





**Figure 2-3**  
**Circumstances Required for EPA to Sign**  
**Prospective Purchaser Agreements**

- An EPA action at the facility has been taken, is ongoing, or is anticipated by EPA.
- The continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination at the property or interfere with EPA's response action. Here, EPA will review the situation on a case-by-case basis.
- The continued operation of new development of the site will not pose health risks to the community and those persons likely to be present at the site.
- The prospective purchaser is financially viable.

Virtually all state governments also have brownfields programs in place.<sup>106</sup> One such program is the Massachusetts Clean Sites Initiative. Some argue that this initiative does not go far enough, particularly in the area of potential liability concerns, but it does provide protection "when contamination is found later even though the contamination was not found during the initial site assessment, provided the appropriate standard of care was followed in performing the initial assessment."<sup>107</sup>

Despite these initiatives, significant concerns about brownfields redevelopment remain. Few contaminated sites would be eligible as housing sites because of the cost to clean or stabilize to that level of use. If these sites are not rehabilitated to a residential use level, citizens may be concerned about the impacts of new industrial development on their neighborhoods and their health. The community may raise the specter of environmental injustice. Consequently, the community may wind up with a site that no one is willing to purchase and that contributes to vandalism and other symptoms of industrial blight. Moreover, the jobs, which would probably have had a positive impact on health of the workers and the community, would be lost.

Nevertheless, if the liability concerns and the stigma of being a contaminated site can be overcome, some of these sites are useful for industrial development. To proceed with redevelopment, there must be a strong commitment to public involvement. Yet this comes at a cost. The public nature of the process, the risk of bad publicity (allegedly taking advantage of the local community), and, above all, the potential for delay may make projects in

brownfields areas very costly. Companies may well find it easier to locate in a greenfield that has the appropriate zoning and is not subject to the same environmental justice issues. I am by no means suggesting that it is not advisable under any circumstances to site in a brownfield, but I am advising that the practical problems (including *fully* understanding the politics of local activist organizations), is necessary.<sup>108</sup> A full discussion of these issues is beyond the scope of this book, but there is much literature on both the opportunities and pitfalls of brownfield redevelopment.<sup>109</sup>

It should be recognized that industry cannot shoulder the total blame—or responsibility—for the social ills that beset industrial areas and surrounding neighborhoods. Part of the problem is lack of sufficient resources for our social needs and the misallocation of resources devoted to environmental issues. Poverty is more of a health problem than all of the other environmental issues combined. Is someone in an urban ghetto or a rural slum entitled to clean air and water? Of course, but are we losing our perspective by focusing on smaller and smaller increments of pollution while we lose new generations to the health and related problems of lack of jobs, health care, and basic self-respect? We in environmental management must do our part to seek cost-effective means to manage our companies so that we can provide both jobs and a clean environment.

### Conclusion

An article by Bradley Bobertz called *Transferring the Blame* helps put the development of environmental law into perspective. His theory is that environmental law in the United States is designed to "deal harshly with culturally accepted *symbols* of environmental problems."<sup>110</sup> Dealing with the *symbol*, however, "makes it less likely that we will deal with the problems—and their causes—themselves."<sup>111</sup> Bobertz also describes a "scapegoating phenomenon," which

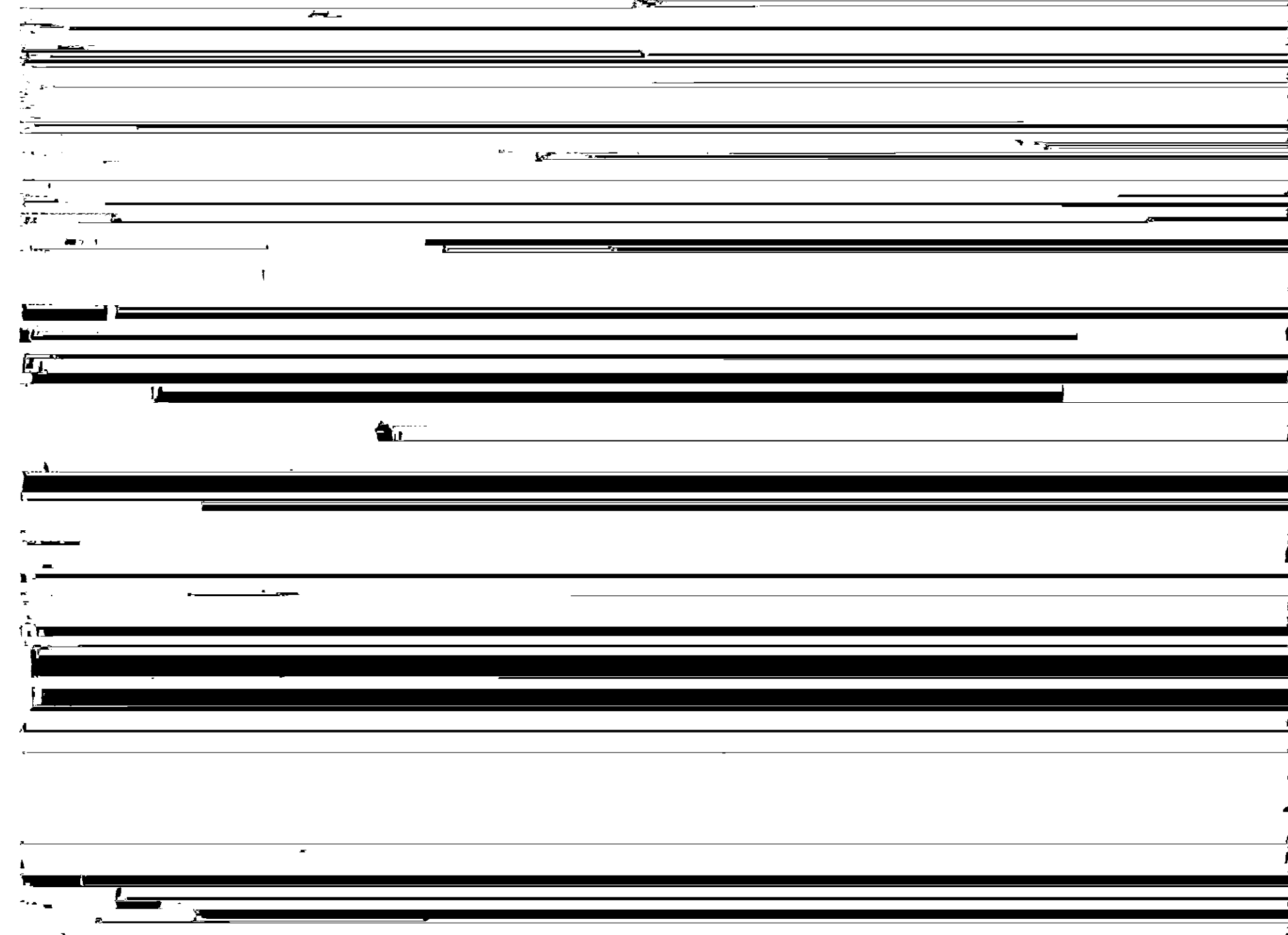
deflects inquiry away from an environmental problem in its full context to mere signifiers of it, effectively blocking productive reform and stifling on-going debate by making the problem appear to vanish from public view with the enactment of apparently responsive legislation. Finally, as the simplistic assumptions of scapegoating laws meet with the hard facts of implementation and enforcement, the law itself grows in length and complexity in order to preserve its initial, but distorted, suppositions.<sup>112</sup>

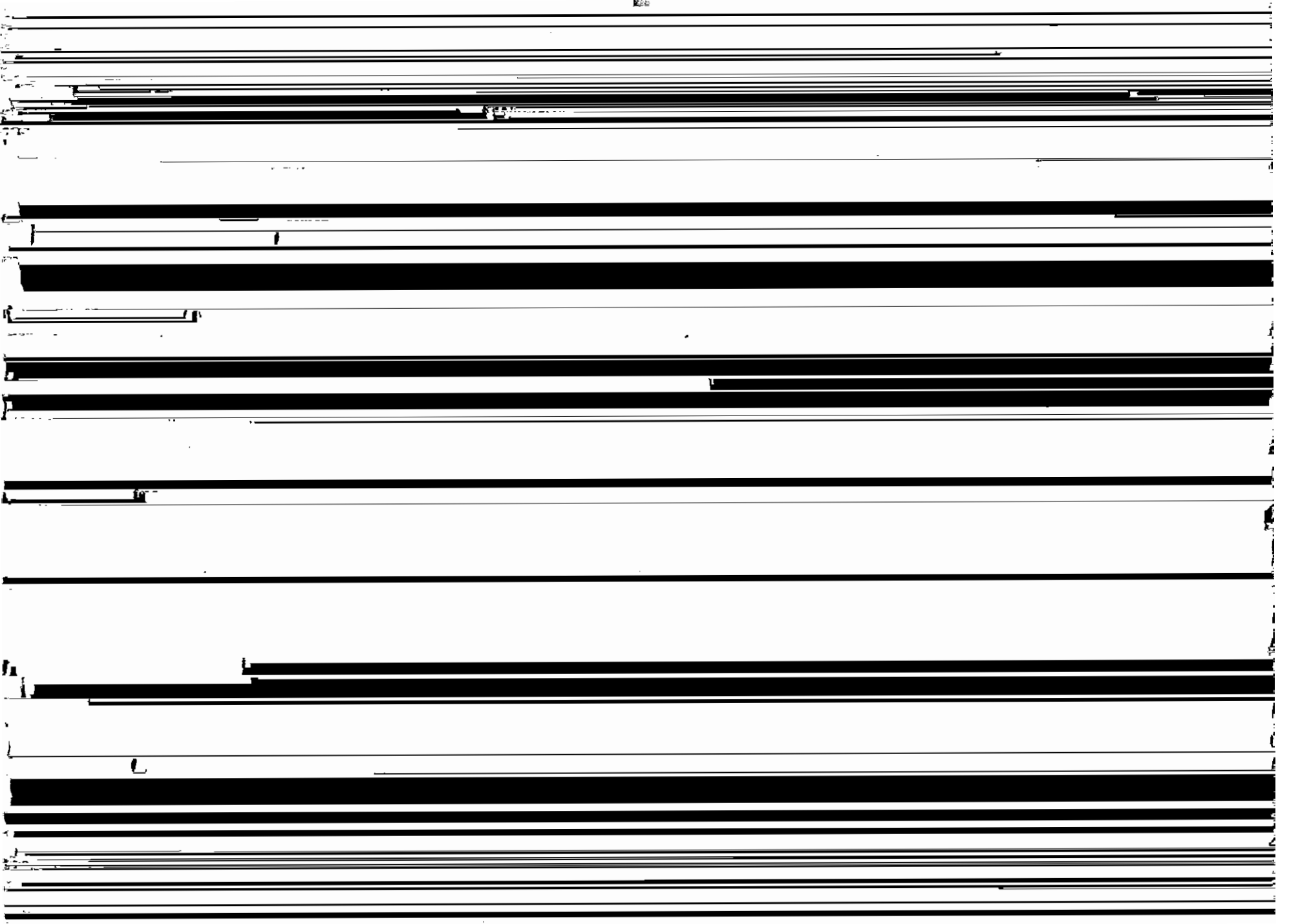
Even so, technically trained managers may take some solace in the possibility that some day a book about environmental management will not have to start with an extensive description of legal and social developments. Al-

though compliance with the law will always be necessary, the search for solutions to environmental problems may move from the realm of law to technology. To some extent, this movement has already begun. As the early federal environmental statutes—NEPA, the CAA, and the FWPCA—were promulgated, there was an initial flurry of primarily legal work. Although these statutes still provide considerable work for lawyers, the emphasis has now shifted to technical analysis. We are beginning to solve these problems less as lawyers and more as managers. Implementation of the more recent hazardous waste statutes has been intensely focused on legal actions; in time, I hope this emphasis will also shift to technical solutions that protect health, the environment, and communities.

### Notes to Chapter 2

1. See generally Frank Friedman, *Corporate Environmental Programs and Litigation: The Role of Lawyer-Managers in Environmental Management*, 45 PUB. ADMIN. REV. 766 (1985). A portion of this chapter is adapted from this article with permission from *Public Administration Review*, © 1985 by The American Society for Public Administration, 1120 G St., NW, Ste. 500, Washington, DC 20005. All rights reserved.
2. See generally ROBERT A. KAGAN & EUGENE BARDACH, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982).
3. Bud Ward, *Reflections*, ENVTL. F., Nov. 1984, at 2. See also R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 5-13* (1983). Although they relied on the federal government to control states and corporations, environmentalists distrusted various elements of the federal government as well. Melnick notes that the specificity of many of the early regulations resulted from the bureaucrats' suspicions about the Nixon Administration's commitment to environmental issues and was an attempt to "protect their initiatives from executive branch sabotage." See MELNICK, at 8.
4. JOHN QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* (1976).
5. Pub. L. No. 91-604, 84 Stat. 1676.
6. *Bishop Processing Co. v. Gardner*, 275 F. Supp. 780 (D. Md. 1967) (chicken processing plant); *United States v. Bishop*, 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970) (chicken processing plant); *Dutton v. Rocky Mountain Phosphate, Inc.*, 438 P.2d 674 (Mont. 1968) (damages upheld against phosphate rock defluorinating plant, remanded on injunction), 450 P.2d 672 (Mont. 1969) (injunction against excessive phosphate emissions upheld).
7. See, e.g., 33 U.S.C. §1365(d), ELR STAT. FWPCA §505(d); 42 U.S.C. §7607(f), ELR STAT. CAA §307(f). For a discussion of the availability of attorneys fees and the statutes specifically allowing such fees at the time, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 5 ELR 20286 (1975).
8. MELNICK, *supra* note 3, at 9.
9. The U.S. Supreme Court has ruled that a party must be victorious on at least one substantive claim on the merits to obtain attorneys fees. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, 13 ELR 20664, 20665 (1983) (reversing attorneys fees award under CAA §307(f)).
10. 42 U.S.C. §4332(2)(C), ELR STAT. NEPA §102(2)(C).
11. To obtain standing, "a party must demonstrate that the challenged action has caused him [or her] 'injury in fact' and that the injury was to an interest within the zone of interests protected by the applicable law." Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17





37. Numbers in this chart were obtained from the following reports: EPA, EPA Sets Enforcement Records in 1999 (Jan. 19, 2000) (press release); EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE FY 98 ACCOMPLISHMENTS REPORT (June 1999) <<http://www.epa.gov/oeca/fy98accomp.pdf>> [hereinafter FY 98 ACCOMPLISHMENTS]; EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT FY 1997 (July 1998) <<http://www.epa.gov/oeca/97accomp.pdf>> [hereinafter FY 1997 ACCOMPLISHMENTS]; EPA, FY 1996 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT (May 1997) <<http://www.epa.gov/oeca/96accomp/96accomp.pdf>>; EPA, FY 1995 ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT (July 1996) <<http://www.epa.gov/oeca/95accomp.pdf>>; and 1994 ACCOMPLISHMENTS REPORT, *supra* note 36. The number of EPA civil referrals, compliance orders, and civil penalty orders fell sharply in 1995 and the first half of 1996. There were 600 civil actions in the first half of the fiscal year, compared with 1,400 in the previous comparable period. EPA blamed much of this drop on the government slowdown, but penalty order complaints dropped 25 percent from FY 1994 to FY 1995, before the government hiatus. AIR DAILY, July 24, 1996, at 3. EPA conducted under 2,000 inspections by March 1996, compared with 7,309 inspections by the same period in 1995. There were only 161 penalty order complaints during the first half of FY 1996, compared with 1,105 in all of FY 1995. *Record Shows Traditional Enforcement Actions Against Industry Have Wilted*, ENV'T, HEALTH & SAFETY MGMT., Aug. 12, 1996, at 1.

For detailed analysis, see 1994 ACCOMPLISHMENTS REPORT, *supra* note 36.

38. EPA Regions Urged to Step Up Traditional Enforcement in FY 1997, ENVTL. POL'Y ALERT, Sept. 25, 1996, at 33.

39. DOJ Presses EPA to Speed Enforcement as Fiscal Year Nears End, ENVTL. POL'Y ALERT, Sept. 25, 1996, at 33.

40. EPA to Add 21 Criminal Investigators by End of Fiscal Year 1996, Official Says, Daily Env't Rep. (BNA), July 8, 1996, at A-8. The Pollution Prosecution Act of 1991 authorized an increase in the number of criminal investigators to 200 by FY 1995. 42 U.S.C. §4321 notes (1994).

41. FY 1997 ACCOMPLISHMENTS, *supra* note 37.

42. Charles A. DeMonaco, Assistant Chief, Environmental Crimes Section, Environment and Natural Resources Division, DOJ, Remarks at the A.L.I./A.B.A. Conference (Feb. 14, 1992), quoted in *Criminal Enforcement Action No Longer Limited to "Midnight Dumpers," Lawyer Tells Conference*, 22 Env't Rep. (BNA) 2406 (Feb. 21, 1992) [hereinafter *Criminal Enforcement Action No Longer Limited*].

43. Kevin A. Gaynor & Thomas R. Bartman, *Frontier Justice*, ENVTL. F., Mar./Apr. 1991, at 23, 24. The DOJ recently amended the environmental crimes provisions of the U.S. Attorney's Manual making it clear that the Environmental Crimes Section must approve virtually all environmental criminal prosecutions made by U.S. Attorneys. The amended provisions specifically define environmen-

tal crimes that may be prosecuted only after approval by DOJ headquarters. *Amended Environmental Crime Procedures for U.S. Attorneys Manual Released by DOJ*, 23 Env't Rep. (BNA) 2488 (Jan. 22, 1993).

Vicki O'Meara, the DOJ's Acting Assistant Attorney General for Environment and Natural Resources, was quoted as noting "that courts had made conflicting decisions and DOJ needed to consider prosecutions on a national level. 'We are sending people to jail here. We are talking about people's lives,' she added." *Id.*

44. Judson W. Starr, Address at the A.B.A. Section of Natural Resources, Energy, and Environmental Law 19th Annual Conference (Mar. 15-18, 1990).

45. Roger J. Marzulla, Testimony Before the Judiciary Committee of the House of Representatives Subcommittee on Commercial and Administrative Law 19 (May 2, 1996).

46. Judson W. Starr et al., *Prosecuting Pollution*, LEGAL TIMES, May 31, 1993.

47. See NICHOLSON, CRIMINAL PROVISIONS IN FEDERAL ENVIRONMENTAL STATUTES, A COMPILATION (Cong. Res. Serv. 1989).

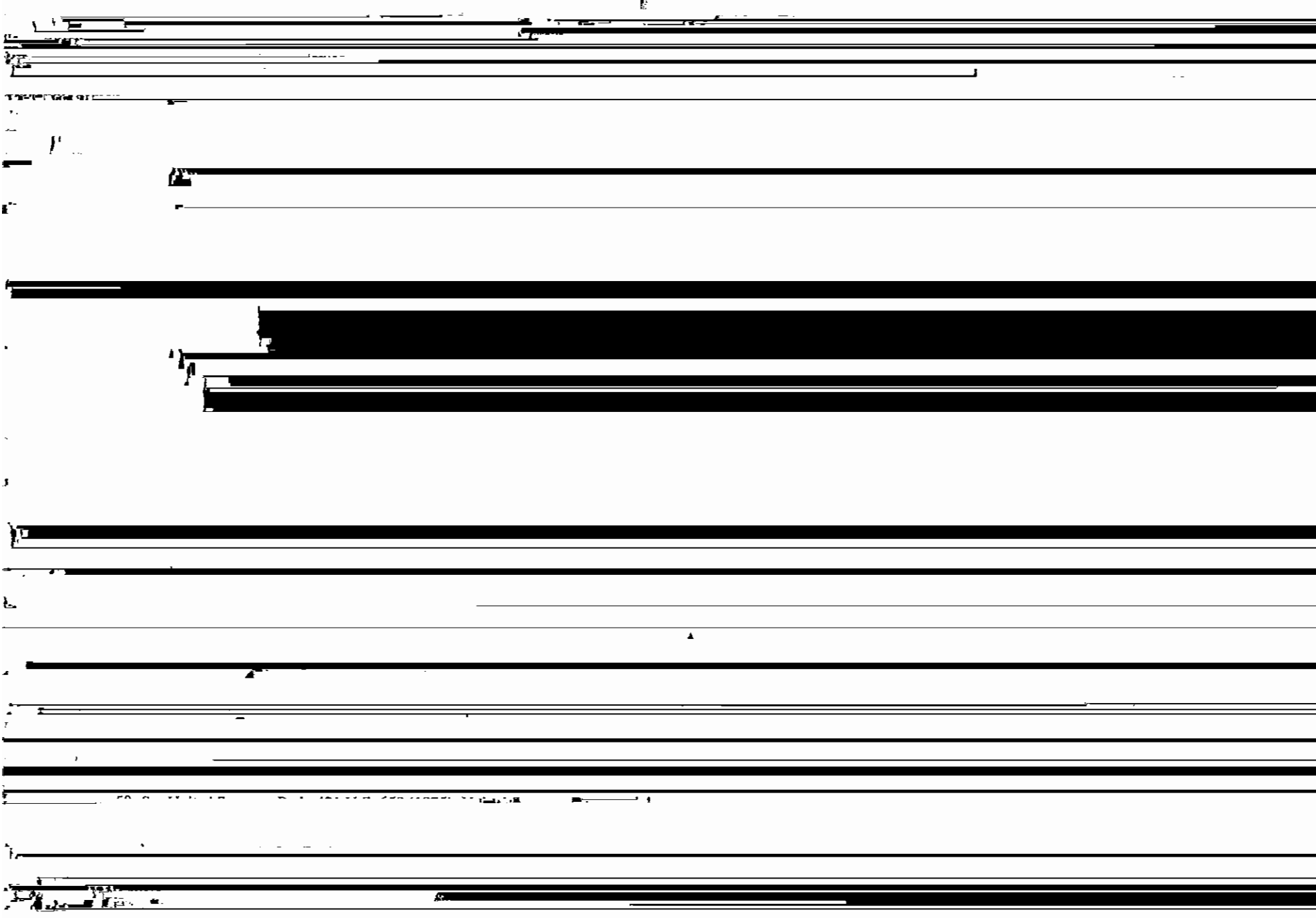
48. CAL. HEALTH & SAFETY CODE §§25189.5-25192 (Deering 1988 & Supp. 1994). Note also the California Corporate Criminal Act of 1989, which provides criminal liability for a corporation or business manager who (1) has actual knowledge of a serious concealed danger subject to regulatory authority and associated with a product or business practice and (2) knowingly fails to provide notice thereof to the California Occupational Safety and Health Administration and affected employees in writing, unless the corporation or manager knows that such notices already have been given. The notices must be given immediately if there is an imminent risk, otherwise within 15 days, unless the condition is abated within those time frames. CAL. PENAL CODE §387 (West 1990) (§387 was added by A.B. No. 2249 §2, 1990 Cal. Adv. Legis. Serv. 166 (Deering)).

49. CAL. HEALTH & SAFETY CODE §25190 (Deering 1988 & Supp. 1994).

50. 35 PA. CONS. STAT. ANN. §6018.606(i) (West 1990).

51. N.J. STAT. ANN. §2C:17-2(a)(1) (West 1995). Thanks to Gerald Krovatin of the law firm of Lowenstein, Sandler, Kohl, Fisher & Boylan in Roseland, New Jersey, who supplied the material in notes 51-52.

52. See N.J. STAT. ANN. §2C:17-2(a)(2). A person who has been convicted of a second-degree offense in New Jersey faces a presumption in favor of incarceration for a term of 7 years, which can be lowered to a minimum of 5 years or raised to a maximum of 10 years, depending on the court's evaluation of aggravating and mitigating factors. *Id.* §2C:44-1(d). The presumption in favor of incarceration applies unless the sentencing court "is of the opinion that the [defendant's] imprisonment would be a serious injustice which overrides the need to deter such conduct by others." *Id.* The New Jersey Supreme Court has indicated that this language must be given very limited reading. See, e.g., *State v. Roth*, 471 A.2d 370 (N.J. 1984).





nificantly—the corporation's implementation of an "effective program to prevent and detect violations of the law." GUIDELINES, *supra* note 78, §8C2.5, at 531-32. Note that while the sentencing guidelines do not directly cover environmental crimes, they do indirectly address probation issues.

81. *Agency Watch, U.S. Sentencing Commission*, NAT'L L.J., Dec. 25, 1995, at A14.

82. Van Cleve, *supra* note 59, at 1227 (citations omitted).

83. *Id.* at 1228.

84. *Id.*

85. See Environmental Auditing Policy Statement, 51 Fed. Reg. 25004 (July 9, 1986) (reproduced as Appendix B of this book), which is reaffirmed in a revised policy, 65 Fed. Reg. 19617 (Apr. 11, 2000) (reproduced as Appendix H of this book). EPA's auditing policies are more fully discussed in Chapter 6.

86. DOJ, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, July 1, 1991 (reproduced as Appendix C of this book).

87. For an extensive discussion of the history of this issue and citations to various studies, see A.B.A., REPORT OF THE STANDING COMMITTEE ON ENVIRONMENTAL LAW (Aug. 1993) (supporting an Aug. 11, 1993, A.B.A. Resolution on Environmental Justice). See also Maryanne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1.

88. Much of the following discussion on environmental justice is adapted from G. Nelson Smith III, *The Use of Title VI of the Civil Rights Act to Defend Corporations in Environmental Justice Actions: A Potential Wrong Searching for a Remedy*, A.B.A. Sec. Nat. Resources, Energy & Env'tl. L., San Francisco, Cal., May 1995. Copyright ©1995 by The American Bar Association. All rights reserved. Reprinted by permission.

89. *Id.* at 1.

90. Lavelle & Coyle, *supra* note 87.

91. Smith, *supra* note 88, at 1-2.

92. *Id.* at 2.

93. *Id.* at 3-4.

94. See Chapter 10 for further information on dealing with citizen groups and the public.

95. Smith, *supra* note 88, at 8-9.

96. Exec. Order No. 12898, ELR ADMIN. MAT. 45075.

97. For a more detailed discussion, see Winston & Strawn, *EPA Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, Client Advisory (Feb. 20, 1998) and Terry L. Schnell & Kathleen J. Davies, *The Increased Sig-*

nificance of Environmental Justice in Facility Siting, Permitting, 29 Env't Rep. (BNA) 528 (July 3, 1998). See also Morrison & Foerster LLP, *New Trends in Environmental Law: Environmental Justice*, LAND USE AND ENVIRONMENTAL LAW BRIEFING (Sept. 1998).

98. J. Samantha Carson, *Emerging Trends in Environmental Justice*, Ballard, Spahr, Andrews & Ingersoll, Environmental Issues Memorandum, 1-4 (Dec. 1997). See also Luke W. Cole, "Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep, 29 ELR 10775 (1999).

99. Carson, *supra* note 98, at 2. For discussion of some of the practical problems in brownfields development, see Christopher J. Daggett, *Brownfields: An Entrepreneur's Perspective*, 9 ENVTL. L. IN N.Y. 33 (1998).

100. Ken Mounger, *Permitting a Major Grassroots Petrochemical Plant Which Includes an IEM Chlor-Alkali Plant*, in ANNUAL CHLORINE INSTITUTE SEMINAR, Mar. 1995, at 6.

101. *Id.*

102. See E. Lynn Grayson & Stephen A.K. Palmer, *The Brownfield Phenomenon: An Analysis of Environmental Economic and Community Concerns*, 7 ELR 10337 (July 1995).

103. Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.).

104. Sven-Erik Kaiser & Elizabeth Bennett, *The Federal Role in Financing Brownfield Revitalization*, in Financing Brownfield Reuse, at 53, 55 (North-east-Midwest Institute Working Paper No. 10, 1999). For a detailed analysis, see Adam Gropper, *Getting the Green Back: Remediating Brownfields Under Internal Revenue Code §198*, 5 ENVTL. LAW 281 (Sept. 1998)

105. 60 Fed. Reg. 34793 (July 3, 1995).

106. ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 1997 UPDATE (1998).

107. These are described in detail in Ned Abelson & Maura McCaffery, *Brownfields: Recent Massachusetts and Federal Developments*, 26 Env't Rep. (BNA) 2152, 2153 (Mar. 15, 1996).

108. For example, a staff member with the Natural Resources Defense Council pushed construction of a paper recycling plant as a redevelopment project in the South Bronx. The plant will bring 2,200 construction jobs and 600 permanent jobs to the area. Yet, a local activist almost torpedoed the project rather than let another group get credit for it. *If You Can Make It Here*, ENV'T, HEALTH & SAFETY MGMT., Aug. 26, 1996, at 6.

109. See ENVTL. LAW INST., A GUIDEBOOK FOR BROWNFIELD PROPERTY OWNERS (1999). See also Ann S. Andrew, *Brownfield Redevelopment: A State Led Reform of Superfund Liability*, 10 NAT. RESOURCES & ENV'T 27 (1996); R. Timo-

thy Weston, *Contaminated and Industrial Properties—Challenges and Opportunities in Structuring Business Transactions* & Nancy J. Marcel, *EPA Efforts to Facilitate the Transfer and Reuse of Contaminated Property*, 25th Annual Conference, A.B.A. Sec. Nat. Resources, Energy & Envtl. L., Keystone, Colo., Mar. 21-24, 1996. For an excellent discussion of legislation relating to brownfields and deed restrictions, see Elizabeth G. Geltman, *Recycling Land: Encouraging the Re-development of Contaminated Property*, 10 NAT. RESOURCES & ENV'T 3 (1996). See also Paul C. Nightingale, *Negotiating Contracts for the Purchase and Sale of Contaminated Property*, 10 NAT. RESOURCES & ENV'T 11 (1996); Karen M. Wardzinski, *Prospective Purchaser Agreements Under EPA's New Guidance*, 10 NAT. RESOURCES & ENV'T 24 (1996).

110. Bradley C. Bobertz, *Transferring the Blame*, ENVTL. F., Jan./Feb. 1996, at 22, 24 (emphasis in original).

111. *Id.*

112. *Id.* at 23.