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Changing All the Rules

By BRUCE BARCOTT

President Bush doesn't talk about new-source review very often. In fact, he has mentioned it in a speech to the public only once, in remarks he delivered on Sept. 15, 2003, to a cheering crowd of power-plant workers and executives in Monroe, Mich., about 35 miles south of Detroit. It was an ideal audience for his chosen subject. New-source review, or N.S.R., involves an obscure and complex set of environmental rules and regulations that most Americans have never heard of, but to people who work in the power industry, few subjects are more crucial.

The Monroe plant, which is operated by Detroit Edison, is one of the nation's top polluters. Its coal-fired generators emit more mercury, a toxic chemical, than any other power plant in the state. Until recently, power plants like the one in Monroe were governed by N.S.R. regulations, which required the plant's owners to install new pollution-control devices if they made any significant improvements to the plant. Those regulations now exist in name only; they were effectively eliminated by a series of rule changes that the Bush administration made out of the public eye in 2002 and 2003. What the president was celebrating in Monroe was the effective end of new-source review.

"The old regulations," he said, speaking in front of a huge American flag, "undermined our goals for protecting the environment and growing the economy." New-source review just didn't work, he said. It dissuaded power companies from updating old equipment. It kept power plants from operating at full efficiency. "Now we've issued new rules that will allow utility companies, like this one right here, to make routine repairs and upgrades without enormous costs and endless disputes," the president said. "We simplified the rules. We made them easy to understand. We trust the people in this plant to make the right decisions." The audience applauded.

Of the many environmental changes brought about by the Bush White House, none illustrate the administration's modus operandi better than the overhaul of new-source review. The president has had little success in the past three years at getting his environmental agenda through Congress. His energy bill remains unpassed. His Clear Skies package of clean-air laws is collecting dust on a committee shelf. The Arctic National Wildlife Refuge remains closed to oil and gas exploration.

But while its legislative initiatives have languished on Capitol Hill, the administration has managed to effect a radical transformation of the nation's environmental laws, quietly and subtly, by means of regulatory changes and bureaucratic directives. Overturning new-source review -- the phrase itself embodies the kind of dull, eye-glazing bureaucrat-speak that distracts attention -- represents the most sweeping change, and among the least noticed.

The changes to new-source review have been portrayed by the president and his advisers as a compromise between the twin goals of preserving the environment and enabling business, based on a desire to make environmental regulations more streamlined and effective. But a careful examination of the process that led to the new policy reveals a very different story, and a different motivation. I

conducted months of extensive interviews with those involved in the process, including current and former government officials, industry representatives, public health researchers and environmental advocates. (Top environmental officials in the Bush administration declined to comment for this article.) Through those interviews and the review of hundreds of pages of documents and transcripts, one thing has become clear: the administration's real problem with the new-source review program wasn't that it didn't work. The problem was that it was about to work all too well -- in the way, finally, that it was designed to when it was passed by Congress more than 25 years ago.

Having long flouted the new-source review law, many of the nation's biggest power companies were facing, in the last months of the 1990's, an expensive day of reckoning. E.P.A. investigators had caught them breaking the law. To make amends, the power companies were on the verge of signing agreements to clean up their plants, which would have delivered one of the greatest advances in clean air in the nation's history. Then George W. Bush took office, and everything changed.

II.

The Clean Air Act, adopted by Congress and signed by President Nixon in 1970, required industrial polluters to clean up their operations. The law forced power plants and large factories to minimize their emissions of harmful pollutants like sulfur dioxide and lead, and it established national air-quality standards to be met by 1975. Congress acknowledged, however, that forcing polluters to retrofit every existing plant immediately would be tremendously costly, potentially crippling entire industries. So in a concession to industry, the lawmakers agreed to apply the tough standards only to newly built facilities.

Seven years passed, and the national air-quality standards went unmet. Instead of building new, cleaner plants, many companies simply patched and upgraded their old, dirty plants. So Congress updated the act in 1977, introducing a regulation called new-source review to bring older plants into compliance. Under N.S.R., a company could operate an old factory as long as it wasn't substantially modified. Eventually, it was assumed, the company would have to update its equipment, at which point new-source rules required the company to install the best available pollution-control technology. It was a way to let companies phase in the switch to cleaner factories over a number of years instead of all at once.

The legislators who passed new-source review expected the law to encourage electric utilities to replace old, heavily polluting coal-fired plants with cleaner new ones. And during the 80's and 90's, some power companies did replace coal plants with cleaner ones that burned natural gas. But many others retooled plants to keep them running long past their expected life spans, and few were fitted with the scrubbers and other equipment required under N.S.R.

The electric industry complained that N.S.R. rules were so complicated and confusing that it was impossible for utilities to determine the difference between "routine" maintenance, which wouldn't require an upgrade, and a significant "physical change," which would. An examination of documents made public as a result of lawsuits, however, makes it difficult to credit these complaints. Beginning soon after N.S.R. was implemented, E.P.A. officials issued frequent letters and bulletins telling power companies exactly where the agency was drawing the line. And in 1990, after a Wisconsin power company lost a suit against the E.P.A. over N.S.R., Henry Nickel, an attorney representing the Utility Air Regulatory Group, an industry association, complained in a letter to William Reilly, the head of the E.P.A. under the first President Bush, that the court's decision meant that "any time a component breaks -- even a minor component -- and repair is needed to maintain normal operations," new-source standards would "be triggered unless the work is found to be 'routine' by the E.P.A. staff." Nickel seemed to understand clearly what the new-source rules said -- but that didn't mean he and other

industry representatives liked them. Nickel said that the rules were bad not only for utilities but also for clean air, because power companies would be discouraged from updating their plants with cleaner, more efficient technology.

Officials in the Clinton administration spent years trying to make the N.S.R. program more palatable to industry without sacrificing public health. Carol M. Browner, President Clinton's E.P.A. administrator, floated new ideas like plantwide applicability limits (P.A.L.'s), a program to cap and reduce emissions on a plant-by-plant basis, but chose not to pursue them when it became apparent that they wouldn't reduce pollution faster than the existing new-source regulations. Robert Perciasepe, Browner's assistant administrator for air and radiation, kept the flagging effort alive by bringing together industry officials, state and local clean-air regulators, environmental leaders and public health advocates in an ad-hoc working group that struggled to find a mutually acceptable way to implement N.S.R. regulations. But by the end of 2000, Browner told me, the E.P.A.'s efforts to find a compromise "were essentially dead."

When I spoke to him recently, Perciasepe, now C.E.O. of the National Audubon Society, put the matter bluntly. The reason new-source review did not get streamlined during the Clinton years, he said, was that the energy companies, utilities and other industries had no interest in any sort of workable reforms. "In hindsight, maybe we were going after a sort of holy grail," he told me. "You were not going to reach agreement with some of these folks," he said, referring to industry representatives, "because what they really wanted was to not have to do it."

Oddly, while industry and government haggled fruitlessly over potential rule changes, nobody was making sure that companies were complying with the existing law. Mostly the E.P.A. was leaving them alone. "There were other things that had to be done first," Browner explained. "We looked at where we could get the biggest bang for the buck in terms of pollution reduction." Coal-fired power plants didn't move to the top of the agency's list until late 1996, when Bruce Buckheit, a former Justice Department lawyer who had recently joined the E.P.A. as director of its air-enforcement division, happened to notice an article in The Washington Post about proposed changes to the ownership rules that govern the power industry. "The story predicted that deregulation would increase the use of coal-fired power generation in the Midwest," Buckheit recalled. "So we thought, If they're going to have all that expansion, they're going to have to pay attention to new-source review rules." That led him to wonder, he said, whether utilities had been paying attention to the rules at all.

Buckheit and other E.P.A. officials began asking questions. They found disturbing answers. Industry records indicated that many power plants had upgraded their facilities to burn more coal, which required new-source review permits, but "we started looking around for the permits," Buckheit said, "and there weren't any." Many of the nation's biggest energy companies, E.P.A. officials found, had updated their plants without putting in any new pollution controls and were illegally releasing millions of tons of harmful pollutants. "Companies understood what was going on, and a lot of them thought they could evade the law," recalled Sylvia Lowrance, who was the E.P.A.'s top official for enforcement and compliance (and Buckheit's boss) from 1996 to 2002.

At the same time, a growing body of medical research indicated that industrial air pollution was making a lot of people sick. Power plants pump dozens of chemicals into the air; among the most harmful are nitrogen oxides, sulfur dioxide and mercury. Nitrogen oxides are major producers of ground-level ozone, or smog, and they interact in the atmosphere with sulfur dioxide, water and oxygen to form acid rain. Mercury, a highly toxic chemical that is emitted as a vapor when coal is burned, has been found to cause brain disorders in developing fetuses and young children, and unhealthy levels of it have recently been detected in swordfish and tuna.

The most disturbing research, though, involved fine particulates, the tiny particles of air pollution that spew out of smokestacks and lodge deep within the lungs of people nearby and even miles away. During the late 80's and 90's, medical researchers found that long-term exposure to fine particulates caused asthma attacks in children and raised the risk of chronic bronchitis in adults. Coal-fired plants account for about 60 percent of the nation's sulfur dioxide emissions and 40 percent of the mercury, and power plants as a whole are the nation's second-largest source of nitrogen-oxides pollution, after automobiles. Public health researchers estimate that fine-particulate pollution from power plants shortens the lives of more than 30,000 Americans every year. Pollution-controlling technology, while costly, can make an enormous difference. A new scrubber can cut emissions up to 95 percent.

Spurred on by that research, E.P.A. officials mounted a campaign to clean up the illegally polluting coal-fired power plants. E.P.A. agents began to go after suspected Clean Air Act violators through the companies' own accounting books. In any corporation, big capital improvement projects usually leave a trail of documents. Any department in a company that proposes a capital improvement has to justify it to the company's higher-ups, often by way of memos, briefing books, e-mail messages or PowerPoint presentations. In 1997, the E.P.A. started collecting such data, threatening subpoenas if companies didn't comply. "We got lists of capital projects, then went after the internal justifications for those projects," Buckheit said.

After two years of investigation, E.P.A. officials had accumulated a daunting amount of evidence of wrongdoing by the coal-burning power industry. "This was the most significant noncompliance pattern E.P.A. had ever found," Sylvia Lowrance said. "It was the environmental equivalent of the tobacco litigation." Records compiled by the utilities themselves showed, according to former E.P.A. officials, that companies industrywide had systematically broken the law. If that was true, E.P.A. officials noted, the agency might have enough legal leverage to force the industry to install up-to-date pollution controls and achieve something truly historic: not merely incremental cuts in emissions but across-the-board reductions of 50 percent or more. "On sulfur dioxide alone, we expected to get several million tons per year out of the atmosphere," Buckheit said.

E.P.A. agents are sometimes portrayed as eco-cops, but they function more like overworked and financially strapped prosecutors. Big enforcement actions are rarely carried out in courtrooms; instead, there's a lot of negotiating and plea bargaining involved. From the E.P.A.'s perspective, at least during the Clinton years, the point was not to hammer violators with big fines but to get them to reduce the amount of pollution they were creating. That strategy had proved effective with the oil-refinery industry, which like the utilities had systematically skirted the new-source review law in the 80's and 90's: E.P.A. officials presented their case, and many refinery executives agreed to pay fines and install new pollution-control measures. Once the agreements had been reached, some refinery officials even embraced the changes. Tim Scruggs, the manager of BP's Texas City refinery, the nation's largest, told Octane Week, an industry publication, "We are a society that can afford a few cents per gallon to achieve cleaner air."

Utility officials, however, weren't going to give in so easily. In the summer of 1999, Buckheit and other E.P.A. officials asked executives at the worst-offending power companies to come to the agency's headquarters in Washington. In a series of meetings, E.P.A. officials sat down with representatives from each company, one by one, and laid out their evidence. "Is there something we're missing?" Buckheit said he asked them. Later, he gathered all the executives together in one room and reiterated the agency's suspicion that their companies had systematically violated the Clean Air Act. "Unless we're getting something wrong here," Buckheit recalled saying, "these are violations of the law. Y'all want to step up to the plate?" No one did.

Months passed. Industry executives and lawyers refused to address the E.P.A.'s complaints. Finally, in November 1999, the agency decided to take the polluters to court. The Justice Department, on behalf of the E.P.A., announced lawsuits against seven electric utility companies in the Midwest and South, charging that their power plants had been illegally releasing enormous amounts of pollutants, in some cases for 20 years or more. The companies included FirstEnergy, American Electric Power and Cinergy, all headquartered in Ohio; Southern Indiana Gas and Electric; Illinois Power; Tampa Electric, in Florida; and Alabama Power and Georgia Power, two subsidiaries of the Atlanta-based Southern Company, the biggest power supplier in the Southeast. The E.P.A. also issued a compliance order to the Tennessee Valley Authority (T.V.A.), the nation's largest public power company, charging T.V.A. with similar violations at seven of its coal-fired plants in Kentucky, Tennessee and Alabama. In addition, the E.P.A. put a number of other utilities on notice, warning them that the Justice Department would come after them next if they didn't clean up their acts.

Taken together, the companies named in the suits emitted more than 2 million tons of sulfur dioxide every year and 660,000 tons of nitrogen oxides. Attorney General Janet Reno announced the suits herself. "When children can't breathe because of pollution from a utility plant hundreds of miles away," she said, "something must be done."

III.

From the perspective of the utility industry, the E.P.A. was changing the rules in the middle of the game. Dan Riedinger, spokesman for the Edison Electric Institute, the leading trade association for electric utilities, told me that the lawsuits came as a surprise. "For years we'd asked the E.P.A. for guidance about how we should meet N.S.R. requirements," Riedinger said. "That guidance never came. Instead, the agency just began suing power plants."

"I've heard that argument," Eric Schaeffer, a former E.P.A. official, responded in an interview. "And I've got to say, that's completely hokey. I was in dozens of conversations with company officials and their lawyers, and the idea that we were enforcing regulations they were unaware of -- that simply didn't come up."

A statement issued by the Southern Company shortly after the lawsuits were announced noted that the utility had cooperated with the E.P.A.'s investigation by providing the agency with more than 120,000 pages of documents. "Our goal throughout this process has been to cooperate with E.P.A. and find a workable solution to this issue," the statement said.

The amount of money at stake was enormous. Potential penalties ran to \$27,500 per plant for each day it had been in violation. Since many of the violations the utilities were charged with began in the 70's, they faced potential fines of tens of millions of dollars. Cost estimates for fitting power plants with new scrubbers and, in some cases, reconfiguring entire plants to run on cleaner-burning natural gas were estimated in the hundreds of millions of dollars. The cost of installing new equipment was, of course, the reason the companies had, according to the E.P.A., skirted the new-source review rules in the first place. (Still, the companies were not about to be put out of business by complying with E.P.A. regulations. In 1999, the Southern Company reported profits of \$1.3 billion.)

The utility industry immediately turned to the Republican-controlled Congress for relief from the lawsuits. A few days after the suits were announced, power companies and industry trade groups asked sympathetic House members to attach a rider to an appropriations bill. The rider would allow companies to perform "routine maintenance" while the lawsuits were pending. In the opinion of the rider's opponents, it would let power companies perform more illegal retooling while the industry's

lawyers delayed the E.P.A.'s lawsuit in court. But Representative C.W. Bill Young, a Tampa-area Republican, unexpectedly turned a deaf ear to the overtures of his local utility company, Tampa Electric, and refused to put the rider on the bill. As chairman of the House Appropriations Committee, Young had fought to keep House members from sneaking special-interest riders onto spending bills. He stood on principle, and the rider died.

Faced with Congressional rejection and mounting fines, some utilities struck bargains with the federal government. Tampa Electric, unable to make any headway with Young, agreed in February 2000 to spend more than \$1 billion on new pollution controls and pay a \$3.5 million civil penalty. The agreement took 123,000 annual tons of pollution out of the sky, and the civil penalty amounted to a little less than 2 percent of Tampa Electric's profits from 1999. Officials at some other utilities followed Tampa Electric to the negotiating table.

But others took an alternate route: they started writing checks to George W. Bush's presidential campaign fund. The Bush campaign had a special title for contributors who raised at least \$100,000: Pioneers. Among the more than 200 Pioneers during the 2000 Bush election campaign were FirstEnergy's president, Anthony Alexander; Reliant Resources' C.E.O., Steve Letbetter; and Reliant's chairman, Don Jordan. (MidAmerican Energy's C.E.O., David Sokol, has joined the elite rank for the 2004 re-election campaign; Southern Company's executive vice president Dwight Evans has been named a Ranger, meaning he has raised more than \$200,000.) Each of these executives' companies was either in litigation or was soon to be under investigation for new-source review violations. Six other Pioneers were lawyers or lobbyists for companies charged with N.S.R. violations.

Even in the early stages of Bush's 2000 run, energy executives understood what strong support of a winning candidate could mean. Thomas R. Kuhn, a Yale classmate of President Bush's and president of the Edison Electric Institute, was a 2000 Pioneer and is a Pioneer for the 2004 campaign as well. On May 27, 1999, Kuhn sent energy-industry executives a confidential memo, later made public in the course of a lawsuit, advising them to bundle their contributions to the Bush campaign under a tracking number to "ensure that our industry is credited" for its generosity.

After Bush eventually emerged as the winner of the 2000 election, industry leaders were upbeat about the prospect of the coming four years. The president and the vice president, Dick Cheney, were, after all, oilmen. The coal-industry trade magazine *Coal Age* exulted in the industry's "high-level access to policymakers in the new administration." Soon after Bush's inauguration, the electric utilities sought relief from the E.P.A. and its new-source review program. The problem was that most voters -- including Republican voters -- opposed rollbacks. A Gallup poll in 2001 found that 81 percent of Americans supported stronger environmental standards for industry. According to another 2001 poll, only 11 percent thought the government was doing "too much" to protect the environment.

Previous Republican leaders tried to enact a pro-industry environmental agenda and met with only limited success. In 1981, President Reagan took office promising that in his administration the E.P.A. would have "leaders who know and care about the coal industry." He appointed as head of the E.P.A. Anne Gorsuch, an attorney who had fought the E.P.A.'s enforcement of clean-air laws, and he named James Watt, a staunch defender of private enterprise against environmental regulation, as secretary of the interior. Watt pushed to open up potential federal wilderness lands to developers. Gorsuch took office under instructions from the White House to make the E.P.A. more friendly to industry. Within two years, they had become provocative symbols of anti-environmentalism and were forced to resign in separate scandals. Similarly, in 1994, Newt Gingrich and his House Republicans rode into power determined to weaken the Clean Water Act and the E.P.A.'s Superfund program. Their bold frontal attacks galvanized environmental activists and the Clinton administration, and Congress was persuaded

to leave the laws alone.

The Bush administration seemed determined not to repeat those political mistakes. Taking a lesson from Reagan's experience with Gorsuch and Watt, Bush officials realized that it would be self-defeating to appoint to public positions people with outspoken views on the environment, so they found noncombative figures instead. They named as head of the E.P.A. Christie Whitman, who was seen as a moderate when she was appointed, in part because she had participated in a clean-air lawsuit against a power company as governor of New Jersey. Learning from the Gingrich defeat, administration officials recognized that bills that overtly attacked environmental protections stood little chance of surviving in Congress. So they adopted a two-track strategy. Publicly, the president asked Congress to pass major environmental legislation like the Clear Skies Initiative and a sweeping energy bill, which he knew would face considerable opposition. Privately, the president's political appointees at the Department of the Interior, Environmental Protection Agency, Department of Agriculture and Office of Management and Budget would carry out those same policies less visibly, through closed-door legal settlements and obscure rule changes.

One key element of the strategy was putting the right people in under-the-radar positions. The Bush administration appointed officials who came directly from industry into these lower rungs of power -- deputy secretaries and assistant administrators. These second-tier appointees knew exactly which rules and regulations to change because they had been trying to change them, on behalf of their industries, for years. One appointee was Jeffrey Holmstead, a lawyer and lobbyist for groups like the Alliance for Constructive Air Policy, an electric utility trade group that sought to weaken the Clean Air Act. Holmstead stepped into the role of assistant E.P.A. administrator for air and radiation, where he would oversee changes to new-source review.

IV.

In the past, industry succeeded in blocking environmental reforms by arguing that they would mean lost jobs. But the jobs-versus-the-environment defense became less convincing during the economic expansion of the 90's, which took place under the relatively tough environmental restrictions of the Clinton administration. The Bush administration needed a different engine of necessity to propel environmental rollbacks like the scuttling of new-source review. It found one in the Cheney energy task force.

Nine days after his swearing in, President Bush created the National Energy Policy Development Group, a task force headed by Vice President Dick Cheney and charged with developing a national energy policy. The timing of Bush's ascendance to the presidency could not have been better for the energy industry. When Bush came to office, the nation was riveted by a bizarre energy crisis unfolding in California. We now know that California's energy shock was largely caused by market manipulation (by Enron, among other companies) and regulatory breakdown, not by a drought in supply. But we didn't know it then. A few days after he created the energy task force, President Bush went on CNN and blamed environmentalists for the crisis. "If there's any environmental regulation that's preventing California from having 100 percent max output at their plants -- as I understand there may be -- then we need to relax those regulations," he said. California utility officials denied that environmental rules had anything to do with the crisis. But their protests didn't matter. The president had forged the link.

Cheney's energy task force solicited suggestions from various quarters, but few outside a tight circle of industry insiders were able to make themselves heard. Although the vice president continues to fight a lawsuit -- now before the Supreme Court -- that would require him to divulge the names of industry executives consulted by his task force, documents released in the course of the legal battle reveal the

tenor of the exchanges.

On March 18, 2001, Joseph Kelliher, a top assistant to Energy Secretary Spencer Abraham, e-mailed Dana Contratto, an energy-industry lobbyist. "If you were King, or Il Duce," Kelliher wrote, "what would you include in a national energy policy . . . ?" Apparently that was one of many e-mail messages to industry lobbyists, for Kelliher's electronic mailbox was soon pinging with activity. A March 20, 2001, message from Jim Ford, lobbyist for the American Petroleum Institute, a powerful oil-and-gas-industry trade group, included a ready-made decree. "The last document," Ford wrote, referring to one of 10 attachments, "is a suggested executive order to ensure that energy implications are considered and acted on in rulemakings and other executive actions." President Bush would issue a very similar executive order two months later, the day after the energy task force report was released.

Another Kelliher correspondent, Stephen Sayle, a Republican Congressional aide, who is now an energy lobbyist, added a somewhat abashed note to the end of his March 23, 2001, wish list, which included a plea to stop enforcement of new-source review. "Obviously, this is a dream list," he wrote. "Not all will be done. But perhaps some of these ideas could be floated and adopted." In fact, Sayle was being needlessly pessimistic; most of the items on his list, many of which dealt with new-source review, were eventually adopted.

Many more wish lists arrived at the Energy Department, and many of them led with the same idea: gutting new-source review. In case the administration didn't get the message, a consortium of energy companies hired Haley Barbour, former chairman of the Republican National Committee, to press their cause in a face-to-face meeting with Vice President Cheney. According to a recent article by Christopher Drew and Richard A. Oppel Jr. in *The New York Times*, Barbour was accompanied in that meeting by Bush's friend Marc Racicot, who is now chairman of the president's re-election campaign.

Over at E.P.A., Whitman and other top officials tried to resist the policy changes coming out of the Energy Department. When a draft of the National Energy Policy circulated in late April 2001, Tom Gibson, an associate E.P.A. administrator appointed under President Bush, sent a memo to the task force director arguing that one of the president's, and the policy's, fundamental assumptions -- that environmental regulations had hamstrung American domestic energy production -- was flat wrong. "Costs of compliance with environmental regulations are overstated, several inaccurate statements and opinions are presented as factual and no citations are provided for many of these statements," Gibson wrote. He and other E.P.A. officials, he continued, "are very concerned that this language is inaccurate and inappropriately implicates environmental programs as a major cause of supply constraints. . . . Such a conclusion, in our opinion, is overly simplistic and not supported by the facts."

Whitman, who was a member of Cheney's task force, often found herself and Treasury Secretary Paul O'Neill acting as the panel's only defenders of environmental protections. In Ron Suskind's recent book "The Price of Loyalty," O'Neill recalls Whitman saying after one meeting: "This is a slaughter. It's 10 on 2, not counting White House people and all the advisers to the group from the various industries." (Whitman, who is co-chairman of President Bush's re-election campaign in New Jersey, declined to comment for this article. According to her spokesman, she has criticized O'Neill's book as inaccurate in many of its details.)

Whitman was in an especially tough position with respect to new-source review. Thirteen months before she was named to the Bush cabinet, when she was governor of New Jersey, Whitman joined a lawsuit to force Ohio-based American Electric Power to clean up its coal-fired plants, and now that she was head of the E.P.A., American Electric was one of the seven utilities the agency was suing for new-source review violations. In the spring of 2001, as the energy task force was completing its work and

preparing its report, Whitman understood that new-source review faced effective elimination under industry pressure, and she worried about the environmental and political implications of such a move. In May 2001, less than two weeks before the final energy report was released, Whitman sent a memo to Cheney. "As we discussed, the real issue for industry is the enforcement cases," she wrote. "We will pay a terrible political price if we undercut or walk away from the enforcement cases; it will be hard to refute the charge that we are deciding not to enforce the Clean Air Act."

President Bush's final National Energy Policy (N.E.P.) was published on May 16, 2001. In its 170 well-designed, color-illustrated pages lay the administration's vision of the environmental future of the United States. The policy's defining notion was simple: environmental regulations have constrained America's domestic energy supply. In broad strokes, the N.E.P. laid out the next three years of the Bush administration's energy and environmental agenda: roll back wilderness and wildlife protections to open up more public land to oil and gas development; establish fast-track hydropower permits; expand offshore oil and gas drilling; and replace tough Clean Air Act rules, including new-source review, with an industry-friendly market-based pollution trading system. These weren't items on a wish list. They were marching orders. Among the first to be carried out was the mandate to overhaul new-source review.

To that end, the White House directed the Justice Department to review its cases against the Southern Company, American Electric and others to see if any of the suits might be dropped outright. According to a senior E.P.A. adviser supportive of the administration's policies, who spoke on condition of anonymity, "The administration believed some of those cases were brought" -- by the Clinton Justice Department -- "without regard to whether they were really egregious violations of the Clean Air Act worthy of enforcement." Certain lawsuits, he said, "were regarded as more punitive than designed to achieve environmental goals."

During the same period, Bush appointees at the E.P.A. disbanded Robert Perciasepe's N.S.R. working group and, led by Jeffrey Holmstead, the former industry lobbyist who had become an assistant administrator at the E.P.A., started to rewrite the rules. Publicly, the president ordered the agency to conduct a 90-day review of its new-source rules, and officials dutifully sat through four public hearings during the summer of 2001 and took note of the hundreds of comments regarding the policy. Privately, though, the E.P.A. and the Energy Department were already moving to undo new-source review. At a Senate hearing that July, Whitman outlined a plan to replace the E.P.A.'s toughest clean-air programs with a more flexible, industry-friendly regimen. "New-source review is certainly one of those regulatory aspects that would no longer be necessary," she said.

The Energy Department took an unusually active role in drawing up the proposed new-source review changes. In November 2001, D.O.E. officials circulated their proposed changes among the E.P.A. staff for feedback. Officials at the E.P.A.'s air-enforcement division were appalled. "The current draft report is highly biased and loaded with emotionally charged code words," E.P.A. officials wrote in an internal memo. "It is drafted as a prelude to recommendations to vitiate the N.S.R. program." The agency's memo noted that the report "contains only comments by industry and ignores the comments of all other stakeholders."

In January 2002, the White House suffered a setback. The Justice Department delivered its report on the legality of the E.P.A.'s lawsuit against the Southern Company and other N.S.R. violators. The department found that contrary to the administration's hopes, all of the lawsuits were legal and warranted. In fact, Justice's lawyers said they intended to prosecute the cases "vigorously."

Shortly thereafter, White House officials decided it was time to try the Congressional track. On Feb. 14,

2002, President Bush unveiled his Clear Skies Initiative. The president declared that his proposed legislation "sets tough new standards to dramatically reduce the three most significant forms of pollution from power plants -- sulfur dioxide, nitrogen oxides and mercury."

It was true that the new standards, if enforced, would reduce emissions from their current rate -- but the president's formulation was somewhat misleading. Clear Skies was to replace Clean Air Act regulations with a cap-and-trade market system. On its face, that was not an unreasonable proposition. Many Republicans and some moderate Democrats embrace the general concept of cap-and-trade, in which Washington sets pollution standards for the entire country (the "cap") and then allows companies that manage to reduce their emissions below the standard to sell their extra pollution "allowance" to companies that haven't met the standard (the "trade"). The key to cap-and-trade lies in the standard -- how low it is set and how quickly it shrinks. And when President Bush announced Clear Skies, the E.P.A. was already on track to require deeper reductions in air pollution than his cap-and-trade proposal would produce. So the air would actually be dirtier under Clear Skies than if the president allowed the E.P.A. to enforce the existing law. Clear Skies allowed 50 percent more sulfur dioxide, nearly 40 percent more nitrogen oxides and three times as much mercury as the Clean Air Act -- rigorously enforced -- called for.

Because of this discrepancy, the legislation was not greeted with much enthusiasm in Congress. Clear Skies wasn't helped by the fact that a former top E.P.A. official went on ABC's "This Week" to denounce the proposal two weeks after it was introduced. "We can do better under current law than what they're putting on the table," Eric Schaeffer told George Stephanopoulos. Schaeffer, the E.P.A.'s head of civil enforcement from 1997 to 2002, had worked on the new-source review lawsuits since their inception. He left the E.P.A. in early 2002, tired, as he said in his letter of resignation, of "fighting a White House that seems determined to weaken the rules we are trying to enforce."

Schaeffer's frustration stemmed from the collapse of talks that had been leading, in his estimation, to the elimination of more than four million tons of air pollution annually. Officials at the power companies named in the new-source review lawsuits, who had been negotiating with E.P.A. officials, were well aware that White House appointees were drafting new rules that would all but scuttle N.S.R., and they lost their incentive to cut deals. Beginning in 2001, soon after Bush took office, negotiations began to break down. "We were 80 percent of the way done with seven or eight companies, and one by one they just walked away," said Bruce Buckheit, who conducted many of the negotiations himself. Even done deals fell apart. In late 2000, E.P.A. officials reached an agreement in principle with Cinergy that was designed to cut nearly 500,000 tons of the company's annual emissions. By 2002, Cinergy had backed out.

Christie Whitman did little to help the negotiations. In her testimony before the Senate Committee on Government Affairs in March 2002, she described new-source review as "a program that needs to be fixed," but assured the committee that the E.P.A. would not eviscerate the program. Later in her testimony, though, Whitman offered unsolicited advice to the companies her agency was suing for N.S.R. violations. At the time, the Tennessee Valley Authority, which had refused to settle with the Justice Department, had gone to court to challenge the E.P.A. over new-source review. "If I were a plaintiff's attorney," Whitman said, "I would not settle anything until I knew what happened" with the T.V.A. case. The message to the power industry, critics charged, was clear: don't settle the cases; change is coming.

V.

Meanwhile, Bush appointees at the E.P.A. and the Energy Department continued to undo the

longstanding N.S.R. rules. There was one technical question that was very important to both sides: where would the line be drawn between "routine maintenance" of plants, meaning changes that did not trigger N.S.R. pollution upgrades, and significant overhauls that did. In the spring of 2002, Jeffrey Holmstead, the E.P.A.'s assistant administrator, asked Sylvia Lowrance, the E.P.A.'s deputy assistant administrator for enforcement, to suggest a financial threshold -- a percentage of the total value of each generator that a utility would be permitted to spend on renovations and still define them as routine. Lowrance, a 24-year veteran of the agency, had officials in her office study years of data, looking at figures that came from actual power plants, and on June 3, 2002, she wrote a memo to Holmstead indicating that her office thought 0.75 percent was a reasonable figure. (The memo was later released to reporters by a former E.P.A. official critical of the administration's policies.) In other words, if the total value of a generating unit was \$1 billion, a power company should be able to legitimately spend up to \$7.5 million a year on routine repair and maintenance without being required to install new pollution controls.

In a separate memo, Lowrance, Buckheit and Schaeffer warned Holmstead that the proposed changes in new-source review could seriously undermine the E.P.A.'s lawsuits against N.S.R. violators. There were several proposed changes, they wrote, "that, if included in the final version of the recommendations, could undercut ongoing enforcement activities, including efforts to reach environmentally beneficial settlements." Holmstead does not appear to have worried much about the warning from his colleagues. A few weeks later, on July 16, 2002, he went before Congress and testified that officials at the E.P.A. "do not believe these changes" -- to new-source review -- "will have a negative impact on the enforcement cases."

Holmstead did not seem to believe in the very notion of new-source review. Speaking at an energy-industry conference in Washington in September 2002, Holmstead noted that N.S.R. had spawned thousands of pages of guidance documents, and, he said, "we can't even say we've gotten any emissions reductions from existing sources." The E.P.A.'s own documents, however, show that from 1997 to 1999 alone, the program reduced emissions nationwide by a total of more than four million tons. Holmstead's statement also ignored the fact that the main reason the new-source review law hadn't brought greater across-the-board pollution reductions was that many power companies had systematically violated it for 20 years. (Holmstead declined to be interviewed for this article.)

Through the spring and into the summer of 2002, President Bush's Clear Skies Initiative was stalled in Congress. The bill's principal sponsor, Representative Joe Barton, a Texas Republican, formally introduced it on the last Friday in July 2002, just before the House adjourned for summer vacation. That fall, an internal E.P.A. analysis, later leaked to the media, found that a rival bill sponsored by Senator Tom Carper, a Democrat from Delaware, would reduce more emissions, on an earlier schedule and at a comparable cost to consumers, than the president's Clear Skies plan. If the Bush administration was going to bring about changes, it was becoming clear that they would have to be done administratively.

The E.P.A. revealed its overhaul of new-source review on Friday, Nov. 22, 2002. For all the buildup, it was a conspicuously low-key debut. President Bush issued no statement about the new guidelines. Christie Whitman declined to attend the news conference, which was run by Jeffrey Holmstead. Cameras were not allowed at the event, which seemed timed to hit the weekly news cycle at its Friday night nadir.

"There will be emissions reductions as a result of the final rules that we are adopting today," Holmstead said. The new rules gave utilities much more maneuverability under N.S.R. The E.P.A. adopted Carol Browner's old "micro-cap" idea -- but abandoned its critical component, the gradual tightening of the cap. Utilities that installed new pollution-control equipment were given 10-year exemptions from

further upgrades. An official with the National Association of Manufacturers called the new rules "a refreshingly flexible approach to regulation." The usually staid American Lung Association, in a report issued with a coalition of environmental groups, called the rule changes "the most harmful and unlawful air-pollution initiative ever undertaken by the federal government."

VI.

Bush's E.P.A. appointees left one crucial detail out of the final report. They said they were still working on a final revision of N.S.R. having to do with the often contested definition of "routine maintenance." The agency published its proposed rule in the Federal Register but left the crucial percentage -- the one Sylvia Lowrance and the E.P.A.'s enforcement office had suggested setting at 0.75 percent -- unspecified.

In early 2003 -- before that important percentage was arrived at -- the Bush changes were being challenged. The attorneys general of nine states filed suit to stop the new rules from taking effect. Attorney General Eliot Spitzer of New York and his colleagues, almost all of whom were from states in the Northeast, charged that the changes were so sweeping and damaging that the E.P.A. could not make them without Congressional approval. The lawsuit argued, in effect, that the Bush administration's entire administrative approach to undoing new-source review was against the law. Administration officials brushed off the suit as a political maneuver, noting that most of the attorneys general were Democrats.

On Aug. 27, 2003, two days before Labor Day weekend, the other N.S.R. shoe dropped. By then, Whitman was gone, having announced her resignation in May. She said she was tired of making the New Jersey-to-Washington commute and wanted to spend more time with her husband. "I'm not leaving because of clashes with the White House," she said in a television interview. "In fact, I haven't had any." A number of career E.P.A. officials told me they suspected that she'd had enough of the White House's dictating policies with which she disagreed, but, if true, Whitman never let on.

So it was Marianne Horinko, acting E.P.A. administrator, who announced in August that the agency had finalized its rule on routine maintenance. The new formula would not adopt Lowrance's suggested threshold of 0.75 percent. Instead, Horinko said, utilities would be allowed to spend up to 20 percent of a generating unit's replacement cost, per year, without tripping the N.S.R. threshold.

In other words, a company that operated a coal-fired power plant could do just about anything it wanted to a \$1 billion generating unit as long as the company didn't spend more than \$200 million a year on the unit. To E.P.A. officials who had worked on N.S.R. enforcement, who had pored over documents and knew what it cost to repair a generator, the new threshold was absurd. "What I don't understand is why they were so greedy," said Eric Schaeffer, the former E.P.A. official. "Five percent would have been too high, but 20? I don't think the industry expected that in its wildest dreams."

The framework of new-source review would remain, but the new rules set thresholds so high that pollution-control requirements would almost never come into effect. "It's a moron test for power companies," said Frank O'Donnell, executive director of the Clean Air Trust, a nonprofit watchdog group. "It's such a huge loophole that only a moron would trip over it and become subject to N.S.R. requirements."

The report from the American Lung Association and various environmental groups estimated that compared with enforcement of the old N.S.R. rules, the new rules would result in emissions increases of 7 million tons of sulfur dioxide and 2.4 million tons of nitrogen oxides per year by 2020. Had the new

rules been in effect before 1999, the lawsuits that the Justice Department filed against the power companies would have been impossible: nearly every illegal action the power companies were accused of back then would have been legal under the new rules.

The announcement of the 20 percent limit had a devastating effect on the E.P.A.'s enforcement division. "Under the new rules," Buckheit said, "almost everything we worked to achieve is wiped out." Two months after Horinko's announcement, in November 2003, J.P. Suarez, the Bush-appointed E.P.A. assistant administrator for enforcement, informed staff members that the agency would newly "evaluate," and perhaps choose not to pursue, existing N.S.R. investigations, except those cases that the Justice Department had already taken to federal court. Investigations into 70 companies suspected of violations of the Clean Air Act were abandoned.

On Christmas Eve, 2003, two days before the new-source review rules were to take effect, a federal appeals court halted their implementation. The court ruled that the new regulations could not go into effect until the lawsuit brought by Eliot Spitzer and 14 other attorneys general (6 more had joined the suit since its inception) was heard. The ruling meant that the new rules would be delayed for at least a year and signaled the beginning of what could be a years-long legal battle.

By the end of 2003, with new-source review all but dead, the White House began moving on to other projects. Mike Leavitt, the newly installed E.P.A. administrator, proposed two new regulations. The first suggested new standards for mercury emissions that would in the short term permit the release of as much as seven times as much mercury as current law allows. The second, known as the interstate air-quality rule, set new national caps on sulfur dioxide and nitrogen oxides, and was seen by many as the administrative enactment of Bush's Clear Skies Initiative. Supporters of the administration contend that the interstate air-quality rule will accomplish all the goals of new-source review in a more efficient and comprehensive way. "All the arguments about N.S.R. and the ability to control pollution from power plants are made moot" by the new rule, according to the senior E.P.A. adviser who is a supporter of the administration's policies and spoke on condition of anonymity.

Yet the new rule set higher national limits for emissions of dangerous chemicals like sulfur dioxide and nitrogen oxides than Clear Skies, which in turn was considered by critics to be weaker than the existing Clean Air Act. Around that time, some longtime E.P.A. officials decided they'd had enough. Bruce Buckheit and Rich Biondi, Buckheit's deputy, took retirement buyouts and left the agency. Buckheit and Biondi said they could no longer carry out their jobs effectively, given the Bush administration's attitude toward the Clean Air Act.

The White House's reversal of clean-air gains was especially disturbing to Biondi, who joined the agency in 1971, six months after its inception under President Nixon. The rule changes and the abandonment of the new-source review investigations "excuse decades of violations," he said. "We worked 30 years to develop a clean-air program that is finally achieving our goals. It was frustrating to see some of our significant advances taken away. I left because I wanted to make a difference, and it became clear that that was going to be difficult at the E.P.A."

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