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OPINION > COMMENTARY

President Trump shouldn't neuter national environmental policy

Trump's changes would render the National Environmental Policy Act less effective.



By Thomas O. McGarity
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This month marks the 50th anniversary of the enactment of the National Environmental Policy Act, or NEPA, the law that requires federal agencies to consider environmental impacts when they fund highways, allow coal and oil companies to extract fossil fuels from public lands, and undertake many other potentially disruptive activities. President Donald Trump celebrated the occasion not with a toast to the most successful environmental law in the nation's history, but with proposed changes to NEPA implementing regulations designed to render the statute less effective in protecting public resources and our shared environment.

NEPA's core requirement that agencies prepare environmental impact statements for "major federal actions" that may "significantly" affect the environment is meant to ensure that federal agencies consider the adverse environmental effects of their actions and inform the public of those effects.

The environmental impact statement requirement is judicially enforceable. For example, early NEPA litigation involving a proposal to dredge a massive 200-foot-wide channel in the Trinity River for 360 miles from Galveston Bay to turn Dallas-Fort Worth into a seaport played an important role in turning public opinion against the project. Voters in those cities rejected the proposal by a 2-to-1 margin.

In deciding whether agencies have complied with NEPA, the courts frequently rely on regulations that the White House Council on Environmental Quality wrote in 1978 to guide agencies in interpreting the law's terse requirements.

Industries that rely on federal dollars or federal permits to ensure their profits consistently complain that the environmental impact statement process has unduly delayed and added to the cost of important projects. In Donald Trump, they've found a receptive audience. On Jan. 2, he announced that the Council on Environmental Quality would publish amendments to "modernize and clarify" the 1978 regulations. Last week, the council followed with proposed changes that would allow agencies to avoid their NEPA obligations and make it harder for affected citizens to challenge NEPA violations in court.

The most significant proposed change would eliminate the requirement that agencies consider the “indirect” effects of their actions. Instead, agencies would only have to consider adverse effects that are reasonably foreseeable and that have a “reasonably close causal relationship” to the federal action. Agencies would not need to consider effects that are “remote in time, geographically remote, or the result of a lengthy causal chain.” The clear intent of this limitation is to relieve agencies of the obligation to consider such “remote” and “unforeseeable” effects as rising sea levels and fiercer wildfires when they approve actions that will release greenhouse gases into the atmosphere.

The proposal also purports to restrict judicial review of agency actions under NEPA. For example, when an agency decision-maker certifies that the agency considered the environmental effects of an action, that certification creates a “conclusive presumption” that the agency did in fact consider those effects. But the fact that a decision-maker (or a signature machine) signs a boilerplate certification does not make it true. The National Environmental Policy Act does not empower the Council on Environmental Quality to bind the discretion of a reviewing court when the evidence is to the contrary.

Prior to the Trump proposal, many federal courts had required federal agencies to analyze the impact of their actions on global warming before proceeding. The regulations, if finalized, will not overturn those opinions, but many of them relied on the 1978 regulations in interpreting NEPA. Whether other courts will be guided by the amended Council on Environmental Quality regulations or the reasoning in the prior cases will depend on the future composition of the federal judiciary.

NEPA has played a powerful role in stopping boondoggles like the Trinity River expansion project. If federal agencies are permitted to ignore climate change, however, Dallas might once again be in trouble.

Thomas O. McGarity teaches environmental law at the University of Texas School of Law and is a board member at the Center for Progressive Reform. He wrote this column for The Dallas Morning News.