

APA-1
07/04

TRANSMITTAL SHEET FOR
NOTICE OF INTENDED ACTION

Control 335 Department or Agency Environmental Management
Rule No. 335-5-1-.02
Rule Title: Applicability

 New X Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? YES

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? YES

Is there another, less restrictive method of regulation available that could adequately protect the public? NO

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? NO

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? NO

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? YES

Does the proposed rule have an economic impact? NO

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Reference Service.

Signature of certifying officer Marilyn Elliott

Date October 22, 2012

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
LAND DIVISION

NOTICE OF INTENDED ACTION

AGENCY NAME: DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

<u>RULE NO. & TITLE</u>	335-5-1-.02	<u>Applicability (Amend)</u>
	335-5-1-.03	<u>Definitions (Amend)</u>
	335-5-1-.05	<u>Registry of Environmental Covenants (Amend)</u>
	335-5-1-.06	<u>Fees (Amend)</u>
	335-5-1-.07	<u>Process for Entering a Covenant (Amend)</u>

INTENDED ACTION:

Revise Division 5 of the ADEM Administrative Code to amend Rules 335-5-1-.02 (Applicability), 335-5-1-.03 (Definitions), 335-5-1-.05 (Registry of Environmental Covenants), 335-5-1-.06 (Fees), 335-5-1-.07 (Process for Entering a Covenant).

SUBSTANCE OR PROPOSED ACTION:

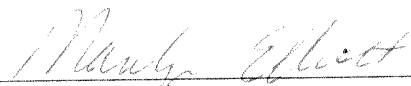
Revisions to Division 5 are being proposed to amend rules 335-5-1-.02, 335-5-1-.03, 335-5-1-.05, 335-5-1-.06, and 335-5-1-.07 to address changes required by Alabama Act 2-12-317 concerning underground storage tanks, to address applicability to federal facilities and to clarify programmatic requirements for environmental covenants.

TIME, PLACE, MANNER OF PRESENTING VIEWS:

Comments may be submitted in writing or orally at a public hearing to be held December 13, 2012 at 1:00 p.m. in the ADEM Main Hearing Room, ADEM Building, 1400 Coliseum Boulevard, Montgomery, Alabama 36110.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE: December 13, 2012

CONTACT PERSON AT AGENCY: James L. Bryant (334)271-7771



Lance R. LeFleur
Director

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 335-5-1-.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, 335-6-15 and 335-6-16.

~~(c) Leaking storage tank remediation sites subject to 335-6-15.~~

~~(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.

(g) Sites subject to the Alabama Hazardous Substance Cleanup Fund Act, Code of Alabama 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.

~~(f1) For properties or sites owned by the federal government, if a land use control is approved in an environmental response project plan for a site or parcel, an environmental covenant shall be required. The environmental covenant shall be incorporated into the installation master plan or other similar and appropriate remediation documentation. The environmental covenant shall also be recorded into the land records of the property or site in compliance with 335-5-3-.02.~~ 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.

(34) 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 Alabama 1975, §35-19-13.

History: May 26, 2009; XXXXXXX, 2013.