

May 16, 2019

Mr. Daniel Werth
Chief Executive Officer
Caliber Midstream Partners, LP
1200 17th Street, Suite 2100
Denver, Colorado 80802

Re: CPF No. 3-2018-6001

Dear Mr. Werth:

Enclosed please find the Final Order issued in the above-referenced case to your subsidiary, Caliber North Dakota, LLC. It makes one finding of violation and assesses a civil penalty of \$19,000. It further finds that Caliber has completed the actions specified in the Notice to comply with the pipeline safety regulations. When the civil penalty has been paid, this enforcement action will be closed. Service of the Final Order by certified mail is effective upon the date of mailing, as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Allan C. Beshore, Director, Central Region, Office of Pipeline Safety, PHMSA

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

In the Matter of)

Caliber North Dakota, LLC,)
a subsidiary of Caliber Midstream Partners, LP,)

Respondent.)

CPF No. 3-2018-6001

FINAL ORDER

On July 25, 2017, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an inspection of Caliber North Dakota, LLC's (Caliber North Dakota or Respondent) oil spill response plans in Washington, D.C. Caliber is a subsidiary of Caliber Midstream Partners, LP (Caliber Midstream), which operates crude-oil and natural-gas gathering and processing facilities in the Bakken and Three Forks shale oil fields of North Dakota.¹

As a result of the inspection, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated January 2, 2018, a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Caliber had violated 49 C.F.R. § 194.101 and proposed assessing a civil penalty of \$19,000 for the alleged violation. The Notice also proposed ordering Respondent to take certain measures to correct the alleged violation.

Caliber Midstream, on behalf of Caliber North Dakota (collectively referred to as Caliber), responded to the Notice by letter dated February 2, 2018 (Response). The company contested the allegation of violation, offered additional information in response to the Notice, and requested that the proposed civil penalty be eliminated.

Respondent did not request a hearing and therefore has waived its right to one.

FINDING OF VIOLATION

The Notice alleged that Respondent violated 49 C.F.R. Part 194, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 194.101(a), which states:

¹ Caliber Midstream Partners, LP, website, available at <http://www.calibermidstream.com/about> (last accessed February 4, 2019).

§ 194.101 Operators required to submit plans.

(a) Except as provided in paragraph (b) of this section, unless OPS grants a request from a[n] Federal On-Scene Coordinator (FOSC) to require an operator of a pipeline in paragraph (b) to submit a response plan, each operator of an onshore pipeline facility shall prepare and submit a response plan to PHMSA as provided in § 194.119. A pipeline which does not meet the criteria for significant and substantial harm as defined in § 194.103(c) and is not eligible for an exception under § 194.101(b), can be expected to cause substantial harm. Operators of substantial harm pipeline facilities must prepare and submit plans to PHMSA for review.

The Notice alleged that Respondent violated 49 C.F.R. § 194.101(a) by failing to prepare and submit an oil-spill response plan to PHMSA, as required by the regulation. Specifically, the Notice alleged that Caliber had been operating an oil pipeline known as the Rawson Gathering System, as shown in its Annual Reports (Form PHMSA F 700-1.1) for the years 2014, 2015, and 2016, but that as of September 20, 2017, the company had yet to submit a response plan to PHMSA, as required by § 194.101.² The Notice further alleged that on April 28, 2016, PHMSA had received a letter and submission from Mr. Jonathan Greiner, president of Basin Safety Consulting, indicating that he was submitting what was represented as Part 1 of 2 of Caliber's "Emergency Response Plan," and that he would submit Part 2 and certain training records "soon to follow." Finally, the Notice stated that in June 2016, PHMSA received Part 2, but determined that the combined document, Parts 1 and 2 together, did not constitute an oil spill response plan at all. The PHMSA staff wrote back to Mr. Greiner on December 12, 2016, indicating that the submission "appears to be an Operations and Maintenance Manual intended to satisfy 49 C.F.R. 195.402 regulations," but that it was not an oil spill response plan meeting the requirements of 49 C.F.R. Part 194. According to PHMSA, no other response-plan documents had been provided to PHMSA as of September 20, 2017.

In its Response, Caliber Midstream (on behalf of Caliber North Dakota) contested the allegation of violation and stated that it had "a response plan in place for the Rawson Crude Oil System since 5/01/14," roughly four months prior to the commissioning of the Rawson Gathering System in August of 2014.³ Caliber asserted that it had retained Basin Safety Consulting to "make administrative changes to the response plan to create a more complete and efficient document for use by Caliber field personnel," and that the contractor had informed Caliber on June 28, 2016, that the plan had been submitted to PHMSA on April 28, 2016. According to Caliber, the company was unaware that PHMSA had identified deficiencies with the plan or that

² The Notice alleged that Caliber had failed to prepare and submit a response plan as of September 20, 2017, even though the pipeline had been in operation since at least 2014. Under 49 C.F.R. § 194.7, operators from whom a response plan is required under § 194.101 "may not handle, store, or transport oil in that pipeline unless the operator has submitted a response plan meeting the requirements of this part." In other words, the operator of a pipeline that is required to have a response plan cannot operate the pipeline until it has already submitted a plan to PHMSA for approval.

³ Response, at 1.

the agency had conveyed these deficiencies via email to Mr. Greiner on December 12, 2016.⁴

Specifically, Caliber stated that it had not been “notified concerning any alleged deficiencies per § 194.119(b). Had PHMSA attempted to contact Caliber concerning this matter as stated in § 194.119(b),⁵ any deficiencies to the submitted Response Plan would have been rectified quickly, as the plan has been in existence since May of 2014.” Instead, Caliber maintained that it had no notice of any problems with the response plan until it received the Notice letter on January 5, 2018.⁶ I would also note that Caliber subsequently provided PHMSA with several revisions to the response plan, which was ultimately approved by the agency on August 9, 2018, roughly eight months after PHMSA issued the Notice.⁷

The foregoing facts are not in dispute, nor does Caliber question that 49 C.F.R. § 194.101 applies to the Rawson Gathering System. Rather, Caliber’s challenge to the Notice can be summarized as follows: 1) a response plan was prepared and on file with Caliber prior to the commissioning of the Rawson Gathering System; 2) the response plan was subsequently submitted to PHMSA by the company’s contractor; 3) Caliber’s contractor did not make Respondent aware of deficiencies identified by PHMSA with the documents submitted by Caliber’s third-party contractor; and 4) Caliber has addressed the deficiencies and PHMSA has approved the response plan. On these grounds, Caliber requested that the allegation of violation and proposed civil penalty be withdrawn.

I am not persuaded by Caliber’s arguments. The Notice alleged that Caliber failed to prepare *and submit* a response plan in accordance with 49 C.F.R. § 194.101(a), which provides that each operator of an onshore pipeline facility must prepare and submit a response plan to PHMSA as provided in § 194.119. When § 194.101(a) is read in conjunction with the timeline outlined in § 194.7, it is clear that Caliber was required to prepare and submit its response plan to PHMSA prior to commissioning its pipeline in 2014.

Caliber acknowledges in its Response that the first time it sent anything to PHMSA purporting to be a response plan was on April 28, 2016. This was over two years after the Rawson Gathering System was put into service. In addition, what Caliber sent to PHMSA on April 28, 2016, and again in June 2016 was not actually a Part 194 response plan, as communicated by PHMSA to Caliber’s contractor via email on December 12, 2016. Even if the documents submitted to PHMSA on April 26, 2016, and June 26, 2016, could be construed as a Part 194 response plan,

⁴ *Id.*, at 2.

⁵ Section 194.119(b) states: “If PHMSA determines that a response plan requiring approval does not meet all the requirements of this part, PHMSA will notify the operator of any alleged deficiencies, and [to] provide the operator an opportunity to respond, including the opportunity for an informal conference, on any proposed plan revisions and an opportunity to correct any deficiencies.” Respondent’s suggestion that PHMSA should have contacted Caliber directly concerning any alleged deficiencies in the plan is immaterial, since PHMSA did, in fact, notify Caliber’s representative, Mr. Greiner, on December 12, 2016, that the documents he had submitted on Caliber’s behalf did not constitute a response plan under Part 194.

⁶ Response, at 2.

⁷ Region Recommendation (on file with PHMSA), at 2.

Caliber's argument that it had a plan on file prior to commencing operations is of no consequence. Having a response plan on file before operations begin does not demonstrate compliance because the regulations require operators to "submit" the plan to PHMSA prior to operations. Further, Caliber's argument that its contractor failed to notify it of PHMSA's rejection of the documents submitted in April and June 2016 does not relieve Caliber of its compliance obligations. Mr. Greiner was acting on behalf of Caliber, as evidenced by the letter dated April 26, 2016, from Mr. Greiner to PHMSA on Caliber's letterhead.⁸ Caliber is responsible for the actions of its contractors in the same manner it is responsible for the actions of its employees.

Finally, the fact that Caliber updated its response plan after operations began, in response to PHMSA identifying deficiencies, and ultimately obtained approval from PHMSA for the plan is also irrelevant to the violation in this case. The first actual Part 194 response plan for the Rawson Gathering System was submitted to PHMSA on February 2, 2018, as an attachment to Caliber's Response.⁹ The initial submission of a response plan for the Rawson Gathering System contained numerous deficiencies and was not approved by PHMSA until August 9, 2018.¹⁰ The evidence demonstrates that Caliber failed to submit an acceptable response plan for the Rawson Gathering System to PHMSA until August 1, 2018,¹¹ eight months after the Notice was issued and four years after Caliber began operation of the Rawson Gathering System.

Accordingly, after considering all of the evidence I find that Respondent violated 49 C.F.R. § 194.101(a), by failing to submit a response plan to PHMSA as required by the regulation.

This finding of violation will be considered a prior offense in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, 33 U.S.C. § 1321(j), and 49 C.F.R. § 190.223(b), Respondent is subject to an administrative civil penalty for the violation. In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$19,000 for the violation cited above.

⁸ Pipeline Safety Violation Report (Violation Report), (January 2, 2018) (on file with PHMSA), at 50.

⁹ PHMSA Letter of Correction (on file with PHMSA), dated March 12, 2018.

¹⁰ PHMSA Letter of Approval (on file with PHMSA), dated August 9, 2018.

¹¹ Email from Caliber to PHMSA (on file with PHMSA), dated August 1, 2018.

Item 1: The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 194.101(a), for failing to prepare and submit a response plan to PHMSA as provided in § 194.119. As noted above, I found that Caliber was required to submit a response plan to PHMSA for the Rawson Gathering System prior to beginning operations in 2014.

In its Response, Caliber requested that the proposed civil penalty be withdrawn because Caliber had a response plan on file prior to putting the Rawson Gathering System into operation, had submitted a response plan to PHMSA after operations began, had updated the response plan when PHMSA identified deficiencies, and had ultimately obtained PHMSA approval of the plan. For the reasons detailed above, Caliber's arguments are rejected. Therefore, I do not withdraw the proposed civil penalty.

Regarding the *nature* criterion in the Violation Report, PHMSA noted that the alleged violation related to a failure to perform a required activity. Caliber asserted that it had prepared a response plan prior to operation of the Rawson Gathering System and had submitted the plan to PHMSA in April 2016. As noted above, the regulations require such plans to be submitted to PHMSA *prior* to operating a pipeline. Caliber does not argue that it submitted the plan prior to operating the Rawson Gathering System. Accordingly, Caliber's position in its Response that it performed the required activity is contrary to the facts contained in the record and no reduction or elimination of the proposed civil penalty is warranted on these grounds.

Regarding the *circumstances* criterion in the Violation Report, PHMSA noted that the probable violation was discovered by PHMSA. Caliber does not attempt to rebut this allegation and the facts contained in the record substantiate PHMSA's assertion.

Regarding the *gravity, culpability, and good faith* criteria, PHMSA noted in the Violation Report that although pipeline safety was minimally affected by the violation, Caliber failed to comply with a requirement that was "clearly applicable" and that Caliber did not have a credible justification for its non-compliance. The Rawson Gathering System is within one mile of environmentally sensitive areas and drinking-water resources, thus triggering the requirement to submit a response plan to PHMSA prior to operating the pipeline. Caliber does not attempt to dispute this fact. In addition, Caliber provided no justification for failing to submit a response plan prior to operating the line, and attempted to mitigate its non-compliance by asserting that its contractor failed to inform Respondent that PHMSA had rejected the April and June 2016 submissions. As detailed above, what was submitted in April and June 2016 did not constitute a Part 194 response plan. In addition, Caliber is responsible for the actions of its contractor in this case and is not entitled to a penalty reduction simply because the contractor failed to communicate with the operator. I can find nothing in the record that warrants a reduction in or elimination of the proposed civil penalty based on these factors.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of **\$19,000** for violation of 49 C.F.R. § 194.101(a).

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be

directed to: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$19,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

COMPLIANCE ORDER

The Notice proposed a compliance order with respect to Item 1 in the Notice for violation of 49 C.F.R. § 194.101(a). Under 49 U.S.C. § 60118(a), each person who engages in the transportation of hazardous liquids or who owns or operates a pipeline facility is required to comply with the applicable safety standards established under chapter 601. The Director indicates that Respondent has taken the following actions specified in the proposed compliance order:

1. With respect to the violation of § 194.101(a) (**Item 1**), Respondent has submitted an oil spill response plan to PHMSA for the Rawson Gathering System, and PHMSA has approved the plan.

Accordingly, I find that compliance has been achieved with respect to this violation. Therefore, the compliance terms proposed in the Notice are not included in this Order.

Under 49 C.F.R. § 190.243, Respondent may submit a Petition for Reconsideration of this Final Order to the Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address, no later than 20 days after receipt of service of the Final Order by Respondent. Any petition submitted must contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed. The other terms of the order, including any corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. If Caliber submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

May 16, 2019

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued