

REGULATORY ANALYSIS

for Proposed Emergency Narrow Revisions
Colorado Air Quality Control Commission
Regulation Number 8, Part B
5 CCR 1001-10, Part B
October 7, 2019

The Colorado Department of Public Health and Environment, Air Pollution Control Division (Division) hereby submits this Regulatory Analysis pursuant to the requirements set forth in 5 Code Colo. Reg. § 1001-1, § V.C.6.a and the Colorado Administrative Procedure Act (“APA”) § 24-4-103(4.5), C.R.S.

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Introduction

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 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 Air Quality Control Commission (“Commission”) 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 Commission have 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.

Because of the regulatory uncertainty, violation of state law and threat to the preservation of public health, safety and welfare caused by *Ferraro*, the Division is requesting the Commission conduct an emergency rulemaking to clarify the regulatory requirements for single-family residential dwellings.

- (I) A description of *the classes of persons who will be affected* by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule:

Any person, including an individual or entity, who is required to inspect and/or abate prior to the renovation or demolition of a single-family residential dwelling, that is not already required to do so under the Federal National Emission Standards for Hazardous Air Pollutants, will bear the costs of the proposed rule revisions. However, because these narrow rule revisions only clarify requirements that have been in place for over fifteen years, this class of people will not incur any additional costs beyond what they have been incurring for over fifteen years.

Any person who may be exposed to asbestos from spills and/or subject to liability from exposure will benefit from the proposed rule revisions. This may include, but is not limited to, current owners of single-family residential dwellings, future owners of single-family residential dwellings, tenants (both long and short-term) of single-family residential dwellings, people who provide services for single-family residential dwellings (e.g. city and county building department inspectors, maintenance workers, trash collectors, etc.), individuals who may come into contact with people doing renovations or demolitions to/of single-family residential dwellings, neighbors of people doing renovations or demolitions to/of single-family residential dwellings¹ and real estate professionals who sell single-family residential dwellings.

Members of the business or governmental sectors who are certified to perform asbestos related activities will also benefit from the proposed rule revisions. Because the proposed revisions only clarify what has been in place for over fifteen years, if adopted the members of this class will benefit from the continuation of need for their services. This class includes, but is not limited to, General Abatement Contractors, Workers, Supervisors, Asbestos Building Inspectors, Project Designers, and Air Monitoring Specialists.

Members of business or governmental sectors who support professionals who perform asbestos related activities will also benefit from the proposed rule revisions. This class includes, but is not limited to, labs, supply companies, and training providers.

¹ The Division often receives complaints from neighbors of people performing renovations to single-family residential dwellings since the renovators have left what often is asbestos containing materials in the yard which adjoins to the neighbor's house.

- (II) To the extent practicable, *a description of the probable quantitative and qualitative impact* of the proposed rule, economic or otherwise, upon affected classes of persons;

Individuals or entities who are required to inspect and/or abate prior to the renovation or demolition of a single-family residential dwelling, that are not already required to do so under the Federal National Emission Standards for Hazardous Air Pollutants, will sustain a negative economic impact from the proposed rule revisions. Costs related to asbestos inspections average \$500 to \$1000 per inspection. Costs related to asbestos abatement depend on the size and complexity of the project, so may range from a few hundred dollars to thousands of dollars. However, the proposed revisions only clarify what has already been implemented and this affected class has been complying with for over fifteen years.

Any person who may be exposed to asbestos from spills and/or subject to liability from exposure will benefit both economically and health-wise from the proposed rule revisions. The inclusion of single-family residential dwellings as an area of public access was to protect people in this class from asbestos spills and/or exposure. The economic benefit for people in this class includes, but is not limited to, a decrease in costs they will have to bear from asbestos spills. The health benefits include avoidance of exposure to asbestos.

Members of the business or governmental sectors who are certified to perform asbestos related activities, and those sectors supporting them, will also benefit economically from the proposed rule revisions. Because the proposed rule revisions restore the regulatory requirements that have been in effect for over fifteen years, members of this class will be able to maintain their normal level of business or, in some cases, remain in business.

The Division has further analyzed economic impacts in the Economic Impact Analysis (“EIA”), developed in accordance with § 25-7-110.5(4). The EIA is attached to this Regulatory Analysis as Exhibit A.

- (III) The probable *costs to the agency* and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

Since the proposed rule revisions only clarify what the requirements have been for over fifteen years, they will not require any additional costs to the Division or to any other agency.

However, if the proposed revisions are not adopted, the Division will incur additional costs to adjust enforcement and implementation. Since the *Ferraro* decision, a significant portion of the Division’s time has been spent answering questions and responding to concerns from the public. Division revenues will also be decreased since, pursuant to the limits imposed by the holding in *Ferraro*, the Division is unable to require that individuals or contractors performing abatement on single-family residential dwellings apply and pay for a permit.

(IV) *A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;*

Should the Commission adopt the proposed rule revisions, the probable costs include those related to required inspections and abatement in single-family residential dwellings.

Should the Commission adopt the proposed rule revisions, the probable benefits include the economic and health related benefits discussed above in § II.

The probable benefits of inaction are that contractors and/or individuals renovating or demolishing single-family residential dwellings will not incur the time and cost of inspections and asbestos abatement.

The probable costs of inaction will be continued regulatory uncertainty, the potential for more asbestos spills, violation of state law, increased costs to homeowners in response to asbestos spills, increased risks to public health, safety and welfare, loss of business, loss of Division revenue, and increased liability for those selling single-family residential dwellings.

(V) *A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;*

The proposed rule revisions are narrowly tailored and are, what the Division believes, the minimum amount required to address the problems caused by the *Ferraro* opinion. Therefore, what has been proposed is already the least costly and least intrusive method for achieving the purpose of the proposed rule revisions.

(VI) *A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.*

The purpose of the proposed rule revisions is to remedy the regulatory uncertainty and threat to the preservation of public health, safety and welfare that *Ferraro* has created. Although the Division understands there are several areas in Regulation Number 8, Part B that relate to single-family residential dwellings, the Division believes that any other alternative methods or revisions would go beyond the remedy required in this situation. Therefore, the Division rejected any alternative methods or revisions in favor of only those revisions necessary to remedy the regulatory uncertainty and threat to public health, safety and welfare at hand.

Quantification of the Data

APA § 24-4-103(4.5)(b) calls for, to the extent practicable, a quantification of the data for both short-term and long-term consequences underlying the regulatory analysis provided in sections (I) through (VI) above. To provide further quantification of the data for both the long- and short-term consequences of the proposed rule, the Division is including the EIA. This analysis is attached as Exhibit A. This document includes additional detail on the direct costs and benefits of the proposed rule.

EXHIBIT A

**ECONOMIC IMPACT ANALYSIS
(Initial Analysis)**

Item Title: Regulation Number 8, Part B

Meeting Date: October 16, 2019

ISSUE

A Colorado Court of Appeals decision has caused regulatory uncertainty, violation of state law and threat to the preservation of public health, safety and welfare. Therefore, the Division is proposing narrow revisions to Regulation Number 8, Part B to clarify the asbestos requirements for single-family residential dwellings.

REQUIREMENTS FOR ECONOMIC IMPACT ANALYSIS (“EIA”)

Section 25-7-110.5(4)(a), C.R.S. sets forth the requirements for the initial and final Economic Impact Analysis, as stated below:

Before any permanent rule is proposed pursuant to this section, an initial economic impact analysis shall be conducted in compliance with this subsection (4) of the proposed rule or alternative proposed rules. Such economic impact analysis shall be in writing, developed by the proponent, or the division in cooperation with the proponent and made available to the public at the time any request for hearing on a proposed rule is heard by the commission. A final economic impact analysis shall be in writing and delivered to the technical secretary and to all parties of record five working days prior to the prehearing conference. If no prehearing conference is scheduled, the economic impact analysis shall be submitted at least ten working days before the date of the rule-making hearing. The proponent of an alternative proposal will provide, in conjunction with the division, a final economic impact analysis five working days prior to the prehearing conference. The economic impact analyses shall be based upon reasonably available data. Except where data is not reasonably available, or as otherwise provided in this section, the failure to provide an economic impact analysis of any noticed proposed rule or any alternative proposed rule will preclude such proposed rule or alternative proposed rule from being considered by the commission. Nothing in this section shall be construed to restrict the commission's authority to consider alternative proposals and alternative economic impact analyses that have not been submitted prior to the prehearing conference for good cause and so long as parties have adequate time to review them.

Per Section 25-7-110.5(2), C.R.S., the requirements of Section 25-7-110.5(4) shall not apply to rules which: (1) adopt by reference applicable federal rules; (2) adopt rules to implement prescriptive state statutory requirements where the AQCC is allowed no significant policy-making options; or, (3) adopt rules that have no regulatory impact on any person, facility or activity.

DISCUSSION

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 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) C.R.S.). By including single-family residential dwellings as an area of public access, it is clear from the plain language of the statute the legislature intended that the Air Quality Control Commission (“Commission”) have 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 Division has requested the Commission conduct an emergency rulemaking on October 16, 2019, to clarify the regulatory requirements for single-family residential dwellings. If adopted, those emergency rule revisions will only be effective for 120 days. The proposed rule revisions in this request for hearing packet are identical to the emergency rule revisions.

The Division provides the following information to satisfy the economic analysis requirements relating to adoption of the proposed revisions to Regulation Number 8, Part B:

- A) Identify of the industrial and business sectors that will be impacted by the proposal;
- B) Quantify the direct cost to the primary affected business or industrial sector;
- C) Incorporate an estimate of the economic impact of the proposal on the supporting business and industrial sectors associated with the primary affected business or industry sectors.

Section 25-7-110.5(4)(c)(III), C.R.S.

- A) Identification of the industrial and business sectors that will be impacted by the proposal**

Any person who is involved with the renovation or demolition of a single-family residential dwelling.

- B) Quantification of the direct cost to the primary affected business or industrial sector;**

If a person or entity intends to renovate or demolish a single-family residential dwelling, the costs may include those related to asbestos inspection and/or abatement. Costs related to asbestos inspections average \$500 to \$1000 per inspection. Costs related to asbestos abatement depend on the size and complexity of the project, so may range from a few hundred dollars to thousands of dollars. However, as this is a clarification of requirements that have been in place for over fifteen years and not a new mandate, there should not be any additional costs.

If the Commission chooses not to adopt the proposal, members of the primary affected business or industrial sector who are certified to perform asbestos related activities may sustain a negative economic impact. Furthermore, Colorado homeowners may incur additional costs related to asbestos spills.

C) Incorporation of an estimate of the economic impact of the proposal on the supporting business and industrial sectors associated with the primary affected business or industry sectors;

The Division is unaware of any members in the supporting business and industrial sectors associated with the primary affected business or industry sectors that will incur additional costs. Furthermore, as this is a clarification and not a new mandate, there should not be any additional costs.

If the Commission chooses not to adopt the proposal, members who support the asbestos industry (e.g. labs, supply companies, training providers, etc.) may sustain a negative economic impact.

SUMMARY AND CONCLUSION

The Division prepared this Initial Economic Impact Analysis in accordance with the requirements of Section 25-7-110.5(4), C.R.S. Specifically, the Division utilized the methodology identified in Section 25-7-110.5(4)(c)(III), C.R.S.

The Division has provided an estimate of costs based on reasonably available information and will consider any additional information provided by stakeholders. The Division requests that affected industry submit any additional information with regard to the cost of compliance with these proposed rule revisions.