UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
BILLMAX PROPERTIES	)	
AND	)	DKT. No. 5-CAA-029-98
UPRIGHT WRECKING,	)	
	)	
Respondents	)	

ORDER DENYING MOTION FOR DEFAULT ORDER

I. Background

This proceeding was commenced on September 25, 1998 with the filing of a Complaint by the United States Environmental Protection Agency (Complainant) against Respondents Billmax Properties and Upright Wrecking. The Complaint charges the Respondents with violating Section 112 of the Clean Air Act, 42 U.S.C. § 7412, by failing to comply with the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) at 40 C.F.R. Part 61 Subpart M. The Complaint alleges that Respondent Billmax Properties, the owner of a building, contracted with Respondent Upright Wrecking to demolish the building, and that Respondents failed to inspect the building for the presence of asbestos prior to demolition and failed to provide written notice of the intent to demolish prior to the demolition. For these violations, Complainant proposes that Respondents be assessed a penalty of $20,020.

On November 3, 1998, Respondent Billmax Properties, through counsel, filed an Answer to the Complaint, requesting a hearing and setting forth an affirmative defenses. Subsequently, the office of the undersigned was advised that the Complainant had reached a settlement in principle with Respondent Billmax Properties. A Prehearing Order was issued on January 4, 1999, directing Complainant Billmax Properties and Complainant to file a Consent Agreement and Consent Order (CACO) by January 29, 1999. The CACO was filed on January 25, 1999.

The Prehearing Order also noted that the case file of the undersigned showed that the Complainant sent the Complaint to Respondent Upright Wrecking by certified mail, but did not show that an Answer or any other document had been filed by

Upright Wrecking in this proceeding. The Prehearing Order therefore directed Complainant to submit a copy of proof of service of the Complaint in preparation for a possible finding of default.

II. Motion for Default Order

With regard to default, Section 22.17(a) of the Rules of Practice, 40 C.F.R. Part 22, provides in pertinent part:

> A party may be found in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . . Default by Respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

On January 13, 1999, Complainant filed a Motion an Memorandum for Default Order (Motion). The Motion requests that a Default Order be issued against Upright Wrecking, finding it in violation of the Clean Air Act and asbestos NESHAP as alleged in the Complaint. The Motion further requests that the entire amount of the proposed penalty of $20,020 be assessed against Upright Wrecking. Attached to the Motion was a copy of the proof of service of the Complaint on Upright Wrecking.

Also attached to the Motion was a letter from Upright Wrecking marked "Answer to Complaint," which had been sent by facsimile to Complainant's counsel on October 2, 1998 (Motion, Exhibit 4). The letter, signed by Mr. Earl Reed, President of Upright Wrecking, included the statements, "I will try to answer all that is required to prevent default in this matter," "we admit to both of these charges," "[w]e were just not aware of the requirements," and "[w]e now have in place the proper 'tools' to make sure this does not occur again." The letter stated further that "[t]he file we received . . . would be the end of our company . . . [and] will put us out of business." The letter also indicated that Upright Wrecking could not afford an attorney.

The Motion states that Complainant's counsel telephoned Upright Wrecking on October 28, 1998 to inform it that the letter does not constitute the filing of an Answer, referring to the Rules of Practice and the requirement to file an Answer with the Regional Hearing Clerk. Complainant asserts that as of the date of the Motion, Upright Wrecking has not filed an Answer to the Complaint, and submits a Declaration of the Regional Hearing Clerk stating that her files do not show receipt of an Answer or of any correspondence from Upright Wrecking (Motion, Exhibit 6). The Motion states further:

> On November 6, 1998, counsel for Complainant received another letter from Mr. Earl L. Reed entitled Answer to the Complaint. Exhibit 5. This letter was also not sent to the Regional Hearing Clerk and therefore did not constitute an Answer to the Complaint.

However, the letter Complainant refers to, is addressed, as shown at the top of the letter, to "Regional Hearing Clerk, U.S. E.P.A. Region 5." (Motion, Exhibit 5). In that letter, *inter alia,* Respondent repeated essentially the same statements as quoted above.

The Answer to the Complaint was due on October 24, 1998 (Motion at 6). The initial letter marked "Answer to Complaint" was received by Complainant's counsel before that deadline. (Motion, Exhibit 4). Complainant's counsel did not contact Upright Wrecking until after the due date, and within nine days of that telephone contact, Complainant received the second letter marked "Answer to Complaint," which was addressed to the Regional Hearing Clerk as Complainant had advised. There is no explanation for the failure of the Regional Hearing Clerk not to have received the latter document. (*See,* Motion, Exhibits 5 and 6)

By letter dated January 26, 1999, Respondent Upright Wrecking submitted a timely Opposition to the Motion, stating "from our records we did respond to answer, of complaint [sic]," and stating that "we are totally unable to pay the fine" (copy attached). The Opposition indicates that Upright Wrecking sent to EPA tax returns of the owner and employees of Upright Wrecking.

Respondent Upright Wrecking, appearing *pro se*, apparently did not serve its documents in compliance with the requirements of the Rules of Practice, 40 C.F.R. Part 22, including the requirement to attach a Certificate of Service. However, Upright Wrecking has sent a timely written response to the Complaint, admitting the violations and claiming inability to pay the proposed penalty. It has repeatedly expressed its intent to avoid a default, and has showed some intent to try to settle the matter (Motion, Exhibit 4; Opposition). In these circumstances, a default order assessing the proposed penalty against Upright Wrecking is unwarranted.

Accordingly, Complainant's Motion for Default Order is hereby **DENIED.**

III. Further proceedings

The parties, Complainant and Upright Wrecking, should note that Agency policy strongly supports settlement and the procedures regarding documenting settlements are set forth in Section 22.18(a) of the Rules of Practice, 40 C.F.R. §22.18(a). Settlement discussions between Upright Wrecking and Complainant may already have been undertaken and, if so, the parties are commended for taking the initiative to resolve this matter informally and expeditiously. If those discussions have not yet commenced or if such discussions have stalled, each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should also realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away.

With such thoughts in mind, Complainant and Upright Wrecking are directed to engage in a settlement conference on or before **February 26, 1999**, and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding settlement on or before **March 5, 1999**. If the case is settled, the Consent Agreement and Final Order signed by the parties should be filed no later than **March 19, 1999**, with a copy sent to the undersigned.

Should a settlement not be reached on or before the dates set forth above, Complainant and Upright Wrecking must prepare for hearing, and an order will be issued forthwith directing the parties to file prehearing exchange documents.

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Susan L. Biro
Chief Administrative Law Judge

Dated: February 5, 1999
Washington, D.C.