

Basic Good Governance: Regulatory Transparency

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SIDEBAR

What the amendments do and don't do:

- The required regulatory analysis does not apply to permitting, but only to rulemaking. Agency promulgation of rules and issuance of permitting are two entirely separate legal processes.
- As in existing law, amendments have limited applicability to a small number of "major environmental rules."
- The purpose of these simple requirements—to estimate costs and benefits of proposed rules—is to save the state and private sector money while assuring genuine effectiveness of rules.
- TCEQ already collects economic data on many proposed rules. Formalizing requirements for a cost-benefit analysis is not a major addition to existing procedures.
- Proposed amendments do not prevent adoption of any rules otherwise authorized—whatever the cost.

It is time for regulatory transparency to join fiscal transparency as a fundamental principle of prudent governance. Texans already benefit from strong fiscal transparency measures—full disclosure of state revenues and expenditures. Texans equally deserve regulatory transparency—full disclosure of the costs and benefits of regulation established by state rules. Regulatory transparency is particularly needed in environmental regulations, the most rapidly expanding area of federal and state regulation. Assessment of the financial costs and the environmental benefits should be a more clearly required component of rulemaking at the Texas Commission on Environmental Quality (TCEQ).

Background: Regulatory Analysis of Cost-Effectiveness

The Texas Administrative Procedures Act (TAPA), governing all state rulemaking, requires an assessment of fiscal implications to state and local government but not to the private sector. The General Government Code "Regulatory Analysis of Major Environmental Rules," (Section 2001.0225) does require this analysis of cost to the private sector for a limited number of "major" rules. Enacted in 1995, these statutory provisions, apparently, have never been utilized by TCEQ.

Minor amendments to this existing law are needed to clarify applicability and to streamline requirements. The amendments will neither increase administrative costs nor preclude adoption of otherwise authorized rule. Properly conducted cost-benefit

or cost-effectiveness analyses can reduce cost to the state and private sector while maximizing environmental effectiveness. Plain common sense and good governance demand that the costs and benefits of regulation are more transparent to the general public and regulated entities.

Federal and state environmental regulations affect every moment of daily life and all goods and services. The number, scope, and cost of environmental regulations have dramatically increased in the last 20 years. TCEQ now implements and enforces roughly 6,000 rules, the majority of which are dictated by federal law. Although multiple benefits to health, safety, and the environment flow from these rules, there is no accessible mechanism for tracking the cost and effectiveness. Unlike the state budget which tracks direct spending supported by taxes and fees, the costs and results of the growing edifice of environmental regulation remain nebulous.

Goal of Regulatory Analysis of Cost and Benefits

As a required step in rulemaking, straightforward analysis of anticipated environmental benefits and financial costs helps regulators design the most efficient regulation. Analysis which concludes extremely high cost with minimal benefit should send the rulemaker back to the drawing board to craft a more efficient rule. Alternative definitions of standards, requirements, and methods of compliance often can yield greater measurable benefit at lower cost.

The federal government has long required cost-benefit analysis of proposed rules but not this state. The federal Administrative Procedures Act requires a Regulatory Impact Analysis (RIA) which includes fiscal impact on the private sector. As Chief Executive, U.S. Presidents have often added rulemaking requirements. Executive Order 12866, in effect since the Clinton Administration, has requirements similar to the Regulatory Analysis provisions of Texas General Government Code 2001.0225.

Current Amendments of Texas Law Needed to Simplify and Clarify Requirements

Proposed amendments to the “Regulatory Analysis of Major Environmental Rule” provisions of the General Government Code intend to clarify and simplify the required analysis. Existing law limits applicability to “major environmental rules.” A “Major Environmental Rule” includes only rules: 1) exceeding an express requirement of federal law or state law; 2) adopted solely under the agency’s general powers; or 3) exceeding a requirement of a delegation agreement. These criteria would only apply to a few rules. Amendments of these criteria would eliminate the third element for reasons of simplicity. Existing law stipulates an impact analysis with 10 steps. Proposed amendments eliminate six of these 10 steps.

Reducing the steps of the analysis will ease any administrative burden while strengthening the core of the analysis. Under the amendments, the regulatory analysis would include: 1) identification of the environmental risk addressed and anticipated benefits of the rule; 2) estimate of the financial costs to state agencies, local governments, citizens, and regulated entities; and 3) assessment of alternative methods of compliance. With over 80 steps in TCEQ’s internal rulemaking process, this straightforward cost-effectiveness analysis of a select few “major” rules need not add time or expense to the agency’s work.

By whatever label—cost-benefit analysis, cost-effectiveness analysis, or impact analysis—regulatory analysis is a widely accepted step in the rulemaking process. Such analysis may help legislative oversight of agency implementation of state law. With minor amendments to clarify and streamline, the Regulatory Analysis of Major Environmental Rule provisions of existing Texas law will provide a sound yardstick.

More prudent rulemaking will save state agency expenditures and reduce the cost to Texans and regulated industries, while maximizing measurable environmental benefits from the thousands of environmental rules under which Texans live. Regulatory transparency is good governance.

SIDEBAR

Proposed Amendments to General Government Code 2001.0225

Subsection (a): Clarifies that rules exceeding an “express requirement of” federal law are major environmental rules. Compliance with federal standards are non-discretionary for the state but the state typically designs, by rule, what regulatory methods to achieve the standard.

Clarifies that rules adopted under the agency’s general powers and not explicitly required by state or federal law are “major” environmental rules.

Subsection (b): New language clarifies that the cost-benefit analysis of proposed rules in no way prevents an agency from adopting a rule.

Subsection (c): Streamlines by eliminating vague or duplicative steps in the regulatory analysis.

Subsection (d) and (e): Streamlines requirements by eliminating duplicative steps.

Subsection (g): Clarifies the scope of “major environmental rules” to include state-adopted control measures for federal criteria pollutants (i.e., ozone), and greenhouse gases. Ozone control measures adopted in state rule have been among the most expensive environmental regulations to date. Any prospective greenhouse gas regulation imposed by state rule should be subject to a vigorous cost-benefit analysis.

