



MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore MD 21230

410-537-3000 • 1-800-633-6101 • www.mde.maryland.gov

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November 24, 2015

Patrick F. Mahoney, President
Energy Answers International
79 North Pearl Street, 4th Floor
Albany, NY 12207

Dear Mr. Mahoney:

It has been several months since we met in my office and I wanted to give you an update on where the Department of the Environment (MDE) stands with respect to the permitting of Energy Answers' Fairfield Renewable Energy Project. When we last spoke it was primarily an opportunity for you to brief me on the project and your plans moving forward. I recall that your aim was to secure financing by the end of this year so that construction beyond what has taken place to date can occur. It is this point, the degree of construction activity, that has become a significant issue at this time and is the reason for this update by MDE.

As has been mentioned on previous occasions, there are a few key federal requirements that apply to this project; namely, construction must commence within eighteen months of permit issuance, it must be continuous (not be discontinued for a period of eighteen months) and it must be completed within a reasonable time in order for the construction approval to remain valid. With the granting of an eighteen-month extension to the original August 6, 2010 approval and the construction of piles to support the facility's stack commencing on August 6, 2013, the requirement to commence construction within eighteen months (of the extension that was granted) was satisfied.

Whether the latter two requirements (continuous construction and completed within a reasonable time) have been satisfied is not so straightforward. According to our records, over six years have passed since the original approvals were issued for this project without any substantive construction beyond the pile driving mentioned earlier, which ceased on October 31, 2013. It is recognized that, because of the former use of the site, there are site constraints that affected the engineering for the foundation of the facility and associated utilities, which affected the timing for the design of the facility. The timing of the lifting of the Department's 2014 stop work order also had some effect on the timing of your project. Finally, the Department recognizes that you have recently secured a permit to crush concrete existing at the site and intend to use the crushed material around the property to elevate utility lines serving the facility and that the crushing work is scheduled to begin in December 2015.

The design effort and the foundation activity, although positive in their occurrence, are not considered adequate to satisfy the requirements of continuous construction and completing construction in a reasonable time. "Construction" has a specific meaning under federal Clean Air Act rules governing this project, and a review of available case law and federal guidance finds that the type of activity that has taken place to date



would not meet the definition of construction. Various courts have ruled that, in order to fit within the federal definition, construction needs to be something of a permanent nature and to a degree that it pushes forward the project to a point that creates an irrevocable commitment to finish the facility. Maryland regulations generally follow the federal definition.

The status of valid construction activity is noteworthy at this time because it bears upon the requirement to not discontinue construction for eighteen months. We have no documentation that construction activity, in the federal Clean Air Act sense, has occurred since October 31, 2013, which would mean the eighteen-month continuous construction period expired over six months ago. If we were to allow additional time for the nearly six-month delay in the project attributable to the Department's lifting its stop work order, by every account the last possible date by which a delay in any construction activity can be supported is November 3, 2015. The specific language in the CPCN that expresses the construction timing issue is Condition A-6, which states:


In accordance with COMAR 26.11.02.04B, the air quality provisions expire if, as determined by MDE-ARMA:

- a) Construction is not commenced within 36 months after the August 6, 2010 effective date of the CPCN issued in Case 9199;*
- b) Construction is substantially discontinued for a period of 18 months or more after it has commenced; or*
- c) Construction is not completed within a reasonable period of time after the issuance of a final CPCN.*

Before the Department takes any official action on this matter, it is important that the Department's records are up to date. As such, you are asked at this time to provide all documents, dated prior to November 3, 2015, showing that Energy Answers has (1) begun or caused to begin a continuous program of actual on site construction of the Fairfield facility or (2) entered into a binding agreement that cannot be cancelled without substantial loss to Energy Answers. Please provide the requested documents no later than December 7, 2015.

The Department will provide a further update after the information you submit is reviewed. In the meantime, should you have any questions, please call Angelo Bianca, Deputy Director of the Air and Radiation Management Administration at 410-537-3893 or via email at angelo.bianca@maryland.gov.

Sincerely,



Ben Grumbles
Secretary

cc: Todd Chason, Esquire
Roberta James, Assistant Attorney General
Angelo Bianca, ARMA Deputy Director

