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EMINENT DOMAIN Exercise of Power of Eminent Domain for Special Purposes: Provide Restrictions on Use of Eminent Domain Power by Petroleum Pipeline Companies

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EMINENT DOMAIN

Exercise of Power of Eminent Domain for Special Purposes: Provide Restrictions on Use of Eminent Domain Power by Petroleum Pipeline Companies

CODE SECTIONS:	O.C.G.A. §§ 22-3-70 to -72, -80 to -83 (repealed), -80 to -88 (new)[1]
BILL NUMBER:	SB 24
ACT NUMBER:	157
GA. LAWS:	1995 Ga. Laws 161
SUMMARY:	The Act requires petroleum pipeline companies to notify property owners of their rights before initiating eminent domain proceedings. The petroleum pipeline companies also must comply with a two-step application and review process. The Act contains provisions for public notices and hearings. Landowners must be compensated by the petroleum pipeline companies for any damages caused by surveying activities, property taken through the eminent domain proceeding, and unreasonable impacts on the property of the landowner that is not acquired by eminent domain.
EFFECTIVE DATE:	March 30, 1995, O.C.G.A. § 22-3-83;[2]

1. Code section 22-3-88, originally enacted as Code section 22-3-83, provides natural gas pipeline companies the right to exercise the power of eminent domain and is unaffected by this legislation.

2. The restrictions created by this Act on the exercise of the right of eminent domain by petroleum pipeline companies were effective July 1, 1995. However, the temporary moratorium on such exercise imposed by 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-80(d) (Supp. 1994)) had an expiration date of March 31, 1995. This would have opened a three-month window during which the pipeline companies could exercise their formerly unrestricted power of eminent domain. *See* Memorandum from Senate Research Office: Senate Bill Summary (Apr. 6, 1995) (available in Georgia State University College of Law Library). Section 1 of this Act was included to close that gap by providing for the immediate repeal of the right of petroleum pipeline companies to exercise the power of eminent

July 1, 1995, §§ 22-3-80 to -88

History

For over fifty years,[3] Georgia has allowed petroleum pipeline companies to exercise the power of eminent domain.[4] The Georgia General Assembly first gave petroleum pipeline companies this right in 1943,[5] following the enactment of the federal Cole Act of 1941, which granted the right of eminent domain to pipeline companies to provide for the interstate transport of oil for war-time purposes.[6] Petroleum pipeline companies have enjoyed an "unfettered" and "indeed awesome" power of eminent domain since this first grant of power.[7] Even

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domain. *Id.* Thus, the General Assembly made section 1 of the Act effective upon approval of the Governor.

3. *Rein in Powerful Pipeline Companies*, ATLANTA CONST., Feb. 15, 1994, at A8. Twice during this period, in the late 1940s and early 1960s, legislation was introduced to change this law; however, both attempts failed. Telephone Interview with Sen. George Hooks, Senate District No. 14 (Apr. 6, 1995).

4. "In the United States, the power of eminent domain is founded in both the federal (Fifth Amend.) and state constitutions. The Constitution limits the power to taking for a public purpose and prohibits the exercise of the power of eminent domain without just compensation to the owners of the property which is taken. The process of exercising the power of eminent domain is commonly referred to as 'condemnation', or, 'expropriation.'" BLACK'S LAW DICTIONARY 523 (6th ed. 1990).

5. 1943 Ga. Laws 1662 (formerly found at O.C.G.A. §§ 22-3-80 to -82 (1982)).

6. COLONIAL PIPELINE AND PLANTATION PIPE LINE, PETROLEUM PIPELINES EMINENT DOMAIN IN GEORGIA: A WHITE PAPER IN SUPPORT OF PETROLEUM PIPELINE'S RIGHT TO EXERCISE EMINENT DOMAIN IN GEORGIA 5 (Oct. 21, 1994) [hereinafter EMINENT DOMAIN POWER] (available in Georgia State University College of Law Library). The Cole Act was enacted by Congress only after the Georgia General Assembly failed to pass an eminent domain bill in March 1941. *Id.* The petroleum pipeline companies needed this power primarily to overcome the resistance of the railroad companies. *Id.* As major transporters of coal, the railroad companies were threatened by petroleum pipelines. *Id.* The railroad companies had blocked the pipelines by not giving them easements to pass under or over their train tracks. *Id.* The federal power was terminated in 1946 after the war ended. OFFICE OF THE FEDERAL REGISTER NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, THE UNITED STATES GOVERNMENT MANUAL 851 (1994/1995).

7. *Lawmakers '95* (GPTV broadcast, Jan. 24, 1995) (remarks by Sen. Hooks, Senate District No. 14, co-sponsor of SB 24, speaking before the Senate) (videotape available in Georgia State University College of Law

though petroleum pipeline companies are privately owned, they have exercised a power of eminent domain as great as, or greater than, that of the state because they are not subject to the political process.[8] Likewise, as common carriers, petroleum pipeline companies' rights have been greater than those of the utilities that are regulated by the Public Service Commission.[9]

Petroleum pipeline companies have possessed broad statutory authority to take public[10] and private property[11] for the purposes of constructing, running, or operating petroleum pipelines in Georgia.[12] Georgia's statute provided that:

> Any corporation engaged in constructing, running, or operating pipelines in this state as a common carrier in interstate or intrastate commerce for the transportation of petroleum and petroleum products shall have the right of eminent domain. Any property or interest condemned pursuant to this Code section shall be deemed to have been condemned for public purposes.[13]

Under prior law, property could be taken by petroleum pipeline companies without any showing that the taking was in the public interest.[14] The petroleum pipeline company could choose a pipeline route without any public participation, federal oversight, or state oversight.[15] Nonetheless, any property condemned was presumed to be "condemned for public purposes."[16]

Library).

8. 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-70(8) (Supp. 1994)); *Rein in Powerful Pipeline Companies, supra* note 3.

9. *See* 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-70(8) (Supp. 1994)).

10. *See* 1981 Ga. Laws 789 (formerly found at O.G.C.A § 22-3-80(b) (1982)).

11. *Id.* (formerly found at O.C.G.A. § 22-3-80(a) (1982)).

12. *Id.*

13. *Id.*

14. THE RED HILLS CONSERVATION PROGRAM OF TALL TIMBERS RESEARCH, INC., PETROLEUM PIPELINES IN GEORGIA: A WHITE PAPER IN SUPPORT OF PETROLEUM PIPELINE LEGISLATION 26 (Aug. 23, 1994) [hereinafter PETROLEUM PIPELINES] (available in Georgia State University College of Law Library). "The Georgia eminent domain statute as written eliminates any possibility of review, at least under state law, of whether the proposed pipeline really serves any public need." *Id.*

15. *See* 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-70(8) to (9) (Supp. 1994)).

16. 1981 Ga. Laws 789, § 1, at 790 (formerly found at O.C.G.A. § 22-3-

While valuable and beneficial,[17] petroleum pipelines can have significant effects on land usage[18] and water supplies.[19] One petroleum pipeline company reported nineteen leaks or spills, totalling 204,624 gallons, in Georgia since 1972.[20]

Recently, a major petroleum pipeline company decided to extend a pipeline from Bainbridge, Georgia to Lloyd, Florida.[21]

80(a) (1982)). However, some believe that this presumption is unwise and believe that "the legislature should refuse to include language deeming pipelines to be a 'public use.' " PETROLEUM PIPELINES, *supra* note 14, at 26.

17. THE PETROLEUM PIPELINE STUDY COMMITTEE, 1994 REPORT [hereinafter STUDY COMMITTEE REPORT] (available in Georgia State University College of Law Library). While environmental interests advocated the elimination of the power of eminent domain, *e.g.,* PETROLEUM PIPELINES, *supra* note 14, at 4, the Study Committee found the petroleum pipelines beneficial and recommended restricting the power rather than eliminating it. STUDY COMMITTEE REPORT, *supra*, at 2.

18. *See* 1994 Ga. Laws 229, § 1, at 231 (formerly found at O.C.G.A. § 22-3-70(3) (Supp. 1994)) ("The siting, construction, and operation of petroleum pipelines create significant impacts on land, including . . . the destruction of property, buildings, crops, forests, wetlands, and wildlife habitat . . . ."). For pipeline inspection and maintenance purposes, thirty- to forty-foot swaths of land must be permanently clear cut along the pipeline path. PETROLEUM PIPELINES, *supra* note 14, at 2; Jakobsen v. Colonial Pipeline Co., 397 S.E.2d 435, 437 (Ga. 1990); Avery v. Colonial Pipeline Co., 444 S.E.2d 363 (Ga. Ct. App. 1994), *cert. denied*, 213 Ga. App. 901 (1994) (allowing pipeline companies to clear trees for inspection and maintenance purposes).

19. 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-70(4) (Supp. 1994)) ("[S]ignificant potential impacts [include] impacts associated with slow leakage of product into ground water . . . [and] impacts associated with catastrophic spills . . . ."). Petroleum pipelines are responsible for more spills than all other sources combined, and the number of pipeline incidents is increasing. PETROLEUM PIPELINES, *supra* note 14, at 2. "Failure rate statistics demonstrate that even a short, 25-mile pipeline has a one in five chance of failure after only ten years in the ground." PETROLEUM PIPELINES, *supra* note 14, at 12.

20. PETROLEUM PIPELINES, *supra* note 14, at 14. A petroleum pipeline leak caused ground water pollution in Crawford County, Georgia, possibly affecting wells owned by Rep. Robert Ray, House District No. 128. PETROLEUM PIPELINES, *supra* note 14, at 15. "[B]enzene, ethylbenzene, toluene, and other petroleum product contaminants" were detected on the Ray property. PETROLEUM PIPELINES, *supra* note 14, at 15.

21. PETROLEUM PIPELINES, *supra* note 14, at 1-2. The pipeline company proposing this project was Colonial Pipeline Company. PETROLEUM PIPELINES, *supra* note 14, at 11. The proposed route would extend through the Red Hills region, a fragile area in southwest Georgia in Thomas and Grady counties. PETROLEUM PIPELINES, *supra* note 14, at 16. It is an

When the petroleum pipeline company tried to survey in the Red Hills region, some of the affected landowners denied access and the petroleum pipeline company sought injunctive relief.[22]

When their efforts toward protecting their lands through the courts proved fruitless,[23] the landowners turned to the General Assembly.[24] The General Assembly responded by imposing a

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historic hunting and protected wildlife area and "ranks in the category of a national historic treasure." PETROLEUM PIPELINES, *supra* note 14, at 16. Its "virgin soils" and "old growth forests" provide refuge to endangered, threatened, and rare species of plants and animal life. PETROLEUM PIPELINES, *supra* note 14, at 16. Geological and hydrological features make the Red Hills area important to the region's water supply. PETROLEUM PIPELINES, *supra* note 14, at 16. Colonial Pipeline Company's first choice for the pipeline route had been to run it through part of Leon County, Florida. Telephone Interview with Stephen O'Day, Counsel for Colonial Pipeline Company and Plantation Pipeline Company, Smith, Gambrell & Russell (Apr. 10, 1995) [hereinafter O'Day Interview]. However, Leon County had local land use planning restrictions that prohibited a linear development such as a pipeline. *Id.* Thus, the company routed the pipeline just north of Leon County in Georgia. *Id.* Colonial Pipeline Company also had planned to run a 250-mile pipeline from Augusta through Savannah to Jacksonville, Florida, crossing sensitive coastal areas and inland wetlands. PETROLEUM PIPELINES, *supra* note 14, at 1-2.

22. Colonial Pipeline Co. v. Christensen, No. 93-V-556, at 6 (Super. Ct. Grady County, Ga. filed Oct. 27, 1993). Colonial Pipeline Company had gained right-of-way to all the properties necessary to complete the pipeline along its proposed routes except for a few tracts of property in Grady and Thomas Counties. Transcript of Hearing at 26, Colonial Pipeline Co. v. Christensen, No. 93-V-556 (Super. Ct. Grady County, Ga. filed Oct. 27, 1993). The Red Hills landowners were concerned that environmentally protective measures would not be used in conducting the survey and that they would not be compensated for the damage caused by the survey. *Id.* at 82-83. The petroleum pipeline company argued that its eminent domain power included the right to perform unhindered surveys "[a]s an incidental and inherent part of its statutory powers of eminent domain." Petition for Injunctive Relief at 6, Colonial Pipeline v. Christensen, No. 93-V-556 (Super. Ct. Grady County, Ga. filed Oct. 27, 1993).

23. PETROLEUM PIPELINES, *supra* note 14, at 16. Constrained by Georgia's eminent domain statute, the Superior Courts of Grady County and Thomas County would not encroach on Colonial Pipeline Company's power to survey. PETROLEUM PIPELINES, *supra* note 14, at 16. The Georgia Supreme Court's decision in *Oglethorpe Power Corp. v. Goss* had acknowledged a "condemning body['s] . . . right, incidental to its power of eminent domain, to enter private property in order to survey, inspect, and appraise the property." 322 S.E.2d 887, 889 (1984).

24. Telephone Interview with John Stevens, Lobbyist, Tall Timbers

one-year moratorium on the exercise of eminent domain by petroleum pipeline companies,[25] and created a Petroleum Pipeline Study Committee (Study Committee) composed of thirteen members representing various interests.[26] The Study Committee was charged with recommending legislation concerning the exercise of the power of eminent domain by petroleum pipeline companies[27] based on a review of the effects of petroleum pipelines[28] and the legal mechanisms which can be used to restrict siting of pipelines to protect natural resources.[29]

To become educated concerning the effects of petroleum pipelines, the Study Committee toured the facilities of two pipeline companies and was briefed on various aspects of pipeline operations, ranging from safety procedures to the effect on the

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Research, Inc. (June 16, 1995). Tall Timbers Research, Inc., in support of Red Hills landowners, hired lobbyist John Stevens to pursue legislation that would eliminate or restrict the eminent domain power of petroleum pipeline companies. *Id.*

25. 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-80(d) (Supp. 1994)). A secondary influence in stimulating this legislation was the contamination of one of Rep. Ray's irrigation wells. Telephone Interview with former Rep. Denmark Groover, House District No. 125 (Apr. 7, 1995) [hereinafter Groover Interview]; *see* Charles Seabrook, *State News: Panel Considering Tighter Controls on Pipelines*, ATLANTA CONST., Oct. 6, 1994, at B4; 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-70(5) (Supp. 1994)).

26. 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-71 (Supp. 1994)). The Study Committee was composed of three House members, three Senate members, the Commissioners for the Departments of Natural Resources and Community Affairs, and five gubernatorial appointees representing a cross-section of interests. *Id.* The Representatives were former Rep. Denmark Groover, House District No. 125; Rep. Newt Hudson, House District No. 156; and Rep. Henry L. Reaves, House District No. 178. STUDY COMMITTEE REPORT, *supra* note 17. The Senators were George Hooks, Senate District No. 14; Harold J. Ragan, Senate District No. 11; and Walters Ray, Senate District No. 19. STUDY COMMITTEE REPORT, *supra* note 17. Both Commissioner Joe Tanner of the Department of Natural Resources and Commissioner Jim Higdon of the Department of Community Affairs participated. STUDY COMMITTEE REPORT, *supra* note 17. John D. Bulloch, Jr., Leonard Eubanks, Susan Hanberry, Carolyn Boyd Hatcher, and Eugene Sutherland were the Governor's appointees. *See* STUDY COMMITTEE REPORT, *supra* note 17.

27. 1994 Ga. Laws 229 (formerly found at O.C.G.A. § 22-3-72(a)(8) (Supp. 1994)).

28. *Id.* (formerly found at O.C.G.A. § 22-3-72(a)(1) (Supp. 1994)).

29. *Id.* (formerly found at O.C.G.A. § 22-3-72(a)(5) (Supp. 1994)).

state's economy.[30] The Study Committee also visited the Red Hills area to learn about the potential impacts of the petroleum pipeline on this area.[31] In addition, three public meetings were held in different parts of the state to ensure that all interested parties would have an opportunity to participate in the process.[32]

In its review of legal mechanisms, the Study Committee found a wide range in state laws governing the eminent domain power of petroleum pipeline companies: six states did not grant eminent domain powers;[33] fifteen states required some type of approval from state agencies;[34] two states required public comment on the pipeline route;[35] and the remaining states had laws resembling Georgia's then-existing law.[36] Rather than adopt the law of another state, Georgia developed its own tailored statute.[37]

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30. STUDY COMMITTEE REPORT, *supra* note 17.

31. STUDY COMMITTEE REPORT, *supra* note 17.

32. STUDY COMMITTEE REPORT, *supra* note 17.

33. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.63. The six jurisdictions that did not grant eminent domain powers to petroleum pipelines are Connecticut, Iowa, Maine, Rhode Island, Vermont, and Washington, D.C. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.63.

34. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.61. The fifteen states that required some type of approval from a state agency were Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Dakota, Virginia, Wisconsin, and Wyoming. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.61.

35. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.62. The two states that required public comment on the pipeline route were Arkansas and New York. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.62.

36. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.60. The states with petroleum pipeline eminent domain laws similar to Georgia's law were Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Washington, and West Virginia. EMINENT DOMAIN POWER, *supra* note 6, at 20 & n.60.

37. Letter from former Rep. Denmark Groover, House District No. 125 to Sen. George Hooks, et al. (Nov. 30, 1994) (available in Georgia State University College of Law Library). Former Rep. Denmark Groover formulated a framework suited to Georgia's infrastructure. *Id.*

SB 24

The Study Committee was successful in proposing legislation that the landowners, the environmentalists, the petroleum pipeline companies, and the regulatory agencies were willing to endorse.[38] Since this "best of the best"[39] compromise between these entities was accomplished, the bill passed unopposed in both the House and Senate.[40]

Scope of Application

The Act grants pipeline companies[41] a restricted and conditional right to exercise the power of eminent domain to acquire property for the construction, reconstruction, operation, and maintenance of pipelines used as common carriers[42] for petroleum or petroleum products.[43] However, the Act does not limit the exercise of the power of eminent domain when property is needed by pipeline companies for the maintenance of existing

38. *Lawmakers '95* (GPTV broadcast, Jan. 24, 1995) (videotape available in Georgia State University College of Law Library). Sen. Hooks, one of the bill's sponsors, held up two letters before the Senate, one from the pipeline companies and the other from the landowners and Tall Timbers Research, Inc., documenting these parties' approval of the proposed legislation. *Id.*; STUDY COMMITTEE REPORT, *supra* note 17. The Study Committee achieved consensus by encouraging participation by "persons representing the competing interests of pipeline companies, property owners, interested environmental organizations, and others" at all meetings. STUDY COMMITTEE REPORT, *supra* note 17.

39. *Lawmakers '95* (GPTV broadcast Jan. 24, 1995) (remarks of Sen. George Hooks, Senate District No. 14) (videotape available in Georgia State University College of Law Library).

40. 1995 Roll Call Vote, Senate; 1995 Roll Call Vote, House of Representatives. The vote in the Senate was 55-0 on January 24, 1995, and the vote in the House was 159-0 on February 16, 1995.

41. A "pipeline company" is defined in the Act as "a corporation organized under the laws of this state or which is organized under the laws of another state and is authorized to do business in this state and which is specifically authorized by its charter or articles of incorporation to construct and operate pipelines for the transportation of petroleum and petroleum products." O.C.G.A. § 22-3-81(2) (Supp. 1995).

42. *Id.* § 22-3-81(1) (" 'Pipeline' means a pipeline constructed or to be constructed as a common carrier in interstate or intrastate commerce for the transportation of petroleum or petroleum products in or through this state.").

43. *Id.* § 22-3-82(a).

pipelines or for relocation "necessitated by the exercise of a legal right by a third party."[44]

Notice to Landowners

One of the more distinctive provisions of Georgia's statute is that it requires the petroleum pipeline company to notify landowners of their rights under the statute prior to initiating the eminent domain process.[45] The notice must be written in bold letters as follows:

> CODE SECTIONS 22-3-80 THROUGH 22-3-87 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED PROVIDE SPECIFIC REQUIREMENTS WHICH MUST BE FOLLOWED BY PETROLEUM PIPELINE COMPANIES BEFORE THEY MAY EXERCISE THE RIGHT TO CONDEMN YOUR PROPERTY. THOSE CODE SECTIONS ALSO PROVIDE SPECIFIC RIGHTS FOR YOUR PROTECTION. YOU SHOULD MAKE YOURSELF FAMILIAR WITH THOSE REQUIREMENTS AND YOUR RIGHTS PRIOR TO CONTINUING NEGOTIATIONS CONCERNING THE SALE OF YOUR PROPERTY TO A PETROLEUM PIPELINE COMPANY.[46]

This section was considered of such primary importance by the House Judiciary Committee that it shifted this section from the latter part of the original version of the bill to the beginning.[47] By doing so, the Committee intended to emphasize the importance of providing this notice to affected property owners early in the process.[48] The notice must be given before the Georgia Department of Natural Resources (DNR) will grant a

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44. *Id.* § 22-3-82(b).

45. *Id.* § 22-3-82(a). According to Department of Natural Resources Commissioner Joe Tanner, one of the legislature's objectives was that the power of eminent domain "be granted in a way so that the companies won't use it in a threatening way against landowners." Seabrook, *supra* note 25.

46. O.G.C.A. § 22-3-82(a) (Supp. 1995). Commissioner Tanner referred to the notice as the "Miranda Warning" and the name stuck throughout the legislative process. O'Day Interview, *supra* note 21.

47. *Compare* SB 24, as introduced, 1995 Ga. Gen. Assem. *with* SB 24 (HCS), 1995 Ga. Gen. Assem.; Telephone Interview with Rep. Jim Martin, House District No. 47 (Apr. 11, 1995) [hereinafter Martin Interview].

48. Martin Interview, *supra* note 47.

permit allowing the pipeline company to exercise the power of eminent domain.[49]

Department of Transportation Certificate and DNR Permit

The Act requires that pipeline companies complete a two step process before acquiring property through eminent domain. First, they must obtain a "certificate of public convenience and necessity" from the Georgia Department of Transportation (DOT).[50] The DOT is charged with developing regulations for obtaining the certificate that would include the following requirements: (1) the petroleum pipeline company must provide the DOT with the pipeline's general route;[51] (2) the company must demonstrate the public convenience and necessity of the proposed route and that public necessity justifies the use of the power of eminent domain;[52] (3) public notice of the proposed route must be given;[53] and (4) a hearing must be held not later than ninety days from publication of notice.[54] Failure to conduct hearings and approve or deny the certificate within the ninety-day time period results in approval of the certificate by operation of law.[55] If the certificate is denied, the petroleum pipeline company has the right to appeal the decision.[56] However, if the

49. O.C.G.A. § 22-3-82(c) (Supp. 1995). The exact point in the process at which this notice must be given is not clearly stated in the Act. *See id.* According to Stephen O'Day, counsel for the pipeline companies, the notice will probably not be given prior to Georgia Department of Transportation (DOT) certificate approval, since this would cause "unnecessary work and expense" at a stage when individual landowners are not affected. O'Day Interview, *supra* note 21. Edwin Hallman thought that any vagueness would be clarified in the DNR rules adopted, with public participation, to implement the Act. Telephone Interview with Edwin Hallman, counsel for Tall Timbers Research, Inc., Decker & Hallman (Apr. 11, 1995) [hereinafter Hallman Interview].

50. O.C.G.A. § 22-3-83(a) (Supp. 1995). Denmark Groover proposed that the DOT determine the public necessity of a pipeline, since the DOT is "intimately concerned and familiar with transportation problems." Groover Interview, *supra* note 25.

51. O.C.G.A. § 22-3-83(b)(1) (Supp. 1995).

52. *Id.*

53. *Id.* § 22-3-83(b)(2).

54. *Id.* § 22-3-83(b)(5).

55. *Id.* § 22-3-83(c).

56. *Id.* § 22-3-83(d). The denial of the certificate will be reviewed by a judge of the superior court and will be affirmed if it is supported by

certificate is issued, there is no right to judicial review until the second stage of the process.[57]

Once the pipeline company has received its certificate from the DOT, and following notice to affected property owners, the second step of the process requires the company to apply for a permit from the DNR.[58] The Act requires the DNR to issue rules and regulations for obtaining the permit which require notice, hearings, and review of the proposed siting of the pipeline project to determine whether the project represents an "undue hazard to the environment and natural resources of this state."[59] Before granting the permit, the DNR must determine:

> (1) Whether the proposed route . . . is an environmentally reasonable route;
> (2) Whether other corridors of public utilities already in existence may reasonably be used . . .;
> (3) The existence of any local zoning ordinances and that . . . the project will comply with those ordinances unless to require such compliance would impose an unreasonable burden on the project . . .;
> (4) That ample opportunity has been afforded for public comment . . .;
> (5) Such reasonable conditions to the permit as will allow the monitoring of the effect of the petroleum pipeline upon the property . . . and the surrounding environment and natural resources.[60]

Either the landowner or the petroleum pipeline company[61] may appeal the DNR decision.[62]

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substantial evidence. *Id.*

57. *Id.* Appeal of the issuance of the DOT certificate is not available for two reasons. First, individual property owners are not directly affected at this stage. O'Day Interview, *supra* note 21. Second, this could result in "interminable delay." Groover Interview, *supra* note 25. The landowners and environmental interest groups advocated for the right to immediately appeal the DOT's decision. O'Day Interview, *supra* note 21.

58. O.C.G.A. § 22-3-84(a) (Supp. 1995).

59. *Id.* § 22-3-84(b).

60. *Id.* § 22-3-84(c).

61. *Id.* § 22-3-85. The statute does not specifically limit who would have standing to appeal the DNR decision. *See id.*

62. *Id.* Judicial review will be performed not by a judge of the superior court, as in the case of the review of the denial of a DOT certificate, but by an administrative law judge. *Id.*

Compensation

Once the pipeline company has obtained both the DOT certificate and the DNR permit and has provided notice to the affected property owners, the pipeline company may acquire the necessary property by condemnation,[63] after reasonable negotiations have failed.[64] Not only must it pay for the portion of the property needed for the pipeline project,[65] but it must also compensate the landowner for the fair market value of any "unreasonable impacts" to any other property of that landowner.[66] The value of the portion acquired through eminent domain and the compensation for the damage to the other property must be decided at the same trial.[67]

Expedited Process

Without any time constraints in the two-step process, a pipeline project could suffer long delays.[68] For this reason, the Act incorporates some key time elements.[69] From the date of public notice of the application for the certificate of public convenience and necessity, the DOT has ninety days to decide whether to issue the certificate or the application will automatically be considered approved.[70] The DNR is allowed 120 days, following the notification to the property owner by the pipeline company, to approve or deny the permit, or the permit automatically will be deemed approved.[71] Finally, the administrative law judge must decide appeals within 120 days of the filing of the petition for review, or the DNR's decision will be considered affirmed.[72]

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63. Condemnation procedures are prescribed by O.C.G.A. §§ 22-2-1 to -142 (1982 & Supp. 1995).

64. O.C.G.A. § 22-3-86 (Supp. 1995).

65. GA. CONST. art. I, § 3, cl. 1 ("[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.").

66. O.C.G.A. § 22-3-87 (Supp. 1995).

67. *Id.*

68. Groover Interview, *supra* note 25.

69. Groover Interview, *supra* note 25.

70. O.C.G.A. § 22-3-83(c) (Supp. 1995).

71. *Id.* § 22-3-84(d).

72. *Id.* § 22-3-85; Groover Interview, *supra* note 25.

Survey Access Constraints

The Act limits petroleum pipeline companies' survey access.[73] Until it has obtained the certificate of public convenience and necessity, a petroleum pipeline company is restricted to surface surveys to evaluate the suitability of a piece of property for a pipeline site.[74] Only after the pipeline company has successfully completed the first step in the process, obtaining a DOT certificate of convenience and necessity, can the petroleum pipeline company perform any additional surveying necessary for its application for the second step, the DNR permit.[75] All surveying activities must minimize damage to the property.[76] The pipeline company must compensate the property owner for any damages to the property related to the surveying.[77]

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73. O.C.G.A. § 22-3-82(b)-(d) (Supp. 1995). Survey access was the subject of two legal actions for injunctions that were pursued against Colonial Pipeline Company by Red Hills landowners. *See supra* notes 22-23 and accompanying text.

74. O.C.G.A. § 22-3-82(b) (Supp. 1995); *see also* Oglethorpe Power Corp. v. Goss, 322 S.E.2d 887, 890 (Ga. 1984) ("The permissible scope of an entry for preliminary survey, inspection and appraisal is, however, necessarily limited by the constitutional restrictions on the taking and damaging of property without just compensation.").

75. O.C.G.A. § 22-3-82(c) (Supp. 1995).

76. *Id.* § 22-3-82(d); *see also Oglethorpe*, 322 S.E.2d at 890 (quoting County of Kave v. Elmhurst Nat'l Bank, 443 N.E.2d 1149 (Ill. App. Ct. 1982)) (" 'A taking may not be allowed under the guise of a preliminary survey; the right of entry does not include the right to make permanent appropriation or cause more than minimal or incidental damage to property . . . .' ").

77. O.C.G.A. § 22-3-82(d) (Supp. 1995). According to the common law, compensation need not be provided until after the surveying has been completed: "Thus, we hold that a prospective condemnor is not required to adhere to condemnation procedures and constitutional provisions for compensation before making a preliminary entry, although it is . . . responsible for all damages which occur during its preliminary entry." *Oglethorpe*, 322 S.E.2d at 890.