ATTACHMENT A
LSP Association (LSPA) Comments on
830 CMR 63.38Q.1: Massachusetts Brownfields Tax Credit (WORKING DRAFT)

Provided below are the LSPA's detailed comments on the above Working Draft document. The comments are organized by section.

Section	Comment
General	The purpose of the program is to encourage redevelopment of distressed land. As a result, the regulations should encourage cleanup and redevelopment through a generous process. Instead, these proposed regulations would create a restrictive and discouraging process.
General	The examples provided throughout the document should be in guidance, not regulations.
General	The regulations should interpret the statutory language to allow Brownfields Tax Credits (BTCs) to be issued even when some noncompliance has occurred that has been addressed by an NOV, ACO, or ACOP as long as the noncompliance does not affect the validity of the Permanent Solution or Remedy Operation Status (e.g., late filing of status reports, failure to determine nature and extent if resolved before PSS or ROS is filed).
	Section 1: Statement of Purpose, Outline of Topics, Effective Date
1a	"Remediates" in the Statement of Purpose doesn't align with the statutory language "achieves and maintains a permanent solution or remedy operation status in compliance with chapter 21E and the regulations adopted under that chapter". This language needs to be revised so that it does not suggest that a PSS or ROS achieved without remediation is ineligible.
1c	The effective date should be 30 days after the date the final regulations are issued instead of date of public comment draft. Otherwise, people submitting applications between the time the draft regulations are issued but before they are finalized cannot know what standard applies as public comment may cause (and indeed, when good comments are received, should cause) the proposed regulations to be changed before they are finalized.
	Section 3: General Rule
3	The LSPA strongly suggests replacing "certain costs for the purposes of remediation of contaminated property" with "costs related to the achievement of a Permanent Solution or Remedy Operations Status."

	Section 4: Net Response and Removal Costs; 15% of Assessed Value Requirement
4b	This section reduces the incentive to pursue responsible parties by making the Eligible Person reduce his or her recovery under the BTC dollar for dollar beginning with the first dollar received from a responsible party. As such, it is inconsistent with legislative intent as expressed in M.G.L. c. 21E to make the polluter pay, by reducing the incentive to seek such recovery. This could be avoided by limiting the provision to avoiding a windfall by the recipient of a BTC. If this provision remains: If an Eligible Person does seek recovery from a responsible party, the reduction of the BTC should not begin with the first dollar recovered but should be the net recovery: amount recovered after attorney's fees and other litigation costs. E.g., if the eligible person recovers $100,000 but spent $35,000 to achieve this recovery, the amount recovered should be $65,000.
4d	This section should not be limited to sites with "...one or more applications…." There are sites with PSSs where subsequent releases are found that fall under the MCP as new response actions.
4d	The LSPA does not agree with the statement that "the additional Net Response and Removal Costs associated with each such additional release must independently equal or exceed 15%...." There are times when two or more RTNs are linked together to form one combined site for an MCP cleanup. In those cases, <u>each</u> RTN should not need to meet the 15% threshold. Rather, the combined costs should be subject to the 15% threshold.
4e	Please make the following edits (in italics) so that sites where a prior BTC application was approved are not automatically shut out of the program. *"In cases where a Permanent Solution has been submitted that required an AUL...."* There are many PSS sites where work is performed after the original response actions for the purpose of removing an AUL.
4e	LSPA believes that the incremental cost to remove the AUL should not be required to meet 15% if the party performing the additional work was also the party that completed the original response actions and the combined costs meet the 15% threshold.
	Section 5: Eligible Costs
5a	Costs that are eligible should track costs that are recoverable under M.G.L. c. 21E, section 4: "necessary and appropriate." Instead, these regulations propose a higher standard – "direct and necessary" (as well as reasonable). This suggests that LSPs should have 20/20 vision from the outset to be able to limit the assessment work and ultimately remedial work in such a way as to avoid any extraneous effort. The LSPA strongly disagrees with the proposed regulatory language.
5a	The LSPA is seriously concerned about the possibility of DOR determining what are "reasonable costs". We urge DOR to delete reference to "reasonable"
5c.4	The use of the phrase "Contaminated Media" suggest that evaluation and monitoring of media that is below RCs is not recoverable. However, once you have a release, you need to evaluate the contaminants throughout the "site" until you achieve NSR, even in areas where the concentration dips below the RC. In addition, in some situations, it may be necessary to remediate to concentrations less than RCs. E.g. an industrial property may have an RCS-2 reporting threshold, however if residential use is a reasonably foreseeable use of the property, remediation to a more stringent standard will be required. This provision unnecessarily limits allowable costs especially in relation to assessment. Assessment should be required if necessary to determine nature and extent.

5c.5	Costs for a treatment system such as a vapor mitigation system should be Eligible Costs even if not required by the PSS or ROS, as long as appropriate under the MCP.

5c.5	Please make the following edits (in italics): "Costs associated with treatment systems such as vapor *mitigation* systems, *including telemetry*, active …"

5c.6	Costs associated with a cap or engineered barrier: This should also include other physical systems to prevent exposure (e.g., marker barrier and 3 feet of clean cover) that are required by the PSS or ROS – not just limited to 310 CMR 40.0442(4). See example 5, paving alone is not compliant with 310 CMR 40.0442(4) which requires compliance with the technical standards for hazardous waste landfills. (This reference should be to 310 CMR 40.0996(5) that provides the specifics for an engineered barrier, the 310 CMR 40.0442(4) citation refers more to RAM Plans). Rather than referring to the MCP specific requirement for an engineered barrier, delete "and as long as such cap or engineered barrier is in compliance with the MCP 310 CMR 40.0442(4), where applicable;". This is consistent with the wording under section (d) 4.

5c.7	Costs associated with the removal of either asbestos or lead paint to the extent such asbestos or lead paint has been released to the environment and such release has been reported to DEP: This should not be either "asbestos or lead paint". It should be changed to "asbestos and/or lead paint". Additionally, "and such release has been reported to DEP" should be deleted. The LSPA believes it should not be limited to releases that have been reported to DEP as lead paint is exempt from reporting under 310 CMR 40.0317 (8)(a) however, the PRP is still responsible for mitigating the risk. While it could still be reported, reporting adds cost to the remediation. Finally, the MCP considers asbestos reportable only if a pound has been released over a 24 hour period. This reporting condition does not apply to many sites where debris in urban fill may contain ACM, and therefore must be removed under regulations of the Bureau of Air and Waste at DEP. This debris that may contain ACM is considerably more expensive to remove and dispose of than urban fill, and could limit or curtail future development if found on a property. Therefore costs for removal of ACM debris in soil should be included under eligible costs regardless of reporting under the MCP.

5c.7	With regard to asbestos, the proposed regulations should allow as eligible costs the costs to comply with both the Massachusetts Contingency Plan 310 CMR 40.0000 (MCP) and DEP's Bureau of Air and Waste under 310 CMR 7.15.

5d.5, 5d.6, and 5d.7	Please make the following edits (in italics): " and (d) the LSP *submitted an Opinion* to DEP..." Delete "certified".

5d.5	Reference to disposal of groundwater: The LSPA believes that management ("disposal") of groundwater, whether contaminated or not, should be eligible if dewatering is required to excavate contaminated soil.

5d.5 and 5d.6	All assessment activities should be eligible costs as long as the assessment is part of response actions under the MCP to evaluate the nature and extent of a release or potential release to the environment. This is consistent with Section 5c.2, which includes all assessment costs as eligible costs.

5d.6 and 5d.7	Because there are no RCs for sediment, work to treat or dispose of contaminated sediment should be covered if required by a risk assessment. As noted above, assessment should be required if necessary to determine nature and extent.

5d.6 and 5d.7	Soils may require offsite storage, reuse, recycling/disposal to access Contaminated Media that requires offsite reuse/treatment/recycling/disposal. Although 5d.7 allows for "removal" costs, the regulations should clearly allow as eligible costs appropriate transportation, storage, and/or disposal costs.
5d.8	The LSPA suggests changing "to remove Contaminated Media under such buildings or structures" to "under the MCP."
5d.14b	The LSPA suggests the following edit in italics: "oil and hazardous material management *except as required under the MCP."*
5d throughout including examples	The LSPA believes that if costs are interpreted by DEP to be response action costs and they meet the definition of "Net Response and Removal Costs," they should be allowed.
5d.17	Costs associated with the removal of asbestos, lead paint, or other hazardous materials represent premium environmental costs related to achieving a Permanent Solution under the MCP. The LSPA recommends changing "regardless of whether" to "unless" to make it clear that if demolition is required under the MCP, these costs are eligible costs.
5d.18	The replacement or relocation of stormwater systems or existing utilities may be necessary for remediation of underlying materials and therefore related to achieving a PSS under the MCP. The LSPA believes these costs should be allowed. The LSPA recommends adding at end of section the following: ", unless necessary as part of Response Actions."
5g	The LSPA disagrees that costs that are incurred that serve a dual purpose should be pro-rated. If the work is necessary under the MCP, then the costs should be eligible costs.
	Section 6: Application Process
6a	The specific application timing referenced may not be possible if cost recovery is not concluded.
6b.4	A copy of the construction plan: This should only be required to the extent that it is required by MGL c.21E or the MCP. Construction plans may not be relevant to cost accounting.
6b.6	Please add "to the extent known" to the end of this sentence.
6d.3	Delete "Power of Attorney." These regulations apply to the taxpayer, not his or her agents, lawyers, or consultants.
6e	The expiration of the credit may cause issues near the end of the program such that a certificate may be valid for only a few months. Add new second-to-last sentence: "Notwithstanding the above, in no event shall a Credit Certificate be valid less than five years."

6e	The statutes only specify that the credit may be used over a five-year period. If a claim is appealed, the length of time that a credit may be applied or transferred should be stayed pending the final resolution of the appeal. Also, if there is a pending cost recovery action or some costs are potentially reimbursable under 21J, an application cannot be filed immediately upon achieving a permanent solution or remedy operation status. As drafted, this may cause claimants to forego cost recovery thus increasing the amount of the credit ultimately issued.

Section 11: Recapture; Payments in Error	
11a, 11b, and 11c	The LSPA believes that MassDEP is the ultimate decisionmaker regarding whether or not a Permanent Solution or Remedy Operation Status has been achieved and maintained in accordance with the MCP. Review of payments in error should be based on loss of ROS or PSS as outlined in 11(a) or due to fraud by the applicant or misrepresentation.

Section 12: Appeal Process for Denial or Partial Denial of Applications for Credit	
12a	This section needs to include that, along with its proposed denial, it is incumbent upon DOR to include a written explanation of the reasons for denial.

12	If an applicant appeals a part of the decision, the part of the decision that is not appealed (as well as any previously issued BTCs) should not be subject to de novo review. Otherwise, appeal will be discouraged. The right to appeal the decision by the Office of Appeals to court should be described here and should be described in each decision of the Office of Appeals.