

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.