



2021 Streamlined Remedial Design/Remedial Action Consent Decree and Statement of Work

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Overview


- Background on Superfund Enforcement models
- Goals for streamlining models
- Overview of key language and structural revisions
- Highlights of the enhanced community involvement provisions in the Statemen of Work



2021 Model Remedial Design/Remedial Action Consent Decree and Statement of Work

- Drafted by national workgroup
- Issued jointly by EPA and DOJ on August 31, 2021
- Revised, streamlined Superfund/CERCLA [RD/RA CD](#) and [SOW](#)
- Last issued in September 2014 with subsequent more minor changes through 2020
- Available on the [Models Database](#)

Goals for Streamlined Models

- Promote more efficient negotiations and faster cleanup starts by
 - Improving clarity
 - Reducing redundancy
 - Simplifying the model language
 - Support the Agency's commitment to community engagement
 - Enhance protection of communities disproportionately impacted by pollution or that have environmental justice concerns
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New “Look” and Improved “Language”

- **Notes in CD and SOW**

- Former **bold** or **[bracketed]** no longer in the text
- Moved to comment bubbles to facilitate drafting

- **Language changes**

- Used “under” or “in accordance with” instead of “pursuant to” in most cases per Garner Redbook
- Section: when referring to Section in CD – capitalized; when referring to section in a statute, lowercase

- **Macros!**

- Easily customize the models – more on that later ...

Key Language and Structural Changes

Streamlining language changes include

- Modification to definitions
- Clarification to additional work provision
- Simplified the wording of the U.S. covenants and the Settling Defendants' covenants

Structural changes include

- Moved certain work-related provisions to SOW
- Reordered the provisions to better match with the order that events occur

New Enhanced community involvement provisions in SOW



CD Sections I and II: Jurisdiction and Parties Bound

- **Parties bound**
 - Omitted “assigns” from sentence about who is bound, ¶ 2
 - Settler’s obligations can only be assigned with U.S. consent, ¶ 2
- **Contractors and subcontractors**
 - Revised to require notice of CD to contractors & subcontractors, in lieu of copies of CD, ¶ 3
 - Contractual relationship with contractor clause omitted as not relevant

CD Section III: Definitions

- **Future Response Costs**

- Integrated “Interim Response Costs” language into Future Response Costs
- Deleted reference to ATSDR costs because they are included in EPA costs

- **Settling Federal Agency**

- New definitions. For Department of Defense (DoD) service branches (e.g., Army, Navy, etc.) DoD can be the Settling Federal Agency, depending on circumstances

- **Work**

- Narrowed to clarify those provisions that actually contain work obligations under Sections V–VIII: Performance of the Work; Property Requirements; Financial Assurance and Indemnification and Insurance

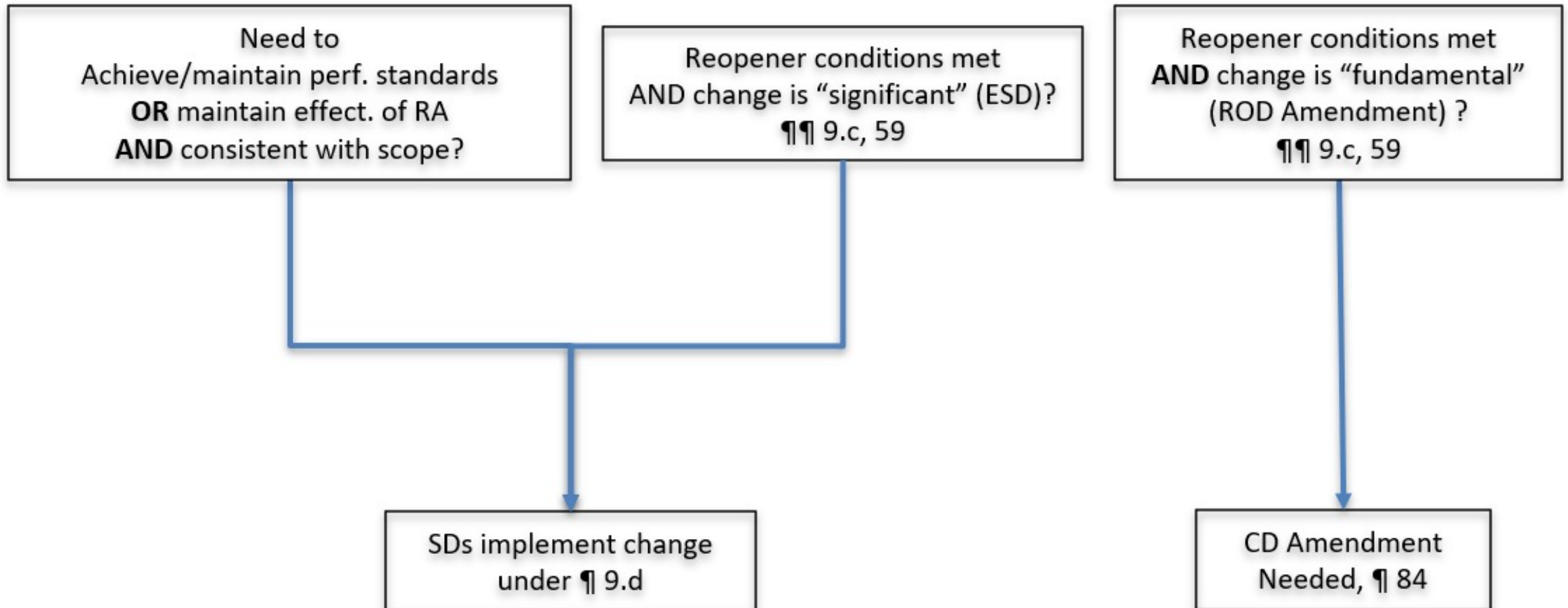
- **Affected Property**

- Definition changed and moved to Access section

CD Section V: Performance of the Work

- **Certain provisions moved to Statement of Work**
 - Community Involvement (Section 2), Coordination and Supervision (Section 3), Emergencies and Releases (Section 5.5), and Periodic Review (Section 5.9)
- **Modifications/Further Response Actions**
 - Changes to work that requires Record of Decision Amendment, needs CD amendment, ¶ 9, 84
 - Additional work within the scope of remedy or that requires only an Explanation of Significant Differences (ESD) can be implemented without need for CD amendment , ¶ 9
- **Work Takeover**
 - Is now part of Section V, not in reservations, ¶ 11
 - Clarified that only noncompliance of Performance of Work section triggers Work Takeover, ¶ 11.a

Remedy Changes Under Streamlined RD/RA CD



CD Section VI: Property Requirements

- **Agreements Re: Access/Non-Interference**
 - Affected Property can now be identified by EPA after Effective Date of CD, ¶ 12
- **Best Efforts**
 - Language about costs incurred helping Settling Defendants obtain access now part of Future Response Cost definition
- **Proprietary Controls (PCs)**
 - Implementation of PCs is considered a Work obligation and it has been moved to SOW (Section 4.2)
 - EPA prefers that Institutional Controls be implemented under an Institutional Control Implementation and Assurance Plan (ICIAP)

CD Sections VII and VIII: Financial Assurance and Indemnification and Insurance

- **FA Obligation to Secure**

- Clarified that the amount of financial assurance is based on cost of is based on the cost of the “Work,” ¶ 17

- **FA Modification**

- Omitted bar against dispute resolution regarding EPA decision to modify financial assurance

- **Insurance**

- Clarified the provision about securing insurance, ¶ 27

CD Section IX: Payment for Response Costs

- **Past Cost Payment amount, instructions, notice**
 - Combined into one paragraph, ¶ 28
 - Use www.pay.gov system that allows various ways of making payment, e.g., ACH, EFT, etc., ¶ 28
- **Future Response Costs Billing procedure, method, notice**
 - Combined into one paragraph, ¶ 29
- **Deposit of Payments**
 - Streamlined three paragraphs into one addressing where payments get deposited (main Fund or Special Account), ¶ 31

CD Section XI: Force Majeure

- **Definition of ‘best efforts’**
 - Added “given the need to protect human health and welfare and the environment” to the “best efforts” sentence, ¶ 40
 - Higher standard of care than for commercial contracts
- **Notice**
 - In order to reduce number of FM notices, notice trigger revised from when SDs “first knew the event might ...” to when Settling Defendants “first knew or should have known the event *would likely* delay performance”, ¶ 41
- **EPA Determination / Initiation of Dispute Resolution**
 - Clarified requirements for Settling Defendants to assert force majeure, ¶ 41
 - Streamlined Settling Defendants’ burden of proof to initiate Dispute Resolution, ¶ 42

CD Section XII: Dispute Resolution

- Clarified that U.S. may enforce regarding any obligation that is not subject to dispute resolution, ¶ 44
- Restructured to make it easier to follow and implement
 - Single track for formal dispute resolution, ¶ 45
- Clarified which disputes are subject to administrative record provision, ¶ 47.b.
- Added provision clarifying that an administrative record is compiled for all disputes, ¶ 46.c.
- Added an optional provision for mediation during informal dispute resolution, ¶ 45

CD Section XIII: Stipulated Penalties

- Liability for Stipulated Penalties and Amounts
 - Combined related provisions from diverse sources from old CD into one new paragraph (Demand, Payment of Stips, Timing of Payment, Interest, No Alteration of Obligations), ¶ 53
 - Substituted “noncompliance” for “violation”, ¶ 50
- Obligations under CD, not just deliverables, can lead to stipulated penalties, ¶ 50
- Accrual of penalties, ¶ 52
 - Clarified periods of time during dispute resolution when stipulated penalties do not accrue
- Setting Defendants not required to establish escrow account for disputes regarding stipulated penalties, ¶ 53

CD Section XIV: Covenants by Plaintiffs

- **Covenants for Settling Defendants**

- Resource Conservation and Recovery Act § 7003 covenant omitted and note revised, ¶ 56
- Omitted some reservations (matters not within covenant, violations of law, costs that are not future costs), ¶ 60

- **Timing/Effect of Covenant**

- Combined the identically-worded paragraphs for the Settling Defendants and Settling Federal Agencies covenants into a single paragraph, ¶ 58
- Added clause saying covenant applies to successors, ¶ 58

- **Unknown Reopeners**

- Combined two identically worded clauses into one, ¶ 59

- **No Limit on EPA Authority to Protect Human Health & Environment**

- Moved this provision from for “Emergencies” section, ¶ 61

CD Section XV: Covenants by Settling Defendants

- **Covenants**

- Combined CERCLA/RCRA covenant with Constitution/Tucker Act/EAJA covenants, ¶ 62
- Narrowed the scope so they don't apply to unrelated matters (e.g., tort claims, government contract claims) ¶ 62

- **Reservation**

- Streamlined to mirror the U.S.'s streamlined reservation, ¶ 63
- Clarified that reservation applies to lawsuits and orders after the "Effective Date", ¶ 63

- **De minimis/Ability to Pay (ATP) waiver**

- Scope of waivers of claims against parties who in the future enter into de minimis and ATP settlements is defined by the scope of the covenant that EPA grants the settlers in those future settlements, ¶ 64
- Clarified settlers' right to comment on any such future settlement, ¶ 64

CD Section XVI: Effect of Settlement/Contribution

Contribution Protection

- Several provisions combined into one paragraph, ¶ 70
- Clearer references to specific reservations, ¶ 70

Res Judicata

- Grammatical changes – “ ... claim preclusion (res judicata), issue preclusion (collateral estoppel) ... ”, ¶ 72

CD Section XVII: Records

Settling Defendants Certification

- New language about implementation of a litigation hold in lieu of requirement that settlers certify they did not dispose of any records, ¶ 74

Confidential Business Information (CBI)

- New requirement that Settling Defendants stamp each page 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, ¶ 79

CD Section XVIII: Notices and Submissions

- Increased emphasis on emailing documents
- Added a sentence that addresses issue of date of receipt of emailed notices




Statement of Work: Enhanced Community Involvement Provisions

- Consistent with Administrator Reagan's prioritization of EPA's commitment to the protection of communities disproportionately impacted by pollution or which have environmental justice concerns, the workgroup developed new community involvement and related provisions for the revised SOW
- The new SOW provisions are anchored in the ideas outlined in the Office of Enforcement and Compliance Assurance July 1, 2021, memo, [Strengthening Environmental Justice Through Cleanup Enforcement Actions](#).


SOW Section 2: Community Involvement

- **EPA and Settling Defendants**
 - Added more opportunities to work together when presenting cleanup work implementation plans to communities at and around Superfund sites, ¶2.2(b)-(c)
- **Settling Defendants**
 - Prepare and provide informational materials to EPA suitable for the public based on EJ Screen information, ¶2.2(d)
 - Provide translations based on dominant language of community members, ¶2.2(d)
- **EPA**
 - Post EPA/Settling Defendants' generated information and documents on Superfund site-specific web pages, social media, or local and mass media, and stages of cleanup work and schedules for expected completion dates, ¶2.2(d)


SOW Section 4.2: Institutional Controls

- Moved ICs from Supporting Deliverables section to Remedial Design section in order to accelerate IC implementation
 - Added language about monitoring ICs and implementing them as soon as feasible and soliciting input from affected communities
 - Procedures for periodic review of ICs and development of alternative ICs if original ICs did not have intended effect
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SOW Section 8.7(e): Sitewide Monitoring Plan – Expedited Data

- New language re: Settling Defendants providing a plan for immediately providing EPA unvalidated data that exceed removal management levels or three times remedial cleanup levels, ¶ 8.7(e)(7)
 - Plan to expedite sampling and analysis in community areas including procedures to communicate sampling results to affected communities, ¶ 8.7(e)(8)
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SOW Section 8.7(f): Community Impacts Mitigation Plan

- Site specific plan to address and monitor collateral impacts cleanup work - noise, traffic, odors
 - Communicate validated remedy implementation monitoring data
 - Make adjustments during cleanup phase to further reduce and manage impacts to affected community areas
 - Structure cleanup work contracts to allow more local business participation to mitigate potential economic effects on community
 - Consistent with [Superfund Community Involvement Handbook](#), pages 53-56, March 2020
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Macros

- 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”
 - Text for other situations (e.g., “OU” covenant, State/Settling Federal Agency participating, single settler, Superfund Alternative Approach site) is designated hidden by default
 - Drafting attorneys can use macros in the control panel to customize the document as needed
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Macro Control Panel

CONTROL PANEL			
Field	Current Setting	Run this macro to change to:
Covenant	Site	Ctrl–Alt–O	OU
State	No	Ctrl–Alt–T	Yes
SFA(g)	No	Ctrl–Alt–G	Yes
No. of Settlers	Multiple	Ctrl–Alt–1	One
Site Type	NPL	Ctrl–Alt–L	SAA(l)
MSW	No	Ctrl–Alt–M	Yes
Prepayment	No	Ctrl–Alt–Y	Yes
Disbursement	No	Ctrl–Alt–B	Yes
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.)		

EPA Resources

- EPA's Cleanup Enforcement Model Language and Sample Documents Database ("Models Database")
<https://cfpub.epa.gov/compliance/models/>
- RD/RA CD model document and resource materials
https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81
- RD/RA CD SOW model document and resource materials
https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=543



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