

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

Arlen Near

ADMINISTRATIVE
CONSENT ORDER

NO. 2022-AQ- 22

To: Arlen Near
307 W. Main Street
Stacyville, Iowa 50476

Re: Illegal open burning of a structure.

I. SUMMARY

This administrative consent order (Order) is entered into by the Iowa Department of Natural Resources (DNR) and Arlen Near (Near) to resolve violations of Iowa law governing the illegal open burning of a demolished structure.

As detailed below, Mr. Near agrees to cease the illegal burning of combustible material, to comply with Iowa law at all times in the future, and to pay an administrative penalty of \$5,000.00 within sixty days of this Order being signed by the Director.

Any questions regarding this Order should be directed to:

Relating to technical requirements:

David Knoll, Env. Specialist Senior
Iowa Department of Natural Resources
Field Office No. 2
2300 15th St. SW
Mason City, Iowa 50401
Phone: 641-424-4073

Relating to legal requirements:

David Scott, Attorney
Iowa Department of Natural Resources
1023 W. Madison Street
Washington, Iowa 52353
Phone: 319-321-8504

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: ARLEN NEAR

II. JURISDICTION

This Order is issued pursuant to Iowa Code §§ 455B.134(9) and 455B.138(1), which authorize the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division II (air quality), and the rules promulgated or permits issued pursuant to that Division; and, Iowa Code § 455B.109 and 567 Iowa Administrative Code (IAC) 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

The following facts are relevant to this matter:

1. On August 9, 2022, Mr. Arlen Near called DNR Field Office (FO) 2 with questions regarding the burning of tree branches and the burning of a structure. DNR staff summarized the open burning requirements for landscape waste and also explained the potential exemptions for the burning of a structure. Mr. Near stated he believed the home would be considered an agricultural structure. Staff briefly explained the agricultural structure exemption and advised that Mr. Near to review the rules in the Iowa Administrative Code for full details. An email was sent to the address Mr. Near provided that same day with links to the open burning rules and a note to reference the agricultural structures exemption.

2. On August 10, 2022, Mr. Brian Retterath, the individual who performed the demolition of the residential structure at 205 Railroad Street in Stacyville, Iowa, was informed by the Stacyville Fire Department that the structure could not be burned due to local ordinance.

3. On August 11, 2022, the demolished structure in the town of Stacyville at 205 Railroad Street was burned at approximately 11:00 PM. Mr. Near (the owner) and Mr. Brian Retterath were present at the scene. The Stacyville Fire Department responded and extinguished the fire.

4. On August 15, 2022, DNR FO 2 received an anonymous complaint stating that a demolished home in the town of Stacyville at 205 Railroad Street was burned. The burning resulted in billowing black smoke and a large fireball. It was reported that the burning took place at approximately 11:00 PM on August 11, 2022, that shingles were still on the house, and that the house had been filled with garbage for a couple of weeks prior to the burning. The Stacyville Fire Department responded and extinguished the fire. Pictures of the fire were submitted with the complaint.

5. On August 17, 2022, staff from DNR FO2 reached out to Mr. Near via the previously provided email address and requested that he call to discuss the burning incident. No call or email reply was received.

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: ARLEN NEAR

On the same day, staff contacted Stacyville Fire Department Chief Cory Adams. Mr. Adams stated that the person who performed the demolition (Brian Retterath) had inquired to the Fire Department about burning the structure prior to the fire. Mr. Adams told Mr. Retterath on August 10, 2022, the structure could not be burned since it was within the city limits and local ordinance prohibited it. Mr. Retterath stated he would pass this information on to Mr. Near. The structure was subsequently burned the following evening. Mr. Adams substantiated the anonymous complaint that the house contained garbage prior to the demolition and burning, and also stated shingles were still present on the structure.

6. On August 18, 2022, DNR FO2 staff traveled to Stacyville to further investigate the complaint. The burn-site had already been leveled and no visible solid waste remained at the site. Staff stopped at a residence which Arlen was listed as owner at 307 W. Main Street. There was no answer at the door, so staff left a business card in the door with a note on the back requesting a call. No call was received.

7. On August 24, 2022, a Notice of Violation (NOV) letter dated August 23, 2022, was mailed to Mr. Near for the unlawful open burning of a structure. The letter stated the violation was being considered for further enforcement action. A copy of the NOV was sent to Mr. Retterath.

8. On August 29, 2022, Mr. Retterath emailed DNR FO2 stating that there had been no contractual agreement nor exchange of money between he and Mr. Near for the house disposal project. Mr. Retterath requested all correspondence regarding the matter be directed to Mr. Near. Shortly after responding, Mr. Retterath called FO2 staff and stated that the matter had been made into a bigger deal than it should have been which was primarily due to local politics. He also stated there was no hazardous materials, as the transite siding on the house had been removed a long time ago and the shingles were newer. Staff asked about the Fire Department telling Mr. Retterath that the structure could not be burned in town. Mr. Retterath stated he relayed the information to Mr. Near, but Mr. Near decided to go forward with it because the DNR has said it was acceptable. Mr. Retterath also stated it was too late by then because the house had already been demolished.

9. On August 30, 2022, FO2 staff called Mr. Near after receiving his phone number from Mr. Retterath. Mr. Near admitted to the burning and took responsibility for it. Mr. Near also stated it was mainly a matter of local politics and miscommunication. Staff asked Mr. Near if he had read the rules provided by DNR via email, as they clearly stated that agricultural structures in town cannot be burned unless written waivers from those living within 1/4 mile were obtained and only if approved by the fire department prior to burning, among other requirements. Mr. Near stated he talked to a number of the neighbors and they were in favor of the site being cleaned up. Mr. Near disputed the claim that garbage was brought

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: ARLEN NEAR

in for burning, stating that he had actually been removing items from the house for a couple weeks prior to the burn.

10. On September 2, 2022, Mr. Near emailed landfill receipts, which showed a disposal of approximately 47 tons of waste on August 15-16, 2022. A bill from the waste service company (Red Can) was also provided, which showed the location of the waste removed was the same property where the burning took place.

IV. CONCLUSIONS OF LAW

1. The Environmental Protection Commission has adopted 567 IAC 23.2(3)"i" which includes an exemption for the open burning of "agricultural structures" as follows:

i. Agricultural structures. The open burning of agricultural structures, provided that the open burning occurs on the premises and, for agricultural structures located within a city or town, at least one-fourth mile from any building inhabited by a person other than the landowner, a tenant, or an employee of the landowner or tenant conducting the open burning unless a written waiver in the form of an affidavit is submitted by the owner of the building to the department prior to the open burning; all chemicals and asphalt roofing are removed; burning is conducted only when weather conditions are favorable with respect to surrounding property; and permission from the local fire chief is secured in advance of the burning. Rubber tires shall not be used to ignite agricultural structures. The asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP), as amended through January 16, 1991, requires the burning of agricultural structures to be conducted in accordance with 40 CFR Section 61.145, "Standard for Demolition and Renovation."

For the purposes of this subrule, "agricultural structures" means barns, machine sheds, storage cribs, animal confinement buildings, and homes located on the premises and used in conjunction with crop production, livestock or poultry raising and feeding operations. "Agricultural structures," for asbestos NESHAP purposes, includes all of the above, with the exception of a single residential structure on the premises having four or fewer dwelling units, which has been used only for residential purposes.

The above-stated facts establish multiple violations of this regulatory provision.

V. ORDER

THEREFORE, the DNR orders and Mr. Near agrees to the following:

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: ARLEN NEAR

1. Mr. Near will comply with Open Burning regulations at all times in the future.
2. Mr. Near will pay an administrative penalty of \$5,000.00 within 60 days of the date that this Order is signed by the Director.

VI. CIVIL PENALTY

1. Iowa Code § 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 that may be assessed administratively. The Commission has adopted this schedule with procedures authorizing the Director to assess administrative penalties at 567 IAC 10.

2. Iowa Code § 455B.146 authorizes civil penalties of up to \$10,000.00 per day for air quality violations.

3. 567 IAC 10 establishes the criteria that the DNR must consider in determining whether an administrative penalty is warranted, and if so how much the penalty should be. The general categories for consideration are the economic benefit of the alleged non-compliance by the violator, the gravity of the alleged violation, and the culpability of the violator. The administrative penalty assessed by this Order is determined as follows:

- a) Economic Benefit: 567 IAC chapter 10 requires that the DNR consider the costs saved or that were likely to be saved by noncompliance. 567 IAC 10.2(1) states that "where the violator received an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit." 567 IAC 10.2(1) further states, "reasonable estimates of economic benefit should be made where clear data are not available."

In the interest of settlement, no penalty is assessed for this factor. The local fire department arrived shortly after the fire was set and extinguished the blaze. The receipts indicate Mr. Near paid approximately \$3,700 in disposal fees by taking the partially burned and unburned waste the landfill.

- b) Gravity of the Violations: Elements to consider when determining the gravity of a violation include the actual or threatened harm to the environment or public health and safety, and whether the violation threatens the integrity of the regulatory program.

The open burning of structures and the burning of asbestos-containing material can release toxins that pollute the air, groundwater, and pose a serious risk to human health and the environment. This fire caused toxic

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER
ISSUED TO: ARLEN NEAR

substances to be released into the atmosphere. This fire also threatened the integrity of DNR's air quality program.

As such, \$2,000.00 is assessed for this factor.

- c) Culpability: The factors to be considered in determining the culpability of the violator include the degree of intent or negligence of the violator, and whether the violator has taken remedial measures to address the harm caused by the violations.

FO2 staff sent Mr. Near an email with a link to the DNR web page where open burning rules could be accessed. Mr. Near was advised to review the agricultural structure exemption, and contact FO2 with any questions. Mr. Near either failed to review the information provided, or decided to ignore it, as the home did not meet the exemption requirements. Written approval was not obtained from neighbors, the fire department stated unequivocally that the structure could not be burned, and the shingles were not removed from the structure prior to burning.

As such, \$3,000.00 is assessed for this factor.

VII. APPEAL RIGHTS

As this Order is entered by consent of the parties, there is no right of appeal.

VIII. NONCOMPLIANCE WITH THIS ORDER

Failure to comply with any requirement of this Order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the Iowa Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code § 455B.146. Compliance with Section V (Order) of this Order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section IV (Conclusions of Law) of this Order.

Kayla Lyon, Director
Iowa Department of Natural Resources


Arlen Near

Dated this 30th day of
November, 2022.

CC: DNR Field Office 2; David Scott