

# Landfill/Class-Action: Federal Appellate Court Addresses Nuisance Claim



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The United States Court of Appeals for the Fifth Circuit (“Court”) addressed in an October 30th opinion issues associated with a class-action lawsuit filed against a landfill. See *Jing Gao, et al. v. Blue Ridge Landfill TX, L.P.*, 2019 WL 5653224.

One of the issues considered was whether the landfill constituted a temporary or permanent nuisance and applicable statute-of-limitations.

Plaintiffs living near a landfill in Pearland, Texas brought a class-action lawsuit against Blue ridge Landfill TX, L.P. (“Blue Ridge”). The Plaintiffs argued that Blue Ridge constituted a nuisance.

The United States District Court for the Southern District of Texas had granted summary judgment to Blue Ridge from which the Plaintiffs appealed.

Plaintiffs on appeal argued that Blue Ridge is not a “permanent” nuisance under Texas law.

The Court notes that Texas law classifies nuisances as either permanent or temporary. Which type of nuisance is applicable affects the statute-of-limitations analysis. For example, a permanent nuisance claim accrues when the injury first occurs or is discovered. A temporary nuisance claim accrues anew upon each injury.

In describing a permanent nuisance the Court stated that it may be established by:

. . . showing that either the plaintiff’s injuries or the defendant’s operations are permanent. . . . In most nuisance cases, a permanent source will result in permanent interference. . . . The presumption of a connection between the two can be rebutted by evidence that a defendant’s noxious operations cause injury only under circumstances so rare that, even when they occur, it remains uncertain whether or to what degree they may every occur again. . .

In applying these principles to Blue Ridge it was noted that the landfill had been in operation since 1992. This was described as a decade before Plaintiffs’ homes were constructed. The Court notes that a survey conducted by Plaintiffs’ counsel identified “numerous residents who lived in the affected area for a decade or more reported experiencing odors continuously ever since they moved to the neighborhood.”

As a result, such injuries and the landfill’s operations were described as permanent.

The Court concludes, after reviewing the evidence (in the light most favorable to Plaintiffs), that it identifies nothing indicating that the odors “are so rare that it is uncertain whether or to what degree

they may ever occur again.” Consequently, the Court determined that the presumption of a permanent nuisance is un rebutted.

This determination has consequences for the Plaintiffs’ claims. They argue the claims are not time-barred. However, the statute-of-limitations for nuisance claims in Texas is two years. Since the landfill is a permanent nuisance, the Court notes that the claims accrued when the injury first occurred or was discovered. Because the Plaintiffs’ neighborhood had been experiencing odors from the landfill for at least a decade, the claims are deemed barred by the statute-of-limitations.

A copy of the opinion can be found [here](#).