



## I. BACKGROUND

The Sierra Club requests a hearing on modifications that it claims have been, or should be, made to the Fort Calhoun Station and that require license amendments.<sup>2</sup> According to the Sierra Club, the need for these modifications became apparent during inspections conducted as part of enhanced NRC oversight that began during the 2011 shutdown of the Fort Calhoun Station.<sup>3</sup> The Sierra Club's hearing request concerns events relating to the Fort Calhoun Station's Spring 2011 refueling outage, which began in April 2011 and was extended due to the effects of Missouri River flooding on the site from June through September 2011, as well as longstanding technical issues.<sup>4</sup> In the course of its oversight, the Staff issued several Confirmatory Action Letters (CALs), confirming, among other things, OPPD's commitments to take actions addressing post-flooding recovery and performance deficiencies before plant restart.<sup>5</sup> After identifying significant performance concerns, the Staff initiated enhanced oversight of the Fort Calhoun Station, effective December 13, 2011, and established a special

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<sup>2</sup> *Id.* at 43.

<sup>3</sup> *Id.* at 1-3.

<sup>4</sup> Collins, Elmo, NRC, letter to David Bannister, OPPD, "Notification of Change to Regulatory Oversight of Fort Calhoun Station" (Dec. 13, 2011), at 1 (ADAMS accession no. ML113470721).

<sup>5</sup> Collins, Elmo, NRC, letter to David Bannister, OPPD, "Confirmatory Action Letter – Fort Calhoun Station" (Sept. 2, 2011) (CAL-4-11-003), at 1-2 (ML112490164) (confirming OPPD's commitments in its Post-Flooding Recovery Action Plan and other assessments and actions); Collins, Elmo, NRC, letter to David Bannister, OPPD, "Confirmatory Action Letter – Fort Calhoun Station" (June 11, 2012) (CAL 4-12-002), at 1-2 (ML12163A289) (incorporating OPPD's commitments in CAL-4-11-003 and expanding their scope to resolve additional, underlying performance deficiencies); Collins, Elmo, NRC, letter to Lou Cortopassi, OPPD, "Confirmatory Action Letter – Fort Calhoun Station" (Feb. 26, 2013) (EA-13-020), at 1-2 (ML13057A287) (incorporating all actions confirmed by CAL 4-12-002 and including three additional commitments prior to restart).

oversight panel to coordinate the agency's regulatory activities associated with the assessment of performance deficiencies.<sup>6</sup>

The Staff closed out the CALs relating to post-flooding recovery actions and other items important for restart on December 17, 2013, and concluded that the NRC had not identified any issues that would preclude restart under the existing licensing basis.<sup>7</sup> The NRC also issued a post-restart CAL the same day that confirmed commitments to ensure that improvements realized during the outage remained in place and performance improvements continued.<sup>8</sup> Later that month, Fort Calhoun resumed operations.<sup>9</sup>

The Sierra Club seeks a hearing on the following plant modifications, claiming that the modifications are, or will be, necessary for Fort Calhoun to comply with its licensing basis and carry with them hearing rights: (1) modifications for flood protection, including severe flooding due to upstream dam failures; (2) reconstitution of design basis and licensing basis documents;

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<sup>6</sup> Collins, Elmo, NRC, letter to David Bannister, OPPD, "Notification of Change to Regulatory Oversight of Fort Calhoun Station" (Dec. 13, 2011), at 1 (ML113470721) ("The IMC [Inspection Manual Chapter] 0350 process is implemented at facilities in an extended shutdown with significant performance concerns to: establish a regulatory oversight framework as a result of significant performance problems or where a significant operational event has occurred, ensure the NRC communicates a unified and consistent position in a clear and predictable manner, establish a record of actions taken and technical issues resolved, verify corrective actions are sufficient for restart, and to provide assurance that following restart the plant will be operated in a manner that provides adequate protection of public health and safety.").

<sup>7</sup> Dapas, Marc, NRC, letter to Lou Cortopassi, OPPD, "Fort Calhoun Station Closure of Confirmatory Action Letter" (Dec. 17, 2013) (EA-13-020), at 1, 5 (ML13351A423) (CAL Closure Letter) (closing out actions in CAL EA-13-020).

<sup>8</sup> Dapas, Marc, NRC, letter to Lou Cortopassi, OPPD, "Confirmatory Action Letter—Fort Calhoun Station" (Dec. 17, 2013) (EA-13-243), at 1 (ML13351A423) (confirming commitments in OPPD's December 2, 2013, "Integrated Report to Support Restart of Fort Calhoun Station and Post-Restart Commitments for Sustained Improvement" to ensure improvements realized during the extended outage remain in place and performance continues to improve at the facility).

<sup>9</sup> Hay, Michael, NRC, letter to Lou Cortopassi, OPPD, "Fort Calhoun—NRC Integrated Inspection Report Number 05000285/2013019" (Feb. 10, 2014), Enclosure at 4 (ML14042A238).

(3) modifications to repair or replace inadequate structural beams and columns; and (4) modifications necessary to address issues caused by the fact that the reactor was built above karst terrain.<sup>10</sup>

This hearing request follows the Sierra Club's petition under 10 C.F.R. § 2.206, in which the Sierra Club has asked the NRC to revoke Fort Calhoun's operating license because of concerns about, among other things, flood protection measures and internal containment structures.<sup>11</sup> The Staff has accepted the 2.206 petition, in part, to consider issues including the adequacy of flood protection, the risk of upstream dam failures, and a licensee event report indicating that a support beam was not within allowable limits for stress and loading.<sup>12</sup> The Staff's review of the petition is ongoing.

The Sierra Club acknowledges that because OPPD has not requested one or more license amendments on the modifications it seeks to challenge, its hearing request does not satisfy the timing requirements set forth in 10 C.F.R. § 2.309(b)(3) or (4) because it was not triggered by a *Federal Register* or other notice contemplated by that regulation.<sup>13</sup> Instead, it

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<sup>10</sup> Hearing Request at 3.

<sup>11</sup> "10 CFR 2.206 Petition Requesting the Nuclear Regulatory Commission to Revoke Omaha Public Power District's License to Operate the Fort Calhoun Nuclear Power Station" (June 21, 2012), at 2-9 (ML12180A124).

<sup>12</sup> The Staff did not accept the Sierra Club's assertion that the operational record at all Exelon-owned or operated plants indicates that Exelon is unable to operate Fort Calhoun Station properly and safely. Leeds, Eric, NRC, letter to Wallace Taylor, Iowa Chapter of the Sierra Club (May 23, 2013), at 3-4 (ML13092A248) (Leeds Letter).

<sup>13</sup> Hearing Request at 5-6. As relevant here, 10 C.F.R. § 2.309(b)(3) states that, in proceedings for which a *Federal Register* notice of agency action is published, a hearing request must be filed not later than: (i) the time specified in the notice or (ii), if no notice is specified, sixty days from the date of publication of the notice. Section 2.309(b)(4) states that, in proceedings for which a notice of agency action is not published, a hearing request must be filed not later than the latest of: (i) sixty days after publication of notice on the NRC Web site, or (ii) sixty days after the requestor receives actual notice of a pending application but not more than sixty days after agency action on the application.

asks that we grant its hearing request on the ground that the request is timely under the circumstances of this case, where the NRC allowed restart of the Fort Calhoun reactor without purportedly necessary license amendments.<sup>14</sup> The Sierra Club requests that we either grant a hearing on the Staff's CAL and enhanced inspection processes under 10 C.F.R. § 2.309 or exercise our inherent supervisory authority over adjudications to grant a discretionary hearing.<sup>15</sup>

OPPD and the NRC Staff oppose the Sierra Club's hearing request.<sup>16</sup> Among other arguments, OPPD contends that the Sierra Club's hearing request should be summarily dismissed because it does not identify any pending or proposed license amendment or other licensing action that would give rise to a hearing opportunity.<sup>17</sup> The NRC Staff argues that the Sierra Club is not entitled to a hearing because it has not identified an actual or *de facto* license amendment proceeding that would trigger a hearing opportunity under the Atomic Energy Act of 1954, as amended (AEA).<sup>18</sup> Instead, the Staff asks that we construe the Sierra Club's petition as a request for an enforcement proceeding under 10 C.F.R. § 2.206.<sup>19</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 43.

<sup>16</sup> *OPPD Response to the Sierra Club Request for Hearing and Petition to Intervene* (May 20, 2014) (OPPD Response); *NRC Staff Answer to Sierra Club Request for a Hearing and Petition to Intervene Asking that a License Amendment Proceeding be Convened* (May 20, 2014) (Staff Response).

<sup>17</sup> OPPD Response at 4-6.

<sup>18</sup> Staff Response at 1-2.

<sup>19</sup> *Id.* The Nuclear Energy Institute (NEI) has requested leave to file a brief *amicus curiae* addressing the precedent establishing the enforcement process, rather than the hearing process, as the means to resolve noncompliance. *Nuclear Energy Institute Motion for Leave to File Amicus Curiae Brief* (May 20, 2014); *Amicus Curiae Brief of the Nuclear Energy Institute in Response to Sierra Club Hearing Request* (May 20, 2014). Our rule in 10 C.F.R. § 2.315(d) provides for the filing of *amicus curiae* briefs when we have taken up a matter pursuant to 10 C.F.R. § 2.341 or *sua sponte*, neither of which is the case here. While our rules do not provide for the filing of *amicus curiae* briefs on motions filed in this circumstance, as a (continued . . .)

## II. DISCUSSION

To obtain a hearing, a petitioner must address its hearing request to a matter that triggers a hearing opportunity under section 189a. of the AEA.<sup>20</sup> For the reasons discussed below, we reject the Sierra Club's hearing request on the ground that it does not address a licensing action subject to AEA hearing rights. Because we deny the hearing request on that basis, we need not reach the question of whether the petitioner has made the necessary showing to satisfy our regulatory requirements for hearing requests: namely, that the petition is timely, that the petitioner has standing, and that the petitioner has proffered at least one admissible contention.<sup>21</sup> Although we deny the Sierra Club's hearing request, we refer the matters raised to the Executive Director of Operations for consideration as a request for enforcement action under 10 C.F.R. § 2.206.

### **A. The Sierra Club Has Not Challenged a Licensing Action Subject to a Hearing Opportunity**

The Sierra Club explains that it seeks a hearing to examine significant safety issues, some of which were identified by the NRC Staff in the course of its oversight of the reactor that, in the Sierra Club's view, will require amendments to the Fort Calhoun operating license.<sup>22</sup> Therefore, it asks us to "clarify" that NRC Staff activities relating to the oversight of the Fort Calhoun Station, specifically the issuance of CALs and enhanced NRC inspection activities, are license amendment proceedings subject to hearing rights and grant its hearing request on that

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( . . . continued)

matter of discretion we have reviewed NEI's brief. See *Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3)*, CLI-13-9, 78 NRC 551, 556 n.17 (2013).

<sup>20</sup> 42 U.S.C. § 2239(a)(1)(A).

<sup>21</sup> 10 C.F.R. § 2.309(a)-(f).

<sup>22</sup> Hearing Request at 5.

basis.<sup>23</sup> The Sierra Club's hearing request reflects a misunderstanding of the distinction between our agency's hearing and oversight processes.

Section 189a. of the AEA requires the NRC to afford interested persons an opportunity for a hearing on "the granting, suspending, revoking or amending of any license."<sup>24</sup> A licensee cannot amend the terms of its license unilaterally; it must request and obtain agency approval.<sup>25</sup> The Sierra Club, however, acknowledges that its hearing request is not premised upon a license amendment request.<sup>26</sup> Instead, the Sierra Club states that it seeks a hearing to participate in a license amendment proceeding triggered by the issuance of CALs and enhanced NRC inspection activities.<sup>27</sup> But Staff inspections and CALs, in and of themselves, are oversight activities normally conducted for the purpose of ensuring that licensees comply with existing NRC requirements and license conditions<sup>28</sup> and, therefore, do not typically trigger the opportunity for a hearing under the AEA.<sup>29</sup>

Licensing actions, in contrast to oversight activities, alter the terms of the license or otherwise authorize additional operating activities. In some cases, we have observed that

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<sup>23</sup> *Id.* at 43.

<sup>24</sup> 42 U.S.C. § 2239(a)(1)(A).

<sup>25</sup> *Florida Power & Light Co.* (St. Lucie Plant, Unit 2), CLI-14-11, 79 NRC \_\_ (Dec. 19, 2014) (slip op. at 8); see 10 C.F.R. § 50.90 ("Whenever a holder of a license . . . desires to amend the license . . . application for an amendment must be filed with the Commission. . .").

<sup>26</sup> Hearing Request at 1-3.

<sup>27</sup> *Id.* at 43; *Reply to NRC Staff's Answer to Sierra Club's Petition to Intervene and Request for Hearing* (June 3, 2014), at 1-6 (Sierra Club Reply) (characterizing the Fort Calhoun CALs and inspection process as a *de facto* license amendment).

<sup>28</sup> See NRC Enforcement Policy (Jan. 28, 2013) § 1.0, at 4 (ML13228A199).

<sup>29</sup> See *Kelley v. Selin*, 42 F.3d 1501,1515 (6th Cir. 1995). This distinction with respect to hearing rights was discussed at some length by the Appeal Board considering a challenge to low-power testing performance in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 234-38 (1990).

agency actions not formally labelled as license amendments nevertheless can constitute *de facto* license amendments and accordingly trigger hearing rights for the public under Section 189a. of the AEA.<sup>30</sup> We have articulated two key factors to consider when determining whether agency action constitutes a *de facto* license amendment: whether the agency action (1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.<sup>31</sup> In its reply brief, the Sierra Club argues that unilateral licensee actions, unapproved by the NRC, may also constitute *de facto* amendments.<sup>32</sup> However, we recently rejected a similar argument in the *St. Lucie* matter.<sup>33</sup> As a result, we do not agree with the Sierra Club that “commitments made by OPPD in response to the CAL and the 0350 process” constitute *de facto* license amendments.<sup>34</sup>

Applying the distinction between Staff oversight of licensee activities and licensing actions to the case at hand, we consider the Staff activities which the Sierra Club cites to support its contentions. As explained below, we conclude that these activities were undertaken or are being undertaken under the Staff’s oversight role to ensure compliance with the requirements of OPPD’s existing license and that the Sierra Club has not pointed to any aspect of these activities that expands OPPD’s operating authority or modifies the terms of the Fort Calhoun operating license.

In Contention 1, Sierra Club asserts that OPPD is undertaking modifications for flood protection, including protection against severe flooding in the event of upstream dam failures,

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<sup>30</sup> See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996).

<sup>31</sup> *Id.*

<sup>32</sup> Sierra Club Reply at 5-6.

<sup>33</sup> *St. Lucie*, CLI-14-11, 79 NRC at \_\_\_ (slip op. at 9 n.33).

<sup>34</sup> Sierra Club Reply at 6.



that will require a license amendment.<sup>35</sup> According to the Sierra Club, these modifications are part of a new approach to flood protection, which OPPD adopted instead of requesting a license amendment in response to a Staff notice of violation of March 2013, citing OPPD for an inadequate evaluation of a flooding mitigation modification under 10 C.F.R. § 50.59.<sup>36</sup> In particular, it points to the Staff's conclusion that, had OPPD appropriately evaluated the change, it would have determined that a license amendment would have been required.<sup>37</sup> The Sierra Club also points to discussions of what it characterizes as OPPD's new flood mitigation strategy at technical meetings,<sup>38</sup> and Staff reports and memoranda relating to flooding issues at Fort Calhoun.<sup>39</sup>

The Sierra Club does not, however, point to any aspect of these activities that expands the licensee's operating authority or alters the terms of the existing license or link these activities to any pending or approved license amendment. Instead, the Sierra Club's hearing request is premised on the expectation that implementation of OPPD's new flood mitigation

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<sup>35</sup> Hearing Request at 16-25.

<sup>36</sup> *Id.* at 18 (citing Hay, Michael, NRC, letter to Louis Cortopassi, OPPD, "Fort Calhoun – NRC Inspection Report Number 05000285/2013011 and Notice of Violation" (Mar. 11, 2013), Enclosure at A-4 to A-5 (ML13070A399)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 18-19 (citing "Summary of Public Meeting Held on April 22, 2013, with Omaha Public Power District to Discuss Potential License Amendment Requests for Fort Calhoun Station, Unit 1 (TAC No. MF0598)" (June 3, 2013) (ML13134A186); "Summary of Closed Meeting Held on April 22, 2013, with Omaha Public Power District to Discuss Means for Protecting Fort Calhoun Station, Unit 1, Against Flooding (TAC No. MF0598)" (Apr. 25, 2013) (ML13114A881)).

<sup>39</sup> *Id.* at 20-25 (citing James, Lois, NRC Office of Nuclear Reactor Regulation, memorandum to Benjamin Beasley, NRC Office of Nuclear Regulatory Research, "Identification of a Generic External Flooding Issue Due to Potential Dam Failures" (July 19, 2010), at 5 (ML13039A086); Richard H. Perkins, P.E. et al., "Screening Analysis Report for the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failures" (July 2011), at 2-4, 10 (ML113500495); Blount, Thomas, NRC Region IV Division of Reactor Safety, memorandum to Elmo Collins, Regional Administrator, "Backfit Panel Regarding Fort Calhoun Flooding" (Mar. 6, 2012), at 2 (ML12229A184)).

strategy will require significant modifications and license amendment in the future.<sup>40</sup> But the prospect of a possible future license amendment does not trigger hearing rights now. In the event that OPPD requests a license amendment to implement flood mitigation measures, the Sierra Club will have an opportunity to request a hearing. In the meantime, the Sierra Club has requested and obtained Staff review of its concerns regarding the adequacy of flood protection at the Fort Calhoun Station through our 2.206 process.<sup>41</sup> The Staff is also evaluating the effect of multiple upstream dam failures on Fort Calhoun in connection with the implementation of post-Fukushima safety requirements.<sup>42</sup>

In Contention 2, the Sierra Club seeks a hearing on a prospective license amendment, claiming one will be required for OPPD to update and maintain accurate design basis documents.<sup>43</sup> As the factual underpinning for this claim, the Sierra Club points to an NRC inspection report identifying a non-cited violation associated with OPPD's failure to update and maintain design basis documents.<sup>44</sup> But those inspection findings, which concern OPPD's compliance with its existing license, do not trigger a hearing opportunity and the Sierra Club has not identified any aspect of those findings that would expand OPPD's operating authority or modify the terms of the Fort Calhoun license. Any corrective actions taken by OPPD to come

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<sup>40</sup> *Id.* at 25.

<sup>41</sup> Leeds Letter at 3-4.

<sup>42</sup> *Id.* at 3 (stating “[t]hese issues [effect of multiple upstream dam failures on Fort Calhoun Station] are being reviewed as part of the ‘Recommendations for Enhancing Reactor Safety in the 21st Century,’ presented by the NRC's Near-Term Task Force review of the Fukushima Dai-ichi accident in Japan, dated July 12, 2011 (ADAMS Accession No. ML112510271).”).

<sup>43</sup> Hearing Request at 25-31.

<sup>44</sup> *Id.* at 28-31 (citing Hay, Michael, NRC, letter to Louis Cortopassi, OPPD, “Fort Calhoun – NRC Integrated Inspection Report Number 05000285/2012011” (Dec. 31, 2012), Enclosure at 42 (ML12366A158) (identifying a non-cited violation of 10 C.F.R. Part 50 Appendix B, Criterion V, “Procedures” for failing to follow a quality procedure, specifically, PED-QP-13 “Design Basis Document Control,” requiring the licensee to update and maintain design basis documents).

back into compliance with its design basis will not trigger a hearing opportunity unless and until they require a license amendment.<sup>45</sup> OPPD will determine whether any proposed changes to the plant, procedures, license or licensing basis associated with its design reconstitution effort require a license amendment under 10 C.F.R. § 50.59.<sup>46</sup> Additionally, hearing rights do not attach to licensee changes made under Section 50.59 because those changes do not require NRC approval but are instead subject to normal NRC oversight through the inspection process. Accordingly, to the extent that the Sierra Club wishes to challenge a Section 50.59 analysis, we have consistently held that such challenges may only be taken by means of a petition for enforcement action under 10 C.F.R. § 2.206.<sup>47</sup> Should OPPD's corrective actions require a license amendment, the Sierra Club will then have an opportunity to request a hearing.

The Sierra Club's Contention 3, which claims that modifications to repair or replace inadequate structural beams and columns will require a license amendment, is premised upon a technical presentation by OPPD to the NRC on proposed modifications to those structures.<sup>48</sup>

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<sup>45</sup> OPPD Response at 11.

<sup>46</sup> *Id.* 10 C.F.R. § 50.59 sets forth the criteria under which licensees must evaluate proposed changes to plants or procedures in order to determine whether a license amendment is necessary.

<sup>47</sup> *St. Lucie*, CLI-14-11, 79 NRC at \_\_\_ (slip op. at 16-17).

<sup>48</sup> Hearing Request at 32 (citing Licensee Slides from 12/12/2012 Public Meeting with Omaha Public Power District to Discuss Containment Internal Structures Issues to Support Restart of Fort Calhoun Station, Unit 1 (TACMF0307), at 27, 37, 50, 55-56 (ML12349A151)). The Sierra Club also claims that, according to the December 2012 presentation, the structures were inoperable during normal operation and argues that "if these structures are operable only in an outage situation, Fort Calhoun should not have been allowed to restart until the problem is solved and a license amendment is obtained." Hearing Request at 34. However, both the Staff and OPPD observed in their answers that OPPD subsequently performed additional analyses showing that the support structures were operational during normal operation. Staff Response at 30-31 & n.115; OPPD Response at 14. Before closing the CAL, the Staff found the additional analyses acceptable. CAL Closure Letter, Enclosure 1 at 9-10. The Sierra Club has not challenged these later analyses with any specificity or suggested that the Staff acceptance of those analyses provided greater operating authority to OPPD or otherwise altered the terms of the Fort Calhoun operating license.

But the Sierra Club does not claim, or point to any evidence to show, that OPPD's proposed modifications require a license amendment or that the NRC has authorized OPPD to operate with greater authority or effected any change to the terms of the Fort Calhoun license. Again, the possibility that an amendment could be requested or approved to modify those structures in the future does not support a hearing request. This does not mean that the Sierra Club is without a meaningful opportunity to have its concerns addressed. Outside of our adjudicatory process, the Staff is reviewing the Sierra Club's concerns regarding structural integrity of the existing support beam detailed in its enforcement petition filed under 10 C.F.R. § 2.206 petition.<sup>49</sup>

Finally, in Contention 4, the Sierra Club asserts that modifications to address the fact that the reactor was built above karst terrain will require a license amendment. But the factual support it cites for this contention, consisting of technical reports concerning the geology underlying the Fort Calhoun site and hazards associated with karst terrain, does not identify any license amendment relating to the presence of karst at the Fort Calhoun site.<sup>50</sup> Instead of identifying a licensing action on which it seeks a hearing or other agency action that has expanded OPPD's operating authority or altered the terms of the Fort Calhoun operating license, the Sierra Club speculates that a license amendment may be necessary in the future to make major, but unspecified, modifications at the Fort Calhoun station.<sup>51</sup> Once again, we find that the mere possibility of a future licensing action does not trigger hearing rights today.

In sum, the Sierra Club's contentions are premised on Staff inspection results, administrative and enforcement actions, informational meetings, and technical reports and

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<sup>49</sup> Leeds Letter at 2 (citing licensee event report submitted September 10, 2012, indicating a support beam was not within allowable limits for stress and loading (ML12255A038)).

<sup>50</sup> Hearing Request at 34-42.

<sup>51</sup> *Id.* at 35.

memoranda. These documents support ongoing Staff oversight activities performed to ensure compliance with OPPD's existing license, as opposed to approving revisions to the license. The Sierra Club has presented no basis for us to conclude that these actions altered the terms of OPPD's license or otherwise granted OPPD greater operating authority. Therefore, we find that the Sierra Club has not identified a licensing action triggering a hearing opportunity.

The NRC's oversight of licensees is conducted separate from the NRC's adjudicatory process.<sup>52</sup> We decline to interpret the AEA to require hearings based on the possibility that a licensee may request an amendment to make unspecified modifications at some uncertain time in the future.

**B. Referral Under 10 C.F.R. § 2.206.**

Alternatively, the Sierra Club asks that we exercise our inherent supervisory authority to grant a hearing in order to serve the public interest in ensuring adequate protection of the public health and safety.<sup>53</sup> However, the Sierra Club has already availed itself of our 10 C.F.R. § 2.206 process, which allows members of the public to raise and obtain review of safety concerns. The Staff has accepted the Sierra Club's enforcement petition with respect to concerns relating to the adequacy of flood protection, the risk of upstream dam failure, and support beam integrity at Fort Calhoun. As we have explained, our 2.206 process affords a meaningful opportunity to seek review of and action on safety-related concerns.<sup>54</sup> Therefore,

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<sup>52</sup> To be sure, our oversight activities at times involve enforcement actions, including orders and civil penalties, to which a hearing right or opportunity attaches. *See, e.g., Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC 64 (1994); *David Geisen*, CLI-10-23, 72 NRC 210 (2010). Discrete enforcement actions like these involve defined opportunities for participation. *See generally* 10 C.F.R. § 2.202. The oversight activities in which the Sierra Club seeks to participate do not fall within this category.

<sup>53</sup> Hearing Request at 43.

<sup>54</sup> *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439-40 (2012).

we deny the Sierra Club's request that we exercise our supervisory authority to initiate a separate adjudicatory hearing and refer the matters raised in the intervention petition to the Executive Director of Operations for any additional action deemed appropriate.

### III. CONCLUSION

For the reasons discussed above, we *deny* the Sierra Club's hearing request and *refer* the matters raised in it to the Executive Director for Operations for consideration under 10 C.F.R. § 2.206.

IT IS SO ORDERED.<sup>55</sup>

For the Commission

**NRC SEAL**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 9<sup>th</sup> day of March, 2015

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<sup>55</sup> During the pendency of this hearing request, the Sierra Club moved to recuse then-Commissioner William D. Magwood, IV from participating in this decision. *Petitioner's Motion for Recusal of Commissioner Magwood from Participating in the Considering of Petition to Intervene and Request for Hearing* (June 27, 2014). Commissioner Magwood denied the motion. Decision on the Motion of Sierra Club for Recusal from Participation in Deliberations on Petition to Intervene and Request for a Hearing (July 14, 2014). Commissioner Magwood has since left the agency and did not participate in this decision.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
OMAHA PUBLIC POWER DISTRICT )  
)  
) Docket No. 50-285  
(Fort Calhoun Station, Unit 1) )  
)  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-5)** have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 9<sup>th</sup> day of March, 2015