

LAW

EPA: Brownfield caveats will soon become clearer

By **JEREMY HARRELL**

Brownfields are like Forrest Gump's box of chocolates: You never know what you're going to get.

A single industrial property can have a number of different owners down through the decades, and each of them may or may not have infested the site with a different kind of contamination. A big part of acquiring these parcels – and a source of some contention between buyers and sellers – involves due diligence to see just what might be hidden in the earth and just who owned the property, which also offers clues as to what's in the soil.

The due diligence, performed by environmental consultants and attorneys, is especially crucial because federal law assigns 100-percent responsibility to the landowner. Buy it and it's yours, contamination included, said Charlotte Biblow, a partner in the environmental practice of Farrell Fritz in Uniondale.

"If you acquire a property where there is contamination ... you have absolute liability," she said. "That's why people do due diligence before buying a property: The penalties are enormous."

For years, however, the specifics of what constitutes due diligence has been a little cloudy, Biblow said. The Environmental Protection Agency never drafted specific

rules, so most attorneys relied on guidelines written by an independent, non-governmental standards-setting organization.

Until now, that is. The EPA, on Nov. 1, will begin enforcing its own due diligence standards, known as the All Appropriate Inquiries rule. Congress passed the law in 2002, but it took the EPA four years to write and promulgate the rules.

There's a lot of overlap between the EPA rule and the previously used independent standards, said Biblow, who led a conference on the subject last week in Uniondale.

Following the new rules will be critical because they will affect what's called the "innocent landlord" defense. As its name implies, this defense allows a landowner who's performed due diligence to claim he or she had no ability to know the brownfield in question was contaminated.

"If you want to fall into the innocent landlord standard, you have to follow the new rules," Biblow said.

The new standard involves more interviews, more site investigations and perhaps more soil samples. The EPA also requires two certifications: One for a consultant performing the investigation and another for the product of the investigation, Biblow said.

"Studies will take a little longer and cost a little more," she added.