

# CLEANING THE INDIAN RIVER WITH COMMON LAW

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## I. INTRODUCTION

Looking out over the North Causeway in Fort Pierce, Florida is truly a sight to behold. Everywhere you look, you are surrounded by beautiful hues of sapphire blues and emerald greens. This majestic sight is host to an array of wildlife and human activity. On any given day, you can see a pod of porpoises splashing around and showing off for the boaters, manatees popping their heads of out the water to say hello to a friendly kayaker, osprey swooping overhead looking for their next meal, school children on fieldtrips seining, and scientists from Harbor Branch taking water samples. The Indian River Lagoon is so much more than a waterway, it is a playground, it is a classroom, it is a home.

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Unfortunately, this home is full of feces. The feces in the Indian River Lagoon are a product of septic tank pollution.<sup>1</sup> Lurking beneath the surface, all along the Indian River, lie thousands of underground septic tanks, slowly oozing into the river and polluting the water. The effluent from septic tanks flows directly into drainfields, which are shallow excavations in the ground surrounded by soil that absorbs the nutrients from the effluent.<sup>2</sup> When these drainfields get too full they can overflow,<sup>3</sup> wreaking havoc on nearby water sources. The sewage from these septic tanks seeps into the river anytime the drain fields overflow.<sup>4</sup> This nitrogen-rich sewage causes algae blooms in the river that are harmful and even deadly to animal and plant life.<sup>5</sup> These algal blooms suffocate seagrass and other marine life, and are also very toxic—causing disease in marine mammals, such as dolphins and manatees.<sup>6</sup>

This Paper will address whether the common law claim of public nuisance is applicable to septic tank pollution in the Indian River Lagoon, and if so, what legal remedies would be available. Properly interpreted, septic tank pollution in the Indian River Lagoon constitutes a public nuisance. The only reasonable remedy for this issue would be an injunction against the counties abutting the Indian River Lagoon, ordering them to remove this outdated technology and replace it with modern sewage utilities. Though all counties along the Indian River Lagoon can theoretically be found liable, this paper will focus specifically St. Lucie County's obligations.

Section I of this Paper details the crisis of septic pollution in the Indian River Lagoon. This section will describe the Indian River Lagoon itself, providing some insight on why this River is so important and why it should be preserved. It will also give some background information on septic tanks and how they cause water pollution. Section II discusses the legal claims available to those seeking to clean up the pollution, especially the common law of nuisance. Here, the Paper will explore the evolution of nuisance law and how it can be applied in the environmental context. This Paper

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1. Lisa Desai & Yasmeen Qureshi, *Florida's Indian River Lagoon in Environmental Crisis*, FLA. CTR. FOR INVESTIGATIVE REPORTING (Aug. 6, 2016), <https://fcir.org/2016/08/06/floridas-indian-river-lagoon-in-environmental-crisis/>.

2. *How Your Septic System Works*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/septic/how-your-septic-system-works> (last updated Aug. 20, 2018).

3. *Id.*

4. Jim Waymer, *Septic Tank Pollution Plagues Indian River Lagoon*, FLA. TODAY (Sept. 27, 2015), <https://www.floridatoday.com/story/news/local/environment/2015/10/09/septic-tank-pollution-plagues-indian-river-lagoon-brevard-county-florida-environment/72570556/>.

5. Desai & Qureshi, *supra* note 1.

6. *See* Waymer, *supra* note 4.

will look to both statutory and case law, and will consider the different remedies that are available for a public nuisance claim. Section III then applies this law to the facts at Indian River Lagoon, considering (1) whether the sewage from septic tanks is even pollution; (2) if so, whether it constitutes a public nuisance; and (3) who might have standing to bring an action in court. Since this issue is not something that is wholly unique to the Indian River Lagoon, Section IV considers how other communities have dealt with the issue of sewage pollution and proposes how to clean up the water pollution from septic drainage in the Indian River Lagoon, specifically how to convert from septic tanks to sewage in St. Lucie County. Finally, Section V concludes.

## II. BACKGROUND

### *A. Background on the Indian River Lagoon*

The Indian River Lagoon is part of the longest barrier island complex in the United States, running along Florida's east coast from the Ponce De Leon Inlet, just south of Daytona Beach, to the Jupiter Inlet, in Jupiter Beach, Florida.<sup>7</sup> Because of the enormous distance it covers, 156 miles, the Indian River Lagoon is rich in biodiversity.<sup>8</sup> The Indian River Lagoon system is comprised of three lagoons: the Mosquito Lagoon, which runs from Volusia county to Brevard County; the Banana River located in Brevard County; and the Indian River Lagoon which stretches all the way from the tip of Brevard County to northern Palm Beach County.<sup>9</sup> This paper will focus solely on the Indian River Lagoon.

The name Indian River is a misnomer. According to Harbor Branch Oceanographic Institute, the Indian River Lagoon is not a river, but an estuary.<sup>10</sup> An estuary is a semiconfined body of water that is a mixture of ocean and freshwater.<sup>11</sup> This is referred to as brackish water.<sup>12</sup> The water from the Atlantic Ocean mixes with the

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7. *Indian River Lagoon Species Inventory*, SMITHSONIAN MARINE STATION AT FORT PIERCE, <https://naturalhistory2.si.edu/smsfp/irlspec/Maps.htm> [hereinafter SMITHSONIAN MARINE STATION] (last visited Mar. 7, 2019) (providing map of Indian River Lagoon).

8. Ron Brockmeyer et al., *Indian River Lagoon*, in COASTAL HABITAT INTEGRATED MAPPING AND MONITORING PROGRAM REPORT FOR THE STATE OF FLORIDA 134, 134 (Kara Radabaugh et al. eds., 2017).

9. SMITHSONIAN MARINE STATION, *supra* note 7.

10. HARBOR BRANCH OCEANOGRAPHIC INST., FLA. ATL. UNIV., INDIAN RIVER LAGOON – FACTS AND FIGURES, <https://www.fau.edu/hboi/irlo/docs/IRL.Fact.Sheet.pdf> (last visited Mar. 7, 2019).

11. *Id.*

12. St. Johns River Water Management District, *Fast Facts About the Indian River Lagoon*, <https://www.sjrwmd.com/waterways/indian-river-lagoon/facts/> (last visited Mar. 21, 2019).

freshwater through five ocean inlets that cut through the barrier island chain along the course of the river.<sup>13</sup> The Indian River has varying levels of salinity, depending on your location in the river.<sup>14</sup> The closer you are to an inlet, the higher the salinity due to the incoming ocean water.<sup>15</sup> Conversely, the closer you are to a fresh water input, the lower the salinity levels will be.<sup>16</sup> This mix of fresh and salt water makes the river an ideal refuge for many spawning and nursing oceanic species.<sup>17</sup>

Another factor that contributes to the uniqueness of the Indian River is its location. The river stretches across the transition zone of two biological provinces: the colder temperate zone and the warmer sub-tropical zone.<sup>18</sup> The meeting of these two biogeographical provinces is one of the underlying causes of the Indian River's high level of biodiversity.<sup>19</sup> With over 4,000 species of plants and animals, the Indian River Lagoon is regarded as the most diverse estuarine ecosystem in North America.<sup>20</sup> Of those 4,000 species, many of them are classified as endangered, including the Florida Manatee, the Green Sea Turtle, the American Crocodile, the Smalltooth Sawfish, the Ivory-Billed Woodpecker, and various types of seagrass.<sup>21</sup> Because of all the incredible and unique life this river is home to, one cannot turn a blind eye when it is threatened.

### *B. Background on Septic Tanks*

A major threat to the health of the Indian River is man-made pollution.<sup>22</sup> There are two main types of pollution, point source and nonpoint source. Point source is any pollution that comes from a discernible, confined source, such as a pipe or a drain.<sup>23</sup> Nonpoint

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13. *Id.*

14. *Id.*

15. *See id.*

16. *See id.*

17. *Indian River Lagoon*, U.S. FISH & WILDLIFE SERV., [https://www.fws.gov/refuge/pelican\\_island/wildlife\\_and\\_habitat/indian\\_river\\_lagoon.html](https://www.fws.gov/refuge/pelican_island/wildlife_and_habitat/indian_river_lagoon.html) (last updated Oct. 16, 2015).

18. INDIAN RIVER LAGOON – FACTS AND FIGURES, *supra* note 10.

19. *Id.*

20. NAT'L ESTUARY PROGRAM, U.S. ENVTL. PROTECTION AGENCY, EPA-842F09001, DETERMINING AN ESTUARY'S ECONOMIC VALUE (2015), [https://www.epa.gov/sites/production/files/201509/documents/2009\\_05\\_28\\_estuaries\\_inaction\\_efficient\\_indianriver.pdf](https://www.epa.gov/sites/production/files/201509/documents/2009_05_28_estuaries_inaction_efficient_indianriver.pdf).

21. *Indian River Lagoon Species Inventory: Expanded Species Reports*, SMITHSONIAN MARINE STATION AT FORT PIERCE, [https://naturalhistory2.si.edu/smsfp/irlspec/Compl\\_Reports.htm](https://naturalhistory2.si.edu/smsfp/irlspec/Compl_Reports.htm) (last visited Mar. 7, 2019).

22. INDIAN RIVER LAGOON – FACTS AND FIGURES, *supra* note 10.

23. 33 U.S.C. § 1362(14) (2018).

source pollution cannot be so easily attributed to a single source and typically comes from runoff or diffuse surface water.<sup>24</sup> Septic tanks are non-point source pollutants.

There are 2.6 million septic tanks in the state of Florida, of which, state health officials estimate that around ten percent are failing.<sup>25</sup> A septic tank is typically considered failing when it no longer effectively treats the waste water; this most commonly occurs when the surrounding soil is not effectively absorbing the excess nutrients.<sup>26</sup> An estimated 300,000 septic tanks run along the Indian River Lagoon.<sup>27</sup> Approximately 140,000 of these lie within the drainage basin that flows into the Indian River.<sup>28</sup> In particular, St. Lucie County has 29,517 septic tanks systems located throughout the county.<sup>29</sup> This is problematic because waste from these septic tanks amasses in drainfields and eventually runs off into the lagoon.<sup>30</sup> Heavy rains exacerbate this process,<sup>31</sup> and are very common in Florida. The waste from septic tanks is very rich in nitrogen and phosphorus.<sup>32</sup> These nutrient pollutants in turn cause harmful algal blooms,<sup>33</sup> which studies have linked to deaths of manatees and diseases in dolphins.<sup>34</sup> It is estimated that septic tanks deliver 2 million pounds of nitrogen per year to the river.<sup>35</sup>

### III. LAW

#### A. Introduction to Common Law of Nuisance

Because this paper will focus solely on the law of public nuisance, it is important to understand what exactly that means. The term nuisance is used to “denote human activity or a physical condition that is harmful or annoying to others.”<sup>36</sup> There are two

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24. Robin K. Craig, Local or National? The Increasing Federalization of Nonpoint Source Pollution Regulation, 15 J. ENVTL. L. & LITIG. 179, 180 (2000).

25. *Septic Tank Pollution Threatening Indian Lagoon*, FLA. CHAMBER OF COM., <https://www.flchamber.com/septic-tank-pollution-threatening-indian-river-lagoon/> (last visited Mar. 8, 2019).

26. CORNELL UNIV. COOP. EXTENSION, YOUR SEPTIC SYSTEM: SEPTIC SYSTEM FAILURE (2013), <http://waterquality.cce.cornell.edu/septic/CCEWQ-YourSepticSystem-Failure.pdf>.

27. Waymer, *supra* note 4.

28. *Id.*

29. *Septic Integrated Database: Florida*, NAT'L ENVTL. SERVS. CTR., [http://www.nesc.wvu.edu/septic\\_idb/florida.htm](http://www.nesc.wvu.edu/septic_idb/florida.htm) (last visited Mar. 8, 2019).

30. *See* Waymer, *supra* note 4.

31. *Id.*

32. *Id.*

33. Brian E. Lapointe et al., *Evidence of Sewage-Driven Eutrophication and Harmful Algal Blooms in Florida's Indian River Lagoon*, 43 HARMFUL ALGAE 82, 82 (2015).

34. Waymer, *supra* note 4.

35. *See id.*

36. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b(1) (AM. LAW INST. 1979).

types of nuisances: public and private.<sup>37</sup> A private nuisance is “a nontrespassory invasion of another's interest in the private use and enjoyment of land.”<sup>38</sup> Alternatively, a public nuisance is something that either causes any annoyance to the community or harms public health.<sup>39</sup> This paper focuses on the doctrine of public nuisance, because the Indian River Lagoon is a public waterway.<sup>40</sup> Historically, the common law doctrine of nuisance has focused on the relationships between property owners.<sup>41</sup> The old English common law applied a harm-based test which considered any act that caused harm to the productive usefulness of the land a nuisance.<sup>42</sup> In America the doctrine evolved towards a reasonableness standard. For something to be deemed a public nuisance, not only does it have to be considered an annoyance or health risk to the community, but there are additional elements that must be met. In modern times, a public nuisance is an “unreasonable interference with a right common to the general public” that either significantly interferes with public health, safety, peace, or convenience; or an interference that is condemned by statute or other regulation; or an interference that is continuous or “has produced a permanent or long-lasting effect,” which the actor knows or should have known would have a significant effect upon the public.<sup>43</sup>

The Florida Supreme Court has defined a public nuisance as an “activity that violates public rights; undermines public order, decency, or morals; or causes harm or inconvenience to the public in general.”<sup>44</sup> Public nuisances typically involve issues of public health and safety, and because of this, are considered offenses against the state.<sup>45</sup> Typically, suits enjoining public nuisances are brought by public authorities such as the state, counties, cities, or towns.<sup>46</sup>

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37. *See id.*

38. *See id.* § 821D.

39. 38 FLA. JUR. 2D *Nuisances* § 5 (2018).

40. *See* Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 4 (2007) (discussing eastern waterbeds and banks subject to state ownership and public use rights).

41. J.B. Ruhl, *The "Background Principles" of Natural Capital and Ecosystem Services—Did Lucas Open Pandora's Box?* 22 J. LAND USE & ENVTL. LAW 525, 531 (2007).

42. *Id.*

43. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW. INST. 1979).

44. 3-93 FLA. TORTS § 93.05 (2018) (citing *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972)).

45. *Id.* § 93.05.

46. James D. Lawlor, Annotation, *Right to Maintain Action to Enjoin Public Nuisance as Affected by Existence of Pollution Control Agency*, 60 A.L.R. 3d 665 at \*2b.

### B. Statutory Law

There has been a shift in nuisance law from common law to statutory law. Many states have their own statute defining what a nuisance is and what the penalties are for creating one. Florida's statute is rather broad. It defines public nuisance as anything that tends to "annoy the community, injure the health of the citizens in general, or corrupt the public morals."<sup>47</sup> Florida classifies a public nuisance as a crime instead of a tort; violating the public nuisance statute is a second-degree misdemeanor.<sup>48</sup>

Florida law includes a subsection of nuisances called sanitary nuisances.<sup>49</sup> A sanitary nuisance is any act or the existence of anything that may threaten the health of individuals or that may directly or indirectly cause disease.<sup>50</sup> The Department of Health is authorized to investigate and take action against any condition that constitutes a sanitary nuisance.<sup>51</sup> Florida law also specifies that nuisances injurious to the public health, fall under the purview of sanitary nuisance.<sup>52</sup> According to the statute, septic tanks that are improperly built or maintained by "any individual, municipal organization, or corporation, governmental or private," are prima facie evidence of a nuisance that is injurious to public health.<sup>53</sup>

Under Florida law, the Attorney General, the state, city, county attorney, or any citizen can sue in the name of the State of Florida to abate or enjoin a public nuisance.<sup>54</sup> This is only possible for public nuisances that are defined as, in pertinent part, taking an action "which tends to annoy the community or injure the health of the community."<sup>55</sup> When suing in the name of the state, the plaintiff is not required to show they suffered a special injury that differs in degree or kind from what the general public suffers.<sup>56</sup> However, such a showing is required of those who make public nuisance claims in their individual capacity.<sup>57</sup>

Pollution can arguably annoy the community or be injurious to public health. If septic tank sewage fits under the definition of

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47. FLA. STAT. § 823.01 (2018).

48. *Id.*

49. FLA. STAT. § 386.01 (2018).

50. *Id.*

51. FLA. STAT. § 386.02 (2018).

52. FLA. STAT. § 386.041 (2018).

53. *Id.* § 386.041(1)(b) (2018).

54. FLA. STAT. § 60.05(1) (2018).

55. FLA. STAT. § 823.05(1) (2018).

56. 3 FLA. TORTS § 93.05(3) (2018).

57. *Id.* § 93.05(4).

pollution, it will easier for a court to find that septic tank sewage seeping into the Indian River Lagoon is a public nuisance. The state of Florida defines pollution as:

the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law.<sup>58</sup>

Florida has also made a legislative declaration on pollution control and the environment. The first part of which states “[t]he pollution of the air and waters of this state constitutes a menace to public health and welfare; creates public nuisances; is harmful to wildlife and fish and other aquatic life; and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.”<sup>59</sup> The statute further specifies that water pollution control programs are to be supported to in order to provide water pollution “prevention, abatement, and control” in order to maintain suitable levels of water quality.<sup>60</sup> The purpose for the declaration was to protect the “health, peace, safety, and general welfare” of the citizens of Florida.<sup>61</sup>

A public nuisance claim is not the only way to rid waterways of pollution. In 1972 Congress passed the Clean Water Act.<sup>62</sup> The two main goals of the Clean Water Act are to eliminate the discharge of pollutants into navigable waters and to attain a level of water quality sufficient for the protection and promotion of fish, shellfish, wildlife, and recreation in and on the water.<sup>63</sup> Congress established three mechanisms to obtain these goals: “effluent limitations, water quality standards, and a national enforcement permit program.”<sup>64</sup> While the Clean Water Act has an extensive reach, this does not necessarily mean it provides the best approach to controlling septic tank pollution. Public nuisance actions can offer plaintiffs a remedy

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58. FLA. STAT. § 403.031(7) (2018).

59. FLA. STAT. § 403.021(1) (2018).

60. FLA. STAT. § 403.021(4) (2018).

61. FLA. STAT. § 403.021(5) (2018).

62. Maria V. Maurrasse, *Oklahoma v. EPA: Does the Clean Water Act Provide an Effective Remedy to Downstream States or Is There Still Room Left for Federal Common Law?*, 45 U. MIAMI L. REV. 1137, 1148 (1991).

63. *Id.* at 1149.

64. *Id.*



that legislation cannot—court-ordered injunctions.<sup>65</sup> These injunctions force polluters to shut down, thereby immediately ceasing the pollution. Another benefit of using public nuisance is that it tends to focus more on the merits of the case than procedure or violations of standards.<sup>66</sup> Additionally, national politics can make the enforcement of federal statutes unpredictable. Administrations that do not view clean waterways as a priority may not enforce federal statutes governing environmental pollution as strictly as administrations that value clean waterways. For this reason, public nuisance law can be refuge during times of political uncertainty.

### C. Case Law

#### 1. Palazzolo

Because statutory law does not specifically list septic tank pollution as a public nuisance, having case law finding that sewage coming from septic tanks would constitute a public nuisance takes on added importance. The name “Palazzolo” has become synonymous with regulatory takings law, along with its predecessors: *Lucas*, *Penn Central*, and *Pennsylvania Coal*.<sup>67</sup> In *Palazzolo v. State*, the Supreme Court found that a claimant does not waive his right to challenge a regulation when title acquisition occurs after the effective date of the regulation.<sup>68</sup> One claim that the Supreme Court did not address in its opinion— which gets more attention in both the prior and subsequent history of the case—is public nuisance.

The plaintiff, Palazzolo, was a shareholder in a company that owned undeveloped land, portions of which were salt marshes.<sup>69</sup> The company made many attempts to get permitting from state agencies to develop the land, but was continually denied.<sup>70</sup> In 1971, the Rhode Island legislature created the Coastal Resource Management Council (CRMC), which was tasked with protecting lands along the state’s coast.<sup>71</sup> The CRMC designated salt marshes as protected coastal wetlands.<sup>72</sup> A few years later, Palazzolo’s company had its

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65. Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline*, 14 FORDHAM ENVTL. L. REV. 55, 65 (2002).

66. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 774 (2001).

67. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

68. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629-30 (2001).

69. David M. Bae, *Palazzolo’s One-Two Punch to the Wetlands Takings Doctrine: Are Massachusetts Wetlands at Risk?*, 37 NEW ENG. L. REV. 781, 794 (2003).

70. *Id.*

71. *Id.* at 795.

72. *Id.*

charter revoked and title to all of the property passed to him.<sup>73</sup> Seven years later, Palazzolo personally applied to the CRMC for a permit to fill eleven acres of the salt marshes on his property in order to build a private beach club.<sup>74</sup> The CRMC denied the request,<sup>75</sup> and litigation ensued.

Palazzolo brought suit for inverse condemnation in the Rhode Island Superior Court, alleging that the CRMC violated his Fifth and Fourteenth Amendment rights and that denying his application constituted a regulatory taking.<sup>76</sup> The Superior Court of Rhode Island found that the Palazzolo's proposed development would constitute a public nuisance and that Palazzolo had no investment-backed expectations.<sup>77</sup> Therefore, the court barred him from compensation.<sup>78</sup> Palazzolo appealed to the Rhode Island Supreme Court, which decided that the issue of regulatory taking was not ripe for review.<sup>79</sup> In 2000, the United States Supreme Court granted certiorari and reversed Rhode Island Supreme Court's finding that the case was unripe for review and that Palazzolo's notice of the wetlands restrictions prior to his acquisition of the property barred his regulatory takings claim, but affirmed that there was not a total deprivation of all economically beneficial use on the property.<sup>80</sup> The Supreme Court then remanded the case back down to the Superior Court of Rhode Island.<sup>81</sup>

On remand, the Superior Court of Rhode Island took into account that the Winnapaug Pond is a fragile ecosystem and that the surrounding salt marshes are an important filtering system.<sup>82</sup> The salt marshes have the ability to filter runoff which typically contains pollutants such as nitrogen from adjacent properties.<sup>83</sup> Palazzolo's proposed subdivision included individual sewage disposal systems, septic tanks, which would significantly increase the levels of nitrogen in the pond.<sup>84</sup> The proposed plan also included filling in part of the salt marshes.<sup>85</sup> This would have resulted in a twelve percent reduction in salt marsh and an overall reduction of pollutant filtering which would have increased the levels of nitrogen

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73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 795–96.

77. Palazzolo v. State, No. WM 88-0297, 2005 R.I. Super. LEXIS 108, at \*4 (R.I. Super. Ct. July 5, 2005).

78. *Id.*

79. Bae, *supra* note 69, at 796 (discussing the procedural history of the case).

80. *Id.* at 797.

81. *Id.*

82. Palazzolo, 2005 R.I. Super. LEXIS 108, at \*12.

83. *Id.*

84. *Id.*

85. *Id.* at \*13.

in the pond.<sup>86</sup> The court determined that the deterioration of the ecosystem in and around the Winnapaug Pond due to the loss of the filtering power of the salt marsh constituted a predictable public nuisance.<sup>87</sup> The court's finding that the installation of these septic tanks would eventually lead to a public nuisance is huge for areas that are already facing the consequences of septic tank pollution. If a court can declare foreseeable events a public nuisance, then a court should also be able to find that those same events—when they are already occurring—are a public nuisance.

## 2. Orlando Sports Stadium

Even though Florida has a statute defining what a public nuisance is, its judiciary has addressed the question. In 1972, the Supreme Court of Florida heard an interlocutory appeal from Orange County alleging that the state's public nuisance statute was unconstitutionally vague.<sup>88</sup> The state sought to abate or enjoin the Orlando Sports Stadium from maintaining a public nuisance.<sup>89</sup> The state alleged that the defendants allowed the unlawful use of drugs at their establishment.<sup>90</sup> According to the state, this activity was a public nuisance under sections 60.05, 823.05, and 823.10 of Florida Statutes.<sup>91</sup> The defendants claimed that these statutes violated the Due Process Clause of the Constitution because they were not "sufficiently explicit" enough in their description of forbidden conduct.<sup>92</sup> Because of the insufficient descriptions, defendants argued, one could not be reasonably certain that their activities were violating the statute.<sup>93</sup>

The court disagreed with the defendants, finding that the language in the statutes was "neither vague nor ambiguous and sufficiently puts [defendant] on notice of the nuisance use of their premises."<sup>94</sup> The court went on to say that the legislature has "broad discretion" when it comes to designating activities as public nuisances.<sup>95</sup> The court recognized that it would be impossible to make a comprehensive list of nuisances; it would be like trying to make a list of all the ways in which you can annoy someone.<sup>96</sup>

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86. *Id.*

87. *Id.* at \*21.

88. *Orlando Sports Stadium, Inc. v. State*, 262 So. 2d 881, 882-83 (1972).

89. *Id.* at 882.

90. *Id.* at 882-83.

91. *See id.* at 883-84.

92. *Id.* at 884.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Because of the fact-specific nature of nuisances, they must be judicially determined on a case-by-case basis.<sup>97</sup> The court stated that preventing and abating nuisances is part of the state's police powers.<sup>98</sup> In exercising its police powers, the state has the right to enact laws for the protection of lives, health, morals, comfort, and the general welfare.<sup>99</sup> Because of this holding—that public nuisances in Florida are determined on a cases-by-case basis—plaintiffs cannot rely solely on statutory law to win their case, but must also have case law to back up their claim.

### 3. National Container

Because the sewage from septic tanks could be pollution and Florida's statute broadly defines what a public nuisance is, it is essential to have case law finding that water pollution is a public nuisance. In 1939, the Florida Supreme Court heard a case about whether the National Container Company should be enjoined from building and operating a wood pulp mill.<sup>100</sup> Plaintiffs filed a complaint in the name of the state against the National Container Corporation and the city of Jacksonville.<sup>101</sup> They alleged that the water and refuse that would have been discharged from the mill would be harmful to marine life in the St. Johns River, creating a public nuisance.<sup>102</sup> The defendants maintained that the private citizens had no right to bring suit in the name of the state, arguing they could not name the state as a plaintiff because it was merely a "threatened nuisance."<sup>103</sup> In interpreting the statutes, the Supreme Court of Florida held that, so long as the Attorney General is willing, a citizen can act in the name of the state.<sup>104</sup> The court also broadly interpreted the statute to apply to threatened nuisances, but stated that if the statute were strictly applied the outcome would remain the same.<sup>105</sup> The defendants would still be enjoined from erecting a wood pulp mill because the statute prohibits any building that will injure the health of the community and become a nuisance.<sup>106</sup> In its opinion, the court stated that "we may safely say that there is no place in Florida suitable or usable as a location for a wood-pulp

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Nat'l Container Corp. v. State*, 189 So. 4 (Fla. 1938).

101. *Id.* at 5.

102. *Id.*

103. *Id.* at 7.

104. *Id.* at 8–10.

105. *Id.* at 10.

106. *Id.* at 10.

mill[.]”<sup>107</sup> The court ultimately found for the plaintiffs and upheld the trial court’s denial of defendants’ motions to dismiss.<sup>108</sup> If a court could find that threatened pollution is a public nuisance, then a court must find that actual pollution is a public nuisance.

#### 4. Penn v. City of Lakeland

Florida does not have much case law on septic sewage polluting the waterways; for this reason, case law on sewage pollution from other sources can be an important indicator of how a Florida court will rule in a public nuisance action. Twenty years after *National Container*, Florida’s Second District Court of Appeal held that sewage pollution was a public nuisance.<sup>109</sup> Appellants lived near a lake south of the city of Lakeland and had alleged that the city was polluting the lake with effluent from a sewage disposal plant that emptied into a canal which flowed into the lake.<sup>110</sup> The appellants contended that this pollution caused foul odors, killed marine life in the lake, and led to a mosquito infestation.<sup>111</sup>

The appellants attached the final decree from a preceding case in which a nuisance was found and a temporary injunction was granted until the plant could improve its sewage disposal system.<sup>112</sup> The decree also ordered that the claims for damages be dismissed without prejudice, reasoning that such claims would be more appropriately brought as individual actions than as a class suit.<sup>113</sup> Plaintiffs appealed this portion of the final decree and the court of appeal reaffirmed the trial court’s judgement.<sup>114</sup> However, both courts found for the appellants in determining that a public nuisance existed.<sup>115</sup> Because a Florida court has previously found that pollution from a sewage disposal plant is a public nuisance and warrants injunctive relief, a Florida court looking to whether pollution from septic tanks is a public nuisance could find this very persuasive.

#### 5. Remedies Available

What makes public nuisance law so attractive is the wide array of remedies available. Typical remedies include monetary damages,

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107. *Id.* at 11.

108. *Id.* at 17.

109. *Penn v. Lakeland*, 109 So. 2d 771, 774 (Fla. 2d DCA 1959).

110. *Id.* at 772.

111. *Id.*

112. *Id.* at 772–73.

113. *Id.* at 773.

114. *Id.* at 774.

115. *Id.*

injunction, or abatement.<sup>116</sup> An injunction is an order from the court demanding or preventing an action.<sup>117</sup> In order to get an injunction granted, a plaintiff needs to show that other remedies would be inadequate, such as monetary damages.<sup>118</sup> The court looks to the economic hardship of both parties and the public interest in allowing the damage to continue when contemplating issuing an injunction.<sup>119</sup> Abatement is the act of eliminating the nuisance.<sup>120</sup> It is a self-help remedy in which the plaintiffs may take it upon themselves to remove the nuisance.<sup>121</sup>

#### IV. ANALYSIS

The State of Florida's statutes provide a set of guidelines for trying to figure out if certain activities constitute a public nuisance. Instead of providing an exhaustive list of activities, the statute, more or less, describes the concept of what a nuisance is. The next question is whether sewage from septic tanks draining into the Indian River Lagoon fits within the Florida conception of nuisance. This is not the final step though, because it is still up to the courts to decide whether they think septic sewage is a public nuisance—and courts have a lot of discretion—advocates must make effective use of the case law to succeed in their claim.

##### *A. Is it Pollution?*

The overflow sewage from septic tanks that seeps into the Indian River undoubtedly satisfies Florida's definition of pollution. The sewage contains high levels of nitrogen and phosphorous. This added nitrogen in the river leads to algae blooms. Thus, the sewage is a human-induced substance that alters the chemical integrity of the water.<sup>122</sup> These nitrogen-induced algae blooms are extremely harmful to marine plant and animal life and the algae is also so thick that it interferes with outdoor recreation, two conditions specified by the statute.<sup>123</sup> Florida's legislature has declared that pollution of water creates a public nuisance.<sup>124</sup> Since septic tank sewage seeping into the Indian River Lagoon is pollution, it is

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116. Boudreaux & Yandle, *supra* note 65, at 62.

117. *See Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

118. *Id.*

119. *Nuisance-Remedies*, LAW LIBRARY – AM. L. & LEGAL INFO., <http://law.jrank.org/pages/8871/Nuisance-Remedies.html> (last visited Feb. 10, 2019).

120. *See Abatement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

121. *Nuisance-Remedies*, *supra* note 119.

122. *See supra* note 58 (defining "pollution" within Florida Statutes).

123. *Id.*

124. *See supra* note 59 and accompanying text.

therefore a public nuisance. The legislative declaration also encourages the abatement of public nuisances that result in water pollution, establishing that cleaning up and preventing water pollution is a high priority for the state of Florida.<sup>125</sup> This declaration even went as far as to say the state is willing to use its police powers to deter pollution.<sup>126</sup> It effectively puts everyone on notice that if they pollute, there is a possibility that the state might come after them.

### B. Public Nuisance Analysis

As stated previously, Florida's statute on public nuisance is very broad. It considers anything that annoys the public to be a public nuisance.<sup>127</sup> In applying this statute, it is very likely that a court would find that sewage from septic tanks draining into the Indian River constitutes a public nuisance. While the algae blooms caused by the increased nitrogen levels from the sewage have yet to be deemed a direct health risk to humans, it is a public annoyance in other ways. The algae blooms kill marine plant and animal life and put a damper on water recreation in the river.<sup>128</sup> This could easily be found to be an annoyance.

Florida's public nuisance statute may be seen as broad, but it is not unconstitutionally vague.<sup>129</sup> While there have been changes made to the statute over time, the reasoning of the court in *Orlando Sports Stadium* remains relevant—that it would be impossible to comprehensively define what a nuisance is.<sup>130</sup> *Orlando Sports Stadium* also set precedent that public nuisance claims must be determined on a case-by-case basis.<sup>131</sup> As mentioned previously, the sewage pollution from septic tanks in the Indian River fits under Florida's statutory definition of a public nuisance. But because of the holding in *Orlando Sports Stadium*, the courts have discretion in how they apply that statute.

Similar to *Penn*, the sewage flowing into the Indian River is killing marine life. In *Penn*, the sewage came from a disposal plant,<sup>132</sup> while here it comes from septic tank systems. Comparing the two systems would not be unreasonable for a court to do. Though different technologies are being used in either case, the pollution is

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125. See *supra* note 60 and accompanying text.

126. See *supra* note 61 and accompanying text.

127. See *supra* note 47 and accompanying text.

128. Desai & Qureshi, *supra* note 1; Waymer, *supra* note 4.

129. See *Orlando Sports Stadium, Inc. v. State*, 262 So. 2d 881, 884 (Fla. 1972).

130. *Id.*

131. *Id.*

132. See *supra* note 110 and accompanying text.

still the same: nutrient-rich human waste. Because the sewage pollution was found to be a public nuisance in *Penn*, a court should find that the sewage seeping into the Indian River from septic tanks is a public nuisance.

Because the sewage is already draining into the Indian River and causing problems, most notably by harming marine life, a court would find that it constitutes a public nuisance. In *National Container*, the court dealt with the issue of a threatened nuisance.<sup>133</sup> The pollution had yet to occur and the court still found it to be a public nuisance.<sup>134</sup> If the Supreme Court of Florida could find that the potential for pollution to harm marine life is a public nuisance, then the actual pollution causing harm to marine life must be a public nuisance as well.

Similar to Winnapaug Pond in *Palazzolo*, the Indian River Lagoon is a fragile ecosystem. The Superior Court of Rhode Island, both at the initial hearing and on remand from the Supreme Court of the United States, determined that the septic tank system for the proposed development would lead to increased levels of nitrogen in the nearby Winnapaug Pond.<sup>135</sup> These increased levels of nitrogen would have had devastating effects on the ecosystem, therefore, the court found that the development was a public nuisance.<sup>136</sup>

The sewage from septic tanks seeping into the Indian River is causing increased nitrogen levels, similar to what was projected to happen to Winnapaug Pond in *Palazzolo*. The increased nitrogen levels have caused, and will continue to cause, algae blooms which devastate the very diverse ecosystem in the Indian River. Like the court in *Palazzolo*, a Florida court should find that this constitutes a public nuisance since the pollution is already occurring and not just a projected outcome.

This issue of public nuisance in *Palazzolo* was not disputed before the United States Supreme Court; the Court was only concerned with the takings issue. Because of this, *Palazzolo v. Rhode Island* would not be applicable to this case. On the other hand, *Palazzolo v. State* is applicable, but is only useful as support for the finding of a nuisance, and not binding precedent.

### C. Who Can Bring Suit?

Because the algae blooms have not had an impact on human health, a court must not find that this issue falls under the umbrella

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133. See *supra* notes 100–108 and accompanying text.

134. See *supra* note 106.

135. See *supra* notes 77, 86.

136. *Palazzolo v. State*, No. WM 88-0297, 2005 R.I. Super. LEXIS 108, at \*21 (R.I. Super. Ct. July 5, 2005); see also *supra* note 87.



of Florida's sanitary nuisance statute. To constitute a sanitary nuisance, the septic tank pollution and subsequent algae bloom would have to threaten the health of individuals or directly or indirectly cause disease,<sup>137</sup> which it has not yet done. However, this is an advantage when trying to bring a public nuisance claim. The Florida Department of Health has jurisdiction over sanitary nuisances,<sup>138</sup> meaning that if this were to fall under the sanitary nuisance statute, plaintiffs would have to exhaust all administrative remedies with the Department of Health before bringing the issue to court.

Plaintiffs would have a strong claim before the court because the sewage seeping into the Indian River from septic tanks that results in harmful algae blooms is a public nuisance that tends to annoy the public. The Indian River Lagoon is the life blood of St. Lucie County. It is a center for recreation, tourism, and home to an incredibly diverse ecosystem.<sup>139</sup> The algae blooms kill marine life, infringe on recreational activities, and drive tourists away.<sup>140</sup> Because it would be classified as this type of public nuisance, a suit could be brought in the name of the State of Florida.<sup>141</sup> Because the government could be a plaintiff, there would be no need to prove a special injury.<sup>142</sup> This is extremely helpful, because it would be impossible to prove an injury of differing kind and degree from the general public when the general public are the very people this action would be protecting.

## V. REMEDY

In this case, the State of Florida should be the named plaintiff in a suit against St. Lucie County. Individual septic owners can be joined as defendants as well. This way, a court ordered injunction could apply to both the county as a whole and the individual citizens who are polluting the river. The requested remedy should be injunctive relief rather than damages because an award of monetary damages would be meaningless. It would not have any effect on pollution, and would most likely bankrupt the county. The only way to stop the water pollution would be for the court to order an injunction against St. Lucie County, commanding it to stop the

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137. See FLA. STAT. § 386.01 (2018); see also *supra* note 50.

138. See *supra* note 51 and accompanying text.

139. Desai & Qureshi, *supra* note 1.

140. Martha C. White, *Florida Tourism Not Seeing Green as Toxic Algae Chokes Business*, NBC News, <https://www.nbcnews.com/business/consumer/florida-tourism-not-seeing-green-toxic-algae-chokes-business-n607106> (last visited Mar. 21, 2019).

141. See *supra* note 54 (citing FLA. STAT. § 60.05(1)).

142. See *supra* note 56 and accompanying text.

pollution of the Indian River with septic sewage. Still, a court issuing an injunction to stop the use of septic tanks that lie within the drainage basin that runs along in Indian River is not the end of the story, the problem is still not fully solved. The injunction is just a band-aid, and the citizens who were dependent on those septic tanks are still going to produce waste, and they will need an alternative to septic tanks. Luckily, there are other regions in the state that can shed some light on how to deal with this issue.

### A. Examples

In a similar circumstance, Pinellas County sought to construct a sewage treatment plant that would service the unincorporated areas of the county.<sup>143</sup> The county planned to fund this project by an ad valorem tax on properties in both the incorporated and unincorporated areas.<sup>144</sup> The incorporated area contested the tax, alleging that the county did not have the authority to tax municipalities for services that were for the exclusive benefit the unincorporated areas.<sup>145</sup> The trial court found for the county, stating that the project was in the best interest of the county as a whole, because it sought to control and eliminate the pollution from inadequate sewage disposal.<sup>146</sup> On appeal, the court affirmed the trial court's findings.<sup>147</sup>

Similarly, Pensacola Bay's Surface Water Improvement and Management (SWIM) system proposes a septic to sewer transition to improve water quality, aquatic habitat, and public use.<sup>148</sup> Pensacola has roughly 54,000 septic systems located in the Bay watershed that contribute to nutrient loading.<sup>149</sup> The plan suggests that, in order to add all of the new connections, existing treatment plants would need to be rehabilitated and retrofitted in order to prevent any overflow.<sup>150</sup>

The state of Maryland has also undertaken a unique solution to the problem of septic pollution. In 2004 the state signed into law the Bay Restoration Fund.<sup>151</sup> The Chesapeake Bay was facing the same issue of nutrient loading that is now facing the Indian River, and

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143. *St. Petersburg v. Briley, Wild & Assocs., Inc.*, 239 So. 2d 817, 818 (Fla. 1970).

144. *Id.*

145. *Id.* at 818–19.

146. *Id.* at 819–20.

147. *Id.* at 824.

148. NW. FLA. WATER MGMT. DIST., PENSACOLA BAY SYSTEM SURFACE WATER IMPROVEMENT AND MANAGEMENT PLAN 31–32 (2017).

149. *Id.* at 32.

150. *Id.*

151. *Bay Restoration Fund*, MD. DEP'T OF THE ENV'T, <https://mde.state.md.us/programs/Water/BayRestorationFund/Pages/index.aspx> (last visited Mar. 9, 2019).

this fund was Maryland's solution.<sup>152</sup> The purpose of the fund was to upgrade sewage treatment plants with enhanced technology capable of removing the excess nutrients.<sup>153</sup>

The Restoration Fund was financed by the users of the treatment plants; each home that was hooked up to a treatment plant was charged a five-dollar monthly fee.<sup>154</sup> This became known as the "flush tax."<sup>155</sup> Septic users were charged a similar fee in order to upgrade their onsite systems.<sup>156</sup> In 2017, a representative from the Chesapeake Bay Foundation stated that the tax was working.<sup>157</sup> According to the foundation, water clarity was improving, bay grass coverage had increased, and for the first time in a decade they were not seeing any "no oxygen" areas in the bay.<sup>158</sup>

### *B. Proposal*

To stop septic pollution for good in the Indian River Lagoon, local septic users ultimately need to be connected to sewages lines. After an injunction is obtained against the county to stop the septic pollution, the county must then raise funds to expand the existing wastewater treatment plants to support these new lines. The county must also raise funds for the infrastructure needed to get sewages lines out to the areas that were previously on septic systems.

In St. Lucie County, a vast majority of the septic tanks are in unincorporated areas. The municipalities are the areas with wastewater treatment plants. This means the unincorporated areas are left to fend for themselves and, instead of paying the exorbitant up-front cost to hook up to sewage, they typically opt for septic tanks. Pinellas County provides precedent that this concern can be overcome by raising funds to expand and hook up unincorporated septic users to city sewage.<sup>159</sup> On average, the cost to hook up septic users to city sewage lines is around 3,425 dollars per household.<sup>160</sup> There are 29,517 septic users in St. Lucie County,<sup>161</sup> so the cost would be 101,095,725 dollars. For expanding the current

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152. *Id.*

153. *Id.*

154. *Id.*

155. Alex DeMetrick, *13 Years Later, Effects Of Maryland's 'Flush Tax' Being Seen*, CBS BALT. (July 12, 2017, 5:35 PM), <https://baltimore.cbslocal.com/2017/07/12/13-years-later-effects-of-marylands-flush-tax-being-seen/>.

156. *Bay Restoration Fund*, *supra* note 151.

157. Demetrick, *supra* note 155.

158. *Id.*

159. *See supra* notes 143–147 and accompanying text.

160. St. Lucie Cty. Bd. of Cty. Comm'rs, Resolution No.15-256, Authorizing the Adjustment of Water, Wastewater, and Reuse Utility Connection Charges for Customers Within the St. Lucie County Water and Sewer District (Dec. 22, 2015).

161. *Septic Integrated Database: Florida*, *supra* note 29.

wastewater treatment plant in St. Lucie, Lee County is currently in the process of expanding their wastewater treatment facilities and provides a great example. Lee County's plan proposes to expand the facility for current and future capacities while keeping the old plant on-line during construction for a cost of 21.8 million dollars.<sup>162</sup> Being able to keep the old plant operating during construction is integral to this plan; this way, St. Lucie County would not have to wait until construction of the new plant is done to hook everyone up to sewage.

The best plan for St. Lucie County would be to combine the Pinellas county-wide tax with Maryland's flush tax and use a similar construction plan as Lee County to expand its treatment facilities. Ridding the Indian River Lagoon of sewage pollution would undoubtedly benefit the entire county, so it would be fair to tax everyone in the county. I propose a penny sales tax for the county; this penny tax would go into a septic to sewer fund. According to one St. Lucie County Commissioner, that additional one percent has the potential to bring in an extra eight million dollars in revenue each year.<sup>163</sup> Additionally, I propose that the septic users be charged a flush tax, much like Maryland's five-dollar tax.<sup>164</sup> With a flush tax set at a rate of ten-dollars per month this would raise 3,542,040 dollars a year towards the septic to sewer fund. This would help expedite the financing process, so that septic users can be hooked up to sewage lines quickly and stop polluting the water. Combining the revenues from both the penny sales tax and the flush tax, it would take about eleven years to pay for the septic to sewer project.

## VI. CONCLUSION

The Indian River Lagoon is an important resource, not only to St. Lucie County, but to all of Florida. It is home to an extremely diverse ecosystem and it should stay that way. This wonderful ecosystem is being ruined by human waste. Septic tanks are draining into the river and causing an increase in nitrogen levels—leading to the production of harmful algae blooms. This is not a natural phenomenon, humans are causing it and humans need to fix it.

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162. *Three Oaks Wastewater Treatment Plant (WWTP) Expansion*, WHARTON SMITH, INC., <http://www.whartonsmith.com/projects/three-oaks-wastewater-treatment-plant-wwtp-expansion/> (last visited Mar. 9, 2019).

163. Keona Gardner, *St. Lucie Commissioner Townsend Pushing For 1 Percent Sales-Tax Increase Over 10 Years*, TCPALM (Oct. 25, 2017, 5:57 PM), <https://www.tcpalm.com/story/news/local/shaping-our-future/roads/2017/10/25/st-lucie-commissioner-townsend-pushing-1-percent-sales-tax-increase-over-10-years/798458001/>.

164. See *supra* notes 154–155 and accompanying text.

This analysis shows that the sewage pollution is a public nuisance. By examining applicable statutes and case law, a court should find that the sewage seeping from septic tanks into the Indian River is a public nuisance that should be abated immediately. With the power of a court-ordered injunction, St. Lucie County would be forced to fix this issue. Through the implementation of taxes, the county would be able to finance a septic to sewer fund. Removing septic tanks and hooking users up to sewage lines would be a huge step forward in restoring the Indian River Lagoon back to the beauty it once was before humans started using it as a toilet.

