

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD PANEL 89 OCT 14 P 3:50

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Linda W. Little, Special Assistant

OFFICE
OF
ADMINISTRATIVE
JUDGES

IN THE MATTER OF:

Docket No. 030-34610-ML

DEPARTMENT OF THE ARMY
Soldier and Biological Chemical Command
(SBCCOM) Aberdeen Proving ground, Maryland

ASLBP NO. 99-768-02-ML

M22/GID-3 Automatic Chemical
Agent Detector/Alarm

October 6, 1999

SECTION I

**RESPONSE TO JUDGE CHARLES BECHHOEFER,
PRESIDING OFFICER (PO), MEMORANDUM DATED SEPTEMBER 23, 1999**

The below comments are submitted regarding paragraphs 1 and 2 of the PO's Memorandum.

PO's paragraph 1 reads:

"Please address specifically and succinctly the factors, circumstances or regulations, if any, that changed between July 2, 1998, when NRC staff discussed with the Army "an alternative approach of registering an internal cell module as the exempt use product," and May 17, 1999, when NRC Staff informed the Army that such an approach was not acceptable".

SBCCOM'S RESPONSE. SBCCOM states that nothing materially or otherwise changed or occurred between July 2, 1998 to May 17, 1999. The Army at all times diligently accommodated all requests for clarifications, changes, etc. issued by the NRC and its employees. Needless to say, SBCCOM was bewildered and mystified upon receiving the denial letter dated May 17, 1999, from the NRC (Donald A. Cool, Director, Div. Of Industrial and Medical Nuclear Safety).

Hearing File (HF), Tab 28.

PO's paragraph 2 reads:

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“Whether there are other approaches by which the Army could achieve the result it appears to desire—e.g., by granting a user license collectively to all soldiers (not specifically identified by name) who may be called upon to use the ACADA device, subject to a requirement that all soldiers authorized to use the ACADA would be adequately trained before doing so”.

SBCCOM’s RESPONSE.

- The Army is not opposed to the granting of a “user license” collectively to all soldiers who may be called upon to use the ACADA, subject to being adequately trained before doing so. The Army welcomes such an approach if it will allow service persons the same freedom as an exempt product license.
- An additional approach is one in which the NRC can grant a **Specific Exemption** pursuant to 10 CFR § 30.11(a). This section reads:

The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part and parts 31 through 36 and 39 of this chapter as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

- The criteria for the NRC approving a “Specific Exemption” appears to be discretionary and not burdensome, i.e.,: 1) a determination is made that an exemption is authorized by law; 2) that an exemption will not endanger life or property or the common defense, and 3) the exemption is otherwise in the public interest.
- The ACADA is a “military unique item” that is presently deployed throughout the world to protect service members from various types of deadly chemical attacks. Federal law authorizes the ACADA Program/acquisition and appropriations are set aside to acquire said items. There are no laws proscribing an exemption for ACADAs. The granting of an exemption will not endanger life or property or the common defense; it will however, enhance such. The ACADA contains Nickel-63, a beta particle emitter with a low energy level. Beta particles typically cannot penetrate even the thickness of paper. Multiple layers of various materials (aluminum and other materials) within the ACADA, easily

prevents the release of byproduct material to soldiers and civilians. In essence, if Beta particles cannot penetrate a sheet of paper, there is a remote safety issue about it penetrating human skin.

- The granting of an exemption is in the public interest. Millions of taxpayers dollars will be saved by eliminating certain costly and unnecessary maintenance and servicing requirements. The ACADA is safe, has been tested and approved to be such and unequivocally satisfies the criteria of § 30.11 and all expressed NRC regulatory mandates.

SECTION II

RESPONSE TO MEMORANDUM/ ORDER FROM ADMINISTRATIVE

JUDGE BEACHHOEFER DATED

SEPTEMBER 13, 1999

PO's QUESTION. *WHETHER THE ARMY WISH TO UTILIZE GRASEBY IN THE PRESENTATION OF ITS CASE OR, ALTERNATIVELY, WHETHER GRASEBY BELIEVES THAT ITS ADMISSION ON A DISCRETIONARY BASIS WOULD BE BENEFICIAL?*

SBCCOM's RESPONSE. The Army will utilize Graseby in the presentation of its case. Graseby is the manufacturer of the ACADA. Graseby will provide testimony concerning all functions of the ACADA, including safety features, testing accomplished, servicing requirements, failures, quantity produced, costs, eligibility for an exemption, etc.

THE BELOW ISSUES ARE IDENTIFIED BY SBCCOM FOR LITIGATION

1. The denial of an exemption by the NRC was arbitrary, capricious, whimsical and without a reasonable and rational basis in law or fact.
2. SBCCOM was misled by the NRC into adopting an approach that it recommended. HF, Tab 7.

SBCCOM did timely respond to and satisfy all areas of concern presented and identified by the NRC for correction. Tabs 1-27, HF. The NRC did summarily and without adequate warning or reasonable and plausible justification, denied SBCCOM an Exemption.

3. That NRC is estopped to deny the Army an Exemption based upon its prior actions and deeds. The NRC, over a period of exceeding one (1) year, misled (HR, Tab 7) the Army into thinking that an exemption would be approved if all NRC identified concerns, issues, requirements, etc., were addressed and satisfied. The Army satisfied all NRC generated issues, concerns, etc. The Army relied (to its detriment) on the NRC to approve of the exemption if all imposed conditions were satisfied. The NRC changed its original position. The legal principle of estoppel clearly exists in this case.
4. That the present design of the ACADA incorporates all safety features (including tamper resistance screws, leak testing, special tools', etc.) to protect the general and military public against release of byproduct material and said features were incorporated into the ACADA design based upon comments from the NRC.
5. That NRC's regulations, when promulgated, did not contemplate or cover "military unique items". The ACADA is a military unique item. Thus, there are no NRC regulations applicable to the ACADA and other military unique items.
6. That NRC's regulations were promulgated to cover "commercial entities" that construct facilities, make smoke detectors, sell and initially distribute products, items, etc. The Army is not a seller or commercial distributor of ACADAs. It acquires and transfers ACADAs to military personnel in order to protect and save lives in time of conflicts/wars.
7. That the denial of the ACADA an exemption, based upon an interpretation that it is not a "single item", "entire product", "entire unit", "completed product", is not supported by NRC's laws or regulations. Said terms are not included nor defined in the Code of Federal Regulations, applicable to the NRC.
8. That NRC's rationale for its denial based upon the ACADA's *"inner source module, separated from its outer device housing, cannot be licensed as an exempt product"* is without a basis in law, regulation or fact. 10 CFR § 32.26 is silent on this issue.

SECTION III

SBCCOM's MOTION/REQUEST

In addition to responses provided above, SBCCOM hereby respectfully requests the Presiding Officer to provide the below relief:

1. Order the NRC to produce and provide to the Army, all documents, records, files, notes, etc., in its files, records, systems of records, etc., which relate to the licensing and processing of the ACADA's exemption application and subsequent denial, not previously provided and not part of the Hearing File. This request is made pursuant to 10 CFR § 2.744 and the Freedom of Information Act (FOIA), and all other applicable laws, regulations, policies, etc. Reasonable fees will be paid for all FOIA related search and information.
2. Enter a Summary Order/Judgment, etc., pursuant to 10 CFR § 2.749, granting to SBCCOM an exemption, or alternatively, provide other relief deemed appropriate. The Army was intentionally misled by the NRC in embarking upon a course of action and approach to satisfy exemption requirements. This approach was relied upon to the Army's detriment. The NRC's deliberate actions should not cause the further expenditure of funds to litigate this matter. The Hearing File (Tabs 1-28) submitted by the NRC, categorically supports the Army's position. Said file is replete with correspondence to and from the Army and NRC addressing issues. Said correspondence does not allude to or hint that a denial of exemption is forthcoming. There are no genuine issues of material facts at issue.

Respectfully submitted,


Philip B. Hunter

Attorney for Army/SBCCOM
Aberdeen Proving Ground, MD.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE PRESIDING OFFICER, CHARLES BECHHOEFER

OCT 14 P3:50

In the Matter of

OFFICE OF STAFF
RULEMAKING AND
ADJUDICATION STAFF

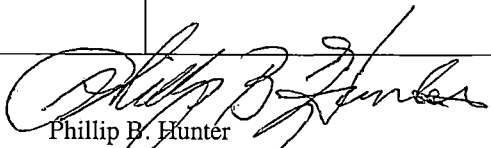
U.S. DEPARTMENT OF ARMY
(Request for Materials License)

Docket No. 30-34610-MI

CERTIFICATE OF SERVICE

I hereby certify that copies of Responses to Judge Bechhoefer's Memorandums/Orders dated September 13 and September 23, 1999, in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk, through facsimile, this 7th day of September, 1999:

Administrative Judge Charles Bechhoefer, Presiding Officer Atomic Safety and Licensing Board Mail Stop T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555	Mitzi A. Young, Esq. * Counsel for NRC Staff Office of the General Counsel Mail Stop-0-15-D21 U.S. Nuclear Regulatory Commission Washington, DC 20555
Dr. Linda W. Little Special Assistant 5000 Hermitage Drive Raleigh, NC 27612	R.J. Dann c/o Neil bloomfield Graseby Dynamics Limited 10640 Main Street, Suite 204 Fairfax, VA 22030
Secretary (2) Attn: Rulemakings and Adjudication's Staff Mail Stop: OWFN-16 C1 U.S. Nuclear Regulatory Commission Washington, DC 20555	Steven V. Reeves * Colonel, U.S. Army Project Manager, NBC Defense Systems SBCCOM 5232 Fleming road Aberdeen Proving, Ground, MD. 21010
Adjudicatory File (2) Atomic Safety and Licensing Board Mail Stop: T-3 F23 U.S. Nuclear Regulatory Commission Washington, DC 20555	Office of Commission Appellate Adjudication Mail Stop: OWFN-16-C-1 U.S. Nuclear Regulatory Commission Washington, DC 20555
Atomic Safety and Licensing Board Panel Mail Stop: T-3 F23 U.S. Nuclear Regulatory Commission Washington, DC 20555	


Phillip B. Hunter
Attorney for SBCCOM/Army