IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

THE CITY OF BRISTOL, TENNESSEE, Plaintiff, v. THE CITY OF BRISTOL, VIRGINIA, Defendant.	)))))))))))	Case No.: 1:22-cv-00023-JPJ

DEFENDANT'S MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS

Defendant The City of Bristol, Virginia ("Bristol VA"), by counsel, states as follows in support of its Partial Motion to Dismiss Plaintiff The City of Bristol, Tennessee ("Bristol TN")'s Complaint (ECF No. 1).

INTRODUCTION

Bristol VA owns and operates an Integrated Solid Waste Management Facility located at 2655 Valley Drive in the City of Bristol, Virginia. The site is home to an active, permitted landfill, which is referred to as Landfill No. 588 (the "Landfill"), as well as two inactive landfills that are covered and closed. Bristol VA, like other municipalities in the Commonwealth, are expressly authorized by statute to own and operate landfills in the exercise of their police powers. Va. Code § 15.2-928(A).

For over four decades, the Landfill has been the disposal destination for garbage from Bristol TN, Bristol VA, and surrounding communities. In the fall of 2020, Bristol VA identified an increase in odor emanating from the Landfill No. 588. Bristol VA has publicly committed to address odor concerns and to cease waste disposal at Landfill No. 588.

Rather than meaningfully assist in that effort, the leadership of Bristol TN chose to file this lawsuit incurring unnecessary legal fees, which will be borne by the citizens of Bristol TN or foisted on Virginia citizens in Bristol VA. Both municipalities would be better served by a cooperative effort to eliminate the odor problem. Bristol VA has agreed to remedy the odor issue and to cease accepting waste at the Landfill. These steps should put an end to this matter.

Bristol TN alleges that odors coming from Bristol VA's Landfill No. 588 have reached "parts of Bristol TN" resulting in difficulty living and working there. (Compl. at 1.) As a result, Bristol TN, brings three claims against Bristol VA: (1) violation of the federal Clean Air Act ("CAA"), (*id.* ¶¶ 146-94); (2) violation of the Resource Conservation and Recovery Act ("RCRA"), (*id.* ¶¶ 195-203); and (3) a public nuisance claim under Virginia law, (*id.* ¶¶ 204-12.)

If prompt resolution of the odor issues was Plaintiff's objective, it would not have included a claim for public nuisance. Instead, it demonstrates Plaintiff's desire for protracted litigation to squeeze every dime it can out of Bristol VA and its citizens. Bristol TN's common law public nuisance claim, however, is abrogated by the Virginia Waste Management Act, 14 Va. Code §§ 10.1-1400 *et seq.* Therefore, Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal of Bristol TN's public nuisance claim.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). In evaluating a complaint, the Court accepts as true all well-pleaded factual allegations, viewing the complaint in the light most favorable to the plaintiff. *De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true,

to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet this standard. *Id.* And a court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

ARGUMENT

I. The General Assembly abrogated common law public nuisance claims arising from the negligent operation of landfills.

In Virginia, "[when] a statute creates a right and provides a remedy for the vindication of that right, then the remedy is ***exclusive*** unless the statute says otherwise." *Vansant & Gusler, Inc. v. Washington*, 429 S.E.2d 31, 33 (Va. 1993) (emphasis added) (quoting *Sch. Bd. v. Giannoutsos*, 380 S.E.2d 647, 649 (Va. 1989)); *Concerned Taxpayers of Brunswick Cty. v. Cty. of Brunswick*, 455 S.E.2d 712, 717 (Va. 1995). Specifically, a statute abrogates a common law claim when the General Assembly "plainly manifest[s]" its intent to do so. *Isbell v. Comm. Inv. Assocs., Inc.*, 644 S.E.2d 72, 75 (Va. 2007). A statute may abrogate common law expressly or through necessary implication of the statute's language. *Id.* "When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule." *Id.* (quoting *Boyd v. Commonwealth*, 374 S.E.2d 301, 302 (Va. 1988). Thus, where an enactment *does* encompass the entire subject, the common law is abrogated completely. In other words, common law claims "fall[ing] squarely within the confines" of an applicable statute are preempted. *Schlegel v. Bank of Am.*, 628 S.E.2d 362, 365-68 (Va. 2006).

A. The Virginia Waste Management Act occupies the field of nuisances arising from landfills.

The Landfill is regulated and permitted under the Virginia Waste Management Act ("VWMA"), Va. Code § 10.1-1400, *et seq*. (Compl. ¶¶ 25-7.) The General Assembly established the Virginia Waste Management Board (the "Board") to "[s]upervise and control waste management activities in the Commonwealth" and "promulgate and enforce regulations . . . necessary to carry out its powers and duties." Va. Code § 10.1-1402(1), (11). The Board is comprised of seven members selected on the basis of merit for their education, training, experience, and knowledge related to waste management. *Id.* § 10.1-1401(A.). Pursuant to its authority, the Board has promulgated extensive solid waste management regulations ("SWMR"). 9 VAC § 20-81, *et seq*. The purpose of the SWMRs is "to establish standards and procedures pertaining to the management of solid wastes by providing the requirements for siting, design, construction, operation, maintenance, closure, and post-closure care of solid waste management facilities in the Commonwealth in order to protect the public health, public safety, the environment, and our natural resources." 9 VAC § 20-81-25(A).

The General Assembly delegated the responsibility for carrying out the Board's policies and regulations to the Director of the Department of Environmental Quality ("DEQ"). Va. Code § 10.1-1405(B). This includes issuing the permits that are required to construct or operate sanitary landfills consistent with conditions proscribed by the Board. *Id.* § 10.1-1408.1(A).

The Supreme Court of Virginia has held that the VWMA exclusively governs nuisances arising from odorous emissions from landfills. *See Campbell Cty. v. Royal*, 720 S.E.2d 90, 99 (Va. 2012) ("Given the specific and all-embracing coverage under the VWMA and [its regulations] of

the occurrences at issue in this case, we conclude that the General Assembly intended such occurrences to be governed exclusively by the VWMA.").[1]

B. The General Assembly intended to abrogate common law public nuisance claims arising from the negligent operation of landfills.

Plaintiff's public nuisance claim arises from Bristol VA's alleged negligent operation of the Landfill. At common law, a public nuisance is a condition "that is a danger to the public." *Taylor v. City of Charlottesville*, 397 S.E.2d 832, 835 (Va. 1990) (citing *White v. Town of Culpeper*, 1 S.E.2d 269, 272 (Va. 1939)). "If the annoyance is one that is common to the public generally, then it is a public nuisance .... [t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights." *City of Va. Beach v. Murphy*, 389 S.E.2d 462, 463 (Va. 1990) (internal citations omitted). "Negligent acts may give rise to" a public nuisance. *Chapman v. City of Va. Beach*, 475 S.E.2d 798, 802 (Va. 1996); *cf. Hawthorn*, 484 S.E.2d 603, 606 (Va. 1997) ("[N]egligence is an essential element or component of nuisance when one seeks to hold a municipality liable for maintaining or operating a nuisance").

The VWMA fully encompasses the entire subject covered by Plaintiff's common law public nuisance claim. *Isbell*, 644 S.E.2d at 75. Among its express powers and duties, the Board is authorized to "abate hazards and *nuisances* dangerous to public health [and] safety . . . created by the improper disposal, treatment, storage, transportation or management of substances within the jurisdiction of the Board." Va. Code § 10.1-1402(21) (emphasis added). The Board has further defined "nuisance" as "an activity that unreasonably interferes with an individual's or the public's

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[1] In 1983, the Fourth Circuit held that Virginia's earlier hazardous waste statute did not preempt a common law nuisance claim. *See Envtl. Def. Fund, Inc. v. Lamphier*, 714 F.2d 331, 337 (4th Cir. 1983). However, this ruling predated the VWMA, which was enacted in 1986, and the Supreme Court of Virginia's holding in *Campbell County*. 720 S.E.2d at 95.

comfort, convenience or enjoyment such that it interferes with the rights of others by causing damage, annoyance, or inconvenience." 9 Va. Admin. Code § 20-81-10.

The Board has specifically recognized that odors from landfills may give rise to "hazards or nuisances" and requires that odors be "effectively controlled." 9 Va. Admin. Code § 20-81-140(A)(10); *id.* § 20-81-200(D) (requiring a landfill owner to implement an odor management plan for odor nuisances). The VWMA authorizes the Board to take enforcement action to abate public nuisances resulting from noxious odors and emissions from landfills and to impose civil penalties for the same.

Undoubtedly, the VWMA and the SWMR provide the remedy for the precise harm Plaintiff's common law nuisance claim seeks to remedy. Plaintiff alleges that Bristol VA has: (1) failed to "properly maintain and operate the landfill" (Compl. ¶ 205), *compare* Va. Code § 10.1-1402(21); (2) which has caused "noxious odors and other harmful emissions to emanate from the Landfill" (Compl. ¶ 205), *compare* 9 Va. Admin. Code § 20-81-140; (3) resulting in a "danger to the public" that "constitute[s] a public nuisance." (Compl. ¶ 205), *compare Taylor*, 397 S.E.2d at 835. The General Assembly has plainly manifested its intent to remedy Plaintiff's claim *solely* through enforcement action by the Board – not through civil causes of action under common law.

That does not mean that the general public does not have any recourse or say in the matter. The Board has created a mechanism for citizens to raise any potential concerns that would fall under the purview of the VWMA. *See* Va. Admin. Code § 20-81-70(D).[2] But these avenues for

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[2] Indeed, it is the Board's stated policy to encourage public participation in compliance evaluation and enforcement programs under the VWMA. 9 Va. Admin. Code § 20-81-70(D). The Board has directed DEQ to:

> 1. Investigate all citizen complaints and provide written responses to all signed, written complaints from citizens, concerning matters within the [B]oard's purview;
> 2. Not oppose intervention by any citizen in a suit brought before a court by the department as a result of the enforcement action; and
> 3. Provide notice on the department's Internet website; and provide at least 30 days of public comment on proposed settlements of civil enforcement actions except where the settlement requires some immediate

public participation do *not* include filing a private suit under common law. Had the Board *wanted* to create a savings clause for a private party to bring suit or create an explicit private right of action, it would have. *See Saunders v. Commonwealth*, 629 S.E.2d 701, 704 (Va. App. 2006) ("When interpreting statutory language, we must assume that the legislature chose with care the words it used and, where it includes specific language in one section but omits that language from another section, we presume that the exclusion of the language was intentional."). For example, the General Assembly explicitly included a savings clause to ensure that the Air Pollution Control Board's authority does not infringe on private rights of action. Va. Code § 10.1-1320 ("Nothing in this chapter shall be construed to abridge, limit, impair, create, enlarge or otherwise affect substantively or procedurally the right to any person to damages or other relief on account of injury to persons or property."). In contrast, the General Assembly did not authorize the Air Pollution Control Board to abate public nuisances. The General Assembly has also created a private right of action in the litter control provisions of the VWMA. *See* Va. Code § 10.1-1418.1(B) (allowing an "owner of real estate in this Commonwealth . . . upon whose property a person improperly disposes of solid waste without the landowner's permission . . . to bring a civil action for such improper disposal of solid waste.").

Here, the General Assembly expressly authorized the Board to abate landfill public nuisances. It did not, however, include a savings clause provision or create a private right of action for those nuisances. Thus, it is clear that the General Assembly intended to abrogate the common law with respect to public nuisance claims arising from improper landfill operations in Virginia. *See Saunders*, 629 S.E.2d at 704.

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action. Where a public comment period is not held prior to the settlement of an enforcement action, public notice will still be provided following the settlement.

Specifically, the plaintiffs in *Campbell County* alleged that the County had violated Virginia's "Discharge of Oil into Waters" law (which, unlike the VWMA, creates a private right of action, Va. Code § 62.1-44.34:18(C)(4)) related to contamination of groundwater on their property by leachate and landfill gas resulting from the County's operations of a municipal landfill, as well as that the County was liable under an inverse condemnation theory. 720 S.E.2d at 93.[3] The Supreme Court of Virginia held that the "Discharge of Oil into Waters" law could not apply to groundwater contamination here because "the General Assembly intended such occurrences to be governed exclusively by the VWMA." *Id.* at 99.

Here, Bristol TN brings a claim against Bristol VA to abate a public nuisance due to its alleged violations of the VWMA—precisely the conduct that the General Assembly has expressly held to be within *the Board*'s authority only. *See* Va. Code § 10.1-1402(21); *Campbell Cty.*, 720 S.E.2d at 99.

Overall, Bristol TN may not seek a public nuisance claim against Bristol VA for conduct that is *only* within the Board's jurisdiction to enforce. Because the VWMA abrogates or preempts the public nuisance claim, Bristol TN fails to state a claim on which relief can be granted.

C. Allowing Plaintiff's public nuisance claim to proceed would undermine the Commonwealth's authority and interest regulating and enforcing its solid waste laws.

The General Assembly enacted the VWMA with the purpose that the DEQ (which controls the Board), *inter alia*, "[s]upervise and control waste management activities in the Commonwealth," which includes "[t]ak[ing] actions to contain or clean up any site . . . where [] solid . . . waste . . . has been improperly managed." Va. Code § 10.1-1402(1), (19). In this case,

[3] The plaintiffs in *Campbell County* did not bring a claim for nuisance, however, they did allege in their complaint that "releases of hazardous and noxious substances not only into the ground and surface waters but also into the air . . . pose a threat to [them] and others as well as create a nuisance interfering with the use and enjoyment of [plaintiffs'] property." Mot. for J., *Campbell County*, No. CL05000074-00, 2005 WL 6154736, ¶ 17 (Va. Cir. Ct. May 11, 2005).

the DEQ *has* performed this role. It has issued several notices of violations ("NOVs") regarding Bristol VA's operation of the Landfill. (*See*, *e.g.*, Compl. ¶¶ 46, 49, 51, 52, 53, 65.) It even set up an expert panel to address the Landfill, which resulted in a report dated April 25, 2022. (*See id.* at 2-3.) There is still the possibility that Bristol VA and the DEQ will enter into a consent order regarding the operation of the Landfill.

It is also in the interest of the Commonwealth of Virginia to give the DEQ the exclusive power to regulate any alleged "nuisance" arising from a Landfill. First, any penalties Bristol VA incurs as a result from its alleged nuisance should go back to the agency charged with remedying similar situations—not into a foreign municipality's pocket. Additionally, allowing only the DEQ to enforce the VWMA gives municipalities consistency and predictability operating a Landfill. Delegating the regulation of landfills to private parties results in unpredictability and higher costs borne by Virginia citizens. Lastly, the DEQ consists of experts in the area of solid waste management who are better situated to regulate complex environmental issues in Virginia than consultants hired by out-of-state litigants.

CONCLUSION

For the reasons stated herein, Bristol VA respectfully requests that the Court dismiss the Count III of the Complaint with prejudice.

Dated: August 19, 2022

Respectfully submitted,

THE CITY OF BRISTOL, VIRGINIA

/s/ *Justin D. Howard*

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2022, I caused the foregoing to be filed with the Clerk of the U.S. District Court for the Western District of Virginia using the Court's CM/ECF system, which will electronically serve copies of the same on counsel for all parties.

/s/ *Justin D. Howard*
Justin D. Howard

Counsel for Defendant, The City of Bristol, Virginia