

# Environmental Regulation and Rulemaking



**EVSS-PUBA 534: Environmental Law and Regulatory Policy**

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# Overview

**What is regulation?**

**Why regulate?**

**Regulatory instruments**

**Administrative rulemaking**

# **What is regulation?**

# Regulation

**Regulation describes the array of public policies explicitly designed to govern economic activity and its consequences at the level of the industry, firm, or individual unit of activity**

-- Eisner et al., 2018

**Social regulations:** *designed to enforce corporations to accept responsibility for the safety and health of workers and consumers, as well as for the negative by-products of the production process*

# Regulatory Regimes

**A historically specific configuration of policies and institutions which structures the relationships between social interests, the state, and economic actors in multiple sectors of the economy**

-- Eisner, 2000

*Whenever there is a change in regime, it is possible to identify a unique synthesis of interests, political-economic ideas, and administrative reform doctrines that shape the new regime*

# Regulatory Regimes

**Market regime: 1880s-1920**

**Associational regime: 1930s-1940s**

**Societal regime: 1960s-1970s**

- **Goal:** Prevention of hazards to health and the environment
- **Political-economy context:** Postwar economic growth and postmaterialist values
- **Policy:** Social regulations

# Regulatory Regimes

## Efficiency regime: 1980s-1990s

- **Goal:** Elimination of policies that interfere with market mechanisms or impose large compliance costs
- **Political-economy context:** Economic stagflation and growing foreign competition
- **Policy:** Deregulation, market-based approaches, cost-benefit analysis

# Why regulate?



# Theories of Regulation

## Public interest theory

- Regulation is in the public interest, it makes the society better off
- Often in response to *market failures*
  - **Externalities**
  - **Public goods**
  - **Common-pool goods**
  - Market power
  - Asymmetric information

# Theories of Regulation

## **Public interest theory**

- Regulation is in the public interest, it makes the society better off

## **Is there agreement on what is in the public interest?**

*... so much of politics entails people fighting over what the public interest is and trying to realize their own definitions of it*

-- Stone, 2012

# Theories of Regulation

## Capture theory

- Regulation serves private interests
- Transactional: political support from industry in exchange for policies
- "Cognitive capture": accepting the *framing* of industry interests
- Decline in interest and original constituency over time
- Strong vs weak capture

## When is capture more likely to occur?

# Theories of Regulation

## **Economic theory of regulation**

### **Assumes**

- *Government's basic resource is the power to coerce*
- *An interest group that can convince the government to use its coercive power to the group's benefit can improve its well-being at the expense of others*
- *Agents (firms, individuals, government officials, and interest groups) are rational and try to maximize their own utility (well-being)*

# Theories of Regulation

## **Economic theory of regulation**

- *... less applicable to the social regulations that have been dominant since the late 1960s (Eisner, 2018)*

## **Bootleggers and Baptists**

## **Advocacy Coalition Framework**

# Theories of Regulation

## Public choice

- Applies *economic* assumptions of human behavior to the public sector
  - Self-interest (utility-maximizers)
  - Not omniscient (boundedly rational)
- **Rent seeking**
- Government failures

# Regulatory instruments

***A regulatory instrument* is a set of rules or restrictions that govern an activity, including directions on what happens if people undertake too much, or too little of that activity**

-- Rowell and van Zebem, pg. 59



# Regulatory Instruments

## Command-and-control

- *The prohibition or prescription of a specific behavior ... through permits or bans*
- **Performance** vs **Technology** standards

**Strengths?**

**Weaknesses?**

# Regulatory Instruments

## **Economic instruments (aka market-based)**

- "Price" behavior to incentivize different behavior
- **Using markets** vs **Creating markets**

# Regulatory Instruments

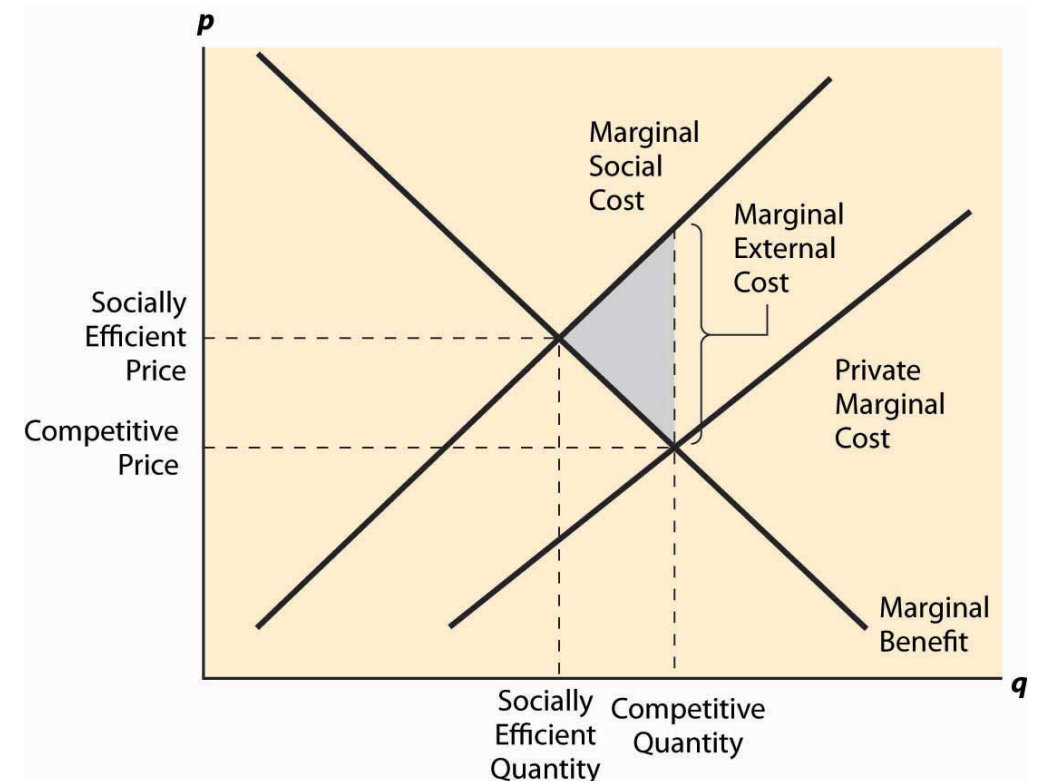
## Using markets

### Externality

Social cost  $>$  Private cost

Socially efficient outcome =  
Private cost + **Price**

### Internalize the externality



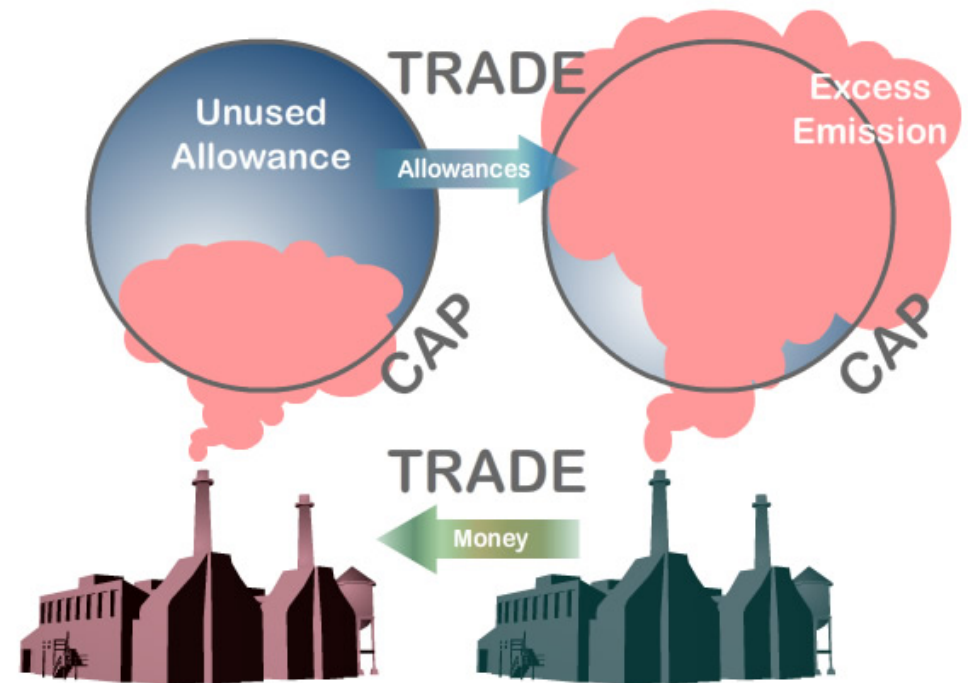
# Regulatory Instruments

## Creating markets

### Common-pool good = no property rights

- *Individual fishing quota* markets

### Allowances create de-facto property rights



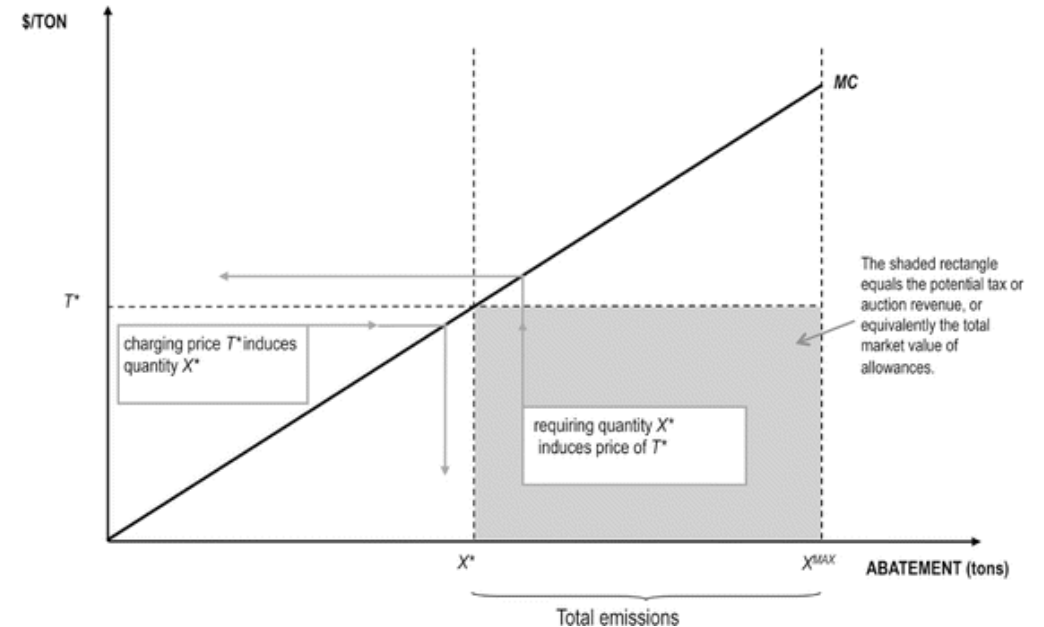
# Regulatory Instruments

**Ideally pricing policies are equivalent**

**Policy sets the demand curve**

- Fixed quantity ( $X^*$ )
  - Cap-and-trade
- Fixed price ( $T^*$ )
  - Tax

**\$/Ton is the same**



# Regulatory Instruments

**Economic instruments (aka market-based)**

**Strengths?**

**Weaknesses?**

# Regulatory Instruments

## Information-based instruments

- Provide information to change behavior, such as *labels* and *disclosures*

**Strengths?**

**Weaknesses?**

# Regulatory Instruments

## **Behavioral instruments**

- *Nudges ... default rules and framing*

**Strengths?**

**Weaknesses?**



# Instrument Choice

## Constraints

- **Institutional and legal:**
  - separation of power and functions
  - statutory language
- **Practical:** capacity (expertise, budget)
- **Path dependency:** past decisions inform current decisions ...  
*continue existing practices even if better is available*

# Cost-Benefit Analysis

**Measure the costs and benefits of each possible policy and then choose the policy that is most *efficient***

## **Steps**

1. Specify set of policy alternatives
2. Determine benefits and costs of stakeholders
3. Monetize impacts
4. Discount to *net present value*
  - Time value of money: Future value vs. present value of \$100
5. Make recommendation

# **Administrative rulemaking**

**To a very large extent, public policy in the United States is established through administrative rulemaking.**

-- Rosenbloom, 2015, pg. 64

# Administrative Rulemaking

## Characteristics of rules

1. Usually prospective
2. Types:
  - *Legislative*
  - *Procedural*
  - *Interpretive*
3. General (clean air) or particular (use of a pesticide)

# Rulemaking Processes

## **Informal (notice and comment) rulemaking**

### **APA Requirements**

1. Notify affected persons or publish a notice of proposed rulemaking (NPRM)
2. Interested persons have an opportunity to participate (comments)
3. Incorporate comments
4. At least 30 days before a final rule takes effect
5. Right to petition for the *issuance, amendment, or repeal of a rule*



# Rulemaking Processes

**Formal rulemaking**

**Hybrid rulemaking**

- Combines formal and informal rulemaking
- More flexible than formal and more participatory than informal

**Negotiated rulemaking (Reg-Neg)**



# For Next Time

## Air Pollution: I

- *Readings:*
  - **Summary of the Clean Air Act**
  - **Bearden et al.**, *Clean Air Act*, pgs. 3-24, from Bearden, David M. et al. 2013. *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency*. Washington D.C.: Congressional Research Service.
  - Boyd, William. 2019. "The Clean Air Act's National Ambient Air Quality Standards: A Case Study of Durability and Flexibility in Program Design and Implementation." In *Lessons from the Clean Air Act: Building Durability and Adaptability into U.S. Climate and Energy Policy*, eds. Ann Carlson and Dallas Burtraw. Cambridge University Press, 15–56.
  - **SKIM:** Liu, Jiawen et al. 2021. "Disparities in Air Pollution Exposure in the United States by Race/Ethnicity and Income, 1990–2010." *Environmental Health Perspectives* 129(12).

# In-Class Assignment

## Find a federal or state regulation

- Federal
  - EPA: <https://www.epa.gov/laws-regulations/regulations>
  - Federal Register: <https://www.regulations.gov/>
- State
  - SCDHEC: <https://scdhec.gov/laws-regulations>

**Report out to class: the regulation, what it covers, and its statutory authority**

**Write that same information up (include a link to the webpage) and put in the assignment folder on OAKS**