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Peter Mantius column: Raiding the homestead

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What's this? chemicals violates contract language contained in virtually every mortgage agreement covering properties drillers want to frack.

Even the act of signing a gas lease raises thorny legal issues.

"Signing a gas lease without lender consent is likely to constitute a mortgage default," attorney Elisabeth N. Radow wrote in the November/December 2011 edition of the New York Bar Association Journal.

Few property owners realized that fact when they signed leases, and few lenders have followed up with foreclosure proceedings. But the fact remains that lenders may be legally entitled to foreclose and could do so if circumstances change.

If they don't foreclose on fracked properties, mortgage lenders must sit and watch as collateral they hold for security on billions of dollars in loans is severely impaired.

The industry's response is that drilling's extreme opponents exaggerate the risks of fracking.

Really? Well, meet the extremists:

- Nationwide, one of the country's largest insurers of homes, recently underscored that it does not cover fracking-related losses and that it doesn't plan to renew properties with gas leases. This company is in the business of calculating risk, and it is voting with its feet.

- Bank of America and Wells Fargo, two megabanks among a growing lists of lenders, now either refuse to write mortgages on gas-leased properties or require substantial buffer zones that exceed state setbacks for drilling.

If, as expected, Gov. Andrew Cuomo allows the first permits to frack shale formations for natural gas in New York State this fall, unsuspecting homeowners throughout the Southern Tier will soon be receiving shocking letters from the state.

Each letter will announce that a gas driller has state authorization to drill horizontally underneath a home and to inject unnamed toxic chemicals there. The homeowner will have no power to stop it, even though the drilling activity will create new uninsured risks and will likely expose the mortgage on the property to technical default.

If these "compulsory integration" rules seem remarkably tilted in favor of gas drillers, that's because they were established under a 2005 state law drafted by a driller's lobbyist. But during his year and a half in office, the governor has made no move to balance this blatant violation of homestead rights.

In recent weeks, Cuomo has been hinting strongly that he'll soon end his moratorium on high-volume, horizontal hydraulic fracturing. But will he ever address the folly of New York's extreme version of compulsory integration? His legacy is at stake.

As folk singer and environmental icon Pete Seeger said in a recent televised YouTube video message to Cuomo: "You father was perhaps the best governor New York State ever had. And if you take the money they want to give you for going along with fracking and injuring people for generations to come, you will go down as perhaps the worst."

The gas industry has been shifting the risks and costs of fracking on a massive scale since 2005, the year Congress exempted fracking from crucial sections of long-standing federal laws protecting our water and air.

Those exemptions, known collectively as the Halliburton loophole, were spearheaded by then-Vice President Dick Cheney, former CEO of Halliburton, the company that pioneered high-volume fracking.

The Cheneyized law helps drillers sidestep financial responsibility for the hazardous chemicals they use. In fact, it even lets them withhold the names and quantities of those chemicals on the grounds that they are proprietary mixes -- as if they were special kitchen recipes or the secret formula for Coca-Cola.

But there's another reason to avoid identifying the toxins: acknowledged use of specific hazardous chemicals violates contract language contained in virtually every mortgage agreement covering properties drillers want to frack.

- The multi-trillion-dollar secondary mortgage market, which buys mortgage paper from first-tier lenders, has guidelines that bar gas-leased properties.

This year Cuomo passed up a chance to take an important first step in closing the gas drilling liability gap. He declined to back state Comptroller Tom DiNapoli's 2012 bill to set up a gas drilling accident fund along the lines of the state's oil spill fund, which has been successfully underwritten by the petroleum industry for decades in New York. The gas drillers didn't want to pay for it. Cuomo declined to force them.

In fact, the governor's made a habit of sitting on his hands on crucial fracking issues. He hasn't pushed for a natural gas severance tax (like the one Gov. John Kasich is fighting for in Ohio or the others already in force in nearly every other gas drilling state).

Cuomo has also ignored the state medical community's demands for a health impact study to evaluate horror stories from intense fracked regions in Pennsylvania. And his proposed state budget contained no extra funds to beef up the understaffed state Department of Environmental Conservation, fracking's regulator.

Even so, he's apparently all set to grant permits to frack Southern Tier communities. So keep an eye out this fall for your postman who may be delivering your compulsory integration letter.

Here's what that letter will say, more or less: A gas drilling company has decided to drill on a site near you. The driller has drawn 640-acre "spacing unit" around that site, and that tract includes your property. Having already obtained leases covering more than 60 percent of the spacing unit -- 384 acres -- the driller is authorized to force the owners of the remaining 256 acres, including you into the drilling project. You are eligible for certain modest compensation based on the acres you own on terms written by the industry. You have no right to negotiate, no right to reject the deal outright.

The DEC -- and ultimately Cuomo himself -- will serve as enforcer for the driller.

Peter Mantius is a freelance journalist from Schuylers County who closely follows shale gas drilling issues. He is former longtime reporter for the Atlanta Journal-Constitution and editor of two business weeklies in the Northeast.

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