What Landfill Operators Should Know About Nuisance Law

Arlene Karidis | Jan 07, 2021

Landfill operators are standing at attention to avoid public and private nuisance lawsuits, mainly around odor; and these suits are on the rise as disposal sites expand and housing developments continue to pop up close to them. They can be tough cases to prove, as what constitutes a bad odor can be objective. And depending on how a case plays out, it can cost a waste management entity millions to hundreds of millions of dollars.

Waste360 spoke to a national odor pro who has served as an expert witness for landfills, and we spoke to two environmental defense attorneys who take on these cases. They advise on how to avoid litigation, but also share insight on how to prepare when legal action is inevitable.

While the language and specific conditions vary, an underlying principle of a nuisance case is that there must be an unreasonable interference with use and enjoyment of property. Then there are two types of nuisance claims: private nuisance, which is an interference involving private property; and public nuisance, which is interference with a right common to the general public, such as the right to clean water and fresh air.

The main defense for operators who receive complaints or face charges is to show they comply with their permits and that they act reasonably in controlling odors, says Phil Comella, a partner at law firm Freeborn & Peters, based out of Chicago. Permits carry weight in that they lay out operating plans to minimize the spread of odors, such as daily inspections of the working face, and also require documentation showing compliance.

Internal inspections are also key to an operator's defense against claims.

"So, increase the rigor of daily inspections and focus on documentation. Additionally, devote your attention to passing government inspections," Comella advises, pointing out that in building their cases plaintiffs' lawyers will look at inspection reports and violation notices. Operators will have one leg up if they can show that the government has stated they are meeting their permit requirements.

If a government inspection identifies a problem, respond immediately.

"The worst thing that could happen is that the same violation recurs. I have been involved in cases where there was a recurrence, and it was much harder to defend," Comella says.

Most nuisance cases are private, centered around the alleged impact on one party's own property, though one party could file a public nuisance claim, which could also require broader action that benefits the public at large.

Just this past July a judge ruled that a Pennsylvania couple could file both private and public nuisance claims against the Bethlehem Landfill Co. because they identified alleged harms that are unique to both themselves and their neighbors.

Comella has been involved in about five nuisance cases in the last two years and all involved landfill or waste transfer stations and all were private.

Only one went to trial before a jury, which was in Illinois state court, who ruled in favor of the landfill. Among other noteworthy cases were an arbitration against a transfer station in Alabama where the resident was awarded nominal damages. And Comella's firm represented a landfill in Michigan in a class action nuisance case that settled in mediation.

"We won the Illinois case because we showed we were in compliance with the permit and went beyond regulations and we had odor monitoring data.

"Conversely in Alabama, even though the severity of odors was minimal according to measurements, the broad Alabama nuisance standard still entitled plaintiffs to compensation," Comella says.

The takeaway, Comella advises, is to the degree that defendants can show the reasonableness of their actions supported by objective data, and the clearer the state law defining a nuisance, the better the chance to win.

Plaintiffs may seek three types of compensation: money in damages for interference with use and enjoyment of property; diminution (devaluation) of property value or rental costs; and or injunctive relief where the defendant must resolve the nuisance.

Complaints are generally handled outside of court by county or state agencies. If odor persists, they go to a hearing board, which is a separate entity, and if the odor still remains unresolved the case can move on to a county or state court. In instances where multiple states are affected, which would typically be due to wind that carries odors, the case could land in federal court.

In some cases, plaintiffs' attorneys have prompted complaints from the community where residents may not have actually smelled odors, according to landfill odor expert and SCS vice president Tom Rappolt.

"I've seen communities given apps to log in complaints and or asked to fill out written surveys. People not even downwind of the facility have complained. I've seen this in class action suits where responses come back almost identical from numerous people. In those cases, you know they were prompted because every person smells odor differently and science shows responses are not absolutely consistent across populations," he says.

Rappolt acknowledges odor complaints are a meaningful data point but stresses that they have limitations.

So, as Comella punctuated, he says if a complaint is driving the litigation, it's imperative to obtain objective, scientific measurements, such as with air samples that independent labs assess for specific chemicals like hydrogen sulfide (H2S).

Rappolt also recommends meteorological studies to measure winds at the time that odor occurs to confirm whether the landfill is the source.

Comella suggests collecting at least one year of data and recommends two tools: one that measures levels specifically of H2S in the atmosphere. The other is a scentometer, which measures the strength of various odors.

Not all local and state jurisdictions objectively define what constitutes an odor violation, but that is starting to change.

For example, a few years ago after a rendering facility in Minnesota initiated a lawsuit against South Saint Paul, alleging that an existing ordinance imposed regulatory burdens without prescribing objective odor verification standards, the city amended the ordinance. It now specifies odor levels for a verified complaint as well as the number of complaints in a given timeframe that would classify an operator as a "significant odor generator."

"I think this is likely where municipalities and counties are going. They are going to defining objective levels around what is considered a nuisance," says Thomas Braun, a partner at Stoel Rives, headquartered in Portland, Oreg.

The firm advises landfill operators to get involved in the process of drafting nuisance ordinances to ensure that there are quantifiable, objective standards for determining what constitutes an odor violation.

"In addition, we would advise our client to make sure that the measurement process makes sense. One of the things we would think about is where the measurements should be taken. At the facility may not make sense if the basis for a nuisance or odor claim stems from the interference with the use of one's property, which may be located across town," Braun says.

Rappolt believes that industry is settling too often—that in many cases companies should go to court and would win.

“Landfills settle as a risk management strategy [to incur less expense]. But I think probably 80 percent of the cases I have been involved with as an expert witness would have prevailed at trial based on data we collected. And probably none of the cases would have gone all the way through the court [system]; they would have settled.

“We do data collection before court hearings and have our ducks in a row to understand the problem, how severe it is, and if other sources are contributing to odors people sense,” Rappolt says.

The “ducks in a row” strategy is the general concept most odor experts push—whether there is an existing odor problem or not, whether litigation is pending or not. Having good, supporting data over time is the way to show compliance.