



Toxics Cleanup Program Policy

Policy 520B

Resource Contact: Policy and Technical Support Staff *Effective:* January 6, 2006
References: RCW 70.105D.040(4)(a) *Revised:* New
See additional references at the end of this policy
Replaces: Interim Policy 500D

Policy 520B *De minimis* Contribution Settlements

Purpose: The purpose of this policy is to provide Ecology staff with guidance on the use of *de minimis* settlements under RCW 70.105D.040(4)(a).

Background: The Model Toxics Control Act (MTCA) provides for *de minimis* settlements with potentially liable persons (PLPs) at sites where the amount of contamination contributed by the PLP is "insignificant in amount and toxicity". The document mandated by MTCA for *de minimis* settlements is a consent decree. *De minimis* settlements are typically used by Ecology at sites with multiple PLPs where one or more of the larger contributors to the site is taking the lead on negotiations/remedial actions. *De minimis* settlements also help to reduce administrative costs. *De minimis* settlements can be based on either a cash payment or agreement to perform a portion of the cleanup work, or a combination of both. In most cases, it makes sense to cash out the smallest contributors to reduce the number of PLPs involved in the details of the cleanup. This policy focuses in particular on how cash payments will be considered.

1. Definition of Key Terms.

De minimis: Insignificant in amount and toxicity.

Premium: The term premium payment refers to a risk-sharing method, similar to an insurance premium. The State's risk for providing a potentially liable person (PLP) with an early release from liability is offset by a payment in excess of the PLP's projected share of the estimated cost to complete the remedy. The greater the site-specific uncertainty regarding remedial costs, the larger the premium should be.

2. Ecology Maintains Discretion in Settling with PLPs Whose Contribution is *De minimis*.

Ecology retains discretion to decide on a case-by-case basis whether it is appropriate to pursue a *de minimis* settlement. Under RCW 70.105D.040(4)(a), a *de minimis* settlement may be entered into only if all of the following conditions are met:

- A. The proposed settlement would lead to a more expeditious (faster) cleanup of hazardous substances;
- B. The proposed cleanup complies with the MTCA cleanup standards and with the requirements in any outstanding orders previously issued by the department for the site;

- C. The settling PLP's contribution of hazardous substances released, or threatened to be released, at the site is insignificant in amount and toxicity; and,
- D. The settlement is practicable (feasible) and is in the public interest.

Factors to consider when evaluating the appropriateness of a *de minimis* settlement are identified in appendix A.

3. The Potentially Liable Person (PLP) May Initiate a *De minimis* Settlement.

If a potentially liable person (PLP) requests a *de minimis* settlement and Ecology agrees to proceed, Ecology will follow the procedures for negotiating a consent decree as found in Chapter 173-340 WAC. See #7 below for submittal requirements for *de minimis* settlements.

If there are multiple *de minimis* PLPs, Ecology should consider the option of encouraging the PLPs to organize and settle as a group to reduce administrative burden.

All *de minimis* settlements must be approved by the Office of Attorney General.

4. *De minimis* Settlements Will be Considered Only for Sites at Which Ecology is Ready to Proceed with Remedial Action.

Because *de minimis* settlements can take significant resources to process, Ecology will negotiate a *de minimis* settlement only for sites ready to proceed with investigation or cleanup of the site. This means Ecology will negotiate *de minimis* settlements only when it is prepared to allocate staff and Attorney General resources to the site beyond that needed for the *de minimis* settlement. There should not be an extended time frame from the date a *de minimis* settlement is reached and investigation or cleanup is to begin at a site. Further, negotiations for a *de minimis* settlement should not begin until Ecology has issued a potentially liable person status letter to the PLP seeking the *de minimis* settlement (see WAC 173-340-500).

5. A *De minimis* Settlement is Applicable at Only One Site.

A *de minimis* settlement pertains to only one contaminated site, and only the contaminant(s) addressed in the consent decree. Liability at any other site(s) or for other contaminants, requires separate action.

6. PLPs Must Provide Information to Demonstrate Their Eligibility for *De minimis* Settlements.

Because *de minimis* settlements are a unique type of consent decree, the submittal requirements for consent decrees in WAC 173-340-520(a) and (b) are not entirely relevant. In lieu of submitting that information but to still demonstrate their eligibility for a *de minimis* settlement, potentially liable persons (PLPs) seeking such a settlement should submit the information listed below to Ecology. Where the PLP is a small business that does not have the resources to gather all of this information OR where Ecology is initiating the settlement discussions, Ecology staff may need to help compile this information to facilitate the settlement process.

Relevant Information Normally Required for a Consent Decree:

- A. The facility for which the settlement is proposed;
- B. A proposed schedule for negotiations and any special schedule considerations;
- C. The proposed settlement offer (proposed cash payment or other method of equal value);
- D. Information demonstrating how the settlement will expedite site cleanup;
- E. A waiver of the procedural requirements of WAC 173-340-500 and acceptance of PLP status for the purposes of settlement; and
- F. Names of other persons who the person has reason to believe may be PLPs at the facility.

Information Unique to *De minimis* Settlements:

- A. The estimated amount (either volume or weight) of the hazardous substance(s) contributed by the PLP seeking the *de minimis* settlement and documentation of the basis for this estimate.
- B. The reason(s) why the PLP believes the amount in A, above is insignificant compared to the contribution of other PLPs at the site.
- C. Information on the toxicity of the hazardous substance(s), including:
 - relevant cleanup standards
 - unique testing requirements, if any
 - likely remediation requirements unique to the substances, if any.
- D. The reason(s) why the PLP believes the toxicity, testing and remediation requirements for the hazardous substance(s) is insignificant compared to the contribution of other PLPs at the site.
- E. The PLP's participation in the operation of the site.
- F. Estimated remedial action costs for the site, including those costs identified for the hazardous substances contributed by the PLP seeking a *de minimis* settlement. The estimate should be based on direct and indirect costs, plus any applicable interest for the following remedial action phases:
 - pre-remedial investigations;
 - remedial investigation/feasibility study and selection of cleanup action; and,
 - site cleanup costs (including design, construction, operation, and monitoring of cleanup actions).

7. *De minimis* Settlements May be Appropriate During Investigative Phases.

Ecology may enter into a *de minimis* settlement prior to the Remedial Investigation/Feasibility Study (RI/FS) phase. However, due to the limited amount of information that is usually available at the

early stages of remedial action and the uncertain nature of future costs at a site, potentially liable persons (PLPs) who enter into a *de minimis* settlement should be required to pay a larger premium.

8. Calculation of PLP Contribution.

The first step in any *de minimis* settlement should be to come to agreement with the potentially liable person (PLP) on the amount the *de minimis* PLP is willing to pay. This should be done before any time is dedicated to negotiating the terms of the settlement in the consent decree.

Calculation of a *de minimis* PLP's contribution to site remedial actions can be based on a variety of approaches. The intent is to derive an estimate of how much the PLP's hazardous substances have contributed to the cost of remedial actions at the site.

For simplicity, the PLP's percent of volume or weight of waste materials disposed of at the site is often used for these calculations. Other techniques could include factoring in extra expenses due to:

- the uniqueness of the PLP's waste (e.g., additional analytical, investigative, treatment or removal costs);
- the PLP's waste's toxicity relative to other wastes at the site; or
- the type of media contaminated; or, some combination of these methods.

Use EPA guidance, as appropriate, to assist in conducting these calculations (see Appendix A). Make sure the calculations documenting the basis for the settlement amount are retained in the site file and summarized in the consent decree.

Assign a premium based on the uncertainty of the cost of cleanup. The greater the site-specific uncertainty regarding remedial costs, the larger the premium should be. Suggested premiums are as follows:

<u>Stage of Remedial Action</u>	<u>Suggested Premium*</u>
Before draft feasibility study	Increase settlement by a factor of 10 due to high level of uncertainty
Feasibility study (FS)	50% <u>or</u> contingency factor used in FS cost estimates
Remedial design	25% <u>or</u> contingency factor used in design cost estimate

***NOTE:** This is for general guidance only. Actual premiums could vary considerably from site to site based on the level of uncertainty in the estimate of the PLP's contribution, whether a remedy has been selected, the level of uncertainty in remedial action costs, and other site-specific factors.

Below is an example approach for calculating a *de minimis* PLP's contribution based on a volumetric contribution:

Example *de minimis* contribution calculation

Assume: Past costs = \$90,000
 Future estimated costs = \$3,000,000
 Premium = 50% based on uncertainty of future costs

		PLP A	PLP B
Volumetric Share		0.5%	0.9%
Ecology and AG Past Costs	\$90,000		
% Share of Past Costs = (Past Costs) x (Volumetric Share)		\$450	\$810
Future Costs	\$3,000,000		
% Share of Future Costs = (Future Costs) x (Volumetric Share)		\$15,000	\$27,000
% Premium	50%		
Premium charge = (Premium) x (Future Costs)		\$7,500	\$13,500
Total Amount of Settlement		\$22,950	\$41,310

- A. Compile costs incurred at the site to date (past costs). Make sure to include costs incurred by Ecology and the Office of Attorney General in negotiating and preparing the *de minimis* consent decree.
- B. Estimate future costs of anticipated remedial actions at the site. Make sure to include all costs of additional site investigations, cleanup, operation and maintenance, post-cleanup monitoring and evaluation, and administrative oversight costs.
- C. Multiply the PLP's volumetric percentage by the total past costs. This is the PLP's share of past costs.
- D. Multiply the PLP's volumetric percentage by total estimated future costs. This is the PLP's share of future costs.
- E. Multiply 'D' above by the premium, as appropriate. For example, a premium of 50% would provide a multiplier of 0.5, 100% would equal 1.0.
- F. As applicable, add 'D', 'E' and 'F' above to arrive at the PLP's total cost share.

9. A *De minimis* Consent Decree Containing a Covenant Not to Sue Must Include a Reopener Clause.

The purpose of the reopener clause is to protect the citizens of the State of Washington from additional remedial action expenses in the event that factors unknown at the time of settlement are discovered (RCW 70.105D 040(4)(c)). The reopener clause differs from the premium in that a

reopener pertains to newly discovered information, whereas premiums pertain to existing costs that may have been underestimated. For example, while the premium typically addresses the risk of cost overruns due to incomplete information about the costs of cleanup or inflation, the reopener would address new information about the amount or types of waste the PLP disposed of at the site.

10. Use of *De minimis* Settlement Funds.

That portion of the settlement reimbursing past costs shall be deposited in the State Toxics Control Account.

For that portion of the settlement intended to cover future site remedial action costs (including any premium):

- Deposit the funds in a trust account specifically established for the site. Ecology must receive approval from the Office of Financial Management to establish a trust account. The Site Manager should contact the Toxics Cleanup Program's lead budget staff person for assistance in establishing a trust account.
- For small settlements where it is not practical to establish a trust account due to the administrative costs of such an account, deposit the monies in the State Toxics Control Account. These funds should be earmarked for the site during the agency budget process. Ideally, the funds would be identified in the State's capital budget, to enable the funds to be dedicated to the site and carried over in future fiscal years.

11. The *De minimis* Consent Decree Shall Include a Reservation Of Rights.

All *de minimis* consent decrees shall include a provision which reserves Ecology's rights on the following issues:

- A. Liability resulting from a settling party's failure to comply with the terms of the settlement (e.g., non-payment of money and other obligations);
- B. Liability for natural resource damages;
- C. Criminal liability; and
- D. Any claim or cause of action not expressly included in the covenant not to sue.

Approved.



James J. Pendowski, Program Manager
Toxics Cleanup Program

Policy Disclaimer: This policy is intended solely for the guidance of Ecology staff. It is not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the state of Washington. Ecology may act at variance with this policy depending on site-specific circumstances, or modify or withdraw this policy at any time.

Appendix A: Factors to Consider for *De minimis* Settlements (1)

Will the Cleanup be expedited by the Settlement?

- The proposed schedule for negotiations and any special schedule considerations. Extended negotiations for *de minimis* settlements should be avoided.
- The proposed settlement offer (proposed cash payment or other method of equal value). Is the offer of significant value compared to the time that will need to be invested to process the settlement? Is the offer commensurate with the potentially liable person's (PLP's) ability to pay?
- Is Ecology ready to dedicate staff resources to the site? There should not be an extended time frame from the date a *de minimis* settlement is reached and remedial action is to begin at a site.
- Has the *de minimis* PLP provided names of other persons who the person has reason to believe may be PLPs at the facility?
- Is the *de minimis* PLP willing to waive the procedural requirements of WAC 173-340-500 and accept of PLP status for the purposes of settlement?
- Would there be significant savings in time spent on process and logistics by settling with the *de minimis* PLP?

Will the Settlement Facilitate Compliance with Cleanup Standards?

- Will the extra funds facilitate compliance with the Model Toxics Control Act (MTCA) cleanup standards?

Will the Settlement Comply with any Outstanding Ecology Order?

- If there is any MTCA order outstanding at the site, will the settlement move cleanup forward in a manner that complies with the order?

Amount of Hazardous Substance(s) Contributed by *De minimis* PLP

- How complete are the records for the estimated amount (either volume or weight) of the hazardous substance(s) contributed by the *de minimis* PLP and other PLPs at the site?
- Does the estimate of the *de minimis* PLP's contribution vs. other PLPs at the site appear reasonable based on observations at the site and knowledge of the processes that generated the wastes?
- Are the *de minimis* PLP's reason(s) why they believe their amount is insignificant compared to the contribution of other PLPs at the site reasonable?

(This list continues on the next page)

(1) NOTE: This is not intended to be a comprehensive list of all factors that need to be considered.

Toxicity of Hazardous Substance(s) Contributed by *De minimis* PLP

- Are the *de minimis* PLP's hazardous substances driving the site cleanup? Consider the relevant cleanup standards and applicable relevant and appropriate requirements (ARARs) for the *de minimis* PLP's wastes compared to other materials at the site
- Are there any additional testing requirements (either in number of hazardous substances needing to be tested or added complexity of analytical protocols) as a result of the *de minimis* PLP's wastes?
- Does the *de minimis* PLP's waste result in more soil or ground water needing to be cleaned up than would otherwise be required? For example, if the *de minimis* PLP's waste was more mobile than other wastes at the site, resulting in a larger area of ground water contamination needing remediation, even a small amount might significantly increase cleanup costs.
- Does the *de minimis* PLP's waste result in unique or additional remediation requirements? For example, if the *de minimis* PLP's waste results in having to switch from a relatively inexpensive vapor extraction system to a more expensive dig and haul remedy, even a small amount might significantly increase cleanup costs.
- Does the *de minimis* PLP's waste result in additional impacted medium? For example, due to the *de minimis* PLP's waste volatility, vapors become an issue at the site that wouldn't have had vapor concerns if the *de minimis* PLP's waste had not been disposed of at the site.

Other

- Did the *de minimis* PLP take precautions to prevent a release?
- Did the *de minimis* PLP have knowledge of the release but continue to dispose of wastes at the site?
- Did the *de minimis* PLP participate in the operations at the site? Direct the site operator to take actions that exacerbated the release?
- Could the PLP likely qualify for an exemption or defense to liability under MTCA (e.g. innocent purchaser, holder of security interest, plume clause defense, etc.)?

(1) NOTE: This is not intended to be a comprehensive list of all factors that need to be considered.

Appendix B: Resources

1. Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De minimis* Settlements under Section 122(g) (1) (B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property; USEPA OSWER Directive 9835.9; June 6, 1989
<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/liab-landownr-mem.pdf>
2. Methodologies for Implementation of CERCLA section 122(g) (1) (A) *De minimis* Waste Contributor Settlements; USEPA OSWER Directive 9834.7-1B; Dec. 20, 1989
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cer122-demin-rpt.pdf>
3. Methodology for Early *De minimis* Waste Contributor Settlements under CERCLA Section 122 (g) (1) (A); USEPA OSWER Directive 9834.7-1C; June 2, 1992
<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/demin-sec122-rpt.pdf>
4. Streamlined Approach for Settlements with *De minimis* Waste Contributors under CERCLA Section 122 (g) (1) (A); USEPA OSWER Directive 9834.7-1D; July 20, 1993
<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/app-deminimis-rpt.pdf>
5. Guidance on Premium Payments in CERCLA Settlements; USEPA OSWER Directive 9835.6; November 17, 1988
<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/prem-settle-mem.pdf>
6. Overview of Ability to Pay Guidance and Models; USEPA Office of Site Remediation and Enforcement Fact Sheet; May, 1995
<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/oviview-atp-rpt.pdf>
7. Standardizing the *De minimis* Premium; USEPA Office of Site Remediation Enforcement; July 7, 1995 Memorandum from Bruce Diamond to Waste Management Division Directors
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/deminimis-prem-mem.pdf>
8. General Policy on Superfund Ability to Pay Determinations; USEPA Office of Enforcement and Compliance Assurance; September 30, 1997
<http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/genpol-atp-rpt.pdf>
9. Interim Guidance on the Ability to Pay and *De minimis* Revisions to CERCLA 122(g) by the Small Business Liability Relief and Brownfields Revitalization Act; May 17, 2004
<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/atp-demin-122g-04.pdf>
10. PRP Search Manual, Chapter 4.5-Performing Ability to Pay Determinations; USEPA Office of Enforcement and Compliance Assurance; September 2003
<http://www.epa.gov/Compliance/resources/publications/cleanup/superfund/prpmanual/prp-search-man-cmp.pdf>