

Eligible Costs Under the Brownfields Tax Credit

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What You Should Know Before You Perform Response Actions

This document is intended as a helpful resource on cost eligibility. However, you should consult additional information available in the Brownfields Credit regulation, 830 CMR 63.38Q.1 and at Mass.gov

Eligibility for the Brownfields Tax Credit (BTC) is predicated on a number of eligibility criteria. Please refer to regulation 830 CMR 63.38Q.1(5) for eligible expenses allowed under this credit. Note that the enabling statute only allows expenses incurred for Response Actions that are for ***the purposes of achieving a Permanent Solution or Remedy Operation Status (ROS)*** in compliance with chapter 21E.

The BTC applicant has the burden of proof that the Response Actions identified for the BTC were undertaken for the purposes of achieving a Permanent Solution or ROS. If you are planning on applying for the Brownfields Tax Credit, it is highly recommended that you clearly document the nature and extent of contamination and the associated risks that must be mitigated in order to achieve a Permanent Solution or ROS ***prior*** to initiating remedial activities. If this information is not documented within reports and documents filed with MassDEP, the BTC applicant's burden of proof is very difficult to meet.

You should consider planning, organizing, and documenting the eligible Response Actions prior to, during, and following the remediation project if you are contemplating applying for the BTC following completion of the remedial work and after achieving site closure (i.e., Permanent Solution or ROS).

Generally, under the Massachusetts General Law MGL c.21E and the Massachusetts Contingency Plan (MCP-310 CMR 40.00), once a release is reported to MassDEP, the responsible party, under the direction and supervision of a Massachusetts Licensed Site Professional (LSP), is required to investigate the nature and extent of contamination and determine whether or not the subject contamination levels represent a risk to health, safety, public welfare, or the environment for current and future use of the site, and subsequently, whether or not Response Actions are required to mitigate those risks and achieve site closure (i.e. a Permanent Solution or ROS). In short, if the contamination at the site does not pose a documented risk, then Response Actions would not be required, and a Permanent Solution can be filed without further action.

Risk may be determined at various stages of the overall remediation project, for example at the Phase II stage when a Comprehensive Site Assessment is performed. As noted above, only the costs for Response Actions that investigate and/or specifically address identified and documented risks and that are undertaken for the purposes of achieving a Permanent Solution are allowable under the credit.

For example, a credit application was submitted for a site where a Phase II Risk Characterization was completed, and identified contaminated soil that represented a risk to human health under a residential use scenario if it were to remain in place. The subsequent Phase III and Phase IV site reports prepared for the purposes of identifying and selecting the Comprehensive Remedial Alternatives specified the necessary Response Actions required to abate those risks so that a Permanent Solution could be achieved. In this case, the costs for performing those identified Response Actions would be eligible for the BTC subject to other eligibility criteria (e.g. proper documentation of costs, cost v. land value ratio, ownership, etc.).

Alternatively, in another example, a Potentially Responsible Party decided to complete a Release Abatement Measure (RAM) prior to completing the Phase II Comprehensive Site Assessment. In this example, soil containing varying levels of contamination that existed within the footprint of a proposed residential building was excavated and disposed of offsite. In this case, a risk characterization to determine if there was a risk to health, safety, public welfare and/or the environment that required Response Actions was ***not*** completed. Therefore, it is not known at the time of the credit review what soil contamination level (if any) required removal without understanding if an actionable risk was present. Consequently, it becomes difficult to determine whether the work that was performed was for the purpose of achieving a Permanent Solution or was directly related to the general construction project. It is therefore incumbent upon the BTC applicant to bear its burden of proof by spelling out

why the expenses it submitted are BTC-eligible costs. If the BTC applicant fails to do so, the Department will not have sufficient data to evaluate the claim and it will be denied.

The criteria for whether the expense for a given Response Action are eligible for the BTC differ from the criteria for whether that Response Action is required by the MCP. The criteria for BTC eligibility are governed by G.L. chapters 62 and 63, and the regulations issued thereunder. The criteria for whether something is required by the MCP are governed by G.L. chapter 21E, and the MCP is the set of regulations issued under that chapter. LSP's who are accustomed to evaluating Response Actions by whether or not they are required by the MCP should be aware that there is a different standard in place when evaluating whether expenses qualify for the BTC or not.

The responsibility for the enforcement of the MCP is the province of MassDEP, while the responsibility for the administration of the BTC is the province of the DOR. The two agencies do coordinate with each other to make sure that they take advantage of each other's expertise in administering their respective domains.

If you have questions about the BTC at any stage of your remediation project, including the pre-remediation planning stages, please contact the Department of Revenue at 617-887-6786.