



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

May 29, 2024

Mr. Fred Storer
111 W 5th Street, Apt. 803
Tulsa, OK 74103

Reference No. 24-0018

Dear Mr. Storer:

This letter is in response to your February 6, 2024, letter and correspondence with the Pipeline and Hazardous Materials Safety Administration (PHMSA) requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) applicable to the definition of “private track.” The HMR defines “private track” in § 171.8 as: (1) track located outside of a carrier’s right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way; or (2) track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee and/or a general system railroad for purpose of moving only cars shipped to or by the lessee, and where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage. You present two different scenarios concerning the determination of “private track” in accordance with the definition provided in § 171.8.

- Q1. In the first scenario (i.e., the Downtown location), the South Kansas and Oklahoma Railroad (SKOL Railroad)—i.e., the lessor—leases track to Centennial Energy (i.e., the lessee) for a butane transloading operation. The transloading of the butane is conducted with no intervention or oversight by SKOL Railroad, and SKOL Railroad exercises no control or responsibility over the trackage or rail cars involved in the butane transloading operation—all of which is exclusively carried out by Centennial Energy. You ask whether this scenario would meet the definition of “private track” in § 171.8.
- A1. Based on the scenario as described in your letter, the answer is yes. As previously stated, one part of the definition for “private track” in § 171.8 is a track leased by a railroad (i.e., SKOL Railroad), to a lessee, (i.e., Centennial Energy), where the lease provides for, and in practice entails, exclusive use of that trackage by the lessee for the purpose of moving only rail cars shipped to or by the lessee, and where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage. Therefore, based on the scenario described in your letter, it is the opinion of this Office that the scenario at the Downtown location meets the definition of “private track” in § 171.8.
- Q2. In the second scenario (i.e., the East Pine location), butane is shipped by BNSF Railway, Inc. directly to US Rail and Logistics (USRL). As presented in your letter, the transloading of the butane occurs exclusively on track owned by BNSF. Furthermore, your letter states that BNSF—as the carrier—exercises complete control of the trackage

used during the transloading operation. You ask whether this scenario would meet the definition of “private track” in § 171.8.

- A2. Based on the scenario as described in your letter, the answer is no. As previously stated, “private track” is defined in § 171.8 as “track located outside of a carrier’s right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way.” Therefore, based on the scenario described in your letter, it is the opinion of this Office that the scenario at the East Pine location does not meet the definition of “private track” in § 171.8.

However, if the trackage where the transloading occurs were owned by USRL or were leased to USRL by BNSF with exclusive use by the lessee (i.e. USRL), for the purpose of moving only rail cars shipped to or by the lessee, and the lessor (i.e., BNSF) exercised no control over or responsibility for the trackage or cars on the track, this trackage would meet the definition of “private track” in § 171.8. Lastly, PHMSA views the 745-ft. stretch of track (owned by USRL) as “private track” based on the information you shared regarding lease of that track by the owner.

I hope this information helpful. Please contact us if we can be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Andrews'.

Steven Andrews
Acting Chief, Regulatory Review and Reinvention Branch
Standards and Rulemaking Division

Jacobson

24-0018

From: [DerKinderen, Dirk \(PHMSA\)](#)
To: [Dodd, Alice \(PHMSA\)](#)
Subject: FW: Tulsa's Butane Risks reply to PHMSA
Date: Tuesday, March 19, 2024 3:30:13 PM
Attachments: [CONCERNED CITIZENS - LEGAL ANALYSIS TULSA BUTANE STORAGE AND TRANSLOADING - FINAL \(1\).pdf](#)
[Buttigieg Letter .pdf](#)
[PHMSA Response Letter to Mr. Fred Storer.pdf](#)
[2.6.2024 reply to PHMSA.pdf](#)
[image002.png](#)
[Tulsa Response Letter \(March 4 2024 draft\).docx](#)

Alice,

Please enter this into the system as a request for a letter of interpretation and assign to a specialist.

Thanks,
Dirk Der Kinderen
Chief, Standards Development Branch
PHMSA
202-366-4460 (desk)
202-365-4684 (cell)

From: Kelley, Shane (PHMSA) <shane.kelley@dot.gov>
Sent: Monday, March 4, 2024 2:20 PM
To: DerKinderen, Dirk (PHMSA) <Dirk.DerKinderen@dot.gov>
Subject: Fwd: Tulsa's Butane Risks reply to PHMSA

Shane C. Kelley
Director, Standards and Rulemaking
Office of Hazardous Materials Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
Office: (202) 366-8553
Mobile: (202) 308-4312

From: Horsley, Adam (PHMSA) <adam.horsley@dot.gov>
Sent: Monday, March 4, 2024 2:05:42 PM
To: Davis, Carey (PHMSA) <carey.davis@dot.gov>
Cc: Kelley, Shane (PHMSA) <shane.kelley@dot.gov>
Subject: FW: Tulsa's Butane Risks reply to PHMSA

Hi Carey,
After reviewing this, Mr. Storer seems to be asking for a letter of interpretation on whether the transloading in Tulsa is taking place on private track. I would recommend that we refer this to Shane

Kelley's group to begin that process. I'm attaching a draft letter for your consideration. Please let me know if you have any questions.

Thanks,

- Adam

Adam Horsley

Assistant Chief Counsel, Office of Chief Counsel

US Department of Transportation

Pipeline and Hazardous Materials Safety Administration

1200 New Jersey Avenue, S.E., Washington, D.C. 20590

Office: 202.366.8000 ♦ Facsimile: 202.366.7041

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From: Davis, Carey (PHMSA) <carey.davis@dot.gov>

Sent: Monday, February 12, 2024 8:43 AM

To: Horsley, Adam (PHMSA) <adam.horsley@dot.gov>

Subject: FW: Tulsa's Butane Risks reply to PHMSA

From: Jones, Jessie Jane CTR (PHMSA) <jessie.jones.ctr@dot.gov>

Sent: Tuesday, February 6, 2024 2:20 PM

To: Davis, Carey (PHMSA) <carey.davis@dot.gov>; Quade, William (PHMSA) <william.quade@dot.gov>

Cc: Doud, Joshua (PHMSA) <joshua.doud@dot.gov>; Manno, Anthony (PHMSA) <anthony.manno@dot.gov>; Jones, Camille CTR (PHMSA) <camille.jones.ctr@dot.gov>; Schaefer, Emily CTR (PHMSA) <emily.schaefer.ctr@dot.gov>

Subject: RE: Tulsa's Butane Risks reply to PHMSA

Hi All,

Mr. Storer forgot to update his response letter. Reattaching all the previous attachment to include his reply.

Thank you,

Jessie

From: Jones, Jessie Jane CTR (PHMSA)
Sent: Tuesday, February 6, 2024 1:10 PM
To: Davis, Carey (PHMSA) <carey.davis@dot.gov>; Quade, William (PHMSA) <william.quade@dot.gov>
Cc: Doud, Joshua (PHMSA) <joshua.doud@dot.gov>; Manno, Anthony (PHMSA) <anthony.manno@dot.gov>; Jones, Camille CTR (PHMSA) <camille.jones.ctr@dot.gov>; Schaefer, Emily CTR (PHMSA) <emily.schaefer.ctr@dot.gov>
Subject: FW: Tulsa's Butane Risks reply to PHMSA

Hi Carey and Bill,

Attached is a reply with attachments from Mr. Fred Storer to PHMSA's response to his letter. I transmitted the signed letter to him yesterday.

Please advise on how to proceed.

Thank you,
Jessie

From: Fred Storer <ffstorer@gmail.com>
Sent: Tuesday, February 6, 2024 1:03 PM
To: Jones, Jessie Jane CTR (PHMSA) <jessie.jones.ctr@dot.gov>
Subject: Tulsa's Butane Risks reply to PHMSA

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Mrs. Jones,
Please deliver this letter to Mr. Carey T. Davis, Office of Hazardous Materials Safety.
Fred Storer

March X, 2024

Mr. Fred Storer
111 W 5th Street, Apt. 803
Tulsa, Oklahoma 74103

Dear Mr. Storer

Thank you for your February 6, 2024 letter requesting that the Pipeline and Hazardous Materials Safety Administration provide a statement that the butane transloading operations you identified in Tulsa, Oklahoma are taking place on “private track”. I am referring your letter to PHMSA’s Standards and Rulemaking Division as a request for a letter of interpretation on this question.

I hope this is helpful. If you have questions regarding the process for seeking a letter of interpretation, please contact Dirk DerKinderen, Chief, Standards Development Branch, by phone at (202) 366-4460 or via email at Dirk.DerKinderen@dot.gov.

Sincerely,

Carey T. Davis
Deputy Associate Administrator
Field Operations
Office of Hazardous Materials Safety

February 6, 2024

Mr. Carey T. Davis
Deputy Associate Administrator
Field Operations
Office of Hazardous Materials Safety
U.S. Department of Transportation
Washington, DC 20590
C/O Jones, Jessie Jane CTR (PHMSA) jessie.jones.ctr@dot.gov

Subject: Tulsa butane hazards

Dear Mr. Davis,

Thank you for responding to my November 12, 2023, letter to Secretary Buttigieg.

This letter addresses the two butane transloading operations in the city of Tulsa. I plan to address the consequential butane safety issues in a future letter.

Although this has been discussed as a railroad preemption issue, you have explained PHMSA lacks jurisdiction if the operations are conducted on “private track” and “PHMSA needs more information to determine whether the Tulsa area transloading sites meet the definition of private track”.

I enclosed with my letter to Secretary Buttigieg a redacted letter which provided “private track” information. I am now able to provide a complete copy of the letter addressed to “Concerned Citizens” from Mr. Peter A. Pfohl, Slover & Loftus LLP.

“Concerned Citizens” is a group of seven Tulsans that retained Mr. Pfohl to address this important public safety issue.

I respectfully request that PHMSA provide a statement that the butane transloading operations are “private track”.

Please advise me if additional information is required.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Storer". The signature is fluid and cursive, with a large initial "F" and "S".

Fred Storer
918-397-3456
ffstorer@gmail.com

Attachments:

March 1, 2023, letter from Peter A. Pfohl to Concerned Citizens

November 12, 2023, Fred Storer letter to Secretary Buttigieg

February 5, 2024, Carey T. Davis, DOT, letter to Fred Storer

Note for those receiving copies: If the transloading operations are on “private track” PHMSA lacks jurisdiction, typical railroad preemption does not apply, and the city is free to enforce all zoning and safety regulations.

Copies of this letter have been furnished to the following: Tulsa Mayor, City Attorney, The City Council, Mr. Peter A. Pfohl, Concerned Citizens, Explorer Pipeline Company, etc.



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

February 5, 2024

Mr. Fred Storer
111 W 5th Street, Apt. 803
Tulsa, OK74103

Dear Mr. Storer:

Thank you for your letter to Secretary of Transportation Pete Buttigieg and the United States Department of Transportation (Department), regarding butane railcar storage and transloading activities being performed at two sites in the vicinity of Tulsa, Oklahoma (City). The Pipeline and Hazardous Materials Safety Administration (PHMSA) is the Agency within the Department responsible for administering federal pipeline and hazardous materials laws and regulations, and the Secretary has asked me to respond on his behalf.

In your letter, you highlighted several issues identified by a group of concerned citizens related to the transportation of energy and other hazardous materials and ask for the Department's guidance on pipeline safety law and whether federal law preempts the City's local zoning laws. You also provided a memorandum regarding Surface Transportation Board preemption.

Your letter also noted that Tulsa officials are not enforcing the City's local zoning laws against the operators of the transloading sites because they believe the City's laws are preempted by the Surface Transportation Board under the ICC Termination Act of 1995. In addition, you indicated local government needs to understand whether railcar parking and transloading of hazardous materials preempts local codes. Finally, you have expressed safety concerns regarding encroachment at the right-of-way for Explorer Pipeline in Oklahoma, as well as concerns about the lack of public awareness.

Regarding federal preemption, the Department has preemption authority under the Federal Hazardous Materials Transportation Law, in addition to the preemption authority of the Surface Transportation Board.

PHMSA also has delegated authority to make a preemption determination as to whether a non-federal requirement is preempted under the Federal Hazardous Material Transportation Law (HMTA), 49 U.S.C. 5101 *et seq.* HMTA and its implementing regulations—the Hazardous Materials Regulations (HMR)—apply to persons who transport or cause hazardous materials to be transported in commerce and to pre-transportation and transportation functions. Transloading operations and storage incidental to movement generally are regulated transportation functions, but there are some exceptions. For example, pursuant to 49 C.F.R. §

171.1(d)(3), the storage of hazardous material in a rail car on private track is not subject to HMR.

In this particular instance, PHMSA needs more information to determine whether the Tulsa area transloading sites meet the definition of private track.¹ If these two sites qualify as private track, then butane storage in rail cars in these locations may not implicate preemption under the HMTA. If you wish to apply for a preemption determination, you must submit an application to PHMSA's Chief Counsel. PHMSA's program procedures and requirements on preemption and the application process may be found in 49 C.F.R. Part 107, Subpart C.

With respect to pipeline safety, in 2021 PHMSA's Central Region identified areas of overgrowth on rights-of-way at the Explorer Pipeline, which were subsequently remediated. Since May 2022, PHMSA's Southwest Region Community Liaisons have worked with you to address your safety concerns, including your concerns about butane injections and Explorer's public awareness in Tulsa. Also, on June 13, 2022, the Vice President of Health, Safety, Security and Environment and the Public Awareness Administrator at Explorer Pipeline met with you in Tulsa to discuss these items. Finally, PHMSA's Central Region Director has been communicating with you since January 2023 in an effort to address your concerns.

We appreciate and value your commitment to pipeline safety. PHMSA will follow up with Explorer Pipeline again on these matters to ensure compliance. If PHMSA finds any issue of noncompliance with the federal pipeline safety regulations, or other potential safety or integrity issues, PHMSA may exercise its enforcement authority to require the company to take appropriate corrective measures.

In addition, thank you for your suggestion to reflect differences between types of hazardous liquids in the pipeline safety regulations. Presently, the regulations at 49 C.F.R. part 195 apply to pipelines transporting petroleum, petroleum products, anhydrous ammonia, ethanol and other non-petroleum fuels (including biofuel), and supercritical carbon dioxide. In general, the regulations apply equally to the transportation of all these materials, but there are a few differentiations. For example, the regulations include specific requirements for pipelines transporting hazardous liquids that form a vapor cloud when released to the atmosphere. PHMSA will consider your suggestion to explicitly identify diluent in the regulations.

I hope this information is helpful. If you need further assistance, please feel free to contact Damon Hill, PHMSA's Deputy Director of Governmental, International, and Public Affairs, by phone at 202-366-4424 or via email at damon.hill@dot.gov.

¹ The HMR defines private track as (i) Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way, or (ii) Track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee and/or a general system railroad for purpose of moving only cars shipped to or by the lessee, and where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage. See 49 C.F.R. § 171.8.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. T. Davis', with a stylized, flowing script.

Carey T. Davis
Deputy Associate Administrator
Field Operations
Office of Hazardous Materials Safety

November 12, 2023

The Honorable Pete Buttigieg
Secretary of Transportation
1200 New Jersey Ave SE
Washington DC 20590

Tulsa's butane risks

Dear Secretary Buttigieg,

In 2015 a butane transloading operation began at a rail spur in the historic Greenville neighborhood within sight of Tulsa's city hall. Semis then moved the butane 14 miles across metro Tulsa to a terminal located at Explorer Pipeline's Glenpool, Oklahoma, tank farm where it was and is blended into a flowing stream of diluent destined for the Canadian tar sands.

This butane business which benefits the four owners of Explorer Pipeline and is essential for the export of Canadian tar involves risks which are regulated by DOT including preemption of federal railroad rules and hazardous pipeline regulations. This letter will summarize the history and issues for the benefit of the DOT and request DOT's assistance in mitigating the risks.

2015 to October 2017

Although EPA Risk Management Plans including Offsite Consequence Analysis (40 CFR 68) were filed by the initial operator, the transloading operation was not recognized by the city of Tulsa. It was and is in clear violation of the city's zoning code.

October 2017

The city was considering using a city owned brownfield site contiguous with the rail spur for a BMX cycle sport venue which was expected to attract families from across the country. The conflict between the potential hazard and exposure of BMX participants was recognized by the city.

January 2018

Local media reported on the hazard and the dialogue between the transloading operator and the city. Without resolving the conflict, the city built and opened the BMX venue, therefore, accepting exposure to the risks described in the facility's Risk Management Plan. In accordance with the RMP rules (40 CFR 68) the Offsite Consequence damage distance was reported as 0.4 miles based on the release of the contents of a single railcar, one of 26.

January 2022

As the BMX facility was completed and opened, a second transloading facility was opened 3.5 miles to the east, it was also in violation of the city zoning code, a poor neighborhood with 1700 people living in the RMP explosion damage distance.

November 2022

Although general opposition to butane transloading was expressed by the city council, the city attorney believed the city's rules were preempted by federal railroad law. Lay people attempting to understand railroad law and regulations discovered the city's rules may not be preempted. An expert opinion was needed. Seven prominent citizens funded an opinion by railroad law expert. The expert's opinion confirmed the city's rules are not preempted and the city attorney subsequently agreed with the expert. The city is reported to have retained the expert, but the city has still not acted to enforce its zoning and fire codes. (A paper copy of the expert's opinion was attached to Secretary Buttigieg's copy. The expert's name and his qualifications are redacted at the request of the group that paid for the opinion. However, I am advised the city attorney has the complete document. Google is blocking electronic copies, please contact Fred Storer for a copy.)

Local rules are all there is when it comes to the location of parking of and transloading from hazardous railcars. The assistance of DOT is necessary to clarify the rules to make determination of federal preemption straight forward.

Fate of Butane

Three to four semi loads are required to empty a butane railcar. The trip to Glenpool is not without risk, a loaded semi turned over when making a left turn across the north bound lane of U.S. 75 on March 14, 2023. All butane semis must make this turn.

At Glenpool the butane is unloaded to active storage and then injected into a passing diluent stream in route to Canada. The technology used for butane injection accurately raises the vapor pressure to 15 psi, about twice the vapor pressure of gasoline. Of the transportation fuels Explorer was built to move, motor fuel gasoline was the highest vapor pressure product transported.

From: Explorer Pipeline Safety Data Sheets

	Gasoline SDS # EXPL-2	Diluent SDS # EXPL-15
Vapor Pressure at 25 deg C	400 mm Hg	510-760 mm Hg

Flash Point	-40 deg F	-70 deg F
Boiling Point (760 mm Hg)	104 deg F	84 deg F

A leak of 15 psi diluent would flash butane significantly extending the ignition envelope over gasoline.

Explorer's Incident Experience

March 9, 2000, Explorer lost 564,000 gallons of gasoline [47,000 gas station fill-ups] about 45 miles northeast of Dallas near Greenville, Texas. A smart pig had been run in 1997 and the pipeline passed that inspection. The NTSB concluded (Pipeline Accident Number: DCA-00-MP-005) "... the probable cause of the pipeline failure was corrosion-fatigue cracking that initiated at the edge of the longitudinal seam weld at a likely pre-existing weld defect. Contributing to the failure was the loss of pipe coating integrity."

The Greenville failure, Explorer's largest to date, was in a rural area and did not find an ignition source. A 15-psi diluent release of that magnitude in Tulsa would have been much more likely to result in disastrous consequences.

Explorer's Incidents from 1986 to 10/29/2023 as reported to PHMSA.

Incident Cause Type	All Reports	Significant	Serious
All Other	15	9	0
Corrosion	19	9	0
Excavation Damage	12	10	0
Incorrect Operation	47	7	0
Material/Weld/Equip Failure	106	26	0
Natural Force Damage	7	2	0
Other Outside Force Damage	1	0	0
Total Reported	207	63	0

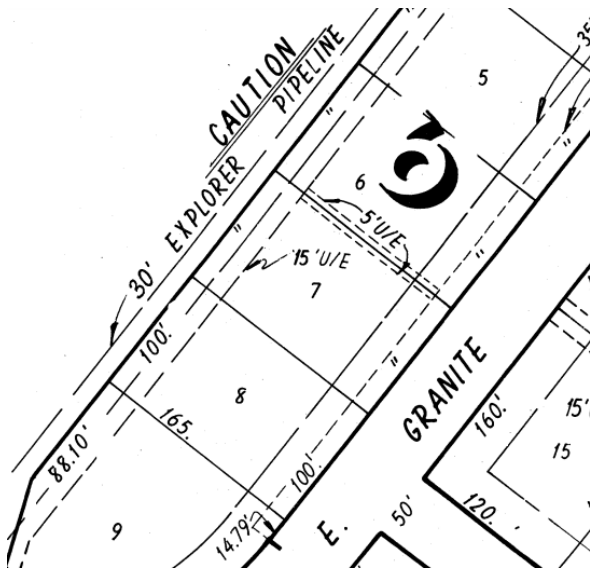
Greenville was reported as Significant but not Serious. Significant reports average 1.7 per year on Explorer's system.

Right-of-way encroachment

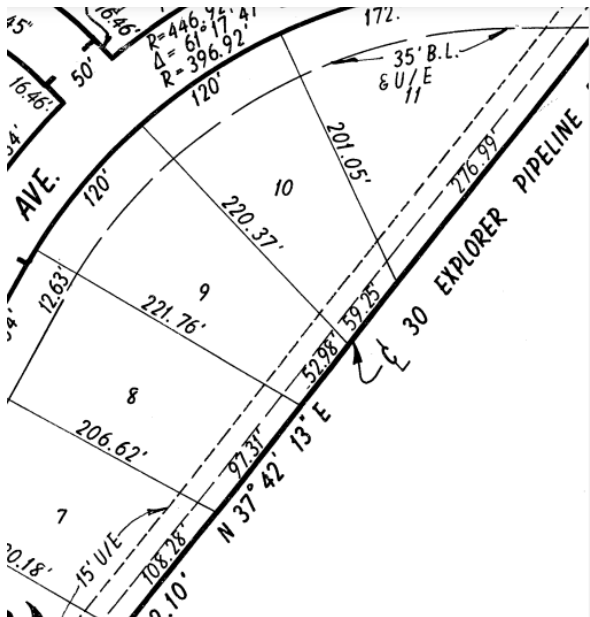
Explorer's rights-of-way were obtained by negotiation and condemnation across open land south of Tulsa and north of Broken Arrow, Oklahoma. The easements give Explorer adequate authority to prevent encroachment. However, shortly after the pipeline became operational in 1972 subdivision surveys began and plats were filed with local governments that encouraged encroachment.

Examples extracted from typical plats are shown here:

Sun Meadow II



Sun Meadow III



The pipeline easements are at the back of the lots and centered on the pipeline. Lot lines then result in cross fencing. Time passes and the pipeline is forgotten, encroachment is common, and an emergency response would be compromised. Stake holders lack knowledge and encroachment, particularly privacy fences, can hide inappropriate activities including sabotage.

Today, Explorer's website reflects right-of-way (ROW) best practices (<https://www.expl.com/report-right-of-way-encroachment/>).

"Unauthorized building or planting in the pipeline right-of-way is known as encroachment. Explorer regularly conducts maintenance to trim trees and remove shrubs or structures that are on the right-of-way. We need to be able to clearly view the pipeline corridor during aerial or foot patrols as part of our safety practices. If you see trees, plants or structures including sheds located near the pipeline, email us at row@expl.com."

In Tulsa County Explorer does not conduct maintenance to trim trees and remove shrubs or structures.

Explorer's website regarding cross fencing ([Microsoft Word - EPL-331 Encroachment Specification Revised \(002\).docx \(expl.com\)](#)) :

"8. FENCES – BARRIERS – WALLS

A) Privacy fences are not permitted, unless otherwise authorized by the easement or as approved by Explorer Pipeline's Public Awareness Program Administrator.

B) Fence posts shall not be installed within 3 feet of the center of the pipeline and the first post either side of the pipe shall be set in hand dug holes. To perform normal maintenance, access through or around fences crossing the right-of-way must be provided."

In Tulsa County Explorer does not attempt to correct past sins regarding privacy fences or regulate the placement of fence posts. The forgotten about pipeline is vulnerable to past and future damage.

Encroachment in unplated areas

One of the most dramatic errors is the schoolyard of Southeast Jenks Elementary School where the pipeline passes through the school yard for over 700 feet as shown here:



Schools are included as a “Stakeholder Audience” in API RP 1162 which should include parents of SE Jenks Elementary students.

SE Jenks Elementary was built in 1990.

API Recommended Practice (RP) 1162

49 CFR 195.440, Public Awareness

(a) Each pipeline operator must develop and implement a written continuing public education program that follows the guidance provided in the American Petroleum Institute’s (API) Recommended Practice (RP) 1162 (incorporated by reference, see part 195.3).

Explorer’s response to RP 1162 in the form of a mailout to the affected public includes “Signs of a leak”, “What to do if a leak occurs”, and “How to recognize a leak”.

Required by RP 1162 (5.3.5) but not included in Explorer’s mail out is encroachment, privacy fences, landscaping, storage buildings, access to the pipeline system during emergencies, and the importance of the ROW area being clear of trees, shrubs, buildings, fences, structures, or any other encroachments that could affect the integrity of the pipeline. Explorer’s mailer does not direct the public to the ROW hazards described on their website.

RP 1162, New Hazards (6.3) includes “Certain operational changes initiated by the operator can introduce new hazards that have not been previously communicated to affected stakeholders.”

The all-encompassing term “Petroleum” used in Part 195 and in Explorer’s public communications and shown on their pipeline markers is not at all adequate to explain the different commodity groups that have different leak recognition and response requirements.

Help needed.

- Local government needs the ability to determine if railcar parking and transloading of hazardous materials preempts local codes.
- Explorer Pipeline should be required to discontinue or fully justify the risk associated with transporting 15 psi diluent across Tulsa in their 50-year-old pipeline.
- Explorer Pipeline should be required to present a plan for correcting historic encroachment.
- Explorer Pipeline should be required to fully comply with the requirements of API RP 1160 and 1162.
- 49 CFR 195 should be changed to reflect the differences between relatively low hazard materials such as diesel and jet fuel and motor gasoline and 15 psi diluent.

Sincerely,

Original Signed by:

Fred Storer
111 W 5th Street, Apt. 803
Tulsa, OK 74103
ffstorer@gmail.com

cc: via email to: Explorer Pipeline Company, et al.

MEMORANDUM

To: Tulsa Concerned Citizens

From: Peter A. Pfohl, Slover & Loftus LLP

Re: Federal Preemption of Local Zoning, Permitting, and Safety Laws
Governing Butane Transloading in Tulsa

Date: March 1, 2023

I. EXECUTIVE SUMMARY

We have been asked to present the framework, reach, and application of federal preemption of local laws under the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (“ICCTA”) as they apply to the storage and transloading of large volumes of butane, a hazardous commodity, being performed at two sites in in Tulsa, Oklahoma, at or near: (1) 660 East Independence Street, an area near downtown close to BMX USA (“Downtown Site”) and (2) 5307 East Pine Street, located in Northeast Tulsa (“East Pine Site”), collectively the “Sites”.

The owners/lessees of these Sites have engaged in the unpermitted storage and transloading of many millions of pounds of butane annually, a highly flammable hazardous chemical, and these activities appear to have been increasing recently. In the event of accidental discharge, such activities pose serious, and imminent public health and safety threats to the substantial nearby populations, neighborhoods, and the environment. These are activities that implicate multiple zoning, permitting, fire code, and other public safety ordinances, codes, and laws. Most notably, both Sites are zoned only for light or medium industry, which prohibits the storage and transloading of such hazardous materials. Also, neither Site has received permission to operate through any permit, Variance, or Special Exemption use to our knowledge.

While the open zoning violations at the Sites are subject to enforcement actions, injunctive relief, and substantial penalties, of \$1,200.00 or more per day for each violation under City Zoning Laws, to date, no such enforcement actions have taken place to our knowledge. Instead, it appears that local enforcement officials may have assumed that, because the activities involve railroads acting within the jurisdiction of the federal Surface Transportation Board (“STB” or “Board”) under ICCTA, all zoning, permitting, fire code, and other public safety laws are completely preempted by federal law.

However, based on the facts known to date, and for the reasons discussed below, we do not believe the butane railcar storage and transloading activities being conducted at

the Sites are within the jurisdiction of the STB and eligible for preemption protection under ICCTA. In sum, based on the facts known to date, we know of no federal law that would prevent local officials from enforcing applicable ordinances, codes, laws, and rules immediately. We are also unaware of any applicable legal authority that would reasonably support a finding of preemption, and believe that any asserted defense of preemption by the operators of the Sites in response to such enforcement actions would be unsuccessful.

II. QUALIFICATIONS

I am an attorney with twenty-five years' experience in rail transportation law, and our firm has been participating in the space for over 50 years. I have represented a wide-variety of stakeholders in the transportation arena, including railroad shippers and receivers, states, cities, localities, public agencies, ports, terminals, and short-line railroads, on a broad range of issues. In the course of these representations, I have worked on numerous matters involving the common carrier obligation, agency jurisdiction, and federal preemption. In my practice, I have addressed many of the issues that commonly arise with respect to ICCTA preemption, including, but not limited to issues relating to: (a) the STB's jurisdiction over transportation, property, and track, (b) categorical (or express) preemption; (c) as-applied preemption; (d) preemption of local ordinances; (e) preemption of state environmental and safety statutes; (f) preemption of other state or federal law remedies; (g) preemption of state property rights claims; (h) preemption of state contract law claims; (i) preemption of state tort claims; and (j) the authority of courts and the STB to decide jurisdictional and preemption matters.

My practice has included representation of clients on these matters in various disputes before state and federal courts and arbitral panels, and in proceedings and hearings before the STB, the Federal Railroad Administration ("FRA"), and the Pipeline and Hazardous Materials Safety Administration.

I earned a Bachelor of Arts degree from the University of Notre Dame (1989) and earned my Juris Doctorate degree from the Columbus School of Law at Catholic University of America (cum laude) (1997). I am an active member of the bar for the District of Columbia, and am a past President, and current Board Member, *ex officio*, of the Association of Transportation Law Professionals. I have received several professional honors for my practice, including Band 1 ranking by Chambers USA, "Leaders in their Field," for Transportation: Rail (for shippers) (Nationwide), and was recently named "Lawyer of the Year" by Best Lawyers for Transportation Law, Washington D.C., 2023.

II. FACTUAL BACKGROUND

The involved butane railcar storage and transloading activities are being conducted at two locations, the Downtown Site and the East Pine Site.

A. Downtown Site Butane Railcar Storage and Transloading Activities

The Downtown Site is in Tulsa’s Historic Greenwood District, a Oklahoma Main Street Community and Destination District. The location consists of a an approximately 8.4 acre privately leased site immediately adjacent to yard track owned by Watco, a non-carrier transportation services and shortline holding company, and/or its subsidiary South Kansas & Oklahoma Railroad (“SKOL”) (collectively “Watco/SKOL”). SKOL is a Class III, shortline railroad that operates over 425 miles of track and interchanges/ connects with other railroads (e.g., BNSF, UP, and KCS) at several nearby locations.

The Downtown Site is immediately adjacent and to the West of the 12.6 acre site of USA BMX headquarters and Hall of Fame opened in 2022, and to the East of Oklahoma State University-Tulsa. It is also immediately adjacent and to the West of the 9.5-acre site owned by the City of Tulsa which has recently approved the \$44 million redevelopment of the 120,000-square-foot Oklahoma Ironworks building into a mixed-use food, retail, office/business incubator space. See <https://www.cityoftulsa.org/press-room/team-alchemy-selected-to-redevelop-historic-evans-fintube-site/>. The location of the Downtown Site is depicted in the schematic below.



The Downtown Site includes two spur tracks extending 1,865 feet, with 26 railcar capacity. Watco/SKOL designed and constructed the Downtown Site in 2015 as a liquified petroleum gas storage and transloading site to be leased to third parties. Since construction completion, we understand that two tenants have leased, occupied, and operated butane railcar storage and transloading at the Site, including Base, Inc. (d/b/a Second Base), and most recently, Centennial Energy, LLC a subsidiary of NGL Energy Partners LP (“Centennial/NGL Energy”).

A recent inspection report of the Downtown Site by the Environmental Protection Agency's ("EPA's") Enforcement and Compliance Assurance Division ("EPA Inspection Report") described in detail operations at the Site. A copy of the EPA Inspection Report is set forth at **Attachment 1**. The butane is owned by Keyera Energy, LLC ("Keyera"), and is shipped by rail in railroad line-haul service to Centennial/NGL Energy's leased Downtown Site in approximately 30,000-gallon (~146,000 pound) railcars, delivered by SKOL. The product is temporarily stored in place in the railcars at the Downtown Site by Centennial/NGL Energy, and ultimately transloaded to approximately 9,200-gallon tanker trucks by RLS International Transport Services, Inc. ("RLS"), Centennial/NGL Energy's contractor. The product is then transported by truck (3-4 trucks per railcar) by Groendyke Transport, Inc. ("Groendyke Transport"), back through the City of Tulsa some 16 miles south of the City to Keyera's Oklahoma Liquids Terminal, in Glenpool, Oklahoma, acquired by Keyera in 2018.

The Keyera Terminal is situated on the southwest corner of the Glenpool tank farm, owned and operated by Explorer Pipeline Company. We understand that Keyera receives and stores the butane at its Terminal, where it is then blended at the location, and transported via Explorer's pipeline and connecting pipelines to Canada to make pumpable bitumen.

The EPA Inspection Report found several safety violations of EPA rules, including inadequate hazard assessment techniques by the operator to identify butane leaks from railcars and a failure to submit a Risk Management Plan ("RMP"). A RMP identifies the potential effects of a chemical accident and an evaluation of worst-case and alternative accidental releases. A RMP also provides a history of accidents/releases, accident prevention programs, and emergency response procedures to be taken should an accident occur.

We understand that a RMP submitted by the previous tenant of the Downtown Site identified the Offsite Consequence Analysis ("OCA") "worst case" damage distance of an accidental butane release from a railcar of 0.4 miles, covering a significant area of Downtown Tulsa. Broadly, for butane, a flammable gas, this is the distance a vapor cloud explosion blast waves will travel before dissipating to the point that serious injuries from exposure will no longer occur. 40 C.F.R. part 68. Put differently, this is the distance required for the pressure wave created by the exploding contents of a single railcar, one of 26, to dissipate to the point where injury or structural damages do not occur. However the larger concern of many citizens is the consequence of a fire occurring at one of three locations where a trailer mounted apparatus is used to make temporary connections via flexible hoses between a rail car and a semi-truck trailer. A fire which impinges on a railcar or trailer can create the conditions for a Boiling Liquid Expanding Vapor Explosion ("BLEVE"). A BLEVE could launch fragments of the vessels for hundreds of yards, causing catastrophic injuries and harm to the public. Should the threat of BLEVE incident arise, the Fire Department would need to evacuate

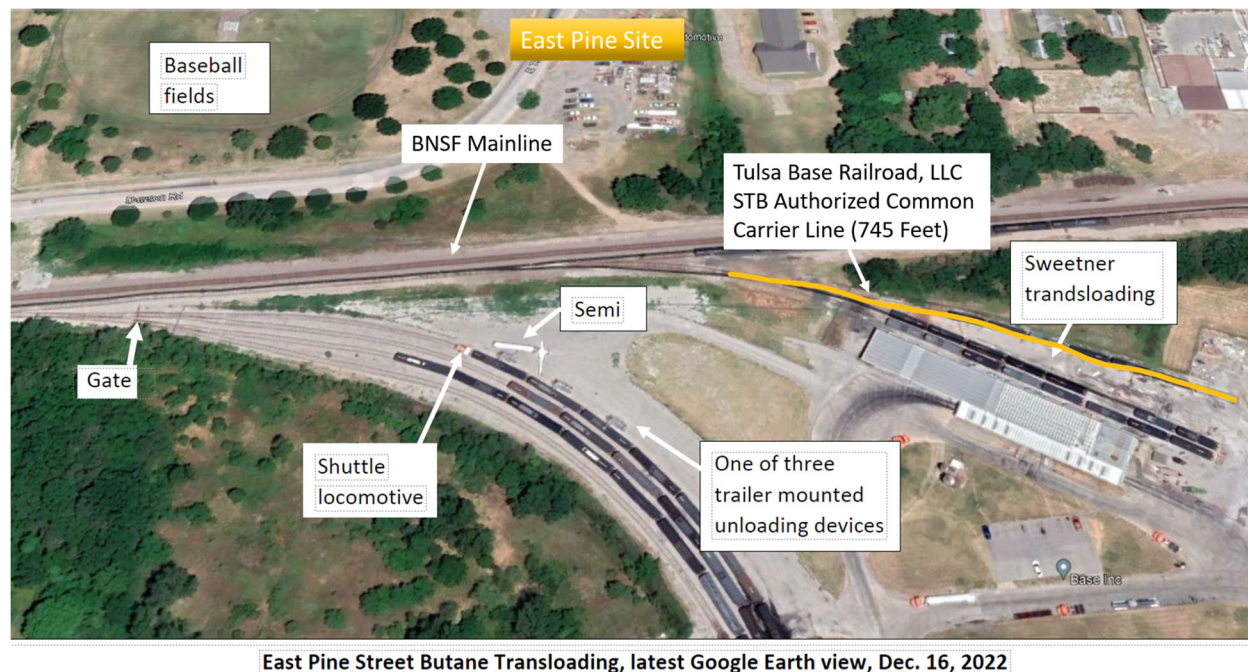
the area, including closing U.S. 75 and I-244, for an extended period while the fire burned out and cooled down, which is what recently occurred with the rail derailment in East Palestine, Ohio, which led to the evacuation of the town, and the controlled release and burning of hazardous commodities from railcars.

It is unclear the total volume of butane currently being stored/transloaded at the Downtown Site by Centennial/NGL Energy, but the maximum volumes appear consistent with the previous operator at the location, who reported to EPA that it temporarily stored in place in railcars as much as 3.8 million pounds (or approximately 781,000 gallons) of butane at one time in batches of 26 railcars. Watco has recently listed the Downtown Site as available for lease for LPG transloading by third parties. A copy of Watco's leasing brochure is set forth at **Attachment 2**.

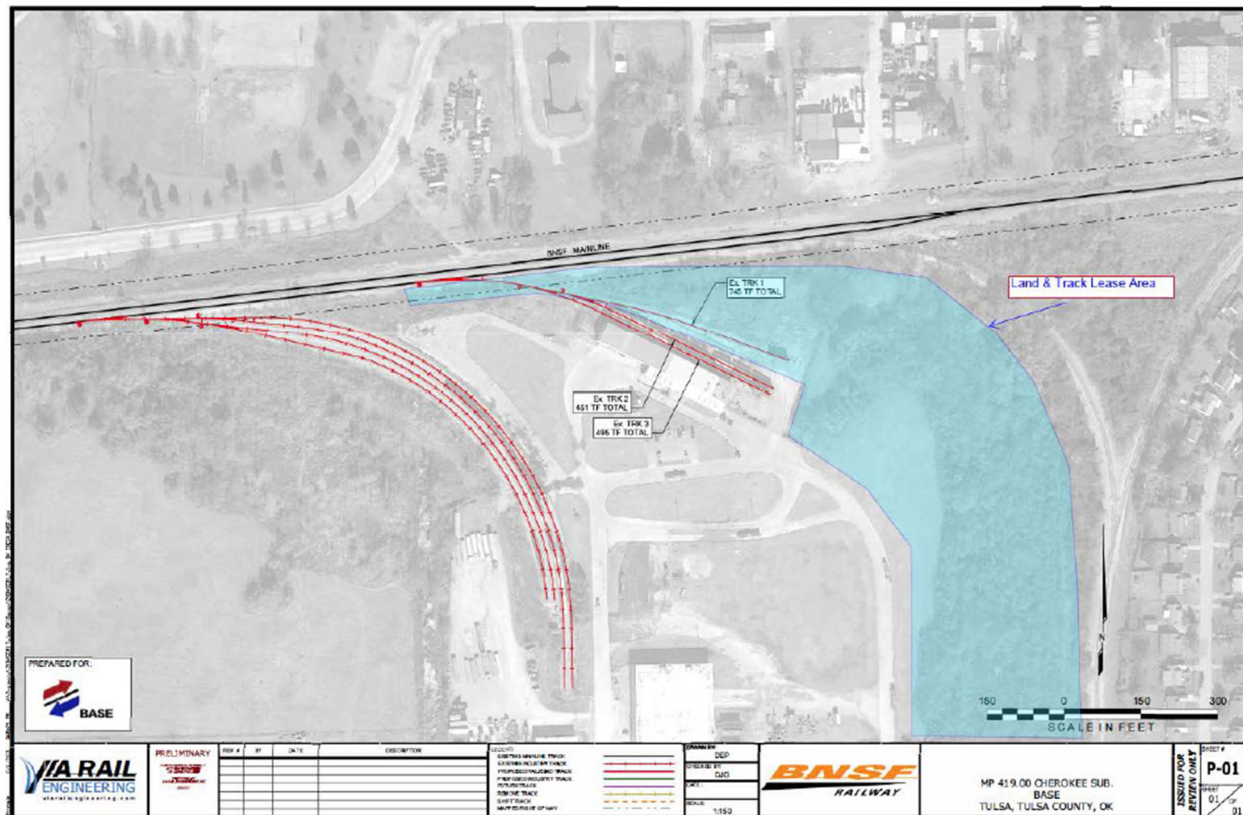
B. East Pine Site Butane Railcar Storage and Transloading Activities

The East Pine Site is located in Northeast Tulsa and is adjacent to the Maplewood and Dawson residential neighborhoods, and the Mike Patrick Park. The Site is owned by Base, Inc., however, a substantial portion of railroad track on and near the parcel, including the mainline used to serve the facility comprising part of BNSF's Cherokee Subdivision, is owned by BNSF Railway, Inc., a Class I common carrier railroad.

The location and relevant aspects of the Site, including rail lines, and the butane railcar storage and transloading locations, are shown in the schematic below.



As reflected above, a very small portion of the railroad track (highlighted in yellow), consisting of 745 feet of track, was authorized by the STB in 2021 to be leased (along with accompanying undeveloped land) to a newly created subsidiary of Base, Inc., Tulsa Base Railroad, L.L.C. (“TBR”) for common carrier service in FD 36536, *Tulsa Base Railroad, L.L.C. – Lease & Operation Exemption – Base Inc.* The remainder of the track where railcars are stored and transloaded is classified as private industry track, owned and maintained by Base, Inc. as reflected in the drawings provided by TBR to the STB in FD 36536, shown below:



We understand, but have not been able to confirm to date, that the butane being shipped to the East Pine Site for storage and transloading, like at the Downtown Site, is owned by Keyera. It is shipped by rail by to the Site by BNSF, also in approximately 30,000-gallon (~150,000 pound) railcars. Similar to the operations being performed by Centennial/NGL Energy at the Downtown Site, after temporary storage on-site, the railcars are ultimately transloaded to approximately 9,200-gallon tanker trucks on the Base’s private industry track to the East of the Sweetener Facility. The product is then transloaded and transported by truck by Groendyke Transport, apparently to Keyera’s Oklahoma Liquids Terminal.

TBR may obtain a switching fee for railcars delivered by BNSF to the 745 feet of common carrier track that it operates. However, it is unclear if TBR is an active common carrier railroad, as it does not appear that TRB has filed any accident/incident reports

with the FRA required of all active common carrier railroads, nor does it appear that TRB has registered to date as a covered employer with the Railroad Retirement Board as required under the Railroad Retirement Act (45 U.S.C. § 231 *et seq.* (“RRA”) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 *et seq.*) (“RUIA”).

The volume of butane being stored at the East Pine Site reported to the EPA in a recent RMP is as much as 7.8 million pounds (or 1.6 million gallons) at one time (roughly 53 railcars). We understand transloading occurs continuously in daylight hours six days a week. We also understand that the OCA “worst case” damage distance of an accidental butane release of a single railcar to be 0.4 miles, covering a population of approximately 1,400 people, along with schools, public recreation (including the Mike Patrick Park), and churches. Also, just like the Downtown Site, the larger concern of many citizens is a fire originating at one of three connections between railcars and semi-trailers which could result in a BLEVE.

III. GENERAL STATUTORY OVERVIEW

Through ICCTA, Congress has provided the STB broad regulatory authority over common carrier freight railroads and the transportation they provide as part of the interstate rail network. 49 U.S.C. § 10501. The STB has exclusive jurisdiction over rail transportation by rail carriers and “the construction, acquisition, operation, abandonment, or discontinuance” of rail lines pursuant to 49 U.S.C. § 10501(b). Under 49 U.S.C. § 10102(5), a “rail carrier” is defined as “a person providing common carrier railroad transportation.” Among other things, common carrier lines are subject to STB licensing and abandonment requirements; common carriers are obligated to provide service to those located on their lines upon reasonable request; and the STB has exclusive jurisdiction over common carrier rail transportation service, and the construction, acquisition, operation, and abandonment of common carrier railroads and railroad lines. 49 U.S.C. § 10502.

State and local laws that affect common carrier operations are subject to federal preemption. This could potentially include local zoning and permitting laws that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the Board has authorized, as well as attempts to address transportation matters that are exclusively regulated by the Board such as railroad rates or common carrier operations. While the preemption of state and local laws affecting legitimate railroad activities is intentionally broad, the states do retain certain historic police powers designed to protect the safety and health of the local population (e.g., plumbing codes, fire codes).

There is a two-part test for preemption to apply to storage and transloading activities, generally summarized: (1) construction/operation activities must comprise transportation, and (2) the activities need to be conducted by or on behalf of a rail carrier. Transloading activities when sufficiently connected with common carrier railroad service are indeed “transportation,” but as to the activities, they must be performed by, or under the auspices of a “rail carrier.” *E.g., Fla. E. Coast Ry. v. City of Palm Beach*, 110 F. Supp. 2d 1367 (S.D. Fla. 2000), *aff’d*, 266 F.3d 1324 (11th Cir. 2001) (third-party noncarrier rail/truck transloading activities are not exempt from local zoning and occupational licensing ordinances). Where an activity, even where on railroad property is not considered transportation by a rail carrier, no federal preemption applies, and states and localities may fully regulate the activity.

Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 413-16 (5th Cir. 2010) (en banc).

IV. ANALYSIS

Based on the facts known to date, we do not believe that the butane railcar storage and transloading activities being conducted at either the Downtown Site or the East Pine Site are a part of rail transportation under the exclusive jurisdiction of the STB that qualify for preemption.

A. Preemption Does Not Likely Apply to Local Zoning, Permitting, and Other Safety Laws Governing the Downtown Site

In order for an activity to be subject to the STB’s jurisdiction, and therefore entitled to preemption, an activity must constitute **both** transportation and must be performed by, or under the auspices of a “rail carrier” as defined under 49 U.S.C. § 10501(a). *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 307-10 (3d Cir. 2004); *New York & Atlantic Ry. Co. v. STB*, 635 F.3d 66, 72-75 (2nd Cir. 2011).

At the Downtown Site, Watco/SKOL is leasing the Site to a third party, Centennial/NGL Energy. Centennial/NGL Energy is conducting the transloading services at the site, through its contractor RLS, and neither are a common carrier railroad.

The only such railroad near the Site is SKOL, but again it is not storing or transloading the butane cars. Instead, the property is possessed and controlled by a third party lessee, Centennial/NGL Energy, who is independently conducting the butane storage and transloading activities at the Site. SKOL’s common carrier transportation duties, including its responsibility and liability for the railcars, ends when they are delivered and uncoupled at the Downtown Site. The railcars are then stored and

transloaded by Centennial/NGL Energy or its subcontractor. SKOL is not holding out its own transloading service through a third-party as an agent, nor is it exerting control over the Centennial/NGL Energy's operations.

The services cannot meet the second part of the ICCTA preemption test, as they are not being conducted by a STB certified common carrier rail carrier or under the auspices of such a common carrier as part of its rail transportation services. As such, local regulation of the storage and transloading activities is not preempted. E.g., *Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order*, FD 35057 (STB served Oct. 16, 2009) at 4 (transloading activities did not qualify for preemption because the activities of the operator were not under the control of the New York and Atlantic Railway Company, the carrier on whose property the facility was located); *Town of Milford, MA – Petition for Declaratory Order*, FD 34444 (STB served Aug. 12, 2004) (no STB jurisdiction over a noncarrier operating a transloading facility within a rail yard pursuant to an agreement with rail carrier for non-exclusive use of the yard); *accord Hi Tech Trans, LLC; New York & Atlantic Ry. Co.*

Also, the involved tracks appear to be of the nature of private track, constructed by Watco/SKOL to be leased for the exclusive use by third-party, non-carrier tenants. In such instances, even operations by a common carrier over such track do not subject the operations to the STB's jurisdiction. For example, "where a carrier serves a mine over private track owned and maintained by the shipper, and does not serve others over that track, the carrier operation is [not subject to STB regulation]." *New York Cent. R.R. v. S. Ry. Co.*, 226 F. Supp. 463, 471 (N.D. Ill. 1964). Again, SKOL is delivering the butane railcars to the Downtown Site, and upon delivery, its common carrier service obligations (and duties) cease. The railcar storage and transloading activities that occur following delivery by SKOL are not part and parcel of any common carrier rail transportation. *See North Am. Freight Car. Ass'n v. BNSF Ry.*, NOR 42060 (Sub-No. 1) (STB served Jan. 26, 2007) at 15 (storage of private railcars on private track by a non-carrier is not within the STB's jurisdiction).

Additionally, even if the track were considered to be so-called "spur" track subject to the jurisdiction of the STB under 49 U.S.C. § 10906, again, the involved common carrier serving the location, SKOL, is not performing the physical transloading, and is not holding out transloading as part of its service. SKOL also is not compensating the third-party transloader or controlling the transloading activities.

Accordingly, at a minimum, Centennial/NGL Energy cannot satisfy, this mandatory "rail carrier" element for § 10501(b) preemption. Where a non-railroad is operating a transload facility separately for its own benefit, it is not subject to the jurisdiction of the STB and there is no preemption.

B. Preemption Does Not Likely Apply to Local Zoning, Permitting, and Other Safety Laws Governing the East Pine Site

Similarly, for the East Pine Site, the involved tracks where transloading occurs appear to be private industry track, owned or possibly leased (from BNSF) by Base, Inc. At the Site, the butane railcar storage and transloading operations appear to be conducted by Base, Inc. on private, industry track. BNSF delivers the cars to East Pine Street, where its common carrier responsibility and responsibility for the cars ends. The cars are then privately switched to the private industry tracks for storage and transloading from railcar to truck by Groendyke Transport. Under the authorities cited in the previous section, none of these activities are entitled to preemption protection under ICCTA.

It is true that Base, Inc. established Tulsa Base Railroad, L.L.C., ("TBR"), which obtained authority from the STB in 2021 to conduct common carrier operations on 745 feet of single-line track that it subleases from Base, Inc. at the location to the northeast of the so-called "sweetener facility." However, no transloading activities are being conducted on that limited 745 feet of common carrier track where TBR is authorized to operate as a common carrier.

Also, the facts known to date appear to show that TBR is not actively conducting operations at the East Pine Site as a common carrier. STB decisions (including exemptions) authorizing railroad common carrier operations are permissive only, and the authority granted must then be properly effectuated by the entity seeking common carrier certification. *E.g., Oakland Global Rail Enterprise, LLC – Operation Exemption – Rail Line of Union Pac. Railroad Co. and BNSF Railway Co.*, FD 35822 (STB served July 24, 2014), at 1. TBR does not appear to have any registered railroad employees under the RRA and the RUIA, and as such, does not appear to be operating as an active common carrier, even though it might still be obtaining "switch" fees from BNSF for the interchange/receipt of each railcar on its 745 feet of common carrier track. The railroad retirement laws generally apply only to STB-regulated carriers and their activities. They do not apply to "private" railroads or private switching activities, which are not subject to STB jurisdiction. TBR also does not appear to have engaged in any FRA monthly reporting required of common carriers that might help show that it is an active common carrier. See *e.g.*, 49 C.F.R. Part 225, FRA Form 6180.55.

Additionally, even assuming *arguendo* that TBR is an active common carrier, TBR has never sought STB authority to conduct common carrier services on the transloading track. And if TBR is performing railcar switching activities on the private industry track where transloading occurs, as referenced above, that does not convert those operations to common carrier operations. *New York Cent. R.R.*, 226 F. Supp. at 471; *accord B. Willis, C.P.A. Inc. – Petition for Declaratory Order*, FD 34013 (STB served Oct. 3, 2001), at 3 (the court in "*New York Central*" [] "indicated that a common carrier operating over private track would not [be engaged in regulated operations], so long as it

does not perform common carriage service on the private track and it does not maintain that track with its own funds.”); *Florida E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) (transloading of cement within rail yard not within Board jurisdiction).

Further, the transloading tracks are not directly connected to TBR’s 745 feet of common carrier track leased from BNSF, and possibly subject to the STB’s jurisdiction as exempt “spur” tracks.¹ Instead, the tracks have been designated by TBR and Base, Inc. in STB filings as private industry track, and, as such, the entity conducting service over the tracks is not holding itself out to openly provide service to anyone else. The STB does not have jurisdiction over these private lines, they are not subject to federal regulation under ICCTA, or ICCTA preemption, and state and local regulation is fully applicable to the lines. *See, e.g., Suffolk & Southern R.R. – Lease & Operation Exemption – Sills Rd. Realty, LLC*, FD 35036 (STB served Nov. 16, 2007), at 1 n.1; *Willis*, FD 34013 (STB served Oct. 3, 2001), at 2; *see North Am. Freight Car. Ass’n v. BNSF Ry.*, NOR 42060 (Sub-No. 1) (STB served Jan. 26, 2007) at 15 (storage of private railcars on private track by a non-carrier is not within the STB’s jurisdiction).

Finally, even if the transloading tracks were ultimately considered to be under the jurisdiction of the STB, and are being conducted by a common carrier as part and parcel of its common carrier operations, which the facts known to date do not show to be the case, the FRA requires railroads to expedite each shipment of hazardous materials such as butane and prevents the railcar from being held on any railroad tracks for more than 48 hours. 49 C.F.R. § 174.14(a). As such, even if the storage and transloading operations were being conducted on common carrier track (or excepted track) by a common carrier pursuant to the jurisdiction of the STB, then the FRA 48-hour rule would apply, and the operators would be in substantial continuing violation of this important federal safety requirement because many of the loaded butane railcars are stored on the tracks for more than 48 hours.²

¹ Preemption principles can apply to tracks subject to 49 U.S.C. § 10901 (“§ 10901 track”) or ancillary and excepted tracks pursuant to 49 U.S.C. § 10906 (“§ 10906 track”).

² We understand that based on FRA’s recent review of operations at the East Pine Site, and the Downtown Site, FRA has determined that its 48-hour rule is inapplicable to the railcar storage because the activities are not being conducted by a common carrier on common carrier (or excepted spur) track. We await further clarification from the FRA on same.

C. The Authorities Cited by the City to Date are Inapposite, and the City Has Failed to Consider Directly Applicable Authorities

We are aware that, in response to requests for zoning law enforcement by Tulsa citizens, the City may have conducted an initial legal review of railroad preemption, and in doing so, may have assumed, incorrectly, that federal preemption under ICCTA applies to all, or at least most, railcar storage and transloading activities. The Concerned Citizens shared one response from the City, which opines as follows:

I am reluctant to get too far into the substantive legal issues, but the City cannot simply choose to ignore federal law and authority with respect to rail carrier operations. In short, the federal Surface Transportation Board (STB) has exclusive jurisdiction over "transportation by rail carriers" (49 U.S.C. § 10501 (b)(1)), and the Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempts state and local laws which come within the jurisdiction of the STB. *Franks Inv. Co. v. Union Pacific*, 593 F.3d 404 (5th Cir. 2010).

Federal preemption of state and local regulations has been held to include transloading operations, whether such activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over a third party's operations. *Borough of Riverdale—Pet. for Declaratory Order*, FD 35299, slip op. at 4 (STB 2010). *See, for example, Padgett v. Surface Transportation Board*, 804 F.3d 103 (1st Cir. 2015) (ICCTA preempts state and local regulation of liquid petroleum gas transloading facility); *Texas Central v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012) (ICCTA preempts city's regulation of transloading operations); *Norfolk Southern v. City of Alexandria*, 608 F.3d 150, (4th Cir. 2010) (ICCTA preempts city's regulation of transloading operations); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005) (ICCTA preempts state land use law as applied to transloading and storage facilities).

I am aware of these decisions, and have reviewed them further. I was involved and assisted in the *Franks Investment* decision for the plaintiff, which found a general presumption *against* preemption and that a landowner's possessory action seeking the right to continue to use of private railroad crossings was *not* preempted. The court found

that the involved railroad had no right under ICCTA, or under the auspices of preemption, to override state property laws and unilaterally close private rail crossings in the absence of a showing of unreasonable interference with rail operations.

The other cases directly address federal preemption of transloading operations, but are all inapposite. In each case, ICCTA preemption over local laws was found, but only after a close review of the individual facts and circumstances, which revealed that all the activities were being conducted by a bona fide common carrier as part and parcel of its common carrier rail service. For example, *City of Alexandria* involved a challenge by a city to ethanol transloading being conducted under the control of the Norfolk Southern Railway Company (“NS”), where NS fully owned, controlled, and constructed the facility, the transloading was held out by NS as part of its rail transportation services, and NS set, invoiced, and collected all transloading fees charged to the shipper as part of its overall price for its common carrier transportation. While NS hired a contractor to conduct transloading, the contractor was found not to be conducting transloading services on its own as an independent business, and only received payment through a flat rate, without the ability to market the facility in any way. Based on this close review of the factual circumstances, the involved transloading activities were considered sufficiently under the control and auspices of NS to make the activities a part of NS’s common carrier rail transportation services.

The *Borough of Riverdale*, *Padgett*, *Texas Central*, and *Green Mountain* similarly examined all the facts and circumstances of the transloading activities being performed, and only after finding that the transloading activities were being conducted under the full auspices and control of a bona fide common carrier railroad, did preemption apply. Such control and authority by a bona fide rail carrier is simply not occurring at either the Downtown Site or the East Pine Street Site for the reasons cited above. Unfortunately, the City failed to find or attempt to differentiate any of the many cases cited in the above sections where the involved transloading activities, similar to the activities occurring at the Downtown Site and the East Pine Site, were not found to enjoy preemption protection under ICCTA.

V. CONCLUSION

Applying the known facts to the applicable law, in our opinion the butane storage and transloading activities being conducted at the Downtown Site and the East Pine Site are not part of “transportation by rail carrier” within the STB’s exclusive jurisdiction, and the operations are therefore not exempt from local zoning, permitting, and other safety laws.

If the City or County were to enforce applicable ordinances, codes, laws, and rules, it would be up to each of the entities conducting the storage and transloading

activities to overcome a presumption against preemption and demonstrate that their activities are in fact subject to the STB's exclusive jurisdiction, and therefore eligible for preemption protection. Based on the facts of record known to us to date, we do not believe that the operators at the two Sites could successfully overcome this substantial legal hurdle and establish ICCTA preemption in court or before the STB.

In our opinion, the continuing lack of any enforcement actions in the face of apparent clear non-compliance with essential land use and public safety laws where the activities pose a clear threat to public health and safety in sensitive areas of the City based on the mere possibility of a future defense claim of preemption would constitute a vastly overbroad reading of applicable ICCTA preemption law and is unjustified.

ATTACHMENT 1



**Region 6 Enforcement and Compliance Assurance Division
INSPECTION REPORT**

Inspection Date(s):	10/12/2022 - 10/13/2022	
Media Program:	Air	
Regulatory Program(s)	Clean Air Act (CAA) § 112(r) and 40 Code of Federal Regulations (C.F.R.) Part 68 Chemical Accident Risk Management Plan (RMP)	
Company Name:	WATCO/South Kansas & Oklahoma Railroad, LLC (SKOL)	
Facility Name:	Tulsa SKOL Location	
Facility Physical Location:	660 East Independence Street	
(city, state, zip code)	Tulsa, Oklahoma 74106	
Mailing address:	WATCO/SKOL 315 West 3 rd Street	
(city, state, zip code)	Pittsburg, Kansas 66782	
County/Parish:	Tulsa	
Facility Contact:	Matthias Sayer	Senior Vice President, Legal
	Matthias.Sayer@nglep.com	
FRS Number:	110064022864	
Identification/Permit Number:	No CAA Title V Permit	
Media Identifier Number:	RMP 1000 0022 8639	
NAICS:	424710 – Petroleum Bulk Stations and Terminals	
SIC:	5171 – Petroleum Bulk Stations and Terminals	
Personnel participating in inspection:		
Tony Robledo	U.S. EPA	Inspector/Enforcement Officer
Rodney Shewey	NGL Energy Partners LP	Marketer
Nathan Tromopke	RLS International Transport Services, Inc.	Site Manager
Kurston McMurray	Centennial/NGL Energy Partners LP	General Counsel
Brett Forkner	Centennial/NGL Energy Partners LP	Director, Environmental Compliance
EPA Lead Inspector Signature/Date		
	Tony Robledo	
Supervisor Signature/Date		
	Samuel Tates	

Section I – INTRODUCTION PURPOSE OF THE INSPECTON

I, the Environmental Protection Agency (EPA) Region 6 inspector Tony Robledo, arrived at the WATCO/SKOL facility location at approximately 1:30 p.m. on October 12, 2022, and again on the morning of October 13, 2022, for an announced inspection. I met with facility representatives noted above at the opening meeting. I presented my credentials and informed them that this was an EPA inspection to determine compliance with CAA § 112(r) and 40 C.F.R. Part 68 Chemical Accident Prevention Provisions. I was informed by facility representatives that the owner of the property WATCO/SKOL leases the property to Centennial Energy, LLC. Therefore, Centennial Energy, LLC is the main operator of the site.

FACILITY DESCRIPTION

Facility representatives described the facility's operations. Operations at this facility location started in March of the year 2022. Railcars containing liquid butane belonging to Keyera Energy, LLC (Keyera) are delivered to the facility where Railroad Loading Services, LLC (RLS) conducts transloading and handling operations. Therefore, RLS is also an operator at the site. Butane arrives at the location in approximately 30,000-gallon (~150,000 pound) railcars and is transloaded to approximately 9,200-gallon tanker trucks owned by Groendyke. This railcar location can accommodate a total of 26 railcars, with 13 railcars on each of two railroad tracks, and the butane that is contained in the railcars ultimately offloaded to tanker trucks. Only butane is transloaded, and no chemical blending is conducted at this location. There were three RLS non-union employees onsite at the time of the inspection, although I was informed that SKOL and Keyera may have additional non-union employees onsite periodically, which makes Keyera an additional site operator. Although Groendyke owns tanker trucks at the site, their employees are not present, therefore Groendyke is not an operator. Operators at this site work Monday through Friday from 5:00 a.m. to 5:00 p.m.

Section II – OBSERVATIONS

I conducted a walk-through of the facility, accompanied by facility representatives to observe the facility process, equipment, and railcar operations. I observed 13 railcars (Photo No. 1) on one railroad track that were connected to each other with rail car couplings (Photo No. 2). I observed the handling and unloading of butane from three non-moving/static railcars, which were not connected to a locomotive, onto to three non-moving/static tanker trucks (Photo No. 3).

During unloading, a mobile generator was used to operate a compressor with a hose connected to the railcar. Facility representatives explained this procedure was to compress vapor in the railcar to assist in pushing the butane out of the railcar into the tanker truck (Photo Nos. 4 and 5). Hoses were connected from the railcar to the tanker truck (Photo No. 6). I observed one small thermal anomaly from a potential hydrocarbon vapor trail at a tank hatch valve connector on railcar TILX 306572 with the Forward Looking Infrared (FLIR™) Series GF320 camera (Photo No. 7). The onsite contractors tightened the connector with a wrench. I considered this action by the onsite contractors an on-the-spot correction. I observed onsite operators using soapy water solution in spray bottles to check for leaks in accordance with the facility's written standard operating procedures, a copy of which facility representatives provided.

Section III – AREAS OF CONCERN

Close-out Meeting – I convened a short closing meeting on Thursday, October 13, 2022. I informed onsite

personnel that a written report would be completed pending the review of additional information requested.

AOC 1. Clean Air Act (CAA) § 112(r)(1) – The General Duty Clause

The owners and operators of stationary sources producing, processing, handling, or storing such substances [i.e., a chemical in 40 CFR part 68 or any other extremely hazardous substance] have a general duty [in the same manner and to the same extent as the general duty clause in the Occupational Safety and Health Act (OSHA)] to identify hazards which may result from (such) releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.

Based on the observation using the Forward Looking Infrared (FLIR™) Series GF320 camera, and process knowledge, I determined that the release of the RMP regulated substance was flammable butane. I further determined that the practice and procedure to identify leaks on railcars using soapy water solution in spray bottles to be inadequate. EPA notes that there are more advanced and accurate methods for leak identification that can be used to maintain a safe facility and prevent releases. Such hazard assessment techniques include the use of hand-held portable instruments with chemical-specific sensors, and hand-held infrared cameras that use optical gas imaging.

AOC 2. 40.CFR § 68.10 – Applicability

(a) Except as provided in paragraphs (b) through (f) of this section, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process, as determined under § 68.115, shall comply with the requirements of this part no later than the latest of the following dates: (1) June 21, 1999; (2) Three years after the date on which a regulated substance is first listed under § 68.130; (3) The date on which a regulated substance is first present above a threshold quantity in a process; or (4) For any revisions to this part, the effective date of the final rule that revises this part.

EPA requested information regarding the transloading operations to determine the potential regulatory applicability of 40 C.F.R. Part 68 Chemical Accident Program requirements, specifically regarding the capacity of butane contained in each railcar, and the length of time that the railcars filled with butane remain stationary on the railroad track awaiting transloading process operations¹. EPA was provided confidential business information documents regarding the duration of specific transloading process operations at this facility location.

AOC 3. 40 CFR § 68.150 – RMP Submission.

(a) The owner or operator shall submit a single RMP that includes the information required by §§ 68.155 through 68.185 for all covered processes. The RMP shall be submitted in the method and format to the central point specified by EPA as of the date of submission. (b) The owner or operator shall submit the

¹ Per § 68.3 Definitions, for the purposes of this part, the term *stationary source* does not apply to transportation, including storage incident to transportation, of any regulated substance or any other extremely hazardous substance under the provisions of this part. A stationary source includes transportation containers used for storage not incident to transportation and transportation containers connected to equipment at a stationary source for loading or unloading. Transportation includes, but is not limited to, transportation subject to oversight or regulation under 49 CFR parts 192, 193, or 195, or a state natural gas or hazardous liquid program for which the state has in effect a certification to DOT under 49 U.S.C. section 60105.

first RMP no later than the latest of the following dates: (1) June 21, 1999; (2) Three years after the date on which a regulated substance is first listed under § 68.130; or (3) The date on which a regulated substance is first present above a threshold quantity in a process.

At the time of the inspection, the owner or operator failed to provide documentation that it had submitted an RMP registration for the transloading operations at this facility, which appear to be subject to the requirements of 40 C.F.R. Part 68.

Section IV – FOLLOW UP

No follow up occurred or was necessary after the inspection.

Section V – LIST OF APPENDICES

Appendix 1 – Photo Log

Appendix 1

Photograph Log



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Photograph Log

Photo No. 1

Location: 660 East Independence Street		
City: Tulsa	County/Parish: Tulsa	State: Oklahoma





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Photograph Log

Photo No. 2

Location: 660 East Independence Street

City: Tulsa

County/Parish: Tulsa

State: Oklahoma





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Photograph Log

Photo No. 3

Location: 660 East Independence Street		
City: Tulsa	County/Parish: Tulsa	State: Oklahoma





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Photograph Log

Photo No. 4

Location: 660 East Independence Street		
City: Tulsa	County/Parish: Tulsa	State: Oklahoma





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Photograph Log

Photo No. 5

Location: 660 East Independence Street		
City: Tulsa	County/Parish: Tulsa	State: Oklahoma





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Photograph Log

Photo No. 6

Location: 660 East Independence Street		
City: Tulsa	County/Parish: Tulsa	State: Oklahoma





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Photograph Log

Photo No. 7

Location: 660 East Independence Street		
City: Tulsa	County/Parish: Tulsa	State: Oklahoma



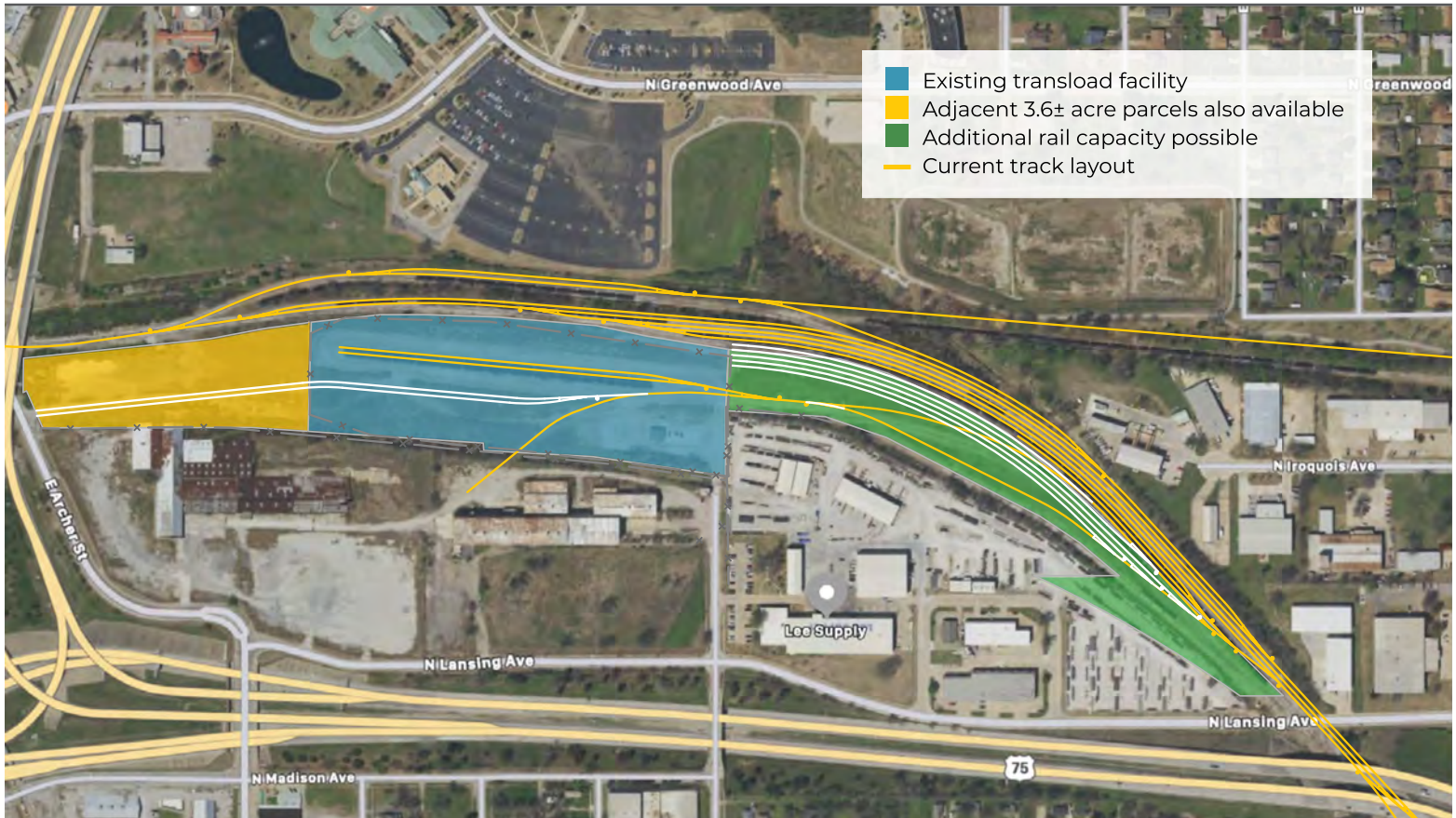
ATTACHMENT 2

Available Rail-Truck Transload Facility to Lease

600 East Independence | Tulsa, OK 74106



Located in Federal Opportunity Zone



4.4±
developed acres

660
SF office building



SITE PROFILE

- 4.4± acre rail served site expansion potential available
- Two existing spur tracks (1,864 LF) with 26 railcar capacity
- Excellent condition – year built 2015
- Ancillary improvements include a 660 SF office
- Site was built as an LPG transload facility
- Adjacent *3.6*± acre parcels available



LOCATION

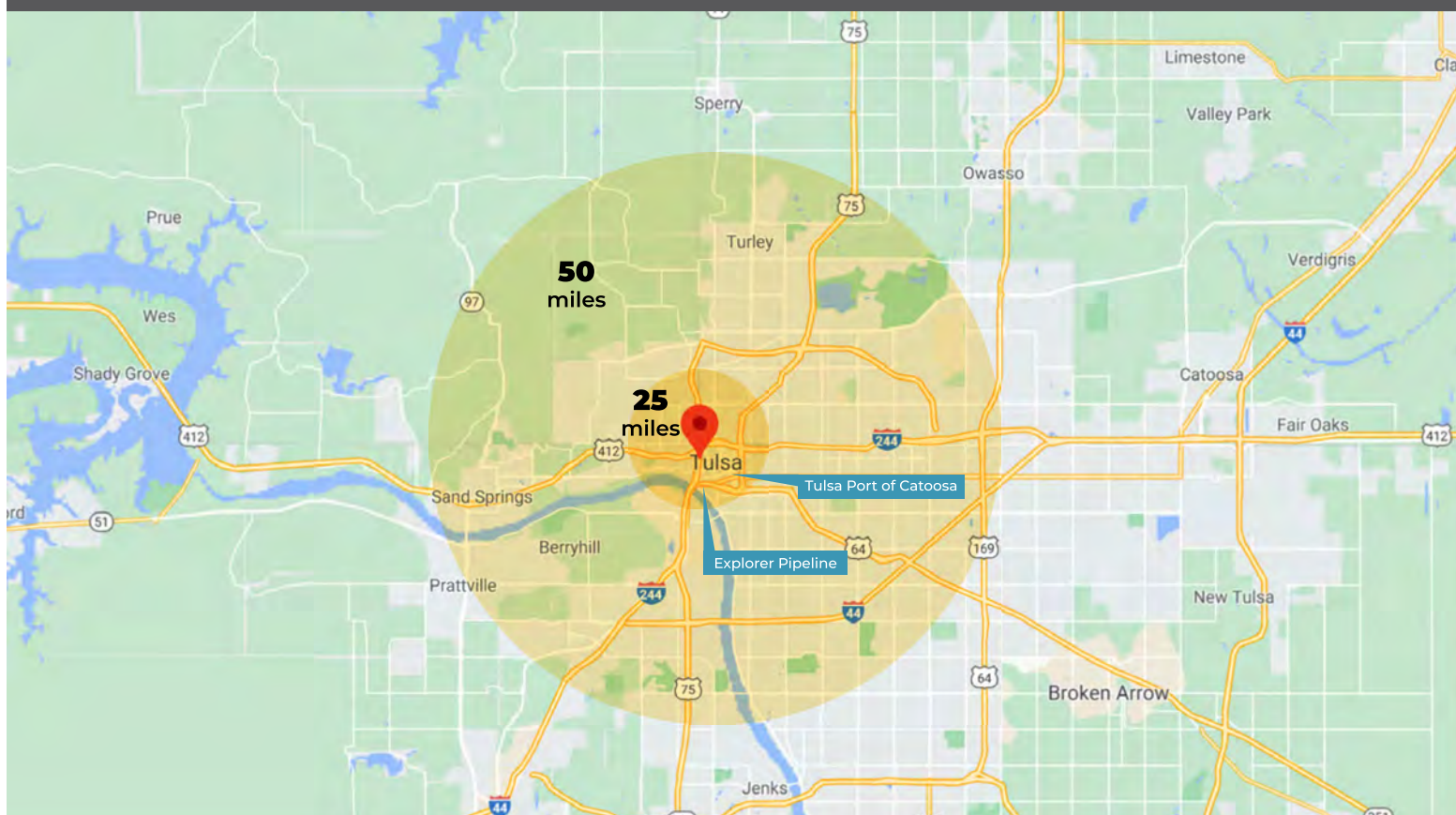
- Less than 25 miles from Tulsa Port of Catoosa
- Easy access to the Explorer Pipeline
- Within 250 miles of Dallas, TX and Kansas City, MO
- Serving railroad: South Kansas & Oklahoma (6 days per week)
- Railroad connections: BNSF, UP, and the KCS
- Highway connections: Interstate 244, US Hwy 75, & US Hwy 412

Available Rail-Truck Transload Facility to Lease

600 East Independence | Tulsa, OK 74106



Located in Federal Opportunity Zone



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