



NATIVE VILLAGE OF EKLUTNA

December 4, 2023

Submitted via Email

Samantha Owen
Senior Regulatory Consultant
McMillen Inc.
2607 Western Ave, Unit 360
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Re: Eklutna Hydroelectric Project Draft Fish and Wildlife Program

Dear Ms. Owen:

The Native Village of Eklutna (“NVE”) provides the following comments on the Chugach Electric Association, Matanuska Electric Association, and Municipality of Anchorage (“Project Owners”)’s Eklutna Hydroelectric Project Draft Fish and Wildlife Program (“Draft Program”).¹

Our elders tell us that Eklutna (*Idlughet*) is an old, old Village located by the Eklutna River, which was once an abundant salmon system. The Eklutna River (*Idluytnu*) has provided nutritional and cultural benefits to Eklutna Dena’ina throughout time immemorial, but hydroelectric dams have severely degraded its productivity. NVE has adopted a vision for fully restoring the Eklutna River for fish and wildlife habitat, traditional subsistence uses, and sustainable natural resource development, from the top of the watershed to Cook Inlet.²

NVE has broad support for this vision. Eklutna Inc. recently remarked that “[c]onnecting Eklutna Lake to Cook Inlet will benefit not just the adjacent landowner but our collective community,” including all Southcentral Alaska.³ The Alaska Federation of Natives, the largest statewide Native organization in Alaska, passed a resolution in 2020 proclaiming that “[AFN] supports efforts to restore traditional rivers and streams for fish and wildlife habitat, traditional subsistence uses, and sustainable natural resources development, and in particularly, supports tribes like Native Village of Eklutna [...] to restore the Eklutna River for salmon habitat.”⁴

¹ Chugach Electric Association, Matanuska Electric Association, and Municipality of Anchorage (“Project Owners”), Eklutna Hydroelectric Project Draft Fish and Wildlife Program (Oct. 27, 2023) https://eklutnahydro.com/wp-content/uploads/2023/10/2023-10-27-Eklutna-Draft-Fish-and-Wildlife-Program_with-Appendices.pdf.

² Native Village of Eklutna, “Our Vision for the Eklutna River” (accessed Nov. 20, 2023) <https://static1.squarespace.com/static/5f52cd19995bf84b22653379/t/642742b42454b574f1be304f/1680294580774/A+Vision+for+the+Eklutna+River+%28%29.pdf>.

³ Eklutna, Inc., Letter to Anchorage Assembly Re: Eklutna Draft Fish and Wildlife Program (Nov. 21, 2023).

⁴ Alaska Federation of Natives, Restoration of Traditional Salmon Habitat Resolution 20-7 (2020).

Alaska’s late Representative Don Young, who was largely responsible for the sale and divestiture of the Eklutna Project, affirmed his “keen[] interest[] in seeing the timely restoration of the Eklutna River and the recovery of salmon for the benefit of the Native people of Eklutna,” and further that “[r]estoring healthy salmon runs in the Eklutna River will benefit a great many Alaskans who live in Anchorage and the Mat-Su Valley.”⁵ Alaska’s current Congresswoman Mary Peltola maintains that commitment, stating that “[l]ike my predecessor, Congressman Don Young, I support the efforts of the Eklutna Dena’ina to restore their river and the salmon runs they depend on.”⁶ The Assembly of the Municipality of Anchorage, which owns 53.33% of the Eklutna Project, passed a resolution in 2022 committing to “the restoration of the Eklutna watershed, including providing instream flow and fish passage the length of the Eklutna River and into Eklutna Lake [...]”⁷

Since the Eklutna Hydroelectric Project (“Project”) became operational in 1955, it has caused the Eklutna River to run dry. The hydrological record is clear on this point. As we have previously explained:

Currently, no water spills over the Eklutna Lake Dam down the river except during floods. A 4.5-mile bypass tunnel diverts water from the lake to the power plant. Of the water diverted, 90% is diverted to the Knik River for hydropower, while 10% is diverted for Anchorage drinking and wastewater, effectively blocking the remaining 14 miles of Eklutna River from its water source.⁸

The Project’s adverse effects on fish and wildlife resources in the Eklutna River were not evaluated for almost 70 years after project construction due, in part, to the existence of the lower diversion dam, which prevented salmon from ascending to Eklutna Lake (*Idlu bena*) and the upper reaches of the river. However, since the lower diversion dam was removed in 2018, the Project’s continued diversion of all controllable flow at Eklutna Lake to the Project’s powerhouse on Knik Arm (*Nuti*) and the complete disconnection of the river to the lake and upper tributaries are, and will continue to be under the Project Owners’ Program, *the primary causes* for ongoing degradation of fish and wildlife habitat in the Eklutna River system.

The Eklutna River ecosystem, including its fish and wildlife resources and particularly its salmon runs, is fundamental to the historical properties and traditional and cultural resources of the Eklutna People. The dewatering of the river and destruction of salmon are adverse effects of the

⁵ Congressman Don Young, Letter to Matanuska Electric Association (Aug. 6, 2018).

⁶ Congresswoman Mary Peltola, Letter to Chugach Electric Association (May 12, 2023).

⁷ Anchorage Assembly, A Resolution of the Anchorage Municipal Assembly in Support of Efforts to Restore the Eklutna River AR No. 2022-262 (Sept. 13, 2022); *See also*, Eklutna Draft Fish and Wildlife Program at 3 (“MOA’s ownership share of the Project is 53.33%, Chugach’s ownership share is 30%, and MEA’s ownership share is 16.67%.”).

⁸ Native Village of Eklutna, “Eklutna River: Idlughetnu” (accessed Nov. 17, 2023) <https://eklutna-nsn.gov/departments/land-and-environment/eklutna-river/>; *see also*, Kleinschmidt Associates, Draft Instream Flow Technical Memo at 2 (Sept. 28, 2022) https://eklutnahydro.com/wp-content/uploads/2022/12/2022-9-27-Eklutna-Instream-Flow-Tech-Memo_DRAFT.pdf (“In 1955, the federal government completed construction of a new hydropower project and in 1964 a new storage dam which *effectively eliminated any flow releases from Eklutna Lake to the Eklutna River.*” (emphasis added)).

Project that have already degraded and threaten to destroy the significance of these properties and resources.⁹ The Project Owners are required to afford protection to these cultural resources.¹⁰

Eklutna Dena'ina's health, families, and culture depend on restoring salmon to the Eklutna River. Rather than fully evaluate alternatives that would avoid, minimize, or mitigate the project's adverse effects, as would generally be required for the relicensing of any other similarly-sized non-federal hydropower project, the Project Owners have put forward a Draft Program that would maintain those adverse effects by continuing to dewater a portion of the lower Eklutna River and deny salmon access to the majority of the system's salmon habitat for the next 35 years. The Draft Program shows that the Project Owners did not fully evaluate alternatives that would mitigate and enhance, let alone avoid or minimize the Project's ongoing impacts to sockeye, Chinook, and coho salmon habitat even though the loss of the sockeye salmon run was one of the express reasons for the Agreement.

This letter outlines our proposed alternative to truly meet the purposes of the Agreement, our concerns with the Draft Program analysis, process, and conclusions, and our requests for further procedures. As we say, Łiq'a nagh qinqtudeł - we are hopeful the salmon will return to us.

I. Purpose of the 1991 Fish and Wildlife Agreement

The purpose of the 1991 Eklutna Fish and Wildlife Agreement (“Agreement”) and the resultant Fish and Wildlife Program is to develop and implement measures to “protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” from the harms of the Project.¹¹ Salmon spawning grounds and habitat harmed by the project include the lower Eklutna river below the dam, Eklutna Lake, and the upper tributaries to Eklutna Lake. The Divestiture Summary Report for the Sale of Eklutna and Snettisham Hydroelectric Projects (“Divestiture Report”), to which the Agreement is an appendix, notes that mitigating harms to sockeye salmon and their spawning habitat was particularly important in creating the Agreement. The Divestiture Report explained that “[d]uring reviews of the legislative proposal, loss of a sockeye salmon run that once spawned in Eklutna Lake was identified[...] 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.”¹² The Divestiture Report notes that the Agreement's fish and wildlife measures were intended to “work at least as well as Federal regulation for the intended purpose of mitigation and enhancement of affected fish and wildlife resources,” and were to be “quite similar to that under the [Federal Energy Regulatory Commission (“FERC”)] licensing” process for hydroelectric projects.¹³

⁹ 36 C.F.R. § 800.5(a)(2).

¹⁰ Divestiture Report at Appendix E-12 (“The final Environmental Management Plan will include language that affords protection to cultural resources [...]”).

¹¹ Fish and Wildlife Agreement Snettisham and Eklutna Projects at 1 (Aug. 7, 1991) <https://eklutnahydro.com/wp-content/uploads/2019/05/1991-Fish-and-Wildlife-Agreement.pdf>; See also Eklutna Draft Fish and Wildlife Program at 45; See also Alaska Power Administration Asset Sale and Termination, Pub. L 104-58, title I § 104(a)(2) (Nov. 28 1995) <https://www.govinfo.gov/content/pkg/STATUTE-109/pdf/STATUTE-109-Pg557.pdf>.

¹² Divestiture Summary Report, Sale of Eklutna and Snettisham Hydroelectric Projects at 19 (Apr. 1992) <https://eklutnahydro.com/wp-content/uploads/2020/03/APA-1992-Divestiture-Summary-Report.pdf>.

¹³ *Id.* at 20, 18.

II. NVE’s Recommended Alternative Would Meet the Purpose of the 1991 Agreement

To meaningfully meet the purpose of the Agreement, NVE proposes an alternative solution – removing the Eklutna Lake dam within ten years when sufficient renewable power generation is available to offset the lost power generation from dam removal.¹⁴ In 2011, the U.S. Army Corps of Engineers (“USACE”) proclaimed that “[t]rue restoration of the Eklutna River ecosystem would require removal of both dams [...]”¹⁵ The Eklutna Lake dam does not impound Eklutna Lake but merely increases lake storage capacity for hydropower generation. Doing so severs the connection between the lower Eklutna River, Eklutna Lake, and upper tributaries, blocking all outflow of water, drying up the Eklutna River, and decimating the salmon runs.¹⁶ Now that the lower Eklutna dam is gone, it is time to plan for a future with a free-flowing Eklutna River and salmon runs truly restored.

NVE’s alternative of dam removal within ten years will provide fish passage upstream and downstream to and from the lake and upper tributaries and return the river’s natural flow regime that salmon co-evolved to depend upon, restoring the entire river and lake ecosystem. This proposal aligns closely with National Marine Fisheries Service (“NMFS”), US Fish and Wildlife Service (“USFWS”), and other Technical Working Group (“TWG”) member’s study period preferred alternatives with fish passage to and from the lake and flows that closely mimic the river’s historic natural flow regime.¹⁷ The Conservation Fund has pledged to pay all the costs of removing the Eklutna Lake dam.

The benefits of removing the Eklutna Lake dam include:

1. Collectively addressing a century of cultural and environmental neglect;
2. Restoring the Eklutna River to flow naturally out of Eklutna Lake;
3. Re-connecting the river to the lake, allowing for the recovery of sockeye, Chinook, and coho salmon, opening up 65% of their available habitat in Eklutna Lake and its upstream tributaries;
4. Sparing CEA and MEA ratepayers and MOA taxpayers from rate and property tax hikes to pay \$57 million to implement the utilities’ proposed plan;
5. Avoiding lost generation capacity at the Eklutna hydroelectric facility for the immediate future;
6. Securing the AWWU drinking water system; and,
7. Protecting popular lakeside trails from erosion caused by fluctuating lake levels.¹⁸

¹⁴ See Native Village of Eklutna, Letter to Anchorage Assembly Re: Eklutna Draft Fish and Wildlife Program (Nov. 10, 2023).

¹⁵ U.S. Army Corps of Engineers Alaska District, Eklutna River Aquatic Ecosystem Restoration Technical Report at i (Nov. 2011) <https://eklutnahydro.com/wp-content/uploads/2020/03/USACE-2011-Eklutna-River-Aquatic-Ecosystem-Restoration-Technical-Report.pdf>.

¹⁶ See Trout Unlimited, Eklutna River Workshop: Summary of Outcomes, Recommendations, and Future Needs at 4-6 (Jun. 2018) <https://www.tu.org/wp-content/uploads/2019/06/Eklutna-Workshop-Report-20181005-Final.pdf> (“[...] typical pre-1955 seasonal streamflow [on the Eklutna River downstream from the lake outlet] ranged from approximately 100 cubic feet per second (cfs) to as much as 1,000 cfs”).

¹⁷ Eklutna Draft Fish and Wildlife Program at 37-40.

¹⁸ Watershed GeoDynamics, Eklutna Hydroelectric Project Lakeside Trail Erosion Study Report Draft at 1 (Feb. 2022) https://eklutnahydro.com/wp-content/uploads/2022/06/2022-2-11-Eklutna-Study-Report_Lakeside-Trail-

In comparison, the “AWWU Portal” plan proposed in the Draft Program by the Project Owners leaves Eklutna Lake and its upper tributaries completely disconnected from the lower Eklutna River, maintaining over a mile of dry streambed.¹⁹ Furthermore, the flows the Project Owners propose to release from the AWWU Portal are the *minimum* flows considered by any of the signatory parties to the Agreement (“Parties”) during the Agreement study process, with inadequate higher flushing flow events in only three out of every ten years.²⁰

The AWWU Portal proposal provides no solution for the complete blockage of salmon reaching the extensive lake spawning habitat required by sockeye salmon (which was the key driver for the Agreement in the first place) and 15 miles of upper tributaries spawning habitat above the lake that is highly amenable to Chinook and coho salmon.²¹ Without a connection to Eklutna Lake, restoring those key spawning grounds and habitat is impossible. The Project Owners admit in the Draft Program that “*no change in sockeye rearing habitat is anticipated.*”²² The proposed nominal flow releases from the AWWU Portal, which represent less than 10% of the inflows to Eklutna Lake, will only minimally enhance Chinook and coho salmon and their habitat in the lower Eklutna River and bear no resemblance to historic flows.²³ Alaska’s late Congressman Don Young who spearheaded the sale and divestiture of the Eklutna Project would almost certainly agree that the Project Owner’s proposal is far from adequate, stating in 2018 when celebrating the removal of the lower dam that “[S]almon can now move upstream for the first time in 88 years. But the salmon need more water. With the lower dam removed it is now time to find ways to restore normal water flows to the Eklutna River.”²⁴

[Erosion_DRAFT.pdf](#) (“Operation of the Eklutna Hydroelectric Project results in variations in the water level in Eklutna Lake and may influence erosion of the trail in locations where it is directly adjacent to the lakeshore. Lake elevation fluctuation may also contribute to erosion at other facilities such as public use cabins and can inundate portions of the Bold airstrip along the lake shoreline.”)

¹⁹ Eklutna Draft Fish and Wildlife Program at 46-56.

²⁰ *Id.* at 39, 40; *see, e.g.*, Trout Unlimited, Eklutna River Workshop: Summary of Outcomes, Recommendations, and Future Needs at 4-6; *see also, e.g.*, U.S. Fish and Wildlife Service, Upper Eklutna River Survey Preliminary Fish Habitat Flow Assessment (July 14, 2019) <https://www.tu.org/wp-content/uploads/2019/06/Upper-Eklutna-Flow-Assessment-071419-1.pdf>.

²¹ *See, e.g.*, Native Village of Eklutna, Eklutna Lake and Tributaries Salmon Habitat (2022) <https://static1.squarespace.com/static/5f52cd19995bf84b22653379/t/630683349fc05e329044d6bf/1661371211807/Lake+%26+Tributaries+Habitat.pdf>; *See also e.g.*, McMillian Jacobs Associates, Eklutna Lake Aquatic Habitat and Fish Utilization, Year 2 Study Report Draft (2023) <https://eklutnahydro.com/wp-content/uploads/2023/04/Draft-Eklutna-Lake-Habitat-and-Fish-Y2-Report.pdf>; *See also, e.g.*, Native Village of Eklutna, TWG 2021-2022 Final Report (Jul. 23, 2023).

²² Eklutna Draft Fish and Wildlife Program at Appendix B-4 (emphasis added).

²³ McMillian Jacobs Associates, Initial Information Package at 77 (Sept. 2020) https://eklutnahydro.com/wp-content/uploads/2020/10/200928-Eklutna-IIP_FINAL.pdf (“According to flow records from 1923 to 1928 taken at the mouth of the canyon prior to construction of the first dam in 1929, “[t]he minimum flow recorded ... was 50 cfs and the average for the whole period was 640 cfs. The maximum discharge recorded was 2,930 cfs in September 1925.” In comparison, the Project Owners’ proposed flows from the AWWU Portal are average daily flows of 27-40 cfs and flushing flows that are intended to mimic maximum discharge of only 220 cfs for 36 hours three years out of every ten years.). *See also* Eklutna Draft Fish and Wildlife Program at 39, 49.

²⁴ Cong. Don Young, Letter to MEA.

As such, we reject the AWWU Portal alternative because it:

1. Fails to remedy the harms to sockeye salmon and their spawning habitat that instigated the Agreement and Program process;
2. Leaves one mile of dry riverbed that prevents fish from reaching Eklutna Lake;²⁵
3. Blocks access to the majority of sockeye, Chinook, and coho salmon spawning and rearing habitat in the lake and its tributaries;
4. Delivers inadequate flows for fish below the Eklutna Lake dam;²⁶
5. Ignores the requests of the Eklutna Dena'ina for the recovery of a natural river after 94 years of harm;
6. Ignores the science-based recommendations of the two federal agencies (USFWS and NMFS) that are responsible for protecting salmon and other affected fish and wildlife resources;
7. Could jeopardize the Anchorage drinking water system; and,
8. Burdens ratepayers and taxpayers with \$57 million in unnecessary cost increases.²⁷

The Project Owners are not providing decision-makers and the public with the full range of alternative solutions and mitigation measures to meet the Agreement requirements. NVE has requested the Project Owners analyze alternatives that would restore connectivity of Eklutna Lake and upper tributaries to the lower river, including a formal request for analyzing removal of the Eklutna Lake dam on October 5, 2023, echoing The Conservation Fund's repeated and specific requests for evaluation of removal of the dam throughout the study plan and alternatives analysis process.²⁸ The Project Owners rebuffed these requests based on a cost-benefit analysis and subsequent balancing test they are not qualified to undertake nor authorized to administer.

The Eklutna River has been degraded by hydropower for 94 years. It is not worth rushing into an expensive and ineffective solution when we can properly fix the problem within the next decade. NVE's alternative calls for a phased solution instead of a commitment to an additional 35-year term of devastation. Rather than commit ratepayers and taxpayers to a \$57 million expense for the AWWU Portal, we suggest saving that money and waiting a few more years to do the job right at little to no cost to ratepayers and taxpayers.

NVE's vision for the Eklutna River includes a commitment to expanding renewable energy in Southcentral Alaska, and we are eager to work with all the Parties toward that goal. Recent projections are that Alaska will easily meet the 80% renewable portfolio standard by 2040, given the known opportunities that include a major expansion of the Bradley Lake hydroelectric project that will generate more power than the Eklutna project alone, an estimated 200 MW of new wind and solar projects under good-faith negotiations across the Railbelt, and increased

²⁵ Eklutna Draft Fish and Wildlife Program at 46 ("Release of water from the portal valve will provide year-round flow to 11 of the 12 river miles.").

²⁶ See, e.g., USFWS, Upper Eklutna River Survey Preliminary Fish Habitat Flow Assessment; see also, e.g., Trout Unlimited, Eklutna River Workshop: Summary of Outcomes, Recommendations, and Future Needs at 4-6.

²⁷ Eklutna Draft Fish and Wildlife Program at 64.

²⁸ See Native Village of Eklutna, Eklutna Alternatives Analysis Letter to Samantha Owen, McMillen Inc. (Oct. 5, 2023); see also, e.g., The Conservation Fund, Year 2 Study Plans – Eklutna Hydroelectric Project Comments at 3 (Mar. 11, 2022) https://eklutnahydro.com/wp-content/uploads/2022/06/Eklutna-Draft-Year-2-Study-Plans_Comments_TCF.pdf.

Railbelt grid efficiency required by Alaska SB123 passed in April 2020 and the resultant Regulatory Commission of Alaska May 2020 Order.²⁹

III. The Draft Program Analysis is Incomplete, Flawed, and Otherwise Insufficient for a Decision on the Future of the Eklutna River under the Agreement

The Draft Program is severely flawed and insufficient, and we contest the scientific and policy analysis on which many of its findings and conclusions are based.

A. The Project Owners Did Not Follow the Delineation of Responsibilities in the Agreement

The Agreement carefully divides which considerations should be made by which Parties at which stage of the mitigation process. During the Study Plan stage, the Project Owners are “to examine, and quantify, if possible, the impacts to fish and wildlife from the Eklutna [...] project” and “shall consider the impacts of fish and wildlife measures on electric rate payers, municipal water utilities, recreational users and adjacent land use, as well as available means to mitigate these impacts.”³⁰ The Agreement then requires the Project Owners to recommend measures “for the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat).”³¹ While it can be reasonably interpreted that the Program would include the analysis from the study plan of the impacts of fish and wildlife measures on other considerations, such as electric ratepayers, the Agreement does not state, as it does clearly in other sections, that other considerations, such as electric rate payers, power production or energy conservation, are to be considered when evaluating and recommending measures that are necessary to mitigate the Project’s impacts on fish and wildlife.³² The Agreement is clear that the Program’s only consideration is meeting the purpose of the Agreement, which is “the protection, mitigation of damages to, and enhancement of fish and wildlife (including related spawning grounds and habitat).”³³

It is then the Governor of Alaska’s responsibility, *not the Project Owners’*, to evaluate whether the proposed Program of fish and wildlife measures is appropriate after considering the several criteria listed in the Agreement in making his final Program determination.³⁴

The Project Owners overreach their authority under the Agreement by claiming that they are charged not just with undertaking the study process, but also with undertaking the policy analysis to give equal consideration to the eight purposes the Governor must balance in his final decision

²⁹ Alaska SB 123 (2020); Regulatory Commission of Alaska, Order R-20-001 (May 18, 2020).

³⁰ Fish and Wildlife Agreement at 2.

³¹ *Id.* at 3.

³² *Id.* at 2, 3.

³³ *Id.* at 3.

³⁴ *Id.* at 4 (“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.”).

when promulgating a Program.³⁵ They are neither qualified nor authorized to make policy determinations and have plain conflicts of interest. This calls into question the integrity of the entire Draft Program and its ability to meet the Agreement’s purpose.

B. The Draft Program Does Not Meet the Purpose of the Agreement

The Draft Program fails to meet the fundamental purpose of the Agreement and steps far beyond fish and wildlife considerations laid out in the Agreement. The AWWU Portal plan proposed in the Draft Program by the Project Owners leaves Eklutna Lake and upper tributary streams completely disconnected from the lower Eklutna River, maintaining over a mile of dry streambed.³⁶ Furthermore, the flows the Project Owners propose to release from the AWWU Portal are the minimum flows considered by any of the parties during the Agreement study process, with small high-flow events in only three out of every ten years.³⁷ This proposal provides no solution for the complete blockage of salmon reaching the extensive lake spawning habitat required by sockeye salmon (which was the key driver for the Agreement in the first place), and 15 miles of upper tributaries spawning habitat above the lake that is highly amenable to Chinook and coho salmon completely stranded.³⁸ Without a connection to Eklutna Lake and upper tributaries, restoring those key spawning and rearing grounds and habitat is impossible. The Project Owners admit in the Draft Program that “no change in sockeye rearing habitat is anticipated.”³⁹ The proposed nominal flow releases from the AWWU Portal will only minimally enhance Chinook and coho salmon and their habitat in the lower Eklutna River.

Instead of focusing on the most beneficial program for fish and wildlife, the Draft Program is primarily concerned with implementation costs, along with impacts on power generation, ratepayers, and drinking water.⁴⁰ The Program states that the AWWU Portal is the “most cost-effective” alternative in its rationale for choosing that option. Cost-effectiveness is not a primary consideration in the Agreement, nor one of the eight factors the Governor must consider in his decision.⁴¹ The Draft Program’s incorporation of aspects far beyond fish and wildlife takes the task of balancing considerations away from the Governor and places them in the hands of the Project Owners. This is a significant conflict of interest that was intended to be avoided by the clear language of the Agreement. The Draft Program should have been concerned only with protecting, mitigating, and enhancing fish and wildlife habitat, and its failure to do so resulted in a thoroughly flawed Draft Program.

C. The Project Owners Have Not Implemented the Consultation Process to Protect Fish and Wildlife from Project Impacts “At Least As Well” as a FERC Process

³⁵ Eklutna Draft Fish and Wildlife Program at 44.

³⁶ *Id.* at 46-56.

³⁷ *Id.* at 39.

³⁸ *See, e.g.*, Native Village of Eklutna, Eklutna Lake and Tributaries Salmon Habitat (2022)

<https://static1.squarespace.com/static/5f52cd19995bf84b22653379/t/630683349fc05e329044d6bf/1661371211807/Lake+%26+Tributaries+Habitat.pdf>; *See also* McMillian Jacobs Associates, Eklutna Lake Aquatic Habitat and Fish Utilization, Year 2 Study Report Draft (2023) <https://eklutnahydro.com/wp-content/uploads/2023/04/Draft-Eklutna-Lake-Habitat-and-Fish-Y2-Report.pdf>; *See also* Native Village of Eklutna, TWG 2021-2022 Final Report.

³⁹ Eklutna Draft Fish and Wildlife Program at Appendix B-4.

⁴⁰ *Id.* at 44.

⁴¹ *Id.*

The consultation process agreed to in the Agreement was intended to be “quite similar to that under [FERC] licensing of hydroelectric projects with the Governor of Alaska assigned a role similar to FERC’s in decisions on fish and wildlife measures.”⁴² The Agreement process was intended to work “at least as well” for fish and wildlife as a FERC relicensing process.⁴³ Yet, the consultation process has not been implemented in a manner that matches the procedural protections afforded to fish and wildlife in a FERC relicensing process. The deficiencies in the process are manifested in a Draft Program that will not provide adequate or equitable protection, mitigation, and enhancement of fish and wildlife in the Eklutna watershed that have been adversely impacted by the Project. These include not only the impacts of project construction, but the totality of impacts of project construction, operation, and maintenance on fish and wildlife and their habitat, including the temporal loss of services and functions of a free-flowing anadromous river.⁴⁴ Alaska’s Congresswoman Mary Peltola unambiguously states that “[t]he intent of Congress was clear: [the Project Owners] must mitigate for drying up the Eklutna River for the past 70 years.”⁴⁵

One of the primary deficiencies in the consultation process has been the Project Owners’ conflation of improvements to the baseline condition with adequate protection, mitigation, and enhancement of fish and wildlife impacted by the Project. This misunderstanding of the level of protection the Project Owners are required to deliver under the Agreement, and that would similarly be required in a FERC proceeding, has contributed to an inadequate scope of study and alternatives analysis. Rather than develop and evaluate alternatives according to their comparative effectiveness in mitigating the impacts caused by the Project’s dewatering of the Eklutna River and the resulting destruction of fish and wildlife habitat from the 1950s to present, the Project Owners evaluated alternatives according to their “ecological lift in terms of gains in salmon spawning and rearing habitat” compared to their cost.⁴⁶ However, “ecological lift” is not the same as providing adequate and equitable protection, mitigation, and enhancement of fish and wildlife. In short, the Project Owners have developed a Draft Program that would be marginally better for fish and wildlife, but not one that would actually mitigate the project’s impacts on fish and wildlife.⁴⁷

⁴² Divestiture Report at 18.

⁴³ *Id.* at 20.

⁴⁴ See 40 C.F.R. § 1508.1(g) (definition of “effects” for purposes of environmental analysis under the National Environmental Policy Act); see also USFWS and NMFS, Final ESA Section 7 Consultation Handbook at 4-30 (Mar. 1998) (“The total effects of all past activities, including effects of the past operation of the project, current non-Federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline.”); see also 33 C.F.R. § 332.2 (Corps regulations requiring consideration of “temporal loss” in determining appropriate mitigation).

⁴⁵ Cong. Mary Peltola, Letter to CEA.

⁴⁶ Eklutna Draft Fish and Wildlife Program at 31 (According to the Draft Program, “[t]he process helped to narrow down the list of comprehensive alternatives by removing those that either did not provide a significant ecological lift, or where multiple alternatives provided a similar ecological lift, those that were more costly could be removed from consideration.”)

⁴⁷ See Eklutna Draft Fish and Wildlife Program at 45-46.

Another significant deficiency in the consultation process has been the Project Owners' unilateral rejection of reasonable alternatives without rigorous study or analysis.⁴⁸ This is a departure from a FERC relicensing proceeding where FERC, not the applicant, is required under the Federal Power Act ("FPA") and the National Environmental Policy Act ("NEPA") to undertake a full study of alternatives as the basis for determining that a project, as licensed, will be best adapted to a comprehensive plan of development.⁴⁹ Here, by contrast, the Draft Program does not demonstrate the Project Owners adequately considered a reasonable range of alternatives proposed for analysis by the Parties, NVE, and other stakeholders.⁵⁰ Rather than provide enough detail about each alternative for the Governor to "evaluate their comparative merits," the Project Owners preemptorily eliminated certain alternatives from detailed study based on their biased cost-benefit assessment.⁵¹

The Project Owners' exclusion of a dam removal alternative is an egregious error in the environmental analysis.⁵² Dam removal is a reasonable alternative because it would provide the most protection, mitigation, and enhancement of fish and wildlife at a cost far lower than other alternatives considered.⁵³ Other dams, like those on the Elwha River in Washington and the Klamath River in California, have been removed or are planned for removal as the most effective means for achieving restoration of salmon runs that have been decimated by 20th century dam construction and operation.⁵⁴ Moreover, dam removal to restore fish passage and recover salmon is a NMFS priority action.⁵⁵ Yet because the Draft Program does not consider dam removal, the Governor cannot make an informed decision as to how dam removal compares to the Project Owners' preferred alternative.

Again, in a FERC proceeding the Project Owners would not have been allowed to unilaterally limit the analysis of alternative measures, like dam removal, to mitigate the Project's impacts on

⁴⁸ Based on our review, the Owners have exercised almost complete discretion in the scope and substance of the environmental analysis contained in the Draft Program document. This is a significant departure from a FERC proceeding where FERC is responsible for independently verifying any information it relies upon to comply with its statutory responsibilities to evaluate the environmental impacts of its licensing decisions. *See, e.g.*, 16 U.S.C. § 797d.

⁴⁹ 16 U.S.C. §§ 803(a), 808(a); *Green Island Power Auth. v. FERC*, 577 F.3d 148, 168 (2d Cir. 2009) (... "FERC is statutorily obligated, pursuant to the 'best adapted' standard outlined in sections 10 and 15 of the FPA, to give full consideration to all feasible alternatives, even where it ultimately cannot license those alternatives."). FERC is subject to a parallel requirement under NEPA to develop and conduct a rigorous and detailed analysis of all reasonable alternatives. 42 U.S.C. § 4332(2)(H), 40 C.F.R. § 1502.14. Given the potentially significant impacts of continued operation of a major hydropower project, FERC complies with NEPA by preparing an environmental document that evaluates the comparative merits of several alternatives in preparation for any licensing or relicensing decision. 40 C.F.R. § 1502(b); 18 C.F.R. §§ 380.5, 380.6

⁵⁰ *See* Eklutna Draft Fish and Wildlife Program at 65-75.

⁵¹ *Id.*

⁵² 40 C.F.R. § 1502.14(a).

⁵³ U.S. Army Corps of Engineers, Eklutna River Aquatic Ecosystem Restoration Technical Report at i.

⁵⁴ *See, e.g.*, NOAA Fisheries, Dam Removals on the Elwha River (accessed Nov. 17, 2023)

<https://www.fisheries.noaa.gov/west-coast/dam-removals-elwha-river>; *See also, e.g.*, NOAA Fisheries, As Dam Removals Move Forward, NOAA Explores Next Steps for Habitat Restoration in Klamath Watershed (Dec. 7, 2022) <https://www.fisheries.noaa.gov/feature-story/dam-removals-move-forward-noaa-explores-next-steps-habitat-restoration-klamath>.

⁵⁵ *See, e.g.*, NOAA Fisheries, Restoring Fish Passage through Barrier Removal Grants

<https://www.fisheries.noaa.gov/grant/restoring-fish-passage-through-barrier-removal-grants>.

fish and wildlife resources, over the objections of NMFS and USFWS. For example, under FPA section 18, NMFS and USFWS have authority to prescribe fishways that must be included, without modification, in any license issued by FERC.⁵⁶ Under FPA section 10(j), a FERC license must include conditions to “adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project” based on recommendations from NMFS, USFWS, and other state and fish and wildlife agencies.⁵⁷ NMFS would consider the fishery management plan for Pacific salmon as a comprehensive plan for considering mitigation and enhancement for salmon in this process.⁵⁸

Another significant deficiency in the consultation process has been the Project Owners’ failure to evaluate the potential impacts of their proposed Draft Program and alternatives on the critically endangered Cook Inlet beluga whale – a national NMFS priority species – and its designated critical habitat which includes the mouth of the Eklutna River.⁵⁹ Again, such evaluation would be required in any FERC relicensing under Endangered Species Act (“ESA”) section 7.⁶⁰ Given the Agreement’s express intent to provide comparable protection to a FERC proceeding, the Owners failure to fully evaluate the Project’s impacts on the Cook Inlet beluga whale is inexplicable and unjustifiable.

D. The Draft Program Undervalues Traditional Ecological Knowledge

It is well-established traditional ecological knowledge that Eklutna Lake and upper tributary streams once hosted abundant salmon runs, including sockeye, Chinook, and coho salmon.

Six elders, now deceased, told now Elder Maria Coleman that the Eklutna River used to be “overflowing” with “abundant” fish before the dams. Elder Louis Munson recalled stories of her family fishing for salmon (Łiq’a – the generic Dena’ina term for all salmon species) at the cabin that was located at the upper end of Eklutna Lake, at the mouth of

⁵⁶ 16 U.S.C. § 811; *See American Rivers v. FERC*, 187 F.3d 1007 (9th Cir. 1999), *as amended* 201 F.3d 1186, 1210 (9th Cir. 2000) (“Where the Commission disagrees with the scope of a fishway prescription, it may withhold a license altogether or voice its concerns in the court of appeals, but at the administrative stages, ‘it is not the Commission’s role to judge the validity of [the Secretary’s] position-substantially or procedurally.’”).

⁵⁷ 16 U.S.C. § 803(j)(1). FERC may modify a Section 10(j) recommendation only if it finds an alternative condition will provide adequate and equitable fish and wildlife protection, mitigation, and enhancement. *Id.* at § 803(j)(2).

⁵⁸ North Pacific Fishery Management Council, Fishery Management Plan for the Salmon Fisheries in the EEZ off Alaska. Appendix A. Anchorage, Alaska (2021) <https://www.npfmc.org/wp-content/PDFdocuments/fmp/Salmon/SalmonFMPAppendix.pdf>.

⁵⁹ *See* 76 Fed. Reg. 20,180 (Apr. 11, 2011).

⁶⁰ 16 U.S.C. 1536; 18 C.F.R. § 380.13. Under ESA section 7, all federal agencies, including FERC are required to consult with NMFS and/or USFWS to ensure that the reauthorization by the federal agency is “not likely to jeopardize the continued existence of any endangered species [...] or result in the destruction or adverse modification of habitat of such species [...]” 16 U.S.C. § 1536(a)(2); *see also*, FERC, Handbook for Hydroelectric Project Licensing at B-2 (Apr. 2004) <https://www.ferc.gov/sites/default/files/2020-04/licensing-handbook.pdf>. In the consultation process, the action agency and consulting agencies are required to consider only the best available science. *Id.*

the Eklutna River tributary to the lake, before the dams were built. Stories included a fish rack and smoking of salmon in quantities to bring back to the Eklutna Village.⁶¹

Yet, contrary to this well-established traditional ecological knowledge, the Draft Program dismisses the possibility of a substantial sockeye run to the lake and downplays the quality and quantity of salmon habitat in the upper tributaries. The Draft Program concludes that there was never a large run of sockeye to the lake, pointing to limiting factors such as the lake's turbidity, nutrient levels, and size of kokanee, and discounts the critical importance of the upper tributaries for Chinook and coho spawning habitat.⁶² This conclusion ignores the traditional ecological knowledge of NVE that the Project Owners are well aware of and which was shared throughout the Study Plan process.⁶³ Instead, the Draft Program relies solely on Western scientific analysis based on current degraded conditions to justify the hypothesis of a small historic sockeye run, and does not duly weigh traditional knowledge of historic salmon populations in Eklutna lake and the tributaries above.

E. The Preferred Alternative is Insufficient for Salmon and Maintains a Dead-End River

The AWWU Portal puts the least amount of water in the river of all the alternatives for regular flows and high-flow events.⁶⁴ The justification for choosing the lowest flow alternative primarily comes from economic considerations rather than what is best for fish and wildlife. The Agreement makes clear that the consideration of non-fish and wildlife factors should be made by the Governor, not by the Project Owners in the Draft Program. The preferred alternative continues to create a dead-end river, with over a mile of dry streambed below the dam. Creating a dead-end river hardly mitigates the damages caused to fish and wildlife from the Project because it prevents connectivity between Knik Arm, the lower Eklutna River, the lake, and the upper tributaries. The preferred alternative cannot mitigate damages to sockeye in any way because it will continue to prevent nearly all anadromous sockeye from spawning in the Eklutna River system. Because the destruction of the sockeye run was the "specific concern" leading to the Agreement, a Program that continues to prevent almost all sockeye from spawning is impermissible.⁶⁵ The preferred alternative permits less than 10% of the river to flow down its historic channel to the Knik Arm, the smallest amount of any proposed alternative.⁶⁶

High flows are essential to mimic beneficial flooding. Seven of the nine alternatives proposed much more water during high flows, yet the Draft Program Plan settles on the lowest water

⁶¹ Native Village of Eklutna, Eklutna Lake and Tributaries Salmon Habitat Presentation Slides (2022) <https://static1.squarespace.com/static/5f52cd19995bf84b22653379/t/630683349fc05e329044d6bf/1661371211807/Lake+%26+Tributaries+Habitat.pdf>.

⁶² *Id.* at 68-71.

⁶³ See, e.g., Native Village of Eklutna, Comments of Eklutna Hydro Initial Information Package (Apr. 24, 2020) https://eklutnahydro.com/wp-content/uploads/2020/06/Comments-on-Draft-IIP_NVE.pdf; Native Village of Eklutna, NVE Comments on Proposal Final Year 2 Study Plans: Comments from a Tribal Perspective (Jun. 2022) https://eklutnahydro.com/wp-content/uploads/2022/06/Eklutna-Proposed-Final-Year-2-Study-Plans_Comments_NVE_Maria.pdf; See also, Native Village of Eklutna, TWG 21-22 Final Report at 3 (2023).

⁶⁴ Eklutna Draft Fish and Wildlife Program at 39-40.

⁶⁵ See Divestiture Report at 19.

⁶⁶ Eklutna Draft Fish and Wildlife Program, 39, 49.

discharge for channel maintenance flows of all discharges proposed. The maintenance flow regime in the preferred alternative is severely inadequate because it fails to return the river to its natural flow. The 220 cfs maximum flushing flows in the Draft Program is less than 20% of the average flushing flows of 1,402 cfs that USFWS estimated would be necessary to recreate the flows that historically supported the natural fishery and created the natural river channel and off-channel habitat.⁶⁷ Worse, the Draft Program imagines the peak flow for just a few hours for just three out of every ten years before returning to conditions that approximate a severe drought. NMFS concluded that the proposed flushing flows in the Draft Program “are unlikely to modify substrates and support habitat complexity in a meaningful way after nearly a century of limited impactful flow events.”⁶⁸ The chosen channel maintenance flow hardly mitigates for the Eklutna River’s deprivation of almost a century of flooding with a maximum recorded value of approximately 3,000 cfs.⁶⁹

F. The Draft Program Directly Contradicts NVE’s Land and Environment Department and Kleinschmidt Associates’ Assessments of Historic and Potential Salmon Habitat in Eklutna Lake and Upper Tributaries

The Draft Program significantly discounts the potential of the upper Eklutna tributaries as vital salmon habitat. NVE’s TWG 2021-22 Final Report combines traditional ecological knowledge with current surveys and science of the headwaters of the Eklutna River to conclude that there is expansive, preferred habitat for Chinook and coho salmon, which is currently occupied by Dolly Varden, showing its potential.⁷⁰ Our report found that the clearwater tributaries for the West Fork have high-quality habitat and that much of the East Fork has suitable habitat in its main stem and tributaries. NVE’s Land and Environment Department has concluded that there are over 15 miles of salmon habitat in the upper tributaries.

The Draft Program also significantly discounts the potential of Eklutna Lake as vital salmon habitat. The Draft Program concludes that there was never a large run of sockeye to the lake, pointing to limiting factors such as the lake’s turbidity, nutrient levels, and size of kokanee.⁷¹ This current condition may be due to the denial to the lake of marine derived nutrients from salmon carcasses and impacts from the current 40-60 foot biologically devoid varial zone resulting from hydroelectric power water drawdowns around the lake, including such impacts as reduced aquatic vegetation.⁷² Moreover, a primary source for the Project Owner’s conclusion is a 2017 study, which they greatly misrepresent. The study concluded that its results “can[not be] construed as evidence that [salmon runs to the lake] did not [exist].”⁷³ The 2017 study, rather, found that, based on the lake's water volume and turnover rate, as many as 15,000 sockeye could have spawned in the lake annually, which is far from an insignificant number.⁷⁴ A co-author of

⁶⁷ U.S. Fish and Wildlife Service, Upper Eklutna River Survey Preliminary Fish Habitat Flow Assessment.

⁶⁸ National Marine Fisheries Service, Comment Letter to Draft Fish and Wildlife Program (Dec. 5, 2023).

⁶⁹ McMillen, IIP at 77.

⁷⁰ Native Village of Eklutna, TWG 21-22 Final Report (2023).

⁷¹ *Id.* at 68-71.

⁷² *See*, Email from Rick Sinott to Dustin Lorah, NVE (Dec, 1, 2023 at 10:05AM).

⁷³ Loso, Michael et al., Evaluating Evidence for Historical Anadromous Salmon Runs in Eklutna Lake, Alaska 70 Arctic at 270 (Sept. 2017);

⁷⁴ *Id.* at 259.

the paper recently stated that “[a]nyone who cites the study to argue that Eklutna Lake had no salmon or an "insignificant" number isn't using it scientifically, they are using it politically.”⁷⁵

Kleinschmidt Associates surveyed 14 areas totaling 68,512 square ft. around Eklutna Lake that are potentially suitable for sockeye spawning under favorable lake level regimes. These are now largely in the barren varial zone due to 40-60 foot lake drawdowns. However, they contain appropriate slopes, gravel sizes and seeping groundwater or potentially suitable substrate for sockeye spawning, and there may be even more than reported. A total of 331 spawned-out kokanee were observed at Eklutna Lake during the survey period, finding “[s]pawned kokanee ranged from 4.5 – 6.5 inches [...]”⁷⁶ Alaska Department of Fish and Game (“ADFG”) biologists have told us these would grow to normal sockeye size if allowed to develop in the ocean and that these kokanee are likely descendants of a native ocean-run population, since there is no record that they were ever stocked. The Draft Program acknowledges that Trout Unlimited’s Alternative and USFWS’s Alternative B – modifying the current dam to allow upstream and downstream fish passage – both create significant gains in sockeye spawning habitat, which would come from increased lake spawning habitat.⁷⁷

Overall, NVE Land and Environment Department’s assessments indicate the following stream miles would be restored by reconnecting the lake and upper tributaries to the lower river and restoring the natural flow regime: 12 miles in the river below the lake, 7 miles in the lake, and 15 miles above the lake in the upper tributaries.⁷⁸ NVE Land and Environment Department’s measurements are in stream miles, and that metric is used to assess lake habitat, so 7 miles of lake habitat undervalues the actual habitat available for restoration in the lake. These estimates also undervalue habitat off the main channel in the lower river below the lake that could be restored with higher flow releases than are proposed in the Draft Program. Full recovery would therefore restore a minimum of 34 miles of salmon habitat and likely much more taking into account the undervaluing of lake and off channel habitat. The Draft Program, on the other hand, proposes to marginally restore only 11 miles, less than 35% of the conservative estimate of possible salmon habitat in the Eklutna watershed.⁷⁹

G. The Program’s Analysis of Non-Salmonid Wildlife is Severely Inadequate

The Agreement’s protection, mitigation, and enhancement purpose is not limited to salmon but instead includes all fish and wildlife impacted by the Project. Reducing the ecological function of the tidal wetlands, lower river, lake, and upper tributaries from the Project’s impacts reduces the health of fish and wildlife throughout the watershed. However, the Draft Program is not built upon any surveys or studies of marine mammals and its consideration of terrestrial and avian wildlife and habitat is severely inadequate.

⁷⁵ Email from Rick Sinott to Dustin Lorah, NVE (Nov. 30, 2023 at 6:50PM).

⁷⁶ Kleinschmidt Associates, Lake Aquatic Habitat and Fish Utilization Study Year 1 Interim Report DRAFT (Feb. 2022) at 12-20 https://eklutnahydro.com/wp-content/uploads/2022/06/2022-2-11-Eklutna-Year-1-Interim-Report_Lake-Fish_DRAFT.pdf.

⁷⁷ *Id.* at 42.

⁷⁸ Native Village of Eklutna, TWG 21-22 Final Report (2023).

⁷⁹ *Id.*

The wildlife habitat survey study area boundary was limited to the lower end of the lake, the current river channel corridor, and a section of the wetlands at the river mouth.⁸⁰ This study area boundary is insufficient and should have included the entire Eklutna watershed, including the upper tributaries, the entire lake, and the off channel stream areas in the lower river valley, given the Project harms to the whole Eklutna watershed ecosystem. Because of the limited study area, the wildlife analysis could not fully consider the protection, mitigation, and enhancement from all the alternatives, including the potential restoration of habitat from increasing flows and reconnecting the lower river to the lake and upper tributaries.

Terrestrial and avian wildlife and habitat studies were primarily conducted via aerial surveys and literature reviews, both which have issues regarding their accuracy and the amount of place-specific detail they can provide.⁸¹ A recent scientific review of the accuracy of wildlife aerial surveys stated that aerial surveys can be an efficient platform to collect observational counting data “across large spatial areas,” but which are far less well-suited for specific and small-scale geographies like the Eklutna survey area.⁸² Furthermore, the review noted common errors such as “nondetection, counting error, and species misidentification” that if not adequately addressed at all stages of the study “can provide data that obscure animal-environment relationships or introduce biases into inferences.”⁸³ The Project Owners provide no details or assurances that their limited surveys addressed these common errors. Furthermore, aerial and other surveys for wildlife were extremely limited. For example, only one day of raptor aerial surveys were completed, four days of migratory shorebird and waterfowl surveys were completed, and three days of moose surveys were completed, all during 2022.⁸⁴ These surveys would not account for any annual variation in wildlife abundance or timing in the Eklutna watershed, as well as seasonal access limitations, among other issues. Wildlife habitat analysis relied on historic and current aerial photography with no ground vegetation surveys completed.⁸⁵ Scientific literature on Alaska wildlife and habitat is rarely area specific and is therefore not necessarily a valid representation of species using the Eklutna watershed either for their full lifecycles or for their migration routes or travel corridors.

Overall, the Plan recognizes that increasing the Eklutna River’s flow below the dam will “directly or indirectly benefit several ecologically and/or culturally important wildlife species” such as wolves, moose, raptors, and bears.⁸⁶ Yet, because of the severe lack of adequate baseline data, it is impossible to truly analyze and understand how the different alternatives would impact and potentially benefit all wildlife and their habitat and to what degree. For example, even though listed in the “observed or expected” wildlife list, the Draft Program fails to consider

⁸⁰ ABR, Inc., Eklutna Hydroelectric Project Wetlands and Wildlife Habitat Study Report Draft at 3 (Mar. 2023) <https://eklutnahydro.com/wp-content/uploads/2023/04/Draft-Eklutna-Wetlands-and-Wildlife-Habitat-Report.pdf>.

⁸¹ Chugach Electric Association, Matanuska Electric Association, and Municipality of Anchorage (“Project Owners”), Eklutna Hydroelectric Project Draft Summary of Study Results at 46-50 (Oct. 2023) <https://eklutnahydro.com/wp-content/uploads/2023/11/2023-10-27-Eklutna-Draft-Summary-of-Study-Results.pdf>.

⁸² Davis, Kayla L. et al., Errors in aerial survey count data: Identifying pitfalls and solutions, 12 Ecology and Evolution e8733 (Mar. 18, 2022) <https://onlinelibrary.wiley.com/doi/10.1002/ece3.8733>.

⁸³ *Id.*

⁸⁴ Eklutna Draft Summary of Study Results at 46-49.

⁸⁵ *Id.* at 42-43; *see*, Email from Terry Schick, ABR Inc., to Carrie Brophil, NVE (Nov. 22, 2022 at 11:27AM) (on file with NVE).

⁸⁶ Eklutna Draft Fish and Wildlife Program at 53.

imperiled species like the Little brown bat (*Myotis lucifugus*) that rely on the Eklutna watershed and for which mitigation and enhancement of their foraging habitat in the lower Eklutna River valley, which is currently harmed by the Project, could be improved by increasing flows and rebuilding off channel habitat in the lower river.⁸⁷ The Draft Program also fails to analyze why certain wildlife populations appear to be below normal levels. For example, the Summary of Study Results notes that “[w]aterfowl and shorebird numbers in the study area were moderate and low, respectively, during the field surveys” and that “[s]horebirds were noticeably absent during the spring surveys.”⁸⁸ This may be an example of a system that is in depression from nearly a century of harms from hydroelectric dams. These examples, and many others, highlight the Draft Program’s inadequacies in considering and rigorously analyzing how the different alternatives would impact all non-salmonid fish and wildlife in the Eklutna system and whether the preferred alternative provides adequate mitigation and enhancement.

Regarding marine mammals, the Draft Program fails to consider the protection, mitigation, and enhancement of Cook Inlet beluga whales, one of the nation’s most critically endangered marine mammals. The best available science shows that Cook Inlet belugas could significantly benefit from increased salmon runs in the Eklutna River. Given the mouth of the Eklutna River is within designated critical habitat in upper Cook Inlet where the majority of the Cook Inlet beluga population forages during the summer, the critically endangered whales should be a primary concern for the Program.⁸⁹ The 2011 critical habitat designation for Cook Inlet belugas identified shallow intertidal and subtidal waters of Cook Inlet in close proximity to medium to high flow anadromous fish streams along with four species of Pacific salmon (Chinook, sockeye, chum, and coho) as essential to the beluga’s conservation (also known as Primary Constituent Elements).⁹⁰ NMFS 2016 Recovery Plan for Cook Inlet belugas identifies prey availability as a threat of medium concern for their recovery.⁹¹ NMFS acknowledges the heightened importance of prey availability, specifically Pacific salmon, for conserving Cook Inlet beluga whales. NMFS’ Species in the Spotlight, 2021-2025 report states that, “[s]urvival and recovery of Cook Inlet beluga whales depend on an adequate quantity, quality, and accessibility of prey resources.”⁹² In a recent notice to issue an IHA proposal from the Port of Alaska, NMFS noted that, “Pacific salmon represent the highest percent frequency of occurrence of prey species in CIBW stomachs.”⁹³ The notice highlighted that rich foraging areas to the north of the Port of Alaska, including the Eklutna River, are important to belugas and that the whales correlate their movements into Knik Arm around the timing of the salmon runs in those rivers.⁹⁴ A recent 2023 study by Wild et al. delineated portions of Cook Inlet, including Knik Arm and the mouth of the

⁸⁷ ABR Inc., Eklutna Hydroelectric Project Terrestrial Habitat Study Report Draft at 23 (Mar. 2023)

<https://eklutnahydro.com/wp-content/uploads/2023/04/Draft-Eklutna-Terrestrial-Wildlife-Report.pdf>.

⁸⁸ Eklutna Draft Summary of Study Results at 47.

⁸⁹ 76 Fed. Reg. 20,180 (Apr. 11, 2011).

⁹⁰ 76 Fed. Reg. 20,203, 20,214 (Apr. 11, 2011).

⁹¹ National Marine Fisheries Service, Recovery Plan for the Cook Inlet Beluga Whale at III-13 (2016).

⁹² NOAA Fisheries, Species in the Spotlight – Cook Inlet Beluga Whale, Priority Actions 2021-2025 at 14 (Apr. 21, 2021).

⁹³ 88 Fed. Reg. 76588 (Nov. 6, 2023).

⁹⁴ *Id.*

Eklutna River, as a Biologically Important Area (BIA) for the small and resident population of Cook Inlet beluga whales based on scoring methods outlined by Harrison et al. in 2023.⁹⁵

The best available science shows that restoring abundant salmon runs to the Eklutna River may be one of the key strategies available for Cook Inlet beluga recovery by creating more foraging opportunities for belugas in upper Cook Inlet. The results of a 2020 study by Norman et al. suggest that “reproductive success in [Cook Inlet belugas] is tied to salmon abundance” in the Deshka River, which is also located in upper Cook Inlet near Knik Arm and the Eklutna River.⁹⁶ That study showed that “if salmon runs remained at their current levels, the [Cook Inlet beluga] population would likely continue its current slow decline,” yet the study found that “if Chinook salmon increased 20% or more, the current decline would likely be reversed.”⁹⁷ Furthermore, the study simulations found that “doubling the salmon abundance would be sufficient to allow recovery of the population regardless of impacts from other threats.”⁹⁸ The study noted that while Chinook are the most nutritionally important salmon species for Cook Inlet belugas, belugas still rely on other salmon species as important prey.⁹⁹ Moreover, a recent 2023 study by McHuron et al. found that if there is enough prey abundance for Cook Inlet belugas, the whales can withstand other intermittent stressors, concluding that increasing prey availability increases the beluga’s resiliency to threats.¹⁰⁰ Another recent 2023 study by Warlick et al. stated that “aerial survey data suggest that the [Cook Inlet beluga] population continues to decline[, and the] leading hypotheses include reduced prey availability [...]”¹⁰¹

The proposed nominal flow releases from the AWWU Portal will only minimally enhance Chinook and coho salmon and their habitat in the lower Eklutna River. The AWWU Portal provides no solution for the complete blockage of salmon reaching the extensive lake spawning habitat required by sockeye salmon and miles of upper tributaries spawning habitat above the lake that is highly amenable to Chinook and coho salmon, both of which are primary forage species for Cook Inlet belugas.¹⁰² Without connection to Eklutna Lake, protecting, mitigating, and enhancing those key spawning grounds and habitat is impossible. In turn, the mitigation and enhancement for Cook Inlet beluga whales are likely to be minimal as well. Furthermore, no

⁹⁵ Wild, Lauren A. et al., Biologically Important Areas II for cetaceans within U.S. and adjacent waters – Gulf of Alaska Region, 10 *Front. Mar. Sci.* 1134085 (May 5, 2023); Harrison, Jolie, Biologically Important Areas II for cetaceans within U.S. and adjacent waters – Updates and the application of a new scoring system, 10 *Front. Mar. Sci.* 1081893 (Mar. 14, 2023).

⁹⁶ Norman, S. et al., Relationship between per capita births of Cook Inlet belugas and summer salmon runs: age-structured population modeling, 11 *Ecosphere* 1 (2020).

⁹⁷ *Id.* at 1, 9.

⁹⁸ *Id.* at 10 (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ McHuron, Elizabeth A. et al., Modeling the impacts of a changing and disturbed environment on an endangered beluga whale population, 483 *Ecological Modeling* 110417 (Sept. 2023).

¹⁰¹ Warlick, A.J. et al., Identifying demographic and environmental drivers of population dynamics and viability in an endangered top predator using an integrated model, *Anim. Conserv.* (Oct. 6, 2023).

¹⁰² See, e.g., Native Village of Eklutna, Eklutna Lake and Tributaries Salmon Habitat (2022) <https://static1.squarespace.com/static/5f52cd19995bf84b22653379/t/630683349fc05e329044d6bf/1661371211807/Lake+%26+Tributaries+Habitat.pdf>; See also, McMillian Jacobs Associates, Eklutna Lake Aquatic Habitat and Fish Utilization, Year 2 Study Report Final (2023) https://eklutnahydro.com/wp-content/uploads/2023/06/Eklutna-Lake-Study-Y2-Report_FINAL.pdf; See also, Native Village of Eklutna, TWG 2021-2022 Final Report.

analysis was completed for how the other alternatives considered would benefit Cook Inlet belugas.

The Draft Program's severely inadequate analysis of non-salmonid fish and wildlife fails to meet the purposes of the Agreement and the standard of a similar federal process, and severely inhibits the Governor's ability to make an informed decision.

H. The Draft Program Does Not Provide Specific Information Regarding Additional Requirements for the Draft Program or Any Alternatives

The Draft Program states that there may be additional requirements to implementing the Program, including the potential need to secure permits, land rights, easements and Amendment of ADL 44944.¹⁰³ However, it does not describe any strategies the Project Owners have developed for securing necessary permits or land rights for the Draft Program or any alternatives. Instead, the Draft Program document flatly states, “[s]hould any of these requirements fail to be achieved, the Project Owners will not be able to execute on the Fish and Wildlife Program.”¹⁰⁴

There is no basis for the Project Owners' suggestion that their inability to satisfy any “additional requirements” for implementation of the Program is a legitimate basis for their non-performance under the Agreement. Instead, the likelihood of the Project Owners being able to secure permits and property rights necessary for successful implementation of the Draft Program and reasonable alternatives is relevant to the alternatives analysis.

Based on our review, there are several issues related to the Project Owners' ability to secure permits for the Draft Program. The 15% design drawings included in the Draft Program show that the construction of the proposed AWWU Portal would include construction of above ground utility infrastructure as well as eight new bridges and road improvements for the AWWU water supply access road within Chugach State Park. Such construction within the State Park would be a “conversion” of Land and water Conservation Fund property requiring approval by the Department of Interior (“DOI”).¹⁰⁵ Further, any DOI decision approving conversion would be a federal action requiring compliance with NEPA and ESA section 7.

Additional review of the 15% design drawings shows that the Draft Program includes the addition of riprap fill material directly into the Eklutna River channel at the location of the AWWU Portal discharge, which would be subject to compliance with Clean Water Act section

¹⁰³ See Eklutna Draft Fish and Wildlife Program at 81.

¹⁰⁴ *Id.*

¹⁰⁵ See Eklutna Draft Fish and Wildlife Program at Appendix E; see also, 36 C.F.R. § 59.3; see also, Alaska Department of Natural Resources, Chugach State Park Management Plan at 31-32 (Feb. 2016) https://dnr.alaska.gov/parks/plans/chugach/finalplan/cspmp_2016_complete_text.pdf (“All of Chugach State Park is considered an LWCF protected area and is subject to the program provisions. Any property within an LWCF protected area may not be wholly or partly converted to anything other than public outdoor recreation uses without the prior approval of the Secretary of the U.S. Department of the Interior.” “Actions that may represent a conversion of use include installation of [...] above ground utilities, development of roads for primary purposes other than recreation [...].”)

404 and may require an individual permit from U.S. Army Corps of Engineers. Such permitting decisions would also be a federal action subject to compliance with NEPA and ESA section 7.¹⁰⁶

The Project Owners need to address these and any other permitting requirements and pathways for the proposed AWWU Portal as compared to dam removal and any other reasonable alternatives for the Parties, the public, and the Governor to make informed comments and decisions, respectively.

IV. The Project Owners Failed to Provide Meaningful Consultation Regarding Impacts to Historical Resources as Would Be Required Under a Similar Federal Process

NVE was not consulted in the negotiation of the Agreement and is not a party to the Agreement.¹⁰⁷ Rather than rectify that historic injustice, the Project Owners denied our request to be formally recognized as a consulting government and for treatment as a party to the Agreement during this process.¹⁰⁸ The Project Owners' decision appears based on their preference and convenience rather than any legal or moral principle.

The Project Owners describe their voluntary efforts to meet with and consider information provided by NVE, but these efforts offer no substitute for party status or treatment of NVE as a consulting government.¹⁰⁹ For example, after explaining that NVE is not entitled to participate in the consultation process under the Agreement, the Project Owners promise that "if the process set forth in the Agreement bears out the release of water from Eklutna Lake and the addition of salmon into the Eklutna River as part of the Fish and Wildlife Program, we will be prepared to support it."¹¹⁰ This is not a promise NVE can or should be asked to rely upon given that the Project Owners have substantially different interests than NVE, have exerted total control over the consultation process, and have excluded NVE from full participation in that process.

If the Project had not received a unique exemption from federal regulation, FERC, with assistance from the Project Owners, would be required to follow specific procedures in consulting with NVE under the National Historic Preservation Act ("NHPA") section 106 before deciding whether to continue or modify project facilities or operations over the next 30-year term.¹¹¹ In overseeing the Section 106 consultation process, FERC would be required to evaluate and reach agreement with NVE and other consulting parties on "ways to avoid, minimize or mitigate the adverse effects" of the Project.¹¹² In other words, the range of alternatives and alternative measures considered in a Section 106 process would not be limited to only those

¹⁰⁶ See Eklutna Draft Fish and Wildlife Program at Appendix E; *see also*, 33 U.S.C. § 1344.

¹⁰⁷ 36 C.F.R. § 800.5(a)(2)(vii) (The Advisory Council on Historic Preservation's regulations implementing Section 106 of the National Historic Preservation Act, now direct the federal government to consider the potential adverse effects of "[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.")

¹⁰⁸ Eklutna Draft Fish and Wildlife Program at 21.

¹⁰⁹ *Id.* at 21-22.

¹¹⁰ *Id.* at 22.

¹¹¹ 36 C.F.R. § 800.5(a).

¹¹² 36 C.F.R. § 800.6(a)-(b).

advantageous to the Project Owners. Also, NVE would have a role in overseeing and enforcing the Project Owners' compliance with any agreement resolving the Project's adverse effects.¹¹³

V. Interpretation of the Right to Judicial Review Limitation is Inappropriate and Unsupported

The Draft Program states that "Pursuant to the 1991 Agreement and APA Asset Sale Act, the Governor's decision regarding the provisions of the Final Fish and Wildlife Program is reviewable and enforceable *by the Parties* in the U.S. District Court for the District of Alaska."¹¹⁴ We dispute this as a statement of the Project Owners' opinion, which has been misleadingly presented as a formal conclusion without any legal basis. Neither the APA Asset Sale Act nor the Agreement limit judicial review to the Parties, and any such limitation would appear to violate principles of due process given, separate and apart from the enforceability of the Agreement as a contract between the Parties, the Governor's final decision on the Fish and Wildlife Program would affect rights and interests far beyond those of the individual Parties.¹¹⁵

VI. Request for Further Procedures

A. Full Analysis of NVE's Proposed Alternative

To meet the purpose and requirements of the Agreement, we firmly believe that the Parties, the public, and the Governor must have the full range of options identified and analyzed for consideration. As we have previously requested, removing the Eklutna Lake dam within ten years when sufficient renewable power generation is available as an alternative that must be fully analyzed because it appears to be the only alternative that would effectively mitigate the Project's harms to fish and wildlife.¹¹⁶ In preparing these comments, we have confirmed The Conservation Fund's commitment to fully fund the removal of the Eklutna Lake dam. We ask that any analysis of this alternative reflect that the actual capital expenditure (CAPEX) cost to remove the dam is \$0. The next schedule requirement per the Agreement is for the Governor to decide on the Final Program by Oct. 2, 2024, leaving plenty of time to fully analyze this alternative.¹¹⁷ Without analyzing this reasonable alternative, the Program would fail to meet the intent and requirements stated in the Agreement and the Divestiture Report and the Governor cannot make a fully informed decision.¹¹⁸

B. Meaningful Dispute Resolution Process

NVE has serious concerns about the Project Owners' proposed dispute resolution procedures. The Agreement requires that "[i]f USFWS, NMFS, or the State Resource Management Agencies' comments or recommendations different from those of the [Project Owners], the [Project Owners] will attempt to resolve such differences, giving due weight to the

¹¹³ *Id.* at § 800.6(c).

¹¹⁴ Eklutna Draft Fish and Wildlife Program at 17 (emphasis added).

¹¹⁵ See Pub. L 104-58, title I § 104(c)(1); Fish and Wildlife Agreement at 5.

¹¹⁶ Native Village of Eklutna, Letter to Samantha Owen, McMillen Inc. (Oct. 5, 2023).

¹¹⁷ Eklutna Draft Fish and Wildlife Program at 18.

¹¹⁸ Fish and Wildlife Agreement at 2; Divestiture Report at 19.

recommendations, expertise, and statutory responsibilities of USFWS, NMFS, and the State Resource Management Agencies.”¹¹⁹ We recently received notice from the Project Owners that they are proposing a 1.5-hour dispute resolution meeting on December 15th to meet this requirement.

We have raised several dispute issues regarding the adequacy of the Project Owner’s consultation process and the Draft Program in these comments. The Draft Program does not meet the express goals of the Agreement; more specifically, it will not mitigate the Project’s impacts on fish and wildlife because it will not reconnect the lake and upper tributaries to the lower river, which is necessary to restore sockeye, Chinook, and coho salmon to the Eklutna. We expect the federal resource management agencies will also raise disputed issues regarding the AWWU Portal recommendation in the Draft Program. Furthermore, we have proposed an alternative – removing the dam within ten years – that should have been analyzed previously and must be analyzed now as part of the dispute resolution process. We struggle to see how such substantial divergence can be resolved in a single 1.5-hour meeting.

We request the Project Owners provide meaningful, not pro forma, procedures to resolve the significant disputed issues. For example, we request the Owners anticipate the need to schedule additional meetings and that they also provide for an independent dispute resolution specialist to facilitate the dispute resolution process.

VII. Conclusion

The Eklutna Project is the limiting factor preventing the restoration of the Eklutna River that flows from its headwaters to its confluence with the Knik Arm. Plainly, the Project Owners’ Draft Program to maintain a dead-end river is inadequate to mitigate the Project’s harms to fish and wildlife. Adequate and equitable fish and wildlife protection, mitigation, and enhancement, as required by the Agreement, requires the lake and upper tributary streams to be connected to the lower river and adequate flows for salmon to thrive. As such, we request that the Project Owners consider our proposed dam alternative to comply with the Agreement’s purposes and provide a myriad of public interest benefits, including the long-term benefit of affordable energy from truly renewable sources.

Łiq’a nagh qinqtudeł – We are hopeful the salmon will return to us.

Aaron Leggett

Aaron Leggett
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¹¹⁹ Fish and Wildlife Agreement at 3.