

December 22, 2014

Via Email and U.S. Mail

EPA Information Quality Guidelines Processing Staff (quality@epa.gov)
Mail Code 2811T
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

**Re: Walter Coke, Inc. Request for Reconsideration
Concerning EPA Response to Request for Correction (RFC#13001)**

Dear Sir or Madam:

As counsel to Walter Coke, Inc., we write to request reconsideration of EPA's September 22, 2014 Response (the "EPA Response") to Walter Coke's March 12, 2013 Information Quality Act Petition (the "Walter Petition") to correct certain information disseminated by EPA about the extent of alleged "pollution reductions" associated with an Administrative Order on Consent entered under RCRA between EPA and Walter Coke in 2012.

The Walter Petition is attached (Exhibit A). As it describes, EPA disseminated fundamentally misleading information (the "EPA Claims") about the 2012 AOC, including falsely labelling Walter Coke as one of the largest "polluters" in the U.S. That erroneous information was disseminated in the context of past, and ongoing, repeated EPA misrepresentations to the public about Walter Coke and the conditions in the communities surrounding Walter Coke. The Petition carefully outlines the specific problems with the EPA Claims, including the reasons that the claims were inconsistent with EPA's own Guide to Calculating Environmental Benefits for EPA Enforcement Cases – FYI 2012 Update (the "CCDS Guidance").¹

EPA's untimely² Response (Exhibit B) utterly fails to meet the substance of the Walter Petition. Its conclusory, unsupported, and erroneous contentions are unworthy of

¹EPA updated the CCDS Guidance in 2014. The references to it in the Walter Petition, the EPA Response, and this Request for Reconsideration are to the 2012 version. On our review of the 2014 version, such references are equally applicable.

²The Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency (the "EPA IQA Guidance") set a goal of responding to an IQA petition within 90 days. *See* EPA IQA Guidance at 31. EPA rejected comments on its initial draft guidance suggesting different time frames to respond to requests that are more factual in nature versus those that are more "complex." *Id.* at 55. Here, EPA repeatedly granted itself extensions of time to respond to Walter Coke's Petition due to its alleged "complexity," ultimately stretching its 90 day goal to 18 months. The conclusory simplistic EPA Response belies EPA's claim that its delay was caused by complexity. The result—leaving damaging and inaccurate information in the public domain for a year and a half—raises unfortunate questions about the integrity of EPA's processes.

the Response's claim that "EPA takes very seriously its responsibility" to ensure it disseminates only accurate and reliable information. Worse, the Response appears to display a lack of candor about EPA's own policies in an apparent effort to avoid admitting error.

EPA's IQA Guidance provide that requests for reconsideration are to be considered by an Executive Panel comprised of the Science Advisor/Assistant Administrator for the Office of Research and Development, the Chief Information Officer/Assistant Administrator for OIE, and the Economics Advisor/Assistant Administrator for the Office of Policy, Economics and Innovation. Walter Coke respectfully requests that this Request for Reconsideration be submitted to such Executive Panel for timely review and action.³

1. Summary of the core issue presented.

The crux of the Walter Petition is that, under the CCDS Guidance, when calculating the alleged "pollution reductions" resulting from the 2012 AOC, EPA improperly included environmental media for which no remedial decision has yet been made. Under the 2012 AOC, these media (mostly certain soils and other solids) must go through a "corrective measures study," which is RCRA's investigation and evaluation process. Media associated with such investigative and evaluative efforts should not have been included—per the CCDS Guidance—because no remedial decision had been made and, therefore, the environmental benefits are not "readily quantifiable." The EPA Response provides no substantive discussion whatsoever as to why the Agency believes that such speculative benefits were properly included in the calculations contrary to its guidance.

The only new information in the EPA Response is that the agency now admits it included huge quantities of materials in its calculation for which no determination had been made as to the need for remediation, thus inherently exaggerating the supposed pollution reductions. In effect, EPA improperly treated the required investigations and evaluation process involved in a CMS as "corrective actions" counting as pollution reductions. By so doing, EPA departed from its own guidance.

The Response, remarkably, notes that "EPA's estimates of environmental benefit, undertaken at the time enforcement actions are concluded are conservative estimates" *See* EPA Response, n.3. Citing the CCDS Guidance, the footnote implies, that by including **all** media being evaluated by the CMS process in the SWMUs at issue, EPA's calculations had been "conservative." But the CCDS Guidance is clear that it intends the term "conservative estimates," to have a meaning **opposite** of the meaning the EPA Response ascribes to it. The CCDS provides, in pertinent part:

³The EPA IQA Guidance makes clear that the Executive Panel is to be comprised in such a way as to avoid bias or the appearance of a potential conflict of interest. Accordingly, Walter Coke respectfully requests assurances that the Executive Panel exclude any personnel who have been involved, in their current or past positions, in enforcement actions vis-à-vis Walter Coke, and that such persons will not be consulted in the resolution of this request.

EPA strives to be transparent and accurate when counting environmental benefits derived from the Agency's enforcement actions. EPA's numbers need to be credible and defensible, *minimizing the risk of any exaggeration*. Recognizing that all methodologies for quantification are not perfect, are estimates, and include some margin for error, when quantifying environmental benefits from enforcement actions, the rule is to underestimate rather than overestimate the environmental benefits.

CCDS Guidance (2012) §1.21 (pp. 1-4 – 1-5) (emphasis added).⁴

2. EPA improperly counted media associated with investigative and evaluative work that had not yet been completed as “pollution reductions.”

The EPA Response makes clear that EPA in fact derived its pollution reduction claims using the maximum possible amount of media that might ever be subject to remediation, even though the 2012 AOC did not necessarily require remediation of *any* such media. The table on page 3 of the EPA Response shows that EPA estimated “the volume of contaminated soil” in the case of the first two rows of media, estimated the “volume of the contaminated aquifer formation” in the case of row 3 (groundwater), and estimated the volume of certain waste piles in the case of materials from an onsite landfill and waste piles. Far from “minimizing the risk of any exaggeration,” EPA used values that were inherently the maximum theoretically possible values—even if highly unlikely. This fundamental error then led to EPA's erroneous and damaging claims about Walter Coke.

Nowhere does the CCDS authorize EPA to count investigative work—such as the corrective measures studies provided for in the 2012 AOC—as a quantifiable pollution reduction. To the contrary, that document clearly indicates that such work should not be so counted. Hence, in §1.33 “How to Determine Remedy Category,” the CCDS recites “Work Practices Examples,” which include “[m]onitor, test, audit, inspect, assess, characterize, sample.” Such “work practices” are not to be assigned a value. This language captures precisely the CMS exercise required by the 2012 AOC.

And, as noted in the Walter Coke Petition, the most directly analogous specific example noted by the CCDS was that CERCLA RI/FS work would be considered a “work practice” not subject to quantification of benefits.

As with every other issue presented in the Petition, EPA's Response is silent on this issue. This unwillingness to address substantively the issue presented should be alone grounds for reversing the Agency's position.

⁴ This language is repeated verbatim in the same Section of the CCDS 2014 update.

3. Given EPA's untimely response, events have proven EPA's error.

The EPA Response shows that EPA counted more than 1.48 billion pounds of “pollution reduction.” Of these, more than 1.44 billion pounds—approximately 97% of the total—are attributed to a non-hazardous construction debris landfill (SWMU 38) and an emission control waste pile (SWMU 39). *See* EPA Response at p.3. In July, 2013, Walter Coke's consultant, Terracon, submitted a CMS that included these two areas, and no action that would justify counting the contents of these areas under the CCDS is recommended. For SWMU 38 (the construction debris landfill), the CMS notes it is still an active management area for inert wastes and that land use controls are the appropriate corrective measure. *See* CMS – SMA2, p. 3-12.⁵ For SWMU 39, the CMS also states that land use controls can be implemented as a corrective measure. *Id.* at p.3-12.

Importantly, institutional controls such as the land use controls referred to in the CMS are listed by the CCDS as a “Work Practice” for which a volume is not to be calculated CCDS 1-15. Instead, “Work Practices” are to be treated as “mutually exclusive” from “Removal or Restoration” and “Reduction of Ongoing Releases.” *Id.* at §1.2.1(2). Indeed, the definition of “Work Practices” is “[b]enefits derived from a complying action *for which environmental benefits are not readily quantifiable.*” *Id.* at §§1.2.2 and 1.3.3. Hence, the CCDS repeatedly states that “no amounts or units” are associated with various items defined as a work practice. *See e.g., Id.* at §§ 5.22, 5.23, 5.24, 5.25, 5.26.

Here, it is plain that EPA improperly “quantified” 97% of the claimed pollution reductions in a manner inconsistent with its own policy. Walter Coke believes EPA improperly quantified **the** remaining 3% as well, but won't belabor the specifics of those errors, as it is clear that EPA's misattribution described above alone requires EPA to retract its indefensible claims.

4. The EPA Response fails to rebut other errors identified in the Walter Petition.

The EPA Response is silent as to the following issues raised by the Walter Petition. No rebuttal is made, much less is any insight provided as to why these issues should not individually or collectively invalidate the EPA Claims:

- Contrary to guidance, Region 4 failed to even create a CCDS in the first place, rendering its entire process suspect and unreliable. *See* Walter Petition at pp.10-11.
- EPA failed (and its Response continues to fail) to document its calculations. Indeed, EPA's still has not addressed a pending FOIA appeal relating to the

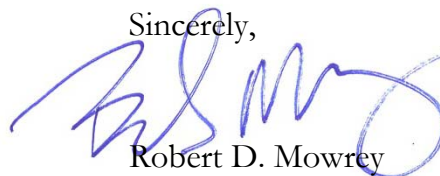
⁵The CMS notes the potential that, should operations of the landfill ever cease, Walter Coke would place a cover and vegetation over it, but even that is speculative and, should it occur, it would not be a function of the 2012 AOC.

underlying calculations, rendering its process and results inherently unreliable and suspect. *See* Walter Petition at pp. 10-11.

- The claimed pollution reductions were so radically inconsistent with pollution reductions claimed by other regions as to render them suspect. *See* Walter Petition at p. 11.
- The information at issue meets the IQA Guidance definition of “influential information” that is “subject to a higher degree of quality.” EPA IQA Guidance at pp. 19, 20. EPA’s unwillingness to produce virtually any contemporaneous documentation associated with the EPA claims utterly defeats EPA’s commitment to assure such influential information’s “reproducibility by increasing the transparency of data sources, assumptions, methods, procedure, and rigor.” *Id.* at 20-21. *See* Walter Petition at p. 12-13.
- EPA improperly included calculations for groundwater measures that were not the result of the 2012 AOC but instead were a function of a 1989 consent order. *See* Walter Petition at n.8.

As explained in the Walter Petition, the above problems with the EPA Claims cause them to fail the relevant standards for information under the Information Quality Act. EPA’s conclusory and inexplicably delayed response does nothing to explain or cure these problems. Accordingly, Walter Coke requests that the Executive Panel review the enclosed Petition, reverse the EPA Response, and take the appropriate steps to retract this faulty information from the public domain.

Sincerely,



Robert D. Mowrey

Enclosures