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Regulatory Transparency is Good Governance

by Kathleen Hartnett White

Key Points

- Texas should clarify in statute that the regulatory analysis applies to all environmental rules promulgated by TCEQ.
- Analysis of the cost-effectiveness of proposed rules in no way prevents an agency from adopting a rule.
- The current regulatory analysis should be streamlined.
- The required analysis should extend to state-adopted control measures in federally required State Implementation Plans (SIPs) to comply with National Ambient Air Quality Standards (NAAQS) such as ozone.

Regulatory transparency should 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 purpose, costs, and intended effects 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 intended environmental results 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, currently requires an assessment of the fiscal implications of proposed rules to state and local government but not to the private sector. The General Government Code's "Regulatory Analysis of Major Environmental Rules," (Section 2001.0225) does require an analysis of cost to the private sector but only for a limited number of "major" rules. A "Major Environmental Rule," however, 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 apply to only a very few rules; in fact, in the 15 years since enactment of these provisions, TCEQ has classified only one proposed regulation as "major."

Simple amendments to this existing law are needed to clarify applicability and to streamline requirements. These amendments will neither increase administrative costs nor preclude adoption of otherwise authorized rules. Properly conducted 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 effects 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 perhaps more than 6,000 rules, the majority of which arise from federal regulation implemented by the state. Although benefits to health, safety, and the environment may 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 effects of the growing edifice of environmental regulation remain nebulous.

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Goal of Regulatory Analysis of Cost and Effects

As a required step in rulemaking, a straightforward estimate of anticipated environmental outcomes and financial costs can help regulators design the most efficient regulation. Analysis which concludes extremely high cost with minimal result should send the rule maker 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. Since the early 1980s, the federal government has required various forms of regulatory impact analysis of proposed rules. The federal Administrative Procedures Act requires a Regulatory Impact Analysis (RIA) which includes fiscal impact on the private sector. The Texas Administrative Procedures Act does not require such an economic impact assessment on the regulated entities. Several major environmental laws like the Clean Air Act and the Clean Water Act also have specific but limited provisions for economic impact analysis. As Chief Executive, U.S. Presidents have often used Executive Orders to stipulate the components of regulatory impact analysis. Executive Order 13563 "Improving Regulation and Regulatory Review," issued by President Obama in 2011, replaced Executive Order 12866, in effect since the Clinton Administration.

Current Amendments of Texas Law Needed to Simplify and Clarify Requirements

Importantly, any proposed amendments should simplify the regulatory analysis now required in the General Government Code. Existing law stipulates an impact analysis with 10 steps. Only three steps are needed. This new simplified analysis would apply to all environmental regulations promulgated by TCEQ, and would replace the more complex analysis currently required for major rules.

Reducing the steps of the analysis will ease administrative burden and strengthen the core of the analysis. Under our proposal, the regulatory analysis would include:

1. identification of the problem the rule is intended to address;

2. estimate of the anticipated environmental effect or result, e.g. measureable improvement in air quality; and

3. estimate of the financial cost of compliance on regulated entities and consumers.

With over 80 steps in TCEQ's internal rulemaking's process, this straightforward cost-effectiveness analysis of environmental rules need not add time or expense to the agency's work.

The required analysis should also extend to state-adopted control measures in federally required State Implementation Plans (SIPs) to comply with National Ambient Air Quality Standards (NAAQS) such as ozone.

In recent years, the EPA has manipulated cost-benefit analysis to implausibly exaggerate and monetize the health benefits from environmental regulation. The TCEQ's Chairman and Chief Toxicologist have testified to the U.S. Congress about the fundamental errors in EPA's cost-benefit analyses.

Reforms to the Government Code can avoid the misguided complexity and errors in the EPA's current approach to "cost-benefit" analysis by using the more straightforward approach of "cost-effectiveness" analysis. Estimating—as quantitatively as possible—the anticipated effects or results of proposed regulation offers a less cumbersome and more objec-

tive measure than the more nebulous and subjective concept of benefits. Cost-benefit regulatory analysis typically quantifies and assigns a dollar value to both costs and the social benefits of regulation. For example, the analysis would compare the cost of using a specific pollution control technology compared to an estimated dollar value assigned to the health benefits supposed to result. Cost-effectiveness analysis, in contrast, compares the dollar cost of regulatory compliance with the intended result (e.g., amount of an emission reduced).

In the last session, the late Representative Ken Legler introduced HB 125, a bill like the amendments here proposed to the existing the General Government Code's requirement for regulatory analysis. HB 125 passed in the House 113-27 but was moved out of the Senate Natural Resources Committee in the last days of the session—too late to get to the Senate floor.

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.

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What the proposed reforms 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.
- The purpose of these simple requirements—to estimate costs and effectiveness of proposed rules—is to save the state and private sector money while assuring genuine effectiveness of new regulation.
- TCEQ already collects economic data on many proposed rules. Formalizing requirements for a cost-benefit analysis is not a major addition to existing procedures.
- Requiring cost-effectiveness analysis does not prevent adoption of any rules otherwise authorized—whatever the cost.

About the Author

Kathleen Hartnett White joined the Texas Public Policy Foundation in January 2008. She is a Distinguished Senior Fellow-in-Residence and Director of the Armstrong Center for Energy & the Environment.

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 & utilities, storage and disposal of waste, TCEQ's staff of 3,000, annual budget of more than $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 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. She is now serving in her fifth gubernatorial appointment as an officer and director of the Lower Colorado River Authority.

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