



1 requests that the State Board hold this Petition in abeyance pursuant to State Board practice.

2 3. The Water Board, through its Assistant Executive Officer, Thomas Mumley,  
3 issued the Order on June 7, 2011.

4 4. In the event this Petition is made active, Petitioner will submit as an amendment to  
5 this Petition a full and complete statement of reasons that Cleanup and Abatement Order No. R2-  
6 2011-0033 is inappropriate and improper.

7 5. Petitioner is aggrieved because Petitioner is being ordered to undertake the burden  
8 and expense of performing substantial work to clean up discharged plastic pellets from sensitive  
9 wetland environments even though Petitioner is not a discharger under Water Code Section  
10 13304. Petitioner did not use the plastic pellets in its operations and did not cause the release of  
11 pellets that resulted in the pellets being discharged to the Oyster Bay Regional Shoreline.  
12 Petitioner's sole connection to this matter is that it subleased a portion of premises that it leases at  
13 2451 Polvorosa Drive in San Leandro, California, to Kaneka Texas Corporation ("Kaneka").  
14 Petitioner has no ownership interest in the premises. Kaneka's operations included use of plastic  
15 pellets and Kaneka's operations resulted in release of some of the pellets at issue in the Cleanup  
16 and Abatement Order. Petitioner neither owns the property nor caused the discharge of the  
17 pellets. Furthermore, as noted in Order No. R2-2011-0033, plastic pellets from Kaneka's  
18 operations have already been successfully removed by Kaneka from the premises that Petitioner  
19 leases and occupies at 2451 Polvorosa Drive in response to a prior Cleanup and Abatement Order,  
20 No. R2-2010-0070. That prior Order, now superseded by this Order No. R2-2011-0033, did not  
21 name Petitioner as a discharger because the pellets at issue were not released by Petitioner, and  
22 neither should the current Order. There is even less basis for naming Petitioner as a discharger  
23 under Order No. R2-2011-0033 now that the premises Petitioner occupies have been cleaned up,  
24 so the premises are no longer a source of further releases and there is no need to access the  
25 premises to perform corrective action. In the event this Petition is made active, Petitioner will  
26 submit as an amendment to this Petition a full and complete statement of the manner in which  
27 Petitioner is aggrieved.

28 6. Petitioner requests that the State Board set aside Order No. R2-2011-0033 or

1 modify it to remove Petitioner from the list of named dischargers or that the State Board direct the  
2 Water Board to set aside or so modify the Order.

3 7. In the event this Petition is made active, Petitioner will submit as an amendment to  
4 this Petition a complete statement of points and authorities in support of the legal issues raised in  
5 this Petition.

6 8. A copy of this Petition for Review and the attached Exhibit A has been sent to the  
7 Water Board and the other interested parties (see Exhibit B).

8 9. In the event this Petition is made active, Petitioner will submit as an amendment to  
9 this Petition a copy of its request to the Water Board for preparation of the Water Board's  
10 administrative record concerning this matter.

11 10. In the event this Petition is made active, Petitioner will submit as an amendment to  
12 this Petition a statement that the substantive issues and objections raised in this Petition were  
13 either raised before the Water Board or an explanation of why Petitioner was not required or were  
14 unable to raise the substantive issues and objections before the Water Board.

15 11. Petitioner requests that the State Board hold a hearing at which Petitioner can  
16 present additional evidence to the State Board. In the event this Petition is made active, Petitioner  
17 will submit as an amendment to this Petition a statement regarding that additional evidence and a  
18 summary of contentions to be addressed or evidence to be introduced and a showing of why the  
19 contentions or evidence have not been previously or adequately presented, as required under 23  
20 Cal. Code Regulations. § 2050.6(a), (b).

21 For all the reasons stated herein, Petitioner requests that the State Board set aside the  
22 Water Board's Cleanup and Abatement Order No. R2-2011-0033 or modify it to remove  
23 Petitioner from the list of named dischargers or direct the Water Board to set aside or so modify  
24 the Order.

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DATED: June 20, 2011

Respectfully submitted,  
FARELLA BRAUN & MARTEL LLP

By: Robert L. Hines  
Robert L. Hines

Attorneys for Petitioner  
FXI, Inc.

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EXHIBIT A



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Acting Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

CERTIFIED MAIL No. 7009 1410 0002 4300 8962      June 7, 2011  
Return Receipt Requested

Agent for Service of Process  
CT Corporation System  
818 West Seventh Street  
Los Angeles, CA 90017

**SUBJECT:    CLEANUP AND ABATEMENT ORDER NO. R2-2011-0033  
              FOR OYSTER BAY REGIONAL SHORELINE AND ORIGINATING  
              SITES, SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

To Whom It May Concern:

Enclosed is a Cleanup and Abatement Order No. R2-2011-0033 (the Order) issued to KANEKA TEXAS CORPORATION, DUDE, INCORPORATED, AND FOAMEX INNOVATIONS OPERATING COMPANY, ALSO KNOWN AS FIOX AND/OR FXI, for unauthorized discharges of pre-production plastic pellets into Oyster Bay Regional Shoreline and San Francisco Bay, and for the property at 2451 POLVOROSA DRIVE.

The Order is the legal document the San Francisco Bay Regional Water Board (Water Board) will use to oversee the investigation and cleanup of the pre-production plastic pellets. It requires the responsible parties to cleanup and abate the sites where the pellets originated (Originating Sites) and surrounding wetlands and related waterways where pellets have and continue to discharge.

### **Cost Recovery Program**

Water Code section 13304 allows the Water Board to recover its reasonable expenses for overseeing the investigation and cleanup of illegal discharges, contaminated properties, and other releases adversely affecting or threatening to adversely affect the state's waters. The properties involved in this matter fall into the category for which the Water Board may recover oversight costs. Our cost recovery program is more fully described in the enclosed "Reimbursement Process for Regulatory Oversight."

*Preserving, enhancing, and restoring the San Francisco Bay Area's waters for over 60 years*



**Estimate of Work to be Performed and Expected Outcome**

Regional and State Water Board staff will be actively overseeing the cleanup and abatement of the Oyster Bay Regional Shoreline and the Originating Sites. We estimate that the following work has been or will be performed by the Regional Water Board staff for your site during fiscal year 2009-2012, ending June 30, 2012:

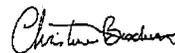
- 1) Draft and finalize the site's Order;
- 2) Review submittals required under the Order and associated plans and correspondence from you, your consultant(s), and/or interested parties;
- 3) Conduct site inspections before, during and after drafting of the Order, including following up on submittals required under the Order;
- 4) Conduct meetings regarding the site on issues relevant to the Order; and
- 5) Discuss issues related to the site and prepare written correspondence between the Water Board and interested parties.

To date, we have expended approximately 100 hours in the preparation of the Order, which includes drafting the Order, site inspections, and investigating your Originating Site and the wetlands. We estimate that an additional 80 hours will be required for our oversight of the site for the next state fiscal year. This is an estimate. The actual time needed will depend on the nature and extent of the necessary oversight. Based on our average billing rate of \$150 per hour, our estimated oversight cost for this site during fiscal years 2009-2012 is about \$27,000.

The "Billing Rates" enclosure lists the billing rates for employees expected to engage in the oversight of work on your site. In accordance with Water Code section 13365, we will identify more detailed, specific outcomes in the future as work progresses and more site-specific data become available.

If you have any questions, please contact me at (510) 622-2346 or via email to [cboschen@waterboards.ca.gov](mailto:cboschen@waterboards.ca.gov). If you are represented by counsel, please contact Laura Drabandt, Staff Counsel, at (916) 341-5180 or [ldrabandt@waterboards.ca.gov](mailto:ldrabandt@waterboards.ca.gov).

Sincerely,

 Digitally signed  
by Christine  
Boschen

Christine Boschen,  
Section Leader  
Watershed Management Division

Enclosures:

Cleanup and Abatement Order No. R2-2011-0033  
Reimbursement Process for Regulatory Oversight  
Billing Rates

cc (via U.S. mail):

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Paul S. Kibel, Esq.  
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Foamex Innovations Operating  
~~Company~~  
2451 Polvorosa Ave.  
San Leandro, CA 94577

Robert L. Hines, Esq.  
Farella Braun + Martel, LLP  
Russ Building  
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San Francisco, CA 94104

East Bay Regional Park District  
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P.O. Box 5381  
Oakland, CA 94605-0381  
ATTN: Oyster Bay Regional Park

Steven Choi  
E\* Poly Star, Inc.  
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San Leandro, CA 94577

Peter Kung  
Metro Poly Corporation  
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San Leandro, CA 94577

Tommy Law  
Uni Poly, Inc.  
1651 Aurora Drive  
San Leandro, CA 9457

cc (via email):

Yuri Won, SWRCB, Office of the Chief Counsel  
Greg Gearheart, SWRCB, Division of Water Quality  
Laura Drabandt, SWRCB, Office of Enforcement  
Regional Water Board Lyris Enforcement email list  
John Camp, City of San Leandro  
Janna Rinderneck, California Department of Fish and Game  
Lr. Kyle Hiatt, California Department of Fish and Game  
Paul Hamilton, California Department of Fish and Game  
Mike Roemer, Alameda County Office of the District Attorney  
Greg Gohlson, United States Environmental Protection Agency

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

**CLEANUP AND ABATEMENT ORDER NO. R2-2011-033**

**KANEKA TEXAS CORPORATION,  
DUDE, INCORPORATED,  
AND  
FOAMEX INNOVATIONS OPERATING COMPANY,  
ALSO KNOWN AS FIOX AND/OR FXI**

**FOR THE PROPERTY LOCATED AT:  
2451 POLVOROSA DRIVE  
SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

**E\* POLY STAR, INCORPORATED**

**FOR THE PROPERTY LOCATED AT:  
2085 BURROUGHS AVENUE  
SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

**METRO POLY, INCORPORATED**

**FOR THE PROPERTY LOCATED AT:  
1651 AURORA DRIVE  
SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

**UNIPOLY, INCORPORATED**

**FOR THE PROPERTY LOCATED AT:  
2020 WILLIAMS STREET  
SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

**AND FOR THE WATERS OF THE STATE LOCATED AT:  
APPROXIMATELY 4.7 ACRES OF TIDAL SALT MARCH, PARALLEL TO NEPTUNE  
DRIVE ALONG THE SOUTHEASTERN EDGE OF OYSTER BAY REGIONAL  
SHORELINE, SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

This Order is issued to KANEKA TEXAS CORPORATION; DUDE, INCORPORATED; FOAMEX INNOVATIONS OPERATING COMPANY; E\* POLY STAR, INCORPORATED; METRO POLY, INCORPORATED; and UNIPOLY, INCORPORATED (hereafter "Dischargers"), based on provisions of California Water Code ("CWC") section 13304 and 13267, which authorize the Assistant Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Water Board") to issue a Cleanup and Abatement Order ("Order") where a discharger has caused or permitted waste to be discharged or deposited where it is or probably will be discharged into waters of the state and United States, and to require a discharger to submit technical and monitoring reports.

1. **Purpose of Order:** This Order requires the cleanup and abatement of pre-production plastic pellets and miscellaneous refuse that the Dischargers have 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. These unauthorized discharges of plastic pellets in the waterway areas of Oyster Bay Regional Shoreline fill the wetlands. The Dischargers are thereby violating the Industrial Storm Water General Permit Order 97-03-DWQ ("Industrial General Permit") issued by the State Water Resources Control Board ("State Water Board"), violating the Water Quality Control Plan for the San Francisco Bay Basin ("Basin Plan"), and violating the federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. § 1251 et seq.). In order for the cleanup of the receiving water to proceed in an organized fashion with the least impact to the marsh habitat, this Order is issued to all responsible parties.
  
2. **Supersedes Order No. R2-2010-0070:** This order supersedes Cleanup and Abatement Order No. R2-2010-0070, issued May 6, 2010, to KANEKA TEXAS CORPORATION ("KANEKA") and CRAIN INDUSTRIES, INC. for the cleanup of the estuary, wetland, and waterway areas of Oyster Bay Regional Shoreline and the industrial facility at 2451 Polvorosa Drive. KANEKA and CRAIN INDUSTRIES, INC. have successfully submitted and implemented a Corrective Action Plan for 2451 Polvorosa Drive and adjacent areas as required by Order No. R2-2010-0070. Neither KANEKA nor CRAIN INDUSTRIES, INC. presently requires coverage under the Industrial Storm Water General Permit since presently neither occupies nor operates industrial activity at the property.
  
3. **Site Locations and Descriptions:** The area requiring cleanup is about 4.7 acres of salt marsh that runs parallel to Neptune Drive, along the southeastern edge of Oyster Bay Regional Shoreline in San Leandro, Alameda County, California. The pre-production plastic pellets discharged from four properties in near Oyster Bay as described in Table 1. Attachment A is a photo with each facility identified.

**Table 1. Site Locations and Descriptions**

Site location	Types of pellets used at site	Main pellet exposure pathways	Facility map and/or site location map
2451 Polvorosa Drive	Expanded polypropylene plastic pellets delivered by truck	Warehouse designed for pneumatic conveyance to off-load materials from semi-trucks to internal storage.	See Attachment B Loading dock
2085 Burroughs Avenue	High Density and Low Density Polyethylene (HDPE and LDPE, respectively) pellets with primarily rail deliveries	Warehouse designed for on and off loading pellets from semi-trucks trailers (in front parking lot) and from rail cars (on back side rail spur). The majority of the pellets are received by rail, and are off-loaded by pneumatic conveyance to internal and external storage.	See Attachment C Rail spur
1651 Aurora Drive	The site uses LDPE in pellet form delivered primarily by rail	Warehouse designed for pneumatic conveyance to off load pellets from rail cars to internal storage.	See Attachment D Rail spur
2020 Williams Street	The site uses LDPE and HDPE in pellet form delivered primarily by rail	Warehouse designed for pneumatic conveyance to off load pellets from rail cars to internal storage.	See Attachment E Rail spur

4. **Responsible Parties:** The named dischargers are responsible parties for discharging pre-production pellets into Oyster Bay waterways. The following four properties are considered the "Originating Sites."
  - a. **2451 Polvorosa Drive**
    - i. KANEKA occupied part of the property from at least April, 2003 through approximately June, 2009. During that time, KANEKA used expanded polypropylene plastic pellets in manufacturing automobile bumpers.
    - ii. DUDE, INC. owns the property. After KANEKA vacated the premises in 2009, expanded polypropylene plastic pellets left on the property, continued to discharge through the storm drain and via wind into the waterways at Oyster Bay. In summer 2010, KANEKA removed the remaining expanded polypropylene plastic pellets from the property and surrounding areas pursuant to Order No. R2-2010-0070.
    - iii. FOAMEX INNOVATIONS OPERATING COMPANY, INC. ("FOAMEX") is the present occupant with a limited partnership ownership rights.
  - b. **2085 Burroughs Avenue:** E\* POLY STAR occupies the property and continues to use high density and low density polyethylene (HDPE and LDPE, respectively) pellets in their manufacturing process.
  - c. **1651 Aurora Drive:** METRO POLY CORPORATION ("METRO POLY") occupies the property and continues to use LDPE pellets in their manufacturing process.
  - d. **2020 Williams Street:** UNIPOLY, INCORPORATED ("UNIPOLY") occupies the property and continues to use HDPE and LDPE pellets in their manufacturing process.
5. **Basis of Order:** Pre-production plastic pellets from the four Originating Sites continue to pollute and fill waters of the state and United States.
  - a. The various types and colors of plastic pellets, used at the Originating Sites, have traveled into the wetlands of Oyster Bay Regional Shoreline. As Water Board staff observed over the course of three inspections of the marsh during the 2009-2010 winter, while some pellets remain in the marsh, many pellets have moved out to the San Francisco Bay and are unrecoverable. As pellets still remain in the marsh (to varying degrees) and are exposed to storm water at the Originating Sites, the threat of continued release of pellets to the marsh remains. Furthermore, so long as pellets are in use at the Originating Sites, if appropriate best management practices are not employed in perpetuity, the threat of future pellet release is possible.
  - b. This Order requires the responsible parties to cleanup the marsh of remaining pellets they have discharged, and to cleanup miscellaneous trash as compensation for the pellets that have moved through the wetland out to the San Francisco Bay. This Order also requires cleanup of the Originating Sites and implementation of best management practices at the Originating Sites to abate ongoing and future pellet discharge.
  - c. Table 2 summarizes the compliance status and inspections at the Originating Sites.

**Table 2. Originating Site Inspections**

Site Location	Inspection Date	Purpose of Inspection	Compliance Status at Time of Inspection	Related Documents <sup>1</sup>
2451 Polvorosa Drive	10/27/2009	Initial visit	Industrial General Permit violations. Follow up inspection needed.	
	01/13/2010	Follow-up to initial visit	Industrial General Permit violations. Staff inspected the surrounding area and parking lot. Staff collected plastic pellets in the loading dock areas, at the cyclone-fenced borders, and near the railroad line border. Staff lifted the grate covering the storm drain inlet near the Site's loading docks and in the middle of the parking lot and observed plastic pellets inside the storm drain inlet walls.	Daily logs and photos
	01/20/2010	Follow-up	Industrial General Permit violations. Staff inspected the Site and observed a profuse amount of plastic pellets in the parking lot, in the drain inlet in the parking lot, and under the loading dock.	Inspection report, daily logs and photos
	08/11/2010 and 08/20/2010	Post-cleanup inspection.	Industrial General Permit violations. Staff observed site clean up activities. Site as clean as is reasonable. Fedex property next door could not be accessed for clean up at that time (it was later cleaned up).	Staff daily log
2085 Burroughs Avenue	03/24/2010	Initial visit	Industrial General Permit violations; follow up inspection needed	Inspection report
	12/15/2010	Enforcement follow up	Industrial General Permit violations; follow up inspection needed	Inspection report
1651 Aurora Drive	10/27/2009	Initial visit	Industrial General Permit violations; follow up inspection needed	Inspection report
	08/11/2010	Enforcement follow up	In compliance with the Industrial General Permit and on-site cleanup requirements,	Staff daily Log
2020 Williams Street	01/13/2010	Initial visit	Industrial General Permit violations; follow up inspection needed	Inspection report
	12/15/2010	Enforcement follow up	In compliance with the Industrial General Permit and on-site cleanup requirements.	Staff report

<sup>1</sup> All documents referenced are in the public files at the Regional Water Board and are available upon request. Should any interested party file a petition, the Prosecution Team will seek to include these referenced documents as incorporated herein and part of the administrative record.

- d. Table 3 describes the Water Board staff inspections at the wetlands at Oyster Bay Regional Park shoreline.

**Table 3. Wetland Inspections**

Specific Focus Area of Marsh	Inspection Date	Purpose of Inspection	Summary of Observations	Related Documents
Upper area near path entrance to parkland and two storm drain inlets	10/27/2009	Initial investigation	Staff saw some pellets embedded in the wetland vegetation and at the water line. Staff determined that they would need to return for more information.	
Upper (northern) area, approximately 100 square feet near path entrance to parkland and two storm drain inlets; lower area was another approximately 100-square foot area at the mouth of wetland accessible from business on Neptune Drive.	01/13/2010	Formal documentation of extent of pellets using modified Rapid Trash Assessment protocol	Staff took samples and photographs of northern and southern portions of wetlands. At high tide, a person could put her hand down into the water and scoop up about 100 pellets.	Photographs, daily logs
Mouth of wetland accessible from business on Neptune Drive	01/20/2010	Additional wet weather observation of state of marsh	Significantly larger quantity and pervasiveness of pellets accumulated at mouth of wetland, embedded in and under debris	Photographs, daily logs
Mouth of wetland accessible from business on Neptune Drive	05/25/2010	Additional wet weather observation of state of marsh	Significantly fewer pellets accumulated at mouth of wetland, evidencing that large quantity of pellets have moved out of the wetland and into San Francisco Bay.	Photographs

6. **Regulatory Status:** After inspections, Water Board Staff determined that all four Originating Sites require Industrial General Permit coverage because they have Standard Industrial Classification (SIC) code 2673: Plastics, Foil, and Coated Paper Bags and having industrial materials exposed to storm water.

- a. **Permit Coverage:** Three of the four facilities have recently obtained coverage under Industrial Storm Water General Permit Order 97-03-DWQ ("Industrial General Permit")<sup>2</sup> in compliance with Notices of Violation issued by enforcement staff.<sup>3</sup> FOAMEX

<sup>2</sup> The Industrial General Permit and information about the program may be found at: [www.waterboards.ca.gov/water\\_issues/programs/stormwater/industrial.shtml](http://www.waterboards.ca.gov/water_issues/programs/stormwater/industrial.shtml).

<sup>3</sup> All Notices of Violations and associated responses from the dischargers are in the public file with the Regional Water Board and are available upon request.

INNOVATIONS OPERATING COMPANY (FOAMEX) already had permit coverage for 2451 Polvorosa Drive for its own foam recycling manufacturing process, and did not receive a Notice of Violation. KANEKA no longer occupies any portion of 2451 Polvorosa Drive, and thus does not require permit coverage. Table 4 describes permit coverage for the four sites where the responsible parties have discharged plastic pellets that have transported to Oyster Bay Regional Shoreline.

- b. **Violations:** KANEKA, E\* POLY STAR, INC., METROPOLY, INC., and UNIPOLY, INC. have all operated industrial facilities with plastic pellets exposed to storm water without Industrial General Permit coverage, violating California Water Code section 13376.

**Table 4. Permit Coverage at Originating Sites**

Site Location	Responsible Party Named in Permit Coverage	Date Permit Coverage Obtained	WDID (site tracking number)
2451 Polvorosa Drive	FOAMEX	07/07/2009	2 011022211 Active 2 011013970 terminated on 11/16/2010
2085 Burroughs Avenue	E* POLY STAR	05/04/2010	2 011022621
1651 Aurora Drive	METRO POLY, INC.	04/06/2010	2 011022583
2020 Williams Street	UNIPOLY, INC.	04/06/2010	2 011022584

7. **Federal Clean Water Act:** The Federal Water Pollution Control Act (a.k.a. "Clean Water Act") requires any person who discharges any pollutant into a water of the United States to have a National Pollutant Discharge Elimination System ("NPDES") permit. The purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (33 U.S.C. §§ 1251 et seq.)
- a. **Violation:** All five Dischargers are violating Clean Water Act section 301 in that they have discharged and/or are likely to discharge plastic pellets into and filling the waters of the state and United States without complying with the NPDES program. (33 U.S.C. 1311.)
8. **Basin Plan Discharge Prohibitions:** The December 22, 2006, Water Quality Control Plan for the San Francisco Bay Basin ("Basin Plan") designates beneficial uses and water quality objectives for waters of the state, and includes programs to achieve water quality objectives.<sup>4</sup> The existing beneficial uses for the wetlands near and in Oyster Bay Regional Shoreline include: Estuarine Habitat, Preservation of Rare and Endangered Species, Water Contact Recreation, Non-Contact Water Recreation, Saltwater Habitat, Spawning, and Wildlife Habitat.

<sup>4</sup> The Basin Plan may be found at [www.waterboards.ca.gov/sanfranciscobay/basin\\_planning.shtml](http://www.waterboards.ca.gov/sanfranciscobay/basin_planning.shtml).

- a. **Discharge Prohibition 6:** Prohibits all conservative toxics and deleterious substances to waters of the Basin above those levels which can be achieved by a program acceptable to the Regional Water Board. The plastic pellets are deleterious in that fish, birds and other marine animals eat the pellets but are unable to digest them, thus starving to death. This process is described further in the following Adverse Impacts to Animals section. The plastic pellets will take decades or centuries to fully degrade and may concentrate and transport other, persistent, organic pollutants that may have toxic effects on plants, fish and wildlife.<sup>5</sup>
  - b. **Discharge Prohibition 7:** Prohibits the discharge of rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they could contact or where they would eventually be transported to surface waters, including flood plain areas. The plastic pellets are a solid waste in that they are associated with human habitation from manufacturing operations in accordance with California Water Code section 13050(d).
  - c. **Violations:** The Dischargers are violating these Basin Plan Prohibitions by discharging plastic pellets, a deleterious solid waste, into and filling the wetlands. The plastic pellets are negatively impacting the wetlands' beneficial uses by impacting the habitat and wildlife in the estuary.
9. **Adverse Impacts to Animals:** The plastic pellets that have discharged and threaten to discharge into the wetlands are potentially deleterious to birds, fish, and other marine animals. Wildlife may feed on small plastic pieces because they resemble food, and field studies have linked consumption of plastic with negative biological impacts. Accumulation of plastic pieces in an animal's stomach can cause feelings of satiation, potentially leading to the animal's malnutrition or starvation.<sup>6</sup> Plastics can also adsorb persistent organic pollutants from their surrounding aquatic environments, with studies finding that persistent organic pollutants adsorbed by plastics mirror levels of the pollutants found in sediment-dwelling invertebrates, such as mussels.<sup>7</sup> Plastic debris may then mediate the transfer of these pollutants to wildlife, as the ingested mass of plastic material has been observed to correlate positively to the persistent organic pollutant concentration in birds.
10. **Endangered Species Acts:** United States Geological Survey ("USGS") has surveyed and mapped a 7.5 foot topographic quad that includes the wetland area of Oyster Bay Regional Shoreline. In the area, USGS has identified certain species that may be present that are federally designated as threatened and endangered under the Endangered Species Act (16 U.S.C. §§ 1531-44) and the California Endangered Species Act (CA Fish and Game Code sec. 2050 et. al.). See Table 5.

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<sup>5</sup> Interagency Marine Debris Coordinating Committee, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, *Interagency Report on Marine Debris Source, Impacts, Strategies & Recommendations*, (August, 2008), p. 24. See also National Oceanic and Atmospheric Administration.

<sup>6</sup> *Id.*

<sup>7</sup> National Oceanic and Atmospheric Administration, U.S. Department of Commerce, *Proceedings of the International Research Workshop on the Occurrence, Effects, and Fate of Microplastic Marine Debris*, (September 9-11, 2008), p. 9.

**Table 5. Endangered and Threatened Species<sup>8</sup>**

Scientific Name	Common Name	Federal	California
Rallus longirostris obsoletus	California clapper rail	Endangered	Endangered
Sternula antillarum browni	California least tern	Endangered	Endangered
Reithrodontomys raviventris	salt-marsh harvest mouse	Endangered	Endangered
Ambystoma californiense	California tiger salamander	Threatened	Candidate Endangered
Charadrius alexandrinus nivosus	western snowy plover	Threatened	None

11. **Future Changes to Cleanup Standards:** The goal of this Cleanup and Abatement Order is to restore the beneficial uses of the wetlands area affected by the discharges from the Originating Sites. Due to the nature of the discharges, it is unknown at this time whether full restoration of beneficial uses to the wetlands is possible. If full restoration of beneficial uses is not technologically or economically achievable within a reasonable period of time, then the Dischargers may request modification to the cleanup standards. Conversely, if new technical information indicates that cleanup standards can be surpassed, the Regional Water Board may decide that further cleanup actions should be taken. Any requests to modify the standards set pursuant to this Order must be submitted in writing to the Regional Water Board for approval.
  
12. **CEQA:** This enforcement action is being undertaken by a regulatory agency to enforce a water quality law. Such action is categorically exempt from provisions of the California Environmental Quality Act ("CEQA") according to Guidelines section 15321 in Article 19, Division 3, Title 14 of the California Code of Regulations. This Order requires the submittal of detailed work plans that address cleanup activities. The proposed activities under the work plans are not yet known, but implementation of the work plans may result in significant physical impacts to the environment that must be evaluated under CEQA. The appropriate lead agency will address the CEQA requirements prior to implementing any work plan that may have a significant impact on the environment.
  
13. **Conclusion:** Based on the above findings, Water Board enforcement staff concludes that the Dischargers have caused or permitted waste to be discharged, or deposited where it can be and has been discharged, or threaten to discharge waste into waters of the state and the United States, and have created and threatened to create a condition of pollution. The discharged wastes have resulted in unnecessary and avoidable adverse impacts to beneficial uses of waters of the state and United States in historic violation of the Industrial General Permit, and in violation of the federal Clean Water Act and the Basin Plan. This Order, therefore, contains tasks for investigating, cleaning up, and abating existing and future impacts to Oyster Bay Regional Shoreline.

<sup>8</sup> California Natural Diversity Database, California Department of Fish and Game.

IT IS HEREBY ORDERED, pursuant to California Water Code sections 13304 that the Dischargers, or their agents, successors, or assigns, shall clean up and abate the effects described in the above findings as follows:

**A. Prohibitions**

1. Discharging any pollutant, including plastic pellets, without coverage under the Industrial General Permit is prohibited.
2. Discharging any pollutant, including plastic pellets, without complying with the NPDES permit program is prohibited.
3. Discharging any wastes, including solid wastes such as plastic pellets, that will degrade, or threaten to degrade, water quality or adversely affect, or threaten to affect beneficial uses of the waters in violation of the Basin Plan is prohibited.

**B. Cleanup and Abatement Tasks**

1. **Submit and Implement Corrective Action Plan for Cleaning Up Oyster Bay Regional Shoreline**

	<u>COMPLIANCE DATE</u>
SUBMIT CORRECTIVE ACTION PLAN	JULY 31, 2011
SELECT APPROVED BIOLOGICAL MONITOR BY	JULY 31, 2011
BEGIN IMPLEMENTING APPROVED PLAN NO LATER THAN	SEPTEMBER 01, 2011
COMPLETE CLEANUP NO LATER THAN	FEBRUARY 1, 2013

**Corrective Action Plan:** The Dischargers shall submit a Corrective Action Plan to clean up the plastic pellets and miscellaneous trash in the marsh areas of Oyster Bay Regional Shoreline. The plan shall include the following requirements, which are intended to reduce the likelihood of "take" of the endangered California clapper rail (*Rallus longirostris obsoletus*), salt marsh harvest mouse (*Reithrodontomys raviventris*), and the potential for adverse effects to the California seablite (*Suaeda cali/ornica*) during the required cleanup activities in the marsh. These requirements were stipulated by U.S. Fish and Wildlife Service and the California Department of Fish and Game in consultation with East Bay Recreation Park District staff biologist:

- a. Cleanup activities may not occur from February 1 through August 31 to avoid the California clapper rail breeding season. Trash and plastic pellet removal must be done by hand with crews limited to 25 people, working two weeks per month, for a period of three months each year. Removal of vegetation, in the course of the marsh cleanup, is strictly prohibited.
- b. Cleanup events must start at high tide (estimated for the specific site location) and continue for two hours. California clapper rails and salt marsh harvest mice are most vulnerable to disturbance and predation during extreme high tides when they are forced out of the marsh into upland areas that often lack cover. Therefore, cleanup activities

shall cease within two hours of extreme high tides (e.g., within two hours before and after high tides exceeding 6.0 feet NGVD at the Golden Gate Bridge adjusted to the timing of local tidal peaks).

- c. Before marsh cleanup commences, the Dischargers shall hire a qualified wetland biologist to survey the cleanup area for the California seablite. If California seablite is found in the marsh, the location of the California seablite must be flagged, and a minimum 50-foot buffer must be maintained around the California seablite plants.
- d. The Dischargers must provide the results of the California seablite surveys to the U.S. Fish and Wildlife Service before cleanup commences. If the California seablite is found, then cleanup activities must not commence until the Service has given approval to proceed. The results of the surveys should be reported to the California Natural Diversity Database. Unless new information reveals effects of the proposed project that may affect listed species in a manner or to an extent not considered, or a new species is listed, no further action pursuant to the Endangered Species Act is necessary for the proposed project.
- e. Cleanup activities must be conducted in the presence of and under direct supervision of a biological monitor, specifically approved by the U.S. Fish and Wildlife Service, who is familiar with the California clapper rail, salt marsh harvest mouse, California seablite, and any other special status species known or suspected to be in the area.
  - i. Prior to starting clean up activities overall and prior to starting cleanup activities each day, the cleanup crew must hold a "tail gate" meeting, led by the U.S. Fish and Wildlife Service-approved biological monitor, to discuss specific precautions and procedures to protect the special status species that may be on site.
  - ii. The biological monitor will look out for (and train the cleanup crew to assist in looking out for) raptors, herons, and gulls. This is particularly important considering the proximity of a waste transfer station (which attracts gulls) to the cleanup area. If raptors, herons, or gulls are present, the biological monitor should halt the cleanup activities and assess the risk to sensitive species before deciding whether to continue the cleanup.
  - iii. The biological monitor has the authority to shut down operations at any time if he/she finds that operations endanger any sensitive species in the vicinity.
  - iv. The biological monitor shall report to the East Bay Regional Park District, California Department of Fish and Game, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, and the Regional Water Board regarding their observations of wildlife activity in the area, including California clapper rails, salt-marsh harvest mouse, and other general wildlife such as wandering shrews, etc, and how the cleanup activities are affecting wildlife behavior.
- f. To the extent possible, the cleanup crew shall access the salt marsh by non-motorized boat such as canoe or kayak. This is a precaution to creating sudden disturbances, which may cause clapper rail to flush and become vulnerable to predators.
- g. While moving through the marsh, the cleanup workers shall do the following:
  - i. Keep noise to a minimum.

- ii. At all times, observe the environment they are walking/boating through to avoid disturbance.
- iii. Avoid using multiple pathways through the marsh. Use trails if they exist.
- iv. Plan and map their route to minimize environmental impacts and decrease running into hazards/barriers such as large channels.
- v. When looking for a suitable place to jump a channel, do not walk along the edge of the channel/slough because these areas provide nesting habitat for many species including the endangered California clapper rail. To find an alternate jump site, walk parallel to the channel at a distance where vegetation is lower in height and where visibility of the ground surface is greater. Choose channel jump sites where vegetation is lower or you can clearly discern what you are jumping onto.
- vi. In general, avoid walking adjacent and parallel to channels/sloughs.

**2. Cleanup the Originating Site at 2085 Burroughs Avenue**

	<u>COMPLIANCE DATE</u>
COMPLETE CLEANUP NO LATER THAN	AUGUST 31, 2011

To abate ongoing discharges from 2085 Burroughs Avenue, E\* POLY STAR shall remove all plastic pellets from the entire Originating Site, and surrounding upland areas where pellets have discharged. This may include vacuuming the storm drains immediately accessible to the Originating Site, and cleaning railroad ballast and other such cleanup activities.

**3. Install, Implement, Maintain, and Update Best Management Practices (BMPs) that Meet Best Available Technology Standard**

	<u>COMPLIANCE DATE</u>
INSTALL AND IMPLEMENT BMPs	OCTOBER 31, 2011
MAINTAIN AND UPDATE BMPs	ONGOING

- a. To abate ongoing discharges at 2085 Burroughs Avenue, 1651 Aurora Drive, and 2020 Williams Street, E\* POLY STAR, METRO POLY, INC., and UNIPOLY, INC. shall implement the following BMPs.
  - i. Pellet Handling. When handling pellets, care must be taken to avoid spills. If spills happen indoors or outdoors, they must be cleaned up immediately and disposed of (or recycled) in a leak proof container.
  - ii. Pellet Storage. Pellets stored outside, such as in a rail car or silo, must be in a vessel that is completely enclosed from wind and rain. Pellets stored inside may be contained in Gaylord boxes or sacks, but care must be taken to avoid the puncture or rupture of the storage containers. If spills happen indoors or outdoors, they must be cleaned up immediately and disposed of (or recycled) in a leak proof container.

- iii. Pellet Loading and Unloading. If vacuum unloading from outside storage area is used, there must be a complete seal between the storage container and the tube being used to offload the pellets. Secondary containment (such as a drip pan) must be used under the connection mechanism. A broom and dust pan or vacuum must be available at all times to allow for immediate cleanup of any spills.
  - iv. Spill and Leak Response. If spills happen indoors or outdoors, they must be cleaned up immediately and disposed of (or recycled) in a leak proof container.
  - v. General Housekeeping. Pellets must not be stored in a precarious manner that would increase the likelihood spilling or leaking pellets. Indoors, floors must be swept on a regular basis to avoid pellets leaving the building through open doorways. Outdoors, any release of pellets must be immediately cleaned up and disposed of (or recycled) in a leak proof container.
  - vi. Employee Training. All employees involved in the handling and/or use of pellets must be trained in "Zero Pellet Loss" activities.
- b. E\* POLY STAR, METRO POLY, INC., and UNIPOLY, INC. shall continue to operate best available technology ("BAT") procedures and equipment to avoid future discharges and to comply with the Industrial General Permit. BAT is a changing and evolving requirement. Thus, E\* POLY STAR, METRO POLY, INC., and UNIPOLY, INC. must keep abreast of improvements in their industry through active involvement in trade industry organizations, communication with City of San Leandro and Water Board staff, and/or their own research and innovation. E\* POLY STAR, METRO POLY, INC., and UNIPOLY, INC. shall then maintain and update their BMPs to meet BAT procedures and equipment to avoid discharges.

**4. California Wetlands Portal**

**COMPLIANCE DATE**

**SUBMIT COMPLETE WETLANDS TRACKER FORM**

**WITHIN SEVEN (7) DAYS  
FROM CORRECTIVE ACTION  
PLAN APPROVAL**

It has been determined through regional, state, and national studies that tracking of mitigation/restoration projects must be improved to better assess the performance of these projects, following monitoring periods that last several years. To effectively carry out the State's No Net Loss Policy for wetlands, the State needs to closely track both wetland losses and mitigation/restoration project success. Therefore, this Order requires the Dischargers to use a standard form to provide site information related to impacts and mitigation/restoration measures for their Originating Sites and for Oyster Bay Regional Shoreline.

The Dischargers are required to use the standard California Wetlands Project (formerly known as "Wetlands Tracker") form to provide Originating Site and Oyster Bay Regional Shoreline information describing impacts and mitigation/restoration measures. Within seven days from the approval of the Corrective Action Plan, complete the standard form and submit electronically to [habitatdata@waterboards.ca.gov](mailto:habitatdata@waterboards.ca.gov), or submit a hard copy to

both: 1) San Francisco Bay Regional Water Quality Control Board, to the attention of "California Wetlands", and 2) San Francisco Estuary Institute, 7770 Pardee Lane, Oakland, CA 94621-1424, to the attention of "California Wetlands". Instructions are available at [www.waterboards.ca.gov/sanfranciscobay/water\\_issues/programs/401\\_certs/Wetlands\\_Instructions.doc](http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/401_certs/Wetlands_Instructions.doc).<sup>9</sup>

### C. Provisions

1. **Cost Recovery:** The Dischargers are and shall be liable, pursuant to California Water Code section 13304, to the Regional Water Board for all reasonable costs actually incurred by the Regional Water Board and associated agencies to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order. Such costs include, but are not limited to, staff time for investigation of the discharge, preparation of this Order, review of reports and correspondence submitted pursuant to this Order, work to complete the directives specified in this Order, and communications between Water Board staff and parties associated with the cleanup and abatement of the discharged waste, including the Dischargers, City of San Leandro, interested members of the public, and other regulatory agencies. These four Originating Sites have been enrolled in a State Water Board managed reimbursement program. Reimbursement shall be made pursuant to this Order and according to the procedures established in that program. Any disputes raised by the Dischargers over reimbursement amounts or methods used in that program shall be consistent with the dispute resolution procedures for that program.
2. **Shared Submissions:** Regional Water Board enforcement staff encourages the Dischargers to share correspondence, technical reports, and other documents in an effort to accomplish the tasks assigned in this Order in the most efficient, resource saving manner. For example, one Corrective Action Plan may be submitted instead of four individual plans if all Dischargers are adequately represented in the submitted plan.
3. **Contractor/Consultant Qualifications:** Dischargers' reliance on qualified professionals promotes proper planning, implementation, and long-term cost-effectiveness of investigation, and cleanup and abatement activities. Professionals shall be qualified, licensed where applicable, and competent and proficient in the fields pertinent to the required activities. California Business and Professions Code sections 6735, 7835, and 7835.1 require that engineering and geologic evaluations and judgments be performed by or under the direction of licensed professionals.
4. **Report Any Changes in Ownership or Occupancy:** The Dischargers shall file a written report on any changes in an Originating Site's ownership or occupancy associated with the site described in this Order. This report shall be filed with the Regional Water Board within 30 days following a change in site occupancy or ownership.

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<sup>9</sup> If you have further questions, please contact Mike May of the San Francisco Estuary Institute at (510) 746-370 or by e-mail to [mikem@sfei.org](mailto:mikem@sfei.org).

5. **Document Distribution:** The Dischargers shall provide electronic or hard copies of all correspondence, technical reports, and other documents pertaining to compliance with this Order *upon request* within two weeks of the established directive deadline to the following recipients. The Assistant Executive Officer may modify this distribution list as needed.
  - a. City of San Leandro
  - b. California Department of Fish and Game
  - c. U.S. Environmental Protections Agency
  - d. U.S. Army Corps of Engineers
  - e. U.S. Fish and Wildlife Service
6. **Delayed Compliance:** The Dischargers shall notify the Regional Water Board Assistant Executive Officer if they are delayed, interrupted or prevented from meeting any of the compliance dates specified in this Order or a key milestone in their approved Corrective Action Plans. The Dischargers may request in writing an extension for compliance dates, stating the basis for their request and what new compliance dates they are requesting. The Regional Water Board has the authority to revise this Order.
7. **Enforcement:** If, in the opinion of the Assistant Executive Officer, the Dischargers fail to comply with the provisions of this Order, the Assistant Executive Officer may pursue further enforcement action. The Assistant Executive Officer may refer this matter to the Attorney General for judicial enforcement, issue a complaint for administrative civil liability, or any take any other applicable enforcement action. Failure to comply with this Order may result in the assessment of an administrative civil liability up to \$10,000 per violation per day, pursuant to California Water Code sections 13350, 13385, and/or 13268. The Regional Water Board reserves its right to take any enforcement actions authorized by law.
8. **Evidentiary Hearing before the Regional Water Board:** Any person affected by this action of the Regional Water Board may request an evidentiary hearing before the Regional Water Board. The Regional Water Board's Executive Officer may elect to hold an informal hearing or a "paper hearing" in lieu of scheduling a hearing before the Regional Water Board itself. If you decide to request an evidentiary hearing, send your request to the San Francisco Bay Regional Water Board Executive Officer, Attn: Bruce Wolfe. Please consider the following carefully:
  - a. The Regional Water Board must receive your request within 30 calendar days of the date of this Order.
  - b. Your request must include all comments, technical analysis, documents, reports, and other evidence that you wish to submit for the evidentiary hearing. However, please note that the administrative record will include all materials the Regional Water Board has previously received regarding these Dischargers. You are not required to submit documents that are already in the record.
  - c. The Executive Officer or Regional Water Board may deny your request for a hearing after reviewing the evidence.
  - d. If you do not request an evidentiary hearing, the State Water Board may prevent you from submitting new evidence in support of a State Water Board petition.

- e. Your request for an evidentiary hearing, if you submit one, does not stay the effective date of the Order, whether or not a hearing is scheduled.
  - f. A request for a hearing does not extend the 30-day period to file a petition with the State Water Board (see below). However, you may ask the State Water Board to hold the ~~petition in abeyance while your request for a hearing is pending.~~ (Refer to CCR Title 23 section 2050.5(d).)
9. **State Water Board Petition:** Any person aggrieved by this action may petition the State Water Board to review the action in accordance with California Water Code section 13320 and Title 23, California Code of Regulations, section 2050 et al. The State Water Board, Office of Chief Counsel, must receive the petition by 5:00 p.m. 30 days after the date this Order becomes final (if the thirtieth day falls on a weekend or state holiday, the petition must be received by the next business day).<sup>10</sup> This Order is effective upon the date of signature.
10. **Periodic Cleanup and Abatement Order Review:** The Regional Water Board may review this Order periodically and may revise it when necessary.



\_\_\_\_\_  
Thomas Mumley  
Assistant Executive Officer

\_\_\_\_\_  
June 7, 2011

Date

- Attachment A: Overview Originating Sites
- Attachment B: 2451 Polvorosa Drive Site Location Map
- Attachment C: 2085 Burroughs Avenue Site Location Map
- Attachment D: 1651 Aurora Drive Site Location Map
- Attachment E: 2020 Williams Street Site Location

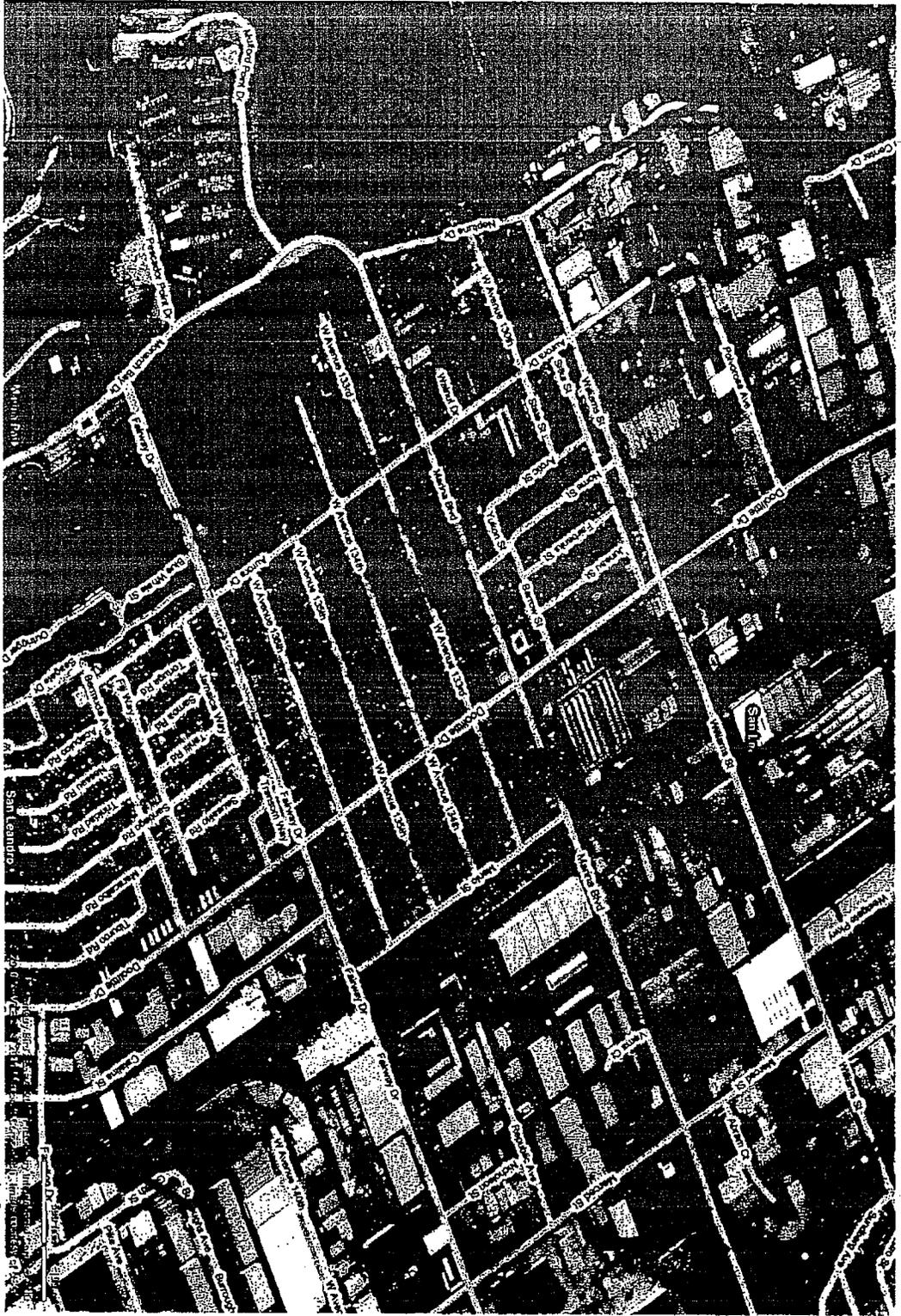
<sup>10</sup> Instructions for petitioning will be provided upon request or you may view them at:  
[www.waterboards.ca.gov/public\\_notices/petitions/water\\_quality/index.shtml](http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml)

## Attachment A

Map of San Leandro, Alameda County, California, indicating the approximate location of:

- (1) KANEKA TEXAS CORPORATION, DUDE, INCORPORATED, 2451 POLVOROSA DRIVE
- (2) E\* POLY STAR, INCORPORATED, 2085 BURROUGHS AVENUE
- (3) METRO POLY, INCORPORATED, 1651 AURORA DRIVE
- (4) UNIPOLY, INCORPORATED, 2020 WILLIAMS STREET
- (5) WATERS OF THE STATE, APPROXIMATELY 4.7 ACRES OF TIDAL SALT MARCH, SOUTHEASTERN EDGE OF OYSTER BAY REGIONAL SHORELINE

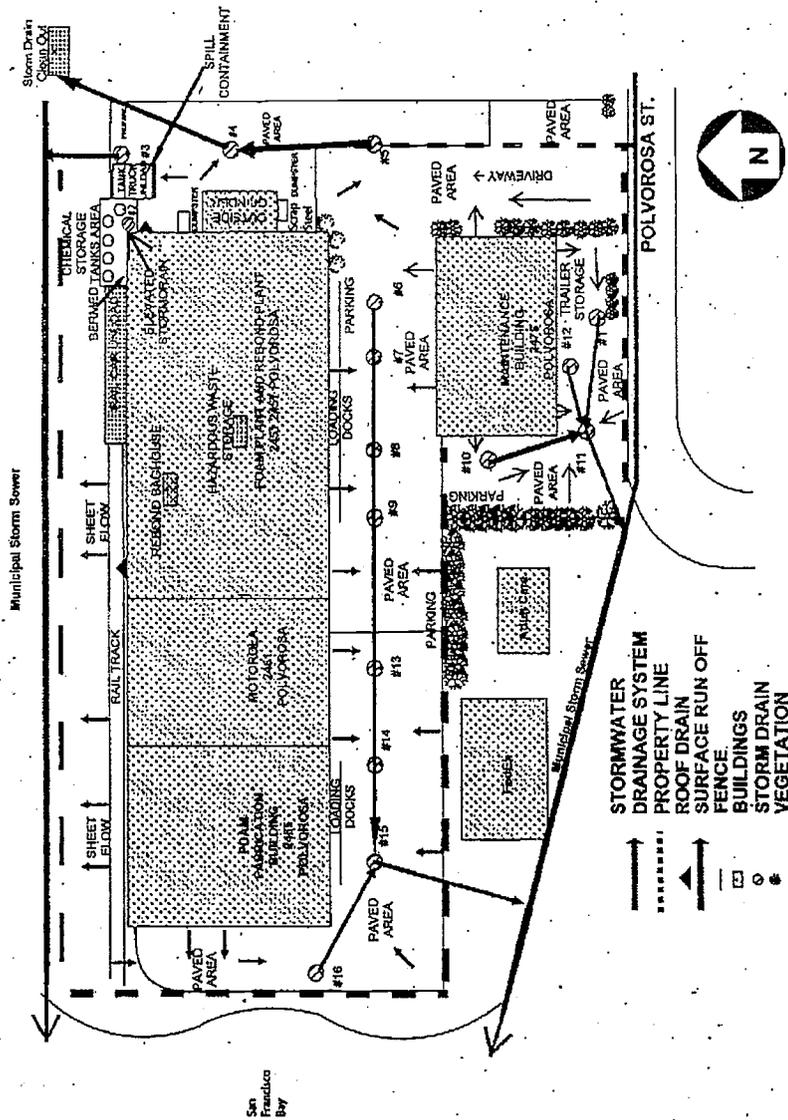
Cleanup and Abatement Order No. R2-2011-033



A-2

## Attachment B

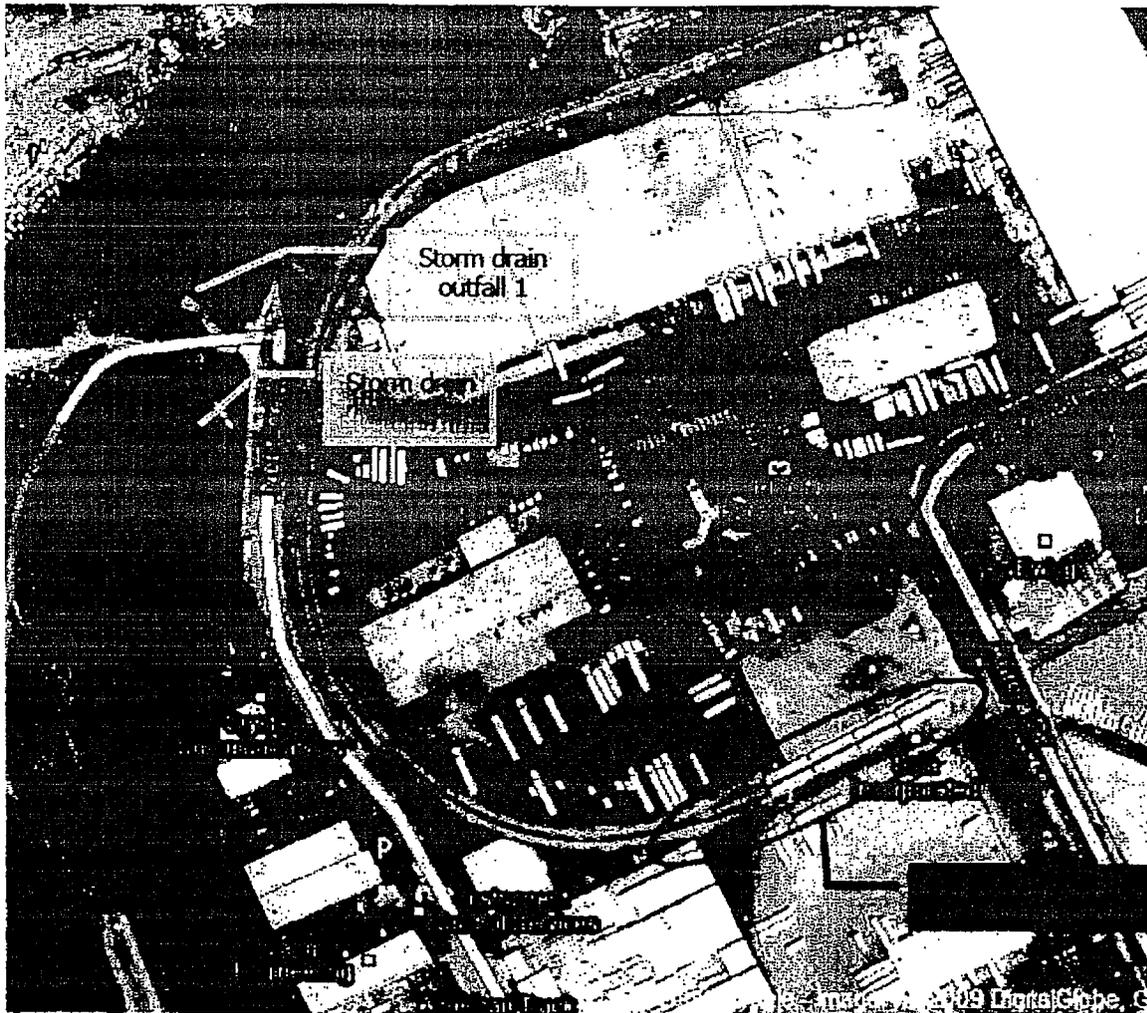
Kaneka & Dude, Inc., 2451, 2461, and 2465 Polvorosa Drive. Kaneka occupied 2465 Polvorosa. Expanded polypropylene plastic pellets were offloaded from truck trailers at the area labeled "Loading Docks."





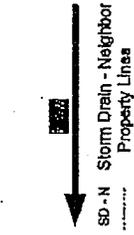
Attachment D

Metro Poly, 1651 Aurora Drive



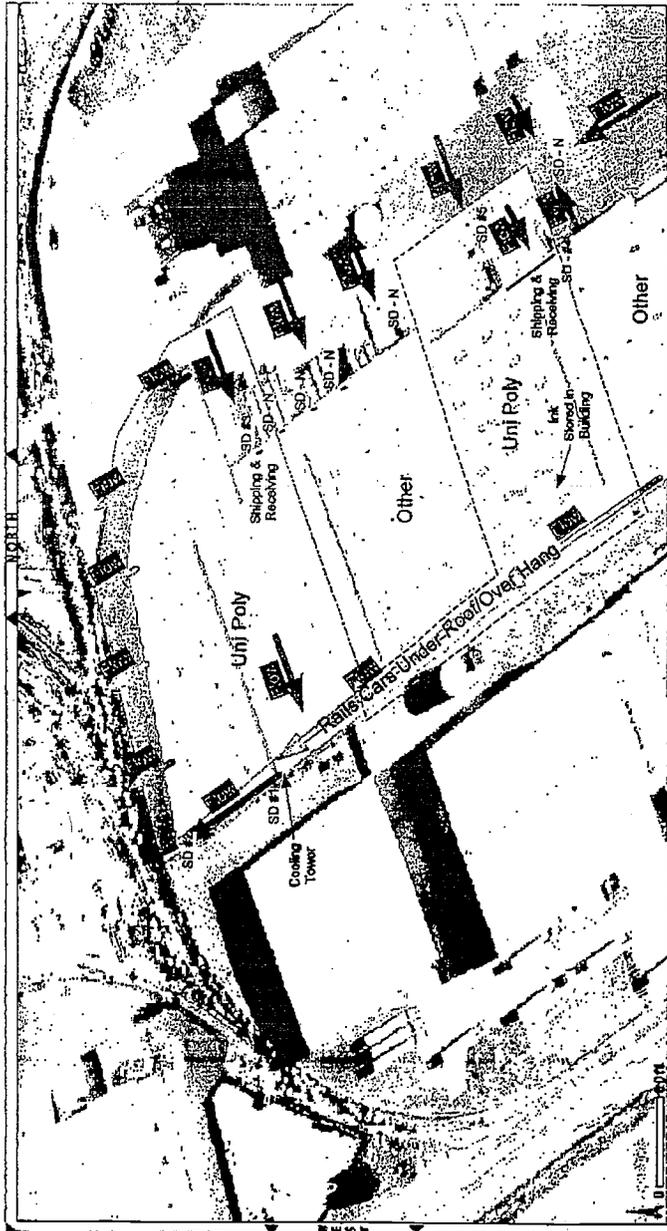
# Attachment E

Uni Poly, 2020 Williams Street. Rail cars are unloaded under roof in center of drawing.



Uni Poly Inc.  
2020 Williams Street  
San Leandro, CA 94577  
SWPPP Site Map  
04/01/2010

Note: Resin/Pellets are  
Unloaded From Rail Cars  
Along the Entire Length  
of the Roof Over Hang.



## REIMBURSEMENT PROCESS FOR REGULATORY OVERSIGHT

We have identified your facility or property as requiring regulatory cleanup oversight. Pursuant to the Porter-Cologne Water Quality Control Act, reasonable costs for such oversight can be recovered by the Regional Water Quality Control Board (Regional Water Board) from the responsible party. The purpose of this enclosure is to explain the oversight billing process structure.

### Introduction

The Porter-Cologne Water Quality Control Act authorizes the State Water Resources Control Board (State Water Board) to set up Cost Recovery Programs. The Budget Act of 1993 authorized the State Water Board to establish a Cost Recovery Program for the Site Cleanup Program (SCP). The program is set up so that reasonable expenses incurred by the State Water Board and Regional Water Boards in overseeing cleanup of illegal discharges, contaminated properties, and other unregulated releases adversely impacting the State's waters can be reimbursed by the responsible party. Reasonable expenses will be billed to responsible parties and collected by the Fee Coordinator at the State Water Board in the Division of Financial Assistance.

### The Billing System

Each cost recovery account has a unique charge number assigned to it. Whenever any oversight work is done, the hours worked are charged to the account number on the employee's time sheet. The cost of the hours worked is calculated by the State Accounting System based on the employee's salary and benefit rate and the State Water Board overhead rate.

State Water Board and Regional Water Board administrative charges for work such as accounting, billing preparation, general program meetings and program specific training cannot be charged directly to an account. This work will be charged to administrative accounting codes.

The Accounting Office totals these administrative charges for the billing period and distributes them back to all of the accounts based on the number of hours charged to each account during that billing period. These charges show as State Water Board Program Administrative Charges and Regional Water Board Program Administrative Charges on the Invoice.

The Overhead Charges are based on the number of labor hours charged to the account. The overhead charges consist of rent, utilities, travel, supplies, training, and personnel services. If there is no labor charged to the account during the billing period, there will be no overhead charges for that billing period with the exception of the last month of each fiscal year. This is due to the fact that the labor charges end June 30 for the current fiscal year. However, several kinds of overhead charges such as supply orders and travel expenses are paid after the fiscal year ends. The State Water Board Accounting Office keeps track of these charges and distributes them back to all of the accounts based on the number of hours charged to each account for the whole fiscal year that has just ended. Therefore, the quarterly statements for the last month of the fiscal year could show no labor hours charged for the billing period, but some overhead charges could be charged to the account.

Invoices are issued quarterly, one quarter in arrears. If a balance is owed, a check is to be remitted to the State Water Board with the invoice remittance stub within 30 days after receipt of the invoice. The Accounting Office sends a report of payments to the Fee Coordinator on a quarterly basis.

Copies of the invoices are sent to the appropriate Regional Water Boards so that they are aware of the oversight work invoiced. Questions regarding the work performed should be directed toward your Regional Water Board project manager. If the responsible party becomes delinquent in its quarterly payments, oversight work may cease immediately. Work will not begin again unless the payments are brought up-to-date.

### **Daily Logs**

A detailed description (daily log) of the actual work being done at each specific site is kept by each employee in the Regional Water Board who works on cleanup oversight at the property. This information is provided on the quarterly invoice using standardized work activity codes to describe the work performed. *Upon request, a more detailed description of the work performed is available from the Regional Water Board staff.*

### **Removal From The Billing System**

After the cleanup is complete, the Regional Water Board will submit a closure form to the State Water Board to close the account. If a balance is due, the Fee Coordinator will send a final billing for the balance owed. The responsible party should then submit a check to the State Water Board to close the account.

### **Agreement**

No cleanup oversight will be performed unless the responsible party of the property acknowledges that it agrees to reimburse the State for appropriate cleanup oversight costs. You may wish to consult an attorney in this matter. As soon as the letter is received, the account will be added to the active SCP Cost Recovery billing list and oversight work will begin.

### **Regional Water Board Dispute Resolution**

Based on the Regional Water Board's review and comment, the following section has been added as a San Francisco Bay Regional Water Board attachment to the SCP Cost Recovery Program's "Guide to the Billing Process" enclosure, "Reimbursement Process for Regulatory Oversight".

The Regional Water Board staff proposes to provide each responsible party (upon request) with daily logs of actual oversight work done and supporting accounting information for the responsible party's site. If, upon the receipt of the billing statement, the responsible party disputes the amount due, the responsible party may follow the dispute resolution procedure described below. If the responsible party follows the procedure, the Regional Water Board will not initiate, except as noted, enforcement action for failure to reimburse the State Water Board. During this procedure, the responsible party is encouraged to confer with Regional Water Board staff at any time to discuss the areas in question and attempt to resolve the dispute.

1. The responsible party must notify the Regional Water Board in writing within 30 calendar days of receipt of the billing statement to indicate that it disputes the billing statement and requests a meeting with the Regional Water Board Assistant Executive Officer. This notification must indicate the specific areas of dispute and provide all appropriate support documentation. Upon completion of the meeting, the Assistant Executive Officer will provide a recommendation to the Regional Water Board Executive Officer on the dispute and recommend an amount due, based on documentation provided by both the responsible party and the Regional Water Board staff at the meeting. The Executive Officer will submit a written decision and resultant amount due to the responsible party and specify the new due date by which the resultant amount due must be paid to avoid enforcement action. This due date will be not less than ten working days from the date of the Executive Officer's written decision.
2. If, upon receipt of the Executive Officer's written decision, the responsible party still disputes the amount due and so notifies the Executive Officer by the new due date, the Executive Officer will schedule an appeal hearing of the decision before the Regional Water Board at the next appropriate monthly meeting. The Executive Officer may also consider recommending that the Regional Water Board take enforcement action for the responsible party's failure to pay the resultant amount due by the new due date if the Regional Water Board finds the responsible party's appeal without basis. Any amount due and not appealed to the Regional Water Board will be considered a violation of the Regional Water Board's order.

#### **California Code of Regulations - Dispute Resolution**

If a dispute regarding oversight charges cannot be resolved with the Regional Water Board, Section 13320 of the California Water Code provides an appeal process to Regional Water Board decisions. Regulations implementing Water Code Section 13320 are found in Title 23 of the California Code of Regulations, Section 2050.

**BILLING RATES**

**SITE CLEANUP PROGRAM (SCP)  
BILLING COST EXPLANATION**

<b>Employee Salary and Benefits by Classification <sup>1</sup></b>	<b>ABR</b>	<b>SALARY SCALE</b>
Associate Governmental Program Analyst	AGPA	5,852 – 7,113
Engineering-Geologist	EG	9,213 – 11,201
Environmental Scientist	ES	4,092 – 7,596
Office Assistant(G)	OA	2,758 – 3,684
Office Assistant(T)	OA	2,850 – 3,759
Office Technician (G)	OT	3,509 – 4,268
Office Technician (T)	OT	3,572 – 4,341
Principal Water Resources Control Engineer	PWRCE	13,090 – 14,434
Sanitary Engineering Associate	SEA	6,597 – 8,016
Sanitary Engineering Technician	SET	4,543 – 6,339
Senior Engineering, Water Resources	SWRCE	9,811 – 13,090
Senior Engineering Geologist	SEG	10,802 – 13,127
Senior Environmental Scientist	SRES	7,248 – 8,749
Senior Water Resources Control Engineer	SRWRCE	10,802 – 13,127
Staff Counsel	STCOUN	6,216 – 10,411
Staff Counsel III	STCOUNIII	10,217 – 12,606
Staff Counsel IV	STCOUNIV	11,286 – 13,934
Staff Environmental Scientist	SES	7,242 – 8,745
Student Assistant	SA	2,663 – 2,938
Student Assistant Engineer	SAE	2,663 – 3,985
Supervising Engineering Geologist	SUEG	10,769 – 13,090
Supervising Water Resources Control Engineer	SUWRCE	10,769 – 13,090
Water Resources Control Engineer	WRCE	7,883 – 11,144

**Operating Expenses and Equipment <sup>2</sup> (both Headquarters and Regional Board offices)**

Indirect Costs (Overhead – cost of doing business) 135%

**Billing Example**

Water Resources Control Engineer	
Salary:	\$ 11,144
Overhead (indirect costs):	\$ <u>15,044</u>
Total Cost per month	\$ 26,188.

Divided by 176 hours per month equals per hour: \$ 148.80  
(Due to the various classifications that expend SCP resources, an average of \$ 150 per hour can be used for projection purposes.)

<sup>1</sup> The name and classification of employees performing oversight work will be listed on the invoice you receive.

<sup>2</sup> The examples are estimates based on recent billings. Actual charges may be slightly higher or lower.



**California Regional Water Quality Control Board**  
**San Francisco Bay Region**



Linda S. Adams  
Acting Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

CERTIFIED MAIL No. 7009 1410 0002 4300 8955      June 7, 2011  
Return Receipt Requested

Steven Choi  
E\* Poly Star  
2085 Burroughs Ave  
San Leandro, CA 94577

**SUBJECT:   CLEANUP AND ABATEMENT ORDER NO. R2-2011-0033  
FOR OYSTER BAY REGIONAL SHORELINE AND ORIGINATING  
SITES, SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

To Whom It May Concern:

Enclosed is a Cleanup and Abatement Order No. R2-2011-0033 (the Order) issued to E\* POLY STAR, INCORPORATED, for unauthorized discharges of pre-production plastic pellets into Oyster Bay Regional Shoreline and San Francisco Bay, and for the property at 2085 BURROUGHS AVENUE.

The Order is the legal document the San Francisco Bay Regional Water Board (Water Board) will use to oversee the investigation and cleanup of the pre-production plastic pellets. It requires the responsible parties to cleanup and abate the sites where the pellets originated (Originating Sites) and surrounding wetlands and related waterways where pellets have and continue to discharge.

**Cost Recovery Program**

Water Code section 13304 allows the Water Board to recover its reasonable expenses for overseeing the investigation and cleanup of illegal discharges, contaminated properties, and other releases adversely affecting or threatening to adversely affect the state's waters. The properties involved in this matter fall into the category for which the Water Board may recover oversight costs. Our cost recovery program is more fully described in the enclosed "Reimbursement Process for Regulatory Oversight."

*Preserving, enhancing, and restoring the San Francisco Bay Area's waters for over 60 years*

**Estimate of Work to be Performed and Expected Outcome**

Regional and State Water Board staff will be actively overseeing the cleanup and abatement of the Oyster Bay Regional Shoreline and the Originating Sites. We estimate that the following work has been or will be performed by the Regional Water Board staff for your site during fiscal year 2009-2012, ending June 30, 2012:

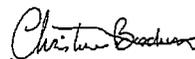
- 1) Draft and finalize the site's Order;
- 2) Review submittals required under the Order and associated plans and correspondence from you, your consultant(s), and/or interested parties;
- 3) Conduct site inspections before, during and after drafting of the Order, including following up on submittals required under the Order;
- 4) Conduct meetings regarding the site on issues relevant to the Order; and
- 5) Discuss issues related to the site and prepare written correspondence between the Water Board and interested parties.

To date, we have expended approximately 70 hours in the preparation of the Order, which includes drafting the Order, site inspections, and investigating your Originating Site and the wetlands. We estimate that an additional 100 hours will be required for our oversight of the site for the next state fiscal year. This is an estimate. The actual time needed will depend on the nature and extent of the necessary oversight. Based on our average billing rate of \$150 per hour, our estimated oversight cost for this site during fiscal years 2009-2012 is about \$25,500.

The "Billing Rates" enclosure lists the billing rates for employees expected to engage in the oversight of work on your site. In accordance with Water Code section 13365, we will identify more detailed, specific outcomes in the future as work progresses and more site-specific data become available.

If you have any questions, please contact me at (510) 622-2346 or via email to [cboschen@waterboards.ca.gov](mailto:cboschen@waterboards.ca.gov). If you are represented by counsel, please contact Laura Drabandt, Staff Counsel, at (916) 341-5180 or [ldrabandt@waterboards.ca.gov](mailto:ldrabandt@waterboards.ca.gov).

Sincerely,



Digitally signed  
by Christine  
Boschen

Christine Boschen,  
Section Leader  
Watershed Management Division

Enclosures:

Cleanup and Abatement Order No. R2-2011-0033  
Reimbursement Process for Regulatory Oversight  
Billing Rates

cc (via U.S. mail):

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East Bay Regional Park District  
2950 Peralta Oaks Court  
P.O. Box 5381  
Oakland, CA 94605-0381  
ATTN: Oyster Bay Regional Park

Steven Choi  
E\* Poly Star, Inc.  
2085 Burroughs Avenue  
San Leandro, CA 94577

Peter Kung  
Metro Poly Corporation  
1651 Aurora Drive  
San Leandro, CA 94577

Tommy Law  
Uni Poly, Inc.  
1651 Aurora Drive  
San Leandro, CA 9457

cc (via email):

Yuri Won, SWRCB, Office of the Chief Counsel  
Greg Gearheart, SWRCB, Division of Water Quality  
Laura Drabandt, SWRCB, Office of Enforcement  
Regional Water Board Lyris Enforcement email list  
John Camp, City of San Leandro  
Janna Rinderneck, California Department of Fish and Game  
Lr. Kyle Hiatt, California Department of Fish and Game  
Paul Hamilton, California Department of Fish and Game  
Mike Roemer, Alameda County Office of the District Attorney  
Greg Gohlsou, United States Environmental Protection Agency



**California Regional Water Quality Control Board**  
**San Francisco Bay Region**



Linda S. Adams  
Acting Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

CERTIFIED MAIL No. 7009 1410 0002 4300 8979      June 7, 2011  
Return Receipt Requested

Peter Kung  
Metro Poly Corporation  
1651 Aurora Drive  
San Leandro, CA 94577

**SUBJECT:   CLEANUP AND ABATEMENT ORDER NO. R2-2011-0033  
FOR OYSTER BAY REGIONAL SHORELINE AND ORIGINATING  
SITES, SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

To Whom It May Concern:

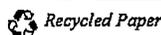
Enclosed is a Cleanup and Abatement Order No. R2-2011-0033 (the Order) issued to METRO POLY CORPORATION, for unauthorized discharges of pre-production plastic pellets into Oyster Bay Regional Shoreline and San Francisco Bay, and for the property at 1651 AURORA DRIVE.

The Order is the legal document the San Francisco Bay Regional Water Board (Water Board) will use to oversee the investigation and cleanup of the pre-production plastic pellets. It requires the responsible parties to cleanup and abate the sites where the pellets originated (Originating Sites) and surrounding wetlands and related waterways where pellets have and continue to discharge.

**Cost Recovery Program**

Water Code section 13304 allows the Water Board to recover its reasonable expenses for overseeing the investigation and cleanup of illegal discharges, contaminated properties, and other releases adversely affecting or threatening to adversely affect the state's waters. The properties involved in this matter fall into the category for which the Water Board may recover oversight costs. Our cost recovery program is more fully described in the enclosed "Reimbursement Process for Regulatory Oversight."

*Preserving, enhancing, and restoring the San Francisco Bay Area's waters for over 60 years*



**Estimate of Work to be Performed and Expected Outcome**

Regional and State Water Board staff will be actively overseeing the cleanup and abatement of the Oyster Bay Regional Shoreline and the Originating Sites. We estimate that the following work has been or will be performed by the Regional Water Board staff for your site during fiscal year 2009-2012, ending June 30, 2012:

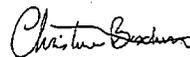
- 1) Draft and finalize the site's Order;
- 2) Review submittals required under the Order and associated plans and correspondence from you, your consultant(s), and/or interested parties;
- 3) Conduct site inspections before, during and after drafting of the Order, including following up on submittals required under the Order;
- 4) Conduct meetings regarding the site on issues relevant to the Order; and
- 5) Discuss issues related to the site and prepare written correspondence between the Water Board and interested parties.

To date, we have expended approximately 70 hours in the preparation of the Order, which includes drafting the Order, site inspections, and investigating your Originating Site and the wetlands. We estimate that an additional 80 hours will be required for our oversight of the site for the next state fiscal year. This is an estimate. The actual time needed will depend on the nature and extent of the necessary oversight. Based on our average billing rate of \$150 per hour, our estimated oversight cost for this site during fiscal years 2009-2012 is about \$22,500.

The "Billing Rates" enclosure lists the billing rates for employees expected to engage in the oversight of work on your site. In accordance with Water Code section 13365, we will identify more detailed, specific outcomes in the future as work progresses and more site-specific data become available.

If you have any questions, please contact me at (510) 622-2346 or via email to [cboschen@waterboards.ca.gov](mailto:cboschen@waterboards.ca.gov). If you are represented by counsel, please contact Laura Drabandt, Staff Counsel, at (916) 341-5180 or [ldrabandt@waterboards.ca.gov](mailto:ldrabandt@waterboards.ca.gov).

Sincerely,



Digitally signed  
by Christine  
Boschen

Christine Boschen,  
Section Leader  
Watershed Management Division

Enclosures:

Cleanup and Abatement Order No. R2-2011-0033  
Reimbursement Process for Regulatory Oversight  
Billing Rates

cc (via U.S. mail):

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Foamex Innovations Operating  
Company  
2451 Polvorosa Ave.  
San Leandro, CA 94577

Robert L. Hines, Esq.  
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Russ Building  
235 Montgomery Street  
San Francisco, CA 94104

East Bay Regional Park District  
2950 Peralta Oaks Court  
P.O. Box 5381  
Oakland, CA 94605-0381  
ATTN: Oyster Bay Regional Park

Steven Choi  
E\* Poly Star, Inc.  
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San Leandro, CA 94577

Peter Kung  
Metro Poly Corporation  
1651 Aurora Drive  
San Leandro, CA 94577

Tommy Law  
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Yuri Won, SWRCB, Office of the Chief Counsel  
Greg Gearheart, SWRCB, Division of Water Quality  
Laura Drabandt, SWRCB, Office of Enforcement  
Regional Water Board Lyris Enforcement email list  
John Camp, City of San Leandro  
Janna Rinderneck, California Department of Fish and Game  
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Paul Hamilton, California Department of Fish and Game  
Mike Roemer, Alameda County Office of the District Attorney  
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**California Regional Water Quality Control Board**  
**San Francisco Bay Region**



Linda S. Adams  
Acting Secretary for  
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<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

CERTIFIED MAIL No. 7009 1410 0002 4300 8986

June 7, 2011

Return Receipt Requested

Tommy Law  
Uni Poly, Inc  
1651 Aurora Drive  
San Leandro, CA 94577

**SUBJECT: CLEANUP AND ABATEMENT ORDER NO. R2-2011-0033  
FOR OYSTER BAY REGIONAL SHORELINE AND ORIGINATING  
SITES, SAN LEANDRO, ALAMEDA COUNTY, CALIFORNIA**

To Whom It May Concern:

Enclosed is a Cleanup and Abatement Order No. R2-2011-0033 (the Order) issued to UNI POLY INCORPORATED, for unauthorized discharges of pre-production plastic pellets into Oyster Bay Regional Shoreline and San Francisco Bay, and for the property at 2020 WILLIAMS STREET.

The Order is the legal document the San Francisco Bay Regional Water Board (Water Board) will use to oversee the investigation and cleanup of the pre-production plastic pellets. It requires the responsible parties to cleanup and abate the sites where the pellets originated (Originating Sites) and surrounding wetlands and related waterways where pellets have and continue to discharge.

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If you have any questions, please contact me at (510) 622-2346 or via email to [cboschen@waterboards.ca.gov](mailto:cboschen@waterboards.ca.gov). If you are represented by counsel, please contact Laura Drabandt, Staff Counsel, at (916) 341-5180 or [ldrabandt@waterboards.ca.gov](mailto:ldrabandt@waterboards.ca.gov).

Sincerely,



Digitally signed  
by Christine  
Boschen

Christine Boschen,  
Section Leader  
Watershed Management Division

Enclosures:

Cleanup and Abatement Order No. R2-2011-0033  
Reimbursement Process for Regulatory Oversight  
Billing Rates

cc (via U.S. mail):

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East Bay Regional Park District  
2950 Peralta Oaks Court  
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Oakland, CA 94605-0381  
ATTN: Oyster Bay Regional Park

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Janna Rinderneck, California Department of Fish and Game  
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Paul Hamilton, California Department of Fish and Game  
Mike Roemer, Alameda County Office of the District Attorney  
Greg Gohlson, United States Environmental Protection Agency

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EXHIBIT B

 **FARELLA BRAUN + MARTEL LLP**  
Attorneys At Law

Russ Building / 235 Montgomery Street  
San Francisco / CA 94104

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www.fbm.com

**ROBERT L. HINES**  
rhines@fbm.com  
D 415.954.4935

June 20, 2011

*Via Federal Express*

Thomas Mumley  
Assistant Executive Officer  
California Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, California 94612

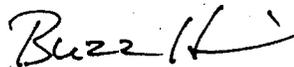
**Re: Cleanup and Abatement Order No. R2-2011-0033 For Oyster Bay Regional  
Shoreline and Originating Sites, San Leandro, Alameda County, California**

Dear Mr. Mumley:

Enclosed please find a copy of FXI, Inc.'s Petition for Review of the Water Board's California Water Code Section Cleanup and Abatement Order No. R2-2011-0033. We have transmitted the original Petition and exhibits today to the State Water Resources Control Board for timely filing.

We are filing this protective petition to meet California Water Code deadlines. However, we look forward to working with Water Board staff to resolve FXI, Inc.'s concerns regarding the Order. Thank you.

Sincerely,



Robert L. Hines

Enclosure  
Petition for Review



Thomas Mumley  
June 20, 2011  
Page 2

cc: (Via U.S. Mail w/encl.)

Christine Boschen  
Section Leader  
Watershed Management Division  
California Regional Water Quality Control Board  
San Francisco Bay Region  
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Laura Drabandt, Staff Counsel  
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State Water Resources Control Board  
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Sacramento, CA 95812

East Bay Regional Park District  
2950 Peralta Oaks Court  
P.O. Box 5381  
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ATTN: Oyster Bay Regional Park

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