

**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.