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## San Diego Regional Water Quality Control Board

July 11, 2022

**Sent by Email Only**

Trent Claughton  
CAPEXCO  
14555 Symons Valley Road N.W.  
Calgary, AB, Canada T3R 1E7  
[tc@capexcofunds.com](mailto:tc@capexcofunds.com)

**In reply refer to:**  
855514:KYaeger

**Subject: Settlement Offer No. R9-2022-0108 Related to Violations of Order No. R9-2015-0013, NPDES No. CAG919003 for CAPEXCO, Outpost at Poway Project Discharge to Poway Creek**

Dear Trent Claughton:

CAPEXCO (Permittee) is hereby notified of alleged violations of Order No. R9-2015-0013, National Pollutant Discharge Elimination System (NPDES) No. CAG919003, *General Waste Discharge Requirements for Groundwater Extraction Discharges to Surface Waters within the San Diego Region*, and of the opportunity to participate in an expedited settlement process to address liability that may be assessed pursuant to California Water Code (Water Code) section 13385.

### **ALLEGED VIOLATIONS SUBJECT TO THIS OFFER**

As detailed in the attached *Notice of Violation(s) of Order No. R9-2015-0013, NPDES No. CAG919003, Subject to Mandatory Minimum Penalties, CAPEXCO, Outpost at Poway Project Discharge to Poway Creek* (Exhibit A), the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) alleges that the Permittee has violated Order No. R9-2015-0013. Exhibit A is incorporated into and made part of this Settlement Offer by reference.

### **STATUTORY LIABILITY**

The Permittee is subject to the following statutory liabilities:

1. Water Code section 13385(h)(1) requires the assessment of a \$3,000 mandatory minimum penalty for each serious violation.<sup>1</sup>
2. Water Code section 13385(c) allows for discretionary administrative civil liability of up to \$10,000 for each day in which the violations occur, and \$10 for each gallon discharged but not cleaned up in excess of 1,000 gallons; and
3. Water Code section 13385(e) allows for the reimbursement of staff costs.

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<sup>1</sup> "Serious violation" is defined in Exhibit A.

These mandatory minimum penalties and discretionary administrative civil liabilities may be assessed by the San Diego Water Board beginning with the date on which the violations first occurred.<sup>2</sup>

The formal enforcement action that the San Diego Water Board uses to assess such liability is an Administrative Civil Liability (ACL) complaint, followed by a public hearing on the matter, although the San Diego Water Board may instead refer such matters to the Attorney General's Office for prosecution. If referred to the Attorney General's Office for prosecution, the Superior Court may assess up to \$25,000 for each day in which the violations occur, and \$25 for each gallon discharged but not cleaned up in excess of 1,000 gallons.

### **SETTLEMENT OFFER**

The Permittee can avoid a formal enforcement action and settle the alleged violations by accepting the San Diego Water Board's ACL Settlement Offer, as detailed herein. The Permittee may accept this Settlement Offer, waive its right to a hearing, and pay the mandatory minimum penalty of **\$36,000** for the alleged violations identified in Exhibit A. If the Permittee accepts this Settlement Offer, the San Diego Water Board, or its delegate, will execute the Settlement Offer, subject to the conditions below. Accordingly, the San Diego Water Board will forego issuance of an administrative civil liability complaint, will not refer the violations to the Attorney General's Office, will not charge incurred staff costs, and will waive its right to seek additional discretionary civil liabilities for the violations identified in Exhibit A.

The Expedited Payment Program does not address or resolve liability for any violation that is not specifically identified in Exhibit A regardless of the date that the violation occurred.

### **OPTIONS FOR RESPONSE TO OFFER**

1. If the Permittee accepts this Settlement Offer, the Permittee shall complete and return the attached *Acceptance of Conditional Resolution and Waiver of Right to Hearing for Settlement Offer No. R9-2022-0108, CAPEXCO, Outpost at Poway Project Discharge to Poway Creek* (Acceptance and Waiver, Exhibit B) on or before 5 p.m. on August 10, 2022.
  - a. In lieu of paying all of the mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account, the Permittee may elect to apply up to \$25,500 of the penalty to fund a supplemental environmental project (SEP). The remaining \$10,500 of the penalty must be paid to the State Water Pollution Cleanup and Abatement Account. One SEP option is available to the Permittee in this settlement: a SEP that supplements the Stormwater Monitoring Coalition Regional Monitoring Program (SMCRMP), which is administered by the Southern California Coastal Water Research Project

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<sup>2</sup> No statute of limitations exists applicable to administrative proceedings to assess mandatory minimum penalties. See *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 48; 3 Witkin, Cal. Procedure (2019 supp.) Actions, § 430(2).

(SCCWRP). This SEP must supplement SMCRMP work that would not otherwise be funded by the SMCRMP's existing workplan(s). The SMCRMP<sup>3</sup> collects data annually on water quality, physical habitat and riparian conditions, and biological communities from streams in 17 coastal watersheds to answer questions such as "What is the extent and magnitude of impact in Southern California's streams?" and "How is this changing over time?" No funds allocated to the SEP will go to the Water Boards, and the Permittee's obligation to complete the SEP is released upon proof of payment to SCCWRP.

- b. If the Permittee does not choose to fund the SMCRMP SEP, they must pay the total mandatory minimum penalty amount to the State Water Pollution Cleanup and Abatement Account.

Both options are represented in the enclosed Acceptance and Waiver.

2. If the Permittee chooses to contest the violations alleged in Exhibit A, the Permittee shall submit a written response that identifies the specific violations and details the basis for the challenge (factual error, affirmative defense, etc.) to the San Diego Water Board on or before 5 p.m. on August 10, 2022. The San Diego Water Board will evaluate the contested violations and take one of two actions:
  - a. If the San Diego Water Board determines the violations are not supported, it will expunge the alleged violations, take no further action against the Permittee for the alleged violations, and notify the Permittee in writing of that determination; or
  - b. If the San Diego Water Board determines the alleged violations are meritorious, it will notify the Permittee of that determination. The Permittee will be given 30 days from the date of receipt of the San Diego Water Board determination to either accept the Settlement Offer by completing and returning the Acceptance and Waiver to the San Diego Water Board, or to reject the Settlement Offer.
3. If the Permittee does not respond to or rejects this Settlement Offer, the San Diego Water Board will initiate a formal enforcement action to resolve the alleged violations. In a formal enforcement action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Settlement Offer. Moreover, the staff costs of investigating the violations and proceeding with a formal enforcement action are factors that will be considered in assessing the liability amount.

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<sup>3</sup> <https://www.sccwrp.org/about/research-areas/regional-monitoring/southern-california-stormwater-monitoring-coalition/>

## **CONDITIONS FOR SAN DIEGO WATER BOARD ACCEPTANCE OF RESOLUTION**

Pursuant to title 40 of the Code of Federal Regulations, section 123.27(d)(2)(iii), the San Diego Water Board is required to publish and allow the public 30 days to comment on any settlement of an enforcement action addressing alleged violations of NPDES permit conditions. Upon receipt of the Permittee's Acceptance and Waiver, the San Diego Water Board will publish a notice of the proposed resolution of the violations.

If no comments are received within the 30-day comment period, and unless there are new material facts that become available to the San Diego Water Board, the San Diego Water Board, or its delegate, will execute the Acceptance and Waiver as a stipulated order assessing the uncontested mandatory minimum penalty amount pursuant to Water Code section 13385(h) and/or (i).

If, however, significant comments are received in opposition to the settlement, this Settlement Offer may be withdrawn. In that case, the Permittee's waiver pursuant to the Acceptance and Waiver will also be treated as withdrawn, and the violation(s) will be addressed in a liability assessment proceeding before the San Diego Water Board, or its delegate. At the liability assessment hearing, the Permittee will be free to make arguments as to the alleged violations, and the Permittee's agreement to accept this Settlement Offer will not in any way be binding or used as evidence against the Permittee. The Permittee will be provided with further information in advance of the liability assessment proceeding.

In the event the Acceptance and Waiver is executed by the San Diego Water Board, or its delegate, full payment of the assessed amount shall be due within 30 calendar days of the San Diego Water Board's, or its delegate's, execution. Failure to pay the full liability within the required time period may subject the Permittee to further liability.

In the subject line of any response, please include the following: 855514:KYaeger. For questions or concerns regarding this letter, please contact Keith Yaeger by phone at 619-521-5899 or by email at [Keith.Yaeger@waterboards.ca.gov](mailto:Keith.Yaeger@waterboards.ca.gov).

Respectfully,

**ORIGINAL ON FILE SIGNED BY  
KELLY DORSEY ON JULY 11, 2022**

Kelly Dorsey, P.G.  
Assistant Executive Officer  
San Diego Water Board

Attachments:

Exhibit A: Notice of Violation(s) of Order No. R9-2015-0013, NPDES No. CAG919003,  
Subject to Mandatory Minimum Penalties, CAPEXCO, Outpost at Poway  
Project Discharge to Poway Creek

Exhibit B: Acceptance of Conditional Resolution and Waiver of Right to Hearing for  
Settlement Offer No. R9-2022-0108, CAPEXCO, Outpost at Poway Project  
Discharge to Poway Creek

cc:

David Barker, San Diego Water Board, [David.Barker@waterboards.ca.gov](mailto:David.Barker@waterboards.ca.gov)  
Chiara Clemente, San Diego Water Board, [Chiara.Clemente@waterboards.ca.gov](mailto:Chiara.Clemente@waterboards.ca.gov)  
Brandi Outwin-Beals, San Diego Water Board, [Brandi.Outwin-Beals@waterboards.ca.gov](mailto:Brandi.Outwin-Beals@waterboards.ca.gov)  
Debbie Phan, San Diego Water Board, [Debbie.Phan@waterboards.ca.gov](mailto:Debbie.Phan@waterboards.ca.gov)  
Keith Yaeger, San Diego Water Board, [Keith.Yaeger@waterboards.ca.gov](mailto:Keith.Yaeger@waterboards.ca.gov)  
Brian Nece, SCCWRP, [bryann@sccwrp.org](mailto:bryann@sccwrp.org)  
Dave Hall, CAPEXCO, [dh@capexcofunds.com](mailto:dh@capexcofunds.com)

**Tech Staff Information & Use**

Order Numbers: R9-2015-0013 (Order), R9-2022-0108 (EPL)  
WDID: 9 000003406  
NPDES Number: CAG919003  
Reg. Measure IDs: 428406 (R9-2015-0013), 448082 (EPL)  
Place ID: 855514

## EXHIBIT A

### NOTICE OF VIOLATION(S) OF ORDER NO. R9-2015-0013, NPDES NO. CAG919003, SUBJECT TO MANDATORY MINIMUM PENALTIES, CAPEXCO, OUTPOST AT POWAY PROJECT DISCHARGE TO POWAY CREEK

The following table lists the alleged violation(s) subject to mandatory minimum penalties (MMPs) pursuant to Water Code section 13385(h) and/or (i). For additional information about the alleged violation(s) listed in the table:

1. Refer to the [State Water Resources Control Board Public Reports](#) webpage;
2. Choose the “MMP Report” link located under the “Violations Reports” category; and
3. Enter the search criteria.

Violation ID	Occurrence Date(s)	Violation Type	MMP Type	Violation Description
1104269	12/1/21	LREP	SIG	The October 2021 self-monitoring report (SMR) was submitted 43 days late or one complete 30-day period.
1104271	12/31/21	LREP	SIG	The November 2021 SMR was submitted 102 days late or three complete 30-day periods.
1104263	1/20/22	CAT 1	SIG	Total nitrogen exceeded the instantaneous maximum effluent limitation of 2.0 milligrams per liter (mg/L) with a result of 9.2 mg/L.
1104265	1/20/22	CAT 1	SIG	Total nitrogen exceeded the instantaneous maximum effluent limitation of 4.8 pounds per day (lbs/day) with a result of 7.9 lbs/day.
1104264	1/1/22 through 1/31/22	CAT 1	SIG	Total nitrogen exceeded the average monthly effluent limitation of 1.0 mg/L with a result of 9.2 mg/L.
1104266	1/1/22 through 1/31/22	CAT 1	SIG	Total nitrogen exceeded the average monthly effluent limitation of 2.4 lbs/day with a result of 7.5 lbs/day.
1104273	1/31/22	LREP	SIG	The December 2021 SMR was submitted 71 days late or two complete 30-day periods.
1104274	1/31/22	LREP	SIG	The Fourth Quarter 2021 SMR was submitted 71 days late or two complete 30-day periods.

#### **PENALTY AMOUNT**

##### MMP Amount for Effluent Violations

4 Serious Violations × \$3,000 per Serious Violation = \$12,000 MMP Amount

MMP Amount for Late Reporting Violations

8 complete 30-day periods × \$3,000 per 30-day period = \$24,000 MMP Amount

**Penalty Amount = \$36,000**

**DEFINITIONS**

<b>TERM</b>	<b>DEFINITION</b>
AM	Effluent exceeds average monthly limitation.
ATOX	Violation of an acute toxicity effluent limitation.
AW	Effluent exceeds average weekly limitation.
CAT 1	Violation of an effluent limitation for a Group I pollutant by more than 40%.
CAT 2	Violation of an effluent limitation for a Group II pollutant by more than 20%.
CHRON	Chronic violation as defined by Water Code section 13385(i). To be counted as a chronic violation, there must be 3 preceding violations (serious or non-serious) within a 180-day period. The fourth and any subsequent non-serious violation that occurs within the 180-day period is an MMP violation.
CIWQS	California Integrated Water Quality System database.
CTOX	Violation of a chronic toxicity effluent limitation.
DM	Effluent exceeds daily maximum limitation.
DREP	Deficient reporting violation. This will only result in an MMP if the report is so deficient as to make determination of compliance impossible for that reporting period.
GROUP	The list of pollutants is based on Appendix A to section 123.45 of title 40 of the Code of Federal Regulations.
IM	Effluent exceeds instantaneous maximum limitation.
LREP	Late reporting violation. Every 30 days a discharge monitoring report is late counts as one serious violation (SIG).
M	Effluent exceeds limit for monthly reporting period.
MMP Type	Classification of the type of MMP violation.
N/A	Not Applicable
Occurrence Date(s)	Date that a violation occurred. For continuing violations, such as a monthly average, the days of the reporting period are used. If the occurrence date is unknown, the date is entered as the day it was first discovered by staff, the discharger, or a third party. For deficient or late reports, the occurrence date is the day after the report was due.
OEV	Violation of any constituent-specific effluent limitation not included in Group I or Group II.
Q	Effluent exceeds limit for quarterly reporting period.
S	Effluent exceeds limit for semi-annual reporting period.

<b>TERM</b>	<b>DEFINITION</b>
SIG	Serious violation as defined by Water Code sections 13385(h)(2) and 13385.1, respectively. Waste discharge exceeds the effluent limitation for a Group I pollutant by 40% or more (CAT1), or a Group II pollutant by 20% or more (CAT2). Also, a failure to file a discharge monitoring report pursuant to Water Code section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations. Each serious violation is an MMP violation.
Violation Description	Narrative description of the violation.
Violation ID	Identification number assigned to a violation in CIWQS.
Violation Type	Classification of a violation. Two types of violations relate to MMPs: 1) Late Reporting Violations (LREP, DREP) 2) Effluent Violations (ATOX, CTOX, CAT1, CAT2, OEV)



## EXHIBIT B

### ACCEPTANCE OF CONDITIONAL RESOLUTION AND WAIVER OF RIGHT TO HEARING FOR SETTLEMENT OFFER NO. R9-2022-0108, CAPEXCO, OUTPOST AT POWAY PROJECT DISCHARGE TO POWAY CREEK

By signing below and returning this *Acceptance of Conditional Resolution and Waiver of Right to Hearing* (Acceptance and Waiver) to the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), CAPEXCO (Permittee) hereby accepts the *Offer to Participate in the Expedited Payment Program* and waives the right to a hearing before the San Diego Water Board to dispute the alleged violations identified in Exhibit A of the Settlement Offer, which is attached hereto and incorporated herein by reference.

The Permittee agrees that the Settlement Offer shall serve as a complaint pursuant to Article 2.5 of the Water Code and that no separate complaint is required for the San Diego Water Board to assert jurisdiction over the alleged violations through its Chief Prosecutor. The Permittee agrees to pay the penalties required by Water Code section 13385(h) and/or (i), in the sum of **\$36,000** (Penalty Amount), which shall be deemed payment in full of any civil liability pursuant to Water Code section 13385 that otherwise might be assessed for the violations identified in the Settlement Offer. The Permittee understands that this Acceptance and Waiver waives the Permittee's right to contest the allegations in the Settlement Offer and the amount of civil liability for such violation.

The Permittee understands that this Acceptance and Waiver does not address or resolve liability for any violation that is not specifically identified in the Settlement Offer.

Upon execution by the Permittee, the completed Acceptance and Waiver shall be submitted by email to [SanDiego@waterboards.ca.gov](mailto:SanDiego@waterboards.ca.gov), attention 855514:KYaeger or by mail to the following address:

California Regional Water Quality Control Board, San Diego Region  
2375 Northside Drive, Suite 100  
San Diego, CA 92108-2700  
ATTN: 855514:KYaeger

The Permittee understands that federal regulations set forth at title 40 of the Code of Federal Regulations, section 123.27(d)(2)(iii), require the San Diego Water Board to publish notice of and provide at least 30 days for public comment on any proposed resolution of an enforcement action addressing National Pollutant Discharge Elimination System (NPDES) permit violations. Accordingly, this Acceptance and Waiver, prior to execution by the San Diego Water Board, or its delegate, will be published as required by law for public comment.

During the public comment period, if no comments are received that cause the San Diego Water Board, or its delegate, to question the Settlement Offer, the San Diego Water Board, or its delegate, will execute the Acceptance and Waiver.

The Permittee understands that if significant comments are received in opposition to the Settlement Offer, the offer may be withdrawn. In that circumstance, the Permittee will be advised of the withdrawal and an administrative civil liability complaint may be issued and the matter may be set for a hearing before the San Diego Water Board. For such a liability hearing, the Permittee understands that this Acceptance and Waiver executed

by the Permittee will be treated as a settlement communication and will not be used as evidence in that hearing.

The Permittee further understands that, in lieu of full payment of the assessed mandatory minimum penalty to the State Water Pollution Cleanup and Abatement Account, a portion of the penalty payment may be made by the Permittee toward a supplemental environment project (SEP). The SEP option available to the Permittee is the Stream Monitoring Coalition Regional Monitoring Program (SMCRMP) SEP Fund, which supplements SMCRMP studies that would not otherwise be conducted through the SMCRMP's existing cost allocations.

The Permittee further understands that once the Acceptance and Waiver is executed by the San Diego Water Board or its delegate, full payment is due no later than 30 days after the date of execution, as a condition of this Acceptance and Waiver. The Permittee shall pay the assessed civil liability to the State Water Pollution Cleanup and Abatement Account and/or the Southern California Coastal Water Research Project (SCCWRP, for the SMCRMP SEP Fund) in accordance with the payment option selected below.

The Permittee agrees to pay the amounts indicated below to the State Water Pollution Cleanup and Abatement Account and, if the applicable payment option is selected, the SMCRMP SEP Fund, in accordance with the Payment Instructions below. The Permittee understands that the San Diego Water Board will consider the Permittee to have fulfilled its SEP obligation when SCCWRP receives the Permittee's contribution to the SMCRMP SEP Fund.

**Payment Instructions:**

SCCWRP SMCRMP SEP Fund

Payments must be made to SCCWRP and made out to the "Southern California Coastal Water Research Project" with the Settlement Offer Number (R9-2022-0108) written on the check. Payment must be mailed to the following address:

SCCWRP  
Attn: SMCRMP SEP Funds  
3535 Harbor Blvd., Suite 110  
Costa Mesa, CA 92626

State Water Pollution Cleanup and Abatement Account

Payments must be made to the State Water Pollution Cleanup and Abatement Account and made out to the "State Water Pollution Cleanup and Abatement Account" with the Settlement Offer Number (R9-2022-0108) written on the check. Payment must be mailed to the following address:

State Water Resources Control Board, Accounting Office,  
Attn: ACL Payment  
P.O. Box 1888  
Sacramento, CA 95812-1888

Verification of Payment

For tracking purposes, a copy of any issued checks must also be provided to the San Diego Water Board via email to [SanDiego@waterboards.ca.gov](mailto:SanDiego@waterboards.ca.gov), attention 855514:KYaeger, or by mail to:

San Diego Water Board  
Attn: 855514:KYaeger  
2375 Northside Drive, Suite 100,  
San Diego, CA 92108

**Payment Options:**

Mark **one** of the "Option" boxes below and fill in the blank fields as appropriate. Electing to pay a portion of the assessed liability to the SMCRMP SEP Fund will not change the total amount to be paid.

Option 1: Pay a portion of the assessed liability to the SMCRMP SEP Fund:

Amount to be paid to the SMCRMP SEP Fund (cannot exceed \$25,500)

\$

Amount to be paid to the State Water Pollution Cleanup and Abatement Account (\$36,000 minus amount inserted above)

\$

**\$ 36,000** Total assessed mandatory minimum penalty (sum of amounts above).

**Or**

Option 2: Pay the total assessed mandatory minimum liability (\$36,000) to the State Water Pollution Cleanup and Abatement Account.

**ORDER NO. R9-2022-0108, EXHIBIT B SIGNATURE PAGE**

I hereby affirm that I am duly authorized to act on behalf of and to bind the Permittee in the making and giving of this Acceptance and Waiver.

CAPEXCO

***ORIGINAL ON FILE SIGNED BY  
TRENT CLAUGHTON ON AUGUST 8, 2022***

IT IS SO ORDERED PURSUANT TO WATER CODE SECTION 13323 AND  
GOVERNMENT SECTION 11415.60 ON BEHALF OF THE CALIFORNIA REGIONAL  
WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

By: \_\_\_\_\_ September 19, 2022  
DAVID W. GIBSON \_\_\_\_\_  
Executive Officer Date