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## San Diego Regional Water Quality Control Board

May 8, 2020

**Sent by Email Only**

Mr. Trent Claughton  
CAPEXCO  
3400, 800-3rd St. SW  
Calgary, AB, Canada T2P 5C5  
[tc@capexcofunds.com](mailto:tc@capexcofunds.com)

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

**Subject: Settlement Offer No. R9-2020-0111: Offer to Participate in Expedited Payment Program Related to Violations of Order No. R9-2015-0013, NPDES No. CAG919003 for the Groundwater Extraction Discharge at 13247 Poway Road, Poway, CA**

Mr. Claughton:

CAPEXCO (Permittee) is hereby notified of alleged violations of Order No. R9-2015-0013, *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 Payment Program to address liability that may be assessed pursuant to Water Code section 13385.

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

As detailed in the attached *Notice of Violation(s) Subject to Mandatory Minimum Penalties, CAPEXCO, Outpost at Poway Project at 13247 Poway Road, Poway, CA* (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 complaint, 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 participating in the San Diego Water Board's Expedited Payment Program. The Permittee may accept this Settlement Offer, waive its right to a hearing, and pay the mandatory minimum penalty of **\$21,000** 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. R9-2020-0111, CAPEXCO, Outpost at Poway Project at 13247 Poway Road, Poway, CA* (Acceptance and Waiver, Exhibit B) on or before 5 p.m. on July 7, 2020.
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 July 7, 2020. The San Diego Water Board will evaluate the contested violations and take one of two actions:
  - a. The San Diego Water Board will determine that the violations are not supported, expunge the alleged violations, take no further action against the

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<sup>2</sup> There is no statute of limitations 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).

- Permittee for the alleged violations, and notify the Permittee in writing of that determination; or
- b. The San Diego Water Board will determine that the alleged violations are meritorious and 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.

#### **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 National Pollutant Discharge Elimination System (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. In accordance with Water Code section 13385(n), funds collected for the alleged violations shall be deposited in the State Water Pollution Cleanup and Abatement Account. Accordingly, the liability

shall be paid by cashier's or certified check made out to the "State Water Pollution Cleanup and Abatement Account." 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,



Kelly Dorsey  
Acting Assistant Executive Officer  
San Diego Water Board

Attachments:

Exhibit A: Notice of Violation(s) Subject to Mandatory Minimum Penalties, CAPEXCO, Outpost at Poway Project at 13247 Poway Road, Poway, CA

Exhibit B: Acceptance of Conditional Resolution and Waiver of Right to Hearing for Settlement Offer No. R9-2020-0111, CAPEXCO, Outpost at Poway Project at 13247 Poway Road, Poway, CA

cc:

Greg Loy  
K.D. Stahl Construction  
[greg@kdstahl.com](mailto:greg@kdstahl.com)

Dave Hall  
CAPEXCO  
[dh@capexcofunds.com](mailto:dh@capexcofunds.com)

David Barker  
San Diego Water Board  
[David.Barker@waterboards.ca.gov](mailto:David.Barker@waterboards.ca.gov)

Ben Neill  
San Diego Water Board  
[Ben.Neill@waterboards.ca.gov](mailto:Ben.Neill@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)

Michael Slaby  
Pure Effect, Inc.  
[mslaby@pureeffect.com](mailto:mslaby@pureeffect.com)

Melody Rocco  
City of Poway  
[mrocco@poway.org](mailto:mrocco@poway.org)

#### Tech Staff Information & Use

Order Numbers	R9-2015-0013 (Order), R9-2020-0111 (EPL)
WDID	9 000003406
NPDES Number	CAG919003
Reg. Measure IDs	428406 (R9-2015-0013), 437208 (EPL)
Place ID	855514

## EXHIBIT A

### NOTICE OF VIOLATION(S) SUBJECT TO MANDATORY MINIMUM PENALTIES CAPEXCO OUTPOST AT POWAY PROJECT AT 13247 POWAY ROAD, POWAY, CA

The following table lists the alleged violation(s) subject to mandatory minimum penalties (MMPs) pursuant to Water Code section 13385(h) and (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:  
[http://www.waterboards.ca.gov/water\\_issues/programs/ciwqs/publicreports.shtml](http://www.waterboards.ca.gov/water_issues/programs/ciwqs/publicreports.shtml);
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
1071381	10/31/2019	LREP	SIG	The discharge monitoring report for the third quarter of 2019 was due on October 30, 2019 and was submitted on February 14, 2020 (107 days late or three complete 30-day periods).
1071382	12/1/2019	LREP	SIG	The discharge monitoring report for October 2019 was due on November 30, 2019 and was submitted on February 27, 2020 (89 days late or two complete 30-day periods).
1071383	12/31/2019	LREP	SIG	The discharge monitoring report for November 2019 was due on December 30, 2019 and was submitted on February 27, 2020 (59 days late or one complete 30-day period).
1073694	3/2/2020	LREP	SIG	The discharge monitoring report for January 2020 was due on March 1, 2020 and was submitted on April 20, 2020 (50 days late or one complete 30-day period).

#### EXPEDITED PAYMENT AMOUNT

##### MMP Amount for Late Reporting Violations

7 complete 30-day periods × \$3,000 per complete 30-day period = \$21,000 MMP Amount

Expedited Payment Amount = \$21,000

#### DEFINITIONS

TERM	DEFINITION
AM	Effluent exceeds average monthly limitation.
ATOX	Violation of an acute toxicity effluent limitation.

TERM	DEFINITION
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 actually 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.
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. R9-2020-0111

#### CAPEXCO

#### OUTPOST AT POWAY PROJECT AT 13247 POWAY ROAD, POWAY, CA

By signing below and returning this *Acceptance of Conditional Resolution and Waiver of Right to Hearing for Settlement Offer No. R9-2020-0111*, CAPEXCO, Outpost at Poway Project at 13247 Poway Road, Poway, CA (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 **\$21,000** (Expedited Payment 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 returned to:

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 Expedited Payment Amount, 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 Expedited Payment Amount, the offer on behalf of the San Diego Water Board to resolve the violations set forth in the Settlement 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 once the Acceptance and Waiver is executed by the San Diego Water Board, or its delegate, the full payment required by the deadline set forth below is a condition of this Acceptance and Waiver. In accordance with Water Code section 13385(n), funds collected for the alleged violations shall be deposited in the State Water Pollution Cleanup and Abatement Account. Accordingly, the liability shall be paid by a cashier's or certified check for **\$21,000** made out to the "State Water Pollution Cleanup and Abatement Account." Please write the Settlement Offer Number (R9-2020-0111) on the check. Payment must be submitted to the State Water Resources Control Board, Accounting Office, Attn: ACL Payment, P.O. Box 1888, Sacramento, CA 95812-1888, no later than thirty (30) calendar days after the San Diego Water Board, or its delegate, has executed this Acceptance and Waiver. A copy of the check must also be received by the San Diego Water Board at 2375 Northside Drive, Suite 100, San Diego, CA 92108 within thirty (30) days of approval via U.S. Postal Service or e-mail to [SanDiego@waterboards.ca.gov](mailto:SanDiego@waterboards.ca.gov), attention 855514:KYaeger.

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.

By:   
Signed Name

July 06, 2020  
Date

Trent M. Cloughton

CEO.

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Title

By: DAVID W. GIBSON  
Executive Officer

Date \_\_\_\_\_