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

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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