Subject Matter Study Report

**Texas Landowner Rights vs.**

**Pipeline Condemnation Rights**

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By

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**Texas Landowner Rights vs. Pipeline Condemnation Rights**

**Executive Summary**

The United States Constitution and State of Texas Constitution contain provisions to protect landowners from unlawful use of eminent domain by energy companies. The power of eminent domain has been overused by pipeline companies for many years, resulting in an unlawful legal precedence in many instances.

The laws of Texas are scattered, piece meal, and disorganized and do not appear in a single useable source that provides clarity and consistent application of the Law. Many pipelines are denied the use of eminent domain in Texas including:

1. Any pipelines or underground storage facility constructed and operated for the primary purpose of economic development in the State of Texas.
2. Any pipelines or underground storage facility constructed and operated for the primary purpose of enhancement of tax revenues.
3. Any pipelines or underground storage facility that does not primarily serve a “public use”.
4. Any pipelines or underground storage facility that confers a private benefit to a private party through the use of the taken property.
5. A gas distribution pipeline company that transports natural gas for other than public consumption.
6. A pipeline that transports any crude oil produced or purchased in another state.
7. A crude oil flow line or gathering line used only for oil wells of the pipeline’s owner.
8. Pipeline facilities used only for stations of the pipeline’s owner.
9. Crude oil pipeline facilities used only for oil treating facilities of the pipeline’s owner.
10. Pipelines used only for petroleum refineries or chemical manufacturing facilities of the pipeline’s owner.
11. Pipeline facilities used only for underground storage facilities of the pipeline’s owner.
12. Intrastate pipelines that transport fluids other than crude oil, because they cannot assume common carrier status. This includes all intrastate and interstate:
    1. Natural gas gathering lines,
    2. Natural gas transmission lines,
    3. Natural gas underground storage facilities,
    4. Natural gas liquids pipelines,
    5. Natural gas liquids underground storage facilities,
    6. Refined petroleum pipelines,
    7. Manufactured chemical pipelines, and
    8. Chemical feedstock pipelines.
13. Crude oil pipelines that qualify as common carriers that are connected to pipelines involved with “interstate commerce” or “foreign commerce”.
14. Natural gas pipelines and gas natural gas underground storage facilities that deliver to NGL facilities and for export.

For natural gas pipelines included in “interstate commerce”, FERC decides if each project provides “public convenience and necessity” before granting the power of eminent domain. This necessary step for compliance with the U.S. Constitution is not performed in Texas. Unfortunately, FERC does not make an independent decision on this issue and goes along with the pipeline storage project facility applicant for a permit to use eminent domain.

Until the Texas Legislature unravels the confusion on eminent domain, every landowner has to fight their battles with the pipeline companies in the courts. Many pipeline companies and many courts are under the illusion that all pipelines have the right of eminent domain. Many courts in Texas go along with this illusion as legal precedence.

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**Texas Landowner Rights vs. Pipeline Condemnation Rights**

**United States Constitution**

Article I, Section 8 of the United States (U.S.) Constitution or Bill of Rights indicates Congress shall have the power:

1. To regulate commerce with foreign nations, among the several States, and with the Indian Tribes and
2. To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all the Powers vested by this Constitution in the Government of the United States, or in any Department or office thereof.

The Fifth Amendment of the U.S. Constitution includes:

No person shall be---deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the U.S. Constitution includes:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment to the U.S. Constitution includes:

The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The Fourteenth Amendment to the U.S. Constitution includes:

1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;
2. No state shall deprive any person of life, liberty, or property, without due process of law; and
3. No state shall deny to any person within its jurisdiction the equal protection of the laws.

Requirements in the U.S. Constitution’s Bill of Rights and subsequent amendments related to landowner rights and eminent domain can be summarized as follows:

1. No person shall be deprived of property without due process of law.
2. Private property shall not be taken for public use, without just compensation which should include safety, not just money.
3. Congress shall have the power to regulate commerce among the states.
4. Congress shall have the power to regulate commerce with Indian Tribes.
5. Congress shall have the power to make all laws necessary and proper for carrying out all the powers vested by the Constitution.
6. The powers not delegated to the United States and the powers not prohibited to the States, are reserved to the States or to the people, respectively.
7. No state shall make or enforce any law which shall reduce the privileges of citizens of the United States.
8. No state shall deprive any person of life, liberty, or property, without due process of law.
9. No state shall deny to any person within its jurisdiction, equal protection of the laws.

**Texas Constitution**

Article 1, Section 17 of the Texas Constitution includes:

1. No person’s property shall be taken, damaged, or destroyed for or applied to “public use” without adequate compensation being made, unless by the person consent of such person, and only if the taking, damage, or destruction if for:
   1. The ownership, use, and enjoyment of the property, without an incidental use, by:
      1. The State, a political subdivision of the State, or the public at large or
      2. An entity granted the power of eminent domain under law.
   2. The elimination of urban blight on a particular parcel of property.
2. The “public use” does not include the taking of property under 1.a above for transfer to a private entity for the primary purpose of economic development or enhancement of government tax revenues.
3. On or after January 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to any entity only on a two-thirds vote of all members elected to each house.

Requirements in the Texas Constitution related to landowner rights and eminent domain can be summarized as follows:

1. No person’s property shall be taken, damaged, or destroyed for “public use” without adequate compensation being made to the owner of the property.
2. No person’s property shall be taken, damaged, or destroyed for public use unless the ownership, use, and enjoyment of the property is without an incidental or secondary use.
3. The right to take property is reserved to:
   1. The State, a political subdivision of the State, or the public at large or
   2. An entity granted the power of eminent domain under Texas law.
4. The right to take property for the primary purpose is economic development is prohibited.
5. The right to take property for enhancement of tax revenues is prohibited.
6. The Texas Legislature may enact a law granting the power of eminent domain to any specific entity with a two-thirds vote of members in each legislative house.
7. The Texas Legislature cannot enact a law granting the power of eminent domain to a category of entities like all crude oil pipelines.

**Texas Landowner’s Bill of Rights**

The State of Texas Landowner’s Bill of Rights are prescribed by the Texas Legislature in Texas Government Code Section 402.031 and Chapter 21 of the Texas Property Code.

1. You, the landowner, are entitled to receive adequate compensation if your property is taken for a public use.
2. Your property can only be taken for a use that serves the general public.
3. Eminent domain cannot be exercised for economic development purposes or for tax revenue purposes.
4. Your property can only be taken by a government entity or private entity authorized to do so.
5. The entity that wants to take your property must notify you that it wants to take your property.
6. The entity proposing to take your property must provide you with a written appraisal from a certified appraiser detailing the adequate compensation you are owed for your property.
7. The entity proposing to take your property must make a bona fide offer to buy the property before it files a lawsuit to condemn the property – which means the condemning entity must make a good faith offer that conforms with Chapter 21 of the Texas Property Code.
8. You may hire an appraiser or other professional to determine the value of your property or to assist you in any condemnation proceedings.
9. You may hire an attorney to negotiate with the condemning entity and to represent you in any legal proceedings involving the condemnation.
10. Before your property is condemned, you are entitled to a hearing before a court appointed panel that includes three special commissioners. The special commissioners must determine if the amount of compensation the condemning entity owes for the taking of your property. The commissioners must also determine what compensation, if any, you are entitled to receive for any reduction in value of your remaining property.
11. If you are unsatisfied with the compensation awarded by the special commissioners, or if you question whether the taking of your property was proper, you have the right to a trial by a judge or jury. If you are dissatisfied with the trial court’s judgment, you may appeal that decision.

The above “Bill of Rights” can be summarized as follows:

1. Your land can be condemned and taken only for a general public use, not private use.
2. Your land can only be taken by a government entity or a private entity authorized by Texas law to do so.
3. You must be provided adequate compensation for the taking of your land including any reduction in value of property not included in the condemnation action.
4. You may hire an appraiser and/or other professional to determine the value of and damages to your property.
5. You may hire an attorney and request a hearing before a court appointed group of three commissioners.
6. If your do not agree with the decisions of the commissioners, you have the right to a trial.

The primary missing pieces to the Texas “Bill of Rights” include:

1. How is the “general public use” criterion to be determined to justify the taking of property?
2. Should the general public use only apply to Texas residents?
3. What is the process to determine that a specific pipeline section or part of a pipeline system is for “public use”?
4. Who are the private entities authorized to take a person’s land?
5. How are these private entities authorized to take a person’s land approved?
6. How is adequate compensation determined for taken property?
7. How will temporarily appointed county commissioners determine the amount of compensation for the taking of property?
8. What experience and knowledge level are required of appointed county commissioners to be able to determine the adequacy of public use and proper compensation to the land owner?
9. How are safety issues identified and addressed by county commissioners?
10. Should counties in Texas be required to develop and publish procedures and standard for addressing condemnation issues?
11. County commissioners should be required to address pipeline safety issues on the properties adjacent to the condemned property.
12. Condemning parties must be required to comply with all applicable state and Federal laws and regulations.
13. Condemning pipeline parties should be required to avoid unsafe conditions outside the limits of right-of-way easements.

The Texas Landowner’s Bill of Rights document does an inadequate job of protecting the landowners of their rights.

**Chapter 21 in Texas Property Code on Eminent Domain**

Title 4, Chapter 21 on eminent domain in the Texas Property Code includes the following information:

1. A person who owns property that may be involved with an eminent domain action on the person’s property can require the condemning party other than a government entity to produce information or proof on their right to condemn property.
2. An entity with eminent domain authority that wants to acquire real property for “a public use” must make a bona fide offer to acquire the property from the property owner.
3. Before making a final offer, the entity with eminent domain authority must obtain a written appraisal from a certified appraiser of the value of the property and the damages, if any, to any of the property owner’s remaining property.
4. The final offer shall be equal to or greater than the amount of the written appraisal of property value plus any damages and reduction in value to the remaining property.
5. The property owner has 14 days to accept or reject the final offer.
6. If an entity with eminent domain authority is unable to agree with the owner of the property on the amount of damages, the entity may begin a condemnation proceeding by filing a petition in the proper court. The petition must:
   1. Describe the property;
   2. State with specificity the “general public use” provisions for which the entity intends to acquire the property;
   3. State the name of the property owner, if known;
   4. State whether the entity and the property owner are unable to agree on damages; and
   5. State whether the entity made a bona fide offer to acquire the property.
7. District courts and county courts at law have concurrent jurisdiction in eminent domain cases. A county court (not at law) has no jurisdiction in eminent domain cases.
8. The venue of a condemnation proceeding is based on the county in which at least part of the property is located. If the county does not have a county court at law, the venue of a condemnation proceeding is the district court(s) for the county or counties.
9. The judge of a court in which a condemnation petition is filed or the petition is assigned shall appoint three disinterested real property owners who reside in the county as special commissioners to assess the damages to the owner of the property being condemned.
10. The special commissioners shall swear to assess damages fairly, impartially, and according to the law.
11. Special commissioners may compel attendance of witnesses and the production of testimony, administer oaths, and punish for contempt in the same manner as a county judge.

Chapter 21 of the Texas Property Code fails to provide answers to the following relevant questions on eminent domain:

1. What are the detailed procedures and criteria to be used to determine “public use” of a pipeline facility?
2. Can the “public use” criteria be challenged in a Texas court handling an eminent domain case?
3. Can anyone declare the “public use” criteria to acquire or use someone else’s property?
4. Should “public use” be based on accessibility of the general public to use a pipeline? What limits or restrictions prevent “public use” exaggeration?
5. “Public use” concepts were generally based on “common carrier” status of a private transportation facility. The “common carrier” concept was first developed for railroads and later pipelines to ensure that every entity had business use accessibility to transportation facilities. However, “public use” implies all citizens, not just businesses dealing with the production, marketing, and distribution of petroleum and natural gas.
6. “Public use” of pipeline transportation near the points of public consumption are much simpler to define such as:
   1. Natural gas pipeline distribution to homes and businesses from gas transmission pipelines;
   2. Propane and butane truck distribution to homes and businesses;
   3. Refined products pipeline transportation from refineries to a marketing, railroad, or airport terminal;
   4. Ammonia used for farming purposes from an ammonia producing facility to farm distribution terminal; and
   5. Other pipeline transportation to the consumption or end use destination of a transported fluid.
7. FERC’s stated policy is to approve an interstate natural gas pipeline project and grant the power of eminent domain if the “public benefits” of the project outweigh the project’s adverse impacts. Should public benefits and adverse impacts be considered in determining pipeline rights of eminent domain in Texas?
8. FERC uses “public convenience or necessity” as the criteria to grant the power of eminent domain to natural gas interstate pipelines. The FERC criteria is much broader than the very limited “public use” criteria in Texas. However, current Texas law limits the power of eminent domain to only “public use” transportation facilities.
9. Texas courts have generally been very liberal in allowing pipelines to assume the powers of eminent domain. Legal processes have accepted pipelines having the privileges of eminent domain without seriously considering the “public use” issue.
10. How will “public benefits” of a specific pipeline be determined?
    1. The potential benefits and adverse effects of a new pipeline vary considerably depending on numerous factors.
    2. A generalization that all pipelines provide positive public benefits over adverse impacts should not be used.
    3. Each new pipeline project should be evaluated on its unique locations and characteristics as required for public education regulations in 49 CFR Parts 192 and 195.
11. How will the “public use” criteria be used at the courts level to validate eminent domain in rights in Texas?
    1. Should county courts consider only county or regional public benefits?
    2. Should county courts consider state wide public benefits?
    3. Should county courts consider United States wide public benefits?
12. In determining the “public use” benefits, should the courts consider the negative “public use” benefits due to risk to public safety, property, public health, and environmental damage? Negative benefits should affect the net determination of “public use” benefits.
13. How is the value of the property being acquired to be determined?
    1. It likely has a greater value to the pipeline company than the value determined by an appraiser.
    2. Is both present value and future value to be considered for the property to be taken?
    3. Are alternate uses of the property to be considered?
    4. How will the dangers of a pipeline transporting hazardous material be considered in the value of the land?
    5. Will the presence of one pipeline be a magnet for additional hazardous pipelines on the owner’s property?
14. If requested by a landowner subject to proposed or actual eminent domain proceeding, what specific information must a pipeline company provide to support their rights of eminent domain claims?
15. What specific information should be provided by a condemning pipeline company on the “public use” of the pipeline and its transported contents? What proof is required to support the pipeline company’s submitted information?
16. What are the minimum qualifications of the three commissioners? Should they be supported by an independent experienced engineering advisor with no relationship with the specific pipeline company, but whose time is paid for through the court by the pipeline company?
17. What laws must the commissioners swear to uphold? What procedures must they follow? Should written procedures be prepared for use of the commissioners through the courts?
18. What minimum production requests and testimony should be required of the landowner and the pipeline company?
19. Each commissioner should be required to prepare written opinions covering issues considered and the reasons for their decisions.
20. What Texas agency has the specific legal authority to grant eminent domain authority to a gas transmission pipeline?

**Texas Resources Code**

Title 3, Subtitle D, Chapter 111 in the Natural Resources Code on common carrier pipelines and public utilities contains the following provisions:

1. An entity is a common carrier subject to this chapter if it:
   1. Owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum or engages in the business of transporting crude petroleum by pipeline.
   2. Owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas or is an entity of whom the right of eminent domain exists.
   3. Owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen if the person files with the Railroad Commission of Texas a written acceptance of the provisions of this chapter agreeing to be a common carrier.
   4. Owns, operates, or manages, wholly or partially, pipelines for the transportation of coal.
   5. Owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas used for the transportation of feedstock for carbon gasification, the products of carbon gasification, or the derivative products of carbon gasification if the person agrees in writing to comply with this chapter as a common carrier.
2. The provisions of this chapter as a common carrier do not apply to pipelines that are limited in their use to wells, stations, plants, and refineries of the owner and that are not part of a pipeline transportation system of a common carrier as defined above.
3. No person, including a common carrier, may transport crude oil or petroleum in Texas unless the crude oil or petroleum has been produced or purchased or both in accordance with the laws of Texas and/or a rule of the Railroad Commission of Texas (Texas RRC).
4. The operation of common carriers covered by this chapter is a business in which the public is interested and is subject to regulation by law.
5. Common carriers shall make and publish their tariffs under rules prescribed by the Texas RRC.
6. Requirements of common carriers in exercising the right and power of eminent domain include:
   1. A common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.
   2. Upon written request by a resident or owner of land crossed by a common carrier pipeline, the common carrier must disclose material data safety sheets in writing on the commodities transported by the common carrier pipeline.
7. An easement created through the power of eminent domain for the benefit of a single common carrier pipeline will extend only a width of 50 feet for each pipeline laid under eminent domain action prior to January 1, 1994.
8. The 50-foot easement width limit does not apply to a common carrier pipeline granted under the terms of an oil and/or gas lease or to any easement which authorizes the construction of gathering lines.
9. The 50-foot easement width limit may be rebutted by evidence on behalf of the common carrier pipeline that a greater width is needed for operation, construction of additional lines, maintenance, repair, replacement, safety, surveillance, or a buffer zone and is granted by an eminent domain judgement.

Relevant information in Title 3, Subtitle D, Chapter 111 the power of eminent domain of common carrier pipelines includes:

1. Common carrier status is limited to pipelines only transporting crude oil within Texas.
2. Intrastate commerce gas transmission pipelines are not given common carrier status in Texas.
3. Pipelines transporting natural gas liquids, refined products, and manufactured chemicals, and/or natural gas do not have common carrier status in Texas.
4. Pipelines transporting coal, carbon dioxide, or hydrogen also have common carrier status and the right of eminent domain in Texas.
5. Common carrier status and right of eminent domain do not apply to pipelines in Texas that have limited transportation use for:
   1. Oil wells of the pipeline’s owner;
   2. Pump, metering, storage, or terminal stations of the pipeline’s owner;
   3. Crude oil treating facilities of the pipeline’s owner;
   4. Underground hydrocarbon storage facilities of the pipeline’s owner; and/or
   5. Chemical manufacturing and petroleum refineries of the pipeline’s owner.
6. A crude oil or petroleum pipeline in Texas cannot assume common carrier status and the right of eminent domain unless all the transported crude oil or petroleum has been produced and purchased in accordance with the laws of Texas.
7. The owner of a common carrier pipeline cannot assume the right of eminent domain for property that is not part of or is not necessary for operation and maintenance of the pipeline system.

**Texas Utilities Code**

Chapter 121 in the Texas Utilities Code on Gas Pipelines Subchapter A of Chapter 121 in section 121.007 excludes the transportation of gas to and from liquefied natural gas (LNG) marine terminals from claiming gas utility status including the power of eminent domain.

A person who owns or operates a natural gas pipeline, a liquefied gas pipeline, or an underground storage facility---is not a gas utility if the person certifies to the railroad commission that the person uses the pipeline or underground storage facility solely to deliver natural gas or the constituents of natural gas or liquefied natural gas:

1. To a liquefied natural gas marine terminal;
2. From a liquefied natural gas marine terminal to the owner of the gas or another person on behalf of the owner of the gas;
3. That is acquired, liquefied, or sold by the person as necessary for the operation or maintenance of its facility that is excluded as a gas utility under this section; or
4. That has been stored for export.

This section does not confer the power of eminent domain to a pipeline or underground storage facility excluded as a gas utility under this section. This section does not create an exemption to the applicability of a pipeline safety requirement provided under this chapter or a penalty for a violation of such a requirement.

Chapter 181 of the Texas Utilities Code contains the following provisions on eminent domain by utility pipelines:

1. Section 181.004 – A gas or electric company has the right to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation.
2. Section 181.007 – A gas or electric corporation has the power to own, hold, or use land, a right-of-way, an easement, a franchise, or a building or other structure as necessary for the purpose of the corporation.

However, the Texas Utilities Code only applies to the electric and telecommunications industries. Section 181.021 indicates that a gas utility must be engaged in the business of gas distribution for public consumption and not for high pressure gas transmission.

The requirements in the Texas Utilities Code can be summarized as follows:

1. A gas pipeline or underground gas storage facility that delivers gas to a LNG terminal is not considered to be a gas utility and cannot exercise the power of eminent domain.
2. A gas pipeline or underground storage facility involved with exporting of natural gas does not provide any “public use” for citizens of the USA of the natural gas.

**Other Texas Eminent Domain Provisions**

Title 10, Subtitle E, Chapter 2206, Subchapter A of the Texas Government Code covers limits on the purpose and use of eminent domain to acquire property. Section 2206.001 applies to the use of eminent domain by private parties.

A government or private entity may not take private property through the use of eminent domain if the taking:

1. Confers a private benefit to a private party (such as a pipeline company) through the use of the property.
2. Is merely a pretext on “public use” to confer a private benefit to a particular private party.
3. Is not for a “public use” of the natural gas.

**Natural Resources Code, Title 3, Subtitle B, Chapter 91**

The Texas Natural Resources Code (NRC) in Title 3, Subtitle B, Chapter 91 on activities of and powers of the Railroad Commission of Texas (Texas RRC) includes the following relevant information related to pipelines and landowner rights:

1. To prevent pollution of State waters, the Railroad Commission of Texas (Texas RRC) shall adopt and enforce rules and orders and may issue permits relating to the production of oil and gas including:
   1. Activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or re-pressuring plants.
   2. Activities associated with any underground natural gas storage facility (see 91.173 of NRC).
   3. Activities associated with any underground hydrocarbon storage facility (see 91.201 of NRC).
   4. Activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil and gas prior to the refining of such oil, or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel.
2. The Texas RRC shall adopt rules to establish groundwater protection requirements for operations that are within the jurisdiction of the Texas RRC, including requirements relating to the depth of surfacing casing for wells.
3. The Texas RRC is directed to employ additional personnel necessary to administer this subchapter and related laws and rules and orders adopted by the Texas RRC.
4. An entity that performs activities within the jurisdiction of the Texas RRC shall file an organization report with the Texas RRC and shall execute and file with Texas RRC a bond, letter of credit, or cash deposit.
5. If oil and gas wastes are causing or likely to cause the pollution of surface or subsurface water, the Texas RRC may use money in the oil and gas regulation fund to conduct a site investigation or environmental assessment to control or clean up the oil and gas wastes.
6. The Texas RRC may issue a rule for a risk assessment guide for the following (see 2001 acts of the 77th legislature):
   1. Conducting site investigations and assessments and
   2. Controlling and cleaning up oil and gas wastes and other substances and materials.
7. If the Texas RRC finds that an underground gas storage facility is in the public interest, the underground gas storer has the right to condemn all the underground storage area and any surface area required for the use and enjoyment of the storage facility (see Section 91.180).
8. In the event there are remaining reserves of native gas in the underground storage facility and a dedicated purchaser and storer are unable to agree on an equitable settlement of rights to the native gas, both parties may apply to the Texas RRC for an adjudication on the native gas. The Texas RRC will direct a settlement that does not interfere with the public benefits from operation of the storage facility. (Unfortunately, the property owner is not mentioned if there is not native gas purchase.)
9. Texas RRC shall supervise or monitor the construction, operation, maintenance, and closure of underground storage facilities.
10. Texas RRC shall establish minimum standards regulating the creation, operation, maintenance, and abandonment of underground natural gas and hydrocarbon storage facilities.
11. Texas RRC may by rule require a permit by a person who creates, operates, maintains, or abandons an underground hydrocarbon storage facility.
12. Texas RRC does not have jurisdiction over a storage facility that is part of an interstate gas pipeline facility as defined by the U.S. Department of Transportation (DOT) and subject to Title 49 CFR Part 192.
13. The owner or operator of any oil or gas well subject to jurisdiction of the Texas RRC shall secure from the Texas RRC a certificate showing compliance with the NRC and Texas RRC’s rules.

The Texas RRC authorizations and jurisdictions in the Texas NRC related to landowner’s rights and pipeline eminent domain are summarized as follows:

1. The primary role of the Texas RRC under the NRC is to adopt and enforce rules to prevent pollution of surface and subsurface water due to oil and gas production related activities.
2. “These oil and gas production related activities” include storage, handling, gathering, transportation, or distribution of oil and gas prior to refining of oil and gas or prior to use as a fuel.
3. Texas RRC is required to adopt and enforce rules and orders related to transportation of oil and gas up to the point of refining of oil and gas.
4. Texas RRC is required to adopt and enforce rules and orders related to the transportation of gas to a manufacturing process or as a residential or industrial fuel.
5. Texas RRC shall adopt rules to establish groundwater protection requirements within the Texas RRC’s jurisdiction.
6. Texas RRC shall employ additional personnel required to administer the rules and orders adopted by the Texas RRC.
7. If oil and/or gas waste are causing or likely to cause pollution of surface or subsurface water, the Texas RRC is authorized to conduct a site investigation and environmental assessment and control and/or clean up oil and gas wastes.
8. The Texas RRC is authorized to issue a rule and guide on:
   1. Conducting site investigations and assessment,
   2. Controlling and cleaning up oil and gas wastes, and
   3. Controlling and cleaning up other substance and materials released into the environment.
9. The Texas RRC is authorized to determine if an underground natural gas or other hydrocarbon storage facility application at a specific location is in the “public interest”.
10. If an underground storage facility is determined by the Texas RRC to be in the “public interest”, the right of eminent domain will be granted by the Texas RRC to the party proposing to construct and operate such a facility for their “use and enjoyment”.
11. If there is native gas under the properties where the underground storage facility is to be constructed, the owner(s) of the native gas cannot rely on the Texas RRC to protect his interest. He has to protect his interests through the courts.
12. The Texas RRC is required to supervise or at least monitor the construction, operation, maintenance, and closure of each underground gas or other hydrocarbon storage facility.
13. The Texas RRC does not have jurisdiction on underground storage facilities that are part of an interstate gas pipeline facility as defined by the U.S. DOT; however, the U.S. DOT does not have a definition of an interstate gas pipeline facility or any regulations on underground natural gas storage facilities.

Findings and opinions on the Texas RRC’s compliance with the Texas NRC include:

1. Texas RRC has not adapted comprehensive rules to prevent pollution of water by all pipelines.
2. Texas RRC has not accepted jurisdiction of and adoption of rules for all gathering lines.
3. Texas RRC does not enforce the regulatory rules to define the end of gathering lines and beginning of transmission pipelines and trunklines.
4. Texas RRC performs few comprehensive audits of pipeline operating and maintenance activities.
5. Texas RRC performs few comprehensive investigations of pipeline incidents and failures.
6. Texas RRC has not passed any comprehensive rules for protection of groundwater from crude oil and other petroleum pipeline leaks and ruptures.
7. Texas RRC has few technically qualified personnel involved with their responsibilities to adopt and enforce all pipeline related regulations.
8. Texas RRC provides few proactive activities on pipelines to protect the health, safety of, and welfare of landowners and other people in Texas.
9. Texas RRC seldom performs investigations and assessments of spills caused by pipelines.
10. Texas RRC has few people assigned to pipeline matters outside of offices in Austin, Texas.
11. Texas RRC is seldom involved in cleaning up substances released from pipelines.
12. Texas RRC has no published rules to determine if a specific application for an underground storage facility is in the “public interest”.
13. The determination of whether a specific underground storage facility is engaged in “intrastate commerce” or “interstate commerce” cannot be made without consideration of the pipelines connected to the storage facility.
14. The determination of whether a specific pipeline is engaged in “intrastate commerce” or “interstate commerce” cannot be determined without consideration of the sources and final destination of fluids transported in each pipeline.
15. The determination of whether a specific underground storage facility is in the “public use and interest” cannot be adequately determined without consideration of the “public use and interest” of connecting pipelines.
16. The determination of whether a specific underground storage facility is in the “public use and interest” cannot be determined without consideration of the sources and final destinations of fluids stored in underground facilities.
17. Texas RRC does not supervise or comprehensively monitor the construction, operation, maintenance, and closure of each underground storage facility.
18. The determination of whether a specific transportation and/or storage facility is in “intrastate commerce” or “interstate commerce” can be complex and requires considerable research and analyses of relevant data.
19. Texas RRC depends on the determinations by the pipeline and underground storage owners to determine whether a facility is in “intrastate commerce” or “interstate commerce”.
20. Texas RRC depends on the determination of “public use and interest” provided by the underground storage owners to approve a storage project and the granting of the power of eminent domain.
21. Texas RRC does not consider the adverse effects of gas transmission pipelines and underground storage facilities.
22. Texas RRC does not have the authority to review and approve proposed pipeline projects based on need for “public use and value”.

**Title 5, Subtitle C on Texas Air Quality and Chapter 82 on the Clean Air Act**

Texas policy and purpose of this chapter are to:

1. Safeguard the state’s air resources from pollution and emission to protect public health, general welfare, and physical property.
2. This chapter is to be rigorously enforced by the Texas Commission on Environmental Quality (TCEQ) through expeditious enforcement actions.

The general powers and duties of the TCEQ include:

1. Administer this chapter,
2. Establish the level of quality to be maintained in the state’s air,
3. Control the level of quality of the state’s air, and
4. Oversee compliance with the Federal Clean Air Act.

Subchapter C of Chapter 82 covers permits to:

1. Construct a new facility or modify an existing facility that may emit air contaminants.
2. Construct and operate reciprocating internal combustion engines that are part of processing, treating, compression, or pumping facilities connected to or part of a gathering or transmission pipeline.
3. Construct and operate any natural gas engine or turbine used in combined heating and power activities.

The TCEQ is empowered to issue a standard permit for new or existing similar facilities. Rules for a standard permit are allowed to include a requirement for a setback or buffer zone from other property or structure as a condition of the permit.

The TCEQ may issue a permit for new and existing oil and gas facilities in matters dealing with only air quality:

1. Crude petroleum and natural gas facilities,
2. Natural gas liquids facilities,
3. Crude petroleum pipelines,
4. Refined products pipelines, and
5. Natural gas transmission and distribution pipelines.

In considering the issuance of any permit to construct or modify a facility within 3,000 feet of a school, the TCEQ shall consider possible adverse short-term and long-term effects of air contaminants or nuisance odor from facility on the individuals attending the school.

Findings and opinions on the TCEQ’s limited regulatory authority include:

1. The State of Texas has no agency with overall environmental responsibility to enforce the Federal rules of the U.S. EPA.
2. The State of Texas has no agency with overall responsibility to protect the public safety, public health, public welfare, physical property, physical environment, and wild life in Texas.
3. The State of Texas has no agency with authority and resources to wisely use the resources and knowledge of the U.S. EPA to protect the citizens, property, and environment of Texas.
4. The TCEQ has not been granted adequate authority by the Texas Legislature to protect the citizens, property, and environment of Texas.
5. The “turf battles and wars” of Federal and State agencies often create gaps in governmental oversight of their functions.
6. Texas RRC and TCEQ jurisdictional memo by the Texas Legislature leaves gaps in health, safety, and environmental protection of landowners and other citizens of Texas.

**Railroad Commission of Texas (Texas RRC) Guide on Eminent Domain and Condemnation**

This guide is supposedly provided by the Texas RRC, as a public service, on information about pipeline companies in Texas and their powers of eminent domain. The Texas RRC staff are prohibited from providing legal advice or interpretation of laws of private individuals. Information in this Texas RRC guide includes:

1. However, a pipeline operator must apply for and receive a Texas RRC T-4 permit to operate a pipeline. The T-4 permit is needed by the Texas RRC to know certain information about the pipeline and whether the pipeline is subject to the Texas RRC’s jurisdiction as an intrastate pipeline.
2. The only pipelines that do not require a T-4 permit to operate are production flow lines that never leave an oil or gas lease and gas distribution pipelines.
3. T-4 permits require the pipeline operator to indicate whether the pipeline will be a common carrier, gas utility, or private pipeline.
4. Generally speaking, common carrier pipelines in Texas have a statutory right of eminent domain.
5. A common carrier pipeline transporting natural gas for others is considered to be a “public utility” and also has the power of eminent domain.
6. The Texas RRC does not have the authority to determine which pipelines are common carriers or gas utilities.
7. The Texas RRC does not have any authority to regulate pipelines with respect to the exercise of their eminent domain powers.
8. The Texas RRC can inform the public on the reported status of a pipeline as either a gas utility, common carrier, or private carrier.
9. For gas pipelines, the Texas RRC has no minimum setback requirement.
10. Hazardous liquids pipelines such as petroleum that are within 50 feet of a structure must be buried at least four (4) feet.

Information in the Texas RRC’s guide on pipeline eminent domain can be summarized as follows:

1. The Texas RRC has no regulatory authority on pipeline eminent domain matters.
2. The right of eminent domain is generally restricted to common carriers. Natural gas common carrier pipelines are referenced to as “gas utilities”.
3. There is no Texas regulatory agency that regulates and enforces pipeline eminent domain activities.
4. The Texas RRC does not have any specific regulatory authority to establish the siting or location requirements of pipelines.
5. The State of Texas has no rules or regulations to address a landowner’s rights to their property and limit or control the eminent domain activities of pipeline operators.
6. The State of Texas has no rules or regulations to follow up on Texas RRC T-4 permits or whether a pipeline operator declared the pipeline as a common carrier or private carrier.
7. According to the Texas RRC, landowners are left to defend their rights as landowners from the potential aggressive acts of pipeline operators.
8. Texas laws on property rights do not address the health and safety of landowners.

**TCEQ and Texas RRC Division of Jurisdiction**

The TCEQ and Texas RRC have a memorandum of understanding from the Texas Legislature that attempts to establish jurisdictional limits between these two agencies. This memo of understanding appears in the Texas Administrative Code as Title 16, Part 1, Chapter 3 as Rule 3.30.

This memo of understanding is required to establish a division of jurisdiction between the TCEQ and Texas RRC “over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil and gas”. In general, the Texas RRC is granted jurisdictional authority over oil and gas exploration, drilling, production, gathering pipelines, processing of produced natural gas, treatment of produced natural gas, pipeline transportation of crude oil to refineries, pipeline transmission of consumption quality natural gas, and distribution of consumption quality natural gas.

The TCEQ has general jurisdiction over waste from oil refining, pipeline transportation of refined products, transportation of crude oil and natural gas including natural gas liquids by railcar, tank truck, barge, or tanker. Since hydrogen sulfide is considered an impurity in crude oil and natural gas, by the time natural gas is transported in trunklines for consumption and industrial use, the hydrogen sulfide level is low. Therefore, the TCEQ has little or no specific jurisdiction of hydrogen sulfide issues involved with natural gas.

Findings and opinions with TCEQ and Texas RRC memo of understanding by the Texas Legislature include:

1. This memo deals with regulatory authority over waste materials which includes solids, liquids, and gases, apparently, as they exist at atmospheric pressure.
2. In Texas, the Texas RRC has general jurisdictional authority over water based pollution which includes solid and liquid wastes once they are released into the environment.
3. In Texas, the TCEQ has general jurisdictional authority over waste materials in the air.
4. However, this memo by the Texas Legislature is not consistent with this division of authority and responsibility.
5. Texas RRC has jurisdiction of all types of waste, solids, liquids, and gases involved with the following activities:
   1. Oil and gas exploration, drilling, and production;
   2. Oil and gas gathering pipelines;
   3. Natural gas processing;
   4. Natural gas treatment;
   5. Crude oil pipeline transportation to refineries;
   6. Pipeline transportation of consumption quality natural gas (transmission lines); and
   7. Pipeline distribution of consumption quality natural gas.
6. TCEQ has jurisdiction of all types of waste, solids, liquids, and gases involved with the following activities:
   1. Oil refinery;
   2. Pipeline transportation of refined products;
   3. Transportation of crude oil by railcar, tank truck, barge, and tanker; and
   4. Transportation of natural gas liquids by railcar, tank truck, barge, and tanker.
7. The memo of understanding overlooked the following activities involving solid, liquid, and gaseous waste:
   1. Chemical manufacturing,
   2. Pipeline transportation of natural gas liquids such as propane, and
   3. Pipeline transportation of manufactured chemicals.
8. The memo of understanding does not address the issue of “intrastate commerce” and “interstate commerce”.
9. The memo of understanding does not address whether the authorities apply to all waste or only to hazardous waste.
10. The memo of understanding is inadequate in numerous areas.

**Scope of the Texas Pipeline Industry**

The Texas RRC website indicates that Texas has the largest pipeline infrastructure in the United States, with more than 439,711 miles of known pipelines. The largest category of pipelines are 176,000 miles of known production and gathering pipelines. However, the Texas RRC only knows of the existence of a pipeline if the pipeline company submits a T-4 permit request. If a T-4 permit request is not submitted, the Texas RRC is unaware of unreported permitted pipelines. The miles of production and gathering pipelines is likely to be more than 200,000 miles.

Permits to operate have been granted to over 4,500 different pipeline operators. Many of the 4,500 pipeline operators are oil and gas producers and gathering pipeline operators. However, the Texas RRC continues to exclude production lines and gathering lines from any form of regulation for safety of the public or environmental protection.

The pipelines in Texas transport about 2.2 million barrels a day of crude oil from Texas producers and about 20 billion standard feet of natural gas. This does not include natural gas liquids, refined products, and manufactured chemicals.

The crude oil and natural gas production in Texas generate about 40 trillion U.S. dollars per year. What chance do Texas landowners have against such a gigantic economic force? About one-third of the natural gas is consumed outside of Texas in interstate commerce according to Texas RRC records.

In Texas, there are about 187,000 leases for oil and gas in Texas. There are over 180,000 oil wells and over 89,000 gas wells in Texas. The mission statement of the Texas RRC includes “our support of enhanced development and economic vitality for the benefit of Texas”. “Enhanced development and economic vitality” are primarily related to the wealth of companies in and outside of Texas and the government of Texas. This enhanced development appears to be primary focus of the Texas RRC.

In Texas, there are thousands of oil and gas wells that produce significant amounts of hydrogen sulfide. A concentration of 500 ppm in air can kill a person in a short period of time. However, there are only 13 TCEQ air monitoring locations that monitor hydrogen sulfide in the air, mainly near populated areas. In oil and gas production areas, the monitoring and control of hydrogen sulfide in air is grossly inadequate.

Landowners with untreated natural gas in gathering pipelines are exposed to extreme dangers that are not addressed by the TCEQ and inadequately addressed by the Texas RRC through Rule 36. The eminent domain process in Texas does not address the exposure of landowners to the elevated dangers of natural gas gathering pipelines.

The Texas Constitution Article I, Section 17 prohibits eminent domain to a private entity for the primary purpose of “economic development” or enhancement of tax revenues. Texas derives considerable taxes from motor gas sales at the pump. These taxes at the pump depend on pipelines to transport refined products to marketing terminals. However, some of the laws in Texas do not bother to comply with the Texas Constitution on “public use” and granting the power of eminent domain indiscriminately to pipeline companies.

Pipelines provide the lowest cost of transportation for large volumes of fluid materials. In general, pipelines are capable of providing the safest mode of transportation for hazardous materials. However, pipelines are regulated with a minimum single “one-size-fits-all” approach to public and environmental safety and are allowed to operate at minimum cost to maximize their profits. As stated earlier, there are no regulations for production lines and gathering pipelines.

**49 CFR Parts 192 and 195 Requirements on Public Education**

Minimum requirements on public education or public awareness requirements in Title 49 CFR Parts 192 and 195 include:

1. Each pipeline operator must develop and implement a written continuing public education program that follows the guidance in American Petroleum Institute Recommended Practice 1162.
2. The operator’s program shall include an assessment of the unique attributes and characteristics of the operator’s pipeline and facilities.
3. The program must specifically include provisions to educate the public, appropriate government organizations, and persons engaged in excavation related activities on:
   1. Use of a one-call excavation notification system and other damage prevention activities,
   2. Possible hazards associated with unintended releases from a gas pipeline facility,
   3. Physical indications that such a release may have occurred,
   4. Steps that should be taken for public safety in the event of a gas pipeline release, and
   5. Procedures for reporting such an event.
4. The program must include activities to advise affected municipalities, school districts, businesses, and residents of pipeline facility locations and the public education information.

Although required by Federal or State regulations, a pipeline should be required to prepare and submit to the education information to the public before a pipeline begins eminent domain activities and before construction and operation. This would be helpful for each landowner to know in determining the potential adverse effects to his remaining property due to the presence of a dangerous pipeline. EPA 40 CFR 370 covers the definitions of a hazardous materials.

**Title 49 CFR Part 192 on Emergency Response to Gas Pipeline Releases**

Section 192.615 on emergency response plans requires each pipeline operator shall establish written procedures to minimize the hazard resulting from a gas pipeline emergency caused by a leak or rupture of the pipeline. These procedures shall at least include:

1. Receiving and identifying notices of events which require immediate response by the pipeline operator.
2. Establishing and maintaining adequate communication with appropriate fire, police, and other public officials.
3. Providing a prompt and effective response when aware of each pipeline emergency at least including:
   1. Gas detected in a building,
   2. Gas detected near a building,
   3. Fire located near or involving a pipeline facility, and
   4. Explosion near or involving a pipeline facility.
4. Emergency shutdown and pressure reduction in any segment of the operating pipeline necessary to minimize hazards to life and property.
5. Providing personnel, equipment, tools, and materials as needed at each emergency response site.
6. Actions toward protecting people first, then property.
7. Making safe any actual or potential hazard to life or property.
8. Notifying fire, police, and public officials of emergencies and coordinating with them responses to gas pipeline emergencies.

Comments on compliance with the above minimum regulatory requirements include:

1. If a pipeline is susceptible to a rupture, compliance with the above on a prompt and effective response.
2. Item No. 7 above on making safe any actual or potential hazard requires a pipeline operator to lower the maximum operating pressure of a gas transmission pipeline to a level that will prevent a propagating rupture. Only leaks should be allowed in gas transmission pipelines and these releases must be responded to as specified in Section 192.615.

**Interstate vs. Intrastate Transportation**

U.S. Department of Transportation (DOT) Title 49 CFR Part 390 on Federal Motor Carrier Safety Regulations defines interstate and intrastate commerce as follows:

1. Interstate commerce means trade, traffic, or transportation in the United States:
   1. Between a place in a State and a place outside of such State (including a place outside of the United States);
   2. Between two places in a State through another State or a place outside of the United States, and
   3. Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.
2. Intrastate commerce means any trade, traffic, or transportation in any State which is not described in the term “interstate commerce”.

Title 49 CFR Parts 190, 191, and 192 do not include definitions of interstate and intrastate. Section 192.1 indicates the scope of 49 CFR Part 192 the regulations “prescribe minimum safety requirements for pipeline facilities and the transportation of gas, including pipeline facilities and the transportation of gas within the limits of the Outer Continental Shelf”. *Transportation of gas* is defined to mean the gathering, transmission, or distribution of gas by pipeline or the storage of gas in or affecting interstate or foreign commerce. This definition applies to the movement or transportation of gas in interstate or foreign commerce, not the physical locations of pipeline facilities.

The Federal Energy Regulatory Commission (FERC) in their Glossary defines interstate commerce and intrastate commerce as follows:

1. *Interstate* *commerce* – Sales where transportation of natural gas, oil, or electricity crosses state boundaries. Interstate sales are subject to FERC jurisdiction.
2. *Interstate commerce* – An interchange of goods or commodities which involves transportation between states.
3. *Intrastate* – Sales where transportation of natural gas, oil, or electricity occurs within a single state and do not cross state boundaries. Intrastate sales are not subject to FERC jurisdiction.

Other definitions appearing in FERC’s Glossary include:

1. *Eminent domain* – Congress has established that natural gas certificates and hydropower licenses issued by FERC also convey the power of eminent domain. Eminent domain is to be used as a last resort if a landowner and the project proponent cannot reach agreement on the compensation for use or purpose of property required by the property. The project proponent is still required to compensate the landowner for the use or purchase of the property, and for any damages incurred during construction. However, the level of compensation would be determined by a court according to state law.
2. *Certificate of public convenience and necessity* – A certificate issued by FERC that allows the recipient to engage in the transportation and/or sale for resale of natural gas in interstate commerce or to acquire and operate facilities needed to accomplish this.
3. *Gathering line* – Pipelines, generally small in diameter, used to transport oil or gas from the well to a processing facility or a mainline pipeline.
4. *Transmission* – Moving bulk energy products from where they are produced or generated to distribution lines that carry the energy products to customers.
5. *Distribution* – For natural gas, the act of distributing as from the city gate (valve) or plant to the customer.
6. *Environmental Assessment* – An environmental assessment (EA) evaluates the consequences of a proposed action on the environment and recommends measures to minimize any potential adverse effects. An EA is prepared when the environmental scoping process has determined that the project would not significantly affect the quality of the human environment.

Other FERC definitions of interstate and intrastate commerce also include:

1. *Interstate pipeline* – A pipeline or that part of a pipeline that is used in the transportation of hazardous liquids or carbon dioxide in interstate or foreign commerce. (FERC indicates this definition is in 49 CFR Part 195, but it is not.)
2. *Interstate pipeline* – A natural gas pipeline company that is engaged in the transportation, by pipeline, of natural gas across state boundaries, and is subject to the jurisdiction of FERC under the Natural Gas Act.
3. *Intrastate pipeline* – A natural gas pipeline engaged in the transportation, by pipelines, of natural gas not subject to the jurisdiction of FERC under the Natural Gas Act.
4. *Intrastate pipeline* – A pipeline or that part of a pipeline to which 49 CFR 195.2 applies that is not an interstate pipeline.
5. *Intrastate pipeline* – Travel within the same state.
6. *Intrastate commerce* – Any trade, traffic, or transportation in any State which is not described in the term interstate commerce.

Many, and likely most, of the petroleum and natural gas pipelines in the United States are interconnected to pipelines that serve both interstate and intrastate pipelines. The petroleum or natural gas from various states are intermixed in these pipelines and serve both interstate and intrastate markets. Therefore, the distinction between “interstate commerce” and “intrastate commerce” cannot be clearly determined in many, and likely most, pipelines because you cannot “slice and dice” mixed fluids in a pipeline. Fluids in a pipeline cannot be segregated for shipping and commercial purposes.

**Title 49 CFR Part 195 Appendix A**

Appendix A to Title 49 CFR Part 195 covers the delineation between Federal and State jurisdiction and is a statement of U.S. Department of Transportation policy and interpretation of FERC rules on petroleum pipelines. Information in Appendix A includes:

1. If a pipeline company operates a pipeline from point A to point B and both points are located within the same state, the pipeline is intrastate regardless of whether a tariff filing was made with FERC for the pipeline transportation.
2. If a pipeline company operates a pipeline from point C to point D in different states, the pipeline is interstate regardless of whether a tariff filing was made with FERC.
3. If a pipeline company operates a pipeline from point A and point B in the same state and is connected to an interstate pipeline with facilities located in different states, the U.S. DOT will consider the pipeline from point A and B to be interstate if a tariff filing for point A to point B was made with FERC.
4. Same as example 3, but a tariff filing for point A to point B was made with a State agency, the pipelines from points A and B is intrastate commerce.
5. If a pipeline company operates a pipeline from point C to point D in different states and a lateral pipeline is connected to the pipeline in the same state or point C or point D, the pipeline will be interstate only if a FERC tariff filing for transportation through the lateral.
6. If a pipeline originates on the Outer Continental Shelf, the pipelines will be interstate regardless of whether a FERC tariff filing was made.
7. If a pipeline company is constructing a pipeline from point C in point D in a different state, the pipeline is interstate.

**Pipeline Public Use Analysis**

The closer a pipeline is located to the ultimate consumer or user of its contents the more obvious is its value to the public. The pipeline facilities have little or no value to the public after construction of the pipeline is complete. The FERC also uses the term “public convenience” in determining the right pipeline right to condemn. Roadways are easy to define public use and convenience. However, what if a pipeline is transporting a highly dangerous substance such as hydrogen sulfide?

Safety based risk analysis should be considered in granting a pipeline the right of eminent domain. The value of public use and convenience should be weighed against the risk of harm to landowners and the general public. Even FERC, in its evaluation of prospective pipeline proposals, is specifically required to consider public safety issues.

FERC’s Guidance Manual for analyses of areas along a proposed pipeline route require separate reports on the potential impacts on the alternate usage of the property, environmental quality, public safety, human health, personal enjoyment, and income production. In general, the presence of a pipeline transporting hazardous materials should affect the uses of the property and is likely to diminish the remaining value of the property.

The risks to public safety, health, and property are primarily based on:

1. Toxicity of the transported substances,
2. Flammability of the transported substance,
3. Explosiveness of the transported substance,
4. Compressed or potential energy in the transported substance,
5. Potential to rupture,
6. Pipeline diameter,
7. Pipeline internal pressure,
8. Pipeline material and its fracture resistant properties,
9. Corrosive exposure to the pipeline, and
10. Excavation and farming activities near the pipeline and the pipeline’s depth.

Neither FERC nor State Courts has access to or technical knowledge on these issues. Therefore, rather than trying to evaluate these issues on the potential effects of a pipeline project or part of a project on the landowners and the public, they ignore these factors at the expense of public safety and environmental protection. They allow pipeline companies to address these issues.

However, the evaluation of public use, public interest, public welfare, etc. should consider the negative impacts of each project that wishes to use the powers of eminent domain. Many entities such as fire departments, police departments, educational institutions, hospitals, public water and sewer utilities, highways, and airports generally provide a positive or net value to public interests and public use. But how about nuclear electric power plants, chemical plants, or pipelines transporting gas that includes hydrogen sulfide? How about large trucks that carry nuclear waste, chlorine, propane, and additional hazardous materials? The safety and health concerns of these dangerous materials should reduce any valid assessment on the public interest or public benefits of transporting these materials. For some materials such as hydrogen sulfide, there is little or no public use for that material. For some materials used as feedstock for petrochemicals, there is not direct use by the public, but public value may be realized through the plastics and other materials used by the public.

For many projects granted the right of eminent domain, the risks to the public and/or the environment cannot be totally eliminated, but the risks can be minimized with proper engineering, use of technology, and knowledge on pipeline integrity issues. Unfortunately, most Federal and State safety and health related regulations are based on minimum protections from hazards and provide an inadequate degree of protection of the public living, working, and playing near facilities handling these dangerous materials through pipeline facilities.

Government regulations are sometimes stated to prescribe actions to be taken to protect the public and/or environment, but not how to perform the activity in detail. The “truth is in the details” as stated in the old saying. Because of generally stated, vague requirements, proactive enforcement is very limited. The penalties for noncompliance are seldom if ever adequate to motivate operators and owners to go beyond the minimum stated requirements, because this may reduce their profits or make them uncompetitive with their rivals. Regulatory enforcement is seldom adequate and tends to give a guilty party an advantage.

Findings and opinions on public use analyses are as follows:

1. FERC does not have a published, comprehensive procedure to specifically determine if a proposed natural gas project is only involved with “interstate and/or foreign commerce”.
2. Many natural gas transportation systems of pipelines and storage facilities transport natural gas that is involved in both “interstate commerce” and “intrastate commerce”.
3. How does FERC decide which natural gas projects are subject to their jurisdiction and which ones are not subject to FERC’s jurisdiction?
4. Apparently, FERC assumes that any natural gas project sponsor that requests an approval from FERC has determined the interstate vs. intrastate commerce issue. Why?
5. FERC has no published, comprehensive procedure or process to determine the value of “public convenience and necessity” of each proposed natural gas project or each parcel of private property.
6. FERC has no published, comprehensive procedure or process to determine the diminished value effects of each proposed natural gas project on each parcel of private property.
7. FERC considers each natural gas project as a whole and does not analyze individual parcels of property. This is an unfair comparison for all individual parcels of land.
8. FERC procedures are not designed to protect private holders of land as required by the fifth and fourteenth amendments of the U.S. Constitution.

**Responsibilities of the Landowner with a Pipeline on His Property**

Property owners, developers, and real estate agents generally have an “ordinary care” responsibility to communicate hazardous conditions on their property to others that inquire on renting, leasing, purchasing, or otherwise using the property. Courts have generally upheld this landowner responsibility when knowledge of a potentially dangerous condition exists.

Chapter 5 of the Texas Property Code in Subchapter A in Section 5.008, Sellers Disclosure of Property Condition, requires:

1. A seller of residential real estate comprising not more than one dwelling unit located in Texas shall give to the purchaser of the property a written notice, which contains as a minimum, all the items prescribed by this section.
2. The notice is a disclosure of seller’s knowledge of the condition of the property.
3. Specific items listed in Section 5.008 include:
   1. Natural gas lines,
   2. Liquid propane facilities,
   3. Hazardous or toxic waste,
   4. Asbestos, and
   5. Any condition on the property which materially affects the physical health or safety of an individual.

Section 5.013, Seller’s Disclosure of Conditions under Surface of Unimproved Real Estate, requires:

1. A seller of unimproved real property to be used for residential purposes shall provide to the purchaser of the property a written notice of a pipeline including transportation of natural gas, natural gas liquids, synthetic gas, liquefied petroleum gas, petroleum, petroleum product, or a hazardous substance.
2. The notice must state the information to the best of the seller’s belief and knowledge as of the date of the notice.
3. This section applies to any seller of unimproved real property, including a seller who is the developer of the property and who sells the property to others for resale.

This requirement to communicate potentially dangerous conditions should require the property owner to have a reasonable level of knowledge on the threats to public and environmental safety to the landowner and those living and working in the vicinity of each pipeline. The landowner can require the pipeline company to carry liability insurance in case of negligence by the pipeline company. However, how will any insurance requirement be enforced? What if the pipeline is sold to another company? What if the pipeline begins to transport other materials than previously committed to in the initial easement negotiations?

In Texas, once a pipeline company is granted the right to condemn a specific parcel of property, the landowner has little or no help from the government. The county commission groups are disbanded and go their merry way. There is no one left to support the landowner in his dealings with the pipeline company unless he hires an attorney and initiates legal action on his own which has little precedence for success.

**Summary of Texas Pipeline Eminent Domain Provisions**

The provisions of Texas law on pipeline eminent domain are unorganized, scattered, and piece meal. Compliance with Texas law is challenging and inconsistent between the Texas law documents. Someone needs to organize and cleanup this mess.

The rights of landowners have been sacrificed for the oil and gas industry by the Texas Legislature and in defiance of the United States Constitution and Texas Constitution.

Current landowner and pipeline eminent domain provisions in Texas should include:

1. No person shall be deprived of property without the due process of law.
2. Private property shall not be taken for public use without just compensation.
3. No state shall make or enforce any law which shall reduce the privileges of citizens of the United States.
4. No state shall deprive any person of property without due process of law.
5. No state shall deny to any person within its jurisdiction equal protection of the laws.
6. The right to take property by eminent domain for the primary purpose of economic development is prohibited.
7. The right to take property by eminent domain for the purpose of enhancement of tax revenues is prohibited.
8. The Texas Legislature may enact a law granting the power to any specific entity with a two-thirds vote in each legislative house.
9. Property can only be taken by eminent domain for a public need and use.
10. A private entity such as a pipeline cannot take private property through the use of eminent domain if the taking:
    1. Confers a private benefit to a private party through the use of the property,
    2. Is a pretext on public use to confer a private benefit to a particular private party, or
    3. Is not for public use.
11. A gas distribution pipeline company that transports gas for only public consumption has the right of eminent domain.
12. A common carrier pipeline that transports only crude oil within the state of Texas has the power of eminent domain if:
    1. All the crude oil is produced and purchased in Texas in accordance with the laws of Texas.
    2. The property being taken is part of and necessary for operation of the pipeline system.
    3. Pipeline does not have limited use for:
       1. Oil wells of the pipeline’s owner;
       2. Pump, metering, storage, or terminal stations of the pipeline’s owner;
       3. Crude oil treating facilities of the pipeline’s owner;
       4. Underground hydrocarbon storage facilities of the pipeline’s owner; and/or
       5. Chemical manufacturing and petroleum refineries of the pipeline’s owner.
13. Pipelines transporting coal, carbon dioxide, or hydrogen have the right of eminent domain in Texas.
14. Natural gas pipelines and gas underground storage facilities that deliver natural gas to a liquefied natural gas facility or has been stored for export have not been granted the power of eminent domain under the Texas Utilities Code.
15. Pipelines transporting natural gas, natural gas liquids, refined products, manufactured chemicals, and/or chemical manufacturing feedstock do not have common carrier status under the Texas Natural Resources Code in Texas and therefore, do not have the power of eminent domain.
16. There is no agency in Texas that reviews for approval proposed pipeline projects to determine:
    1. If the project involves intrastate commerce, interstate commerce, or both intrastate and interstate commerce.
    2. If the pipeline project involves only intrastate commerce and is subject to Texas law, whether the pipeline project qualifies for only public use, not private use.
17. The Texas RRC reviews for approval all underground natural gas and other hydrocarbons project proposals; however, the Texas RRC does not investigate:
    1. Whether the pipelines connected to the proposed underground storage project are involved with intrastate commerce, interstate commerce, or both intrastate and interstate commerce.
    2. Whether the pipelines connected to the proposed underground storage project are for public use or otherwise qualify for public necessity.
18. A proposed underground storage project cannot qualify as intrastate commerce status unless all the interconnected pipelines and other pipelines interconnect to these pipelines are all in intrastate commerce.
19. There is no Federal or State law to define the regulatory status of transportation facilities used for both intrastate and interstate commerce.
20. Because there is no Federal or State law that defines the jurisdictional status of a pipeline involved with both intrastate and interstate commerce, such a pipeline project should be subject to both State and Federal law on matters of eminent domain.
21. The vast majority of natural gas transmission and underground storage facilities in Texas are involved with both intrastate and interstate commerce and should be subject to both State and Federal jurisdiction. A memorandum of understanding between State and Federal agencies is needed.
22. The Texas RRC is the only agency in Texas where a determination of intrastate commerce or interstate commerce is feasible, because this determination should already be made for underground storage projects. Unfortunately, the Texas RRC does not presently perform this analysis for storage projects.
23. The Texas RRC has also failed to comply with the Texas Natural Resources Code in at least the following areas:
    1. Adopt and enforce rules to prevent pollution of surface and subsurface water related to storage, gathering, transportation, and distribution of oil and gas prior to refining of oil or prior to use of natural gas as a fuel.
    2. Adopt and enforce rules and orders related to all transportation activities of oil and gas up to the point of refining the oil and gas.
    3. Conduct spill site investigations and assessments on all petroleum spill sites.
    4. Clean up known oil and gas spill sites.
    5. Issue comprehensive rules and guides on conducting spill site investigations and environmental assessments and on control and/or cleanup of oil and gas wastes.
24. The TCEQ has jurisdiction to safeguard Texas air resources as needed to protect health, general welfare, and physical property. General powers and duties of the TCEQ include:
    1. Establish the level of quality to be maintained in the state’s air,
    2. Control the quality of the state’s air, and
    3. Oversee compliance with the Federal Clean Air Act.
25. When a gas pipeline leaks or ruptures, 99.9% of the pipeline’s contents are gases, not liquids, and the TCEQ should be involved with their permitting and oversight.
26. The TCEQ has no jurisdiction over pollution of the soil or water in the state of Texas. This jurisdiction is given to the Texas RRC. Landowners have little regulatory protection on surface and subsurface oil spill pollution.
27. The TCEQ is empowered to issue standard permits for new or existing oil and gas, underground storages, and pipeline facilities. Rules for standard permits are allowed to include minimum setbacks or buffer zones from other property or structures as a condition of the permit.
28. Unfortunately, the TCEQ has not issued such standard permit requirements although their permits required compliance with EPA 40 CFR Part 68 on risk management plans. EPA 40 CFR Part 68 requires analyses of worse case spills or releases of hazardous materials from oil and gas, pipeline, and underground storage facilities for risk management purposes. These worse case releases of hazardous materials can be used to estimate safe setback distances to protect the public, property, and property structures.

**Federal Natural Gas Act**

Provisions in the Federal Natural Gas Act of 1938 and amendments in 2005 involving pipeline eminent domain issues include:

1. It is hereby declared that the business of transporting and selling of natural gas for ultimate distribution to the public is in the “public interest”.
2. Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
3. The provisions of this Act shall apply to:
   1. The transportation of natural gas in interstate commerce;
   2. The sale in interstate commerce of natural gas for resale for ultimate consumption for domestic, commercial, industrial, or any other use;
   3. To natural gas companies engaged in such transportation or sale;
   4. To the importation or exportation of natural gas in foreign commerce; and
   5. To persons engaged in such importation or exportation.
4. The provisions of this Act shall not apply to:
   1. Any other methods transportation or sale of natural gas,
   2. The local distribution of natural gas or to the facilities used for such distribution,
   3. The production or gathering of natural gas, and
   4. Any person engaged in the transportation in interstate commerce provided that the rates and service of such person and facilities used by such persons are subject to regulation by a state commission.
5. Definitions used in the Act include:
   1. *Interstate commerce* means commerce between any point in a State and any point outside thereof.
   2. *Interstate commerce* also means commerce between points within the same State, but through any place outside another State in the U.S.A.
6. FERC shall promulgate regulations on the National Environmental Policy Act of 1969.
7. No natural gas company or person shall undertake the construction or extension of any new transportation facilities or operations of such facilities unless there is in force a certificate of “public convenience and necessity” issued by FERC authorizing such acts or operations.
8. However, if any natural gas company has continued to be engaged in transportation of natural gas over the route or routes approved previously by FERC, FERC shall issue a certificate of public convenience and necessity without requiring proof that public convenience and necessity will be served by such operation.
9. FERC may issue a temporary certificate of public convenience and necessity without notice of a hearing under emergency conditions to assure maintenance of adequate service to particular customers.
10. FERC may issue a certificate to any qualified applicant authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by an application to FERC if the applicant is:
    1. Able and willing properly to do the acts and perform the services proposed;
    2. To conform to the provisions of the Act and requirements, rules, and regulations of FERC; and
    3. The proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate is or will be required by the present and future public convenience and necessity.
11. FERC, after a hearing, may limit the service areas to which project authorization request is made.
12. When a holder of a certificate of public convenience and necessity cannot agree with an owner of property to acquire the necessary right-of-way to construct, operate, and maintain a pipeline or pipelines for natural gas and other property required for compressor stations and other pipeline facilities, the holder of the certificate may acquire the rights-of-way and/or land by the exercise the right of eminent domain. The amount of compensation to the landowner will be decided by a Federal Court or State Court where the property is located. Federal Courts only have jurisdiction when the amount claimed by the property owner exceeds $3,000.
13. FERC shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purpose of complying with the National Environmental Act of 1969.

Information in the Natural Gas Act of 1938 related to landowner rights can be summarized as follows:

1. In 1938, the Federal government believed the business of transporting natural gas for ultimate distribution to the public was in the “public’s interest”.
2. Federal regulation on the transportation of natural gas in interstate and foreign commerce is necessary for the “public interest”.
3. Provisions of the Act apply to transportation of natural gas in interstate commerce.
4. Provisions of the Act do not apply to:
   1. Local gas distribution,
   2. Production or gathering of natural gas, and
   3. Transportation in intrastate commerce by an interstate transporter if the intrastate commerce transportation is subject to regulation of a State commission.
5. Intrastate commerce means commerce and/or transportation within locations in the same state.
6. FERC is supposed to promulgate regulations on the National Environmental Policy Act, but has failed to do so.
7. No pipeline involved in interstate commerce can be constructed, extended, or operated unless the pipeline’s owner makes an application for and receives a certificate of public convenience and necessity from FERC for the specific pipeline project.
8. For new pipelines along new routes, the pipeline operator must provide proof of public convenience and necessity.
9. For pipeline additions in a route or area where the pipeline company was previously issued a certificate of public convenience and necessity, the pipeline company must submit an application for approval of the project, but does not need to provide proof of “public convenience or necessity”.
10. FERC can issue a temporary certificate of “public convenience or necessity” during certain emergency conditions.
11. FERC must determine that a pipeline company requested a certificate of “public convenience or necessity” is qualified, able, and willing to comply with the various regulatory requirements in an approved project application.
12. FERC can limit the scope of approval of any proposed pipeline project.
13. When land is seized by an eminent domain process, the amount of compensation will be determined by a State Court if the amount claimed by the landowner is $3,000 or less. If the amount claimed by the landowner exceeds $3,000, the compensation will be determined by a Federal Court.

**Federal Energy Regulatory Commission (FERC) Review of Natural Gas Projects**

The Federal Power Commission (FPC) and later, FERC, which superseded the FPC, have been empowered to review for approval or disapproval new interstate gas facility construction projects based on “public convenience and necessity”. This review process indicates the Federal government no longer supports the 1938 conclusion that natural gas transportation projects are always in the “public interest”. On February 9, 2000, FERC issued an order clarifying their policy on reviewing natural gas projects to determine “public convenience and necessity”. The steps to be taken included:

1. Determine whether the project proceeds without subsidies from their existing customers;
2. Determine whether the applicant made efforts to eliminate or minimize any adverse effects the project might have on:
   1. The existing customers of the pipeline company proposing the project;
   2. Existing pipelines in the market and their captive customers; and
   3. Landowners, communities, and environment affected by the route of the new pipeline;
3. If the proposed project will not have any adverse effects as listed in item 2 above, FERC will proceed to a preliminary determination or a final order;
4. If residual adverse effects on the three interests are identified, after efforts have been made to minimize them, then FERC will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects; and
5. FERC policy will strive to advance the development of sustainable energy infrastructure that supports economic growth, environmental protection, and other social benefits over the life of the projects.

The environmental effects considered by FERC only include initial construction activities and not the requirements of the Natural Gas Act. No consideration is given to the lasting effects of large gas compressor units that consume natural gas and potential water pollution issues. Strangely, the FERC does not require a certificate of public convenience and necessity for petroleum pipelines. FERC also does not require an Environmental Impact Statement on petroleum pipelines as frequently required for gas pipeline projects. Petroleum pipelines present both an initial environmental impact during construction and potentially greater impact during operations when leaks, spills, and ruptures occur.

The FERC policy statement on landowner rights includes the following information:

1. The Commission will approve a project where the public benefits of the project outweigh the project’s adverse impacts;
2. Among the adverse effects the Commission will consider are---the interests of the landowners and the surrounding community, including environmental impacts;
3. To what extent new facilities may affect the property of landowners on the proposed route are significant factors for the Commission to consider in weighing public benefits against adverse impacts;
4. If eminent domain proceedings are necessary to obtain rights-of-way, the landowner will receive proper compensation for such rights-of-way;
5. The compensation that a landowner would receive in such a proceeding shall be considered by the Commission in its analysis of the economic impacts on the landowner that would result from the construction of new pipeline facilities;
6. FERC policy encourages project sponsors to acquire as much of the right-of-way as possible by negotiation with the landowners, because it influences the Commissions assessment of public benefits and adverse consequences; and
7. FERC recognizes that a pipeline with a FERC issued certificate of “public convenience and necessity” has a right to exercise eminent domain to acquire the land necessary to construct and operate its proposed new pipeline when it cannot reach a voluntary agreement with the landowner.

**FERC Publication *An Interstate Natural Gas Facility on My Land, What Do I Need to Know?***

FERC has published a document titled *An Interstate Natural Gas Facility on My Land, What Do I Need to Know?* This document describes the limited rights of landowners when FERC and the natural gas pipeline industry decide to place a facility on their land. The introduction of this publication indicates FERC wants each landowner to know the following information:

1. How FERC procedures work,
2. What rights you have,
3. How the location of a pipeline or other facility is decided, and
4. What safety and environmental issues might be involved?

Landowners’ issues included in this publication include:

1. Once a gas company files an application requesting FERC to issue a certificate authorizing the construction of a of a natural gas project, the company will mail the landowners within three days a copy of this brochure.
2. If public meetings are held, you will have an opportunity to express you views and to have them considered.
3. You will have the opportunity to learn the views of others.
4. If FERC approves a project and you fail to reach an easement agreement with the gas company, access to and compensation for the use of your land will be determined by a court.
5. FERC’s project assessment of each pipeline application is supposed to be open to the public, and be designed to keep all parties informed.
6. You can write a letter to FERC to express your views on environmental issues involving the location of the facility.
7. FERC allows you to comment on the proposed project at various stages of FERC’s evaluation process.
8. You may file to become an intervenor to give you “official rights” to a legal process. You may then receive documents related to the case, materials filed by other parties, appear at hearings, and be heard by the courts if you choose to appeal FERC’s final ruling.
9. The landowner pays taxes on the right-of-way. The permanent rights-of-way is usually 50 feet wide.
10. Routine mowing or cutting of vegetation is done no more than once every three years. (This conflicts with 49 CFR Part 192 and 195 on right-of-way maintenance for pipeline patrolling.)
11. In cropland and residential areas, the right-of-way is to be maintained by the landowner.
12. FERC requirements prevail over local, county, and state laws and zoning ordinances.
13. You may build on property next to the pipeline right-of-way or pipeline gas compressor site.
14. For gas storage fields, you can build anywhere agreed to by the gas company and any state authority regulating storage well drilling.
15. All improvements on the right-of-way easement are subject to negotiation with the gas company as long as pipeline maintenance and safety are not affected.
16. The gas pipeline’s easement agreement will specify restricted use on and access the right-of-way. Gas company permission must be sought on use on and access to the right-of-way.
17. Agricultural or other issues warrant additional cover over a pipeline than the minimum requirements in 49 CFR Part 192.
18. If the gas pipeline company does not resolve landowner issues, the landowner can contact FERC’s landowner helpline.
19. A pipeline company can request FERC approval to abandon a pipeline in place. If approved, a pipeline company may continue to hold the easements and only maintain the right-of-way according to its maintenance practices.
20. A pipeline company may reissue the right to convert abandoned pipeline to another use, such as transportation of oil or refined products.
21. FERC does not require the landowner to be notified if a line is abandoned.
22. A company that owns/operates a gas storage facility cannot use the underground portion of a storage field under a landowner’s property without paying for that right. A storage lease or an easement agreement will probably be required.
23. If FERC has issued a certificate approving a storage field, FERC has concluded the storage field is needed and is in the public interest.
24. The Natural Gas Act of 1938 gives the gas company the right to ask a State or Federal Court to award the property right to the gas company through eminent domain if a FERC certificate of public need is issued.
25. Approximately fifty percent (50%) of about 500 underground gas storage facilities in the U.S.A. are under FERC jurisdiction.
26. FERC regulates LNG facilities that are connected to interstate natural gas pipelines.
27. FERC has the responsibility to evaluate and authorize LNG facilities for export. The U.S. DOE must issue an export license.
28. FERC rules limit the daytime noise level from gas transportation and storage activities to 55 decibels at any existing school, hospital, or resident.
29. FERC references U.S. DOT pipeline safety regulations on safety and fire protection issues involving gas pipeline and storage facilities.
30. Construction of natural gas facilities can commence once FERC issues a certificate and other permits are received.
31. Eminent domain can only be used for a proposed pipeline and related facilities at the exact location(s) described and only for the transportation of natural gas.
32. If a company wishes to install another natural gas pipeline under FERC jurisdiction, the company must obtain additional approval(s) from FERC.
33. Other utilities may wish to use an adjacent or overlapping easement, but they will have to obtain approval from the landowner or from another permitting authority that can grant eminent domain.
34. Land restoration shall begin as soon as the trench is backfilled and weather permits.
35. FERC has oversight in ensuring that natural gas pipelines and above-ground facilities are safety constructed and installed. Once the natural gas is flowing in the new pipeline facilities, the U.S. DOT takes over responsibility during the lifetime operation of the pipeline. (However, FERC has no standards for design, materials, construction, and testing of new and replaced facilities. What standards does FERC use to ensure gas pipeline facilities are “safety constructed” and until initial operation?)
36. FERC indicates endangered species must be protected from the effects of construction and this could affect the location of pipelines and other natural gas facilities. (How about endangered species protection during operating and maintenance activities and from leaks?)
37. A notice of intent to prepare an environmental assessment (EA) or an environmental impact statement (EIA) is issued for most major proposals. If prepared, the EA or EIS is to be sent to:
    1. Federal, State, and local agencies;
    2. Local media and libraries;
    3. Environmental groups; and
    4. Affected land owners.
38. Comments outside of FERC on the EA or EIS will be addressed in the final EIS or final order granting or denying the natural gas project application.

What landowner’s really need to know is recommended and summarized as follows:

1. The Federal Power Commission (FPC) promoted the establishment of a semi-monopoly gas transportation systems years ago to promote the use of natural gas in the U.S.A. after World War II.
2. The FPC has never been interested in safety of the public or the environment.
3. The FPC was never concerned with landowner’s rights.
4. FERC inherited the FPC philosophy and initiated gas market control policies.
5. Both FPC and FERC are primarily concerned with expanding the natural gas market. Over supply has never been indicated to be a concern of FERC.
6. FERC activities and decisions on natural gas projects prevail over local, county, and state laws.
7. FERC has no interest in regulating the potential impacts of crude oil and other petroleum pipelines involved with “interstate commerce”. However, spills from these pipelines will affect the physical environment substantially more than natural gas pipelines.
8. The potential for spills is also dependent on the design, materials, construction, and testing of all pipelines, but operations and maintenance activities including corrosion control usually have a greater effect on public safety and environmental protection.
9. There appears to be a widespread belief that natural gas pipelines transport 100% gas. However, some natural gas transmission lines and many gathering pipelines transport substantial amounts of petroleum liquids with the gas in dual phase.
10. These petroleum liquids in natural gas storage facilities tend to be trapped in storage fields unless special provisions are made to recover these liquids.
11. FERC does not fully comply with the Natural Gas Act in the area of monitoring the operations of natural gas projects to determine if they actually provide “public convenience and necessity”.

**Environmental Justice**

On February 11, 1994, Executive Order No. 12898 was issued on the subject of environmental justice. This Executive Order was intended to supplement, but not supersede Executive Order No. 12250, which required consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance.

Environmental justice is defined by the Environmental Protection Agency (EPA) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”.

The EPA indicates that environmental justice will be achieved for all communities and persons when everyone enjoys:

The same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which we live, learn, and work.

Among various non-discriminatory provisions in this new Executive Order, the following two requirements were included under Section 3-302 on human health and environmental data collection and analysis:

1. Each Federal agency, whenever practical and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have substantial human health or economic effect on the surrounding populations, where such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action.
2. Such information shall be made available to the public unless prohibited by law.

No property owner has the wealth and political power of a gas transmission pipeline company and “environmental justice” is not in effect when eminent domain is granted to such a company.

**Federal Pipeline Eminent Domain Provisions**

Findings and opinions on Federal pipeline eminent domain provisions include:

1. The Fifth Amendment of the U.S. Constitution prohibits private property from being taken for “public use” without just compensation.
2. The Fourteenth Amendment of the U.S. Constitution prohibits state and local officials from “depriving persons of life, liberty, or property without legislative authority”.
3. Courts have ruled that the power of eminent domain may be delegated by legislation to certain private entities, such as utilities and railroads when they are promoting a “valid public purpose”.
4. Courts have also ruled that “public use” in the Fifth Amendment can be equated to the public interest and public welfare.
5. Public safety, public health, morality, peace and quiet, and law and order have also been used and should always be used to determine the need for and delegation of eminent domain power.
6. Amendments to the U.S. Constitution should be enforced for facilities and activities involving both interstate commerce and intrastate commerce. This enforcement should include the prohibition of unlawful seizure of private property.
7. Environmental justice is defined by the U.S. EPA as the fair treatment and meaningful treatment of all people---with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This issue should include the rights of property owners.
8. The U.S. EPA indicates that environmental justice will be achieved for all communities and persons when everyone enjoys the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which we live, learn, and work.
9. The Natural Gas Act of 1938 and subsequent amendments include the following declarations, requirements, and information:
   1. In 1938, it is declared that the business of transporting and selling of natural gas for distribution to the public is in the “public interest”.
   2. In 1938, Federal regulation on the transportation of natural gas in interstate and foreign commerce is necessary for the “public interest”.
   3. Provisions of the Act apply to transportation of natural gas in interstate commerce.
   4. Provisions of the Act do not apply to:
      1. Local gas distribution,
      2. Production or gathering of natural gas, and
      3. Transportation in intrastate commerce by an interstate transporter if the intrastate commerce transportation is subject to regulation of a State commission.
   5. Intrastate commerce means commerce and/or transportation within locations in the same state.
   6. FERC is supposed to promulgate regulations on the National Environmental Policy Act.
   7. No pipeline involved in interstate commerce can be constructed, extended, or operated unless the pipeline’s owner makes an application for and receives a certificate of public convenience and necessity from FERC for the specific pipeline project.
   8. For new pipelines along new routes, the pipeline operator must provide proof of public convenience and necessity.
   9. For pipeline additions in a route or area where the pipeline company was previously issued a certificate of public convenience and necessity, the pipeline company must submit an application for approval of the project, but does not need to provide proof of “public convenience or necessity”.
   10. FERC can issue a temporary certificate of “public convenience or necessity” during certain emergency conditions.
   11. FERC must determine that a pipeline company requested a certificate of “public convenience or necessity” is qualified, able, and willing to comply with the various regulatory requirements in an approval project application.
   12. FERC can limit the scope of approval of any proposed pipeline project.
   13. When land is seized by an eminent domain process, the amount of compensation will be determined by a State Court if the amount claimed by the landowner is $3,000 or less. If the amount claimed by the landowner exceeds $3,000, the compensation will be determined by a Federal Court.
10. In the late 1930s, most of the natural gas from oil production was being flared or venting creating public health and environmental problems in oil producing areas.
11. In the late 1930s, natural gas had little economic value and was very cheap and very abundant.
12. Industry in the U.S.A. had a need for cheap energy to support expansion. The vast availability of cheap energy using natural gas was a “no brainer” in 1938.
13. However, the present vast availability of natural gas and electricity have significantly altered the need for new natural gas pipeline and storage projects. The “no brainer” concepts of the late 1930s, 1940s, and 1950s on using natural gas without considering potential adverse effects is no longer valid in all instances.
14. Natural gas and natural gas liquids are extremely dangerous substances when released into the human and natural environment and are capable of killing many people and creating catastrophic property loss.
15. Natural gas in flow lines and gathering lines often contain significant amounts of hydrogen sulfide which is capable of causing death in minutes with an exposure of only 500 parts per million.
16. For each interstate natural gas pipeline, a certificate of “public convenience and necessity” from FERC is required before property can be taken by condemnation.
17. For interstate petroleum pipelines and natural gas liquids pipelines, FERC has no process to grant a certificate of “public convenience and necessity” or other approval for the construction of pipelines other than those transporting natural gas.
18. For each interstate natural gas pipeline granted a certificate of “public convenience and necessity” by FERC, the landowner is required by FERC to receive “proper” compensation to the landowner if an eminent domain process is used to acquire the land or easement.
19. For an interstate natural gas pipeline granted a certificate of “public convenience and necessity” by FERC, “proper” compensation to the landowner will be determined a court, not FERC.
20. FERC’s policy on review of natural gas projects, including natural gas transmission lines and underground storage facilities, includes:
    1. Determine whether the applicant made efforts to eliminate or minimize any adverse effects the natural gas project may have on:
       1. Existing customers of the applicant;
       2. Existing pipelines in the market and their customers; and
       3. Landowners, communities, and environment affected by the route of the new pipeline.
    2. If the proposed natural gas project will not have any adverse effects as listed in item 20a above, FERC will proceed to a preliminary determination or final order.
    3. If there are residual adverse effects, as identified in item 20a above, then FERC will proceed to evaluate the natural gas project by balancing the evidence of public benefits against residual adverse effects (should include construction and operating life of the proposed project).
    4. FERC will approve a natural gas project if the perceived public benefits of the project outweigh the project’s adverse effects.
21. Unfortunately, FERC only considers adverse effects during initial construction of a natural gas project. Potential adverse effects after construction and during operations of the facility are not given consideration by FERC. FERC “passes the buck” to the U.S. DOT which does not provide information on adverse effects during operations and does not even have regulations for underground storage facilities.
22. Only the U.S. EPA can evaluate probable emissions and potential hazardous releases of natural gas from pipelines and underground storage facilities. However, natural gas project review is the primary responsibility of FERC, not the U.S. EPA. Therefore, future health and safety hazards of natural gas projects are not comprehensively analyzed.
23. Only the U.S. DOT has jurisdiction over public safety of natural gas projects; however, there are no comprehensive rules for safety of underground natural gas storage facilities and the rules for transmission pipelines are stated as being “minimum requirements”, not best practices. There is no Federal agency to evaluate potential adverse public safety impacts.
24. FERC policy indicates the agency will strive to advance the development of sustainable energy infrastructure that supports economic growth, environmental protection, and social benefits over the life of the natural gas projects. However, FERC does not publish any criteria on how this policy is achieved and analyzed with each new project.
25. FERC does not review pipeline transportation or storage projects for petroleum and other hydrocarbons.
26. FERC does not require a certificate of “public convenience and necessity” for non-natural gas projects involved with “interstate commerce”.
27. FERC is the only Federal agency with business regulatory oversight of energy related pipelines and storage facilities involved with “interstate commerce”. Why doesn’t this business oversight involve review and approval of all energy related pipeline and storage projects involved with “interstate commerce”?
28. Since FERC does not review and approve non-natural gas transportation energy projects, there is no Federal function to determine the “public convenience and necessity” of non-natural gas transportation energy projects involved in “interstate commerce”.
29. Because FERC does no review and approve non-natural gas transportation energy projects in “interstate commerce” for “public convenience and necessity”, the Federal government has no enforcement activity for the Fifth and Fourteenth Amendments to the U.S. Constitution regarding the taking of property using eminent domain.
30. To avoid complying with the “interstate commerce” provisions in the National Gas Act of 1938, FERC uses the “interstate pipeline” location criteria not “interstate commerce” to establish their jurisdiction. If a pipeline begins in one state, crosses a state line and ends in another state, it is considered by FERC to be an “interstate pipeline”. Therefore, FERC does not comply with the “interstate commerce” requirements of National Gas Act of 1938.
31. Since most pipelines are connected to numerous other pipelines, the vast majority of pipeline transportation and commerce should be considered as both “interstate commerce” and “intrastate commerce”.

**Bibliography**

Federal Energy Regulatory Commission Website

FERC Publication, *An Interstate Natural Gas Facility on My Land, What Do I Need to Know?*

Federal Execution Order 12898 on Environmental Justice

Natural Gas Act of 1938

Railroad Commission of Texas website

Texas Constitution and Amendments

Texas Landowner Bill of Rights

Texas Utilities Code, Chapter 121

Texas Utilities Code, Chapter 181

Title 2, Chapter 5, Subchapter A of the Texas Property Code

Title 3, Subtitle B, Chapter 91, Subchapter A of Natural Resources Code

Title 3, Subtitle D, Chapter 111, Subchapter A of the Natural Resources Code

Title 4, Chapter 21 of the Texas Property Code

Title 5, Subtitle C, Chapter 382, Subchapter A of the Health and Safety Code

Title 10, Subtitle E, Chapter 2206, Eminent Domain

Title 16, Part 1, Chapter 3, Rule 3.30 of the Texas Administrative Code

Title 40, CFR Part 370, *Hazardous Chemical Reporting: Community Right-to-Know*

Title 49 CFR Part 190, *Pipeline Safety Programs and Rulemaking Requirements*

Title 49 CFR Part 191, *Transportation of Natural and Other Gas by Pipeline: Amended Reports,*

*Incident Reports, and Safety Related Condition Reports.*  2021.

Title 49 CFR Part 192, *Transmission of Natural and Other Gas by Pipeline: Minimum Federal*

*Safety Standards.* 2021.

Title 49 CFR Part 195, Appendix A, *Delineation between Federal and State Jurisdiction—*

*Statement of Agency Policy and Interpretation.* 2021.

Title 49 CFR Part 195, *Transportation of Hazardous Liquids by Pipeline.* 2021.

Title 49 CFR Part 390 on Federal Motor Carrier Safety Regulations

United States Constitution and Amendments

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