

Model RD/RA Consent Decree: Technical Fixes

April 29, 2024

Macro Enabled CD:

- Modified macro instructions for clarity
- Deleted MSW macro as it is now controlled by SAA macro (see ¶ 78 below)
- Add blue font color to optional text and deleted brackets that previously denoted optional text

Other Technical Updates:

- ¶ 3 – deleted cite to section 121 to state notification provision as that sections requires EPA to issue regulations but does not require notification. NCP requires state notification.
- ¶ 13 – deletion citation to section 107 in jurisdiction provision as section 107 does not provide jurisdiction. Only sections 106 and 113 address jurisdiction.
- ¶ 16 – Definitions:
 - Revised Definitions introduction language to for clarity and simplicity.
 - Deleted reference to deliverables in definition of “Consent Decree.”
 - Updated definition to FDIC.
 - Added numbering within Institutional Controls definition to clarify that state and local laws are not Proprietary Controls.
 - Add optional “Oversight Costs” definition for CDs where there is some oversight cost forgiveness.
 - Added RPM definition.
- ¶ 17 – Small punctuation edits for consistency with section 106(a) and to clarify that the objectives of the CD are to protect public health and welfare and the environment.
- ¶ 21 -Edited the Modification provision to clarify the procedures for implementing remedy changes. Deadline for initiating dispute resolution consolidated into ¶ 57. Moved text from ¶ 96 into ¶ 21.e. “Notwithstanding any other provision in ¶ 21, any modification 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) shall be considered a material modification under, and may only be implemented in accordance with, ¶ 96.”
- ¶ 27.a – Notice to Successors-in-title: After “Owner Settling Defendant” added “who is record owner...” Term “Owner Settling Defendant” is defined to include persons who own or control (e.g., lease) the property. But lessees cannot record a notice in property records.
- ¶ 35 – Modification to Financial Assurance: Consolidated deadline for initiating dispute resolution into ¶ 57, within the Dispute Resolution section.
- ¶¶ 23.s, 24.c, 25, 59.b, 71.a – “... public health, and welfare, and the environment ...”
- “...public health, or welfare, or the environment ...” Changed “human health” to “public health” for consistency with section 106(a) and changed “and” to “or” to be more inclusive. Note that in ¶ 24.c, the trigger is an endangerment to any one of health or welfare or the environment, so we kept it as “or” there.
- ¶ 40 – Changed “provide” to “send” for clarity: “The Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of _____ shall send ~~provide~~ Settling Defendants instructions for making this payment,
- ¶ 41.d – Edited “Periodic Bills” paragraph for clarity.
 - On a periodic basis, EPA will send Settling Defendants a bill for Future Response Costs-
~~The bill will include~~ including an “e-Recovery Report” or other standard cost summary

- listing direct and indirect costs paid by EPA, ~~its contractors, subcontractors,~~ and DOJ and related indirect costs.
 - Margin note edited to say: If EPA agrees to provide orphan share compensation to Settling Defendants through forgiveness of oversight costs, insert “other than Oversight Costs” after “Future Response Costs.”
 - New margin note added to end of second sentence: If EPA agrees to provide orphan share compensation to Settling Defendants through forgiveness of oversight costs, insert “(iv) whether EPA has included any Oversight Costs.”
- ¶ 44 – Corrected titles and dates of applicable guidance documents in Special Account Disbursement section.
 - Note accompanying this paragraph:

“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 Entities Performing CERCLA Response Actions ~~CERCLA Potentially Responsible Parties~~” (Nov. 3, 1998 March 27, 2018), available at <https://semspub.epa.gov/work/HQ/100001089.pdf>, and the “Updated Consolidated Guidance on the Establishment, Management and Use of CERCLA Special Accounts” (Oct. 4, 2002 August 5, 2019), available at <https://semspub.epa.gov/work/HQ/100002182.pdf>.”
- ¶ 47.c – Edited language in Request for Special Account Disbursement section to make it gender neutral.
 - “The CFO of a SD ... shall also provide EPA a list of the documents that ~~he or she~~ they reviewed in support of the Cost Summary and Certification.”
- ¶¶ 52-55 – Revised Force Majeure Section to include procedures for when there is “prevention” of performance (e.g., sampling or monitoring).
- ¶ 57 – Dispute Resolution:
 - Added “timely” to Notice of Dispute sentence: “A dispute will be considered to have arisen when one or more parties sends a timely written notice of dispute (“Notice of Dispute”).”
 - Consolidated deadlines for initiating dispute resolution into one sentence: “A notice is timely if sent within 30 days after receipt of the EPA notice or determination giving rise to the dispute, or within 15 days in the case of a force majeure determination.”
- ¶ 59.c – Corrected improper use of “shall” in Judicial Review section: “Judicial review of any dispute not governed by ¶ 59.b ~~shall be~~ is governed by applicable principles of law.”
- ¶ 60 – Revised reference to FDIC consistent with new definition: “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”)~~ ...”
- ¶ 64 – Clarified Accrual of Penalties language: ~~“Nothing in this Decree prevents the simultaneous accrual of separate penalties for separate noncompliances with this Decree.”~~ Separate penalties may accrue simultaneously for separate noncompliances with this Decree.”
- ¶ 64.b – Clarified language in the Accrual of Penalties provision by revising the “one free bite at the apple” exclusion from penalties.
 - “(b) with respect to a deficient initial submission under ¶ [8.6(a)] of the SOW if the deficiency is corrected in the resubmitted submittal under ¶ [8.6(b)] of the SOW;” This text replaces SOW ¶ 8.6(d) (“material deficiencies”).
- ¶ 65 – Moved deadline for initiating dispute resolution regarding stipulated penalties into ¶ 57 with Dispute Resolution section.

- ¶ 68 – Revised note to Covenants to Settling Defendants paragraph to reflect resent OSRE consultation requirement when providing RCRA 7003 covenant:
 - “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~~ must consult the RCRA Cleanup Team within the Office of Site Remediation Enforcement and discuss the considerations for and against including this covenant.”
- ¶ 70 – Corrected language in Covenants by Plaintiffs section to state that United States makes payments on behalf of the Settling Federal Agencies.
- ¶¶ 71.a, 82 – Clarified language in Reservations and Contribution sections by replacing “exercise” with “bring a claim”:
 - “The United States may ~~exercise~~ bring a claim under 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 public health or welfare or the environment.”
- ¶ 73 - Changed “human” to “public” and added “welfare” to provision in Reservation section to be consistent with section 106(a): “Subject to ¶ 68[and ¶ 69], nothing in this Decree limits any authority of Plaintiff[s] to take, direct, or order all appropriate action to protect ~~human~~ public health and welfare and the environment ...”
- ¶ 78 – MSW Waiver: This waiver is now coded for deletion when the “SAA” macro is run. This waiver should only be included for an SAA site that is also an MSW site. Margin note added: “Keep this waiver only if the Site is both an SAA site and an MSW site.”
- ¶ 82 – Effect of Settlement/ Contribution
 - Capitalized “Matters Addressed” to indicate it is a defined term. This definition has not been added into the definitions section because the matters addressed changes if we bring a claim under a reservation.
 - Added new sentence for consistency with U.S. covenant to settlers: “The contribution protection under the preceding sentence extends 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.”
 - Corrected verb tense: “...provided, however, that if the United States brings a claim under the reservations in ¶ 71 and ¶¶ 72.a through 72.j, the Matters Addressed in this Decree ~~no longer~~ do not include those response costs or response actions [or natural resource damages] that are within the scope of the ~~exercised~~ claim brought under the reservation.”
- ¶ 86 – Margin note clarified that when using the alternative language, there should be an “or” (not an “and”) between “documents” and “electronically stored information.”
 - “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 documents or electronically stored information ...”
- ¶ 88.c – Added new provision regarding maintenance of electronic documents by settlers due to widespread use of electronic records:
 - “Settling Defendants shall maintain Records that were originally created in an electronic format in their native format or in a reasonably accessible format and shall keep them reasonably organized. Unmarked paper printouts of electronic records maintained in

accordance with this paragraph will be considered duplicates or convenience copies and need not be preserved.”

- ¶ 91 – Technical corrects to Confidential Business Information section:
 - “Settling Defendants are entitled to ~~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). Settling Defendants shall mark each ~~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 as~~ “claimed as confidential business information” or “claimed as CBI.” Records that Settling Defendants properly mark in accordance with the preceding sentence ~~claims to be CBI~~ will be afforded the protections specified in 40 C.F.R. part 2, subpart B. If any record is not properly marked ~~no CBI claim accompanies records~~ when it is ~~they are~~ submitted to EPA[and the State], or if EPA notifies Settling Defendants that the records ~~are~~ is 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.”
- ¶ 94 – Modified Notices and Submissions section for electronic delivery only
- ¶ 96 – Moved some modification text to ¶ 21.e, Modifications to the Remedial Action and Further Response Actions:
 - ~~“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.”~~
- ¶ 97 – Modified Signatories provision for gender neutral language.
 - EPA signature block modified to have signature lines for Regional Counsel, SEM director, and EPA line attorney. Added margin note to say CD should be signed by EPA in accordance with Regional office practice.
- Settling Defendants Signature Page – Modified language to reflect federal records storage requirements against use of paper:
 - If the Decree is not approved by the Court within 60 days after the date of lodging, and the United States requests, [this]Settling Defendant agrees ~~to accept service of the complaint by mail, and~~ to execute a waiver of service of a summons under Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court. This Settling Defendant hereby designates the agent below ~~to accept service of the complaint by mail and~~ to execute the Rule 4 waiver of service. This Settling Defendant understands that: (i) it does not need to file an answer to the complaint until after it has executed the waiver of service or otherwise has been served with the complaint; and (ii) the time within which this Defendant must file its answer is as set forth in the Federal Rules of Civil Procedure and any applicable local rules of this Court, or as ordered by the Court.
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