Monica Trauzzi: Hello and welcome to OnPoint. I'm Monica Trauzzi. Joining me today is Roger Martella, former General Counsel at EPA and a partner at Sidley Austin. Roger, it's great to have you here as always.

Roger Martella: Thanks for having me back.

Monica Trauzzi: Roger, EPA recently pulled its boiler rule saying they wanted to strengthen the rule before it hits prime time. What's your take on the recent move by EPA? Why did they pull it?

Roger Martella: Well, on May 16 I think industry breathed a collective sigh of relief when EPA made this announcement on staying the effective dates of both the boiler rule and the commercial and industrial solid waste rule. And I really think this was the essence of good government. Industry had made a compelling case to EPA that it needed to take more time to consider the numerous comments that had been filed during the rulemaking process. EPA basically said, yes, you've convinced us, we do need to take into account...
these comments. And then they went a step further and said we're going to go ahead and stay the effective date of the rule so that we're not imposing costs on you in the meantime, given you have three years to come into compliance while we engage in this reconsideration process. So this is exactly what I think people hope for in government. People bring concerns to their attention, the government pays attention and they take appropriate action. I think that's noncontroversial and, again, a notion of good government by the agency.

**Monica Trauzzi:** But many people look at this move and say that EPA basically cracked under pressure from the manufacturing sector.

**Roger Martella:** Well, I think EPA's perspective is it wants a rule that's defensible and I think that's something everybody should have the same goal. It doesn't do the environment any good to put a rule into place that people are going to challenge in court and two years later the court remands it and you have to start all over again. So I think from EPA's perspective what it's trying to do is get a defensible rule that it can do right and get into place sooner as opposed to going through litigation and having to start over.

**Monica Trauzzi:** But what impacts will holding the rule have on air quality and the environment?

**Roger Martella:** Well, there's obviously very significant MACT constraints on boilers in place right now. So it's not like the nation is going to go uncontrolled with emissions overnight. We have very stringent controls in place. These controls would have ratcheted things up significantly and EPA is not walking away from this, they're imposing a schedule. My guess is it will be a pretty aggressive schedule, but they're going to try to get things right. They're going to take a hard look at the data and work as quickly as they can imagine, but at the same time, make sure they're taking -- they're dotting all the i's and crossing all the t's to have a rule that's ultimately defensible.

**Monica Trauzzi:** They say that they're delaying it indefinitely. Does that signal to you that this may take some time or do you think they're going to be pretty aggressive trying to get this out?

**Roger Martella:** I think they're going to balance two things. I think one is they want to get it right and that will take some time. It's not going to happen overnight. They've already said July 15. They're going to continue to accept comments and then they're going to move ahead after that. But at the same time, I don't think this is going to be slow boated. I'm sure they're going to be taking a hard look at how quickly they can move under the constraints of making sure that they're looking at the very significant comments that have been filed and shoring up their rule as strongly as possible.

**Monica Trauzzi:** There are some related rules also that are facing some challenges?
Roger Martella: That's correct, there's a whole suite of rules. There's the CISWI rule, which is the incinerator rule, definition of solid waste. The CISWI rule has been stayed as well. The Area Source Boiler MACT rule has not been stayed. All cases are in litigation. It will be curious to see whether some of those issues are put into abeyance during the pendency of the stay.

Monica Trauzzi: So what's happening here? Is this really showing that EPA maybe moved too aggressively with all these rules?

Roger Martella: I think what's happening is EPA has a lot on its plate and there's been a lot of intensity focused on greenhouse gases for the last several years. But that intensity is now shifting outside the greenhouse gas context into a whole range of MACT rules. We're going to see, this fall, EPA start to approach sector-specific kind of packages of MACTs for the chemical sector and for the refining sector. So we have multiple rules coming together at the same time with limited resources at the agency, under very tight deadlines that, in fact, have been largely driven by the environmental groups reaching settlement agreements with them. So I think what they're trying to do, to the extent possible, is take a step back, not abandon these rulemakings, but, again, take the time to get it right, which should be a noncontroversial proposition.

Monica Trauzzi: At the same time as all of these air rules we've also seen a series of public trust cases recently. How are these playing into the push to regulate greenhouse gas emissions?

Roger Martella: These public trust cases, which were filed recently by a group called Our Children's Trust, is really the latest effort in a long range of attempts to get comprehensive climate change controls in the United States. Now, this is a new forum. It's a relatively creative forum, but it's the same goals we've seen before. The group is looking in all 50 states, as well as with the federal government, to impose strict restrictions on greenhouse gases that would realize 6 percent reductions per year and then a phase-out of fossil fuels in 2050. So it's the same goals we've seen before, but it's an entirely new forum. And it's a comprehensive strategy aimed at all 50 states to get these very aggressive reductions.

Monica Trauzzi: And does it really just signal frustration that there isn't a law on the books to regulate greenhouse gases?

Roger Martella: I think it shows some kind of creative and outside-the-box thinking that they're not pursuing legislation, they're not pursuing rule makings with the federal government, so they seem to be turning to a new effort through the courts. Even the common-law nuisance cases, which are going to be decided by the Supreme Court, this is an entirely new line of reasoning. The 50-state effort is very comprehensive. I don't think we've seen anything like that before. And it's relying on this doctrine called the Public Trust Doctrine, which is an arcane legal doctrine going back to the 19th century, never applied in this way before. It's reminiscent of the AEP
common-law nuisance claims in that it's kind of taking an old doctrine off the shelves and applying it in a new way. But at the same time it's very different in that the Public Trust Doctrine doesn't apply to private parties and it can only encourage public action by states. And so we're seeing, again, another doctrine being dusted off the shelves to try to encourage this public action to ultimately reduce greenhouse gases.

**Monica Trauzzi:** So, does this work with or against the EPA rules that we have on the books and also the different state rules that we have throughout the country for greenhouse gases?

**Roger Martella:** My guess is they see this as a complementary strategy. It's to, one, encourage more aggressive action where there already is action and, two, also try to push states that aren't acting, to begin taking greenhouse gas controls and starting to implement those actions. Now, it's too early to know what the state's response is to these actions will be. Governments have a tendency to want to defend their positions and to not let other people dictate their schedules when it comes to what their policies should be for environmental regulations. So I would anticipate we're going to see a lot of states putting forth pretty significant defenses. But it wouldn't be surprising that some states that may be sympathetic to these goals might look at this as an opportunity to seize the chance to reduce greenhouse gases through a regulatory means.

**Monica Trauzzi:** So moving forward, what can we expect out of EPA this summer?

**Roger Martella:** Well, we've got two big developments in July. We have EPA releasing the reconsideration on ozone NAAQS. The EPA is reconsidering the 2008 standard of 0.75 parts per million, where everyone is anticipating they're going to lower it to either 0.65 or 0.70 parts per million. Either way, that's going to be a very significant lowering. It will put scores, if not hundreds of counties into nonattainment for ozone NAAQs and that decision is expected in July. So that will be one big development this summer. The other big development over the summer will be EPA releasing the new source performance standards for greenhouse gases for the utility sector. This is the first time we'll see how EPA proposes to regulate an entire sector, this time utilities, for greenhouse gases. That will be quickly followed up in November with the refinery new source performance standard. And so we'll be looking at that to see both how EPA is proposing to regulate, one, utilities and, two, other manufacturing sectors for greenhouse gas controls, including existing sources.

**Monica Trauzzi:** All right, things will stay busy for you. We'll end it there. Thanks for coming on the show, Roger.

**Roger Martella:** Thank you, Monica.
Monica Trauzzi: And thanks for watching. We'll see you back here tomorrow.

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