

SUBJECT: Cost benefit analyses of environmental rules

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 5 ayes — W. Smith, Aliseda, Legler, Lyne, Reynolds
2 nays — Farrar, Burnam
2 absent — Chisum, Hancock

WITNESSES: For — Stephen Minick, Texas Association of Business; Kathleen White, Texas Public Policy Foundation; (*Registered, but did not testify:* Walt Baum, Association of Electric Companies of Texas (AECT); Trey Blocker, Texas Association of Manufacturers; Steve Hazlewood, Dow Chemical; Dennis Kearns, Burlington Northern Santa Fe Railway; Chris Macomb, Waste Management of Texas, Inc.; Mike Nasi, Clean Coal Technology Foundation of Texas; Bill Oswald, Koch Companies; David Roznowski, Lyondell Basell Industries; Jason Skaggs, Texas and Southwestern Cattle Raisers Association; Christina Wisdom, Texas Chemical Council; Monty Wynn, Texas Municipal League; Rachel Delgado)

Against — Tom “Smitty” Smith, Public Citizen; (*Registered, but did not testify:* Cyrus Reed, Lone Star Chapter, Sierra Club; David Weinberg, Texas League of Conservation Voters)

On — Robert Martinez, Texas Commission on Environmental Quality (TCEQ)

BACKGROUND: Government Code, sec. 2001.0225 requires a regulatory analysis for environmental rules defined as “major.” A major environmental rule means 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.

DIGEST: CSHB 125 would require TCEQ to conduct a regulatory analysis that weighed the expected costs and environmental effects before adopting an environmental rule.

After considering public comments and determining that a proposed rule should be adopted, TCEQ would have to prepare a final regulatory analysis that complied with the Administrative Procedures Act.

An environmental rule would mean a rule intended to protect the environment or reduce risks to human health from environmental exposure.

Impact analysis. When giving notice of an environmental rule, TCEQ would have to incorporate into the required fiscal note, a draft impact analysis that identified:

- the problem the rule was intended to address;
- the environmental effects of the rule, including the projected level of reduction of pollutants or contaminants in air, water, and soil;
- the costs to state agencies, local governments, the public, and the affected regulated entities, other than small businesses; and
- in a separate economic impact analysis, the expected costs to small businesses.

When identifying the environmental effects of the rule, if the rule would be included in the state implementation plan, TCEQ would have to include the modeled improvement for the criteria pollutant design value expected from implementing the rule.

Strict compliance. A person who submitted a public comment in accordance with the Administrative Procedure Act could challenge the validity of an environmental rule that was not proposed and adopted in strict compliance with procedural requirements by filing an action for declaratory judgment within 30 days of the effective date of the rule. If the court determined that an environmental rule was not proposed and adopted in strict compliance with the procedural requirements of the bill, the rule would be invalid.

Effective date. This bill would take effect September 1, 2011, and would only apply to rules proposed on or after December 1, 2011.

SUPPORTERS
SAY:

CSHB 125 would require TCEQ to conduct certain analyses for all environmental rules it proposed, rather than only for rules defined as “major” under existing law. It would require TCEQ to create for all environmental rules an economic impact analysis and to weigh a rule's potential costs and environmental effects. Because of the existing requirement to conduct such analysis only for “major” rules, TCEQ has conducted only one impact analysis in the last 14 years. The bill also would strengthen the required analysis and streamline it to include just three steps — identifying the problem, describing the environmental effect, and describing the economic impact.

The bill would add needed regulatory transparency by requiring a simple, concrete analysis. As a required step in rulemaking, this would help regulators design the most efficient regulation. The bill would encourage a more open rulemaking process, leading to fruitful dialogue and more effective solutions to environmental problems. Through the public comment period, citizens could comment on the agency's assumptions, provide important information, and suggest less intrusive but equally successful ways to address the problem. Providing the public with insight as to what problem the agency was trying to address and allowing more opportunity for public comment on proposed solutions would make the rulemaking process more collaborative and provide more creative and effective and less costly solutions to regulatory dilemmas.

The bill actually would aid TCEQ and the courts in making informed decisions by providing more streamlined guidelines. Rules would be analyzed before being promulgated, ensuring that they presented a true benefit to the public. Given the lack of certainty about the direct cause of certain health conditions, thorough analysis should be conducted before engaging in expensive regulation. Unnecessary regulation can have a negative impact on business, especially small business, leading to slow productivity and job creation.

CSHB 125 need not increase administrative cost or preclude adoption of otherwise authorized rules. The regulatory analyses described by CSHB 125 could be performed by current agency personnel who already must prepare a fiscal note for proposed rules. TCEQ already collects economic data on many proposed rules. Formalizing requirements for a cost-benefit analysis would not be a major addition to existing procedures. The bill's fiscal note says the bill would result in no fiscal implication to the state.

OPPONENTS
SAY:

CSHB 125 would delay the TCEQ process for adopting rules and add costs. The analysis required by the bill would duplicate similar ones in federal regulation, and TCEQ seldom goes beyond the minimum of federal regulation. Similar language in current law applies only to major rules, but it has been invoked by TCEQ only once since 1997 because it is seen as duplicative and unnecessarily costly.

Due to the way the definitions have been drafted, the cost-benefit analysis would be biased toward cost rather than benefit. The expanded definition of cost would not adequately account for externalities such as cost of health care. Cost-benefit analyses of environmental rules would require an agency to place monetary values on the cost of saving lives and preventing disease. It usually is easier to quantify the costs of complying with an environmental rule than it is to qualify the benefits, but those benefits can be of immeasurable importance. How would one assign a cost to whether or not a child suffered from asthma? It would be difficult for the agency to make such calculations. 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.

This bill also would add a strict compliance requirement for environmental rules, rather than the substantial compliance required under current law. This would run counter to the Administrative Procedure Act, which states that mere technical defects that do not result in prejudice to a person's rights or privileges are not grounds for invalidation of a rule. Ordinarily, a rule that is not in substantial compliance is voidable not invalid. The bill would take away judicial discretion and impede TCEQ from carrying out its mission by making the adoption of environmental rules more difficult and easier to invalidate.

NOTES:

Comparison of original to substitute. The committee substitute differs from the original bill in that it would require TCEQ to incorporate into the fiscal note a draft impact analysis when giving notice.

The original bill would have required the draft impact analysis to meet the regulatory requirements under existing law while the committee substitute would identify specific required information.

The committee substitute contains certain provisions not in the original bill, including:

- definitions of cost, environmental effect, environmental rule, and small business;
- a requirement for TCEQ to conduct a regulatory analysis that would weigh the costs and environmental effects before adopting an environmental rule;
- authorization for a person who submitted a comment to challenge the validity of an environmental rule;
- providing a rule would be invalid if a court determined the rule was not proposed and adopted in strict compliance with procedural requirements; and
- requiring TCEQ to include certain information in identifying the environmental effects of a rule to be included in the state implementation plan.