CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2011-0065
AMENDING CLEANUP ABATEMENT ORDER NO. R2-2011-033

KANEKA TEXAS CORPORATION
DUDE, INC.
AND
FXI, INC., f/k/a/ FOAMEX INNOVATIONS OPERATING COMPANY

For the Property Located at:
2451 POLVOROSA DRIVE
SAN LEANDRO, ALAMEDA COUNTY

E*POLY STAR, INC.

For the Property Located at:
2085 BURROUGHS AVE.
SAN LEANDRO, ALAMEDA COUNTY

METRO POLY, INC.

For the Property Located at:
1651 AURORA DR.
SAN LEANDRO, ALAMEDA COUNTY

UNIPOLY, INC.

For the Property Located at:
2020 WILLIAMS ST.
SAN LEANDRO, ALAMEDA COUNTY

And for the Waters of the State Located at:
APPROXIMATELY 4.7 ACRES OF TIDAL SALT MARSH, PARALLEL TO NEPTUNE DRIVE ALONG THE SOUTHEASTERN EDGE OF OYSTER BAY REGIONAL SHORELINE,
SAN LEANDRO, ALAMEDA COUNTY

The Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter, Regional Water Board), under his delegated authority, finds:

1. On June 7, 2011, the Regional Water Board issued Cleanup and Abatement Order No. R2-2011-033 ("CAO") to the above-named parties (collectively, "Dischargers") requiring cleanup and abatement of pre-production plastic pellets and miscellaneous refuse that the Dischargers have caused or permitted to be discharged into the estuary, wetland, and waterway areas of Oyster Bay Regional Shoreline, to prevent future waste discharges of plastic pellets, and to submit technical and monitoring reports.

2. On July 7, 2011, FXI, Inc., f/k/a Foamex Innovations Operating Company, ("FXI") requested an evidentiary hearing on the basis that it is not a discharger under California Water Code (CWC) section 13304, because it did not use plastic pellets in its operations, did not cause the release of pellets into Oyster Bay Regional Shoreline, and did not and does not have an ownership interest in 2451 Polvorosa Drive.

3. On August 1, 2011, the Executive Officer asked the prosecution staff of the Regional Water Board assigned to this matter ("Prosecution Staff") to respond to FXI's argument that it was not properly named to the CAO. Since then, the following parties submitted evidence, argument, and responses on the issue:

a. Kaneka Texas Corporation ("Kaneka"), by letter dated August 9, 2011.
b. FXI, by letter dated August 25, 2011.
c. Kaneka, by letter dated August 30, 2011.
d. Prosecution Staff, by letter dated September 7, 2011.
e. FXI, by letter dated September 19, 2011.

4. On September 23, 2011, the Executive Officer informed all parties to the CAO that given the many submittals listed above, in effect, a written evidentiary hearing on whether FXI was properly named to the CAO was underway. The parties were given a final opportunity to submit new evidence not already submitted by October 7, 2011. The parties did not submit any additional evidence.

5. Having considered all of the evidence submitted by the parties as well as the record, the Executive Officer finds that FXI is a properly named discharger to the CAO. FXI, as master tenant of the 2451 Polvorosa Drive property, had legal control of the property when Regional Water Board and State Water Resources Control Board ("State Water Board") staff observed and documented pellets at the property and in a storm drain inlet during site inspections on January 13, 2010, and January 20, 2010. By this time, Kaneka was no longer a subtenant at the property (it vacated the property in or around July 2009). Cleanup of the pellets on the property did not conclude until well after the Regional Water Board ordered cleanup of the property on May 6, 2010. Thus, the observed pellets at the property and in the storm drain inlet would have washed out into Oyster Bay Regional Shoreline during the 2009-2010 winter rains. Furthermore, FXI knew about the pellets as an inspection log indicates that during the January 20, 2010, site inspection, Terry Thompson from FXI asked State Water Board staff for regulatory relief from the Kaneka pellets that were still on its leased property. Thus, FXI permitted the plastic pellets to be discharged from 2451 Polvorosa Drive into Oyster Bay Regional Shoreline where it created a condition of pollution or nuisance. That FXI does not have fee title to the property or that it did not originally cause the discharge of the pellets does not preclude it from being a discharger under CWC section 13304. The State Water Board has made it clear in numerous precedential decisions that a person who controls property on which there is an ongoing discharge permits a discharge even if he or she did not cause the initial release. *See, e.g.*, State Water Board Order WQ 89-8 (*In the Matter of Arthur Spitzer et al.*)(lessee is responsible for waste discharges caused by prior sublessee where lessee now possesses and controls the property, knows of the ongoing discharge and has the ability to obviate it).

6. The CAO does not provide the correct basis for naming FXI as a discharger; therefore, this amendment is necessary to reflect the proper basis for naming FXI to the CAO.

7. This amendment to change the basis for naming FXI as a discharger to the CAO has no possibility of a significant impact on the environment; therefore, it not subject to the California Environmental Quality Act under the "common sense" exemption at tit. 14, Code of Regs., § 15061(b)(3).

8. The Executive Officer has notified the parties to the CAO of his intent to rule on the issue of whether FXI is properly named to the CAO and has provided them with an opportunity to submit their written comments.

IT IS HEREBY ORDERED, pursuant to CWC section 13304, that Order No. R2-2011-033 shall be amended as follows:

1. All references to "Foamex Innovations Operating Company" shall be changed to "FXI, Inc., formerly known as Foamex Innovations Operating Company." All references to "Foamex" shall be changed to "FXI."

2. Section 4.a.iii of the CAO's findings shall be deleted and replaced with:

"FXI, as master tenant of the 2451 Polvorosa Drive property, had legal control of the property when Regional and State Water Board staff observed and documented pellets at the property and in a storm drain inlet during site inspections on January 13, 2010, and January 20, 2010. By this time, Kaneka was no longer a subtenant at the property (it vacated the property in or around July 2009). Cleanup of the pellets on the property did not conclude until well after the Regional Water Board ordered cleanup of the property on May 6, 2010. Thus, the observed pellets at the property and in the storm drain inlet would have washed out into Oyster Bay Regional Shoreline during the 2009-2010 winter rains. Furthermore, FXI knew about the pellets as an inspection log indicates that during the January 20, 2010, site inspection, Terry Thompson from FXI asked State Water Board staff for regulatory relief from the Kaneka pellets that were still on its leased property. Thus, FXI permitted the plastic pellets to be discharged from 2451 Polvorosa Drive into Oyster Bay Regional Shoreline where it created a condition of pollution or nuisance."

Executed this 18th day of October 2011.

Digitally signed by Bruce Wolfe
Date: 2011.10.18 15:28:15 -07'00'

Bruce H. Wolfe
Executive Officer