Speed Chess Review Part 1: FERC Licensing & Climate Change, Background & Past

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The question (slightly modified in blue)

Are the statutory provisions of the Federal Power Act (and other relevant statutes like the Clean Water Act) broad enough to allow enhanced consideration of climate change in FERC licensing, or does this require statutory changes to the Federal Power Act (and/or other relevant statutes)?

General Answer:

- Existing statutes could allow enhanced consideration of climate change in licensing.

- Statutory clarification of FPA, CWA and/or NEPA may be necessary or desirable to offset policies, practices and court decisions.

Background: Information in FERC Licensing Is a Weapon in an Adversarial Process

- FERC licensee (project operator) priorities in FERC licensing
  - Avoid regulatory exposure and ongoing regulation, gain certainty
  - Limit expense of licensing (Don Pedro and La Grange were exceptions)
  - Outcome maintains revenue stream, operational flexibility and control

- Licensees hire consultants in FERC licensing to:
  - Manage administration, gather data, produce technical reports, produce license application, produce other filings
  - Keep information that increases regulatory exposure out of the record
  - Interpret information in support of licensee priorities

But what about collaboration in licensing?

- Agreements on issues are possible and often happen.
- Regardless of opportunities for collaboration, one must evaluate potential changes to licensing process considering the adversarial use of information.

Where Disputes over Information Show Up in FERC Licensing

- In study planning process (what gets studied, what studies contain)
- In “technical memos” (reports from studies)
- In license applications
- In agency and NGO conditions and recommendations
- In discussion of mitigation and protection measures
- In NEPA scoping
- In NEPA Environmental Impact Statement
- In CWA Section 401 development and certification, CEQA (California)

How does climate change affect hydropower and FERC licensing at the broadest level?

- Changes in hydrology (volume, pattern, and timing of runoff)
- Diminished reliability of using past hydrology to evaluate future
- Changing impacts of project operations under changed conditions
- Changes in habitat suitability under changed conditions, esp. water temperature
- Changes in ambient weather and thus consumptive water demand
- Increased urgency of fish passage

How Regulators Have Dealt with Future Hydrology in Past Licensings

- FERC: changes in hydrology under climate change “too speculative”
- FERC pointed to “standard license reopener” if conditions change
- State Water Board: Condition allowing change in 401 Certification to protect beneficial uses under changing climate conditions
- Licensees objected that State Water Board has no authority to change Certification once issued
- Butte County sued DWR under CEQA (2008) for not evaluating hydrology under climate change; DWR claimed it was too speculative for analysis of its Oroville Facilities (FERC Project no. 2100)

How Don Pedro & La Grange Licensings Addressed Issues Related to Climate Change

- Operations model uses past (historical) hydrology only
- Districts produced a study and report whose purpose was to weaken the standard/benchmark for water temperatures for steelhead/trout
- Districts fought licensing of La Grange to eliminate exposure to fish passage to upper Tuolumne River; they lost
- FERC said Districts didn't have to study habitat upstream of Don Pedro because conditions there not a "project effect;" Districts study anyway, then argue habitat is not suitable for salmon, steelhead
- Districts persuaded Senator Feinstein to write letters the Secretaries of Commerce and Interior saying fish passage to upper T. "infeasible"
- San Francisco staff and officials repeated "infeasible" early and often

Positive Proof Upper Tuolumne Has Poor Habitat for Salmonids (Jan. 2021)