

Litigation Alert

January 2022

DTSC Makes 'De Minimis' Settlement Offers to BKK Site Potentially Responsible Parties

In recent months, the California Department of Toxic Substances Control (DTSC) has made "de minimis" "cash out" settlement offers to potentially responsible parties (PRPs) that allegedly sent waste to the BKK Class I Landfill Site in West Covina, California. In exchange for payment, DTSC is offering a covenant not to sue and contribution protection under the Comprehensive Environmental Response and Compensation Liability Act (CERCLA). The term "de minimis" is in quotes because the amounts demanded by DTSC range to as high as \$3 million, and the term "cash out" is in quotes because the settlements do not appear to resolve all potential liabilities. In evaluating whether to accept the offer, PRPs should consider various issues, including the following.

The offer effectively assumes that it could cost approximately \$2 billion to address environmental conditions at the BKK site. This is a staggering amount, particularly given that the BKK Working Group has been investigating the site for many years, much work has already been done and the site is stable. PRPs should consider whether this is a reasonable number on which to base a settlement.

Agencies typically impose a 100% cash-out premium to account for unknown risks at the early stages of site investigation when relatively little is known about the site and it is not possible to develop a reliable cost estimate. In this case, however, DTSC applied a 125% premium to its future cost estimate despite the fact that the site has been under investigation for years and there appears to be ample information available to develop a cost estimate. In addition, where a 100% premium is demanded, the settling parties are generally provided full protection against future claims. In this case, however settling parties will not be fully protected.



For example, it is unclear whether the proposed settlement will provide protection against claims related to per- and polyfluoroalkyl substances (PFAS), so-called forever chemicals, even though former landfills have been identified by the state as potentially significant sources of PFAS and these chemicals are now under intense scrutiny. Second, DTSC itself notes that settling parties may not be protected from future claims under Section 107 of CERCLA and the Resource Conservation Recovery Act (RCRA). Third, portions of the former BKK facility, including the Class III landfill, are not covered by the proposed settlement.

When evaluating whether to accept the offer, PRPs should consider whether the benefits outweigh the cost and risks. They should also consider whether there are alternatives to the current offer. Although DTSC states that it will not negotiate with parties that do not accept the offer, there may nevertheless be opportunities to negotiate with DTSC or the BKK Group. PRPs may also be able to join the BKK Group, in which case they would likely only be responsible for their fair share of costs, without a premium, though they would retain long-term liability and the risk that costs could exceed DTSC's

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estimate. Parties that reject the offer and do not reach another settlement may have to incur attorneys' fees and other costs. There is a risk that DTSC could sue non-settlers on the basis of joint and several liability. It should be noted, however, that DTSC's share of costs is relatively small compared with the costs incurred and to be incurred by the BKK Group, and the BKK Group can only sue non-settlers under CERCLA for their equitable shares of response costs, and would not be entitled to recover a premium which, as noted above, constitutes a significant part of the proposed settlement.

In our experience, PRPs can more cost-effectively evaluate these kinds of issues and, if necessary, negotiate with the regulatory agencies or the private parties if they work together. We are in discussion with other PRPS and counsel about coordinating efforts. If you received an offer and would like assistance in evaluating the settlement and working with other parties, please contact [Albert Cohen](#).

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6847 REV1 01-14-2022