

March 6, 2004

How Industry Won the Battle of Pollution Control at E.P.A.

By **CHRISTOPHER DREW** and **RICHARD A. OPPEL Jr.**

Just six weeks into the Bush administration, Haley Barbour, a former Republican party chairman who was a lobbyist for electric power companies, sent a memorandum to Vice President Dick Cheney laying down a challenge.

"The question is whether environmental policy still prevails over energy policy with Bush-Cheney, as it did with Clinton-Gore," Mr. Barbour wrote, and called for measures to show that environmental concerns would no longer "trump good energy policy."

Mr. Barbour's memo was an opening shot in a two-year fight inside the Bush administration for dominance between environmental protection and energy production on clean air policy. One camp included officials, like Mr. Cheney, who came from the energy industry. In another were enforcers of environmental policy, led by Christie Whitman, a former Republican governor of New Jersey.

The battle engaged some of the nation's largest power companies, which were also among the largest donors to [President Bush](#) and other Republicans. They were represented by Mr. Barbour and another influential lobbyist, Marc Racicot, who also would later become chairman of the Republican National Committee.

In an administration that puts a premium on keeping its internal disputes private, this struggle went on well out of the public's view. But interviews and documents trace the decisions in which the Bush administration changed the nation's approach to environmental controls, ultimately shifting the balance to the side of energy policy. Senior officials at the Environmental Protection Agency, including Mrs. Whitman, became isolated, former aides said, and several resigned.

Thirty years after the first Earth Day, the incoming administration was still confronting power-plant smokestacks spewing fumes. The policy questions were arcane, involving strategies to control polluting particles. At stake, though, were environmental risks to human health and the nation's ability to produce cheap energy, as well as decisions about how the most polluting industries would be monitored for decades to come.

For operators of some coal-fired plants, the stakes were more tangible. Dozens of plants were facing

lawsuits over air pollution brought by the Clinton administration and several northeastern states — including New Jersey under Mrs. Whitman before she became head of the E.P.A. The industry, fearing billions of dollars in new costs, set about to undo the suits.

One of the most important decisions was Mr. Bush's reversal of a campaign promise to regulate emissions of carbon dioxide, a gas that many scientists say contributes to global warming. The administration also has proposed looser standards for emissions of mercury — a highly toxic pollutant — than President Bill Clinton had sought. The most protracted fight concerned the administration's decision to issue new rules that substantially reduced the requirements for utilities to build pollution controls when modernizing their plants. The final policy shift may ultimately help the coal-plant operators shed the lawsuits.

The struggle within the administration, in skirmishes between Cabinet officers and volleys of memorandums, showed how the White House has transformed domestic policy through regulatory revision, rather than more contentious congressional debate.

Administration officials say the changes were needed to raise energy production and lift the burden of cumbersome and costly regulations on industry. They said that the approach will continue the trend of declining emissions and reduce some of the most harmful pollutants by about half in the next decade — cuts as deep if not deeper than the old measures would bring.

"It's not about whether air quality will get better," said James L. Connaughton, chairman of the White House Council on Environmental Quality. "It will, and it must. The question is what path you take to get there."

Critics on Capitol Hill and environmental groups say the policies will slow the cleaning of the air and undercut Congress's authority, while catering to companies that are big contributors to Mr. Bush's campaigns.

"Rather than work with Congress to move us forward on environmental issues, the Bush administration is working with the special interests to undermine them," said Senator James M. Jeffords, the Vermont independent who is the ranking minority member of the Senate environment committee.

But both sides agree on one outcome of the struggle: The nation's approach to air pollution control shifted drastically.

An Early Challenge

As President Bush took office, he said he wanted to swiftly address energy shortages that had caused blackouts in California. Coming from the Texas energy industry, he was convinced that Clinton administration environmental policies were restraining energy production. And utilities geared up to press the new administration for big changes on a handful of issues that were crucial to them.

Their biggest worry was Mr. Bush's campaign pledge to carry through on a Clinton administration effort to impose controls on power plant emissions of carbon dioxide.

The coal-fired power companies, which are among the nation's largest sources of carbon dioxide, were alarmed when Mrs. Whitman in her first days at the agency said Mr. Bush would carry out his promise. Not long after, Mr. Barbour sent his memorandum to Vice President Cheney, who was heading a task force Mr. Bush had ordered to conduct a broad review of energy policy.

Mr. Cheney had been chief executive at Halliburton, an oil-and-gas-services company. Energy corporations had been among the strongest supporters of Mr. Bush's presidential campaign: There were more executives from energy than from any other industry group among Mr. Bush's most elite fund-raisers, called "Pioneers," who each generated more than \$100,000 in donations.

The industry's outcry over carbon dioxide reached Mr. Bush. In March 2001, he reversed himself, saying there would be no carbon dioxide controls. "I was responding to realities," Mr. Bush said at the time, "and the reality is our nation has a real problem when it comes to energy."

After that victory, the utilities moved to press their advantage, turning to Mr. Cheney for help on another issue: a set of rules requiring them to add new pollution controls when they upgraded or expanded their plants. The power companies strongly objected to the rules, which were known as "new source review," calling them arbitrary, expensive and outmoded.

A small group of coal-fired utilities was especially unhappy. In 1999, the Clinton administration had sued nine companies, saying they had expanded 51 older plants without adding the required controls. Among those facing suits were the Southern Company, based in Atlanta; the Duke Energy Corporation, based in Charlotte, N.C.; and the FirstEnergy Corporation, based in Akron, Ohio. Southern, one of Mr. Barbour's biggest clients, was facing potential liabilities of hundreds of millions of dollars.

The rules had not previously been vigorously enforced, and the companies contested the suits, saying the Clinton administration had focused on them unfairly and made it too costly to improve their plants.

Mrs. Whitman made it clear she was willing to revise the rules and settle the lawsuits. But, former aides at the E.P.A. said, she favored old-fashioned political horse-trading: She would ease up on the old rules, but only after going to Congress with broad legislation to establish tough new controls on three important pollutants — sulfur dioxide, nitrogen oxide and mercury.

Mrs. Whitman's orders were to "find ways to deal with" the rules "without giving away the farm to industry unilaterally," said Jeremy Symons, a former agency official who works with the National Wildlife Federation, an advocacy group.

Industry lobbyists had a different strategy. C. Boyden Gray, who was White House counsel during the

first Bush administration and represented some utilities, said the companies viewed the pollution lawsuits as "a gun to the head." They feared, he said, that if their bid to change the rules got caught up in a bigger battle in Congress, "they might not get anything."

The industry's main lobbying group, the Edison Electric Institute, already had meetings with White House and Energy Department officials about relaxing the pollution rules. The group's president, Thomas R. Kuhn, had been a Yale classmate of President Bush, and was also a Pioneer.

Yet for some companies named in the lawsuits, the institute was not forceful enough. "We needed a strategy and an organization to take a more aggressive approach," said Todd Terrell, a spokesman for Southern. So, at Mr. Barbour's urging, a handful of coal-burning utilities formed their own lobbying group.

At the time, Mr. Barbour was probably Washington's most successful lobbyist. As Republican National Committee chairman from 1993 to 1997, he had helped the party gain control of Congress and had long been one of its most prodigious fund-raisers. His corporate clients included many of the party's largest donors. That added to his entree with Republican officials.

The splinter group, organized by Mr. Barbour in the spring of 2001, was called the Electric Reliability Coordinating Council. Scott Segal, its executive director, said it sought a "more consistent" effort to rewrite the pollution rules. Several government officials and lobbyists said the group's underlying goal was bolder: to persuade the administration to repudiate the old rules and thus torpedo the lawsuits based on them.

According to the Center for Responsive Politics, the six utility companies now in the council and their employees made more than \$10 million in political donations over the last five years, nearly three-fourths of that going to Republicans. Southern and its employees account for nearly \$4 million of the total, with 72 percent of their donations going to Republicans.

Mr. Barbour had a meeting with Mr. Cheney on May 3, 2001, just two weeks before the task force was set to unveil its energy plan, Mr. Segal said. Mr. Barbour was accompanied by Mr. Racicot, a friend of President Bush who would become the Republican chairman in January 2002 and is now chairman of Mr. Bush's campaign.

Mr. Segal said that Mr. Barbour and Mr. Racicot "did not dwell" on the lawsuits, but suggested that the administration should abandon the standards that the Clinton administration had applied in bringing them.

Mrs. Whitman's aides said Mr. Cheney's office did not inform her of that meeting. But the next day Mrs. Whitman, knowing the debate was reaching a climax, sent a blunt memorandum to Mr. Cheney.

"We will pay a terrible political price if we undercut or walk away from" the lawsuits, she wrote.

She said it would be "hard to refute the charge that we are deciding not to enforce the Clean Air Act."

She warned Mr. Cheney that a "broad attack" in his final report on the pollution rules would wipe out her leverage over the industry and "permanently destroy our chance to achieve any needed legislative reforms we may seek in the future."

As the task force neared its end, Southern and other utilities in Mr. Barbour's group were busy on another front. On May 15, 2001, they gave \$100,000 to the Republican party.

A Shift in Lobbying Efforts

Mrs. Whitman's arguments succeeded in forestalling any recommendation in the Cheney task force report, issued on May 17, to rewrite the rules or cripple the lawsuits. Instead, the task force called only for the E.P.A. to review the rules with the Energy Department, whose focus is to promote energy supply, and for the Justice Department to review whether the suits were valid.

In January 2002, though, Mr. Barbour and his group learned that they would get no help from the Justice Department. Its lawyers found nothing amiss with the pollution lawsuits, concluding that they were supported by "a reasonable basis in law and fact."

That setback did not slow the lobbying. Soon its locus shifted, as the Energy Department, led by Spencer Abraham, became increasingly involved, setting off a fight that reverberated inside the E.P.A. as officials there said they felt outmaneuvered.

Mr. Barbour and Mr. Racicot joined a parade of industry lobbyists seeking out Energy officials. Between July 2001 and November 2001, Francis S. Blake, then the deputy energy secretary, held seven meetings with industry groups about the pollution rules, attended by more than 60 executives and lobbyists, records show. During that time he met with only one lobbyist from an environmental group.

In early 2002, Energy and E.P.A. officials got down to considering new rules. Environmental officials in charge of enforcement grew alarmed at the proposals emanating from Mr. Abraham's department, which often echoed the industry's demands.

In one memorandum, E.P.A. officials attacked an Energy Department draft as "highly biased and loaded with emotionally charged code words" that would ultimately "vitiate" the pollution-control program.

At one point, her aides said, Mrs. Whitman set up what she thought would be a private meeting with Mr. Cheney to discuss E.P.A. concerns. When she arrived at his office, though, she was disappointed to find that Mr. Abraham was already there to present counterarguments.

Soon an exodus began from the E.P.A.'s enforcement branch. Eric V. Schaeffer, who joined the agency

during the first Bush administration and was head of the Office of Regulatory Enforcement, sent a resignation letter to Mrs. Whitman that February. "We seem about to snatch defeat from the jaws of victory," he wrote, adding that the White House "seems determined to weaken the rules we are trying to enforce."

Mr. Schaeffer and his boss, Sylvia K. Lowrance, then the agency's top career enforcement official, both said in interviews they repeatedly warned Mrs. Whitman that the rule changes would jeopardize the enforcement lawsuits. Their view, shared by many industry lawyers, was that judges were often reluctant to penalize companies for failing to comply with rules that had been subsequently relaxed. Mrs. Lowrance later took early retirement.

A different view was held by some E.P.A. policy officials, including Jeffrey R. Holmstead, a former aide to Mr. Gray in the first Bush White House, who was now in charge of writing air-pollution regulations. Mr. Holmstead had long criticized the old rules as unmanageable and counter-productive, and he believed revising them would have no impact on the lawsuits in court.

But Mr. Holmstead was uneasy with the lobbyists' participation. "This would have been so much simpler if they hadn't gotten Barbour involved, because that just created this new political intrigue," he said.

In June 2002, Mr. Holmstead had a chance to see how closely the White House was watching. At a party for the 50th birthday of Mr. Abraham, Mr. Holmstead ran into Andrew Card, the White House chief of staff.

Mr. Card "wanted to know how come we were having so much trouble" finishing up the rule revisions, Mr. Holmstead recalled.

Shortly after, on June 13, Mrs. Whitman sent a proposal to the White House. It contained many of the changes that the Energy Department had championed, and was the foundation of the final rule revisions published in October 2003.

Mrs. Whitman has never discussed the decision-making process or broken ranks in public with President Bush. But the new rules showed that the White House had thrown its weight behind energy priorities, both environment and energy officials said.

The rules said utilities would not have to add new pollution-control devices if upgrades and construction projects did not cost more than 20 percent of the plant's value — a loophole all sides said was huge.

Departures From E.P.A.

Mrs. Whitman resigned last May, saying she hoped to spend more time with her family. Several former aides said she was frustrated that she did not have more support within the administration. She declined through a spokesman to be interviewed.

In a statement, Mrs. Whitman said she had supported streamlining the pollution rules because many groups agreed that they "had grown cumbersome, unreliable and unpredictable." She said that Mr. Bush "expects the members of his cabinet to advocate forcefully on behalf of his or her agency" before making major decisions.

Mr. Cheney, Mr. Abraham, Mr. Racicot and Mr. Barbour — now the governor of Mississippi — declined to comment.

Late last year, top E.P.A. officials announced a new pollution enforcement policy that seemed likely to critically weaken the pending lawsuits. By year's end three more of the agency's top enforcement officials resigned. "The rug was pulled out from under us," one of them, Rich Biondi, said.

The new rules evoked fierce opposition, though, as fourteen states sued to block the change. In December, a federal appeals court stayed their use, pending further arguments. E.P.A. officials said they put the new enforcement policy on hold until the court challenge is resolved.

The administration's goal now is to expand the use of a more flexible "cap and trade" regulatory system created in the early 1990's that worked with notable success to combat acid rain. It lets utilities buy and sell credits that give them a pollution allowance. The number of credits available nationwide shrinks over time, creating a cap to ensure that pollution levels decline. Late last year, administration officials announced plans to move to the new cap-and-trade system by revising regulations, rather than pressing for a new pollution bill, as Mrs. Whitman had envisioned.

Under the administration's plan, nationwide sulfur dioxide emissions from power plants would fall to 5.3 million tons by 2015, and nitrogen oxide emissions to 2.2 million tons, according to E.P.A. estimates. Those would be reductions of 51 and 55 percent, respectively, over levels in 2001.

A recent administration move to control diesel emissions has drawn praise from environmentalists. But in December, officials set off a new controversy by proposing a cap-and-trade approach for another pollutant: emissions from coal-fired power plants of mercury, which can cause neurological damage to humans. Instead of starting to curtail the emissions by 2007, as was widely expected, the proposal would give utilities until 2018 to make significant cuts.

Many environmentalists and some former E.P.A. officials said that while the proposed pollution cuts are substantial, they give industry more time to make reductions than existing law. The critics contend that it was foolish to weaken the pollution lawsuits without extracting anything in return.

"They are packaging this as a pollution cut, but in fact it is a pollution delay imposed on a program that the Clean Air Act requires to go faster," said Dave Hawkins, a lawyer for the Natural Resources Defense Council in Washington.

What is clear is that the energy industry is satisfied with the way the Bush administration has gone. "Cost-effective, and effective, are reasonable ways to describe the Bush administration's clean-air policy," said Mr. Segal of the electricity lobbying group. "The administration has a lot to be proud of on its air policy."

Jennifer 8. Lee contributed reporting from Washington for this article.

[Copyright 2004 The New York Times Company](#) | [Home](#) | [Privacy Policy](#) | [Search](#) | [Corrections](#) | [Help](#) | [Back to Top](#)