COMMENT

What Appears Obvious Is Not Necessarily So

by Sally Katzen

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This extraordinarily well-written, well-researched article by Michael Livermore and Ricky Revesz ("the authors") makes a significant contribution to the literature and public policy debates by challenging conventional wisdom—namely, that health-based National Ambient Air Quality Standards (NAAQS) are more stringent (and hence more protective) than those that would be set were we to consider the costs of achieving those standards.[1] The authors carefully, and to my mind convincingly, debunk the idea that health-based standards are necessarily more protective than those that might be based on cost/benefit analysis (CBA) or other economic considerations, providing facts rather than unsubstantiated rhetoric. This information is new and it is dramatic.

While I believe there is much here that will fuel constructive consideration of a critical issue, I have two concerns: aspects of their characterization of how health-based standards are set; and their reading/analysis of the relevant Supreme Court precedent.

With respect to the first, the authors describe a "stopping point problem," which arises because, they say, there is no coherent, defensible way for EPA to set the permissible level of a pollutant based on health considerations alone. This conclusion is based on their premise that, especially for a non-threshold pollutant (where by definition anything above zero will have some adverse biological effect), faithful implementation of a health-based standard would mean that everyone that can be protected should be protected; and that agency invocation of "public health policy judgments" as the basis for its decision for a stopping point short of universal protection is essentially disingenuous (if not duplicitous).[2] Rather than making "public health policy judgments," they believe the agency is in reality "considering costs surreptitiously . . . [with] negative consequences for the transparency, accountability, and soundness of agency decision-making."[3] By following this trail, it is understandable that they would then condemn such "obstruction of reason."[4]

But I see (and have seen) the decisionmaking process differently. Public health policy judgments are not limited to those reached in a laboratory setting. That is why the phrase includes the terms "policy" and "judgment." There may be more art than science, or, more specifically, more sense than specificity, to the decisionmaking, but the fact that the decision is often more difficult to document than CBA (although there are aspects of CBA that can hardly be called precise) does not make it any less valid. In our own lives, we often make decisions (including drawing seemingly arbitrary lines) that are informed by science but may ultimately be based on alternative criteria—consider, for example, how you decide how much contact to have with a family member with a suspected contagious disease. In the same vein, medical doctors often opine about alternative treatments for a disease; in some cases, they may be influenced by costs, but many times costs are not a factor and there is still extensive deliberation because of the consistency or volatility of the data, the efficacy over time of different courses of action and/or the potential risks of those choices. Not surprisingly, therefore, public policy decisionmakers routinely draw lines (wholly apart from cost considerations) regarding health issues, from the nature of warnings (but not bans) on certain products (consider cigarettes and peanuts) to requiring protective equipment or approving drugs as safe and effective even though adhering to the specified standards will leave some particularly vulnerable individuals at, possibly very serious, risk.[5]

1. Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. Rev. 1184 (2014).
2. *See id.* at 1188 ("The result is, most likely, an elaborate obfuscation of the true reasoning underlying the agency's decision, undermining core values of the administrative state."). Indeed, the authors apparently dismiss the legitimacy of making "public health policy judgments" for the purposes of standard setting. *See*, *e.g.*, *id.* at 1200 ("These decisions require the agency to . . . decid[e] which negative health consequences will be deemed tolerable and what level of certainty concerning the link between exposure and health is sufficient to justify imposing controls . . . [, as well as] . . . determin[ing] the percentage of the population to protect, which often translates into a question of how many people who are particularly susceptible to the negative consequences of the pollutant . . . to leave unprotected. To the extent that there are correct answers to such questions, *they sound in morality or politics, not science*." (Emphasis added.)).
3. *Id.* at 1189.
4. *Id.*
5. Each of these examples is governed by its own applicable statute, which incorporate a multitude of different standards. While therefore none is on point, together they tell a story that I believe is worth telling.

With respect to the NAAQS process at EPA, there are science-based bounds to any determination. At one end of the spectrum is background; EPA cannot set standards below background levels (even if sensitive populations may suffer adverse health effects at background),[6] and background levels for some pollutants may vary (significantly) across the country, which is relevant because EPA must set a nation-wide standard that is the same across the nation. At the other end of the spectrum is where even minimal exposure would likely cause severe and irreversible harm (even death) to those affected. Between these two are numerous levels, where adverse health effects range from low to high for different segments of the population, depending on a number of factors (or confounders) in addition to exposure (which is not always susceptible to precise measurement). This is where judgment (informed by all the information that science can contribute) operates to determine whether to protect some, most or virtually all of the population. Also, importantly, this judgment is not exercised in a vacuum, but rather incorporates a number of factors (to which the authors do not apparently give much weight), such as the degree of uncertainty in the science (which in some cases can be quite significant)[7] or the ease of implementing the selected standard.[8]

The authors take a different (less complicated) path. For them, if the test is "public health," then there is no room for the exercise of judgment:

> "Of course, if only public health considerations were relevant, less risk would always be better. And without considering the non-health consequences of a rule, such as compliance costs, there can be no justification for any decision to allow *any risk at all*."[9]

This sounds like a call for the application of the precautionary principle, which has never been read into the Clean Air Act and is not the norm in regulatory policymaking in this country. Rather, in much, if not most, of our regulatory sphere, decisionmakers frequently face the question: how much risk is acceptable? That is the essence of a public health policy debate, and the answer is what I understand to be a public health policy judgment. It has substance and is not simply a guise for secretly considering costs.

My view on this is admittedly biased (or informed) by my own experience in policy deliberations, including specifically the debates concerning the setting of the NAAQS for ozone and fine particulate matter in 1997.[10] The authors assert that we must have considered costs.[11] They are partially correct, for we did consider costs *for the implementation phase*.[12] But costs were not a consideration when we took the first step analytically in the rulemaking proceeding—namely, the *setting of the standard*. Later, when it came time to determine how much time to allow regulated entities to come into compliance with the specified standard, we took into account the costs of compliance as well as the state of the technology. The authors recognize that the Clean Air Act is a technology-forcing act[13]—it sets the standards where health considerations dictate and hope (or expect) that American ingenuity will develop more sophisticated, less costly ways of meeting that standard. But technological developments do not happen overnight—even with strong incentives at work—and it is therefore important to set an attainable (even one that assumes a huge stretch) schedule for meeting that standard.

In any event, my recollection is that the many discussions that we had in 1997 during review of the final standards for ozone and fine particular matter were bifurcated—what does the science say about the appropriate level and then, and only then, what is realistic about an implementation schedule. I stress this point because, while I understand the authors' skepticism,[14] they appear to move through the article from possibility to certainty that the actual basis for decisionmaking in standard setting proceedings is the consideration of costs.[15] I respectfully disagree, based on my admittedly limited experience.

My second point relates to *Whitman v. American Trucking*[16] and whether it is a bar to the use of CBA in standard setting if the use is confined to setting a level for the pollutant that is *more* protective than that which would result

6. I use "adverse health effects" rather than "nonharmful biological responses," Livermore & Revesz, *supra* note 1, at 1210, because the Clean Air Act is cast in terms of health effects, and I subscribe to the view that health effects means effects on health, not a nonharmful biological response.
7. In the 2015 revised National Ambient Air Quality Standards for Ozone, the Administrator acknowledged scientific uncertainties during the 1997 review: "A more restrictive form was not selected, recognizing that the differences in the degree of protection afforded by the alternatives were not well enough understood to use any such differences as a basis for choosing the most restrictive forms (62 FR 38856)." National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292, 65,350 (Oct. 26, 2015) (to be codified at 40 C.F.R. pts. 50–53, 58).
8. The Administrator explained that her choice among the alternatives for the 2015 revised National Ambient Air Quality Standards for Ozone was the one that would provide "an appropriate balance between public health protection and a stable target for implementing programs to improve air quality." *Id.* at 65,352.
9. Livermore & Revesz, *supra* note 1, at 1213 (emphasis added).
10. At the time, I was the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget, which has responsibility for reviewing draft proposed and final regulations from Executive Branch agencies under Executive Order 12,866, 3 C.F.R. § 638, 24 ELR 45070 (1993).
11. Livermore & Revesz, *supra* note 1, at 1189.
12. *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 493, 31 ELR 20512 (2001) (Breyer, J., concurring) ("[T]he Act does not, on this reading, wholly ignore cost and feasibility. As the majority points out . . . the Act allows regulators to take those concerns into account when they determine how to implement ambient air quality standards.").
13. *See* Livermore & Revesz, *supra* note 1, at 1195.
14. The authors cite several former executive branch officials, including George Eads, C. Boyden Gray, and Brian Mannix, who have voiced similar views, but, to my knowledge, the authors are the first who have declared, with a certain definitiveness, that this is actually what happens. *Id.* at 1232-33.
15. *E.g.*, *id.* at 1231–32 ("Because the agency cannot acknowledge any factor other than health in its analysis, yet health alone cannot provide a complete answer to the regulatory question that it faces, it *must* engage in an unacknowledged consideration of nonstatutory factors to arrive at a final outcome."); *id.* at 1234 ("EPA's inability to divulge the *genuine reasons* behind its chosen standard . . . ") (emphasis added); *id.* at 1235 ("[T]he statutory standard prevents the agency from disclosing the criteria it used to actually arrive at its decision."); *id.* at 1254 ("[Commenters] do not have the opportunity to specifically refute the *actual* basis for the agency's decision." (Emphasis added.)).
16. 531 U.S. 457 (2001).

from using a health-based standard—in other words, the authors' suggestion that CBA can be used as a one-way ratchet, to tighten but not to loosen a standard.[17] I believe in CBA and am convinced that it is a valuable (though not dispositive) factor in decisionmaking. However, to say that *American Trucking* can be "reinterpreted" (or that its holding barring the use of costs can be viewed as dicta) to allow consideration of costs for this purpose (namely, the setting of a more stringent standard) is not only a heavy lift, but also a true testament to the authors' ingenuity.[18]

My (admittedly unimaginative) reading of the decision is that EPA cannot consider costs in the setting of the NAAQS under the terms of the Clean Air Act. None of the Justices who wrote opinions (and there are four separate opinions)[19] even hints that, given the statutory language, costs can be considered in setting the standard. This includes Justice Breyer who is a consistently strong supporter of CBA as a tool in decisionmaking. The authors may well be correct that the Justices assumed that use of CBA would yield a standard that would be less protective than one derived solely on health considerations.[20] Based on the data and analysis assembled by the authors, that assumption was clearly unwarranted. That happens. Similarly, it is likely that in enacting (and amending) the Clean Air Act, Congress assumed that health-based standards would be more protective than those incorporating economic considerations.[21] Indeed, as the authors document, it has been the long-standing view of both environmentalists and industry "that health-based standards will lead to more stringent environmental standards."[22] Thus, Congress probably wrote (and rewrote) the statute based on a mistaken impression. Again, that happens.

The solution is for Congress to correct its mistake. If Congress continues to want EPA to set the most protective standards and can be convinced that CBA can, at least in some instances, militate in favor of a more protective standard than one based solely on health considerations, it should amend the Clean Air Act. I recognize this course is extraordinarily unlikely with the current paralysis on Capitol Hill. But it is not for the courts to rewrite a statute or read into it something so at odds with what Congress thought it was doing, and what it did (albeit mistakenly).[23] This would not only be beyond the ken of any textualist, but also a huge stretch for even a devout purposivist.

With the energy and enthusiasm the authors bring to this subject, along with the incredible array of data and analysis they have assembled, they may persist and prevail. It is a worthy effort and, at the very least, the work they have done will shake (if not shatter) our conventional wisdom—which is always a good thing.

17. *See id.* at 1262-63 ("The consideration of costs in the face of congressional silence should be prohibited only in cases in which it would lead to compromising the stringency of the health-based standards, which was the situation the Court focused on in *American Trucking*, not where it would lead to strengthening them.").
18. *See* Livermore & Revesz, *supra* note 1, at 1258–59.
19. Justice Scalia wrote the Majority opinion for a unanimous court, and Justices Thomas, Stevens, and Breyer wrote concurring opinions. *See id.* at 462 (Justice Scalia's opinion); *id.* at 486 (Justice Thomas' opinion); *id.* at 487 (Justice Stevens' opinion); *id.* at 490 (Justice Breyer's opinion).
20. The quotes that the authors selected reveal the Justices' assumption that consideration of costs would lead to less protective standards, *see* Livermore & Revesz, *supra* note 1, at 1261–62, but that does not establish the obverse—that is, that the Justices would have accepted the consideration of costs if doing so would lead to more protective standards. Thus, I do not subscribe to the authors' view that the Act is "silent" on the use of costs to make the standard more protective and that, therefore, *Chevron* deference would enable EPA to reinterpret the Act to allow consideration of costs to such an end. *Id.* at 1262–63.
21. The Clean Air Act of 1970 called on the Administrator to consider specifically what is requisite for the protection of public health. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 109(b)(1), 84 Stat. 1676, 1680 (1970) ("National primary ambient air quality standards . . . shall be . . . based on such criteria and allowing an adequate margin of safety, [as] are requisite to protect the public health."). In spite of major amendments in 1990, this language remains in the statute. *See* 42 U.S.C. § 7409(b)(1) ("National primary ambient air quality standards . . . shall be ambient air quality standards the attainment and maintenance of which, . . . based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.").
22. Livermore & Revesz, *supra* note 1, at 1236, 1259–61.
23. *See* United States v. Locke, 471 U.S. 84, 95, 30 ELR 20438 (1985) ("But the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.").