

January 12, 2022

**VIA ELECTRONIC MAIL TO: dwerth@calibermidstream.com**

Mr. Daniel Werth  
President and Chief Executive Officer  
Caliber Midstream Partners, LP  
950 17<sup>th</sup> Street, Suite 1000  
Denver, Colorado 80202

**Re: CPF No. 3-2021-037-NOPV**

Dear Mr. Werth:

Enclosed please find the Final Order issued in the above-referenced case to your subsidiary, Caliber Bear Den Interconnect, LLC. It makes findings of violation and assesses a civil penalty of \$57,000. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by e-mail is effective upon the date of transmission 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. Gregory A. Ochs, Director, Central Region, Office of Pipeline Safety, PHMSA  
Ms. Carol Butero, Director of Regulatory, Safety, and Compliance, Caliber Midstream  
Partners, LP, cbutero@calibermidstream.com

**CONFIRMATION OF RECEIPT REQUESTED**

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

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<b>In the Matter of</b>	)	
	)	
<b>Caliber Bear Den Interconnect, LLC,</b>	)	<b>CPF No. 3-2021-037-NOPV</b>
<b>a subsidiary of Caliber Midstream Partners, LP,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

**FINAL ORDER**

From March 18, 2019 through August 1, 2019, 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 on-site pipeline safety inspection of the facilities and records of Caliber Bear Den Interconnect, LLC (CBDI or Respondent), near Watford City, North Dakota and at the headquarters of Caliber Midstream Partners, LP, located in Denver, Colorado. Respondent is a subsidiary of Caliber Midstream Partners, LP, and operates approximately six miles of pipeline that transports crude oil between Enable Midstream’s Devore Terminal and Dakota Access Pipeline’s Watford City Terminal.

As a result of the inspection, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated August 4, 2021, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that CBDI had committed two violations of 49 C.F.R. Part 194 and one violation of 49 C.F.R. Part 195 and proposed assessing a civil penalty of \$57,000 for the alleged violations. The Notice also included an additional warning item pursuant to 49 C.F.R. § 190.205, which required no further action, but warned the operator to correct the probable violation or face possible future enforcement action

On behalf of Respondent, Caliber Midstream Partners, LP, responded to the Notice by letter dated September 21, 2021 (Response). CBDI contested one of the allegations, 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.

## **FINDINGS OF VIOLATION**

The Notice alleged that Respondent violated 49 C.F.R. Part 194 and Part 195, as follows:

**Item 1:** The Notice alleged that Respondent violated 49 C.F.R. § 194.107(c)(1)(ix), which in relevant part states:

**§ 194.107 General response plan requirements.**

- (a) ...
- (c) Each response plan must include:
  - (1) A core plan consisting of –
    - (i) ...
    - (ix) Drill Program – an operator will satisfy the requirement for a drill program by following the National Preparedness for Response Exercise Program (PREP) guidelines. An operator choosing not to follow PREP guidelines must have a drill program that is equivalent to PREP.

The Notice alleged that Respondent violated 49 C.F.R. § 194.107(c)(1)(ix) by failing to satisfy the requirements for a drill program by failing to follow the National Preparedness for Response Exercise Program (PREP) guidelines. Specifically, the Notice alleged that CBDI failed to make changes to its response plan after discovering deficiencies during its September 20, 2017 drill, as required under the PREP guidelines. The PREP guidelines state that “[P]lan holders are responsible for addressing any issues that arise from evaluation of exercises and making changes to their respective response plans to ensure the highest level of preparedness.”<sup>1</sup> CBDI identified communication issues during a drill that occurred on September 20, 2017. However, CBDI was unable to provide any documentation identifying changes they made to their response plan to address these issues.

In its Response, CBDI did not contest the allegation but stated that it had taken steps to improve its drill program practices. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 194.107(c)(1)(ix) by failing to make changes to its response plan after discovering deficiencies during its September 20, 2017 drill, as required by PREP guidelines.

**Item 2:** The Notice alleged that Respondent violated 49 C.F.R. § 194.121(b)(8), which states:

**§ 194.121 Response plan review and update procedures.**

- (a) ...
- (b) If a new or different operating condition or information would substantially affect the implementation of a response plan, the operator must immediately modify its response plan to address such a change and, within 30 days of making such a change, submit

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<sup>1</sup> NATIONAL PREPAREDNESS FOR RESPONSE EXERCISE PROGRAM (PREP) GUIDELINES, DEP’T OF HOMELAND SEC., U.S. COAST GUARD, ENVTL. PROT. AGENCY, DEP’T OF TRANSP., PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., DEP’T OF INTERIOR, BUREAU OF SAFETY & ENVTL. ENF’T, at 1-1 (2016), [https://www.epa.gov/sites/default/files/2020-03/documents/prep\\_guidelines\\_2016\\_12oct18.pdf](https://www.epa.gov/sites/default/files/2020-03/documents/prep_guidelines_2016_12oct18.pdf).

the change to PHMSA. Examples of changes in operating conditions that would cause a significant change to an operator's response plan are:

(8) Any other information relating to circumstances that may affect full implementation of the plan.

The Notice alleged that Respondent violated 49 C.F.R. § 194.121(b)(8) by failing to modify its response plan to address new or different operating conditions or information that would substantially affect the implementation of the response plan and by failing to submit such a change to PHMSA within 30 days. Specifically, the Notice alleged that CBDI failed to submit its Spill Response Plan (SRP) revised on July 27, 2018, to PHMSA within 30 days of a significant information update. CBDI also had outdated information in Section 2.1 and Section 5.71 of its SRP.

In its Response, CBDI did not contest the allegation and provided PHMSA with its updated SRP. Accordingly, after considering all of the evidence, I find that Respondent violated 49 C.F.R. § 194.121(b)(8) by failing to modify its response plan to address new operating information and by failing to submit the changes to its SRP, revised July 27, 2018, to PHMSA within 30 days.

**Item 3:** The Notice alleged that Respondent violated 49 C.F.R. § 195.403(c), which states:

**§ 195.403 Emergency response training.**

(a) ...

(c) Each operator shall require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance.

The Notice alleged that Respondent violated 49 C.F.R. § 195.403(c) by failing to require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible to ensure compliance. Specifically, the Notice alleged that CBDI failed to provide any documentation verifying that supervisors maintained a thorough knowledge of the emergency response procedures for which they are responsible to ensure compliance.

In its Response, CBDI contested this alleged violation and provided two substantive arguments for its withdrawal.<sup>2</sup> In the first instance, CBDI argued that the Notice did not allege facts that established a violation of § 195.403(c). Alternatively, CBDI argued that PHMSA had failed to meet its burden of production and its burden of persuasion such that it had not proven that a violation of § 195.403(c) had occurred. I discuss these arguments in turn.

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<sup>2</sup> The Respondent makes a tangential argument alleging that the supporting documents for Item 3 were incomplete. Specifically, that the Violation Report lists email correspondence as an exhibit to Item 3 but fails to document those emails in the Exhibit list. This inconsistency in the Violation Report is an inconsequential typographical error and does not negate the allegation that CBDI failed to provide any documentation verifying that its supervisors maintained a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible for ensuring compliance.

First, Respondent argues that the allegation should be withdrawn because the facts asserted in the Notice did not amount to a violation of § 195.403(c) because that section of the Pipeline Safety Regulations “does not require operators to create or keep documentation of that activity.”<sup>3</sup> Respondent has failed to consider the Pipeline Safety Regulations in their entirety and PHMSA’s longstanding enforcement precedent. CBDI overlooks both the need of operators to demonstrate compliance with the Pipeline Safety Regulations during inspections and years of PHMA enforcement of § 195.403(c) requiring proof of compliance in the form of documentation or other response demonstrating that verification had taken place.<sup>4</sup>

During an inspection, operators must be able to provide information to PHMSA that demonstrates compliance with the Pipeline Safety Regulations.<sup>5</sup> As Respondent points out, the language of § 195.403(c) does not prescribe how operators are to show compliance. Instead, operators have the flexibility to prove compliance with § 195.403(c) by any appropriate method. Compliance can be shown through submission of written documentation, test records, or other verification, including official meeting notes or personnel evaluations. Therefore, PHMSA properly alleged a violation of § 195.403(c) based on CBDI’s failure to show, through documentation or any other appropriate method, that it had verified supervisor’s knowledge of those emergency response procedures established under § 195.402 for which they are responsible to ensure compliance.

Second, Respondent argues that, even if the Notice properly alleged a violation of § 195.403(c), this Item should nevertheless be withdrawn because PHMSA has failed to meet its burdens of production and persuasion. In order to satisfy its burden and find that CBDI violated § 195.403(c), PHMSA must determine, by a preponderance of the evidence, that CBDI failed to require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible to ensure compliance.<sup>6</sup>

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<sup>3</sup> Response, at 2.

<sup>4</sup> *See, e.g.*, Columbia Midstream Group, LLC, a subsidiary of TransCanada Corporation, Final Order, CPF No. 1-2018-6001, 2018 WL 3703697, at \*2 (June 15, 2018) (finding a violation of § 195.403(c) where “[C]olumbia was allegedly unable to provide any documentation, training record, or response demonstrating that it had verified that supervisors maintained a thorough knowledge of the portions of the emergency response procedures for which they were responsible to ensure compliance.”); TE Products Pipeline Company, LLC, F/N/A Texas Eastern Petroleum Products Co., Final Order, CPF No. 3-2005-5018, 2009 WL 557739, at \*7 (Feb. 27, 2009) (stating that evidence of verification under § 195.403(c) might typically include “a documented review, written test or other form of verification.”); *see also* Navajo Nation Oil & Gas Co., Inc., a federal corporation, Final Order, CPF No. 4-2006-5029, 2010 WL 1323383 (Mar. 17, 2010).

<sup>5</sup> 49 U.S.C. § 60117(c); *see also* Kinder Morgan Energy Partners, LP, Final Order, CPF No. 4-2006-5023, 2010 WL 6531634, at \*2 (Aug. 31, 2010) (citing to the section of the United States Code that 49 U.S.C. § 60117(c) was codified at prior to amendment by the PIPES Act of 2020, Public Law No. 116-260 (Dec. 27, 2020)) (stating “§ 60117(b) gives PHMSA broad authority to require pipeline owners or operators to provide documentation of compliance”); *see also* Pipeline & Terminal Management Corp. Key West Pipeline Company, Decision on Petition for Reconsideration, CPF No. 2-2005-6027, 2006 WL 7129215, at \*1 (Sept. 1, 2006).

<sup>6</sup> *See, e.g.*, Express Holdings (USA), LLC, a subsidiary of Enbridge, Inc., Decision on Reconsideration, CPF No. 3-2020-5005, 2021 WL 4055257, at \*\*4–5 (July 26, 2021); Sunoco Pipeline, LP, a subsidiary of Energy Transfer, LP, Final Order, CPF No. 1-2019-5006, 2020 WL 6955633, at \*3 (June 26, 2020).

Throughout the inspection and these proceedings, including in its Response to the Notice, CBDI has failed to provide any evidence that they complied with § 195.403(c). The documentation of emergency procedure trainings in 2017 and 2018 that CBDI submitted during the inspection failed to verify that supervisors maintained a thorough knowledge of the emergency response procedures as required by § 195.403(c). Here, PHMSA requested that CBDI provide documentation verifying compliance with § 195.403(c) as part of the inspection and gave CBDI the opportunity to respond. CBDI failed to provide any evidence of compliance and has not attempted to refute PHMSA's claim by stating that they have verified supervisor's knowledge as required by § 195.403(c). Therefore, in the absence of any evidence to the contrary, the preponderance of the evidence supports a finding that CBDI failed to verify supervisor's knowledge in accordance with § 195.403(c).

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 195.403(c) by failing to require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible to ensure compliance.

These findings of violation will be considered prior offenses 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 violations.

In determining the amount of a civil penalty under 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; the good faith of Respondent in attempting to comply with the pipeline safety regulations; and self-disclosure or actions to correct a violation prior to discovery by PHMSA. 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 \$57,000 for the violations cited above.

**Item 1:** The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 194.107(c)(1)(ix), for failing to make changes to its response plan after discovering deficiencies during a drill as required by PREP guidelines. Respondent neither contested the allegation nor presented any evidence or argument justifying reduction of the proposed civil penalty. 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. § 194.107(c)(1)(ix).

**Item 2:** The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 194.121(b)(8), for failing to modify its response plan to address new information and for failing to submit its plan to PHMSA within 30 days of making such change. Respondent neither contested the allegation nor presented any evidence or argument justifying reduction of the

proposed civil penalty. 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. § 194.121(b)(8).

**Item 3:** The Notice proposed a civil penalty of \$19,000 for Respondent's violation of 49 C.F.R. § 195.403(c), for failing to require and verify that its supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under § 195.402 for which they are responsible to ensure compliance. Respondent contested the allegation but, for the reasons described above, I found CBDI in violation of § 195.403(c). CBDI did not provide any arguments justifying reduction of the proposed civil penalty. 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. § 195.403(c).

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **\$57,000**.

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 \$57,000 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.

### **WARNING ITEM**

With respect to Item 4, the Notice alleged a probable violation of Part 195, but identified it as a warning item pursuant to § 190.205. The warning was for:

49 C.F.R. § 195.420(b) (**Item 4**) — Respondent's alleged failure to inspect its mainline valves at intervals not exceeding 7 ½ months, but at least twice each calendar year.

CBDI presented information in its Response showing that it had taken certain actions to address the cited item. If OPS finds a violation of this provision in a subsequent inspection, Respondent may be subject to future enforcement action.

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, 2<sup>nd</sup> 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 issues 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 Respondent 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.

January 12, 2022

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Alan K. Mayberry  
Associate Administrator  
for Pipeline Safety

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Date Issued