ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION
ADMINISTRATIVE CODE

CHAPTER 335-15-4
TECHNICAL INFORMATION

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335-15-4-.01 Purpose.

Establishes criteria for the submission of voluntary property assessment plans and other technical information, liability limitations, assessments, plans, cleanup requirements, and certification of compliance.
Author: Fred A. Barnes; Keith N. West; Lawrence A. Norris; Stephen A. Cobb; Sonja B. Favors; Austin R. Pierce; Pamela L. Monaghan
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335-15-4-.02 Limitation Of Liability Qualifications.

(1) Limitation of liability criteria. To qualify for a limitation of liability as provided in the Code of Alabama 1975, §§22-30E-9(a) and 22-30E-10(b), an applicant shall meet all the following criteria:

(a) The applicant shall not be a responsible person, as defined in 335-15-1-.02, at the qualifying property.

(b) Where the applicant is an individual, the individual shall not:

1. Be a relative by blood within the third degree of consanguinity or by marriage; or

2. Be an employee, shareholder, officer, or agent; or otherwise be affiliated with a current owner of the subject property or any responsible person on the subject property.

(c) Where the applicant is a corporation or other legal entity, the corporation must not:

1. Be a current or former subsidiary, division, parent company, or partner of a current owner; or

2. Be the employer or former employer of the current owner; or

3. Be any responsible person on the subject property.

(d) The limitation of liability provided by the Code of Alabama 1975, §§22-30E-9(a)and 22-30E-10 shall be contingent upon the applicant's good faith implementation of the voluntary property assessment and/or voluntary cleanup plan as approved by the Department. Such limitation of liability shall not be applicable to any activities conducted on the qualifying property before the Department's approval of the voluntary property assessment plan, cleanup plan, or concurrence with a certification of compliance, whichever occurs first.

(2) Inability to meet limitation of liability criteria. Applicants who do not meet the criteria in 335-15-4-.02(1), shall qualify only for a limitation of liability upon acceptance by the Department of the certification of compliance for cleanup of the site.

(3) Revocation of limitation of liability. If the Department determines the assessment or cleanup is not being implemented in accordance with the approved plan, it will notify the applicant and give reasonable opportunity to correct the deficiency. Failure to correct noted deficiencies shall result in the revocation of the limitation of liability protection afforded by the Alabama Land Recycling and Economic Redevelopment Act.

(4) Fiduciary limitation of liability. A lender, including one serving as a trustee, personal representative, or in any other fiduciary capacity in connection with a loan, or a lender holding evidence of ownership of a qualifying property primarily to protect a security interest, or as a result of foreclosure or a deed in lieu of foreclosure of a security interest, is entitled to the liability protection established in the Code of Alabama 1975, §22-30E-9 if the lender meets each of the following requirements:

(a) The lender has not caused or contributed to a release of a contaminant at the qualified property;

(b) The lender seeks to sell, transfer, or otherwise divest the qualifying property at the earliest time; and

(c) The lender has not divested the borrower of, or otherwise engaged in, decision-making control of assessment or cleanup activities at the qualifying property or operations at the qualifying property or undertaken management activities beyond those required to protect its financial interest while making a good faith effort to sell the qualifying property;

(5) Extension of Limitation of Liability. The limitation of liability provided by the Code of Alabama 1975, §22-30E-9 and 22-30E-10 shall extend to the heirs, assigns, and designees of the person to whom such limitation of liability is granted; provided, however, that, except as may be provided by the Code of Alabama 1975, §22-30E-9(a), §22-30E-9(f)or §22-30E-9(g), such extension of the limitation of liability shall not operate to absolve from liability any person deemed to be a responsible person on the qualifying property.

(6) Departmental Response to Release. Nothing in 335-15-4 shall limit the authority of the Department to take action in response to any release or threat of release of regulated substances.

(7) Preexisting Contamination or Release Reporting. As provided in the Code of Alabama 1975, §22-30E-4, the reporting of preexisting contamination or a preexisting release detected during the course of due diligence or site assessment activities to the Department, provided that any release reporting obligations shall be co-extensive with federal release-reporting obligations.

(8) Preexisting And New Release Liability. As provided in Code of Alabama 1975, §22-30E-8 and §22-30E-10 upon the first to occur of the Department's approval of a voluntary property assessment plan, approval of a voluntary cleanup plan, or concurrence with the certification of compliance, with respect to a qualifying property, a responsible person applicant or an applicant shall be fully discharged and released from any and all liability to the state or to any other person, including any successor in interest to the applicant, with respect to the qualifying property for post-remediation costs incurred in connection with, equitable relief relating to, or damages resultant from, in whole or in part, a preexisting release at the qualifying property.

(9) Regulatory Compliance and Limitation of Liability. If, during the course of the assessment and or remediation process, the site becomes an active industrial facility, the facility will then be responsible for maintaining compliance with all applicable state and federal regulations. The limitation of liability provided in 335-15-4-.02(1), 335-15-4-.02(4), and 335-15-4-.02(8) does not extend to:

(a) Release(s) as a result of new industrial activity occurring during the assessment and, or remediation phase of the cleanup,

(b) Activities not described in the voluntary cleanup assessment plan or the voluntary cleanup work plan(s); or

(c) Release(s) that occur on the qualifying property after Departmental acceptance of the certification of compliance as a result of noncompliance with the applicable response action or land use controls within the environmental covenant by the applicant or successor in interest to the applicant.

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335-15-4-.03 Voluntary Property Assessment Plans.

(1) Submission.

(a) After acceptance of the application by the Department as required in 335-15-3-.03, the applicant shall submit for approval, a complete and comprehensive Voluntary Property Assessment Plan for the site,

(b) If a property assessment has already been performed, a complete and representative Voluntary Property Assessment Report shall be submitted to the Department for review in accordance with 335-15-4-.03(8)(b).

(2) Content. A Voluntary Property Assessment Plan submitted by an applicant shall describe in sufficient detail those actions planned to develop the information necessary to perform a risk assessment or identify applicable cleanup standards for the qualifying property utilizing requirements found in the Alabama Risk-based Corrective Action Guidance (ARBCA)Manual or other appropriate risk-based corrective action principles through the appropriate implementation of applicable response actions or land use controls. The plan should describe the methods to be used to determine the type(s) and the amount(s) of any contamination including the delineation of all soil and groundwater contamination discovered or known to exist within the qualifying property boundaries or portions thereof. Information previously submitted in the application package need not be resubmitted unless, during the assessment phase, information is discovered

which is contrary to that information in the application package. Information submitted in the Voluntary Property Assessment Plan shall be submitted in a format consistent with the Alabama Environmental Investigation and Remediation Guidance (AEIRG).

(a) A Voluntary Property Assessment Plan submitted by a non-responsible person must delineate the horizontal and vertical extent of contamination in groundwater on-site only for the qualifying property. Such delineation of groundwater contamination shall be contained in a written report authored, signed and sealed by a qualified professional geologist or engineer licensed in the State of Alabama.

(b) A Voluntary Property Assessment Plan submitted by a responsible person applicant for a qualifying property may focus on known contaminants and must delineate the full vertical extent of groundwater contamination and horizontal extent to the property boundary within the qualifying property boundary or portions thereof. Such delineation of groundwater contamination shall be contained in a written report authored, signed and sealed by a qualified professional geologist or engineer licensed in the State of Alabama.

(3) Approval. The Department shall approve a complete Voluntary Property Assessment Plan within 60 days of submittal. The plan shall be considered approved if the Department fails to act within this timeframe.

(4) Implementation. Upon approval of the Voluntary Property Assessment Plan, the Department shall specify a time within which the applicant shall implement the approved Voluntary Property Assessment Plan. The applicant shall implement the plan in accordance with the specified schedule.

(5) Loss of Limitation of Liability. If the Department determines activities at the property are not being implemented in accordance with the approved Voluntary Property Assessment Plan, it will notify the applicant and give a reasonable opportunity to remedy the deficiencies. Failure to correct deficiencies will result in the loss of liability protections provided by the Code of Alabama 1975, §22-30E-10. The applicant will be provided with written notification specifying the basis for making the determination.

(6) Modification. If the applicant determines that any element of an approved Voluntary Property Assessment Plan must be modified in order to develop the information necessary to perform a risk assessment or identify applicable cleanup requirements for the qualifying property, the applicant shall modify the approved plan and submit the proposed modification for approval.

(7) Termination. If the applicant determines that any element of an approved Voluntary Property Assessment Plan must be modified in order to terminate activities at the property, the applicant shall

notify the Department and obtain approval of the proposed modification. Approval may be withheld only if the requested modification to terminate assessment activities would increase the risk to human health and the environment posed by the conditions at the property within a specified time.

(8) Voluntary Property Assessment Report.

(a) An applicant shall, upon completion of those activities specified in the Voluntary Property Assessment Plan, submit to the Department a report of the assessment and findings from the assessment, which may include a recommendation for applying cleanup requirements to the property.

(b) If an assessment has been conducted prior to submission of an application, all pertinent information from that assessment shall be incorporated in the Voluntary Property Assessment Report.

(c) When a Voluntary Property Assessment Report proposes an Environmental Covenant as the appropriate remedy for the site, the Department will provide for public comment in accordance with 335-15-6-.02(1). The Voluntary Property Assessment Report and the draft Environmental Covenant shall be included in the Public Notice.

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335-15-4-.04 Voluntary Cleanup Plans.

(1) Submission. An acceptable Voluntary Cleanup Plan shall describe in sufficient detail those actions necessary to return the property to residential quality use, or at a minimum include restrictions such as land use controls, if appropriate, to satisfy the cleanup requirements for the qualifying property.

(2) Content. The plan must identify those steps necessary to perform approved cleanup for the site. At a minimum, the cleanup plan must include:

(a) A description of the remediation at each area of known contamination;

(b) A description of the conduct of the cleanup at the facility;

1. A detailed description of the methods to be used during cleanup, including but not limited to, removing, transporting, treating, storing, or disposing of all remediation waste, identification of the type(s) of off-site solid and/or hazardous waste management unit(s) to be used, if applicable.

2. A detailed description of the steps needed to remove or decontaminate all hazardous residues and contaminated containment system components, equipment, structures, and soils during cleanup including, but not limited to:

(i) Procedures for cleaning equipment and removal of contaminated soils;

(ii) Methods for sampling and testing surrounding soils,

(iii) Criteria for determining the extent of remediation necessary to satisfy the cleanup requirements, and

(iv) An estimate of the expected year of cleanup for facilities that use trust funds to demonstrate financial assurance under 335-15-5-.02(b).

3. A detailed description of other activities necessary during or after the cleanup period to ensure compliance with the cleanup performance requirements. This description may include operation and maintenance, such as, but not limited to groundwater monitoring, leachate collection, and run-on and run-off control;

4. A schedule for cleanup of known areas of contamination. At a minimum, the schedule must include the total time necessary to remediate each known area of contamination and the time required for cleanup activities;

5. Provide proof of financial assurance in accordance with 335-15-5; and

6. An estimate of the expected year of cleanup for facilities that use trust funds to demonstrate financial assurance under 335-15-5-.02(b).

(c) An estimate of the maximum inventory of remediation wastes/contaminated media on-site during cleanup operations.

(d) A Voluntary Cleanup Plan submitted by a responsible person must provide for remediation of all contamination described in the property assessment report whether on-site or off-site beyond the property boundary. (e) A Voluntary Cleanup Plan submitted by a non-responsible party must provide for remediation of all contamination described in the property assessment report on-site only.

(e) A Voluntary Cleanup Plan submitted by a non-responsible person or a responsible person applicant must provide for remediation of the contamination described in the property assessment report within the qualifying property boundaries or portions thereof.

(3) Modifications. The applicant may modify the approved cleanup plan at any time prior to the notification of cleanup by submitting a written request to the Department. The request for modification approval must include a copy of the amended cleanup plan.

(a) The applicant must modify the cleanup plan whenever:

1. Changes in operating plans or facility design affect the cleanup plan;

2. There is a change in the expected year of cleanup, if applicable;

3. Unexpected events encountered during cleanup require a modification of the cleanup plan; and/or

4. The applicant determines that it necessary or advisable to make changes and/or deviations in cleanup requirements that affect either cleanup activities or the degree of remediation initially proposed.

(b) An applicant with an approved cleanup plan shall submit request for modification to the Department at least 60 days prior to the proposed change in facility design or operation, or no more than 30 days after an unexpected event has occurred which has affected the cleanup plan.

(c) If at any time an applicant determines that any element of an approved voluntary cleanup plan must be modified in order to terminate activities at the property, the applicant shall notify the Department and obtain approval of the proposed modification which may be withheld only if the requested modification would increase the risk to human health and the environment posed by conditions at the property.

(4) Processing.

(a) Within 60 days of submittal, the Department shall either approve a complete or modified Voluntary Cleanup Plan, or request corrections to or disapprove the Voluntary Cleanup Plan. The plan shall be considered approved if the Department fails to act within this timeframe.

(b) The Department shall review for completeness every cleanup plan submitted for approval as required by 335-15-4-.04(4). Upon completing the review, the Department shall notify the applicant in writing whether the plan is complete. If the plan is incomplete, the Department:

1. Shall list the information necessary to make the plan complete;

2. Shall specify in the notice of deficiency a date for submitting the necessary information; and

3. Shall request any information necessary to clarify, modify, or supplement previously submitted material.

4. Disapprove the plan if requested information is not submitted in a timely fashion.

(c) Once a cleanup plan is determined to be complete, the Department will provide for public comment in accordance with 335-15-6-.02(1).

(5) Implementation of Voluntary Cleanup Plan.

(a) Upon the Department approval of a Voluntary Cleanup Plan, the applicant shall begin implementation. The Department's approval of a Voluntary Cleanup Plan shall in no way be construed as a guarantee, promise, or assurance that the Department will concur with the applicant's Certification of Compliance with the cleanup requirements.

(b) If at any time the applicant or the Department determines that any element of an approved Voluntary Cleanup Plan must be modified in order to develop the information necessary to perform a risk assessment or identify applicable cleanup standards for the qualifying property, the applicant shall modify the approved plan and obtain approval of the proposed modification.

(c) An applicant shall retain records of any test results, waste analyses, and determinations made in accordance with the Voluntary Property Assessment Plan and/or the Voluntary Property Cleanup Plan, as well as records of off-site disposal locations, waste types and quantities, for a period of three years.

(d) The applicant shall submit proof of financial assurance to implement the Voluntary Cleanup Plan, in such form as specified by the Department in 335-15-5-.02.

(6) Removal of Wastes and Decontamination or Dismantling of Equipment. Nothing in 335-15-4-.04 shall preclude the applicant from the removal of hazardous wastes, constituents, contaminants or pollutants and decontamination or dismantling equipment in accordance with an approved cleanup plan either before or after notification of cleanup, provided all appropriate manifesting records are maintained.

(7) Voluntary Cleanup Report.

(a) Submission. Within 60 days of completion of the cleanup of the entire site, the applicant shall submit to the Department, by registered mail, a report that the site, has been remediated in accordance with the specifications in the approved cleanup plan.

(b) Content. The report must detail the actions performed in accordance with the specifications in the approved cleanup plan. At a minimum, the cleanup report must include:

1. The information required by 335-15-4-.04(2).

2. Certification of Compliance.

(i) Within 60 days of completion of cleanup or each area of contamination and/or within 60 days of completion of cleanup of the entire site, the applicant shall submit to the Department, by registered mail, a Certification of Compliance that the area of contamination, unit, or site, as applicable, has been remediated in accordance with the specifications in the approved cleanup plan

(ii) Certain information required by 335-15 involves the practice of engineering and/or land surveying, as those terms are defined in the Code of Alabama 1975, §§34-11-1 to 34-11-37; and/or the practice of geology, as that term is defined in Code of Alabama 1975, §§34-41-1 to 34-41-24. It is the responsibility of any person preparing or submitting such information to ensure compliance with these laws and any regulations promulgated thereunder. All submissions, or parts thereof, which are required by State law to be prepared by a licensed engineer, land surveyor, or geologist, must include the engineer's, land surveyor's, and/or geologist's signature and/or seal, as required by the applicable licensure laws.

3. Restricted Use Property. For those properties that are cleaned up to requirements less stringent than those required for unrestricted residential use, the property owner shall comply with the requirements of 335-15-6-.03(3) within 60 days of the submission of the Certification of Compliance.

(8) Site Cleanup Prior to Submission of the Application. If site cleanup was conducted prior to submission of the application, all pertinent information from the original assessment and cleanup plans shall be incorporated into a Voluntary Property Assessment and Cleanup Report. The site is required to meet all requirements of 335-15 to be eligible for limitation of liability provisions cited in the Alabama Land Recycling and Economic Redevelopment Act.

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335-15-4-.05 Cleanup Requirements.

(1) Cleanup levels.

(a) The participant, with the concurrence of the Department, shall consider impacts to human health and the environment. In establishing cleanup standards, cleanup levels may be based on specific requirements of relevant environmental laws or regulations (e.g., Clean Water Act, Clean Air Act, TSCA, RCRA, CERCLA, et al.), derived using the procedures outlined in Section 300.430(e)(2) of the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300), and/or based upon the results of a site-specific risk assessment.

(b) The Department may set cleanup levels that reflect current and future use scenarios for the property as follows:

1. A site shall be deemed to have met the requirements for unrestricted use if the cleanup levels are derived in a manner consistent with Department or Environmental Protection Agency guidelines for assessing human and environmental health risks from hazardous constituents.

2. For sites that do not achieve the unrestricted use classification, restrictions on site use shall be applied to achieve cleanup standards. Restrictions shall include, but are not limited to, land use controls. The restrictions imposed upon a site shall be media-specific and may vary according to site-specific conditions.

(2) Remedial Action Measures. Cleanup levels for all media contaminated with hazardous constituents or hazardous wastes, that the applicant or the Department has reason to believe may have been released at the site shall be determined in accordance with 335-15-4-.05(3). Should the concentration of hazardous constituent(s) in an aquifer, surface water, soil, sediment or air exceed its cleanup level, the Department may require the voluntary cleanup plan to include measures as necessary to protect human health and the environment.

(3) Risk Assessment. Cleanup levels may be based upon a risk assessment that considers the site and all surrounding areas that may be impacted. This risk assessment must reflect current and future use scenarios.

(4) Property Use Considerations.

(a) A site shall be deemed to have met the requirements for unrestricted residential use if the cleanup level(s) satisfy the following criteria:

1. Is derived in a manner consistent with ADEM/EPA guidelines for assessing human and environmental health risks from hazardous constituents;

2. Is based on scientifically valid studies conducted in accordance with the Toxic Substances Control Act (TSCA) Good Laboratory Practice Standards (40 CFR Part 792, as amended), or equivalent;

3. Represents for human health cleanup levels to address carcinogens, a cumulative concentration associated with an excess upper bound lifetime cancer risk range of between 1 X 10-4 and 1 X 10-6 for carcinogens due to continuous constant lifetime exposure; and

4. Represents for human health cleanup levels to address noncarcinogens, a concentration to which the human population (including sensitive subgroups) could be exposed on a daily basis that is without appreciable risk of deleterious effects during a lifetime.

(b) Applies appropriate restrictions on future use for sites that do not achieve the unrestricted use classification. Restrictions shall include, but are not limited to, institutional and/or engineering controls. The restrictions

imposed upon a site will be media-specific and may vary according to site-specific conditions. All use restrictions shall be described in the Certification of Compliance.

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335-15-4-.06 Certificate Of Compliance-Letter Of Concurrence.

(1) Certification of Compliance. When all requirements of an approved cleanup plan have been completed, the applicant shall submit to the Department a Certification of Compliance. A Certification of Compliance may also be submitted when an assessment based on an approved Voluntary Property Assessment Plan has been completed and no contamination discovered. The Department shall review all reports and the required Certification of Compliance submitted under 335-15-4-.06. The applicant or eligible successor must satisfactorily maintain the engineering controls, remediation systems, or if non-permanent institutional controls are utilized pursuant to an agreement, the Department may issue the applicant a "Letter of Concurrence" with conditions. The Department may authorize an applicant to conduct a phased response only when, in the Department's evaluation, the schedule is reasonable.

(2) "Letter of Concurrence". Upon concurrence by the Department, the Department shall issue to the applicant "Letter of Concurrence".

(3) "Letter of Concurrence with Conditions". For partial response actions, a "Letter of Concurrence" with conditions shall pertain only to the partial response action area and shall include a legal description of that area.

(4) Deed Records. The applicant shall comply with the requirements of 335-5.

(5) Revocation. The "Letter of Concurrence" may be revoked by the Department in the event that contamination posing an unacceptable risk to human health and the environment is discovered on site, or discovery is made that the submitted certification of compliance was based on information that was materially false, inaccurate or misleading.

(a) The applicant shall be notified in writing by certified mail of the proposed revocation.

(b) The applicant shall be given an opportunity to respond within 30 days upon receipt of the letter.

(c) Unacceptable response to the revocation letter will result in the reinstatement of any cleared deed notation and/or deed restriction until such time as the property is deemed to be in compliance.

(6) Sovereign Immunity. Issuance of the "Letter of Concurrence" does not constitute a waiver of sovereign immunity.

(7) Release from Liability. Upon the first to occur of the Department's approval of a Voluntary Property Assessment Plan, approval of a Voluntary Cleanup Plan, or concurrence with the submitted Certification of Compliance described in 335-15-4-.06, an applicant who is a non-responsible person or a responsible person applicant, as defined in 335-15-1-.02, at the qualifying property, shall not be liable to the state or any other person, including any successor in interest to the applicant with respect to the qualifying property, for costs incurred in the investigation or cleanup of, or equitable relief relating to, or damages resultant from, in whole or in part, a preexisting release at the qualifying property, including, but not limited to, any liability to the state for the cleanup of the property under Title 22, Chapters 22, 27, 30, 30A, and 35 of the Code of Alabama 1975, or a new release of a substance, constituent, or material which had been part of a preexisting release at the property, unless such new release results from noncompliance with an approved Voluntary Property Assessment Plan or Voluntary Cleanup Plan or from the negligent, wanton, willful, or intentional conduct of the applicant.

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