

April 4, 2020

Kevin Brown, Acting Commissioner
Massachusetts Department of Revenue
100 Cambridge Street
Boston, MA 02114

Subject: *Comments on Working Draft Regulation 830 CMR 63.38Q.1 – Massachusetts Brownfields Tax Credit*

Dear Commissioner Brown:

The LSP Association (LSPA) is the non-profit association of Licensed Site Professionals (LSPs) and related practitioners. LSPs are the scientists, engineers, and public health specialists licensed by the Commonwealth to work on behalf of property owners, operators, and other involved parties to oversee the assessment and cleanup of oil and hazardous materials released to the environment. LSPA members also include environmental attorneys, toxicologists, and other practitioners. Our members work with their institutional, non-profit, government, and private clients to remediate contaminated sites, often brownfield sites, so these properties can be placed back into active and productive use to benefit the Commonwealth.

The LSPA appreciates the opportunity to comment on the Working Draft Regulation and applauds the Department for its efforts to clarify and further codify the Brownfields Tax Credit (BTC) program. We hope that an updated regulation will provide LSPA members and other applicants access to an up-dated program that is predictable and effective, thereby reducing the backlog of applications that now exist.

LSPA comments are provided in more detail in a spreadsheet attached to this letter. The overall themes of our comments are described more below.

The proposed regulation appears to be designed to limit the amount of a Brownfields Tax Credit, which seems inconsistent with the purpose of the statutes which is to encourage reuse of contaminated properties.

- The use of the term “remediates” in Section (1)(a) and “remediation” in Section (3) serves to limit the amount of a BTC because it does not reference the broader actions that may be required in the achievement of a Permanent Solution (PS) or Remedy Operation Status (ROS) as required under MGL c. 21E.
- Section (5)(a) proposes a higher standard for Eligible Costs (“direct and necessary”) than those recoverable under MGL c. 21E. Moreover, this section also refers to “reasonable” which adds a new restrictive requirement and thereby reduces opportunities for BTCs.
- Certain costs that may be integral to achieving a PS or ROS are excluded in Section (5)(d), including the assessment of soils, treatment systems, other physical systems in addition to caps and engineered barriers, removal of asbestos containing materials in soil, dewatering, and others. The ineligibility of the examples above is inconsistent with the language and purpose of MGL c.21E and the MA Contingency Plan (MCP).
- MGL c. 21E requires the Responsible Party to approach or achieve background as part of a solution, to the extent feasible. Also, a risk characterization may require remediation below initial reportable concentrations depending upon the property’s reasonably foreseeable uses, and planned changes in use associated with brownfield redevelopment.

The proposed regulation is inconsistent with the process developed by MassDEP to ensure appropriate assessment and remediation of sites. This is manifested in several ways:

- Several of the “ineligible” costs are often necessary when conducting response actions, or are required by 21E (specifically the requirement to achieve background if feasible) even if it is possible to achieve a PS without them. It becomes problematic to categorically exclude these costs. For example, the reference to Contaminated Media in Section 5(c)4 suggests that costs related to evaluating and monitoring of media that is below Reportable Concentrations (RCs) is not recoverable. This is especially problematic if an applicant is taking an RCS-2 site (old industrial area) and redeveloping it for residential use (thus getting to more stringent endpoints than the original use and reporting trigger).
- There are several instances where language in the Working Draft differs from the Brownfields Tax Credit statutory objective of bringing sites to PS or ROS. This is most evident in Section 3 which refers to “certain costs for the purposes of remediation of contaminated property” rather than to the achievement of a PS or ROS.
- Certain assessment costs should be eligible but read like they are not. This is particularly the case in the instance of risk assessments for sediment and surface water as discussed in Section 5(d)6 and 5(d)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. The proposed language implies that achievement of (or approach to) background is a prerequisite for eligibility. Assessment should always be eligible if necessary to determine nature and extent.

The proposed regulation requires MassDOR to make determinations that are within the expertise and authority of MassDEP. Determinations of “appropriateness” of expenses for response actions should be made by MassDEP.

- Section (5)(a) proposes a higher standard for Eligible Costs (“direct and necessary” -as well as reasonable) than those recoverable under MGL c. 21E. This should not be the case; these standards should be aligned.
- Section (11) refers to “violation of the MCP” without referencing what entity determines that the MCP has been violated. It is of great concern to the LSPA if an entity other than MassDEP makes this determination.

The proposed regulation creates several timing issues.

- Many of the Brownfields Tax Credit applications run concurrent with cost recovery claims, 21J reimbursements, or other actions, which can take years to fully resolve. The time periods in the Working Draft do not allow for these actions to be resolved, and if the BTC application requires an appeal, there is no provision to extend the credit’s lifetime. For example, see the reference to “...must be filed on or before December 31st of the fifth year after the year...” in Section (6)(a), and in Section (6)(e) there is reference to “expiration date” and “tax year.”

Brownfield redevelopment projects are vital to revitalizing communities across the Commonwealth. Planning for and securing project financing is complex. Development of these properties, in many cases, turns on the availability of the Brownfields Tax Credit for the economics to work. Clarifying the DOR’s BTC regulation and aligning it with MGL c. 21E is critical to the further cleanup and redevelopment of these sites.

We appreciate your consideration of our comments on the *Working Draft Regulation 830 CMR 63.38Q.1 – Massachusetts Brownfields Tax Credit*. We look forward to the formal public comment period.

Sincerely,



Michele Paul, LSP
President



Wendy Rundle
Executive Director

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