**Commonwealth of Massachusetts**
**Executive Office of Energy and Environmental Affairs**
**DEPARTMENT OF ENERGY RESOURCES**
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

# RENEWABLE ENERGY PORTFOLIO STANDARD (225 CMR 14.00)

# GUIDELINE

## Guideline Regarding the Definition of "Brownfield"

**Effective Date: TBD**

This document provides guidance regarding the manner in which property may qualify as a "Brownfield" under the Department of Energy Resource's (DOER) Renewable Energy Portfolio Standard – Class I regulations at 225 CMR 14.00 (Class I Regulations).

***BACKGROUND***

In May of 2013, the Patrick Administration announced that the Commonwealth had reached its goal of 250 megawatts (MW) of installed solar capacity four years ahead of schedule. At this same time, the Administration also announced a new goal of 1,600 MW by 2020.

In order to achieve the expanded goal, DOER set out to create a new class of solar carve-out incentives referred to as the Solar Carve-Out II program or "SREC-II." Under the SREC II program, PV generation units on certain properties at which contamination has come to be located, defined as "Brownfields" under DOER's regulations, may receive the third highest incentive levels available. The purpose of the incentive is to help steer PV development to underutilized land or properties whose redevelopment is otherwise hindered before developing uncontaminated "greenfields." In the case of Brownfields, this is accomplished by offsetting the additional activities and expenses that often hinder or prohibit development on contaminated property.

***WHAT IS A BROWNFIELD UNDER THE CLASS I REGULATIONS?***

Under the Class I Regulations, a Brownfield is defined as follows:

> *A disposal site that has received a release tracking number from MassDEP pursuant to 310 CMR 40.0000: Massachusetts Contingency Plan, the redevelopment or reuse of which is hindered by the presence of oil or hazardous materials, as determined by the Department, in consultation with MassDEP. For the purposes of this definition, the terms "disposal site," "release tracking number," "oil," and "hazardous materials" shall have the meanings giving to such terms in 310 CMR 40.0006: Terminology, Definitions and Acronyms. No disposal site that otherwise meets the requirements of 225 CMR 14.02: Brownfield shall be excluded from consideration as a Brownfield because its cleanup is also regulated by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 – 6939g, or any other federal program.*

The regulatory definition has two major components: (1) the presence of a disposal site that has been assigned a release tracking number (RTN) by the Massachusetts Department of Environmental Protection (MassDEP), and (2) the presence of oil or hazardous materials that hinder redevelopment. Each component is discussed, in turn, below:

**1. A disposal site that has received a RTN from MassDEP pursuant to 310 CMR 40.0000.**

MassDEP maintains a database of approximately 44,000 releases of oil or hazardous materials that have been assigned a RTN. Typically, MassDEP will assign a RTN to a disposal site when someone with knowledge of the release reports it to MassDEP, or if MassDEP discovers the release through its own investigations. Generally, the contamination must reach a reportable threshold before MassDEP will assign a RTN.

The cleanup of these sites is regulated by MassDEP under M.G.L. c. 21E and the Massachusetts Contingency Plan (MCP) at 310 CMR 40.0000. A complete inventory of disposal sites with RTNs is available online and can be searched by RTN, disposal site name, address, status, and/or chemical type. Results include lists of site actions, maps, and links to both electronically submitted and scanned documents. The list is found here: http://public.dep.state.ma.us/SearchableSites2/Search.aspx.

Of the releases that have received an RTN (as of 06/30/13):

- 7% (~2,900) are "open" and undergoing cleanup;
- 83% (~41,000) have reached regulatory closure with a permanent solution under the MCP. Of these:
    - 32% have been cleaned up to levels which would have existed in the absence of a release, or "Background;"
    - 60% have not reached Background, but have been cleaned up for unrestricted use;
    - 8% require deed notices or use restrictions as part of the remedy, and
- 3% of sites have achieved a Temporary Solution.
- 7% of sites fall into other site categories.

Some disposal sites with RTNs are also regulated under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (CERCLA), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 – 6939g (RCRA), or some other federal program. The regulation of such sites under a federal program does not automatically exclude it from consideration as a potential Brownfield under DOER's regulations. In Massachusetts, there are 36 CERCLA sites listed under the National Priorities List and 46 RCRA sites.

**2. The redevelopment or reuse of property is hindered by the presence of oil or hazardous materials, as determined by DOER, in consultation with MassDEP.**

The presence of oil or hazardous materials that *hinders* redevelopment or reuse of property was inherent to the crafting of the DOER definition of Brownfield and the associated higher level SREC-II incentives. The incentives are intended to recognize, and help overcome, the disincentives to appropriate reuse or redevelopment that may result from the presence of oil or hazardous materials in environmental media.

The following are common activities or expenses that could hinder redevelopment or reuse of properties at which oil or hazardous materials are present. These activities and expenses could arise predevelopment, or during the development phase. The following list is not intended to be exhaustive.

- **Predevelopment:**
  - Agreements to manage liability, and other risk management activities;
  - Review of status of contamination;
  - Review of environmental restrictions; and
  - Other environmental due diligence.

- **Development:**
  - Cleanup costs;
  - Costs associated with compliance with environmental restrictions, such as installation of ballasted systems and raised conduits (to avoid digging); and
  - Soil management.

DOER, in consultation with MassDEP, reads the definition of Brownfield broadly to recognize a wide array of costs and other disincentives associated with the presence of oil or hazardous materials. Generally, "open" sites, or sites that have not reached a permanent solution under the MCP, are eligible for consideration as a Brownfield, assuming cleanup costs and other issues arising out of the presence of oil or hazardous materials are a real hindrance to reuse or redevelopment. "Closed" sites may, in some circumstances, be considered Brownfields. For example, environmental restrictions or activity and use limitations (AULs) may hinder numerous forms of development, making the property a good candidate for SREC incentives. Even sites without AULs, but cleaned up to a level of no significant risk and/or for unrestricted use, may in some circumstances be burdened with material soil management or other material disincentives that hinder future development.

However, sites may not qualify where the presence of contamination, or the costs and other disincentives associated that contamination, are merely speculative or are *de minimis* in comparison to the overall development project, or where the presence of oil or hazardous materials does not otherwise reasonably hinder reuse or redevelopment. Sites cleaned up to background are unlikely to be considered a Brownfield.

***HOW DO I OBTAIN A DETERMINATION FROM DOER THAT MY PROPERTY IS A BROWNFIELD?***

DOER regulations provide that a determination as to whether a project is located on a Brownfield is made by DOER, in consultation with MassDEP. The final DOER determination as to whether the regulatory definition of Brownfield is satisfied is made in the Statement of Qualification Application process pursuant to 225 CMR 14.06, in which the appropriate SREC factor is also assigned.

In some circumstances, an entity planning to submit a Statement of Qualification Application under 225 CMR 14.06 may wish to obtain guidance from DOER as to whether its project is likely to qualify as being on a Brownfield. To facilitate PV development on Brownfields, DOER will provide such guidance pursuant to a written "Brownfield Pre-Determination Letter."

To obtain a Brownfield Pre-Determination Letter, applicants must submit to DOER a "Brownfield Pre-Determination Request Form," with supporting documents, containing specific reasons as to why

the applicant believes that its project would meet the definition of a Brownfield. A copy of the Brownfield Pre-Determination Request Form is included as Attachment A to this Guideline.

The Pre-Determination Request Form requires the applicant to provide the following:

A. Documentation of the Name of Entity that will Apply For Statement of Qualifications under 225 CMR 14.06(1).
B. Documentation of the receipt/assignment of a RTN.
C. Documentation showing that the redevelopment and/or reuse of the property is hindered by the presence of oil or hazardous materials, including:
    1. Estimate(s) of past, present and/or future cleanup costs from one or more Licensed Site Professionals (LSPs) as to how much any remaining cleanup will cost, or other credible and specific evidence of future cleanup costs, as well as documentation as to how cleanup will be achieved(Required if cleanup obligations remain.) ;
    2. Evidence showing that the marketability or development of the site has been hindered by the presence of oil or hazardous materials, including, for example and if applicable,
        a. Evidence that the property containing the disposal site has been on the market at fair market value but remains unsold, due to costs and other issues associated with oil or hazardous materials present at the site;
        b. Evidence showing that the owner of the property containing the disposal site has been unable to obtain financing due to costs and other issues associated with oil or hazardous materials present at the site;
        c. Evidence showing that environmental restrictions or AULs materially hinder redevelopment and reuse of the property;
        d. Evidence of the site being abandoned by the current or recent owners due to the presence of oil or hazardous materials; or
        e. Any other evidence
    3. Evidence showing if the site is largely undeveloped, evidence as to why the most appropriate reuse of the site is not for it to remain undeveloped, given its natural resource values.

A Pre-Determination Request Form and accompanying documentation must be submitted electronically to: DOER.SREC@state.ma.us

DOER will respond to a Pre-Determination Request Form either with a request for additional information, or the issuance of a Brownfield Pre-Determination Letter. Prior to the issuance of a Brownfield Pre-Determination Letter, DOER will consult with MassDEP. Generally, DOER will provide the Brownfield Pre-Determination Letter within thirty (30) days after receiving a complete Pre-Determination Request Form, or within thirty (30) days after receiving a complete response to any request by DOER for additional information, whichever is later. DOER's Brownfield Pre-Determination Letter is not a final agency decision, and is not binding on DOER or MassDEP, and does not give rise to any appeal right under M.G.L. c. 30A, or any other law. The Brownfield Pre-Determination Letter is based on the information provided to DOER consistent with this Guideline, and DOER reserves the right to make a different determination in its Statement of Qualification should information provided to DOER in connection with a Pre-Determination Request prove to be materially inaccurate or incomplete. A sample Pre-Determination Letter can be found in Attachment B.

**ATTACHMENT A: Pre-Determination Request Form**

# Massachusetts Department of Energy Resources (DOER) and Massachusetts Department of Environmental Protection (MassDEP)

"Brownfield Pre-Determination Request Form" (225 CMR 14.02)

## A. Name of Entity that will Apply For Statement of Qualifications under 225 CMR 14.06(1) (please print)

Name of Applicant

Company Name (if applicable)

Type of Entity:

☐ Corp. ☐ Trust ☐ Partnership ☐ LLC ☐ Nonprofit ☐ Other:

Mailing Address | City/Town | State/Zip

Email Address | Telephone Number | Cell ☐ Home ☐ Office ☐

## B. Assignment of a Release Tracking Number (RTN)

Does the property on which the Generation Unit will be located contain a disposal site that has received a Release Tracking Number (RTN) in accordance with 310 CMR 40.0000? [Link to Site List: Sites]

☐ No

☐ Yes RTN(s) Notification Date

City/Town of Disposal Site | Release Address | Site Name/Location Aid

## C. Redevelopment Or Reuse Is Hindered By The Presence Of Oil Or Hazardous Materials

Provide the following supporting documents as applicable. [check where attachments provided]

| | | | |
|---|---|---|---|
| ☐ | 1. | **Estimate of Cleanup Costs** | Estimate(s) of past, present and/or future cleanup costs from a Licensed Site Professionals (LSPs) as to how much any remaining cleanup will cost, or other credible and specific evidence of future cleanup costs, as well as documentation as to how cleanup will be achieved. (Required if cleanup obligations remain.) |
| ☐ | 2. | **Evidence of Marketability** | Evidence showing that the marketability or development of the site has been hindered by the presence of oil or hazardous materials, including, for example and if applicable: (check all that may apply): |
| | | ☐ | a. Evidence that the property containing the disposal site has been on the market at fair market value but remains unsold, due to costs and other issues associated with oil or hazardous materials present at the site. |
| | | ☐ | b. Evidence showing that the owner of the property containing the disposal site has been unable to obtain financing due to costs and other issues associated with oil or hazardous materials present at the site. |
| | | ☐ | c. Evidence showing that environmental restrictions or AULs materially hinder redevelopment and reuse of the property. |
| | | ☐ | d. Evidence of the site being abandoned by the current or recent owners due to the presence of oil or hazardous materials. |
| | | ☐ | e. Other evidence. |
| ☐ | 3. | **Evidence as to Appropriate Reuse** | If the property containing the disposal site is largely undeveloped, evidence as to why the most appropriate reuse of the site is not for it to remain undeveloped, given its natural resource values. (Required if property is largely undeveloped.) |

## C. Signature Statement. [to be signed by authorized representative of Owner or Operator of Potential Generation Unit, or Authorized Agent of Owner or Operator, as defined by 225 CMR 14.02]

I, _____, attest under the pains and penalties of perjury (i) that I have personally examined and am familiar with the information contained in this submittal, including any and all supporting documents accompanying this form, (ii) that, based on my inquiry of those individuals immediately responsible for obtaining the information, the material information contained in this submittal is, to the best of my knowledge and belief, true, accurate and complete, and (iii) that I am fully authorized to make this attestation on behalf of the entity legally responsible for this submittal. I/the person or entity on whose behalf this submittal is made am/is aware that there are significant penalties, including, but not limited to, possible fines and imprisonment, for willfully submitting false, inaccurate, or incomplete information.

Printed name | Signature | Date

**ATTACHMENT B: Sample Pre-Determination Letter**

DATE

[First Name], [Last Name]
[Title]
[Organization]
[Address]
[City], [State] [Zip Code]

Dear Mr./Ms. [Last Name],

The purpose of this letter is to respond to [Organization's] request dated [date], concerning the potential qualification of [Site Name] in [City], Massachusetts ("Site"), as a Brownfield under 225 CMR 14.00. The Department of Energy Resources ("Department"), acting in consultation with the Department of Environmental Protection ("MassDEP"), have reviewed your request which explains [summarize factual details as submitted in request form].

Under 225 CMR 14.02, a Brownfield is defined as follows:

> *A disposal site that has received a release tracking number from MassDEP pursuant to 310 CMR 40.0000: Massachusetts Contingency Plan, the redevelopment or reuse of which is hindered by the presence of oil or hazardous materials, as determined by the Department, in consultation with MassDEP. For the purposes of this definition, the terms "disposal site," "release tracking number," "oil," and "hazardous materials" shall have the meanings giving to such terms in 310 CMR 40.0006: Terminology, Definitions and Acronyms. No disposal site that otherwise meets the requirements of 225 CMR 14.02: Brownfield shall be excluded from consideration as a Brownfield because its cleanup is also regulated by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 – 6939g, or any other federal program.*

The Department and MassDEP have issued guidance to govern the pre-determination of Brownfield eligibility process. *Guideline Regarding the Definition of "Brownfield" Under the Renewable Energy Portfolio Standard – Class I Regulations 225 CMR 14.00* [Insert link]("Guidance"). Acting in accordance with 225 CMR 14 and applicable Guidance, the Department, in consultation with MassDEP, has reached the conclusion that the Site likely [does/does not] meet the criteria set forth in 225 CMR 14.00 to be considered a Brownfield. This conclusion is based upon the following: [summarize reasons why site meets / does not meet criteria].

Please be advised that this pre-determination of Brownfield eligibility letter is not a final agency decision, and is not binding on DOER or MassDEP, and does not give rise to any appeal right under M.G.L. c. 30A, or any other law. The Department, in consultation with MassDEP, will make a final determination on the eligibility of the Site's status as a Brownfield at the time it issues a Statement of Qualification under 225 CMR 14.06. Such final determination may be different from the pre-determination contained in this letter if information provided by you in connection with your Pre-Determination Request Form is materially inaccurate or incomplete.

If you have any questions regarding this pre-determination of Brownfield eligibility, please contact Michael.Judge@state.ma.us or 617-626-7368.

Sincerely,

Dwayne Breger, Ph.D.
Director, Renewable and Alternative Energy Development

cc: MassDEP