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Recent Developments in Land Use and Environmental Law

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The recent developments section was researched and written by Chanta G. Hundley, J.D., Florida State University College of Law (1998).

RECENT DEVELOPMENTS IN LAND USE AND ENVIRONMENTAL LAW*

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I. UNITED STATES SUPREME COURT CASES

A. Ohio Forestry Ass'n v. Sierra Club, *118 S.Ct. 1665 (1998)*

In this unanimous opinion written by Justice Breyer, the United States Supreme Court concluded that the Sierra Club's claim, was not ripe for judicial review.[1] The Sierra Club charged that the Forest Service's plan to allow logging and clearcutting in a national forest was too excessive.[2]

Under the National Forest Management Act of 1976 (NFMA), the Secretary of Agriculture is required to "develop, maintain, and revise land and resource management plans for units of the National Forest System."[3] The Forest Service developed a plan for the Wayne National Forest located in southern Ohio.[4] Collectively, the Sierra Club and the Citizens Council on Conservation and Environmental Control objected to the plan.[5] After pursuing various administrative remedies, the Sierra Club sued in federal court.[6] The Sierra Club claimed that Forest Service violated various laws by approving a plan which allowed below-cost timber sales of timber removed by clearcutting; the defendants action of accepting this plan violated their duties as public trustees; and the regulations the defendants used to select the amount of forest suitable for timber production failed to identify economically unsuitable lands.[7]

The district court reviewed the Plan and granted summary judgement for the Forest Service by concluding that the Forest Service had acted properly in making its determinations.[8] The Court of Appeals reversed the district court's decision when it concluded that the Plan improperly favored clearcutting, thus violating NFMA.[9] The Supreme Court granted certiorari to determine if the Plan's dispute was yet a justiciable controversy.

In concluding that the case was not ripe, the Court considered whether a delayed review would cause hardship to the plaintiffs; whether judicial intervention would inappropriately interfere with further administrative action; and whether the courts would benefit from further factual development of the issues presented.[10]

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1. *See Ohio Forestry Ass'n*, 118 S.Ct. at 1673.
2. *See id. at* 1678.
3. *See* 16 U.S.C. §1604(a).
4. *See Ohio Forestry Ass'n*, 118 S.Ct. at 1668.
5. *See id.* at 1669.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.* at 1670.
10. *See id.*

Applying these analytical steps, the Court concluded that the Sierra Club claims were not based on adverse effects of a kind that would traditionally qualify as harm.[11] Further, the Court did not find a harm against the interest that the Sierra club advanced.[12] The Court also found that immediate judicial review would be time-consuming and potentially unnecessary since many different parcels of land were involved.[13] A review at this point would threatened the kind of "'abstract disagreements over administrative policies,' . . . that the ripeness doctrine seeks to avoid."[14]

B. Steel Co. v. Citizens for a Better Env't, *118 S.Ct. 1003 (1998)*

In an opinion written by Justice Scalia, the United States Supreme Court determined that a citizen environmental group did not have standing to sue under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA or the Act) for past violations of the Act.[15]

EPCRA establishes a framework of state, regional, and local agencies designed to inform citizens about the presence of hazardous and toxic chemicals in their communities.[16] EPCRA also mandates that users of specific toxic and hazardous chemicals have to file annual "emergency and hazardous chemical inventory forms" and "toxic chemical release forms" which disclose specific information about facilities operating with hazardous and toxic chemicals.[17] EPCRA has several enforcement mechanisms, including a citizen suit provision.[18] According to the citizen suit provision, citizens may not proceed with their suits unless they file a notice of intent to sue with the Administrator of the Environmental Protection Agency (EPA), various state officials in the state where the alleged violation occurred, and the alleged violator.[19] Furthermore, citizens may not proceed with their suit if the EPA commences administrative or civil proceedings based on the alleged violation.[20]

Since 1988, the Steel Company had failed to file the appropriate forms required by EPCRA.[21] In 1995, a citizen environmental group

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11. *See id.*
12. *See id.*
13. *See id.* at 1671.
14. *See id.* at 1671-72.
15. *See Steel Co.*, 118 S.Ct. at 1020.
16. *See id.* at 1008.
17. *See id.* at 1008-09.
18. *See id.* at 1009.
19. *See id.*
20. *See id.*
21. *See id.*

sent the requisite notices of its intent to enforce EPCRA pursuant to EPCRA's citizen suit provision.[22] Upon receiving its notice, the Steel Company filed all the correct overdue forms with the appropriate administrative agencies.[23] As a result, the EPA chose not to take any action against the Steel Company.[24] However, the citizen group filed suit in federal district court, seeking declaratory and injunctive relief and requesting orders requiring the Steel Company to pay civil penalties and litigation expenses.[25]

The Supreme Court held that the citizens lacked standing to sue because none of the relief sought would reimburse the citizens for the losses caused by the Steel Company's failure to timely file its reports.[26] In other words, the Court stated that even if an injury-in-fact did exist, the citizens' suit failed to meet the redressibility requirement established in *Lujan v. Defenders of Wildlife*.[27]

Furthermore, Scalia reaffirmed the well-established notion that courts may not decide the merits of any case before determining whether Article III jurisdiction exists.[28] In doing so, Scalia explicitly rejected the argument promoted by Justice Stevens' concurrence that a cause of action brought pursuant to EPCRA constitutes a jurisdictional issue that must be decided before resolving the standing issue.[29] Additionally, the Court rejected the "doctrine of hypothetical jurisdiction" which several appellate circuits had applied to avoid unanswered jurisdictional questions where (1) the merits of the case were more readily resolved than the jurisdictional issues and (2) the prevailing party on the merits would have been the prevailing party if jurisdiction had been denied.[30]

C. U.S. v. Bestfoods, Inc., *118 S.Ct. 1876 (1998)*

In a unanimous opinion written by Justice Souter, the Court overruled the Sixth Circuit in deciding that under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[31] a parent corporation can be held liable for cleaning up a subsidiary's toxic waste site, especially when the parent corporation is directly responsible for the operation of the waste site.

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22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.* at 1016-20.
27. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). *See Steel Co.*, 118 S.Ct. at 1020.
28. *See Steel Co.*, 118 S.Ct. at 1012, 1014.
29. *See id.* at 1009-12.
30. *See id.* at 1012-16.
31. 42 U.S.C. § 9601-9675.

The U.S. brought suit against CPC International Inc. (CPC), the parent corporation of Ott Chemical Co. (Ott), and others, for cleaning up Ott's industrial chemical waste.[32] The district court ruled that operator liability attached to a parent corporation when the corporate veil can be pierced under state law, and when the parent corporation has exerted influence over its subsidiary during a period of hazardous waste disposal. [33] Under this test, the court held CPC liable because CPC had selected Ott's board of directors and another CPC official was significantly involved in developing Ott's environmental compliance policy.[34] Sitting en banc, the Sixth Circuit reversed in part by acknowledging that the a parent company may be held directly liable as an operator of a facility owned by its subsidiary, but refusing to find liability for a parent company if it does not actually operate its subsidiary's facility in the place of the subsidiary, or alongside of it as a joint venturer.[35]

The Supreme Court noted that under corporate law, a general principle exists that a parent corporation is not liable for the acts of its subsidiaries and that CERCLA does not infringe upon this principle.[36] But, the corporate veil may be pierced and a parent corporation held liable for the parent's conduct when the corporate form is misused to accomplish certain improper acts.[37] As legislated, a parent corporation actively participating in, and exercising control over, the operations of a subsidiary's facility may be held directly liable as an owner/operator.[38]

The Court went on to acknowledge that the Sixth Circuit correctly rejected the district court's analysis of basing CPC's liability on CPC's majority control over Ott's board of directors.[39] This type of analysis focused on the relationship between the parent corporation and its subsidiary rather than the parent corporation and facility.[40] However, the Court found that the Sixth Circuit was wrong in its limiting of liability under CERCLA since there was evidence that an agent of CPC was involved with developing Ott's environmental compliance policy. [41] The case was remanded to the lower court to

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32. *See Bestfoods*, 118 S.Ct. at 1883.
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.* at 1884.
37. *See id.* at 1885.
38. *See id.*
39. *See id.* at 1887.
40. *See id.*
41. *See id.* at 1887-90.

reevaluate and resolve if the agent of CPC's activities constituted direct control by CPC over Ott.[42]

D. Other Recent Land Use Cases

1. Alaska v. Native Village of Venetie Tribal Gov't, *118 S.Ct. 948 (1998)*

The Supreme Court held that the Native Village of Venetie Tribal Government (the Tribe) lacked the power to impose a tax upon non-members of the Tribe where the lands being used by the non-members were not "Indian country" within the meaning of the Alaska Native Claims Settlement Act (ANCSA).[43]

In 1971, Congress enacted ANCSA to settle all land claims by Alaska Natives.[44] In doing so, Congress revoked various Indian reservations and authorized the transfer of money and reservation land to state-chartered private business corporations owned and operated by Alaska Natives.[45] Pursuant to this scheme, the United States conveyed fee simple title to the former Venetie Reservation to two Native-owned corporations which, in turn, transferred title to the Tribe.[46]

In 1986, Alaska entered into a joint venture with a private contractor to construct a public school in Venetie.[47] After the contractor and the State refused to pay the Tribe for approximately $161,000 in taxes imposed for doing business on tribal land, the Tribe sought to collect the money in tribal court.[48] As a result, the State sued the Tribe in federal court to enjoin the collection of the tax.[49]

The Supreme Court held that the Tribe's land does not constitute "Indian country."[50] According to the Court, "Indian country" refers to a limited category of Indian lands that (1) have been set aside by the federal government for the use of the Indians as Indian land and (2) are under federal superintendence.[51] The Court held that the land at issue in this case failed to satisfy either of these requirements because Congress, in enacting ANCSA, clearly intended that non-members of the Tribe could own the Venetie Reservation and that

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42. *See id.* at 1890.
43. *See Native Village*, 118 S.Ct. at 951.
44. *See id.*
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.* at 952.
50. *See id.* at 955-56.
51. *See id.* at 953.

the Tribe is free to use it for non-Indian purposes.[52] Furthermore, the Court held that ANCSA clearly ended federal superintendence over the Tribe's lands by revoking all existing Alaska reservations except the Annette Island Reserve and by conveying the lands to private business corporations.[53]

Because the Tribe's land does not constitute "Indian country," the Tribe implicitly lacks the power to impose a tax on the State and private contractor.[54]

2. South Dakota v. Yankton Sioux Tribe, *118 S.Ct. 789 (1998)*

The Supreme Court held that South Dakota acquired primary jurisdiction over land once belonging to the Yankton Sioux Tribe (Tribe).[55] As a result, a solid waste disposal facility now located on the land is subject to the State's environmental regulations.[56]

In 1858, the United States and the Tribe signed a treaty establishing the Yankton Sioux Reservation.[57] However, in 1887, Congress enacted legislation permitting the federal government to allot tracts of tribal land to individual Indians and, with tribal consent, to open remaining holdings to non-Indian settlements.[58] In 1892, the federal government and the Tribe reached an agreement whereby the Tribe gave the federal government all of its unallotted lands for $600,000.[59] Congress ratified this agreement in 1894.[60]

A solid waste disposal facility now sits on the unallotted, non-Indian land; however, this facility falls within the Tribe's original 1858 boundaries.[61] As a result, the Court had to determine whether state or federal regulations now have primary jurisdiction over the land.[62]

In an opinion written by Justice O'Connor, the Court held that courts must examine congressional intent to determine whether a federal statute diminishes or retains an Indian reservation's boundaries.[63] The Court stated that when a statute contains both explicit cession language and a provision for a fixed sum payment, a "nearly

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52. *See id.* at 955-56.
53. *See id.*
54. *See id.* at 951-52.
55. *See* Yankton *Sioux Tribe*, 118 S.Ct. at 793.
56. *See id.*
57. *See id.* at 793-96.
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.* at 796.
62. *See id.* at 793.
63. *See id.* at 797-98.

conclusive" presumption of diminishment arises.[64] The Court also noted that even in the absence of a clear expression of congressional intent, evidence of the surrounding circumstances may support the conclusion that a reservation has been diminished.[65]

Applying this analysis to this case, the Court held that the plain language of the 1894 ratification by Congress evinces the "clear and plain" intent to diminish the Yankton Sioux Reservation, thereby extinguishing the reservation status of the unallotted lands.[66] As a result, the State acquired primary jurisdiction over the unallotted lands, and the waste disposal facility on these lands is now subject to the State's environmental laws.[67]

The Court noted, however, that it was not determining whether Congress disestablished the reservation altogether.[68]

E. Cases in Which the Supreme Court has Granted Certiorari

1. Del Monte Dunes at Monterey v. City of Monterey, *95 F.3d 1422 (9th Cir. 1996)*

The Supreme Court granted *certiorari*[69] in this case in which the Ninth Circuit held that a property owner's inverse condemnation claim against a city could be submitted to a jury for resolution because an inverse condemnation claim constitutes an action at law.[70]

2. U. S. v. Cordova Chem. Co, *113 F.3d 572 (6th Cir. 1995)*

The Supreme Court granted *certiorari*[71] in this case in which the Sixth Circuit held that a parent corporation could incur operator liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for the conduct of its subsidiaries only if the elements necessary to pierce the corporate veil are present.[72] Furthermore, the court held that a parent corporation does not incur former owner liability under CERCLA if the parent corporation owned the contaminated site for a brief period and no evidence exists that additional releases of hazardous substances

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64. *See id.* at 798.
65. *See id.* at 802-04.
66. *See id.* at 798-802.
67. *See id.* at 805.
68. *See id.*
69. *See* City of Monterey v. Del Monte Dunes at Monterey, No. 97-1235, 1998 WL 37996 (U.S. March 30, 1998).
70. *See Del Monte Dunes*, 95 F.3d at 1426-27.
71. *See* United States v. Bestfoods, 118 S.Ct. 621 (1997).
72. *See Cordova Chem.*, 113 F.3d at 578-81.

occurred during that time.[73] Finally, the Sixth Circuit also held that CERCLA precludes a finding of arranger liability against the State's Department of Natural Resources (Department) when the Department engaged in good faith negotiations to acquire the site and to create a plan to clean up the groundwater contamination.[74]

3. Sierra Club v. Thomas, *105 F.3d 248 (6th Cir. 1997)*

The Supreme Court granted *certiorari*[75] in this case in which the Sixth Circuit held that environmental groups have standing to challenge the Forest Service's land resource management plan allowing clearcutting in the Wayne National Forest.[76] Furthermore, the court held that the plaintiffs' claim presents a sufficiently ripe controversy.[77] The court concluded that the land resource management plan was arbitrary, capricious, and not in compliance with the intent of the National Forest Management Act because the Forest Service's planning process was improperly predisposed to clearcutting.[78]

II. ELEVENTH CIRCUIT CASES

A. GJR Inv., Inc. v. County of Escambia, *132 F.3d 1359 (11th Cir. 1998)*

GJR Investments, Inc. (GJR) wanted to construct an RV campground on its property in Escambia County, Florida.[79] Before receiving approval from the county, GJR had to file four separate applications and two separate state court actions.[80] As a result, GJR sued the county and county officials for damages allegedly caused by the delays in approving the project.[81] More specifically, GJR claimed that the county's action violated its rights to due process and equal protection and constituted a compensable taking.[82] The county claimed qualified immunity as a defense.[83]

The doctrine of qualified immunity states that government officials performing discretionary functions are immune from suit unless the conduct which is the basis of the suit violates "clearly established [federal] statutory or constitutional rights of which a

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73. *See id.* at 582-83.
74. *See id.* at 581-82.
75. *See* Ohio Forestry Ass'n Inc. v. Sierra Club, 118 S.Ct. 334 (1997).
76. *See Sierra Club*, 105 F.3d at 250.
77. *See id.*
78. *See id.* at 250-52.
79. *See GJR*, 132 F.3d at 1362.
80. *See id.*
81. *See id.* at 1361-64.
82. *See id.* at 1362.
83. *See id.* at 1364.

reasonable person would have known."[84] For a right to be "clearly established," previous case law must have developed it in a concrete factual context so as to make it obvious to a reasonable government actor that his actions violate federal law.[85]

Applying this analysis, the court had to determine whether GJR pled any federal claims that would abrogate the county's qualified immunity.[86] The court held that GJR failed to sufficiently plead a violation of a "clearly established" right, and, as a result, dismissed GJR's complaint with prejudice.[87]

B. Andrews v. U.S., *122 F.3d 1367 (11th Cir. 1997)*

Pursuant to the Equal Access to Justice Act (EAJA), the plaintiffs in this case requested attorneys' fees incurred in pursuing claims against the federal government under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[88] EAJA allows plaintiffs to recover fees and costs incurred in litigating their CERCLA claims.[89] The district court granted the plaintiffs attorneys' fees.[90]

However, the Eleventh Circuit held that the district court abused its discretion by not giving greater weight to the plaintiffs' limited success on their CERCLA claims when determining attorneys' fees.[91] Specifically, the Eleventh Circuit noted that the CERCLA damages awarded at trial equaled less than one percent of the amount the plaintiffs originally sought and were slight in comparison to the overall damages award.[92] Furthermore, the court stated that the CERCLA claims did not vindicate an important non-monetary principle.[93] Considering that the district court did not weigh these factors, the Eleventh Circuit held that the district court abused its discretion when calculating attorneys' fees for the plaintiffs' CERCLA claims.[94]

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84. *Id.* at 1366(citations omitted).
85. *See id.*
86. *See id.* at 1367-70.
87. *See id.* at 1370.
88. *See Andrews*, 122 F.3d at 1374.
89. *See id.*
90. *See id.*
91. *See id.* at 1375-76.
92. *See id.*
93. *See id.*
94. *See id.*

C. Andrews v. U.S., *121 F.3d 1430 (11th Cir. 1997)*

Current and former residents of a semi-rural neighborhood sued the United States, seeking damages for injuries resulting from the contamination of groundwater caused by hazardous waste disposal by two Navy bases.[95] The Navy had contracted with an independent contractor for the safe disposal of its hazardous waste.[96]

The plaintiffs sought damages under the Federal Tort Claims Act (FTCA) which constitutes a limited waiver of the federal government's sovereign immunity.[97] FTCA allows suits against the federal government for damages caused by tortious conduct of federal employees when such conduct would render a private actor liable under the law of the place where the conduct occurred.[98] However, FTCA does not allow claims based on the exercise or the failure to exercise a discretionary function.[99] The Eleventh Circuit discussed a two-part test to determine the applicability of this "discretionary function" exception; the court must determine (1) whether the challenged conduct involves an element of judgment or choice and (2) if the challenged conduct does involve discretion, whether that discretion was used to make a policy decision.[100]

The Eleventh Circuit held that in this case, this discretionary function exception shields the government from strict tort liability for the consequences flowing from the Navy's decision to delegate its waste disposal.[101] Furthermore, the court held that the government is not liable for negligent failure to supervise its independent contractor.[102] However, the court held that the exception does not shield the Navy for breach of its duty to not place flammable liquid waste in the dumpsters on base.[103] However, the court determined that the Navy's breach of this duty did not cause the contamination of the plaintiffs' wells.[104]

The court noted that Congress has since enacted federal environmental legislation mandating nondelegable responsibility for hazardous waste disposal on the part of those who generate it, thereby making this decision something of an anachronism.[105]

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95. *See Andrews*, 121 F.3d at 1436.
96. *See id.*
97. *See id.* at 1437-38.
98. *See id.* at 1438.
99. *See id.*
100. *See id.*
101. *See id.* at 1440-41.
102. *See id.*
103. *See id.* at 1441.
104. *See id.*
105. *See id.* at 1442.

D. Villas of Lake Jackson, Ltd. v. Leon County, *121 F.3d 610 (11th Cir. 1997)*

Leon County, Florida rezoned the property owner's tract of land from an intense development category to a single family housing category.[106] Due to this rezoning, the landowners were deprived of the right to complete a high density apartment development that they had already started.[107] The landowners claimed that the right to complete the high density apartment project was vested under Florida law because of their reliance on the county's prior regulatory activity on this issue.[108]

When they filed suit in federal court, the landowners framed their claim as a substantive "due process taking" as opposed to a compensable taking under the Takings Clause of the Fifth Amendment.[109] However, the Eleventh Circuit held that a substantive due process taking does not exist as a separate and independent cause of action from the Takings Clause.[110] Furthermore, the court noted that substantive due process only applies when the claim is for arbitrary and capricious conduct, and the court held that the rezoning in this case was not arbitrary and capricious because the rezoning had a rational relation to the county's interest in protecting the water quality at a nearby lake.[111]

The court stated that a right to the specific use of property is protected only by the following constitutional constraints: (1) procedural due process claims challenging procedures used by the government entity to adopt the regulation; (2) substantive due process claims based on the arbitrary and capricious action of the government in adopting the regulation; (3) a takings claim which seeks just compensation and/or invalidation of the regulation; and (4) claims under some other constitutional provision that gives the landowners a protectable right that is not specifically involved with the real property right itself.[112]

Additionally, the Eleventh Circuit held that the district court correctly entered summary judgment for the county on the landowners' equal protection claim.[113]

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106. *See Lake Jackson*, 121 F.3d at 611-12.
107. *See id.* at 612.
108. *See id.*
109. *See id.*
110. *See id.* at 612-614.
111. *See id.* at 614.
112. *See id.* at 615.
113. *See id.*

E. Digital Properties, Inc. v. City of Plantation, *121 F.3d 586 (11th Cir. 1997)*

Digital Properties (Digital) sought to establish an adult book and video store in Plantation, Florida.[114] Digital's representatives spoke to several city employees, none of whom offered a conclusive, authoritative denial of Digital's ability to use the property as an adult entertainment store.[115] Nevertheless, in anticipation of being denied the appropriate permits to use its property as an adult book and video store, Digital filed suit against the city in federal court, claiming that the city's zoning scheme violated its First Amendment rights.[116]

The Eleventh Circuit held that Digital failed to present a case or controversy ripe for judicial review.[117] The court noted that Digital did not even have confirmation that the city failed to provide at least one zone where adult enterprises were explicitly permitted.[118] Furthermore, Digital failed to exhaust its administrative remedies.[119] As a result, the court held that no concrete deprivation of Digital's First Amendment rights had occurred and found that no justiciable case or controversy existed.[120]

F. LaFarge Corp. v. Travelers Indemnity Co., *118 F.3d 1511 (11th Cir. 1997)*

The Environmental Protection Agency (EPA) was investigating and preparing a clean-up of toxic wastes at a Tampa, Florida borrow pit owned and operated by LaFarge Corporation (LaFarge).[121] Travelers Indemnity Company (Travelers) had issued a series of comprehensive general liability insurance policies to LaFarge.[122] When LaFarge notified Travelers of the EPA's potential charges against it, Travelers told LaFarge that the pollution exclusion clauses in the insurance contracts relieved Travelers of any duty to defend LaFarge against EPA's potential charges.[123] As a result, LaFarge sued Travelers, seeking declaratory relief and damages for breach of contract.[124]

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114. *See Digital Properties*, 121 F.3d at 587-88.
115. *See id.* at 588-89.
116. *See id.* at 589.
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. *See LaFarge*, 118 F.3d at 1513.
122. *See id.* at 1513-14.
123. *See id.* at 1514.
124. *See id.*

In this diversity suit, the Eleventh Circuit applied the "substantial relationship test" to determine that Florida law applied because Florida has the most significant relationship with the transaction and the parties at issue.[125]

The court also noted that the insurance contracts between the parties do have a pollution exclusion clause but that an exception to this exclusion exists when the actual discharge of pollutants is sudden and accidental.[126] Furthermore, the policies preclude relief if the pollution arises from a discharge of waste that is expected or intended or non-sudden and gradual.[127] In other words, if the actual discharge of the pollutants was sudden and accidental, Travelers would provide coverage for LaFarge, but if the actual discharge was expected or intended or non-sudden and gradual, Travelers did not have to provide coverage for LaFarge.[128] The court found that the discharge of the pollutants was not sudden and accidental; therefore, the exception to the pollution exclusion clause does not apply, and Travelers does not have to defend LaFarge against EPA's claims.[129]

G. LEAF, Inc. v. EPA, *118 F.3d 1467 (11th Cir. 1997)*

The Safe Water Drinking Act (SWDA) establishes a regulatory program for the protection of underground resources of drinking water.[130] Pursuant to SWDA, the Environmental Protection Agency (EPA) has to promulgate regulations establishing the minimum requirements for state underground injection control (UIC) programs.[131] Furthermore, the EPA has to approve a State's proposed UIC program.[132]

After EPA granted approval to Alabama's UIC program, LEAF, an environmental activist group, petitioned EPA to withdraw its approval of the program, claiming that Alabama's program failed to comply with the requirements established by SWDA.[133] Specifically, LEAF argued that SWDA mandates the regulation of hydraulic fracturing activities as part of the UIC program and that Alabama's UIC program fails to regulate such activities.[134] However, EPA denied LEAF's petition, claiming that SWDA does not mandate the

125. *See id.* at 1515-16.
126. *See id.* at 1516.
127. *See id.* at 1517.
128. *See id.* at 1516-17.
129. *See id.* at 1516-18.
130. *See LEAF*, 118 F.3d at 1469.
131. *See id.*
132. *See id.*
133. *See id.* at 1471.
134. *See id.*

regulation of hydraulic fracturing activities.[135] LEAF subsequently filed a petition for review of EPA's denial of LEAF's petition.[136]

The court held that Congress, in adopting SWDA, clearly dictated that the UIC programs are to regulate all underground injection, including hydraulic fracturing activities.[137] Because the words used by Congress are unambiguous, the court held that it does not have to give deference to EPA's interpretation of the statute.[138] As a result, the court concluded that EPA's interpretation of the regulations is inconsistent with the SWDA and granted LEAF's petition for review.[139]

H. U.S. v. Banks, *115 F.3d 916 (11th Cir. 1997)*

Banks, an owner of three lots in Big Pine Key, Florida, was bulldozing two of his lots and covering them with fill.[140] The Army Corps of Engineers warned Banks that part of his land constituted wetlands and that discharges onto those areas were illegal without a permit.[141] Nevertheless, Banks never acquired the appropriate permits and continued to discharge fill without a permit.[142] The federal government sued Banks under the Clean Water Act (CWA) and asked the court to enjoin Banks from discharging fill materials into the wetlands, to require him to restore the wetlands, and to require him to pay an appropriate civil penalty.[143]

The first issue resolved by the Eleventh Circuit was whether the statute of limitations in 28 U.S.C. § 2462(1991) applied to the government's claims.[144] The court held that the statute of limitations applied only to civil penalties; however, the statute did not bar the government's claims for equitable relief.[145]

Furthermore, the court concluded that the district court's finding that Banks land constituted jurisdictional, adjacent wetlands was not clearly erroneous because sufficient evidence existed to prove that Banks' property met the statutory and regulatory definitions of jurisdictional and adjacent wetlands.[146]

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135. *See id.*
136. *See id.* at 1472.
137. *See id.* at 1474-75.
138. *See id.* at 1477.
139. *See id.* at 1478.
140. *See Banks*, 115 F.3d at 918.
141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.* at 918-19.
145. *See id.* at 919.
146. *See id.* at 919-21.

Finally, the Eleventh Circuit held that Banks failed to carry his burden of persuasion on the issue of whether Nationwide Permit 26 (NWP 26) issued by the government authorized some of his discharges.[147] In fact, the court held that the government consistently construed Banks' activities to be outside the scope of NWP 26 which authorizes the discharge of material into specific navigable waters.[148]

III. FLORIDA SUPREME COURT CASES

A. Deni Assoc. v. State Farm Fire & Casualty Ins. Co., *Nos. 89115, 89300, 1998 WL 29822 (Fla. Jan. 29, 1998)*

In this case, the Supreme Court consolidated two unrelated cases which addressed the same issue: the applicability of a pollution exclusion clause in a comprehensive general liability insurance policy.[149] In one case, the insurer wanted to apply it to indoor air contamination from an ammonia spill, and in the other case, the insurer wanted to apply it to an incident in which insecticide was accidentally sprayed on bystanders.[150]

Both pollution exclusion clauses excluded coverage for any injury or damage caused by the "discharge, dispersal, release, or escape of pollutants."[151] The court held that the pollution exclusion clause is clear and unambiguous on its face, and, as such, is applicable to both cases.[152] Furthermore, the court explicitly rejected the argument that a pollution exclusion clause is limited to environmental or industrial pollution.[153]

The court also explicitly rejected the doctrine of reasonable expectations under which the court upholds an insured's expectation as to the scope of coverage as long as such expectations are reasonable.[154] The court held that the reasonable expectations doctrine is unnecessary in Florida because if a policy is ambiguous in Florida, the ambiguities are construed against the insurer.[155]

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147. *See id.* at 921-22.
148. *See id.*
149. *See Deni*, Nos. 89115, 89300, 1998 WL 29822, at *1.
150. *See id.*
151. *See id.*
152. *See id.* at *2-*4.
153. *See id.* at *2.
154. *See id.* at *4-*5.
155. *See id.* at *5.

B. *Advisory Opinion regarding the Fish and Wildlife Conservation Comm'n, No. 91193, 1998 WL 25443 (Fla. Jan. 8, 1998)*

In this Advisory Opinion to the Attorney General, the Supreme Court held that the initiative petition to unify the Marine Fisheries Commission and the Game and Freshwater Fish Commission complied with the single-subject rule but failed to comply with ballot title and summary requirements.[156] The court held that the summary failed to explain the transfer of power from the Legislature that would result if this initiative passed.[157] As a result, the title, summary, and proposed text of the initiative cannot appear on the 1998 ballot.[158]

C. *Advisory Opinion regarding Amendment 5 (Everglades), No. 90042, 1997 WL 731823 (Fla. Nov. 26, 1997)*

In this Advisory Opinion to the Governor, the court held that Amendment 5 (Amendment), which requires polluters to pay for the abatement of pollution in the Everglades, is not self-executing.[159] As a result, the Amendment requires implementing legislation, notwithstanding the existence of the Everglades Forever Act.[160] Furthermore, the court construed the Amendment to require those in the Everglades Agricultural Area (EAA) who cause water pollution in the Everglades Protection Area (EPA) or in the EAA to bear the costs of abating that pollution.[161]

D. State v. Inland Protection Fin. Corp., *699 So. 2d 1352 (Fla. 1997)*

In 1996, the Legislature created the Inland Protection Financing Corporation (Corporation) to assist the Department of Environmental Protection (DEP) in financing the rehabilitation of petroleum contamination sites by providing a mechanism for bond issuances to pay for the rehabilitation.[162] The Corporation intends to issue bonds from amounts paid by DEP under a service contract.[163] The State Attorney challenged the Corporation's authority to issue bonds.[164]

The court held that the Corporation's purpose to finance the rehabilitation of petroleum contamination sites serves a legitimate

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156. *See Fish and Wildlife Conservation Comm'n*, No. 91193, 1998 WL 25443, at *2-*5.
157. *See id.* at *4.
158. *See id.* at *5.
159. *See Amendment 5*, No. 90042, 1997 WL 731823, at *3.
160. *See id.* at *4.
161. *See id.*
162. *See Inland Protection*, 699 So. 2d at 1353.
163. *See id.*
164. *See id.* at 1355-57.

public purpose.[165] Furthermore, the court held that because the bonds do not pledge public credit or taxing power, the issuance of the bonds does not violate the constitutional prohibition against lending the State's credit to private entities.[166] Finally, the court held that since the bonds are not supported by a pledge of tax revenue, the issuance of the bonds does not violate the constitutional prohibition against the State's issuance of revenue bonds.[167] Accordingly, the court affirmed the trial court's judgment of bond validation.[168]

E. Lane v. Chiles, *698 So. 2d 260 (Fla. 1997)*

Commercial net fishermen challenged the constitutionality of Article X, section 16 of the Florida Constitution, known as the "Net Ban Amendment."[169] The voters adopted the Net Ban Amendment as an initiative in 1994.[170]

The court held that the rational basis standard, as opposed to the strict scrutiny standard, applies when reviewing the validity of an initiative.[171] Furthermore, the court held that the Net Ban Amendment does not violate the plaintiffs' right to due process because the Amendment is rationally related to the State's goal of protecting its natural resources and does not prohibit the plaintiffs from engaging in their chosen occupation.[172] As a result, the court held that the Amendment does not constitute a compensable taking.[173] Additionally, the court held that the Amendment does not violate the plaintiffs' right to equal protection because the Amendment does not seek to punish any particular type of fishermen.[174] Finally, the court held that the Net Ban Amendment is not subject to a challenge on the grounds that it constitutes improper subject matter for the constitution.[175] The court also concluded that the plaintiffs' challenge to the ballot summary was untimely.[176]

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165. *See id.* at 1356.
166. *See id.*
167. *See id.* at 1357.
168. *See id.*
169. *See Lane*, 698 So. 2d at 262.
170. *See id.*
171. *See id.* at 262-63.
172. *See id.* at 263-64.
173. *See id.*
174. *See id.* at 264.
175. *See id.* at 263.
176. *See id.* at 264-65.

IV. PROPOSALS FROM FLORIDA'S 1997-98 CONSTITUTION REVISION COMMISSION[177]

Florida's 1997-98 Constitution Revision Commission (CRC) has proposed the following amendment to Florida's constitution: Conservation of Natural Resources and Creation of Fish and Wildlife Conservation Commission. This amendment, which will be on the November 1998 ballot, amends Articles II, VII, and X of the Florida Constitution. If adopted, this amendment will require that the Legislature make adequate provision for the conservation of natural resources. Furthermore, it will unify the Game and Fresh Water Fish Commission and the Marine Fisheries Commission, thereby removing exclusive legislative authority to regulate marine life. Additionally, this amendment will authorize revenue bonds to finance the acquisition and improvements of lands for conservation, outdoor recreation, and related purposes. Finally, this amendment will restrict the disposition of state lands designated for conservation purposes.

V. NEW LAWS FROM FLORIDA'S 1998 LEGISLATIVE SESSION[178]

During its 1998 session, the Florida Legislature passed eleven bills related to environmental and land use issues for the Governor's signature. The Governor vetoed two of the bills.[179] A brief overview of the bills enacted into law is provided below.

CS/SB 812 Air/Accidental Release
Chapter 98-193, Florida Statutes

This bill was passed to satisfy a requirement of the federal Clean Air Act Amendments of 1990. With the Department of Community Affairs having implementing authority, this law allows Florida to obtain delegation of the federal Accidental Release Prevention Program. The Program is aimed at dealing with accidental releases of certain toxic, flammable, and explosive substances by preventing such releases and minimizing the consequences of the releases if they

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177. The following summary was adopted directly from the Constitution Revision Commission's home page which may be found on the internet at http://www.law.fsu.edu/crc.

178. The following summaries were adopted from the Florida Legislature's home page, Florida Online Sunshine, which is located at http://www.leg.state.fl.us. The page includes complete copies of each bill passed in the 1998 Legislative Session. Many law firms provide Legislative reviews about the most recent sessions. One such law firm whose site was used in preparing this summary was Holland & Knight LLP which is located at http://www.hklaw.com.

179. The Governor Vetoed the Everglades Restoration Restudy Bill, CS/HB 4141, and the Lake Belt Mining Bill, CS/CS/HB 4071.

do occur. A fee system is included in this law to ensure that the program is self-sustaining.

CS/SB 1202 Brownfields
Chapter 98-75, Florida Statutes

In 1997 the Brownfields Redevelopment Act became law. This new law clarifies several glitches identified since its adoption. This new law also included several additional economic incentives. For example, the Brownfields Property Ownership clearance Assistance Program will assist in removing prior liens from certain Brownfields properties.

The Brownfields Areas Loan Guarantee Program limits loan guarantees backed by up to five million dollars in funds from the Non-mandatory Land Reclamation Trust Fund. This law also creates the Center for Brownfields Rehabilitation Assistance at the University of South Florida. The Center will research and assist in Brownfields site rehabilitation.

CS/SB 244 Drycleaning/Solvent Cleanup
Chapter 98-189, Florida Statutes

This new law updates Florida's drycleaning-solvent, contaminated-site cleanup program. For example, a contaminated-site rehabilitation tax credit against the intangible personal property tax and against corporate income tax is included. Another change is that the period for applying for eligibility in this program is shortened from December 31, 2005 to December 31, 1998.

CS/HB 945 Environmental Equity and Justice
Chapter 98-304, Florida Statutes

This new law creates the Center for Environmental Equity and Justice at Florida A&M University and the Community Environmental Health Program. The Center is created to conduct and facilitate research; develop policies, and engage in education, training, and community outreach with respect to environmental equity and justice issues. The Program is created to ensure the availability of public health services to residents of low-income communities who may adversely be affected by contaminated sites located in or near their community.

CS/HB 3701 Hazardous Waste Facilities
Chapter 98-334, Florida Statutes

This new law prohibits the Department of Environmental Protection from issuing permits for hazardous waste facilities within certain described distances of any residence, hospital, prison, school, nursing home facility, day care facility, stadium, place of worship, or the like.

CS/SB 1176 Phosphogypsum Stack System Management
Chapter 98-117, Florida Statutes

In response to a spill in Polk County last year, the Department of Environmental Protection is given the authority to adopt rules that relate to the safety, operational requirements, and management of phosphate gypsum stacks.

CS/SB 2474 Public Schools/Growth Management
Chapter 98-176, Florida Statutes

This law extends the concurrency requirements to public schools and codifies the recommendations of the Public Schools Construction Study Commission on planning and siting of public schools. This law also makes several other changes to Florida's growth management laws, such as an optional sector plan for local governments to address Development of Regional Impact issues within certain designated geographic areas.

CS/CS/HB 3229 Tax Exemption for Pollution Control Equipment
Chapter 98-317, Florida Statutes

With an effective date of January 1, 1999, this law exempts pollution control equipment used in connection with manufacturing from the Florida sales tax. Also exempted from the Florida sales tax by this law are certain items used to control pollution at specified solid waste management facilities.

CS/SB 312 Water/"Local Sources First"
Chapter 98-88, Florida Statutes

In 1997, the legislature passed a comprehensive water supply bill. One issue left unresolved was the issue of looking at local sources prior to transporting water across a water management district's boundary lines. This law establishes new state water policy whereas the use of local water source should be encouraged, although not mandated. When evaluating whether a permit for transporting and using water across county boundaries is in the public interest, the

districts must evaluate a number of considerations aimed at ensuring that local courses of water are investigated and used when possible. Two of the few exceptions allowed by this law include water transportation for Everglades restoration and electricity production.