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Governor Mike Dunleavy
STATE OF ALASKA

October 2, 2024

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Dear Parties,

Thank you to the Owners for your submission on April 25, 2024, of the Proposed Final Fish and Wildlife Program (Proposed Final Program) for the Eklutna Hydropower Project (Project) and to the remaining parties for their comments and participation in developing the Proposed Final Program.

As you know, through an act of Congress, the Project was sold by the federal government to Chugach Electric Association (CEA), Matanuska Electric Association (MEA), and Anchorage

Municipal Light & Power (through the Municipality of Anchorage). As part of this transaction, the 1991 Fish and Wildlife Agreement (Agreement) laid out the process for the purchasers of the Project to fund studies to examine and quantify impacts to fish and wildlife from the Project, and to develop a proposed Final Program for the protection, mitigation, and enhancement of fish and wildlife effected by the Project and for the other Parties to offer their comments.

As Governor, my duties under the Agreement are to evaluate the Proposed Final Program, attempt to reconcile differences between the Parties to the Agreement, and establish a Final Program that “adequately and equitably protects, mitigates damage to, and enhances fish and wildlife resources.”

The evaluation process requires me to give “equal consideration” to eight factors to “ensure that Eklutna [is] best adapted for power generation and other beneficial public uses.” The factors are: 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 recreational opportunities; municipal water supplies; the preservation of other aspects of environmental quality; other beneficial public uses; and requirements of State law.

The Final Program established today includes my evaluation of these eight criteria and my amendments to the Proposed Final Program that attempt to reconcile differences among the Parties and the Native Village of Eklutna.

The Proposed Final Program restored year-round water flows to the Eklutna River by connecting Eklutna Lake to the existing Anchorage Water and Wastewater Utility (AWWU) infrastructure; required the Purchasers to provide funding for ongoing monitoring studies, physical habitat enhancement, and lakeside trail repairs; the creation of a Monitoring and Adaptive Management Committee (Committee); and two limited reopeners of the Program for the potential construction of a Fixed Wheel Gate to replace the existing outlet and spillway and for the potential construction of fish passage into and out of Eklutna Lake.

In accordance with my responsibilities to attempt to reconcile differences, I have adopted the Proposed Final Program with the establishment of three amendments to the Proposed Final Program:

1. I added a Governor-appointed seat to the Monitoring and Adaptive Management Committee. This allows future Governors and myself to continue our responsibility under the Agreement as the work of the Committee is ongoing in the final Program.
2. I accepted the request by federal signatories, U.S. Fish and Wildlife Service, and National Marine Fisheries Service, to modify the Proposed Final Program. The Proposed Final Program allocated up to \$10 million to study and potentially construct the Fixed Wheel Gate at the Eklutna Dam. If the Fixed Wheel Gate is determined to not be structurally or economically feasible, as requested by the federal parties, the remaining funds not expended of up to \$10 million will be made available to the Monitoring and Adaptive

Management Committee for additional studies or measures that protect, mitigate damage to, or enhance fish and wildlife habitat.

3. I am accepting the request by the Municipality of Anchorage and Native Village of Eklutna in their joint resolution of September 5, 2024, to evaluate the Pumped Storage Hydro alternative. However, the Agreement does not provide any party the authority to unilaterally suspend or delay implementation of the Final Program and therefore the necessary work to design, permit, and construct the connection to AWWU's infrastructure and to evaluate the Fixed Wheel Gate is required to begin immediately.

The Final Fish and Wildlife Program established today under the Agreement balances the eight factors I am required to consider, and the Program is designed to be an iterative one that will be able to adapt to changing conditions and technologies well before the process is required to repeat itself.

I want to thank the Parties, the Native Village of Eklutna, and the members of the public who helped shape this Final Program with their time, resources, input, and participation over the past five years. This is not the end of the process, and I am committed to seeing this Final Program successfully enacted. I encourage everyone to join me in working together to implement this Program without delay.

Sincerely,



Mike Dunleavy
Governor

BEFORE GOVERNOR MIKE DUNLEAVY

IN THE MATTER OF THE EKLUTNA : **DECISION**
RIVER FISH & WILDLIFE PROGRAM : **October 2, 2024**

This matter comes before the Governor pursuant to the 1991 Agreement (“Agreement”) among the Municipality of Anchorage (“MOA”), Chugach Electric Association, Inc. (“Chugach”), Matanuska Electric Association, Inc. (“Matanuska”) (MOA, Chugach and Matanuska are collectively referred to as “Eklutna Purchasers” or “Owners”; when discussing issues where the Owners disagree, Chugach and Matanuska will be referred to as the “Operators” and MOA will be listed separately), the United States Fish & Wildlife Service (“FWS”), The National Marine Fisheries Service (“NMFS”), the Alaska Energy Authority (“AEA”) and the State of Alaska (“State”) concerning the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the Eklutna Hydroelectric Project (“Project”) near the Native Village of Eklutna (“NVE”).¹ Per the Agreement the Governor is required to establish a “final Fish and Wildlife Program that adequately and equitably protects, mitigates damage to, and enhances fish and wildlife resources affected by the Project”.²

I. PROJECT HISTORY

¹ The Agreement also involved the Snettisham Hydroelectric Project, but that project is not part of this decision.

² Agreement, Section 5 at P. 4.

The U. S. Bureau of Reclamation built the Project in the 1950s and it was rehabilitated over time. It currently consists of a dam which is an earth and rockfill structure 815 feet long and 41 feet high with a rectangular spillway that runs through the dam.³ The intake structure for the Project is located 36 feet below the natural Eklutna Lake level. From there, water is diverted north into a 4.6-mile-long tunnel through Goat Mountain and then into a 1,370-foot-long penstock before reaching the powerhouse located on Old Glenn Highway. The tailrace flows under the highway and then discharges into the Knik River. The powerhouse contains two generating units.⁴ Eklutna Lake, approximately seven miles long and one mile wide, is located within Chugach State Park and provides almost 90 percent of the domestic water supply for the Municipality of Anchorage. As of 2018 the Project produced 177,438 megawatt hours of clean energy, enough to power more than 24,600 residential homes for an entire year.⁵

The federal government owned and operated the project until October 1997 when it sold it to the Eklutna Purchasers and is currently owned by Chugach (30%), Matanuska (16.67%) and MOA (53.33%), however, it has been operated exclusively by Chugach and Matanuska since October 30, 2020.⁶ The purchase by the Eklutna Purchasers also included a requirement that the Eklutna Purchasers enter into the Agreement with NMFS,

³ <https://eklutnahydro.com/background/>.

⁴ Id.

⁵ Id.

⁶ MOA was required to surrender its right to operate the Project. RCA Order U-18-102(44)/U-19-020(39)/U-19-021(39). Surrender of Eklutna Operation Committee (EOC) Voting Rights dated as of October 27, 2020, and filed with the RCA in docket number U-18-102(44).

FWS, AEA, and the State (the Eklutna Purchasers, NMFS, FWS, AEA and State are collectively referred to as the “Parties⁷”).

II. THE AGREEMENT

To obtain Congressional approval of the Project sale to the Eklutna Purchasers and as a substitute for federal licensing under the Federal Power Act⁸ and its accompanying regulations⁹, the Parties were required to enter into the Agreement to develop a fish and wildlife program that provides for the protection, mitigation of damages to, and enhancement of fish and wildlife affected by the Project.¹⁰ The Agreement outlined a 35 year timeline to develop the fish and wildlife program. The timeline ran from the date of the sale, i.e., October 2, 1997, and initially culminates with the complete implementation of the fish and wildlife program by October 2, 2032. This process is designed to reoccur every 35 years.

A. Agreement Requirements

The Agreement set forth a comprehensive process to arrive at a final fish and wildlife plan. It required the Parties to perform the following:

⁷ For purposes of this decision, Parties will also include NVE, unless stated otherwise, even though they are not an actual party to the Agreement.

⁸ 16 U.S. C. §791a et seq.

⁹ 18 C.F.R. 4.1 et seq.

¹⁰ The Agreement was a substitute for the requirements of the Federal Power Act and its regulations and there are no requirements in the Agreement imposing those laws on the Parties. Rather, the Agreement specifically spells out all requirements the Parties must follow to develop a fish and wildlife program.

- a. Purchasers to fund and perform studies in consultation with the other Parties and other State of Alaska agencies to “examine, and quantify, if possible, the impacts to fish and wildlife from the Project and to develop proposals for the protection, mitigation, and enhancement of fish and wildlife affected by the Project.”¹¹
- b. Purchasers develop a draft program, the remaining Parties and other interested persons comment on the draft program, and the Purchasers reply to the comments, with all comments and the replies to be made part of the public record.¹²
- c. Preparation of draft summary of the study results and a draft Fish and Wildlife Program by Purchasers.¹³ Purchasers to hold public meetings and receive public comments on the program.¹⁴
- d. Purchasers develop a Proposed Final Fish and Wildlife Program (“Proposed Final Program”), an explanation of its reasons for the final program, and provide them and all public comments to the other Parties and the Governor.¹⁵

¹¹ Agreement, Section 2, P. 2.

¹² Id. Section 3, P. 2.

¹³ Id. Section 4, P. 3.

¹⁴ Id. Section 5, P. 3.

¹⁵ Id. Section 5, P. 4.

- e. The remaining Parties prepare written comments to the Proposed Final Program and Purchasers prepare a reply. The comments and reply are provided to the Governor.¹⁶
- f. The Governor establishes a Final Fish and Wildlife Program.¹⁷
- g. The Agreement requires the Owners to implement the final Program within 30 years of the transaction date and for the Governor to approve the Final Fish and Wildlife Program three years prior to commencement of the implementation of the Program.¹⁸

III. PROPOSED FINAL PROGRAM AND PARTIES' COMMENTS¹⁹

The Proposed Final Program was provided to the Parties and the Governor on April 25, 2024. The Proposed Final Program can be summarized as follows²⁰:

1. Proposed Final Program

- a. Construction of a new valve and release structure (“Eklutna River Release Facility”) located adjacent to the existing Anchorage Water and Wastewater Utility (“AWWU”) portal valve to restore year-round water

¹⁶ Id. Section 5, P. 4.

¹⁷ Id.

¹⁸ Id. Section 7, P. 4-5. The transaction date is October 2, 1997, which is the date of the sale of the Eklutna Project to the Owners. Program implementation must therefore begin by October 2, 2027, and the Governor’s approved final Plan must be issued by October 2, 2024, i.e., three years prior to the commencement of Plan implementation.

¹⁹ AEA did not provide comments to the Final Proposed Fish and Wildlife Program. NVE did provide comments even though it was not a party to the Agreement. I will consider those comments as part of this decision.

²⁰ The Final Proposed Fish and Wildlife Program is attached hereto as Appendix “A”.

flow to the Eklutna River (“River”) one mile downstream from the Eklutna Dam;²¹

1. The Eklutna River Release Facility is projected to provide year-round water flow to the River one mile below the dam at rates of 27 cubic feet per second to 40 cubic feet per second;²²
2. The Eklutna River Release Facility is designed to increase available spawning habitat for chinook, coho, pink and chum salmon;
 - b. Automation of the existing outlet gate at the base of the spillway at the Eklutna Dam for remote operation;²³
 - c. Development of a channel maintenance flow regime to support fish habitat over the long term;²⁴
 - d. Construction of eight new bridges for Anchorage Water and Wastewater Utility (AWWU) at each existing ford crossing to be designed and built to withstand the projected flows;²⁵
 - e. One-time payment of \$234,000 for lakeside trail repairs;²⁶
 - f. Monitoring and Adaptive Management Plan;²⁷

²¹ Proposed Final Fish and Wildlife Program, Section 2.1.1 at P. 4-5.

²² Id. at Section 2.1.2 at P. 6-7. And

²³ Id. Section 2.2.1 at P. 7.

²⁴ Id. Section 2.2.2 at Pp. 8-10.

²⁵ Id. Section 2.5 at P. 10.

²⁶ Id. Section 2.4.1 at P. 11.

²⁷ Id. Section 3.0 – 3.4 at P. 12 - 15. This plan includes the creation of a Monitoring and Adaptive Management Committee consisting of five voting members, one each from the following entities: Alaska Department of Fish and Game, Alaska Department of Natural Resources, NMFS, FWS and NVE. Id. Section 3.1 at P. 12.

- g. Two limited reopeners, i.e., the study and potential construction of a fixed wheel gate to replace the existing overflow spillway and provisions to review fish passage alternatives to allow adult salmon to pass into the lake from the River and juvenile salmon to pass from the lake downstream into the River (“Limited Reopeners”)²⁸.

2. MOA Comments

MOA raised the following issues in response to the Proposed Final Program²⁹:

- a. Although the prior Mayor supported the Proposed Final Program, the new Administration believed that Anchorage Assembly approval was necessary, and the prior Mayor failed to obtain it³⁰;
- b. Requests full water restoration to the Eklutna River for the full 12 miles from the Eklutna River Dam downstream and permit fish passage to and from Eklutna Lake;
- c. Removal of the limited reopeners; and

²⁸ The Fixed Wheel Gate Limited Reopener does not trigger the process terms of the 1991 Agreement; the Fish Passage Limited Reopener does not alter any other components of the Final Program. Proposed Final Program, Section 4.0, Pgs. 17, 20.

²⁹ Letter from Mayor Susanne LaFrance to Governor Dunleavy, July 19, 2024, and accompanying AR No. 2024-218(S).

³⁰ Mayor LaFrance was sworn into office on July 1, 2024. David Bronson previously served as Mayor of Anchorage from July 1, 2021 – June 30, 2024. The Proposed Final Program was drafted during and completed while Mayor Bronson served as Mayor of Anchorage. Former Mayor Bronson submitted a letter of support to the Governor’s office on April 26, 2024.

- d. Requested a two-year extension for the purpose of studying pumped storage hydropower as a potential alternative.

3. FWS Comments

In general, FWS agreed with the Proposed Final Program, but it believed full restoration of water flow to the Eklutna River and fish passage to and from Eklutna Lake was an “important component of a long-term mitigation strategy and that the Proposed Final Program was a starting point to reconnecting the River with their phased approach.” They also commented that “[n]either an engineering solution nor funding support have yet been identified that can accomplish all criteria, but we look forward to exploring opportunities to accomplish river connectivity and return an anadromous sockeye salmon run to the Eklutna River”.³¹

FWS requested one modification to the Proposed Final Program. FWS requested that if the Fixed Wheel Gate is determined to not be feasible, that the \$10 million in funding committed for that purpose be allocated for other protection, mitigation, and enhancement measures “to improve habitat by other means.”³²

4. NMFS Comments

NMFS raised similar issues raised by FWS but did not object to the Proposed Final Program. It concluded the “Program provides a framework to initiate the protection, mitigation and enhancement of fish and wildlife resources and will support the next

³¹ Sara Boario, Regional Director, FWS, letter to Governor Dunleavy, June 24, 2024.
³² Id.

iteration of a mitigation plan.”³³ NMFS had one request for a modification of the Proposed Final Plan. NMFS requested that if the Fixed Wheel Gate was determined to not be feasible or did not proceed, that either the \$10 million committed for that purpose be allocated for other protection, mitigation, and enhancement measures in coordination with the Monitoring and Adaptive Management Committee, or that the NVE pump station alternative be studied.³⁴

5. NVE Comments

NVE maintains the primary purpose of the Agreement was to “restore and maintain sockeye salmon that depend on free passage into and out of Eklutna Lake, their preferred spawning habitat.”³⁵ NVE further states the Program is deficient in the following ways:

- a. Failure to restore water to all 12 miles of the Eklutna River from the dam downstream at sufficient volumes to support salmon habitat;
- b. Failure to permit passage of sockeye salmon to and from Eklutna Lake;
- c. Low water flows only minimally enhance chinook and coho salmon habitat;
- d. Jeopardizes Anchorage drinking water; and
- e. Burdens ratepayers and taxpayers with excessive costs.³⁶

³³ Jonathan M. Kurland, Regional Administrator, National Marine Fisheries Service, letter to Governor Dunleavy June 21, 2024. Mr. Kurland’s letter acknowledges that the mitigation process is ongoing and repeats every 35 years beginning 25 years after implementation of the Final Fish and Wildlife Program has been implemented.

³⁴ Id.

³⁵ Aaron Leggett, Chair/President, NVE, letter to Governor Dunleavy, June 21, 2024.

³⁶ Id.

6. Operators' Reply to Comments

The Operators replied to the comments from the other Parties and NVE and continued to maintain the Proposed Final Program was consistent with the Agreement. The Operators identified the federal Parties generally approved the Proposed Final Program with some reservations and they identified some key disagreement with MOA and NVE, including:

- a. Flow regimes will enhance spawning habitat for chinook, coho, chum and pink salmon that currently exist in the Eklutna River;
- b. Included a limited reopener in the Proposed Final Program for the Monitoring and Adaptive Management Committee to address fish passage to and from the Eklutna Lake in the future;
- c. Operators worked with AWWU to negotiate agreements that protected the supply of drinking water to Anchorage;
- d. NVE's proposed Pumped Station alternative posed higher costs and increased risks to the Project;
- e. Removal of the Eklutna Dam in 10 years was not feasible due to foreseeable energy needs, inhibition of renewable energy goals, excessive replacement and removal costs, and damage to infrastructure and property downstream; and

- f. The two-year delay requested by MOA for further study will thwart implementation of the Final Approved Program in the timeline required by the Agreement.³⁷

7. Joint MOA/NVE Resolution for Pumped Storage Hydropower

Well after the comment period had expired and even after the deadline for Owners' reply to the comments, MOA and NVE provided the Governor and the other Parties a joint resolution recommending a new alternative, pumped storage hydropower, they believed "could result in full restoration of waterflow to the River, protection of Anchorage's drinking water source, and increased power generation, potentially with lower costs to municipal taxpayers and ratepayers".³⁸ MOA and NVE claim that pumped storage hydropower is used worldwide and it has the "potential to maintain and improve existing power production, meet municipal water supply needs and provide full river hydrological function and connection into and out of Eklutna Lake for fish passage". They requested the Governor require, as part of the Final Approved Program, Owners to use two years of the three year pre-implementation period in the Agreement to explore alternative infrastructure options, including pumped storage hydropower, so water could be restored to the entire Eklutna River and permit fish passage to and from the Eklutna Lake.³⁹ This joint resolution was virtually identical to MOA's prior request to delay the Governor's decision on a final

³⁷ Operators Response to Comments, July 24, 2024.

³⁸ Anchorage Assembly and NVE Joint Resolution, No. 2024-001.

³⁹ Id.

program, with the exception of it now identified a proposed alternative to pursue, i.e., pumped storage hydropower. The Operators did not have an opportunity to respond to this joint resolution, but it was addressed in the meeting of the Parties with the Governor's office on September 9, 2024.

IV. DISCUSSION

The Proposed Final Program and the comment period that followed ends a long public process that started with the Agreement in 1991. The most recent process started in March 2019 and included:

- Years of studies, consultations, and alternative analysis;
- Several public meetings;
- Extensive public comments;
- A draft fish and wildlife program;
- Numerous parties' comments, meetings, and discussions; and
- A Proposed Final Program.⁴⁰

Almost all the Parties have described the process of reaching the Proposed Final Program as a negotiation.⁴¹ As with any negotiation, participants do not always come away with

⁴⁰ Operators Response to Comments on Proposed final Fish & Wildlife Program, July 2024 at P. 1.

⁴¹ Transcript of Proceedings before the Governor's Office, September 9, 2024 at Pp. 26 (Operators); P. 73 (FWS); and P. 83 (NMFS). NVE although not a Party to the Agreement also commented that the process included negotiations. *Id.* at P. 85. MOA did not describe the process as a negotiation, but is now represented by a different administration than the one in place when the Proposed Final Program was drafted. However, see Former Mayor Bronson's letter of support to the Governor's office on April

what they want, and the end result is a resolution that neither side may be completely happy with but nevertheless agree to the terms to move the matter forward. This is certainly the case with the Proposed Final Program put forth by the Operators. The Parties have disagreements as to what should be included and how far the Final Program should go. The Parties, at the time they entered the Agreement, clearly understood that not everyone would get what it desired. The Agreement includes provisions on how to resolve those differences.

A. Governor as Final Decision Maker

1. Review Standard

The Agreement sets forth the role of the Governor in establishing a Final Program. The Governor is required to “review the Proposed Final Program, comments, testimony, summary and analysis materials, and any alternative recommendations for the protection, mitigation, and enhancement of fish and wildlife resources”.⁴² He is then tasked with “attempting to reconcile any differences between the Parties, giving due weight to the recommendations, expertise, and statutory responsibilities of FWS, NMFS, the State Resource Management Agencies and the Purchasers”.⁴³ Finally, the Agreement provides:

In order to ensure that Eklutna . . . [is] best adapted for power generation and other beneficial public uses, 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

26, 2024, wherein he states MOA (Anchorage Hydropower) was involved in the process every step of the way.

⁴² Agreement at Section 5, P. 4.

⁴³ Id.

supplies, the preservation of other aspects of environmental quality, other beneficial public uses, and requirements of State law (“Eight Factors”).⁴⁴

The Governor is then tasked with establishing the Final Program that adequately and equitably protects, mitigates damage to, and enhances fish and wildlife resources affected by the Project.

2. Operators’ Proposed Final Program and Analysis of Eight Factors

We must first evaluate the Proposed Final Program in light of the Eight Factors outlined in the Agreement.

a. Efficient and Economic Power Production and Energy Conservation - Factors One and Two

The Operators assert the Project “produces nearly six percent of the Owners’ combined generation portfolio, which also amounts to roughly 25% of Chugach’s renewable energy and 44% for Matanuska.”⁴⁵ This power is also alleged to be the lowest cost resource for power in the Alaska Railbelt.⁴⁶ The Project also assists with power reliability for the region.⁴⁷ None of the Parties challenge these assertions. Obviously, the downside to restoring water flow to the River from a power production standpoint is the loss of the water for that production. This comes at a cost, both financial and in terms of

⁴⁴ Id.

⁴⁵ Operators’ Brief to Governor, September 4, 2024 at P. 4.

⁴⁶ Id. citing SID at 2.2.2

⁴⁷ Operators’ Brief, September 4, 2024, P.p. 4-5. Operators also cite an example of how the Project assists other power production in the region. When a natural gas company experienced delivery problem, Operators were able to maximize their usage of the Project to maintain system reliability. Id. (Citing Tony Zellers, et al, letter to MOA, February 12, 2024).

power availability, which cannot be overlooked. Maximizing the Project's power output results in energy conservation by reducing natural gas usage, avoidance of diesel usage for power generation and thus lower emissions, and thus reduced costs if these other power production methods were employed.

The Operators chosen method for restoring instream water flow to the River was also based on using cost effective means to achieve the goal and consideration of the costs to the rate payer. They also rejected alternatives that shut the Project down for lengthy periods of time which would have impacted the Project's value for capacity reserves and grid reliability.⁴⁸ These facts are likewise not challenged by any Party.

b. Protection, Mitigation of Damage to, and Enhancement of Fish and Wildlife (including related spawning grounds and habitat) – Factor Three

The Proposed Final Program provides several steps for restoring water flow to the River and thus enhancing, protecting, and mitigating damage to fish and wildlife. The Program restores water flow to the River at rates between 27cfs and 40cfs throughout the year.⁴⁹ It also requires periodic channel maintenance flows up to 220cfs.⁵⁰ It rewaters 11 of the 12 miles of River at the rates noted above thus restoring water flow to the River that has not existed for years. The plan also creates a Monitoring and Adaptive Management Committee of experts to review, evaluate and modify flow regimes within a water budget to increase and enhance fish habitat. Likewise, the increased flow and enhancement of fish habitat will have a corresponding effect on other wildlife, including

⁴⁸ Id.

⁴⁹ Proposed Final Fish and Wildlife Program, Section 2.1.2.

⁵⁰ Id. at Section 2.2.

bear and moose populations. Operators' modeling projects increases in chinook spawning and rearing habitat by 209 and 53 percent respectively with increases for coho by 65 and 67 percent, respectively.⁵¹ Limited Reopeners are also included, i.e., potential installation of a fixed wheel gate and fish passage in the future.

The federal Parties, NVE, and MOA correctly point out that the Proposed Final Program fails to include rewatering of the entire River and allow for fish passage to and from Eklutna Lake. NVE and MOA believe that this failure alone makes the Proposed Final Program deficient. They also challenge whether the flows proposed will result in any substantial benefit to salmon habitat. The federal Parties, although proponents of full water flow and fish passage, realize that this process is long and with technological advancements in the future, the goals can be achieved. For that reason, they did not reject the Proposed Final Program. The Agreement provides the Governor must give due weight to the recommendations, expertise, and statutory responsibilities of the Parties, including FWS and NMFS.⁵² Due weight is given to the FWS and NMFS' expertise and the fact that they have not objected to proceeding with the Proposed Final Program is a very strong indicator that it meets Factor Three.

⁵¹ SID at Section 4.10.1.

⁵² Agreement at Section 5, P. 4. The Agreement also permits the Governor to give due weight to the Purchasers, which includes MOA. However, MOA gave up their right to vote on operations at the Project and conceded they lacked the expertise to participate in the Project's operations, which included establishing the Proposed Final Program per the Agreement. See RCA Order U-18-102(44)/U-19-020(39)/U-19-021(39) and Surrender of Eklutna Operation Committee (EOC) Voting Rights dated as of October 27, 2020, and filed with the RCA in docket number U-18-102(44).

As stated earlier herein, fish passage is not a requirement in the Agreement, nor is restoration of complete waterflow to the River and fish passage. However, from a review of the record, it appears all parties recognize the importance of eventual complete waterflow restoration and fish passage. The difference between the Parties is focused on the methods and timeline to achieve those goals. The Proposed Final Program includes a Limited Reopener to achieve full water restoration and fish passage, understanding that as technology advances, those goals may be cost effective or technically feasible to achieve in the future.⁵³

c. The Protection of Recreation Opportunities – Factor Four

Several positive impacts on recreational activities are included within the Proposed Final Program:

- Commitment of \$234,000 as a match to Chugach State Park or its designee for lakeside trail repairs;
- Potential fishing in the River;
- Kayaking on the Eklutna Lake
- Hunting opportunities;
- Camping;
- Wildlife viewing; and
- Protection of the tailrace fishery.⁵⁴

⁵³ See Section IV.A.3. herein for further discussion on restoration of complete waterflow and fish passage.

⁵⁴ Operators' Brief, September 4, 2024, P.p. 8-9.

The other Parties did not address this issue in their briefs.⁵⁵ There are clear benefits and protections from the Proposed Final Program as outlined above.

d. Municipal Water Supplies – Factor Five

The Parties once again disagree on the impacts the Proposed Final Program will have on municipal water supply. Operators acknowledge they will use AWWU infrastructure to restore water flow to the River. They assert it will not negatively affect the water supply and, in some ways, enhance the water supply infrastructure. MOA and NVE on the other hand believe it will negatively affect municipal water supply.

However, neither MOA nor NVE have been able to adequately detail these alleged negative effects. Once again, the Agreement permits the Governor to rely on the expertise of the Operators and give due weight to their findings.⁵⁶

Operators maintain the Project’s infrastructure and Anchorage’s municipal water supply have been “inextricably linked as a matter of physical infrastructure, operations, contract, water rights, and authorizing law since the 1980s when AWWU connected its intake pipe to the Project’s intake structure”.⁵⁷ Operators assert they worked closely with AWWU leadership and engineers to develop legal terms and agreements by which AWWU will be comfortable with the use of AWWU infrastructure to release water into

⁵⁵ MOA makes a passing reference that 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”. MOA Brief at P. 11.

⁵⁶ See also, Footnote 51.⁵⁷ Operators’ Brief, September 4, 2024, P. 9.

⁵⁷ Operators’ Brief, September 4, 2024, P. 9.

the River.⁵⁸ AWWU and Operators have agreed on key terms for an agreement to govern the construction and use of the Eklutna River Release Facility and an agreement for the long term sharing of Eklutna Lake water rights. AWWU and Operators also negotiated three agreements to detail and govern the arrangement if the Governor approves the Proposed Final Program. Finally, Operators agreed to commit to not take any action in connection with the Fish and Wildlife Program that would compromise Anchorage's water supply, and they agreed to accept liability if they did so. Additionally, other benefits flowed to AWWU, including design approval rights, the construction of eight new bridges over Eklutna River for AWWU to maintain access to its infrastructure, new communications systems, flow meters and a new isolation valve structure for safer maintenance of their facilities, as well as other benefits. AWWU receives its water under a contract with the Eklutna Owners; the proposed term sheet according to Operators would reduce the current water supply costs by half under the new contract to replace contract expiring at end of 2025. For all these reasons, the Proposed Final Program does meet the requirements of the Agreement concerning municipal water supply.

The central issue here is not whether the water supply is protected and/or enhanced, as the evidence clearly demonstrates it is, but rather, whether the Operators and AWWU's agreements must be approved by MOA and to date that approval has not been achieved. In Resolution 2024-182(S-1), the Assembly stated "The Municipality of Anchorage does not intend to issue authorizations or provide funds or any other form of

⁵⁸ Id.

support of the Proposed Final Program or any alternative that doesn't work toward the restoration of the full length of the River..."⁵⁹. The Operators believe they have legal avenues to pursue the agreements even if MOA withholds approval, but litigation does not move the Final Program forward, creates delay in restoring water flows to the River, and impedes implementation of the Final Program.

**e. The Preservation of Other Aspects of Environmental Quality –
Factor Six**

The redirection of lake water to the River instead of the Project's powerhouse reduces the generation of carbon free power that will most likely be replaced by natural gas generation. However, all alternatives considered reduce the power generation from the Project. The Proposed Final Program has the smallest impact in this regard of all the alternatives considered.

f. Other Beneficial Public Uses – Factor Seven

The Operators cite restoration of salmon habitat in the River as another beneficial public use and that flows will not impact infrastructure downriver, including bridges over the River. Enhanced salmon habitat is important to the public and to NVE and its people. Protecting existing infrastructure used by the public is also a beneficial public use.

g. Requirements of State Law – Factor Eight

Numerous areas of State law are impacted by this Proposed Final Program, including permitting, safety, fish and game, natural resources to list a few. The Operators

⁵⁹ MOA Resolution 2024-182(S-1), June 25, 2024

acknowledge the need to comply with all State laws that apply to the Proposed Final Program and their need to obtain an amendment to their certificate of authority from DNR to permit the conveyance and release of water into the River. Additionally, as operators of an electric utility, Operators also have an obligation to comply with all State laws related to utility operations.

h. MOA and NVE Proposed Alternatives

Neither MOA nor NVE have provided any analysis with respect to how their proposed alternatives consider the Eight Factors. Rather, they seem to rely on the belief that their proposed alternatives, such as dam removal or pumped storage hydro, will result in full water restoration to the River and allow for fish passage thus promoting the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat). While that is one factor that must be considered, the Governor is required to give equal consideration to all Eight Factors. They have not provided any evidence or analysis of how these proposed alternatives will impact the other seven factors. For example, there is no evidence of how these alternatives will promote the purposes of efficient and economical power production and energy conservation or impact municipal water supplies.

3. Differences Between the Parties

In addition to giving equal consideration to the Eight Factors, the Governor must also attempt to reconcile differences among the Parties. Although the Parties have generally agreed that the Proposed Final Program was arrived at through rigorous studies, public review, comment, and negotiation, two glaring differences were identified, 1)

water flow for the entire Eklutna River from the dam downstream; and 2) fish passage to and from Eklutna Lake.⁶⁰

The Operators believe that current technology and cost are major prohibitions to obtaining full water flow throughout the River and fish passage to and from the lake at the present time. They posit that the agreement provides a mechanism to continually review these goals and as technology evolves and costs decline, the goals may be achievable, and have provided for this to be regularly evaluated by the Monitoring and Adaptive Management Committee.

FWS and NMFS believe that complete water flow and fish passage were intended as part of the Agreement, but they also indicate that the process must start somewhere and

⁶⁰ MOA and NVE allege the process to arrive at the Operators' Final Proposed Program was flawed. MOA asserts it was denied a viable way to participate due to the fact it lost its vote as an Owner of the Project via an RCA order. However, MOA's assertion in this regard is misguided for three reasons. First, MOA voluntarily gave up its right to vote on matters affecting the operation of the Project and the 1991 Agreement. Secondly, Mayor Bronson formally acknowledged the MOA's complete participation in "every step in the process that led to the Proposed Final Program" and that MOA supported the agreement with the Proposed Final Program. See Mayor Bronson letter to Governor Dunleavy, April 26, 2024. Thirdly, the Operators assert that they and MOA conducted themselves as equals throughout the process and made all decision on the Proposed Final Program through unanimous consent. The record contains no evidence to the contrary. NVE asserts that the Operators failed to pursue alternatives that would have provided for rewatering the entire river and allowed fish passage. Operators counter that they did look at several other alternatives, including NVE's pump station alternative and dam removal, and for various reasons, including economics and other risks, it chose to proceed as outlined in the Proposed Final Program. See NVE comments, June 21, 2024 and Operators' Reply to Comments, July 2024 at Pp. 22-23.

there is time to achieve both and still comply with the Agreement's requirements.⁶¹ They are each committed to pursuit of any alternatives that will achieve those goals.

MOA and NVE however, believe that both goals should be pursued now and absent complete River waterflow and fish passage, the Program should not be adopted. First, the Agreement does not require complete waterflow and fish passage. Had the Parties intended to make those requirements of the Program, they could have and should have so stated in the Agreement itself.⁶² Rather, the Agreement outlines requirements to protect, mitigates damage to, and enhances fish and wildlife resources affected by the Project. At the time the Agreement was signed, the River did not enjoy complete waterflow nor were fish able to pass from River to lake and lake to River. As NVE acknowledges, these goals were not achievable until the lower diversion dam was removed in 2018.⁶³ Courts cannot add words to the contract that would impermissibly re-write that contract, nor can the Governor in this situation.⁶⁴ Simply put, the Agreement is not ambiguous. Rather, complete waterflow and fish passage can be adopted in a final

⁶¹ “. . . the Program provides a framework to initiate the protection, mitigation and enhancement of fish and wildlife resources, and will support the next iteration of a mitigation plan”. NMFS Comments to Proposed Final Fish and Wildlife Program, June 21, 2024 at P. 2. “Although the proposed Program does not immediately meet the FWS’s goals of ecological connectivity . . . the Program, with commitment of all stakeholders, could be an interim step to reconnecting the river, consistent with our request for a phased approach”. FWS comments on the Proposed Final Program, June 24, 2024 at P. 4.

⁶² *McConnell v. Pickering Lumber Corp.*, 217 F.2d 44, 47 (9th Cir. 1954) (“Appellants would have the court under the guise of construction add words to the contract which are not to be found in it. We do not understand such to be the function of the court.”).

⁶³ NVE Brief to Governor Dunleavy, September 4, 2024 at P. 7.

⁶⁴ *JAE Properties, Inc. v. AMTAX Holdings 2001-XX, LLC*, ___ F. Supp. Ed ___, 2024 WL 538570 (USDC S. D. Cal. 2024).

program if supported by an analysis of the factors in the Agreement, but the Agreement did not mandate it.

NVE and MOA also seem to place all their emphasis on Factor Three, i.e., protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat) without providing for equal consideration of the other seven factors. The Agreement clearly and unequivocally requires the Governor to give “equal consideration” to all Eight Factors.⁶⁵ Although Factor Three is an extremely important element of this process, it cannot be viewed alone or to the detriment of the other factors. Each factor has an impact on the final program.

However, with that said, it does not mean that the Governor cannot alter or improve the Proposed Final Program. The Proposed Final Program meets the requirements of the Agreement, giving equal consideration to the Eight Factors, and provides for the protection, mitigation of damage to, and enhancement of fish and wildlife habitat. It can, however, be improved in certain ways to try to reconcile the differences between the Parties per the requirements in the Agreement.

4. Governor’s Amendments to Final Proposed Program

The Proposed Final Program is established with the following amendments. Discussion on the amendments will follow this section.

Section 3.1 Committee

This section is amended as follows:

⁶⁵ Agreement at Section 5, P. 4.

The Committee will consist of one voting representative from each of the following:

Alaska Department of Fish and Game – member appointed by the Commissioner;

Alaska Department of Natural Resources – member appointed by the Commissioner;

NMFS – member appointed by its Regional Director;

FWS – member appointed by its Regional Director;

NVE - member appointed by its Chair/President; and

Governor of Alaska – appoints one member.

The Committee will make decisions by consensus and four members shall constitute a quorum.

Section 4.1 Fixed Wheel Gate

If it is determined that the construction of the fixed wheel gate is not structurally or economically feasible, the Owners shall make available any remaining funds not expended of the \$10,000,000.00 (up to \$10,000,000.00 in April 2024 U. S. dollars)⁶⁶ for other protection, mitigation, and enhancement measures for fish and wildlife including impacted habitat loss and other effects

⁶⁶ The current estimate for that fixed wheel gate is \$4 million. Operators committed up to \$10 million in 2024 dollars. See Transcript of Proceedings, September 9, 2024 at P. 109.

related the Project in accordance with the terms and process previously outlined in Section 3.3.6.⁶⁷

Section 4.0 Limited Reopeners

New Section 4.3 is added.

Section 4.3 Pumped Storage Hydropower

Pumped Storage Hydropower is added as a Limited Reopener.

The Parties are directed to study this upon terms and conditions they mutually agree to. The terms and conditions will include level of engineering, level of cost analysis, what Party or Parties will fund the study and in what amounts and any other matters the Parties find necessary to implement this Limited Reopener. The study should be consistent with studies performed for other alternatives reviewed by Operators. The Parties, assuming they agree on the above requirements, are directed to undertake the study immediately, but this study will not delay the implementation of the Governor's Approved Final Program or the review and study of the fixed wheel alternative. The results of the study will be reported to the Monitoring and Adaptive Management Committee ("Committee").

The Committee will analyze the study findings and perform the Eight Factor analysis required by the Agreement. The Committee will then provide the study findings and Eight Factor analysis to the Owners for the Owners review. If

⁶⁷ See FWS comments to the Proposed Final Program, June 24, 2024 at Pp. 4-5.

the Owners approve the study findings and Eight Factors analysis, they will provide a statement of support to the Committee and the Committee and Owners will coordinate and cooperate to obtain the Governor's approval. Governor approval of the decision to pursue Pumped Storage Hydropower is required. If the Governor approves the proposal, then the 35-year timeframe requirement to repeat the consultation process required by the Agreement will restart from the date the Governor's approval. The construction of Pumped Storage Hydropower must minimize impacts to Project operations. The Project Owners will oversee all construction activities and will support the development and operation of Pumped Storage Hydropower facilities and infrastructure. This is a limited reopener and will not reopen any other components of the Fish and Wildlife Program.

Discussion of Amendments

Amendment to 3.1

Since the Proposed Final Program provides for ongoing review through the Monitoring and Adaptive Management Committee, and it is the Governor's role under the Agreement to establish a Final Program, adding a Governor appointed seat to the Monitoring and Adaptive Management Committee allows the Governor, and future Governors, to continue to fulfill his or her role under the Agreement to establish the Final Program as the work of the committee is ongoing. The definition of a quorum is added to assist in governance and ensure the recommendations made by the committee have robust involvement from the entities represented.

Amendment to 4.1

As one of the purposes of the Agreement and Final Program is to protect, mitigate damage to, and enhance fish and wildlife habitat, ensuring the funds already set aside for the fixed wheel gate alternative are available to be used for other protection, mitigation, and enhancement measures is consistent with the intent of the Agreement in the event the fixed wheel gate is found to be infeasible. This amendment is responsive to the modification of the Proposed Final Plan requested by NMFS and FWS.

Amendment to 4.0, addition of Section 4.3

MOA and NVE have suggested that Pumped Storage Hydropower (“PSH”) is a viable alternative to the Proposed Final Program. They passed a joint resolution on September 5, 2024, advocating for PSH. They claim it is a “proven energy storage solution used worldwide that provides carbon free power production, storage and grid stabilization and that it has the potential to maintain or improve power production, meet municipal water needs and provide full River hydrological function and connection into and out of Eklutna Lake for fish passage.”⁶⁸ They suggested that the Governor require the Owners use the first two years of the three year implementation period to explore this option.⁶⁹

Neither MOA nor NVE have studied this potential alternative. The Operators have reviewed it but admittedly did not get to any final conclusions on its viability, nor did they engineer or model it to see if it was economically or engineeringly feasible at this location. At the meeting with the Governor’s office, MOA, NVE and Operators each

⁶⁸ MOA/NVE Joint Resolution, September 5, 2024

⁶⁹ Id.

agreed that this was a potential option that could be explored.⁷⁰ However, Operators and the federal Parties do not want to delay implementation of the Final Approved Program to explore this option.

Implementation of the Final Approved Program should not be delayed or extended for an option of unknown cost and feasibility. However, if PSH is as promising as MOA and NVE indicate, there are numerous potential benefits and improvements to the Eight Factors which must be considered when evaluating this Program. As such, conducting this study, under terms agreeable to the Parties, will provide more information relevant to those factors and the potential benefit or harm to the protection, mitigation of damage to, and enhancement of fish and wildlife resources.

All other components and requirements of the Final Proposed Program are adopted herein unless otherwise amended hereby. The Owners are directed to begin implementation of the Final Approved Program as approved herein as soon as possible.

V. CONCLUSION

The Final Approved Program established today is the culmination of many years of difficult work, analysis, evaluation, discussion, and negotiation by the Parties. Each party did not get all they wanted in this Final Approved Program. However, this is a long-standing problem with no readily available easy solutions and implementation of this

⁷⁰ Transcript of Proceedings, September 9, 2024 at Pp. 105-122. The federal parties did not take a position other than to state they are in favor of exploring options that restores full waterflow to the river and allows for fish passage. Id. at Pp. 112-113.

Final Approved Program will put the River on track towards potential full water flow and fish passage.



Mike Dunleavy
Governor

Date: 10-2-2024