

Last week's NEPA proposal bars agencies from considering many of the harms their actions will produce, such as climate change. These restrictions profoundly misunderstand the nature of environmental problems and are based on the flimsiest of legal foundations.

Specifically, the proposal tells agencies they do not need to consider environmental "effects if they are remote in time, geographically remote, or the product of a lengthy causal chain." The proposal also excludes "cumulative effects." [85 FR 1708] Not coincidentally, all of these restrictions target climate change, which involves very long-term, global, complex, and cumulative effects.

These restrictions fly in the face of everything we know about harm to the environment. We know that harm is often long-term rather than immediately obvious — think of chemicals that cause cancer decades after exposure. We also know that environmental effects aren't limited to the immediate neighborhood — think of the fertilizer runoff in the Midwest that causes dead zones in the Gulf of Mexico. In ecology, causal chains are often complex, and the same is true for atmospheric physics and other parts of environmental science. And we also know that much damage to the environment is cumulative, such as the effect of deforestation on biodiversity.

When it passed NEPA, Congress was well-aware of those realities. Rather than focusing only on direct effects, the statute speaks of the "interrelationships of all components of the natural environment." (§ 101(a)) Rather than focusing only on the near-term, it speaks of "the responsibility of each generation as a trustee of the environment for succeeding generations" (§ 101(b)(1)), and of "the relationship of short-term uses of man's environment and the maintenance and enhancement of long-term productivity" (§ 101(2)(C)(iv)). Rather than considering only localized effects, Congress was concerned about the "worldwide and long-range character of environmental problems." (§ 101(2)(F)) In short, Congress knew then what scientists know today about the complex, long-term, and widespread nature of environmental effects.

The Administration relies on two justifications for arbitrarily restricting what counts as an environmental effect. The first justification is based on the concept of proximate cause in tort law. I teach tort law, and I feel confident in saying the Administration misrepresents tort law as it exists today and as it existed when NEPA was passed. It used to be thought, a century ago, that only "direct" effects counted as proximate cause, as measured by the length of the chain of causation and closeness in space and time. That was the view taken in Judge Andrews dissenting opinion in the famous *Palsgraf* case. (Famous to lawyers and law students, anyway). But that was a *dissenting* opinion, and by the middle of the 20<sup>th</sup> Century it was clear that Justice Cardozo's majority opinion prevailed. Under the majority review,

the keystone is whether an effect is reasonably foreseeable, not whether it is direct or close in time or space. Moreover, tort law does provide liability for cumulative effects, when multiple wrongful acts combine to cause harm. Tort law just doesn't share the Administration's cramped view of what qualifies as causation.

The Administration's other justification is a single Supreme Court case, *Department of Transportation v. Public Citizen*. The facts of the case were peculiar. There was a moratorium on allowing Mexican trucks in the U.S. The President could not lift the moratorium until DOT came up with safety rules for the trucks. DOT did an environmental impact statement on the safety rules. It didn't consider the follow-on effect that the President would lift the moratorium, which might increase air pollution. Of course, DOT had no control of the President's action, and the President himself is not subject to NEPA. The Court sided with DOT and said that the President's actions were his responsibility, not DOT's. From this offbeat case, the Trump Administration is trying to find a basis for transforming the interpretation of NEPA.

That's a drastic over-reading of the Court's very brief opinion. For instance, the Court specifically said that the requirement to consider cumulative effects simply didn't apply here, not that cumulative effects were irrelevant. The Court quoted language from the existing regulations saying that consideration of direct and indirect effects was required, but it did not question the validity of that language. It also said specifically that DOT had complied with its obligation to consider cumulative effects. There's not much there to support the current proposal. Like the proposal, the Court did point to the proximate cause requirement in tort law as a source of guidance — but as we've seen above, tort law doesn't support Trump's proposal either. When you get down to it, the Court's reasoning was very simple: since the agency was only entitled to consider truck safety issues, it had no reason to consider environmental effects that it could not control and were legally irrelevant to its decision.

In short, the Administration is trying to build an entire brick fortress out of a handful of straw. Every failed argument that industry has made in court seems to have resurfaced in this proposal. But neither in science nor in law is causation defined as narrowly as the proposed NEPA rule.