

**Overview of Substantive Changes from
2011 – 2014 Remedial Design/Remedial Action Consent Decree**

2011 §/¶	2014 §/¶	SUBJECT	EXPLANATION
III. PARTIES BOUND			
2	2	“This Consent Decree [CD] applies to and is binding upon ...”	Simplified and redundancy removed.
IV. DEFINITIONS			
4	4	“Affected Property”	New definition regarding the property that is covered by the new Property Requirements Section. Affected Property is all real property at the Site and any other real property for which access or use restrictions are needed to implement the Remedial Action.
4	4	“Day”	Deleted references to “working day” since term is not used in CD.
4	4	“Effective Date” (ED)	Simplified and clarified to state that the ED is the date on which the approval of the CD is recorded on the Court’s docket.
4	4	“Future Oversight Costs” (FOC)	Edited to address restructuring of CD.
4	4	“Future Response Costs” (FRC)	Edited to address restructuring of CD, and to include Technical Assistance Grant costs (moved from Community Involvement Section to FRC definition) and “litigation costs” (added for consistency with wording of FOC definition).
4	4	“Institutional Controls” (ICs)	Changed “land, water, and/or resource use” to “land, water, or other resource use” here and throughout CD.
4	4	“Institutional Controls Implementation and Assurance Plan” (ICIAP)	Omitted. Was originally intended for Statement of Work (SOW) and is now in attached SOW.
4	4	“Interest”	Added sentence about where rates can be found online, and dropped the accompanying note.
	4	“Non-Settling Owner”	New definition needed for new Property Requirements Section.
4	4	“Operation & Maintenance”	Simplified and redrafted to reference and conform to the SOW.
	4	“Owner SD”	New definition needed for new Property Requirements Section.
4	4	“Performance Standards” (PS)	Modified this definition for better consistency with National Contingency Plan and EPA guidance, including to clarify that PS are selected in the Record of Decision (ROD).

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4	4	“Pre-Achievement O&M”	Omitted – no longer needed because addressed by SOW ¶ 4.6 (RA Construction Completion), ¶ 4.7 (Certification of RA Completion, and ¶ 7.7(h) (O&M Plan).
4	4	“Post-Achievement O&M”	Omitted –no longer needed (reasons above).
4	4	“Remedial Action” (RA)	Simplified; references to SOW and other deliverables not needed in RA definition as they are included in ¶¶ 6.a and 10 of CD. Deleted alternative RA definition because no longer needed.
4	4	“Remedial Action Work Plan”	Moved to SOW ¶ 4.1.
4	4	“Remedial Design” (RD)	Modified to reference SOW.
4	4	“Remedial Design Work Plan”	Moved to SOW ¶ 3.1.
4	4	“Statement of Work”	Simplified.
	4	“Tribe”	New definition.
4	4	“Waste Material”	Deleted brackets so that solid waste will always be included in the definition.
			Added acronyms to definitions of “CD,” “RA,” “RD,” “SDs,” “SFAs,” and used the acronyms throughout CD. Shortens CD by five pages.
V. GENERAL PROVISIONS			
6	6	“Commitments by SDs [and Settling Federal Agencies (SFAs)]”	Simplified and clarified.
7	7	“Compliance with Applicable Law”	Modified first sentence to remove implication that compliance with laws not within EPA’s enforcement authority are EPA-enforceable requirements of the CD.
VI. PERFORMANCE OF THE WORK			
10, 41-43	9	“Coordination and Supervision”	Combined “Selection of Supervising Contractor” (SC) Paragraph (former ¶ 10) with “Project Coordinators” (PC) section (former ¶¶ 41-43) into a new paragraph. Procedures for selection of both SC and PC are now the same (¶ 9.c).
11-13	10	Remedial Design, Remedial Action	Moved to SOW §§ 3, 4. Replaced with new ¶ 10 requiring SDs to perform the RD, RA and O&M in accordance with SOW and all EPA-approved, conditionally-approved, or modified deliverables.

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52-53	11	Emergencies and Releases	Former ¶ 52 moved to SOW ¶ 4.4 and cross-referenced in CD ¶ 11 (within Performance of the Work Section). Former ¶53 moved to ¶ 11. Provision from ¶ 52 that EPA’s emergency response work is reimbursable as FRC moved to ¶ 11.
128	12	Community Involvement	Modified and mostly moved to SOW §§ 2 and 11. Streamlined provision retained in CD as new ¶ 12, which cross-references SOW provision and includes language regarding Future Response Cost recoverability.
14	13	Modification of SOW or Related Work Plans <u>Deliverables</u>	Modified, simplified, and renamed to conform to SOW.
16	--	Off Site Shipment of Waste Material	Moved to SOW ¶ 4.5 (also covered in ¶ 7.7(g)). First paragraph modified to change “Waste Material” to “hazardous substances, pollutants, and contaminants” and to address Investigation Derived Waste.
VII. REMEDY REVIEW			
		First note	Modified to better explain rules for editing this section.
17	15	Periodic Review	Simplified and modified to reference SOW. (SOW has new ¶ 7.7(k) provision for “Periodic Review Support Plan.”)
22-24	--	Quality Assurance Sampling and Data Analysis	Moved to SOW ¶ 7.7(f), except that 2 nd sentence of former ¶ 22.b (validated sampling data) moved to ¶98, and former ¶ 25 (retention of information gathering rights) moved to ¶ 99.
VIII. PROPERTY REQUIREMENTS			
9, 26-30	20-26	Property Requirements	New “Property Requirements” section replaces 2011 Model’s “Notice to Successors in Title and Transfers of Real Property” ¶ 9 and Access and Institutional Controls § IX. The new Section has been reorganized to emphasize a preference for PCs (¶ 20) over contractual controls (¶ 21).
26.c & 27.b	20	New Proprietary Controls (PC) paragraph	Substantive requirements re implementation of PCs by SDs who <i>do not</i> own affected property (former ¶ 27.a(3), ¶ 27.c) are combined with paragraph applicable to “Owner SDs” who <i>do</i> own the affected property (former ¶ 26.c) into a single new provision (¶ 20), since these provisions are parallel.

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26.a & 26.b	20.a, 20.b	Lists of access requirements and use restrictions	Separate paragraphs containing list of access requirements and list of use restrictions, which lists are applicable both to the PCs to be implemented under ¶ 20 and the contractual agreements to be secured under ¶ 21.
	20.c	Uniform Environmental Covenants Act (UECA)	New language consistent with the UECA for CDs in the 29 States that have adopted UECA. For instance, UECA-based laws generally use the term “agency” to refer to the agency that determines or approves the cleanup pursuant to which the PC is created.
	20.d- 20.f	New release/subordination of prior encumbrances paragraph	The new paragraph includes procedures for investigating the existence of prior encumbrances, for securing release/subordination of prior encumbrances, and for obtaining EPA waiver of release/subordination requirement in event prior encumbrance cannot be released.
28	22	Best Efforts	Modified provision to include a more detailed explanation about what constitutes “best efforts” for purposes of implementing PCs and obtaining agreements regarding access and restrictions.
9	24	Notice to successors in title	New streamlined provision regarding notice to successors.
FORMER “REPORTING” SECTION			
X	n/a	Reporting Requirements	Moved to SOW § 6.
FORMER “EPA APPROVAL OF PLANS” SECTION			
37- 40	n/a	EPA Approval of Plans Reports and Other Deliverables	Mostly moved to SOW ¶ 7.6, except for ¶ 39 (Material Defects), which was moved to ¶ 64.a within Stipulated Penalties section.
FORMER “CERTIFICATION OF COMPLETION” SECTION			
XIV 50-51	n/a	Certification of Completion of RA and Work	Moved to SOW ¶¶ 4.7, 4.8. Cross references in the CD to these certifications now refer to the SOW. Added note and new ¶ 4.8(d) to clarify which obligations continue after Certification of Work Completion.

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IX. FINANCIAL ASSURANCE			
44-49	27-33		Streamlined section. Changed section title from “Performance Guarantee” to the more commonly-used “Financial Assurance” (FA) term of art.
Notes after 45, 111	Before 27, 88	FA-related practitioners’ notes and Superfund Alternative Approach (SAA) guidance	Moved practitioners’ notes to the beginning of the section and updated SAA notes to reference 2012 guidance instead of now-superseded 2004 guidance.
44	27	Form of FA to be provided	Added link to EPA sample mechanisms.
44.e	27.e	Financial test (FT) coverage	Clarified (with “and this Section” addition) that FT-related requirements in CD go beyond RCRA requirements. Added optional (bracketed) standby funding commitment for more protection in Work Takeover scenarios.
45	28	Particular form of FA selected	Added optional language to cover situation where case team and SDs have negotiated the form of FA prior to signing CD.
46	29	FT and corporate guarantee submissions	Removed link to sample submissions because link to all samples appears in ¶ 27. Added sentence to allow EPA to demand reports of financial condition at any time. Modified text to clarify the CERCLA/RCRA interplay.
47	30	Adequacy of FA over time	Added requirement that SDs affirmatively monitor adequacy of their financial assurance.
48	31	FA “triggers”	Edited to clarify triggers for requiring work or funds guaranteed by FA mechanisms. Inserted new note before ¶ 31 to urge case teams to check that trigger in CD corresponds with trigger in mechanism(s).
49	32-33	FA modifications/releases	Streamlined paragraphs.

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X. PAYMENTS FOR RESPONSE COSTS			
55	35	Payments for Future Response Costs (FRC)	Edited to remove redundancy. Added sentence that, if balance in Special Account is sufficient to address currently anticipated future needs, EPA may deposit a specific FRC payment into Hazardous Substance Superfund.
55.e	35.b	Replenishment of Future Response Costs Special Account (FRCSA)	Edited this provision (in FRC pre-payment process) to clarify that requirement to replenish FRCSA in event of a shortfall ends once EPA submits first FRC bill, or one year after the Effective Date, whichever is earlier.
55.f	35.e	Final accounting for Future Response Costs Special Account	Amended this provision (in FRC pre-payment process) to reflect practice that this account is usually not kept open for entire duration of RA. Clarified that final accounting is of FRCSA, not of FRCs, because FRC payments for, e.g., remedy review, continue.
58	37	Payment Instructions for SDs	Payment to DOJ instruction modified to make option for payment online or by EFT equally preferred, to remove payment by check option, and to update email addresses.
60	38	Contesting Future Response Costs Billings	Edited this provision to clarify that procedures for disputing a FRC bill are same procedures as under DR Section. Email and street address for sending notice of payment to Cincinnati Finance Center updated and moved to ¶ 104 (within Notices and Submissions section).
XIII. FORCE MAJEURE			
n/a	55	EPA failure to complete obligations	Added new paragraph clarifying that EPA failure to complete its obligations is not a violation of CD, and that SDs may seek relief under force majeure section.
XIV. DISPUTE RESOLUTION			
77	57	When a dispute arises	Moved last sentence to first position for clarification.
80.a	60.a	When EPA issues the final decision regarding the dispute.	Modified this sentence to be parallel to similar sentence in ¶ 59.b, and to correct the sentence to read that the decision is issued after all statements of position and the reply, if any.

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81	61	Effect of invocation of dispute resolution	Edited provision to make clear that invocation of dispute resolution, by itself, does not extend or postpone any obligation.
XV. STIPULATED PENALTIES			
83.b	63.b	Stipulated Penalties	Added milestone regarding establishment and maintenance of financial assurance.
XVI. COVENANTS BY PLAINTIFF[S]			
94-95	74-75	Covenants for SDs by U.S. and for SFAs by EPA	Effective date (ED) of “present liability” covenant is now ED of CD, not upon payment of the Past Response Cost (and any Interest or stipulated penalties due thereon). While U.S. does not believe that it is necessary for the U.S.’ covenant to take effect on the ED in order for contribution protection and rights to attach on that date, we made this change to forestall any argument that liability is not resolved as of the ED for purposes of Section 113(f). Some extraneous wording (recitation of consideration) deleted. Added note about meaning of “future liability.”
96-97	76-77	Pre- and Post-Certification Reopeners	“Certification of Completion of RA” is changed to “Certification of RA Completion” to be consistent with EPA guidance documents and attached SOW. (Same change made in ¶ 35.e, and similarly, “Certification of Completion of the Work” is changed to “Certification of Work Completion” in ¶¶ 33 (release of FA) & 100 (retention of records.)
99	79	General Reservations	Optional clause “[and the State]” omitted as it is a mistake made in and carried over from 2009 RD/RA CD version. This will be covered in State’s general reservations, if added.
99.i	79.i	General reservation for additional response action that cannot be required under ¶ 13 (Modification of SOW or Related Deliverables)	Edited this reservation so that it works for final and non-final OU remedies without need for further editing.

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XVII. COVENANTS BY SDs [AND SFAs]			
107-11	87	Waiver of Claims by SDs	Created new combined municipal solid waste (MSW), de micromis, and <i>de minimis</i> /ability to pay (ATP) waiver and exception to waiver paragraph. Restructuring reduces duplication of language and simplifies editing of model. Fixed cross references elsewhere to this new [paragraph. Only substantive change is that note allowing settlers to exclude specifically identified contractual indemnification claims from scope of waiver, which formerly only applied to MSW and de micromis waivers, now applies to <i>de minimis</i> /ATP waiver as well.
XVIII. EFFECT OF SETTLEMENT; CONTRIBUTION			
114	90	Contribution Protection	So as to better track the statutory language of Section 122(f)(2), modified existing contribution protection language to add an express statement that the CD “resolves liability to the United States within the meaning of Section 122(f)(2) of CERCLA.”
--	91	Contribution Rights	For additional clarification, new paragraph added providing that, “The Parties further agree, and by entering this CD this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this CD constitutes a judicially-approved settlement pursuant to which each Settling Defendant [if SFAs insert: and each Settling Federal Agency] has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).”
XIX. ACCESS TO INFORMATION			
119.a	97	Confidential Business Information (CBI)	For improved procedural clarity, moved process for asserting CBI into its own paragraph and switched order with paragraph addressing privilege claims.

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119.b	96	Privileged and Protected Documents	Moved process for asserting privilege or protection claims into own paragraph. Order switched with CBI paragraph so these two paragraphs are in temporal order. Replaced “attorney client privilege or any other privilege recognized by federal law” with “privileged or protected as provided by federal law.” Attorney work product is classified under the Federal Rules of Evidence (F.R.E.) as a “protection” not a “privilege.” See F.R.E. 502.
119.c & 123 (last sen- tence)	96.c	Blanket prohibition against withholding records “created or generated pursuant to the requirements of the CD.”	This blanket prohibition moved into “Privileged and Protected Claims” paragraph. Prohibition has been narrowed to “the portion of any . . . Record that evidences conditions around the Site” and “the portion of any Record that Settling Parties are required to create or generate pursuant to this CD.” This change makes clear that the prohibition does not bar privilege claims regarding documents that are not required to be created under the CD and that may be privileged, such as cover letters and emails from attorneys to their PRP clients.
120	96.c	Types of data for which SDs may not assert privilege/protection.	Moved into “Privileged and Protected Claims” paragraph and added “radiological” data to the list.
XX. RETENTION OF RECORDS			
123	102	Delivery of Records to U.S.	Provision for contents of privilege log deleted in lieu of cross reference to requirements for asserting privilege found in ¶ 96.
124	103	Certification	Modified as follows because notice of liability will always precede filing of suit: “. . . since the earlier notification of potential liability by the United States or the State or the filing of suit against it regarding the Site. . . .” CERCLA § 122(e) reference changed to 122(e)(3)(B) for clarity.
XXI. NOTICES AND SUBMISSIONS			
XXVI 125	104	Notices and Submissions	Updated addresses for EES and EDS, added new email address for EES case management, updated EPA Cincinnati Finance Center email and street address, and updated provision to make it easier to provide notice via email.

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FORMER “COMMUNITY INVOLVEMENT” SECTION			
XIV 128	12		Modified and mostly moved to SOW §§ 2 & 11. Streamlined provision retained in CD as new ¶ 12, which cross-references SOW provision and includes language regarding Future Response Cost recoverability.
XXIV. MODIFICATION			
129	107	SOW Modification	Clarified to add that “[a] modification to the SOW shall be considered material if it implements a ROD amendment that fundamentally alters the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(ii).”
XXV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT			
132	110	Lodging	Edited as follows: “This CD shall will be lodged with the Court for a period of not less than at least 30 days . . .” to make the provision consistent with § 122(d)(2) and 28 C.F.R. § 50.7.