



1000 Vermont Avenue, NW
Suite 1100
Washington, DC 20005
Main: 202-296-8800
Fax: 202-296-8822
www.environmentalintegrity.org

August 12, 2015

Via e-mail and first class mail

Benjamin H. Grumbles
Secretary of the Environment
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, Maryland 21230
ben.grumbles@maryland.gov

RE: Energy Answers Baltimore, LLC Permit Expiration (PSC. Case No. 9199)

Dear Secretary Grumbles:

The nineteen undersigned environmental, health, faith, and social justice groups write to respectfully request that the Maryland Department of the Environment (“MDE”) enforce the terms of the Certificate of Public Convenience and Necessity (“CPCN”) held by Energy Answers Baltimore, LLC (“Energy Answers”) and find that the air quality provisions of Energy Answers’ CPCN have expired due to the company’s ongoing failure to construct the 4,000 ton-per-day trash combustion plant that it proposes to build in Baltimore City.

Condition A-6 of the CPCN states that the air quality provisions of the CPCN expire if, as determined by MDE, any one of the following occurs: (1) “[c]onstruction is substantially discontinued for a period of 18 months or more after it has commenced;” (2) “[c]onstruction is not commenced within 36 months after the August 6, 2010 effective date of the CPCN . . . ;” or (3) “[c]onstruction is not completed within a reasonable period of time after the issuance of a final CPCN.” As documented by MDE, Energy Answers has substantially discontinued construction for a period of well over 18 months. Therefore, the air quality conditions of the CPCN have expired, and Energy Answers must apply for a new CPCN in order to construct the plant. In addition, the prolonged lapse in construction means that Energy Answers has failed to commence construction of the project, as that term is defined by law, and the CPCN has expired on this basis as well.

Background

On August 22, 2013, nine environmental and public health groups sent a letter to MDE requesting that the agency conduct an investigation and issue a written determination regarding whether Energy Answers met its August 6, 2013 deadline to commence construction of its trash burning plant.¹ Though we were initially informed by phone that MDE would respond to our

¹ Letter from environmental and public health groups to MD Department of the Environment (Aug. 22, 2013) (Attachment A).

letter, MDE never did so. In fact, MDE was completely silent on this matter until December 18, 2013, when it issued the statement below in an email to a reporter with the Baltimore Brew.

The short answer is that we have not found the company to be in violation of the requirement to have started construction by the required time. . . .

MDE is responsible for determining whether a facility such as this is in compliance with the federal Clean Air Act. The Clean Air Act requires a facility to begin construction within 18 months of the issuance of a permit and any extensions. The Clean Air Act also requires construction to continue at a reasonable pace and be completed within a reasonable time frame. Based on our observations of activity at the site, we have not found the facility to be out of compliance for any of those requirements. We will continue to monitor the progress of the work at the site to determine compliance with those requirements.²

Since that time, MDE has documented in site inspection reports that Energy Answers discontinued construction at the site on November 1, 2013 and, as of June 3, 2015, construction had not resumed. Furthermore, based on recent observations of the site, it appears that no additional construction has been performed as of the date of this letter.

I. Energy Answers' Permit Has Expired Because the Company Substantially Discontinued Construction for a Period of Over 18 Months

Under Energy Answers' CPCN and the federal Clean Air Act, a permit for the construction of a major source of air pollution, like the Energy Answers plant, expires if construction is substantially discontinued for a period of 18 months or more after it has commenced.³ As of June 3, 2015, the date of MDE's most recent site inspection, Energy Answers had substantially discontinued construction for over 19 months, and no additional construction appears to have been performed since then. Therefore, the air quality provisions of the CPCN, which represent Energy Answers' Clean Air Act approval to construct the incinerator, have expired.

A. Construction Has Been Substantially Discontinued for 19 Months and Counting

MDE has documented the lack of construction at the site in three site inspection reports, dated November 1, 2013, February 28, 2014, and June 3, 2015. Those reports are attached hereto as Attachment B. The November 1, 2013 report states that, as of that date, 32 pilings for the plant's smokestack had been installed on site and that "the stack piling project was completed on October 31, 2013 with the re-driving of 9 pilings."⁴ The February 28, 2014 report states that "[d]uring [that] site inspection, it was confirmed that Energy Answers has not performed any

² MDE (Jay Apperson) statement to Baltimore Brew Dec. 18 re. Energy Answers' Fairfield Renewable Energy Power Plant, Baltimore Brew, at <https://www.baltimorebrew.com/mde-jay-apperson-statement-to-baltimore-brew-dec-18-re-energy-answers-fairfield-renewable-energy-power-plant/> (last visited Aug. 5 2015) (emphasis added.)

³ Energy Answers CPCN Condition A-6; COMAR 26.11.02.04(B)(2); 40 C.F.R. § 52.21(r)(2). The federal regulations do not require that the discontinuation of construction be "substantial."

⁴ Nov. 1, 2013 site inspection report, 1 (Attachment B).

additional work since MDE's last inspection of November 1, 2013."⁵ The June 3, 2015 report states that "[d]uring the June 3, 2015 Energy Answers site inspection, it was observed that the company has not performed any additional construction work on-site since MDE's last inspection of February 28, 2014."

Thus, Energy Answers substantially discontinued construction on November 1, 2013. As of May 1, 2015, construction had been substantially discontinued for 18 months, resulting in the expiration of the air quality provisions of Energy Answers' CPCN. As of MDE's June 3, 2015 site inspection, Energy Answers had substantially discontinued construction for approximately 19 months. A lapse of the same duration led the Seventh Circuit Court of Appeals to uphold the invalidation of a coal plant permit in Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d, 918, 931 (7th Cir. 2008). In that case, the Court noted that "[t]his 19-month lapse in construction activity killed the Company's . . . permit."⁶ Finally, the photographs attached hereto as Attachment C, taken on August 3, 2015, appear to show that no additional construction had been performed on the site as of that date, extending the lapse to 21 months.⁷

B. The March 4, 2014 Removal of The Pile-Driving Crane from the Site Cannot be Considered Construction Activity

Energy Answers is apparently claiming that it finished "Phase I" of the construction on March 4, 2014, the date on which it removed from the site the crane used to drive the pilings.⁸ However, such an activity cannot be considered construction under the EPA's interpretation of Clean Air Act construction requirements. In a memorandum discussing the "commence construction" requirement, EPA stated:

We have interpreted physical on-site construction to refer to placement, assembly, or installation of materials, equipment or facilities which will make up part of the ultimate structure of the source. In order to qualify, these activities must take place on-site or be site specific. Placement of footings, pilings and other materials needed to support the ultimate structures clearly constitutes on-site construction. . . . [I]t will not suffice merely to have begun erection of auxiliary buildings or construction sheds unless there is clear evidence (through contracts or otherwise) that construction of the entire facility will definitely go forward in a continuous manner.⁹

⁵ Feb. 28, 2014 site inspection report, 2 (Attachment B).

⁶ Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d at 931.

⁷ These facts are also fully supported by the quarterly construction reports that Energy Answers has been filing with MDE pursuant to MDE's March 2014 order requiring it to do so. Due to their length, Energy Answers' quarterly construction reports are not attached. However, the Environmental Integrity Project (EIP) has obtained these reports and is willing to provide them upon request.

⁸ Energy Answers' most recent quarterly construction report states: "Initial Construction Phase 1 of the Work was completed in March 2014 with the demobilization and transport of the piling rig."

⁹ Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to David Kee, Chief Air Enforcement Branch Region V, "Commence Construction" under PSD, 2 (July 1, 1978) ("Reich Memorandum") available at <http://www.epa.gov/region7/air/nsr/nsrmemos/commence.pdf>; see Sierra Club, 546 F.3d at 930 (citing to the Reich memorandum in decision holding that permittee had failed to commence construction).

While this memorandum focuses on the “commence construction” requirement, it is instructive on the important distinction between ancillary activities, such as placement of support materials or (even less significant) removal of equipment from the site, and the assembly of the actual permitted structure.

In addition, records obtained from MDE belie Energy Answers’ claim. In attachments to an August 6, 2013 letter to MDE, Energy Answers stated that “Phase 1 of the Initial Construction work consist [sic] of driving thirty-two piles to support the imposed loads from the Stack and its foundation” and projects that the “field work duration” will be 8 weeks.¹⁰ Nowhere in this document does Energy Answers identify the removal of the crane as a separate construction activity or mention it in any way. MDE’s staff also appear to have already rejected this argument. A chronology produced on June 11, 2014 by Stephen Laing in the Air Quality Compliance Program identifies October 31, 2013 as the date on which Phase I construction ended¹¹ and MDE’s November 1, 2013 site inspection report also identifies October 31, 2013 as the date on which the pile-driving phase of construction was completed.¹² A set of meeting notes for a July 1, 2014 meeting between MDE and Energy Answers shows a question mark next to the words “March 2014 pile driving rig,” indicating appropriate skepticism of the inventive yet incorrect claim that this action constitutes construction.

Thus, the removal of the crane cannot be considered construction activity. Construction was discontinued starting November 1, 2013.

C. Energy Answers May Not Claim That Requirements Regarding Continuation of Construction Were “Tolled” During the Period when Energy Answers was Violating A Separate CPCN Condition

Additionally, Energy Answers may not claim that the construction requirements were “tolled” or inapplicable during the approximately 7.5 months in which it was subject to a stop-work order from MDE because the company was violating a separate condition of its CPCN. Maryland does not recognize a defense or exception to the duty to comply with air quality laws in situations over which the violator has control.¹³ As discussed below, Energy Answers was in control of the duration of the stop work order and could have taken action to lift the order much earlier. Moreover, even if this were entirely beyond Energy Answers’ control, the proper course of action would have been to seek for the company to seek an extension of the time periods under 40 C.F.R. § 52.21(r)(2).

¹⁰ Energy Answers’ August 6, 2013 letter and enclosures are attached hereto as Attachment D.

¹¹ The June 11, 2014 chronology is attached hereto as Attachment E.

¹² Nov. 1, 2013 site inspection report, 2 (Attachment B).

¹³ See Md. Code Ann., Envir. § 2-613 (“A condition that is caused by an act of God, a strike, a riot, a catastrophe, or a cause over which an alleged violator has no control is not a violation of this title or any standard set or rule or regulation adopted under this title.”) (emphasis added.) See also County Comm’rs of Charles County v. Sec’ of Health and Mental Hygiene, 302 Md. 566, 568 (1985)(finding that a lapse in construction caused a county-issued building permit to expire, even though the permittee discontinued construction pursuant to a state agency order that the permit was void and the county and permittee timely filed administrative appeals of state decision).

On June 19, 2014, MDE sent Energy Answers an Opportunity to Resolve Claim for Civil Penalty (“Notice of Violation”) informing Energy Answers that it was violating Maryland’s air quality laws by failing to maintain its legal right to certain required emission offsets. In the Notice of Violation, MDE also ordered Energy Answers to discontinue construction until it could demonstrate that it had “replaced” the offsets that it failed to maintain. MDE lifted the stop-work order by letter dated February 3, 2015.

MDE did not lift the order until February 3, 2015 because Energy Answers did not “replace” the offsets until around that time. As shown in the letter and agreement attached hereto as Attachment F, Energy Answers responded to the Notice of Violation by letter dated July 31, 2014.¹⁴ In that letter, Energy Answers noted that it had arranged a “purchase contract” for credits for nitrogen oxides (NO_x) offsets generated by the shutdown of the Sparrows Point steel mill. The terms of the “Spot Agreement” with Sparrows Point, which is included in Attachment F hereto, provide that the documents necessary to transfer the credits would not be prepared and executed until “full payment [was made] of the entire Total Price” by Energy Answers. Payment of the “Total Price,” however, was to be made in installments under the agreement, with the last installment due on or before December 1, 2014. Documents attached at Attachment G show that Sparrows Point sent MDE a letter dated December 10, 2014 requesting the transfer of credits and Energy Answers sent a similar letter dated December 22, 2014. MDE sent letters dated December 23, 2014 confirming the transfer.

Since Energy Answers did not actually replace the NO_x offsets until the tail end of 2014, thereby addressing the violations described in MDE’s Notice of Violation,¹⁵ it cannot use its delay in complying with CPCN Condition A-2 (as generously interpreted by MDE) to evade the requirements of a separate set of Clean Air Act requirements (relating to pace of construction). It also does not appear that there is any external excuse for this lengthy delay, given that the Sparrows Point offsets were apparently approved by MDE and available for transfer by October 1, 2014¹⁶ and possibly earlier.

¹⁴ We note that Energy Answers had the right to challenge MDE’s order in court but chose not to. Md. Code Ann., Envir. § 2-607(a)(1) (“Any person aggrieved by a final decision of the Secretary or the designated hearing officer in connection with a show-cause order, a corrective order, or any other final order issued under this subtitle may take a direct judicial appeal.”) Additionally, in the July 31, 2014 letter, Energy Answers concedes fault, stating, “[a]s noted in your letter, Energy Answers did not execute the final call option [on the offsets] before May 12, 2014 as required under the contract.” Letter from Energy Answers to MD Dep’t of the Envir. (July 31, 2014) (Attachment F).

¹⁵ EIP, CCAN, Baltimore Harbor Waterkeeper, and United Workers have written previously to express strong disagreement with MDE’s interpretation of CPCN Condition A-2, relating to offsets, as set forth in MDE’s August 5, 2013 letter to Energy Answers. This is still the position of these groups. MDE’s interpretation, which allows Energy Answers to obtain pollution offset credits on a phased basis each time it “commences construction” of one of the four boilers at the facility, flatly contradicts the plain language of Condition A-2, which requires that all credits must be obtained and approved before the Clean Air Act approvals take effect and before construction can lawfully begin.

¹⁶ MDE maintains a chart of available emission reduction credits on its website at <http://www.mde.state.md.us/programs/permits/airmanagementpermits/erc/pages/index.aspx> (last visited Aug. 6, 2015). On October 20, 2014, EIP saved the chart available on that date, which showed credits available as of October 1, 2014. That chart, attached hereto as Attachment H, shows 2963 available NO_x credits from HRE Sparrows Point, LLC.

Additionally, even if the duration of the stop-work order were entirely beyond Energy Answers' control, the Clean Air Act provides a mechanism for addressing a permittee's inability to meet its requirements relating to commencing, continuing, and completing construction. Energy Answers could have availed itself of this remedy but chose not to. The EPA and state agencies "may extend the 18-month period upon a satisfactory showing that such an extension is justified."¹⁷ Energy Answers has already received such an extension once and could have attempted to present the stop-work order as a factor justifying a request for a second extension. However, the company has instead chosen to flout the requirements of its CPCN and the Clean Air Act relating to commencing and continuing construction. For example, after the order was lifted on February 3, 2015, Energy Answers did nothing whatsoever until mid-May 2015¹⁸ when it submitted an application for a permit to crush concrete on the site. Nothing more has been done since that time, according to all available records.¹⁹

Thus, Energy Answers' obligation to continue construction cannot be considered "tolled" because of its own failure to comply with the conditions of its CPCN. If MDE allows such an outcome, it will be setting a policy that rewards companies that violate the law.

D. Part I Conclusion

Energy Answers must be held accountable for its actions and must face the clear and unambiguous consequences of its failure to meet the construction requirements of its CPCN and the Clean Air Act: expiration of its approval to construct the facility. We urge MDE to issue a written determination that the air quality provisions of MDE's CPCN have expired.

II. Energy Answers' Permit Has Expired Because the Company Failed to Commence a Continuous Program of On-site Construction

The CPCN also includes a second basis for determining that Energy Answers' authorization to construct the incinerator has expired. CPCN Condition A-6(a) provides for expiration if construction is not commenced by August 6, 2013. In order to "commence" construction, as that term is defined in the federal Clean Air Act and Maryland's implementing laws, a company must either "beg[i]n, or cause[] to begin, a continuous program of actual on-site construction of the source to be completed within a reasonable time" or enter into substantial contractual obligations for "actual on-site construction of the source to be completed within a reasonable time."²⁰

Energy Answers has never claimed that it commenced construction by entering into contracts and, in its August 6, 2013 letter to MDE, the company claimed to have

¹⁷ 40 C.F.R. § 52.21(r)(2).

¹⁸ Submitting the crusher permit application also does not constitute construction.

¹⁹ It is entirely unclear why Energy Answers is not moving forward with other construction activities while the crusher permit application is pending. It seems very likely, based on MDE's June 3, 2015 inspection report and the most recent quarterly construction report, that Energy Answers will need more concrete than can be generated from the on-site concrete piles that it is planning to crush. If this is the case, it could start bringing in the additional concrete and using that to build the foundation while it awaits the crusher permit, but it has not done so.

²⁰ COMAR 26.11.17.01(7); COMAR 26.11.06.14(B)(1) (incorporating by reference 40 C.F.R. § 52.21, which defines "commence"); 42 U.S.C. § 7479(2)(A).

commenced construction by initiating on-site activities.²¹ Additionally, even if Energy Answers were now to claim that it commenced construction by assuming contractual obligations, in order to qualify, those obligations must be so significant that canceling or modifying them would result in “substantial loss” to the permittee²² and the contracts would have to be for “actual on-site construction of the source to be completed within a reasonable time.” Given the extremely limited history of construction on the site, it seems almost certain that Energy Answers has not entered into contracts that meet these criteria. If it claims that it has, the company should be required to produce the contracts immediately.

In the absence of sufficient contracts, Energy Answers must demonstrate that, on August 6, 2013, it began or caused to begin a “continuous program of actual on-site construction of the source to be completed within a reasonable time.” Energy Answers cannot meet this test. At best, it constructed for a period of approximately 2.5 months²³ and then abandoned the site for a period of at least 19 months. This does not constitute a “continuous program of actual on-site construction of the source.” Therefore, Energy Answers has not commenced construction of the project, as that term is defined by law, and its permit has expired on that basis as well.

III. Conclusion

Energy Answers received its CPCN on August 6, 2010 and has already received one extension of the commence construction deadline in that permit. After the extension, its new deadline to commence construction was August 6, 2013. As demonstrated by the August 3, 2015 site photographs in Attachment C, two years after that deadline, almost nothing at the site has changed. The site could be used for a number of different kinds of beneficial development including the generation of solar energy, an idea that is supported by members of the nearby community. Instead, the land is being allowed to sit unused with no end in sight to the lapse in construction.

In its December 2013 statement to the Baltimore Brew, MDE acknowledged that construction must continue at a reasonable place and be completed within a reasonable time. MDE further committed to “monitor[ing] the progress of the work at the site to determine compliance with those requirements.” We are asking MDE to follow through on this commitment. Specifically, we urge MDE to take swift action by issuing a written determination that (1) the air quality provisions of Energy Answers’ CPCN have expired because of the company’s failure to meet the construction milestones set forth in CPCN Condition A-6; and (2)

²¹ Attachment D.

²² EPA’s policy is that a loss is substantial if it represents 10% or more of the total project cost. Below 10%, a case-by-case analysis should be performed. Reich Memorandum at 2. In general, courts have found losses under 10% of the total project cost to be insubstantial. See Sierra Club, 546 F.3d at 933-934 (\$72 million termination fee was not substantial because less than 10% of project cost); Montana Power Co. v. EPA, 608 F.2d 334, 337 (9th Cir. 1979) (loss of 2.3% of total project cost was insubstantial).

²³ EIP also disputes that the required construction activities began on August 6, 2013 and contends that construction commenced on August 19, 2013, the date given in Energy Answers’ first construction report (dated March 31, 2014) as the day on which the first piling was driven.

Energy Answers must apply for and receive new approvals under the Clean Air Act's New Source Review program in order to lawfully build the incinerator.

The undersigned groups appreciate the opportunity to make our position known to MDE. There are also other groups and individuals that support our request. A short video showing messages from members of the school, faith, and small business communities in the Curtis Bay neighborhood in South Baltimore is provided at the following link: <https://vimeo.com/135869330>. To ensure that all voices are heard, we will be submitting additional video statements and written comments, as we collect them, from individuals calling on MDE to enforce the law.

Thank you for your time and consideration.

Sincerely,

Leah Kelly
Attorney
Environmental Integrity Project
1000 Vermont Ave. NW, Suite 1100
Washington, DC 20005
Phone: 202-263-4448
lkelly@environmentalintegrity.org

Wendy E. Shaia
Executive Director
Social Work Community Outreach Service
University of Maryland
School of Social Work
525 W. Redwood Street
Baltimore, Maryland 21201

Gregory Sawtell
Leadership Organizer
United Workers and Free Your Voice
2640 St. Paul Street
Baltimore, Maryland 21218

Michael Dorsey
Director of Community Outreach
Docs in the Park Co-Founder
Chesapeake Center for Youth Development
301 East Patapsco Avenue
Baltimore Maryland 21225

Dante M. de Tablan
Executive Director
The Ben Franklin Center for Community
Schools
1201 Cambria Street, Room 104
Baltimore, Maryland 21225

Trisha Sheehan
Regional Field Manager
Moms Clean Air Force, Maryland
1875 Connecticut Avenue, NW Suite 600
Washington, DC 20009

David Flores
Baltimore Harbor Waterkeeper
Blue Water Baltimore
3545 Belair Rd.
Baltimore, Maryland 21213

Rebecca Ruggles
Director
Maryland Environmental Health Network
2 East Read Street, 2nd Floor
Baltimore, Maryland 21202

Tim Whitehouse
Executive Director
Chesapeake Physicians for Social
Responsibility
325 East 25th Street
Baltimore, Maryland 21218

Josh Tulkin
State Director
Maryland Sierra Club
7338 Baltimore Avenue #102
College Park, Maryland 20740

Anne Havemann
Senior General Counsel
Chesapeake Climate Action Network
6930 Carroll Ave., Suite 720
Takoma Park, Maryland 20912

Joelle Novey
Director
Interfaith Power & Light (DC.MD.NoVA)
100 Allison Street NW
Washington, DC 20011

Fr. Ty Hullinger
Chair
Interfaith Worker Justice, Maryland
Church of the Most Precious Blood
5010 Bowleys Ln.
Baltimore, MD 21206

Molly Amster
Baltimore Director
Jews United for Justice
5601 Newbury Street
Baltimore, MD 21209

Chris Lafferty
Northeast Housing Initiative
St. Anthony's Church
4414 Frankford Ave.
Baltimore, MD 21206

Elisabeth Hoffman
Howard County Climate Change
Columbia, MD 21045
<http://www.hococlimatechange.org/>

Mike Ewall, Esq.
Founder & Director
Energy Justice Network
1434 Elbridge Street
Philadelphia, PA 19149

Monica Wilson
U.S. and Canada Program Director
Global Alliance for Incinerator Alternatives
1958 University Avenue
Berkeley, CA 94704

Greg Smith and Suchitra Balachandran
Co-Directors
Community Research

CC: Via e-mail and first class mail

George (Tad) Aburn
Director
Air & Radiation Management Administration
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, Maryland 21230
george.aburn@maryland.gov

Horacio Tablada
Deputy Secretary for Regulatory Programs & Policy

Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, Maryland 21230
horacio.tablada@maryland.gov

Brian Frosh
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202
bfrosh@oag.state.md.us

Steven R. Johnson
Principal Counsel
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, Maryland 21230
Steven.johnson1@maryland.gov

Roberta R. James
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, Maryland 21230
roberta.james@maryland.gov