SUBJECT: Cost benefit analyses of major environmental rules

COMMITTEE: Environmental Regulation — favorable, without amendment

VOTE: 6 ayes — Chisum, Jackson, Allen, Howard, Kuempel, Talton

0 nays

3 absent — Dukes, Hirschi, Puente

SENATE VOTE: On final passage, March 17 — 25-6 (Barrientos, Gallegos, Shapleigh, Truan, West, Zaffirini)

WITNESSES: For — Jon Fisher, Texas Chemical Council; Mary Miksa, Texas Association of Business and Chambers of Commerce; Ben Seabree, Texas Mid-Continent Oil and Gas Association; Peggy Venable, Citizens for a Sound Economy

Against — Mary Arnold, League of Women Voters; Ken Kramer, Sierra Club; John Scanlon, Environmental Defense Fund

DIGEST: SB 633 would require a state agency to conduct a regulatory analysis before adopting a major environmental rule.

The validity of a major environmental rule that was adopted without a regulatory analysis could be challenged by a person who submitted a public comment about the rule to the state agency. The person would have to file an action for declaratory judgment within 30 days after the effective date of the rule. If a Travis County district court determined that the rule had not been properly proposed and adopted, the rule would be invalid.

The bill would take effect September 1, 1997, and would only apply to rules proposed on or after than date.

Affected rules. A major environmental rule would mean a rule to protect the environment or reduce risks to human health from environmental exposure and that could adversely affect in a material way the economy,

productivity, competition, jobs, the environment, or the public health and safety of the state.

A regulatory analysis would determine whether the new rule was necessary to address the problem it was intended to address and would consider the costs and benefits of the proposed rule in relationship to state agencies, local governments, the public, the regulated community, and the environment.

Regulatory analyses would be required only for proposed rules that would:

- exceed standards set by federal law, unless the rules were specifically required by state law;
- be adopted solely under the general powers of the agency instead of under specific state laws;
- exceed a requirement of state law, unless the rules were specifically required by federal law; or
- exceed a requirement of a federal delegation agreement or contract between the state and the federal government to implement a state or federal program.

A regulatory analysis would not have to be conducted for rules proposed or adopted on an emergency basis to protect the environment or reduce risks to human health from environmental exposure.

Impact analysis. When giving required notice of rulemaking for a proposed major environmental rule, the agency would have to prepare a draft impact analysis describing the anticipated effects of the proposed rule. The analysis would be incorporated into the fiscal note already required by the Administrative Procedure Act. The draft impact analysis would be written in such a manner that a reasonable reader would be able to identify the impacts of the proposed rule.

A draft impact analysis prepared by an agency would be required to identify the rule's anticipated costs and benefits to state agencies, local governments, the public, and the regulated community and would explain why the agency had determined that a specified method of compliance was preferable to adopting a flexible regulatory approach such as a performance-oriented,

voluntary, or market-based approach. A draft impact analysis would also describe alternative methods for achieving the purpose of the rule that were considered by the agency and provide the reason those alternatives were rejected.

After considering public comments on the rule and determining that a proposed rule would be adopted, the agency would be have to prepare a final regulatory analysis addressing all comments and finding that the rule would be the most effective at obtaining the desired result with costs no greater than those of alternative regulatory methods. The analysis and final statement would identify information the agency determined was relevant and the assumptions and facts upon which it had based the regulatory decision. In making its final decision on the rule, the agency would be required to assess all the information that had been submitted, actual data, and assumptions that reflected actual impacts that the regulation was likely to impose.

SUPPORTERS SAY:

SB 633 would allow for scrutiny of certain major environmental rules that could adversely affect the economy or a sector of the economy without providing additional protection to the public. The regulatory analyses described by SB 633 would be applied in very limited circumstances and would apply only to rules that the state has discretion to adopt and that are not required by federal law or specifically required by state law. These analyses could be performed by current agency personnel who are already required to prepare a fiscal note for proposed rules, and the bill's fiscal note says the bill would result in no fiscal implication to the state.

The purpose of the proposed law is not to thwart regulation but to ensure that agencies have all the resources they need to make an informed decision. Under SB 633, regulations would be crafted to accomplish their goal in as cost-effective and nonintrusive manner as possible. The bureaucrats who promulgate rules are not accountable to the public and often have no real-world idea about the effect of rules. SB 633 would require scrutiny and reflection for environmental rules not mandated by federal law or specifically required by state law.

While there are numerous situations where environmental regulation is necessary and beneficial, in some cases rules are promulgated without rhyme

or reason, providing almost no benefit to the public but costing the regulated community and the public it serves large amounts of money. SB 633 would provide a way by which these rules would be analyzed prior to promulgation to ensure that they would represent a true benefit to the public. Unnecessary regulatory laws can have a negative impact on business, especially small business, and slow productivity and job creation.

The bill would encourage a more open process of rulemaking, requiring agencies to to present their views on problems and proposed solutions. This would lead to fruitful dialogue about rules that, in the end, would lead to more effective solutions to environmental problems. Through the public comment period, ordinary citizens could comment on the agency's assumptions, provide important information to it, and suggest less-intrusive but equally successful ways to address the problem. Small businesses and others would welcome the bill's requirement that the agency furnish information about the rule in plain language, since government regulations are often written so that a normal person cannot understand them.

Providing the public with insight as to what problem the agency is trying to address and allowing public comment on proposed solution would make the rulemaking process more collaborative and provide creative, more effective, and less costly solutions to regulatory dilemmas.

OPPONENTS SAY:

Under SB 633, all state agencies would have to conduct an expensive, highly bureaucratic multi-step regulatory analysis of any significant environmental legislation. The bill is being promoted by regulated industries who want to thwart possible environmental rules by paralyzing them with unnecessary bureaucratic procedures.

Agencies, for fear of being sued, would end up conducting unnecessary and time-consuming analyses on many of the environmental rules they promulgate or even more likely decide not promulgate rules at all. Since the bill would not appropriate money for additional agency staff, the time spent analyzing proposed rules would ultimately slow down vital agency business, including permitting decisions, enforcement actions, and responding to the needs of citizens in a timely manner.

Cost benefit analyses of environmental rules would require an agency to place monetary values on the cost of saving lives and preventing disease. It is usually easier to quantify the costs of complying with an environmental rule than it is to qualify the benefits, but those benefits are of immeasurable importance. How, for example, does one assign a cost to whether or not a child suffers from asthma? It would be be impossible and morally questionable for the agency to make such calculations. After all, there are grave costs to *not* providing environmental protections and the long-term benefits for all citizens that come from clean air and safe water.

The bill would leave the Texas Natural Resource Conservation Commission (TNRCC) and other agencies vulnerable to costly lawsuits over whether a rule was required by a federal program or "expressly" required by state law. An agency would be hamstrung in trying to decide whether or not a regulatory analysis was required. The TNRCC, for example, is required to adopt water quality standards by federal laws, but the federal government does not specify the numerical standards for each stream. The bill is unclear as to whether or not the TNRCC would have to do a regulatory analysis in this case.

There are some resources in the state that need unique and additional protection and even the regulated community in those areas agree on this fact.
Under SB 633, however, special rules like the Edwards rules, promulgated to protect the recharge zone of the Edwards Aquifer, could be invalidated.

OTHER OPPONENTS SAY:

SB 633 should be amended to delete the requirement for a cost-benefit analysis. Instead, its objectives should be limited to providing new information to the public and interested parties about proposed environmental rules. Those who comment on rules are allowed to sue to invalidate them, so those who support rules should also have the right to intervene in these lawsuits.