
Case No. 19-1692

IN THE

United States Court of Appeals
FOR THE THIRD CIRCUIT

ROBIN BAPTISTE and DEXTER BAPTISTE,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

BETHLEHEM LANDFILL COMPANY,
A Delaware Corporation doing business as IESI PA Bethlehem Landfill,

Defendant-Appellee.

*On Appeal from the United States District Court for the
Eastern District of Pennsylvania*

BRIEF OF *AMICUS CURIAE*
NATIONAL WASTE & RECYCLING ASSOCIATION
IN SUPPORT OF DEFENDANT-APPELLEE

SAUL EWING ARNSTEIN & LEHR LLP

John F. Stoviak (PA 23471)
Cathleen M. Devlin (PA 73680)
Albert F. Moran (PA 318683)
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Phone: (215) 972-1095
John.Stoviak@saul.com

*Attorneys for Amicus Curiae
National Waste & Recycling Association*

In Support of Affirmance of the District Court's Dismissal of Plaintiffs-Appellants' Complaint

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amicus Curiae* National Waste & Recycling Association (the “Association”) hereby certifies that the Association has no parent corporation, and no publicly held company has 10% or greater ownership in the Association.

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT3

ARGUMENT4

 I. Municipal Waste Landfills in Pennsylvania Are Comprehensively Regulated by the Commonwealth Through PADEP.....4

 A. Background on PADEP and Key Statutes and Regulations.4

 B. The Commonwealth Provided PADEP with Comprehensive Enforcement Powers Under the SWMA.....8

 C. Pennsylvania’s Municipal Waste Management Regulations Address Landfill Odors.....9

 II. Beyond PADEP’s Regulatory Enforcement Role, Local Authorities Also Scrutinize Landfill Operations and Connect Area Property Owners to PADEP.....11

 III. Municipal Waste Landfills Are Technologically Sophisticated Operations that Employ Multiple Effective Odor Control Processes and Systems.....13

 IV. Tort Actions Are Not Needed to Redress Naturally Occurring Landfill Odors.16

 A. Private Nuisance Claims Exist to Remedy Disputes Between Small Numbers of Neighboring Private Landowners, Not Disputes Between Highly Regulated Operations and Members of Surrounding Communities at Large.17

 B. The Tort of Public Nuisance Should Not Apply to Situations Where PADEP Has Been Charged with Abating Nuisance Conditions and Effectively Does So.....18

 C. There Is No Legitimate Rationale for Imposing a Common-Law Negligence Duty on Landfill Operators to Mitigate Naturally Occurring Odors, Particularly When Regulators Aggressively Monitor Odors and Penalize Excessive Odors.20

1.	Plaintiffs’ Negligence Claim Is Predicated on an Alleged Duty that Is Not Recognized Under Pennsylvania Law.....	20
2.	This Court Should Not Take the Extraordinary Step of Recognizing a Novel Duty to Prevent Off-Site Migration of Naturally Occurring Odors.	23
a.	The <i>Althaus</i> Factors.....	24
b.	The Geographic Distance Between Landfills and Individuals in Local Communities Militates Against the Imposition of a Tort-Based Duty to Prevent Off-Site Migration of Odors.	25
c.	The Services Offered at Landfills Such as Bethlehem Landfill Are of Great Social Value....	26
d.	The Risk of the Harms Allegedly Incurred Is Slight and the Classes of Potential Plaintiffs Is Not Foreseeable.....	27
e.	The Consequences of Imposing Tort-Based Duties Would Be Drastic.	28
f.	Because PADEP Already Heavily Regulates Landfills in Pennsylvania, the Public Interest in a Tort-Based Liability Solution to Alleged Odor Impacts Is Low.	30
	CONCLUSION.....	31

TABLE OF AUTHORITIES

FEDERAL CASES

Baptiste v. Bethlehem Landfill Co.,
 No. CV 18-2691, 2019 WL 1219709 (E.D. Pa. Mar. 13, 2019)*passim*

In re Orfa Corp. of Phila.,
 129 B.R. 404 (Bankr. E.D. Pa. 1991)26

Indira v. Groff,
 No. 14-4050, 2015 WL 1637151 (E.D. Pa. Apr. 13, 2015)26

Russell v. Chesapeake Appalachia, L.L.C.,
 No. 4:14-cv-00148, 2014 WL 6634892 (M.D. Pa. Nov. 21, 2014)21

STATE CASES

Althaus ex rel. Althaus v. Cohen,
 756 A.2d 1166 (Pa. 2000) 23, 24, 25, 26, 27, 29, 30, 31

Berks Cty. v. Pa. Dep’t of Env’tl. Prot.,
 894 A.2d 183 (Pa. Commw. Ct. 2006)5

Cantwell v. Allegheny Cty.,
 483 A.2d 1350 (Pa. 1984)27

Centolanza v. Lehigh Valley Dairies, Inc.,
 658 A.2d 336 (Pa. 1995)22

Charlie v. Erie Ins. Exch.,
 100 A.3d 244 (Pa. Super. Ct. 2014)24

Gilbert v. Synagro Cent., LLC,
 90 A.3d 37 (Pa. Super. Ct. 2014)20, 21, 23, 31

R.W. v. Manzek,
 888 A.2d 740 (Pa. 2005)24

Thierfelder v. Wolfert,
 52 A.3d 1251 (Pa. 2012)26

Walters v. UPMC Presbyterian Shadyside,
 187 A.3d 214 (Pa. 2018)25, 29

FEDERAL RULES

Federal Rule of Appellate Procedure 29(a)(2)..... 1
Federal Rule of Civil Procedure 12(b)(6) 2

STATE STATUTES

35 P.S. § 6018.102 6, 18
35 P.S. § 6018.103 7
35 P.S. § 6018.104 6
35 P.S. § 6018.201 7
35 P.S. § 6018.601 8
35 P.S. § 6018.602 8, 9
35 P.S. § 6018.603 8, 9
35 P.S. § 6018.605 9
35 P.S. § 6018.606 9

STATE REGULATIONS

25 Pa. Code § 273.101-197 10
25 Pa. Code § 273.201 11
25 Pa. Code § 273.218(b) 10
25 Pa. Code § 273.311-313 11
25 Pa. Code § 285.101-219 11
25 Pa. Code § 285.115 11

OTHER AUTHORITIES

About DEP – Mission Statement, Pa. Dep’t of Env’tl. Prot. 4
Biosolids Program, Pa. Dep’t of Env’tl. Prot. 21

Disposal Sites & Hauling Companies, Cty. of Berks, Pa......12

Environmental Complaints, Pa. Dep’t of Env’tl. Prot.12

Forester Media, *MSW Management, A Brief History of Solid Waste Management in the US During the Last 50 Years – Part 2* (Sept. 7, 2016).....14

Important Topics, Bethlehem IESI Landfill, Lower Saucon Twp., Northampton Cty., Pa.12

Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 Admin. L. Rev. 647, 667 (2008).....29

Natural Odors, MSW Management 26, 29 (June 2019)15

Restatement (Second) Torts § 288(b)22

Bureau and Program Contacts – Bureau of Waste Management, Pa. Dep’t of Env’tl. Prot......4

INTEREST OF AMICUS CURIAE¹

Amicus Curiae, the National Waste & Recycling Association (the “Association”), is a trade association representing private sector waste and recycling companies in the United States, as well as manufacturers and service providers who do business with those companies. Its members operate in all 50 states and the District of Columbia. The Association provides leadership, education, research, advocacy, and safety expertise to promote North American waste and recycling industries, to serve as their voice, and to facilitate a climate in which members are able to prosper and provide safe, economically sustainable, and environmentally sound services.

The Association respectfully files this Brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). The parties to this appeal have consented to the filing of this Brief.

¹ No counsel for a party to this appeal authored this Brief in whole or in part, and no such counsel or party made a monetary contribution toward the preparation or submission of this Brief. Waste Management of Pennsylvania, Inc., a member of the Association, made a monetary contribution toward the preparation and submission of this Brief.

STATEMENT OF THE CASE

The underlying District Court litigation involves a failed attempt by Plaintiffs-Appellants to assert private nuisance, public nuisance, and negligence claims on behalf of a proposed class of thousands of individuals against Defendant-Appellee Bethlehem Landfill Company (“Bethlehem Landfill”), the operator of a municipal waste landfill located in Northampton County, Pennsylvania, for alleged odors emanating from the landfill. The underlying action is one of numerous similar odor-based proposed class actions purportedly sounding in tort that have been filed by counsel for Plaintiffs-Appellants (a plaintiffs’ law firm located in Detroit, Michigan) against landfill owners and operators -- many of whom are members of the Association -- across the nation.

Here, the District Court recognized that Plaintiffs-Appellants improperly sought to distort the well-established contours of the torts of private nuisance, public nuisance, and negligence beyond recognition, and dismissed all of Plaintiffs-Appellants’ claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Association supports Defendant-Appellee’s position that this Court should affirm the District Court’s dismissal of all of Plaintiffs-Appellants’ claims.

SUMMARY OF ARGUMENT

The Association respectfully offers this Brief to provide this Court with important background and context regarding: (1) the comprehensive regulatory framework in place for monitoring the operations of municipal waste landfills in Pennsylvania, and the role of the Pennsylvania Department of Environmental Protection (“PADEP”) in effectuating this framework; (2) the role that local municipalities play in ensuring well-run landfill operations; and (3) the sophisticated odor-minimization technologies typically employed by municipal waste landfills throughout Pennsylvania.

Because municipal waste landfills and their highly engineered operations already are comprehensively regulated, there is no legally significant harm that needs to be remedied through private putative mass-tort actions, which may result from naturally occurring odors. Further, allowing Plaintiffs-Appellants’ tort claims to proceed here would undermine the comprehensive regulatory systems already in place, and subject landfills to unfair and unpredictable liability exposure to unknowable scores of potential plaintiffs. Accordingly, the District Court’s dismissal of this action in its entirety should be affirmed.

ARGUMENT

I. Municipal Waste Landfills in Pennsylvania Are Comprehensively Regulated by the Commonwealth Through PADEP.

A. Background on PADEP and Key Statutes and Regulations.

The Commonwealth has charged PADEP to abate the precise type of public nuisance at issue in this lawsuit -- alleged odors emanating from a municipal waste landfill. The agency is responsible for “protect[ing] Pennsylvania’s air, land and water from pollution” and for “provid[ing] for the health and safety of its citizens through a cleaner environment.” *About DEP – Mission Statement*, Pa. Dep’t of Env’tl. Prot., <https://www.dep.pa.gov/About/Pages/default.aspx> (last visited Aug. 12, 2019). In fulfilling this charge, PADEP comprehensively regulates Defendant-Appellee’s landfill and all other municipal waste landfills in Pennsylvania. PADEP’s Bureau of Waste Management serves multiple functions, including:

- Providing management oversight and support for the state through hazardous, municipal, and residual waste programs;
- Providing technical and administrative support to PADEP’s Solid Waste Advisory Committee; and
- Administering the host municipality inspector program.²

² See *Bureau and Program Contacts – Bureau of Waste Management*, Pa. Dep’t of Env’tl. Prot., <https://www.dep.pa.gov/Business/Land/Waste/Contacts/Pages/default.aspx> (last visited Aug. 12, 2019).

As the District Court observed, PADEP “is tasked with administering and enforcing the Solid Waste Management Act (“SWMA”) . . . which regulates landfills such as [Defendant-Appellee’s] landfill.” Dist. Ct. Op. at 7; *see also Berks Cty. v. Pa. Dep’t of Env’tl. Prot.*, 894 A.2d 183, 186 n.2 (Pa. Commw. Ct. 2006) (“[PA]DEP is the agency of the Commonwealth of Pennsylvania authorized to administer and enforce . . . the [SWMA] . . . and the rules and regulations promulgated thereunder, including the Municipal Waste Management Regulations, 25 Pa. Code Chapters 271-285.”).

The SWMA, as implemented by PADEP, serves several important purposes designed to benefit and protect the public. In this regard, the legislative finding and declaration of policy section of the SWMA states:

[It] is the purpose of this act to:

(1) establish and maintain a cooperative State and local program of planning and technical and financial assistance for ***comprehensive solid waste management***;

.

(3) ***require permits for the operation of municipal and residual waste processing and disposal systems . . .***;

(4) ***protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes***;

(5) ***provide a flexible and effective means to implement and enforce the provisions of this act***;

.
(10) implement Article I, section 27 of the Pennsylvania Constitution [providing, among other things, that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment”]; and

(11) *utilize, wherever feasible, the capabilities of private enterprise in accomplishing the desired objectives of an effective, comprehensive solid waste management program.*

35 P.S. § 6018.102 (emphases added). Thus, the SWMA explicitly contemplates comprehensive regulatory oversight that is designed to prevent, or redress, any public health harms arising from landfill operations.

The SWMA provides, in relevant part, that PADEP *shall* have the power, and its duty *shall* be, to:

(1) administer the solid waste management program, including resource recovery and utilization, pursuant to the provisions of this act;

.
(6) regulate the storage, collection, transportation, processing, treatment and disposal of solid waste;

(7) issue permits, licenses and orders, and specify the terms and conditions thereof, and conduct inspections and abate public nuisances to implement the purposes and provisions of this act and the rules, regulations and standards adopted pursuant to this act.

35 P.S. § 6018.104.

Further, the “Municipal Waste” section of the SWMA mandates that any person or municipality who stores, collects, transports, processes, or disposes of municipal waste³ must do so pursuant to the rules and regulations of PADEP and must first obtain a permit for such facility from PADEP. *See* 35 P.S. § 6018.201. Consequently, unlike private property owners or the plaintiffs’ bar, PADEP can and *does ensure* that municipal waste landfills operate in a reasonably prudent manner on a cohesive, *statewide basis* in the Commonwealth of Pennsylvania.

Finally, the SWMA provides that:

Any violation of any provision of this act, any rule or regulation of the department, any order of the department, or any term or condition of any permit, ***shall constitute a public nuisance***. Any person or municipality committing such a violation shall be liable [to PADEP] for the costs of abatement of any pollution and any public nuisance caused by such violation. The [Pennsylvania] Environmental Hearing Board and any court of competent jurisdiction is hereby given jurisdiction over actions to recover the costs of such abatement.

³ “Municipal waste” is defined as “[a]ny garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities and any sludge not meeting the definition of residual or hazardous waste hereunder from a municipal, commercial or institutional water supply treatment plant, waste water treatment plant, or air pollution control facility.” 35 P.S. § 6018.103.

35 P.S. § 6018.601 (emphasis added). Accordingly, PADEP is charged with remedying potential nuisance conditions that affect the public arising from landfill operations.

B. The Commonwealth Provided PADEP with Comprehensive Enforcement Powers Under the SWMA.

The SWMA empowers PADEP with broad enforcement authority. Pursuant to this authority, landfill operators must comply with PADEP's enforcement efforts. *See* 35 P.S. §§ 6018.602, 6018.603. For example, PADEP may revoke or suspend a landfill operator's permit if the landfill is violating the SWMA or any implementing regulation. *Id.* § 6018.602(a) ("The [PADEP] may issue orders to such persons and municipalities as it deems necessary to aid in the enforcement of the provisions of [the SWMA],” including, but not limited to, “orders modifying, suspending or revoking permits and orders requiring persons and municipalities to cease unlawful activities or operations of a solid waste facility which in the course of its operation is in violation of any provision of this act, any rule or regulation of the department or any terms and conditions of a permit issued under this act.”).

Additionally, PADEP can order a landfill operator to change its disposal practices in order to prevent pollution or abate a public nuisance. *Id.* § 6018.602(b) (“If . . . [PADEP] finds that the storage, collection, transportation, processing, treatment, beneficial use or disposal of solid waste is causing pollution of the air, water, land or other natural resources of the Commonwealth or is

creating a public nuisance, the [PADEP] may order the person or the municipality to alter its storage, collection, transportation, processing, treatment, beneficial use or disposal systems to provide such storage, collection, transportation, processing, treatment, beneficial use or disposal systems as will prevent pollution and public nuisances.”).

In conjunction with PADEP’s broad enforcement powers under Section 6018.602, the SWMA provides:

It *shall be the duty* of any person and municipality to proceed diligently to comply with any order issued pursuant to section [35 P.S. § 6018.602]. If such person or municipality fails to proceed diligently, or fails to comply with the order within such time, if any, as may be specified, such person or municipality shall be guilty of contempt, and shall be punished by the court in an appropriate manner and for this purpose, application may be made by the department to the court.

Id. § 6018.603 (emphasis added). Breach of this duty -- which duty is imposed by regulation -- subjects a landfill operator to possible civil and criminal penalties. *See id.* §§ 6018.605-6018.606.

C. Pennsylvania’s Municipal Waste Management Regulations Address Landfill Odors.

Pennsylvania’s Municipal Waste Management Regulations (“MWMR”), 25 Pa. Code § 273.1 *et seq.*, which are promulgated pursuant to the SWMA and enforced by PADEP, expressly regulate the control of landfill odors by requiring a

landfill operator to implement a PADEP reviewed and approved plan for nuisance minimization and control:

An operator shall implement the plan approved under § 273.136 (relating to nuisance minimization and control plan) to minimize and control public nuisances from odors. If the Department determines during operation of the facility that the plan is inadequate to minimize or control public nuisances, the Department may modify the plan or require the operator to modify the plan and obtain Department approval.

25 Pa. Code § 273.218(b)(1). In order to ensure that landfills comply with this plan, the MWMR mandate that a municipal waste landfill operator “shall perform **regular, frequent** and **comprehensive** site inspections to evaluate the effectiveness of cover, capping, gas collection and destruction, waste acceptance and all other waste management practices in reducing the potential for offsite odor creation.” *Id.* § 273.218(b)(2) (emphases added).

The MWMR also set forth the application and operating requirements for operators of municipal waste landfills like Bethlehem Landfill. Authorization to operate a municipal waste landfill involves a detailed, two-phase process. *See* 25 Pa. Code §§ 273.101-197. Under the MWMR, an entity that operates a municipal waste landfill shall comply with: (a) the SWMA; (b) the MWMR; (c) other applicable regulations promulgated under the SWMA; (d) the plans and specifications in the PADEP-issued permit; (e) the terms and conditions of that

permit; (f) Pennsylvania’s environmental protection acts; and (g) orders issued by PADEP. *See* 25 Pa. Code § 273.201.

The MWMR also imposes extensive recordkeeping and reporting requirements. For example, the operator of a municipal waste landfill facility shall make and maintain daily, quarterly, and annual operational records. *See* 25 Pa. Code §§ 273.311-313. Similarly, the MWMR regulates the storage, collection and transportation of municipal waste, *see id.* §§ 285.101-219, all of which relate to nuisance minimization and control. *See id.* § 285.115 (“A person or municipality storing municipal waste shall . . . minimize and control conditions not otherwise prohibited by this subchapter that are harmful to the public health, public safety or the environment, or which create safety hazards, odors, dust, unsightliness or other public nuisances.”).

II. Beyond PADEP’s Regulatory Enforcement Role, Local Authorities Also Scrutinize Landfill Operations and Connect Area Property Owners to PADEP.

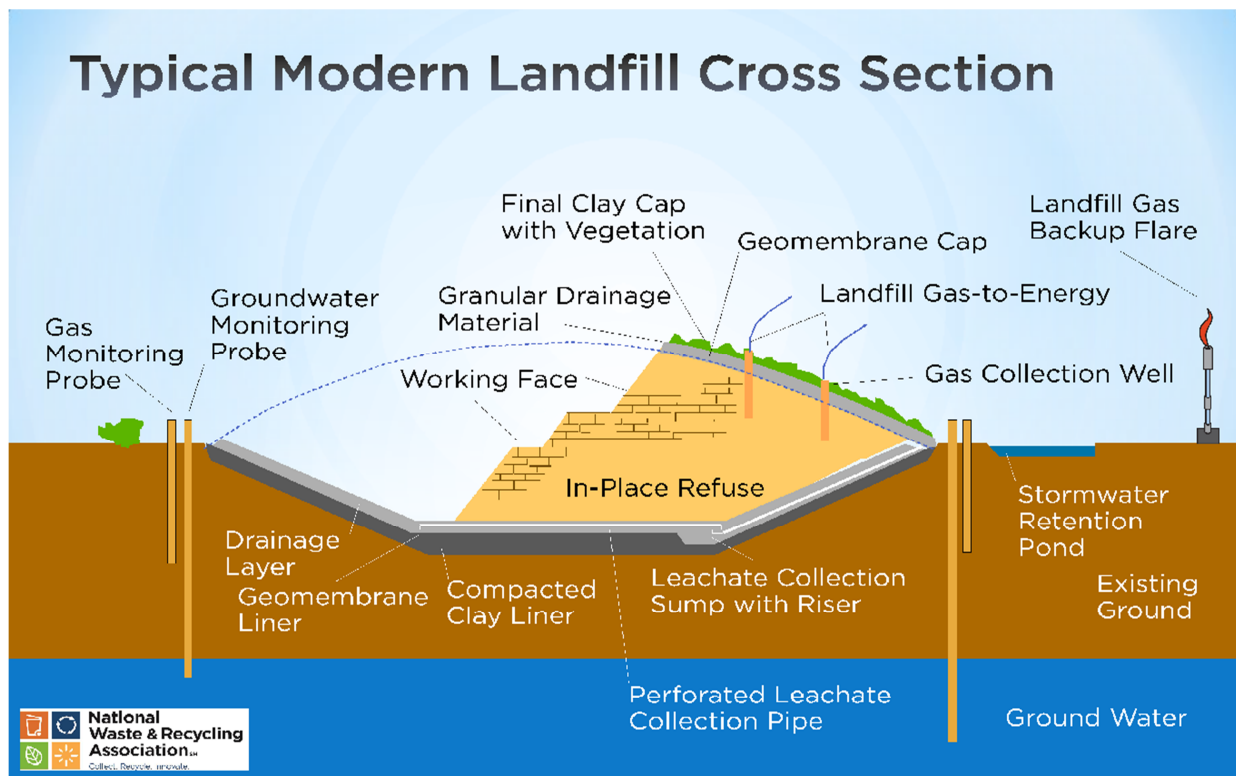
PADEP’s regulatory role is supplemented by the role of local authorities. Local authorities often take an active role in monitoring and interacting with municipal waste landfills situated in their vicinities. Here, by way of example, Lower Saucon Township maintains an active relationship with Bethlehem Landfill. Among other things, via its website, Lower Saucon Township “encourages its residents to report complaints regarding odors, noise, or other

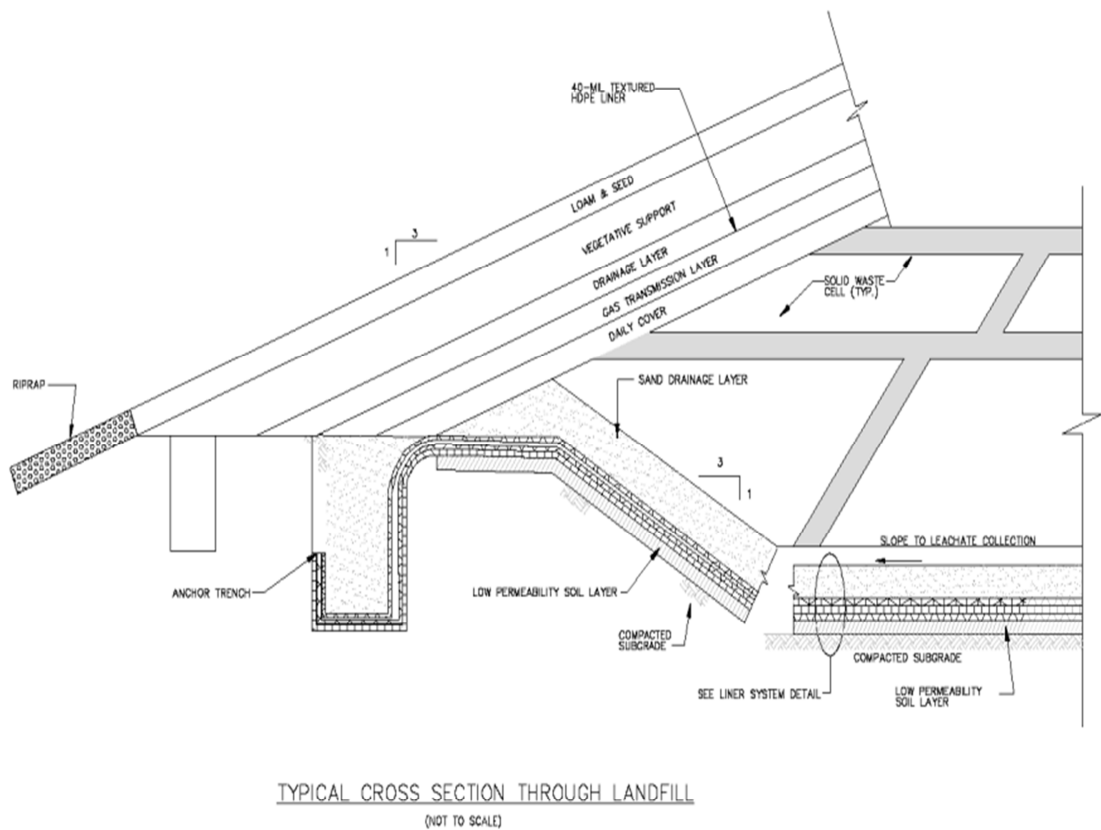
issues related to the IESI Bethlehem Landfill directly to [PADEP];” provides the phone number for PADEP’s toll-free hotline; and advises that PADEP “maintains a log of complaints received which are followed-up on by their staff.” *See Important Topics, Bethlehem IESI Landfill, Lower Saucon Twp., Northampton Cty., Pa.*, http://www.lowersaucontownship.org/important_topics.html (last visited Aug. 12, 2019). Lower Saucon Township also provides links to PADEP’s inspection reports, air quality reports, and monthly status reports regarding Bethlehem Landfill. *Id.* In addition, the Township maintains its own “Community Hotline” for township residents, connecting concerned citizens with landfill staff. *See id.* Other townships and localities throughout Pennsylvania similarly provide resources for their residents to voice any concerns they may have about landfill operations and to alert PADEP to such concerns.⁴

⁴ *See, e.g., Disposal Sites & Hauling Companies, Cty. of Berks, Pa.*, <http://www.co.berks.pa.us/Dept/SWA/Pages/DisposalSitesHaulingCompanies.aspx> (last visited Aug. 12, 2019) (providing link to PADEP “Environmental Complaint Form”); *see also Environmental Complaints, Pa. Dep’t of Env’tl. Prot.*, <https://www.dep.pa.gov/About/ReportanIncident/Pages/EnvironmentalComplaints.aspx> (last visited Aug. 12, 2019) (providing toll free number and contact for regional office for citizens to report environmental complaints). Some townships and localities in Pennsylvania even perform their own inspections of landfills. For example, Plainfield Township performs monthly inspections of Grand Central Sanitary Landfill in Pen Argyl, Pennsylvania.

III. Municipal Waste Landfills Are Technologically Sophisticated Operations that Employ Multiple Effective Odor Control Processes and Systems.

In addition to being highly regulated and scrutinized, today’s municipal waste landfills are technologically sophisticated operations that employ cutting-edge engineering practices to ensure the safe and environmentally friendly disposal and decomposition of waste. Graphics illustrating cross-sections and features of a typical modern municipal waste landfill like Bethlehem Landfill appear below:





As reflected in these cross-section graphics, modern municipal waste landfills have evolved dramatically beyond the primitive waste disposal methods often used in the mid-20th century.⁵ This evolution has led to the development of

⁵ See Forester Media, *MSW Management, A Brief History of Solid Waste Management in the US During the Last 50 Years – Part 2* (Sept. 7, 2016), <https://www.foresternetwork.com/msw-management/article/13025970/a-brief-history-of-solid-waste-mangement-in-the-us-during-the-last-50-years-part-2> (describing conditions of a landfill in 1949 and noting that (1) “[r]efuse was dropped and spread out over a large area to allow scavengers easy access”; (2) “[a]t the end of the day pigs were allowed on the spread-out refuse for overnight feeding”; and (3) “[t]he next day the pigs were herded off and the refuse was pushed to the edge of the fill for burning”) (footnote omitted).

several industry-standard practices that, among other things, are employed to minimize potential naturally occurring odors resulting from the decomposition of waste:

- First, the “working face” on any modern municipal waste landfill – where waste is actively disposed – is a mere fraction of the entire operation, which minimizes exposure of waste to the surrounding air. At the end of each working day, operators cover the working face with several inches of approved cover materials, such as soil. The working face is also covered throughout each day with an intermediate cover to maintain quality cover integrity throughout operation.
- Second, portable odor misters are typically deployed around the working face, particularly in the directions that track the prevailing winds on a given day, for odor-control purposes.⁶
- Third, beneath the working face, multiple liners prevent the spread of leachate (liquid) into the soil and groundwater, and landfill gas (which is a byproduct of natural decomposition) and leachate collection systems ensure that gas and leachate are collected, monitored, and safely and appropriately managed in accordance with regulatory standards.
- Fourth, after a working face is exhausted, it is temporarily capped using a geomembrane cover, and

⁶ See Carol Brzozowski, *Control and Mitigate: Evaluating and Implementing Technology and Processes to Improve Our Ability to Control and Mitigate the Natural Odors*, MSW Management 26, 29 (June 2019), http://digital.mswmanagement.com/publication/?i=595233&p=29&pp=1&view=issueViewer#%22page%22:%2229%22,%22issue_id%22:595233,%22numpages%22:%221%22 (noting that “liquid misting systems and vapor-based systems” are used in conjunction with other technologies to control fugitive odors).

then permanently capped with synthetic and clay covers to trap odors. Vegetation is then planted on top of a permanent cap to create a natural and aesthetically pleasing appearance for nearby communities.

Despite utilization of these technologies in municipal waste landfill operations, waste decomposition results in some naturally occurring odors. However, through technological innovations -- and in response to regulatory obligations -- landfills take great care to minimize these odors. While fugitive odors may occur from time to time, PADEP's enforcement arm stands ready, willing, and able to intervene to address such issues, as it did here with respect to Bethlehem Landfill when it deemed appropriate.

IV. Tort Actions Are Not Needed to Redress Naturally Occurring Landfill Odors.

Because municipal waste landfills in Pennsylvania are subject to a comprehensive regulatory framework with active PADEP oversight and enforcement, there is no public policy need to extend the long-standing limitations on tort actions to allow private parties to redress landfill odors. Landfill operators are incentivized to comply with the statewide regulatory programs and directives or else face the risks of monetary fines, enforcement actions, and permit renewal challenges. Further, municipal waste landfills are encouraged to be good corporate citizens vis-à-vis their surrounding communities, given that the governing bodies of these local communities often supplement PADEP's oversight. As a result of

this multifaceted regulatory framework, municipal waste landfills have developed sophisticated technologies to ensure safe operations and minimize odors and other potential disturbances arising from day-to-day operations. In light of all of the foregoing mechanisms in place to regulate municipal waste landfill operations, the tort claims alleged by Plaintiffs-Appellants are simply not necessary to remedy naturally occurring landfill odors, and only serve to undermine already-existing regulatory structures.

A. Private Nuisance Claims Exist to Remedy Disputes Between Small Numbers of Neighboring Private Landowners, Not Disputes Between Highly Regulated Operations and Members of Surrounding Communities at Large.

As Defendant-Appellee explains in its Brief, “private nuisance actions are fundamentally for neighbors, not residents of entire regions.” Defendant-Appellee Br. at 9. This principle is reflected throughout decades of private nuisance case law in the Commonwealth of Pennsylvania. *See id.* at 16. Importantly, this principle is well-justified from a policy perspective. The tort of private nuisance exists to remedy property-based harms where one or a few neighbors have *no other recourse* against a harm caused by a proximately located property owner. The tort was not designed for and should not be expanded to remedy conditions that affect the public at large, let alone conditions that were allegedly caused by a property owner like a municipal waste landfill that is already subject to intense regulatory scrutiny.

Yet this is precisely the factual scenario under which Plaintiffs-Appellants purport to bring their private nuisance claims. These claims are, at their very core, designed to address alleged odors that affect the public at large. This reality moves the legal basis for such claims, if any, out of the realm of private nuisance and into the potential realm of public nuisance. Accordingly, this Court should affirm the District Court's dismissal of Plaintiffs-Appellants' private nuisance claims.

B. The Tort of Public Nuisance Should Not Apply to Situations Where PADEP Has Been Charged with Abating Nuisance Conditions and Effectively Does So.

As detailed above, PADEP comprehensively regulates solid waste disposal in Pennsylvania and protects “the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes.” 35 P.S. § 6018.102. PADEP is empowered to, and often does, bring enforcement actions when public nuisance conditions arise from landfill operations. Indeed, Plaintiffs-Appellants concede in their Complaint that PADEP has brought such enforcement actions against Bethlehem Landfill. *See* Complaint (Dist. Ct. Dkt. No. 1) ¶ 16. Thus, under the circumstances presented here, the regulatory system that the Pennsylvania General Assembly implemented is working exactly as intended.

In attempting to assert their public nuisance claims, Plaintiffs-Appellants seek to fill a nonexistent void in the legal system. PADEP actively works to

prevent public nuisance conditions, and Plaintiffs-Appellants make no allegation that PADEP has been derelict in its oversight and enforcement duties. Lower Saucon Township has additionally taken an active role in ensuring that its residents are well aware of PADEP's resources. Plaintiffs-Appellants are free to request that PADEP investigate any alleged odors emanating from Bethlehem Landfill, and PADEP is closely familiar with the design, operations, and odor minimization controls at this facility through its pervasive regulatory oversight. Thus, as members of the public residing near the landfill, Plaintiffs-Appellants have a powerful tool to remedy any alleged harms that may arise from landfill odors. If they suffer special harm above and beyond the public at large, the tort of public nuisance remains available for them to vindicate their legal rights. But Plaintiffs-Appellants have not alleged, and have no basis to allege, a special harm.

This Court should also affirm the District Court's dismissal of Plaintiffs-Appellants' public nuisance claims because allowing these claims to proceed would undermine PADEP's authority and weaken the regulatory framework contemplated by the SWMA. *The value of a regulatory regime lies, in large measure, in its consistent application.* Municipal waste landfills across the Commonwealth of Pennsylvania are subject to the same standards, and if PADEP opts to change those standards, it can balance input from all stakeholders, including landfills and residents who live near landfills. If, however, plaintiffs'

attorneys, like counsel for Plaintiffs-Appellants here, are allowed to wield the sword of the tort of public nuisance on a piecemeal basis to attack landfill operations, inconsistent standards will be set by different courts across the state. This is particularly true here because the determination of a public nuisance is based on a reasonableness analysis. Such a result is bad policy and counterproductive for the Commonwealth, for municipal waste landfills, and, ultimately, for the communities surrounding these landfills, particularly given that PADEP and the Pennsylvania Environmental Hearing Board are best equipped to address disputes regarding landfill operations and the control of odors.

C. There Is No Legitimate Rationale for Imposing a Common-Law Negligence Duty on Landfill Operators to Mitigate Naturally Occurring Odors, Particularly When Regulators Aggressively Monitor Odors and Penalize Excessive Odors.

1. Plaintiffs' Negligence Claim Is Predicated on an Alleged Duty that Is Not Recognized Under Pennsylvania Law.

The Association agrees with the District Court's holding and Defendant-Appellee's position that the Superior Court of Pennsylvania has dispositively held that no duty exists under Pennsylvania law "that requires a property owner to use his or her property in such a manner that it protects neighboring landowners from offensive odors or other nuisance conditions." *See Gilbert v. Synagro Cent., LLC*, 90 A.3d 37, 51 (Pa. Super. Ct. 2014), *aff'd in part, rev'd in part on other grounds*,

131 A.3d 1 (Pa. 2015).⁷ *Gilbert*'s holding controls here and compels dismissal of Plaintiffs-Appellants' negligence claims. Additionally, the Association submits that *Gilbert* rests on sound footing from a policy perspective, such that this Court should not impose freestanding tort duties of care on pervasively regulated and closely scrutinized municipal waste landfill operators like Bethlehem Landfill.

Gilbert involved alleged odors from a biosolids operation, another activity that is heavily regulated by PADEP.⁸ The court in that case refused to recognize a common law duty to prevent naturally occurring odors from the defendants' biosolids operations. *Gilbert*, 90 A.3d at 51.

The regulatory protections in place to mitigate odor-based harms is similarly present here. Importantly, federal and state courts interpreting Pennsylvania law have repeatedly rejected the notion that the SWMA imposes a common law duty. *See Russell v. Chesapeake Appalachia, L.L.C.*, No. 4:14-cv-00148, 2014 WL 6634892, at *3 (M.D. Pa. Nov. 21, 2014) (collecting cases and explaining that "it

⁷ Plaintiffs-Appellants may claim in their Reply Brief or at oral argument that *Gilbert* only stands for the proposition that the plaintiffs in that case had failed to *identify* an applicable duty. However, this failure demonstrates, or at the very least strongly suggests, that no such duty exists under Pennsylvania law. Moreover, if a generalized duty of care to operate and maintain one's property in such a manner that prevents the offsite migration of naturally occurring odors existed, *Gilbert* surely would have said so.

⁸ *See, e.g., Biosolids Program*, Pa. Dep't of Env'tl. Prot., <https://www.dep.pa.gov/Business/Water/CleanWater/WastewaterMgmt/Biosolids/Pages/default.aspx> (last visited Aug. 12, 2019).

is firmly established that violations of SWMA do not provide a basis for a negligence action because the statute is intended to benefit the public generally, not a particular group, as required by the negligence *per se* standard”); *Centolanza v. Lehigh Valley Dairies, Inc.*, 658 A.2d 336, 341 (Pa. 1995) (observing that the “SWMA was never meant to be used in legal actions instituted by private citizens”); *see also* Restatement (Second) Torts § 288(b) (stating that a “court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public”).

The rejection of such a duty is for good reason. PADEP, through its administration of the SWMA and the MWMR, already extensively regulates municipal waste landfills, including, as explained above, by exercising explicit statutory authority to redress nuisance conditions resulting from landfill operations. Local townships may impose additional regulatory parameters upon landfill operations or actively serve as a conduit between their residents and PADEP, as Lower Saucon Township has done with respect to Bethlehem Landfill.

If an amorphous common law duty of care is imposed upon landfills that relates to, but stands separate and apart from, their obligations under the existing state statutes and regulations, there is a meaningful risk that new and potentially

inconsistent duties will result creating new standards of care that fundamentally differ from PADEP's comprehensive program for regulating landfills. Essentially, the plaintiffs' bar would seek to have courts apply one set of standards that might vary by court and by case, while PADEP -- the regulator charged by the Pennsylvania General Assembly with landfill oversight and enforcement authority -- would be applying a different standard on a statewide basis. This result would undermine the uniformity that the already-existing comprehensive regulatory structure provides, and would seriously disrupt PADEP's regulatory authority.

For these reasons, application of *Gilbert's* holding to this case is well founded from a public policy perspective. This Court should therefore affirm the District Court's dismissal of Plaintiffs-Appellants' negligence claims.

2. This Court Should Not Take the Extraordinary Step of Recognizing a Novel Duty to Prevent Off-Site Migration of Naturally Occurring Odors.

Even if this Court were to conclude that *Gilbert* does not bar Plaintiffs-Appellants' negligence claims, those claims still fail for lack of a cognizable alleged duty. Specifically, the Supreme Court of Pennsylvania established a five-factor test for determining whether or not to recognize novel tort duties in *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000). Review of these five factors weigh heavily against the imposition of alleged duties of care here. There simply is no need to create new freestanding tort-based duties upon Defendant-Appellee

and other landfill operators, particularly when PADEP already robustly protects the communities that surround landfills, and society more broadly, from harms that may potentially arise from landfill operations.

a. *The Althaus Factors.*

Under Pennsylvania law, a plaintiff who attempts to bring a negligence claim bears the burden to show, among other things, “a duty or obligation recognized by law requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks.” *R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2005). Recognizing that common law tort duties flow from freestanding, and often amorphous, social obligations, Pennsylvania courts employ the flexible multi-factor test set forth in *Althaus* to determine whether a tort-based duty of care should be imposed in a given situation:

The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.

Althaus, 756 A.2d at 1169; *Manzek*, 888 A.2d at 746.⁹

⁹ The factors set forth in *Althaus* are non-exclusive, such that courts are not required to weigh them equally. *Charlie v. Erie Ins. Exch.*, 100 A.3d 244, 251-52 (Pa. Super. Ct. 2014). Further, the Supreme Court of Pennsylvania has recently cautioned against excessive “judicial policy-making,” instead

All five *Althaus* factors weigh heavily against the imposition of alleged duties of care regarding naturally occurring odors that would be owed by municipal waste landfill operators to society at large.

b. *The Geographic Distance Between Landfills and Individuals in Local Communities Militates Against the Imposition of a Tort-Based Duty to Prevent Off-Site Migration of Odors.*

The only potential relationship between landfills and individuals in nearby communities is that they are situated in the same broad geographic area. However, landfills are typically surrounded in large part by buffer areas comprised of forested areas, undeveloped land, and land under other commercial or industrial uses. *See, e.g.*, Defendant-Appellee’s Br. at 4-5 (aerial photograph of Bethlehem Landfill and surrounding area). Thus, while there is a superficial geographic relationship between landfills and individuals residing within any arbitrarily selected distance from them, that relationship is relatively remote, and, as described in Defendant-Appellee’s Brief, landfills and local property owners cannot reasonably be considered “neighbors.” This lack of a significant relationship counsels against the imposition of tort duties relating to municipal waste landfill operations.

favoring the exercise of “continuing restraint” regarding the imposition of new duties absent action by the Pennsylvania legislature. *See Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 223 (Pa. 2018).

c. *The Services Offered at Landfills Such as Bethlehem Landfill Are of Great Social Value.*

The waste disposal services offered at municipal waste landfills play a vital role in society and thus have very high social utility. *See, e.g., Indira v. Groff*, No. 14-4050, 2015 WL 1637151, at *5 n.11 (E.D. Pa. Apr. 13, 2015) (recognizing that “waste disposal and its impact on public health are a very important governmental interest” and are “subject to strict regulation”); *In re Orfa Corp. of Phila.*, 129 B.R. 404, 411 (Bankr. E.D. Pa. 1991) (observing that “[t]he issue of waste disposal is very important”). It is in recognition of this important social role that the operations of landfills in Pennsylvania are heavily regulated by PADEP. By conducting their operations within a strict regulatory regime, landfills are able to offer services that are vital to society while their owners and operators incur legal risks and exposures that are predictable and fair. The imposition of amorphous, unpredictable common law tort-based duties would significantly disrupt this balance.¹⁰

¹⁰ Plaintiffs-Appellants may argue in their Reply Brief or at oral argument that there is no social utility in the offsite migration of odors from landfills, which is the alleged activity at issue in this action. Under prevailing case law, however, this argument frames the relevant inquiry too narrowly and improperly focuses on the alleged harm rather than an assessment of the activity that gave rise to the alleged harm. *See Thierfelder v. Wolfert*, 52 A.3d 1251, 1275-76 (Pa. 2012) (rejecting argument that social utility of “sexual activity between a general practitioner and a patient” should guide *Althaus* analysis and instead engaging in broader analysis of the social value of medical treatment by general practitioners).

d. *The Risk of the Harms Allegedly Incurred Is Slight and the Classes of Potential Plaintiffs Is Not Foreseeable.*

A tort-based duty cannot lie unless a “foreseeable harm to a foreseeable class of plaintiffs” exists. *Cantwell v. Allegheny Cty.*, 483 A.2d 1350, 1354 (Pa. 1984) (quoting *Kane v. Hartford Accident & Indem. Co.*, 98 Cal. App. 3d 350, 357 (Cal. App. 1st Dist. 1979)). In analyzing such foreseeability, *Althaus* requires an analysis of “the nature of the risk imposed.” 756 A.2d at 1169. Here, given the strict regulatory framework applicable to Pennsylvania landfills, along with the sophisticated technologies used by landfills to mitigate off-site odors, the risk of the harms allegedly suffered by Plaintiffs-Appellants and the proposed class members -- specifically, experiencing unpleasant odors -- is relatively remote.

Thus, the duties that Plaintiffs-Appellants seek to impose are aimed at rectifying a relatively remote harm that already is effectively addressed by PADEP’s comprehensive regulatory program. Landfill operators have a strong interest in complying with the regulations set by PADEP because if they do not, they are subject to a range of penalties, from monetary fines to permit renewal challenges. The practical effect of this regulatory regime is that landfill operators are incentivized to comply with odor-minimization measures established by PADEP, which makes the risk of odor-based harms to private citizens, like Plaintiffs-Appellants and the proposed class members, remote at best.

Even beyond the remote nature of the risks, imposing common law tort-based duties to govern the operations of municipal waste landfills would expose their operators to an unforeseeable class of potential plaintiffs, encompassing not only the proposed class members, but an amorphous and ever-changing group of random individuals who could claim to be harmed by a breach of those duties. Whether persons residing within two, five, or ten miles of a landfill, or even farther away could cognizably claim to be owed duties is unknown. This lack of any limiting principle underscores precisely why the imposition of a novel duty of care for off-site odor migration is inappropriate. Further, whether or not tort liability may attach would depend upon whether a given person incurred damages proximately caused by a particular landfill operator's alleged actions. This alleged harm, given its fact-dependent nature, is anything but foreseeable, and the imposition of tort-based duties would place landfill operators in the untenable position of not knowing to whom they may owe duties.

e. *The Consequences of Imposing Tort-Based Duties Would Be Drastic.*

Imposing common law tort-based duties of care on landfill operators, so as to expand already-existing regulatory duties to a broad and undefined group of persons, would severely prejudice these entities. The social value of regulatory requirements, in large part, arises from the predictability they provide -- both to the public and the given regulated entity which will know precisely where it stands *vis-*

à-vis the state laws and regulations as implemented by PADEP. *See* Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 Admin. L. Rev. 647, 667 (2008) (“Predictability -- the ability of regulated parties to know what the law proscribes -- is another important component of the rule of law. . . . [A]n absence of predictability can significantly hamper regulated entities’ ability to order their affairs consistently with legal principles.” (internal citations omitted)).

Expanding duties that are rooted in a regulatory regime to society more broadly under a common law tort theory would effectively constitute a *de facto* expansion of -- and end-run around -- regulatory requirements, and would render the reasonable expectations of the regulated industries meaningless. Moreover, as described above, the imposition of common law tort duties on the operations of landfills would open the floodgates of tort liability in favor of the plaintiffs’ bar, particularly those seeking to represent an indeterminate group of persons who are allegedly injured from odors emanating from the landfill. The opening of these floodgates also would drastically increase the potential legal exposure for Pennsylvania-permitted landfill operators, even if they comply with all applicable state statutes and regulations. *See Walters*, 187 A.3d at 238 (observing that defendants’ “fear of runaway liability” warranted a more “detailed consideration” under the fourth *Althaus* factor).

f. *Because PADEP Already Heavily Regulates Landfills in Pennsylvania, the Public Interest in a Tort-Based Liability Solution to Alleged Odor Impacts Is Low.*

Finally, the public interest factor of *Althaus* weighs against the imposition of a tort-based duty of care here. As the District Court recognized, and as detailed above, landfills are pervasively regulated by PADEP. Plaintiffs-Appellants concede in their Complaint that PADEP has issued regulatory violations relating to Bethlehem Landfill's operations. *See* Complaint (Dist. Ct. Dkt. No. 1) ¶ 16; Dist. Ct. Op. at 4; *see also* Dist. Ct. Op. at 7.

Because landfills are comprehensively regulated by the State and operate within the parameters of a complex permitting and regulatory structure, tort-based liability for potential off-site odors should not be imposed. Protections from off-site odors fall within the purview of PADEP through enforcement of municipal waste landfill solid waste and air permits, which govern all aspects of landfill operations, including odor control. Unlike private property owners, PADEP is in a position to weigh the competing costs and benefits of stakeholders on a statewide basis, and has the technical expertise to ensure that landfills are operated in a reasonable manner. The public interest in the imposition of tort-based duties and potential liability relating to alleged breaches of the same is therefore low.

* * *

Based upon each of the *Althaus* factors, this Court should reject any proposal by Plaintiffs-Appellants to impose freestanding, extra-regulatory tort duties relating to the operations of municipal waste landfills. Accordingly, even if this Court does not find that *Gilbert* controls, the District Court's dismissal of Plaintiffs-Appellants' negligence claims should be affirmed.

CONCLUSION

For all of the foregoing reasons, the Association respectfully joins in Defendant-Appellee's request that this Court affirm the District Court's decision dismissing Plaintiffs-Appellants' private nuisance, public nuisance, and negligence claims with prejudice.

Respectfully submitted this 12th day of August, 2019.

By: s/ John F. Stoviak
John F. Stoviak, Esq.
Pennsylvania Bar No. 23741
Cathleen M. Devlin, Esq.
Pennsylvania Bar No. 73680
Albert F. Moran, Esq.
Pennsylvania Bar No. 318683
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
(215) 972-1095
John.Stoviak@saul.com
Cathleen.Devlin@saul.com
Albert.Moran@saul.com

*Attorneys for Amicus Curiae
National Waste & Recycling Association*

CERTIFICATE OF ADMISSION TO THE BAR

I hereby certify pursuant to Local Rule 28.3(d) that John F. Stoviak, Cathleen M. Devlin, and Albert F. Moran are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: August 12, 2019

s/ John F. Stoviak
John F. Stoviak (PA 23471)
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Phone: (215) 972-1095
Fax: (215) 972-1921
John.Stoviak@saul.com

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF
APPELLATE PROCEDURE 29(A)(4)(G) AND 32(G)(1) AND LOCAL RULE
OF APPELLATE PROCEDURE 31.1(C)**

I hereby certify the following:

This Brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,277 words, excluding the parts of the Brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and Local Rule of Appellate Procedure 29.1(b).

This Brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this Brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman font.

This Brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic Brief is identical to the text of the paper copies, and FortiClient Antivirus version 70.665 has been run on the file containing the electronic version of this Brief and no viruses have been detected.

Dated: August 12, 2019

s/ John F. Stoviak
John F. Stoviak (PA 23471)
Saul Ewing Arnstein & Lehr LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
Phone: (215) 972-1095
John.Stoviak@saul.com

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on August 12, 2019, the foregoing *Brief of Amicus Curiae National Waste & Recycling Association in Support of Defendant-Appellee* was filed and served electronically through the Court's CM/ECF system on the below-listed counsel of record.

Steven D. Liddle, Esquire
Nicholas A. Coulson, Esquire
LIDDLE & DUBIN, P.C.
975 East Jefferson Avenue
Detroit, MI 48207

Kevin S. Riechelson, Esquire
Philip J. Cohen, Esquire
KAMENSKY, COHEN & RIECHELSON
194 South Broad Street
Trenton, NJ 08608

Counsel for Plaintiffs-Appellants

James B. Slaughter, Esquire
Michael G. Murphy, Esquire
John H. Paul, Esquire
Eric L. Klein, Esquire
Roy D. Prather, III, Esquire
BEVERIDGE & DIAMOND, PC
1350 I St., NW, #700
Washington, DC 20005

Robert M. Donchez, Esquire
Robert Freedberg, Esquire
FLORIO PERRUCCI STEINHARDT &
CAPPELLI LLC
60 West Broad Street, Suite 102
Bethlehem, Pennsylvania 18018

Counsel for Defendant-Appellee

s/ John F. Stoviak _____
John F. Stoviak
Attorney for Amicus Curiae
National Waste & Recycling
Association