



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

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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.<sup>1</sup> 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.<sup>2</sup> The EPA's approach to the

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<sup>1</sup> 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).

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> As this

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<sup>3</sup> 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.").

<sup>4</sup> 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).

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

<sup>6</sup> 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](mailto:aarons.kyle@epa.gov) or (202) 564-7351.

Sincerely,



Avi S. Garbow  
General Counsel

cc: The Honorable Frank Pallone  
Ranking Member