

# New Massachusetts Brownfields Tax Credits Regulations Just Released

July 12, 2021

---

The Massachusetts Department of Revenue (DOR) issued final regulations effective July 9, 2021 (the Regulations) that are intended to aid in the implementation of the Massachusetts Brownfields Tax Credits program, which was created in 1998 as part of the Massachusetts Brownfields Bill. The Brownfields Bill was previously enacted to encourage the redevelopment of Brownfields in Massachusetts by providing both liability protection and financial incentives to new owners and/or operators of these sites.

This Advisory provides a brief summary of both the Massachusetts Brownfields Tax Credits program and the recently enacted Regulations.

## **The Massachusetts Brownfields Tax Credits Program**

Pursuant to the 1998 Massachusetts Brownfields Bill and its subsequent amendments (the Statute), certain taxpayers have the ability to obtain tax credits against their Massachusetts income tax liability as an incentive to clean up and redevelop Massachusetts Brownfields sites. A number of statutory criteria must be satisfied for a project to qualify for Massachusetts Brownfields tax credits. Note that some of the terms used below have the meaning given to them in the Massachusetts Contingency Plan (the "MCP"), which is the Massachusetts regulatory program concerning the assessment and cleanup of contaminated sites. Eligibility criteria include the following:

- The taxpayer must be an Eligible Person, as defined by Chapter 21E. An Eligible Person is defined by Chapter 21E, in part, as an owner or operator of a site who (a) would be liable under Chapter 21E solely because that party currently owns or operates the site, (b) did not cause or contribute to the contamination at the site, and (c) did not own or operate the site at the time of the contamination. In other words, only innocent owners or tenants of the site can qualify for the Brownfields tax credit, and those parties must not have owned or operated the site at the time the relevant contamination was released.
- The taxpayer must "commence and diligently pursue" the relevant environmental response action(s) on or before August 5, 2023. The entity planning to seek Brownfields tax credits must also be the party performing the relevant response actions.
- The "net response and removal costs" must be incurred between August 1, 1998 and January 1, 2024. Although these dates are clear, before the Regulations were released, not much guidance was available regarding what costs were eligible.

- A Permanent Solution or Remedy Operation Status for the site must be achieved and maintained in compliance with the MCP. What this means in English is that the cleanup must largely be completed before the tax credits are available.
- If an Activity and Use Limitation (an "AUL") is used to close out a site under the MCP, then a credit of 25% of the net response and removal costs is permitted. If no AUL is used, the credit increases to 50% of net response and removal costs, creating an incentive for additional cleanup to be performed.
- The relevant property must be owned or leased by the taxpayer for business purposes, and the property must be located within an "economically distressed area," a term defined in the Statute.
- The net response and removal costs must be no less than (i.e., equal to or greater than) 15% of the assessed value of the property prior to "response action on or before remediation." Defining what constitutes the "property" for this purpose can be challenging, as the relevant MCP site where remedial action is occurring is often different than the relevant tax parcel(s).
- The Brownfields Tax Credit is transferable. A number of taxpayers who were not able to use all of the credits they received have now transferred and sold their unused credits, for which there continues to be a very strong market.

### **The Massachusetts Brownfields Tax Credit Regulations**

The Brownfields tax credit program was initially successful, and continued to be so for a number of years. As the program grew in popularity, however, taxpayers began to experience significant delays in the consideration of their applications. There has also been growing uncertainty about the application review process. In response to these issues, the DOR made available prior drafts of the Regulations in 2020 and 2021, which were just finalized in an effort to provide greater certainty for the program.

The new Regulations supplement the guidance that was previously available in the form of DOR-issued Technical Information Releases and Letter Rulings. The Regulations offer a clearer picture of what response costs are considered "eligible" and provide a more streamlined process for the review and approval of applications.

#### ***Eligible Costs***

The Regulations for the first time set out a detailed list of "Eligible Costs" and costs that are not considered "eligible," as well as a number of examples of each. Among the helpful clarifications is the inclusion of certain costs associated with the removal and disposal of asbestos or asbestos-containing material from a building prior to its demolition, if the soil beneath the building must be accessed and remediated in order to achieve regulatory closure. The applicant must be able to demonstrate that they knew, at the time the asbestos was removed from the building, that oil and/or hazardous material were present beneath the building.

Also eligible for tax credits are costs incurred for the removal of soils that are uncontaminated, if the removal of such uncontaminated soils is necessary to access previously identified contaminated

soils. The Regulations also clarify that costs incurred for assessment activities prior to reporting a release to the Massachusetts Department of Environmental Protection (“DEP”) pursuant to the MCP may be eligible under certain circumstances. However, depending on how the DOR implements the Regulations, some of the examples regarding which costs are eligible may be problematic.

### ***Multiple Releases***

The Regulations clarify that an applicant may aggregate net response and removal costs over a 3-year period where there are multiple contaminated sites or “releases” at one property, provided the applicant has not already sought tax credits for the same sites. This will help applicants satisfy the eligibility threshold that the relevant net response costs are equal to or greater than 15% of the assessed value of the property in some instances where the costs associated with individual releases would be insufficient to satisfy this 15% requirement.

### ***Appeals Process***

The Regulations require DOR to provide a written notification to the taxpayer explaining why a credit was denied and detailing the procedure for appealing the denial. An appeal, which must be filed within 30 days of the date set forth in the notification of the denial, will in most instances only involve the review of the credits denied, and not the credits granted. This is an important change from the Regulations as initially proposed, which would have made a taxpayer’s entire application subject to *de novo* review.

### ***Administrative and Procedural Changes***

Taxpayers who have submitted Brownfields tax credit applications to DOR have recently experienced significant delays (often a year or more) in the review of their applications. In connection with the Regulations, DOR released an [administrative procedure document](#), which clarifies timelines and sets forth an expedited review process. Pursuant to the newly released procedure, DOR will contact applicants within 30 days to notify them of their assigned examiner, and applicants will receive an update from their assigned examiner every 60 days. DOR has also established an expedited review process for applicants seeking tax credits of \$250,000 or less.

DOR has also communicated that it is planning to hire a dedicated environmental engineer as well as three additional audit staff members. This may help speed up the review process and reduce DOR’s current backlog.

### ***Conclusion***

The Regulations provide detailed new guidance concerning how to apply for Massachusetts Brownfields tax credits and which costs are eligible. The Regulations are intended to clarify and expedite the process. Although the requirements remain numerous and are quite complicated, and some are potentially problematic, if you have spent the money and you qualify, then you should make sure to get the credits you deserve.

### ***Environmental Team***

Click headshot to view bio



**Ned Abelson**  
*Director*



**Jonathan Pearlson**  
*Director*



**Justin Rheingold**  
*Associate*



**William Seuch**  
*Director*