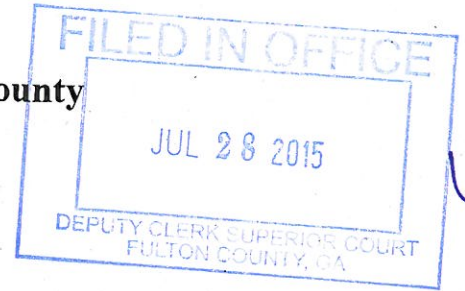


In the Superior Court of Fulton County  
State of Georgia



Palmetto Products Pipe Line, LLC, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
Georgia Department of )  
Transportation and Russell R. )  
McMurry, Commissioner, )  
 )  
Respondents. )

Docket No. 2015-CV-262194

**Motion to Intervene and Incorporated Brief in Support Thereof**

Pursuant to O.C.G.A. §§ 9-11-24 and 50-13-14, the Savannah Riverkeeper (SRK), Ogeechee Riverkeeper ("ORK"), Altamaha Riverkeeper (ARK), Satilla Riverkeeper ("STRK"), and Center for Sustainable Coast ("CSC") (collectively referred to as "Intervenors") move to intervene as Respondents-Intervenors in this matter.<sup>1</sup>

As more fully set forth below, Intervenors seek permission to intervene as a matter of right pursuant to O.C.G.A. § 9-11-24(a) on the grounds that (1) a statute gives them an unconditional right to intervene and (2) they claim an interest relating to the subject matter of the action, they are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest, and their interest is not adequately represented. In the alternative, Intervenors seek to intervene permissively pursuant to O.C.G.A. § 9-11-24(b) on the basis that they possess claims and defenses that have questions of law and fact in common with the main action and their intervention will not unduly delay or prejudice the adjudication of the

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<sup>1</sup> The standard for intervention under O.C.G.A. § 50-13-14 is identical to the standard under O.C.G.A. § 9-11-24. Therefore, for purposes of brevity, Intervenors will cite solely to § 9-11-24 in the remainder of this motion although the motion is made under both statutory provisions.

rights of the original parties. Intervenor's motion is timely as Petitioner's appeal was filed on June 17, 2015, the Georgia DOT's answer was filed on July 17, 2015, and no significant proceedings have yet occurred in this matter.

### Statement of Facts

#### I. **Palmetto's application and the record below.**

This case involves an effort by foreign-based Palmetto Products Pipe Line, LLC ("Palmetto"), a self-described subsidiary of the largest energy infrastructure company in the United States (Kinder Morgan),<sup>2</sup> to forcibly take through eminent domain the private property of Georgia citizens for private profit in order to construct a 360-mile petroleum pipeline from Belton, South Carolina to Jacksonville, Florida. The pipeline would cross 210 miles of largely pristine Georgia land without any public necessity, public use, or public good as required by Georgia law.<sup>3</sup> Palmetto's proposed pipeline would cross five major rivers, the Altamaha, Ogeechee, Satilla, Savannah, and St. Mary's, numerous streams, invaluable forest land and wetlands, and sensitive coastal areas for the economic benefit of others outside Georgia and to the detriment of Georgia's citizens and environment.

Under Georgia law, Palmetto is required to obtain a certificate of public convenience and necessity from the Commissioner (or his designee) of the Georgia Department of Transportation ("DOT") in order to use eminent domain to construct its pipeline.<sup>4</sup> On May 18, 2015, Georgia DOT Commissioner Russell R. McMurry found that Palmetto had not met its burden, as required

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<sup>2</sup> See Palmetto's Petition for Review at ¶ 7.

<sup>3</sup> See O.C.G.A. § 22-3-83(b)(1) ("the application . . . shall include . . . a showing that the **public necessity** for the petroleum pipeline justifies the use of eminent domain." (Emphasis added.) See also O.C.G.A. §22-1-2 ("Notwithstanding any other provision of law, neither this state . . . nor any other condemning authority shall use eminent domain unless it is for **public use**."))

<sup>4</sup> See O.C.G.A. § 22-3-83(a).

by Georgia law, of demonstrating that the proposed pipeline would serve the public's convenience and necessity.<sup>5</sup>

This Court must affirm the Commissioner's decision if it is supported by substantial evidence.<sup>6</sup> The Commissioner's decision is supported by overwhelming substantial evidence in the record before the Commissioner which includes the following evidence submitted by these Intervenor (and thousands of other commenters):

- As admitted by Palmetto in its submissions to the Commissioner, at least 75% of coastal Georgia's petroleum needs are satisfied by a combination of two existing pipelines and tanker trucks. The remainder is supplied by two competing ocean terminals through seven separate suppliers. Palmetto made no argument and provided no evidence to the Commissioner showing that current supplies are in any way inadequate. In fact, there is healthy competition, abundant supplies, and reasonable prices.
- Palmetto is only a transporter of petroleum products. It does not own the fuel that it ships. As such, Palmetto admitted to the Commissioner that it cannot provide any assurance that its shippers will actually deliver any fuel anywhere in Georgia. Palmetto therefore failed to make any showing that the fuel transported in its proposed pipeline will benefit anyone in Georgia.
- It is undisputed that current fuel supply to Savannah – which meets all of Savannah's fuel demand - is 20,000 barrels/day, yet Palmetto contended before the Commissioner that the shippers on its pipeline *might* deliver 25,000 barrels/day to the Savannah market. That amount is more than current demand. Moreover, even assuming that 25,000 barrels/day actually were delivered, the simple result would be that Palmetto's shippers would displace all current suppliers – hardly a healthy outcome for competition and reasonable prices.
- Palmetto provided no evidence to support its assertion that its transportation costs would be lower than the costs charged by current suppliers. In fact, Palmetto repeatedly has refused to disclose the rates and terms of its contracts with its shippers. Additionally, to the extent that Palmetto's transportation costs might be less than the current transportation costs of other suppliers, Palmetto admitted that it cannot give any assurance that those lower costs would be passed onto Georgia consumers in the form of lower fuel prices.

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<sup>5</sup> Georgia eminent domain law provides that “[p]ublic use is a matter of law to be determined by the court and **the condemnor bears the burden of proof.**” See O.C.G.A. § 22-1-2 (emphasis added).

<sup>6</sup> See O.C.G.A. § 22-3-83(d).

- The most authoritative federal agency on the subject of future demand for energy consumption, the United States Energy Information Administration, has compiled data showing that gasoline and diesel usage in Georgia has decreased 14% since the peak year of 2002 and that demand in the South Atlantic Region, which includes coastal Georgia, is expected to continue to decline over the next 25 years by approximately 7.8% despite anticipated increases in population and miles driven. This is due, in part, to increases in fuel economy expected to occur during that time period.
- Kinder Morgan, the owner of Palmetto, has an odious record of numerous criminal convictions and tens of millions of dollars in civil and criminal fines over a long period of time for safety violations, accidents, and criminal behavior. Kinder Morgan's pipelines have leaked, ruptured and exploded causing hundreds of millions of dollars in property damage, economic damage, bodily injury, and death. Since 2003, Kinder Morgan pipelines have been responsible for at least 180 regulatory violations, maintenance infractions, leaks, spills, evacuations, explosions, fires, and fatalities in 24 states.<sup>7</sup> In Texas alone (Kinder Morgan's home state), from 2003 to 2014, Kinder Morgan experienced 36 "significant incidents" consisting of spills, fires, and explosions that resulted in bodily injury and death.<sup>8</sup> Kinder Morgan's deplorable safety record outweighs any potential benefit its proposed pipeline might provide to Georgia.

## II. The Intervenors.

Intervenors are five Georgia grass-roots environmental organizations who were parties to the DOT administrative proceedings as allowed by statute. At the behest of their members and countless members of the public, Intervenors appeared repeatedly and submitted all of the above evidence and more in the administrative proceedings below. Intervenors appeared and/or spoke at the six informational meetings that Palmetto presided over in this matter. Intervenors also appeared and spoke in opposition to the proposed pipeline at each of the two hearings conducted

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<sup>7</sup> See PHMSA Pipeline Safety State Pages at <http://primis.phmsa.dot.gov/comm/States.htm?nocache=3971>.

<sup>8</sup> See "*Building Safe Communities: Pipeline Risk and Its Application to Local Development Decisions*," U.S. Dept. of Transportation Office of Pipeline Safety at p. 10 (2010) found at <http://primis.phmsa.dot.gov/comm/publications/PIPA/PIPA-PipelineRiskReport-Final-20101021.pdf> (accessed June 18, 2014).

by the DOT.<sup>9</sup> Finally, Intervenors filed with the Commissioner a 24-page letter brief with over 125 pages of evidence in opposition to Palmetto's proposed pipeline before the Commissioner issued his decision. The Commissioner agreed with many of the arguments that Intervenors made in their letter brief.

Intervenors' missions include protection of the natural resources in areas of the state through which the proposed pipeline would traverse. Each organization has individual members whose interests are directly affected by the potential pipeline.

SRK is a 501(c)(3) non-profit corporation whose mission is to protect the water quality of the Savannah River as well as the integrity of its watershed. The Savannah River extends from the mountains in North Carolina to the Atlantic Ocean. SRK has approximately 1,000 members who use, recreate, work, and reside near and in, as well as derive aesthetic enjoyment from, the Savannah River basin, including its feeder streams, tributaries, and coastal wetlands. The Savannah River has a diverse range of uses. The water quality of the river is susceptible to the adverse effects caused by population growth, industrial expansion, and land development pressures. SRK strives to achieve its protection and restoration goals through the promotion of best management practices for construction, agriculture, forestry, and other activities that pose potential threats to water quality. SRK provides and participates in educational programs that focus on the river basin's ecology, and SRK participates in restoration programs. SRK also engages in administrative and legislative advocacy as well as legal action when necessary to protect the Savannah River watershed. Palmetto's proposed pipeline would directly and

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<sup>9</sup> Approximately 600 people, including Intervenors' members, attended the first DOT hearing in Richmond Hill, Georgia, and many more had to be turned away due to space constraints. Several hundred more people, including Intervenors' members, attended the second DOT hearing in Waynesboro, Georgia. At both hearings, Intervenors, their members, and the public at large overwhelmingly opposed Palmetto's proposed pipeline.



irreparably harm SRK's and its members' recreational, aesthetic, and economic interests in the Savannah River watershed.

ORK is a 501(c)(3) non-profit corporation whose mission is to protect, preserve, and improve the water quality of the Ogeechee River basin. ORK has approximately 700 members who use, recreate, work, and reside near and in, as well as derive aesthetic enjoyment from, the Ogeechee river basin, including its feeder streams, tributaries, and coastal wetlands. ORK provides and participates in educational programs that focus on the river basin's ecology, and ORK participates in restoration programs. ORK also engages in administrative and legislative advocacy as well as legal action when necessary to protect the Ogeechee River watershed. Palmetto's proposed pipeline would directly and irreparably harm ORK's and its members' recreational, aesthetic, and economic interests in the Ogeechee River watershed.

ARK is a 501(c)(3) non-profit corporation whose mission is to protect, defend, and restore the habitat, water quality, and flow of the Altamaha River – Georgia's largest river - from its headwaters in the Piedmont to its terminus at the Atlantic Ocean near Darien. ARK has over 1,000 members who use, recreate, work, and reside near and in, as well as derive aesthetic enjoyment from, the Altamaha River basin, including its feeder streams, tributaries, coastal wetlands, and Oconee, Ocmulgee, and Ohoopsee river basins that make up the Altamaha River watershed. ARK provides and participates in educational programs that focus on the river basin's ecology, and ARK participates in restoration programs. ARK also engages in administrative and legislative advocacy as well as legal action when necessary to protect the Altamaha River watershed. Palmetto's proposed pipeline would directly and irreparably harm ARK's and its members' recreational, aesthetic, and economic interests in the Altamaha River watershed.

STRK is a 501(c)(3) non-profit corporation dedicated to restoring and protecting the water quality and integrity of the uniquely beautiful ecological system that constitutes the Satilla River watershed. STRK has approximately 400 members who use, recreate, work, and reside near and in, as well as derive aesthetic enjoyment from, the Satilla River basin, including its feeder streams, tributaries, and coastal wetlands. STRK provides and participates in educational programs that focus on the river basin's ecology, and STRK participates in restoration programs. STRK also engages in administrative and legislative action as well as legal action when necessary to protect the Satilla River watershed. Palmetto's proposed pipeline would directly and irreparably harm STRK's and its members' recreational, aesthetic, and economic interests in the Satilla River watershed.

CSC is a 501(c)(3) non-profit corporation whose mission is to support and improve the responsible use, protection, and conservation of Georgia's coastal resources – natural, historic, and economic. CSC has numerous members who use, recreate, work, and reside near and in, as well as derive aesthetic enjoyment from, Georgia's coastal areas. CSC provides and participates in educational programs that focus on Georgia's coastal ecology including threats from irresponsible and inappropriate commercial, industrial and residential development. CSC also engages in administrative and legislative advocacy as well as legal action when necessary to protect Georgia's beautiful and diverse coastal area. Palmetto's proposed pipeline would directly and irreparably harm CSC's and its members' recreational, aesthetic, and economic interests in Georgia's coastal areas.

Each Intervenor is a local, grass-roots environmental organization made up of everyday citizens who are concerned about the adverse effects that Palmetto's proposed pipeline would have on their watersheds, coastal areas, and economic interests. Each organization and its

members are gravely concerned that Palmetto's proposed pipeline will damage their areas of interest. Intervenors are equally concerned that no one who is a party to this lawsuit is charged with protecting their interests. As such, this case is uniquely suited to their intervention so that their interests can be asserted in this litigation.

### Argument and Citation of Authority

Intervention in civil actions in Georgia is governed by O.C.G.A. § 9-11-24. Pursuant to O.C.G.A. § 9-11-24, there are two types of intervention, intervention of right and permissive intervention. Intervenors are entitled to intervention under both avenues.

**I. Intervenors are entitled to intervene as a matter of right pursuant to O.C.G.A. § 9-11-24(a).**

Intervention of right is governed by O.C.G.A. § 9-11-24(a) which states:

Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) When the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, there are two ways in which a person can qualify for intervention as a matter of right.

Intervenors qualify for intervention under both methods.

**A. Intervenors are entitled to intervene as a matter of right by statute under Rule 24(a)(1).**

Under O.C.G.A. § 9-11-24(a)(1), Intervenors have a statutory right to intervene based upon O.C.G.A. § 22-3-83(b)(2) and (3). Those subsections require public notice of Palmetto's application and proposed route, provide for a hearing on the application, and allow the filing and hearing of any objections to the application. As noted above, Intervenors actively participated in the administrative proceedings below by participating in the two DOT hearings held in this matter and by submitting a substantial letter brief and evidence that was considered by the



Commissioner. Intervenors are entitled to remain in this action and to defend their evidence and argument that was submitted to and considered by the Commissioner.

**B. Intervenors are entitled to intervene as matter of right under Rule 24(a)(2).**

The requirements for intervention of right under Rule 24(a)(2) are three-fold: (1) an interest in the subject matter of the suit; (2) possible impairment of the ability to protect that interest by the disposition of the suit; and (3) inadequate representation by the existing parties to the suit. *Baker v. Lankford*, 306 Ga. App. 327, 329 (2010); *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1250 (11<sup>th</sup> Cir. 2002) (“*ACOE*”).<sup>10</sup> The Court should apply these requirements liberally, and “[a]ny doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action.” *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11<sup>th</sup> Cir. 1993); *see also WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1198 (10<sup>th</sup> Cir. 2010) (the factors under Rule 24(a)(2) “are not rigid, technical requirements,” and a “liberal line” should be followed in allowing intervention). As such, the required elements for intervention as of right should be construed to present only a minimal burden to a movant/intervenor. *WildEarth Guardians*, 604 F.3d at 1199-1200.

Intervenors here meet all three elements required under Rule 24(a)(2). Consequently, they are entitled to intervene as a matter of right.

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<sup>10</sup> Due to the similarity between the Georgia Civil Practice Act and the Federal Rules of Civil Procedure, Georgia courts “. . . give consideration and great weight to constructions placed on federal rules by the federal courts.” *Barnum v. Coastal Health Services*, 288 Ga. App. 209, 215 (2007). Therefore, this motion will cite federal case law as appropriate.

**1. Intervenor claim an interest relating to the subject matter of the suit.**

A court's inquiry regarding a potential intervenor's interest in the subject matter of the suit is a flexible one that focuses on the particular facts and circumstances of the case. *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11<sup>th</sup> Cir. 1989). Although the proposed intervenor's interest must be supported by a direct, substantial, and legally protectable interest, the interest need not be of a legal nature identical to that of the claims asserted in the main action. *Id.* Federal courts have repeatedly found that environmental organizations have protectable interests permitting intervention under Rule 24 of the Federal Rules of Civil Procedure, which is substantially the same as Georgia's intervention statute.

For example, in *Sagebrush Rebellion Inc. v. Watt*, 713 F.2d 525 (9<sup>th</sup> Cir. 1983), in an action challenging the legality of actions taken by the Secretary of the Interior in creating a National Conservation Area in Idaho, the court found that several non-profit organizations devoted to the protection of birds and other animals and their habitats, including the Audubon Society, were entitled to intervene on the side of the defendant. The court stated that "there can be no serious dispute in this case concerning . . . the existence of a protectable interest on the part of the applicant which may, as a practical matter, be impaired." *Id.* at 528.

Additional examples abound. *See, e.g., New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, 540 Fed. Appx. 877, 880 (10<sup>th</sup> Cir. 2013) (holding that environmental groups had a protectable interest and were entitled to intervene in action challenging a U.S. Forest Service travel management plan for the Santa Fe National Forest); *WildEarth Guardians, supra*, 604 F.3d at 1198 (holding that environmental groups had a protectable interest and were entitled to intervene in action challenging the National Park Service's plan to reduce the elk population in the Rocky Mountain National Park); *see also Mausolf v. Babbitt*, 85 F.3d 1295,

1302 (8<sup>th</sup> Cir. 1996) (holding that environmental groups had a protectable interest and were entitled to intervene in action seeking to enjoin the enforcement of restrictions on snowmobiling in a national park); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 776, 779 (4<sup>th</sup> Cir. 1991) (holding that environmental group that was a party to an administrative permit proceeding had a protectable interest and was entitled to intervene as a matter of right in an action challenging the constitutionality of a governing state regulation); *Am. Farm Bureau Federation v. U.S. EPA*, 278 F.R.D. 98, 106-07 (M.D. Penn. 2011) (holding that environmental groups had a protectable interest and were entitled to intervene in action seeking to enjoin the U.S. EPA from enforcing a total maximum daily load for pollutants being discharged into the Chesapeake Bay and its tributaries).

The Intervenor Riverkeepers and the Center for a Sustainable Coast have a protectable interest in the subject matter of this case because the missions of their organizations are to preserve, protect, and restore the integrity of their respective watersheds and coastal areas, including water quality and habitat. This includes protection from industrial and land development, such as the construction of petroleum pipelines like the Palmetto pipeline, that, if approved by this Court, would bulldoze through and harm the Intervenor's river basins, their tributaries, streams, and associated wetlands, and the coastal areas that are fed by those rivers and tributaries. Additionally, all of the Intervenor's have numerous members who use, live, enjoy, recreate, and work in and/or near the affected areas that their organizations seek to protect.

Intervenor's concerns regarding the potential adverse effects are not limited to the damage that will be inflicted by the mere construction of the pipeline. As noted previously, pipelines, including Kinder Morgan's pipelines, are notorious for leaking, rupturing, spilling, and

exploding resulting in staggering environmental damage, property damage, economic damage, personal injury, and death.

Perhaps the best example of the non-speculative nature of Intervenor's concerns and their interest in this case is the recent catastrophic failure of Kinder Morgan's Plantation pipeline in Belton, South Carolina – the very pipeline that will be connected to and provide fuel for Kinder Morgan's proposed Palmetto pipeline. On December 14, 2015, a passing motorist noticed dead vegetation and detected an odor in the vicinity of the Plantation pipeline. Although Kinder Morgan claims that it has state of the art early detection systems and sufficient shut-off valves that can timely control leaks with minimal impact to property owners and the environment, by the time the lucky observations of a concerned citizen were reported and investigated, 370,000 gallons of refined petroleum products had leaked into the environment including sensitive and invaluable wetlands. As of May of this year – five months after the catastrophe was discovered - approximately 2,832 tons of soil had been removed and treated, and only approximately half of the spilled petroleum products (approximately 177,000 gallons) had been recovered. The cleanup effort has required the installation of 71 monitoring wells, 20 recovery sumps, 15 recovery wells, and two recovery trenches. Also notable is that Kinder Morgan originally misrepresented that only 8,000 gallons of product had leaked when, in fact, 8,800 barrels had leaked. There are 42 gallons of product per barrel.<sup>11</sup>

Any leak, rupture, spill, or other release at any of the river crossings or in any of the countless streams and tributaries of the Riverkeeper Intervenor has a significant danger of traveling all the way to Georgia's coast and contaminating everything in its wake. If Palmetto's

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<sup>11</sup> See <http://www.blufftontoday.com/bluffton-news/2015-05-03/sc-leak-patched-cleanup-continues#.VUvjA5O2UgU>.

appeal in this Court is successful, Palmetto will receive a certificate of public convenience and necessity that is a critical first step in allowing it to build its proposed pipeline. Intervenors have a protectable interest in preventing the issuance of such a certificate and therefore satisfy the first element of O.C.G.A. § 9-11-24(a)(2).

**2. The disposition of this action may impair Intervenors' ability to protect their interests.**

The second element of the test for intervention as a matter of right requires Intervenors to show that, as a practical matter, the disposition of this case may impair their ability to protect their interests. *Huff v. Comm'r of IRS*, 743 F.3d 790, 800 (11<sup>th</sup> Cir. 2014); *Chiles, supra*, 865 F.2d at 1214. The nature of the Intervenors' interests and the effect that the disposition of the lawsuit will have on their ability to protect those interests are closely related issues. *Chiles*, 865 F.2d at 1214. The second element cannot be answered without reference to the first element. *Id.* As a result, the burden on Intervenors to establish impairment of their interests is "minimal." *WildEarth Guardians*, 604 F.3d at 1199. The Court "may consider *any* significant legal effect in the applicant's [intervenor's] interest and [the Court is] not restricted to a rigid *res judicata* test." *Id.* (emphasis added).

Impairment may be established if the disposition of the case creates the potential for a negative *stare decisis* effect. *Chiles*, 865 F.2d at 1214; *Huff*, 743 F.3d at 800; *Stone v. First Union Corp.*, 371 F.3d 1305, 1309-10 (11<sup>th</sup> Cir. 2004). Impairment also would include a decision by this Court returning the case to the administrative decision-making process notwithstanding the prospective intervenor's ability to participate in that process. *WildEarth Guardians*, 604 F.3d 1190.

As a practical matter, if the Intervenors are not allowed to be parties to this case, they will have no adequate means to ensure the preservation and protection of their watersheds and coastal

areas which constitute the very heart of their respective missions and is the *raison d'etre* for their existence. As such, their ability to protect their interests will not only be impaired, it likely will be extinguished because, in all probability, they will have no ability to pursue an independent judgment against any of the parties to this appeal. They also would have no ability to pursue an appeal of a decision by this Court should the Court grant a certificate of public convenience and necessity to Palmetto. And even if Intervenor somehow could pursue an independent action, an adverse decision would certainly have some *stare decisis* effect that would impair their ability to succeed in any such action. Consequently, the disposition of this action without the Intervenor's participation will impair the Intervenor's ability to protect their interests. Therefore, they satisfy the second element of Rule 24.

**3. Intervenor's interests cannot be adequately represented.**

The third part of the test for intervention of right requires Intervenor to show that the existing parties cannot adequately represent their interests. The issue of adequacy of representation is a question of fact which must be ruled on by the trial court after considering the status and claims of the parties as revealed by the pleadings and representations of counsel. *See Southwest Georgia Production Credit Ass'n. v. Wainwright*, 241 Ga. 355, 356 (1978). The Intervenor need only show that representation of their interests "**may**" be inadequate, and the burden of making that showing is "**minimal**." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972) (emphasis added); *see also ACOE, supra*, 302 F.3d at 1255, 1259; *Am. Farm Bureau, supra*, 278 F.R.D. at 110 ("an intervenor need only show that representation *may* be inadequate, not that it is inadequate.") (emphasis in original).

The minimal showing for inadequate representation is satisfied, even though an intervenor may desire the same ultimate outcome as another party in the case, if the intervenor



has different interests from the other parties to the case. See, e.g., *ACOE*, 302 F.3d at 1259; *Huff*, 743 F.3d at 800-01. As noted by the Eleventh Circuit in the *Chiles* case, a party seeking intervention as a matter of right “should be allowed to intervene unless it is *clear* that [the Georgia DOT] *will* provide adequate representation.” *Chiles*, 865 F.2d at 1214 (emphasis added).

The *ACOE* and *Huff* cases are instructive. In *ACOE*, the State of Georgia made a request to the Army Corps of Engineers to withdraw additional amounts of water from the Buford Dam. Due to the Corps’ failure to grant Georgia’s request, Georgia sued the Corps. The State of Florida and Southeastern Federal Power Customers, Inc. (“SeFPC” - hydropower purchasers) sought to intervene to support denial of the request. Florida desired intervention to protect its interest in insuring an adequate quality and quantity of water to the Apalachicola River and Bay. SeFPC moved for intervention to protect the economic interests of its members in purchasing hydropower from the Corps. The District Court denied intervention, in part, on the ground that the Corps sought the same outcome as the proposed intervenors (denial of Georgia’s water withdrawal permit) and could adequately defend against Georgia’s claims. *ACOE*, 302 F.2d at 1249.

In reversing the District Court, the Eleventh Circuit found that even though the Corps, the State of Florida, and SeFPC all sought the same outcome, *i.e.* denial of Georgia’s request for additional water, their respective interests were not the same. Florida’s interest in insuring sufficient water for the Apalachicola River and Bay was not represented by the Corps which had no independent stake in how much water reached the Apalachicola. *Id.*, 302 F.2d at 1256. SeFPC’s interest in protecting the economic interests of its members was not the same as the Corps’ interest in protecting its decision-making process. *Id.*, 302 F.2d at 1259. As a result, the

Eleventh Circuit held that the Corps could not adequately represent the interests of Florida and SeFPC and that they should be allowed to intervene as a matter of right. *Id.*, 302 F.2d at 1256, 1259. Similarly here, the environmental and economic interests of Intervenors are not the same as the interests of the Georgia DOT in protecting its administrative and decision-making process that are under attack in Palmetto's Petition for Review.<sup>12</sup>

In the *Huff* case, the U.S. IRS Commissioner brought a tax deficiency case against a Virgin Islands taxpayer on the ground that the taxpayer was not a *bona fide* resident of the Virgin Islands. The Virgin Islands taxpayer had filed returns with the Virgin Islands Bureau of Internal Revenue and paid taxes to the Virgin Islands. The Virgin Islands' motion to intervene in the Tax Court was denied, and, on appeal, the Eleventh Circuit reversed. Although both the taxpayer and the Virgin Islands government sought the same relief – denial of the U.S. IRS' claimed tax deficiency – their interests in defeating that claim were not the same. The taxpayer sought to avoid the potential for double taxation, whereas the Virgin Islands government sought to protect its sovereign interest in the administration of its tax system which included how taxes should be apportioned between the two governments. *Id.*, 743 F.3d at 800. As a result, the Virgin Islands was allowed to intervene as a matter of right because its interests were not adequately represented by the taxpayer. *Id.*

Other Circuit Courts of Appeals have made similar rulings with respect to intervention by environmental groups such as the ones here. For example, in *Hazardous Waste Treatment Council, supra*, the Sierra Club and several other environmental groups sought to intervene in a matter where the plaintiffs had sued South Carolina regarding a state regulation relating to

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<sup>12</sup> The vast majority of Palmetto's Petition for Review, including two of its three legal counts, is devoted to perceived procedural irregularities in the DOT's decision-making process.

permits for hazardous waste treatment facilities. The District Court denied the intervention motion on the ground that South Carolina would adequately represent the interests of the environmental groups because the environmental groups had the same ultimate objective as the State which was upholding the South Carolina regulation and denying the plaintiff's permit application.

On appeal, the Fourth Circuit Court of Appeals reversed the District Court because South Carolina's interest – representing all of the citizens of the state including proponents of new hazardous waste facilities – was different from the Sierra Club's interest – representing only a subset of citizens who would prefer that few or no hazardous waste facilities receive permits. *Hazardous Waste Treatment Council*, 945 F.2d at 780. As a result, the Court held that South Carolina could not adequately represent the Sierra Club's interests. Similarly here, Intervenors represent a subset of citizens who oppose pipelines such as the Palmetto pipeline and whose environmental, economic, and aesthetic interests would be adversely affected by such a pipeline.

In *N.M. Off-Highway Vehicle Alliance*, *supra*, the plaintiff challenged a U.S. Forest Service travel management plan for the Santa Fe National Forest. The District Court denied an intervention motion by two environmental groups on the ground that the Forest Service had taken the environmental groups' position in developing the plan and therefore would adequately represent their interests. *Id.*, 540 Fed. Appx. at 879.

On appeal, the Tenth Circuit Court of Appeals reversed the District Court's decision because “[a]lthough both the Forest Service and the environmental groups would defend the Plan, we cannot assume that the environmental groups' interests, as evidenced by their comments during the development of the Plan and during their administrative appeal, wholly

align with those of the Forest Service.” *Id.* at 881. Furthermore, based on the administrative proceedings, there was no guarantee that the Forest Service would make all of the environmental groups’ arguments in litigation, and there was no guarantee that the Forest Service’s policy would not shift during the litigation. *Id.*; see also *Am. Farm Bureau Fed’n, supra*, 278 F.R.D. at 109-10 (EPA could not adequately represent environmental groups’ interests because, despite presumption that a public agency will adequately represent a public interest group’s interest, presumption was overcome due to combination of factors including possible change in political pressures or administration, requirement that EPA represent broader, more complex, and varied interests than the specific, parochial interests of the environmental groups, EPA might settle the case or otherwise agree to resolve it contrary to the interests of the environmental groups, and EPA might not appeal an adverse decision). Similarly here, Intervenors expressed several environmental, economic, safety, and aesthetic concerns in the DOT administrative proceedings that are of little concern to the DOT. Moreover, the same concerns outlined in the *Am. Farm Bureau* decision are present here.

In *Sierra Club v. Robertson*, 960 F.2d 83 (8<sup>th</sup> Cir. 1992), the Eighth Circuit Court of Appeals considered the reverse situation where a state sought to intervene in an action brought by the Sierra Club challenging a U.S. Forest Service forest management policy. The District Court denied intervention on the ground that the state’s proposed complaint sought the same relief on the same grounds as the Sierra Club’s complaint. *Id.* at 86.

On appeal, the Eighth Circuit reversed holding that “[t]he ‘tactical similarity’ of the ‘legal contentions’ of a current party with that of a proposed intervenor . . . does not assure adequate representation. Rather, we determine the adequacy of representation primarily by comparing the interests of the proposed intervenor with the interests of the current parties to the action.” *Id.*

The Court went on to find that the Sierra Club's interests were different from the state's interests because the Sierra Club represented only the interests of its members whereas the state was obligated to represent the interests of all of its citizens, it had property interests at stake, it had an interest in promoting the state economy on behalf of its citizens, and it had an interest in protecting its tax revenues. *Id.* Once again, the same distinguishing factors at play in the *Robertson* case are present here.

The record before the Georgia DOT, the DOT Commissioner's decision, the pleadings filed in this matter to date, and the facts and circumstances set forth in this motion demonstrate that although the interests of Intervenors and the DOT may be similar, they are not identical. As a result, the DOT cannot adequately represent the interests of Intervenors. And, of course, Palmetto cannot do so because Intervenors' oppose the pipeline Palmetto wants to build. Therefore, Intervenors are entitled to intervene in this action as a matter of right.<sup>13</sup>

**II. In the Alternative, Intervenors Should Be Granted Permissive Intervention Pursuant to O.C.G.A. § 9-11-24(b).**

Intervenors believe that intervention as a matter of right is the appropriate means to proceed in this case. However, in the alternative, should the Court disagree that the Intervenors have met the test for intervention as of right, Intervenors ask the Court to grant permissive intervention as governed by O.C.G.A. § 9-11-24(b). Specifically, O.C.G.A. § 9-11-24(b) provides:

Upon timely application anyone may be permitted to intervene in an action . . . [w]hen an applicant's claim or defense and the main

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<sup>13</sup> Although certain Georgia cases hold that an intervenor must make a strong showing of inadequate representation when a governmental entity represents the public interest, that principle applies only when the interests of the governmental entity and the private intervenor are identical. *See, e.g., Buckler v. DeKalb County*, 290 Ga. App. 190, 195 (2008). As noted, the interests of the DOT and Intervenors are not identical.

action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Thus, permissive intervention may be allowed when two elements are shown: (1) common questions of law and fact, and (2) lack of undue delay or prejudice to the original parties. The Court shall also consider “other relevant circumstances, such as the degree to which the intervenor would be affected by the outcome of the underlying case.” *Branch v. Maxwell*, 203 Ga. App. 553, 554 (1992) (citing *Allgood v. Georgia Marble Co.*, 239 Ga. 858, 859 (1977)).

For permissive intervention, the most important factor is whether the intervention will unduly delay or prejudice the existing parties. *Sta-Power Industries, Inc. v. Avant*, 134 Ga. App. 952, 958 (1975); *Ryder Truck Rental v. Mayo*, 120 Ga. App. 495, 498 (1969). “In determining whether intervention is appropriate, each case must be judged on its own facts.” *Hampton Island Founders, LLC v. Liberty Capital, LLC*, 658 S.E.2d 619, 625 (Ga. 2008).

Granting Intervenors’ motion will not cause any undue delay or prejudice to the original parties to this case. Respondents only filed their answer to the Petition for Review on July 17, 2015, a mere 11 days ago. Additionally, as of the date of filing this motion, the record below has not been submitted to the Court, and no substantial proceedings of any kind have occurred or been scheduled. *See, e.g., Moore v. Moore*, 247 Ga. 243, 244-45 (1981) (“The mother’s motion was timely, coming as it did ‘before any substantial proceedings [had] been had in the case.’”).

Additionally, Intervenors do not intend to raise any independent claims or requests for affirmative relief against the Petitioner that might have the potential to complicate or unduly delay the proceedings in this matter. Intervenors merely seek to defend the Commissioner’s decision in this matter and to insure that Intervenors’ interests are properly considered by the Court. *Compare Ryder Truck, supra*, 120 Ga. App. at 498 (trial court’s denial of permissive



intervention upheld because intervenors made no effort to defend the action but, instead, sought affirmative relief that may have unduly delayed or prejudiced the existing parties and were clearly seeking a shortcut to their own lawsuit which they could have brought independently).

Finally, Intervenors' defense of the Commissioner's decision will share common questions of fact and law. Those questions include: (1) whether the evidence in the record supports the Commissioner's decision that Palmetto's proposed pipeline is not needed in light of current and projected fuel demand and existing suppliers; (2) whether the evidence in the record supports the Commissioner's decision that Palmetto's proposed pipeline will not benefit Georgia citizens in a manner that would justify the draconian use of eminent domain; (3) whether the evidence in the record supports the Commissioner's finding of a lack of evidence to support Palmetto's claim that its proposed pipeline would result in increased competition and lower fuel prices; (4) whether Palmetto's claim that its pipeline would be safer than other methods of transporting fuel products is adequately supported by the record; (5) whether the Commissioner's decision is supported by substantial evidence in the record; (6) whether the Commissioner followed proper procedure in issuing his decision; and (7) whether Palmetto waived many of its legal arguments by not raising them in the administrative proceedings below.

As noted above, the Court also may consider other relevant circumstances including the degree to which an intervenor might be affected by the outcome in the case. Intervenors, whose fundamental missions are to protect the environmental, economic, and aesthetic interests of their members, would be adversely affected by a decision to overturn the Commissioner's decision and potentially allow this pipeline to be built. Intervenors likely would have no recourse to such a decision and certainly would have no right of appeal. Thus, although the existing parties will

not suffer any prejudice by Intervenor's intervention, Intervenor will be prejudiced by their exclusion. This added factor weighs in favor of permissive intervention.

**Conclusion**

For all of the foregoing reasons, the Court should grant Intervenor's Motion to Intervene.

Respectfully submitted this 28<sup>th</sup> day of July, 2015.



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**Certificate of Service**

I hereby certify that on this 28th day of July 2015, I served all counsel in the foregoing matter with a true and correct copy of the Motion to Intervene and Incorporated Brief in Support Thereof by depositing a copy of same in the United States mail with adequate postage thereon to:

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