



WHAT REAL ESTATE PRACTITIONERS NEED TO KNOW
ABOUT THE NEW COLORADO ASBESTOS REGULATIONS

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THE NEW REGULATIONS

- Introduction to the Regs
 - Basics
 - History
 - Relevance to real estate practice
- Requirements
- Issues and Questions
- Practice Considerations



INTRODUCTION TO THE NEW REGULATIONS

The Basics

- Govern management of asbestos contaminated soils
- Effective April 30, 2006
- Codified at 6 CCR 1007-2, Colorado Department of Public Health and Environment Solid Waste regulations
- Amend existing definitions in Section 1.2
- Replace former Section 5 – Asbestos Waste Management
- Draft guidance was issued in April 2006



INTRODUCTION TO THE NEW REGULATIONS

What do they replace?

- “Reg. 8” was the principal rule
- Designed to address asbestos abatement in buildings and other structures
- Soil standard intended for soil in crawl spaces
- Asbestos-contaminated soil defined as greater than 1% asbestos or visible friable asbestos
- Required removal of top 2” of soil or sealing
- Notification, and if trigger quantities of material encountered, permitting was required
- Other requirements also applied



INTRODUCTION TO THE NEW REGULATIONS

Some History

- Discovery of asbestos contaminated soils at Lowry triggered action
- Rulemaking process commenced in March of 2005 and final rule was effective in April 2006
- Current rule is subject to challenge



INTRODUCTION TO THE NEW REGULATIONS

Why does a real estate practitioner care?

- Regulatory requirements are likely to be triggered on sites where there is any history of demolition (or dumping)
- New regulations impose additional procedural and cleanup obligations--time and money that needs to be accounted for in the property transaction
- New regulatory approvals ideally will need to be addressed prior to any soil disturbing activities and may inject new regulatory consultation element to due diligence activities
- Failure to identify and appropriately manage asbestos can lead to significant legal liability to client and business risk



INTRODUCTION TO THE NEW REGULATIONS

Why does a real estate practitioner care?

Two Cautionary Tales:
A Sharp Eye Saves the Day



INTRODUCTION TO THE NEW REGULATIONS

Why does a real estate practitioner care? Two Cautionary Tales: Carelessness is Expensive and Risky

THE COST OF REMEDIATION • AIR FORCE QUESTIONS ASBESTOS RISK, NEED FOR SOIL REMOVAL



The Air Force reports that asbestos at the Lowry site poses little threat and does not require the removal of soil, as will be done Wednesday at the corner of 11th Avenue and Spruce Court. State health official Jeff Edson says the report has a lot of holes.

AF disputes state on Lowry cleanup

By Kristi Arellano
Denver Post Business Writer

Health risks from asbestos at Lowry are negligible and do not necessitate soil removal, the Air Force said in a report made public Wednesday.

Those findings could make it harder for the Lowry Redevelopment Authority and 12 builders working in the northwest neighborhood to reclaim any of the \$15 million spent cleaning up 250 lots and public spaces.

State health officials, who ordered soil removal, immediately disputed the Air Force's findings.

"There are a lot of holes in the report," said Jeff Edson, manager of the Colorado Department of Public Health and Environment's remediation and restoration unit. The department issued its own assessment of the Lowry site and requiring the extensive cleanup, which is nearly

complete.

Edson said the government report only considered the risk of trace levels of asbestos in the soil and did not account for debris that contains asbestos, which has been found at the surface of property on the former Air Force base. The report also overlooked the extra risk posed by a certain type of asbestos that has been found at Lowry, he said.

Health risks from exposure to asbestos can range from respiratory problems to cancer.

The debate over the report is the latest salvo in a battle that has raged since last April, when asbestos was found in the soil at Lowry. The asbestos was traced to a group of hospital buildings demolished decades earlier.

About 4,000 homes will be built at Lowry. Construction is to be complete by 2009.

The Air Force has taken responsibility for

Air Force findings on Lowry risk disputed

LOWRY FROM PAGE 1C

The debris but said the level of sampling and cleanup required by the state is "not based on science."

"There are rules and regulations and laws that determine how we spend money for clean-up," said Doug Karas, a spokesman for the Air Force's real property agency. The Air Force cannot pay for a cleanup not scientifically justified, he said.

About \$3 million has been spent so far. The redevelopment authority has picked up nearly 23 percent of the tab and is working with the state's congressional delegation to force the Air Force to reimburse the cleanup costs.

"The Air Force and the state can't agree on the element of risk, and that's frustrating for us," said Tom Markham, executive director of the Lowry Redevelopment Authority.

The authority joined the Air Force in its initial opposition to the state's requirements but still had to comply with the order, Markham said.

Karas cautioned that the Air Force's findings are based on an initial assessment of 14 samples collected from 22 acres that should be owned. The report is the result of an extrapolation without a more extensive order, he said.

Air Force residents concluded that the debris is not as hazardous as workers thought. The Air Force would like to see an immediate cleanup. The Air Force would like to see six more samples collected from 100,000 people. The Air Force would like to see six more samples collected from 100,000 people. The Air Force would like to see six more samples collected from 100,000 people.

BY THE NUMBERS

- The Lowry Redevelopment Authority and home builders have paid nearly \$8 million of a projected \$15 million to test for and clean up asbestos buried when a hospital was demolished decades ago. Here's how tests were done and the results:
- Samples have been collected from about 250 residential lots, two small parcels and several median strips, and from property owned by the Air Force.
- 23,274 soil samples have been taken.
- 21,707 samples came back negative for asbestos.
- 1,486 samples showed trace amounts.
- 71 pieces of debris that contained asbestos, including floor tile, siding, pipe and pipe wrapping and three rocks, were found.
- There is no evidence of indoor contamination in homes, nor evidence of outdoor site exposure to workers outside.

SEE LOWRY ON 2C



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REQUIREMENTS OF THE NEW REGULATIONS

Triggers

- Requirements apply to the owner or operator of any property with asbestos-contaminated soil at which soil-disturbing activities are occurring or planned
- Requirements are triggered “when the owner or operator has reason to know of asbestos-contaminated soil at a site...or has reason to believe that visible asbestos may be encountered”
- Asbestos-contaminated soil is soil “containing any amount of asbestos”



REQUIREMENTS OF THE NEW REGULATIONS

Exemptions

- Solely non-friable material that has not been rendered friable as determined by an asbestos building inspector may be simply removed from soil and properly disposed of
- Asbestos abatement of facility components
- Spill response
- “Ambient occurrences” of asbestos in soil (naturally occurring or distributed by normal wear of automotive parts, for example)
- Excavations involving less than 1 cubic yard of soil using low-emission methods, such as light equipment or hand tools
- Projects conducted by homeowners such as residential landscaping after the primary dwelling is built



REQUIREMENTS OF THE NEW REGULATIONS

Unexpected Encounters

- All soil disturbing activity must stop, site access must be controlled, and soils must be stabilized
- Notify the HMWMD of CDPHE within 24-hours of discovery
- A Soil Characterization and Management Plan must be approved before continuing soil disturbing activities
- Operators may obtain approval of a plan from CDPHE in advance



REQUIREMENTS OF THE NEW REGULATIONS

Known Areas

- HMWMD must be notified 10 working days in advance; will use “best efforts” to review and respond within 10 days of receipt
- Among other things the notice must include a Soil Characterization and Management Plan
- The Plan must include, among other things:
 - Proposed soil sampling or soil characterization
 - Description of planned soil disturbing activity
 - Exposure mitigation measures
 - Methods of preventing exposure to undisturbed asbestos contaminated soil appropriate to future use (such as paving or clean cover)
 - Disposal plan
- Once the plan is approved, soil disturbing activities may commence



REQUIREMENTS OF THE NEW REGULATIONS

Remediation

- A remediation plan must be submitted if the property owner chooses to “remediate (rather than just manage) all or a portion of the property containing asbestos contaminated soil”
- Remediation is “a cleanup or removal to prevent or minimize the possible current or future release of hazardous substances to prevent an unacceptable threat to present or future public health, welfare or the environment”



REQUIREMENTS OF THE NEW REGULATIONS

Remediation

- The remediation plan must include:
 - A soil characterization and management plan
 - A detailed description of planned remediation activities
 - Proposed use and area of remediation
 - Planned engineering controls to prevent exposure to any asbestos left in place
- CDPHE has 45 days to review and approve or deny



REQUIREMENTS OF THE NEW REGULATIONS

Training

- Asbestos-contaminated soil awareness training required for individuals conducting soil disturbing activities
- Inspection and identification of asbestos in soil shall be conducted by a certified asbestos building inspector
- Soil characterization and management plan must be prepared and signed by a certified asbestos project designer
- Air monitoring must be performed by a certified air monitoring specialist
- Training records must be available for CDPHE review



REQUIREMENTS OF THE NEW REGULATIONS

Disposal of soils

- Only soils that are not asbestos-contaminated *based on analysis showing no detectable amount of asbestos may be placed back into the disturbed area*, used as a fill or disposed as solid waste
- Container, documentation and other disposal requirements apply



REQUIREMENTS OF THE NEW REGULATIONS

Fees

CDPHE is required to collect fees for review of the soil characterization and management plan, related documents, and oversight



ISSUES AND QUESTIONS

Avoiding the Trigger:

When does an owner or operator have “no reason to know or suspect of asbestos contaminated soil at a site”?

- Basis for determination
 - Actual knowledge, or
 - Review of historical records
 - Interviews with past and present site personnel, if possible
 - Use an environmental professional
- No actual knowledge of asbestos
- Historical review indicates “low potential of encountering asbestos”
- Actual encounter during construction will trigger regulations



ISSUES AND QUESTIONS

How do you invoke the exemptions?

Non-Friable Asbestos

- Engage a certified building inspector to determine whether or not asbestos is friable
- Non-friable material can be simply removed from the soil and properly disposed of
- Disposal requirements of the new regulations will apply
- Less expensive



ISSUES AND QUESTIONS

How do you invoke the exemptions?

Abatement and Spill Response

- Facility components formerly addressed solely under Reg. 8 will include transite pipe, vaults, and other subsurface structures and now are subject to the new regulations as well as work practices under Reg. 8
- Debris containing trace amounts of asbestos that comes into contact with soils during building abatement can remain during demolition and be disposed of as construction debris



ISSUES AND QUESTIONS

How do you invoke the exemptions?

Ambient Asbestos

- If asbestos is present, can it be attributed to naturally occurring sources or non-site specific activities?
- Helpful if asbestos shows up in soil sampling, without clear source associated with historical on-site activities



ISSUES AND QUESTIONS

How do you invoke the exemptions?

Small and Homeowner Projects

- Homeowner projects
 - Primary residence only
 - Only done by the private individual, not a contractor
 - Does not apply to projects performed by person who does not own the property
- Small projects
 - Only less than 1 cubic yard of soil and low-emission techniques



ISSUES AND QUESTIONS

What is the difference between “remediating” and “managing” asbestos contaminated soils?

- Management (mandatory)
 - Only soil disturbed during a project must be removed and disposed of
 - Leaving undisturbed soils in place is allowed as long as there is no exposure pathway
 - Requirements including notification, planning, excavation techniques, and monitoring are mandatory
- Remediation (options)
 - Soils are cleaned up to risk based on criteria or standards defined in a remediation plan
 - Remediation is not required under the new asbestos regulations (although CDPHE has authority to issue compliance orders in certain circumstances)



ISSUES AND QUESTIONS

Why “remediate” instead of “manage” asbestos contaminated soils?

- Management
 - Pros
 - Potentially lower cost
 - Closure report
 - Cons
 - Disclosure and appropriate controls (covenants or engineering)
 - Soils must be “non-detect” for reuse as fill



ISSUES AND QUESTIONS

Why “remediate” instead of “manage” asbestos contaminated soils?

- Remediation
 - Pros
 - Flexibility
 - “Clean closure”
 - Closure report
 - Cons
 - Risk analysis
 - Institutional (covenants) and engineering controls (caps) to manage risk
 - Mandatory cleanup that leaves asbestos in place will require a statutory covenant to be implemented



ISSUES AND QUESTIONS

When is an environmental covenant required or appropriate?

- *Required* by statute (§25-15-320, C.R.S.) when:
 - Cleanup is mandated by order under certain statutory authorities
 - Residual contamination is not safe for all land uses or engineering features require monitoring, maintenance or operation or will not function if disturbed
- Form of covenant is prescribed by CDPHE
- Unlikely to be required on a site unless it is under an enforcement order or an enforcement order is sought



ISSUES AND QUESTIONS

When is an environmental covenant required or available and appropriate?

- Covenants are *available*:
 - Under §30-15-320, may be accepted and enforced by CDPHE under the voluntary cleanup program
 - Other forms of covenants also are validated and enforceable by their terms if implemented in conjunction with a voluntary cleanup
 - Other covenants are enforceable to the extent otherwise enforceable under statute or common law



ISSUES AND QUESTIONS

When is an environmental covenant required or available and appropriate?

- Covenants may be *appropriate*:
 - Risk of exposure is significant if residual material is disturbed or structures (such as caps) are disturbed
 - Disclosure or contractual obligations are not considered adequate to protect seller/owner from liability due to exposure
 - Significant impairment of value is not anticipated due to a recorded document
 - Covenants facilitate approval of remedial plan



PRACTICE CONSIDERATIONS

In the Purchase & Sale Agreement:

- Disclose known asbestos containing material on the site
- Provide adequate opportunity for buyer to investigate and terminate a transaction if asbestos containing material is discovered
- Retain the flexibility for owner/seller to place covenants on the property
- Allocate responsibility for performing and bearing the cost of management or remediation of ACS
- Allow adequate oversight by owner if the owner is not responsible for management or remediation
- Consider requiring environmental insurance and make sure it covers ACS
- “As-is” conveyance



PRACTICE CONSIDERATIONS

During Due Diligence

- Have an environmental consultant evaluate whether there is “reason to know of asbestos-contaminated soil at a site” and document the conclusion and its basis
- If ACS is present:
 - Evaluate whether management or remediation is appropriate
 - Consider working with regulators prior to conveyance
 - Price the work and consider cost-cap insurance



PRACTICE CONSIDERATIONS

During Development

- If any “elevated potential” of ACS, have clients incorporate materials management procedures into construction contracts
- If there has been disposal on the site, but no documented asbestos, discuss the benefits of a pre-approved management plan with client
- If asbestos is encountered, look for exemptions, especially for non-friable asbestos
- Pay attention to qualification requirements
- Document as required and disclose to subsequent purchasers



QUESTIONS?

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