



U.S. ENVIRONMENTAL PROTECTION AGENCY



U.S. DEPARTMENT OF JUSTICE

MEMORANDUM

SUBJECT: Issuance of 2021 Comprehensive Environmental Response, Compensation, and Liability Act Model Remedial Design/Remedial Action Consent Decree and Statement of Work

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TO: Regional Counsels, Regions 1-10
Superfund National Program Managers, Regions 1-10
U.S. Environmental Protection Agency

Deputy Chiefs, Assistant Chiefs, Environmental Enforcement Section
Deputy Chief, Assistant Chiefs, Environmental Defense Section
U.S. Department of Justice

I. Introduction

This memorandum transmits the revised, streamlined Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Model Remedial Design/Remedial Action (RD/RA) Consent Decree (“2021 RD/RA CD”) and the revised CERCLA Model RD/RA Statement of Work (“2021 RD/RA SOW”). The two documents are available from the RD/RA category on the Cleanup Enforcement Model Language and Sample Documents Database (“Models Database”) at <https://cfpub.epa.gov/compliance/models/>.¹

¹ The U.S. Environmental Protection Agency (EPA) and the Department of Justice (DOJ) issued an updated RD/RA CD and a new model SOW in 2014. Since then, minor updates were made to these model documents as necessary and made available on the Models Database. The latest changes to the RD/RA CD and SOW were made in 2020, referenced herein as the 2020 Version of the model.

II. Explanation of Revisions

The effort to streamline the model RD/RA CD is the result of a review by a national workgroup comprised of attorneys from several EPA Regional Counsel offices, the Office of Site Remediation Enforcement (OSRE), and the Department of Justice (DOJ) that believed that streamlining the model RD/RA CD would result in a quicker negotiation process for CERCLA cleanup settlements. In addition, consistent with Administrator Regan’s prioritization of EPA’s commitment to the protection of environmental justice (EJ) communities disproportionately impacted by pollution,¹ the workgroup developed new provisions for the revised SOW to advance this commitment.

The new environmental justice provisions are made in accordance with Executive Order 14008, [“Tackling the Climate Crisis at Home and Aboard: Securing Environmental Justice and Spurring Economic Opportunity,”](#) 86 Federal Register 7619 (Feb. 1, 2021), Section 219 (Policy) and Section 222(b)(ii) and (c)(ii) (Agency Obligations). These changes are anchored in the ideas outlined in OECA’s July 1, 2021 memorandum titled [“Strengthening Environmental Justice Through Cleanup Enforcement Actions.”](#)

In its review of the pre-existing version of the RD/RA model CD, and in developing a streamlined model CD, the workgroup strived to:

- Improve clarity, remove redundancy, and simplify language;
- Expedite negotiations;
- Practice good government by better expressing what is intended;
- Strengthen our enforcement documents to better address community concerns; and
- Improve the efficiency of implementation of the remedies after the CD effective date.

Overall, the substance of much of the streamlined 2021 model RD/RA CD and SOW remain unchanged from the 2014 model CD and SOW, as revised through September 2020 (i.e., the 2020 Version of the model). For example, the prior models included several provisions stating general propositions of applicable law for background or information. Removing some of these provisions to streamline the document does not indicate any change in the government’s legal position. These streamlining revisions, however, make some significant language and structural changes. Some of these key revisions are shown in the box below.

¹ See, e.g., Exec. Order 14008, [“Tackling the Climate Crisis at Home and Aboard: Securing Environmental Justice and Spurring Economic Opportunity,”](#) 86 Fed. Reg. 7619 (Feb. 1, 2021), Section 219 (Policy) and Section 222(b)(ii) and (c)(ii) (Agency Obligations).

Key Revisions	Overview
Past, Interim and Future Costs Definitions	Simplified and reduced definitions by using only “Past” and “Future” cost terms. “Interim Response Costs” is integrated into “Future Response Costs” definition.
Settling Federal Agencies Definition	When Department of Defense (DoD) service branches are Settling Federal Agencies, in most cases the DoD definition citing to 10 U.S.C. § 111 will be used. ³
Work Definition	Narrowed to clarify those provisions that actually contain work obligations: “Work” means all obligations of Settling Defendants under Sections V (Performance of the Work) through VIII (Indemnification and Insurance) of this CD. ⁴
Modifications to Work	Clarifies “Additional Work” provision and the triggers enabling the EPA to require additional work.
Dispute Resolution	Restructured provision to make it easier to follow and implement; clarifies which disputes are subject to administrative record provision.
Select CD Provisions Moved to the SOW	Moved to the SOW some provisions related to decisions typically made during cleanup process.
Community Involvement	Enhanced Community Involvement provisions in the SOW to better address EJ issues facing communities disproportionately impacted by pollution.
Covenants	Clarified the scope of the settlers’ covenants so that they do not apply to unrelated matters (<i>e.g.</i> , tort claims, government contract claims, Uranium Mill Tailings Radiation Control Act (UMTRCA) claims) and omitted reservations for matters not covered by the covenants (<i>e.g.</i> , tort claims reservation) to avoid redundancy.
Macros to Customize CD for Particular Situations	Instead of dissecting and following the myriad instructions and bracketed text interlaced throughout the text, the lawyer preparing the first draft of the document can implement, with a few keystrokes, most changes needed to customize the CD for particular situations (<i>e.g.</i> , “OU” vs “Site” covenant, Settling Federal Agencies participating, the State participating, special account disbursement).

These and various other changes that were made in the 2021 model CD and SOW are summarized in the attached “Overview of Key Changes From the 2020 Version of the Model RD/RA Consent Decree to the 2021 Version.”

³ DOJ’s Environmental Defense Section reviewed and approved the model documents, including language relating to settling federal agencies.

⁴ Compare to 2020 Version of the model CD language: “Work shall mean all activities and obligations Settling Defendants SDs are required to perform under this CD, except the activities required under Section XX (Retention of Records).”

III. Effective Date/Contacts

The 2021 RD/RA model CD and SOW are effective as of the date of this transmittal memorandum and should be used for all new RD/RA negotiations. For RD/RA negotiations that are already underway, we recommend that the negotiating parties continue to use the 2020 version of the model CD and SOW. Due to the significant structural and interrelated changes of the 2021 model CD and SOW, the provisions from these new documents should not be incorporated into CDs or SOWs that are based on the previous model documents.

As EPA's model settlements are living documents, further revisions to the models will be considered based on EPA priorities or when other circumstances warrant to reflect, for example, the Agency's ongoing work related to Superfund site cleanups as affected by climate change.

Please direct any questions about the 2021 model CD and SOW to Tina Skaar, Office of Site Remediation Enforcement, Regional Support Division at 202-564-0895 (skaar.christina@epa.gov), or Mark Gallagher, DOJ Environmental Enforcement Section at 202-514-5405 (mark.gallagher@usdoj.gov). For technical issues related to the macros described above, please submit questions to OSRE-Models-Help@epa.gov.

IV. Disclaimer

This memorandum and the documents referenced herein are intended as guidance for EPA and DOJ employees. They are not rules and do not create any legal obligations. The extent to which EPA and DOJ applies them in a particular case will depend on the facts of the case.

Attachments

cc: Larry Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance
Barry Breen, Principal Deputy Assistant Administrator, Office of Land and Emergency Management (OLEM)
Carlton Waterhouse, Deputy Assistant Administrator, OLEM
Larry Douchand, Director, Office of Site Remediation and Technology Innovation (OSRTI), OLEM
Kathleen Salyer, Acting Director, Office of Emergency Management (OEM), OLEM
Greg Gervais, Director, Federal Facilities Restoration and Reuse Office (FFRRO), OLEM
Karin Leff, Director, Federal Facilities Enforcement Office (FFEO), OECA
Lorie Schmidt, Associate General Counsel, Solid Waste and Emergency Law Office, Office of General Counsel (SWERLO/OGC)
Jeanne Conklin, Controller, Office of the Comptroller, Office of the Chief Financial Officer (OC/OCFO)
Meshell Jones-Peeler, Deputy Controller, OC/OCFO
Greg Luebbering, Director, Cincinnati Finance Center, OC/OCFO
Regional Counsel Branch Chiefs, Regions 1-10
Superfund Remedial Branch Chiefs, Regions 1-10

MODEL REMEDIAL DESIGN/REMEDIAL ACTION CONSENT DECREE
Used with Model RD/RA Statement of Work
August 2021

- This document includes macros. The macros greatly streamline the editing process. The RD/RA Model Development team created them and they will not harm your computer.
- To use the macros do the following: (i) save the document locally; (ii) open the local copy; (iii) In the yellow ribbon at the top, click “Enable Content;” and (iv) make sure “Show/Hide ¶” mode is switched *off* (press Shift-Ctrl-*). For questions or technical problems contact osre-models-help@epa.gov.
- Text for a simple Decree, *i.e.*, for a NPL site, with multiple settlers, and a “Site” covenant, is *visible* by default. Text for other situations (*e.g.*, “OU” covenant, State/SFAs participating, single settler, SAA site) is designated *hidden* by default. By default, the paragraph numbers appear to be out of sequence since the numbers for the hidden paragraphs also are hidden. To view the hidden text run the “All_Text_Visible” macro (View > Macros > View Macros). (Run the “Default_Settings” macro to reverse this.) You can also switch Show/Hide ¶ mode *on* (Shift-Ctrl-*).
- Use the macros in the control panel to customize your Decree as needed. Switch Show/Hide ¶ mode *off* (Shift-Ctrl-*) to view the control panel properly.

CONTROL PANEL			
Field	Current Setting	Run this macro to change to:
Covenant	[OU] [Site]	Ctrl-Alt-[O][S]	[OU] [Site]
State	Yes	Shift-Ctrl-Alt-T	No
SFA(g)	Yes	Shift-Ctrl-Alt-G	No
No. of Settlers	Multiple	Ctrl-Alt-1	One
Site Type	[NPL] [SAA]	Ctrl-Alt-[N][L]	[NPL] [SAA(I)]
MSW	Yes	Shift-Ctrl-Alt-M	No
Prepayment	Yes	Shift-Ctrl-Alt-Y	No
Disbursement	Yes	Shift-Ctrl-Alt-B	No
For Decrees with <i>one</i> settler, manually substitute “Defendant” for “Defendants” in these provisions: additional work (¶ 9.c), prepayment (¶ 29), disbursement (§ X), SAA (¶’s 65, 68), & MSW (¶ 66).			
When done with the macros:	Run this macro	... to do this:	
	Ctrl-Alt-H	Delete all hidden text	
	Ctrl-Alt-U	Update all cross refs. and TOC	
	Search for “error!” to find and delete all “broken” cross references.		
	Update the Table of Contents: Right-click in the TOC > click “Update Field” > “Update entire table” > “OK.”		
Save! (Save as a .docm doc so you can keep using the “update” macro.)			

- When finished with the macros delete all the bulleted instructions after the first two. The case caption below will then be on page 1 of the Decree.

Commented [A1]: Do not delete these two bullet comments or this margin note until all persons who are participating in negotiations have seen the draft Decree at least once.

Commented [A2]: The default text is for a sole or final operable unit (OU) at the Site, which provides a “Site” covenant and includes the “standard reopeners.” This macro makes the necessary changes for a Decree that covers an intermediate OU, specifically: (1) substitutes the “OU CD” text into the covenants paragraphs; (2) deletes the standard reopeners; (3) deletes the NRD reservation (¶ 60.f); and (4) adds the “further OUs” reservation (60.g).

Commented [A3]: The “default” text is for a NPL site. If the Decree is for a Superfund Alternative Approach (“SAA”) (*i.e.*, non-NPL) Site, this macro will make the necessary changes, specifically: (1) deletes the Whereas paragraph regarding the NPL listing; (2) adds the *de micromis* waiver; and (3) adds the provision barring challenges to a later NPL listing. For explanation, see Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non Exempt De Micromis Parties, at 9 (November 6, 2002) [<https://www.epa.gov/sites/production/files/2013-09/documents/wv-exmpt-dmicro-mem.pdf>]; and “Transmittal of Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA Guidance),” OSWER Dir. No. 9200.2-125 (Sep. 28, 2012), available at: <https://www.epa.gov/sites/production/files/documents/rev-saa-2012-mem.pdf>.

Commented [A4]: The macro adds the MSW waiver for a Site that is an MSW site.

Commented [A5]: This macro adds the provisions for pre-paying EPA’s future costs.

Commented [A6]: This macro adds the provisions for disbursement of funds from a special account to the settlers.

- This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They do not constitute rulemaking by EPA and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA may take action at variance with this model or its internal implementing procedures.

UNITED STATES DISTRICT COURT
DISTRICT OF _____

UNITED STATES OF AMERICA and
STATE OF _____,

Plaintiffs,

v.

_____, et al.,

Defendants.

Civil Action No. _____

CONSENT DECREE

Commented [A7]: This caption is a table. To make it easier to navigate within it, turn on gridlines as follows: Click anywhere in the table. Under the "Table Tools" menu that appears in the upper ribbon, click the "Layout" button. In the layout ribbon that appears, on the far left, click the "View Gridlines" button.

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WHEREAS, the United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter under sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”).

WHEREAS, the United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at the _____ Superfund Site in _____ (“Site”), together with accrued interest; and (2) performance by the defendants of a response action at the Site consistent with the National Contingency Plan, 40 C.F.R. part 300 (“NCP”).

WHEREAS, in accordance with the NCP and section 121(f)(1)(F) of CERCLA, EPA notified the State of _____ (“State”) on _____, 20____, of negotiations with potentially responsible parties (“PRPs”) regarding the implementation of the remedial design and remedial action (“RD/RA”) for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and to be a party to this Consent Decree (“Decree”).

WHEREAS, the State has also filed a complaint against the defendants [and the United States] in this Court alleging that the defendants [and Settling Federal Agencies] are liable to the State under section 107 of CERCLA, and [list state laws cited in the State’s complaint], for: _____.

WHEREAS, in accordance with section 122(j)(1) of CERCLA, EPA notified the **[name(s) of relevant federal natural resource trustee(s)]** on _____, 20____, of negotiations with PRPs regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Decree.

WHEREAS, the defendants that have entered into this Decree (“Settling Defendants”) do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaints, nor do they acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment. Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim or crossclaim asserted by Settling Defendants or any claim by the State.

WHEREAS, in accordance with section 105 of CERCLA, EPA listed the Site on the National Priorities List (“NPL”), set forth at 40 C.F.R. part 300, Appendix B, by publication in the Federal Register on _____, 20____, Fed. Reg. _____.

WHEREAS, in response to a release or a substantial threat of a release of hazardous substances at or from the Site, [EPA, Settling Defendants, other PRPs at the Site, or the State] completed a Remedial Investigation for the Site on _____, 20____, and a Feasibility Study for the Site on _____, 20____, in accordance with 40 C.F.R. § 300.430.

WHEREAS, in accordance with section 117 of CERCLA and 40 C.F.R. § 300.430(f), EPA published notice of the completion of the Feasibility Study and of the proposed plan for

Commented [A8]: The case team should supplement the whereas clauses as necessary to describe additional relevant facts, e.g., that the defendants answered the complaint, that there was some litigation, or that certain facts were established through such litigation.

remedial action on _____, 20__ , in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting and comments received are available to the public as part of the administrative record upon which the Regional Administrator [or Regional delegatee, if any], EPA Region __, based the selection of the response action.

WHEREAS, EPA selected a remedial action to be implemented at the Site, which is embodied in a final Record of Decision (“Record of Decision”), executed on _____, 20__, on which the State had a reasonable opportunity to review and comment/on which the State has given its concurrence. The Record of Decision includes a summary of responses to the public comments [and a description of any significant changes to the proposed remedy]. Notice of the final plan was published in accordance with section 117(b) of CERCLA.

WHEREAS, based on the information currently available, EPA and the State have determined that the Work will be properly and promptly conducted by Settling Defendants if conducted in accordance with this Decree.

WHEREAS, the Parties recognize, and the Court by entering this Decree finds, that this Decree has been negotiated by the Parties in good faith, that implementation of this Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Decree is fair, reasonable, in the public interest, and consistent with CERCLA.

NOW, THEREFORE, it is hereby **ORDERED** and **DECREED** as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, [1367], and 1345, and sections 106, 107 and 113(b) of CERCLA, and personal jurisdiction over the Parties. Venue lies in this District under section 113(b) of CERCLA and 28 U.S.C. §§ 1391(b), and 1395(a), because the Site is located in this judicial district. This Court retains jurisdiction over the subject matter of this action and over the Parties for the purpose of resolving disputes arising under this Decree, entering orders modifying this Decree, or effectuating or enforcing compliance with this Decree. Settling Defendants may not challenge the terms of this Decree or this Court’s jurisdiction to enter and enforce this Decree.

Commented [A9]: Keep, if the State is a party and asserts state law claims in its complaint.

II. PARTIES BOUND

2. This Decree is binding upon the United States and the State and upon Settling Defendants and their successors [and heirs]. Unless the United States otherwise consents, (a) any change in ownership or corporate or other legal status of any Settling Defendant, including any transfer of assets, or (b) any Transfer of the Site or any portion thereof, does not alter any of Settling Defendants’ obligations under this Decree. Settling Defendants’ responsibilities under this Decree cannot be assigned except under a modification executed in accordance with ¶ 84.

Commented [A10]: Include “heirs” if any Settling Defendant is both an individual and an owner of the Site.

3. In any action to enforce this Decree, Settling Defendants may not raise as a defense the failure of any of their officers, directors, employees, agents, contractors, subcontractors, or any person representing Settling Defendants to take any action necessary to comply with this Decree. Settling Defendants shall provide notice of this Decree to each person representing Settling Defendants with respect to the Site or the Work. Settling Defendants shall provide notice of this Decree to each contractor performing any Work and shall ensure that notice of the Decree is provided to each subcontractor performing any Work.

III. DEFINITIONS

4. Subject to the next sentence, terms used in this Decree that are defined in CERCLA or the regulations promulgated under CERCLA have the meanings assigned to them in CERCLA and the regulations promulgated under CERCLA. Whenever the terms set forth below are used in this Decree, the following definitions apply:

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Consent Decree” or “Decree” means this consent decree, all appendixes attached hereto (listed in Section XIX), and all deliverables incorporated into the Decree under ¶ [8.6] of the SOW. If there is a conflict between a provision in Sections I through XXIV and a provision in any appendix or deliverable, the provision in Sections I through XXIV controls.

“Day” or “day” means a calendar day. In computing any period under this Decree, the day of the event that triggers the period is not counted and, where the last day is not a working day, the period runs until the close of business of the next working day. “Working day” means any day other than a Saturday, Sunday, or federal or State holiday.

“DOJ” means the United States Department of Justice.

“Effective Date” means the date upon which the Court’s approval of this Decree is recorded on its docket.

“EPA” means the United States Environmental Protection Agency.

“Fund” means the Hazardous Substance Superfund established under section 9507 of the Internal Revenue Code, 26 I.R.C. § 9507.

“Future Response Costs” means all costs (including direct, indirect, payroll, contractor, travel, and laboratory costs) that the United States: (a) pays between ---- [same cutoff date as in PRC definition] and the Effective Date; and (b) pays after the Effective Date in implementing, overseeing, or enforcing this Decree, including: (i) in developing, reviewing and approving deliverables generated under this Decree; (ii) in overseeing Settling Defendants’ performance of the Work; (iii) in assisting or taking action to obtain access or use restrictions under ¶ 12.a; (iv) in securing, implementing, monitoring, maintaining, or enforcing Institutional Controls, including any compensation paid; (v) in taking action under ¶ 22 (Access to Financial Assurance); (vi) in taking response action described in ¶ 61 because of Settling Defendants’ failure to take emergency action under ¶ [5.5] of the SOW; (vii) in implementing a Work

Commented [A11]: If EPA is incurring costs that are not within this definition, then supplement the definition to reference such costs.

Takeover under ¶ 9; (viii) in implementing community involvement activities including the cost of any technical assistance grant provided under section 117(e) of CERCLA; (ix) in enforcing this Decree, including all costs paid under Section XII (Dispute Resolution) and all litigation costs; [and] (x) in conducting periodic reviews in accordance with section 121(c) of CERCLA. [“Future Response Costs” does not include any Agency for Toxic Substances and Disease Registry (“ATSDR”) costs regarding the Site]. Future Response Costs also includes all Interest accrued after [same cutoff date as in PRC definition] on EPA’s unreimbursed costs (including Past Response Costs) under section 107(a) of CERCLA.

Commented [A12]: Include this text if ATSDR is currently conducting activities or anticipates doing so in the future.

“Including” or “including” means “including but not limited to.”

“Institutional Controls” means Proprietary Controls (*i.e.*, easements or covenants running with the land that (i) limit land, water, or other resource use, provide access rights, or both and (ii) are created under common law or statutory law by an instrument that is recorded, or for which notice is recorded, in the appropriate land records office) and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (a) limit land, water, or other resource use to minimize the potential for human exposure to Waste Material at or in connection with the Site; (b) limit land, water, or other resource use to implement, ensure noninterference with, or ensure the protectiveness of the Remedial Action; (c) provide information intended to modify or guide human behavior at or in connection with the Site; or (d) any combination thereof.

“Interest” means interest at the rate specified for interest on investments of the Fund, as provided under section 107(a) of CERCLA, compounded annually on October 1 of each year. The applicable rate of interest will be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. As of the date of lodging of this Decree, rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“National Contingency Plan” or “NCP” means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated under section 105 of CERCLA, codified at 40 C.F.R. part 300, and any amendments thereto.

Commented [A13]: If the settlement will resolve natural resource damages, add a definition for that here. A number of additional provisions addressing NRD also will be needed throughout the Decree.

[Add, if applicable] “Owner Settling Defendant” means the following Settling Defendant who owns or controls all or a portion of the Site: ____.

“Paragraph” or “¶” means a portion of this Decree identified by an Arabic numeral or an upper- or lower-case letter.

“Parties” means the United States, the State, and Settling Defendants.

“Past Response Costs” means all costs (including direct, indirect, payroll, contractor, travel, and laboratory costs) that the United States paid in connection with the Site through [insert a cutoff date; may be the date of the most recent cost update], plus all interest on such costs accrued under section 107(a) of CERCLA through such date.

Commented [A14]: In some cases, the Army Corps of Engineers (“Corps”) may be implementing a response action at the Site under its authority as the lead agency for Formerly Utilized Defense Sites (FUDS), rather than performing work under an interagency agreement with EPA. In that case modify this definition to exclude the Corps’ “FUDS” costs.

“Performance Standards” means the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the Record of Decision.

“Plaintiffs” means the United States and the State.

“RCRA” means the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k, (also known as the Resource Conservation and Recovery Act).

“Record of Decision” means the EPA decision document that memorializes the selection of the remedial action relating to the [Site or Operable Unit at the Site] signed on _____, 20 __, by the Regional Administrator [or Regional delegatee, if any], EPA Region __, and all attachments thereto. The Record of Decision is attached as Appendix A.

“Remedial Action” means the remedial action selected in the Record of Decision.

“Remedial Design” means those activities to be undertaken by Settling Defendants to develop plans and specifications for implementing the Remedial Action as set forth in the SOW.

“Scope of the Remedy” means the scope of the remedy set forth in ¶ [1.3] of the SOW.

“Section” means a portion of this Decree identified by a Roman numeral.

“Settling Defendants” means the settling defendants identified in Appendix D. As used in this Decree, this definition means all settling defendants, collectively, and each settling defendant, individually.

“Settling Federal Agency” means DoD including its past and present components. DoD means the Department of Defense as described in 10 U.S.C. § 111.

“Settling Federal Agency” means DoD acting by and through the [insert names of DoD service branches (and DLA) addressed in DoD’s investigation, e.g. Air Force, Army, Marine Corps, Navy, as applicable]. DoD means the Department of Defense as described in 10 U.S.C. § 111.

“Settling Federal Agency” means _____.

“Site” means the _____ Superfund Site, [comprising approximately _____ acres, located at [address or description of location] in [city], _____ County, [state], and depicted generally on the map attached as Appendix C.]

“Special Account” means the special account, within the Fund, established for the Site by EPA under section 122(b)(3) of CERCLA.

“State” means the State [or Commonwealth] of _____.

“Statement of Work” or “SOW” means the document attached as Appendix B, which describes the activities Settling Defendants must perform to implement and maintain the effectiveness of the Remedial Action.

Commented [A15]: Modify this definition to reference any ROD Amendments or Explanations of Significant Differences issued.

Commented [A16]: Use the first SFA definition above if the potential liability of DoD or one of its service branches is being resolved and DoD has duly responded to any outstanding section 104(e) information requests, and otherwise represented that it investigated the potential responsibility at the Site of all of its service branches (e.g., Air Force, Army, Marine Corps, Navy) and the Defense Logistics Agency (DLA). Use the second SFA definition if the potential liability of DoD or one of its service branches is being resolved and DoD has represented that only certain service branches were investigated for their potential liability at the Site. Use the third SFA definition for non-DoD SFAs, and generally use the name of the responsible agency component rather than the name of the agency (e.g., U.S. Forest Service rather than U.S. Department of Agriculture). If both DoD SFAs and non-DoD SFAs are involved at the Site, combine the DoD and non-DoD SFA definitions.

If the SFAs are making payments to the Settling Defendants to reimburse past and/or future response costs paid by Settling Defendants, add definitions for “Settling Defendants’ Past Response Costs” and “Settling Defendants’ Future Response Costs.” DOJ’s Environmental Defense Section will generally take the lead in negotiating these definitions.

Commented [A17]: The definition of “Site” affects the scope of the covenants not to sue. The definition should conform with the intended scope of the covenants and the general reservations provided in Section XIV (Covenants by Plaintiff). Note that “suitable areas in very close proximity to the contamination necessary for implementation of the response action” may be included within the boundaries of the Site as defined herein. See NCP, 40 C.F.R. § 300.400(e)(1).

Commented [A18]: If ¶ 30.c provides that payments for past or future costs be deposited into the Site’s Special Account, keep this definition. Modify as appropriate if EPA has established more than one special account, or if the special account was established under a prior settlement.

Commented [A19]: Add a definition for the State pollution control agency if needed. If the State is a party and the State’s costs are being paid, add definitions for “State Past Response Costs” and “State Future Response Costs.”

“Transfer” means to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“United States” means the United States of America and each department, agency, and instrumentality of the United States, including EPA, and the Settling Federal Agencies.

“Waste Material” means (a) any “hazardous substance” under Section 101(14) of CERCLA; (b) any pollutant or contaminant under section 101(33) of CERCLA; (c) any “solid waste” under section 1004(27) of RCRA; and (d) any [“hazardous material”] under [**insert appropriate state or tribal statutory terminology and citation**].

“Work” means all obligations of Settling Defendants under Sections V (Performance of the Work) through VIII (Indemnification and Insurance).

“Work Takeover” means EPA’s assumption of the performance of any of the Work in accordance with ¶ 11.

IV. OBJECTIVES

5. The objectives of the Parties in entering into this Decree are to protect public health, welfare, and the environment through the design, implementation, and maintenance of a response action at the Site by Settling Defendants, to pay response costs of Plaintiffs, and to resolve and settle the claims of Plaintiffs against Settling Defendants and the claims of the State and Settling Defendants that were or could have been asserted against the United States with regard to this Site as provided in this Decree.

V. PERFORMANCE OF THE WORK

6. Settling Defendants shall finance, develop, implement, operate, maintain, and monitor the effectiveness of the Remedial Action all in accordance with the SOW, any modified SOW and all EPA-approved, conditionally approved, or modified deliverables as required by the SOW or modified SOW.

7. Nothing in this Decree and no EPA approval of any deliverable required under this Decree constitutes a warranty or representation by EPA or the State that completion of the Work will achieve the Performance Standards.

8. Settling Defendants’ obligations to finance and perform the Work and to pay amounts due under this Decree are joint and several. In the event of the insolvency of any Settling Defendant or the failure by any Settling Defendant to participate in the implementation of the Decree, the remaining Settling Defendants shall complete the Work and make the payments.

9. Modifications to the Remedial Action and Further Response Actions

a. Nothing in this Decree limits EPA’s authority to modify the Remedial Action or to select further response actions for the Site in accordance with the requirements of

Commented [A20]: Add a definition for “Tribe” if there is one that has a role or interest at the Site:

“Tribe” means the _____ Tribe.

If the Site is entirely on tribal land, substitute “Tribe” for “State” throughout the Decree.

CERCLA and the NCP. Nothing in this Decree limits Settling Defendants' rights, under sections 113(k)(2) or 117 of CERCLA, to comment on any modified or further response actions proposed by EPA.

b. If EPA modifies the Remedial Action in order to achieve or maintain the Performance Standards, or both, or to carry out and maintain the effectiveness of the Remedial Action, and such modification is consistent with the Scope of the Remedy, then Settling Defendants shall implement the modification as provided in ¶ 9.d.

c. If EPA selects a further response action for the Site because a reopener condition in ¶ 59 is satisfied, then, subject to ¶ 84, Settling Defendants shall implement the further response action as provided in ¶ 9.d.

d. Upon receipt of notice from EPA that it has modified the Remedial Action as provided in ¶ 9.b or selected a further response action as provided in ¶ 9.c and requesting that Settling Defendants implement the modified Remedial Action or further response action, Settling Defendants shall implement the modification or further response action, subject to their right to initiate dispute resolution under Section XII within 30 days after receipt of EPA's notice. Settling Defendants shall modify the SOW, or related work plans, or both in accordance with the Remedial Action modification or further response action or, if Settling Defendants invoke dispute resolution, in accordance with the final resolution of the dispute. The Remedial Action modification or further response action, the approved modified SOW, and any related work plans will be deemed to be incorporated into and enforceable under this Decree.

10. **Compliance with Applicable Law.** Nothing in this Decree affects Settling Defendants' obligations to comply with all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the Record of Decision and the SOW. The activities conducted in accordance with this Decree, if approved by EPA, will be deemed to be consistent with the NCP as provided under section 300.700(c)(3)(ii).

11. **Work Takeover**

a. If EPA determines that Settling Defendants (i) have ceased to perform any of the Work required under this Section; (ii) are seriously or repeatedly deficient or late in performing the Work required under this Section; or (iii) are performing the Work required under this Section in a manner that may cause an endangerment to human health or the environment, EPA may issue a notice of Work Takeover to Settling Defendants, including a description of the grounds for the notice and a period of time ("Remedy Period") within which Settling Defendants must remedy the circumstances giving rise to the notice. The Remedy Period will be [20] days, unless EPA determines in its unreviewable discretion that there may be an endangerment, in which case the Remedy Period will be 10 days.

b. If, by the end of the Remedy Period, Settling Defendants do not remedy to EPA's satisfaction the circumstances giving rise to the notice of Work Takeover, EPA may notify Settling Defendants and, as it deems necessary, commence a Work Takeover.

c. EPA may conduct the Work Takeover during the pendency of any dispute under Section XII but shall terminate the Work Takeover if and when: (i) Settling Defendants remedy, to EPA's satisfaction, the circumstances giving rise to the notice of Work Takeover; or (ii) upon the issuance of a final determination under Section XII (Dispute Resolution) that EPA is required to terminate the Work Takeover.

VI. PROPERTY REQUIREMENTS

12. Agreements Regarding Access and Noninterference

a. As used in this Section, "Affected Property" means any real property, including the Site, where EPA determines, at any time, that access; land, water, or other resource use restrictions; Institutional Controls; or any combination thereof, are needed to implement the Remedial Action.

b. Settling Defendants shall use best efforts to secure from the owner(s) [if **including ¶ 13, add:** , other than an Owner Settling Defendant,] of all Affected Property, an agreement, enforceable by Settling Defendants and by Plaintiffs, requiring such owner to provide Plaintiffs and Settling Defendants, and their respective representatives, contractors, and subcontractors with access at all reasonable times to such owner's property to conduct any activity regarding the Decree, including the following:

- (1) implementing the Work and overseeing compliance with the Decree;
- (2) conducting investigations of contamination at or near the Site;
- (3) assessing the need for, planning, or implementing additional response actions at or near the Site;
- (4) determining whether the Site is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Decree; and
- (5) implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions [**if applicable:** and Institutional Controls].

c. Further, each agreement required under ¶ 12.b must commit the owner to refrain from using its property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment as a result of exposure to Waste Material, or will interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action [**use if applicable:** , including the following:

- (1) engaging in the following activities that could interfere with the Remedial Action: _____;
- (2) using contaminated groundwater;

- (3) engaging in the following activities that could result in human exposure to contaminants in soils and groundwater: _____;
- (4) constructing new structures that may interfere with the Remedial Action: _____; and
- (5) constructing new structures that may cause an increased risk of inhalation of contaminants: _____.

d. As used in this Section, “best efforts” means the efforts that a reasonable person in the position of Settling Defendants would use to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements.

e. Settling Defendants shall provide to EPA and the State a copy of each agreement required under ¶ 12.b. If Settling Defendants cannot accomplish what is required through best efforts in a timely manner, they shall notify EPA, and include a description of the steps taken to achieve the requirements. If the United States deems it appropriate, it may assist Settling Defendants, or take independent action, to obtain such access or use restrictions.

13. **Access and Noninterference by Owner Settling Defendant.** The Owner Settling Defendant shall: (a) provide Plaintiffs and the Settling Defendants, and their representatives, contractors, and subcontractors with access at all reasonable times to the Site to conduct any activity regarding the Decree, including those listed in ¶ 12.b; and (b) refrain from using the Site in any manner that EPA determines will pose an unacceptable risk to human health or to the environment because of exposure to Waste Material, or will interfere with or adversely affect the implementation, integrity, or protectiveness of the Remedial Action [**add if applicable:** , including the restrictions listed in ¶ 12.c].

Commented [A21]: Keep this paragraph if there is an Owner Settling Defendant.

14. If EPA determines in a decision document prepared in accordance with the NCP that Institutional Controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are appropriate, Settling Defendants shall cooperate with EPA’s and the State’s efforts to secure and ensure compliance with such Institutional Controls.

15. **Notice to Successors-in-Title**

a. Owner Settling Defendant shall, within 15 days after the Effective Date, submit for EPA approval a notice to be recorded regarding its property at the Site in the appropriate land records. The notice must: (1) include a proper legal description of the property; (2) provide notice to all successors-in-title: (i) that the property is part of, or affected by, the Site; (ii) that EPA has selected a remedy for the Site; and (iii) that potentially responsible parties have entered into a Decree requiring implementation of such remedy; and (3) identify the U.S. District Court in which the Decree was filed, the name and civil action number of this case, and the Effective Date of the Decree. Owner Settling Defendant shall record the notice within 10 days after EPA’s approval of the notice and submit to EPA, within 10 days thereafter, a certified copy of the recorded notice.

Commented [A22]: Keep this next paragraph if there is an owner settling defendant, no Proprietary Controls (“PCs”) have been recorded on the Site, and the case team believes no PCs will be recorded on the Site within a year after the Effective Date. In the absence of such PCs, the notice to be recorded under this paragraph will put potential buyers on notice that the property is part of the Site.

b. Owner Settling Defendant shall, prior to entering into a contract to Transfer any of its property that is part of the Site, or 60 days prior to a Transfer of such property, whichever is earlier:

- (1) notify the proposed transferee that EPA has selected a remedy regarding the Site, that potentially responsible parties have entered into a Consent Decree requiring implementation of such remedy, and that the United States District Court has entered the Decree (identifying the name and civil action number of this case and the date the Court entered the Decree); and
- (2) notify EPA and the State of the name and address of the proposed transferee and provide EPA and the State with a copy of the notice that it provided to the proposed transferee.

16. Notwithstanding any provision of the Decree, EPA and the State retain all of their access authorities and rights, as well as all of their rights to require land, water, or other resource use restrictions and Institutional Controls, including related enforcement authorities, under CERCLA, RCRA, and any other applicable statute or regulations.

VII. FINANCIAL ASSURANCE

17. To ensure completion of the Work required under Section V, Settling Defendants shall secure financial assurance, initially in the amount of \$_____ (“Estimated Cost of the Work”), for the benefit of EPA. The financial assurance must: (i) be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA; and (ii) be satisfactory to EPA. As of the date of lodging of this Decree, the sample documents can be found under the “Financial Assurance - Settlements” category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>. Settling Defendants may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, insurance policies, or some combination thereof. The following are acceptable mechanisms:

- a. a surety bond guaranteeing payment, performance of the Work, or both, that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;
- b. an irrevocable letter of credit, payable to EPA or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;
- c. a trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;
- d. a policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue

Commented [A23]: Case teams should negotiate and finalize the form, substance, and value of SDs’ financial assurance well before the lodging of the CD so that the final financial assurance mechanism can take effect within 30 days after the Effective Date. Such review should ensure, among other things, that an instrument or account is established (or can be established) to receive financial assurance resources when needed. Case teams can find the most current sample financial assurance documents in the “Financial Assurance - Settlements” category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>. Case teams should also ensure that entities providing a demonstration or guarantee under ¶ 17.e or ¶ 17.f have: (1) submitted all required documentation well in advance of the lodging of the CD so that EPA can determine whether such financial assurance is adequate; and (2) fully and accurately reflected in their submission all of their financial assurance or “performance guarantee” obligations (under CERCLA, RCRA, the Underground Injection Control Program, the Toxic Substances Control Act, and any other federal, state, or tribal environmental obligation) to the United States or other governmental entities so all such obligations have been properly accounted for in determining whether any such entity meets the financial test criteria. When reviewing which of the permissible financial assurance mechanisms set forth in ¶ 17 may be appropriate for inclusion in the CD, case teams should consider, as part of the facts and circumstances of each case, the estimated cost of the Work to be performed, the estimated time to complete the Work, the nature and extent of contamination at the Site, the financial health of the SDs, and the industry sector(s) in which the SDs operate. The Regions have discretion, for example, to require that SDs provide the financial assurance through a liquid mechanism rather than through a demonstration or guarantee under ¶ 17.e or 17.f. If an SD is a municipality, contact financial assurance team members within the Office of Site Remediation Enforcement for assistance. For more specific information and considerations, see “Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders” (April 6, 2015), available at <https://www.epa.gov/enforcement/guidance-financial-assurance-superfund-settlements-and-orders>. Superfund Trust Fund monies cannot be used for remedial actions at sites not listed on the NPL. ... [1]

insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

e. a demonstration by one or more Settling Defendants that they meet the relevant test criteria of ¶ 18 [, accompanied by a standby funding commitment that requires the affected Settling Defendants to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover]; or

f. a guarantee to fund or perform the Work executed in favor of EPA by a company: (1) that is a direct or indirect parent company of a Settling Defendant or has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a Settling Defendant; and (2) demonstrates to EPA’s satisfaction that it meets the financial test criteria of ¶ 18.

18. Settling Defendants seeking to provide financial assurance by means of a demonstration or guarantee under ¶ 17.e or 17.f must, within 30 days after the Effective Date:

a. demonstrate that:

(1) the affected Settling Defendant or guarantor has:

- i. two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
- ii. net working capital and tangible net worth each at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. tangible net worth of at least \$10 million; and
- iv. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or

(2) the affected Settling Defendant or guarantor has:

- i. a current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor’s or Aaa, Aa, A or Baa as issued by Moody’s; and

Commented [A24]: A sample of a standby funding commitment is available via the link in ¶ 17.

- ii. tangible net worth at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. tangible net worth of at least \$10 million; and
- iv. assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and

b. submit to EPA for the affected Settling Defendant or guarantor: (1) a copy of an independent certified public accountant’s report of the entity’s financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public accountant substantially identical to the sample letter and reports available from EPA. As of the date of lodging of this Decree, a sample letter and report is available under the “Financial Assurance - Settlements” subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>.

19. Settling Defendants providing financial assurance by means of a demonstration or guarantee under ¶ 17.e or 17.f must also:

- a. annually resubmit the documents described in ¶ 18.b within 90 days after the close of the affected Settling Defendant’s or guarantor’s fiscal year;
- b. notify EPA within 30 days after the affected Settling Defendant or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and
- c. provide to EPA, within 30 days of EPA’s request, reports of the financial condition of the affected Settling Defendant or guarantor in addition to those specified in ¶ 18.b; EPA may make such a request at any time based on a belief that the affected Settling Defendant or guarantor may no longer meet the financial test requirements of this Section.

20. Settling Defendants have selected, and EPA has found satisfactory, a **[insert type]** as an initial form of financial assurance. ~~[[Settling Defendants shall, within ___ days after the Effective Date, seek EPA’s approval of the form of Settling Defendants’ financial assurance.]]~~ Within 30 days after [the Effective Date / such approval], Settling Defendants shall secure all executed or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the Regional Financial Management Officer, to DOJ, and to EPA and the State in accordance with ¶ 82.

Commented [A25]: If the parties have pre-negotiated the form of the FA, use this sentence.

Commented [A26]: Otherwise, use this sentence.

21. Settling Defendants shall diligently monitor the adequacy of the financial assurance. If any Settling Defendant becomes aware of any information indicating that the

financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such Settling Defendant shall notify EPA of such information within [seven] days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected Settling Defendant of such determination. Settling Defendants shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the affected Settling Defendant, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed [60] days. Settling Defendants shall follow the procedures of ¶ 23 in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Settling Defendants' inability to secure financial assurance in accordance with this Section does not excuse performance of any other requirement of this Decree.

22. Access to Financial Assurance

a. If EPA issues a notice of a Work Takeover under ¶ 11.b, then, in accordance with any applicable financial assurance mechanism [**if a standby funding commitment requirement is included in ¶ 17.e, insert:** including the related standby funding commitment], EPA may require that any funds guaranteed be paid in accordance with ¶ 22.d.

b. If EPA is notified that the issuer of a financial assurance mechanism intends to cancel the mechanism, and the affected Settling Defendant fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 22.d.

c. If, upon issuance of a notice of a Work Takeover under ¶ 11.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism [including the related standby funding commitment], whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is a demonstration or guarantee under ¶ 17.e or 17.f, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Settling Defendants shall, within __ days after such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 22 must be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the Fund or into the Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the Fund.

23. **Modification of Amount, Form, or Terms of Financial Assurance.** Beginning after the first anniversary of the Effective Date, and no more than once per calendar year,

Commented [A27]: Case teams should make sure that the "trigger" for obtaining funds and/or work under the financial assurance mechanism in ¶ 22 is consistent with the trigger in the CD, e.g., if the CD allows EPA to access the funds in the event of a Work Takeover or an SD's failure to provide alternative financial assurance 30 days prior to an impending mechanism cancellation, the mechanism should contain equivalent language.

Settling Defendants may submit a request to change the form, terms, or amount of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 20, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify Settling Defendants of its decision regarding the request. Settling Defendants may initiate dispute resolution under Section XII regarding EPA's decision within 30 days after receipt of the decision [**alternative**: by the earlier of 30 days after receipt of EPA's decision or [180] days after EPA's receipt of the request]. Settling Defendants may modify the form, terms, or amount of the financial assurance mechanism only: (a) in accordance with EPA's approval; or (b) in accordance with any resolution of a dispute under Section XII. Settling Defendants shall submit to EPA, within 30 days after receipt of EPA's approval or consistent with the terms of the resolution of the dispute, documentation of the change to the form, terms, or amount of the financial assurance instrument.

24. **Release, Cancellation, or Discontinuation of Financial Assurance.** Settling Defendants may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Certification of Work Completion under ¶ [5.10] of the SOW; (b) in accordance with EPA's approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation or discontinuance of any financial assurance, in accordance with the agreement, final administrative decision, or final judicial decision resolving such dispute under Section XII.

VIII. INDEMNIFICATION AND INSURANCE

25. **Indemnification**

a. Plaintiffs do not assume any liability by entering into this Decree or by virtue of any designation of Settling Defendants as EPA's and the State's authorized representatives under section 104(e)(1) of CERCLA. Settling Defendants shall indemnify and save and hold harmless Plaintiffs and their officials, agents, employees, contractors, subcontractors, and representatives for or from any claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on Settling Defendants' behalf or under their control, in carrying out activities under this Decree, including any claims arising from any designation of Settling Defendants as EPA's and the State's authorized representatives under section 104(e)(1) of CERCLA. Further, Settling Defendants agree to pay Plaintiffs all costs they incur including attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against Plaintiffs based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control in carrying out activities under with this Decree. Plaintiffs may not be held out as parties to any contract entered into by or on behalf of Settling Defendants in carrying out activities under this Decree. The Settling Defendants and any such contractor may not be considered an agent of Plaintiffs.

b. Either Plaintiff shall give Settling Defendants notice of any claim for which such Plaintiff plans to seek indemnification in accordance with this ¶ 25, and shall consult with Settling Defendants prior to settling such claim.

26. Settling Defendants covenant not to sue and shall not assert any claim or cause of action against Plaintiffs for damages or reimbursement or for set-off of any payments made or to be made to Plaintiffs, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work or other activities on or relating to the Site, including claims on account of construction delays. In addition, Settling Defendants shall indemnify and save and hold Plaintiffs harmless with respect to any claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of work at or relating to the Site, including claims on account of construction delays.

27. **Insurance.** Settling Defendants shall secure, by no later than 15 days before commencing any on-site Work, the following insurance: (a) commercial general liability insurance with limits of liability of \$1 million per occurrence; (b) automobile liability insurance with limits of liability of \$1 million per accident; and (c) umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits. The insurance policy must name Plaintiffs as additional insureds with respect to all liability arising out of the activities performed by or on behalf of Settling Defendants under this Decree. Settling Defendants shall maintain this insurance until the first anniversary after [issuance of EPA's Certification of Remedial Action Completion under ¶ [5.8] of the SOW [or if **Certification of Remedial Action Completion is not used substitute:** the Remedial Action has been performed in accordance with this Decree and the Performance Standards have been achieved]. In addition, for the duration of this Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Decree. Prior to commencement of the Work, Settling Defendants shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Settling Defendants shall ensure that all submittals to EPA under this Paragraph identify the [Site name, city, state] and the civil action number of this case.

IX. PAYMENTS FOR RESPONSE COSTS

28. **Payment for Past Response Costs.** Within 30 days after the Effective Date, Settling Defendants shall pay EPA, in reimbursement of Past Response Costs in connection with the Site, \$ _____. The Financial Litigation Unit ("FLU") of the United States Attorney's Office for the District of _____ shall provide to Settling Defendants, in accordance with ¶ 82, instructions for making this payment, including a Consolidated Debt Collection System

("CDCS") reference number. Settling Defendants shall make such payment at <https://www.pay.gov> in accordance with the FLU's instructions, including references to the CDCS Number. Settling Defendants shall send notices of this payment to DOJ and EPA in accordance with ¶ 82. If the payment required under this Paragraph is late, Settling Defendants shall pay, in addition to any stipulated penalties owed under Section XIII, an additional amount for Interest accrued from the Effective Date until the date of payment.

29. Payments by Settling Defendants for Future Response Costs

a. **Prepayment of Future Response Costs.** Within 30 days after the Effective Date, Settling Defendants shall pay to EPA \$ _____ as a prepayment of [if the ¶ 29.b (Shortfall Payments) optional provision for replenishment is used substitute: as an initial payment toward] Future Response Costs. Settling Defendants shall make payment in accordance with ¶ 29.e.

b. **Shortfall Payments.** If at any time prior to the date EPA sends Settling Defendants the first bill under ¶ 29.d (Periodic Bills), or one year after the Effective Date, whichever is earlier, the balance in the Future Response Costs Special Account falls below \$ _____, EPA will so notify Settling Defendants. Settling Defendants shall, within 30 days after receipt of such notice, pay \$ _____ to EPA. Settling Defendants shall make payment in accordance with ¶ 29.e.

c. EPA will deposit the amounts paid under ¶¶ 29.a and 29.b into the [Site name] Future Response Costs Special Account ("Future Response Costs Special Account"). EPA will retain and use these funds to conduct or finance future response actions at or in connection with the Site.

d. **Periodic Bills.** On a periodic basis, EPA will send Settling Defendants a bill for Future Response Costs, including a ["SCORPIOS Report" or other standard cost summary] listing direct and indirect costs paid by EPA, its contractors, subcontractors, and DOJ. Settling Defendants may initiate a dispute under Section XII regarding a Future Response Cost billing, but only if the dispute relates to one or more of the following issues: (i) whether EPA has made an arithmetical error; (ii) whether EPA has included a cost item that is not within the definition of Future Response Costs; or (iii) whether EPA has paid excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. Settling Defendants must specify in the Notice of Dispute the contested costs and the basis for the objection.

e. **Payment of Bill.** Settling Defendants shall pay the bill, or if they initiate dispute resolution, the uncontested portion of the bill, if any, within 30 days after receipt of the bill. Settling Defendants shall pay the contested portion of the bill determined to be owed, if any, within 30 days after the determination regarding the dispute. Each payment for: (i) the uncontested bill or portion of bill, if late, and; (ii) the contested portion of the bill determined to be owed, if any, must include an additional amount for Interest accrued from the date of receipt of the bill through the date of payment. Settling Defendants shall make payment at <https://www.pay.gov> using the "EPA Miscellaneous Payments Cincinnati Finance Center" link, and including references to the Site/Spill ID and DJ numbers listed in ¶ 82 and the purpose of the

Commented [A28]: This paragraph is an optional provision for replenishment of the Future Response Costs Special Account in the event of a shortfall in the prepayment.) For an explanation of prepaid accounts, including when prepayment is appropriate, see "Additional Guidance on Prepayment of Oversight Costs and Special Accounts" (Dec. 22, 2006), available at <https://www.epa.gov/enforcement/guidance-prepayment-oversight-costs-and-special-accounts>.

Commented [A29]: If EPA agrees to provide orphan share compensation to Settling Defendants through forgiveness of oversight costs (i.e., "costs the U.S. incurs in overseeing Settling Defendants' performance of the Work, including reviewing deliverables submitted under the Decree") modify ¶ 29 to add an exclusion for these costs.

Commented [A30]: The pay.gov system includes alternatives for making payment by credit card, debit card, automatic clearinghouse (ACH), and electronic fund transfer (EFT). If the SDs cannot make payment using the pay.gov system, the EPA attorney should contact the Cincinnati Finance Center about alternative methods of payment.

payment. Settling Defendants shall send notices of this payment to DOJ and EPA in accordance with ¶ 82.

f. **Unused Amount.** After EPA issues the Certification of Remedial Action Completion under ¶ [5.8] of the SOW and a final accounting of the Future Response Costs Special Account (including crediting Settling Defendants for any amounts received under ¶¶ 29.a (Prepayment of Future Response Costs) [, 29.b (Shortfall Payments),] or 29.e (Payment of Bill), EPA may, in its unreviewable discretion, [choose one or more of the following three clauses: “offset the next Future Response Costs bill by the unused amount paid by Settling Defendants under ¶ 29.a (Prepayment of Future Response Costs) [or 29.b (Shortfall Payments),]” “apply any unused amount paid by Settling Defendants under ¶ 29.a (Prepayment of Future Response Costs) [or 29.b (Shortfall Payments),] to any other unreimbursed response costs or response actions remaining at the Site;” or “remit and return to Settling Defendants any unused amount of the funds paid by Settling Defendants under ¶ 29.a (Prepayment of Future Response Costs) [or 29.b (Shortfall Payments)]”].

Insert a provision for payments to State if needed.

30. **Payments by Settling Federal Agencies.**

a. As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay:

- (1) To EPA \$ _____, in payment of Past Response Costs and Future Response Costs;
- (2) To the State \$ _____ [insert as appropriate: in payment of State Past Response Costs and State Future Response Costs] by Automated Clearing House (“ACH”) Electronic Funds Transfer in accordance with instructions provided by the State; and
- (3) To Settling Defendants \$ _____ [insert as appropriate: in payment of Settling Defendants’ Past Response Costs and Settling Defendants’ Future Response Costs] by Automated Clearing House (ACH) Electronic Funds Transfer in accordance with instructions provided by Settling Defendants.

b. **Interest.** If any payment required by ¶ 30.a is not made within 120 days after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay Interest on the unpaid balance, with such Interest commencing on the 121st day after the Effective Date and accruing through the date of the payment.

c. The Settling Federal Agencies’ payment[s] under this Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Decree constitutes a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

Commented [A31]: SFAs will usually “cash out” of the various components of response costs. In cases where the SFA’s responsibility for response costs cannot be resolved with a single cash out payment, contact DOJ’s Environmental Defense Section to obtain an alternative payment provision for cost reimbursement. Also consult with the Office of Site Remediation and Enforcement.

31. **Deposit of Payments.** EPA may, in its unreviewable discretion, deposit the amounts paid under ¶¶ 28, 29.e, and 30.a(1) in the Fund, in the Special Account, or both. EPA may, in its unreviewable discretion, retain and use any amounts deposited in the Special Account to conduct or finance response actions at or in connection with the Site, or transfer those amounts to the Fund.

X. DISBURSEMENT OF SPECIAL ACCOUNT FUNDS

32. **Creation of the Disbursement Special Account and Agreement to Disburse Funds to Settling Defendants.** Within 30 days after the Effective Date, EPA will establish the [Site name] Disbursement Special Account (“Disbursement Special Account”) and shall transfer \$_____ from the Special Account to the Disbursement Special Account. [NOTE: If, as part of the Decree, there are cashout parties whose funds will be deposited into a special account and then disbursed to Settling Defendants, contact the Office of Site Remediation Enforcement to consult on appropriate language.] Subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in the Disbursement Special Account, including Interest Earned on the funds in the Disbursement Special Account, available for disbursement to Settling Defendants as partial reimbursement for performance of the Work [or specify the activity for which the special account funds are to be disbursed]. EPA shall disburse funds from the Disbursement Special Account to Settling Defendants in accordance with the procedures and milestones for phased disbursement set forth in this Section. For purposes of this Paragraph, “Interest Earned” means interest earned on amounts in the [Site name] Disbursement Special Account, which will be computed monthly at a rate based on the annual return on investments of the EPA Hazardous Substance Superfund. The applicable rate of interest will be the rate in effect at the time the interest accrues.

33. **Timing and Amount of Disbursements.** Within ___ days after EPA’s receipt of a Cost Summary and Certification, as defined by ¶ 35.b, or if EPA has requested additional information under ¶ 35.b or a revised Cost Summary and Certification under ¶ 35.d, within ___ days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall disburse the funds from the Disbursement Special Account at the completion of the following milestones, and in the amounts set forth below:

Milestone	Funds to be Disbursed
EPA approval of RD Work Plan	\$___ or ___% of funds
EPA approval of the [insert task]	\$___ or ___% of funds
EPA Cert. of RA Completion	Remainder of funds

34. EPA shall disburse the funds from the Disbursement Special Account to Settling Defendants in the following manner: [Insert name and address for payment or instructions for electronic funds transfer.]

35. Requests for Disbursement of Special Account Funds

a. Within ___ days after issuance of EPA’s written confirmation that a milestone of the Work, as defined in ¶ 33, has been satisfactorily completed, Settling Defendants shall submit to EPA a Cost Summary and Certification, as defined in ¶ 35.b, covering the Work

Commented [A32]: The case team can modify this sentence to provide for different allocations between the Fund and the Special Account by replacing this sentence with one of the following or can modify one of these as appropriate:

EPA will deposit the total amounts paid under ¶¶ 28, 29.e, or 30.a(1) in the Fund.

EPA will deposit the total amounts paid by under ¶¶ 28, 29.e, or 30.a(1) in the Special Account.

Of the total amounts paid under ¶¶ 28, 29.e, or 30.a(1), EPA will deposit [“\$___” or “___%”] in the Fund and [“\$___” or “___%”] in the Special Account.

The odd formatting of this paragraph will be corrected after you run the Delete Hidden Text macro (Ctrl-Alt-H).

Commented [A33]: The decision to disburse funds is within EPA’s sole discretion and should be consistent with the “Interim Final Guidance on Disbursement of Funds From EPA Special Accounts to CERCLA Potentially Responsible Parties” (Nov. 3, 1998), available at <https://semsub.epa.gov/work/HQ/100001089.pdf>, and the “Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts” (Oct. 4, 2002), available at <https://semsub.epa.gov/work/HQ/100002182.pdf>.

Commented [A34]: The Decree should outline a phased payment plan that typically lists two to four milestones of the Work. The completion of a milestone will trigger the right to request disbursement of a set amount or percentage of funds from the Disbursement Special Account in partial reimbursement for Work performed up to the date of completion of that milestone. In most situations the appropriate milestones will be (1) completion of all activities in the EPA-approved Remedial Design Work Plan, (2) completion of one or two components of the EPA-approved Remedial Action Work Plan, and (3) Certification of Remedial Action Completion. This is sample language.

performed up to the date of completion of that milestone. Settling Defendants shall not include in any submission costs included in a previous Cost Summary and Certification following completion of an earlier milestone of the Work if those costs have been previously sought or reimbursed in accordance with ¶ 33.

b. Each Cost Summary and Certification must include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by Settling Defendants for the Work covered by the particular submission, excluding costs not eligible for disbursement under ¶ 36. Each Cost Summary and Certification must contain the following statement signed by the [insert “Chief Financial Officer of a Settling Defendant,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA]:

To the best of my knowledge, after thorough investigation and review of Settling Defendants’ documentation of costs incurred and paid for Work performed in accordance with this Decree [insert, as appropriate: “up to the date of completion of milestone 1,” “between the date of completion of milestone 1 and the date of completion of milestone 2,” or “between the date of completion of milestone 2 and the date of completion of the milestone 3;”] I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment.

c. The [insert “Chief Financial Officer of a Settling Defendant,” “Independent Certified Public Accountant,” or title of other specified independent person acceptable to EPA] shall also provide EPA a list of the documents that he or she reviewed in support of the Cost Summary and Certification. Upon request by EPA, Settling Defendants shall submit to EPA any additional information that EPA deems necessary for its review and approval of a Cost Summary and Certification.

d. If EPA finds that a Cost Summary and Certification includes a arithmetical error, costs excluded under ¶ 36, costs that are inadequately documented, or costs submitted in a prior Cost Summary and Certification, it will notify Settling Defendants and provide them an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification. If Settling Defendants fail to cure the deficiency within __ days after being notified of, and given the opportunity to cure, the deficiency, EPA will recalculate Settling Defendants’ costs eligible for disbursement for that submission and disburse the corrected amount to Settling Defendants in accordance with the procedures in ¶ 33. Settling Defendants may dispute EPA’s recalculation under this Paragraph in accordance with Section XII. In no event may Settling Defendants be disbursed funds from the Disbursement Special Account in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by EPA.

36. **Costs Excluded from Disbursement.** The following costs are excluded from, and may not be sought by Settling Defendants for, disbursement from the Disbursement Special Account: (a) response costs paid in accordance with Section IX; (b) any other payments made by Settling Defendants to the United States in accordance with this Decree, including any Interest or stipulated penalties paid in accordance with Sections IX or XIII; (c) attorneys’ fees and costs,

except for reasonable attorneys' fees and costs necessarily related to [insert reference to any requirements under the Decree for which legal services are essential, such as obtaining access or institutional controls] as required by Section VI; (d) costs of any response activities Settling Defendants perform that are not required under, or approved by EPA under, this Decree; (e) costs related to Settling Defendants' litigation, settlement, development of potential contribution claims, or identification of defendants; (f) internal costs of Settling Defendants, including salaries, travel, or in-kind services, except for those costs that represent the work of employees of Settling Defendants directly performing the Work; (g) any costs incurred by Settling Defendants before the Effective Date **[if Remedial Design or other response activity performed under this Decree is commenced prior to the Effective Date insert: except for approved Work completed in accordance with this Decree];** or (h) any costs incurred by Settling Defendants under Section XII.

37. **Termination of Disbursements.** EPA's obligation to disburse funds from the Disbursement Special Account under this Decree terminates upon EPA's determination that Settling Defendants: (a) have knowingly submitted a materially false or misleading Cost Summary and Certification; (b) have submitted a materially inaccurate or incomplete Cost Summary and Certification, and have failed to correct the materially inaccurate or incomplete Cost Summary and Certification within __ days after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a Cost Summary and Certification as required by ¶ 35 within __ days (or such longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to make disbursements under this Section because of Settling Defendants' failure to submit the Cost Summary and Certification as required by ¶ 35. EPA's obligation to disburse funds from the Disbursement Special Account also terminates upon EPA's assumption of performance of any portion of the Work in accordance with ¶ 9, when such assumption of performance of the Work is not challenged by Settling Defendants or, if challenged, is upheld under Section XII. Settling Defendants may dispute EPA's termination of special account disbursements under Section XII.

38. **Recapture of Disbursements.** Upon termination of disbursements from the Disbursement Special Account under ¶ 37, if EPA has previously disbursed funds from the Disbursement Special Account for activities specifically related to the reason for termination, e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission, EPA shall submit a bill to Settling Defendants for those amounts already disbursed from the Disbursement Special Account specifically related to the reason for termination, plus Interest on that amount covering the period from the date of disbursement of the funds by EPA to the date of repayment of the funds by Settling Defendants. Within __ days after receipt of EPA's bill, Settling Defendants shall reimburse the Fund for the total amount billed. Payment must be made in accordance with ¶ 29.e. Upon receipt of payment, EPA may, in its sole discretion, deposit all or any portion thereof in the Special Account, the Disbursement Special Account, or the Fund.

39. **Balance of Special Account Funds.** After EPA issues its written Certification of Remedial Action Completion in accordance with this Decree [or if Certification of Remedial Action Completion is not used substitute: After the Remedial Action has been performed in accordance with this Decree and the Performance Standards have been achieved], and after EPA completes all disbursement to Settling Defendants in accordance with this Section, if any funds

remain in the Disbursement Special Account, EPA may, in its sole discretion, transfer such funds to the Special Account or to the Fund.]

XI. FORCE MAJEURE

40. “Force majeure,” for purposes of this Decree, means any event arising from causes beyond the control of Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants’ contractors that delays or prevents the performance of any obligation under this Decree despite Settling Defendants’ best efforts to fulfill the obligation. Given the need to protect public health and welfare and the environment, the requirement that Settling Defendants exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. “Force majeure” does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

41. If any event occurs for which Settling Defendants will or may claim a force majeure, Settling Defendants shall notify EPA’s Project Coordinator by email. The deadline for the initial notice is __ days after the date Settling Defendants first knew or should have known that the event would likely delay performance. Settling Defendants shall be deemed to know of any circumstance of which any contractor of, subcontractor of, or entity controlled by Settling Defendants knew or should have known. Within __ days thereafter, Settling Defendants shall send a further notice to EPA and the State that includes: (i) a description of the event and its effect on Settling Defendants’ completion of the requirements of the Decree; (ii) a description of all actions taken or to be taken to prevent or minimize the adverse effects or delay; (iii) the proposed extension of time for Settling Defendants to complete the requirements of the Decree; (iv) a statement as to whether, in the opinion of Settling Defendants, such event may cause or contribute to an endangerment to public health or welfare, or the environment; and (v) all available proof supporting their claim of force majeure. Failure to comply with the notice requirements herein regarding an event precludes Settling Defendants from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 40 and whether Settling Defendants have exercised their best efforts under ¶ 40, EPA may, in its unreviewable discretion, excuse in writing Settling Defendants’ failure to submit timely or complete notices under this Paragraph.

42. EPA, after a reasonable opportunity for review and comment by the State, will notify Settling Defendants of its determination whether Settling Defendants are entitled to relief under ¶ 40, and, if so, the duration of the extension of time for performance of the obligations affected by the force majeure. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. Settling Defendants may initiate dispute resolution under Section XII regarding EPA’s determination within 15 days after receipt of the determination. In any such proceeding, Settling Defendants have the burden of proving that they are entitled to relief under ¶ 40 and that their proposed extension was or will be warranted under the circumstances.

43. The failure by EPA to timely complete any activity under the Decree or the SOW is not a violation of the Decree, provided, however, that if such failure prevents Settling Defendants from timely completing a requirement of the Decree, Settling Defendants may seek relief under this Section.

XII. DISPUTE RESOLUTION

44. Unless otherwise provided in this Decree, Settling Defendants must use the dispute resolution procedures of this Section to resolve any dispute arising under this Decree. Settling Defendants shall not initiate a dispute challenging the Record of Decision. The United States may enforce any requirement of the Decree that is not the subject of a pending dispute under this Section.

45. A dispute will be considered to have arisen when one or more parties sends a written notice of dispute (“Notice of Dispute”) in accordance with ¶ 82. Disputes arising under this Decree must in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations may not exceed 20 days after the dispute arises, unless the parties to the dispute otherwise agree. If the parties cannot resolve the dispute by informal negotiations, the position advanced by EPA is binding unless Settling Defendants initiate formal dispute resolution under ¶ 46. [By agreement of the parties, mediation may be used during this informal negotiation period to assist the parties in reaching a voluntary resolution or narrowing of the matters in dispute.]

46. Formal Dispute Resolution

a. **Statements of Position.** Settling Defendants may initiate formal dispute resolution by serving on the Plaintiffs, within [20] days after the conclusion of informal dispute resolution under ¶ 45, an initial Statement of Position regarding the matter in dispute. The Plaintiffs’ responsive Statements of Position are due within [20] days after receipt of the initial Statement of Position. All Statements of Position must include supporting factual data, analysis, opinion, and other documentation. A reply, if any, is due within [10] days after receipt of the response. If appropriate, EPA may extend the deadlines for filing statements of position for up to [45] days and may allow the submission of supplemental statements of position.

b. **Formal Decision.** The Director of the [Superfund & Emergency Management Division], EPA Region __, will issue a formal decision resolving the dispute (“Formal Decision”) based on the statements of position and any replies and supplemental statements of position. The Formal Decision is binding on Settling Defendants unless they timely seek judicial review under ¶ 47.

c. **Compilation of Administrative Record.** EPA shall compile an administrative record regarding the dispute, which must include all statements of position, replies, supplemental statements of position, and the Formal Decision.

47. Judicial Review

a. Settling Defendants may obtain judicial review of the Formal Decision by filing, within [20] days after receiving it, a motion with the Court and serving the motion on all

Parties. The motion must describe the matter in dispute and the relief requested. The parties to the dispute shall brief the matter in accordance with local court rules.

b. **Review on the Administrative Record.** Judicial review of disputes regarding the following issues must be on the administrative record: (i) the adequacy or appropriateness of deliverables required under the Decree; (ii) the adequacy of the performance of the Remedial Action; (iii) whether a Work Takeover is warranted under ¶ 11; (iv) determinations about financial assurance under Section VII; (v) whether a reopener condition under ¶ 59 is satisfied, including whether the Remedial Action is not protective of human health and the environment; (vi) EPA’s selection of modified or further response actions; (vii) any other items requiring EPA approval under the Decree; and (viii) any other disputes that the Court determines should be reviewed on the administrative record. For all of these disputes, Settling Defendants bear the burden of demonstrating that the Formal Decision was arbitrary and capricious or otherwise not in accordance with law.

c. Judicial review of any dispute not governed by ¶ 47.b shall be governed by applicable principles of law.

48. **Escrow Account.** For disputes regarding a Future Response Cost billing, Settling Defendants shall: (a) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (“FDIC”); (b) remit to that escrow account funds equal to the amount of the contested Future Response Costs; and (c) send to EPA, in accordance with ¶ 82, copies of the correspondence and of the payment documentation (e.g., the check) that established and funded the escrow account, including the name of the bank, the bank account number, and a bank statement showing the initial balance in the account. EPA may, in its unreviewable discretion, waive the requirement to establish the escrow account. Settling Defendants shall cause the escrow agent to pay the amounts due to EPA and the State under ¶ 29, if any, by the deadline for such payment in ¶ 29. Settling Defendants are responsible for any balance due under ¶ 29 after the payment by the escrow agent.

49. The initiation of dispute resolution procedures under this Section does not extend, postpone, or affect in any way any requirement of this Decree, except as EPA agrees, or as determined by the Court. Stipulated penalties with respect to the disputed matter will continue to accrue, but payment is stayed pending resolution of the dispute, as provided in ¶ 52.

XIII. STIPULATED PENALTIES

50. Unless the noncompliance is excused under Section XI (Force Majeure), Settling Defendants are liable to the United States and the State [**specify percentage split**] for the following stipulated penalties:

a. for any failure: (i) to pay any amount due under Section IX; (ii) to establish and maintain financial assurance in accordance with Section VII; (iii) to submit timely or adequate deliverables under Section [9] of the SOW; (iv) [**add other compliance milestones or obligations**]:

Period of Noncompliance	Penalty Per Noncompliance Per Day
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Commented [A35]: For each milestone or obligation added here make sure that (a) the Decree sets forth a date for the start and/or completion of the obligation, or (b) the start or completion date can be readily ascertained after the Effective Date. For additional information see “Use of Stipulated Penalties in Hazardous Waste Consent Decrees” (September 21, 1987), available at <https://www.epa.gov/enforcement/guidance-use-stipulated-penalties-hazardous-waste-consent-decrees>.

1st through 14th day	\$
15th through 30th day	\$
31st day and beyond	\$

b. for any failure to submit timely or adequate deliverables required by this Decree other than those specified in ¶ 50.a:

Period of Noncompliance	Penalty Per Noncompliance Per Day
1st through 14th day	\$
15th through 30th day	\$
31st day and beyond	\$

51. **Work Takeover Penalty.** If EPA commences a Work Takeover, Settling Defendants are liable for a stipulated penalty in the amount of \$_____. This stipulated penalty is in addition to the remedy available to EPA under ¶ 22 (Access to Financial Assurance) to fund the performance of the Work by EPA.

52. **Accrual of Penalties.** Stipulated penalties accrue from the date performance is due, or the day a noncompliance occurs, whichever is applicable, until the date the requirement is completed or the final day of the correction of the noncompliance. Nothing in this Decree prevents the simultaneous accrual of separate penalties for separate noncompliances with this Decree. Stipulated penalties accrue regardless of whether Settling Defendants have been notified of their noncompliance, and regardless of whether Settling Defendants have initiated dispute resolution under Section XII, provided, however, that no penalties will accrue as follows:

a. with respect to a submission that EPA subsequently determines is deficient under ¶ [8.6] of the SOW, during the period, if any, beginning on the 31st day after EPA’s receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency;

b. with respect to a matter that is the subject of dispute resolution under Section XII, during the period, if any, beginning on the 21st day after the later of the date that EPA’s Statement of Position is received or the date that Settling Defendants’ reply thereto (if any) is received until the date of the Formal Decision under ¶ 46.b; or

c. with respect to a matter that is the subject of judicial review by the Court under ¶ 47, during the period, if any, beginning on the 31st day after the Court’s receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute.

53. **Demand and Payment of Stipulated Penalties.** EPA may send Settling Defendants a demand for stipulated penalties. The demand will include a description of the noncompliance and will specify the amount of the stipulated penalties owed. Settling Defendants may initiate dispute resolution under Section XII within 30 days after receipt of the demand. Settling Defendants shall pay the amount demanded or, if they initiate dispute resolution, the uncontested portion of the amount demanded, within 30 days after receipt of the demand. Settling Defendants shall pay the contested portion of the penalties determined to be owed, if any, within 30 days after the resolution of the dispute. Each payment for: (a) the uncontested

penalty demand or uncontested portion, if late, and; (b) the contested portion of the penalty demand determined to be owed, if any, must include an additional amount for Interest accrued from the date of receipt of the demand through the date of payment. Settling Defendants shall make payment at <https://www.pay.gov> using the link for “EPA Miscellaneous Payments Cincinnati Finance Center,” including references to the Site/Spill ID and DJ numbers listed in ¶ 82, and the purpose of the payment. Settling Defendants shall send a notice of this payment to DOJ and EPA, in accordance with ¶ 82. The payment of stipulated penalties and Interest, if any, does not alter any obligation by Settling Defendants under the Decree.

54. Nothing in this Decree limits the authority of the United States or the State: (a) to seek any remedy otherwise provided by law for Settling Defendants’ failure to pay stipulated penalties or interest; or (b) to seek any other remedies or sanctions available by virtue of Settling Defendants’ noncompliances with this Decree or of the statutes and regulations upon which it is based, including penalties under section 122(l) of CERCLA, provided, however, that the United States may not seek civil penalties under section 122(l) of CERCLA for any noncompliance for which a stipulated penalty is provided for in this Decree, except in the case of a willful noncompliance with this Decree.

55. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued under this Decree.

XIV. COVENANTS BY PLAINTIFFS

56. **Covenants for Settling Defendants.** Subject to ¶¶ 59 and 60, the United States covenants not to sue or to take administrative action against Settling Defendants under sections 106 and 107(a) of CERCLA regarding [the Site] [the Work, Past Response Costs, [and] Future Response Costs].

57. **Covenants for Settling Federal Agencies.** Subject to ¶¶ 59 and 60, EPA covenants not to take administrative action against Settling Federal Agencies under sections 106 and 107(a) of CERCLA regarding [Site CD: the Site] [OU CD: the Work, Past Response Costs, and Future Response Costs].

58. The covenants under ¶ 56 [and ¶ 57]: (a) take effect upon the Effective Date, except with respect to future liability, for which these covenants take effect upon Certification of Remedial Action Completion by EPA under ¶ [5.8] of the SOW; (b) are conditioned, respectively, on the satisfactory performance by Settling Defendants and Settling Federal Agencies of the requirements of this Decree; (c) extend to the successors of each Settling Defendant but only to the extent that the alleged liability of the successor of the Settling Defendant is based solely on its status as a successor of the Settling Defendant; and (d) do not extend to any other person.

59. United States’ Pre- and Post-certification Reservations

a. Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, the right to issue an administrative order or to

Commented [A36]: If the State is a party and is entitled to a portion of the stipulated penalties, add procedures for payment to the State.

Commented [A37]: A provision for the U.S. to elect between seeking stipulated and statutory penalties for a particular Decree noncompliance may be substituted in ¶ 54 in appropriate cases by replacing this text with: “collected under this Decree.”

Commented [A38]: On rare occasions, case circumstances may justify expanding the covenant by adding a reference to “section 7003 of RCRA.” Before doing so, the case team should fully examine the considerations for and against including this covenant. If the covenant covers claims under RCRA § 7003, the *Federal Register* notice soliciting comments on the settlement will include an offer to have a public meeting regarding the settlement.

Commented [A39]: If the CD resolves SDs’ claims against SFAs, add to this paragraph, as appropriate:

“Settling Defendants’ Past Response Costs and Settling Defendants Future Response Costs.”

Commented [A40]: EPA’s covenant may also be extended to a federal PRP contractor where the federal PRP settlement includes the contractor. This generally occurs where the contractor is indemnified by the United States under the contract.

Commented [A41]: See comment above about RCRA § 7003 covenant.

Commented [A42]: Covenants not to sue regarding the “Site” address both “present” and “future” liability. EPA interprets “present liability” to include the requirements to pay past response costs, to perform the Work, and to pay future response costs relating to the Work. See “Superfund Program, Covenants Not To Sue,” 52 Fed. Reg. 28,038, 28,040 (July 27, 1987), available at <https://www.epa.gov/enforcement/guidance-covenants-not-sue-under-superfund>. “Future liability” refers to the requirements to perform any additional response activities at the Site that are necessary to protect public health and the environment. Id. Under CERCLA § 122(f)(3), a covenant not to sue with respect to future liability will not take effect until Certification of Remedial Action Completion. OU CDs do not address future liability because the covenant is only for past costs and for performance of, and costs relating to, the Work.

institute proceedings in this action or in a new action seeking to compel Settling Defendants [, and EPA reserves the right to issue an administrative order seeking to compel Settling Federal Agencies,] to perform further response actions relating to the Site, to pay the United States for additional costs of response, or any combination thereof. The United States may exercise this reservation only if, at any time, conditions at the Site previously unknown to EPA are discovered, or information previously unknown to EPA is received, and EPA determines, based in whole or in part on these previously unknown conditions or information, that the Remedial Action is not protective of human health or the environment.

Commented [A43]: Omit this bracketed text if no SFAs are participating.

b. Before certification of Remedial Action Completion, the information and the conditions known to EPA include only that information and those conditions known to EPA as of the date the Record of Decision was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision.

c. After certification of Remedial Action Completion, the information and the conditions known to EPA include only that information and those conditions known to EPA as of the date of Certification of Remedial Action Completion and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-Record of Decision administrative record, or in any information received by EPA in accordance with the requirements of this Decree prior to Certification of Remedial Action Completion.

60. **General Reservations.** Notwithstanding any other provision of this Decree, the United States reserves, and this Decree is without prejudice to, all rights against Settling Defendants, and EPA and the federal natural resource trustee reserve, and this Decree is without prejudice to, all rights against Settling Federal Agencies, regarding the following:

a. liability for failure by Settling Defendants or Settling Federal Agencies to meet a requirement of this Decree;

b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;

c. liability based on Settling Defendants' ownership of the Site when such ownership commences after Settling Defendants' signature of this Decree;

d. liability based on Settling Defendants' operation of the Site when such operation commences after Settling Defendants' signature of this Decree and does not arise solely from Settling Defendants' performance of the Work;

e. liability based on Settling Defendants' or Settling Federal Agencies' transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, after signature of this Decree by Settling Defendants or on behalf of Settling Federal Agencies, other than as provided in the Record of Decision, under this Decree, or ordered by EPA;

f. liability for additional operable units at the Site or the final response action;

g. [if needed: liability for the following response costs that are not being reimbursed under ¶ 28 (Payment for Past Response Costs): _____;]

h. [if needed: liability for costs incurred or to be incurred by [name of U.S. Agency] regarding the Site;

i. liability, prior to achievement of Performance Standards, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the Remedial Action, but that are not covered by ¶ 9.b;

j. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and

k. criminal liability.

61. Subject to ¶ 56 [and ¶ 57], nothing in this Decree limits any authority of Plaintiffs to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or to request a Court to order such action.

XV. COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES

62. Covenants by Settling Defendants

a. Subject to ¶ 63, Settling Defendants covenant not to sue and shall not assert any claim or cause of action against the United States or the State under CERCLA, section 7002(a) of RCRA, the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, the State Constitution, State law, or at common law regarding [the Site][the Work, past response actions relating to the Site, Past Response Costs, [and] Future Response Costs].

b. Subject to ¶ 63, Settling Defendants covenant not to seek reimbursement from the Fund through CERCLA or any other law for costs [regarding the Site][of the Work and past response actions regarding the Site, Past Response Costs, [and] Future Response Costs [if applicable: , State Past Response Costs, State Future Response Costs] [if SFAs are paying Settling Defendants's past costs: , Settling Defendants's Past Response Costs, and Settling Defendants's Future Response Costs]].

63. **Settling Defendants' Reservation.** The covenants in ¶ 62 do not apply to any claim or cause of action brought, or order issued, after the Effective Date by the United States or the State to the extent such claim, cause of action, or order is within the scope of a reservation under ¶¶ 59, and 60.a through 60.j.

64. **De Minimis/Ability to Pay Waiver.** Settling Defendants shall not assert any claims and waive all claims or causes of action (including claims or causes of action under sections 107(a) and 113 of CERCLA) that they may have against any third party who enters or

Commented [A44]: Add separate paragraphs for State's covenants for SDs and SFAs, and reservations, as needed.

Commented [A45]: If one or more of the settlers is a government contractor that can charge back cleanup costs to DoD under a contract with DoD, and no Federal PRP is participating in the settlement, the DOJ case team must contact the General Counsel, Defense Contract Management Agency (DCMA) to notify them about this CD and the potential that the contractor may submit bills that include cleanup costs under the CD.

Commented [A46]: If the State is participating: (i) substitute references to applicable provisions of State CERCLA and RCRA laws for the term "State law;" and (ii) add to this covenant, if applicable: "State Past Response Costs and State Future Response Costs."

Commented [A47]: If SFAs are participating and are paying SDs' past and future response costs, add to this covenant: "Settling Defendants' Past Response Costs and Settling Defendants Future Response Costs."

Commented [A48]: Keep this paragraph if there are known or potential *de minimis* and/or ability to pay ("ATP") PRPs at the Site. Do not change the scope of the waiver to something less than "the matters addressed in the third party's settlement with EPA." Note that this waiver will not affect Settling Defendants' right to oppose entry of any such future *de minimis* or ATP settlement through the public comment process. Add "natural resource damages and assessment costs" if appropriate.

has entered into a *de minimis* or “ability-to-pay” settlement with EPA to the extent Settling Defendants’ claims and causes of action are within the scope of the matters addressed in the third party’s settlement with EPA, provided, however, that this waiver does not apply if the third party asserts a claim or cause of action regarding the Site against the Settling Defendants. Nothing in the Decree limits Settling Defendants’ rights under section 122(d)(2) of CERCLA to comment on any *de minimis* or ability-to-pay settlement proposed by EPA.

65. **De Micromis Waiver.** Settling Defendants shall not assert any claims and waive all claims or causes of action (including claims or causes of action under sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site against any person where the person’s liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than [110] gallons of liquid materials or [200] pounds of solid materials. This waiver does not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing hazardous substances contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued under sections 104(e) or 122(e)(3)(B) of CERCLA or section 3007 of RCRA, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site; or if (iii) such person has been convicted of a criminal violation for the conduct to which the waiver would apply and that conviction has not been vitiated on appeal or otherwise. This waiver does not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person otherwise covered by this waiver if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

66. **MSW Waiver**

a. “Municipal Solid Waste” or “MSW” means waste material: (1) generated by a household (including a single or multifamily residence); or (2) generated by a commercial, industrial, or institutional entity, to the extent that the waste material (i) is essentially the same as waste normally generated by a household; (ii) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (iii) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

b. Settling Defendants shall not assert any claims and waive all claims or causes of action (including claims or causes of action under sections 107(a) and 113 of CERCLA) that they may have for all matters relating to the Site against any person where the person’s liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of MSW at the Site, if the volume of MSW disposed, treated, or transported by such person to the Site did not exceed 0.2% of the total volume of waste at the Site. This waiver does not apply to any claim or cause of

action against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing MSW contributed to the Site by such person contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued under sections 104(e) or 122(e)(3)(B) of CERCLA or section 3007 of RCRA, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site. This waiver does not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person otherwise covered by this waiver if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

67. The waiver[s] under ¶¶ 64, 65, and 66 do[es] not apply to Settling Defendant's contractual indemnification claim against _____.

68. Settling Defendants agree not to seek judicial review of the final rule listing the Site on the NPL based on a claim that changed site conditions that resulted from the performance of the Work in any way affected the basis for listing the Site.

69. **Covenant by Settling Federal Agencies.** Settling Federal Agencies shall not seek reimbursement from the Fund through CERCLA or any other law for [use same items listed in ¶ 62.a]. This covenant does not preclude demand for reimbursement from the Fund of costs incurred by a Settling Federal Agency in the performance of its duties (other than in accordance with this Decree) as lead or support agency under the NCP.

XVI. EFFECT OF SETTLEMENT; CONTRIBUTION

70. The Parties agree and the Court finds that: (a) the complaint filed by the United States in this action is a civil action within the meaning of section 113(f)(1) of CERCLA; (b) this Decree constitutes a judicially approved settlement under which each Settling Defendant and each Settling Federal Agency has, as of the Effective Date, resolved its liability to the United States within the meaning of sections 113(f)(2) and 113(f)(3)(B) of CERCLA; and (c) each Settling Defendant and each Settling Federal Agency is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for the "matters addressed" in this Decree. The "matters addressed" in this Decree are [all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State] [the Work, Past Response Costs, and Future Response Costs], provided, however, that if the United States exercises rights against Settling Defendants (or if EPA or the federal natural resource trustee [or the State] assert rights against Settling Federal Agencies) under the reservations in ¶ 59 and ¶¶ 60.a through 60.i, the "matters addressed" in this Decree will no longer include those response costs or response actions [or natural resource damages] that are within the scope of the exercised reservation.

71. Each Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Decree, notify DOJ and EPA and the State no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant shall, with respect to any suit or claim brought against it for matters related to this Decree, notify DOJ and EPA and the State

Commented [A49]: Keep this paragraph if a SD asserts that it has a claim against a PRP within the scope of the waivers that is unrelated to the PRP's CERCLA liability at the Site, e.g., a claim for contractual indemnification.

Commented [A50]: If the State is a party and is resolving its claims, delete "except for the State" from ¶ 70. Also note that State claims do not include claims for Fund costs that have been provided to the State through a cooperative agreement with EPA and for which EPA retains the responsibility for cost recovery.

Commented [A51]: If resolving State and/or PRP claims against SDs, add as appropriate: State Past and Future Response Costs and/or SDs' Past and Future Response Costs.

Commented [A52]: Keep this text if SFAs are participating.

within 10 days after service of the complaint on such Settling Defendant. In addition, each Settling Defendant shall notify DOJ and EPA and the State within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial.

72. **Res Judicata and Other Defenses.** In any subsequent administrative or judicial proceeding initiated against any Settling Defendant by either Plaintiff for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants [**if SFAs and the State are parties, insert:** (and, with respect to a State proceeding initiated against a Settling Federal Agency, Settling Federal Agencies)] shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, claim preclusion (res judicata), issue preclusion (collateral estoppel), claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case.

73. Nothing in this Decree diminishes the right of the United States under section 113(f)(2) and (3) of CERCLA to pursue any person not a party to this Decree to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to section 113(f)(2).

XVII. RECORDS

74. **Settling Defendant Certification.** Each Settling Defendant certifies individually that: (a) it has implemented a litigation hold on documents and electronically stored information relating to the Site, including information relating to its potential liability under CERCLA regarding the Site, since the earlier of notification of potential liability by the United States or the State or the filing of suit against it regarding the Site; and (b) it has fully complied with any and all EPA and State requests for information under sections 104(e) and 122(e) of CERCLA, and section 3007 of RCRA, and State law. [**If needed:** Add a sentence regarding known document or data losses.]

Commented [A53]: The case team may replace this clause with “to the best of its knowledge and belief, after thorough inquiry it has not altered, mutilated, discarded, destroyed or otherwise disposed of any ...”

75. **Settling Federal Agency Acknowledgment.** The United States acknowledges that each Settling Federal Agency: (a) is subject to all applicable federal record retention laws, regulations, and policies; and (b) has certified that it has fully complied with any and all EPA and State requests for information regarding the Site under sections 104(e) and 122(e)(3)(B) of CERCLA, section 3007 of RCRA, and state law.

Commented [A54]: If SFAs, include this paragraph. EPA attorneys must assure that the Agency has received a written response to any information requests that it has sent to SFAs containing a certification substantially similar to that required from private PRPs.

76. Retention of Records and Information

a. Settling Defendants shall retain, and instruct their contractors and agents to retain, the following documents and electronically stored data (“Records”) until 10 years after the Certification Completion of the Work under SOW ¶ [5.8] (the “Record Retention Period”):

Commented [A55]: The case team has flexibility to add to this paragraph other categories of information that the agency wants the defendant to retain during the Record Retention Period. Be specific about what the agency wants, and consider proposals to exclude categories of ESI that may be inaccessible. Consult DOJ’s e-discovery office coordinator for advice regarding inaccessible ESI.

- (1) All records regarding Settling Defendants’ liability under CERCLA regarding the Site;

- (2) All reports, plans, permits, and documents submitted to EPA in accordance with this Decree, including all underlying research and data; and
- (3) All data developed by, or on behalf of, Settling Defendants in the course of performing the Remedial Action.

b. **[If needed: [name of each SD that is an owner or operator]** shall retain all Records regarding the liability of any person under CERCLA regarding the Site during the Record Retention Period.]

c. At the end of the Record Retention Period, Settling Defendants shall notify EPA that it has 90 days to request the Settling Defendants' Records subject to this Section. Settling Defendants shall retain and preserve their Records subject to this Section until 90 days after EPA's receipt of the notice. These record retention requirements apply regardless of any corporate record retention policy.

77. Settling Defendants shall provide to EPA and the State, upon request, copies of all Records and information required to be retained under this Section. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

78. **Privileged and Protected Claims**

a. Settling Defendants may assert that all or part of a record requested by Plaintiffs is privileged or protected as provided under federal law, in lieu of providing the record, provided that Settling Defendants comply with ¶ 78.b, and except as provided in ¶ 78.c.

b. If Settling Defendants assert a claim of privilege or protection, they shall provide Plaintiffs with the following information regarding such record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a record, Settling Defendants shall provide the record to Plaintiffs in redacted form to mask the privileged or protected portion only. Settling Defendants shall retain all records that they claim to be privileged or protected until Plaintiffs have had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Settling Defendants' favor.

c. Settling Defendants shall not make any claim of privilege or protection regarding: (1) any data regarding the Site, including all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological or engineering data, or the portion of any other record that evidences conditions at or around the Site; or (2) the portion of any record that Settling Defendants are required to create or generate in accordance with this Decree.

79. **Confidential Business Information (CBI) Claims.** Settling Defendants may claim that all or part of a record provided to Plaintiffs under this Section is CBI to the extent permitted by and in accordance with section 104(e)(7) of CERCLA and 40 C.F.R. § 2.203(b).

Commented [A56]: Don't substitute "Record" for "record" here, as this provision is not limited to "Records" referenced in ¶ 76.a.

Commented [A57]: Don't substitute "Record" for "record" here, as this provision is not limited to "Records" referenced in ¶ 76.a.

Settling Defendants shall segregate and shall clearly identify all records or parts thereof submitted under this Decree for which they claim is CBI by labeling each page or each electronic file “claimed as confidential business information” or “claimed as CBI.” Records that Settling Defendants claim to be CBI will be afforded the protection specified in 40 C.F.R. part 2, subpart B. If no CBI claim accompanies records when they are submitted to EPA and the State, or if EPA notifies Settling Defendants that the records are not entitled to confidential treatment under the standards of section 104(e)(7) of CERCLA or 40 C.F.R. part 2, subpart B, the public may be given access to such records without further notice to Settling Defendants.

80. In any proceeding under this Decree, validated sampling or monitoring data generated in accordance with the SOW and reviewed and approved by EPA, if relevant to the proceeding, is admissible as evidence, without objection.

81. Notwithstanding any provision of this Decree, Plaintiffs retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XVIII. NOTICES AND SUBMISSIONS

82. All agreements, approvals, consents, deliverables, modifications, notices, notifications, objections, proposals, reports, waivers, and requests specified in this Decree must be in writing unless otherwise specified. Whenever a notice is required to be given or a report or other document is required to be sent by one Party to another under this Decree, it must be sent as specified below. All notices under this Section are effective upon receipt, unless otherwise specified. In the case of emailed notices, there is a rebuttable presumption that such notices are received on the same day that they are sent. Any Party may change the method, person, or address applicable to it by providing notice of such change to all Parties.

As to DOJ: *via email to:*
eesdcopy.enrd@usdoj.gov
Re: DJ # _____

As to DOJ on behalf of Settling Federal Agencies: *via regular or overnight mail to:*
Chief
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
Washington, D.C. 20044-7611
Re: DJ # _____

As to EPA: *via email to:*
[Superfund & Emergency Mgmt. Div. Director’s email address]
and
[EPA Project Coordinator’s email address]
Re: Site/Spill ID # _____

Commented [A58]: This block of addresses is a table. To make it easier to navigate within it, turn on gridlines as follows: Click anywhere in the table. Under the “Table Tools” menu that appears in the upper ribbon, click the “Layout” button. In the layout ribbon that appears, on the far left, click the “View Gridlines” button.

Commented [A59]: If needed add mailing addresses for Director, Superfund & Emergency Management Division, EPA Project Coordinator, and Regional Financial Management Officer. Include Site/Spill ID. If needed add SDs’ Project Coordinator’s mailing address.

As to the Regional *via email to:*
Financial Management _____@epa.gov
Officer: Re: Site/Spill ID # _____

As to the State: _____

As to Settling *via email to:*
Defendants: [SD Project Coordinator's email address]

XIX. APPENDIXES

83. The following appendixes are attached to and incorporated into this Decree:

“Appendix A” is the Record of Decision.

“Appendix B” is the SOW.

“Appendix C” is the description [and/or] map of the Site.

“Appendix D” is the complete list of Settling Defendants.

XX. MODIFICATIONS TO DECREE

84. Except as provided in ¶ 9 of the Decree and ¶ [8.6] of the SOW (Approval of Deliverables), nonmaterial modifications to Sections I through XXIV and the Appendixes must be in writing and are effective when signed (including electronically signed) by the Parties. Material modifications to Sections I through XXIV and the Appendixes must be in writing, signed (which may include electronically signed) by the Parties, and are effective upon approval by the Court. As to changes to the remedy, a modification to the Decree, including the SOW, to implement an amendment to the Record of Decision that “fundamentally alters the basic features” of the Remedial Action within the meaning of 40 C.F.R. § 300.435(c)(2)(ii) will be considered a material modification.

XXI. SIGNATORIES

85. The undersigned representative of the United States, the undersigned representative of the State, and each undersigned representative of a Settling Defendant certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such Party to this document.

XXII. PRE-ENTRY PROVISIONS

86. If for any reason the Court should decline to approve this Decree in the form presented, this agreement, except for ¶ 87 and ¶ 88, is voidable at the sole discretion of any Party and its terms may not be used as evidence in any litigation between the Parties.

87. This Decree will be lodged with the Court for at least 30 days for public notice and comment in accordance with section 122(d)(2) of CERCLA and 28 C.F.R. § 50.7. The

United States may withdraw or withhold its consent if the comments regarding the Decree disclose facts or considerations that indicate that the Decree is inappropriate, improper, or inadequate.

88. Settling Defendants agree not oppose or appeal the entry of this Decree.

XXIII. INTEGRATION

89. This Decree constitutes the entire agreement among the Parties regarding the subject matter of the Decree and supersedes all prior representations, agreements, and understandings, whether oral or written, regarding the subject matter of the Decree.

XXIV. FINAL JUDGMENT

90. Upon entry of this Decree by the Court, this Decree constitutes a final judgment under Fed. R. Civ. P. 54 and 58 among the Parties.

SO ORDERED this ___ day of _____, 20__.

United States District Judge

Commented [A60]: If this settlement will be a "partial" judgment, *i.e.*, the parties to the Decree comprise fewer than *all* of the parties named in the complaint, then replace this clause with "... this Decree constitutes a final judgment between and among the United States and Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as ..." RD/RA Decrees that are partial judgments are rare. A Decree that resolves the PRPs' liability for less than the full Site (*e.g.*, a Decree that addresses a remedy for a single operable unit) is not a partial judgment. Consult with DOJ if you have any questions about this.

Commented [A61]: The signature blocks here and below are tables. To make it easier to navigate within them, turn on gridlines as follows: Click anywhere in the table. Under the "Table Tools" menu that appears in the upper ribbon, click the "Layout" button. In the layout ribbon that appears, on the far left, click the "View Gridlines" button.

Signature Page for Consent Decree in *U.S. v. _____* (D. __)

FOR THE UNITED STATES:

Dated

[name]
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

[name]
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
[address]
[email and phone no. if needed]

[name]
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
[address]
[email and phone no. if needed]

[name]
United States Attorney
District of _____

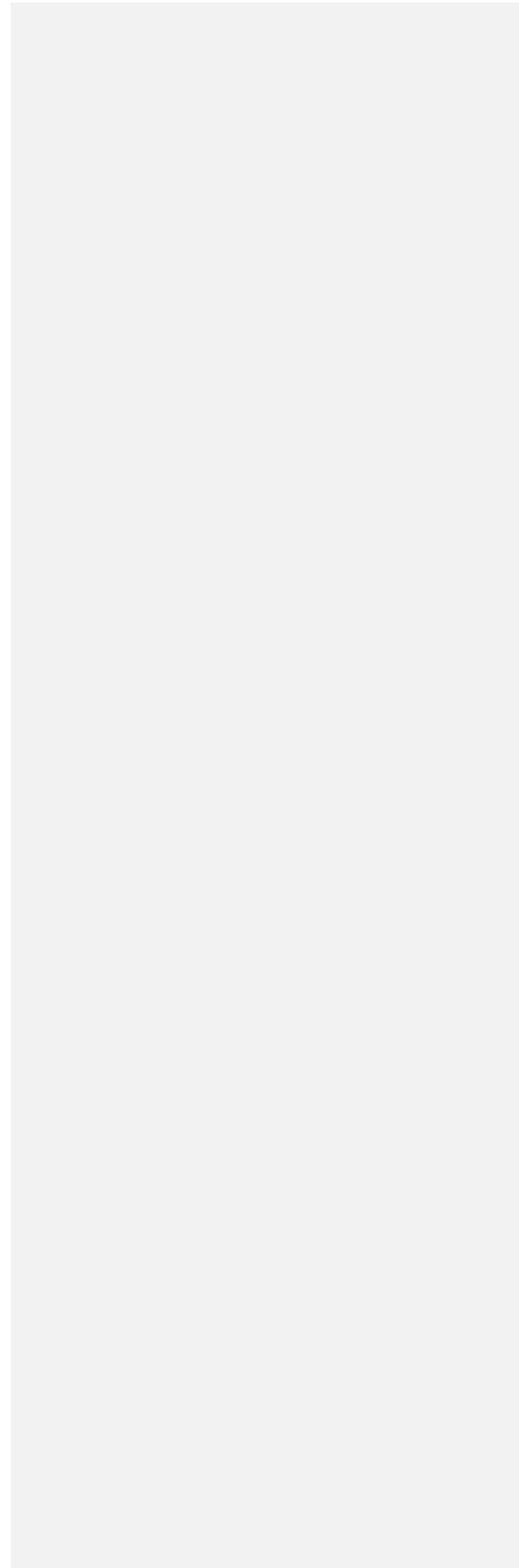
[name]
Assistant United States Attorney
District of _____
[address]

Signature Page for Consent Decree in *U.S. v. _____* (D. __)

**FOR THE U.S. ENVIRONMENTAL
PROTECTION AGENCY:**

[name]
Regional Counsel
U.S. Environmental Protection Agency
Region __

[name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region __
[address]



INSTRUCTIONS REGARDING AUTOMATED FEATURES

FEATURE	INSTRUCTIONS
Insert text copied from a different document	<p><i>Always</i> use the “Paste Special” function! [Press Ctrl-Alt-V; in the “Paste Special” pop-up menu, click “Unformatted Text” and “OK.”]</p> <p>Do not use Ctrl-V to paste! Pasting text from a different document using Ctrl-V will cause unpredictable and frustrating formatting results.</p>
Insert a new paragraph or Section heading	<p>Move the cursor to where you wish to add the new paragraph, and press Enter to add a new paragraph. Then assign the correct outline level to your new paragraph: Home tab >> (in the Styles box) click “LVL 1”, “LVL 2,” etc. or “Section Head.”</p>
Add an updateable section or paragraph cross-reference	<ul style="list-style-type: none"> ● Move cursor to where you wish to insert a cross-reference; ● Click the “References” tab ● (In the “Captions” box) click “Cross-reference;” ● In the pop-up menu that appears: <ul style="list-style-type: none"> ○ change the “Reference type” to “Numbered item,” ○ change “Insert reference to” to “Paragraph Number (full context)” ○ change “For which numbered item” field” to the desired section or paragraph you wish to cross-reference; and ● Click “Insert.”
Update the cross-references	<p>Press Ctrl-Alt-U. Note: If a numbered paragraph that was cross-referenced elsewhere in the document has been deleted, remove the “broken” paragraph cross-reference. To find and delete the broken cross-references, do a search for “Error!”.</p>
Update the Table of Contents	<p>Right-click in the TOC > click “Update Field” > “Update entire table” > “OK.”</p>

Case teams should negotiate and finalize the form, substance, and value of SDs' financial assurance well before the lodging of the CD so that the final financial assurance mechanism can take effect within 30 days after the Effective Date. Such review should ensure, among other things, that an instrument or account is established (or can be established) to receive financial assurance resources when needed. Case teams can find the most current sample financial assurance documents in the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>. Case teams should also ensure that entities providing a demonstration or guarantee under ¶ 17.e or ¶ 17.f have: (1) submitted all required documentation well in advance of the lodging of the CD so that EPA can determine whether such financial assurance is adequate; and (2) fully and accurately reflected in their submission all of their financial assurance or "performance guarantee" obligations (under CERCLA, RCRA, the Underground Injection Control Program, the Toxic Substances Control Act, and any other federal, state, or tribal environmental obligation) to the United States or other governmental entities so all such obligations have been properly accounted for in determining whether any such entity meets the financial test criteria. When reviewing which of the permissible financial assurance mechanisms set forth in ¶ 17 may be appropriate for inclusion in the CD, case teams should consider, as part of the facts and circumstances of each case, the estimated cost of the Work to be performed, the estimated time to complete the Work, the nature and extent of contamination at the Site, the financial health of the SDs, and the industry sector(s) in which the SDs operate. The Regions have discretion, for example, to require that SDs provide the financial assurance through a liquid mechanism rather than through a demonstration or guarantee under ¶ 17.e or 17.f. If an SD is a municipality, contact financial assurance team members within the Office of Site Remediation Enforcement for assistance. For more specific information and considerations, see "Guidance on Financial Assurance in Superfund Settlement Agreements and Unilateral Administrative Orders" (April 6, 2015), available at <https://www.epa.gov/enforcement/guidance-financial-assurance-superfund-settlements-and-orders>.

Superfund Trust Fund monies cannot be used for remedial actions at sites not listed on the NPL. Therefore, for CDs using the SA Approach, case teams should ensure that parties provide an amount of the financial assurance through one or more liquid mechanism(s) at least equal to the amount of funds estimated to be necessary to keep cleanup work going through the listing process, in the event the Site needs to be listed. Based on case-specific circumstances, case teams may require SDs to provide liquid financial assurance mechanism(s) for the entire amount of the Estimated Cost of the Work. Acceptable liquid financial assurance instruments include those listed at ¶¶ 17.a through 17.d. For more specific information, see "Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach," OSWER 9200.2-125 (Sep. 28, 2012), available at: <https://www.epa.gov/sites/production/files/documents/rev-saa-2012-mem.pdf>.

MODEL REMEDIAL DESIGN/REMEDIAL ACTION

STATEMENT OF WORK

For Use with “Streamlined” Model RD/RA Consent Decree

August 2021

- This document includes macros. The macros greatly streamline the editing process. The RDRA Model Development Team created them and they will not harm your computer.
- To use the macros do the following: (i) save the document locally; (ii) open the local copy; (iii) in the yellow ribbon at the top, click “Enable Content;” and (iv) make sure “Show/Hide ¶” mode is *off* (Shift-Ctrl-*)]. For questions or technical problems contact osre-models-help@epa.gov.
- The text needed for a simple SOW, *i.e.*, one for multiple settlers and without the State, is *visible* by default. Text for a settlement that includes the State and only one settler is designated as *hidden* by default. Switch Show/Hide ¶ mode *on* (Shift-Ctrl-*) to see the hidden text.
- Use the macros in the control panel below to customize your SOW as needed. Switch Show/Hide ¶ mode *off* (Shift-Ctrl-*) to properly view the control panel.

Commented [A1]: Do not delete these bullet comments or this margin note until all persons involved in the negotiations have seen this document at least once.

CONTROL PANEL		
Current Setting	Run this macro to make this change:
State In	Shift-Ctrl-Alt-S	State Out
Multiple Settlers	Ctrl-Alt-1	One Settler
For Decrees with <i>one</i> settler, manually substitute “Defendant” for “Defendants” in Paragraph 2.3.		
When done with the above macros:	Run this macro to do this:
	Ctrl-Alt-H	Delete all hidden text
	Ctrl-Alt-U	Update all cross references
	Search for “error!” to find and delete all “broken” cross refs.	

Commented [A2]: The default text is for a settlement in which the State is not participating. If the State is participating, run this macro which will add a paragraph requiring the state to give notice regarding its project coordinator.

Commented [A3]: The default text is for a settlement in which multiple PRPs are participating. If only one PRP is participating, run this macro which will change “Defendants” to “Defendant” in most cases, and change the verb to singular form as necessary.

- This model, the guidance documents referenced herein, and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model, the guidance documents referenced herein, or its internal procedures.

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1. INTRODUCTION

- 1.1 Purpose of SOW.** This SOW sets forth the procedures and requirements for implementing the Work.
- 1.2 Structure of the SOW**
- Section 2 (Community Involvement) sets forth EPA’s and Settling Defendants’ responsibilities for community involvement.
 - Section 3 (Coordination and Supervision) contains the provisions for selecting the Supervising Contractor and Project Coordinators regarding the Work.
 - Section 4 (Remedial Design) sets forth the process for developing the Remedial Design, which includes the submission of specified primary deliverables.
 - Section 5 (Remedial Action) sets forth requirements regarding the completion of the Remedial Action, including primary deliverables related to completion of the Remedial Action.
 - Section 6 (Contingency Remedy) sets forth Settling Defendants’ obligations regarding implementation of contingency remedies.
 - Section 7 (Reporting) sets forth Settling Defendants’ reporting obligations.
 - Section 8 (Deliverables) describes the contents of the supporting deliverables and the general requirements regarding Settling Defendants’ submission of, and EPA’s review of, approval of, comment on, and/or modification of, the deliverables.
 - Section 9 (Schedules) sets forth the schedule for submitting the primary deliverables, specifies the supporting deliverables that must accompany each primary deliverable, and sets forth the schedule of milestones regarding the completion of the Remedial Action.
 - Section 10 (State Participation) addresses State participation.
 - Section 11 (References) provides a list of references, including URLs.
- 1.3** The Scope of the Remedy includes the actions described in Section ___ of the Record of Decision, including _____.
- 1.4** The terms used in this SOW that are defined in CERCLA, in regulations promulgated under CERCLA, or in the Consent Decree (“Decree”), have the meanings assigned to them in CERCLA, in such regulations, or in the Decree, except that the term “Paragraph” or “¶” means a paragraph of the SOW, and the term “Section” means a section of the SOW, unless otherwise stated.

Commented [A4]: This document uses styles to make editing easier. Do not try to format any paragraphs manually. Instead, use the custom-made “quick style” buttons, accessible from the “Home” tab. There is a quick style for each of the six numbered paragraph levels; they are “LVL 1” through “LVL 5.” All section headings (which have “LVL 1” formatting) will appear in the Table of Contents (TOC). Do not manually renumber any internal cross references, as they are all automatic. Run the update macro to update the cross references: Ctrl—Alt—U.

Commented [A5]: Do not delete this note until DOJ/ENRD has reviewed the draft SOW. The ENRD attorney should review any changes to the “model” provisions, in particular the following: ¶ 5.4 (Permits), ¶ 5.5 (Emergency Response and Reporting), ¶ 5.6 (Off-Site Shipments), ¶ 5.8 (Certification of Remedial Action Completion), ¶ 8.6 (Approval of Deliverables), and, if they are used in lieu of the Institutional Controls Implementation and Assurance Plan (ICIAP) under ¶ 4.2, the optional Proprietary Controls provisions.

Commented [A6]: Insert description of remedy from ROD (and any ROD Amendments or ESD) in ¶ 1.3, including any contingency remedies. The model RDRA Decree defines the “Scope of the Remedy” by reference to ¶ 1.3 of the SOW.

2. COMMUNITY INVOLVEMENT

- 2.1** As requested by EPA, Settling Defendants shall conduct community involvement activities under EPA’s oversight as provided for in, and in accordance with this Section. Such activities must include designation of a Community Involvement Coordinator (“CI Coordinator”) [insert, if provided for below: and implementation of a technical assistance plan].
- 2.2** **Community Involvement Responsibilities**

- (a) EPA has the lead responsibility for developing and implementing community involvement activities at the Site. Previously [during the Remedial Investigation and Feasibility Study (“RI/FS”) phase], EPA developed a Community Involvement Plan (“CIP”) for the Site. In accordance with 40 C.F.R. § 300.435(c), EPA shall review the existing CIP and determine whether it should be revised to describe further public involvement activities during the Work that are not already addressed or provided for in the existing CIP [, including, if applicable, [any Technical Assistance Grant (“TAG”), any use of the Technical Assistance Services for Communities (“TASC”) contract, and/or any Technical Assistance Plan (“TAP”)]].
- (b) **Settling Defendants’ CI Coordinator.** As requested by EPA, Settling Defendants shall, within [15] days, designate and notify EPA of Settling Defendants’ CI Coordinator (Settling Defendants’ CI Coordinator). Settling Defendants may hire a contractor for this purpose. Settling Defendants’ notice must include the name, title, and qualifications of the Settling Defendants’ CI Coordinator. Settling Defendants’ CI Coordinator shall coordinate his/her activities with EPA’s CI Coordinator, provide support regarding EPA’s community involvement activities, and, as requested by EPA’s CI Coordinator, provide draft responses to the public’s inquiries including requests for information or data about the Site. The Settling Defendants’ CI Coordinator has the responsibility to ensure that when they communicate with the public, the Settling Defendants protect any “Personally Identifiable Information” (“PII”) (*e.g.* sample results from residential properties) in accordance with “EPA Policy 2151.0: Privacy Policy.”
- (c) As requested by EPA, Settling Defendants shall participate in community involvement activities, including participation in: (1) public meetings that may be held or sponsored by EPA to explain activities at or relating to the Site (with interpreters present for community members with limited English proficiency); and (2) [add other activities EPA decides are necessary to protect and address the concerns of EJ and disadvantaged communities, *e.g.*, “giving presentations,” “providing a live video feed of areas where work is being performed”]. Settling Defendants’ support of EPA’s community involvement activities may include providing online access to initial submissions and updates of deliverables to: (1) any Community Advisory Groups, (2) any Technical Assistance Grant (“TAG”) recipients and their advisors, and (3) other entities to provide them with a reasonable opportunity for review and comment. EPA may describe in its CIP Settling Defendants’ responsibilities for community involvement activities. All community involvement activities conducted by Settling Defendants at EPA’s request are subject to EPA’s oversight. Upon EPA’s request, Settling Defendants shall establish, as early as is feasible, a community information repository at or near the Site, as provided in the CIP, to house one copy of the administrative record.
- (d) **Information for the Community.** As requested by EPA, Settling Defendants shall develop and provide to EPA information about the design and

Commented [A7]: See OMB memorandum “Interim Implementation Guidance for the Justice40 Initiative” (July 20, 2021) and its interim definition of disadvantaged communities. However, the OMB memorandum does not mandate the use of this term. The case team should make its own determination regarding the appropriate term to be used here based on the needs of the Site and the community. See footnote 4 of the OMB memorandum.

implementation of the remedy including: (1) any validated data from monitoring of impacts to communities as provided in the Community Impact Mitigation Plan under ¶ 8.7(f); (2) results from validated sampling as provided under ¶ 8.7(e)(7); (3) a copy of the Community Impacts Mitigation Plan required under ¶ 8.7(f); (4) schedules prepared under Section 9; (5) dates that Settling Defendants completed each task listed in the schedules; and (6) digital photographs of the Work being performed, together with descriptions of the Work depicted in each photograph, the purpose of the Work, the equipment being used, and the location of the Work. The EPA Project Coordinator may use this information for communication to the public via EPA’s website, social media, or local and mass media. The information provided to EPA should be suitable for sharing with the public and the education levels of the community as indicated in EJ Screen. Translations should be in the dominant language(s) of community members with limited English proficiency.

2.3 Settling Defendants’ Responsibilities for Technical Assistance

- (a) At EPA’s request, Settling Defendants shall arrange for a qualified community group to receive the services of a technical advisor(s) who can: (1) help group members understand Site cleanup issues (specifically, to interpret and comment on Site-related documents developed under this SOW); and (2) share this information with others in the community. The technical advisor(s) will be independent from the Settling Defendants. Settling Defendants’ assistance will be limited to \$50,000, except as provided in ¶ 2.3(d)(3), and will end when EPA issues the Certification of Work Completion under ¶ 5.10. Settling Defendants shall implement this requirement under a Technical Assistance Plan (“TAP”).
- (b) At EPA’s request, Settling Defendants shall cooperate with EPA in soliciting interest from community groups regarding a TAP at the Site. If more than one community group expresses an interest in a TAP, Settling Defendants shall cooperate with EPA in encouraging the groups to submit a single, joint application for a TAP.
- (c) At EPA’s request, Settling Defendants shall, within [30] days, submit a proposed TAP for EPA approval. The TAP must describe the Settling Defendants’ plans for the qualified community group to receive independent technical assistance. The TAP must include the following elements:
 - (1) For Settling Defendants to arrange for publication of a notice in local media that it has received a Letter of Intent (“LOI”) to submit an application for a TAP. The notice should explain how other interested groups may also try to combine efforts with the LOI group or submit their own applications, by a reasonable specified deadline;
 - (2) For Settling Defendants to review the application(s) received and determine the eligibility of the community group(s). The proposed TAP must include eligibility criteria as follows:

Commented [A8]: Keep this Technical Assistance Plan (TAP) provision if the Site is a “Superfund Alternative Approach” (SAA) site. This TAP provision is optional if the Site is an NPL site. Technical Assistance Plans are conceptually similar to Technical Assistance Grants, which typically provide an initial \$50,000 for independent technical assistance to communities. If a prior RI/FS settlement agreement relating to the ROD included a TAP provision, then this SOW will also probably include a TAP provision. Moreover, in that instance, EPA and the Settling Defendants will likely agree to simply continue the existing TAP, and portions of ¶ 2.3 (Settling Defendants’ Responsibilities for Technical Assistance) should be modified accordingly (e.g., to omit the process for selecting a community group and to replace it with language that reflects that a group was already selected during the RI/FS).

Commented [A9]: This paragraph does not necessarily mean that Settling Defendants will transfer funds to the community group. Settling Defendants may elect, for example, to enter into an agreement providing that the community group direct its advisor to provide certain services, with the community group later receiving an invoice from the advisor, approving it, and sending the invoice to Settling Defendants for payment.

Commented [A10]: If a community group expresses interest in participating in a TAP and appears to be eligible, then EPA generally should request that Settling Defendants prepare and submit a TAP. See *Interim Guidance: Providing Communities with Opportunities for Independent Technical Assistance in Superfund Settlements* (Sep. 3, 2009).

- (i) A community group is eligible if it is: (a) comprised of people who are affected by the release or threatened release at the Site; and (b) able to demonstrate its ability to adequately and responsibly manage TAP-related obligations.
 - (ii) A community group is ineligible if it is: (a) a potentially responsible party (PRP) at the Site, represents such a PRP, or receives money or services from a PRP (other than through the TAP); (b) affiliated with a national organization; (c) an academic institution; (d) a political subdivision; (e) a tribal government; (f) a group established or presently sustained by any of the above ineligible entities; or (g) a group in which any of the above ineligible entities is represented;
- (3) For Settling Defendants to notify EPA of their determination on eligibility of the applicant group(s) to ensure that the determination is consistent with the SOW before notifying the group(s);
- (4) If more than one community group submits a timely application, for Settling Defendants to review each application and evaluate each application based on the following elements:
- (i) The extent to which the group is representative of those persons affected by the Site; and
 - (ii) The effectiveness of the group's proposed system for managing TAP-related responsibilities, including its plans for working with its technical advisor and for sharing Site-related information with other members of the community.
- (5) For Settling Defendants to document their evaluation of, and their selection of, a qualified community group, and to brief EPA regarding their evaluation process and choice. EPA may review Settling Defendants' evaluation process to determine whether the process satisfactorily follows the criteria in ¶ 2.3(c)(4). TAP assistance may be awarded to only one qualified group at a time;
- (6) For Settling Defendants to notify all applicant(s) about Settling Defendants' decision;
- (7) For Settling Defendants to designate a person (TAP Coordinator) to be their primary contact with the selected community group;
- (8) A description of Settling Defendants' plans to implement the requirements of ¶ 2.3(d) (Agreement with Selected Community Group); and
- (9) For Settling Defendants to submit quarterly progress reports regarding the implementation of the TAP.

Commented [A11]: Settling Defendants' obligations to implement a TAP and their obligation to support EPA's Community Involvement Activities are distinct obligations. The EPA Remedial Project Manager (RPM) might not request that Settling Defendants prepare and implement a TAP (and designate a TAP Coordinator) since, historically, community groups have expressed interest in TAPs in only about 20% of settlements that contain TAP provisions. Similarly, the RPM might not request that Settling Defendants designate a CI Coordinator, since the RPM might decide EPA does not need Settling Defendants' support. Therefore, the deadlines for designating a TAP coordinator and for designating a CI Coordinator may be different. However, Settling Defendants generally will designate the same individual for both responsibilities if both requirements are triggered.

(d) Agreement with Selected Community Group

- (1) Settling Defendants shall negotiate an agreement with the selected community group that specifies the duties of Settling Defendants and the community group. The agreement must specify the activities that may be reimbursed under the TAP and the activities that may not be reimbursed under the TAP. The list of allowable activities must be consistent with 40 C.F.R. § 35.4070 (*e.g.*, obtaining the services of an advisor to help the group understand the nature of the environmental and public health hazards at the Site and the various stages of the response action, and communicating Site information to others in the community). The list of non-allowable activities must be consistent with 40 C.F.R. § 35.4075 (*e.g.*, activities related to litigation or political lobbying).
- (2) The agreement must provide that Settling Defendants' review of the Community Group's recommended choice for Technical Advisor will be limited, consistent with 40 C.F.R. §§ 35.4190 and 35.4195, to criteria such as whether the advisor has relevant knowledge, academic training, and relevant experience as well as the ability to translate technical information into terms the community can understand.
- (3) The agreement must provide that the Community Group is eligible for additional TAP assistance, if it can demonstrate that it has effectively managed its TAP responsibilities to date, and that at least three of the following 10 factors are satisfied:
 - (i) EPA expects that more than eight years (beginning with the initiation of the RI/FS) will pass before construction completion will be achieved;
 - (ii) EPA requires treatability studies or evaluation of new and innovative technologies;
 - (iii) EPA reopens the Record of Decision;
 - (iv) The public health assessment (or related activities) for the Site indicates the need for further health investigations and/or health-related activities;
 - (v) After Settling Defendants' selection of the Community Group for the TAP, EPA designates additional operable units at the Site;
 - (vi) EPA issues an Explanation of Significant Differences for the Record of Decision;
 - (vii) After Settling Defendants' selection of the Community Group, a legislative or regulatory change results in significant new Site information;

Commented [A12]: EPA has developed a sample agreement to use as a starting point for negotiations between Settling Defendants and the selected community group. The sample agreement is available from the Office of Site Remediation Enforcement upon request.

- (viii) Significant public concern about the Site exists, as evidenced, *e.g.*, by relatively large turnout at meetings, the need for multiple meetings, the need for numerous copies of documents to inform community members, etc.;
 - (ix) Any other factor that, in EPA’s judgment, indicates that the Site is unusually complex; or
 - (x) A RI/FS costing at least \$2 million was performed at the Site.
- (4) Settling Defendants are entitled to retain any unobligated TAP funds upon EPA’s Certification of Work Completion under ¶ 5.10.
 - (5) Settling Defendants shall submit a draft of the proposed agreement to EPA for its comments.

3. COORDINATION AND SUPERVISION

3.1 Project Coordinators

- (a) Settling Defendants’ Project Coordinator must have sufficient technical expertise to coordinate the Work. Settling Defendants’ Project Coordinator may not be an attorney representing any Settling Defendant in this matter and may not act as the Supervising Contractor. Settling Defendants’ Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.
- (b) EPA shall designate and notify the Settling Defendants of EPA’s Project Coordinator[s] and Alternate Project Coordinator[s]. EPA may designate other representatives, which may include its employees, contractors, and/or consultants, to oversee the Work. EPA’s Project Coordinator/Alternate Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”). This includes the authority to halt the Work and/or to conduct or direct any necessary response action when it is determined that conditions at the Site constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.
- (c) The State shall designate and notify EPA and the Settling Defendants of its Project Coordinator[s] and Alternate Project Coordinator[s]. The State may designate other representatives, including its employees, contractors and/or consultants to oversee the Work. For any meetings and inspections in which EPA’s Project Coordinator participates, the State’s Project Coordinator also may participate. Settling Defendants shall notify the State reasonably in advance of any such meetings or inspections.

Commented [A13]: In this section and throughout this SOW, the deadlines for performing a task or submitting a deliverable have been intentionally omitted. In lieu of including such deadlines (and even cross references to the Schedules), ¶ 9.1 provides that “all deliverables and tasks required under this SOW must be submitted or completed by the deadlines or within the time durations listed in the RD and RA Schedules.” To simplify editing of the SOW, and to simplify executing subsequent modifications to SOW deadlines, it is intended that all deadlines be in a central location, *i.e.*, in Section 9 (Schedules). Therefore, the SOW should *not* be edited to include, in each paragraph that describes a deliverable or task, either the deadline for such deliverable or task, or even a cross reference to the Schedule that contains such deadline.

- (d) Settling Defendants' Project Coordinators shall communicate with EPA's and the State's Project Coordinators at least [monthly].

3.2 Supervising Contractor. Settling Defendants' proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system that complies with the most recent version of *Quality Systems for Environmental Data and Technology Programs -- Requirements with Guidance for Use* (American National Standard), ANSI/ASQC E4 (Feb. 2014).

3.3 Procedures for Disapproval/Notice to Proceed

- (a) Settling Defendants shall designate, and notify EPA, within [10] days after the Effective Date, of the name[s], title[s], contact information, and qualifications of the Settling Defendants' proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA's review for verification based on objective assessment criteria (*e.g.*, experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.
- (b) EPA shall issue notices of disapproval and/or authorizations to proceed regarding any proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval, Settling Defendants shall, within [30] days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. Settling Defendants may select any coordinator/contractor covered by an authorization to proceed and shall, within [21] days, notify EPA of Settling Defendants' selection.
- (c) EPA may disapprove the proposed Project Coordinator, the Supervising Contractor, or both, based on objective assessment criteria (*e.g.*, experience, capacity, technical expertise), if they have a conflict of interest regarding the project, or any combination of these factors.
- (d) Settling Defendants may change their Project Coordinator and/or Supervising Contractor, or both, by following the procedures of ¶¶ 3.3(a) and 3.3(b).
- (e) Notwithstanding the procedures of ¶¶ 3.3(a) through 3.3(d), Settling Defendants have proposed, and EPA has authorized Settling Defendants to proceed, regarding the following Project Coordinator and Supervising Contractor: **[name and contact information]**.

Commented [A14]: Include this paragraph if EPA has already accepted Settling Defendants' Project Coordinator/Supervising Contractor.

4. REMEDIAL DESIGN

4.1 Remedial Design Work Plan ("RDWP"). Settling Defendants shall submit a RDWP for EPA approval. The RDWP must include:

- (a) Plans for implementing all Remedial Design activities identified in this SOW, in the RDWP, or required by EPA to be conducted to develop the Remedial Design;

- (b) A description of the overall management strategy for performing the Remedial Design, including a proposal for phasing of design and construction, if applicable;
- (c) A description of the proposed general approach to contracting, construction, operation, maintenance, and monitoring of the Remedial Action as necessary to implement the Work;
- (d) A description of the responsibility and authority of all organizations and key personnel involved with the development of the Remedial Design;
- (e) Descriptions of any areas requiring clarification and/or anticipated problems (*e.g.*, data gaps);
- (f) [Description of any proposed pre-design investigation;]
- (g) [Description of any proposed treatability study;]
- (h) Descriptions of any applicable permitting requirements and other regulatory requirements;
- (i) Description of plans for obtaining access in connection with the Work, such as property acquisition, property leases, and/or easements; and
- (j) The following supporting deliverables described in ¶ 8.7 (Supporting Deliverables): Health and Safety Plan and Emergency Response Plan.

Commented [A15]: If the SOW includes ¶ 4.3 (Pre-Design Investigation), also include Field Sampling Plan and Quality Assurance Project Plan.

4.2 Institutional Controls Implementation and Assurance Plan (“ICIAP”). Settling Defendants shall submit a proposed ICIAP for EPA approval. The ICIAP should describe plans to implement, maintain, monitor, and enforce the Institutional Controls (“ICs”) at the Site. The ICIAP shall include plans to commence implementing ICs as early as is feasible, including before EPA approval of the 100% design under ¶ 4.9. The ICIAP also should include procedures for effective and comprehensive review of implemented ICs, procedures for the solicitation of input from affected communities regarding the implementation of ICs, procedures to periodically review and determine if the ICs are having their intended effect, and if not, procedures for the development, approval and implementation of alternative, more effective ICs. Settling Defendants shall develop the ICIAP in accordance with *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites*, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012), and *Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites*, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012). Settling Defendants also shall consider including in the ICIAP the establishment of effective Long-Term Stewardship procedures including those described in EPA Memorandum: *Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship* (July 20, 2018). The ICIAP must include the following additional requirements:

- (a) Locations of recorded real property interests (*e.g.*, easements, liens) and resource interests in the property that may affect ICs (*e.g.*, surface, mineral, and water

rights) including accurate mapping and geographic information system (GIS) coordinates of such interests; and

- (b) Legal descriptions and survey maps that are prepared according to current American Land Title Association (“ALTA”) [for Texas sites: Texas Land Title Association (“TLTA”)] Survey guidelines and certified by a licensed surveyor.

4.3 Settling Defendants shall communicate regularly with EPA to discuss design issues as necessary, as directed or determined by EPA.

4.4 **Pre-Design Investigation (“PDI”)**. The purpose of the PDI is to address data gaps by conducting additional field investigations.

- (a) **PDI Work Plan.** [If EPA requests,] Settling Defendants shall submit a PDI Work Plan (“PDIWP”) for EPA approval. The PDIWP must include:

- (1) An evaluation and summary of existing data and description of data gaps;
- (2) A sampling plan including media to be sampled, contaminants or parameters for which sampling will be conducted, location (areal extent and depths), and number of samples; and
- (3) Cross references to quality assurance/quality control (“QA/QC”) requirements set forth in the Quality Assurance Project Plan (“QAPP”) as described in ¶ 8.7(d).

- (b) Following the PDI, Settling Defendants shall submit a PDI Evaluation Report for approval. This report must include:

- (1) Summary of the investigations performed;
- (2) Summary of investigation results;
- (3) Summary of validated data (*i.e.*, tables and graphics);
- (4) Data validation reports and laboratory data reports;
- (5) Narrative interpretation of data and results;
- (6) Results of statistical and modeling analyses;
- (7) Photographs documenting the work conducted; and
- (8) Conclusions and recommendations for Remedial Design, including design parameters and criteria.

- (c) EPA may require Settling Defendants to supplement the PDI Evaluation Report and/or to perform additional pre-design studies.

Commented [A16]: The SOW includes many EPA obligations (such as approvals and notices) that must be completed in a timely manner for the remedial process to proceed efficiently and on schedule. Some of these are items that the Settling Defendants require to proceed with the next step of the remedial process. Note that the CD contains a provision in the “Force Majeure” section [¶ 43], as follows: “The failure by EPA to timely complete any activity under the Decree or the SOW is not a violation of the Decree, provided, however, that if such failure prevents Settling Defendants from timely completing a requirement of the Decree, Settling Defendants may seek relief under this Section.”

Commented [A17]: The Pre-Design Investigation (PDI) may not be needed if sufficient data was gathered during the RI/FS. The PDI is only needed when additional field investigations are necessary to address data gaps.

Commented [A18]: The SOW describes many deliverables that are to be submitted to EPA. Some are to be submitted “for EPA approval,” some “for EPA comment,” and some are to be simply submitted without either EPA approval or comment. The model SOW includes careful selections of those deliverables that are to be submitted for “approval,” those that are to be submitted for “comment,” and those that are to be submitted without the need for “comment” or “approval.”

4.5 **Treatability Study** (“TS”).

- (a) Settling Defendants shall perform a TS for the purpose of _____.
- (b) Settling Defendants shall submit a TS Work Plan (“TSWP”) for EPA approval. Settling Defendants shall prepare the TSWP in accordance with EPA’s *Guide for Conducting Treatability Studies under CERCLA, Final* (Oct. 1992), as supplemented for Remedial Design by the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995).
- (c) Following completion of the TS, Settling Defendants shall submit a TS Evaluation Report for EPA comment.
- (d) EPA may require Settling Defendants to supplement the TS Evaluation Report and/or to perform additional treatability studies.

Commented [A19]: Depending on the type of remedy selected, a Treatability Study (TS) may be needed during Remedial Design. Remedies involving the use of proven technologies may not need a TS. Review the guidance referenced in ¶ 4.4(b) for information about whether a TS is appropriate in a given case.

4.6 **Preliminary (30%) Remedial Design.** Settling Defendants shall submit a Preliminary (30%) Remedial Design for EPA’s comment. The Preliminary Remedial Design must include:

- (a) A design criteria report, as described in the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995);
- (b) Preliminary drawings and specifications;
- (c) Descriptions of permit requirements, if applicable;
- (d) Preliminary Operation and Maintenance (“O&M”) Plan and O&M Manual;
- (e) A description of how the Remedial Action will be implemented in a manner that minimizes environmental impacts in accordance with EPA’s *Principles for Greener Cleanups* (Aug. 2009);
- (f) A description of monitoring and control measures to protect human health and the environment, such as air monitoring, and measures to reduce and manage traffic, noise, odors, and dust, during the Remedial Action in accordance with the *Community Involvement Handbook* pp. 53-66 (text box on p. 55) to minimize community impacts;
- (g) Any proposed revisions to the Remedial Action Schedule that is set forth in ¶ 9.3 (Remedial Action Schedule); and
- (h) Updates of all supporting deliverables required to accompany the RDWP and the following additional supporting deliverables described in ¶ 8.7 (Supporting Deliverables): [~~delete if submitted with RDWP:~~ Field Sampling Plan; Quality Assurance Project Plan;] Site Wide Monitoring Plan; Community Impacts Mitigation Plan, Construction Quality Assurance/Quality Control Plan; Transportation and Off-Site Disposal Plan; O&M Plan; and O&M Manual.

4.7 Intermediate (60%) Remedial Design. Settling Defendants shall submit the Intermediate (60%) Remedial Design for EPA's comment. The Intermediate Remedial Design must: (a) be a continuation and expansion of the Preliminary Remedial Design; (b) address EPA's comments regarding the Preliminary Remedial Design; and (c) include the same elements as are required for the Preliminary (30%) Remedial Design.

Commented [A20]: The Intermediate (60%) Remedial Design generally is not needed for less complex projects.

4.8 Pre-Final (95%) Remedial Design. Settling Defendants shall submit the Pre-final (95%) Remedial Design for EPA's comment. The Pre-final Remedial Design must be a continuation and expansion of the previous design submittal and must address EPA's comments regarding the Intermediate Remedial Design. The Pre-final Remedial Design will serve as the approved Final (100%) Remedial Design if EPA approves the Pre-final Remedial Design without comments. The Pre-final Remedial Design must include:

- (a) A complete set of construction drawings and specifications that are: (1) certified by a registered professional engineer; (2) suitable for procurement; and (3) follow the Construction Specifications Institute's MasterFormat 2012;
- (b) A survey and engineering drawings showing existing Site features, such as elements, property borders, easements, and Site conditions;
- (c) Pre-Final versions of the same elements and deliverables as are required for the [Preliminary/Intermediate] Remedial Design;
- (d) A specification for photographic documentation of the Remedial Action; and
- (e) Updates of all supporting deliverables required to accompany the Preliminary (30%) Remedial Design.

4.9 Final (100%) Remedial Design. Settling Defendants shall submit the Final (100%) Remedial Design for EPA approval. The Final Remedial Design must address EPA's comments on the Pre-final Remedial Design and must include final versions of all Pre-final Remedial Design deliverables.

5. REMEDIAL ACTION

5.1 Remedial Action Work Plan ("RAWP"). Settling Defendants shall submit a RAWP for EPA approval that includes:

- (a) A proposed Remedial Action Construction Schedule [specify desired format, such as critical path method, Gantt chart, or Program Evaluation and Review Techniques ("PERT") chart];
- (b) An updated health and safety plan that covers activities during the Remedial Action; and
- (c) **[If applicable:** Plans for satisfying permitting requirements, including obtaining permits for off-site activity and for satisfying substantive requirements of permits for on-site activity.]

5.2 Independent Quality Assurance Team (“IQAT”). Settling Defendants shall notify EPA of Settling Defendants’ designated IQAT. The IQAT must be independent of, and cannot include the Supervising Contractor. Settling Defendants may hire a third party for this purpose. Settling Defendants’ notice must include the names, titles, contact information, and qualifications of the members of the IQAT. The IQAT will have the responsibility to determine whether Work is of expected quality and conforms to applicable plans and specifications. The IQAT will have the responsibilities as described in ¶ 2.1.3 of the *Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties*, EPA/540/G-90/001 (Apr. 1990).

Commented [A21]: Include this element if case team determines that an Independent Quality Assurance Team is appropriate for the Work. See *Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties*, EPA/540/G-90/001 (Apr. 1990).

5.3 Meetings and Inspections

- (a) **Preconstruction Conference.** Settling Defendants shall hold a preconstruction conference with EPA and others as directed or approved by EPA and as described in the *Remedial Design/Remedial Action Handbook*, EPA 540/R-95/059 (June 1995). Settling Defendants shall prepare minutes of the conference and shall distribute the minutes to all Parties.
- (b) **Periodic Communications.** During the construction portion of the Remedial Action (Remedial Action Construction), Settling Defendants shall communicate regularly [**insert frequency if appropriate**] with EPA, and others as directed or determined by EPA, to discuss construction issues. Settling Defendants shall distribute an agenda and list of attendees to all Parties prior to each meeting or telephone call. Settling Defendants shall prepare minutes of the meetings or calls and shall distribute the minutes to all Parties.
- (c) **Inspections**
 - (1) EPA or its representative shall conduct periodic inspections of [or have an on-site presence during] the Work. At EPA’s request, the Supervising Contractor or other designee shall accompany EPA or its representative during inspections.
 - (2) **[If needed:** Settling Defendants shall provide [on-site] office space for EPA personnel to perform their oversight duties. The minimum office requirements are [*e.g.*, a private office with at least 150 square feet of floor space, an office desk with chair, a four-drawer file cabinet, and a telephone with a private line, access to facsimile, reproduction, and personal computer equipment, wireless internet access, and sanitation facilities.]]
 - (3) **[If needed:** Settling Defendants shall provide personal protective equipment needed for EPA personnel and any oversight officials to perform their oversight duties.]
 - (4) Upon notification by EPA of any deficiencies in the Remedial Action Construction, Settling Defendants shall take all necessary steps to correct the deficiencies and/or bring the Remedial Action Construction into

compliance with the approved Final Remedial Design, any approved design changes, and/or the approved RAWP. If applicable, Settling Defendants shall comply with any schedule provided by EPA in its notice of deficiency.

5.4 Permits

- (a) As provided in CERCLA § 121(e), and Section 300.400(e) of the NCP, no permit is required for any portion of the Work conducted entirely on-site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.
- (b) Settling Defendants may seek relief under the provisions of Section [XI] (Force Majeure) of the Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 5.4(a) and required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals.
- (c) Nothing in the Decree or this SOW constitutes a permit issued under any federal or state statute or regulation.

5.5 Emergency Response and Reporting

- (a) **Emergency Action.** If any event occurs during performance of the Work that causes or threatens to cause a release of Waste Material on, at, or from the Site and that either constitutes an emergency situation or that may present an immediate threat to public health or welfare or the environment, Settling Defendants shall: (1) immediately take all appropriate action to prevent, abate, or minimize such release or threat of release; (2) immediately notify the authorized EPA officer (as specified in ¶ 5.5(c)) orally; and (3) take such actions in consultation with the authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plan, the Emergency Response Plan, and any other deliverable approved by EPA under the SOW.
- (b) **Release Reporting.** Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report under CERCLA § 103 or Section 304 of the Emergency Planning and Community Right-to-know Act (“EPCRA”), Settling Defendants shall immediately notify the authorized EPA officer orally.
- (c) The “authorized EPA officer” for purposes of immediate oral notifications and consultations under ¶ 5.5(a) and ¶ 5.5(b) is the EPA Project Coordinator, the EPA Alternate Project Coordinator (if the EPA Project Coordinator is unavailable), or

the EPA [Emergency Response Unit], Region __ (if neither EPA Project Coordinator is available).

- (d) For any event covered by ¶ 5.5(a) and ¶ 5.5(b), Settling Defendants shall:
 - (1) within [14] days after the onset of such event, submit a report to EPA describing the actions or events that occurred and the measures taken, and to be taken, in response thereto; and
 - (2) within 30 days after the conclusion of such event, submit a report to EPA describing all actions taken in response to such event.
- (e) The reporting requirements under ¶ 5.4 are in addition to the reporting required by CERCLA § 103 or EPCRA § 304.

5.6 Off-Site Shipments

- (a) Settling Defendants may ship hazardous substances, pollutants, and contaminants from the Site to an off-Site facility only if they comply with CERCLA § 121(d)(3), and 40 C.F.R. § 300.440. Settling Defendants will be deemed to be in compliance with CERCLA § 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if Settling Defendants obtain a prior determination from EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b).
- (b) Settling Defendants may ship Waste Material from the Site to an out-of-state waste management facility only if, prior to any shipment, they provide notice to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator. This notice requirement will not apply to any off-Site shipments when the total quantity of all such shipments does not exceed 10 cubic yards. The notice must include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. Settling Defendants also shall notify the state environmental official referenced above and the EPA Project Coordinator of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Settling Defendants shall provide the notice after the award of the contract for Remedial Action construction and before the Waste Material is shipped.
- (c) Settling Defendants may ship Investigation Derived Waste (IDW) from the Site to an off-Site facility only if they comply with CERCLA § 121(d)(3), 40 C.F.R. § 300.440, *EPA's Guide to Management of Investigation Derived Waste*, OSWER 9345.3-03FS (Jan. 1992), and any IDW-specific requirements contained in the Record of Decision. Wastes shipped off-Site to a laboratory for characterization, and RCRA hazardous wastes that meet the requirements for an exemption from RCRA under 40 CFR § 261.4(e) shipped off-site for treatability studies, are not subject to 40 C.F.R. § 300.440.

Commented [A22]: If case team elects to use proprietary controls provisions from the supplement in lieu of requiring an ICIAP (which is the preferred option) insert the PC provisions here. (All paragraphs should renumber automatically.)

For any remedy that involves the construction and operation of a system to achieve Performance Standards (such as groundwater or surface water restoration remedies), the case team should include ¶ 5.7 (Remedial Action Construction Completion). Under applicable EPA guidance, for such remedies, EPA approves the "Remedial Action Construction Completion" (also known as the "operational and functional" determination). "Remedial Action Construction Completion" includes two components: construction of the system, and the determination that the Remedial Action is functioning properly and performing as designed. For such remedies, "Remedial Action Completion" will occur later, *i.e.*, once the system has operated long enough for Performance Standards to be achieved. For remedies in which Performance Standards are achieved upon RA Construction Completion (such as soil excavation and off-site disposal remedies), omit ¶ 5.7. In that case, ¶ 5.8 (Certification of RA Completion) will mark both RA Construction Completion *and* Remedial Action Completion. Case teams may modify ¶ 5.7 to provide for multiple RA Construction Completion approvals, if needed due to specific Site circumstances. Such instances are rare, and case teams should consult with the Office of Superfund Remediation and Technology Innovation and the Office of Site Remediation Enforcement to discuss site-specific circumstances.

5.7 Remedial Action Construction Completion

- (a) For purposes of this ¶ 5.7, “Remedial Action Construction” comprises, for any Remedial Action that involves the construction and operation of a system to achieve Performance Standards (for example, groundwater or surface water restoration remedies), the construction of such system and the performance of all activities necessary for the system to function properly and as designed.
- (b) **Inspection of Constructed Remedy.** Settling Defendants shall schedule an inspection to review the construction and operation of the system and to review whether the system is functioning properly and as designed. The inspection must be attended by Settling Defendants and EPA and/or their representatives. A reinspection must be conducted if requested by EPA.
- (c) **Shakedown Period.** There shall be a shakedown period of up to one year for EPA to review whether the remedy is functioning properly and performing as designed. Settling Defendants shall provide such information as EPA requests for such review.
- (d) **Remedial Action Report.** Following the shakedown period, Settling Defendants shall submit an “Remedial Action Report” requesting EPA’s determination that Remedial Action Construction has been completed. The Remedial Action Report must: (1) include statements by a registered professional engineer and by Settling Defendants’ Project Coordinator that the construction of the system is complete and that the system is functioning properly and as designed; (2) include a demonstration, and supporting documentation, that construction of the system is complete and that the system is functioning properly and as designed; (3) include as-built drawings signed and stamped by a registered professional engineer; (4) be prepared in accordance with Chapter 2 (Remedial Action Completion) of EPA’s *Close Out Procedures for NPL Sites* guidance (May 2011), as supplemented by *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017); and (5) be certified in accordance with ¶ 8.5 (Certification).
- (e) If EPA determines that Remedial Action Construction is not complete, EPA shall so notify Settling Defendants. EPA’s notice must include a description of, and schedule for, the activities that Settling Defendants must perform to complete Remedial Action Construction. EPA’s notice may include a schedule for completion of such activities or may require Settling Defendants to submit a proposed schedule for EPA approval. Settling Defendants shall perform all activities described in the EPA notice in accordance with the schedule.
- (f) If EPA determines, based on the initial or any subsequent Remedial Action Report, that Remedial Action Construction is complete, EPA shall so notify Settling Defendants.

5.8 Certification of Remedial Action Completion

Commented [A23]: Include ¶ 5.8 (Certification of RA Completion) for all remedial actions. For excavation remedies, “RA Completion” also signifies “RA Construction Completion.” For groundwater or surface water restoration remedies, RA Completion occurs after RA Construction Completion, *i.e.*, once the groundwater or surface water restoration system has been operating long enough for Performance Standards to be achieved. Paragraph 5.8 is needed for either situation. However, for groundwater or surface water restoration remedies, the information enabling EPA to make a determination that Performance Standards have been achieved is provided in a Monitoring Report (as provided in ¶ 5.8(b)) because the RA Report would have been previously submitted under ¶ 5.7(d) (RA Report). Therefore, if using ¶ 5.7 (*i.e.*, for groundwater and surface water restoration remedies): (i) delete ¶ 5.8(a) (RA Completion Inspection) and any references to the inspection (as no inspection is needed); (ii) change the heading and text of ¶ 5.8(b) from “RA Report” to “Monitoring Report;” and (iii) delete the requirement under ¶ 5.8(b)(2) for as-built drawings (as they will already have been provided under ¶ 5.7(d) (RA Report)).

- (a) **Remedial Action Completion Inspection.** The Remedial Action is “Complete” for purposes of this ¶ 5.8 when it has been fully performed and the Performance Standards have been achieved. Settling Defendants shall schedule an inspection for the purpose of obtaining EPA’s Certification of Remedial Action Completion. The inspection must be attended by Settling Defendants and EPA and/or their representatives.
- (b) **[Remedial Action Report/Monitoring Report].** Following the inspection, Settling Defendants shall submit a [Remedial Action Report/Monitoring Report] to EPA requesting EPA’s Certification of Remedial Action Completion. The report must: (1) include certifications by a registered professional engineer and by Settling Defendants’ Project Coordinator that the Remedial Action is complete; [(2) include as-built drawings signed and stamped by a registered professional engineer;] (3) be prepared in accordance with Chapter 2 (Remedial Action Completion) of EPA’s *Close Out Procedures for NPL Sites* guidance (May 2011), as supplemented by *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017); [(4) contain monitoring data to demonstrate that Performance Standards have been achieved;] and (5) be certified in accordance with ¶ 8.5 (Certification).
- (c) If EPA concludes that the Remedial Action is not Complete, EPA shall so notify Settling Defendants. EPA’s notice must include a description of any deficiencies. EPA’s notice may include a schedule for addressing such deficiencies or may require Settling Defendants to submit a schedule for EPA approval. Settling Defendants shall perform all activities described in the notice in accordance with the schedule.
- (d) If EPA concludes, based on the initial or any subsequent [Remedial Action Report/Monitoring Report] requesting Certification of Remedial Action Completion, that the Remedial Action is Complete, EPA shall so certify to Settling Defendants. This certification will constitute the Certification of Remedial Action Completion for purposes of the Decree, including Section [XIV] of the Decree (Covenants by Plaintiffs). Certification of Remedial Action Completion will not affect Settling Defendants’ remaining obligations under the Decree.

5.9 Periodic Review Support Plan (“PRSP”). Settling Defendants shall submit the PRSP for EPA approval. The PRSP addresses the studies and investigations that Settling Defendants shall conduct to support EPA’s reviews of whether the Remedial Action is protective of human health and the environment in accordance with CERCLA § 121(c) (also known as “Five-year Reviews”). Settling Defendants shall develop the plan in accordance with *Comprehensive Five-year Review Guidance*, OSWER 9355.7-03B-P (June 2001), and any other relevant five-year review guidances.

5.10 Certification of Work Completion

Commented [A24]: The “Work” can include, in addition to the “RA,” such tasks as O&M activities after performance standards have been met (e.g., monitoring of groundwater). Thus, the Work is completed after (sometimes long after) the RA is completed.

- (a) **Work Completion Inspection.** Settling Defendants shall schedule an inspection for the purpose of obtaining EPA’s Certification of Work Completion. The inspection must be attended by Settling Defendants and EPA and/or their representatives.
- (b) **Work Completion Report.** Following the inspection, Settling Defendants shall submit a report to EPA requesting EPA’s Certification of Work Completion. The report must: (1) include certifications by a registered professional engineer and by Settling Defendants’ Project Coordinator that the Work, including all O&M activities, is complete; and (2) be certified in accordance with ¶ 8.5 (Certification). If the [Remedial Action Report/Monitoring Report] submitted under ¶ 5.8(b) includes all elements required under this ¶ 5.10(b), then the [Remedial Action Report/Monitoring Report] suffices to satisfy all requirements under this ¶ 5.10(b).
- (c) If EPA concludes that the Work is not complete, EPA shall so notify Settling Defendants. EPA’s notice must include a description of the activities that Settling Defendants must perform to complete the Work. EPA’s notice must include specifications and a schedule for such activities or must require Settling Defendants to submit specifications and a schedule for EPA approval. Settling Defendants shall perform all activities described in the notice or in the EPA-approved specifications and schedule.
- (d) If EPA concludes, based on the initial or any subsequent report requesting Certification of Work Completion, that the Work is complete, EPA shall so certify in writing to Settling Defendants. Issuance of the Certification of Work Completion does not affect the following continuing obligations: (1) activities under the Periodic Review Support Plan; (2) obligations under Sections [VI] (Property Requirements), and [XVII] (Records) of the Decree; (3) [Institutional Controls obligations as provided in the ICIAP;] (4) **[add other relevant obligations]**; and (5) reimbursement of EPA’s Future Response Costs under Section [IX] (Payments for Response Costs) of the Decree.]

Commented [A25]: In most cases, despite issuance of the Certification of Work Completion, the Settling Defendants will have continuing obligations regarding the Site, such as implementing further studies in support of EPA’s five year reviews. The Settling Defendants may also have other obligations including ICs. Modify this paragraph as appropriate.

6. CONTINGENCY REMEDY

Commented [A26]: Include this section only if the ROD provides for a contingency remedy.

- 6.1 Testing/Investigations.** If testing and/or investigations are needed for EPA to make a determination whether the contingency remedy selected in the Record of Decision needs to be implemented, Settling Defendants shall submit a plan for implementing such testing and/or investigations, shall implement such testing and/or investigations in accordance with EPA’s approval and/or modification of such plan, and shall submit reports to EPA regarding the results of such testing and/or investigations.
- 6.2 Reports Regarding Performance of Selected Remedy.** If the Record of Decision provides for implementation of a contingency remedy in the event of failure of the selected remedy to achieve desired performance levels, Settling Defendants shall submit such reports as EPA requests regarding the performance of the selected remedy.

- 6.3 Invocation of Contingency Remedy.** If EPA determines that the contingency remedy selected in the Record of Decision needs to be implemented, EPA shall so notify Settling Defendants, and shall include a copy of EPA’s decision document invoking the contingency remedy.
- 6.4 Implementation of Contingency Remedy.** Settling Defendants shall implement the contingency remedy in accordance with the EPA notification and consistent with the requirements of Section 4 and Section 5 of this SOW.
- 6.5 Other Modifications.** If EPA determines that implementation of the contingency remedy selected in the Record of Decision will require modifications to any deliverable submitted under this SOW, Settling Defendants shall modify those deliverables.

7. REPORTING

7.1 Progress Reports. Commencing with the [month] following lodging of the Decree and until EPA approves the Remedial Action [if using ¶ 5.7, insert: Construction] Completion, Settling Defendants shall submit progress reports to EPA on a [monthly/weekly] basis, or as otherwise requested by EPA. The reports must cover all activities that took place during the prior reporting period, including:

- (a) The actions that have been taken toward achieving compliance with the Decree;
- (b) A summary of all results of sampling, tests, and all other data received or generated by Settling Defendants;
- (c) A description of all deliverables that Settling Defendants submitted to EPA;
- (d) A description of all activities relating to Remedial Action Construction that are scheduled for the next [six weeks];
- (e) An updated Remedial Action Construction Schedule, together with information regarding percentage of completion, delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays;
- (f) A description of any modifications to the work plans or other schedules that Settling Defendants have proposed or that have been approved by EPA; and
- (g) A description of all activities undertaken in support of the Community Involvement Plan (“CIP”) during the reporting period and those to be undertaken in the next [six weeks].

7.2 Notice of Progress Report Schedule Changes. If the schedule for any activity described in the Progress Reports, including activities required to be described under ¶ 7.1(d), changes, Settling Defendants shall notify EPA of such change at least seven days before performance of the activity.

Commented [A27]: The cutoff for reporting under this paragraph (Progress Reports), which is “RA Completion” (or “RA Construction Completion, if ¶ 5.7 is used) is intentional. Reporting subsequent to that milestone is covered in the O&M Plan as provided under ¶ 8.7(h)(3) (O&M Reporting).

8. DELIVERABLES

8.1 Applicability. Settling Defendants shall submit deliverables for EPA approval or for EPA comment as specified in the SOW. If neither is specified, the deliverable does not require EPA’s approval or comment. Paragraphs 8.2 (In Writing) through 8.4 (Technical Specifications) apply to all deliverables. Paragraph 8.5 (Certification) applies to any deliverable that is required to be certified. Paragraph 8.6 (Approval of Deliverables) applies to any deliverable that is required to be submitted for EPA approval.

8.2 In Writing. As provided in [¶ 82] of the Decree, all deliverables under this SOW must be in writing unless otherwise specified.

8.3 General Requirements for Deliverables. All deliverables must be submitted by the deadlines in the Remedial Design Schedule or Remedial Action Schedule, as applicable. Settling Defendants shall submit all deliverables to EPA in electronic form. Technical specifications for sampling and monitoring data and spatial data are addressed in ¶ 8.4. All other deliverables shall be submitted to EPA in the electronic form specified by the EPA Project Coordinator. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5” by 11”, Settling Defendants shall also provide EPA with paper copies of such exhibits.

Commented [A28]: If paper copies of specific deliverables (in addition to large exhibits) are needed, this paragraph should be revised accordingly.

8.4 Technical Specifications

- (a) Sampling and monitoring data should be submitted in standard regional Electronic Data Deliverable (“EDD”) format. **[Specify the EDD format that the Region uses.]** Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.
- (b) Spatial data, including spatially-referenced data and geospatial data, should be submitted: (1) in the ESRI File Geodatabase format **[or insert Regionally-preferred spatial file format]**; and (2) as unprojected geographic coordinates in decimal degree format using North American Datum 1983 (“NAD83”) or World Geodetic System 1984 (WGS84) as the datum. If applicable, submissions should include the collection method(s). Projected coordinates may optionally be included but must be documented. Spatial data should be accompanied by metadata, and such metadata should be compliant with the Federal Geographic Data Committee (“FGDC”) Content Standard for Digital Geospatial Metadata and its EPA profile, the EPA Geospatial Metadata Technical Specification. An add-on metadata editor for ESRI software, the EPA Metadata Editor (“EME”), complies with these FGDC and EPA metadata requirements and is available at <https://edg.epa.gov/EME/>.
- (c) Each file must include an attribute name for each site unit or sub-unit submitted. Consult <https://www.epa.gov/geospatial/geospatial-policies-and-standards> for any further available guidance on attribute identification and naming.
- (d) Spatial data submitted by Settling Defendants does not, and is not intended to, define the boundaries of the Site.

Commented [A29]: The information in this paragraph is consistent with the EPA National Geospatial Data Policy 2008, which is under review and may be revised at any time. The case team should check <https://www.epa.gov/geospatial/geospatial-policies-and-standards> for the latest guidance on the policy and associated EPA and CERCLA procedures and technical specifications, including standards and quality assurance for geographic information system (GIS) deliverables.

8.5 Certification. All deliverables that require compliance with this paragraph must be signed by the Settling Defendants' Project Coordinator, or other responsible official of Settling Defendants, and must contain the following statement:

I certify under penalty of perjury that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Commented [A30]: The model SOW identifies the deliverables that should be certified in accordance with ¶ 8.5 (Certification). If the case team wishes that additional deliverables be so certified, the case team should make sure that the paragraph regarding such additional deliverable also refers to ¶ 8.5.

8.6 Approval of Deliverables

(a) Initial Submissions

- (1) After review of any deliverable that is required to be submitted for EPA approval under the Decree or the SOW, EPA shall: (i) approve, in whole or in part, the submission; (ii) approve the submission upon specified conditions; (iii) disapprove, in whole or in part, the submission; or (iv) any combination of the foregoing.
- (2) EPA also may modify the initial submission to cure deficiencies in the submission if: (i) EPA determines that disapproving the submission and awaiting a resubmission would cause substantial disruption to the Work; or (ii) previous submission(s) have been disapproved due to material defects and the deficiencies in the initial submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

(b) Resubmissions. Upon receipt of a notice of disapproval under ¶ 8.6(a) (Initial Submissions), or if required by a notice of approval upon specified conditions under ¶ 8.6(a), Settling Defendants shall, within __ days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. After review of the resubmitted deliverable, EPA may: (1) approve, in whole or in part, the resubmission; (2) approve the resubmission upon specified conditions; (3) modify the resubmission; (4) disapprove, in whole or in part, the resubmission, requiring Settling Defendants to correct the deficiencies; or (5) any combination of the foregoing.

(c) Implementation. Upon approval, approval upon conditions, or modification by EPA under ¶ 8.6(a) (Initial Submissions) or ¶ 8.6(b) (Resubmissions), of any deliverable, or any portion thereof: (1) such deliverable, or portion thereof, will be incorporated into and enforceable under the Decree; and (2) Settling Defendants

Commented [A31]: The provisions of this paragraph have been carefully integrated. It is recommended that these provisions not be changed unless there is a site-specific reason for doing so. Even then the case team should ensure that the change is consistent with the other parts of this paragraph.

shall take any action required by such deliverable, or portion thereof. The implementation of any non-deficient portion of a deliverable submitted or resubmitted under ¶ 8.6(a) or ¶ 8.6(b) does not relieve Settling Defendants of any liability for stipulated penalties under Section [XIII] (Stipulated Penalties) of the Decree.

- (d) If: (1) an initially submitted deliverable contains a material defect and the conditions are met for modifying the deliverable under ¶ 8.6(a)(2); or (2) a resubmitted deliverable contains a material defect; then the material defect constitutes a lack of compliance for purposes of this Paragraph.

8.7 Supporting Deliverables. Settling Defendants shall submit each of the following supporting deliverables for EPA approval, except as specifically provided. Settling Defendants shall develop the deliverables in accordance with all applicable regulations, guidances, and policies (see Section 11 (References)). Settling Defendants shall update each of these supporting deliverables as necessary or appropriate during the course of the Work, and/or as requested by EPA.

- (a) **Health and Safety Plan (“HASP”).** The HASP describes all activities to be performed to protect on site personnel and area residents from physical, chemical, and all other hazards posed by the Work. Settling Defendants shall develop the HASP in accordance with EPA’s *Emergency Responder Health and Safety Manual* and Occupational Safety and Health Administration (“OSHA”) requirements under 29 C.F.R. §§ 1910 and 1926. The HASP should cover Remedial Design activities and should be, as appropriate, updated to cover activities during the Remedial Action and updated to cover activities after Remedial Action completion. EPA does not approve the HASP but will review it to ensure that all necessary elements are included and that the plan provides for the protection of human health and the environment.
- (b) **Emergency Response Plan (“ERP”).** The ERP must describe procedures to be used in the event of an accident or emergency at the Site (for example, power outages, water impoundment failure, treatment plant failure, slope failure, etc.). The ERP must include:
 - (1) Name of the person or entity responsible for responding in the event of an emergency incident;
 - (2) Plan and date(s) for meeting(s) with the local community, including local, State, and federal agencies involved in the cleanup, as well as local emergency squads and hospitals;
 - (3) Spill Prevention, Control, and Countermeasures (“SPCC”) Plan (if applicable), consistent with the regulations under 40 C.F.R. part 112, describing measures to prevent, and contingency plans for, spills and discharges;

Commented [A32]: The case team should keep or delete the elements below as appropriate based on requirements of the particular remedy.

- (4) Notification activities in accordance with ¶ 5.5(b) (Release Reporting) in the event of a release of hazardous substances requiring reporting under CERCLA § 103 or EPCRA § 304; and
 - (5) A description of all necessary actions to ensure compliance with ¶ 5.5 of the SOW in the event of an occurrence during the performance of the Work that causes or threatens a release of Waste Material from the Site that constitutes an emergency or may present an immediate threat to public health or welfare or the environment.
- (c) **Field Sampling Plan (“FSP”).** The FSP addresses all sample collection activities. The FSP must be written so that a field sampling team unfamiliar with the project would be able to gather the samples and field information required. Settling Defendants shall develop the FSP in accordance with *Guidance for Conducting Remedial Investigations and Feasibility Studies*, EPA/540/G 89/004 (Oct. 1988).
- (d) **Quality Assurance Project Plan (“QAPP”).** The QAPP must include a detailed explanation of Settling Defendants’ quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance, and monitoring samples. Settling Defendants shall develop the QAPP in accordance with EPA Directive CIO 2105.1 (Environmental Information Quality Policy, 2021), the most recent version of *Quality Management Systems for Environmental Information and Technology Programs – Requirements with Guidance for Use*, ASQ/ANSI E-4 (Feb. 2014), and *Guidance for Quality Assurance Project Plans*, EPA QA/G-5, EPA Office of Environmental Information (Dec. 2002). Settling Defendants shall collect, produce, and evaluate all environmental information at the Site in accordance with the approved QAPP.
- (e) **Site Wide Monitoring Plan (“SWMP”).** The purpose of the SWMP is to obtain baseline information regarding the extent of contamination in affected media at the Site; to obtain information, through short- and long- term monitoring, about the movement of and changes in contamination throughout the Site, before and during implementation of the Remedial Action; to obtain information regarding contamination levels to determine whether Performance Standards are achieved; and to obtain information to determine whether to perform additional actions, including further Site monitoring. The SWMP must include:
- (1) Description of the environmental media to be monitored;
 - (2) Description of the data collection parameters, including existing and proposed monitoring devices and locations, schedule and frequency of monitoring, analytical parameters to be monitored, and analytical methods employed;
 - (3) Description of how performance data will be analyzed, interpreted, and reported, and/or other Site-related requirements;

- (4) Description of verification sampling procedures;
 - (5) Description of deliverables that will be generated in connection with monitoring, including sampling schedules, laboratory records, monitoring reports, and monthly and annual reports to EPA and State agencies;
 - (6) Description of proposed additional monitoring and data collection actions (such as increases in frequency of monitoring, and/or installation of additional monitoring devices in the affected areas) in the event that results from monitoring devices indicate changed conditions (such as higher than expected concentrations of the contaminants of concern or groundwater contaminant plume movement);
 - (7) A plan to immediately provide to EPA any unvalidated sampling data from Community Areas as defined in ¶ 8.7(f) affected by the remedy that exceed removal management levels or three times remedial cleanup levels, whichever is lower; and
 - (8) A plan to expedite sampling and analysis in Community Areas as defined in ¶ 8.7(f) affected by the remedy (particularly in situations where EPA determines that unvalidated sampling data indicates substantial exceedances of cleanup standards), including procedures for expedited analysis, validation, and communication of sampling results to affected communities.
- (f) **Community Impact Mitigation Plan (“CIMP”)**. The CIMP describes all activities [If EJ concerns add: including any to address concerns of EJ and disadvantaged communities] to be performed: (1) to reduce and manage the impacts from remedy implementation (*e.g.*, air emissions, traffic, noise, odor, temporary or permanent relocation) to residential areas, schools, playgrounds, healthcare facilities, or recreational or impacted public areas (“Community Areas”) from and during remedy implementation, (2) to conduct monitoring in Community Areas of impacts from remedy implementation, (3) to expeditiously communicate validated remedy implementation monitoring data, (4) to make adjustments during remedy implementation in order to further reduce and manage impacts from remedy implementation to affected Community Areas, (5) to expeditiously restore community resources damaged during remediation such as roads and culverts, and (6) to mitigate the economic effects that the Remedial Action will have on the community by structuring remediation contracts to allow more local business participation. The CIMP should contain information about impacts to Community Areas that is sufficient to assist EPA’s Project Coordinator in performing the evaluations recommended under the *Superfund Community Involvement Handbook*, OLEM 9230.0-51 (March 2020), pp. 53-56.
- (g) **Construction Quality Assurance Plan (“CQAP”) and Construction Quality Control Plan (“CQCP”)**. The purpose of the CQAP is to describe planned and systemic activities that provide confidence that the Remedial Action construction

Commented [A33]: Use this shorthand definition “Community Areas” to substitute for “residential areas, schools, playgrounds, or recreational or public areas frequented by community members” and so we don’t have to repeat that litany two more times. If anyone can think of a better shorthand word for this, please suggest it.

Commented [A34]: See CI Handbook, page 55.

will satisfy all plans, specifications, and related requirements, including quality objectives. The purpose of the CQCP is to describe the activities to verify that Remedial Action construction has satisfied all plans, specifications, and related requirements, including quality objectives. The CQAP/CQCP (“CQA/CP”) must:

- (1) Identify, and describe the responsibilities of, the organizations and personnel implementing the CQA/CP;
- (2) Describe the Performance Standards required to be met to achieve Completion of the Remedial Action;
- (3) Describe the activities to be performed: (i) to provide confidence that Performance Standards will be met; and (ii) to determine whether Performance Standards have been met;
- (4) Describe verification activities, such as inspections, sampling, testing, monitoring, and production controls, under the CQA/CP;
- (5) Describe industry standards and technical specifications used in implementing the CQA/CP;
- (6) Describe procedures for tracking construction deficiencies from identification through corrective action;
- (7) Describe procedures for documenting all CQA/CP activities; and
- (8) Describe procedures for retention of documents and for final storage of documents.

(h) **Transportation and Off-Site Disposal Plan (“TODP”).** The TODP describes plans to ensure compliance with ¶ 5.6 (Off-Site Shipments). The TODP must include:

- (1) Proposed times and routes for off-site shipment of Waste Material;
- (2) Identification of communities, including underserved communities referred to in Executive Order 14008, § 222(b) (Feb. 1, 2021), affected by shipment of Waste Material; and
- (3) Description of plans to minimize impacts (*e.g.*, noise, traffic, dust, odors) on affected communities.

(i) **O&M Plan.** The O&M Plan describes the requirements for inspecting, operating, and maintaining the Remedial Action. Settling Defendants shall develop the O&M Plan in accordance with *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017). The O&M Plan must include the following additional requirements:

Commented [A35]: For most remedial actions, ¶ 5.6 (Off-Site Shipments) should be sufficient to ensure that Waste Material will be disposed of properly off-site and, therefore, the requirement to prepare a Transportation and Off-Site Disposal Plan (TODP) can be omitted. However, a TODP may be required, for example, when off-site disposal requirements are complicated by high vehicle traffic and densely populated areas.

- (1) Description of Performance Standards required to be met to implement the Record of Decision;
 - (2) Description of activities to be performed: (i) to provide confidence that Performance Standards will be met; and (ii) to determine whether Performance Standards have been met;
 - (3) **O&M Reporting.** Description of records and reports that will be generated during O&M, such as daily operating logs, laboratory records, records of operating costs, reports regarding emergencies, personnel and maintenance records, monitoring reports, and monthly and annual reports to EPA and State agencies;
 - (4) Description of corrective action in case of systems failure, including: (i) alternative procedures to prevent the release or threatened release of Waste Material which may endanger public health and the environment or may cause a failure to achieve Performance Standards; (ii) analysis of vulnerability and additional resource requirements should a failure occur; (iii) notification and reporting requirements should O&M systems fail or be in danger of imminent failure; and (iv) community notification requirements; and
 - (5) Description of corrective action to be implemented in the event that Performance Standards are not achieved; and a schedule for implementing these corrective actions.
- (j) **O&M Manual.** The O&M Manual serves as a guide to the purpose and function of the equipment and systems that make up the remedy. Settling Defendants shall develop the O&M Manual in accordance with *Guidance for Management of Superfund Remedies in Post Construction*, OLEM 9200.3-105 (Feb. 2017).

9. SCHEDULES

- 9.1 Applicability and Revisions.** All deliverables and tasks required under this SOW must be submitted or completed by the deadlines or within the time durations listed in the Remedial Design and Remedial Action Schedules set forth below. Settling Defendants may submit proposed revised Remedial Design Schedules or Remedial Action Schedules for EPA approval. Upon EPA's approval, the revised Remedial Design and/or Remedial Action Schedules supersede the Remedial Design and Remedial Action Schedules set forth below, and any previously-approved Remedial Design and/or Remedial Action Schedules.

9.2 Remedial Design Schedule

	Description of Deliverable, Task	¶ Ref.	Deadline
1	TAP	2.3(c)	X days after EPA request
2	Designate TAP Coordinator	2.3(c)(7)	X days after EPA request
3	RDWP	4.1	X days after EPA's Authorization to Proceed regarding Supervising Contractor (¶ 9.c).
4	ICIAP	4.2	X days after EPA Authorization to Proceed regarding Supervising Contractor (¶ 9.c).
5	PDIWP	4.4(a)	X days after EPA's Authorization to Proceed regarding Supervising Contractor (¶ 9.c).
6	Preliminary (30%) Remedial Design	4.6 4.4(a)	X days after EPA approval of Final RDWP
7	Intermediate (60%) Remedial Design	4.7	X days after EPA comments on Preliminary Remedial Design
8	Pre-final (90/95%) Remedial Design	4.8	X days after EPA comments on [Preliminary or Intermediate] Remedial Design
9	Final (100%) Remedial Design	4.9	X days after EPA comments on Pre-final Remedial Design

9.3 Remedial Action Schedule

	Description of Deliverable / Task	¶ Ref.	Deadline
1	Commence to Implement ICIAP	4.2	X days after EPA Notice of Authorization to Proceed with ICIAP
2	Award Remedial Action contract		X days after EPA Notice of Authorization to Proceed with Remedial Action
3	RAWP	5.1	X days after EPA Notice of Authorization to Proceed with Remedial Action
4	[Designate IQAT]	5.2	
5	Pre-Construction Conference	5.3(a)	X days after Approval of RAWP
6	Start of Construction		X days after Approval of RAWP
7	Completion of Construction		
8	Pre-final Inspection	5.7(b)	X days after completion of construction
9	Pre-final Inspection Report	5.7(d)	X days after completion of Pre-final Inspection
10	Final Inspection		X days after Completion of Work identified in Pre-final Inspection Report
11	Remedial Action Report	5.7(d)	X days after Final Inspection
12	[Monitoring Report]	5.8(b)	
13	Work Completion Report	5.10(b)	
14	Periodic Review Support Plan	5.9	[Five years after Start of Remedial Action Construction]

Commented [A36]: The RPMs are encouraged to approve the ICIAP and have the Settling Defendants commence implementation of ICs, if feasible based on site-specific circumstances, even before the remedial design process has been completed.

10. STATE PARTICIPATION

- 10.1 Copies.** Settling Defendants shall, at any time they send a deliverable to EPA, send a copy of such deliverable to the State. EPA shall, at any time it sends a notice, authorization, approval, disapproval, or certification to Settling Defendants, send a copy of such document to the State.
- 10.2 Review and Comment.** The State will have a reasonable opportunity for review and comment prior to:
- (a) Any EPA notice to proceed under ¶ 3.3 (Procedures for Disapproval/Notice to Proceed);
 - (b) Any EPA approval or disapproval under ¶ 8.6 (Approval of Deliverables) of any deliverables that are required to be submitted for EPA approval; and
 - (c) Any approval or disapproval of the Construction Phase under ¶ 5.7 (Remedial Action Construction Completion), any disapproval of, or Certification of Remedial Action Completion under ¶ 5.8 (Certification of Remedial Action Completion), and any disapproval of, or Certification of Work Completion under ¶ 5.10 (Certification of Work Completion).

11. REFERENCES

- 11.1** The following regulations and guidance documents, among others, apply to the Work. Any item for which a specific URL is not provided below is available on one of the three EPA web pages listed in ¶ 11.2:
- (a) A Compendium of Superfund Field Operations Methods, OSWER 9355.0-14, EPA/540/P-87/001a (Aug. 1987).
 - (b) CERCLA Compliance with Other Laws Manual, Part I: Interim Final, OSWER 9234.1-01, EPA/540/G-89/006 (Aug. 1988).
 - (c) Guidance for Conducting Remedial Investigations and Feasibility Studies, OSWER 9355.3-01, EPA/540/G-89/004 (Oct. 1988).
 - (d) CERCLA Compliance with Other Laws Manual, Part II, OSWER 9234.1-02, EPA/540/G-89/009 (Aug. 1989).
 - (e) Guidance on EPA Oversight of Remedial Designs and Remedial Actions Performed by Potentially Responsible Parties, OSWER 9355.5-01, EPA/540/G90/001 (Apr.1990).
 - (f) Guidance on Expediting Remedial Design and Remedial Actions, OSWER 9355.5-02, EPA/540/G-90/006 (Aug. 1990).

Commented [A37]: Substitute “Tribe” for “State” throughout Section 10 if the Site is entirely on tribal land. Add “and Tribe” after “State” throughout Section 10 if both have a role at or an interest in the Site.

Commented [A38]: Case teams may modify the list to add references specific to the remedy selected in the ROD or to any applicable Regional guidance.

- (g) Guide to Management of Investigation-Derived Wastes, OSWER 9345.3-03FS (Jan. 1992).
- (h) Permits and Permit Equivalency Processes for CERCLA On-Site Response Actions, OSWER 9355.7-03 (Feb. 1992).
- (i) Guidance for Conducting Treatability Studies under CERCLA, OSWER 9380.3-10, EPA/540/R-92/071A (Nov. 1992).
- (j) National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule, 40 C.F.R. part 300 (Oct. 1994).
- (k) Guidance for Scoping the Remedial Design, OSWER 9355.0-43, EPA/540/R-95/025 (Mar. 1995).
- (l) Remedial Design/Remedial Action Handbook, OSWER 9355.0-04B, EPA/540/R-95/059 (June 1995).
- (m) EPA Guidance for Data Quality Assessment, Practical Methods for Data Analysis, QA/G-9, EPA/600/R-96/084 (July 2000).
- (n) Comprehensive Five-year Review Guidance, OSWER 9355.7-03B-P, EPA/540-R-01-007 (June 2001).
- (o) Guidance for Quality Assurance Project Plans, EPA QA/G-5, EPA Office of Environmental Information (Dec. 2002) <https://www.epa.gov/quality/guidance-quality-assurance-project-plans-epa-qag-5>.
- (p) Institutional Controls: Third-Party Beneficiary Rights in Proprietary Controls, OECA (Apr. 2004).
- (q) EPA Guidance on Systematic Planning Using the Data Quality Objectives Process, QA/G-4, EPA/240/B-06/001 (Feb. 2006).
- (r) EPA Requirements for Quality Management Plans, QA/R-2, EPA/240/B-01/002 (Mar. 2001, reissued May 2006).
- (s) EPA National Geospatial Data Policy, CIO Policy Transmittal 05-002 (Aug. 2005), <https://www.epa.gov/geospatial/epa-national-geospatial-data-policy>.
- (t) Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, OSWER 9283.1-33 (June 2009).
- (u) Principles for Greener Cleanups (Aug. 2009), <https://www.epa.gov/greenercleanups/epa-principles-greener-cleanups>.

- (v) **[If Technical Assistance Plan provided for in SOW:** Providing Communities with Opportunities for Independent Technical Assistance in Superfund Settlements, Interim (Sep. 2009).]
- (w) Close Out Procedures for National Priorities List Sites, OSWER 9320.2-22 (May 2011).
- (x) Groundwater Road Map: Recommended Process for Restoring Contaminated Groundwater at Superfund Sites, OSWER 9283.1-34 (July 2011).
- (y) Recommended Evaluation of Institutional Controls: Supplement to the “Comprehensive Five-Year Review Guidance,” OSWER 9355.7-18 (Sep. 2011).
- (z) Plan EJ 2014: Legal Tools, EPA Office of General Counsel (Dec. 2011), <https://www.epa.gov/environmentaljustice/plan-ej-2014-legal-tools>.
- (aa) Construction Specifications Institute’s MasterFormat **[specify current edition]**, available from the Construction Specifications Institute, <http://www.csinet.org/masterformat>.
- (bb) Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach, OSWER 9200.2-125 (Sep. 2012)
- (cc) Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites, OSWER 9355.0-89, EPA/540/R-09/001 (Dec. 2012), <https://semspub.epa.gov/work/HQ/175446.pdf>.
- (dd) Institutional Controls: A Guide to Preparing Institutional Controls Implementation and Assurance Plans at Contaminated Sites, OSWER 9200.0-77, EPA/540/R-09/02 (Dec. 2012), <https://semspub.epa.gov/work/HQ/175449.pdf>.
- (ee) EPA’s Emergency Responder Health and Safety Manual, OSWER 9285.3-12 (July 2005 and updates), <https://www.epaosc.org/HealthSafetyManual/manual-index.htm>.
- (ff) Broader Application of Remedial Design and Remedial Action Pilot Project Lessons Learned, OSWER 9200.2-129 (Feb. 2013).
- (gg) Guidance for Evaluating Completion of Groundwater Restoration Remedial Actions, OSWER 9355.0-129 (Nov. 2013).
- (hh) Groundwater Remedy Completion Strategy: Moving Forward with the End in Mind, OSWER 9200.2-144 (May 2014).
- (ii) Quality Management Systems for Environmental Information and Technology Programs -- Requirements with Guidance for Use, ASQ/ANSI E-4 (February 2014), available at <https://webstore.ansi.org/>.

- (jj) Guidance for Management of Superfund Remedies in Post Construction, OLEM 9200.3-105 (Feb. 2017), <https://www.epa.gov/superfund/superfund-post-construction-completion>.
- (kk) Advanced Monitoring Technologies and Approaches to Support Long-Term Stewardship (July 20, 2018), <https://www.epa.gov/enforcement/use-advanced-monitoring-technologies-and-approaches-support-long-term-stewardship>.
- (ll) Superfund Community Involvement Handbook, OLEM 9230.0-51 (March 2020). More information on Superfund community involvement is available on the Agency's Superfund Community Involvement Tools and Resources web page at <https://www.epa.gov/superfund/superfund-community-involvement-tools-and-resources>.
- (mm) EPA directive CIO 2105.1 (Environmental Information Quality Policy, 2021), https://www.epa.gov/sites/production/files/2021-04/documents/environmental_information_quality_policy.pdf.

11.2 A more complete list may be found on the following EPA web pages:

- (a) Laws, Policy, and Guidance at <https://www.epa.gov/superfund/superfund-policy-guidance-and-laws>;
- (b) Search Superfund Documents at <https://www.epa.gov/superfund/search-superfund-documents>; and
- (c) Test Methods Collections at: <https://www.epa.gov/measurements/collection-methods>.

11.3 For any regulation or guidance referenced in the Decree or SOW, the reference will be read to include any subsequent modification, amendment, or replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after Settling Defendants receive notification from EPA of the modification, amendment, or replacement.

SUPPLEMENT

The following is an insert regarding proprietary controls for use in situations where there will be no Institutional Controls Implementation and Assurance Plan.

- 11.4 Proprietary Controls.** Settling Defendants shall, with respect to any Affected Property that is not owned by a Settling Defendant, use best efforts to secure from such owner cooperation in executing and recording, in accordance with the procedures of this ¶ 11.4, Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the Decree, including those activities listed in ¶ [12.b] of the Decree (Access Requirements); and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in ¶ [12.c] of the Decree (Restrictions). Any Settling Defendant that is an owner of any Affected Property (“Owner SD”) shall, with respect to its Affected Property, execute and record, in accordance with the procedures of this ¶ 11.4, Proprietary Controls that: (i) grant a right of access to conduct any activity regarding the Decree, including those activities listed in ¶ [12.b] (Access Requirements); and (ii) grant the right to enforce the land, water, or other resource use restrictions set forth in ¶ [12.c] (Property Restrictions).
- (a) **Grantees.** The Proprietary Controls must be granted to one or more of the following persons and their representatives, as determined by EPA: the United States, the State, Settling Defendants, and other appropriate grantees. Proprietary Controls in the nature of a Uniform Environmental Covenants Act (“UECA”) document granted to persons other than the United States must include a designation that [for UECA states, insert: EPA (and/or the State as appropriate) is either an “agency” or a party] [for non-UECA states, insert: EPA (and/or the State as appropriate) is a “third-party beneficiary”] expressly granted the right of access and the right to enforce the covenants allowing EPA [and/or the State] to maintain the right to enforce the Proprietary Controls without acquiring an interest in real property.
- (b) **Initial Title Evidence.** Settling Defendants shall, within [45] days after the Effective Date:
- (1) **Record Title Evidence.** Submit to EPA a title insurance commitment or other title evidence acceptable to EPA that: (i) names the proposed insured or the party in whose favor the title evidence runs, or the party who will hold the real estate interest, or if that party is uncertain, names the United States, the State, the Settling Defendants, or “To Be Determined;” (ii) covers the Affected Property that is to be encumbered; (iii) demonstrates that the person or entity that will execute and record the Proprietary Controls is the owner of such Affected Property; (iv) identifies all record matters that affect title to the Affected Property, including all prior liens, claims, rights (such as easements), mortgages, and other encumbrances (collectively, “Prior Encumbrances”); and (v) includes complete, legible copies of such Prior Encumbrances; and

Commented [A39]: We recommend that implementation, maintenance, and enforcement of PCs be covered under an “Institutional Controls Implementation and Assurance Plan” (ICIAP) as part of the SOW. See ¶ 4.2. However, the case team may choose, instead, to incorporate the procedures below into the SOW. If used, we suggest inserting this text just before ¶ 5.7 (RA Construction Completion). Consult with DOJ about this. The paragraph numbers should update automatically.

Commented [A40]: “Agency” is a defined term in the statutes of states that have adopted UECA. For UECA states that have defined “agency” to exclude EPA (such as Delaware) and non-UECA states, the case team can usually substitute the term “third-party beneficiary.” However, the case team should review state law to make sure that the term used will ensure that the United States will acquire the rights it needs, *i.e.*, access and rights to enforce land use restrictions that are not real property interests, but that, similar to real property interests, run with the land and are enforceable against both present and future owners. If the interest EPA needs cannot be acquired through being designated as a third-party beneficiary, then it may be necessary for EPA to acquire an interest in real property. See the next margin note. For more specific information, see “Institutional Controls: Third Party Beneficiary Rights in Proprietary Controls” (Apr. 19, 2004), available at <https://www.epa.gov/enforcement/guidance-third-party-beneficiary-rights-proprietary-institutional-controls>.

Commented [A41]: EPA prefers that the PCs be prepared so that the United States does not acquire an interest in real property. If the PCs grant an interest in real property to the United States, such as a right of access or the right to enforce land use restrictions, 40 U.S.C. § 3111 mandates that the conveyance documents and the title evidence be reviewed and approved, prior to recording, by the Attorney General (or his/her delegatee). Guidance on this title review process may be obtained from the Title Unit, Land Acquisition Section, Environment and Natural Resources Division (ENRD), DOJ, at 202-305-0316. When the PCs grant an interest in real property to any person other than the United States, but also give the United States, and perhaps others, rights, such as the right to enforce PCs that are defined as not being an interest in real property (as is often the structure found in state versions of UECA, and as may be the effect in non-UECA instruments designating the United States, and perhaps others, as “third-party beneficiaries”), the mandate of 40 U.S.C. § 3111 for the review of the title by the Attorney General does not apply. However, EPA should conduct its own title review. The interest ...

- (2) **Non-Record Title Evidence.** Submit to EPA a report of the results of an investigation, including a physical inspection of the Affected Property, which identifies non-record matters that could affect the title, such as unrecorded leases or encroachments.

Commented [A42]: For general guidance on both record and non-record forms of title evidence acceptable to the United States, see the U.S. Department of Justice Title Standards 2001, available at https://www.justice.gov/enrd/Current_topics.html.

(c) **Release or Subordination of Prior Liens, Claims, and Encumbrances**

- (1) If any Prior Encumbrance may defeat or adversely affect the rights to be granted by the Proprietary Controls in a manner that could interfere with the remedy or result in unacceptable exposure to Waste Material, Settling Defendants shall consult with EPA regarding the release, subordination, modification, or relocation of such Prior Encumbrance.

(d) **Update to Title Evidence and Recording of Proprietary Controls**

- (1) Settling Defendants shall submit to all draft Proprietary Controls and draft instruments addressing Prior Encumbrances, if any, to EPA for review and approval within [180] days after the Effective Date.
- (2) Upon EPA’s approval of the proposed Proprietary Controls, Settling Defendants shall, within [15] days, update the original title insurance commitment (or other evidence of title acceptable to EPA) under ¶ 11.4(b) (Initial Title Evidence). If the updated title examination indicates that no liens, claims, rights, or encumbrances have been recorded since the effective date of the original commitment (or other title evidence), Settling Defendants shall secure the immediate **recording** of the Proprietary Controls in the appropriate land records. Otherwise, Settling Defendants shall consult with EPA, in accordance with ¶ 11.4(c)(1) regarding any newly-discovered liens, claims, rights, and encumbrances, prior to recording the Proprietary Controls.
- (3) If Settling Defendants submitted a title insurance commitment under ¶ 11.4(b)(1) (Record Title Evidence), then upon the recording of the Proprietary Controls and instruments addressing Prior Encumbrances, if any, Settling Defendants shall obtain a title insurance policy that: (i) is consistent with the original title insurance commitment; (ii) **is for \$100,000** or other amount approved by EPA; (iii) is issued to the United States, Settling Defendants, or other person approved by EPA; and (iv) is issued on a current American Land Title Association (“ALTA”) form **[in Texas: “Texas Land Title Association (“TLTA”) form”]** or other form approved by EPA.
- (4) Settling Defendants shall, within [30] days after recording the Proprietary Controls and instruments addressing Prior Encumbrances, if any, or such other deadline approved by EPA, provide to the United States and to all grantees of the Proprietary Controls: (i) certified copies of the recorded Proprietary Controls and instruments addressing Prior Encumbrances, if

Commented [A43]: The appropriate land records are most commonly in the county where the Affected Property is located.

Commented [A44]: The \$100,000 amount of the title insurance coverage in the policy was selected by EPA as appropriate and adequate. If there are questions or concerns the case team may consult with DOJ or with the Civil Rights and Finance Law Office of EPA’s Office of General Counsel, 202-564-5461, concerning this issue.

any, showing the clerk's recording stamps; and (ii) the title insurance policy(ies) or other approved form of updated title evidence dated as of the date of recording of the Proprietary Controls and instruments.

- (e) Settling Defendants shall monitor, maintain, enforce, and [annually] report on all Proprietary Controls required under this Decree.
- (f) **[Include if there is an Owner SD:** Owner Settling Defendant shall not Transfer its Affected Property unless it has executed and recorded all Proprietary Controls and all instruments addressing Prior Encumbrances required by EPA regarding such Affected Property in accordance with this Paragraph.]

Overview of Key Changes From 2020¹ Version of the Model RD/RA Consent Decree to the 2021 Version

August 2021

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
		Background/Whereas Paragraphs	Background paragraphs modified to return to older format that commenced with “Whereas ...” instead of capital letters. Omitted “Background” section heading for the Whereas clauses.
		“pursuant to”	In accordance with Garner’s Redbook, used “under” or “in accordance with” instead of “pursuant to” in most cases.
		“Section” vs “section”	Used “Section” to refer to a section of the CD. Use “section” to refer to portions of statutes and regulations.
		Sections of CERCLA	Omitted the statutory citation in most cases (<i>e.g.</i> , “42 U.S.C. § 9607(a)”).
		Last Whereas ¶	Added “the Decree is ... consistent with CERCLA.” Oft cited-element for approval by the courts.
		“ORDERED” paragraph	Omitted “adjudged.”
I. JURISDICTION AND VENUE			
1 106	1	Jurisdiction and venue	Streamlined. Integrated old ¶ 106, which addressed court’s jurisdiction to enforce the CD.
II. PARTIES BOUND			
2	2		Omitted “assigns” from sentence about who is bound. Settler’s obligations can only be assigned with U.S. consent.
25	2	Transfer of Site	Any transfer of Site does not alter SD’s obligations, but clause re access/use restrictions omitted.
3	3	Contractors and subs	Revised to require notice of CD to contractors & subs, in lieu of <i>copies</i> of CD.
III. DEFINITIONS			
4	4	Main definitions paragraph	Revised to state that specific terms of Decree control over generic terms found in the statute.

¹ EPA and DOJ last issued a Revised RD/RA Model CD and SOW in 2014. Minor updates are made to model documents within the Models Database as necessary and the dates associated with the current model reflect the latest update. The most recent update to the model RD/RA CD was in 2020.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
		“Decree”	Was “Consent Decree.” Revised to say Decree includes appendixes and deliverables and edited second sentence to remove circularity.
		“Day”	Revised definition.
		“Future Response Costs”	“Interim costs” definition integrated into the “future response costs” definition. Modified the interest clause of FRC definition to include <i>all</i> interest accrued on the unpaid balance, not just interest accrued on the past costs.
		“Including”	New definition and omitted “but not limited to” throughout the Decree.
		“Institutional Controls”	“Proprietary Controls” definition integrated into the IC definition. Added text to recognize that <i>notice</i> of the IC is sometimes recorded rather than the whole document with all the conditions.
		“Other Affected Property”	“Other Affected Property” definition omitted. EPA has flexibility to decide after entry which properties needs access or use restrictions.
		“Settling Federal Agency”	New definitions. For DoD service branches (e.g., Army, Navy, etc.) DoD can be the SFA, depending on circumstances.
		“Site”	Note accompanying this definition amended to mention inclusion of “suitable areas in very close proximity to the contamination necessary for implementation of the response action.”
		“Work”	This definition narrowed to include requirements of Performance of Work, Property Requirements, Financial Assurance, and Indemnification/Insurance sections. Note that “OU” Decrees provide covenant for “Work.”
		“Work Takeover”	New definition.
IV. OBJECTIVES			
5	5	Objectives	Slight wording change; add “and settle.”
6.a		Commitments	Omitted.
8		Permits	Moved to SOW ¶ 5.4.
V. PERFORMANCE OF THE WORK			
9		Coordination & Supervision	Moved to SOW Section 3.
10	6	Performance of Work	Sentence re approval of deliverables omitted.
11		Emergencies	Moved to SOW ¶ 5.5. Reservations portion of this paragraph moved to reservations, ¶ 61 in CD.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
12		Community Involvement	Moved to SOW Section 2.
14	7	No warranty RA will work	Minor wording changes.
6.b	8	Joint & several obligations	Minor wording changes.
13.c 16 17	9.a	EPA authority to modify; SD right to comment	Revised to better clarify that EPA’s right to make modifications does not come from the CD. EPA authority to issue “RA modification” and “new RA” combined. “Further RA proposed by EPA” substituted for “selected by EPA” since the public comments are triggered after EPA <i>proposes</i> the modified or further RA.
13.a	9.b	“Within Scope” Mods	Streamlined.
18	9.c	“Reopener” mods	Added cross reference “subject to ¶ 84” to clarify that ability to order settlers to perform work to implement a modification of the ROD is subject to the “modifications” provision, which requires ROD Amendment changes to be incorporated into a Decree amendment.
13.b 19	9.d	Procedure to implement mods, further RAs	Streamlined.
15		Periodic Review	Moved to SOW ¶ 5.9. Provision about costs of periodic review moved to FRC definition in CD.
7	10	Compliance with Applicable Law	No change.
81	11	Work Takeover	Provisions of old ¶ 81 moved here and streamlined. Clarified that only non-compliances with § V are addressed by WT provision. Default cure period is now [20] days except in case of emergency. Streamlined provision re notice to SDs of WT. Provision re WT costs omitted as covered in FA Section. Streamlined provision re implementation of WT.
VI. PROPERTY REQUIREMENTS			
20	12	Agreements Re Access/Non-Interference	“Affected Property” (i.e., property where access or non-interference controls are needed) does not need to be identified by EPA at time of signing the CD. Can be identified by EPA after effective date.
22	12.d	Best Efforts	Last sentence about costs incurred in helping SDs obtain access has been moved to FRC definition.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
20	13	Access/Non-Interference by Owner	Portions of old ¶ 20 that applied to Owner SD have been moved to this separate paragraph.
21		Proprietary Controls	Moved to SOW Supplement & ¶ 21.c (subordination of prior encumbrances) omitted. EPA generally prefers that proprietary controls be implemented under an ICIAP.
23	14	Institutional Controls	No change.
24	15	Notice to Successors	No change.
26	16	Access Authorities	No change.
VII. FINANCIAL ASSURANCE			
27	17	Obligation to Secure FA	Clarified that FA amount based on cost of “Work” under Section V (which does not include cost of FA, insurance, etc.).
28-32	18-22	Various FA	No change.
32.d	22.d	Access to FA	Omitted sentence about reimbursing WT costs as those costs are covered by FRC definition.
33	23	Mods of FA	Omitted bar against DR of EPA decision re FA mod. Added optional text allowing initiation of DR if EPA does not act on FA mod request within 180 days.
34	24	Release of FA	Minor change to cross reference.
VIII. INDEMNIFICATION AND INSURANCE			
49	25	Indemnification	Minor wording changes.
50	26	Construction Delays	Added “or other activities” after “Work” so as not to limit coverage of this provision to construction of the Work.
51	27	Insurance	Revised first sentence into three new sentences, one each about: (1) what insurance settlers must secure; (2) the U.S. being named; (3) maintaining the insurance.
IX. PAYMENTS FOR RESPONSE COSTS			
35 38.a 41	28	Past Costs Payment, Instructions, Notice, Interest	Past cost payment amount, procedure, method, and notice combined into one paragraph.
36.a	29.a	Prepayment of Future Response Costs	No change.
36.b	29.b	Shortfall Payments	Minor conforming wording changes.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
36.c 39 40	29.c	FRC Periodic Bills	Future cost payment procedure, method, and notice combined into one paragraph. This paragraph does double duty for regular Decrees and for Decrees with prepayment provisions. “Arithmetical error” substituted for “mathematical error.”
36.c 38.b 38.c 41	29.d	FRC Payment Procedures, Instructions, Notice, Interest	New provision to cover the requirement to pay interest on FRC payments. Omitted sentence stating payment of interest is in addition to payments for stips.
36.d	29.e	Deposit of FRC Payments	Omitted third clause about where to deposit periodic bill payment as it was not an exception to the two options presented but was encompassed within the second option. Added new wording (“EPA’s sole discretion”) and omitted two clauses about “not subject to challenge.”
36.e	29.f	Unused Amount	Minor conforming wording changes.
36.f 37.b	note	Payments to State	Simplified.
37	30	Payments by SFAs	Sentence about where to deposit the payment has been moved to ¶ 31.
35.b 36.a 36.b 36.d 37.a.2	31	Deposit of Payments	Single streamlined paragraph addressing where payments get deposited (main Fund or Special Account), that replaces three parallel paragraphs.
X. DISBURSEMENT OF SPECIAL ACCOUNT FUNDS			
42-48	32-39	Disbursements from Special Account	Minor conforming wording changes.
XI. FORCE MAJEURE			
52	40	FM Definition	Added “given the need to protect public health and welfare and the environment” to the “best efforts” sentence.
53	41	SD Notice of FM	Streamlined procedure. “Notice trigger” revised to be when SDs “first knew or should have known that the event would likely delay performance.”
54 55	42	EPA Determination re FM, Initiation of DR	Streamlined. Settlers’ burden proof in case of DR is streamlined.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
56	43	EPA failure to act timely	Wording changed to "... timely completing a requirement of the Decree ..."
XII. DISPUTE RESOLUTION			
57	44	Requirement to use DR procedures	Modified to clarify that SDs cannot initiate DR about the original ROD. Simpler language about enforcement of matters not subject to DR.
58	45	Trigger for DR	Similar. New optional clause regarding mediation.
59	46.a	Formal DR; Statements of Position	Procedure for formal DR of "AR" disputes and formal DR of "non-AR" disputes combined into a single provision. New provision for EPA to extend deadlines.
60.b	46.b	Formal Decision	Slight wording changes.
60.a	46.c	Compilation of Admin Record	An AR is compiled for all disputes, even if the matter is not to be resolved on the AR at the judicial level.
60.c	47.a	Initiation of Judicial Review	Omitted provisions about efforts made by the parties to resolve dispute, and schedule to resolve dispute. Added sentence that matter is briefed according to court rules.
60 60.d	47.b	Disputes Reviewable on the Admin Record; Standard of Review	Narrowed disputes about whether RA is protective of HH & the envt. to such disputes arising under the standard reopeners. Omitted sentence about ¶ M (which referred to judicial review on the admin record), as it was moved to DR section.
61		Review of Disputes not on Admin Record	Omitted.
39	48	Escrow Account	Similar, but does not apply to disputes about stips.
62	49	Initiation of DR not an Extension of Deadline	Streamlined.
XIII. STIPULATED PENALTIES			
63 64 65	50	Liability for Stips & Amounts	Combined related provisions from diverse sources into one paragraph. Substituted "non-compliance" for "violation." Omitted "payments" since covered below. Omitted clause defining what constitutes "compliance." Clause in last sentence of old ¶ 63 (regarding "material defects" of deliverables), moved to ¶ 8.6 (the deliverables procedure paragraph) in the SOW.
66	51	Work Takeover Stip	Minor wording changes.
62 67 69	52	Accrual of Stips	Combined related provisions from diverse sources into one paragraph.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
68 69 70 71 72	53	Demand, Payment of Stips, Timing of Payment, Interest, No Alteration of Obligations	Combined related provisions from diverse sources into one paragraph.
73	54	No Limit on U.S.’s Other Authorities	The clause “Nothing in this CD limits” replaces “Nothing in this Consent Decree may be construed to prohibit, alter, or in any way limit ...” Streamlined provision stating nothing limits U.S.’s authority to seek a remedy otherwise provided by law for Settling Defendants’ failure to pay stipulated penalties.
74	55	Waiver of Stips	No change.
XIV. COVENANTS BY PLAINTIFFS			
75	56	Covenants for SDs	Streamlined. Text for RCRA § 7003 covenant omitted and note about it has been revised.
76	57	Covenants for SFAs	Streamlined and tightened.
75	58	Timing, effect of covenant	Combined the identically-worded paragraphs for the SD covenant and SFA covenant into a single ¶ that applies to both covenants. Modified the ¶ saying these covenants don’t extend to any other person. Added clause saying covenant applies to successors.
77 78 79	59	“Unknowns” Reopeners	Combined two identically worded clauses into one. Kept and moved the “based in whole or in part” clause and omitted the “together with any other relevant information” clause.
80.a- 80.f	60.a- 60.f	Various general reservations	No change. Grammatical changes to ¶ 60.e.
80.h		Violations of law during/after implementation	Omitted.
80.j	60.g	Additional OUs	No change.
80.k		Future costs not covered by FRC Defn	Omitted.
80.l	60.h	Past cost not covered by PRC Defn.	Minor wording changes.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
80.m	60.i	Costs from other agencies	No change.
80.i	60.j	“Within the Scope” reservation	Minor wording changes.
80.g	60.k	Criminal liability	No change.
11	61	No Limit on EPA Authority to Protect HH & Env't	EPA reservation of authority to take emergency action that was in old ¶ 11 (Emergencies) moved to here.
82		Authority to take any response action	Omitted.
XV. COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES			
83	62.a	SDs Covenants	CERCLA/RCRA covenant is combined with Constitution/Tucker Act/EAJA covenants. Scope of the latter now same as the scope of the U.S. covenant. New reference to all of CERCLA in lieu of specific CERCLA references. “With respect to” changed to “relating to” to be consistent with U.S. covenant. Omitted reference to “this CD.”
83.a	62.b	Covenant re the Fund	Streamlined. New note requiring DOJ case team to consult with DCMA in certain cases.
85	63	SD’s Reservation	Streamlined to mirror the U.S.’s streamlined reservations. Clarified that the reservation applies to lawsuits and orders <i>after</i> the Effective Date. Omitted exceptions under the waivers and res judicata paragraphs.
86		Tort Claims Reservation	Omitted. Not needed as the re-worded SDs’ covenants does not bar such claims.
87		No preauthorization	Omitted.
88.a.3 88.b.1	64	<i>De minimis</i> /ATP waiver	Coverage of the <i>de minimis</i> /ATP waiver revised to be based on the matters addressed in the future <i>de minimis</i> /ATP settlement, and no longer mirrors the matters addressed in <i>this</i> settlement. Clarification of settlers’ right to comment on any such future settlement.
88.a.1 88.b.1	65	<i>De micromis</i> Waiver	Minor conforming wording changes. Now optional; used only for SAA Sites.
88.a.2 88.b.1	66	MSW Waiver	Minor conforming wording changes.
88.b.2	67	Contractual Indem.	No change.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
89	68	SAA Site: No challenge to NPL Listing	No change.
84	69	Covenant by SFAs	Streamlined.
XVI. EFFECT OF SETTLEMENT; CONTRIBUTION			
91 92	70	Contribution protection	Streamlined. Several provisions from different sources combined into one paragraph. Clearer references to specific reservations in lieu of prior text.
93 94	71	Notice of contribution claims	Two provisions combined, but otherwise no change.
95	72	Res Judicata, etc.	Grammatical changes. "... claim preclusion (res judicata), issue preclusion (collateral estoppel) ..." Omitted clause about enforceability of the U.S. covenants.
90	73	Right of U.S. to pursue 3 rd Parties	Streamlined.
XVII. RECORDS			
104	74	SDs' Certification	New language about implementation of a litigation hold in lieu of requirement that settlers certify they did not dispose of any records.
102	75	SFA acknowledgment	No change.
101	76	Retention of Records/Info	Streamlined.
96 103	77	Provision of Records	Streamlined.
97	78	Privilege	Streamlined.
98	79	CBI	Minor editorial changes. New requirement that SDs stamp <i>each page</i> for which they wish to have CBI protection. This goes beyond the requirements of 40 C.F.R. § 2.203 which only requires a cover sheet.
99	80	Validated Data	Minor wording changes.
100	81	Info Gathering Authority	No change.
XVIII. NOTICES AND SUBMISSIONS			
105	82	Notices	New sentence for emailed notices. Tables added to facilitate editing.
XIX. APPENDIXES			
107	83	Appendixes	Spelling of "appendixes" changed in accordance with Garner.

2020 ¶	2021 ¶	SUBJECT	EXPLANATION
XX. MODIFICATIONS TO DECREE			
108	84	Mods to Decree	Clarified that modifications made in accordance with Paragraph 9 are not covered by ¶ 84. Edited the “material modification” sentence for clarity.
109		Modifications that affect DM & Cashout parties	Omitted.
110		Court’s power to enforce	Omitted.
XXI. SIGNATORIES			
113	85	Signatories	Same but changed order.
XXII. PRE-ENTRY PROVISIONS			
112	86	Effect of CD Before Entry	Clarified that ¶¶ 87 & 88 are exceptions to this provision.
111	87	Lodging; Public Comment	Grammatical changes.
114	88	SDs shall not oppose CD	Streamlined.
115		Agent for service	Moved to settler’s signature page.
XXIII. INTEGRATION			
116	89	Integration	Simplified integration clause.
XXIV. FINAL JUDGMENT			
117	90	Final Judgment	Omitted F.R.C.P. language covering partial settlements.