

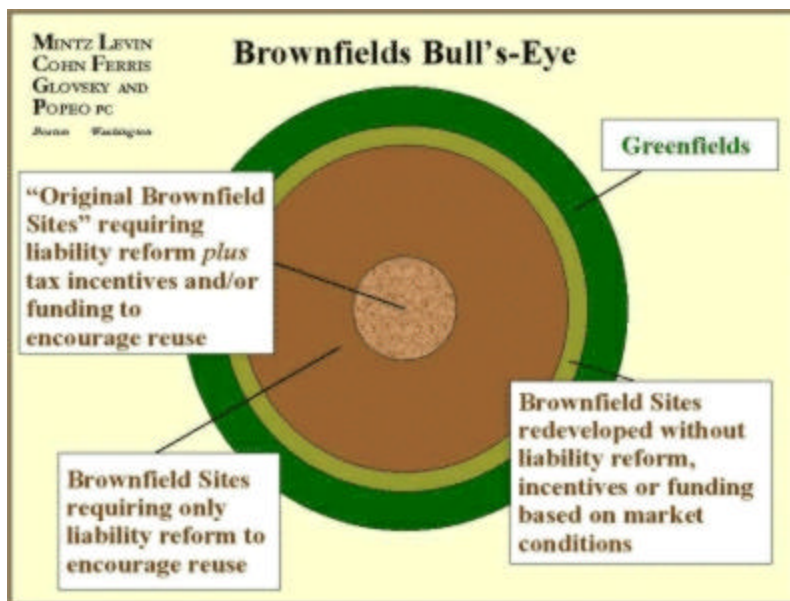
**Testimony of Jeffrey R. Porter****Mintz Levin Cohn Ferris Glovsky & Popeo, P.C.****Before the Massachusetts Joint Committee on Natural Resources and  
Agriculture****June 16, 1997**

Chairman Peterson, Chairwoman Pines and members of the Joint Committee on Natural Resources and Agriculture, my name is Jeff Porter. I am a partner in the Boston office of Mintz Levin Cohn Ferris Glovsky & Popeo practicing in the environmental and litigation sections. For the past nine years I have observed and participated in the continuing evolution of c. 21E, the Massachusetts Superfund Statute, and the Massachusetts Contingency Plan (MCP), the state's clean up regulations. This evolution has, for the most part, benefited the citizens of the Commonwealth and improved our environment. Massachusetts led the nation in the development of uniform clean up standards and procedures and the creation of a profession to oversee compliance with those standards and procedures. I thank you for the opportunity to discuss what I believe is a necessary next step in this evolutionary process, and the most compelling environmental initiative of the current Legislative session -- liability reform that would allow someone who purchases and cleans up contaminated property, also known as Brownfields, to be exempt from liability to the government, or anyone else, for costs resulting from that prior contamination.

Governor Weld, Attorney General Harshbarger and Representative Peter Larkin, sponsors of the three major bills before you today, all agree on the advisability of this reform.

Since its enactment Chapter 21E, Section 5(a)(1) has threatened **any** owner of contaminated property with joint and several strict liability for any clean up costs or other damages resulting from that contamination whether or not the property owner caused or contributed to the contamination. The threat of significant and often unquantifiable liability arising from the mere ownership of previously contaminated property discourages otherwise interested developers from investing in the remediation and redevelopment of contaminated properties. To avoid investing in properties which might present staggering hidden liability, developers turn to rapidly disappearing pristine land, or "greenfields", where there is no risk of contamination.

U.S. EPA Administrator Carol Browner estimates that there are approximately 450,000 Brownfield sites nationwide. Over 7,000 of these sites are located in Massachusetts. Many of us are neighbors to vacant contaminated properties, otherwise prime candidates for redevelopment, that remain contaminated and unused because the risks to a redeveloper of cleaning up the property and restoring it to beneficial use are too much to bear. I believe that these sites are best illustrated by a series of concentric circles. I call it the Brownfield Bull's-Eye.



To completely solve our Brownfield problem the Legislature should do two things. First, liability reform must be enacted, freeing for redevelopment those sites in the outer circles of the Brownfield Bull's-Eye which would be immediately reused if not held hostage by the current liability scheme. Liability reform will render contamination at these sites just another issue to be considered, like a traffic problem or substandard soils requiring special engineering. The real estate industry as a whole will develop sufficient sophistication, and the statutory liability and clean-up regulations will be sufficiently rational, to permit the immediate redevelopment of these sites. No governmental financial pump priming will be necessary.

Next, sufficient incentives must be provided to encourage the redevelopment of those Brownfields sites in urban and economically depressed areas for which there are hindrances to redevelopment and reuse beyond the environmental condition of the properties or the current liability scheme. Liability reform alone will not cause the redevelopment of these sites at the core of the Brownfield Bull's-Eye. Grants, tax incentives, or perhaps both, in addition to liability reform, will be necessary to spur the development of these "original Brownfield sites."

Once governmental incentive programs are in place, and not until then, a subspecialty of the real estate development industry will evolve to redevelop these "original Brownfield sites" and reap the benefits of the tax and other financial incentives which will necessarily be provided to encourage the redevelopment of these difficult sites.

So what can be done? Adoption of the Brownfields development pilot program proposed by Attorney General Harshbarger and Representative Richie would be a good start for dealing with the "original Brownfield sites", as would the tax credits, state loans and grants proposed in the legislation filed by Representative Larkin and Governor Weld. However, a more comprehensive solution is possible.

The Legislature should reform Chapter 21E, the Massachusetts Superfund Statute, so that any purchaser of already contaminated property is not liable if he completes a cleanup of the property in compliance with the state's clean-up regulations. This reform, presented in both Representative Larkin's and Governor Weld's proposals, will encourage the redevelopment of most contaminated properties without compromising environmental protection or unnecessarily expending scarce state resources.

This reform has several advantages. First, it provides relief from Chapter 21E's draconian liability scheme to those who most deserve it - redevelopers who voluntarily address contamination that they did not cause in furtherance of one of Chapter 21E's primary purposes: expedited private cleanups of contaminated properties. Chapter 21E's current liability standards could be maintained with respect to all other liable persons. Second, relief is afforded only to those who address contaminated properties in full compliance with the MCP. This furthers another of Chapter 21E's primary purposes: achievement of cleanups which eliminate, or will eliminate, **any** "significant risk of damage to health, safety, public welfare or the environment during any foreseeable period of time." Compare G.L. c. 21E, section 3A. Third, **complete** relief from liability pursuant to Chapter 21E is provided to redevelopers of contaminated properties. These redevelopers will not be faced with the unpalatable prospect of purchasing a contaminated property, responding to the contamination of the property in complete compliance with the Commonwealth's clean up regulations and still facing suits under the Commonwealth's clean up statute.

In the absence of such reform redevelopers will continue to be concerned about their potential liability under Chapter 21E and will **not** step in and purchase contaminated properties. The liability reform proposed by Representative Larkin and Governor Weld will encourage these **potential** owners to purchase contaminated properties by not imposing liability on them for conditions for which they would otherwise have no liability. At the same time the Commonwealth and third parties will continue to have claims against anyone else liable under Chapter 21E including those who did cause or contribute to contamination and resulting damages and those who did not participate in the implementation of a response to the contamination compliant with the MCP. All that is affected by the liability reform proposed is the liability of property owners whose liability arises solely from the purchase of an already contaminated property for the purpose of cleaning it up and redeveloping it.

The Department of Environmental Protection recognizes that it does not now have, and likely will never have, the resources to compel or undertake cleanup actions at all Brownfield sites. If by providing a liability exemption to people not currently caught by Chapter 21E's broad liability net the Commonwealth can encourage the purchase and clean up of these already contaminated properties in full compliance with the MCP, the Commonwealth will see more cleanup, not less.

Over thirty states already have Brownfield redevelopment statutes or regulations on their books encouraging the redevelopment of previously contaminated sites. Maine, New Hampshire, Rhode Island and Vermont have already revised their laws and regulations to provide liability relief in one form or another to owners

of previously contaminated properties who voluntarily clean them up. With the passage of the liability reform for redevelopers contained in legislative proposals before this Committee, Massachusetts can join its New England neighbors in encouraging both the redevelopment of otherwise underutilized Brownfield sites and the preservation of more valuable "greenfields."

I thank you for your consideration of this exciting opportunity for the Commonwealth and I look forward to your questions and comments.