustrated when a source fails to purchase a sufficient supply of reduction trading credits to offset emissions.

54 *Id.*

55 Cenco Order at 4.

56 *Id.*

57 *Id.* at 4-5.

58 *Id.*

59 *Id.*

60 *Id.* at 7.

61 *Id.* at 6.

62 Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal. 4th 945, 951 (2001), cited in Order Denying CBE's Motion for Summary Adjudication and

Powerine did consistently renew or timely reinstate its permits through the period of 1995-1998.[63] In letters to SCAQMD between 1996-1998, Powerine repeatedly expressed its intent to resume crude oil refining at the facility, even as it requested extensions of time for payment of fees required for permits.[64] Powerine consistently fulfilled its obligation to pay to SCAQMD the required annual permit fees between July 1995 and July 1998.[65] In December 1997, SCAQMD notified Powerine that the facility could allow its permits to expire without threat of permanent revocation as long as Powerine paid a 15% penalty within one year.[66] Powerine accepted SCAQMD's offer in January 1998, and the Powerine permits were allowed to expire under the condition that they could be reinstated with payment of the penalty.[67]

Just before the formal transfer of ownership to Cenco in August 1998, Powerine applied to SCAQMD to reinstate its permits.[68] Cenco proceeded to apply to SCAQMD for a change in ownership in October 1998.[69] On December 29, 1998, SCAQMD reinstated the Powerine permit to operate and at some time between October 1998 and January 1999, SCAQMD named Cenco as the holder of the refinery facility permit.[70]

After purchasing the facility, Cenco applied to SCAQMD, the City of Santa Fe Springs and the State Water Board for the permits necessary to operate the refinery.[71] The city provided permits conditioned on the implementation of health and safety modifications, and changes to enable the manufacture of gasoline in compliance with state regulations.[72] SCAQMD concluded that some of Powerine's permits could be reinstated consistent with both SCAQMD rules and the EPA Reactivation Policy.[73] However, SCAQMD required the application of NSR to equipment that had been altered or modified before it would reactivate permits for such equipment.[74] Similarly, SCAQMD refused to reinstate permits to construct for any activity not commenced by Powerine.[75] In its order, the Court surmised that SCAQMD used an emissions baseline

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Permanent Injunction and Granting CBE's Motion for Preliminary Injunction, CBE v. Cenco Ref. Co., *supra* note 33.

63 Cenco Order at 6.

64 *Id.*

65 *Id.*

66 *Id.* at 7.

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 9.

73 *Id.* at 10.

74 *Id.*

75 *Id.*

consistent with the facility's emissions recorded before the termination of operations in 1995 to determine whether the application of NSR was appropriate for the equipment in question.[76] SCAQMD applied NSR only to modifications that it found would increase emissions over the 1995 baseline.[77]

Subsequently, CBE filed suit, alleging that defendants Cenco and SCAQMD failed to comply with the CAA when NSR was not applied to the Cenco crude oil refinery.[78] CBE then moved for summary judgment and a permanent injunction, or in the alternative, a preliminary injunction, arguing, among other reasons[79] that Cenco and SCAQMD should have applied NSR to the facility under the EPA's Reactivation Policy because the refinery had been permanently shut down by Powerine and had been non-operational for over six years.[80] Finding that CBE had made a sufficient showing to demonstrate that the refinery's six-year shutdown, combined with its physical modifications, required NSR for the entire facility, the court granted a preliminary injunction.[81] The preliminary injunction "prohibit[ed] [Cenco and SCAQMD] from taking actions in furtherance of construction or operation of the facility and require[d] SCAQMD to rescind Cenco's permits pending trial."[82]

C. *The District Court's Application of the* Monroe Electric *Factors*

The district court analyzed the facts and circumstances of the Cenco refinery's shutdown under the guidance of the factors established in *Monroe Electric*.[83] By addressing each factor listed in *Monroe Electric*, the court created a clear and succinct test to determine the applicability of the Reactivation Policy to a shutdown facility.

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76 *Id.* at 11.

77 *Id.*

78 *Id.* at 1.

79 CBE asserted that Cenco and SCAQMD violated the California SIP by "failing to void the refinery's facility permit" when the permit was transferred to Cenco from Powerine, and when equipment was altered. If the permit had been properly voided, CBE argued that NSR would apply. CBE also asserted that Cenco and SCAQMD violated other SIP provisions, including the SCAQMD Rule 2005(c)(2) (a facility must hold sufficient RECLAIM credits to offset facility emissions through the first year of operation); Rule 201 (construction may not be commenced without compliance with NSR); Rule 210 (failing to submit materials required by NSR); Rule 212 (a 30-day public comment period is required for grants of permits).

80 Cenco Order at 1.

81 *Id.* at 2-3.

82 *Id.*

83 Cenco Order at 28-33.

1. Duration of Shutdown

First, the district court found that minimal operations and presence of a nominal staff was insufficient to overcome the presumption of permanent shutdown indicated by six years of suspended crude oil refining operations.[84] Though Cenco argued that there had been "various operations" occurring at the facility since 1995, the court pointed to the statements by Cenco that "any activity at the facility was that of a 'skeleton staff that oversees the maintenance of its assets.'"[85]

2. Reasons for Shutdown

Next, the court explained that Cenco's economic reasons for shutdown "do not militate in favor of finding" permanence *per se*.[86] While EPA did consider economic factors in *Monroe Electric* and the Noranda Lakeshores Memo, in neither case did the EPA state that reasons based on "market conditions" were absolute indicators of permanent closure; rather they were generally "incidental to the decisions" by the EPA.[87]

3. Intent of Owner

The order in *Monroe Electric*, as adopted by the district court, included the following comment about the relevant time period to consider when determining the owner's intent:

> While the policy suggests that the key determination is whether, *at the time of shutdown*, the owner or operator intended shutdown to be permanent, in practice, after two years, statements of original intent are not considered determinative. Instead, EPA assesses whether the owner or operator has demonstrated a continuous intent to reopen. To make this assessment, EPA looks at activities during time of shutdown that evidence the continuing validity of the original intent not to permanently shutdown.[88]

Therefore, owners and operators of a shutdown facility must provide documentation or other evidence demonstrating their continuous intent and "concrete plans" to restart the facility in the "reasonably foreseeable future" if they wish to take advantage of reactivating without a new source permit.[89] *Monroe Electric* further explains that once an owner or

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84 *Id.* at 28.

85 *Id.*

86 *Id.* at 29.

87 *Id.* at 28-29.

88 *See* Monroe Electric at 9, *supra* note 29 (emphasis in original).

89 *Id.*

operator is found to have no plans to reopen a facility, this intent cannot be superseded by later efforts to restart operations.[90]

The district court points to several letters from Powerine to SCAQMD to demonstrate that the refinery in question was at one point definitely intended to be permanently shutdown. Powerine not only informed SCAQMD of the suspension of all refining operations, but also stated that the facility would be shutting down beginning in July 1995. In fact, as the district court pointed out, the refinery had not refined crude oil since that date. Powerine also notified SCAQMD in October 1995 that the refinery was preparing for "ultimate dismantling" by its new parent company, and subsequently applied to SCAQMD for emission reduction credits and suspension of reporting requirements due to its termination of operations.

Although the court acknowledged that Powerine later notified state entities, including SCAQMD, of changes in sale of the refinery that could result in bringing the refinery back into operation, the court found that the period between July 1995 and December 1995 "negates any showing. . . that Powerine *continuously* planned to restart the facility."[91] Furthermore, the court considered the statements made by Powerine that its management was not satisfied with the bargain struck with Kenyen insufficient evidence of intent to reopen and use the facility in the foreseeable future.[92]

4. Cost and Time Needed to Restart

In the Noranda Lakeshores Memo, the EPA found that reactivation of a roaster leach acid plant at the cost of "several hundred thousand dollars" and lasting "approximately four months" was a sufficient expenditure of time and capital to evidence the permanence of the plant's shutdown.[93] In comparison, reactivation of the Cenco refinery was estimated by the parties to require between $28 million and $180 million and between six to eighteen months of work. The court found that despite the large disparity between the estimates, even the lowest numbers were significantly higher than those in other cases in which the EPA found facilities to be permanently shutdown.[94] Therefore, the court concluded that the cost to reactivate the Cenco refinery "slightly favors finding a permanent shutdown."[95]

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90 *Id.* at 10.

91 Cenco Order at 31 (emphasis in original).

92 *Id.*

93 EPA Noranda Lakeshores Memo at 2. The EPA also considered the significant amount of time that had passed since the suspension of operations, failure to maintain the permit, and removal of the plant from the emissions inventory.

94 Cenco Order at 32.

95 *Id.*

5. Status of Permits

In the EPA Cyprus Grande Letter, the facility in question had allowed its operating permit to expire.[96] The facility was then sold to another owner who purchased the site with knowledge that the facility neither no longer had an operating permit, nor was listed in the State's emissions inventory.[97]

Because Powerine allowed its facility permit to expire in 1998 with the express understanding that the permit could be reinstated within one year upon payment of a 15 percent penalty, and because Powerine did reinstate the permit within six months, the court determined that Powerine satisfactorily maintained its necessary permit.[98] Additionally, Powerine kept other permits up to date during the period of shutdown. As a result, the court found that this factor contributed nothing to a finding of permanent shutdown.[99] Although the court emphasized the maintenance of the Cenco refinery on the SCAQMD emissions inventory, it noted that Powerine did apply to SCAQMD for emission reduction credits for the suspension of operations in October 1995.[100] Nevertheless, the court concluded that SCAQMD's retention of the refinery on its emissions inventory "militates in favor of finding no permanent shutdown."[101]

6. Ongoing Maintenance at the Facility during Shutdown

Powerine continuously employed about 24 workers at the refinery to maintain the equipment at the site. The small crew working at the facility was engaged "primarily for environmental compliance and equipment maintenance purposes."[102] For this simple reason, the court concluded that this factor supports finding no permanent shutdown as maintenance did continue, though minimally, at the site.

IV. The Impact of the Cenco Order

By acknowledging and systematically applying the Reactivation Policy, the district court in the Cenco Order introduced a formal test into legal precedent. The district court addressed Cenco's challenge to the Policy by affirming CBE's contention that the Reactivation Policy is a reasonable interpretation of the Act's regulations and does not conflict with the terms of the NSR program.[103]

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96 EPA Cyprus Casa Grande Letter at 2.
97 *Id.* at 3.
98 Cenco Order at 33.
99 *Id.* at 32-33.
100 CBE Brief at 19.
101 Cenco Order at 32, note 14.
102 *Id.* at 6 (citing Certain Underwriters at Lloyd's of London, 24 Cal.4th at 951).
103 Cenco Order at 25-27.

The NSR regulations require the application of NSR to a facility that will experience a "significant increase in net emissions."[104] To determine the increase in emissions, the emissions baseline will be compared with the future potential emissions of the facility. The baseline calculation is therefore a very important factor in the NSR program. Under the NSR regulations, the baseline equals the past actual emissions as of the date preceding the change; according to the regulations, "in general, the actual emissions as of a particular date shall equal the average rate. . . at which the unit actually emitted the pollutant during the two-year period which precedes the [date of the change] and which is representative of normal source operation."[105]

The Reactivation Policy presumes the permanence of a facility shutdown after a period of two years; at that time, it is presumable under the regulations that the facility's baseline emissions would be zero. Any operation of a shutdown facility will result in an emissions increase; the increase will be "significant" under the Act if it reaches the requisite increment for the emitted pollutant, thereby establishing the facility as a new source under the NSR program.[106]

Accordingly, the district court in the Cenco Order determined that the application of the Reactivation Policy does not conflict with a regulatory provision exempting changes in the hours of operation or production rate because restarting the facility would constitute a "fundamental change in the facility's operational status"; moreover, the restart would involve physical modifications to the refinery that would "trigger a comparison of new emissions to the zero baseline."[107] Because the NSR regulations of the CAA are not in conflict with the Reactivation Policy, the court found that the Policy is a "permissible and reasonable standard to apply in interpreting the Clean Air Act."[108]

The district court declined to rule on the level of deference entitled to the Reactivation Policy, stating merely that a federal regulatory agency's reasonable interpretation of its own regulations cannot be ignored.[109] According to the United States Supreme Court, a "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[110] As dis-

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104 *See* 40 C.F.R. § 51.165(a)(1)(vi)(A)(1), § 51.166(b)(3)(i)(a).

105 40 C.F.R. § 51.165(a)(1)(xii)(B), § 51.166(b)(21)(ii).

106 *See* 40 C.F.R. § 51.165 for the regulated pollutants and emission levels sufficient to find significant increase under nonattainment NSR. *See also* 40 C.F.R. 52.21 for the relevant increases under PSD.

107 Cenco Order at 26. *See also* 40 C.F.R. § 51.165.

108 Cenco Order at 27.

109 *Id.*

110 Chevron v. Natural Resources Defense Counsel, 467 U.S. 837, 843-44 (1984). After the decision in *Christensen v. Harris County*, 529 U.S. 576, 577 (2000), a court is not required to give total deference to an agency decision that has not completed

cussed above, in *Monroe Electric*, the former Administrator of the EPA discussed the restart of a polluting facility as a new source and as a major modification to the facility under the NSR program.[111] When the administrator of an agency interprets a regulation, the agency's interpretation is accorded great deference.[112]

Finally, it is important to note that the reactivation of a facility long out of operation may also trigger the application of NSR or PSD review as a "major modification" to the facility. While the permanence of a facility's suspension of operations does not need to be shown, the restart must meet the definition of major modification under the CAA regulations. As discussed above, major modification is "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act."[113] The CAA only defines exceptions to the term "physical change"; routine maintenance, repair and replacement are not "physical changes" under the Act.[114] While the courts have generally interpreted "physical changes" broadly, the exceptions to the rule ultimately guide most of the decisions as to whether a facility's restart will mandate the application of the NSR program.[115].

V. Conclusion

The district court's recognition and application of the EPA's Reactivation Policy in *CBE v. Cenco* is a valuable addition to the sources available to aid interpretation of the Clean Air Act's NSR program. In light of the main goals of the Act, particularly installation of pollution control equipment at the time of construction of or major modification to a polluting source, the implementation of such measures may also be appropriate when a source is preparing to restart after years of suspended operation. Not only do nonattainment NSR and PSD review subject a source to control technology, they also require offsets from elsewhere in the facility or acquisition of offsets from other sources in the district. If the factors in *Monroe Electric*, as formally applied in the Cenco Order, are satisfied predominately by consideration of the facts and circum-

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formal rulemaking. Instead, a court may interpret such policies or guidelines with "respect" to the extent that those interpretations have the power to persuade. Although the Reactivation Policy has not been formally promulgated as a rule, it has been consistently applied for over 20 years and its application substantially incorporates CAA regulations.

111 Monroe Electric, *supra* note 29 at 10-11.

112 *Chevron*, 467 U.S. at 843-44.

113 40 C.F.R. § 51.166(b)(2)(i).

114 40 C.F.R. § 51.166(b)(2)(iii)(a).

115 *See* Wisconsin Electric Power Co., 893 F.2d at 908 ("'any physical change' means precisely that").

stances surrounding the shutdown, a facility will be subject to NSR as a "new source." The Reactivation Policy shifts the burden of establishing the applicability of NSR from the party requesting review to the allegedly offending facility, which must show that it never intended to permanently shut down its operations. This shift is consistent with the aim of the CAA, and limits the availability of exceptions to the NSR program on which facilities had customarily relied.

Moreover, practical considerations support the reasonableness of this shift. If a community has been free of one source of polluting emissions for a period of time, there may be very strong reactions to the reactivation of that source. In such a situation, a source should be expected to update its pollution control measures to the apex of current technology to ameliorate the effects on the surrounding areas. While facilities may argue that such measures are cost prohibitive or are impediments to smooth functioning during normal operations, it is certainly foreseeable that these measures would be required at a site that has been dormant for a period of more than two years. Thus, the Cenco Order solidifies an EPA policy intended to look closely at emissions caused by reactivation of shutdown facilities and takes a step closer to the clean air Congress envisioned.

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