

# ***Sierra Club v. FERC: Evaluating Climate Change Under NEPA***

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## **I. Introduction**

The extent to which the National Environmental Policy Act (“NEPA”) requires consideration of climate change is an ongoing debate. The debate recently came to a head with the Southeast Market Pipeline Project (“SMP Project”).<sup>1</sup> The DC Circuit found the Federal Energy Regulatory Commission’s (“FERC”) SMP Project Environmental Impact Statement (“EIS”) to be inadequate. The Court found the EIS was inadequate because it lacked consideration of climate change and failed to estimate downstream greenhouse gas (“GHG”) emissions.<sup>2</sup> This article examines how climate change has previously been considered under NEPA, the potential impact of the SMP Project decision on future projects, and how NEPA may evolve under the Trump administration.

## **II. Background on NEPA and Regulating Climate Change**

NEPA was enacted in 1969 to promote man and nature’s existence in productive harmony.<sup>3</sup> Congress recognized “that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”<sup>4</sup> Thus, NEPA requires federal agencies to publish an EIS whenever a major federal action significantly affects the quality of the environment.<sup>5</sup> The EIS must include a detailed statement of environmental impacts, alternatives to proposed action, and any

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<sup>1</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017).

<sup>2</sup> *Id.* at 1374.

<sup>3</sup> *See* 42 U.S.C. § 4331(a).

<sup>4</sup> 42 U.S.C. § 4331(c).

<sup>5</sup> 42 U.S.C. § 4332.

irretrievable commitment of resources.<sup>6</sup> NEPA requires agencies to take a “hard look” at the environmental consequences of their actions and is a way to disclose those environmental consequences to the public.<sup>7</sup>

NEPA-based challenges are reviewed under the Administrative Procedure Act (“APA”)<sup>8</sup> and “its deferential standard of review.”<sup>9</sup> “The role of the court is simply to ensure the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.”<sup>10</sup> The court’s review of agency actions under the arbitrary and capricious standard is a narrow review.<sup>11</sup> So long as an agency decision has a rational connection between the facts and the conclusions the agency decision will be upheld by the court.<sup>12</sup> The court’s judgment is not substituted for that of the agency under an arbitrary and capricious review.<sup>13</sup>

Under NEPA, an EIS must consider both direct and indirect environmental effects.<sup>14</sup> Direct effects, “are caused by the action and occur at the same time and place.”<sup>15</sup> Indirect effects, “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>16</sup> “Effects are reasonably foreseeable if they are ‘sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.’”<sup>17</sup> An agency is only responsible for considering environmental effects it has the legal

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<sup>6</sup> *Id.*

<sup>7</sup> *Sierra Club*, 867 F.3d at 1380.

<sup>8</sup> 5 U.S.C. § 706(2)(a).

<sup>9</sup> *Sierra Club*, 867 F.3d at 1367.

<sup>10</sup> *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98, (1983).

<sup>11</sup> *Barnes v. US DOT*, 655 F.3d 1124, 1132 (9<sup>th</sup> Cir. 2011).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 40 CFR § 1502.16(a)(b).

<sup>15</sup> 40 CFR § 1508.8(a).

<sup>16</sup> 40 CFR § 1508.8(b).

<sup>17</sup> *Sierra Club*, 867 F.3d at 1371.

power to prevent and need not gather environmental information if it has no statutory authority to act on that information.<sup>18</sup> If an agency is limited by its statutory authority over relevant actions it need not consider those effects under NEPA.<sup>19</sup>

Since the early 1990's, courts have grappled with claims that NEPA analyses were inadequate because they ignored climate change impacts.<sup>20</sup> Courts have required agencies to assess climate change in their EIS's.<sup>21</sup> For example, the Court in *Center for Biological Diversity*<sup>22</sup> found the National Highway Traffic Safety Administration's draft environmental assessment related to fuel economy standards to be inadequate because it failed to consider the impact on climate change.<sup>23</sup> Although, "climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control . . . [that] does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming."<sup>24</sup> However, "no agency that has at least mentioned GHGs and climate-change has suffered any judicial consequences."<sup>25</sup>

Courts have also required agencies to consider the social cost of carbon when developing EISs under NEPA.<sup>26</sup> The social cost of carbon tool was developed by the Interagency Working Group on Social Cost of Greenhouse Gases to value in dollars the long-term harm by each ton of carbon dioxide emitted.<sup>27</sup> The tool includes, but is not limited to, "changes in net agricultural

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<sup>18</sup> *Id.* at 1372.

<sup>19</sup> *DOT v. Public Citizen*, 541 U.S. 752, 770 (2004).

<sup>20</sup> See Jamison E. Colburn, *A Climate-Constrained NEPA*, 2017 U. Ill. L. Rev. 1091, 1095-1096 (2017) (discussing judicial encounters with NEPA and climate change from 1990 to present).

<sup>21</sup> *Id.* at 1097.

<sup>22</sup> *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1189 (9th Cir. 2008).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1217.

<sup>25</sup> See Jamison E. Colburn, *A Climate-Constrained NEPA*, 2017 U. Ill. L. Rev. 1091, 1097 (2017).

<sup>26</sup> *Sierra Club*, 867 F.3d at 1375.

<sup>27</sup> *Id.*

productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change.”<sup>28</sup>

### **III. The SMP Project Decision and the Impact to NEPA**

FERC has jurisdiction to approve or deny interstate natural gas transmission pipeline facilities and is required to issue a “certificate of public convenience and necessity” to project developers.<sup>29</sup> FERC must determine projects will serve the public interest<sup>30</sup> and, where the projects are determined to be a, “major Federal action[] significantly affecting the quality of the human environment,” an EIS must be prepared.<sup>31</sup> Throughout the EIS process, FERC must request, assess, and consider comments from the public.<sup>32</sup>

The SMP Project is designed to meet the future electric generation needs of Florida and the growing demand for natural gas.<sup>33</sup> Three separate, but related, pipeline projects comprise the SMP Project.<sup>34</sup> First, the Sabal Trail Project involves constructing and operating 515.5 miles of pipeline and associated facilities through Alabama, Georgia, and Florida ending at the Central Florida Hub (“CFH”).<sup>35</sup> Second, Transco’s Hillabee Expansion Project involves constructing and operating approximately 43.5 miles of pipeline and associated facilities within Alabama to provide the Sabal Trail Project with up to 1.1 billion cubic feet per day of natural gas.<sup>36</sup> Finally, the Florida Southeast Connection, LLC (FSC) involves constructing and operating about 126.4

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<sup>28</sup> INTERAGENCY WORKING GROUP ON SOCIAL COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON REGULATORY IMPACT ANALYSIS (2016).

<sup>29</sup> *See* 15 U.S.C. § 717.

<sup>30</sup> *Id.*

<sup>31</sup> 42 U.S.C. § 4332.

<sup>32</sup> 40 C.F.R. § 1503.1.

<sup>33</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-000, CP15-16-000, CP15-17-000, FINAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT INTRODUCTION (2015).

<sup>34</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-000, CP15-16-000, CP15-17-000, FINAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT EXECUTIVE SUMMARY (2015).

<sup>35</sup> *Id.*

<sup>36</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-000, CP15-16-000, CP15-17-000, FINAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT INTRODUCTION (2015).

miles of pipeline and associated facilities in Florida from the CFH to the already existing natural gas-fired Martin Plant with an initial capacity of up to 640 million cubic feet per day.<sup>37</sup> In 2014, each of the three projects filed separate applications to FERC seeking Certificates of Public Convenience and Necessity for their segments of the natural gas pipeline and associated facilities.<sup>38</sup>

After the Project applications were received, pursuant to the requirements of NEPA, FERC prepared an SMP Project EIS and issued a draft in September 2015.<sup>39</sup> FERC held public meetings and solicited public comments on the draft EIS and the project's environmental effects.<sup>40</sup> FERC then made limited modifications to the EIS and issued a final EIS in December 2015.<sup>41</sup> The Final EIS came in five separate sections with fifteen appendices and concluded that although there would be some adverse environmental impacts, the impacts would be reduced to less-than-significant levels with the proposed mitigations.<sup>42</sup> The Final EIS did not quantify the downstream GHG emissions, consider environmental effects of climate change related to those emissions, and did not discuss the social cost of carbon related to the SMP Project.<sup>43</sup>

After the Final EIS was issued, the Sierra Club filed a lawsuit asserting that FERC's EIS was inadequate.<sup>44</sup> The Sierra Club claimed the EIS was inadequate because it failed to consider the downstream GHG emissions and associated climate change impacts.<sup>45</sup> In response to the Sierra Club lawsuit, the D.C. Circuit Court of Appeals issued its decision on August 22, 2017

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-000, CP15-16-000, CP15-17-000, FINAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT EXECUTIVE SUMMARY (2015).

<sup>40</sup> *Sierra Club*, 867 F.3d at 1364.

<sup>41</sup> *Id.*

<sup>42</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-000, CP15-16-000, CP15-17-000, FINAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT EXECUTIVE SUMMARY (2015).

<sup>43</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-000, CP15-16-000, CP15-17-000, FINAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT ENVIRONMENTAL ANALYSIS (2015).

<sup>44</sup> *Sierra Club*, 867 F.3d at 1363.

<sup>45</sup> *Id.*

and remanded FERC to prepare a Supplemental Environmental Impact Statement (“SEIS”) that: (1) quantifies and considers the Project downstream GHG emissions; and (2) explains “whether the position on the social cost of carbon that the agency took in *EarthReports* still holds, and why.”<sup>46</sup> The court’s decision could impact future projects based on (A) its requirement of what is a “reasonably foreseeable” indirect effect under a NEPA review; and (B) whether the Court decides FERC’s SEIS is adequate or not.

#### **A. Reasonably Foreseeable Indirect Effects in FERC’s SMP Project EIS**

*Sierra Club v. FERC* used a “reasonably foreseeable” test to justify what indirect effects FERC should have considered in the SMP Project EIS.<sup>47</sup> “Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves.”<sup>48</sup> The Court determined it was “reasonably foreseeable” for FERC to know the gas would be burned in specific power plants downstream because it is clear in the Project purpose.<sup>49</sup> FERC is tasked with considering “the public convenience and necessity” when evaluating interstate pipeline applications and balancing the public benefits against the adverse effects of the project.<sup>50</sup> The Court determined the indirect effects of the SMP Project, specifically the downstream GHG emissions, needed to be considered by FERC.<sup>51</sup>

The Court’s interpretation of “reasonably foreseeable” in *Sierra Club v. FERC* may impact FERC’s review of future natural gas pipeline decisions. The Court’s requirement that FERC quantify or state why it cannot quantify the downstream GHG emissions shows the Court

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<sup>46</sup> *Id.* at 1374-1375.

<sup>47</sup> *Sierra Club*, 867 F.3d at 1371.

<sup>48</sup> *Id.* at 1373.

<sup>49</sup> *Id.* at 1372.

<sup>50</sup> *Id.* at 1379.

<sup>51</sup> *Id.* at 1374.

considers those GHG emissions to be a “reasonably foreseeable” consequence of the natural gas pipeline. This interpretation of “reasonably foreseeable” means future projects need to consider the downstream GHG emissions their projects will cause even if the facilities downstream are not within the scope of the EIS and FERC does not control those emissions.<sup>52</sup>

The *Sierra Club v. FERC* interpretation of “reasonably foreseeable” must be considered taking into account the two major pipeline projects FERC has since approved: the Atlantic Coast Project and the Mountain Valley Project. First, the Atlantic Coast Project EIS concluded the downstream combustion of gas was not causally connected to the pipeline project and the precise end-users were not all known, so only a downstream end-use estimate of GHG emissions was included in the EIS.<sup>53</sup> Additionally, the EIS stated since climate change was a global phenomenon, the cumulative impact analysis did not assess specific cumulative impacts to the project area.<sup>54</sup> Second, the Mountain Valley Project EIS calculated the downstream GHG emissions increase that would occur, however, it stated the climate change impact and cumulative impacts on climate change could not be determined.<sup>55</sup> The assessment of the “reasonably foreseeable” downstream GHG emissions and potential climate change impacts in the Atlantic Coast Project EIS and the Mountain Valley Project EIS were relatively short, only adding a paragraph or two to each EIS.<sup>56</sup> These sections in relation to the entire EIS, which were hundreds of pages, did not appear to add an onerous addition to the FERC review or greatly expand the assessment of climate change review under NEPA.

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<sup>52</sup> *Id.* at 1381.

<sup>53</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP15-554-000, CP15-554-001, CP15-555-000, CP15-556-000 FINAL ENVIRONMENTAL IMPACT STATEMENT ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT VOLUME 1 (2017).

<sup>54</sup> *Id.*

<sup>55</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP16-10-000, CP16-13-000 FINAL ENVIRONMENTAL IMPACT STATEMENT MOUNTAIN VALLEY PROJECT AND EQUITRANS EXPANSION PROJECT (2017).

<sup>56</sup> *Id.*

## **B. FERC’s Draft SEIS: Will it Scratch the Court’s Itch?**

FERC responded to the Court’s remand of its EIS on September 27, 2017 with a draft Supplemental Environmental Impact Statement (“SEIS”) for the SMP Project.<sup>57</sup> The draft SEIS is a five-page document, which: (1) estimates the GHG emissions from the downstream facilities; (2) describes how the GHG emissions were calculated; (3) puts the GHG emissions into context; and (4) discusses the social cost of carbon tool and its value for this Project.<sup>58</sup>

The GHG emissions were estimated based on the downstream potential-to-emit (“PTE”) of the natural gas provided by the pipeline.<sup>59</sup> To contextualize the amount of GHG emissions from the SMP Project, FERC provided the GHG inventory of the State of Florida and the GHG inventory at a national level.<sup>60</sup> The State of Florida’s GHG inventory was derived from air quality permits for both existing and proposed facilities in Florida.<sup>61</sup> This demonstrated the SMP Project has the potential to increase Florida GHG inventory between 3.7 and 9.7 percent (net PTE and gross PTE, respectively).<sup>62</sup> The gross PTE emissions are the total downstream emissions, while the net PTE emissions are the total downstream permitted emissions taking into account the projected displacement of coal or oil as a primary fuel. The SEIS stated FERC did not find a suitable method or model to determine the environmental effects from the GHG emissions from the SMP Project.<sup>63</sup>

FERC also stated the social cost of carbon tool was not appropriate for the project-level NEPA review.<sup>64</sup> FERC stated the tool was not appropriate because: (1) there is no consensus on

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<sup>57</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-002, CP15-16-003, CP15-17-002, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT (2017).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*



what discount rate to use for the analysis and thus output variations can result; (2) the actual incremental impacts are not measured by the tool; and (3) it is unclear what monetized values would be considered significant for NEPA reviews.<sup>65</sup>

As of the publication of this article, the D.C. Circuit Court of Appeals has not made a decision regarding the adequacy of the FERC draft SEIS. The court's decision with respect to the FERC draft SEIS will aid future projects in understanding what will be required of their EIS's. If the D.C. Circuit Court of Appeals finds the FERC draft SEIS to be adequate, future projects may need to only calculate an estimate of downstream GHG emissions and may not need to consider the social cost of carbon associated with their projects nor consider the environmental effect of the downstream GHG emissions.<sup>66</sup> The FERC draft SEIS is only a five-page document, prepared within a month. If the FERC draft SEIS is found to be adequate the implications on future projects would not be too onerous because it did not take FERC long to draft the short, additional SEIS.

However, if the D.C. Circuit Court of Appeals finds the FERC draft SEIS to be inadequate, depending on what the inadequacy is, future projects may need to account for the social cost of carbon or the environmental effects of the downstream GHG emissions. If the FERC draft SEIS is considered inadequate, future projects may need to do more in depth analysis of downstream climate change impacts, which could be costly and time intensive.

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<sup>65</sup> FEDERAL ENERGY REGULATORY COMMISSION, DOCKET NO. CP14-554-002, CP15-16-003, CP15-17-002, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON SOUTHEAST MARKET PIPELINES PROJECT (2017).

<sup>66</sup> Ellen M. Gilmer, *FERC Response to Court's Climate Rebuke? 5 pages*, ENERGYWIRE (Sept. 28, 2017), <https://www.eenews.net/energywire/2017/09/28/stories/1060061967>.

#### IV. Climate Change and NEPA Under the Trump Administration

On August 5, 2016, the Council on Environmental Quality (“CEQ”) published final guidance to provide federal agencies with clarity and consistency in considering climate change within existing NEPA requirements.<sup>67</sup> The guidance recommended agencies quantify direct and indirect GHG emissions; use projected GHG emissions as a means of assessing climate change effects; and, when quantifying GHG emissions is not possible, use a qualitative method.<sup>68</sup> This guidance document was referenced by both FERC and The Sierra Club in the court materials related to *Sierra Club v. FERC*.<sup>69</sup>

However, the guidance document was withdrawn on March 28, 2017 pursuant to Executive Order (“EO”) 13783, “Promoting Energy Independence and Economic Growth.”<sup>70</sup> Additionally, this EO disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and withdrew the guidance documents developed by this group as no longer representative of government policy.<sup>71</sup> The CEQ guidance was not a regulation and its withdrawal did not change any law, regulation or other legally binding requirement.<sup>72</sup>

The *Sierra Club v. FERC* decision still requires agencies to consider downstream GHG emissions and potential climate change impacts. The Court’s decision remained consistent with the CEQ requirement to consider downstream GHG emissions of indirect effects from a

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<sup>67</sup> COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS (Aug. 1, 2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa\\_final\\_ghg\\_guidance.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf).

<sup>68</sup> *Id.*

<sup>69</sup> See Brief of Respondent at 78, *Sierra Club v. FERC*, 867 F.3d 1357, 1381 (D.C. Cir. 2017) (No. 16-1329); See also Final Reply Brief of Petitioners at 13, *Sierra Club v. FERC*, 867 F.3d 1357, 1381 (D.C. Cir. 2017).

<sup>70</sup> Exec. Order No. 13,783, 82 Fed. Reg. 61, (March 31, 2017).

<sup>71</sup> Exec. Order No. 13,783, 82 Fed. Reg. 61, (March 28, 2017).

<sup>72</sup> COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, WITHDRAWAL OF FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS (2017), <https://www.federalregister.gov/documents/2017/04/05/2017-06770/withdrawal-of-final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas>.

project.<sup>73</sup> Similarly, the Court required FERC to comment on the social cost of carbon tool, despite the March EO rescinding that guidance. Therefore, an outstanding question remains of the impact EO 13783 will have on how agencies consider climate change impacts under NEPA.

## **V. Conclusion**

The reach of NEPA’s “reasonably foreseeable” test on indirect effects related to climate change is still continuing to be defined. If the FERC SMP Project draft SEIS is adequate, projects may only need to quantify, when feasible, the downstream GHG emissions, but may not need to go any further in assessing the environmental effects or the social cost of carbon implications. If this is the case, the additional time and resources needed to do this assessment may not be that substantial compared with the overall work of the EIS itself. However, if the FERC draft SEIS is deemed inadequate by the Court and more effort is needed by FERC to find a tool suited to assess the environmental effects of downstream GHG emissions, this could mark an increase in effort required by FERC for EIS’s and also for other agencies as they look at climate change impacts under NEPA.

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<sup>73</sup> James Thompson and Katy Larkins, *DC Circ. Ruling Could Change Pipeline Review Procedure*, LAW360 (Sept. 7, 2017), <https://www.law360.com/articles/960685>.