

**To:** Jackson, Ryan[jackson.ryan@epa.gov]  
**From:** POLITICO Pro Energy  
**Sent:** Thur 8/10/2017 9:42:20 AM  
**Subject:** Morning Energy: Trump's 2-for-1 reg order gets day in court — A detour on the road from Montreal to Kigali — Heartland backing Pruitt's uphill climate fight

By Esther Whieldon | 08/10/2017 05:40 AM EDT

*With help from Emily Holden and Alex Guillén*

**TRUMP'S 2-FOR-1 REG ORDER GOES TO COURT :** A federal judge will hold a hearing this morning on President Donald Trump's "2-for-1" regulatory executive order that directed agencies to identify two rules for revision or repeal for every one they finalized. Three groups — the Natural Resources Defense Council, Public Citizen and the Communications Workers of America — will argue Trump's order is unlawful and endangers public welfare by threatening health and safety rules. The administration says Trump's order is a valid exercise of presidential authority and doesn't require agencies to do more than identify potential rules to cut. The White House also argues it is too early to challenge the order, and the groups must wait for an agency to act on it before going to court. The 10 a.m. hearing at the U.S. District Court will be held before Judge Randolph D. Moss, an Obama appointee.

**A DETOUR ON THE ROAD FROM MONTREAL TO KIGALI:** Finding ways to get the U.S. to comply with an international treaty to limit the use of a heat-trapping chemical got more difficult this week, Pro's Eric Wolff [reports](#). The D.C. Circuit Court's decision to block EPA from using a key section of the Clean Air Act to rein in hydrofluorocarbons means there won't be a simple way for the U.S. to implement the Kigali amendment to the Montreal Protocol.

**The way is long, and uncertain:** Treaty backers now must not only sell the Senate on ratification, they must persuade both chambers of Congress to write implementing legislation if the treaty is affirmed. Either that or they'll have to persuade EPA Administrator Scott Pruitt to use the agency's power to regulation chemicals under the Toxic Substances Control Act. And even though the move is backed by business interests, getting Pruitt to write a new climate regulation would be no small feat. Treaty proponents must still convince a skeptical Trump administration, which has been dismissive of both multi-party treaties and climate science, on bringing the treaty to Congress.

**Green groups are looking for a short cut:** NRDC's David Doniger says they group is exploring an en banc appeal of Tuesday's court ruling. If that were to succeed, the rule would go back into effect, and treaty backers can go back to focusing on the Senate.

**HEARTLAND BACKING PRUITT'S UPHILL CLIMATE FIGHT:** The Heartland Institute, a group that rejects climate science, is voicing its support for EPA's Pruitt to challenge a finding that EPA must limit greenhouse gas emissions. The group's comments follow POLITICO's [reporting](#) that other conservative allies of the administration haven't endorsed that strategy. "A lot of resources will be expended in fighting this," H. Sterling Burnett, a Heartland research fellow, told ME. "Ultimately if you don't overturn the endangerment finding, Trump or whoever comes after him will have to impose their own carbon restrictions. ... You can't get around it."

Burnett argues climate models are often wrong and can't show with certainty that humans are causing climate change. A draft report from federal climate scientists that emerged on Tuesday contradicts that view. Burnett says Pruitt could challenge the endangerment finding on procedural or scientific grounds and should pursue both, although EPA might not finish the fight before the end of the Trump administration.

**FALSE ALARM AT EPA:** D.C. Police and Federal Protective Service officers responded to reports of gunshots inside EPA's Pennsylvania Ave. headquarters around 5 p.m. Wednesday, but authorities said the reports of gunshots were "unfounded," no one was injured and the building was secure."

**Welcome to Thursday!** I'm your guest host, Esther Whieldon. Joe McClelland of FERC was the first to answer that Abigail Fillmore was the first First Lady to keep her day job as a teacher for more than a year after she married Millard Fillmore, the future 13th U.S. president. Joe also knew that Abigail met her husband in 1819 when she was his teacher at New Hope Academy in New York. Today's trivia question: Name the first female artist to be commissioned by the U.S. government to sculpt a statue (Hint, the statue is in the Capitol). Bonus points if you can name the statue, where the artist is buried today and what sculpture marks her grave. Send me your guesses, tips, energy gossip and comments at [ewhieldon@politico.com](mailto:ewhieldon@politico.com) and follow us on Twitter [@esthernow](https://twitter.com/esthernow), [@aadragna](https://twitter.com/aadragna), [@bjlefebvre](https://twitter.com/bjlefebvre), [@Morning\\_Energy](https://twitter.com/Morning_Energy), and [@POLITICOPro](https://twitter.com/POLITICOPro).

**ONE IN FIVE MINE INSPECTORS MEDICALLY UNFIT:** As many as one in five federal mine inspectors doesn't meet the physical requirements necessary to do the job, Ian Kullgren reports. The Labor Department said on Wednesday it would create individualized assessment plans for employees who do not pass routine physical exams.

**CALL IT THE REVERSE CARBON TAX:** West Virginia Governor and new Republican Jim Justice, who made billions as a coal magnate, says President Donald Trump is "really interested" in his plan to subsidize Appalachian coal production, according to news reports. The subsidy would involve the Department of Homeland Security paying eastern utilities \$15 per ton of Appalachian coal burned, according to Bloomberg. Justice says he has discussed the plan, which analysts peg at costing more than \$1.6 billion annually, with Vice President Mike Pence, Jared Kushner and Energy Secretary Rick Perry. The subsidy likely would face opposition from Western coal producers, the natural gas industry, and the wind and solar sectors.

**Why DHS?** Justice says a healthy reliance on coal for electricity is the best protection against terror attacks on energy infrastructure, echoing an argument made frequently by EPA Administrator Scott Pruitt. "Can you imagine what would happen if we lost the power in the east for a month, or two months, or three months?" Justice said. "It would be like a nuclear blast went off. You would lose hundreds of thousands of people. It would be just absolute chaos beyond belief."

**COMMISSION REJECTS CALL TO CLOSE SUNIVA TRADE HEARING:** The US International Trade Commission on Wednesday rejected a request by the Solar Energy Industries Association and SunPower Inc. to close a portion of the agency's Aug. 15 hearing to the public.

The commission ruled it has already obtained enough confidential information from solar companies and SEIA to consider all of the group's arguments "without resorting to the extraordinary measure" of closing part of the hearing.

#### **INTERIOR AIMS TO EXPAND HUNTING, FISHING IN WILDLIFE REFUGES:**

Following up on Secretary Ryan Zinke's pledge to create more opportunities for sportsmen to use public lands, the Interior Department's Fish and Wildlife Service is proposing to allow more hunting and fishing in 10 wildlife refuges in Georgia, South Carolina, Indiana, Minnesota, North Dakota, Oklahoma, Oregon and Wisconsin. The agency will accept comments on the proposed rule for 30 days after publication in the Federal Register, which is expected this morning. For the 2017-2018 season, FWS is also adding refuge-specific regulations on topics such as hunting dog use, ATV riding and minimum age requirements.

#### **ZINKE OKS LAND DONATION NEAR ELK STOMPING GROUNDS:**

Zinke on Wednesday gave BLM the thumbs to accept the donation of about 4,000 acres of a former ranch that would for the first time allow public access to prime elk hunting grounds in the Sabinoso Wilderness in Northeastern New Mexico. The public has been cut off from the 16,000-acre area because it is surrounded by private land. But the Wilderness Land Trust bought a closed down ranch bordering Sabinoso and has offered to donate it. New Mexico Sens. Tom Udall, Martin Heinrich and Zinke toured the Sabinoso by horseback in late July.

**CERES REPORT SAYS AUTOMAKERS NEED TO EVOLVE FASTER:** A new report out today by Ceres that says that the increasing importance of operating costs and synergy between autonomous vehicles and electrification, fuel efficiency and electrification are key to automakers succeeding in the fast changing marketplace. The report argues that automakers are blaming their financial woes on fuel economy standards but that the standards are actually stimulating investment in advanced technologies "that are necessary for automakers' long-term financial health, especially given oil price volatility."

**NOAA CLIMATE REPORT DUE OUT TODAY:** The National Oceanic and Atmospheric Administration and American Meteorological Society are slated to release their annual check up on the state of the planet's climate this afternoon. More than 450 scientists from over 60 countries contributed to the report, which will highlight such indicators as greenhouse gases, temperature, sea level rise and glacier sizes. The report comes just days after the controversy over an earlier report that US scientists feared could be altered by the Trump administration.

#### **QUICK HITS:**

—The Sea Level Did, in Fact, Rise Faster in the Southeast U.S., NYT

—Exclusive: Tesla developing self-driving tech for semi-truck, wants to test in Nevada, Reuters

—Power Hungry: The States That Use The Most And Least Energy Per Capita, Forbes

—U.S. oil industry pushes back on sanctions against Venezuela, Washington Post

—Sunoco Reaches Settlement on Natural Gas Pipeline, [AP](#)

## **That's all for ME!**

*To view online:*

<https://www.politicopro.com/tipsheets/morning-energy/2017/08/trumps-2-for-1-reg-order-gets-day-in-court-024165>

## **Stories from POLITICO Pro**

### **Court ruling leaves HFC future in hands of EPA, Congress [Back](#)**

By Eric Wolff | 08/09/2017 05:09 PM EDT

The effort to get the U.S. to comply with a treaty eliminating a heat-trapping chemical now faces a grueling path after a major courtroom setback this week — and it may depend on EPA using its power to regulate chemicals.

The D.C. Circuit Court's [ruling](#) Tuesday forced EPA to abandon its plan to use the Clean Air Act to limit use of hydrofluorocarbons, a refrigerant that would be phased down under recent changes to the Montreal Protocol. Proponents of the effort, including environmentalists and the air conditioning industry, will now need the Senate to approve the treaty and Congress to pass a new law authorizing EPA to implement it, or they will have to persuade EPA Administrator Scott Pruitt to act — no small feat considering the EPA chief's disdain for both climate change initiatives and regulations.

The changes to the Montreal Protocol agreed to in Kigali, Rwanda, last year would curtail global use of HFCs, a move that scientists say could prevent up to 0.5 degrees Celsius — 0.9 degrees Fahrenheit — of warming by the end of the century. U.S. industry groups have supported the Kigali agreement and had backed EPA's plan to implement it under the Clean Air Act's Section 612. That section, put in place nearly 30 years ago as authorizing language to implement the initial Montreal Protocol, established a market mechanism that was designed to reduce ozone-damaging chemicals.

But the court's rejection of using Section 612 may require new legal authority to empower EPA to act if the U.S. eventually ratifies the Kigali amendment.

"You'll have a treaty and have Congress look at it and pass implementing legislation," said Stephen Yurek, CEO of the Air Conditioning, Heating, and Refrigeration Institute, whose members are the world's biggest makers of HFCs — and will produce most of the next generation chemicals.

In its ruling, the D.C. court suggested a slew of laws EPA could use to regulate HFCs: The Toxic Substances Control Act, the National Ambient Air Quality Standards, regulating as a hazardous air pollutant, and regulating HFCs in cars and trucks. But several lawyers said TSCA was the only credible alternative.

"There's a lot of authority under TSCA to regulate chemicals and chemical uses," said Jane Montgomery, a partner with Schiff Hardin who works with power companies. "It's not as straightforward as what they intended to under 612, but there's an environmental harm portion of TSCA. ... For managing the sale and manufacturing and use, TSCA is the most appropriate statute we have."

Yurek said AHRI was still reviewing TSCA as an option, but he feared that it would be a blunt instrument, requiring EPA to issue a rule that immediately limited or banned HFCs, in contrast to the phase-down approach created under Section 612 of the Clean Air Act.

"I'm concerned that it's much more of a command-and-control-type regime, you have different categories, and potentially banning," he said.

Under the TSCA update Congress passed last year, EPA must assess HFCs before regulating them, and then issue a rule, a process that could take about five years, legal experts said. The agency would ultimately have the authority to limit or even prohibit them, Montgomery said. And in its ruling, the D.C. Circuit upheld several of EPA's tools used to assess the global warming impact of HFCs, bolstering the case for a potential TSCA rule.

AHRI and environmental attorneys largely dismissed the court's other suggestions for EPA to comply with the Kigali goals. The NAAQS program focuses on just six pollutants, none of which are HFCs, they said. Congress similarly created a fixed list of pollutants under the hazardous air pollutants rules, limiting that program's broader application, attorneys said. And refrigerants used in car and truck air conditioners make up only a small part of the refrigerants market.

"These authorities are even less congruent with the authority the EPA invoked in this rulemaking to regulate ozone-depleting chemicals and their substitutes down the road," said Brendan Collins, a partner with law firm Ballard Spahr who represents power companies and oil and gas companies.

EPA says it is still reviewing the court decision, but it's not clear whether Pruitt would advance another rule to govern HFCs, even though it is backed by business interests. Proponents of the Kigali treaty could draw a skeptical reception from the Trump administration, which has been dismissive of both multi-party treaties and climate science — though the administration did defend the rule in court in February. The White House would need to submit the treaty amendment to the Senate for ratification.

Kigali advocates have long aimed to keep a low profile and quietly persuade staffers to support the effort as the administration got up to speed. AHRI is now trying to determine whether the court decision will require a change in its strategy, or if it can apply the same pro-U.S. business approach to the more conservative House.

"We have to decide [if] we do a more public push or keep the schedule," Yurek said. "Right now, the plan is that we continue to wait until the end of this year, and continue to educate both House

and Senate."

Green groups who back the ban on HFCs may try a more direct route by appealing to the D.C. Circuit for en banc review. There are seven D.C. Circuit judges appointed by Democrats, versus four appointed by Republicans, potentially giving the appeal an edge — though that advantage flips at the Supreme Court, should the case go that far.

"We are exploring the options," said David Doniger, director of climate programs for the Natural Resources Defense Council. "Including rehearing based on the dissent."

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### **Pruitt climate science challenge splits conservative allies** [Back](#)

By Emily Holden | 08/09/2017 05:38 AM EDT

EPA chief Scott Pruitt's attacks on mainstream climate science are causing discomfort in a surprising corner — among many of the conservative and industry groups that have cheered his efforts to dismantle Barack Obama's environmental regulations.

The U.S. Chamber of Commerce, political groups backed by the Koch brothers and the top lobbying organizations for the coal, oil, natural gas and power industries are among those so far declining to back Pruitt's efforts to undermine the scientific consensus on human-caused climate change, according to more than a dozen interviews by POLITICO. Some advocates privately worry that the debate would politically harm moderate Republicans, while wasting time and effort that's better spent on the Environmental Protection Agency's regulatory rollback.

Nevertheless, the former Oklahoma attorney general is persisting — a stance that could enhance his future political prospects in his deep-red home state.

As with immigration, trade and health care, climate change is one of numerous issues on which President Donald Trump's administration must decide how aggressively to attack the established consensus. And some of Pruitt's allies worry about the dangers of going too far.

"Policy risks could arise from playing politics," said Chrissy Harbin, vice president of external affairs for Americans for Prosperity, a major conservative group backed by the industrialist brothers Charles and David Koch. "If done incorrectly, efforts that are more politically motivated than policy-focused could unintentionally undermine conservatives' ability to roll back overreaching Obama-era regulations."

Pruitt drew widespread criticism in late June after EPA [revealed](#) that he was pushing for government-chosen experts to hold a public "red team, blue team" debate about climate science — a move that environmentalists say would place fringe views on an even playing field with

established, peer-reviewed research.

He also hasn't ruled out trying to overturn EPA's science-based conclusion that climate change threatens human health and welfare, a 2009 decision that legally requires the agency to take action to limit greenhouse gas emissions.

Pruitt is also weighing a crucial policy decision in which science could play a major role — whether EPA should craft a replacement for Obama's landmark 2015 greenhouse gas regulations for power plants, which Pruitt and Trump have vowed to repeal. Most power companies want the agency to replace Obama's climate standards with a far laxer regulation that would require few changes for coal plants, but doing that would mean acknowledging EPA's legal authority on climate change.

A riskier alternative would be for EPA to revoke its 2009 scientific conclusions in hopes of forgoing climate regulations altogether.

Pruitt's decision could be influenced by people like West Virginia Attorney General Patrick Morrisey, who is challenging Sen. [Joe Manchin](#) (D-W.Va.) in 2018 and was involved in lawsuits against Obama's regulations. Morrisey recently pitched options to "permanently kill the Obama Power Plan" to his state's coal lobby, and he plans to talk to through those possibilities with other Republican attorneys general soon.

Pruitt has [publicly scoffed](#) at the idea that carbon dioxide is a "primary contributor" to global warming — not too unlike Trump himself, who has dismissed human-caused climate change as a "hoax."

But not all Republicans support reopening that debate. And the top fossil-fuel trade groups have not asked the agency to reexamine its 2009 conclusion about climate science, commonly known as the "endangerment finding."

"We have neither taken a position on it nor have we been terribly interested in that debate," said Luke Popovich, a spokesman for the National Mining Association, which has preferred to attack Obama-era regulations as government overreach and threats to jobs and the economy. "We're not debating the 'accept or deny climate science.' We approach it as a policy issue: how do we deal with this issue, what is the most prudent and rational course for that ... we have much more pressing issues, as you can imagine."

AFP and the Chamber also have not asked Pruitt to dispute climate science or the legal finding, and neither have the Koch-backed American Legislative Exchange Council, the American Petroleum Institute, the American Coalition for Clean Coal Electricity, the Edison Electric Institute or the National Rural Electric Cooperative Association, a major political donor whose members include coal-burning power utilities in rural states. Most of those groups haven't taken a public stance, but others have privately argued against the effort.

On the other hand, some conservative groups do want Pruitt to contest the endangerment finding — among them, the Heritage Foundation, the Cato Institute, the American Energy Alliance, the

Competitive Enterprise Institute and the Heartland Institute. Bob Murray, CEO of the coal company Murray Energy CEO, has also argued that his industry needs Pruitt to rescind the finding, although other coal producers have disagreed with him. Other coal companies are still discussing their positions.

Steve Milloy, a well-known climate change critic who is a fellow for the conservative E&E Legal Institute, maintained that "all of the climate skeptics are in favor of this whole thing." But he added that he thinks the idea for challenging climate science "all came from Scott Pruitt himself."

"Industry guys are all over the map," Milloy said. "They're all very confused and don't know what's good for them."

Disputing the endangerment finding would be tough, triggering a legal fight from environmental groups that EPA could easily lose given the vast amount of evidence from scientists that shows man-made greenhouse gas emissions harm the environment. And it could last through the end of the Trump administration.

"The downsides are considerable," said David Bookbinder, chief counsel for the libertarian Niskanen Center, which believes Pruitt has a legal duty to regulate greenhouse gases. "It would take an enormous amount of work to do it, and then [Pruitt] would get laughed out of court."

Bookbinder argues Pruitt's climate debate is a "a political exercise entirely."

"This is nothing more than to give people a show," Bookbinder said. "The man's running for Senate next year. Everything he says is calculated toward securing the Republican nomination in Oklahoma and then winning the general election there."

Pruitt has not disclosed any plans for a Senate run, although Sen. Jim Inhofe's term is up in 2020. Democrats and watchdog groups have similarly accused Pruitt of using his EPA post and the climate debate to launch a campaign for Congress. Pruitt has helped fuel those accusations by making frequent trips home — based on a review of travel records, Reuters reported that Pruitt spent almost half his days in Oklahoma this past spring.

Pruitt recently told The Oklahoman that he was not interested in jumping into the state's open gubernatorial race next year. But he declined to speculate on a possible run for Senate if Inhofe retires before Election Day in 2020, at which point Inhofe would be 85.

EPA did not comment for this story.

Climate change typically doesn't drive voters to the polls. Still, Oklahomans are more skeptical of the science than most Americans, according to the Yale Program on Climate Change Communication. Inhofe has repeatedly won reelection as one of the chamber's most vocal critics of climate science, including writing a book on the topic called "The Greatest Hoax."

Republicans who accept that humans cause climate change but have questions about the best

policy response say Pruitt's enterprise could be helpful but risks becoming overly politicized.

Eli Lehrer, president of the R Street Institute, a free-market think tank that has argued for a congressionally mandated carbon price, said a debate "could be very helpful in clarifying what conservatives should be doing and how conservatives should and should not worry about it."

"If Republicans, on the other hand, end up going down the rabbit hole of saying that an overwhelming scientific consensus is a hoax or a fraud, then it becomes a problem," he added.

GOP politicians in swing districts would be forced to defend or denounce the administration, he said.

But that's inevitable, some of the people pushing for a review of the science say.

"The whole, 'I'm not a scientist' thing went over like a lead balloon," said one conservative familiar with polling on the issue — alluding to one [recent GOP talking point](#) on climate change. "You're not a doctor either, but you vote on health care. [Addressing] the science in unavoidable."

In addition to potentially stressing moderate Republicans, Pruitt's plans put industry in a tough spot.

Power companies in particular are against debating the science or reviewing the endangerment finding, but they don't want to fight Pruitt publicly.

"In the utility world, I couldn't name anyone who is advocating for that right now," said one power-sector source who spoke anonymously because he didn't want to draw attention to his company.

Some want the finding intact because they are continuing to lower their carbon emissions by shutting down coal plants and building more natural gas-fired and renewable electricity. They assume they will face carbon limits in the future, regardless of the Trump administration's plans. Others don't think the fight is worth the time and money, the source said.

The source added that most aren't making their position known because it's "not worth the risk of being out in front of something like this like this," including because they might come under pressure from shareholders for any public comments.

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**DOL: 20 percent of mine inspectors could be medically unfit** [Back](#)

By Ian Kullgren | 08/09/2017 06:31 PM EDT

As many as one in five federal mine inspectors doesn't meet the physical requirements necessary to do the job, the Labor Department said today.

A recent review of Mine Safety and Health Administration records found that between 15 percent and 20 percent of inspectors did not pass routine physical examinations, "and that the problem had been growing over the past several years," DOL said in a statement.

DOL said it would create individualized assessment plans for employees who don't meet medical standards. "The process will incorporate requirements for reasonable accommodation, resolve issues efficiently and effectively, and be conducted in a consistent and fair manner," DOL said.

Inspectors are required to have periodic exams, including vision and hearing tests, to ensure they meet Office of Personnel Management physical standards.

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