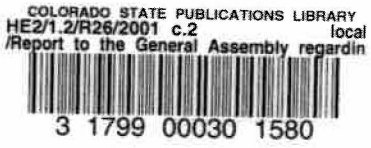

STATE OF COLORADO

Colorado Department
of Public Health
and Environment

Report to the General Assembly Regarding the Definition of "Area of Public Access"

Submitted to the Colorado Legislature
by the Air Quality Control Commission
Colorado Department of Public Health and Environment
November 1, 2001

In accordance with the requirements of § 25-7-502 (1) (b), C.R.S., the Colorado Air Quality Control Commission respectfully submits this report with its recommendation regarding the definition of "Area of Public Access" in the context of asbestos abatement.

I. INTRODUCTION

The Colorado Air Quality Control Commission established a stakeholder process, to review and make a recommendation concerning the definition of "Area of Public Access" set forth in § 25-7-502(1)(a), C.R.S. The Commission held three workgroup meetings to identify and discuss the issues. The Colorado Department of Public Health and Environment's Air Pollution Control Division, industry representatives, other concerned individuals and members of the Commission attended the meetings. The following is a summary of the workgroup discussions and the Commission's recommendation regarding the need to change the statutory definition of "Area of Public Access."

II. BACKGROUND

The definition of "Area of Public Access" is important to Colorado's asbestos management program because many of the requirements governing asbestos abatement projects apply only when the abatement is occurring or impacting such public access areas. The term is presently defined in statute as follows:

> "Area of Public Access" means any building, facility, or property, or only that portion thereof, that any member of the general public can enter without limitation or restriction by the owner or lessee under normal business conditions; except that "area of public access" includes a single family residential dwelling and any facility that charges the general public a fee for admission, such as any theater or arena. For the purposes of this subsection (1) "general public" does not include employees of the entity that owns, leases, or operates such building, facility, or property, or such portion thereof, or any service personnel or vendors connected therewith.

§ 25-7-502 (1) (a), C.R.S.

In 2000, the Colorado Department of Regulatory Agencies issued a sunset report describing the "Area of Public Access" definition as vague and complex. Department of Regulatory Agencies further reported that the above definition might prevent effective enforcement of the state's asbestos control laws, and could lend itself to interpretation instead of providing a framework of specificity for the regulating agency. As part of the sunset review process, Senate Bill 01-121 was introduced, passed and signed into law by Governor Bill Owens. It extended the asbestos management program and directed the

Commission to establish a stakeholder process to review the statutory definition and provide a report to the General Assembly by November 1, 2001, outlining the Commission's recommendations, including suggested statutory changes, if any.

III. SUMMARY OF MEETING DISCUSSIONS

The Department of Regulatory Agencies report, generated with limited input from the public, stated that there might be problems with the definition of "Area of Public Access;" however, it did not specifically identify the potentially problematic portions of the statutory provision. The workgroup spent significant time identifying and discussing potential issues with the current definition. The stakeholder workgroup discussions highlighted two basic areas of concern: 1) whether the phrase "without limitation or restriction" contained in the present definition could be interpreted to restrict regulation of abatement projects in areas that historically have been deemed to be areas of public access; and 2) the issue of airflow within buildings and how situations involving airflow from one section of a facility that may be restricted to another that may be open to the general public would fit within the statutory definition of "Area of Public Access."

The workgroup also discussed the inclusion of single family residences in the "Area of Public Access" definition and the belief that vendors and service personnel should be considered members of the general public when interpreting the definition of areas of public access. The workgroup determined that, because the provisions including single family residences and excluding vendors and service personnel are not ambiguous, recommendations regarding these issues were inappropriate.

The stakeholder workgroup discussed resolution of the issues once it had identified the potential problems with the definition. The group agreed to consider three possible courses of actions for each issue: 1) recommend a change to the statutory language; 2) address the issue on the administrative level, either through revisions to the regulation or through written guidance; or 3) recommend no action on either the statutory or regulatory level.

IV. ANALYSIS OF OPTIONS AND RECOMMENDATIONS

The workgroup recognized several general principles that helped guide its discussions. First, stakeholders concluded that the current definition has worked well for several years and has yet to pose a significant problem to the enforcement of the regulations. Second, the group recognized that there are ambiguities inherent in any definition and, therefore, any statutory change may not necessarily provide clarity as to what constitutes an "Area of Public Access." Third, group members identified that the current statutory definition resulted from a compromise among interested parties a number of years ago.

A. Potential Changes to the "Without Limitation or Restriction" Language

Much of the group's analysis focused on whether the phrase "without limitation or restriction" in the statutory definition jeopardized the Air Pollution Control Division's ability to enforce the regulatory requirements in areas that have been considered "Areas of Public Access." For example, division representatives stated that visitors to its own offices must check in with a receptionist and be allowed entrance through an otherwise locked door to gain access to the offices. Based on this, the division pointed out that one could argue that the division offices were not areas of public access and thus not subject to many of the requirements of Regulation Number 8, Part B. Other examples the group discussed involved buildings that allowed public access during certain hours, but were closed at other times of the day or on certain days of the week, and businesses that typically allowed members of the public to enter, but that might deny access to a particular individual either because that individual did not have business on the premises or had caused some sort of disturbance warranting exclusion.

While accepting that such arguments might be made, the group also accepted that each of these examples constituted "Areas of Public Access" under the present definition. The group agreed that concerns with respect to such areas did not warrant a change to the statutory definition. Several workgroup members stated that they understood the present definition to exclude only a very limited number of facilities, such as highly secured areas of some facilities and turbine rooms at power plants. Stakeholders expressed a perspective that the division's current application of the program accurately reflects the intent of the statute.

Consequently, the workgroup did not believe that deletion of or changes to the phrase "without limitation or restriction" in the statutory definition were necessary.

The group did acknowledge that under the current definition, groups or individuals that are unfamiliar with asbestos abatement practices in Colorado might have some questions as to the precise scope of the "Area of Public Access" definition. The stakeholder workgroup recommended that the Commission and/or the division consider some form of administrative directive to further clarify the statutory definition, such as a list of examples of what areas are included and excluded.

B. Airflow Within Facilities

There was limited discussion regarding the role that airflow plays in determining "Areas of Public Access." Division representatives reported that an analysis of airflow is a component in determining whether a particular area should be considered an "Area of Public Access." To explain this, the division discussed the example of a bank lobby. Technically, members of the general public are restricted from the teller area, yet any

abatement performed in that area would clearly impact the general public since there is a free flow of air from the teller area to the area in which the public stands. In this example, stakeholders agreed that the teller area should be considered an "Area of Public Access." The workgroup further acknowledged, however, that other cases involving air flow may be less clear and will need to be addressed on a case-by-case basis, recognizing the statutory limitation in § 25-7-501(1), C.R.S., that abatements themselves must be in "locations to which the general public has access."

The work group generally agreed that the current statutory definition is flexible enough to address specific situations involving airflow concerns in light of the statute's broader goal of protecting the general public from exposure to asbestos fibers within the limits stated. Therefore, the workgroup did not believe that the statutory definition should be revised based on this issue.

V. RECOMMENDATION

The Commission recommends that no changes to the statutory definition be made at this time.

The Commission believes that it may be possible to improve the unfamiliar reader's understanding of the definition through the provision of a list of examples of its application, but that this is probably best accomplished outside the language of the statute. The Commission also believes that some form of administrative directive to further clarify the statutory definition, such as a list of examples illustrating areas that are included and excluded, might assist the uninitiated reader in understanding the application of "Area of Public Access" in light of the "without limitation and restriction" language in the statute.

The Commission agrees with the legislative declaration in § 25-7-501(1), C.R.S., that states, in part, "It is the intent of the general assembly to ensure the health, safety, and welfare of the public by regulating the practice of asbestos abatement in locations to which the general public has access for the purpose of ensuring that such abatement is performed in a manner which will minimize the risk of release of asbestos. However, it is not the intent of the General Assembly to regulate occupational health practices which are regulated pursuant to federal laws or to grant authority to the Department of Public Health and Environment to enter and regulate areas where general public access is limited."