

Brownfield Continuous Program Improvement Workgroup Committee Recommendations

Committee Name: Program Implementation Issues

Issue Statement #1: Administrative Costs

The Brownfield program allows 3% to 10% of grant/loan amounts to be used by local governments to cover grant/loan administrative oversight costs. The administrative budget can be used by either the grantee/borrower or by its consultant for meetings, progress reports, and other non-technical administrative time.

Local auditors have questioned what constitutes an eligible activity for a local government vs. for a consultant. Eligible activities need to be clarified.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

1. The local unit of government's or environmental consultant's administrative fees for non-technical oversight such as preparing invoices, attending meetings, and so on should be capped at 3% of the grant or loan amount.
2. An additional 5% should be available to pay for oversight by an environmental professional in cases where the developer's consultant will perform response activities and the grantee/borrower wishes or is requested by the DEQ to retain an additional technical profession to represent them.
3. In cases where oversight is expected to be extensive, the local government may contribute its 3% for administration to the cost for technical oversight. The maximum allowed would be 8% of the grant/loan amount, but the entire amount would be for technical oversight and the grantee/borrower would bear the administrative costs.
4. Activities eligible for reimbursement should be clarified for both non-technical and technical project administration and specified in contract boilerplate or individual Appendix A documents included with contracts.

Supporting Arguments:

- I. Pros
 - Provides clarification of eligible activities for local audit.
 - While the DEQ or grantees / borrowers occasionally use technical oversight professionals, and there is a provision in the program's existing Conflict of Interest policy

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for an oversight consultant, there has not been any standard amount or limit to what the oversight should cost.

II. Cons

- Local governments are not required to provide a match for brownfield grants or loans, and paying their own administrative costs could be considered the grantee's or borrower's "match".

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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Issue Statement #2: Brownfield Grant/Loan/Act 381 Work Plan Reviews and Oversight

Interpretation of required response activities, DEQ policy, and statutes is not always consistent between districts and individual staff who review Act 381 work plans.

The DEQ has different levels of oversight over brownfield grants, loans, and Act 381 work plans. Work plans are approved for all three funding sources, but DEQ staff typically visit work sites frequently for grants, and almost never for sites that are strictly funded with tax increment financing under Act 381. (The exception for Act 381 projects sites is if they are funded with other sources as well, such as a loan.) Loan oversight falls in the middle. Grants have typically had a higher level of oversight because of a relatively higher risk of state dollars, whereas loans are repaid and there is no outflow of actual tax dollars under Act 381. **Is this really an issue or do we want to focus on consistency of 381 work plan review here?**

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

In order to streamline reviews of Act 381 work plans, the Program Implementation Issues Committee believes that dedicated staff in each of the DEQ districts and headquarters would expedite and ensure streamlined and consistent reviews. Should dedicated staff not be feasible, one individual be identified as “Brownfield 381 Work Plan” expert. Leaving the district staff as is with copies of all 381 work plans going to that new dedicated staff for all work plans and copies to district offices.

Supporting Arguments:

I. Pros

Act 381 work plan reviews would be more consistent with fewer people doing the reviews

One point of contact for Brownfield Redevelopment Authorities

Designated staff would develop expertise in Act 381

Cross training opportunities

II. Cons

District staff’s local knowledge enters into Act 381 work plan reviews. If a single staff person is assigned to cover a whole district’s Act 381 work plan reviews, that person will not have local knowledge of the whole district, only of the counties assigned to him/her. This can be offset by involving the district person assigned to the project area and maintaining good communication

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between staff, but requires much more communication between DEQ employees and could be viewed as a disadvantage.

The one point of contact for Brownfield Authorities may not be the same point of contact as for other cleanup projects.

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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Issue Statement #3: Grant and loan awards when there is a liable party

Another committee has been charged with liability issues and we do not wish to duplicate the considerable time and effort that group has spent on this issue. However, we do want to state an opinion about liability from the program implementation perspective.

The DEQ is statutorily prohibited from making grants and some loans if a liable party is associated with a release of contamination at the project site. However, the statutes are inconsistent. Some do not specifically prohibit grants or loans but allow for cost recovery, an expensive and arduous process that is a strong disincentive to awarding grants where there may be a liable party. It is not clear whether the DEQ can fund projects where there is a liable party who is without responsibility for any further response activities, for example when redevelopment costs fall under the non-liable developer's due care responsibilities. Local governments are also specifically prohibited in Part 196 from receiving a grant or loan if the local government is responsible for the release.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

The committee believes there are circumstances under which some funding should be available for projects with potentially liable parties, particularly for liable local governments.

1. Part 19608 should be changed to allow a liable local unit of government to use **loan** dollars for response activities. Local governments are struggling financially and do not have the resources to clean up their contaminated sites, including some with high redevelopment potential. A loan would provide up-front funding for response activities that could be repaid from tax increments. Any loan provided is required to have a 50% from the local governmental unit.

2. The statute should be clarified to provide additional guidance on when grants and loans can be used if there is a liable party associated with a piece of property. We support flexibility so that funding can be used even when there is a liable party if:

- The liable party is not relieved of its responsibility to perform response activities, such as when the requested funds will be used to fulfill the non-liable developer's due care responsibilities
- The liable party is not viable
- DEQ staff cannot determine which of several owners/operators may be liable

Supporting Arguments:

I. Pros

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The proposed change would eliminate inconsistencies in the law and clarify the state's expectations of liable parties

More cleanups and redevelopment projects could result from broader funding availability

Local governments would have financial assistance to address their contaminated sites

II. Cons

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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For reference, the liability sections from the grant and loan statutes and administrative rules are below.

Clean Michigan Initiative (CMI), Section 19608 (1)(a)(iv): ...Grants or loans provided for in this subparagraph shall not be made to a local unit of government or a brownfield redevelopment authority that is responsible for causing a release or threat of release under Part 201 at the site proposed for grant or loan funding.

CMI, Section 19614: The department and the department of the attorney general may recover costs expended pursuant to section 19608(1)(a)(i) to (iv) for corrective actions, response activities, site assessments, and all other recoverable costs under part 201 from persons who are liable under part 201. Actions to recover costs shall be taken in the manner provided in part 201.

Environmental Protection Bond (EPB), Section 19508 (3): If money that is expended pursuant to subsection (1)(a)(ii) is recovered by an eligible community from a person who may be liable under part 201, through proceeds from the sale of the property, or through any other mechanism, and additional funds for environmental response activities on the property are not necessary, the eligible community may retain those funds for expenditure on projects that the department determines are eligible to receive funding under subsection (1)(a)(ii).

EPB Administrative Rule 299.5053 (n): That the funds requested do no relieve potentially responsible parties from their obligation or responsibility for response activities and do not permit potentially responsible parties to profit from the investment of public funds.

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Issue Statement #3: Multiple grant/loan awards for the same project

Brownfield grant and loan packages have typically been limited to a maximum of \$2 million. This is in part due to the statute, which limits grants and loans to one per year at a maximum of \$1 million each, and in part by policy to preserve the capital of the grant and loan program so that the money may be more broadly distributed throughout the state.

Some projects, however, have significant environmental contamination that can't be addressed for \$2 million, or they are transformational projects, or there is inadequate tax increment income to repay a \$1 million loan. In a limited number of instances, funding assistance in excess of \$2 million, or a grant or loan of more than \$1 million, may be justified.

The statute allows the DEQ to award more funding than \$2 million, but awards would need to be made over multiple years. (For example, a project funded with a grant in 2014 would theoretically also be eligible for another grant in 2015.) The DEQ cannot fully commit to funding projects over multiple years because of uncertainty about fund balances, but the DEQ's policy could allow grants or loans over multiple years for the same project provided that the project is a priority for the agency and funding is available.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

Project can receive multiple grants or loans in a fiscal year.

Establish project-specific benchmarks for multiple grants or loans. Environmental contamination / cleanup results (not just due care), must still meet criteria that development value must be more than grant/loan amount

Suggestion to commit dollars for multiple years and agree to hold dollars to project, so there is a level of certainty for grantees/borrowers. For multiple grants and loans, more emphasis (weighted) must be provided on environmental impact then community (placemaking) impact.

Supporting Arguments:

I. Pros

Would allow the DEQ to fund high priority projects with major environmental cleanup component

II. Cons

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Could deplete funding more quickly

Uncertainty about availability of funding makes it difficult to commit to additional funds a year or two ahead

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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Issue Statement #4: Eligible activities for grants and loans

1. Asbestos Abatement

Asbestos abatement is prohibited only by the Site Reclamation Program's administrative rules, not by statute. Program policy allows other asbestos-related costs such as surveys to be conducted. Abatement should be an eligible expense under loan. Already being addressed by the asbestos committee, but we want a statement that says we support it.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

- Asbestos abatement should be an eligible expense, potentially with some limitations so that it is not the primary cost in a brownfield redevelopment grant or loan.

Supporting Arguments:

I. Pros

Asbestos abatement is not typically a major cost, but it may be a deal-breaker on a smaller project.

The program's policy on asbestos already allows for almost every other asbestos cost to be covered

The asbestos prohibition is in rules, not statute

II. Cons

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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Issue Statement #6: Loan guarantees and repayment

More flexibility is needed in how loans are guaranteed and repaid.

- Many local governments are viable but don't want to commit full faith and credit to guarantee a loan.
- Full faith and credit was eliminated from CMI but not RRL. Needs to be consistent.
- Treasury can take loan payments from revenue sharing if the LUG defaults on a loan. There should be other options available for loan payment.
- Flexibility in loan terms if a project doesn't move forward.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

Allow other methods than full faith and credit / revenue sharing to guarantee loan – escrow account; more flexibility in loan payments; ability to negotiate loan terms. Use language in subsection 7 of SB 719 “Revenue sharing, escrow account, or other acceptable mechanism negotiated with DEQ.”

Alternatives for when a project doesn't go forward? Committee agrees that requirement to repay should not go away. Share risk with developer?

Supporting Arguments:

I. Pros

Provides greater flexibility to communities to avoid loan default or financial problems if projects are not completed (and therefore no TIF to repay the loan)

Allows communities to work with Developer to start the “risk” component for redevelopment projects without risking communities general funding components.

II. Cons

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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Issue Statement #7: Grant and loan approval timing; State Administrative Board approval

Up to half the time required for approval of a grant may be spent waiting for approval by the State Administrative Board (Ad Board). The Ad Board's approval is required for all grants over \$250,000. Ad Board approval is not required for loans. Projects on the fast track for redevelopment could otherwise be approved in a few weeks but may be delayed while waiting for Ad Board approval.

Grant / loan program procedure has been to wait until a completed application has been submitted before submitting a project to the Ad Board's agenda. This is not a requirement imposed by Ad Board; they have no guidance on when projects may be placed on the Ad Board agenda for approval. There are no consequences from Ad Board for requesting approval of a project that is not implemented.

Part 19608a (3) of 1994 PA 451, as amended, requires final decisions to be made on loan applications within 90 days, but there is no such limit for grants. Program policy is to make decisions on both grants and loans within 90 days.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

If a local unit of government requests expedited review of a grant and staff are confident that the project is feasible based on a project proposal, staff should have the ability to request Ad Board approval prior to submittal of a full application.

The DEQ should be required to make final decisions on both grants and loans within 90 days for consistency.

Supporting Arguments:

I. Pros

Allows faster turnaround of priority projects and greater responsiveness to communities and developers.

Makes statutes consistent for grants and loans.

II. Cons

Draft Legislative Language (if appropriate):

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Recommended Follow up Actions (if appropriate):

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Issue Statement #8: Sustainable funding sources; capture of 3 mills from Act 381 work plans

Half of three mills on Act 381 work plans will not sustain the grant/loan program.

Measurements need to be established to determine effectiveness of 3 mills.

If there is not a MSF-approved work plan, should MEGA get any of the three mills? Should all go to DEQ?

Need for sustainable funding source for brownfield programs.

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

The Program Implementation Committee would like time to create a process for further consideration of funding. Our thought is to have a stakeholder group specifically dedicated to making funding recommendations. This group should include local / regional environmental organizations such as NMEAC, WMEAC, FLOW, etc. who, with their board members, could build local support for whatever is the recommended funding source. There should be a group from each Prosperity Region when possible.

Potential funding sources include: gas tax; business tax; one time fee on development projects, bond; deposit on water bottles

Supporting Arguments:

I. Pros

This issue is big enough that it deserves more thoughtful consideration that the Program Implementation Committee has been able to commit to it.

II. Cons

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):

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Issue Statement #9: Capturing TIF on MSF-funded eligible activities for Local Revolving Funds

Committee is in favor of amending Act 381 to allow for capture of taxes levied for school operating purposes for MSF eligible activities into the Local Site Remediation Revolving Loan Fund. This opportunity would assist local communities to help identify gaps locally and become less reliant on State limited resources.

This was an important component when local communities agreed to provide the 3 mills upfront on all state approved projects and not at the back-end of the project, being understood that MSF eligible activities would be allowed to be captured to into the Local Site Remediation Revolving Loan Fund. This change would be consistent with statute allow DEQ eligible activities to be captured into the Local Site Remediation Revolving Loan Fund (LSRRLF).

Specific Action to be Taken:

Statutory Rule Policy Governance (Process)

Recommendations:

At this time, Committee Chair will be meeting with MEDC staff to prepare recommendation(s) for consideration

Supporting Arguments:

- I. Pros: Allows local to build LSRRLF to help fund gaps in financing instead of relying on state limited resources. Capture would be limited to eligible activities and capture of 5 years.

- II. Cons: MSF eligible activities are significantly higher than DEQ eligible activities and could be substantial in capture.

Draft Legislative Language (if appropriate):

Recommended Follow up Actions (if appropriate):