

Department of Toxic Substances Control



FREQUENTLY ASKED QUESTIONS Regarding *De Minimis* Settlements for the BKK Class I Landfill Site

Version dated January 9, 2020

Have you been contacted by the California Department of Toxic Substances Control (DTSC) regarding your possible involvement with the BKK Class I Landfill? If the waste that you contributed to the site was minimal, you may be eligible to enter into a *de minimis* settlement with DTSC. These responses to frequently asked questions (FAQs) identify the relevant provisions of state and federal law, describe who potentially responsible parties are, and explain why a *de minimis* settlement may be to your advantage.

1. What is the HSAA?

The Carpenter-Presley-Tanner Hazardous Substances Account Act (“HSAA”), Health and Safety Code section 25300 et seq., provides DTSC with authority to ensure that public health and the environment are protected from the harmful effects of a release or threatened release of hazardous substances. The HSAA authorizes DTSC to take response actions necessary (e.g., cleanup of a site) when there may be an imminent and substantial endangerment because of a release or threatened release of hazardous substances. The HSAA also authorizes DTSC to compel a responsible party to conduct response actions at the site and/or to pay for response actions conducted by DTSC. (Health & Saf. Code, § 25358.3.) The HSAA and its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”), authorize DTSC to recover all costs it incurs in response actions from responsible parties. (Health & Saf. Code, § 25360; 42 U.S.C. § 9607.)

2. Who pays for cleanups?

In enacting the HSAA as the state counterpart to CERCLA, the California Legislature adopted Congress’ intent to “make the polluters pay” for the cost of cleanup. To achieve this goal, DTSC seeks to hold those parties who contributed to the contamination at a site responsible for the costs of cleanup. Such parties are required to help pay for the cleanup even if they acted in full accordance with the law at the time they disposed of the waste. As explained below, the HSAA authorizes DTSC to bring actions in court to require responsible parties to pay for or conduct the cleanup and also authorizes DTSC to settle with *de minimis* responsible parties outside of court.

3. How did I become a potentially responsible party?

“Potentially responsible parties” (“PRPs”) are parties who may be responsible for all or part of the contamination at a site. PRPs include individuals, businesses, local, state or federal governmental agencies, and other types of organizations. You may be identified as a PRP if you are:

- a current owner or operator of the site;
- a former owner or operator of the site during the period of disposal;
- a party that arranged for the treatment, disposal, or transportation of hazardous substances to the site;
- a party that transported hazardous substances to the site and selected the site for disposal.

If you fit one of these descriptions, you may be a PRP even if you were unaware that your waste was disposed of at the site, or you did not dispose of it yourself.

4. Who is the BKK Working Group?

The BKK Working Group (“BWG”) is a group of over 50 PRPs who agreed to conduct response actions at the BKK Class I Landfill and have entered into three separate consent decrees with DTSC. A PRP or group of PRPs, like the BWG, who has incurred cleanup costs at a site in accordance with a consent decree can sue other PRPs for contribution under Health and Safety Code section 25363(d) or section 113(f) of CERCLA.

5. What is a “*de minimis*” party?

A PRP who contributed only a very small amount of waste to a site may be considered a “*de minimis*” party when their contribution is minimal compared to other waste at the site. For example, an individual who contributed one percent or less of the waste at the site may be considered a *de minimis* party.

In recognition of their relatively small contribution of waste, and to help ensure that these *de minimis* parties do not get drawn into lengthy and expensive lawsuits, the HSAA authorizes DTSC to offer a special type of settlement to these types of parties called *de minimis* settlements. (Health & Saf. Code, § 25360.6.)

6. How does a PRP qualify for a “*de minimis*” settlement?

Whether and how a PRP qualifies for a *de minimis* settlement depends on a variety of site-specific factors. However, in general, a PRP may qualify for a *de minimis* settlement if:

- the amount of waste the PRP contributed is minimal in comparison to the other hazardous substances at the site;
- the toxic or other hazardous effects of the waste the PRP contributed are minimal in comparison to the other hazardous substances at the site; and
- the settlement is in the public interest and involves only a minor portion of the response costs at the site.

7. What are the benefits of a “*de minimis*” settlement?

DTSC often prefers to settle its claims against PRPs without resorting to expensive and time-consuming court action. Settlements save both time and money for all parties involved. By entering into a *de minimis* settlement with DTSC and the BWG, a *de minimis* settlor receives several benefits, including:

- Certainty – A *de minimis* settlement allows the settling party to resolve its liability for the site rather than carrying a liability of an unknown amount on its books.
- A Covenant Not to Sue – This settlement provision is a promise that DTSC will not bring any future legal actions against the settling party regarding response actions and response costs at the site. The BWG and its individual members will also provide a separate covenant not to sue.
- Contribution Protection – This settlement provision offers protection to the settling party from being sued for contribution by other PRPs at the site. Frequently, major waste contributors, such as the members of the BWG, will sue smaller waste contributors for contribution to recover their cleanup costs. A *de minimis* settlement protects the *de minimis* settlor from such contribution suits¹ and indicates DTSC’s determination that the settling party has paid its fair share.

Taken together, the covenant not to sue and contribution protection provisions provide *de minimis* settlers with the most certainty that DTSC can offer that their responsibilities to DTSC at the site are fulfilled, and that they are protected from future contribution actions related to those matters addressed by the settlement.

8. What other settlement provisions are important?

Although the amount a *de minimis* settlor pays varies from site to site, in general, the payment amount is calculated by combining a basic payment and a premium payment. The basic payment is based on the estimated costs to clean up the site and the amount of the *de minimis* party’s waste as a percentage of the total waste at the site.

- Premium - *De minimis* settlements also include a premium payment because the *de minimis* parties are receiving covenants not to sue before the remedy for the site is selected, and all response costs are known. At the BKK Class I Landfill, the premium payment protects DTSC and the BWG from the risk that the total costs will be much higher than expected.
- Certification – If you enter into a *de minimis* settlement with DTSC, you will be asked to certify that your waste contribution is the amount that you claim (e.g., the volume amount that the settlement payment is based upon). After the settlement is finalized, if new information indicates that your contribution is actually greater than you originally certified, the settlement may be deemed invalid.

In sum, accepting the *de minimis* settlement offer will resolve your liability from being required to conduct response actions and pay response costs incurred by DTSC, and the BWG and its individual members, in connection with the BKK Class I Landfill.

¹ You should note though, that a *de minimis* settlement may not be able to protect you from all future claims by other PRPs. A U.S. Supreme Court case has held that in certain situations, a PRP who incurs cleanup costs voluntarily can sue other PRPs under section 107(a)(4)(B) of CERCLA and seek to recover those costs. This type of claim may not be barred by the contribution protection provided by a settlement. (See *United States v. Atlantic Research Corporation* (2007) 551 U.S. 128, 127 S.Ct. 2331.) As applied to the BKK matter, that would only include PRPs that both incurred costs and are not members of the BWG at the time you enter into settlement with DTSC and the BWG, if any. Additionally, a *de minimis* party may not be protected from suits brought under other statutes such as the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901 et seq. (also known as the Resource Conservation and Recovery Act (RCRA)).