



August 15, 1983

ADJUDICATORY ISSUE SECY-83-335

(NEGATIVE CONSENT)

For: The Commission
From: Herzel H. E. Plaine, General Counsel
Subject: LORION V. NRC (D.C. CIR. NO. 82-1132)
Purpose: To advise the Commission of proposed action in response to the Lorion decision

Discussion: On July 26, 1983 OGC notified the Commission of the Court of Appeals decision in Lorion v. NRC (D.C. Cir. No. 82-1132). The court in that decision held that jurisdiction over 2.206 denials lies in the district court rather than the court of appeals. This paper elaborates on that decision and our proposed response to it, which includes filing a motion for rehearing while considering further the prospects for obtaining (1) Supreme Court review, (2) appropriate legislative changes in Section 189 of the Atomic Energy Act, or (3) amendment of Commission regulations in a manner that might circumvent Lorion.

I. Background

On September 11, 1981 Joette Lorion wrote the Commission on behalf of the Center for Nuclear Responsibility, requesting that Turkey Point Unit #4 be shut down because of concerns over pressure vessel integrity and steam generator tube integrity. On November 5, 1981 the Director, NRR, issued a decision under 10 CFR 2.206 denying her request.

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SECY NOTE: This paper is identical to the one advanced on Monday, August 15, 1983.

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Ms. Lorion thereupon requested that the Commission vacate the Director's decision because she had not intended her letter to be a petition under 10 CFR 2.206. The Commission declined, and Ms. Lorion subsequently filed a petition for review in the Court of Appeals for the District of Columbia Circuit.¹ Ms. Lorion argued to the court that the Commission erred in treating her letter as a 2.206 petition, and, alternatively, that the Commission erred in denying her petition.

At oral argument, although no party had raised the issue, Judge Mikva expressed reservations about the court's jurisdiction to hear the case. Judge Mikva felt that a 2.206 denial was not a "proceeding" under Section 189a of the Atomic Energy Act, and, since courts of appeals only have jurisdiction to review final NRC orders in Section 189a proceedings, that the Court of Appeals did not have jurisdiction over Ms. Lorion's petition for review. Counsel pointed out that in previous cases the D.C. Circuit had taken review of 2.206 denials and offered to brief the jurisdictional issue, but the court did not accept the offer.

II. The Decision in Lorion

The court, in an opinion written by Judge Mikva, held that the agency had properly treated Ms. Lorion's letter as a petition under 10 CFR 2.206. But the court then held that it did not have jurisdiction to review the Commission's denial of the petition.

The court interpreted Section 189b of the Atomic Energy Act as giving it the jurisdiction only to review "final orders of the NRC entered after formal agency proceedings" under Section 189a. Slip Op. at 2 (emphasis added). The court held that a 2.206 request triggers a preliminary investigation by the NRC to determine whether or not to institute a formal proceeding, and that the mere processing of the request does not

¹The background is discussed more thoroughly in SECY-81-658, where OGC recommended that the Commission grant Ms. Lorion's request to vacate the Director's decision.

constitute a proceeding under Section 189a. To support this holding the court cited prior cases which had held that a 2.206 request does not automatically trigger a Section 189a hearing. E.g., Porter County v. NRC, 606 F.2d 1363 (D.C. Cir. 1979). The court also cited the statement in our brief in Lorion that a 2.206 request, until granted, "is not a proceeding where the requester has any right to present evidence." See Slip Op. at 7-8 (emphasis added). The court then concluded that a 2.206 denial is not a final order in a Section 189a proceeding, and therefore was not initially reviewable in the court of appeals.

In so holding the court overruled a consistent line of authority to the contrary.² In Natural Resources Defense Council, Inc. v. NRC, 606 F.2d 1261 (D.C. Cir. 1979), the D.C. Circuit considered whether the NRC's decision that it had no licensing authority over certain ERDA waste tanks was reviewable exclusively in the court of appeals. The court held that "a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license," and hence a decision denying a request to exert licensing authority was an order entered in a "proceeding" under Section 189. Both the Seventh Circuit and D.C. Circuit followed this "necessary first step" rationale in finding that a 2.206 proceeding is a first step toward a Section 189a license proceeding and therefore the court of appeals has jurisdiction to review 2.206 denials. Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982); Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1982).

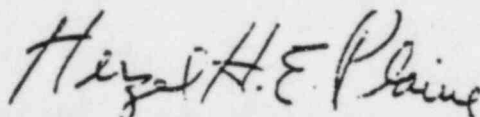
The Lorion court in overruling this line of authority stated that it was "no longer comfortable with the strain our decisions have placed on the clear-cut language" of Section 189. The court found that the statutory language of Section 189 "explicitly restricts our reviewing

²The court in a footnote noted this conflict and stated that this part of the opinion had been "separately considered and approved by the full court." Slip Op. at 14.

³These cases are discussed at length in the Lorion decision.

jurisdiction to those final orders entered in the kinds of formal 'proceedings' specified in [Section 189]," and that this "unusual, interlocking scheme does not allow 'proceeding' to mean one thing for procedural purposes and another for jurisdictional purposes." Slip Op. at 11. Finally, the court stated that there was no legislative history "to suggest that Congress envisioned its jurisdictional grant ... to extend beyond orders entered in formal hearings." Id. at 13.

Accordingly, the court dismissed the case for lack of subject matter jurisdiction and transferred it to the federal District Court for the District of Columbia.



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SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Monday, August 29, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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SUMMARY OF LORION V. NRC, D.C. CIR. NO. 82-1132

The Court of Appeals for the District of Columbia Circuit in Lorion v. NRC held that the courts of appeals lack jurisdiction to review denials by the Nuclear Regulatory Commission of requests under 10 CFR 2.206 for enforcement action against NRC licensees. The Court stated that jurisdiction to review such denials lies in the district court. This holding directly contradicts decisions in the Second, Sixth, and Seventh Circuits and overrules earlier decisions in the D.C. Circuit. The jurisdictional issue was raised by the court sua sponte, and the court did not provide the parties an opportunity to brief the issue.

There are at least three major adverse results from this decision.