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Suits Against Gas-Emitting Landfills in West Virginia: Identifying and Overcoming the Barriers

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Student Note by Shawn H. Hogbin

SUITS AGAINST GAS-EMITTING LANDFILLS IN WEST VIRGINIA: IDENTIFYING AND OVERCOMING THE BARRIERS

ABSTRACT

The U.S. in the past two decades has experienced an increase in class actions stemming from landfill odors, with many of these lawsuits utilizing the common law doctrines of nuisance, trespass, and negligence. Landfill odors impact nearby residents, making it unenjoyable for them to be outside on their lawns, and even in their homes. West Virginia's sole appellate court, despite the state having 17 operational landfills and disposing of nearly 1.5 million tons of trash, has seen no such suit. This Note identifies whether West Virginia decisional law is prohibitive of this type of suit; it finds no clear legal barriers precluding such suits and outlines a potential litigation strategy. This Note will also briefly address non-legal explanations for the lack of litigation. Finally, this Note will conclude by finding that there are no steadfast legal barriers that can completely preclude such suits.

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I. INTRODUCTION

On a small scale, we are all aware that municipal trash can create unwelcome odors. This fact becomes apparent during any attempt at emptying the kitchen trashcan that has been neglected for too long. On a large scale, landfills that fail to implement proactive and prudent measures can turn into an odor problem several magnitudes greater than the one lurking in our kitchens or at our curbsides. These odors can impact communities near landfills by limiting or preventing the use of lawns, embarrassing homeowners, or even making it uncomfortable to be in one’s own home.

Residents of the town of Hedgesville, West Virginia, have faced such odor issues. In the spring of 1990, a privately owned landfill, LCS Services, was constructed two miles from downtown Hedgesville.¹ Once constructed, the landfill was bound by regulation to “not cause a nuisance because of the emission of noxious odors, gases, contaminants, or particulate matter.”² But, the landfill has not always lived up to its obligation. Notably, public outcry reached a peak in 2015 and 2017 with the noxious landfill odors present at the post office, downtown, and at the local schools.³ Despite dozens of impacted citizens, no legal action was brought either by citizens or regulatory agencies.⁴ The issue was not “solved” until the operator installed gas-extraction wells.⁵ But, even after the installation of the wells, the odors persist.⁶

¹ State *ex rel.* Hamrick v. LCS Servs., Inc., 454 S.E.2d 405, 408–09 (W. Va. 1994) (per curium).

² W. VA. CODE R. § 33-1-5.1.c.1.M (2021).

³ Matthew Umstead, *W.Va. Landfill Operator Addressing Odor Issue*, HERALD-MAIL MEDIA (Jan. 11, 2017), https://www.heraldmillmedia.com/news/tri_state/west_virginia/w-va-landfill-operator-addressing-odor-issue/article_b02cd05c-72ba-5533-9db3-934286e205b0.html; Jenni Vincent, *Citizens and Solid Waste Authority Protest Landfill Odor*, THE JOURNAL (Dec. 27, 2015), https://www.journal-news.net/news/local-news/citizens-and-solid-waste-authority-protest-landfill-odor/article_941b3a15-fb23-5502-b404-59337f889d11.html.

⁴ Umstead, *supra* note 3.

⁵ *Id.*

⁶ See *infra* text accompanying note 56.

The story of Hedgesville, West Virginia, can be retold in communities across the United States. However, in response, some impacted communities have armed themselves using common law doctrines that have roots hundreds of years prior to the advent of the municipal solid waste landfill.⁷ Claims for nuisance, trespass, or negligence against odor-emitting landfills have been filed in at least seven states; multiple suits have been filed in the federal courts.⁸ These suits have the advantage of not requiring government enforcement action.

However, despite having 17 operational landfills and 36 non-operational landfills,⁹ the West Virginia appellate docket remains barren of claims regarding landfill odors.¹⁰ This Note seeks to identify any structural or legal obstacles to “odor suits” against landfills, and whether any of these legal obstacles contribute to the lack of discussion by the West Virginia Supreme Court. Although other potential issues including noise, tremors, excessive litter, leaking leachate, and increased traffic can plague residents living close to landfills,¹¹ this Note only directly deals with landfill odors.

Part I describes the origins of landfill odors generally and establishes that those odors are a problem in West Virginia. Part II analyzes common law claims brought against landfills in other states for odors and identifies certain state law characteristics that can be hostile or friendly to these claims. Part III explores the elements of West Virginia common law to see if similar barriers are present with analogous cases and if West Virginia is a viable ground for such claims and creates a corresponding litigation strategy. Part IV outlines other potential explanatory factors for West Virginia’s lack of common law complaints about landfill odors. This Note concludes by finding that there are more ambiguities than obstacles found in West Virginia common law, meaning

⁷ See *Bethlehem Landfill Bad Odor Nuisance Pennsylvania Class Action*, CLASS ACTIONS REP., <https://classactionsreporter.com/bethlehem-landfill-bad-odor-nuisance-pennsylvania-class-action/> (last visited Sept. 6, 2021).

⁸ See *infra* Part II.

⁹ WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD, WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN 4-6, 4-14, (2019), <http://www.state.wv.us/swmb/State%20Plans/2019%20Complete%20State%20Plan.pdf> [hereinafter WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN].

¹⁰ This is briefly discussed later, but because of the author’s access to legal databases, this Note is limited to a review of cases before the West Virginia Supreme Court of Appeals and brought in West Virginia’s federal district courts. However, West Virginia’s appellate court hears appeals as of right and does not have discretionary review. Although this certainly leaves a gap in the record, it is a fair assumption that a large class action LFG odor suit would either be brought in federal court or would have been appealed as of right to the West Virginia Supreme Court of Appeals.

¹¹ *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 450 (W.D.N.Y. 2019).

that the lack of appellate cases is explained by factual considerations or cases being exclusively settled at West Virginia's trial-court level.

A. *What Is Landfill Gas?*

The U.S. generates nearly 270 million tons of municipal solid waste each year.¹² Of that 270 million tons, over 52% is landfilled.¹³ Of the 52% that is landfilled, nearly half of it is organic materials like paper, food waste, wood, and lawn clippings, with food waste being the largest of those four.¹⁴ The result is that approximately 70 million tons of organic waste are landfilled each year in the U.S.¹⁵ When large amounts of organic material in municipal solid waste landfills start to decompose, the waste emits landfill gas (“LFG”).¹⁶ This process of decomposition is fueled by bacteria,¹⁷ and the gas is a “natural byproduct” of the waste disposal process.¹⁸ Not all LFG creates noticeable odors. In fact, the large majority of LFGs are odorless gases like methane and carbon dioxide;¹⁹ although these gases exacerbate global warming, they are not noticeable to the human nose. The noxious smells that are associated with LFGs derive from a specific subset of gases: sulfides, most commonly hydrogen sulfide.²⁰

The smell of sulfides is most closely compared to that of rotten eggs and other “pungent odors,”²¹ including ammonia.²² The prevalence of these odors depends heavily on several factors, including the composition of the

¹² This figure does not include construction and demolition waste, industrial waste, and wastewater sludge. *National Overview: Facts and Figures on Materials, Wastes and Recycling*, ENV'T PROT. AGENCY, <https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/national-overview-facts-and-figures-materials> (last visited Sept. 6, 2021).

¹³ *Advancing Sustainable Materials Management: 2017 Fact Sheet*, ENV'T PROT. AGENCY, https://www.epa.gov/sites/production/files/2019-11/documents/2017_facts_and_figures_fact_sheet_final.pdf (last visited Sept. 6, 2021).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Basic Information About Landfill Gas*, ENV'T PROT. AGENCY, <https://www.epa.gov/lmop/basic-information-about-landfill-gas> (last visited Sept. 6, 2021) [hereinafter *Basic Information*].

¹⁷ *Landfill Gases*, S.C. DEP'T OF HEALTH AND ENV'T CONTROL, <https://scdhec.gov/sites/default/files/Library/OR-1197.pdf> (last visited Sept. 6, 2021).

¹⁸ *Basic Information*, *supra* note 16.

¹⁹ *Landfill Gases*, *supra* note 17.

²⁰ *Id.*

²¹ *Important Things to Know About Landfill Gas*, N.Y. STATE DEP'T OF HEALTH (Oct. 2019), https://www.health.ny.gov/environmental/outdoors/air/landfill_gas.htm [hereinafter *Important Things*].

²² *Id.*

trash, ambient temperature, weather, and internal moisture of the waste itself.²³ Particularly, odors are exacerbated by cold or wet weather, where moisture acts as an agent to encourage the biological decomposition process.²⁴ Because the decomposition process is gradual, even landfills that are no longer accepting new waste can continue to produce LFG, with odor production peaking five to seven years after deposition and continuing to emit for more than 50 years.²⁵

The existence of odorous LFGs is, largely, not an issue to the community until the odors travel off the landfill's property and onto neighboring properties. However, odors do not respect property boundaries; they are considered "fugitive," and their movement "var[ies] with atmospheric conditions, such as wind speed and stability."²⁶ Particularly relevant for West Virginia, "valley-like environment[s]" can lead to odors settling at elevations lower than the landfill.²⁷ Due to their fugitive nature, once odors are created, they can be particularly difficult to intercept and treat.²⁸ No matter the other factors, the proximity of the landfill to neighbors is the "number one influence" for the creation of odor issues.²⁹

Sulfides not only are offensive to the senses, but they are also damaging to the human body. OSHA's general industry limit states that workers' hydrogen sulfide exposures must not exceed 20 ppm (0.002%) for an eight-hour workday.³⁰ This precaution is for good reason because the health effects of overexposure include coughing; irritation of the eyes, nose, and throat; headache; nausea; breathing difficulties; nasal blockage; sleeping difficulties; weight loss; chest pain; and aggravation of asthma.³¹

Landfills are not powerless to lower their emission of odorous LFGs and the impact on the surrounding community. Landfills can employ methods that minimize surface water saturation, which removes an important catalyst in the decomposition process.³² Additionally, "capped" sections of the landfills

²³ *Landfill Gases*, *supra* note 17.

²⁴ See *Facts About Landfill Gas*, ENV'T PROT. AGENCY (Jan. 2000), <http://www.dem.ri.gov/programs/benviron/waste/central/lfgfact.pdf> [hereinafter *Facts*]; Elizabeth Matthews, *Cold Temps Causing Smells at Bridgeton Landfill*, 5 ON YOUR SIDE (Jan. 7, 2014, 10:34 PM), <https://www.ksdk.com/article/news/local/cold-temps-causing-smells-at-bridgeton-landfill/282268885>.

²⁵ *Important Things*, *supra* note 21.

²⁶ Carol Brzozowski, *Landfill Odor Control*, MSW MGMT. (June 20, 2017), <https://www.mswmanagement.com/landfills/article/13030283/landfill-odor-control>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *Facts*, *supra* note 24.

³¹ *Important Things*, *supra* note 21.

³² Tim O'Donnell, *What's That Smell*, WASTE360 (Dec. 1, 2006), https://www.waste360.com/mag/waste_whats_smell.

can install gas extraction wells that burn and filter LFGs, including those that are offensive to the human nose.³³ Vertical wells are relatively effective, but they are not an option for areas that are still actively taking trash. In these areas, horizontal drainage ditches can be built to reduce odors even while waste is still being deposited.³⁴

The downsides to these solutions are clear; they cost time and money and can become outdated.³⁵ These systems also require a proactive management style,³⁶ which is often absent, with landfill management commonly taking preventative measures only once regulatory and public action becomes feared. At that point, the surrounding public is already completely disillusioned with the landfill.³⁷

B. Landfill Gas in West Virginia

There is little doubt that West Virginia landfills are vulnerable to LFG odor issues. West Virginia has 17 active landfills, located in 15 out of 55 counties, with all these landfills taking municipal solid waste.³⁸ Of the 17 active landfills, one-third are publicly owned and operated, with the remaining two-thirds being either privately owned or managed.³⁹

The landfills in West Virginia are segregated into “classes.”⁴⁰ Facilities that accept over 10,000 tons per month are considered “Class A,” and facilities accepting 9,999 tons or less per month are classified as “Class B” facilities.⁴¹ Class A landfills in West Virginia are permitted to accept a wide range of 16,638 to 50,000 tons of waste per month.⁴² The Short Creek Landfill located in Ohio County accepts the largest amount of tons annually of all West Virginia landfills, exceeding 300,000 tons.⁴³ In the aggregate, 1.42 million tons of waste are annually deposited within the State’s landfills.⁴⁴

These landfills lie close to residential communities. Some of West Virginia’s largest cities like Weirton, Hurricane, New Martinsville, Parkersburg, Kanawha City, and the state capital of Charleston are all located

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Brzozowski, *supra* note 26.

³⁷ O’Donnell, *supra* note 32.

³⁸ WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-1 to -2.

³⁹ *Id.* at 4-6 to -9.

⁴⁰ W. VA. CODE ANN. § 22C-4-2 (West 2021).

⁴¹ *Id.*

⁴² WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-5.

⁴³ *See id.* at 4-2, 4-5.

⁴⁴ *Id.* at 4-2.

within two miles of operating landfills.⁴⁵ Over 30 named towns, cities, or residential developments are located within two miles of operating landfills, including the tourism centers of Thomas, Davis, and Lewisburg.⁴⁶ This does not include the 36 other landfills in the State that are closed or not currently accepting waste.⁴⁷

The landfills in West Virginia, like all landfills, produce LFG. Just one Class A landfill alone can produce over 900 standard cubic feet of LFG in a year.⁴⁸ LFG only becomes an issue once landfills fail to manage gases properly; unfortunately, West Virginia landfills have an impeachable track record. The Brooke County landfill came under fire in 2001 for odors related to a sewage composting operation.⁴⁹ In addition to the 2017 incident discussed above, in 2015, the LCS Services Berkeley County landfill made the news due to public

⁴⁵ See *infra* note 46.

⁴⁶ See Brooke County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Brooke County Landfill located at 1118 Petrillo Road, Colliers, WV); Copper Ridge Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Copper Ridge Landfill, WV); Greenbrier County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Greenbrier County Landfill, WV); HAM Sanitary Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for HAM Sanitary Landfill, LLC WV); LCS Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—LCS Services, WV); Mercer County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Mercer County Landfill, WV); Pocahontas County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Rt. 28 Pocahontas County High School, the landfill is approximately .7 miles to the south west); Raleigh County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Raleigh County Landfill, WV); S&S Grading Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—S&S Grading Landfill); Short Creek Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Short Creek Landfill WV); Tucker County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Tucker County Landfill WV); Waste Management—Charleston Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—Charleston Landfill); Waste Management—DSI Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—DSI Landfill, Putnam County, WV); Waste Management—DSI Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—DSI Landfill, Putnam County, WV); Waste Management—Meadowfill Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—Meadowfill Landfill, WV); Waste Management—Northwestern Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Waste Management—Northwestern Landfill, WV); Wetzel County Landfill, GOOGLE MAPS, <https://www.google.com/maps/> (search for Wetzel County Landfill WV).

⁴⁷ WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-13.

⁴⁸ Evan Hansen, Alyse Schrecongost, Brent Bailey, & Annie Morris, *The Prospects for Landfill Gas-to-Energy Projects in West Virginia*, THE MOUNTAIN INST. (May 2006), https://www.downstreamstrategies.com/wp-content/uploads/2020/01/Prospects_for_landfill_gas-to-energy_WV_May2006.pdf.

⁴⁹ Cindi Lash, *Landfill Owner Challenges Court Order to Clean Up*, POST-GAZETTE (Apr. 15, 2001), <http://old.post-gazette.com/regionstate/20010415landfillreg6.asp>.

pushback because of odors emanating from the landfill.⁵⁰ The Tucker County Landfill made the news in March 2020, with odors specifically impacting the town of Davis.⁵¹ Notably, after the infamous Freedom Industries MCHM⁵² chemical spill, a private landfill in Putnam County was complained to smell like licorice due to the “solidified wastewater” from the spill deposited there.⁵³

Landfill odors have not been limited to just bad press. Between January 1, 2015, and January 1, 2020, the West Virginia Department of Environmental Protection’s Division of Air Quality (“DAQ”) received at least 50 odor complaints from the public.⁵⁴ Of those 50 complaints, 18 complaints are concentrated around the Waste Management owned landfill near Parkersburg, West Virginia.⁵⁵ Two other landfills stand out—the privately owned landfill in Hedgesville, West Virginia, that was the subject of 16 complaints, and a publicly owned landfill near Lewisburg that was the subject of twelve complaints within the past five years.⁵⁶

Landfills have not just been subject to public displeasure, but some light regulatory action has been taken. In the past 20 years, the DAQ has issued at least two notices of violation to landfills (“NOVs”). The first was in 2001 to the LCS Services landfill in Berkeley County for failure to present an annual report on non-methane organic compound emissions, but this NOV was later withdrawn for compliance.⁵⁷ The second was issued in 2020 to the City of Charleston Sanitary Landfill for violation of West Virginia regulatory codes banning excessive noxious odors.⁵⁸

Despite these issues, West Virginia appellate case law contains no common law class action claims regarding landfill odors and few claims in general surrounding landfill odors. The closest case is a nuisance action

⁵⁰ Vincent, *supra* note 3.

⁵¹ Heather Clower, *Odors from the Landfill Expected as Corrections Being Made*, THE PARSONS ADVOC. (Apr. 27, 2020), <https://parsonsvococate.com/news/pa-local-stories/odors-from-the-landfill-expected-as-corrections-being-made/>.

⁵² Abbreviation for 4-methylcyclohexanemethanol.

⁵³ *WVDEP Division of Air Quality Responds to Landfill Odor Complaints*, W. VA. DEP’T. OF ENV’T PROT., <https://dep.wv.gov/news/Pages/WVDEP-Division-of-Air-Quality-responds-to-landfill-odor-complaints-.aspx> (last visited Sept. 6, 2021).

⁵⁴ DEP’T OF ENV’T PROT. AIR QUALITY, COMPILATION OF COMPLAINT INVESTIGATIONS FORMS (2015–2020) (on file with the West Virginia Law Review).

⁵⁵ *Id.*

⁵⁶ *Id.* These statistics suggest, rather than West Virginia having a state-wide LFG odor problem, it is limited to a handful of mismanaged landfills, with 68% of odor complaints being against Waste Management owned landfills.

⁵⁷ Letter from Stephanie Timmermeyer, W. Va. Dep’t of Env’t Prot. Director of Air Quality to Frank E. Williams, III, LCS Services, Inc. Landfill (Jan. 9, 2002) (on file with the West Virginia Law Review).

⁵⁸ *Id.*

brought by a husband and wife against a landfill in 1991, and the decisions of law were limited strictly to damages.⁵⁹ The opinion does not mention odors at all.⁶⁰ Research yields negligible results evidencing common law claims against landfills for odors, especially when searching for class action claims.⁶¹ This Note will identify the potential barriers to LFG suits brought in other states and then identifies the presence of those obstacles in West Virginia's decisional law.

In summation, West Virginia certainly has the potential to produce thousands of pounds of LFG, some of it odorous. West Virginia landfills are not located in the wilderness, instead, nearly every operational landfill is within two miles of a residential community, including some which are within two miles of large and well-established communities, including the State Capitol. These landfills' proximity to communities has proven to be problematic with at least 50 odor complaints to the DAQ within the past five years, along with a decorated history of public protest and at least two NOVs. But, despite the public concern, the West Virginia appellate court docket remains barren.

II. CFOMMON LAW LITIGATION OF LANDFILL GAS ODORS

Odors associated with landfills had previously been tolerated as an inevitable societal cost associated with landfills, but as technology has improved, there has been a societal shift, resulting in a lack of toleration of these odors.⁶² There are a plethora of current or ongoing class actions in various states related to landfill odors.⁶³ In the past 20 years, these claims have been brought in Pennsylvania, Arkansas, New York, Ohio, South Carolina, Texas, and Louisiana; some resulted in large monetary rewards, while others were dismissed with prejudice.⁶⁴ Generally, the largest barriers for these suits are motions to dismiss for failure to state a claim or related motions to dismiss in state court.⁶⁵ Fortunately, these motions revolving around legal standards

⁵⁹ *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).

⁶⁰ *Id.*

⁶¹ *See, e.g.*, LEXISNEXIS, <https://plus.lexis.com/firsttime?crd=d5e6fbbe-cb74-45cb-a8ba-7e1e4ed7ce8d>, (search for Landfill AND Odors, Landfill Nuisance, or Landfill Class Actions); WESTLAW, <https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=%28sc.Default%29> (search for Landfill AND Odors, Landfill Nuisance, or Landfill Class Actions).

⁶² O'Donnell, *supra* note 32.

⁶³ *See, e.g., Landfill Odor Lawsuits*, GOOGLE, <https://www.google.com/> (search for Landfill Odor Lawsuits or Landfill Odor Class Actions).

⁶⁴ *See infra* Part II.

⁶⁵ FED. R. CIV. P. 12(b)(6); *e.g.*, *Beck v. Stony Hollow Landfill, Inc.*, No. 3:16-CV-455, 2017 WL 1551216, at *2 (S.D. Ohio May 1, 2017).

enable a survey of prevalent legal pitfalls and barriers faced by claimants in each type of common law claim against LFG odors.

A. Nuisance

Arguably, the most applicable common law claim is a nuisance claim. Nuisance can broadly be defined as “conduct by one landowner that unreasonably interferes with use and enjoyment of the lands of another.”⁶⁶ However, these definitions are deceptively underinclusive and oversimplified. As put by Justice Blackmun, “one searches in vain . . . for anything resembling a principle in the common law of nuisance.”⁶⁷ So, appropriately, and presumably in vain, this Note searches for principles germane to nuisance claims against landfills for LFG odors.

1. Private Nuisance

The bare elements of a private nuisance require a (1) unreasonable invasion of (2) “another’s interest in the private use and enjoyment of land.”⁶⁸ But, the Restatement of Torts—as well as several states—recognize two different types of nuisance: private nuisance and public nuisance;⁶⁹ this makes a distinction between the two necessary. The most relevant and contemporaneous example of this distinction would be the Third Circuit decision in *Baptiste v. Bethlehem Landfill Co.*,⁷⁰ a federal diversity suit interpreting Pennsylvania law. Here, the court distinguishes a private nuisance impacting “another’s interest in the *private use* and enjoyment of land,” rather than public rights like to clean air and clean water.⁷¹

First is the requirement that the invasion is unreasonable, a requirement that is oft-articulated in the common law.⁷² Facts germane to the reasonableness of the invasion include the frequency and strength of the landfill odors, which

⁶⁶ *Cross v. W. Waste Indus.*, 469 S.W.3d 820, 823 (Ark. Ct. App. 2015).

⁶⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

⁶⁸ *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 222–23 (3d Cir. 2020) (citing *Youst v. Keck’s Food Serv., Inc.*, 94 A.3d 1057 (Pa. Super. Ct. 2014)). Although outside the scope of this paper, the “negligence” requirement is also found in states with civil-law tradition. *Ictech-Bendeck v. Progressive Waste Sols. of La., Inc.*, No. CV 18-7889, 2019 WL 4111681, at *2 (E.D. La. Aug. 29, 2019).

⁶⁹ *E.g., Baptiste*, 965 F.3d at 220.

⁷⁰ *Id.* This landfill accepts 1,375 tons of waste daily, equating to a 42,000-ton monthly permit, which is within the size of WV landfills that are permitted to accept up to 50,000 tons per month. *Id.* at 218.

⁷¹ *Id.* at 222–23 (emphasis added) (citing *Youst*, 94 A.3d 1057).

⁷² If the harm was intentional, the invasion must be unreasonable, and if the invasion was unintentional, it must be negligent, which requires a finding of unreasonableness.

could be evidenced by permit conditions, previous violations, public complaints, and other facts about landfill procedures.⁷³ With private nuisance, the reasonableness standard is also quite susceptible to additional requirements created by the court. One Arkansas court found that mere property value depreciation is not sufficient.⁷⁴

A Louisiana court established a test of degree and declared that the odors must be “excessive [and] unreasonable in degree, and of such character as to produce actual, physical discomfort and annoyance to a person of ordinary sensibilities.”⁷⁵ A different Arkansan court required the nuisance to be “substantial and beyond speculation and conjecture.”⁷⁶ But, regardless of its form, reasonableness is largely a factual determination and a question reserved for the jury when damages are sought.⁷⁷ Lastly, if the unreasonable interference is unintentional, it must also be negligent. By stating that the interference must be unreasonable, the court incorporates the elements of a reasonable person into the elements of a private nuisance suit.

Aside from a showing of unreasonableness, there is the second requirement that invasion be to a “private use and enjoyment of land,” with limiting language stating specifically that the invasion must impact something “private.” To articulate this requirement, some states have a proximity limitation. A proximity limitation acts as a restraint on who can bring a nuisance claim based on the distance between the nuisance and the property owner.⁷⁸ In other states like Louisiana, the originally strict requirement that the plaintiff must be a “neighbor” and the properties must exist in “some propinquity” has been gradually loosened to only require that the property could be “damaged irrespective of the distance.”⁷⁹ A strict requirement for “neighborliness” could be detrimental to landfill odor nuisance claims because odors can travel several miles from the site.⁸⁰ This limitation has been completely rejected in some states.⁸¹

Relatedly, some states, including New York, create an amorphous limitation on the number of people affected. The court reasons that a private

⁷³ *Baptiste*, 965 F.3d at 218; *Miller v. Jasinski*, 705 S.W.2d 442, 442 (Ark. Ct. App. 1986).

⁷⁴ *Jasinski*, 705 S.W.2d at 442.

⁷⁵ *Ictech-Bendeck v. Progressive Waste Sols. of La., Inc.*, No. 18-7889, 2019 WL 4111681, at *4 (E.D. La. Aug. 29, 2019) (alteration in original).

⁷⁶ *See Se. Ark. Landfill, Inc. v. State*, 858 S.W.2d 665, 667 (Ark. 1993).

⁷⁷ *See Phillips v. Fujitec Am., Inc.*, 3 A.3d 324, 329 (D.C. 2010).

⁷⁸ *Baptiste*, 965 F.3d at 223.

⁷⁹ *Ictech-Bendeck*, 2019 WL 4111681, at *3–4.

⁸⁰ *See supra* Part I.A.

⁸¹ *See, e.g., Baptiste* 965 F.3d at 223.

nuisance is for the “relatively few.”⁸² Here, the plaintiff class was composed of approximately 200 individuals that lived within four miles of the landfill.⁸³ Because of the large class size, the court dismissed the private nuisance claim with prejudice, finding that only a suit in public nuisance was appropriate.⁸⁴ The size limitation produces a challenging strategic problem for attorneys representing a class harmed by landfill odors: the larger the class becomes, the higher the risk the private nuisance claim will be dismissed.⁸⁵

In summary, most of the fact-based elements of a private nuisance, like unreasonableness, intent, or negligence, do not pose a uniquely prohibitive hurdle to suits against landfills for noxious fumes. However, states may add particularized “term of art” language that demands an attorney’s attention when crafting pleadings. Some of these phrases may be “physical discomfort” or “substantial and beyond speculation and conjecture.” But, determining the degree of the nuisance is not the only prohibitive requirement. First, if narrowly articulated, the requirement that the nuisance and the harmed land have “some propinquity” could be directly prohibitive to landowners harmed by odors that travel miles from the landfill. Second, a private nuisance may be barred if the class size grows too large and the court deems a “public nuisance” to be more appropriate. Consequently, the contour of West Virginia’s private nuisance doctrine could have notable impacts on litigation, specifically if it has a particularized pleading standard, a neighborliness requirement, or a size limitation.

2. Public Nuisance

A public nuisance is defined as “an unreasonable interference with a right common to the general public, such as the right to clean public water and fresh air in public spaces.”⁸⁶ Fundamentally, the difference comes down to the “nature of the right affected,” with a private nuisance requiring interference with personal or private rights and a public nuisance interfering with common rights.⁸⁷

However, just because a public nuisance “interferes with a public right” does not mean that it is privately actionable; for a plaintiff to prevail on a

⁸² *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 441 (W.D.N.Y. 2019).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ As discussed in Part II.A.2, the difference between public and private nuisance is commonly determined by the *right* that is affected, rather than the size of the aggrieved. This difference can have a large impact on these types of suits.

⁸⁶ *Baptiste*, 965 F.3d at 220 (internal quotation marks omitted); *D’Amico v. Waste Mgmt. of N.Y., L.L.C.*, No. 6:18-CV-06080, 2019 WL 1332575, at *3 (W.D.N.Y. Mar. 25, 2019).

⁸⁷ *Baptiste*, 965 F.3d at 223.

public nuisance claim, the plaintiff must have suffered harm different than the harm suffered by the general public.⁸⁸ *Baptiste* demonstrates that a way to satisfy this “special injury” requirement is to show that the plaintiff had suffered property damage or that the landowner’s property had been devalued. The court explained that property damage and even loss of property enjoyment “identified cumulative harms that are unique to [the plaintiffs].”⁸⁹

Here is another great example where pleadings matter. First, a plaintiff must explicitly state the public right that has been violated, which in this case would be the right to clean and non-odorous air.⁹⁰ Second, and more importantly, the plaintiff must plead an injury not shared by the whole locality; simply pleading that the residents “suffer from the discomfort of having to breathe polluted air in public spaces” would not be sufficient.⁹¹ In *Baptiste*, the plaintiffs satisfied the second requirement by pleading that their homes and yards were “physically invaded by noxious odors, pollutants and air contaminants.”⁹² New York courts have broadened the potential class of “special injury” to greater than just property harms by allowing increased health risks to satisfy this requirement.⁹³

Interestingly, because landfill odors can impact a large group of residents, the larger the group of residents, the more the group resembles “the public.” Theoretically, as the class grows larger, more and more of the public would be represented, and the injuries would become increasingly similar. This could threaten the satisfaction of the “special injury” requirement. New York courts have identified this problem and succinctly neutralized it by stating “[a] ‘special injury’ need not be ‘unique,’ and simply because a large number of individuals suffer from a peculiar injury does not mean that the injury is not different in kind from that sustained by the public at large.”⁹⁴

In summary, when an individual is looking to enforce an LFG public nuisance suit, the plaintiff must have suffered an injury different than the harm suffered by the public. Satisfying the “individualized harm” requirement is essential, and it will be heavily dependent on what each state has recognized as a specialized injury. Pennsylvania and New York have made this hurdle clearable by allowing loss in property value or increased health risks to satisfy the individualized harm requirement. West Virginia’s articulation of its public

⁸⁸ *Id.* at 220; *Fresh Air for the Eastside*, 405 F. Supp. 3d at 441; *Beck v. Stony Hollow Landfill, Inc.*, No. 3:16-CV-455, 2017 WL 1551216, at *2 (S.D. Ohio May 1, 2017).

⁸⁹ *Baptiste*, 965 F.3d at 221. This can be shown by the plaintiff’s “inability to use and enjoy their swimming pools, porches, and yards.” *Id.* (emphasis omitted).

⁹⁰ *D’Amico*, 2019 WL 1332575, at *3.

⁹¹ *See Baptiste*, 965 F.3d at 221; *Brunner v. Schaffer*, 1 Pa. D. 646 (Pa. C.P. 1892).

⁹² *Baptiste*, 965 F.3d at 218.

⁹³ *Fresh Air for the Eastside, Inc.*, 405 F. Supp. 3d at 443.

⁹⁴ *Id.*

nuisance doctrine, including the requirement for a specialized injury, will have direct consequences for an LFG odor suit.

3. Temporary or Permanent?

Not only can a nuisance be public or private, but it can also be classified as temporary or permanent. A temporary nuisance is one of limited duration, and it is uncertain that the nuisance will reoccur in the future.⁹⁵ A permanent nuisance is often defined as relatively enduring and cannot be corrected or abated at a reasonable expense to the owner.⁹⁶ The classification between the two has important litigation outcomes at opposite ends of the litigation timeline. First, the classification can determine when the statute of limitations begins to run. For example, in Texas, a “permanent nuisance claim accrues when injury *first* occurs or is discovered; a temporary nuisance claim accrues anew upon each injury.”⁹⁷ Even an increase in the intensity of the odors will not “restart” the statute of limitations if the nuisance is classified as a permanent nuisance.⁹⁸ Therefore, the classification of a “permanent” nuisance can become a death knell for a nuisance claim brought several years after the construction of a landfill, especially considering that some landfills have been established for many decades and landfill odors are only recently now viewed as an unacceptable burden.⁹⁹

Second, the “temporary” classification has an impact on the extent of available damages. Some states like South Carolina and Texas limit the damages in a temporary nuisance case to “lost rental value,” whereas damages for permanent nuisance are limited to depreciation in the “full market value” of the property.¹⁰⁰ The justification for this system is that nuisance is a tort tied to the property, and therefore property should anchor the damages award.¹⁰¹ Under such a system, classification as a temporary nuisance could cripple recovery, making classification as a permanent nuisance more attractive to attorneys.

Notice that an attorney has a difficult decision to make. If the attorney needs an extended statute of limitations, she will be best suited to classify the nuisance as temporary. However, in doing so, she has had to reduce the potential damage award. This strategic “catch-22” may be particularly

⁹⁵ 58 AM. JUR. 2D *Nuisances* § 20 (2021).

⁹⁶ *Id.* § 19.

⁹⁷ *Jing Gao v. Blue Ridge Landfill Tex., L.P.*, 783 F. App’x 409, 410–11 (5th Cir. 2019) (per curium) (emphasis omitted).

⁹⁸ *See id.* at 411.

⁹⁹ *See O’Donnell, supra* note 32.

¹⁰⁰ *Babb v. Lee Cnty. Landfill SC, L.L.C.*, 747 S.E.2d 468, 480 (S.C. 2013); *City of Lubbock v. Tice*, 517 S.W.2d 428, 430 (Tex. Civ. App. 1974).

¹⁰¹ *Babb*, 747 S.E.2d at 480.

discouraging given the protracted cost of a scientifically technical class-action suit. So, the question now becomes, “are landfill odors more likely to be a permanent or temporary nuisance?”

Unfortunately, the distinction between the two is obfuscated. Emblematic of this hazy distinction is that the nuisance “need not be perpetual in order to be permanent.”¹⁰² Texas courts have shied away from the distinction and its harsh outcomes by stating it is a rule based in equity.¹⁰³ In Texas, the ambiguity has resulted in the narrowing of what constitutes “temporary,” where the nuisance is presumed to be permanent unless it can be rebutted by “evidence that a defendant’s noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may ever occur again.”¹⁰⁴ Counterintuitively, “the fact that damages might decrease or cease after a substantial period of time did not keep the damage from being permanent.”¹⁰⁵

In summary, the distinction between permanent and temporary nuisances, if recognized, can have a significant impact on landfill odor claims. The presence and intensity of landfill gas are dependent on climatic conditions and the composition of the waste,¹⁰⁶ and the extent that the nuisance may fluctuate. The distinction between the two can be counterintuitive, and therefore requires close attention to that state’s common law tradition. Not only is the distinction difficult to determine, but it also has ramifications, which can impact both the statute of limitations and the damages award. There are disadvantages to both classifications, and these disadvantages could potentially dissuade or preclude landfill odor nuisance suits. If West Virginia were to recognize the distinction between temporary and permanent nuisances, the presence of any of the above-associated limitations could prove quite burdensome to LFG odor class actions.

4. Sovereign Immunity

It is worth a brief mention that some states may give municipalities and local governments immunity from nuisance suits.¹⁰⁷ Such insulation from liability may be particularly preclusive of landfill nuisance suits because

¹⁰² *City of Lubbock*, 517 S.W.2d at 431 (finding that 20 years of remaining landfill life, even if the odors would decrease, is still a permanent nuisance).

¹⁰³ *See id.*

¹⁰⁴ *Jing Gao v. Blue Ridge Landfill Tex., L.P.*, 783 F. App’x 409, 411 (5th Cir. 2019) (per curiam).

¹⁰⁵ *City of Lubbock*, 517 S.W.2d at 431 (finding that 20 years of remaining landfill life, even if the odors would decrease, is still a permanent nuisance).

¹⁰⁶ *See supra* Part I.A.

¹⁰⁷ *E.g. Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 433 (W.D.N.Y. 2019).

landfills are often owned or operated by local governments. Therefore, if recognized in West Virginia, local sovereign immunity could preclude an LFG odor class action suit completely.

5. Summary

This Note has identified four “types” of nuisance, all of which have particular hurdles that may prove prohibitive to LFG nuisance claims. First, private nuisance claims may be (1) required to satisfy heightened unreasonableness standards, (2) limited by physical distance from the nuisance, or (3) limited by the number of harmed individuals. Second, public nuisance claims may be limited by the requirement to show a “specialized” injury that is distinguishable from the public’s injury. Third, a permanent nuisance claim may be precluded by the statute of limitations, which starts running as soon as the nuisance is created. Fourth, a temporary nuisance claim may have a reduced recovery, with damages only tied to the loss in a property’s rental value. Additionally, because some states offer immunity to local governments, landfills that are owned or operated by local governments may be immune from landfill odor suits.

B. Trespass

In an effort likely aimed at diversifying routes of success, plaintiffs in landfill odor suits have also brought claims of trespass.¹⁰⁸ The potency in a trespass claim is alluring, requiring only an entity’s intent or substantial certainty of an intrusion onto the land and for the intrusion to occur.¹⁰⁹ However, the success of trespass claims in an odor suit context depends heavily on what constitutes an *intrusion*. Some states have a requirement that the invasion is “physical” or tangible.¹¹⁰ If a state recognizes this distinction, the relevant question becomes whether odors constitute a physical invasion. Courts in both New York and South Carolina have stated that odors are intangible, and therefore not a physical invasion.¹¹¹

The South Carolina courts proceeded despite acknowledging the scientific impossibility of calling odor intangible by stating that even if odors have a physical molecular state, good policy recommends barring recovery “to constrain the expansion of trespass liability.”¹¹² The fear is that broad reading

¹⁰⁸ *Id.* at 451; *Babb v. Lee Cnty. Landfill SC, L.L.C.*, 747 S.E.2d 468, 476 (S.C. 2013).

¹⁰⁹ RESTATEMENT (SECOND) OF TORTS §§ 8A, 158 (AM. L. INST. 1965).

¹¹⁰ *Fresh Air for the Eastside, Inc.*, 405 F. Supp. 3d at 451.

¹¹¹ *Id.*; *Babb*, 747 S.E.2d at 476.

¹¹² *Babb*, 747 S.E.2d at 478 (citing *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959)).

of liability would hold industries liable “for even the smallest intrusions.”¹¹³ South Carolina holds that the intrusion must interfere with the “exclusive possession” of the land before constituting a trespass.¹¹⁴ New York courts, while addressing a landfill odor trespass suit, have stated that tangibility requires a liquid or solid substance.¹¹⁵ Here, the court also was worried about the blurring together of trespass and nuisance claims, stating that intangible interferences should remain the realm of nuisance laws.¹¹⁶

However, the requirements surrounding the nature of the invasion can vary greatly from state to state. Some states have held that arguably intangible or molecular invasions like fire,¹¹⁷ electronic signals,¹¹⁸ and radioactive emissions,¹¹⁹ constitute an invasion. However, other states have adopted a requirement that intangible interferences must be corroborated by actual damages.¹²⁰

In summary, depending on how a state classifies and defines the element of “invasion,” a suit against a landfill for odors may be summarily precluded. Some states require that the invasion be “tangible,” which has been used to dismiss odor suits against landfills, despite the molecular physical nature of odor particles. If this *de minimus* limitation is recognized in West Virginia’s articulation of trespass, it could completely preclude the trespass theory of recovery.

C. Negligence

A suit in negligence requires duty, breach, causation, and damages. Each element, save causation,¹²¹ has proven to contain notable legal hurdles for negligence claims against landfills for noxious odors.

Duty can occasionally be difficult to establish, especially if the plaintiff is proceeding under a theory of negligence *per se*. These claims have

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Fresh Air for the Eastside, Inc.*, 405 F. Supp. 3d at 451.

¹¹⁶ *See id.*

¹¹⁷ *Elton v. Anheuser-Busch Beverage Grp., Inc.*, 58 Cal. Rptr. 2d 303, 306 (Cal. Ct. App. 1996).

¹¹⁸ *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal. Rptr. 2d 468, 473 n.6 (Cal. Ct. App. 1996).

¹¹⁹ *Md. Heights Leasing, Inc. v. Malinckrodt, Inc.*, 706 S.W.2d 218, 225–26 (Md. 1985).

¹²⁰ *Wilson v. Interlake Steel Co.*, 185 Cal. Rptr. 280, 282 (Cal. 1982) (finding that intangible interferences such as electromagnetic fields constitute an invasion); *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001) (finding that intangible interferences such as noise constitute an invasion.)

¹²¹ Causation can certainly be a factual barrier to LFG suits because there may be other potential sources of noxious odors nearby, but no research indicates that unique legal barriers are germane to causation and LFG odor suits.

occasionally been dismissed because a mere violation of a statutory provision regulating landfill odors may not explicitly establish a duty to surrounding communities.¹²² However, in some states, like Pennsylvania, duty can be established under the common law doctrine of “affirmative act duty.”¹²³ Under the doctrine of “affirmative act duty,” when a “person undertakes ‘affirmative, risk-causing conduct,’ such as operating a landfill, that person assumes a common-law duty to protect others ‘against an unreasonable risk of harm arising out of that act.’”¹²⁴ Affirmative act duty has also been supported by New York courts.¹²⁵ New York has also found that there is a societal duty “as adjacent landowners.”¹²⁶

Breach is largely a factual finding reserved for the jury.¹²⁷ Facts that help to determine breach in a landfill odor case would be the frequency and strength of the odors, the numerosity, and severity of public complaints, along with determinations by the appropriate regulatory agency.¹²⁸ However, a state may require that the plaintiff establish a breach using expert testimony when the “subject is beyond the common knowledge of the jury.”¹²⁹ Although not a direct legal barrier, because the impacts of landfill odors and the odors themselves can be technical, this requirement of expert evidence could increase litigation costs.

Damages may be the most difficult negligence element to establish in an LFG suit. The damage element usually requires a showing of bodily harm.¹³⁰ In dicta, the Pennsylvania courts have stated that smelling noxious odor alone is not a “bodily harm,” but because hydrogen sulfide, the odorous gas in LFG, has negative health effects, exposure to hydrogen sulfide gas specifically may satisfy the bodily harm requirement.¹³¹ Although noxious odors are often mentally detrimental, mere mental suffering has typically not been recoverable unless there is a physical manifestation of emotional distress.¹³² They may not always manifest into physical health effects.

¹²² *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 227 (3d Cir. 2020).

¹²³ *E.g., id.* at 228.

¹²⁴ *Id.*

¹²⁵ *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 448 (W.D.N.Y. 2019); *D’Amico v. Waste Mgmt. of N.Y., L.L.C.*, No. 6:18-CV-06080, 2019 WL 1332575, at *7 (W.D.N.Y. Mar. 25, 2019).

¹²⁶ *D’Amico*, 2019 WL 1332575, at *7.

¹²⁷ *Body By Cook v. Ingersoll-Rand Co.*, 39 F. Supp. 3d 827, 838–39 (E.D. La. 2014).

¹²⁸ O’Donnell, *supra* note 32.

¹²⁹ *Babb v. Lee Cnty. Landfill SC, L.L.C.*, 747 S.E.2d 468, 481 (S.C. 2013).

¹³⁰ *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 228 (3d Cir. 2020).

¹³¹ *Id.* at 228–29.

¹³² *Babb*, 747 S.E.2d at 481.

If there is no bodily injury, the economic loss rule, which varies greatly from state to state, may occasionally preclude recovery.¹³³ The economic loss rule may preclude recovery for the lost use of “property for its intended purposes.”¹³⁴ New York courts have circumvented the economic loss rule by crafting a unique exception for pollution cases called “stigma damages,” where economic damages can satisfy the damage requirement.¹³⁵ In these cases, economic damages are recognized, specifically because “diminished property values result from an actual or imminent invasion of a landowner’s property [rights].”¹³⁶ The stigma damages exception was crafted in the specific context of pollution cases because these damages are a response to a “public fear of exposure to a potential health hazard.”¹³⁷ Courts have had little trouble applying the stigma damages exception to landfill odor claims.¹³⁸

In summary, three of the elements of negligence contain potential hurdles to claims against landfills for noxious odors. Duty may be difficult to establish if the plaintiffs are attempting to prevail solely on a negligence per se claim, but courts have often established duty using the doctrine of “affirmative act duty” or the duty between adjacent landowners. Breach is a heavily factual inquiry that will often require reliance on experts. The damage element can be particularly preclusive because traditionally bodily harm is required. However, some courts have found that the negative health effects of hydrogen sulfide or stigma damages can establish the element of damages. The success of a negligence claim in West Virginia will depend on whether the state has articulated a form of affirmative act duty, an expert requirement, or a requirement for bodily harm.

D. Summary

A national increase in class action litigation against landfills for noxious odors has made it possible to identify specific legal hurdles that exist in three particular common law causes of action. The most archetypical suit is one sounding in nuisance. Each “type” of nuisance claim, whether it be private, public, temporary, or permanent, may face a difficult legal hurdle. A private nuisance claim may be required to satisfy (1) heightened unreasonableness standards, (2) proximity requirements, or (3) numerosity limitations. Public nuisance claims may be limited by the requirement to show a “specialized

¹³³ PHILIP L. BRUNER & PATRICK J. O’CONNOR JR., BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 19:10, Westlaw (database updated Aug. 2021).

¹³⁴ *Id.*

¹³⁵ *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of New York, L.L.C.*, 405 F. Supp. 3d 408, 447 (W.D.N.Y. 2019). Other states have also crafted stigma damages. *Id.*

¹³⁶ *Id.*

¹³⁷ *D’Amico v. Waste Mgmt. of N.Y., L.L.C.*, No. 6:18-CV-06080, 2019 WL 1332575, at *6.

¹³⁸ *Id.* at *7

injury.” Additionally, a permanent nuisance claim may be precluded by the statute of limitations, while a temporary nuisance claim may have a reduced recovery. A claim of trespass may be precluded if odors do not constitute a “tangible” invasion. A claim of negligence may need to utilize the “affirmative act duty” doctrine or establish the parties are adjacent landowners to satisfy duty. Negligence suits can also require a showing of damages, and plaintiffs may need to assert the negative health effects of hydrogen sulfide or use the concept of stigma damages to satisfy the element of damages.

Now that the common barriers and hurdles have been identified, it is appropriate to examine West Virginia case law to determine whether they exist in the Mountain State.

III. WEST VIRGINIA CASE LAW COMPARISON

Despite the rise in litigation surrounding landfill odors around the U.S., even in states that border West Virginia, no such claims have reached the sole West Virginia appellate court.¹³⁹ This persists despite West Virginia having 17 active landfills, many of which have been the subject of complaints by the surrounding communities.¹⁴⁰ Even when there is public displeasure for nearly a decade involving a landfill’s odors, the only observable legal action culminates with regulatory action from the state, rather than a personal injury suit rooted in the common law.¹⁴¹ One possible inference of the barren appellate docket is that the common law tradition in West Virginia may have established preclusive hurdles to landfill odor personal injury suit. To address this inference, this Part will compare the hurdles identified in Part II to West Virginia’s common law doctrines to identify potentially preclusive elements in West Virginia common law.

A. Nuisance

The West Virginia Supreme Court of Appeals has acknowledged the complexity associated with nuisance suits by stating, “‘nuisance’ is incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike.”¹⁴² The basis of nuisance claims in West Virginia requires an “interference with the private use and enjoyment of another’s land.”¹⁴³ Like the other states discussed above, West Virginia

¹³⁹ See *supra* notes 59–61 and accompanying text.

¹⁴⁰ See *supra* notes 49–61 and accompanying text.

¹⁴¹ Cindi Lash, *supra* note 49. The source of regulatory authority can be derived from W. Va. Code R. § 45-4-3.1, which prohibits any person from discharging “air pollutants which cause or contribute to an objectionable odor at any location occupied by the public.”

¹⁴² *Harless v. Workman*, 114 S.E.2d 548, 552 (W. Va. 1960).

¹⁴³ *Syl. Pt. 2, Bansbach v. Harbin*, 728 S.E.2d 533 (W. Va. 2012).

recognizes the distinction between public and private nuisance¹⁴⁴ and also differentiates between temporary and permanent nuisances.¹⁴⁵

1. Private Nuisance

West Virginia defines a private nuisance as “a substantial and unreasonable interference with the private use and enjoyment of another’s land . . . that is intentional and unreasonable, negligent or reckless, or that results in an abnormally dangerous condition or activities in an inappropriate place.”¹⁴⁶ This is a common articulation of a private nuisance,¹⁴⁷ and regardless of how established, the plaintiff must establish an unreasonable interference.

Like Arkansas and Louisiana, the West Virginia Supreme Court has fleshed out specific requirements in determining whether the nuisance is unreasonable. The result is likely more burdensome than a bare reasonableness test. The court has emphasized that to prove a private nuisance, the plaintiff must establish that “the gravity of the harm outweighs the social value of the activity alleged to cause the harm.”¹⁴⁸ In making this determination, the “nature of the location and surrounding area” is considered a relevant inquiry.¹⁴⁹ This balancing test is a barrier to landfill odor nuisance suits because it provides an avenue for landfills to argue their utilitarian value while minimizing the impact to locals based on the localities’ expectations.¹⁵⁰ However, the ability to argue a landfill’s value may become increasingly precarious as alternatives to landfilling become more prevalent in West Virginia.¹⁵¹

West Virginia case law also addresses specific nuisances. For example, “unsightliness” was deemed not enough alone to constitute a legally recognizable nuisance.¹⁵² Additionally, alleging mere property value depreciation is not enough to qualify for an injunction.¹⁵³ However, the court has not been as clear when it comes to odor-related nuisances.

¹⁴⁴ *Id.* at 536 n.13.

¹⁴⁵ *Taylor v. Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 203–04 (W. Va. 2003).

¹⁴⁶ *Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (W. Va. 1989).

¹⁴⁷ *See supra* II.A.1.

¹⁴⁸ *Hendricks*, 380 S.E.2d at 202.

¹⁴⁹ *Bansbach*, 728 S.E.2d at 537.

¹⁵⁰ In *Bansbach*, the court illustrates this balancing test by stating, “[r]ural residents must expect to bear with farm and livestock conditions normally found in the area where they reside.” 728 S.E.2d at 537.

¹⁵¹ An example of a landfilling alternative would be a waste-to-energy facility. *E.g.*, *Entsorga West Virginia—Martinsburg (West Virginia)—USA*, ENTSORGA <https://www.entsorga.it/en/case-studies-en/entsorga-west-virginia-martinsburg-west-virginia-usa/> (last visited Sept. 6, 2021).

¹⁵² *Bansbach*, 728 S.E.2d at 538–39.

¹⁵³ *Martin v. Williams*, 93 S.E.2d 835, 844 (W. Va. 1956).

The court's first, and arguably most enlightening, discussion on odor nuisance occurred in the 1886 case of *Snyder v. Cabell*.¹⁵⁴ Here, the court states "offensive odors alone, although not injurious to health, may severally constitute a nuisance," and further elaborates by saying that "[t]he material question in all cases is whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence."¹⁵⁵ The court again visited the topic in the 1888 case, *Medford v. Levy*,¹⁵⁶ where the court refused to interfere in "mere domestic broils" regarding noxious cooking odors in a shared housing building.¹⁵⁷ By 1951, the court stated that the presence of "some noises and some odors" is not enough to establish a nuisance per se.¹⁵⁸ The definition of "some" was further enlightened in 1991 when the court stated "odors . . . which disturb[] the free use of the plaintiffs' property" constitutes a nuisance.¹⁵⁹ This reflects a willingness by the court to recognize odors as a compensable nuisance.

As stated above, some states implement a numerosity or size limitation on nuisance suits. West Virginia also historically recognizes a size limitation in the area of private nuisance, which may prove as a legal barrier to class action claims against not just landfill nuisance claims, but all nuisance class action claims. The West Virginia Supreme Court has defined and limited a private nuisance to an act that "injures one person or a limited number of persons only."¹⁶⁰ However, the contemporary nuisance case of *Hendricks v. Stalnaker*,¹⁶¹ while acknowledging the prior definition, focuses on defining a private nuisance based on the *right* affected.¹⁶² The difference in emphasis may reflect the waning strength of the previously recognized size limitations.

This conclusion is bolstered by *Bansbach v. Harbin*.¹⁶³ In a footnote, the court states "[p]rior to our decision in *Hendricks*, a private nuisance was defined in contrast to a public nuisance—that which affects the general public—and identified in terms of causing 'injur[y] [to] one person or a limited

¹⁵⁴ 1 S.E. 241, 250 (W. Va. 1886).

¹⁵⁵ *Id.*

¹⁵⁶ 8 S.E. 302, 306 (W. Va. 1888).

¹⁵⁷ *See id.*

¹⁵⁸ State *ex rel.* Ammerman v. City of Philippi, 65 S.E.2d 713, 715 (W. Va. 1951) (emphasis added).

¹⁵⁹ *Arnoldt v. Ashland Oil, Inc.*, 412 S.E.2d 795, 801 (W. Va. 1991). *Arnoldt* is arguably just a more contemporary framing of the same standard established in 1886 by *Snyder v. Campbell*.

¹⁶⁰ *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945).

¹⁶¹ 380 S.E.2d 198 (W. Va. 1989).

¹⁶² As opposed to defining the difference based on the size of the plaintiff class. *See id.* (placing West Virginia on similar ground as other states, such as Pennsylvania, as discussed above in Part III)

¹⁶³ 728 S.E.2d 533 (W. Va. 2012).

number of persons only.”¹⁶⁴ The court’s use of “prior to . . . *Hendricks*” may reflect that *Hendricks* did more than just clarify West Virginia nuisance law, instead exemplifying a meaningful doctrinal shift, resulting in an elimination of the numerosity limitation. Even before the *Bansbach* footnote, the court did not seem bothered by class certification of a nuisance claim, continuing to suggest that numerosity is no longer a defining feature of a private nuisance.¹⁶⁵ As of the writing of this Note, the West Virginia Supreme Court has not directly addressed how the historical numerosity limitation clashes with the numerosity requirement for class actions.¹⁶⁶

In summary, West Virginia’s private nuisance doctrine contains potential obstacles to a class action claim regarding LFG odors. First, West Virginia law requires a balancing test of the nuisance against the value of the activity, which would allow a landfill to argue its utility as a substantive defense. On the other hand, West Virginia law certainly has acknowledged that odors alone can constitute a private nuisance and looks to the odors’ impact on the landowner. The most unclear (and arguably lethal) limitation may be the lurking presence of a numerosity requirement to private nuisance suits. However, the recent restructuring under *Bansbach* may have discarded such a limitation.

2. Public Nuisance

West Virginia has used the size of the affected group to define a public nuisance, with “[t]he distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only.”¹⁶⁷ This definition creates a fairly wide definition for a public nuisance, but it has recently been slightly cabined with the court stating a public nuisance “affects the general public *as public*.”¹⁶⁸ This language lightly reflects the approach seen in Pennsylvania, and other states, where a public nuisance is one that “interferes with a public right,” rather than being tied to a numerical formula.¹⁶⁹

West Virginia recognizes that “[o]rordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is

¹⁶⁴ *Id.* at 537 n.13 (alteration in original).

¹⁶⁵ *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 855 (W. Va. 2010).

¹⁶⁶ The numerosity requirement is stated in *W. Va. R. Civ. P.* 23.

¹⁶⁷ *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945).

¹⁶⁸ *Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (W. Va. 1989) (emphasis added).

¹⁶⁹ *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 220 (3d Cir. 2020); *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 441 (W.D.N.Y. 2019); *Beck v. Stony Hollow Landfill, Inc.*, No. 16-CV-455, 2017 WL 1551216, at *2 (S.D. Ohio May 1, 2017).

the duty of the proper public officials.”¹⁷⁰ However, the court has long recognized that an individual can maintain a private action against a public nuisance if her “rights are injuriously affected in a manner different from the public in general.”¹⁷¹ In determining whether the injury is a “special injury,” an important guidepost is whether there has been “permanent damage.”¹⁷² The injury must be special, not “simply in degree, but in character, from that affecting the general public.”¹⁷³

As discussed above, plaintiffs in recent odor litigation have circumvented the “special injury” obstacle by alleging that devaluing their properties is a specialized injury.¹⁷⁴ With no West Virginia cases on point, there is only minimal support for such a maneuver in West Virginia. For example, the court rejected a private claim against a public nuisance, reasoning that the plaintiff has “not alleged that the *use of the land* was interfered with by the [nuisance].”¹⁷⁵ As in other states, this issue may require careful pleading to assure that the injury is truly distinct from that suffered by the public.

In summary, in the context of burdens to class action odor litigation, West Virginia’s public nuisance doctrine, like its private nuisance doctrine, is largely undecided. Because LFG’s can emanate several miles from the landfill, they may be classified as a public nuisance. If classified as such, a citizen could not privately sue unless she suffered a special or particularized injury. It is here where the law is unclear, and the lack of clarity creates a risk that stymies LFG class action litigation. Therefore, the West Virginia Supreme Court has not foreclosed the possibility that the specialized injury requirement could be satisfied by establishing loss in property values.

3. Temporary or Permanent (or Continuing)?

As stated in Part II, the distinction between a temporary or permanent nuisance can have quite serious consequences for LFG class actions. This section of the Note will look specifically for those limitations in West Virginia. In West Virginia, the classification between “permanent” and “private” nuisance impacts the statute of limitations. In *Taylor v. Culloden Public Service District*,¹⁷⁶ the court expanded *Graham v. Beverage*¹⁷⁷ to nuisance suits and

¹⁷⁰ *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 620 (W. Va. 1985).

¹⁷¹ *Davis v. Spragg*, 79 S.E. 652, 653 (W. Va. 1913).

¹⁷² *Hark*, 34 S.E.2d at 354.

¹⁷³ Syl. Pt. 1, *Int’l Shoe Co. v. Heatwole*, 30 S.E.2d 537, 538 (W. Va. 1944). Here, the court nearly had to address whether devalued property rights constituted a “special injury,” however, the party only alleged harm to his water rights, not land rights. *Id.* at 541.

¹⁷⁴ *See, e.g., Baptiste*, 965 F.3d at 220.

¹⁷⁵ *Heatwole*, 30 S.E.2d at 541 (emphasis added).

¹⁷⁶ 591 S.E.2d 197 (W. Va. 2003).

found that with a temporary nuisance the “cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease.”¹⁷⁸ Rather than focusing on whether the nuisance is “temporary,” the court often determines whether the injury is “continuing” for the statute of limitations purposes.¹⁷⁹ This is reflected by the cause of action for a continuing nuisance re-accruing “from time to time as long as the cause of the injury continues.”¹⁸⁰

On the other hand, if the nuisance is permanent “the statute of limitations begins to run from the time when the nuisance was created.”¹⁸¹ The reason for the difference between the two types of nuisance is tied to the fault of the defendant.¹⁸² For example, in *Smith v. Point Pleasant & Ohio River Railroad Co.* where the plaintiff sued for damages and to enjoin the creation of a road adjacent to his lot, the court found that the nuisance was permanent because the creation was a single event, requiring “no lapse in time” to create.¹⁸³ The court analogized to an Iowa case where the improper construction of a ditch was a single act of fault, rather than a continuous one.¹⁸⁴ So, as seen in other states, because West Virginia recognizes a difference between temporary¹⁸⁵ and permanent nuisances, it also recognizes this distinction’s impact on the statute of limitations.¹⁸⁶

Next, the permanent versus temporary classification’s impact on damages will be assessed. The West Virginia Supreme Court has been clear on measuring damages for a temporary nuisance and has stated in a footnote that “damages that the [plaintiffs] can recover in connection with a temporary nuisance are *limited to the two-year period in time prior to the filing of their cause of action.*”¹⁸⁷ On the other hand, the appropriate recovery for a permanent nuisance has a circular definition in West Virginia. If the plaintiff has alleged that the property has been permanently devalued, then this constitutes a

¹⁷⁷ 566 S.E.2d 603 (W. Va. 2002).

¹⁷⁸ *Taylor*, 591 S.E.2d at 204.

¹⁷⁹ *Id.*; *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 921 (W. Va. 1997). The court defines continuing as “continuing in the sense that distinct instances of injury result from the nuisance, as opposed to a singular injury.” *Taylor*, 591 S.E.2d at 205.

¹⁸⁰ *Hargreaves v. Kimberly*, 26 W. Va. 787, 788 (1885).

¹⁸¹ *Smith v. Point Pleasant & Ohio River R.R. Co.*, 23 W. Va. 451, 453 (1884).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Or, as the court seems to suggest, “continuing.”

¹⁸⁶ *Id.*; *Hargreaves v. Kimberly*, 26 W. Va. 787, 799 (1885).

¹⁸⁷ *Taylor v. Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 205 n.21 (W. Va. 2003) (emphasis added).

permanent nuisance, where the loss in property value is the appropriate measure of damages.¹⁸⁸

As discussed in Part II, the appropriate measure of damages plays a large role in litigation strategy and motivation. In some states, a temporary nuisance action only can recover the loss in rental value.¹⁸⁹ West Virginia's measure, on the other hand, more broadly embraces damages in connection with the prior two years.¹⁹⁰ Although this certainly reduces the amount of potentially recoverable damages,¹⁹¹ West Virginia's broader construction leaves substantially more "on the table" than just lost rental value and leaves damages like "annoyance; discomfort; loss of use and enjoyment of part of . . . property" recoverable.¹⁹²

Interestingly, the court's circular definition of a permanent nuisance may create a strategic conflict between the need to satisfy the "specialized injury" requirement to have an actionable public nuisance¹⁹³ and the shortened statute of limitations for permanent nuisances. As seen in other states, LFG class plaintiffs will plead a devalued property to survive the requirement that an injury is specialized when a public nuisance is at issue.¹⁹⁴ Although it is unknown if such a strategy would succeed in West Virginia,¹⁹⁵ it would have the simultaneous effect of potentially classifying the nuisance as a permanent nuisance, with a relatively curtailed statute of limitations. Alleging "loss of use of property" rather than "loss of property value" may circumvent this strategic conflict, while obtaining the result of a privately actionable public nuisance.

With such a meaningful impact on the statute of limitations and damages, any previous classification by the court involving odor nuisances will be incredibly insightful. The 1917 case of *Keene v. City of Huntington*,¹⁹⁶ articulates that odors caused by the *improper operation* of an incinerator constituted a temporary nuisance, but the harm caused solely by the erection and proper operation of the incinerator was classified as permanent.¹⁹⁷ The court further expounds on *Keene* in 1922, with the strongly worded opinion stating that:

¹⁸⁸ *Point Pleasant & Ohio River R.R. Co.*, 23 W. Va. at 453.

¹⁸⁹ *Babb v. Lee Cnty. Landfill SC, L.L.C.*, 747 S.E.2d 468, 480 (S.C. 2013); *City of Lubbock v. Tice*, 517 S.W.2d 428, 430 (Tex. Civ. App. 1974).

¹⁹⁰ *Taylor*, 591 S.E.2d at 205 n.21.

¹⁹¹ Because permanent loss in property value is not available.

¹⁹² *Taylor*, 591 S.E.2d at 203.

¹⁹³ *See infra* III.A.2.

¹⁹⁴ *Id.*

¹⁹⁵ Although unclarified, there is some support that pleading devalued property values would prevail. *See Int'l Shoe Co. v. Heatwole*, 30 S.E.2d 537, 541 (W. Va. 1944).

¹⁹⁶ 92 S.E. 119 (W. Va. 1917).

¹⁹⁷ *Id.* at 124.

Damages to land, occasioned by emission of smoke, gases, dust, and fumes from smelting furnaces maintained and operated on an adjoining or neighboring tract of land . . . which impair its enjoyment, productiveness, and value, *are temporary* in the legal sense of the term, *and permanent damages are not recoverable* for such an injury.¹⁹⁸

Looking at similar environmental nuisance suits in West Virginia shows that the court has maintained a preference for the “temporary” classification.¹⁹⁹ In doing so, the court reasons that such environmental harms are “capable of being abated or discontinued,” and therefore are temporary.²⁰⁰

In summary, the distinction between temporary and permanent nuisance contains pitfalls for the unwary that require careful pleading. Temporary and continuing nuisances have an extended statute of limitations and re-accrue each time the harm occurs. However, recovery for such nuisances will be limited to the harms of the prior two years, which is reduced in comparison to the full loss of property value that could be obtained if the nuisance was permanent. Of course, the downside to pleading a permanent nuisance is that the statute of limitations is not tolled. But, damages for temporary nuisances are not as curtailed in West Virginia as they could be, like in Texas and North Carolina. Lastly, there may be a strategic conflict between needing to satisfy the “specialized injury” requirement for a privately actionable public nuisance with the shortened statute of limitations for permanent nuisances.

4. Sovereign Immunity

As noted earlier, with one-third of West Virginia’s municipal solid waste landfills being owned and operated by county or municipal governments, sovereign immunity is an important issue.²⁰¹ Because this Note deals specifically with common law tort claims, West Virginia’s Governmental Tort Claims and Insurance Reform Act is on point.²⁰² This act applies to both municipalities and political subdivisions, like county governments.²⁰³

¹⁹⁸ *Bartlett v. Grasselli Chem. Co.*, 115 S.E. 451, 451 (W. Va. 1922) (emphasis added).

¹⁹⁹ *E.g.*, *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 925 (W. Va. 1997) (holding that hazardous lumber related waste can be a temporary nuisance); *Taylor v. Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 204–05 (W. Va. 2003) (holding that discharge of effluents into waters is a temporary nuisance).

²⁰⁰ *Taylor*, 591 S.E.2d at 205.

²⁰¹ WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-1. Additionally, three landfills are owned by counties or municipalities but operated by private entities.

²⁰² W. VA. CODE ANN. §§ 29-12A-1 to -18 (West 2021).

²⁰³ W. VA. CODE ANN. § 29-12A-3 (West 2021).

The Act both creates and limits liability, with the “liability-creating provisions [being] broadly construed, and the immunity-creating provisions [being] narrowly construed.”²⁰⁴ Although the Act has been used to create liability for nuisances,²⁰⁵ there is a specific liability exception for “[t]he operation of dumps, sanitary landfills, and facilities where conducted directly by a political subdivision.”²⁰⁶ The meaning of the last clause has been read relatively narrowly by the court, excluding sewer systems,²⁰⁷ but including waste transfer stations.²⁰⁸

This Act effectively means that of West Virginia’s 17 landfills, one-third of those landfills that are owned *and* operated by immune governmental bodies are therefore immune from LFG class action nuisance suits. However, a small subset of West Virginia landfills are owned by local governments but are privately operated, and immunity may not extend to those landfills.²⁰⁹

5. Summary

In West Virginia, when it comes to environmental suits, “[t]here is simply no common law doctrine that approaches nuisance in comprehensiveness or detail.”²¹⁰ A comparison of West Virginia nuisance doctrine with hurdles seen in LFG nuisance suits from other states illustrates that West Virginia has more uncertainty, as opposed to steadfast hurdles. Although the historical numerosity limitation to a private nuisance may prove to be a hurdle, this limitation may have been discarded. Additionally, what exactly satisfies the “specialized injury” requirement for a public nuisance has not been thoroughly articulated, especially in the context of an odor nuisance.

The doctrine contains clear barriers. In determining the presence of a private nuisance, the court has articulated a balancing test that affords a substantive legal defense. Additionally, if the nuisance is classified as permanent, it has a compressed statute of limitations when compared to a temporary nuisance. And, a temporary nuisance has a reduced potential damage amount. Given the more recent holdings of the court, it is more likely an LFG odor nuisance suit would be classified as a temporary nuisance. Also, West Virginia has gilded landfills operated by municipalities and counties with

²⁰⁴ *Calabrese v. City of Charleston*, 515 S.E.2d 814, 820 n.7 (W. Va. 1999).

²⁰⁵ *Calabrese*, 515 S.E.2d at 820–23.

²⁰⁶ W. VA. CODE ANN. § 29-12A-5 (West 2021).

²⁰⁷ *Calabrese*, 515 S.E.2d at 824.

²⁰⁸ *Posey v. City of Buckhannon*, 723 S.E.2d 842, 846 (W. Va. 2012) (quoting *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 621 (W. Va. 1985)).

²⁰⁹ Further discussion on sovereign immunity is outside the scope of this Note and will be avoided to not force a conversation on the constitutionality of West Virginia’s sovereign immunity laws.

²¹⁰ *Taylor v. Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 206 (W. Va. 2003).

immunity, protecting one-third of West Virginia's landfills from nuisance claims.²¹¹

However, West Virginia law also articulates favorable law for LFG odor suits. West Virginia allows a plaintiff in a temporary nuisance claim to recover for all harms within the prior two years, not just loss in rental value. Although sovereign immunity protects a notable subset of landfills, it certainly does not shield the majority of West Virginia's landfills. Lastly, although West Virginia does not have a well fleshed-out class action odor nuisance suit history, it does have several successful claims against odor nuisances brought by one or two individuals.²¹²

B. Trespass

As discussed in Part II.B., trespass is particularly alluring for LFG odor suits because of its technical potency, requiring only a defendant to act intentionally or negligently.²¹³ A subjective belief that there was not a trespass is not a defense, and inadvertent or "innocent trespass" is still actionable.²¹⁴ However, the technical potency may be irrelevant if the invasion must be "tangible" or "physical," and odors are simultaneously not considered such an invasion.²¹⁵

An examination of West Virginia law does not unearth a discussion about whether the invasion is "tangible" or "physical." West Virginia defines trespass as "*an entry on another man's ground without lawful authority . . . doing some damage, however inconsiderable, to his real property.*"²¹⁶ It is of significance that the phrase "an entry" exists unqualified or conditioned. It is also worth noting that the damage can be inconsiderable; this language is again reinforced, with the court finding a trespass "although the damage may be negligible."²¹⁷

Although not at issue, the court in *Perrine v. E.I. du Pont de Nemours & Co.*²¹⁸ made no mention of such a requirement when discussing the environmental contamination caused by a zinc smelter.²¹⁹ There, the contamination was caused in part by the prevailing winds and water runoff,²²⁰

²¹¹ Sovereign immunity carries to all of the torts discussed in this Note.

²¹² See, e.g., *supra* notes 154–59 and accompanying text.

²¹³ *Bailey v. S. J. Groves & Sons Co.*, 230 S.E.2d 267, 270 (W. Va. 1976).

²¹⁴ *Reynolds v. Pardee & Curtin Lumber Co.*, 310 S.E.2d 870, 876 (W. Va. 1983).

²¹⁵ See *supra* Part II.B.

²¹⁶ *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 352 (W. Va. 1945) (emphasis added).

²¹⁷ Syl. Pt. 2, *id.* at 349.

²¹⁸ 694 S.E.2d 815 (W. Va. 2010).

²¹⁹ *Id.* at 855.

²²⁰ *Id.* at 832.

and therefore imperceptible as it occurred. Similarly, while *State ex rel. Surnaik Holdings of West Virginia, L.L.C. v. Bedell*²²¹ focused on class certification, a claim for smoke trespass made its way to the West Virginia Supreme Court without an assertion of a “tangible” invasion requirement.

In summary, for two reasons, it does not appear that West Virginia has a “tangible” or “physical” entry bar that has precluded LFG class suits in other states. West Virginia’s articulation of trespass contains broad language that is quite inclusive, and therefore unlikely to exclude invasion by physical odor particles or molecules. Second, in cases involving more imperceptible or amorphous particulates, the court has not commented or articulated such a limitation. Because of this, West Virginia’s doctrine of trespass does not seem to contain the most common barrier to an LFG trespass suit.

C. Negligence

As discussed above, three of the four elements of negligence—duty, breach, and damages—can present hurdles for LFG suits. In turn, these three elements will be examined under West Virginia law.

First, it must be shown that the landfill had a duty to the surrounding neighborhood; this has been a barrier in some states. In West Virginia, the question of duty is a matter of law, not appropriate for a jury.²²² In West Virginia, the seminal case governing duty is *Robertson v. LeMaster*.²²³ In *Robertson*, the West Virginia Supreme Court articulated a theory of affirmative act duty in stating that “[o]ne who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.”²²⁴ The court also articulated that duty requires foreseeable harm and can be influenced by policy considerations.²²⁵ The requirement of foreseeability makes the duty determination fact-dependent.²²⁶

The court addressed the issue of negligent land use head-on in *In re Flood Litigation Coal River Watershed*.²²⁷ Here, the court affirmed the proposition that when unreasonable land use causes harm to a plaintiff, the plaintiff has a cognizable cause of action sounding in negligence.²²⁸ This logic

²²¹ No. 19-1006, 2020 WL 7223178 (W. Va. Nov. 20, 2020).

²²² *Jack v. Fritts*, 457 S.E.2d 431, 435 (W. Va. 1995).

²²³ 301 S.E.2d 567 (W. Va. 1983).

²²⁴ *Id.* at 564.

²²⁵ *Id.* at 568.

²²⁶ *See, e.g., Crum v. Equity Inns, Inc.*, 685 S.E.2d 219 (W. Va. 2009) (per curiam).

²²⁷ 668 S.E.2d 203 (W. Va. 2008) (per curiam).

²²⁸ *Id.* at 206.

reflects a similar policy attitude seen in New York, where the courts have articulated a duty to adjacent landowners. The presence of affirmative act duty and support for a societal duty to reasonably use land suggests that duty would not be a legal hurdle to LFG class actions in West Virginia.

Breach may pose a structural barrier if an expert is required in LFG cases. But, West Virginia does not articulate a steadfast requirement that complex cases have expert testimony, with the exception being that most medical malpractice claims must have an expert.²²⁹ Even still, requiring an expert is a determination left to the trial court rather than a strict rule.²³⁰ Because of this, it is unlikely that “breach” poses any unique legal barrier to LFG odors lawsuits in West Virginia.

When it comes to damages, exposure to LFG odors must constitute a compensable harm. If seeking property damages, a potential barrier may be the “economic loss rule,” which West Virginia recognizes in some capacity.²³¹ In West Virginia, a plaintiff sustaining a “purely economic loss . . . caused by another’s negligence may not recover damages in the absence of physical harm to that individual’s person *or property*, a contractual relationship with the alleged tortfeasor, or some other special relationship.”²³² Because an LFG plaintiff is likely able to plead property damage, rather than “purely economic loss,” West Virginia’s economic loss rule is unlikely to prove to be a burden.

As discussed in Part II.C., in some states, emotional distress and mental anguish are not compensable injuries. What constitutes a compensable injury is especially important in LFG cases, where an odor may not constitute bodily harm.²³³ However, West Virginia law has been clear: “[a]n individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious.”²³⁴ The court has more recently emphasized that negligent infliction of emotional distress should be compensable “only in limited circumstances,” and must be based from the

²²⁹ McGraw v. St. Joseph’s Hosp., 488 S.E.2d 389, 394 (W. Va. 1997) (citing Roberts v. Gale, 139 S.E.2d 272 (W. Va. 1964)).

²³⁰ W. VA. CODE ANN. § 55-7B-7 (West 2021).

²³¹ The economic loss rule is a doctrine that precludes recovery of purely economic losses when there is no bodily injury; the definition of what constitutes “pure economic loss” varies from state to state. Syl. Pt. 9, Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000).

²³² *Id.* (emphasis added).

²³³ It is unknown whether arguing exposure to odorous particles, specifically hydrogen sulfide, would satisfy the “bodily harm” requirement in WV. This is a quite specific legal tactic, which worked in Pennsylvania, but which may or may not be successful in WV.

²³⁴ Ricottilli v. Summersville Mem’l Hosp., 425 S.E.2d 629 (W. Va. 1992). Although the original holding was limited to the “dead body exception,” it was expanded to all types of negligent infliction of emotional distress in *Marlin v. Bill Rich Constr., Inc.*, 482 S.E.2d 620 (W. Va. 1996).

perspective of a “reasonable person, normally constituted.”²³⁵ And generally, these suits are in the context of a wrongful death or witnessing the death of a close family member.²³⁶ Because of the court’s recent articulations, it may be difficult to allege only emotional distress under an LFG odor suit. Lastly, unlike New York, there is little or no support for the proposition that West Virginia recognizes recovery for stigma damages.²³⁷

In conclusion, an LFG odor suit may have potential avenues for limited recovery under the theory of negligence. First, it appears that West Virginia’s articulation of the duty requirement, which includes a form of affirmative act duty along with a duty to adjacent properties, would not preclude an LFG odor suit. Second, breach remains a largely factual inquiry, and there are no steadfast legal barriers to an LFG suit. However, LFG suits would face the most difficulty with proving a compensable injury. Although the economic loss rule would not preclude recovery for property damage caused by LFG, there is no case law to support the contention that inhaling LFG fumes constitutes bodily harm or that the emotional stress caused by inhaling the odors constitutes serious emotional harm. For these reasons, a negligence LFG suit may be limited to recovery for property damages only.

D. Litigation Strategy

West Virginia common law doctrines are not preclusive to LFG class action claims, and a claim, with the requisite facts, could be successful. However, the law still contains notable hurdles and ambiguities; with no existing commentary on a litigation strategy for such a suit, this Note seeks to fill that void.

West Virginia’s articulation of trespass likely is the most doctrinally successful avenue to pursue an LFG odor suit. This is because it does not appear that West Virginia has a “tangible” or “physical” entry bar, and the court has not precluded past cases involving imperceptible particulates. This makes it a must-have for a plaintiff in an LFG odor lawsuit.

For the sake of security in the pleadings and potentially larger damage awards, nuisance should also be pleaded. Although it would be considered “the most applicable claim,” nuisance would face the most legal barriers for LFG odor suits, in the form of both fully articulated law and legal ambiguities. West Virginia’s nuisance doctrine contains consequential ambiguities regarding a numerosity limitation and how to plead a specialized injury for a public nuisance, but the most recent case law suggests these barriers have been abolished. Other established barriers to a nuisance suit include (1) a balancing

²³⁵ Mays v. Marshall Univ. Bd. of Governors, No. 14-0788, 2015 WL 6181508, at *3 (W. Va. Oct. 20, 2015).

²³⁶ See, e.g., Heldreth v. Marrs, 425 S.E.2d 157 (W. Va. 1992).

²³⁷ See *supra* notes 135–138 and accompanying text.

test, (2) a non-tolled statute of limitations period for a permanent nuisance, (3) a reduced potential damage amount for temporary nuisances, and (4) statutory immunity for municipalities and counties. The balancing test and statutory immunity are going to be fact-driven issues and, therefore, difficult to anticipate for a strategic purpose.

With these other obstacles in mind, along with other West Virginia odor nuisance lawsuits,²³⁸ the strongest approach would likely be to treat noxious LFG as a private temporary nuisance. For a permanent nuisance to surpass the statute of limitations, the plaintiff would need to argue that the landfill was improperly constructed within the past two years, which may be difficult to prove with many of West Virginia's landfills being over two years old.²³⁹ An additional strength of a temporary nuisance is that the cause of action renews if the nuisance fails to cease. The downside to a temporary nuisance is, of course, the reduced damage award. However, comparison with other states reveals that West Virginia's courts are doctrinally more forgiving than other courts in this regard. A downside to pleading a temporary nuisance is an increased difficulty satisfying the specialized injury requirement for a public nuisance, where the West Virginia Supreme Court looks for "permanent" harms. Although the use of the word "permanent" in that context may be different than in the context of a "permanent nuisance," the identity is hard to overlook. This leaves a private temporary nuisance as the most viable option.

Negligence is likely the doctrinally weakest ground to bring an LFG suit in West Virginia. Although it is the weakest doctrine, duty, breach, and damages do not seem completely elusive. West Virginia recognizes a form of affirmative act duty and a duty to adjacent properties. Breach remains largely a factual inquiry, and there are no steadfast requirements for an expert. Proving damages may be the most difficult with minimal support for LFG odors constituting a bodily injury or serious emotional distress. But West Virginia's economic loss rule should not be a barrier, allowing property damage to be recoverable. This likely will limit recovery to just property damage under this doctrine, but facts could theoretically exist that expand the damages award.

In totality, although West Virginia law certainly contains *some* legal barriers, these obstacles cannot likely account for the complete dearth of LFG lawsuits reaching the West Virginia appellate courts, nor the additional absence of class action claims. The lack of obstacles implies that there are other factors at work.

²³⁸ *E.g.*, Keene v. City of Huntington, 92 S.E. 119, 124 (W. Va. 1917); Bartlett v. Grasselli Chem. Co., 115 S.E. 451 (W. Va. 1922).

²³⁹ *See* WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-6 to -11.

IV. ADDITIONAL EXPLANATIONS FOR THE LACK OF CASES

While Parts II–III focused on legal barriers, this Part will briefly focus more directly on potential methodological and factual limitations that may explain West Virginia’s lack of legal action surrounding LFG odors.

First, this Note must confront a severe methodological limitation posed by legal research databases. These databases do not have West Virginia’s Circuit Court opinions readily available. With the Circuit Courts being the state’s trial court, LFG claims may have been brought, fought, and decided without an appeal. These opinions would be highly probative in identifying legal obstacles specifically relevant to LFG suits, but they remain unavailable. However, opinions from the federal district courts located in West Virginia were searched, and no LFG odor suits were found. Alternatively, LFG suits may also have been brought and then settled, resulting in no judicial opinion altogether.

Second, LFG class action suits can be high-risk and technical. The classes can be large, with other states seeing class sizes growing in excess of 10,000 people.²⁴⁰ Plaintiffs’ attorneys typically work on a contingency fee basis and front expert witnesses and other expenses. The scientific nature of LFG suits discussed in Part I poses serious risks for plaintiffs’ lawyers interested in litigating such a suit.

Third, although West Virginia has LFG odors,²⁴¹ the magnitude of West Virginia’s LFG odors may be lesser than states with LFG Suits. On the whole, West Virginia’s landfills are smaller than those found in neighboring states. For example, compare the landfill discussed in *Baptiste*, which accepted 1.1 million tons of waste annually,²⁴² with the whole state of West Virginia annually accepting 1.42 million tons of waste.²⁴³ The reduced amount of waste acceptance is to the credit of the West Virginia Solid Waste Management Act, which delegates landfill size control to county boards.²⁴⁴ These statutory “caps” have empowered local governments to limit landfill tonnage intake for eight landfills to 9,999 tons per month or less.²⁴⁵ While size does not prevent a landfill from producing noxious odors,²⁴⁶ it could reduce the frequency, magnitude, or area impacted by LFG odors.

²⁴⁰ Katrina Mendrey, *Legal Perspectives on Odor Impacts*, BIOCYCLE (Feb. 21, 2014), <https://www.biocycle.net/legal-perspectives-on-odor-impacts/>.

²⁴¹ See *supra* Part I.B.

²⁴² *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., L.L.C.*, 405 F. Supp. 3d 408, 446 (W.D.N.Y. 2019).

²⁴³ WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-2.

²⁴⁴ W. VA. CODE ANN. §§ 22C-4-1 to -40.

²⁴⁵ WEST VIRGINIA SOLID WASTE MANAGEMENT PLAN, *supra* note 9, at 4-5.

²⁴⁶ For example, the LCS landfill in Berkeley County along with the Greenbrier County landfill are limited to 9,999 tons per month or less but still are the subject of odor complaints.

Fourth, although the large majority of West Virginia landfills are located within two miles of a residential community,²⁴⁷ West Virginia's population is much more diffuse than other states. States discussed in Part II like New York, Pennsylvania, and Ohio all have higher population densities than West Virginia.²⁴⁸ All of these states also have a higher population than West Virginia.²⁴⁹ A smaller and more diffuse population may reduce the size of the harmed class while also reducing the chances of a potential plaintiff from approaching a law firm for legal representation. The nature of West Virginia's population has the added effect of reducing potential class recovery.

In conclusion, research and factual issues may exist that could elaborate on West Virginia's lack of LFG odor suits both at the appellate and trial court level. The concert of the scientific nature of LFG lawsuits, capped landfills, and a smaller state population are all factual realities that may dissuade or complicate attempts to litigate LFG suits. These realities, in concert with existing legal barriers and ambiguities, offer an explanation for the lack of LFG suits in West Virginia.

V. CONCLUSION

Throughout the United States, there has been an increase in class action claims based on theories of nuisance, trespass, and negligence stemming from LFG odors. Although West Virginia has documented LFG odors, no LFG claim has reached West Virginia's only appellate court. The ongoing litigation in other states has revealed common-law legal barriers that can preclude or complicate LFG odor suits. Some of these barriers exist in West Virginia. In other places, barriers are absent and replaced with ambiguity. However, neither the obstacles nor ambiguities justify the complete absence of LFG suits in the West Virginia appellate docket. The lack of appellate opinions may be explained by the risk associated with LFG suits, West Virginia's diffuse population, and, lastly, West Virginia's Solid Waste Management Act.

Of the obstacles and barriers that were identified, only one of the obstacles was statutory; the remaining obstacles were a product of common law. With these common-law obstacles, the power to overcome or even modify such obstacles is firmly in the hands of West Virginia's bar and bench. Perhaps the malleability of common law is why people all over the United States have looked to ancient common law doctrines. The actions of the litigants across the United States acknowledge that the core principles of common law "remain

²⁴⁷ See *supra* note 46.

²⁴⁸ Erin Duffin, *Population Density in the U.S. by Federal States Including the District of Columbia in 2020*, STATISTA (Dec. 22, 2020), <https://www.statista.com/statistics/183588/population-density-in-the-federal-states-of-the-us/>.

²⁴⁹ *State Population by Rank*, INFOPLEASE, <https://www.infoplease.com/us/states/state-population-by-rank> (last visited Sept. 6, 2021).

unchanged, yet their application is to be changed with the changing circumstances of the times.”²⁵⁰ And although some consider that change retrogression, others consider it the “progression of human opinion.”²⁵¹

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²⁵⁰ Walker v. Solomon (1890) 11 NSWLR 88, 99 (Austl.).

²⁵¹ *Id.*

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