

MUNICIPALITY OF ANCHORAGE



Office of the Municipal Attorney

Telephone: 907-343-4545

Fax: 907-343-4550

Mayor Suzanne LaFrance

September 4, 2024

Rachel Bylsma
Deputy Chief of Staff
Office of the Governor
State of Alaska

Ms. Bylsma,

On behalf of the Municipality of Anchorage, including Mayor LaFrance and the Anchorage Assembly, the Municipal Attorney's Office respectfully submits the enclosed brief in response to the Governor's August 15, 2024, letter regarding the Final Proposed Fish and Wildlife Program, Eklutna Hydro Project, which requested the Municipality's perspective on six specific issues to aid the Governor's efforts to review the final program and reconcile differences between the parties.

The Municipality looks forward to presenting its position at the upcoming September 9, 2024, meeting.

Sincerely,

Eva R. Gardner, Municipal Attorney

/s/ Joseph F. Busa

Joseph F. Busa, Deputy Municipal Attorney

**The Municipality of Anchorage’s Brief Addressing the Governor’s Questions about
the Final Proposed Fish and Wildlife Program, Eklutna Hydro Project**

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INTRODUCTION AND SUMMARY

The Governor has a unique opportunity to make a decision that could lead to unprecedented public benefits and unleash innovation. He is not limited to choosing from a small menu of disappointing options. He is instead empowered to review all proposals, reconcile differences between them, and render the decision that best serves the public interest by protecting, mitigating damage to, and enhancing fish and wildlife. This gives the Governor the freedom to take the best of each proposal and craft a final program that could result in re-watering the entire Eklutna River, providing the conditions necessary for the return of sockeye salmon, increasing the available water for Anchorage, *increasing* useful power generation utilizing existing infrastructure, and providing badly needed energy storage for the Railbelt at a time of constrained energy supplies.

The Municipality respectfully requests that the Governor promote the public interest by making a modest modification, described below, to the flawed fish and wildlife program proposed by Chugach Electric Association (“CEA”) and Matanuska Electric Association, Inc. (“MEA”), the Minority Owners of the Eklutna Hydroelectric Project (collectively, “Minority Owners”). The Minority Owners propose an experimental program that appears to have never been used anywhere else in the country, which would tap into municipal water infrastructure and re-water only a portion of the Eklutna River starting a full mile downstream of the dam, leaving the last mile high, dry, and fish-free.

That disappointing proposal emerged from a broken process. The Municipality—the majority owner of the Project—had no voting rights on the owners’ committee during the development and submission of that proposal and thus had no formal power to ensure

that the studies and proposal accounted for and balanced *all* of the relevant public interests at stake. The result is a proposal not supported by the majority owner of the Project, the democratically elected representatives of the people directly affected by the Project (including residents, taxpayers and ratepayers), and the municipal government charged with protecting their interests. As explained further below, the Minority Owners' proposal—by requiring the disposal of the Municipality's interests in land and modification of municipal drinking water infrastructure—could be implemented only with the approval of the Anchorage Assembly. The other owners have not sought and do not have such approval. Nor did the other owners present the proposed program to the Municipality for its formal approval. They have instead imprudently asked the Governor to approve a program that, without Municipal approval, could not be implemented.

In addition to these flaws in the development and implementation of the proposed program, the program scores poorly on the merits. The Governor's job under the agreement that created this process is to protect the public interest. But the proposed program would have an *annualized* cost of \$3.7 million. It would lead to a 10% *decrease* in power production. And it would fail to actually mitigate harms to the last mile of the river, the entire lake, and all upper tributaries suitable for fish spawning.

The public interest would be better served by modifying the proposed program in one important respect. The final program should devote the first two years of the required three-year pre-implementation period to reviewing proven technological alternatives, such as pumped storage hydro using existing infrastructure, that the Minority Owners have not yet considered. Pumped storage hydro is widely used in the U.S. and eligible for

federal funding. It could re-water all 12 miles of the Eklutna River, reconnect the River to the Lake, create the conditions for the return of sockeye salmon to the Lake, and provide improved fishing and recreation for all Alaskans in a crown jewel of the Chugach State Park—all while also *increasing* useful power production by providing what would essentially be an enormous battery to save variable wind-and-solar power for later usage any time of the day or year, regardless of whether the wind is blowing or the sun is shining at any given moment. The inclusion of limited “reopeners” in the Minority Owners’ proposed program confirms that all three owners agree that the Governor has authority to adopt a flexible final program. The specific design need not be definitively established in the final program, but can and should allow for further innovation and development. The Municipality simply asks the Governor to provide such flexibility during the first two years of the pre-implementation period to refine the best alternative by exploring promising projects not yet adequately evaluated, including but not limited to pumped storage hydro—a project that could unleash energy abundance and economic opportunity throughout the Railbelt—and the alternative pump proposal submitted by the Native Village of Eklutna.

The Municipality—including the Mayor, the Anchorage Assembly, and the Anchorage Hydropower Utility—are united in thanking the Governor for the opportunity to submit this brief; to further advocate for the potential win-win alternatives at the upcoming meeting convened by the Governor on September 9, 2024; and to explain why the public interest would be best served by declining the Minority Owners’ request that

the Governor approve their flawed proposal without any changes that would better protect the public interest.

BACKGROUND

A. The Federal Government Sold the Eklutna Hydroelectric Project to New Owners And Required Protections for Fish and Wildlife.

The federal government built a dam at the natural outflow of Eklutna Lake in 1955. The water impounded by the dam spins hydroelectric turbines that generate electricity. From 1989 to 1997, the federal government initiated and completed the process of selling this hydroelectric project to a group of three buyers: CEA, MEA, and the Municipality, then doing business as Municipal Light and Power (“ML&P”).¹

During that process, concerns arose “that without [Federal Energy Regulatory Commission (“FERC”)] licensing,” there would be “no opportunity” for “measures to protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat), and implement fish and wildlife measures found to be in the public interest.”² The parties thus signed the 1991 Fish and Wildlife Agreement to create a “mechanism to develop and implement measures to protect, mitigate damages to, and enhance fish and wildlife” that would “obviate the need” for FERC review.³

¹ See generally Eklutna Hydroelectric Project: Proposed Final Fish and Wildlife Program 1 (April 2024), <https://eklutnahydro.com/wp-content/uploads/2024/04/Proposed-Final-Fish-and-Wildlife-Program.pdf>.

² Fish and Wildlife Agreement: Snettisham and Eklutna Projects, Whereas Clauses, at 1-2 (Aug. 7, 1991), <https://eklutnahydro.com/wp-content/uploads/2020/03/Fish-and-Wildlife-Agreement-1991.pdf>.

³ *Id.* § 1.

B. The Governor Was Charged with Protecting the Public’s Interest in Enhancing Fish and Wildlife on the Eklutna River and Lake.

Under the 1991 Agreement, the project owners must submit to the Governor of the State of Alaska “a Proposed Final Fish and Wildlife Program to protect, mitigate, and enhance fish and wildlife resources.”⁴ The Governor “shall review the Proposed Final Fish and Wildlife Program, the comments, testimony, summary and analysis materials, and any alternative recommendations for the protection, mitigation, and enhancement of fish and wildlife resources.”⁵ “The Governor shall attempt to reconcile any differences between the parties, giving due weight to the recommendations, expertise, and statutory responsibilities of” the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, “the state Resource Management Agencies and the Purchasers.”⁶

In conducting that review, the Governor “shall give equal consideration to the purposes of efficient and economical power production, energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat), the protection of recreation opportunities, municipal water supplies, the preservation of other aspects of environmental quality, other beneficial public uses, and requirements of state law.”⁷ “Based on” the Governor’s analysis, the Governor must then make a “Public Interest Determination.”⁸ The Governor “shall establish a final Fish and Wildlife program that adequately and equitably protects,

⁴ *Id.* § 5.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

mitigates damage to, and enhances fish and wildlife resources (including affected spawning grounds and habitat) affected by the Eklutna project.”⁹

The 1991 Agreement thus draws on the standards by which FERC and other regional federal councils license and regulate hydroelectric projects, but puts the Governor in the position otherwise normally occupied by FERC and other regional federal councils.¹⁰ In 1995, Congress authorized the sale of the project to the new owners, recognized the 1991 Fish and Wildlife Agreement, concluded that the Governor’s public-interest review should stand in for FERC review and thus generally should displace FERC licensing requirements, and provided for judicial review.¹¹

C. The Municipality of Anchorage Lost Its Vote on the Owners’ Committee and the Minority Owners Submitted a Proposed Fish and Wildlife Program with Limited Benefits.

The Municipality sold its electric utility, ML&P, to CEA in 2020. CEA did not purchase all ML&P assets, however, and the Municipality, through the Anchorage Hydropower Utility, retained a 53.33% majority stake in the Eklutna Hydroelectric Project. The Municipality entered into long-term power purchase agreements with the other owners, in which CEA (but not MEA) agreed to pay a significant share of the

⁹ *Id.*

¹⁰ Compare 16 U.S.C. §§ 797(e), 803(j) (providing for FERC’s “equal consideration” of “the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality,” as well as “the power and development purposes for which licenses are issued”); *id.* § 839b (requiring a regional federal council overseeing hydroelectric projects in the Pacific Northwest to “adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated”).

¹¹ Alaska Power Administration Asset Sale and Termination Act, Sec. 104(a), (c), Pub. L. 104-58, 109 Stat. 557, 558-59 (1995).

Municipality’s portion of costs associated with the Eklutna Hydroelectric Project including any final fish and wildlife program. Accordingly, in addition to retaining its majority ownership of the Project, the Municipality also remains responsible for 19.04% of the capital, operation, and maintenance costs of any final fish and wildlife program.¹²

In order to retain its majority ownership interest in the project after the sale of ML&P, the Municipality was required by state regulators in 2020 to relinquish its voting rights on the project owners’ committee until such time as the new Anchorage Hydropower Utility acquired necessary expertise in utility management.¹³ Anchorage Hydropower, now headed by an engineer who has led the Anchorage Water and Wastewater Utility (“AWWU”), has acquired the necessary expertise and has petitioned regulators to regain its voting rights in a pending proceeding.¹⁴ The Municipality has been without voting rights within the Eklutna Project, of which it remains the majority owner, for over four years, including during the critical phases of the development and submission of the Minority Owners’ proposed fish and wildlife program.

The Minority Owners ultimately chose to propose a program that would tap into municipal water infrastructure a mile downstream of the Eklutna Dam and divert water into the lower Eklutna River using that municipal infrastructure.¹⁵ The proposed program would not rewater the last mile of river or otherwise enhance fish or wildlife on the

¹² See Letter from Chugach Electric Association to Anchorage Assembly 4 (May 23, 2024), <https://eklutnahydro.com/wp-content/uploads/2024/05/2021-05-23-Chugach-Letter-to-Assembly.pdf>.

¹³ Order No. U-18-102(44)/U-19-020(39)/U-19-021(39) (Regulatory Comm’n of Alaska, May 28, 2020).

¹⁴ *In Re. Acquisition of Expertise*, Dkt. No. U-24-024 (Regulatory Comm’n of Alaska, filed July 18, 2024).

¹⁵ Proposed Final Fish and Wildlife Program 4-5.

lake.¹⁶ The program would monitor and adjust flow below mile 11 and try to maintain the river channel to provide some new spawning and rearing habitat for Chinook, coho, pink, and chum salmon.¹⁷ Draft ancillary agreements to the program would attempt to compensate AWWU for using its drinking water infrastructure in various ways,¹⁸ and it would provide modest one-time payments to repair a trail near the lake and enhance some vegetation on the lower river.¹⁹ Finally, the program would reopen for consideration of alternatives in two limited circumstances: (i) if lake inflows from melting glaciers increase due to climate change to warrant installation of a fixed wheel gate, and (ii) if a means for fish passage is found that satisfies five narrow criteria.²⁰

The Governor has scheduled a meeting on September 9, 2024, to discuss the proposed project and has requested briefs addressing six questions:

1. The Governor is required to give equal consideration to eight factors identified in Section 5 of the Agreement. Please identify how the proposed final program or an alternate program promoted by any other parties, or the Native Village of Eklutna, does or does not meet those eight factors.

2. Does the Agreement require complete connection between the river and the lake to support fish passage?

3. Is MOA Assembly approval required for approval of the Owners' program?

¹⁶ *Id.*

¹⁷ *Id.* at 6-9.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 11, 15.

²⁰ *Id.* at 16-19.

4. What effect, if any, did the MOA's lack of a vote on the Owners' program have on the process set forth in the Agreement?

5. Does the Governor have the authority under the Agreement to impose a two-year extension on the process as requested by the MOA?

6. Whether the Owners and Anchorage Water and Wastewater Utility ("AWWU") have reached a final and binding agreement concerning the use of AWWU infrastructure as outlined in the Owners' program. If a final agreement has not been reached, what effect will that have on the Owners' ability to implement the final proposed program?

RESPONSES TO GOVERNOR'S QUESTIONS

The Municipality greatly appreciates this opportunity to answer the Governor's questions regarding the public interest in enhancing fish and wildlife on the Eklutna River and Eklutna Lake. The Minority Owners' disappointing proposal emerged from a broken process in which the Municipality had no formal vote and in which the Minority Owners did not seek or obtain Municipal approval of the final proposal before submitting it to the Governor. The proposal disserves the public interest because it has an annualized cost of \$3.7 million each year on an experimental program that taps into municipal infrastructure, decreases power output, and leaves the last mile high and dry. Crucially, implementation of that proposal hinges on Assembly approval of the use of municipal property, but the Minority Owners have not sought or obtained such approval.

The public would be better served by devoting the first two years of the three-year pre-implementation period for consideration of proven technologies overlooked by the Minority Owners, including but not limited to pumped storage hydro using existing

infrastructure. Such alternatives could better serve the public interest by re-watering the entire river, providing the conditions necessary for the return of sockeye salmon to the full river and the lake (and its tributaries), increasing power generation, and providing badly needed energy storage for the Railbelt at a time of constrained energy supplies. The Minority Owners mistakenly overlooked the pumped storage hydropower alternative without realizing that using existing infrastructure would sharply limit costs. The Minority Owners' inclusion of limited reopeners in their proposed program confirms that they agree the Governor has authority to build flexibility for innovation into the final program. The 1991 Agreement allows reopeners at any time under Section 7. And the public interest would be best served by getting this process right from the outset.

A. (Answer to Governor's Question 1) The Proposed Program Does Not Serve the Public Interest Nearly as Well as Proven Technologies that Can and Should Be Evaluated.

The 1991 Agreement protects the public by giving “equal consideration to [i] the purposes of efficient and economical power production, [ii] energy conservation, [iii] the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat), [iv] the protection of recreation opportunities, [v] municipal water supplies, [vi] the preservation of other aspects of environmental quality, [vii] other beneficial public uses, and [viii] requirements of State law.”²¹

²¹ 1991 Agreement, § 5.

1. The Minority Owners' Proposal to Tap into Municipal Drinking Water Infrastructure Reduces Power Generation and Does Not Enhance Fish and Wildlife on the Upper River and the Lake.

The Minority Owners' proposal scores poorly on nearly all of the relevant factors. Rather than increase power production or conserve energy, the proposed program would have an annualized cost of \$3.7 million²² and *reduce* power production by 10%.²³

The other side of the ledger is also in the red. The preservation, mitigation of damage to, and enhancement of fish and wildlife is the reason the 1991 Agreement exists. As explained in Part C below, reconnecting the river to the lake is a crucial component of the public's interest in this process. But the Minority Owners chose an option that fails to rewater the full Eklutna River or provide fish passage from the river to the lake, and thus fails to actually protect, mitigate harm to, or enhance fish and wildlife on those crucial segments of the affected waterways. By the same token, the proposed program fails to adequately advance recreational and other beneficial public uses such as fishing or taking in the beauty of a real mountain river with real water in it. And, as explained in more detail in Part D below, the implementation of this proposal hinges on Assembly approval that, under applicable requirements of State law, the Assembly is free to withhold.

The Municipality is not alone in concluding that a proposed program that rewaters only part of the river falls short. That view is shared by the other agencies whose

²² Explanatory Statement 5, <https://eklutnahydro.com/wp-content/uploads/2024/04/Explanatory-Statement.pdf>.

²³ Proposed Fish and Wildlife Program, Attachment H: Comparison to Existing Conditions 12, <https://eklutnahydro.com/wp-content/uploads/2024/04/Attachment-H-Comparison-to-Existing-Conditions.pdf>.

expertise the Governor “giv[es] due weight” under the 1991 Agreement.²⁴ The U.S. Fish and Wildlife Service criticizes the proposal for failing to achieve “full ecosystem connectivity” and “fish passage.”²⁵ The National Marine Fisheries Service criticizes the proposal for not establishing “continuous flow of water in the full length of the Eklutna River” and “safe and effective upstream and downstream fish passage.”²⁶ The Native Village of Eklutna has criticized the proposal as “deeply disappoint[ing]” because it “will cost ratepayers and taxpayers up to \$72 million, threaten public drinking water infrastructure, and fail to meaningfully recover and maintain salmon in the Eklutna River for the benefit of our people and all Alaskans.”²⁷ And individual public commenters similarly disfavor the draft program.²⁸

2. Considering Proven Technologies in the First Two Years of the Pre-Implementation Period Would Best Serve the Public Interest.

A better program is possible. The proposed program acknowledges its own shortcomings: to offset its failure to provide for fish passage in the proposed design, it includes a reopener for an alternative program for fish passage in narrow circumstances post-implementation.²⁹ This recognition that fish passage is the ideal goal of any program

²⁴ 1991 Agreement, § 5.

²⁵ U.S. Fish and Wildlife Service, Comments on Proposed Program 1 (June 24, 2024), https://eklutnahydro.com/wp-content/uploads/2024/07/2024-6-24-Comments-on-Proposed-Final_USFWS.pdf.

²⁶ National Marine Fisheries Service, Comments on Proposed Program 3 (June 21, 2024), https://eklutnahydro.com/wp-content/uploads/2024/07/2024-6-21-Comments-on-Proposed-Final_NMFS.pdf.

²⁷ Native Village of Eklutna, Comments on Proposed Program 1 (June 21, 2024), https://eklutnahydro.com/wp-content/uploads/2024/07/2024-6-21-Comments-on-Proposed-Final-Program_NVE.pdf.

²⁸ See Proposed Program Attachment G: Erratum Addendum 3, https://eklutnahydro.com/wp-content/uploads/2024/06/Attachment-G-Public-Comment-Summary-and-Analysis_Erratum-Addendum.pdf.

²⁹ See Proposed Final Fish and Wildlife Program 17-19.

highlights the failings of the proposed program to set up a procedure designed to maximize the odds of achieving that goal.

The search for better alternatives should not wait or be constrained to the scope of the limited reopeners in the proposed program. As explained in more detail in Part B below, if the proposed program can be reopened under limited circumstances at some uncertain date in the future under the limited reopeners proposed by the Minority Owners, then the first two years of the three-year pre-implementation period certainly can and should be used to develop the best alternative. All parties and stakeholders should commit during that period to creatively and cooperatively evaluating and incorporating promising alternatives that would better serve the public interest and fully restore the Eklutna River and provide for fish passage into Eklutna Lake, while also improving on the current proposal's performance under other public-interest factors. If such an alternative is identified during that period, it should be proposed to the Governor and, upon the Governor's approval, should become a component of the fish and wildlife program. If no such alternative is identified, the best of bad options currently available could be implemented, subject to obtaining all required approvals and further subject to revision under Section 7 of the 1991 Agreement whenever a better option is found.

Several alternatives not yet adequately considered by the Minority Owners appear promising. A preliminary proposal for pumped storage hydro, for example, was presented to a worksession of the Anchorage Assembly on August 23, 2024, by the head of the

Anchorage Hydropower utility and received favorable discussion.³⁰ That proposal would use wind and solar energy, when it is abundant, to pump water from the Knik River up to Eklutna Lake through the existing hydroelectric tunnel. The stored water would act as a battery, saving the renewable energy generated on an intermittent basis and making it available for reliable dispatch through the same hydroelectric tunnel back down to the Knik River and through hydroelectric turbines when more power is required, such as in the depths of winter, at night, or when the wind is not blowing. “Existing infrastructure is in place” for the initial phase of this proposal, “keeping costs low”—unlike the Minority Owners’ proposal.³¹ Pumped storage hydro is a proven technology in widespread use. Though its application here would require more evaluation, it shows promise as a means of increasing the available water in Eklutna Lake for power generation and use by AWWU, restoring the entire Eklutna River, and creating a new source of abundant, reliable energy storage for the Railbelt for generations to come.

Modifying the proposed final program as the Municipality suggests would give the owners adequate time over the next two years to properly evaluate and incorporate this option or others, such as the option suggested by the Native Village of Eklutna of pumping water from Eklutna Lake to the pond next to the Eklutna Dam and modifying the dam’s gate to re-water the entire river. The public interest is best served by taking every available opportunity to improve the proposed program. In the third year of the pre-implementation

³⁰ Anchorage Hydropower Utility, *Modified PSH Concept with Wind & Solar at Eklutna Lake with River Restoration and Fish Passage* (Aug. 23, 20204), https://www.muni.org/Departments/Assembly/Documents/EklutnaRiver_PSH_rev1.pdf.

³¹ *Id.* at 9.

period, and starting earlier if necessary (simultaneous with the two-year reopening), the owners could obtain needed permits and conduct any other necessary preparatory work for proceeding with the proposed program if no superior alternative is identified.

B. (Q5) The Governor Has Undisputed Authority to Require that the Final Program Consider Additional Alternatives.

The Governor has the power to do what the Municipality requests. A final fish and wildlife program can use the first two years of the three-year pre-implementation period for further study or alteration of the program in the event that a better solution is found. FERC orders regarding fish and wildlife programs for other hydroelectric projects, issued under a federal statute on which the 1991 Agreement was modeled, routinely include so-called “reopener” provisions that trigger studies and adoption of additional or alternative measures even after FERC’s issuance of a final license or fish and wildlife program.³² And the 1991 Agreement itself contemplates the program can be reopened at any time. Section 7 provides that “prior to undertaking any major structural or operational modification substantially affecting water usage or fish and wildlife at the projects, the Purchasers shall follow the process called for in Sections 2 through 6 of this Agreement.”³³

Indeed, the Minority Owners’ own proposed program contains two such reopeners.³⁴ One of those reopeners calls for “a more detailed feasibility study of the fixed wheel gate”

³² See *Idaho Rivers United v. FERC*, 189 F. App’x 629, 635-36 (9th Cir. 2006) (“approv[ing] deferral of FERC’s decisions on certain fishery issues pending post-licensing studies and monitoring” regarding “sturgeon mitigation”); *State of California v. Fed. Power Comm’n*, 345 F.2d 917, 924-25 (9th Cir. 1965) (a final license may “outlin[e] procedures to be followed in the interim looking to the development of a proper solution”).

³³ 1991 Agreement, § 7.

³⁴ Proposed Final Fish and Wildlife Program 16-19.

during the first three years of the final program and provides that the fixed wheel gate solution may be implemented, if appropriate under certain conditions, ten years after the Governor’s approval of the final program and up to a cost of \$10 million to the parties.³⁵ There is no material distinction between the reopeners the Minority Owners’ have already proposed, which no one disputes may legally be included in a final program, and the change the Municipality is requesting. If a final program can contain provisions requiring additional study and implementation of additional solutions favored by the Minority Owners, then the final program at issue here can do the same for promising alternatives put forward by the Municipality, the Native Village of Eklutna, or other stakeholders.

The Minority Owners have argued that the Municipality’s request “fails to acknowledge” the Regulatory Commission of Alaska’s order that allowed Anchorage to retain its majority ownership of the Project by surrendering its vote on the owners’ committee.³⁶ That regulatory order is irrelevant to the Municipality’s request to the Governor. Because the Municipality lost its voting rights on the owners’ committee, the Municipality had no formal power to protect its own interests and the interests of the residents of Anchorage by voting as part of the that committee to “delay or change” any “Eklutna Project decisions made by the Chugach and MEA representatives” on the owners’ committee.³⁷ But the Municipality’s lack of voting rights on the committee does not change the fact that, outside of that committee, the Municipality is a party to the 1991 Agreement

³⁵ *Id.* at 16.

³⁶ Minority Owners’ Responses to Comments on Proposed Final Fish and Wildlife Program 33 (July 2024).

³⁷ *Id.*

and, as such, fully entitled to make its case to the Governor, who, under the Agreement, reviews such comments and “attempt[s] to reconcile any differences between the parties.”³⁸

The Minority Owners thus correctly stop short of suggesting that the state regulatory order directed at voting rights on the project owners’ committee somehow also deprived the Municipality of Anchorage of a right unrelated to any voting power on the owners committee—a right that derives from a federal contract recognized by federal statute.

C. (Q2) Fully Mitigating Harms to Fish and Wildlife Means Re-Connecting the River to the Lake to Support Fish Passage.

The core purpose of the 1991 Agreement is to mitigate harm to fish and wildlife. Fully mitigating those harms means re-connecting the river to the lake to support fish passage. The focus of analysis during the first two years of the three-year implementation program should thus be on identifying alternatives that achieve that goal *and* advance the public’s other interests by increasing useful power production at a reasonable cost.

Eklutna River and Eklutna Lake were once hydrologically connected from the headwaters to the mouth and supported fish passage and personal use and sport or subsistence fishing along the full length of the waterway. Hydroelectric projects including the Eklutna Hydroelectric Project severed that connection and de-watered the river for much of the year, thus destroying fish spawning and rearing habitat and denying fish passage. The core purpose of the 1991 Agreement, as explained by the Agreement itself in its very first section, is to address that problem by creating a “mechanism to develop

³⁸ 1991 Agreement, § 5.

and implement measures to protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat).”³⁹ Re-watering the river and providing for fish passage is the most obvious means of accomplishing those goals. It was also the intent of those who drafted and signed the Agreement as documented shortly after it was executed: the “loss of a sockeye salmon run” was the “specific problem” that “led to the August 7, 1991 Agreement.”⁴⁰ Accordingly, for every section of riverbed that the final fish and wildlife program leaves dry, the program fails to actually protect, mitigate damage to, and enhance fish and fish spawning and rearing grounds currently affected by the Project. It also fails to deliver the benefits of marine-derived nutrients that only an anadromous fish run can provide throughout the ecosystem, including for other wildlife.

The Minority Owners have emphasized that fish passage was first disrupted in the 1920s by a private dam on the lower river before the Eklutna Hydroelectric Project was built. On that basis, they have argued that the 1991 Agreement does not provide for re-watering the full river to enable fish passage into and out of the lake.⁴¹ That is incorrect.

The core purpose of the 1991 Agreement was to solve the problem of the salmon run that was first lost in the 1920s. State and federal agencies examined in 1992 how federal divestiture of Eklutna might be accomplished. Their report formed the basis for

³⁹ 1991 Agreement, § 1.

⁴⁰ Alaska Power Admin. & U.S. Dep’t of Energy, Divestiture Summary Report 19 (April 1992), <https://eklutnahydro.com/wp-content/uploads/2020/03/APA-1992-Divestiture-Summary-Report.pdf>; see Nat’l Marine Fisheries Serv. Comments 5 (“Restoring fish passage, specifically for sockeye salmon, was a driving factor in establishing the 1991 Agreement.”); Fish & Wildlife Serv. Comments 1 (“[T]he loss of a historic sockeye salmon run is what prompted the development of the 1991 Agreement.”).

⁴¹ *E.g.*, Responses to Comments on Proposed Final Fish and Wildlife Program 12, 15 (July 2024), <https://eklutnahydro.com/wp-content/uploads/2024/07/2024-7-24-Owners-Responses-to-Comments-on-Proposed-Final-Program.pdf>.

the federal legislation that authorized selling the Project in 1995 and gave federal recognition to the 1991 Agreement. That report explained that “[d]uring reviews of the legislative proposal, loss of a sockeye salmon run that once spawned in Eklutna Lake was identified,” caused “by a small private power project constructed in the 1920s.”⁴² “That loss was not identified in pre-authorization studies for the Federal Eklutna Project and the Federal project does not include mitigation” of that loss.⁴³ “*This specific problem* and the desires of the fish and wildlife agencies to provide appropriate consideration to fish and wildlife resources over the long run led to the August 7, 1991 Agreement.”⁴⁴ The Minority Owners thus cannot reasonably deny that solving the problem of the lost sockeye run was the intent of the parties in executing the 1991 Agreement.

The plain terms of the 1991 Agreement require that the lost sockeye run be addressed. The FERC procedure that the 1991 Agreement was modeled on provides for FERC review of cumulative impacts of hydroelectric projects “when added to other past ... actions.” *American Rivers v. FERC*, 201 F.3d 1186, 1198 n.19 (9th Cir. 1999). The 1991 Agreement requires the same equal consideration of the same factors as the FERC statute and should be interpreted to provide for the same cumulative assessment of the impacts of the Eklutna Hydroelectric Project. In any event, the lower dam is now gone and is not an obstacle to restoring fish passage today. The remaining obstacle is the Eklutna Project, as all parties recognize. Any effort to “mitigate” the effects of the Project

⁴² Divestiture Summary Report 19.

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added).

today must thus take the watershed as it is now and recognize that the river is currently dry because of the Eklutna Dam and fish passage is currently blocked because of the Eklutna Dam. Finally, the 1991 Agreement requires not only mitigation but “enhancement” of fish and wildlife. Enhancement plainly encompasses leaving fish and wildlife better off. The Minority Owner’s attempts to unduly constrain the goals of the fish and wildlife program should be rejected as contrary to the Agreement.

The Minority Owners incorrectly assert that the Municipality’s position on this issue has shifted due to “[t]he changing of municipal leadership.”⁴⁵ For nearly seven years, the Municipality has consistently maintained that re-watering the river and re-establishing a hydrological connection between the river and the lake for fish passage, consistent with the other considerations under the 1991 Agreement, would best serve the public interest.⁴⁶ The Minority Owners intentionally overlooked that position and chose to propose a final program that fails to restore a hydrological connection between the river and the lake and nonetheless hinges on Assembly approval. That decision to play hard ball reflects the Minority Owners’ strategic choices. It does not reflect any shift in

⁴⁵ Minority Owners’ Responses to Comments on Proposed Final Fish and Wildlife Program 33 (July 2024)

⁴⁶ AR No. 2017-324(S), Sec. 1, (Oct. 24, 2017) (calling to “restore the hydrology and fisheries of the Eklutna River subject to all provisions of the Fish & Wildlife agreement of August 7, 1991”); AR No. 2022-262, As Amended (Sept. 27, 2022) (declaring that “the restoration of instream flow to the Eklutna River and restored fish passage to and from Eklutna Lake are the most desirable forms of mitigation for impacts caused by the Eklutna Power Project” and “commit[ting] to the restoration of the Eklutna watershed, including providing instream flow and fish passage the length of the Eklutna River and into Eklutna Lake”); AO No. 2023-131, As Amended (Dec. 19, 2023) (same); AR No. 2024-40, As Amended (Feb. 2, 2024) (“The Municipality of Anchorage does not intend to issue authorizations or provide funds or any other form of support of the Draft Fish and Wildlife Program or any alternative that doesn’t restore the full length of the Eklutna River and comply with policy of the Municipality.”); AMC 26.30.025A (“It is the policy of the Municipality of Anchorage and the Anchorage Hydropower utility to restore the continuous water flow of the Eklutna River and the fish populations of the River and Eklutna Lake, to the greatest extent possible, subject to all provisions of the 1991 Fish & Wildlife Agreement.”).

the Municipality's clear and consistent position regarding the scope of the problem to be solved under the 1991 Agreement: the lack of a hydrological connection between the river and the lake.

There is no basis for the Minority Owners' apparent position that protecting, mitigating damage to, and enhancing fish and wildlife cannot include reconnecting the river to the lake to support fish passage. Approving the Minority Owners' proposed program, which is apparently predicated on that proposition,⁴⁷ would create litigation risk that could upend the entire program. The Municipality simply requests that the Governor, in assessing the protection, mitigation of damage to, and enhancement of fish and wildlife, recognize that re-watering the river and re-connecting it to the lake is plainly within the goals of the 1991 Agreement and that any program that accomplishes those goals is superior on that public-interest factor than any alternative that does not.

The Municipality acknowledges that the Governor must give equal consideration to several public-interest factors, not only the goal of protecting, mitigating damage to, and enhancing fish and wildlife. And "the reconciliation of power and other development needs with fish and wildlife needs in cases of conflict is ultimately left to the public interest judgment" of the Governor.⁴⁸ The Municipality respectfully requests that the Governor use his public-interest judgment to create a final program that evaluates alternatives that incorporate proven technologies that could surpass the existing proposal

⁴⁷ *E.g.*, Responses to Comments on Proposed Final Fish and Wildlife Program 12, 15.

⁴⁸ *State of Cal. ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992) (quoting 132 Cong. Rec. S. 15107 (statement of Sen. Johnston)) (addressing FERC statute comparable to 1991 Agreement).

by, among other things, restoring a hydrological connection between the river and the lake for fish passage, which was the driving intent behind the 1991 Agreement.

D. (Q3, Q4, Q6) Because the Municipality Had No Vote on the Owner’s Committee, the Municipality Could Not Advance Its View of the Public Interest and Secure a Program with the Necessary Approvals.

Municipal code provides that “[i]t is the policy of the Municipality of Anchorage and the Anchorage Hydropower utility to restore the continuous water flow of the Eklutna River and the fish populations of the River and Eklutna Lake, to the greatest extent possible, subject to all provisions of the 1991 Fish & Wildlife Agreement.”⁴⁹ Code further provides that “[t]he Proposed Final Fish and Wildlife Program to protect, mitigate, and enhance fish and wildlife resources in the Eklutna River shall be subject to assembly approval, prior to its submission to the Governor of Alaska.”⁵⁰

If the Municipality’s representatives on the owners’ committee had full voting rights commensurate with the Municipality’s 53.3% ownership of the Project, the Municipality would have had the formal power to vote consistent with municipal policy to seek to re-water the entire river, increase useful power generation and storage, and otherwise advance the public interest at reasonable cost using existing infrastructure. Action on behalf of the owners of the Project generally requires a majority of the total voting interest and the support of at least two of the owners.⁵¹ The Municipality’s 53.3% ownership would have thus given the Municipality the option of functionally vetoing

⁴⁹ AMC 26.30.025A.

⁵⁰ AMC 26.30.025B.2.

⁵¹ 1996 Eklutna Transition Plan, Exhibit E, § 3.

proposed actions by the Minority Owners in appropriate circumstances. That option would have given the Minority Owners the incentive to take the Municipality's understanding of the public interest and prudent decision-making more seriously and would have helped all three owners reach consensus and avoid the necessity of the Municipality filing this opposition to the Minority Owners' disappointing final proposal.

The Municipality recognizes that the Governor's formal power to approve, disapprove, or modify the proposed plan is not curtailed by Anchorage's municipal code. But approval is merely the first step in actually implementing a fish and wildlife program. And implementation cannot occur without Assembly approval of the heart of the program: the construction of a new valve and release structure that taps into municipally owned infrastructure on municipally owned rights of way and easements.⁵²

There is no final and binding agreement to permit a final fish and wildlife program to tap into municipally owned pipes on municipally owned rights of way or easements, as desired by the Minority Owners' proposal. The Municipal Manager and head of AWWU, without the approval of the Assembly, entered into a then-confidential binding term sheet with the Eklutna Hydroelectric Project, agreeing to negotiate three formal agreements that could be executed later.⁵³ None of the three draft agreements between the Eklutna Hydroelectric Project and AWWU related to the proposed program have been signed or executed.⁵⁴ The cover page of each draft agreement notes that it "will not be signed by

⁵² Proposed Final Fish & Wildlife Program 4; Supporting Information Document 12.

⁵³ See Binding Term Sheet (Oct. 27, 2023), <https://eklutnahydro.com/wp-content/uploads/2024/04/AWWU-Owners-Term-Sheet-confidentiality-waived-4-25-2024.pdf>

⁵⁴ See generally Proposed Fish and Wildlife Program, Attachment D.

the MOA until ... such signatures have been authorized by the Anchorage Assembly.”⁵⁵

Numerous portions of the drafts remain incomplete, and accompanying text notes that the missing information “will be populated by the Parties ... prior to signing.”⁵⁶

An amendment to the binding term sheet expressly recognizes that there will be no final and binding agreement to use municipal infrastructure on municipal rights of way or easements without Assembly approval. The preamble to the agreement states that AWWU “requires certain approvals before it may enter into one or more of the Agreements.”⁵⁷ The amendment extends the time for executing final agreements to provide time for “AWWU to seek and gain approvals necessary for it to enter into” the contemplated agreements.⁵⁸ And the amendment provides that the “prerequisites” to the execution of the draft agreements include “[a]pproval by the Municipality of Anchorage Assembly to the extent necessary for the Municipality of Anchorage to execute and perform under the Agreements.”⁵⁹ The proposal submitted to the Governor similarly recognizes that “Project Owners will enter into long-term agreements with AWWU following, and subject to, all necessary approvals,” and “[i]f such approvals are delayed or are not able to be obtained,” the heart of the program will not be able to be implemented and the parties will proceed only with the modest handful of “other” mitigation efforts “outlined” in the proposal.⁶⁰

⁵⁵ *E.g.*, Water Facilities Interconnection Agreement i.

⁵⁶ *See* Water Transportation Agreement Exhibit B through D-2; Interconnection Agreement Schedule 3.5, Exhibits A-2 through B, and Exhibits D through K.

⁵⁷ Amendment to Binding Term Sheet 1, <https://eklutnahydro.com/wp-content/uploads/2024/04/AWWU-Owners-Amendment-to-Term-Sheet-confidentiality-waived-4-25-2024.pdf>

⁵⁸ *Id.* § 1.

⁵⁹ *Id.* § 5.b.

⁶⁰ Proposed Fish and Wildlife Program 5.

State and local law also recognizes that Assembly approval will be required before the proposed program could be implemented. State law provides that the legislative body of a municipality is empowered to “establish a formal procedure for acquisition and disposal of land and interests in land by the municipality.”⁶¹ The Anchorage Municipal Charter and Municipal Code provide that a conveyance of an interest in land of the Municipality and improvements thereon, including rights of way of substantial value, must be approved by the Municipal Assembly via ordinance.⁶² And agreements respecting water rights at issue in the drafts must also be approved by the Assembly.⁶³

Successful implementation of the Minority Owners’ proposed program thus hinges on Assembly approval. The Assembly has not given such approval. Indeed, it has indicated that it will not give such approval to a program that does not address the public interest in rewatering the entire river, consistent with the other public interest factors.⁶⁴

CONCLUSION

The Municipality respectfully requests that the Governor set us on a path to a solution that works for everyone at the table by adopting the Municipality’s modest request to modify the Minority Owners’ proposal and use the first two years of the three-year pre-implementation period of the final program to consider prudent alternatives that have been overlooked and that may better serve the public interest.

⁶¹ AS 29.35.090(a).

⁶² Anchorage Municipal Charter 10.02(8), 17.13(e); AMC 25.30.020A.

⁶³ AMC 26.40.090.

⁶⁴ AR No. 2024-40, As Amended, Sec. 2 (Feb. 2, 2024) (“The Municipality of Anchorage does not intend to issue authorizations” for “any alternative that doesn’t restore the full length of the Eklutna River.”).