

Toxic Times

The Tuscarora Nation's remedies in response to the Auto City
Hazardous Waste Management Site expansion.

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PREFACE

The Tuscarora Indian Reservation (hereinafter “The Nation” or “The Tuscarora Nation”) is a diametric place; both homey and fiercely foreign despite its locale. The road roughens with the neighborhoods exterior, but a stop at the local gas station reveals that the people do not become similarly troglodyte. Despite his bullet proof vest over a clean blue dress shirt, the attendant at a local gas station jumped at the chance to help a lost stranger. He didn’t know off hand where the Pattersons lived, but instead of turning the lost away with a shrug, per the Buffalo gas station vogue, he grabbed the office phone, flipped through the phonebook, and called the Pattersons for directions. Emerging from the office he told me to drive up the road about a mile, the house was set back in the woods. I bought a lighter and thanked the man. The Pattersons (especially their jovial yellow lab) were just as friendly.

The experience exacerbated my shock at seeing the towering stacks of the Auto City Waste Management Plant (hereinafter “Auto City Plant” or “Auto City Site”) belching plumes of God-knows-what into the air just north of the Nation, marring the otherwise beautiful vista of a rare north-western New York hill. That same plant has petitioned the State for a permit to expand their plan, increasing its size by 50 acres.

The Nation, a community long since designated as an environmental justice (hereinafter “EJ”) community by the Environmental Protection Agency (EPA), and already under threat of environmental and economic harm from the Auto City Plant and abdication of water rights, has been threatened again by the Auto City Plant, and seeks estoppel of the plant expansion.¹

This essay is an assessment of the avenues available to the Tuscarora Nation to combat the expansion of the Auto City Waste Management Site and, should they be unable to effective forestallment, an assessment of the legal remedies the Nation may invoke to force an injunction defeating the Plant’s expansion. This essay is broken into three sections: first is a factual background concerning the history of the Nation, Waste Management, and the interplay between the two, second is an overview of the Federal

¹ Interview with Neil Patterson, Director of the Tuscarora Environmental Program. (Feb. 2011).

and New York State Hazardous Waste law, and finally is a discussion of the Nation's available remedies under the Hazardous Waste law.

FACTUAL BACKGROUND

Like so many legal issues, the fight between the Tuscarora Nation and the Auto City Waste Management Site is grounded in fact. Facts give form to the substantive legal problems; and give context and meaning to the precise issue. Without the facts there exists only dry law, inapropos to most. The factual underpinnings here trace back further than most legal issues; to truly understand the conflict one must be familiar with the history of the Tuscarora People and their relationship with the Federal Government. Furthermore, one must be familiar with the Auto City Waste Management Site, its history and its current events, as well as be familiar with its parent company, Waste Management. Finally, one must be familiar with how the Tuscarora People believe the waste management expansion will affect them.

The History of the Tuscarora Nation

This history of the Tuscarora People is long and complex, and like so many of America's native populations, truly tragic. While true that the Tuscarora did not march with so many others on the Trail of Tears,² they were forced from their homes to travel to remote regions during America's westward expansion under the thrall of manifest destiny.

Like most Native American tribes, no one really knows when the Tuscarora Nation formed; oral history and tradition frustrate the formulation an exact date on our Georgian calendar. It is clear, however, that the Tuscarora people were here when the white settlers arrived in their Galleons in the late 1600s and early 1700s.³ Relations during this early period were misanthropic, with the Tuscaroras' fighting a brief war (bromidically called the "Tuscarora War") with the colonists.⁴ The war culminated during the battle

² Africans in America, *Indian Removal*, PBS, available at <http://www.pbs.org/wgbh/aia/part4/4p2959.html>.

³ HODGE, F.W., *HANDBOOK OF AMERICAN INDIANS, TUSCARORA* (Smithsonian Institution 1906); *see also Tuscarora Indian Tribe History*, <http://www.accessgenealogy.com/native/tribes/tuscarora/tuscarorahist.htm>.

⁴ BRUCE, TRIGGER, *HANDBOOK OF AMERICAN INDIANS*, Volume 15 (1978);

at Fort Neoheroke in North Carolina, with the Tuscaroras losing in spectacular fashion to the colonists and their allies.⁵

While the Tuscarora stayed in North Carolina for a time, encroachment and illegal land takings by eventually forced the tribe to split, one group leaving their traditional lands and migrating north and the other digging in, despite the overcrowding.⁶ The northern group eventually found its way into New York and banded with the Iroquois as part of the six nations.⁷ It is with this group that our focus lies.

Since the northern migration relations between the United States Federal and State governments and the Nation have fluctuated, but remain strained at best. During the War of 1812 the Tuscarora Nation sided with the United States in their fight against the British and, during the battle of Lewiston, the Tuscarora Nation came to the aid of embattled U.S. soldiers fleeing from British and Mohawk forces. The American forces, with remarkable cold-heartedness, abandoned the Tuscarora warriors, leaving them to fight at odds of at least thirty to one.⁸

Military history is not the only cause of strain between the Tuscarora Nation and the United States. Land expropriation has been, and continues to be, a point of frequent contention between the Nation and the United States. Indeed, during his time as Commissioner, Robert Moses expropriated 500 acres of the Tuscarora Nation's reservation for the hydroelectric construction project at Niagara Falls to power New York City.⁹

As it currently stands, the Tuscarora Nation, which sits on approximately 5,700 acres (or 9 square miles), is home to approximately 1,200 residents who are led by a traditional Council of Chiefs.¹⁰ The Nation is a participant in the annual Indian Leadership Meeting with the EPA. Here, participants discuss specific environmental issues, territorial protection, and development of an environmental program

⁵ PASCHAL, HERBERT R. JR., A HISTORY OF COLONIAL BATH (Edwards & Broughton, 1955); *see also Tuscarora Indian Tribe History*, <http://www.accessgenealogy.com/native/tribes/tuscarora/tuscarorahist.htm>.

⁶ *Supra*.

⁷ *Supra*.

⁸ SIMONSEN, LEE, TUSCARORA HEROES: THE WAR OF 1812 BRITISH ATTACK ON LEWISTON, NEW YORK (Lewiston, N.Y. Historical Association 2010).

⁹ *Niagara Falls History of Power*, Niagara Falls Thunder Alley, *available at* <http://www.niagarafontier.com/power.html>; *see also Tuscarora Nation*, EPA, <http://www.epa.gov/region2/nations/tusca.htm>.

¹⁰ *Tuscarora Nation*, EPA Region 2, <http://www.epa.gov/region2/nations/tusca.htm>.

capacity.¹¹ In addition, the Nation has begun an environmental assessment of their lands. They have found support for this program through the EPA's Haudenosaunee Environmental Task Force which focuses on preservation, conservation, and protection of the environment of the Nation for future generations.¹²

The Auto City Waste Management Site

In this context, a history of the Tuscarora Nation alone is vacuous without mention of Waste Management as a company, as well as its subsidiary, the Auto City Waste Management Site itself.

Waste Management is considered by Forbes Magazine to be one of the top 20 most responsible companies in the United States based on board accountability, financial disclosure, internal controls, shareholder rights, remuneration, market control, and corporate behavior.¹³ Interestingly, this ranking omits their noted environmental commitment. When available information is viewed in a light most favorable to them, Waste Management may be seen as an environmental powerhouse; the company uses the waste it collects to power nearly 1 million homes, is the United States largest recycler (recycling more than 7 million tons of material in 2009), runs many of its trucks on natural gas, has built plants converting landfill gas into liquefied natural gas to power these trucks, and have dedicated approximately 24,000 acres to conservation.¹⁴

The company, beyond its commitment to the environment, appears to be an economic powerhouse. The company employs some 45,000 people, has posed \$11.79 billion in revenue for 2009, and returned approximately \$795 million dollars to their shareholders through dividends and share repurchase.¹⁵ Moreover, the company reduced their operating costs by 14.5 percent and generated roughly \$1.2 billion in cash flow.¹⁶

Speculatively, it is unsurprising that Waste Management's website does not openly proclaim the existence of the Auto City Waste Management facility. Its existence is the visible reminder of the grimy

¹¹ *Supra.*

¹² *Supra.*

¹³ Waste Management, *Waste Management: One of the 20 Most Responsible Companies of 2010*, www.wm.com/about/press-room/forbes-20.jsp.

¹⁴ Waste Management, *About Us*, www.wm.com/about/index.jsp.

¹⁵ *Supra.*

¹⁶ *Supra.*

film basing the company's environmental record. Despite its name, The Auto City Waste Management facility is located at 1550 Balmer Road, in Model City, New York.¹⁷ This site, according to Mr. Patterson, is one of the very few hazardous waste disposal facilities in the north east, the next nearest located in New Jersey.¹⁸

A hazardous waste facility must meet a cornucopia of standards and regulations, and must be granted a permit before they may begin operations. Waste Management's Auto City site's permit expired on August 5, 2010.¹⁹ The expired permit allowed Waste Management to store solid and liquid hazardous and non-hazardous waste in containers, store liquid hazardous and non-hazardous waste in tanks, treat liquid hazardous and non-hazardous waste in tanks, treat (through stabilization, immobilization & encapsulation) solid hazardous and non-hazardous waste in tanks, store (after treatment) liquid hazardous and non-hazardous waste in surface impoundments, dispose of solid hazardous and non-hazardous waste in a landfill, comingle liquid hazardous waste and repackage laboratory chemical waste for shipment, implement final corrective action remedies for site-wide contamination, and monitor groundwater and perpetual post-closure care at all on-site land disposal units.²⁰

Critically, new guidance under the New York State Hazardous Waste Facility Siting Plan was enacted impacting Waste Management's application for a new permit.²¹ The new guidance provides that sufficient TSD facilities exist for hazardous waste generated in New York, and that the sufficiency of such facilities will remain for the foreseeable future.²² The new guidance notes that there is no current need for increased capacity for hazardous waste management in this state.²³ Furthermore, the new

¹⁷ Waste Management, *Landfills and Disposal Facilities*, <http://www.wmdisposal.com/facilities/results.asp?state=NY>.

¹⁸ Interview with Neil Patterson, Director of the Tuscarora Environmental Program (Feb. 2011).

¹⁹ New York State Department of Environmental Conservation, Permit No. 9-2934-00022/00097.

²⁰ *Supra*.

²¹ New York State Department of Environmental Conservation, *New York State Hazardous Waste Facility Siting Plan* (Oct. 2010).

²² *Supra*, n. 21 (Chapter 6: "There are sufficient available TSD facilities for management of RCRA hazardous waste generated in NY, and will be for the foreseeable future. Periodically, USEPA will revisit the issue of national capacity and need through analysis of available data and regulators at both a state and federal level will have years of lead time to address potential capacity shortfalls. Thus there is no current or near term need for increased capacity for hazardous waste management in NYS").

²³ *Supra*.

guidance takes a stand on environmental justice issues, requiring a facility to take environmental justice concerns into account before any plan may be implemented.²⁴

It is apparent, therefore, that while Waste Management has a better-than-average track record in environmental consideration, they have not had cause to reason this principle to environmental justice. Under the new guidance, Waste Management must take such considerations into account. Accordingly, discussions and legal action between the Nation and Waste Management will implicate environmental justice; allowing the Nation to bring another possible claim to the table.

The Feared Effects of the Plant Expansion

The effects of the Hazardous Waste Expansion on the Tuscarora Nation are admittedly speculative. Much comes from local concerns and fears founded on human health and environmental grounds. Neil Patterson, in his role as Director of the Tuscarora Environmental Program, was instrumental in delineating the greater community's concerns.²⁵ The Tuscarora people are right to be concerned; the Nation, already beleaguered by three other waste treatment facilities on their borders, will have yet another waste facility, this one of the more toxic variety pushed to their very doorstep should plant expansion go through.

The first major concern rests in water quality. The Nation receives most of its water from a nearby reservoir and through well water. The Nation, even before the proposed hazardous waste facility expansion, was concerned about the effects of the waste facilities on their groundwater and the reservoir water. These fears have been compounded by the proposed expansion. In fact, Mr. Patterson emphasized this as the primary fear of the Tuscarora Nation with regard to the expansion project.

A second concern centers on the Nation's hunting practices. Mr. Patterson emphasized the importance of deer hunting on the reservation, suggesting that many of the Tuscarora people consume a large amount of free-range venison. The Tuscarora People believe that the deer they hunt may wander north onto Waste Facility lands, browse thereon, and return to the reservation where they are killed and

²⁴ *Supra.*

²⁵ This section comes, in its entirety, from discussions with Mr. Patterson about the community's concerns. Interview with Neil Patterson, Director of the Tuscarora Environmental Program (Feb. 2011).

eaten. The concern lies mainly with the belief that the venison may contain high levels of toxins picked up by the deer at the waste facility.

A third fear centers on atmospheric and air quality issues relating to the Auto City Site. Already, high plumes of white smoke from the hazardous waste treatment facility can be seen on parts of the reservation. The proposed expansion will bring these gas-releasing operations closer to Nation Territory. Here, the primary concern is that any southerly wind will blow the pollution and fine particulate matter from the plant directly onto The Nation.

LEGAL OVERLAY

The legal landscape surrounding siting and control of hazardous waste facilities is expansive and complex; the language of which shifts from Federal to State concerns and back again. The following is a brief overview of the legal framework upon which any argument must be built, beginning with the Federal law. A discussion of hazardous waste facility law generally will be followed by a discussion of facility siting.

Hazardous Waste Regulation in the Federal System

Congress passed the Resource Conservation and Recovery Act (hereinafter RCRA) in 1976.²⁶ The Act, the first of its kind, recognized “that improper hazardous waste management can result in harm to public health and the environment.”²⁷ The RCRA is unique in its comprehensiveness; regulating hazardous waste from creation by generators, transportation, storage, treatment, or disposal.²⁸ The act has been codified as 42 U.S.C.A. § 6903 *et seq.* The relevant provisions for this discussion are contained in §§ 6903, 6925, 6926, and 6928.

Section 6903 defines “Hazardous Waste” as “a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible illness; or (B) pose a substantial present or potential hazard to human health or

²⁶ Resource Conservation and Recovery Act, 42 U.S.C.A §§ 6903 *et seq.* (1976).

²⁷ *Supra.*

²⁸ *Supra.*

the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.”²⁹ Importantly, this statute does not limit the definition of hazardous waste to purely human concerns by including the term “environment” in subsection (5)(B).³⁰

Section 6925 delineates the federal process for obtaining permits for “treatment, storage, or disposal of hazardous wastes.”³¹ The statutes required the Administrator to, within 18 months of October 21, 1976, promulgate regulations requiring those connected with the creation, transport, or disposal of hazardous waste to obtain a permit to continue such work.³² To obtain a permit, the applicant must provide the Administrator with documentation estimating the “composition, quantities, and concentration of any hazardous wastes” to be disposed of, treated, or otherwise, along with the “time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored.”³³ Furthermore, the applicant must provide the Administrator with the location or site of disposal, transport, or treatment.³⁴

Should the applicant satisfactorily meet these requirements, the Administrator shall issue a permit to the applicant.³⁵ The issued permit is subject to withdrawal by the Administrator and, if modifications to the facility are required, the permit “shall specify the time allowed to complete the modifications.”³⁶

Under Federal Law, “any State which seeks to administer and enforce a hazardous waste program” may do so provided that the State’s proposed legislation is, at minimum, equal to the Federal regulation.³⁷ Specifically, the Administrator must find (1) that the State program is equivalent to the Federal program, (2) such program is consistent with the programs of other states and the Federal program, and (3) the State program provides effective enforcement of compliance.³⁸

Most critically, 42 U.S.C.A § 6926 provides that “any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the

²⁹ 42 U.S.C.A. § 6903 (5) (A),(B).

³⁰ 42 U.S.C.A. § 6903 (5)(B).

³¹ 42 U.S.C.A. § 6925.

³² *Id.* at (a).

³³ *Id.* at (b)(1).

³⁴ *Id.* at (b)(2).

³⁵ *Id.* at (c)(1).

³⁶ 42 U.S.C.A. § 6925.

³⁷ 42 U.S.C.A. § 6926.

³⁸ *Id.* at (b).

Administrator under this subchapter.”³⁹ By including the language of § 6926 (d), the Federal Government is, in essence, creating a Federal Cause of action when a State authorized program violates this section. This is so because the State law will have the “same force and effect” as its Federal counterpart.⁴⁰ This allows plaintiffs to sue under the Federal “Civilian Suits” provision of § 6972 and the Federal Enforcement provisions of § 6928.

Federal enforcement provisions are severe. Once the Administrator has discovered a violation, he may issue civil penalties for any past or current violation and may require immediate compliance.⁴¹ Failure to comply with the Statute or a compliance order may result in suspension or revocation of the facilities permit. Moreover, a penalty of up to \$25,000.00 per day per violation may be imposed.⁴² Should a State regulate the facility, the Administrator shall “give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action.”⁴³

In addition to civil penalties, criminal penalties may be imposed on any person who transports hazardous waste without a permit; or who knowingly omits “material information or makes any false material statement” in any document; or who knowingly “generates, stores, treats, . . . or otherwise handles hazardous waste . . . and who knowingly destroys, alters, conceals, or fails to file any record . . . ;” or who knowingly “exports a hazardous waste without (A) the consent of the receiving country or, (B)” where an international agreement prohibits.⁴⁴ Anyone in violation of this section may be subject to jail time and a fine of \$50,000.00 per day per violation.⁴⁵ Finally, any person who commits a violation knowingly, and thereby “places another person in imminent danger of death or serious bodily injury,” shall be subject to a prison sentence of not more than 15 years and a fine of \$250,000.00; if it is an organization which commits the offence, the penalty is increased to a maximum of \$1,000,000.00.⁴⁶

³⁹ *Id.* at (d).

⁴⁰ *Id.*

⁴¹ 42 U.S.C.A § 6928 (a).

⁴² *Id.* at (3).

⁴³ *Id.* at (2).

⁴⁴ 42 U.S.C.A. § 6928

⁴⁵ *Id.* at (d)(7)(B).

⁴⁶ *Id.* at (e).

While State Law is Dominant, Federal Law Remains Important to the Discussion

As previously mentioned, 42 U.S.C.A § 6903 *et seq.* allows States to promulgate and implement their own Hazardous Waste Plan.⁴⁷ Every State, with the exception of Iowa, has been authorized by the EPA to create their own management program.⁴⁸ Like all such State programs, the New York State hazardous waste management program meets the EPA guidelines in 42 U.S.C.A. § 6903 *et seq.* and meets the further prohibition that “any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage, or disposal of hazardous waste in the State may be deemed inconsistent.”⁴⁹

While the operation of a State-wide hazardous waste program in lieu of the EPA’s program may seem to imply that State law applies to hazardous waste treatment, significant Federal overlay remains. First, state authorization to implement its own program may be revoked should the State’s program fail to meet 40 C.F.R. 271.4(b).⁵⁰ Further, the Supreme Court has held that hazardous waste is an article of interstate commerce and may therefore be regulated by the Federal Government under the Commerce Clause of the U.S. Constitution.⁵¹ Therefore, while the State may have the largess of control, the Federal government remains an important player.

New York State’s Hazardous Waste Management Program and Siting Plan

New York State’s Hazardous Waste Management program is contained in N.Y. ECL Title 9, § 27-0900 *et seq.* The Hazardous Waste Siting program, however, is contained in Title 11, §§ 27-1101 - 27-1113. The regulations contained in Title 9 are broad, applying to any generator storing more than 100kg of waste for over 90 days and restricting permits to “suitable persons.”⁵² Even then, each permit may be revoked on the grounds contained therein.⁵³ Finally, New York’s regulations showcase a mentality of

⁴⁷ 42 U.S.C.A. § 6926.

⁴⁸ *See generally*, New York State Hazardous Waste Siting Plan, New York State Department of Environmental Conservation (Oct. 2010), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/hwspfinal.pdf.

⁴⁹ Protection of the Environment, 40 C.F.R. § 271.4(b).

⁵⁰ *Id.*

⁵¹ *See Philadelphia v. New Jersey*, 437 U.S. 617 (1988).

⁵² Industrial Hazardous Waste Management, N.Y. E.C.L. § 27-0913.

⁵³ *Id.*

reduction; stating that the State's first preference is for the reduction or elimination of hazardous wastes and that land disposal should be used only for a last resort.⁵⁴

Section 27-0900 defines the applicability and purpose of the New York Hazardous Waste Management program. The program was enacted "to regulate the management of hazardous waste in this State and to do so in a manner consistent with the Federal Solid Waste Disposal Act as amended."⁵⁵ This section specifically states that the regulations are designed to be at least as stringent as those outlined in the Federal system.⁵⁶

The New York Management Plan defines "hazardous waste" in a manner identical to the Federal law.⁵⁷ In addition, the statute defines "disposal" as "abatement, discharge, deposit, injection, dumping, spilling, leaking or placing of any substance so that such substance or any related constituent thereof may enter the environment"⁵⁸. Disposal also means the thermal destruction of waste or hazardous waste and the burning of such wastes as fuel for the purpose of recovering usable energy."⁵⁹ Obviously, the fact that the Auto City Waste Management Facility stores waste classified as "hazardous" puts them squarely in the type of facility managed by Title 9.

The law surrounding hazardous waste in New York State begins in earnest with section 27-0903, which delineates the procedures for identifying and listing hazardous waste. This section charges the Commissioner of the DEC with creation of a system to list hazardous wastes.⁶⁰ In addition, the Commissioner is to identify said hazardous wastes by characteristics in "a manner at least as stringent" as

⁵⁴ 55 N.Y. Jur. 2d. Environmental Rights § 221 (discusses the preference hierarchy in New York State. After reduction or elimination, the state prefers that recovery, reuse, or recycling occurs, if this is unavailable, the State prefers detoxification, treatment, or destruction. Land disposal is delineated as a last resort).

⁵⁵ N.Y. E.C.L. § 27-0900 (citing the Resource Conservation and Recovery Act as well as 42 U.S.C.A. § 6901 *et seq.*)

⁵⁶ *Id.*

⁵⁷ N.Y. E.C.L. § 27-0901 (defining "hazardous waste" as "a waste or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (a) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed"); *compare from* 42 U.S.C.A 0903.

⁵⁸ N.Y. E.C.L. § 27-0901.

⁵⁹ *Id.*

⁶⁰ N.Y. E.C.L. § 27-0903.

the RCRA's procedure.⁶¹ Indeed, so long as the regulations adopted by the Department are consistent with the provisions of this section, the State is not limited to those delineated hazardous wastes adopted by the EPA.⁶²

Finally, this section allows the Commissioner to create exemptions to this provision, provided that the exemptions are for minor quantities generated by research or limited use operations, and provided the exemptions are consistent with the RCRA.⁶³

Section 27-0905, a predominant section, lays the framework for New York State's "Manifest System" for dealing with hazardous waste. This section requires the State to establish "a manifest system by which to monitor the transportation, storage, and disposal of hazardous waste and to assure that such acts are performed in a manner consistent with" Title 9.⁶⁴ The section gave the Commissioner of the DEC only 6 months after the Title's enactment to comply.⁶⁵

While the New York Management Program spends some time on the standards applicable to transporters of hazardous waste, the next section relevant to the Auto City Site is contained in section 27-0907. This section lays out the standards applicable to generators of hazardous waste and first requires that the standards establish requirements respecting: (1) recordkeeping practices which identify the quantities of waste generated and its constituents; (2) a labeling methodology for containers; (3) use of appropriate hazardous waste containers; and (4) furnishment of chemical composition information to those who transport, treat, store, or dispose of such waste.⁶⁶

Additionally, this section requires that the manifest of such facilities certify: (1) that the generator has a procedure in place to reduce the quantity and/or toxicity of the waste they produce to the greatest degree practicable, and (2) that the proposed method of treatment, storage, or disposal minimizes the threat to human health and the environment. Finally, this section requires the submission of an annual

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ N.Y. E.C.L. § 27-0905.

⁶⁵ *Id.*

⁶⁶ N.Y. E.C.L. § 27-0907

report which respects the quantities, composition, and disposition of hazardous wastes, the efforts undertaken to reduce volumes produced, changes in volume, quantity, or toxicity.⁶⁷ New York has placed a truly onerous burden on those involved with hazardous waste.

Beyond the standards applicable to generators of hazardous waste, there are also a number of standards applicable to owners and operators of hazardous waste facilities.⁶⁸ First, owners and operators must comply with all regulations promulgated by the EPA pursuant to the RCRA as well as the standards of § 27-0905.⁶⁹ These standards “shall require corrective action, including corrective action *beyond the facility boundary* where necessary to protect human health and the environment, for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit... regardless of the time at which waste was placed in such unit.”⁷⁰

While exemptions or variations may be granted under this provision in circumstances falling beneath the watchful gaze of the RCRA, this section exposes owners and operators to increased liability.⁷¹ The section does so by requiring owners and operators to take corrective action off-site, thereby expanding their zone of danger as well as those plaintiffs who may be deemed “reasonably foreseeable.”⁷² It seems quite likely, therefore, that the Auto City Waste Management Site may be held liable for injuries resulting from any toxicity-tainted ground water or venison entering the Tuscarora Nation.

Importantly, the plan does not stop at a discussion of standards applicable to hazardous waste facilities and those who transport the material. New York law requires generators of hazardous waste to reduce their output of such wastes over time.⁷³ Indeed, this section, reminiscent of § 27-0105, discussed below, requires these generators to establish timetables to assist in the reduction of hazardous waste.⁷⁴

⁶⁷ *Id.*

⁶⁸ *See generally* N.Y. E.C.L. § 27-0911.

⁶⁹ N.Y. E.C.L. § 27-0911.

⁷⁰ *Id.* at (2).

⁷¹ *Id.* at (1).

⁷² *See Palsgraph v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

⁷³ N.Y. E.C.L. § 0908

⁷⁴ *Id.*

No section may be more on point than section 27-0912, which deals exclusively with land disposal of Hazardous Waste.⁷⁵ This section empowers the Commissioner to create rules restricting or prohibiting land disposal of specified wastes, and is applicable to all hazardous wastes except those in storage solely for the purpose of “the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment, or disposal.”⁷⁶ The commissioner must make a written determination for each of these wastes considering the waste’s long-term containment, characteristics, persistence, toxicity, mobility, and propensity to bio-accumulate.⁷⁷

The remaining sections are of limited importance to the interplay between the Tuscarora Nation and the Auto City Waste Facility. Section 27-0914 simply makes it unlawful for any person to possess, dispose of, or deal in hazardous waste without a permit.⁷⁸ Finally, section 27-0915 pertains to inspections and general reporting required of hazardous waste sites. In short, this section allows an officer, upon oral or written consent, and so long as proper notice and identification has been given, to view all records relating to wastes and to enter and inspect a place where hazardous waste is generated, stored, treated, or disposed.⁷⁹ A final caveat to this section is the requirement that such inspection be conducted with “reasonable promptness” and “at reasonable times.”⁸⁰

New York State’s Hazardous Waste Facility Siting Plan

With the above legal principles acting as scaffolding, New York State enacted Title 11 of the Environmental Conservation Law to deal specifically with the siting of industrial hazardous waste facilities. Like the vast majority of statutes, Title 11 begins with a definitions section which defines the terms contained within the section. Section 27-1101, like its predecessor in Title 9, defines “hazardous waste” in exactly the same language as the Federal Statute.⁸¹ Additionally, this section defines “industrial

⁷⁵ See N.Y. E.C.L. § 27-0912.

⁷⁶ N.Y. E.C.L. § 27-0912

⁷⁷ *Id.*

⁷⁸ N.Y. E.C.L. § 27-0914.

⁷⁹ N.Y. E.C.L. § 27-0915.

⁸⁰ *Id.*

⁸¹ N.Y. E.C.L. § 27-1101; *see also* N.Y. E.C.L. § 27-0903.

hazardous waste treatment, storage, and disposal facility” broadly, easily encompassing the Auto City Site within its language.⁸²

Luckily, the requirements for a New York State Siting plan are more easily summarized than the State-wide legal landscape of hazardous waste law. Title 11 requires, at minimum, that the Commissioner’s published criteria for siting of hazardous waste include that “no person may commence construction of a new industrial hazardous waste treatment, storage, or disposal facility without having received a certificate of environmental safety and public necessity from the facility siting board.”⁸³ Such an application must be submitted to the Commissioner and notice of the application must be published.⁸⁴ Following the application’s submission, “the governor must appoint a facility siting board; and the facility siting board [must] render a decision based on the record of the hearing either granting or denying the application, or granting it on appropriate terms, conditions, limitations, or modifications.”⁸⁵ As an aside, the municipalities surrounding the Model City Site may not impose their own requirements for hazardous waste siting; State authorization is sufficient unless the Municipality has received no notice.⁸⁶

The specifics for the siting plan are contained in section 27-1102. This section requires the DEC to establish a framework for siting. Such framework must include: (1) an inventory and appraisal of all hazardous waste facilities including their identification, location, and life expectancy; (2) a compilation of existing inventories and other reports generated by hazardous waste facilities, and an analysis of the same; (3) projections of the amount of waste generated by the state for the next 20 years; (4) a schedule for elimination of land disposal; (5) identification of those areas of the state with hazardous waste facilities compatible to Title 9; (6) a determination of the number of new hazardous waste facilities needed, with an eye toward equitable geographic distribution of such facilities; (7) an analysis of the transportation routes;

⁸² *Id.* (defining “industrial hazardous waste” as “a specialized facility... for the purpose of treating, storing, compacting, recycling, exchanging, or disposing of industrial hazardous waste materials...”).

⁸³ 55 N.Y. Jur. 2d, Environmental Rights § 228, *citing* N.Y. E.C.L § 1105(1).

⁸⁴ *Id. citing* N.Y. E.C.L § 27-1105(3).

⁸⁵ *Id.*, *citing* N.Y. E.C.L. § 27-1105 (3)(a),(c).

⁸⁶ *Id.*, *citing* N.Y. E.C.L. § 27-1107.

(8) recommendations to encourage cooperative treatment; and (8) “recommendations on procedures for periodically updating the... siting plan.”⁸⁷

In response, The New York State Department of Environmental Conservation adopted the “New York State Hazardous Waste Facility Siting Plan” in October 2010.⁸⁸ While plan meets, if barely, the requirements of Title 9 and Title 11, surprisingly, it fails utterly to actually lay out a procedure for siting such hazardous waste facilities apart from meeting the permit requirements.⁸⁹

REMEDIES

The Tuscarora Nation is not without hope; a wide variety of remedies exist though which they may fight the Auto City Site expansion. These remedies are both legal and extralegal, intrepid and plebeian. Sadly, constraints prohibit an exhaustive analysis of every avenue the Nation might take, and this paper focuses primarily on the legal avenues possible under the Hazardous Waste Law discussed above. Mention to alternative avenues will be made, but their scope will be limited to suggestions.

The lack of factual development in the conflict between the Tuscarora Nation and the Auto City Hazardous Waste Management Site necessitates the qualification of these legal options as sophomoric; lacking tenacity until the facts have been more clearly developed through time, discovery, or other alternative means.

Current Discussions

Due in part to the primordial nature of this controversy, no evidence has surfaced that tends to suggest that there are any discussions between the Nation and Waste Management or its subsidiaries on this issue. This is particularly surprising given the severity of concerns of the Tuscarora Nation on the one hand, and the desire for expansion and resulting increase in profits on the part of the Auto City Site, on the other.

⁸⁷ N.Y. E.C.L. § 27-1102 (2)(a)-(i).

⁸⁸ New York State Department of Environmental Conservation, *New York State Hazardous Waste Facility Siting Plan* (Oct. 2010).

⁸⁹ *See generally, Supra.* n. 88.

However, this lack of discussion may in fact be a boon to the Nation. The Nation has been presented with a relatively clean slate, and may choose any of a great variety of paths at this point. Indeed, the Nation is in the unique position to fight the expansion both through community activism, alternative dispute resolution, and classical litigation, or any pertinent combination of the three.

Environmental Justice Issues and the Possibility of Community Activism

An unfortunate historical trend has made itself clear in recent years: communities consisting primarily of minority groups, low-income groups, and the politically disenfranchised (whether as a function of their minority or low-income status or not), have borne the greatest health and welfare burden from the siting of environmentally toxic activities.⁹⁰

The Nation, as mentioned previously, is a listed EJ community, and falls squarely into the EPA's definition of an EJ community of concern.⁹¹ The Nation is beleaguered by surrounding waste treatment facilities, and walled from behind by a large reservoir. "Not in My Backyard" (NIMBY), is common phraseology when a new industry moves into a town, and many affluent communities push these industries away. Unfortunately, the Tuscarora Nation seems to be the backyard where these industries find ground.

Environmental justice, however, is becoming a more and more common concern as people recognize these communities and their plight. Many organizations, such as Envirojustice, have sprung up to pursue their goal of promoting "environmental justice through education, activism, and mobilization."⁹² Indeed, communities and organizations across the country are finding ways to improve their community, the environment, and promote equality and environmental justice. The very best of these are given an "Environmental Justice Achievement Award" by the EPA, in recognition of these groups "positive environmental and human health benefits in communities."⁹³

⁹⁰ EPA, *Environmental Justice*, available at <http://www.epa.gov/environmentaljustice/>

⁹¹ Interview with Neil Patterson, Director of the Tuscarora Environmental Program (Feb. 2011).

⁹² Envirojustice, *About Envirojustice*, available at <http://www.envirojustice.org>.

⁹³ EPA, *Environmental Justice Achievement Award*, available at <http://www.epa.gov/environmentaljustice/awards/index.html> (This year's winners include ENLACE Cano Martin Pena Project, San Juan, Puerto Rico, Transportation Equity/Stops for Us Coalition, St. Paul, Minnesota, EcoCenter

Communities across America have achieved success on environmental justice issues. In 2006, under intense public opposition and actions on the part of Envirojustice, International Paper permanently scrapped a proposal to burn over 70 tons of tire derived fuel and 80 cubic yards of toxic sludge.⁹⁴ In 2000, the citizens of Macon County, Alabama banded together to create the Macon County Citizens for a Clean Environment and successfully fought the siting of a major landfill near Tuskegee University.⁹⁵ Finally, closer to home, environmental justice focus groups exist throughout New York State. These groups, like the Environmental Justice Action Group of Western New York, focus on community concerns and help to achieve EJ goals.⁹⁶

Environmental justice activism influences both legal and extralegal avenues the Nation may take to enjoin this project. Legally, in any argument put forth by the Nation, the Nation may argue that environmental justice will be served by enjoining the project, and therefore enjoining the project will protect a major state goal. Moreover, the Nation may argue that any EIS conducted by either the DEC or the Auto City Site failed to adequately account for environmental justice issues.

Indeed, as an environmental justice community the Tuscarora Nation is entitled to additional consideration when projects are to be implemented near their borders. Specifically, the Tuscarora Nation is already surrounded by waste disposal facilities, hazardous or otherwise. The New York State Siting plan requires EJ communities be taken into consideration.⁹⁷ Indeed, the siting plan goes a step further and actually requires siting plans to include consideration of geographic equity.⁹⁸

The Nation has a very strong argument that the State, as well as the Auto City Site, have failed to meet the expectations of the New York State siting plan. The Nation may allege that the siting plan failed because it failed to adequately protect an EJ community against unreasonable economic, social, health,

at Heron's Head Park Partnership, San Francisco, California, Lead Poisoning Prevention Citizen's Advisory Task Force, San Diego, California, and Oregon Environmental Justice Task Force).

⁹⁴ Envirojustice, *Success Stories*, available at <http://www.envirjustice.org/aboutus/success.htm>.

⁹⁵ *Supra*. n. 94.

⁹⁶ Winners of Past Environmental Justice Community Impact Grants, NYS DEC, available at <http://www.dec.ny.gov/public/31403.html>.

⁹⁷ See New York State Department of Environmental Conservation, *New York State Hazardous Waste Facility Siting Plan* (Oct. 2010).

⁹⁸ *Id.*

and environmental harm. The Nation may further argue that even if the Auto City Site did take EJ concerns into consideration, they failed to meet their burden of proving equitable distribution of hazardous waste sites. Here, the Nation need simply show the facts, that they alone bear the toxic brunt of New York State. They are surrounded by these waste sites, and they are the ones whom Auto City has chosen to build toward. Indeed, it will be quite difficult for the Auto City Site to refute the fact.

Environmental justice is, however, more powerful outside the courtroom. The Nation may take an activist stance against the project and begin an environmental justice campaign against Auto City. This campaign would focus on the damage caused to the Nation, would showcase how Waste Management has been, quite literally, dumping their environmentally harmful practices on the Nation's doorstep, all the while toting their flag of environmental leadership. With the combined efforts of the community, it is possible to get the expansion into the public eye; and the public's resulting outrage may well curtail any desire to pursue expansion on the part of Waste Management.

Alternative Dispute Resolution May Lead to a Mutually Agreeable Result

Interestingly, litigation may be entirely unnecessary to resolve the dispute between the Tuscarora Nation and the Auto City expansion plan. The Nation and the Facility, while seeming to have polar opposite desires, actually have a variety of concurrent interests between them; foremost among them is the desire of both parties to ensure environmental protection.

The Nation has, and remains, culturally connected to the environment and environmental stewardship and protection like few other groups. Their commitment to the environment evidenced by their industrious involvement and commitment to a large variety of environmental organizations and projects. The Facility, aside from a speculatively moral commitment to environmental protection, certainly concerns itself with environmental protection due to the mandates of State and Federal Environmental Protection Law.⁹⁹

⁹⁹ See 40 CFR § 271.4(b) (“any aspect of State Law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage, or disposal of hazardous waste in the State may be deemed inconsistent); see also ECL § 27-0907 (repeatedly referencing protection of “human health and the environment”).

The authors of *Getting to Yes* would suggest that the parties involved in this dispute use this mutual goal as a starting point to further discussion outside the courtroom. Parties would discuss their concerns: the Nation focusing on the potential for malignancy in human health in the Nation while the facility would instead focus on expanding their facility in compliance with State Statutes.¹⁰⁰ The two parties would quickly realize that all that is truly necessary for this project to move forward, while alleviating the concerns of the Nation, is for Waste Management to move the site, perhaps to the other end of the facility and away from nation territory, or to another site entirely.

The Tuscarora Nation may bring a citizen's suit under Federal law

Citizen suits provide perhaps the broadest authority available to the Nation to bring suit. Citizen suits provide scenarios wherein the Nation may attack, civilly, any person or entity (including State and Federal governments along with any governmental agencies with regard to Hazardous Waste law).¹⁰¹ A person may sue under this statute for one of two purposes; first, under an alleged violation of any permit; or second, for any imminent and substantial endangerment to health or the environment.¹⁰² Finally, an action may be brought against any administrator, State or Federal, for failure to perform any act or duty required under the Federal Hazardous Waste Law.¹⁰³ Limitations on suits do exist; for instance, any suit under this section must be coupled with a 60 day notice period.¹⁰⁴ Additionally, no action may be commenced against an individual if the Government, State or Federal, is commencing an action against the violator.¹⁰⁵

The Nation may allege two possible actions under this statute. First, the Nation may allege that the Auto City Site violated some permitting requirement under Federal law. Unfortunately, without more information on possible violations, it is impossible to determine whether this suit has merit or whether it would be dismissed for failure to state a claim. Second, the Nation may allege that the proposed

¹⁰⁰ FISHER, ROGER AND URY, WILLIAM, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, (2d Ed. 1991).

¹⁰¹ 42 U.S.C.A § 6972.

¹⁰² *Id.*

¹⁰³ *Id.* at (2).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

expansion creates an unreasonable danger to human health or the environment. This is, of course, far easier to meet. The nation may simply point to their concerns that the nearby plant will taint their food and drinking water. Expert evidence, if it can be found, should be used to support this attack on the proposed expansion. Finally, the Nation may bring suit against the Government for failure to deny the permit. This will require inclusion the other options below; showing that the siting arrangements failed to meet the applicable standards.

While potentially very effective, this option will not be useable until after the permitting process has concluded and construction of the site is underway. Therefore this option must be treated as a last resort, and the Nation would do well to attack the project on pre-construction grounds beforehand.

The Tuscarora nation may allege that the plan fails to meet siting requirements

This option is quite broad, and the Nation may attack the plan on multiple grounds. First, the Nation may allege that the October 2010 siting “plan” is no plan at all. Reading the plan in a light most favorable to the state still shows that the plan contains no language concerning exactly how a siting plan is to be developed or implemented. All the plan does merely discusses the current state of hazardous waste in New York.¹⁰⁶ Indeed, the plan fails even to outline the statutory requirements in the text, removing the relevant (albeit condensed) statutory language to the appendix.¹⁰⁷

Second, the Nation may allege that the plan fails to meet all of the siting requirements; specifically it may allege that the Nation failed to garner a certificate of environmental safety and public necessity.¹⁰⁸ All siting plans require such a certificate and, due to the findings in the October 2010 siting plan, the Auto City Waste Management Site is unlikely to get one. The October 2010 plan discussed the present and future need of hazardous waste facilities of the type proposed at Auto City and determined that there would be no need for an expansion of *any* Hazardous Waste Land Disposal Site in New York or

¹⁰⁶ See generally, New York State Department of Environmental Conservation , *New York State Hazardous Waste Facility Siting Plan* (Oct. 2010).

¹⁰⁷ *Supra*.

¹⁰⁸ *CWM Chemical Services Proposed Landfill Residual management Unit 2 (RMU-2) for Model City, New York*, NYS DEC, available at <Http://www.dec.ny.gov/chemical/9075.html>.

Nationwide until approximately 2040. Obviously, this makes it quite clear that there is no “public necessity” for the hazardous waste facility and the State, therefore, should not grant the permit.

The Tuscarora Nation may delay the expansion by showing that no specific EIS was conducted for the site

Environmental Impact Statements are required whenever a project has the potential to significantly impact human health or the environment.¹⁰⁹ While a general EIS was required for the New York State Hazardous Waste Siting Plan, and such a general EIS was completed,¹¹⁰ this does not alleviate the need for an EIS for the Auto City Site specifically.

No site-specific EIS was conducted and, as such, the Tuscarora Nation may allege that the Auto City Site failed to meet its obligations under the National Environmental Policy Act (NEPA). While the likelihood of success under a NEPA claim is questionable, the procedural requirements of a NEPA analysis will likely forestall the project for some time, giving the Nation additional time to mount a more permanent attack.

The Tuscarora Nation may allege that the expansion is not in the public interest

Under any of the analyses, the Nation may simply allege that the expansion is against the public interest and, what’s more, is against the siting plan as a whole. This argument is based on the simple premise that no additional hazardous waste disposal facilities are required, nationwide, until the year 2040.¹¹¹

Due to the fact that no new hazardous waste sites are needed nationwide, and States cannot impose restrictions on the transport of hazardous waste,¹¹² it makes little sense to create a hazardous waste expansion site where proposed. This is especially true in light of the fact that the Auto City Site currently

¹⁰⁹ National Environmental Policy Act, 42 U.S.C. § 4231 *et seq.*

¹¹⁰ Final Generic Environmental Impact Statement Supporting the New York State Hazardous Waste Facility Siting Plan, NYC DEC (Oct. 2010), *available at* http://www.dec.ny.gov/docs/materials_minerals_pdf/spfinalgeis.pdf.

¹¹¹ New York State Department of Environmental Conservation, *New York State Hazardous Waste Facility Siting Plan*, intro-3 (Oct. 2010).

¹¹² *Supra*, n. 107; *see also Philadelphia*

has 3 unused sites, and the site currently in use is not nearing capacity.¹¹³ Therefore, it seems rather simple for the Nation to argue that no reasonable person would want to implement this expansion in light of the foregoing, and in light of the potential additional environmental and human health concerns.

The Tuscarora Nation may allege violations under the Clean Water Act (CWA) or the Safe Drinking Water Act (SDWA)

An additional avenue available to the nation is litigation under the Clean Water act or the Safe Drinking Water Act. Full analysis of these acts is beyond the scope of this paper, and, as such, recommendations hereunder will be treated in a more cursory manner.

The Clean Water Act of 1972 (and further amended in 1977) is, in reality, an expansion of the Federal Water Pollution Control Act of 1948.¹¹⁴ The Clean Water Act makes it illegal to discharge *any* pollutant from a point source into the navigable waters of the United States.¹¹⁵ Permits may be obtained by individuals and corporations exempting them, in whole or in part, from the provisions of the act.¹¹⁶ Indeed, any industrial or municipal facility must obtain a permit for their discharges.¹¹⁷

Thereunder, the Tuscarora Nation may allege that the Auto City expansion violates the clean water act because the facility's expansion constitutes a discharge of pollutant into the navigable waters of the United States. The Nation must allege that their activities are releasing some form of pollutant into the nearby streams or nearby reservoir in order to meet their burden of proof in this case.

The Safe Drinking Water Act is "the main federal law that ensures the quality of American's drinking water."¹¹⁸ Under this act, the EPA sets drinking water standards and oversees those who implement them.¹¹⁹ Originally passed in 1974, and amended further in 1986 and 1996, the act "requires many actions to protect drinking water and its sources."¹²⁰ Finally, this act authorizes the EPA to

¹¹³ *Supra.* n. 107, into-3.

¹¹⁴ Summary of Clean Water Act, EPA, *available at* <http://www.epa.gov/lawsregs/laws/cwa.html>.

¹¹⁵ Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1972).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Safe Drinking Water Act, EPA, *available at* <http://water.epa.gov/lawsregs/sdwa/index.cfm>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

promulgate national standards of drinking water to protect the public against natural and man-made contaminants found in drinking water.¹²¹ While this regulation applies primarily to States and water systems,¹²² the Nation may allege that the discharge of pollutants at the Auto City site implicates the Safe Drinking Water Act by discharging pollutants into the nearby reservoir, either through in-ground leaching or direct injection. Such allegations must, of course, be backed by scientific evidence; however the legislation provides another avenue of attack at a minimum.

Litigation under these two acts may prove to be one of the most powerful tools available to the Tuscarora Nation. Unfortunately, full discussion of these topics is beyond the scope of this paper. A full analysis of the Nation's likelihood of success under these acts may be discussed in future publications.

CONCLUSION

The Tuscarora Nation has options; if perhaps not foolproof ones. The Nation may conduct alternative dispute resolution in an attempt to more fully develop their side of the story, or the Nation may wait until the project begins to sue for an injunction discontinuing construction of the Hazardous Waste Treatment Facility.

While the Nation may, and should, allege all of the options above in their attempt to win at court, it seems that the battle will be an uphill one for the Nation. All relevant evidence points toward the desire of both the State and the industry to implement this expansion. Should the Nation truly wish to fight this battle they must prepare to dig deep, and they must steel themselves for a difficult and extended battle.

¹²¹ *Id.*

¹²² *Id.*