

SB 467: Regulatory Analysis of Rules Proposed by the Texas Commission on Environmental Quality

Testimony before the Senate Committee on Natural Resources

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Introduction

Thank you Chairman Fraser and other members of the Natural Resources Committee for the opportunity to testify on SB 467, a bill to require an estimate of the costs and anticipated effects of rules promulgated by the Texas Commission on Environmental Quality.

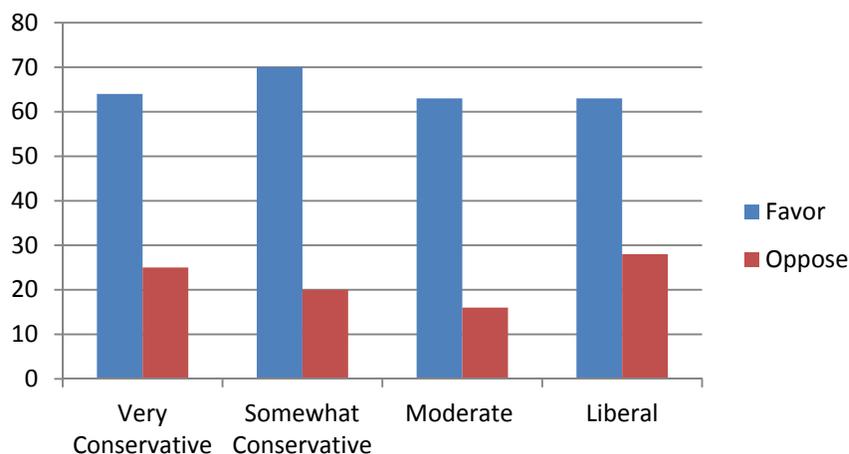
When conducted appropriately, such regulatory impact analyses (RIA) can improve the efficiency, effectiveness, and transparency of regulation promulgated by state agencies in Texas.

Before I begin, I would like to salute the late Texas Representative Ken Legler who passed HB 125 in the last legislative session, a bill virtually identical to SB 467. As former Chairman of the U.S. EPA Small Business Advisory Committee, the Texas Compliance Advisory Panel (CAP) and as two-term member of the Environmental Regulation Committee, Legler was a committed advocate for efficient and transparent regulation.

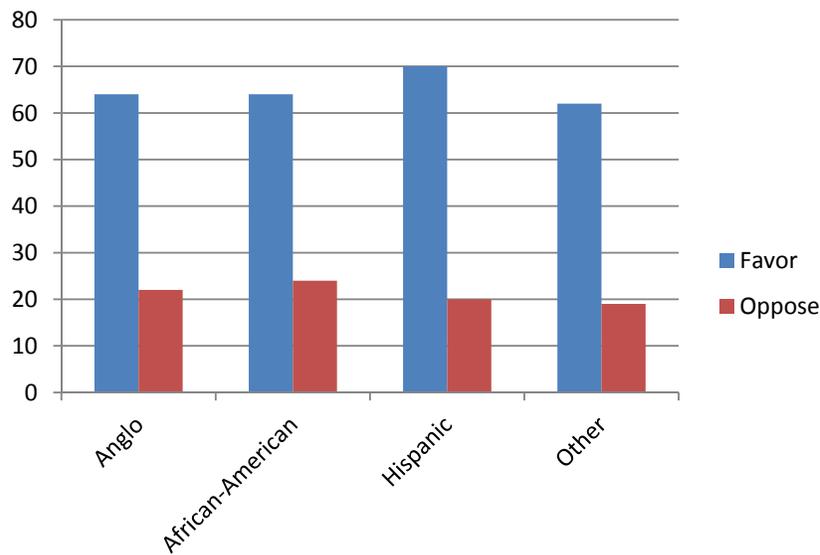
In the 82nd Session, Representative Legler's HB 125 passed the House by a strong bipartisan vote of 113-27.

I am pleased to report that recent polling (conducted February 20-24, 2013) by Baseline & Associates shows broad public support for requiring regulatory impact analyses for environmental rules—65 percent of respondents supported the requirement while only 22 percent opposed. Moreover, support was strong across the political spectrum, and among all regions and ethnic groups. Please note the attached graphs on this polling. *continued on back*

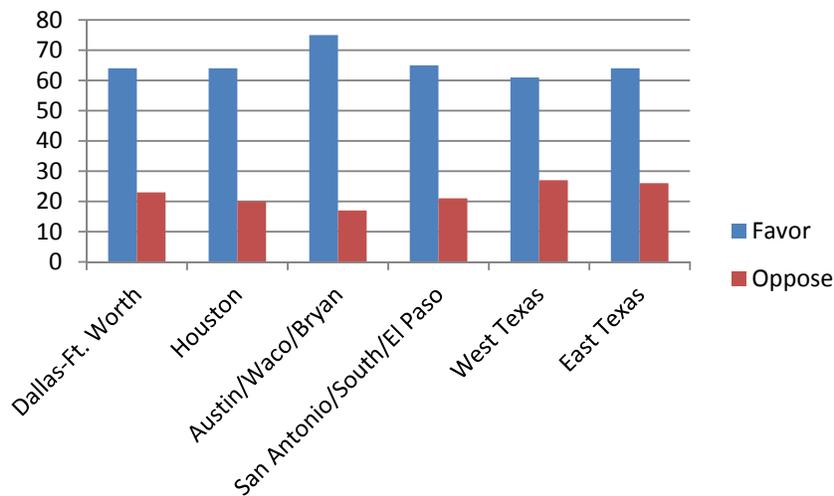
Support for Regulatory Impact Analyses by Political Spectrum



Support for Regulatory Impact Analyses by Ethnicity



Support for Regulatory Impact Analyses by Texas Region



Source: Baseline & Associates, Texas Omnibus Survey #13910 (Feb. 20-24, 2013).

Regulatory Transparency Through Regulatory Impact Analyses (RIA)

Texas needs to strengthen transparency in state agency rulemakings. Texans already benefit from strong fiscal transparency measures—full disclosure of state revenues and expenditures. Texans equally deserve regulatory transparency—disclosure of the cost and effectiveness of regulation imposed by state rules.

Unlike the federal government, the Texas Administrative Procedures Act (APA) does not have a clear requirement to estimate a proposed regulation’s economic impact on the regulated entities and the Texas public. The Texas APA, governing all state rulemaking, requires an estimate of fiscal implications for state and local governments but not clearly for the private sector. Section 2001.024(5)(B) does require an estimate of the “probable economic cost to persons required to comply with the rule.” This provision, however, has long been interpreted to include only cursory administrative costs like a fee or permit and not to include full, and perhaps ongoing, compliance costs.

Existing Texas Government Code Section 2001.0225 does include a section called “Regulatory Analysis of Major Environmental Rules,” applicable to a limited number of rules defined as “major.”¹ The formal analysis required in these provisions apparently has been conducted in only one rulemaking over the 15 years since enactment. The current statutory definition of “major rule” has been interpreted to exclude all rules promulgated.²

What SB 467 Requires

SB 467 would amend these sections of the General Government Code to clarify applicability and streamline requirements by stipulating a far more straightforward and simple three-step analysis: (1) identify the problem the rule is intended to address; (2) estimate the rule’s environmental effectiveness (i.e., amount of expected reduction in a pollutant and note this is not a “benefit” as traditionally understood) and (3) estimate the financial cost—both directly on regulated entities and indirectly on Texas citizens. The regulatory analysis in SB 467 would in no way preclude adoption of otherwise authorized rules nor would the accuracy of the analysis be judicially reviewable. This is merely a look-before-you-leap check on regulatory decision.

Straightforward impact analyses, like the one provided by SB 467, can help regulators design the most efficient regulation: targeted and effective with the least cost to the state, regulated entities, and Texans. Proposed rules with extremely high costs and minimal or immeasurable environmental effects should send the rule maker back to the drawing board to design a more efficient rule. Alternative definitions of standards, requirements, and methods of compliance can yield greater environmental outcomes or effect at lower cost.

Note that the RIA outlined in SB 467 is not a traditional cost-benefit analysis like the EPA typically uses. Nor does this proposed form of regulatory analysis try to monetize both sides of the equation as does the EPA. Regrettably, the EPA has distorted the concept of regulatory benefits and implausibly inflates the dollar-value of the benefits.³

Instead of using RIA of costs, effects, and/or benefits to provide regulatory transparency, EPA manipulates this analytical rubric to justify rules with exorbitant costs and no measureable benefits. Upon closer examination, the EPA’s recent public declarations that regulation under the Clean Air Act (1990-2020) provides almost \$2 trillion in benefits but only \$65 billion in direct costs is implausible and misleads the public.⁴

SB 467 Provides a Simple, Straightforward Analysis

The analysis stipulated in SB 467 is far more straightforward and objective. It estimates effects or measurable outcomes such as reduction in ambient levels of a pollutant or the concentration of contaminants in water as measured by monitors. Such intended regulatory “effects” are far more tangible and physically measurable conditions than EPA’s assumption-driven models of statistical aggregates.

Note that SB 467 pertains only to rules and not to permits. TCEQ’s promulgation of rules and issuance of permits are entirely separate legal processes. And also note that this required regulatory impact analysis in no way prevents TCEQ’s adoption of rules otherwise authorized regardless of cost.

I believe Texas agencies generally avoid the excesses more typical of federal agencies. State agencies, like the TCEQ, are far more connected to the regulated entities and communities in which regulated business operates. The state’s far more hands-on knowledge and practical understanding of real-world effects tend to accelerate and enhance environmental improvements. Yet, the state of Texas, whose population and economy are 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 agencies.

SB 467 is Basic Good Governance

Regulatory impact analysis is a widely accepted step in the rulemaking process. Yet, it all too often can become a routine “check the box” action. The extraordinary expertise and sophistication for which the TCEQ is known across the country, however, is well-positioned to utilize SB 467 to conduct meaningful, transparent regulatory analysis. Regulatory transparency is basic, good governance. ★

See Appendix on back.

Appendix

The steadily increasing volume of regulation at the federal and state levels gives pause. The EPA's regulations occupy 31 volumes in the Code of Federal Regulations. At the moment, 60 federal agencies have 4,128 new regulations in the pipeline. In the last 3.5 years, the Obama administration has issued 953 "major" rules. A federal regulation is defined as "major" or "economically significant" when estimated compliance costs exceed \$100 million or more. Even by the EPA's low estimates, almost all of EPA's new air quality rules carry costs in the billions. The hundreds of new federal regulations required by the Dodd-Frank Wall Street Reform Act and the Patient Protection and Affordable Care Act are just entering the pipeline.

The massive and ever-growing federal regulatory burden imposed on Texas is a formidable obstacle to streamlining state regulation. Indeed, there is an urgent need to communicate the importance of federal regulatory reform and state regulatory authority to the Texas congressional delegation.

But there are steps Texas might take.

Texas needs a formalized system to measure regulatory effectiveness—in order to track whether regulations in place achieve their desired result and whether regulatory efficiency increases over time. Texas may impose fewer and more reasonable regulations than the federal government's burgeoning mountain, but this large state—like the federal government—continually churns out more regulations.

Texas would benefit from a system to measure the real-world outcomes of regulations and not just to track administrative outputs such as number of permits or enforcement orders. 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). In the case of the TCEQ, this would include measuring ambient levels of air and water quality and corresponding trends. Through TCEQ programs, Texas has in place the most extensive environmental monitoring system, but data may not be appropriately organized, accessible, or comparable.

As our country and our state continue to expand the daunting mountain of regulation, we need a system to see if the best regulatory intentions, in fact, achieve the law's and the corresponding regulation's objective.

¹ See TEX. GOV'T CODE ANN. § 2001.0225 (West 2012).

² See *Brazoria Cnty. v. Tex. Comm'n on Env'tl. Quality*, 128 S.W.3d 728, 742 (Tex. App.—Austin 2004).

³ See Kathleen Hartnett White, *EPA's Pretense of Science: Regulating Phantom Risks*, Texas Public Policy Foundation (May 2012).

⁴ Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act from 1990-2020* (2011).

