EBC Site Remediation and Redevelopment Program: Effective Project Planning for the Brownfields Tax Credit
Welcome

Jonathan Kitchen

EBC Site Remediation & Redevelopment Committee

Principal, Civil & Environmental Consultants, Inc.
Welcome to McLane Middleton

David Moynihan

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Program Purpose – What You Will Learn

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Environmental Business Council of New England
Energy Environment Economy
Laying the Groundwork for the Credit

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Effective Project Planning
for the
Brownfields Tax Credit

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History of the Brownfields Credit

- Initially established in 1998 by the Brownfields Act ("Act Relative to Environmental Cleanup and Promoting the Redevelopment of Contaminated Property") (Stat. 1998, c. 206)

- Now codified as M.G.L. c. 63 §38Q pertaining to corporations and c. 62 §6(j) pertaining to taxpayers and nonprofit organizations.
Brownfields Incentives

Two Components:

Encourage developers to redevelop Brownfields sites
AND
Encourage developers to undertake more extensive cleanups in the course of development

PS or ROS with AUL -> 25% of net response and removal costs
PS or ROS w/out AUL -> 50% of net response and removal costs
Eligibility requirements:

1. Commence and diligently pursue a response action on or before August 1, 2023.
2. Achieve a PS or ROS
3. Own/lease the property “for business purposes”
4. The property must be located within an economically distressed area (as defined in M.G.L. Ch. 21E)
5. Net response and removal costs were not less than 15 per cent of the assessed value of the property prior to cleanup
6. The site was reported to the DEP (i.e., it has an RTN)
7. Claimant must be “eligible person” - an owner or operator who did not own or operate the site at the time of the release and did not cause or contribute to the contamination.
8. Claimant is not subject to any enforcement action brought under chapter 21E
Also specific gas plant sites in Arlington, Danvers, Lexington, Marblehead, Nantucket, and Stoneham.
Net Response and Removal Costs

Defined as:

“expenses paid by the taxpayer

for the purpose of achieving a permanent solution or remedy operation status in compliance with chapter 21E”

(Incurred between 8/1/1998 and 1/1/2024)

“Response” “Removal” “Permanent Solution” and “Remedy Operation Status” defined in chapter 21E
Net Response and Removal Costs

Net costs:

- Eligible costs may be offset by:
  - 21J reimbursement
  - Cost recovery from RPs

- No credit allowed for state financial assistance received from BRAC or BRF
Sources of information and guidance about credit eligibility:

- The statute
- Form BCA
- Technical Information Releases (TIRs)
- Letter Rulings
- Directive 13-4
- Information Letters
Technical Information Releases:
https://www.mass.gov/lists/dor-technical-information-releases

TIR 18-6: Northeastern University v. Commissioner of Revenue – Eligible Costs for Brownfields Tax Credit

TIR 13-15: Tax Changes in the Fiscal Year 2014 Budget, the Transportation Finance Act, and the Fiscal Year 2013 Supplemental Budget


TIR 06-16: Effect of Recent Economic Incentive Legislation on the Personal Income Tax, the Corporate Excise, and Tax Administration

TIR 04-7: Changes to the Brownfields Credit and Investment Tax Credit Contained in Chapter 141 of the Acts of 2003

TIR 00-9: Tax Changes in the Fiscal Year 2001 Budget

TIR 99-13: The Tax Credit Provisions of the Brownfields Act

TIR 99-13: A taxpayer subject to any outstanding or unresolved enforcement action under Chapter 21E cannot claim the credit.
Letter Rulings and Directives

Letter Ruling 12-3:
Inapplicability of Brownfields Tax Limitation to Insurance Premium Excise
https://www.mass.gov/letter-ruling/letter-ruling-12-3-inapplicability-of-brownfields-tax-limitation-to-insurance-premium

Letter Ruling 10-5:
Applicability of Brownfields Tax Credit to Solid Waste Facility

Directive 13-4
- Now modified by TIR 18-6 to allow a nonprofit to claim a credit for costs incurred beginning on or after August 1, 1998 (i.e., prior to the 2006 amendment that allowed nonprofits to claim a tax credit);
- Claimant must use or sell credit within 5 years of the year in which PS or ROS is achieved;
https://www.mass.gov/directive/directive-13-4-guidance-with-respect-to-brownfields-tax-credit-applications
Information Letters

- Provide general information in response to specific question(s).
- Not legally binding on DOR.

Transparency Reports

https://www.mass.gov/lists/massachusetts-dor-tax-credit-transparency-reports

Massachusetts Tax Credit Transparency Report
Calendar Year 2017

I. Introduction

Massachusetts legislation enacted in 2010 requires agencies that administer refundable and transferable tax credit programs to submit an annual public report, by May 15 of each year, to the Department of Revenue with respect to such credits awarded or issued for the previous calendar year.1 See St. 2010, c. 131, §§ 37, 38, 39 and 47, amending G.L. c. 62C by amending § 1, and adding new § 89; St. 2010, c. 240, § 118, further amending G.L. c. 62C § 1. For more information regarding this legislation, see Technical.
Pre-application planning – why it matters

Hope for the best – but plan for the worst.

Documentation is key.
Form BCA requires:

- A copy of the Response Action Outcome Report/Remedy Operation Status Report/Permanent Solution Statement prepared by the Licensed Site Professional hired for this project;
- Documentation showing the assessed value of the property prior to remediation;
- The deed or lease agreement for the property;
- A description of the business purpose for which the property is owned or leased, i.e., the current business activity that is taking place on this site;
- Copies of all correspondence sent to and received from the DEP relating to the cleanup and outcome of this property.

**Note:** This must be in a standard database spreadsheet format:
- A complete list of all eligible costs. This list should include the invoice date, invoice number, vendor, eligible net response and removal costs and a brief description of the service(s) provided.
What happens if BCA is denied in whole or in part?
It’s all about record review –

Internal Appeal at DOR
- Informal process
- Request conference within 30 days of Proposed Denial
- Chance to provide additional information
- No fixed deadlines for DOR review and action

If internal appeal does not resolve claim to claimant’s satisfaction

Record Review (certiorari) in Superior Court
- File within 60 days of DOR “final decision”
- Claimant files Complaint
- DOR “answers” by filling in the administrative record that documents its decision
- Limited opportunities to supplement the record
- Judge determines whether the record supports DOR’s decision, i.e., is supported by “substantial evidence,” is not “arbitrary and capricious” or otherwise inconsistent with the law.
Practice Points

- Net response and removal costs are not less than 15% of the assessed value of property prior to cleanup.

- **Claimant** must “achieve” the PS/ROS
  - “Achieve” is not defined. Typically this means that the claimant’s name is on the PSS/ROS.

- Claimant must own or lease – a development license is insufficient.

- Costs must be incurred while the claimant owns/operates the property.
Practice Points

- Costs incurred prior to acquisition are not eligible.

- Financial Record-keeping/Payment confirmation:
  - If remedial work is being performed by a subcontractor to the GC, should make the need for cost documentation clear up front.
  - Also expect that there will be follow-up requests for documentation after the project is completed.
Practice Points

- Attorneys fees /record-keeping :
  
    
    “To be recoverable as response costs, attorney’s fees must be for services that are closely tied to the response action.”
  
  - The language relating to attorneys fees in Form BCA reflects *Bank*.
    
    “Attorney’s fees for ‘compliance assistance’ in preparation of submittals documenting response actions required pursuant to the MCP.”
Practice Points

Subsequent Brownfields Credit Applications at the Same Property

**Permanent Solution with AUL**
- File Brownfields Credit Application
- 25% Net Response and Removal Costs

Conduct subsequent work at same property and terminate AUL

**Permanent Solution without AUL**
- No provision for revised or amended applications for the credit.
- If additional costs are incurred subsequent to the initial application for the credit and a revised PS is obtained, a new application for the credit may be submitted.
- The new application must independently meet each of the eligibility criteria for the credit, i.e. eligible costs incurred since the initial application must meet or exceed the fifteen percent threshold, etc.
Brownfields, LSPs, and the MCP

Kevin Trainer

Senior Geologist
GeoInsight, Inc.
Role of the LSP
Commonwealth v. Eskanian

“Licensed Site Professionals are “licensed, quasi-governmental workers whose role is to advise and guide the cleanup efforts of [Responsible Parties]. Though the regulatory scheme requires that Responsible Parties hire LSPs, the LSP remains an agent of the government for all intents and purposes.”
Eligible Costs

What are costs incurred for the purpose of achieving a PS/ROS vs. regular costs of construction?

“It is DEP’s position that construction activities at a Disposal Site meet the regulatory definition of a Remedial Action, \textit{to the extent that such activities involve the removal, disposal, or relocation (including re-grading) of released oil or hazardous material, and because such activities must be conducted in a manner to prevent, minimize, or mitigate damage to health, safety, public welfare, or the environment}.”

\textbf{Construction of Buildings in Contaminated Areas}

January 2000

Policy #WSC-00-425
 Eligible Costs

- Scope of eligible costs is established by MCP submittals prepared by LSP.

- At least one judge has held that DOR’s role is limited:
  - To verify eligible costs (matters of accounting, documentation of costs, mistake, fraud)
Eligible Cost Examples

- Assessment, removal, or containment under MCP
- Preparing MCP reports
- Geotechnical or environmental testing
- Demolition of buildings to conduct response actions
- UST closure or removal
Ineligible Cost Examples

- UST replacement, relining, retrofitting
- Loss of business revenue from shutdown during response and removal
- Landscaping
- Federal, state, local fees (including DEP fees)
- Ordinary capital improvements
Background

- Natural Background
  - e.g., Boston Blue Clay (elevated As, Be, Ni)

- Anthropogenic Background

- Historic Fill (“Urban Fill”)
  - Typically contains metals (e.g., lead) and PAH

- Notification Exemptions
  - Coal, coal ash, or wood ash
  - As, Be, Ni in Boston Blue Clay, or As in area of elevated As
Background

- Achieving a Permanent Solution
- 310 MCR 40.0902(3):
  - “If the concentration of an oil and/or hazardous material at the disposal site is at or below background levels, then that oil and/or hazardous material need not be included in the disposal site Risk Characterization.”
- Feasibility of Achieving or Approaching Background

Conducting Feasibility Evaluations Under the MCP

Policy #WSC-04-160
Background

- Soil with Urban Fill or elevated background needs to be managed appropriately

- Costs
  - Disposal
  - Stabilization (for characteristically hazardous soil)

- Potential Risks
What to do with Sites with Background Conditions?

- Release reporting?
  - If apply notification exemption then not eligible for tax credit.

- Treat as a “release”?
  - Risk characterization includes detected constituents.
  - Metals (especially lead) may require an AUL
  - Is extent of impacts really defined?

- Treat as Background?
  - Background constituents removed from Risk Characterization.
  - Background constituents will not require an AUL.
Project Example

- Former bulk oil storage facility
- Fuel oil release
  - Impacts from immediately below pavement to 10 feet below grade (silt and clay underlying urban fill)
- Impacted soil was “Urban Fill”
- Remediation required to address fuel oil impacts (not urban fill constituents)
Project Example

- DOR initial review of BCA:
  - only top 3 feet of soil required remediation.
  - apportioned claim based on that position.
  - the fuel oil release data (impacts extended to 10 feet below grade) were apparently not considered in the initial review.
Project Example

- DOR’s position based on DEP’s 2002 Technical Update
  Background Levels of Polycyclic Aromatic Hydrocarbons and Metals in Soil

Minimizing Exposure to Soils Containing Elevated Background Material and/or Material Exempt from M.G.L. c.21E

As discussed in this Technical Update, M.G.L. Chapter 21E and the Massachusetts Contingency Plan (the statute and regulations) do not require remediation of chemicals present at levels consistent with background, even if such concentrations would otherwise pose a significant risk of harm to health, safety, public welfare or the environment. The statute also exempts several other environmental conditions (such as lead from lead paint or gasoline and pesticides applied according to their label) that could pose a Significant Risk.

While such conditions are not subject to regulation by DEP, the Department encourages parties to mitigate potential exposures whenever possible. Such mitigation measures could include:

- providing clean soil (down to a depth of 3 feet) in residential settings, and
- providing clean corridors for utility lines.
Three years later, after appeal to Superior Court, Brownfields Credit issued reflecting full extent of remediation.
Responding to Technical Issues

- Check for similar projects with Brownfields Tax Credits
  - DOR Transparency Reports

### Table of Transferable or Refundable Tax Credits

<table>
<thead>
<tr>
<th>Administering Agency</th>
<th>Period Covered</th>
<th>Tax Credit Program</th>
<th>Project Name/Title</th>
<th>Identity of the Taxpayer Receiving an Authorized Credit</th>
<th>Amount of the Authorized Tax Credit</th>
<th>Date the Authorized Tax Credit Was Issued</th>
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<tbody>
<tr>
<td>Department of Revenue</td>
<td>2018</td>
<td>Brownfields Tax Credit</td>
<td>55-71 Needham Street, Newton, MA 02464</td>
<td>Needham Street Village Shops, LLC</td>
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<td>Nova MP Cambridgeparks Drive LLC</td>
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Summary

Timing

- Begin planning for the credit at the earliest stages of the project.
  Consider: when costs are incurred
  when PS/ROS is submitted
  when BCA is filed

Documentation

- Organize project records with Form BCA in mind
- Reports should reflect nature and extent of response and removal activities, consistent with MCP and DEP guidance
- Reports should support site costs that are “expenses paid...for the purposes of achieving a PS or ROS in compliance with Chapter 21E”
Questions?

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Massachusetts Brownfields Tax Credit

Brownfields Tax Credit Amount Awarded

Number of Credits
Tax Credit Recipients (2011 through 2017)

- Mostly (>70%) to Developers
- 10% to Healthcare Companies ($12.4 million to Dana Farber Cancer Institute)
- 9.2% to Universities (MIT, Northeastern, Harvard, BU, etc.)
- Smaller amounts to manufacturers, community housing development, utilities.
Moderated Discussion

Moderator: Jonathan Kitchen
Civil & Environmental Consultants, Inc.

Panelists:
• Thomas Fiore, Urbelis & Fieldsteel, LLP
• Kevin Trainer, GeoInsight, Inc.
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