IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL ACTION

LUTHER BOND and DAVID FLYTE, on behalf of themselves and all others similarly situated, Plaintiffs	)	**No. C-48-CR-2019-02017**
v.	)	
WASTE MANAGEMENT OF PENNSYLVANIA, INC. and GRAND CENTRAL SANITARY LANDFILL, INC., Defendants	)	

OPINION OF THE COURT

This case is before the court on "Plaintiffs' Motion for Class Certification," filed on April 22, 2022. A hearing on the Motion was held on December 5, 2022, and December 6, 2022. Briefs have been submitted, and the Motion is ready for disposition.

FINDINGS OF FACT

The Parties

1. Plaintiff Luther Bond is an individual who resides at 312 East Main Street, Pen Argyl, Northampton County, Pennsylvania. (N.T., 12/5/2022, at 148:8-12.)

2. Bond has lived at that residence for fifteen years. (*Id.* at 148:13-14.)

3. Plaintiff David Flyte is an individual living at 136 Buss Street, Pen Argyl, Northampton County, Pennsylvania. (*Id.* at 108:11-15.)

4. Flyte has lived at that residence for sixty years. (*Id.* at 108:16-17.)

5. Defendant Waste Management of Pennsylvania, Inc. is a Pennsylvania Corporation and the parent company of Defendant Grand Central Sanitary Landfill, Inc. (Pls.' Second Am. Compl. ¶ 4; Defs' Answer ¶ 4.)

6. Defendant Grand Central Sanitary Landfill, Inc. is a Pennsylvania Corporation which owns and operates Grand Central Sanitary Landfill ("GCSL") in Plainfield Township, Northampton County, Pennsylvania. (Pls.' Second Am. Compl. ¶ 4-5; Defs.' Answer ¶¶ 4-5.)

GCSL and its Odor Control Measures

7. GCSL dates back to the early 1950's. (N.T., 12/5/2022, at 177:23-178:1.)

8. Scott Perin is an area director of disposal operation for Waste Management of Pennsylvania, Inc. and oversees GCSL as well as other landfills in the Greater Mid-Atlantic region. (*Id.* at 177:1-12.)

9. GCSL occupies roughly 160 acres but is filled in smaller, ten to fifteen-acre increments called cells. (*Id.* at 180:18-181:3.)

10. GCSL is a solid waste landfill which accepts normal household waste as well as construction debris and certain commercial industrial waste. (*Id.* at 188:3-189:1.)

11. GCSL has a permit for operation from the Pennsylvania Department of Environmental Protection ("DEP"). (*Id.* at 197:15-20.)

12. The process for obtaining such a permit is lengthy and includes such measures as:

a) obtaining approval from the local planning commission and board of supervisors;

b) obtaining local conditional use approval;

c) obtaining a solid waste permit from the Bureau of Solid Waste; and

d) an air and water quality permit.

(*Id.* at 197:23-199:5.)

13. GCSL pays Wind Gap Borough, Pen Argyl Borough, and Plainfield Township host and royalty fees for operating GCSL on or in proximity to those localities. (*Id.* at 199:14-201:11.)

14. GCSL takes a number of measures to mitigate and monitor the emission of odors from its property.

15. A cover, comprised of soil or weighted tarps, is spread over the newly-deposited waste on a daily basis. (*Id.* at 185:20-187:8.)

16. GCSL also applies an odor control chemical which encapsulates odorous particles. (*Id.* at 222:15-20.)

17. GCSL also utilizes flares to control the gasses emitted from the waste. (*Id.* at 223:9-14.)

18. The natural decomposition of trash will begin to generate gas after approximately six to eight months. (*Id.* at 191:9-16.)

19. Among these gasses is hydrogen sulfide. (*Id.* at 197:8-11.)

20. Hydrogen sulfide has an odor commonly described as that of a rotten egg smell. (*Id.* at 197:12-14; 251:8-13.)

21. GCSL has gas collection systems to collect and send the gas to the Green Knight Energy Center or to GCSL's own backup site. (*Id.* at 223:9-14.)

22. GCSL is required to maintain a nuisance control plan which, among other things, monitors other potential local sources of odor. (*Id.* at 223:15-224:1.)

23. These other sources of odor include but are not limited to:

a) the Wind Gap Wastewater Treatment Plant;

b) the GAF Premium Products Manufacturing facility, which is an asphalt shingle manufacturing facility;

c) Techno-Bloc, another manufacturing facility; and

d) farm fields.

(N.T., 12/6/2022, at 113:8-115:3; N.T., 12/5/2022, at 224:10-14.)

24. GCSL is subject to random inspections by the DEP, during which an inspector will conduct an onsite water and air quality inspection. (N.T., 12/5/2022, at 208:17-209:11.)

25. The DEP also conducts odor patrol surveys in which inspectors visit various areas surrounding GCSL and record observations of odor, its intensity, and its duration. (N.T., 12/6/2022, at 88:14-89:15.)

26. These inspections are conducted several times a month. (*Id.*)

27. Each inspection consists of between thirty and fifty observations. (*Id.* at 100:23-101:5.)

28. Odor inspections are labeled as strong, moderate, slight, or none. (*Id.* at 91:5-9.)

29. Of the more than 3,000 odor inspections completed between 2017 and 2019, the DEP reported 216 instances of odors. (*Id.* at 101:6-22.)

30. GCSL, as part of its quality assurance program, employs an individual to inspect the facility and the local community for the nuisance impact of GCSL. (N.T., 12/5/2022, at 210:15-21.)

31. GCSL maintains a 24/7 hotline for residents to call and record a complaint related to GCSL. (*Id.* at 212:7-16.)

32. Plainfield Township has also commissioned an engineering firm, Hanover Engineering, to conduct monthly odor surveys. (N.T., 12/6/2022, at at 103:15-20.)

33. Between 2017 and 2019, Hanover Engineering conducted thirty-six odor inspections. (*Id.* at 103:21-104:5.)

34. During nineteen percent of these odor inspections, Hanover Engineering discovered that an odor was present. (*Id.* at 104:10-15.)

Odors Alleged by Plaintiffs and the Circumstances Surrounding Them

35. David Flyte's residence is approximately 800 feet from GCSL. (N.T., 12/5/2022, at 120:11-13.)

36. Flyte smells "putrid garbage" odors from GCSL while at his property. (*Id.* at 113:17-114:3.)

37. In 2017, Flyte smelled the odors on at least a weekly basis. (*Id.* at 114:25-115:3.)

38. In 2018, the frequency of those odors became daily. (*Id.* at 115:17-116:9.)

39. In 2019, Flyte continued to smell the garbage odors. (*Id.* at 116:10-25.)

40. Because of the odors, Flyte was at times unable to work in his yard, open his windows in the summer, or host picnics for his family. (*Id.* at 117:4-119:3.)

41. Flyte made complaints to the DEP about the odors coming from GCSL. (*Id.* at 119:20-120:10.)

42. Luther Bond's home is roughly one mile from GCSL. (*Id.* at 153:11-14.)

43. Bond's home is a single dwelling with two stories and an attached garage which functions as his office. (*Id.* at 149:24-150:3.)

44. At times, Bond has smelled foul and putrid odors emanating from GCSL which he described as making him "want to almost vomit." (*Id.* at 150:7-17.)

45. Bond identifies the odors as coming from GCSL because they match the odor he observes when he has driven past GCSL for the last fifteen years. (*Id.* at 150:18-21.)

46. Bond testified that in 2017, the frequency and intensity of the odors began to increase. (*Id.* at 151:9-13.)

47. At that time, he was smelling the odors approximately two to three times per week. (*Id.* at 151:17-19.)

48. In 2018, the odors and their frequency were even more intense, reaching him several times a week. (*Id.* at 152:4-17.)

49. In 2019, the odors subsided to between one and three times per week. (*Id.* at 153:7-10.)

50. The odors prevented Bond from using his swimming pool, entertaining guests outside, and opening his windows. (*Id.* at 154:9-155:25.)

51. Bond reported the odors to the DEP. (*Id.* at 156:12-17.)

Notable Circumstances of GCSL from 2017-2019

52. In August of 2018, GCSL experienced abnormally heavy rains. (*Id.* at 216:24-217:10.)

53. Rainwater is a catalyst for landfill gases because it accelerates the decomposition of waste. (*Id.* at 217:10-14.)

54. In October of 2018, GCSL had hired a construction crew to expand its gas collection system by drilling wells into the landfill to install corrugated stone to collect gas. (*Id.* at 217:21-218:7.)

55. The abnormal rains also delayed the construction of these wells. (*Id.* at 217:21-24.)

56. During the construction, a piece of the drill rig broke and caused further delays as GCSL attempted to extract the equipment and resume the project. (*Id.* at 218:8-23.)

57. These issues resulted in the issuance of two Notices of Violation by the DEP. (*Id.* at 220:2-12.)

58. The construction was ultimately completed by January of 2019. (*Id.* at 226:10-12.)

Testimony of Expert Witness Sullivan

59. Ryan Sullivan has been a scientist meteorologist with Sullivan Environmental Consulting since 2004. (*Id.* at 39:9-20.)

60. Sullivan has obtained a bachelor's degree in business administration from James Madison University and a master's degree in

geoscience with a concentration in applied meteorology from Mississippi State. (*Id.* at 36:14-23, 37:22-38:2.)

61. Applied meteorology is the application of meteorology and physics to real world problems. (*Id.* at 38:9-12.)

62. The scope of Sullivan's work includes agricultural studies, establishing meteorological stations and air quality collections, air dispersion modeling, and noise, air, and odor dispersion. (*Id.* at 39:20-40:12.)

63. Sullivan prepared a report in connection with the instant litigation. (*See* Pls.' Ex. 1.)

64. As part of his report, Sullivan used AERMOD to assess the concentration of odorous particles in the area surrounding GCSL. (*Id.*)

65. AERMOD is a model typically used to assess the transport of chemicals or pollutants. (N.T., 12/5/2022, at 44:5-10.)

66. AERMOD is recommended by the EPA in matters of simple and complex range. (*Id.* at 44:11-17.)

67. The amount of a pollutant emitted, terrain data, and meteorological data, such as upper and surface air, are inputted into AERMOD. (*Id.* at 44:18-45:5.)

68. Using this data, AERMOD calculates the concentration or depositions of the pollutant at various distances from the source. (*Id.* at 45:6-11.)

69. Sullivan's AERMOD model used the input of two main data sets: hydrogen sulfide emissions and weather data taken from GCSL's weather station.

70. Specifically, Sullivan used the DEP's data on fugitive hydrogen sulfide emissions from 2017, 2018, and 2019. (*Id.* at 65:17-66:17.)

71. Regarding weather data, Sullivan incorporated meteorological data collected from the GCSL facility to construct three wind roses. (*Id.* at 55:12-57:17.)

72. Notably, Sullivan substituted the 2017 GCSL meteorological data for the 2018 data because he understood the 2018 data to be anomalous due to a broken wind vane. (*Id.* at 61:3-18.)

73. A wind rose is a graphic representation of wind direction, frequency and speed. (*Id.* at 55:7-11.)

74. Sullivan then used AERMOD to determine where hydrogen sulfide would exist in concentrations beyond .0005 parts per million. (Pls.' Ex. 1.)

75. Humans can usually smell hydrogen sulfide at concentrations of .0005 parts per million and above. (Pls.' Ex. 2.)

76. Sullivan's report also included a frequency analysis which modeled how many times a year the hydrogen sulfide concentration exceeded .0005 parts per million. (Pls.' Ex. 1.)

77. Sullivan also based his review on the DEP's emission inventory documents, the depositions of Flyte and Bond, complaint logs submitted to GCSL, and an onsite inspection. (*Id.* at 52:13-53:18.)

78. Section 7.0 of Sullivan's report depicts a black polygon encompassing Pen Argyl and surrounding areas impacted by GCSL's emissions. (Pls.' Ex. 1.)

79. This black polygon represents the proposed class area in the instant matter. (*Id.*)

Expert Testimony of Roberto Gasparini, PhD, CCM

80. Dr. Roberto Gasparini is a meteorologist for Spirit Environmental and does consulting in the field of air quality. (N.T., 12/6/2022, at 56:8-14.)

81. Dr. Gasparini has a bachelor's degree in meteorology as well as a master's degree and Ph.D. in atmospheric sciences, all from Texas A&M University. (*Id.* at 56:21-24; 58:12-24; Defs.' Ex. 1.)

82. In preparation for his testimony, Dr. Gasparini reviewed the inspection and odor patrol reports prepared by the DEP, the Hanover Engineering odor inspection reports, the GCSL complaint logs, the Title V permit, and Sullivan's report. (N.T., 12/6/2022, at 66:20-67:16, 116:2.)

83. Dr. Gasparini also conducted a site inspection of the GCSL and its surrounding area. (*Id.* at 68:5-20.)

84. Gasparini opined that, based on his investigation, there was no widespread or persistent odor in the area. (*Id.* at 88:3-10.)

85. Gasparini also opined that there is no persistent wind pattern in the area such that the emissions and odors from GCSL would have been highly variable. (*Id.* at 79:2-9.)

DISCUSSION

This case is before the court on Plaintiffs' Motion for Class Certification filed pursuant to Pennsylvania Rule of Civil Procedure 1707. That rule requires that the court hold a hearing to determine whether class certification is appropriate after considering "all relevant testimony, depositions, admissions and other evidence." Pa.R.Civ.P. 1707(c).

"The burden of proving that class certification is appropriate falls upon the party seeking certification." *Foust v. Se. Pennsylvania Transp. Auth.*, 756 A.2d 112, 118 (Pa. Commw. 2000). That burden is "akin to a preliminary hearing," *Debbs v. Chrysler Corp.*, 810 A.2d 137, 153 (Pa. Super. 2002), in which the proponent "must only present sufficient evidence to make out a *prima facie* case" that the five prerequisites for class certification are met. *Keppley v. Sch. Dist. of Twin Valley*, 866 A.2d 1165, 1171 (Pa. Commw. 2005).

Nevertheless, "[w]hile the class proponent's burden is not heavy, more than mere conjecture or conclusory allegations are required to enable a court to conclude that the class certification requirements are met." *Dunn v. Allegheny Cnty. Prop. Assessment Appeals and Review*, 794 A.2d 416, 423 (Pa. Commw. 2002). Further, where "there is an actual conflict on an essential

fact, the proponent bears the risk of non-persuasion." *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 16 (Pa. 2011) (quoting *Clark v. Pfizer Inc.*, 990 A.2d 17, 24 (Pa. Super. 2010)).

The court also analyzes the present matter upon the premise that, as a matter of policy, Pennsylvania law construes the rules for class certification "liberally and in favor of maintaining a class action." *Debbs*, 810 A.2d at 153 (quoting *Weinberg v. Sun Co.*, 740 A.2d 1152, 1162 (Pa. Super. 1999), *rev'd in part on other grounds*, 777 A.2d 442 (Pa. 2011)). The rationale behind this policy is that that these suits "permit the aggregation of small claims that would otherwise go unlitigated in individual actions." *Dunn*, 794 A.2d at 427. Further, class actions "promote efficiency and economy of litigation in adjudicating the claims of large groups of similarly situated plaintiffs." *In re Bridgeport Fire Litig.*, 5 A.3d 1250, 1255 (Pa. Super. 2010). To that end, the court must strike a balance between judicial economy and the uniformity of claims.

Rule 1702 outlines the five prerequisites which must be met for class certification as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.Civ.P. § 1702. The court addresses each in turn.

Numerosity

Rule 1702(1) requires that the prospective class be "so numerous that joinder of all members is impracticable." *Id.* Our Commonwealth Court has explained:

> There is no clear test of numerosity, but it is proper for a court to inquire whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should such potential plaintiffs sue individually. When a class is narrowly and precisely drawn and there are still so many potential class members that joinder is impracticable or impossible, the class is sufficiently delineated to meet the numerosity requirement.

Muscarella v. Com., 39 A.3d 459, 468 (Pa. Commw. 2012) (quoting *Foust v. Southeastern Pa. Transp. Auth.*, 756 A. 2d 112, 118 (Pa. Commw. 2000)). Thus, the proposed class must be, at once, so numerous that considerations of judicial economy counsel against individual lawsuits, yet identifiable to the extent that the proponent can "define the class with some precision and affords the court with sufficient indicia that more members exist than it would

be practicable to join." *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 456 (Pa. Super. 1982). Moreover, "[w]hether the class is sufficiently numerous is not dependent upon any arbitrary limit but upon the facts of each case." *Cook v. Highland Water & Sewer Auth.*, 530 A.2d 499, 503 (Pa. Commw. 1987).

In the instant case, the proposed class is a polygon based upon the work of Ryan Sullivan of Sullivan Environmental. Within that polygon are thousands of residents allegedly impacted by the emission of odors from GCSL. In generating that polygon, Sullivan used AERMOD, an air dispersion model which projects concentrations and depositions of a pollutant emitted from a source. Here, the pollutant at issue is hydrogen sulfide, an odorous gas typically associated with the smell of rotting garbage. An individual will begin to smell hydrogen sulfide when its air concentration reaches .0005 parts per million. The DEP collects data on GCSL's fugitive emissions of hydrogen sulfide. Fugitive emissions are emissions from the surface of GCSL that reach the atmosphere.

Separately, Sullivan prepared wind roses for the years 2017, 2018, and 2019 based upon data recorded at GCSL. A wind rose is a graphical representation of wind direction, frequency, and speed. Notably, Sullivan did not use GCSL's 2018 data, as GCSL's wind vane was broken for part of that year, rendering the data unreliable in his estimation. As part of his report,

Sullivan also conducted site inspections of GCSL and its weather station as well as the DEP emissions inventory documents.

Thus, the scope of the proposed class is generally the intersection of three data values: the volume of hydrogen sulfide emissions, as dispersed according to the wind roses, but only reaching as far as where the air concentrations remain above the odor threshold. The resulting polygon covers thousands of individuals within the Pen Argyl area.

Plainly, at a prospective class of 3,500, the court finds that the class is so numerous that considerations of judicial economy counsel against individual lawsuits. However, as noted, this inquiry makes up only half of the numerosity analysis, as Plaintiffs must still "define the class with some precision." *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184, 190 (Pa. Super. 2002) (quoting *Janicik*, 451 A.2d at 456.)

Here, Defendants challenge the sufficiency of Plaintiffs' evidence on two grounds. First, Defendants claim that Plaintiffs' proposed class rests on a flawed model. Specifically, Defendants argue that AERMOD cannot be used to create a prospective class because it is a model only capable of predicting odor concentration, not measuring actual impact. Further, Defendants argue that the prospective class is arbitrary because Sullivan erroneously substituted the 2017 meteorological data for the entire 2018 data because of a broken wind vane which, in reality, was only broken for two weeks. The court disagrees. Plaintiffs have not sought to certify an overly expansive and

arbitrarily-defined class. *See Cribb v. United Health Clubs Inc.*, 485 A.2d 1182, 1184 (Pa. Super. 1984) (finding numerosity could not be met by simply seeking to represent "all customers" of the defendant's business.); *see also Weismer v. Beech-Nut Nutrition Corp.*, 615 A.2d 428, 430-31 (Pa. Super. 1992) (finding a class consisting of "all children residing in the Commonwealth" who have suffered the complained of injury to be too broad to satisfy numerosity.) Rather, at this preliminary juncture, Sullivan's analysis using AERMOD produced sufficiently particular contours around a proposed class affected by an odorous concentration of hydrogen sulfide. Defendants' arguments regard the weight of the evidence to be decided by the ultimate finder of fact.

Second, Defendants argue that Plaintiffs have failed to show that a sufficient number of potential class members were actually affected by GCSL. This is a challenge to the odor's causation. Defendants' argument focuses on what Sullivan's model fails to consider, namely other potential sources of odor and the variable impact of other factors such as distance from the odor and wind speed/direction. However, the court finds this argument better suited for the commonality review. With regard to numerosity, the court is concerned with whether the class was drawn with at least some precision such that it may define the class scope. Here, the court finds the precision of the proposed class sufficient where it is not construed using arbitrary lines but

rather actual analysis, interpreted by a reliable model and data, and applying agency standards.

Commonality

Next, Rule 1702 requires that there exist "questions of law or fact common to the class." Pa.R.Civ.P. 1702(2). The commonality prerequisite is a consideration of judicial economy. That purpose is served where each claim is rooted in the same contention(s) of fact and law such that their resolution will substantially resolve all the class members' claims. The Commonwealth Court has explained:

> "The common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant could be proof as to all." *Allegheny County Housing Authority v. Berry*, 338 Pa. Super. 338, 487 A.2d 995, 997 (1985). Common questions will generally exist if the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent.

Buynak v. Dep't of Transp., 833 A.2d 1159, 1163 (Pa. Commw. 2003). Conversely, where "each question of disputed fact has a different origin, a different manner of proof and to which there are different defenses, [the court] cannot consider them to be common questions of fact within the meaning of Pa.R.C.P. 1702." *Allegheny*, 487 A.2d at 997. Moreover, the existence of individual questions is not itself fatal to commonality but is instead relevant to the later predominance analysis. *Id.*

The court now turns to the substantive elements of nuisance insofar as they are useful to determine what common matters of fact or law may be at issue. *See Debbs*, 810 A.2d at 154 (noting that "courts may need to examine the elements of the underlying cause of action in order to dispose of class issues properly.") In doing so, the court's primary inquiry is whether these issues of law or fact may be subject to common proof.

The Pennsylvania Superior Court has looked to the Restatement of Torts to provide the definition and elements of a private nuisance cause of action. *See Youst v. Keck's Food Serv., Inc.*, 94 A.3d 1057, 1072 (Pa. Super. 2014). The Second Restatement of Torts § 822 provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

RESTATEMENT (SECOND) OF TORTS § 822 (1979). The Restatement further clarifies that "[t]here is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Id.* § 821F.

Thus, to establish its claim, the class will need to prove that GCSL was the legal cause of odors invading the class members' properties and that the

odors interfered with the private use and enjoyment of those properties resulting in an objectively significant harm. The court then explores whether these questions can be shown by common proof. Foremost, Plaintiffs contend that significant harm can be shown by common proof and is demonstrated wherever hydrogen sulfide was concentrated beyond the government's odor detection threshold. Whether the threshold constitutes significant harm is a question for the jury but a common question nonetheless.

Next, the class will need to prove that GCSL's conduct caused odors to invade its properties to establish its claims. Here, Plaintiffs have made clear that the conduct in question is GCSL's odor mitigation practices during the time in question. This conduct is the same for each prospective class member and will turn on the common question of whether such practices were reasonable during the time in question.

Finally, the issue of legal or proximate cause is more difficult and Defendants argue that Plaintiffs have failed to prove GCSL is the legal cause of the odors. Specifically, Defendants argue that Plaintiffs have failed to rule out the local wastewater treatment plant, farm, or nearby dumpsters as a source of the odors. To be certain, the existence of intervening or superseding causes may preclude commonality. *See Weismer*, 615 A.2d at 431. Moreover, such causes are relevant to the merits of the underlying nuisance claim. However, the court returns to the preliminary nature of the proceeding.

Indeed, "if there is an actual conflict on an essential fact, the class proponent bears the risk of non-persuasion." *Janicik*, 451 A.2d at 456. However, the court does not interpret this risk to require that the court prematurely supplant the role of the ultimate fact finder and rule on causation. At this juncture, the court finds that Plaintiffs have sufficiently shown that causation is capable of common proof at trial.

Thus, the court finds that Plaintiffs have shown that nuisance is indeed subject to common proof. Here, there exists a common injury in the effect that GCSL's hydrogen sulfide emissions may have had on the proposed class. All of those injuries are themselves rooted in a common course of conduct or practice: GCSL's odor mitigation practices during the time in question. Put another way, all of the proposed class members' claims would rise or fall on three common legal questions: whether GCSL caused hydrogen sulfide to invade the class member's land; whether GCSL is the legal cause of that invasion; and whether that invasion resulted in a significant harm by interfering with the private use and enjoyment of the land. Therefore, the court finds the commonality prerequisite satisfied.

Typicality

Next, Rule 1702 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Pa.R.Civ.P. 1702(3). Typicality is a consideration of fairness. Its purpose "is to ensure that 'the class representative's overall position on the common

issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members.'" *Samuel-Bassett*, 34 A.3d at 30 (quoting *D'Amelio v. Blue Cross of Lehigh Valley*, 500 A.2d 1137, 1146 (Pa. Super. 1985)). "The existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class will not necessarily preclude a determination of typicality." *Muscarella*, 39 A.3d at 470. "The typicality requirement is closely akin to the requirements of commonality and the adequacy of representation." *Janicik*, 451 A.2d at 457. However, "while commonality tests the sufficiency of the class itself by focusing on the class claims, typicality tests the sufficiency of the named plaintiff by focusing on the relationship between the named plaintiff and the class as a whole." *Buynak*, 833 A.2d at 1164.

The court is convinced that Flyte and Bond's claims are sufficiently typical such that they will likely advance the interests of absent class members in advancing the interests of their own claims. Both Flyte and Bond live within the proposed class area and described the foul-smelling odor in a similar manner. Further, their claims are both rooted in the emission of such odors from GCSL and the odors' effect on the use and enjoyment of their land. In particular, they are rooted in the use of the outdoor area of their properties, the ability to entertain guests, or, at the very least, their ability to open their windows. In pursuing this litigation, Flyte and Bond will advance the interests of all proposed class members.

Again, Defendants argue that the possible existence of other odors and the variability of impact preclude a finding of typicality. Defendants further note the variability of the homes in size and amenities, etc. However, these individual circumstances are more relevant to the commonality and predominance requirement. For the reasons already outlined, the court finds the typicality prerequisite met.

Adequacy of Representation

The fourth prerequisite is that "the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709." Pa.R.Civ.P. 1702(4). Rule 1709 states:

> In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters
>
> > (1) whether the attorney for the representative parties will adequately represent the interests of the class,
> >
> > (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
> >
> > (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa.R.Civ.P. 1709. "Preliminarily, '[a] litigant must be a member of the class which he or she seeks to represent at the time the class is certified by the . . . court' in order to ensure due process to the absent class members and to satisfy requirements of standing." *Janicik*, 451 A.2d at 458 (quoting *Sosna v.*

Iowa, 419 U.S. 393, 403 (1975)). Adequacy of representation and lack of conflicts of interest are generally presumed unless evidence is offered to the contrary. *See id.* at 458-59; *see also Haft v. U.S. Steel Corp.*, 451 A.2d 445, 447-48 (Pa. Super. 1982).

Here, the Plaintiff's attorneys have represented to this court that they will be advancing the costs of the representation to the class. Further, given the performance and professionalism of Plaintiffs' attorneys thus far, the court is convinced, and Defendants offer no evidence to the contrary, that Plaintiffs' counsel will fairly and adequately represent the interests of the class.

Fair and Efficient

Finally, the fifth prerequisite is that "a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708." Pa.R.Civ.P. 1702(5). Rule 1708 provides, in relevant part, the following criteria for determination of this prerequisite:

> In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a), (b) and (c).
>
> (a) Where monetary recovery alone is sought, the court shall consider
>
> (1) whether common questions of law or fact predominate over any question affecting only individual members;
>
> (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

> (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
> >
> > (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
>
> (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
>
> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
>
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.Civ.P. 1702(a). "In determining fairness and efficiency, the court must balance the interests of the litigants, present and absent, and of the court system." *Janicik*, 451 A.2d at 461.

Many of these factors weigh in favor of maintaining a suit with little or no analysis. For example, the court finds, and Defendants do not contest, that Northampton County is the appropriate venue in which to litigate the

claims, as GCSL and the proposed class are entirely within the county. The court has not been made aware of any pending litigation concerning the same issues. Further, the court agrees with Plaintiffs that the attorney's fees and expense of proving this claim through expert testimony is likely to dissuade class members from bringing individual suits. Moreover, the sheer volume of claims makes inconsistent verdicts or adjudications a risk.

The crux of remaining factors in the rule is "whether common questions of law or fact predominate over any question affecting only individual members." Pa.R.Civ.P. 1708(a)(1).

> The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, [*Inc. v. Windsor*,] 521 U.S. [591], 623 [1997] . . . . Thus, a class consisting of members for whom most essential elements of its cause or causes of action may be proven through simultaneous class-wide evidence is better suited for class treatment than one consisting of individuals for whom resolution of such elements does not advance the interests of the entire class.

Samuel-Bassett, 34 A.3d at 23. The predominance requirement is closely related to though more demanding than the commonality prerequisite. *See id.* In analyzing the predominance requirement, the court finds it useful to separate common questions of law and fact from individual questions of law and fact.

By now, the common questions essential to the proposed class members' claims are familiar: whether GCSL proximately caused an odor to invade the class members' properties; whether that invasion interfered with

the private use and enjoyment of the land; and whether that interference constitutes a significant harm. The individual questions are also familiar. Through the testimony of real estate appraiser Charles T. Brigden, Defendants have singled out the extent of the interference on each property, the types of use and enjoyment interfered with, and the variability in the size and amenities of each home.

Generally, Defendants argue that the interests in use and enjoyment of each property is so broad that they must predominate any common issues. Per the Restatement, use and enjoyment comprehends a wide range of considerations including "the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land." RESTATEMENT (SECOND) OF TORTS § 821D cmt. b. For instance, gardeners and non-gardeners are impacted differently. The social property owner loses the enjoyment of hosting company while the loners do not. At its simplest, those closest to GCSL suffer a higher concentration of odors than those farthest. However, these variables speak to the extent of damage, which would not itself be dispositive as to predominance. *See Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635, 640 (Pa. Super. 1985) ("It is well-established that questions as to the amount of individual damages do not preclude a class action.")

Further, the court does not find that these individual issues predominate the common issues of fact and law addressed above. The bulk of the issues identified are all bound together by recurring themes, namely an inability to

use the outside portion of their properties and an inability to entertain guests. The variability of what lays in the backyard of each property owner is not so great as to outweigh the common questions at issue. Finally, Plaintiffs have offered a method by which the variability in damages can be calculated. Their proposal would have Sullivan model the frequency with which the hydrogen sulfide was concentrated beyond the applicable threshold in the class area from 2017 to 2019. Should the jury resolve the common issues of law and fact in favor of Plaintiffs, it would then need only assign an amount of damages on a per-hour basis. Plaintiffs' proposed method thus mitigates some of the variability of the individual questions at issue.

For all the reasons noted above, the court finds that Plaintiffs have satisfied Pennsylvania's class action prerequisites.

CONCLUSIONS OF LAW

1. The proposed class is so numerous as to make joinder of all its members impracticable.

2. There exist questions of fact and law common to the class which predominate over any questions affecting individual members.

3. Plaintiffs' claims are typical of the claims of the class.

4. Plaintiffs' counsel will fairly and adequately represent all members of the class.

5. A class action is a fair and efficient method for adjudicating this controversy.

WHEREFORE, the court enters the following:

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL ACTION

LUTHER BOND and DAVID FLYTE, on behalf of themselves and all others similarly situated,	)	**No. C-48-CR-2019-02017**
Plaintiffs	)	
v.	)	
WASTE MANAGEMENT OF PENNSYLVANIA, INC. and GRAND CENTRAL SANITARY LANDFILL, INC.,	)	
Defendants	)	

ORDER OF COURT

AND NOW, this 31st day of July, 2023, it is hereby **ORDERED** and **DECREED** that:

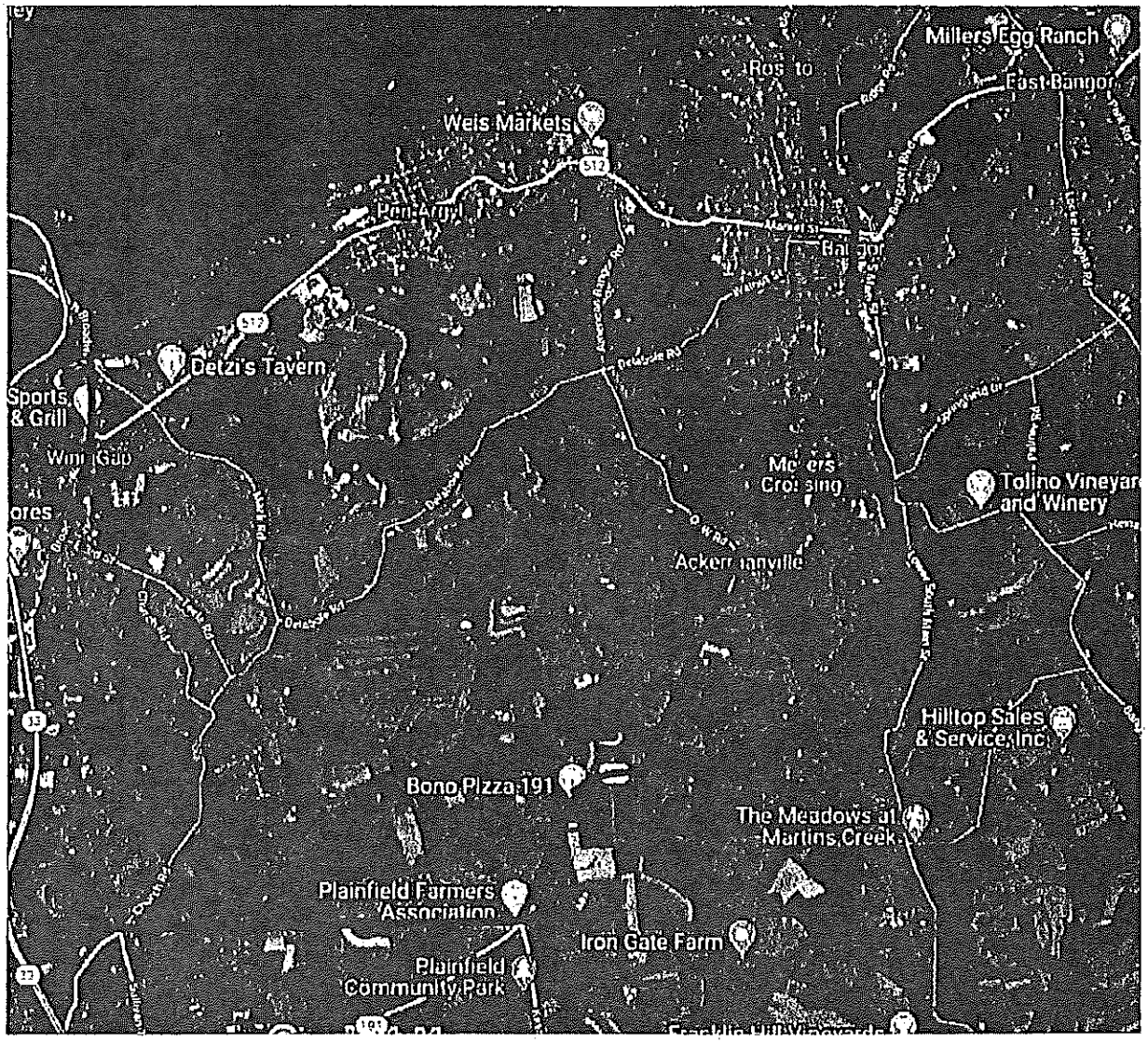
1. Plaintiffs' Motion for Class Certification, filed on April 22, 2022, is hereby **GRANTED**.

2. Luther Bond and David Flyte are designated as Class Representatives in the instant action.

3. Attorneys John E. Kotsatos, Jonathan Nace, and Mark L. Minotti shall serve as Class Counsel and represent the interests of the Class Representatives and all Class Members in this Matter.

4. The following Class is certified for the instant action: All individuals who owned or rented residential property between 2017 through 2019 within the class area identified below as proposed in Section 7.0 of Ryan Sullivan's report dated February 15, 2022, page 25:

7.0 CLASS AREA IMPACTED BY H_2S EMISSIONS



5. Pursuant to Pa.R.Civ.P. 1711(a), the court finds that every member of the class as defined herein is included, unless and until a written

election to be excluded from the class is received after notice is disseminated to the class and an opportunity to be heard as to any requested exclusion is afforded to all parties.

6. Within fifteen (15) days of the date of this order, Class Plaintiffs shall submit a proposed plan and form of notice of the pendency of this class action. Within ten (10) days thereafter, Defendants shall file any objections thereto and, within ten (10) days thereafter, Plaintiffs shall file any reply thereto. Otherwise, the parties may submit a joint proposed plan and form of notice to the court within thirty (30) days.

7. Pursuant to Pa.R.Civ.P. 1710(d), this Class Certification Order is conditional and may be revoked, altered or amended by the court on its own motion or on the motion of any party.

BY THE COURT:

ANTHONY S. BELTRAMI, J.