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September 8, 2014

Via First Class Mail and E-mail

Robert M. Summers
Secretary
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, MD 21230
bsummers@mde.state.md.us

RE: Energy Answers Clean Air Act Approvals and Permit;
PSC Case No. 9199

Dear Secretary Summers:

The Environmental Integrity Project (“EIP”) and United Workers are writing 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”) for the construction of a waste-burning incinerator in Baltimore City. Specifically, we request that MDE (1) determine that Energy Answers lacks the required Clean Air Act approvals and permit to construct the incinerator because it has failed to obtain the emissions offsets required under Condition A-2 of its CPCN, and (2) order that construction of the incinerator be discontinued until Energy Answers has applied for and obtained the required approvals.¹

Energy Answers’ Clean Air Act Approvals and Permit Are Invalid

The Clean Air Act establishes certain requirements for new major sources of air pollution located in areas that do not meet federal air quality standards (called “nonattainment areas”). One requirement is that these sources must offset new emissions for pollutants that are contributing to the area’s nonattainment status. Baltimore is classified as a nonattainment area for two pollutants: ozone and fine particulate matter (PM_{2.5}).² Because of this, new major sources in Baltimore, like the Energy Answers incinerator, must offset their emissions of PM_{2.5}, sulfur dioxide (a precursor for PM_{2.5}), volatile organic compounds (a precursor for ozone), and nitrogen oxides (a precursor for ozone and PM_{2.5}).

¹ This is the second letter that EIP has sent to MDE and the Maryland Attorney General’s Office about this issue. Our first letter was dated July 24, 2014 and requested a meeting to discuss our concerns. Our understanding is that MDE has declined to meet with us.

² Ozone and PM_{2.5} can each aggravate existing respiratory diseases like asthma, and PM_{2.5} has been associated with premature mortality from heart and respiratory disease and lung cancer.

Condition A-2 of Energy Answers' CPCN states:

The CPCN serves as the Prevention of Significant Deterioration (PSD) approval, Nonattainment New Source Review (NA-NSR) approval, and air quality construction permit for the Fairfield Renewable Energy Project and does not constitute the permit to construct or approvals until such time as [Energy Answers] has provided documentation demonstrating that nitrogen oxides (NOx) emission offsets totaling at least 781 tons, volatile organic compound (VOC) emission offsets totaling at least 125 tons, particulate matter less than 2.5 micrograms (PM2.5) emission offsets totaling at least 156 tons, and [sulfur dioxide] SO₂ (as a PM2.5 precursor) emission offsets totaling at least 446 tons have been obtained and approved by the MDE [Air and Radiation Management Administration] and are federally enforceable.

(Emphasis added.) Page 2 of Energy Answers' CPCN, setting forth Condition A-2, is attached hereto as Exhibit 1.

The plain language of Condition A-2 clearly makes the approvals and permit listed - Prevention of Significant Deterioration approval, Nonattainment New Source Review approval, and air quality construction permit (hereafter referred to as the "Clean Air Act Approvals") - contingent on Energy Answers satisfying certain conditions relating to emissions offsets. Specifically, Energy Answers must obtain a certain number of offsets for each kind of pollutant (e.g. 781 tons of nitrogen oxides and 125 tons of volatile organic compounds) and those offsets must be federally enforceable and approved by MDE. If these conditions are not met, then the Clean Air Act Approvals do not take effect.

To our knowledge, Energy Answers has never obtained all of the offsets required under Condition A-2. According to records that we have received from MDE, at most Energy Answers has obtained emissions offsets in the following amounts: 196 tons of nitrogen oxides, 34.7 tons of volatile organic compounds, 325 tons of sulfur dioxides, and 113 tons of PM_{2.5}. In other words, to our knowledge, Energy Answers has acquired, at most, approximately ¼ of the total required offsets for nitrogen oxides and volatile organic compounds, the two precursor pollutants for ozone.³ These numbers are based on a summary in an August 5, 2013 letter from Energy

³ MDE is allowing Energy Answers to obtain ¼ of the offsets for each pollutant before commencing construction of each of the four boilers (emission units) at the facility. See MDE's August 5, 2013 letter, attached hereto as Exhibit 3, in response to the letter of the same date from Energy Answers. This is not a permissible interpretation of law because it contradicts the unambiguous language of Condition A-2. Additionally, Maryland laws and federal laws do not allow a source to obtain offsets and ensure the federal enforceability of those offsets on an emissions-unit-by-emissions-unit basis. MDE must deny a permit or approval for construction of a major stationary source unless "the emission offsets for the major source . . . shall be federally enforceable before construction is commenced." COMAR 26.11.17.03(B)(5). The federal Clean Air Act states that "any emission reductions required as a precondition of a permit . . . shall be federally enforceable before such permit may be issued." 42 U.S.C. § 7503(a).

Answers to MDE, which is attached hereto as Exhibit 2. As of early August 2014, records from MDE showed that no additional offsets had been obtained.

Because Energy Answers has never obtained the total number of offsets required under Condition A-2 of its CPCN, the Clean Air Act Approvals have never taken effect and are invalid. Moreover, the Clean Air Act Approvals are required in order for Energy Answers to commence construction of the incinerator,⁴ and the deadline for Energy Answers to commence construction was August 6, 2013.⁵ Therefore, the deadline has passed for the Clean Air Approvals to be made effective, and Energy Answers must seek new Clean Air Approvals in order to construct the incinerator.

Additionally, MDE's recent notice of violation to Energy Answers, dated June 19, 2014, does not address this deficiency. In that letter, MDE notified Energy Answers that the company was violating the law because it had failed to maintain its option to buy approximately 80 tons of previously-obtained offsets. However, this does not address the larger violation: that Energy Answers has never, to our knowledge, obtained required offsets in the amounts of 585 tons of nitrogen oxides, 90.3 tons of volatile organic compounds, 43 tons of PM_{2.5}, and 121 tons of sulfur dioxide. The June 19, 2014 notice of violation is attached hereto as Exhibit 4.

Energy Answers has failed to obtain the emission offsets required under Condition A-2 of its CPCN. For this reason, we respectfully request that MDE immediately determine that Energy Answers lacks the required Clean Air Act Approvals to construct the incinerator and order that all construction be discontinued until Energy Answers has applied for, and obtained, those approvals.

Sincerely,



Leah Kelly
Attorney
Environmental Integrity Project
1000 Vermont Ave., NW, Suite 1100
Washington, D.C. 20005
*On behalf of the Environmental Integrity Project
and United Workers*

Cc: Via First Class Mail and E-mail

George (Tad) Aburn
Director
Air & Radiation Management Administration

⁴ 42 U.S.C. §§ 7475(a), 7502(c)(5), 7503(a); COMAR 26.11.02.09.

⁵ CPCN Condition A-6(a).

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george.aburn@maryland.gov

Roberta R. James
Assistant Attorney General
Office of the Attorney General
Maryland Department of the Environment
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roberta.james@maryland.gov

Exhibit 1

Excerpt from Energy Answers' Certificate of Public Convenience and
Necessity (CPCN), including Condition A-2

- d) Having access to or copying any records required to be kept by EA pursuant to this CPCN or applicable regulations;
 - e) Obtaining any photographic documentation and evidence; and
 - f) Determining compliance with the conditions and regulations specified in the CPCN.
- G-5. Informational copies of the reports and notifications as described in Conditions A-2, A-8, A-13, A-15, A-20b, A-21 b-d, A-41, A-44, A-46, A-53, A-56, A-57, A-58, A-61, F-4, and E-7 shall be sent to the Maryland Power Plant Research Program (PPRP) at:

Power Plant Assessment Division
Department of Natural Resources
Tawes State Office Building, B-3
580 Taylor Avenue
Annapolis, Maryland 21401

AIR QUALITY REQUIREMENTS

General Air Quality Requirements

- A-1. MDE Air and Radiation Management Administration (MDE-ARMA) shall have concurrent jurisdiction with the PSC to enforce the air quality conditions of this CPCN.
- A-2. The CPCN serves as the Prevention of Significant Deterioration (PSD) approval, Nonattainment New Source Review (NA-NSR) approval, and air quality construction permit for the Fairfield Renewable Energy Project and does not constitute the permit to construct or approvals until such time as EA has provided documentation demonstrating that nitrogen oxides (NO_x) emission offsets totaling at least 781 tons, volatile organic compound (VOC) emission offsets totaling at least 125 tons, particulate matter less than 2.5 micrograms (PM_{2.5}) emission offsets totaling at least 156 tons, and SO₂ (as a PM_{2.5} precursor) emission offsets totaling at least 446 tons have been obtained and approved by the MDE-ARMA and are federally enforceable. Should the PM_{2.5} Lowest Achievable Emissions Rate (LAER) limit be determined to be greater than the provisional LAER limit for PM_{2.5} in Condition 21(b) of 22 milligrams per dry standard cubic meter (mg/dscm) @ 7% O₂, EA shall be required to obtain additional PM_{2.5} offsets for the difference between the provisional and final LAER limit at a ratio of 1:1 within 180 days of the final PM_{2.5} limit having been imposed by MDE-ARMA.
- A-3. For air permitting purposes, the facility shall be comprised of the following equipment:
 - a) Four spreader-stoker boilers ("combustors") each designed to operate at 450 million British thermal units per hour (MMBtu/hr), and each designed to combust an average of 1,000 tons per day (tpd) of Waste-derived Fuel to generate electricity and steam. High pressure steam from the boilers will drive one, nominal, 157-megawatt (MW) turbine generator. Each boiler shall be equipped with three, 150-million Btu per hour (MMBtu/hr) natural burners. Each boiler

Exhibit 2

August 5, 2013 Letter from Energy Answers to MDE

Maryland Department of the Environment
Air and Radiation Management Administration
Ms. Karen Irons
1800 Washington Blvd.
Baltimore, Maryland 21230

August 5, 2013

Re: Energy Answers Baltimore, LLC – Fairfield Renewable Energy Project
Emissions Reduction Credits (“ERCs”)

Dear Ms. Irons:

Pursuant to Condition A-2 of the Final Recommended Licensing Conditions for Energy Answers Baltimore, LLC (“Energy Answers”), Energy Answers is required to provide documentation to the Maryland Department of the Environment Air and Radiation Management Administration (“MDE-ARMA”) demonstrating that emissions offsets have been obtained for the above-referenced facility. For the entire Fairfield Renewable Energy Facility (the “Facility”), consisting of four boilers nominally rated to generate 157-megawatts (“MWs”), the Certificate of Public Convenience and Necessity (“CPCN” or “Permit”) requires federally enforceable emissions offsets of at least 781 tons for nitrogen oxides (“NOx”), 125 tons for volatile organic compounds (“VOCs”), 156 tons of PM2.5 and 446 tons of SO2.

Pursuant to Maryland regulations, “Emission reduction credits shall be enforceable by the Department and the EPA and shall be obtained by the date the new emissions unit commences construction.” COMAR 26.11.17.04(C)(5). “Emissions unit” is in turn defined as “any part of a stationary source which emits, or would have the potential to emit, a regulated NSR pollutant.” COMAR 26.11.17.01B(11). As Energy Answers begins construction on the first of the four permitted units, attached please find documentation for at least 25% of its total emissions credits. See attached agreements. The following table summarizes these credits:

	Total Tons needed (Four Units)	Tons Per Unit (25%)	Credits Obtained	FMC	Sasol	Alcoa	Curry
NOx	784	196	196	105	62.75		28.25
SOx	446	111.5	325	325	0		
PM2.5	156	39	113	17	7	89	
VOC	125	31.25	34.7	16	10		8.7

Energy Answers Baltimore, LLC

MARYLAND 1701 East Patapsco Avenue • Baltimore • MD • 21226 • Phone: 443 602 3750 • Fax: 443 602 3780
NEW YORK 79 North Pearl Street • Albany • NY • 12207 • Phone: 518 434 1227 • Fax: 518 436 6343

Maryland Department of the Environment
August 5, 2013
Page 2

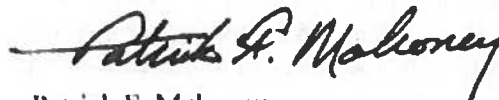
The credits obtained from the former FMC facility are a perfect match between creating and using facility because the Energy Answers Fairfield Renewable Energy Facility will be located on the former FMC property. The former Sunol facility was also located in Baltimore. The Alcoa facility is located in Frederick County, Maryland. Attached is a letter from ALL4 Inc. providing technical justification for using ERCs from another area, *i.e.*, demonstrating that emissions from Frederick County contribute to a violation of the National Ambient Air Quality Standard in Baltimore, Maryland where the Facility will be located. See attached.

At the time Energy Answers was permitted (August 6, 2010), EPA classified Baltimore, Philadelphia, Pennsylvania, Washington, D.C. (including western Maryland) as Moderate for attainment purposes. In July 2012, the designations for Philadelphia and D.C. were "upgraded" to Marginal, while Baltimore remained Moderate. Prior to the change in designation, Energy Answers had already obtained ERCs attached to a permit from Philadelphia for Curry Industries and applied those ERCs to its permit. Because these ERCs were acceptable at the time of purchase, prior to the designation change, those credits should be allowed to be used.

The foregoing information is true and correct to the best of my knowledge, information and belief.

If the Department has any questions, please do not hesitate to contact either Energy Answers or its counsel, Gordon Feinblatt LLC.

Sincerely,



Patrick F. Mahoney

President, Energy Answers Baltimore LLC

CC: Power Plant Assessment Division, MD DNR

Exhibit 3

August 5, 2013 Letter from MDE to Energy Answers



MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore MD 21230

410-537-3000 • 1-800-633-6101 • www.mde.state.md.us

Martin O'Malley
Governor

Robert M. Summers, Ph.D.
Secretary

Anthony G. Brown
Lieutenant Governor

August 5, 2013

Mr. Patrick F. Mahoney, President
Energy Answers Baltimore LLC
1701 East Patapsco Avenue
Baltimore, Maryland 21226

Dear Mr. Mahoney:

This is in response to your August 5, 2013 letter submitting documentation demonstrating that Energy Answers has fulfilled Condition A-2 in the licensing conditions contained in the Certificate of Public Convenience and Necessity (CPCN) issued by the Public Service Commission on January 10, 2013.

The mentioned CPCN issued to Energy Answers on January 10, 2013 contained the following requirement with regard to emission reduction credits (ERCs):

- A-2. The CPCN serves as the Prevention of Significant Deterioration (PSD) approval, Nonattainment New Source Review (NA-NSR) approval, and air quality construction permit for the Fairfield Renewable Energy Project and does not constitute the permit to construct or approvals until such time as EA has provided documentation demonstrating that nitrogen oxides (NOx) emission offsets totaling at least 781 tons, volatile organic (VOC) emission offsets totaling at least 125 tons, particulate matter less than 2.5 micrograms (PM2.5) emission offsets totaling at least 156 tons, and SO₂ (as a PM2.5 precursor) emission offsets totaling at least 446 tons have been obtained and approved by the MDE-ARMA and are federally determined to be greater than the provisional LAER limit for PM2.5 in Condition 21(b) of 22 milligrams per dry standard cubic meter (mg/dscm) @ 7 O₂, EA shall be required to obtain additional PM2.5 offsets for the difference between the provisional and final LAER limit at a ratio of 1:1 within 180 days of the final PM2.5 limit having been imposed by MDE-ARMA.

Code of Maryland Regulations (COMAR) 26.11.17.04C(5) states the following:

Emission reduction credits shall be enforceable by the Department and the EPA and shall be obtained by the due date the new emissions unit commences construction.

Your letter includes the following documentation:

- An August 5, 2013 purchase agreement for securing 10 tons of VOC, 62.75 tons of NOx and 7.0 tons of PM2.5 emission reduction credits from SASOL North America, a shutdown facility in Baltimore, Maryland

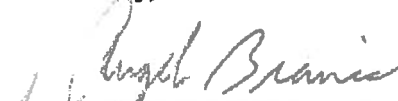


- A September 6, 2011 purchase agreement for securing 8.7 tons of VOC and 28.25 tons of NO_x emission reduction credits from Currie Industrial Services, LLC, a shutdown facility in Montgomery County, Pennsylvania
- An August 1, 2013 purchase agreement for securing 16 tons of VOC, 105 tons of NO_x, 17 tons of PM_{2.4} and 325 tons of SO₂ emission reduction credits from the FMC Corporation, a shutdown facility in Baltimore, Maryland
- An August 5, 2013 purchase agreement for securing 89 tons of PM_{2.5} emission reduction credits from the Eastalco Aluminum Company, a shutdown facility in Frederick County, Maryland
- An analysis of the use of PM_{2.5} emission reduction credits from the Frederick County area

Based upon a review of your letter and supporting documentation, CPCN condition A-2 and COMAR 26.11.17.04C(5), the Department has determined that Energy Answers has met the requirements of Condition A-2 with regard to the construction of the first combustion unit at the facility.

If you have any questions, please feel free to call me or Bill Paul at 410-537-3225.

Sincerely,


Karen Irons, Manager
Air Quality Permits Program

Cc: Todd Chason
Roberta James

Exhibit 4

June 19, 2014 Notice of Violation

1 5 6 1 8 7

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
CHIEF DEPUTY ATTORNEY GENERAL

JOHN B. HOWARD, JR.
DEPUTY ATTORNEY GENERAL

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MATTHEW ZIMMERMAN

ASSISTANT ATTORNEYS GENERAL

MATTHEW D. STANDEVEN
STAFF ATTORNEY

June 19, 2014

VIA CERTIFIED MAIL

Mr. Patrick F. Mahoney, P.E.
President
Energy Answers Baltimore, LLC
79 North Pearl Street
Albany, NY 12207

FILED
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JUN 20 2014
JUN 20 2014

PUBLIC SERVICE COMM
OF MARYLAND

Re: Opportunity to Resolve Claim for Civil Penalty - PSC Case No. 9199,
Order No. 83517 issued August 6, 2010 Granting a CPCN to Energy
Answers International, Inc. – Fairfield Renewal Energy Project

Dear Mr. Mahoney:

The Air & Radiation Management Administration (“ARMA”) of the Maryland Department of the Environment (the “Department”) has the responsibility to implement and enforce the ambient air quality control laws of the State, as codified in Title 2 of the Environment Article, Annotated Code of Maryland, and Title 26, Subtitle 11 of the Code of Maryland Administrative Regulations (COMAR). The Department has determined that Energy Answers Baltimore, LLC (“Energy Answers”) has violated Maryland’s air quality regulations.

Specifically, Energy Answers is charged with violating the following regulations:

- COMAR 26.11.02.05A, which prohibits a person from violating any term or condition of a permit, and
- COMAR 26.11.17.04C(5), which requires that emission reduction credits shall be enforceable by the Department and the EPA and shall be obtained before the date the new emissions unit commences construction.

On behalf of the Department, I am writing to offer Energy Answers an opportunity to resolve, in advance of litigation, a civil penalty claim that the State has against Energy Answers, arising out the air quality permit violation.

The Department's determination is based on the following:

1. Energy Answers received an air quality permit to construct a 120 MW Generating Facility designed to combust an average of 4,000 tons per day of processed refuse derived from municipal solid waste through the issuance of a Certificate of Public Convenience and Necessity ("CPCN") Case No. 9199 on August 6, 2010. The proposed facility, known as the Fairfield Renewable Energy Facility ("Facility") consists of four (4) identical units to be constructed on a site owned by the FMC Corporation located at 1701 East Patapsco Avenue, Baltimore, Maryland 21226. The CPCN required that Energy Answers start construction of the Facility by February 6, 2012.
2. On October 24, 2012, the CPCN was revised to extend the start of construction by 18 months from February 6, 2012 to August 6, 2013.
3. Condition A-2 of the revised CPCN states that the CPCN serves as the Prevention of Significant Deterioration (PSD) approval, Nonattainment New Source Review (NA-NSR) approval, and air quality construction permit for the Fairfield Renewable Energy Project. Condition A-2 also states, however, that the CPCN "does *not* constitute the permit to construct or approvals until such time as EA has provided documentation demonstrating that nitrogen oxides (NOx) emission offsets totaling at least 781 tons, volatile organic compound (VOC) emission offsets totaling at least 125 tons, particulate matter less than 2.5 micrometers (PM2.5) emission offsets totaling at least 156 tons, and SO2 (as a PM2.5 precursor) emission offsets totaling at least 446 tons have been obtained and approved by the MDE-ARMA and are federally enforceable. Should the PM2.5 Lowest Achievable Emissions Rate (LAER) limit be determined to be greater than the provisional LAER limit for PM2.5 in Condition 21(b) of 22 milligrams per dry standard cubic meter (mg/dscm) @ 7% O2, EA shall be required to obtain additional PM2.5 offsets for the difference between the provisional and final LAER limit at a ratio of 1:1 within 180 days of the final PM2.5 limit having been imposed by MDE-ARMA."
4. On August 5, 2013, Energy Answers provided documentation to the Department showing that the required emission offsets for the construction of one (1) unit for the proposed project were obtained from four (4) separate companies. The Department approved those emission offsets on August 5, 2013.
5. Energy Answers commenced construction of one (1) unit of the proposed facility at 1701 East Patapsco Avenue on August 6, 2013.
6. On June 2, 2014, Sasol North America, Inc. ("Sasol") notified the Department that on **May 12, 2014**, Energy Answers failed to execute the final call option on the 79.75 tons of emission offsets owned by Sasol and encumbered by Energy Answers for the Facility. Failing to obtain or maintain the emission offsets prior to or during the course of construction is a violation Maryland's ambient air quality control laws.

Energy Answers is subject to State air pollution control laws and regulations, codified in

Title 2 of the Environment Article, Annotated Code of Maryland and Title 26, Subtitle 11 of the Code of Maryland Regulations (COMAR). Section 2-610 of the Environment Article of the Maryland Annotated Code authorizes the Department to seek civil penalties of up to \$25,000 for each violation of Title 2 or any rule, regulation, or order adopted or issued thereunder. Each day that a violation continues is a separate violation under Section 2-610.

Each additional day after May 12, 2014 that Energy Answers fails to obtain the required emission offsets and continues construction is an additional day of violation.

In the interest of resolving this matter without the need for litigation, the Department is offering Energy Answers the opportunity to meet with Department representatives to explore possible settlement of the Department's claims. If you would like to pursue settlement discussions on behalf of Energy Answer, please contact Angelo Bianca at (410) 537-3226 within five (5) days of receipt of this letter.

In the interim, Energy Answers must discontinue all construction operation at the Fairfield site until Energy Answers is able to demonstrate to the Department's satisfaction that it has replaced all the emissions offsets for which Energy Answers had an option to purchase from Sasol.

Very truly yours,



Roberta R. James
Assistant Attorney General

cc: Frank Courtright, MDE
Karen Irons, MDE
Steve Lang, MDE
David J. Collins, Executive Secretary, Public Service Commission
Todd R. Chason, Gordon, Feinblatt