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HAZY SKIES IN AMERICA'S FUTURE?:

THE BATTLE BETWEEN "FREE INDUSTRY" AND CLEAN AIR

by Oded Cedar*

A series of Republican-supported bills in the 112th Congress are aimed at preventing the Environmental Protection Agency ("EPA") from regulating the heaviest polluting industries in America.¹ At the forefront is H.R. 97—short-titled the Free Industry Act—a bill introduced by Rep. Marsha Blackburn (R-TN) and sponsored by 120 other representatives.² H.R. 97 would amend the Clean Air Act ("CAA") to exclude a series of greenhouse gases ("GHG") from the list of pollutants that the EPA can regulate.³ Media sources have already pointed out that H.R. 97 will likely die in the Senate or by Presidential veto.⁴ Regardless, H.R. 97 indicates an agenda to impede EPA regulatory authority that could rise to the forefront should Republicans take control of Congress.⁵ The philosophy that undergirds H.R. 97 represents a paralytic force to U.S. climate change policy, and policymakers should begin drafting solutions now before H.R. 97 and similar bills become a reality.

The CAA is a cornerstone of U.S. climate change policy, and the EPA is the primary vehicle through which the federal government enforces the provisions of the CAA.⁶ Congress successively increased the EPA's authority to regulate harmful pollutants under the CAA with amendments in 1977⁷ and 1990.⁸ GHG emissions entered the dialogue in 2007 when the Supreme Court decided *Massachusetts v. EPA*, mandating that the EPA had the authority to regulate GHG emissions pursuant to the CAA.⁹ In 2009, the EPA issued an Endangerment Finding, stating that GHG emissions posed a serious health risk for the population and environment.¹⁰ With the support of the Obama Administration, the EPA declared that it would pursue new regulations for mobile and stationary sources.¹¹ It is against this backdrop that Republicans in the 112th Congress levy their attacks against the EPA.

Supporters of H.R. 97 ("97'ers") wish to strip the EPA of its regulatory authority because they claim that stricter GHG standards will "kill" American industrial jobs.¹² The 97'ers first argue that the detrimental effects of GHG emissions are uncertain and require more research before the EPA can move to regulate those emissions.¹³ The argument continues that stricter regulations will force companies to expend money installing new equipment and put American jobs at risk.¹⁴ There is evidence that lends credence to the 97'ers' economic argument, but most of it comes from industry-led reports.¹⁵

The two largest stationary sources of GHG emissions are the electric power industry (oil, natural gas, and coal) and manufacturing, producing an estimated 51.3% of U.S. GHG emissions in 2007.¹⁶ The oil and natural gas industries directly employ roughly two million people,¹⁷ coal employs about ninety

thousand,¹⁸ and manufacturing employs around twelve million people.¹⁹ With more than fourteen million people employed by these industries (not including "supporting" industries),²⁰ it is reasonable to assume that new regulations could cause potential job losses. However, the 97'ers' argument fails to consider the potential for job creation resulting from new technology and programs required to comply with these regulations.²¹ Instead, H.R. 97 proposes an extreme political maneuver that threatens to dismantle the core of U.S. climate change policy.

By eliminating EPA's authority to regulate GHG, H.R. 97 unleashes a host of consequences. Without the EPA as the regulatory authority, state governments will have the choice, or obligation, to regulate GHG emissions. This means a patchwork of regulations from state to state instead of one uniform federal standard.²² Companies who wish to escape GHG regulations may decide to move to states without emissions standards.²³ Also, without GHG regulations, it is unlikely that industrial companies will invest in "clean tech," only further delaying U.S. entrance into a growing global marketplace with \$7.8 billion in investment in 2010.²⁴ Finally, there is no way to measure how much credibility the U.S. will lose in the international climate change dialogue without an effective policy in place.²⁵

H.R. 97 is part of a broader Republican plan to dismantle the EPA.²⁶ The bills presented in the 112th Congress bear an eerie resemblance to bills presented by Republicans during the 111th legislative session.²⁷ To assume that Republicans will not present these bills in the 113th Congress would be foolish. Policymakers who favor a strong climate change policy must take affirmative steps to entrench the EPA's authority to regulate GHG emissions. Amending the CAA or passing an authorization bill would be two ways of accomplishing this goal.²⁸ Although the political distribution of the 112th Congress is unlikely to allow the entrenchment efforts to succeed, it could provide a rally-point for all those in the public who stand against H.R. 97.



Endnotes: Hazy Skies in America's Future?

¹ See *Anti-Regulatory Forces Launch Full Assault on Public Protections*, OMB WATCH (Feb. 8, 2011), <http://www.ombwatch.org/node/11485>; see also Dina Cappiello, *House Republicans Propose \$1.9 Billion Cut to EPA*, ASSOC. PRESS (Feb. 9, 2011, 3:58 PM), http://www.huffingtonpost.com/2011/02/09/house-republicans-move-fo_n_820911.html.

² See *H.R. 97 – Free Industry Act*, OPEN CONGRESS, <http://www.opencongress.org/bill/112-h97/show> (last visited Feb. 12, 2011).

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³ See H.R. 97, 112th Cong. (2011), <http://www.opencongress.org/bill/112-h97/text> (last visited Feb. 12, 2011); see also Renee Schoof, *With Health Care 'Repealed,' GOP Turn to Climate Change*, McCLATCHY NEWSPAPERS (Jan. 20, 2011), <http://www.mcclatchydc.com/2011/01/20/107168/ethics-of-climate-change-rise.html>; Jeremy Moule, *Clean Air v. Free Industry*, CITY NEWSPAPER BLOG (Jan. 28, 2011, 11:48 AM), <http://www.rochestercitynewspaper.com/news/blog/2011/01/Clean-Air-vs-Free-Industry/>.

⁴ See Schoof, *supra* note 3.

⁵ Since Democrats retain control over the Senate and Presidency, any Republican efforts to eliminate EPA regulatory authority will probably fail. Republicans are posturing for the 2012 elections and setting an agenda early. Should Republicans gain control of the Senate, it is likely that laws similar to H.R. 97 will pass during the 113th Congress. See generally OMB WATCH, *supra* note 1 (highlighting that Republicans are fulfilling their campaign promises by attacking specific regulations and the rulemaking process itself); see also Nick Wing, *Fred Upton's EPA Battle: Incoming Energy Chair Announces Plan to Stymie Carbon Regulations*, HUFFINGTON POST (Dec. 30, 2010, 1:15 AM), http://www.huffingtonpost.com/2010/12/30/fred-upton-epa-carbon-emissions_n_802295.html (noting that the chairman of the House Energy and Commerce Committee intends to use his position to fight EPA regulations); Kasie Hunt, *Newt Gingrich Proposes Abolishing the EPA*, POLITICO (Jan. 25, 2011, 1:23 PM), <http://www.politico.com/news/stories/0111/48143.html> (citing statements made by the potential 2012 Republican presidential candidate Newt Gingrich at a Renewable Fuels Summit that EPA should be replaced by a new government agency).

⁶ See *Understanding the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/air/peg/understand.html> (last visited Feb. 12, 2011) (discussing the passage of the 1970 version of the Clean Air Act and the subsequent creation of the EPA, to which Congress gave the primary authority of enforcing the provisions of the Clean Air Act).

⁷ The 1977 amendments were largely concerned with strengthening EPA's ability to enforce and maintain National Ambient Air Quality Standards ("NAAQS"). One of the major additions of the 1977 amendments was the "Prevention of Significant Deterioration of Air Quality Standards," which required assessment of new stationary sources or modifications of old stationary sources of pollution. See Clean Air Act, 42 U.S.C. § 7401 (2006), <http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf>; see also *History of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, http://epa.gov/oar/caa/caa_history.html#caa70 (last visited Feb. 12, 2011).

⁸ The 1990 amendments to the Clean Air Act were far broader than the 1977 amendments. The 1990 amendments were instrumental in expanding the federal governments control over acid rain deposition and emission of other toxic pollutants. After the 1990 amendments, EPA had far more enforcement authority due to new permitting standards. There was also significant concentration on the elimination of chemicals that depleted the ozone layer. See S.1630, 101st Cong. (1990) (enacted) [http://thomas.loc.gov/cgi-bin/query/F?c101:5:/temp/~c101kCzQQq:e0](http://thomas.loc.gov/cgi-bin/query/F?c101:5:/temp/~c101kCzQQq:e0;); see also *History of Clean Air Act*, *supra* note 7.

⁹ See *Massachusetts v. EPA*, 549 U.S. 497, 533-35 (2007) (concluding that EPA has authority under the Clean Air Act to regulate greenhouse gases as long as EPA issues an Endangerment Finding). For a brief summary of the court decision, see also *Massachusetts et al. v. EPA et al.*, PEW CTR. ON GLOBAL CLIMATE CHANGE, <http://www.pewclimate.org/epavmsa.cfm> (last visited on Feb. 12, 2011).

¹⁰ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act Final Rule, 74 Fed. Reg. 66496 (Dec. 15, 2009), http://www.epa.gov/climatechange/endangerment/downloads/Federal_Register-EPA-HQ-OAR-2009-0171-Dec.15-09.pdf.

¹¹ See *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/endangerment.html> (last visited Feb. 12, 2011) (citing EPA's intention to pursue regulation of greenhouse gases based on the evidence laid out in the Endangerment Finding); *Energy and Environment*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/energy-and-environment> (last visited Feb. 12, 2011) (declaring the Obama Administration's intent to support EPA regulation of greenhouse gases).

¹² See Schoof, *supra* note 3 (quoting Chairman Rep. Fred Upton's declaration that he would oppose EPA regulations and protect American jobs); see also *Inhofe Says EPA's New Boiler Rule Could Kill Nearly 800,000 Manufacturing Jobs*, FOX NEWS (Sep. 28, 2010) [hereinafter *Inhofe*], <http://www.foxnews.com/>

politics/2010/09/28/inhofe-says-epas-new-boiler-rule-kill-nearly-manufacturing-jobs/ (citing further Republican opposition to EPA regulations aimed at reducing greenhouse gases, because of the regulations' effect on jobs); U.S. Sen. Kay Bailey Hutchinson, *EPA Regulations on Refineries Will Kill Jobs in Texas*, THE HOUSTON CHRON. (Jan. 7, 2011, 8:30 PM), <http://www.chron.com/disp/story.mpl/editorial/outlook/7371466.html> (discussing the effect of EPA regulations on the economy of Texas).

¹³ See Schoof, *supra* note 3; *House Energy Committee Chairman Fred Upton Denies Human Role In Climate Change*, THE HUFFINGTON POST (Feb. 8, 2011, 7:47 PM), http://www.huffingtonpost.com/2011/02/08/fred-upton-climate-change_n_820511.html; *House Readies Ban on EPA Greenhouse Gas Regulations*, FOX NEWS (Feb. 2, 2011), <http://www.foxnews.com/us/2011/02/02/house-gop-readies-ban-epa-greenhouse-gas-regulations/> (establishing that critics of EPA regulations do not believe that the evidence proving the negative impacts of climate change are conclusive).

¹⁴ See Schoof, *supra* note 3; *Inhofe*, *supra* note 12; Hutchinson, *supra* note 12.

¹⁵ See Donald A. Norman, MACH. & ALLIED PRODS. INST., *Economic Implications of EPA's Proposed Ozone Standard*, 1, 5-8 (Sept. 2010), <http://www.mapi.net/Filepost/ER-707.pdf> (finding a total loss of 7.3 million manufacturing jobs by 2020 and an annual attainment cost of \$1.013 trillion to the manufacturing sector if EPA implements new ozone regulations); Margo Thorning, *EPA Regulation of GHGs, U.S. Investment and Economic Recovery: Questions and Answers*, AM. COUNCIL FOR CAPITAL FORMATION, pg. 1-2, 5-6 (Dec. 2010), <http://www.accf.org/publications/143/epa-regulation-of-ghgs-us-investment-and-economic-recovery-questions-answers> (providing non-industry specific job-loss and cost data for new EPA GHG regulations).

¹⁶ See James A. McCarthy & Larry Parker, CONG. RESEARCH SERV., *EPA Regulation of Greenhouse Gases: Congressional Responses and Options*, tbl. 1, at 4 (June 8, 2010), <http://www.fas.org/spp/crs/misc/R41212.pdf> (providing detailed statistics for the total greenhouse gas emissions by the energy and manufacturing industries). For more data and background, see also ENERGY INFO. ADMIN., *Emissions of Greenhouse Gases in the United States 2008*, fig. 1, 3, & 11, tbl. 5, 9, & 11 (2009).

¹⁷ See *Industry Jobs*, AM. PETROLEUM INST., <http://energytomorrow.org/issues/economy/industry-jobs/> (last visited Feb. 12, 2011) (stating that the oil and gas industries directly employ 2.1 million people); see also PRICEWATERHOUSECOOPERS, *THE ECONOMIC IMPACTS OF THE OIL AND NATURAL GAS INDUSTRY ON THE U.S. ECONOMY: EMPLOYMENT, LABOR INCOME AND VALUE ADDED* tbl. 2 (2009), http://www.api.org/Newsroom/upload/Industry_Economic_Contributions_Report.pdf (providing statistics that indicate the total employment provided by the oil and gas industries is 9.2 million when all supporting industries are included).

¹⁸ This employment figure indicates the 2009 employment figures in the coal sector, as provided by the National Mining Association. See NAT'L MINING ASSOC., *Mining Industry Employment in the United States by Sector 1985-2009* (2011), http://www.nma.org/pdf/e_sector.pdf.

¹⁹ See *Facts About Manufacturing*, NAT'L ASSOC. OF MFERS., <http://www.nam.org/Resource-Center/Facts-About-Manufacturing/Landing.aspx> (providing basic statistics about direct and indirect employment by the manufacturing sector).

²⁰ The employment figures used in this article only take account of the people directly employed by the respective industrial sectors mentioned above. "Supporting industries," as used in this article, refers to industries that are inter-related with a specific industry so much so that the livelihood of a "supporting industry" depends considerably upon the success of its "parent industry." For instance, according to figures provided by the American Petroleum Institute, the oil and natural gas industry directly employs 2.1 million Americans, but employs 9.1 million Americans when we take account of "supporting industries." See *Industry Jobs*, *supra* note 17.

²¹ See James Heintz, Heidi Garrett-Peltier, & Ben Zipperer, *New Jobs-Cleaner Air*, CERES, tbl. ES.1-2 (Feb. 2011), <http://www.ceres.org/Page.aspx?pid=592> (citing figures that predict 1.46 million jobs could be created by 2015 by EPA greenhouse gas regulations).

²² One federal regulatory standard that is applicable across all states would be more uniform than various laws that differ from state to state. As the chart referenced below indicates, some states already have stricter standards, others have less stringent ones, and still others have none at all. See Amy Royden Bloom, NAT'L ASSOC. OF CLEAN AIR AGENCIES, *State Greenhouse Gas (GHG) Actions*, (Jan. 16, 2008), <http://www.4cleanair.org/documents/stateghgactions-chart.pdf>.

²³ This is a classic “race-to-the-bottom” argument, where in the face of economic competition governmental entities (nations, states, cities, etc.) relax their regulatory standards to promote economic growth in their jurisdiction. This idea gained recognition in the U.S. after Justice Louis Brandeis discussed it in his dissenting opinion in *Liggett Co. v. Lee*, 288 U.S. 517, 558-60 (1933) (Brandeis, J., dissenting).

²⁴ See Press Release, Cleantech Grp. LLC, Record Number of Clean Technology Venture Investment Deals in 2010, as Total Amount Invested Rises 28 Percent to \$7.8 Billion, (Jan. 7, 2011), <http://cleantech.com/about/pressreleases/4Q10-investments.cfm>.

²⁵ See McCarthy, *supra* note 16, at n.31 (discussing the Obama administration’s efforts to seek international reduction of global GHG emissions, and the central role that U.S. emissions reductions play in the international process).

²⁶ See OMB Watch, *supra* note 1; Cappiello, *supra* note 1 (citing several House and Senate measures aimed at limiting the EPA’s ability to enforce regu-

lations GHG).

²⁷ See McCarthy, *supra* note 16, at 11; see also Elizabeth McGowan, *EPA and Congress Headed for Showdowns Over Carbon Regulations in 2011*, SOLVE CLIMATE NEWS (Dec. 29, 2010), <http://solveclimatenews.com/news/20101229/epa-and-congress-headed-showdowns-over-carbon-regulations-2011?page=2> (citing the controversy between the EPA and Republicans as a carry-over from the 111th Congress); *Appreciating the Clean Air Act*, FRIENDS COMM. ON NAT’L LEGISLATION (Nov. 30, 2010), http://www.fcnl.org/issues/item.php?item_id=4028&issue_id=102 (providing a timeline of bills introduced in the 111th Congress, both in the House and Senate with similar aims to the current set of bills circulating through Congress).

²⁸ Congress has acted in a similar fashion with respect to EPA authority in the 1977 and 1990 amendments to the Clean Air Act. See McCarthy, *supra* note 16, at 13.