

EFFECTIVE DATE

Section applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99-495, set out as an Effective Date of 1986 Amendment note under section 797 of this title.

§ 823c. Alaska State jurisdiction over small hydroelectric projects

(a) Discontinuance of regulation by the Commission

Notwithstanding sections 797(e) and 817 of this title, the Commission shall discontinue exercising licensing and regulatory authority under this subchapter over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this subchapter and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of—

- (A) energy conservation;
- (B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat);
- (C) the protection of recreational opportunities;
- (D) the preservation of other aspects of environmental quality;
- (E) the interests of Alaska Natives; and
- (F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works—

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate;

(B) the operation of any navigation facilities which may be constructed as part of any project to be controlled at all times by such reasonable rules and regulations as may be made by the Secretary of the Army; and

(C) except as provided in subsection (j), conditions for the protection, mitigation, and enhancement of fish and wildlife based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(b) Definition of “qualifying project works”

For purposes of this section, the term “qualifying project works” means project works—

(1) that are not part of a project licensed under this part or exempted from licensing

under this subchapter or section 2705 of this title prior to November 9, 2000;

(2) for which a preliminary permit, a license application, or an application for an exemption from licensing has not been accepted for filing by the Commission prior to November 9, 2000 (unless such application is withdrawn at the election of the applicant);

(3) that are part of a project that has a power production capacity of 5,000 kilowatts or less;

(4) that are located entirely within the boundaries of the State of Alaska; and

(5) that are not located in whole or in part on any Indian reservation, a conservation system unit (as defined in section 3102(4) of this title), or segment of a river designated for study for addition to the Wild and Scenic Rivers System.

(c) Election of State licensing

In the case of nonqualifying project works that would be a qualifying project works but for the fact that the project has been licensed (or exempted from licensing) by the Commission prior to November 9, 2000, the licensee of such project may in its discretion elect to make the project subject to licensing and regulation by the State of Alaska under this section.

(d) Project works on Federal lands

With respect to projects located in whole or in part on a reservation, a conservation system unit, or the public lands, a State license or exemption from licensing shall be subject to—

(1) the approval of the Secretary having jurisdiction over such lands; and

(2) such conditions as the Secretary may prescribe.

(e) Consultation with affected agencies

The Commission shall consult with the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce before certifying the State of Alaska’s regulatory program.

(f) Application of Federal laws

Nothing in this section shall preempt the application of Federal environmental, natural resources, or cultural resources protection laws according to their terms.

(g) Oversight by the Commission

The State of Alaska shall notify the Commission not later than 30 days after making any significant modification to its regulatory program. The Commission shall periodically review the State’s program to ensure compliance with the provisions of this section.

(h) Resumption of Commission authority

Notwithstanding subsection (a), the Commission shall reassert its licensing and regulatory authority under this subchapter if the Commission finds that the State of Alaska has not complied with one or more of the requirements of this section.

(i) Determination by the Commission

(1) Upon application by the Governor of the State of Alaska, the Commission shall within 30 days commence a review of the State of Alaska’s

regulatory program for water-power development to determine whether it complies with the requirements of subsection (a).

(2) The Commission's review required by paragraph (1) shall be completed within 1 year of initiation, and the Commission shall within 30 days thereafter issue a final order determining whether or not the State of Alaska's regulatory program for water-power development complies with the requirements of subsection (a).

(3) If the Commission fails to issue a final order in accordance with paragraph (2) the State of Alaska's regulatory program for water-power development shall be deemed to be in compliance with subsection (a).

(j) Fish and wildlife

If the State of Alaska determines that a recommendation under subsection (a)(3)(C) is inconsistent with paragraphs (1) and (2) of subsection (a), the State of Alaska may decline to adopt all or part of the recommendations in accordance with the procedures established under section 803(j)(2) of this title.

(June 10, 1920, ch. 285, pt. I, § 32, as added Pub. L. 106-469, title V, § 501, Nov. 9, 2000, 114 Stat. 2037; amended Pub. L. 109-58, title II, § 244, Aug. 8, 2005, 119 Stat. 678.)

REFERENCES IN TEXT

The Endangered Species Act, referred to in subsec. (a)(1), probably means the Endangered Species Act of 1973, Pub. L. 93-205, Dec. 28, 1973, 87 Stat. 884, as amended, which is classified generally to chapter 35 (§ 1531 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Fish and Wildlife Coordination Act, referred to in subsec. (a)(1), (3)(C), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

2005—Subsec. (a)(3)(C). Pub. L. 109-58, § 244(1), inserted "except as provided in subsection (j)," before "conditions".

Subsec. (j). Pub. L. 109-58, § 244(2), added subsec. (j).

TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.

§ 823d. Alternative conditions and prescriptions

(a) Alternative conditions

(1) Whenever any person applies for a license for any project works within any reservation of the United States, and the Secretary of the department under whose supervision such reservation falls (referred to in this subsection as the "Secretary") deems a condition to such license to be necessary under the first proviso of section 797(e) of this title, the license applicant or any other party to the license proceeding may propose an alternative condition.

(2) Notwithstanding the first proviso of section 797(e) of this title, the Secretary shall accept the proposed alternative condition referred to in paragraph (1), and the Commission shall include in the license such alternative condition, if the Secretary determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative condition—

(A) provides for the adequate protection and utilization of the reservation; and

(B) will either, as compared to the condition initially by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any condition under section 797(e) of this title or alternative condition it accepts under this section, a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the condition adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final condition would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.