CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

In the matter of:	)	
	)	
MONTEREY MUSHROOMS, INC., SANTA CLARA COUNTY	)	**SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF ADMINISTRATIVE CIVIL LIABILITY ORDER**
	)	
March 7, 2016, and February 17 through 19, 2017, Unauthorized Discharges of Polluted Stormwater	)	**R2-2020-1023**
	)	

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 Monterey Mushrooms, Inc. (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 Government Code section 11415.60. This Stipulated Order resolves all the violations alleged herein by imposing administrative civil liability against the Settling Respondent in the amount of **$911,800**.

Section II: RECITALS

1. The Settling Respondent owns and operates, either directly or through its wholly owned subsidiaries, four mushroom growing facilities in California. One of the four California facilities is located at 642 Hale Avenue in Morgan Hill, Santa Clara County (Facility). At the time the alleged violations occurred, the Facility was regulated under Waste Discharge Requirements (WDR) Order No. 85-128 (1985 Permit) issued by the Regional Water Board. The Settling Respondent is currently regulated under WDR Order No. R2-2017-0037 (2017 Permit).

2. The 1985 Permit prohibited the discharge of any wastes to waters of the United States (U.S.), including Fisher Creek and Coyote Creek. Fisher Creek flows northwesterly through the Facility's western half and through the Laguna Seca and a series of channels to Coyote Creek.

3. Federal Water Pollution Control Act (Clean Water Act) section 301 (33 U.S.C. § 1311) prohibits any person to discharge any pollutant into waters of the U.S. without authorization under specific Clean Water Act provisions, including section 402 (33 U.S.C. § 1342) for point source discharges. Point source discharges of pollutants to waters of the U.S. are to be authorized under a National Pollutant

Discharge Elimination System (NPDES) permit. NPDES permits are issued in accordance with Water Code section 13376. The Settling Respondent has never filed for a Report of Waste Discharge pursuant to California Water Code section 13376 to obtain an NPDES permit that authorizes the discharge of pollutants from point sources (i.e., ditches and pipes) at the Facility to Fisher Creek.

4. Pursuant to Water Code section 13385, subdivision (a), a person that violates Water Code section 13376 and/or Clean Water Act section 301 is subject to administrative civil liability under Water Code section 13385, subdivision (c):

> …in an amount not to exceed the sum of the following: (1) Ten thousand dollars ($10,000) for each day in which the violation occurs. (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

5. On March 7, 2016, the Settling Respondent allegedly violated Water Code section 13376 and Clean Water Act section 301 when polluted stormwater from the Facility discharged into Fisher Creek. An estimated 258,500 gallons of stormwater polluted with compost leachate flowed from piles of spent compost into a ditch that runs through the Facility along Miramonte Avenue (Ditch B) and discharges into Fisher Creek.

6. From February 17 through 19, 2017, the Settling Respondent allegedly violated Water Code section 13376 and Clean Water Act section 301 when polluted stormwater from the Facility discharged into Fisher Creek. The Settling Respondent pumped at least 400,000 gallons of stormwater polluted with compost leachate from the Facility's stormwater pond through an outfall that discharges directly into Fisher Creek.

7. To resolve the alleged violations listed in Section II, paragraphs 5 to 6, by consent and without further administrative proceedings, the Parties have agreed to the imposition of an administrative civil liability of **$911,800** 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 (May 2010) (Enforcement Policy) as shown in Attachment A, which is incorporated herein by reference.

8. The Parties have 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 Government Code section 11415.60.

9. The Prosecution Team contends that the resolution of the alleged violations is fair and reasonable, and fulfills all its enforcement objectives; that no further action is warranted concerning the alleged violations, 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 totaling **$911,800** to resolve all alleged violations set forth in Section II, paragraphs 5 and 6, as follows:

   a. No later than 30 days after the Regional Water Board or its delegate signs this Stipulated Order, the Settling Respondent shall submit a check for **$471,436**, made payable to the "State Water Pollution Cleanup and Abatement Account," referencing the Order number on page one of this Stipulated Order, and mailed to:

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

      The Settling Respondent shall provide a copy of the check via e-mail to the State Water Resources Control Board, Office of Enforcement (Paul.Ciccarelli@waterboards.ca.gov) and the Regional Water Board (Maya.McInerney@waterboards.ca.gov).

   b. **Supplemental Environmental Project:** In accordance with the State Water Resources Control Board's Policy on Supplemental Environmental Projects, the Parties agree that **$440,364** of the administrative civil liability shall be suspended pending completion of the Supplemental Environmental Project (SEP) as set forth in the attached SEP Proposal Form (Attachment B), which is incorporated herein by reference. The suspended liability will become due and payable if the initial monetary assessment in Section III, paragraph 1.a. is not paid within the required 30 days.

2. **SEP Description:** The Settling Respondent agrees to implement a third party-performed SEP, the Fisher Creek Riparian Habitat Restoration Project, proposed by the Santa Clara Valley Open Space Authority. The complete SEP description, project milestones, budget, and reporting schedule are contained in Attachment B.

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 the $**440,364** (SEP Amount) suspended liability will be used to implement the SEP as set forth in Attachment B. 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 agrees to (1) spend the SEP Amount as described in this Stipulated Order; (2) have certified, written reports provided to the Regional Water Board consistent with the terms of this Stipulated Order detailing SEP implementation; and (3) have the final completion report due January 30, 2023, include a certification by a responsible official, signed under penalty of perjury, that the Santa Clara Valley Open Space Authority followed all applicable environmental laws and regulations in implementing the SEP, including the California Environmental Quality Act (CEQA), Porter-Cologne Act, and federal Clean Water Act.

c. 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.

4. **SEP Oversight Costs:** Regional Water Board staff will oversee implementation of the SEP. The Settling Respondent is responsible for any charged costs for such oversight, which are not included in the SEP Amount.

5. **Publicity Associated with the SEP:** Whenever the Settling Respondent, or its agents or subcontractors, publicize one or more elements of the SEP, they shall state in a **prominent manner** that the project is undertaken as part of a settlement to a Regional Water Board enforcement action against the Settling Respondent.

6. **Progress Reports and Inspection Authority:** The Santa Clara Valley Open Space Authority has agreed to provide reports on behalf of the Settling Respondent describing progress implementing the SEP to the Regional Water Board as described in Attachment B. The Settling Respondent and Santa Clara Valley Open Space Authority agree that Regional Water Board staff has permission to inspect the SEP at any time without notice.

7. **Certification of SEP Completion:** On or before January 30, 2023, the Santa Clara Valley Open Space Authority has agreed that a responsible official will submit on behalf of the Settling Respondent a final completion report as described in Attachment B and a certified statement, signed under penalty of perjury, that documents the following: (a) Santa Clara Valley Open Space Authority's receipt of the Settling Respondent's payments for the SEP Amount as described in Attachment B, (b) the Santa Clara Valley Open Space Authority's expenditures made during the SEP completion period (which may exceed the amount funded by this Stipulated Order), and (c) Santa Clara Valley Open Space Authority's completion of the SEP in accordance with the terms of this Stipulated Order. The expenditures may include external payments to outside vendors, but may not include the normal, routine work undertaken by the Santa Clara Valley Open Space Authority's 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 Santa Clara Valley Open Space Authority has agreed to provide Regional Water Board staff with any additional information reasonably necessary to verify the Santa Clara Valley Open Space Authority's SEP expenditures and SEP completion on behalf of the Settling Respondent. The Settling Respondent shall provide Regional Water Board staff with any additional information reasonably necessary to verify the Settling Respondent's payments for the SEP Amount.

8. **Time Extension for SEP:** The Executive Officer of the Regional Water Board may extend the SEP deadlines contained in Attachment B of this Stipulated Order if the Santa Clara Valley Open Space Authority demonstrates delays from unforeseeable circumstances, provided that the Settling Respondent and Santa Clara Valley Open Space Authority continue to undertake all appropriate measures to meet their deadlines. Upon timely request by the Santa Clara Valley Open Space Authority, the Settling Respondent shall make any deadline extension request in writing at least 30 days prior to the deadline. Any approval of an extension by the Executive Officer or its delegate must be in writing.

9. **Regional Water Board Acceptance of Completed SEP:** Upon the Settling Respondent's satisfaction of its obligations under this Stipulated Order, SEP completion, and any audits, the Executive Officer will issue a "Satisfaction of Order." The Satisfaction of Order shall terminate any further Settling Respondent obligations under this Stipulated Order and dismisses the suspended liability.

10. **Failure to Expend All Suspended Funds on the Approved SEP:** 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 by December 31, 2022 (SEP Completion Date), 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 (the Difference). The Executive Officer shall issue a "Notice of Violation" that will require the Settling Respondent to pay the Difference to the "State Water Pollution Cleanup and Abatement Account" within 30 days of the Notice of Violation's 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.

11. **Failure to Complete the SEP:** If the SEP is not fully implemented by the SEP Completion Date, or if there has been a material failure to satisfy a project milestone, a "Notice of Violation" will be issued. As a consequence, the Settling Respondent shall be liable to pay the entire SEP Amount, less any amount that has been permanently suspended or excused based on the timely and successful completion of any interim project milestone that has an identifiable and stand-alone environmental benefit. 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. The amount of the suspended liability owed shall be determined via a written, stipulated agreement between the Parties or, if the Parties cannot reach an agreement on the amount owed, via a "Motion for Payment of Suspended Liability" before the Regional Water Board or its delegate. Within 30 days of the Regional Water Board's or its delegate's determination of the suspended liability assessed, the Settling Respondent shall pay the amount owed to the "State Water Pollution Cleanup and Abatement Account." 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. This Stipulated Order does not restrict the Settling Respondent from seeking reimbursement from the Santa Clara Valley Open Space Authority if payment of the suspended liability becomes due and payable under this Paragraph.

12. **Regional Water Board is Not Liable:** Neither the Regional Water Board members nor the Regional Water Board staff, attorneys, or representatives shall 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, nor shall the Regional Water Board, its members, or its staff 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.

13. **Compliance with Applicable Laws:** The Settling Respondent understands that payment of 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.

14. **Party Contacts for Communications related to this Stipulated Order:**

For the Regional Water Board:	**For the Settling Respondent:**
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	Mr. Shah Kazemi Monterey Mushrooms, Inc. 642 Hale Ave. Morgan Hill, CA 95038 SKazemi@montmush.com
Counsel: Paul Ciccarelli State Water Resources Control Board 801 K Street, 23rd Floor Sacramento, CA 95814 Paul.Ciccarelli@waterboards.ca.gov (916) 322-3227	Counsel: Melissa Thorme Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814 mthorme@downeybrand.com (916) 520-5376

15. **Attorney's Fees and Costs:** Except as otherwise provided herein, each Party shall bear all attorneys' fees and costs arising from the Party's own counsel relating to the matters set forth herein.

16. **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 violations 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.a., and the Settling Respondent's full satisfaction of the obligations to implement the SEP in accordance with the terms of this Stipulated Order.

17. **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.

18. **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 or the Regional Water Board 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 the procedure and/or this Stipulated Order as necessary or advisable under the circumstances.

19. **No Waiver of Right to Enforce:** The failure of the Regional Water Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of this Stipulated Order. The failure of the Regional Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order. If the Settling Respondent fails to comply with this Stipulated Order, the Regional Water Board or its delegate may refer the matter to the State Attorney General to enforce the terms of this Stipulated Order.

20. **Effect of the Stipulated Order:** Except as expressly provided in this Stipulated Order, nothing in this Stipulated Order precludes the Regional Water Board or any State agency, department, board, or local agency from exercising its authority under any law, statute, or regulation.

21. **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.

22. **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.

23. **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 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 liabilities for the underlying alleged violations, 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 the following:

    a. 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 the Stipulated Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations alleged herein in this matter; or

b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

24. **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 Order's adoption. However, if the settlement is not adopted and if the matter proceeds to the Regional Water Board or State Water Resources Control Board for hearing, the Settling Respondent does not waive its right to a hearing before an order is imposed.

25. **Waiver of Right to Petition or Appeal:** Except in the instance where the settlement 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 adoption of the Order for review by the State Water Resources Control Board, and further waives its rights, if any, to appeal the same to a California Superior Court and/or any California appellate-level court.

26. **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 or the SEP, except that this covenant is not intended to, and does not, limit the Settling Respondent's rights to sue over other Regional Water Board orders (e.g., permits, cease and desist orders, etc.) 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, and shall not release any claims or complaints against any State agency, or the State of California or its officers, Regional Water Board members, employees, representatives, agents, or attorneys to the extent 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.

27. **No Admission of Liability/No Waiver of Defenses:** In settling this matter, the Settling Respondent does not admit to liability, admit to the truth of the findings or allegations made by the Prosecution Team, or admit to any of the findings in this Stipulated Order or its attachments, or admit to any violations of the Water Code, the Clean Water Act, any Regional Water Board order, or any other federal, State, or local laws or ordinances, but recognizes that this Stipulated Order may be used as evidence of a prior enforcement action consistent with Water Code sections 13327 and 13385, subdivision (e), and the Enforcement Policy. By entering into this agreement, the Settling Respondent does not waive any defenses or arguments related to any new enforcement action that may be brought by the Regional Water Board, including any brought under its discretionary enforcement authority reserved herein.

28. **Necessity for Written Approvals:** All approvals and decisions of the Regional Water Board 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.

29. **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.

30. **No Third-Party Beneficiaries:** This Stipulated Order is not intended to confer any rights or obligations on any third party, and no third party shall have any right of action under this Stipulated Order for any cause whatsoever.

31. **Severability:** This Stipulated Order is severable; if any provision is found to be invalid, the remainder shall remain in full force and effect.

32. **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.

33. **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.

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

Date: Feb. 26, 2020

By: Lisa H McCann
Lisa Horowitz McCann
Assistant Executive Officer

Approved as to form:

By:
Paul D. Ciccarelli, Attorney
State Water Resources Control Board
Office of Enforcement

MONTEREY MUSHROOMS, INC.

Date: 2/22/20

By: _____
Shah Kazemi
Monterey Mushrooms, Inc.

Approved as to form only:

By: _____
Melissa Thorme, Attorney
Downey Brand LLP

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 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 Regional Water Board's consideration of these factors and application of the Enforcement Policy are based on information the Prosecution Team obtained in investigating the allegations 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 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 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.

Digitally signed by Michael Montgomery
Date: 2020.04.02 14:59:52 -07'00'

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

Date

ATTACHMENT A

Alleged Violations and Factors in Determining Administrative Civil Liability

MONTEREY MUSHROOMS, INC.
POLLUTED STORMWATER DISCHARGES TO FISHER CREEK
MORGAN HILL FACILITY, SANTA CLARA COUNTY

The State Water Resources Control Board Water Quality Enforcement Policy[1] (Enforcement Policy) establishes a methodology for assessing administrative civil liability. Use of the methodology addresses the factors that must be considered pursuant to Water Code section 13385, subdivision (e). Each factor in the Enforcement Policy and its corresponding category, adjustment, and amount are presented below for two unauthorized discharge violations.

DISCHARGER INFORMATION

Monterey Mushrooms, Inc. (Discharger) owns ten mushroom growing facilities throughout the U.S. and Mexico, where they grow and ship different mushroom varieties across the U.S. The Discharger owns and operates, either directly or through its wholly owned subsidiaries, four mushroom growing facilities in California. One of the four California facilities is located at 642 Hale Avenue in Morgan Hill, Santa Clara County (Facility). At the time the alleged violations occurred, the Facility was regulated under Waste Discharge Requirements (WDRs) Order 85-128 (Permit)[2] issued by the San Francisco Bay Regional Water Quality Control Board (Regional Water Board). The Discharger is currently regulated under WDRs Order R2-2017-0037.

The Permit regulated the Discharger's discharge of wastewater at the Facility, where mushrooms are spawned, grown, harvested, and packaged. Compost is manufactured and stored at the Facility for use at the Facility as mushroom substrate. Spent mushroom substrate (also called spent compost) is also stored at the Facility. Spent compost is compost waste that remains after mushrooms are grown and harvested. Compost leachate, further defined below, is a process water recycled and stored at the Facility and reused to add nutrients to compost. The Discharger also generates process water from sanitizing its mushroom growing trays after mushrooms are harvested. All process water, including stormwater commingled with process water and/or other wastes, generated at the Facility is wastewater and must be placed and contained in the Facility's ponds as permitted.

The Permit prohibits the discharge of any wastes[3] to waters of the U.S., including Fisher Creek and Coyote Creek. Fisher Creek flows northwesterly through the Facility's western half and through the Laguna Seca to Coyote Creek. The Discharger has never filed for a Report of Waste

[1] The State Water Board amended the 2010 Enforcement Policy, effective October 5, 2017. This document applies the 2010 Enforcement Policy because it was in effect at the time the alleged violations occurred.
[2] San Francisco Bay Regional Water Quality Control Board Order 86-069 amended Permit Provision C.2, extending the compliance deadline for Prohibition A.4 (prohibiting discharge of wastewater containing total dissolved solids in excess of 500 mg/L to an unlined percolation pond) from November 1, 1986, to September 1, 1988.
[3] "Waste" includes "sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation …." (Wat. Code, § 13050, subd. (d).)

Discharge pursuant to Water Code section 13376 to obtain a National Pollutant Discharge Elimination System (NPDES) permit that authorizes the point source[4] discharge of pollutants[5] to waters of the U.S. The Discharge of pollutants from point sources (i.e., ditches and pipes) at the Facility to Fisher Creek are unauthorized.

Figure 1 provides an aerial image of the Facility and identifies the location of the compost and spent compost storage areas, the applicable Facility point sources (Ditch B and stormwater pond outfall pipe), and Fisher Creek.

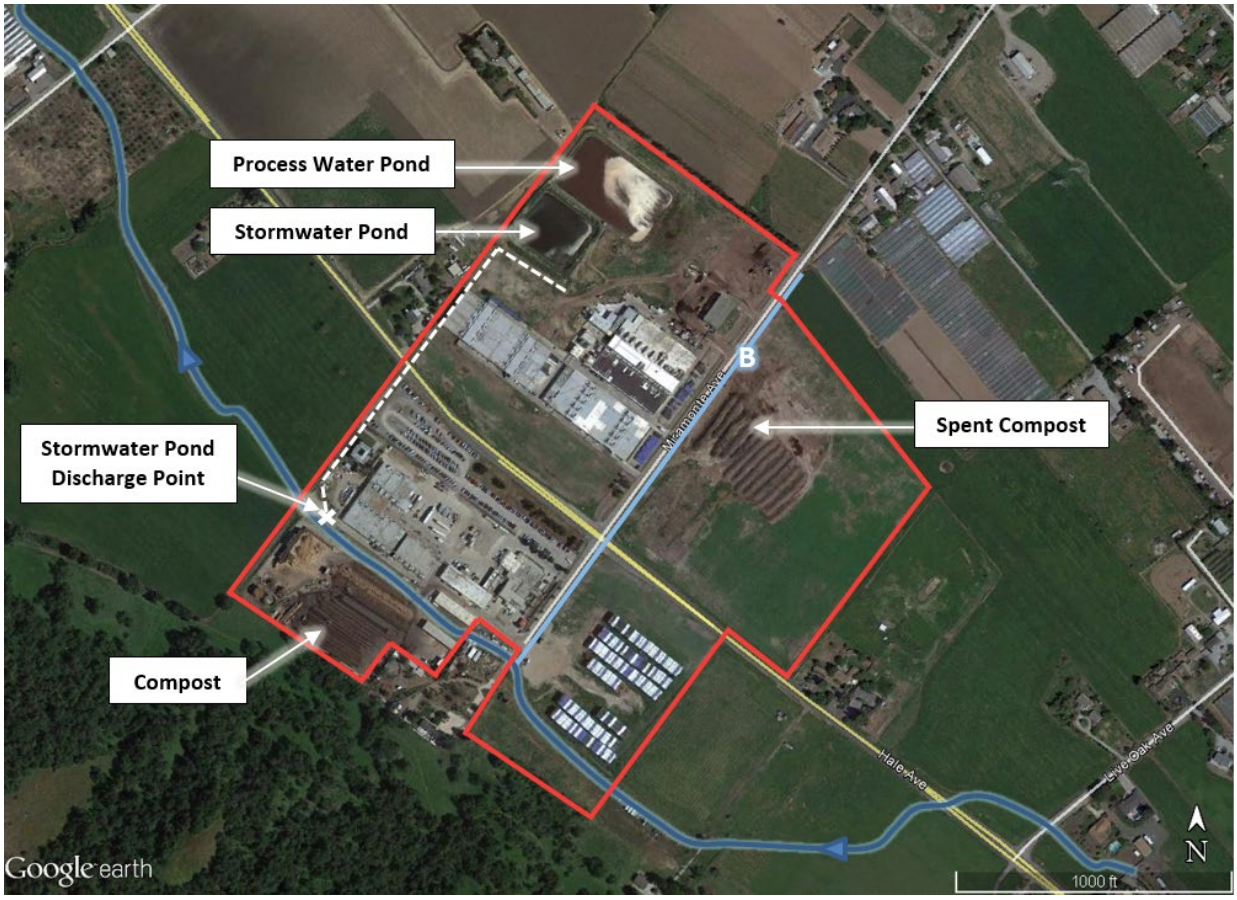

Figure 1: Satellite image accessed via GoogleEarth Pro on February 15, 2019, and modified to mark the approximate property boundary (red line), Fisher Creek (dark blue line, direction of flow indicated by arrows), compost storage area, spent compost storage area, stormwater pond location, buried stormwater pond outfall pipe (dashed white line), stormwater pond discharge point (white "X"), and Ditch B (light blue line labeled B).

[4] "Point Source" means "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C § 1362(14).)

[5] "Pollutant" means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." (33 U.S.C. § 1362(6).) All references to "waste" in this document include one or more pollutants.

ALLEGED VIOLATIONS

Violation 1: Unauthorized Discharge of Pollutants from Facility's Spent Compost Area in Violation of Water Code Section 13376 and Clean Water Act Section 301

On March 7, 2016, the Discharger violated Water Code section 13376 and federal Water Pollution Control Act (Clean Water Act) section 301 (33 U.S.C. § 1311) when it discharged polluted stormwater into a water of the U.S. Approximately 258,500 gallons of stormwater polluted with compost leachate flowed from piles of spent compost into a ditch that runs through the Facility along Miramonte Avenue (Ditch B) that discharges into Fisher Creek. The Discharger neither filed a Report of Waste Discharge under Water Code section 13376 prior to the discharge nor obtained an NPDES permit authorizing the discharge.

The unauthorized discharge subjects the Discharger to administrative civil liability pursuant to Water Code section 13385, subdivision (c). The proposed administrative civil liability for Violation 1, excluding staff costs, is $425,600.

Violation 2: Unauthorized Discharge of Pollutants from Facility's Stormwater Pond in Violation of Water Code Section 13376 and Clean Water Act Section 301

On or about, and at least from, February 17 through 19, 2017, the Discharger violated Water Code section 13376 and Clean Water Act section 301 when it discharged polluted stormwater into a water of the U.S. The Discharger pumped at least 400,000 gallons of stormwater polluted with compost leachate from the Facility's stormwater pond[6] through an outfall that discharges directly into Fisher Creek. The Discharger neither filed a Report of Waste Discharge pursuant to Water Code section 13376 prior the discharge nor obtained an NPDES permit authorizing the discharge.

The unauthorized discharge subjects the Discharger to administrative civil liability pursuant to Water Code section 13385, subdivision (c). The proposed administrative civil liability for Violation 2, excluding staff costs, is $455,500.

ADMINISTRATIVE CIVIL LIABILITY METHODOLOGY STEPS

STEP 1 – POTENTIAL FOR HARM FOR DISCHARGE VIOLATIONS

The "potential harm" factor considers the harm to beneficial uses in the affected receiving water that resulted or that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violations. A three-factor scoring system is used for each violation: (1) the harm or potential harm to beneficial uses, (2) the degree of toxicity of the discharge, and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

[6] The stormwater pond is sometimes referred to as the percolation pond in Discharger documents and historic Regional Water Board records.

The Enforcement Policy specifies that a score between 0 and 5 be assigned based on a determination of whether direct or indirect harm, or potential for harm, from a violation is negligible (0) to major (5). Discharges associated with Violations 1 and 2 resulted in direct or indirect harm, or had the potential to cause harm, to beneficial uses of surface waters and groundwater near the Facility.

For clarity and consistency with stormwater terminology, the term "compost leachate" is used herein to describe water containing or degraded by compost materials. "Compost leachate" applies to any liquid (e.g., irrigation water, precipitation, stormwater) that drained from compost piles or flowed through compost materials as runoff. The color of compost leachate varies from yellow brown, to reddish brown, to dark-brown, mainly due to an abundance of tannins and dissolved and particulate organic matter.[7,8] In Regional Water Board and California Department of Fish and Wildlife (DFW) inspection reports, stormwater polluted by compost leachate at the Facility is described as dark colored, reddish, dark brown, or dark reddish-brown.

Fisher Creek and Coyote Creek are waters of the U.S. Fisher Creek is an ephemeral stream that flows into perennially flowing Coyote Creek. San Francisco Bay Basin Water Quality Control Plan (Basin Plan) Table 2-1 lists the following beneficial uses for Fisher Creek: warm freshwater habitat, wildlife habitat, water contact recreation, and noncontact water recreation. For Coyote Creek, Basin Plan Table 2-1 lists the same beneficial uses as Fisher Creek, plus the following: groundwater recharge, commercial and sport fishing, cold freshwater habitat, fish migration, preservation of rare and endangered species, and fish spawning. Coyote Creek is also assigned the municipal supply beneficial use pursuant to State Water Board Resolution 88-63 and Regional Water Board Resolution 89-39.

Violation 1: The potential harm to beneficial uses from the Ditch B discharge to Fisher Creek is moderate (3). "Moderate" is assigned when impacts are observed or reasonably expected, and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects."

Regional Water Board staff and DFW Warden Max Schad[9] inspected the Facility during a rain event on March 7, 2016, to evaluate Facility discharges. There was measurable rainfall of 0.01 inches or more from 12:00 p.m. to 1:00 p.m. and from 3:00 p.m. to 4:00 p.m.[10] Ditch B contained stormwater runoff that was visibly flowing during the inspection. The flow in Ditch B included runoff that originated both from the Facility and upstream of the Facility.

Regional Water Board staff observed compost leachate from spent compost piles mix with stormwater and discharge into Ditch B and Fisher Creek. Compost contaminants may migrate with the compost leachate or wastewater, but implementation of best practicable treatment or

[7] Chatterjee, N., Flury, M., Hinman, C., et al. 2013. *Chemical and Physical Characteristics of Compost Leachates: A Review*. Washington State University. Available online at https://www.wsdot.wa.gov/research/reports/fullreports/819.1.pdf. Accessed on March 6, 2019.
[8] Coker, C. 2008. *Managing Storm Water*. BioCycle. Available online at https://files.nc.gov/ncdeq/Waste%20Management/DWM/Stakeholder%20Group/Biocyle%20-%20Managing%20Stormwater.pdf. Accessed March 6, 2019.
[9] During the investigation, Warden Schad left DFW and became Officer Schad. Officer Schad is now an investigator for the Santa Clara County District Attorney's Office. For convenience, Max Schad is referred to as Warden Schad in this document.
[10] June 7, 2016, Regional Water Board Inspection Report, p. 3.

controls can prevent or minimize offsite migration of contaminants.[11] The Discharger did not apply controls to contain all compost leachate onsite. The Discharger allowed Facility stormwater to become polluted or contaminated with toxic levels of compost leachate and then discharge into Ditch B and Fisher Creek.

The discharge from Ditch B observably degraded the water quality in Fisher Creek. Upstream of Ditch B, Fisher Creek was brown in color and free of bubbles and foam. Where Ditch B discharged into Fisher Creek, the water was dark, reddish-brown, the same color as the discharge, and was bubbly with some foam.[12] Elevated levels of surfactants in the form of dissolved organic carbon cause foam in surface waters[13] and likely caused the foam in the compost leachate-laden discharge entering Fisher Creek from Ditch B. High dissolved organic carbon and nutrients in surface waters may reduce dissolved oxygen downstream, which can negatively affect aquatic habitat and kill fish.[14]

The discharge from Ditch B measurably affected Fisher Creek water quality. Regional Water Board staff used field instruments to measure ambient water quality in Fisher Creek upstream of the Facility and where Fisher Creek exits the Facility. Water quality changed as follows:

- Dissolved oxygen concentrations decreased by 9.1 percent (from 9.64 to 8.76 milligrams per liter (mg/L));
- Turbidity increased by 7 percent (from 110 to 118 nephelometric turbidity units (NTU));
- Salinity increased by 110 percent (from 0.10 to 0.21 parts per thousand (ppth)[15]);
- Total dissolved solids (TDS) increased by 105 percent (from 143 to 294 mg/L).[16]

All the parameters measured indicate that the discharge had a negative impact on Fisher Creek water quality.

The Basin Plan establishes water quality objectives to define appropriate levels of environmental quality and to control activities that can adversely affect aquatic systems. The Basin Plan sets forth the following water quality objectives for dissolved oxygen, turbidity, salinity, and TDS for Fisher Creek:

- Dissolved oxygen: 5.0 mg/L minimum.
- Turbidity: Waters shall be free of changes in turbidity that cause nuisance or adversely affect beneficial uses. Increases from normal background light penetration or turbidity relatable to waste discharge shall not be greater than 10 percent in areas where natural turbidity is greater than 50 NTU.

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[11] State Water Resources Control Board Order 2015-0121-DWQ, *General Waste Discharge Requirements for Composting Operations*, Background Information section, finding 20.
[12] June 7, 2016, Regional Water Board Inspection Report, p. 18.
[13] Davis, Jeffrey C. *What causes foam in streams and lakes?* The Aquatic Restoration and Research Institute. Available online at http://www.arrialaska.org/foam-in-streams.html. Accessed March 6, 2019.
[14] Mount, Jeffrey F. 1995. *California Rivers and Streams*. University of California Press. pp. 259-260.
[15] In the June 7, 2016, Regional Water Board Inspection Report, salinity measurements were reported in units of ppt, which was erroneously defined as parts per trillion. Salinity measurements taken during the March 25, 2016, inspection and reported in the June 7, 2016, Inspection Report were actually measured in parts per thousand. In this exhibit, parts per thousand is abbreviated as "ppth" to avoid confusion.
[16] Estimate based on specific conductance measurements. Total dissolved solids are approximately two thirds of specific conductance. "Comparison of Total Dissolved Solids Methods." Prince George's Community College. Available online at http://academic.pgcc.edu/~ssinex/excelets/TDS_comparison.xls. Accessed April 25, 2016.

- Salinity*:* Controllable water quality factors shall not increase the total dissolved solids or salinity of waters of the State so as to adversely affect beneficial uses, particularly fish migration and estuarine habitat.
- TDS: Water supplied to the public by community water systems shall not exceed the upper secondary maximum contaminant level of 1,000 mg/L TDS, though concentrations below the recommended level of 500 mg/L TDS are desirable.[17]

Impacts to Fisher Creek are reasonably expected to impact Coyote Creek due to the connectivity of the two creeks. Fisher Creek flows into Coyote Creek approximately five miles downstream of the Facility.

Degradation of water quality in Fisher Creek and Coyote Creek impacted the creeks' beneficial uses. Additional constituents frequently found in compost leachate, (e.g. nitrate, pathogens and oxygen-reducing materials), [18] which cannot be directly observed or readily measured using field instruments, were likely present in the Ditch B discharge and further degraded water quality in Fisher Creek and Coyote Creek. Degraded water quality in Fisher Creek endangered the fish and non-fish species dependent on the creek, thereby harming the warm and cold freshwater habitat uses of Fisher Creek and Coyote Creek. These impacts to warm and cold freshwater habitats likely affected organisms in both creeks, which provide food for fish, small mammals, and water fowl, thereby impacting the wildlife habitat beneficial use. Impacts to food web dynamics may have had other long-term impacts, such as reducing compatibility of the creeks for fish migration and spawning beneficial uses. Commercial and sport fishing beneficial uses were also harmed because the creeks were less habitable to freshwater organisms.

Coyote Creek recharges groundwater in the Coyote Valley groundwater basin, which is a source of drinking water for the Santa Clara Valley Water District and a source of domestic and agricultural supply water for the Facility.[19] The Facility pumps and treats groundwater using reverse osmosis to remove nitrates before using the groundwater as domestic supply water for farm uses, mushroom growing, and packaging operations.[20] The Ditch B discharge to Fisher Creek had the potential to percolate to groundwater and contribute to nitrates loads that impair groundwater beneath the Facility and degrade its beneficial uses.

Violation 2: The potential harm to beneficial uses from the stormwater pond discharge to Fisher Creek is moderate (3). "Moderate" is assigned when impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects.

On February 17, 2017, the Discharger reported to Regional Water Board staff that it ran out of storage for stormwater and was discharging from the stormwater pond.[21] During Warden Schad's February 19, 2017, Facility inspection, he observed an active discharge from the stormwater pond outfall and documented the water level in the stormwater pond. From February

[17] Secondary maximum contaminant levels for municipal supply beneficial use are incorporated into the Basin Plan by reference and are specified in California Code of Regulations, title 22, section 64449.
[18] State Water Resources Control Board Order 2015-0121-DWQ, *General Waste Discharge Requirements for Composting Operations*, Background Information section, finding 20.
[19] 2017 Report of Waste Discharge.
[20] 2017 Monterey Mushrooms, Inc. Morgan Hill Farm Water Management Plan, page 15 and Appendix 7.
[21] Smith, C., former vice president, Monterey Mushrooms, Inc. Personal communication (email), February 17, 2017.

17 to 19, 2017, Regional Water Board staff calculate that the Discharger discharged 400,000 to 600,000 gallons of stormwater contaminated by mushroom and compost operations from the stormwater pond to Fisher Creek. This analysis conservatively assumes a minimum discharge volume of 400,000 gallons. The volume and toxicity of the discharge resulted in at least temporary harm to Fisher Creek's beneficial uses and posed a moderate threat to human and ecological health.

The discharge from the contaminated stormwater pond measurably affected Fisher Creek water quality. During Warden Schad's February 19, 2017, Facility inspection, he observed dark brown discolored water discharging into Fisher Creek through the stormwater pond outfall pipe. Foam was in the creek at the outfall, which likely indicates elevated levels of dissolved organic carbon and nutrients in the discharge.[22] Surfactants released during the breakdown of organic material reduce surface tension in water and allow air to more easily mix with water and create bubbles that congregate as natural foam.[23] The breakdown of organic matter may have increased the amount of dissolved organic carbon in Fisher Creek, leading to reduced dissolved oxygen downstream, potentially harming oxygen-dependent organisms in Fisher Creek.

DFW Senior Environmental Scientist Daniel Orr reviewed and analyzed the results of water samples collected during Facility inspections from March 6, 2016, through April 14, 2017, and concluded that Fisher Creek typified natural waters stressed by the presence of organic wastes.[24] In his report, Mr. Orr states, "Organic wastes can cause intolerably high concentrations of ammonia, intolerably low dissolved oxygen and intolerably high sediment for aquatic life if allowed to enter State Waters."[25]

The total ammonia nitrogen (TAN) concentration in the Discharger's stormwater pond samples collected on February 17, 2017, was 90 mg/L. This TAN concentration posed a threat of toxicity in Fisher Creek from February 17 to February 19, 2017. The U.S. Environmental Protection Agency (EPA) water quality criteria for TAN are 17 mg/L (one-hour average) and 1.9 mg/L (four-day average), assuming a pH of 7.0 and temperature of 20ºC, to protect aquatic life.[26] The actual TAN criteria for Fisher Creek from February 17 through February 19, 2017, were likely lower, considering that the pH is typically higher than 7.0 and the temperature is typically lower than 20ºC in Fisher Creek.[27] Assuming the discharge occurred over 3 days, during which a pump operated for a total of at least 27 hours, and using downstream flow measurements, Regional Water Board staff estimate that there was about 17 to 1 dilution of the discharge (i.e., 17 parts receiving water after mixing for each part discharge); therefore, the discharge was likely diluted to a concentration of about 5 mg/L TAN instream.

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[22] Davis, *supra*, par. (3).
[23] *Foam on Water.* Indiana Department of Environmental Management. Available online at https://www.in.gov/idem/files/factsheet_owq_nps_foam.pdf. Accessed March 20, 2019.
[24] Orr, Daniel, Senior Environmental Scientist (Specialist), California Department of Fish and Wildlife. Supplemental Report Regarding Deleterious Effects of Organic Waste to Fish and Aquatic Life, January 25, 2018, p. 39.
[25] *Ibid.*
[26] U.S. EPA, August 2013. Aquatic Life Ambient Water Quality Criteria for Ammonia – Freshwater (2013). Office of Water. Available online at https://www.epa.gov/sites/production/files/2015-08/documents/fact_sheet_aquatic-life-ambient-water-quality-criteria-for-ammonia-freshwater-2013.pdf. Accessed May 16, 2019.
[27] June 7, 2016, Water Board Inspection Report, Table B1.

The ammonia, nitrogen, and other nutrients discharged to Fisher Creek also threatened water quality in other ways. Ammonia is the preferred nitrogen-containing nutrient for plant growth.[28] In the aquatic environment, adverse effects of nutrient additions on freshwater ecosystems include, but are not limited to, increased algal growth, changes to aquatic plant species composition and biomass, decreases in water clarity, oxygen depletion, increased frequency of fish kills, and reductions in harvestable fish species.[29]

Nitrogen is highly water soluble and is transported downstream in surface water and downgradient in groundwater. The ammonia, nutrients, and other compost leachate components negatively impacted the beneficial uses of Fisher Creek and Coyote Creek. The levels of ammonia and nutrients released likely impacted the warm and cold freshwater habitat and wildlife habitat beneficial uses of Fisher Creek and Coyote Creek, and the commercial and sport fishing, fish migration, preservation of rare species, and fish spawning beneficial uses of Coyote Creek.

The potential for this discharge to harm the groundwater recharge and the municipal supply beneficial use of Coyote Creek by percolating into groundwater was similar to that of Violation 1 because of the presence of compost leachate in the discharge. See the Factor 1 analysis of Violation 1 above.

Factor 2: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge

The Enforcement Policy specifies that a score between 0 and 4 be assigned based on a determination of the risk or threat of the discharged material to potential receptors. It defines "potential receptors" as those identified considering human, environmental, and ecosystem health exposure pathways.

Runoff from Facility compost production, use, and storage operations is a process wastewater, which, if released from the Facility, may affect the physical and chemical characteristics of surface water and groundwater. Compost used to produce mushrooms at the Facility is made from virgin straw, used horse stable bedding straw, and additives, such as poultry manure, canola meal, gypsum, cottonseed meal, and soybean oil.[30] Mature compost is inoculated with mushroom culture in the production area of the Facility, and peat moss, agricultural lime, and other proprietary amendments are added. After harvesting the mushrooms, the Discharger moves spent compost to the spent compost storage area. Horse stable bedding straw[31] and poultry waste,[32] both of which are components of the compost and compost leachate found throughout the Facility, contain ammonia, the un-ionized component of which is toxic to aquatic life. The toxicity of the Violations 1 and 2 discharges is due in part to the compost leachate and/or the ammonia present in these discharges.

[28] Surface Water Ambient Monitoring Program, 2010. *Ammonia.* State Water Resources Control Board. Available online at https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/3310en.pdf. Accessed May 21, 2019.
[29] Carpenter, et al. 1998. *Nonpoint pollution of surface waters with phosphorous and nitrogen*. Ecological Applications. Volume 8, pp. 559-568.
[30] WDRs Order R2-2017-0037, finding 17.
[31] Wickens, C., Weir, J., and Hong Li. 2016. *Strategies for Reducing Ammonia in Horse Barns*. Southern Equine Consortium. Vol. 1 No. 4.
[32] Gupta, G., Borowiec, J., & Okoh, J. 1997. *Toxicity Identification of Poultry Litter Aqueous Leachate*. Poultry Science. 76:1364-1367.

Compostable materials may contain salts, oxygen-reducing compounds, nutrients, and other constituents that can degrade water quality if allowed to migrate into groundwater or surface water.[33] High salt concentrations in streams can sicken and kill freshwater plants and animals, which tolerate only very low amounts of salts.[34] High levels of oxygen-reducing compounds can cause prolonged periods of low dissolved oxygen that are harmful to most aquatic life and can cause fish kills and dead zones that cannot support aquatic life.[35] Excess nutrients, including nitrogen and phosphorous, in streams can cause too much aquatic plant growth and algae blooms, sometimes choking off waterways and causing toxic or oxygen-poor conditions that can kill fish and other aquatic life.[36] Ammonia is converted to nitrate by bacteria in water, and nitrate is a common cause of human health problems and fish kills.[37] In surface water, high levels of ammonia can result in heavy growth of harmful algae, which can cause illness if swallowed.[38] Ammonia converted to nitrate travels easily through soil carried by rain or irrigation water into groundwater, and can make groundwater used for drinking water supply unsafe for human consumption.[39]

Violation 1: The risk or threat of the discharged material to potential receptors is above moderate (3). "Above moderate" is assigned when the chemical and/or physical characteristics of the discharge material exceed known risk factors and/or there is substantial concern regarding receptor protection.

Exposure of the compost piles to stormwater adversely affected the physical, chemical, and biological characteristics of the water in Ditch B based on visual observations of compost leachate entering Ditch B[40] and field measurements of water quality in Ditch B upstream and downstream of the compost area. During the March 7, 2016, site inspection, Regional Water Board staff and Warden Schad observed brown compost leachate flowing from the spent compost storage area and entering Ditch B, which originates upstream of the Facility. Warden Schad described water in Ditch B upstream of the Facility as clear and documented a change in the water quality where runoff from the spent compost storage area entered Ditch B. Regional Water Board staff described the water in Ditch B downstream of the spent compost storage area as dark, reddish brown, and bubbly.

On March 7, 2016, Regional Water Board staff collected field measurements of water quality parameters in Ditch B both upstream and downstream of the spent compost storage area and observed the following:

- Dissolved Oxygen decreased by 51 percent, from 10.76 mg/L to 5.31 mg/L.

[33] State Water Resources Control Board Order 2015-0121-DWQ, General Waste Discharge Requirements for Composting Operations, Background Information section, finding 6.
[34] U.S. EPA, Summaries of Water Pollution Reporting Categories, adapted from document no. EPA841-R-12-104, October 2012, p. 15. Available online at https://www.epa.gov/sites/production/files/2015-08/documents/34parentattainsdescriptions.pdf. Accessed March 22, 2019.
[35] *Id.* at p. 12.
[36] *Id.* at p. 11.
[37] *Id.* at pp. 2-3.
[38] *Id.* at p. 3.
[39] Central Coast Regional Water Quality Control Board 2013. *Fact Sheet: Nitrate/Nitrite in Drinking Water.* Central Coast Ambient Monitoring Program – Groundwater Assessment and Protection.
[40] Visual observations of the discharge are further documented in the March 7, 2016, DFW Supplemental Report (photos 1 through 3).

- Turbidity increased by 1,670 percent, from 32 NTU to 578 NTU.
- Salinity increased 10,000 percent, from 0.02 ppth to 2.22 ppth.
- TDS increased by 9,800 percent, from 28 mg/L to 2,777 mg/L.[41]

The observed water quality conditions in Ditch B reveal the following harmful physical and chemical characteristics of the compost leachate-laden discharge:

- Dissolved oxygen in the discharge was just above the minimum for warm freshwater habitat (5.0 mg/L), but the oxygen-reducing compounds known to be in compost leachate likely further reduced dissolved oxygen in the discharge to below the water quality objective. Reduced dissolved oxygen can be a cause of chronic and acute toxicity to aquatic species, including invertebrates and fish.
- The turbidity in Ditch B exceeded the Basin Plan water quality objective because it represented greater than a 10 percent increase over upstream measurements of turbidity in Fisher Creek (of 110 NTU). High turbidity reduces the respiratory capacity and feeding efficiency of fish, and reduces light penetration into the water column decreasing primary productivity. The Ditch B turbidity was sufficient to reduce the productivity of aquatic biota and harm habitat quality, and likely carried pollutants such as metals and pathogens. The particles observed as turbidity provided a means to increase metals and pathogens concentrations in the receiving water since metals and pathogens adhere to particles.[42] Ingestion of metals and pathogens can cause acute and chronic impacts to aquatic and terrestrial animals.
- Runoff from composting operations increased Ditch B salinity to above the acceptable salinity for freshwater, which is defined in the Basin Plan as having less than 1 ppth salinity 95 percent of the time.[43] The higher salinity was sufficient to harm aquatic organisms dependent on freshwater ecosystems.
- The TDS concentration (about 2,800 mg/L) in the discharge was almost three times the secondary maximum contaminant level (MCL) established to assist public water systems in managing drinking water for aesthetic considerations, such as taste, color, and odor.

Violation 2: The risk or threat of the discharged material to potential receptors is above moderate (3). "Above moderate" is assigned when the chemical and/or physical characteristics of the discharge material exceed known risk factors and/or there is substantial concern regarding receptor protection.

The chemical characteristics of the contaminated stormwater in the stormwater pond were sufficient to be toxic to potential receptors based on an analysis of water samples collected from the pond at the start of the discharge, primarily due to the deleterious nature of ammonia on aquatic life. The water in the stormwater pond exceeded known risk factors set by EPA.

[41] Estimate based on specific conductance measurements. Total dissolved solids are approximately two thirds of specific conductance. "Comparison of Total Dissolved Solids Methods." Prince George's Community College. Available online at http://academic.pgcc.edu/~ssinex/excelets/TDS_comparison.xls. Accessed on April 25, 2016.
[42] USGS. *Turbidity and Water.* Available online at https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science_center_objects=0#qt-science_center_objects. Accessed on May 16, 2019.
[43] Basin Plan, section 4.6.2.

Water discharged from the stormwater pond from February 17 to February 19, 2017, likely exceeded the EPA water quality criteria for TAN of 17 mg/L (one-hour average) and 1.9 mg/L (four-day average). The Discharger's stormwater pond samples collected on February 17, 2017, had a TAN concentration of 90 mg/L[44]; roughly 50 times the four-day criterion and 5 times the one-hour criterion. The Facility received very little rainfall on February 18 and 19, 2017,[45] so it is unlikely that the ammonia concentration in the stormwater pond was measurably diluted during the course of the discharge.

In his Biological Opinion Report, Mr. Orr summarized the harmful effects of ammonia on aquatic biota, stating, "The toxic action of unionized ammonia on aquatic life may be due to one or more of the following: (1) proliferation in gill tissues, increased ventilation rates and damage to gill epithelium (2) reduction in blood oxygen carrying capacity due to acidosis (3) uncoupling oxidative phosphorylation causing inhibition of production and depletion of adenosine triphosphate (ATP) in the brain; and (4) the disruption of osmoregulatory and circulatory activity disrupting normal metabolic functioning of the liver and kidneys (EPA 2013, referring to Lang et al. 1987, Russo 1985, Camargo and Alonso 2006, Arillo et al. 1981, and Tomasso et al. 1980)."[46]

Water discharged from the stormwater pond on February 17, 18 and 19, 2017, likely had total suspended solids (TSS) levels representative of waters that would not support healthy fisheries. Stormwater pond samples the Discharger collected on February 17, 2017, had a TSS concentration of 200 mg/L.[47] When DFW Senior Environmental Scientist Daniel Orr evaluated the TSS concentrations of water samples collected at the Facility on January 4, 8, and 20, 2017, and April 14, 2017, he found that TSS concentrations in the range of 104 mg/L to 214 mg/L are typical of waters in which good fisheries are unlikely.[48] TSS in the sample the Discharger collected on February 17, 2017, was within that range, so the discharge is assumed to also be reflective of water in which good fisheries are unlikely.

Factor 3: Susceptibility to Cleanup or Abatement

The Enforcement Policy specifies that if 50 percent or more of the discharge is susceptible to cleanup or abatement, then a score of 0 is assigned. If less than 50 percent of the discharge is susceptible to cleanup or abatement, a score of 1 is assigned. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated.

Violations 1 and 2: The discharges were not susceptible to cleanup or abatement and are thus assigned a score of 1. In each instance, the discharged material flowed into and commingled with ambient receiving waters (Fisher Creek). There was no opportunity for cleaning up the material or abating its effects.

[44] Sample analysis performed by Alpha Analytical Laboratories Inc. March 8, 2017.
[45] Monthly precipitation data for San Jose weather station accessed from https://w2.weather.gov/climate/xmacis.php?wfo=mtr on April 24, 2019.
[46] Orr, Daniel, Senior Environmental Scientist (Specialist), California Department of Fish and Wildlife. Biological effects of Organic Waste to Fish and Aquatic Life, April 4, 2016, p. 1.
[47] Sample analysis performed by Alpha Analytical Laboratories Inc. March 8, 2017.
[48] Sample analysis reported in April 4, 2016, Biological Effects of Organic Wastes to Fish and Aquatic Life memo and January 25, 2018, Supplemental Report Regarding Deleterious Effects of Organic Waste to Fish and Aquatic Life.

STEP 2 – ASSESSMENTS FOR DISCHARGE VIOLATIONS

The Enforcement Policy specifies that when there is a discharge, an initial liability amount based on a per-gallon and/or per-day basis is determined using the sum of the potential for harm scores from Step 1 and a determination of deviation from requirement. The deviation from requirement reflects the extent to which a violation deviates from the specific requirement violated.

Violations 1 and 2: The deviation from requirement is **major**. "Major" is assigned when the requirement was rendered ineffective (e.g., when a discharger disregards the requirement or the requirement is rendered ineffective in its essential functions).

Clean Water Act section 301 prohibits any person to discharge any pollutant into waters of the U.S. without authorization under specific Clean Water Act provisions, including section 402 for point source discharges. Point source discharges of pollutants to waters of the U.S. are to be authorized under an NPDES permit. NPDES permits are issued in accordance with Water Code section 13376. The Facility discharged pollutants (compost leachate-laden stormwater, process water, or both) into a water of the U.S. (Fisher Creek) from a point source (Ditch B and stormwater pond outfall) without an NPDES permit in violation of Clean Water Act section 301 and Water Code section 13376. The requirement to obtain authorization for the discharge was disregarded and rendered ineffective in its essential functions.

Water Code section 13385, subdivision (c), authorizes the Regional Water Board to impose an administrative civil liability of up to $10,000 for each day of violation, and $10 for each gallon discharged but not cleaned up in excess of 1,000 gallons. The Enforcement Policy provides discretion to reduce the statutory maximum per gallon liability ($10) when there is a high-volume discharge. The Enforcement Policy recommends use of a value between $2 and $10 for the per-gallon factor when evaluating high volume discharges. Where reducing the per-gallon factor results in an inappropriately small liability given the harm to beneficial uses, a higher amount, up to the maximum per-gallon amount, may be used.

Initial Liability Amounts

Violation 1: The sum of the three factors from Step 1 is 7. The resulting per-gallon and per-day factors are both 0.31 from the matrices in Tables 1 and 2 of the Enforcement Policy based on the potential for harm score and extent of deviation from requirement described above. Below, both per-gallon and per-day factors are used as allowed by statute.

Initial Liability Amount

The discharge of at least 258,500 gallons[49] is a marginally high volume that qualifies as a high-volume discharge. Application of $2 per gallon for this incident would result in an inappropriately small liability relative to the volume and its impact on beneficial uses. Instead, $4 per gallon is used to calculate the initial liability because the resulting liability is a suitable deterrent and bears a reasonable relationship to the gravity of the violation and the harm to beneficial uses. The initial liability is calculated as follows:

Per-Gallon Liability: (258,500 gallons - 1,000 gallons) x (0.31) x ($4/gallon) = $319,300

Per-Day Liability: $10,000/day x (0.31) x (1 day) = $3,100

Initial Liability = $322,400

Violation 2: The sum of the three factors from Step 1 is 8. The resulting per-gallon and per-day factors are both 0.6 from the matrices in Tables 1 and 2 of the Enforcement Policy based on the potential for harm score and extent of deviation from requirement described above. Below, both per-gallon and per-day factors are used as allowed by statute.

Initial Liability Amount

The discharge of at least 400,000 gallons qualifies as a high-volume discharge. Application of $2 per gallon for this incident would result in an inappropriately small liability relative to the volume and its impact on beneficial uses. Therefore, $2.50 per gallon is used to calculate the initial liability because the resulting liability is a suitable deterrent and bears a reasonable relationship to the gravity of the violation and the harm to beneficial uses. The initial liability is calculated as follows:

Per-Gallon Liability: (400,000 gallons - 1,000 gallons) x (0.31) x ($2.50/gallon) = $309,225

Per-Day Liability: $10,000/day x (0.31) x (3 days) = $9,300

Initial Liability = $318,525

STEP 3 – PER DAY ASSESSMENT FOR NON-DISCHARGE VIOLATIONS

This step does not apply because the violations are discharge violations.

[49] According to the June 7, 2016, Regional Water Board Inspection Report, the flow in Ditch B at 1:59 p.m. on March 7, 2016, was 0.8 cubic feet per second (ft^3/s). According to "California Data Exchange Center - Query Tools," the precipitation on March 5, 2016, was 10 times greater than the precipitation on March 7, 2016, and the precipitation on March 6, 2016, was 3 times greater than the precipitation on March 7, 2016. Therefore, the soil on March 7, 2016, was likely saturated, and the rain that day would have likely caused discharge, as observed. There were 12 hours on March 7, 2016, with at least as much rain as when the discharge was measured. These 12 hours would have all resulted in comparable or larger discharges from Ditch B as what was measured. The 12 hours of discharge at 0.8 ft^3/s equals 258,500 gallons of discharge.

STEP 4 – ADJUSTMENTS TO INITIAL LIABILITY

The Enforcement Policy specifies that three additional factors should be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and compliance history.

Culpability

The Enforcement Policy specifies that higher liabilities should result from intentional or negligent violations as opposed to accidental violations. It specifies use of a multiplier between 0.5 and 1.5, with a higher multiplier for intentional or negligent behavior.

Violation 1: The selected culpability multiplier is 1.2.

The Discharger obtained regulatory coverage under the Permit on November 20, 1985. The Permit includes prohibitions on altering turbidity and color of waters of the State or U.S., and on placing wastes in a position where they can be carried from and discharged to waters of the State or U.S. An April 19, 2001, notice of violation and a June 26, 2001, cleanup and abatement order (2001 Cleanup Order) reiterated these prohibitions.

Regional Water Board staff inspected the Facility on March 28, 2001, and observed an unauthorized discharge of waste to a stormwater drainage channel along the Facility's north side.[50] In the April 19, 2001, notice of violation, issued to the Discharger after the inspection, Regional Water Board staff reiterated for the Discharger that the Permit and Basin Plan prohibit the discharge of any water other than clean stormwater to the Facility's drainage channels. The notice of violation required the Discharger to submit a technical report describing the characteristics and volume of the liquid discharged, along with dates on which discharge(s) occurred. In its response, the Discharger informed Regional Water Board staff that it discharged 158,000 gallons of wastewater over the course of four days, December 1, 2000, January 26, 2001, February 24, 2001, and March 24, 2001.[51]

During the March 7, 2016, inspection, the flow of compost leachate in stormwater runoff from the compost area to Ditch B, and then into Fisher Creek, was clearly visible. Ditch B was the only stormwater runoff conveyance from the spent compost storage area. The Discharger deliberately used Ditch B to dispose of compost leachate from that portion of the Facility.

Regional Water Board staff notified the Discharger of the issues pertaining to its discharge over the course of decades. The Discharger knew or should have known that it needed to contain polluted stormwater onsite. A reasonable and prudent discharger under similar circumstances would have implemented effective management practices to keep spent compost stockpiles away from surface water and prevent or minimize stormwater pollution, in accordance with Permit prohibitions.

Violation 2: The selected culpability multiplier is 1.3.

[50] Regional Water Board notice of violation, issued April 19, 2001.
[51] 2001 Cleanup Order, p. 2.

Since November 25, 1985, the Discharger was on notice that the Permit required all wastewater containing TDS in excess of 500 mg/L to be discharged into a lined Class II surface impoundment (process water pond) and that the Permit prohibited, among other things, the discharge of wastes into waters of the U.S.

Through its Report of Waste Discharge submittals dated January 25, April 4, May 16, and August 9, 1985, the Discharger proposed to protect beneficial uses of ground and surface waters near the Facility by constructing two process water ponds to dispose of its wastewater. The Permit originally required the Discharger to construct and operate the two process water ponds by November 1, 1986.

According to WDRs Order 86-69, the Discharger requested a time extension to complete construction of the process water ponds because the cost of construction would be more than twice the original cost estimate and "An expenditure of that magnitude could seriously jeopardize the financial stability and existence of the company at this [F]acility." The Regional Water Board extended the Discharger's deadline to adequately manage wastewater onsite to September 1, 1988. WDRs Order 86-69, added Provision C.12 to the Permit, which required the Discharger to report to the Regional Water Board on its decision either to operate in compliance with Regional Water Board requirements or to close the Facility by September 1, 1987.

The Discharger continued to operate the Facility and did not construct a process water pond until 2001.[52] Before constructing the process water pond, the Discharger continued to use the unlined stormwater pond (formerly referred to as the percolation pond) to store process water, including polluted stormwater runoff, in violation of the Permit. On April 8, 1997, the Regional Water Board issued a notice of violation reiterating that the stormwater pond did not qualify as a Class II surface impoundment, citing unauthorized discharges to the stormwater pond and noting groundwater quality degradation due to the use of the stormwater pond for process water storage. On March 28, 2001, Regional Water Board staff inspected the Facility and observed that the Discharger was still using the stormwater pond to store its process water.[53] In the April 19, 2001, notice of violation that followed the inspection, Regional Water Board staff alerted the Discharger that discharge of waste was not permitted.

The 2001 Cleanup Order addressed the "…illicit discharge of wastewater, washwater and polluted stormwater from [the Facility], into the [F]acility's percolation pond, which [was] not authorized to accept this waste, and for discharges to Fisher Creek, a tributary of Coyote Creek." It also cited the history of violations and noted that the holding capacity for wastewater was regularly exceeded.

In response to the 2001 Cleanup Order, the Discharger built the current process water pond to receive the Facility's process water. During the Regional Water Board's February 25 and March 7, 2016, inspections, Facility staff stated that the stormwater pond is unlined and is no longer used to receive process water.[54] Site maps provided in the March 15, 2017, ROWD, however, indicate that the process water and stormwater ponds are still connected by permanent pipes and the connection is controlled by a valve that could allow water flow in either direction.

[52] WDRs Order R2-2017-0037, finding 23.
[53] Regional Water Board notice of violation, issued April 19, 2001.
[54] June 7, 2016, Regional Water Board Inspection Report, p. 18.

Between June and November 2016, the Discharger increased process water and stormwater storage at the Facility to begin to address its water storage capacity issues. According to a November 18, 2016, technical report submitted by the Discharger, it completed farm improvement projects in 2016 that included installing a replacement process water tank, installing new evaporators on the process water pond, and cleaning out the stormwater pond. These efforts were insufficient to address the capacity issues facing the Discharger.

Warden Schad observed and documented in his reports the degraded condition of the stormwater pond during his Facility inspections on January 4 and 8, 2017, and February 19, 2017. On January 4 and 8, 2017, Warden Schad observed that the stormwater pond appeared to be contaminated with process water. During an inspection on January 20, 2017, Mr. Orr collected samples from the actively discharging stormwater pond outfall pipe. Analysis of these samples indicates that TDS in the stormwater pond was 3,200 mg/L, six times the Permit requirement and the MCL for TDS.[55] On February 19, 2017, Warden Schad observed that the area around the stormwater pond had an odor consistent with the active compost production area at the Facility (Figure 1). The Discharger neglected to address the degraded water quality of the stormwater pond prior to discharging on February 17, 2017. Instead of discharging to Fisher Creek, the Discharger should have made other arrangements for storage and disposal of the contaminated stormwater (e.g. pumping the contaminated stormwater to baker tanks instead of discharging to Fisher Creek).

On February 17, 2017, the Discharger began pumping notably contaminated stormwater (as observed during Warden Schad's January 4 and 8, 2017, inspections) from the stormwater pond, which has plumbed connections to the process water pond, to Fisher Creek through an outfall pipe.[56] The Discharger has never been authorized to discharge stormwater contaminated with process water through the stormwater pond outfall. The Discharger knew or should have known that contaminated stormwater discharge from the stormwater pond to Fisher Creek is prohibited. Moreover, a reasonable and prudent discharger would prevent the contamination of the stormwater pond and notice by either observation or calculation that the stormwater pond was discharging more than stormwater. A reasonable discharger would have arranged to store the contaminated water onsite until it could be hauled for disposal or stored in the process water pond.

Cleanup and Cooperation

The Enforcement Policy provides for an adjustment to reflect the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. The adjustment is a multiplier between 0.75 and 1.5, with a higher multiplier where there was a lack of cooperation.

Violation 1: The selected cleanup and cooperation multiplier is 1. The June 7, 2016, Regional Water Board inspection report was accompanied by a notice of violation that required the Discharger to "submit a technical report in which it details the actions taken to correct the violation" by November 25, 2016. The Discharger submitted a technical report on time

[55] Sample analysis reported in January 25, 2018, Supplemental Report Regarding Deleterious Effects of Organic Waste to Fish and Aquatic Life.
[56] March 15, 2017, ROWD, Attachment 1.

(November 18, 2016) and moved the compost piles to a bermed concrete pad that stops stormwater from flowing off the compost piles into the Facility ditches and Fisher Creek.

Violation 2: The selected cleanup and cooperation factor multiplier is 1. The discharger made efforts to improve water quality in the stormwater pond and process water management across the Facility.

Warden Schad found that the stormwater pond had signs of process water contamination during his April 14, 2017, inspection. In his report he stated that the water in the stormwater pond appeared deep brown, the same color and consistency as water in the process water pond. He also observed foaming and solids in the stormwater pond. When Warden Schad inspected the Facility on January 9, 2018, the TSS and ammonia in the stormwater pond were well within acceptable limits for stormwater.[57]

The Discharger was aware that its capacity for managing process water (including stormwater contaminated by compost leachate) at the Facility during the 2016/2017 wet season was insufficient, and took steps to increase capacity and better manage its process water during the following dry season in 2017. The Discharger emptied and scraped the stormwater pond again,[58] just as it did during the 2016 dry season preceding the discharge event. In early November 2017, the Discharger completed installation of a one-million-gallon excess process water storage tank.[59] In 2018, the Discharger tested technology that might partially treat its process water for odor, nitrate, chloride, and solids.[60] The Discharger also investigated ways to reduce the amount of stored process water including spray irrigation of the field formerly used for spent compost storage and connecting to the sanitary sewer system.[61]

History of Violations

The Enforcement Policy provides that where there is a history of repeat violations, a minimum multiplier of 1.1 should be used.

Violations 1 and 2: The selected history multiplier is 1.1 because the Discharger was subject to formal Regional Water Board enforcement (the 2001 Cleanup Order) for substantially similar violations as discussed above.

STEP 5 – DETERMINATION OF TOTAL BASE LIABILITY

The total base liability is determined by applying the adjustment factors from Step 4 to the initial liability amount determined in Step 2.

[57] DFW January 9, 2018, Inspection Report and Caltest Analytical Laboratory, Report of Laboratory Analysis, January 26, 2018.
[58] DFW October 10, 2017, Inspection Report, Photo 21.
[59] Walker, Jim, Pacific Crest Engineering Inc. Personal communication (email), November 10, 2017.
[60] Walker, Jim, Pacific Crest Engineering Inc. Personal communication (email), May 15, 2018.
[61] *Ibid.*

Violation 1:
Total Base Liability = $322,400 (Initial Liability) x 1.2 (Culpability Multiplier) x 1 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier)

Total Base Liability = $425,600 (rounded)

Violation 2:
Total Base Liability = $318,525 (Initial Liability) x 1.3 (Culpability Multiplier) x 1 (Cleanup and Cooperation Multiplier) x 1.1 (History of Violations Multiplier)

Total Base Liability = $455,500 (rounded)

Combined Total Base Liability

The combined total base liability for Violations 1 and 2 ($425,600 + $455,500) is **$881,100**.

STEP 6 – ABILITY TO PAY AND TO CONTINUE IN BUSINESS

A discharger's ability to pay an administrative civil liability is determined by its revenues and assets. The total base liability may be adjusted to address a discharger's ability to pay or to continue in business if the Regional Water Board has sufficient financial information necessary to assess its ability to pay or to assess the effect of the total base liability on the discharger's ability to continue in business.

In most cases, it is in the public interest for a discharger to continue in business and bring its operations into compliance. The Water Code requires the Regional Water Board to consider this issue when imposing civil liability but does not require the Board to set civil liabilities at levels that allow dischargers to continue in business. However, civil liabilities should be imposed at levels that do not allow dischargers to obtain a competitive economic advantage over dischargers that voluntarily incur the costs of regulatory compliance, whether or not a discharger is able to continue in business after incurring the liability.

Sufficient publicly available information exists to show that the Discharger has the ability to pay the proposed final liability. D&B WorldBase estimates the Discharger's annual sales are over $531,000,000.[62] According to county assessor records, the Discharger, either directly or through its wholly owned subsidiaries, also owns significant assets in California, Pennsylvania, and Florida. In California alone, the Discharger and its wholly owned subsidiaries (Spawn Mate, Inc. and Amycel, Inc.) own at least sixteen parcels with assessed total values of $50,805,564 combined.[63] The Discharger directly owns at least ten parcels in Santa Clara County and two parcels in Monterey County with assessed total values of $3,744,868 and $31,259,118. Spawn Mate, Inc. owns at least two parcels in Monterey County and one parcel in San Luis Obispo County with assessed total values of $5,786,101 and $3,169,969. Amycel, Inc. owns one parcel in San Benito County with an assessed total value of $6,845,508.

[62] A D&B Worldbase Summary was accessed on June 5, 2019, through a Westlaw Company Investigator Report.
[63] Assessed total values are based on the 2018 tax year, as reflected in ParcelQuest reports accessed on February 5, 2019, and June 5, 2019.

The proposed final liability is far below the Discharger's estimated revenue and assets, and should not affect the Discharger's ability to pay and continue in business. No adjustment is proposed.

STEP 7 – OTHER FACTORS AS JUSTICE MAY REQUIRE

The Enforcement Policy provides that if the Regional Water Board reasons that the amount determined using the above factors is inappropriate, the amount may be adjusted for "other factors as justice may require." The Enforcement Policy includes the costs of investigation and enforcement as "other factors as justice may require" that can be considered to increase the liability.

The Regional Water Board prosecution team incurred at least $30,700 in staff costs to investigate this case and prepare this methodology and supporting information. This includes time spent by all team members, excluding legal counsel, at an hourly rate based on the middle of the salary range for their positions (State classifications). Increasing the total base liability by $30,700 in consideration of investigation and enforcement costs is warranted given the totality of the circumstances and is intended to serve as a general and specific deterrent against future violations.

Staff costs were calculated as follows:

$8,698.40 = 80 hours x $108.73/hourly burdened rate (Water Resource Control Engineer)
$7,399.98 = 98 hours x $75.51/hourly burdened rate (Environmental Scientist)
$7,810.40 = 19 hours x $150.20/hourly burdened rate (Senior Engineering Geologist)
$3,366.31 = 6 hours x $164.21/hourly burdened rate (Environmental Program Manager I)
$2,708.00 = 16 hours x $169.25/hourly burdened rate (Assistant Executive Officer D. Whyte)
$761.63 = 3.5 hours x $169.25/hourly burdened rate (Assistant Executive Officer L. McCann)
$30,700 = total staff costs (rounded)

The total base liability after adjusting for staff costs is $911,800.

STEP 8 – ECONOMIC BENEFIT

The Enforcement Policy requires recovery of the economic benefit gained associated with the violations plus 10 percent. Economic benefit is any savings or monetary gain derived from the act or omission that constitutes the violation.

Economic benefit was calculated using the EPA's Economic Benefit Model (BEN) penalty and financial modeling program, version 5.7.0. BEN calculates the present value of a discharger's economic benefit derived from delaying or avoiding compliance with environmental statutes using standard discount rates applicable to specific entity types.

The adjusted total base liability from Step 7 is unchanged because it is more than ten percent higher than the total estimated economic benefit for the violations as discussed below.

Violation 1: For purposes of estimating economic benefit, the initial non-compliance date is assumed to be March 7, 2016, the date Regional Water Board staff first observed the compost

piles near Ditch B without adequate management practices to protect stormwater. The compliance date is assumed to be November 18, 2016, the day the Discharger submitted a technical report showing that it moved the spent compost piles to a bermed concrete pad. Based on these assumptions, the Discharger avoided approximately $45,800 for the temporary storage of 258,500 gallons of contaminated stormwater and $29,800 for hauling and legal disposal of the contaminated stormwater. [64,65] The Discharger also gained by delaying about $172,000 in costs associated with the construction of a bermed-compost pad.[66] Using BEN, the economic benefit for a corporation with $172,000 in deferred capital costs and $75,600 in avoided transportation and disposal costs is about $48,000.

The economic benefit plus ten percent is about $52,800.

Violation 2: For purposes of estimating economic benefit, the initial non-compliance date is assumed to be February 17, 2017, the date on which the Discharger reported the start of discharge. The compliance date is assumed to be February 19, 2017, the last day the discharge was observed. Based on these assumptions, the Discharger avoided approximately $63,600 for the temporary storage of 400,000 gallons of contaminated stormwater and $46,000 for hauling and legal disposal of the contaminated stormwater. [67,68] Using BEN, the economic benefit for a corporation with $109,600 in avoided transportation and disposal costs is about $183,270.

The economic benefit plus ten percent is $201,600.

STEP 9 – MAXIMUM AND MINIMUM LIABILITY

a) ***Minimum Liability***

The minimum administrative civil liability for the violations is $254,400. This is based on the total economic benefit of $231,270 plus ten percent.

b) ***Maximum Liability***

Based on the discharge days and volumes described above for the two violations, the maximum administrative civil liability is $6,605,000. This is based on the maximum allowed by Water Code section 13385. Water Code section 13385, subdivision (c), allows up to $10,000 per day of violation, plus $10 for each gallon exceeding 1,000 gallons discharged but not cleaned up ($6,605,000 = [(258,500 gallons – 1,000 gallons) x $10/gallon] + [$10,000/day of violation x 1 day of violation] + [(400,000 gallons – 1,000 gallons) x $10/gallon] + [$10,000/day of violation x 3 days of violation]).

[64] Baker Corp, Quote for complete modular tank option, August 15, 2017. Quote provided by the Discharger and used by Regional Water Board staff to apply to storage of 258,500 gallons.
[65] City of Watsonville Water Resource Center, Mobile Waste Hauler Dumping Fees (memo), June 25, 2018.
[66] Monterey Mushrooms Inc., Purchase Order to "build 10,000sf (100'x100')slab", September 27, 2016
[67] Baker Corp, Quote for complete modular tank option, August 15, 2017. Quote provided by the Discharger and used by Regional Water Board staff to apply to storage of 400,000 gallons.
[68] City of Watsonville Water Resource Center, Mobile Waste Hauler Dumping Fees (memo), June 25, 2018.

STEP 10 – FINAL LIABILITY

The final liability proposed is **$911,800** (rounded) for Violations 1 and 2, based on consideration of the penalty factors discussed above. It is within the minimum and maximum liabilities.

ATTACHMENT B

Proposal for Supplemental Environmental Project (SEP): Fisher Creek Riparian Habitat Restoration

MONTEREY MUSHROOMS, INC.

1. Project Name: Fisher Creek Riparian Habitat Restoration Project

2. Project Applicant: Santa Clara Valley Open Space Authority

3. Address: Las Colinas Lane, San José, CA 95119

4. Contact Person and Title: Matt Freeman, Assistant General Manager

5. Contact Phone Number and Email: (408) 224-7476, mfreeman@openspaceauthority.org

6. Project Category: Pollution reduction and environmental restoration and protection

7. Project Location:

   The Fisher Creek Riparian Habitat Restoration Project (Project) consists of one site located in Coyote Valley, within Santa Clara County and the Coyote Creek Watershed: Fisher's Bend, owned by Peninsula Open Space Trust (POST) and managed by the Santa Clara Valley Open Space Authority (Authority) (See map in Appendix A).

   Fisher's Bend is a 62-acre site dominated by agricultural farmland (hay production). Fisher Creek's east bank borders the property for approximately 3,100 feet. Willow riparian forest lies along the entire 3,100-foot bank, and seasonal wetland vegetation lies adjacent to the willow riparian forest for approximately 2,000 feet. The dominant vegetation of the willow riparian forest is sandbar willow (*Salix exigua*), valley oak (*Quercus lobata*), and walnut (*Juglans hindsii*); with portions of the creek supporting stands of cattails (*Typha* sp.). This riparian community is an important linkage between terrestrial and aquatic communities and is vital to the structure and function of Fisher Creek. Shade from the riparian vegetation moderates stream temperatures, often preventing excessive summer temperatures that may be lethal to invertebrates and fish. The mosaic of seasonal wetlands and uplands just outside the riparian corridor are dominated by invasive species, such as poison hemlock (*Conium maculatum*). Directly adjacent to this site is a road and active farmland (See photos in Appendix B). Restoration of 50-feet of habitat adjacent to Fisher Creek would create 3.5 acres of riparian and upland habitat.

8. Project Description:

   The Project would restore riparian vegetation along Fisher Creek described in the Project Location, covering approximately 3.5 acres in total. Riparian woodlands are some of the most important habitats for terrestrial birds and mammals.

Habitat on Fisher Creek provides nesting, roosting, and foraging habitat for numerous bird species, including special-status species such as the yellow warbler (*Dendroica petechia*) and white-tailed kite (*Elanus leucurus*). The riparian corridor is an important component of the wildlife movement pathway within and through Coyote Valley, connecting patches of habitat that have been fragmented due to development in the region. Riparian areas are carbon sinks with a high capacity to store carbon (Dybala *et al*. 2019).

As noted earlier, Coyote Valley and Fisher Creek are part of the larger groundwater basin that provide drinking water to Santa Clara County. Restoration of aquatic habitat in Coyote Valley will help to enhance water quality in the Santa Clara Plain groundwater basin and San Francisco Bay.

In addition to the climatic, water quality, and wildlife habitat and connectivity benefits, this Project connects communities to the lands around them. Restoration work would be completed in partnership with Go Native, a local habitat restoration firm, and with Point Blue Conservation Science's Students and Teachers Restoring A Watershed (STRAW) program. The STRAW program engages K-12 students, community members, and Conservation Corps members in climate-smart restoration. STRAW has implemented hundreds of successful restoration projects throughout the San Francisco Bay Area. The San José Conservation Corps offers paid job training and a high school education to "at-risk" disadvantaged youth. They are "an educational safety net for opportunity youth who have been disconnected from mainstream education and job training systems." The Authority has developed a strong partnership with the San José Conservation Corps and has contracted with them on many improvement projects on its preserves, including at Coyote Valley Open Space Preserve. Environmental education will continue beyond the implementation of this Project through interpretative signs and training for Authority Staff and Docents.

To summarize, the specific Project objectives include:

- Climate-smart restoration of 3,100 feet of riparian habitat and 3.5 acres,
- Carbon sequestration and improved water quality,
- Wildlife habitat benefits,
- Enhanced wildlife corridor connectivity through Coyote Valley, and
- Provide opportunities for environmental education and interpretation.

At Fisher's Bend, the Project proposes to expand the riparian corridor by 50-feet along 3,100-feet of Fisher Creek, which would result in a 3.5-acre restoration project. Currently the riparian woodland is located in a narrow patch along the bank of Fisher Creek, surrounded by a narrow patch of seasonal wetlands and uplands dominated by invasive plant species. Bordering this region is active farm production. Due to the active planting, disking, and herbicide use on the hay fields, many of the wetland characteristics have been muted. Restoration efforts will expand the buffer between active farmland and

riparian vegetation by 50 feet resulting in 3.5 acres of restored habitat. Areas along the creek bank would be restored to willow-cottonwood habitat followed by upland species such as large seed grasses or berry bushes. The new 50-foot buffer would provide water quality benefits to Fisher Creek by increasing the separation between active farmland and Fisher Creek, therefore reducing sediment and pollutants from entering Fisher Creek. Restoration of the riparian corridor was identified as a key opportunity in the Opportunities and Constraints Report for the property (HT Harvey, 2018). The plants selected would follow climate smart restoration design principles. Climate-smart plant traits include drought tolerance, use by wildlife as a seed source, use by insects, fire adaptation, and flood tolerance, all of which are traits that provide resilience to variable climatic conditions.

9. Brief workplan, including tasks, deliverables, milestones, and schedule: The deliverables must include quarterly progress reports and a final completion report, which will be prepared and submitted by the Authority on behalf of Monterey Mushrooms, Inc. All reports shall be submitted to the San Francisco Bay Regional Water Quality Control Board's (Regional Water Board's) contact, Maya McInerney, via email at Maya.McInerney@waterboards.ca.gov.

Table 1: Project Tasks, Budget, and Projected Completion Dates			
Total Project Timeline: 1/1/2020-1/30/2023			
Task (Scope of work)	**Total Project Budget Amount**	**Partner Completing Task**	**Projected Completion Date**
1. Initial Site Preparation (Spring 2020) - Removal of invasive species in riparian woodland understory, removal of invasive species adjacent to riparian woodland, soil/bed preparation for 50-foot buffer, power and irrigation purchase and installation, pre-project photo monitoring.	$139,890	Go Native San Jose Conservation Corps Pt. Blue	November 1, 2020
2. Planting (Fall 2020) - Includes 20 restoration project days with K-12 students following STRAW's climate-smart restoration design principles. Pt. Blue's program includes both classroom education on watershed health and restoration days with students.	$172,892	Pt. Blue Go Native	March 31, 2021
3. Maintenance and Monitoring (2021 and 2022) - Includes irrigation maintenance, weed control, and plant establishment measures. This task is on-going for the first two years of plant establishment. After plants are in the ground, we will utilize the Riparian Zone Monitoring Plan to inform any needed adaptive management. The Riparian Zone Monitoring Plan documents changes in site conditions over time using qualitative and quantitative metrics such as photo-monitoring, plant cover, and plant survivorship.	$109,582	Go Native Pt. Blue San José Conservation Corps	December 31, 2022
4. Interpretive Materials and Training Related to Water Quality and Ecosystem Benefits (2021-2022) - This task includes development of Project-specific interpretive materials for use by Authority staff and its team of trained Docents. Point Blue would prepare informational materials for use on the Authority's website and that can be handed out during on-site interpretive walks describing the importance of watershed stewardship and the benefits of the Project, and they would also lead a training session for Authority staff and Docents. A small interpretive kiosk would be established at Fisher's Bend that would serve as a focal point of interpretive walks. Interpretative signs would be established at Fisher's Bend that highlight water quality and ecosystem benefits.	$18,000	Pt. Blue	December 31, 2022
Total Project Cost, which includes report writing and submission.	**$440,364**		

Table 2: Monterey Mushrooms Inc.'s Payment Schedule for Total Project Cost[1]	
Amount	**Due Date**
$150,000	No later than 10 days after the effective date of the Stipulated Order that approves this Project as a SEP
$175,000	June 30, 2020
$115,364	November 31, 2020

1. The Authority has agreed to allow Monterey Mushrooms, Inc. to fund the Total Project Cost of $440,364 (or SEP Amount) per the payment schedule provided in Table 2. Monterey Mushrooms, Inc.'s timely payment of the SEP Amount does not relieve Monterey Mushrooms, Inc. of its responsibility to fully implement and complete the Project as required by the Stipulated Order approving this Project as a SEP and the State Water Resources Control Board's Policy on Supplemental Environmental Projects (May 2018) (SEP Policy).

Table 3: Authority Reporting and Milestones			
#	**Type of Report[1,2]**	**Timeframe and Milestones Covered**	**Due Date[3]**
1	**Quarterly Report**	2020 1st Quarter Report	April 30, 2020
2	**Quarterly Report**	2020 2nd Quarter Report	July 30, 2020
3	**Quarterly Report**	2020 3rd Quarter Report	October 30, 2020
4	**Quarterly Report**	2020 4th Quarter Report - Initial site preparation complete	January 29, 2021
5	**Quarterly Report**	2021 1st Quarter Report - Planting complete	April 30, 2021
6	**Quarterly Report**	2021 2nd Quarter Report	July 30, 2021
7	**Quarterly Report**	2021 3rd Quarter Report	October 29, 2021
8	**Quarterly Report**	2021 4th Quarter Report	January 28, 2022
9	**Quarterly Report**	2022 1st Quarter Report	April 29, 2022
10	**Quarterly Report**	2022 2nd Quarter Report	July 29, 2022
11	**Quarterly Report**	2022 3rd Quarter Report	October 28, 2022
12	**Quarterly Report and Final Completion Report**	2022 4th Quarter Report and Final Completion Report – Monitoring and maintenance complete, interpretive materials and training complete	January 30, 2023

1. Quarterly Reports document the Project's progress and shall include the following: documentation of the tasks completed during the previous quarter; an explanation for any incomplete tasks and an updated Project schedule with projected completion dates, if necessary; descriptions and photos of activities completed during the previous quarter; results of any monitoring completed during the previous quarter, and an analysis of the Project's progress.
2. The Final Completion Report documents Project completion and shall include the following: a summary of all completed tasks, an evaluation of the Project's success criteria (plant survivorship of 55 percent), photographs documenting the restoration area at the close of the Project, and a certified statement of SEP completion, signed under penalty for perjury, as required in Section III, paragraph 7 of the Stipulated Order approving this Project as a SEP.
3. Report due dates are 30 days after the end of the quarter upon which the report is based.

Table 4: Key Project Partners		
Partner Name	**Background Information**	**Role**
Santa Clara Valley Open Space Authority	Independent special district, whose mission is to conserve the natural environment, support agriculture, and connect people to nature for future generations	Project lead
Peninsula Open Space Trust	Non-profit land trust that protects open space on the Peninsula and in the South Bay for all	Partner and landowner; will provide logistical and technical support
Pt. Blue Conservation Science	Non-profit conservation and science organization that advances the conservation of birds, other wildlife, and ecosystems through science, partnerships, and outreach	Project management, site preparation, school engagement, planting, maintenance, monitoring, reporting
San José Conservation Corps	Non-profit school and job training program that inspires youth to become positively connected to their environment and be the next generation of environmental stewards	Maintenance, weeding

10. Total Project cost and amount of SEP money requested. If there are other funding sources, indicate if the funds have been committed and whether there are any restrictions on the funds:

    The Authority is seeking **$440,364** in funding for the Project. On-the-ground restoration will be complete within one year. However, the Authority sees a tremendous benefit in monitoring the success of the restoration planting efforts over time, including the extent to which the Project may facilitate additional natural recruitment of riparian species. These costs, as well as additional maintenance will be covered as in-kind match provided by the Authority through its annual parcel-based tax revenues. These funds are derived in part from Measure Q, which has no restrictions related to projects of this type.

11. Project readiness, including status of CEQA, permits, and landowner agreements:

    The Project is "shovel-ready." Following execution of a funding agreement, the Authority would contract with our Project partners and aim to initiate the Project in Spring 2020.

    CEQA: The Authority is an independent special district and would serve as the lead public agency for CEQA compliance. The Authority has determined that the Project is categorically exempt under CEQA Section 15333, which consists of small habitat restoration projects less than five acres in size.

    Permits: No permits are necessary for this Project. Most of the work will be conducted by hand. To the extent small tractors or other machinery is involved in removing invasive vegetation, this small-scale work will not trigger the need for a grading or other permit.

Landowner Agreements: POST has conveyed management responsibility over the Fisher Bend property to the Authority through a License and Management Agreement. In addition to this level of site control, POST fully supports this Project and grants permission to proceed with the Project as planned.

12. Expected benefits or improvements to water quality or beneficial uses:

The riparian plantings adjacent to the stream channel and within the new 50-foot buffer area at Fisher's Bend will protect water quality by intercepting and reducing surface runoff and associated soil erosion from surrounding agricultural fields and nearby rural residential areas, and will contribute to the removal of nitrates and other agricultural chemicals. The Project will substantially improve habitat conditions for birds and other native wildlife by establishing a small riparian "oasis" along Fisher Creek and is expected to improve aquatic habitat conditions for invertebrates by shading the water and reducing water temperature. Additionally, the Project will enhance wildlife connectivity along this critically important movement corridor between the Santa Cruz Mountains and the Diablo Range by increasing the amount and quality of the vegetated cover that deer, coyote, bobcats, gray fox, and other species require for safe passage through the Coyote Valley.

Finally, half of Santa Clara County's drinking water supplies come from local groundwater aquifers. Located upstream from the Metcalf Recharge Ponds on Coyote Creek, this Project contributes to other regional efforts to enhance water quality through environmental and habitat restoration.

13. Is the Project located within, or does it benefit, an Environmental Justice community, a Disadvantaged Community, or a community that has a financial hardship? If yes, describe:

The nearest downstream disadvantaged community (DAC) (Block Group 060855120431) as determined in the State's Department of Water Resources' Disadvantaged Communities Map Tool, is approximately 4 miles away from the project site. The Project does not benefit DACs because it is too far from the nearest DACs and too small to impact water quality far downstream. For a riparian habitat restoration project to benefit communities over four miles downstream, it would need to be much larger than the 3.5 acre proposed Project. This Project is not expected to impact nearby DACs.

Though, by involving the San José Conservation Corps, the Project provides hands-on opportunities to engage disadvantaged or at-risk youth to gain practical work experience in the field of open space conservation.

14. Will this Project further the State Water Board's core value of the human right to water? If yes, describe:

The Project protects water quality in Fisher Creek and the larger Coyote Creek Watershed from sedimentation, soil erosion, and runoff impacts from nearby agricultural

operations; enhances habitat conditions to benefit the environment; and provides new opportunities for public environmental education and interpretation that will foster an appreciation for stewardship of streams, watersheds, and their important role in the environment. By restoring approximately 3.5 acres of riparian habitat adjacent to Fisher Creek, the Project directly supports the Water Board's core value of the human right to water. As stated in the resolution, the Water Boards will work "to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations."

15. Optional information. If appropriate, discuss the following:

-Whether this Project is resilient to climate change and conforms with State Water Board Resolution No. 2017-0012, Comprehensive Response to Climate Change.

This Project provides climate resilience by establishing 3.5 acres of riparian vegetation that will sequester atmospheric CO_2. By utilizing a "climate-smart" palette of species that are adapted to survive in a range of variable conditions related to rainfall, temperature, and drought extremes, the two Project sites are expected to be quite resilient to changing conditions.

-Whether this Project can be the basis for additional funding from other sources.

As described earlier, we see this Project as an important implementation element of the Coyote Valley Landscape Linkage. As new properties are protected along Fisher Creek between Coyote Valley Open Space Preserve and the confluence with Coyote Creek, these areas provide new opportunities for similar riparian and wetland habitat restoration and enhancement opportunities. The Authority and POST just completed a series of critical land purchases located just downstream from the Project site, at an approximate cost of $96M. These properties will be the subject of a resource planning effort to identify and prioritize floodplain restoration opportunities.

-Whether this Project is required by another entity or agency.

This is a voluntary Project initiated by the Authority in partnership with POST.

-Whether this Project has monitoring, success criteria, or other tools to track long-term success.

Although this is a voluntary Project, the Authority is committed to its success. We would expect to attain at least 55% success in terms of planting survivorship at the end of three years, and will implement annual monitoring and adaptive management protocols to ensure that success, consistent with expectations of typical state grant funding programs administered by the Coastal Conservancy or Wildlife Conservation Board.

-Whether the applicant has an established record of completing projects with the Water Board or other agencies

The Authority has a proven track record working collaboratively with partners on regional conservation initiatives, securing grant funding, and successfully implementing restoration projects.

-*Whether the applicant has the institutional stability and capacity to complete the Project as proposed.*

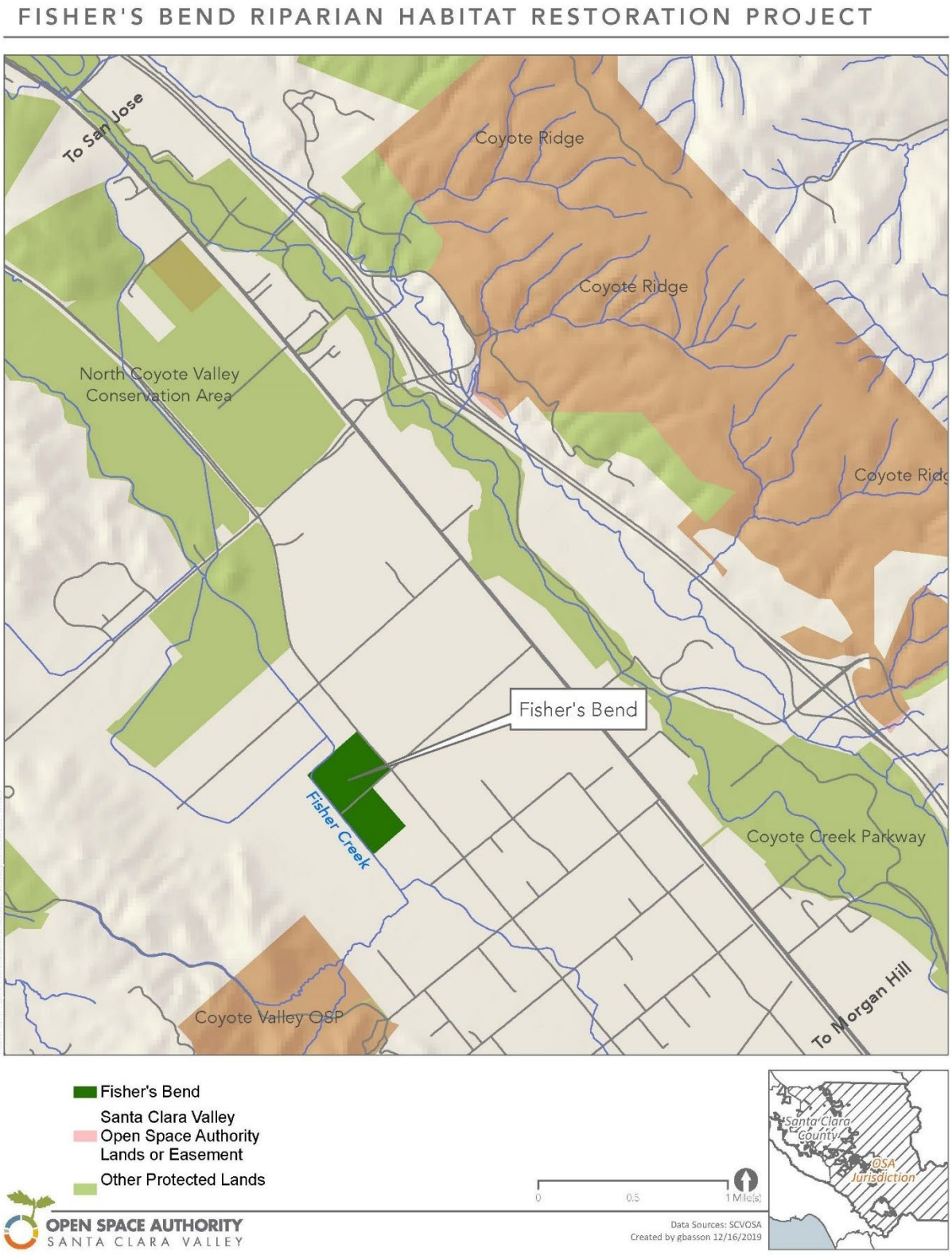
The mission of the Santa Clara Valley Open Space Authority is to conserve the natural environment, support agriculture, and connect people to nature, by protecting open spaces, natural areas, and working farms and ranches for future generations. Since the Authority was founded in 1993, the agency has protected over 25,000 acres and manages over 16,000 acres.

Citations:

Dybala KE, Matzek V, Gardali T, Seavy NE (2019). Carbon sequestration in riparian forests: a global synthesis and meta-analysis. Global Change Biology 25:57-67.

H.T Harvey & Associates (2018). Fisher Flats and Fisher's Bend Properties Biological Opportunities and Constraints Analysis. Prepared for Peninsula Open Space Trust and Santa Clara Valley Open Space Authority.

Appendix A - Project Location Map



Appendix B - Project Photos

Figure 1: *View of Fisher Creek Looking North on Fisher's Bend*

Figure 2: *View of Fisher Creek looking south on Fisher's Bend*