

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman  
Kristine L. Svinicki  
William C. Ostendorff  
Jeff Baran

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant,  
Units 1 and 2)

Docket Nos. 50-275,  
50-323

CLI-16-09

**MEMORANDUM AND ORDER**

In May 2015 we referred to the Atomic Safety and Licensing Board Friends of the Earth's claim that the NRC has informally, or "*de facto*," amended the operating licenses of Diablo Canyon Nuclear Power Plant, Units 1 and 2.<sup>1</sup> In LBP-15-27 the Board held that Friends of the Earth had not identified a *de facto* license amendment proceeding and denied its hearing request.<sup>2</sup> Friends of the Earth now appeals.<sup>3</sup> As discussed below, we affirm the Board's decision.

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<sup>1</sup> CLI-15-14, 81 NRC 729, 730 (2015); see *Petition to Intervene and Request for Hearing by Friends of the Earth* (Aug. 26, 2014) (Hearing Request).

<sup>2</sup> LBP-15-27, 82 NRC 184 (2015).

<sup>3</sup> *Friends of the Earth's Notice of Appeal of LBP-15-27* (Oct. 23, 2015); *Brief of Friends of the Earth in Support of Appeal of LBP-15-27* (Oct. 23, 2015) (FOE Appeal).

## I. BACKGROUND

### A. Jurisprudence Associated with Asserted *De Facto* License Amendments

Friends of the Earth argues that a series of actions by Pacific Gas & Electric Company (PG&E) and the NRC Staff, taken in response to the discovery of the Shoreline Fault near Diablo Canyon, have changed the plant's licensing basis and thereby effected a "*de facto* license amendment."<sup>4</sup> The Staff and PG&E both argue that none of the challenged activities, consisting of evaluations, related correspondence, and a revision to PG&E's updated final safety analysis report (UFSAR), has either granted PG&E greater operating authority or altered the terms of the operating licenses for Diablo Canyon.<sup>5</sup>

Section 189a. of the Atomic Energy Act of 1954, as amended, provides for the opportunity to request a hearing in any proceeding "for the granting, suspending, revoking, or amending of any license."<sup>6</sup> An agency action that has the effect of amending a license, whether or not formally designated a "license amendment," carries with it the opportunity to request a hearing.<sup>7</sup> Our case law acknowledges that an agency action not formally labeled a license amendment could constitute a *de facto* license amendment and trigger hearing rights under

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<sup>4</sup> See, e.g., FOE Appeal at 2.

<sup>5</sup> See *NRC Staff Answer to Petition to Intervene and Request for Hearing by Friends of the Earth* (Oct. 6, 2014), at 22-38 (Staff Answer); *Pacific Gas and Electric Company's Answer to Friends of the Earth Hearing Request* (Oct. 6, 2014), at 17-23 (PG&E Answer); see also *NRC Staff Brief in Opposition to Friends of the Earth Appeal of LBP-15-27* (Nov. 17, 2015) (Staff Appeal Brief); *Pacific Gas & Electric Company's Response to Friends of the Earth's Appeal of LBP-15-27* (Nov. 17, 2015) (PG&E Appeal Brief).

<sup>6</sup> Atomic Energy Act of 1954, § 189a., 42 U.S.C. § 2239a.

<sup>7</sup> See *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 295 (1st Cir. 1995).

Atomic Energy Act section 189a. if that action “(1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.”<sup>8</sup>

We have recently clarified and expanded upon our jurisprudence relating to asserted *de facto* license amendments. In *Fort Calhoun* we observed that regulatory oversight activities such as “inspection results, administrative and enforcement actions, informational meetings, and technical reports and memoranda” supported “ongoing Staff oversight activities performed to ensure compliance” with requirements and a plant’s current licensing basis.<sup>9</sup> Therefore, ongoing oversight—including oversight that may eventually result in a licensee requesting to amend an operating license—does not constitute a license amendment “proceeding” that triggers hearing rights.<sup>10</sup> Moreover, the prospect of a future license amendment does not create a present hearing opportunity.<sup>11</sup> Instead, concerns involving such ongoing oversight activities are appropriately raised via a request for enforcement action under 10 C.F.R. § 2.206.<sup>12</sup>

And in *St. Lucie*, we rejected a petitioner’s argument that a series of NRC staff oversight activities constituted an ongoing *de facto* license amendment proceeding. In that case, the petitioner relied on a series of communications (associated with replacement of a steam

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<sup>8</sup> *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015); see also *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996) (recognizing that courts have found a Section 189a. hearing right where the NRC action “grant[ed] the licensee ‘greater operating authority’ or otherwise ‘altered the original terms of a license’” (internal citations omitted)).

<sup>9</sup> *Fort Calhoun*, CLI-15-5, 81 NRC at 338; see also *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant), CLI-14-11, 80 NRC 167, 174 (2014).

<sup>10</sup> *Fort Calhoun*, CLI-15-5, 81 NRC at 334.

<sup>11</sup> *Id.* at 338.

<sup>12</sup> *Id.* at 336.

generator) that pertained to the NRC's oversight of the facility.<sup>13</sup> At bottom, we declined to accept the premise that each cited item was an element of a single licensing action. Rather, the communications pertained to ongoing oversight activities and did not approve or authorize any change to the license.<sup>14</sup> Although our ruling in *St. Lucie* was grounded in timeliness,<sup>15</sup> we emphasized that the proper avenue to challenge licensee actions (in that case, made under 10 C.F.R. § 50.59) is likewise through a petition under 10 C.F.R. § 2.206.<sup>16</sup> These decisions inform our analysis here.

#### **B. Events Leading to Friends of the Earth's Hearing Request**

Friends of the Earth raises challenges associated with recent ongoing activities related to the seismic qualification of Diablo Canyon. We briefly described Diablo Canyon's complex history with respect to its seismic design basis in CLI-15-14.<sup>17</sup> As relevant here, the construction permits for Diablo Canyon were issued in 1968 and 1970 and therefore predated the current NRC regulations governing seismic design in 10 C.F.R. Part 100, Appendix A.<sup>18</sup>

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<sup>13</sup> *St. Lucie*, CLI-14-11, 80 NRC at 174-75.

<sup>14</sup> *Id.* at 175.

<sup>15</sup> We rejected the hearing request in *St. Lucie* because it was not filed within sixty days of a licensing action that provided an opportunity to request a hearing. *Id.* at 172-75.

<sup>16</sup> *Id.* at 175; see CLI-15-14, 81 NRC at 734-35 (emphasizing in the context of this referral "that claims regarding inadequacies in a licensee's technical evaluation or non-compliance with its license, standing alone, do not suffice to identify an activity that may constitute a license amendment").

<sup>17</sup> CLI-15-14, 81 NRC at 731-32.

<sup>18</sup> See Office of Nuclear Reactor Regulation, NRC, Safety Evaluation of the Diablo Canyon Nuclear Power Stations Units 1 and 2 (Supp. 7 May 1978), at 1-2 (ADAMS accession no. ML14279A129) (SSER 7); Atomic Energy Commission, Part 50—Licensing of Production and Utilization Facilities, Part 100—Reactor Site Criteria Seismic and Geologic Siting Criteria, 38 Fed. Reg. 31,279 (Nov. 13, 1973), as amended at 38 Fed. Reg. 32,575 (Nov. 27, 1973).

Diablo Canyon was originally designed to withstand both a “design earthquake,” which was thought to be the largest earthquake expected to occur during the life of the facility, and a “double design earthquake,” which doubled the expected ground motions of the design earthquake to add a safety margin.<sup>19</sup> After construction began, the Hosgri Fault was discovered a few miles off the coast of the Diablo Canyon site, which necessitated plant modifications and reanalysis before NRC could approve the operating licenses.<sup>20</sup> The NRC determined that the plant should be re-evaluated assuming a magnitude 7.5 earthquake along the Hosgri Fault.<sup>21</sup> Litigation during the operating license phase confirmed that the plant would survive the seismic loads associated with such an event.<sup>22</sup> As a result, Diablo Canyon has three design basis earthquakes: the original Design Earthquake, the Double Design Earthquake, and the Hosgri Earthquake.<sup>23</sup>

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<sup>19</sup> SSER 7 at 1-2, 2-3 to 2-4.

<sup>20</sup> *Id.* at 1-2 to 1-4, ch. 3.

<sup>21</sup> *Id.* at 1-3; *see also* “Safety Evaluation Report Related to the Operation of Diablo Canyon Nuclear Power Plant,” NUREG-0675, Supplement 34 (June 1991), § 1.1, at 1-2 (ML14279A130) (SSER 34).

<sup>22</sup> *See* LBP-79-26, 10 NRC 453, 485, 507 (1979), *aff’d*, ALAB-644, 13 NRC 903 (1981); *id.* at 485 (concluding, among other things, that “the requirement imposed by the Staff that a 7.5 magnitude earthquake be used by [PG&E] in its seismic analysis is reasonable and meets regulatory requirements”). The Appeal Board’s decision both affirmed the Board’s decision and ruled on evidence taken after the record was reopened following the 1979 Imperial Valley earthquake (approximately 250 miles southeast of the Diablo Canyon site). ALAB-644, 13 NRC at 923-89.

<sup>23</sup> *See* SSER 7 at 2-3. In SSER 7, the Staff explained that it considered the “Hosgri event” (Hosgri Earthquake) as Diablo Canyon’s safe shutdown earthquake “or its equivalent,” while PG&E considered the Double Design Earthquake as the equivalent of the safe shutdown earthquake. *Id.* at 2-3 to 2-4. The Staff observed, “[t]his disagreement over which event is the safe shutdown earthquake has no bearing on plant safety since, whatever name is assigned to

A license condition required PG&E to develop and implement a program to reevaluate the seismic design bases used for Diablo Canyon.<sup>24</sup> PG&E developed a program, called the Long-Term Seismic Program, or LTSP, and it reported its results to the NRC in 1988.<sup>25</sup> The Staff's 1991 Supplemental Safety Evaluation Report found that, subject to a confirmatory item, PG&E had satisfied the license condition, that the plant's seismic qualification basis would continue to be the "original design basis plus the Hosgri evaluation basis," and that future plant modifications would be reviewed in light of the higher LTSP spectra.<sup>26</sup> PG&E also committed to continue to study seismic issues around Diablo Canyon.<sup>27</sup>

In 2008, a previously unknown fault, now designated the Shoreline Fault, was discovered near the Diablo Canyon plant as a result of PG&E's ongoing activities under the LTSP.<sup>28</sup> PG&E's analysis concluded that the postulated peak ground motions from the Shoreline fault would not exceed the ground motions already evaluated.<sup>29</sup> The NRC Staff then

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the event, we require that the plant design be shown to be adequate for the Hosgri event and the applicant is proceeding with the work necessary to demonstrate this." *Id.* at 2-4.

<sup>24</sup> See "Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Plant, Unit 1, Docket No. 50-275," Facility Operating License, at 7 (ML053140349).

<sup>25</sup> See SSER 34, § 1.2, at 1-4.

<sup>26</sup> SSER 34, § 1.4, at 1-7. The Staff required PG&E to perform confirmatory analyses to assure that the seismic margins were acceptable to accommodate the Staff's higher estimates for 84th percentile vertical ground motions over the 1 to 10 Hz frequency range. *Id.* at 1-5 to 1-7.

<sup>27</sup> See SSER 34, § 2.5.2.4, at 2-49. Specifically, PG&E committed to continue to maintain a "strong geosciences and engineering staff" and to continue to operate a strong-motion accelerometer array in support of its studies.

<sup>28</sup> PG&E, "Report on the Analysis of the Shoreline Fault Zone, Central Coastal California: Report to the U.S. Nuclear Regulatory Commission (Jan. 2011), at ES-1 (ML110140431 (package)) (PG&E Shoreline Fault Report); see PG&E Appeal Brief at 3.

<sup>29</sup> See PG&E Shoreline Fault Report at ES-1 to ES-2, A2-18.

performed a confirmatory analysis of PG&E's new data to determine whether a safety concern existed as a result of the identification of the Shoreline Fault.<sup>30</sup> The Staff's confirmatory evaluation, set forth in Research Information Letter 12-01, found that "potential ground motions from the Shoreline fault are bounded by the ground motions for which [Diablo Canyon] has been previously analyzed and shown to have an adequate safety margin."<sup>31</sup> In particular, the Staff concluded that the deterministic seismic-loading levels predicted for the analyzed Shoreline Fault earthquake scenarios are at or below those levels for the previously-evaluated Hosgri earthquake and LTSP ground motions.<sup>32</sup>

In March 2012—independent of its review of PG&E's Shoreline Fault Report—the NRC Staff issued a request for information to all reactor licensees, including PG&E, calling for (among other things) seismic hazard reevaluations in response to recommendations of the NRC's Near-Term Task Force review of the accident at Fukushima Dai-ichi.<sup>33</sup> This request, issued pursuant to 10 C.F.R. § 50.54(f), detailed a two-phase approach for all licensees to reevaluate seismic hazards at their facilities.

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<sup>30</sup> "Confirmatory Analysis of Seismic Hazard at the Diablo Canyon Power Plant from the Shoreline Fault Zone," Research Information Letter 12-01 (Sept. 2012) (ML121230035) (Research Information Letter 12-01).

<sup>31</sup> *Id.* at 95.

<sup>32</sup> *See id.* at 60.

<sup>33</sup> *See* Letter from NRC to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status (Mar. 12, 2012) (ML12053A340) (requesting information pursuant to 10 C.F.R. § 50.54(f) regarding recommendations 2.1, 2.3, and 9.3 of the Near-Term Task Force Review of insights from the Fukushima Dai-ichi accident) (Section 50.54(f) Request); Staff Requirements—SECY-11-0124—Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ML112911571).

In an October 12, 2012, letter to PG&E, the Staff explained how it expected PG&E to proceed in analyzing new seismic data.<sup>34</sup> The letter summarized the results of the Staff's analysis, documented in Research Information Letter 12-01, that the Shoreline Fault should be considered a "lesser included case" under the Hosgri Earthquake evaluation and advised PG&E to update its FSAR to include the Shoreline scenario "in accordance with the requirements of 10 CFR 50.71(e)."<sup>35</sup> With respect to the Section 50.54(f) Request, the Staff stated that PG&E should use the Double Design Earthquake in preparing its response.<sup>36</sup>

While the activities discussed above were ongoing, PG&E filed, and then withdrew, a license amendment request related to seismic issues. In 2011—during the period that the Staff was conducting its analysis of the Shoreline Fault—PG&E requested a license amendment that would:

- (1) clearly define an evaluation process for newly identified seismic information and incorporate ongoing commitments associated with the Long Term Seismic Program (LTSP) into the [Updated Final Safety Analysis Report]; and (2) clarify, consistent with the NRC Supplemental Safety Evaluation Report 7, that the 1977 Hosgri earthquake is the equivalent of [Diablo Canyon's] safe shutdown earthquake, as defined in 10 CFR 100, Appendix

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<sup>34</sup> Letter from Joseph Sebrosky, NRC, to Edward Halpin, PG&E (Oct. 12, 2012) (ML120730106) (regarding Diablo Canyon Power Plant, Unit Nos. 1 and 2 – NRC Review of Shoreline Fault) (October 12, 2012, Letter).

<sup>35</sup> *Id.* at 2; *see also* Research Information Letter 12-01 at xii-xiii.

<sup>36</sup> October 12, 2012, Letter at 3-4 (citing "Diablo Canyon Power Plant Units 1 and 2, Final Safety Analysis Report Update," rev. 20 (Nov. 2011) (ML15009A024) (UFSAR Revision 20)) ("The NRC staff expects that [PG&E's] response to the [Section 50.54(f) Request] will compare the updated probabilistic ground motion . . . with the ground motion in the plant's current licensing basis that is stated as the equivalent of the [safe shutdown earthquake]. Consistent with [FSAR Revision 20] the [Double Design Earthquake] is the equivalent of the [safe shutdown earthquake] at [Diablo Canyon].").



A,<sup>37</sup> and (3) use the square-root-of-the-sum-of-squares (SRSS) method for the evaluations of load combinations.<sup>38</sup>

In October 2012, PG&E withdrew this license amendment request.<sup>39</sup> PG&E stated that the Staff's Section 50.54(f) Request established "an evaluation process" for new seismic information, which eliminated the need for the plant-specific evaluation process it had sought with the license amendment request.<sup>40</sup> PG&E further stated that it would update the UFSAR as necessary to reflect the Staff's conclusion "that the Shoreline scenario should be considered as a lesser included case under the [Hosgri Earthquake evaluation] . . . in accordance with the requirements of 10 CFR 50.71(e)."<sup>41</sup> And with respect to the request for approval to use the SRSS method for evaluating seismic load combinations, PG&E stated that it was continuing to review whether a license amendment was necessary and that it might submit a new license amendment request in the future.<sup>42</sup>

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<sup>37</sup> See *supra* note 23; SSER 7 at 2-3 to 2-4.

<sup>38</sup> Letter DCL-11-097 from James Becker, PG&E to NRC Document Control Desk, (Oct. 20, 2011) (ML11312A166), encl., "Evaluation of the Proposed Change" (regarding License Amendment Request 11-05, "Evaluation Process for New Seismic Information and Clarifying the Diablo Canyon Power Plant Safe Shutdown Earthquake") (License Amendment Request 11-05).

<sup>39</sup> Letter DCL-12-108 from Barry Allen, PG&E, to NRC Document Control Desk (Oct. 25, 2012) (ML12300A105) (regarding withdrawal of License Amendment Request 11-05) (License Amendment Request Withdrawal).

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.*; see *id.*, encl., "List of Regulatory Commitments," at 1 (Commitment 1).

<sup>42</sup> License Amendment Request Withdrawal at 2-3.

PG&E submitted the twenty-first update to its FSAR in September 2013.<sup>43</sup> The revision included changes to the geology and seismology discussion in Chapter 2 and the seismic design section of Chapter 3 that clarified the plant’s licensing history with respect to the Hosgri evaluation and the LTSP, and it summarized the evaluations of the Shoreline fault.<sup>44</sup> A June 2014 internal NRC staff memorandum—referred to in this proceeding as the “Bamford Memo”—confirmed that UFSAR Revision 21 included the information required by regulation to be included in FSAR updates.<sup>45</sup>

### **C. Procedural Background**

In August 2014, Friends of the Earth requested a hearing and proposed two contentions.<sup>46</sup> In Contention 1, Friends of the Earth argued that because the NRC was “conducting a *de facto* license amendment proceeding that has significant safety implications,” Friends of the Earth was entitled to a public hearing under section 189a. of the Atomic Energy

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<sup>43</sup> “Diablo Canyon Power Plant Units 1 and 2 Final Safety Analysis Report Update,” rev. 21 (Sept. 2013) (ML14269A007) (UFSAR Revision 21).

<sup>44</sup> Compare UFSAR Revision 21, § 2.5, at 2.5-1, 2.5-61 to -66, with UFSAR Revision 20, § 2.5, at 2.5-57 to -64, 2.5-73. UFSAR Revision 21 also reflected thirteen changes incorporated into the FSAR as a result of evaluations performed under 10 C.F.R. § 50.59 and four changes incorporated into the FSAR as a result of license amendments. UFSAR Revision 21, encl. 1 (listing section 50.59 evaluations), encl. 2 (listing changes incorporated as a result of license amendments). Chapter 2 contains descriptions of the plant’s site characteristics and Chapter 3 concerns the design of structures, systems, equipment, and components.

<sup>45</sup> See Memorandum from Peter Bamford, NRC, to Michael Markley, NRC, “Diablo Canyon Power Plant, Units 1 and 2 – Review of Final Safety Analysis Report Update, Revision 21 (TAC Nos. MF2945 and MF2946)” (June 23, 2014) (ML14022A120).

<sup>46</sup> Friends of the Earth also requested that we empanel a Licensing Board to conduct an adjudicatory hearing regarding the ability of Diablo Canyon to be safely shut down in the event of an earthquake and that we order PG&E to suspend operations at Diablo Canyon pending a determination, following a hearing, that the plant can be safely operated. FOE Appeal at 4; Hearing Request at 7.

Act.<sup>47</sup> In Contention 2, Friends of the Earth argued: “[the] NRC Staff’s determination that the new seismic information, including the Shoreline Earthquake and its effect on the San Luis Bay and Los Osos Faults, is a lesser-included case within the Hosgri Earthquake is [insufficient] to [ensure] that Diablo Canyon is operating safely with an adequate margin of safety.”<sup>48</sup>

Friends of the Earth cited four documents as evidence that the Staff has effectively allowed PG&E to alter the terms of its licenses. Its hearing request cited (1) the Section 50.54(f) Request; (2) Research Information Letter 12-01; and (3) the October 12, 2012, Letter.<sup>49</sup> And in its reply to the Staff and PG&E’s answers, Friends of the Earth argued for the first time that the Bamford Memo constituted Staff “approval” of the changes reflected in UFSAR Revision 21.<sup>50</sup>

We referred Friends of the Earth’s request to the Board in part for a determination as to “whether the NRC granted PG&E, greater authority than that provided by its existing licenses or otherwise altered the terms of PG&E’s existing licenses” with respect to the seismic qualification of Diablo Canyon.<sup>51</sup> We also denied portions of Friends of the Earth’s request, and we referred portions of the request to the Executive Director for Operations for consideration of Friends of the Earth’s arguments under 10 C.F.R. § 2.206.<sup>52</sup>

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<sup>47</sup> Hearing Request at 29.

<sup>48</sup> *Id.* at 47.

<sup>49</sup> These three documents were discussed in the Hearing Request at 14-18, 21-22, 42, 49-53.

<sup>50</sup> *Friends of the Earth’s Reply to NRC Staff’s and Pacific Gas & Electric Company’s Answers and Proposed Amicus Curiae Nuclear Energy Institute’s Brief in Response to Petition to Intervene and Request for Hearing* (Oct. 14, 2014), at 11-19.

<sup>51</sup> CLI-15-14, 81 NRC at 734. We directed that PG&E and the Staff be given the opportunity to address the claim regarding UFSAR Revision 21. *Id.* at 735.

<sup>52</sup> *Id.* at 737. We denied Friends of the Earth’s request for a hearing on operational safety and safe-shutdown, and we declined its request to suspend operations. The concerns underlying

Following the referral, Friends of the Earth supplemented its hearing request, arguing that the Staff's actions pursuant to the Near-Term Task Force recommendations were part of a proceeding to informally amend the licenses.<sup>53</sup> In support, Friends of the Earth cited PG&E's March 2015 Seismic Hazard Report (responding to the Staff's Section 50.54(f) Request) and the Staff's response to licensees regarding the section 50.54(f) evaluations (referred to as the "Screen-In Letter").<sup>54</sup> Friends of the Earth argued that the Seismic Hazard Report showed that Diablo Canyon "could not comply with its seismic design basis" and that the Staff's Screen-In Letter had modified the license by authorizing the plants' "continued operation" for two years while PG&E performs additional evaluations.<sup>55</sup> Similarly, Friends of the Earth claimed that a December 2014 inspection report "approved" a PG&E operability determination, thereby

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these requests were likewise referred to the Executive Director for Operations for consideration under section 2.206. *Id.* at 736; see also Letter from Richard Ayres, Friends of the Earth, to Margaret Watford and Lisa Regner, Petition Managers, NRC (Feb. 8, 2016) (ML16040A221) (providing additional information in support of section 2.206 petition). The review of this petition is ongoing.

<sup>53</sup> *Petitioner Friends of the Earth's Motion to Allow Supplemental Briefing* (June 5, 2015), *Petitioner Friends of the Earth's Supplemental Brief* (June 19, 2015) (FOE Supplemental Brief); see also *Pacific Gas & Electric Company's Response to FOE's Supplemental Brief* (June 26, 2015) (PG&E Response to FOE Supplemental Brief), *NRC Staff's Response to Friends of the Earth's Supplemental Brief* (June 26, 2015).

<sup>54</sup> FOE Supplemental Brief (citing Letter DCL-15-035 from Barry Allen, PG&E, to NRC Document Control Desk (Mar. 11, 2015) (ML15070A607) (March 2015 Seismic Hazard Report) (transmitting encl. 1, "Seismic Hazard and Screening Report")); see Letter from William Dean, NRC, to Mark Reddeman, Energy Northwest, Edward Halpin, PG&E, and Randall Edington, Arizona Public Service Co. (May 13, 2015) (ML15113B344) (Screen-In Letter).

<sup>55</sup> FOE Supplemental Brief at 6-8.

modifying the licenses by allowing the plant to continue operating when, in Friends of the Earth's view, it should have been shut down.<sup>56</sup>

After taking supplemental briefs and hearing oral argument, the Board found that Friends of the Earth had not shown any *de facto* amendment of PG&E's licenses.<sup>57</sup> The Board considered each of the documents that Friends of the Earth cited in support of its claims and concluded that none had expanded PG&E's operating authority or altered the terms of the licenses. Because the Board found that no license amendment had been approved by the NRC, and therefore that Friends of the Earth had not established a right to request a hearing, it did not reach the question of the admissibility of Contention 2.<sup>58</sup> Friends of the Earth's appeal followed.<sup>59</sup>

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<sup>56</sup> *Id.* at 18-20; see Letter from Wayne Walker, NRC, to Edward Halpin, PG&E (Dec. 15, 2014) (ML14349A485) (December 2014 Inspection Report).

<sup>57</sup> LBP-15-27, 82 NRC at 190, 192-98; see also *NRC Staff Answer to Friends of the Earth's De Facto License Amendment Claims Related to PG&E's Updated Final Safety Analysis Report, Revision 21* (June 15, 2015); *Pacific Gas & Electric Company's Supplemental Brief Regarding UFSAR Revision 21* (June 15, 2015).

<sup>58</sup> LBP-15-27, 82 NRC at 190-91. Nor did the Board reach the question of Friends of the Earth's standing. *Id.* at 189. Because we affirm the Board's decision on Friends of the Earth's Contention 1, we likewise reach neither issue.

<sup>59</sup> After briefing on its appeal was completed, Friends of the Earth submitted a letter arguing that a November 2015 inspection report (issued subsequent to the Board's ruling) provides additional support for its claims. Letter from Richard Ayres, Friends of the Earth, to Commissioners, NRC (Jan. 14, 2016) (regarding "Recent NRC Staff Inspection Report Relevant to Diablo Canyon Power Plant De Facto License Amendment Proceeding, Docket Nos. 50-275 and 50-323") (FOE Supplement to Appeal). Friends of the Earth's letter did not address the good cause factors for supplementing a hearing request found in 10 C.F.R. § 2.309(c). The particular inspection finding that Friends of the Earth points to relates to PG&E's continued assessment of the SRSS method for evaluating load combinations. See Letter from Richard Smith, NRC to Edward Halpin, PG&E (Nov. 13, 2015), encl. at 11 (ML15317A216) (November 2015 Inspection Report). Although it is improper for Friends of the Earth to supplement its petition or otherwise raise new issues on appeal, we have considered Friends of the Earth's letter, as well as PG&E's response to it, as a matter of discretion. See

## II. DISCUSSION

### A. Standard of Review

Friends of the Earth appeals the denial of its hearing request under 10 C.F.R. § 2.311(c).<sup>60</sup> Absent error of law or abuse of discretion, we give “substantial deference” to the Board’s rulings on threshold procedural matters such as standing and contention admissibility.<sup>61</sup> We referred this matter to the Board with a clear description of the applicable law.<sup>62</sup> As explained below, the Board’s conclusions reflect no error of law or abuse of discretion, and we affirm its decision.

### B. The Board’s Decision

The Board found that none of the communications and other documents Friends of the Earth cited in its hearing request or supplemental brief had the effect of granting PG&E greater operating authority or otherwise altering the terms of the licenses and therefore determined that Friends of the Earth was not entitled to an opportunity to request a hearing under Atomic Energy Act section 189a.<sup>63</sup> The Board began its analysis by recognizing that hearing rights may be triggered when “the substance of an NRC action, while not formally labeled a license

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Letter from David Repka, Winston & Strawn, to the Commission (Feb. 9, 2016) (Response to Friends of the Earth letter dated January 14, 2016). For further discussion of the inspection report, see section II.C.5, *infra*.

<sup>60</sup> Section 2.311(c) provides, as relevant here, that an order denying a request for hearing is appealable as to the question whether the hearing request should have been granted.

<sup>61</sup> See, e.g., *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

<sup>62</sup> CLI-15-14, 81 NRC at 734-35.

<sup>63</sup> LBP-15-27, 82 NRC at 198.

amendment, in effect accomplishes the same thing.”<sup>64</sup> The Board recognized that a petitioner cannot create the opportunity for a hearing simply by claiming that a licensee is operating in violation of its license: “[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206.”<sup>65</sup> The Board also held that a change must have the Staff’s approval in order to constitute a *de facto* license amendment, but not every Staff approval constitutes a license amendment.<sup>66</sup>

The Board then examined each of the documents Friends of the Earth cited in its hearing request and concluded that none of the documents effected or evidenced a change in the operating authority or terms of PG&E’s licenses. With respect to the Staff’s Section 50.54(f) Request, the Board observed that the stated purpose of the request was to “provide additional information to enable the NRC to determine whether future changes to any of the plants’ design bases might be warranted,” and the letter explicitly stated that the evaluations provided in response would “not revise the design basis of the plant.”<sup>67</sup> Noting that our case law does not provide for an adjudicatory hearing based on “speculative changes to a plant’s licensing basis,” the Board found no *de facto* amendment from the Section 50.54(f) Request.<sup>68</sup> The Board next found that neither Research Information Letter 12-01 nor the October 12, 2012, Letter altered the Diablo Canyon licenses. The Board found that these documents were part of the Staff’s

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<sup>64</sup> *Id.* at 191.

<sup>65</sup> *Id.* at 192.

<sup>66</sup> *Id.* at 191 & n.41 (citing *Perry*, CLI-96-13, 44 NRC at 328).

<sup>67</sup> *Id.* at 193.

<sup>68</sup> *Id.* (citing *Fort Calhoun*, CLI-15-5, 81 NRC at 338).

regulatory oversight activities and did not give rise to a hearing opportunity.<sup>69</sup> Moreover, it found that the “Hosgri Earthquake has been an established part of the Diablo Canyon design basis since the facility began operation.”<sup>70</sup> Further, the Board rejected the argument that the Staff approved a change in the licenses by accepting, via the Bamford Memo, UFSAR Revision 21. The Board explained that an FSAR update is a “reporting requirement,” which the Staff reviews for completeness and timeliness, not for substance.<sup>71</sup> Any unauthorized substantive changes in the FSAR “would be a matter for NRC oversight, not for adjudication.”<sup>72</sup>

The Board also found the claims in Friends of the Earth’s supplemental brief to be unpersuasive.<sup>73</sup> The Board found that PG&E’s Seismic Hazards Report, standing alone, could not be a license amendment because a licensee cannot grant itself a license amendment.<sup>74</sup> Moreover, the Staff’s Screen-In Letter—which was addressed to a group of power reactor licensees—had not approved a change in any of the licenses; rather, it described the next steps in an ongoing oversight process relating to the agency’s post-Fukushima activities.<sup>75</sup> The Board observed that the Screen-In Letter acknowledges that the evaluations might eventually require amendments to affected licenses but that the “mere possibility of a future license amendment

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<sup>69</sup> *Id.* at 193-95.

<sup>70</sup> *Id.* at 194.

<sup>71</sup> *Id.* at 195-96.

<sup>72</sup> *Id.* at 196.

<sup>73</sup> The Board noted that there was a “substantial question” whether any of the matters in the supplemental brief were within the scope of the referral. Because it found the arguments substantively unpersuasive, however, it did not address this question. *Id.* at 196 n.71.

<sup>74</sup> *Id.* at 197-98.

<sup>75</sup> *Id.*



. . . does not trigger a hearing opportunity today.”<sup>76</sup> And finally, the Board rejected Friends of the Earth’s arguments with respect to the Staff’s December 2014 inspection report because Staff oversight activities “ensure compliance with existing requirements” and are distinct from processes that could authorize such a change.<sup>77</sup>

### **C. Friends of the Earth’s Appeal**

This dispute centers around Friends of the Earth’s argument that, since the discovery of the Shoreline Fault, PG&E and the Staff have engaged in a series of actions that have revised the Diablo Canyon licenses to allow continued plant operation despite “potentially more powerful faulting” offshore from the plant.<sup>78</sup> More specifically, Friends of the Earth argues that PG&E and the Staff have improperly “added” the Hosgri Earthquake evaluation to the Diablo Canyon licensing basis by virtue of several asserted actions memorialized in a series of documents presented to the Board. Central to Friends of the Earth’s claims is that the Hosgri Earthquake evaluation involved less conservative methods for evaluating seismic risk than have previously been used.

To resolve this dispute, the Board closely parsed these documents; we consider the Board’s assessment below. We conclude that the Board did not err in its assessment. No license amendment has taken place—the Hosgri evaluation has been part of the plant’s seismic design and licensing bases for many years—well prior to the Shoreline Fault analyses that have

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<sup>76</sup> *Id.* at 198; see Screen-In Letter at 1 (“The purpose of [the Section 50.54(f) Request] was to gather information concerning seismic hazards at operating reactor sites and to enable the NRC staff to determine whether licenses should be modified, suspended, or revoked.”).

<sup>77</sup> LBP-15-27, 82 NRC at 196-97.

<sup>78</sup> FOE Appeal at 2.

been performed since 2008 and well prior to the Staff's current efforts related to seismic hazard reevaluation at all operating plant sites.

**1. The Board Considered Whether There Was  
A "Proceeding" to Amend the Diablo Canyon Licenses**

Friends of the Earth views its *de facto* license amendment claim as positing a series of events that, taken together, have the effect of amending the Diablo Canyon operating licenses. Thus, it claims that the Board "failed to consider whether the Staff has engaged in a 'proceeding' to *de facto* amend Diablo Canyon's licenses."<sup>79</sup> In this vein, Friends of the Earth argues that the Board erroneously looked at each activity singly, rather than consider the total effect of the activities.

We disagree. The record reflects that the Board considered the total effect of the communications and activities to support its determination that "none involve[d] the NRC's granting to PG&E greater authority than that provided by its existing licenses or otherwise altering their terms."<sup>80</sup> The Board—consistent with our precedent—went on to discuss individually each document and Staff action that Friends of the Earth cited in its hearing request and supplemental filings and explained why each document neither accomplished a change in the license nor granted PG&E greater operating authority. The Board's thoroughness in addressing each individual item does not undermine its broader conclusion that there has been no amendment to PG&E's existing licenses. In fact, it serves to strengthen the Board's conclusion.

Nor do we interpret the Board's ruling to hold that a series of Staff actions, taken together, could not alter the terms of a license and constitute a *de facto* license amendment.

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<sup>79</sup> FOE Appeal at 10, 29.

<sup>80</sup> LBP-15-27, 82 NRC at 192.

But to support such a claim, a Staff action increasing the licensee's operating authority or changing the terms of a license must be complete or have taken effect. Friends of the Earth's argument that a change is under way would effectively require us to hold hearings on a host of ongoing Staff oversight activities that might, at some unspecified future time, lead to a license amendment. But as we have held, "NRC oversight activities gathering information about and evaluating plant performance" do not amend a license and therefore "cannot form the basis for the right to request a hearing."<sup>81</sup> We find that the Board appropriately distinguished between the Staff's oversight activities and the license amendment process. Friends of the Earth cannot erase this distinction by recasting oversight activities as a "process" for amending a license informally. To gain an adjudicatory hearing on a claim of a *de facto* license amendment, Friends of the Earth must show that an alteration in the license has taken place. It has not shown that the Board erred in its assessment of this issue.

**2. The Staff Did Not "Approve" Changes to Diablo Canyon's Licenses  
By "Accepting" UFSAR Revision 21**

Friends of the Earth argues that the Board erred when it found that the Staff had not approved changes contained in UFSAR Revision 21.<sup>82</sup> By way of background, the FSAR is part of the application for an operating license and must "include information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole."<sup>83</sup> Each operating

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<sup>81</sup> *St. Lucie*, CLI-14-11, 80 NRC at 175.

<sup>82</sup> FOE Appeal at 10-14.

<sup>83</sup> 10 C.F.R. § 50.34(b); *see id.* §§ 50.34(b)(1)-(12) (setting forth contents of the FSAR); 50.4(b)(6) (requirements for submission of FSAR updates), 50.59(a)(4) (defining FSAR, as updated, as "the Final Safety Analysis Report . . . submitted in accordance with § 50.34, as

license holder must periodically update its FSAR, pursuant to 10 C.F.R. § 50.71(e), “to assure that the information included in the [FSAR] contains the latest information developed.”<sup>84</sup> Section 50.71(e) is a reporting requirement, intended “to insure that an updated FSAR will be available.”<sup>85</sup> At the time of section 50.71(e)’s implementation, the NRC made clear that “[s]ubmittal of updated FSAR pages does not constitute a licensing action but is only intended to provide information.”<sup>86</sup> And as the Staff observed before the Board, the Staff reviews FSAR updates submitted pursuant to section 50.71(e) only “as part of its oversight to ensure compliance with existing requirements.”<sup>87</sup>

The Board observed that section 50.71(e) does not provide for Staff “approval” of the revisions.<sup>88</sup> The Board concluded, in short, that the Staff’s acceptance of Revision 21 did not constitute a *de facto* license amendment because section 50.71(e) is only a reporting

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amended and supplemented, and as updated per the requirements of § 50.71(e) or § 50.71(f), as applicable”).

<sup>84</sup> 10 C.F.R. § 50.71(e). Each FSAR update must include changes made via license amendment and changes made pursuant to 10 C.F.R. § 50.59. *Id.* § 50.71(e)(2). And it must contain certain changes to the quality assurance program description. *Id.* § 50.54(a)(3). The rule’s stated purpose is “to provide an updated reference document to be used in recurring safety analyses performed by the licensee, the Commission, and other interested parties. Final Rule, Periodic Updating of Final Safety Analysis Reports, 45 Fed. Reg. 30,614, 30,614 (May 9, 1980) (FSAR Update Final Rule).

<sup>85</sup> FSAR Update Final Rule, 45 Fed. Reg. at 30,615.

<sup>86</sup> *Id.* Further, the update “is not intended for the purpose of re-reviewing plants.” *Id.*

<sup>87</sup> Staff Brief on UFSAR Revision 21, at 4 (citing FSAR Update Final Rule, 45 Fed. Reg. at 30,615 (“The material submitted [under section 50.71(e)] may be reviewed by the NRC staff but will not be formally approved.”)).

<sup>88</sup> LBP-15-27, 82 NRC at 195 (citing 10 C.F.R. § 50.71(e)).

requirement that does not require Staff “approval.”<sup>89</sup> By the plain language of the regulation, an FSAR update must reflect both license amendments (which will have already undergone a formal approval process) and changes that fall under 10 C.F.R. § 50.59, which applies to those matters that do not require NRC Staff preapproval. Moreover, the Board observed that if the revision included any changes “without proper authorization or analysis, that would be a matter for NRC oversight, not for adjudication.”<sup>90</sup>

Friends of the Earth asserts that while it may normally be the case that the Staff does not review or approve FSAR updates, the Board disregarded the particular facts in this case.<sup>91</sup> We disagree. As an initial matter, as the Board observed, the Staff’s review of a UFSAR revision under section 50.71(e), standing alone, cannot constitute a *de facto* license amendment. And the Board’s ruling that the Staff does not “approve” FSAR updates accurately reflects the operative regulation. Moreover, we are not persuaded by Friends of the Earth’s assertion that, despite the Staff’s normal practice of not “approving” FSAR updates, in this particular case the Staff endorsed the changes. The Bamford Memo is an internal Staff memorandum—not addressed to PG&E—that summarizes the update’s contents.<sup>92</sup> The Bamford Memo does no more than confirm that UFSAR Revision 21 was timely submitted and

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 196.

<sup>91</sup> FOE Appeal at 11-12.

<sup>92</sup> See Bamford Memo at 1. The Bamford Memo is roughly akin to a short checklist, in that it simply memorializes the license amendments, inspection reports, and licensee event reports that affected the UFSAR during the update period.

appropriately discussed license amendments, inspection reports, and Licensee Event Reports, as required by section 50.71(e).

Friends of the Earth additionally points to a PG&E document—a “UFSAR change request”—and attaches significance to remarks in that request referring to NRC correspondence.<sup>93</sup> The request, which appears to be an internal PG&E form that is not submitted to the NRC (and thereby is not relevant to the agency’s decision-making process), does not support Friends of the Earth’s claim. References to NRC documents and correspondence in an internal PG&E document cannot, and do not, transform Revision 21 into a request for NRC approval, nor do they represent alterations to the license in and of themselves.<sup>94</sup> In short, nothing in the record reflects that PG&E requested, or the Staff

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<sup>93</sup> FOE Appeal at 13; see FOE Supplemental Brief, Exhibit 1, DCP Form 69-20108 UFSAR Change Request (June 9, 2013), at 102 (unnumbered) (ML15170A452) (UFSAR Change Request). The request notes that the proposed revisions to Revision 21 “involve changes to the UFSAR that explicitly identify the licensing basis design requirements and their bases submitted to, and approved by, the NRC in docketed correspondence,” and that the changes “are derived from correspondence with the NRC, NRC regulatory documentation, and specific UFSAR text.” *Id.* at 102. And a different page of the “change request” states that changes “explicitly identify the licensing basis design requirements” and “provide clarification.” *Id.* at 101.

<sup>94</sup> See *St. Lucie*, CLI-14-11, 80 NRC at 173 (observing that “[a] licensee cannot amend the terms of its license unilaterally”). Friends of the Earth makes much of the comment in the change request that the update identifies licensing basis documents “submitted to, and approved by, the NRC in docketed correspondence.” But section 50.71(e) requires this very information—the update must contain “all the changes necessary to reflect information and analyses submitted to the Commission by the . . . licensee or prepared by . . . the licensee pursuant to a Commission requirement since the submittal of the original FSAR, or as appropriate, the last update to the FSAR under this section,” including evaluations performed by the licensee in support of “approved license amendments.” To the extent that Revision 21 contained information “approved by” the NRC, we understand this reference to pertain to information that was previously approved via license amendments and not to approval of a revised seismic analysis, as Friends of the Earth suggests.

approved, changes to the Diablo Canyon operating licenses in conjunction with UFSAR Revision 21.

**3. *The Board Did Not Err in Finding that the Hosgri is a Design Basis Earthquake***

Friends of the Earth next argues that, prior to UFSAR Revision 21, the Hosgri Earthquake evaluation “was not the plant’s safe shutdown earthquake and, therefore, was not part of its seismic design basis.”<sup>95</sup> Friends of the Earth therefore contends that the Board erred when it found that the Hosgri Earthquake has been part of the design basis “since the facility began operation.”<sup>96</sup> Friends of the Earth contends that nuclear power plants have only two design basis earthquakes—the operating basis earthquake and the safe shutdown earthquake.<sup>97</sup> It argues that the Hosgri Earthquake is neither of these and, prior to UFSAR Revision 21, the Hosgri Earthquake evaluation played a “lesser role,” such that it was not part of the plant’s design basis.<sup>98</sup>

The Board did not err in its determination that the Hosgri Earthquake has long been part of Diablo Canyon’s seismic design basis and was not “added” by UFSAR Revision 21 or any of the Staff’s and PG&E’s actions at issue here. Friends of the Earth misconstrues the changes made by UFSAR Revision 21. The Board’s conclusions regarding the Hosgri Earthquake are well supported by the record, including the extensive litigation over the plant’s capability to

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<sup>95</sup> FOE Appeal at 15.

<sup>96</sup> *Id.* at 15-21 (citing LBP-15-27, 82 NRC at 194, 197).

<sup>97</sup> *Id.* at 17, 18.

<sup>98</sup> *Id.* at 18.

withstand a Hosgri Earthquake at the operating license stage and the Staff's safety evaluations dating back to 1978.<sup>99</sup>

By definition, a plant's "design bases" are those "values chosen for controlling parameters as reference bounds for design" and "requirements derived from analysis . . . of the effects of a postulated accident for which a structure, system, or component must meet its functional goals."<sup>100</sup> Diablo Canyon was modified and qualified to withstand the higher ground acceleration produced by the Hosgri Earthquake, making such analyses and modifications by definition part of the plant's design basis. Even prior to the clarification in UFSAR Revision 21, the FSAR described the Hosgri as the earthquake potentially producing the maximum ground motions at the site.<sup>101</sup> Therefore, the Board did not err in concluding that Revision 21 did not "add" the Hosgri Earthquake to the plant's seismic design basis.<sup>102</sup>

Nor does Friends of the Earth identify any change in UFSAR Revision 21 that revises the design basis of the plant. For example, Friends of the Earth points to changes in UFSAR section 2.5, "Geology and Seismology," in support of its arguments that Revision 21 "inserts" the

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<sup>99</sup> See LBP-15-27, 82 NRC at 194 (citing LBP-79-26, 10 NRC at 499, ALAB-644, 13 NRC at 923); *id.* at 194 n.56 (citing SSER 7 at 2-4; SSER 34 at 1-7).

<sup>100</sup> See 10 C.F.R. § 50.2.

<sup>101</sup> See, e.g., UFSAR Revision 20 at 2.5-58, 2.5-73, 3.7-1 to 3.7-2. Although these sections are included in Revision 20, some had not been changed throughout many FSAR updates. See, e.g., *id.* at 3.2-1 to 3.2-2 (footers indicate that the pages appeared in Revision 15, 2003).

<sup>102</sup> In support of this argument Friends of the Earth also argues that the Board erred in relying on SSER 7 to find that the Hosgri Earthquake was part of the plant's licensing basis, because that report was published prior to issuance of the operating licenses. FOE Appeal at 19. But the fact that the Staff considered the Hosgri Earthquake prior to issuing the licenses supports, rather than undermines, the claim that the Hosgri Earthquake has long been a part of Diablo Canyon's design and licensing basis. See LBP-15-27, 82 NRC at 194 n.56 (citing SSER 7).



Hosgri Earthquake and the LTSP into the plant's design basis.<sup>103</sup> But these changes simply described and clarified the history of the seismic investigations at Diablo Canyon.<sup>104</sup> On their face, these descriptions do not change the design basis of the plant. Moreover, Friends of the Earth acknowledges that UFSAR Revision 21 did not change FSAR statements that the "safe shutdown earthquake" of Appendix A is the equivalent of the Double Design Earthquake.<sup>105</sup> And with respect to the LTSP—which PG&E acknowledges is not part of the plant's design basis—the discussion added in Revision 21 expressly states that the analysis did not "replace or modify" the Design, Double Design, and Hosgri Earthquakes (that is, the original design basis earthquakes).<sup>106</sup> In short, Friends of the Earth does not show that UFSAR Revision 21 changed—or purported to change—the seismic design basis of Diablo Canyon.

#### **4. *Diablo Canyon's Seismic Evaluations Have Not Amended the Licenses***

Friends of the Earth also claims that the Staff granted PG&E greater operating authority by permitting PG&E to assess new seismic information against the Hosgri Earthquake and the ground motions analyzed in the LTSP.<sup>107</sup> Friends of the Earth argues that prior to UFSAR Revision 21, the Double Design Earthquake was clearly Diablo Canyon's "maximum

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<sup>103</sup> FOE Appeal at 22-23.

<sup>104</sup> *Compare* UFSAR Revision 21, § 2.5, at 2.5-1, 2.5-61 to -66, *with* UFSAR Revision 20, § 2.5.2.9, at 2.5-57 to -64, 2.5-73.

<sup>105</sup> *See* FOE Appeal at 23 n.72 (citing FSAR Revision 21 at 3.2-1). The relevant section, which has not been revised since the fifteenth revision in 2003, explains that plant features important to safety have been analyzed against the Hosgri, Design, and Double Design earthquakes. *Compare* UFSAR Revision 21, § 3.2.1, *with* UFSAR Revision 20, § 3.2.1.

<sup>106</sup> UFSAR Revision 21, § 2.5.3.10.4, at 2.5-67.

<sup>107</sup> FOE Appeal at 21-24.

earthquake.”<sup>108</sup> Therefore, it argues, PG&E must compare new seismic information to the Double Design Earthquake and that comparing the Shoreline Fault risk to the Hosgri Earthquake or the 1991 LTSP evaluation reduces the safety margins and thereby alters the licensing basis of the plant.<sup>109</sup>

Here, Friends of the Earth conflates regulatory oversight with a licensing action. The Board found that the Staff’s investigations of new seismic information, both in connection with its post-Fukushima activities and with the Diablo Canyon-specific analyses, were performed in the course of its regulatory oversight duties and did not affect the plant’s licenses.<sup>110</sup> The Board correctly explained that the Staff’s analysis documented in Research Information Letter 12-01 was performed to determine whether the plant could continue to operate safely and made “no conclusions whatsoever regarding the Diablo Canyon operating licenses.”<sup>111</sup> The analyses comparing the potential hazard from the Shoreline Fault to the Hosgri evaluation did no more than confirm that Diablo Canyon is operating within its *existing* design and licensing bases.

Similarly, the Board did not err in finding that the Section 50.54(f) Request was undertaken as an exercise of the Staff’s regulatory oversight.<sup>112</sup> Friends of the Earth has not demonstrated that gathering new information or reanalyzing existing information changes the

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<sup>108</sup> *Id.* at 21.

<sup>109</sup> *Id.* at 23-24.

<sup>110</sup> LBP-15-27, 82 NRC at 193-95 (concerning Research Information Letter 12-01 and the October 12, 2012, Letter).

<sup>111</sup> *Id.* at 193-94.

<sup>112</sup> *Id.* at 192 (characterizing section 50.54(f) requests issued to all power reactors as “requests for information to allow the NRC to determine whether, as to each facility, it should or should not require additional action”).

operating authority of Diablo Canyon. Although the Section 50.54(f) Request directed licensees to conduct seismic hazard reevaluations using new information and updated methodologies, the request itself expressly stated that it did not alter the facilities' licensing bases.<sup>113</sup> The request explained that the purpose of gathering the information was to determine whether further regulatory action (which could include license modifications) would be needed.<sup>114</sup> In sum, the Board did not err in finding that the Staff did not amend the Diablo Canyon operating licenses when it directed PG&E to perform the seismic hazard reevaluation under Section 50.54(f).

Likewise, Friends of the Earth argues that the Board erred in finding that the December 2014 Inspection Report did not constitute a *de facto* license amendment because the Board incorrectly concluded that an inspection report could never constitute a *de facto* amendment.<sup>115</sup> But Friends of the Earth's argument with respect to the December 2014 Inspection Report ultimately confuses oversight with licensing. PG&E's operability determination does not purport to alter its design basis.<sup>116</sup> Nor does the Staff's finding of no violation constitute an approval of any change.<sup>117</sup> Thus we find no error in the Board's determination that December 2014 Inspection Report did not constitute a *de facto* amendment.<sup>118</sup>

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<sup>113</sup> Section 50.54(f) Request at 4.

<sup>114</sup> *Id.* at 1, 3, 4; *see also id.*, encl. 1 at 1.

<sup>115</sup> FOE Appeal at 29.

<sup>116</sup> December 2014 Inspection Report, encl. at 3.

<sup>117</sup> *Id.*, encl. at 6.

<sup>118</sup> LBP-15-27, 82 NRC at 197.

**5. The Board Did Not Err in Its Assessment of License Amendment Request 11-05**

Finally, Friends of the Earth argues that the Board erred in its treatment of PG&E's filing and subsequent withdrawal of License Amendment Request 11-05. The Board stated that it attached "little if any significance" to the fact that PG&E applied for a license amendment and later withdrew the application.<sup>119</sup> Friends of the Earth argues that PG&E's "subjective belief" that a license amendment was needed to designate the Hosgri Earthquake as the plant's safe shutdown earthquake "is probative to this matter."<sup>120</sup>

We find no error in the Board's treatment of this issue. The critical inquiry is not what might have motivated PG&E to withdraw its license amendment request, but rather whether any changes that were proposed to be made through the request and that required a license amendment have been accomplished by some other means. The record reflects that the changes that would have been sought through the license amendment request have not otherwise occurred. First, the request would have established the Hosgri Earthquake as the "equivalent" of Diablo Canyon's safe shutdown earthquake as that term is defined in Part 100, Appendix A.<sup>121</sup> But as discussed above, UFSAR Revision 21, like the previous iterations of the FSAR, continues to state that the Double Design Earthquake is the equivalent of the safe shutdown earthquake for Diablo Canyon; thus, the change that would have been sought via the license amendment request has not been made via any other mechanism.<sup>122</sup>

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<sup>119</sup> *Id.* at 191 n.39.

<sup>120</sup> FOE Appeal at 24-26.

<sup>121</sup> License Amendment Request 11-05, encl. at 2-3, 5, 16, 22.

<sup>122</sup> In accordance with its commitment in withdrawing the license amendment request, PG&E, in its response to the Staff's Section 50.54(f) Request, used the Double Design Earthquake as its

Second, the request would have added to Diablo Canyon's technical specifications a new program describing a process for evaluating new seismic information.<sup>123</sup> In its withdrawal notice, PG&E represented that the license amendment request was no longer needed because the Staff's Section 50.54(f) Request had defined a process for reevaluating the current licensing bases using new information and current methodologies.<sup>124</sup> To be sure, the reevaluation itself may lead to further action—including amendments to Diablo Canyon's licenses or licensing basis.<sup>125</sup> If the reevaluations require a license amendment, as the Board observed, at that time the public—including Friends of the Earth—would have the opportunity to participate consistent with applicable rules.<sup>126</sup>

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safe shutdown earthquake to determine that the plant “screens in” for further evaluation. See March 2015 Seismic Hazards Report at 2-3.

<sup>123</sup> License Amendment Request 11-05, encl. at 11.

<sup>124</sup> See License Amendment Request Withdrawal at 2. See Section 50.54(f) Request, encl. 1 at 4-5 (citing “A Performance-Based Approach to Define the Site-Specific Earthquake Ground Motion,” Regulatory Guide 1.208 (Mar. 2007) (ML070310619); “An Approach to the Quantification of Seismic Margins in Nuclear Power Plants,” NUREG/CR-4334 (Aug. 1985) (ML090500182)). Licensees were directed to “reevaluate the seismic hazard at their sites using updated seismic hazard information and present-day regulatory guidance and methodologies,” using a probabilistic approach or a seismic margins assessment.

<sup>125</sup> In this vein, Friends of Earth claims that “[l]eaving Diablo Canyon's Technical Specifications unaltered in this case violates regulations requiring certain information, including an evaluation method for new seismic data, to be incorporated into the plant's Technical Specifications.” FOE Appeal at 26; see License Amendment Request 11-05, attachs. 1 & 2. Because the amendment to incorporate a process for the evaluation of new seismic information was not made, no changes to the Technical Specifications were made. And the Section 50.54(f) Request did not amend the plant licenses such that a technical specification change was needed.

<sup>126</sup> See LBP-15-27, 81 NRC at 192.

The third change PG&E sought in the license amendment request, concerning a change in methods for combining calculated loads, is under consideration in the section 50.59 process, but it has not been made. Friends of the Earth's supplemental letter addresses this issue. Particularly, Friends of the Earth argues, referencing a November 2015 inspection report, that the Staff has effectively amended the Diablo Canyon licenses by allowing the plant to continue to operate despite the fact that the Staff determined that PG&E had not adequately documented its section 50.59 evaluation with respect to the change of methods to calculate the loads.<sup>127</sup> The inspection report identified this performance deficiency as a Severity Level IV violation, which the Staff treated as a non-cited violation; the issue was entered into PG&E's corrective action program and will be addressed by PG&E through a re-evaluation of the methodology change; any required actions will thereafter be implemented.<sup>128</sup> Should PG&E determine that this change to the FSAR does not require an amendment, that determination may be challenged through a section 2.206 petition.<sup>129</sup> If a license amendment is required, then a hearing opportunity will be available at that time—a possibility that PG&E itself acknowledged.<sup>130</sup>

This example illustrates the overarching flaw in Friends of the Earth's reasoning in this case. If PG&E were to inappropriately make a change to its licensing basis without NRC approval, it has not *amended* its licenses. Rather, PG&E would be *out of compliance* with its

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<sup>127</sup> FOE Supplement to Appeal at 2; see November 2015 Inspection Report at 11-12.

<sup>128</sup> November 2015 Inspection Report at 12, 13.

<sup>129</sup> *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 n.10 (2012) (citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994)).

<sup>130</sup> License Amendment Request Withdrawal at 3.

licenses and corrective action is appropriately imposed via the inspection and enforcement process.

We find no error in the Board's determination to ascribe little weight to PG&E's actions with respect to License Amendment Request 11-05, particularly in view of the fact that the changes sought therein have not otherwise been made.

### III. CONCLUSION

For the foregoing reasons, we find that Friends of the Earth has not shown that the Board committed error of law or abused its discretion in determining that there has been no *de facto* amendment of the Diablo Canyon operating licenses and therefore that no opportunity to request a hearing has accrued to Friends of the Earth. We *affirm* the Board's decision in LBP-15-27.

IT IS SO ORDERED.

For the Commission

**NRC Seal**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 2<sup>nd</sup> day of June, 2016.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
PACIFIC GAS & ELECTRIC COMPANY ) Docket Nos. 50-275 and 50-323  
)  
(Diablo Canyon Nuclear Power Plant, )  
Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-16-09)** have been served upon the following persons by the Electronic Information Exchange and by electronic mail.

U.S. Nuclear Regulatory Commission  
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Diablo Canyon Nuclear Power Plant - Docket Nos. 50-275 and 50-323  
**COMMISSION MEMORANDUM AND ORDER (CLI-16-09)**

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