



**PushBackthePipeline**  
Coalition

# Objections to Kinder Morgan's

Use of Eminent Domain for Private  
**Palmetto Pipeline Project**

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# Objections to Kinder Morgan's Use of Eminent Domain for Private Palmetto Pipeline Project

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Kinder Morgan's proposed pipeline will not serve any public good, any public convenience, or any public necessity in Georgia that could possibly justify the use of the extraordinary power of eminent domain. Additionally, Kinder Morgan has the dubious honor of being responsible for at least 180 regulatory violations, maintenance infractions, leaks, spills, evacuations, explosions, fires, and deaths in 24 states. Those incidents have led to several criminal convictions, tens of millions of dollars in civil and criminal fines, hundreds of millions of dollars in property damage, bodily injury, and destroyed lives. This unsavory history which extends over at least two decades is not a public good, a public convenience, or a public need that Georgia should embrace. Consequently, Kinder Morgan's application should be denied.

## **I. The power of eminent domain is an extraordinary and dangerous power that is granted only to parties who can unequivocally demonstrate that the power will be used for the public good.**

Kinder Morgan has applied to the Georgia Department of Transportation for a certificate of public convenience and necessity so that it may obtain and exercise the power of eminent domain. This is not a power to bestow lightly.

The Georgia Supreme Court has long recognized that the power of eminent domain is one of the highest sovereign powers of the State. *Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co.*, 119 Ga. 354, 355 (1904). It is a power "so dangerous and extraordinary" that it cannot be inferred or implied from vague or doubtful language, but must be granted plainly and unequivocally. *Botts v. Southeastern Pipe-Line Co.*, 190 Ga. 689, 698, 705 (1940); *Harrell v. Southeastern Pipe-Line Co.*, 190 Ga. 709, 721-22 (1940). Moreover, in the exercise of the power, "[t]oo much caution cannot be observed to prevent abuse and oppression." *D.O.T. v. City of Atlanta*, 255 Ga. 124, 132 (1985). As a result, delegations of the actual power of eminent domain as well as the procedures for exercising that power must be strictly construed against the condemning authority. *Id.*; *State Highway Dept. v. Hatcher*, 218 Ga. 299, 304 (1962).

Consistent with these principles, the Georgia General Assembly has provided that the right of eminent domain may be exercised only "on account of public exigency and for the **public good**," and that "[n]otwithstanding any other provisions of law, neither this state . . . nor any other condemning authority shall use eminent domain unless it is for a **public use**. Public use is a matter of law to be determined by the court and **the con-**

**demnor bears the burden of proof.”** O.C.G.A. § 22-1-2(a) (emphasis added); *cf. Brunswick Landing, LLC v. Glynn County*, 301 Ga. App. 288, 289 (2009).

In recent decades, the Georgia General Assembly has come to share the Supreme Court’s general concern regarding delegations of the eminent domain power with particular reference to petroleum pipeline companies. This is best evidenced by the statutory history of the applicable eminent domain provisions for petroleum pipeline companies in the Georgia Code.

Before 1995, the only applicable statutory provision granting the power of eminent domain to petroleum pipeline companies provided as follows:

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.

O.C.G.A. § 22-3-80(a) (1982).

As the clear language of this statute shows, petroleum pipeline companies once had an automatic right of eminent domain. No agency or governmental body was required to conclude that a proposed petroleum pipeline was for a public purpose before the pipeline company had the right of eminent domain. As long as the pipeline company operated as a common carrier, the pipeline was deemed to be for a public purpose, and the pipeline company could exercise the power of eminent domain.

Concerns arose in the early nineties regarding the State’s delegation of the unfettered power of eminent domain to petroleum pipeline companies based, in part, on their poor safety record including a leaking petroleum pipeline on Georgia State Representative Robert Ray’s property in southwest Georgia. See Beberman, J., *“Eminent Domain: Exercise of Power of Eminent Domain for Special Purposes: Provide Restrictions on Use of Eminent Domain Power by Petroleum Pipeline Companies,”* 12 Ga. St. U. L. Rev. 184, 187, n. 20 and 189, n. 25 (1995). The issue came to a head when Colonial Pipeline proposed a pipeline project through the fragile and ecologically rich Red Hills region in southwest Georgia. *Id.* at 187, n. 21. When the landowners in the area found themselves with no recourse under the law, they turned to the Georgia General Assembly for help. *Id.* at 188.

In response to the landowners’ concerns, the General Assembly imposed a one-year moratorium on the use of eminent domain by petroleum pipeline companies and formed a Petroleum Pipeline Study Committee to recommend legislation regarding the use of eminent domain by such companies. See 1994 Ga. Laws 229 formerly codified at O.C.G.A. § 22-3-80(d) (Supp. 1994). In the same bill that established the Study Committee, the General Assembly recognized that “[t]he siting, construction, and operation

of petroleum pipelines create significant impacts on land, including . . . the destruction of property, buildings, crops, forests, wetlands, and wildlife habitat . . . .” See 1994 Ga. Laws 229, § 1 at 231 formerly codified at O.C.G.A. § 22-3-70(3) (Supp. 1994). The General Assembly further found that “[s]ignificant potential impacts [include] impacts associated with slow leakage of product into ground water . . . [and] impacts associated with catastrophic spills . . . .” See Ga. Laws 229 formerly found at O.C.G.A. § 22-3-70(4) (Supp. 1994).

The Study Committee fulfilled its charge and recommended legislation that ultimately became law. Under the new law, which still exists today, the grant of condemnation power no longer is automatic; instead, pipeline companies must make certain showings in order to exercise the right of eminent domain. The first section of the new law confirms the General Assembly’s earlier recognition, albeit in more general terms, that petroleum pipelines have negative impacts on land and water – “certain problems and characteristics” - which require special procedures and restrictions before petroleum pipeline companies may exercise the power of eminent domain:

The General Assembly finds and declares that, based on an authorized study by the Petroleum Pipeline Study Committee created by the General Assembly, while petroleum pipelines are appropriate and valuable for use in the transportation of petroleum and petroleum products, **there are certain problems and characteristics indigenous to such pipelines which require the enactment and implementation of special procedures and restrictions on petroleum pipelines and related facilities as a condition of the grant of the power of eminent domain to petroleum pipeline companies.**

O.C.G.A. § 22-3- 80 (emphasis added).

Of course, one of the “problems and characteristics indigenous to such pipelines” is that they leak and rupture and thereby cause substantial property damage. So one of the “special procedures” the legislature adopted is that a petroleum pipeline company must now apply for and obtain a certificate of public convenience and necessity from the Georgia DOT before the company may be considered eligible for having the power of eminent domain. O.C.G.A. § 22-3-83(a). Additionally, the application must contain the following information:

1. a description of the proposed project including the general route;
2. a description of the **public convenience and necessity** which support the proposed pipeline route;
3. the width of the proposed pipeline corridor up to a maximum width of one-third mile; and

4. a showing that the **public necessity for the petroleum pipeline justifies the use of the power of eminent domain.**

O.C.G.A. § 22-3-83(b)(1) (emphasis added); *see also* Ga. Comp. R. & Regs. 672-13-.03(c) – (g).

The legislature also required the Georgia DOT to adopt regulations providing for public notice of the application and the proposed route, a hearing on the application, filing and hearing of objections to the application, holding a hearing and making a decision not later than 90 days from the date of publishing notice of the application, and adopting such other reasonable requirements deemed necessary or desirable to a proper decision on the application. O.C.G.A. § 22-3-83(b)(2)-(5). The Georgia DOT has promulgated such regulations at Ga. Comp. R. & Regs. 672-13-.05 and .06.

In enacting the above provisions, the General Assembly left intact the more general eminent domain provisions discussed above that apply notwithstanding any other provisions of law and which require that any person, including a petroleum pipeline company, bears the burden of showing that its proposed activity is for the public good, is for a public purpose, and is both convenient and necessary for the public. Thus, opponents of Kinder Morgan’s proposed pipeline only need to show that Kinder Morgan has not met its burden of proof. When the objective facts are considered, Kinder Morgan has not and cannot meet its burden.

## **II. Kinder Morgan has not and cannot meet its burden of showing that its proposed pipeline is for the public good, is for a public purpose, and is for the convenience and necessity of the public.**

On February 13, 2015, Kinder Morgan initially submitted a bare bones application with very little information. The initial application contained only a three page letter from Kinder Morgan’s law firm and three attachments consisting of a very generalized map for the pipeline route, a certificate of formation for Palmetto Products Pipe Line LLC from the Delaware Secretary of State, and a signed verification by a Kinder Morgan representative. In three short paragraphs, Kinder Morgan’s law firm stated five bases to support its required showing of public convenience and necessity for Georgia:

1. “[t]he pipeline will . . . provide Savannah and Jacksonville with a second major source . . . of refined petroleum products”;
2. the pipeline will provide “a more efficient pipeline supply of ethanol” to Savannah because “marine transport is the only source of supply to Savannah”;
3. the pipeline will promote competition, which “could” serve to decrease prices;

4. the pipeline will help to insure that supply needs of the market are continuously served without fear of disruption from inclement weather conditions such as hurricanes that “currently” affect marine transport; and
5. the pipeline has an unstated level of volume commitments that Kinder Morgan believes is sufficient to proceed with the project.

Kinder Morgan baldly made these statements, some of which are outright false, without offering any supporting data. As will be demonstrated below, these unsubstantiated and generalized statements hardly comported with satisfying Kinder Morgan’s heavy burden of showing a public good and public convenience and necessity to justify extensive taking of private property and extensive environmental degradation over a 210 mile-long swath of land along Georgia’s sensitive and ecologically diverse coastal area.

To its credit, the Georgia DOT recognized the dearth of evidence in Kinder Morgan’s February 13 submission to support granting the extraordinary power of eminent domain. Consequently, on March 18, 2015, Deputy Commissioner Todd Long requested additional information from Kinder Morgan that might clarify the alleged public benefit of the pipeline that would justify the use of the power of eminent domain. Deputy Commissioner Long requested this information “as soon as possible,” undoubtedly due to the short 90-day statutory deadline for DOT to make a decision. *See* O.C.G.A. § 22-3-83(b)(4) and (c). It took Kinder Morgan’s law firm three weeks to respond in a letter that essentially repeated in conclusory fashion the same justifications that Kinder Morgan had included in its initial application.

Now, 49 days after Deputy Commissioner Long requested additional information “as soon as possible” that would justify taking peoples’ private property against their will for private profit, 82 days after filing its application, and only 13 days before the DOT must make a decision under the 90 day statutory deadline, Kinder Morgan, on May 6, 2015, submitted 98 pages of supplemental materials.<sup>1</sup> Most of those materials make many of the same arguments that Kinder Morgan made in its February 13 and April 8 submissions. However, Kinder Morgan also has submitted some data for the first time which, at this late date, is hardly calculated to give the public adequate time to respond.

Kinder Morgan has submitted this latest information and argument 55 days after the last Georgia informational open house was held on March 12, 15 days after the first public hearing was held in this matter on April 21, and only one day before the second and final Georgia hearing held on May 7. Moreover, Kinder Morgan made no effort to apprise

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<sup>1</sup> Kinder Morgan submitted its application on February 13, 2015, but the 90 day statutory period did not begin to run until Kinder Morgan published notice of its application in several required newspapers. *See* O.C.G.A. § 22-3-83(4). The first notice was published on February 18. Even though some of the required notices were not published until as late as February 25, the DOT has conservatively deemed the 90-day period to begin running on February 13 which results in a May 19 deadline to either approve or deny the application or the application will be deemed approved by operation of law. *See* O.C.G.A. § 22-3-83(b)(4) and (c).



the public before the May 7 hearing that it had made an additional submission of almost 100 pages.

Not only is Kinder Morgan's submission tardy and prejudicial to the public and to the individually affected landowners, Kinder Morgan has failed to provide any excuse for this late submittal. It would be hard-pressed to do so since all of the submitted information has been in existence for months and years, including a Carl Vinson Institute study that has been in existence since 2010. Kinder Morgan's tardy submittal was clearly calculated to unfairly ambush opponents of the proposed pipeline and to deny opponents a fair hearing on May 7 in Waynesboro. It would be a clear denial of due process to the public at large and the individually affected landowners for the DOT to consider this information at this late date. For this reason, the DOT should reject Kinder Morgan's May 6 submission and refrain from considering it.

As further demonstrated below, all of Kinder Morgan's submissions suffer from the same defects: they make unsupported and completely irrelevant assertions, rely on outdated information that is contradicted by objective findings from governmental agencies, and use carefully crafted language that, on close examination, is meaningless. As a result, Kinder Morgan has failed to meet its heavy burden of showing a public purpose, a public good, and a public convenience and necessity that would justify the taking of private property under the extraordinary power of eminent domain.

**A. Contrary to Kinder Morgan's assertion, its proposed pipeline would not be a second source of refined petroleum products to the Savannah market.**

In Kinder Morgan's initial application, it incorrectly stated that its proposed pipeline would provide a second major source of refined petroleum products to Savannah.<sup>2</sup> In fact, there are currently at least four major suppliers of refined petroleum products to Savannah. There are two major pipelines, Colonial Pipeline in North Augusta and Plantation Pipeline in Macon, whose fuel supplies are conveyed to the Savannah market by truck. Additionally, there are two major marine suppliers, Colonial Oil (no relation to Colonial Pipeline) and Epic Midstream. So Kinder Morgan's proposed pipeline would be a *fifth* source of supply, not a second one.

**B. Kinder Morgan's statement that marine transport is the sole source of supply to Savannah is false.**

In its initial application, Kinder Morgan states that marine transport is the sole source of supply to Savannah.<sup>3</sup> Kinder Morgan makes this statement in support of its argument that its pipeline would provide a more efficient supply of ethanol to the Savannah market. As tacitly acknowledged in its May 6 submission where Kinder Morgan states that approximately 75% of the petroleum supply to the Savannah market is by a combination

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<sup>2</sup> See Jonathan R. Chally February 13, 2015 letter to Commissioner Russell McMurry at p. 2.

<sup>3</sup> *Id.*

of two pipelines and truck transport, this statement is false.<sup>4</sup> Given that the premise is false, Kinder Morgan cannot base any conclusions on it.

**C. Kinder Morgan's statement that eastern and coastal Georgia are "pipeline constrained" ignores the Port of Savannah and the complete absence of limited fuel supplies to the Savannah market.**

Related to the above point, Kinder Morgan makes much ado in its April 8 and May 6 submissions that eastern and coastal Georgia are "pipeline constrained" and that Kinder Morgan's proposed pipeline, unlike other areas of Georgia, would be the first direct pipeline to provide fuel to the Savannah area.<sup>5</sup> Of course, what Kinder Morgan conspicuously fails to acknowledge in its submissions is that the rest of Georgia does not have a major port to supply fuel whereas Savannah does. Furthermore, as will be discussed further below, fuel supplies provided by two marine shippers to the Port of Savannah and a combination of two other major pipelines and trucking more than adequately meet Savannah's current fuel supply needs at reasonable prices and are projected to continue doing so for decades to come. As a result, another pipeline is simply not needed.

That the general public sees no need for an additional supplier of fuel to the Savannah area is perhaps best evidenced by the overwhelming opposition to Kinder Morgan's proposed pipeline at the two public hearings held by the Georgia DOT in this matter. Almost 600 people attended the public hearing in Richmond Hill on April 21. Dozens of people who wanted to attend, including at least one busload of pipeline opponents, were turned away due to the over-capacity crowd already in attendance. Over 40 persons spoke at that hearing, and only one person spoke in favor of the pipeline. The others all spoke out strongly against the pipeline. Numerous opponents of the pipeline were not allowed to speak because the two-hour allotment of time had expired. The audience response to persons who spoke in opposition to the proposed pipeline was loud and emphatic. Mike Bolden who conducted the meeting on behalf of the DOT stated afterwards that in his 30 years at the Georgia DOT, he had never seen anything close to the opposition he observed at the Richmond Hill hearing.

Public opposition to the pipeline was overwhelming as well at the Waynesboro hearing held on May 7. Approximately 400 persons attended that hearing. Of approximately 40 speakers at that hearing, only three speakers spoke in favor of the proposed pipeline; all of the others were opposed. The audience response to opponents of the pipeline was similar to the response in Richmond Hill – emphatically opposed to the pipeline. Over two thousand people have now signed petitions opposing Kinder Morgan's pro-

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<sup>4</sup> See Kinder Morgan May 6, 2015 submission at p. 23, Section E.3 where Kinder Morgan notes that 15,000 barrels/day of motor fuels is trucked to Savannah from Macon and North Augusta, and about 5,000 barrels/day is transported to Savannah by marine vessel.

<sup>5</sup> See Jonathan R. Chally April 8, 2015 letter to Commissioner Russell McMurtry at p. 2 and Kinder Morgan May 6, 2015 submission at p. 23, Section E.2.



posed pipeline. Clearly, the general public – the public who Kinder Morgan claims has a need for its proposed pipeline – does not see any need for it.

**D. Kinder Morgan’s statement that pipeline transport would reduce the risk of weather-related disruption in fuel supplies is based on a false assumption and is contradicted by actual experience.**

In its February 13 and April 8 submissions, Kinder Morgan argues that its proposed pipeline would minimize availability problems “currently”<sup>6</sup> associated with marine transport. Once again, Kinder Morgan provides no data to support this statement because there is none. In fact, there is no “current” issue with Savannah’s marine source of supply nor has there ever been such an issue. The statement is ill-founded because it implicitly suggests once again that Savannah relies entirely on marine sources of fuel. In actuality, marine transport supplies significantly less than one-half of Savannah’s supply – which Kinder Morgan belatedly acknowledges in its May 6 submission.

Kinder Morgan’s statement is especially outlandish because actual experience shows that it is pipeline supplies from the Gulf of Mexico that have actually experienced weather-related disruptions. For example, Hurricane Katrina disrupted fuel supplies to non-coastal areas of Georgia that relied on pipelines because those pipelines relied on fuel supplies from the Gulf of Mexico. Kinder Morgan’s pipeline similarly will rely on fuel supplies from the Gulf of Mexico where most hurricanes occur. In contrast, Savannah’s marine supply of fuel during and after Hurricane Katrina (and other hurricanes as well) has not been disrupted at all. Perhaps Kinder Morgan now realizes the fallacy of its argument and recognizes that weather-related events actually counsel against the reliability of its own proposed pipeline because it makes no mention of this argument in its voluminous May 6 submission.

**E. Kinder Morgan’s unsupported statements that its proposed pipeline “could” lower fuel prices through increased competition is nothing more than pure speculation.**

In its February 13, 2015 submission, Kinder Morgan states that product from its pipeline will increase competition and thereby “*could* serve to decrease prices.”<sup>7</sup> Kinder Morgan repeats this competition mantra in its April 8 and May 6 submissions.<sup>8</sup> Kinder Morgan’s statements are nothing more than pure speculation. Kinder Morgan provides no data or economic analysis to support this assertion. Kinder Morgan also fails to provide any examples of other situations where a market with supplies from two pipelines (Planta-

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<sup>6</sup> See Chally February 13 letter at p. 3; *see also* Chally April 8 letter at p. 2.

<sup>7</sup> See Chally February 13 letter at p. 3 (emphasis added).

<sup>8</sup> See Chally April 8 letter at p. 2 and Kinder Morgan May 6 submission at p. 24, Section E.5 (noting that “[a]s a *general proposition*, additional sources of supply will lower motor fuel prices.”) (Emphasis added.)

tion Pipeline in Macon and Colonial Pipeline in North Augusta) combined with trucking, and supplies from one of the major ports on the entire eastern seaboard of the United States, experienced lower fuel prices as a result of another supplier being added to the mix. Instead, Kinder Morgan merely recites the “general proposition” that more competition inexorably leads to lower prices.<sup>9</sup> Yet at the end of its discussion about the supposed benefits of additional competition, Kinder Morgan carefully adds the following critical caveat:

Note: Palmetto will not own the product transported in the pipeline and will not set the price of gasoline at the pump, and therefore *has no ability to raise or lower fuel prices*.<sup>10</sup>

With at least four current suppliers (two marine shippers and two pipelines combined with trucking), there is already healthy competition and low fuel prices in the Savannah market.

Kinder Morgan’s statement also assumes, erroneously, that its undisclosed shippers will actually deliver fuel to the Savannah area. However, Kinder Morgan admits in its submissions, as it must, that it has no control over where its shippers ultimately will deliver their fuel supplies.

Kinder Morgan has repeatedly refused to disclose the identity of its shippers. It has justified this refusal on the ground that the Federal Energy Regulatory Commission and federal regulations allegedly prohibit such disclosure. Kinder Morgan cites no authority for this novel proposition because none exists. The truth is that FERC will protect the non-disclosure of such information *at the request of the applicant*. However, there is no prohibition in federal law or FERC practice against disclosing the identity of shippers if the applicant wishes to do so. In fact, in the only previous application for a certificate of public convenience and necessity to the Georgia DOT under O.C.G.A. § 22-3-80 *et seq.*, Colonial Pipeline voluntarily disclosed the identities of its shippers. And more recently, in terms of FERC’s practice, Sabal Trail Transmission, LLC voluntarily disclosed not only the names of its shippers for its pending application to construct an interstate natural gas pipeline through southwest Georgia, but it also produced copies of the “precedent” (shipping) agreements themselves.<sup>11</sup>

So what does Kinder Morgan have to hide? The most likely answer is that Kinder Morgan is hiding the fact that its shippers are behemoth energy companies such as Exxon/Mobil whose size and market share will actually result in *less* competition, not more

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<sup>9</sup> *Id.*

<sup>10</sup> See Kinder Morgan May 6 submission at p. 24, Section E.5 (emphasis added).

<sup>11</sup> See Sabal Trail Transmission, LLC, FERC Docket No. CP15-17-000 and Precedent Agreements attached hereto as Exhibits 1 and 2.

competition, in the Savannah market. If shippers such as Exxon/Mobil, who brought us the Exxon Valdez debacle, actually decided to deliver fuel to the Savannah market, they would have the ability to undercut the current competition by charging artificially low prices just long enough to drive out the current suppliers, and then raise prices even higher than current prices once there is no competition. If this is not the case, then Kinder Morgan should be willing to disclose the identities of its shippers.

The bottom line is that Kinder Morgan's claims of more competition and lower fuel prices are nothing but pure speculation. Pure speculation hardly comports with Kinder Morgan's heavy burden to show that its proposed pipeline is for the public good and is for the public's convenience and necessity. As such, Kinder Morgan's competition claim is entitled to no weight.

**F. Kinder Morgan's statement that it has committed shippers and FERC approval for the rates, terms, and conditions of those commitments has nothing to do with convenience and necessity for the *public*.**

In its February 13, April 8, and May 6 submissions, Kinder Morgan suggests that public convenience and necessity are shown by having a certain number of shippers who are willing to ship fuel through Kinder Morgan's proposed pipeline.<sup>12</sup> Kinder Morgan further states in its May 6 submission that FERC's recent approval of the rates, terms, and conditions of the proposed shipper contracts also proves the need for the proposed pipeline.

Kinder Morgan does not state any reason why these facts have any bearing on *public* convenience and necessity. Simply because certain companies are willing to ship product through the proposed pipeline does not mean that there is any *public* convenience and necessity. The willingness of certain *private* companies to ship product simply means that they are willing to take the risk that they will be able to make a *private* profit from the product that they will ship. Given that current and projected demand is being and will be fully met by current suppliers, the ability of these particular private companies to make a profit is entirely dependent on displacing current suppliers – it has nothing to do with public need.

Additionally, as noted previously, Kinder Morgan has no control over where its shippers will actually ship the fuel and, correspondingly, where they will make their private profits. The shippers are free to ship their fuel, which they own, wherever they wish. As a result, Kinder Morgan cannot make any assurance that its pipeline will meet any supposed public need in Georgia.

Finally, FERC's approval of the rates, terms, and conditions of the private shipper contracts has nothing to do with a determination of public convenience and necessity. In-

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<sup>12</sup> See Chally February 13 letter at p. 2, Chally April 8 letter at p. 2, and Kinder Morgan May 6 submission at p. 25, Section E.9.

deed, although FERC must make a finding a public convenience and necessity to issue a certificate to any person who desires to construct an interstate natural gas pipeline, FERC does not do so for petroleum pipelines. That determination is the Georgia DOT's responsibility. FERC's approval of Kinder Morgan's proposed rates, terms, and conditions is irrelevant to proving public convenience and necessity, and Kinder Morgan's reliance on that approval to show such convenience and necessity is simply misplaced.

**G. Kinder Morgan's claims of lower transportation costs are wholly unsupported by any data and, even if true, may not be passed on to consumers in the form of lower fuel prices.**

In its May 6 submission, Kinder Morgan for the first time in almost three months sets forth a comparison of costs to transport fuel to the Savannah market by pipeline, pipeline/trucking, and marine vessels. Kinder Morgan suggests that, in general, transportation costs are lower for a pipeline than a combination of pipeline/trucking or marine vessels.<sup>13</sup>

Nowhere in 98 pages of materials, however, does Kinder Morgan cite any sources for its claim of lower transportation costs by pipeline. Moreover, the only specific transportation cost that Kinder Morgan sets forth in its submission is one for trucking fuel from Baton Rouge to Savannah. This cost, of course, is completely irrelevant because virtually no fuel, if any, is currently supplied by truck to Savannah all the way from Baton Rouge. Rather, the fuel is supplied by marine transport or by a combination of pipelines and trucks. The trucks generally transport fuels only from Macon and North Augusta, not from Baton Rouge. At other points in its various submissions, Kinder Morgan acknowledges this basic fact.

Perhaps most importantly, Kinder Morgan's three submissions conspicuously fail to set forth any data whatsoever regarding the transportation charges it will actually impose on its shippers. Instead, it hides behind what it contends are the general costs in the industry without any supporting data. Opponents of the proposed pipeline have repeatedly requested information regarding the actual rates Kinder Morgan will charge, but it has steadfastly refused to provide this data. Until Kinder Morgan provides the data to back up its claim, the Georgia DOT should give no consideration to Kinder Morgan's claim.

Last, even if pipeline transportation costs are lower than other forms of transportation, there is no guarantee that any shipper will pass any savings from those lower costs on to consumers. If Kinder Morgan cannot guarantee where its shippers will actually ship their product and cannot guarantee the price they will charge to consumers, it certainly cannot guarantee that any transportation savings will be passed on to consumers.

It bears repeating that the burden is on Kinder Morgan to prove the public good and public convenience and necessity of its proposed pipeline. If it refuses to substantiate

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<sup>13</sup> See Kinder Morgan May 6 submission at p. 24, Section E.4.

the underlying statements upon which it relies to prove public need, then it cannot possibly meet its burden of establishing public need.

**H. Based upon current and projected fuel use, Kinder Morgan's proposed pipeline is not needed for the Savannah market or for Georgia in general.**

In its February 13 application and its supplemental April 8 response to Deputy Commissioner Long's request for all information setting forth the need for the proposed pipeline that would justify the use of eminent domain, Kinder Morgan provided no information or data showing that current suppliers are not meeting current demand or that current suppliers cannot meet projected demand. In fact, despite Commissioner Long's request for all information justifying the need for this proposed pipeline, Kinder Morgan did not even address the issue of future demand. Now, 49 days after Deputy Commissioner Long's request and only 13 days before the Georgia DOT must make its decision, Kinder Morgan has submitted for the first time an outdated five-year-old study from the Carl Vinson Institute to support its new claim that projected demand requires additional supplies. As further discussed below, Kinder Morgan has not submitted any information that carries its burden of showing a new pipeline is needed to meet current demand or future demand.

**1. Kinder Morgan has not met its burden to show that its proposed pipeline is needed to meet current demand.**

First, Kinder Morgan acknowledges that current demand in the Savannah market is 15,000 to 20,000 barrels/day.<sup>14</sup> Not surprisingly, Kinder Morgan makes no argument that this demand is not being met fully by the current suppliers at reasonable cost because there is no evidence to support such an argument. This failure alone requires a finding that Kinder Morgan has not met its burden of showing that its proposed pipeline is needed to meet current demand.

Second, Kinder Morgan has not made any showing that the shippers on its proposed pipeline will actually deliver any fuel to the Savannah market, let alone 20,000 to 25,000 barrels/day. Kinder Morgan contracted with those shippers to use its proposed pipeline but admits that it has no control regarding where the fuel ultimately will be shipped. Instead, it merely "estimates" that the shippers on its proposed pipeline *might* deliver 20,000 to 25,000 barrels/day to the Savannah market.<sup>15</sup> Given that the fuel shipped on the proposed pipeline will be sold at gasoline stations, and given that gasoline prices historically and currently are significantly higher in Jacksonville than Savannah, it is fairly certain that the product will be shipped to Jacksonville, not to Savannah.

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<sup>14</sup> See Kinder Morgan May 6 submission at p. 23, Section E.3.

<sup>15</sup> *Id.* at p. 24, Section E.6. In its earlier submissions, Kinder Morgan had speculated that its shippers would transport 25,000 barrels/day, not 20,000 to 25,000 barrels/day. Kinder Morgan's earlier estimate would have exceeded all current demand for the Savannah market.

Third, it defies common sense to suggest that the proposed pipeline would deliver 20,000 to 25,000 barrels/day to Savannah when current demand is only 20,000 barrels/day and when demand has been falling since 2002 with the exception of a very slight uptick last year. According to the authoritative United States Energy Information Administration (“EIA”), demand for gasoline and diesel in Georgia has decreased approximately 14% since 2002 – the year with the highest demand in Georgia.<sup>16</sup> Given current demand, even if Kinder Morgan’s undisclosed shippers actually delivered fuel to Savannah, those shippers and their fuel supplies would merely displace all current suppliers and supplies rather than truly serve any public need. Under these circumstances, the only “need” that would be fulfilled would be the private desire of Kinder Morgan and its shippers to make a profit.

## **2. Kinder Morgan has not met its burden to show that its proposed pipeline is needed to meet future demand.**

Apparently recognizing the above-noted indisputable discrepancies in its claimed public need for the pipeline, Kinder Morgan now, for the first time, relies on a five-year-old study from the Carl Vinson Institute (“Vinson”) to argue that projected population growth in Georgia will lead to increased demand for transportation fuels over the next several years. The 2010 Vinson study provides no support for Kinder Morgan’s argument.

First, Vinson’s projections made in 2010 are comparable to making 25-year horse deployment projections in 1910 at the advent of the automobile’s mass production or 25-year computer and internet growth projections in the 1990s. The projections are simply outdated and significantly under-estimated the dramatic decline in consumption over the past five years.

This is perhaps best exemplified by a comparison of Vinson’s projections for Georgia’s fuel needs in Table 13 of the Vinson report with the actual usage documented by the EIA from 2009 (the first year for which Vinson gives a projection) through 2014 (the last year for which we have data). The comparison shows that Vinson’s projections significantly inflated demand for gasoline consumption from 2009 to 2014:

<u>Year</u>	<u>Vinson’s Projected Use (thousands of gallons)</u>	<u>Actual Use (EIA) (thousands of gallons)</u>	<u>Differential</u>
2009	4,703,818	4,488,405	-4.6%
2010	4,805,912	4,521,255	-5.9%

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<sup>16</sup> See EIA Prime Supplier Sales Volumes at [http://www.eia.gov/dnav/pet/pet\\_cons\\_prim\\_a\\_EPm0\\_P00\\_Mgalpd\\_a.htm](http://www.eia.gov/dnav/pet/pet_cons_prim_a_EPm0_P00_Mgalpd_a.htm) (last visited May 10, 2015); see also composite chart and graphs of EIA information attached as Exhibit 3. Similar results obtain for predicted and actual diesel usage. See [http://www.eia.gov/dnav/pet/pet\\_cons\\_prim\\_a\\_EPd2\\_P00\\_Mgalpd\\_a.htm](http://www.eia.gov/dnav/pet/pet_cons_prim_a_EPd2_P00_Mgalpd_a.htm) (last visited May 10, 2015).

2011	4,905,722	4,375,255	-10.8%
2012	5,004,103	4,243,490	-15.2%
2013	5,101,006	4,239,110	-16.9%
2014	5,196,663	4,422,340	-14.9%.

As one can observe from this comparison, Vinson's projected consumption was consistently rising when actual consumption consistently decreased at a greater percentage for each passing year (with a small exception for last year).<sup>17</sup>

Second, Vinson's 2010 report assumes that "the demand for motor fuels nationally will increase only gradually over the next ten years."<sup>18</sup> However, recent and more current data from the EIA shows that for the South Atlantic Region, which includes Georgia, projected demand for gasoline, ethanol, and diesel fuel is expected to continue falling over the next 25 years. More specifically, from 2015 through 2040, the EIA projects that except for a very short window of slight increases in consumption through 2018, consumption will fall below the 2015 rate by 2019 and continue falling every year thereafter through 2040.<sup>19</sup> The overall decline in consumption of gasoline and diesel fuels over this time period is now projected to be approximately 7.8%.<sup>20</sup>

Third, the Vinson report is based on dramatically outdated information with respect to fuel economy. The report essentially assumes no change in fuel economy of 24 mpg through 2020.<sup>21</sup> Since the Vinson study was released in 2010, however, the U.S. EPA and the U.S. DOT have adopted two separate updates to the Corporate Average Fuel Economy ("CAFE") standards. Adopted in 2012, the "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emission and Corporate Average Fuel Economy Standards" rule will increase the average fleet fuel economy for cars and light-duty trucks to the equivalent of 54.4 mpg by Model Year 2025. Similar rules have been adopted for

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<sup>17</sup> Compare Vinson report at p. 30, Table 13 with attached Exhibit 3 which is a compilation of information found on EIA's website at [http://www.eia.gov/dnav/pet/pet\\_cons\\_prim\\_a\\_EPd2\\_P00\\_Mgalpd\\_a.htm](http://www.eia.gov/dnav/pet/pet_cons_prim_a_EPd2_P00_Mgalpd_a.htm) (last visited May 10, 2015). Please note that the EIA data is expressed in terms of gallons per day whereas Vinson's data is expressed as an annual number. Consequently, the EIA numbers had to be multiplied by 365 days in order to make a proper comparison.

<sup>18</sup> See Vinson report at p. 28.

<sup>19</sup> See Exhibit 4 attached hereto which is a compilation of information found on EIA's website at <http://www.eia.gov/beta/aeo/#/?id=2-AEO2015&region=1-0&cases=ref2015&start=2012&end=2040&f=A&linechart=2-AEO2015.3> (last visited May 10, 2015).

<sup>20</sup> *Id.*

<sup>21</sup> See Vinson report at p. 30, Table 13.



medium and heavy-duty trucks.<sup>22</sup> These new fuel economy standards are consistent with EIA's projected declines in motor vehicle fuel consumption through 2040.

Fourth, Vinson's and Kinder Morgan's conclusion that fuel needs will increase through 2020 is based almost exclusively on Vinson's assumption that total vehicle miles traveled ("VMT") will increase. As shown by more current data from the EIA, however, an increase in VMTs will not lead to an increase in fuel consumption:

Energy consumption by LDVs [light duty vehicles] – including passenger cars, light-duty trucks, and commercial light-duty trucks - falls from 15.7 quadrillion Btu in 2013 to 12.6 quadrillion Btu in 2040, **as increases in fuel economy more than offset increases in LDV travel.**<sup>23</sup>

With respect to heavy-duty vehicles (HDVs), the EIA projects higher VMTs that are only partially offset by improved fuel economy. However, when combined with savings in fuel usage by LDVs, the EIA projects an overall decline in transportation-related fuel use from 2013 to 2040.<sup>24</sup>

In addition, the Vinson study erroneously assumes a compound rate of growth for VMT of 1.8% from 2010 to 2020.<sup>25</sup> The actual rate of increase in VMT has been slowing, or even declining nationally, since the early 2000s – before the Vinson study was even released. Of special note, VMT has grown more slowly since 2008 which is the last year considered by the Vinson study.<sup>26</sup> As a result, the Vinson study's projected increases in fuel consumption based on increased VMTs is ill-founded.

Fifth, Kinder Morgan relies heavily on expected population growth to project increased motor vehicle fuel consumption. However, actual population growth has been slower than the pre-recession projections relied upon by the Vinson study. For example, whereas the Vinson study projected a statewide population of

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<sup>22</sup> See <http://www.nhtsa.gov/fuel-economy>.

<sup>23</sup> See EIA "Annual Energy Outlook with projections to 2040" (April 2015) at p.10 attached, in pertinent part, as Exhibit 5 (emphasis added).

<sup>24</sup> *Id.* including Figure 10.

<sup>25</sup> See Vinson report at p. 30, Table 13.

<sup>26</sup> See <http://www.frontiergroup.org/blogs/blog/fg/dueling-forecasts-does-energy-dept-know-something-us-dot-doesn%E2%80%99t> and <http://www.ssti.us/2014/02/vmt-drops-ninth-year-dots-taking-notice/>.

10,516,766 by 2014 (Table 10), according to the Census the actual population in 2014 was nearly 4% lower (10,097,343).<sup>27</sup>

Sixth, Kinder Morgan completely ignores those portions of the Vinson report that cut against the assumption that increased VMTs will automatically result in increases in fuel demand. The Vinson report actually stated, based on EIA data, that gasoline use may decrease from 2012 to 2020 while noting that slight increases might occur in diesel use:

The Energy Information Administration (EIA) of the U.S. Department of Energy anticipates that use of gasoline as a motor fuel will increase by less than 2.5 percent from 2010 to 2011 and will then actually decline by amounts of less than 1 percent each year through 2020. During the same period, the EIA projects growth in diesel fuel use of about 3 percent in 2011 and 2012, then increase of less than 1 percent through 2020.<sup>28</sup>

Of course, as illustrated above, even these modest projections were wrong; from 2009 to 2014, gasoline use declined each year between 4.6% and 16.9%. And diesel use saw similar dramatic declines.

The many erroneous and obsolete assumptions made in the Vinson study all combine to overstate the projected growth in Georgia's motor fuel consumption. This analysis demonstrates, based on more current and more accurate information, the fallacy of Kinder Morgan's simplistic argument that fuel consumption will significantly increase based upon expected population growth. Kinder Morgan's assumption is based on out-dated information that has not withstood the test of time even in just the past five years. As a result, the Vinson report provides no basis for concluding that Kinder Morgan's proposed pipeline is needed.

**I. Well-reasoned case law requires a finding that Kinder Morgan's proposed pipeline is not for a public purpose but is solely for a private purpose to make a private profit.**

Although there are numerous Georgia appellate court cases on eminent domain, there do not appear to be any regarding O.C.G.A. § 22-3-80 *et seq.* which is not very surprising given that Kinder Morgan's application is apparently only the second such application under this statute. However, in *RTC Transportation, Inc. v. Ga. Public Service Comm'n*, 165 Ga. App. 539 (1983), the Georgia Public Service Commission was faced with deciding whether a transportation company should be issued a certificate of public convenience and necessity. There was conflicting evidence regarding whether current transportation needs were being met which would bear upon whether the certificate was

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<sup>27</sup> See <http://quickfacts.census.gov/qfd/states/13000.html>.

<sup>28</sup> See Vinson report at p. 27.

needed. The Public Service Commission denied the application on the ground that other transportation companies were already transporting the same commodities. On appeal, the Georgia Court of Appeals affirmed the PSC's decision because it was not arbitrary and capricious. Similarly here, the Georgia DOT should deny Kinder Morgan's application because at least four other competitors are already meeting all of the needs of the Savannah market.

Appellate courts from other states have directly addressed the precise issue present in this case in the context of petroleum pipelines and held that the pipeline company did not meet its burden of showing a public need that would justify the use of eminent domain. For example, in *Lakehead Pipeline Co. v. Ill. Commerce Comm'n*, 296 Ill.App.3d 942 (1998), a petroleum pipeline company proposed building a new crude oil pipeline through northern Illinois to supply refineries in the Midwest. The pipeline company argued that substantial growth in the need for crude oil was expected during the next decade and that rationing had already occurred. However, a senior economic analyst testified that so long as the public had an adequate supply of refined petroleum products at reasonable prices, public convenience and necessity were being served. His testimony was coupled with that of an economist who stated that any barrel of oil that would be shipped via the proposed pipeline would simply displace crude oil which arrived from other points on other lines. As a result, he further testified that the crude oil that would be delivered through the proposed pipeline would have no effect on market prices because the aggregate supply would not change.

Based on this evidence, the Illinois Court of Appeals held that the pipeline company had failed to demonstrate a public need as opposed to the pipeline company's private need or desire for the pipeline. In so holding, the Court relied on Illinois Supreme Court precedent to find that:

[T]he "convenience and necessity required to support an order of the commission is that of the public and not any individuals or number of individuals. . . ." [T]he public is larger than a limited number of market players and the need of a few refiners does not in and of itself establish a public need. A public need . . . cannot be defined as involving only a limited number of private interests. . . . **In the context of public need, it is appropriate to look at the larger group of the general public to see if it requires the service, not whether some components of the public are in fact using the service.** Only by looking to the public at large can one determine whether there is an actual existing or expected popular need for the proposed service which should not be denied.

*Lakehead*, 296 Ill.App.3d at 955 (emphasis added); *see also Thompson v. Ill. Commerce Comm'n*, 1 Ill.2d 350 (1953) (holding that a railroad could discontinue two trains because public convenience was met by other forms of transportation); *Roy v. Ill. Commerce Comm'n*, 322 Ill. 452 (1926) (holding that public convenience and necessity is for the public, not an individual or number of individuals and that public interest not served by another railroad proposing to serve the same public); *Missouri P.R. v. State*

*Corp. Comm'n*, 192 Kan. 575 (1964) (holding that public convenience means the convenience of the public not an individual doing a limited business); *Western M. R.R. v. Public Service Comm'n*, 144 W. Va. 110 (1959) (holding that a railroad could discontinue passenger service because public convenience was being met by others).

This case is virtually identical to the above cases. Just as in *Lakehead*, Kinder Morgan is proposing to build a pipeline that will not serve any additional need in the Savannah area. The general public does not “require the service” that Kinder Morgan would provide. Instead, Kinder Morgan merely wants to serve its own desire to make a profit for itself. Such motivation does not justify the use of eminent domain and therefore requires that Kinder Morgan’s application be denied.

**J. Kinder Morgan’s estimates of tax revenues have fluctuated wildly and do not constitute a public need that justifies taking people’s private property by eminent domain.**

Kinder Morgan’s blatant appeal for approval of its unnecessary and destructive pipeline in exchange for payment of money in the form of taxes shows the desperate lengths to which Kinder Morgan will go in order to take the people’s property for private profit. The offer should be rejected as the worst form of pandering and a cynical attempt to get public officials to betray the public interest in the supposed name of the public.

Additionally, Kinder Morgan has been all over the map regarding the amount of taxes its pipeline would supposedly generate. At the initial open houses and in its April 8 submission, Kinder Morgan claimed that its proposed pipeline would generate \$14 million.<sup>29</sup> At the public hearing held in Waynesboro on April 21, Mr. Alan Fore on behalf of Kinder Morgan reduced that amount to \$12 million. Now, in its latest submission of May 6, Kinder Morgan claims that the amount would be \$4.5 million.<sup>30</sup> At these declining rates, by the time the regulatory process is complete, Kinder Morgan will be paying virtually nothing. Kinder Morgan provides no substantial data to support any of the asserted tax amounts, and its claims of substantial tax payments ring increasingly hollow.

In any event, a for-profit enterprise does not suddenly fulfill a public need or serve a public purpose merely because the enterprise might be required to pay taxes. If that becomes the standard, this state may as well abolish private property rights altogether and be done with it. As already demonstrated, there is no public need for Kinder Morgan’s proposed pipeline, so the application should be denied.

**K. Temporary jobs do not justify taking people’s private property by eminent domain.**

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<sup>29</sup> See Chally April 8, 2015 letter at p. 3.

<sup>30</sup> See Kinder Morgan May 6, 2015 submission at p. 32, Section F.

If Kinder Morgan's proposed pipeline is approved, Kinder Morgan claims that, at its peak, approximately 1,200 temporary jobs would be generated. Kinder Morgan, however, would not employ those workers. Rather, Kinder Morgan would hire a contractor who would be free to bring in his own employees to do the work. So there is no guarantee that any substantial number of local workers would be hired.

Moreover, those temporary jobs would not last very long. Kinder Morgan's timeline calls for completing construction in a little over a year. Once finished, only 28 skilled jobs would be left – likely filled from out-of-state. In contrast, given that the pipeline would merely replace the current supply network rather than supplement it, an estimated 200 trucking jobs would be lost. This is hardly a good trade-off in terms of jobs.

More fundamentally, temporary jobs do not justify the taking of people's property by eminent domain. The creation of jobs should have nothing to do with the consideration of Kinder Morgan's application.

**L. Kinder Morgan's deplorable safety record and criminal convictions do not serve a public need justifying the taking of private property by eminent domain.**

Richard Kinder and William Morgan were high level executives at Enron. They purchased pipelines and other assets from Enron and formed Kinder Morgan. Kinder's and Morgan's backgrounds at Enron are not ones to inspire confidence in responsible management of a company that has one of the worst pipeline safety records in North America. Kinder Morgan has numerous criminal convictions and has paid tens of millions in civil and criminal fines over a long period of time for safety violations, accidents, and criminal behavior. Kinder Morgan's pipelines have leaked, ruptured and exploded causing hundreds of millions of dollars in property damage, bodily injury, and death.

Kinder Morgan's overall safety and accident record is appalling. Since 2003, Kinder Morgan pipelines have been responsible for at least 180 regulatory violations, maintenance infractions, leaks, spills, evacuations, explosions, fires, and fatalities in 24 states.<sup>31</sup> In Texas alone (Kinder Morgan's home state), from 2003 to 2014, Kinder Morgan experienced 36 "significant incidents" consisting of spills, fires, and explosions and resulting in bodily injury and death.<sup>32</sup>

In 2006, the Pipeline and Hazardous Materials Safety Administration found "widespread failure" on the part of Kinder Morgan in protecting its pipelines. As will be discussed further below, despite that 2006 finding, nothing seems to change – the leaks, accidents, property damage, bodily injury, and deaths continue. Wall Street analysts have finally

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<sup>31</sup> See PHMSA Pipeline Safety State Pages at <http://primis.phmsa.dot.gov/comm/States.htm?nocache=3971>

<sup>32</sup> See "Building Safe Communities: Pipeline Risk and Its Application to Local Development Decisions," U.S. Dept. of Transportation Office of Pipeline Safety at p. 10 (2010) found at <http://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-PipelineRiskReport-Final-20101021.pdf> (accessed June 18, 2014).

taken note of Kinder Morgan's precarious financial situation calling Kinder Morgan a "house of cards" that diverts critical pipeline maintenance funds to the pockets of its shareholders. If a serious accident were to occur in Georgia, one would have to question Kinder Morgan's ability to do all necessary cleanup work and fully compensate the property owners.

Kinder Morgan's appalling record (further described below) and the risk it poses to Georgia and its citizens should give the DOT great pause. As already noted, there is little likelihood that Kinder Morgan's shippers will actually deliver any gasoline, diesel, or ethanol to any communities in Georgia. As such, it is unlikely that Georgia citizens will receive any benefit from the proposed pipeline. On the other hand, the proposed pipeline will unquestionably cause substantial and long-lasting negative impacts to Georgia and the public good.

First, approximately 58% of Kinder Morgan's pipeline will traverse coastal Georgia plowing through substantial tracts of private property and extremely sensitive environmental areas. Therefore, Georgia will receive 58% of the detrimental effects of this pipeline while receiving no real benefit from it. Imposing these detriments on Georgia particularly makes no sense given that the shipped product will originate from coastal Louisiana, and the final destination for all the product most likely will be Jacksonville. The most direct route from coastal Louisiana to Jacksonville is straight across the southern-most portions of Louisiana, Mississippi, and Alabama and through the Florida Panhandle. For a substantial portion of this route, Kinder Morgan would be able to co-locate with existing pipelines and other utilities, including the Florida Gas Transmission line through the Florida Panhandle.

Second, while providing little to no benefit in Georgia, Kinder Morgan's proposed pipeline will impose substantial risks of pipeline leaks and explosions on Georgia. This risk is not speculative. Contrary to its sales pitch to the Georgia public and to the DOT, Kinder Morgan has one of the worst safety records in the industry. It has a lengthy history of significant pipeline failures that have resulted in property damage, environmental damage, bodily injury, and death. Regulatory authorities have imposed tens of millions of dollars in fines on Kinder Morgan for numerous accidents and safety violations for decades. Kinder Morgan's safety record is so horrendous that it has pleaded guilty to several felony counts and has settled cases involving allegations of outright bribery and fraud. Kinder Morgan's long history of unsavory conduct would take many pages to fully catalogue. Below we will describe a small portion of that history, but first, we will begin with the larger context of pipeline leaks and ruptures that are inevitable in this industry.

According to the United States Pipeline and Hazardous Materials Safety Administration ("PHMSA"), pipelines in the United States spilled 2,127,183 barrels or 89,341,686 gallons of crude oil, refined petroleum products, highly volatile liquids, carbon dioxide, and

biofuel from 1995 to 2014. The vast majority of this product was petroleum products.<sup>33</sup> The amount of spilled product for that time period results in an average per year spill rate of 4,562,124 gallons. Thus far this year, the numbers are not looking any better. In the first four months of 2015, pipelines spilled 63,308 barrels or 2,658,936 gallons of hazardous liquids in the United States. Worse, of that amount, 59,796 barrels or 2,211,432 gallons were not recovered.<sup>34</sup> This is a disturbing trend given that over the past five years, the amount of lost hazardous liquids for an entire year has averaged 48,748 barrels or 2,047,416 gallons.<sup>35</sup>

Kinder Morgan is a big part of the picture for spills. In Georgia alone, from 1995 to 2014, Kinder Morgan's Plantation Pipeline had nine spills totaling 1,315 barrels or 55,230 gallons of petroleum product and resulting property damage in excess of \$21,000,000.<sup>36</sup> During that same time period, Colonial Pipeline spills caused \$9,000,000 in property damage, and Dixie Pipeline spills caused \$950,000 in property damage.<sup>37</sup> These are all significant amounts, but Kinder Morgan's amount was substantially higher than those of its competitors.

By comparison, and contrary to Kinder Morgan's representations, spills from all other sources combined, including tanker trucks, railroads, tank ships, and tank barges are five times less than spills from pipelines. Although it is difficult to make perfect comparisons due to various data sources, according to the American Petroleum Institute, the leading trade organization for the fossil fuel industry, from 1998 to 2007, the average amount of refined petroleum products spilled from various sources is as follows:

- Pipelines: 76,754 barrels
- Railroads: 1,431 barrels
- Tanker trucks: 9,180 barrels
- Tank ships: 3,598 barrels
- Tank barges: 5,429 barrels
- Total: 96,393 barrels

According to these numbers, pipelines accounted for 80% of refined petroleum products spilled from 1998 to 2007.

A few examples follow of Kinder Morgan's shoddy safety record.

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<sup>33</sup> See <http://phmsa.dot.gov/pipeline/library/datastatistics/pipelineincidenttrends>. For computation purposes, one barrel of product holds 42 gallons.

<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.*

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



On November 9, 2004 in Walnut Creek, California, a high pressure oil pipeline owned by a Kinder Morgan subsidiary exploded, ignited in an explosive 60-foot high fireball, caused significant property damage including destruction of a home, seriously injured four workers, and killed five other workers. Kinder Morgan pleaded no contest to six felonies and agreed to pay \$15 million in civil and criminal fines.<sup>38</sup> Additionally, Kinder Morgan ended up paying more than \$69 million to 17 victims in civil lawsuits stemming from the explosion.<sup>39</sup>

Due to the Walnut Creek disaster and numerous other leaks and spills in western states, Kinder Morgan reached an agreement with PHMSA on April 10, 2006 to spend as much as \$90 million to improve its safety program after PHMSA found “widespread failure” to protect its pipelines.<sup>40</sup>

In another November 2004 incident, an oil pipeline owned by a Kinder Morgan subsidiary burst in the Mohave Desert, sending a jet of fuel 80 feet into the air. The break closed the nearby interstate highway and contaminated over 10,000 tons of habitat for the federally endangered gopher tortoise, a species that exists in Georgia.<sup>41</sup>

On April 28, 2004, a long stretch of corroded Kinder Morgan pipeline discharged 123,774 gallons of diesel fuel into Suisun Marsh, the largest salt water wetland in the western United States and home of several species of water fowl and the endangered salt marsh harvest mouse. The spill tarred shorelines and significantly impacted or killed many mammals and birds. The pipeline ran right through the marsh raising significant concerns regarding Kinder Morgan’s proposed route for the Palmetto pipeline which will go through portions of Georgia’s coastal wetlands and cross numerous streams and major river bodies that flow to and through Georgia’s unique and invaluable coastal marsh system. Notably, the Suisun Marsh disaster was not reported to the appropriate authorities as required by California law until almost 20 hours after Kinder Morgan was aware of a significant drop in pressure on the pipeline. Kinder Morgan paid \$5.3 million in fines to resolve state and federal environmental violations related to this incident and two more minor incidents on the same pipeline.<sup>42</sup>

In May 2005, a Kinder Morgan Natural Gas Pipeline of America 30-inch diameter pipeline exploded near Marshall, Texas, sending a giant fireball into the sky and hurling a

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<sup>38</sup> See <http://www.dir.ca.gov/dirnews/2005/ir2005-20.html>; [http://www.mercurynews.com/crime/ci\\_6970300](http://www.mercurynews.com/crime/ci_6970300).

<sup>39</sup> See [http://www.mercurynews.com/crime/ci\\_6970300](http://www.mercurynews.com/crime/ci_6970300).

<sup>40</sup> *Id.*

<sup>41</sup> See [http://www.epa.gov/osweroel/docs/oil/fss06/key\\_2.pdf](http://www.epa.gov/osweroel/docs/oil/fss06/key_2.pdf).

<sup>42</sup> See [http://www.solano.courts.ca.gov/materials/Suisun\\_Marsh\\_Oil\\_Spill.pdf](http://www.solano.courts.ca.gov/materials/Suisun_Marsh_Oil_Spill.pdf); <http://yosemite.epa.gov/opa/adm-press.nsf/d0cf6618525a9efb85257359003fb69d/4bbf4038800cedd6852572e200711592>.

160-foot section of pipe onto the grounds of an electric generating plant. Two plant employees were injured, the plant was shut down, and 40 people were evacuated. The cause was stress corrosion cracking.<sup>43</sup>

On July 24, 2007, the Trans Mountain Pipeline, operated by Kinder Morgan, ruptured in Burnaby, British Columbia after a backhoe broke the improperly marked line. The rupture caused a 150-foot geyser to shoot into the air raining down on houses and two lanes of traffic, required the evacuation of 250 people, and in just 25 minutes released over 250,000 litres of crude oil with 15,000 litres flowing into Burrard Inlet. The required cleanup cost \$15 million, and two contractors and Trans Mountain pleaded guilty to a 21 count indictment.<sup>44</sup>

On November 4, 2008, Plantation Pipeline Company (owned primarily by Kinder Morgan), entered into a consent decree settling a lawsuit with the U.S. Department of Justice stemming from Clean Water Act violations from pipeline spills over a period of six years in Georgia, North Carolina, and Virginia. Plantation Pipeline also was cited for failing to prepare and implement a required spill prevention, control, and countermeasure plan for a 420,000 gallon storage tank in Newington, Virginia. The settlement required Plantation to pay a \$715,000 penalty to the federal government's Oil Spill Liability Trust Fund. Plantation was also required to implement \$13 million in spill prevention safeguards.<sup>45</sup>

On September 23, 2008, a Kinder Morgan pipeline exploded and burned for more than 10 hours in Pasadena, Texas. One person died, and another was injured. The cause of this "significant event" was corrosion. The Pasadena pipeline experienced at least 18 "significant incidents" from 2004 to 2013.<sup>46</sup>

In May 2009, near Palm City, Florida, a Kinder Morgan Florida Gas Transmission Company natural gas pipeline ruptured and blew out 106 feet of pipe weighing 5,000 pounds which landed in the right-of-way between Interstate 95 and the Florida Turnpike and near a high school that was within the 366-foot potential impact radius. Two people were injured when their car ran off the road as a result of the blast.<sup>47</sup>

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<sup>43</sup> See [http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420051011H/cpf\\_420051011H.pdf?nocache=8618](http://primis.phmsa.dot.gov/comm/reports/enforce/documents/420051011H/cpf_420051011H.pdf?nocache=8618).

<sup>44</sup> See <http://www.cbc.ca/news/canada/british-columbia/3-companies-plead-guilty-to-burnaby-oil-spill-1.1005862>.

<sup>45</sup> See <http://www.justice.gov/archive/opa/pr/2008/November/08-enrd-980.html>.

<sup>46</sup> See "Pipeline at Pasadena plant explodes," Eric James (September 24, 2008), ABC Eyewitness News, Houston, Texas, <http://abc13.com/archive/6408372/> (accessed June 17, 2014); "Texas Significant Incidents Listing," 2003-2014, PHMSA Pipeline Safety Stakeholder Communication, U.S. DOT, [http://primis.phmsa.dot.gov/comm/reports/safety/IncDetSt\\_st\\_TX\\_ft\\_sig.html?nocache=8751](http://primis.phmsa.dot.gov/comm/reports/safety/IncDetSt_st_TX_ft_sig.html?nocache=8751) (accessed June 17, 2014).

<sup>47</sup> See NTSB pipeline accident brief DCA09FP007.

On November 16, 2011, near Gloucester, Ohio, a weld failed on a Kinder Morgan Tennessee Gas Pipeline causing a leak that exploded with a resulting crater 30 feet across and 15 feet deep. Three homes were destroyed by fire. The weld failed due to inadequate design, materials and workmanship, exceeding the operational limits, gaps in integrity management, and earth movement.<sup>48</sup>

In June 2012, in Gray County, Texas, a 50-foot section of Kinder Morgan Natural Gas Pipeline of America pipeline ruptured, ignited, blew a 30-foot crater, and burned two acres of land, two 500 gallon tanks used to store liquid fertilizer, and two telephone poles and transformers. State Highway 52 was closed for several hours.<sup>49</sup>

On June 18, 2013, in Louisiana, a Kinder Morgan Florida Gas Transmission Company pipeline ruptured and exploded requiring the evacuation of 50 homes. The blast knocked down trees in a 200 yard area and burned everything within another 300 yards. The dirt in and around the resulting crater looked like it had been cooked in a kiln.<sup>50</sup>

On December 8, 2014, in Belton, South Carolina, a Kinder Morgan Plantation Pipeline petroleum pipeline ruptured and spilled approximately 370,000 gallons of refined petroleum products. The leak was caused by a failed sleeve on the pipeline and was discovered only after dead vegetation was noticed nearby. The tardy discovery belies Kinder Morgan's representations that it has early detection systems in place and sufficient shut-off valves that can timely control leaks with minimal impact to property owners and the environment. Approximately 2, 832 tons of soil have been removed and treated to date, and only approximately half of the spilled petroleum products (approximately 177,000 gallons) have been recovered. Cleanup efforts are still continuing over five months after the leak was discovered. The cleanup effort has required the installation of 71 monitoring wells, 20 recovery sumps, 15 recovery wells, and two recovery trenches. Kinder Morgan originally reported that only 8,000 gallons of product had leaked when, in fact, 8,800 barrels had leaked. There are 42 gallons of product per barrel.<sup>51</sup>

The above-described incidents are merely a small representative sampling of the hundreds of leaks, spills, and accidents that have characterized Kinder Morgan's pipeline

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<sup>48</sup> See <http://www.dispatch.com/content/stories/local/2011/11/16gas-pipeline-explodes-in-athens-county.html>; <http://www.10tv.com/content/stories/2011/11/16/athens-county-explosion.html>; <http://www.10tv.com/content/stories/2011/11/16/athens-county-flames-worse-seem/html>; <http://bloximages.chicago2.vip.townnews.com/athensohiotoday.com/content/tncms/assets/v3/editorial/a/8a/a8aab150-cf7f-11e1-8a70-001a4bcf887a/500471418c9e3.pdf>.

<sup>49</sup> See PHMSA Corrective Action Order, CPF NO. 4-2012-1011H.

<sup>50</sup> See "Gas line explosion rattles Washington Paris," Baton Rouge Advocate, June 26, 2013 at <http://theadvocate.com/home/6283023-125/gas-pipeline-explosion-in-franklinton> (accessed August 8, 2014).

<sup>51</sup> See <http://www.blufftontoday.com/bluffton-news/2015-05-03/sc-leak-patched-cleanup-continues#.VUUr-jA5O2UgU>.

operations all across the United States for many years until the present time. Additional cause for concern is Kinder Morgan's many instances of dishonest behavior including bribery and outright fraud.

For example, in one 2003 incident, Kinder Morgan illegally dumped contaminated potassium chloride into the Pacific Ocean rather than pay landfill charges to dispose of it properly. The dumping, according to dock workers, was accomplished by bribing a ship captain \$1,100 to haul 159 tons of the contaminated material and dump it. Almost five years later, Kinder Morgan pled guilty to violating the Ocean Dumping Act and agreed to pay a fine of \$240,000.<sup>52</sup>

The bribery case in Oregon is not an isolated example of criminal wrongdoing. According to the FBI, between 1997 and 2001, Kinder Morgan systematically defrauded its own customers including the Tennessee Valley Authority. Kinder Morgan did so by using two different methods for weighing coal provided to its customers from Kinder Morgan's Cora Terminal in Illinois. Operators used certified scales to weigh incoming coal delivered by rail cars, but then weighed outgoing coal to its customers by "barge draft." This resulted in weights that were two to three times heavier than the certified scale weights. Kinder Morgan claimed it was shipping the same amount of coal it had received when that was clearly not the case. Kinder Morgan then sold the excess coal as its own coal.

The same FBI investigation discovered that Kinder Morgan outright stole coal from its customer stockpiles at its Grand River Terminal in Kentucky. As a result of these fraudulent practices in Illinois and Kentucky, Kinder Morgan agreed to a \$25 million settlement with the U.S. government.<sup>53</sup>

Kinder Morgan's dishonorable and illegal activity did not stop in Illinois and Kentucky. Kinder Morgan settled another case in 2007 with the U.S. Environmental Protection Agency by paying a fine of \$613,000 for violations of the federal Clean Air Act. In that case, federal regulators caught Kinder Morgan illegally mixing an industrial solvent, a dangerous hazardous waste called a "cyclohexane mixture," into unleaded gasoline and diesel. Kinder Morgan distributed 8,000,000 gallons of the contaminated fuel which caused vehicles to break down by clogging their fuel filters.<sup>54</sup>

In 2010, the U.S. Department of Justice discovered that Kinder Morgan had been outright lying on its Clean Air Act permit applications to the federal government with respect to its Port Manatee Terminal in Florida. The company repeatedly stated that it would

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<sup>52</sup> See [http://www.wweek.com/portland/article-7447-voyage\\_to\\_the\\_bottom\\_of\\_the\\_sea.html](http://www.wweek.com/portland/article-7447-voyage_to_the_bottom_of_the_sea.html); <http://www.oregonlive.com/business/oregonian/index.ssf?/base/business/1208917515292290.xml>.

<sup>53</sup> See <http://www.prnewswire.com/news-releases/kinder-morgan-agrees-to-25-million-civil-settlement-for-unauthorized-sales-of-customers-coal-59896332.html>.

<sup>54</sup> See <http://www2.epa.gov/enforcement/kinder-morgan-consent-agreement-and-final-order>.

control its pollution when the company knew that its pollution control equipment was not even being used and was not being properly maintained. Kinder Morgan was fined \$1,000,000 for these deliberate violations.<sup>55</sup>

In addition to all of the above, Wall Street has raised serious concerns regarding Kinder Morgan's maintenance practices that it believes should cause equal concern by the communities located near its facilities. For example, Kevin Kaiser, a senior analyst with the hedge fund investment firm Hedgeye has published a highly critical report of Kinder Morgan entitled "Is Kinder Morgan Maintaining its Stock Prices Instead of its Assets?" Hedgeye flatly states that "Kinder Morgan's high level business strategy is to starve its pipelines and related infrastructure of routine maintenance spending." The report documents several instances where the company has slashed maintenance spending on some of its pipelines by 90%.

Kinder Morgan's shareholders are even concerned. In February 2014, a shareholder filed a lawsuit alleging that Kinder Morgan had taken \$3.2 billion out of Kinder Morgan Energy Partners, one of Kinder Morgan's affiliated pipeline companies, money that is needed for maintenance of pipelines and other energy infrastructure. In fact, the lawsuit attributes some of Kinder Morgan's pipeline incidents to this raiding of capital from Kinder Morgan's affiliated company.<sup>56</sup>

The respected financial magazine *Barron's* has also raised concerns regarding Kinder Morgan's failure to allocate and spend sufficient monies for maintenance. In February 2014, *Barron's* quoted an analyst at investment banking firm Jefferies: "We struggle to understand how KMP [Kinder Morgan Partners] can safely operate the largest portfolio of transmission and storage assets in the industry for just a fraction of its peers' expenditures." By the term "fraction," Jefferies meant the fact that Kinder Morgan spends only half as much as Spectra Energy, another major pipeline operator, spends on maintenance per mile of pipeline.<sup>57</sup>

Based on Kinder Morgan's deplorable record of pipeline disasters, its deliberate business practices designed to starve its pipelines of proper maintenance, and its criminal, fraudulent, and deceitful practices, the Georgia DOT should be extremely wary of finding that Kinder Morgan is a reliable company whose proposed pipeline will serve the greater public good. Kinder Morgan's proven track record shows that it won't.

### **III. Conclusion**

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<sup>55</sup> See [http://cfpub.epa.gov/compliance/criminal\\_prosecution/index.cfm?action=3&prosecution\\_summary\\_id=2065](http://cfpub.epa.gov/compliance/criminal_prosecution/index.cfm?action=3&prosecution_summary_id=2065).

<sup>56</sup> <http://www.bloomberg.com/news/articles/2014-02-06/kinder-morgan-sued-by-investor-over-pipeline-distributions-1->.

<sup>57</sup> <http://online.barrons.com/news/articles/SB50001424053111903713804579394913023088996>.

Kinder Morgan has the burden of showing that its proposed pipeline will serve the public good, convenience, and necessity in order to be granted the extraordinary power of taking people's private property against their will. Kinder Morgan has failed to do so. The public good is not served by allowing a private company with a deplorable safety and criminal record to come into Georgia and take people's property for a pipeline that is, by all the objective and unassailable evidence, not needed to serve the Georgia public.