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September 29, 2023

Via email to: rulesandregs@dor.state.ma.us

Massachusetts Department of Revenue
Attn: Geoffrey E. Snyder, Commissioner
100 Cambridge Street
Boston, MA 02114

Subject: DOR Request for Feedback Concerning the Massachusetts Brownfields Tax Credit Regulations (830 CMR 63.38Q.1)

Dear Commissioner Snyder:

The LSP Association appreciates the opportunity to provide feedback on the implementation of the Massachusetts Brownfields Tax Credit regulations (830 CMR 63.38Q.1; the “Regulations”) which went into effect on July 9, 2021, just over two years ago.

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, risk assessors, and other practitioners. Our members work with their institutional, non-profit, government and private clients to remediate contaminated sites, often brownfields, so these properties can be placed back into active and productive use to benefit the Commonwealth.

In February 2021, when we provided comments in an effort to contribute to the clarification and codification of the Brownfields Tax Credit (BTC) program, our goal and expectation was for a regulation that would provide LSPA members and other applicants access to an up-dated program that was predictable and effective. Our hope was that by codifying the rules and procedures for applying for the credit, including the appeal procedure, the process to receive a Brownfield credit – which historically had been cumbersome and lengthy – would be improved and streamlined with greater clarity.

Unfortunately, our members have not found this to be the case. In fact, their experiences over the past two years have been quite the opposite, with application reviews stretching out to months.

Even more disappointing has been the experience of many applicants who have seen their applications denied in part or entirely, despite appearing to qualify on each of the eligibility criteria.

Denials at the initial audit stage frequently lead to an appeal of the Department of Revenue's (DOR's) initial findings, at best causing a significant and burdensome additional review process with many new requests for information (over and above the long initial review process). This process has resulted in many application reviews requiring up to two years or longer, reducing the value of the credit as an incentive and reward for following the spirit and letter of the law.

The area that has been most disappointing to applicants, based on feedback from our members, concerns the DOR's treatment of cleanups utilizing Release Abatement Measures (RAMs) to address soil contamination. This approach, which is encouraged in the Massachusetts Contingency Plan (MCP) regulations as a means to expeditiously reach site closure, is commonly employed as part of site redevelopment because it is both timely and cost-effective and can be paired with construction to save time and money which are critical considerations for determining a project's viability to proceed. Members' experiences over the past two years have been that DOR considers the costs of managing contaminated soil, as part of RAMs, to be ineligible for the tax credit expense base.

This stance is directly contrary to the intent of the Brownfields Act and the tax credit itself, which is to encourage environmental restoration as part of site redevelopment and to provide a credit for net response and removal costs, which are defined as expenses paid for the purpose of achieving a Permanent Solution or Remedy Operation Status. The regulatory language is to the same effect. The MCP does not call for the minimum remediation possible to achieve a Permanent Solution (which would be at odds with the spirit of the regulations), nor does it restrict in any way combining MCP response actions with construction activities. Given the stated purpose of the BTC program to encourage redevelopment, the language necessarily contemplates, and in fact appropriately encourages, Permanent Solutions achieved in connection with site construction.

DOR's extreme stance in denying some or all of the soil excavation, transportation and disposal costs – often the most significant aspect of Brownfields remediation – has neutered the benefits of the tax credit to the point of questioning its efficacy. We encourage DOR to review its process and recognize that these soil management costs are legitimate, reasonable, and necessary to achieve a Permanent Solution at most sites. This is all the more compelling since the soil crisis in Massachusetts (the growing lack of alternatives for disposal of contaminated materials) has driven costs to increase, threatening the economic viability of many projects. This is especially true for building affordable housing units, a priority for the Healey-Driscoll administration.

LSPs are the only private sector experts licensed by the state to make waste site cleanup decisions. At times, it seems that DOR audit staff are attempting to usurp and abrogate that status during their review process by, for example, second-guessing the LSP's remedial decisions

and disallowing expenses that the LSP deems necessary and in full compliance with regulations. We would strongly suggest that DOR maintain its role in verifying the costs incurred rather than trying to question LSPs' professional decisions.

The LSPA appreciates this opportunity to provide input to the vitally important Brownfields Tax Credit program. We urge DOR to use the feedback received to re-evaluate its approaches to provide a review process that recognizes the unique and singular role of LSPs in managing MCP response actions at disposal sites. And, in doing so, to allow credit for the eligible net response and removal costs associated with construction-related activities as required under the MCP. Tax credit applicants should be able to depend and rely on the BTC to meet the dual goals of environmental remediation and economic development, providing significant benefits to the Commonwealth.

Sincerely,

THE LSP ASSOCIATION, INC.



Charles P. Young, LSP, President



Wendy Rundle, Executive Director

cc:

Bonnie Heiple, Commissioner, MassDEP

Elizabeth Callahan, Assistant Commissioner, Bureau of Waste Site Cleanup, MassDEP