

THE AIR POLLUTION CONTROL DIVISION'S PETITION FOR AN EMERGENCY RULEMAKING

ISSUES AT HAND:

On August 15, 2019, the Colorado Department of Public Health and Environment, Air Pollution Control Division ("Division") was made aware of a Colorado Court of Appeals case, decided on August 1, 2019 (See *Ferraro v. Frias Drywall, LLC*, 2019COA123). The Division was not a party in the District Court, nor at the Court of Appeals. In *Ferraro*, the Court of Appeals held that there is no duty to inspect single-family residential dwellings for suspect asbestos containing materials prior to renovation or demolition. In part, the Court of Appeals based its decision on an inconsistency in the definition of "facility" in Regulation 8, Part B.

In 2001, the Colorado Legislature amended the definition of area of public access to include single-family residential dwellings (See 25-7-502(1)(a) C.R.S.). By including single-family residential dwellings as an area of public access, it is clear from the plain language in the statute the legislature intended that the Air Quality Control Commission (Commission) has the same regulatory authority and duties over single-family residential dwellings as it does over public and commercial buildings. This includes the duty to inspect for suspect asbestos containing materials prior to renovation or demolition. Since the inclusion of single-family residential dwellings as an area of public access, the Division has instituted the same requirements for single-family residential dwellings as it has for public and commercial buildings unless the homeowner opts out pursuant to 25-7-502(1)(c) C.R.S.

WHY AN EMERGENCY RULEMAKING IS NEEDED:

The holding in *Ferraro* has caused regulatory uncertainty, which has crippled the Division's ability to ensure single-family residential homeowners are protected from asbestos spills and improper asbestos abatement. This is in direct conflict with the statutory mandate prescribed by the legislature in 2001.

THE AIR QUALITY CONTROL COMMISSION'S AUTHORITY AND BASIS FOR ADOPTING AN EMERGENCY RULE:

The Commission may adopt an emergency rule where it has found that immediate adoption of the rule is imperatively necessary to comply with a state law or to ensure the preservation of public health, safety or welfare and compliance with the normal rulemaking requirements is contrary to public interest. See 24-4-103(6) C.R.S. and 5 Code Colo. Reg. § 1001-1, Commission Procedural Rules, § V.C.6.a.

It is clear from the plain language of 25.7.502(1) C.R.S. that, unless the homeowner opts out, single-family residential dwellings must be regulated the same as public and commercial buildings are regulated. The failure to do so puts the health, safety and welfare of single-family residential homeowners at risk for asbestos spills and improper abatement. Hundreds of inspections and asbestos abatement involving single-family residential dwellings occur every week. During this time of regulatory uncertainty, the Division is unable to ensure the proper procedures are followed for single-family residential dwellings. Therefore, an immediate adoption of revisions to Regulation 8, Part B regarding requirements for single-family residential dwellings is imperatively necessary both to comply with state law and ensure the preservation of public health, safety, and welfare. Furthermore, following the normal timing for rulemaking may lead to thousands of asbestos spills and improper abatement in the homes of Colorado citizens. Therefore, compliance with the normal rulemaking requirements in § 24-4-103 C.R.S. is contrary to the public interest.

SUMMARY:

In response to the regulatory uncertainty caused by *Ferraro*, the Division is proposing minimal changes to Regulation 8, Part B to clarify the requirements for single-family residential dwellings, ensure compliance with state law and preserve public health, safety and welfare.

ATTACHMENTS:

1. Proposed rule revisions - Regulation Number 8, Part B
2. Findings in Support of Adoption of Emergency Revisions to Regulation 8, Part B Clarifying the Requirements for Single-Family Residential Dwellings.
3. Agenda Item Control Sheet
4. Memorandum of Notice

CONTACT:

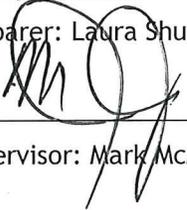
Please contact Laura Shumpert, with the Air Pollution Control Division, Indoor Environment Program at 303-692-3102 or at laura.shumpert@state.co.us with any questions.

SIGNATURES:



Preparer: Laura Shumpert

9/27/19
Date



Supervisor: Mark McMillan

9/27/19
Date



Division Director: Garry Kaufman

9/27/19
Date