



Toxics Cleanup Program

Policy 520C: *De Minimis* Consent Decrees

Established: January 6, 2006

Revised: December 30, 2016

Contact: Policy and Technical Support Unit, Headquarters

Purpose: This Policy provides Ecology staff guidance on when and how to exercise their authority under the Model Toxics Control Act to agree to a *de minimis* consent decree (settlement) with a potentially liable person.

References: [RCW 70.105D.040](#) (4)
[RCW 70.105D.130](#)
[WAC 173-340-510](#)
[WAC 173-340-520](#)
[WAC 173-340-600](#) (10)
[TCP Policy 520A: Consent Decrees](#)
[Ecology Executive Policy 21-03: Managing the Cleanup Settlement Account](#)
[Sediment Cleanup User's Manual II](#)

Attachments: A – *De Minimis* Settlement Factors
B – *De Minimis* Settlement Resources

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.

Approved by:

James J. Pendowski, Program Manager
Toxics Cleanup Program

Accommodation Requests: To request ADA accommodation, including materials in a format for the visually impaired, call Ecology's Toxics Cleanup Program at 360-407-7170. Persons with impaired hearing may call Washington Relay Service at 711. Persons with speech disability may call TTY at 877-833-6341.

Purpose and Applicability

The Model Toxics Control Act (MTCA) authorizes the Department of Ecology (Ecology) and the Attorney General to agree to *de minimis* settlements with a potentially liable person (PLP) at contaminated sites where the amount of contamination contributed by the PLP is “insignificant in amount and toxicity.” A settlement agreement must be entered as a consent decree issued by a court of competent jurisdiction. The settlement agreement will include protection from claims for contribution regarding matters addressed in the settlement, and may include a covenant not to sue ([RCW 70.105D.040](#)(4) and [WAC 173-340-520](#)).

De minimis settlements are typically used by Ecology at contaminated sites where there are multiple PLPs and one or more of the larger site contributors is taking the lead. *De minimis* settlements also help to reduce administrative costs. *De minimis* settlements can be based on a cash payment, an 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 site contributors to reduce the number of PLPs involved in the details of the cleanup.

This Policy provides Ecology staff guidance on when and how to exercise this authority, and focuses on how cash payments will be considered. For the purposes of this Policy, the following definitions apply:

- a. “*De minimis*” means insignificant in amount and toxicity.
- b. “Premium” means a risk-sharing method, similar to an insurance premium. The State’s risk for providing a 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.

For general guidance on entering into a consent decree, see [Policy 520A](#). For additional guidance related to sediment cleanups, see the [Sediment Cleanup User’s Manual II](#).

1. 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 negotiate or enter into 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 cleanup standards and the requirements in any outstanding orders previously issued by Ecology 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.
- d. The settlement is practicable (feasible) and in the public interest.

Ecology will consider the factors listed in **Attachment A** when evaluating the appropriateness of a *de minimis* settlement. The list is not intended to be a comprehensive list of all factors that need to be considered.

2. PLP or Ecology may initiate negotiations.

Negotiations for a *de minimis* consent decree may be initiated by either a PLP or Ecology. Ecology will follow the procedures for requesting and negotiating a consent decree in [WAC 173-340-520](#) and [Policy 520A](#). See Section 3 of this Policy 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 Attorney General's Office. See Policy 520A.

3. PLP must provide information to demonstrate eligibility.

Because *de minimis* settlements are a unique type of settlement, the submittal requirements for entering negotiations in [WAC 173-340-520](#)(1)(a) and (b) are not entirely relevant or sufficient. To demonstrate eligibility for a *de minimis* settlement, PLPs must submit the information listed below. If the PLP is a small business that does not have the resources to gather all information or if Ecology initiates negotiations, staff may need to help compile the information to facilitate the settlement process.

a. Information required for any settlement

The request must include the following information, which is required to enter negotiations for any type of settlement:

- i. The facility for which the settlement is proposed.
- ii. A proposed schedule for negotiations and any special schedule considerations.
- iii. The proposed settlement offer (proposed cash payment or other method of equal value).
- iv. Information demonstrating how the settlement will expedite site cleanup.
- v. A waiver of the procedural requirements of WAC 173-340-500 and acceptance of PLP status for the purposes of settlement.

- vi. Names of other persons who the person has reason to believe may be PLPs at the facility.

b. Information required for *de minimis* settlement

The request must include the following additional information:

- i. The estimated amount (either volume or weight) of the hazardous substances contributed by the PLP seeking the *de minimis* settlement, and documentation of the basis for the estimate.
- ii. The reasons why the PLP believes the estimated amount is insignificant compared to the contribution of other PLPs at the site.
- iii. Information on the toxicity of the hazardous substances, including:
 - Relevant cleanup standards.
 - Unique testing requirements, if any.
 - Likely remediation requirements unique to the substances, if any.
- iv. The reasons why the PLP believes the toxicity, testing, and remediation requirements for the hazardous substances are insignificant compared to the contribution of other PLPs at the site.
- v. The PLP's participation in the operation of the site.
- vi. Estimated remedial action costs for the site, including the 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.
 - Cleanup (including design, construction, operation, and monitoring of cleanup actions).

4. Before entering negotiations, Ecology must be ready to proceed with remedial actions.

Because negotiating a *de minimis* settlement can take significant resources, Ecology will not enter negotiations with a person unless Ecology has identified the person as a PLP and Ecology is ready to proceed with the investigation or cleanup. This means Ecology will not enter negotiations unless it is prepared to allocate staff and Attorney General resources to both negotiate the settlement and implement remedial actions. There should not be an extended time frame between entering a settlement and starting remedial actions.

5. Ecology may enter *de minimis* settlement before remedial investigation and feasibility study.

Ecology may enter into a *de minimis* settlement before the remedial investigation and feasibility study. However, due to the limited amount of information that is usually available at such an early stage and the uncertain nature of future costs at a site, PLPs who enter into a *de minimis* settlement early should be required to pay a larger premium.

6. *De minimis* settlement applies only to one contaminated site.

A *de minimis* settlement applies only to one contaminated site, and only the contaminants addressed in the settlement. Liability at any other sites, or for other contaminants, requires separate action.

7. Determining PLP contribution and assigning premium.

The first step in any *de minimis* settlement negotiation should be to come to agreement with the PLP on the amount the 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.

a. Calculating contribution

Calculation of a 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 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;
- The type of media contaminated; or,
- Some combination of these methods.

For assistance in conducting these calculations, use guidance developed by the U.S. Environmental Protection Agency (**see Attachment B**), as appropriate.

Make sure the calculations documenting the basis for the settlement amount are retained in the site file and summarized in the consent decree.

b. Assigning premium

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:

Remedial Action Phase	Suggested Premium ¹
Before feasibility study	Increase settlement by factor of 10 due to high level of uncertainty
Feasibility study	50% <u>or</u> contingency factor used in feasibility study cost estimates
Remedial design	25% <u>or</u> contingency factor used in design cost estimate

c. Example of *de minimis* contribution calculation

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

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

Steps:

- i. Determine 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.

¹ 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.

- ii. 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.
- iii. Multiply the PLP's volumetric percentage by the total past costs. This is the PLP's share of past costs.
- iv. Multiply the PLP's volumetric percentage by total estimated future costs. This is the PLP's share of future costs.
- v. Multiply value calculated under Step 4 by the premium, as appropriate. For example, a premium of 50% would provide a multiplier of 0.5, and a premium of 100% would equal 1.0.
- vi. Add the values calculated under Steps 3 through 5, as applicable, to arrive at the PLP's total cost share.

8. Ecology will use boilerplate when drafting *de minimis* settlement.

Ecology is developing boilerplate *de minimis* consent decrees for cash-out and for remedial action. For more information, contact the Assistant Attorney General assigned to the site. Ecology will use the applicable boilerplate when drafting a *de minimis* consent decree. The Cleanup Project Manager may not alter the boilerplates without consulting with their Section Manager and the assigned Assistant Attorney General.

9. *De minimis* settlement containing covenant not to sue will include 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 at the site.

10. *De minimis* settlement will include reservation of rights.

All *de minimis* consent decrees will include a provision that 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.
- d. Any claim or cause of action not expressly included in the covenant not to sue.

11. Ecology will deposit receipts from *de minimis* settlement in Cleanup Settlement Account.

Ecology will deposit receipts from a *de minimis* settlement in the Cleanup Settlement Account (CSA) for future remedial actions, if agreed to and directed in the settlement. If the settlement does not direct receipts into the CSA, then the receipts must be deposited into the State Toxics Control Account (STCA) ([RCW 70.105D.130\(2\)\(a\)\(i\)](#) and (3)).

Before entering into a *de minimis* settlement, contact the Toxics Cleanup Program's Financial Services Manager to determine whether it is appropriate to direct receipts from the settlement into the CSA. For guidance on establishing, tracking, and dispersing funds under the CSA, see [Ecology Executive Policy 21-03](#).

References

Hazardous Waste Cleanup—Model Toxics Control Act. WASH. REV. CODE § Chapter 70.105D RCW. (2013). Retrieved from: <http://apps.leg.wa.gov/RCW/default.aspx?cite=70.105D>

Model Toxics Control Act—Cleanup Regulation. WASH. ADMIN CODE § Chapter 173-340 WAC. (2013). Retrieved from: <http://apps.leg.wa.gov/wac/default.aspx?cite=173-340>

Washington State Department of Ecology. (n.d.). *Toxics Cleanup Program: Policies, procedures and implementation memoranda* [website]. Retrieved from: <http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>

Washington State Department of Ecology. (2008). Chapter 21: Financial Operations: Managing the Cleanup Settlement Account. (Ecology Executive Policy 21-03). In *Ecology policy and procedure manual*. Retrieved from: <http://teams/sites/EXEC/policies/PolicyDocuments/POL21-03.pdf> and <http://teams/sites/EXEC/policies/PolicyDocuments/Forms/Chapter.aspx> [internal SharePoint site].

Washington State Department of Ecology. (2015). *Sediment cleanup user's manual II* (SCUM II). (Ecology Publication No. 12-9-057.) Lacey, WA: Ecology, Toxics Cleanup Program. Retrieved from: <https://fortress.wa.gov/ecy/publications/summarypages/1209057.html>

Washington State Department of Ecology. (2016). *Toxics Cleanup Program Policy 520A: Consent decrees*. (Ecology Publication No. 16-09-067.) Lacey, WA: Ecology, Toxics Cleanup Program. Retrieved from: <https://fortress.wa.gov/ecy/publications/SummaryPages/1609067.html>

This page left intentionally blank.

Attachment A

De Minimis Settlement Factors

This page left intentionally blank.

De Minimis Settlement Factors

The Department of Ecology (Ecology) will consider the factors listed below when evaluating the appropriateness of a *de minimis* settlement. The list is not intended to be a comprehensive list of all factors that need to be considered.

Will the cleanup be expedited by the settlement?

- What is the proposed schedule for negotiations and any special schedule considerations? Extended negotiations for *de minimis* settlements should be avoided.
- What is the proposed settlement offer (proposed cash payment or other method of equal value)? Is the offer significant compared to the time needed 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 site?
- Is the *de minimis* PLP willing to waive the procedural requirements of [WAC 173-340-500](#) and accept status as a PLP 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 cleanup standards established under the Model Toxics Control Act (MTCA), [Chapter 70.105D RCW](#)?

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?

What amount of hazardous substances was contributed by the *de minimis* PLP?

- How complete are the records for the estimated amount (either volume or weight) of hazardous substances contributed by the *de minimis* PLP and other PLPs at the site?

- Does the estimate of the *de minimis* PLP's contribution versus 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 reasons why they believe their amount is insignificant compared to the contribution of other PLPs at the site reasonable?

What is the toxicity of the hazardous substances contributed by the *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 groundwater 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 groundwater 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 volatility of the *de minimis* PLP's waste, 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 factors

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

Attachment B

De Minimis Settlement Resources

This page left intentionally blank.

De Minimis Settlement Resources

The Department of Ecology (Ecology) may use the following resources when calculating the *de minimis* potentially liable person's (PLP's) contribution to the remedial action costs at a site. The resources were developed by the U.S. Environmental Protection Agency (USEPA).

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.
<https://www.epa.gov/sites/production/files/documents/liab-landownr-mem.pdf>
<https://www.epa.gov/enforcement/guidance-landowner-liability-under-section-107a1-cercla-de-minimis-settlements-under>
2. Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De minimis* Waste Contributor Settlements; USEPA OSWER Directive 9834.7-1B; December 20, 1989.
<https://www.epa.gov/sites/production/files/2013-09/documents/cer122-demin-rpt.pdf>
<https://www.epa.gov/enforcement/guidance-de-minimis-waste-contributor-settlement-methodologies>
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.
<https://www.epa.gov/sites/production/files/2013-09/documents/demin-sec122-rpt.pdf>
<https://www.epa.gov/enforcement/guidance-early-de-minimis-waste-contributor-settlements-methodology>
4. Streamlined Approach for Settlements with *De minimis* Waste Contributors under CERCLA Section 122(g)(1)(A); USEPA OSWER Directive 9834.7-1D; July 30, 1993.
<https://www.epa.gov/sites/production/files/2013-09/documents/app-deminimis-rpt.pdf>
<https://www.epa.gov/enforcement/guidance-de-minimis-waste-contributors-superfund-settlements-streamlined-approach>
5. Guidance on Premium Payments in CERCLA Settlements; USEPA OSWER Directive 9835.6; November 17, 1988.
<https://www.epa.gov/sites/production/files/2013-10/documents/prem-settle-mem.pdf>
<https://www.epa.gov/enforcement/guidance-premium-payments-superfund-settlements>
6. Overview of Ability to Pay Guidance and Models; USEPA Office of Site Remediation and Enforcement Fact Sheet; May 1995.
<https://www.epa.gov/sites/production/files/documents/ovrview-atp-rpt.pdf>
<https://www.epa.gov/enforcement/guidance-ability-pay>
7. Standardizing the *De minimis* Premium; USEPA Office of Site Remediation Enforcement; July 7, 1995 Memorandum from Bruce Diamond to Waste Management Division Directors.
<https://www.epa.gov/sites/production/files/2013-09/documents/deminimis-prem-mem.pdf>

<https://www.epa.gov/enforcement/guidance-standardizing-de-minimis-premium>

8. General Policy on Superfund Ability to Pay Determinations; USEPA Office of Enforcement and Compliance Assurance; September 30, 1997.
<https://www.epa.gov/sites/production/files/2013-09/documents/genpol-atp-rpt.pdf>
<https://www.epa.gov/enforcement/guidance-evaluating-ability-pay-civil-penalty-administrative-enforcement-actions>
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.
<https://www.epa.gov/sites/production/files/2013-09/documents/atp-demin-122g-04.pdf>
<https://www.epa.gov/enforcement/guidance-ability-pay-and-de-minimis-revisions-cercla-section-122g-2002-brownfield>
10. PRP Search Manual, Chapter 4.5-Performing Ability to Pay Determinations; USEPA Office of Enforcement and Compliance Assurance; September 2009.
<https://www.epa.gov/sites/production/files/documents/prp-search-man-cmp-09b.pdf>
<https://www.epa.gov/enforcement/report-prp-search-manual-2009-edition-2011-addendum>