



Reply to  
Attention of:

DEPARTMENT OF THE ARMY  
NORTHWESTERN DIVISION, CORPS OF ENGINEERS  
P.O. BOX 2870  
PORTLAND, OREGON 97208-2870

CECC-NWD-OC

16 September 2009

**VIA EXPRESS MAIL**

Markham A. Quehrn  
Perkins Coie  
The PSE Building  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579

Subject: Agreement for Flood Control and Replacement Power

Mr. Quehrn:

Attached please find an original executed copy of the Agreement for Flood Control and Replacement Power for the Baker River Project, FERC Project No. 2150.

Thank you very much for your assistance in this matter. Also, please convey to PSE the Corps' appreciation for their cooperation in working through the details of this agreement.

Should you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Seeronen".

John R. Seeronen  
Assistant Division Counsel

Enclosure  
as

## **AGREEMENT FOR FLOOD CONTROL AND REPLACEMENT POWER**

This AGREEMENT FOR FLOOD CONTROL AND REPLACEMENT POWER FOR THE BAKER RIVER PROJECT ("Agreement") is made and executed as of this 5<sup>th</sup> day of SEPTEMBER, 2009 by and between the UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY, acting by and through the Division Engineer, Northwestern Division, U.S. Army Corps of Engineers ("Corps"), and PUGET SOUND ENERGY, INC. ("Puget"), a corporation organized and existing under the laws of the State of Washington. The Corps and Puget are hereafter sometimes referred to individually as "Party" and jointly as "Parties."

### **RECITALS**

WHEREAS, Puget owns and operates the Baker River Project, Federal Energy Regulatory Commission ("FERC") Project No. 2150 (the "Project"), including improvements at the Upper Baker Development and at the Lower Baker Development, such developments being located on the Baker River in the State of Washington;

WHEREAS, the Project's prior and current FERC licenses establish a framework by which Puget heretofore has, on terms and conditions established by predecessor agreements with the Corps, provided 74,000 acre feet of storage space for flood control during the storage drawdown season at the Upper Baker Development;

WHEREAS, on October 5, 2004, the Parties entered into an interim agreement which, as amended, extends the respective obligations of the Parties to provide 74,000 acre feet of storage space for flood control during the storage drawdown season at the Upper Baker Development through September 30, 2009;

WHEREAS, the Corps is authorized to enter into such agreements by federal legislation contained in section 201 of Public Law 89-298 to implement the provisions contained in House Document No. 95-149, House Committee on Public Works and Transportation Resolution Docket No. 201-86, dated May 10, 1977, and Resolution of the Senate Committee on Environment and Public Works, dated May 23, 1977;

WHEREAS, on January 27, 2005, the Corps and Puget signed a Notice of Intent to enter into this Agreement, subject to the satisfaction of certain regulatory contingencies;

WHEREAS, on October 17, 2008, the FERC issued a new fifty (50) year license for the Project (herein the "New FERC License");

WHEREAS, Article 107(a) of the New FERC License allows, among other things, for the continuation of the flood control arrangements heretofore established at the Upper Baker Development in accordance with aforementioned authorities;

WHEREAS, the Corps's comments to FERC as to the sufficiency of the flood control measures contained in the New FERC License are attached hereto for reference purposes only as Exhibit A; and

WHEREAS, pursuant to the aforementioned authorities, and having satisfied all applicable regulatory contingencies, the Parties now desire to enter into this Agreement to implement the applicable provisions of Article 107(a) of the New FERC License.

NOW, THEREFORE, the Parties hereto mutually agree as follows:

**1. Term of Agreement.**

(a) This Agreement shall take effect as of 2400 hours on ~~5 SEPTEMBER~~ 2009 and shall thereafter be and remain in full force and effect through 2400 hours of the earliest of the following dates to occur (the "Term"): (i) the date on which the Project becomes inoperable; (ii) the date on which Puget ceases to be the owner and/or the operator of the Project; (iii) the date that is twenty (20) years from and after the date upon which this Agreement shall take effect; or (iv) October 1 of any operating year, provided prior written notice of termination of one-hundred and eighty (180) days is provided by a Party to and received by the other Party prior to October 1 of that same calendar year.

(b) A Party may request, not less than forty-five (45) days prior to the expiration of the Term by written notice to the other Party in accordance with paragraph 6 below, that the Term be extended. The other Party may, at its option, at any time during such forty-five (45) day period, agree to so extend the Term by written notice to the Party requesting such extension given in accordance with paragraph 6 below. Unless otherwise agreed by the Parties, any extension of the Term pursuant to this paragraph 1(b) shall be for a period of not less than ten (10) years.

**2. Flood Control Operation by Puget.**

(a) Puget shall operate the Upper Baker Development to provide (i) 16,000 acre feet of flood control storage space between October 15 and March 1 and (ii) an additional 58,000 acre feet of storage space between November 1 and March 1 of each operating year during the Term. Such flood control operations shall be at the direction of the Corps on terms and conditions to be mutually agreed upon by the Corps and Puget. It shall be the intent of this Agreement to comply with the

flood control objectives specified in House Document No. 95-149, while minimizing spill at the Upper Baker Development to the extent that it is feasible.

(b) The Corps hereby appoints Puget as its agent for the purpose of providing flood control operations pursuant to subparagraph (a) above. All such operations shall be undertaken by Puget at the Corps' direction and under the Corps' control, and all such operations shall be undertaken by Puget in a manner that is consistent with the terms and conditions referenced in subparagraph (a) above. The Parties intend that, to the extent permitted by applicable law, in the performance of its obligations pursuant to subparagraph (a) above Puget shall be afforded the protection of the immunity provided by 33 U.S.C. § 702(c). Without limiting the generality of the foregoing, Puget shall provide prompt notice to the Corps of any litigation filed against Puget in carrying out the terms of this Agreement and seeking costs, (including but not limited to, costs incurred to mitigate or enhance actual or alleged natural resource consequences) expenses, harm, losses, fines, attorney fees, litigation costs, penalties, liens, liabilities, or equitable relief. The purpose of such notice is to provide the Corps with the opportunity to consider what actions may be appropriate to protect the interests of the United States as such proceedings relate to the Corps authorized flood control project at the Upper Baker Project and the Corps immunity from damages of any kind under the Flood Control Immunity Statute, 33 U.S.C. Section 702c.

**3. Energy and Capacity to Be Delivered to Puget.**

(a) From November 1 through March 1 of each year occurring during the Term, the Corps shall cause electric energy to be delivered to Puget in an amount equal to 7,000 megawatt hours. The energy shall be delivered to Puget during such period in the following amounts:

<u>Month</u>	<u>Megawatt hours</u>
November	1750
December	1750
January	1750
February	1750

(b) The Corps shall cause the firm capacity necessary to deliver the sum of the energy available pursuant to subparagraph (a) above to Puget to be provided at an hourly rate requested by Puget, but not to exceed 7 megawatts unless otherwise agreed to by the Parties.

(c) Puget hereby agrees that it will coordinate with the Bonneville Power Administration ("BPA"), or such successor transmission provider as may be

designated by the Corps, regarding scheduling the delivery of energy and capacity set forth above pursuant to the provisions of paragraph 5 below.

**4. Replacement Energy and Capacity.**

(a) If at any time Puget does not for any reason receive energy and capacity in accordance with the requirements of paragraph 3 above, Puget shall be entitled to receive (and the Corps shall arrange for the provision and delivery to Puget of) replacement energy. Replacement energy (on a one-to-one basis) for an interruption shall be delivered to Puget on the next prescheduled day when non-firm transmission is available, on like hours, unless otherwise agreed to by the Parties. The specific time of such deliveries shall be as requested by Puget pursuant to scheduling provisions provided by paragraph 5 below.

(b) Puget shall notify the Corps of an interruption, and with regard to any such interruption, Puget shall provide the Corps with a subsequent written report that enumerates (i) the replacement energy determined for such interruption in accordance with subparagraph 4(a) above and (ii) if and to the extent such replacement energy was delivered to Puget in accordance with paragraph 5 below.

**5. Delivery and Transmission of Energy and Capacity.**

(a) The Corps shall cause to be delivered to Puget by BPA all quantities of energy specified in paragraphs 3 and 4, above, directly over the Federal System to the Sedro Woolley Point of Delivery. In lieu of the Sedro Woolley Point of Delivery, BPA may deliver such quantities of energy to Puget at such other Points of Delivery as may be specified by Puget. Puget shall preschedule such firm energy on non-firm transmission consistent with BPA's current transmission scheduling procedures.

(b) The Parties shall work together to secure firm transmission for the delivery of all quantities of energy specified in paragraphs 3 and 4 above on terms and conditions that are mutually satisfactory to the Parties.

**6. Notices.** Any notice, request, approval, consent, instruction, direction or other communication under this Agreement given by either Party to the other Party shall be in writing and shall be delivered in person or mailed, properly addressed and sent first-class mail or commercial delivery services, postage prepaid. Either Party may from time to time change the person authorized to receive such notice or such person's address by giving the other Party notice of such change in accordance with the provisions of this paragraph 6.

Puget: Puget Sound Energy, Inc.  
P.O. Box 97034  
Bellevue, WA 98009-97034  
Attn: Edward R. Schild  
Director, Hydroelectric Resources  
Phone: (425) 462-3022  
Fax: (425) 462-3223  
Email: Edward.schild@pse.com

Corps: Corps of Engineers  
P.O. Box 2870  
Portland, OR 97208-2870  
Attn: James D. Barton  
Chief, Columbia River Basin  
Water Management Division,  
Northwestern Division  
Phone: (503) 808-3930  
Fax: (503) 808-3833  
Email: James.D.Barton@usace.army.mil

7. **Amendments.** No oral or written amendment, rescission, waiver, modification or other change of this Agreement shall be of any force or effect unless set forth in a written instrument hereafter signed by authorized representatives of each Party.

8. **Integration.** This Agreement constitutes the entire agreement between the Parties concerning the subject matter hereof, and supersedes all previous communications, representations or contracts, either written or oral, which purport to describe or embody the subject matter of this Agreement.

9. **Waiver.** The failure or delay of a Party to insist upon strict performance of any of the provisions of this Agreement, to exercise any rights or remedies provided in this Agreement or by law, or to notify the other Party in the event of breach of this Agreement shall not release or relieve the other Party from any of its obligations under this Agreement. Waiver by any Party of any default by the other shall not be deemed a waiver by such Party of any other default. Either Party may waive any notice or agree to accept a shorter notice than specified in this Agreement. Such waiver of notice or acceptance of shorter notice by a Party shall not be considered a waiver with respect to any subsequent notice required under this Agreement.

10. **Dispute Resolution.** As a condition precedent to a Party bringing any suit for breach of this Agreement, a Party must first notify the other Party in writing

of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the Parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to all Parties. The Parties shall each pay one-half of any cost for the services provided by such a third party as such costs are incurred. Unless otherwise agreed by the Parties in writing, upon expiration of ninety (90) days from and after the date a Party shall notify the other Party of an alleged breach, any Party may elect to pursue such other and further remedies available to such Party, at law or in equity, arising from or in any way connected with such breach. The Parties' participation in negotiation or any form of alternative dispute resolution shall not in any event be construed or interpreted as waiving any rights or remedies at law or in equity available to such Party under this Agreement or otherwise. The existence of a dispute shall not excuse the Parties from performance pursuant to this Agreement.

**11. Governing Law.** The Parties agree that this Agreement, and all questions concerning the performance of this Agreement, shall be interpreted, construed and enforced in all respects in accordance with the laws of the United States of America, to include when made applicable by the foregoing, the laws of the State of Washington. To the extent allowed by law, the Corps, hereby consents to suit by Puget, or its successors and assigns, for disputes arising under or relating to this Agreement and agrees that such enforcement may be brought in the United States Court of Federal Claims, 28 U.S.C. Section 1491.

**12. Compliance With Laws.** The Parties shall comply with all applicable laws in connection with performing their respective obligations arising under this Agreement. Without limiting the generality of the foregoing, Puget is not obligated to provide flood control storage space in accordance with paragraph 2 above if providing such storage may reasonably be expected to violate any such applicable law. In such event, and only with regard to such flood control storage space that is not so provided (in whole or in part) by Puget, the Corps shall be relieved of its corresponding obligation to deliver energy and capacity pursuant to paragraph 3 above (in whole or in part) to compensate for such flood control storage space that was not provided by Puget.

**13. Assignment; Successor.** A Party shall not assign all or any part of this Agreement or any of its rights hereunder without the prior written consent of the other Party, which such consent shall not be unreasonably withheld.

**14. Survival.** All provisions of this Agreement that may reasonably be interpreted or construed as surviving the completion or termination of this Agreement shall survive the completion or termination of this Agreement.

**15. Severability; Interpretation.** The invalidity or unenforceability of any provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted. The headings of sections, paragraphs and subparagraphs of this Agreement are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections, paragraphs or subparagraphs. This Agreement shall be construed as a whole, and all provisions and parts of this Agreement are intended to be correlative and complementary.

**16. No Partnership; Implementation.** Except with respect to the agency relationship established pursuant to paragraph 2 above, this Agreement shall not be interpreted or construed to create an association, joint venture or partnership between Puget and the Corps or to impose any partnership obligations or liability upon either Party. Each Party shall take such action (including, but not limited to, the execution, acknowledgment and delivery of documents) as may reasonably be requested by the other Party for the implementation or continuing performance of this Agreement.

**17. No Third-Party Beneficiaries.** This Agreement shall not be interpreted or construed to create any rights, benefits or interests in any person or entity other than the Parties.

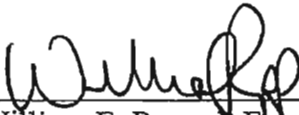
**18. Signatory Authority.** The signatories represent that they are authorized to enter into this Agreement on behalf of the Party for whom they sign.



IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in counterparts.

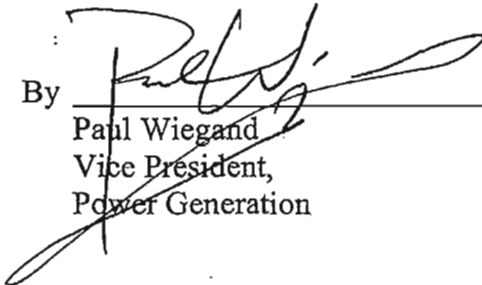
Corps:

UNITED STATES OF AMERICA,  
DEPARTMENT OF THE ARMY

By  \_\_\_\_\_  
William E. Rapp, P.E.  
Brigadier General, US Army  
Division Engineer  
Northwestern Division  
U.S. Army Corps of Engineers

Puget:

PUGET SOUND ENERGY, INC.

By  \_\_\_\_\_  
Paul Wiegand  
Vice President,  
Power Generation

## **EXHIBIT A**

The Corps's comments to FERC as to the sufficiency of the flood control measures proposed for the New FERC License are appended hereto



REPLY TO  
ATTENTION OF

Planning Branch

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

December 21, 2004

Honorable Magalie Roman Salas  
Secretary, Federal Energy Regulatory Commission  
888 First Street Northeast  
Washington, DC 20426

Dear Ms. Salas:

This letter is in response to the Federal Energy Regulatory Commission's (FERC) Notice of Settlement for the Baker River Project (P-2150-033). On December 8, 2004 PSE held a video teleconference to provide FERC with an overview of the Settlement Agreement for the Upper and Lower Baker Dams. It became clear during this event that the U. S. Army Corps of Engineers (Corps) needed to comment on the Settlement Agreement to clarify the Corps' position on Article 107 for flood control. The Corps is confident that the Settlement Agreement Article 107 (a) is consistent with the Corps' authorized flood control project. The existing Corps project provides for 58,000 acre-feet of water storage for flood control in Upper Baker Dam in addition to the 16,000 acre-feet of storage originally required by FERC for lost valley storage, for a total of 74,000 acre-feet of water storage. The proposed 29,000 acre-feet of flood control storage at Lower Baker Dam that is included in Article 107 (b) has not been thoroughly addressed during the Alternative Licensing Process (ALP) and the Corps considers this section of Article 107 as a place holder for possible future action. The Corps has no authority to evaluate the 29,000 acre-feet of additional storage nor undertake the operation of new additional flood control as part of the FERC process.

The Corps does have the authority from Congress to evaluate additional flood control storage at Lower Baker Dam under our General Investigation (GI) program, which is a separate action from the relicensing process. The evaluation of additional flood storage at Lower Baker Dam through the GI process will involve a thorough evaluation by the Corps and be open to the scrutiny of the public for economic, social, and environmental impacts of additional storage. Without the completion and Congressional approval of the GI study, the Corps does not have the authority to regulate any additional storage at Upper or Lower Baker Dam.

The Corps expects to become a cooperating agency with FERC regarding this relicensing agreement and is looking forward to working with FERC on addressing the project's National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) issues. The Corps is confident that the vast majority of the environmental issues related to the existing 74,000 acre-feet of flood control storage have been addressed during the ALP, and the requirements



REPLY TO  
ATTENTION OF

Planning Branch

DEPARTMENT OF THE ARMY  
SEATTLE DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 3755  
SEATTLE, WASHINGTON 98124-2255

JAN 3 2005

Honorable Magalie Roman Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, North East  
Washington DC, 20426

Dear Mr. Salas:

This is in response to comment letters submitted to the Federal Energy Regulatory Commission (FERC) concerning the Notice of Settlement Agreement for the Baker River Project (P-2150-033).

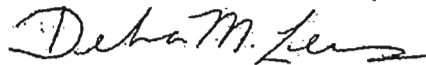
As noted in our comment letter of December 23, 2004, the Corps will evaluate the license conditions for the Baker River Project based on our existing flood control authority for 74,000 acre-feet of storage at Upper Baker Dam. We do not have the authority or the funding to evaluate a new flood-damage reduction operation at either Upper or Lower Baker Dams as part of the license review process. If FERC includes the addition of 29,000 acre-feet of storage at Lower Baker Dam as part of the license review for the Baker River Project, this would significantly complicate and delay the National Environmental Protection Act (NEPA) and Endangered Species Act (ESA) review for the license. As noted in our previous comment letter dated December 23, 2004, at this time the environmental effects of the 29,000 acre-feet have not yet been adequately addressed and the scope of any additional storage project is presently unknown. Our participation as a cooperating agency with FERC on the existing license would therefore necessarily be limited to the existing 74,000 acre-feet.

The Congress grants to the Secretary of the Army authority for flood-damage reduction projects. In order for the Corps to request the authority for additional flood control at either Upper or Lower Baker, we are required to determine the economic, social, and environmental impacts of additional storage. The Corps is further directed by Congress to insure that additional flood control at the Baker Dams is the most economically viable alternative within the basin to reduce flood damages. Congress has granted to the Corps the authority to evaluate flood damage reduction for the Skagit River Basin under the Skagit River General Investigation (GI) study. Under this study, the Corps has been directed to evaluate a wide range of flood-damage reduction measures and identify those that are most economical, implementable, and have the least environmental impact. This study has not yet identified whether there is a Federal interest in adding additional flood control at either Upper or Lower Baker Dams, but this will be considered as an option. NEPA and ESA compliance will be included in the GI study. License

Article 107(b) notes that the operation of Lower Baker Dam for flood control storage "shall be provided only in accordance with arrangements that are acceptable to the Corps of Engineers". In order to be acceptable to the Corps, we must follow our designated planning process, which is the GI study.

Article 107(b) is a placeholder, allowing the addition of flood control at Lower Baker Dam if it is found by the Corps to be economically, socially, and environmentally justified, without requiring a reopening of the FERC license process. We consider this a significant benefit to the goal of providing flood protection to the Skagit Basin.

Sincerely,

A handwritten signature in cursive script that reads "Debra M. Lewis".

Debra M. Lewis  
Colonel, Corps of Engineers  
District Engineer