

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*, 451 P.3d 1255 (Colo. App. 2019)). 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.

The holding in *Ferraro* caused regulatory uncertainty, which crippled the Division's ability to ensure single-family residential homeowners are protected from asbestos spills and improper asbestos abatement. This was in direct conflict with the statutory mandate prescribed by the legislature in 2001. Therefore, on October 16, 2019, the Commission adopted narrow emergency revisions to Regulation 8, Part B in order to restore the status quo. These emergency revisions are temporary and will expire after 120 days, which is February 13, 2020.¹ Therefore, on January 16, 2020, the Commission will hold a normal rulemaking hearing to determine if these same narrow temporary revisions should be adopted on a permanent basis.

WHY AN EMERGENCY RULEMAKING IS NEEDED:

If the narrow revisions are adopted on a permanent basis on January 16, 2020, the earliest they will become effective is March 1, 2020, and potentially may not become effective until March 16, 2020.² Therefore, an emergency rulemaking is needed to bridge the gap between when the temporary rule expires on February 13, 2020 and when the permanent rule becomes effective. Should the temporary rule expire before the permanent rule becomes effective, the holding in *Ferraro* will again cause regulatory uncertainty and cripple the Division's ability to ensure single-family residential homeowners are protected from asbestos spills and improper asbestos abatement.

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.

¹ See § 24-4-103(6), C.R.S.

² See § 24-4-103(5) and (11), C.R.S. See also APCD_EMER_PET_EX-001, the Colorado Register Publishing Calendar, which can be found at <https://www.sos.state.co.us/pubs/CCR/registerCalendar.html>

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. Should the temporary rule expire before the permanent rule becomes effective, the Division will again be unable to ensure the proper procedures are followed for single-family residential dwellings. Therefore, an adoption of the narrow 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 is not feasible to bridge the gap between when the temporary rule expires on February 13, 2020 and when the permanent rule becomes effective. A gap may lead to hundreds 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. to bridge the gap is ineffective and contrary to the public interest.

SUMMARY:

Because the temporary rule revisions adopted in October 2019 will expire before the permanent rule becomes effective, the Division is requesting the Commission adopt the identical narrow revisions to Regulation 8, Part B on an emergency basis to bridge the gap between when the temporary rule expires on February 13, 2020 and the permanent rule becomes effective.

ATTACHMENTS:

1. Proposed rule revisions - Regulation Number 8, Part B
2. Findings in Support of Adoption of Emergency Revisions to Regulation 8, Part B, Which Clarify the Requirements for Single-Family Residential Dwellings, in Order to Bridge the Gap Between When the Temporary Rule Expires and the Permanent Rule Becomes Effective.
3. Agenda Item Control Sheet
4. Memorandum of Notice

CONTACT:

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SIGNATURES:


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