EPA issued a new regulation last week that mandates a reduction in ozone levels to 70 ppm from the current 75 ppm (originally set by the Bush Administration). The new regulation was immediately attacked by industry and environmentalists. According to industry, the regulation will be a job-killing burden on the economy. According to environmentalists, the Administration sold out to industry pressure for a second time, after previously killing an EPA effort to revise the Bush standard a couple of years ago.

EPA, in the meantime, insists that it set the level solely based on evidence about the health effects of ozone. It did, however, prepare a cost-benefit analysis of the rule. . EPA projects 2025 costs of $2.2 billion and benefits of $3.7 -$7.1 billion. In other words, benefits are between 1.6 and 3.2 times greater than costs. Another way to look at it is that the return on investment is between 60% and 220% for this regulation.

Industry insists that the costs will be much higher. But a study from Resources for the Future (RFF) disagrees:

“We find no support for the picture painted by industry groups and some members of government about the cost of tighter ozone standards. Claims made by these groups about the effect of the rule on low-income populations are on especially shaky ground since it is these populations that can expect to gain the most from tighter standards.”

RFF has a high reputation, both in terms of competence and impartiality, and I see no reason to question this study.

EPA claims that it did not consider cost in setting the standard. Although costs are clearly irrelevant under the terms of the statute, this is a dubious claim. According to REF, “[m]ost studies show that ozone affects health down to or near “background” levels (i.e., ozone concentrations in the absence of US emissions).” Admittedly, EPA faces a difficult judgment call about when health impacts are clear enough and significant enough to constitute a danger to the public health. But it seems likely that cost, not to mention the possible political impacts of a tighter standard, influenced this line-drawing decision – if not at EPA then at the White House level.

It will be up to the courts to decide whether there was enough evidence in the record to justify the choice of 70 ppm. Courts almost never look beyond the face of the regulation to consider evidence of what really motivated an administrative decision. Moreover, many judges undoubtedly favor consideration of costs into in making regulatory decisions, so they are unlikely to void a regulation if they think EPA covertly did so. Given the degree of deference that EPA receives in scientific matters, it seems very likely that the regulation will survive judicial review intact.

From a pragmatic point of view EPA may have made the right call, at least if we assume that a tighter regulation would have imposed unreasonable costs and done political damage. In terms of realism, considering cost seems to accord with current social values, and a Republican President and White House could wreak havoc with environmental protections. But even assuming this pragmatic justification the decision remains troubling. The courts have made it clear that the statute precludes consideration of cost, and evading that prohibition does damage to the rule of law.