

Texas Public Policy Foundation

Keeping Texas Competitive

A Legislator's Guide to the Issues 2013-2014



Regulatory Impact Analysis ★ Keeping Texas Competitive Priority

The Issue

The basic purpose of regulation in our state and federal constitutional scheme is to implement the laws enacted by popularly elected representatives—no more and no less. The Legislature creates and delegates to agencies the authority to promulgate and enforce regulations. Regulations carry the force of law. These are very broad powers which can—but should not—authorize regulation not clearly authorized by specific law. For example, the Texas Commission on Environmental Quality (TCEQ's) general powers provide authority “necessary and convenient” to carry out the agency’s statutory mission to protect health, safety, and the environment.

If limited government is the guiding principle, state regulation must come under specific and limited—in contrast to general—authority. Regulation issued solely by the general powers of an agency should be the exception and only exercised under heightened justification. Statutes articulating clear policy objectives and preferred regulatory mechanisms limit regulatory scope and can facilitate measurable results. Although agencies often prefer more general statutes granting broad discretionary authority, clear statutory language stipulating regulatory goal and mechanism reduces regulatory “creep,” i.e., regulations exceeding authorizing statutes.

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 may flow from these rules, there is no accessible mechanism for tracking their cost and effectiveness.

The federal government has long required cost-benefit analysis of proposed rules. Texas has no similar requirement. The Texas Administrative Procedures Act, governing all state rulemaking, requires an assessment of fiscal implications of new regulations on state and local government but not of impacts on the private sector. The General Govt. Code “Regulatory Analysis of Major Environmental Rules” (Sec. 2001.0225) does require this analysis of cost to the private sector for a limited number of “major” rules. However, a “major” environmental rule includes only rules: 1) exceeding an express requirement of federal or state law, 2) adopted solely under the agency’s general powers, or 3) exceeding a requirement of a delegation agreement. The formal Regulatory Impact Analysis (RIA) required in these provisions apparently has only been included in one rulemaking over the 14 years since enactment. The current statutory definition of “major rule” has been effectively interpreted to exclude all rules promulgated.

Court decisions seem to validate this interpretation of current law. In *Brazoria County v. Texas Com’n on Environmental Quality* (App. 3 Dist. 2004)128 S.W.3d728, 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 developed the regulation to meet, not exceed, the National Ambient Air Quality Standard for ozone.

Texas environmental agencies generally avoid most of the excesses and inefficiencies typical of the federal agencies. State and local governments are connected to the regulated entities and the communities in which regulated business operates. TCEQ has wisely striven to resist unwarranted, counter-productive, unlawful dictates of federal agencies. Yet Texas, whose population is larger than many countries and whose economy is larger than most countries, has a regulatory purview that is, indeed, vast. However well-honed now, efforts to streamline regulatory design and to measure effectiveness should remain a constant focus of Texas state agencies.

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Proposed rules with extremely high cost and minimal or immeasurable environmental effect should be sent back to the drawing board. Alternative definition of standards, requirements, and methods of compliance can yield greater environmental outcomes at lower cost. With over 80 steps in TCEQ's internal rulemaking process, this cost-effectiveness analysis of a select few "major" rules need not add time or expense to the agency's work.

The Facts

- Texas does not currently require state agencies to perform a cost-benefit analysis for new regulations in most circumstances. A current requirement that RIA be done for "major" new environmental rules has been invoked only once in 14 years.
- The Texas Administrative Procedures Act requires an estimate of the fiscal implications of new rules for state and local government but not for costs for private business and Texas residents.
- In the 82nd Legislature, Rep. Ken Legler introduced HB 125, which would have implemented RIA requirements for new TCEQ regulations. HB 125 passed the House, but did not make it to the Senate floor in time for passage.

Recommendations

- Before imposing new regulations, Texas agencies should be required to do a three-step regulatory impact analysis that: 1) identifies the problem the rule is intended to address, 2) estimates the rule's environmental effectiveness, and 3) estimates the financial cost directly on regulated entities and indirectly on Texas citizens.
- In conducting this analysis, actual monitored data (credible, representative measures of actual air quality) should trump modeled data (computer simulations of projected air quality).
- Performance measures for regulatory agencies should include measured outcomes (i.e., measurable improvement in air quality, water quality) and not merely outputs (i.e., number of permits, enforcement actions).

Resources

"Taming the Fourth Branch of Government" *The Daily Caller* by Kathleen Hartnett White (Sept. 2011).

Time for Regulatory Transparency by Kathleen Hartnett White, Texas Public Policy Foundation (May 2009).

Basic Good Governance: Regulatory Transparency by Kathleen Hartnett White, Texas Public Policy Foundation (Apr. 2009).

