

Comment 1

One letter representing four commenters (6) documented their opposition to the proposed settlement and urged it to be withdrawn. The commenters indicated that efforts should be redoubled to find a suitable location for restoration within the immediate area of damages instead of at a significant distance from the identified contaminated sites. The commenters note that restoration projects should serve to repair and offer some modicum of restoration to impacted areas, specifically focusing devoting restoration funding and projects in communities overburdened and harmed by polluters for many decades. The commenters also stated that the Department needs to consult suggested reports and make greater effort to consult local constituents and organizations that represent impacted overburdened communities in an effort to properly identify, prioritize, and recommend restoration sites.

Response 1

As trustee of the State's natural resources (land, air, water, and living resources), the Commissioner of Department has the fiduciary responsibility to protect and, where an injury occurs, to seek restoration and compensation for injuries to our vital resources. Accordingly, when assessing any proposed restoration project to compensate for natural resource injuries, Department considers whether the ecological benefits of the proposal will fully abate any injury to pre-discharge condition (primary restoration) and compensate the public for lost use (compensatory restoration) rather than focusing on the cost of any restoration project. Further, Article VIII, § II, ¶ 9 of the New Jersey Constitution requires that revenue derived from "all settlements and judicial and administrative rewards relating to natural resources damages" be applied to "repair, restore, or replace damaged or lost natural resources ... or permanently protect the natural resources of the State" or pay legal and other costs.

Here, Kinder Morgan seeks to compensate the public for natural resource injuries caused by hazardous discharges from their five waterfront sites in Fords, Bayonne, Garfield, Harrison, and Newark into the Raritan River, Passaic River, Newark Bay, and the Kill Van Kull. While this agreement will not result in any significant monetary revenue, the scope of its project is nonetheless an appropriate pursuant to the Constitution because it is being directly applied to "repair, restore, or replace damaged or lost natural resources" in the same estuary system as where the injury occurred.

When approached by Kinder Morgan to voluntarily settle its potential liability, Department conducted an assessment of the company's potential contributions to natural resource injuries through the use of a habitat equivalency analysis ("HEA"). The HEA compared Kinder Morgan's potential contributions to natural resource injuries to the ecological benefits that would be achieved through completion of the proposed restoration project – removal of the Head Gates Dam as well as certain water quality and access improvements to the historically significant Raritan Power Canal. In so doing, Department reviewed available site-related remedial records and historical operational records documenting the timing of site activities that likely resulted in natural resource injuries together with other available records related to area conditions. Department used this information to quantify the injuries, which informed the determination of what was necessary to restore and compensate for Kinder Morgan's potential contributions to the natural resource injuries. The assessment showed that the restoration project proposed by the company would completely offset the potential injuries by improving water quality, reducing flooding, enhancing safe recreational opportunities, and restoring migratory anadromous fish migration in the Raritan Watershed.

When evaluating the proposed restoration project, the Department considered the nexus to the Kinder Morgan sites as well as the ability to most directly offset the injury and examined several areas and types of projects for potential restoration. The injuries attributable to the Kinder Morgan sites primarily included impacts to estuarine sediments and food webs. While these types of injuries are typically restored through the restoration and creation of estuarine habitat within intertidal wetlands, in conducting this assessment, the Department found limited opportunity for habitat

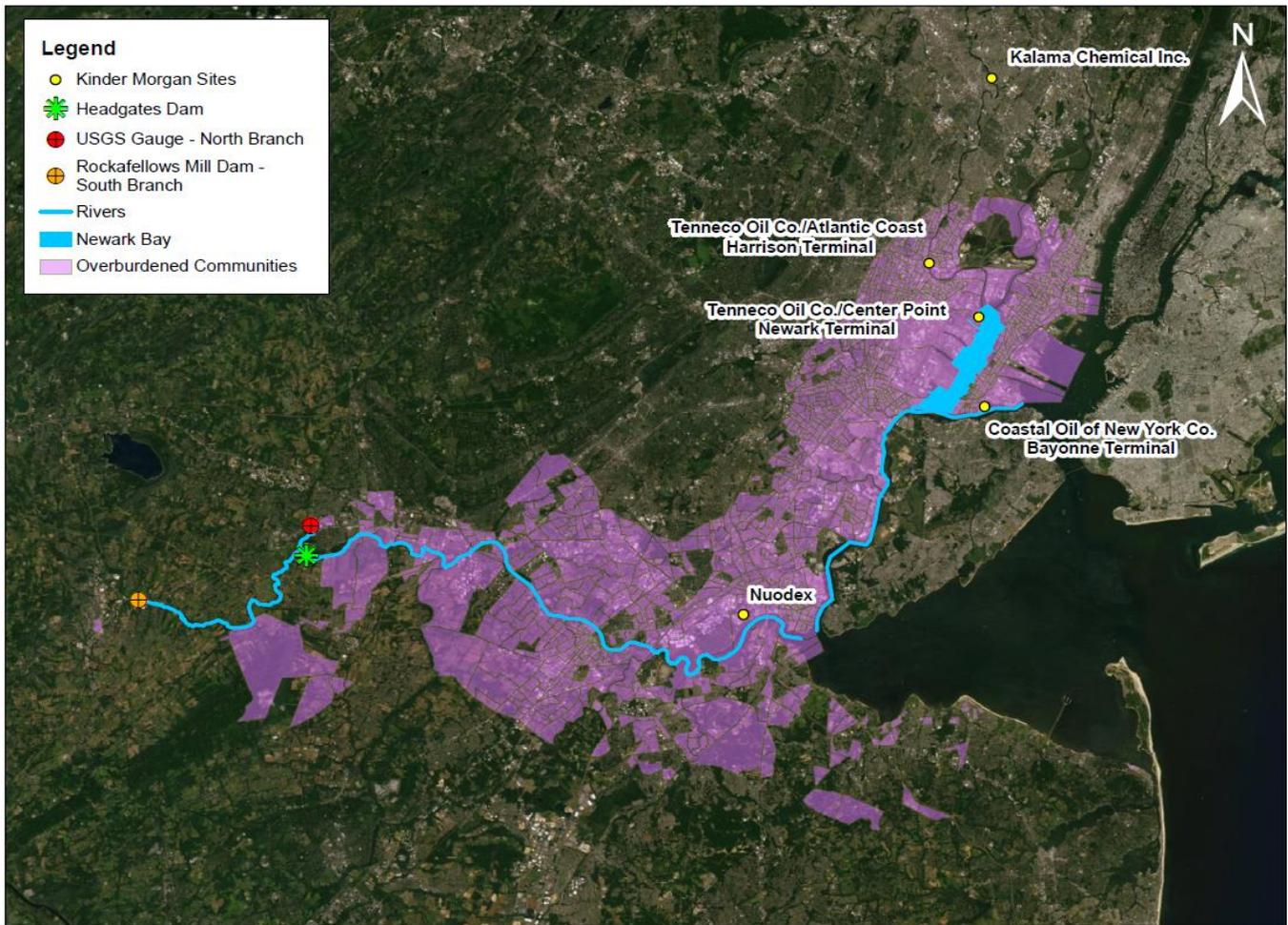
restoration in the vicinity of the affected sites due to a lack of available wetlands and the largely developed environment. Due to the lack of restoration opportunities near the injured sites, the Department determined that removing the Headgates Dam represented a suitable alternative based on the estuary-wide ecological and recreational benefits and its ability to completely offset the potential injuries.

While the restoration will occur approximately 19 river-miles from the nearest site where Kinder Morgan discharged hazardous material, the project is hydraulically and ecologically connected to the affected areas as both the injury and restoration will occur in the Hudson-Raritan estuary: (1) one of the five sites (Nuodex) is unquestionably in the immediate area of the dam removal; (2) the remaining sites are at minimum in the same water region as the dam removal; (3) any closer conceptual projects to the remaining four sites will have a far less significant uplift potential; and (4) the HRE is hydraulically and ecologically complex such that benefits from one river directly uplift those of other rivers within the HRE.

Conceptual restoration projects in closer proximity to four of the five sites would face substantial hurdles that do not burden the Headgates dam project: most sites are contaminated and would need to be remediated first, several are privately owned and would likely need to be purchased, most face a real risk of re-contamination from sediment and stormwater runoff, several face erosion risk (which might undo all restoration work), and most are 'attractive nuisances.' Further, these sites are conceptual, meaning that Kinder Morgan would need years of feasibility studies and the acquisition of title or the right to enter the property, something not required with Headgates Dam.

Fish species (shad, striped bass, etc.) impacted by the sites would directly benefit from a more free-flowing ecological environment and associated increased habitat, improved water quality, and greater ability to forage, migrate, and spawn further upstream. Recreational opportunities will also be created with this project that include increased paddle craft access, more fishing opportunities for different fish species, and improvements in human safety. Given the hydraulic and ecological connection of the affected sites to these estuaries, benefits are expected in the proximity of the subject sites.

Because the injuries occur in or near several historically-underserved and underrepresented overburdened communities (as defined under N.J.S.A. 13:1D-158), the Department also considered the presence of overburdened communities within five miles of the Raritan River. The Department identified 66 overburdened communities within a five-mile buffer of the area most positively impacted by the restoration project (see image below, overburdened communities highlighted in pink) that are expected to benefit from the that will benefit from the project (see attached).



Notwithstanding, the Department takes seriously the concerns raised by the Commenters. As it continues to rebuild its natural resource damages program to compensate the public for injuries, Department remains committed to identifying and completing restoration projects in close proximity to the sources of these injuries as possible and ensure that the principles of equity and environmental justice remain at the forefront of its decisions.

In furtherance of this commitment, the Department has conducted the majority of its restoration work in overburdened communities, including a \$60M grant program for public access projects and ecological restoration in the Newark Bay Complex and Lower Passaic River, the Harrison Avenue Landfill Restoration in Camden, Lincoln Park restoration in Jersey City and the Woodbridge River Restoration. The Department has also committed to implementing the Liberty State Park Ecological Restoration which will meet the diverse needs of the surrounding community with a design including both passive and active recreational amenities. Overall, ONRR has or is currently funding over \$220M in restoration projects in New Jersey municipalities that have overburdened communities and will continue to prioritize projects that will occur within or directly benefit overburdened communities. For additional details, see: <https://www.nj.gov/dep/nrr/>

Comment 2

Five commenters (1,2,4,5,7) offered support of the settlement.

Response 2

The Department acknowledges and thanks the commenters for the support.

Comment 3

Four commenters (1,2,4,5) highlighted the ecological uplift that is likely to occur from the removal of the Head Gates Dam. This included improvements to water quality, migratory fish passage and access to ancestral spawning and maturation habitat for multiple species including blueback herring, alewife, American eel, American shad, and striped bass.

Response 3

The Department acknowledges and thanks the commenters for the support.

Comment 4

Two commenters (1,4) highlighted recreational benefits associated with removal of the Head Gates Dam including kayaking, canoeing, fishing, and wildlife viewing.

Response 4

The Department acknowledges and thanks the commenters for the support.

Comment 5

Two commenters (2,3) raised concerns about maintaining water flow through the adjacent historic Raritan Power Canal during and after the dam removal. Concerns included potentially degraded environmental conditions within the canal that may impact wetlands and wildlife. Commenters also raised concerns that should water flow be diverted, the Canal would suffer aesthetically and become a source of odors.

Response 5

Currently, little water from the Raritan River makes its way to the canal as the canal has been modified from its original design; the proposed project would increase water flow to the canal. Phase 1 of this project would replace the sanitary sewer line. Phase 2 includes the design, design approval, permitting, subcontracting, and construction of a replacement Raritan Power Canal water supply at the head of the Canal, redirecting water to the canal. Phase 3 includes design, permitting, and construction/dam removal. See Appendices B and C for more information and proposed schedule, respectively. The new water source that will be provided as a direct result of this project will be an improvement over the existing water supply conveyance. Given that the existing water supply will not be altered until the new and improved water source is operational, there will be no expected change in odor during construction. The new water source will likely provide more volume than what currently exists, and for that reason, may lead to less odor from the canal once operational.

Comment 6

One commenter (5) described the difficulties in siting fish passage projects in the industrialized areas in northeastern New Jersey, and the high ecological uplift that can be yielded because of these actions. Noted attempts were to explore fish ladders at Shadow Lake Dam on the Navesink River, smaller obstacles on the Second River, and removal of the Dundee Dam on the Passaic River. Issues included nearby structures and obstacles, and federal agencies' concerns with re-entraining contaminated sediments in more polluted waterways.

Response 6

The Department acknowledges the commenter's experiences with the difficulties in siting fish passage projects involving fish passage structures and dam removals. Building from the Department's prior experience with dam removals and fish passage projects, the Department determined that removing the Head Gates Dam will result in a high level of ecological uplift. Fish species (shad, striped bass, etc.) impacted by the sites would directly benefit from a more free-flowing ecological environment and associated increased habitat, improved water quality, and greater ability to forage, migrate,

and spawn further upstream. Recreational opportunities will also be created with this project that include increased paddle craft access, more fishing opportunities for different fish species, and improvements in human safety. ONRR conducts outreach and engages stakeholders to solicit potential projects that may offset natural resource injury. ONRR further evaluates potential projects for feasibility and proceeds to design and construction, provided ample funding exists. This settlement was reached after a cooperative responsible party approached the Department to resolve its outstanding natural resource damage liability. ONRR continues to accept projects for consideration suggested by stakeholders and encourages cooperative responsible parties to settle their natural resource damage liability.

Comment 7

One commenter (1) expressed concerns with short term sediment transport impacts following dam removal and confidence in planning processes to reduce potential impacts.

Response 7

Three other dams on the main stem of the Raritan River have been successfully removed, with no known negative consequences from sediment release. The Office of Natural Resource Restoration will oversee the project to ensure no such impacts occur (see Appendix B). The responsible party must obtain all required permits and approvals prior to dam removal, which will address the short-term water quality impacts caused by sediment releases and seek to avoid or minimize any negative effects. The permitting process requires detailed modeling that evaluates sediment flow and changes to flooding, if any. Any potential negative effect shown by the modeling or permitting process will be avoided or minimized. Permits required for this project will be posted for additional public comments in accordance with applicable regulations.

Comment 8

One commenter (5) discussed concerns with the nexus between the proposed Head Gates Dam removal as restoration and potential geographical disconnect from the natural resource damages that are the subject of the proposed settlement, ultimately concluding that the location of the restoration is appropriate. This commenter noted that the greatest amount of natural resource damages occurred at the Neuodex site located in Woodbridge, which is near the mouth of the Raritan River. The commenter also noted the Department's actions in soliciting and awarding grants to provide restoration projects in Newark, Harrison, and Garfield, and encouraged the Department to use other restoration dollars in the Bayonne area.

Response 8

The Department acknowledges the commenter's discussion, and thanks them for their support of the restoration and for recognizing other restorations in the lower Passaic River and Newark Bay Complex areas. For further information responsive to this comment, please see Response to Comment 1 above.