



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



M.J. Hayward Mechanical/Electrical
Services, Inc.
48 Lafayette Street
Lebanon, NH 03766

Re: 14 Allen Street, Hanover, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 03-007**

April 30, 2003

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Air Resources Division (the "Division") to M.J. Hayward Mechanical/Electrical Services, Inc., pursuant to RSA 141-E:15-a,II and Env-C 601.05. The Division is proposing that a fine of \$6,250 be imposed against M.J. Hayward Mechanical/Electrical Services, Inc., for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Air Resources Division is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, P.O. Box 95, Concord, NH 03302.
2. M.J. Hayward Mechanical/Electrical Services, Inc. is a corporation registered with the NH Secretary of State's Office, currently conducting business in New Hampshire and having a mailing address of 48 Lafayette Street, Lebanon, NH 03766.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. RSA 141-E authorizes the Department of Environmental Services ("DES") to regulate exposure to asbestos fibers. RSA 141-E:4 authorizes the Commissioner of DES to adopt rules relative to the establishment of work practices and engineering control standards for asbestos abatement activities. Pursuant to this authority, the Commissioner has adopted NH Admin. Rules Env-A 1800.
2. Pursuant to RSA 141-E:16 the Commissioner may impose administrative fines of up to \$2,000 per offense for violations of RSA 141-E. RSA 141-E:16,II(c) provides that violations of RSA 141-E shall be determined in accordance and rule promulgated pursuant thereto, with RSA 125-C:15,I-b(b).
3. Env-A 101.164 defines "major asbestos abatement project - Class S" as "any asbestos abatement project involving less than 260 linear feet, 160 square feet, or 35 cubic feet of Regulated Asbestos-Containing Material ("RACM") but more than 10 linear feet, 25 square feet or 3 cubic feet."

4. Env-A 1803.01 requires each facility operator to provide written notification to the Division, the EPA Regional office, and the city/town health officer at least 10 working days before asbestos abatement activity begins at any major asbestos abatement project.
5. Env-A 1804.01 requires a facility operator, prior to undertaking any demolition or renovation, to provide for an inspection by a competent person of the affected portion(s) of the facility for the presence of asbestos-containing material ("ACM").
6. Env-A 1805.02 requires that all personnel involved in a major asbestos abatement project to be licensed and certified in accordance with NH Administrative Rule He-P 5000.
7. Env-A 1805 *Work Practice Requirements* requires the operator of a facility at which a major asbestos abatement project will occur, to take steps to prevent exposure to asbestos fibers during the removal of the ACM. Prior to the start of the abatement, site preparation must be undertaken, including isolating the contaminated areas by utilizing airtight barriers, the posting of warning signs at all entrances to the work area, and emergency telephone numbers placed within three feet of the nearest telephone. The work area must be served by a sufficient number of negative pressure ventilation units with HEPA filtration. Each asbestos abatement site must have a worker decontamination enclosure system. All ACM must be thoroughly wetted prior to, during, and after removal, until placed in leak tight containers for transport to a landfill for proper disposal.
8. M.J.Hayward Mechanical/Electrical Services, Inc., ("Hayward") is a HVAC-R/electrical/plumbing company registered with the NH Secretary of State's Office with a mailing address of 48 Lafayette Street, Lebanon, NH 03766.
9. On August 2, 2002, DES personnel responded to 14 Allen Street, Hanover, NH ("the Property") at the request of Mrs. Marion T. Lilley, the Property owner, in response to her complaint that unlicensed workers had knowingly disturbed asbestos while replacing her heating system. Mrs. Lilley told the inspectors that she had contracted with M.J. Hayward Mechanical/Electrical Services, Inc. to replace the heating system at the Property.
10. During the inspection on August 2, 2002, Mrs. Lilley told the inspectors that Mark Niles, a Hayward employee, had arrived on July 24, 2002 to begin the removal of the old heating system. As Mr. Niles began work, Mrs. Lilley pointed out the ACM to him. She stated that Mr. Niles then called the Hayward office to advise his supervisor of the presence of suspected ACM on the old heating system. Mrs. Lilley also stated that Mr. Niles was told to proceed with the removal, but to take care not to cut through any joints in the heating pipes.
11. During the inspection on August 2, 2002, DES personnel spoke with Ray Archbold, an environmental consultant with K-D Associates, Inc., and Eric Levaggi from Levaggi Environmental Services, a licensed asbestos abatement contractor from South Burlington, VT. Mr. Archbold said that Mr. Phil Maheu, a Hayward employee, had first brought him to the Property on July 29, 2002. Mr. Archbold was to perform testing for the presence of asbestos on the Property and to arrange for possible abatement. Test results confirmed the presence of ACM on the Property.

12. Further, on August 2, 2002, Mr. Archbold stated that unlicensed workers had removed ACM from the Property and, in the process, had heavily contaminated several areas of the Property. Mr. Archbold brought in Mr. Levaggi to perform the clean up of ACM that was found to be present in the basement, first floor, garage and driveway. Mr. Archbold told the inspectors that, prior to his involvement, Hayward employees had taken the asbestos-covered piping from the Property to the Hayward shop.

13. During the inspection on August 2, 2002, DES personnel took samples of suspected ACM from the Property for analysis.

14. On August 2, 2002, DES personnel went to Hayward's shop, located at 48 Lafayette Street, Lebanon, and were met by Hayward employees Phil Maheu and Steven Milman. Mr. Maheu told the inspectors that Michael Hayward, Jr. was not available to meet with them, but that Messrs. Maheu and Milman were familiar with the situation and the reason for the visit. Mr. Maheu stated that Hayward, Jr. had negotiated the \$19,670 contract with Mrs. Lilley, but that the Lilleys had never pointed out the ACM to him, and that Hayward, Jr. "was young" and had not recognized that the encapsulated heating pipes contained ACM.

15. During the August 2, 2002 visit to Hayward's, DES personnel were shown a quantity of wrapped heating pipes that had been removed from the Property. The piping, in excess of 10 linear feet, was stored in an interior loading dock and covered with poly tarps. The loading dock area was cordoned off. Mr. Maheu stated that after the piping was brought to Hayward's, they decided to have samples of the pipe covering tested for the presence of ACM. Test results confirmed the presence of ACM, and work at the Property was temporarily halted.

16. On August 7, 2002, Steve Cullinane, DES Asbestos Program Manager, went to the Property to meet with Messrs. Archbold and Levaggi and to view the scene and discuss the clean up. Both Mr. Archbold and Levaggi described the Property as initially being "a pretty bad scene".

17. On August 7, 2002, Steve Cullinane went to Hayward's and met with Mike Hayward, Sr., Tom Wiley, Phil Maheu and Steven Milman. The Hayward employees stated that Michael Hayward, Jr. had no idea what ACM actually looked like and denied that the Lilleys had ever told him about the ACM being present in the basement prior to the removal of the piping. Mr. Maheu stated that when Mark Niles called him to report the presence of suspected ACM, he had told Mr. Niles to continue to cut and remove the piping from the Property, but to avoid cutting through any joints, as he believed the joints contained asbestos but thought the straight sections of heat piping were wrapped in fiberglass insulation.

18. On October 15, 2002, Division personnel submitted samples of the ACM collected from the Property on August 2, 2002, to The Scott Lawson Group, Ltd., Concord, NH ("SLG") for analysis.

19. On October 29, 2002, analytical results received from SLG confirmed that the samples submitted by the Division for analysis contain asbestos in an amount greater than one percent.

20. On December 20, 2002, DES personnel contacted Mrs. Lilley's ex-husband, Mr. Edward Lilley by telephone. Mr. Lilley stated that prior to any work being started on the heating system, he had gone to the Property, met and discussed the presence of ACM on the Property with Michael Hayward, Jr., and had raised the question of ACM removal versus encapsulation.

21. On January 2, 2003, DES received a written statement from Mr. Lilley, recapping his contact and conversation with Hayward, and reiterating his earlier statement that the presence of ACM was discussed with Hayward prior to any work being done.

22. On February 14, 2003, DES personnel telephoned Hayward in an attempt to reach Mark Niles, but were told that Mr. Niles no longer worked for Hayward.

IV. VIOLATIONS ALLEGED

1. Hayward violated Env-A 1803.01 by failing to provide written notification to the Division at least 10 working days prior to beginning any major asbestos abatement activity ("Violation 1").

2. Hayward violated Env-A 1804.01 by failing to provide for an inspection for the presence of ACM by a competent person prior to undertaking a renovation/removal of the existing heating system ("Violation 2").

3. Hayward violated Env-A 1805.02 by utilizing unlicensed personnel to remove ACM. All personnel involved in any major asbestos abatement project shall be licensed and certified in accordance with NH Administrative Rule He-P 5000 ("Violation 3").

4. Hayward violated Env-A 1805 by failing to perform adequate site preparation, including failing to install airtight barriers to isolate the contaminated areas, failure to provide negative pressure ventilation with HEPA filtration and a worker decontamination enclosure system. In addition, Hayward failed to follow proper asbestos removal and disposal procedures, including wetting all ACM prior to and during the removal and placing all ACM into watertight containers. ("Violation 4").

V. PROPOSED ADMINISTRATIVE FINES

1. The Division has determined that Violation 1 identified above is a major deviation from the requirements with minor potential for harm. RSA 125-C:15,I-b(b) specifies a fine range of between \$851 and \$1,500. The Division is seeking a fine of \$1,000 for this violation.

2. The Division has determined that Violation 2 identified above is a major deviation from the requirements with moderate potential for harm. RSA 125-C:15,I-b(b) specifies a fine range of between \$1,251 and \$1,750. The Division is seeking a fine of \$1,750 for this violation.

3. The Division has determined that Violation 3 identified above is a major deviation from the requirements with moderate potential for harm. RSA 125-C:15,I-b(b) specifies a fine range of between \$1,251 and \$1,750. The Division is seeking a fine of \$1,750 for this violation.

4. The Division has determined that Violation 4 identified above is a major deviation from the requirements with moderate potential for harm. RSA 125-C:15,I-b(b) specifies a fine range of between \$1,251 and \$1,750. The Division is seeking a fine of \$1,750 for this violation.

The total fine being sought is \$6,250.

VI. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, Hayward is required to respond to this notice. Please respond **no later than May 29, 2003**, using the enclosed form as follows:

1. If Hayward plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to the DES Legal Unit at the address noted on the form.
2. If Hayward chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Hayward wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Hayward's interest in settling.

Hayward is not required to be represented by an attorney. If Hayward chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If Hayward wishes to have a hearing but is unable to send an authorized representative to the hearing as scheduled, Hayward must notify the DES Legal Unit at least one week in advance of the hearing and request that the hearing be rescheduled. If Hayward does not notify the DES Legal Unit in advance and does not have an authorized representative attend the hearing, the hearing will be conducted anyway in accordance with Env-C 202.08.

VII. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Hayward committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by "a preponderance of the evidence" means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Hayward committed the violation(s) and that the amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine(s) sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Hayward proves, by a preponderance of the evidence**, applies in this case: The violation was a one-time or non-continuing violation, **and** Hayward did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Hayward did not benefit financially, whether directly or indirectly, from the violation.
 1. At the time the violation was committed, Hayward was making a good faith effort to comply with the requirement that was violated.
 2. Hayward has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
 2. Other information exists which is favorable to Hayward's case that was not known to the Division at the time the fine was proposed.

***** **IMPORTANT NOTICE** *****

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Hayward's opportunity to present testimony and evidence that Hayward did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Hayward has any evidence, such as photographs, business records or other documents, that Hayward believes show that Hayward did not commit the violation(s) or that otherwise support Hayward's position, Hayward should bring the evidence to the hearing. Hayward may also bring witnesses (other people) to the hearing to testify on Hayward's behalf.

If Hayward wishes to have an informal meeting to discuss the issues, Hayward must contact the DES Legal Unit at (603) 271-6330 to request a prehearing conference.

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Information regarding this proposed fine may be made available to the public via DES's Web page (www.state.nh.us/des). If Hayward has any questions about this matter, please contact the DES Legal Unit at (603) 271-6330.

COPY
James C. Moore
Compliance Bureau Administrator
Air Resources Division

Enclosure: Env-A 1800

cc: Mark Harbaugh, DES Legal Unit
Public Information Officer, DES PIP Office
R. Kurowski, EPA Region 1
B. Walsh, Chairman of Selectmen, Hanover NH
AFS #3300083333

***** RETURN THIS PAGE ONLY *****

**M.J. HAYWARD MECHANICAL/ELECTRICAL SERVICES, INC.,
IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN MAY 29, 2003

Please check the appropriate line and fill in the requested information below.

APPEARANCE ON behalf of M.J. Hayward Mechanical/Electrical Services, Inc.

- I request to have a **formal hearing** scheduled in this matter.
- I request to have a **pre-hearing conference** scheduled in this matter.
- I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of M.J. Hayward Mechanical/Electrical Services, Inc,

I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$6,250 paid to "Treasurer, State of New Hampshire" is enclosed. *

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

Michael Sclafani, Legal Assistant

Department of Environmental Services ~ Legal Unit

6 Hazen Drive, P.O. Box 95

Concord, NH 03302-0095

* If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.