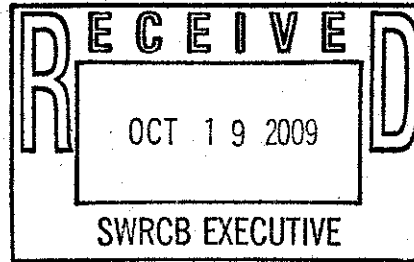


Supporting our watershed community through education and public outreach projects

Board of Directors

- Michael Boulland, President
- Mike Cox, Vice President
- William R. Jones, Treasurer
- Secretary
- Fredrick Dill, Director
- Kitty Monahan, Director
- Ron Soto, Director
- Claire Teel, Director



October 19, 2009

Ms. Jeanine Townsend, Clerk
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

Dear Mr. Charles R. Hopping and the Honorable Members of State Water Resources Control Board,

The Friends of Los Alamos Creek watershed is pleased to submit these comments to the State Water Resources Control Board (SWRCB) pursuant to the Notice of Opportunity to Comment for the "PROPOSED APPROVAL OF AN AMENDMENT TO THE WATER QUALITY CONTROL PLAN FOR THE SAN FRANCISCO BAY REGION (BASIN PLAN) TO ESTABLISH NEW WATER QUALITY OBJECTIVES, TOTAL MAXIMUM DAILY LOADS (TMDLs), AND AN IMPLEMENTATION PLAN, AND TO VACATE AN EXISTING WATER QUALITY OBJECTIVE, FOR MERCURY IN THE GUADALUPE RIVER WATERSHED."

After reviewing the issues in depth, the directors of FOLAW feel that the organization should remain focused on facilitating communication and education. The primary RPs already named and engaged by the San Francisco Bay Regional Water Quality Control Board (Regional Board) should be responsible for the broader issue of investigating and addressing the various mercury issues that might emanate from the abandoned mines and upland water bodies. Therefore, as a facilitating organization with respect to gathering and communicating upland watershed protection information and issues, the purpose of this letter is to verify and clarify understandings and concerns after a review of the above document and discussion with residents of the New Almaden area of the watershed. The intention is to document, for the record, issues that seem unclear to watershed residents and to verify public agency support of cleanup and restoration projects that affect property owners along Los Alamos Creek downstream if the mercury mines. It is also FOLAW's purpose to state its understanding of the TMDL as a result of discussions with staff from the Regional Board, Santa Clara County Parks and Recreation, and the Santa Clara Valley Water District.

Funding Mechanisms

Members and residents understand that it is the intent of the Regional Board to encourage the "District to seek funding" mechanisms to aid in the financing of the restoration work required for the TMDL implementation. We support using a multi-agency cooperatively approach to fund the projects that will help prioritize and expedite solutions to the problem. We feel a multi-agency approach is the only economical and efficient solution to addressing the needs of the regional Bay TMDL, needs that are dictated by the widespread nature of mercury in

FOLAW - P.O. BOX 122 - New Almaden - California 95042
Phone: 408 268 2703 - Fax: 408 9972079 - E-mail: folaw@folaw.com

the Bay Area and the many scientific uncertainties associated with its source, transport, and fate. (BPA-14)

Grant Funding Priority

We have observed that the individual Los Alamitos community members have neither the expertise nor a staff to work together as a single entity that can effectively apply for, administer, and use grant monies in an efficient way to remove the downstream wastes on behalf of the upstream sources. We understand that the responsible public agencies will be encouraged to pursue grants and other funding sources from public and private agencies as an efficient solution to the above community management problem. We believe that the widespread nature of mercury-impacted mining wastes in California make it imperative that SWRCB relieve the enormous potential problem associated with the issue of allocating responsibility for the clean up of impacted sediments along streams and rivers. It is confusing to innocent property owners when they are told they have to bear the responsibility for organizing and finding funding for the removal of sediments impacted (deposited) from upstream mine sources.

Concerned residents strongly agree with the Regional Board that the "District and its partners", with other multi-agencies are in the best position to rapidly and efficiently navigate the unique legal requirements and technical challenges associated with removing and stabilizing mining wastes along creek channels adjacent to and on private lands. On behalf of the general taxpayer, downstream residents feel the above Regional Board action will be the most efficient method to keep costs down for the restoration project, court challenges, legal fees and restorations costs for general taxpaying public. (BPA-14)

Challenges

A major challenge is that mercury does not behave entirely as a type of point source discharge of pollution that is easy to regulate and control. With no significant mining activity in the New Almaden District for about 40 years, and most significant mining having occurred over 100 years ago, we have found the present contamination has multiple sources that mix old mining impacts with impacts that continue from outside sources, such as atmospheric deposition and general human activity. We have observed that no water agencies have completed restoration projects that demonstrated that localized waste and sediment removal has a statistically significant effect on fish tissue mercury concentrations in the Bay. With these challenges ahead, multi-agencies will need to be encouraged by the State Water Resources Control Board to help provide the resources to pay for the scientific and technical research that will help both the public and the private parties solve these complex restoration challenges in years to ahead.

Creekside Property Owners Concerns

Several residents of the Los Alamitos Creek watershed area attended and listened to the comments at the October 8th, 2008 meeting of the Regional Board in Oakland, California. The Regional Board members and staff stated their intent to recognize and address the Los Alamitos downstream property owner's concerns. The Los Alamitos Creek residents heard the recommendation from the Regional Board that the responsible local agencies continue to take the lead to clean up the mining wastes anywhere they may have been deposited along the water courses and pose a significant threat to water quality (see BPA page 14). Concerned residents also acknowledge the efforts in the field to begin the restoration work in the upland

FOLAW - P.O. BOX 122 - New Almaden - California 95042

Phone: 408 268 2703 - Fax: 408 9972079 - E-mail: folaw@folaw.com

stream areas. None the less, some members of the community are concerned that restoration projects do not restore the streams to their naturally eroding nature but rather engineer a non-eroding replacement channel that may cause a future increase in downstream erosion and mercury loads to the bay.

It is essential that the proposed remediation efforts are studied for their risks and effectiveness before these solutions are implemented as a standard mercury cleanup technique used in the watershed and throughout California. It is extremely important to check for technique validation so that private and public landowners are not further damaged by upstream sources and unintended consequences. Important facets of the mercury problem may be damaged in the restoration actions unless the funding mechanisms encourage projects that adequately assess the benefits and risks. (BPA-14)

Waste Clean Up Laws

The concerned community understands the problem of an implied consent to liability under the water protection and waste cleanup Water Code laws. The Board states in the Guadalupe Basin Plan that the "District" will take responsibility to be the technical lead for the mining wastes discharged to the creeks. "The creekside property owners are responsible to provide reasonable access to the creek..." We believe this means that creekside property owners are not responsible for funding. This is far from certain in communications with district staff members. We think the responsible parties have the resources and experience necessary to remove the wastes and restore impacted streams in the most efficient method. This needs to be communicated in a definitive statement of responsibility. (BPA-14)

Good Samaritan Law

Many residents are concerned that the Water Code laws, even with the Good Samaritan Law (Water Code 5.7) mentioned in the TMDL (BPA-12) may not be enough to aid and protect innocent downstream residents who might want to help cleanup in some way and/or control the impact from upstream waste discharges. Some residents are concerned that the Good Samaritan laws might relieve mine owners from responsibility for downstream impacts, even while their abandoned mines continue to discharge waste indefinitely (Water Code 5.7.3). As a solution, residents would like the SWRCB and Regional Board to make a definitive statement of the responsibility of the upstream mine owners for the cleanup of the mining wastes deposited along downstream channels. Specifically, we request the board relieve those innocent parties downstream who have no complicity in the contamination of the watershed.

Legal Precedent

In cases of industrial pollution, such as from mine processing plants, it should be the source that bears responsibility for the cleanup of waste transported off the site. Community members will be more cooperative if they are protected from liability for the impacts that originate from upstream sources.

Legislative Solutions

Some residents encourage a legislative solution, because the mercury problem potentially impacts large numbers of innocent downstream property owners along impacted waters throughout the State. If the SWRCB is unable to make a definitive allocation of responsibility, perhaps a recommendation to the California State Legislature could prompt action to help correct this situation. One solution might be to change Section 5.7.4 of the Water Code

to include protection for non-responsible innocent downstream property owners. We think that if downstream property owners have the same relief from joint and several liabilities as Good Samaritans undertaking abandoned mine land cleanup, it will resolve open questions about liability and facilitate additional public and private funding for creek restoration projects.

Adaptive Implementation

With respect to the TMDL and BPA as technical documents, we understand and appreciate that they provide for "Adaptive Implementation" and "Best Practice" solutions as new scientific information and studies become available. We recognize the TMDL document has many serious unresolved issues due to the limits of science and certainty. We are most concerned that parties are not forced to restore sediment total mercury to concentrations that are lower than pre-mining conditions for the specific area in question. (BPA-18)

We understand that the Guadalupe Basin Plan – Amendment referred to above is for the restoration of the Los Alamitos Watershed. This assumes that concerns and statements listed above by the Friends of Los Alamitos Watershed are correct, are the intent of the Guadalupe Basin Plan – TMDL and become part of the official board records.

FOLAW members' admire the foresight of the staff to support adaptive implementation and allows for public input in order to promote changes and modifications to the TMDL that better support the goal of a clean Watershed. We thank you for allowing us to communicate community concerns and suggestions. Please note that Secretary, Dr. Roberta Lamons has not approved this letter and has sent her own comments under separate cover.

Sincerely,

Michael Boulland and the following undersigned Concerned Residents of Los Alamitos Creek

Michael F. Cop

responsibility, perhaps a recommendation to the California State Legislature could prompt action to help correct this situation. One solution might be to change Section 5.7.4 of the Water Code to include protection for non-responsible innocent downstream property owners. We think that if downstream property owners have the same relief from joint and several liabilities as Good Samaritans undertaking abandoned mine land cleanup, it will resolve open questions about liability and facilitate additional public and private funding for creek restoration projects.

Adaptive Implementation

With respect to the TMDL and BPA as technical documents, we understand and appreciate that they provide for "Adaptive Implementation" and "Best Practice" solutions as new scientific information and studies become available. We recognize the TMDL document has many serious unresolved issues due to the limits of science and certainty. We are most concerned that parties are not forced to restore sediment total mercury to concentrations that are lower than pre-mining conditions for the specific area in question. (BPA-18)

We understand that the Guadalupe Basin Plan - Amendment referred to above is for the restoration of the Los Alamitos Watershed. This is assumed that concerns and statements listed above by the Friends of Los Alamitos Watershed are correct, are the intent of the Guadalupe Basin Plan - TMDL and become part of the official board records.

FOLAW members' admire the foresight of the staff to support adaptive implementation and allows for public input in order to promote changes and modifications to the TMDL that better support the goal of a clean Watershed. We thank you for allowing us to communicate community concerns and suggestions. Please note that Secretary Lamons has not approved this letter and has sent her own comments under separate cover.

Sincerely,

Michael Boulland

Michael Boulland and the following undersigned Concerned Residents of Los Alamitos Creek

Michael S. Cop

Art Boudewalt

~~*[Signature]*~~
Jean Fuller
[Signature]
[Signature]
CLARE TEE

Fred Dell
Wm. R. Jones
Lotty Monahan