

# New Jersey Law Journal

VOL. CLXXV – NO. 10 – INDEX 943

MARCH 8, 2004

ESTABLISHED 1878

## Commentary

### When Voluntary Isn't

New Jersey's use of sticks rather than carrots for brownfields cleanups doesn't do the trick

By Janet S. Kole

In today's world of spin, the dictionary is not the master of meaning; the user of the language is. Lewis Carroll's Alice discovered that 100 years ago.

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

So my senior free checking account costs \$1.50 a month, and the Bush administration's assault on the Clean Air Act, with its cornerstone of allowing more pollutants into the environment, is called the Clear Skies Initiative.

In a similar vein, the state of New Jersey has now determined that the term "voluntary," when applied to cleanups of contaminated sites, means "being forced to do something you don't want to do."

In a press release issued just before Thanksgiving, the state Department of Environmental Protection announced it was launching enforcement actions against three companies that refused the invitation to "voluntarily" clean up their property under the state Brownfield Development Area Initiative.

Although the department's description on its Web site of the brownfields initiative speaks of parties potentially responsible for cleanup of the site as being "invited to the table to participate in this cleanup," the enforcement actions tell a different story.

Despite touting the brownfields program as voluntary, with participants signing "nonbinding" memoranda of agreement, the DEP has subjected these three companies to a state directive, with

---

*Kole is a shareholder in the Cherry Hill and Philadelphia offices of Flaster/Greenberg, where she practices environmental law. She is a vice chair of the Special Committee on Smart Growth and Urban Policy for the American Bar Association's Section on the Environment Energy and Resources.*

substantial penalties attached for noncompliance.

I am all in favor of cleanups of contaminated property. But DEP's latest tactics recall the "bad old days," when its managers were convinced that only by forcing potentially responsible parties to clean sites to the pristine state enjoyed by native Americans hundreds of years ago could they call themselves successful.

The issue isn't merely one of spin. The issue really is which is more successful — forcing cleanup through punitive enforcement techniques or encouraging cleanup through flexible negotiations with potential remediators. Pennsylvania has shown that flexibility in cleanup targets, coupled with grants and other "carrots," like tax incentives and zoning deals, beats the "stick" when it comes to remediating brownfields sites.

Pennsylvania has continued to lead the country in putting contaminated sites back into fruitful use while protecting its citizens and the environment from pollution.

Pennsylvania's success — close to 1,500 sites have been cleaned up in the six years its program has been in existence — is mostly due to the willingness of its regulators to think outside the box on almost every issue, be it related to money or to science. Their regulations and guidance policies — and, more important, their actions — reflect a preference for volunteerism and innovation to get the job done.

By contrast, despite a public commitment to flexibility and volunteerism, the state DEP's real preference is for a coerced, complete cleanup to the pristine state of long ago. As it says on its brownfields Web site: "while permanent remedies are preferred, it is understood and recognized in *New Jersey statutes* that it does not always make sense to remove all contamination at a site" (emphasis supplied).

Reading between the lines, the regulators are complaining that while *they* prefer permanent remedies, the Legislature, through passage of the state's brownfields law, has forced them to recognize that sometimes leaving contamination in place is the alternative that makes economic sense while also protecting human health.

But they don't have to *like* it!

As long as New Jersey's regulators hold that mindset, any hope that the majority of New Jersey's brownfields will be quickly remediated and returned to viable economic use is doomed. A successful brownfields initiative, as Pennsylvania has demonstrated, depends on a true partnership with willing, *voluntary* remediators and truly flexible regulators.

As long as New Jersey doesn't mean "voluntary" when it says "voluntary," the brownfields program will be slowed to a crawl, if not completely stalled. ■