ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT LAND DIVISIONS - UNIFORM ENVIRONMENTAL COVENANTS PROGRAM ADMINISTRATIVE CODE

CHAPTER 335-5-1 GENERAL

TABLE OF CONTENTS

335-5-1-.01 Purpose
335-5-1-.02 Applicability
335-5-1-.03 Definitions
335-5-1-.04 Holder
335-5-1-.05 Registry Of Environmental Covenants
335-5-1-.06 Fees
335-5-1-.07 Process For Entering A Covenant

335-5-1-.01 Purpose.

These regulations are promulgated to establish minimum requirements governing environmental covenants pursuant to the Alabama Uniform Environmental Covenants Act, Code of Ala. 1975, §§35-19-1 to 35-19-14.
Author: James L. Bryant; Lawrence A. Norris
Statutory Authority: Code of Ala. 1975, §§35-19-1; 35-19-13.
History: New Rule: Filed April 21, 2009; effective May 26, 2009.

335-5-1-.02 Applicability.

(1) These regulations apply to a property or site undergoing a response action that does not return the property to unrestricted use.

(a) An environmental covenant is required for a site if the approved environmental response project plan places a land use control on the site because it is not being remediated to unrestricted use, unless exempt in 335-3-1-.02(3).

(b) The Department, when considering the environmental response project plan for a site, may require the owner or operator or other responsible person to enter into an environmental covenant with the owner of the off-site parcels or properties to ensure that the remedy approved in the plan is protective of human health and the environment.

(c) An owner or operator or other responsible person whose environmental response project plan includes other off-site

parcels or properties may voluntarily include the off-site parcels or properties in an environmental covenant.

(d) Failure to enter into an environmental covenant with an off-site property owner, for any reason, does not release or absolve the site owner or operator or other responsible person from any obligation to perform required remediation activities addressing on-site or off-site contamination, including land use controls. Lack of an environmental covenant may require the owner or operator or other responsible person to perform additional activities in the approved environmental response project plan to ensure effectiveness of the response action and the protection of human health and the environment for current and future uses of the on-site and/or off-site property.

(2) These regulations apply to environmental covenants arising from environmental response projects conducted under any of the following ADEM programs:

(a) Scrap tire remediation sites subject to 335-4.

(b) Soil and groundwater remediation sites subject to 335-6-8.

(c) Solid waste disposal sites subject to 335-13.

(d) Hazardous waste disposal sites subject to 335-14.

(e) Voluntary cleanup program sites subject to 335-15.

(f) Dry cleaner remediation sites subject to 335-16.

(g) Sites subject to the Alabama Hazardous Substance Cleanup Fund Act, Code of Ala. 1975, §§22-30A-1 to 22-30A-11, and

(h) Sites being remediated by potentially responsible parties or the United States Environmental Protection Agency which are subject to the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9601 et seq.).

(3) For properties or sites owned by the federal government which are legally unable to execute an environmental covenant during the period of federal ownership, the following requirements shall apply:

(a) During the period of federal ownership.

1. In lieu of an environmental covenant, a Notice of Environmental Use Restriction for properties or sites owned by the federal government shall be prepared and submitted to ADEM for approval that gives notice of the

current and future use of the federal property. The Notice shall:

(i) Contain a provision that an environmental covenant shall be executed with ADEM and appropriately filed at such time the property is transferred to a non-federal owner.

(ii) Contain a provision that the Notice does not convey a property interest.

(iii) Contain a provision that, if the property is transferred to another federal agency, the environmental use restrictions shall remain in effect and be binding upon the recipient federal agency.

(iv) Be incorporated into the installation master plan or facility property management plan and shall be recorded into the land records of the property in compliance with 335-5-3-.02.

(v) Contain a provision that all cleanup plans, decision documents, permits and other instruments relying upon or referencing the Notice shall include appropriate conditions requiring that the Notice remain in place for the duration of federal ownership, and that a covenant shall be executed and filed at such time as the property is transferred to an owner that is not the federal government, and conditioning the continued approval of any selected remedies relying upon or referencing the Notice or covenant upon the timely execution and filing of a covenant at the time the property is transferred to an owner that is not the federal government.

(vi) Contain a provision that all other regulations applying to an environmental covenant shall apply to the Notice.

(b) At the time of transfer of property subject to 335-5-1-.02(3)(a) to non-federal ownership, an environmental covenant pursuant to this Division shall be executed.

(4) These regulations apply to interests in real property which are in existence at the time an environmental covenant is created or amended.

(a) An interest that has priority under other law is not affected by an environmental covenant unless the person owning the interest subordinates that interest to the covenant.

(b) A person owning a prior interest is not required to subordinate that interest to an environmental covenant or to agree to be bound by the covenant.

(c) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the subordination agreement may be signed by any person authorized by the governing board of the owners' association.

(d) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not automatically impose any affirmative obligation on the person with respect to the environmental covenant.

Author: James L. Bryant; Lawrence A. Norris, R. Blake Schmidt, Pamela W. Luckie.
Statutory Authority: Code of Ala. 1975, §35-19-13.
History: New Rule: Filed April 21, 2009; effective May 26, 2009.
Amended: Filed February 19, 20013; effective March 26, 2013.
Amended: Published December 29, 2023; effective February 12, 2024.

335-5-1-.03 Definitions.

For the purpose of this Division, the following words and phrases, unless the context of 335-5 plainly indicates otherwise, shall have the following meanings:

(a) Activity and Use Limitations - Restrictions or obligations created under this Act with respect to real property.

(b) ADEM or Department - The Alabama Department of Environmental Management.

(c) Alabama Uniform Environmental Covenants Act or "Act" - Code of Alabama 1975, §§ 35-19-1 to 35-19-14.

(d) Common Interest Community - A condominium, cooperative, or other real property with respect to which a person, by virtue of the person's ownership of a parcel of real property, is obligated to pay property taxes or insurance premiums, or for maintenance, or improvement of other real property described in a recorded covenant that creates the common interest community.

(e) Director - The Director of the Alabama Department of Environmental Management or his or her designated representative.

(f) Environmental Covenant - A servitude arising under an environmental response project that imposes activity and use limitations.

(g) Environmental Response Project - A plan or work performed for environmental remediation of real property and conducted under any of the following programs or situations:

(i) A federal or state program governing environmental remediation of real property as listed in 335-5-1-.02(2);

(ii) Incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency;

(iii) Under a state voluntary cleanup program pursuant to 335-15.

(h) Holder - The grantee of an environmental covenant that meets the requirements of 335-5-2-.01.

(i) Land Use Controls - Any restriction or control that serves to protect human health and the environment by limiting the use of or exposure to any portion of a property or site, including water resources. These controls include, but are not limited to:

1. Engineering controls for remedial actions directed toward containing or controlling the migration of contaminants through the environment. These include, but are not limited to, stormwater conveyance systems, slurry walls, liner systems, caps, leachate collection systems, pump-and-treat systems, and groundwater recovery systems. Engineering controls are classified as:

(i) Class 1, which includes multi-1ayer caps or liner systems, soil vapor extraction systems, groundwater pump-and-treat systems, leachate and groundwater recovery systems, stormwater conveyance systems, slurry walls and active ventilation of closed spaces.

(ii) Class 2, which includes clay or soil caps or liner systems, sub-structural vapor barriers, and passive ventilation of closed spaces.

(iii) Class 3, which includes asphalt caps and fencing systems.

(iv) For other engineering controls not listed, ADEM shall determine the classification of the engineering control upon the request of an owner or operator or other responsible person.

2. Institutional controls that are legal or contractual restrictions on property use that remain effective after remediation is completed and are used to meet an approved environmental response project plan or proposal. These include, but are not limited to, deed notations, deed restrictions, groundwater use restrictions, restrictive covenants, conservation easements, and limited development rights. Institutional controls are classified as:

(i) Class 1, which includes any water use restriction.

(ii) Class 2, which includes restrictive covenants for industrial or commercial use only or no schools or daycares, and imposition of conservation easements or limited developmental rights.

(iii) Class 3, which includes restrictive covenants for no excavations, for use as greenspace only, and no hunting or fishing.

(iv) For other institutional controls not listed, ADEM shall determine the classification of the institutional control upon the request of an owner or operator or other responsible person.

(j) Owner or Operator - Includes the following:

1. In the case of a property or site, any person owning or operating that property or site.

2. Any person who owned, operated, or otherwise controlled activities at a property or site immediately prior to conveyance of title of that property or site to a unit of state or local government or loss of control of that property or site due to bankruptcy, foreclosure, tax delinquency, or abandonment.

3. The definition does not include the following:

(i) A person acting solely in a fiduciary capacity who can show evidence of ownership and who did not actively participate in the management, disposal, or release of hazardous wastes, hazardous constituents, hazardous substances or petroleum product from the property or site.

(ii) A unit of a state or local government that acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or any other circumstance where the government involuntarily acquires title by virtue of its function as

sovereign. This exclusion shall not apply to any state or local government that has caused or contributed to the release of hazardous wastes, hazardous constituents, or hazardous substances from the property or site.

(k) Person - An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(l) Property or Site - A parcel of land defined by boundaries of a legal description where a hazardous waste, hazardous constituent, hazardous substance or petroleum product has been or is suspected to have been deposited, discharged, stored, disposed of, placed, or otherwise come to be located.

(m) Record - Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(n) Response Action - Action taken in the event of a release or threatened release of a hazardous waste, hazardous substance, petroleum product, or other pollutant into the environment to remove or to prevent or minimize the threat to public health or the environment.

(o) Responsible Person - Any person who has contributed or is contributing to a release of any hazardous waste, hazardous constituent or hazardous substance at a property. This term includes any person who has contributed or is contributing to a release of petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, and finishing, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils. This term includes persons described in §§107(a)(1) through 107(a)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC Section 9601, et seq. (CERCLA). This term excludes persons described in §107(b) of CERCLA.

(p) Restricted Use - Any use of a property or site other than unrestricted use.

(q) State - The State of Alabama.

(r) Unrestricted Use - The designation of acceptable future use at a property or site where the remediation levels, based on either background or standard exposure factors, shall have been attained in all media to allow the property or site to be used for any purpose.

Author: James L. Bryant; Lawrence A. Norris, R. Blake Schmidt, Pamela W. Luckie,
Statutory Authority: Code of Ala. 1975, §§35-19-2; 35-19-13.
History: New Rule: Filed April 21, 2009; effective May 26, 2009.
Amended: Filed February 19, 2013; effective March 26, 2013.
Amended: Published December 29, 2023; effective February 12, 2024.

335-5-1-.04 Holder.

(1) Any person may be a holder. An environmental covenant may identify more than one holder. The holder's interest is an interest in real property.

(2) A right of the Department under the Act or under an environmental covenant, other than a right as a holder, is not an interest in real property.

(3) The Department is bound by any obligation it assumes in an environmental covenant, but does not assume obligations merely by signing an environmental covenant.

(4) Any other person who signs an environmental covenant is bound by the obligations the person assumes in the covenant; however, signing the covenant does not change the person's obligations, rights, or protections granted to or imposed upon that person under other law, except as provided in the covenant.
Author: James L. Bryant; Lawrence A. Norris
Statutory Authority: Code of Ala. 1975, §§35-19-3; 35-19-13.
History: New Rule: Filed April 21, 2009; effective May 26, 2009.

335-5-1-.05 Registry Of Environmental Covenants.

(1) The Department shall establish and maintain a registry that contains all environmental covenants and any amendment or termination of those covenants executed pursuant to 335-5.

(2) In addition to the requirements of 335-5-1-.05(1), the registry may contain any other information concerning environmental covenants and the real property subject to them which the Department considers appropriate.

(3) The full text of the covenant, amendment, or termination and any other information required by ADEM shall be submitted to the Department for inclusion in the ADEM Registry of Environmental Covenants within 30 days of ADEM approval of the draft covenant. The person submitting the covenant may be the owner, operator, other responsible person, grantor or any holder of the covenant.
Author: James L. Bryant; Lawrence A. Norris; Sonja B. Favors
Statutory Authority: Code of Ala. 1975, §§35-19-12; 35-19-13.

History: New Rule: Filed April 21, 2009; effective May 26, 2009.
Amended: Filed February 19, 2013; effective March 26, 2013.
Amended: Filed August 20, 2019; effective October 4, 2019.

335-5-1-.06 Fees.

The Department may assess fees to implement the provisions of the Act.

(1) A Processing and Review Fee shall be required to cover the cost of processing the covenant application and for reviewing the draft and final covenants. For sites utilizing both institutional controls and engineering controls, the processing and review fees shall be the greater of the applicable fees.

(2) A Registry Recording Fee shall be required to cover cost of establishing and maintaining the ADEM Registry of Environmental Covenants, for entering the site in this Registry, and for performing routine inspections at the site to determine compliance with the covenant restrictions. For sites with more than one classification of institutional or engineering control, the Registry Recording Fee shall be the greater of the applicable fees.

(3) An owner or operator or other responsible person desiring to enter an environmental covenant shall submit a draft environmental covenant and all required fees.

(4) Fees required pursuant to this section are included in 335-1-6-.04, Schedule J.

(5) Exemptions. The following sites are exempt from paying fees in 335-1-6-.04, Fee Schedule J and in 335-5-1-.06, as specified below. These sites will be entered in the ADEM Registry of Environmental Covenants.

(a) A site that is enrolled in the ADEM Voluntary Cleanup Program pursuant to 335-15 is exempt from paying processing and review fees in Fee Schedule J.

(b) A site regulated under the programs listed in 335-5-1-.02(2) that has a provision for a post-closure permit which is renewable by payment of a permit fee and a provision for routine inspection by the Department or other environmental regulatory agency is exempt from paying all fees in Fee Schedule J.

(c) A site regulated under the programs listed in 335-5-1-.02(2) that has a provision for cost reimbursement to the Department as contained in a

cooperative agreement, a memorandum of agreement or an administrative order is exempt from paying the Processing and Review Fees in Fee Schedule J, to the extent such costs are reimbursable under these agreements.

(6) An owner or operator or other responsible person desiring to enter an environmental covenant for an environmental response project containing multiple individually deeded parcels off-site of the property or site which are subject to the environmental response project plan may submit an alternative fee schedule to the Department as part of its formal submittal of the environmental covenant in lieu of fees required in 335-1-6-.04, Fee Schedule J.

(a) If submitting an alternative fee schedule, the owner or operator or other responsible person shall be required to pay the applicable processing and review fees found in 335-1-6-.04, Fee Schedule J for each individually worded covenant for an off-site property that is different from land use controls or restrictions found in other covenants utilized for other individually deeded parcels off-site of the property or site subject to the environmental response project plan.

(b) If submitting an alternative fee schedule, the owner or operator or other responsible person shall propose how to reimburse the Department for the registry recording fee which covers its cost to inspect each individually deeded off-site parcel to determine compliance with the covenant. The method to reimburse the Department shall be included in an order or agreement executed between the owner or operator or other responsible person and the Department. The length of time in years over which inspections will be conducted by the Department shall be negotiable and included in the covenant.

Author: James L. Bryant; Lawrence A. Norris; Sonja B. Favors and Pamela W. Luckie.
Statutory Authority: Code of Ala. 1975, §35-19-13.
History: New Rule: Filed April 21, 2009; effective May 26, 2009.
Amended: Filed February 19, 2013; effective March 26, 2013.
Amended: Filed August 20, 2019; effective October 4, 2019.
Amended: Published December 29, 2023; effective February 12, 2024.

335-5-1-.07 Process For Entering A Covenant.

(1) The owner or operator, the other responsible person or the person conducting an environmental response project may use land use control in lieu of remediating the property to a level supporting unrestricted use. The ADEM organizational unit under which the response action is being conducted shall approve the

environmental response project plan which proposes a land use control.

(2) For properties not remediated to a level supporting unrestricted use, an environmental covenant is required in accordance with 335-5-1-.02. To enter an environmental covenant, the owner or operator, the other responsible person or the person conducting an environmental response project shall submit the following to the ADEM organizational unit under which the response action is being conducted:

(a) A draft of the proposed environmental covenant.

(b) The applicable fees in Fee Schedule J of 335-1-6 and 335-5-1-.06.

(c) All pertinent information required in 335-5-2-.01(1).

(3) ADEM shall review and approve the draft covenant or request modifications. If requesting modifications to the draft covenant, ADEM shall provide the applicant with its reasons for requesting change. Upon submittal by the applicant of acceptable modifications, ADEM shall approve the draft covenant.

(4) Within 30 days of ADEM's approval of the draft covenant, the applicant shall submit one copy of the final covenant signed by the Grantee, which complies with 335-5-2 for execution by the Director or his designee. Upon execution by the Department, the signed copy shall be returned to the applicant.

(5) Upon receiving the executed copy of the covenant from ADEM, the applicant shall have the covenant or an ADEM-approved recording instrument, as described in 335-5-3-.02(3), recorded in the land records of the county where the site is located, in compliance with 335-5-3-.02.

(6) Documentation of the recorded covenant or the ADEM-approved recording instrument shall be submitted to ADEM within 30 days of recording in compliance with 335-5-3-.02.

Author: James L. Bryant; Lawrence A. Norris; Sonja B. Favors; Lynn T. Roper; Pamela W. Luckie
Statutory Authority: Code of Ala. 1975, §§35-19-3; 35-19-13.
History: **New Rule**: Filed April 21, 2009; effective May 26, 2009.
Amended: Filed February 19, 2013; effective March 26, 2013.
Amended: Filed August 20, 2019; effective October 4, 2019.
Amended: Published December 29, 2023; effective February 12, 2024.