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ELECTRONIC FILING

Ms. Magalie Roman Salas
Federal Energy Regulatory
Commission Secretary
Mail Code: DLC, HL-11.1
888 First Street, NE
Washington, D.C. 20426

**Re: Puget Sound Energy, Inc.'s Comments on Baker River Hydroelectric
Project Comprehensive Settlement Agreement, FERC No 2150-033**

Dear Ms. Salas:

Enclosed for electronic filing with the Commission is Puget Sound Energy, Inc.'s
Comments on Baker River Hydroelectric Project Comprehensive Settlement
Agreement, FERC No. 2150-033.

If you have any questions, please contact me at 425-635-1426.

Sincerely,

Kristine R. Wilson

KRW:cs

Enclosures

cc: FERC Service List for P-2150

[07772-1126/BA043560.007]

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Perkins Coie LLP and Affiliates

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PUGET SOUND ENERGY, INC.) FERC No. 2150-033
APPLICATION FOR NEW LICENSE) Baker River Project
)
_____)

**PUGET SOUND ENERGY'S COMMENTS ON BAKER RIVER
HYDROELECTRIC PROJECT COMPREHENSIVE SETTLEMENT
AGREEMENT, FERC NO. 2150**

I. INTRODUCTION

Pursuant to Rule 602(f)¹ of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure ("Rules"), Puget Sound Energy, Inc. ("PSE") files these comments on the Baker River Hydroelectric Project Comprehensive Settlement Agreement (the "Settlement"), in response to questions raised by Commission staff at the technical conference held on December 8, 2004. The purpose of these comments is to support the Settlement and reaffirm its comprehensive resolution of all issues pertaining to the proposed new license for the Baker River Hydroelectric Project, FERC No. 2150 (the "Baker River Project").

¹ 18 C.F.R. § 385.602(f).

PSE submitted its application for a new license on April 30, 2004,² in order to facilitate the Commission's timely issuance of a new license on or prior to the expiration of PSE's existing license in April 2006. Subsequently, PSE and all active participants in the pre-filing Alternative Licensing Procedure process ("Collaborative Process") reached a comprehensive settlement, which PSE filed with the Commission on November 30, 2004. At the request of the parties to the Settlement (collectively referred to herein as the "Parties," and individually, as a "Party"), the Commission's staff held a technical conference on December 8, 2004, to allow the Parties to provide an overview of the Settlement and provide Commission staff with an opportunity to ask pertinent questions to facilitate their review of the Settlement and related Proposed License Articles. During this technical conference, FERC staff raised three issues, requesting that the parties provide comments and other supporting documents, as appropriate, in response to these issues.

Specifically, Commission staff raised the following issues:

- 1) Whether the parties understood the limitations of the Commission's authority with respect to cost limitations contained within a proposed settlement agreement;
- 2) Whether each proposed article would be properly included in a new license based on an adequate nexus to the Baker River Project; and
- 3) Whether the Settlement is truly comprehensive, owing to comments and discussion that occurred among Commission staff, the Army Corps of Engineers, PSE and Skagit County regarding process expectations associated with Proposed Article 107.

PSE files these comments in order to address each of the issues raised by

² PSE's *Application for New License Major Project – Existing Dam*, associated exhibits, and its Preliminary Draft Environmental Assessment ("PDEA") were filed with the Commission on April 30, 2004. See FERC Accession Nos. 20040505-0255, -0256, -0257, -0258, and -0259.

Commission staff, and to support the comprehensive and uncontested nature of the Settlement.

II. COMMENTS ON SETTLEMENT

A. THE COST LIMITATIONS AND RELATED PROVISIONS OF THE PROPOSED LICENSE ARTICLES ARE FULLY CONSISTENT WITH THE COMMISSION'S AUTHORITY

1. All Proposed License Articles that Contain Cost Limitations Are within the Scope of the Commission's Authority.

The Federal Power Act, 16 U.S.C. §791(a) et seq. ("FPA"), authorizes the Commission to issue licenses that are desirable and justified in the public interest, based upon an analysis that gives equal consideration to: power and development purposes; the purposes of energy conservation; the protection, mitigation of damage to, and enhancement of, fish and wildlife; the protection of recreational opportunities; and the preservation of other aspects of environmental quality. 16 U.S.C. § 797(e). In the development of each Proposed License Article that contains a cost limitation, the Parties evaluated the action required to meet the resource protection, mitigation, and/or enhancement measure being addressed by the article, analyzed the scope and costs anticipated to carry out the action, and identified a cost limitation that would meet the purpose and scope of the action.³

Each cost limitation functions as a definition of the level of effort required to achieve that purpose and scope. In fact, PSE's efforts in working with the Parties to

³ Various Parties were involved in the development of individual Articles. If additional information is desired by the Commission, PSE will be pleased to coordinate with the Parties and respond to any requests by Commission staff regarding the specific documentation for any individual article.

identify cost limitations were for reasons similar to the Commission's own analysis of the costs of all aspects of a proposed project. That is, these efforts were made to determine the economics of hydropower projects, with the basic purpose of providing a general estimate of the potential power benefits and costs of a project, and reasonable alternatives to project power. See Mead Corp., 72 FERC ¶ 61,027 (1995). In making its decision, the Commission considers the project power benefits with proposed protection, mitigation, and enhancement measures. This is certainly consistent with the Commission's role in giving equal weight to power and non-power developmental purposes required by the FPA – and the extension by the Commission of this principle to the adoption of license articles containing agreed cost limitations is also consistent with this role.

Although no Party can, at this time, guarantee that the costs required to carry out the specific actions established per article will exactly conform to the cost limitations stated, the Commission does not violate any requirement of the FPA in issuing license articles consistent with the stated cost limitations. Indeed, the Commission will approve such cost limitations in appropriate circumstances. See, e.g., New York Power Authority, 105 FERC ¶ 61,102 at 61,572 (2003) (citing Southern California Edison, 77 FERC ¶ 61,313, at 62,428, n. 46 (1996)) (agreements among settlement parties to limit a licensee's costs for agreed-upon measures do not limit the Commission's reserved authority to require additional measures, as future circumstances may warrant); Wisconsin Pub. Serv. Corp. v. FERC, 32 F.3d 1165 (7th Cir. 1994) (Commission retains appropriate authority to address future circumstances); Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts (Policy Statement), 59 Fed. Reg. 66,714 (Dec. 28, 1994), FERC Stats. and Regs., ¶ 31,010; cf. City of Seattle, Washington, 71 FERC ¶ 61,169 at

61,535, note 30 (1995) (Commission explanation of its own authority to continue to seek modifications during the term of the license).

In addition, the Proposed License Articles provide additional safeguards to the full implementation of the proposed license:

- 1) funds not expended during one license year are carried over into the next year until expended, pursuant to Proposed Article 602;
- 2) fund limitations are stated in 2006 dollars and the actual dollars expended will be provided according to a formula that provides escalation for inflation, pursuant to Proposed Article 602;
- 3) unspent funds that are required to be made available during a specified year and are not used accrue interest as long as unexpended, pursuant to Proposed Article 602;
- 4) the Baker Funds identified in Proposed Article 602 provide for funds in excess of those identified for specific resource protection, mitigation, and enhancement measures as additional needs are specifically identified during the term of the license; and
- 5) all Proposed License Articles are subject to the adaptive management principles described in Proposed Article 603.

Each Proposed License Article will be referenced in the Preliminary Draft Environmental Assessment being revised and scheduled to be filed with the Commission on or before January 31, 2005 ("Revised PDEA"). The Revised PDEA will also include the environmental analysis supporting the subject matter of each Proposed License

Article,⁴ and reference or include any relevant documents or information supporting the analysis. In addition, the Commission may receive terms and conditions from agencies and tribes that provide additional details and basis for the required actions and attendant cost limitations. Taken together, the Commission will have ample evidence to support the issuance of a new license incorporating the Proposed License Articles.

2. The Commission Has Ample Authority to Approve the Proposed License Articles that Contain Cost Limitations Without Modification and Simply Reserve the Commission's Authority to Require Changes in the Future.

The existence of cost limitations in a settlement agreement does not render the agreement deficient. There is no express limitation in the FPA that requires the Commission to strike cost limitations from license articles.

Adopting cost limitations does not limit the Commission's authority to require the licensee to implement the resource plans required by the license, or to include in those plans appropriate resource measures – including those that may be necessary to address new or unexpected circumstances that arise. Cf. Virginia Electric & Power Co., 106 FERC ¶ 62,245 (2004). The cost limitations do not limit the Commission's reserved authority. In fact, the parties to the Settlement expressly acknowledge the Commission's reserved authority, and the Settlement provides the Commission explicit assurance that the adoption of language by the Commission in the license that reserves the Commission's authority is not "Inconsistent with the Settlement" and, therefore, will not threaten the viability of the Settlement. See Settlement, at 4, Section 2.4.

⁴ For Proposed Article 107, see infra Section II.C.

There are several avenues available to the Commission to provide the ongoing assurance that proper resources protection, mitigation, and enhancement measures will be carried out – eliminating cost limitations is only one, albeit unnecessary, option. For example, the Commission can insert clear language into the license reserving its authority. Next, when the Commission reviews the various plans that are required to be submitted to the Commission, the Commission has the authority to confirm that the plans meet the purpose and scope of the article and provide adequate means and methods to carry out described resource protection, mitigation, and enhancement measures. Additionally, when PSE files annual reports that contain information on how funds are being expended in conformance with approved plans, the Commission can monitor that the required resource protection, mitigation, and enhancement measures are being carried out.

Moreover, the Parties also have a substantial interest in assuring that the agreed resource protection, mitigation, and enhancement measures are carried out. The Settlement is based upon a wealth of the Parties' technical knowledge, is grounded in an expectation of compliance with the Parties' statutory and other legal responsibilities, and results from the Parties' commitments of significant time and resources spent reaching the Settlement. Supporting the Settlement by adopting the Proposed License Articles respects the Commission's policy of encouraging comprehensive settlements and recognizes the Parties' respective roles and obligations under various laws relevant to their consideration in entering the Settlement. PSE respectfully encourages the Commission not to second guess the many federal and state agencies, tribes, and non-governmental organizations charged with the responsibility for safeguarding the very same resources that are the subjects of the Proposed License Articles.

3. The Commission Should Approve the Proposed License Articles as Consistent with its Authority.

As a matter of policy, the Commission strongly encourages comprehensive settlement as a basis for a new license. See Pacific Gas & Elec. Co., 97 FERC ¶ 61,084 at 61,408-61,409 (2001) ("We commend the signatories...for their successful effort to reach consensus on the broad issues involved in the operation of this project; bring this lengthy proceeding to a close; and develop a sound framework for a continuing collaborative approach to the management of the project in the public interest. . . . The Commission strongly encourages settlements in hydropower proceedings."). The success of this Settlement confirms the prudence of that policy. To encourage this Settlement, it is important for the Commission to keep in mind that a part of what makes a settlement comprehensive is the delicate balance that is struck and is reflected in the care taken in drafting each Proposed License Article.

Several reasons explain the Settlement's success. The two dozen Parties focused on their interest rather than their often-conflicting positions which enabled reasonable compromises to occur. The Parties who were involved understood the place of the Baker River Project in the local environment and its interaction with the environment (due to their proximity and familiarity with the local and regional environmental issues and values). The Parties worked incessantly to analyze data and craft solutions to fully protect, mitigate and enhance the environment in which the Baker River Project exists. The Parties provided extensive resources through their representatives in the process who attended hundreds of meetings to allow for the data review to occur and a common understanding to be reached. Last, the Parties stayed fully engaged throughout the proposed article drafting process so that all of the work developed in the preceding years

of the pre-filing process was preserved in the Settlement and represented the accumulation of data, analysis and agreement in the method for achieving protection, mitigation, and enhancement measures for the term of a new license.

Additionally, each party to the Settlement will have an ongoing role in overseeing PSE's implementation of the license, through the decision rule established for implementation of the Settlement. See Settlement, at Article 601. This article essentially continues forward the collaborative process during the license term and maintains the input of the parties to the Settlement to provide further assurances of license implementation and enforcement.

Where a settlement contains articles that "govern relations among parties to the settlement agreement" or "the procedural practices" of the parties, such as dispute resolution, the Commission has retained authority to enforce such provisions against the licensee. This Settlement carefully limits the Proposed License Articles to PSE's jurisdictional obligations, including those to consult with other Parties in the implementation of the new license. See New York Power Authority, 105 FERC ¶ 61,102 at n. 69 (citing In re Erie Boulevard Hydropower LP, 88 FERC ¶ 61,176 (1999); Avista Corp., 93 FERC ¶ 61,116 (2000) and 93 FERC ¶ 61,116 at 61,329). The Commission has recognized that:

prior consultation and dispute resolution can significantly reduce the transaction costs of litigating before the Commission over license disputes. Therefore, we will, in these and future licenses, direct licensees to comply with settlement provisions of this kind.

Erie Boulevard Hydropower, LP and Hudson River-Black River Regulating Dist., 100 FERC ¶ 61,321 at 61,502 (2002). On this basis, the Commission has approved numerous settlements that include such internal decision-making practices among settlement

signatories or adaptive management provisions similar to those set forth in Proposed Articles 601 and 603. See New York Power Auth., 105 FERC ¶ 61,102 (2003); City of Tacoma, Wash., 98 FERC ¶ 61,274 (2002); Pacific Gas & Elec., 97 FERC ¶ 61,084 (2001); Pacific Gas & Elec., 97 FERC ¶ 61,031 (2001).

Every word in the Settlement was carefully reviewed; each Proposed License Article was reviewed and edited extensively by the parties to reflect intent and provide adequate specificity of purpose. The Parties did their best to assure that the Proposed License Articles are fully consistent with the Commission's authority. Even so, PSE fully acknowledges that the Commission alone will determine whether the Settlement is consistent with its authority and otherwise complies with all applicable laws for the protection of the public interest.

Recognizing the risk that a given Proposed License Article may not clearly express the Parties' intent in the judgment of Commission staff, and also the possibility that the Commission staff may prefer to express even acceptable provisions in a different form, PSE respectfully requests that the Commission staff publish license articles in draft form for public comment. Thus, before the final licensing order, the Parties may comment on any apparent inconsistencies and attempt to resolve such comments through a Technical Conference or otherwise. PSE encourages the Commission to appreciate the scope and level of the effort undertaken and the connected and integrated nature of each part of the Settlement in carrying out its own policy – to encourage parties to act collaboratively and achieve their interests through collaboration rather than litigation.

B. EACH PROPOSED ARTICLE IS PROPERLY ENFORCEABLE BY THE COMMISSION

1. Each Proposed License Article Results from an Extensive Study, Analysis, and Evaluation Process that Demonstrates the Necessity of Including It in the Commission's New License for the Baker River Project.

The Parties respectfully request and urge the Commission to adopt all of the Proposed License Articles, without material modification, as license articles in the Commission's new license for the Baker River Project. See Settlement, at 4, Section 3.1. Indeed, the framework of the Settlement is based upon this expectation and any material modification by the Commission can lead to a dispute resolution process and, potentially, withdrawal by one or more Parties (and rehearing requests). Id. at 7, 15, Sections 3.4.2, 5.5. These provisions reflect the Parties' expectation that each Proposed License Article is appropriate for inclusion in the new license.

This expectation is supported by the analysis completed to justify each article and each Proposed License Article contains a statement of purpose, which reflects the relationship of the article to the project effect being addressed by the article. The Joint Explanatory Statement provides a high level statement of project nexus for each article. To aid the Commission in reviewing the record before it and part of the basis for each Proposed License Article, attached as Exhibit A is a table describing the studies completed in the prefiling process and generally referencing the articles⁵ utilizing all or some of the information contained in the studies.

⁵ Please note this matrix was prepared by PSE and there was not adequate time prior to the Settlement comment deadline for the Parties to confirm that the list is comprehensive and the articles referenced as being supported by specific studies is complete. Thus, PSE may need to supplement or revise this table upon receiving comments from other Parties.

Additionally, the primary environmental documents available to the Commission to confirm the proper inclusion in the new license of the various resource protection, mitigation, and enhancement measures found in the Proposed License Articles will include: the Revised PDEA; the Biological Assessment; and terms and conditions to be filed with the Commission. If the Commission needs a more detailed explanation of the efficacy of each article, the Parties could work together to provide an article by article explanation of the supporting documentation. However, this effort would appear premature until the Revised PDEA is filed and terms and conditions are submitted. Thus, PSE will take direction from Commission staff, as needed, to address questions regarding specific license articles when Commission staff has had the opportunity to review the available data and analyses supporting the Proposed License Articles.

2. Each Proposed Article Is Supported by One or More of the Parties to the Settlement, Meets an Interest in Resource Protection, Mitigation, and/or Enhancement Associated with the Baker River Project, and Is Based Upon a Proper Nexus to the Project.

Each Proposed License Article⁶ is within the Commission's authority to enforce, either directly or through the licensee. Each Proposed License Article contains provisions requiring licensee actions enforceable by the Commission, and aspects of each pertain to relevant Project effects supporting licensee's enforcement responsibility. In accordance with the requirements of the FPA and recent Commission precedent, each Proposed License Article is entirely appropriate for inclusion in a new license for the Baker River Project.

⁶ It should be noted that this general statement reflects the articles overall, however, the nature of connection to the Project varies for each Proposed License Article.

The Commission has recently reiterated its position that nexus issues are best resolved in the context of specific cases if "reasonably objective criteria" exists for a judge to study the connection within its context. See *Hydroelectric Licensing under the Federal Power Act*, Notice of Proposed Rulemaking, Docket No. RM02-16-000, 102 FERC ¶ 61,185 (2003). Such proof of a nexus could include findings of direct, indirect, or cumulative environmental impacts within an environmental impact statement. See *Kennebec Water Power Co.*, 102 FERC ¶ 61,259, fn. 18 (2003). When examining proof of the reasonableness of a license condition, the Commission may evaluate the circumstances of the individual case and make a finding consistent with the public interest and reasonable. See *Cochecho Falls Associates*, 100 FERC ¶ 61,307, fn. 46 (2002). PSE respectfully submits that the Commission's review of each of the Proposed License Articles, and supporting environmental information, will demonstrate appropriate project nexus exists and supports the inclusion of each Proposed License Article in the new license.

C. THE SETTLEMENT IS TRULY COMPREHENSIVE WITH RESPECT TO ALL ISSUES RELEVANT TO THE ISSUANCE OF A NEW LICENSE FOR THE BAKER RIVER PROJECT

1. The Settlement Is Comprehensive Because it Resolves between the Parties All Substantive Issues Necessary for Relicensing the Baker River Project.

At the technical conference held on December 8, 2004, Commission staff questioned whether or not the Settlement is truly a "comprehensive settlement agreement" following a discussion among Commission staff, the Army Corps of Engineers ("ACOE"), Skagit County, and PSE regarding process expectations. That discussion concerned Proposed Article 107(b), which provides:

Additionally, from October 1 to March 1, licensee shall operate the Lower Baker storage reservoir to provide up to 29,000 acre-feet of storage for flood regulation, at the direction of the District Engineer, Corps of Engineers, acting on behalf of the Secretary of the Department of the Army, subject to the following: (i) such storage shall be provided only in accordance with arrangements that are acceptable to the Corps of Engineers; and (ii) such storage shall be provided only after suitable arrangements have been made to compensate the Licensee for the 29,000 acre-feet of storage for flood regulation specified herein.

Specifically, Skagit County requested that the Commission undertake a National Environmental Policy Act (“NEPA”) review of this provision for additional flood regulation storage before making its relicensing decision, while PSE stated that such NEPA review, including its timing, is the responsibility of the ACOE, which has exclusive federal authority to direct the provision and use of such storage.

PSE acknowledges the dispute between the County and other Parties regarding the NEPA process for Proposed License Article 107(b). It acknowledges that the Settlement does not determine such process. However, that omission is customary for flood control provisions under the control of the ACOE, which generally does not participate as a party in any relicensing proceeding, including settlement. The Parties did not purport to determine the ACOE’s process on its behalf. Notwithstanding this process dispute, PSE fully supports the Settlement as drafted, signed by the Parties, and filed with the Commission as being a truly comprehensive settlement agreement.

Commission rules do not define the comprehensive nature of a settlement based upon the number of parties signing the agreement; rather prior Commission decisions

demonstrate that the focus is upon the substantive content of the agreement.⁷ That is, a settlement agreement related to a hydroelectric licensing proceeding is comprehensive because it addresses all of the relevant issues of public interest associated with a proposed license.

The Commission has not adopted a definition of the term "settlement agreement," except to prescribe certain submittal requirements. See 18 C.F.R. § 385.602. But the Commission has found that comprehensive settlement agreements must provide comprehensive resolution of all substantive issues. See, e.g., PJM Interconnection L.L.C. and Allegheny Power, Docket No. RT01-98-002 "Presiding Judge's Notice Concerning Rejection of Deficient Offer of Settlement..." (April 30, 2002) (J. Young) (unreported) (ALJ determined he was precluded from certifying an offer of settlement that "provided inadequate basis for [the ALJ] to ascertain either the precise parameters of the issues left unresolved or whether those issues may be decided by the Commission purely as a matter of policy"); see also PJM Interconnection LLC and Allegheny Power, Docket No. RT01-98-002 "Post-argument Order on Joint Motion..." (May 15, 2002) (J. Young) (unreported). A settlement agreement is evaluated by the Commission on the basis of whether the agreement reasonably resolves all outstanding substantive issues in a manner

⁷ In United Gas Pipe Line Co., 57 FERC ¶ 61,161 (1991), the Commission noted:

There is no point in resolving disputes over the exact number of supporters and non-supporters of the settlement, or the percentage of refunds each group represents. In Commission proceedings, settlements are frequently supported by some, but not necessarily by all of the parties; if on examination they are found equitable and are approved by the Commission, then the terms of the settlement are binding on all the parties, even though not all are in accord as to the result.

consistent with the Commission's approval criteria, in this case, the hydroelectric licensing requirements of the FPA and implementing regulations. See, e.g., Penn-York Energy Corp., 42 FERC ¶ 63,008 (1988).

The Settlement is a fully comprehensive settlement with respect to the substantive issues pertaining to the licensing of the Baker River Project.⁸ The Settlement covers a multitude of resource protection, mitigation, and enhancement measures, including, but not limited to: measures addressing aquatic species and habitat; terrestrial species and habitat; cultural resources; and recreational opportunities. See Settlement, Proposed License Articles 101 through 517.

Specifically, with respect to Proposed Article 107, the Settlement provides for the continuation of substantial enhanced flood storage at the Upper Baker Dam. The Settlement provides the strong potential for even more federally administered storage following a process that authorizes the ACOE to direct PSE to provide the storage through Proposed Article 107(b), which is integrated with the agreed instream flows found in Proposed Article 106. Once authorized, the additional, enhanced flood storage at the Lower Baker Dam is almost self-implementing as it will require no need for the Commission to revisit its relationship to the agreed instream flows. Finally, the Settlement includes Proposed License Articles 601 through 603 that address license implementation decision-making, licensee funding for additional resource protection, mitigation and enhancement measures identified during the term of the license, and requiring adaptive management principles to be applied in implementation decisions.

⁸ Please note there are side agreements that also pertain to the licensing, but they do not include license articles proposed to be adopted by the Commission.

The scope, breadth, and coverage of the Proposed License Articles speak for themselves – they demonstrate the comprehensive nature of the Settlement.

2. The Discussions with Commission Staff Pertaining to Process Expectations Associated with Proposed Article 107 Relate to How Two Federal Agencies, FERC and the ACOE, May Act in Response to the Settlement, Not Whether It Is Truly Comprehensive.

Process expectations of the Parties with respect to Proposed Article 107(b) are just that – process expectations, not Settlement obligations. They do not modify or diminish the Settlement. A dispute between the Parties about process expectations also does not amount to a breach of the Settlement or undercut the validity of the substantive provision. However, because the Commission Staff asked the Parties to address the issue, PSE does so.

The Settlement does not explicitly require⁹ the Commission to conduct its NEPA review in one manner over another, nor does the Settlement specifically dictate how the ACOE will obtain the authority to direct PSE to operate additional flood storage at the Lower Baker Dam. However, the Settlement must be read as a whole. It is certain that many of the Proposed License Articles will not be implemented as written if the Commission engages in a new¹⁰ environmental review process to assess the environmental effects of flood regulation storage at Lower Baker Dam.

⁹ The Parties to the Settlement cannot dictate the Commission's NEPA process.

¹⁰ FERC's scoping process for NEPA did not include the identification of additional flood storage at Lower Baker and the parties have had no opportunity to comment on the proper scope of environmental review, nor have environmental studies been developed, by the Parties in the collaborative manner anticipated by the ALP procedures -- and that has guided the process to date.

PSE strove to meet the interests of all of the Parties, including Skagit County. Skagit County's signature on the Settlement indicates their interests, indeed, have been met – and met in the context of all of the other requirements and commitments in the Settlement. While PSE may take issue with Skagit County's expectations for process as stated to Commission staff on December 8, 2004, Commission staff should not be led to the conclusion that the Settlement cannot withstand a discussion of process expectations. Proposed License Article 107(b) is but one of many Proposed License Articles, and Commission staff is fully equipped to make the proper assessment of how to comply with its NEPA obligations¹¹ in evaluating the proposed license as a federal action.

3. A Primary Interest of the Parties that the Commission Needs to Consider in Order to Preserve the Settlement Is the Expectation that the Timing of the Filing of the Settlement Enables the Commission to Issue a New License at or Prior to the Expiration of the Existing License So That All Implementation Schedules Contained within Proposed License Articles Can Be Met.

Of paramount importance in the Commission's review of the Settlement are the many implementation schedules and timing requirements of various actions required by the Proposed License Articles. Because PSE is limited from carrying out many of the Proposed License Articles until the Commission issues a new license, the longer the Commission takes to review and issue a new license, the more likely it will be that PSE will not be able to meet all of the agreed implementation schedules. While the Settlement makes some provisions for license issuance timing and many of the timing requirements

¹¹ These comments with respect to the FERC NEPA process pertain to the method that the Commission should consider to direct its NEPA process in a way that has the greatest likelihood of preserving the Settlement – and is also consistent with applicable law and the interests of all the Parties.

stated in the Proposed License Articles are tied to license issuance, several of the required actions must occur by specified dates.

For example, Proposed Article 101 contains a schedule that requires initiation of design and permitting for fish hatchery construction to begin in the year before license issuance so that the schedule for construction in 2006 can be met. The remaining schedule in this article for future phases relies on the completion of the initial phase. Also, Proposed Article 105 contains a schedule requiring construction of a floating surface collector that is to become operational by March 2008. Planning steps prerequisite to meeting this deadline must take place now, including the initial steps for the launch site to support the construction work. PSE had to seek approval from the Commission to go forward with this work now to meet the schedules in Proposed Article 105. See Letter from FERC, Harry T. Hall, P.E., Regional Engineer to Edward R. Schild, dated November 18, 2004, FERC Accession No. 20041123-0037. Other articles also contain express scheduling requirements that are based on the expectation of license issuance on or before the expiration of the current license. See, e.g., Settlement, at Proposed Article 301, referencing Recreation Implementation Schedule (relating to all recreational articles).

As is demonstrated by the Parties' agreement to seek Commission approval of *all* Proposed License Articles without material modification, the agreed implementation schedules are integral and essential to the preservation of the Settlement. Each Party, by signing the Settlement and agreeing to support the Proposed License Articles, made a commitment to support the implementation schedules contained in the Proposed License Articles. See, e.g., Settlement, at 2, 4, 5, Sections 2.1, 3.1, and 3.2.

The Commission's current schedule for license review and issuance supports issuance of a timely license and contemplates the Commission's completion of the Draft

Environmental Assessment by May 2005. See Letter from J. Mark Robinson dated September 24, 2004 re: Request for Relicensing Process Schedule Modifications. Furthermore, the Parties expressly reiterated the expectation of a timely decision on the license as part of requesting an extension of the deadline for filing the Settlement to November 30, 2004, that the Commission would still be able to issue a license prior to the expiration of the existing license. See PSE's Request for Extension of Deadline for Schedule for Relicensing of Baker River Hydroelectric Project, FERC No. 2150, at 4. Timely license issuance is essential to giving full effect to the agreed implementation schedules in the Settlement.¹²

4. With Respect to the Commission's NEPA Process, the Commission Is Not Required to Perform An Analysis of Additional Flood Storage at Lower Baker to Support the Issuance of a New License Consistent with the Settlement.

Section 102(2)(C) of NEPA requires every proposal for major Federal action to include "a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . . [and] alternatives to the proposed action." 42 U.S.C. § 4332(2)(C).

Because this requirement is "essentially procedural," in reviewing an agency's compliance with it courts need only "ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision."

¹² Also note the support from Senators Patty Murray and Maria Cantwell and Representative Rick Larsen in the Commission's expeditious review and adoption of the proposed license articles. Letter from U.S. Senate to FERC, dated December 1, 2004 (attached as Exhibit B).

Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101 (D.D.C. 1992) (citing Natural Res. Defense Council, Inc.[NRDC] v. Hodel, 865 F.2d 288, 295 (D.C. Cir. 1998)). The proposed action, for the purposes of NEPA, does not include a provision ordering PSE to implement flood storage at Lower Baker until so directed by the ACOE. Indeed, during the pre-filing process, and at the December 8, 2004 technical conference, the ACOE has consistently indicated that Congressional authorization¹³ will likely be required in order for the ACOE to have the authority to direct PSE to operate storage at Lower Baker. This is consistent with the ACOE's conclusion, at a time when increasing storage at Upper Baker was being considered, that:

The language of a new FERC license would not convey authority to the Corps to operate Upper Baker for additional flood control storage specified in the license article.

See Letter from Col. Ralph H. Graves to Lloyd Pernela, dated May 30, 2003, Attachment, at 2, attached as Exhibit C. PSE relied on this information from the ACOE, as well as the ACOE's source of authority and approval for flood storage at Upper Baker Dam, in its agreement with Skagit County (Appendix B to the Settlement) and in its review of the language developed for Proposed Article 107(b).

Completion of the evaluation of flood storage in the ACOE process involves substantial value the FERC process cannot provide because ACOE is presently authorized and responsible for providing flood control operations at Upper Baker and coordinating

¹³ Similarly, Congressional authorization was required to give the ACOE the authority to direct PSE to provide storage at Upper Baker, pursuant to Section 201 of Public Law 89-298 (79 Stat. 1073). See United States House of Representatives Committee on Public Works and Transportation Resolution Docket No. 201-86 (adopted May 18, 1977) and United States Senate Committee on Environmental and Public Works Resolution (adopted May 23, 1977), substantially in accordance with House Document No. 95-149.

those efforts with the ACOE's flood control operations at Ross Dam. The ACOE's evaluation of additional flood storage is important to both assuring consistency of operational control among the flood storage operations in the Project area and prevents the Commission from putting PSE in the position of providing federal flood control operations that could conflict with overall Skagit River basin flood control operations. Through the Settlement and bilateral agreement between PSE and Skagit County, the Parties can work together with the ACOE to facilitate the ACOE's consideration of additional flood storage at Lower Baker. However, the process has not yet occurred and, so, for purposes of NEPA, the exact "flood storage proposal" has not been defined. Hence, increased flood storage is not part of the "proposed action" as defined by NEPA.

Nor is it a reasonable alternative that the Commission must consider in its NEPA document. Although not directly applicable if an EIS is not prepared, a federal agency preparing an EIS need not consider alternatives which are remote and speculative; it may deal with circumstances as they exist and are likely to exist. See, e.g., NRDC, 865 F.2d at 295; Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Engineers, 526 F.Supp. 1063, 1071-72 (W.D. Pa. 1981).

FERC recently applied this rule in consideration of a proposed hydropower license in In re Pacific Gas & Elec. Co., 107 FERC ¶ 61,232, 2004 WL 1211554 (June 2, 2004). There, the Round Valley Indian Tribes challenged the EIS issued by FERC in support of an order amending the license for Pacific Gas and Electric Company's Potter Valley Project in northern California. One of their objections was that FERC's EIS did not consider a future water-resource development initiative under consideration by Sonoma County and others to increase the storage in the Russian River basin. Id. at **7. The Commission rejected for consideration "this potential raising of an existing Russian River

federal dam by 20 to 40 feet" finding that it was speculative "because it would require numerous prerequisites that are not in place." Id. FERC held that "[a]n alternative is not reasonable if it is nothing more than speculation about what various entities might do or arguably ought to be doing." Id.

Where a possible future action is too speculative for review concurrently with review of the proposed action, FERC will address the potential actions when the speculative action becomes a reality. In New York Power Auth. v. Power Auth. of State of New York, 105 FERC ¶ 61,102 (2003), the Commission considered whether the potential amendment of a plan by a federal/international body, the International Joint Commission ("IJC"), which regulated water levels within the Project area that was under investigation, should be evaluated along with the proposed hydropower license application and settlement agreement. In evaluating that issue, the Commission provided as follows:

The IJC has initiated a plan to study regulation of water levels in Lake Ontario. It is not known when the study will be completed. However, the lands proposed to be removed from the Project boundary would be inundated if the IJC ordered [the licensee and Ontario Power Generation] to provide for a full Lake Ontario level.

...

There is no need at this time for the Project boundary to remain at EL 250. That level is based on the 100-year high water level for Lake Ontario. It is not necessary for a Project Boundary to be set at this level; the normal high water mark is generally sufficient.

We are however concerned about the possibility that the IJC could modify the Plan of Regulation so as to increase the target levels for Lake Ontario, which could, as noted, cause lands that would be outside the proposed Project Boundary at Lake St. Lawrence to be commonly inundated. In such an event, NYPA would need to request an amendment to the license to modify the Project Boundary so as to bring those lands back into the Project Boundary.

. . . We intend license Article 421, which requires NYPA to comply with all applicable orders of the IJC, to encompass the obligation to apply for such an amendment.

105 FERC at ¶ 61, 589 (emphasis added). In NYPA, the Commission determined that a speculative study considering future implementation of another agency's action would *not* be considered concurrently with the license application and settlement agreement even though the action if implemented could reasonably be expected to affect the Project.

The Parties jointly agreed on the implementation of any additional flood storage so that it can be fully implemented without revising other, related Proposed License Articles. Specifically, the Parties propose language in Proposed Article 106 that revises instream flow operations in a manner that integrates them with up to 29,000 acre-feet of flood storage at Lower Baker. This minimizes the need for the Parties or the Commission to reevaluate the related terms of the license once the ACOE process is complete. Proposed Article 107(b) paves the way for PSE to implement additional flood storage (up to 29,000 acre-feet) at Lower Baker once the ACOE completes its required process, whatever it may be – but does not prompt Commission action as part of the NEPA process for the proposed license.

Determining that the possible flood storage at Lower Baker is too speculative or remote to be considered as an alternative in FERC's NEPA review of the Baker River Project does not mean that the flood storage project would escape environmental review – nor that it cannot go forward. Pursuant to the ACOE's NEPA procedures, in preparing a General Investigation Study ("G.I. Study"), the ACOE would undertake environmental analysis during the reconnaissance phase for the increased flood storage proposal, once defined, which would continue into the feasibility study phase. Engineer Regulation ("ER") 200-2-2; 33 C.F.R. Part 230. The Corps would also be expected to initiate Section

7 consultation with NOAA Fisheries and USFWS. ER 1105-2-100, Appendix G, Amendment #1, at pp. 34 and 64.

Most importantly, the amount of time that would be required to conduct a NEPA process for Lower Baker when the elements of environmental review have not been scoped, studies have not been conducted, and timelines for drafting, review, and comment have not been established, means that a Commission decision to do so would directly conflict with the agreed implementation schedules and timelines that are part of the Settlement and its Proposed License Articles.

5. The Settlement Establishes a Framework for Achieving Skagit County's Interest in Making Additional Flood Storage Available at the Baker River Project.

The Settlement more than amply meets Skagit County's stated interests in securing flood storage protection for the Skagit River basin. It both continues the enhanced flood storage provided at Upper Baker Dam and provides for a confirmation from the parties to the Settlement that additional flood storage (to be provided at Lower Baker) can be integrated with the instream flow regimes set forth in Proposed Article 106. Indeed, modeling work was done to support Aquatics Table 2, and Proposed Article 106 provides for Aquatics Table 2 to be implemented "in the event that the Army Corps of Engineers District Engineer directs the licensee to operate the Lower Baker reservoir to provide up to 29,000 acre-feet of storage in accordance with [Proposed] Article 107" and following the construction of any necessary modifications, and revisions to the Flow Implementation Plan incorporating Aquatics Table 2. See Settlement, at 65, Proposed Article 106(C); attached Exhibit A Article 107 references.

With respect to the Baker River Project, Proposed Article 107 makes it possible for any ACOE-directed storage at Lower Baker to be operated – and the corresponding

revisions to the instream flow regime as described in Proposed Article 106 made -- without necessitating subsequent review by the Commission of the integration of the flood storage operation and revised flow regime. The Parties' efforts preceding the Settlement will facilitate expeditious environmental review associated with additional flood storage at Lower Baker (because the interaction between the agreed instream flows and flood storage at Lower Baker was considered as a part of the development of Proposed Articles 106 and 107(b)). Presently, PSE fully supports its obligations to partner with Skagit County in seeking up to 29,000 acre-feet of additional flood storage and move the ACOE review process forward – obligations that are contingent on Skagit County's acting consistent with the Settlement. Supported by Proposed License Article 107, the ACOE evaluation will be made with the advantage of already having significant data available regarding the interplay between instream flows and flood storage.

In the interim, Proposed License Article 106 carries forward the Interim Protection Plan analyzed in the Biological Opinion for Endangered Species Act Section 7 Consultation for the Baker River Hydroelectric Project, NOAA Fisheries Consultation No. 2002/01040 ("IPP"). Additionally, Proposed Article 107(c) requires PSE to consult with the Settlement Parties that become members of the Aquatics Resources Group to develop "means and operational methods to operate the Project reservoirs in a manner addressing imminent flood events and consistent with the requirements of the license." This provides for additional, potential interim measures. Finally, Section 4.1.1 of the Settlement requires PSE to provide what is available from its existing operational reservoir buffers; the Parties specifically agreed *not* to include this in the Proposed License Articles to be adopted by the Commission.

Effectively, the Settlement makes the provision of additional flood storage at Lower Baker, up to 29,000 acre-feet, almost self-implementing following the conclusion of the process the ACOE must complete to direct PSE's operation of Lower Baker. All of the Parties are poised to assist Skagit County in meeting its interests of achieving increased flood storage at Lower Baker. PSE is hopeful that Skagit County will not pursue FERC's evaluation of Lower Baker flood storage as part of a NEPA process that could, due to its context and timing, undermine the preservation of the very mechanism that otherwise could enable the County to achieve its interests – the Settlement.

In short, PSE agreed to provide as much flood storage as possible through present operational methods (see Section 4.1.1), to evaluate new means and methods to provide flood storage when flood events are imminent (Proposed Article 107(c)), and to work cooperatively with the County to attain Lower Baker flood storage (as described in Appendix B)). Finally, the County, by being a Party to the Settlement, has obtained the assurances of the other Parties that each Party will act in a manner that is Consistent with the Settlement and its requirements.

The Commission should not proceed with analyzing the effects of the potential for additional flood storage provided by Proposed Article 107 in the Commission's NEPA document supporting the new license. It is not necessary to meet the County's objectives; it is not required by NEPA; nor is it in the interest of preserving the Settlement and the timelines associated with its included implementation schedules. The issuance of a timely license simply cannot – and does not need to – wait for the development of environmental scoping, studies, and analyses for, and the completion of, the ACOE evaluation of additional flood storage needs at the Baker River Project.

IV. CONCLUSION

PSE respectfully requests the Commission accept the Offer of Settlement and issue a new license for the Baker River Project that incorporates the Proposed License Articles without material modification.

DATED: December 22, 2004.

PERKINS COIE LLP

By: Kristine R. Wilson
Pamela W. Krueger, WSBA #24913
Kristine R. Wilson, WSBA #33152
Attorneys for Puget Sound Energy, Inc.

Exhibit A – Table Listing Completed Studies Supporting Settlement

Proposed License Article	Studies Related to Proposed License Article
101 – Fish Propagation	<ul style="list-style-type: none"> • A-01a – Reservoir Tributary Habitat Surveys • A-01b – Reservoir Tributary Biological Surveys • A-01c – Reservoir Tributary Delta Surveys • A-02 – Lower Baker River Habitat and Fish Utilization • A-03 – Reservoir Fish Population Characteristics • A-15 – Upper Baker Delta Scour • A-18 – Baker River Survey 1 Kilometer from Reservoir Upstream to Anadromous Fish Barriers • A-19 – Review Limnological Information • A-25 – Evaluation of Project-Influenced Predation on Juvenile Sockeye Salmon • A-26a – Reservoir Limnology-Production Potential • A26b – Tributary Production Potential • A-29 – Estimate Sockeye Production from Different Incubation Sources
102 – Aquatics Reporting	<ul style="list-style-type: none"> • --
103 – Upstream Fish Passage Implementation Plan	<ul style="list-style-type: none"> • A-02 – Lower Baker River Habitat and Fish Utilization • A-35 – Upstream Fish Passage Run Timing Correlation Analysis
104 – Connectivity Between Lake Shannon and Baker Lake	<ul style="list-style-type: none"> • A-01a – Reservoir Tributary Habitat Surveys • A-01b – Reservoir Tributary Biological Surveys • A-01c – Reservoir Tributary Delta Surveys • A-03 – Reservoir Fish Population Characteristics • A-38 – Bull Trout Population Assessment • A-39 – Native Non-Salmonids
105 – Downstream Fish Passage Implementation Plan	<ul style="list-style-type: none"> • A-06 – Upper Baker Passage Design Baffle Modification • A-07 – Lower Baker Forebay Bathymetric Survey • A-08 – Upper Baker Passage System Evaluation • A-28 – Fish Passage-Reservoir Management • A-30 – Near Field Smolt Behavior • A-31 – Far Field Smolt Behavior • A-32 – Kelt Radio-Telemetry Study • A-33 – Passive Integrated Transponders (PIT) Tag Migration Study • A-34 – Downstream Fish Passage Periodicity Correlation Analysis

Proposed License Article	Studies Related to Proposed License Article
106 – Flow Implementation	<ul style="list-style-type: none"> • A-04 – Lower Baker/Skagit River Flow Coordination, Gagging • A-09a – Skagit River Flow, Ramping and Habitat Assessment • A-09b – Salmonid Redd Selection and Maintenance in Middle Skagit River in Response to River Fluctuations • A-09c – Distribution, Timing, and Depth of Salmonid Redds • A-09d – Distribution, Timing of Juvenile Salmonids • A-12 – Instream Flows for Biodiversity • A-24 – Hydrologic and Geomorphic Analysis
107 – Flood Storage	<ul style="list-style-type: none"> • A-04 – Lower Baker/Skagit River Flow Coordination, Gagging • A-09a – Skagit River Flow, Ramping and Habitat Assessment • A-09b – Salmonid Redd Selection and Maintenance in Middle Skagit River in Response to River Fluctuations • A-09c – Distribution, Timing, and Depth of Salmonid Redds
108 – Gravel	<ul style="list-style-type: none"> • A-02 – Lower Baker River Habitat and Fish Utilization • A-16 – Feasibility Assessment of Potential PME Measures for Lower Baker Alluvial Fan • A-24 – Hydrologic and Geomorphic Analysis
109 – Large Woody Debris	<ul style="list-style-type: none"> • A-20 – Large Woody Debris Management
110 – Shoreline Erosion	<ul style="list-style-type: none"> • A-14a – Reservoir Shoreline Erosion and Deposition • A-15 – Upper Baker Delta Scour
201	<ul style="list-style-type: none"> • Historic Buildings and Structures Survey (Historical Research Associates February 2004)
201	<ul style="list-style-type: none"> • Archaeological Survey and National Register Evaluation of Archaeological Resources (Northwest Archaeological Associates February 2004)
201	<ul style="list-style-type: none"> • Technical Report Ethnographic Overview (Equinox Research & Consulting April 2004)
201	<ul style="list-style-type: none"> • Status of Traditional Cultural Properties Investigations Report (Equinox Research & Consulting April 2004)
302 – Aesthetic Management	<ul style="list-style-type: none"> • R5 – Aesthetic / Visual Resources Study • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
303 – Baker Lake Resort Redevelopment Plan	<ul style="list-style-type: none"> • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
304 – Baker Reservoir Recreation Water Safety Plan	<ul style="list-style-type: none"> • R12 – Dispersed Site Inventory • R13 – Recreation Visitor Survey • R14 – Secondary Data

Proposed License Article	Studies Related to Proposed License Article
305 – Lower Baker Developed Recreation	<ul style="list-style-type: none"> • R11 – R15 – Capacity and Suitability Analysis • R12 – Dispersed Site Inventory • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
306 – Upper Baker Visitors Information Funding	<ul style="list-style-type: none"> • R9 – Electronic Monitoring • R12 – Dispersed Site Inventory • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
307 – Upper Baker Visitor Interpretive Services Funding	<ul style="list-style-type: none"> • R9 – Electronic Monitoring • R12 – Dispersed Site Inventory • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
308 – Dispersed Recreation Management Funding	<ul style="list-style-type: none"> • R5 – Aesthetic / Visual Resources Study • R11 – R15 – Capacity and Suitability Analysis • R12 – Dispersed Site Inventory • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
309 – Bayview Campground Rehabilitation Funding	<ul style="list-style-type: none"> • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
310 – Upper Baker Trail and Trailhead Construction Funding	<ul style="list-style-type: none"> • R9 – Electronic Monitoring • R11 – R15 – Capacity and Suitability Analysis • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
311 – Lower Baker Trail Construction	<ul style="list-style-type: none"> • R11 – R15 – Capacity and Suitability Analysis • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
312 – Developed Recreation Monitoring and Funding	<ul style="list-style-type: none"> • R5 – Aesthetic / Visual Resources Study • R9 – Electronic Monitoring • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
313 – Upper Baker Developed Recreation Maintenance and Funding	<ul style="list-style-type: none"> • R9 – Electronic Monitoring • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
314 – Upper Baker Trail and Trailhead Maintenance Funding	<ul style="list-style-type: none"> • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
315 – Lower Baker Trail Maintenance	<ul style="list-style-type: none"> • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis

Proposed License Article	Studies Related to Proposed License Article
316 – USDA-FS Forest Road maintenance Funding	<ul style="list-style-type: none"> • R5 – Aesthetic / Visual Resources Study • R9 – Electronic Monitoring • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
317 – Access to Baker Lake	<ul style="list-style-type: none"> • R9 – Electronic Monitoring • R13 – Recreation Visitor Survey • R16 – Recreation Needs Analysis
318 – Law Enforcement	<ul style="list-style-type: none"> • R5 – Aesthetic / Visual Resources Study • R12 – Dispersed Site Inventory • R13 – Recreation Visitor Survey • R14 – Secondary Data • R16 – Recreation Needs Analysis
401 – Water Quality	<ul style="list-style-type: none"> • A-05 – Water Quality Sampling • A-19 – Review Limnological Information
501 – Terrestrial Resource Management Plan	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T6 – Invasive Weed Surveys in the Baker River Hydroelectric Project Area • T7 – Historic Vegetation of the Baker River Project Area • T7B – Potential Future Vegetation of the Baker River Project Area • T11 – Oregon Spotted Frog Inventory of the Baker River Watershed • T15 – Baker Basin Vegetation Mapping • T16 – Rare Plant Surveys for the Baker River Project Area • T17 – Amphibian Surveys in the Baker River Hydroelectric Project Area • T21 – Elk Habitat Mapping Study • T23 – Hydrologic Monitoring of Wetland WB-30
502 – Forest Habitat	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T7B – Potential Future Vegetation of the Baker River Project Area • T15 – Baker Basin Vegetation Mapping
503 – Elk Habitat	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T7B – Potential Future Vegetation of the Baker River Project Area • T15 – Baker Basin Vegetation Mapping • T21 – Elk Habitat Mapping Study

Proposed License Article	Studies Related to Proposed License Article
504 – Wetland Habitat	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T7B – Potential Future Vegetation of the Baker River Project Area • T15 – Baker Basin Vegetation Mapping • T23 – Hydrologic Monitoring of Wetland WB-30
505 – Aquatic Riparian Habitat Protection, Restoration, and Enhancement Plan	<ul style="list-style-type: none"> • A-37 – Future Potential Aquatic Habitats of the Baker River Project Area
505 – Aquatic Riparian Habitat Protection, Restoration, and Enhancement Plan	<ul style="list-style-type: none"> • A37 – Future Potential Aquatic Habitats of the Baker River Project Area (Aquatic WG Study) • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T7B – Potential Future Vegetation of the Baker River Project Area • T15 – Baker Basin Vegetation Mapping
506 – Osprey Nest Structures	<ul style="list-style-type: none"> • T4 – Analysis Species Assessment
507 – Loon Floating Nest Platforms	<ul style="list-style-type: none"> • T4 – Analysis Species Assessment
508 – Noxious Weeds	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T6 – Invasive Weed Surveys in the Baker River Hydroelectric Project Area • T23 – Hydrologic Monitoring of Wetland WB-30
509 – Plants of Special Status	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T16 – Rare Plant Surveys for the Baker River Project Area
510 – <i>Carex flava</i>	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T16 – Rare Plant Surveys for the Baker River Project Area
511 – Decaying and Legacy Wood	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment
512 – Bald Eagle Night Roost Surveys	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T15 – Baker Basin Vegetation Mapping
513 – Bald Eagle Management Plans	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T15 – Baker Basin Vegetation Mapping

Proposed License Article	Studies Related to Proposed License Article
514 – Use of Habitat Evaluation Procedures	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T7 – Historic Vegetation of the Baker River Project Area • T7B – Potential Future Vegetation of the Baker River Project Area • T12 – Grizzly Bear Spring Foraging Habitat Study • T21 – Elk Habitat Mapping Study
515 – Late Seral Forest Growth	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T15 – Baker Basin Vegetation Mapping
516 – Mountain Goats	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T4 – Analysis Species Assessment • T15 – Baker Basin Vegetation Mapping
517 – Grizzly Bear Road Management	<ul style="list-style-type: none"> • T2/T5 – Vegetation Mapping in the Project Area and Wetland Inventory • T12 – Grizzly Bear Spring Foraging Habitat Study • T15 – Baker Basin Vegetation Mapping
602 – Required Funding-HERC	<ul style="list-style-type: none"> • A-39 – Native Non-Salmonids

Exhibit B – Letter from U.S. Senate to FERC

United States Senate

WASHINGTON, DC 20510

December 1, 2004

The Honorable Pat Wood
Chairman
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Baker River Hydroelectric Project (FERC No. 2150) Comprehensive Settlement Agreement and Proposed New License

Dear Chairman Wood:

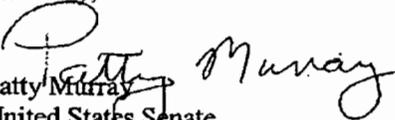
We are writing to request the Federal Energy Regulatory Commission's expeditious approval of the settlement recently submitted to you by Puget Sound Energy and 23 other parties for Puget Sound Energy, Inc.'s Baker River Hydroelectric Project License.

The settlement represents the culmination of a nearly five-year process involving federal, state and local agencies, municipalities, several non-governmental organizations and three Native American tribal communities. These groups have worked diligently together to reach an agreement on a new license for the Baker River Project. The settlement and accompanying proposed license articles are carefully crafted and strike a strong balance between the interests of all the parties involved and will provide a wide array of benefits to the environment, local communities, energy customers, and other interests. In addition, the agreements also create the Baker River Coordinating Committee to monitor and oversee the implementation of the settlement and the projects therein authorized.

With the Commission's prompt approval and support of this settlement and adoption of the proposed articles in the form submitted, Puget Sound Energy will be able to operate the Baker River Hydroelectric Project for another 45 years or more. Your approval of this settlement, and adoption of the accompanying proposed articles, will allow all of the parties involved to begin work on many of the aquatic, terrestrial, cultural and recreation projects outlined in the license.

We appreciate the Commission's attention to this matter.

Sincerely,


Patty Murray
United States Senate



Maria Cantwell
United States Senate



Rick Larsen
Member of Congress

Exhibit C – Letter from Col. Ralph H. Graves to Lloyd Pernela



DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-3755

REPLY TO
ATTENTION OF

Planning Branch

MAY 30 2003

Lloyd M. Pernela, Manager, Plant Licensing
Energy, Production and Storage, OBC-14N
Puget Sound Energy
Post Office Box 97034
Bellevue, Washington 98009-9734

Dear Mr. Pernela:

This is in reply to your letter dated May 1, 2003 regarding the Baker River Hydroelectric Project (Baker Project) flood control agreement. In the letter, you requested a response from the U.S. Army Corps of Engineers (Corps) regarding the potential for implementation of a different level of storage for flood control at Upper Baker Dam than presently provided under the existing authority granted to the Corps by Congressional Resolutions in 1977. Your request relates to the Federal Energy Regulatory Commission (FERC) relicensing process for Puget Sound Energy's (PSE) Baker Project, as well as to Skagit County's desire that additional flood control storage be evaluated for implementation in conjunction with the relicensing of the Baker Project.

Responses to questions regarding flood control operation issues and the extent of Corps discretionary authority are enclosed. These include responses to questions posed on page two of your letter, and related issues discussed between our respective staffs at a meeting on May 20, 2003.

As requested, I am furnishing a copy of this letter to Mr. David Brookings, Public Works Administrator, Skagit County Public Works Department, 1111 Cleveland Avenue, Mount Vernon, Washington 98273-4215. If you have questions on this matter, you may contact me at telephone (206) 764-3690 or Steven Babcock, my staff point of contract, at telephone (206) 764-3651.

Sincerely,

A handwritten signature in black ink, appearing to read "Ralph H. Graves".

Ralph H. Graves
Colonel, Corps of Engineers
District Engineer

Enclosure

**Corps of Engineers Responses
To Questions Relating to Implementation of Additional
Flood Control Storage at Baker River Hydroelectric Project, FERC No. 2150**

Questions posed by Puget Sound Energy (PSE) in May 1, 2003 letter.

1. Question: Absent request from the District Engineer to FERC in accord with the appropriate Corps approval process, would COE object to a license article for the FERC Project that provided modified flood storage at Upper Baker that would be managed by an entity other than COE with prior approval from COE?

Response: We would not support shifting flood control responsibilities at Puget Sound Energy's (PSE) Upper Baker River Project (Upper Baker) from the Corps of Engineers (Corps) to another entity. Such a shift in management responsibility would not be the most effective means of providing flood control to the Skagit River valley and could lead to difficulty in making timely and sound operational decisions with less than desirable outcomes with respect to flood damage reduction in the lower Skagit River valley.

The Corps is presently authorized, and thus responsible, for providing flood control operations at Upper Baker on the Baker River and at Seattle City Light's Ross Dam on the Skagit River. The direct involvement of multiple entities in providing flood control operations within the Skagit River basin would not be operationally efficient. We do not believe that our current authorization would permit the transfer of flood control responsibilities at Upper Baker Dam to another entity. If the existing project for flood control storage at Upper Baker Dam were ever to be deauthorized by Congress, however, we would have to coordinate flood control operations at Ross Dam with that of the entity responsible for flood control at Upper Baker. In practice, flood control at these two projects is by necessity a well-coordinated operation in order to achieve the desired goal of providing optimal flood control to the lower Skagit River valley (downstream of Concrete).

Having a single entity responsible for flood control at both projects also has operational benefits, in addition to being the most efficient in terms of coordination. For example, effective flood control within a particular sub-basin of the Skagit River watershed generally requires careful tracking of the flood event from a basin-wide scale given the typically synoptic-scale character of weather events that cause flooding in the basin. In other words, observing how a weather event and associated flood hydrograph develop in the Baker River basin is often beneficial to understanding how the same weather event may affect the flood hydrograph in the upper Skagit River basin (i.e., inflow hydrograph to Ross Dam reservoir). The use of a single entity to administer flood control operations at both projects inherently creates a situation in which the entity charged with basin-wide flood control operations (reservoir operations) tracks conditions throughout the basin, thereby leading to a better understanding and execution of basin-wide flood control.

2. Question: Can FERC preempt the COE's statutory authority requirements for flood control at Baker by issuing a license article that authorizes a different level of flood control than authorized through House Document 95-149, United States Senate Resolution No. 201-86 (May 10, 1977), pursuant to Section 201 of Public Law 89-298 (79 Stat. 1073)?

Response: A license article in the new FERC license for the Baker River Hydroelectric Project that specified a different level of flood control at Upper Baker than authorized [United States House of Representatives Committee on Public Works and Transportation Resolution Docket No. 201-86 (adopted May 18, 1977) and United States Senate Committee on Environment and Public Works Resolution (adopted May 23, 1977) pursuant to Section 201 of Public Law 89-298 (79 Stat. 1073), substantially in accordance with House Document No. 95-149] does not preempt the Corps' statutory authority requirements for flood control at Upper Baker. The language of a new FERC license article would not convey authority to the Corps to operate Upper Baker for additional flood control storage specified in the license article.

The Corps will be required to obtain necessary authorization prior to operating Upper Baker for additional flood control storage specified in a FERC license article. Without knowledge of the specifics of an actual license article, the Corps cannot determine whether new Congressional authority would be required. The Corps' Division Commander or the Chief of Engineers (Commander USACE) may have delegated authority to approve changes to the authorized Upper Baker Flood Control Project. Engineer Regulation (ER) 1105-2-100, Appendix G, Section III at paragraph G-13 (Approval Authority) provides the following guidance (The ER is also available for download or review online at <http://www.usace.army.mil/inet/usace-docs/eng-regs/er1105-2-100/a-g.pdf>):

a. Approval Authority Delegated to Division Commander. Division commanders may approve changes to authorized projects, or elements thereof, if such changes meet all of the criteria listed below. Such changes shall be reported to HQUSACE through the Project Review Board process. Division commanders should submit doubtful or controversial cases to HQUSACE (CECW-P) for a determination of the proper approval authority, reports, and report processing.

(1) For projects authorized by the Water Resources Development Act (WRDA) of 1986, and subsequent legislation, an increase in total project cost no greater than increases in price level changes and cost of modifications required by subsequent legislation. For projects authorized prior to the WRDA of 1986, an increase in total baseline project cost estimate no greater than increases in price level changes and the cost of modifications required by subsequent legislation.

(2) Increase or decrease in scope no greater than 20 percent of the scope authorized by Congress. If the scope can be defined by several parameters, (for example, storage capacity, outputs, environmental impacts) and the change in any one parameter exceeds 20 percent, the change must be approved by the Chief of Engineers.

- (3) Change in the location or the design of the project to the extent that the location and magnitude of the impacts of the change are determined to be insignificant compared to the impacts assessed for the authorized project.
 - (4) Change does not add or delete a project purpose, except deletion of water quality where the benefits attributed to water quality are less than fifteen percent of the total project benefits, pursuant to Section 65, of the WRDA of 1974.
- b. Approval Authority Reserved by the Commander USACE. Any change to an authorized, uncompleted project that does not meet all of the criteria listed in paragraph G-13a and which does not require authorization by Congress pursuant to one or more of the criteria in paragraph G-13c shall be approved by the Director of Civil Works, HQUSACE, or specifically delegated by the Director to the Division Commander for approval.
- c. Changes Requiring Authorization by Congress. The Chief of Engineers' discretionary authority to approve changes to authorized projects must not be abused. Changes in scope, including reduction in scope, beyond those listed in paragraph G-13a. should serve as an alert that the change may exceed the Chief of Engineers' discretionary authority. After review, the Commander USACE, in consultation with the Assistant Secretary of the Army (Civil Works) (ASA(CW)), will determine whether the change can be made under discretionary authority or whether additional Congressional authorization is required. In addition, the following always require authorization by Congress:
- (1) Addition or deletion of a project purpose, unless permitted under existing general authorities as discussed in paragraph G-14.
 - (2) For projects more than ten percent complete as of 17 November 1986, addition of fish and wildlife mitigation measures requiring acquisition of lands by condemnation. Acquisition of water interests by condemnation.
 - (3) Change in the local cooperation requirements specifically referenced in the authorizing language, unless required by:
 - (a) Subsequent legislation; or,
 - (b) Addition of a project purpose within the general authority of the Chief of Engineers.
 - (4) Exceedence of the \$10 million Federal cost, exclusive of price level changes, if the ER 1105-2-100 22 Apr 2000 project was authorized under Section 201, prior to 22 October 1976; or \$15 million Federal cost if authorized under Section 201, as amended by Section 131, of the WRDA of 1976, on or after 22 October 1976.
 - (5) Deepening of navigation channels.

- (6) For projects authorized by WRDA of 1986 and subsequent authorizations, an increase in total project cost, exclusive of price level changes, of more than twenty percent of the total project cost stated in the authorizing legislation.

It is not clear that an increase in project storage would meet the limitations contained in ER 1105-2-100 for Corps approval authority, as opposed to requiring Congressional authorization. In any event, a decision document submitted by the Corps' Seattle District office would be required to support the recommendation for authorization for the Corps to operate Upper Baker for additional flood control storage. This decision document would have to demonstrate a Federal interest in additional flood control storage at Upper Baker. The decision document would thus have to demonstrate that the recommended plan is economically justified (i.e., flood damage reduction monetary benefits exceed project costs). The recommended plan would have to be demonstrated to be consistent with protecting the Nation's environment, pursuant to national environmental statutes, applicable Executive Orders and other Federal planning requirements. Section 16 of Appendix G of ER 1105-2-100 sets forth the information required by Corps Headquarters, and similar information is expected to be required by our Division Commander in the event the change fell within his authority.

One important issue would be compensation for power losses if a new FERC license article called for Federal compensation of PSE for power losses that would result from the additional flood control storage. The Corps' current Congressional authority provides for Federal compensation to PSE for power losses associated with 58,000 acre-feet of flood control. The Corps entered into a flood control operating agreement with PSE and operates the project for a total of 74,000 acre-feet of storage for flood control (16,000 acre-feet that PSE is required by Article 32 of the current FERC license to provide without compensation for lost valley storage associated with construction of the project, plus 58,000 acre-feet subject to Federal compensation). The existing flood control operating agreement with PSE is about to expire. A new agreement will need to be developed to prescribe the means of providing compensation to PSE for power losses associated with 58,000 acre-feet of flood control storage.

Implementation by the Corps of a new license article prescribing additional flood control storage may require environmental documentation, including National Environmental Policy Act (NEPA) and Endangered Species Act (ESA), over and above that contained in the FERC relicensing. Whether additional NEPA and/or ESA documentation would be required to satisfy Corps requirements is not known at this point.

3. Question: In the event that a license article authorizes a non-COE entity to manage flood control operations at Upper Baker River Project when flood stage levels exceeded 90,000 cfs near Concrete (USGS gaging station 12194000) to maintain flood storage above 74,000 acre-feet, would a discharge rate of more or less than 5,000 cfs implemented by said non-COE entity during flood events conflict with the COE Water Control Manual for Baker River Project, February 1997, pps. 7-9 and 7-10, regarding flood control operations over which COE has responsibility?

If such a conflict would occur with the stated Corps reservoir policy, to what extent would it be possible to allow a non-COE entity to regulate and pass inflow? Would the COE object to a non-COE entity being legally authorized to make operational decisions at the Project in conjunction with a license article that authorized a different level of flood storage than the COE must presently provide?

Response: For the same reasons cited in our response to question 1 above, it would not be either acceptable or operationally viable to have a shared flood control responsibility at Upper Baker between the Corps and another entity. Having multiple entities responsible for providing flood control at a single project would be difficult to effectively implement and could lead to situations in which the individual actions of the responsible entities result in conflict, confusion, and ultimately poor flood control management at Upper Baker, to the detriment of the Skagit River valley. For instance, an operational decision made by one of the responsible entities could be detrimental to the desired operations/goals of the second entity. Furthermore, while the definition of flood control responsibilities for multiple entities might appear very straightforward contractually, the transition of responsibilities during a flood event would be less clear. Transition of responsibilities in real-time would likely be further complicated by the typically rapid pace at which Skagit Basin flood events develop and the attendant need for quick and effective decision-making. The current situation in which the Corps provides flood control operations at both the Upper Baker and Ross Projects reflects an intentional decision by the Federal Government to place the responsibility of flood control operations (specifically reservoir control) with a single entity.

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of December, 2004, served Puget Sound Energy, Inc.'s Comments on Baker River Hydroelectric Project Comprehensive Settlement Agreement upon each person designated on the official service list compiled by the Secretary in this proceeding.

A handwritten signature in cursive script, reading "Corinne Scowcroft", is written over a horizontal line.

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