ATTACHMENT:
LSP Association ("Author") Comments on Proposed Regulation 830 CMR 63.38Q.1: Massachusetts Brownfield Tax Credit

830 CMR 63.38Q.1: Massachusetts Brownfields Tax Credit (PROPOSED REGULATION)

DATE:	01/08/202
ORGANIZATION:	Massachusetts Department of Revenue
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(1) Statement of Purpose, Outline of Topics, Effective Date

(a) *Statement of Purpose.* 830 CMR 63.38Q.1 explains the provisions of the brownfields tax credit for environmental Response Actions, as set out in M.G.L. c. 62, § 6(j) and M.G.L. c. 63, § 38Q. Under these statutes, an Eligible Person that achieves and maintains a ~~p~~Permanent ~~s~~Solution or ~~r~~Remedy ~~o~~Operation ~~s~~Status in compliance with chapter 21E and the regulations adopted under that chapter ~~remediates~~ at certain contaminated properties may be eligible for a credit against that person's Massachusetts personal income tax or corporate excise liability equal

Commented [A1]: The term "remediates" does not appear in the statute. The statutory language is, "achieves and maintains a permanent solution or remedy operation status in compliance with chapter 21E and the regulations adopted under that chapter" (emphasis added).

to a percentage of the Net Response and Removal Costs incurred for such ~~remediation~~ Response Actions in compliance with M.G.L. c. 21E.

830 CMR 63.38Q.1 explains who is eligible for purposes of the credit and what costs are Eligible Costs for purposes of the credit, as well as the limitations on how much credit may be claimed in any tax year.

Additionally, 830 CMR 63.38Q.1 sets out rules pertaining to the carryforward of unused credits, the procedure to transfer, sell or assign unused credits, the circumstances under which a credit will be recaptured, and the appeals process in instances where the credit is fully or partially denied.

(b) *Outline of Topics.* 830 CMR 63.38Q.1 is organized as follows:

(1) Statement of Purpose; Outline of Topics; Effective Date
(2) Definitions
(3) General Rule
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(7) Limitations; Claiming and Carryforward of Credit; Deductibility of Net Response and Removal Costs
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(12) Appeal Process for Denial or Partial Denial of Applications for Credit

(c) *Effective Date*. 830 CMR 63.38Q.1 applies to applications received on or after March 9, 2020.

Commented [A2]: Replace "remediation", which is not a defined term, with the defined term "Response Actions" throughout

Commented [A3]: A reasonable effective date should be no earlier than 30 days after issuance of the final regulations following the close of the public comment period.

(2) Definitions

For purposes of 830 CMR 63.38Q.1, the following terms shall have the following meanings.

Active Exposure Pathway Mitigation Measure (AEPMM), as defined in the MCP.

Active Remedial Monitoring Programs, as defined in the MCP.

Active Remedial Systems, as defined in the MCP.

Activity and Use Limitation (AUL), as defined in the MCP.

Assessed Value, as defined in 830 CMR 63.38Q.1(4)(c).

Background, as defined in the MCP.

Contaminated Groundwater, as defined in the MCP.

Contaminated Media, as defined in the MCP.

Contaminated Sediments, as defined in the MCP.

Contaminated Soil, as defined in the MCP.

Contaminated Surface Water, as defined in the MCP.

Commissioner, the Commissioner of Revenue, or the Commissioner's duly authorized representative.

Department, the Department of Revenue.

Department of Environmental Protection (MassDEP), the state agency within the Executive Office of Energy and Environmental Affairs tasked with enforcement of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21E.

Economically Distressed Area (EDA), as defined in pertinent part in M.G.L. c. 21E, § 2.

Eligible Costs, as identified in 830 CMR 63.38Q.1(5)(a).

Eligible Person, as defined in M.G.L. c. 21E, § 2 and the MCP, an owner or operator of a site or a portion thereof from or at which there is or has been a Release of OHM who would be liable under M.G.L. c. 21E solely pursuant to M.G.L. c. 21E, § 5(a)(1), and who did not cause or contribute to the Release of OHM from or at the site and did not own or operate the site at the time of the Release.

Historic Fill, as defined in the MCP.

Immediate Response Action (IRA), as defined in the MCP.

Licensed Site Professional (LSP), as defined in the MCP.

Massachusetts Contingency Plan (MCP), the Department of Environmental Protection's Regulation found at 310 CMR 40.0000 pursuant to which a credit applicant must have submitted a Permanent Solution Statement or ROS Submittal to MassDEP prior to filing an application for the credit with the Department.

Net Response and Removal Costs, as defined in M.G.L. c. 62, § 6(j) and M.G.L c. 63, § 38Q.~~as identified in 830 CMR 63.38Q.1(4)(b).~~

Commented [A4]: "Net Response and Removal Costs" is a term that is defined in the statute; this regulation should use the same definition as the underlying statute. The term should not mean one thing in the statute and something slightly different in the regulation.

No Significant Risk, as defined in the MCP.

Oil and/or Hazardous Material (OHM), as defined in the MCP.

Permanent Solution, as defined in the MCP. The term "Permanent Solution" includes both a "Permanent Solution With Conditions" and a "Permanent Solution Without Conditions."

Permanent Solution Statement, as defined in the MCP.

Potentially Responsible Party (PRP), as defined in the MCP.

Release, as defined in M.G.L. c. 21E, § 2 and the MCP.

Release Abatement Measure (RAM), as defined in the MCP.

Remedy Operation Status (ROS), as defined in M.G.L. c. 21E, § 2 and the MCP.

Reportable Concentration, as defined in the MCP.

Response Action, as defined in M.G.L. c. 21E, § 2 and the MCP.

(3) General Rule

A credit is allowed to Eligible Persons under M.G.L. c. 62, § 6(j) and M.G.L. c. 63, § 38Q for Net Response and Removal costs ~~certain costs~~ incurred for the purpose of ~~remediating contaminated property~~ achieving a permanent solution or remedy operation status in compliance with chapter 21E and the regulations adopted under that chapter at a ~~site~~property that is located in an Economically Distressed Area that has been reported to MassDEP. The credit is generally equal to either 25% (if an AUL is in place) or 50% of the applicant's Net Response and Removal Costs incurred ~~in the remediation of~~at such a property. To be eligible for the credit with respect to a property, an applicant must commence and diligently pursue an environmental Response Action on or before the date listed in M.G.L. c. 62, § 6(j) or M.G.L. c. 63, § 38Q, and must achieve and maintain a Permanent Solution or ROS in compliance with M.G.L. c. 21E, § 2 and the MCP. In addition, the applicant may not be subject to any enforcement action by MassDEP under M.G.L. c. 21E, the applicant must be an Eligible Person with an ownership or leasehold interest in the property, and the applicant must own or lease the property for business purposes. The credit may be transferred but is not refundable. ~~For purposes of determining if an applicant is an Eligible Person, the affiliation provisions of M.G.L. c. 21E, sec. 5(i) and 310 CMR 40.0570(3)(d) are taken into account.~~

(4) Net Response and Removal Costs; 15% of Assessed Value Requirement

(a) *In general*. An applicant may apply to the Department for a credit equal to either 25% (if an AUL is in place) or 50% of the Net Response and Removal Costs incurred by an applicant with respect to a particular property, in compliance with M.G.L. c. 21E. The applicant will not be entitled to any credit unless the Net Response and Removal Costs are equal to or greater than 15% of the Assessed Value of the property.

Commented [A5]: This proposed language is consistent 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"

Commented [A6]: Consistent with Section 11, we request that who determines a violation of the MCP be clarified: "*For purposes of determining whether a given Permanent Solution or ROS has, in violation of the MCP, ceased to be adequately maintained, the Department will consult letters, electronic correspondence, enforcement documents and other official records issued by MassDEP that are publicly available on its website, or that have otherwise been made available to the Department.*"

Commented [A7]: This reference to the "affiliation provisions of M.G.L. c. 21E sec. 5(i)…." Is incorrect since Section (5)(i) is not related to "affiliation". This is not related to the definition of "eligible person" and should be struck.

(b) *Net Response and Removal Costs.* An applicant's Net Response and Removal Costs are the applicant's total expenses paid by the ~~taxpayer~~taxpayer for the purpose of achieving a permanent solution or remedy operation status in compliance with chapter 21E ~~Eligible Costs~~ less any reimbursement that is received, or will be received, by the applicant for these costs. Such reimbursement may include, but is not limited to, the amount of any state financial assistance received from the Redevelopment Access to Capital Program established pursuant to section 60 of chapter 23A, or from the Brownfields Redevelopment Fund, established pursuant to section 29A of chapter 23G of the General Laws, or any recovery or damages (net of any attorney's fees and other litigation costs) received by the applicant as a result of any lawsuit against any person or entity on the grounds that such person or entity was responsible for a Release. With respect to the Redevelopment Access to Capital Program, the amount of state financial assistance is calculated as the amount of state funds paid on behalf of the borrower for participation in the program. If the taxpayer has borrowed funds subject to a state guarantee in order to finance the expenses of ~~remediation~~Response Actions, the amount of the loan is permitted to be included in the expense base for which the credit is available. However, if the borrower defaults on the loan and the guarantee is invoked, any credit taken for the amount of the loan will be recaptured as taxes due in the year the loan is paid. Loans and grants received from the Brownfields Redevelopment Fund constitute state financial assistance that must be excluded from Net Response and Removal Costs.

Commented [A8]: The regulation should be consistent with the language of the statute. "Net Response and Removal Costs" is a term that is defined in the statute; such terms in the regulation should use the same definition as the underlying statute. The term should not mean one thing in the statute and something slightly different in the regulation.

(c) *15% of Assessed Value Requirement.* The applicant will not be entitled to any credit unless the Net Response and Removal Costs are equal to or exceed 15% of the Assessed Value of the property. For purposes of this requirement, the Assessed Value of the property shall be the January 1st valuation that applies to the municipal fiscal year during which Net Response and Removal Costs begin to be incurred. For purposes of the following two examples, municipal fiscal year 2018 begins on July 1, 2017, ends on June 30, 2018, and assessments for that fiscal year are based on a valuation as of January 1, 2017; similarly, municipal fiscal year 2019 begins on July 1, 2018, ends on June 30, 2019, and assessments for that fiscal year are based upon a valuation as of January 1, 2018. For example, if ~~remediation~~ Response Actions commenced in February 2018 (i.e., during fiscal year 2018), the Assessed Value of the property prior to ~~remediation~~ Response Actions would be the Assessed Value as of January 1, 2017. If ~~remediation~~ Response Actions commenced in August 2018 (i.e., during fiscal year 2019), the Assessed Value of the property prior to ~~remediation~~ Response Actions would be the Assessed Value as of January 1, 2018.

(d) *Multiple Releases.* Where a Permanent Solution or ROS has already been achieved on a property, and an additional Release is discovered with respect to that property, an applicant may still apply for credit in connection with Net Response and Removal Costs incurred in obtaining a Permanent Solution or ROS with respect to such additional Release, regardless of whether a credit application had already been submitted and/or approved with respect to the earlier Permanent Solution or ROS. The additional Net Response and Removal Costs associated with each such additional Release must independently equal or exceed 15% of the Assessed Value of the property. However, if a Permanent Solution or ROS is achieved within ~~one year~~three years of another Permanent Solution or ROS, an applicant may aggregate the Net Response and Removal Costs of all such Permanent Solutions and Remedy Operation Statuses achieved within a three~~one~~-year period for purposes of determining whether the costs equal or exceed 15% of the Assessed Value of the property.

Commented [A9]: For properties with more than one release, one year is not typically sufficient to achieve a Permanent Solution or ROS for multiple releases.

(e) *Costs incurred to remove an AUL*. Where a Permanent Solution with an AUL has already been achieved on a property, an applicant may still apply for credit in connection with Net Response and Removal Costs incurred to remove all or part of that AUL, regardless of whether a credit application had already been submitted and/or approved with respect to the earlier Permanent Solution. The additional Net Response and Removal Costs associated with the removal of all or part of the AUL must independently equal or exceed 15% of the Assessed Value of the property. However, if the resulting Permanent Solution or ROS that removed all or part of an AUL was achieved within three years of~~one year of~~ another Permanent Solution or ROS, an applicant may aggregate the Net Response and Removal Costs of all such Permanent Solutions and Remedy Operation Statuses achieved within a three~~one~~-year period for purposes of determining whether the costs equal or exceed 15% of the Assessed Value of the property.

Commented [A10]: For properties requiring an AUL, one year is not typically sufficient to achieve a Permanent Solution without a AUL.

(5) Eligible Costs

(a) *In general.* Eligible Costs are Net Response and Removal Costs~~costs~~ incurred by an Eligible Person in performing Response Actions for the purpose of achieving a Permanent Solution or ROS in compliance with M.G.L. c. 21E, the MCP and supporting MassDEP regulatory policies and guidance. ~~A cost will not be an Eligible Cost simply because it is incurred in compliance with M.G.L. c. 21E; rather, it must also be incurred for the purpose of achieving a Permanent Solution or ROS. A cost will be considered to be incurred for the purpose of achieving a Permanent Solution or ROS if it was (1) reasonable, and (2) for Response Actions that are a direct and necessary part of attaining such Permanent Solution or ROS.~~

Commented [A11]: MCP compliance is itself "necessary and appropriate" and consistent with the definition of Net Response and Removal Cost in the statute.

(b) *Persons who do not own or lease the property.* Costs are not Eligible Costs (1) if they are incurred when the applicant does not own or lease the property or (2) if they are incurred by persons that do not own or lease the property at the time the Permanent Solution or ROS is achieved. As an example of (1), a developer or other person with a development agreement or a purchase and sale agreement may incur costs with respect to a property during a time when they do not yet own or lease the property. Such costs are not Eligible Costs and do not become Eligible Costs when the developer or other person subsequently acquires ownership or leases the property. A developer's right to enter a property for surveys, test borings, engineering and architectural studies or other limited purposes does not rise to the level of a leasehold or ownership interest required for eligibility for the credit. As an example of (2), a developer or other person may incur costs with respect to a property after buying that property, but may then sell the property prior to achieving a Permanent Solution or ROS (without retaining a leasehold interest in such property). Such costs are not Eligible Costs.

(c) *Types of costs generally considered eligible*. Because all projects are different, the examples in this section are provided only as guidelines. In some instances the Department may determine that a cost on this list is ineligible due to the particular circumstances of the Response Action. Furthermore, the Department does not exclude the possibility that an applicant may be able to show that a cost outside this list was incurred for the purpose of achieving a Permanent Solution or ROS and is an Eligible Cost. In general, however, an Eligible Cost will be found among the following types of costs:

1. Costs incurred for assessment activities performed prior to notification of MassDEP that identify an obligation to notify MassDEP (e.g., the portion of a surveyor's costs attributable to laying out a pre-characterization sample grid, when the surveyor has been contracted to conduct a property survey);

2. Costs incurred after the notification of MassDEP for any Response Actions performed~~assessment, containment, or removal action required~~ to achieve a Permanent Solution or ROS;

3. Costs incurred for the preparation and filing of all submittals (including, but not limited to plans, reports, completion statements, status reports and/or remedial monitoring reports);

4. Costs incurred for the assessment, containment, mitigation, treatment, removal (including earth support systems), transport, storage, reuse, recycling and/or disposal of Contaminated Groundwater, Contaminated Surface Water, Contaminated Soil, ~~or~~ Contaminated Sediment, or other impacted environmental media, unless the costs relate to a Response Action that is not performed~~required~~ to achieve a Permanent Solution or ROS;~~:~~

5. Costs associated with treatment systems or mitigation measures (including Active Remedial Systems, Active Remedial Monitoring Programs, Active Exposure Pathway Mitigation Measures, and vapor mitigation systems such as active ventilation systems, passive ventilation systems, impermeable vapor barriers or waterproofing) performed to achieve a Permanent Solution or ROS in compliance with chapter 21E;, if it was reasonable that the system was needed at the time of installation to achieve a Permanent Solution or ROS;~~as long as the Permanent Solution or ROS requires such a treatment system to be in place and operational;~~

6. Costs associated with an engineered barrier or with a paved area, marker barrier, clean soil cover, vegetation and/or building slab acting as a barrier or cap~~,~~ necessary to achieve a Permanent Solution or Remedy Operation Status (ROS) in compliance with chapter 21E; ~~as long as the Permanent Solution or ROS requires such engineered barrier or paved area, marker barrier, clean soil cover, vegetation and/or building slab acting as a barrier or cap to be in place, and as long as such engineered barrier, barrier or cap is in compliance with the MCP;~~

7. Costs incurred to achieve or approach Background if (a) the applicant can show the costs were incurred for such purpose by a verification process that complies with 830 CMR 63.38Q.1(5)(f)2.and (b) the Permanent Solution Statement to MassDEP documents that Background has been achieved or approached at the site or portion thereof;

8. Costs incurred for removal of soils or sediments if the removal of such soils or sediments is necessary to remove, ~~or~~ remediate, or mitigate ~~-~~Contaminated Media under such soils or sediments, unless the costs relate to a Response Action that is not performed~~required~~ to achieve a Permanent Solution or ROS;~~:~~

9. Demolition costs (other than extraordinary costs of the type listed in 830 CMR 63.38Q.1(5)(d)14.) pertaining to an existing building or structure if, prior to any such demolition, it has been determined that such demolition (a) is necessary to remove Contaminated Media under such building or structure and (b) is required to achieve a Permanent Solution or ROS;

Commented [A12]: Example 1 under Section 5(g) Proration of Certain Costs allows earth support systems as an eligible cost

Commented [A13]: The MCP does not limit itself to "Contaminated Soil" when requiring assessment and remediation of soil. Assessment to determine nature and extent must extend beyond the area of "Contaminated Soil" in order to delineate it. Further, remediation of soil containing oil and hazardous material below MCP Reportable Concentrations (the definition of "Contaminated Soil") may be necessary due to changes in site use or to approach or achieve background.

Commented [A14]: Costs incurred after Permanent Solution or ROS are not eligible costs, so the deleted language is not necessary.

Commented [A15]: It appears this should reference 830 CMR 63.38Q.1(5)(d)**15**

10. Costs incurred for development and implementation of assessment and ~~remediation~~ Response Action plans, including pilot testing and treatability tests;

11. Costs incurred for environmental testing if such tests are pertinent to the performance of ~~remediation of the Release~~ Response Actions to which the Permanent Solution or ROS relate~~s~~;

12. Costs incurred for hydrogeologic/aquifer tests if such tests are pertinent to the performance of ~~the remediation of the Release~~ Response Actions to which the Permanent Solution or ROS relate~~s~~;

13, Costs incurred in provisions for the temporary and/or permanent replacement or treatment of potable drinking water supply contaminated by OHM;

14. Costs incurred for installation of test pits, test borings, monitoring wells, recovery wells, and/or gaseous monitoring points or injection or extraction wells, and for the sampling of drinking water, soil gas, and/or indoor air;

15. Attorney fees for compliance assistance in the preparation of submittals documenting Response Actions and preparing Activity and Use Limitations; and

16. Permit fees, and cost of paid police details and security details required during eligible activities.

(d) *Types of costs generally not considered eligible*. Because all projects are different, the examples in this section are provided as guidelines. This list is not exhaustive, and other costs not found on this list may also be ineligible. Furthermore, the Department does not exclude the possibility that an applicant may be able to show that a cost on this list was incurred for the purpose of achieving a Permanent Solution or ROS and is an Eligible Cost. However, unless the applicant can show that an exception should be made due to the particular circumstances of the Response Action, the following types of costs will generally not be considered Eligible Costs:

1. Costs incurred for retro-fitting, relining or replacing underground storage tank systems;

2. Loss of business revenue because of shutdown of business due to a Release or the performance of Response Actions;

3. Landscaping expenses including expenses related to the loss, replacement, or installation of trees, shrubs, or signs, unless these costs are incurred in accordance with section (5)(c)6. above;

4. Costs incurred for the replacement or repair of asphalt pavement, bituminous concrete or concrete areas unless these costs are incurred in accordance with section (5)(c)6. above;

5. Costs of managing environmental media for which the excavation, removal, transport, storage, reuse, recycling and/or disposal is not ~~necessary to~~performed for the purposes of achiev~~e~~ing a Permanent Solution or ROS;

6. Costs incurred for the containment, treatment, removal, transport, storage, reuse, recycling and/or disposal of Historic Fill where such activities were not taken for the purposes of achieving a Permanent Solution or ROS;

7. All federal, state, local and other governmental oversight fees;

8. ~~Compliance fees, including annual compliance fees owing under 310 CMR 4.00,~~ pPunitive damages, civil or administrative penalties, and criminal fines;

9. Interest payments or any finance charges;

10. Costs incurred for small tools;

11. Except as specifically provided in 830 CMR 63.38Q.1(5)(c)1., costs that are incurred prior to notifying MassDEP of the Release;

12. Ordinary business expenses or capital improvements, including (a) oil and hazardous materials management, and/or (b) replacement of tanks;

13. Insurance costs associated with Response Actions~~remediation~~;

14. Costs attributable to the time and expense of an owner, operator, or principal of the ~~subject~~ property;

15. Extraordinary costs associated with the demolition of a building or structure, such as (a) the costs of removal, disposal or preservation of machinery, inventory, fuel, furniture, furnishings, artwork or tangible property located within the building or structure; (b) the costs of removal or disposal of hazardous materials other than those regulated under the MCP, including (but not limited to) nuclear waste, unexploded ordnance, medical waste, biohazards, asbestos, or lead paint (other than that incorporated within the materials comprising the building or structure (e.g. mastic, painted surfaces); or (c) the costs of replacing or relocating stormwater systems or other utilities;

16. Costs associated with the disposal of solid waste, asbestos-containing materials upon removal from a building or structure, asphalt binder in bituminous pavement or demolition debris (other than debris ~~that is Contaminated Media);~~generated as a result of Response Actions performed to achieve a Permanent Solution or ROS);

17. Costs of constructing foundations, including but not limited to load-bearing elements, driven piles, geopiers, rammed aggregate piers, grade beams or pile caps; and

18. Any other construction expenses that are not necessary for the achievement of a Permanent Solution or ROS.

Example 1. Company A undertakes to redevelop a site containing an existing building, and intends to demolish that building as part of the redevelopment. Prior to the demolition of the building, Company A has its consultant~~LSP~~ conduct tests on the soil at the site and determines that OHM levels exceed MCP Reportable Concentrations, thus requiring notification to

Commented [A16]: It is reasonable that compliance fees related to the Disposal Site would be an eligible cost

Commented [A17]: Certain hazardous building materials typically cannot be abated prior to demolition; in these cases the costs to remove this waste should be an eligible cost

Commented [A18]: This clarification is necessary since the MCP requires Response Actions related to asbestos-containing materials in soil

Commented [A19]: In all examples, please also indicate that the costs to prepare the MCP submittals (e.g., RAM Plan, any RAM status reports, RAM Completion Report, Phase reports, and Permanent Solution Statement) are eligible costs, consistent with Section (5)(c)(3).

Commented [A20]: None of the examples below involves an imminent hazard. Please consider adding such an example and/or clarifying that such costs are eligible.

Commented [A21]: Prior to the discovery of an MCP Reportable Condition, there is no obligation for the consultant to be an LSP

MassDEP. Additionally, the testing determined that the soil under the building requires remediation or removal for the purposes of achieving a Permanent Solution. Demolition of the building was determined to be necessary to access the contamination and achieve a Permanent Solution. In compliance with a Release Abatement Measure Plan, Company A then demolishes the building and removes, transports and disposes of the soil below the building that contains OHM in excess of Reportable Concentrations. Because Company A undertook to demolish the building for the purpose of achieving a Permanent Solution, its costs of assessment prior to demolition and demolishing the building are Eligible Costs. Furthermore, to the extent they relate to the soil under the building that was removed to achieve a Permanent Solution or ROS, and subject to 830 CMR 63.38Q.1(5)(f)2, contained OHM equal to or greater than Reportable Concentrations, Company A's costs of removing, transporting and disposing of such soil are Eligible Costs.

Example 2. Assume the same facts as in Example 1, except that when the consultant tests under the building prior to demolition, no soil is discovered with OHM equal to or above Reportable Concentrations. After demolition has started, as the ground-level slab of the building is being demolished, visual and olfactory evidence of contamination is encountered in the soil below the building. Company A again has the soil below the building tested; some of that soil is found to be Contaminated Soil, and this result is reported to MassDEP. In compliance with a RAM Plan, Company A then excavates, transports and disposes of the Contaminated Soil located below the building. Because Company A did not undertake to demolish the building for the purpose of achieving a Permanent Solution or ROS, and because it demolished the building prior to any report of a Release to MassDEP, its costs of demolishing the building are not Eligible Costs. However, Company A's costs of removing, transporting and disposing of soil with OHM equal to or greater than Reportable Concentrations are Eligible Costs.

Example 3. Assume the same facts as in Example 2, except that Company A conducted no tests of the soil prior to demolition. After finding visual and olfactory evidence of contamination during demolition, Company A has the soil tested by a consultant~~n LSP~~, who concludes that some of that soil contains OHM above Reportable Concentrations. This result is reported to MassDEP. Company A's costs of demolishing the building are not Eligible Costs. However, to the extent they relate to ~~Contaminated Soil~~Response Actions performed to address the soil contamination ~~that~~ had been located under the building prior to demolition, Company A's costs of removing, transporting and disposing of such soil are Eligible Costs.

Example 4. Company B discovers OHM on its property that exceeds Reportable Concentrations, and this result is reported to MassDEP. Company B engages an LSP, who determines that the OHM above Reportable Concentrations is located in soil located more than 10 feet below the ground surface. Company B now undertakes to achieve a Permanent Solution with respect to the site, and determines in conjunction with its LSP that removal, transport and disposal of soil in order to address this contamination ~~the Contaminated Soil~~ is a ~~direct and~~ necessary part of achieving such a Permanent Solution. The LSP reports to MASSDEP in the RAM Plan that (1) removal of the uncontaminated soil located in the 10 feet above the Contaminated Soil and (2) removal, transportation and disposal of the ~~Contaminated Soil~~soil are among the planned RAM activities. In compliance with the RAM Plan, Company B then removes the uncontaminated soil from above the Contaminated Soil and removes, transports and disposes of the Contaminated Soil. Company B also transports and disposes of the uncontaminated soil that it removed from above the Contaminated Soil. Company B's costs for removal of the uncontaminated soil, and

Commented [A22]: The initial assessment costs are eligible, consistent with Section 5(c)(1) (assessment activities performed prior to notification of MassDEP).

Commented [A23]: Please consider expanding example to the purchase of clean soil to replace the excavated soil. This cost should be an eligible cost.

its costs for removal, transport and disposal of the Contaminated Soil are Eligible Costs. Company B's costs for transporting and disposing of the uncontaminated soil are not Eligible Costs.

Example 5. Company C discovers OHM on its property that exceeds Reportable Concentrations, and this result is reported to MassDEP. Company C engages an LSP, who selects a Remedial Alternative that requires that a paved area acting as a cap be placed on the site. Company C constructs a paved area to act as a cap and creates a parking lot on the paved area. The LSP submits a Permanent Solution with Conditions with an AUL that requires a cap to be maintained and an AUL to be placed on the property. Because the paved area acting as a cap is required to be in place by the Permanent Solution and the accompanying AUL, Company C's costs of paving are Eligible Costs. Company C's costs of creating the parking lot on the paved area (*e.g.*, line striping, signage, planters or median dividers, or curbing) are not Eligible Costs.

Example 6. Company D discovers OHM on its property that exceeds Reportable Concentrations, and reports this to MassDEP. Company D's LSP creates a RAM Plan that indicates that all Contaminated Media will be removed from the site. As part of the construction accompanying the remediation, Company D paves over the site and creates a parking lot. The LSP submits a Permanent Solution without Conditions, which does not require a cap to be maintained or an AUL to be placed on the property. Because the paving is not necessary to create a cap that is required to be in place by the Permanent Solution, Company D's costs of paving are not Eligible Costs.

Example 7. Company E discovers OHM that exceeds Reportable Concentrations in two locations on property that it owns, and this is reported to MassDEP. Company E's LSP researches the origin of the two Releases and determines they occurred at different times. One Release occurred prior to the purchase of the property by Company E, while the other occurred after Company E purchased the property. With respect to costs incurred to remediate the first Release, which occurred prior to the purchase of the property, Company E may qualify as an Eligible Person. With respect to costs incurred to remediate the second Release, which occurred during the period that Company E owned the property, Company E is not an Eligible Person.

Example 8. Company F discovers OHM on its property that exceeds Reportable Concentrations, and this result is reported to MassDEP. Company F engages an LSP, who selects a Remedial Alternative that requires that a cap be placed on the site. Company F creates this cap in part by building a three-story parking garage over a portion of the site. The LSP submits a Permanent Solution with Conditions with an AUL that requires a cap to be maintained and an AUL to be placed on the property. Because the three-story parking garage serves as a cap that is required to be in place by the Permanent Solution and the accompanying AUL, that portion of Company F's costs of building the three-story parking garage that is reasonable will be considered Eligible Costs. The cost of constructing a three-story parking garage is not the type of cost generally recognized as necessary and appropriate for the purpose of achieving a Permanent Solution as a "capping" expense, and so Company F's costs of building the walls, the upper two floors and the load-bearing structural elements that support them (*e.g.*, piles, pile caps, and cap beams) will not be considered reasonable and will be disallowed as an Eligible Cost. The cost of pouring a building slab is the type of cost generally recognized as necessary and appropriate for the purpose of achieving a Permanent Solution as a "capping" expense, and Company F's cost of pouring the building slab will be considered reasonable to the extent needed to satisfy the

intended use as a cap (*i.e*., by backing out the additional design and construction costs needed to satisfy the intended use as a garage floor that will support anticipated loads associated with vehicle weight).

Example 9. Company G discovers OHM on its property that exceeds Reportable Concentrations, and this result is reported to MassDEP. Company G engages an LSP, who selects a remedial alternative that requires the soil in a certain location of the site to be excavated to a depth that would require support of excavation to resist the lateral pressure from the abutting parcels. Company G decides to provide this support of excavation by constructing a slurry wall that will be made up in part of load-bearing elements that will also serve as the foundations of a 30-story building and thus will need to withstand forces of compression and tension in addition to lateral forces. These load-bearing elements designed for these additional loads will be more expensive than a section of slurry wall that only needs to withstand lateral forces. Company G's implementation of the remedial alternative selected by its LSP has been done in a manner that increases its cost because it serves other purposes unrelated to ~~remediation~~Response Actions. Thus, Company G's additional cost attributable to its additional construction purposes is not reasonable and will be disallowed as an Eligible Cost.

(e) *Timing of Costs*.

For the costs of ~~a remediation~~Response Actions to be eligible for the credit, the Response Actions~~remediation~~ must begin on or before the date listed in M.G.L. c. 62, § 6(j) or M.G.L. c. 63, § 38Q, and the costs must be incurred on or after August 1, 1998. Except as specifically provided in 830 CMR 63.38Q.1(5)(c)1., the costs must also be incurred after notifying MassDEP of the Release. Furthermore, the costs must also be incurred prior to the submittal of a Permanent Solution Statement or ROS Submittal to MassDEP. The costs for actions or expenses that have occurred prior to the submittal of a Permanent Solution Statement or ROS to MassDEP, but that are billed to and paid by an applicant after such submittal, will still be eligible, provided they meet all other requirements of 830 CMR 63.38Q.1(4) and are billed and paid prior to the Brownfields Credit Application being submitted to the Department.

Example. Company X performs work on a site for Owner Y in June. Owner Y achieves a Permanent Solution in July of the same year, as documented in a Permanent Solution Statement submitted to MassDEP at that time. Company X does its billing quarterly and does not issue an invoice until September. As long as the work or expense to which the invoice relates is done before the Permanent Solution was submitted to MassDEP, the expense is billed and paid before the credit application is submitted, and the expense meets all other criteria to constitute a qualified expense, such expense will be allowed as an Eligible Cost.

(f) *Verification of Costs*.

1. *Listing of Eligible Costs in Electronic Format:* To be eligible for the credit, an applicant must provide a listing of all Eligible Costs and certain related information, including invoice dates and numbers, the name of the vendor and a brief description of the services provided. This listing should be submitted electronically, in a standard database spreadsheet format. The Department may also require proof of payment (e.g., cancelled checks) or additional information regarding the nature of the services provided with respect to any cost items. In all cases, the Commissioner

may require additional information or records or otherwise take such steps necessary to verify the appropriateness and accuracy of the costs submitted.

~~*2. Special verification with respect to the costs associated with approaching or achieving Background*: As part of its verification of the eligibility of a cost under 830 CMR 63.38Q.1(5)(c)7., an applicant must provide the following information: (a) a calculation and documentation of the cost required to achieve a condition of No Significant Risk for the Permanent Solution as implemented and (b) a calculation and documentation of any additional costs required to achieve or approach Background. If the cost required to achieve or approach Background was greater than 20% of the cost required to achieve No Significant Risk for the Permanent Solution, then the Department will treat such costs as having been incurred for a purpose other than that of achieving a Permanent Solution, such as a construction purpose, unless the applicant can otherwise show it was incurred for the purpose of achieving a Permanent Solution. Where the Permanent Solution achieves or approaches Background for a portion of the site, the analysis described above shall apply to the costs associated with that portion of the site.~~

~~*3. Verification of whether a cost was incurred for the purpose of achieving a Permanent Solution or ROS*. In order to evaluate this criterion, the Department will require an applicant to state the rationale for any particular cost whose purpose is not readily evident. If the Department determines that the proffered justification is pretextual, that the cost is not reasonable, or that the cost is not a direct and necessary part of attaining a Permanent Solution or ROS, the cost will be disallowed. The fact that a cost was incurred as part of a Response Action is not by itself a sufficient reason to deem it to have been incurred for the purpose of attaining a Permanent Solution or ROS. Similarly, the fact that a cost was incurred in compliance with a requirement of the MCP is not a sufficient reason, standing alone, for that cost to be considered to have been incurred for the purpose of achieving a Permanent Solution or ROS. Additionally, the fact that an activity was mentioned in a Release Abatement Measure Plan is not by itself a sufficient reason to deem the costs of that activity to have been incurred for the purpose of attaining a Permanent Solution or ROS.~~

Example 1. Company H discovers OHM on its property that exceeds Reportable Concentrations, and this result is reported to MassDEP. Company H engages an LSP, who selects a remedial alternative that requires the soil at the site to be excavated to Depth X, a depth that does not require support of excavation. Company H decides that it wishes to build a building on the site. The design of the building requires excavation to Depth Y, a depth that is deeper than Depth X. Company H determines that excavation to Depth Y will require support of excavation. Company H also determines that the soil between Depth X and Depth Y is not suitable for re-use on the site, and will need to be shipped off-site for disposal. Company H and its LSP determine that any decision to excavate the soils between Depth X and Depth Y and to dispose of them off-site will give rise to additional obligations under certain provisions of the MCP that would not have applied otherwise, for example, those located at 310 CMR 40.0032(3), referred to as the antidegradation provision of the MCP. Company H and its LSP further determine that if Company H decides to go forward with this decision, compliance with the additional obligations that will arise under the MCP will become an additional condition of attaining a Permanent Solution or ROS. Because these additional obligations only became a condition of the Permanent Solution or ROS as a result of Company H's decision to excavate to Depth Y and dispose of the soil between Depth X and Depth Y off-site, Company H's costs of

Commented [A24]: • A special verification process for costs for approaching background is unreasonable. MGL c. 21E requires the Responsible Party to approach or achieve background as part of a solution, to the extent feasible. MassDEP strongly encourages achievement of background even when arguably infeasible due to cost.

Section 9.3.3.4 of MassDEP Policy #WSC-04-160 - Conducting Feasibility Evaluations under the MCP provides a Benefit-Cost Evaluation to quantify when the incremental cost of conducting a remedial action to achieve or approach background is "substantial and disproportionate to the incremental benefit". The presumption in MGL c. 21E is that a Permanent Solution must include measures to achieve or approach background where those measures are feasible. The proposed exclusion of ineligible costs if media containing oil and hazardous material removed at a cost greater than 20% above the cost to achieve no significant risk conflicts with the regulatory framework which required the costs to be incurred and therefore is not appropriate. The proposed provision at section (5)(f)2 is therefore inconsistent with MassDEP policy.

Commented [A25]: These criteria appear in direct conflict with the attestation required by the LSP in submitting a Permanent Solution Statement Form BWSC 104 to MassDEP. Namely, *"the response action(s) that is (are) the subject of this submittal (i) has (have) been developed and implemented in accordance with the applicable provisions of M.G.L. c. 21E and 310 CMR 40.0000, (ii) is (are) appropriate and reasonable to accomplish the purposes of such response action(s) as set forth in the applicable provisions of M.G.L. c. 21E and 310 CMR 40.0000, and (iii) comply(ies) with the identified provisions of all orders, permits, and approvals identified in this submittal."*

Essentially, the DOR verification criteria of Section (5)(f)3. imply that compliance with MassDEP policies and guidance under the MCP is not a requirement for submitting a Permanent Solution. Furthermore, the arbitrary nature of Section (5)(f)3 would be subject to broad differences of opinion and make it impossible to establish a consistent standard of practice regarding eligible costs. **Section (5)(f)3 should be eliminated**.

fulfilling these additional obligations are not a ~~direct and~~ necessary part of attaining a Permanent Solution or ROS and will not be Eligible Costs.

Example 2. Company J discovers OHM on its property that exceeds Reportable Concentrations, and this result is reported to MassDEP. Company J engages an LSP, who selects a remedial alternative of a type generally recognized as necessary and appropriate for the purpose of achieving a Permanent Solution with respect to the type of contamination located on Company J's property. Acting on the LSP's advice, Company J implements this remedial alternative with the purpose of achieving a Permanent Solution. The LSP then conducts further assessment after the remedial alternative is implemented and determines that it did not succeed in achieving a condition of "No Significant Risk." The LSP then selects a second remedial alternative that is also of a type generally recognized as necessary and appropriate for the purpose of achieving a Permanent Solution with respect to the type of contamination located on Company J's property. Again acting on the LSP's advice, Company J implements the second remedial alternative with the purpose of achieving a Permanent Solution, after which the LSP determines that a condition of "No Significant Risk" has been achieved and submits a Permanent Solution Statement to MassDEP. Even though, in hindsight, the LSP has determined that the first remedial alternative was not necessary, the costs of both remedial alternatives will be considered direct and necessary parts of attaining a Permanent Solution because both remedial alternatives were of the type generally recognized as necessary and appropriate for the purpose of achieving a Permanent Solution with respect to the type of contamination located on Company J's property, and because both remedial alternatives were implemented by Company J with the purpose of achieving a Permanent Solution.

(g) *Denial or Proration of Certain Costs*.

1. *Dual Purpose Costs.* Costs that are higher than they would otherwise be because they are serving an additional purpose that is not eligible (*i.e.*, a purpose other than the purpose of achieving a Permanent Solution or ROS) may be prorated, unless proration is not representative of the relative costs. For example, costs related to excavation of soil may be prorated based upon the depth of soil needed to be removed for ~~remediation~~ Response Action purposes.

Example 1. An applicant plans to erect a new building on the property that requires the digging of a foundation of 15 feet. Based on information from its LSP, the applicant determines that excavation of soil to a depth of 10 feet below ground surface is necessary for Response Actions~~remediation~~. The Commissioner may disallow 5/15ths, or 33%, of the costs associated with excavation and removal of the soil.

Example 2. Assume the same facts as above except that erection of a new building on the site requires digging a foundation of 100 feet and the use of bracing and other support measures to complete the digging. In this circumstance direct proration (i.e., allowance of 10/100ths, or 10%, of the costs) may not be representative of the costs necessary for excavation down to 10 feet. In such a case, the Commissioner will allow a lesser percentage of the excavation costs, to the extent proven by the taxpayer.

2. *Soft Costs*. Costs that are allocable to both eligible and ineligible expenses, also known as "soft" costs, will also generally be prorated. Soft costs may include such items as general

conditions, general requirements, police details, or other similar overhead costs. The proration of soft costs will generally be done by determining the percentage of "hard" costs (i.e., all items that are not soft costs) that are eligible, and multiplying that percentage by the soft costs.

(6) Application Process

(a) Once an applicant has completed its ~~remediation~~ Response Actions ~~work~~ and submitted evidence that it has achieved a Permanent Solution or ROS to MassDEP, it may apply to the Department for a credit by utilizing Form BCA: Brownfields Credit Application or such other form as the Commissioner may prescribe. Such application must be filed on or before December 31st of the fifth year after the year in which the Permanent Solution or ROS is achieved, or the applicant will not be eligible for the brownfields credit. Such application may be filed even before the applicant has completed cost recovery under other reimbursement pathways (*e.g.* chapter 21J, or a lawsuit against another PRP) as long as the applicant discloses their existence on its credit application.

(b) *Required Documentation.* As part of a completed application, an applicant must furnish the Department with the following documentation and representations:

1. A prose justification of the submitted costs explaining (a) why they should be considered to have been taken for the purpose of achieving a Permanent Solution or ROS, (b) why they were reasonable and (c) why they were a ~~direct and~~ necessary part of achieving a Ppermanent Ssolution or ROS.

2. Documentation showing the Assessed Value of the property;

3, The applicant's deed or lease agreement for the property;

4. A description of the business purpose for which the property is owned or leased, i.e., the business activity taking place on this site once the Permanent Solution or ROS was achieved;

5, A copy of the construction plan for the property or site, including a cross-sectional diagram if available;

6. Daily or weekly field reports or field log books prepared by contractors and/or onsite engineering oversight personnel that describe the ~~related~~ activities conducted on days when ~~remediation~~ Response Action costs are incurred;

7. Soil transportation logs (or their equivalent, such as Bills-of-Lading or manifests);

8. A detailed statement of the property's contamination history to the extent known or discoverable by the applicant, including dates of the Release(s), identification of the person(s) who caused the Release(s), and identification of the person(s) who owned, leased or operated the property at the time of the Release(s);

9. A complete list of all Eligible Costs, submitted electronically in a standard database spreadsheet format, that includes with respect to each item the invoice date, the invoice number, the vendor, the amount of the cost and a brief description of the service(s) provided;

10. With respect to any general requirements or general conditions payment item claimed as an Eligible Cost on the application, an itemized breakdown of the costs that are included in such general requirements or general conditions payment item;

11. A representation, provided under the pains and penalties of perjury, that all requirements of 830 CMR 63.38Q.1 have been met, including without limitation (a) that the applicant is an Eligible Person; (b) that the property is located in an Economically Distressed Area; (c) that only Eligible Costs are claimed in the application; (d) that all of the claimed costs relate to one of the release tracking numbers for which a Permanent Solution or ROS was achieved; (e) that, to the best of the applicant's knowledge, all statements contained within the application are accurate; (f) that all reimbursements received or that will be received by the applicant with respect to its Eligible Costs have been reported in the application; (g) an acknowledgement that the applicant has a duty to notify the DOR of any reimbursements it may receive in the future other than those disclosed in the application; and (h) an acknowledgement that if the applicant does receive any such reimbursement not disclosed in the application and the applicant has received a credit that was attributable to costs that were ultimately reimbursed, the applicant has a duty to pay back to the DOR the corresponding (whether 25% or 50%) amount of credit attributable to the amount of the reimbursement; and

12. A site investigation report, pre-characterization report or other similar report of the location of Contaminated Media as determined prior to or during remedial activities.

(c) *Additional Documentation.* An applicant must furnish any additional information or documentation that the Department deems necessary to determine and to verify the eligibility of costs. As noted in 830 CMR 63.38Q.1(5)(f) above, the Department reserves the right to request, *inter alia*, all invoices and proof of payment thereof.

(d) *Duty to Report Changes in Circumstances.* After an application has been submitted, the applicant has the duty to report to the Department any subsequent material changes to its application. Some such circumstances include, but are not limited to:

1. The applicant receives a reimbursement with respect to any of its Eligible Costs that was not already reported on its application, regardless of whether such reimbursement was anticipated;

2. The Permanent Solution or ROS is retracted or otherwise modified such that it is no longer valid or no longer in the form described in the application (e.g., a Permanent Solution without an AUL that is modified to a Permanent Solution with an AUL); or

3. The applicant or the person acting on its behalf through a Power of Attorney becomes aware that any statement contained within the application was not materially accurate at the time it was made, or is no longer materially accurate.

(e) *Credit Certificate*. If an application is approved, the Department will issue a notice of credit approval and a "Form BCC – Brownfields Credit Certificate," indicating a certificate number,

the expiration date of the credit, and the amount of credit approved. The expiration date of the credit shall be the same as the date by which an application must be filed as set out in 830 CMR 63.38Q.1(6)(a). The applicant may use the credit for any tax year ending on or before the expiration date on the tax certificate, in accordance with 830 CMR 63.38Q.1(7)(b).

Commented [A26]: The statute specifies that a credit may be used over a five year period. Since there is no requirement that DOR act in a timely manner, 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.

Additionally, if there is a pending cost recovery action or costs are potentially reimbursable under 21J, an application cannot be filed immediately upon achieving a Permanent Solution or ROS. As drafted, this may cause some applicants to forego cost recovery, thereby increasing the amount of the credit ultimately issued.

(7) Limitations; Claiming and Carryforward of Credit; Deductibility of Net Response and Removal Costs

(a) *Limitations on use of the Credit.*

1. *Fifty-percent Limitation for Personal Income Taxpayers*. Pursuant to M.G.L. c. 62, § 6(j)(3), the maximum amount of credit that may be taken for a single tax year may not exceed fifty percent (50%) of the claimant's personal income tax liability for such year.

2. *Fifty-percent Limitation for certain Business Corporations*. Pursuant to M.G.L. c. 63, § 38Q(c), the maximum amount of credit that may be taken for a single year may not exceed fifty percent (50%) of the claimant's corporate excise liability for such year. This limitation does not apply to financial institutions or insurance companies that are subject to a financial institution excise or an insurance premium excise, respectively, set out in M.G.L. c. 63.

3. *Minimum Excise Limitation*. Pursuant to M.G.L. c. 63, § 38Q(e), the credit may not be used to reduce the tax liability of a business corporation below the minimum excise. Pursuant to M.G.L. c. 63, § 2(b) the credit may not be used to reduce the financial institution excise liability of a financial institution below the minimum excise.

(b) *Claiming and Carryforward of Credit*. A taxpayer may claim the credit for the tax year in which the credit is generated. A taxpayer may also carry over the portion of the credit, as reduced from year to year, that it was unable to claim based upon the limitations set out in M.G.L. c. 63, § 38Q(c) and (e) and M.G.L. c. 62, § 6(j)(3). The taxpayer may claim such carryover credit against its tax liability for any subsequent taxable year ending on or before the expiration date on the certificate. For purposes of this section, the tax year in which the credit is generated is the tax year in which the Permanent Solution Statement or ROS Submittal is filed with MassDEP. If a taxpayer does not claim the credit on its original return for an eligible tax year, such taxpayer may claim the credit by filing an amended return with respect to such year so long as the year ended on or before the expiration date of the certificate and the statute of limitations is still open for filing an amended return for that year. The period of time for filing an amended tax return is set forth in M.G.L. c. 62C, § 37. If the period of limitations for filing an amended return for a particular year was open at the time that a credit application was filed but then closes before the date that the certificate is issued or within ninety days thereafter, then the Commissioner will treat the credit application as an amended return for the limited purposes of claiming the credit for that year and apply the credits from that certificate to that year at such time. For purposes of this paragraph, the application will be considered filed on the date it was received by the Commissioner. However, in no event may a taxpayer claim the credit for a taxable year during which it ceased to maintain the ROS or the Permanent Solution for which the credit was granted.

(c) *Deductibility of Net Response and Removal Costs*. Where a taxpayer has claimed a deduction on any Massachusetts tax return for any expense which qualifies as a Net Response and Removal Cost, and a brownfields credit is awarded with respect to any such Net Response and Removal Cost, the taxpayer's income for the tax year in which the credit was awarded shall be increased to the extent of such credit.

(8) Transfer of the Credit

(a) *Transfer, Sale or Assignment of the Credit*. A recipient of a credit seeking to transfer, sell or assign the credit, or any unused portion thereof, must complete and submit to the Department a transfer application on Form BCTA before making a transfer. The recipient must submit the transfer application to the Commissioner on or before the expiration date of the credit certificate that it seeks to transfer or within one year of the date that the original credit certificate was issued, whichever is later. The transfer application requires a statement describing the amount of the credit available for transfer, sale or assignment, as well as a statement as to the amount of the credit to be transferred. A transferor may also be required to acknowledge the transfer and its amount on a form prescribed by the Commissioner. If the transfer is approved, the Department will issue a certificate to the transferee stating the amount of the credit transferred. The new certificate to the transferee will have the same expiration date as the original certificate for such credit.

(b) *Claiming the Credit as a Transferee*. A person that receives a valid transfer of the credit may, subject to the requirements and limitations of 830 CMR 63.38Q.1, apply such credit to either the tax imposed under M.G.L. c. 62 or the excise imposed under M.G.L. c. 63. The transfer, sale or assignment of a credit does not extend the carryforward period. A transferee may claim the credit for any year in which it could have been claimed by the original credit recipient as set out in 830 CMR 63.38Q.1(7)(b), either by including the credit on its original return or by filing an amended return, as long as the transferee's statute of limitations is still open for filing an amended return for that tax year. The period of time for filing an amended tax return is set forth in M.G.L. c. 62C, § 37.

(c) *Gain from Sale or Transfer of Credit*. The granting of a credit to a taxpayer is not considered income to the taxpayer to the extent the credit is used to actually offset a tax owed by that taxpayer. However, the sale of a credit to a transferee is a taxable event that could trigger gain to the transferor. Additionally, a nonprofit organization that recognizes gain from the sale of a credit may be required to report such gain as unrelated business income. *See* 830 CMR 63.38T.1: Taxation of Unrelated Business Income of Exempt Organizations.

(9) Allocation of Credit Among Partners, Members or Owners

A credit granted to a partnership, a limited liability company taxed as a partnership or multiple owners of a property shall be passed through to the persons designated as partners, members or owners, respectively. This pass-through shall be pro rata or pursuant to an executed agreement among such persons documenting an alternative allocation method.

(10) Ordering; Non-refundability of Credit

(a) *Ordering of Credits*. The credit may be applied in combination with other credits allowed under M.G.L. c. 62 in any order. Similarly, the credit may be applied in combination with other credits allowed under M.G.L. c. 63 in any order.

(b) *Combined Group Members*. A taxpayer that participates in the filing of a Massachusetts combined report under M.G.L. c. 63, § 32B may apply the credit against its liability as determined through such filing, and may share the credit with the other taxable members of the combined group in accordance with the provisions of 830 CMR 63.32B.2(9).

(c) *Credit Non-refundable*. The credit is non-refundable.

(11) Recapture; Payments in Error

(a) *Recapture in general*. If a credit recipient ceases to maintain the Permanent Solution or the ROS in violation of the MCP prior to its sale of the property or the termination of the property lease, the recipient shall add back as additional taxes due the difference between the credit taken and the credit allowed for maintaining the remedy. The recipient shall report such amounts on its return for the year the recipient fails to maintain the Permanent Solution or ROS. As set out in M.G.L. c. 63, § 38Q(b) and M.G.L. c. 62, § 6(j)(2), the amount of the credit allowed for maintaining the remedy shall be determined by multiplying the original credit by the ratio of the number of months the remedy was adequately maintained over the number of months of the useful life of the property. Pursuant to M.G.L. c. 63, § 38Q(b) and M.G.L. c. 62, § 6(j)(2), the useful life of the property shall be deemed to be the same as that applied by corporations for depreciation purposes when computing federal income tax liability; provided, however, that in the case of real property that is not depreciable, the useful life shall be deemed to be 12 months. For purposes of determining whether a given Permanent Solution or ROS has, in violation of the MCP, ceased to be adequately maintained, the Department will consult letters, electronic correspondence, enforcement documents and other official records issued by MassDEP that are publicly available on its website, or that have otherwise been made available to the Department and the applicant.

(b) *Recapture where a credit has been transferred*. For purposes of determining the amount of recapture (as set forth in 830 CMR 63.38Q.1(11)(a)) following a transfer of the credit, any credit, or portion thereof, that has been transferred by a credit recipient will be treated as having been taken by the credit recipient prior to the transfer. In the absence of fraud by the transferee, where a credit recipient ceases to maintain the property in compliance with the MCP prior to the sale, transfer or assignment of a credit or portion thereof, the Department will seek recapture against the transferor rather than the transferee.

(c) *Credits Allowed in Error*. Where the Department allows all or part of a credit in error, the Department is directed to recover such amounts as "payments in error" pursuant to M.G.L. c. 62C, § 36A. If the Department has made a "payment in error," has demanded return of that payment, and the full amount has not been repaid within 30 days, the amount demanded is considered a tax assessed under M.G.L. c. 62C. A demand for repayment may be made at any time within three years from the date of the payment in error. However, if it appears that all or

Commented [A27]: This reference is to documents from DEP made available to DOR that are not public record. If not available on MassDEP's website, then such documents should also be made available to the applicant. Our concern is that DOR and MassDEP share documentation and deny an application without the applicant knowing why.

Commented [A28]: This would affect buyers of tax credits – who would already have waited for a first review and approval of the application and then have to wait till the term of the audit expires to be able to purchase them. Depending on circumstances this could greatly diminish the value of the credits or render them non-transferable. NAIOP pointed out that BTC are often critical to financing affordable housing, adding a three year audit to the process would be restrictive and discourage those projects.

any part of a payment in error was induced by fraud or misrepresentation of a material fact, a demand for repayment may be made at any time within six years from the date of the payment in error. Misrepresentation of a material fact includes failure to disclose a material fact or to correct the Commissioner's misunderstanding of such a fact. Where a credit has been transferred, the Commissioner may seek recovery of the payment in error from the original applicant (i.e., the transferor) but, in the absence of fraud by the transferee, will not seek recovery from the transferee. ~~An example~~Examples of such a credit in error includes~~is~~ a situation where the Applicant has received a reimbursement that was not disclosed on its application or~~,~~ the applicant has received a credit that was, in whole or in part, attributable to costs for which it ultimately received reimbursement, and in either of these cases, the applicant has not paid back to the DOR the corresponding (whether 25% or 50%) amount of credit attributable to the amount of the reimbursement.

(12) Appeal Process for Denial or Partial Denial of Applications for Credit

(a) *Written Notification of a Proposed Denial or Partial Denial.* If the Department proposes to deny an application for the credit, in whole or in part, the Department will send written notification to the applicant of its proposed denial. The written notification will explain that the applicant has the right to file a written appeal of such proposed denial or partial denial. In the case of a proposed partial denial, the applicant may request that the Department issue a credit certificate with respect to the proposed approved credit amount pending an appeal, provided that any such tentatively approved credit amount is subject to adjustment pursuant to the appeals process, as described in 830 CMR 63.38Q.1(12)(b).

(b) *Appealing a Proposed Denial or Partial Denial.*

1. *Requesting an Appeal.* Upon receipt of notification of a proposed denial or partial denial of a credit, an applicant may make a written request for a conference with the Department's Office of Appeals. Such request must be filed with and received by the Department within 30 days of the date set forth in the notification of proposed denial or partial denial and must include a statement as to the reason or reasons why a specific amount of credit that has been proposed to be denied should be approved, as well as supporting documentation. A timely request for a conference will extend the expiration date of any that may be issued at the conclusion of the appeals process including any appeal final determination by the Commissioner.

2. *Appeals Process.* The appeal of a proposed denial or partial denial is a *de novo* proceeding. The appeals officer will not review ~~the entire application, including~~ any part of the application that the Department did not propose to deny. As part of this review, the appeals officer may require the applicant to provide additional information relevant to the portion of the application that is the subject of the appeal. The Office of Appeals will schedule a conference and notify the applicant in writing of the date and time of such conference and of any disputed issues to be addressed at the conference. The conference shall be an adjudicatory hearing conducted in the manner provided by chapter 30A of the General Laws.

3. *Decision by the Office of Appeals.* The Office of Appeals will notify the applicant as to its decision by a letter of determination, which will explain the reasons for the decision. If the

Commented [A29]: 30 days is insufficient time to make the filing described in this section. A notice of appeal could be required within 30 days followed by a schedule established by the appeals officer for a more detailed statement of reasons and supporting documentation.

Commented [A30]: LSPA strongly urges that the appeal process should not be punitive; applicants should not be deterred from filing a legitimate appeal out of fear of retribution. As written, the language below allows DOR during appeal to reconsider application materials it has already approved. The portion of the application considered during the appeal process should be limited to the items that are appealed.

Office of Appeals in its letter of determination approves the applicant's credit application, in whole or in part, the Department will send the applicant a credit certificate with the amount of approved credit eligible for the applicant's own use and/or for transfer, sale, or assignment, to the extent that a certificate was not previously issued for such amount. ~~If the credit amount approved pursuant to the letter of determination is less than the amount reflected on any credit certificate previously issued with respect to the credit application, the applicant is responsible for repayment of any excess credit previously issued.~~

Commented [A31]: This is punitive. See above comment.

4. *Time Period for Appeals Requests.* An appeal of a proposed denial or partial denial must be made within the 30-day period set forth in 830 CMR 63.38Q.1(12)(b)1. A subsequent claim based upon costs that were previously considered in the context of a credit claim that was denied will not be re-considered.

(c) *Proposed Denials Not Appealed by the Applicant.* If the Department does not receive a written request for a conference within 30 days of the date set forth in the notification of proposed denial, it will issue the applicant a notice of credit denial.

(d) *Proposed Partial Denials Not Appealed by the Applicant.* Once the Department has notified the applicant of its proposal to deny an application in part, the applicant may notify the Department in writing that the applicant does not wish to file an appeal of the partial denial. If the Department receives such a written notice, or if the Department does not receive a written request for a conference with the Department's Office of Appeals within 30 days of the date set forth in the notification of proposed partial denial, the Department will send the applicant a credit certificate. That certificate will state the amount of approved credit eligible for the applicant's own use and/or for transfer, sale, or assignment.

Proposed Regulation - Public Hearing February 11, 2021

Written comments may be emailed to RulesandRegs@dor.state.ma.us