

The Dismantling of Environmental Policies in the USA: The Case of the New Source Review

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1. Introduction

In the past decades a huge body of academic literature has emerged that analyzes how and under what circumstances environmental policies are introduced by pioneer states, transferred to other countries, and continuously strengthened and expanded all around the world. This focus on the expansion of environmental policies is not astonishing considering that environmental protection is a rather young policy field. In contrast, the dismantling of environmental policies, i.e. the termination of policy instruments or the weakening of regulatory levels, has hardly been systematically assessed. A rare exception is the theory of regulatory competition that predicts a cross-national race to the bottom in environmental standards and therefore a systematic dismantling of environmental policies, but lack empirical support. Overall, a growing academic consensus supports the expectation that a race to the top occurs which is traced back to the global spread of policy innovations as a consequence of international legal harmonization as well as cross-national imitation and learning of environmental policies (Busch and Jörgens 2007; Holzinger 2007)

Although there is no empirical evidence for a systematic dismantling of environmental policies on an international scale, singular cases of environmental policy dismantling can be observed, in particular in the USA during the Presidencies of Ronald Reagan and, more recently, of George W. Bush. And while limited in number, these observable cases already show that the politics of dismantling differ significantly from the more frequent politics of expansion (Bauer and Knill 2010) and therefore deserve our academic attention. In order to improve our understanding of the circumstances under which environmental policies get dismantled, we will analyze the case of the New Source Review (NSR). In this case the Bush Administration deliberately engaged in an immense effort to dismantle the regulatory stringency of an air pollution control program established with the 1977 Clean Air Act amendments. The NSR program requires industries to install modern pollution control technologies in stationary sources of air pollution whenever new facilities are created or existing ones expand their capacity and increase emission. Between 2001 and 2007 the Bush Administration undertook several attempts to weaken the regulatory stringency of this program. It proposed both legislative as well as rule changes, some of which would have resulted in a de facto elimination of the NSR requirements and all of which dismantled the regulatory stringency of the Clean Air Act. While legislative attempts to substitute the New Source Review failed, several significant changes were adopted by the Bush Administration at the level of administrative rulemaking. Although, in the end, most of these rule changes did not survive judicial review, NSR dismantling is widely considered as one of the most far-reaching case of environmental policy dismantling and as a powerful reminder of

the great dismantling pressures that exist and may increasingly come to threaten environmental regulation.

Consequently, a thorough analysis of actors' motivations to dismantle environmental regulations and of the institutional constraints that limit and/or impede dismantling can improve our theoretical and empirical understanding of dismantling processes. By taking a deeper look at the pressures that led to the dismantling of the New Source Review and the processes through which dismantling was achieved, we want to find out under which conditions political actors engage in the dismantling of environmental policies and what factors influence the success of dismantling attempts.

In the next section we will first review the academic body of literature on policy change in order to derive expectations concerning the circumstances facilitating or hindering environmental policy dismantling. Therefore we will first look at the perceived costs and benefits decision-makers face when engaging in policy dismantling, second, we will focus on actors' potential to dismantle environmental policies in different institutional venues. In line with the current state of research, we expect that business actors lobbying for environmental policy dismantling in combination with a governing party whose ideological core beliefs are highly compatible with these lobby interests are the main drivers in agenda setting and policy formulation where environmental policies get dismantled. Furthermore, due to a varying number of institutional veto points at different levels of policymaking, we expect lobbying activities to dismantle environmental policies to be most successful at the level of administrative rulemaking. In section three we will provide a thick description of the decision-making processes accompanying the dismantling of the NSR. We want to analyze the impact of business interests on the agenda-setting process and the potentials (and limits) of business to lobby for environmental policy dismantling in different institutional venues and under varying degrees of ideological polarization of the political system.

2. Determinants of Policy Dismantling

In his seminal study on the dismantling of the welfare state Pierson compares dismantling strategies during the conservative eras of President Reagan in the USA and Prime Minister Thatcher in the UK. Despite their great determination to dismantle welfare state programs, Pierson finds that while changes occur, continuity in the established welfare programs prevails. This high durability of welfare state policies is traced back to the high political costs associated with welfare state retrenchment due to strong public resistance to welfare state reductions (Pierson 1994). The dismantling and termination of policies highly valued and supported by most voters involve a significant degree of redistribution of costs and benefits and consequently trigger the fierce opposition of potential losers. As vote-seeking politicians hardly perceive dismantling to be a rewarding strategy, a high degree of stability or even expansion of existing policies can be expected. In contrast, dismantling is generally considered to be a rare phenomenon (Bauer and Knill 2010; Jordan, Green Pedersen and Turnpenny 2010).

Compared to welfare policies, the dismantling of environmental policies is of less empirical relevance so far and in most industrial countries, including the United States, environmental policies enjoy great public support. However, in spite of the fact that most important environmental policies of the 1970s were adopted by a broad bipartisan majority and with great public support, strong dismantling pressures arose in the USA during the Presidencies of Reagan and Bush (Buzbee et al. 2004; Kennedy 2005; Kraft 2004; Vig 2010). In this chapter we want to review the relevant literature on

(environmental) policy change in order to specify our expectations under which circumstances dismantling pressures arise and environmental policies get dismantled.

2.1. Political Costs and Benefits of Dismantling

Political actors can be expected to only engage in the dismantling of an environmental policy's regulatory stringency if they perceive the benefits of policy dismantling to be higher than its costs (Bauer and Knill 2010). Existing literature consider actors' ideological orientation, the saliency of policy issues, and business influence on agenda-setting as factors facilitating or hindering policy change.

By making governmental decisions, policymakers are guided by their ideological core beliefs as argued by Huntington (1957). He defines ideology as "a system of ideas concerned with the distribution of political and social values and acquiesced in by a significant social group". A growing body of empirical research has demonstrated that ideology significantly affects governmental decision-making (for an early theoretical underpinning of these studies, see Sartori 1969). In a comparative study on the provision of public infrastructures in OECD countries, for example, Schneider and Häge (Schneider and Häge 2008) find government ideology to be one of two factors closely associated with the extent to which infrastructures are privatized. Similarly, Aspinwall (2007) finds government ideology to be a major determinant of national voting behavior on questions of European integration in the Council of Ministers. In a study on the determinants of interstate policy learning in the US, Grossback et al. (2004) demonstrate that the ideological stance of state governments has a significant impact on the policies and programs that are transferred from other states. We can therefore expect that the more pronounced the ideological core beliefs of a government are, the more they will affect the degree and direction of environmental policy change. Moreover, Tufte (1978), Schmidt (1996) and Hibbs (1977) argue that differences in the partisan composition of governments result in a variance in policy outputs. As different parties represent different constituencies they pursue different policies once they are in government. Knill, Debus und Heichelt (2010) test this claim for the field of environmental policy. They find that the more parties in government stress the need for environmental protection, the more environmental policies are adopted by a government. Party political orientations and ideological beliefs of political actors therefore influence policy outputs.

In the US, a polarization of political actors' ideological beliefs occurred and due to this change of ideological beliefs, formerly consensual policies came under dismantling pressure. In the 1970s Congress adopted a row of important environmental legislation by a broad bipartisan majority and despite strong opposition from business actors (Kraft 2004). Nevertheless environmental policies came under dismantling pressure during the Presidency of Reagan and Bush, the so called "rollback presidents" (Vig and Kraft 2010). Since the 1970s, a powerful conservative movement has formed whose overarching aim consists in fighting big government and federal activism (Hacker and Pierson 2006; Pierson and Skocpol 2007). As a result, interparty conflict has extended and today shapes along a single liberal conservative cleavage in Congress. Due to polarization, both intraparty homogeneity as well as interparty heterogeneity is growing.¹ This tendency of polarization is also obvious in the

¹ One of the most frequently stated reasons for this transformation is seen in an electoral change in Southern states. Over the last years, conservative Southern Democrats were increasingly voted out of Congress to be replaced by Republicans that tended to be more conservative than Republicans from other parts of the country Layman, Carsey and Menasce Horowitz (2006). Consequently the Democrat faction in Congress became more

realm of environmental politics. While in the 1970s environmental acts were normally supported by both Democrats and Republicans, since the 1980s conservative Republicans favoring deregulation over regulation have begun to criticize the environmental protection acts adopted earlier. This polarization becomes manifest in the increasingly dissimilar voting behavior of Democrats and Republicans in Congress. While the share of Democrats voting in favor of environmental issues grows, the share of Republicans voting in favor of environmental issues declines (Dunlap, Xiao Chenyang and McCright 2001; Kamieniecki 1995; Shipan and Lowry 2002). Partisan ideological differences also become visible in the environmental agendas of US presidents. Although the performance on environmental issues might have been rather weak during the Clinton administration, he entered office with a comparatively huge environmental agenda. In contrast, the conservative governments of Reagan and George W. Bush entered office with anti-environmental agendas and a strong ideological motivation to dismantle and rollback environmental regulation. George H.W. Bush did not enter office with such a strong anti-environmental agenda and only moved to a more conservative environmental policy later in his term (Vig 2010). Consequently we expect conservative Republicans with a strong ideological aversion against government intervention in environmental protection to be the main supporters of environmental policy dismantling.

On the one hand, political actors want to pursue policy goals consistent with their ideological position. On the other hand, they want to be reelected in order to command decision-making power in the long run. Political actors striving for policy goals therefore have to consider electoral costs and benefits constraining decision-making. In contrast to the attitudes of political elites, the general public's opinion towards environmental policy issues has – despite some low divergence since the late 1990s – remained rather consensual (Dunlap 2008). Public support for the environmental movement is constantly strong (decade maximum: 71 percent in 2000, decade minimum: 61 percent in 2003, 2004, 2010)(Dunlap 2008), 80 per cent of Americans call for higher pollution standards for business and industry, and 75 percent want a stricter enforcement of environmental regulations. Despite this great support for environmental policies and regulation, the Bush Administration and other conservative Republicans not only adopted an anti-environmental discourse, but also actively engaged in the dismantling of environmental policies. Contrary, however, to what Pierson observes with regard to the dismantling of welfare programs, the dismantling of environmental regulations did not result in a clear public opposition against the Bush government. Although experts had expected a clear backlash, in 2003 44 percent of respondents (compared to 50 percent in 2002 and 51 percent in 2001) still stated that President Bush did a good job on environmental protection while only 43 percent took a critical stance (compared to 38 percent in 2002 and 2001).² This discrepancy between stated preferences towards environmental policy issues and the evaluation of government behavior can be explained with the low saliency that is generally attributed to environmental policies. US citizens have only limited knowledge about environmental issues and, apart from major

liberal while the Republican faction turned more conservative and shifted to the right of the center Hacker and Pierson (2006). Other often stated reasons for the increasing polarization are seen in gerrymandering, the existence of primaries, and the dependence of candidates on campaign finance Fiorina and Abrams (2009).

² In March 2003 only 35 percent (compared to 34 percent in April 2001) considered that environmental protection policies had been weakened, while the majority of 53 percent (compared to 48 percent in April 2001) of Americans perceived neither a strengthening nor a weakening of environmental protection policies under the Bush administration. 9 percent expect a higher stringency (compared to 13 percent in 2001) and 35 percent think stringency was weakened (compared to 34 percent in 2001) Dunlap (2003).

catastrophes, consider non-environmental issues like social and economic programs to be more important than environmental protection (Kraft 2004, pp. 109ff). Consequently the impact of environmental issues on voters' choices at present is negligible (Guber 2001). Nevertheless, it is often argued that in future environmental policy issues will increasingly gain significance and especially the Democratic party adopts pro-environmental attitudes to attract young moderate voters from the Republicans (Guber 2001). Recent research also shows that environmental issues are becoming more relevant on the state level and state policy-makers are indeed influenced by electoral incentives in constituencies where environmental movements are large and electoral competition is great (List and Sturm 2006). Nevertheless, there is little doubt that until today environmental policy issues have been a secondary issue in the United States. Political engagement with environmental politics therefore is of lower value to political actor's seeking reelection as only few voters are expected to recognize and value the expansion of environmental policies. For the same reasons also the dismantling of environmental policies can be expected to yield only very low electoral benefits as most voters have a slight preference for the expansion of environmental policies over their dismantling. Considering high transaction costs resulting from policy-making processes (inner-party consensus building, bargaining in Congress or within agencies, potential judicial control etc.) it is not reasonable why conservative governments should be willing to actively engage in the dismantling of existing environmental policies and thereby invest limited resources into a policy-making process that in electoral terms cannot be considered to be particularly rewarding. What benefits do conservative governments attribute to the dismantling of environmental policies? Which policies are targeted and under what circumstances? What indirect benefits do result from environmental policy dismantling?

Most US environmental laws were crafted in the 1970s and consist of federal command-and-control regulation that was developed in order to compel business actors to change polluting behavior. Business actors heavily criticize this still dominant approach for its high degree of top-down government intervention and for its alleged economic inefficiency. They argue that compliance with present laws and regulations is too expensive while environmental benefits are only moderate. Business groups therefore heavily lobby for reductions of regulatory burdens and costs resulting from environmental laws and regulations (Kraft and Kamieniecki 2007). Clawson, Neustadt, and Weller (1998), for example, argue that business organizations give campaign contributions to candidates in order to gain access to elected politicians in exchange for some influence on decision-making processes and policies. Although influence on final political decisions is not guaranteed by candidates, they nevertheless exchange business electoral contributions for future access to agenda-setting processes. The inclusion of business actors in agenda setting processes and policy formulation therefore offers indirect electoral benefits in the form of past and future campaign contributions which are essential for candidates in US to win elections. Business impact on agenda-setting and policy making is greatest where the perceived electoral costs for political actors resulting from an alignment with business actors are comparably low like in secondary issues as environmental policy. Where policy issues are of low salience the discretion of political actors' on agenda-setting and formulation and therefore potential for successful interest group lobbying is greater (Kamieniecki and Kraft 2007; Layzer 2007; Pierson 1994; Shipan and Lowry 2001; Smith 2000). Concerning the influence of different interest groups, Olson (1965) suggested, that business-oriented groups enjoy an advantage relative to consumer or other citizen interest groups due to their better organization and greater resources for collectively influencing decision-making processes. Smith (2000) further differentiates this claim. Against the oft-stated assumption that business influence on public policy is

strongest where its issue-specific interests are homogeneous, Smith argues that the influence of business actors on policy formulation is highest on particularistic and conflictive business interests. Where business actors are united on a policy issue it also gets highly ideological, partisan and salient. Therefore the public exerts substantial control over elected officials' policy decisions on these issues as voters might hold elected politicians accountable. According to Smith, business lobbying therefore is strongest with regard to issues characterized by a relatively low degree of public salience and which therefore have only limited impact on voting behavior (Layzer 2007; Shipan and Lowry 2001; Smith 2000).

Against this background, we argue that a conservative ideological attitude combined with strong business pressures for dismantling can explain that environmental dismantling finds its way to the political agenda. In particular, we expect dismantling pressures to be highest and most successful, where influential business actors strive to realize particularistic interests which are highly compatible with the ideological core beliefs of the governing party.

2.2. Institutional Constraints to Dismantling

As outlined in section 2.1, we expect business to be most successful in influencing the political agenda and policy formulation in order to dismantle environmental policies where the following conditions are fulfilled: First, decision makers are ideologically motivated to dismantle environmental policies, second, business actors engage in strong lobbying efforts in order to dismantle environmental policies and realize particularistic interests. Decision making on environmental policy issues takes place in many different venues, apart from Congress also the executive realm, courts as well as state and local governments are engaged in environmental policy making (Baumgartner and Jones 2004; Kamieniecki and Kraft 2007; Klyza and Sousa 2008; Kraft 2004). In order to influence agenda-setting processes and to push the dismantling of the regulatory stringency of federal environmental policies on the political agenda, business actors can either direct their lobbying activity towards the legislative venue (i.e. Congress) or towards regulatory agencies (i.e. EPA).³ Business' potential to influence environmental policymaking in both venues varies with institutional constraints and depends on both the extent to which business is able to influence the content of policy proposals and the chance that a policy proposal is adopted by politicians (Holyoke 2003; Kamieniecki and Kraft 2007).

Due to a high number of veto players and a strong system of checks and balances legislative policy stability is high in the venue of legislative decision-making in the US. In order to pass a law, the support of both Houses of Congress as well as the President are required, moreover Senate needs be able to terminate a potential filibuster. Especially in case of divided government, i. e. where the White House and Congress Houses are dominated by different parties, strong institutional constraints exist and hinder the easy passage of new legislation (Fiorino 1995; Klyza and Sousa 2008; Kraft 2004; Tsebelis 2002). Apart from the high number of institutional veto players, the growing partisan polarization between Democrats and Republicans is impeding legislative policy change as the probability that moderates from one party support proposals of the other party has significantly declined in the past three decades (Klyza and Sousa 2008; Pierson and Skocpol 2007). In the field of environmental politics Congress therefore often is gridlocked. Apart from a few exceptions like the

³ Also courts offer a venue to manipulate and dismantle political decisions. But courts review existing political decisions in regard to its legality and decide whether a law/rule is vacated or not. Courts in contrast do not offer business a venue no influence on agenda-setting or policy formulation.

Clean Air Act Amendment of 1990 environmental policy stability has been high since the early 1980s. Despite unified democratic government between 1993 and 1994 under President Clinton as well as a unified Republican government between 2004 and 2007 under President Bush no huge reforms in the realm of environmental policy occurred (Klyza and Sousa 2008). The chance that a dismantling policy issue is passing Congress therefore is rather low. Moreover business influence on policy formulation is low as the potential for policy change is low due to the high number of veto players (Tsebelis 2002). Radical proposals therefore hardly have a chance to be adopted.

Where Congress is gridlocked, the relevance of the administrative arena and rulemaking increases (Klyza and Sousa 2008). In this venue the sequence and veto requirements structuring the decision making process and with it decision-making power are shifted in favour of the executive: While Congress loses decision-making and agenda-setting power, the influence of the government grows in issue areas where Congress has delegated rulemaking authority to the executive. Although congressional control mechanisms exist, the White House enjoys great leverage in agency decision making due to its power over agencies' organizational structures and budgetary resources as well as the president's privilege to appoint top administrators to federal agencies. Congress can control agencies as it approves the budget and the appointment of top administrators (Senate) and has the right to review the final rules adopted by regulatory agencies (Congressional Review Act) (Ashford and Caldart 2008; Fiorino 1995; Kraft 2004). But in order to use these mechanisms, Congress needs to be capable of creating a majority. Administrative rulemaking therefore opens a way for regulatory reform and the dismantling of regulatory stringency of existing programs despite high policy stability in the legislative arena.⁴ In the administrative arena business' ability to influence agenda-setting and policy formulation therefore strongly depends on the ideological stance of the White House. To pursue the dismantling of environmental regulation in the administrative arena has further advantages to business actors: Companies are affected by specific bureaucratic decisions much more than by general laws and therefore lobbying is more effective in the administrative arena (Kraft and Kamieniecki 2007; Uslaner 1998). Moreover business lobbying of regulatory agencies is less visible to the public as media scrutiny is less extensive in the case of agency rulemaking than in legislative policymaking in Congress. Therefore the chance that public interest groups manage to increase issue salience and public attention is lower.

Considering the impact of institutional constraints in different institutional venues, we expect business lobbying to be most successful in agency rulemaking and therefore dismantling pressures to be greatest in this venue. Depending on the ideological core beliefs of the White House, business actors can be expected to gain varying degrees of impact on policy formulation. Moreover institutional constraints to the adoption of policy proposals aiming at the dismantling of environmental policies are lower in processes of administrative rulemaking.

2.3. Conclusion and Implications

Providing business actors with access to political decision-making, political actors can increase indirect electoral benefits by exchanging policy influence for past (or future) campaign contributions. As environmental policy issues are of rather low electoral salience in the US the influence of business actors to shape the issue agenda grows. Where party politicians with a pro-business or anti-environmental ideological backgrounds control decision-making processes, defenders of

⁴ But more frequent than legislative acts, rules and regulation is vacated in courts.

particularistic interests may successfully lobby for reforms aiming to dismantle the regulatory stringency of existing environmental policies. While institutional barriers to weaken environmental policies are high in Congress, federal agencies offer business actors a venue to successfully push the dismantling of environmental policy issues. Consequently we expect business actors to be the main drivers in agenda setting and formulation in dismantling processes. As the potential to influence decision-making processes is greater in administrative rulemaking processes, *we expect dismantling pressures to be highest and dismantling to be most successful in the administrative arena when it is controlled by a conservative Republican government and business engages in strong lobbying for particularistic interests.* The Dismantling of the regulatory stringency of the NSR during the Bush Administration between 2001 and 2009 offers an interesting case to analyze the empirical relevance of these expectations derived from the current state of research. The thick description of dismantling processes and the identification of potential access points for business actors to manipulate the environmental policy agenda cannot only improve our understanding of business influence in environmental decision-making in general but also broadens our understanding of how interest group lobbying interacts with political ideology in the dismantling of environmental policies.

In the following section we will first describe the context and content of several attempts to dismantle the NSR. Subsequently we will analyze the institutional context and decision-making processes offering business access to political and agenda-setting processes in the realm of environmental politics.

3. The Case of the New Source Review

3.1. Background

The Clean Air Act was adopted in 1970 in order to protect public health by controlling and reducing levels of air pollution. Stationary sources of air pollution and most significantly coal-fired power plants and refineries emit a huge amount of air pollutants with immense public health impact. Therefore stationary sources constitute an important target to improve respectively not to deteriorate air quality. In order to control pollution of stationary sources, Congress adopted the New Source Review program in 1977. It requires high technological standards of emission control technology if new sources are established. Existing sources of air pollution were exempted from installing high technological standards unless a source is modified so that emissions of regulated air pollutants increase. In order to implement the NSR program the EPA issued a set of complicated rules in the early 1980s. These rules specify exemptions from NSR for minor modifications. Most famous, routine maintenance and repair activities are exempted from NSR and therefore from costly investments into pollution control technologies. But EPA never clearly defined, what qualifies a routine maintenance. Business therefore criticized NSR regulations - for them it were impossible to determine whether a NSR was required or whether a modification would be exempted from NSR as it qualifies as routine maintenance (Barcott 2004). Moreover they claimed that the time-consuming pre-construction review works as a barrier to improving reliability, efficiency, and safety of industrial sources (National Academy of Public Administration 2003). Consequently strong reform pressure arose due to a lack of clarity how to apply existing rules. The Clinton Administration engaged in rulemaking to simplify and streamline existing rules and tried to bring together industry officials, state and local clean-air regulators, environmental leaders and public health advocates in an ad-hoc working group in order to formulate acceptable NSR reforms (Barcott 2004). In 1996 first rule proposals were published in the Federal Register. But after public consultations, the Clinton's leading

political appointees in the EPA doubted that these rule changes would have accelerated the reduction of air pollution but therefore opposed a decline of NSR's regulatory scope and stringency. Therefore they abstained from finalizing the proposed rules and did not finalize any NSR reform (National Academy of Public Administration 2003).

Although EPA tried to reform existing NSR rules until 1996 nobody ensured that industries really comply with these rules. But in 1996 the newly organized and recentralized EPA Enforcement Office recognized that NSR rules have never been effectively implemented since its introduction in the early 1980s. As a consequence the Enforcement Office undertook the first concerted enforcement action to control compliance with NSR requirements. EPA investigated whether refineries and coal fired power plants – the nation's biggest contributors to pollutant emissions - complied with the law and detected the “most significant non-compliance pattern ever” (Sylvia Lawrence in Barcott 2004). Investigations showed that refineries underwent several modifications without updating pollution control technologies. Also coal fired power plants had extended their facilities to burn more coal and increased capacities without applying for a preconstruction permission required according to the NSR. Industry officials argued they only undertook routine maintenance and therefore modifications were exempted from NSR and technological updates. But the Clinton Administration saw huge potential for emissions reduction from existing factories and plants and therefore decided to strictly enforce the NSR (Gattuso 2002; Whitman 2005). The amount of illegal pollutant emissions (especially of sulfur dioxides) was immense – the forceful implementation of existing law would result in an emissions decrease of harmful pollutants by 50 per cent or more in most facilities and would seriously increase the level of public health protection (Barcott 2004; Collins 2010). The refiners settled with the EPA in order to avoid litigation and agreed to pay fines and install pollution control equipment to eliminate 153.000 tons of pollution. The utility industry running outdated coal fired power plants in contrast did not settle so easily. In autumn 1999 the EPA decided to file lawsuits against utility companies in violation with the NSR and not willing to settle with EPA (Barcott 2004).

3.2. Dismantling during the Bush Administration

When the presidential election campaign started in 2000, major NSR lawsuits against the biggest US electrical utilities were pending and companies feared high penalties for each day they have violated the NSR. Potential fines for industries added to tens of millions of dollars. Additionally companies would have to invest hundreds of millions of dollar into pollution control technologies to comply with existing rules (Kamieniecki 1995). Faced with these immense penalties some companies started to bargain with the government in order to reach extrajudicial agreements.⁵ Others did not want to settle with EPA and instead hoped for relief from EPA subsequent to a probable change of government. In order to support Clinton's challenger, utility companies gave huge contributions to the election campaign of Bush and Cheney. The executives of the companies in litigation and those on the EPA list for further investigations belonged to the strongest contributors to Bush's election campaign (Barcott 2004; Collins 2010).

In January 2001, Bush became President and only nine days after his inauguration he established the National Energy Policy Development Group lead by Vice-President Cheney to develop a national

⁵ Tampa Electric, PSEG of New Jersey, Dominion Resources/Virginia Electric Power, Wisconsin Electric Power, and Southern Indiana Gas and Electric) agreed to spend more than \$3.1 billion on pollution controls or fuel switching. Two more companies (Cinergy, Tennessee Valley Authority) negotiated with the EPA but settlements have not been concluded McCarthy (2003).

energy plan. The National Energy Policy Development Group was suspected to be dominated by representatives from the utility industry. During the consultations in the National Energy Task Force also the NSR was attacked (Whitman 2005) and the final National Energy Policy provided two recommendations in regard to the NSR. First, it recommended to “review existing enforcement actions regarding New Source Review to ensure that the enforcement actions are consistent with the Clean Air Act and its regulations” (National Energy Policy Development Group 2001, p. 160). Second, it recommended to “review New Source Review regulations, including administrative interpretation and implementation, and report to the President within 90 days on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection” (National Energy Policy Development Group 2001, p. 160). The first recommendation aimed at cancellation of ongoing court cases against utility companies. But in January 2002 the Justice Department decided that NSR lawsuits filed by the Clinton Administration were legal and prosecuted “vigorously”. A retreat from filed court cases obviously would have undercut the Justice Department’s credibility. The second recommendation aimed at some kind of reform and pushed the agenda setting in order to dismantle the NSR. The EPA Report to the President which was demanded in the Energy Policy Plan was issued in June 2002 and approved that “the NSR program has impeded or resulted in the cancellation of projects which would maintain and improve reliability, efficiency and safety of existing energy capacity.” Furthermore it concluded that “[s]uch discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce air pollution.” (Environmental Protection Agency 2002, p. 1). The report suggests that existing rules of the NSR need to be improved. Especially changes that “add to the clarity and certainty of the scope of the routine maintenance exclusion” are recommended.

Consequently the Bush Administration sought for a reform of the NSR program and pushed for changes in both venues – on the one hand in Congress and on the other hand in the EPA. Already in February 2002 President Bush presented the Clear Skies Initiative which was introduced in both Houses of Congress in February 2003. This Clean Air Act Amendment proposes the introduction of a cap and trade system to reduce pollutant emissions from power plants (sulfur dioxide, nitrogen oxides and mercury, but no carbon dioxide). As a cap and trade system introduces financial incentives for technological upgrades, additional command and control instruments like technological standards are less relevant. Therefore the Clear Skies initiative proposes to terminate NSR program. Although the Clear Skies Initiative aims at the reduction of nitrogen oxide, sulfur dioxide and mercury emissions by 70 percent by 2018, it was fought by environmentalist. According to a National Academy of Science report, the enforcement of existing laws would realize emissions reductions of a greater size and much sooner. Therefore the Clear Skies Initiative constitutes a rollback and dismantling of existing regulatory stringency. But already in summer 2002 it got obvious that Congress was stalled and the Bush Administration would not be able to push the Clear Skies Initiative through Congress especially due to a missing consensus in Senate concerning the regulation of carbon dioxides within a cap and trade system. Rival proposals and disagreement about the regulation of carbon dioxide under a cap and trade system also made the adoption of any Clean Air Act Amendments in the near future rather unlikely.

Parallel to this legislative approach Bush appointees at the E.P.A. and the Energy Department started to rewrite great parts of the rules concerning the NSR. Apart from the adoption of rather small and general NSR changes proposed during the Clinton Administration and allowing utilities more maneuverability under the NSR, reform efforts concentrated on the controversial routine repair and maintenance exclusion - the exclusion that has been used by utilities to justify modifications and the

upgrading of coal fired power plants without triggering the NSR. Jeffrey Holmstead, assistant EPA administrator for air and radiation, proposed to introduce a financial threshold – a percentage of the total value of a unit- in order to define the maximum amount of money that can be spent on maintenance a year without being required to trigger NSR. In its final rule from August 2003, the EPA adopted a 20% threshold when it finalized its routine maintenance rule in August 2003. This means, that a company is allowed to legitimately spend \$ 20 million a year for modifying a unit that is worth \$ 1 billion without installing modern pollution control required under NSR. The chosen threshold is that high that it quasi terminates the NSR for coal fired power plants as it allows polluting facilities to permanently grandfather older, more polluting facilities. Some days before the reform of the routine maintenance exclusion went into effect a federal appeals court stayed the rule and halted its implementation. While the legality of the routine maintenance exclusion was uncertain, the Bush Administration stayed active in changing NSR rules. Other in effect dismantling rule changes have been considered and some have been finalized during the Bush Administration. Although very active in changing the rules concerning the NSR, only parts of the 2002 rule changes that were already proposed during the Clinton Administration, survived. The controversial routine maintenance exclusion has finally been vacated by the Court of Appeals for the District of Columbia in March 2006.

3.3. Empirical Reconstruction of NSR Dismantling

In the following, we want to analyze the success of business lobbying to influence agenda-setting and policy formulation. In 3.3.1 we will analyze, how the success of business lobbying varies with the ideological background of agenda-setters. Subsequently in 3.3.2 we will analyze how success of business lobbying varies with institutional constraints in different venues. We will summarize our findings in 3.3.

3.3.1. Political Costs and Benefits of NSR Dismantling

Pressures to reform the complicated NSR rules have been high since the beginning of the 1990s and business has strongly lobbied for a dismantling of the NSR while environmental interest groups strongly opposed any weakening of NSR rules. As outlined in chapter 2, we expect these business lobbying activities for NSR dismantling to be greatest and most successful, where particularistic business interests are highly compatible with the ideological core beliefs of the governing party.

Democrats are generally more pro-environmental than Republicans. Also with regard to the NSR, Democrats put great emphasis on air pollution control and started these huge NSR enforcement actions in 1999 in order to force utility companies to reduce pollutant emissions. Democrats therefore mainly engaged in an expansion of NSR enforcement. But also in the realm of rulemaking, Democrats supported much more moderate NSR reform proposals than the subsequent Bush Administration. In 1996, the EPA proposed several rule changes, which were the first comprehensive reform proposal. In effect these rule proposals would slightly dismantle the regulatory stringency of the NSR. But after the 1996 proposal generated public criticism, EPA first solicited additional comment on rule changes in 1998 and in the end, did not finalize rulemaking. Robert Perciasepe, Assistant Administrator for Air and Radiation during the Clinton Administration, argued that EPA was unable to reform NSR rules “[d]ue to the array of policy and legal issues that arose on the vast number of areas we attempted to tackle in one very large rulemaking” (National Academy of Public Administration 2003) and criticized industries’ strong resistance to any workable reforms (Barcott 2004). Although very critical towards the regulatory complexity of the NSR program, Democrats therefore resisted the dismantling of regulatory stringency of NSR and the Clean Air Act. Considering

dismantling aspects in the 1996 rule-proposals, it seems highly probable that business actors enjoyed some influence on agenda-setting and policy formulation processes also when they are controlled by Democrats (e.g. in exchange for campaign contribution). But during the Clinton Administration, business influence obviously is limited due to the pro-environmental stance of the Democratic party.

Republicans undertook several attempts to dismantle the regulatory stringency of the NSR. Since the 1970s, Republicans gained more and more critical towards business regulations and especially towards command and control regulation which still is the dominant approach of US environmental policies (Fiorino 2006). Therefore Republicans are united in rejecting the NSR program as too inflexible and expensive for industry. But moderate and conservative Republicans disagree with regard to their preferences towards a possible alternative to NSR. Bush's EPA administrator (2001-2003) Christine Todd Whitman, a moderate Republican, pushed the Clear Skies Approach in order to substitute the New Source Review with a less costly and more business friendly instrument. Although the Administration's proposal was of lower environmental stringency compared to other multi-pollutant legislations and compared to existing regulatory standards, it nevertheless aimed at some emissions reductions compared to existing levels of air pollution. Moderate Republicans like Christine Todd Whitman therefore actively pushed for some form of NSR and CAA reform in order to improve actual air quality (Whitman 2005). Conservative Republicans like President Bush, his Vice President Cheney as well as Holmstead, Assistant Administrator of the EPA Office for Air and Radiation pursued a different path. In contrast to moderate Republicans they seemed to be reserved towards legislative reforms resulting in any financial costs for industry. Although they did not publicly oppose the Clear Skies Initiative, they certainly did not show strong support and push Clear Skies (Bryner 2007; Whitman 2005). Conservative Republicans preferred to dismantle existing NSR rules by reforming the contested routine maintenance exclusion. Compared to the Clear Skies Initiative, a reform of the routine maintenance exclusion has further advantages for business. It would not only legitimize that old coal fired power plants may go on to pollute at high rates in future without being charged but would also effect ongoing as well as new court cases against NSR violators (Barcott 2004; Bryner 2007; Collins 2010; Office of Inspector General 2004; Samuelsohn 2005; Schaeffer 2002; Whitman 2005). Due to its potential impact on ongoing litigation, the routine maintenance exclusion was not only opposed by EPA career staff from the enforcement office but also by some of Bush's moderate appointees, most prominently EPA Administrator Christine Todd Whitman (Whitman 2005) as well as John Peter Suarez, EPA Assistant Administrator of the Office of Enforcement and Compliance Assurance (OECA) (Mintz 2004).⁶

This shows that the extent, to which business actors gain influence on agenda setting and policy formulation, inter alia depends on the ideological position of the agenda-setter. While influence is limited if Democrats control the agenda, it is greater if Republicans control the agenda. Business potential to influence the agenda is greatest, where conservative Republicans strongly opposed to

⁶ The routine maintenance exclusion indeed influenced ongoing NSR cases as the EPA Office of Inspector General 2004, p. 2 concludes in its evaluation in 2004: "According to key enforcement officials, the NSR rule change is so dramatic that it has impacted OECA's ongoing litigation, out-of-court settlements, and new enforcement actions against coal-fired electric utilities. This is because, even though a court in December 2003 issued a stay delaying implementation of the NSR rule, OECA's ability to obtain appropriate controls through settlements or court-imposed remedies has been weakened."

environmental regulation control the agenda. In the following, we will show how business realizes to impact agenda setting and policy formulation and how its influence varies in different institutional venues due to the level of agenda control and decision making power of political actors in these venues.

3.3.2. Institutional Constraints to NSR Dismantling

We expected the impact of institutional constraints to vary in different institutional venues and business lobbying to be most successful in agency rulemaking due to the strong agenda-setting power of the White House. Moreover institutional constraints to the adoption of policy proposals are lower in processes of administrative rulemaking and therefore the adoption of dismantling policy proposals is more probable in this venue. In the following, we analyze how business influence on policy formulation varies in the legislative and the administrative arena and – in order to corroborate our claim - describe how political actors manage to gain influence on agenda-setting in administrations.

The EPA developed two approaches in order to reform respectively to dismantle the NSR: the Clear Skies Initiative as a legislative and the routine maintenance exemption as a rule proposal. Considering both, the Clear Skies Initiative and the routine maintenance exclusion, as strategies to dismantle the regulatory stringency of the NSR, the routine maintenance exclusion can be considered as the approach aiming at a farther dismantling of NSR regulatory stringency. The emission trading system proposed in the Clear Skies Initiative introduces financial incentives for utility companies to install pollution control technologies like scrubbers in outdated coal fired power plants and therefore would have some positive effect on emission reduction, environmental protection and public health. The reform of the routine maintenance exclusion in contrast abolishes any need for utilities to improve emission rates and moreover eliminates EPA's basis to fight enforcement cases. This finding approves our expectation that business influence on policy formulation is more far-reaching in agency rulemaking than in Congress' lawmaking. As outlined in chapter 2.2, business influence on policy formulation is limited in Congress due to the great number of institutional veto players. A legislative proposal has to be approved by the median voter in the House and the Senate (here even a majority to terminate filibuster is needed). Policy stability therefore is higher in Congress. Moderate Republicans in Congress would hardly support strongly dismantling reform proposals neither would "center Democrats". In the case of Clear Skies, this gets obvious: Also the more moderate dismantling approach, the Clear Skies Initiative stalled in the Senate Committee on Public Works and Environment due to a conflict between Senators favoring a more stringent regulation also regulating carbon dioxides and those who preferred a less stringent proposal (Bryner 2007; Klyza and Sousa 2008). Due to these high institutional constraints, business influence on policy formulation in Congress is limited. Also the probability that a dismantling policy proposal is adopted by Congress, is rather low. This might explain why the support of utility companies for the Clear Skies Initiative was very low although it contained the termination of the NSR (Bryner 2007; Whitman 2005). Obviously, utility companies favored to change existing regulatory provisions of the NSR via rulemaking in order to reform the routine maintenance exclusion and conservatives in government supported this approach.

Compared to Congressional decision making, business influence to manipulate agenda-setting and policy formulation is immense if business interests are supported by the White House. As we will show in the following, this is due to the White House's great control over agenda-setting and policy-formulation processes. Moreover the role of Congress to limit the White House's power and overturn

its decisions is strongly reduced. Therefore the White House enjoys great leverage to decide which actors and whose interests are considered in rulemaking processes. With huge campaign contributions, utility companies' executives wanted to ensure that they gain influence on a future Bush – Cheney government and bundled their contributions (Barcott 2004, p. 5). Indeed, utility industries gained great influence on agenda-setting and policy formulation (inter alia and especially strong) in the case of NSR reform. Soon after his inauguration, President Bush created the National Energy Policy Development Group, a task force headed by Vice President Dick Cheney and with him one of the most conservative forces within the Bush government (Gellman 2008). Its main task was to develop "a national energy policy designed to help the private sector". Members and consultants of the Energy Task Force strongly criticized environmental regulation and argued that stringent environmental regulations had caused the California's energy crisis and threaten national energy security (Barcott 2004; Whitman 2005). The National Energy Policy Development Group clearly offered business actors access to agenda setting and policy formulation. It set the agenda to dismantle the NSR by requiring the EPA to review the implications of existing rules for business activities (Environmental Protection Agency 2001, 2002; National Energy Policy Development Group 2001). Also in the further development of rule proposals the Bush Administration seemed to prioritize business interests (Barcott 2004; Bryner 2007; Collins 2010; Dunlap 1995; Hacker and Pierson 2006; Schaeffer 2002; Vig and Kraft 2010). A great deal of political appointees in Bush's administrative agencies were former lobbyists or lawyers of industry interests (Gellman 2008; Kamieniecki 1995, p. 10). These appointees could easily ensure that business preferences also gained great influence in the formulation of dismantling rule proposals. Bush's appointee Jeffrey Holmstead e.g. was a former lawyer and lobbyist of the utility industry and as assistant EPA administrator for air and radiation in charge of NSR reform. His influence on the formulation of the routine maintenance exclusion has been very strong and he and the White House (esp. Cheney) clearly pushed for the contested 20% threshold despite protests from other actors – both appointed and career staff - from EPA and the Justice Department. The EPA enforcement office - requested by Holmstead for its opinion concerning a threshold for limiting routine maintenance - e.g. suggested a threshold as low as 0.75% (Office of Inspector General 2004) and therefore favored much less dismantling reform proposals.⁷ Also a large share of the members of Congress opposed the reform of the routine maintenance exclusion but was unable to restrict the Bush Administration on rulemaking.⁸

The Bush Administration and conservative Republicans therefore obviously offered utility lobbyist privileged access to agenda-setting and policy formulation in the administrative arena. During the

⁷ Many EPA administrators resigned from EPA during the Bush administration because they were frustrated by strong dismantling pressures during the Bush Administration. Eric Schaeffer, the director of the air enforcement office, resigned from EPA in February 2002 in protest of EPA's NSR rulemaking plans Schaeffer (2002). He commented the 20% rule finally adopted by the Bush Administration with "Five percent would have been too high, but 20? I don't think the industry expected that in its wildest dreams" Kamieniecki (1995, p. 11). Also Christine Todd Whitman resigned from EPA in June 2003 before the rule change was adopted. While she supported the substitution of the NSR by Clear Skies, she writes that "I could not have signed regulatory changes that would have undermined the environmentally important NSR cases that were working their way through the courts" Carson et al. (2007, p. 185). Also Suarez, director of the enforcement office called the reform "overdone" and judges "we ended up with a reform package that doesn't pass the laugh test" Mintz (2004, p. 10939).

⁸ Compare articles from Darren Samuelsohn of E&E Publishing.

Clinton Administration the influence of business actors on rulemaking has been much more restricted. EPA administrator Carol Brown tried to bring together industry officials, state and local clean-air regulators, environmental leaders and public health advocates in an ad-hoc working group in order to formulate acceptable NSR reforms (Barcott 2004) and therefore came up with much more moderate rule proposals. Conservative Republicans in contrast monopolized agenda-setting control and were so determined to dismantle the NSR that they even disregarded strong opposition from moderate parts of their own party. This approves our expectation raised in chapter 2.2 that business lobbying for the dismantling of the regulatory stringency of environmental policy proposals is especially great in the case of agency rulemaking when the administration is controlled by Republicans. Due to the lower number of veto players and especially due to White House's strong control over agenda-setting and policy formulation, the leverage for policy change and therefore the potential for successful business lobbying is greater in the administrative than in the legislative arena. Although most of the NSR rule changes filed during the Bush Administration were vacated by courts, utility companies managed to further delay the promulgation of a set of rules adequate to implement NSR. Rulemaking efforts moreover undermined ongoing and future NSR enforcement cases and therefore resulted in immense financial benefits for utilities running outdated and expensed coal-fired power plants.

3.3.3. Conclusion

After utility companies for years violated the NSR by expanding capacities of coal-fired power plants without triggering the NSR and without installing required pollution control technology, the Clinton Administration in 1999 filed or threatened to file court cases against the US largest utility companies in order to enforce existing regulation. These utility companies that were in conflict with NSR regulation belonged to the circle of strongest supporters of candidate Bush during the presidential elections in 2000 and gave huge campaign contributions to the Bush-Cheney campaign. As the salience of environmental policy issues is rather low, utility lobbyists managed to gain great leverage to influence agenda-setting and policy formulation. The Bush Administration ideologically supported the goal of NSR dismantling and as the analysis of agenda-setting processes in chapter 2.2 reveals, the White House left great leverage to utility lobbyists to influence agenda setting and formulation. Industrial lobbyists enjoyed privileged access to agency decision making processes e.g. through their consultation of Cheney's Energy Task Force and numerous ex-lobbyists appointed to agencies by the Bush administration. The analysis of dismantling processes of the NSR therefore support our expectation raised in chapter 2.3 that dismantling pressures are strongest in the administrative arena when this is controlled by a conservative Republican government and business lobbies for particularistic interests. Nevertheless the potential for lasting policy change is also limited in the administrative arena as rule changes often get challenged in court and court reviews often result in the vacation of EPA rules – as in the case of the reform of the routine maintenance exclusion.

4. Conclusion

So far the dismantling of environmental policy stringency has been of low empirical relevance in most industrial countries. Only in the US great dismantling pressures arose since the beginning of the 1980s – nevertheless the success of dismantling attempts has been limited. Dismantling attempts in the legislative arena have mostly been counteracted by concurrent veto players while dismantling EPA rule changes were often been vacated by courts. Nevertheless, as the case of NSR dismantling demonstrates, great dismantling pressures arise when conservative Republicans permit industry

lobbyists privileged access to agenda setting and policy formulation processes. Academic research to improve our understanding of the potentials and limits of business influence to induce environmental policy dismantling consequently is of great relevance.

The chosen case of NSR dismantling has been an outstanding and prominent case of environmental policy dismantling: A particular and very influential industry was in great need of political support (here: high costs for technological upgrades, Clinton's enforcement cases). Consequently this industry gave immense campaign contributions to conservative candidates who share the political goal of deregulating environmental policies. In turn this industry gained immense influence on agency rulemaking and they managed to push for the dismantling of NSR regulation. The case of the NSR therefore clearly demonstrates that business actors gain great influence on policy-making and even the possibility to push for the dismantling of environmental regulation. The analysis of NSR dismantling furthermore allowed a comparison, how different administrations react to dismantling pressures and how effectively dismantling can be pursued in different venues. We could show that business influence on agenda-setting and policy formulation indeed varies with the party political orientation and the ideology of political actors. Business influence is greatest where conservative Republicans control the agenda. Also Democrats give attention to business interests but equally consider the interests of concurrent interest groups like environmentalists. Furthermore, the analysis revealed that business potential to push for the dismantling of environmental policies is greatest in the administrative arena (under a conservative government) due to the potentially great control of the White House on agenda setting and formulation. Nevertheless, further systematic research is needed in order to specify our knowledge concerning the concrete determinants of business actors' capacities to realize their interest in environmental policy dismantling. A comparison of the policy processes of different dismantling cases could further increase our knowledge of the potentials and limits of business lobbying for environmental policy dismantling. Especially the empirical analysis of failed dismantling attempts (e.g. arsenic levels in drinking water Mintz 2004; Whitman 2005) can improve our understanding of factors limiting business influence to set political agendas and formulate policy proposals which dismantle the regulatory stringency of environmental policies.

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