

Community Environmental Defense Council, Inc.

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Certified Mail, Return Receipt Requested

Commissioner Joseph Martens
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-0001

July 31, 2012

Re: Letter to you (dated July 26, 2012) from Lenape Resources regarding Avon, NY Local Law

Dear Commissioner Martens:

I am in receipt of a copy of a letter dated July 26, 2012, addressed to you, in which (the "July 26 Letter") Lenape Resources, Inc. ("Lenape") requests that the DEC take certain actions, including certain legal actions.

I do not represent the Town of Avon. I am writing you now so as to put the DEC on formal notice as to certain factual and legal matters that properly ought to be considered by you in connection with the DEC's evaluation of the requests made by Lenape in the July 26 Letter. Out of respect for your time, I shall be brief and to the point.

By its July 26 Letter Lenape makes multiple, material misrepresentations of fact and law, and omits material facts necessary to make statements in that Letter not misleading. It appears that Lenape has made these material misrepresentations and omissions in a wrongful attempt to influence the DEC to undertake certain policy and legal actions that Lenape has calculated will serve its financial interests.

Lenape's statements and omissions are materially misleading and deceptive as follows:

1. It is a fact that the Town of Avon law of which Lenape complains by its very terms does not affect operation of Lenape's wells as at the enactment of that Law. Given the specific and particular circumstances surrounding enactment of that Law, it is not credible that Lenape could not know that its operations in place at the time of enactment of the Law are not affected by the Law. Similarly, it is not credible that Lenape could in good faith believe that continuing to conduct operations (of the same nature as conducted as of enactment of the complained-of-Law) at the (legally unaffected) wells "may well" constitute a violation of that Law, or could subject Lenape personnel "to arrest, fines and possibly jail time." Lenape is engaging in fraudulent and deceptive conduct by deliberately misrepresenting the affect of the complained-of-Law upon its

business operations and personnel, and Lenape is doing so in an attempt to influence the DEC to take certain (improper) actions, so as to benefit the financial interests of Lenape.

2. Lenape further attempts to mislead the DEC by asserting that the complained-of-Law constitutes an illegal 'regulation' of the gas industry. As the Lenape officer signing the July 26 Letter without question is aware, there are only two New York judicial decisions – the *Dryden* and *Middlefield* cases¹ - directly considering the issue, and each of those decisions *unequivocally* holds that (i) New York municipalities wishing to do so have the legal authority to pass local laws of general applicability to prohibit gas drilling activities within their municipal borders, (ii) **such local laws are NOT 'regulations' within the meaning of ECL 23-0303(2)**, and (iii) accordingly such local laws are NOT preempted by or otherwise 'illegal' under ECL 23-0303(2).

If the Lenape representative who signed the July 26 Letter is an attorney, without question his material misrepresentations and omissions of fact and law constitute ethical violations of an extremely serious nature. In any event, and whether or not that representative is a lawyer, under the circumstances here present it appears that **Lenape's material misrepresentations and omissions in the July 26 Letter constitute attempted fraud on the DEC, an offense involving false written statements as contemplated by Article 175 of the Penal Law, an offense against public administration, and fraudulent, unfair, and deceptive trade practices as to various members of the public, and by copy of this letter to Attorney General Eric Schneiderman I am respectfully requesting that his Office investigate the same.**

Lastly with respect to the requests of the DEC that Lenape makes, I wish respectfully to remind the DEC that any institutional 'opinions' its administrators may have as to the 'proper' meaning or statutory interpretation of ECL 23-0303(2) are legally irrelevant. As a matter of law, agency opinions or determinations as to matters of statutory interpretation are not entitled to deference (*see, e.g.*, the Court of Appeals' decision in *Bikman V. New York City Loft Bd.*, 14 N.Y. 3d 377 (2010))

Thank you for your anticipated attention to this matter.

Very truly yours,

/s/

David F. Slottje,
Senior Attorney

cc.: Attorney General Eric T. Schneiderman, cert. mail
Helen Holden Slottje, Esq.

¹ By the way, when enterprises such as Lenape and its ilk are not busy attempting to mislead people into believing that the *Dryden* and *Middlefield* decisions do not exist, they often assert that those decisions should be accorded no or only limited legal weight because they are 'on appeal.' Those cases are NOT on appeal. Notices of appeal have been filed, but all a *notice of appeal* does is preserve the *option to appeal*. The filing of a notice of appeal does not indicate that the party on whose behalf the notice was filed intends to appeal, is likely to appeal, or even might appeal; it simply preserves the option to appeal, down the road. In order to actually commence an appeal, a party must 'perfect' an appeal. And thus far – *over five months after the Dryden and Middlefield decisions came down* – not a single piece of paper has been filed to *perfect* an appeal. Indeed, attorney Tom West has repeatedly and publicly said that his client the plaintiff in the *Dryden* decision does *not* want to appeal, probably *will not* appeal, and desires to find a person who might purchase that client's option to appeal.