

PENOBSCOT RIVER RESTORATION TRUST

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 1st Street, N.E., Docket Room, #1-East
Washington, D.C. 20426

Re: Penobscot River Restoration Trust's Request to be Designated the Commission's Non-Federal Representative for Purposes of Consultation under the Endangered Species Act with Respect to the Proposed Surrender of Licenses for Project Nos. 2403 (Veazie), 2721 (Howland), and 2312 (Great Works)

Dear Secretary Bose:

On November 7, 2008, the Penobscot River Restoration Trust ("Trust") filed with the Federal Energy Regulatory Commission applications to surrender the licenses and remove the works of the Veazie Project (FERC No. 2403) and Great Works Project (FERC No. 2312); and to surrender the license and construct a fish bypass channel around the Howland Project (FERC No. 2721). The Trust and the respective current licensees of these projects, PPL Maine, LLC and its wholly-owned subsidiary PPL Great Works LLC (together, "PPL"), filed on the same date joint applications to transfer the project licenses to the Trust.¹ These filings were submitted pursuant to the terms of a comprehensive settlement ("Accord")² which has as a principal goal the restoration of native sea-run fish through improved access to 1,000 miles of the Penobscot River.

Pursuant to the Accord, the Trust acquired a five-year option to buy the referenced projects at a purchase price that increased at specified time increments. In addition, the Accord provides that the purchase price will escalate by 3 percent per annum, accrued and compounded daily, if closing of the acquisition occurs more than one year after the Trust provides PPL with written notification that it is exercising the option.³ The Trust provided such notification on June 19, 2008.

¹ On November 7, by PPL Maine, LLC and the Trust filed joint applications to transfer the licenses for the Veazie and Howland Projects (FERC Nos. 2403 and 2721, respectively) from PPL Maine, LLC to the Trust and to substitute the Trust as applicant for new license for Howland; and PPL Great Works, LLC and the Trust filed a joint application to transfer the license for the Great Works Project (FERC No. 2312) from PPL Great Works, LLC to the Trust.

² The Lower Penobscot River Multiparty Settlement Agreement (June 2004) was filed with the Commission for its information on June 25, 2004.

³ Accord at Section III(a)(5).

P.O. Box 5695 ~ Augusta, ME 04332
Tel. 207-232-5976
www.penobscotriver.org

Because the sale's closing date cannot precede issuance of the Commission's final, non-reviewable orders on the license transfer and surrender applications,⁴ the ultimate purchase price the Trust must pay for the projects largely depends on the issuance date of such orders. So that it may assist in facilitating the timely execution of the Commission's consultation obligations under Section 7(a) of the Endangered Species Act ("ESA"), the Trust respectfully requests that it be designated the Commission's non-federal representative for purposes of initiating informal consultation under Section 7(a) with respect to the Trust's surrender applications.

The Commission on December 6, 2009, granted the parties' November 7 license transfer applications,⁵ but until these transfers are effective, the Trust does not hold the licenses for which it has filed surrender applications. However, the regulations implementing ESA Section 7 provide that, with the consent of the licensee, an agency can designate a third party to be its non-federal representative.⁶ The Trust submits that in the special circumstances attending fulfillment of the Accord's significant public interest objectives, it is appropriate that the Trust be authorized to initiate consultation with respect to potential conditions on the removal of project works, since it will fall to the Trust to satisfy such conditions, once it is the licensee. Reserving the right to represent its own interests in the process independent of the Trust, PPL has authorized the Trust to state that PPL consents to the Trust being designated the Commission's non-federal representative for purposes of the surrender applications.

Upon the Commission's grant of the Trust's request herein, the Trust will promptly contact the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("USFWS") and work closely with NMFS, the USFWS, and the Commission staff in order to advance the consultation process in an appropriate and timely manner.

⁴ *Id.* at Section V(d). Pursuant to the terms of the Accord, the November 7 transfer applications (at 2) ask that the Commission orders granting same be made effective as of the date of conveyance of the Projects' properties (closing date).

⁵ 126 FERC ¶ 62,004 and 126 FERC ¶ 62,005 (2009).

⁶ *See* 50 C.F.R. § 402.08 (2007), which states in pertinent part:

A Federal agency may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment by giving written notice to the Director [NOAA or USFWS] of such designation. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and Federal agency must agree on the choice of the designated non-Federal representative.

While this provision does not refer to license surrenders, there is no apparent reason to treat them differently. Similarly, the Commission's regulation providing that potential license applicants can request to be the Commission's non-federal representative for purposes of consultation under the ESA (18 C.F.R. § 5.5(e) (2008)) makes no direct reference to surrender applications. Indirect reference is arguably made through the Commission's surrender regulations, which, for major projects such as we are concerned with here, provide that such applications shall be filed in the same form and manner as the application for license. 18 C.F.R. § 6.1.

Respectfully submitted,

A handwritten signature in black ink that reads "Laura Rose Day". The signature is written in a cursive style with a large, sweeping flourish at the end.

Laura Rose Day
Executive Director
Penobscot River Restoration Trust