

**TESTIMONY OF DOUGLAS BENEVENTO
EXECUTIVE DIRECTOR OF THE COLORADO
DEPARTMENT OF PUBLIC HEALTH AND
ENVIRONMENT
BEFORE THE SENATE ARMED SERVICES
SUBCOMMITTEE ON READINESS AND MANAGEMENT
SUPPORT
APRIL 1, 2003**

Good morning, my name is Doug Benevento and I am the executive director of the Colorado Department of Public Health and Environment. In that position I am responsible for the oversight of the State of Colorado's air, water, solid waste and hazardous waste programs as well as the bulk of the state's health programs. The majority of the programs that I am responsible for on the environmental side are programs that are delegated to the state through the Clean Air Act, the Clean Water Act, or the Resource Conservation and Recovery Act. Also, I am a member of the Environmental Council of States and serve on that body's executive committee. Also, I am also a co-chair of ECOS' DoD forum, which is designed to open communications with DoD for the purpose of working through issues like this one. I do want to make clear though that today I am speaking for the state of Colorado and not ECOS or the DoD forum.

It is a great honor for me to be testifying before the United States Senate. Prior to moving back to Colorado in June of 1999 I had worked for almost 10 years for Senator Allard in a variety of staff positions and it is truly a great honor to be testifying before a committee he serves on. Also, I spent some time in the mid-90's working for both Mr. Allard and Mr. Roberts on the House Agriculture Committee when Mr. Roberts chaired the full committee and Mr. Allard chaired a subcommittee. I am equally honored to be testifying before a committee he serves on. Throughout the time I spent working in Congress I predominately worked on environmental issues and given the number of active and inactive military sites in Colorado, working on issues surrounding federal facilities was a major issue.

Since returning to Colorado to first run the environmental programs and subsequently to run the entire agency my involvement in federal facilities has increased dramatically both from the standpoint of day to day cleanup and oversight of these facilities to such non-routine matters such as how to handle sarin nerve gas bomblets manufactured decades ago at the Rocky Mountain Arsenal and found in a junk pile at the site.

My experience on both Capitol Hill and in state government has given me a unique perspective on environmental issues as they impact the military. Those who have a background developing environmental laws or those who are environmental regulators tend to automatically react negatively to any change in the laws that could provide more

flexibility to the military. This conclusion is reinforced for me by reviewing testimony from a hearing on this issue last year where colleagues of mine in environmental regulation did a superb job of pointing out every potential and actual shortfall in a similar proposal without offering any suggestions for making the proposal viable.

On the other hand the proponents of more flexibility tend to develop their proposals in isolation and then spring them out at the last moment, professing surprise that there would be any questions that would arise. A good example of this was also last year when final language was proposed and states learned about it at about the time it was being considered in Congress. Last year we did not feel like our advice was being seriously sought or considered.

This year is different and I am very grateful that states are being asked by this committee for their opinions early on. I believe that based upon the early outreach and the willingness that DoD and congressional staff have expressed to me with respect to working on this issue we can craft language that meets the needs of all parties.

Much of the credit for this is due to the outreach that this committee and other committees are engaging in on this topic. I also want to thank DoD for spending a lot of time with me over the past week and walking through the issues they face. My experience is that these kinds of issues are resolvable so long as the lines of communication are open. I commend the committee for helping open those lines of communication.

I am here today to try and offer some suggestions that would be helpful in resolving some of the issues surrounding the proposed amendments to certain environmental laws. These amendments are called the Readiness and Range Preservation Initiative and seek to provide greater flexibility for the military so that they ensure that their training is done in a fashion that is timely and not hindered by unnecessary environmental requirements. I offer my suggestions today in the spirit of allowing DoD to reach that goal while at the same time ensuring that offsite impacts are prevented or mitigated.

The suggestions that I offer today are based upon the principle that no harm to the public would be acceptable to the state of Colorado, DoD, or this committee. I believe that the suggestions that I will offer are consistent with this criterion.

Specifically, I would today like to address the proposal of DoD with respect to the changes they are seeking to CERCLA, RCRA, and the Clean Air Act. These are the environmental laws that my agency is either responsible for implementing through a delegation or, in the case of CERCLA, a law which we partner with EPA on implementing.

With some changes in general I think Colorado would be comfortable with the goals stated by Armed Services Committee staff and DoD of ensuring essential training activities can be accomplished and that public health is protected.

I would like to spend the rest of my time defining what I see as the issues and then offer suggestions on how those issues can be resolved in a fashion that ensures military training can be done without unnecessary delay while also ensuring that public health and the environment is protected. I don't have statutory language to offer at this time but would be happy to draft something for the committee if it would be helpful.

After reading the statutory language and prior testimony on this issue it appears as if DoD is seeking exemptions from certain portions of environmental laws including: the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and seeking time extensions from compliance with portions of the Clean Air Act. My understanding of the intent of the DoD in seeking these exemptions under RCRA and CERCLA is to allow for training at specifically identifiable sites. As I understand, DOD is not seeking to be excused from any cleanup obligations under RCRA or CERCLA for contamination it causes, nor from any off-site impacts, nor from obligations under the Safe Drinking Water Act. Finally, DOD is not seeking a permanent exemption from hazardous waste management requirements under RCRA at the defined sites. Under the CAA my understanding of the intent of the DoD is to allow for movement of planes and other mechanized material between bases without triggering immediate applicability of portions of the CAA. In short:

1. They are seeking time extensions from portions of the Clean Air Act.
2. Also, they are seeking exemptions from RCRA on operational ranges where the military is actively undertaking military training where, "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof," could be found.
3. Finally, they are seeking a clarification of the definition of what is a release under CERCLA.

I would like to comment on the proposed changes to RCRA, CERCLA, and the CAA and to offer some suggestions that from my perspective would make all three proposals more workable.

First, I would like to address RCRA. I want to state at the outset that I don't know of any state that issues RCRA permits or attempts to regulate normal training activities of the military. Colorado has worked well with DoD on training activities on their sites in our state. I think the proposed legislation attempts to codify a generally good relationship with Colorado and other states on these issues.

I have had several conversations with DoD and Armed Services Committee staff on this topic and I think that I understand what they are attempting to accomplish and I think their goals in RCRA should be supportable by states. What DoD is seeking are protections for their training activities on a range. They are not, according to my conversations with them, seeking to exempt themselves from any impact caused by training off of a range.

For example, in conversations with DoD they were clear that under RCRA they are not seeking a change to permitting of open burning or open detonation (OB/OD) when used as a disposal activity. Colorado currently permits such activities and will continue to permit such activities even under their proposed concept. However, under this law an OB/OD activity that is a necessary part of training would be exempt. That is legitimate and currently the practice in Colorado and other states.

At the outset I want to state that like most environmental laws RCRA is relatively old and almost every word in the statute has a meaning applied to it either through adjudication, regulation, or common understanding. The current proposal before you seeks to change definitions in RCRA to exempt out certain training activities on certain DoD sites.

The first issue that I would raise is that the language as drafted allows for exemptions at operational ranges. I can't find a definition of an operational range in current law or regulation and therefore don't know to what ranges this section would apply. There is no limitation on what is an operational range and that obviously causes some concern.

Second, it is also unclear from the drafting whether the activities exempted must be on an operational range or whether certain activities can occur anywhere and still be exempted. My understanding from talking with DoD is that they are seeking exemptions from RCRA at operational ranges for legitimate DoD training activities. If that is correct this language is too broad and should be narrowed to accomplish the end they are seeking --- assurances that sites they operate on would not be subject to RCRA permitting that could interfere with their training.

Third, ground water and surface water protection are also of concern in this regard. Depending upon the soil type and how near the ground water is to the surface there is the possibility that ground water could be contaminated by constituents of spent or live ordnance. Offsite impacts could be created from these activities and these should be addressed. It is my understanding that DOD's proposal would not affect their obligations under the Safe Drinking Water Act. It would be helpful if the legislation stated this explicitly.

Therefore, I would like to suggest the following changes to the language that has been provided to the committee. First, don't change current definitions or any current law; instead create an exemption under a new section of RCRA. Second, limit the exemption to active ranges and inactive ranges and the munitions on those ranges. My understanding after talking with DoD is that they are seeking protection on active ranges and that they are seeking to preserve their ability to use inactive ranges in the future. I would avoid creating new terms, such as "operational range" because it isn't clear what that means. Instead, what I would recommend is that you create an exemption based off current definitions. Third, the exemption for inactive ranges may be controversial. However, the way it was explained to me by DoD was that these are ranges that are potentially useful in the future. The military does not want to give up their potential use because training sites are becoming difficult to find. Therefore, an exemption in both these areas makes sense. However, from a state perspective it would be helpful if every

few years the military was forced to go through a review process of these inactive ranges and, after seeking public input, determine whether they should remain inactive, go to active status, or move to cleanup status. Fourth, limit the exemption with tight language so that we all understand what we are exempting and what we are not exempting. Fifth, I would recommend that some kind of additional ground and or surface water monitoring be required if conditions dictate that to be appropriate. If the monitors did catch contamination then appropriate actions to prevent an environmental or public health concern could be required by states. Sixth, state clearly that in no way does this section impact cleanup responsibilities of DoD once the site no longer meets the definition of an active range. Seventh, mandate that DoD maintain good records of activities that take place on the range so that we know what was used on the site and what will be necessary for cleanup, without an expensive remedial investigation. Finally, it should be made clear that the exemptions are available only to DoD and not to contractors or other private parties.

What this gets you is a solution to the expressed concern that RCRA could impact military training. What it does not do is expose the public to contaminants from ordnance. In this regard, I would also suggest the committee strike the part of proposed § 2019(a)(1)(A)(i)(III) that allows material that goes off-site to be addressed under CERCLA before States can take action under their authorities to protect public health and the environment. There is no military readiness rationale for DoD to be given this priority for off-range material, and States need to be able exercise their authority to protect the public. We have examples in Colorado from sites like the Rocky Mountain Arsenal where we have found it important to have the ability to exercise State authority over potential off-site impacts.

A better approach may be one that several states have already worked out with DOD in a collaborative effort called the “Munitions Response Committee.” In this committee we have agreed with DoD to identify key decision points in the clean up process for which we will seek consensus on decisions. If that can’t be achieved, there would be an expeditious dispute resolution process. If agreement still can’t be achieved, each party would rely on their existing CERCLA and RCRA authorities for action. This approach preserves both DOD’s and States’ existing authorities while making every effort to reach agreement. Further, since there is some agreement on this issue currently, it should not require a statutory change to RCRA or CERCLA.

Finally, there has been considerable work and thinking over the last several years on the role of enforceable land use controls on sites where contamination remains. One example is Colorado’s environmental covenants law. Mechanisms like Colorado’s law give communities and regulatory agencies comfort that contamination is being monitored and that controls to protect public health and the environmental are established and enforced. This kind of approach should be considered for munitions that remain on DOD ranges.

With the above caveats and changes I don’t think that this type of narrow exemption under RCRA should cause a concern for human health or the environment. This

exemption would meet DOD's need to conduct readiness activities without regulatory hindrance.

The next exemption in the language that I have seen surrounds an exemption from the term "release" as used in CERCLA for the purposes of triggering action under that law. The exemption from release would apply to explosives, ordnance, etc on operational ranges but would not apply to releases offsite of an operational range.

As with RCRA conceptually I would agree that there should be some middle ground that could be reached on a narrow exemption under the same criteria I outlined above for RCRA.

Again I would encourage the committee to abandon any rewrite of the body of CERCLA and instead encourage adding on an exemption to CERCLA.

The change being sought by DoD is really a limitation on federal power. Since Superfund is not a delegated law this limitation would apply to an action by the federal government. The only recommendation we would have is that the exemption should apply, as with RCRA above, to active and inactive ranges and not operational ranges because as I noted above there is not yet an established definition of operational range and therefore what that term would apply to is uncertain. There is a definition of active and inactive range that should have some common understanding amongst both the military and environmental regulators that should provide some certainty as to what is being exempted.

Finally, I would like to address the proposed changes to the Clean Air Act.

This portion of the proposal is the most difficult to work with because it involves offsite releases. As I mentioned earlier in my testimony the principle that I ran these proposal through was whether any exemption would allow for an offsite release. Within the borders of a training area I think that statutory flexibility is appropriate. However, as Colorado's top public health official I must be concerned about offsite releases from any activity and then I must try and ensure that those impacts are minimized.

There are two applicable air quality sections of the proposed legislation;

The first is conformity. There are two parts to conformity the first is the concept of general conformity and the second is transportation conformity.

This legislation would exempt the military from meeting the general conformity test that no federal action will cause or contribute to the violation of the National Ambient Air Quality Standards (NAAQS). Under the proposal within 3 years after starting a military readiness activity, DoD would have to come into compliance with the requirements of the applicable law. The general conformity requirements would apply to any non-attainment or maintenance area of a state. In Colorado for example, this would most likely apply to the Colorado Springs area and the Denver area.

The general conformity provisions would most likely apply in Colorado to fog oil or fire that that could lead to particulate non-attainment situations. An area would have to develop a full SIP showing that all other measures are being taken to meet attainment including adoption of any mandatory federal programs prescribed for that type of non-attainment area.

My concern with this language is first and foremost the offsite impacts of the activities and the 3-year exemption from addressing those offsite impacts. However, I am also slightly confused by how this section would be implemented. The language says that there is a 3-year exemption but the administrator must approve the plan. I assume that the administrator and the states would have to show at some point that within years some control of the emissions from the military readiness activity had occurred. Second, I would like further information as to when the 3-year clock would start running. Section 2018(a)(3) states that, “within 3 years of the date new activities begin” the activity must conform to the requirements of the CAA. I think it would be important to have a common understanding on when these activities begin to avoid confusion. For example, if planes are being brought into an area is that a military readiness activity that trigger this section or does the activity begin when the new planes start arriving or when they are all on site.

Also, I think there may be an important practical problem with this approach. My responsibility is to protect public health and environment in Colorado. Therefore, if for example the Denver Metro Area were to fall into non-compliance with the NAAQS my goal would be to put controls in place as quickly as possible to protect air quality in the area. Therefore, if there were a 3-year restriction on controls at any military readiness activity we deemed was contributing to the problem my response would be to make my restrictions on other sources more stringent to make up for what the military was not contributing. As a practical matter what I would want to do in this situation is put control in place to ensure an area’s air quality was safe. Because I would have to wait 3-years for certain exempted activities it would make sense for me to merely shift whatever burden turned out to be to other sources. This you can imagine would not be welcomed by those sources that felt they were being disproportionately controlled.

I don’t want to appear to be hypercritical of this proposal but I think it is important that it be fully understood prior to implementation so that states and EPA know fully what to expect. Also, it is important that DoD understand the potential impact from this change.

My initial suggestion to fix this problem would be to exempt military readiness activities altogether instead of for merely three years. However, you should still require that the emissions budgets be developed as envisioned by this proposal and then require offsets on other non-military readiness activities in the impacted area from DoD sources. For example, requiring stricter controls at any power plants on military bases or require stricter controls for non-exempt vehicle fleets. If this would not offset the emissions increase then they would be required to purchase emissions credits from other sources in the area.

This would meet the intent of DoD. However, this approach also has its own shortcomings that I want to be certain to point out. First, it could require the expenditure of significant amounts of money depending upon the offsets. Second, the offsets may not be available in a given area or may not be sufficient. Third, purchasing credits is a good market based approach but in many areas there is not a well-developed credit-trading program or credits may not be available in a given area.

Another alternative would be to direct EPA to expand their natural events policy to include military activities. As you may know EPA has a policy that allows states to avoid non-attainment due to natural events. This policy has been used by Colorado to avoid PM-10 non-attainment in certain areas of the state that experience significant windborne dust and that result in attainment problems. The purpose of the policy is to first recognize that there are certain uncontrollable events that can cause non-attainment that should not lead to non-attainment designation. However, this policy does have certain mitigation and notification requirements that could be burdensome. Further, the policy would likely have to be adjusted so that it would meet the needs of the military better.

The downside to this proposal of course would be that offsite impacts from training would still occur and may raise the concern of the community.

I would be willing to continue to explore solutions to the issues brought up by DoD but at this point I would encourage the committee to proceed cautiously with this portion of the proposal.

I understand that one of the motivations behind DOD's present proposal is concern about citizen suits potentially impacting its military readiness activities. Consistent with my overall comments, if this is a concern that Congress wishes to address, I suggest an exemption from citizen suits for readiness activities on active ranges rather than the definitional changes to the environmental laws proposed.

Finally, as you are well aware, the question of sovereign immunity for DOD's waste management and cleanup obligations has been dealt with several times over the years by Congress. This has been necessary due to the narrow interpretation given such waivers by the Courts. In the interest of preserving the current state of the law and just narrowly addressing DOD's concern, the committee may wish to affirm that any exemption granted not enlarge the universe of current sovereign immunity.

Thank you for your time and for asking me to testify. I would like to finish by re-emphasizing my belief that most of the issues brought up by DoD are resolvable with appropriate statutory changes. However, the one difficult area I would encourage some caution is with changes to the CAA.