LSP Association
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Via Email: *rulesandregs@dor.state.ma.us*

February 11, 2021

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

And

Rulings and Regulations Bureau
P.O. Box 9566
Boston, MA 02114-9566

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

Dear Commissioner Snyder:

The LSP Association appreciates the opportunity to comment on the *Proposed Regulation 830 CMR 63.38Q.1- Massachusetts Brownfields Tax Credit* and appreciates the Department's 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 pending review that now exist, and promoting redevelopment of under-utilized brownfields, as intended.

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.

LSPA comments are provided in red-line edits and comments to the proposed regulation attached to this letter. The overall themes of our comments are described more below.

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Effective Date:

- 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.

We recommend edits to the proposed regulation to maintain consistency with the statutes (M.G.L. c. 62 § 6(j) and M.G.L. c. 63, § 38Q), as in the following ways:

- The proposed regulation uses the term "remediation" and "remediates" throughout, but these are terms that do 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".*

- "Net Response and Removal Costs" as defined in the regulation should be the same as the underlying statute. The term should not mean one thing in the statute and something slightly different in the regulation.

The proposed regulation requires MassDOR to make determinations that are within the expertise and authority of MassDEP. Determinations of "appropriateness" and "necessity" of expenses for Response Actions should be made by MassDEP.

- Section 3 refers to "enforcement action under M.G.L. c. 21E" without referencing what entity determines such enforcement action. It is of great concern to the LSPA if an entity other than MassDEP makes this determination. We note that we previously provided this comment relative to Section 11 in the Working Draft of the regulation, which has been addressed and clarified, but Section 3 requires similar clarification.

- Section 5(a) proposes a higher standard for eligible costs ("direct and necessary" as well as reasonable) than those recoverable under M.G.L. c. 21E. This should not be the case; compliance with the Massachusetts Contingency Plan (310 CMR 40) is itself "necessary and appropriate" and consistent with the definition of Net Response and Removal Costs in the statute.

The proposed regulation is inconsistent with the Massachusetts Contingency Plan (MCP, 310 CMR 40) which regulates appropriate assessment and remediation of sites. This is manifested in several ways:

- The proposed provision at section (5)(f)2 is inconsistent with MassDEP policy. 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. A special verification process for costs for approaching background is unreasonable and inconsistent with the MCP.

- Section (5)(f)3 should be eliminated. The criteria outlined in this section are 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.

LSPA strongly urges that the appeals process (section (12)) should not be punitive; applicants should not be deterred from filing a legitimate appeal out of fear of retribution.

- As written, section (12)(b)2. 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.

- The following portion of Section (12)(b)3 should be deleted as it is similarly punitive: *"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".*

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

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We appreciate your consideration of our comments on *Proposed Regulation 830 CMR 63.38Q.1-Massachusetts Brownfields Tax Credit*, and are available for further discussion at your request.

Sincerely,

Michele Paul, LSP
President

Wendy Rundle
Executive Director

Attachment: LSPA Comments on Proposed Regulation 830 CMR 63.38Q.1: Massachusetts Brownfield Tax Credit