

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

In the matter of:)	
)	
CITY OF SUNNYVALE,)	SETTLEMENT AGREEMENT AND
SANTA CLARA COUNTY)	STIPULATION FOR ENTRY OF
)	ADMINISTRATIVE CIVIL LIABILITY
)	ORDER
Unauthorized Discharge to)	
Guadalupe Slough on)	<i>PROPOSED ORDER</i>
July 29, 2020)	
)	
)	
)	
)	

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order) is entered into by and between the California Regional Water Quality Control Board, San Francisco Bay Region, Prosecution Team (Prosecution Team) and City of Sunnyvale (Settling Respondent) (collectively, Parties), and is presented to the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board), or its delegate, for adoption as an Order by settlement pursuant to California Water Code (Water Code) section 13323 and Government Code section 11415.60. This Stipulated Order resolves the violation alleged herein by the imposition of administrative civil liability against the Settling Respondent in the amount of **\$187,000**.

Section II: RECITALS

1. The Settling Respondent owns and operates the Sunnyvale Water Pollution Control Plant located at 1444 Borregas Avenue, Sunnyvale (Facility). The Settling Respondent is required to operate and maintain the Facility in compliance with National Pollutant Discharge Elimination System (NPDES) Permit No. CA0037621, Order No. R2-2020-0002 (Permit), an NPDES permit for point source discharges to surface waters of the United States issued pursuant to Clean Water Act section 402 and the Water Code Chapter 5.5, Division 7 (commencing with section 13370). The Facility is permitted to discharge advanced secondary-treated municipal wastewater via Discharge Point 001 to Moffett Channel.
2. On July 29, 2020, the Settling Respondent discharged approximately 292,600 gallons of partially-treated and undisinfected wastewater to a California Department of Fish and Wildlife Service channel (FWS Channel) tidally connected to Guadalupe Slough

and South San Francisco Bay. The discharge occurred when a secondary effluent pipeline ruptured at the Facility.

3. The discharge on July 29, 2020, was unauthorized and in violation of the Permit, Water Code, and Clean Water Act. Prohibition III.A of the Permit prohibits discharge of treated wastewater at a location or in a manner different from that described in the Permit. Water Code section 13376 prohibits the discharge of pollutants to navigable waters of the United States by any person except as authorized by waste discharge requirements. Pursuant to Clean Water Act section 301, it is unlawful for any person to discharge any pollutant into waters of the United States without authorization (i.e., a permit) under specific provisions of the Clean Water Act, including section 402 (NPDES permits). (33 U.S.C. § 1311(a).)
4. The Settling Respondent is subject to administrative civil liability for the unauthorized discharge pursuant to Water Code section 13385, subdivisions (a)(1), (a)(2), and (a)(5). Civil liability may be imposed in the amount of \$10,000 for each day in which the violation occurs, plus \$10 for each gallon exceeding 1,000 gallons discharged and not cleaned up pursuant to Water Code section 13385, subdivisions c(1) and c(2).
5. To resolve the alleged violation in section II, paragraph 2, by consent and without further administrative proceedings, the Parties agree to the imposition of an administrative civil liability of \$187,000 against the Settling Respondent. The Prosecution Team calculated the proposed liability using Steps 1 through 10 of the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy) (October 2017) as shown in Attachment A, which is incorporated herein by reference.
6. The Parties engaged in settlement negotiations and agreed to settle this matter without administrative or civil litigation, and to present this Stipulated Order to the Regional Water Board or its delegate for adoption as an Order by settlement pursuant to Water Code section 13323 and Government Code section 11415.60.
7. The Prosecution Team contends that the resolution of the alleged violation is fair and reasonable, and fulfills all of its enforcement objectives; that no further action is warranted concerning the violation, except as provided in this Stipulated Order; and that this Stipulated Order is in the public's best interest.

Section III: STIPULATIONS

The Parties incorporate the foregoing Recitals and stipulate to the following:

1. **Administrative Civil Liability:** The Settling Respondent hereby agrees to the imposition of an administrative civil liability of **\$187,000** to resolve the alleged violation set forth in section II as follows:
 - a. No later than 30 days after the Regional Water Board or its delegate signs this Stipulated Order, the Settling Respondent shall mail a check for **\$93,500** (half of

the total administrative civil liability) made payable to “State Water Pollution Cleanup and Abatement Account,” referencing the Order number on page one of this Stipulated Order, to:

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

The Settling Respondent shall email a copy of the check to the State Water Resources Control Board, Office of Enforcement (to Naomi Rubin at naomi.rubin@waterboards.ca.gov) and to the Regional Water Board (to Maya McInerney at maya.mcinerney@waterboards.ca.gov).

- b. The Parties agree that the remaining **\$93,500** of the administrative liability amount shall be suspended pending completion of the Supplemental Environmental Project (SEP) described in section III, paragraph 2, and Attachment B, incorporated by reference herein.
2. **SEP Description:** The Settling Respondent proposed and agreed to implement an *SEP for the Green Stormwater Infrastructure at Wolfe/Stewart Intersection*. The SEP will integrate green stormwater infrastructure into a traffic improvement project. Stormwater runoff from adjacent streets will flow into a landscaped area for treatment as a stormwater best management practice prior to discharge into the subsurface storm drain system. Attachment B further describes the SEP and its project milestones, budget, and reporting schedule.
3. **Representations and Agreements Regarding the SEP**
 - a. As a material condition for the Regional Water Board’s acceptance of this Stipulated Order, the Settling Respondent represents that it will use the suspended liability of \$93,500 (SEP Amount) to implement the SEP as set forth in section III, paragraph 2, and Attachment B of this Stipulated Order. The Settling Respondent understands that its promise to implement the SEP, in its entirety and in accordance with the implementation schedule and budget set forth in Attachment B, represents a material condition of this settlement of liability between the Settling Respondent and the Regional Water Board.
 - b. The Settling Respondent shall provide certified, written reports describing SEP implementation progress to the Regional Water Board as described in Attachment B. The Settling Respondent agrees that Regional Water Board staff have permission to inspect SEP implementation at any reasonable time during normal business hours with 24-hour notice.
 - c. On or before May 1, 2023, a responsible official of the Settling Respondent shall submit a final completion report as described in Attachment B and a certified statement, signed under penalty of perjury, that documents the Settling Respondent’s expenditures during the SEP completion period, that the Settling

- Respondent completed the SEP in accordance with the terms of this Stipulated Order, and that the Settling Respondent followed all applicable environmental laws and regulations in implementing the SEP, including the California Environmental Quality Act (CEQA), Porter-Cologne Water Quality Control Act, and federal Clean Water Act. The expenditures may include external payments to outside vendors, but may not include the cost of normal, routine work undertaken by Settling Respondent staff. In making such certification, the signatories may rely on normal organizational project tracking systems that capture employee time expenditures and external payments to outside vendors, such as environmental and information technology contractors or consultants. Documentation of SEP completion may include photographs, invoices, receipts, certifications, and other materials reasonably necessary for the Regional Water Board to evaluate SEP completion and the costs incurred. The Settling Respondent shall provide the Regional Water Board with any additional information reasonably necessary to verify the Settling Respondent's SEP expenditures and completion.
- d. The Settling Respondent further agrees that the Regional Water Board has the right to require a third-party audit of the funds expended to implement the SEP at the Settling Respondent's cost, and that the Settling Respondent bears ultimate responsibility for meeting all deadlines and requirements specified in Attachment B.
 - e. Whenever the Settling Respondent, or its agents or subcontractors, publicize one or more SEP elements, it shall state in a prominent manner that the project is undertaken as part of a settlement of a Regional Water Board enforcement action against the Settling Respondent.
 - f. The Executive Officer of the Regional Water Board may extend the SEP deadlines contained in Attachment B of this Stipulated Order if the Settling Respondent demonstrates delays from unforeseeable circumstances beyond its control, provided that the Settling Respondent continues to undertake all appropriate measures to meet the deadlines. The Settling Respondent shall make any deadline extension request in writing. Any approval of an extension by the Executive Officer must be in writing.
 - g. Upon the Settling Respondent's satisfaction of its obligations under this Stipulated Order, including SEP completion and any audits, the Executive Officer shall issue a "Satisfaction of Order" terminating any further obligations under this Stipulated Order, permanently suspending the remaining penalty, and resolving the Administrative Civil Liability proceedings.
 - h. If the Settling Respondent is unable to demonstrate to the reasonable satisfaction of the Executive Officer that the entire SEP Amount was spent on the completed SEP, the Settling Respondent shall pay the difference between the SEP Amount and the amount the Settling Respondent can demonstrate was actually spent on the SEP (Difference). The Executive Officer shall issue a "notice" that requires the Settling Respondent to pay the Difference to the State Water Pollution

- Cleanup and Abatement Account within 30 days of the notice issuance date. The Settling Respondent shall submit payment consistent with the payment method described in section III, paragraph 1.a. Payment of the Difference shall satisfy the Settling Respondent's obligations to implement the SEP.
- i. If the SEP is not fully implemented by May 1 2023, or by the due date if extended pursuant to section III, paragraph 3.f, or if there has been a material failure to satisfy a project milestone, the Executive officer shall issue a Notice of Violation or otherwise notify the Settling Respondent that the SEP completion due date has passed. The amount of suspended liability owed shall be determined by a written, stipulated agreement of the Parties, or if the Parties cannot reach agreement, via a Motion for Payment of Suspended Liability before the Regional Water Board or its delegate. The Settling Respondent shall be liable to pay the entire SEP Amount or, if shown by the Settling Respondent, some portion thereof less the value of any completed milestones as stipulated by the Parties in writing or as determined by the Motion for Payment of Suspended Liability. Unless the Regional Water Board or its delegate determines otherwise, the Settling Respondent shall not be entitled to any credit, offset, or reimbursement from the Regional Water Board for expenditures made on the SEP prior to the Notice of Violation's issuance date. Within 30 days of the Regional Water Board's or its delegate's determination of the suspended liability amount assessed for the Settling Respondent to pay, the Settling Respondent shall submit payment consistent with the payment method described in section III, paragraph 1.a. Payment of the assessed amount shall satisfy the Settling Respondent's obligations to implement the SEP.
4. **Regional Water Board Not Liable:** The Regional Water Board and its members, staff, attorneys, and representatives shall not be liable for any injury or damage to persons or property resulting from negligent or intentional acts or omissions by the Settling Respondent or its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Stipulated Order. The Regional Water Board, its members, and its staff shall not be held as parties to, or guarantors of, any contract entered into by the Settling Respondent or its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Stipulated Order.
 5. **Compliance with Applicable Laws:** The Settling Respondent understands that payment of the administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged herein may subject it to further enforcement, including additional administrative civil liability.

6. Party Contacts for Communications related to this Stipulated Order:

For the Regional Water Board:

Maya McInerney
San Francisco Bay Regional Water
Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 94612
Maya.McInerney@waterboards.ca.gov
(510) 622-2373

Counsel:
Naomi Rubin
State Water Resources Control Board
801 K St., Suite 2300
Sacramento, CA 95814
Naomi.Rubin@waterboards.ca.gov
(916) 341-5677

For the Settling Respondent:

Melody Tovar
Sunnyvale Water Pollution Control
Plant
PO Box 3707
Sunnyvale, CA 94088
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(408) 730-7740

Counsel:
Rebecca Moon
City of Sunnyvale
PO Box 3707
Sunnyvale, CA 94088
RMoon@sunnyvale.ca.gov
(408) 730-7464

7. **Attorney Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorney fees and costs incurred pursuant to this Stipulated Order.

8. **Matters Addressed by this Stipulated Order:** Upon the Regional Water Board's or its delegate's adoption, this Stipulated Order represents a final and binding resolution and settlement of the alleged violation contained in section II, paragraph 2, as of the effective date of this Stipulated Order. The provisions of this paragraph are expressly conditioned on the full payment of the administrative civil liability by the deadline specified in section III, paragraph 1.

9. **Public Notice:** The Settling Respondent understands that this Stipulated Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board or its delegate. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the Regional Water Board or its delegate for adoption, the Prosecution Team may unilaterally declare this Stipulated Order void and decide not to present it to the Regional Water Board or its delegate. The Settling Respondent agrees that it may not rescind or otherwise withdraw its approval of this proposed Stipulated Order.

10. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for public review of this Stipulated Order and the Regional Water Board's or its delegate's adoption of this Stipulated Order is lawful and adequate. The Parties understand that the Regional Water Board or its delegate has the authority to require a public hearing on this Stipulated Order. If procedural objections are raised and the Regional Water Board or its delegate requires a public hearing prior to the Stipulated Order becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust this Stipulated Order as necessary or advisable under the circumstances.

11. **Interpretation:** This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. The Parties are represented by counsel in this matter.
12. **Modification:** The Parties shall not modify this Stipulated Order by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Regional Water Board or its delegate.
13. **If the Stipulated Order Does Not Take Effect:** If the Stipulated Order does not take effect because the Regional Water Board or its delegate does not approve it, or because the State Water Resources Control Board (State Water Board) or a court vacates it in whole or in part, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liability for the underlying alleged violation, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing, or in any other administrative or judicial proceeding. The Parties agree to waive any and all objections based on settlement communications in this matter, including but not limited to objections related to prejudice or bias of any of the Regional Water Board members or their advisors, or any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing this Stipulated Order and, therefore, may have formed impressions or conclusions prior to any contested evidentiary hearing on the violation alleged herein in this matter. The Parties also agree to waive any and all objections based on laches, delay, or other equitable defenses related to the period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.
14. **Waiver of Hearing:** The Settling Respondent has been informed of the rights Water Code section 13323, subdivision (b), provides and, if the settlement is adopted by the Regional Water Board or its delegate, hereby waives its right to a hearing before the Regional Water Board prior to the Stipulated Order's adoption. However, if the settlement is not adopted, or if the matter proceeds to the Regional Water Board or State Water Board for hearing, the Settling Respondent does not waive its right to a hearing before an order is imposed.
15. **Waiver of Right to Petition or Appeal:** Except in the instance where the Stipulated Order is not adopted by the Regional Water Board or its delegate, the Settling Respondent hereby waives its right to petition the Regional Water Board's or its delegate's adoption of the Stipulated Order for review by the State Water Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or California appellate court. This explicit waiver of rights includes potential future decisions by the Regional Water Board or its delegate directly related to this Stipulated Order, including but not limited to time extensions and SEP completion.

16. **Covenant Not to Sue:** The Settling Respondent covenants not to sue or pursue any administrative or civil claims against the State of California, any State agency, or its officers, Board members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Stipulated Order, except that this covenant is not intended to bar and does not limit the Settling Respondent's rights to sue over other Regional Water Board orders (e.g., permits or cease and desist orders) or limit the Settling Respondent's rights to defend against any additional enforcement or other actions taken by the Regional Water Board or its employees, representatives, agents, or attorneys. Moreover, this covenant shall not release any claims or complaints against any State agency or the State of California, its officers, Regional Water Board members, employees, representatives, agents, or attorneys to the extent that such covenant would be prohibited by California Business and Professions Code section 6090.5 or by any other statute, rule, regulation, or legal principle of similar effect.
17. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board or its delegate under the terms of this Stipulated Order shall be communicated to the Settling Respondent in writing. No oral advice, guidance, suggestions, or comments from Regional Water Board employees or officials regarding submissions or notices shall be construed to relieve the Settling Respondent of its obligation to obtain any final written approval this Stipulated Order requires.
18. **Authority to Bind:** Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of, and to bind, the entity on whose behalf he or she executes the Stipulated Order.
19. **No Third-Party Beneficiaries:** This Stipulated Order is not intended to confer any right or obligation on any third party, and no third party shall have any right of action under this Stipulated Order for any cause whatsoever.
20. **Severability:** This Stipulated Order is severable; if any provision is found to be invalid, the remainder shall remain in full force and effect.
21. **Counterpart Signatures; Facsimile and Electronic Signature:** This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document. Further, this Stipulated Order may be executed by facsimile or electronic signature, and any such facsimile or electronic signature by any Party hereto shall be deemed to be an original signature and shall be binding on such Party to the same extent as if such facsimile or electronic signature were an original signature.

22. **Effective Date:** This Stipulated Order shall be effective and binding on the Parties upon the date the Regional Water Board or its delegate enters the Order incorporating the terms of this Stipulated Order.

IT IS SO STIPULATED.

Settlement Agreement and Stipulated Administrative Civil Liability
City of Sunnyvale

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION, PROSECUTION TEAM**

Date: February 24, 2021

By:
Thomas Mumley
Assistant Executive Officer

Approved as to form:

By:
Naomi Rubin, Attorney III
State Water Resources Control Board
Office of Enforcement

Settlement Agreement and Stipulated Administrative Civil Liability
City of Sunnyvale

CITY OF SUNNYVALE

Date: 2/23/2021

DocuSigned by:
Kent Steffens
By: 40B2D2DDFE064D8...
Kent Steffens, City Manager

Approved as to form only:

DocuSigned by:
Rebecca Moon
By: 4004B848C114497...
Rebecca Moon, Sr. Assistant City Attorney
City of Sunnyvale

ORDER OF THE REGIONAL WATER BOARD

1. This Order incorporates the foregoing sections I through III by this reference as if set forth fully herein.
2. In accepting this Stipulated Order, the Regional Water Board or its delegate has considered, where applicable, each of the factors prescribed in Water Code section 13385, subdivision (e), and has applied the State Water Resource Control Board’s Enforcement Policy, which is incorporated by reference herein. The consideration of these factors and application of the Enforcement Policy are based on information the Prosecution Team obtained in investigating the allegation set forth in the Stipulated Order or otherwise provided to the Regional Water Board.
3. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board or its delegate finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, § 21000 et seq.) in accordance with section 15321, subdivision (a)(2), Title 14, of the California Code of Regulations. Additionally, this Order generally accepts the plans proposed for the SEP prior to implementation. Mere submittal of plans is exempt from CEQA because submittal will not cause a direct or indirect physical change in the environment.
4. The Executive Officer of the Regional Water Board is authorized to refer this matter directly to the Attorney General for enforcement if the Settling Respondent fails to perform any of its obligations under this Stipulated Order.

IT IS HEREBY ORDERED pursuant to Water Code section 13323 and Government Code section 11415.60, on behalf of the California Regional Water Quality Control Board, San Francisco Bay Region.

Michael Montgomery
Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region

Date

ATTACHMENT A

**Factors in Determining
Stipulated Administrative Civil Liability**

**CITY OF SUNNYVALE
UNAUTHORIZED DISCHARGE OF 292,600 GALLONS OF
PARTIALLY-TREATED WASTEWATER INTO GUADALUPE SLOUGH
SUNNYVALE WATER POLLUTION CONTROL PLANT
SUNNYVALE, SANTA CLARA COUNTY**

The State Water Resources Control Board Water Quality Enforcement Policy (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors required by Water Code sections 13327 and 13385, subdivision (e). Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount for the alleged violation is presented below. The Enforcement Policy should be used as a companion document in conjunction with this administrative civil liability assessment since the penalty methodology and definition of terms are not replicated herein. The Enforcement Policy is at: http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11709.pdf

ALLEGED VIOLATION

On July 29, 2020, the City of Sunnyvale (Discharger) discharged approximately 292,600 gallons of partially-treated and undisinfected wastewater to a California Department of Fish and Wildlife Service channel (FWS Channel) tidally connected to Guadalupe Slough and South San Francisco Bay. The discharge occurred when a secondary effluent pipeline ruptured at the Discharger's Sunnyvale Water Pollution Control Plant (Facility).

The Discharger is subject to administrative civil liabilities for the unauthorized discharge pursuant to Water Code section 13385, subdivisions (a)(1) and (a)(5). National Pollutant Discharge Elimination System (NPDES) Permit No. CA0037621, Order No. R2-2020-0002 (Permit), prohibited the discharge. Water Code section 13376 prohibits any discharge of pollutants to navigable waters of the United States by any person except as authorized by waste discharge requirements. Likewise, under Clean Water Act section 301, it is unlawful for any person to discharge any pollutant into waters of the United States without authorization (i.e., a permit) under specific provisions of the Clean Water Act, including section 402 (NPDES permits). (33 U.S.C. § 1311(a).)

The administrative civil liability calculated using the Enforcement Policy methodology is **\$187,000**.

PENALTY FACTOR	SCORE	DISCUSSION
Degree of Toxicity of Discharge	2	<p>Degree of Toxicity: moderate</p> <p>The discharge posed a moderate risk or threat to potential receptors based on its chemical and physical characteristics. The discharge was partially-treated and undisinfected municipal wastewater. The wastewater had passed through mechanical barrel grinders and been treated in preaeration tanks, primary sedimentation basins, and oxidation ponds, but it had not yet been disinfected.</p> <p>According to the Discharger’s Five-Day Written Report, the discharge contained ammonia, total suspended solids (TSS), and biochemical oxygen demand (BOD) at or above the Permit’s effluent limits: the ammonia, TSS, and BOD discharge concentrations were 6.4 milligrams per liter (mg/L), 60 mg/L, and 20 mg/L, compared to the Permit’s maximum daily effluent limits of 5 mg/L, 30 mg/L, and 20 mg/L. The pH of the discharge was 8.9 and exceeded the Permit’s instantaneous effluent limit of 8.5.</p> <p>The discharge contained enterococcus at more than 2,420 most probable number per 100 milliliters (MPN/100 mL). The bacteria water quality objective for all waters where the salinity is greater than one part per thousand more than five percent of the time during the calendar year is a six-week geometric mean effluent limit of 30 colony forming units per 100 milliliters (CFU/100 mL), calculated weekly, and a statistical threshold value of 110 CFU/100 mL.¹ For the purposes of this comparison, 1 MPU/100 mL is equivalent to 1 CFU/100 mL. The discharge was a single event, so the six-week geometric mean is not applicable. The discharge contained at least 2,420 MPU/100mL, 22 times the statistical threshold value for enterococcus, exceeding the water quality objective for bacteria in saline water.</p> <p>Bacteria, such as enterococcus, can cause a variety of diseases or illnesses through physical contact or ingestion, and the pH in the discharge was at a level indicative of water not suitable for a healthy aquatic ecosystem.</p>
Actual Harm or Potential Harm to Beneficial Uses	2	<p>Harm or Potential for Harm: below moderate</p> <p>The discharge posed below-moderate harm or potential harm to beneficial uses because, although impacts could be reasonably expected based on the discharge characteristics (see “Degree of Toxicity of Discharge” above) and applicable beneficial uses, the harm was likely short-term and not appreciable.</p> <p>The Basin Plan states that the beneficial uses of a specified water body generally apply to its tributaries. The Basin Plan assigns Guadalupe Slough – and by the tributary rule, Fish and Wildlife Service Pond Alviso 3 West (Pond AW3) and the FWS Channel – the following beneficial uses: Estuarine Habitat (EST); Preservation of Rare and</p>

¹ State Water Resources Control Board, “Part 3 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California – Bacteria Provisions and a Water Quality Standards Variance Policy,” 2019, p. 3.

PENALTY FACTOR	SCORE	DISCUSSION
		<p>Endangered Species (RARE); Wildlife Habitat (WILD); Water Contact Recreation (REC1); and Non-Contact Water Recreation (REC2).</p> <p>The 292,600-gallon discharge of partially-treated and undisinfected wastewater flowed into the FWS Channel, which is tidally-influenced, unlined, and partially-vegetated. From there, it likely flowed to Pond A3W, a tidal wetland connected to Guadalupe Slough. In its Five-Day Written Report, the Discharger stated that the predominant flow direction is from Pond A3W into the FWS Channel and that most of the discharge likely remained in, and attenuated within, the FWS Channel. However, during an ebbing tide, the flow direction would be reversed, with the potential to carry the discharged wastewater from Pond A3W toward Guadalupe Slough and South San Francisco Bay.</p> <p>Below moderate impacts to beneficial uses would be reasonably expected based on the characteristics of the discharge and limited natural tidal flushing of the channel. According to the Five-Day Written Report, the Discharger observed no impact to biota or water quality during daily visual observations recorded during sampling events following the discharge. Water quality samples collected downstream of the discharge at the connection point between the FWS Channel and Pond A3W on July 31, 2020, confirm attenuation of the discharge with enterococcus levels at 15 MPU/100 mL. Nevertheless, elevated enterococcus levels are an indicator of environmental fecal contamination, which is associated with an increased risk of disease or illness through physical contact or ingestion of impacted water. Increased odors associated with fecal contamination may also impact enjoyment of public areas adjacent to the FWS Channel and Pond A3W. The short-term increase in enterococcus limited the use of the area for contact and non-contact recreation. Additionally, the pH of water affects the normal physiological functions of aquatic organisms, including the exchange of ions with the water respiration, and a short-term increase in the pH of the FWS Channel and Pond A3W may have affected aquatic life.</p>
Susceptibility to Cleanup or Abatement	1	<p>Susceptibility to Cleanup: no</p> <p>The discharge was not susceptible to cleanup because the discharge quickly comingled with the receiving water.</p>
Per-Gallon and Per-Day Factors for Discharge Violations	0.15	<p>Deviation from Requirement: major</p> <p>The deviation from the Permit requirement was major because the Permit prohibited the discharge. The Discharger is only authorized to discharge advanced, secondary-treated municipal wastewater directly into Moffett Channel, a tributary of South San Francisco Bay. The Permit (section III.A) prohibits discharge at any other location. Discharge to the FWS Channel rendered the Permit requirement ineffective in its essential functions.</p> <p>The per-gallon and per-day factors come from Enforcement Policy Tables 1 and 2, and are based on the sum of the toxicity, harm, and</p>

PENALTY FACTOR	SCORE	DISCUSSION
		susceptibility factors above (5) and the “major” deviation from requirement.
High Volume Discharge Adjustment	\$3.50/gallon	A per-gallon liability of \$3.50, rather than the maximum of \$10, is appropriate because the discharge volume was over 100,000 gallons and this assessment would not result in an inappropriately small penalty. Using \$3.50 per gallon to calculate the initial liability discounts much of the penalty for the discharge volume above 100,000 gallons. Using \$3.50 per gallon results in a suitable deterrent and bears a reasonable relationship to the gravity of the violation.
Days of Violation	1	The discharge occurred on one day: July 29, 2020. Facility staff discovered the discharge while performing an inspection at 6:15 p.m. that evening. Staff observed an unusual upwelling in the FWS Channel at a location aligned with the Facility’s secondary effluent pipeline and shut off flow to the pipeline by turning off the oxidation pond effluent pumps. The upwelling in the FWS Channel decreased. Further testing on July 30, 2020, confirmed that the secondary effluent pipeline was the source of the discharge.
Initial Liability	\$154,600 (rounded)	<p>The initial liability is calculated as follows: per-gallon factor multiplied by gallons discharged to surface water (minus 1,000 gallons) multiplied by maximum per-gallon liability (as adjusted above), plus per-day factor multiplied by maximum per-day liability (\$10,000) multiplied by number of days of discharge.</p> <p>Initial Liability: \$154,600 = $(0.15 \times 291,600 \text{ gal} \times \\$3.50/\text{gal}) + (0.15 \times \\$10,000/\text{day} \times 1 \text{ day})$</p>
Adjustments for Discharger Conduct		
Culpability	1.0	A neutral culpability factor is appropriate because the Discharger took prudent steps to rehabilitate the Facility to address aging infrastructure, including plans to upgrade the secondary effluent pipeline within the expected lifecycle of the pipe.
History of Violations	1.1	A 10 percent increase is appropriate because the Discharger has a history of effluent limit violations. The Discharger violated effluent limits set forth in Order No. R2-2014-0035 (effective November 2014 through March 2020) for nickel (once) and chlorine (twice). Prior to that, the Discharger violated effluent limits set forth in Order No. R2-2009-0061 (effective October 2009 through October 2014) for chlorine five times.
Cleanup and Cooperation	1.1	A 10 percent increase is appropriate because the Discharger delayed reporting the discharge and posting adequate signage as required by Permit Attachment G. On July 29, 2020, within two hours of observing upwelling in the FWS Channel and seeing it decrease after the oxidation pond effluent pumps were turned off, the Discharger should have reported a discharge, or suspected discharge, to the California Office of Emergency Services and the local health officer or director of environmental health with jurisdiction over the affected water body. The Discharger did not report the incident until 11:00 a.m. the following day. This delay increased the potential for the public to be exposed to the

PENALTY FACTOR	SCORE	DISCUSSION
		<p>discharge. According to the Five-Day Written Report, no additional signs were posted around Pond AW3, which is adjacent to the Bay Trail. The only new signs posted were around Pond A4 and did not indicate any reason for public-health concern; the signs simply stated, “DO NOT ENTER.”</p> <p>As an interim fix, the Facility is using a backup pipeline to convey secondary effluent from the oxidation ponds to the fixed growth reactors, the next phase in the treatment process. The Discharger has provided monthly updates regarding its progress toward constructing a new above-ground secondary effluent pipeline as an emergency repair project.</p>
Total Base Liability	\$187,000 (rounded)	<p>Each applicable factor relating to the Discharger’s conduct is multiplied by the Initial Liability (above) to determine the Total Base Liability.</p> <p>Total Base Liability: \$187,000 = (\$154,600 x 1.0 x 1.1 x 1.1)</p>
Ability to Pay and Continue in Business	No adjustment	<p>The Discharger is able to pay the proposed administrative civil liability based on publicly available information. The Discharger has an annual wastewater treatment operations, maintenance, and administration budget greater than \$12 million for fiscal year 2020-2021.² The proposed liability will not affect the Discharger’s ability to continue the operation and maintenance of the Facility.</p>
Economic Benefit	None	<p>The Discharger did not gain any significant economic benefit associated with the violation and had a reasonable plan for rehabilitation of the pipeline within its expected lifecycle.</p>
Other Factors as Justice May Require		
Staff Costs	None	<p>The costs of investigation and enforcement could be added to the liability. However, prosecution staff has chosen not to include these costs in consideration of settlement.</p>
Maximum and Minimum Liabilities		
Maximum Liability	\$2,926,000	<p>Water Code section 13385(c) allows up to \$10,000 for each day in which a violation occurs, plus \$10 for each gallon exceeding 1,000 gallons discharged and not cleaned up. The maximum liability reflects the unauthorized discharge of 292,600 gallons of partially-treated and undisinfected wastewater and one day of violation.</p>
Minimum Liability	\$0.0	<p>The violation is not subject to mandatory minimum penalties per Water Code section 13385(h) and (i), and the Discharger did not benefit economically from the violation. Thus, the minimum liability for this violation is zero.</p>
Final Liability	\$187,000	<p>The final liability amount is the total base liability after adjusting for ability to pay, economic benefit, other factors, and the maximum and minimum liabilities.</p>

² City of Sunnyvale, FY 2020/2021 Adopted Budget and Resource Allocation Plan, p. 433.

ATTACHMENT B

City of Sunnyvale

Supplemental Environmental Project (SEP) for the Green Stormwater Infrastructure at Wolfe/Stewart Intersection

1. Project Name

Green Stormwater Infrastructure at Wolfe/Stewart Intersection – part of the East Sunnyvale Area Transportation Improvements Project

2. Project Amount

\$93,500 (SEP share)

Total Project cost estimate is \$118,250 for the GSI element.

3. Project Lead

City of Sunnyvale (Sunnyvale)

4. Contacts

- Nupur Hiremath, Environmental Programs Manager, nhiremath@sunnyvale.ca.gov, (408) 730-7743
- Melody Tovar, Regulatory Programs Division Manager, mtovar@sunnyvale.ca.gov, (408) 730-7740

5. Project Description

This project will integrate green stormwater infrastructure (GSI) into a planned traffic improvement project. In this project, a right-hand-turn slip lane is being removed and a traditional intersection right turn design is being implemented. The objective is to reduce driving speeds at this location and improve safety for pedestrians and cyclists. This kind of design change leaves a “porkchop” or triangle of space that would typically be filled by paved surfaces or passive, very low maintenance landscaping including stone or bark. The SEP would repurpose that available space to a GSI treatment feature. The updated design would allow for runoff from the adjacent streets to flow into the landscaped area as a treatment best management practice (BMP) prior to discharge into the subsurface storm sewer system.

The outcome will be approximately 2,000 square feet of treatment area (serving to disconnect approximately 15,000 square feet of impervious area). An additional benefit will be experience with transitioning traditional design for small street projects into those that incorporate GSI.

6. Compliance with SEP Criteria

An SEP must directly benefit or study groundwater or surface water quality or quantity and

the beneficial uses of the water of the State. This project complies with the SEP criteria by improving surface water quality.

7. Above and Beyond Settling Respondent’s Obligations

This project contains only measures beyond Sunnyvale’s otherwise required legal obligations. Sunnyvale has met the numeric targets for PCBs/Mercury reduction through GSI as specified in the Municipal Regional Stormwater Permit and would not need to implement this project to meet its current stormwater permit obligations.

8. No Benefit to Water Board Functions, Members, or Staff

This project provides no direct fiscal benefit to the San Francisco Bay Regional Water Quality Control Board’s (Regional Water Board’s) functions, its members, its staff, or any family members of staff.

9. Nexus to Nature or Location of Violation

This project has a nexus to the nature and location of the alleged violation by improving surface water quality in tributaries of Lower South San Francisco Bay. Both the project’s stormwater and the Sunnyvale Water Pollution Control Plant discharge to local channels that connect to Guadalupe Slough and then the Bay.

10. Project Milestones and Performance Measures

The project is in the design phase and is scheduled to meet the following milestones:

- Final Design Completion – November 30, 2021
- Construction Award – February 28, 2022
- Construction Complete – March 31, 2023

The project performance measure will be the amount of impervious surface area treated with GSI, approximately 15,000 square feet. The final design will determine the specific treatment area.

11. Project Budget

Table 1. Budget for Base Project and Additional Cost of GSI Component

	Base Project	Additional Cost for GSI
Design	\$754,940	\$11,000
Construction	\$3,101,960	\$107,250

- (1) These costs do not include Sunnyvale staff time for design oversight and construction management.
- (2) Sunnyvale will fund the difference between the estimated Additional Cost for GSI and the SEP amount.

12. Reports to Water Board

Sunnyvale will provide quarterly updates on this project with the Self-Monitoring Reports (SMRs) required by Regional Water Board Order No. R2-2020-0002 (Sunnyvale’s NPDES permit), Attachment E, provision IX.B. Upon project completion, Sunnyvale will submit a standalone final completion report. See Table 1 for due dates and specific deliverables.

Table 1. Reports to Water Board

Due Date	Report Description
July 30, 2021	Quarterly Report 1 – Description of SEP activities from the start of the project through June 2021.
November 1, 2021	Quarterly Report 2 – Description of SEP activities during July through September 2021.
January 31, 2022	Quarterly Report 3 – Description of SEP activities during October through December 2021, including assessment of Final Design Completion milestone.
May 2, 2022	Quarterly Report 4 – Description of SEP activities during January through March 2022, including assessment of Construction Award milestone.
August 1, 2022	Quarterly Report 5 – Description of SEP activities during April through June 2022.
October 31, 2022	Quarterly Report 6 – Description of SEP activities during July through August 2022.
January 31, 2023	Quarterly Report 7 – Description of SEP activities during October through December 2022.
May 1, 2023	Final Completion Report –Description of SEP activities during January through March 2023, including assessment of Construction Completion milestone. Report shall also include a summary of all completed tasks, final project implementation costs, an evaluation of the project’s success criteria (amount of impervious surface area treated), photographs documenting the completed project, and a certified statement of SEP completion as required in section III, paragraph 6, of the Stipulated Order approving this project as a SEP.

13. California Environmental Quality Act (CEQA) Compliance

The Wolfe/Stewart traffic improvement project is currently in the design stage. Sunnyvale will make a CEQA finding prior to the construction award. Sunnyvale anticipates that the traffic improvement project will qualify for a Class 1 Categorical Exemption under CEQA Guidelines section 15301(c) (alterations to existing highways and streets). The addition of landscaping for a GSI treatment feature will likely fall within the Class 1 Exemption or the Class 4 Exemption under Guidelines section 15304(b) (“New gardening or landscaping”).