ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ENVIRONMENTAL MANAGEMENT COMMISSION
ADMINISTRATIVE CODE

CHAPTER 335-2-1
RULES OF PROCEDURE FOR HEARING APPEALS OF ADMINISTRATIVE ACTIONS OF THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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335-2-1-.01 Applicability.

This Chapter prescribes the Environmental Management Commission's procedures for the hearing and determination of appeals of administrative actions of the Alabama Department of Environmental Management.

Author: David A. Ludder, Olivia H. Jenkins

Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective: July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.02 Definitions.

For purposes of this Chapter, the following words and phrases, unless a different meaning is plainly required by the context, shall have the following meanings:

(a) "administrative action" means the issuance, modification, repeal, or denial of any permit, license, certification, or variance, or the issuance, modification or repeal of any order, notice of violation, citation, rule, or regulation by the Department.

(b) "aggrieved" means having suffered a threatened or actual injury in fact.

(c) "Commission" means the Environmental Management Commission of the Alabama Department of Environmental Management.

(d) "Department" means the Alabama Department of Environmental Management, established by the Alabama Environmental Management Act, Code of Ala. 1975, §§22-22A-1 to 22-22A-16.

(e) "person" means any and all persons, natural or artificial, including, but not limited to, any individual, partnership, association, society, joint stock company, firm, company, corporation, institution, trust, estate, or other legal entity or other business organization or any governmental entity, and any successor, representative, agent, or agency of the foregoing.

Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective, July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.03 Right To Hearing.

Upon a proper request made and filed in accordance with Rule 335-2-1-.04, any person aggrieved by an administrative action of the Department shall be entitled to a hearing before the Commission or its designated Hearing Officer.
Author:
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.

History: Effective, July 1, 1983. **Amended:** October 10, 1984.

335-2-1-.04 Request For Hearing.

(1) Any person aggrieved by an administrative action of the Department, other than the issuance of any rule or regulation or emergency order, may file with the Commission a request for a hearing to contest such action within thirty days of such action.

(2) To obtain a hearing on any order assessing a civil penalty issued by the Department, an aggrieved person must either be subject to the order or have submitted timely written comments on the proposed order in accordance with Code of Ala. 1975, §22-22A-5(18).

(3) Any person aggrieved by the issuance, modification or repeal of any rule or regulation by the Department may file with the Commission a request for a hearing to contest such administrative action within forty-five days of the adoption of the rule or regulation by the Commission.

(4) Any person aggrieved by the issuance of any emergency order by the Department may file with the Commission a request for an expedited hearing to contest such administrative action. The request shall be filed within the time provided in paragraph (1), above.

(5) A request for a hearing to contest an administrative action of the Department shall be made in writing and shall contain:

(a) the name, mailing address, and telephone number of the person making the request;

(b) a short and plain statement identifying the administrative action of the Department being contested;

(c) a short and plain statement of the threatened or actual injury suffered by the person making the request as a result of the administrative action of the Department;

(d) a short and plain statement of the alleged error(s) made by the Department in the administrative action;

(e) a short statement of the terms and conditions which the person making the request proposes that the Commission should include in an order modifying or disapproving the Department's administrative action; and

(f) the name, mailing address, and telephone number of the attorney for the person making the request, if represented by an attorney.

(g) an original signature of the person making the request or such person's attorney.

(6) A request for a hearing to contest an administrative action of the Department shall be filed with the Commission. Filing may be accomplished by personal, private-service or mail delivery addressed to:

ENVIRONMENTAL MANAGEMENT COMMISSION

Street Address: 1400 Coliseum Boulevard Montgomery, AL 36110 2059

Mailing Address: P.O. Box 301463 Montgomery, AL 36130-1463

Filing shall not be timely unless the papers are received by the Commission within the time fixed for filing, except that papers shall be deemed filed on the day of mailing if mailed by certified, registered or express mail of the United States Postal Service or a similar private express-delivery service, and the date of the official post-mark is on or before the time fixed for filing. A request for a hearing may not be filed by facsimile (telefax).

(7) Within five (5) days of receipt by the Department of a timely request for a hearing, the Department shall file with the Commission, if appropriate, a notice alleging any pleading defects in the request for a hearing and identifying the omissions of information required by paragraph (4), above. A copy of the notice shall be served on the petitioner. Thereupon, the petitioner shall correct the identified defects within ten (10) days of receipt of the notice. Failure by the petitioner to cure all identified defects within the time provided shall deem the original filing an improper request and will not preserve that person's right to a hearing.
Author: David A. Ludder, Olivia H. Jenkins, Thomas L. Johnston
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994. **Amended:** Filed June 20, 2003; effective July 25, 2003. **Amended:** Filed October 21, 2004; effective November 25, 2004.

335-2-1-.05 Notice Of Filing A Request For Hearing.

Upon the filing with the Commission of a request for a hearing to contest an administrative action of the Department, the person making the request (the "petitioner") shall serve a copy of such request upon the Department and any other parties required by this rule to be served. If the administrative action appealed is the issuance of a permit, license, certification, or variance, and the petitioner is a person other than the recipient of said permit,

license, certification, or variance, the petitioner shall serve a copy of the request upon the recipient of the permit, license, certification, or variance. If the administrative action appealed is the issuance of a notice of violation or of an administrative order, and the petitioner is a person other than the recipient of the notice of violation or administrative order, the petitioner shall serve a copy of the request upon the recipient of the notice of violation or administrative order.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.06 Parties.

(1) In any hearing to contest an administrative action of the Department, the person making and filing a request for a hearing in accordance with Rule 335-2-1-.04 (the "petitioner") shall be a party.

(2) In any hearing to contest an administrative action of the Department, the Department shall be a party.

(3) In any hearing to contest an administrative action of the Department, any person whose application to intervene is granted by the Commission or Hearing Officer shall be a party.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.07 Motions.

(1) All motions, except those made orally on the record during a hearing, shall (a) be in writing; (b) state the grounds therefor with particularity; (c) set forth the relief or order sought; and (d) be accompanied by any affidavit, certificate, other evidence, or legal argument relied upon. Such motions shall be served as provided by Rule 335-2-1-.24

(2) The Commission or Hearing Officer shall set a reasonable time for response to motions. A party's response to such motion shall be accompanied by any affidavit, certificate, other evidence, or legal argument relied upon.

(3) The Commission or Hearing Officer shall rule on all written motions within fifteen days after the last allowed time period for

response or the last hearing on the motion, whichever is later. The failure of the Commission or Hearing Officer to rule on a motion within the time required will be considered a denial of said motion without prejudice. This paragraph shall not apply to motions to dismiss filed pursuant to Rule 335-2-1-.21 (4), or motions for summary judgment filed pursuant to Rule 335-2-1-.22.
Author: Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.08 Intervention.

(1) A motion for leave to intervene in any hearing to contest an administrative action of the Department shall set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an opposition to the motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (6) of this section, within 10 days after service of the motion for leave to intervene.

(2) An application to intervene shall contain:

(a) the name, mailing address, and telephone number of the applicant;

(b) a short and plain statement identifying the administrative action of the Department being contested and, if possible, the name of the person who filed the request for a hearing to contest such action;

(c) a short and plain statement of the grounds for the application, including reference to any statute which confers an unconditional right to intervene or a statement of the individual interest of the applicant in the outcome of the hearing and a statement of why the representation of the interest of the applicant by persons already parties in the hearing is inadequate; and

(d) the name, mailing address, and telephone number of the applicant's attorney, if represented by an attorney.

(3) An application to intervene shall contain an original signature of the person making the request or the applicant's attorney.

(4) A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in

the absence of a prehearing conference, before the setting of a date and time for the hearing. Any motion filed after that time shall include, in addition to the information set forth in paragraphs (1) and (2) of this section, a statement of good cause for the failure to file in a timely manner. Except for good cause shown, the Intervenor shall be bound by any agreements, arrangements, schedules and other matters previously made in this proceeding.

(5) Within five days after the filing of an application to intervene in any hearing to contest an administrative action of the Department, the petitioning Intervenor shall serve a copy of such application upon each of the parties.

(6) Leave to intervene may be granted only if the movant demonstrants that (a) the movant's presence in the proceeding would not prejudice the timely adjudication of the rights of the original parties; (b) the movant may be aggrieved by a final order; and (c) the interests of the movant are not being adequately represented by the original parties. In the case of an appeal of a permit by a third party, the Permittee's intervention shall be as of right. The Intervenor shall become a full party to the proceeding upon the granting of leave to intervene.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.09 Consolidation And Severance.

(1) The Commission or Hearing Officer may order consolidation, in whole or in part, of two or more hearings to contest an administrative action of the Department whenever it appears that such consolidation would expedite or simplify consideration of the issues and no party would be prejudiced thereby.

(2) The Commission or Hearing Officer may order severance, in whole or in part, of any hearings consolidated in accordance with paragraph (1) of this Rule whenever it appears that continued consolidation will not expedite or simplify consideration of the issues or will prejudice any party.

(3) The Commission or Hearing Officer may order severance, in whole or in part, of any hearing upon the consent of all parties or upon the motion of any party whenever it appears that severance would serve to make presentation of the issues more orderly and would not unduly delay the resolution of the issues.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8

History: Effective July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.10 Prehearing Procedure.

(1) Upon receipt by the Department of a request for hearing timely filed pursuant to Rule 335-2-1-.04, the Department shall waive the requirements of ADEM Admin. Code Rule 335-1-1-.06 and shall make the Department's files immediately available to the petitioner and/or the petitioner's representative.

(2) No later than 15 days prior to the hearing, except by consent of the parties, the Commission or Hearing Officer shall direct the parties to appear at a specified time and place for one or more conferences, prior to or during a hearing to consider:

(a) settlement of the case;

(b) the identification, clarification, simplification, or limitation of the issues;

(c) the necessity or desirability of amendments to pleadings, except that amendments to cure jurisdictional defects shall not be allowed;

(d) the submission of admissions or stipulations as to facts or the genuineness of documents which will avoid unnecessary proof;

(e) the identification of facts, and the source thereof, of which official notice is proposed to be taken;

(f) the identification of persons with knowledge of any relevant matter;

(g) the identification of any expert witnesses expected to be called by any party to testify at the hearing and the substance of the facts and opinions to which the expert witness is expected to testify and a summary of the grounds for each opinion;

(h) the limitation of the number of expert or other witnesses;

(i) the deadline for the service of subpoenas to compel the attendance of any witness at the hearing;

(j) the need for the issuance of subpoenas for the production of any papers, books, accounts, payrolls, documents, or records, either prior to or at the hearing;

(k) the need for the issuance of subpoenas to compel the attendance of any witness at the taking of the witness' deposition, if such witness is unable to be present or to testify at the hearing because of age, illness, infirmity, or imprisonment or if the parties have agreed to the submission of the testimony of such witness in verified form;

(l) the possibility of submitting any evidence in verified form when the hearing will be expedited and the interests of the parties will not be prejudiced thereby, provided that the right of cross-examination of any witness shall not be denied;

(m) setting a time for the hearing; and

(n) such other matters as may aid in the disposition of the case.

(3) Pre-Hearing Order.

(a) The Commission or Hearing Officer shall issue a written prehearing order reciting the action taken at the conference and the agreements made by the parties as to any of the matters considered.

(b) The Pre-Hearing Order shall include:

1. A statement of petitioner's allegation of the error(s) committed by the Department in taking the contested administrative action;

2. A statement of the factual basis supporting the petitioner's allegation of error.

3. A statement of the legal issues raised in the appeal and each party's position on said issues,

4. A statement of agreed and disputed facts,

5. A schedule for the exchange of the following:

(i) copies of all documents and exhibits which each party intends to introduce into evidence,

(ii) the name, address and relationship to the appeal of each fact witness that each party intends to call, along with a brief narrative summary of the expected testimony of each witness;

(iii) the name, address and qualifications of each expert witness that each party intends to call, along with a brief narrative summary of the facts and opinions to which the expert witness is expected to

testify and a summary of the grounds for each opinion.

6. Such other matters as the Hearing Officer deems appropriate.

(c) The order shall identify the manner in which documents and exhibits shall be marked for identification. The order shall provide that documents that have not been exchanged and witnesses whose names, addresses, qualifications and/or relationship to the appeal have not been exchanged shall not be introduced into evidence or allowed to testify at the hearing without a determination by the Commission or Hearing Officer that introduction of the evidence would not cause undue prejudice and that, in such a case, the Commission or Hearing Officer shall allow the parties reasonable opportunity to review new evidence prior to its being offered into evidence. In addition, the order shall limit the issues for consideration at the hearing to those not disposed of by admissions or agreement of the parties and those which are properly before the Commission. The Pre-Hearing Order shall specify only those issues identified in the request for hearing unless the issue is based on facts that were not known and reasonably could not have been known to the petitioner within the time required by statute for filing a request for hearing. Such order, when entered as amended, shall control the subsequent course of the hearing, unless modified to prevent manifest injustice.

Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7 22-22A-8.
History: Effective July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.11 Discovery.

(1) Except as provided by Rule 335-2-1-.10, discovery shall be permitted only upon determination by the Hearing Officer:

(a) That such discovery will not unreasonably delay the proceeding;

(b) That the information to be obtained is not otherwise obtainable;

(c) That such information has significant probative value; and

(d) That such information is not confidential, financial, commercial or trade-secret information, or privileged. The Commission shall give effect to the rules of privilege recognized and protected by law.

(2) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth:

(a) The nature of the information expected to be discovered; and

(b) The proposed time and place where it will be taken. If the Commission or Hearing Officer determines that the motion should be granted, the Commission or Hearing Officer shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(3) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (a) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (b) the issuance of a dismissal order under Rule 335-2-1-.21

(4) Parties may obtain discovery by one or more of the following methods: depositions upon oral examinations and production of documents or things.

(5) With the exception of petitioner's witnesses in an appeal of an enforcement action, depositions of all parties, their family members, employees, agents, and other persons under their control will be conducted at the Department's offices in Montgomery, Alabama, unless all parties agree otherwise. Depositions of petitioner's witnesses in appeals of enforcement actions may be scheduled in the county of the witness's residence or the county where the violation occurred, or any other persons who are not subject to the control of a party to the proceeding may be taken in Montgomery County, the county where the person resides, or any other place to which all parties agree.

(6) Court reporter's fees and reasonable copying costs shall be borne by the party requesting the discovery.
Author: Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.12 Subpoenas.

(1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Chair of the Commission or the Hearing Officer may grant a request for a subpoena upon a showing of (a) the grounds and necessity therefor, and (b) the materiality and relevance of the evidence to be adduced. Request for the production of documents shall describe the evidence sought

as specifically as practicable. A subpoena may be issued by the Chair of the Commission, the Hearing Officer, or a designee.

(2) Subpoenas shall be served in accordance with the Alabama Rules of Civil Procedure.

(3) Witnesses summoned before the Hearing Officer shall be paid the same fees for attendance and travel that are paid witnesses in the courts of Alabama pursuant to Code of Ala, 1975, §12-19-131 and §12-21-181, and shall be paid from funds of the Department.
Author: Olivia H. Jenkins, Shawn Sibley
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994. **Amended:** Published December 31, 2020; effective February 14, 2021.

335-2-1-.13 Notice Of Hearing.

(1) At least fifteen days prior to the commencement of any hearing to contest an administrative action of the Department, other than the issuance of an emergency order, the Commission or Hearing Officer shall give written notice of the time and nature of such hearing to the person requesting such hearing, the Department and any other named or necessary party. Such notice shall include a citation to the legal authority and jurisdiction under which the hearing is to be held and reference to the particular sections of the statutes and rules involved and a short and plain statement of the matters asserted by the requester.

(2) Within such time as may be reasonable under the circumstances, the Commission or Hearing Officer shall give notice of the time and nature of any hearing to contest the issuance of an emergency order to the person requesting such hearing, the Department, and any other named or necessary party.

(3) Any notice required by this Rule to be given to any party shall be delivered to such party either personally, by registered mail, or by certified mail return receipt requested. A Prehearing Order issued pursuant to Rule 335-2-1-.10 at least fifteen days before the hearing shall satisfy the notice requirements of this Rule.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Filed July 1, 1983. **Amended:** Filed October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.14 Hearing Procedure.

(1) A hearing to contest an administrative action of the Department shall be commenced in Montgomery, Alabama within a reasonable time, not to exceed forty-five days after the making and filing of a proper request in accordance with Rule 335-2-1-.04.

(2) Upon motion of any of the parties, the Commission or Hearing Officer may delay the commencement of the hearing if all parties agree to waive the forty-five day period for commencement of the hearing set forth in subsection (1) above.

(3) The testimony of all parties and witnesses shall be made under oath administered by the Commission or Hearing Officer.

(4) All testimony or comments given in any hearing before the Commission or Hearing Officer shall be electronically or stenographically recorded. Parties wishing to obtain a copy of the transcript may make arrangements with the court reporter to receive a copy at their expense or may purchase a copy from the Department.

(5) The parties shall not be bound by the strict rules of evidence prevailing in the courts. The Commission or Hearing Officer shall admit all evidence that is not irrelevant, immaterial, unduly repetitious, confidential, privileged or otherwise unreliable or of little probative value, except that offers of compromise are not admissible. The Commission or Hearing Officer shall preserve the confidentiality of trade-secrets and other commercial or financial information. The Commission or Hearing Officer may make such orders as may be necessary to consider such evidence in camera to address questions of law, fact, or discretion which arise out of that portion of the evidence which includes secrets, confidences, or privileged information.

(6) Each party shall be entitled to respond and present evidence and argument on all material issues properly before the Commission. The burden of going forward with the evidence shall be on the party requesting the hearing. The hearing shall be conducted as a de novo proceeding.

(7) Each party shall be entitled to present opening statements and closing arguments, oral or written, or both.

(8) Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules or by the Commission or Hearing Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(9) The Commission or Hearing Officer may admit and insert into the record as evidence, in lieu or oral testimony, statements of fact or opinion prepared by a witness, provided such statements are served on all parties not later than five (5) days before the hearing. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Commission or Hearing Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(10) The Commission or Hearing Officer may admit into evidence depositions of witnesses who are not subject to the subpoena power of the Commission or who are unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity or call to military duty.

(11) Where practicable, an original and seven copies of each exhibit shall be filed with the Commission or Hearing Officer for the record and a copy shall be furnished to each party. Each party shall be responsible for submitting the required number of copies of each exhibit that party offers into evidence, except that the Department shall provide the required number of copies of any exhibit that is taken from the Department's files. A true copy of any exhibit may be substituted for the original. Any party who wishes may arrange for the court reporter to make the requisite number of copies of each exhibit; however, the requesting party shall pay the court reporter for all such copies.

(12) Official notice may be taken of any matter judicially noticed in the courts of Alabama and of any scientific or technical facts within the specialized knowledge of the agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

(13) Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection shall supply a short statement of its grounds. The ruling by the Commission or Hearing Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection shall be automatic and is not waived by further participation in the hearing.

(14) Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

(15) At any time after the commencement of a hearing to contest an administrative action of the Department, the Commission or Hearing Officer may on its own initiative, or on the motion of any party, adjourn the hearing to a later time and/or different place. If any party raises an issue at hearing which was not included in the pre-hearing order, the Hearing Officer shall allow the issue to be raised only upon a finding that it is based upon newly discovered evidence that was not known and could not have been know at the time of the pre-hearing order. If the issue is allowed, the Hearing Officer shall, upon request of the other party, delay the hearing for a period of at least five working days, if he determines that the party will be prejudiced if no continuance is granted.

(16) Within ten (10) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Commission or Hearing Officer, any party may submit for consideration of the Commission or Hearing Officer proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Commission or Hearing Officer shall set a time by which reply briefs must be submitted and may set a page limit for said briefs. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon.

(17) A hearing to contest an administrative action of the Department is concluded on the date when all evidence, other submissions, testimony, comments, briefs, opening statements, and closing arguments have been received or heard by the Commission or its designated Hearing Officer and all motions have been ruled upon.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.15 Default.

If a party fails to appear at a hearing after being given proper notice thereof, the Commission or Hearing Officer may, if no adjournment is granted, proceed with the hearing in the absence of the party. If the petitioner fails to appear without good cause, such being submitted in writing within twenty-four hours of the commencement of the scheduled hearing, the Hearing Officer may recommend to the Commission a dismissal and the Commission may then enter said order of dismissal. In the case of an emergency, the Hearing Officer or Commission may waive the 24-hour notification requirement.
Author: David A. Ludder, Olivia H. Jenkins

Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.16 Record.

The record of a hearing to contest an administrative action of the Department shall include:

(a) the request for a hearing made and filed in accordance with Rule 335-2-1-.04;

(b) all motions, applications and intermediate rulings and orders;

(c) all evidence admitted or for which an offer of proof has been made and all briefs; provided, in the event that evidence in any proceeding contains information which the Department has determined to be confidential or otherwise not available to the public under any law, rule, or regulation administered by the Department, the Commission and Hearing Officer shall take such steps as are necessary to prevent public disclosure of that information;

(d) a statement of all matters officially noticed;

(e) all questions and objections, and rulings thereon;

(f) all proposed findings and exceptions;

(g) the report of the Hearing Officer, if one was designated by the Commission.

(h) a certified copy of the court reporter's transcript of the proceedings; and

(i) the final Order of the Commission.

Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984 . **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.17 Order.

(1) Within thirty days after the conclusion of a hearing contesting an administrative action of the Department, other than the issuance of an emergency order, the Commission shall issue an

appropriate order modifying, approving, or disapproving the Department's action unless all the parties agree to some other period of time.

(2) Within such time as may be reasonable under the circumstances but not later than thirty days after the conclusion of a hearing contesting the issuance of an emergency order, unless all the parties agree to some other period of time, the Commission shall issue an appropriate order modifying, approving, or disapproving the Department's action.

(3) Any order of the Commission modifying, approving, or disapproving the Department's administrative action shall be in writing and shall include findings of fact and conclusions of law separately stated. Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record. Findings of fact, if set forth in a manner which is no more than mere tracking of statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.

(4) The Hearing Officer's recommendation shall be given due weight but is not binding on the Commission.

(5) A copy of the order of the Commission shall be served upon each of the parties either personally, by registered mail, or by certified mail return receipt requested.

(6) In the case of the imposition of civil penalties in an administrative order, the Commission may increase or decrease the penalty assessed based upon the evidence presented as applied to the six penalty factors found at Code of Ala. 1975, Section 22-22A-5(18).
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.18 Majority Of Quorum Needed To Issue Order.

The Commission may not issue an order modifying, approving, or disapproving an administrative action of the Department without the concurrence of a majority of a quorum. A quorum shall be any four of the seven members of the Commission. Recusal of a member of the Commission shall not affect the quorum.
Author: David A. Ludder
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983.

335-2-1-.19 Mandatory Recusal.

(1) Any Commission member who was not present at a hearing to contest an administrative action of the Department and who has not considered the record, including a transcript of all testimony or comments given in such hearing, the pleadings, briefs, and the Hearing Officer's recommendation, shall recuse himself or herself from voting to issue any order modifying, approving, or disapproving such administrative action of the Department and from participating in any discussions with other members of the Commission concerning the issuance of any such order.

(2) Any party to a hearing contesting an administrative action of the Department may file a timely motion to compel the recusal of any member of the Commission from voting to issue an order modifying, approving, or disapproving such administrative action or to disqualify a Hearing Officer from conducting a hearing contesting such administrative action. Such motion shall be supported by a sufficient affidavit, made on personal knowledge, asserting conflict of interest or personal bias. The Commission shall determine the matter as part of the record of the hearing; however, the Commission member against whom conflict of interest or personal bias is asserted, shall recuse himself or herself from such determination.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.20 Permissive Recusal.

Any Commission member may recuse himself or herself from voting to issue any order modifying, approving, or disapproving an administrative action of the Department and from participating in any discussions with other members of the Commission concerning the issuance of any such order if the Commissioner believes himself or herself to have a conflict of interest or personal bias which would prevent the Commissioner's fair and impartial consideration of the merits of the case.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.21 Disposition Without Hearing.

(1) Any party who made and filed with the Commission a request for a hearing to contest an administrative action of the Department in accordance with Rule 335-2-1-.04, may at any time before the commencement of a hearing withdraw the request by filing a notice thereof with the Commission and serving a copy upon the Hearing Officer and all parties in accordance with Rule 335-2-1-.24.

(2) Any party who made and filed with the Commission a request for a hearing to contest an administrative action of the Department in accordance with Rule 335-2-1-.04, may at any time after the commencement of a hearing file a motion for voluntary dismissal of the contest with the Commission. A copy of said notice shall be served upon all parties and the Hearing Officer in accordance with Rule 335-2-1-.24.

(3) The parties to any hearing to contest an administrative action of the Department may at any time after the filing of the request for a hearing to contest an administrative action of the Department file with the Commission a proposed consent order modifying, approving, or disapproving the administrative action of the Department with a joint motion that the Commission issue an order in accordance therewith. A copy of said consent order shall be served upon the Hearing Officer as provided by Rule 335-2-1-.24.

(4) Motion to Dismiss.

(a) Upon motion of the Department, the Commission may dismiss an action for failure of the petitioner to comply with any of the following:

1. The time requirements for filing a request for hearing set forth at Rule 335-2-1-.04;

2. The pleading requirements of Rule 335-2-1-.04;

3. An order of the Commission or Hearing Officer; or,

4. A requirement to appear and proceed at a pre-hearing conference or at the hearing.

(b) Before any action is taken on a motion to dismiss filed in accordance with this rule, all parties shall be given a reasonable opportunity to oppose such motion.

Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.

History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.22 Summary Judgment.

(a) The Commission or Hearing Officer, upon motion of any party or sua sponte, may at any time render an accelerated recommendation in favor of the petitioner or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as the Commission or Hearing Officer may require, if no genuine issue of material fact exists and a party is entitled to decision as a matter of law, as to all or any part of the proceeding.

(b) Before any motion is granted in accordance with this rule, all parties shall be given a reasonable opportunity to oppose such motion.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.23 Stay Of Action Pending Issuance Of Order.

(1) Pending issuance of the Commission's order and upon application therefor made by any party, the Commission may stay the operation of the contested administrative action of the Department upon such terms and conditions as it may deem proper.

(2) An application for a stay of the operation of the contested administrative action shall state the grounds therefor.

(3) No stay of the operation of a contested administrative action of the Department shall be granted without prior notice to each party and an opportunity to be heard before the Commission. The Commission shall afford each party the opportunity to be heard, upon such terms and conditions as it may deem proper.

(4) The party moving for a stay shall file with the Commission all briefs, affidavits, exhibits and other evidence the movant wishes considered at least 6 days before the stay hearing. The opposing parties shall file any briefs, affidavits, exhibits or other evidence they wish considered at least 3 days before the stay hearing. The Commission, through its Chair, may grant oral argument on its own motion or upon request of a party.

(5) No stay of the operation of a contested administrative action of the Department shall be granted unless the party requesting the stay shows

(a) that there is a substantial likelihood that the petitioner will prevail on the merits at the hearing,

(b) that the movant will suffer irreparable harm if not granted injunctive relief,

(c) that the benefits the stay will provide the movant outweigh the harm it will cause the opposing party, and

(d) that issuance of the stay will not harm the public interest.

Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983.

335-2-1-.24 Filing And Service.

(1) Except as otherwise provided in this Chapter, the filing of any request, application, motion, or other pleading or paper with the Commission shall be made by delivering such request, application, motion, or other pleading or paper to:

Environmental Management Commission

1400 Coliseum Boulevard

Montgomery, Alabama 36110-1463

Filing shall not be timely unless the papers are received by the Commission within the time fixed for filing, except that papers shall be deemed filed on the day of mailing if mailed by certified, registered or express mail of the United States Postal Service or a similar private express-delivery service, and the date of the official post-mark is on or before the time fixed for filing.

(2) A copy of every motion or other pleading or paper, other than a request for a hearing and application to intervene, filed with the Commission concerning a contested administrative action of the Department shall be served upon each of the parties, the Department's Office of General Counsel, and the Hearing Officer if one has been appointed. The Hearing Officer shall maintain a duplicate file during the course of the proceeding. When the Hearing Officer corresponds directly with the parties, a copy of the correspondence shall be sent to the Commission, a copy shall be maintained by the Hearing Officer in the duplicate file, and a

copy shall be sent to all the parties. Parties who correspond directly with the Hearing Officer shall, in addition to serving all other parties, send a copy of all such correspondence to the Commission. A certificate of service shall accompany each document served under this subsection. Except as otherwise provided in this Chapter, service upon a party shall be made by delivering or mailing a copy to the party or the party's attorney, if represented by one. Delivery of a copy for purposes of service means: handing it to the party or the party's attorney; or leaving it at the party's office with his or her clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994. **Amended:** Filed June 20, 2003; effective July 25, 2003.

335-2-1-.25 Computation Of Time.

In computing any period of time prescribed by this Chapter or by Code of Ala. 1975, §22-22A-7, the day of the event from which the designated period begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. A legal holiday includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, Christmas Day, and any other day appropriated as a holiday by the President or the Congress of the United States, or the Governor of Alabama, or as prescribed in Code of Ala. 1975, §1-3-8. With the exception of the initial filing of the appeal request, whenever a party has the right or is required to do some act or to take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.26 Ex Parte Communications.

(1) A party, or the party's attorney, shall not communicate, or cause another to communicate, with the Commission or any member thereof or a Hearing Officer, as to any matter which concerns a contested administrative action of the Department then pending, except:

(a) in the course of official proceedings concerning the contested administrative action;

(b) in writing if the party promptly serves a copy of the writing on all other parties;

(c) orally upon adequate notice to each party or the party's attorney; or

(d) to set up scheduling conferences and make other contacts of an administrative nature in which substantive issues are not discussed.

(2) No Commission member or Hearing Officer shall initiate, entertain, or consider any communication with a party, or the party's attorney, concerning a contested administrative action of the Department then pending unless such communication is permitted as provided in this Rule.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.27 Hearing Officers.

(1) The Commission may hire or employ one or more Hearing Officers to conduct hearings of contested administrative actions of the Department, other than requests for a stay of an administrative action of the Department or hearings to contest the issuance of emergency orders. Such Hearing Officers shall be attorneys licensed to practice law in the State of Alabama and shall be paid an amount prescribed by the Commission from Department funds but shall not be subject to the authority, direction, or discretion of the Director of the Department or any other person subject to the authority, direction, or discretion of the Director of the Department.

(2) The Commission may delegate to a Hearing Officer the power to conduct hearings of contested administrative actions of the

Department, other than hearings to contest the issuance of an emergency order or to request a stay of the administrative action, and all proceedings related thereto, in the same manner as provided in this Chapter for the conduct of such hearings and proceedings before the Commission. Except as otherwise provided by these rules, the power to conduct hearings of contested administrative actions of the Department shall include the power to do all things which the Commission might do under this Chapter, except issue an order modifying, approving, or disapproving an administrative action of the Department, issue an order dismissing an appeal pursuant to Rule 335-2-1-.15 or Rule 335-2-1-.21, or issue an order granting or denying an application for a stay of the operation of the contested administrative action of the Department pending issuance of a Commission order modifying, approving, or disapproving such administrative action.

(3) The Hearing Officer shall prepare and submit to the Commission within ten days after the close of the record of any hearing to contest an administrative action of the Department, or such other time as the parties agree, a report containing findings of fact, conclusions of law, recommendations, and the record, including a transcript of all testimony or comments given in such hearing, for the consideration of the Commission. The report of the Hearing Officer shall also state the date on which the hearing was concluded.

(4) The Hearing Officer is specifically authorized to:

(a) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders other than those specifically reserved to the Commission under this chapter;

(b) Administer oaths and affirmations and take affidavits;

(c) Examine witnesses and receive documentary or other evidence;

(d) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other non privileged evidence, and failing the production thereof without good cause shown, draw adverse inferences against the party;

(e) Limit or strike issues not properly before the Commission;

(f) Admit or exclude evidence;

(g) Hear and make recommendations on questions of facts, law or discretion;

(h) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(i) Issue subpoenas;

(j) Make recommendations to the Commission concerning the final disposition of the proceedings;

(k) Establish guidelines and limitations on the scope and length of any hearings and briefs presented consistent with the principles of administrative law and the intent of the Environmental Management Act; and

(l) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(5) In preparing the recommendation to the Commission, the Hearing Officer shall determine each matter of controversy upon a preponderance of the evidence. The burden shall rest with the petitioner to show by a preponderance of the evidence that the Department's action should be modified or disapproved.
Author: David A. Ludder, Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: Effective July 1, 1983. **Amended:** October 10, 1984. **Amended:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.28 Objections To Hearing Officer's Recommendation.

(1) Any party may object to the recommendation of the Hearing Officer by filing objections to the recommendation and an accompanying brief with the Commission within ten (10) days after the Hearing Officer's recommendation is served upon the parties. The objections shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the Hearing Officer's recommendation.

(2) Not later than 3 days prior to the meeting of the Commission to make its final decision, or ten days after receipt of notice of the filing of objections to the Hearing Officer's recommendation, whichever is sooner, any other party may file and serve with the Commission a reply brief responding to arguments raised by the objecting party, together with references to the relevant portions of the record, recommendation, or opposing brief. Rely briefs shall be limited to the scope of the objections. Further briefs shall be filed only with the permission of the Chair of the Commission.

(3) The Commission may grant oral argument of issues raised by the objections to the recommendation of the Hearing Officer on its own motion or upon request of a party. If oral argument is required, the argument shall be limited to the issues included in the objections filed with the Commission. The Commission may limit the amount of time each party shall have for oral argument. No oral argument will be allowed if objections to the Hearing Officer's recommendation are not filed.
Author: Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.29 Oral Argument Before The Commission.

Any party may request oral argument before the Commission to address matters raised by the Commission. The decision to allow oral argument is discretionary with the Commission.
Author: Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994.

335-2-1-.30 Practice Before The Commission.

No person shall represent a party before the Commission unless that person is licensed to practice law in the State of Alabama or has been admitted pro hac vice in accordance with Rule VII, Rules Governing Admission to the Alabama State Bar.
Author: Olivia H. Jenkins
Statutory Authority: Code of Ala. 1975, §§22-22A-5, 22-22A-6, 22-22A-7, 22-22A-8.
History: **New Rule:** Filed September 27, 1994; effective November 1, 1994.