



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 18 2015

OFFICE OF
GENERAL COUNSEL

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of November 2, 2015, to the U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Office of Law Revision Counsel's effort to codify the Clean Air Act. The Administrator asked that I respond on her behalf. This letter is an initial response.

Your letter focuses on the treatment of Clean Air Act Sec. 111(d) in H.R. 2834, a draft bill to restate the Clean Air Act (the Act) as a new positive law title of the United States Code, and its relationship to our authority to adopt the Clean Power Plan.

While your letter highlights H.R. 2834's treatment of section 111(d) – and clearly reflects an intent to resolve the meaning of existing law in that provision on an issue that is currently before the courts - the EPA's concerns are much broader because H.R. 2834 is a restatement of the *entire* Clean Air Act (as well as the National Environmental Policy Act and other authorities). Our response to the efforts to rewrite the Clean Air Act are motivated by our concern that a rewritten Clean Air Act would not accurately reflect existing law, making the already complicated task of interpreting and implementing the Act even more complicated for state, local and tribal governments; industry; environmental groups; Agency personnel; and others. In addition, rewriting the Clean Air Act would entail a substantial commitment of Agency resources.¹ The breadth of the restatement effort and the complexity of the Act mean that the potential for error in rewriting it is high – and the consequences for the regulated community and others of getting the rewrite wrong are significant.

The EPA's reluctance to participate in the rewriting of the Clean Air Act is longstanding, spanning the administration of two presidents. OLRC initially approached the EPA and requested help in the Environment title codification process in 2007, as the Law Revision Counsel notes in his September 16, 2015 letter to Chairman Marino. In early 2009, OLRC noted that EPA had declined to participate in the project and had failed to respond to OLRC questions sent two years earlier.² The EPA's approach to the

¹ See Letter from Avi Garbow, General Counsel, EPA, to the Honorable Tom Marino, Chairman, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Committee on the Judiciary (July 27, 2015) (attached).

² See Email from Tim Trushel (OLRC) to Byron Brown and Tom Dickerson (EPA) (February 25, 2009) ("EPA declined to assist in the Environment title codification project by responding to the questions that I submitted to you about two years ago") (attached).

codification effort predates both this Administration and the EPA's exercise of section 111(d) authority to reduce carbon pollution from existing power plants.

The EPA has been (and still is) concerned that it would take significant EPA resources to ensure that any rewrite of the Clean Air Act accurately reflects the meaning of existing law, and is not convinced that the task is achievable. Comparing rewritten text to the existing text is not sufficient to determine whether the rewritten text is an accurate restatement of the law. Rather, the process requires a review of the extensive body of law that has developed interpreting the Act. The Clean Air Act's numerous programs, which focus on different pollutants and different types of sources, are implemented through numerous federal, state, tribal and local actions, including rulemakings, permit issuances, adjudications, and enforcement actions. Many of these actions, particularly federal rulemakings, are challenged in court. As a result, there have been hundreds of cases interpreting the Act. Ensuring that changes in the text are faithful to the Act's original meaning requires research and review of the rulemakings, guidance documents, court decisions, and other documents that have interpreted the provision – as well as similar provisions elsewhere in the Act. We are concerned about H.R. 2834's extensive changes: it adds definitions, changes words, removes deadlines, breaks paragraphs into clauses and sub-clauses, inserts headings – all of which have the potential to convey a different meaning than does existing law. All of these changes would need to be carefully evaluated, because even something as simple as adding headings can change a court's interpretation of the law.³

Further, were Congress to actually enact a rewritten Clean Air Act, it would make interpreting the Act harder instead of easier and create unnecessary confusion for everyone involved in implementing and complying with the Act. Despite OLRC's statement that H.R. 2834 would establish the "text" of the law, the bill itself provides, "The restatement of existing law enacted by this Act does not change the meaning or effect of the existing law." H.R. 2834 Sec. 2(b)(1). And OLRC stated in its September 16, 2015, letter that minor changes in language (such as adding headings) are not to be understood as changing the law's meaning.⁴ Presumably then, if a rewritten Clean Air Act were enacted as positive law, anyone interpreting it would need to look at both it and the statutes at large, as the courts have done in interpreting prior restatements. If the wording or structure had been changed, one would then need to determine the original law's meaning to properly interpret the text of the rewritten version.⁵ Currently, interpreting the Clean Air Act almost never requires one to go back to the statutes at large rather than relying on the U.S. Code because the text is almost never at issue (section 111(d) is an unusual exception). In contrast, given that the meaning of the Clean Air Act is often at issue, we anticipate that interpreting a positive law codification of the Clean Air Act would regularly require the agency, states, industry, other stakeholders, and the public at large to shift back and forth between two versions of the law – the restatement and the statutes at large. This would further complicate the already complex task of interpreting the Clean Air Act in regulatory proceedings and court cases.

We are concerned that the focus on section 111(d) and the Clean Power Plan is obscuring the much broader issue of whether OLRC's rewrite of the Clean Air Act in H.R. 2834 is advisable.⁶ As this

³ See, e.g., *Cheung v. United States*, 213 F.3d 82, 90 (2d Cir. 2000)("[T]his Court has recognized that statutory headings may be used to resolve ambiguities in the text.>").

⁴ Letter from Ralph V. Seep, Law Revision Counsel, to The Honorable Tom Marino, Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, at 2 (Sept. 16, 2015).

⁵ *Finley v. United States*, 490 U.S. 545, 553–55 (1989). See also Explanation of H.R. 2834, at 2 (collecting cases).

⁶ In any event, the codification process should have no effect on whether the EPA has authority under Clean Air Act section 111(d) to adopt and implement the Clean Power Plan because, under the terms of the draft codified law itself, "[t]he restatement of existing law enacted by this Act does not change the meaning or effect of the existing law." H.R. 2834 Sec. 2(b)(1). As we have authority to enact the Clean Power Plan now, enactment of the rewritten Clean Air Act would not deprive the EPA of that authority. (See discussion of the EPA's authority in the Clean Power Plan preamble at 80 Fed. Reg. 64662, 64710-64715 (October 23, 2015).)

Committee well knows, the Clean Air Act is a lengthy, complicated law that Congress designed to address numerous, complex air quality problems in ways that balance wide-ranging and disparate environmental, economic, geographic and societal interests. Even if we were operating on a clean slate, rewriting the Act without upsetting those balances and changing its existing meaning would be a daunting task. Far from operating on a clean slate, we have forty-five years of EPA regulations and hundreds of court cases interpreting the Act – all of which must be taken into account to determine whether a rewritten Clean Air Act is the same as the existing Act. When, as H.R. 2834 does pervasively, one moves provisions around, adds headings, changes organizational structure, defines terms previously undefined in the statute, changes terminology, and deletes deadlines, it is difficult to tell whether the changes are benign or substantive.

If you have further questions, please contact me, or your staff may contact Kyle Aarons in the Office of Congressional and Intergovernmental Relations at aarons.kyle@epa.gov or (202) 564-7351.

Sincerely,



Avi S. Garbow
General Counsel

cc: The Honorable Frank Pallone
Ranking Member



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

JUL 27 2015

OFFICE OF
GENERAL COUNSEL

The Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform, Commercial, and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of June 17, 2015, requesting comments on H.R. 2834, the bill you introduced to enact certain laws relating to the environment as title 55, United States Code, "Environment." I understand that the intent of the bill is to restate the National Environmental Policy Act of 1969, Reorganization Plan No. 3 of 1970, and the Clean Air Act, along with related provisions in other Acts, as a new positive law title of the United States Code. The new positive law title would replace the existing provisions.

Limiting confusion and uncertainty about the meaning of the Clean Air Act is not only vitally important to public health and the environment, but essential to effective implementation, and critical for American businesses that make important decisions based on interpretations of Clean Air Act requirements.

The Clean Air Act, which was first enacted in its modern form in 1970, is one of our nation's biggest success stories. Since 1970 it has reduced pollution for six common pollutants (often called criteria pollutants) by nearly 70 percent while the economy has more than tripled in size. The benefits from Clean Air Act programs dramatically outweigh the costs, by as much as 30 to 1 according to a 2011 study. These benefits include preventing over 230,000 early deaths; 200,000 heart attacks; 17 million lost work days; and 2.4 million asthma attacks in 2020.

The Clean Air Act is comprised of numerous programs that focus on different pollutants and different types of sources, which are implemented through numerous federal, state, tribal and local actions, including rulemakings, permit issuances, adjudications, and enforcement. Many of these actions, particularly federal rulemakings, are challenged in court. As a result, there have been hundreds of cases interpreting the Clean Air Act. Understanding the meaning of a particular Clean Air Act provision requires research and review of the rulemakings, guidance documents and court cases that have interpreted the provision – and those that have interpreted similar provisions elsewhere in the Act.

I am concerned that if H.R. 2834 were enacted, it would further complicate the already complex task of interpreting the Clean Air Act in regulatory proceedings and court cases. I understand that the intent of the codification is not to change existing law. Section 2(b)(1) specifically says, “The restatement of existing law enacted by this Act does not change the meaning or effect of existing law.” Under 1 U.S.C. § 204 and Supreme Court precedent, therefore, the restatement would remain nothing more than prima facie evidence of the law. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) (“Even where Congress has enacted a codification into positive law, this Court has said that the change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment.”). The consequence will be that the agency, industry, stakeholders, and the public at large will need to shift back and forth between two versions of the law, the restatement and the existing law.

The proposed restatement of the Clean Air Act into the U.S. Code as positive law, even without an intent to change the meaning of the law, will likely depart frequently from the Statutes at Large and recourse to the original enactment will be required. H.R. 2834 changes headings and organizational structure. In some cases this may be innocuous, but even something as simple as adding headings can change a court’s interpretation of the law. *See, e.g., Cheung v. United States*, 213 F.3d 82, 90 (2d Cir. 2000) (“[T]his Court has recognized that statutory headings may be used to resolve ambiguities in the text.”); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1116 (W.D. Wisc. 2001) (“[D]isregard for the heading undermines the ... conclusion. Statutes are to be read to give effect to every word, wherever possible. Disregarding a title runs the risk of missing the meaning of the statute.”). New headings and structure at best will be confusing and present a real risk that a court or parties will wrongly assume it substantively changed the provision.

Two examples provide just a small window into the difficulties I anticipate should this bill be enacted. First, the restatement makes what appear to be minor structural changes to the Renewable Fuel Standard (RFS) program. Section 221111(o)(2)(A)(i) splits the general charge to the Administrator to promulgate regulations to implement the renewable fuel standard into two subclauses, one with the heading “Gasoline” and one with the heading “Transportation Fuel.” The most natural reading of the restatement is that gasoline is not a transportation fuel, which in turn may mean that only the requirement for total renewable fuel content (and not for sub-categories, such as advanced biofuel content) apply to gasoline. In contrast, Section 211(o)(2)(a)(i) of the existing Clean Air Act directs the Administrator to issue regulations to ensure minimum renewable fuel content of gasoline no later than August 8, 2006, and to revise those regulations to ensure minimum renewable fuel content (including separate requirements for advanced biofuel and other sub-categories) for transportation fuel no later than December 19, 2008, (dates that were not included in the restatement). It is clear from the existing law (and with just a minimal knowledge of legislative history) that the direction to issue regulations for gasoline was in the Energy Policy Act of 2005, and that Congress expanded the RFS program in the Energy Independence and Security Act of 2007 to establish requirements for different categories of renewable fuels and apply them to other transportation fuels as well as gasoline.

Second, Section 211111(d) of the restatement fails to include legislative language that is relevant to whether EPA has statutory authority to issue the Clean Power Plan and regulate greenhouse gas emissions from power plants and other stationary sources. There has been significant confusion concerning this provision, which was enacted as part of the Clean Air Act Amendments of 1990, as well as litigation over its proper interpretation in the U.S. Court of Appeals for the District of Columbia Circuit. By selectively using one text and not including other language that had been enacted by Congress and signed into law by the President, the restated provision, if it were law, would exacerbate the confusion.

To provide technical assistance on whether H.R. 2834, which is 580 pages long, accurately represents existing law would be an enormous undertaking. It is not just a matter of finding *all* of the wording, punctuation, organizational and structural changes from existing law to the restatement, it is trying to determine whether those changes are legally significant. That determination cannot rest just on textual comparisons of the restated and existing provisions, it requires an understanding of how related provisions are worded, and how the provisions have been interpreted in hundreds of rulemaking actions and hundreds of court cases.

Clean Air Act attorneys representing the agency, industry, states, environmental groups and other interested stakeholders already spend countless hours parsing the statute, comparing how words in one part of the Act are similar to (or different than) words used elsewhere, examining changes in the statute as it has been amended over time and studying the legislative history. I am concerned that a restatement of the Clean Air Act would only introduce a new interpretive step and add to this already complicated process. If attorneys were interpreting a restated Clean Air Act, they would still have to check the now existing law to ensure that the restated law was not different. I can easily foresee situations where the agency and the courts would have to analyze both versions to ensure that the restated version did not change existing law. This additional complication would make understanding the Act more complicated instead of less, and thus undermine one of the goals of the restatement.

I appreciate the opportunity to provide comments on H.R. 2834. If you have further questions please contact me, or your staff may contact Josh Lewis in the EPA's Office of Congressional and Intergovernmental Relations at 202-564-2095 or lewis.josh@epa.gov.

Sincerely,



Avi S. Garbow
General Counsel



Archive:

{In Archive} Draft Environment title bill and explanation

Trushel, Tim to: Byron Brown, Tom Dickerson

02/25/2009 10:49 AM

This message is being viewed in an archive.

Byron and Tom--

Since EPA declined to assist in the Environment title codification project by responding to the questions that I submitted to you about two years ago, I sought and received the assistance of the Congressional Research Service in obtaining answers to those questions and completed a draft bill and explanation. Those are attached, and they are also posted at <http://uscode.house.gov/>. EPA may or may not agree with the answers that I obtained.

As I mentioned to you earlier, when the bill is introduced this Office will recommend to the Chairman of the House Judiciary Committee that EPA and others be requested in writing to submit comment on the bill to this Office. I would welcome any comment that EPA may choose to provide before that, however.

Tim

Tim Trushel
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