



PolicyPerspective

Time for Regulatory Transparency

by Kathleen Hartnett
White
Distinguished Senior Fellow
& Director, Center for
Natural Resources

Introduction

Texas needs measures to strengthen transparency in agency rulemakings. Texans already benefit from strong fiscal transparency measures—full disclosure of state revenues and expenditures. Texans equally deserve regulatory transparency—full disclosure of the cost-effectiveness of regulation imposed by state rules.¹ The federal government and most states already require such assessment of cost-effectiveness, but Texas has not required it for private sector impacts.² The Texas *Administrative Procedures Act* requires assessment of fiscal implications for state and local government, but not for the public and regulated entities.

Full disclosure of cost-effectiveness is particularly needed in environmental regulations, the most rapidly expanding area of state and federal regulation.³ Environmental regulations now affect every moment of daily life and all goods and services. The Texas Commission on Environmental Quality (TCEQ) now implements and enforces roughly 6,000 rules. Although multiple benefits to health, safety and the environment flow from these rules, there is no mechanism for tracking the financial cost and environmental effectiveness of the rules. Appropriately conducted, cost-effectiveness analysis of proposed rules can reduce cost and strengthen environmental protections. Such analysis in no way precludes high-cost regulation otherwise authorized, but should help regulators design the most efficient regulation.

Existing Law: Important First Step

The Texas General Government Code: 2001.0225 does require a cost-effectiveness

analysis for a select group of rules, titled “Regulatory Analysis of Major Environmental Rules.” These provisions, however, have apparently never been utilized by TCEQ over the 12 years since their enactment.

The prospect of onerous new ozone State Implementation Plan control measures and mandatory CO₂ reduction heightens the importance of such “regulatory transparency” in Texas. Minor amendments to these existing General Government Code provisions are needed to clarify the scope of rules covered by existing law and simplify the required steps of the cost-effectiveness analyses. Although applicable to a small group of rules defined as “Major” under the law, re-invigorating this existing law is an important step toward much needed regulatory transparency.

Statutory Background

The Texas *Administrative Procedure Act* (APA) currently requires a fiscal note for every rule promulgated by a state agency. The note must explain the fiscal implications on state and local governments expected as a result of enforcing and administering the proposed rule. This fiscal analysis excludes economic impact on regulated entities and the general public.

For “Major Environmental Rules” intended to protect human health, safety and the environment, the General Government Code requires that the fiscal note must also include a detailed “Regulatory Analysis of a Major Environmental Rule,” assessing the following about the proposed rule: (i) the benefits, (ii) the costs to state agencies, local governments, the public, and the regulated community, (iii) a quantitative assessment of cost or a quali-

tative assessment if a quantitative estimate is not feasible, (iv) reasonable alternative methods to achieve the same purposes, and (v) whether there is more than one method of compliance. However, the exceptions in current law—as interpreted—have nullified the requirements that information on economic impact to the private sector be considered for rules.

Legislative History

In 1995, the Senate passed Senate Bill 978 by Senators Sims and Brown, which would have required an agency adopting an environmental regulation to conduct a cost-benefit analysis prior to adoption of a rule. The purpose of SB 978 was to require state agencies to consider the impact of proposed regulations on the public, regulated entities, local governments, and state agencies. Although SB 978 was received by the House late in the session and died prior to committee consideration, the bill became the subject of a Senate Natural Resources Committee interim study charge. The interim study committee recommended that the Legislature opt for a broader approach of information gathering on major environmental regulations, culminating in the enactment into law of Senate Bill 633 by Senator Brown and Representative Uher in 1997, now codified as General Government Code 2001.0225. According to the bill analysis, the approach of the statute created by SB 633 avoids placing a “price tag” on benefits to the environment and human health, focusing instead on cost-effectiveness through full disclosure of information, assumptions, and data on which the proposing agency has relied in drafting the rule. Note that SB 633 in no way precluded agency adoption of high-cost regulation. The legislation only required regulatory transparency on cost to the private sector.

Current Statutory Framework—Generally

Government Code Section 2001.0225, created by SB 633 in 1997, requires any state agency to perform a Regulatory Analysis of a Major Environmental Rule if two separate criteria are met. The first prong is whether a proposed rule comes under the definition of a “Major Environmental Rule” which is:

. . . a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.⁴

If a proposed rule falls under this definition of a Major Environmental Rule, the second prong is met by one of the following four criteria. The proposed rule: (i) exceeds a standard set by federal law unless specifically required by state law; (ii) exceeds an express requirement of state law unless required by federal law; (iii) exceeds a requirement of a delegation agreement with the federal government to implement a state and federal program, or (iv) is adopted solely under the general powers of the agency.

If both prongs of the statutory test are met, an agency must perform a cost-effectiveness analysis called a Regulatory Analysis of a Major Environmental Rule. Agencies most likely subject to performing a Regulatory Analysis of a Major Environmental Rule include the Texas Parks and Wildlife Commission, General Land Office, Railroad Commission, and Texas Commission on Environmental Quality (TCEQ). This memorandum only expressly addresses rulemakings of the TCEQ.

TCEQ Practice

In practice, rarely if ever has TCEQ determined that a proposed rule meets both prongs of the statutory test requiring a Regulatory Analysis of a Major Environmental Rule. Interestingly, the TCEQ has no formal procedural rules or guidance readily available to inform the public how the agency determines whether a proposed rule would require a Regulatory Analysis of a Major Environmental Rule.

Typical TCEQ preamble language in rulemakings since the enactment of SB 633 merely asserts that the legislation was intended only for “extraordinary rules” and further explains that:

With the understanding that [the Regulatory Analysis for a Major Environmental Rule] would seldom apply, the [TCEQ] provided a cost estimate for [Senate Bill 633] that concluded “based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.” The [TCEQ] also noted that the number of rules that would require assessment under the provisions of the bill was not large. The conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.⁵

Thus, the TCEQ consistently takes the position in preamble language that the agency intended to sparingly perform a Regulatory Analysis for a Major Environmental Rule. Citing a long line of case law, the agency also firmly asserts that the Legislature has revised the Government Code since the enactment of SB 633, but left the statutory provisions created by the bill intact. Thus, the Legislature is deemed to have accepted the agency's interpretation of sparingly performing a Regulatory Analysis for a Major Environmental Rule except in extraordinary circumstances. Further, the TCEQ argues that the agency is only required to "substantially comply" with requirements to provide a Regulatory Analysis for a Major Environmental Rule, since the "substantial compliance" provisions of the APA found at Government Code 2001.035 specifically reference statutes created by SB 633.

TCEQ's implementation of requirements of the federal Clean Air Act (FCAA) is instructive of TCEQ's position on when a Regulatory Analysis for a Major Environmental Rule would be triggered. The FCAA requires states to adopt and implement State Implementation Plans (SIPs) to meet the National Ambient Air Quality Standards (NAAQS) but the FCAA does not dictate which specific control measures must be adopted in state rule. Rather, the FCAA requires that the combined measures taken by a state and incorporated in the state SIP result in monitored attainment of the numeric air quality standards.

TCEQ has excluded all SIP control measure rulemakings from Major Environmental Rule analysis. Although the TCEQ may otherwise agree that a rule proposed to meet the NAAQS falls under the definition of a Major Environmental Rule, the agency nevertheless generally asserts that the proposed rule is required by federal law and thus the Regulatory Analysis for a Major Environmental Rule is not required.

The one reported appellate court case appears to support TCEQ's position that SIP measures intended to comply with

the NAAQS are exempted from a Regulatory Analysis for a Major Environmental Rule. Brazoria County challenged the administrative sufficiency of TCEQ's promulgation of SIP control measures mandating annual vehicle emission inspection and regulating lawn maintenance.⁶

In this case, the court held that TCEQ's rules implementing requirements for vehicle inspection and lawn-maintenance did not trigger the statutory requirement for a Regulatory Analysis for a Major Environmental Rule since the TCEQ was attempting to meet, not exceed, a relevant standard set by federal law. Minor change to the existing law could clarify that state rules exceeding an express requirement of federal law (to replace the current "exceeds a standard set by federal law") and not required by state law are major environmental rules.

TCEQ has successfully resisted performing any Regulatory Analysis for any Major Environmental Rules, as evidenced by a particularly onerous rulemaking adopted in May 2007 to meet the NAAQS for ozone in the Dallas-Fort Worth area. The TCEQ, however, has demonstrated that the agency is able to determine how much new regulations will cost. In this particular rulemaking, the agency provided information about the number of regulated entities which would be affected, and cited a figure of \$225 million to \$350.6 million for the first five years for all industries, and \$9.6 million for all governmental entities.⁷

With relatively minor clarification of the criteria for "Major Environmental Rules," and with simplification of the steps in the required "Regulatory Analysis," existing General Government Code 2001.0225 provides an important step toward regulatory transparency. Strengthening administrative requirements for cost-effectiveness assessments of proposed rules will help decision-makers design more effective and more practical regulation—good for the environment, business, and household budgets. ★

¹ Cost-effectiveness analysis is usefully distinguished from cost-benefit analysis. Cost-benefit analysis typically quantifies and assigns dollar values to both the costs and the social benefits of the regulation. (For example, the cost of pollution control technology compared to a dollar value assigned to the pollution reduction achieved by the regulation). Cost-effectiveness analysis, in contrast, compares the dollar cost of the regulation with the intended result of the regulation (e.g., amount of pollution reduced.)

² See Executive Order 12866 issued by President Bill Clinton and still in effect. The Order requires a regulatory analysis similar to that in Texas General Government Code 2001.0225. Every U.S. President since Richard Nixon has required some type of administrative procedure comparing cost, benefit or effectiveness in executive agency rulemakings. Also see Executive Order 12291 issued by President Ronald Reagan with Office of Management and Budget analysis and approval required before Federal Register publication of rule proposals.

³ Dudley, Susan E., Primer on Regulation, Policy Resource No.1, Mercatus Policy Series, November 2005, George Mason University

⁴ Texas Govt. Code 2001.0225 Ann., 2001.0225(g)(3) (Vernon 2000).

⁵ 32 Tex. Reg. 3268, June 8, 2007.

⁶ Brazoria County v. Texas Com'n on Environmental Quality (App. 3 Dist. 2004)128 S.W.3d728.

⁷ 30 Texas Administrative Code, Subchapter E, Division 4, East Texas Combustion.

About the Author

Kathleen Hartnett White joined the Texas Public Policy Foundation in January 2008 as Director of the Center for Natural Resources.

Prior to joining the Foundation, White served a six-year term as Chairman and Commissioner of the Texas Commission on Environmental Quality (TCEQ). With regulatory jurisdiction over air quality, water quality, water rights and utilities, and storage and disposal of waste. TCEQ's staff of 3,000, annual budget of over \$600 million, and 16 regional offices make it the second largest environmental regulatory agency in the world after the U.S. Environmental Protection Agency.

Prior to Governor Rick Perry's appointment of White to the TCEQ in 2001, she served as then-Governor George Bush's appointee to the Texas Water Development Board, where she sat until appointed to TCEQ. She also served on the Texas Economic Development Commission and the Environmental Flows Study Commission.

A writer and consultant on environmental laws, free market natural resource policy, private property rights, and ranching history, White received her bachelor *cum laude* and master degrees from Stanford University where for three years she held the Elizabeth Wheeler Lyman Scholarship for an Outstanding Woman in the Humanities. She was also awarded a Danforth National Fellowship for doctoral work at Princeton University in Comparative Religion and there won the Jonathan Edwards Award for Academic Excellence. She also studied law under a Lineberry Foundation Fellowship at Tech University.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute guided by the core principles of individual liberty, personal responsibility, private property rights, free markets, and limited government.

The Foundation's mission is to lead the nation in public policy issues by using Texas as a model for reform. We seek to improve Texas by generating academically sound research and data on state issues, and recommending the findings to policymakers, opinion leaders, the media, and general public.

The work of the Foundation is primarily conducted by staff analysts under the auspices of issue-based policy centers. Their work is supplemented by academics from across Texas and the nation.

Funded by hundreds of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

