



**Newtown Creek Superfund Site:
CAG Meeting June 10, 2020. EPA
Approach to De Minimis, De
Micromis (and Ability to Pay) Parties**

De Minimis, De Micromis (and Ability to Pay) Parties

- Peripheral Party settlements include de minimis, de micromis and ability to pay settlements
- Authority: CERCLA or EPA Guidance
- Administrative Settlement or Judicial Settlement
- Participation of Department of Justice
- Settling Party: “Cash-out”
- Settling Party Receives United States Covenant Not to Sue for Response Costs (107) or for Work (106)
- Pursuant to CERCLA, Settling Party Becomes Entitled to Contribution Protection From Third Parties

De Minimis Settlement

- Statutory: 1986 SARA Amendments to CERCLA Section 122(g)
- Settlement with de minimis PRP may be available to:
 - Waste contributors, where
 - Both volume of waste and toxic effect are minimal compared to other waste at the site, and which settlement would apply to only a minor portion of response costs.

De Minimis Settlement

- Settlement based on comparative waste contributions. At Newtown Creek (and other sediment sites where waste is not part of a commercial transaction, cf. disposal facility, recycling business), waste-in is not tracked and difficult to develop waste-in information. Comparative waste contributions would be based on rough estimates (release activities at the property, pipes, time periods, rainfall data, paved versus unpaved surfaces, slope to waterbody for adjacent facilities; etc.).
- Landowners – Although mentioned in CERCLA, there is very high bar, equivalent to satisfying the Innocent Landowner (ILO) Defense thus, by policy, Landowner would seek ILO rather than de minimis settlement.

De Minimis Settlement

- PRP status: De minimis settling party must be a PRP
- Settlement based on fair allocable shares – based on relative waste contribution
- Presumptive Premium: Pre-ROD Early de minimis 100% Premium; Post ROD presumptive Premium of 50%.
- De minimis usually post-ROD when EPA would have information including : i) identity of de minimis and major party PRPs; ii) PRP contributions by volume and toxicity; iii) remedy cost.

De Minimis Settlement

- De Minimis settlement seeks PRP to pay “fair allocable share.” It is not a “discount” settlement program. Advantage to de minimis party is settling out and avoiding litigation and avoiding transaction costs.
- But, what if the de minimis party is a small business proprietor - and can not afford to pay its allocable de minimis Superfund share?

De Micromis Parties

- A de micromis party is one who has contributed miniscule amounts of waste to a Superfund site
- EPA/DOJ Guidance: De Micromis Settlement has roots in 1996 EPA/DOJ Guidance intended to discourage major party PRPs from suing or threatening suit in contribution litigation against de micromis waste contributors:
 - De micromis party: Less than 110 gallons of liquid waste or 200 pounds of solid waste.
 - Settle with EPA and get contribution protection that would insulate de micromis party against i) EPA claims (for cost recovery or CERCLA work obligation) and ii) PRP claims (for contribution claims)

De Micromis Parties

- Amendment to CERCLA 107(o). Brownfield amendments in 2002 largely enacted the 1996 policy into law. If qualified for exemption under CERCLA, a de micromis exempt party would not need to enter a settlement because such party would not be liable under CERCLA.
 - Statutory conditions for de micromis exemption: i) limitation on amount of waste sent to site (see prior slide); ii) at an NPL site; iii) all or part of disposal occurred before April 1, 2001
- De Micromis party not fitting completely under CERCLA 107(o) may still settle with EPA and get the equivalent liability protection. EPA would settle under its Guidance only if de micromis party had already been sued by other PRPs at a site, or faced concrete threat of litigation from PRPs.

Ability to Pay Settlement

- Added to CERCLA by 2002 SBLRBRA “Brownfields” Amendments.
- Prior to 2002, Ability to Pay (ATP) was based on EPA Ability to Pay Guidance and 2002 CERCLA amendment largely codified EPA Policy.
- ATP settlement seeks to avoid “undue financial hardship” for businesses and individuals.
- ATP could arise, for instance, where PRP believes that EPA’s proposal for de minimis settlement amount would jeopardize continuation of the de minimis party’s business.

Ability to Pay Settlement

- CERCLA 122(g)(7)(B): “In determining whether or not a demonstration is made under subparagraph (A) by a person, the President shall take into consideration the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.”
- ATP candidate would have the burden of establishing inability to pay based on financial information provided to EPA. EPA would analyze financial information in order to offer de minimis settlement.

Additional Resources

EPA Guidance Documents(Access Through Google Search)

De Minimis

1. **Interim Guidance on Settlement with de minimis Waste Contributors Under Section 122(g) of SARA (June 19, 1987)** <https://www.epa.gov/sites/production/files/2013-09/documents/demin-122g-settle-87.pdf>
2. **Standardizing the de minimis premium (July 7, 1995) (discussion of presumptive premiums and settlement reopeners)** <https://semspub.epa.gov/work/01/36086.pdf>

Ability to Pay

1. **Determining a Violator's Ability to Pay a Civil Penalty (1986)**
<https://www.epa.gov/sites/production/files/documents/civilpenalty-violators.pdf>
2. **General Policy on Superfund Ability to Pay Determinations - available at:**
<https://www.epa.gov/sites/production/files/2013-09/documents/genpol-atp-rpt.pdf>
3. **Guidance on Evaluating A Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action (June 29, 2015)** <https://www.epa.gov/sites/production/files/2015-06/documents/atp-penalty-evaluate-2015.pdf>

Additional Resources

De minimis and Ability to Pay

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, with modifications through April 2008)

See: <https://www.epa.gov/sites/production/files/2013-09/documents/atp-demin-122g-04.pdf>

Appendices to this Guidance include model EPA notices:

- Notice of Eligibility To Receive A De Minimis Party Settlement;
 - Approving Reduction In Settlement Amount Based On Inability To Pay
 - Basis Of Inability To Pay Determination (Review of Financial Documents Analyzed
 - Notice Of Ineligibility To Receive A De Minimis Party Settlement
 - Notice Denying Reduction In Settlement Amount Based On Inability To Pay
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Additional Resources

De Micromis

EPA DOJ Guidance Document Available at the following Link: Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties (PDF)(25 pp, 555 K, 11/6/2002)

CERCLA Section 107(o) Amended in 2002 to codify EPA/DOJ de micromis policy available at the following link:

<https://www.law.cornell.edu/uscode/text/42/9607>

QUESTIONS



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As of January 27, 2020 Newtown Creek Site Currently Identified PRPs

- Phelps Dodge Refining Corporation¹
- Texaco, Inc.¹
- BP Products North America Inc.¹
- The Brooklyn Union Gas Company d/b/a National Grid NY¹
- ExxonMobil Oil Corporation¹
- The City of New York²
- Simsmetal East LLC
- Consolidated Edison Company of New York, Inc.
- National Railroad Passenger Corporation (AMTRAK)
- American Premier Underwriters, Inc.
- Connell Limited Partnership
- The Long Island Railroad Company
- Motiva Enterprises, LLC
- Shell Oil Company
- Darling Ingredients Inc.
- Sunoco Entities:
 - Sunoco, Inc.; and
 - Energy Transfer, LP
- Harsco Corporation

1 Newtown Creek Group member and respondent under the OU1 RI/FS Consent Order

2 Respondent under the OU1 RI/FS Consent Order

Additional Statutory Resources: De Minimis

Statutory Resources: Excerpts from CERCLA 122(g) (Amended in 1986 and 2002)

De Minimis

CERCLA 122(g) DE MINIMIS SETTLEMENTS.—

(1) EXPEDITED FINAL SETTLEMENT.—Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 106 or 107 if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

Additional Statutory Resources De Mimimis

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance(2) COVENANT NOT TO SUE.—The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f).

(3) EXPEDITED AGREEMENT.—The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

Additional Statutory Resources: De Minimis

(4) CONSENT DECREE OR ADMINISTRATIVE ORDER.—A settlement under this subsection shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed \$500,000 (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) EFFECT OF AGREEMENT.—A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Additional Statutory Resources: Ability to Pay

Ability to Pay

CERCLA 122(g)

(7) REDUCTION IN SETTLEMENT AMOUNT BASED ON LIMITED ABILITY TO PAY.—

(A) IN GENERAL.—The condition for settlement under this paragraph is that the potentially responsible party is a person who demonstrates to the President an inability or a limited ability to pay response costs.

(B) CONSIDERATIONS.—In determining whether or not a demonstration is made under subparagraph (A) by a person, the President shall take into consideration the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues.

(C) INFORMATION.—A person requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the person to pay response costs.

(D) ALTERNATIVE PAYMENT METHODS.—If the President determines that a person is unable to pay its total settlement amount at the time of settlement, the President shall consider such alternative payment methods as may be necessary or appropriate.

Additional Statutory Resources: De Micromis

De Micromis added by CERCLA Section 107(o) by CERCLA “Brownfields” Amendment of 2002

(o) DE MICROMIS EXEMPTION.—

(1) IN GENERAL.—Except as provided in paragraph (2), a person shall not be liable, with respect to response costs at a facility on the National Priorities List, under this Act if liability is based solely on paragraph (3) or (4) of subsection (a), and the person, except as provided in paragraph (4) of this subsection, can demonstrate that—

(A) the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation); and

(B) all or part of the disposal, treatment, or transport concerned occurred before April 1, 2001.

(2) EXCEPTIONS.—Paragraph (1) shall not apply in a case in which—

(A) the President determines that—

(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

Additional Statutory Resources: De Micromis

(ii) the person has failed to comply with an information request or administrative subpoena issued by the President under this Act or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the facility; or

(B) a person has been convicted of a criminal violation for the conduct to which the exemption would apply, and that conviction has not been vitiated on appeal or otherwise.

(3) NO JUDICIAL REVIEW.—A determination by the President under paragraph (2)(A) shall not be subject to judicial review.

(4) NONGOVERNMENTAL THIRD-PARTY CONTRIBUTION ACTIONS.—

In the case of a contribution action, with respect to response costs at a facility on the National Priorities List, brought by a party, other than a Federal, State, or local government, under this Act, the burden of proof shall be on the party bringing the action to demonstrate that the conditions described in paragraph (1)(A) and (B) of this subsection are not met.