If Congress passes a law banning the EPA from regulating carbon dioxide, climate action will go to the courts. (photo: Diana Ofosu/ThinkProgress)

What Happens if the EPA Is Stripped of Its Power to Fight Climate Change?

By Natasha Geiling, ThinkProgress, 03 April 17

If Congress passes a law banning the EPA from regulating carbon dioxide, climate action will go to the courts.

When President Richard Nixon created the Environmental Protection Agency in 1970, it was charged with tackling some of the nation's most pressing environmental concerns — choking smog, toxic air and water pollution, languishing industrial waste sites, and widespread use of the chemical pesticide DDT.

Several decades later, a key decision fundamentally changed the agency's role in American environmental policy: in 2007, the Supreme Court ruled in a 5–4 decision that the EPA had the authority to regulate greenhouse gases. Two years after that, following extensive scientific inquiry, the EPA released an endangerment finding, arguing that the weight of scientific evidence proved greenhouse gases, like carbon dioxide, pose a threat to public health.

The agency then turned its sights on greenhouse gas emissions — the primary driver of rampant global warming.

But reigning in emissions requires regulating polluters and powerful industries, like fossil fuel producers or auto makers. And since those industries — and the money they contribute — wield significant power in Washington, the EPA's renewed focus on greenhouse gases has not come without controversy.

In particular, it has drawn the ire of Republican lawmakers, many of whom argue the agency is overstepping its authority at the expense of industry. Every year since 2009, a member of Congress has introduced a bill aimed at revoking or delaying the EPA's authority to regulate greenhouse gases. And every year, those bills have died — withering under a lack of support from Democratic lawmakers or the threat of veto from a Democrat-controlled White House.

The landscape is different now. Republicans control both chambers of Congress and the White House. Bills stripping the EPA of its authority to regulate greenhouse gases — bills that might have been written off as dead on arrival months ago — carry a new weight in a government marked by unprecedented antagonism towards the mission of the EPA.

Bills like the Stopping EPA Overreach Act of 2017 — introduced this session by Rep. Gary Palmer (R-AL) and supported by 120 fellow representatives — are still a relative long shot. The bill was introduced to the House on January 24, and was referred to four different committees that same day; so far, none of those committees have chosen to hold meetings on the matter. And the idea of explicitly prohibiting the EPA from regulating greenhouse gases is likely to draw stiff opposition from Democrats in the Senate, who could mount a filibuster to block the Senate from passing similar legislation — as long as the filibuster remains intact, and Democrats don't lose a substantial number of seats in the midterms.

But the specter of an EPA rendered toothless on climate change by the will of Congress is certainly more likely than perhaps at any other point in the agency's history. Which raises the question, what happens if the EPA legally can't regulate greenhouse gas emissions?

The long road to regulation

The Clean Air Act of 1970 wasn't the first time the federal government considered the concept of air pollution control; two other laws, passed in 1955 and 1963, gave the government leeway to first research, and then control, pollutants in the air. But the Clean Air Act of 1970 authorized the development of both state and federal laws to regulate air pollution from both stationary sources, like power plants, and mobile ones, like vehicles.

The Clean Air Act also required the EPA to set National Ambient Air Quality Standards, known as NAAQS (pronounced like *knacks*) for six common air pollutants linked to public health problems: ground-level ozone, particulate matter, carbon monoxide, lead, sulfur dioxide, and nitrogen dioxide. In 1990, Congress expanded the list of specific air pollutants to include 187 toxic air pollutants, known as Hazardous Air Pollutants (HAPs)— things like asbestos or benzene.

But Congress also built a fair amount of leeway into the Clean Air Act for the EPA to regulate other air pollutants — things that might not have been identified as being deleterious to public health back in the when the law was initially crafted, or 1990s when the law was expanded.

In 1998, Jonathan Cannon, the Clinton EPA's general counsel, sent a memorandum to then-administrator Carol Browner. In it, he argued that carbon dioxide and other greenhouse gases qualified as air pollutants, and as such, could be regulated by the EPA, so long as the agency was able to prove the pollutants were a danger to public health. That lead a coalition of environmental groups and states to petition the EPA to begin the process of regulating vehicle emissions under the Clean Air Act. Before the rule could be created, however, there was a transfer of power and the decision was reversed; in 2003, the George W. Bush administration declared carbon dioxide and other greenhouse gases did not qualify as pollutants under the purview of the EPA.

The coalition that filed the initial petition in 1999 was predictably angered by the Bush EPA's decision to not regulate vehicle emissions. So they went to the courts, appealing the EPA's decision first at the appellate level and, eventually, before the Supreme Court.

In 2007, the Supreme Court ruled in the landmark *Massachusetts v. EPA* case that greenhouse gases qualified as air pollutants under the Clean Air Act, which gave the EPA the statutory framework to regulate greenhouse gas emissions.

A different legal strategy

But *Massachusetts v. EPA* wasn't the only major climate case working its way through the courts during the mid-to late 2000s. A handful of state attorneys general and private plaintiffs brought a number of cases against fossil fuel companies and utilities for their role in climate change, arguing that harm caused by climate change could be attributed to the actions of those companies.

These cases were, for the most part, public nuisance claims — the same claim used against school districts to recoup the costs of asbestos abatement in the 1980s and 1990s, or against tobacco companies in the mid-1990s and firearm manufacturers in the late 1990s. More recently, claims of public nuisance have been

used to try to get chemical companies like Monsanto to clean up legacy pollutants like PCBs.

In general, public nuisance claims have seen limited success in courts, because courts have historically found it difficult to link a particular consequence back to a particular defendant. With lead paint public nuisance claims, for example, defendants have argued that their liability essentially ended when the paint left their manufacturing plants. They manufactured the paint, the defense would go, but they did not directly cause the health problems that followed — that was due to the paint deteriorating long after it had been applied to walls.

Despite limited success in courts, a number of plaintiffs — both public and private — tried to bring climate-related public nuisance suites against fossil fuel companies in the mid-to late 2000s. They argued that the companies had created a public nuisance by emitting greenhouse gases that drove climate change and its panoply of dangerous side effects — sea level rise, heat waves, flooding, drought, shore erosion, damaging storm surge.

One of these cases, *American Electric Power Co. v. Connecticut,* made it all the way to the Supreme Court. In 2011, the high court ruled in a unanimous decision that the plaintiffs in the case could not invoke federal common law nuisance claim against utilities, because the Clean Air Act displaced those claims. Put another way, because the Clean Air Act gave the EPA the authority to regulate greenhouse gases, as underscored in the 2007 *Massachusetts v. EPA* decision, federal common law claims don't apply to questions about carbon emissions. A year later, the Ninth Circuit found a similar displacement of federal public nuisance law in a case between the Alaskan village of Kivalina — a village that was being displaced due to climate change-fueled sea level rise and eroding coastlines — and ExxonMobil.

And with those decisions, it seemed as though the route to climate action through federal public nuisance lawsuits had been permanently closed.

"I think the prevailing thought out there is that the door is basically shut on the federal side for both injunctive relief and monetary relief," Mike McDonough, an environmental attorney with Pillsbury Winthrop Shaw Pittman LLP, told Law360 in 2013. "I think [*American Electric Power Co. v. Connecticut*] laid down the gauntlet — the Clean Air Act is one-stop shopping for questions under climate change."

An unexpected consequence

The Supreme Court's ruling in *Massachusetts v. EPA*, combined with the EPA's own Endangerment Finding, essentially compel the agency to regulate carbon dioxide and other greenhouse gases as a dangerous pollutant under the Clean Air Act. Short of rolling back the Endangerment Finding — which experts have said would have "almost no chance" of standing up in court, due to the volumes of scientific literature it would contradict — it's difficult to see how the EPA would dispense of its authority to regulate carbon dioxide and other greenhouse gases under the Clean Air Act.

But that all holds true only as long as the Clean Air Act remains in its current form; if Congress were to amend the law to explicitly prohibit the EPA from regulating greenhouse gas emissions, then the agency would lose its authority to do so.

"Clean Air Act authority to tackle greenhouse gases is a sword, but its also a shield."

Despite being high on Republican lawmakers' wish list, a bill prohibiting the EPA from regulating greenhouse gases would face significant legal obstacles — mainly, a filibuster in the Senate. But if Democrats were to lose enough seats in the midterm elections to give Republican lawmakers a filibuster-proof majority, or if Republicans decide to do away with the filibuster altogether, it's possible Republican lawmakers would try to pass a bill explicitly banning the EPA from regulating greenhouse gases.

While the prospect of climate action under current EPA Administrator Scott Pruitt seems dim as is, such a bill would be a huge blow to the agency's effort to tackle climate change. But barring the EPA from regulating carbon through the Clean Air Act would not necessarily mean the end of climate regulation at the federal government level.

In fact, repealing the EPA's authority to regulate carbon could have an unintended legal consequence: it would reopen the path to forcing climate action through federal common law claims, making utilities and fossil fuel companies vulnerable to legal action at both the state and federal level.

"Clean Air Act authority to tackle greenhouse gases is a sword, but its also a shield," Cara Horowitz, environmental law professor and co-executive director of the Emmett Institute on Climate Change and the Environment at the UCLA School of Law, told ThinkProgress. "It had been used under the Obama administration to tackle greenhouse gases, but it has also been used as shield to keep lawsuits from moving forward with claims that they might otherwise."

Without that shield, companies and utilities could face an onslaught of public nuisance claims, similar to what was seen in the late 2000s, before the EPA issued its endangerment finding and began using its regulatory authority to curb emissions from vehicles and the power sector.

"In some ways, I feel as though removing greenhouse gases from the Clean Air Act could basically put us back, from a legal perspective, to where we were in about 2006 or 2007, in the sense that you would basically have a re-invigoration of common law litigation," Melissa Powers, associate professor and director of the Green Energy Institute at Lewis & Clark Law School, told ThinkProgress. "That's because the main avenue that the Obama administration had been pursuing, which was a regulatory avenue, would have been taken away."

Taking climate action to the courts

Using the courts to respond to climate change is not a new tactic, but it fell out of vogue under the Obama administration, when it seemed the federal government had finally decided to take steps to combat the problem through regulatory measures. But as the Trump administration ushers in an era of climate denial at the highest level — and as a Republican-controlled Congress seems poised to strike down environmental protections, rather than strengthen them — environmental groups and climate-focused attorneys general are looking to the courts once again for progress on climate action.

Much of that action, like public nuisance claims, will be part of what is known as tort law, or the section of the legal system that applies to individuals in civil proceedings who have suffered some kind of harm due to the wrongful acts of others.

Historically, tort law has not been favorable to climate litigation because the sheer scope of climate change makes establishing blame difficult; as Yale law professor Douglas Kysar wrote in 2011, "tort law seems fundamentally ill-equipped to address the causes and impacts of climate change… anthropogenic greenhouse gas emissions represent the paradigmatic anti-tort, a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible."

But climate science has come a long way in recent years, and the ability to clearly draw connections from certain major emitters to climate change and the consequences it brings is getting easier. And that could mean making the case that a particular company — a major utility, or a multinational fossil fuel company — is liable for a particular damage could also be getting easier.

"The science is getting stronger on attributing extreme weather events to the buildup of greenhouse gases — in other words what is the probability that extreme heat waves or extreme storms would not have occurred absent the greenhouse concentrations," David Doniger, senior attorney for Natural Resources Defense Council's climate and clean air program, said. "That used to be a question that people really couldn't answer, and now there are scientists that can put quite a strong probability on certain events. And that kind of evidence could very well meet the thresholds that courts might require for proof."

Already, a lawsuit brought by a group of kids and young adults, arguing that the federal government, through its actions, has failed to protect future generations from climate change, has been given the green light for trial by a court in Oregon. In her November decision, federal judge Ann Aiken found that the plaintiffs had adequately alleged injury — they had shown that climate change-driven algal blooms harm the water they drink, for instance — and that the injury was personal enough that the plaintiffs had sufficient standing for the case to move forward.

The Trump administration, along with fossil fuel companies and lobbying groups, are currently fighting Aiken's decision to allow the case to move forward. But if those efforts fail, it's possible the case will go trial as early as this summer.

Outside of the United States, courts have shown a growing willingness to hear cases regarding climate change — and rule in favor of climate action. In 2015, a court in the Netherlands ruled in favor of plaintiffs

suing the government over climate inaction; in that case, over 900 plaintiffs argued that the government's climate policies constituted a human rights violation. The Dutch court agreed, and ordered the government to cut greenhouse gas emissions by 25 percent compared to 1990 levels by 2020. Similar lawsuits have been filed in Switzerland, Belgium, and New Zealand.

Elsewhere, climate arguments made in court have been successful in stopping specific carbon-intensive projects, whose associated emissions could hasten climate change. In South Africa, the government recently lost a case brought against them by an environmental justice organization, which sued to stop the construction of a new coal-fired power station on the basis that its impact on climate had not been properly considered. And in Austria, a court rejected a proposal for a new airport runway, arguing that the construction of the runway would increase the country's greenhouse gas emissions and force Austria to miss goals set by the Paris climate agreement.

Some experts argue that any climate remedy ordered by the courts might be less effective than a government-backed approach that combines regulations with incentives for clean energy technology. Still, if Congress were to prohibit the EPA from regulating greenhouse gases, then environmental groups would turn to whatever paths were available to them — even if those paths led back to legal strategies first employed more than a decade ago.

"People need to be pursuing all regulatory and business options. If federal common law of public nuisance becomes the best approach possible, that's what will be pursued," William Buzbee, a professor at the Georgetown University Law Center, said. "But it certainly would be less effective than the Clean Power Plan, which fundamentally was designed to incentivize states and utilities to trade pollution and energy and cost-effectively reduce their pollution."