

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

**LAND DIVISION
UNIFORM ENVIRONMENTAL COVENANTS PROGRAM**

DIVISION 335-5

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ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

LAND DIVISION

UNIFORM ENVIRONMENTAL COVENANTS PROGRAM

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**CHAPTER 335-5-1
GENERAL**

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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 Alabama 1975, §§35-19-1 to 35-19-14.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Alabama 1975, §§35-19-1; 35-19-13.

History: ~~XXXXX~~, 2009.

335-5-1-.02 Applicability.

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

(2) These regulations apply to 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;
- (c) Leaking storage tank remediation sites subject to 335-6-15 and 335-6-16;
- (d) Solid waste disposal sites subject to 335-13;
- (e) Hazardous waste disposal sites subject to 335-14;
- (f) Voluntary cleanup program sites subject to 335-15;

(g) Dry cleaner remediation sites subject to 335-16;

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

(i) 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) 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.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §35-19-13.

History: ~~XXXXX~~, 2009.

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 a federal or state program governing environmental remediation of real property.

(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, 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 include multi-layer 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 include clay or soil caps or liner systems, sub-structural vapor barriers, and passive ventilation of closed spaces;

(iii) Class 3, which include 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.

2. Institutional controls that are legal or contractual restrictions on property use which remain effective after remediation is completed and are used to meet an approved remediation plan or proposal. These include, but are not limited to, deed notations, deed restrictions, water 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 include 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 include 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.

3. Water use restrictions that can be placed on the use of a particular water supply source that has been identified as being contaminated with hazardous substances or other contaminants in order to protect human health and the environment.

(j) Owner or Operator - Includes the following:

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

2. Any person who owned, operated, or otherwise controlled activities at a facility immediately prior to conveyance of title of that facility to a unit of state or local government or loss of control of that facility 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, or hazardous substances from the facility.

(ii) A unit of a state or local government which 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 facility.

(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 Facility - Includes any of the following:

1. Any land, building, structure, installation, equipment, pipe or pipeline, sewer or publicly owned treatment works, well, pond, pit, lagoon, impoundment, ditch, landfill, or storage container.

2. Any site or area where a hazardous waste, hazardous constituent, hazardous substance or petroleum product has been deposited, discharged, stored, disposed of, placed, or has otherwise come to be located.

3. A parcel of land defined by the boundaries in the applicable deed.

(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 release of a hazardous waste, hazardous substances, petroleum product, or other pollutant so that it does not pose a threat to public health or the environment.

(o) Restricted Use - Any use of a property or facility other than unrestricted use.

(p) State - The State of Alabama.

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

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-2; 35-19-13.

History: ~~XXXXX~~, 2009.

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.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-3; 35-19-13.

History: ~~XXXXX~~, 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.

(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 ADEM within thirty (30) days of its completion for inclusion in the registry required in 335-5-1-.05.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-12; 35-19-13.

History: ~~XXXXX~~. 2009.

335-5-1-.06 Fees. The Department may assess fees to implement the provisions of the Act.

(a) An owner or operator desiring to enter an environmental covenant shall submit a formal request, along with a processing and review fee.

(b) An owner or operator entering the environmental covenant in the registry pursuant to 335-5-1-.05 shall submit a registry recording fee with the submittal of all information required by the covenant and the Department.

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

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §35-19-13.

History: ~~XXXXX~~, 2009.

335-5-1-.07 Process for entering a Covenant.

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

(2) The owner or operator or the person conducting an environmental response project who is requesting an environmental covenant shall submit the following to the appropriate organizational unit under which the response action is being conducted:

(a) The applicable processing and review fee identified in Fee Schedule J of 335-1-6.

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

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-3; 35-19-13.

History: ~~XXXXX~~, 2009.

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**CHAPTER 335-5-2
ENVIRONMENTAL COVENANTS**

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335-5-2-.01 Covenant Contents.

(1) An environmental covenant is not effective unless it includes all of the following information:

(a) A statement that the instrument is an environmental covenant executed pursuant to the Act.

(b) A legally sufficient description of the real property subject to the covenant.

(c) A description of the activity and use limitations on the real property.

(d) Identification of every holder.

(e) The signatures of the Director, every holder, and unless waived by the Department in writing, every owner of the fee simple of the real property subject to the covenant.

(f) The name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(2) Other information, restrictions, and requirements agreed to by the persons who signed it, including any of the following:

(a) Requirements for notice following transfer of a specified interest in the property subject to the covenant;

(b) Requirements for notice concerning proposed changes in use of, applications for building permits for, or proposals for any site work affecting the contamination on, the property subject to the covenant;

(c) Requirements for periodic reports of compliance with the covenant;

(d) Rights of access to the property which are granted in connection with implementation or enforcement of the covenant;

(e) A brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(f) Limitations on amendment or termination of the covenant in addition to those provided in 335-5-4-.02; and

(g) Rights of the holder in addition to the holder's right to enforce the covenant pursuant to 335-5-5-.01.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-4; 35-19-13.

History: **XXXXX, 2009.**

335-5-2-.02 Covenant Rules.

(1) An environmental covenant that complies with the Act and 335-5 runs with the land.

(2) An environmental covenant that is otherwise effective is valid and enforceable even if one or more of the following conditions apply:

(a) It is not appurtenant to an interest in real property.

(b) It can be or has been assigned to a person other than the original holder.

(c) It is not of a character that has been recognized traditionally at common law.

(d) It imposes a negative burden.

(e) It imposes an affirmative obligation on a person having an interest in the real property or on the holder.

(f) The benefit or burden does not touch or concern real property.

(g) There is no privity of estate or contract.

(h) The holder dies, ceases to exist, resigns, or is replaced.

(i) The owner of an interest subject to the environmental covenant and the holder are the same person.

(3) An instrument may create restrictions or obligations with respect to real property which might otherwise qualify as activity and use limitations

except for the fact that the instrument was recorded after December 31, 2007. That instrument is not invalid or unenforceable because of any of the limitations on enforcement of interests described in 335-5-2-.02(2) or because it was identified as an easement, servitude, deed restriction, or other interest. 335-5 does not apply in any other respect to such an instrument.

(4) Neither the Act nor 335-5 invalidates or renders unenforceable any interest, whether designated as an environmental covenant or other interest, which is otherwise enforceable under the laws of this State.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-5; 35-19-13.

History: ~~XXXXX~~, 2009.

335-5-2-.03 Relationship to other Land Use Law. Neither the Act nor 335-5 authorizes use of real property which is otherwise prohibited by zoning, by other law which regulates the use of real property, or by a recorded instrument that has priority over the environmental covenant. An environmental covenant may prohibit or restrict a use of real property which is authorized by zoning or by law other than the Act.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-6; 35-19-13.

History: ~~XXXX~~, 2009.

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**CHAPTER 335-5-3
NOTICE AND RECORDATION**

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335-5-3-.01 Notices of Covenants.

(1) A copy of the environmental covenant shall be provided by the owner or operator and in the manner required by the Department to each of the following:

- (a) Each person who signed the covenant;
- (b) Each person holding a recorded interest in the real property subject to the covenant;
- (c) Each person in possession of the real property subject to the covenant;
- (d) Each municipality or other unit of local government in which the real property subject to the covenant is located; and
- (e) Any other person the Department requires.

(2) The validity of a covenant is not affected by failure to provide a copy of the covenant as required under 335-5-3-.01(1).

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-7; 35-19-13.

History: **XXXX, 2009.**

335-5-3-.02 Recording of Covenants.

(1) An environmental covenant and any amendment or termination of the covenant must be recorded in every county where any portion of the real property subject to the covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(2) Except as otherwise provided in 335-5-4-.01(3), an environmental covenant is subject to the laws of the State governing recording and priority of interests in real property.

(3) Content of Recording Instrument. In lieu of recording the entire covenant, a notice may be recorded which must contain all of the following:

(a) A legally sufficient description and any available street address of the real property subject to the covenant.

(b) The names and addresses of the owner of the fee simple interest in the real property, the Department, and the holder if other than the Department.

(c) A statement that the covenant, amendment, or termination is available in a registry at the Department.

(d) A statement that the notice is notification of an environmental covenant executed pursuant to this Act.

(4) The requirements of 335-5-3-.02(3) are satisfied with a statement, executed with the same formalities as a deed in the State of Alabama, in substantially the following form:

(a) This notice is filed in the land records of the Probate Office of _____ County, Alabama, pursuant to Section 12 of the Alabama Uniform Environmental Covenants Act.

(b) This notice and the covenant, amendment, or termination to which it refers may impose significant obligations with respect to the property described below.

(c) A legal description of the property is attached as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is [insert address of property] [not available].

(d) The name and address of the owner of the fee simple interest in the real property on the date of this notice is [insert name of current owner of the property and the owner's current address as shown on the tax records of the jurisdiction in which the property is located].

(e) The environmental covenant, amendment, or termination was signed by the Director of the Alabama Department of Environmental Management.

(f) The environmental covenant, amendment, or termination was filed in the registry on [insert date of filing].

(g) The full text of the covenant, amendment, or termination and any other information required by the Department is on file and available for inspection and copying in the registry maintained for that purpose by the Alabama Department of Environmental Management."

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-8; 35-19-12; 35-19-13.

History: XXXX, 2009.

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
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**CHAPTER 335-5-4
DURATION AND AMENDMENT**

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335-5-4-.01 Duration of Covenants.

(1) An environmental covenant is perpetual unless any of the following conditions apply:

- (a) Its term is limited to a specific duration or terminated by the occurrence of a specific event.
- (b) It is terminated or modified pursuant to 335-5-4-.01(2).
- (c) It is terminated or modified by consent pursuant to 335-5-4-.02.
- (d) It is terminated by foreclosure of an interest that has priority over the environmental covenant.

(e) It is terminated or modified in an eminent domain proceeding, but only if all of the following requirements are satisfied:

- 1. The Department is a party to the proceeding.
- 2. All persons identified in 335-5-4-.02(1) and (2) are given notice of the pendency of the proceeding.
- 3. The court determines, after hearing, that the termination or modification will not adversely affect human health, public welfare, or the environment.

(2) If the Department determines that the intended benefits of the covenant can no longer be realized, or are no longer protective of human health and the environment, it shall give notice of at least thirty days to all persons identified in 335-5-4-.02(1) and (2), of its intention to petition a court, under the doctrine of changed circumstances, for termination of the covenant or reduction of its burden on the real property subject to the covenant. The Department's determination or its failure to make a determination upon request is subject to review pursuant to the Alabama Administrative Procedures Act, Code of Alabama 1975, §§41-22-1 to 41-22-27 (AAPA). After the applicable provisions

of AAPA have been satisfied, the Department may petition a court to terminate or reduce the covenant.

(3) Except as otherwise provided in 335-5-4-.01(1) and (2), an environmental covenant may not be extinguished, limited, or impaired through issuance of a tax deed, foreclosure of a tax lien, or by application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(4) An environmental covenant may not be extinguished, limited, or impaired by the application of any law relating to marketable title or dormant mineral interests.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-9; 35-19-13.

History: ~~XXXXX~~, 2009.

335-5-4-.02 Amendment of Covenants.

(1) Unless otherwise specified in the environmental covenant, no environmental covenant may be amended or terminated by consent unless the amendment or termination is signed by all of the following:

(a) The Department. Where the Department waives this requirement, the current owner of the fee simple of the real property subject to the covenant shall sign.

(b) Each person who originally signed the covenant, unless a person, in a signed record, waives the right to consent or a court finds that a person no longer exists or cannot be located or identified with the exercise of reasonable diligence.

(c) Except as otherwise provided in 335-5-4-.02(4)(b)., the holder.

(2) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the covenant unless the current owner of the interest consents to the amendment or waives, in a signed record, the right to consent to amendments.

(3) Except for an assignment undertaken pursuant to a governmental reorganization, an assignment of an environmental covenant to a new holder is an amendment.

(4) Except as otherwise provided in an environmental covenant:

(a) A holder may not assign its interest without consent of the other parties.

(b) A holder may be removed and replaced by agreement of the parties specified in 335-5-4-.02(1)(a) and (b).

(c) A court of competent jurisdiction may fill a vacancy in the position of holder.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-10; 35-19-13.

History: ~~XXXXX~~, 2009.

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**CHAPTER 335-5-5
ENFORCEMENT**

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335-5-5-.01 Enforcement of Covenants.

(1) Pursuant to Code of Alabama 1975, §22-22A-5, ADEM may pursue enforcement action for violation of an environmental covenant established under 335-5.

(2) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by any of the following parties or entities:

(a) A party to the covenant.

(b) The Department.

(c) Any person to whom the covenant expressly grants power to enforce.

(d) A person whose collateral, liability, or interest in the real property may be affected by the alleged violation of the covenant.

(e) A municipality or other unit of local government in which the real property subject to the covenant is located.

(3) A person is not responsible for or subject to liability for environmental remediation solely because that person has the right to enforce an environmental covenant.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-11; 35-19-13.

History: ~~XXXXX~~, 2009.

335-5-5-.02 Duties of the Department.

(1) The Department is designated as the administrating agency for the Act and 335-5 and is authorized to administer and enforce the Act and these

regulations through the authorities granted to it by the Environmental Management Act.

(2) The designation provided in subsection (1) does not imply that the Department shall assume any administration or enforcement functions other than those directly related to the environmental covenant.

(3) With respect to an environmental response project, the Act does not limit the regulatory authority of the Department under other law.

Authors: James L. Bryant; Lawrence A. Norris.

Statutory Authority: Code of Ala. 1975, §§35-19-11; 35-19-13.

History: ~~XXXXX~~, 2009.